



4. **North Delhi Power Limited,  
Grid Sub Station Building  
Hudson Lines, Kingsway Camp,  
Delhi-110 009**
5. **New Delhi Municipal Council,  
Palika Kendra, Parliament Street,  
New Delhi-110 001**
6. **Military Engineers Services,  
Ministry of Defence,  
Government of India,  
New Delhi-110 001.** ... Respondents

**Counsel for the Appellant(s)** Mr. M.G. Ramachandran  
Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Ms. Sneha Venkataramani

**Counsel for the Respondent(s)** Mr. Meet Malhotra, Sr. Adv.  
with Mr. Ravi S.S. Chauhan  
for R-1  
Mr. Amit Kapoor &  
Ms. Sugandha Somani for R-  
2 to 4

## **JUDGMENT**

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

1. Delhi Transco Limited (DTL) is the Appellant herein.

2. Aggrieved by the impugned order dated 20.12.2007 passed by the Delhi Electricity Regulatory Commission (State Commission) whereby the State Commission has determined the revenue requirement and tariff as applicable to the Appellant for the Multi Year Tariff for FY 2007-08 to 2010-11, including true up for FY 2005-06 and 2006-07 disallowing some claims, the present Appeal has been filed by the Appellant.

3. The relevant facts for understanding the core of the controversy would be required to be stated. They are as follows.

4. The Appellant is a transmission licensee for the National Capital Territory of Delhi. The Appellant also discharges the statutory functions of State Transmission Utility (STU) and State Load Dispatch Centre (SLDC) for the National Capital Territory of Delhi.

5. Till the period 31.03.2007, the Appellant undertook the functions of bulk purchase of electricity and bulk sale to the

distribution licensees in Delhi. With effect from 01.04.2007, the Appellant has been discharging only the function of transmission of electricity in NCT of Delhi as State Transmission Utility and State Load Dispatch Centre.

6. On 20.08.2007, the Appellant filed a petition in Petition No. 46 of 2007 before the State Commission for determination of Revenue Requirements and tariff for the Appellant for the MYT 2007-08 to 2010-11. In addition to this, the Appellant submitted all the details and prayed for truing up of the financial of the Appellant for the FY 2006-07. For the FY 2005-06, the Appellant requested the State Commission to capitalize asset before undertaking the true-up exercise. By the impugned order dated 20.12.2007, the State Commission has determined the Revenue requirements and the tariff of the Appellant for the MYT 2007-08 to 2010-11 and also trued up the financial of the Appellant for the FY 2005-06 and FY 2006-07. Since some of the claims have not been allowed by the State Commission in

the impugned order, the Appellant has filed this present Appeal before this Tribunal.

7. This Appeal was admitted on 24.04.2008. During the pendency of the Appeal, this Tribunal passed order on 04.05.2009 suggesting both the parties to convene a meeting to be attended by the officers of the Appellant and other parties of the Appeal and resolve the issues pertaining to the Power Purchase Cost, RLDC charges, contingency reserves, employees cost, Administrative and General expenses and some of the other issues during the pendency of the Appeal before the Tribunal. Time was granted for such a meeting and the matter was adjourned for reporting the result of the meeting.

8. Pursuant to the order of this Tribunal, a meeting was held between the officers of the Appellant and other parties of the Appeal. The issues relating to Power Purchase Cost for FY 2005-06 and RLDC and ULDC charges for FY 2006-07 were

resolved by the order dated 12.11.2009 passed by the State Commission. The other issues were not resolved.

9. Hence, the Appellant restricted the Appeal to the other issues alone before this Tribunal. It is noticed that the Appellant had earlier filed an Appeal in Appeal No. 133/07 in respect of tariff for the previous year before this Tribunal and this Tribunal passed order on 13.01.2009 allowing the Appeal on various grounds and remanded the matter to the State Commission for redetermination of tariff of the Appellant. On the basis of the judgment rendered by this Tribunal in Appeal No. 133/07, it is submitted that some of the issues resolved by this Tribunal in its above decision are also raised in the present Appeal and the same can be allowed as those issues are covered. In the light of the above, let us refer to grounds raised by the Appellant challenging the impugned order.

- (i) **Carrying Cost**: According to the Appellant even though the State Commission has allowed the Power Purchase Cost and Load Dispatch charges,

paid by the Appellant during the pendency of the Appeal, by the order dated 12.11.2009, the carrying costs for the said amount has not been allowed. It is also pointed out in the earlier order passed by the Tribunal in Appeal No. 133/07 dated 13.01.2009 in respect of previous year in the Appeal filed by the Appellant, this Tribunal, while remanding the matter, directed the State Commission that carrying cost will have to be given in truing-up and subsequent tariff order but despite this, carrying cost has not been allowed.

(ii) **Interest Expenditure on Short-term Borrowings:**

According to the Appellant, the Appellant had to take short-term loan for the year 2005-06 and 2006-07 to meet the shortfall as revenue requirement has not been allowed by the State Commission even though the above issues were covered by the earlier decision of the Tribunal in Appeal No. 133/07 dated

13.01.2009. In the circumstances, it is submitted that the Appellant is entitled to interest on the short-term borrowings.

(iii) **Past Delhi Vidyut Board Arrears:** According to the Appellant, the State Commission, following its earlier practice, had considered the past arrears relating to the DVB recovered by the distribution company and remitted to the holding company namely Delhi Power Company Limited. This was wholly contrary to the provisions of the Statutory Transfer Scheme. Further, the above issue is also decided in the decision of the Tribunal in earlier Appeal of the Appellant in Appeal No. 133/07 dated 13.01.2009. As such this point is also covered.

(iv) **Power Purchase Cost for the FY 2006-07:** It is contended by the Appellant that the State

Commission, while truing up for the Power Purchase Cost for the year 2006-07, has not allowed a sum of Rs. 4 crores from the audited accounts of the Appellant. The Appellant had filed the audited accounts before the State Commission giving the details of the Power Purchase Cost at Rs. 5344 crores. As against the above, the State Commission has permitted only Rs. 5340 crores in the impugned order, which is an obvious mistake. Therefore, the same needs to be rectified.

- (v) **Contingency Reserves**: According to the Appellant, the State Commission had till the year 2004-05 allowed the contingency reserves. While truing up the financial of the Appellant for the FY 2006-07, the State Commission has wrongly disallowed such contingency reserves and, on the other hand, the State Commission has adjusted the reserves earlier created by the Appellant. The reason given by the

State Commission for disallowing claim is that in the Tariff Regulations, 2007, the State Commission did not feel the necessity to provide for such reserves in the case of transmission companies.. This reason is wrong as Regulations do not prohibit the contingency reserves and in any event there is no justification for readjusting the contingency reserves of Rs. 5.48 crores earlier allowed and appearing in the Book of Accounts and treated as an income in the hands of the Appellant while undertaking truing-up.

- (vi) **Employees Cost for MYT 2007-08 to 2010-11:** The Appellant has contended that the State Commission, while allowing the employees' cost for MYT period 2007-08 to 2010-11 has only allowed 10% increase in employees cost and postponed the consideration of the issue relating to the 6<sup>th</sup> Pay Commission's Recommendations in the truing-up proceedings. This approach is wrong since 6<sup>th</sup> Pay

Commission's recommendations have already been implemented by the Appellant and postponement of the consideration of the expenses will result in cash flow constraints to the Appellant and also burden the consumer in the future for recovering the carrying cost at a later point of time.

- (vii) **Equity Ratio**: According to the Appellant, the State Commission has applied the debt equity ratio of 77:23 for the apportionment of the capital cost instead of normative ratio of 70:30 on the basis that the Balance Sheet of the Appellant shows a total equity of only 23% of the capital cost as on 31.03.2007. This is wrong. The Appellant has pleaded for the treatment of the loan received from the Government of Delhi as equity, as the Appellant has taken this loan from the Government due to shortfall in the internal accruals. Therefore, the

equity ratio of the Appellant ought to be determined on normative ratio of 70:30.

(viii) **Efficiency Factor for Operation and Maintenance**

**Expenses:** According to the Appellant, the State Commission made an ad-hoc additional reduction of 2%, 3% and 4% for the years 2008-09, 2009-10 and 2010-11 respectively in operation and maintenance expenditure for the reason that the Appellant is expected to improve its performance, but this ad-hoc reduction is arbitrary. The operation and maintenance expenses have been determined by the State Commission after applying full prudent check and in terms of Regulations framed. Therefore, there is no justification for the ad-hoc reduction in the operation and maintenance expenditure applying any annual efficiency improvement factor. Such adjustment is not envisaged in the Regulations framed by the State Commission.

(ix) **Interest on Plan Loan Fund**: According to the Appellant, the interest paid to the Government is a legitimate expenditure and till the activities are actually carried out, the amounts received as loan are deposited by the Appellant in the interest earning deposits and during such period the Appellant is required to pay interest to the Government, pending utilization of the fund in the capital works and therefore the State Commission ought to have allowed the interest payable on Government loan which were practically in the bank.

x) **Administrative & General Expenditure, Repair & Maintenance expenses, etc.** : According to the Appellant, the State Commission has wrongly not considered the projections on this issue. It is submitted that the State Commission ought to have considered these projections and allowed the same. In the absence of any imprudence on the part of the

Appellant's claim and further wherever the norms of the regulation restricted the amount to be allowed, there are sufficient justifications for relaxing those norms and allowing the claim. The State Commission in the truing-up process can consider the actual expenditure incurred by the Appellant and, therefore, the Tribunal may direct the consideration of the above aspect by the State Commission during the truing-up proceedings.

10. The replies on these issues given by the Learned Counsel for the Commission are as follows:

- (i) In regard to the carrying cost, it is submitted by the Respondent that the point relating to the carrying cost has been raised for the first time in course of the arguments and is not a ground in the memo of the Appeal. Since the Appellant has not asked for the carrying cost before the State Commission, the State

Commission did not consider the same. Further, the Appellant is required to file separate petition before the State Commission giving all the details about the dates of payment and the details of the loan for paying the Power Purchase Cost and in the absence of any details, the carrying cost cannot be determined by the State Commission.

(ii) In respect of the issues of interest on short-term borrowings, it is submitted by the learned counsel for the Commission that the State Commission would allow interest on long term borrowings which are loan taken for capital expenditure and interest as working capital and besides the above, no interest could be allowed.

(iii) In respect of the issue relating to past DVB arrears, the learned counsel of the State Commission

contended that this claim cannot be entertained in view of the fact that the State Commission has already filed appeal against the Order dated 13.1.2009 passed by this Tribunal in Appeal No. 133 of 2007 before the Hon'ble Supreme Court. As such, the issue has not attained finality and in the present case a serious impact of Rs. 429 crore and odd is to be reckoned with and since the Apex Court is seized of the matter, it would be fit and proper not to preempt the decision of the Hon'ble Apex Court.

- (iv) In respect of the next issue of Power Purchase Cost for the FY 2006-07, the reply by the Commission is that the Appellant must ask for and clearly seek relief from the Commission. In respect of FY 2006-07 and in respect of other issues, the Appellant needs to submit a separate petition before the State Commission detailing the said power purchase cost for the FY 2006-07 since the State Commission

cannot suo moto grant relief which was not even set out or asked for in the petition.

- (v) In respect of the issue relating to the contingency reserves, the Counsel for the Commission has stated that the Commission had already approved the contribution to contingency reserves in the tariff order for 2004-05; and further in tariff order for FY 2006-07 the Commission reviewed its decision on contingency reserves and concluded that in accordance with the Electricity Act, 2003, the Commission did not feel the necessity to provide these reserves. Further, the terms and conditions for determination of tariff for Transmission Regulations, 2007 dealing with various items of revenue requirement of the transmission licensee, the contingency reserve was not considered to be a regular part of the ARR and the same was not included as part of the Regulations. Therefore, the Commission reduced the amount of contingency

reserves present in the Books of Accounts of the Appellant.

(vi) In respect of the employees cost, it is replied by the Learned Counsel for the Commission that the impact of the 6<sup>th</sup> Pay Commission's Recommendations was not quantifiable in view of the inadequate supporting evidence and in any case the increase will be trued-up on the basis of actuals.

(vii) In respect of the debt equity ratio, the reply of the Learned Counsel for the Commission is that the relevant Regulations namely 5.13 clearly provides that where actual equity employed is less than 30%, the actual equity and debt shall be considered. The Commission has allowed interest on the loan taken from the Government of Delhi and the loan cannot be treated as equity unless the Government of Delhi agrees to convert the loan into equity. Further, a sum of Rs. 429 crore was made due to the Appellant by

the judgment of the Tribunal dated 13.01.2009 and hence it cannot be treated as equity for the period prior to that date.

(viii) In regard to the efficiency factor, the Commission's reply is that the Commission has applied the efficiency factor on the operation and maintenance expenses in accordance with clause 5.7 of the MYT Regulations and the efficiency factor is applied only once on the operation and maintenance expenses determined by summing up three expenses namely, Repair & Maintenance, Employee Cost and Administration & General Expenses, not twice over, as alleged by the Appellant. As such, the formula applied is given in the Regulations. The Appellant in its MYT Petition did not propose any values for the efficiency factor in accordance with the provisions of the MYT Regulations. Therefore, the decision by the State Commission cannot be faulted with as the

formula adopted by the State Commission is in accordance with the Regulations.

- (ix) In respect of interest on Plan Loan Fund, the Commission reply is that the Commission has approved interest under two heads: (1) interest on working capital and (2) interest on long-term loans. In the MYT order the Commission has allowed interest on working capital on normative basis. The Commission has not considered any interest for short-term loans. The Commission has also allowed interest on long-term loan for capital expenditure based upon the capital expenditure incurred by the Appellant. Therefore, any additional loan taken by the Appellant over and above the loan for working capital has not been considered by the Commission and consequently the interest expenditure on the same has been disallowed. Further, the Commission

cannot allow interest on any loan till the time it is being utilized.

- (x) In respect of the issue of Administrative and General Expenses, etc., the Commission's reply is that the Commission has determined the Administrative and General expenditure as per clause 5.7 of the MYT Regulations and the Appellant gave bald proposal of 4% to 5% increase whereas the Commission has calculated the increase based on the MYT Regulations as the Appellant has not shown that the Regulations have been wrongly applied.

11. In view of the rival contentions urged by the Learned Counsel for the parties, the following questions would arise for consideration in this Appeal:

- (a) Whether the State Commission was justified in not allowing the carrying cost even though the State Commission has allowed the power purchase cost and

load dispatch charges, despite the order of the Tribunal dated 13.01.2009 in Appeal No. 133/07 remanding the matter and directing the State Commission to give carrying cost as well in respect of the previous year?

- (b) Whether the State Commission was justified in not allowing the claim for interest on short-term borrowings despite this issue having been decided by the Tribunal by the judgment dated 13.01.2009 in Appeal No. 133/07?
- (c) Whether the State Commission erred in treating the DVB arrears as a deemed revenue of the Appellant and thereby reducing the revenue requirements of the Appellant especially when the statutory Transfer Scheme Rules are contrary to the same and when the Government of National Capital Territory of Delhi has not agreed to amend the Transfer Scheme and even then the State Commission declined the same as revenues of the Appellant?

- (d) Whether the State Commission is justified in allowing the power purchase cost only at Rs. 5340 crores even though the audited accounts submitted by the Appellant clearly give the details about the power purchase at Rs. 5344 crores?
- (e) Whether the State Commission erred in disallowing the contingency reserves even though the State Commission earlier allowed the contingency reserves till the year 2004-05, merely on the reason that the Tariff Regulations, 2007 do not provide for such reserves in the case of transmission licensee?
- (f) Whether the State Commission was justified in not accepting the proposal of the Appellant with regard to escalation in employees cost for the MYT period 2007-08 to 2010-11 due to the Sixth Pay Commission's recommendations which would be considered at the truing-up proceedings at the end of the tariff period, which would have the effect of affecting the cash flow of the Appellant?

- (g) Whether the State Commission is right in not allowing the debt-equity ratio of 70:30 by applying the debt-equity ratio of 77:23 for the apportionment of the capital cost as on 31.03.2007?
- (h) Whether the State Commission was justified in introducing efficiency factor in Operation and Maintenance expenses and thereby further reducing the revenues from tariff when the Appellant is said to be already operating at the highest possible efficiency and in the light of the State Commission reducing the operation and maintenance expenditure to a low level as against the claim of the Appellant?
- (i) Whether the State Commission was justified in not allowing the interest on the Plan Loan Funds actually paid by the Appellant to the Government to the extent of the amount of such loan lying in deposit with the Appellant pending deployment when the Appellant had kept the funds in the fixed deposits which has been taken into account benefiting the tariff therefrom as

revenue reducing the revenue requirements to be covered in tariff to be allowed to the Appellant?

- (j) Whether the State Commission was justified in not allowing the Administrative and General Expenses and the Repair and Maintenance Expenses, etc. as claimed by the Appellant and allowing the same at a lower level without any justification for disallowing the said claim of the Appellant.

12. On the basis of above questions, let us now deal with the issues one by one.

13. The first issue relates to carrying cost. According to the Appellant, the State Commission having allowed the power purchase cost for the FY 2005-06 and RLDC/ULDC charges for FY 2006-07, the carrying cost for the same has not been allowed, which is wrong. According to the Respondent, this is a new point raised for the first time in this Appeal and the same was not raised by the Appellant before the State Commission and, therefore, the State Commission could not have granted

relief which has not been specifically prayed. As pointed out by the Appellant, the carrying cost is a consequential order to be passed for the deprivation of legitimate amount to the Appellant. It is settled law that whenever the tariff is revised, the carrying cost, which is a consequential order, has to be allowed. It is also pointed out by the Appellant that in the earlier orders passed by the Tribunal dated 13.01.2009 in Appeal No. 133/07 in respect of the previous year in the Appeal filed by the Appellant, this Tribunal remanded the matter and directed the State Commission to allow the carrying cost in the truing-up proceedings as also in the subsequent tariff orders. The principle of carrying cost/interest has been laid down by the Hon'ble Supreme Court in the case of *South Eastern Coalfield Limited v. State of Madhya Pradesh*, (2003) 8 SCC 5648. The relevant observation of this judgment is as follows:

*“ 21. Interest is also payable in equity in certain circumstances. The rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement.*

*Interest in equity has been held to be payable on the market rate even though the deed contains no mention of interest. Applicability of the rule to award interest in equity is attracted on the existence of a state of circumstances being established which justify the exercise of such equitable jurisdiction and such circumstances can be many.”*

14. Therefore, the State Commission is directed to pass the consequential order on the basis of details of the materials relating to payment of power purchase cost and ULDC charges to be submitted before the State Commission by the Appellant. Accordingly, the issue is answered in favour of the Appellant.

15. The next issue is relating to the interest expenditure on short-term borrowings for the FY 2005-06 and FY 2006-07. According to the Appellant, the Appellant is entitled to interest expenditure incurred on the short-term borrowings. The Appellant, during the relevant years, took the short-term

borrowings to meet the shortfall in the revenue requirements. Such short-term borrowings were only on account of legitimate revenue requirements. Admittedly, the State Commission has not given any reason for disallowing this claim. It is submitted by the Learned Counsel for the State Commission that the State Commission would allow interest on long-term borrowings which are loan taken for capital expenditure and interest on working capital and besides the above, no interest could be allowed. This contention, in our view, is wrong. This Tribunal in the Appeal filed by the Appellant earlier for previous year in Appeal No. 133/07, as reported in 2009 ELR APTEL 86, held as follows:

*“19) The Commission has allowed an amount of Rs. 2.28 crores which the Appellant has paid to the holding company as interest on short-term loan. Since the amount has actually been paid and here is no allegation of imprudence for the borrowing done by the Appellant from the holding company, there is no reason why the Appellant*

*should not be allowed to recover this amount through tariff. We are therefore of the opinion that the Appellant should be allowed to recover this amount as pass through in tariff.”*

16. The short-term borrowings to meet the deficit are on account of wrong disallowance by the State Commission of the legitimate expenditure. As indicated above, this has already been considered by the Tribunal in the order dated 13.01.2009 in Appeal No. 133/07. Therefore, the interest expenditure on short-term borrowings, as claimed by the Appellant, being a necessary expenditure and therefore the same needs to be serviced through interest. However, it has to be ensured that while allowing carrying cost as directed by this Tribunal, the interest on short term borrowings is appropriately accounted for to avoid any double payment of interest on account of short-fall in revenue requirements. This point is accordingly decided.

17. The next issue is relating to the past DVB arrears. According to the Appellant, the State Commission, following its earlier practice, had considered the past arrears relating to the DVB recovered by the distribution company and remitted to the holding company as a revenue of the Appellant and this finding is contrary to the provisions of the Statutory Transfer Scheme. The Statutory Transfer Scheme provides that the same must be to the account of the Delhi Power Company Limited, namely the holding company. The said amounts were not remitted to the Appellant. It is pointed out that this issue is covered by the decision of this Tribunal in its decision dated 13.01.2009 in the earlier Appeal No. 133/07. The relevant observation made by this Tribunal is as follows:

*“10) From the facts narrated above, the issue of DVB arrears is simple. The DVB, which stood unbundled after coming into force of the Delhi Electricity Reforms Act, 2000 and the Transfer Scheme was entitled to receive certain payments from the consumers and, perhaps some*

*other parties. At the same time DVB was also liable to pay dues to various parties. At the time DVB was unbundled it had huge outstanding dues of Central Power Sector utilities like NTPC, etc; amounting to over Rs. 1000 crores. DVB also had certain unpaid loans taken from the Government. The liability to pay back the loan fell on the holding company, DPCL. In order to make the repayment viable, it was granted 80% of the recoveries made. These recoveries were made by the DISCOMs. For the services extended by the DISCOMs for recovering the past arrears of DVB they were given the incentive of retaining 20% of such recoveries. There is no dispute that the Transfer Scheme which was formulated at that time has always remained unchanged. It is also not disputed that the Commission is bound by the Transfer Scheme and cannot direct any alternation in the sharing of the past receivables. More importantly there has not been, in actual practice, any alteration in the sharing of the past receivables and undisputedly past receivables were*

*actually received by the holding company, DPCL, and by the DISCOMs. It naturally follows that when such past receivables which were of the tune of Rs. 210 crores in the FY 2002-03 and in 2003-04 and Rs. 219 crores in the FY 2005-06 are taken as revenue of the appellant, the income required to be generated for the appellant from tariff would also be reduced. The appellant, therefore, has been granted a tariff which is artificially low. The appellant being the transmitter of power, such low tariff has resulted in lowering the cost of wheeling of power for DISCOMs consequently lowering the tariff for consumers of power. The question, however, is straight and simple. Can the money that has actually not been received by the appellant be treated to have been revenue earned by the appellant? If the answer is 'no' the consequent result will follow. The appellant will have to be granted the higher tariff and the cost of power purchase will rise for the DISCOMs. The intention of the Commission to keep the tariff low may be pious. However, the Commission has to reach its intended*

*goal in a logical rational and lawful manner. It defies all logic to say that past receivables should actually be received by DPCL but revenue to that extent be denied to appellant, DTL.”*

.....

*“12) In any case so long as the recoveries of the past dues are not actually made over to the appellant, the Commission cannot deprive the appellant of its entitlement to recover its revenue requirement to that extent. The Govt. has already rejected the Commission’s request to make amends in the Transfer Scheme. So long as the Transfer Scheme stands as it is, the transactions between the DTL, DISCOMs and DPCL will continue to be governed by it. The Commission can neither alter the scheme nor write the recovered past arrears into the revenue side of the appellant’s accounts, particularly because in reality the recovered past arrears had gone to either the DISCOMs or DPCL.*

18. It is contended by the Learned Counsel for the State Commission that this claim cannot be allowed in pursuance of the order dated 13.01.2009 of Tribunal since the State Commission has filed an Appeal against the said order and therefore it has not attained finality. In reply to the above submission, the Learned Counsel for the Appellant has submitted that while the Appeal has been filed by the State Commission before the Hon'ble Supreme Court, there was a considerable delay in filing the Appeal and therefore they filed an application for condonation of delay which has not been disposed of yet and further no stay has been granted by the Hon'ble Supreme Court and therefore, the State Commission ought to have followed the finding of the Tribunal. We are unable to accept the submission made by the Learned Counsel for the State Commission since mere pendency of the Appeal before the Hon'ble Supreme Court, would not entitle the State Commission to observe that they would not follow the order of the Tribunal merely because an Appeal has been filed. In this case, it is relevant to refer to the Hon'ble Supreme Court's

decision in the case of *Shree Chamundi Mopeds Limited v. Church of South India Trust Association, Madras* (1992) 3 SCC 1 wherein it was held that even a stay granted by the Hon'ble Supreme Court would not mean that the decision rendered by the Appellate Court would become non-est. Therefore, this point is allowed in favour of the Appellant.

19. The next issue is relating to the power purchase cost for the FY 2006-07. According to the Appellant, the State Commission had rectified the similar omission in respect of the FY 2005-06 but not for the FY 2006-07. Appellant had claimed power purchase cost of Rs. 5344 crores against which Rs. 5340 crores has been approved of leaving a short-fall of Rs. 4 crores from the audited accounts of the Appellant towards power purchase cost for the FY 2006-07. While truing-up, this was not allowed even though the claim for earlier year was allowed. It is contended by the Learned Counsel for the State Commission that the State Commission in the MYT order had

trued up the cost for the FY 2006-07 based on the information submitted by the Appellant and the Appellant did not raise this question of additional power purchase cost of Rs. 4 crores.

20. It is noticed from the impugned order that the actual power purchase cost from all the generating stations and other sources including UI sales to other States was Rs. 5116 crores. The entire power purchase cost of Rs. 5116 crores has been allowed. Also, the actual cost of PGCIL transmission charges, RLDC/ULDC charges, incentives, income-tax, wheeling charges and open access charges have also been allowed fully. However, Rs. 4 crores actually received on account of Reactive Energy have been deducted. The Actual Power purchase cost including PGCIL transmission charges of Rs. 5600 crores have been permitted in the true-up. Thus, we do not find short-fall of Rs. 4 crores as claimed by the Appellant. Accordingly, we uphold the power purchase cost as trued-up by the Commission for the FY 2006-07.

21. The next issue is with reference to the contingency reserves. According to the Appellant, the State Commission allowed the contingency reserves in the past but now have disallowed the same. Further, the contingency reserves in the Books of Accounts of the Appellant was also reduced by the State Commission. According to the Learned Counsel for the State Commission, the Tariff Regulations, 2007 did not provide for the contingency reserves as it was not considered to be a regular part of ARR of a transmission company. Even though the State Commission had allowed the contingency reserves in the tariff order for the FY 2004-05, the State Commission in the tariff for the FY 2005-2006 reviewed its decision as it did not feel the necessity to provide for any such reserves in the case of transmission company. As the contingency reserve was not considered to be a regular part of the ARR, the State Commission reduced the amount of contingency reserves present in the Books of Accounts of the Appellant as there is no further requirement for the Appellant to maintain the same in its Books of Accounts.

22. As pointed out by the learned counsel for the Commission, we find that the MYT Tariff Regulations, 2007 do not provide for contingency reserve as the Commission did not feel it necessary to maintain contingency reserves for the Delhi Transmission company, the Appellant. On this basis, the Commission disallowed this claim. This reasoning cannot be said to be wrong. In view of this, we uphold the order of the Commission in regard to contingency reserve.

23. The next issue relates to Employees cost for MYT from 2007-08 to 2010-11. According to the Appellant, the State Commission allowed only 10% increase in Employees cost though the impact of the Sixth Pay Commission's Recommendations is much more and merely postponed the consideration of this issue in the truing-up exercise. In its reply, the Learned Counsel for the Respondent submitted that the impact of the Sixth Pay Commission's Recommendations was not quantifiable in view of inadequate supporting evidence and

in any case the increase will be tried up on the basis of actual. The State Commission admittedly has not disallowed the employees cost in entirety but on the other hand it has simply postponed the impact of Sixth Pay Commission's Recommendations to the truing-up proceedings. It is pointed out that Sixth Pay Commission's Recommendations have already been implemented by the Appellant and the Appellant is required to incur such expenditure without any recovery in the tariff. We find substance in this contention because the postponement of consideration of the same will only result in cash flow constraints to the Appellant and a burden to consumers in future. Further, the State Commission does not deny the necessity to consider the employees cost based on the recommendations of the Sixth Pay Commission. It is, therefore, appropriate to direct the State Commission to consider the impact of the Sixth Pay Commission's Recommendations implementation and allow the tariff with a carrying cost in the truing-up proceedings. This point is answered accordingly.

24. The next issue raised by the Appellant is with regard to the Debt-Equity ratio. According to the Appellant, the State Commission has applied the actual ratio of 77:23 instead of applying the normative ratio of 70:30. It is also pleaded by the Appellant that the loan received from the Government should be treated as equity as the Appellant has taken this loan due to the shortfall in internal accruals. According to the Learned Counsel for the State Commission, as per Regulations 5.13, where actual equity employed is less than 30%, the actual equity and debt shall be considered and thus the consideration of the actual debt-equity ratio was right. The State Commission, while determining the debt-equity ratio considered the debt equity ratio of old assets as per actuals and for new assets considered the normative ratio of 70:30 as specified in the MYT Regulations, 2007. The actual debt component of the Appellant in the past admittedly was very high, on account of the DVB arrears to the account of the Appellant. Consequently, the revenue requirements of the Appellant were substantially reduced and the Appellant was forced to borrow money essentially from the State Government

to meet its revenue requirements. The Appellant was in fact deprived of its internal accruals that would have accrued in case the revenue requirements were properly allowed. It is submitted by the Appellant that the revenue requirements of the Appellant for the past 3 years are now required to be re-worked and consequently the Balance Sheet of the Appellant will undergo substantial change. The Tribunal has already held that the past DVB arrears have been wrongly shown as revenue of DTL and has directed the Commission to give effect to its directions with carrying cost. This order will be given effect to in the future only by adding the amount with carrying cost to the revenue requirement to be recovered in the form of tariff over a period of time in future. However, it may not be possible to re-write the past balance-sheet. While we do not think that it is appropriate to direct the Commission to treat the loan given by the Delhi Government to Delhi Transco to cover its short-fall in revenue as equity as argued by the Appellant, we direct the Commission to true up the financials of the Appellant as early as possible. According to the MYT Regulations, 2007, the true-up is to be

done at the end of the control period. However, in view of the severity of issue and financial difficulties being experienced by the Appellant, we direct the Commission to carry out the true up exercise as early as possible without waiting for the end of the control period so that recovery of past revenue due to the Appellant could commence at the earliest after invoking the provision in Regulations regarding power to remove difficulties and power of relaxation.

25. The next issue is relating to efficiency factor. According to the Appellant, the State Commission made an ad hoc additional reduction of 2%, 3% and 4% for the FY 2008-09, 2009-10 and 2010-11 respectively and this ad hoc reduction is arbitrary as the operation and maintenance expenses have already been determined by the State Commission after applying full prudent check and in accordance with the Regulations framed. In reply to the above, the Learned Counsel for the State Commission submits that the State Commission applied the efficiency factor on the operation and maintenance expenses in accordance with

clause 5.7 of the MYT Regulations and the efficiency is only applied once on the operation and maintenance determined by summing up three expenses namely R&M expenses, employees cost and A&G expenses. It is not disputed that the State Commission after applying the prudent check allowed the O&M expenses for the MYT period to ensure efficiency in the system, made ad hoc additional reduction of 2%, 3% and 4% for the FY 2008-09, 2009-10 and 2010-11 respectively. The only reason given by the State Commission is that the Appellant is expected to improve its performance. The very nature of operation and maintenance expenses require higher expenditure year after year on account of inflation. After providing for escalation in operation and maintenance expenses due to inflation, these are reduced again by application of ad-hoc efficiency factor. The MYT Regulations do provide for reduction of O&M expenditure by application of efficiency factor. However, the efficiency factor has to be determined by the Commission based on licensee's filing, benchmarking, approved cost by the Commission in the past and any other factor that Commission

feels appropriate. In the impugned order the Commission has determined the efficiency improvement factor as 2%, 3% and 4% for FY 2009, FY 2010 and FY-2011 respectively arbitrarily without any benchmarking or any analysis and identification of area of inefficiency where the improvement is desired to be carried out. Such efficiency factor has naturally to be determined only on the basis of material placed before the State Commission and analysis of various factors and not on ad-hoc basis as done by the State Commission. Therefore, this point is answered accordingly in favour of the Appellant.

26. The next issue relates to interest on Plan Loan Fund. According to the Appellant, with reference to this issue, the State Commission ought to have allowed as the interest paid to the Government by the Appellant is a legitimate expenditure and the State Commission has wrongly considered the interest earned on it as non-tariff income. According to the Learned Counsel for the State Commission, the interest is allowed on capital expenditure and working capital and the State

Commission cannot allow interest on any loan till the time it is being utilized for the capital expenditure of working capital purpose and in other words, the State Commission cannot allow interest on loan amount lying unutilized in bank accounts. It is also contended by the Learned Counsel for the State Commission that the Appellant has never given any details to the State Commission with reference to the interest earned on these funds and if those details are placed before the State Commission, the State Commission will reduce the non-tariff income. The State Government disperses the loan to the Appellant based on the planned activities. Till the activities are actually carried out, the loan received are deposited by the Appellant in interest earning deposits. During such period the Appellant is required to pay interest to the Government pending the utilization of the funds in the capital project. The State Commission would only allow the interest actually paid by the Appellant for capitalisation as Interest During Construction after commissioning of the capital works. However, the Commission has included the interest earned by the Appellant from the

deposits in the other income of the Appellant and thus adjusted the revenue requirements of the Appellant. The Plan loan fund given by the State Government is also utilized for capital expenditure. This amount is kept as mobilized amount pending incurring of the capital expenditure. There could be two alternatives for treatment of interest earned on the unutilised loan amount drawn from the State Government pending utilisation in capital works in the ARR. The first alternative is to keep separate account of interest earned on the debt funds drawn for the capital works and adjust the interest earned on the unutilised debt amount lying in the deposits of the Transmission Company while working out the Interest During Construction (IDC) for the capital works. In such case the IDC will be net of the interest earned by the company on the deposit, pending utilisation of the debt funds. Alternatively, the interest earned on such debt funds for capital works is considered as non-tariff income as considered by the Commission. In that case the interest paid by the Transmission company on the loan amount will be considered as Interest During Construction at the time of

capitalisation of the works, subject to prudence check by the Commission. The Commission's Counsel has argued that interest on deposits on account of unutilised debt on capital works was not shown separately in the accounts submitted by the Appellant. In view of the above explanation, we do not find any fault in the treatment given by the Commission in the absence of availability of detailed accounts. This point is answered accordingly.

27. The next issue relates to Administrative & General expenditure, etc. According to the Appellant, the State Commission has wrongly not considered the projections made by the Appellant. It is replied by the Learned Counsel for the State Commission that the State Commission has determined the A&G expenses as per Regulations 5.7 of the DERC Regulations and the Appellant actually gave bald proposal of 4 to 5% increase whereas the State Commission has calculated the increase based on the provisions contained in the MYT Regulations and that therefore, the finding is correct. The

Appellant had claimed additional expenses to meet the expenditure on gas insulated switch gear station of the Appellant in Delhi for which costs have increased substantially. Therefore, the State Commission in the truing-up process may consider the actual expenditure incurred by the Appellant pertaining to norms laid down in the Regulations and deviations and relaxations, if any required based on the justification provided by the Appellant. Accordingly, the same is directed and the State Commission may do so during the true-up proceedings, as we do not feel it necessary to adjudicate on this aspect at this stage. This point is answered accordingly.

28. **SUMMARY OF OUR FINDINGS:**

- (i) **The State Commission allowed power purchase cost for the FY 2005-06 and RLDC/ULDC charges for the FY 2006-07 and the said charges were allowed by the State Commission, the carrying cost which is a consequential order has**

got to be allowed. Therefore, the State Commission is directed to pass the consequential order on the basis of the details of the material furnished by the Appellant relating to date of payment and the details of loan, etc.

- (ii) The interest on expenditure on short-term borrowings being a necessary expenditure needs to be serviced. It is established by the Appellant that the Appellant took the short-term borrowings to meet the shortfall in the revenue requirements. Such short-term borrowings were only on account of legitimate revenue requirements. The principle regarding the same has already been laid down by the Tribunal in its judgment dated 13.01.2009 in Appeal No. 133/07. Therefore, the Appellant is entitled to interest on expenditure on short-term borrowings. However, it has to be ensured by the Commission that while

**allowing the carrying cost as directed by this Tribunal the interest on short-term borrowing is appropriately accounted for to avoid double payment of interest on account of short-fall in revenue requirement.**

- (iii) On the issue of DVB arrears, this Tribunal has already passed order in favour of the Appellant in its decision dated 13.01.2009 in Appeal No. 133/07. Despite this, the State Commission following its earlier practice, has considered the past arrears relating to the DVB recovered by the distribution company and remitted to the holding company as a revenue of the Appellant. This is contrary to the provisions of the statutory Transfer Scheme as well as the dictum laid down by this Tribunal in the decision quoted above. According to the Learned Counsel for the State Commission, the judgment dated 13.01.2009 passed by the**

**Tribunal has been appealed before the Hon'ble Supreme Court and as such it has not attained finality and, therefore, the same need not be followed. This contention of the Learned Counsel for the State Commission is untenable since it is settled law that mere pendency of the Appeal before the Hon'ble Supreme Court would not entitle the State Commission to observe that they need not follow the order of the Tribunal. Therefore, the State Commission is directed to allow the claim of the Appellant relating to this issue.**

- (iv) With regard to the power purchase cost for the FY 2006-07, the Appellant claimed that the State Commission had allowed the said claim in respect for FY 2005-06 and not for the FY 2006-07. It is, however, noticed from the impugned order that the Commission has allowed the actual power**

**purchase cost of Rs. 5600 crores. Accordingly, we uphold the power purchase cost as trued-up by the Commission for the year 2006-07.**

- (v) In regard to the issue of contingency reserves, the State Commission allowed the same in the past and the same was disallowed only for this year. According to the Learned Counsel for the State Commission, the Tariff Regulations, 2007, do not provide for the contingency reserves. The perusal of the Tariff Regulations, 2007 would show that they do not provide for the contingency reserves. Therefore, the Commission has acted according to the Regulations. In view of this, we uphold the order of the Commission in regard to the contingency reserve.**
- (vi) The State Commission allowed only 10% increase in employees cost without considering the impact**

**of Sixth Pay Commission's recommendations. According to the Appellant Sixth Pay Commission's recommendations have already been implemented and the Appellant is required to incur such expenditure without any recovery in the tariff. The State Commission does not deny the necessity to consider the employees cost based on the Sixth Pay Commission's recommendations. If the said consideration has been postponed till the truing-up, it will result in the cash flow constraints to the Appellant and consequently a burden to the consumers in the future. Therefore, the State Commission is directed to consider the impact of Sixth Pay Commission's recommendations implementation and allow the tariff with a carrying cost in the truing-up proceedings as expeditiously as possible.**

**(vii) The State Commission instead of applying 70:30 towards debt-equity ratio has applied the actual ratio of 77:23. The actual debt component of the Appellant in the past was very high on account of the DVB arrears to the account of the Appellant. Consequently the revenue requirements of the Appellant were substantially reduced and the Appellant was forced to borrow money from the State Government to meet its revenue requirements. We have noticed that the Commission has considered the Debt Equity ratio of old assets as per actuals and for new assets considered the normative ratio of 70:30, as per the Regulations. Even though the Appellant has been deprived of its legitimate revenue, it is not possible to re-write the past balance-sheet of the Appellant. The Tribunal has already directed the Commission to give effect to its directions relating to DVB arrears wrongly shown as revenue of the**

**Appellant and other costs due to the Appellant with carrying cost. However, this will be given effect in future only and recovery will be made by the Appellant over a period of time through tariff. We do not feel that it would be appropriate to direct the Commission to treat the loan given by the Government of Delhi to the Appellant to meet its short-fall in revenue as equity. Accordingly, we direct the Commission to effect the true-up exercise of the Appellant as early as possible without waiting for the current control period to be over. This will help in early recovery of the past revenue due to the Appellant.**

- (viii) The State Commission made an ad-hoc reduction of 2%, 3% and 4% for the FY 2008-09, FY 2009-10 and FY 2010-11 respectively. The only reason given by the State Commission is that the Appellant will have to improve its**

**performance. There cannot be any reason for the ad-hoc reduction in O&M expenditure applying any annual improvement efficiency factor. Even though the Regulations provide for application of efficiency factor, such factor has to be determined only on the basis of the materials placed before the State Commission and analysis by the Commission and not on ad-hoc basis. The State Commission is directed to consider this and pass order accordingly on this issue.**

- (ix) Regarding the interest on Plan Loan Fund, the State Commission did not allow the same but the interest earned on it was included in non-tariff income. According to the Learned Counsel for the State Commission, the interest is allowed on capital expenditure and working capital and till the loan is completely utilised, the State Commission cannot allow interest on any loan.**

**The State Government disburses the loan to the Appellant based on the planned activities. Till the activities are carried out the loan are deposited by the Appellant in interest earning deposits. During such period the Appellant is required to pay interest to the Government pending the utilization of the funds in the capital project. According to the learned counsel for the Commission the interest on unutilised debt on capital works was not shown separately in the accounts furnished by the Appellant. Under those circumstances, we do not find any fault in the treatment given by the Commission to such interest earned on debt funds income for capital works in the absence of availability of detailed accounts. If the interest on loan taken for capital works is considered as IDC at the time of capitalisation of works without deducting the interest earned by the Appellant on depositing such debt when it was awaiting**

investment, no harm would be done to the Appellant. In view of this, we uphold the finding of the Commission regarding interest on plan loan funds.

- (x) On the issue relating to Administrative & General expenditure, etc. it is contended by the Learned Counsel for the State Commission that the State Commission has determined the A&G expenditure as per Regulation 5.7 on the basis of the bald proposal of 4 % to 5% increase given by the Appellant. The Appellant had claimed additional expenditure to meet the expenses of gas installed switch gear station of the Appellant in Delhi for which costs have increased substantially. Therefore, the State Commission is directed to consider the actual expenditure incurred by the Appellant pertaining to norms laid down in the

**Regulations, deviations and relaxation in the  
truing-up proceedings.**

**CONCLUSION**

29. In the light of our findings, referred to above, the impugned order is set aside to the extent as indicated above. Accordingly, the State Commission is directed to pass suitable orders in accordance with our observations in respect of the relevant issues and implement the same.

30. The Appeal is partly allowed. No costs.

**(Justice P.S. Datta) (Rakesh Nath) (Justice M. Karpaga Vinayagam)**  
**Judicial Member Technical Member Chairperson**

REPORTABLE/NON-REPORTABLE

**Dated: 29<sup>th</sup> September, 2010**