

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 175 of 2009

Dated 14th February, 2011

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

In the matter of:

**Tata Power Company Limited
Bombay House, Homi Mody Street,
Fort, Mumbai-400 001**

... Appellant(s)

Versus

**Maharashtra Electricity Regulatory Commission
World Trade Centre, Centre No. 1,
13th Floor, Cuffe Parade,
Mumbai-400 006**

Respondent(s)

Counsel for the Appellant

**Mr. Amit Kapur
Ms. Poonam Verma**

Counsel for Respondent

**Mr. Buddy A. Ranganadhan
for MERC**

JUDGMENT

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

1. Tata Power Company Limited is the Appellant herein.

2. Aggrieved by the impugned order dated 15.06.2009, passed by the Maharashtra Electricity Regulatory Commission, Tata Power Limited (Distribution Business) has filed this present Appeal.

The relevant facts are as follows:

3. The Appellant is a company having its registered office at Mumbai, involving itself in the business of distribution of electricity.

4. The Appellant on 04.12.2008 submitted its petition for truing up for FY 2007-08, for Annual Performance Review for FY 2008-09 and for

determination of tariff for the FY 2009-2010 based on annual audited expenditure for the FY 2007-08. The State Commission, after issuing public notice and after receiving written objections from the public, passed the impugned order on 15.06.2009.

5. Aggrieved by the disallowance of 3 claims, the Appellant has filed the present Appeal. In respect of those 3 claims, the following issues have been raised by the Appellant.

- (i) Wrongful consideration of the difference between the normative interest on working capital and actual interest on working capital as gains and sharing of 1/3rd amount with the distribution licensee;
- (ii) Disallowance of Administration and General expenses towards Tata Brand Equity Payment; and

(iii) Unjustified disallowance of actual power purchase cost pertaining to Demand Side Management Measures.

6. As pointed out by the Learned Counsel for both the parties, the first 2 issues have already been decided in favour of the Appellant by this Tribunal in its judgment dated 15.07.2009 in Appeal No. 137/08, reported in 2009 ELR (APTEL) 622 and in the judgment dated 28.05.2009 in Appeal No. 111/09 as reported in 2009 ELR (APTEL) 560. We have to hold that the Appellant is entitled to both these claims in respect of Issue No. 1 and (2). Accordingly, the State Commission is directed to pass order on these issues in the light of the findings and observations made in these judgments. Thus the first and second issues are answered in favour of the Appellant.

7. The third issue is relating to the Disallowance of Actual power purchase cost pertaining to Demand Side Management Measures. According to the Appellant, the State Commission has disallowed 10.44 crores from the actually incurred power purchase expenses for the FY 2007-08 and such a disallowance has resulted in penalising the distribution utility in purchasing power to meet the demands of its consumers and the demand can be controlled by the consumer and not the distribution licensee. It is further contended that for demand to be reduced or controlled, the consumer has to actively participate in the efforts and hence controlling demand can not be said to be a function of a distribution licensee. On the other hand, it is contended by the Learned Counsel for the State Commission that section 86(k) empowers the State Commission to discharge the functions such as

to take all steps that are required to ensure that Demand Side Management Measures are adequately taken by the distribution utility and on the basis of the said provision, the State Commission has correctly disallowed the costly power purchase expenses for the FY 2007-08 to the extent of 10.44 crores. It is further contended by the learned counsel for the State Commission that the State Commission had given the direction for Demand Side Management Measures to the Appellant in the MYT order dated 30.4.2007, but the said MYT order was not challenged by the Appellant and therefore, it has become final.

8. In view of the above rival contentions, it is proper to examine the relevant provisions of the Act, National Electricity Policy and Tariff Policy relating to energy conservation and energy efficiency and the functions

defined for the Distribution licensee and the State Commission in this regard.

(a) “Conservation” has been defined in the Electricity Act as “any reduction in consumption of electricity as a result of increase in efficiency in supply and use of electricity”.

Thus Conservation applies to both supply and end use of electricity.

(b) Section 42(1) makes it obligatory on the Distribution licensee to develop and maintain an efficient coordinated and economical distribution system. Section 42(1) is reproduced below:-

“42. (1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act”.

(c) According to Section 61(c), the State Commission in specifying terms and conditions for determination of tariff shall be guided by factors which would encourage efficiency and economical use of the resources. Section 61(e) stipulates that the Commission shall be guided by the principles rewarding efficiency in performance. Sections 61 (c) & (e) are reproduced below:

“61. Tariff regulations- The Appropriate Commission shall subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following namely:-

(a)

(b).....

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d)

(e) *the principles rewarding efficiency in performance;*”

(d) Section 86(1) describes the functions of the State Commission. Section 86(1)(b) stipulates that the State Commission shall regulate electricity purchase and procurement process of distribution licensee including the price at which electricity is procured.

(e) According to Section 86(2), the State Commission has to advise the State Government in the matter of promotion of competition, efficiency and economy in activities of the electricity industry. Section 86 does not specify regulation regarding end use efficiency and energy conservation. Section 86(k) is only a general clause regarding discharge of such other functions as may be assigned to the State Commission under the Act. However, power under Section 86 (k) can be

exercised only in respect of the functions assigned to the State Commission under the Act.

(f) The National Electricity Policy of 2005 envisages predetermined improvements in efficiency parameters in distribution business. The relevant sub-clauses under clause 5.4 on Distribution is reproduced below:-

“5.4.4 Conducive business environment in terms of adequate returns and suitable transitional model with predetermined improvements in efficiency parameters in distribution business would be necessary for facilitating funding and attracting investments in distribution. Multi-Year Tariff (MYT) framework is an important structural incentive to minimize risks for utilities and consumers, promote efficiency and rapid reduction of system losses. It would serve public interest through economic efficiency and improved service quality.....”.

“5.4.6. A time-bound programme should be drawn up by the State Electricity Regulatory Commissions

(SERC) for segregation of technical and commercial losses through energy audits. Energy accounting and declaration of its results in each defined unit, as determined by SERCs, should be mandatory not later than March 2007. An action plan for reduction of the losses with adequate investments and suitable improvements in governance should be drawn up”.

(g) Clause 5.9 of the National Electricity Policy is related to Energy Conservation. Let us quote relevant sub-clauses:

“5.9. ENERGY CONSERVATION

5.9.1 There is a significant potential of energy savings through energy efficiency and demand side management measures. In order to minimize the overall requirement, energy conservation and demand side management (DSM) is being accorded high priority. The Energy Conservation Act has been enacted and the Bureau of Energy Efficiency has been setup.

5.9.2 The potential number of installations where demand side management and energy conservation measures are to be carried out is very large. Bureau of Energy Efficiency (BEE) shall initiate action in this regard. BEE would also make available the estimated conservation and DSM potential, its staged implementation along with cost estimates for consideration in the planning process for National Electricity Plan.

5.9.3 Periodic energy audits have been made compulsory for power intensive industries under the Energy Conservation Act. Other industries may also be encouraged to adopt energy audits and energy conservation measures. Energy conservation measures shall be adopted in all Government buildings for which saving potential has been estimated to be about 30% energy. Solar water heating systems and solar passive architecture can contribute significantly to this effort.

5.9.4 In the field of energy conservation initial approach would be voluntary and self-regulating with emphasis on labelling of appliances. Gradually as awareness increases, a more regulatory approach of setting standards would be followed.

5.9.5 In the agriculture sector, the pump sets and the water delivery system engineered for high efficiency would be promoted. In the industrial sector, energy efficient technologies should be used and energy audits carried out to indicate scope for energy conservation measures. Motors and drive system are the major source of high consumption in Agricultural and Industrial Sector. These need to be addressed. Energy efficient lighting technologies should also be adopted in industries, commercial and domestic establishments.

5.9.6 In order to reduce the requirements for capacity additions, the difference between electrical power demand during peak periods and

off-peak periods would have to be reduced. Suitable load management techniques should be adopted for this purpose. Differential tariff structure for peak and off peak supply and metering arrangements (Time of Day metering) should be conducive to load management objectives. Regulatory Commissions should ensure adherence to energy efficiency standards by utilities.

5.9.7 For effective implementation of energy conservation measures, role of Energy Service Companies would be enlarged. Steps would be taken to encourage and incentivise emergence of such companies.

5.9.8 A national campaign for bringing about awareness about energy conservation would be essential to achieve efficient consumption of electricity.

5.9.9. A National Action Plan has been developed. Progress on all the proposed measures will be

monitored with reference to the specific plans of action”.

Thus clause 5.9.6 provides for differential tariff for peak and off-peak periods and that the Regulatory Commissions have to ensure adherence to energy efficiency standards by the utilities. The clauses relating to end use energy efficiency are in the context of Energy Conservation Act, 2001 under which the nodal agency is Bureau of Energy Efficiency.

(h) The Tariff Policy of 2006 provides for time differentiated tariffs for flattening the peak and implementing various energy conservation measures.

The relevant clause 8.4(1) is reproduced below:

“8.4(1). Two-part tariffs featuring separate fixed and variable charges and Time differentiated tariff shall be introduced on priority for large consumers

(say, consumers with demand exceeding 1 MW) within one year. This would also help in flattening the peak and implementing various energy conservation measures”.

(i) Thus the National Electricity Policy and Tariff Policy mainly provide for improving supply side efficiency and promoting time-of-the-day tariff to encourage the consumer in demand side management as far as the function of distribution licensee is concerned. The energy conservation/energy efficiency in respect of end use has been described mainly in the context of the Energy Conservation Act, 2001.

9. Let us now examine the provisions of the Energy Conservation Act, 2001 with regard to Demand Side Management and end use energy efficiency.

(a) Section 13 of the Energy Conservation Act describe the Power and Functions of the Bureau of Efficiency

which *inter alia*, includes 'to take all measures to create awareness and disseminate information for efficient use of energy and its conservation, promote use of energy efficient processes, equipment, devices and systems and promote innovative financing of energy efficiency projects'.

(b) Section 14 of the Energy Conservation Act 2001 describes the power of the Central Government which include specifying norms for process and energy consumption standards for any equipment and appliance which consumes energy, specify and prescribe energy consumption norms for designated consumers, direct energy intensive Industries and designated consumers to get energy audit conducted and other measures for implementation of energy efficiency/conservation.

(c) Section 15 of Energy Conservation Act describes the powers of the State Government to enforce certain provisions for efficient use of energy and its conservation.

(d) Section 26 provides for penalty for default in complying with the various provisions of the Act to be imposed by a designated agency appointed by the State Government.

(e) According to Section 27, the State Commission has to appoint any of its members to be adjudicating officer for holding an inquiry for the purpose of adjudging under Section 26. The Appeal against the order of adjudicating officer or the Central Government or the State Government has to be filed with Appellate Tribunal for Electricity under Section 30 of the Act.

(f) The Schedule of the Energy Conservation Act 2001 includes distribution companies as energy

intensive industry, besides various energy intensive consumers of energy. Thus the distribution licensee is expected to carry out energy audit and follow all energy efficiency norms on supply side as stipulated in the 2001 Act. However, the function of the distribution licensee does not include the end use efficiency and the respective consumers are responsible for energy efficiency and energy conservation in end use of energy.

10. Let us now examine the Tariff Regulations of 2005 of the State Commission. Regulation 23 provides for Long-Term power procurement plan for five years to be prepared by the distribution licensee to serve the demand of electricity in the area of supply. Regulation

23.2 is reproduced below:

“23.2. The long term power procurement plan of the Distribution Licensee shall comprise the following:

- (a) A quantitative forecast of the unrestricted demand for electricity, within his area of supply, from each tariff category over the plan period;*
- (b) An estimate of the quantities of electricity supply from the approved sources of generation and power purchase;*
- (c) Standards to be maintained with regard to quality and reliability of supply, in accordance with the Standards of Performance Regulations;*
- (d) Measures proposed to be implemented as regards energy conservation and energy efficiency;*
- (e)*

(f)

23.3. The forecasts/estimates shall be prepared using forecasting techniques based on past data and reasonable assumptions regarding the future:

Provided that the forecasts/estimates shall take into account factors such as overall economic growth, consumption growth of electricity-intensive sectors, advent of competition in the electricity industry, trends in captive power, impact of loss reduction initiatives, improvement in generating station Plant Load Factors and other relevant factors”.

According to the Regulations 23 the planning for long term power procurement of Distribution Licensee for 5 years shall include measures proposed to be implemented as regards energy conservation and energy efficiency. This Regulation only pertains to long term planning where impact of energy

conservation and energy efficiency measures is also to be considered for assessment of long term power requirement. However, energy conservation and energy efficiency is not intended as a source of generation or power purchase or supply for the distribution licensee in the Regulation, even though it will have an impact on quantum of power purchase by the licensee.

11. Regulation 25 describes the short term power procurement. According to Regulation 25.1 the Distribution Licensee has to undertake his power procurement during the year in accordance with power procurement plan for such year approved by the State Commission in accordance with Regulation 76.5. Regulation 76.5 covers the cost of power

generation/power purchase. The relevant Regulations are reproduced below:

“76.5.1. The Distribution Licensee shall be allowed to recover the cost of power generated by the Generation Business or purchased from external sources for supply to consumers based on the annual power procurement plan of the Distribution Licensee.

76.5.2. The power procurement plan shall be prepared based on the sales forecast and taking into consideration the approved level of transmission losses, in accordance with Regulation 54 and approved level of distribution losses, in accordance with Regulation 81 below.

76.5.3. The power procurement plan shall be consistent with the long-term power procurement plan of the Distribution Licensee with regard to power generation and purchases from long-term sources of supply”.

Thus, the annual power procurement plan has to be consistent with long term Power Procurement Plan of distribution licensee with regard to purchases from long term sources of supply and has to be prepared based on sales forecast and approved level of transmission and distribution losses. The distribution licensee shall also be allowed to recover the cost of power purchased for supply to consumer based on annual power procurement plan. There is no provision in these Regulations regarding Demand Side Management in end use as a source of supply for distribution licensee or deduction of power purchase cost of the distribution licensee on account of DSM in end use of electricity.

12. In the MYT order dated 30.4.2007 for the period FY 2007-08 to FY 2009-10 the State Commission

approved power purchase cost of Rs. 1298 crores for the FY 2007-08 against the projection of 1220 crores by the Appellant. Further, the State Commission prescribed that the Appellant would undertake Demand Side Management measures in consumption of electricity to reduce power purchase cost from costly sources by 2%. Relevant extracts of the said MYT order dated 30.4.2007 are reproduced below:

“5.4 DSM Mechanism for TPC-D

Traditionally, distribution licensees have responded to their consumers’ rising electricity demand or to rising gap between the electricity demand and supply through supply side options such as increasing the electricity purchases from outside sources and/or reducing the distribution losses. Hitherto, distribution licensees have ignored the demand side options. Demand Side options involve reducing the demand for electricity by implementing suitable Demand Side Management (DSM) initiatives that call for adoption of energy

conservation (EC) and energy efficiency improving (EE) measures and practices by consumers of electricity that result in saving of electricity consumption and reducing demand for electricity. Since electricity saved is better than electricity generated or purchased, any saving in electricity consumption or demand achieved as a result of DSM initiatives directly contributes to balancing the electricity demand supply equation.

.....

Recognising this potential of demand side option or DSM, the Commission, in its Tariff Regulations of 2005, has treated EC and EE measures as a ‘supply’ source and has stipulated that long term power procurement plan of distribution licensees shall have proposals about measures proposed to be implemented as regards EC and EE [(Regulation 23.2(d))]. However none of the distribution licensees have submitted any proposals for EC and EE measures in their Multi Year Tariff ARR submissions.

In the absence of detailed data and analysis, however, the Commission, at this juncture, is not in

a position to arrive at the exact quantum by which power procurement cost would have been lower. Nevertheless, the Commission, being in, “in principle” agreement with the observation that consumers are having to pay higher overall cost of power procurement because the distribution licensees have ignored demand side options, and, that too despite Commission’s Tariff Regulations explicitly providing for consideration of such options; the Commission has assumed that 2% of the costly power purchase requirement will be reduced through DSM measures. This translates to Rs. 10.42 crore, which is only 0.8 percent of the total power purchase cost. This, the Commission believes, will encourage TPC-D to speedily take up EC and EE to reduce their overall demand and thus, reduce their need for costly power purchase. However, it is the obligation of the distribution licensee to meet all the demand in its license area, and licensees should not undertake load shedding in their area by reducing power purchase.

In line with National Electricity Policy, the Commission is committed to DSM and whereas, in

the past, it had provided encouragement to the consumers to reduce their demand or reduce their demand during certain periods of the day through its tariff proclamations such as load management charge and incentive or time of day tariff; this time, the Commission by assuming a 2% reduction in costly power purchase requirement through DSM measures, is providing encouragement to TPC-D to take up EC and EE through appropriately formulated DSM initiatives on a sustained basis and as an integral part of their operations.....

The Commission will revisit the power procurement plan during the Annual Review of FY 2007-08 and in line with its Tariff Regulations, directs the distribution licensees to include measures proposed to be implemented as regards EC and EE in all its future long term power procurement plans.

The Commission reiterates its directive that TPC-D undertake design, development and implementation of DSM initiatives that provide technical and financial assistance, incentives and guidance to motivate the consumers to adopt EE and EC improving measures and practices as well

as to motivate other stakeholders such as financiers, energy efficiency delivery companies and energy efficient product, process and device manufacturers to participate in the DSM initiatives. The Commission therefore, directs TPC-D to initiate systematic load research exercises on a continuous basis and to make load research an integral part of their operations”.

Thus, the Appellant was directed to take up schemes to motivate the consumers to adopt energy efficiency and energy conservation measures and practices by providing technical and financial assistance, incentives and guidance as well as motivate other stakeholders such as manufacturers, financiers, etc., to participate in the DSM initiative. The State Commission also assumed that Demand Side Management (DSM) measures would result in 2% reduction in costly power purchase requirement of the Appellant on *ad-hoc* basis without any analysis. The

State Commission also indicated that it would allow as pass through in the ARR all the cost incurred by the distribution licensee on DSM initiatives. However, the distribution licensee was directed to meet full demand of the consumers, without resorting to load shedding. Admittedly, no DSM schemes and their finances were included in the ARR of the Appellant for FY 2007-08.

13. The learned counsel for the Appellant argued that the Appellant had taken various steps for implementing Demand Side Management initiatives. The Appellant had submitted specific DSM schemes before the State Commission for approval on 26.9.2007 and 19.11.2007 which were approved only on 2.4.2008 after completion of FY 2007-08. The Appellant had also undertaken various Energy Conservation Awareness Programmes during the year 2007-08 to sensitize the consumers and school

children on impacts and benefits of the energy conservation. Further the actual sales of electricity to the consumers was lower at 2506 MU compared to 2563 MU as approved in APR order, a reduction of over 2%. There was also reduction in the actual net power purchase quantum at 2687 MU as compared to approved quantum of 2775 MU. In the absence of any specific measurement, it would be extremely difficult to ascertain the reason for the fall in demand. Further reduction of power purchase cost to the extent of 10.44 Crores was calculated at 2% of the projected cost of costly power. However, there was reduction in actual cost of costly power and if actual cost as per true up petition is taken it would work out to be significantly lower than Rs. 10.44 crores.

14. While we examine this issue, we have to bear in mind that the Energy Efficiency and Energy

Conservation can be achieved by taking measures on supply side as also end use. A Distribution Licensee can improve supply side efficiency by reducing Transmission & Distribution losses which are controllable. The State Commission sets up T&D loss reduction targets. In case the licensee is not able to achieve the loss reduction targets it has to bear the financial consequences to the extent of non-achievement of the T&D loss targets. As far as reduction of T&D losses is concerned, the State Commission has noted in the MYT order dated 30.4.2007 that the Appellant has responded to reducing the transmission and distribution losses. In the FY 2007-08 the Appellant has also over-achieved the target of T&D losses. Thus, there is no deficiency as far as efficiency in the distribution function of the Appellant is concerned.

15. The end use energy efficiency and Energy Conservation is to be implemented by the consumers and the distribution licensee does not have any control over the same except to motivate and assist the consumer. The State Commission can also motivate the consumers to participate in DSM by devising suitable tariffs like time of the day tariff, interruptible tariffs, etc. The State Commission has already implemented Time-of-Day (TOD) tariffs to motivate the consumers. In the MYT order dated 30.4.2007 the State Commission has also directed the Appellant to take up measures for energy efficiency and energy conservation in end use of electricity and also assumed reduction of 2% in costly power purchase on *ad-hoc* basis without any study or approval of any specific DSM schemes. The direction of the State Commission to the Appellant for DSM in the matter of

end use of energy though not a function of the distribution licensee, shows the concern of the State Commission to this very important issue which is laudable. The Appellant has also accepted to undertake the DSM activities.

16. We have no doubt that the technical and financial assistance and awareness proposed to be provided by the Distribution Licensee to the consumers will motivate and assist them to take measures to conserve electricity by adopting more efficient technologies, using efficient equipments and curb wasteful use of electricity. The distribution licensee can definitely take up the DSM programmes as approved by the State Commission to promote end use efficiency but it has no authority to enforce these measures on the consumers. The distribution licensee also has obligation to supply to meet the consumer demand in

accordance with Sections 42 and 43 of the Act. In the MYT order dated 30.4.2007 also the State Commission has reminded the Appellant of its obligation to meet the demand of consumers in its licensed area and not to undertake load shedding.

17. In the MYT order dated 30.4.2007 no specific DSM Schemes and financing were included and only general directions were given to the Appellant to devise and implement the DSM scheme. Subsequently, the Appellant submitted the DSM schemes for approval to the State Commission on 26.9.2007 and 19.11.2007. However, the proposals of DSM of the Appellant were approved by the State Commission only in April 2008. Thus there was no possibility of getting any relief in energy consumption from the approved schemes during the FY 2007-08.

18. In the absence of any approved DSM schemes in the year 2007-08, the Appellant has only conducted programmes to sensitise the consumers and disseminate information. Even though there is reduction in energy sales, net energy requirement and power purchase cost during the year 2007-08 there is no means to establish if it is due to energy conservation measures taken by the consumers or due to reduction in demand due to natural reasons. The Commission in the impugned order has held that the reduction in energy sales was due to reduction in demand and has disallowed power purchase cost to the extent of Rs. 10.44 crores.

19. The learned counsel for the State Commission argued that the Appellant has not challenged the MYT order dated 30.4.2007 and APR order dated 4.6.2008 in respect of reduction in power purchase cost on

account of DSM and as such these orders have become final and can not be challenged in the true up order dated 15.6.2009.

20. According to the Appellant the occasion to challenge the disallowance of actually incurred power purchase cost on account of DSM arose only after the impugned order was passed.

21. In the MYT order dated 30.4.2007 the State Commission only gave general directions to the Appellant for DSM and assumed reduction of costly power purchase of the Appellant on this account on *ad-hoc* basis without approving any specific DSM schemes or analysis. Thus we agree with the contention of the Appellant that the occasion to challenge the disallowance or power purchase cost arose only after the impugned order was passed. In

our opinion neither the State Commission's Regulations nor the provisions of the Act 2003 or the National Electricity Policy or Tariff Policy provide for any disallowance of power purchase cost of distribution licensee due to non-implementation of DSM in end use of electricity.

22. Thus, we hold that deduction in power purchase cost of the Appellant on account of DSM in end use is not in consonance with the Regulations of the State Commissions and provisions of the Electricity Act 2003, National Electricity Plan and the Tariff Policy. On the other hand, the Tariff Policy under clause 8.2.1 stipulates that "*all the power purchase costs need to be considered as legitimate unless it is established that the merit order principles have been violated or power has been purchased at unreasonable rates*". The Tariff Policy further states that the actual level of

retail sales should be grossed up by normative level T&D losses as indicated in MYT trajectory for allowing power purchase cost. Thus deduction of power purchase cost of the Appellant on account of DSM which is an uncontrollable factor is not valid legally. The State Commission by all means could have disallowed the expenditure on DSM schemes partly or fully to the Appellant if such schemes had not been implemented as per the directions of the State Commission. Admittedly, in the ARR for 2007-08 no specific DSM scheme or finances were approved by the State Commission.

Accordingly, this issue is also decided in favour of the Appellant.

23. Before parting with this case, we would like to make observations on the implementation of Demand Side Management for the guidance of the State

Commission for future in case it decides to implement the same through the distribution licensee. The State Commission may approve specific DSM Programmes with estimates for potential of energy conservation in the area where such programmes are implemented, method for estimating the quantum of energy saved and financing for undertaking these programmes in the ARR of the Distribution Licensee.

24. It would not be prudent to set up the targets in terms of power purchase cost or the total energy consumption in the licensed area. The total energy sale of the Distribution Licensee may increase due to higher growth in load of the consumers due to various reasons such as climatic changes, higher economic growth, etc. Accordingly, the power purchase cost may also vary compared to what was planned. The

power purchase cost may also vary due to actual availability of power from various sources of power, fuel price variation, etc. In case the Distribution Licensee does not implement the approved DSM Schemes as per the directions of the State Commission, the State Commission may dis-allow partly or fully the expenditure approved for such Schemes.

25. SUMMARY OF FINDINGS

- (i) The first issue is wrongful consideration of difference between the normative interest on working capital and actual interest on working capital as gains and sharing of 1/3rd amount with the distribution licensee. The second issue is disallowance of administration and general expenses towards Tata Brand Equity payment.**

These two issues have already been decided in favour of the Appellant by this Tribunal in its Judgment dated 15.07.2009 in Appeal No. 137/08, reported in 2009 ELR (APTEL) 622 and in the judgment dated 28.05.2009 in Appeal No. 111/09 as reported in 2009 ELR (APTEL) 560. Accordingly, these issues are decided in favour of the Appellant.

- (ii) The third issue is disallowance of actual power purchase cost pertaining to Demand Side Management Measures. In the MYT order dated 30.4.2007, the State Commission after approving the power purchase cost of Rs. 1298 crores for FY 2007-08 also gave general directions to the Appellant to take up DSM in end use**

of electricity and also assumed reduction in costly power purchase on *ad-hoc* basis at 2% without any analysis. The specific schemes with finances were approved only in April 2008 by the State Commission which could have been implemented after FY 2007-08. The Appellant has over-achieved the targets for transmission and distribution losses for FY 2007-08. Thus there is no deficiency in operations of the Appellant as far as supply side efficiency is concerned. On the end use efficiency the Appellant took some measures to sensitise the consumers and disseminate information about energy conservation. According to the learned counsel for the State Commission, the Appellant has not

challenged the MYT order dated 30.4.2007 and therefore, it has become final. In the MYT order dated 30.4.2007 the Appellant was given only general directions relating to DSM and an assumption was made relating to reduction in costly power purchase cost on *ad-hoc* basis on account of DSM without any analysis. Therefore, the occasion to challenge the disallowance of actually incurred power purchase cost on account of DSM would arise only after the impugned order is passed. In our opinion neither the State Commission's Regulations nor the provisions of the 2003 Act or the National Electricity Plan or Tariff Policy provide for disallowance of power purchase cost to distribution

licensee on account of DSM in end use of electricity. Implementation of measures for improving end use efficiency is not a function of distribution licensee under the Act and it can only assist by carrying out promotional schemes approved by the State Commission. Accordingly, the deduction of power purchase cost of the Appellant on account of DSM/ end use efficiency which is an uncontrollable factor is not valid legally. Accordingly, this issue is decided in favour of the Appellant.

- (iii) This Tribunal has made observations on the implementation of DSM schemes for guidance of the State Commission for future in para 23 and 24 of this Judgment.**

The State Commission is directed to take note of the same for future guidance.

26. In view of the summary of findings, referred to above, we hold that all the three issues are decided in favour of the Appellant. The State Commission is accordingly, directed to pass the consequential orders on the above issues in the light of the findings rendered by this Tribunal.

27. The Appeal is allowed.

28. No order as to cost.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

REPORTABLE / NON-REPORTABLE

vs