

STATUTORY ADVICE UNDER SECTION 86 (2) (IV) OF THE ELECTRICITY ACT, 2003

As per communication dated 4th May, 2010, the Govt. of NCT of Delhi (GNCTD) has sought the advice of DERC under Section 86 (2) (iv) of Electricity Act, 2003 on the representations, given by the private Distribution Licensees in Delhi to GNCTD, which were also forwarded along with the above mentioned communication. The GNCTD identified the following issues mentioned in the representations:-

- (i) Ability to supply power contingent on Cost Reflective Tariff.
- (ii) Precarious Financial Position of DISCOMs.
- (iii) Accumulation of revenue gaps beyond sustainable levels.
- (iv) Continuation of the practice of assuming higher surplus for tariff fixation.
- (v) Power purchase cost/quantum.
- (vi) Continuous recourse to additional debt to finance operations, and
- (vii) Critical need to additional financing.

2. GNCTD has also drawn attention to clause 5.3 (h)-4 of the National Tariff Policy prescribing that uncontrollable costs should be recovered speedily to ensure that the future consumers are not burdened with the past costs and non True-up of the account of F.Y. 2009-10 would mean that future consumers would be burdened with the interest cost of F.Y. 2009-10.

3. GNCTD has directed the DERC to give statutory advice and clarification on the issues raised in the representations of DISCOMs as well as on the issues covered under clause 5.3 (h)-4 of the National Tariff Policy. GNCTD further directed DERC U/s 108 of EA 2003 not to issue the Tariff Order till the statutory advice given by DERC is thoroughly examined by GNCTD and it gives a go ahead for passing of Tariff Orders.

4. The advice on the issues listed by GNCTD could not have been given without disclosing details of quasi-judicial activities of the Commission and the contents of the Tariff Order which already stood finalized having received the approval of Member (SRS) and Chairman. Further, the Government intended giving its views on the tariff matters after thoroughly examining the advice given by the Commission. Since the legal implication of the direction under Section 108 was not clear, the matter was referred to the Solicitor General of India, Sh. Gopal Subramaniam, for his opinion. Regarding the extent and scope of advice to be tendered under Section 86(2)(iv) of the Electricity Act, 2003, the Solicitor General opined that the DERC is required to give advice to **“the State Government on any matter referred to it by the State Government. In doing so, however, it would be improper for the Querist to disclose details of its quasi-judicial activities or details of the Tariff Order that is about to be passed”**. The Solicitor General further opined that the DERC, **“must respond to the State Government’s communication by identifying the aspects that it cannot offer any advice on, because they pertain to its quasi-judicial function of tariff determination, or are going to be covered by its Tariff Orders, or are otherwise pending adjudication before itself or the Appellate Tribunal. It will have to give its statutory advice on the approach in principle to the various issues without jeopardising its quasi-judicial function, which cannot be controlled by the State Government”**. As regards the direction under Section 108 for not issuing the Tariff Orders, the Solicitor General has advised that the **‘direction amounts to**

placing a fetter on the quasi-judicial function and such direction is ultra vires and therefore void.' The Solicitor General advised that the Tariff Orders for all the three DISCOMs must be issued. A copy of the opinion is **enclosed. (Annexure-I)**

5. In accordance with the advice given by the Solicitor General, I am furnishing the advice, even though I have not received the views of the two Members of the Commission on this issue. The file on statutory advice was sent to them by Secretary long time back, on 28.05.2010, with the recommendations of the Commission's Secretary. They were reminded also by the Secretary to the Commission to expedite the matter. When they continued to retain the file for about a month, I also sent a note to them suggesting that the matter be expedited and advice be sent to the Government. However, I received a note on 24.06.2010 from the Sh. Shyam Wadhera, Member that there should not be any 'undue haste' in sending the advice. He did not send the file. I again advised Members on 25.06.2010 saying that the matter is already delayed for more than 7 weeks and it relates to the issue of Tariff Orders which must be issued without any further delay. I reminded them that Tariff determination was the most important work of the Commission and this cannot be kept pending under any pretext. Therefore, I asked them to send their views without any further delay in the absence of which I will be constrained to send my views to the Government. I also pointed out to the Members that the decisions of the Commission on various issues in the Tariff Orders had already been taken unanimously which are part of the record and can be communicated to the Government. Copies of notes sent by me to Members and the note of Sh. Shyam Wadhera are **enclosed (Annexure-II)**. The Members have not cleared the file as yet.

6. At this stage, it is important to mention the sequence of events. The Tariff Petitions were filed on different dates in the month of December, 2009 by the DISCOMs. All three Petitions were admitted on 05.01.2010. The PwC was appointed as a Consultant for the purpose of dealing with the Petitions. As per the contract with the Consultant, the Tariff Orders were to be finalized and issued by 15th March, 2010. Public hearings on the Petitions were concluded on 25.02.2010. **The first draft Order was submitted by the Consultant and staff to the Commission on 5th March 2010. Thereafter, 6 draft Orders were submitted** on different dates as per the discussions and directions given by the Commission to the Staff and the Consultant from time to time. The preliminary comments on the drafts submitted to the Commission were given by the Members which were responded to by the Staff. Copies of such comments of both Members and responses thereon are **enclosed (Annexure-III)**. **The approach on all major issues was decided unanimously on 1st April 2010, on the basis of recommendations on major issues in the Tariff Orders given by Sh. S.R. Sethi, Member, which were endorsed by Sh. Shyam Wadhera, Member and then approved by me.** Copy of notes indicating such unanimous decision on all major issues is **enclosed (Annexure-IV)**. The final draft Order was submitted to the Commission on the basis of directions given on 27.04.2010. Separate copies were given to Members and me. **I approved the Order on 28.04.2010. Sh. S.R. Sethi, Member approved the Order on 29.04.2010.** Copies of notes indicating such approval are **enclosed (Annexure-V)**.

7. As is in the knowledge of the Government, power from new generation plants viz. Jhajar, Bawana, Dadri, Maithon, Mejia etc. would become available during the

course of the current financial year. As a result, **the DISCOMs in Delhi would have substantial surplus power during the year, mostly in the 2nd half of the year. The power from the new plants would be available to the DISCOMs at regulated rates, which are invariably less than market rates because of shortage of power in the country. It is thus likely that the DISCOMs will be able to sell the surplus power and earn a profit of at least Rs. 2 to 3 per unit. Keeping in view this scenario and based on approach in principles decided unanimously by the Commission, the Tariff Orders for F.Y. 2010-11 were finalised in which the three private DISCOMs at Delhi have a surplus of Rs. 3577 Crores after meeting all expenses and after allowing the return on capital etc. admissible to them under Multi Year Tariff Regulations.** A major portion of this surplus of Rs. 3577 Crores was thus utilized for reducing tariff in the Tariff Order for the year 2010-11, which stands approved by me and Sh. S. R. Sethi.

8. The power availability from the new generation plants for the current financial year is for only a part of the year. For the next year i.e. F.Y. 2011-12, the power from these plants will be available for the whole year, resulting in huge power surplus with the DISCOMs. This power will be available to the DISCOMS at regulated rates and they will be able to make substantial profit from sale of the surplus power. The result will be that the surplus with the DISCOMs for F.Y. 2011-12, after meeting all expenses and after providing for the return on capital etc. admissible to them, will be at least double the surplus of Rs. 3577 for the year 2010-11.

9. The Order of NDMC was also finalized on the basis of principles approved unanimously by the Commission and the final Order was submitted to the Commission on 06.05.2010. The final Order contained a substantial surplus and the tariff was designed with appropriate reduction. **Members took a position that the Tariff Order in case of NDMC also cannot be issued because it was covered in the direction U/s 108 given by the Government. NDMC had not given any representation to the Government and it was not even mentioned in the communication dated 04.05.2010 from the Government.** However, since Members had expressed such a view, the matter was referred to the Solicitor General, who opined that the communication dated 04.05.2010 does not cover NDMC, since NDMC made no representation. He suggested that the Tariff Order for NDMC may, therefore, be passed. **However, despite this Members have not agreed to release the Order of NDMC.**

10. I am giving in the subsequent paragraphs the approach in principles to the various issues followed in the process of tariff determination unanimously by the Commission. As mentioned above, the notes indicating such unanimous decisions are **enclosed (Annexure-IV)** so that views of Members on these issues are also known the Government. **I am making it very clear that views of Members on all major issues are part of the record and have received finality with their signatures available on the file.** It is another matter that now they are not wanting to disclose their views to the Government. The sequence of events mentioned above only shows that the principles were decided unanimously based on which consolidated surplus of Rs. 3577 Crores was worked out and tariff was designed with appropriate reduction but surprisingly, after 30.04.2010 events took a different turn. DISCOMs filed representations to Government on 03.05.2010 on which Government issued directions U/s 108 on 04.05.2010 for not

issuing the Orders. Thereafter, the **Members have taken a view that the Orders need not be issued and at the same time their effort is that the statutory advice be also delayed till my retirement in September, 2010.** Such an approach is only helping DISCOMs and consumers are being deprived of the rightful tariff reduction. **The non-issue of the Tariff Order for F.Y. 2010-11 because of the direction under Section 108 on 04.05.2010 issued by GNCTD, has resulted in non-accounting of the surplus of Rs. 3577 Crores in tariff for F.Y. 2010-11. This has enabled the DISCOMs to overcharge the consumers to the extent of about Rs. 300 Crores per month starting from 1st April 2010.** I have not succeeded in my attempts to persuade Members either to issue the Tariff Orders or to send the advice so that the Government may consider withdrawing the direction U/s 108 and thereafter Members may agree to release the Tariff Orders. **Therefore, I am sending the advice on the basis of unanimous decisions available in records.** Apart from the approach in principles to the various issues, I would also give my advice on the issues raised by DISCOMs in their representations as well as the issues covered under clause 5.3 (h)-4 of the National Tariff Policy.

11. Approach in Principle to the various issues followed in the tariff determination.

(A) The tariff determination is done by the Commission under various provisions of the Electricity Act and MYT Regulations. Some important provisions are reproduced as under:-

i. Electricity Act, 2003 –

“61(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;”

“61(g) that the tariff progressively reflects the cost of supply of electricity and also reduces cross-subsidies in the manner specified by the Appropriate Commission;”

“62(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.”

“64. Procedure for Tariff Order

(1) An application for determination of tariff under Section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by Regulations.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-Section (1) and after considering all suggestions and objections received from the public-

(a) issue a Tariff Order accepting the application with such modifications or such conditions as may be specified in that Order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and Regulations made thereunder or the provisions of any other law for the time being in force:

PROVIDED that an applicant shall be given a reasonable opportunity of being heard before rejecting his application."

ii. MYT Regulations 2007 –

"4.16. The True-up across various controllable and uncontrollable parameters shall be conducted as per principle stated below:

(a) Variation in revenue / expenditure on account of uncontrollable sales and power purchase shall be trued-up every year;

(b) For controllable parameters,

(i) Any surplus or deficit on account of O&M expenses shall be to the account of the Licensee and shall not be trued-up in ARR; and

(ii) Depreciation and RoCE shall be trued-up at the end of Control Period."

"5.41. These Regulations do not provide for any truing up for controllable items."

"5.42 Variations on account of uncontrollable items like energy sales and power purchase cost shall be trued-up. Truing-up shall be carried out for each year based on the actual/audited information and prudence check by the Commission;

Provided that if such variations are large, and it is not feasible to recover in one year alone, the Commission may take a view to create a regulatory asset, as per the guidelines provided in clause 8.2.2 of the National Tariff Policy."

(B) The process and practice in respect of tariff determination is as under:-

- i. The Licensees file Petitions for True-up and determination of Annual Revenue Requirement every year by 30th November. The Commission is required to issue the Order on the Petitions within 120 days of filing the

Petitions. The period of 120 days is normally counted from the date of admission of the Petitions by the Commission.

- ii. After admission, the Licensees are asked to issue a public advertisement giving salient features of the Petitions and inviting comments of all stakeholders. The salient features of the Petitions are also placed on the website of the commission in such a manner as is convenient for general consumers to understand the intricacies of the Petitions.
- iii. The Commission also issues a public advertisement in which important issues are raised for discussion on which comments of all stakeholders are invited.
- iv. The comments of stakeholders are sent to the Licensees for obtaining their views. After their views are obtained, the Petitions are listed for public hearing.
- v. A reputed Consultant is appointed to process the Petitions of Licensees on merits. This year PricewaterhouseCoopers (PwC) has been appointed. Several validation sessions are held by the Consultant and Staff of the Commission with the Licensees, during which prudence check is conducted in respect of information given by the Licensees in their Petitions. Based on the result of the prudence check, the Consultant prepares a draft Order which is vetted by the Staff of the Commission also.
- vi. After the public hearing is held, the proceedings are concluded and Order is reserved.
- vii. The draft Order prepared by the Consultant and the Staff is presented to the Commission for seeking guidance. Based on the directions given and modifications suggested by the Commission, the draft Order is finalized.

(C) **Nature of Petitions**

- i. The Petitions filed by the Licensees are in two parts: True-up of uncontrollable items of energy sales and power purchase cost for the year for which audited accounts are available **and** determination of Annual Revenue Requirement (ARR) for the next year.
- ii. **The Petition is not required to contain True-up of uncontrollable items of the current year in which the Petition is filed because the year has not ended and the audited accounts are not available. Audited accounts are sine qua non for True-up.**

(D) **Approach on Petitions in respect of F.Y. 2008-09, 2009-10 and 2010-11** – The approach finalized unanimously by the Commission is as under:-

- i. **True-up for F.Y. 2008-09:** It has been carried out as per the provisions of MYT Regulations, 2007 and the Electricity Act 2003 and the Commission has

trued-up the uncontrollable parameters of energy sales and revenue and power purchase cost based on audited accounts. The controllable parameters are not trued-up following the provisions of MYT Regulations. However, the impact of 6th Pay Commission and cost of certain new initiatives have been considered on the ground that these are new developments.

- ii. **True-up of F.Y. 2009-10:** The True-up/Tariff Petitions were filed by the DISCOMs in December 2009, when the F.Y. 2009-10 was not completed and audited accounts for this year could not have been available either at the time of filing of the tariff Petitions or at the time of public hearings. Accordingly the Commission's approach was that the True-up for F.Y. 2009-10 could only be considered based on the audited financial statements, once the Petitioner makes a regular tariff Petition for True-up of F.Y. 2009-10.
- iii. **ARR of F.Y. 2010-11:** The Commission decided that the sales forecast and power purchase quantum and cost, as projected in the MYT Order issued in 2008, could be revisited and revised. The principles adopted for revision of these items will be discussed separately in the subsequent paragraphs.

(E) **Principles adopted for True-up for F.Y. 2008-09.**

- i. The True-up entitlement available pursuant to the Order by the Hon. Appellate Tribunal for Electricity (ATE) on the MYT Order in the case of BRPL and BYPL has been given. In the case of NDPL the Order has not yet come. The Orders passed by ATE in case of NDPL on limited issues have been remanded back to ATE by the Hon'ble Supreme Court. However, in case of BRPL and BYPL **appeal effects on the Reactive Energy charges, SVRS payments, Employees expenses (non DVB) etc. have been provided (along with carrying cost)**. As regards R&M and A&G expenses, the ATE had directed that the Commission should conduct prudence check and then grant approval for such expenses, if properly incurred. BRPL and BYPL could not provide evidence of having incurred any additional expenses as claimed by them and, therefore, the expenses claimed over and above those already allowed earlier, have not been allowed.
- ii. As regards energy sales and power purchase cost, the **actual expenses on power purchase (net of the rebate received by DISCOMs for timely payment of power purchase bills) have been allowed.**
- iii. For arriving at the actual T&D losses of the Licensees in F.Y. 2008-09, the Commission has made use of actual figures made available to the Commission by the Licensees and used the same to compute the Licensees' T&D losses in F.Y. 2008-09.
- iv. With respect to income tax expenses, only the income tax incurred on account of the return on equity component has been allowed by the Commission, in line with the MYT Regulations.

- v. For arriving at the actual amount of Non Tariff Income to be considered towards ARR, the Commission has made use of actual figures made available to the Commission by the Licensees and used the same to compute the Licensees' Non Tariff Income in F.Y. 2008-09.
- vi. The revenue available towards ARR for each Licensee has been calculated by the Commission using the actual figures made available to the Commission by the Licensees.
- vii. **AT&C:** As regards giving benefits on over achievement on AT&C loss targets, as provided in MYT Regulations, prudence check is done during the course of which validation of data submitted by them to the Commission, either in the Petitions or in various prescribed formats submitted periodically, is done. If the DISCOMs are not able to substantiate the authenticity of the information furnished by them, such benefits are not allowed. **As regards F.Y. 2008-09, BRPL and BYPL were not able to substantiate the information furnished by them and, therefore, such benefits have not been allowed in their case.**
- viii. **The above mentioned approach followed in True-up has significantly reduced or has shown surplus instead of revenue gap claimed by the DISCOMs for F.Y. 2008-09. The three DISCOMs had claimed a consolidated gap of Rs. 604 crores and after prudence check, the Commission has arrived at a consolidated surplus of about Rs. 25 Crores. In one case Rs. 173 Crores of revenue gap was claimed but it was found to be surplus of Rs. 90 Crores. In the second case the revenue gap claimed has come down from Rs. 364 Crores to Rs. 19 Crores only and in the third case it has come down from Rs. 68 Crores to Rs. 46 Crores only.**

(F) **ARR of F.Y. 2010-11:**

- i. The Commission considered the latest data of F.Y. 2009-10 submitted by the Distribution licensees for the projections for the figures of purchase quantum and cost for the F.Y. 2010-11.
- ii. Based on the experience on load shedding in the year 2009 the summer preparedness by the Distribution licensees for Delhi was reviewed. It was noted that the Distribution licensees, in their Petitions filed in December 2009, had either projected zero or very insignificant amount in purchases from the bilateral sales during the summer months of F.Y. 2010-11. The commission felt that with a view to ensure that in the F.Y. 2010-11 there is no load shedding due to lack of adequate power arrangements and to provide sufficient comfort to the licensees to borrow funds for meeting their power purchase requirements, **it was unanimously decided by the Commission that after obtaining details of all contracts for bilateral arrangements made by all three DISCOMs, the entire cost may be allowed in the Tariff Order even though no such claims were made by them in their**

Petitions. **Accordingly, an amount of Rs. 1775 crores has been allowed** on this count only for all three DISCOMs. Such approach of the Commission will enable the Distribution licensees to procure sufficient power to ensure uninterrupted supply and meet its obligation to supply power under Section 42 of the Electricity Act.

- iii. The approach of the Commission has always been to base projections of power purchase from new stations on the CEAs' realistic assessment of the likely commissioning of new power projects; and considering the rate of power based on the recently commissioned plants of such nature. It was decided unanimously that the power availability for F.Y. 2010-11 should be projected as per the status given by CEA. The Commission projected the cost of power purchases from such plants on realistic basis irrespective of the fact that the licensee in the Petition has projected considerably lower cost.
- iv. The cost of power from new Bawana –II plant proposed by the DISCOMs was at Rs. 2.65 per unit only. The Commission decided to project it on the realistic basis with the result that it was taken at Rs. 3.17 per unit, i.e. at a much higher rate.
- v. The rate of power from the Dadri and Arawli plants was also projected by the BRPL and BYPL at Rs. 2.35 and by NDPL at Rs. 2.91 but it was decided to take the rate on the basis of 10 month bills of F.Y. 2009-10 of existing 840 MW plants, after reducing the heat rate on 500 MW plus fixed cost and, accordingly, the cost was given at a much higher rate than claimed by the DISCOMs.
- vi. Similarly, variable cost was taken as 10 months average for 2009-10 and fixed cost was taken as approved by CERC on which 7% escalation was provided.
- vii. **The impact of above mentioned principles in respect of Power Purchase Cost from future stations was that the per unit cost was given to DISCOMs at a much higher than claimed by them in their Petitions. For example, in BRPL and BYPL the per unit rate claimed was Rs. 2.32 only against which the Commission has allowed Rs. 3.17. Similarly, for CSGS stations also, the rate allowed is Rs. 2.91 against rates claimed by DISCOMs at Rs. 2.67-2.76 only.**
- viii. The Commission has projected the energy sales in F.Y. 2010-11 on the basis of the past growth trends in each consumer category of each Licensee. In Order to do so, the Commission has adopted the statistical tool of Compounded Annual Growth Rate (CAGR) which is used to calculate the smoothed annualized growth rate for a parameter in Order to capture fluctuations in the value of that parameter over a period of time. Subject to the specific characteristics of each consumer category, a particular CAGR has been chosen as the basis of sales projection for that category. The basis for choosing a CAGR corresponding to a particular period is the relative

importance of the most recent trends in making projections for that category. For instance, if it is judged that the pattern of consumption of a consumer category has changed immensely over the years, it renders older historical trends irrelevant for the purpose of making projections for that category. In such a scenario, the 1-year growth rate or the 2-year CAGR would make a much sounder basis of projection for F.Y. 2010-11 compared to the 5-year CAGR which includes data from much older periods. Hence, using CAGR, the Commission has projected the annual sales, number of consumers and connected load in each consumer category for F.Y. 2010-11 for the three Licensees.

- ix. **It is very relevant to point out that all decisions mentioned above were taken unanimously in the Commission. The principles were first decided on the basis of proposals framed by Sh. S.R. Sethi, Member, which were endorsed by Sh. Shyam Wadhera, Member and then only I approved the same.** After such decisions on principles were recorded and signed by all three of us, the Staff and Consultant were directed to modify the drafts accordingly and submit the final Orders. Such decisions were arrived at after extensive discussions in a series of meetings. **All such decisions are signed and are part of the record. Copies of notings are enclosed (Annexure-IV). All discussions in the Commission are also recorded.** It was only after the directions of the Commission were communicated to the staff and the Consultant that the final Orders containing consolidated surplus of Rs. 3577 crores were put up for our approval. **I approved the same on 28.04.2010 and Sh. S. R. Sethi, Member approved it on the file on 29.04.2010.** I may also mention that tariff design containing appropriate reduction in different categories was also finalized after several extensive discussions (all recorded) and Sh. Sethi played an important role in this.

(G) **True-up of F.Y. 2009-10.**

- (i) The Petitions were filed by Distribution Licensees in December, 2009 when the F.Y. 2009-10 was not completed and audited accounts of this year were not available. There was no question of claiming True-up of F.Y. 2009-10 in the Petitions on the basis of audited accounts, as per the provisions of MYT Regulations, because the audited accounts could not have been the basis for such Petitions.
- (ii) In the Petitions the DISCOMs had given only projections for F.Y. 2009-10 and had not given the actual figures which are necessarily required for any Truing-up exercise.
- (iii) **In the Petitions all three DISCOMs had not demanded tariff hike on the basis of True-up of F.Y. 2009-10. On the contrary, they had specifically mentioned that tariff hike should recover the Revenue Gap upto F.Y. 2008-09 and the Revenue Gap projected by them in the ARR of F.Y. 2010-11 as claimed by them in their Petitions.**

- (iv) BRPL had even withdrawn the prayer made in the Petition for recovery of Revenue Gap of F.Y. 2009-10.
- (v) Tariff Orders were required to be issued by 15.03.2010, as per the contract with the Consultants which was approved unanimously by the Commission. It was only because there was delay in issue of Tariff Orders beyond 31.03.2010 that the issue of True-up of F.Y. 2009-10 has been raised. Even then it was decided by the Commission that such True-up can be done only after a proper true up Petition is filed by DISCOMs. The noting indicating such a decision is **enclosed (Annexure-VI)**. It was only one Member i.e. Sh. Shyam Wadhera who kept on insisting that such incomplete provisional True-up can be done on the basis of tentative Power Purchase Cost for F.Y. 2009-10 based on audited accounts upto December, 2009 only. The second Member Sh. S. R. Sethi suggested that such True-up can be done only after a Petition is filed by DISCOM. When it was pointed out to Sh. Wadhera that F.Y. 2009-10 had ended and audited accounts were ready, he also suggested that we should formally ask DISCOMs to file True-up Petitions. Sh. Sethi suggested that let DISCOMs file such Petitions on their own. The notings indicating views of both Members are **enclosed (Annexure VI)**. This shows that True-up Petitions for F.Y. 2009-10 were at no stage linked with the Tariff Orders for F.Y. 2010-11 and nor could it be because the Commission is a quasi-judicial authority and there is no way any evidence can be taken on record after the public hearing in February, 2010 when the judgment was reserved.
- (vi) **Any True-up Petition for F.Y. 2009-10 filed now by the DISCOMs cannot be linked with the Tariff Orders, already finalized in the month of April, 2010. Any new Petition has to be dealt with according to the process and practice of dealing with such Petitions, mentioned earlier.**
- (vii) The three DISCOMs filed incomplete True-up Petitions for F.Y. 2009-10 in June, 2010, after the direction under Section 108 was issued by GNCTD, in which they claimed the difference between Power Purchase Cost projected in the Tariff Order issued in May, 2009 and actual Power Purchase Cost incurred by them. **While claiming such difference, they suppressed the revenue earned by them from the sale of energy, even though at the time of filing such incomplete True-up Petitions the audited accounts were available.**
- (viii) MYT Regulations provide for True-up of uncontrollable items of energy sales and Power Purchase Cost. There is no provision of considering only Power Purchase Cost by suppressing energy sales as this will give a distorted and incomplete picture. The DISCOMs cannot be allowed true up of only a few items of income or expenditure, picked and chosen by them. Therefore, the three DISCOMs were asked to file a complete True-up Petition in accordance with the MYT Regulations.

- (ix) The audited accounts are now available and a quick glance at the figures of energy sales and Power Purchase Cost in the audited accounts would show that all three DISCOMs have earned surplus in their energy account to the tune of Rs. 2,209 Crores and even after providing all controllable expenses like O&M, Depreciation, RoCE, Income Tax etc., there may be revenue surplus of around Rs. 517 Crores. Of course these figures are tentative and may change after complete True-up Petition is filed and prudence check is conducted. **There may be some consolidated gap or even surplus but the Revenue Gap projected by them on the basis of Power Purchase Cost only will never be true, as in the F.Y. 2008-09 wherein the claim of consolidated gap of Rs. 604 Crores was found to be incorrect and prudence check showed consolidated surplus of Rs. 25 Crores.**
- (x) **At the time of finalizing the Tariff Orders, the audited accounts of F.Y. 2009-10 were not ready and it was not possible even to arrive at a tentative figure of Revenue Gap or surplus. It was only for this reason that it was decided unanimously to leave a surplus of Rs. 1,000 Crores in the hands of DISCOMs to cater to all types of uncertainties. The noting indicating such unanimous decision is enclosed (Annexure IV). Such huge surplus in the hands of DISCOMs will surely take care of Revenue Gap, if any, for the F.Y. 2009-10, which may or may not arise after prudence check.**

12. Issues in the representations of DISCOMs:

Before dealing with the issues in the representations of DISCOMs it is pointed out that **GNCTD was informed on 30.04.2010 that with a view to ensure that in F.Y. 2010-11 there is no load shedding due to lack of adequate power arrangements and to provide sufficient comfort to the DISCOMs to borrow funds for meeting their power purchase requirements, the Commission had taken the following decisions unanimously:**

- (i) Cost of Bilateral arrangements:- **The entire cost (Rs. 1775 crores) of bilateral arrangements made by three private Distribution Licensees is being allowed in the proposed Tariff Orders for F.Y. 2010-11, due to be issued soon, even though no such claims were made by the DISCOMs in Tariff Petitions filed in November 2009.**
- (ii) Short-Term Measure: **As an extraordinary measure to ensure that there is no difficulty in making adequate arrangement of power, the proposed Tariff Orders would leave a large surplus, around Rs.1,200 (one thousand two hundred) Crores (at existing tariff), in the hands of the three Distribution Licensees to deal with the exigencies arising out of dynamics of power market. This is the first time such a measure is being taken in the larger interests of all stakeholders. We are confident that this would take care of additional power purchase cost during the year.**
- (iii) Long-Term Measure: **A systems improvement is needed whereby recovery of additional cost, if any, by the licensees by way of True-up mechanism is**

*expedited. The Commission is considering introduction of Fuel Price Adjustment Mechanism as per Electricity Act, 2003 on a quarterly basis so that additional power cost, if any, incurred by the licensees is made recoverable after the end of the quarter. **We intend initiating the process of framing appropriate Regulation, as mandated by Electricity Act, 2003, with a view to introduce Fuel Price Adjustment at the earliest. This is being mentioned clearly in the Tariff Orders, and the process will start immediately after the issue of Tariff Orders of 2010-11.** We intend to finalise it early so that it becomes operational immediately after the end of the first quarter."*

13. Immediately after GNCTD was informed about the decisions of the Commission to meet the concerns of DISCOMs, they submitted representations to the Government on 03.05.2010 on the basis of which the Government issued directions under Section 108 of the Electricity Act, 2003 on 04.05.2010 directing the Commission not to pass the tariff order. The comments on the issues raised in the representations are as under:

(i) Ability to supply power contingent on cost reflective Tariff:

- a) As mentioned earlier, Rs. 1,775 Crores has been given to the DISCOMs on account of purchases from bilateral sources even though they had claimed 'zero' purchases or very insignificant purchases in their Petitions filed in December, 2009.
- b) Besides above, the cost per unit of power purchased from new plants have been allowed to them at Rs. 3.13 per unit, though claim made by BRPL and BYPL was Rs. 2.32 and by NDPL at Rs. 2.91 per unit only.
- c) The Commission has also left Rs. 1,200 Crores (at existing tariff) of surplus in their hands to meet all types of uncertainties including delay in likely commissioning of new power plants. The cost of power purchases has been projected on realistic basis and, therefore, the apprehensions of the DISCOMs in the representations are baseless and such apprehensions would not have arisen if the Tariff Orders had been issued on schedule.
- d) The Commission has always adopted cost reflective approach in the Tariff Orders.
- e) **The claim of DISCOMs regarding ban on fresh lending by the lenders is a total fabrication. The DISCOMs had not given any evidence to this effect with their representations.** The factual position was examined on the basis of their audited accounts, reports of Credit Rating Agencies and sanction letters of Banks. The position is as under:

BSES Rajdhani Power Limited

(in Rs. Crores)

	2009-10	2008-09	2007-08	2006-07	2005-06	2004-05
Cash Profit	319.16	63.35	-294.77	165.58	205.49	185.93
Net Cash Accrual	102.52	27.23	22.62	115.78	48.44	30.99
Tangible Net Worth	575.88	297.82	435.18	793.12	718.78	590.91
Debt Equity Ratio	4.93	7.57	4.33	1.94	0.70	0.35
Total Debt/Net Worth	5.70	8.40	4.49	2.05	1.83	1.66
Current Ratio	2.25	1.33	0.94	1.11	0.88	0.79

BSES Yamuna Power Limited

(in Rs. Crores)

	2009-10	2008-09	2007-08	2006-07	2005-06	2004-05
Cash Profit	157.33	142.16	16.89	105.40	94.86	48.88
Net Cash Accrual	71.65	15.37	16.92	22.08	4.21	3.66
Tangible Net Worth	320.06	224.20	151.59	169.68	101.39	38.54
Debt Equity Ratio	5.32	5.71	8.27	4.94	4.93	9.10
Total Debt/Net Worth	5.76	6.36	9.40	5.66	7.84	15.38
Current Ratio	2.47	1.64	1.14	0.73	0.86	0.87

North Delhi Power Limited

(in Rs. Crores)

	2009-10	2008-09	2007-08	2006-07	2005-06	2004-05
Cash Profit	468.82	266.75	436.64	314.86	222.49	169.60
Net Cash Accrual	82.71	48.92	25.18	69.58	24.22	51.09
Tangible Net Worth	1561.11	1111.08	980.65	742.24	572.76	456.94
Debt Equity Ratio	0.95	0.90	0.89	1.13	1.54	1.89
Total Debt/Net Worth	1.07	0.98	0.98	1.22	1.65	2.06
Current Ratio	2.24	1.52	1.46	1.08	1.24	1.89

The main lenders' covenants, as per the latest sanction letters of Indian Bank and Dena Bank, were also calculated. These are as under:

Fixed Assets Coverage Ratio (FACR) and Debt Service Coverage Ratio (DSCR) of DISCOMs as on 31.03.2010

(in Rs. Crores)

Particulars	NDPL	BRPL	BYPL
Net Fixed Assets (incl. CWIP)	2364.01	2784.21	1558.07
Loan Funds excluding Working Capital loans	1321.77	2643.86	1531.09
FACR (required minimum of 1.10)	1.79	1.05	1.02
Profit after Tax	357.79	186.61	76.85
Add: Depreciation	111.02	132.55	80.48
Add: Interest	94.73	275.46	155.67
Add: Debt Drawdown (Cl. Debt+Repayment-Opening Debt)except WC	624	890.08	580.13
Equity Infusion	0	0	0
Less: Capital Expenditure (Cl. Gross Block-Op.Gross Block+ including CWIP)	-432.1	-298.51	-176.16
Less: Increase in Working Capital	-22.54	-153.49	5.25
Add: Opening Cash Balance	48.92	27.23	15.37
Add: Consumer Contribution as on 31/03/2010	246.21	386.49	169.7
Add: Consumer Security Deposit as on 31/03/2010	239.72	311.12	187.08
Add: Cash credit (WC Loan) as on 31/03/2010	109.15	294.67	104.89
Add: Movement in Reserve	357.8	-0.91	17.35
Total Cash Available*	1734.7	2051.3	1216.61
Interest Expenses	94.73	275.46	155.67
Loan Repayment as per Representation	110.18	302	182.00
Total Debt Servicing Requirement	204.91	577.46	337.67
DSCR (required minimum of 1.10)	8.47	3.55	3.60

* There is no Regulatory Asset in the Tariff Order issued by the Commission. Regulatory Asset has been defined in Clause 5.42 of MYT Regulations and has to be created by the Regulatory Commission in the Tariff Order only if there is large variation on account of uncontrollable items, "and if it is not feasible to recover in one year alone, the Commission may take a view to create a Regulatory Asset, as per the guidelines provided in Clause 8.2.2 of the National Tariff Policy." The Commission has not taken any such view.

It may be seen that **the financial position showing cash availability, Net worth, Fixed Assets Coverage Ratio, Debt Equity Ratio and Debt Service Coverage Ratio etc. are not only well above the minimum required for lending by Banks, but the position of NDPL is so excellent that it can be compared to any other financially strong company. This is the reason that all lenders continue to sanction loans to them. They had been sanctioned loans as recently as June, 2010 by different banks. The letters showing sanction of loans are enclosed (Annexure VII).** NDPL has not even utilized fully the loans sanctioned to them by different banks.

- f) Apart from above, the Credit Rating Agency ICRA has given LAA (high credit quality) rating to NDPL and CARE has given BBB+ (moderate safety for timely servicing of debt) ratings to BRPL and BYPL. These ratings are reflective of their excellent credit standing in the market.

(ii) Precarious financial position of DISCOMs:

- a) The actual Revenue Gap for F.Y. 2008-09, as projected by the DISCOMs, is Rs. 606 Crores and after prudence check the actual trued-up figures shows a revenue surplus of around Rs. 75 Crores. This establishes clearly the fallacy of arguments in the representations through which DISCOMs have misled the Government.
- b) **The figures of Regulatory Asset given by them are also entirely incorrect and baseless. There is no Regulatory Asset in the Tariff Orders issued by the Commission. Regulatory Asset has been defined in Clause 5.42 of MYT Regulations and has to be created by the Regulatory Commission in the Tariff Order, only if there is large variation on account of uncontrollable items, and if it is 'not feasible to recover in one year alone, the Commission may take a view to create a Regulatory Asset, as per the guidelines provided in Clause 8.2.2 of the National Tariff Policy'. The Commission has not taken any such view in the case of any DISCOM. Therefore, the statement about Regulatory Asset is entirely untrue and misleading.**
- c) In the representation, the DISCOMs have emphasized the critical financial health of their companies, mentioning that lenders' covenants have been severely breached. **All three DISCOMs have been informed separately that in none of the cases lenders covenants have been breached.** In fact based on their audited accounts and reports of the Credit Rating Agencies, the Debt Equity Ratio and Debt Service Coverage Ratio show very healthy figures and these ratios are different from that mentioned in the representations. This shows that **they have given the incorrect ratios in the representations in Order to mislead the Government. This is again proved from the fact that the lenders have been continuously sanctioning loans. Even by the formula mentioned in the sanction letters issued as recently as June, 2010 these financial ratios are excellent in cases of all three DISCOMs.** The factual position has been apprised to all of them. Copies of such letters

sent to them alongwith sanction letters of the banks and reports of Credit Rating Agencies are **enclosed (Annexure-VIII)**.

(iii) Accumulation of Revenue Gap beyond sustainable levels:

The DISCOMs have tried to mislead the Government by not mentioning the excessive claims made by them in the Tariff Petitions, year after year, which are ultimately reduced very substantially on prudence check. As mentioned in earlier paras, even in the F.Y. 2008-09 they claimed a consolidated Revenue Gap of Rs. 606 Crores and the final True-up figure, after prudence check, shows a surplus of Rs. 75 Crores. Such misrepresentation of facts has created unnecessary avoidable controversy leading to directions under Section 108 by the Government.

(iv) Continuation and practice of assuming higher surplus of tariff fixation:

DISCOMs have apprehended that the actual Revenue Gap of F.Y. 2009-10 may be ignored by the Commission. The decision with respect to F.Y. 2009-10 has been explained in detail above. DISCOMs have been asked to file complete True-up Petitions showing both uncontrollable items, i.e. Energy Sales and Power Purchase Cost, which was not filed with the intention to suppress the sales revenue. At the same time they keep on crying about the difference between projected Power Purchase Cost in the Tariff Order and the actual Power Purchase Cost. It has also been mentioned earlier that if complete True-up Petitions are filed, the Revenue Gap being claimed by them now would be either very significantly reduced or would turn into surplus in some cases, as we have seen in the F.Y. 2008-09.

(v) Power Purchase Cost/Quantum:

The Commission has unanimously decided to project the energy available from new plants on the basis of status shown by CEA. The notings of the Commission showing such unanimous decision are **enclosed (Annexure IV)**. As regards the Power Purchase Cost, it has been mentioned earlier that the Commission has adopted such principles as are based on the latest available data because of which the per unit Power Purchase Cost approved by the Commission is higher than claimed by the DISCOMs in their Petitions.

(vi) Continuous recourse to additional debt to finance operations:

DISCOMs have lied completely in projecting incorrect figures of net worth, Debt Equity Ratio and Debt Service Coverage Ratio in their representations. If such incorrect statements would have been made by them in the Tariff Petitions before the Commission, they would have been liable to be prosecuted. The factual position is entirely different, as reflected from their own audited books and accounts, reports of Credit Rating Agencies obtained by them only and sanction letters of different lenders issued from time to time. DISCOMs have been

apprised about this. The letters sent to DISCOMs on the factual position are **enclosed (Annexure VIII)**.

(vii) Critical need for additional financing:

DISCOMs have requested GNCTD for a bridge loan. It is for the Government to take a decision on this matter. However, as pointed out earlier the concerns of the Distribution Licensees are entirely artificial, not based on facts which have been manipulated by making false statements, so that the Government is misled.

14. Another major issue which has been referred by the Government of Delhi for advice is regarding burdening the future consumer for past liabilities especially with reference to the clause 5.3 (h) - (4) of the Tariff Policy, which is reproduced below:-

"(4) Uncontrollable costs should be recovered speedily to ensure that future consumers are not burdened with past costs. Uncontrollable costs would include (but not limited to) fuel costs, costs on account of inflation, taxes and cess, variations in power purchase unit costs including on account of hydro-thermal mix in case of adverse natural events".

15. In Order to achieve this goal, the Tariff Policy clause 5.3 (h)-(1) says that MYT regime will be established and that MYT principles/Regulations will be followed.

16. MYT Tariff Regulations, 2007 have been **already notified** keeping in view, the spirit laid down in clause 5.3 (h)-(4) regarding speedy recovery of the uncontrollable cost. The MYT Regulations provide for annual True-up with reference to the available audited accounts. As soon as the audited accounts are available, the licensees are required to file their True-up Petitions and the Commission is required to dispose them of within 120 days of the filing of the True-up Petition. Normally the new Tariff Order is to be applicable from 1st April of each year. The Tariff Petitions for F.Y. 2010-11 were filed in December, 2009 when F.Y. 2009-10 was not even complete. There was no question of True-up of 2009-10 at that stage as the year was not over and accounts were not available. During the course of public hearing they had never asked for True-up of 2009-10. It is only because the Tariff Orders were delayed beyond March, 2010 that the issue of True-up of 2009-10 has come up. If the Tariff Orders had been finalized by 31st of March as scheduled by the Commission and it had become operative w.e.f. 1st April, 2010 the whole question of True-up of 2009-10 would not have arisen because audited account of 2009-10 would not have been available by 1st April, 2010.

17. The objectives set out in sub-clause 5.3 (h) (4) regarding speedy recovery is laudable. However, it must be remembered that Tariff Policy is only a guiding principle and is not mandatory. However, even the Tariff Policy itself, in clause 8.2.2., envisages a *situation where recovery can be delayed by spreading the recovery of uncontrollable items alongwith carrying cost for a period not exceeding three years.*

18. The principles enunciated in 8.2.2. of the Tariff Policy have been highlighted only with a view to stress the obvious that speedy recovery is alright and the Commission is

also committed to this goal as per the MYT Regulations framed by it and keeping in view the Electricity Act, 2003.

19. Having said the above, the Commission has considered the need for speedy recovery of cost and has decided unanimously introduction of Power Purchase Adjustment formula from this year itself to enable the DISCOMs recover differential Power Cost on a quarterly basis. GNCTD was already informed about this on 30.04.2010. The Regulation for this would have been place by June 2010, had the Tariff Orders been issued in time. The Commission has already decided to initiate the processing for framing such Regulation after issue of Tariff Orders as all such adjustments can be made only with reference to power purchase cost for F.Y. 2010-11 projected in the Tariff Orders. This would take care of the issue of not burdening future consumers with past costs for all time to come.

20. Implication of delay in issue of Tariff Orders

- a) The non-issue of Tariff Orders because of directions under Section 108 issued by GNCTD has resulted in non-accounting of the surplus of Rs. 3577 Crores in the tariff for F.Y. 2010-11 which could not be passed on to the consumers. This has enabled the DISCOMs to overcharge the consumers to the extent of about Rs. 300 Crores per month starting from April, 2010.
- b) The delay in issue of Tariff Orders have also delayed the framing of Regulations on power purchase adjustment formula which would have been effective from the first quarter of 2010-11 itself, if the Tariff Orders would have been issued in time.

21. Recommendations:

The representations of DISCOMs are baseless, incorrect and full of lies. Such representations deserve outright rejection. The Tariff Orders have been already approved by me and Sh. S. R. Sethi, Member. Solicitor General of India has opined that Tariff Orders must be issued immediately. In view of these facts GNCTD may consider withdrawing the directions under Section 108 to enable the Commission to issue the Tariff Orders without any further delay. This will also result in issue of Tariff Orders of NDMC which is also not being released by the two Members, without assigning any reason, although the communication dated 04.05.2010 of GNCTD does not even remotely connect NDMC with the direction under Section 108. Because of such unwarranted linkage, consumers of NDMC area are also suffering as the surplus in their case also is not being passed on to them in the form of reduction of tariff. Further, there has been continuous speculation in the media about the Tariff Orders. A large number of consumer groups and NGOs have represented before the Commission and they want to know the reason for delay in Tariff Orders. The only way to put at rest all speculations is to issue the Tariff Orders immediately.

Sd/-
(Berjinder Singh)
Chairman
30.06.2010

ANNEXURES TO THE STATUTORY ADVICE

- Annexure-I** - Opinion dated 18.05.2010 of Solicitor General of India (7 Pages);
- Annexure-II** - Note dated 23.06.2010 and 25.06.2010 of Chairman to the Members on expediting Statutory Advice (8 Pages);
- Annexure-III** - Preliminary comments of Sh. Shyam Wadhera and Sh. S. R. Sethi, Members on the draft Tariff Orders submitted by the staff and response of the staff on these comments (39 Pages);
- Annexure-IV** - Note showing unanimous decisions of Members and Chairman on major issues in the Tariff Orders (8 Pages);
- Annexure-V** - Approval of Tariff Orders of the three DISCOMs by Sh. S. R. Sethi, Member (2 Pages);
- Annexure-VI** - Note of Sh. S. R. Sethi, Member recommending that the True-up of F.Y. 2009-10 can be done only if DISCOMs file Petitions (1 Page);
- Annexure-VII** - Loan approvals in 2009-10 of BRPL & BYPL and Sanction Letters of Indian Bank and Dena Bank issued in June, 2010;
- Annexure-VIII** - Letters dated 28.05.2010 and 21.06.2010 addressed to the three DISCOMs on the factual position vis-à-vis representations given to GNCTD, enclosing reports of Credit Rating Agencies like ICRA and CARE.