IN THE APPELLA TE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

Appeal No. 05 of 2019 & IA No. 55 of 2021,
Appeal No. 06 of 2019 & IA No. 54 of 2021,
Appeal No. 34 of 2020 & IA No. 138 of 2020, &
IA No. 356 of 2021 & IA No. 605 of 2021
and
Appeal No. 154 of 2021 & IA NO. 1630 OF 2020

Dated: 31st August, 2021

Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member

Appeal No. 05 of 2019 & IA No. 55 of 2021

In the matter of:

BSES Yamuna Power Limited,
having its registered office
at Shakti Kiran Building, Karkardooma,
New Delhi – 110 032,
through its Authorised Signatory .... Appellant(s)

Versus

Delhi Electricity Regulatory Commission,
Viniyamak Bhawan, C-Block, Shivalik,
Malviya Nagar, New Delhi – 110 017
through its Secretary .... Respondent(s)

Counsel for the Appellant (s) : Mr. Buddy A. Ranganadhan
Mr. Hasan Murtaza

Counsel for the Respondent (s) : Mr. S. Venkatsh
Mr. Rishub Kapoor
Ms. Mehak Verma

Appeal No. 06 of 2019 & IA No. 54 of 2021

In the matter of:

BSES Rajdhani Power Limited,
having its registered office at
BSES Bhavan, Nehru Place,
New Delhi – 110 019
through its Authorised Signatory .... Appellant(s)

Versus

Delhi Electricity Regulatory Commission,
Viniyamak Bhawan, C-Block, Shivalik,
Malviya Nagar, New Delhi – 110 017
through its Secretary .... Respondent(s)

Counsel for the Appellant (s) : Mr. Buddy A. Ranganadhan
Mr. Hasan Murtaza

Counsel for the Respondent (s) : Mr. S. Venkatsh
Mr. Rishub Kapoor
Ms. Mehak Verma

Appeal No. 34 of 2020 & IA No. 138 of 2020, &
IA No. 356 of 2021 & IA No. 605 of 2021

In the matter of:

1. **BSES Rajdhani Power Limited,**
   BSES Bhavan, Nehru Place,
   New Delhi – 110 019
   through its Authorised Signatory .... Appellant No.1

2. **BSES Yamuna Power Limited,**
   Shakti Kiran Building, Karkardooma,
   New Delhi – 110 032,
   through its Authorised Signatory .... Appellant No.2

Versus

Delhi Electricity Regulatory Commission,
Viniyamak Bhawan, C-Block, Shivalik,

Malviya Nagar, New Delhi – 110 017
through its Secretary …. Respondent(s)

Counsel for the Appellant (s) : **Mr. Buddy A. Ranganadhan**
Mr. Rahul Kinra
Mr. Anupam Verma
Mr. Utkarsh Singh

Counsel for the Respondent (s) : **Mr. Nikhil Nayyar, Sr. Adv.**
Mr. Dhananjay Baijal

Appeal No. 154 of 2021 & IA NO. 1630 OF 2020

In the matter of:

Tata Power Delhi Distribution Limited
Through: Authorised Representative
NDPL House, Hudson Lines
Kingsway Camp Delhi – 110 009
…. Appellant(s)

Versus

1. **Delhi Electricity Regulatory Commission,**
Viniyamak Bhawan, C-Block, Shivalik,
Malviya Nagar, New Delhi – 110 017
through its Secretary …. Respondent No.1

2. **BSES Rajdhani Power Limited**
Through: The Chief Executive Officer
BSES Bhavan, Nehru Place,
New Delhi – 110 019 …. Respondent No.2

3. **BSES Yamuna Power Limited,**
Through: The Chief Executive Officer
Shakti Kiran Building, Karkardooma,
New Delhi – 110 032 …. Respondent No.3

Counsel for the Appellant (s) : **Mr. Hemant Sahai**
Mr. Apoorva Misra
Ms. Molshree Bhatnagar

Counsel for the Respondent (s) : **Mr. Nikhil Nayyar, Sr. Adv.**
Mr. Dhananjay Baijal

JUDGMENT

PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

Appeal No. 05 of 2019 & IA No. 55 of 2021

1. The Appeal No. 05 of 2019 has been filed by BSES Yamuna Power Limited (hereinafter referred as **"the Appellant or BYPL"**) against the Interim Order dated 18.06.2018 passed by the Delhi Electricity Regulatory Commission (hereinafter referred as **"the Commission/State Commission or DERC"**), in Petition No. 2 of 2010.

2. **Relief Sought**

   (a) Set aside the Impugned Order dated 18.06.2018 passed by Respondent Commission in Petition No. 2 of 2010; and

   (b) Pass such other or further orders as the Tribunal may deem fit and proper in the facts and circumstances of the case.

Appeal No. 06 of 2019 & IA No. 54 of 2021

3. The Appeal No. 06 of 2019 has been filed by BSES Rajdhani Power Limited (hereinafter referred as **"the Appellant or BRPL"**) against the Interim Order dated 18.06.2018 passed by the Delhi Electricity

Regulatory Commission (hereinafter referred as **"the Commission/ State Commission or DERC"**), in Petition No. 2 of 2010.

4. **Relief Sought**

(a) Set aside the Impugned Order dated 18.06.2018 passed by Respondent Commission in Petition No. 1 of 2010; and

(b) Pass such other or further orders as the Tribunal may deem fit and proper in the facts and circumstances of the case.

Appeal No. 34 of 2020 & IA No. 138 of 2020 & IA No. 356 of 2021

5. The Appeal No. 34 of 2019 has been filed by BSES Rajdhani Power Limited BSES and Yamuna Power Limited (hereinafter referred as **"the Appellants or BRPL/BYPL"**) against the impugned order dated 05.12.2019 passed by the Delhi Electricity Regulatory Commission (hereinafter referred as **"the Commission/State Commission or DERC"**), in the Petition No. 1 and 2 of 2010.

6. **Relief Sought**

(a) Admit the present Appeal and Set aside the Impugned Order dated 05.12.2019 passed by the Delhi Electricity Regulatory Commission in Petition No. 01 of 2010 and 02 of 2010; and

(b) Direct the Delhi Commission to recast the ARR's insofar as it pertains to the treatment of Consumer Contribution in Capitalization until all consequential adjustments and;

(c) Direct the Delhi Commission to provide for the funding of all Consumer Contribution refunds in the next ARR before the refunds are directed to be made to the concerned consumers;

d) Pass any such orders as this Tribunal may deem fit in the facts and circumstances of the present case.

Appeal No. 154 of 2021

7. The Appeal No. 154 of 2021 has been filed by TATA Power Delhi Distribution Limited (hereinafter referred as **"the Appellant or TPDDL"**) against the impugned order dated 05.12.2019 passed by the Delhi Electricity Regulatory Commission (hereinafter referred as **"the Commission/State Commission or DERC"**), in Petition No. 01 - 03 of 2010.

8. **Relief Sought**

(a) Allow the present appeal and set aside the Impugned Order dated 05.12.2019 passed by Respondent Commission in Petition No.03 of 2010;

(b) Direct the Respondent Commission to comply with the directions contained in the judgments dated 23.02.2015 and 15.05.2017 passed by this Tribunal in Appeal Nos.109,110 and 111 of 2014 and Appeal Nos.103 and 104 of 2017 respectively;

(c) Direct the Respondent Commission to provide for funding of all consumer contribution refunds in the next ARR before the refunds are directed to be made to the concerned consumers; and / or

(d) Pass such other and further orders as this Tribunal may deem fit in the interest of justice and equity.

9. BSES Rajdhani Power Limited (Appellant in Appeal No. 06 of 2019 and Appeal No. 34 of 2020), BSES Yamuna Power Ltd. (Appellant in Appeal No. 05 of 2019) and Tata Power Delhi Distribution Limited (Appellant in Appeal No. 154 of 2021) (hereinafter collectively called as **"the Appellants"**) are the distribution licensees engaged in the distribution of electricity in the areas within Delhi according to the terms and conditions of the license issued by the State Commission.

10. Delhi Electricity Regulatory Commission (DERC) is discharging its functions under the Electricity Act, 2003 and is the Respondent No.1 in all these appeals.

11. This batch of four appeals have been preferred by the Appellants against the Interim Order dated 18.06.2018 and Impugned Order dated 05.12.2019 passed by the Delhi Electricity Regulatory Commission in Petition No. 1 of 2010, Petition No. 2 of 2010 and Petition No. 03 of 2010 respectively. The Impugned Order is common to all the four Appeals and the issues raised are the same. Hence, all the four Appeals have been heard together. Since the issues involved in the Appeals are common; a common judgment is being rendered.

However, for the sake of brevity, specific figures and impugned order, etc., of Appeal no. 34 of 2020 have been referred in this judgment.

Background of the case:

12. Distribution Licensees (DISCOMs) in Delhi have to undertake various projects/ schemes which involve capital outlay with or without Consumer Contribution. There are mainly three types of projects/ schemes undertaken by the DISCOMS, which are:

    i. Projects/Schemes with the Government Grants (Normally not refundable/repayable).

    ii Projects/ Schemes with 100 % share by Consumers without any contribution by DISCOMS.

    iii Projects/ Schemes with certain share i.e. upto 50% of Cost by Consumer Contribution/ Government Grants. The balance is to be arranged by the DISCOM to the extent of its share.

13. The methodology adopted by DISCOMS in these cases is that the DISCOM finalizes the projects, estimates the costs and intimates the amount of consumer contribution to the respective consumers, in case of (ii) and (iii) above. The Consumer deposits its intimated share in advance based on express/ implied contract. The DISCOM undertakes the projects/ schemes, which could be completed in one or more accounting periods. Electrical Inspector is expected to issue the certificate of completion for these projects. While there are no

issues involved in the cases at (i) above, the projects/ schemes at (ii) and (iii) above require a separate treatment.

DERC letter dated 03.12.2009

14. In the year 2009, it came to the notice of the Commission that the DISCOMs have not refunded the balance/unspent of consumer contribution to the respective consumers in respect of capitalized deposit work. The Commission vide its letter dated 03.12.2009 directed the DISCOMs as under:

i. The DISCOMs shall finalize the accounts of the deposit works already executed by them and approved by the Electrical Inspector (wherever applicable) and refund the amounts due to the agencies on whose behalf the work has been carried out by the DISCOMS within a period of one month of energization.

ii. The DISCOMs shall send reconciled account to all such consumer and refund them the due amount, along with penal interest of 12% per annum. The interest will be to the account of DISCOMs only and cannot be booked to ARR because this has become payable because of their fault.

iii. In all future cases, the accounts be finalized immediately after completion of works and refunds made to the consumers within three months of energization. A quarterly report shall be submitted to the Commission in this regard in the format enclosed.

15. Aggrieved by the aforesaid order regarding refund of the unspent consumer's contribution, the DISCOMs filed petition No. 1 of 2010, 2 of 2010 and 3 of 2010 before the Commission in which the main plea of the DISCOMs was that the Commission in its various orders had considered the entire consumer's contribution as "means of finance" and therefore, no such amount is available with them to refund to the respective consumer.

DERC order dated 11.03.2014

16. The respondent Commission passed the order dated 11.03.2014 in filed petition No. 1 of 2010, 2 of 2010 and 3 of 2010 and the observations made by the respondent Commission read as under:

"9. The Commission observed that: -

i. The Commission in MYT order dated 23.2.2008 has made order that the total consumer contribution, in policy direction period should be considered as a source of funding for capital investment irrespective of assts capitalized or not. This was in respect to the observation of stake holders that consumer contribution used by the Commission against means of finance was lesser than actual consumer contribution received by the petitioner. The petitioner, in response has submitted that it has shown consumer contribution as a source of funding only against the capitalized asst. The reference to an order dated 23.02.2008 cannot be read to imply that unused consumer contribution should also be used for further asset creation.

ii. The contention of DISCOMs that the global benefits have been passed on to consumer for the period through tariff is not within the tenets of established law and practice. The amount by the DISCOMs is for a specific purpose and is to be utilized for the same with the condition the balance, if any, is to be refunded to the concerned consumer, as per the system on which a contract operates. The Commission while taking the amount received as consumer contribution for capital works as part of Means of Finance for meeting the ARR for respective DISCOMs for the various years has allowed it to be utilized specifically for that purpose under the assumption; it is at best a resource item to meet expenses related to that year. Any balance i.e. the difference between the amount collected by the Discom from the consumers for a scheme and the amount actually spent in capitalization of the scheme is to be refunded within the provision of express/implied contracts executed by respective organizations/consumers for the purpose.

iii. Additionally, the contract to create the assets out of consumer contribution received for capital works was between the two parties without any involvement of the Commission. As per the related provision of Doctrine of privity of contract, the parties to the contract have the recourse for its performance, unless they have renounced their rights in the favour of the party, which is not affected by the performance of the contract. As the Commission is not a party to any of these contracts, it cannot be requested to change the terms of contract among the concerned parties.

iv. The practise of not refunding the unspent consumer contribution is against the direction of the Commission to reconcile the account with the consumer and therefore is not acceptable and legally untenable, it is a clear cut violation of the directions of the Commission.

v. That there is no cogent reason for not refunding the unspent portion of consumer contribution for a particular scheme after its completion and instead utilizing it for other CAPEX works as the consumer contribution is for a specific deposit work as requested by a particular consumer.

vi. That after the work is completed the amount is to be reconciled and the consumer is to be informed and excess amount has to be refunded along with interest @ 12% p.a. from the date of completion of work as per the certificate from Electrical Inspector.

"10. For the reasons recorded above, the Commission finds no reason to review or modify the order contained in letter dated 03.12.2009. However, the request of the petition to expunge the remark "Financing of capital investment en-block is surely not only a wrong accounting practice but also a dishonest one" is acceded to the limited extent that the words 'but also a dishonest one' are expunged. The revised extract in the sentence would read as follows "Financing of Capital investment en-bloc is a wrong accounting practice". The Commission also directs the respondents to comply with the

above orders and submit a compliance report to the Commission within four weeks from the date of this order."

Judgment dated 23.02.2015 passed by APTEL

17. Aggrieved by order dated 11.03.2014 passed by DERC, the distribution companies filed appeals before this Tribunal being Appeal Nos. 109 of 2014, 110 of 2014 and 111 of 2014. On 23.02.2015, the Tribunal passed the Judgment in these appeals.

18. In this judgment dated 23.02.2015, the Tribunal concluded as under:

Issue No. A:

Whether the State Commission has erred in exercising its jurisdiction?

……..

……..

……

10. We find that Section 86(1)(f) of the Electricity Act 2003 says that the Commission is having jurisdiction to adjudicate the disputes between licensees and generators only. The relevant section is quoted below:

"86. Functions of State Commission – (1) The State Commission shall discharge the following functions, namely :-

...

...

(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;

...

..."

But here the subject matter is related to tariff i.e. issue regarding utilisation of unspent consumers' contribution as means of finance for execution of capital works in the licensed area and thereby the interest on debt and return on equity has the effect on the tariff as submitted by the Appellant. ***Hence, the Commission is having jurisdiction to adjudicate in this matter to safe guard the interest of the consumers at large and it is a tariff related issue****. Hence the contention of the Appellant regarding jurisdiction is negatived / disallowed. This issue is decided against the appellant.*

Issue No. B is whether the distribution company has right to keep the consumers contribution for development of network / infrastructure in the licensed area?

……..

……...

13) We feel that it is a general practice that the distribution companies collect the estimated cost of the capital work required for release of supply from a specified consumer. ***It is the duty of the distribution licensee that as soon as the work is completed and certified by the Electrical Inspector, the work order of the said work has to be closed and amount, if any left over, should be returned to the specified consumer. Utilizing unspent amount of the consumers contribution of a deposit work for execution of the capital works of the distribution licensee in their licensed***

area is not a correct practice. *Hence, we reject the plea of the Appellants towards utilization of unspent amount of the consumers' contribution for their other capital works in their respective licensed areas. This issue is also decided against the appellants.*

Issue No.C and Issue No.D

16. After going through the rival contentions of the parties, we find that the learned Commission has been considering the consumers contribution as means of financing the capital cost. It has been submitted by the appellants / DISCOMs that the unutilized portion of the consumer's contribution was also used as means of financing for the capital works and accordingly the regulated rate base from FY 2002-03 onwards was reduced. The consumers got the benefit of lower tariff. If the unutilized consumer contribution has been utilized as means of financing in the tariff orders from FY 2002-03 onwards and corresponding relief has been given to the consumer in terms of retail supply tariff, then there is a force in the contention of the appellants. In that situation the appellants should then get the ***consequential relief****. If the said contention of the appellants is true and correct,* ***then the unspent consumer contribution with interest to be refunded by the appellants. The said amount may be considered as an expenditure in the future annual revenue requirement (ARR)*** *of the appellants. Then the appellants should be given liberty to furnish the accounts showing that the excess amount of consumers contribution has been duly considered in the ARRs from FY 2002-03 onwards in reducing the retail supply tariffs. This appears just and proper and also in the interest of justice that the impugned order passed by the*

learned Commission should be set aside with the aforesaid direction because if utilization of unspent consumer contribution as a means of finance has reduced the tariff and thereby benefitted the consumers then the liberty should be given to the appellants to furnish the respective accounts showing that the excess amount of consumers contribution has been duly considered in the ARRs from FY 2002-03 onwards in reducing the retail supply tariffs. Accordingly, the issue Nos. C & D are disposed of.

……

……..

18. ***Summary of findings:***

*The learned Delhi Electricity Regulatory Commission has been considering consumer contribution as means of financing the capital cost. The appellant's contention, that the unutilized portion of the consumer contribution was also used as means of finance for the capital works and accordingly regulated rate base from FY 2002-03 onwards was reduced and consumers got the benefit of lower tariff, has legal force **which we accept**. If the unutilized consumers contribution has been utilized as means of financing for the tariff orders from FY 2002-03 onwards and corresponding relief has been given to the consumers in terms of retail supply tariffs, then the appellants are entitled to get **consequential relief** and the said **unspent contribution amount be refunded** by the appellants as per the Commission's order. The unspent consumers contribution amount **may be considered as an expenditure in the future ARR** of each of the appellants / DISCOMs. These matters are fit to be remanded giving liberty to appellant's to furnish the accounts showing that the excess amount of consumers contribution has*

been duly considered in the annual revenue requirements from FY 2002-03 onwards in reducing the retail supply tariffs.

19. In view of the above, these appeals being Nos. 109, 110 and 111 of 2014 are hereby partly allowed and the common impugned order dated 11.03.2014 passed by the Delhi Electricity Regulatory Commission in Review Petition Nos. 1, 2 & 3 of 2010 is modified to the extent indicated above. These matters are remanded to the learned Delhi Electricity Regulatory Commission giving liberty to the appellant's / DISCOMs to furnish the accounts showing that the excess amount of consumers contribution has been duly considered in the ARRs from FY 2002-03 onwards in reducing the retail supply tariffs. In that situation the Commission is further directed to hear the matter and pass the consequential order as it thinks fit and proper in the facts and circumstances of these matters. No order as to costs.

DERC Order dated 23.12.2015

19. In view of the judgment dated 23.02.3015 passed by this Tribunal DERC heard the matter and passed orders on 23.12.2015 wherein it directed the DISCOMs to arrive at the exact figure of the amount to be refunded to the respective consumers and from what date, the DISCOMs were further asked to come up with the details of consumer contribution in each case and from which date it has to be refunded. The Commission also directed that this exercise should be completed within two months.

20. DERC vide their letter dated 21.04.2016 again advised the DISCOMs to submit the final figures about the total liability only after

payment of balance of consumer contribution along with interest within a month, supported by Auditor certificate reconciling with their audited accounts

DERC letter dated 12.01.2017

21. DERC was in receipt of a letter from Sh. Shashi Ranjan Sinha, General Manager TAJSATS addressed to BRPL requesting for Refund of the excess contribution deposited by it against a scheme on 01.04.2007. It was decided that the DISCOMs should refund the unspent consumer contribution to the respective consumers immediately with interest as specified in the Commission's order dated 23.12.2015. The Commission has already ordered that the amount of unspent consumer contribution for the period from FY 2002-03 to FY 2006-07 shall be adjusted into the ARR of the DISCOMs based on the refund made by the DISCOMs to the respective consumers so that the amount of interest can be finalized up to the date at which such refund is processed and credited to the consumers account. With regard to this a letter dated 12.01.2017 was forwarded to the DISCOMs for compliance of the Commission's order for expeditiously performing the refund of the unspent consumer contribution to the respective consumers. Also, a letter was sent to BRPL for compliance of the Commission's order for refund in the case of TAJSATS expeditiously and the failure of the same will clearly attract action under Section 142 of the Electricity Act, 2003.

Judgment dated 15.05.2017 passed by APTEL

22. Aggrieved by the decision of DERC conveyed through its letter dated 12.01.2017 in the matter of TAJSATS, BRPL and BYPL filed

Appeal No. 103 of 2017 and 104 of 2017, respectively in APTEL stating that the Commission has failed to implement the APTEL's judgment dated 23.02.2015 in Appeal nos. 109, 110 and 111 of 2014. The Tribunal passed judgment dated 15.05.2017 in these appeals and the operative part of the judgment reads as under:

*"14. **Our Consideration and Conclusion***

After having a careful examination of the issues brought before us for our consideration, our observations are as follows:

All the issues are inter-related and hence we are taking up all issues together for consideration.

14.1 The contention of the Appellants is that the Delhi Electricity Regulatory Commission failed to implement this Tribunal's judgment dated 23.02.2015 where the matters were remanded to the Respondent Commission giving liberty to Appellants to furnish the accounts showing that the excess amount of consumers' contribution has been duly considered in the annual revenue requirements from FY 2002-03 onwards in reducing the retail supply tariff to the State Commission (DERC). Further, the Appellants stated that the Respondent Commission misinterpreted the aforesaid judgment of this Tribunal negotiating the portion that refund of balance of consumer contributions is to be done only after recasting of ARRs.

14.2 We have gone through the submissions and observed that the Respondent Commission in their Order dated 23.12.2015 directed the Appellants to come up with the details of balance consumer contribution in each case and from which date it has to be refunded. The relevant part of the order is quoted below:

4. On the issue of how to arrive at the exact figure of the amount to be refunded to the respective consumers and from what date the Commission directed the Petitioners to come up with the details of balance of consumer contribution in each case and from which date it has to be refunded. The Commission

directed that this exercise should be completed within two months. Regarding re-casting of ARR for previous years, the Commission directed the Petitioners to submit the details of such cases, where the unutilized consumer contribution for assets capitalized were considered as means of finance for other capital schemes of the Petitioners. This information will be utilized for passing orders on details of refund of consumer contribution as well as re-casting of previous ARR's in the next tariff order.

Thus, the State Commission as per this Tribunal's Judgment dated 23.02.2015, directed the Appellants to submit case-wise details of consumers'' contribution from 2002-03 to 2006-07 and unspent consumers' contribution from FY 2007-08 to 2011-12.

Accordingly, the Appellants submitted the details as per various correspondences occurred between the Commission and Appellants but the Commission failed to hear the Appellants' submissions and issued the impugned letter/orderdated12.01.2017.

14.3 Let us examine this Tribunal's Judgment dated 23.02.2015 against the appeal Nos. 109/2014, 110/2014 and 111/2014. The relevant part of the judgment is quoted below:

18. Summary of findings:

The learned Delhi Electricity Regulatory Commission has been considering consumer contribution as means of financing the capital cost. The Appellant's contention, that the unutilized portion of the consumer contribution was also used as means of finance for the capital works and accordingly regulated rate base from FY 2002-03 onwards was reduced and consumers got the benefit of lower tariff, has legal force which we accept. If the unutilized consumers contribution has been utilized as means of financing for the tariff orders from FY 2002-03 onwards and corresponding relief has been given to the consumers in terms of retail supply tariffs, then the Appellants are entitled to get consequential relief and the said unspent contribution amount be refunded by the Appellants as per the Commission's order. The unspent consumers' contribution amount may be considered as an expenditure in the future

ARR of each of the Appellants / DISCOMs. These matters are fit to be remanded giving liberty to Appellant's to furnish the accounts showing that the excess amount of consumers contribution has been duly considered in the annual revenue requirements from FY 2002-03 onwards in reducing the retail supply tariffs.

Thus, in the above Judgment, the matter was remanded back to the Commission and directed the Commission to obtain the details of consumers' contribution from 2002-03 to 2006-07 and unspent consumer's contribution considered from 2007-08 to 2011-12 and examine whether the consumers' contribution actually given any relief in the tariff orders from FY 2002-03 to 2011-12. Instead, the State Commission issued impugned letter/order with a penalty clause signed by Secretary of the Commission.

14.4 Let us examine this Tribunal's Judgment dated 10.05.2010 in the matter of Damodar Valley Corporation vs. CERC and others, where this Tribunal laid down the principles of limited remand. The relevant part of the Judgment is quoted below:

(i) When a matter if remanded by the superior court to subordinate court for rehearing in the light of observations contained in the judgment, then the same matter is to be heard again on the materials already available on record. Its scope cannot be enlarged by the introduction of further evidence, regarding the subsequent events simply because the matter has been remanded for a rehearing or do novo hearing.

(ii) The court below to which the matter is remanded by the superior court is bound to act within the scope of remand. It is not open to the court below to do anything but to carry out the terms of the remand in letter and spirit.

(iii) When the matter comes back to the superior court again on appeal after the final order upon remand is passed by the Court below, the matter/issues finally disposed of by order of remand, cannot be reopened.

(iv) Remand order is confined only to the extent it was remanded. Ordinarily, the superior court can set aside the entire judgment of the court below or it can remand the matter on specific issues through a "Limited Remand Order". In case of Limited Remand Order, the jurisdiction of the court below is limited to the issue remanded. It cannot sit on appeal over the Remand Order.

(v) If no appeal is preferred against the order of Remand, the issues finally decided in the order of remand by the superior court attains finality and the same can neither be subsequently re-agitated before the court below to which remanded nor before the superior court where the order passed upon remand is challenged in the Appeal.

(vi) In the following cases, the finality is reached:

(a) The issue being not challenged before the superior court, or

(b) The issue challenged but not interfered by the superior court, or

(c) The issue decided by the superior court from which no further appeal is preferred.

These issues cannot be re-agitated either before the court below or the superior court".

Thus, we noticed that the State Commission neither followed the principles laid down in this Tribunal's Judgment in the matter of Damodar Valley Corporation vs. Central Electricity Regulatory Commission & Ors. dated 10.05.2010 in Appeal No. 146 of 2009nor followed their own Order dated 23.12.2015, issued impugned letter/order dated 12.01.2017 to the Appellants with a penalty clause under Section 142 of Electricity Act, 2003.

14.5 Let us examine the procedure to be followed for issuing a notice under Section 142 of Electricity Act, 2003. The Section 142 of Electricity Act, 2003 is quoted below:

142. Punishment for non-compliance of directions by Appropriate Commission. – *In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made there under, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction.*

21. *In the 2004 (2) SC 783 Karnataka Rare Earth and Another vs. Senior Geologist, Department of Mines & Geology and another the Hon'ble Court held as under:*

" An order imposing penalty for failure to carry out the statutory obligation is the result of a quasi-criminal proceeding and penalty will not ordinarily be imposed unless the party obliged has either acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct or acted in conscious disregard of its obligation".

22. *The Hon'ble Supreme Court in these decisions has culled out the following mandatory requirements to be satisfied especially in the penalty proceedings:*

(i) It is quite essential that a party facing the penalty proceedings should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of the natural justice.

(ii) A show cause notice is the foundation on which the Department has to built-up its case. Therefore, a show cause notice shall contain the allegations. If the allegations in the show cause notice are not specific, or vague or unintelligible, then that can be taken as a ground to hold that the said notice was not legally valid as it had

not given adequate opportunity to the person concerned to meet the allegations indicated in the show cause notice.

(iii) The first and foremost principle is what is known as audi alteram partem rule. The notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively the case he has to meet. Adequate time has to be given to the person concerned so as to enable him to make his representation to meet the allegations contained in the notice. In the absence of the notice of the kind and such reasonable opportunity, the final order passed becomes wholly vitiated.

(iv) The principles of natural justice are those which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

25. The perusal of this section would reveal that the State Commission should follow the following procedure before finding the person guilty of violation of provisions or directions and imposing the penalty as contemplated under Section 142 of the act:

"(i) When a complaint or a Petition is filed by a person before the Appropriate Commission against a person for taking action under Section 142 of the Act or when an information is received, the Appropriate Commission has to first find out as to whether there are prima facie allegations in the petition or complaint or information received, that the person has contravened the relevant provisions or violated the directions issued by the Appropriate Commission. In other words, the Appropriate Commission, before entertaining the petition or complaint for taking action under Section 142 of the Act, at the outset has to satisfy itself by applying its mind as to whether the allegations contained in the said Petition or complaint or information would constitute contravention or violation of any of the provisions of the Act or rules or regulations made there under or directions issued by the Appropriate

Commission which necessitates the issuance of show cause notice to conduct inquiry under section 142 of the Act. Thus, the satisfaction to entertain the complaint is first and foremost requirement.

(ii) After arriving at such a satisfaction, the Appropriate Commission shall entertain the petition and issue notice to the person concerned intimating that the Appropriate Commission is satisfied with the particulars of the specific allegations that the person concerned has violated the provisions or directions and calling upon him to show cause as to why that person be not proceeded with under section 142 of the Act and why the penalty be not imposed upon him for such allegation of the contravention or a violation thereby, the Appropriate Commission is mandated to give opportunity to the said person to offer his explanation through his reply to the charge levelled against him referred in the show cause notice by giving sufficient time.

(iii) On receipt of the said explanation offered by the person concerned, the Appropriate Commission has to scrutinize and find out as to whether his explanation is satisfactory or not. If it is satisfied, it may drop the proceedings under Section 142 of the Act. On the other hand, if the Appropriate Commission feels that the explanation is not satisfactory, the Appropriate Commission can summon him to appear before the Commission and frame the specific charges in his presence and intimate him that the Appropriate Commission propose to conduct inquiry with regard to those charges and give opportunity to the person concerned of hearing to offer his further explanation and to produce materials to disapprove those charges.

(iv) After considering the reply and evidence available on record and after hearing the parties, the Appropriate Commission then has to find out as to whether those charges framed against him have been proved or not in the light of the submission and the evidence produced by the person concerned. If the Appropriate Commission is of the opinion that the charges framed are not proved, the proceedings at that stage can be dropped. On the

contrary, if the Appropriate Commission is satisfied that those charges have been proved, it may find him guilty and impose penalty.

26. *The above procedure in penalty proceedings would clearly indicate that the State Commission shall first find out the prima facie satisfaction and then issue show cause notice to the person concerned who has to file reply and thereafter the State Commission has to frame charges and give further opportunity to the person concerned to place materials to disprove the charges and then decide the case on the basis of the evidence available on record.*

27. *From the above, it is clear that the State Commission has to arrive at prima facie satisfaction, that it is a fit case for initiation of Section 142 of the proceedings and then it has to record its satisfaction in the show cause notice in respect of the specific allegations and send it to the person for the purpose of giving an opportunity to such a person to defend or rebut such specific allegation. These procedures are contemplated to follow the principle of natural justice by giving full opportunity to the Appellant to defend the allegation.*

28. *Thus, there are two phases. (i) One is to arrive at a satisfaction to issue show cause notice while initiating penalty proceedings and (ii) Next is, after issuance of the show cause notice, the person must be heard to arrive at a satisfaction whether such contravention has actually been committed or not. Only then, the State Commission can come to the conclusion whether to find him guilty or not under Section 142 of the Act.*

Thus, it became evident that the show cause notice should contain (i) specific allegations of violation, (ii) prima facie satisfaction over the said allegations (iii) issuance of show cause notice in respect of specific allegations by way of giving an opportunity to the concerned person to rebut those allegations. All these three ingredients must find place in the notice which is a show cause notice.

We have gone through the submissions and noticed that the State Commission without following the procedure laid down in the above Hon'ble Supreme Court's Judgment issued the impugned letter dated 12.01.2017. We find serious lapses in the action of the Respondent Commission.

The State Commission without following the principles of remand matter and also without following the procedure for issuance of penalty notice issued notice/impugned letter to the Appellants under Section 142 of Electricity Act.

14.6 We have also noticed that the Respondent Commission while determining the tariff order from FY 2002-03 onwards, a methodology was followed and in the methodology, the consumers' contribution was considered as " Means of Finance" while arriving ARR of respective years from 2002-03 onwards.

The Respondent Commission raised the issue regarding refund of consumer contribution to the respective consumers only after the issue was raised by some of the stake holders during the public hearing held between 08.01.2008 and 11.01.2009.

However, we once again direct the State Commission (DERC) to examine the submissions made by the Appellants with respect to consumers' contribution and give an opportunity to the Appellants to place their case on merits.

Accordingly, we set aside the impugned letter dated 12.01.2017.

Thus, all the issues are decided in favour of the Appellants.

ORDER

In view of our above conclusion, the Appeals are allowed and the impugned Order letter dated 12.01.2017 is set aside. The Appeal Nos. 103 of 2017, 104 of 2017 and IA Nos. 303 of 2017,

304 of 2017 are disposed of with no cost. We direct DERC to follow instructions given in this Tribunal's Judgment dated 23.02.2015."

Hon'ble Supreme Court judgment dated 03.10.2017

23. Aggrieved by the judgment dated 15.05.2017 passed by this Tribunal, DERC filed a civil appeal before the Hon'ble Supreme Court and the same was dismissed by judgment dated 03.10.2017.

DERC's impugned order dated 05.12.2019

24. In compliance with the judgment passed by the Tribunal on 15.05.2017, DERC re-opened the petition no. 01 of 2010, petition no. 02 of 2010 and petition no. 03 of 2010 and asked DISCOMs to present their case and make submissions.

25. DERC vide interim order dated 18.06.2018 made the following observations:

"it is made clear that the ARRs of previous years upto FY 2015-16 have already been trued up and it would not be desirable to recast the ARRs at this juncture. As much as it is related to the issue of arranging the finance for refund, it is for the DISCOMs to arrange the necessary finance. Once refund of the Consumer Contribution is made by the DISCOMs, the actual amount refunded shall be allowed in the subsequent true up of ARR.

The petitioners are directed to have a meeting with the officers of the Commission within four weeks to sort out the issues relating to the amount of refund etc."

26. Aggrieved by the interim order dated 18.06.2018 passed by DERC, the DISCOMs appealed before the APTEL on the ground that the interim order is issued in the Disposed of Petitions. This application is pending with the Tribunal and no stay has been granted.

27. DERC passed the impugned order dated 05.12.2019 and disposed of the petition no. 01 of 2010, petition no. 02 of 2010 and petition no. 03 of 2010. The operative part of this order reads as under:

"4. In view of the forgoing, following questions has to be decided by the present petition:

I. Whether present proceeding in Petition No. 01,02 & 03 of 2010 are in respect of Petitions disposed of;
II. Whether DISCOMs are liable to pay balance/unspent of consumer contribution in respect of capitalized assets or not;
III. What should be the mechanism for the Respondent DISCOMs to recover the unspent consumer contributions in a situation when such unspent consumer contributions were treated as 'means of finance' for other capital projects.

The Issues have been deliberated in succeeding paragraphs.

Issue No. I

Whether present proceeding in Petition No. 01,02 & 03 of 2010 are in respect of Petitions disposed of.

5. This issue has cropped up because the Respondent Discom has raised the plea before Hon'ble APTEL that the Interim Order dated 18.06.2018 has been issued in the Disposed off

Petition. The aforesaid contention of the Petitioner has been considered in light of the judgements dated 23.02.2015 and 15.05.2017 of Hon'ble APTEL. Vide judgement dated 23.02.2015, Hon'ble APTEL has directed the following:

"The learned Delhi Electricity Regulatory Commission has been considering consumer contribution as means of financing the capital cost. The appellant's contention, that the unutilized portion of the consumer contribution was also used as means of finance for the capital works and accordingly regulated rate base from FY 2002-03 onwards was reduced and consumers got the benefit of lower tariff, has legal force which we accept. If the unutilized consumers contribution has been utilized as means of financing for the tariff orders from FY 2002-03 onwards and corresponding relief has been given to the consumers in terms of retail supply tariffs, then the appellants are entitled to get consequential relief and the said unspent contribution amount be refunded by the appellants as per the Commission's order. The unspent consumers contribution amount may be considered as an expenditure in the future ARR of each of the appellants / DISCOMs. These matters are fit to be remanded giving liberty to appellant's to furnish the accounts showing that the excess amount of consumers contribution has been duly considered in the annual revenue requirements from FY 2002-03 onwards in reducing the retail supply tariffs.

In view of the above, these appeals being Nos. 109, 110 and 111 of 2014 are hereby partly allowed and the common impugned order dated 11.03.2014 passed by the Delhi Electricity Regulatory Commission in Review Petition Nos. 1, 2 & 3 of 2010 is modified to the extent indicated above. The matters are remanded to the learned Delhi Electricity Regulatory Commission giving liberty to the appellant's / DISCOMs to furnish the accounts showing that the excess amount of consumers contribution has been duly considered in the ARRs from FY 2002-03 onwards in reducing the retail supply tariffs. In that situation the Commission is further directed to hear the matter and pass the consequential order as it thinks fit and proper in the facts and circumstances of these matters. No order as to costs"

6 The Commission proceeded as per the directions of the Hon'ble APTEL contained in the judgement dated 23.02.2015 and passed the order whereby the Respondent DiSCOMs have been directed to provide details of unspent consumer contribution which had to be refunded to the respective consumers. In subsequent development, the Respondent DISCOMs approached the Hon'ble APTEL in respect of the letter, of this Commission whereby DISCOM was asked to refund unspent consumer contribution to one of the consumers namely Taj Sats Air Catering Ltd. or otherwise to face action u/S 142 of the Electricity Act, 2003 for non-complying the order of the Commission. The Hon'ble APTEL vide judgement dated 15.05.2017 remanded back the matter to the Commission and directed DERC to follow the instructions given in judgement dated 23.02.2015. Hon'ble APTEL had held the following:

"14.6 that the Commission has failed to consider that the unutilized portion of the consumers contributions, till date, is no longer retained by the Appellants but used in tariff for capital investment financing on en-bloc basis and the benefit of these contributions had therefore been passed on to the consumers through tariff. Further, while determining the ARR of each of the Appellants had the Commission preferred to consider only the portion of the consumers deposits to the extent utilized, instead of utilizing the unutilized portion on a global basis towards financing of capital investment en-bloc, the Appellant would have refunded the unutilized portion of the contribution to the concerned consumer."

7. As may be seen from the aforesaid that the Commission has to examine the submissions made by the Appellant and to give opportunity to the appellants to place their case on merits, and therefore the present petitions No. 01, 02 and 03 of 2010 have been reopened. Therefore, it is not correct to plead that the Commission has issued directions in the disposed of petitions. It is also to be noted that as per the directions of the Hon'ble APTEL, the Respondent DISCOMs had to make submissions for consideration of the Commission, which is possible through the present petition only, moreover, when hearing in the present petition was called for, the Respondent DISCOMs nowhere raised the issue that this is the disposed of petition. Accordingly, through the Interim Order dated18.06.2018 the DISCOMs had been asked to furnish details/submissions.

8. *Therefore, the Interim Order dated 18.06.2018 has been issued in the Petitions, which have been reopened consequent to the remanding back the issue to the Commission by Hon'ble APTEL.*

ISSUE NO. 2

Whether DISCOMs are liable to pay balance/unspent of consumer contribution in respect of capitalized assets or not

9. *From the submissions made by the DISCOMs as well as from the judgement of Hon'ble APTEL dated 23.02.2015 and 15.05.2017 there is no dispute that the balance/unspent consumer contributions in respect of capitalized assets have to be refunded to the respective consumers. This is more because it is an amount paid by the consumer towards capital work which cannot be used for any work other than for which it was paid. The only plea of the DISCOMs is that unspent/balance of consumer contribution of capitalized assets were treated as 'means of finance' for other capital work and therefore, they are left with no such unspent/balance of consumer contribution with them and unless provided in ARR, it will be difficult for DISOMs to refund the same. It was the duty of the DISCOMs to refund the unspent/balance of consumer contribution to the respective consumers after capitalization of assets and thereafter balance of consumer contribution would have been reported to the Commission to be treated as 'means of finance'. This had to be done without any direction from the Commission because keeping the amount from a person and using it for any other purpose without his consent is against the basic principles of Law. Moreover, the DISCOMs had also failed to submit before the Commission the segregated amount of the consumer contribution, one in respect of capitalized assets and other in respect of capital projects in progress.*

10. *Nonetheless, for whatsoever reason, as the unspent of consumer contribution has been considered as means of finance and the plea of the Respondent DISCOMs has been considered that they are not left with the amount of which they have to return/refund to the respective consumers, the issue has been considered in the subsequent para.*

ISSUE No. 3

What should be the mechanism for the Respondent DISCOMs to recover the unspent consumer contributions in a situation when such unspent consumer contributions were treated as 'means of finance' for other capital projects.

11. *Now it has been settled that the Respondent DISCOMs has to refund the unspent of consumer contribution towards the capitalized assets to the respective consumers and also that such amount has been considered as means of finance for other capital work, the issue for deliberation is that how the demand of the Respondent DISCOMs for recasting of previous ARR's be resolved. The facts are very simple that the DSICOMs has to refund the unspent consumer contributions and to get it back in ARR. Whatever amount of consumer contribution is refunded, will be recovered by the DISCOMs through ARR and truing up.*

12. *The Hon'ble APTEL vide Judgement dated 25.05.2017 has given following direction to DERC:*

    "We direct DERC to follow instructions given in this Tribunal's Judgment dated 23.02.2015."

    And whereas Hon'ble APTEL vide judgment dated 23.02.2015 has held that

    "If the Commission has been considering consumer contribution as means of financing the capital cost and if the unutilized consumers contribution has been utilized as means of financing for the tariff orders from FY 2002-03 onwards and corresponding relief has been given to the consumers in terms of retail supply tariffs, then the appellants are entitled to get consequential relief and the ***said unspent contribution amount be refunded by the appellants as per the Commission's order. The unspent consumer's contribution amount may be considered as expenditure in the future ARR of each of the DISCOMs****. These matters are fit to be remanded giving liberty to the appellants to furnish the*

accounts showing that the excess amount of consumer's contribution has been duly considered in the ARRs from FY 2002-03 onwards in reducing the retail supply tariffs. ……

**** **** **** **** **** ****

In that situation the Commission is further directed to hear the matter and pass the consequential order as it thinks fit and proper in the facts and circumstances of these matters."

13. *In compliance to the Hon'ble APTEL's Judgement dated 25.05.2017, and as per the instructions of Hon'ble tribunal judgement dated 23.02.2015, the Commission vide Order dated 24.10.2017 directed the DISCOMs to provide the exact figure of the amount to be refunded to the respective consumers with the date from which it has to be refunded along with the provision of relevant tariff orders in which it was considered as means of finance. The submissions of the DISCOMs that unspent/balance of consumer contribution has been utilized as means of finance and therefore, in the event of refund of such amount, the DISCOMs are entitled for such amount with the consequential relief has also been considered. Accordingly, vide the Interim Order dated 18.06.2018, it was simply directed that:*

"Once refund of the Consumer Contribution is made by the DISCOMs, the actual amount refunded shall be allowed in the subsequent true up of ARR. The petitioners are directed to have a meeting with the officers of the Commission within four weeks to sort out the issues relating to the amount of refund etc."

14. *Against the aforesaid Order dated 18.06.2018, the DISCOMs appealed before the Hon'ble APTEL, which is pending adjudication.*

15. *The only issue which is vehemently contested by the DISCOMs is about treatment and recovery of balance of consumer contribution, in the event of refund to the concerned consumer, as the same had been considered as means of finance in respective ARR and therefore, is no more available*

with them. It is to be understood that in the event of payment of balance of consumer contribution to the concerned consumer, the recovery by the DISCOM can be made through future ARR only. This has also been the observation of Hon'ble APTEL, as already stated in para 11 above. The contention of the DISCOMs that ARR should be re-casted at first before refund of consumer contribution would be meaningless because ultimately they can get the amount only in future tariff and truing up. It would be utterly misconceived and futile exercise to recast the previous ARR's because tariff cannot be modified retrospectively therefore, it would be only an academic exercise with so much complexities and uncertainties and the actual re-imbursement can be done through future ARR only as has been correctly directed by the Hon'ble APTEL. It will be always prudent on part of the Respondent DISCOMs to refund the balance of consumer contribution first and then seek claim of consumer contribution amount with admissible consequential relief in future ARR and truing up.

16. *In the light and spirit of the directions of the Hon'ble APTEL in judgment dated 23.02.2015 that the said unspent contribution amount be refunded by the Petitioner DISCOMs as per the Commission's order and in the event of unspent consumers' contribution utilized as means of financing for the tariff orders from FY 2002-03, the Petitioner DISCOMs are entitled to get consequential relief in the future ARR; it is directed that the Petitioner DISCOMs shall refund the balance of unspent/balance consumer contribution in respect of the capitalized assets to the respective consumers and file claim before this Commission, which will be considered along with admissible consequential relief in future ARR. The directions of the Commission be complied within 2 months."*

28. Aggrieved by the impugned order dated 05.12.2019 passed by the DERC, the BSES Rajdhani Power Ltd., BSES Yamuna Power Ltd. and Tata Power Delhi Distribution Ltd. have filed the present appeals.

Submissions of Appellants / (BRPL and BYPL)

29. Case of the Appellant Discoms is that the Delhi Electricity Regulatory Commission has till date not re-cast the means of finance based on actual consumer contribution capitalized instead of consumer contribution received from FY 2002-03 to FY 2006-07 nor allowed the expenditure on refunding the same as an expense in the ARR. As such it is the Discoms' case that the Commission has acted in violation of:

(a) Order dated 23.02.2015, passed by this Tribunal with the direction on remand to examine the accounts of the Appellant Discoms to find out whether the excess amount of consumers contribution has been duly considered in the ARR from FY 2002-03 onwards in reducing the retail supply tariffs.

(b) Own Order dated 23.12.2015, in terms of which the Commission had directed Appellant Discoms:

(i) To furnish details where the unutilized consumer contribution for assets capitalized were considered as means of finance for other capital schemes of the Appellant Discoms; and

(iii) The said information provided by the Appellant Discoms shall be utilized for passing orders on details of refund of consumer contribution as well as re-casting of previous ARR's in the next Tariff Order.

(c) Full Bench Judgment dated 15.05.2017 of this Tribunal wherein the Full Bench had reiterated the directions as contained in Judgment dated 23.02.2015 passed by the Tribunal.

30. Till date there have been four (4) rounds of litigation before the Tribunal on the same subject matter, including the present Appeals, viz.:

(a) Appeal Nos. 110 and 111 of 2014, filed by Appellant Discoms against Order dated 11.03.2014 passed by the Commission, which was disposed of by this Tribunal by Judgment dated 23.02.2015, remanding the matter *inter-alia* with a direction to Commission to hear Appellant Discoms and pass consequential Orders.

(b) Appeal Nos. 103 and 104 of 2017 against the Communication/Direction/Order dated 12.01.2017 issued by the Commission, wherein the Full Bench of this Tribunal allowed the Appeals of Appellant Discoms *inter-alia* with a direction to the Commission to implement the Tribunal's Judgment dated 23.02.2015.

(c) Appeal No. 05 and 06 of 2019 against the Order dated 18.06.2018 passed by the Commission, which is pending adjudication before this Tribunal.

(d) Appeal No. 34 of 2020 wherein Appellant Discoms have challenged the Final Order dated 05.12.2019 which is again pending adjudication before the Tribunal.

31. Appellant Discoms in the Appeals have sought following directions from this Tribunal against the Commission:

(a) Set aside the Impugned Orders dated 18.06.2018 and 05.12.2019.

(b) To re-cast the ARRs of Appellant Discoms insofar as it pertains

to the treatment of Consumer Contribution in Capitalization until all consequential adjustments, and.

(c) To provide for the funding of all Consumer Contribution refunds in the next ARR before the refunds are directed to be made to the concerned consumers.

32. Appellant Discoms have raised the following Questions of Law for this Tribunals kind consideration:

A. Whether Commission has acted in contravention of the orders dated 23.02.2015 and 23.12.2015, wherein it was held that Appellant Discoms are entitled to get consequential relief by means of re-casting the previous ARR's and providing for the expenditure on refunds as an expense in the future ARR's?

B. Whether Commission by Orders dated 18.06.2018 and 05.12.2019 re-opened issues which had been decided by this Tribunal in its judgement dated 15.05.2017?

I. Impugned proceedings in Petition No. 01 and 02 of 2010 are in respect of petitions already disposed of.

33. Undisputably, the Commission has disposed of the Petitions three times. First time, Petitions were disposed of on 23.12.2015. Thereafter by Order dated 18.06.2018 (referred to as the Interim Order). Lastly by Order dated 05.12.2019 for the third time.

34. Commission had to only implement Order dated 23.02.2015, which so understood by the Commission on 23.12.2015. However, by

Communication dated 12.01.2017 had again directed refund of the consumer contribution without either recasting the means of finance or providing for the expenditure on refund as an expense in the future ARR. The Full Bench of this Tribunal in Judgment dated 15.05.2017 was pleased to set aside Communication dated 12.01.2017, with a categorical direction to Commission to follow the instructions given by the Tribunal in the Order dated 23.02.2015.

II. Impugned Orders vitiate Hon'ble Tribunal's earlier Orders dated 23.02.2015 and 15.05.2017 and are also contrary to Commission's Own Order dated 23.12.2015.

35. Commission by Impugned Orders has completely set at naught the Tribunal's judgements/orders dated 23.02.2015 and 15.05.2017 and has acted contrary to its own order dated 23.12.2015 by directing the Appellant Discoms to refund the unspent/balance consumer contribution and file a claim Petition.

36. By Order dated 23.02.2015, clear instructions of remand were issued by this Tribunal to examine the accounts of the Appellants to find out whether the excess amount of consumers contribution has been duly considered in the ARR from FY 2002-03 onwards in reducing the retail supply tariffs.

37. Pursuant to the remand by this Tribunal, the Commission by Order dated 23.12.2015, had:

(a) Categorically recorded that it shall pass consequential orders and regarding the recasting of the ARR for previous years.

(b) Directed the Appellant Discoms to furnish details where the unutilized consumer contribution for assets capitalized were considered as means of finance for other capital schemes and the said information provided by the Appellant Discoms shall be utilized for passing orders on details of refund of consumer contribution as well as re-casting of previous ARR's in the next Tariff Order

38. On 07.03.2016, Appellant Discoms in compliance with the aforesaid Order, had submitted consumer-wise details in respect of amounts refundable against schemes completed upto FY 2014-15 in cases where the deposits were received upto FY 2011-12 along with single line item of the total amount refundable for the scheme, where deposits were received after FY 2011-12.

39. However, Commission by Communication dated 12.01.2017 in disregard of this Tribunal's direction in 23.02.2015 as well as its own Order dated 23.12.2015 directed:

(a) Appellants to refund the balance amount of consumer contribution to the respective consumers; and
(b) That any failure to comply with the same would attract action under section 142 of the Electricity Act, 2003;

40. Full Bench of this Tribunal by Judgment dated 15.05.2017, was pleased to set aside the Communication dated 15.05.2017 and that "*In view of our above conclusion, the Appeals are allowed, and the impugned Order letter dated 12.01.2017 is set aside. The Appeal*

Nos. 103 of 2017, 104 of 2017 and IA Nos. 303 of 2017, 304 of 2017 are disposed of with no cost. We direct DERC to follow instructions given in this Tribunal's Judgment dated 23.02.2015"

41. The Civil Appeal filed by the Commission against the Full Bench Judgment has also been dismissed by the Hon'ble Supreme Court by Order dated 03.10.2017 Hence, this Tribunal judgment dated 15.05.2017 has attained finality. The stand of the Commission has been that the DISCOM must first refund the consumer contribution and the means of finance in the ARR would be re-casted later. This specific stand has been rejected by this Tribunal in its Judgment dated 15.05.2017.

42. In view of the above, the Commission has to implement the order dated 23.02.2015 which was confirmed by the Full Bench of this Tribunal in Judgment dated 15.05.2017.

III. Direction to refund the consumer contribution to consumers without providing for an upfront equivalent adjustment in tariff

43. Direction to refund the consumer contribution to consumers without providing for an upfront equivalent adjustment in tariff and/or means of finance causes extreme prejudice to the Appellant Discoms. Commission has to take notice of the fact that:

(a) As per directions of the Commission itself, Discoms have already spent the unspent/ balance amounts towards capitalization of other schemes and the benefit of the same has been passed on the consumers at large.

(b) As such the direction of refund of unspent/balance consumer contribution without providing for an upfront equivalent adjustment in tariff and recasting the means of finance, would result in Discoms incurring liability twice over which will adversely affect the already precarious financial position of Discoms.

(c) The records will show that for the years, FY 2002-02 to 2006-07, the Commission took into account the total consumer contribution (whether spent or unspent) as a means of finance. Whereas for the years FY 2007-08 to 2011-12, the Commission considered only the unspent consumer contribution as a means of finance.

(d) By requiring the Discoms to refund the same, effectively, for the years, FY 2002-03 to FY 2006-07, the Discoms will be spending the same amount *three times* over and for the years FY 2007-08 to FY 2011-12, the Discoms would be spending the same amount *two times* over.

44. Appellant Discoms by Letter dated 26.11.2009 had already clarified to the Commission that the consumer contribution was being used on a global basis, the benefit of which was being given to the other consumers, as under:

"The whole of the consumer contribution received by the Company has been utilized fully by the Hon'ble Commission on global basis towards financing of capital investment and the benefit of these contributions has therefore been entirely passed on to the consumers through tariff…."

45. Commission despite being aware of the fact that:

(a) Appellant Discoms have already utilized the unspent portions of consumer contribution under the directions of the Commission but still it directed the Appellant Discoms to refund the balance amounts when there is no unspent/balance amount left with the Appellant Discoms. As such the direction of the Commission to refund the unspent consumer contribution utilized as means of financing for the Tariff Orders from FY 2002-03 without recasting of the previous year's ARR is wholly untenable and against the well-established principle of *lex non cogit ad impossibilia.* Catena of judgements of the Hon'ble Supreme Court have held that the act of the Court cannot compel a man to do something which is not possible. *(Employees State Insurance Corporation and Ors. v. Jardine Henderson Staff Association and Ors.,* (2006) 6 SCC 581)

(b) After considering the unspent portion of the consumer contribution in the consequent Tariff Orders towards means of finance, cannot now claim ignorance of the practice adopted by the Appellant Discoms, which were also approved by the Commission including in its various Tariff Orders. This violates the doctrines of reasonableness, proportionality, and the maxim, *"actus curiae neminem gravabit"* i.e., an act of Court shall prejudice no one.

46. In the event the Appellant Discoms are directed to refund the consumer contribution to consumers, then an equivalent adjustment in tariff ought to be made upfront on the same premise as any other

expense in the ARR like power purchase, O&M, RoE, etc which are all given on a predictive basis at the beginning of the year and then trued up. The same is on account of the fact that since the benefit has passed on the consumers at large, in the event, the Appellant Discoms are asked to refund unspent consumer contribution, it will result in the Appellant Discoms incurring the liability twice/thrice over which will adversely affect the already precarious financial position of the Appellant Discoms.

Submissions of Appellant / TPDDL

47. On 23.02.2015, this Tribunal in Appeal Nos. 109, 110 and 111 of 2014, while considering that the unutilized consumers contribution has been utilized as a means of financing of CAPEX for the tariff orders from FY 2002-03 onwards and corresponding relief in the form of lower tariffs, has been given to the consumers gave the following effective directions:

(i) Appellants are entitled to get consequential relief;
(ii) Unspent Consumer Contribution amount is required to be refunded by the Appellants as per Commission's Order; AND
(iii) Unspent Consumer Contribution amount may be considered as an expenditure in the future ARRs of each of the Appellants/ DISCOMs.

48. The aforesaid directions have two main facets inextricably linked to the refund of unspent amounts to the concerned consumers:

(i) consequential accounting treatment to be carried out in the relevant year, i.e. the accounting years in respect of which, the unspent amounts are to be refunded to consumers. Therefore,

this accounting correction has to be undertaken retrospectively in the ARRs of the "relevant years"; AND

(ii) making the cash available to the Appellants, for giving effect to the aforesaid correction of the accounts in the relevant years as above and for enabling refund to the consumers. This availability of cash has to be undertaken prospectively in future ARR and not True up stage. Modes of such ARR funding have been recommended by the Appellants in the current note.

49. The key issue is that the consequential relief to be provided to the Appellant is nothing else but correcting the accounting treatment of the said amounts, retrospectively, in the "relevant years" as explained hereinbelow.

50. Every Capital Expenditure entitles the Appellant to the following treatment in the ARR of the "relevant year" i.e. the accounting year for which the said capex has been incurred:

(i) Normative Debt-Equity Ratio (70:30) to be applied to such amount, in the Relevant Year;

(ii) Interest on debt component (70%) to be given as part of the ARR;

(iii) Return on Equity along on net of tax basis, with applicable income tax, on the equity component (30%) to be given as part of the ARR; and

(iv) Depreciation on such amount. Depreciation, in accounting principles, is a "Return OF Capital" (not to be confused with

return ON capital/equity) and the Appellants are entitled to such return of the capital amount expended by them.

51. When the consumer contribution was used as means of financing capital expenditure (Capex) in the relevant year, this source of financing was effectively “free money” and therefore, such free money was, correctly, not subjected to the usual accounting treatment as above, i.e. no interest, return on equity along with income tax or depreciation was provided on such “free money”.

52. Now, when the unspent consumer contribution that was earlier in the relevant year, treated as financing for Capex, is to be refunded to the relevant consumer, then the obvious sequitur is that in the relevant year, the accounting treatment too has to be changed. This is not a cash issue but an accounting issue. Therefore, the so called “free money” that was available in the relevant year, has now, retrospectively, in the ARR and accounts for such relevant year, to be replaced by capital financed by Appellants, i.e. as having been financed by Appellants and no longer “free money”. The immediate consequential actions to be taken, therefore, are that *in the relevant years*, the free money (unspent consumer contribution) is to be *replaced by* money representing Appellants financing of Capex, i.e. money contributed by Appellants and not free money from consumers. Therefore, the Appellants contribution has to be provided the usual accounting treatment, *in the “relevant years”* and given the interest, return on equity along with income tax and depreciation identical to the other financing of Capex undertaken by Appellants through its own sources in the normal course.

53. The key point to be reiterated is that this accounting treatment and providing consequential relief to Appellants in the form of interest, return on equity along with income tax and depreciation, is to be undertaken in respect of the "relevant years", retrospectively, such that the Appellants are put into the same economic position, as though the consumer contribution had never been used for Capex, rather the Capex was incurred using Appellant's own source of financing.

54. Once this accounting anomaly is rectified, and the aggregate amounts to be compensated to the Appellant (i.e. including the interest, RoE along with income tax and depreciation) are arithmetically and in accounting terms, determined, then such amounts need to be made available to the Appellant in cash, to allow the Appellant the necessary cash to be able to repay the concerned consumers. This is a prospective exercise to be dealt with in future ARRs.

55. The amounts so determined applying the above accounting treatment, are all in the context of and to be determined with reference to the "relevant years". Ordinarily and in the usual course, the Appellant would have recovered such amounts in the relevant year of the ARRs itself, in the form of tariff. However, now that the cash amounts equivalent to such amounts will be made available to the Appellants in the next ARR, the Appellant is also entitled to carrying cost on such amounts for the period starting from the "relevant years" when the Appellant was entitled to such amounts, till such time the same are compensated in cash to the Appellant in future ARR.

56. In the relevant years, the Consumer Contribution was a means of financing capital expenditure. However, being “free-money”, the consumer contribution was correctly not given the Interest, Return on Equity along with income tax and Depreciation which would have been available to Appellants contributions for financing such Capex, as mentioned hereinabove.

57. If the unspent Consumer Contribution is required to be refunded, the appropriate treatment would be to re-cast the ARRs and accounts, in the “relevant years”, to replace the “free-money” (unspent consumer contribution) by Appellant’s contribution for financing the Capital Expenditure. Consequently, the said Appellant’s contribution will be entitled to Interest, Return on Equity along with income tax and Depreciation.

58. The distinction between Capex and revenue expenditure is significant because unless the amount is shown as Capital Expenditure financed by the Appellant in the “relevant years”, the reimbursement to be allowed on cash basis in the future ARRs would be treated as revenue receipt in the hands of the Appellant, thus distorting the accounts and creating several anomalous situations. One example is that the Appellant would be liable to pay income tax on the entirety of such amounts reimbursed to it in future ARRs, as these would not be classified as Capex. Ordinarily, no income tax is payable on the components of interest (representing interest payable to banks and financial institutions), RoE and depreciation as these are all in the nature of Capex. It is re iterated that the correct accounting treatment, as already explained in detail hereinabove, must ensure that the said amounts to be reimbursed to the Appellant in future ARRs, must be recognised as Capex in the

"relevant years". This is what this Tribunal meant by allowing consequential relief to the Appellant, which the Commission is choosing to ignore and/or misinterpret.

59. Therefore, the correct accounting treatment to ensure that the consequential relief, as contemplated in this Tribunal's order dated 23.02.2015, in Appeal Nos. 109, 110 and 111 of 2014, must be as following:

(i) The amount to be refunded to the consumers must be shown as Capital Expenditure financed by the Appellant in the "relevant years";

(ii) Thus, the Appellant is entitled to Interest, Return on Equity along with income tax and Depreciation, in the relevant years;

(iv) As such, if this amount is provided to the Appellant in future ARRs on cash basis, the carrying cost on the aforementioned elements is required to be provided to the Appellant from date of accrual in the "relevant years" till the date such cash is made available to the Appellant.

60. The Commission vide the impugned Order dated 05.12.2019, directed as under:

"16. …….it is directed that the Petitioner DISCOMs shall refund the balance of unspent/balance consumer contribution in respect of the capitalized assets to the respective consumers and file claim before this Commission, which will be considered along with admissible consequential relief in future ARR. The directions of the Commission be complied within 2 months."

A perusal of the above makes it clear that the Commission is wrongfully confusing the consequential relief (accounting treatment) and the making of the consequential cash available, by stating that the consequential relief will be considered in the future ARRs. This is an erroneous understanding and interpretation of this Tribunal's order dated 23.02.2015, in Appeal Nos. 109, 110 and 111 of 2014.

In the circumstances, the actions to be taken by the Commission are sequential, and are explained in detail in para III below.

61. Verification of Data and quantification of Amounts to be reimbursed to Appellant

(i) This Tribunal may direct the Appellant to furnish the requisite information in the format specified by the Commission, within a period of two weeks from the date of passing of the Order by this Tribunal. The data thus furnished shall be supported by a certificate from the statutory auditor of the Appellant and such data shall consequently be taken as verified.

(ii) Upon receipt of the aforesaid information, based on the statutory auditor's certification, the Commission shall determine the aggregate as well as consumer wise amounts to be refunded to each consumer and pass an order to this effect accordingly. It be clarified that such amounts to be refunded to the consumers shall include interest calculated @ 12% p.a in accordance with order dated 11.03.2014 of the Commission, and such interest shall accrue till the date the refund is effected to the respective consumer. These amounts shall be refunded to the consumers by the Appellant within a period of one year of the date of this order/date of order to be

passed by the Commission. The suggestion proposed by the Commission in it's note submitted to this Tribunal requiring the Appellant to submit certification on joint affidavit (by CFO and consumer receiving refund) is unworkable and unnecessarily intrusive. The certification to be provided by the Appellant's auditor affidavit/confirmation from beneficiary consumer carries weight and must be taken at face value, especially since it is precisely this exercise of verification that has been one of the factors that has contributed to the inordinate delays.

(iii) The aggregate and customer wise itemised amounts to be refunded to consumers together with interest, as determined in Para III(a)(ii) above, shall be the amounts that will be required to be re-imbursed to the Appellant, in the manner set out in Para III(b) below (hereinafter "Entitled Amount"). For the avoidance of doubt, the Entitled Amount shall include the interest that accrues and is actually paid to the concerned consumer upto the date of refund to the said concerned consumer.

(iv) In addition to the re-imbursement of the Entitled Amount determined in accordance with Para III(a)(iii) above, the Appellant shall also be entitled to the cost of capital, which shall be the aggregate of the components specified hereinbelow i.e. interest, RoE along with income tax and depreciation ("Cost of Capital"). The aggregate Entitled Amount shall be treated as additional capitalisation in the respective years in which the said amounts were received by the Appellant from the consumers ("Additional Capitalisation"). The Appellant shall be entitled to the following components on

such Additional Capitalisation, and the aggregate of these components shall be the Cost of Capital:

(1) The Additional Capitalisation shall be treated as having been financed by the Appellant, in the debt: equity ratio of 70:30;

(2) The Appellant shall be entitled to interest on the debt component and return on equity along with income tax on the equity component, each at the rates prescribed for the same in the DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007 ("Retail Supply Tariff Regulations");

(3) The amounts so determined shall be deemed to have become due and payable to the Appellant as on the respective Relevant Dates;

(4) The Appellant shall be entitled to depreciation on the amounts determined in para III(a)(iv)(3) above, such depreciation is to be determined in accordance with Regulation 5 of the Retail Supply Tariff Regulations. The amounts so determined shall be deemed to have become due and payable to the Appellant as in the "relevant years" ("Depreciation Due Date");

(5) The Appellant shall be entitled to carrying cost on the amounts determined in terms of this Para III(a)(iv)(1) to (4) above calculated at carrying cost rate in force as determined by the Commission in the last Tariff

order/Applicable Tariff Regulations from the respective Relevant Date till such time the said amounts are reimbursed to the Appellant in accordance with Para III(b) below;

62. Refund of amounts

(i) The Appellant shall be entitled to re-imbursement of the aggregate Entitled amounts determined in accordance with Para III(a) above including the Cost of Capital, depreciation and carrying cost ("Reimbursable Amount"). The reimbursement shall be effected in the manner set out hereinafter.

(ii) In order to prevent an immediate tariff shock to consumers, the Reimbursable Amount shall be added to the current existing Regulatory Asset outstanding for each respective Appellant. However, the Reimbursable Amount component of the Regulatory Asset shall be amortised in equal annual instalments and liquidated by the Commission in priority, over a period of not more than 3 years.

(iii) The process of re-imbursement of the reimbursable amount may be subjected to the following conditions:

(1) To ensure transparency, accounting and accountability, the Reimbursable Amount will be allowed to be recovered as a separate surcharge below the line (and not merged as part of the ARR), similar to the accounting and regulatory treatment that is being followed by the Commission for Pension Trust Surcharge etc.

(2) The refunds to the consumers will be effected by crediting the refundable amount to the Consumer's Ledger Account which will reflect in the subsequent bills of the concerned consumers under a written intimation to the consumers.

63. Exceptional Cases: In the event there are certain consumers:

(i) *Disputes*: In case of dispute with a consumer relating to the amount to be refunded, the Appellant should be entitled to account for the higher amount claimed by consumer for the purposes of determination of Entitled Amount, and in case of any settlement with consumer for a lower amount, the amount saved should be adjusted later to reduce the Entitled Amount. Alternatively, the Appellant may be allowed to just pay the higher amount and close the issue with such consumer.

(ii) *Government Agencies*: Wherever there is a demand by the governmental agencies (namely DDA/MCD/ PWD etc), the same have to be dealt with separately considering they have a running account with the Appellant DISCOMs, which includes payments towards the invoices raised for their electricity consumption, deposit schemes and towards the license fee etc. Therefore, the adjustments cannot be just only towards the consumer contribution but in its entirety, including the adjustments towards the licence fee dues etc and towards their pending dues (if any) towards the aforesaid schemes.

(iii) *Untraceable Consumers*: In case of untraceable consumers, the amounts to be refunded would be treated as no longer to be refunded and the Appellant should be entitled to treat such

account as closed. For the avoidance of doubt, if at any time in the future such untraceable consumer makes a claim, then such claim will be dealt with in accordance with law and amounts, if any, are then refunded to such consumer, then such amounts shall be treated as Entitled Amount as per this order.

(iv) *Deficit in Contribution*: In cases where the Deposit Work cost incurred by the Appellant has been more than the payment made by the consumers or the consumer has refused to pay the balance amounts, if any for such scheme, then the Appellant shall be entitled to treat the accounts with such consumer as closed and the unrecovered amount from such consumer shall be treated as Entitled Amount and dealt with in accordance with this order.

Submissions of DERC

64. That the answering Respondent, the State Commission is a statutory authority constituted under Section 82 of the Electricity Act, 2003 [hereinafter "the Act"]. The functions of the State Commission are enumerated under Section 86 of the Act and Section 86(1)(a) specifically states that it is the function of the State Commission to 'determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State'; Section 86(1)(b) makes it the function of the State Commission to regulate electricity purchase, procurement, distribution including the price of the same within the State; Further, Section 86(1)(f) of the Act gives the State Commission the power to

‘adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration’. Furthermore, Section 181 of the Act confers on the State Commission the power to make ‘regulations consistent with this Act and the rules generally to carry out the provisions of this Act.’

65. The Appellant's are essentially challenging the order of the Commission directing them to refund portions of their Consumer contribution that remained unspent. It is submitted that in accordance with the judgment of this Tribunal, the Respondent Commission has noted that any amount so refunded that had been utilized as means of finance for capital projects and not accounted for in the Aggregate Revenue Requirement (ARR) of the Appellant's would be adjusted in future ARR's. It is therefore important to appreciate the background of the dispute.

66. Distribution Licensees (DISCOMs) in Delhi have to undertake various projects/schemes which involves capital outlay with or without Consumer Contribution. There are mainly three types of projects/ schemes undertaken by the DISCOMS, which are:

i. Projects/Schemes with the Government Grants (Normally not refundable/repayable).

ii. Projects/ Schemes with 100 % share by Consumers without any contribution by DISCOMS.

iii. Projects/ Schemes with certain share i.e.u pto 50% of Cost by Consumer Contribution/Government Grants. The balance is to be arranged by the DISCOM to the extent of its share.

67. The methodology adopted by DISCOMS in these cases is that the DISCOM finalizes the projects, estimates the costs and intimates the amount of consumer contribution to the respective consumers, in case of (ii) and (iii) above. The Consumer deposits its intimated share in advance based on express/ implied contract. The DISCOM undertakes the projects/ schemes, which could be completed in one or more accounting periods. Electrical Inspector is expected to issue the certificate of completion for these projects. While there are no issues involved in the cases at (i) above, the projects/ schemes at (ii) and (iii) above require a separate treatment.

68. It is submitted that the utilization of collected consumer contribution for capital works as part of Means of Finance for meeting the ARR for respective DISCOMS for various financial years had only been allowed by the Answering Respondent on the condition that it be utilized specifically for that particular purpose, in that financial year, under the assumption that it is at best a resource item to meet expenses related to that year. Any additional amount which has been left over is required to be returned since the terms of the license only allow the consumer contribution to be collected for a specific purpose.

69. It is submitted that the funds owed to specific consumers for its specific scheme cannot be used for any other scheme by any commercial undertaking. By collecting contribution from new consumers for the future projects/ schemes, the Appellants now cannot say it has met its own contribution with reduced interest. The Appellants are expected to generate fresh contribution of its own

share.

70. The present Appellants approached this Tribunal against the direction for refund as well as the decision of the Respondent Commission to not consider the utilization of unspent consumer contributions as means of finance on a global basis. The Tribunal vide its judgment dated 23.2.2015 decided the issue partly in favour of the Appellants herein and decided as follows:

> "If the unutilized consumers contribution has been utilized as means of financing for the tariff orders from FY 2002-03 onwards and corresponding relief has been given to the consumers in terms of retail supply tariffs, then the appellants are entitled to get consequential relief and the said unspent contribution amount be refunded by the appellants as per the Commission's order. The unspent consumers contribution amount may be considered as an expenditure in the future ARR of each of the appellants / DISCOMs. These matters are fit to be remanded giving liberty to appellant's to furnish the accounts showing that the excess amount of consumers contribution has been duly considered in the annual revenue requirements from FY 2002-03 onwards in reducing the retail supply tariffs." [Emphasis Supplied]

71. APTEL vide its judgment dated 23/02/2015 has ruled that if unutilized consumer contribution has been utilized· as means of financing from Tariff Order FY 2003 onwards then the DISCOMs are entitled to get consequential relief and the unspent contribution amount has to be

refunded by the DISCOM as per the Commission's Order. The unspent consumer contribution may be considered as expenditure in future ARR of DISCOMs. Based on the said APTEL Judgment, the Commission in its Order dated 05/12/2019 directed the DISCOMs to refund the balance of unspent consumer contribution and file their claim before the Commission which will be considered along with admissible consequential relief.

72. The impugned order of the Respondent Commission is fully in consonance with this Tribunal's decision dated 23.02.2015. It is therefore apparent that there is no occasion for the Appellants to seek judicial review of the direction to refund the excess consumer contributions because the same has already been decided by this Tribunal and is now settled law. However, the principle contentions raised by the Appellants are rebutted in the following paragraphs. The Respondent Commission reserves its right to file a detailed para-wise reply if required.

73. The Appellants have broadly raised the following three contentions:-

a. That the impugned order has been passed in respect of petitions already disposed of.
b. Whether the Discoms are liable to pay balance unspent of consumer contribution in respect of capitalized asset or not.
c. The mechanism of recovery of unspent consumer contributions in a situation when such unspent contributions were treated as a "means of finance" for other capital projects.

A. That the impugned order has been passed in respect of petitions already disposed of.

74. The submissions of the Appellants that the impugned order has been passed in respect of petitions, which have been disposed or have attained finality are bereft of any merit and are required to be rejected at the threshold. It is submitted that the Appellants are failing to appreciate that the fundamental finding of this Tribunal vide its judgment dated 23.02.2015 was that the Appellant's were required to refund the unspent consumer contribution. In fact this Tribunal held as follows:

"….If the said contention of the appellants is true and correct then the unspent consumer contribution with interest to be refunded by the Appellants…." [Emphasis Supplied]

75. It is therefore submitted that even if the best case of the Appellants is accepted, they were required to refund the unspent consumer contribution along with interest. It is only pursuant to the refund that the issue of consequential relief was to be considered. Furthermore, the Tribunal had on 23.02.2015 remanded the matter to the Commission and therefore the said issue was clearly alive and required the Commission to apply its mind.

76. Similarly, this Tribunal vide its order dated 15.05.2017 again directed that the Commission give an opportunity to the Appellants to place their case on merits. It is submitted that a hearing on merits cannot be done if a matter is 'disposed of' and therefore the submissions of the Appellant are contrary to the record.

77. It is apparent that this petition is just another attempt by the Appellants to escape the categorical findings of this Tribunal that they have to refund excess consumer contribution to the Consumers by raising frivolous and technical objections, such as their desire to have trued-up ARR's recast. It is submitted that the Commission has in all its orders post the decision of this Tribunal dated 23.2.2015 stated that it would adjust the amounts refunded in future ARR's subject to the Appellant's establishing that these amounts were used as means of finance for capital asset creation and benefit has been passed to the general consumer of its licensed area through reduced tariff. It is submitted that this Tribunal has also held that the Appellant's are entitled to the expenses in 'future ARR's', it is therefore unclear as to why the Appellant's have for more than five years of the direction of this Tribunal to make the refund and claim expenses, failed to make any refund.

78. The Appellants are filing these litigations to only prolong the implementation of this Tribunal's judgment dated 23.02.2015 and somehow escape the refunds through an attempt at judicial obfuscation of facts. It is submitted that such practices are required to be deprecated by this Tribunal and the Appellants be directed to complete the pending refunds and claim consequential reliefs in their subsequent ARR's as directed by this Tribunal.

B. Whether the Discoms are liable to pay balance unspent of consumer contribution in respect of capitalized asset or not.

79. The Appellants contentions in regard to this ground betray the true intention of the present proceedings. It is submitted that post the decision of this Tribunal dated 23.02.2015, wherein the Tribunal held that, '…*the unspent consumer contribution with interest to be refunded by the Appellants*..' the issue of refund is no longer *res integra.*

80. The Appellants accepted the finality of the decision of this Tribunal dated 23.02.2015, they have also accepted the order of the Respondent Commission, dated 23.12.2015. A bare perusal of the order dated 23.12.2015 would indicate that the Appellants are recorded as having accepted their obligation to refund. The relevant portion of the said order reads as follows:

"***It is an admitted fact by the Petitioners that there is no dispute about refund of balance of consumer contribution*** *and there is only one issue about re-casting of means of finance in respective ARRs."* [Emphasis Supplied]

81. The Appellants to now assail the principal of refund itself, and that too five years after the issue was settled by this Tribunal, reeks of malafides and is further proof of the true intentions of the Appellants, which is to frustrate the decision of this Tribunal and not refund the necessary amounts.

82. The Appellants assertion that they haven't been provided 'consequential relief' is also baseless. It is submitted that the Commission has never denied the fact that in the event the

Appellants establish that the unspent consumer contribution was utilized to capitalize other assets and the same resulted in any under recovery in the ARR, it would have to be expensed in the future ARR's of the Appellants. It is submitted that this is what was held by the Tribunal in its decision dated 23.02.2015 and the Commission has at every step agreed to do this exercise.

83. However, the Appellants are not cooperating in as much they seem to interpret the word, 'consequential' in a manner wholly alien to what it means. It is submitted that the word, 'consequential' as per the Oxford dictionary means an adjective that means 'following as a result or effect'. Therefore, for any consequential relief to accrue to the Appellants, the same would have to necessarily follow a result or effect, which in the present factual matrix would be the resultant refund that the Appellants are required to issue in terms of the final judgment and order of this Tribunal, dated 23.02.2015.

84. It is humbly submitted that the issue of a consequential relief does not arise at all, when the Appellants have not initiated the refund as directed by this Tribunal over five years ago. It is submitted that the Appellants are only engaged in dilatory tactics and attempting to use legal process as a mechanism to frustrate the implementation of a settled judgment.

85. It is therefore submitted that this Tribunal should recognize that this ground raised by the Appellants is nothing but an attempt to reagitate an issue that has been settled by a final judgment of this Tribunal and the same is wholly impermissible.

C. The mechanism of recovery of unspent consumer contributions in a situation when such unspent contributions were treated as a “means of finance” for other capital projects.

86. It is humbly submitted that the Appellants contentions in this Ground seem to again be an attempt to review the decision of this Tribunal dated 23.02.2015 and fail to even comprehend the true scope and import of either the order dated 23.02.2015 or the impugned order.

87. It is reiterated that the issue of refund has been settled by this Tribunal and has been expressly accepted by the Appellants as recorded in the order dated 23.12.2015. It is further submitted that the Appellants are entitled to consequential relief after due verification of their stand and the same is required to be allowed to the Appellants as expenses in their future ARRs.

88. It is submitted that the decision of this Tribunal, dated 23.02.2015 categorically states that the expenses can only be recovered by the Appellants in future ARRs. It is therefore difficult to comprehend, what the true purport of the argument of the Appellants actually is.

89. It is submitted that no prejudice is being caused to them, if they are allowed to recover the amount so spent on capital expenditure in future ARRs. Therefore, the argument that an act of Court is now prejudicing them is wholly unsustainable, given the fact that the Appellants have accepted the decision, dated 23.02.2015 and the same has attained finality.

90. It is further submitted that the Appellants assertion that the directions of the Commission are impossible to perform have no legal tenability. It is submitted that the direction for refund stems from the unspent consumer contributions that the Appellants were in any event contractually required to refund. Furthermore, the requirement for refund has been upheld by this Tribunal vide its decision dated, 23.02.2015. It is submitted that financial inability is not a legal ground to fail to comply with a decision of a Court of law.

91. It is further submitted that the impugned order itself takes cognizance of the requirement of the Appellants to have the expenses recovered in future ARRs. In fact, the impugned order notes that the only way for the Appellants to recover the requisite amounts is through future tariffs. The relevant portion of the impugned order is extracted herewith:

> "*The contention of the DISCOMs that ARR should be re-casted at first before refund of consumer contribution would be meaningless because ultimately they can get the amount only in the future tariff and truing up. It would be utterly misconceived and futile exercise to recast the previous ARR's because tariff cannot be modified retrospectively therefore, it would be only an academic exercise with so much complexities and uncertainties and the actual re-imbursement can be done through future ARR only as has been correctly directed by the APTEL.*

92. It is therefore humbly submitted that the Respondent Commission has only implemented the directions of this Tribunal and is well cognizant of the fact that the Appellants may be entitled to consequential relief. However, the Appellants are attempting to escape their liabilities that have fructified and become final after the decision of this Tribunal. It is submitted that the Appellant's cannot be allowed to reagitate the issue of refund of consumer contribution again and again and to delay the implementation of the judgment of this Tribunal.

93. In light of the submissions made hereinabove in reply it is submitted that the present Appeal of the Appellants are devoid of any merits and it is prayed that the same be dismissed by this Tribunal with costs.

Note on procedure for refund of consumer contribution submitted by DERC

94. In para 18 of the judgment of thisTribunal in Appeal No. 109, 110 and 111 of 2014 dated 23.02.2015, it has been held as follow:

"*if the unutilized Consumers Contribution has been utilized as means of financing for the tariff orders from FY 2002-03 onwards and corresponding relief has been given to the consumers in terms of retail supply tariffs, then the appellants are entitled to get consequential relief and the said unspent contribution amount be refunded by the appellants as per the*

Commission's Order. The unspent Consumers Contribution amount may be considered as an expenditure in the future ARR of each of the appellants/DISCOMs."

95. The Commission will comply with the judgment of the APTEL dated 23.02.2015 and requests that it may be a given a suitable time frame to do the same after implementing the procedure as outlined in Paragraphs 3 to 5 below to verify the amounts of refund. It is submitted that a large number of officials and staff of the Commission are presently COVID -19 positive, which is impacting the work of the Commission.

96. The Commission will call upon the DISCOMs to furnish data in a specified format within one week of the passing of the order by this Tribunal. The data, *inter alia*, would consist of an Auditor Certificate clearly stating the Consumer wise Consumer Contribution received every year, spent during every year on Capital Investment activities (showing the break-up of assets capitalised and amount lying in WIP), balance at the end of every year and total for all consumers matching with Balance Sheet, Relevant Schedules and Tariff Orders. The DISCOMs shall submit this data within a period of two weeks thereafter.

97. The Commission, thereafter, in compliance with the judgment dated 23.02.2015 will consider the information submitted by the DISCOMs and will provide the unspent Consumer Contribution to be refunded by the DISCOMs as an expenditure in the subsequent Tariff Order as directed by the Tribunal, which will be recovered through Tariff and will thereafter be refunded to the identified consumers by DISCOMs within the same Financial Year.

98. Thereafter, the DISCOMs on completion of the refunds will provide the details of the same along-with the certification indicating that it is full and final settlement on affidavit jointly signed by such consumer and Chief Finance Officer (CFO) of the respective DISCOM further indicating the amount refunded to the consumer and the year it was pertaining to.

Response on behalf of the Appellant Discoms to the Note submitted by DERC on procedure for refund of consumer contribution

99. The fundamental and glaring omission in the Note submitted by the Commission pertains to the re-casting of the past years ARR's for the period FY 2002-03 onwards. The Note is completely silent on this aspect. In this regard it is submitted, inter alia, that: -

(i) At no point of time has the Commission, in the past, ever even suggested that the re-casting of the past years ARR's is not needed to be done.

(ii) On the other hand, the Commission has in its Order dated 23.12.20151 (on remand from the Judgment dt 23.02.2015) expressly stated as under: -

"… This information will be utilised for passing Orders on details of refund of consumer contribution as well as re-casting of previous ARR's in the next Tariff Orders….."

(iii) Even in the Tariff Order dated 28.03.20182, the Commission had, inter alia held, as under:

"*Therefore, the Commission will finalise the means of finance based on each year final value of capitalisation including the dispute related to utilisation of consumer contribution during policy direction period.*"

(iv) It is only in the Impugned Order dated 18.06.2018 that the Commission held that "…*it would not be desirable to recast the ARR's at this juncture*…" and in the Impugned Order dated 05.12.2019, the Commission has held that "… *It would be utterly misconceived and futile exercise to recast the previous ARR's because tariff cannot be modified retrospectively therefore it would be only an academic exercise which so much complexities and uncertainties and the actual re-imbursement can be done*

through future ARR only as has been correctly directed by the Hon'ble APTEL…."

100. In this regard it is submitted that:

(i) Re-casting of the past years ARR's is a direct, consequential and automatic consequence of removing part of one item (of consumer contribution) from the "means of finance" of those past years. That is why in Para 18 of the Tribunal's Judgment dated 23.02.2015, it was inter alia held, that "… *the Appellants are entitled to consequential relief*…" and it was so accepted by the Commission in its Order dated 23.12.2015.

(ii) If, hypothetically, there were five (5) sources of "means of finance" in the past and today, one of such source is to be reversed, (i.e. consumer contribution refunded, even if in part), then the other four sources have to be re-worked to make up for the one that is being reversed.

(iii) This is for the simple reason that if the total finance comprised of five (5) items worth 20 each equalling to 100 and today one (1) item is being taken away (in whole), the balance 4 items would have to be made 25 each to total to Rs 100. Even if the 20 were to be removed in part, the balance items would have to be re-worked to equal the total. The total of 100 has not, is not and cannot be changed because 100 was actually spent. Hence it is only the other four remainder items which could and have to be changed.

(iv) Consumer Contribution was used as a means of finance under the Orders of the Commission. If today, those Orders are being modified and part of the consumer contribution already used as a 'means of finance' is being reversed, there is no gainsaying that the principle of *actus curiae neminem gravabit* squarely applies. No man shall suffer because of an act of the Court.

(v) If the Appellant Discoms did something under the Orders of the Commission and today the Commission wants to undo some part of those Orders, the Discoms cannot be made to bear the brunt of such undoing.

(vi) The current scenario is a classic example of the Commission wanting to create a legal fiction (retrospectively) and then allowing its imagination to boggle when faced with the consequences of such legal fiction. This is contrary to the well settled dictum laid down by Lord Asquith at the House of Lords, in *East End Dwellings vs Finsbury Borough Council 1951 AC 109 at 132*3.

(vii) By requiring the refund of consumer contribution already used as a means of finance in the past years, the Commission is creating a legal fiction of the "consumer contribution" in those years not to be used as a "means of finance". Having created this legal fiction, then equally, the Commission must then accept, and implement all the concomitants of such legal fiction. Those concomitants are nothing but the re-working of the other means of finance such as Debt, Equity and Depreciation (wherever

applicable). That is what this Tribunal accepted and held in Para 18 of the Tribunal's Judgment dt 23.02.2015.

101. The retrospective re-working of the past years capitalisation and means of finance (for various other purposes) has been done by the Commission in every one of the following Tariff Orders: -

(i) 23.02.2008

"Means of Finance:

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3.71 The Commission has done recasting of the means of finance based on the additional depreciation allowed by the Commission in this Order. The means of finance now approved by the Commission for the Policy Direction Period are shown below…"

(ii) 26.08.2011

"Depreciation

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.

3.61 The revised RRB now approved by the Commission for the Control Period after including correction for consumer contribution, capital grants and revised
depreciation approved in this Order is provided in the table below….

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3.73 The Commission in this Order is now approving the revised Return on Capital Employed and Supply Margin for the Petitioner based on the revised rate base approved in this Order and revised WACC approved now:…."

(iii) 31.07.2013

"Petitioner's submission

3.161 The Petitioner has submitted the funding of investment capitalized from FY 2007-08 to FY 11-12 through Consumer Contribution, grants, subsidies, debt and

equity. The detail of financing of investment capitalized during the Control period as submitted by Petitioner is as below:……"

.

Commission's Analysis

3.162 The Commission has analysed the submission made by Petitioner and the approved means of finance has been considered only for fresh investments towards Capitalization as indicated above. Provisionally approved means of finance as per the actual capitalization is as below:…."

(iv) 29.09.2015

"Impact of De-capitalisation on Depreciation

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3.137 The Commission has revised depreciation from FY 2002-03 to FY 2006-07 on the basis of opening GFA and FY 2007-08 to FY 2012-13 on the basis of average GFA (net of Consumer Contribution) due to change in GFA on account of de-capitalisation and also due to change in rate of depreciation in

FY 2007-08. The revised GFA due to consideration of de-capitalisation of assets is as follows:

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Impact of De-capitalisation on means of finance and Return on Equity

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3.140 With revision in the depreciation due to de-capitalization, utilization of depreciation and means of finance are accordingly revised for FY 2004-05 to FY 2006-07 as follows:….

.

.3.146 Total Capital requirement in the Distribution business for the relevant year is indicated in the form of RRB which includes Actual Equity and Actual Debt after repayment. The Commission has considered the Actual available Equity including Free reserve upto maximum of 30% of RRB for the purpose of computation of WACC. RRB includes original cost of Fixed Asset excluding accumulated depreciation. By considering the Actual Equity available, the balance of RRB has been considered to be funded from Debt which is net of repayment of loans.

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3.147 In view of the above, the revised Equity of the Petitioner is as follows:…

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Operation and Maintenance Expenses from FY 2007-08 to FY 2012-13

3.148 With revision in the Gross Fixed Asset based on de-capitalization from FY 2004-05 to FY 2012-13 the R&M Expenses as per the formula specified in MYT Regulations, 2007 is as follows:…"

Hence, there is no conceivable reason for refusing to do it now.

102. The refusal of the Commission to re-cast the means of finance for the period FY 2002-03 to 2006-07 (i.e., the Policy Direction Period) would tantamount to changing the Debt/Equity Ratio for that period. This is exemplified in the following table:-

Sl. No.	Particulars	Unit of measurement	Formulae	Commission's Methodology	In Case the Means of Finance is not altered	Correct Approach
A	Total funding Requirement of Capital Expenditure is funded by following:	Rs. Cr		450	450	450
B	Consumer Contribution during a particular Financial year	Rs. Cr	80 (Utilized) 20 (Unutilized)	100	80	80*
C	Grants	Rs. Cr		10	10	10
D	Depreciation	Rs. Cr		40	40	40
E	Balance amount left to be funded through Debt and Equity	Rs. Cr	E = A - (B+C+D)	300	320	320*

Sl. No.	Particulars	Unit of measurement	Formulae	Commission's Methodology	In Case the Means of Finance is not altered	Correct Approach
F	Equity	Rs. Cr	F = E x 30%	90	90	96*
G	Debt	Rs. Cr	G = E X 70%	210	210	224
H	Debt Equity Ratio	Rs. Cr		70:30	66:28 (210/320:90/320)	70:30

#Entire consumer contribution received by the Discoms is being taken as part of means of finance. Assuming, now that 20 has to be refunded this number will become Rs. 80.

**If 20 is removed from the consumer contribution as a means of finance. The balance Means of Finance will have to be increased to make up for the removal of 20 from consumer contribution. This 300 will then become Rs. 320.*

$ If 300 has become 320, then 90 will become 96 and 210 will become 224.

103. If the Consumer Contribution were refunded and the ARR's were not re-casted, the D/E ratio would no longer remain 70:30 but would become 66:28 (As shown in the above table). In case Equity and Debt are not corrected/revised, the same will have recurring impact on the ROE/ROCE of the Appellant Discoms, as the same would

form part of the Opening Equity /Debt of the subsequent Financial Year(s).

104. The True-up for Capitalisation from FY 2004-05 is still open, since the Physical Verification of Assets has still not been completed by the Commission. Hence the RoE/ROCE, Debt, Interest, Depreciation etc. are all still open. Therefore, there cannot be any good reason for the Commission to suggest that the Capitalisation figures of the past years are frozen in time.

105. The Appellants seek leave of this Tribunal to refer to and rely upon the Terms of Proposal during the course of the hearing as a means to put a quietus to the issue.

Clarificatory Note on behalf of Respondent Commission

106. The Commission had vide its 'Note on Procedure' filed on 04.05.2021 submitted a roadmap for the implementation of this Tribunal's judgment dated 23.02.2015. Paragraph 4 of the Note on Procedure is reproduced for ready reference:

> "*4. The Commission, thereafter, in compliance with the judgment dated 23.02.2015 will consider the information submitted by the DISCOMs and will provide the unspent Consumer Contribution to be refunded by the DISCOMs as an expenditure in the subsequent Tariff Order as directed by the Tribunal, which will be recovered through Tariff and will thereafter be refunded to the identified*

consumers by DISCOMs within the same Financial Year"

107. In response to the Commission's note the Appellant in this Appeal as well as the connected appeal had filed submissions negating the position of the Commission and reiterated their plea for the recast of the Tariffs from the year 2002-03. It is submitted that the stand of the Appellant's is totally inequitable in as much that the consequences of the procedure that is being proposed by the Appellants would cause the burden on the Consumers at large to increase drastically.

108. It is submitted that the Appellant's contention that Debt: Equity is to be allowed in the ratio of 70:30 from the date of using the unspent consumer contribution amount is tantamount to allowing a retrospective investment. It is submitted that no utility can re-invest an amount retrospectively since the utilities did not actually have any outgoing cashflow from their own coffers in that period. It is pertinent to state that a question arises as to how utility will be able to change its financing pattern retrospectively at this distance of time.

109. It is submitted that if the ARR is re-casted then the Appellant DISCOMs would be the beneficiaries of windfall gains ranging back

to 2002-03 onwards, even though they had no cash outflow or actual investment for the amounts that are in contemplation today.

110. As per Commission's Letter dated 3.12.2009, which culminated in the first impugned order of 11.03.2014 and thereafter the principal judgment of this Tribunal dated 23.02.2015, the principal amount of unspent consumer contribution amount has to be refunded to the individual consumers along with penal interest @ 12%.

111. The distribution licensees are insisting for recasting of ARR because they are contemplating a higher return at the expense of the consumers of Delhi, without any actual investment being made at the point of time from when the return is being contemplated.

112. The judgment of this Tribunal dated 23.02.2015, and reiterated by the Full Bench of this Tribunal on 15.05.2017, is required to be read as an order in equity which permits the Appellant's the benefit of a consequential relief so that they are in no manner in a position worse off after making the refund and nor do they make windfall gains on the back of the ordinary consumers of Delhi.

113. If the unspent consumer contribution to the extent utilised by the Commission in reducing the tariff of general consumers is allowed in

the tariff as an expenditure, as described in Para 4 of the Note on Procedure dated 04.05.2021 , to the distribution licensee, which in turn will be refunded to the identified consumers, then the distribution licensee will not be at any loss as the amount allowed in Tariff Order to distribution licensee is to be refunded to the identified consumers.

114. It is submitted that this will also be consistent with the funding pattern in the Tariff Orders for the concerned years.

115. Furthermore, the issue raised by the Appellants regarding the Debt Equity Ratio being changed to 66:28 instead of 70:30 by allowing unspent consumer contribution as an expenditure is wholly incorrect.

116. It is submitted that there is no mandate in law that supports the position that if the equity actually deployed by a Distribution Licensee, as is the admitted case in the facts of the present case, is in actual fact less than 30%, then the same has to be considered as 30% to provide higher return on equity to the said Distribution Licensee and that too by burdening the consumers at large with a higher tariff.

117. In fact the *DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007,*in Regulation 5.10 while specifying the formula for determination of the WACC specifically states that when equity employed is in excess of 30% of the capital employed, the amount of equity for the purpose of tariff shall be limited to 30% and the balance amount shall be considered as notional loan and when actual equity employed is less than 30%, the actual equity and debt shall be considered for tariff determination, as follows:

> *"5.10…… Where equity employed is in excess of 30% of the capital employed, the amount of equity for the purpose of tariff shall be limited to 30% and the balance amount shall be considered as notional loan. The amount of equity in excess of 30% treated as notional loan. The interest rate on excess equity shall be the weighted average rate of interest on the actual loans of the Licensee for the respective years. Where actual equity employed is less than 30%, the actual equity and debt shall be considered;"* [Emphasis Supplied]

118. This principle has been consistently been reiterated in *DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2011* and *DERC (Terms and Conditions for Determination of Tariff) Regulations, 2017*.

119. For the above reasons it is respectfully submitted that the mechanism provided by the Commission is an appropriate mechanism to balance the equities and ensure that the interests of all parties are protected and bring a quietus to the issue at hand. It is therefore prayed that this Tribunal may be pleased to accept the methodology suggested in the Note on Procedure dated 4.5.2021 filed by the Commission.

120. In para 18 of the judgment of this Tribunal in Appeal No. 109, 110 and 111 of 2014 dated 23.02.2015, it has been held as follow:

"*if the unutilized Consumers Contribution has been utilized as means of financing for the tariff orders from FY 2002-03 onwards and corresponding relief has been given to the consumers in terms of retail supply tariffs, then the appellants are entitled to get consequential relief and the said unspent contribution amount be refunded by the appellants as per the Commission's Order. The unspent Consumers Contribution amount may be considered as an expenditure in the future ARR of each of the appellants/DISCOMs*."

121. The Commission will comply with the judgment of the APTEL dated 23.02.2015 and requests that it may be a given a suitable time frame to do the same after implementing the procedure as outlined in Paragraphs 3 to 5 below to verify the amounts of refund. It is submitted that a large number of officials and staff of the Commission are presently COVID -19 positive, which is impacting the work of the Commission.

122. The Commission will call upon the DISCOMs to furnish data in a specified format within one week of the passing of the order by this Tribunal. The data, *inter alia*, would consist of an Auditor Certificate clearly stating the Consumer wise Consumer Contribution received every year, spent during every year on Capital Investment activities (showing the break-up of assets capitalised and amount lying in WIP), balance at the end of every year and total for all consumers matching with Balance Sheet, Relevant Schedules and Tariff Orders. The DISCOMs shall submit this data within a period of two weeks thereafter.

123. The Commission, thereafter, in compliance with the judgment dated 23.02.2015 will consider the information submitted by the DISCOMs and will provide the unspent Consumer Contribution to be refunded by the DISCOMs as an expenditure in the subsequent Tariff Order

as directed by the Tribunal, which will be recovered through Tariff and will thereafter be refunded to the identified consumers by DISCOMs within the same Financial Year.

124. Thereafter, the DISCOMs on completion of the refunds will provide the details of the same along-with the certification indicating that it is full and final settlement on affidavit jointly signed by such consumer and Chief Finance Officer (CFO) of the respective DISCOM further indicating the amount refunded to the consumer and the year it was pertaining to.

Finding and analysis

125. We have heard the learned counsel representing the Appellants (BSES Rajdhani Power Ltd., BSES Yamuna Power Ltd. and Tata Power Delhi Distribution Ltd.), Respondent (DERC), have gone through the written submissions/notes filed by all the counsel and the material/documents placed before us and our observation are as under:

126. Distribution Licensees (DISCOMs) in Delhi have to undertake various projects/ schemes which involve capital outlay with or without Consumer Contribution. There are mainly three types of projects/ schemes undertaken by the DISCOMS, which are:

i. Projects/Schemes with the Government Grants (Normally not refundable/repayable).

ii Projects/ Schemes with 100 % share by Consumers without any contribution by DISCOMS.

iii Projects/ Schemes with certain share i.e.upto 50% of Cost by Consumer Contribution/ Government Grants. The balance is to be arranged by the DISCOM to the extent of its share.

127. The methodology adopted by DISCOMS in these cases is that the DISCOM finalizes the projects, estimates the costs and intimates the amount of consumer contribution to the respective consumers, in case of (ii) and (iii) above. The Consumer deposits its intimated share in advance based on express/ implied contract. The DISCOM undertakes the projects/ schemes, which could be completed in one or more accounting periods. Electrical Inspector is expected to issue the certificate of completion for these projects. While there are no issues involved in the cases at (i) above, the projects/ schemes at (ii) and (iii) above require a separate treatment.

128. We note that the issue regarding the refund of unspent consumer's contribution by the DISCOMs has been dealt extensively by this Tribunal in its earlier judgment dated 23.02.2015. There is no dispute that the unspent consumer's contribution with interest has to be refunded back by the Appellants and the said amount will be considered as an expenditure in the future Annual Revenue Requirement (ARR) of the Appellants. The Appellants should be given liberty to furnish the accounts showing that the excess amount

of consumer's contribution has been duly considered in the ARR from FY 2002-03 onwards in reducing the retail supply tariffs.

129. DERC in its all orders including the order dated 05.12.2019 has been directing the DISCOMs to refund the unspent consumer's contribution and in the event of unspent consumer's contribution having been utilized as 'means of financing' for the Tariff Orders from FY 2002-03, the said amount will be considered as an expenditure in the future ARR.

130. The DISCOMs have submitted that since the unspent consumer's contribution has already been utilized as a 'means of finance' from Financial Year 2002-03, there is no money left with DISCOMs to refund the unspent consumer's contribution. They have further submitted that to facilitate refund the ARRs in respect of previous years from 2002-03 must be recasted.

131. It is the case of DISCOMs that in case the unspent consumer contribution is being refunded then the ARRs of the previous years from the FY 2002-03 should be recasted and Debt : Equity is to be allowed in the ratio of 70:30 from the date of using the unspent consumer contribution.

132. DERC has submitted that no utility can reinvest an amount retrospectively since the utility did not actually have any outgoing cash flow from their own coffers in that period and therefore utilities cannot change its financing pattern retrospectively at this distance of time. DERCD has further submitted that if ARRs are recasted then the Appellant DISCOMs would be the beneficiaries of windfall gains

ranging back to 2002-03 onwards, even though they had no such cash flow or actual investment for the amount that are in contemplation today.

133. DERC during the course of hearings have submitted a note on procedure for refunding the unspent consumer's contribution by the Appellant and the same reads as under:

"1. In para 18 of the judgment of Hon'ble Tribunal in Appeal No. 109, 110 and 111 of 2014 dated 23.02.2015, it has been held as follow:

"if the unutilized Consumers Contribution has been utilized as means of financing for the tariff orders from FY 2002-03 onwards and corresponding relief has been given to the consumers in terms of retail supply tariffs, then the appellants are entitled to get consequential relief and the said unspent contribution amount be refunded by the appellants as per the Commission's Order. The unspent Consumers Contribution amount may be considered as an expenditure in the future ARR of each of the appellants/DISCOMs."

2. The Commission will comply with the judgment of the Hon'ble APTEL dated 23.02.2015 and requests that it may be a given a suitable time frame to do the same after implementing the procedure as outlined in Paragraphs 3 to 5 below to verify the amounts of refund. It is submitted that a large number of officials

and staff of the Commission are presently COVID -19 positive, which is impacting the work of the Commission.

3. *The Commission will call upon the DISCOMs to furnish data in a specified format within one week of the passing of the order by this Hon'ble Tribunal. The data, inter alia, would consist of an Auditor Certificate clearly stating the Consumer wise Consumer Contribution received every year, spent during every year on Capital Investment activities (showing the break-up of assets capitalised and amount lying in WIP), balance at the end of every year and total for all consumers matching with Balance Sheet, Relevant Schedules and Tariff Orders. The DISCOMs shall submit this data within a period of two weeks thereafter.*

4. *The Commission, thereafter, in compliance with the judgment dated 23.02.2015 will consider the information submitted by the DISCOMs and will provide the unspent Consumer Contribution to be refunded by the DISCOMs as an expenditure in the subsequent Tariff Order as directed by the Tribunal, which will be recovered through Tariff* ***and will thereafter be refunded to the identified consumers by DISCOMs within the same Financial Year.***

5. *Thereafter, the DISCOMs on completion of the refunds will provide the details of the same along-with the certification indicating that it is full and final settlement on affidavit jointly signed by such consumer and Chief Finance Officer (CFO) of the respective DISCOM further indicating the amount refunded to the consumer and the year it was pertaining to."*

134. We note that DERC has considered the submissions of the Appellants that the unspent consumer's contribution has been utilized as 'means of finance' in the previous year and as such they are left with no money to refund the unspent consumer's contribution and DERC has accordingly submitted a **'Note on procedure for refund of consumer contribution'** on 04.05.2021.

135. As per this procedure, the Commission will call upon the DISCOMs to furnish data in a specified format within one week of the passing of the order by this Tribunal. The data, *inter alia*, would consist of an Auditor Certificate clearly stating the Consumer wise Consumer Contribution received every year, spent during every year on Capital Investment activities (showing the break-up of assets capitalised and amount lying in WIP), balance at the end of every year and total for all consumers matching with Balance Sheet, Relevant Schedules and Tariff Orders. The DISCOMs shall submit this data within a period of two weeks thereafter. The Commission, thereafter, in compliance with the judgment dated 23.02.2015 will consider the information submitted by the DISCOMs and will provide the unspent Consumer Contribution to be refunded by the DISCOMs as an expenditure in the subsequent Tariff Order as directed by the Tribunal, which will be recovered through Tariff **and will thereafter be refunded to the identified consumers by DISCOMs within the same Financial Year.**

136. We note that the procedure submitted by DERC for refund of unspent consumer's contribution amending its earlier direction to refund the unspent consumer's contribution and file claim before

the Commission for consideration as an expenditure in the future ARRs, the grievance of the Appellants that the funds are not available with them for making refund has been mitigated. We are of the opinion that the procedure submitted by the Commission/DERC resolves the issue regarding the refund of the unspent consumer's contribution and is a balanced decision, and can be accepted. Accordingly, we direct the Commission/DERC to implement this procedure forthwith.

137. As regards to the contention of the Appellants regarding the recasting of the ARR of previous years, we have gone through the submissions made by all the counsel representing the Appellants and the Respondent Commission and we are convinced by the submission of the Commission wherein it has been submitted that this could result into undue windfall gain to the DISCOM wherein DISCOMs will earn Return on Equity on a component of equity which actually has not been invested by the DISCOMs.

138. The fact is that the unspent consumer's contribution has been used as a 'means of finance' in the previous years starting from FY 2002-03 and the same has not been refunded till date. Even if, suppose the ARRs of the previous years are recasted then also the amounts of debt and equity invested by the Appellants in the respective years would remain unchanged as per actual investment done in the respective years, the exercise of recasting cannot change into something which has not happened at all. It is wrong even to conceive that the amount of debt and equity will be enhanced to the extent of 70% and 30% of the unspent consumer contribution respectively. The fact is the unspent consumer contribution was

used as a ‘means of finance’ in the earlier ARRs from FY 2002-03 and the same would now be considered, subject to verification by the DERC, as an expenditure in future ARRs. By doing this the Commission will be correcting the error, happened in the past, by considering this as an expenditure in the future ARRs. The unspent consumer contribution which should have been refunded after the certification by Electrical Inspector and should not have been used as a ‘means of finance’ in the previous ARRs. The Commission is correcting that error by refunding this amount to whom it belongs by recovering it as an expenditure in the future ARRs. The party effected in this whole process is the consumer from whom the contribution was collected and the unspent consumer contribution was not refunded in time. The Appellants cannot be allowed for any undue gains on account of this error. By correcting the error, by way of refunding the unspent consumer contribution to the identified consumer to whom it belongs, to whom it should have been paid in the past after the certification by the Electrical Inspector, the DISCOMs will not be at any loss. The DISCOMs have already been allowed the Return on Equity in the ARRs of the respective years on the actually equity invested by them.

139. In view of the above, we are convinced with the submission of the DERC that allowing such kind of gain as sought by the Appellants by recasting the ARRs of the previous years, Return on Equity on a component of equity which has not actually been invested by DISCOMs is illogical, unfair, not in the interest of consumers, not as per the law and need not be considered. Accordingly, this contention of the Appellants is rejected.

140. In terms of above, the appeals being Appeal No. 05 of 2019, Appeal No. 06 of 2019, Appeal No. 34 of 2020 and Appeal No. 154 of 2021 and the pending applications stand disposed of. No order as to costs.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 31st DAY OF AUGUST, 2021.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

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REPORTABLE/NON-REPORTABLE

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