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Ref: RA/2010-11/02/E/64

Dated: July 19, 2010

**Shri Rakesh Mehta**  
Chief Secretary,  
GoNCTD,  
Sachivalaya,  
New Delhi- 110 002.

*Dear Sh. Mehta,*

**Sub: Response on behalf of M/s BSES Rajdhani Power Limited to the Advice dated June 30, 2010 rendered by the Chairman, Delhi Electricity Regulatory Commission**

This is with reference to the purported Statutory Advice dated June 30, 2010 (hereinafter "**Advice**") rendered by the Chairman, Delhi Electricity Regulatory Commission (hereinafter "**Chairman**") in response to GoNCTD communication dated May 4, 2010 seeking statutory advice from the Delhi Electricity Regulatory Commission (hereinafter "**Commission / DERC**") under Section 86(2)(iv) of the Electricity Act, 2003 (hereinafter "**Act**") on issues enumerated in the said communication, which has been put up on the website of DERC and is now in the public domain.

M/s BSES Rajdhani Power Limited (hereinafter "**Licensee**") states that the said **Advice** casts certain unwarranted and false aspersions on the Licensee. Certain assertions made in the **Advice** are not only factually unsustainable but are prima facie against the findings in the Tariff Orders passed by the Commission itself. Therefore it has become necessary for the Licensee to respond to the same to ensure that the correct and complete factual position is before the Government before it takes a final decision in this regard. However, before the Licensee puts out its detailed response, it is imperative to highlight the manner in which the Licensee functions to enable the Government to better appreciate the present response of the Licensee.

The Licensee most respectfully submits that it is one amongst the three privatized distribution utilities of Delhi which is an embodiment of successful public-private partnership between the Government of National Capital Territory of Delhi (hereinafter



“GoNCTD”) and companies of International repute with the GoNCTD having a 49% shareholding in the Licensee. Further, as a result of the significant shareholding of the GoNCTD in the Licensee, the Board (hereinafter “**Board**”) of the Licensee comprises of directors nominated by GoNCTD as well. In fact as on date the Board of the Licensee has more number of Directors appointed by the GoNCTD. The Licensee states that it observes strict principles of good corporate governance and is managed, supervised and guided by the Board which inter alia includes eminent persons who are well qualified with extra-ordinary management skills and who are highly respected in the country.

In a short span after unbundling of the erstwhile Delhi Vidyut Board, the Licensee has been able to achieve excellence in its operations, significant reduction in the distribution losses, and has brought about several technical interventions for system strengthening and augmentation thus achieving significant reduction in number and duration of interruptions in power supply to the consumers.

Financial statements and books of accounts of the Licensee are audited by a reputed auditing firm with an experience of over 50 years in the country and recognized by The Institute of Chartered Accountants of India and are also empanelled with various Regulatory bodies like RBI, SEBI, CAG etc.

The Chairman in his **Advice** has doubted the veracity of figures submitted to the Government. It may be noted that representation made by the Licensee before the Government was on the basis of facts and figures duly audited by the statutory auditors and approved by the Board. It needs to be highlighted that a four tier system of auditing / review is followed by the Licensee which includes:

- a. Internal Audit by Auditors nominated by Board of Directors;
- b. Statutory Audit
- c. Review by the Board nominated Audit Committee
- d. Final approval by the Board of Directors.

Unfortunately, the Chairman, by alleging that the Licensee has not presented the true and correct factual position before the Government and has tried to mislead the Government, has implicitly questioned the integrity of the members of the Board, the management and the professional skills and ability of the statutory auditors.

Our comments and observations on the **Advice** are divided into two broad categories for the sake of convenience. Part I of the present response captures certain preliminary comments on behalf of the Licensee against certain aspect of the **Advice**. Part II would respond to **Advice** rendered by the Chairman on the seven issues on which statutory advice was sought by the Government from the Commission / DERC.

#### **PART I: PRELIMINARY COMMENTS**

1. *The **Advice** rendered to the Government is not on behalf of the Commission but has been given solely by the Chairman and is therefore in contravention of the express provisions of the Act.*

Whereas rendering advice to the State Government is a statutory function of the Commission **as a whole** under Section 86(2)(iv) of the Act, the **Advice** rendered is solely the personal advice of the Chairman as it has admittedly not been endorsed by either of the members of the Commission / DERC. It is also equally important to note that Section 92(3) of the Act clearly mandates that matters before the Appropriate Commission are to be decided by a majority of votes present and voting. Section 92(3) of the Act has been produced below:

**“92: Proceedings of Appropriate Commission:**

...

*(3) All questions which come up before any meeting of the Appropriate Commission shall be decided by a majority of votes of the Members present and voting, and in the event of any equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.”* (Emphasis supplied)

Section 86(2)(iv) read with section 92(3) of the Act, clearly indicates that for an advice to be legally sustainable, the same has to be endorsed by the majority of the Commission. However, admittedly, the said **Advice** has been rendered only by the Chairman of the Commission. The contention of the Chairman that the other Members of the Commission were uncooperative and were deliberately delaying the rendering of the said advice till such time as the Chairman retires from his tenure sometime in September 2010 ought to be ignored.

The present **Advice** has been rendered only by the Chairman of the Commission without being endorsed by a majority, which clearly is a statutory requirement, makes the present **Advice** legally unsustainable and merits no consideration by the Government. It is also pertinent to note that one of the members, Mr. Shyam Wadhera also made it amply clear in his internal noting dated June 6, 2010, that the present statutory advice being a complex issue, the same should not be unduly hastened and that due deliberations should take place. Relevant extract of Mr. Wadhera's notings is produced below for the sake of convenience:

*“It is requested that Chairman may convene a meeting of the Commission to specifically discuss the above or any other issues concerning the Statutory Advice, which may be brought before the Commission for its consideration.*

*The Statutory Advice needs to be deliberated in detail and sent after due consideration by the Commission. In my view, there should be no undue haste in this matter.*

*If the Chairman decides to convey his views to the Government without deliberation and due consideration of the matter by the Commission, this would be his personal decision and such views cannot be linked to the Statutory Advice sought by the Government from the Commission, for which the due process as envisaged under Section 92(3) of the Electricity Act, 2003 would need to be followed.”*

However, ignoring the above legitimate concerns of Mr. Wadhera, the Chairman wrongly alleged that the members of the Commission were trying to protect the distribution companies from a legitimate tariff reduction. Providing personal advice

virtually reduces the three member Commission into a single member Commission, which is not permissible as per the Act.

It is also pertinent to note that the advice sought by the Government was on the following issues:

- a. Ability to supply power contingent on Cost Reflective Tariff
- b. Precarious financial position of DISCOMs
- c. Accumulation of revenue gaps beyond sustainable levels
- d. Continuation of the practice of assuming higher surplus for tariff fixation
- e. Power purchase cost/quantum
- f. Continuous recourse to additional debt to finance operations
- g. Critical needs to additional financing.

The Chairman while rendering his **Advice** has asserted that although it has not been endorsed by the members, the same has in principle approval of the Members in the form of unanimous decision to all the major issues in the Tariff Order. But no evidence has been annexed with the **Advice** rendered by the Chairman which would indicate that the members had agreed in principle on the contrary it is evident from Mr. Wadhwa's comments quoted above that due deliberations were required before the Commission gave an advice to the Government. It is submitted that if the contention that the Members have given their in principle consent to the **Advice** as accepted, then it is not clear as to why the other Members have not signed the **Advice** and the Chairman had to raise this issue on several occasion in his communication to the Government.

In view of the above, the Licensee submits that the Government should ignore the present personal **Advice** rendered by the Chairman since it is in contravention to the express provisions of the Act and is, therefore, legally unsustainable. In view of the foregoing the Government should reject the personal Advice and seek statutory advice of the Commission, as a whole, as per the procedure stipulated in Section 92(3) of the Act.

2. Comments made by the Chairman against the members of the Commission would seriously undermine the confidence of the stakeholders in the functioning of the Commission

The Licensee submits that even though it is not the Licensee's prerogative to comment upon or otherwise judge the veracity of the allegations made by the Chairman against the members of the Commission, such strong allegations of bias against the members of the Commission would undermine the confidence of the general public in the autonomy of the Regulator. The Licensee submits that if the Chairman had certain internal conflicts with the members of the Commission, the same should have been resolved in a meeting of the Commission where the majority view of the Members would have emerged on the issue under discussion.

3. The **Advice** makes unsubstantiated and baseless allegations against the distribution companies in Delhi

Allegations made by the Chairman are totally false, unfounded and not based on facts. Yet the Chairman has gone to use unpalatable and derogatory language against the three reputed privatized distribution utilities of Delhi who are joint ventures of the GoNCTD and Internationally recognized corporations. The Licensee takes serious objections to such baseless allegations, which, as has been demonstrated subsequently, are not only factually and legally unsustainable but are clearly against the Commission's own Tariff Orders.

One such instance of allegations made by the Chairman, which is clearly against the Commission's own records, is the denial by the Chairman of the existence of Regulatory Assets. The Chairman has at various points in his **Advice** to the Government noted that there do not exist any Regulatory Assets and that any statement made by the distribution licensees to the contrary, is an attempt to mislead the Government. The Licensee submits that the statement made by the Chairman about non existence of Regulatory Assets, is clearly against Commission's own Tariff Orders as demonstrated subsequently Part II of the present response and shows factual fallacies (refer Sl. no. (ii) b at page 15 of Part II).

4. **Advice** from the Chairman indicates his intent to pass the Tariff Orders in disregard of the policy directions issued under section 108 of the Act:

The Licensee submits that the Chairman has noted in his **Advice** that even the Solicitor General of India has opined that the Commission should proceed with the issuance of the Tariff Orders for the three distribution licensees in Delhi in spite of the Policy Directions issued by the Government under Section 108 of the Act. The opinion of the Solicitor General which has also been placed on record by the Chairman in his **Advice**, is premised on the fact that since the said Policy Directions are ultra vires the Act, the Commission should proceed with the issuance of the Tariff Orders. We presume that the Government will take suitable legal opinion in the matter.

Further, after submission of the ARR Petition on 15.12.2009, there has been significant developments which will impact the power purchase costs projections for FY 2010-11, some of which are enumerated below:

- a. Implementation of recent CERC Regulations whereby the realization from sale of power through UI / Power Exchange has considerably reduced.
- b. Delay in Commissioning of new plants will reduce the surplus available.
- c. Rise in coal / gas prices which will impact the power purchase cost of existing and new plants

We apprehend that the Tariff Order ignores all the above cost factors and is far from ground realities. It has arrived at huge imaginary surpluses by one or more combination of the following:

- a. Higher Revenue estimated from Retail Sale of power.
- b. Higher Revenue estimated from Bulk Sale of Power.

- c. Anticipation of large quantum of power from existing / new generating stations.
- d. Anticipation of earlier Commercial operation date of new generating stations supplying power at regulated rates.
- e. Lower Power Purchase cost from existing / new generating stations.

It is noteworthy that w.e.f. April 1, 2007, the Licensee has been entrusted with the responsibility for procuring power for its consumers. The Licensee during the FY 2010-11, in order to meet its supply obligation has arranged power from available bilateral sources. Despite such contracts and agreements in place, the Licensee is driven to a situation where it does not have enough cash by way of a commensurate tariff to pay for the power and meet its service obligation since recovery of most of the expenses incurred by the Licensee are deferred by the Commission.

This was precisely the reason that the Licensee had appraised the Commission and the Government on the liquidity and cash flow constraints affecting Licensee's ability to purchase power in FY 2010-11. The **Advice** and the approach of the Chairman not only corroborate the concerns of the distribution companies but also justify Government's policy directives to the Commission.

5. *The **Advice** of the Chairman is a clear indication of the Chairman's attitude towards tariff fixation which could have an adverse impact on the sector:*

The Licensee has been able to bring down AT&C losses from about 50% to 19% within a span of 8 years from the point of privatization. This is an unprecedented reduction which has been unmatched in the rest of the nation except Delhi. Unfortunately, three Delhi DISCOMs who have managed to achieve such excellent operational results have been repeatedly penalized through non-grant of legitimate expenses from the Commission when due, leave alone the promised return and overachievement incentives. This indicates the loss reduction and the reliability of supply and performance on account of the same coupled with massive capital expenditure in the sector has been recognized as laudable initiatives which have won accolades across the nation. This successful unbundling, corporatization and subsequent privatization model has been successfully implemented to this great extent only in Delhi and has held out as an example for others to follow. However, the said successful model is being dismantled with each successive Tariff Order through denial of legitimate expenses, promised statutory return and statutory performance incentive through design of deferment of the same and failure to timely true up the entitlements of the licensees despite various decisions of the ATE.

This unreasonable approach of the Commission has resulted in the Tariff Orders of the Commission being successfully challenged by the DISCOMs in Delhi before the Appellate Tribunal for Electricity (hereinafter "**ATE**") and as well as the Supreme Court. The relevant extracts of the ATE Order are reproduced below:

*"116) Before parting with the judgment we have to remind the Commission of the observations in our judgment in appeal No. 265 of 2006, 266 of 2006 and 267 of 2006 in the case of North Delhi Power Ltd. Vs. Delhi Electricity Regulatory Commission in which we said the following:*

*“60. Before parting with the judgment we are constrained to remark that the Commission has not properly understood the concept of truing up. While considering the Tariff Petition of the utility the Commission has to reasonably anticipate the Revenue required by a particular utility and such assessment should be based on practical considerations. .... The truing up exercise is meant (sic) to fill the gap between the actual expenses at the end of the year and anticipated expenses in the beginning of the year. When the utility gives its own statement of anticipated expenditure, the Commission has to accept the same except where the Commission has reasons to differ with the statement of the utility and records reasons thereof or where the Commission is able to suggest some method of reducing the anticipated expenditure. This process of restricting the claim of the utility by not allowing the reasonably anticipated expenditure and offering to do the needful in the truing up exercise is not prudence. ...”*

*117) All projections and assessments have to be made as accurately as possible. Truing up is an exercise that is necessarily to be done as no projection can be so accurate as to equal the real situation. Simply because the truing up exercise will be made on some day in future the Commission cannot take a casual approach in making its projections. We do appreciate that the Commission intends to keep the burden on the consumer as low as possible. At the same time one has to remember that the burden of the consumer is not ultimately reduced by under estimating the cost today and truing it up in future as such method also burdens the consumer with carrying cost.*

*...”*

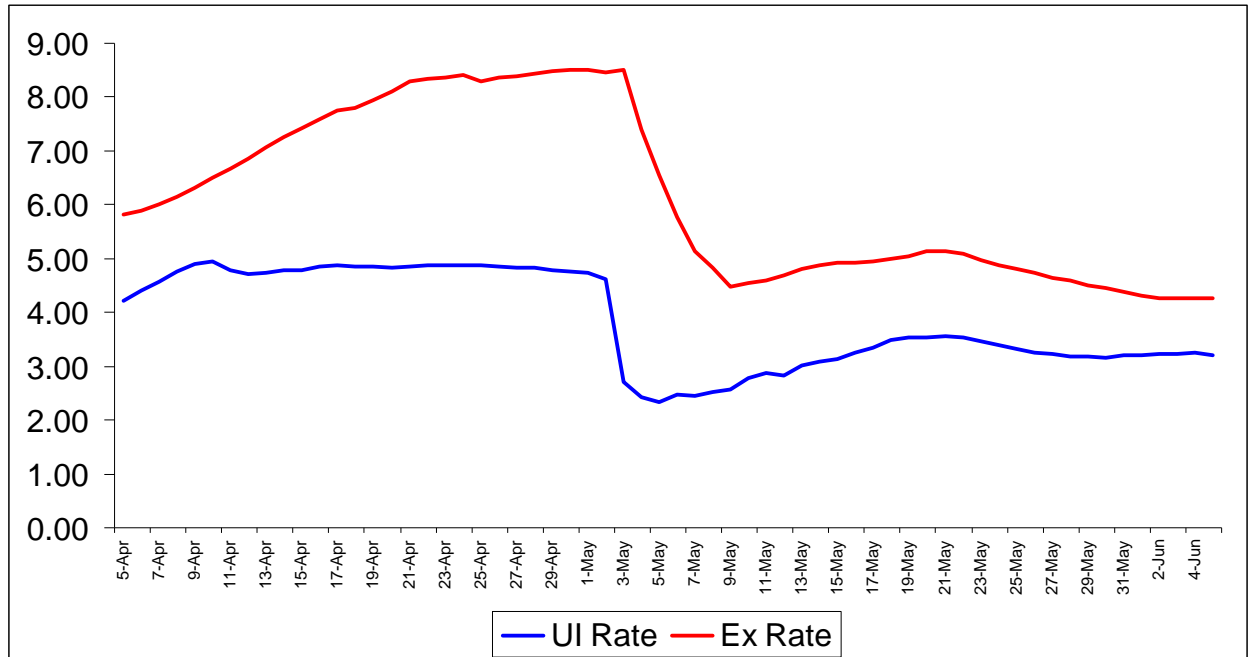
*[In the matter of Appeal 36 of 2008]*

As evident from the past Tariff Orders of the Commission and the **Advice** of the Chairman, the consistent approach has been to postpone the increase in tariff to a later year by either not allowing the timely true up or creating regulatory assets by whatever name. This approach is detrimental to all stakeholders. Whereas Licensees suffer cash deficits, the consumers of the future will not only have to pay for the expenses of the past but will also have to bear the brunt of carrying costs. Such an approach of deferment of tariff increase to subsequent periods has been disapproved by the orders passed by the Supreme Court and the ATE, where such approach of the Commission has been severely commented upon.

6. *Allegation that DISCOMs are overcharging at current tariff is incorrect*

With respect to the averment made by the Chairman in his **Advice** that the distribution companies in Delhi are overcharging their consumers at the current tariff to the extent of about Rs. 300 cr. per month, the Licensee submits that the same is factually incorrect as is clearly evident from the Licensee's accounts. The Licensee submits that for the first quarter for FY 2010-11, the Licensee purchased 3711 MUs of power at an average cost of Rs. 3.85/ unit. Out of the said 3711 MUs, the Licensee had only a surplus of 456 MU which were sold leaving around 3116 MU at an average cost of Rs. 4.03/ unit (available at Discom periphery after accounting for

139 MU of transmission losses) of power for the Licensee's consumers. The average realization from sale of surplus power through UI/ Exchange/ Bilateral sources which was Rs. 7.04 / unit in April '10 has significantly reduced to Rs. 3.15/ unit in the month of June'10 after implementation of recent CERC revised Regulations as shown in the following graph:



We anticipate that this trend of increased purchase cost and decreased sale price of surplus power would remain unaltered for the rest of the financial year. Therefore, the average net cost of this power which was sold to the Licensee's consumers, after accounting for the sale of surplus power is Rs. 3.94/unit. Since the retail tariff assumes an average power purchase cost of Rs. 2.90/unit (as approved for FY 2010-11 in the MYT Tariff Order), the Licensee is suffering a loss of Rs. 1.04 on every one unit of power sold to its consumers. Therefore, the allegation made by the Chairman that the distribution companies, including the Licensee have been overcharging their consumers to the extent of Rs. 300 crores per month since April 1, 2010, is factually incorrect. On the contrary, the Licensee's alone has suffered a loss of Rs. 1.04 /unit, which translates to Rs. 108 crores per month on the power purchase cost alone, i.e. excluding other distribution cost (which includes operational and heavy financial costs), for the power serviced to its consumers in the said time period.

7. Accounting of Delhi Vidyut Board (hereinafter "DVB") arrears for the computation of Aggregate Technical and Commercial (hereinafter "AT&C") loss calculation

The Licensee submits that the MYT Regulations provide for the inclusion of the entire collection for the purposes of AT&C loss computation. Further, even in the

past the Licensee has been including the DVB arrears as a component for the computation of AT&C losses. The said methodology has also been adopted and approved by the Commission. The fact that the Commission wishes to change the said methodology would have a corresponding impact on the opening levels of AT&C loss figures for the MYT period. Further, even the year end targets for each year of the MYT period would have to be appropriately relaxed/modified.

The Licensee submits that the Commission should take note of its deliberations on this issue whilst finalizing the Tariff Order for FY 2006-07 wherein the Commission had first taken a stand in this regard. Therefore, it is inappropriate for the Commission to deviate from its past practice.

In summation, we would request the Government to kindly consider the present response before taking any action in this regard on the following major aspects:

- i. The Advice rendered to the Government is not on behalf of the Commission but has been given solely by the Chairman and is therefore in contravention of the express provisions of the Act. Therefore the Government should reject the personal Advice and seek statutory advice of the Commission, as a whole, as per the procedure stipulated in Section 92(3) of the Act.
- ii. Comments made by the Chairman in the Advice against the members of the Commission would seriously undermine the confidence of the stakeholders in the functioning of the Commission. If the Chairman had certain internal conflicts with the members of the Commission, the same should have been resolved in a meeting of the Commission where the majority view of the Members would have emerged on the issue under discussion.
- iii. The Advice makes unsubstantiated and baseless allegations against the distribution companies in Delhi. The Licensee takes serious objections to such baseless allegations, which, as has been demonstrated, are not only factually and legally unsustainable but are clearly against the Commission's own Tariff Orders.
- iv. The Advice of the Chairman indicates his intent to pass the Tariff Orders in disregard of the policy directions issued under section 108 of the Act. We presume that the Government will take suitable legal opinion in the matter.
- v. The Advice is a clear indication of the Chairman's attitude towards tariff fixation which could have an adverse impact on the sector. The successful unbundling, corporatization and subsequent privatization model, which has been successfully implemented in Delhi, is being dismantled with each successive Tariff Order through denial of legitimate expenses, promised statutory return and statutory performance incentive through design of deferment of the same and failure to timely true up the entitlements of the licensees despite various decisions of the ATE.
- vi. Allegation that DISCOMs are overcharging to the extent of Rs. 300 crores at current tariff is incorrect. On the contrary, the Licensee's alone has suffered a loss of Rs. 1.04 /unit, which translates to Rs. 108 crores per month on the power purchase cost alone, i.e. excluding other distribution cost (which includes

operational and heavy financial costs), for the power serviced to its consumers in the said time period.

- vii. The MYT Regulations provide for the inclusion of the entire collection for the purposes of AT&C loss computation. The fact that the Commission wishes to change the said methodology would have a corresponding impact on the opening levels of AT&C loss figures for the MYT period. Further, even the year end targets for each year of the MYT period would have to be appropriately relaxed/modified.

We would be more than willing to provide the Government with any additional information/assistance in this regard which may be required.

*With personal regards,*

*Yours sincerely,*

*Gopal K Saxena*

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(Gopal K Saxena)

: Enclosed : as above