

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 56 of 2005

Dated: 24th May, 2011

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

In The Matter Of

M/S. Tata Power Company Limited.
Bombay House, Homi Mody Street
Mumbai- 400001

... Appellant(s)

Versus

1. M/S. Reliance Energy Limited.
Nagin Mahal (6th floor)
82, Veer Nariman Road
Mumbai-400020
2. Maharashtra State Electricity Board
Ali Yavar Jung Road
Prakash Gadh,
Bandra (East)
Mumbai-400051
3. The State of Maharashtra
Ministry of Industry
Mantaralaya
Mumbai.

4. Maharashtra Electricity Regulatory Commission
13th floor, Centre No. 1
World Trade Centre, Cuffe Parade,
Colaba, Mumbai-400005.
5. Mumbai Grahak Panchayat
Grahak Bhavan, Sant Dnyaneshwar Marg
Behind cooper Hospital,
Vile Parle(West)
Mumbai-400056
6. Prayas
4, OM Krishna Kunj Society
Ganagote path, Opp.
Kamla Nehru Park Erandavane,
Pune-411006
7. Thane Belapur Industries Association
Plot No. P-14, MIDC,
Rebale Village, Post Ghansoli
Navi Mumbai-400071
8. Vidarbha Industries Association
1st floor, Udyog Bhavan, Civil Lines
Nagpur-440001
9. National Textile Corporation
(Maharashtra North) Ltd.
N.T.C. House, 15, N.M. Marg
Ballard Estate,
Mumbai-400001

10. National Textile Corporation
(South Maharashtra) Ltd.
Apollo House, 382, N.M. Joshi Marg
Chinchpokli
Mumbai-400011
 11. Brihan Mumbai Mahanagarpalika
BEST Bhavan, Colaba,
Mumbai-400005
 12. Western Railways,
5th floor,
Churchgate Station Building
Mumbai-400020
 13. Central Railways
New Parcel Office Building
C.S.T. Mumbai-400001
 14. The Mill Owners' Association
Elphinstone Building
10, Veer Nariman Road
Mumbai-400001
 15. Bombay Small Scale Industries
Association
Madhu Compound, 2nd floor
Sonawala Cross Road No. 2
Goregaon(E)
Mumbai-400063
-Respondent(s)

Counsel for Appellant(s): Mr. Iqbal Chagla, Sr. Advocate
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Mr. Janak Dwarkadas, Sr. Adv.
Mr. Ramji Shrinivasan
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Mr. Parag Kabadi
Ms Ruchira Gupta, Ms Laxmi
Ms Lakshmi Ramachandran
Ms Ruby Singh Ahuja
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Mr. P. Tripathy, Mr. Bomi Shroff
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Ms Anjali Chandurkar
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Mr. Hassan Murtuza
Mr. Anusha Nagarajan
Mr. Sanjay Ghosh
Ms Mayuri Raghuvanshi
Ms Anusha Nagarajan
Mr. Anuj Agrawal
Ms Shilpy Chaturvedi
Ms Smieeta Inna, Mr. Rajiv Nanda,
Mr. Nishant Gupta
Mr. Saurabh Mishra
Mr. D.J. Kakalia, Mr. Anand Mishra
Mr. A. Prasad, Ms Gargi Hazarika,
Mr. Syed Naqvi, Mr. Mukesh Tyagi
Mr. Pheroze Palkivala
Mr. G. Ramakrishna
Mr. Venkat Subramanyam
Mr. B. Suyodhan,
Ms Anjali Chandurkar
Ms Alpana Dhake, Mr. Jawahar Raja
Ms Junaira Rehman

JUDGMENT

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

M/s Tata Power Company Limited is the Appellant. M/s. Reliance Energy Limited is the First Respondent. Maharashtra State Electricity Board is the second Respondent. Maharashtra State Government is the third Respondent. Maharashtra State Commission is the 4th Respondent.

2. M/s. Tata Power Company, the Appellant has filed this Appeal No. 56/2005 challenging the impugned order dated 11.6.2004 passed by the Maharashtra State Commission which relates to the determination of Annual Revenue Requirements and Tariff applicable to various categories of consumers of Tata Power Company Limited for the Financial Year 2003-04 and 2004-05.

The short facts are as follows:-

(i) Prior to 1998, the entire requirements of Reliance Energy Limited as a Distribution Licensee was being procured by M/s. Reliance Energy from M/s. Tata Power Company Limited. The tariff in respect thereof was being fixed by Tata Power under the statutory provisions existing at that time . Tata Power was required to pay standby charges to the Maharashtra State Electricity Board pursuant to the arrangements made earlier. Tata Power was factoring in the entire standby charges in its tariff which it charged to its various consumers including Reliance Energy Limited.

(ii) Originally a dispute with reference to standby charges to be paid by M/s. Reliance Energy Limited to Tata Power Company Limited was raised before the Bombay High Court. As against the decision of the Bombay High Court, the parties went to Hon'ble Supreme Court. By the order dated 17.10.2003, the Hon'ble Supreme Court remanded the issue to the State Commission to determine the liability of the

standby charges to be paid by the Reliance Energy Limited to Tata Power Company.

(iii) In pursuant to the said remand order, the State Commission by the order dated 31.5.2004, determined the amount of standby charges required to be paid by the Reliance Energy Limited to Tata Power Company Limited.

(iv) Immediately, thereafter, the State Commission passed an order dated 11.6.2004, fixed the tariff which Tata Power Company had to charge from its various consumers including the Reliance Energy as a Distribution Licensee for the FY 2003-04 and 2004-05. Similarly, the State Commission passed another order dated 18.6.2004 determining the retail tariff which M/S. Reliance Energy Limited was to charge from its consumers.

(v) While passing these tariff orders, the State Commission gave effect to its earlier order dated 31.5.2004.

3. Being aggrieved by the order dated 31.5.2004 fixing the liability of standby charges to be paid by Reliance Energy Limited to Tata Power Company Limited, the Tata Power Company as well as M/S. Reliance Energy Limited filed separate Appeals in Appeal No.202 of 2005 and 29 of 2005 before this Tribunal.

4. According to Tata Power Company in its Appeal, the State Commission had fixed the liability of Reliance Energy for the payment of standby charges at a lower figure. Conversely, M/s. Reliance Energy Limited claimed in its Appeal contending that the State Commission fixed the liability of M/s. Reliance Energy for payment of standby charges at a figure higher than what Reliance Energy Limited was liable to pay.

5. Both the Appeals 202/2005 and 29/2005 challenging the order dated 31.5.2004 were taken up for final disposal. Ultimately, the Division Bench of this Tribunal by the order dated 20.12.2006 rejected the prayer of the Tata Power Company and further reduced the quantum of liability to the payment of standby charges

payable by M/s. Reliance Energy Limited to Tata Power Company Limited as per the State Commission's order dated 31.5.2004.

6. Even during the pendency of the above Appeals in 202/2005 and 29/2005 before this Tribunal challenging the order dated 31.5.2004, passed by the State Commission fixing the liability to pay standby charges, the Tata Power Company Limited, challenging the tariff order passed by the State Commission dated 11.6.2004 has filed this present Appeal in 56/2005.

7. Aggrieved over the judgment of this Tribunal in the Appeals dated 20.12.2006, reducing the quantum of standby charges both Tata Power and Reliance filed the Appeals in the Hon'ble Supreme Court. While admitting the Appeal filed by the Tata Power Company as against to the decision taken by this Tribunal reducing the standby charges, the Hon'ble Supreme Court granted conditional stay of the judgment of this Tribunal dated 20.12.2006 in favour of the Appellant Tata Power Company directing the Appellant to furnish a bank guarantee of a sum of

Rs.227 crores and, in addition, shall deposit a sum of Rs. 227 crores and allowing the Reliance to withdraw the said amount after giving an undertaking that in the event of the Appeal being decided against the Reliance , the amount withdrawn would be refunded to the Appellant with interest.

8. At that stage this Appeal No. 56/2005 was taken up for final disposal by this Tribunal. But periodically, both the parties have asked for adjournments before this Tribunal requesting that the Appeals in the Supreme Court as against the order dated 20.12.2006 passed by this Tribunal are pending and since most of the issues in this Appeal had already been decided by this Tribunal in Appeals No. 202/2005 and 29/2005 and the same is the subject matter of the Appeals filed by the both the parties pending before the Hon'ble Supreme Court, this Appeal No. 56/2005 may not be taken for final disposal till the decision is arrived at by the Supreme Court with reference to the order passed by the Commission on 31.5.2004. Accordingly, the matter was periodically adjourned expecting that Appeals filed before the

Hon'ble Supreme Court would be disposed of early. We have waited for too long. However, on noticing that both the parties have not taken steps to request the Hon'ble Supreme Court to take-up the Appeals for final decision at an early date and in the light of the fact that there is no stay granted in respect of the proceedings in this Appeal 56/2005 and also for the reason that this Appeal is spending for more than 5 years, we have decided to hear the matter and to dispose of this Appeal at an early date. Accordingly, we have intimated to both the parties about our decision to take up the matter for final hearing and have given sufficient time to both the parties to be ready for final disposal.

9. Accordingly, on the date fixed, the matter was taken up for final disposal. We have heard both the Learned Senior Counsel for the parties on a number of days. On hearing the elaborate submissions made by the Learned Senior Counsel for both the parties and also on considering the fact that the order impugned dated 11.6.2004 was based upon the earlier order passed by the Commission on 31.5.2004 which had been set-

aside by the Tribunal by judgment dated 20.12.2006 and the said judgment has been appealed in the Appeals which are pending in the Hon'ble Supreme Court, we feel that it is not desirable to go into the merits of the issues raised in this Appeal against the impugned order dated 11.6.2004. Hence, we deem it appropriate to dispose the Appeal with following observations and consequent directions to the State Commission.

Some of the important events which have to be borne in mind are as follows:

- (i) By the order dated 31.5.2004, in case No.07 of 2004, the State Commission passed an order determining the quantum of standby charges required to be paid by the Reliance Energy Limited to the Tata Power Company Limited.
- (ii) Immediately, thereafter, the State Commission passed an order on 11.6.2004 fixing the tariff which Tata Power Company could charge from its various customers including the Reliance Energy Limited as a 'Distribution Licensee. Similarly, on 18.6.2004, the State Commission passed an

order determining the retail tariff which M/S. Reliance Energy Limited was to charge from its customers in various categories. Admittedly, while passing the said two tariff orders, the State Commission gave effect to its earlier order dated 31.5.2004.

(iii) Being aggrieved by the order dated 31.5.2004, fixing the liability of standby charges, both the Tata Power Company Limited and M/s. Reliance Energy Limited filed the Appeals before this Tribunal in Appeal No.202 and 29 of 2005. Both the parties challenged the said order mainly with reference to the quantum of payment of standby charges. While these Appeals were pending, M/s. Tata Power Company Limited filed this present Appeal No. 56/2005 as against the order dated 11.6.2004 which had given effect to the order dated 31.5.2004 to the extent that it relates to fixation of tariff of the standby facility being provided by the Tata Power Company Ltd. to M/s. Reliance Energy Limited from the period 1998.

(iv) As mentioned above, the Division Bench of this Tribunal by the order dated 20.12.2006 rejected the prayer of the Tata Power Company and further reduced the quantum of the standby charges. Admittedly, this judgment dated 20.12.2006 which set aside the order dated 31.5.2004 by the State Commission has been challenged in the Hon'ble Supreme Court which granted conditional stay of the operation of the judgment of this Tribunal. The said Appeal is still pending.

10. The perusal of the grounds raised in the present Appeal show that most of these grounds had been raised by Tata Power Company Limited in the earlier Appeals as against the order dated 31.5.2004 and the said grounds had been dealt with and decision had been rendered in the judgment of this Tribunal dated 20.12.2006. As indicated above, those issues decided by the Tribunal are pending consideration before the Hon'ble Supreme Court. Therefore, we are not inclined to deal with those grounds which have already been decided by this Tribunal.

11. The specific prayer made in this Appeal is to quash and set aside the impugned order dated 11.6.2004 only to the extent of fixation of tariff of the standby facilities and consequently, the Tata Power Company Limited may be permitted to recover the tariff for standby facility at the same rate at which the Tata Power Company has paid to the State Electricity Board. From the reading of this prayer, it is clear that this Tribunal has been requested by the Appellant in this Appeal to go into the grounds which have been already decided by this Tribunal and which are to be decided by the Hon'ble Supreme Court. In other words, the issue in respect of liability to pay standby charges which has been considered and decided by this Tribunal is sought to be considered again by reopening the entire issue.

12. Admittedly, the impugned order dated 11.6.2004 passed by the State Commission was based upon the earlier order dated 31.5.2004, passed by the State Commission which had already been set aside. Such being the case, if we go into the validity of

the impugned order, it would amount to review the earlier judgment rendered by this Tribunal dated 20.12.2006 setting aside the order dated 31.5.2004 which is not permissible under the law.

13. Further, impugned order dated 11.6.2004 which is a tariff order had given effect to the order dated 31.5.2004 by following a particular methodology. That methodology has resulted in State Commission fixing a particular tariff which has been recovered by the Tata power Company as well as the Reliance Energy Company Limited from their consumers for several years in question. If that methodology is disturbed at this stage, without getting the result of the final adjudication of the Hon'ble Supreme Court in regard to the order dated 31.5.2004 passed by the State Commission, we feel that it would result in a totally unworkable situation.

14. Therefore, we do not want to go into the merits of these issues now in this Appeal as we are yet to know the outcome of

the very same issue in the pending Appeals before the Hon'ble Supreme Court.

15. There are two possibilities arising out of the outcome of the Hon'ble Supreme Court judgment:

(i) If the Tribunal judgment dated 20.12.2006 is upheld by the Hon'ble Supreme Court, the State Commission has to restore the standby charges payable by the Reliance for the Financial Year 1998-99 to 2003-04 on the basis of the judgment of this Tribunal dated 20.12.2006. The State Commission order dated 11.6.2004 to that extent would have to be modified by the State Commission.

(ii) In case the Tribunal judgment dated 20.12.2006 is set-aside by the Hon'ble Supreme Court, there are two possibilities:

(a) If the Tribunal judgment is set aside and if the State Commission's order in entirety is upheld,

then the question of the adjustment of the amount payable by the Tata Power Company to the Reliance Energy against Tata Power Company's contingency reserve would have to be decided.

(b) If both the Tribunal's judgment dated 20.12.2006 as well as the State Commission's order dated 31.5.2004 are set aside by the Hon'ble Supreme Court and the matter is remanded back to the State Commission by giving some guidelines for determining the liabilities of both the parties arising out of standby charges, the State Commission will have to decide the matter de-novo.

16. Thus viewed from any angle we feel that it is not proper to decide the issue afresh till these issues are decided by the Hon'ble Supreme Court. Therefore, we deem it appropriate to dispose of this Appeal with a direction to the State Commission to take up the matter afresh and to pass appropriate orders in accordance with the Hon'ble Supreme Court final judgement as and when it is pronounced.

17. Accordingly ordered. With these observations, this Appeal is disposed of. No order as to cost.

(V.J.Talwar) **(Rakesh Nath)** **(Justice M. Karpaga Vinayagam)**
Technical Member **Technical Member** **Chairperson**

Dated: 24th May, 2011

REPORTABLE/NON-REPORTABLE