

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

**Appeal No. 67 of 2009**

**Dated: 6<sup>th</sup> September, 2011**

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

**In the matter of:**

**DPSC Limited  
Plot X – 1, 2 & 3, Block E P,  
Sector V,  
Salt Lake City,  
Kolkata-700 091**

**... Appellant**

**Versus**

**West Bengal Electricity Regulatory Commission,  
FD-415A, Poura Bhawan,  
3<sup>rd</sup> Floor, Sector-III,  
Bidhannagar,  
Kolkata-700 106**

**... Respondent**

Counsel for the Appellant(s):      Dr. Samir Chakraborty,  
   Ms. A. Biswas  
   Mr. Atul Shankar Mathur  
   Ms. Shruti Verma

Counsel for the Respondent(s):      Mr. Pratik Dhar &  
   Mr. C.K. Rai for WBERC

**JUDGMENT**

**HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

This Appeal has been filed by DPSC Ltd. against the order dated 15.9.2008 regarding the Annual

Performance Review of the Appellant for the FY 2006-07 and the order dated 26.12.2008 passed by the West Bengal Electricity Regulatory Commission in the Review Petition filed against the order dated 15.9.2008.

2. The Appellant is in the business of power generation and distribution. It has distribution licence of Asansol- Raniganj belt of District Burdwan in West Bengal. The State Commission is the Respondent.

3. The brief facts of the case are as under:

3.1. The Annual Revenue Requirement and Tariff of the Appellant for the FY 2006-07 was determined by the State Commission in accordance with the provisions of the West Bengal Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2005 by its order dated 8.5.2006.

3.2. On 9.2.2007, the State Commission notified the Tariff Regulations, 2007 which was amended on 31.12.2007. The 2007 Regulations provided for multi-year tariff.

3.3. On 31.1.2008, the State Commission passed the Fuel and Power Purchase Cost Adjustment (FPPCA) order for the years 2004-05, 2005-06 and 2006-07.

3.4. On 31.3.2008, the Appellant filed the Annual Performance Review (APR) for the FY 2006-07 registered as Case No. APR-4/07-08.

3.5. The State Commission by its impugned order dated 15.9.2008 disposed of the APR petition of the Appellant.

3.6. A Review Petition was filed by the Appellant against the said order dated 15.9.2008 which was

rejected by the State Commission by its order dated 26.12.2008.

3.7. The Appellant on being aggrieved over the findings on two issues namely (i) Power Purchase Cost under Allowable Variable Cost and (ii) the interest on working capital under fixed charges determined in the impugned order, has filed this Appeal.

4. The Appellant has urged the following contentions relating to the above two issues.

4.1. Power Purchase Cost: The Tariff Regulations, 2007 provide for APR by the State Commission for the ensuing year or base year. The Regulation 2.6 stipulates APR to be carried out in respect of annual fixed charges, incentives and effects of gain sharing for the ensuing year or base year. The Regulations do not provide for APR of variable charges like Power

Purchase Cost, which has been specifically left out of the scope of APR. The first control period under the Multi Year Tariff (MYT) framework was FY 2007-08 and the base year, immediately preceding the first year of control period, was the FY 2006-07. The State Commission while carrying out the APR under the 2007 Regulations, applied the 2005 Regulations for carrying out the review of variable charges. The State Commission took into account the actual transmission and distribution loss of 4.76%\_instead of the T&D loss of 5.74% approved in the Tariff Order and reduced the Power Purchase cost of the Appellant. Even under the 2005 Regulations, the State Commission was obliged to arrive at allowable power purchase cost by taking into account the approved T&D loss of 5.74%. But this was not taken into account. Thus, the State

Commission has erroneously reduced the Power Purchase Cost of the Appellant.

4.2. Interest on Working Capital: The 2005 Tariff Regulations provide for working capital to be assessed on normative basis according to Regulation 4.6.5.1. The interest on working capital amount is required to be computed according to the Regulation 4.6.5.2, applying the lower of actual rate of interest or SBI short-term prime lending rate. The State Commission, instead of determining the interest on working capital according to the Regulations, allowed the actual interest, thereby reducing the interest on working capital.

5. According to the learned counsel for the State Commission, the Appellant has not challenged the FPPCA order dated 31.1.2008 vide which the State

Commission adopted the actual T&D loss of 4.76% for determining the Power Purchase Cost. This order had reached finality and, therefore, the Appellant is estopped from raising the issue of T&D loss in the present Appeal under the garb of challenging the APR order dated 15.9.2008, which admittedly deals with only the fixed cost and not the variable cost. T&D loss of 5.74% was considered provisionally in the Tariff Order dated 8.5.2006, subject to revision because of non-filing of the audited figures.

6. Regarding the interest on working capital, the learned counsel for the State Commission has submitted that the 2007 Regulations would show that the State Commission is entitled to take the actual interest on working capital incurred by the licensee.

7. In the light of the rival contentions of the Appellant and the State Commission, the following questions would arise for our consideration:

- i) Whether the State Commission has erred in determining the Power Purchase Cost in the impugned APR order taking into account the actual transmission & distribution loss instead of the normative loss allowed in the Tariff Order?
- ii) Whether the State Commission was correct in allowing the actual interest on working capital instead of computing on the basis of lower of the actual interest rate or SBI short term PLR applied on the normative working capital?



8. The first issue is regarding the power purchase cost.

8.1. According to learned counsel for the Appellant, the Annual Performance Review of variable charges, like Power Purchase Cost has been specifically left out of the scope of APR, according to the 2007 Regulations. As such, reduction of Power Purchase Cost and T&D loss are without any jurisdiction. APR was done under the 2007 Regulations while the State Commission applied the 2005 Regulations for carrying out such review. Even if the 2005 Regulations are applied the normative allowable purchase cost for the FY 2006-07 has to be arrived at after taking into account the purchasable quantum of energy on the basis of the approved T&D loss of 5.74%.

8.2. According to the learned counsel for the State Commission, the Appellant had not challenged the FPPCA order dated 31.1.2008 vide which the State Commission had considered the T&D loss of 4.76% on actual basis. Since FPPCA order had attained finality, in the impugned APR order, the State Commission has allowed the variable charges according to the FPPCA order dated 31.1.2008. Further, the State Commission did not approve T&D loss of 5.74% in the Tariff order for the FY 2006-07 but only provisionally considered as 5.74% as projected by the Appellant in its petition. The State Commission in its Tariff Order for the FY 2006-07 had clearly recorded lack of data furnished by the Appellant in its petition.

8.3. Let us first examine the 2005 Tariff Regulations under which the tariff for the FY 2006-07 was determined. According to the Regulation 11 of

Schedule 5, the variation in fuel and power purchase cost has to be dealt as per FPPCA formula specified under Schedule 7. The FPPCA formula in Schedule 7 takes into account the normative T&D loss fixed by the State Commission for calculating the FPPCA.

8.4. In the tariff order for the FY 2006-07 dated 8.5.2006, the State Commission has allowed the T&D loss of 5.74% for the year 2006-07; as projected by the Appellant. Even though the State Commission has recorded that the Appellant in the data furnished with the petition, has not given proper quantitative disclosure of energy handled during the year 2004-05, it finally decided the T&D loss at 5.74% for the FY 2006-07. We are unable to accept the argument of learned counsel for the State Commission that the T&D loss decided in the tariff order was provisional only because the State Commission decided to “allow

for the present a T&D loss of 5.74%”. If the actual T&D loss level achieved by the Appellant was found to be better than the normative level, the same cannot be substituted for the approved normative T&D loss retrospectively.

8.5. However, we notice that the Appellant vide its application dated 20.9.2007 filed before the State Commission had made a claim of FPPCA for the FY 2006-07. The State Commission vide its order dated 31.1.2008 decided the total variable cost allowed for FY 2006-07 and the amount of FPPCA to be recovered from the consumers. In this order, the State Commission used the FPPCA formula according to the 2005 Regulations. The loss factor used in the formula has also been based on the normative T&D loss as per the formula specified in the 2005 Regulations. Subsequently, the Appellant filed a Petition with the

State Commission on 1.4.2008 for review of FPPCA order dated 31.1.2008 claiming additional cost of energy saved on account of achieving T&D loss level below the normative level to be passed on to the Appellant in FPPCA. The State Commission by its order dated 18.12.2008 rejected the Review Petition. The Appellant did not file any Appeal against the FPPCA order dated 31.1.2008. Thus, the FPPCA order dated 31.1.2008 has attained finality.

8.6. According to learned counsel for the State Commission, the variable cost for FY 2006-07 as allowed in the FPPCA order has been adopted in the impugned order. We find that the State Commission in the impugned order has not determined the FPPCA but has applied the variable cost as determined in the FPPCA order. Thus, we do not find any infirmity in the order of the State Commission.

8.7. Learned counsel for the Appellant argued that the APR for FY 2006-07 was made under the 2007 Regulations and therefore, the State Commission had to confine itself to the APR of the annual fixed charges. There is no provision for APR for the variable charges in the 2005 Regulations or 2007 Regulations. Variable charges like power purchase cost have been specifically left out of the scope of APR. Thus, the State Commission had no authority to review or alter the allowed T&D loss and power purchase cost.

8.8. Let us examine the relevant Regulations of the 2005 Regulations under which the ARR for FY 2006-07 was determined. Regulation 11 of Schedule 5 the 2005 Tariff Regulations provides for variation in fuel and power purchase cost as per the FPPCA formula specified in Schedule 7. The State

Commission on the Petition submitted by the Appellant determined the FPPCA by its order dated 31.1.2008.

8.9. Now we shall examine the 2007 Regulations dated 9.2.2007 as amended on 31.12.2007. The first control period under the Multi Year Tariff according to the Regulations is FY 2007-08. The base year for the first control period is FY 2006-07. Similarly, FY 2007-08 is the base year for control period 2008-11. Regulation 2.5.6 (ii) provides for any variation in expenditure on account of FPPCA for a base year to be adjusted with the ARR of any ensuing year. Regulation 2.6 stipulates Annual Performance Review to cover annual fixed charges, incentives as per Schedule 10 and effect of gain sharing as per Schedule 9B. The incentives as per Schedule 9B and gain sharing as per Schedule 10

of the 2007 Regulations, in our view, are not applicable to the FY 2006-07 as norms have been decided for only the ensuing years of the control period and cannot be applied retrospectively to the FY 2006-07. However, the review of fixed charges of the FY 2006-07 as per the Regulations 2005 will have to be done so that the trued-up amount can be adjusted in the future ARR and tariff of the Appellant.

8.10. Regulation 2.8.7 of the 2007 Regulations also provides for FPPCA as per the formula specified in Schedule 7. However, the formula as specified in the 2007 Regulations will be applicable only for the ensuing years of the MYT Control Period. Regulation 2.8.7.1 also provides for adjustment of FPPCA against old power purchase liabilities as under:

*“2.8.7.1. The FPPCA in respect of a generating company or a licensee shall be worked out as per*



*the relevant formula specified in Schedule 7. Any variation in expenditure on account of FPPCA arising out of variation of price for fuel or heat value of fuel or power purchase cost etc. or an FPPCA against old power purchase liabilities, arising from earlier period's purchase of power shall be either adjusted with the ARR of the next earliest available ensuing year during the stage of tariff determination for recovery/refund through tariff or allowed to be recovered from or refunded to the consumers through a separate order of the Commission, as the Commission may decide.”*

In view of the above, we do not agree with the learned counsel for the Appellant that the adjustment on account of FPPCA determined by the State Commission in its earlier order dated 31.1.2008 should not be accounted in the APR of FY 2006-07.

8.11. The Appellant in our view is only raising a technical point that the impugned APR order as per

the 2007 Regulations cannot have adjustment for variable charges. The State Commission has not determined the admissible variable charges for FY 2006-07 in the impugned order but has adopted the same as per the FPPCA order dated 31.1.2008. FPPCA for 2006-07 was necessary to be adjusted to determine the net amount of excess recovery to be adjusted in the ARR of FY 2008-09 or any other ensuing year of the Appellant.

8.12. The cause for challenging the FPPCA arose immediately after the FPPCA order dated 31.1.2008. The Appellant did not challenge the FPPCA order which has since reached finality. The Appellant cannot challenge the variable cost adopted in the APR order dated 15.9.2008 on the basis of the FPPCA order dated 31.1.2008.

8.13. In view of above, we decide this issue against the Appellant.

9. The second issue is regarding the interest on working capital.

9.1. According to the learned counsel for the Appellant the interest on working capital should not have been reduced to the actuals and should have been retained at the normative level as per the 2005 Regulations. Further, when working capital is funded through internal resources, the internal funds also carry cost.

9.2. According to the learned counsel for the State Commission Regulations 2.7.1, 4.6.5.1 and 4.6.5.2 of 2007 Regulations would show that the State Commission is entitled to take the actual amount of interest on working capital incurred by the Appellant.

9.3. Let us first examine the relevant Regulations of the 2005 Regulations. The relevant Regulation 4.6.5 is reproduced below:

**"4.6.5 Interest on Working Capital**

*4.6.5.1. The working capital requirement shall be assessed on normative basis @ 12.5% on estimated annual sales revenue reduced by the amount of Depreciation, Deferred Revenue Expenditure and Return of the Generating Company / licensee.*

*4.6.5.2. Rate of interest on working capital so assessed on normative basis, shall be equal to the short-term prime lending rate of State Bank of India as on the 1st April of the year preceding the year for which tariff is proposed to be determined or at the actual rate of borrowing whichever is less".*

The 2005 Regulations provide that the working capital will be assessed on normative basis but the interest rate on working capital shall be the short-term

prime lending rate of SBI or the actual rate of borrowing whichever is less.

9.4. Regulation 2.7.1 provides for filing of an application for determination of tariff 120 days in advance of the effective date of the tariff revision. In our opinion, Regulation 2.7.1 referred to by the learned counsel for the Appellant is not relevant to the issue under consideration. The Petition of the Appellant in this case was for APR and not tariff determination.

9.5. Regulations 4.6.5.1 and 4.6.5.2 of the 2007 Regulations referred to by the learned counsel for the Appellant are reproduced below:-

*“4.6.5.1 The working capital requirement shall be assessed on normative basis @ 18% on summation of annual fixed charge, fuel cost and power purchase cost reduced by the amount of*

*depreciation, deferred revenue expenditure, return on equity and other non cash expenditures such as, the provision for bad-debt, reserve for unforeseen exigencies, special appropriation against any withheld amount of previous year, arrear on account of adjustment due to Annual Performance Review, FPPCA, etc. of a generating company or a licensee, as the case may be.*

*4.6.5.2 Rate of interest on working capital so assessed on normative basis, shall be equal to the short-term prime lending rate of State Bank of India as on the 1st April of the year preceding the year for which tariff is proposed to be determined or at the actual rate of borrowing whichever is less”.*

The formulation of working capital requirement in the 2007 Regulations is different from the provision in the 2005 Regulations. However, the working capital has to be on normative basis according to both the 2005 and the 2007 Regulations. The provision for

interest rate on the working capital is also the same in both the 2005 and the 2007 Regulations.

9.6. The tariff for 2006-07 was determined according to the 2005 Regulations. Thus, the interest on working capital has also to be determined according to the 2005 Regulations. The 2007 Regulations will only be applicable for determining the interest on working capital for the ensuing year of the Mutli Year Control Period i.e. with effect from the FY 2007-08.

9.7. It is clear from the 2005 Regulations that the working capital should be based on the normative basis. In the Tariff Order, the working capital was assessed on normative basis and the interest on working capital was taken as 10.25%. However, the weighted average rate of actual interest is 8.66%, being less than the SBI short-term prime lending rate

of 10.25%. Thus the interest on working capital according to the Regulations has to be determined on the normative working capital calculated according to the Regulation 4.6.5.1 at the actual rate of interest which is lower than the SBI PLR Rate, according to the Regulation 4.6.5.2.

9.8. This issue has already been decided by this Tribunal in the case of Reliance Infrastructure Ltd. vs. Maharashtra Electricity Regulatory Commission reported as 2009 ELR (APTEL) 0672. The relevant extracts of the judgment are reproduced below:

*“11. The Commission has directed that the interest on working capital be treated as efficiency gain and is required to be shared as per Regulation No. 19. The treatment given to the interest on working capital is as under:*

***“Interest on Working Capital***



*As discussed in the above paragraphs, the actual interest on working capital incurred by REL during FY 2006-07 is nil and the normative interest on working capital approved by the Commission considering other elements of expenses as approved after truing up, works out to Rs.0.60 Crore. As the actual expenditure under this head is zero, the Commission has considered the entire normative interest on working capital as efficiency gains and has considered sharing of the same with the distribution licensees in the appropriate ratio, as discussed while sharing efficiency gains due to reduction in R&M expenses.*

*12) It is submitted on behalf of the appellant that when working capital is funded through internal sources of the appellant, the internal funds also carry cost. It is further submitted that such funds employed elsewhere would have carried interest income.*

13) *The Commission observed that in actual fact no amount has been paid towards interest. Therefore, the entire interest on working capital granted as pass through in tariff has been treated as efficiency gain. It is true that internal funds also deserve interest in as much as the internal fund when employed as working capital loses the interest it could have earned by investment elsewhere. Further the licensee can never have any funds which has no cost. The internal accruals are not like some reserve which does not carry any cost. Internal accruals could have been inter corporate deposits, as suggested on behalf of the appellant. In that case the same would also carry the cost of interest. When the Commission observed that the REL had actually not incurred any expenditure towards interest on working capital it should have also considered if the internal accruals had to bear some costs themselves. The Commission could have looked into the source of such internal accruals and the cost of generating such accruals. The cost of such accruals or funds could be less or more than the normative interest.*

*In arriving at whether there was a gain or loss the Commission was required to take the total picture into consideration which the Commission has not done. It cannot be said that simply because internal accruals were used and there was no outflow of funds by way of interest on working capital and hence the entire interest on working capital was gain which could be shared as per Regulation No. 19. Accordingly, the claim of the appellant that it has wrongly been made to share the interest on working capital as per Regulation 19 has merit”.*

In the above judgment the Tribunal has held that the working capital funded through internal sources as also carry cost. Such funds employed elsewhere would have carried interest income.

9.9. The above issue has also been dealt with in another judgment of this Tribunal dated 28.8.2009 in Appeal No. 117 of 2008 in the matter of Reliance

Infrastructure Ltd. vs. Maharashtra Electricity Regulatory Commission & Ors. The relevant extracts are reproduced below:

*“15. In Appeal No.111/08, in the matter of Reliance Infrastructure v/s MERC and Ors., this Tribunal has dealt the same issue of full admissibility of the normative interest on Working Capital when the Working Capital has been deployed from the internal accruals. Our decision is set out in the following paras of our judgment dated May 28, 2008 in Appeal No. 111 of 2008.*

*“7) The Commission observed that in actual fact no amount has been paid towards interest. Therefore, the entire interest on Working Capital granted as pass through in tariff has been treated as efficiency gain. It is true that internal funds also deserve interest in as much as the internal fund when employed as Working Capital loses the interest it could have earned by investment elsewhere. Further the licensee can never*

*have any funds which has no cost. The internal accruals are not like some reserve which does not carry any cost. Internal accruals could have been inter corporate deposits, as suggested on behalf of the appellant. In that case the same would also carry the cost of interest. When the Commission observed that the REL had actually not incurred any expenditure towards interest on Working Capital it should have also considered if the internal accruals had to bear some costs themselves. The Commission could have looked into the source of such internal accruals or funds could be less or more than the normative interest. In arriving at whether there was a gain or loss the Commission was required to take the total picture into consideration which the Commission has not done. It cannot be said that simply because internal accruals were used and there was no outflow of funds by way of interest on Working Capital and hence the entire interest on working capital was gain which could be*

*shared as per Regulation No. 19. Accordingly, the claim of the appellant that it has wrongly been made to share the interest on Working Capital as per Regulation 19 has merit.*

*15. b): The interest on Working Capital, for the year in question, shall not be treated as efficiency gain.*

*16. In view of our earlier decision on the same issue we allow the appeal in this view of the matter and hold that the entire interest on normative interest rate basis is payable to the appellant”.*

9.10. The learned counsel for the State Commission has argued that in terms of Regulation 5.4 of the Tariff Regulations, nothing in the Tariff Regulation is to be deemed to limit or otherwise affect the inherent power of the State Commission to make such orders as may be necessary for meeting the ends of justice. We do not find force in this submission. In our opinion, if the

Regulations have specifically provided for treatment of interest on working capital, it has to be carried out as per the Regulations, and in no other way.

9.11. In view of above, we direct the State Commission to determine the interest on working capital based on the normative working capital and actual interest rate, being less than the SBI PLR, as per the Regulations.

10. **Summary of our findings:**

**10.1. The first issue is regarding the Power Purchase Cost. The State Commission has not determined the variable cost, which includes the Power Purchase Cost, for FY 2006-07 in the impugned order but has adopted the same according to the FPPCA order dated 31.1.2008 which was not challenged by the Appellant and has**

since attained finality. Even though the APR for the FY 2006-07 was to be done for the fixed charges, consideration of variable cost as determined in the FPPCA order earlier was necessary to determine the net amount of excess/short recovery to be adjusted in the ARR for the subsequent years. Thus, the issue regarding consideration of Power Purchase Cost is decided against the Appellant.

10.2. The second issue is regarding the interest on working capital. According to the 2005 Regulations the interest on working capital has to be determined based on normative working capital as per the Regulation 4.6.5.1 and the actual rate of interest on borrowing, being less than the SBI short term PLR, according to the Regulation 4.6.5.2. This issue has also been decided by the



**Tribunal in judgment reported as 2009 ELR (APTEL) 0672 and in Appeal No. 117 of 2008 dated 28.8.2009 in Reliance Infrastructure Ltd. vs. MERC & Ors. Accordingly, this issue is decided in favour of the Appellant.**

11. In view of above, the Appeal is allowed partly to the extent above. The State Commission is directed to give effect to the findings made in this judgment. No order as to costs.

12. Pronounced in the open court on this **6<sup>th</sup> day of September, 2011.**

**( Rakesh Nath)  
Technical Member**

**(Justice M. Karpaga Vinayagam)  
Chairperson**

REPORTABLE / NON-REPORTABLE

vs