Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.148 OF 2009

Dated:23rd March, 2012

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

In the Matter Of

1. Reliance Infrastructure Limited
Reliance Energy Centre,
Santacruz (East)
Mumbai-400 055

…….. Appellant

Versus

1. The Maharashtra Electricity Regulatory Commission
World Trade Centre No.1
13th Floor, Cuffe Parade
Colaba
Mumbai-400 001

2. Mumbai Grahak Panchayat
Sant Dnyaneshwar Marg,
Vile Parle (W)
Mumbai-400 056

3. Prayas
C/O Amrita Clinic, Athawale Corner
Karve Road,
Pune-411 004

4. Thane Belapur Industries,
Post: Ghansoli,
Navi Mumbai-400 071

5. Vidarbha Industries Association
Civil Lines,
Nagpur-400 041

…… Respondent(s)

Counsel for the Appellant : Mr. J.J Bhatt,Sr.Adv
Ms. Anjali Chandurkar
Mr. Shiv K Suri
Mr. Hasan Murtaza
Ms. Shilpy Chaturvedi
Mr. Saswat Pattnaik

Counsel for the Respondent : Mr. Buddy A Ranganadhan
Ms. Richa Bhardwaja

JUDGMENT

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

1. Reliance Infrastructure Limited is the Appellant herein.

2. The Present Appeal challenges the tariff order dated 28.5.2009 passed by the Maharashtra State Commission in the matter of Appellant's Generation Tariff Petition for the Financial Year 2009-10.

3. There are two issues which arise for consideration in the Present Appeal.

   (i) Transit Losses of Imported Coal; and

   (ii)Grossing up of Income Tax

4. The First Issue is Transit Losses of Imported Coal. This issue revolves around the truing-up of transit losses of imported coal for the financial year 2007-08. The Appellant uses both the domestic coal as well as the imported coal for its Dahanu Thermal Power Station (DTPS). As regards the domestic coal, the actual losses claim is 1.5%. The norm for transit losses for coal as per the Regulations is 0.8%.

5. As regards the imported coal, actual losses claimed is 0.35%. There is no separate norms specified in 2005 Tariff Regulations in respect of imported coal. Therefore, in the impugned order no transit loss on imported coal has been permitted.

6. According to the Appellant the generating facility of the Appellant is non pithead generation as it is away from the place from which raw material is procured i.e. the coal mines. The Regulations 33.1.6 (a) (ii) is applicable and the permissible transit losses for domestic coal is 0.8% being considered.

7. As regards the transit loss for imported coal, it is the contention of the Appellant that the transit losses occur while unloading from the vessel to barge, barge to jetty and from jetty to DTPS coal-yard and on that reason the Appellant has claimed that the transit loss of primary fuel as uncontrollable factor and accordingly, the Appellant is entitled to the claim the actual transit losses.

8. The State Commission did not accept this contention since the Appellant had not entered into proper contracts to get the imported coal on delivery basis. Further, the State Commission had observed that since MERC Tariff Regulations do not provide for any transit loss on imported coal, the Commission has not allowed any transit loss for imported coal. However, the State Commission considered the normative transit loss of 0.8% for washed coal for truing up purposes.

9. It is also noticed from the impugned order that the State Commission has followed the judgment of this Tribunal in Appeal No.251 of 2006 and considered the norms fixed in the Regulations rather than the trajectory fixed in its earlier tariff order. As a matter of fact, this Tribunal has held in the judgment that the trajectory specified in the Commission's orders would be effective only in the absence of the norms and if the norms were specified in the Regulations such norms would have to be applied.

10. The Appellant has contended that judgment in Appeal No.251 of 2006 would not be applicable to this case.

11. We do not agree with the contention of the Appellant. This Tribunal in the judgment referred to above, dealt with the case where the generator performed better than the norm and in that event the Tribunal directed that the benefit of the norms must be given to such a generator. If the benefit of norm is to be provided to the generator for better performance then the loss of performance below the norm has to be borne by the generator. The present is a case where the generator has performed below the norm. If the generator is given the benefit of not adhering to the norm even though it performed below the norm, it would be a clear case of **eating one's cake and having it too.**

12. If the rule of law prescribes the supremacy of the Norm over the actual performance, such principle must hold good whether the utility performs better than the norm or not.

13. Further it is noticed from the impugned order that the State Commission has clearly observed that other generating Companies in the State of Maharashtra i.e. Maharashtra State Power Generation Company and the Tata Power Company also procured imported coal but they have not reported any

transit loss for imported coal. This implies that they procured coal on delivery basis.

14. When the State owned generators have been able to procure imported coal on delivery basis, there is no reason as to why private generator is not prudent enough to procure coal on similar terms. Therefore, the State Commission is correct in not permitting the Appellant the transit loss on imported coal when it is established that other generators including the State owned generators can procure coal on delivery basis. Therefore, the contention of the Appellant on the first point would fail.

15. In regard to the **Second Point**, namely the Grossing up of Income Tax, it is admitted by both the parties that this issue i.e. grossing up of income tax has been considered by this Tribunal and decided in the following cases. In these cases it is held that the income tax is to be allowed by grossing up to ensure the stipulated post tax returns by the State Commission to the generators. Those judgments are as follows:

(i) Appeal No.173 of 2009-Tata Power Co Vs MERC dated 15.2.2011

(ii) Appeal No.174 of 2009- Tata Power Co Vs MERC dated 14.2.2011

(iii) Appeal No.175 of 2009- Tata Power Co Vs MERC dated 14.2.2011

(iv) Appeal No.49 of 2010-Tamil Nadu Electricity Board Vs Neyvelli Lignite Corporation dated 10.9.2010

(v) Appeal No.68 of 2009 – Torrent Power Vs GERC dated 23.3.2010

(vi) Review Petition No.9 of 2010 in Appeal No.68 of 2009 dated 5.1.2011

16. According to the State Commission, the Commission has not grossed up the return on equity component for income tax since the income tax is allowed as part of the ARR as an expense head in accordance with the MERC Tariff Regulations. Regulation 34.2.1 states that "income tax on the income of the Generation Business of the Generating Company shall be allowed for inclusion in the annual fixed charges". If the income is equivalent to the Return on Equity, the difference between the income and expenditure as well as other expenses are being reimbursed through ARR. Accordingly, the State Commission has allowed income tax on RoE component in the impugned order. This is in accordance with the MERC tariff regulations.

17. However, it is to be pointed that this Tribunal in Review Application No.9 of 2010 in Appeal No.68 of 2009 i.e Torrent Power case dated 5.2.2011 has held as follows:

> *"The Torrent Power Limited should neither benefit nor loose on account of tax payable which is a pass through in*

the tariff. Thus, there is no question of the generating company making profit on account of income tax".

18. This observation would squarely apply to the present case as well.

19. With these observations the above Appeal is disposed of. However, there is no order as to costs.

(V.J. Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:23rd Mar, 2012

Reportable/Not Reportable