Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.150 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 attribual

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. The Reliance Infrastructure Limited is the Appellant.

2. This Appeal relates to the determination of tariff for the Distribution Business of the Appellant for the Financial Year 2009-10.

3. The above proceedings would include truing-up for the Financial Year 2007-08 and Annual Performance Review for the Financial Year 2008-09. There are 07 issues that may arise for consideration in this Appeal. Those issues are as follows:

(i) Security charges for the Financial Year 2007-08;

(ii) Conveyance and Travelling Expenses for the Financial Year 2007-08

(iii) Consumer contribution reduced from regulated equity for the financial year 2007-08 and financial year 2008-09

(iv) Grossing up of income tax for the financial year 2007-2008, 2008-09 and 2009-2010

(v) Reduction of Power Purchase owing to Demand Side Management (DSM)

(vi) Capital expenditure for meeting scheme

(vii) Wheeling loss level for Financial Year 2009-10

4. The **First Issue** is relating to the **security charges for the Financial year 2007-08**. The question in the present issue pertains to whether the security charges incurred by the Appellant for the Financial Year 2007-08 should be allowed on the basis of the actuals ignoring the tariff Regulations pertaining to the Annual Performance Review and the sharing of efficiency gains and/or losses.

5. According to the Appellant, the Additional expenses incurred by the Appellant on this ground were completely uncontrollable and hence the same ought to have been allowed on the basis

of the actual. The crux of the grounds raised by the Appellant is as follows:

> "The Appellant in order to protect its various establishments has to hire security and the same has to outsourced by contracting from the external service providers. The security expenses are directly proportional to the number of locations to be covered. The business of the Appellant is dynamic in nature. There is load growth on account of new customer, load growth on account of higher per capital consumption of electricity. To tackle this load growth, network expansion and augmentation is required and has to be undertaken. Provision for security at new locations has to be made. Further, the Appellant has to pay the security charges as per the rates prescribed by the Security Board as per the prevailing market rates for such services. Owing to reason explained herein above, the charges are clearly out of control of the Appellant. The security expenses on account of various factors are uncontrollable and also vital and essential. Thus, these additional expenses amounting to Rs.66 lacs ought to be allowed by the State Commission".

6. However, the State Commission has held that such charges are controllable in nature and any excess expenditure over and above the projected amount in the relevant year of the MYT

period must be shared between the Appellant and the consumers in accordance with the MERC (Terms and Conditions for the Determination of Tariff Regulation 2005). On that basis, the Commission disallowed the said claim. The relevant finding which has been given by the State Commission is as follows:

> "*The Commission is of the view that these expenses are controllable in nature and the licensee has to ensure that the expenses are managed within the approved levels. Hence, the Commission has allowed A&G, expenses only to the extent approved in the APR Order dated June 4, 2008 and has considered the difference between the allowed A&G expenses and actual A&G expenses under the sharing of gains and losses due to controllable factors (without giving effect to the disallowed expenses, since these cannot be allowed under the mechanism of sharing of controllable gain/losses) since A&G is a controllable expense"*

7. Through the impugned order, the State Commission has considered the performance parameters and expenses for computing the sharing of gain/losses in accordance with the provisions of Tariff Regulations. Accordingly, the State Commission, in the impugned order treated the increase in expenses over the approved level and shared the difference in accordance with the tariff Regulation since such expenditures are controllable in nature. The State Commission, as a Regulator is required to set certainty in application of its Regulations when the same is applied for verifying the

reasonableness of expenses incurred by a regulated entity. Accordingly, the principle laid down in the Tariff Regulations notified by it on how to interpret the term "uncontrollable factors" and the factors which are beyond the control of the utility are to be applied without exception to any expense head.

8. While the Appellant has sought to treat all such expenditure as "uncontrollable", the Appellant has admittedly not been able to give any justification as to why such expenditure are beyond the control of the Appellant or what steps the Appellant has taken to mitigate the increase in such expenses.

9. The Appellant merely contended that those expenses are uncontrollable. This approach is wrong. In this regard, it is pointed out that this Tribunal in Full Bench Appeal No.139 of 2009 titled Maharashtra State Electricity Transmission Company Vs. MERC dated 23.3.2011 has specifically held that the Administrative and General expenses and also the Repair and Maintenance Expenses are generally controllable in nature. The relevant extract of the judgment is hereunder:

> *"8.4. The relevant part of the Regulation 19 of the Tariff Regulations is extracted hereunder:-*
>
> *19.2. The approved aggregate loss to the Generating Company or Licensee on account of controllable factors shall be dealt with in the following manner:*

(a) One – third of the amount of such loss may be passed on as on additional charge in tariffs over such period as may be specified in the order of the Commission under Regulation 17.10: and

(b) The balance amount of loss shall be absorbed by the Generating Company or Licensee

The above Regulations indicate that 1/3rd of loss on account of controllable factors has to be passed on as an additional charge in the tariffs and the balance 2/3rd has to be absorbed by the licensee. A&G and R&M expenses are controllable factors. The State Commission has compared the actual audited expenses with the figures projected for the Multi Year Tariff Period for the purpose of sharing the efficiency loss/gain as per Regulation 19.

8.5. Thus, we find that the State Commission has determined the A&G and R&M expenses according to its Regulations and MYT tariff order"

10. So, this issue has already been decided by this Tribunal. However, in the present case, the Appellant not only has also not been able to establish that such expenses were uncontrollable but the Appellant has not been able to place any material to show that as to what steps it has taken to mitigate such increase. In the absence of the same, the said expenses are obviously controllable and have been accordingly treated in accordance with the Tariff Regulations in the impugned order. Therefore, there is no merit in the contention urged by the

Learned Counsel for the Appellant. Accordingly this contention would fail.

11. The **second issue** is relating to **Conveyance and Travelling Expenses for the Financial Year 2007-08.**

12. On this issue, the Appellant has claimed the increase in actual Conveyance and Travelling expenses over the approved limit to be allowed as per actual in the Tariff Order. According to the Appellant, the Conveyance and Travelling expenses had increased from Rs.5.90 Crore to Res.7.16 Crore primarily due to the shifting of the offices and due to increase in conveyance allowance and the expenditure of employees subsequent to the wage revision. On this point, the State Commission has given the following finding:

> "*The Commission is of the view that these expenses are controllable in nature and the licensee has to ensure that the expenses are managed within the approved levels. Hence, the Commission has allowed A&G expenses only to the extent approved in the APR Order dated June 4, 2008, and has considered the difference between the allowed A&G expenses and actual A&G expenses under the sharing of gains and losses due to controllable factors (without giving effect to the disallowed expenses, since these cannot be allowed under the mechanism of sharing of controllable gain/losses), since A&G is a controllable expense. The summary of A&G expenses approved in the Order, actual A&G expenses and A&G expenses approved after truing up for FY 2007-08".*

13. These finding would make it clear that these expenses being controllable in nature had to be managed by the licensee within the approved levels. Having said so, the State Commission has allowed Administrative and General expenses only to the extent approved in the APRs and has considered the difference between the allowed Administrative and General expenses and Actual Administrative and General expenses under the sharing of gains and losses due to controlled factors. This finding in our view, is perfectly justified. Therefore, the contention of the Appellant on this ground would fail.

14. The **third issue** is relating to the **Consumer Contribution Reduced from Regulated Equity for Financial year 2007-08 and Financial Year 2008-09.**

15. According to the Appellant, the State Commission while dealing with this issue has wrongly relied upon the Regulations 76.1.1. The State Commission has fairly admitted in its counter affidavit that the treatment of this issue by the State Commission in the impugned order was due to inadvertent error and will be corrected in the next tariff order of the Appellant. The relevant extract of the statement of the State Commission is given hereunder:

> *"The Commission has considered the Appellant's submissions in this regard, and has come to the conclusion that there has been an inadvertent error in the*

computation of Return on Equity of the Appellant, and reliance has been placed only on Regulation 76.1.1 of the MERC Tariff Regulations, 2005. However, the Tariff Regulations have to be seen in totality, and a combined reading of Regulation 72.11 and Regulation 76.1.1 of the MERC Tariff Regulations, 2005, reveals that the Consumer Contribution should have been reduced from the original cost of the Fixed Assets, for the purpose of calculating the amount of loan capital and equity capital, rather than reducing the entire Consumer Contribution from the regulated equity. The Commission will address this issue and correct the computation for Financial year 2007-08 and Financial Year 2008-09 in its next Order for the Appellant".

16. In view of the admissions made by the State Commission as mentioned above, the reliance of the State Commission on Regulation 76.1.1 of the Regulation is wrong. Therefore, the same shall be corrected by the State Commission in the next tariff order as it has undertaken through its counter affidavit. So, this point is answered accordingly.

17. The **Fourth Issue** is **Grossing up of Income Tax for the Financial Year 2007-2008, 2008-2009 and 2009-2010.**

18. This issue on grossing up of income tax for the Financial Year 2007-2008, 2008-2009 and 2009-2010 has also been considered by this Tribunal in the following judgments:

(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

19. As submitted by the State Commission, this Tribunal has observed the following in the judgment dated 5.1.2011 in the Review application No.9 of 2010:

> *"……The Tribunal has also held in the judgment that the Appellant, 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".*

20. In view of the above, the said principle has to be followed.

21. The **Fifth Issue** is **Reduction of Power Purchase Owing to Demand Side Management (DSM).**

22. According to the Appellant, the State Commission has no justification for deducting the amount of Rs.4.71 Crore for the Financial Year 2007-08. The State Commission has fairly stated in its counter affidavit that in case the Appellant

furnishes the materials before the State Commission to substantiate the claim, the same will be allowed in the next Annual Performance Review Order of the Appellant. The relevant portion of the statement made by the State Commission is extracted hereunder:

> *"Also, most of the steps purported to have been taken by the Appellant towards DSM, are in the nature of preparatory work, and cannot be considered as having helped to achieve any reduction in energy consumption by the consumers of the Appellant for Financial Year 2007-08, in the absence of any substantive evidence submitted by the Appellant. Hence, the Commission has already ruled that in case the Appellant is able to submit evidence to substantiate the claim that around 17 MU of expensive power purchase through DSM measures, then the same will be allowed in the next APR Order".*

23. In view of the statement made by the State Commission, the Appellant is directed to furnish the materials before the State Commission to substantiate the claim with reference to power purchase through the Demand Side Management (DSM) and in that event the State Commission will allow the same in the next APR order. This issue is also decided accordingly.

24. The **Sixth Issue** is relating to the **Capital Expenditure for Metering Scheme.**

25. Urging on this point, the Appellant has contended that the State Commission ought to have allowed the investment made by the

Appellant in replacement of the Meters etc. The State Commission while answering this point has stated that the Meters installed by the Appellant were found to be faulty and there were numerous complaints received from the consumers in this regard. It is also stated by the State Commission in its counter affidavit that the State Commission has decided to undertake 3rd party inspection and the impact of the detailed inspection report will be considered by the State Commission and the same would be factored in the next APR. The relevant portion of the statement by the State Commission through its counter affidavit is as follows:

> "*In the meantime, there were lot of complaints regarding the accuracy of the electronic meters installed by Rinfra-D at the consumer's premises….*
>
> *…….*
>
> *…….*
>
> *In order to verify the growing concerns/apprehensions of Rinfra-D's consumers related to the purported higher consumption recorded by imported electronic meters installed by Rinfra-D, the Commission decided to undertake third party meter testing through independent National Accreditation Board Laboratories (NABL) accredited testing agency IDEMI, Mumbai to verify the accuracy of operational meters for sample number of consumers from each category, since it would be improper to allow capitalization of a scheme, which results in installation of meters that are not functioning properly.*

IDEMI, the leading meter testing agency, was appointed by the Commission for undertaking the above exercise on a sample basis, after a competitive bidding exercise.

…….

Thus, the Commission has been taking all necessary steps in this regard, and the impact of the DPRs already approved will be factored in the next APR order. As regards the remaining DPR schemes, in case the IDEMI Report gives a recommendation that the electronic meters are working properly, then the DPR as well as the impact of the same can be considered in the next APR order".

26. As stated by the State Commission in the Counter affidavit, the State Commission has been taking all necessary steps and in this regard it has given an undertaking that the impact of the DPR already approved will be factored in the next APR orders. Accordingly, the State Commission will do the same at the appropriate stage. So, this point is answered accordingly.

27. The **last issue** is relating to **Wheeling Loss Level for Financial Year 2009-10.**

28. According to the Appellant, the Wheeling loss level provided by the State Commission is at the rate of 9% for drawal at the LT level whereas the total loss of the Appellant occurred in its distribution system is at the rate of 10.5%. It is stated by the Appellant that if the HT losses are considered at 1.5% as approved by the State Commission, LT losses are bound to be 11.64%. Consequently, there will be losses up to 10.5%.

Therefore, the Appellant requested this Tribunal through this Appeal to direct the State Commission to reset the loss level for LT wheeling at 11.64%.

29. It is pointed out by the State Commission that this aspect has been clarified by the State Commission in its order dated 22.7.2009. In that order, it has been stated that wheeling charges and wheeling losses level have been determined by the State Commission on the basis of the datas submitted by the Appellant in the tariff application. The relevant portion of the order is extracted hereunder:

> "*The objective of the Commission is to ensure that competitive forces are able to work, to achieve the overall objective of reduction in tariffs and improvement in quality of supply and customer service. In this context, the Commission is of the view that there is a need to simplify the levy of wheeling charges and wheeling losses, to facilitate supply of electricity by TPC to consumers, who are currently supplied by Rinfra-D, by utilizing the wire network of Rinfra-D. Based on the data submitted by Rinfra-D along with the APR Petition for Financial Year 2008-09, the wheeling charges were determined in terms of Rs/kW/month in the above said Order. In order to operationalise the system and to enable the consumers and distribution licensees to understand the implications correctly, these Wheeling Charges are now being expressed in terms of Rs/kWh. This is because the metering and billing is done on the basis of energy consumed in KWh, and this will facilitate practical implementation of the system. It is clarified that no substantive change has been made to the wheeling*

charges and the wheeling charges have not been freshly determined.

Approved wheeling charges and wheeling losses at HT and LT level for Financial year 2009-10 for Rinfra-D wire network is summarized in the following Table"……."

30. Thus, the position has already been clarified. But even then, this point has been raised by the Appellant through amended application. In this context, it would be appropriate to refer to the counter affidavit filed by the Commission to the said amendment application. In that counter affidavit, it has been clearly stated that the wheeling losses is determined by the State Commission on the basis of the proposal given by the Appellant itself. The relevant portion of the counter affidavit is as follows:

"From the above extract of the impugned order, it is clear that the ***Appellant itself had asked for approval of wheeling loss at LT voltage of only 9.79%, rather than 11.65% or even 10.5%, and had not given any such computation before the Commission as is being put forth by the Appellant now in Appeal****. More importantly, the Commission had followed the same of methodology of considering only the technical losses as wheeling losses, and the commercial losses had not been considered earlier also. Even in the previous APR order (Case No.66 of 2007 dated June 4, 2008), the wheeling losses allowed at LT voltage was 9.3% only, which has been reduced slightly to 9% in the impugned order, in view of the overall reduction in distribution losses considered by the Commission. Since the same methodology was being followed, the Commission has not separately given any*

rationale in this regard, though it has been mentioned that only the technical losses are being considered under wheeling losses applicable for open access transactions.

Further, the Appellant has itself agreed that Commercial Losses are towards inaccurate meters, pilferage of electricity etc. Further, the Appellant's contention that in case of migration from the distribution licensee to another supplier, there is no change in the physical connection or the meter. This however, is not strictly correct, and it is understood that in many cases, the consumers who have migrated from Rinfra-D to TPC-D have opted for TPC-D meter. Against this background, there is no reason why the consumers who have opted to migrate to TPC-D should also pay the commercial loss in the Appellant's distribution network, which is used to gross up the consumption of the switch over consumer".

31. In this context, it is pointed out by the Learned Counsel for the State Commission that the Appellant had never objected/appealed as against the State Commission's approach in this regard, when the same methodology was being adopted by the Commission in earlier orders also. Having accepted the Commission's philosophy in this regard, it is not open for the Appellant to raise this issue at this juncture.

32. As indicated above, the wheeling losses for the LT level has been determined by the State Commission using the methodology of the State Commission on the basis of the tariff petition filed by the Appellant. Therefore, the present contention raised in the amended application is contrary to the stand taken by the Appellant before the State Commission.

Even in that Appeal, the stand taken by the Appellant is different from the stand taken by the Appellant in various written submissions filed by them before this Tribunal. In the first written submissions the Appellant has urged that the LT losses must be grossed up by the HT losses for the purpose of arriving at the wheeling losses for open access transactions. In the second written submissions, the Appellant has claimed that in case the consumer is opting for open access on the Appellant's Distribution system, the Appellant is responsible for the aforesaid activities. The Appellant has now contended that in respect of open access transactions, the technical losses only can be considered and technical plus commercial losses may be considered for change over consumers. This fundamental contention raised now by the Appellant has admittedly not been raised before the Commission.

33. According to the Appellant, the LT losses of 9% ought to be grossed up by the HT losses of 1.5% to arrive at the total wheeling losses. It is also contended by the Appellant that the said total wheeling losses has to be borne by the open access consumers. Both the contentions are fundamentally wrong. The contention that open access consumers must bear even the commercial losses of the Distribution Company is unfair to the consumers. Admittedly, the State Commission has been consistently taking the view that commercial losses ought not to

be factored into wheeling losses to be borne by the open access consumers. Similarly, the contention of the Appellant that the LT losses levels ought to be grossed up by the HT losses was mathematically incorrect logic.

34. The learned Counsel for the Commission submitted that the HT and LT losses are calculated on different parameters. These two cannot either be mathematically added or even one grossed up by the other. Since the denominator for calculation of HT losses and LT losses is completely different, the question of one being grossed up by the other cannot arise.

35. We have examined the issue in detail. The Losses in LT system and losses attributable to LT consumers are two different propositions. Appellant's submission in its ARR petition that losses in its LT system were of the order of 9% would not mean that losses attributable to LT consumers migrating to TPC would also be 9%. Admittedly power is generated at remote generating station and transmitted to load centers on EHT transmission system. At load centers power is stepped down to 33 kV and 11 kV and distributed in bulk. It is again stepped down to LT Voltage (400 Volts) for retail supply. Therefore, a consumer who avails supply at LT level is liable to bear losses occurred in the system i.e. from generating end to its premises. Thus a consumer connected at LT level to Appellant's system is paying for system losses for LT system

as well as for HT system. Therefore, a migrating consumer at LT level has to pay for losses in LT system and HT system. Otherwise the differential losses would be loaded on the remaining consumers of the Appellant.

36. In view of the reasoning given above, the submissions made by the Appellant appear to be correct and tenable. Accordingly, the same is accepted and the State Commission is directed to carryout necessary amendment in the impugned order.

37. **Summary of Our Findings**

(a) **Regarding Security Charges the Appellant not only has not been able to establish that such expenses were uncontrollable but the Appellant has also not been able to place any material to show that as to what steps it has taken to mitigate such increase. In the absence of the same, the said expenses are obviously controllable and have been accordingly treated in accordance with the Tariff Regulations in the impugned order. Therefore, there is no merit in the contention urged by the Learned Counsel for the Appellant. Accordingly this contention would fail.**

(b) **The findings of the State Commission in regard to Conveyance and Travelling Expenses would make it clear that these expenses being controllable in nature**

had to be managed by the licensee within the approved levels. This finding in our view, is perfectly justified. Therefore, the contention of the Appellant on this ground would fail.

(c) **In view of the admissions made by the State Commission In regard to Consumer contribution that the reliance of the State Commission on Regulation 76.1.1 of the Regulation is wrong and the same shall be corrected by the State Commission in the next tariff order as it has undertaken through its counter affidavit. So, this point is answered accordingly.**

(d) **Regarding issue related to grossing up of Income Tax, the observation made by this Tribunal in the judgment dated 5.1.2011 in the Review application No.9 of 2010 have to be followed in this case also.**

(e) **The Appellant is directed to furnish the materials related power purchase before the State Commission to substantiate the claim with reference to power purchase through the Demand Side Management (DSM) and in that event the State Commission will allow the same in the next APR order. This issue is also decided accordingly.**

(f) **In view of the statement by the State Commission in the Counter affidavit that the impact of the DPR already approved will be factored in the next APR orders. Accordingly, the State Commission will do the same at the appropriate stage. So, this point is answered accordingly.**

(g) **In regard to distribution losses attributable to LT and HT migrating consumers, the submissions made by the Appellant appear to be correct and tenable. Accordingly, the same is accepted and the State Commission is directed to carryout necessary amendment in the impugned order.**

38. In view of our above findings on each of the issues, the Appeal is partly allowed to the extent mentioned above.

39. 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