Appellate Tribunal for Electricity
(Appellate Jurisdiction)
Appeal No. 124 OF 2010

Dated: 3rd January, 2012

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member

In the matter of:

Maharashtra State Electricity
Distribution Co. Ltd.
Regd. Office at Prakashgad Bandra (East),
Mumbai-400 051. .... Appellant

Versus

1.Maharashtra Electricity Regulatory
Commission,
Centre 1, 13th Floor, World Trade Centre,
Cuffe Parade, Mumbai-400 005.

2. Prayas (Energy Group)
Amrita Clinic, Athwale Corner,
Deccan Gymkhana, Karve Road,
Pune-411 004.

3. Dr. Ashok Pendse
Mumbai Grahak Panchayat
Grahak Bhavan, Behind Cooper Hospital,
Sant Dhyaneshwar Marg, Vileparle (West),
Mumbai-400 056.

4. Thane Belapur Industrial Association
Plot – P 14, MIDC, Rabale Village,
PO, Ghansoli, Navi Mumbai-400701.

5. The President,
Vidarb ha Industries Association,
1st Floor, Udyog Bhawan,
Civil Lines, Nagpur- 440001. .... Respondents

Counsel for the Appellant(s) : Ms. Deepa Chawan
Ms. Kiran Gandhi

Ms. Taruna A. Prasad

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan for R-1.

JUDGMENT

Hon'ble Justice P.S. Datta

Maharashtra State Electricity Distribution Co. Ltd. preferred this appeal against the order dated 17.8.2009 passed in petition no. 116 of 2008 by the Maharashtra State Electricity Regulatory Commission, the respondent No. 1 herein whereby the said Commission made order in respect of true up for the FY 2007-08, annual performance review for 2008-09 and determination of ARR and tariff for the FY 2009-10.

2. Certain facts require to be mentioned bereft of unnecessary verbiages. Maharashtra State Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2005 came into force on 26.8.2005. It superseded the earlier Regulations 2004. Importantly, the Commission issued the Multi Year Tariff Order in respect of the appellant on

18.5.2007 that came into effect from 1.5.2007 and in this order tariff for FY 2007-08 was determined. On 30.11.2007 the appellant submitted a petition for annual performance review of its business for FY 2007-08 and for determination of tariff for FY 2008-09 in respect of which the Commission passed an order on 20.6.2008. This tariff order for FY 2008-09 was enforceable from 1.6.2008. On 20.7.2008 the appellant filed a review petition for review of the order dated 20.6.2008 passed in case No. 72 of 2007 and the Commission in such review petition by the order dated 10.12.2008 upheld some of the contentions raised in the review petition with clarification that the impact of such review would be taken into account when the Commission passes order for annual performance review for the year 2008-09 and determines tariff for the FY 2009-10. On 8.12.2008 the appellant submitted its petition for true up for FY 2007-08, APR for 2008-09 and ARR and tariff for 2009-10. On 17.8.2009 the Commission passed the impugned order upon such petition and when the appellant filed a review application for review of the order dated 17.8.2009 passed in case No. 116 of 2008 the

Commission rejected the review petition by the order dated 7.1.2010 which merged with the main order dated 17.8.2009.

3. With this prolegomena the appellant categorised its appeal into three broad categories namely,

(i) Failure to carry out truing up for FY 2007-08

(ii) Infringement of the Statutory Regulations by the Regulatory Commission

(iii) Wrongful order of the Respondent No. 1, Commission on issues relating to:

a) Erroneous treatment meted out to the distribution loss and reduction for FY 2009-10.

b) Non-consideration of the revenue from sale of power to the franchisee at Bhiwandi at Bulk Supply Tariff Rate(Approximately financial impact is Rs.385 crores)

c) Erroneous disallowance of interest paid to Wind Developers. (Approximately financial impact is Rs. 12 crores)

Under the first head the appellant's case is that the Commission erroneously considered an amount of Rs.214 crores to be surplus in the provisional true up for FY 2008-09. The appellant filed a petition for annual performance review for the year 2008-09 wherein it showed true up of expenses and revenue for the FY 2007-08 based on audited accounts and provisional true up of the expenses of FY 2008-09 as was approved by the Commission in its order dated 20.6.2008 in case of 72 of 2007 and thirdly revised projection for the FY 2009-10 based on the estimates for the FY 2008-09 and other factual considerations. The Commission by the MYT order dated 18.5.2007 determined the ARR for FY 2006-07, 2007-08 and 2008-09 and estimated that the total revenue gap to be recovered through sale of electricity in FY 2008-09 would be Rs. 1010 crore as against Rs.3318 crore estimated by the appellant in the APR/ARR petition. While estimating the revenue gap for the FY 2008-09 the Commission considered Rs.214 crore as surplus after true up exercise for the FY 2006-07. In the impugned order the

Commission accordingly carried out the exercise of provisional true up for the FY 2008-09 and determined the provision net aggregate revenue requirement of the appellant from the retail tariff for the FY 2008-09 as Rs.22,940 crore and further estimated the revenue gap for the year 2008-09 at Rs.981 crore and thereby considered surplus of Rs.214 crore for the year 2006-07. According to the appellant, the Commission did not consider its own order dated 10.12.2008 passed in case No . 42 of 2008 wherein the Commission admitted that an error due to double counting of ASC revenue for FY 2006-07 occurred in its earlier order dated 20.6.2008 while determining the revenue gap for the FY 2008-09. In the order dated 10.12.2008 the Commission categorically stated that due to double counting error the revenue gap for the year 2008-09 as *estimated* in the order dated 10.12.2008 would have been higher by 427 crore which inter alia means that there could not be any surplus of Rs. 214 crores as estimated in the order dated 20.6.2008, and on the contrary there would be revenue gap of Rs.213 crores for the FY

2008-09 . This error was pointed out in the review petition against the impugned order dated 17.8.2009 but the Commission unfortunately declined to review. According to the appellant, the Commission by the order dated 10.12.2008 permitted recovery of Rs.427 crores by way of additional charge and the same has been levied and recovered in FY 2008-09, but the said recovery for the purpose of truing up pertains to the FY 2006-07, and therefore, the revenue on account of additional charge of Rs.427 crores cannot be accounted for as the revenue income for the year 2008-09.

4. Under the 2nd item the appellant contends that the Commission introduced Regulatory Liability Charge in its tariff order dated 10.3.2004. The impugned order dated 17.8.2009 whereby tariff was determined for the FY 2009-10 is based on MYT Framework in respect of which, as aforesaid, the Commission made a MYT order on 18.5.2007. Now, MERC Tariff Regulations, 2005 in its regulation 19 provides for a mechanism for sharing of gains and losses on

account of controllable factors. According to the appellant, the impugned order dated 17.8.2008 is contrary to that regulation which was framed under the section 181 of Electricity Act, 2003 and in view thereof the Commission disregarded the sharing of gains and losses as contemplated in that regulation. Clause (b) of the regulation 19.1 clearly provides that one third of the such gain shall be retained with the licensee as a special reserve to be absorbed in future losses, while the Commission directed that one third to be credited to the consumers in addition to one third to be passed on as rebate in tariffs over such period as may be specified by the Commission in its order. For better appreciation of this order we will reproduce regulation 19 at the appropriate place of this judgement. The appellant claimed a sum of Rs.284 crores equivalent to two-third of the amount (additional revenue) representing gain on account of over achievement of reduction and distribution loss during the FY 2007-08 in accordance with regulation 19 for retention as a special reserve and utilization at its discretion.

The appellant while determining the revenue gap for the FY 2009-10 apportioned this amount of Rs.284 crores. The Commission contrary to the Regulations, 2005 directed that one-third of the efficiency gains which was to be retained as a special reserve should be used to fund additional fund of RLC in a sum of Rs.176.20 crore. According to the Commission, RLC can neither be treated as loss nor future loss on account of controllable factors and the direction of the Commission on this score is wrong.

5. Under the third item the appellant contends that the Commission's order while determining the tariff for FY 2009-10 that the distribution loss would be reduced by 4% during that year was not realistic and unachievable. According to the appellant, reduction in T& D loss is a complex issue involving technical, organizational, and social factors and while the appellant made considerable progress over the last three years in reducing losses. According to the appellant, the Commission ought to have determined the

distribution loss at 21.20% as estimated by the appellant i.e. a decrease by 1%.

6. Fourthly, according to the appellant the Commission did not consider the revenue from sale of power to the franchisee at Bhiwandi at bulk supply tariff rate. The appellant estimated the revenue after segregating the sales to Bhiwandi franchisee from normal consumer category and applied bulk supply tariff for sale to Bhiwandi franchisee as per the agreement but the Commission while estimating the revenue from sale of power in the impugned order dated 17.8.2009 for the FY 2009-10 has not considered the sale to Bhiwandi at the bulk supply tariff of 213 paisa per unit. The Commission estimated the revenue from sale of power that the appellant would get for the FY 2009-10 as per revised tariff including the category wise estimated sales in the Bhiwandi franchisee area and such consideration of the Commission that the appellant would get revenue from Bhiwandi franchisee as per the revised tariff applicable to the different categories of the consumers resulted in the estimated

excess revenue from sale of power for the FY 2009-10. The appellant feels injured that the Commission estimated excess revenue of Rs.878 crore by apportioning the bulk supply to Bhiwandi franchisee in different categories of consumers. The wrong was sought to be redressed through review petition which, however, was dismissed.

7. Lastly, the Commission disallowed in the true up process for the year 2007-08 an expenditure of Rs.12.92 crores incurred by the appellant towards pay of penal interest to Wind Developers due to delay in payment of invoices raised by the Wind Developers. According to the appellant, the Commission admitted that the issue of payment of invoices raised by the Wind Developers was legally agitated and if the appellant would have immediately released the payment to the Wind Developers against the invoices received and then contested the issue it would have been very difficult for the appellant to recover such amount at a later stage if the appellant would have succeeded in the litigation. The decision of the Commission to disallow

expenditure of Rs.12.92 crores paid by the appellant as interest amounts to infringement of the fundamental right of the appellant to legally agitate an issue on principles considering the financial implications of the said issues.

8. The respondent No.1, the Commission filed a counter affidavit on 29.11.2010 challenging all the contgentions of the appellant. They are categorized hereunder :

8.1. On the question of consideration of surplus of Rs.214 crores in the provisional true up for FY 2008-09 the Commission in its counter affidavit reproduced extract of its own impugned order dated 17.8.2009 and also the order dated 7.1.2010 passed in review petition No. 69 of 2009 which we will reproduce at the relevant place of the judgment and contends that the Commission allowed the appellant to recover additional revenue of Rs.427 crores and thus non consideration of surplus of Rs.214 crore for FY 2006-07 while undertaking provisional true up for FY 2008-09 would amount to

double counting in favour of the appellant. Accordingly, the Commission while explaining its decision to consider the surplus of Rs.214 crore of FY 2006-07, while undertaking provisional true up for 2008-09 in the impugned order clearly refer to the order dated 10/12.2008 passed in review petition No. 2 of 2008 and had based its decision precisely on the account of treatment given by the Commission in the order. Had the Commission allowed the appellant to recover the revenue gap of Rs.213 crore then the appellant's contention that the surplus of Rs.213 crore should have not been considered would have had merit, but as the Commission allowed the appellant to recover the entire amount of double counting error of Rs.427 crore it follows, therefore, that the surplus of Rs.214 crore was restored to the appellant. The effect of the original truing up for FY 2006-07 was passed on in the Tariff Order for FY 2008-09 and all subsequent adjustments to the same, through the additional charges,

etc., have to be considered against expenses and revenue for FY 2008-09, in order to ensure that the accounting for the same is done in a consistent manner. While undertaking the provisional or final truing up for any year, if all the expenses and revenue heads considered for that year in the original Tariff Order for that year are not considered in comparison to the actual expenses and revenue for the same heads, it will lead to erroneous results. If this is not done, then the additional revenue earned by MSEDCL will not be accounted anywhere, and it will lead to undue enrichment of MSEDCL, at the expense of its consumers.

8.2. With respect to the alleged infringement of the Tariff Regulations in the context of sharing of efficiency gains the Commission while quoting its own impugned order and the order dated 7.1.2010 justifies its treatment on the following grounds:

i) Since it was the last year of the first Control Period, the Commission was of the view that there was no benefit in parking one-third of the efficiency gains i.e. Rsd.176.2 crore to the revenue under Regulation 19.1., which is also to be used to eventually reduce the burden on the consumers.

ii) Hence, the Commission directed that the RLC refund amount to be increased to this extent i.e., the total RLC refund of Rs.676.2 crore (Rs.500 crore+Rs.176.2 crore) . It may be noted that the total RLC collected by MSEDCL over the years was Rs. 3227 crore, of which only Rs.500 crore was refunded before the year in question and the Commission as well as the consumers were desirous of speeding up the process of RLC refund, as it would take

over 6 years at the rate of Rs.500 crore every year.

iii) The Commission's approach was also consistent with the original conception of the RLC, which was intended to be refunded out of efficiency gains, i.e. accelerated reduction in distribution losses.

iv) Further, this amount of Rs.176.2 crore, was not available to MSEDCL for normal use, since it would have to parked in a separate reserve.

v) In the impugned order the Commission also clarified that MSEDCL's share of one-third of the efficiency gain had been allowed to be retained by MSEDCL, since the Commission was of the view that MSEDCL needs to be adequately incentivised to reduce the distribution losses further.

8.3. With regard to distribution loss trajectory for FY 2009-10 the Commission in its counter affidavit reiterated its own impugned order and contends as follows:

i) The loss reduction trajectory of 4% for FY 2009-10 was stipulated in the MYT Order for FY 2007-08 vide the Commission's order dated May 18, 2007 in Case 65 of 2006, which has achieved aside finality, since, it has not been set aside, nor stayed by any higher judicial authority. In fact, the loss reduction trajectory stipulated in this Order has not even been challenged by the appellant.

ii) MSEDCL has achieved the distribution loss reduction target in FY 2007-08 and FY 2008-09 and has even earned incentive towards efficiency gains for FY 2007-08;hence it is reasonable to expect that

MSEDCL will be able to achieve the loss reduction n target for FY 2009-10 also.

iii) Though MSEDCL is reporting overall loss levels of 21.98%, there are 17 Circles i.e. 43% of the Circles, where the distribution losses are higher than 25%. Similarly, 11 circles (28%) have distribution losses higher than 30%. Since, each of this Circles consists of 3 to 4 Divisions, there will be even more number of Divisions where the distribution losses are higher than 25% to 30%, which only proves that there is still ample scope for reduction of distribution losses by MSEDCL.

iv) DISCOMs in the State of Gujarat and Andhra Pradesh, which are States comparable to Maharashtra had distribution losses ranging from 15% to 18% in FY

2008-09, which are expected to reduce to 13% to 15% in FY 2009-10.

v) Considering the capital expenditure planned by MSEDCL and the cost benefit analysis indicated by MSEDCL while seeking in principle approval of the capital expenditure schemes, it should be possible for MSEDCL to reduce the distribution losses to 18.2% in FY 2009-10.

8.4 With respect to alleged non consideration of revenue from sale of power to Bhiwandi at bulk supply tariff rate the Commission contends that though the Distribution Franchisee Agreement provided for an independent audit of the ABR and other relevant data and an independent subsidy audit, the same had not been done for the Bhiwandi Franchisee area since January, 2007, when the Franchisee took over the operation. In

the absence of the independent audit, there is no means of verifying the ABR and the corresponding indexed Input Rate, which are necessary to assess the revenue that the appellant can realise from the Bhiwandi Franchisee area. The Commission also observed that the impact of Rs.385 crore, on base revenue of Rs.878 crore, appears to be very high, and can be granted only if the same is verified by an independent audit, and directed MSEDCL to immediately initiate an independent audit of the sales, revenue, ABR and subsidy claimable, claimed and received from Government of Maharashtra for the period starting from January 2007 onwards till date. The Commission further ruled that pending the audit review, to partly mitigate MSDECL's difficulties, an adhoc amount of Rs.200 crore would be considered at the time of truing up for FY 2009-10. However, if the audit were to be completed

before the submission of the APR Petition or before March 1, 2010 and submitted to the Commission, the actual amount would be considered and allowed. It may be noted that the appellant is yet to submit any report of the audit of the Bhiwandi Franchisee operations to the Commission. In the meantime, the Commission has allowed additional recovery of the ad-hoc amount of Rs.200 crore in this regard, in the recently issued Tariff Order for MSEDCL dated September 12, 2010 in Case 111 of 2009.

8.5. With respect to disallowance of penal interest paid to Wind Developers a sum of Rs.12.2 crores the Commission reiterates its own impugned order and refers to a judgment of this Tribunal dated 1.10.2010 in appeal No. 1 of 2010 wherein the Tribunal deprecated the conduct of the very present appellant in not making prompt payment to the

Developers despite several orders passed by the Commission as well as by the Tribunal.

9. The respondent No. 2, 3, 4 and 5 are not contesting the appeal.

10. On the pleadings as aforesaid, the following points call for consideration by this Tribunal:-

a) Whether the Commission committed illegality in the matter of consideration of surplus fund to the tune of Rs.214 crore in the provisional true up for FY 2008-09

b) Whether the Commission committed illegality in not following the statutory regulations concerning sharing of efficiency gains and losses due to controllable factors

c) Whether the Commission committed illegality in the treatment of distribution loss reduction for FY 2009-10.

d) Whether the Commission committed illegality in not considering the revenue from sale of power to the franchisee at Bhiwandi at bulk supply tariff rate.

e) Whether the Commission committed illegality in disallowing interest of Rs. 12.92 crore incurred by the appellant towards payment of penal interest to the Wind Developers due to delay in payment of invoices raised by the Wind Developers.

11. We have heard Ms. Deepa Chawan, learned Counsel for the appellant and Mr. Buddy A Ranganadhan, learned Counsel for the Commission. None appeared for the other respondents. On the first point there has been a lot of controversy between the parties but such controversy really is not a dispute on fact but on methodology to be adopted to rectify the mistake. The impugned order relates to true up for FY 2007-08, APR for FY 2008-09 and ARR and tariff for FY 2009-10. Apart from the impugned order dated 17.8.2009 and the order passed in review dated 7.1.2010 which are under challenge in this

appeal certain other orders are also very relevant. These are : the order dated 18.5.2007 which is a MYT order, the order dated 20.6.2008 whereby the Commission made annual performance review for 2007-08 and determination of tariff for wheeling of electricity and retail sale of electricity for the appellant for FY 2008-09 and the order dated 10.12.2008 passed in Case No. 42 of 2008 whereby the Commission, according to the appellant, admitted that an error due to double counting of ASC revenue for FY 2006-07 has occurred in its order dated 20.6.2008 while determining the revenue gap for the FY 2008-09 . According to the appellant, there was no surplus of fund in the sum of Rs.214 crore as estimated by the Commission in the order dated 20.6.2008; on the contrary there was a revenue gap of Rs.213 crore for the FY 2008-09. The appellant contends that though the Commission by its order dated 10.12.2008 permitted recovery of Rs.427 crore by way of additional charge and the same has been levied and recovered in FY 2008-09 the said recovery for the

purpose of truing up pertains to the FY 2006-07 and as such the revenue income on account of additional charge of Rs.427 crore cannot be accounted for as the revenue income of the year 2008-09. According to the Commission, on the other hand, in the review petition No. 63 of 2009 that gave rise to the order dated 7.1.2010 the appellant admitted that the surplus of Rs.214 crores would have been realised only when the amount of Rs.427 crore was passed on to the appellant. The Commission allowed the appellant to recover the amount of double counting error of Rs.427 crore which means that the Commission has restored Rs. 214 crores to the appellant. In the written note of argument the Commission presented the following table to argue as follows therefrom:

Sl.No.	Particulars	Scenario 1	Scenario II	Scenario III	Scenario IV
1.	Scenario Description	Original Tariff Order –Case 116 of 2008	If only Rs.100 crore had been allowed through addnl charges	If only Rs.213 crore had been allowed through addnl. Charges	Aftger Review Order-Case 63 of 2009
2	Amount of revenue considered twice	427	327	214	0

	due to double counting error				
3	Amount of Surplus considered by the Commission	214	214	214	214
4	Actual surplus for MSEDCL	-213	-213	0	214

According to the Commission, the appellant stands by scenario III whereby the Commission allowed recovery of Rs.213 crore through additional charges in its order dated 10.12.2008. But the Commission allowed the appellant to recover the entire unrecovered amount of Rs.427 crore through its order dated 10.12.2008 in case No. 42 of 2008 with the consequence that the surplus of Rs.214 crore has been restored to the appellant. Further, the effect of the original true up for FY 2006-07 was passed on to the tariff order for the FY 2008-09 and all subsequent adjustments to the same through the additional charges have to be considered against expenses and revenue for FY 2008-09. It is argued by Mr. Buddy A Ranganadhan that while undertaking provisional or final true up for any year, if all the

expenses and revenue heads considered for that year in the original tariff order for that year are not considered in comparison to the actual expenses and revenue for the same heads it will lead to erroneous results; if this is not done, then the additional revenue earned by MSEDCL will not be accounted for anywhere leading to unjust enrichment of the appellant at the expense of the consumers. The Commission further explains that, say, there was surplus of Rs. 5crore and Rs. 7 crore in FY 2001-02 and Rs.2006-07 respectively which were considered while determining the net revenue gap/surplus in FY 2008-09which worked out to Rs.13 crore. Under the provisional true up exercise, if the appellant's approach is accepted, then it would result in the surplus of Rs. 5 crore and Rs.7 crore for FY 2001—02 and FY 2006-07 respectively, not being considered as a result of which the net revenue gap would work out to be Rs.26 crore, and an effective tariff increase requirement of 27%. If all the expenses and revenue heads are

considered at their revised estimate/actual values including the surplus of the previous years the net revenue gap works out to Rs.14 crore which is only slightly higher than the original revenue gap estimated by the Commission at the time of original tariff order. There will be no significant tariff increase on account of provisional truing up for FY 2008-09. Therefore, there is no double accounting of the surplus of the previous years.

12. After having heard the learned Counsel for the parties it seems to us that the dispute is not with regard to issue of entitlement but one of methodology of accounting. The point at issue was raised by the appellant before the Commission in case No. 42 of 2008 which was decided on 10.12.2008 wherein it was pointed out that the error had crept in the order dated 20.6.2008 in case No. 72 of 2007. The relevant extract of the order dated 10.12.2008 passed by the Commission reads as follows:-

"*However, the fact remains that the ASC revenue has been apparently double-counted, which has resulted in MSEDCL's revenue requirement for FY 2008-09 being understated by Rs.427 crore. Accordingly, the Commission accepts MSEDCL's contention of double-counting of ASC revenue for FY 2006-07, under the grounds of error apparent*".

13. The Commission was of the view that the effective revenue shortfall of Rs.427 crore for the FY 2008-09 should be allowed to be recovered by the appellant in the remaining four months of FY 2008-09 through additional charge due to double counting of additional surcharge revenue for FY 2006-07 so that the appellant's liquidity is not adversely affected. The Commission reasoned that had this amount of Rs.427 crore been not deducted from the appellant's ARR for FY 2008-09 the revenue gap for the FY 2008-09 would have been correspondingly higher. Thus, according to the Commission, it allowed the appellant to recover the entire amount of double counting error of Rs.427 crore which means that the surplus of Rs.214 crore had been restored to the appellant. To our understanding, the Commission appears to have wrongly

reasoned that the additional charges of Rs.427 crore have to be considered against expenses and revenue for the FY 2008-09 . It is not that the aggregate revenue requirement for the FY 2008-09 was altered. The revenue gap was reduced to Rs.181 crore as the Commission granted Rs.421 crore to be recovered in FY 2008-09. This is revealed from the impugned order that dealt with the revenue gap for the FY 2008-09 and that for the FY 2009-10. The Commission's reasoning is that since in the order dated 10.12.2008 the Commission permitted the recovery of Rs.427 crore by way of additional charge and the same has been recovered in FY 2008-09 the appellant cannot have any further grievance. But the matter of the fact is that the recovery of Rs.427 crore for the purpose of truing up pertains to the FY 2006-07 which means that the revenue income on account of additional charge of Rs.427 crore cannot be accounted for as the revenue income of the year 2008-09.The revenue through ASC of Rs.427 crore which had been allowed to be recovered during the

four months of 2008-09 having pertained to FY 2006-07 it cannot be said to be a revenue income for the FY 2008-09 in which year the Commission allows the appellant to get recovery of the said amount. Therefore, the mistake of Rs.214 crore being considered as surplus in FY 2006-07 needed to be rectified in the tariff for the year 2006-07 itself. The Commission determined the ARR for 2006-07 computing the item "part of ASC over – recovery set of against non- costly power" at Rs.427 crore and approved this gap minus Rs.214 crore but this was wrong because the appellant has demonstrated that the existing tariff at Rs.18863 crore comprised within itself a sum of Rs.427 crore. In fact, the total revenue computed was inadvertently inflated because of this error to the tune of Rs 19290 crore with the aggregate revenue requirement from retail tariff of Rs.19076 crore. In fact, the correct computation in truing up for FY 2006-07 would have left a gap of Rs.213 crore as against minus Rs.214 crore and revenue gap of Rs.1937 crore as against the incorrect

figure of Rs.1510 crore. This will be apparent from page 879 of the appeal paper book. In the circumstances, we would ask the Commission to do necessary correction of the wrong committed by it in its order dated 20.6.2008 which actually was not rectified in the order dated 10.12.2008. In fact there was no surplus of Rs.214 crore as estimated by the Commission in the order dated 20.6.2008; rather there would be a revenue gap of Rs.213 crore for the FY 2008-09. The revenue income on account of additional charge to the tune of Rs.427 crore has to relate back to and has to be reflected in FY 2006-07 far from being a revenue income for the FY 2008-09.

14. Admittedly the State Commission allowed recovery of Rs. 427 crore during the last four months of the FY 2008-09 by its order dated 10.12.2008 but this additional recovery has been included in the figure of revenue from sale of electricity for Rs. 21959 crore computed in the provisional true up of the FY 2008-09 in the impugned order. Thus, the appellant did not effectively get the

benefit of the correction of error of Rs. 427 crore in the ARR which was required to be carried out as per the order dated 10.12.2008 of the State Commission. The recovery of Rs. 427 crore allowed during the last four months of the FY 2008-09 only helped the appellant in maintaining the cash flow during the financial year 2008-09 but by including this additional recovery in the revenue scheme for the FY 2008-09 in the true up of financials resulted in the error not being corrected in the ARR.

15. With regard to the issue No. (b) it is better we reproduce at the outset:

*"**Regulation 19: Mechanism for Sharing of gains/losses on account of controllable factor:***
….."19.1 The approved aggregate gain 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 gain shall be passed on as rebate in tariffs over such period as may be specified in the Order of the Commission under Regulation 17.10;

(b) In case of a Licensee, one-third of the amount of such gain shall be retained in a special reserve for the purpose of absorbing the impact of any future losses on account of controllable factors under clause (b) of Regulation 19.2; and

(c) The balance amount of gain may be utilized at the discretion of the Generating Company or Licensee.

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 an additional charge in tariff s 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"

16. Having read the provision in the Regulations it admits of no doubt that the provision is mandatory in nature as the word "shall" was preferred to "may" and the language of the provision admitted of no second meaning over and above what appears clearly on perusal of the same. It is the Commission itself that framed Regulations under section 181 of the Act and the rationale of the Regulation 19.1. (b) was that one-third amount should be with the distribution licensee in order for it to absorb the impact of future losses due to controllable factors. Now, the Commission's reasoning that rather than parking one-third of the efficiency gains in the special reserve in the last year of the first control period the amount of Rs. 176.2 crores should be used to fund the additional refund of RLC does not appear to be justifiable. This finding does not stand the test of the law. The mere fact that it was the last year of the first control period and therefore one-third of

the amount should be used to reduce the burden on the consumers is not correct. It is beyond dispute that the appellant has been refunding Rs.500 crores towards RLC and the impugned order virtually commands that in addition to Rs.500 crores the one-third of the amount achieved through efficiency gain representing a sum of Rs.176.20 crore should be passed on to the category of consumers. This exact point arose for our consideration in *Torrent Power Limited Ahmedabad Vs Gujarat Electricity Distribution Co. Ltd. reported in 2011 ELR (APTEL) 0628* wherein similar provision was there in Gujarat Electricity Regulatory Commission (MYT Framework) Regulations, 2007. This Tribunal held as follows: `

> *"The impugned order does not show that the Commission intended that its own Regulations 11 and 12 should be departed from in any public interest. The Commission departed from its own Regulations without showing any reason, and the arguments put*

forward in the written note of submissions were not used by the Commission in the impugned order while departing from its own Regulations., It appears that the reason given by the Commission in its written notes of arguments is intended to be used as supplemental to the impugned order. Order has to be explained or interpreted by the order itself. Reference may be had to the decision in M.S. Gill V. Chief Election Commissioner, New Delhi reported in 1978 (1) SCC 405. It has been argued by the Appellant that in case of Dakshin Gujarat Vij Co.Ltd. the treatment has been given to the utility by the Commission in line with the spirit of the law. We also notice that in case of loss on account of controllable factors two-third of such loss is absorbed by the generating company or licensee according to Regulation 11.2 However, in case of gain instead of passing on two-third to the generating company or licensee only one-third has been allowed and balance one third is to be retained

by the generating company or licensee in a special reserve for the purpose of absorbing any future loss on account of controllable factors. Thus, there is also no logic I n the argument of the Commission that it has no impact on the Appellant. Therefore, we are of the opinion that the finding of the Commission on this score is not legally justifiable and it needs interference."

The Commission's reasoning that all the reserves are to be eventually used to reduce the burden on the consumers and as such there is no illegality in directing for refund to the RLC the one third amount representing Rs.176.20 crore would amount to negate the provision of the law. We are of the opinion, therefore, that like the first issue, this second issue also should stand decided in favour of the appellant.

17. With respect to distribution loss trajectory for the FY 2009-10, we find that the following chart reveals the

performance of the appellant in the reduction of the distribution loss during the FY 2005-06 to FY 2009-10.

FY	% Distribution Losses
2005-06	31.72%
2006-07	29.50%
2007-08	24.09%
2008-09	21.98%
2009-10	20.98%

According to the appellant, the Commission overlooked the relevant clause of the National Tariff Policy which reads as under:-

"a) The relevant Clause of the National Tariff Policy is as under:

Clause no. 5.3 (h) (2) I n cases where the operations have been much below the norms for many previous years the initial starting point in determining the revenue

requirement and the improvement trajectories should be recognized at "relaxed levels" and not on "desired levels. Suitable benchmarking studies may be conducted to establish the "desired" performance standards. Separate studies may be required to assess the capital expenditure necessary to meet the minimum service standards".

b) The relevant Clause of the Nation al Electricity Policy is as under:

National Electricity Policy: 5.8.10 states that "…The State Government would prepare a Five Year Plan with annual milestones to bring down these losses expeditiously. Community participation, effective enforcement, incentives for entities, staff and consumers, and technological up gradation should form part of campaign efforts for reducing these losses.

18. The appellant refers to the decision of this Tribunal in *Reliance Energy Ltd. Vs MERC (Appeal No. 90 of 2007)* wherein the Tribunal observed that the practical

difficulties regarding the mechanical meters and theft of electricity in unorganized areas should be kept in view while targeting loss reduction. The appellant further refers to the decision of the Bihar Electricity Regulatory Commission in the mater of tariff order for the FY 2008-09 for Bihar State Electricity Board, the decision of the Kerala State Electricity Regulatory Commission in tariff order for Kerala State Electricity Board for the FY 2008-09 in support of the submission that 4% loss reduction during the FY 2009-10 was not realistic or achievable. The appellant refers to the Abraham Committee Report on restructuring of APDRP which provided as follows:

"*The Task Force recommends following targets for reduction in AT&C losses by the Utilities:*

i) Utilities having AT&C losses above 40% Reduction by 4% per year,

ii) Utilities having AT&C losses between 30 & 40%: Reduction by 3% per year,

iii) Utilities having AT&C losses between 20& 30% : Reduction by 2% per year,

iv) Utilities having AT&C losses below 20%: Reduction by 1% per year.

v) The appellant states that the Respondent No.1 Commission ought to have permitted realistic and achievable levels of Distribution loss during the FY 2009-10 and ought to have determined the Energy Sales/Aggregate Revenue Requirement of the Appellant for the year FY 2009-10 considering Distribution Loss as 21.20% as estimated by the Appellant (i.e.) an decreased by 1%..

19. It goes beyond dispute that the actual level of distribution loss achieved by the appellant in FY 2006-07 was 30.2% which becomes the opening level for the MYT control period for three years from FY 2007-08, 2008-09 and 2009-10. According to the Commission, in response to the Commission's

directions the appellant submitted the revised energy balance for FY 2009-10 by considering the distribution loss reduction trajectory during FY 2009-10 as 4%. The matter of the fact is that the distribution loss trajectory as was specified by the Commission for the appellant through its MYT order dated 18.5.2007 in case No. 65 of 2006 has remained unchallenged and is still operative. The year in which the impugned order was passed was the last year of the first control period. In FY 2007-08 the overall loss level was lower than the normative loss level of 26.2 % as we have found in the chart earlier. Similarly, in FY 2008-09, the distribution loss level which stood at 21.98% was better than the normative level of 22.2% specified in the MYT order. The Commission's argument is that the distribution loss level estimated by the Commission is only 0.28% which is higher than the normative level of 22.2% specified in the MYT order and it hoped that the

appellant was in position to achieve the distribution loss trajectory of 4% in FY 2009-10. Now, the MYT control period is over and it does not appear that the Commission's fixation of distribution loss trajectory was not based on objective considerations. The Commission has pointed out another aspect of the matter behind 4% loss reduction trajectory per year within the control period. According to the Commission, there are several circles where the distribution losses are higher than 25% and there was ample scope for reduction of distribution loss by MSEDCL. In the review order dated 7.1.2010 passed in case No. 63 of 2009 the appellant reiterated this point to which the Commission reiterated its own reasonings made in the order dated 17.8.2009. It had been submitted by the learned Counsel for the Commission that considering the capital expenditure planned by the appellant at the cost benefit analysis indicated by the appellant while seeking in- principle

approval of the capital expenditure schemes it could be possible for the appellant to reduce the distribution losses 18.2% in FY 2009-10. The fact of the matter is that the opening distribution loss level cannot said to be unrealistic. The appellant was able to achieve distribution loss trajectory in the first two years of three year control period. In the decision of this Tribunal in Reliance Energy Limited Vs MERC the factualities were different. Again, in the Bihar case it was the 2nd tariff order after the commencement of regulatory regime in Bihar. The situations in the two States are not similar. The Abraham Committee's Report on the restructuring of APDRP is definitely a guideline but in the case of the appellant, tariff orders have been passed since the year 2000 and the Commission has been insisting on the appellant to strive for loss reduction which was not possible till 2006-07 where after there has been a marked improvement above the normative level, and

considering all the circumstances we do not think that the Commission's estimations fixed through public hearing was totally a hypothetical one.

20. With respect to alleged non- consideration of the revenue from sale of power to the franchisee at Bhiwandi at bulk supply tariff rate in terms of the agreement with Torrent Power Limited, it is the case of the appellant that in the ARR for 2009-10 it has projected category-wise sales projections inclusive of the sale to Bhiwandi franchisee in terms of bulk supply tariff but the Commission while estimating the revenue from sale of power for the year 2009-10 did not consider the sale to the Bhiwandi Franchisee but instead estimated the revenue from sale of power that the appellant would get for the FY 2009-10 as per the revised tariff resulting in estimated excess revenue from sale of power for the year 2009-10 to the tune of Rs.878 crores. According to the

appellant, the appellant would generate estimated revenue of Rs.493 crore (2315 MUs @ Rs.2.13 per unit) which has the effect of reduction of the net revenue by Rs.385 crore. It appears from the order dated 7.1.2010 passed in case No. 63 of 2009 that the appellant was directed to immediately initiate an independent audit of the sales revenue, ABR, subsidy claimable, claimed unreceived from the Government of Maharashtra from January 2007 onwards. The Commission observed "*Pending the audit review, to partly mitigate MSEDCL's difficulties, an adhoc amount of Rs.200 crore would be considered at the time of truing up for FY 2009-10. However, if the Audit is completed before the submission of the APR Petition or before March 1, 2010, and submitted to the Commission, the actual amount would be considered and allowed"* Thus, according to the Commission, in the absence of an independent audit there is no means of verifying the ABR and the

corresponding indexed input rate which are necessary to access the revenue that the appellant can realise from the Bhiwandi Franchisee area. Therefore, subject to independent audit and subsequent verification by the Commission the Commission would consider the matter at the time of true up for the year 2009-10.

21. With respect to the disallowance of penal interest paid by the appellant to the Wind Developers to the tune of 12.29 crores, it appears that the Commission's reasoning is quite meaningful and the appellant's contention that had the payments been released to the developers it would have been difficult for the appellant to recover such payment at a latter stage carries no force at all. Moreover, in this connection a judgment of this Tribunal dated 1.10.2010 in appeal No. 1 of 2010 in the matter of MSEDCL Vs MERC & ors. would not be out of

context and we reproduce relevant part of the same as under:

"35. The above facts would clearly reveal that even after the Joint Meter Reading the members of the Association (Respondent -2) were not given the credit notes with the result they were virtually prevented from issuing invoices to the Appellant. Thus the conduct of the appellant would clearly show that by not issuing credit notes in time to the Developers, they were not allowed to issue invoices or bills and the said situation has now been taken advantage of by the appellant to make a plea that the bills were not issued and, therefore, they are not liable to pay the amount due. Under the above situation, the impugned order has been passed by the State Commission giving a practical solution to the effect "wherever invoices have not been issued, 30th day from the Joint Meter Reading would be taken to be date of the bill and the last due date of payment by

the appellant would be 45 days thereafter and for payment beyond 45 days, interest would become due"

22. In the result, the appeal succeeds in part on first two points. We partly allow the appeal to the extent indicated in the body of the judgement and direct the Commission to have the wrongs corrected on the following two points:

a) The Respondent No. 1 shall pass an order relating to surplus of Rs.214 crore in the provisional true up for the FY 2008-09 in the light of this decision

b) The Respondent No. 1 shall pass an order correcting its error concerning mechanism for sharing of gains/losses on account of controllable factors.

On the other issues, the appellant has no case. The parties are left to bear the cost of the appeal.

Pronounced in the open Court on
this 3rd day of January, 2012

(Justice P.S.Datta) **(Rakesh Nath)**
Judicial Member **Technical Member**

Reportable/Non-reportable

rkt