

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

Appeal No. 139 of 2009

Dated 23rd March, 2011

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

In the matter of:

**Maharashtra State Electricity Transmission Co. Ltd.,
"Prakashganga", Plot No. C-19,
E Block, Bandra Kurla Complex,
Bandra (East), Mumbai-400 051**

... Appellant(s)

Versus

- 1. Maharashtra Electricity Regularity Commission,
Through its Secretary,
13th Floor, Center No. 1,
World Trade Centre, Cuffe Parade,
Colaba, Mumbai-400 005.**
- 2. Prayas Energy Group,
4, Om Krishna Kunj Society,
Opp. Kamla Nehru Park,
Ganagote Path, Erandavane,
Pune-411 004.**
- 3. Mumbai Grahak Panchyat,
Grahak Bhavan, Sant Dyaneshwar Marg,
Behind Cooper Hospital,
Vile Parle (W),
Mumbai- 400 056.**
- 4. Thane Belapur Industrial Association,
Plot No. P-14, MIDC, Rabale Village,
P.O. Ghasoli,
Navi Mumbai-400 701.**

**5. Vidarbha Industries Association,
1st Floor, Udyog Bhavan,
Civil Lines, Nagpur-440 001.**

...Respondent(s)

Counsel for the Appellant(s): Mr. Vikas Singh, Sr. Adv. with
Mr. Varun Pathak, Mr. Ashish
Bernad, Mr. Ravi Prakash
Mr. Raunak Jain & Ms. Amrita
Narayan

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

JUDGMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

This appeal has been filed by Maharashtra State Electricity Transmission Co. Ltd., a transmission licensee in Maharashtra against the orders passed by Maharashtra Electricity Regulatory Commission (State Commission) in Case No. 114 of 2008 and 155 of 2008, both dated 28.5.2009 determining the Aggregate Revenue Requirements and Intra-state Transmission tariff respectively to be charged by the Appellant for the year 2009-10.

2. The State Commission is respondent no. 1. Respondents 2 to 5 are the NGOs and Industries' Associations representing the interests of consumers.

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

3.1. On 31.5.2008 the State Commission passed tariff order for Intra-state Transmission system of the Appellant in Case No. 104 of 2007 which was to be applicable from 1.6.2008 till 31.3.2009. By an order of the same date, the State Commission in case No. 70 of 2007 determined the Annual Revenue Requirements of the Appellant for the FY 2008-09.

3.2. On 27.1.2008 the Appellant submitted a petition for Annual Performance Review for FY 2008-09 before the State Commission registered as Case No. 114 of 2008. On 28.5.2009 the State Commission in Case No. 114 of 2008 after following due procedure passed

an order approving the Annual Performance Review for FY 2008-09 and Aggregate Revenue Requirement for FY 2009-10. The State Commission by another order of the same date in case No. 155 of 2008 approved the tariff chargeable by the Appellant taking cognizance of the ARR approved for the Appellant in Case No. 114 of 2008.

3.3. The Appellant being aggrieved by the orders dated 28.5.2009 passed in Case No. 114 of 2008 and 155 of 2008 has preferred this Appeal on the following grounds:

- i) Error in true up of financials for FY 2008-09.
- ii) Disallowance of Administrative & General expenses and Repair & Maintenance expenses.
- iii) Disallowance of Capital Expenditure.
- iv) Appointment of Consultant.

Appellant's submissions

4. Mr. Vikas Singh, the learned senior counsel for the Appellant has made the following submissions:

4.1. Error in true up of financials for 2008-09:

In the ARR approved for the FY 2008-09 vide order dated 31.5.2008, the State Commission has allowed the following amounts approved in APR order for FY 2007-08:

a)	Under recovery in 2005-06	Rs. 4.58 crores
b)	Truing up amount for 2006-07	Rs. 20.27 crores
c)	Incentive for HVDC transmission system availability in FY 2006-07	Rs. 10.19 crores
d)	Reduction in fixed cost recovery due to non-achievement of HVDC normative availability levels in 2006-07	(-)Rs.9.84 crores

Rs. 25.20 crores

As a result of tariff determined for FY 2008-09 vide order dated 31.5.2008 effective from 1.6.2008 and

the tariff prevailing before the said order, the Appellant was expected to get a revenue of Rs. 1811.52 crores during FY 2008-09. In the impugned order in case No. 114 of 2008, the State Commission while determining the net ARR for FY 2009-10, provisionally trued up this approved revenue of Rs. 1811.52 crores with the revised ARR for 2008-09 as approved in the order. In doing so, the State Commission erred in not recognizing that the revenue of Rs. 1811.52 crores included an amount of Rs. 25.20 crores as indicated at S. No. (a) to (d) above which did not pertain to FY 2008-09. While determining the provisional surplus of 2008-09, the State Commission should have considered a revenue of Rs. 1786.34 crores (1811.54-25.20) instead of Rs. 1811.52 crores as considered in the order which would have resulted into a provisional surplus of Rs. 173.25 crores instead of Rs. 198.45

crores. Thus the net ARR for FY 2009-10 should have been higher by Rs. 25.20 crores.

4.2. Disallowance of Administrative & General and Repair & Maintenance Expenses:

The State Commission has disallowed A&G expenses to the tune of Rs. 7.32 crores in FY 2007-08 in the impugned order in Case No. 114 of 2008 rejecting the claim of the Appellant that such increase was mainly on account of conveyance and travel costs due to hike in fuel prices, security related costs due to enhanced threat to assets, purchase related costs due to increased cost on tender publication and other purchase related activities and increase in electricity charges. Similarly, the State Commission has also disallowed Rs. 81.21 crores in Repair & Maintenance expenses. The State Commission has only allowed escalation factor on account of Wholesale Price Index

(WPI) against actual audited expenditure for FY 2007-08. This is against the judgment of this Tribunal dated 1.10.2007 passed in Appeal No. 76 of 2007. In terms of the Judgment of the Tribunal the actual expenses for the subsequent years also have to be allowed subject to prudence check till the norms of controllable and uncontrollable expenses had been decided.

4.3. Disallowance of Capital Expenditure:

The State Commission has erred in holding that total expenditure and capitalization on non-DPR Scheme in any year shall not exceed 20% of that for DPR Scheme during that period. Further, the State Commission has not capitalized non-DPR Scheme below Rs. 10 crores after subjecting it to prudence check. Thus, an amount of Rs. 406.35 crores spent on overall improvement of transmission system of the

Appellant has not been capitalized. The State Commission has also wrongly directed the Appellant to club the non- DPR Scheme in such a manner that the overall value exceeds ten crores and thereafter the same is to be converted into DPR scheme and submitted to the State Commission for in-principle approval.

4.4. Appointment of Consultant:

The State Commission has erred in directing the Appellant to appoint consultants by way of competitive bidding process for engagements of more than one crore rupees. There is no such requirement as per the 2003 Act or the Regulations made thereunder.

Submissions of the Respondents (State Commission)

5. Mr. Buddy A. Ranganadhan, the learned counsel for the State Commission in support of the impugned orders has submitted the following:

5.1. The Appellant in its petition in Case No. 114 of 2008 had not included the amount of Rs. 25.52 crores pertaining to previous years. However, it is accepted that the amount should have been adjusted in the ARR as suggested by the Appellant in this Appeal. The State Commission shall adjust the amount of Rs. 25.52 crores while undertaking the final true-up for FY 2008-09.

5.2. Regarding A&G and R&M expenses, the State Commission has decided the same as per its Regulations after complying with the directions given by the Tribunal in its Judgment dated 1.10.2007 in

Appeal No. 76 of 2007 to extrapolate the projections of A&G and R&M expenses on the actual audited expenses for FY 2006-07 with escalation index over the MYT Control Period of FY 2007-08 to FY 2009-10.

5.3. The findings and directions given by the State Commission regarding capitalization of non-DPR Schemes are to have scrutiny of the Schemes in view of the steep increase in capital expenditure and capitalization over past few years without commensurate increase in the demand served. The Appellant has since regrouped its investments schemes such that it's non-DPR Schemes are only to the extent of 22% of the total capital expenditure, and have re-submitted the same before the State Commission. Therefore, this issue would not survive in the present Appeal.

5.4. The direction given regarding appointment of Consultants is salutary provision keeping in mind the interest of the consumers.

6. **Issues**

6.1. On perusal of the documents submitted by the parties and on hearing the contentions of the learned counsel for the parties, the following questions may arise for consideration:

- i) Whether the State Commission has committed an error in the true up of 2008-09 by not allowing a sum of Rs. 25.2 crores which was approved in the APR order for FY 2007-08?
- ii) Whether the State Commission has erred in disallowing the Administrative & General Expenses and Repair & Maintenance expenses as claimed by the Appellant?

- iii) Whether the State Commission was right in disallowing the capital expenditure for non-DPR Scheme and also directing the Appellant to combine non-DPR Scheme costing less than Rs. 10 crores to convert into DPR schemes for seeking approval of the State Commission?
- iv) Whether the State Commission was correct in directing the Appellant not to appoint Consultant without competitive bidding?

Discussions and Findings

7. The first issue is regarding error in true up for FY 2008-09.

7.1. Learned counsel for the State Commission in its submissions has already accepted inadvertent error of Rs. 25.25 crores pertaining to previous years in the ARR which would be adjusted while undertaking the

final true up for the FY 2008-09. In view of this, we direct the State Commission to do the necessary adjustment in the final true up for FY 2008-09.

8. The next issue is regarding Administrative & General Expenses and Repair & Maintenance expenses.

8.1. Learned counsel for the Appellant has stated that in terms of the order of this Tribunal dated 1.10.2007 in Appeal No. 76 of 2007, the State Commission should have allowed actual expenses on account of A&G and R&M for the subsequent years subject to the prudence check till the norms of controllable and uncontrollable expenses are determined by the State Commission. The Appellant has always been constrained to work with low budget as approved by the State Commission whereas the Appellant has all

along been projecting R&M expenses on the higher side. According to the State Commission, the A&G and R&M expenses have been determined according to the Regulations and MTY order.

8.2. The State Commission had issued the MYT order for the period 2007-08 to 2009-10 on 2.4.2007. The State Commission has taken the actual expenses for 2006-07 as base figures and then applied index linked escalation for working out normative A&G and R&M expenses for the subsequent years. Any variation from the normative expenses has been treated as deviation and shared between the Appellant and the distribution licensee according to Regulation 19. The findings of the State Commission in regard to A&G expenses in the impugned order are reproduced below:

“In response to the Commission’s query on reasons for increase in other components of A&G expense

by Rs. 7.32 Crore , MSETCL submitted that the increase is mainly on account of (a) conveyance and travel costs due to hike in fuel prices, (b) security related costs due to enhanced threat to assets. (c) purchase related costs due to increased cost on tender publication and other purchase related activities, and (d) increase in electricity charges. The Commission observes that under MYT regime, the Commission has approved A&G expense after considering audited results for FY 2006-07 as the base and allowing for escalating factor on account of Consumer Price Index (CPI)/ Wholesale Price Index (WPI) . Thus, variation between allowed expenses and actual expenses will have to be considered as a controllable loss/gain, and will have to be shared between MSETCL and the distribution licensees, in accordance with Regulation 19 of the MERC Tariff regulations. Accordingly, for the purpose of true-up of A&G expense for FY 2007-08, the Commission has only considered A&G expenses approved in the APR Order in addition to lease rent as already elaborated earlier. Accordingly, gross A&G expense

for FY 2007-08 allowed after truing-up amounts to Rs. 60.37 Crore (i.e.Rs. 50.84 Crore+Rs. 9.53 Crore towards lease rent for FY 2007-08)”.

8.3. Similarly, the findings of the State Commission relating to R&M expenses is reproduced below:

“The Commission holds that activities like hot line maintenance, etc., are part of routine R&M and cannot be cited as reason for additional expenses. Also, the Commission observes that under the MYT regime, the Commission has approved R&M expenses after considering audited results for FY 2006-07 as the base and allowing for escalation factor on account of Wholesale Price Index (WPI). Thus, variation between allowed expenses and actual expenses will have to be considered as a controllable loss/gain, and will have to be shared between MSETCL and the distribution licensees, in accordance with Regulation 19 of the MERC Tariff Regulations”.

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 an 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.

8.6. The learned counsel for the Appellant has argued that the A&G and R&M expenses have not been determined according to the directions of the Tribunal in its Judgment dated 1.10.2007 in Appeal No. 76 of 2007 filed by the Appellant against the order of the State Commission determining the ARR for the period FY 2007-08 to FY 2009-10 and transmission tariff for 2007-08 (MYT order). The relevant portion of the said Judgment is reproduced below:

“7. In so far as the projections of A&G Expenses, employees expenses and R&M expenses for the

control period during FY 2007-08 to FY 2009-10, in the impugned order are concerned:

- (i) actual expenditure for the purposes of truing up for FY 2006-07 shall be considered by Commission subject to prudence check along with Annual Performance Review as per the Regulation 17 of the MERC (Terms and Conditions of Tariff) Regulations, 2005.*
- (ii) Projections of ARR for the control period for the aforesaid heads shall be done by extrapolating the actual audited expenses for the FY 2006-07 subject to prudence check and the same approach shall be followed for the subsequent years till norms are finalized”.*

8.7. We are unable to agree with the contentions of the learned senior counsel for the Appellant that the Tribunal had directed the State Commission to determine the A&G and R&M expenses for the Control Period 2007-08 to 2009-10 as per the audited figures,

subject to prudence check by the State Commission. The Tribunal had only directed the State Commission to take the actual audited expenses for FY 2006-07, rather than the normative figures for 2006-07 as stipulated by the State Commission, as base figures and then the projections for the control period shall be done by extrapolating the base figures. Accordingly, the State Commission has taken the actual audited figures for FY 2006-07 as base and projected the normative figures after applying the escalation factor on account of WPI. Thus, the State Commission has correctly determined that A&G and R&M expenses according to its regulations and MYT order after complying with the directions of the Tribunal.

8.8. Having decided this issue, we wish to record our directions to streamline the determination of A&G and

R&M expenses for future. We notice from the submissions of the Appellant that the transmission system of the Appellant is ageing and requires more expenditure to ensure required reliability of operation.

8.9. In the MYT order for the Control Period 2007-10, on the proposal of the Appellant/Transmission Licensee regarding Operation & Maintenance expenses based on norms on the basis of per bay and per ckt km the State Commission has recorded that any suitable norms could be adopted after undertaking a thorough study of the Operation & Maintenance expenditure and till such norms are determined the Commission was adopting Operation & Maintenance expenditure based on increase linked to inflation indices for the first Control period of MYT. We feel it would be prudent to move to Operation & Maintenance

norms based on per ckt km for transmission line and per bay for sub-station, as determined by the Central Commission in its Regulations.

8.10. The relevant provision of Tariff Policy is reproduced below:

“(f) Operating Norms”

“The Central Commission would, in consultation with the Central Electricity Authority, notify operating norms from time to time for generation and transmission. The SERC would adopt these norms. In cases where operations have been much below the norms for many previous years, the SERCs may fix relaxed norms suitably and draw a transition path over the time for achieving the norms notified by the Central Commission.

g) Renovation and Modernization

Renovation and modernization (it shall not include periodic overhauls) for higher efficiency levels needs to be encouraged. A multi-year

tariff (MYT) framework may be prescribed which should also cover capital investments necessary for revocation and modernization and an incentive framework to share the benefits of efficiency improvement between the utilities and the beneficiaries with reference to revised and specific performance norms to be fixed by the Appropriate Commission. Appropriate capital costs required for pre-determined efficiency gains and /or for sustenance of high level performance would need to be assessed by the Appropriate Commission”.

*“(h) **Multi Year Tariff**”*

- 1) Section 61 of the Act states that the Appropriate Commission, for determining the terms and conditions for the determination for tariff, shall be guided inter-alia, by multi-year tariff principles. The MYT framework is to be adopted for any tariffs to be determined from April 1, 2006. The framework should feature a five-year control period. The initial control period may however be of 3 year duration for*

transmission and distribution if deemed necessary by the Regulatory Commission on account of data uncertainties and other practical consideration. In cases of lack of reliable data, the Appropriate Commission may state assumptions in MYT for first control period and fresh control period may be started as and when more reliable data becomes available.

- 2) *In cases where 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 the “desired” levels. Suitable benchmarking studies may be conducted to establish the “desired” performance standards. Separate studies may be required for each utility to assess the capital expenditure necessary to meet the minimum service standards”.*

8.11. Accordingly, the State Commission may direct the Appellant to prepare a proposal of Renovation & Modernisation of its ageing transmission system along with proposed capital expenditure and time schedule. The State Commission after considering the Renovation & Modernisation proposal may also determine trajectory of Operation & Maintenance norms for the control period after carrying out a study.

9. The next issue is regarding disallowance of capitalization of expenditure.

9.1. We have noticed that the State Commission has given detailed reasonings for disallowance of capital expenditure incurred on Non-DPR scheme. The State Commission in the APR Order for FY 2007-08 had approved DPR Schemes for Rs. 697.92 crores and

Non-DPR scheme for Rs. 65.89 crores. Against this, the capitalization claimed by the Appellant is Rs. 197.21 crores for DPR scheme and Rs. 669.93 crores for Non-DPR Scheme. Thus, while there was under achievement in capitalization of DPR scheme, the capitalization in Non-DPR scheme exceeded the provision by over tenfold. The relevant extracts from the State Commission's impugned order are reproduced below:

“3.3. Capital expenditure and capitalization for FY 2007-08”

“However, MSETCL in its present submission is claiming Non-DPR related capital expenditure of Rs.618.75 Crore and capitalization of Rs.669.93 Crore on such schemes during FY 2007-08, for projects that have been approved by the erstwhile MSEB Board. It follows that if a scheme has been approved around three years ago, then the same would have been started at least two years ago, but MSETCL has not made any such submission in

its earlier submissions. MSETCL appears to have stated these “non”- DPR schemes in FY 2007-08, i.e. over three years after obtaining the approval of the MSEB Board. The Commission is of the view that since these schemes have been started at a time, when the Commission’s Guidelines for approval of capital investment are in force, MSETCL will have to obtain the Commission’s approval for the schemes”.

“In view of the above, as a general rule, the Commission has decided that the total capital expenditure and capitalization on non-DFR schemes in any year should not exceed 20 % of that for DPR schemes during that year. To achieve the purpose, the purported non-DPR schemes should be packaged into larger schemes by combining similar or related non-DPR schemes together and converted to DPR schemes, so that the in-principle approval of the Commission can be sought in accordance with the guidelines specified by the Commission.

Further, in the absence of documentary evidence that the stated purpose and objective of the capex schemes have been achieved, the Commission is restricting the capitalization considered for the purpose of determination of ARR and tariff. Once MSETCL submits the necessary justification to prove that the scope and objective of the capex scheme has been achieved as projected in the DPR, the same may be considered in future Orders. The Commission may also undertake, if required, a detailed independent technical/ financial audit of the “Non”- DPR schemes of the erstwhile MSEB period”.

9.2. Thus, the State Commission after fully justifying its action to disallow capitalization of Non-DPR Schemes has indicated its willingness to consider the justification of the schemes in future orders once the Appellant submits the necessary justification regarding the scope and objective of the scheme. The learned counsel for the Appellant also submitted that

the Appellant has already regrouped its investment schemes and resubmitted to the State Commission for consideration. We, therefore, direct the State Commission to consider the schemes submitted by the Appellant for capitalization.

10. The last issue is regarding Appointment of Consultant.

10.1. The directions given by the State Commission regarding appointment of consultant are reproduced below:

“Further, as regards appointment of consultants, the Commission directs MSETCL that in future, any appointment of consultants where the estimated cost for the engagement of the Consultants is more than Rs. 1 crore, it should ensure that the selection is made through a competitive bidding process. Proper Terms of Reference are prepared, cost benefit analysis is stated upfront and the

deliverables of the consultancy assignment are properly defined. MSETCL should submit the should submit the following details for all consultancy assignment are properly defined. MSETCL should submit the following details for all consultancy assignments of more than Rs 1 Crore in its APR and Tariff Petition:

- *Process followed for appointment of Consultant including number of bids received along with bid documents.*
- *Stated Cost-Benefit analysis and assessment of cost benefit analysis after completion of the assignment*
- *List of Deliverables submitted by Consultant”.*

10.2. We agree with the learned counsel for the State Commission that these are salutary directions given in the consumer interest. The Appellant has also submitted that the Appellant has in principle no

dispute with the said direction of the State Commission except that in emergency situations the Appellant should be allowed to appoint Consultants even if the expenditure towards expenses is more than Rs. 1 crore and the justification of the emergent situation would be submitted before the State Commission while submitting its ARR. In view of above, this issue does not survive. The State Commission may, however, consider the submission of the Appellant regarding appointment of Consultant in emergent situation.

11. **Summary of findings:**

- i) The Appellant has pointed out error of Rs. 25.20 crores while doing true up for 2008-09. The learned counsel for the State Commission has agreed to consider the same in the final truing up of FY 2008-09.**

Accordingly, the State Commission is directed to do the needful in the matter.

- ii) The second issue is regarding Administrative & General Expenses and Repair & Maintenance Expenses. We find that the State Commission has determined the same according to its Regulations and Multi Year Tariff Order for the Control Period 2007-08 to 2009-10. The State Commission has also complied with the directions given by this Tribunal by its Judgment dated 1.10.2007 in Appeal No. 76 of 2007 filed by the Appellant by taking the actual audited figures for FY 2006-07 as base figures and then projecting the normative figures for A&G and R&M expenses after applying escalation factor on account of inflation. However, we**

have given some directions for future to the State Commission in paras 8.8 to 8.11 regarding determination of Operation & Maintenance expenditure on normative basis.

- iii) The third issue is regarding capital expenditure. Learned counsel for the Appellant has submitted that the Appellant has already gone back to the State Commission seeking its approval on all schemes by submitting the documents relating to the schemes approved by the erstwhile State Electricity Board and also by clubbing the non-DPR Schemes to make them more than 10 crores to the extent possible. The State Commission had already recorded in the impugned order its**

willingness to consider the schemes provided the required justification is submitted to it. Accordingly, the State Commission is directed to consider the schemes submitted by the Appellant for capitalization.

- iv) The last issue is regarding appointment of Consultant. In view of the Appellant's acceptance of the directions of the State Commission this issue does not survive. However, the State Commission may consider the proposal of the Appellant for appointment of consultant in emergent situation.**

12. **Conclusion**

In view of above the Appeal is partly allowed. No order as to costs.

13. Pronounced in the open court on this **23rd day of March, 2011.**

(Justice P.S. Datta) (Rakesh Nath) (Justice M. Karpaga Vinayagam)
Judicial Member Technical Member Chairperson

REPORTABLE / NON-REPORTABLE

vs