

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

**Review Petition no. 13 of 2012 in
Appeal No. 203 of 2010**

Dated: 2nd January , 2013

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

In the matter of:

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

...Appellant/Review Petitioner (s)

Versus

1. The Maharashtra Electricity Regulatory Commission,
World Trade Centre No. 1,
13th Floor, Cuffe Parade, Colaba,
Mumbai-400 001
2. Mumbai Grahak Panchayat,
Sant Dnyaneshwar Marg,
Vile Parle (W),
Mumbai-400 056.
3. Prayas,
C/o Amrita Clinic,
Athawale Corner,
Karve Road, Pune-411 004
4. Thane Belapur Industries,
Post: Ghansoli, Navi Mumbai-400 071.
5. Vidarbha Industries Association,
Civil Lines, Nagpur-400 041

...Respondent(s)

Counsel for Appellant/
Review petitioner (s)

:

Mr. Akhil Sibbal
Mr. Hasan Murtaza
Mr. Nikhil Y. Choulu

Counsel for the Respondent(s):

Mr. Buddy A. Ranganadhan for R-1

ORDER

This Review Petition has been filed by Reliance Infrastructure Ltd. against the judgment of this Tribunal dated 13.9.2012 in appeal no. 203 of 2010.

2. In appeal no. 203 of 2010, the petitioner had challenged the decision of the State Commission to deny carrying cost on the true up revenue gap for the FY 2008-09 from the date of incurrance of expenditure i.e. from 2008-09 onwards. This Tribunal in its judgment dated 13.9.2012 laid down the principle for allowing carrying cost. The Tribunal held that the carrying cost could be allowed on the projected expenditure claimed by the utility earlier at the time of approval of ARR/tariff but denied by the State Commission, expenditure accepted but recovery is deferred, claim not approved within a reasonable time and expenditure allowed by Superior authority. However, if the revenue gap is as a result of routine true up carried out in the time frame specified in the Regulations and not on account of genuine expenditure denied on a claim by the petitioner earlier or on account of deferred

liabilities, then no carrying cost may be admissible as the claim is made for the first time at the time of true up.

3. According to the petitioner there is an error apparent on the face of records as some fact brought to the notice of the Tribunal has not been considered.

4. We heard learned counsel for the review petitioner/appellant and learned counsel for the State Commission.

5. According to learned counsel for the petitioner, even though the instant judgment relies on the findings of the Tribunal in judgment in Appeal no. 36 of 2008, 173 and 153 of 2009, etc., the principle of allowance of carrying cost more particularly set out in paragraph 11.4 and 11.5 of the judgment does not address the chief reasons for accrual of carrying cost on legitimate expenditure of the licensee as put forth in the said appeals 36 of 2008 and 153/173 of 2009 and hence the review petition has been filed. In the summary of findings, the Tribunal in paragraph 12.3 had directed the State Commission to consider the claim of the appellant on the

principles given in paragraphs 11.4 and 11.5. However, the conclusion in paragraph 11.5 which is further clarified in paragraph 11.6 is inconsistent and contrary to the previous judgments mentioned in paragraph 11.4. This inconsistency is an error apparent on the face of record. The findings in the above said paragraphs 11.4 & 11.5 are contrary to each other and earlier orders passed by the Tribunal in appeal nos. 265, 266 and 267 of 2006, 117 of 2008, 36 of 2008, 153 of 2009 and 173 of 2009. The State Commission also had in the past allowed carrying cost on revenue gap as a result of true-up but the same was not allowed in the Financial Year in question. Though this fact was brought to the notice of the Tribunal during the arguments and in the written submissions, the same has not been noted or considered.

6. Learned counsel for the petitioner also argued that the projections in ARR are estimates only and could be lower or higher than the actual expenditure. To encourage the licensee not to over estimate the expenditure but project reasonably, it

is desirable to review the judgment in so far as issue of carrying cost on revenue gap decided on truing up of ARR.

7. Learned counsel for the State Commission supported the judgment of the Tribunal stating that there is no error apparent on the face of record.

8. We find that in giving the findings in the judgment dated 13.9.2012 on the issue of carrying cost on revenue gap decided on truing up of ARR, we had relied on this Tribunal's judgment dated 15.2.2011 in appeal no. 173 of 2009.

9. Let us now examine the principle laid down by this Tribunal in judgment dated 15.2.2011 in appeal no. 173 of 2009, as elaborated in our judgment dated 13.9.2012.

10. In the above judgment the findings of the Tribunal in judgment dated 6.10.2009 in appeal no. 36 of 2008 as reported in 2009 ELR (APTEL) has been relied upon and noted as under:

“117. All projection and assessments have to be made as accurately as possible. Truing up is an exercise that is necessarily to be done as no projection can be so accurate as to equal the real situation. Simply because

the truing up exercise will be made on some day in future the Commission cannot take a casual approach in making its projections. We do appreciate that the Commission intends to keep the burden on the consumer as low as possible. At the same time one has to remember that the burden of the consumer is not ultimately reduced by under estimating the cost today and truing it up in future as such method also burdens the consumer with carrying cost.”

11. Further the judgment dated 30.7.2010 passed in appeal no. 153 of 2009 reported as 2010 ELR (APTEL) 0891 was also noted and relied upon as under:

“45. The carrying cost is allowed based on the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow arranged by the distribution company from lenders and/or promoters and/or accruals, has to be paid for by way of carrying cost. This principle has been well recognized in the regulatory practices as laid down by this Tribunal as well as the Hon’ble Supreme Court. In 2007 APTEL 193, this Tribunal has held that “along with the expenses, carrying cost is also to be given as legitimate expense”. Hon’ble Supreme Court in 2007 (3) SCC 33 has also held “the reduction in the rate of depreciation is violative of the legitimate expectation of the distribution company to get lawful and reasonable recovery of expenditure.”

“58. (iv): The carrying cost is a legitimate expense and therefore recovery of such carrying cost is legitimate expenditure of the distribution company”.

12. Further the “Summary of our findings” in judgment dated 15.2.2011 in appeal no. 173 of 2009 relied upon in our judgment dated 13.9.2012 but not noted in the judgment is as under:

“(1) Carrying cost is a legitimate expense. Therefore, recovery of such carrying cost is legitimate expenditure of the distribution companies. The carrying cost is allowed based on the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow arranged by the Distribution Company from lenders/promoters/accruals is to be paid by way of carrying cost. In this case, the Appellant, in fact, had prayed for allowing the legitimate expenditure including carrying cost. Therefore, the Appellant is entitled to carrying cost”.

13. We find that findings in paragraphs 11.5 and 11.6 of the judgment dated 13.9.2012 are contrary to the above findings of the Tribunal in judgment dated 15.2.2011 in Appeal no. 173 of 2009 and findings in judgment dated 30.7.2010 in Appeal no. 153 of 2009 which have been relied upon in the judgment

dated 13.9.2012. When the expenditure allowed on true up is legitimate, the carrying cost has to be allowed on the legitimate expenditure.

14. We agree that an error apparent on the face of the record has taken place in our judgment dated 13.9.2012 in which we had relied upon this Tribunal's judgment dated 15.2.2011 in Appeal no. 173 of 2009. Even though in paragraph 12.3 under "Summary of our findings", we had stated that the State Commission shall decide carrying cost based on the principles in paragraphs 11.4 and 11.5, paragraph 11.6 gave a direction in contradiction to earlier paragraphs and the findings in judgment dated 15.2.2011. Further the findings in paragraph 11.5 were also contrary to the judgments of the APTEL relied upon.

15. Accordingly, paragraphs 11.5 & 11.6 of the judgment dated 13.9.2012 may be amended to read as under:

"11.5. The utility is entitled to carrying cost on its claim of legitimate expenditure if the expenditure is:

i) accepted but recovery is deferred e.g. interest on regulatory assets,

ii) claim not approved within a reasonable time, and

iii) disallowed by the State Commission but subsequently allowed by the Superior authority.

iv) Revenue gap as a result of allowance of legitimate expenditure in the true up.

11.6. The State Commission shall decide the claim of the appellant on the above principles”

16. The Review Petition is allowed. The State Commission is directed to pass consequential order. No order as to costs.

17. **Pronounced in the open court on this 2nd day of January, 2013.**

**(Justice P.S. Datta)
Judicial Member**

**(Rakesh Nath)
Technical Member**

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REPORTABLE/NON-REPORTABLE

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