

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

Appeal No. 19 of 2008

Dated : 02.12.2008

**Coram : Hon'ble Mrs. Justice Manju Goel, Judicial Member
Hon'ble Mr. H. L. Bajaj, Technical Member**

1. Shri Padmakar Balkrishna Samant
Meghdoot, Opp. Railway Station,
Goregaon (East),
Mumbai – 400 063
 2. Shri Datta Gondhalekar
C/o P. B. Samant
Meghdoot, Opp. Railway Station,
Goregaon (East),
Mumbai – 400 063
 3. Shri Vasant Shirali
C/o P. B. Samant
Meghdoot, Opp. Railway Station,
Goregaon (East),
Mumbai – 400 063
- ... Appellant(s)

Versus

1. Maharashtra State Electricity Regulatory Commission
13th Floor, Centre No.1,
World Trade Centre,
Cuffe Parade,
Mumbai – 400 005
2. Reliance Energy Ltd.
Reliance Energy Centre,

Santacruz East,
Mumbai – 400 055

3. Union of India
Through Ministry of Power
Shram Shakti Bhawan,
New Delhi – 110 001

... Respondent(s)

Counsel for the appellant(s) : Mr. Prashant Bhushan,
Mr. Mayank Misra
Mr. Somesh, Mr. Vinayak
Joshi, Ms. Deepa Chawan

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan,
Mr. Arijit Maitra and Mr. Ravi
Kumar (Consultant) for MERC

Mr. J. J. Bhatt, Ms. Anjali
Chandurkar, Ms. Smieetaa
Inna, Mr. Syed Naqvi and
Mr. Harish V. Shankar for REL

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

The present appeal is directed against the order dated 24.04.07, passed by Maharashtra Electricity Regulatory Commission (the Commission for short) arrayed as respondent No.1 on the ground that it contradicts Sections 41 & 51 of The Electricity Act, 2003. The appellant also seeks certain directions on the respondent No.2, a distribution licensee in the area falling within

the jurisdiction of Commission in respect of maintenance of accounts of the respondent No.2.

2. The appellants are consumers of electricity within the area of operation of respondent No.2.

3. By an order dated 24.04.07, the Commission approved the respondent No.2's Annual Revenue Requirement (ARR) for the control period of FY 2007-08 and 2009-10 and fixed retail tariff for the period of 2007-08. In the memo of appeal, the appellant has detailed certain discrepancies which the appellants claimed to have found in the impugned tariff order. Several questions of law and legal grounds for raising such questions have been mentioned in the memorandum of appeal. However, at the time of arguments the appellants have pressed only four points which are as under:

- i) the respondent No.2 has, *inter alia*, filed reconciliation of ARR data submitted to MERC and Annual Accounts for the FY ended 31st March, 2006 (hereinafter referred to as Reconciliation Data) in which the respondent at item No.2 showed "Other income" of a total amount of Rs.574.40 Crores of which only Rs.51.21 Crores is attributed to Mumbai licensee business and Rs.521.62 Crores is shown as corporate unallocable adjustments. According to the appellants, this income arose out of

‘other business’ and income from such business has to be governed by Section 51 of the Electricity Act, 2003 requiring accounts to be maintained separately for the distribution business as well as ‘other business’ which the respondent No.2 has not done and hence, the tariff order based on the accounts of the respondent No.2 is vitiated.

- ii) Even if Section 51 is not given effect to the respondent No.2, which is running several businesses apart from that of distribution of electricity has to maintain separate accounts for separate businesses so that electricity consumers are not burdened with any consequences of ‘other businesses’ of the respondent No.2 and this having not been done the tariff order is vitiated.
- iii) The Commission engaged M/s. Pricewaterhouse Cooper as their Consultant, for the purpose of fixation of tariff for the respondent No.2 whereas the same professional firm were the Auditors for the respondent No.2 and hence there was a conflict of interest for the professional house while giving consultation services to the Commission and therefore the tariff order is vitiated
- iv) The accounts of respondent No.2 which were allowed to be seen by the appellant was not shown in full. A list of documents not shown has been annexed with an affidavit filed by the appellant.

4. It may be stated here that the points 3 & 4 were not subject matter of memorandum of appeal. The appellants have raised these two points during the course of hearing of the appeal. However, since all the three parties had occasions to make submissions on these two points we prefer to address these as well.

5. So far as first issue is concerned, the key rests with Section 51 which is as under:

“51. Other businesses of distribution licensees

A distribution licensee may, with prior intimation to the Appropriate Commission, engage in any other business for optimum utilization of its assets:

PROVIDED that a proportion of the revenues derived from such business shall, as may be specified by the concerned State Commission, be utilized for reducing its charges for wheeling;

PROVIDED FURTHER that the distribution licensee shall maintain separate accounts for each such business undertaking to ensure that distribution business neither subsidises in any way such

business undertaking nor encumbers its distribution assets in any way to support such business:

PROVIDED also that nothing contained in this section shall apply to a local authority engaged, before the commencement of this Act, in the business of distribution of electricity.”

6. The Commission had occasion to deal with ‘other business’. The Commission in the impugned order says “.... Commission has directed the licensee to submit the details of income from other business on affidavit. Accordingly, REL-D has submitted under above said affidavit that the assets of the distribution business are not utilized for any other business. Therefore based on the affidavit submitted by licensee, the Commission considered zero income from other business for Distribution business. Hence, for this tariff order the Commission has not considered any income from other business.”

7. Mr. Prashant Bhushan, Advocate appearing for the appellant submits that the respondent No.2 is not only engaged in the distribution business but also in the business of transmission and generation of electricity as also various other kinds of business and therefore respondent No. 2 does have ‘other business’ and that the income from such ‘other business’ is only disclosed in item No. 2 of the aforesaid Reconciliation Data.

8. Section 51, properly read, shows what is understood by 'other businesses'. The respondent No.2 may be engaged in various businesses. But Section 51 takes into account only such business in which the distribution licensee may engage for "optimum utilization of its assets". The respondent No.2 has already given an affidavit that its assets are not utilized for any 'other businesses'. So far as 'other income' in item No.2 is concerned, Mr. J.J.Bhatt, Advocate appearing for respondent No.2 explains that such business has come from other activities of the distribution licensee which may be in the form of deposits, sale of scrap etc. Rs.51.21 Crores of such income is shown to be attributable to Mumbai area. The other income of Rs.574.40 Crores, Mr. Bhatt explains, comes from sources other than sale of electricity. Sale of electricity is shown in item No.1 of the Reconciliation Data. Other income of Rs.574.40 Crores is from businesses other than sale of electricity. This income is not on account of 'other businesses' which is stipulated in Section 51 of the Electricity Act, 2003.

9. We are in agreement with the explanation given by Mr.Bhatt. Section 51 is quite clear and categorical. The conditions laid down in Section 51 are applicable only when the asset of a distribution licensee is used for 'other businesses' of the same licensee with a view to optimize the utilization of the asset. Since the respondent No.2 has stated in an affidavit that none of the assets of the

respondent No.2 were used in any 'other businesses' for optimum utilization, the other income in item No.2 of the reconciliation data cannot be said to be covered by Section 51.

10. Mr. Prashant Bhushan submits that it is not possible that no asset of the respondent No.2 has been used for any 'other businesses'. Since the Company is one, Mr. Prashant Bhushan submits, various assets are commonly used for different businesses. For example, a corporate office may be common. Similarly, the higher level staff may also be common. According to Mr. Bhatt, the office of the Company may be used for distribution business as well as for 'other businesses' but not vice versa. Admittedly, the respondent No. 2 Company existed before the distribution license was given to it. Hence, the submission of Mr. Bhatt carries much weight. It is the asset of the company which is used in the distribution business and not the asset of the distribution business which is used in other activities of the respondent No.2, Company. Hence, we find no merit in the first point urged by Mr. Prashant Bhushan.

11. Mr. Prashant Bhushan nonetheless submits that even on first principles there should be separate accounts for different businesses run by respondent No.2 for otherwise there is every risk of the consumers of electricity being burdened with the cost incurred by the respondent No.2 for its business other than

electricity distribution or the profit of distribution business being appropriated for the purpose of other activities of the respondent No.2. On behalf of MERC it is submitted that the respondent No.2 submitted the data required for assessing the ARR of the respondent No.2. It is contended on behalf of appellants that the appellants inspected the accounts of the respondent No.2 under the orders of this Court but the respondent No.2 failed to produce certain documents. These are as under :

- “(i) *Balance Sheet of REL-D (Distribution Business), prepared in accordance with the form contained in Part I of Schedule VI of the Companies Act, 1956, for FY 2005-06.*
- (ii) *Profit and loss account of REL-D, complying with the requirements contained in Part II of Schedule VI to the Companies Act, 1956, for FY 2005-06*
- (iii) *Cash Flow Statement of REL-D, prepared in accordance with the Accounting Standard on Cash Flow Statement (AS-3) of the ‘Institute of Chartered Accountants of India for FY 05-06*
- (iv) *Report of the statutory auditors on the accounts of Distribution Licensee, REL-D, for FY 2005-06*
- (v) *The Accounts of REL in respect of other Business of REL for FY 2005-06*

- (vi) Auditor's certificates submitted by REL-D to the Commission*
- (vii) Accounting statements showing separately the amounts of any revenue, cost, asset, liability, reserve or provision which have been either charged from the Licensed Business to any Other Business or from any Other Business to the Licensed Business, as the case may be, together with a description of the basis of that charge etc.*
- (viii) Basis of allocation adopted by MERC for allocating income and expenses of REL over REL-G, REL-T, REL-D and other businesses for FY 2005-06 or for the relevant year with respect to case no.75 of 2006*
- (ix) Reconciliation statement (with respect to assets, liabilities, expenses and income) between audited balance sheet of REL for FY 2005-06 or for the relevant year and figures considered by MERC for determination of tariff of REL-D with respect to case no.75 of 2006*
- (x) Response of REL to the Directives issued by MERC."*

12. The grievance of the appellant is really misconceived. There can be no balance sheet mentioned in item no. (i) above, for the respondent No.2's distribution business alone in the form contained in Part-1, Schedule-VI of the Companies Act 1956 as such a

balance sheet can be prepared for the entire company and not for one particular business of that company. The same is true in respect of the items (ii), (iii), (iv), (vi) & (ix) in the above light. So far as other items are concerned they relate to 'other businesses' which actually is non-existent since respondent No.2 has not used any of its assets for any 'other business' for the purpose of optimum utilization.

13. The Commission accepts that clear and categorical data about the cost and income relating to distribution business is essential. The Commission contends that the respondent No.2 submitted information separately for its generation, transmission and distribution businesses in the formats in which they were demanded and supported that information with affidavits. On the basis of this information and on sample benchmarking checks the Commission has fixed the tariff. The Commission, however, accepts that clear guidelines which provide a framework for regulation of accounts of different functions of the Generation, Transmission and Distribution of the same licensee are necessary and that the Commission has taken up initiative to resolve the issue of accounting matter of licensees and is in the process of preparing Information Requirements Regulation. The Commission further discloses that it is directing the licensee as part of Regulatory Account and Information Requirements Regulation to provide information as per the Commission's requirements (business

segment-wise under the jurisdiction of the Commission). The Commission is also asking for a reconciliation statement and is also asking the licensees to “identify the costs, where possible, to appropriate business segments at voucher level itself” and “is providing an allocation formula” for common costs.

14. As the law and regulation stand now the tariff order cannot be interfered with on the grounds of not submitting the relevant data for ‘other business’ or on the grounds that the data in respect of the separate businesses has not been provided for. All the data required for fixing the distribution tariff, as per the Regulations, have been duly provided by the respondent No.2. Therefore, neither the respondent No.2 nor the Commission can be said to have committed any default in the matter.

15. So far as appointment of M/s. Pricewaterhouse Cooper is concerned, the Commission submits that the services provided to the respondent No.2 and the services provided to the Commission are of two entirely different lines and that steps were taken to protect confidentiality of the information including segregation of personnel and otherwise restricting access to confidential information. Mr.Prashant Bhushan submits that M/s.Pricewaterhouse Cooper should not have accepted the assignment offered by the Commission. Since M/s.Pricewaterhouse Cooper is not a party before us, we refrain from making any

comment on the submission. However, no concrete example is cited to show that M/s. Pricewaterhouse Cooper has misled the Commission in any manner or has shown any kind of favoritism towards the respondent No.2 which is also their client. In fact, it was accepted at the bar, the respondent No.2 itself has challenged the tariff order in question although the same may have been passed after consulting M/s. Pricewaterhouse Cooper .

16. In view of the above, we find no merit in the appeal. The same is accordingly dismissed.

Pronounced in open court on this **02nd day of December, 2008.**

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member