

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

R.P. No. 10 of 2015 in Appeal No. 333 of 2013

Dated: 6th May, 2015

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

In the matter of:

**Mumbai Grahak Panchayat
Grahak Bhavan,
Sant Dnyaneshwar Marg,
Behind Cooper Hospital,
JVPD Scheme, Vile Parle (West)
Mumbai-400056.... Appellant**

... Review Petitioner

Versus

**1. Maharashtra Electricity Regulatory
Commission
World Trade Centre No.1,13th Floor,
Cuffe Parade, Colaba,
Mumbai-400 005**

...Respondent(s)

**2. Reliance Infrastructure Ltd
H Block, First Floor,
Dhirubhai Ambani Knowledge City
Navi Mumbai-400 710**

**3. PRAYAS (Energy Group)
Amrita Clinic, Athawale
Corner, Karve Road,
Pune-411 004**

**4. Thane Belapur Industries
Plot No.P-14, MIDC,
Rabale Vilalge, PO: Ghansoli,**

Navi Mumbai-400 071

5. Vidarbha Industries Association
1st Floor, Udyog Bhavan,
Civil Lines,
Nagpur-400 041

Counsel for the Appellant(s) : Mr. Shirish V Deshpande
Ms. Varsha V Raut

Counsel for the Respondent(s): Mr. Buddy A Rangandhan
Mr. D.V. Raghuvanshi for R-1

Mr. Hasan Murtaza
Ms. Malavika Prasad for R-2

ORDER

This Review Petition has been filed to review judgment dated 26.11.2014 of this Tribunal in Appeal no. 333 of 2013 which was decided along with Appeal No. 294 of 2013 and batch. The Review Petitioner is aggrieved with the judgment dated 26.11.2014 since three out of five issues raised in the Appeal were not dealt with in the judgment despite oral and written submissions. These issues are refusal to fix maximum ceiling tariff as required under Section 62(1)(d), refusal to determine only wheeling charges for open access consumers as mandated by Section 86(1)(a) and levy of wheeling charges on Rlnfra's own consumer contrary to law. Further, even while deciding issue of Regulatory Asset Charges ("**RAC**"), the Tribunal has

not taken into consideration the written note of arguments of the Review Petitioner/Appellant.

2. On the above issues we have heard Mr. Shirish V. Deshpande, for the Review Petitioner and Shri Buddy A. Ranganadhan, Learned Counsel for the State Commission.
3. Let us take up the issues raised by the Review Petitioner one by one.
4. **The first issue is refusal to fix maximum ceiling rate of tariff.**

We find that this issue was raised by the Review Petitioner/Appellant in the main Appeal but was not dealt directly by the Tribunal in the impugned judgment. According to the Review Petitioner the State Commission should have fixed the maximum ceiling tariff for the licence area common to RInfra and Tata Power as provided for under Section 62(1)(d) of the Electricity Act. The State Commission instead of fixing ceiling tariff has determined retail supply tariff for each licensee thus denying the benefit of competition to the consumers. The reasons given by the State Commission for not accepting their suggestions for ceiling tariff are not valid.

5. According to Learned Counsel for the State Commission, Section 62(1)(d) of the Act only enables the State Commission to fix the maximum ceiling tariff when there are more than one distribution

licensees in a particular area. The said proviso is not mandatory but only an enabling provision. The Commission has in the original impugned order carried out detailed analysis of the comparative sales mix, revenue mix and consumer mix of Tata Power and RInfra. The State Commission also noted that there are several operational and legal issues that need to be debated before implementation of the ceiling tariff. In light of findings and directions of this Tribunal in judgment dated 28.11.2014 in Appeal no. 246 and 229 of 2012, it would be a matter of serious debate as to whether ceiling tariff could at all even be considered in common licence area of Tata Power and RInfra.

6. Let us examine the Section 62 (1) of the Electricity Act.

“62. Determination of tariff --- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity ;

(c) *wheeling of electricity;*

(d) *retail sale of electricity:*

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees , fix only maximum ceiling of tariff for retail sale of electricity.”

7. The proviso to Section 62(1)(d) provides that the State Commission may fix maximum ceiling tariff in area having two or more distribution licensees for promoting competition. This is an enabling proviso and is not mandatory as an exception of main provision for determination of retail sale of electricity.
8. Let us now examine the State Commission's order dated 22.08.2013 impugned in Appeal No. 333 of 2013. The State Commission under paragraph 5.5.2 of the order has dealt with the suggestion of the Mumbai Grahak Panchayat, the Review Petitioner and analysed the sales and revenue mix of RInfra and Tata Power and come to the following conclusion:

“5.5.2.6 It is clear from the above charts that the sales to domestic category of TPC-D contributes 16% of sales and 11 % of revenue of TPC-D. Also it also noted that industrial sales including railways is around 43% of sales mix of TPC-D contributing to 45 % of revenue, whereas sales to

commercial consumers is 40 % of sales mix contributing around 43% of revenue of Rlnfra-D.

5.5.2.7 *The Commission notes that sales and revenue mix of Rlnfra-D and TPC-D is distinct and heterogeneous in nature and fixing ceiling tariff would require homogeneous sales and revenue mix of the Licensees for whom ceiling needs to fixed.*

5.5.2.8 *The Commission further notes that are several operational and legal issues that need to be debated before implementation of the ceiling tariff and without consideration of the same, it will not be appropriate to consider implementation of ceiling tariff. Hence, the Commission has not considered this suggestion for tariff design in this Tariff Order.”*

9. Thus, the State Commission has dealt with the suggestion of Mumbai Grahak Panchayat and given a reasoned order. The State Commission has also not ruled out introduction of ceiling tariff in future.

10. While we accept the contention of the Review Petitioner that for introduction of a ceiling tariff in common area of the two licensees, similar sales and revenue mix is a not a precondition, the introduction of ceiling tariff pursuant to findings and directions of this Tribunal in Appeal no. 246 of 2012 and 229 of 2012, would be a matter of serious debate whether ceiling tariff could be considered for common licence area of Tata Power and Rlnfra. In this judgment the Tribunal has laid restrictions on Tata Power to lay new line etc. where Rlnfra already has

- a reliable network and use RInfra network to supply power to consumer who wish to seek supply from Tata Power. Similarly where Tata Power already has a line/network RInfra would not lay down any new line, etc.
11. Shri Deshmukh submitted that Tata Power was insisting on supplying power to change over consumer at the tariff determined by the Commission in their Annual Revenue Requirement/tariff order. He requested that Tribunal could direct Tata Power to consider to supply power at a rate lower than the tariff determined by the Commission for the licensed area of Tata Power which is not applicable to change over consumers who are taking power through open access after paying the cross subsidy surcharge and wheeling charges for RInfra System.
 12. We are not in a position to give such direction to Tata Power for the following reasons:
 - (i) Tata Power is not a party to the present Petition.
 - (ii) The State Commission has not determined the tariff of Tata Power by the order dated 22.08.2013 which was impugned in Appeal no. 333 of 2013. The tariff of Tata Power was determined by a separate order. In the order dated 22.08.2013 the State Commission has only determined the wheeling charges and cross subsidy surcharge for open access consumers.

(iii) This issue was not a matter for consideration the main Appeal.

However, the Review Petitioner may raise the above issue before the State Commission by filing a separate petition.

13. In view of above, we do not want to interfere with the findings of the State Commission in the order dated 22.08.2013. However, the Review Petitioner can raise the issue of ceiling tariff in the next tariff proceedings with their suggestions on modalities of determination of ceiling tariff also considering the restrictions imposed by this Tribunal on Tata Power and RInfra in judgment in Appeal no. 246 of 2012 and 229 of 2012.
14. **The second issue is refusal to determine only wheeling charges for open access consumers.**
15. According to Shri Deshmukh, this Tribunal in Appeal no. 132 of 2011 and batch has decided that the consumers who migrated from RInfra to Tata Power using wires of RInfra are open access consumers under Section 42 and 86 of the Act. Hence, for this category of consumers, the State Commission ought to have only determined the wheeling charges and surcharge thereon, if any. However, the State Commission has determined the entire multi-year tariff for these open access consumers for next three years and thereby deprived them of

- competitive rates and thus departed from the very objective of the Electricity Act, 2003.
16. As regards determination of Regulatory Asset Charge (“RAC”) this Tribunal in the impugned judgment has dealt with the issue in paragraphs 92 to 94 of the judgment. There is no error apparent on the face of the records pointed out by the Review Petitioner in the finding regarding RAC.
 17. As regards determination of retail supply tariff, the State Commission has determined the retail supply tariff for the consumers of RInfra who have not chosen to take open access. The State Commission has not determined the retail supply tariff for open access consumers for the change over consumers. Therefore, we do not find any merit in the contention of the Review Petitioner in this regard.
 18. **The third issue is regarding wheeling charges for RInfra’s open consumers.**
 19. According to Review Petitioner, the State Commission has illegally and unjustifiably levied wheeling charges on RInfra’s own consumers as well as open access consumers migrating to Tata Power. In this connection Part H of MYT Tariff Regulations, 2011 was referred to.

20. Shri Buddy Ranganadhan, Learned Counsel for the State Commission even a consumer of the licensee taking supply from such licensee is using the network of such licensee for receiving supply of electricity like an open access consumer. In both cases the person who receives supply is using the network of licensee for the purpose of conveyance of electricity. Such concept has been engrafted into the 2011 MYT Regulations.
21. Let us examine the MYT Regulations, 2011. The relevant Regulations are reproduced below:

“PART H: DISTRIBUTION WIRES BUSINESS

71 Separation of accounts

71.1 Every Distribution Licensee shall make a separate application for determination of tariff for –

- (a) Distribution Wires Business;*
- (b) Retail Supply of electricity:*

Provided that every Distribution Licensee shall maintain separate records for the Distribution Wires Business and Retail Supply Business and shall prepare an Allocation Statement to enable the Commission to determine the tariff, pursuant to each such application made by the Distribution Licensee.

72 Applicability

72.1 The Regulations contained in this Part shall apply in determining tariff payable for usage of distribution wires of a Distribution Licensee by a Distribution System User.

73 *Components of Aggregate Revenue Requirement for Distribution Wires Business*

73.1 *The wheeling charges for Distribution Wires Business of the Distribution Licensee shall provide for the recovery of the Aggregate Revenue Requirement, as provided in Regulation 78 of these Regulations and shall comprise the following:*

Aggregate Revenue Requirement:

- (a) Return on Equity Capital;*
- (b) Interest on Loan Capital;*
- (c) Depreciation;*
- (d) Operation and maintenance expenses;*
- (e) Interest on working capital and deposits from consumers and Distribution System Users;*
- (f) Provision for Bad and doubtful debts; and*
- (g) Contribution to contingency reserves.*

Wheeling charges = Aggregate Revenue Requirement, as above, minus:

- (h) Non-tariff income; and*
- (i) Income from Other Business, to the extent specified in these Regulations, and*
- (j) Receipts on account of additional surcharge on charges of wheeling.”*

22. As per the Regulation the distribution licensee has to maintain separate records for Distribution Wires Business and Retail Supply Business and make a separate application for determination of tariff for Distribution Wires Business and Retail Supply of Electricity. The wheeling charges

levied on the consumers on R/Infra are the charges for wires business of the licensee.

23. The issue was dealt with by this Tribunal in judgment dated 28.11.2014 in Appeal no. 281 of 2013 in the matter of Central Railway Vs. Tata Power Company Ltd. & Ors. The relevant extracts for the judgment are reproduced below:

“24. On noticing the two previous orders in Case No.98 of 2009 dated 12.9.2010 and Case No.179 of 2011 dated 28.6.2013, the contention of the Counsel for the Appellant is untenable. The HT railways tariff as per the Tariff Order dated 12.9.2010 did not have a separate head called the “Wheeling Charges” and the same was introduced as a separate head by way of MYT Regulations, 2011. In the MYT Regulations, 2011, Wheeling Charges and Supply Business are divided into separate heads and the Distribution Licensee is eligible to charge both Wheeling and Supply tariff from the consumers. Further the components under wheeling charges have been specifically provided under MYT Regulations, 2011. Therefore, it does not matter as to whether the Appellant has set up its own infrastructure to receive supply of electricity; wheeling charges are always recovered from the Appellant for the Distribution Company’s network used for supply of electricity. However, the same was never shown as separate head and the same was subsumed under the head of Energy Charges. Therefore, the State Commission has specified the Wheeling Charges in the Impugned Order to comply with the requirements as laid down in the MYT Regulations, 2011. Hence, there is no infirmity in levying the Wheeling Charges on the Appellant.”

24. We do not find any merit in the contention of the Review Petitioner.

25. Lastly, the Review Petitioner has reiterated its submissions on levy of Regulatory Asset charges as made in the main Appeal. It is argued that the Revenue gap which is sought to be bridged through Regulatory Asset charges has arisen solely and directly on account of RInfra's consistent failure/neglect to enter into long term Power Purchase Agreements ("**PPA**") to secure cheaper power for long term. The consumers are in no way responsible for such revenue gap arising on account of RInfra's neglect in procuring cheaper power through long term PPA.
26. It is pointed out by Learned Counsel for the State Commission that Regulatory Assets which were decided to be recovered by levy of Regulatory Asset charges in the order impugned in the main Appeal were decided in the previous orders of the Commission and the recovery deferred in the previous orders has been decided to be recovered as RAC in the MYT order dated 22.08.2013. He referred to order dated 29.07.2011 regarding truing up for FY 2008-09, APR for FY 2009-10 and tariff determination for FY 2010-11 wherein cumulative revenue gap of Rs. 2316.21 crores was approved by the Commission. This order has since become final. It was also decided by the Commission to defer recovery of carrying cost on the revenue gap.

27. We find that in the order dated 22.08.2013, the State Commission has accounted for the revenue gap already approved in earlier orders and has only applied carrying cost on the same as per the judgments of this Tribunal. Therefore, we do not find any reason to interfere with the impugned judgment.
28. The Review Petitioner has not pointed out any error on the face of records in the impugned judgment regarding levy of Regulatory Asset charges.
29. In view of above the Review Petition is dismissed.
30. Pronounced in the open court on this 6th day of May, 2015.

(Rakesh Nath)
Technical Member

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REPORTABLE/NON-REPORTABLE

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(Justice Ranjana P. Desai)
Chairperson