

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.287 of 2013

Dated:23rd May, 2014

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

In the Matter of:

DPSC Limited
Plot X-1,2 & 3, Block EP, Sector V
Salt Lake City, Kolkata – 700 091

...Appellant

Versus

West Bengal Electricity Regulatory
Commission
FD-415A, Poura Bhawan
3rd Floor, Sector – III
Bidhannagar, Kolkata – 700 106

.....Respondent(s)

Counsel for the Appellant(s) : Mr. Buddy A. Ranganadhan
Mr. Debnath Ghosh
Ms. Shruti Verma
Mr. Shounak Mitra
Mr. Atul Shankar Mathur
Mr. Sandip Mitra
Mr. Subir Kumar
Mr. Dhiren Sharma
Mr. Abhisar Bairagi

Counsel for the Respondent(s) : Mr. Pratik Dhar
Mr. C.K. Rai

Mr. Samir Haldar

JUDGMENT

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. DPSC Limited is the Appellant. West Bengal State Commission is the Respondent.
2. The Appellant has filed this Appeal challenging the impugned Multi Year Tariff Order dated 14.2.2013 whereby the Operation and Maintenance expenses for the generating stations of the Appellant were reduced by the State Commission.
3. The Appellant has also challenged the Review order dated 8.5.2013 passed by the State Commission by which the main order dated 14.2.2013 was confirmed.
4. The short facts are as follows:-

(A) The Appellant has been operating two embedded generating stations within its licence area at Dishargarh and Chinakuri power plants. The Appellant is also maintaining a highly efficient distribution system for supply of energy in an area of 610 square kilometres to its consumers.

(B) The Appellant on 17.1.2013 filed its ARR petition for the FY 2011-12. The State Commission on 14.2.2013 passed the impugned order determining the ARR for the MYT period and also the tariff for FY 2011-12.

(C) As against this order in respect of the claim of Operation and Maintenance expenses, the Appellant filed a Review Petition from 9.4.2013 before the State Commission. The State Commission after hearing the parties dismissed the Review Petition on 8.5.2013 on the ground that the State Commission in the tariff order has allowed Operation and Maintenance expenses correctly in terms of Tariff Regulation 2011.

(D) Challenging these orders dated 14.2.2013 and 8.5.2013, the Appellant has filed the present Appeal.

5. The present Appeal is preferred only with reference to the issue of Operation and Maintenance expenses which was

not allowed in the impugned MYT order as prayed for. The grievance of the Appellant is that the State Commission has permitted a normative increase over the previous year level, the FY 2010-11 for almost all the expenses except legal charges and consultancy fees and on staff training expenses.

6. Thus, the Appellant has confined its challenge only to the issue of Operation and Maintenance expenses relating to the legal charges and staff pay expenses not allowed in the impugned MYT order.
7. According to the Appellant, the State Commission have decreased the Operation and Maintenance expenses on these items without proper reasons while the State Commission has decided to increase the Operation and Maintenance expenses for the other distribution licensee of the State who is similarly situated as that of the Appellant.
8. It is further stated by the Appellant that even in the Review Order, the State Commission simply confirmed the main order without giving proper reasons and that therefore; the impugned orders are required to be set aside.
9. The Learned Counsel for the Respondents has argued in detail in justification of the Impugned Order.

10. In the light of the rival contentions, the only question that arises for our consideration is as follows: “

“Whether the State Commission was justified in holding that Operation and Maintenance expenses as proposed by the Appellant can be controlled as per the Tariff Regulations 2011 and disallowed the expenses drastically from what has been proposed by the Appellant?”

11. As stated earlier, the main contention urged in this Appeal by the Appellant that the Operation and Maintenance expenses have been reduced to the unrealistic low level, whereas the State Commission has allowed a higher Operation and Maintenance expenses in relation to other activities by misconstruing the Tariff Regulation 2011.

12. Let us now refer to the finding given by the State Commission with regard to Operation and Maintenance Expenses

“5.7 Operation and Maintenance Expenses

5.7.1 After analysing the tariff application of DPSCCL for the period from 2011-12 to 2013-14, it is found that from O & M expenses DPSCCL has taken out expenses on consumables and stores. As expenses for consumables and stores fall under repairs and maintenance head, which is part of the O&M expenses, the expenses for consumables and stores

are part of O&M expenses. Under O&M expenses the sub-head of Administrative and General expenses includes expenses in the heads of travelling expenses, vehicle maintenance expenses, telephone expenses, security charges, other management and administrative expenses and rent, rates & taxes. The expenses projected under the head 'Payment to Contract Labour' though shown under sub-head Employees' Cost by DPSCCL have been considered under Repair & Maintenance head for obvious reason. The expenses projected under the head 'Other expenses-centrally maintained' have been proportionately distributed to the generation function and distribution function in the ratio of projection for respective expenses under Operation & Maintenance Cost for the years 2011-12, 2012-13 and 2013-14.

5.7.2 DPSCCL has claimed for the amounts of Rs. 20.00 lakh, Rs. 21.59 lakh and Rs. 23.32 lakh during 2011-12, 2012-13 and 2013-14 towards expenses on Marketing team to attract consumers under 'Other Expenses – Centrally maintained'. DPSCCL has not elaborated the requirement of the amount in their submission. In the absence of any clarification, the Commission does not admit any expenses under this head.

5.7.3 Thus while determining O&M expenses for generation function, the Commission has allowed O&M Expenses on generation in accordance with the norms specified in Part G of Schedule 9A of the Tariff Regulations and the submission of DPSCCL in response to the Commission's letter no. WBERC/TP-51/11-12/1322 dated 19.12.2012 and n. WBERC/TP-51/11/-12/1401 dated 8th January, 2013 in respect of the new unit (1x12 MW)of DPS and the old units (12.2 MW) of DPS, The O&M expenses of the new unit of

DPS for 2012-13 and 2013-14 have been arrived at in terms of Part-A(7) of Schedule – 9D of Tariff Regulations as under:

O&M expense of the old unit of DPS from 01.04.2012 to 24.09.2012	$\frac{\text{Rs.16.08 lakh} \times 12.2 \times 177}{365}$ = Rs.95.13 lakh
O&M expense of new unit of DPS from 25.09.2012 to 31.03.2013.	$\frac{\text{Rs.6.33 lakh} \times 12 \times 188}{365}$ = Rs.39.12 lakh
O&M expense of new unit of DPS for 2013-14	Rs.6.65 lakh x 12 = Rs. 79.80 lakh

DPSCCL is directed to furnish the details of sub-head wise expenses under O&M expense in respect of the new unit of DPS for the period from 25.09.2012 to 31.03.2013 and for the year 2013-14 duly audited and certified by Auditor along with their APR applications for the respective years.

5.7.4 For distribution system, the cost admitted for 2011-12 is computed on the basis of comparison of its actual and admitted expenditure of previous years. For such analysis, the amounts projected in 2011-12 for DPS new unit (1x2 MW) has been excluded since the same came into operation during 2012-13. The expenses projected for Insurance premium is considered separately by the Commission being categorized as uncontrollable as per Tariff Regulations. It is now observed that the overall amount asked by DPSCCL on sub-heads Legal charges and consultancy fees and expenses during 2011-12 for Rs. 218.09 lakh under centrally maintained expenses is on the higher side as compared to the actual expenditure in 2009-10 for Rs. 129.33 lakh and the estimated expenditure in 2010-11 for Rs. 166.99 lakh. After apportioning the same to distribution

function the proposed amount comes to Rs. 82.54 lakh in 2011-12. The Commission however allows the actual expenditure of 2009-10 for Rs. 129.33 lakh with an annual escalation of 5% to arrive at Rs. 142.59 lakh and apportioning the same to the distribution function in the ratio of proposed O&M expenses during 2011-12. The admitted amount is thus determined at Rs. 54.05 lakh for 2011-12. For Rent, Rates & Taxes, the total amount projected during 2011-12 for Rs. 35.94 lakh is found to be quite reasonable in comparison to the actual expenditure of 2010-11 for Rs. 32.62 lakh and after apportioning the same to the distribution function as per the ratio in the proposed O&M Expenses, the Commission thus admits Rs. 13.60 lakh as projected for 2011-12. Similarly, the amount projected under Audit Fees for total amount Rs.19.60 lakh in 2011-12 is found reasonable compared to actual expenditure of 2009-10 and estimated expenditure of 2010-11 and after allocating the same to distribution function, the Commission admits Rs. 7.42 lakh. Out of total amount of Rs. 497.33 lakh projected by DPSCCL in 2011-12 under the head Other Administrative and General Expenses, the proposed amount under distribution function comes to Rs. 188.24 lakh which appears to be reasonable in comparison to the amount admitted by the Commission in APR 2009-10. The Commission thus allows the amount as projected that is Rs. 188.24 lakh for 2011-12 under the head Other Administrative and General Expenses. DPSCCL has claimed overall amounts of Rs. 100.00 lakh, Rs. 150.00 lakh and Rs. 200.00 lakh towards staff training expenses for 2011-12, 2012-13 and 2013-14 respectively. After apportioning the same to the distribution function such claim is found as Rs. 37.85 lakh, Rs. 54.30 lakh and Rs. 90.40 lakh for 2011-12, 2012-13 and 2013-14 respectively. It was found that expenditure for an

amount of Rs. 9.60 lakh was incurred by DPSCCL towards Staff Training Expenses during 2010-11. In view of submission of DPSCCL as stated in paragraph 5.2, the Commission after considering the proposal of DPSCCL allows on the basis of expenditure incurred in 2010-11 with an annual hike of 5% on the same, i.e. for Rs. 10.08 lakh, Rs. 10.58 lakh and Rs. 11.11 lakh for 2011-2012, 2012-2013 and 2013-2014 respectively. Although the expenditure is administrative and general expenses in nature, the same is identified separately in order to review the actual expense under this head at the time of APR of the respective years. For repair and maintenance the amount projected by DPSCCL for 2011-12 is kept unaltered on the ground of the requirement of strengthening the distribution network. The Commission thus admits Rs. 244.36 lakh for 2011-12 under the head which includes proportionate expenses on contract labour.

5.75 For 2012-13 and 2013-14, the costs under different sub-heads under O&M cost for distribution system have been determined for admission by giving an increase of 5% over the admitted amount of the preceding year considering the present inflationary trend except under the head Other Administrative and General Expenses of 2012-13 which has been admitted for the amount as proposed during the year. For 2012-13 expenses under the said head has been considered with a 5% hike over the admitted amount for 2012-13. The expenses on contract labour for 2012-2013 and 2013-2014 have been considered with annual hike of 5% on the projected amount of 2011-2012 for six months and full year respectively. Accordingly, the admitted amounts for O&M expenses for the distribution system of DPSCCL for the three ensuring years are shown in the following table.

Rupees in lakh

OPERATION & MAINTENANCE EXPENSES OF DISTRIBUTION SYSTEM OF DPSCCL							
Sl. No.	Particulars	2011-12		2012-13		2013-14	
		Proposed	Admitted	Proposed	Admitted	Proposed	Admitted
1	Legal & Professional Charges	82.54	54.05	91.00	56.76	131.64	59.59
2	Rent & Rates & Taxes	13.60	13.60	14.36	14.28	19.39	14.99
3	Audit Fees	7.42	7.42	7.80	7.79	10.72	8.18
4	Other Administrative & General Expenses	188.24	188.24	194.85	194.85	250.19	204.59
5	Staff Training Expenses	37.85	10.08	54.30	10.58	90.40	11.11
6	R&M including Consumables and Contract Labour	244.36	244.36	261.13	261.13	332.45	280.53
7	Total	574.01	517.75	623.90	545.39	834.79	578.99

The Commission hereby directs that in case the actual expenses under repair and maintenance head of distribution system are found to be less than the admitted amount for any of the three ensuing years, the Commission will allow the actual expenditure under this head in APR for the concerned year.

5.7.6 The admitted amounts for O&M expenses for generating stations and distribution systems of DPSCCL for all the ensuing years are given below:

Rupees in lakh

Particulars	Operation & Maintenance Expense					
	Proposed by DPSCCL			As admitted by the Commission		
	2011-12	2012-13	2013-14	2011-12	2012-13	2013-14
Dishergarh TPS(old)	269.06	296.61	-----	186.78	95.13	----
Dishergarh TPS(new)	20.58	85.85	133.36	----	39.12	79.80
Chinakuri TPS	650.56	717.19	878.85	351.00	122.90	129.00
Distribution System	574.01	6.23.00	834.79	515.75	545.39	578.89
Total	1514.21	1723.55	1847.00	1055.53	802.54	787.79

• Proposed figure arrived at by adding Administrative and General Expenses centrally maintained (excluding employee cost) and repair and maintenance cost including consumables & Stores.”

13. On perusal of the above order, it is clear that the State Commission recorded in the impugned order that the Appellant should furnish details of the sub-headwise expenses under Operation and Maintenance expense. While giving the relevant finding, the State Commission has taken into consideration all the Regulations 2011 with reference to

the Operation and Maintenance. Thus, the Regulations would refer to the Operation and Maintenance expenses which includes (a) Repair and Maintenance expenses (b) Administrative and Generation expenses subject to the condition. The relevant clause is as follows:

“5.7.2 Administrative and General Expenses will also include the expenditure to be incurred on account of the following heads, viz.,

- (i) Rent and lease charge for asset.*
- (ii) Legal charges;*
- (iii) Auditor’s expenses, which include auditor’s fees, auditor’s expenses and payment to auditors in any other capacity or for any work which is necessary to be got done from them and audited.*
- (iv) Consultancy charges for work which cannot be done in-house or is uneconomical in doing in-house or is essential to be done from outside sources except payment to Auditors;*
- (v) Other expenses necessary and arising from and ancillary or incidental to the business of electricity except penalty etc. levied under this Act or any other Act.”*

“5.7.3 The Commission shall accept Operation and Maintenance Expenditure subject to prudence check and other specific provision on this respect in these regulations.”

14. These Regulations would provide that the Commission has to approve the expenses under Operation and Maintenance after prudent check.

15. According to the Appellant the actual legal expenses for the year 2009-10 was Rs. 129.33 lakh. In the year 2011-12 the Appellant claimed legal charges and consultancy fees for Rs. 218.09 lakh. According to the State Commission, the Appellant has been directed to furnish all the details of the sub-head wise expenses under Operation and Maintenance. Despite this, no details have been furnished in respect of the legal expenses and in fact, the Appellant has been directed to furnish the details of the legal expenses by the State Commission during each year along with the application for APR for respective year but, these particulars have not been given by the Appellant.
16. According to the Learned Counsel appearing for the State Commission, that the State Commission directed the Appellant to furnish details of sub-head wise expenses under Operation and Maintenance but, those details were not given in respect of legal expenses and, therefore, the State Commission further directed the Appellant to furnish details of legal expenses during each year along with application for APR for respective year. It is stated by the Learned Counsel for the State Commission that it has relied on clause 5.7.3 of Tariff Regulations 2011 by applying prudence check in absence of details being given by the Appellant. MYT order for the FY 2011-12, 2012-13 and

2013-14 had been passed after one and half year after the year 2011-12.

17. Whatever the expenses had to be incurred by the Appellant were already incurred by the time the said order had been passed. 2011 Tariff Regulation do not contain any norms for Operation and Maintenance expenses for distribution licensees. In fact Regulation 5.7.3 provides that State Commission shall accept operation and maintenance expenditure subject to the prudence check and other specific provision in this respect in these Regulations. Schedule 9-A of the Regulations which contain the operating norms does not contain any norms of Operation and Maintenance for distribution licensees. Despite this, Operation and Maintenance expenses for the Appellant have been effectively decreased by the order when taken on per unit basis. Even in the Review order the State Commission observed that the issues relating to the Operation and Maintenance expenses were already discussed in the Tariff order and as such the same need not be reviewed since Operation and Maintenance expenses were admitted as per the provisions of the Tariff Regulations 2011.
18. It is now submitted by the Appellant that all the particulars relating to the expenses actually incurred by the Appellant

are now available with the Appellant and they are prepared to furnish those details before the State Commission and the State Commission may be directed to fix the Operation and Maintenance expenses after prudence check. On this aspect, we have heard the learned Counsel for the State Commission.

19. In view of the statement made by the Appellant the MYT order for 2011-12, 2013-14 have been passed one and half year later to the year 2011, it is clear that the expenses which had to be incurred by the Appellant were already incurred before the order was passed.
20. Under those circumstances, it is appropriate to direct the Appellant to give those particulars to the State Commission regarding the legal expenses actually incurred and in that event the State Commission would consider the same and decide the issue after prudent check.
21. With these observations the matter is remanded back to the State Commission to pass appropriate order on this aspect in accordance with law after hearing the Appellant and after considering the materials furnished by them as expeditiously as possible. The matter is remanded back for re-consideration in light of the reasons narrated above.

22. Accordingly, the Appeal is allowed in part with the directions referred to above. However, there is no order as to costs.

23. Pronounced in the open court on this 23rd day of May, 2014.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:23rd May, 2014

✓ ~~REPORTABLE/NON-REPORTABLE~~