Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 84 of 2012

Dated: 10th May, 2013

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

In the matter of:

Reliance Infrastructure Limited,
H Block, 1st Floor,
Dhirubhai Ambani Knowledge City,
Navi Mumbai- 400 710 … Appellant (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,
   Grahak Bhavan, Sant Dnyaneshwar Marg,
   Vile Parle (W),
   Mumbai-400 056.

3. Prayas,
   4, OM Krishna Kunj Society,
   Ganagote Path,
   Erandavane. Pune-411 004

4. Thane Belapur Industries Association,
   Post: Ghansoli, Navi Mumbai-400 071.

5. Vidarbha Industries Association,
   Civil Lines, Nagpur-400 041

6. Shri N. Poonaratnam,
   25, Majithia Industrial Estate,
   Waman Tukaram Patil Marg,
   Deonar, Mumbai-400 088

7. Shri Rakshpal Abrol,
Bhartiya Udhami Avam Upbhokta Sangh,
Madhu Compound, 2nd Floor,
2nd Sonawala Cross Road,
Goregaon (East),
Mumbai-400 063

8. Shri Sandeep N. Ohri,
A-74, Tirupati Tower,
Thakur Complex,
Kandivali (East)
Mumbai-400 101 ...Respondent(s)

Counsel for Appellant(s) : Ms. Anjali Chandurkar
Mr. Saswat Pattnaik
Mr. Hasan Murtaza

Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan,
Mr. Arijit Mitra
Ms. Richa Bhardwaja for R-1

JUDGMENT

RAKESH NATH, TEHNICAL MEMBER

This Appeal has been filed by Reliance Infrastructure Ltd. (Generation Business) against the order dated 27.2.2012 passed by the Maharashtra Electricity Regulatory Commission ("State Commission") in respect of final truing up for FY 2009-10 and Annual Performance Review ("APR") for FY 2010-11 for generation business of the

Appellant. The State Commission is the first Respondent.

2. The Appellant is aggrieved by disallowance of following:

i) **Interest on working capital:** The State Commission has treated the entire interest on working capital as efficiency gain.

ii) **Disallowance of transit loss on imported coal:** The transit loss on imported coal has been denied as the Tariff Regulations do not provide any transit loss on imported coal and the State Commission felt that the Appellant should have entered into contracts to get imported coal on delivery basis.

iii) **Non-capitalisation of approved DPR Schemes for FY 2009-10 and 2010-11:** The DPR schemes approved by the State Commission prior to

passing the impugned order for 2009-10 and 2010-11 have not been capitalized.

3. The Appellant has made the following submissions:

i) **Interest on working capital for FY 2009-10:** This issue is covered by the judgment of this Tribunal dated 13.9.2012 in Appeal nos. 202 and 203 of 2010 in the case of Reliance Infrastructure Ltd. vs. Maharasthra Electricity Regulatory Commission & Ors.

ii) **Disallowance of transit loss on imported coal:** This issue has been decided for the FY 2007-08 by judgment of this Tribunal dated 23.3.2012 passed in Appeal no. 148 of 2012 as against the Appellant. Against this order the Appellant has filed an Appeal before the Hon'ble Supreme Court. The Tribunal has held that State owned generators

have been able to procure imported coal on delivery basis and there is no reason why a private generator is not prudent enough to procure coal on similar lines. The Appellant has now carried out an exercise to compute the per unit cost of coal procured by the Appellant and power stations of Maharashtra State Power Generation Company Ltd. ("MSPGCL") and Tata Power Company ("TPC") on the basis of gross calorific value for FY 2007-08, 2008-09 and 2009-10 which shows that the landed cost per unit in respect of the Appellant even after factoring the transit loss is much lower than the power stations of MSPGCL and TPC. Therefore, transit loss should be allowed in respect of imported coal to the Appellant.

iii) **Non-capitalisation of approved DPR Schemes for FY 2009-10 and 2010-11:** The Appellant submitted DPRs to the State Commission for

approval on 8th January, 2009, 24th Sept., 2009 and 20th Nov., 2009 respectively, which related to work to be carried out in the FYs 2009-10 and 2010-11 and included these Schemes in the petition filed towards truing up for FY 2009-10 and provisional truing up for the FY 2010-11. In respect of DPRs submitted on 24th Sept., 2009 and 20th Nov., 2009 approval was given by the State Commission on 31st March, 2011 and 22nd Sept., 2011 respectively much prior to passing the impugned order on 27th Feb., 2012. However, capitalization of these schemes has not been allowed.

4. The State Commission has filed counter affidavit supporting the findings of its order dated 27.02.2012.

5. We have heard Ms. Anjali Chandurkar, learned counsel for the Appellant and Shri Buddy Ranganadhan, learned counsel for the State Commission. After taking into account the rival contentions of both the parties, the following questions would arise for our consideration:

i) Whether the State Commission was correct in treating the entire interest on working capital as efficiency gain?

ii) Whether the State Commission was correct in disallowing the transit loss on imported coal?

iii) Whether the State Commission has erred in not capitalizing the approved DPR schemes for FYs 2009-10 and 2010-11?

6. The first issue is regarding Interest on Working Capital for FY 2009-10.

6.1 The State Commission has decided that actual interest on working capital as Nil and has considered the interest on working capital computed on a normative basis as efficiency gain to be shared with the consumers in accordance with its Regulations.

6.2 This issue has been decided by this Tribunal in the judgment dated 13th Sept., 2012 in Appeal nos. 202 & 203 of 2010. The relevant extracts are as under:

> *"9. Let us first take up the first issue relating to efficiency gain on interest on working capital which is common to both the appeals.*
>
> *9.1 This issue has already been decided by the Tribunal in its judgment dated 31.8.2012 in Appeal nos. 17, 18 & 19 of 2011 in the matter of Tata Power Company Limited Vs. MERC. The relevant extracts of the judgment are reproduced below:*

"20 Issue no.3 On this issue the only point raised by the Commission is that the ratio of the decision in Appeal no.111 of 2008 is that the Commission must enquire into and consider the actual costs of the funds used by the utility as working capital in the regulated business. In that case the Commission had treated the entire difference between the normative interest on working capital and actual interest as efficiency gain on the ground that the entire working capital of the appellant had been made from the internal funds of the appellant. It must not be missed that in Appeal no.111 of 2008 it has not been held that unless internal fund is located and sourced out interest on working capital cannot be given so far as normative portion is concerned. Merely because internal funds were spent as working capital it cannot follow that no cost was associated with it. This point has been made clear in number of decisions namely Appeal no.137 of 2008 decided on 15.07.2009 which refers to the judgment in Appeal no.111 of

2008 and Appeal no.173 of 2009. In Appeal no.137 of 2008 following observation was made:-

"20. In Appeal No.111/08, in the matter of Reliance Infrastructure v/s MERC and Ors., this Tribunal has dealt the same issue of full admissibility of the normative interest on Working Capital when the Working Capital has been deployed from the internal accruals. Our decision is set out in the following paras of our judgment dated May 28, 2008 in Appeal No. 111 of 2008.

"7) The Commission observed that in actual fact no amount has been paid towards interest. Therefore, the entire interest on Working Capital granted as pass through in tariff has been treated as efficiency gain. It is true that internal funds also deserve interest in as much as the internal fund when employed as Working Capital loses the interest it could have earned by investment elsewhere. Further the licensee can never have any funds which has no cost. The internal accruals are not like

some reserve which does not carry any cost. Internal accruals could have been inter corporate deposits, as suggested on behalf of the appellant. In that case the same would also carry the cost of interest. When the Commission observed that the REL had actually not incurred any expenditure towards interest on Working Capital it should have also considered if the internal accruals had to bear some costs themselves. The Commission could have looked into the source of such internal accruals or funds could be less or more than the normative interest. In arriving at whether there was a gain or loss the Commission was required to take the total picture into consideration which the Commission has not done. It cannot be said that simply because internal accruals were used and there was no outflow of funds by way of interest on Working Capital and hence the entire interest on working capital was gain which could be shared as per Regulation No. 19. Accordingly, the claim of the appellant that it has wrongly

been made to share the interest on Working Capital as per Regulation 19 has merit.

15. b): The interest on Working Capital, for the year in question, shall not be treated as efficiency gain.

21. In view of our earlier decision on the same issue we allow the appeal in this regard also."

In Appeal no.173 of 2009 this Tribunal held as follows:

"23. The next issue is wrongful consideration of the difference between normative interest on working capital and the actual interest of working capital. In respect of this issue, according to the Learned Counsel for the Appellant, the judgment rendered by this Tribunal in Appeal NO. 137/08, this point has been referred in favour of the Appellant. The relevant observation in the said judgment is as follows:

Analysis and decision

"20. in Appeal No. 111/08, in the matter of Reliance Infrastructure V/s MERC and Ors., this Tribunal has dealt the same issue of full admissibility of the normative interest on Working Capital where the Working Capital has been deployed from the internal accruals. Our decision is set out in the following paras of our judgment dated May 28, 2008 in Appeal No. 111 of 2008.

……

21. In view of our earlier decision on the same issue we allow the appeal in this regard also."

24. In view of the law laid down by his Tribunal in the aforesaid judgment which covers the issue in hand, the State Commission is directed to restore the actual amounts considered as part of the gains on account of saving in interest expenditure in working capital".

This issue is decided in favour of the Appellant accordingly. However, the State Commission may

frame regulations for evaluation of cost of internal accruals used as working capital for working out the actual interest on working capital and efficiency gain".

9.2 This issue is decided in favour of the appellant accordingly".

6.3 The findings of the Tribunal in the above judgment will be applicable in this case. Accordingly, this issue is decided in favour of the Appellant.

7. The second issue is regarding transit loss on imported coal.

7.1 The learned counsel for the Appellant has submitted a bar chart showing comparison of landed cost of coal per unit in terms of gross calorific value of coal in respect of Power Stations of MSPGCL, Tata Power Company Ltd. and Appellant's power plant at Dahanu including transit loss to show that the landed

cost of coal per unit including transit loss at Dahanu is much lower than the landed cost for MSPGCL and Tata Power Company.

7.2 Learned counsel for the State Commission has relied on the judgment dated 23rd March, 2012 of this Tribunal in Appeal no. 148 of 2009 in which the Tribunal has upheld the findings of the State Commission in a similar case.

7.3 As pointed by the learned counsel for the State Commission, this issue has already been decided by this Tribunal in Appeal no. 148 of 2009 on 23rd March, 2012 against the Appellant. The relevant extracts are as under:

> *"11. We do not agree with the contention of the Appellant. This Tribunal in the judgment referred to above, dealt with the case where the generator performed better than the norm and in that event*

the Tribunal directed that the benefit of the norms must be given to such a generator. If the benefit of norm is to be provided to the generator for better performance then the loss of performance below the norm has to be borne by the generator. The present is a case where the generator has performed below the norm. If the generator is given the benefit of not adhering to the norm even though it performed below the norm, it would be a clear case of eating one's cake and having it too.

12. If the rule of law prescribes the supremacy of the Norm over the actual performance, such principle must hold good whether the utility performs better than the norm or not.

13. Further it is noticed from the impugned order that the State Commission has clearly observed that other generating Companies in the State of Maharashtra i.e. Maharashtra State Power Generation Company and the Tata Power Company also procured imported coal but they have not reported any transit loss for imported coal. This implies that they procured coal on delivery basis.

14. When the State owned generators have been able to procure imported coal on delivery basis, there is no reason as to why private generator is not prudent enough to procure coal on similar terms. Therefore, the State Commission is correct in not permitting the Appellant the transit loss on imported coal when it is established that other generators including the State owned generators can procure coal on delivery basis. Therefore, the contention of the Appellant on the first point would fail."

7.4 We notice from the impugned order that the Appellant in its Petition had indicated that the State Commission in the previous orders for FYs 2007-08 and 2008-09 truing up did not permit transit loss on imported coal holding that the imported coal needed to be contracted on delivery basis. It is also indicated that the Appellant before the Tribunal in Appeal no. 148 of 2009 had contended that the Tariff

Regulations of the State Commission permitted transit loss of 0.8% for non- pithead stations and as their thermal power plant was a non pithead station, transit loss of 0.8% should be permitted. Thus, it is clear from the impugned order that the Appellant did not furnish the data relating to comparative landed cost of coal per unit before the State Commission and that this data is now being submitted before this Tribunal for the first time. Thus, the State Commission did not have the opportunity to consider the data which is now being submitted before us by the Appellant in support of its argument for allowing transit loss on imported coal. We are not inclined to go into the new data which has not been scrutinized by the State Commission and is being submitted at the Appeal stage. This is not permissible. However, the Appellant is at liberty to

submit this data for consideration of the State Commission in the future tariff proceedings.

7.5 Accordingly, this issue is decided as against the Appellant in terms of findings of this Tribunal in Appeal no. 148 of 2009.

8. The third issue is regarding non-consideration of capitalization of DPR Schemes.

8.1 According to the learned counsel for the State Commission, any capital expenditure incurred by the Appellant without prior in-principle approval could not be admitted according to the principles enacted in the "Guidelines for in-principle clearance of proposed investment schemes" issued by the State Commission. Accordingly, the State Commission has noted that since in-principle approval has not been given to a set of schemes, the extent of the scope and objectives of

the capital expenditure cannot be established. Therefore, any capital expenditure not fulfilling the above condition was not allowed to the Appellant.

8.2 The learned counsel for the Appellant has submitted that in respect of DPR Scheme submitted on 24th Sept., 2009 and 20th Nov., 2009, approval was given by the State Commission on 31st March, 2011 and 22nd Sept., 2011 much prior to passing the impugned order on 27th Feb., 2012. According to the learned counsel for the Appellant, the State Commission has not allowed capitalization of these approved schemes in the impugned order.

8.3 We find that the State Commission has approved capitalization of DPR Schemes approved by the State Commission for the FYs 2009-10 and 2010-11. However, the State Commission has not considered

capitalization of DPR Schemes where in-principle approval of the State Commission is yet to be accorded. The State Commission has also noted that once in-principle approval is granted by the State Commission, the same may be considered in future orders subject to prudence check. However, the Appellant has submitted that DPR Schemes submitted on 24th Sept., 2009 and 20th Nov., 2009 for which approval was given by the State Commission on 31st March, 2011 and 22nd Sept., 2011 prior to the passing of the impugned order have not been considered. Hence, we remand the matter to the State Commission for consideration of the submissions of the Appellant regarding capitalization of the schemes which were approved by the State Commission on 31st March, 2011 and 22nd Sept., 2011 prior to passing of the impugned order.

9. Summary of our findings

i) The issue regarding interest on working capital is decided in favour of the Appellant in terms of the judgment of the Tribunal dated 13.9.2012 in Appeal nos. 202 & 203 of 2010 in case of Reliance Infrastructure Ltd. vs. MERC & Ors.

ii) The contention of Appellant regarding transit loss on imported coal is rejected in terms of the judgment of this Tribunal in Appeal no. 148 of 2009 dated 23.3.2012. However, the Appellant is at liberty to submit the fresh data furnished by the Appellant before us for consideration of the State Commission in future tariff proceedings.

iii) The impugned order indicates that the State Commission has allowed capitalization of the approved DPR Schemes. However, the Appellant

has submitted that the capitalization of the DPR schemes which were approved by the State Commission on 31.3.2011 and 22.9.2011 prior to passing of the impugned order was not permitted. Hence, we remand the matter to the State Commission for consideration of the submissions of the Appellant on this issue.

10. In view of above, the Appeal is allowed in part as indicated above. No order as to costs.

11. Pronounced in the open court on this ***10th day of May, 2013***.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

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REPORTABLE/~~NON-REPORTABLE~~

vs