Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 85 of 2012

Dated: 20th 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 ….Appellant(s)
H-Block, 1st Floor
Dhirubhai Ambani Knowledge City
Navi Mumbai – 400 710

Vs

1. **The Maharashtra Electricity Regulatory Commission ...Respondent(s)**
   World Trade Centre No.1
   13th Floor, Cuffee Parade, Colaba
   Mumbai – 400 001

2. **Mumbai Grahak Panchayat**
   Grahak Bhavan, Sant Dyaneshwar Marg
   Vile Parle (W), Mumbai – 400 056

3. **Prayas**
   C/o. Amrita Clinic, Athawale Corner
   Deccan Gymkhana, Karve Road
   Pune – 411 004

4. Thane Belapur Industries Association
Plot No. P-14, MIDC, Rabale Village
Post: Ghansoli,
Navi Mumbai – 400 071

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

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

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

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

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

Counsel for the Respondents (s): **Mr. Buddy Ranganadhan**
Mr. Arijit Mitra
Ms. Richa Bharadwaja
Ms. Deepieka

JUDGMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by the Reliance Infrastructure Limited against the order dated 27.02.2012 passed by the Maharashtra Electricity Regulatory Commission in respect of final truing up for FY 2009-10 and Annual Performance Review for FY 2010-11 of the Appellant's distribution business.

2. The Appellant in the present Appeal has pressed the following issues:

(i) Interest on working capital for FY 2009-10 denied by the State Commission.

(ii) Electronic Clearing System (ECS) and Internet Discount for FYs 2009-10 and 2010-11 denied by the State Commission.

(iii) Disallowing Efficiency Gain for reduction in Distribution Loss by non-consideration of Assessed Sale and Revenue therefrom for FY 2009-10 and FY 2010-11 by the State Commission as a part of sale of electricity.

(iv) Disallowance of Power Purchase Cost in respect of Day Ahead Bilateral Transactions for FYs 2009-10 and 2010-11.

3. The Appellant has made the following submissions with regard to the above four issues:

3.1 **Interest on working capital for FY 2009-10.**

The State Commission has incorrectly allowed the entire interest on working capital as efficiency gain and shared the same with the consumers. This issue is already covered by the judgment of this Tribunal dated 13.09.2012 in Appeal nos. 202 and 203 of 2010 in the case of Reliance Infrastructure Limited Vs. MERC in favour of the Appellant.

3.2 **Electronic Clearing System (ECS) and Internet Discount for FY 2009-10 and 2010-11.**

The State Commission has incorrectly disallowed the discounts given by the Appellant to the consumers for Internet and ECS payments on the ground that the same is beyond the regulatory requirement. Admittedly such discounts have been availed by the various consumers of the Appellant. Such discounts were introduced by the Appellant as in the long run the

consumers would avail of payment either by way of Internet or through ECS, thus reducing the operational/establishment cost of the Appellant. The State Commission vide its tariff order dated 29.07.2011 had in fact at the time of determining the APR for FY 2009-10 and ARR for FY 2010-11 permitted such ECS and Internet discounts. Having considered such discounts in the tariff order, the State Commission ought not to have disallowed the same thereby creating regulatory uncertainty.

3.3 **Disallowing efficiency gain for reduction in Distribution Loss by non-consideration of Assessed Sales for FYs 2009-10 and 2010-11.**

The Appellant in its petition had included the sales and revenue assessed through vigilance drive in the total sales and revenue of the distribution business. The

State Commission has incorrectly disallowed the assessed sales and revenue earned therefrom as tariff income on the ground that such sales do not represent actual supply of energy to the consumers. By non-consideration of assessed sales, the Distribution Loss has increased thereby reducing the Appellant's entitlement to earn efficiency gain by reasons of reduction in the distribution loss achieved by the Appellant as against the target given by the State Commission. The electricity consumed by consumers by unauthorized use thereof can be assessed by the Distribution Licensees as per the provisions of Section 126 of the Electricity Act, 2003. Out of total energy that entered the system at transmission to distribution interface a portion of energy is lost due to technical reasons and a portion of energy is lost on account of fact that the same could not be metered either because the consumers bypassed the meter or that the meter

was not installed at the consumer's premises or it was not functioning and the remaining portion which is recorded in the meters is considered as sold. These losses are categorized as technical loss and commercial loss respectively. It is the responsibility of the distribution licensee to reduce both the technical loss as well as the commercial loss. By not considering the assessed energy as consumed, the State Commission simply inflated the distribution loss in the system.

3.4 **The disallowance of power purchase cost in respect of Day Ahead Bilateral Transactions.**

The State Commission has disallowed the transactions dated 05.06.2009, 10.6.2009, 19.06.2009 and 01.07.2010 by holding that these purchases were at the

rate higher than the maximum Market Clearing Price of the respective day and accordingly disallowed the differences between the bilateral purchase price and weightage average price of energy. The power on the above dates was procured by the Appellant as a Member of Mumbai Power Management Group which procures short term power for all the distribution licensees in Mumbai. While these purchases through the traders at the price claimed by the Appellant on 5th, 10th and 19th June, 2009 have been allowed for the other Distribution Licensees namely Tata Power Company and BEST, the same has been denied in case of the Appellant. Thus, there is no justification for discriminating the Appellant in power procured on the same days at the same rate as has been allowed in the two orders of the State Commission relating to Tata Power Company and BEST against the power procured by Mumbai Power Management Group which is a joint

procurement group for the Distribution Licensees in Mumbai.

4. The State Commission, the 1st Respondent has filed counter affidavit in support of its findings on the above issues in the impugned order.

4.1 We have heard Mrs. Anjali Chandurkar, Learned Counsel for the Appellant and Mr. Buddy A. Ranganadhan, Learned Counsel for the State Commission on the above issues.

4.2 In the light of 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 has erred in not allowing the ECS and Internet Discount given by the Distribution Licensee to its consumers on payment of electricity bills through ECS and internet?

iii) Whether the State Commission was correct in not considering the assessed sales as a part of sale of electricity by the Appellant?

iv) Whether the State Commission was justified in disallowing the Power Purchase Cost of Day

Ahead Bilateral Transactions by the Distribution Licensee on certain days?

Let us discuss these questions one by one.

5. The first issue is regarding interest on working capital for FY 2009-10.

5.1 As pointed by the Appellant, this issue has already been decided by this Tribunal in judgment dated 13.09.2012 in Appeal nos. 202 and 203 of 2010 on the basis of the earlier judgments. The relevant extracts of the judgment 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."

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

6. The second issue is regarding ECS and Internet Discounts allowed by the Appellant to the consumers during FY 2009-10 and FY 2010-11.

6.1 According to the Appellant, the State Commission ought to have considered the ECS and Internet discounts given by the Appellant to its consumers which would help in reducing the operational/establishment cost of the Appellant.

6.2 According to the Ld. Counsel for the State Commission, in the schedule of electricity tariff for FY 2009-10 issued with the tariff order, the Commission had allowed only discounts/incentive only on specific items which did not include the ECS and Internet discount and therefore the same could not be allowed. It is further contended that if the Appellant is able to achieve lower employees expenses/A&G expenses on account of such additional discounts for Internet and ECS payment, then the Appellant can get the benefit of efficiency gain on account of such reduction in operation and maintenance expenses.

6.3 Let us examine the findings of the State Commission in the impugned order:

"3.25.5 In the schedule of electricity tariffs for FY 2009-10 issued with its Order in Case No. 121 of 2008, the Commission allowed discounts/ incentives only on specific items namely - Power Factor Incentive, Prompt Payment Discount, Load Factor Incentive. Therefore, the practice of RInfra-D to provide further discounts is beyond a regulatory requirement. Therefore, the Commission has not allowed discounts given for internet and ECS payments to be passed through to the consumers. Therefore, the Commission adds back Rs. 0.4 Crore of discount on ECS payment and Rs. 1.58 Crore of internet payment to the tariff revenues as submitted by RInfra-D."

Thus, the State Commission did not allow pass through of ECS and Internet discount given by the Appellant to the consumers as it was not allowed in the tariff order for FY 2009-10 and was beyond regulatory requirement.

6.4 We are in agreement with the findings of the State Commission. The State Commission had not allowed any discounts/incentives for payments through ECS and Internet in the tariff order. These discounts have been offered by the Appellant on its own. If offering of such discounts helps in reducing the operation and maintenances expenses of the Appellant, then it will be entitled to claim the benefit of the efficiency gain on account of reduction in operation & maintenance expenses. Thus, ECS and Internet discount offered by the Appellant to its consumer could not be allowed to be a pass through in the tariff.

6.5 The Appellant has stated that in the tariff order dated 29.7.2011, the State Commission at that time of determining the APR for FY 2009-10 and ARR for FY 2010-11 permitted such ECS and Internet discount. The Appellant enclosed extracts of the order dated

29.07.2011 in support of this point. We have gone through the said order. We do not find any specific findings of the State Commission for allowing the ECS and Internet discount to the consumers. If the State Commission has allowed such discounts inadvertently by approving the data of expenses and revenue submitted by the Appellant, this could not be taken as a finding of the State Commission. Accordingly, this issue is decided as against the Appellant.

7. The third issue is regarding non-consideration of Assessed Sales for the FYs 2009-10 and 2010-11.

7.1 According to the Ld. Counsel for the Appellant, the State Commission had set the target for distribution loss with some reduction over the previous year which the Distribution Licensee had to achieve by reducing technical losses through Capex and Opex and by

reducing commercial losses through vigilance, theft prevention, regular meter testing, efficiency in replacement of stopped and slow meters, etc. If the Distribution Licensee was not authorized to include the estimated unrecorded consumption in sales for the purpose of actual loss determination, it would amount to the licensee being not allowed to retrieve the energy consumed but not recorded and to that extent its capability to meet its commercial loss reduction targets is compromised. The targetted distribution losses envisaged a reduction in commercial losses which was achieved by way of discovering and assessing unauthorized usage and theft of electricity and replacing meters where required and retrieving energy consumed by means mentioned above.

7.2 According to the Ld. Counsel for the State Commission, the sales assessed as vigilance activities could not be

considered as actual sales. The assessment of actual consumption happened over a period of such theft remains just an estimate which may be significantly different than actually consumed energy over a period of theft. The energy assessed is only an assessment not the actual sale recorded from the consumers meter. Since the actual sales along with actual injected energy determine the actual distribution losses for a particular year, it is essential to ensure that both such parameters are actual values and not based on any assessment/estimates. Further something which is consumed in unauthorized manner, even if it is identified afterwards, it does not amount to sale of the product.

7.3 Let us examine the findings of the State Commission on this issue. The relevant extracts for truing up for the FY 2009-10 are as under:

"3.2.3 The Commission observed that while reporting income against recovery from theft of power for FY 2009-10, RInfra-D has factored in assessed revenue along with assessed sales against respective consumer category. The Commission is of the view that such sales do not represent actual supply of energy to the consumers during FY 2009-10. Therefore, the sales assessed while booking such revenue shall be reduced from the total sales. In absence of the actual quantum of sales booked while booking income against recovery from theft of power, the Commission has derived such sales quantum by applying ABR of Rs. 6.12 per unit for FY 2009-10 over the said recovery of Rs. 17.20 Crore, which results in sales of 28.12 MU. However, the Commission directs RInfra-D to submit actually assessed sales as booked by it immediately within one month from the date of issue of this Order".

"3.25.2 In the meeting held at the Commission's office, representatives of RInfra-D have informed that income against recovery from theft of power for FY 2009-10 has been factored into the revenue from sale of power along with the assessed sales against respective consumer category. However, as stated in the previous section, the Commission has classified the amount of Rs. 17.20 Crore as 'non tariff income' instead of 'revenue from sale of electricity' for FY 2009-10. Moreover, the sales assessed while booking such revenue shall be

reduced from the total sales, as such sales do not represent actual supply of energy to the consumers during FY 2009-10. In absence of the actual quantum of sales booked while booking income against recovery from theft of power, the Commission has derived such sales quantum by applying ABR of FY 2009-10 over the said recovery. However, the Commission directs RInfra-D to submit the assessed sale actually booked by it immediately within one month from the date of issue of this Order."

7.4 Thus, the State Commission has held that the assessed sales on account of unauthorized use of electricity could not be considered as the actual supply of energy to the consumers. Similarly, the revenue recovery from such assessed sales have also been deducted from the revenue from sale of electricity and the same has been considered as non-tariff income. Similar findings have been rendered in the APR of FY 2010-11 in the impugned order.

7.5 We find that the unauthorized use of electricity has been defined in the explanation under Section 126 of the Electricity Act, 2003 as:

"unauthorised use of electricity" means the usage of electricity—

(i) by any artificial means; or

(ii) by a means not authorised by the concerned person or authority or licensee; or

(iii) through a tampered meter; or

(iv) for the purpose other than for which the usage of electricity was authorised; or

(v) for the premises or areas other than those for which the supply of electricity was authorized."

7.6 Let us examine the Section 126 of the Electricity Act which empowers the assessing officer of the licensee to assess the electricity charges for unauthorized use of electricity:

***"126. Assessment.**—(1) If on an inspection of any place or premises or after inspection of the equipments,*

gadgets, machines, devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorised use of electricity, he shall provisionally assess to the best of his judgment the electricity charges payable by such person or by any other person benefited by such use.

(2) The order of provisional assessment shall be served upon the person in occupation or possession or in charge of the place or premises in such manner as may be prescribed.

(3) The person, on whom an order has been served under sub-section (2), shall be entitled to file objections, if any, against the provisional assessment before the assessing officer, who shall, after affording a reasonable opportunity of hearing to such person, pass a final order of assessment within thirty days from the date of service of such order of provisional assessment, of the electricity charges payable by such person.

(4) Any person served with the order of provisional assessment may, accept such assessment and deposit the assessed amount with the licensee within seven days of service of such provisional assessment order upon him.

(5) If the assessing officer reaches to the conclusion that unauthorised use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorised use of electricity has taken place and if, however, the period during which such unauthorised use of electricity has taken place cannot be ascertained, such period shall be limited to a period

of twelve months immediately preceding the date of inspection.

(6) The assessment under this section shall be made at a rate equal to 4[twice] the tariff applicable for the relevant category of services specified in sub-section (5).”

Thus, the assessing officer of the distribution licensee has to make assessment of unauthorized use of electricity at the rate equal to twice the applicable tariff for the relevant category after giving an opportunity of hearing to the concerned person.

7.7 Let us now examine the Tariff Regulations, 2005.

7.8 Non-tariff income has been defined in the Regulations as under:-

*“(zg) **“Non-Tariff Income”** means income relating to the Licensed Business other than from tariff, excluding any income from Other Business and, in case of the Retail Supply Business of a Distribution Licensee, excluding income from wheeling and receipts on account of cross-*

subsidy surcharge and additional surcharge on charges of wheeling:"

Thus, the non-tariff income is the income from the licensee's business other than from tariff.

7.9 Regulation 81 deals with Distribution Losses.

"81.1 The Distribution Licensee shall be allowed to recover, in kind, the approved level of energy losses arising from the Retail Supply Business:

Provided that the Commission may stipulate a trajectory for distribution losses in accordance with Regulation 16 as part of the multi-year tariff framework applicable to the Distribution Licensee:

Provided that any variation between the actual level of distribution losses and the approved level shall be dealt with, as part of the ongoing performance review, in accordance with the mechanisms provided in Regulation 18 or Regulation 19, as the case may be:

Provided also that the Commission may stipulate a time period beyond which Distribution Licensee shall not be permitted to recover, under this Regulation, energy losses arising from theft, pilferage, failure to meter or bill for electricity transmitted."

7.10 The above Regulations indicate that the Distribution Loss trajectory would include the technical losses and the loss of energy arising from theft, pilferage and loss of energy due to slow meters or defective meters, etc.

7.11 We find that the assessment of electricity charges is made by the Assessing Officer as per the procedure laid down in the 2003 Act, after giving opportunity to the concerned person to file objection, if any, as against the provisional assessment. Only after affording opportunity of hearing to such person, the Assessing Officer passes the final order of assessment of the electricity charges payable by such person. The assessed electricity charges are made by the assessing officer after inspection of the premises or after inspection of equipments, gadgets machines, etc., connected at the

premises or after inspection of records. The assessed electricity charges are based on the assessed power/energy consumption and is charged at twice the tariff applicable for the relevant category. Thus, the assessed energy has to be considered as supplied by the distribution licensee to the concerned person.

7.12 According to the State Commission, only the energy recorded in the meter is required to be considered for computation of distribution loss. We are not in agreement with the contention of the State Commission. A large number of agriculture consumers in the country are still being supplied electricity without meters. The consumption of such unmetered consumers are being assessed by the State Commission and considered as sale to agriculture consumers. The unauthorized use of electricity assessed by the Assessing Officer as per Section 126

of the Act is nothing but consumption of electricity supplied by the distribution licensee.

7.13 Out of total energy received by the distribution licensee at the transmission distribution interface and recovered at the points of injection, a portion of energy is lost due to technical loss i.e. heat loss, core loss in transformers, etc.; and a portion of energy is lost as the same could not be metered either because of the fact that the consumer has bypassed the meter or meter has not been functioning and the remaining portion recorded in the meters is billed. The energy lost due to theft, pilferage or dysfunctional meter is classified as "commercial loss". The distribution licensee has the responsibility to reduce both technical loss and commercial loss. The target distribution loss decided by the State Commission comprises the technical and commercial loss. The loss reduction targeted with

respect to the previous year is for reduction of both technical and commercial loss.

7.14 If the distribution licensee has plugged the energy "leakages" in the system through vigilance initiative, it has not only ensured that the recorded consumption would increase in future but has also ensured that the consumption not recorded in the meter in the past is also retrieved by charging the concerned person for such energy.

7.15 There is no dispute that the pilfered electricity has also been consumed and has been procured by the distribution licensee for distributing in its licensed area. The pilfered energy has not been recorded in the meter and can only be assessed. Section 126 of the 2003 Act specifically provides for assessment of charges for unauthorized use of electricity. The rate for such

charges is at twice the tariff applicable for the relevant category as approved by the State Commission. The charges will have to be worked out by assessment of the electricity consumption by inspection of place or premises, inspection of equipments, gadgets, etc., found connected or used or after inspection of records, etc. as specified in Section 126 (1) of the Act. Therefore, the assessed energy has to be considered as consumed. If the licensee has been able to reduce the distribution losses with vigilance drive, it should be given the credit for efficiency gain if it helps in reducing the loss below the target level. Therefore, we hold that the assessed energy as a result of vigilance drive should be accounted for while computing the distribution loss.

7.16 Accordingly, this issue is decided in favour of the Appellant.

8. The fourth issue is regarding disallowance of Power Purchase Cost in respect of Day Ahead Bilateral Purchases.

8.1 The Learned Counsel for the Appellant has submitted that similar purchases of power in short term through traders has been allowed in case of other Distribution Licensees namely TPC and BEST.

8.2 Learned Counsel for the State Commission has replied stating that the State Commission has carried out a detailed analysis of the bilateral transactions made by the Appellant for its power purchase and has disallowed power purchases made at exorbitantly high cost. The Learned Counsel for the State Commission has further argued that the State Commission in various orders relating to power purchase over the past few years had

directed the Appellant to enter into long term Power Purchase Agreements to meet its demand and energy requirement at a reasonable rates rather than relying on costly short term sources. Due to failure of the Appellant to enter into long term power purchase contracts, their share of power procurement form bilateral purchases has increased substantially and for FY 2009-10 it constitutes around 21% of the total power purchase with 36% of the total cost of power purchase. The State Commission has found that some Day Ahead purchases have been made at rates higher than a maximum Market Clearing Price of energy exchanges. Further, the Appellant's contention that the State Commission had allowed the cost of such power purchase to other Distribution Licensee in Mumbai is not acceptable in view of the fact that during the FY 2009-10, the share of bilateral purchase in total power purchase was very significant for the Appellant

compared to other Distribution Utilities. Further, the Appellant has made submissions in support of its case are fresh submissions which were not made before the State Commission. Such submissions could not be raised at the stage of Appeal.

8.3 Let us now examine the impugned order:

"3.4.34 For the DA transactions with mention of power purchase rates, the Commission referred to the monthly reports on short-term transactions of electricity issued by the CERC. Such reports provide the date wise market clearing volume and market clearing price (MCP) in terms of minimum, maximum and weighted average rates at both exchanges i.e. IEX and PXIL. The Commission compared the DA power purchase rates with the market rates. The Commission observed that some DA power purchases were done at buying rate higher than maximum MCP of IEX and PXIL for that day. It indicated that the Day-Ahead power was purchased at the rates higher than the Maximum market price of respective date. In this regard, the Commission asked RInfra-D to submit the clarification for such transactions.

3.4.35 In reply, RInfra-D submitted that the dates given in all day-ahead transactions are the date of signing of contract and not the dates of power flow. The particular transactions referred are sum total of all day-ahead transactions made in the particular months of 2009 and their collective weighted average power purchase cost is mentioned in submission of bilateral power purchase transactions.

3.4.36 The Commission was not satisfied with RInfra-D's response and asked it to submit further details clearly mentioning the actual dates for power supply along with the respective quantities and the costs for each DA transaction for FY 2009-10.

3.4.37 Vide its email dated February 15, 2012; RInfra-D submitted actual dates of supply for various DA transactions. However, the Commission observed that some DA purchases were at the rate higher than maximum Market Clearing Price (MCP) of respective date.

Table 16: Short-term DA purchases with power purchase rates>maximum MCP for FY 2009-10

Trader	Source	Date of supply	Power purchase rates	Energy qty.	Landed cost	Landed rate per unit	Max MCP for IEX/PXIL	Wad avg. market rate	Aproved landed rate	Approved landed cost
				A	B	B/A			C	A*C
			Rs./Unit	MU	Rs.Crore	Rs./Unit	Rs./Unit	Rs./Unit	Rs./Unit	Rs.Crore
NVVNL	WBSEB-RINFRA	10-Jun-09	5.7	0.70	0.43	6.13	5.30	3.86	4.29	0.30
Nvvnl	Cseb-rel	5-Jun-09	5.04	0.21	0.11	5.35	5.00	3.19	3.50	0.07
PTC	CSEB-RINFRA	19-Jun-09	9.45	0.15	0.15	10.00	9.35	7.43	7.98	0.12

3.4.38 DA power purchases at the purchase rate higher than Maximum Market Clearing Price evidently show that the power is procured at higher cost even though it was available at cheaper rates in the market. The Commission is of the view that such power purchase expense is not a prudent expense. Moreover, it is not possible that all such power purchases would have happened when both the exchanges-IEX and PXIL were at maximum market rate for the day. Therefore, for the above mentioned DA transactions, the Commission has considered the weighted average market rate of power purchase as a prudent price for allowance of power purchase cost. The Commission has added other charges per unit on such power purchase rate as submitted by RInfra-D. Therefore, the Commission has approved costs of Rs. 0.49 Crore against Rs. 0.69 Crore as claimed by RInfra-D for such transactions for the purpose of final true up of FY 2009-10. As a result, the Commission has disallowed the cost of Rs. 0.20 Crore on account of imprudent power purchase for DA transactions."

8.4 Similar finding has been given for disallowing short term

Day Ahead purchase on 01.07.2010.

8.5 Thus, the State Commission has allowed some of the Day Ahead transactions where the power purchase rate was higher than the Maximum Market Clearing Price and allowed these transactions based on the Weighted Average Market rate.

8.6. We find from the impugned order that the State Commission had observed that some Day Ahead power purchases were done at rate higher than Maximum Market Clearing price of power exchanges for that day. Accordingly, the Appellant was asked to submit the clarification for such transactions. Further, we find from the impugned order that no satisfactory explanation was given by the Appellant for carrying out the transactions at rates higher than the Maximum Market Clearing price of the power exchange for the respective rates. Now the Appellant is giving new arguments justifying the power procurement at high rates. This is

not permissible at the Appeal stage. The Appellant should have submitted the requisite explanation before the State Commission when it was given the opportunity to explain the same.

8.7 The Appellant has submitted that on 5th, 10th and 19th June, 2009, the power was procured by the Appellant as a member of Mumbai Power Management Group which procurers short-term power for all the Distribution Licensees in Mumbai. The power procured on 5th, 10th and 19th June, 2009 were booked in agreed proportion between the Appellant and other two Distribution Licensees, Tata Power Company and BEST. According to the Appellant Day Ahead power procurement on the above dates has been permitted in the true-up of accounts of Tata Power Company and BEST but the same has not been allowed to the Appellant. The Appellant in support of its arguments has submitted the

copies of the true-up orders for Tata Power Company and BEST for the FY 2009-10. We have examined these orders but we do not find any specific findings of the State Commission about approval of the power procurement in Day Ahead bilateral transactions on the above dates. The State Commission has allowed short-term power purchases as claimed by the Tata Power Company and BEST which was found to be of the same order as approved in the APR order.

8.8 In view of above we reject the contentions of the Appellant for claim of power purchase cost disallowed by the State Commission in respect of some Day Ahead bilateral transactions.

9. **Summary of our findings:**

i) The first issue regarding treatment of the entire interest on working capital as efficiency gain

is decided in favour of the Appellant in terms of this Tribunal's judgment dated 13.9.2012 in Appeal nos. 202 and 203 of 2010.

ii) We are in agreement with the findings of the State Commission in regard to ECS and Internet discount allowed by the Appellant to the consumers and confirm the order of the State Commission.

iii) The third issue regarding non-consideration of assessed sale for the FY 2009-10 and 2010-11 is decided in favour of the Appellant. The State Commission shall consider the assessed energy from unauthorized uses of electricity which has been detected by the vigilance action as sale of electricity in computing the Distribution Loss.

iv) The fourth issue regarding disallowance of power purchase cost in respect of certain Day-Ahead bilateral transactions is decided as against the Appellant.

10. In view of our above findings, the Appeal is allowed in part as indicated above. The State Commission is directed to pass the consequential orders in terms of our findings. No order as to cost.

11. Pronounced in the open court on this 20th day of May, *2013*.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

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REPORTABLE/~~NON-REPORTABLE~~

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