Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

I.A. No. 364 of 2013 in Appeal No. 265 of 2013
&
I.A. no. 365 of 2013 in Appeal No.266 of 2013

Dated: 11th March, 2014

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

I.A. No. 364 of 2013 in Appeal No. 265 of 2013

In the matter of:

BSES Yamuna Power Limited,
502, Nilgiri Apartments,
9. Barakhamba Road,
NEW DELHI-110 001 ....Applicant/Appellant

Vs.

Delhi Electricity Regulatory Commission,
Viniyamak Bhavan, C- Block, Shivalik,
Malviya Nagar,
NEW DELHI-110 017 .... Respondent

I.A. no. 365 of 2013 in Appeal No.266 of 2013

In the matter of:

BSES Rajdhani Power Limited,
BSES Bhawan,
Nehru Place,
New Delhi-110 019 ....Applicant/Appellant

Vs.

Delhi Electricity Regulatory Commission,
Viniyamak Bhavan, C- Block, Shivalik,
Malviya Nagar,
NEW DELHI-110 017 .... Respondent

Counsel for the Applicants/ Appellant (s):	**Mr. J.J. Bhatt, Sr. Adv.** **Mr. Sanjay Sen, Sr. Adv.** **Mr. Hasan Murtaza** **Mr. Arijit Maitra** **Mr. Aditya Panda**
Counsel for the Respondent(s):	**Mr. Pradeep Misra,** **Mr. Shashanik Pandit,** **Mr. Manoj Kr. Sharma for R.1** **Mr. B.B. Tiwari** **Mr. Saurabh Gandhi** **Mr. Jitender Tyagi (Reps.)**

O R D E R

Rakesh Nath, Technical Member

The Applicants/Appellants, the Distribution licensees, have filed IAs 364 and 365 of 2013 seeking for interim orders in Appeal nos. 265 and 266 of 2013 respectively. In Appeals 265 and 266 of 2013 the Applicants/Appellants have challenged the impugned order dated 31.7.2013 passed by Delhi Electricity Regulatory Commission ("Commission") determining true-up for FY 2011-12, review for FY 2012-13 and ARR and retail supply tariff for FY 2013-14.

2. One of the issues raised in these Appeals is that no roadmap has been given by the Commission for recovery of Regulatory Assets and the surcharge allowed is insufficient to recover the accumulated shortfall.

3. The Applicants/Appellants have made the following submissions in the IAs 364 and 365 of 2013.

(A) The generating companies and transmission licensees have threatened the Applicants/Appellants for Regulation of supply on account of non-payment of outstanding dues and non-maintenance of Letter of Credit (LC) which have resulted because of very low rate of recovery of surcharge for Regulatory Assets created by the Commission. The Applicants have apprehended that their supplies from the generating companies will be restricted resulting in deprivation of supply of power to the public at large as also posing threat to grid security, the consequences of which may be public disorder and unrest, etc.

(B) The Commission was mandated in terms of the judgment of this Tribunal dated 11.11.2011 in O.P. no. 1 of 2011 to allow carrying cost on the regulatory asset in a manner so as to avoid the problem of cash flow to the Applicants/Appellants. By failing to implement the said mandate in the impugned order dated 31.7.2013, the Commission has crippled the Appellants' ability to meet their outstanding dues to the generating companies and the transmission licensees.

(C) The Applicants/Appellants have partially funded their respective Regulatory Assets through commercial borrowings from lenders who had expressed their concern regarding liquidation of revenue gap and have advised the Applicants to take up the matter with the Commission for obtaining suitable confirmations. The Commission by their letter dated 2.12.2011 assured the lenders that they would endeavour to cover the revenue gap till FY 2009-10 and the un-recovered revenue gap for FY 2011-12 in the course of forthcoming MYT Period.

(D) The Commission in the statutory advice to the Government of National Capital Territory of Delhi dated 1.2.2013 has itself recognized the fact that 8% surcharge has not made any significant dent in reduction of the accumulated Regulatory Assets. Despite this, the Commission has increased the amount of Regulatory Assets and continued the same 8% surcharge for recovery of Regulatory Assets in the impugned order.

(E) The Applicants are facing the situation of severe financial crisis owing to inadequate cost reflective tariffs as determined by the Commission as well as creation of revenue gap year after year and creation of huge Regulatory Assets.

(F) On the one hand the Banks/Financial Institutions are not willing to lend to the Applicants due to their prevailing financial position and on the other hand they are required to make immediate payments to the generating and transmission companies to maintain power supply to the consumers of Delhi.

4. The Applicants/Appellants have now sought for suitable directions to the Commission to increase the amount of surcharge to fully meet the carrying cost upto 31.3.2014 and to repay one third of principal

component of the Regulatory Assets recognized by the Commission in the impugned order and decide a road map for liquidation of the Regulatory Assets within a period of 3 years in accordance with the Tariff Policy and the Regulations to enable them to raise finances from the Banks/Financial Institutions.

5. The Applicants also brought to our notice the findings of the Commission in the impugned order indicating that the Commission in consultation with the Government of NCT of Delhi would evolve a reasonable schedule for liquidation of revenue gap which would be fair to all stakeholders and requested that the Commission should be directed to implement its own order.

6. The Commission in its reply submitted that since FY 2009-10 there has been major increase in power

purchase cost while on the other hand due to frequency control measures instituted by the Central Commission the distribution licensees have not been able to sell their surplus power at a premium thus incurring losses in sale of surplus power. This has resulted in progressive build up of revenue gap and Regulatory Assets. The Commission has increased the tariff to the extent of 70% during last three years which is seen as a tariff shock by the consumers. The accounts for FY 2012-13 have not been trued up but the Commission expects surplus for all companies for FYs 2012-13 and 2013-14 which will help in liquidating some of the Regulatory Assets. The Commission has also issued a statutory advice u/s 86(2) of the Electricity Act, 2003 to the Government of NCT of Delhi for availing the Financial Restructuring package proposed by the Ministry of Power for the distribution licensees facing financial problems as well as to access to other schemes such as APDRP to avail soft financing of loans for the benefit of the consumers of Delhi.

7. We have heard Shri Sanjay Sen, learned Sr. Counsel and Shri J.J. Bhatt, learned Sr. counsel for the Applicants/Appellants and Shri Pradeep Misra, learned counsel for the Commission.

8. We find from the impugned order dated 31.7.2013 that the Regulatory Assets for the three Distribution licensees in Delhi have been increasing since 2007-08 and have accumulated to Rs. 11431.12 crores at the end of FY 2011-12. The increase in the Regulatory Assets from FY 2010-11 to 2011-12 has been over Rs. 4000 crores for the three Distribution licensees. The Commission has allowed a tariff increase of 5%

and continuation of the prevailing surcharge at 8% over the revised tariff. The Commission has also stated that a reasonable schedule for liquidation of revenue gap which will be fair to all stakeholders shall be evolved in consultation with Government of NCT of Delhi.

9. The position taken by this Tribunal regarding Regulatory Assets has been reflected in a number of judgments. This Tribunal in order dated 11.11.2011 in O.P. no. 1 of 2011 had held that Regulatory Asset should not be created as a matter of course except where it is justifiable, in accordance with the Tariff Policy and the Regulations and directed the State Commission that the recovery of the Regulatory Asset should be time bound and within a period not exceeding three years at the most and preferably

within Control Period and carrying cost of the Regulatory Asset should be allowed to the utilities in the ARR of the year in which the Regulatory Assets are created to avoid problem of cash flow to the distribution licensee.

10. We find that in the impugned order the Commission has not given any schedule for liquidation of the Regulatory Assets. The Commission has only stated that a reasonable schedule shall be evolved in consultation with the Government of NCT of Delhi. However, so far, the schedule for liquidation of the Regulatory Assets has not been worked out. Even for availing the scheme of the Central Government for financial restructuring of the Distribution licensees the statutory advice has been sent by the Commission to the Government only on 1.2.2013.

11. The Regulatory Assets have been created by the Commission to avoid tariff shock to the consumers. However, it is affecting the finances of the Applicants. The carrying cost on the accumulated Regulatory Asset is compounding the problem. The Applicants are not making payment to the generating companies and transmission licensees affecting the liquidity of the generating and transmission companies. Load shedding in the National Capital due to regulation of power supply by the generating companies due to default in payment is unacceptable particularly when the consumers are paying their bills at the tariff determined by the Commission. Thus, the consumers cannot be made to suffer for no fault of theirs. We feel that in the interest of ensuring a reliable power supply

to the consumers of National capital we have to pass some interim order in these Applications.

12. Learned Sr. counsel for the Applicants/Appellants have stated that if a road map of liquidation of Regulatory Assets is given by the Commission then they would be able to arrange finances from Banks/Financial Institutions on the strength of that Road Map.

13. During the proceedings of the case, the Commission furnished a broad proposal on liquidation of the Regulatory Assets which is summarized as under:

BSES Yamuna Power Limited

(i) The provisional revenue gap recognized is Rs. 2855 crores upto FY 2011-12 as per the impugned order.

(ii) The revenue available through 8% surcharge will generate additional revenue of Rs. 297 crores during FY 2013-14.

(iii) If Rs. 297 crores is available in each year, the Revenue Gap will be liquidated in about 10 years (2855/297).

(iv) ARR for each year is going to increase due to increase in demand, fuel cost, etc., which will result in additional revenue generated through 8% surcharge due to which liquidation will take place earlier than projected 10 years.

14. For BSES Rajdhani Power Ltd. similar road map has been given for liquidation of the Regulatory Assets of Rs. 5206 crores earlier than 10 years.

15. The Applicants/Appellants also submitted a letter dated 1.3.2014 from the Commission addressed to them in which the Commission proposed to liquidate revenue gap of Rs. 8000 crores for all the three distribution licensees in a period of 8 years. We find that the schedule given in the letter dated 1.3.2014 is at variance with the schedule furnished before this Tribunal.

16. It is not clear to us from the schedule for recovery of the Regulatory Assets filed by the Commission how the carrying cost of the Regulatory Assets has to be recovered when the revenue generated from 8% surcharge is to be used to set off the principal sum of the Regulatory Assets. We expect a proper road map from the Commission indicating clearly the proposed year-wise of liquidation of the Regulatory Assets both

for the principal and the interest thereupon for the approved Regulatory Asset as at the end of 2011-12 which could give comfort to the Banks/Financial Institutions to continue financial support to the Applicants.

17. The Applicants/Appellants want us to direct the Commission to liquidate the Regulatory Assets in next 3 years. We are not inclined to pass such directions as we do not want to usurp the powers of the Commission. Only the Commission will be in a position to decide a proper road map after examining the present financial position of the Applicants after balancing the interests of the consumers and the distribution licensees. As the Regulatory Assets have accumulated to a huge amount the recovery of the accumulated Regulatory Assets in a short period may

result in huge tariff shock to the consumers which has to be avoided. The Commission has to examine why the Applicants/Appellants are not able to pay the current bills of the generating companies and transmission licensees even though the Commission in the impugned order has provided for recovery of more than the current expenditure of the Applicants/Appellants including the power purchase cost and carrying cost on the Regulatory Assets by way of increase in tariff and surcharge of 8% over and above the tariff. On the other hand, we find that the Applicants are not making even the current payments to the generating and transmission companies.

18. While we appreciate the anxiety of the Applicants for recovery of the Regulatory Assets, we fail to understand why the Applicants/Appellants are not

making current payments when the impugned order dated 31.7.2013 provides for recovery of their full costs for FY 2013-14 and over and above which the State Commission has decided to continue a surcharge of 8% to cover the carrying cost.

19. In view of above, we issue the following directions to the Commission:

i) The problem is to be examined in two parts viz. a) meeting the current expenses and avoiding further accumulation of the Regulatory Assets b) liquidation of the approved Regulatory Assets as at the end of FY 2011-12.

ii) The Commission has to examine why the Applicants/Appellants are not paying the current bills of the generating and transmission companies when the impugned order dated 31.7.2013 has provided for meeting the current expenses of the distribution licensees including the carrying cost and take further necessary action in the matter. The current payments have to be ensured at all cost to avoid any possibility of reduction of power availability to the NCT of Delhi.

iii) The Commission has to decide a road map for liquidation of the accepted Regulatory Assets keeping in view the interests of the consumers and the distribution licensees after satisfying itself that there are no constraints in arranging finances for making regular and timely payments of the current dues by the Applicants/Appellants to the generating companies and transmission licensees and meeting the operation and maintenance expenses and arranging finances for taking up augmentation of distribution system for meeting the load demand of the National Capital. Needless to say that the actual liquidation of the Regulatory Assets to be decided in the Annual Tariff Orders will be subject to change depending on the actual facts and figures available before the Commission due to audited accounts, as a result of the CAG audit, etc. The road map may also need review from time to time depending on the true up of accounts and new facts which come to the notice of the Commission from time to time and also subject to the outcome of these Appeals nos. 265 and 266 of 2013.

iv) The road map will also be subject to financial restructuring of the distribution licensee as per the advice given by the Commission to the Government of NCT of Delhi. However, in the absence of any financial restructuring by the State Government, the consumers of Delhi could not be left at the mercy of the generating companies and the distribution licensees to manage the power supply in the National Capital at their own will. In the absence of the support from the Government, the Commission may follow its own road map for liquidation of the Regulatory Assets to remedy the finances of the Distribution licensees.

v) We feel that in view of large Regulatory Assets which have been accumulated over the years, financial restructuring of the distribution licensees will be very helpful in sustaining the business of the licensees with minimum burden on the consumers. The Commission shall again take up with the Government of NCT of Delhi for early decision on the financial restructuring of the Distribution Licensees to minimize the burden on the consumers on account of increase in retail supply tariff due to liquidation of the Regulatory Assets.

20. We also direct the Appellants to promptly provide any information sought by the Commission to enable it to comply with the above directions.

21. Accordingly, IAs 364 and 365 of 2013 are disposed of. The Registry is directed to send a copy of this order to Chief Secretary, Government of NCT of Delhi and Secretary, Ministry of Power, Government of India. The State Commission is directed to pass consequential orders at the earliest.

22. Post the matter for hearing in the main Appeals on ***<u>17th April, 2014</u>***. In the meantime, the pleadings be completed.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

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<u>REPORTABLE/~~NON-REPORTABLE~~</u>

vs