

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)**

**Appeal No. 34 of 2021 &
IA Nos. 111 of 2021 & 589 of 2021**

Dated : 18th February, 2022

**Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

IN THE MATTER OF:

The Tata Power Company Limited –(Generation Business)
Through its Head (Corporate Legal)
Bombay House, Homi Mody Street,
Mumbai, Maharashtra- 400001

Appellant

Versus

1. Maharashtra Electricity Regulatory Commission
Through its Secretary
World Trade Centre, Centre No.1., 13th Floor, Cuffe Parade,
Colaba, Mumbai, Maharashtra-400005

Respondent No.1

2. Adani Electricity Mumbai Limited
Through its Managing Director
CTS 407/A (NEW), 408 Old Village,
Eksar Devidas Lane, Off SVP Road
Near Devidas Lane, Telephone Exchange,
Borivali (W), Mumbai, Maharashtra – 400103

Respondent No.2

3. The Tata Power Company Limited- Distribution Business
Through its Managing Director
Bombay House, Homi Mody Street,
Mumbai, Maharashtra-400001

Respondent No.3

4. BEST Undertaking
Through its Chief Engineer
BEST Bhavan, BEST Marg,
Fort, Mumbai, Maharashtra- 400001

Respondent No.4

Counsel for the Appellant(s) : Mr. Sajan Poovayya, Sr. Adv.
Mr. S. Venkatesh
Mr. Ashutosh Kumar Srivastava
Ms. Raksha Agrawal
Mr. Nihal Bhardwaj
Mr. SuhaelButtan
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Mr. Anant Singh
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Mr. Mehak Verma

Counsel for the Respondent(s) : Mr. Buddy Ranganadhan
Mr. ChritarthPalli for R-1

Mr. Sanjay Sen, Sr. Adv.
Mr. Hemant Singh
Mr. Mridul Chakravarty
Mr. Tushar Srivastava
Ms. Supriya Rastogi Agarwal
Mr. Lakshyajit Singh Bagdwal
Mr. Harshit Singhfor R-2

Ms. Padma Priya
Ms. Neetika Sharma
Mr. Dhruv Nayar
Ms. Shreya Sethi
Ms. Akanksha Das
Mr. Harinder Toor for R-4

J U D G M E N T

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The present Appeal has been filed by Tata Power Company Limited-
Generation (in short "**Appellant**" or "**TPC-G**") having grievances against the

order dated 21.12.2020 (“**Impugned Order**”) passed by Maharashtra Electricity Regulatory Commission (the “**Respondent Commission**” or “**MERC**”) in Petition No. 163 of 2020 (“Petition 163”).

2. The Adani Electricity Mumbai Ltd.- Distribution (in short “**AEML-D**” or “**Respondent No. 2**”) filed the Petition 163 against the findings rendered by the Respondent Commission in Tariff Orders dated 30.03.2020, passed in Petition No. 300 of 2019 for TPC-G and in Case No. 325 of 2019 for AEML-D. Vide the said Petition 163, AEML-D sought correction in the findings so as to bring the Orders dated 30.03.2020 in line with the Final Judgement dated 20.08.2019 passed by the Hon’ble Supreme Court of India in M.A. No. 1404/2019 in C.A. No(s). 415 of 2007 (“**Clarification Order**”). The issue is short and narrow requiring examination only whether it is in line with the Judgement passed by the Hon’ble Supreme Court.

Description of the Parties

3. The Appellant i.e., TPC-G is the division of the Tata Power Company Limited (“TPC”)-an integrated Utility engaged in Generation, Transmission and Distribution of electricity. The TPC-G is responsible for the generation business of electricity having its registered office at Bombay House, Homi Mody Street, Mumbai- 400001.

4. Respondent No. 1 - MERC is a Statutory Authority constituted under the Electricity Regulatory Commissions Act, 1998 with powers vested in it by Section 86 and 181 of the Act.

5. Respondent No.2 i.e., the Adani Electricity Mumbai Limited (“**AEML-D**”) is a public limited company registered under the Companies Act, 1956 and is a

Distribution Licensee under the Electricity Act. It is to be noted that AEML-D is successor of BSES and Reliance Energy Limited (“**REL**”).

6. Respondent No. 3 - The Tata Power Company (Distribution Business), in short “**TPC-D**”, is the division of TPC which is engaged in the distribution of electricity in the Island City of Mumbai, as also the Suburban Area of Mumbai by way of the distribution licence granted by MERC for 25 years from 15.08.2014.

7. Respondent No.4- Brihanmumbai Electricity Supply & Transport Undertaking (“**BEST**”), is an undertaking of the Municipal Corporation of Greater Mumbai (“**MCGM**”). It distributes electricity to consumers in the island area of Mumbai and provides public road transport in the entire city and some adjoining areas of Mumbai.

Facts of the Case

8. The facts of the case are noted in brief as the issue is whether the Impugned Order is in compliance with the Clarification Order dated 20.08.2019 passed by the Hon’ble Supreme Court of India. The brief facts of the case are as follows:

- i. MERC vide Order dated 31.05.2004 in Petition No. 07 of 2000, determined the standby charges payable by REL, AEML and BSES (presently known as AEM L- D) to TPC for the period FY 1999 -2000 to FY 2003 – 2004 and further computed interest payable inter-se between TPC and BSES, REL and AEML for the respective payments.

- ii. On 12.12.2005, TPC challenged the Order dated 31.05.2004 passed by MERC before this Tribunal by way of an Appeal bearing Appeal No. 202 of 2005, which was disposed of by Judgement dated 20.12.2006, whereby the TPC was directed to pay a net amount of Rs. 339 Crores to AEML-D.
- iii. TPC, on 15.01.2007, challenged the Tribunal's Judgement dated 20.12.2006, by way of a Civil Appeal No. 415 of 2007 in the Hon'ble Supreme Court.
- iv. On 07.02.2007, the Hon'ble Supreme Court passed an Interim Order staying the Judgment dated 20.12.2006 of the Tribunal and further directed Appellant to furnish a bank guarantee for Rs. 227 Crores and deposit a sum of Rs.227 crores with the Registrar General of the Hon'ble Supreme Court. The relevant extracts of the Order dated 07.02.20227 is as follows:

“Having considered all aspects of the matter, we direct that there shall be stay of the impugned order of the Appellate Tribunal subject to the condition that the appellant shall furnish a bank guarantee in the sum of Rs. 227 crores and, in addition, deposit a sum of Rs.227 crores with the Registrar General of this Court which may be withdrawn by the respondent No. 1 subject to their giving an undertaking to this Court that in the event of this appeal being decided against them, wholly or in part, the amount as may be found refundable by them shall be refunded to the appellant without demur together with interest as may be determined by this Court....”

- v. The Hon'ble Supreme Court *vide* its Judgement dated 02.05.2019 disposed-off the aforesaid Civil Appeal No. 415 of 2007, upholding the judgement dated 20.12.2006 passed by this Tribunal in Appeal

No. 202 of 2005 and directed the entire amount including interest deposited with the Registrar General of the Hon'ble Supreme Court to be paid to AEML-D, the operative part of the Judgement is as follows:

“23. Shri J.J. Bhatt learned senior counsel appearing on behalf of BSES/REL has contended that TPC and MSEB entered into an arrangement on 12.3.1985. There was an independent agreement between TPC and BSES/REL entered into on 31.1.1998 and it has no connection with the agreement between the TPC and MSEB. Notwithstanding the fact that MSEB supplied TPC with standby power or not, TPC was bound to supply BSES/REL from its own generation standby power. On approximately 90 percent of the occasions, BSES/REL has utilised standby power of TPC. It has exceeded on some occasions more than 275 MVA and has gone up to above 400 MVA, whereas TPC has drawn standby from MSEB. The Government passed an order on 19.1.1998, considering several factors and determined Rs.3.5 crores per month as standby charges. The payment of standby charges by BSES/REL to TPC was independent of the charges to be paid by TPC to MSEB. The determination has been made on the basis of various factors. Basis of 50:50 sharing has been rightly rejected by the MERC as well as by the APTEL. The decision of spinning reserve by the Technical and Judicial Members at zero levels is justified in the facts of the case. The submission made on the basis of Binani Zinc Ltd. v. Kerala State Electricity Board (supra) is not tenable. The total generating capacity of TPC was 1777 MW, whereas that of BSES/REL is 500 MW. It is incorrect that TPC has recovered only 50 percent of standby charges payable to MSEB. The standby charges of Rs.24.75 crores per month i.e., Rs.297 crores per annum were factored into TPC tariff in addition to the amount of Rs.3.5 crores per month was paid by BSES/REL. It wanted to realise 75 percent of the charges from BSES/REL by claiming a 50:50 ratio sharing. The TPC has spinning reserve surplus of 317 MVA with regard to its total capacity of 1777 MW. It was not MSEB but TPC which has provided standby support to BSES/REL on 90 percent occasions. It is further contended

that the appeal filed by BSES/REL should be allowed and the excess amount has been worked out by the APTEL. The same may be suitably reduced.

...

32. It appears that there was no stay on the order passed by the APTEL by this Court. The plea of non-implementation of the order taken by TPC is not understandable. It was only the bank guarantee which was submitted by TPC, in addition, to deposit of a sum of Rs.227 crores with the Registrar General of this Court. The implementation of the order of the APTEL would mean that the determination made by it has been acted upon and corresponding liability factored into tariff has been passed on the customers and actual consumers and realised from them since there was no such interim stay on implementation of the order. We find force in the submission raised on behalf of BSES/REL that order of APTEL has already been worked out even otherwise it is found to be just and equitable. No case for interference with the same is made out.

...

35. Resultantly, we find there is no case made out for interference in either of the appeals filed by TPC and BSES/REL. The order passed by Technical and Judicial Members of APTEL is hereby upheld. The amount which is payable to Reliance Energy Limited, deposited or secured by way of bank guarantee by TPC as per order dated 07.02.2007 along with interest lying with the Registrar of this Court as per agreement of the Counsel for Reliance Energy Limited and Adani Electricity Mumbai Limited be paid to Adani Electricity Mumbai Limited. The appeals being devoid of merits are hereby dismissed. Consequently, IA Nos.59365/2019 & 59374/2019 in CA No.415/2007 and IA Nos.59356/2019 &59380/2019 in CA No.3229/2007 are disposed of. Any other IA, if any, also stands disposed of. No costs.

- vi. In May 2019, TPC filed a Review Petition (R.P. No. 1615/2019) against Judgment dated 02.05.2019 passed by the Hon'ble Supreme Court in Civil Appeal No. 415 of 2007 which was

dismissed by the Hon'ble Court vide its order dated 16.07.2019. The relevant extract of the Order dated 16.07.2019 is as follows:

“Application for listing of the review petition in court is rejected. Having peruse the Review Petition and the connected paper with meticulous care, we do not find any justifiable reason to entertain the Review Petition.”

- vii. On the same day, the Appellant filed a Clarification Application (M.A. No. 1404 of 2019) seeking clarification of the Judgment dated 02.05.2019 passed by the Hon'ble Supreme Court in C.A. No. 415 of 2007, however, the prayer made therein was denied by the Hon'ble Court. The relevant extract of the Order dated 20.08.2019 is as follows:

“12. Coming to the clarification sought of certain observations and application for rectification of observation made in the judgment and order dated 02.05.2019, it is submitted that this court has observed that there was no interim stay granted on the order passed by the APTEL. We clarify that, while making the aforesaid observation what we meant was that the stay was on the money part of the order requiring refund. There was no stay as to the tariff to be realised from the consumers. the refund part, which was determined was stayed on certain stipulations. It was conceded before us that liability has been passed over to consumers and that fact has been recorded in paragraph 32 and other paragraphs in the judgment passed by us. Now it is too late in the day to seek such a clarification that liability may be permitted to be passed on to consumers. Apart from that prayer made will have the effect of reviewing the order itself. No modification is required. Accordingly, the application for clarification/modification is disposed of.”

- viii. On 30.11.2019, TPC filed a Curative Petition no. 26 of 2020 in R.P. No. 1615 of 2019 in C.A. No. 415 of 2007 which was also dismissed

by the Hon'ble Supreme Court *vide* the Order dated 21.05.2020 passed in Curative Petition No. 26 of 2020. The relevant extract of the Order dated 21.05.2020 has been reproduced below:

“We have gone through the Curative Petition and the relevant documents. In our opinion, no case is made out within the parameters indicated in the decision of this court in “Rupa Ashok Hurra vs Ashok Hurra & Another, reported in 2002(4)SCC388. Hence, the Curative Petition is dismissed.”

- ix. On 30.03.2020, MERC passed an Multi Year Tariff Order in Case No. 300 of 2019 for the Appellant whereby MERC observed that the additional amount of standby charges incurred by the Appellant are to be recovered from the “consumers” of the Appellant for the past period i.e. FY 1999-2000 to FY 2003-2004 which included AEML-D being a distribution licensee.
- x. On 30.03.2020, MERC passed the Tariff Order in Case No. 325 of 2019 for AEML-D whereby Ld. MERC, while approving the ARR of AEML-D for FY 2020-21 to FY 2024- 25, included the amount of Rs. 88.28 Crores in the ARR for FY 2020-21 to be paid to Appellant towards standby charges. The relevant extract of the Order is as follows:

“5.16 PAYMENT OF TPC-G FOR STANDBY

The Commission has approved AEML-D’s share of Standby Charges of past period to be paid to TPC-G in TPC-G’s MYT Order for FY 2020-21 to FY 2024-25 in Case No. 300 of 2019. The Commission has considered the cost of Rs. 88.28 Crore in the ARR of FY 2020-21 to be paid to TPC-G.”

- xi. Subsequently, TPC and AEML-D filed separate Review Petitions being Case No. 94 of 2020 in Order dated 30.03.2020 passed by

- MERC in Case No. 300 of 2019 (filed by TPC) and Case No. 103 of 2020 Order dated 30.03.2020 passed in Case No. 325 of 2019 (filed by AEML-D).
- xii. MERC vide its order dated 27.06.2020, disposed of the Case No. 94 of 2020 filed by the Appellant seeking review of Order dated 30.03.2020 in Case No. 300 of 2019.
- xiii. Further, on 21.07.2020, MERC disposed of the Case No. 103 of 2020 filed by AEML-D seeking Review of Order dated 30.03.2020 in Case No. 325 of 2020 wherein MERC denied to entertain the plea of AEML-D to adjudicate on the issue of stand-by charges and directed AEML-D to file a separate petition in case of any grievance.
- xiv. On 06.08.2020, AEML-D filed the Subject Petition i.e. Case No. 163 of 2020 against it the Impugned Order dated 21.12.2020 was passed by the MERC, wherein the MERC revised its decision allowing Appellant to recover the amount determined towards Standby Charges in its Multi Year Tariff Order dated 30 March 2020 in Case No. 300 of 2019 from Distribution Licensees being AEML-D, Respondent No. 4 i.e, BEST and Respondent No.3 i.e., TPC-D and directed the Appellant to not recover the component of Standby Charges in the balance installments from the said Distribution Licensees. The relevant extract of the Order dated 21.12.2020 has been reproduced below:

“ORDER

...

2. In light of the Clarificatory Order dated 20 August 2019 by the Hon’ble Supreme Court and discussions made at Para.

10 to Para. 21 of this Order, the Commission revises its decision of allowing Tata Power Company Ltd.-Generation to recover the amount determined towards Standby Charges in its Multi Year Tariff Order dated 30 March 2020 in Case No. 300 of 2019 from BEST Undertaking, Adani Electricity Mumbai Ltd.- Distribution and Tata Power Company Ltd.- Distribution.

3. Tata Power Company Ltd.-Generation is directed not to recover the component of Standby Charges in the balance installments from the above Distribution Licensees. Also, the amount refundable to BEST Undertaking, Adani Electricity Mumbai Ltd.- Distribution and Tata Power Company Ltd.- Distribution by Tata Power Company Ltd.-Generation on account of component of Standby Charges already paid in the past installments by them, may be claimed, along with the associated holding cost in the respective forthcoming Mid-Term Review Petitions by these Distribution Licensees which would be adjusted in the respective Mid- Term Review Orders of these utilities.”

- xv. Being aggrieved by the above Order, Appellant has preferred the present Appeal submitting that Impugned Order is vexatious and non-speaking as MERC has failed to appreciate or deal with the submissions made by the Appellant. Further, according to the Appellant, MERC, despite being *functus officio*, entertained Case 163 and the Impugned Order is essentially a second review order. In addition to the above, Appellant has also contended that MERC has wholly misinterpreted Clarification Order passed by the Hon'ble

Supreme Court and has disallowed legitimate entitlement of the Appellant.

Our findings and analysis

9. The crux of the Appeal is whether the Impugned Order passed by the Respondent Commission is in compliance with the Final Judgement dated 20.08.2019 passed by the Hon'ble Supreme Court of India in M.A. No. 1404/2019 in C.A. No(s). 415 of 2007 ("**Clarification Order**").

10. The Respondent Commission while passing the Impugned Order has observed that:

"20. It is evident from the aforesaid extract of the Supreme Court Clarificatory Order that TPC's request for directions to Regulatory Commission for allowing recovery of Standby Charges liability (principal as well as the interest) has been rejected by the Hon'ble Supreme Court. The Commission is of the view that pursuant to the aforesaid Supreme Court Clarificatory Order, TPC-G has lost right to recover any further amount from the consumers, be it differential principal amount and interest thereon.

21. The Commission further notes that the Supreme Court Clarificatory Order had a bearing on the MYT Petition of TPC-G on account of TPC-G's request to seek recovery of differential Standby Charges citing the Supreme Court Order. However, this important Order was neither brought on record by TPC-G nor AEML-D pointed out the same while submission of its objection on the TPC-G's MYT Petition.

22. The decision of this Commission allowing the differential Standby Charges along with the interest thereon, was due to ignorance of the important Order passed by the Hon'ble Supreme Court and the same would need to be corrected considering the fact that specific observations have been recorded in the Supreme Court Clarificatory Order. Accordingly, the Commission deems it appropriate to revise its decision of allowing TPC-G to recover the amounts towards differential

Standby Charges determined in its MYT Order from the Mumbai DISCOMs.”

11. We find no merit in the submissions made by the Appellant that the Impugned Order is vexatious and non-speaking as MERC has failed to appreciate or deal with the submissions made by the Appellant.

12. In addition to the above, Appellant has also contended that MERC has wholly misinterpreted Clarification Order passed by the Hon'ble Supreme Court and has disallowed legitimate entitlement of the Appellant. We are not inclined to accept this contention also. The relevant extract of the Order passed by the 02.05.2019 passed by the Hon'ble Court is as follows:

“35. Resultantly, we find there is no case made out for interference in either of the appeals filed by TPC and BSES/REL. The order passed by Technical and Judicial Members of APTEL is hereby upheld. The amount which is payable to Reliance Energy Limited, deposited or secured by way of bank guarantee by TPC as per order dated 07.02.2007 along with interest lying with the Registrar of this Court as per agreement of the Counsel for Reliance Energy Limited and Adani Electricity Mumbai Limited be paid to Adani Electricity Mumbai Limited. The appeals being devoid of merits are hereby dismissed. Consequently, IA Nos.59365/2019 & 59374/2019 in CA No.415/2007 and IA Nos.59356/2019 & 59380/2019 in CA No.3229/2007 are disposed of. Any other IA, if any, also stands disposed of. No costs.”

xvi. Further, the Hon'ble Supreme Court vide its Order dated 20.08.2019 clarified that:

“12. Coming to the clarification sought of certain observations and application for rectification of observation made in the judgment and order dated 02.05.2019, it is submitted that this court has observed that there was no interim stay granted on the order passed by the APTEL. We

clarify that, while making the aforesaid observation what we meant was that the stay was on the money part of the order requiring refund. There was no stay as to the tariff to be realised from the consumers. the refund part, which was determined was stayed on certain stipulations. It was conceded before us that liability has been passed over to consumers and that fact has been recorded in paragraph 32 and other paragraphs in the judgment passed by us. Now it is too late in the day to seek such a clarification that liability may be permitted to be passed on to consumers. Apart from that prayer made will have the effect of reviewing the order itself. No modification is required. Accordingly, the application for clarification/modification is disposed of.”

13. The Respondents have filed their respective replies and have opposed the grounds raised by the Appellant. The Respondent No.2 has mainly relied upon the Orders passed by the Hon’ble Supreme Court to contend that the Appellant by virtue of the said Orders is precluded to claim any sums under the category ‘Stand By Charges’ from its consumers.

14. We are inclined to accept the contention of the Respondent No. 2 in the light of the directions passed by the Hon’ble Court.

15. Further, during the course of hearing, the Appellant argued that the Hon’ble Supreme Court’s Judgment in C.A. No. 415 of 2017 is premised on a factual error and the consequence of the Judgment is that on one hand the Appellant is directed to make payment to the Respondent for the Stand By Charges and on the other the Appellant has been precluded in claiming such charges from its Consumers.

16. We carefully gone through the judgement passed by the Hon’ble Court and are of the firm opinion that the Respondent Commission has passed the Impugned Order in compliance with the directions of the Hon’ble Supreme Court in C.A. No. 415/2007 and the subsequent Order dated 20.08.2019 in M.A.

No. 1404/2019 and aligned the Tariff Orders accordingly. The Hon'ble Supreme Court in its said Order dated 20.08.2019 has taken a categorical view that

“There was no stay as to the tariff to be realised from the consumers. the refund part, which was determined was stayed on certain stipulations. It was conceded before us that liability has been passed over to consumers and that fact has been recorded in paragraph 32 and other paragraphs in the judgment passed by us. Now it is too late in the day to seek such a clarification that liability may be permitted to be passed on to consumers.”

17. We are bound by the observations of the Hon'ble Court and, therefore, in the light of the observation made by the Hon'ble Court decline to examine the merit of the particular contentions of the appellant. The appellant can take appropriate remedy as it deems fit in this regard.

ORDER

For foregoing reasons as stated above, we are of the considered view that the present Appeal i.e., Appeal No. 34 of 2021 is devoid of merit and stand dismissed.

Needless to mention that pending IAs if any shall stand disposed of. No order as to costs.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERENCING ON THIS 18th DAY OF FEBRUARY, 2022.**

**(Sandesh Kumar Sharma)
Technical Member**

**(Justice R.K. Gauba)
Officiating Chairperson**

REPORTABLE / ~~NON-REPORTABLE~~

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