

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.265 OF 2012

Dated: 14th Nov, 2013

**Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. V. J TALWAR, TECHNICAL MEMBER**

In the Matter of:

**M/s. Brihanmumbai Electric Supply and Transport Undertaking
BEST Bhawan, BEST Marg,
Post Box No.192,
Mumbai-400 001
Maharashtra, India**

..... Appellant

Versus

**Maharashtra Electricity Regulatory Commission
World Trade Centre,
Centre No.1,
13th Floor, Cuffe Parade,
Mumbai-400 005, India**

..... Respondent(s)

**Counsel for the Appellant : Mr. Harinder Toor
Mr. S N Bhole
Mr. Ganesh Kamath
Mr. Niteen Bhandari
Mr. V K Patil
Mr. Rajendra D Patsute**

**Counsel for the Respondent(s): Mr. Buddy A Ranganadhan
Ms. Richa Bharadwaja for R-1**

J U D G M E N T

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

1. Brihanmumbai Electric Supply and Transport Undertaking (BEST) is the Appellant herein.
2. Partly aggrieved by the impugned order dated 16.3.2012 disallowing the actual expenditure incurred by the Appellant in purchase of energy from renewable sources of energy during the year 2009-10, the Appellant has filed this present Appeal.
3. The facts of the case in brief are as follows:-
 - (a) The Appellant, BEST is the Municipal Corporation of Greater Mumbai. It is also a local authority and institution of self government which plans for economic development and social justice.
 - (b) The BEST, as a Municipal Corporation/local authority and public utility provides mass public transport service through its BEST buses to the city of Mumbai as well as distributes electricity in the island city of Greater Mumbai. In that way, the BEST is the deemed Distribution Licensee under 1st Proviso to the Section 14 of the 2003 Act.
 - (c) In pursuance to the Section 86(1)(e) of the 2003 Act, the State Commission specified the Renewable

Purchase Service Obligation through its generic order dated 16.8.2006. The said order defined the obligated entities which were required to meet the RPO as well as the quantum of renewable energy requirement to be procured by the said obligated entities. This order also provided for a levy of penalty, by way of enforcement charge, for shortfall in meeting RPS (Renewable Purchase Service) obligation.

- (d) The Appellant was one of the said obligated entities. On 17.9.2007, the BEST submitted the petition in case No.73 of 2007 in the matter of APR (Annual Performance Review) for the Financial Year 2007-08 and for determination of Tariff for the Financial Year 2008-09 before the State Commission. After observing the procedure, the State Commission by the order dated 6.6.2008 decided the said petition in case No. 73 of 2007. In this order, the State Commission clarified that it would deliberate on the issue cost of energy purchased from renewable sources for the FY 2007-08 of considering the final statement of the renewable purchase specification for the FY 2007-08 during the final truing up of for the Financial Year 2007-08.
- (e) On 11.12.2008, the BEST filed a petition in case No. 11 of 2009 for truing up for the FY 2007-08, APR for

FY 2008-08 and determination of tariff for FY 2009-10 before the State Commission. The State Commission by the order dated 15.6.2009 decided the said case. In the said order, the State Commission for FY 2007-08 observed as follows:-

“As regards the cost of renewable energy power purchase for 2007-08, the State Commission allowed actual power purchase cost and the actual rate as claimed by the BEST. However, in the said order, the State Commission clarified that it has considered this amount for truing up without detailed scrutiny of sources and rate for such a purchase from renewable energy sources. The State Commission also specified that the State Commission will consider the appropriate impact of the independent and separate proceedings which were pending for the waiver of RPS obligations.

- (f) For the FY 2008-09, the State Commission considered and approved the actual power purchased from renewable sources at the rate actually incurred by the BEST for the purpose of truing up. However, the State Commission clarified that the said approval should not be considered as the approval for the rate of purchase of renewable energy as projected by the BEST.
- (g) In respect of the Financial Year 2009-10(which is the issue in the present Appeal), the State Commission

had observed that for the purpose of determination of tariff for the FY 2009-10, the State Commission would consider the approved power purchase cost considering the actual purchase and approved purchase rate in accordance with the tariff approved for such a renewable energy source from where BEST would purchase renewable energy while undertaking the truing up for the Financial Year 2009-10.

- (h) Meanwhile, the other licensees namely MSCDCL and Reliance Infra have filed the cases on 7.8.2009 for exemption from RPS Obligation. On 07.10.2009, the State Commission passed an order in those Petitions filed by the licensees of Maharashtra modifying the RPS Obligation requirements for FY 2007-08, 2008-09 and 2009-10.
- (i) On 7.6.2010, the State Commission framed the Renewable Purchase Service Obligation Regulations, 2010. Thereafter, i.e. more than three months after completion of FY 2009-10 i.e. 14.7.2010, the State Commission passed a suo-motu tariff order determining the generic renewable energy tariff for various sources of renewable energy.
- (j) On 12.9.2010, the State Commission disposed of the petition filed by the BEST for truing up for FY 2008-09, APR for 2009-10 and tariff for 2010-11. In the said

order, the State Commission accepted the actual rate incurred by the BEST for meeting its RPS Obligation for the FY 2008-09 on the ground that RPS percentage for FY 2008-09 had been exempted. In the very same order, the State Commission while undertaking Annual Performance Review for the FY 2009-10, considered the purchase from renewable energy source at the rate claimed in the Petition.

- (k) In the meantime, on 01.9.2010, BEST filed a petition in case No.45 of 2010 before the State Commission to relax the requirements laid down in the proviso to Regulation 7.2 of MERC(Renewable Purchase Obligations) Regulation, 2010 for the first year i.e. financial year 2010-11. In this petition, the State Commission passed an order dated 28.10.2010 exercising its power under the Regulation relating to relaxation and relaxed the requirement under the Regulation 7.2 of the MERC (RPS Obligation) Regulation 2010 in respect of FY 2010-11 only.
- (l) At this stage, the State Commission passed the impugned order dated 16.3.2012 for truing up for FY 2009-10 and provisional truing up for FY 2010-11 disallowing the actual expenditure incurred for power purchase from the renewable sources in respect of FY 2009-10.

- (m) The Appellant being partly aggrieved and dis-satisfied with the said disallowance has filed this Appeal.
 - (n) Though the issue has been raised by the Appellant in this Appeal with reference to disallowance of Purchase cost of energy purchased from renewable sources for 2 years namely FY 2009-10 and FY 2010-11, the Appellant has not pressed the issue relating to FY 2010-11 as the State Commission has filed a reply in his Appeal stating that the disallowance for FY 2010-11 was not correct and the same would be restored to the Appellant in this subsequent tariff and APR petition. So, the Appellant confined itself to the issue in respect of the Financial Year 2009-10 only.
4. While assailing the impugned order, the learned Counsel for the Appellant has made elaborate submissions by quoting relevant paragraphs from the impugned order as well as earlier orders of the State Commission relating to the Renewable Energy Purchases.
5. The detailed submissions made by the Appellant are summarized below:
- (a) The State Commission has wrongly decided in the Truing-Up for FY 2009-10 that the purchase cost of Renewable Energy is only Rs.53.06 Crores as against

Rs.93.73 Crores claimed by the Appellant. The State Commission has substantially disallowed the purchase cost of Renewable Energy claimed by the Appellant by mechanically relying upon the tariff determined by State Commission in its Renewable Energy Tariff Orders for the Truing-Up for FY 2009-10 and, Order (Suo Motu) dated 14.07.2010.

- (b) The State Commission has gravely erred in summarily discounting the actual rates at which Renewable Energy was procured by the Appellant by inviting EOIs from Renewable Energy generators and electricity traders, to meet its RPS Obligation for FY 2009-10 and RPO Obligation for FY 2010-11. These Renewable Energy generators and electricity traders were willing to contract with the Appellant for short term supply of Renewable Energy only on market driven rates and they were not ready to contract with the Appellant at the preferential tariff determined by the State Commission. The Appellant despite its best efforts, could not procure renewable energy to meet its RPS Obligation for FY 2009-10. Consequently, the Renewable Energy could be procured by the Appellant from such Renewable Energy generators / electricity traders only at the rates which were higher and more than the tariff determined by the State

Commission. As such, the State Commission has failed to consider that the rates for procurement of Renewable Energy are an uncontrollable factor beyond the control of the Appellant.

- (c) The State Commission has wrongly disallowed the purchase cost of Renewable Energy claimed by the Appellant by overlooking its practical and reasonable view consistently adopted in its Orders dated 06.06.2008, 15.06.2009 and dated 12.09.2010. In fact, the State Commission, in these Orders had approved for the procurement of Renewable Energy at actual cost incurred by the Appellant during the period from FY 2007-08 to FY 2008-09.
- (d) The State Commission has erred in substantially disallowing the purchase cost of Renewable Energy by overlooking the important fact that the State Commission by Order the dated 28.10.2010 passed in Case No.45 of 2010 filed by the Appellant exercised its power of relaxation under the RPO Regulations, 2010 and relaxed the requirements laid down in the Proviso to the Regulation 7.2 of the RPO Regulations, 2010, for the FY 2010-11. In fact, the State Commission has totally overlooked the fact that the Renewable Energy Generation is still at a nascent stage, and there is no sufficient Renewable Energy

generation and supply to collectively meet the RPS Obligation for FY 2009-10 and RPO Obligation for FY 2010-11, of all the Distribution Licensees, including the Appellant.

- (e) The State Commission has while doing Annual Revenue Requirements and Annual Performance Requirements exercise for FY 2007-08 and 2008-09, has approved the actual renewable energy cost incurred by the Appellant when the average rate of purchase of Renewable Energy was higher than the tariff determined by Commission. The same circumstances were also prevalent during FY 2009-10 also. In spite of taking proactive initiative in procurement of Renewable Energy by the Appellant, the State Commission has curtailed the legitimate Renewable Energy purchase cost from Rs. 93.73 Crore to 53.06 Crore.
- 6.** In reply to the above submissions, the learned Counsel for the State Commission has made the following submissions in support of the impugned order by quoting various paragraphs of the impugned order of the State Commission.
- 7.** The gist of the submissions made by the Respondent are as under:

- (a) The State Commission while dealing with the Financial Year 2009-10, had already mandated in its order dated 15.6.2009, that the rate of Renewable Energy would be considered at the approved rate at the time of truing up. This order has not been challenged. Only on the basis of that order, the State Commission has fixed the approved rates in the impugned order.
- (b) In respect of FY 2010-11, the Regulation 7.2 has been relaxed. Therefore, the State Commission has stated that it would allow the actual rate to the Appellant for that year. But, Regulation 7.2 would not apply to the Financial Year 2009-10 since these Regulations were framed only in June, 2010. The exemption from RPO for the Financial Year 2009-10 was given in the order dated 7.8.2009 only in respect of quantum of procurement and not the Renewable Energy rate.
- (c) Equally for FY 2008-09 there was an exemption in respect of the quantum of RPO but in respect of the Renewable Purchase rate the State Commission had only observed that it would deliberate the same while Truing up for FY 2008-09. Hence the principles adopted by the Commission for FY 2008-09 and FY

2010-11 would not automatically apply for FY 2009-10.

(d) In respect of the rate of power procurement for Renewable Energy for FY 2009-10, the State Commission has correctly considered the same at the approved power purchase rate rather than at the actual rate as claimed by the BEST, the Appellant.

8. Having regard to the rival contentions urged by the learned Counsel for the parties, the only issue which arises in this Appeal is as follows:

“Whether the State Commission has wrongly disallowed the actual expenditure cost incurred by the Appellant by holding and deciding in the Truing-Up for the Financial Year 2009-10 that the purchase cost of the Renewable Energy is only Rs.53.06 Crores as against Rs.93.73 Crores as claimed by the BEST, the Appellant ?

9. Let us deal with the issue in detail.
10. According to the Appellant, the State Commission, while deciding the extraordinary circumstances, has relaxed the conditions under the proviso to Regulation 7.2 of the RPO Regulations, 2010 for the Financial Year 2010-11 but, it has failed and neglected to consider the analogous

extraordinary circumstances which were already existing and pending for the Financial Year 2009-10.

11. Thus, the main contention of the Appellant in this Appeal is that the State Commission, in fact, in law ought to have considered such analogous extraordinary circumstances and as such allowed the actual rate for the Renewable Energy procurement by BEST, the Appellant for the Financial Year 2009-10.
12. The Renewable Purchase Obligation was originally determined by the State Commission through its generic order dated 16.8.2006. The State Commission by the order dated 16.8.2006 passed in case No.6 of 2006 had mandated each obligated entity including the Distribution Licensees in Maharashtra to fulfill its Renewable Energy Obligations at specified percentage during the control period for the Financial Year 2006-07 to 2009-10. This order dated 16.8.2006 provided for levy of penalty by way of enforcement charge for a short fall in meeting the RPS obligations. This order, however clarified that there would not be any enforcement charge during the first year i.e. Financial Year 2006-07.
13. According to the Appellant, the Distribution Licensees in Maharashtra during the year 2006-07 were not able to meet the RPS Obligation and consequently, the Appellant and other Distribution Licensees could not procure any

Renewable Energy during the Financial Year 2006-07. That apart, the total Renewable Energy generation in Maharashtra during the Financial Year 2006-07 was not sufficient to fulfill the RPS obligations of each obligated entity.

14. Meanwhile, the Distribution Licensees, including the Appellant filed their Petitions before the State Commission seeking waiver of the 4% of the RPS obligations for the Year 2007-08 and condonation of the enforcement charges levied by the MEDA on the basis of the order dated 16.8.2006 passed by the State Commission. These matters were taken-up together and decided the same vide its order dated 7.8.2009.
15. In the meantime, the State Commission passed the order on 6.8.2008 on the Annual Performance Review for the Financial Year 2007-08 and tariff for the Financial Year 2008-09 in the Petition filed by the Appellant. In respect of purchase cost of the energy procured from Renewable source for the Financial Year 2007-08, the State Commission clarified that it would deliberate upon the issue considering the final statement of the Renewable Purchase specifications for the Financial Year 2007-08.
16. The relevant portion of the State Commission's order dated 6.6.2008 is quoted below:

“For FY 2007-08, the Commission has considered power purchase quantum and cost from renewable sources, as projected by BEST and accordingly for provisional truing up purposes has considered 40 MU at an estimated cost of Rs.20 Crore. However, this should not be construed as the Commission having granted approval for the rate of Rs.5 per kWh indicated by BEST, which has been discovered through a competitive bidding process undertaken by BEST as submitted by BEST. The rate of power purchase from renewable sources by BEST and other Distribution Licensees will have to be in accordance with the rates approved by the Commission through its various Orders, or through a competitive bidding process approved by the Commission. The Commission clarifies that it would deliberate the issue considering the final settlement of RPS for FY 2007-08, during the final truing up of FY 2007-08.”

17. Thus, by virtue of this Order, the State Commission observed that in respect of cost of Renewable Energy power purchase for the Financial Year 2007-08, would deliberate on the issue while undertaking the final Truing up for the Financial Year 2007-08.
18. The State Commission disposed of the Petition for Truing up for the FY 2007-08, Annual Performance Review for the FY 2008-09 and Tariff for the FY 2009-10 of the Appellant by the order dated 15.6.2009. In this order, the State Commission observed that as regards the cost of Renewable Energy power purchase for the Financial Year

2007-08, it allowed the actual purchase at the actual rate as claimed by the BEST, the Appellant. But in the said order, the State Commission has specified that the State Commission would consider the appropriate impact of the independent and separate proceedings which were pending for waiver of the RPS Obligations.

19. The relevant portion of the order relating to the truing-up for the Financial Year 2007-08:

“3.3.3 Renewable Purchase Specification (RPS) Obligation

As regards the purchase from Renewable energy sources for FY 2007-08, BEST submitted that it purchased only 3.67 MU at a cost of Rs.1.67 crore.

As regards purchase from RE sources, BEST submitted that during FY 2007-08, it invited Expression of Interests (EOI) on three occasions, to procure renewable power from various sources. On two occasions, BEST received only solitary offers and the third EOI resulted in a few offers. BEST submitted that one of the offers in the third EOI was from a RE project developer ;who sought higher tariff to sell RE to BEST by terminating existing Energy Purchase Agreements (EPAs) with Maharashtra State Electricity Distribution Company Ltd (MSEDCL). BEST submitted that the developer could only supply 3.67 MU @ Rs.4.56/kWh. BEST submitted that even this 3.67 MU was procured by scheduling the energy and therefore,

it was in fact replacement for the costly generation of TPC-G itself.

BEST further submitted that due to the shortage of availability of RE sources, it had initiated steps to setup a wind farm of 51 MW at an estimated cost of Rs.331 crore. However, due to various financial, administrative and land issues, the project could not be taken up. BEST submitted that it is pursuing, in partnership with a developer to set up a biomass generation facility, which is expected to start generation from the third quarter of FY 2008-09.

*Considering energy input for FY 2007-08 as 4608.38 MU, 4% of the RPS target as stipulated in the Commission's Order dated August 16,2006 in Case No.6 of 2006 works out to 184.34 MU, as against actual purchase of 3.67 MU by BEST. Thus, BEST has not met the RPS target corresponding to FY 2007-08. **For truing up purposes, the Commission for FY 2007-08 has considered actual purchase of 3.67 MU from renewable sources at a purchase cost of Rs.1.67 crore, however, the Commission clarifies that it has considered this amount for truing up without detailed scrutiny of source and rate for such purchase from RE sources.** As regards the enforcement on account of non-fulfilment of the RPS target, BEST has filed a separate Petition in Case No.125 of 2008 before the Commission for waiver of the RPS target, which is under the scrutiny of the Commission. Based on the Commission's ruling on this issue in the separate case pending before the Commission for waiver of the RPS target, the Commission will consider the appropriate impact on*

account of the Order of the Commission on this issue. However, the Commission directs BEST to expedite its activities to procure power from possible RE sources to meet the targets as specified by the Commission for FY 2009-10 in this Order.”

- 20.** While considering the cost of the Renewable Energy Power purchase for the Financial Year 2008-09, the State Commission considered the actual power purchase at the actual rate incurred by the Appellant for the purpose of provisional truing-up. However, the State Commission clarified that such approval should not be construed as an approval for the rate of purchase of Renewable Energy as projected by the Appellant.
- 21.** The relevant portion of the order pertaining to FY 2008-09 is set out below:

“For FY 2008-09, the Commission has considered power purchase quantum and cost from renewable sources as estimated by BEST and has accordingly considered 59.29 MU at an estimated cost of Rs.31.35 crore for provisional truing up purposes. However, the Commission clarifies that it would deliberate on the issue of meeting RPS and other related issues during the final truing-up of FY 2008-09, and this approval should not be construed as approval for the rate of purchase of RE as projected by BEST.”

- 22.** The issue in the Appeal is with reference to the Financial Year 2009-10. In respect of the Financial Year 2009-10,

the State Commission has recorded in the said order that for the purpose of determination of tariff for the Financial year 2009-10, the State Commission would consider the approved power purchase cost in accordance with the tariff approved for such Renewable Energy source though the State Commission has considered the power purchase rate as projected by the Appellant.

23. The relevant portion of the order relating to the Financial Year 2009-10 is quoted as below:

*“For FY 2009-10, the Commission has considered the power purchase from Renewable Energy Sources as per RPS obligation, i.e. 6% of the total energy input. Based on the total energy input approved by the Commission, the RPS obligation of BEST for FY 2009-10 works out to 298.75 MU and corresponding cost works out to Rs.113.52 crore, assuming an average rate of Rs.3.80/kWh. **Though the Commission has considered the purchase rate of Rs.3.80/kWh from renewable sources, the Commission clarifies that it would consider the actual power purchase cost considering the actual purchase and effective purchase rate in accordance with the tariff approved for such RE source from where BEST would purchase RE, while undertaking the truing up for FY 2009-10.***

24. Thus, in the order dated 15.6.2009 while dealing with the Financial Year 2009-10, the State Commission though observed that the State Commission left it open to

deliberate the issue of cost of renewable energy power purchase for the Financial Year 2008-09, the State Commission had specified in respect of Financial Year 2009-10, it would consider only the approved rate of the power purchase from renewable energy source and not the actual cost incurred by the BEST, the Appellant.

- 25.** On the strength of this order, the learned Counsel for the State Commission has strenuously submitted that this order dated 15.6.2009 in respect of Financial Year 2009-10 has not been challenged by the Appellant and as such it has assumed finality and the same was followed in the impugned order as has been stated in the order dated 15.6.2009 and therefore, the Appellant could not be permitted not to question the correctness of the findings given by the State Commission in the order dated 15.6.2009 by means of challenge to the present impugned order.
- 26.** While considering this submission, we have to refer to other orders passed by the State Commission subsequent to the order dated 15.6.2009.
- 27.** As has already been mentioned, the various Petitions filed by the different licensees of the Maharashtra seeking for the exemption from the Renewable Purchase Obligation were taken-up together by the State Commission. While disposing such Petitions by the order dated 7.10.2009, the

State Commission modified the RPS percentage requirements for the Financial Year 2007-08, 2008-09 and Financial Year 2009-10 to be the lower of the RPS target or the actual achievement of RPS target in the following terms:

“Further, considering year-to-year shortfall in RE capacity addition, the Commission is of the view that it would not be practical to expect that such shortfall can be made good on cumulative basis by the end of FY 2009-10. Hence, the Commission believes that in pursuance of Clause 2.6.12 of RPS Order (Case 6 of 2006), it would be most appropriate to modify the RPS percentage requirement for FY 2007-08, FY 2008-09 and FY 2009-10 to be lower of (a) RPS target as specified under Cl. 2.6.7 (b) actual achievement of RPS target in respect of each ‘Eligible Person’.”

- 28.** On 7.6.2010, the State Commission framed the Renewable Purchase Obligation Regulation, 2010 and the determination of the Renewable Energy Tariff Regulations, 2010. The Regulation 7.2 requires every obligated entity to procure electricity generated from eligible renewable energy sources at specified percentages for the control period from the Financial Year 2010-11 to Financial Year 2015-16.
- 29.** Regulation 7.2 of the RPO Regulations which is quite relevant in this case is as follows:

“7.2 Every ‘Obligated Entity’ may meet its RPO target by way of own generation or procurement of power from RE developer or by way of purchase from other licensee or by way of purchase of renewable energy certificate or by way of combination of any of the above options.

Provided further that procurement of RE power generated within the State by Distribution Licensees at rate other than rate approved by the State Commission directly from generator or from trader shall not be considered as eligible quantum for fulfilment of renewable purchase obligation of such Distribution Licensees.”

- 30.** Thereafter, the State Commission under Regulation 8.1 of the Tariff Regulations, 2010 has determined the generic tariff of the Renewable Energy purchase for various sources of renewable energy in the suo-motu order dated 14.7.2010. The said order also determined the approved tariff for such source particularly for wind energy right from the date of commissioning of the wind energy plant depending upon the year of the commissioning.
- 31.** In pursuance of these Regulations, the Appellant requested such renewable energy generators and electricity traders to supply renewable energy at the preferential tariff determined by the State Commission by the order dated 14.7.2010. However, these renewable energy generators and traders were not ready to supply the renewable energy

to the Appellant on the preferential tariff determined by the State Commission.

32. Therefore, the Appellant in order to meet its RPO Obligations for the Financial Year 2010-11 filed a Petition on 1.9.2010 in case No.45 of 2010 before the State Commission to relax the requirements as laid down in the proviso to the Regulations 7.2.
33. In the meantime, the State Commission disposed of the Petition filed by the Appellant for trueing up for the Financial Year 2008-09, APR for the Financial Year 2009-10 and Tariff for the Financial Year 2010-11 by the order dated 12.9.2010. In the said order, the State Commission accepted the actual RPS rates incurred by the Appellant for the Financial Year 2008-09 on the grounds that the RPS percentage for the Financial Year 2008-09 had been exempted.
34. The relevant portion of the order dated 12.9.2010 in respect of the Financial Year 2008-09 is given below:

“3.3.3 Renewable Purchase Specification (RPS)

As regards the purchase from Renewable Energy sources for FY 2008-09, BEST submitted that it purchased 43.58 MU at a cost of Rs.19.88 Crore.

As a part of the replies to the queries raised by the Commission, BEST submitted the source-wise details

of quantum and cost of energy purchased from renewable energy sources. The Commission further asked BEST to submit the type of source, i.e. wind, solar, biomass, etc., from which power was purchased during FY 2008-09. The details of quantum and cost of power purchase from each type of renewable energy sources during FY 2008-09 are summarized as under:

Table: Renewable Purchase during FY 2008-09

Source	Quantum (MU)	Type of Source	Cost (Rs. Crore)
Individual windmill owners	16.40	Wind	6.30
TPTCL (Trading Licensee)	27.18	Basasse	13.59
Total	43.58		19.88

Considering energy input for FY 2008-09 as 4754.30 MU, 5% of the RPS target as stipulated in the Commission's Order dated August 16, 2006 in Case No.6 of 2006 works out to 237.72 MU, as against actual purchase of 43.58 MU by BEST. Thus, BEST has not met the RPS target corresponding to FY 2008-09.

As regards the enforcement on account of non-fulfilment of the RPS target, the Commission in its Order dated August 7, 2009 in Case No.125 of 2008 modified the RPS percentage requirement for FY 2007-08, FY 2008-09 and FY 2009-10.

Para-39 of Order dated August 7, 2009 (Case Nos. 104, 122 and 125 of 2008) is reproduced below:

“39. Further, considering year-to-year shortfall in RE capacity addition, the Commission is of the view that it would not be practical to expect that such shortfall can be made good on cumulative basis by the end of FY 2009-10. Hence, the Commission believes that in pursuance of Cl.2.6.12 of RPS Order (Case 6 of 2006), it would be most appropriate to modify the RPS percentage requirement for FY 2007-08, FY 2008-09 and FY 2009-10 to be lower of (a) RPS target as specified under Cl. 2.6.7 or (b) actual achievement of RPS target in respect of each ‘Eligible Person’”

Therefore, the Commission has considered the purchase from Renewable energy sources as submitted by BEST in the petition. However, the Commission directs BEST to expedite its activities to procure power from possible RE sources to meet the targets for FY 2010-11.”

- 35.** Since, the State Commission had in the earlier orders indicated that it would deliberate on the issue in respect of the Financial Year 2008-09; it gave the benefit of doubt to the Appellant. Accordingly, the actual power purchase rate of RPS was allowed to it in respect of the Financial Year 2008-09. However, this benefit has not been given in respect of Financial Year 2009-10 since the State Commission in the earlier order dated 15.6.2009 observed

that the State Commission would consider the approved RPS rate and not the actual RPS rates.

- 36.** In the same order, while undertaking the annual performance review for the Financial Year 2009-10, the State Commission considered the power purchase cost from renewable energy source at the rate claimed in the Petition. This was obviously because the final truing-up for the Financial Year 2009-10 was not undertaken in the said order and the same was only for the Annual Performance Review.
- 37.** At this stage, the State Commission disposed of the Petition filed by the Appellant seeking relaxation of Regulation 7.2 of the RPO Regulations, 2010 by the order dated 28.10.2010. In this order, the State Commission exercised its power under Regulation 18.1 and relaxed the requirements laid down in the proviso to the Regulations 7.2 of the MERC (RPO Regulations, 2010) for the Financial Year 2010-11 only. The State Commission also clarified in the said order that the said order would be applicable to all the Distribution Licensees in the State of Maharashtra.
- 38.** The relevant portion of the said order dated 28.10.2010, is extracted hereunder:

“The Commission has taken into account the difficulties in implementing the proviso to Regulation 7.2 because it has also been submitted in the present

proceedings that some Distribution Licensees are already energy sufficient in terms of RPO target for FY 2010-11 through long term and short term renewable power arrangements through traders. BEST has requested that the Commission may relax Regulation 7.2 for at least one year. So when contracts had already been signed for such procurement even prior to the date of notification of the concerned Regulations it would be justifiable to relax the proviso to Regulation 7.2. The powers to relax are provided in Regulation 18.1 as follows:-

“ 18.1. The Commission may by general or special order, for reasons to be recorded in writing, and after giving an opportunity of hearing to the parties likely to be affected may relax or may waive any of the provisions of these Regulations on its own motion or on an application made before it by an interested person.”

In exercise of the above powers the Commission hereby, by this order relaxes/waives the requirements laid down in the proviso to Regulation 7.2 for F.Y. 2010-11 only. This order shall be applicable to all Distribution Licensees in the State of Maharashtra.”

- 39.** At that stage, the Petition No.125 of 2011 was filed by the Appellant for approval of true-up for the Financial Year 2009-10 and provisional true-up for the Financial Year 2010-11. This Petition was disposed of by the order dated 16.3.2012. In this impugned order, the final true-up for the

Financial Year 2009-10 were undertaken and the State Commission in this order, allowed RPS power procurement at the approved rate for various renewable energy source.

40. The relevant portion of the impugned order is set-out as follow:

“3.2.2. Renewable Purchase Specification (RPS)

As regards the purchase from Renewable Energy sources for FY 2009-10, BEST submitted that it had purchased 187.89 MU at a cost of Rs.93.92 Crore as against 185.82 MU at a cost of Rs.96.30 Crore approved by the Commission. As a part of the replies to the queries raised by the Commission, BEST submitted the source-wise details of cost and quantum of energy purchased from renewable energy sources including the name of the source, RE technology, the rate of Power, etc. for FY 2009-10, summarized as under:

Table: Summary of power Purchase Expenses from Renewable Sources in FY 2009-10.

Source	Quantum (MU)	Type of Source	Cost (Rs.Crore)	Average rate (Rs/.kWh)
Individual Wind mill Owners	25.84	Wind	10.75	4.16
TPTCL(Trading Licensee)	44.84	Bagsasse	25.24	5.63
TPTCL (Trading Licensee)	15.16	Small Hydro	8.97	5.92
TPTCL (Trading Licensee)	102.05	Wind	48.77	4.78
Total	187.89		93.73	

The Commission observed that BEST has submitted cost of power purchase from RE sources as Rs.93.92 Crore in Form F2, whereas the Total Energy Cost of Rs.93.73 Crore was submitted while providing documents for 'Cost of Procurement during FY 2009-10'. In reply to the Commission's query, BEST replied that the cost of Rs.93.73 Crore was worked out including prompt payment discount/rebate whereas the cost of Rs.93.92 Crore is audited figure, which excludes prompt payment discount/rebate offered for prompt payment, further, this prompt payment discount/rebate of Rs.0.19 Crore has been accounted under non-tariff income.

However, the Commission is of the view that prompt payment discount/rebate reflects the cost of power purchase, and hence, should be netted off under power purchase expenses and not treated as non-tariff income. Thus, the Commission has considered net power purchase cost of Rs.93.73 Crore and prompt payment discount/rebate of Rs.0.19 Crore has been reduced from non-tariff income accordingly.

As regards the average rate of power purchase, the Commission observed that BEST has procured power from RE sources at a rate much higher than the preferential tariff approved by the Commission in its various Orders and submitted by BEST in reply to data gaps. For Bagasse based power, BEST had submitted applicable preferential tariff as Rs.3.05/kWh plus 2% escalation p.a. As the year of commissioning of the concerned power project has not been submitted by BEST, it has been assumed that the

project has been commissioned in FY 2001-02 and the preferential tariff has been worked out as Rs.3.65/kWh, thus, considering the entire escalation for this period.

Accordingly, the Commission has considered the preferential tariff as submitted by BEST and re-computed the allowable power purchase cost for RE power purchase as Rs.53.06 Crore as against Rs.93.73 Crore submitted by BEST, as shown below:-

Table: Renewable Energy purchase cost approved.

Sources	Preferential Tariff	Quantum	Cost
	Rs/Unit	MU	Rs.Crore
Bagasse	3.65	44.84	16.34
Small Hydro	2.96	15.16	4.49
Wind	2.52	127.89	32.23
Total		187.89	53.06

As regards the enforcement on account of non-fulfillment of the RPS target, the Commission, in its Order dated August 7, 2009 in Case No.125 of 2008 modified the RPS percentage requirement for FY 2007-08, FY 2008-09 and FY 2009-10. Para 39 of Order dated August 7, 2009 (Case No.104, 122 and 125 of 2008) is reproduced below:

“39. Further, considering year-to-year shortfall in RE capacity addition, the Commission is of the view that it would not be practical to expect that such shortfall can be made good on cumulative basis by the end of FY 2009-10. Hence, the

Commission believes that in pursuance of Cl.2.6.12 of RPS Order (Case 6 of 2006), it would be most appropriate to modify the RPS percentage requirement for FY 2007-08, FY 2008-09 and FY 2009-10 to be lower of (a) RPS target as specified under Cl. 2.6.7 or (b) actual achievement of RPS target in respect of each 'Eligible Person'”

Therefore, for FY 2009-10, the Commission has considered the purchase from Renewable energy sources as submitted by BEST in the Petition.

Considering the above, the Commission has approved purchase of 187.89 MU from renewable sources at purchase cost of Rs.53.06 Crore for FY 2009-10.

41. In the light of the above facts and various orders referred to above, it would be desirable to analyze the issue in appropriate prospective by taking note of the few important events which took place on various dates as mentioned below:

- (a) The Renewable Purchase Obligation was originally determined by the State Commission through its generic **Order dated 16.8.2006**. The said order as mentioned earlier specified the obligated entities and also the quantum of Renewable Energy required to be procured by such obligated entities.
- (b) On 6.6.2008, the State Commission passed an Order on the Annual Performance Review for the FY 2007-08 and Tariff for FY 2008-09. In respect of the cost of

energy purchased from renewable sources for FY 2007-08, the State Commission clarified that it would deliberate on the issue considering the final statement of the renewable purchase specification for FY 2007-08 considering the final Truing up for FY 2007-08.

- (c) On 15.6.2009, the State Commission disposed of the petition for Truing up for FY 2007-08, APR for FY 2008-09 and Tariff for FY 2009-10 of BEST, the Appellant. In the said order, the State Commission allowed the actual power purchase at the actual rate as claimed by the Appellant without detailed scrutiny of source and rate for such purchases from Renewable Energy sources for truing up for FY 2007-08 and APR for FY 2008-09. For the FY 2009-10, the Commission considered the rate projected by the Appellant and also recorded that it would consider the approved power purchase cost considering the actual purchase and approved purchase rate in accordance with the tariff approved for such Renewable Energy source from where the BEST would purchase Renewable Energy while undertaking the truing up for FY 2009-10.
- (d) At this juncture, it is very important and relevant to note that at the time of issuance of this order dated

15.6.2009; admittedly, there was no “approved purchase rate” for Renewable Energy source.

(e) Only on 14.7.2010, (*i.e. more than 3 months after the completion of FY 2009-10*) the State Commission passed a suo moto Tariff Order determining the generic Renewable Energy tariff for various sources of renewable energy. The said order also determined the approved tariff for such sources particularly for wind energy right from the date of commissioning of the wind energy plant depending upon the year of commissioning.

- 42.** The above factual aspects have got to be borne in mind while deciding the issue in question.
- 43.** According to the learned Counsel for the State Commission in its Tariff Order dated 15.6.2009, while approving tariff for FY 2009-10 the State Commission had specifically recorded that it would consider the approved power purchase cost in accordance with the tariff approved for such Renewable Energy source from where the Appellant could purchase Renewable Energy while undertaking the truing up for FY 2009-10 and accordingly, the State Commission has considered the approved purchase rate in the impugned order accordingly.

44. It is true that in the said order dated 15.6.2009, the State Commission had made such observation, but it is to be noted that the State Commission had not approved any tariff for purchases to be made from Renewable Energy sources at the time of issuance of 15.6.2009 order. As mentioned earlier, the State Commission had approved tariff for the Renewable Energy sources only on 14.7.2010 i.e. more than 3 months after completion of the FY 2009-10. By virtue of this order, the licensees are expected to anticipate the future rate of tariff to be fixed and what the State Commission would be going through in future.
45. The State Commission while issuing the tariff order dated 15.6.2009, should have at least indicated the maximum price at which the licensee could procure power from Renewable Energy Sources as required by Proviso to Section 62(1)(a) which requires the State Commission to fix ceiling price for power purchase by a Distribution Licensee from generator in the case of shortages.
46. Let us now quote Section 62 of the Electricity Act, 2003 which deals with the determination of the tariff. The same is as follows:

62. Determination of tariff.—*(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for—*

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

47. In the instant case, the State Commission had fixed the Renewable Purchase Obligation for all the Distribution Licensees in the State without fixing the maximum price at which the Distribution Licensee could purchase such power from Renewable Energy sources.
48. In the present case, the State Commission first fixed the Renewable Purchase Obligations without ascertaining as to whether power from Renewable Sources is available or not. Para 6.4 (1) of the Tariff Policy requires the State Commission to ascertain that the power from Renewable Energy Sources is available in the region before fixing the Renewable Purchase Obligations. Accordingly, the Commission ought to have ascertained the availability of power from such sources at the approved rate. Only, then, it should have directed the licensees that it would approve the power purchases cost from Renewable Energy sources at rate to be approved by the Commission in future. This

was not done by the State Commission in the present case. The approach adopted by the State Commission was incorrect.

- 49.** In our opinion, the State Commission has not adopted a correct approach. For example, employees of the Central Government are allowed reimbursement for medical expenses. However, such reimbursement is restricted to pre-defined Central Government Health Scheme (CGHS) rates. By this method, employees would be able to know the amount which they are entitled to get as reimbursement. Truing up is nothing but reimbursement of expenses a licensee has incurred.
- 50.** As indicated above, the State Commission even without fixing the price at which the Distribution Licensees were required to purchase the power from Renewable Energy sources fixed the Renewable Purchase Obligation for all the Distribution Licensees in the State. This is a flaw on the part of the State Commission.
- 51.** As indicated earlier, the State Commission has approved the actual renewable energy purchase cost incurred by the BEST, the Appellant for the Financial Year 2007-08 and FY 2008-09 and in principle, considered the actual renewable energy purchase cost incurred by the Appellant for the Financial Year 2010-11. However, the State Commission has declined to consider the actual purchase cost incurred

by the Appellant for the Financial Year 2009-10, after having over looked its reasonable view consistently adopted in its Orders dated 6.6.2008,15.6.2009 and 12.9.2010.

- 52.** It is significant to note that the State Commission under the said orders had practically accounted for and approved for the procurement of the renewable energy at the actual cost incurred by the BEST during the period from FY 2007-08 to 2008-09. However, the State Commission has disallowed the purchase cost of renewable energy claimed by the Appellant in respect of the FY 2009-10 by ignoring the significant fact that the State Commission under the order dated 7.8.2009 held that the actual energy capacity additions had fallen short of the projected energy capacity additions and that thereby there was renewable energy supply constraints during the Financial Year 2007-08 and FY 2008-09.
- 53.** The stand taken by the State Commission to consider the renewable energy at the approved rate only for the Financial Year 2009-10, is not appropriate and impractical. Hence, the stringent approach in approving the renewable energy purchase cost at the tariff rates when there is sufficient material to show that the renewable energy market is not fully developed is not justifiable.

54. Summary of Our Findings

- a) The State Commission first fixed the Renewable Purchase Obligations without ascertaining as to whether power from Renewable Sources is available or not. Para 6.4 (1) of the Tariff Policy requires the State Commission to ascertain that the power from Renewable Energy Sources is available in the region before fixing the Renewable Purchase Obligations. Accordingly, the Commission ought to have ascertained the availability of power from such sources at the approved rate. Only, then, it should have directed the licensees that it would approve the power purchases cost from Renewable Energy sources at rate to be approved by the Commission in future. This was not done by the State Commission in the present case. The approach adopted by the State Commission was incorrect.

55. In view of our findings above, the Impugned Order is set aside and the State Commission is directed to pass consequential orders. The Appeal is accordingly allowed. No order as to costs.

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 14th Nov, 2013

√REPORTABLE/~~NON-REPORTABLE~~