Before the

MAHARASHTRA ELECTRICITY REGULATORY COMMISSION

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Case No. 92 of 2011

In the matter of
BEST's Petition for review of Order dated May 5, 2011 in Case No. 43 of 2011 regarding deferment of implementation of MERC (Multi Year Tariff) Regulations, 2011

Shri V.P. Raja, Chairman
Shri Vijay L. Sonavane, Member

ORDER

Dated: September 9, 2011

The Brihanmumbai Electric Supply & Transport Undertaking of Municipal Corporation of Greater Mumbai (hereinafter referred as "BEST") submitted a Petition under affidavit before the Commission on June 29, 2011, under Regulations 74 and 85 (a) of the MERC (Conduct of Business) Regulations, 2004 seeking review of the Commission's Order dated May 5, 2011 in Case No. 43 of 2011 regarding deferment of implementation of MERC (Multi Year Tariff) Regulations, 2011 (hereinafter referred as MYT Regulations, 2011), with the following prayers:

"

a) *Admit Review Petition in accordance with Regulations 74 and 85(a) of MERC (Conduct of Business) Regulations, 2004.*
b) *Consider clause by clause our submissions and concerns pertaining to power purchase cost, O & M expenses including employee expenses, distribution loss, absence of annual review and other relevant matters already submitted to this Hon'ble Commission vide our letter nos. DO/GM/ DGM(ES)/56361/2009 dated 29th October, 2009 and ESO/DGMES/ 1310/2010 dated 28/10/2010 and petition (Case No. 43 of 2011).*
c) *Review the Order of the Hon'ble Commission dated 5th May, 2011 and pass a reasoned Order.*
d) *Grant liberty to BEST Undertaking to add/change/modify/alter this petition and make further submissions as may be required at a future date."*

2. BEST submitted in its Petition that the Commission forwarded the Approach Paper on MYT Regulations for the second Control Period from FY 2010-11 to FY 2014-15 vide email dated September 25, 2009. The Commission invited comments and suggestions on the Approach Paper so as to have an interactive consultation with a select group of stakeholders. BEST submitted that an interactive session was held on October 9, 2009 and BEST officials had presented their concerns in implementing the proposed MYT Regulations. BEST added that the comments on the Approach Paper were sent to the Commission vide letter no. DO/DM/DGM (ES)/56361/2009 dated October 29, 2009.

3. BEST submitted that the Commission vide its email dated September 25, 2010 informed that to implement the MYT Regulations expeditiously, a two-day workshop was organised on October 15, 2010 and October 16, 2010 for a clause by clause consideration of the MYT Regulations. BEST officials had presented their views and raised various issues during the workshop and requested the Commission not to proceed with the MYT Regulations in the present form and also requested to postpone the same by at least one year.

4. BEST further submitted that vide its letter no. ESO/DGM(ES)/1310/2010 dated October 28, 2010, it had informed the Commission that most of the views expressed by BEST in its comments on the Approach Paper had not been considered while framing the draft MYT Regulations. BEST had informed the Commission that the issue of uncontrollable items such as power purchase cost, O&M expenses, trajectory of distribution loss, absence of annual review, and other general matters had not been addressed in the proposed MYT Regulations which would have serious and detrimental impact on the operations and financial viability of BEST. BEST had reiterated that the Commission should take into consideration its submissions expressed during the workshop and that it would not be appropriate to proceed with the draft MYT Regulations in the present form and that it requires further consultation and concurrence of major stake holders. BEST added that it had brought to the notice of the Commission that it would be prudent that this Regulation may be finalized based on further consultation process and that the proposal may be deferred by at least one year.

5. BEST submitted that the MYT Regulations, 2011 were notified on February 4, 2011, for determination of tariff in all cases covered under the Regulations from April 1, 2011 to March 31, 2016. As the comments and presentations of BEST were not considered in the MYT Regulations, 2011, Case No. 43 of 2011 was filed by BEST before the Commission with the following prayers:

"Admit Petition in accordance with Section 94 (2) of the Electricity Act 2003, Regulation 85 (a) of the MERC (Conduct of Business) Regulations, 2004 and Regulations 4.1, 99 and 100 of the MERC (MYT Regulations) 2011.

Vary, alter, modify or amend the relevant Regulations under MERC (MYT) Regulations, 2011 on the basis of the submissions made by the BEST Undertaking and by taking into consideration our concerns pertaining to power purchase cost, O&M expenses including employee expenses, distribution loss, absence of annual review and other relevant matters already submitted to this Hon'ble Commission.

Defer the implementation of MERC (MYT) Regulations, 2011 for a minimum period of one year so as to enable BEST Undertaking to submit specific Multi Year Tariff based on the approved business plan.

Grant liberty to BEST Undertaking to add/charge/modify/alter this petition and make further submissions as may be required at a future date.

Pass such further and other orders, as the Hon'ble Commission may deem fit and proper keeping in view the facts and circumstances of the case."

6. BEST submitted that the Commission held hearing of the same on April 20, 2011 in the Commission's office and having heard the Parties, the Commission issued the Order on May 05, 2011 expressing its views as under:

"20. The Commission is mandated under clause (f) of Section 61 of the Electricity Act, 2003 to be guided by "multi year tariff principles" while determining the terms and conditions of tariff including while determining the tariff. The Commission is of the view that there is no force in the contention of BEST that the Commission is not obligated to adopt MYT regime. Even the Tariff Policy mandates the same. The Tariff Policy even states that "Appropriate Commissions should initiate tariff determination and regulatory scrutiny on a suo moto basis in case the licensee does not initiate filings in time. It is desirable that requisite tariff changes come into effect from the date of commencement of each financial year and any gap on account of delay in filing should be on account of licensee."

21. The issues relating to the MYT Regulations, 2011 have already been addressed while formulating the said Regulations. As stated by BEST, the

Commission has notified the MYT Regulations, 2011 after following due regulatory process and an extensive consultative process, whereby the Commission heard all the stakeholders and considered their views, suggestions, comments and objections while framing the final MYT Regulations, 2011. The Commission has thus taken a conscious decision to implement the said Regulations in a specific manner, and has done away with the concept of annual truing up, and the Commission is not inclined to amend the same. Further, the Commission has already extended the implementation of MYT Regulations by one year based on the request made by the Utilities, as the MYT Regulations were earlier intended to be in force with effect from April 1, 2010.

22. Further, the Commission has addressed the concern of BEST relating to submission of MYT Petition after approval of Business Plan, vide its Order dated February 23, 2011, as reproduced below:

> *"In order to adhere to the timeline specified in Regulation 19.1, difficulty has arisen in giving effect to the provisions of Regulation 9.2 of the Maharashtra Electricity Regulatory Commission (Multi Year Tariff) Regulations, 2011. 3. In order to remove the difficulty, as aforesaid, the Commission is of the view that the powers to remove difficulties under Regulation 100 of the above-said Regulations need to be invoked. Regulation 100 provides as follows:*
>
> *...*
>
> *The Commission hereby rules that Regulation 9.2 of the Maharashtra Electricity Regulatory Commission (Multi Year Tariff) Regulations, 2011 shall be kept in abeyance."*

23. Hence, the Commission is not inclined to grant an extension of one year, as initially sought by BEST. During the hearing, BEST did submit that in all fairness, it would expect an extension of four months atleast. Taking cognizance of BEST's concerns regarding the timelines for submission of the Business Plan and MYT Petition, and as BEST is filing the Business Plan and MYT Petition for a period of 5 years for the first time, the Commission finds it appropriate to invoke the provisions of Regulation 100 "Power to remove difficulties" and to remove the difficulty which has arisen on the part of BEST in giving effect to the provisions of Regulation 19.1. Hence, the Commission by this specific order and for removing the difficulty allows BEST an extension by 4 months, of date of submission of the Business Plan and MYT Petition, i.e., BEST shall have to submit the Business Plan and MYT Petition as per the MERC (MYT) Regulations, 2011 on or before August 31, 2011. If BEST fails to

submit the Business Plan and MYT Petition by the said date, BEST shall be liable for consequences in accordance with law.

With the above, the Petition filed by BEST in Case No. 43 of 2011 is disposed of."

7. In its Review Petition, BEST contended that it had never stated in its Petition in Case No. 43 of 2011 that the Commission is not obligated to adopt the MYT Regime. The reference in para 2.1.15 of the said Petition was only with respect to clause (f) of Section 61 of the Electricity Act, 2003, which provides that, the Commission, for the determination of tariff shall be guided by the "Multi-Year Tariff principles". BEST had also pointed out that BEST was not against the MYT regime, since it had filed its MYT Petition for the first Control Period from FY 2007-08 to FY 2009-10 in Case No. 66 of 2006.

8. BEST submitted that the Commission in para 21 of its Order in Case No. 43 of 2011 erred in holding that,

"The issues relating to the MYT Regulations, 2011 have already been addressed while formulating the said Regulations. As stated by BEST, the Commission has notified the MYT Regulations, 2011 after following due regulatory process and an extensive consultative process, whereby the Commission heard all the stakeholders and considered their views, suggestions, comments and objections while framing the final MYT Regulations, 2011."

9. BEST added that it has been submitting its concerns/objections/comments on the Approach Paper and draft Regulations on the subject of MYT, as and when sought by the Commission. However, on perusal of the MYT Regulations, 2011 notified by the Commission, it is observed that there is no mention of the concerns and comments expressed by any of the stakeholders including BEST. The Petitioner submitted that the Commission while issuing its earlier Order on implementation of ABT mechanism (in Case No. 42 of 2006 dated May 17, 2007) has brought out the comments of the stakeholders and has addressed all concerns of stakeholders in detail and given its decisions on each issue. BEST added that the same has not been done in the MYT Regulations, 2011 and therefore, it was constrained to file its Petition in Case No. 43 of 2011. BEST reiterated that its observations/comments/objections have not been addressed by the Commission while issuing MYT Regulations, 2011. The core issues brought out in the letters and Petition in Case No. 43 of 2011 for deferment of implementation of MYT Regulations, 2011 have been left unaddressed. The Order passed by the Commission is not a reasoned Order and a limited

relief by granting extension of date for submission of the Business Plan and MYT Petition by four months has been granted. As a consequence, the Petitioner would be put to further financial difficulties by following the MYT Regulations, 2011. BEST added that a detailed and reasoned Order would have enabled BEST to overcome its genuine concerns and to serve the consumers better.

10. BEST further submitted that the Commission has held that it has taken a conscious decision to implement the MYT Regulations, 2011 in a specific manner and has done away with the concept of annual truing up and the Commission is not inclined to amend the same. Here again, BEST submitted that the Order is devoid of reasons. Though the Commission had extended the implementation of MYT Regulations, 2011 by one year from April 01, 2010 to April 01, 2011 and further allowed BEST an extension of four months (i.e., till August 31, 2011), for the submission of the Business Plan and MYT Petition, the Commission has not incorporated the reasonable and logical concern of BEST for which purpose the submissions and Petition were filed.

11. The Commission, vide its Notice dated July 04, 2011, scheduled a hearing in the matter on July 27, 2011, and directed BEST to serve a copy of its Petition to the authorized Consumer Representatives.

12. At the hearing held in the matter on July 27, 2011, Shri. K.N. Rajagopal, Chief Engineer, Regulatory Cell, and Shri. Harinder Toor, Counsel, appeared on behalf of BEST.

13. During the hearing, BEST's Counsel submitted that BEST would like to apologize for the poor phrasing of the prayers, and that BEST appreciated that the Commission had plenary powers to frame Regulations. Counsel for BEST added that BEST was in agreement with paragraph 20 of the impugned Order, wherein the Commission has ruled that the Commission is mandated under the 2003 Act to follow multi-year tariff principles. As regards the Commission's ruling in paragraph 21 of the impugned Order, Counsel for BEST submitted that while the Commission has the right to take a considered decision on all the submissions made on the draft Regulations and is not bound to give any reasons for its decisions, BEST would have preferred if the Commission had given some reasons for its decisions.

14. Having heard the Parties and after considering the material placed on record, the Commission hereby rules as under:

a. Review of any Order passed by the Commission is permitted under Regulation 85(a) of the MERC (Conduct of Business) Regulations, 2004 only under the following specific grounds:

> *"Any person aggrieved by a direction, decision or order of the Commission, from which (i) no appeal has been preferred or (ii) from which no appeal is allowed, may, upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the direction, decision or order was passed or on account of some mistake or error apparent from the face of the record, or for any other sufficient reasons, may apply for a review of such order, within forty-five (45) days of the date of the direction, decision or order, as the case may be, to the Commission."*

Admittedly, BEST is in agreement with paragraph 20 of the impugned Order and as regards the Commission's ruling in paragraph 21 of the impugned Order, BEST has submitted that BEST would have preferred if the Commission had given some reasons for the MYT Regulations, 2011. The Commission is of the view that providing of reasons behind Regulations cannot be a matter for grant of review or a matter to be considered in review proceedings. This shows that BEST has not pointed out any mistake or error on the face of the record. There is also no case of discovery of new or important matter or evidence which after the exercise of due diligence was not within the knowledge of the Petitioner or could not be produced by it at the time when the impugned order was passed. The scope of review is limited. Thus, BEST has not been able to justify the maintainability of its Review Petition under the above quoted Regulation 85 (a) of the MERC (Conduct of Business) Regulations, 2004, and has submitted during the hearing that it was merely seeking clarifications on the reasons for the various clauses incorporated in the MYT Regulations, 2011 by the Commission.

Accordingly, the Review Petition filed by BEST is dismissed as not maintainable.

Sd/-	Sd/-
(Vijay L. Sonavane)	(V.P. Raja)
Member	Chairman