Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th floor, Cuffe Parade, Mumbai 400 005
Tel. No. 022 22163964/65/69 – Fax 022 22163976
E-mail mercindia@mercindia.com
Website: www.mercindia.com

Case No. 43 of 2011

In the matter of

BEST's Petition for deferment of the implementation of the MERC (Multi Year Tariff) Regulations, 2011

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

ORDER

Dated: May 5, 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 March 24, 2011, under Section 94 (2) of EA 2003, Regulation 85 (a) of the MERC (Conduct of Business) Regulations, 2004, and Regulations 4.1, 99 and 100 of the MERC (Multi Year Tariff) Regulations, 2011 (hereinafter referred as MYT Regulations, 2011), for deferment of the implementation of MYT Regulations, 2011, with the following prayers:

"

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

7.1.2 Vary, alter, modify or amend the relevant Regulations under MERC (MYT) Regulations, 2011 on that 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.

7.1.3 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.

7.1.4 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 MYT Regulations, 2011 notified on February 4, 2011, for determination of tariff in all cases covered under the Regulations from April 1, 2011 to till March 31, 2016, still has some inherent issues, which BEST had submitted to the Commission vide its letter No. ESO/DGMES/1310/2010 dated October 28, 2010 for consideration along with its comments/suggestions on Draft MYT Regulations, 2010, which had not been considered by the Commission while finalizing the MYT Regulations, 2011.

3. BEST submitted that the concept of pre-determining the tariff for next five years is unheard of in India for any other commodity or services. With the ever-changing socio economic realities and policies at national and international level, to make a forecast with financial implications for a long period of 5 years is fraught with uncertainties and consequent pitfalls. For a distribution licensee like BEST, where the major power requirement is met from one generator at a price regulated by the Commission, BEST cannot have a tariff trajectory for next five years, which will be determined by the Commission. BEST added that projecting the prices only for electricity will be impractical and illogical. BEST further stated that the issues such as uncontrollable nature of power purchase cost, O&M expenses, trajectory of distribution loss, and absence of annual review had not been addressed in the Regulations, and would have a serious

and detrimental implication on the operations and financial viability of the BEST. BEST submitted that it would not be appropriate to proceed with the MYT Regulations in the present form and it requires further consultation and concurrence of major stakeholders and the present proposal may be deferred by at least 1 year.

4. BEST submitted that in the parallel licence scenario existing today in Mumbai where the other licensee may offer lower tariff, there is a real possibility of migration of the subsidizing consumers, which may give a tariff shock to the remaining consumers of the incumbent licensee. Moreover, changing nature of consumer mix and ever changing consumer base would seriously hamper the process of long-term power purchase forecast and consequently the power purchase projections based on the present consumption could lead to uncertainties, and hence, power purchase is uncontrollable.

5. BEST also submitted that the Commission in its e-mail dated February 01, 2011, communicated to the GM, BEST, to submit the Business Plan as well as MYT Petition on or before March 31, 2011. As per the provisions of Regulation 4.2(ii) of the MYT Regulations, 2011, BEST has to submit the detailed Business Plan based on the operational norms and trajectories of performance parameters specified in the MYT Regulations, 2011, for each year of the Control Period for the Commission's approval. Similarly as per the provisions of Regulations 8.1, 9.1 and 9.2 of MYT Regulations, 2011, BEST has to submit the forecast of Aggregate Revenue Requirement and expected revenue from tariff, for the Control Period based on the approved Business Plan. Hence, filing of Business Plan as well as MYT Petition on or before March 31, 2011 is contradictory to the above provisions of the Regulations.

6. Also as per the recommendations of the Forum of Regulators, Distribution Licensees need to submit the Business Plan and Power Purchase plan, for approval of the Commission, at least six months prior to submission of MYT Petitions.

7. BEST submitted that the time taken by the Commission to finalize the MYT Regulations, 2011 is around 2 years and it would be unreasonable to ask the Utilities to file MYT Petition and Business Plan having impact for a period of 5 years, within a period of 2 months.

8. BEST further submitted that the important concerns of BEST, which need to be addressed by the Commission prior to implementation of MYT Regulations, 2011, are still pending, and therefore, to proceed with MYT Regulations, 2011 issued by the Commission would be not only grossly unfair but detrimental to the economic viability of BEST and the consumers in the long run.

9. BEST submitted that the demand situation in the State may not remain the same. It will require time and meticulous studies to arrive at the demand-supply assessment nearest to actuals. Also, the timely availability of the contracted power needs to be factored in while projecting the expenses. Any delay in supply of contracted power may alter the projected Power Procurement Plan of BEST, which may have adverse financial implications on BEST or energy deficit situation for consumers.

10. BEST had filed an appeal in Appellate Tribunal for Electricity (ATE) in the matter of MERC Order dated September 12, 2009 in Case No. 95 of 2009. The said appeal is pending for hearing before the Hon'ble ATE. The impact of the above appeal will have to be considered in the MYT Petition as this will affect the long term financial projections, which need to be included in the MYT Petition.

11. BEST submitted that the Hon'ble Supreme Court's Judgment dated February 02, 2011 in the matter of Civil Appeal no. 848 of 2007 needs to be factored in the MYT Petition. The detailed working on financial implication due to the impact of Hon'ble Supreme Court's Judgment pertaining to the deficits of the Transport Division of BEST Undertaking will have to be carried out. The Commission had disallowed the deficits of the Transport Division as a part of the ARR from FY 2004-05 onwards.

12. BEST added that there are various pending issues related to BEST such as indiscriminate deductions by the Commission in legitimate expenditure incurred by BEST; impact of ATE Judgment, segregation of wire and supply business, parallel licence, cross subsidy, etc., which also needs to be given appropriate consideration prior to commencement of MYT regime. Until the pending issues are resolved, financial implications of these issues will adversely affect BEST and MYT Regulations, 2011 will not get implemented in the true sense and will make the operations of BEST totally unviable.

13. BEST submitted that as per Section 61 of EA 2003, the Commission has to be only guided by the Multi Year Tariff Principles and is not obligated to adopt MYT regime.

14. Considering the historical background of BEST and in the larger consumer interest, BEST requested the Commission to defer the implementation of MYT Regulations, 2011 for BEST for a minimum period of 1 year, which will enable BEST to work out the MYT Petition in a more appropriate manner. BEST added that Regulation 4.1 of MERC (MYT) Regulations, 2011 gives the Commission the powers to exempt the determination of tariff of Licensees under MYT Framework for specific period as may be determined by the Commission either on suo-motu or on application made by the Licensee for exemption.

15. The Commission, vide its Notice dated April 05, 2011, scheduled a hearing in the matter on April 20, 2011, and directed BEST to serve a copy of its Petition to the authorized Consumer Representatives.

16. At the hearing held in the matter on April 20, 2011, Shri. K.N. Rajagopal, Chief Engineer, Regulatory Cell, and Shri. Harinder Toor, Counsel, appeared on behalf of BEST. BEST submitted that BEST operates two businesses i.e., transport and electricity business,

therefore, further segregating the accounts of electricity business for wires and supply would be difficult.

17. Shri. Rajagopal submitted the difficulties in complying with the MYT Regulations, 2011 and BEST's suggestions in this regard, as under:

a. The MYT Regulations, 2011 should be made applicable from April 1, 2012 up to FY 2014-15 [i.e., till March 31, 2015], by reducing the Control Period to three years. However, if the Commission decides to extend the Control Period up to FY 2015-16, BEST has no serious objection to the same.
b. A second proviso may be added under Regulation 4.1 of the MYT Regulations, 2011, specifying that the Utility may be allowed to file APR/ARR Petition for the period of exemption.
c. The actual/audited performance of BEST cannot be segregated into Wire Business and Supply Business. BEST suggested that the Commission should make a separate provision for submission of ARR Petitions by Local Authority, and exempt Local Authorities from maintenance of separate accounts for Wire and Supply Business. BEST added that the Return on Equity for Local Authority should be computed on equity capital @ 16% p.a.
d. The MYT Petition should be submitted by the Utilities only after getting the Business Plan approved by the Commission, and in this regard, the Commission may reconsider the Removal of Difficulty Order dated February 02, 2011 issued by the Commission in the matter of the Removal of Difficulty in Implementing the MYT Regulations, 2011.
e. Annual Performance Review and annual tariff determination should be undertaken by the Commission in accordance with earlier Tariff Regulations. Further, the Commission may consider specification of indexation for specific parameters based on the approved forecast for urban/rural Utilities separately.
f. The Licensee should be given reasonable opportunity of being heard if the Commission is approving a lower tariff than proposed tariff, to explain their view point.
g. The Commission should stipulate the performance trajectory separately for urban Utilities/Local Authorities.

h. The variation in O&M expenses may be considered as uncontrollable.
i. Variations in power purchase should be attributable generally to controllable factors, however, should be allowed subject to prudence check by the Commission as there are uncertainties such as demand estimation and regulatory uncertainties such as parallel licence, Open Access, Cross Subsidy, etc.
j. The Commission may consider actual contingency reserves of minimum 0.5% of opening GFA, subject to prudence check.
k. The Commission may add a proviso in the MYT Regulations, 2011 for relaxing any Regulation considering the actual submission by the Utility subject to prudence check and on being satisfied of the variation.

18. In summary, Shri. Harinder Toor, Counsel, submitted that as a consequence of all the above reasons, the Commission may grant an extension of at least 4 (four) months to file the MYT Petition.

19. Having heard the Parties and after considering the material placed on record, the Commission is of the view 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:

> *"2. 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.

Sd/-
(V. L. Sonavane)
Member

Sd/-
(V.P.Raja)
Chairman

(K. N. Khawarey)
Secretary, MERC