



## JUDGMENT

1. These Review Petition Nos. 7 of 2017 and 8 of 2017 are being filed by M/s JPTL (hereinafter referred to as the “**Review Petitioner/ Appellant**”) under Section 120 (2) (f) of the Electricity Act, 2003 (“**the Act**”) for review of the judgments dated 11.05.2017 (“**Impugned Judgements**”) of this Tribunal passed in Appeal Nos. 250 of 2015 & 242 of 2016 (“the Appeals”) respectively filed by the Appellant on the decision of this Tribunal on certain questions raised in the Appeals. The said questions are generalized and are reproduced below:

*“Whether the State Commission was justified in including the DPC payable by the STU to the Appellant in the non tariff income and thereby deducting the same from the ARR of the Appellant?”*

*Whether the State Commission was justified in calculating the carrying cost on the basis of simple interest and not on the settled basis of compounded interest as sought by the Appellant in its petition before the State Commission?*

*Whether the State Commission has discharged its obligations in conducting a fair and impartial mid-year review of the Appellant while following accepted commercial principles and sound application of the MYT Regulations?”*

These Review Petitions are mainly filed on two issues i.e. whether Delayed Payment Charge (DPC) can be considered as a part of

Non-Tariff Income (NTI) and what should be the rate of interest on carrying cost i.e. whether simple rate of interest or compounded rate of interest. Third question is the offshoot of the earlier two questions.

2. This Tribunal vide judgement dated 11.5.2017 in Appeal No. 250 of 2015 has upheld the order dated 26.6.2015 ("**Impugned Order**") passed by the Maharashtra Electricity Regulatory Commission (hereinafter referred to as the '**State Commission**') in Petition filed by the Review Petitioner seeking approval of True up of Aggregate Revenue Requirement (ARR) for FY 2012-13 and FY 2013-14 and Revised estimates of ARR for FY 2014-15 and FY 2015-16. This Tribunal vide judgement dated 11.5.2017 in Appeal No. 242 of 2016 has upheld the order dated 27.6.2016 ("**Impugned Order**") passed by the State Commission in Case No. 12 of 2016 for Truing up of ARR for FY 2014-15, Provisional Truing up for FY 2015-16 and approval of ARR for the period FY 2016-17 to FY 2019-20. The issues raised in the Review Petitions are being dealt vide this common order. The True up of ARR for the period from FY 2012-13 to FY 2015-16 are governed by the Tariff Regulations, 2011 of the State Commission and the issues are confined to this period only.
3. The Review Petitions are limited to the decision of this Tribunal upholding the decision of the State Commission on certain questions raised in the Appeals as reproduced at S. No. 1 above.
4. We have heard at length the learned senior counsel for the Review Petitioner and learned counsel for the Respondent and considered

their arguments and written submissions. Gist of the same is discussed hereunder;

- a) The learned senior counsel for the Review Petitioner has made the following arguments and submissions for our consideration.
  - i. This Tribunal has not dealt with all the contentions raised by the Appellant raised in the Appeals on the issue related to consideration of DPC as NTI. This Tribunal has not dealt with the legal principle and commercial purpose for allowing recovery of DPC, the nature of income that could be included in NTI and the approach rendering Regulation 68 totally nugatory.
  - ii. This Tribunal while rightly concluding that NTI has to be approved by the State Commission omitted to consider that the State Commission is bound to act in accordance with its Regulations and the Regulations do not empower a State Commission to decide any income to be included in NTI without considering the nature of it.
  - iii. This Tribunal has also drawn similar conclusion on the issue of DPC to be considered as a part of NTI though Regulation 43 (generation business) and Regulation 62 (transmission business) of the Tariff Regulations, 2011 were differently worded. The indicative list of Regulation 43 cannot be taken and made part of Regulation 62 which does not contain any such indicative list which includes DPC to be considered as NTI. This Tribunal has omitted

the settled position of law that different wordings in different sections of the Regulations are to be respected and acted upon accordingly. On this issue the Review Petitioner has relied on the judgement of Hon'ble Supreme Court in case of Bhim Singh, Maharao of Kota v. Commissioner of Income Tax, Rajasthan-II, Jaipur (2017) 1 SCC 554. This Tribunal vide judgement dated 30.7.2010 in Appeal No. 153 of 2009 in case of NDPL Vs. DERC has concluded that DPC cannot be considered as NTI. The Appellant therein was only praying that finance cost involved in earning DPC should be allowed. If DPC is treated as NTI this would incentivize the late payment as its benefits will be subsequently available to the defaulting party.

- iv. This Tribunal in the Impugned Judgements has erred in overlooking the fact that the definition of NTI excludes an income relatable to tariff. The Review Petitioner has contended that as per the provisions of the Regulations 2.1 (42), 68.3 and 68.4 of the Tariff Regulations, 2011 the payment of DPC on account of delay in payment of tariff is also a tariff income. It is not the income relating to the regulated business other than from tariff so as to fall within the meaning of income under the definition of NTI. This Tribunal has overlooked this aspect which is error and needs to be rectified. The response of the State Commission was also evasive on this issue.

- v. On the issue of maintainability of the Review Petition and grounds of review, the Review Petitioner has relied on the judgement of Hon'ble Supreme Court in case of Board of Cricket Control of India and Anr. V. Netaji Cricket Club and Ors. (2005) 4 SCC 741. Further, the submission of the State Commission that similar matters are pending before the Hon'ble Supreme Court is incorrect as the decision taken in Appeal Nos. 244 of 2014 and 246 of 2014 relates to regulations governing generation business and not the transmission business.
- vi. This Tribunal's judgement in Appeal No. 180 of 2013 relating to the working capital and interest on the same of UPCL was allowed on two parameters i.e. 2 months billing and collection inefficiency. UPCL was not able to justify increased working capital requirement in view of approved collection inefficiency target allowed to UPCL. On failure by UPCL to provide details the DPC was allowed to be classified as NTI. Accordingly, the treatment of NTI and/ or financing cost would be different for distribution licensees and transmission licensees.
- vii. On the issue of applicability of interest (simple or compounded) on carrying cost, the Review Petitioner has again contended that to meet the additional interest burden it should be allowed interest by compounding on quarterly basis as the lender banks are charging it on the basis of compounding on quarterly basis and the Review Petitioner is subjected to additional interest burden. In this support

the Review Petitioner has reproduced the judgement dated 18.7.2011 of Hon'ble Supreme Court in case of Indian Council for Enviro-Legal action v. Union of India (2011) 8 SCC 161.

viii. Had this Tribunal considered all the contentions of the Appellant the conclusion of this Tribunal would have been in favour of the Review Petitioner/ Appellant. Accordingly, the Impugned Judgements need to be reviewed and modified.

b) The learned counsel for the Respondent has made the following arguments, submissions for our consideration.

i. The Review Petitions are not maintainable as the Review Petitioner is seeking rehearing on the issues raised in guise of these Review Petitions. The proceedings in these petitions are to be confined to the scope and ambit of Order 47 Rule 1 of the Code of Civil Procedure. The principles of a review have been detailed out in this Tribunal's judgement dated 17.11.2016 in RP No. 13 of 2016 in Appeal No. 244 & 246 of 2015 in case of Tata Power Vs. MERC and the same can be relied. The judgement of Hon'ble Supreme Court in case of Kamlesh Verma v. Mayawati & Ors. (2013) 8 SCC 320 has laid down the principles that govern the maintainability of a review.

- ii. The Review Petitioner has not satisfied any ground which define the scope of review of the Impugned Judgements and has failed to point out any error on the face of the record and has also not shown any sufficient cause for review. The Review Petitioner has sought to reopen the same issues which have already been decided by this Tribunal in the Impugned Judgements.
- iii. The issue of consideration of DPC as NTI has been dealt at length by this Tribunal in the Impugned Judgement by analyzing the Tariff Regulations, 2011 and concluded the findings of the State Commission are in order. The contention of the Review Petitioner regarding this Tribunal's judgement in Appeal No. 153 of 2009 regarding DPC as NTI has ignored the judgement of this Tribunal in case of UPCL Vs UERC in Appeal No. 180 of 2014 wherein it has been categorically held that the judgement in former case is limited to an interpretation of the Delhi Commission's Regulations. This has also been accepted by this Tribunal in its judgements in Appeal No. 244 & 246 of 2015 in case of TPC Vs MERC. This Tribunal vide judgement dated 17.11.2016 in RP No. 13 of 2016 in Appeal No. 244 & 246 of 2015 in case of Tata Power Vs. MERC has also dismissed the Review Petition on this point.
- iv. The definition of "Non-Tariff Income" at Regulation 2.1 (42) of the Tariff Regulations, 2011 is clear and unambiguous and is applicable to 'generation' and 'transmission'

businesses equally. According to this definition any income related to the regulated business other than from tariff is non-tariff income and includes DPC. The Review Petitioner's contention that even income from investments earned out of RoE can be treated as NTI is misplaced as it is income earned out of income from regulated business and it is not regulated income. The argument of the Review Petitioner that the words "unless the context otherwise provides" in the definition part of the Regulation 2.1 based on which it is trying to delink the Regulation 43.1 and 62.1 by linking it with the judgement of this Tribunal in Appeal No. 153 of 2009 also does not survive. According to the definition DPC is NTI and is to be reduced from ARR of the Review Petitioner. DPC has been held as NTI by at least three other judgements of this Tribunal under the same regulations, two of which are pending before the Hon'ble Supreme Court.

- v. The contention of the Review Petitioner that all income irrespective of its nature cannot be treated as NTI cannot be considered as it is challenging this Tribunal's findings on the meaning of NTI as given in the Tariff Regulations, 2011.
- vi. On the contention of incentivizing late payment the learned counsel for the State Commission has submitted that the State Commission in case no. 151 of 2014 has disallowed waiver of DPC on delayed payment of transmission charges by MSEDCL to the STU the same has also been

recorded in the State Commission's order in case no. 208 of 2014. Accordingly, it could not be said that the approach adopted by the State Commission would incentivize late payment to State Transmission Utility by the Transmission System Users.

vii. The issue regarding DPC being considered as NTI is already pending in two appeals before the Hon'ble Supreme Court in Civil Appeal Diary No. 40207/2016 in case of Tata Power Company v. MERC and Civil Appeal No. 9408/2017 in case of Maharashtra State Power Generating Company Ltd. v. MERC. Accordingly, this Tribunal may not relook at the issues pending consideration before the Hon'ble Supreme Court.

viii. On this issue of interest on carrying cost to be granted on simple or compounding basis, the Review Petitioner is seeking re-hearing as this issue has been dealt by this Tribunal and is also a settled case as the State Commission has been providing simple interest to all the businesses i.e. generation, transmission and distribution. Further, there is no provision in the Tariff Regulations, 2011 for providing compounded interest on the carrying cost. The learned counsel of the Respondent also produced the judgements of the Hon'ble Supreme Court in case of Priya Vart v. Union of India (1995) 5 SCC 437 and Indo Arya Central Transport Co. Ltd. v. M/s Khateema Fibres (2012) SCC online Del 5185. The judgement of Hon'ble Supreme Court in case of Indian Council for Enviro

Legal Action v. Union of India (2011) 8 SCC 161 has been produced for first time by the Review Petitioner before this Tribunal. However, this judgement is not applicable in present case as it deals with conscious and deliberate abuse of the judicial process and prevent the suffering litigant from the fruits of a decree of the court.

5. After having a careful examination of all the aspects brought before us and submissions made by the rival parties, we decide as below:
  - i. The Review Petitioner has submitted that this Tribunal has not dealt with all the issues raised by it in the Appeals on the issue of DPC being treated as NTI and allowance of interest on compounding basis as against simple interest on carrying cost.
  - ii. The Review Petitioner has contended that the judgement of this Tribunal in Appeal Nos. 244 of 2014 and 246 of 2014 is for generation business only and the matters pending before Hon'ble Supreme Court cannot be relied upon by the learned counsel for the State Commission. After scrutiny we find that there is no such judgement of this Tribunal in Appeal Nos. 244 of 2014 and 246 of 2014 on the issues in question. However, if the Review Petitioner is referring to the judgement of this Tribunal in Appeal Nos. 244 of 2015 and 246 of 2015 in case of Tata Power Company Ltd. vs. MERC, we find that the Appeal No. 246 of 2015 was related to transmission business and the Appeal No. 244 of 2015 was related to generation business. The Appellant in the said Appeals have raised the issue of considering DPC as NTI by the State Commission and the same was dealt by this Tribunal as common

issue in both the Appeals (244 of 2015 and 246 of 2015) and has upheld the decision of the State Commission.

- iii. This Tribunal in its judgement dated 3.6.2016 in Appeal Nos. 244 of 2015 & 246 of 2015 has clearly held that the judgement in the case of NDPL Vs. DERC is not applicable as the said judgment relates to the regulations of DERC as the norms of the working capital specified by Delhi Commission do not include capital required to finance shortfall in collection of current dues. The said judgment has been distinguished and limited to an interpretation of Delhi Commission's Regulations by a subsequent judgment dated 18.05.2015 in Appeal No.180 of 2013 in the matter of UPCL Vs. UERC.
- iv. The reliance of the Review Petitioner on the judgement of Hon'ble Supreme Court in case of Bhim Singh, Maharao of Kota v. Commissioner of Income Tax, Rajasthan-II, Jaipur (2017) 1 SCC 554 is also misplaced as the decision of this Tribunal on the issue of DPC being treated as NTI is based on the various provisions of the Tariff Regulations, 2011 and the decision of the State Commission in Impugned Order and other orders under the Tariff Regulations, 2011 based on inherent powers vested in it. Regulation 2.1 (42) defines NTI which is common to all Regulations. Regulation 43.1 of the Tariff Regulations, 2011 provides indicative list of NTI under generation business and Regulation 62.1 under transmission business provides NTI as approved by the State Commission. The contention of the Review Petitioner that before deciding DPC as NTI its nature should have been decided, does not require any further discussion by this Tribunal as the issue has been decided based on

the various provisions of the Tariff Regulations, 2011 and the orders of the State Commission based on inherent powers vested in it. Once NTI is defined in Regulation 2.1 (42) of the Tariff Regulations, 2011 and DPC specifically considered as NTI for Generation Business but DPC to be treated as NTI specifically not appearing under Transmission section of the Tariff Regulations, 2011, then it is left to the wisdom of the State Commission to deal DPC appropriately so that there is harmony among the various provisions of the Tariff Regulations, 2011. The State Commission after applying due diligence and using inherent powers vested in it decided DPC as NTI for transmission business as well. We do not find any infirmity in the decision of the State Commission on this count and there is no need to interfere with the Impugned Judgements.

- v. In current scenario it is seen that many of the distribution licensees are defaulting the payments of generation/ transmission utilities. This has led to deterioration in finances of the distribution licensees and widening of Average Cost of Supply (ACS) and ARR. To overcome this issue the State Regulators are resorting to creation of Regulatory Assets in a routine matter and without a roadmap for their recovery. This Tribunal in the judgement dated 11.11.2011 in O.P. No. 1 of 2011 on the issue of Regulatory Asset has held as below:

*“65 (iv) In determination of ARR/tariff, the revenue gaps ought not to be left and Regulatory Asset should not be created as a matter of course except where it is justifiable, in accordance with the Tariff Policy and the Regulations. The recovery of*

*the Regulatory Asset should be time bound and within a period not exceeding three years at the most and preferably within Control Period. Carrying cost of the Regulatory Asset should be allowed to the utilities in the ARR of the year in which the Regulatory Assets are created to avoid problem of cash flow to the distribution licensee.”*

As evident from the above, this Tribunal does not encourage late payment of the bills by the distribution licensees but is of the view that the orders passed by the State Commissions based on provisions of the Regulations and inherent powers vested in them are supporting the cause of narrowing ACS and ARR gaps which is of great relevance in this context.

- vi. Similarly, the issue regarding interest on carrying cost have been decided by the State Commission based on earlier orders passed by it and inherent powers available to it as there was no specific provision in the Tariff Regulations, 2011 related to the type of interest to be charged. Accordingly, the decision of the State Commission for applying simple interest and not compound interest has been upheld by this Tribunal.
  - vii. After having again decided the above two issues against the Review Petitioner, the third issue is automatically decided against the Review Petitioner and does not need any further elaboration from our side on the same.
6. The learned counsel of the State Commission has submitted that the issue of DPC being treated as NTI is lying before the Hon'ble

Supreme Court in two different cases and under the same Tariff Regulations, 2011 of the State Commission. Therefore, it would suffice for this Tribunal to hold that interference by this Tribunal considering the relief sought by the Review Petitioner does not call for indulgence.

7. The Review Petitioner has also relied on various judgements of Hon'ble Supreme Court & this Tribunal. We have gone through the said judgements and we find that the judgements quoted by the Review Petitioner either already have been dealt in the Impugned Judgements/ this order or do not have relevance based on the facts and circumstances of the case of the matter in hand.
8. Accordingly, we find that the issues brought before us in these Review Petitions have been dealtwith in detail in our Impugned Judgments dated 11.5.2017 and the Review Petitioner is trying to seek re-hearing/re-argue the original matter. The Review Petitioner has failed to establish any error apparent on the face of record or any good ground as such made out by the Petitioner necessitating the review of the Impugned Judgment. Hence, it is not possible for us to entertain this Review Petition. Accordingly, the Review Petitions are dismissed.
9. Pronounced in the Open Court on this **20<sup>th</sup> day of February, 2018.**

**(Justice N. K. Patil)**  
**Judicial Member**

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**REPORTABLE/NON-REPORTABLE**

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**(I.J. Kapoor)**  
**Technical Member**