

In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

Appeal No. 199 of 2015

Dated: 18th April, 2017

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member

In the matter of :-

Maharashtra State Power Generating Company Ltd.
PRAKASHGAD,
Plot No. G-9, Bandra (East)
Mumbai-400 051

... Appellant

Versus

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

...Respondent No.1

**2. Maharashtra State Electricity
Distribution Co. Ltd.**
PRAKASHGAD,
Plot No. G-9, Bandra (East)
Mumbai- 400 051

...Respondent No.2

**3. Prayas, (Energy Group), Amrita Clinic,
Athwale Corner, Deccan Gymkhana,
Karve Road,**
Pune – 411 004

...Respondent No.3

4. **Mumbai Grahak Panchayat, Grahak Bhavan,
Sant Dyaneshwar Marg,
Behind Cooper Hospital, Vile Parle (W)
Mumbai- 400 056** **...Respondent No.4**

5. **The General Secretary,
Thane Belapur Ind. Association,
Plot-P14, MIDC, Rabale Village,
PO- Ghansoli, Navi
Mumbai- 400 701** **...Respondent No.5**

6. **The President, Vidarbha Ind Association
1st Floor, Udyog Bhawan,
Civil Lines
Nagpur - 440 001** **...Respondent No.6**

7. **Maharashtra Chamber of Commerce,
Industry and Agriculture, (Nashik Branch)
Oricon House, 6th Floor,
12 K, Dubhash Marg,
Fort Mumbai- 400 001** **...Respondent No.7**

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Ms. Poorva Saigal**

Counsel for the Respondent(s): **Mr. Budy A Ranganadhan
Mr. D V Raghu Vamsy
Ms. Aditi Sharma** **for R-1**

**Mr. G Sai Kumar
Mr. Varun Agarwal
Ms. Noor Rampal
Mr. Aditya Dawan
Ms. Himangina Mehta** **for R-2**

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal is being filed by Maharashtra State Power Generating Company Ltd. (herein after referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 challenging the Order dated 26.06.2015 (“**Impugned Order**”) passed by the Maharashtra Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”), in Case No. 15 of 2015. The present Appeal is concerning about the consideration of Late Payment Surcharge (LPSC), to be paid by the Respondent No. 2, to the Appellant as Non-Tariff Income and reduction of the same from the Aggregate Revenue Requirements of the Appellant. The Appellant has also filed Review Petition with State Commission on the Impugned Order on other aspects different from the issues raised in present appeal.
2. The Appellant, Maharashtra State Power Generating Company Ltd. is a power generating company within meaning Section 2 of the Electricity Act, 2003 in the State of Maharashtra supplying power to Respondent No. 2.
3. The Respondent No.1, Maharashtra Electricity Regulatory Commission is the Regulatory Commission for the State of Maharashtra, exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.

4. The Respondent No. 2, Maharashtra State Electricity Distribution Co. Ltd. is the distribution licensee in the State of Maharashtra.
5. The Respondents Nos. 3 to 7 are various consumers' associations and groups in the State of Maharashtra.
6. **Brief of Issues raised in the present Appeal:**
 - a) The State Commission on 23.8.2005 notified the Maharashtra Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2005 (herein referred as Tariff Regulations, 2005). These Regulations do not have any provision for deduction of LPSC as non-tariff income for generation business for the purpose of determination of ARR. These regulations also have the provisions for rebate for prompt payment and levy of LPSC @ 1.25% per month if the payment is delayed by Respondent No. 2 beyond a period of 2 months from the date of billing.
 - b) The Appellant on 01.04.2009 executed Power Purchase Agreement (PPA) with Respondent No. 2 for sale of power from its generating stations. The PPA provides for payment in 60 days' period by Respondent No. 2 on the bills raised by the Appellant. The PPA has the provisions of rebate for prompt payment and LPSC for delayed payment beyond 60 days @ 1.25% per month.
 - c) The State Commission on 04.02.2011, issued Maharashtra Electricity Regulatory Commission (Multi Year Tariff) Regulations, 2011 (herein referred as Tariff Regulations, 2011) for determination of tariff of the Appellant. These Regulations describe interest on

delayed or deferred payments of bills as non- tariff income. The applicability of these regulations was from 01.04.2011.

- d) The State Commission vide order dated 23.08.2011 in a Petition being Case No. 44 of 2011, deferred implementation of Regulations, 2011 till 31.03.2013. This means that Tariff Regulations, 2005 are applicable to the Appellant till 31.03.2013. The applicability of Regulations, 2011 to the Appellant was from 01.04.2013 i.e. from financial year 2013-14.
- e) As per provisions of the PPA, the Appellant started raising bills for LPSC on payment defaults by the Respondent No. 2 from 2010-11 onwards. The disputes on billing methodology of LPSC were resolved between the Appellant & the Respondent No. 2 through mutual discussions in 2014. In February, 2015 the Appellant raised revised bills for LPSC for the period from 2009-10 up to January, 2015. The year wise LPSC due from Respondent No. 2 is as below:

Year	LPSC (Rs. Cr.)
2010-11	64.00
2011-12	158.85
2012-13	625.33
2013-14	878.62
2014-15 up to January, 2015	783.37

- f) The Appellant on 09.01.2015 filed petition being Case No. 15 of 2015 for mid-term performance review for control period 2013-14 to 2015-16. This petition was revised on 13.03.2015 seeking approval of final true-up for 2013-14, provisional true up for 2014-15 and revised ARR and tariff for 2015-16.

- g) The State Commission 20.04.2015 in Case No. 201 of 2014 approved revenue gap of Rs. 1197.67 Cr. on account of final true up for year 2012-13 & 2013-14 and provisional true up for 2014-15 for units 4 & 5 of Bhusawal TPS of the Appellant. The recovery of this amount i.e. Rs. 1197.67 Cr. was to be decided by the State Commission in a separate order in Case No. 15 of 2015.
- h) The State Commission on 26.06.2015 decided Case No. 15 of 2015 determining tariff for 2015-16, truing up of 2013-14 and provisional true up for 2014-15. The State Commission for the years 2013-14 and 2014-15 up to January, 2015 has considered LPSC amount at para 6 e) above, as non-tariff income. The State Commission also considered Rs. 973.29 Cr. for the period 2010-11 to 2012-13 along with holding cost from 2010-11 to 2015-16 as non-tariff income for adjustment of revenue gap of Rs. 1197.67 Cr. approved in order dated 20.04.2015.
- i) The State Commission has also decided other aspects in the Impugned Order dated 26.06.2015. The Appellant has filed Review Petition on 07.08.2015 before the State Commission on certain aspects which are distinct from LPSC adjustment issue as non-tariff income raised in present appeal.
- j) Aggrieved by the Impugned Order dated 26.06.2015 passed by the State Commission, the Appellant has preferred the present appeal on the following issues:
- i. Adjustment of LPSC as non-tariff income with holding costs and without considering adverse financial impact on account of late

- receipt of the payments from the Respondent No. 2.
- ii. Consideration of LPSC for period 2010-11 to 2012-13 as per Regulations, 2011 while the period 2010-11 to 2012-13 is covered under Regulations, 2005.
- iii. Consideration of holding cost on LPSC for the period 2010-11 to 2012-13.

7. **QUESTIONS OF LAW**

The Appellant has raised the following questions of law in the present appeal:

- a. **Whether the State Commission is right in considering the Late Payment Surcharge amount with holding costs as Non-Tariff Income in an absolute manner without considering the corresponding adverse financial impact to the Appellant?**
- b. **Whether the State Commission is correct in considering the Late Payment Surcharge pertaining to years 2010-11 to 2012-13 as Non-Tariff Income as per Regulations, 2011 when the said years were continued to be governed by Tariff Regulations, 2005 and the said Tariff Regulations, 2005 did not provide for treatment of delayed payment surcharge as Non-Tariff Income?**
- c. **Whether the State Commission in considering late payment surcharge as Non-Tariff Income is right in treating the entire amount of surcharge as income to be adjusted without considering all the financial adverse effect, including in the form of opportunity cost of non-availability of the amount?**

8. We have heard at length the learned counsel for the parties and considered carefully their written submissions, arguments put forth during the hearings etc. Gist of the same is discussed hereunder.
9. The learned counsel for the Appellant has made following arguments/submissions for our consideration on the issues raised by it:
 - a) The State Commission in the Impugned Order failed to appreciate that the LPSC as per PPA is a compensation for delayed payment beyond due date. The cash deficit due to delayed payments results in additional borrowing of money or use of retained earnings by the Appellant which could have been gainfully utilised. This results in adverse financial impacts on the Appellant. Thus, LPSC should not be considered as income of the Appellant to be adjusted against the Non-Tariff income in ARR, instead LPSC should be treated as a compensatory change. Accordingly, there is also no need to adjust holding cost of LPSC in ARR.
 - b) The State Commission has erred in considering LPSC as a part of Non-Tariff Income as per Regulations, 2011 as it cannot be dealt in isolation with its associated adverse financial impact. The intention is to reduce ARR requirements by net income earned from sources other than tariff.
 - c) The State Commission should have considered adverse financial impact on the Appellant due to delayed payments by the Respondent No. 2 as margin over the rate applicable for Interest on Working Capital and considering Return on Equity, taking into

account the unwillingness of the lenders to finance the revenue gap arising due to delayed payment of bills and the need for the Appellant to fund such gap by other means. The opportunity cost of use of retained earnings and the resultant impact on its cash flow for timely payment has to be considered. The Appellant should not be compelled to pass on compensation received for financial hardships faced by the Appellant due to the payment default of the Respondent No. 2.

- d) LPSC is a commercial arrangement between the parties through the PPA and reducing LPSC from ARR in the form of Non-Tariff Income is in turn returning LPSC back to the defaulting Respondent No. 2 from whom it is received. This defeats the whole purpose of LPSC as a deterrent to ensure timely payments to the Appellant.
- e) The outstanding amount payable by Respondent No. 2 as on 31.07.2015 was Rs. 8564 Cr. and the same is subject to LPSC which keeps on increasing due to non-payment. This LPSC is being treated as asset in the hands of the Appellant and on top of it the State Commission has factored additionally carrying cost for adjustment. This has led to cascading impact on the Appellant.
- f) The State Commission has erred in considering LPSC for the years 2010-11 to 2012-13 for reduction of net revenue gap as per Tariff Regulations, 2011 which were applicable only from 01.04.2013. The true up for previous years were required to be dealt in accordance with Regulations, 2005 which do not provide for treating LPSC as Non-Tariff Income being deducted from ARR of the Appellant.

- g) The State Commission failed to appreciate that the concept of holding costs is based on opportunity costs for the funds retained by the Appellant which were required to be passed on as Non-Tariff Income. Similarly, LPSC is opportunity cost for funds retained by the Respondent No. 2 which were required to be paid to the Appellant. LPSC is reimbursement of the cost of opportunity lost due to non-payment by the Respondent in timely manner as per PPA and not income. The State Commission acted in the contrary manner.
- h) The Appellant is to be compensated by way of LPSC for cost of arranging funds. This principle has been settled by this Tribunal's Judgement dated 30.7.2010 in **Appeal No. 153 of 2009 in the case of North Delhi Power Ltd V Delhi Electricity Regulatory Commission.**
- i) Interest on Working Capital is allowed by the State Commission on normative basis. Once fixed they are not subjected to adjustments on the basis that the actual expenses are less. It has no bearing on the adverse financial impact on account of LPSC. This issue is already settled by this Tribunal vide Judgement dated 18.10.2012 in **Appeal No. 746 and 122 of 2011, Punjab State Power Corporation Ltd. vs. Punjab State Electricity Regulatory Commission**, Judgement dated 31.07.2009 in **Appeal no. 42 and 43 of 2008, Haryana Power Generation Corporation Ltd. vs. Haryana Electricity Regulatory Commission & Anr.** and Judgement dated 14.11.2006 in **Appeal No. 96 of 2005 (2007) ELR APTEL 828, NTPC Ltd. vs. Central Electricity Regulatory Commission.**

- j) The Appellant filed a Petition before the State Commission being Case No. 73 of 2013 regarding payment of outstanding bills/ recovery of dues from Respondent No. 2. In the Petition the Appellant had sought specific directives to Respondent No. 2 regarding recovery of dues from consumers of Respondent No. 2. The State Commission in this Petition has only resolved the specific order related issues and had not commented on the overall outstanding dues.
- k) The State Commission in its order dated 16.03.2015 related to true up of Financial Year 2012 merely stated that it shall take a view regarding treatment of revenue from surcharge from previous years till 2012-13 in the mid-term review of second control period. Accordingly there was no final decision on the issue.
10. The learned counsel for the Respondent No.1 has made following arguments/submissions on the issues raised in the present Appeal for our consideration:
- a) LPSC is a commercial/contractual issue between the Appellant and the Respondent No. 2. The cost of arranging funds are compensated by LPSC and the same is to be considered as Non-Tariff Income.
- b) The State Commission has acted in accordance with Tariff Regulations, 2011 which specifies that the interest on delayed or deferred payment of bills is to be considered as Non-Tariff Income. These Regulations do not mention about the reduction of ARR by net surplus or net income. The non-recovery of tariff approved by

the State Commission does not entitle the Appellant for claiming financial difficulties unless relief is sought through proper means under the Statute. The Appellant has not filed any petition with the State Commission for non-payment of dues by the Respondent No.2.

- c) The contentions of the Appellant regarding arranging additional funds by additional borrowings due to delayed payments by the Respondent No. 2 are incorrect as the actual Interest on Working Capital (IWC) is lower than the IWC allowed on normative basis. It is the responsibility of the Appellant to recover the dues from the Respondent No.2.
- d) The order dated 16.03.2015 in Petition No. 122 of 2014 of the Appellant, the State Commission has held that it shall take a view regarding treatment of revenue from LPSC for previous years till 2012-13 in mid-term review of second control period for 2013-14 to 2015-16 as the reconciliation of LPSC between the Appellant and the Respondent No. 2 was pending. This order of the State Commission has achieved finality and there is no error on part of the State Commission.
- e) This Tribunal in Appeal No. 173 of 2009 provides for carrying cost on deferred legitimate recoveries. In similar way holding cost applicable on LPSC needs to be adjusted in ARR. The Judgement of this Tribunal in appeal no. 153 of 2009 does not apply to this case as it held that rebate earned by discom over and above 1% does not form part of Non-Tariff Income. In the order dated 16.03.2015 of the State Commission it has been held that LPSC was required to be

crystallised between Appellant and Respondent No. 2. Therefore, the findings of this Tribunal in appeal no. 153 of 2009 does not apply to the present case.

- f) The Tariff Regulations, 2005 do not specify non-tariff income for reduction in ARR of the generation business. Since the State Commission has been reducing non-tariff income from the ARR for all the years, the same is justified in doing so. This Tribunal has also ruled on the Appellant's appeal itself that non-tariff income should be reduced from ARR so long as costs involved for earning such non-tariff income are passed through.
- g) The Tariff Regulations, 2005 and 2011 provide for sharing of efficiency gains and losses based on normative vs. actual IWC as well as performance parameters. The Appellant is contending that only losses to be shared and not the gains.
- h) The Appellant's contention that holding cost should not be considered as it has not received the amounts. This contention has no bearing as all accounts are considered on accrual basis.
- i) The composition of non-tariff income under Tariff Regulations, 2005 and Tariff Regulations, 2011 is similar. The State Commission has treated LPSC as non-tariff income in respect of other utilities as well. The State Commission has been considering the Non-Tariff Income of the Appellant and other generators for previous periods based on the Tariff Regulations, 2005. The treatment of LPSC as non-tariff income has been consistently followed by the State Commission.

j) The reliance of the Appellant on this Tribunal's Judgement in appeal no. 153 of 2009 is misplaced which was passed on specific regulations of Delhi Commission. The Judgement in Appeal No. 153 of 2009 is so explained and distinguished in the subsequent Tribunal's Judgement in appeal No. 180 of 2013 in case of distribution licensee of Uttarakhand. This position of the State Commission has been further settled by this Tribunal's Judgement dated 03.06.2016 in appeal nos. 244 and 246 of 2015.

11. After having a careful examination of all the aspects brought before us on the issues raised in Appeal and submissions made by the Appellant and the Respondents for our consideration, our observations are as follows:-

a. The present case pertains to decision of the State Commission vide its Impugned Order regarding consideration of LPSC as a part of Non-Tariff Income and deduction of the same from the ARR. Deduction of LPSC for the period 2010-11 to 2012-13 & its carrying cost from ARR although there was no provision in Regulations, 2005 which were applicable for that period.

b. On Question No. 7 (b) i.e. Whether the State Commission is correct in considering the Late Payment Surcharge pertaining to years 2010-11 to 2012-13 as Non-Tariff Income as per Regulations, 2011 when the said years were continued to be governed by Tariff Regulations, 2005 and the said Tariff Regulations, 2005 did not provide for treatment of delayed payment surcharge as Non-Tariff Income?, we decide as follows:

- i. Let us first examine the relevant provisions contained in the State Commission's Regulations, 2005. The Tariff Regulations, 2005 define Non-Tariff Income as below:

"2 Definitions

2.1 In these Regulations unless the context otherwise requires:

.....

.....

(zg) "Non-Tariff Income" means income relating to the Licensed Business other than from tariff, excluding any income from Other Business and, in case of the Retail Supply Business of a Distribution Licensee, excluding income from wheeling and receipts on account of cross-subsidy surcharge and additional surcharge on charges of wheeling;"

This means that Non-Tariff Income is not defined for Generation Business which is a delicensed activity under Section 7 of the Electricity Act, 2003. Further, the Non-Tariff Income is also detailed out in the said Regulations under Part F, Part G and Part H under the headings of Transmission, Wheeling and Distribution Business respectively.

It is clear that there is no provision of Non-Tariff Income deduction from ARR of the generation business. Thus, as per Tariff Regulations, 2005, LPSC, as Non-Tariff Income is not to be considered for ARR of the Appellant.

- ii. The Non-Tariff Income in the State Commission’s Tariff Regulations, 2011 is defined as below:

“2.1(1) (42) Non-Tariff Income” means income relating to the regulated business other than from tariff, excluding any income from Other Business and, in case of the Retail Supply Business of a Distribution Licensee, excluding income from wheeling and receipts on account of cross-subsidy surcharge and additional surcharge on charges of wheeling;”

Further the Non-Tariff Income in the Section related to Generation Business is defined as below:

“43.1 The amount of non tariff income relating to the Generation Business as approved by the Commission shall be deducted from the Annual Fixed Cost in determining the Annual Fixed Cost of the Generation Company:

Provided that the Generation Company shall submit full details of its forecast of non tariff income to the Commission in such form as may be stipulated by the Commission from time to time. The indicative list of various heads to be considered for non tariff income shall be as under:

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.....

- e) **Interest on delayed or deferred payment on bills;**
- f) *Interest on advances to suppliers/contractors;*
- g) *Rental from staff quarters;*
- h) *Rental from contractors;*
- i) *Income from hire charges from contractors and others;*

- j) *Income from advertisements, etc.;*
- k) *Any other non tariff income”*

From the above, it is clear that the Non-Tariff Income includes interest on delayed or deferred payment of bills which is to be reduced while considering ARR of the Appellant.

- iii. The applicability of the Tariff Regulations, 2011 has been decided by the State Commission in its order dated 23.08.2011 in Case No. 44 of 2011 as below:

“In light of the above, the Commission is of the view that it has become necessary to invoke the proviso to Regulation 4.1 of MYT Regulations, 2011 in order to exempt the determination of tariff of the Petitioner under the Multi-Year Tariff framework till March 31, 2013 (i.e., for a period of 2 years). The said exemption is hereby granted. The Commission is also empowered under Regulation 100 of the MYT Regulations, 2011 to remove any difficulty arising in giving effect to the provisions of MYT Regulations 2011.”

On 21.10.2011, the State Commission came out with first amendment to Tariff Regulations, 2011. The following is amendment is made to Regulation 4.1:

.....
.....

“Provided further that in case the determination of ARR and /or tariff of a Generating Company or Transmission Licensee or Distribution Licensee or category of Transmission Licensee or Distribution Licensee is exempted for a particular period from the Multi-Year

Tariff framework under the above proviso, then in all such cases, Annual Petitions for approval of ARR and tariff shall be filed during the period of exemption, in accordance with the MERC (Terms and Conditions of Tariff) Regulations, 2005.”

Accordingly, the Tariff Regulations, 2005 are applicable to the Appellant till 31.3.2013.

- iv. However, it is observed that under different orders of the Appellant and other generators under the jurisdiction of the State Commission, the State Commission while approving/truing up their tariff deducted Non-Tariff Income from their ARRs under Tariff Regulations, 2005. The State Commission vide order dated 25.04.2007 in Case No. 68 of 2006, while approving the Appellant's ARR for 2007-08 to 2009-10 and determination of tariff for 2007-08 deducted provisionally Non-Tariff Income of the Appellant equivalent to actual Non-Tariff Income during 2005-06. The Appellant filed an Appeal No. 87 of 2007 against the said order with this Tribunal. In the Judgement dated 10.04.2008, this Tribunal has held as below:

“73.....However, if the income can not be reasonably linked to any cost item allowed by the Commission as part of the ARR, the same should not be adjusted against the ARR of the Appellant, in the absence of specific Regulations. In the original order the Commission did not adjust any such other income.

74. In the case before us, the Appellant has claimed that other revenue of Rs. 112 crore arising under various heads other

than from sale of electricity should not be considered while determining its ARR. These heads are broadly as under:

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.....

75. The appellant has not submitted any break-up of miscellaneous receipts of around Rs. 75 crore.
76. From the order dated 25 April 2007 (page 37-38, para 3.10) of the Commission, it is observed that the Commission adjusted 'other income' of Rs. 112.93 crore while determining the ARR for 2005-06, though in the earlier order the Commission did not adjust 'other income' while determining the ARR of the Appellant.
77. Keeping in view of our observations given above, we direct the Commission to look into the details of other incomes and decide the claim for truing up of other income in accordance with our views given above."

- v. Based on the above, the State Commission in its order dated 05.03.2010 in Case No. 16 of 2008 regarding petition for true up for 2005-06 to 2007-08 and provisional truing up of 2008-09 has dealt the issue of Non-Tariff Income based on this Tribunal's Judgement dated 10.04.2008. The State Commission has dealt head wise Non-Tariff Income details submitted by the Appellant and the State Commission has deducted the interest from consumers (Interest on delayed ore deferred payment of bills) while truing up of ARR for the years 2005-06 to 2007-08. While doing so the State Commission has held that the Appellant has not submitted any specific reason for not considering LPSC as a part of non-tariff income. Subsequently, the State Commission vide order dated 12.09.2010

in Case No. 102 of 2009 regarding truing up for 2008-09, annual performance review of 2009-10 and determination of tariff for 2010-11 has considered non-tariff income for 2009-10 & 2010-11 as provided by the Appellant while computing ARR.

In view of the above it can be concluded that the Appellant knowingly admitted the treatment of LPSC as non-tariff income to be deducted while deciding ARR. The above orders were also not challenged by the Appellant and they have achieved finality in the form of treatment of LPSC as non-tariff income.

- vi. The State Commission in its order dated 16.03.2015 in Petition No. 122 of 2014 of the Appellant, has held as below:

“4.5.13.3 In accordance with the contractual obligations of the PPA, MSPGCL is entitled to late payment surcharge on delayed payments. It shall be the responsibility of MSPGCL to enforce the conditions of its PPA with MSEDCL. The Commission is of the view that revenue from surcharge qualifies to be treated as revenue. However, in light of the observation of the Statutory Auditor and the on-going reconciliation of invoices between MSPGCL and MSEDCL, the Commission in this Order, has not considered the revenue from surcharge in the revenue side true up for FY 2012-13. MSPGCL is directed to apprise the Commission on the final outcome of the said reconciliation, in its Petition for mid-term review of the second Control Period for FY 2013-14 to FY 2015-16. The Commission, after scrutiny of the information submitted by MSPGCL, shall take a view regarding the treatment of revenue from surcharge for previous years till FY 2012-13 in the mid-term review

of the second Control Period for FY 2013-14 to FY 2015-16 for MSPGCL.”

It is clear from the above that the State Commission has held that revenue from surcharge qualifies to be treated as revenue. Based on the prevailing situations/ conditions as highlighted above the State Commission has held that it shall take a view regarding the treatment of revenue from surcharge for previous years till FY 2012-13 in the mid-term review of the second Control Period for FY 2013-14 to FY 2015-16 for MSPGCL. This order of the State Commission was not challenged by the Appellant and has achieved finality.

vii. In view of the above it is clear that the Tariff Regulations, 2005 were Applicable to the Appellant till 31.03.2013 and also there was no provision in Tariff Regulations, 2005 for deduction of LPSC as Non-Tariff Income from ARR. However, the Appellant has accepted the deduction of LPSC as Non-Tariff Income in previous orders which have achieved finality and as such the deduction of LPSC for the period from 2010-11 to 2012-13 from ARR in the Impugned Order by the State Commission is in order. The Impugned Order to that extent is upheld.

viii. This issue is decided against the Appellant.

c. On Question No. 7 (c) i.e. Whether the State Commission in considering late payment surcharge as non-tariff income is right in treating the entire amount of surcharge as income to be adjusted without considering all the financial adverse effect, including in the form of opportunity cost of non-availability of the amount?, we decide as below:

- i. The Appellant has submitted that considering late payment surcharge as non-tariff income to be adjusted in ARR should not be without considering all the financial adverse effect, including in the form of opportunity cost of non-availability of the amount which affects the Appellant adversely. The above is not compensated by the IWC which is normative.

- ii. The above issue is to be seen in light of the provisions made in the regulations issued by the State Commission. The various regulations are framed after consultative process with all the stakeholders. After examining the Tariff Regulations, 2011 or Tariff Regulations, 2005 and various orders of the State Commission discussed in this judgement regarding determination of tariff/ true up provides for treatment of LPSC as Non-Tariff Income. There is no provision in these regulations/orders regarding consideration of adverse financial impact while considering LPSC as Non-Tariff Income.

- iii. The Appellant has relied on the Judgement dated 30.07.2010 in **Appeal No. 153 of 2009 in the case of North Delhi Power Ltd V Delhi Electricity Regulatory Commission** of this Tribunal on the issue of allowing carrying cost on LPSC. On careful examination of the Judgement, it is found that the issue in Judgement dated 30.07.2010 is related to the base (LPSC amount or the whole delayed payment amount) on which carrying cost/ financing cost is to be calculated. As recorded in this Judgement, the MYT regulations of Delhi Electricity Regulatory Commission allow

financing cost associated with LPSC. The relevant para of the Judgement is produced below:

“17. *The above observation would make it clear that the State Commission has given a finding that the Appellant is entitled to the financing cost interest/financing cost associated with the delayed payment surcharge. It is not the case of the State Commission in the impugned order that the MYT Regulations do not provide the financing cost associated with the delayed payment surcharge. The question whether the financing cost to be calculated in respect of the entire outstanding dues, namely the principal amount, has not been considered. On the other hand, the State Commission has limited the financing cost to the late payment surcharge amount alone.*”

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24. *It is not the case of the Appellant that the late payment surcharge should be treated as non-tariff income and should be retained by the Appellant. The Appellant is only praying that the financing cost is involved in earning late payment surcharge and as such the Appellant is entitled for compensation to incur such additional financing cost. Therefore, the financing cost of outstanding dues, i.e. the entire principal amount, should be allowed and it should not be limited to late payment surcharge amount alone.*”

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25..... *Therefore, we deem it appropriate to direct the State Commission to rectify its computation of financing cost relating to the late payment surcharge and consequently reduce the amount of non-tariff income considered by the State Commission as available for the tariff determination for the FY 2007-08 at the prevalent market lending rates. Accordingly ordered.*”

In the present case there is no such provision in Tariff Regulations, 2005 or Tariff Regulations, 2011 of the State Commission. Thus this Judgement is not applicable to the present case.

- iv. The Appellant has also admitted that the Judgement dated 18.05.2015 of this Tribunal in appeal No. 180 of 2013 in case of distribution licensee of Uttarakhand relied by the State Commission is distinguishable from the present case and is not applicable to it. The position of the State Commission has been further settled by this Tribunal's Judgement dated 03.06.2016 in appeal nos. 244 and 246 in 2015. The other Judgements of this Tribunal quoted by the Appellant viz. Judgement dated 02.03.2015 in Appeal Nos. 177 & 178 of 2012, Judgement dated 31.07.2009 in Appeal Nos. 42 & 43 of 2008 and Judgement dated 14.11.2006 in Appeal No. 96 of 2005 & IA No. 117 of 2006 in Appeal No. 94 of 2005 do not apply to the present case.
- v. The Appellant has also not raised the issue of adverse financial impact on account of treating LPSC as Non-Tariff Income, before the State Commission while making the submissions when the State Commission was applying the findings of this Tribunal's Judgement dated 10.04.2008 in Appeal No. 87 of 2007. The subsequent orders of the State Commission were also not challenged by the Appellant. Thus the treatment of LPSC as Non-Tariff Income by the State Commission for the period upto 2012-13 is valid. As such the issue raised by the Appellant is devoid of merits.
- vi. This issue is decided against the Appellant.

- d. **On Question No. 7 (a) i.e. Whether the State Commission is right in considering the Late Payment Surcharge amount with holding costs as Non-Tariff Income in an absolute manner without considering the corresponding adverse financial impact to the Appellant?, we decide as below:**
- i. Based on the facts and circumstances of the present case and having decided above as treatment of LPSC as Non-Tariff Income, now we deal with the applicability of holding costs on LPSC as Non-Tariff Income.
- ii. The State Commission allows carrying costs to the Appellant on tariff and other charges and has accordingly also considered holding costs on LPSC while considering it as Non-Tariff Income. The Respondent No. 1 has contested that this Tribunal's Judgement dated 15.02.2011 in **Appeal no. 173 of 2009 Tata Power Company Ltd. Vs Maharashtra State Electricity Regulatory Commission** provides carrying cost on deferred legitimate recoveries. On similar lines any excess amount needs to be adjusted with holding cost.

This Tribunal in the said Judgement held as below:

"42.....

.....

However, we would like to add that the Appellant is entitled to carrying cost on his claim of legitimate expenditure if the expenditure is:

(a) accepted but recovery is deferred, e.g. interest on

regulatory assets;

(b) claim not approved within a reasonable time; and

(c) disallowed by the State Commission but subsequently allowed by the superior authority.

43. Summary of Our Findings

(1) *Carrying cost is a legitimate expense. Therefore, recovery of such carrying cost is legitimate expenditure of the distribution companies. The carrying cost is allowed based on the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow arranged by the Distribution Company from lenders/promoters/accruals is to be paid by way of carrying cost. In this case, the Appellant, in fact, had prayed for allowing the legitimate expenditure including carrying cost. Therefore, the Appellant is entitled to carrying cost.”*

- iii. We are in agreement with the argument of the State Commission that when carrying costs on legitimate recoveries is allowed then on similar lines the excess amounts need to be adjusted with holding cost.
- iv. In view of the above the actions of the State Commission i.e. considering LPSC and its holding cost as a part of non-tariff income is justified and the Impugned Order of the State Commission is upheld.
- v. Accordingly this issue is also decided against the Appellant.

ORDER

We are of the considered opinion that the issues raised in the present appeal have no merit as discussed above. The Appeal is hereby dismissed.

The Impugned Order passed by the State Commission is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **18th day of April, 2017.**

(I.J. Kapoor)
Technical Member

✓

(Mrs. Justice Ranjana P. Desai)
Chairperson

REPORTABLE/NON-REPORTABLE

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