

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

Appeal No.242 of 2016 & IA No. 522 of 2016

Dated: 11th May, 2017

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

In the matter of :-

Jaigad Power Transco Ltd. (JPTL)
JSW Centre, Bandra Kurla Complex
Bandra (East)
Mumbai-400 051

... Appellant

Versus

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

...Respondent

Counsel for the Appellant(s): Mr. Aman Anand
Mr. Manpreet Lamba
Mr. Aman Dixit

Counsel for the Respondent(s): Mr. Buddy A Ranganadhan
Mr. D V Raghu Vamsy
Mr. Raunak Jain
Ms. Aditi Sharma

JUDGMENT

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

1. The present Appeal is being filed by M/s Jaigad Power Transco Ltd. (hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 challenging the Order dated 27.06.2016 (“**Impugned Order**”) passed by the Maharashtra Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”), in Case No. 12 of 2016, for Truing up of Aggregate Revenue Requirement (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 present Appeal is concerning about the consideration of Delayed Payment Charges (DPC) as a part Non-Tariff Income (NTI) of the Appellant while provisionally truing up the ARR for FY 2015-16.
2. The Appellant, M/s Jaigad Power Transco Ltd., a Transmission Licensee is a Joint Venture Company (JVC) between JSW Energy Ltd. (JSWEL) and Maharashtra State Electricity Transmission Company Ltd. (MSETCL), set up for the purpose of developing, operating and maintaining a transmission system, consisting of two transmission lines along with associated equipment and terminal bays at MSETCL’s New Koyana and Karad Sub-Stations.
3. The 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. Brief of Issues raised in the present Appeal:

- a) The State Commission on 04.2.2011 notified the Maharashtra Electricity Regulatory Commission's (Multi Year Tariff) Regulations, 2011 (herein referred as Tariff Regulations, 2011). These Regulations are applicable for the control period FY 2011-12 to FY 2015-16.
- b) The Appellant on 28.11.2014 filed a petition in Case No. 208 of 2014 before the State Commission for true up of ARR for FY 2012-13 and FY 2013-14 and provisional true up of ARR for FY 2014-15 and revised estimate of ARR for FY 2015-16. The State Commission issued order on 26.6.2015 in this petition. In this order the State Commission considered DPC amount of Rs. 16.73 Cr. payable by STU to the Appellant as a part of NTI for FY 2015-16. The Appellant has filed Appeal No. 250 of 2015 before this Tribunal which is pending.
- c) The Appellant on 28.1.2016 filed a petition being Case No. 12 of 2016, before the State Commission for approval of true up or FY 2014-15, provisional true up of ARR for FY 2015-16 and estimates for the control period FY 2016-17 to FY 2019-20.
- d) The State Commission vide Order dated 27.06.2016 (Impugned Order) decided Case No. 12 of 2016. In this order the State

Commission has considered DPC amount of Rs. 20.22 Cr. as NTI for FY 2015-16. The amount of DPC for FY 2015-16 increased to 20.22 Cr. (provisional true up in Case No. 12 of 2016) from 16.73 Cr. (revised estimate of ARR in Case No. 208 of 2014).

- e) Aggrieved by the Impugned Order passed by the State Commission, the Appellant has preferred the present appeal on the issue of adjustment of DPC as NTI from ARR for FY 2015-16.

5. QUESTIONS OF LAW

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

- a. **Whether the State Commission was justified in including the DPC payable by the STU/ transmission system users to the Appellant in the Non-Tariff Income while conducting the provisional true up of ARR for FY 15-16, more so when admittedly no amount was realised from the STU during FY 15-16?**
- b. **Whether the State Commission has correctly interpreted and applied the MYT Regulations, while treating DPC as part of the Non-Tariff Income?**
6. 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.

7. The learned counsel for the Appellant has made following arguments/submissions for our consideration on the issues raised by it:
- a) The Regulation 62 of the Regulations, 2011 states that the amount of NTI related to transmission business shall be deducted from ARR while determining the annual transmission charges of the Transmission Licensee. The Appellant in the petition has submitted the details of NTI (Rs. 0.44 Cr under the head Income from contingency Reserve Investments for FY 2015-16) as per Regulation 36 of the Tariff Regulations, 2011.
 - b) The State Commission in the Impugned Order has erred in considering DPC payable by the STU to the Appellant as a part of NTI while approving provisional true up of ARR for FY 2015-16. Furthermore, the DPC has not been actually recovered by the Appellant during FY 2015-16.
 - c) The Tariff Regulations, 2011 allow Interest on Working capital (IWC) on normative basis for 45 days only while the tariff bill remain unpaid for a period of more than 6 months requiring infusion of additional working capital. This calls that DPC should not form part of NTI.
 - d) The Tariff Regulations, 2011 do not specify DPC as a part of NTI for Transmission and Distribution Business under Regulation 62.1 and 93.1 as done in the case of Generation Business under Regulation 43.1. Thus these Regulations in case of DPC treat Generation and Transmission/ Distribution Businesses separately.

- e) The State Commission in MYT Regulations, 2015 excluded DPC from being treated as NTI for all segments i.e. Generation, Transmission and Distribution Businesses. Thus the Impugned Order is arbitrary and lacks legal & commercial basis. Accordingly, DPC amount of Rs. 20.22 Cr should not be treated as NTI.
 - f) The State Commission has failed to appreciate and apply Regulations, 2011 and incorrectly included DPC in NTI of the Appellant. The State Commission also failed to devise any mechanism and / or pass appropriate directions to ensure recovery of DPC amount.
8. The learned counsel for the Respondent has made following arguments/submissions on the issues raised in the present Appeal for our consideration:
- a) The Tariff Regulations, 2011 provide for Late Payment Surcharge i.e. DPC. This is legitimate income for the Transmission Licensee and is entitled to recover in accordance with Regulations, 2011.
 - b) The State Commission has adopted an approach for treatment of DPC which is consistent with the approach adopted in the Mid Term performance Review Order dated 26.6.2015 in Case No. 208 of 2014 of the Appellant. The State Commission in the said order had reasoned out for considering DPC as a part of NTI as below:

“Commission’s Analysis

4.10.3 In its Order dated 12 December, 2014 in Case No. 151 of 2014 (Petition of Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) for waiver of Delayed Payment Charges (DPC)), the Commission has disallowed waiver of DPC on delayed payment of Transmission Charges to the State Transmission Utility (STU). Accordingly, as regards the inclusion of DPC in the Non-Tariff Income, the Commission has sought details of DPC to be recovered by each Transmission Licensee from the STU. From the details submitted by the STU, it is observed that a total of Rs. 16.73 Crore of DPC are to be recovered by JPTL from the Transmission System Users (TSUs) i.e. the Distribution Licensees. The Commission accordingly, considers Rs. 16.73 Crore as Non-Tariff Income to be recovered in FY 2015-16 over and above the projections of JPTL.

.....”

As the State Commission has not waived the DPC payable by the Distribution Licensee/ Transmission System Users to the STU, it has considered DPC as a part of NTI.

- c) As Recovery of Transmission charges is a commercial/contractual issue between the Appellant and the Transmission System Users, the Appellant should have made all efforts to ensure timely recovery of the same as per the Transmission Tariff Orders of the State Commission.
- d) The Appellant had made a case that DPC is not specified in Tariff Regulations, 2011 as a part of NTI for Transmission Licensee,

whereas it is expressly specified for Generating Companies. The State Commission has specified the indicative list of various heads to be considered for NTI for Generating Companies and such list is not specified for Transmission Licensees. These provisions cannot be interpreted to contend that DPC shall not be considered under NTI for Transmission Licensees. Since provisional true up of FY 2015-16 is carried out by the State Commission, it is deemed fit for considering DPC under NTI for FY 2015-16.

e) The comparison of MYT Regulations, 2015 with Regulations, 2011 by the Appellant is not justified as the applicability period of both regulations are different and the Impugned Order has been issued under the Tariff Regulations, 2011.

f) On the issue that the Appeal No. 250 of 2015 is still pending and the State Commission has erred in issuing order on similar issue, the State Commission has submitted that the Order dated 26.6.2015 has not been stayed by this Tribunal and the same is in force for implementation.

9. **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 considering DPC as a part of Non-Tariff Income of the Appellant while approving provisional true up of FY 2015-16 and deduction of the same from the ARR.

b. On Question No. 5 a. i.e. Whether the State Commission was justified in including the DPC payable by the STU/ transmission system users to the Appellant in the Non-Tariff Income while conducting the provisional true up of ARR for FY 15-16, more so when admittedly no amount was realised from the STU during FY 15-16? and on Question no. 5 b. i.e. Whether the State Commission has correctly interpreted and applied the MYT Regulations, while treating DPC as part of the Non-Tariff Income?, we decide as follows:

i. 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;"

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:

.....

.....

e) Interest on delayed or deferred payment on bills;

f) Interest on advances to suppliers/contractors;

g) Rental from staff quarters;

.....

.....

k) Any other non tariff income”

The Non-Tariff Income in the Section related to Transmission Business is defined as below:

“62 Non-Tariff Income

62.1 The amount of non-tariff income relating to the Transmission Business as approved by the Commission shall be deducted from the aggregate revenue requirement in determining annual transmission charges of the Transmission Licensee:

Provided that the Transmission Licensee shall submit full details of its forecast of non-tariff income to the Commission

along with its application for determination of aggregate revenue requirement.”

From the above, it can be seen that the State Commission has in general defined NTI at 2.1(1) 42 of Regulations, 2011 as income related to regulated business other than tariff with some specific exclusions like income from other business, wheeling charges and cross-subsidy surcharge/ additional surcharge for on wheeling charges for discoms.

The definition of NTI under Generation Business and Transmission Business is similar except that the indicative list of income to be considered under NTI is given under Generation Business which includes interest on delayed or deferred payment of bills i.e. DPC.

The DPC is arising out of from the following provisions of the Regulations, 2011:

“68.3 All TSUs shall ensure timely payment of Transmission Tariff to STU so as to enable STU to make timely settlement of claims raised by Transmission Licensees.

68.4 Where there is delay in payment by any TSU, late payment surcharge at the rate of 1.25% per month or part thereof shall be applicable.”

Further, the definitions at Regulation 43.1 and 62.1 make it clear that amount of NTI after its prudence check needs to be approved by the Commission. Although there is no specific reference to DPC as non-tariff income in the definition of NTI under clause 62.1, the

State Commission is empowered to approve DPC income as NTI under the said clause as it deemed fit. Moreover, this is important for the State Commission to have harmony in various provisions of the said regulations.

ii. The State Commission in the Impugned Order held as below:

“3.10 Non-Tariff Income

JPTL’s Submission

3.10.1 Income has been projected from the amount apportioned toward Contingency Reserves as per Regulation 36 of the MYT Regulations, 2011. The return on such investment has been projected at 8.29%, i.e. the return on 10-year Government Securities.

3.10.2 In the MTR Order, the Commission had approved DPC of Rs. 16.73 Crore which is yet to be received from the Transmission System Users (TSUs) as part of Non-Tariff Income. However, since the amount has not been recovered, JPTL has not included DPC as part of Non-Tariff Income.

3.10.3 The Non-Tariff Income as submitted by JPTL is as given in the following Table:

Table 46: Non-Tariff Income for FY 2015-16, as submitted by JPTL (Rs. Crore)

<i>Particulars</i>	<i>MTR Order</i>	<i>FY 2015-16 (H1 Actual)</i>	<i>FY 2015-16 (H2 Projected)</i>	<i>FY 2015-16 (Estimated)</i>
<i>Non-Tariff Income</i>	<i>17.17</i>	<i>0.22</i>	<i>0.22</i>	<i>0.44</i>

Commission’s Analysis and Ruling

3.10.4 As sought, the State Transmission Utility (STU) provided, details of the DPC due to each Transmission Licensee from it as on 31 March, 2016. DPC of Rs. 20.22 Crore yet is to be recovered by JPTL from TSUs, i.e. mainly Distribution Licensees. As in the MTR Order, the Commission has considered this amount as Non-Tariff Income to be recovered in FY 2015-16 over and above the interest income on investment of the contribution to Contingency Reserves. The Non-Tariff Income approved by the Commission is shown in the following Table:

Table 47: Non-Tariff Income for FY 2015-16 approved by Commission (Rs. Crore)

Particulars	MTR Order	JPTL Petition	Approved in this Order
Income from Contingency Reserve Investments	0.44	0.44	0.44
Delay Payment surcharge	16.73	-	20.22
Total	17.17	0.44	20.66

From the above, it is seen that the State Commission has adopted the approach similar to that of MTR Order and considered Rs. 20.22 Cr as NTI.

Though in the present case, it has not been clearly spelt out that the DPC in to be treated as NTI but the State Commission is empowered to approve the NTI and in its due diligence considered DPC as NTI.

- iii. In view of our discussions on the Tariff Regulations, 2011 as above and submissions made by the State Commission, we are of the considered opinion that there is no infirmity in the State

Commission's decision in considering DPC as NTI and deducting the same from the ARR of the Appellant. The State Commission has correctly interpreted and applied the Regulations, 2011 in this regard.

- iv. Further, the Appellant has claimed that DPC amount was not realised from the STU during FY 2015-16. In response to this the State Commission has submitted that as provisional true up for FY 2015-16 is undertaken under Regulations, 2011, the State Commission deemed it appropriate to consider DPC under NTI for FY 2015-16. Further, the ARR exercise is based on accrual basis. We are in agreement with the State Commission's view regarding treatment of the DPC during FY 2015-16.
- v. The Appellant had submitted that the MYT Regulations, 2015 notified by the State Commission do not include the DPC as a part of NTI. The Appellant had also quoted the judgement of Hon'ble Supreme Court in case (2008) 9 SCC 622 Commissioner of Income Tax I, Ahmedabad V. Gold Coin Health Food Pvt. Ltd. in its support wherein it was opined that "It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole." This judgment is not applicable in the present case as the present Appeal deals with the Tariff Regulations 2011 and the subsequent MYT Regulations 2015 are for a different control period.

On perusal of the provisions of the Tariff Regulations, 2015 it is clear that the applicability of these regulations is from 1.4.2016 to 31.3.2020. The applicability of the Tariff Regulations, 2011 was from 1.4.2012 to 31.3.2016. It is clear that the said regulations were/are applicable to different control periods of time as defined in them. These regulations were also framed after due consultative process and regulations evolve over a period of time based on the various circumstances / issues prevalent at that point of time. Accordingly, in our considered opinion the provisions of the Tariff Regulations, 2015 cannot be applied retrospectively and the judgement of the Hon'ble Supreme Court quoted does not apply to this case.

- vi. The Appellant has also quoted the judgement of the Hon'ble Supreme Court in 1990 (2) SCC 134 Pushpa Devi Vs. Mikhi Ram in support of its arguments on "unless the context otherwise requires" in Clause 2.1 of the Tariff Regulations, 2011. In light of earlier observation, this judgement does not find any relevance in the present case.
- vii. The Appellant has also submitted that the judgement dated 18.4.2017 of this Tribunal in Appeal No. 199 of 2015 does not apply to it as it was in reference to the Generating Company where the definition of NTI includes DPC. In view of our discussions at 9 b above, this argument does not survive.
- viii. Hence this issue is 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 dated 27.06.2016 passed by the State Commission is hereby upheld. In view of above, I.A. No. 522 of 2016 does not survive and is disposed of as such.

No order as to costs.

Pronounced in the Open Court on this **11th day of May, 2017.**

(I.J. Kapoor)
Technical Member

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(Mrs. Justice Ranjana P. Desai)
Chairperson

REPORTABLE/NON-REPORTABLE

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