

**Appellate Tribunal for Electricity**  
**(Appellate Jurisdiction)**

**APPEAL No.32 of 2012**

**Dated: 03<sup>rd</sup> July, 2013**

**Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON**  
**HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

**In the Matter of:**

**Torrent Energy Limited.**

**Torrent House,**

**Off: Ashram Road,**

**Ahmedabad-380 009**

**...Appellant**

**Versus**

**Gujarat Electricity Regulatory Commission**

**1<sup>st</sup> Floor, Neptune Tower,**

**Opp-Nehru Bridge, Ashram Road,**

**Ahmedabad-380 009**

**..... Respondent**

Counsel for the Appellant(s) : Ms. Deepa Chawan,  
Mr. H.S. Jaggi  
Mr. Alok Shukla  
Mr. Samir Shah  
Mr. Hardik Luthra

Counsel for the Respondent(s): Mr. M G Ramachandran,  
Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Ms. Swagatika

## J U D G M E N T

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,  
CHAIRPERSON

1. Torrent Energy Limited is the Appellant herein.
2. In this Appeal, the impugned Multi Year Tariff Order passed by the Gujarat State Commission dated 12.12.2011 has been challenged.
3. The short facts are as follows:
  - (a) The Appellant, Torrent Energy Limited is a Distribution Licensee in the Special Economic Zone Area (SEZ AREA). Dahej SEZ limited is a Special Purpose Vehicle floated jointly by the Gujarat Industrial Development Corporation and Oil and Natural Gas Corporation.
  - (b) On 20.12.2006, the Dahez SEZ Limited has been notified by the Ministry of Commerce and Industry, Government of India as a Multi Product SEZ.
  - (c) The Government of Gujarat gave in principle approval to designate the Appellant, Torrent Energy Limited as the co-developer of Dahej SEZ for the purpose of establishing 1500 MW Generation and Distribution facilities in SEZ area.

(d) The State Commission framed the Multi Year Tariff Regulations, 2007 which came into force on 20.12.2007.

(e) On 13.2.2008, the Torrent Power Limited and others promoted the Appellant, the Torrent Energy Limited as a Special Purpose Vehicle for carrying out its obligations related to generation and distribution of power in the SEZ area.

(f) On 13.5.2008, the Dahej SEZ Limited acknowledged and accepted the Torrent Energy Limited, the Appellant as the co-developer.

(g) Accordingly, the Appellant entered into a Co-Developer Agreement with Dahej SEZ Limited on 2.8.2008.

(h) On 17.11.2009, the Distribution License was issued to the Appellant.

(i) The Appellant on 22.1.2010, filed its first Multi Year Tariff Petition before the State Commission for the control period Financial Year 2008-09 to 2010-11.

(j) The Appellant on 4.4.2010, started commercial operations and it was in the process of establishing distribution network for power distribution to various SEZ units.

(k) The Appellant was also in the process of implementing power plant at Dahej.

(l) The Gujarat State Commission, through the letter dated 26.5.2010, directed the Appellant to charge DGVCL tariff to the consumers of the Appellant in Dahej SEZ area pending further action.

(m) On 12.11.2010, the State Commission directed the Appellant to file the MYT Petition for the next Control period i.e. Financial Year 2011-12 to 2015-16. Accordingly, on 14.7.2011, the Appellant submitted its MYT Petition for (i) Truing Up for Year 2010-11 (ii) Determination of Aggregate Revenue Requirements for MYT period for the year 2011-12 to 2015-16 and (iii) Retail Supply Tariff for the Financial year 2011-12.

(n) The said Petition was admitted by the State Commission on 2.8.2011.

(o) Public notice was issued on 13.8.2011 inviting objections and suggestions from the stake holders with regard to Petition filed by the Appellant before the State Commission. Accordingly, the objections were filed and received by the State Commission.

(p) On 18.12.2011, public hearing was held. After observing all the formalities, the State Commission by the impugned order dated 12.12.2011, determined the

truing-up for the year 2010-11, Aggregate Revenue Requirements for the MYT Period from 2011-12 to 2015-2016 and Retail Supply Tariff for the year 2011-12.

- (q) In this impugned order, the State Commission
- (i) disapproved the portion of legitimate power purchase cost claimed by the Appellant under 'Take or Pay Clause';
  - (ii) denied the O&M expenses claimed by the Appellant for the MYT period;
  - (iii) Disallowed the income tax for the MYT Control Period based on actual tax paid for the financial year 2010-11 and;
  - (iv) Specified the wheeling charges.
- (r) Aggrieved over this impugned order, the Appellant, Torrent Energy Limited has filed this Appeal.

4. The learned Counsel for the Appellant while assailing the impugned order has raised the following grounds:

- (a) The portion of the power purchase cost claimed by the Appellant on account of 'Take or Pay clause' which is a clause generally and regularly incorporated

in the power purchase agreement, has been wrongly disapproved.

(b) Computation of operation and maintenance expenses for the MYT period 2011-12 to 2015-16 by ignoring the relevant statutory Regulations is erroneous.

(c) The State Commission has wrongly disallowed amount of income tax for all these years of the MYT period namely five years merely because the Appellant has not paid any income tax for the Financial Year 2010-11 which resulted in the reduction in the ARR.

(d) The specification of wheeling charges in the impugned order is erroneous as the relevant Regulations have not been followed.

5. On these four issues elaborate arguments were advanced by the learned Counsel for the Appellant.
6. The learned Counsel for the State Commission in reply, made submissions in detail justifying the findings given in the impugned order of the State Commission on these issues.
7. In the light of the rival contentions of both the parties, the following questions would arise for consideration.

(a) Whether the State Commission was justified in denying the legitimate power purchase cost in terms of 'Take or Pay' clause which is the common contractual terms generally found in electricity industry?

(b) Whether the methodology adopted by the State Commission in determining the operation and maintenance expenses is in contravention of the provisions of the Electricity Act, the National Tariff Policy and the Statutory Regulations?

(c) Whether the State Commission was justified in disallowing any amount of income tax for the Multi Year Tariff Period of 5 years i.e. 2011-12 to 2015-16, just because the Appellant had not paid any tax for the Financial year 2010-11?

(d) Whether the State Commission was justified in determining the Wheeling Charges in Rs. Per unit basis instead of in Rs. per KW basis?

8. Now let us deal with each of the above issues.

9. The **First issue** is relating to disapproval of the portion of the power purchase cost claimed by the Appellant on account of 'Take or Pay clause'.

10. According to the Appellant, the State Commission has wrongly disallowed the liability of the Appellant in terms of

'Take or Pay clause' under the power purchase agreement executed by the Appellant with the Gujarat Urja Vikas Nigam Limited (Gujarat Urja) for the MYT period from the Financial Year 2011-12 to Financial Year 2015-16.

11. The Appellant has further contended that in spite of the fact that the power purchase agreement for the purchase of power from Gujarat Urja had been approved by the State Commission by its order dated 21.10.2011, which contained the 'Take or Pay clause', the State Commission has not allowed the liability towards the 'Take or Pay clause' obligation payable to Gujarat Urja. Further, the State Commission on 22.7.2011 in another case No.1090 of 2011 considered the take or pay clause in the PPA, its rational and factors governing the same.
12. It is further contended by the Appellant that purchase of power by the Appellant from 'Gujarat Urja' was only for the quantum of 10 MW out of the total quantum of 150 MW being procured by Torrent Power Limited, the sister concern of the Appellant and in terms of the Power Purchase Agreement, the tariff for the purchase of power by the Appellant from the 'Gujarat Urja' is Rs.4.35 per unit and any shortfall in the off-take of the electricity by the Appellant below 70% of the contracted quantum calculated on a monthly basis, would mandate the Appellant to compensate the 'Gujarat Urja' at Re.1 per unit for such short fall below

70% and as such the disallowance of this amount is not in accordance with the law.

13. On this issue, we have heard the learned Counsel for the State Commission.
14. Before dealing with this issue, let us refer to the relevant analysis and findings of the State Commission on this issue in the impugned order:

***“Commission’s Analysis***

*The TEL-D projected the RTC rate as per the recent bilateral arrangement with GUVNL for sourcing power. As discussed in the tariff order for TPL for the control period FY 2011-12 to FY 2015-16, the TPL has entered into an arrangement/agreement with GUVNL for supply of 140 MW with minimum off take of 70% at Rs.4.35 per unit on round the clock basis for the FY 2011-12, 2012-13 and 2013-14. The Commission considers reasonable to adopt the same rate of Rs.4.35 per unit for purchase of RTC power from GUVNL for Tel-D also for the years FY 2011-12, FY 2012-13 and FY 2013-14. From 2014-15 onwards, TEL will be purchasing power from D GEN subject to GERC approval.*

*The transmission charge is projected by TEL-D at 0.25, 0.18, 0.14/kWh for the years FY 2011-12, FY 2012-13 and FY 2013-14 respectively. The actual of transmission charges for FY 2010-11, as claimed by the petitioner was only Rs.0.15/kWh. In view of the above, the Commission considers it reasonable, to approve the transmission charges at Rs.0.15/kWh for FY 2011-12 & FY 2012-13 and for other year as projected by TEL-D.*

Based on the above analysis, the Commission approves the power purchase cost for the control period FY 2011-12 to FY 2015-16, as given in the table below:

Table 5.18: Details of power purchase cost approved by the Commission for the control period FY 2011-12 to FY 2015-16.

Sl.No.	Particular	Unit	FY	FY 2011-12	FY 2012-13	FY 2013-14	FY 2015-16
1.	Quantum of power to be purchased	MU	202.05	743.29	1342.12	1834.29	2273.87
2.	Basic Cost	Rs./kWh	4.35	4.35	4.35	*4.40	*3.92
3.	Transmission Charge	Rs./kWh	0.15	0.15	0.14	0.09	0.07
4.	Basic Cost	Rs.Crore	87.89	323.33	583.82	807.09	891.36
5.	Transmission Cost	Rs.Crore	3.03	11.15	18.79	16.51	15.92
6.	<b>Total Cost</b>	<b>Rs.Crore</b>	<b>90.92</b>	<b>334.48</b>	<b>602.61</b>	<b>823.60</b>	<b>907.28</b>

*\*Cost of DGEN power subject to approval of the Commission.*

Thus, the power purchase cost approved for the control period is as given in the table below:

Table 5.19: Approved power purchase cost for the Control Period FY 2011-12 to FY 2015-16

Particular	FY 2011-12	FY 2012-13	FY 2013-14	FY 2014-15	FY 2015-16
Total Quantity in MU	201.21	743.29	1342.12	1834.29	2273.87
<b>Total Cost in Rs.Crore</b>	90.92	334.48	602.61	823.60	907.28

*Any variation in the power purchase cost can be adjusted at the time of truing up. RPO Obligation shall be followed and the cost will be considered at the time of truing-up.*

15. Thus, the approved Power Purchase Cost has been referred to in the above Table in the impugned order.

- 16.** According to the Appellant, in view of the fact that the Power Purchase cost for the electricity procured from 'Gujarat Urja' being approved by the State Commission by its order dated 22.7.2011, and the PPA containing the 'Take or Pay Clause', the State Commission ought to have allowed the liability towards the 'Take or Pay' obligation payable by the Appellant.
- 17.** The above claim of the Appellant is refuted by the State Commission contending that the Appellant cannot be permitted to seek an advance ruling over the quantum of power being procured by the Appellant in future.
- 18.** In the impugned order, the State Commission has approved the Annual Revenue Requirement for the future period from 1.4.2011 to 31.3.2016. It has also approved the total power purchase cost for the quantum of electricity projected by the Appellant to be procured from Gujarat Urja and also from other sources. In fact, the actual tariff rate of Rs.4.35 per unit for the purchase of electricity from Gujarat Urja has been considered and accepted by the State Commission in the impugned order.
- 19.** According to the State Commission, the Appellant has neither in the tariff Petition nor in the proceedings leading to the passing of the impugned order, raised the issue of 'Take or Pay' liability and that, therefore, it would not be proper for

the State Commission to decide on the issue of quantum of 'Take or Pay' liability to the Appellant in advance.

- 20.** On the other hand, it has been submitted by the Appellant that this issue had in fact been raised, but the same had not been decided.
- 21.** We find from the petition filed by the Appellant before the State Commission that the Appellant indicated the quantum of power and total cost of power for the various years from 2011-12 to 2015-16. The Appellant also indicated that short-term and medium-term power is generally available on Round The Clock ('RTC') basis and, therefore, the cost of under utilisation of electricity due to lower off take results in higher cost per unit. However, the submissions do not show the cost of energy at variable cost and cost expected to be incurred for take or pay liability. For example, the energy requirements for 2011-12 and 2012-13 have been indicated as 201.33 MU and 745.83 MU. These average requirements are more than the 10 MW RTC power contracted by the Appellant with GUVNL at Rs.4.35/kWh with "Take or Pay" liability of Re.1/kWh for energy procured below 70% Load factor. Similar submissions have been made in respect of true up for FY 2010-11 where the Appellant claimed cost of procurement of 39.29 MU at Rs. 32.81 Crores i.e. at Rs.8.35/kWh

- 22.** We are not inclined to go into the question as to whether this issue had been raised before the State Commission or not. However, it is to be pointed out that very nature of the 'Take or Pay' liability sought for by the Appellant can be considered and adjudicated on merits only after the tariff period is over i.e. during the truing up proceedings after applying the prudence check. In other words, it would be possible for the State Commission to determine the quantum of electricity not purchased by the Appellant below 70% of the contracted quantum from Gujarat Urja only after the tariff period is over. This means that before the expiry of the one year period, the State Commission would not be able to decide as to the exact quantum of "Take or Pay" liability which was actually paid by the Appellant in the past to Gujarat Urja.
- 23.** As pointed out by the learned Counsel for the State Commission, if the State Commission is asked to decide on the issue at this stage, it would imply that the quantum of power purchase which is below 70% of the contracted quantum with Gujarat Urja has to be assessed and projected and for such shortfall instead of allowing the tariff rate of Rs.4.35 per unit, the quantum of Re.1 per unit has to be allowed towards "Take or Pay" liability which may be paid by the Appellant.

- 24.** According to the learned Counsel for the State Commission, those details were not furnished before the State Commission to decide the issue. When such being the case, it may not be possible for the State Commission to undertake this exercise that too at the stage of tariff order when the power procurement projection from Gujarat Urja has not been made. The very nature of the “Take or Pay” liability would imply that the said issue can be considered only post facto in the truing up exercise after verification of the actual quantum of the Power procured by the Appellant from the Gujarat Urja.
- 25.** It is contended by the Appellant since the Agreement for the power purchase from the Gujarat Urja by the Appellant had been approved by the State Commission by its order dated 22.7.2011 and the PPA contained the “Take or Pay” clause, the State Commission ought to have allowed the liability towards the ‘Take or Pay’ obligation payable by the Appellant to the Gujarat Urja.
- 26.** As mentioned above, the State Commission had clarified that the purchase of power by the Appellant from Gujarat Urja is for the quantum of 10 MW out of the total quantum of 150 MW for the period from 1.4.2011 to 31.3.2013. Therefore, the issue of ‘Take or Pay’ liability assuming that in future the Appellant will default in off take of electricity from Gujarat Urja, would not arise at present.

- 27.** The Appellant has contended that the principle of “Take or Pay” clause is also applicable to its short term power purchase contracts with its sister company Torrent SUGEN for the year 2010-11 and the claim for “Take or Pay” clause liability should be allowed in all cases whether or not the principle power purchase is approved by the State Commission.
- 28.** This contention is not tenable. In the present case, the State Commission has not approved the basic short term Power Purchase Agreement of the Appellant with Torrent SUGEN. Therefore, there cannot be any question of approving the “Take or Pay” clause liability of the same. It cannot be that the Appellant will enter into any contract or short term power purchase from its sister company and then contend that the same in terms of “Take or Pay” clause liability should be passed on to the consumers since the State Commission has approved another PPA with Gujarat Urja which contains a similar “Take or Pay” clause. In other words, these issues cannot be decided in principle and therefore apply to whichever power the Appellant purchases.
- 29.** In this case as mentioned above, the State Commission has not allowed or approved the short term power purchase of the Appellant from its sister company namely Torrent SUGEN.

- 30.** The State Commission has allowed the high power purchase cost of Rs.5.50 per unit for procurement of electricity from the Appellant's sister concern. Therefore, the Appellant cannot claim over and above contending that the "Take or Pay" liability to its sister concern has to be allowed.
- 31.** One more argument advanced by the Appellant is that the State Commission observed in the order dated 27.8.2012 that there was no provision to approve the short term power purchase and that therefore, the State Commission was bound to allow liability in terms of 'Take or Pay' clause.
- 32.** We are not able to accept this contention.
- 33.** In the order dated 27.8.2012, the State Commission was only concerned with the procurement of the power by the Appellant through Case 1 competitive bidding process on a long term basis. The State Commission after going through the Evaluation Committee Report which did not recommend the bid which has resulted in a levelised tariff of Rs.7.350 /kWh rejected the power procurement. This was not a proceeding concerning the short term power purchase being approved by the State Commission.

**34.** Let us now refer to the observation of the State Commission on this aspect through its order dated 27.8.2012 which is as follows:

*“5.5 The Evaluation Committee has recommended not to accept the bid and to look for alternate supplier. We adopt the same. Accordingly, the bidding price received through competitive bidding is not approved. However, the petitioner has been granted distribution license for 25 years. Hence, they are directed to go in for long-term power procurement process to meet the future demand of the consumers.*

*5.6 The petitioner has submitted that they have made short-term arrangement for procurement of power from Sugan 1147.5 MW CCPP for 15 MW for the period of 18<sup>th</sup> march, 2010 to 31<sup>st</sup> March, 2013 for different quantities. The petitioner has prayed for approval of this procurement of power on short-term basis. This short term arrangement is not part of the present petition. Also, there is no provision in the Act or any Regulation regarding approval of short term power purchase, as this is a day to day activity of any distribution licensee. As such, we prefer not to make any observation on this issue.”*

**35.** Thus, it is clear that the State Commission had not given any prior approval to the short term power purchase by the Appellant. Therefore, there cannot be any question of approving the “Take or Pay” liability or any such clause stipulated by the Appellant in the said power purchase.

**36.** In view of the stand taken by the State Commission which in our view is valid, the State Commission is directed to consider the “Take or Pay” liability on the basis of the

audited data in the truing-up proceedings after prudence check. This issue is decided accordingly.

- 37.** The **Second Issue** relates to the disallowance of the operation and maintenance charges.
- 38.** The Appellant has challenged this disallowance on the ground that the State Commission has wrongly disallowed the Operation and Maintenance Charges of the Appellant for the Multi Year Tariff period by not correctly applying Regulation 85.4 and 98.6 of the Multi Year Tariff Regulations 2011.
- 39.** On the other hand, the learned Counsel for the State Commission contends that the Operation and Maintenance expenses have been correctly assessed and allowed by the State Commission based on the actual data for the previous year of the Appellant and based on the escalation as provided for in the Tariff Regulations of the State Commission.
- 40.** Let us now refer to the relevant Regulations dealing with the Operation and Maintenance expenses which are as under:

***85.4 Operation and Maintenance expenses:***

*a) The Operation and Maintenance expenses shall be derived on the basis of the average of the actual Operation and Maintenance expenses for the three (3) years ending March 31, 2010, subject to prudence check by the Commission.*

b) *The average of such operation and maintenance expenses shall be considered as operation and maintenance expenses for the financial year ended March 31, 2009 and shall be escalated at the escalation factor of 4% to arrive at operation and maintenance expenses for FY 2011-12.*

c) *The O&M expenses for each subsequent year will be determined by escalating the base expenses determined above for FY 2011-12, at the escalation factor of 5.72 % to arrive at permissible O&M expenses for each year of the Control Period:*

*Provided that in case, the Distribution Licensee has been in operation for less than three (3) years as on the date of effectiveness of these Regulations, the O&M Expenses shall be determined on case to case basis.*

.....

**98.6 Operation and Maintenance expenses:**

a) *The Operation and Maintenance expenses shall be derived on the basis of the average of the actual Operation and Maintenance expenses for the three (3) years ending March 31, 2010, subject to prudence check by the Commission.*

b) *The average of such operation and maintenance expenses shall be considered as operation and maintenance expenses for the financial year ended March 31, 2009 and shall be escalated at the escalation factor of 4% to arrive at operation and maintenance expenses for FY 2011-12.*

*c) The O&M expenses for each subsequent year will be determined by escalating the base expenses determined above for FY 2011-12, at the escalation factor of 5.72 % to arrive at permissible O&M expenses for each year of the Control Period:*

*Provided that in case, the Distribution Licensee has been in operation for less than three (3) years as on the date of effectiveness of these Regulations, the O&M Expenses shall be determined on case to case basis.*

**41.** On the strength of these Regulations. it is contended by the Appellant that the Operation and Maintenance expenses in the impugned order have been provided only for inflation and not for business growth and that in the absence of 3 years of operation by the Appellant, the Operation and Maintenance Expenses was to be allowed solely on the projection made by the Appellant.

**42.** Let us quote the relevant extract of the findings on this issue:

*“The Commission has examined the submission made by the utility. The TEL-D has furnished the actual O&M expenses during the year FY 2010-11 at Rs.2.36 Crore and projected these expenses for the control period by escalating 43.2% for FY 2011-12, 36.6% for 2012-13, 32.7% for 2013-14, 36.2% for 2014-15 and 21.4% for 2015-16. The projection is not in accordance with the Regulation 98.6 (MYT) Regulations, 2011 for the control period.*

*With reference to a query from the Commission, the TEL-D has submitted vide letter dated October, 13,*

2011 that the O&M expenses are in accordance with the provisions of Regulations 85.4 and 98.6 of the GERC (MYT) Regulations, 2011 and quoted the proviso:

*“Provided that in case, the distribution licensee has been in operation for less than three (3) years, as on the date of effectiveness of these Regulations, the O&M expenses shall be determined on case to case basis.”*

TELD has thus requested to approve the O&M expenses as projected.

As per the Regulation 98.6 of GERC (MYT) Regulations, 2011 the O&M expenses are to be derived on the basis of the average of the actual O&M expenses for the three (3) years ending March 31, 2010. In the case of TEL-D the utility has started commercial operation from 4<sup>th</sup> April, 2010. The utility has furnished the actual O&M expenses at Rs.2.36 Crore for FY 2010-11 which includes one time expense of Rs.1.32 Crores paid to GETCO for connectivity. The TEL-D has been in operation for less than 3 years as on the date of effectiveness of MYT Regulations. The utility has completed only one year of operation of Dahej SEZ. The Commission has obtained the O&M expenses (actual) incurred during the first half year of FY 2011-12 which are of the order of Rs.0.69 Crore. The Commission takes into consideration the actual O&M expenses incurred during the first half-year and determined the O&M expenses prorate at Rs.1.38 Crore for FY 2011-12. These O&M expenses are escalated at 5.72% in accordance with the Regulation 98.6 (C) of GERC (MYT) Regulations 2011 to arrive at the permissible O&M expenses for each year of the control period. The details are given in the table below:

*Table 5.21: O&M Cost approved for the control period FY 2011-12 to FY 2015-16*

*(Rs.Crore)*

<i>Particular</i>	<i>FY</i>	<i>FY</i>	<i>FY</i>	<i>FY</i>	<i>FY</i>
	<i>2011-12</i>	<i>2012-13</i>	<i>2013-14</i>	<i>2014-15</i>	<i>2015-16</i>
<i>O&amp;M Expenses</i>	<i>1.38</i>	<i>1.46</i>	<i>1.54</i>	<i>1.63</i>	<i>1.72</i>

*The Commission accordingly approves O&M Expenses as detailed in the above table for the control period.”*

**43.** While challenging the above findings, the learned Counsel for the Appellant submits that the Appellant has been in operation since 4.4.2010; the data for past 3 years are not available and considering the network and business growth, the Appellant has projected the Operation and Maintenance expenses in accordance with the proviso to the Regulations 85.4 of the MYT Regulations, 2011 and that therefore, the State Commission ought to have taken note of this aspect and approved it giving the due consideration to the new area.

**44.** We have considered this submission of the Appellant. The careful perusal of the proviso to Regulation 85.4 and 98.6 would make it clear that in case, the Distribution Licensee has been in existence for less than three years and it is not possible to determine the base figure for the year 2010-11, based upon the actual data of three years ending on

31.3.2010, the State Commission will consider the facts of the case to determine the Operation and Maintenance expenses to be allowed and it should not consider only the normative parameters.

**45.** In the present case, the distribution functions of the Appellant had begun only from 4.4.2010. The actual data available with the State Commission for the said year 2010-11 worked out to Rs.1.04 Crores after prudence check. In addition, an actual operation and maintenance expense of Rs.0.69 Crores for the first half of the year of the year 2011-12 was also available with the State Commission. This has been considered by the State Commission for arriving at the operation and maintenance cost at Rs.1.38 Crores for the FY 2011-12. The findings in the impugned order as referred to in the table 5.21 would clearly indicate that the State Commission has taken into account the actual expenses incurred by the Appellant in the first half of the year 2011-12 and considered the expenditure incurred during the previous year 2010-11 to arrive at the quantum of operation and maintenance expenses to be allowed for the Financial Year 2011-12.

**46.** The Appellant has submitted that the Appellant has commenced the operation in Dahej SEZ only during 2010-11 and the full infrastructure is yet to be developed in the SEZ area and industrial development is likely to take place

gradually. There is force in the argument of the Appellant that the O&M expenses approved by the State Commission take into consideration the inflationary increase in expenses on the O&M of the existing infrastructure but do not take into account the O&M expansion on the additional infrastructure to be set up during the control period to meet the growth in demand.

47. The Regulations specifically provide that where the distribution licensee has been in operation for less than three years, the O&M expenses shall be determined on case to case basis. In the present case, the State Commission did not have a complete data for 2011-12 and projected the O&M expenses for 2011-12 on the basis of the actual O&M expenses for first six months of the year, on pro-rata basis. The approved figures do not account for O&M expenses on the additional network to be set up in the second half of 2011-12 and in subsequent years of the Control Period.

48. The projection made by the Appellant involves an increase of Rs.43.12% for the Financial Year 2011-12 itself. The projection for subsequent years indicates that there was a further increase of about 30%.

**49.** We feel that from the information available before the State Commission, it was not possible to adopt the figures projected by the Appellant. Therefore, the O&M expenses for the Control Period have to be decided by the State Commission based on the actual expenses incurred by the Appellant, after prudence check in the true-up of accounts for Financial Years 2011-12 & 2012-13. The State Commission shall thereafter re-determine the O&M expenses for the FYs 2013-14 to 2015-16 taking into account actual expenses for the previous years and additional expenses on the additional infrastructure proposed during the period. Accordingly, directed.

**50. The next issue is Disallowance of the Income Tax.**

**51.** According to the Appellant, State Commission has not approved income tax provisionally as mandated in the Regulations on the ground that the Appellant has not paid any tax for the Financial Year 2010-11 and other SEZ has not claimed any tax for the MYT period. It is further contended by the Appellant that the State Commission has ignored the facts and clarifications given by the Appellant and made error in interpretation of the provisions of the MYT Regulations.

**52.** In reply to the above submissions made by the Appellant on this issue, the learned Counsel for the State Commission

has submitted that the State Commission in the impugned order has not stated that no income tax will be allowed to the Appellant for the control period but in fact, it has stated that as per the audited accounts of the Appellant for the previous year, no income tax had been paid and that the income tax not being applicable to SEZ area and there being no actual data available, the same has not been provisionally considered at the stage of the projection of the revenue requirements and this finding cannot be said to be wrong.

**53.** Let us refer to the relevant extract of the impugned order on this issue. The same is as follows:

**“5.12 Income Tax**

*The TEL-D has projected the income tax at Rs. 11.51 crore for the control period FY 2011-12 to FY 2015-16 as detailed in the table below:*

**Table 5.32: Income tax projected for the control period (Rs. crore)**

Particulars	(Rs. Crore)				
	FY 2011-12	FY 2012-13	FY 2013-14	FY 2014-15	FY 2015-16
Tax on Income	0.91	1.90	2.38	2.92	3.40

**Petitioners submission**

*The petitioner has submitted that tax on income is not applicable to TEL-D as per the SEZ Act, 2005. However MAT will be applicable on SEZ developers and unit holders as per the Union Budget for FY 2011-12. The MAT rate of 18.50% after considering the*

*surcharge and Education Cess works out to Rs. 20.007%.*

### **Commissions Analysis**

*The utility has claimed the income tax on ROE grossed up with MAT. The Regulation 42.1 of GERC (MYT) Regulations, 2011 specified that the Commission shall provisionally approve income tax for each year of the control period, if any, based on the actual income tax as per latest audited accounts available for the applicant, subject to prudence check. As per the audited accounts TEL-D has not paid any income tax for FY 2010-11. The Commission, therefore, does not consider any income tax projection for the control period. The other SEZ i.e MPSEZ has not claimed any income tax for the control period. The Commission will however take into consideration the actual income tax paid if any at the time of truing up under Regulation 22 of GERC (MYT) Regulations, 2011”.*

- 54.** According to the Appellant, the State Commission has not given proper interpretation of Regulation 42 and has ignored the amendment made with reference to the applicability of the income tax to the SEZ developers through its findings.
- 55.** According to the State Commission, it has followed the provisions of Tariff Regulations in letter and spirit.
- 56.** Let us see Regulations 42 which is as under:

#### **“42 Tax on income**

*42.1 The Commission in its MYT Order shall provisionally approve Income Tax payable for each*

*year of the Control Period, if any, based on the actual income tax paid as per latest Audited Accounts available for the applicant, subject to prudence check.*

*42.2 Variation between Income Tax actually paid and approved, if any, on the income stream of the regulated business of Generating Companies, Transmission Licensees and Distribution Licensees shall be reimbursed to/recovered from the Generating Companies, Transmission Licensees and Distribution Licensees, based on the documentary evidence submitted at the time of truing up of each year of the Control Period, subject to prudence check.*

*42.3 Under-recovery or over-recovery of any amount from the beneficiaries or the consumers on account of such tax having been passed on to them shall be adjusted every year on the basis of income-tax assessment under the Income Tax Act, 1961, as certified by the statutory auditors. The Generating Company, or the Transmission Licensee or Distribution Licensee, as the case may be, may include this variation in its truing up Petition:*

*Provided that tax on any income stream other than the core business shall not be a pass through component in tariff and tax on such other income shall be borne by the Generating Company or Transmission Licensee or the Distribution Licensee, as the case may be.”*

- 57.** The above Regulation would point out that at the stage of projection of the revenue requirements; the income tax has to be allowed provisionally based on the actual income tax paid as per the latest audited accounts of the licensee. In the present case, the latest audited accounts of the

Appellant for the Financial Year 2010-11 shows that no income tax had been paid by the Appellant.

- 58.** Under those circumstances, the State Commission as per the Tariff Regulations has not allowed any income tax provisionally for the control period. However, the State Commission has in the impugned order specifically observed that it would consider the actual income tax paid if any at the time of truing-up in terms of the Regulations 22 of the Multi Year Tariff Regulations of the State Commission. In view of the above statement assuring to consider the same at the time of truing-up in terms of Regulation 22, the State Commission is directed to take note of the actual income tax paid if any at that time of truing-up as observed in the impugned order and pass appropriate orders in accordance with the law. This issue is decided accordingly.
- 59.** The **last issue** is with reference to **the Wheeling Charges**.
- 60.** The Appellant has challenged the impugned order on the ground that the State Commission has not correctly determined the wheeling charges since the same has been determined at Rs. Per unit basis instead of Rs. per KW i.e. on Capacity Basis.
- 61.** According to the learned Counsel for the State Commission, the wheeling charges have been determined by the State

Commission as per the Open Access Regulations, 2011 and as such there is no infirmity.

62. Let us now refer to the finding of the State Commission on this issue:

### **“5.19.3 Wheeling Charges**

*The network of TEL is still developing and TEL has not provided the details of 33 kV, 11kV and LT network. In view of this, the Commission has computed the wheeling charges for the entire network without segregating into 33 kV, 11kV or LT voltage wise. TEL is directed to provide the details of 33 kV, 11 kV and LT network in the next tariff petition to work out the wheeling charges voltage wise. The wheeling charges for FY 2011-12 are given in the table below:*

**Table 5.46: Wheeling Charges for the entire network**

SL. No.	Particular	Units	Amount
1.	Total distribution costs (wheeling cost)	Rs.Crore	9.81
2.	Energy input at Distribution Level	MU	192.91
3.	Wheeling Charges	Rs./kWh	0.51

63. The learned Counsel for the State Commission on the basis of the above table has submitted that the State Commission has taken the total distribution cost relating to the wheeling of the Appellant and divided the same by the total energy input of the Distribution level to arrive at the distribution

charges per kWh for the Appellant and that the said cost got divided between the consumers of the Appellant and the Open Access consumers thereby ensuring the same wheeling charges for all the consumers.

64. It is also submitted by the learned Counsel for the State Commission that in terms of the Tariff Regulations and in order to effectively workout the wheeling charges on two part basis, the Appellant was required to provide necessary data including the requisite voltage level data to enable the State Commission to determine the wheeling charges but the Appellant did not provide the data as required for the determination of the wheeling charges on two part basis. This submission has been stoutly denied by the learned Counsel for the Appellant stating that the details for determining the wheeling charges as required by the Regulations have already been furnished in the petition itself and further particulars also have been given to the State Commission through Email dated 17.11.2011 but the same was not considered by the State Commission.

65. Let us see the relevant part of Intra-State Open Access Regulations which are as under:

***“23 Wheeling Charges***

.....

*Provided that the charges payable by a Distribution System User under this Chapter may comprise any*

*combination of fixed/demand charges, and variable charges, as may be stipulated by the Commission in such Order.*

*Provided that Wheeling charges shall be payable on the basis of scheduled energy.”*

*The MYT Tariff Regulations,2011 provide for as under :*

*“88. Determination of Wheeling charges*

*88.1 The Commission shall specify the wheeling charges of Distribution Business of the Distribution Licensee in the order passed under sub-section(3) of Section 64 of the Act.*

*Provided that the wheeling charges payable by the Distribution System user, other than retail consumers getting electricity supply from the same Distribution Licensee, may comprise any combination of fixed/demand charges, and variable charges as may be stipulated by the Commission in such order.”*

**66.** As per the Regulations, the State Commission is required to specify the wheeling charges in Rs. Per unit and fixed/demand charges in any combination of the wheeling cost from the wheeling consumers.

**67.** On this issue, this Tribunal has decided in the judgment in Appeal No.68 of 2009 reported in 2010 ELR (APTEL) 378 pronounced on 23.3.2010 in the case of Torrent Power Limited Vs Gujarat Electricity Regulatory Commission. The relevant observation is as follows:

***“Analysis and decision***

27. Gravamen of pleas of the Appellant is that whereas the GERC (Open Access in Intrastate Transmission and Distribution) Regulations require levying of wheeling charges in terms of capacity to be reserved in MW the Commission has determined the wheeling charges in terms of paise per unit. Here it is necessary to set out the Regulation 14(i) of the GERC Regulations:

*(i) Transmission/Distribution (Wheeling) Charges.*

*The charges for use of the system of the licensee for intra-state transmission or distribution except intervening transmission facilities shall be regulated as under, namely:*

*(i) The annual charges shall be determined by the Commission in accordance with the terms and conditions of tariff notified by the Commission from time to time and after deducting the adjustable revenue from the short-term users, these charges shall be shared by the long-term users;*

*(ii) (a) The charges payable by a short-term users shall be calculated in accordance with the following methodology:*

*ST RATE= 0.25X(TSC/Av CAP)/365 Where ST RATE is the rate for short-term open access user in Rs. Per MW per day.*

*“TSC” means the Annual Transmission/Distribution Charges of the transmission or distribution licensee for the previous financial year determined by the Commission.*

*“Av CAP” means the average capacity in MW served by the system.*

*28. The Appellant had also pleaded that in case the capacity is not utilized and payment is made in terms of units transmitted, the transmission/distribution line will not be utilized and there will be under-recovery which will have to be compensated by other consumers which is not the intention of Section 42(2)(3) of The Act which provides for non-discriminatory open access but not any preferential tariff or treatment at the cost of other retail consumers. In view of the Commission's own Regulations requiring wheeling charges payable on the basis of capacity reserved and not on the basis of paise per unit, we are inclined to agree with the contention of the Appellant. We order accordingly.*

- 68.** The very same judgment has been followed in yet another judgment in Appeal No.61 of 2010 reported in 2010 ELR (APTEL) 0628 dated 9.5.2011 in the case of Torrent Power Limited Vs Gujarat Electricity Distribution Company Ltd.
- 69.** In the above judgment the Tribunal followed the 2005 Regulations which were prevalent then which provided for wheeling charges based on the average capacity served by the system. However, the newly notified Regulations namely GERC (Terms and Conditions of Infra State Open Access) Regulations, 2011 provide for wheeling charges to comprise the combination of fixed/demand charges and variable charges as stipulated by the Commission in the order.
- 70.** Thus, in accordance with the statutory regulations, the State Commission is required to specify the wheeling charges in

Rs/unit and fixed/demand charges in any combination so as to ensure the recovery of the wheeling cost from the wheeling consumers and not to burden the other retail consumers in accordance with the provisions of the Electricity Act, 2003.

**71.** Thus, the principle of recovery of wheeling charges has already been laid down by this Tribunal and accepted by the State Commission in the Regulations. Therefore, it would be appropriate to direct the State Commission to determine the wheeling charges as a combination of fixed/demand charges in Rs. Per KW and variable charges in accordance with the regulatory provisions specifying the methodology to recover the wheeling charges. Accordingly directed.

**72.** The Appellant is also directed to co-operate with State Commission by furnishing required particulars to the State Commission to enable it to determine the wheeling charges in the light of the findings of this Tribunal and to pass an order in accordance with the law. Thus, this issue is decided in favour of the Appellant.

**73. Summary of Our Findings**

**i) The Appellant has not been able to establish its case for allowance of “Take or Pay” liability for procurement of power in the impugned order. However, the State Commission is directed to**

consider the “Take or Pay” liability on the basis of the audited data in the truing up proceedings after prudence check.

- ii) The O&M expenses approved by the State Commission take into consideration the inflationary increase in expenses on the operation & maintenance of the existing infrastructure but do not take into account the O&M expenses on the additional infrastructure to be set up during the Control Period to meet the growth in demand. The Regulations specifically provide that where the distribution licensee has been in operation for less than three years, the O&M expenses shall be determined on case to case basis. In the present case, the State Commission did not have a complete data for 2011-12 and projected the O&M expenses for 2011-12 on the basis of the actual O&M expenses for first six months of the year, on pro-rata basis. The approved figures do not account for O&M expenses on the additional network to be set up in the second half of 2011-12 and in subsequent years of the Control Period. The projection made by the Appellant involves an increase of Rs.43.12% for the Financial Year 2011-

**12 and for the subsequent years an increase of 30%.**

- iii) We feel that from the information available before the State Commission, it was not possible to accept the figures projected by the Appellant. Therefore, the O&M expenses for the Control Period have to be decided by the State Commission based on the actual expenses incurred by the Appellant, after prudence check in the true-up of accounts for Financial Years 2011-12 & 2012-13. The State Commission shall thereafter also re-determine the O&M expenses for the FYs 2013-14 to 2015-16 taking into account actual expenses for the previous years and additional expenses on the additional infrastructure proposed during the period. Accordingly, directed.**
- iv) The State Commission as per the Tariff Regulations has not allowed any income tax provisionally for the Control Period. The State Commission shall consider the actual income tax paid at the time of truing up and pass appropriate orders in accordance with the law.**
- v) The State Commission is directed to re-determine the wheeling charges as a combination of**

**fixed/demand charges in Rs. per KW and variable charges in accordance with the Regulations. The Appellant is directed to provide required particulars to the State Commission to enable it to determine the wheeling charges.**

- 74.** In view of the above, Appeal is partly allowed. The State Commission is directed to pass consequential orders at the earliest. No order as to costs.
- 75.** Pronounced on **03<sup>rd</sup>** day of **July,2013** in the open Court.

***(Rakesh Nath)***  
***Technical Member***

***(Justice M. Karpaga Vinayagam)***  
***Chairperson***

Dated: 03<sup>rd</sup> July, 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~