Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL NO.244 of 2013

Dated: 28th November, 2014

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

In the Matter of:
The Tata Power Company Limited (D)
Bombay House, Homi Mody Street, Fort
Mumbai – 400 001

..... Appellant(s)

Versus

Maharashtra Electricity Regulatory State Commission
World Trade Centre, Centre No. 1,
13th Floor, Cuffe Parade,
Mumbai – 400 005.

….. Respondent(s)

Counsel for the Appellant : Mr. Ramji Srinivasan, Sr. Adv.
Mr. Amit Kapur
Mr. Sakya Singha Chaudhuri
Mr. Sitesh Mukherjee
Mr. Anand Kr. Srivastava
Ms. Poonam Verma
Mr. Vishal Anand
Mr. Shantanu Singh
Ms. Prerna Priyadarshini
Mr. Jafar Alam
Ms. Kanika Chug
Mr. Aditya Mathur
Mr. Gaurav Dudeja

Counsel for the Respondent : Mr. Buddy A. Ranganadhan
Mr. Raunak Jain

J U D G M E NT

RAKESH NATH, TECHNICAL MEMBER

1. This Appeal has been filed by Tata Power Corporation Ltd. challenging the impugned order dated 28.06.2013 passed by the Maharashtra Electricity Regulatory Commission *(***"State** ***Commission")*** in case 179 of 2011 filed by the Appellant Tata Power seeking approval of the Aggregate Revenue Requirement (ARR) for FY 2011-12 as per Multi Year Tariff for the period from FY 2012-13 to FY 2015-16 for its Distribution Business on the following five issues:-

I. Wrongly Allowing income from gain/ loss on Foreign Exchange as a part of Non-tariff Income

II. Wrongful Computation of O&M Expenses

III. Determination of Cross Subsidy in contravention of Tariff Policy framed by the Central Government

IV. Wrongful Determination of Higher Wheeling Charges

V. Allowing Recovery of the Entire Regulatory Asset in the MYT Period as compared to the Appellant's Claim

2. On the above issues we have heard Mr. Ramji Srinivasan, Learned Senior Counsel and Mr. Amit Kapur, Learned Counsel for the Appellant and Mr. Buddy A. Ranganadhan, Learned Counsel for the State Commission. Keeping in view the contentions of the parties, the following questions would arise for our consideration:

(i) Whether the State Commission has erred in allowing income from gain/loss in foreign exchange as a part of non-tariff income?

ii) Whether the State Commission has erred in carrying out the true-up for O&M expenses for FY 2011-12 as per the MYT Regulations, 2005 instead of applying MYT Regulations, 2011?

(iii) Whether the State Commission has erred in determination of Cross Subsidy in contravention of Tariff Policy framed by the Central Government?

(iv) Whether the State Commission has erred in determination of wheeling charges?

(v) Whether the State Commission has erred in amortizing the Entire Regulatory Asset in the MYT Period.

3. Let us examine the first issue regarding income from gain or loss on foreign exchange.

4. We find that this issue has been dealt with by this Tribunal in its recent judgment dated 27.10.2014 in Appeal number 212 of 2013 – Tata Power Company Vs Maharashtra Electricity Regulatory Commission following its earlier judgment dated 28.11.2013 in Appeal no. 106 of 2012 as under:

"5.According to the Appellant, this issue has already been covered in their favour in judgment dated 28.11.2013 of this Tribunal in Appeal no. 106 of 2012. During Technical Validation Session, in its response dated 22.12.2012 to one of the queries raised by the State Commission, the Appellant had specifically clarified that gain of 96 crores in the treasury is not on account of Mumbai Licensed Area. It was made clear that the amount of Rs. 96 crores income had arisen out of Foreign Exchange Loss of Rs. 77 crores which is on account of Mumbai Licensed Area and a gain of Rs. 173 crores arising out of exchange gains on foreign loans taken for outside Mumbai Licensed Area. As such the gain of Rs. 96 crores are not attributable to Mumbai Licensed Area and the State Commission has wrongly included it to arrive at Non-tariff income for Mumbai Licensed Area. Out of loss of 77 crores, the loss of Rs. 21 crores incurred on fuel payments made for imported fuel used for Tata Power-Generation was only included in the Mumbai Licensed Area under the fuel cost by the Appellant. The remaining loss of 56 crores on account of actual interest on Working Capital paid for Buyer's Credit was not included by the Appellant while calculating the ARR for licensed business of Mumbai.

6. The State Commission in its counter affidavit in reply has supported the findings in the impugned order in allocating the gain from Corporate Treasury in the same proportion in which the expenses of Corporate Treasury have been proposed to be allocated by the Appellant i.e. on the basis of the operating revenue of Mumbai Licensed Area to total operating revenue.

7. We find that the State Commission has followed the same approach as adopted in its previous true-up order in case no. 105 of 2011.

8. We find that this issue has been dealt with by this Tribunal in its judgment dated 28.11.2013 in Appeal no. 106 of 2012 - Tata Power Company Vs. Maharashtra Electricity Regulatory Commission, as under:

"116. The Appellant has earned certain amount due to gains in Corporate Treasury function and exchange rate. The State Commission has allocated such gains to Regulated Business in the same proportion as the expenses of the Corporate Treasury functions. The approach of the State Commission appears to be logical at first glance. But it is too simplistic. In any business, the expenses and gains are not necessarily be in the same proportion. For example, on establishment is involved in manufacturing as well as trading of its product. The expenses in the manufacturing process would be much higher than the its marketing. But profit margin could be higher in marketing than manufacturing. 117. Had the Appellant not furnished the requisite information, the approach adopted by the State Commission would have been the correct approach. However, in this case the Appellant had furnished full details of gains the State Commission ought to have considered the same and gave reason for rejection of the same. The State Commission simply brushed aside the details furnished by the Appellant and adopted on erroneous simplistic approach. Therefore, the State Commission would consider the issue in the light of our above observations and pass the order accordingly."

5. The above findings of this Tribunal in Appeal no. 212 of 2013 will squarely apply to the present case. Accordingly, this issue is decided in terms of the above findings in favour of the Appellant.

6. **The second issue is regarding compensation of O&M expenses.**

7. According to Appellant, this issue is covered by the judgment of this Tribunal dated 28.11.2013 in Appeal no. 158 of 2012 wherein it was held that the truing-up for FY 2011-12 has to be done as per MYT Regulations, 2011-12.

8. We find that the above issue has been dealt with in this Tribunal's judgment dated 28.11.2013 in Appeal no. 158 of 2012 and batch in the matter of Tata Power Company Ltd. Vs. MERC, and reaffirmed by this Tribunal in its recent judgment dated 27.10.2014 in Appeal number 212 of 2013 between the same parties. The relevant extract of the Tribunal's judgment dated 27.10.2014 ar as under:

> *"13. Perusal of the Regulation 101 would indicate that the 2005 Regulations have been repealed for the purpose of determination of tariff for FY 2011-12 and onwards i.e. for the purpose for future tariffs. However, all the proceedings such as APR, True up or Review etc., for the period till 2010-11 would be done as per 2005 Regulations. Clearly, the 2005 Regulations had been repealed for all future applications.*
>
> *14. In other words, all proceedings relating to tariff periods prior to 2010-11 would necessarily be conducted under 2005 Regulations. But that would not make 2005 Regulations alive. 2005 Regulations have become dead letter like Indian Electricity Act, 1910, Electricity (Supply) Act, 1948 and Electricity Regulatory Commission Act, 1998 after the enactment of the Electricity Act 2003."*

9. Accordingly, the O&M expenses for FY 2011-12 have to be redetermined as per the MYT Regulations, 2011. This issue is also decided in favour of the Appellant.

10. The third issue is related to determination of Cross Subsidy in contravention of Tariff Policy framed by the Central Government?

11. Learned Counsel for Appellant made elaborate submission on this issue. The crux of his submissions are as under:

i. In terms of the Tariff Policy notified by the Ministry of Power read with Section 61(1) and 86(4) of the Act, the State Electricity Regulatory Commissions are mandated to determine and fix tariff within ± 20 % of the average cost of supply. However, the Maharashtra Commission has failed to comply with the above mandate.

ii. The Maharashtra Commission has been consistently following the aforesaid mandate of Tariff Policy. The Maharashtra Commission in its tariff order dated 12.09.2010 has determined and fixed the tariff of all the category of consumers in consonance with the Tariff Policy. However, in the Impugned Order the Maharashtra Commission has deviated from its past practices and determined the tariff outside the range prescribed by the

Tariff Policy (i.e. within ± 20% of the average cost of supply).

12. Mr Buddy Ranganathan, the learned counsel for the State Commission supported the findings of the Commission in the Impugned Order and made the following submissions:

a) If the Maharashtra Commission had blindly followed the principle of ± 20%, the amount required to recover the revenue gap would have to be recovered by increasing the tariff of the subsidised consumers. The tariff of the categories namely HT-II Commercial, LT-II B Commercial, LT-II C Commercial and LT-IV Industrial had to be increased as further increase of tariff of the subsidised consumers was not feasible and the same would result in a tariff shock to subsidized consumers.

b) Tata Power has only highlighted the categories where the Average Billing Rate approved by the commission is higher than that sought by Tata Power and the Tariff determined by the Maharashtra Commission cannot be held to be incorrect merely be because the tariff proposed by Tata Power was not accepted.

13. The main grievance of the Appellant is that the Commission has fixed the tariff of some of the categories higher than 120% of Average Cost of Supply. We have analysed the data made available to us and have found that the Appellant itself had

proposed tariff for certain categories much higher than 120% of the Average cost of supply as indicated in the Table below:

Category	***Average Cost of Supply (Rs. /unit)***	***Average Billing Rate (Rs./unit)***			***Ratio of Average Billing Rate to Average Cost of Supply (%)***		
		Existing Tariff	***Tariff Proposed by TPC-D***	***Revised Tariff***	***Existing Tariff to Current ACOS***	***Proposed Tariff to ACOS***	***Revised Tariff to current ACOS***
HT I-Industry		*6.08*	*7.14*	*7.3*	96%	112%	115%
HT II-Commercial		*6.62*	*7.59*	*7.97*	104%	120%	126%
HT III- Group Housing Society		*4.79*	*5.07*	*5.45*	75%	80%	86%
HT IV-Temporary Supply		*10.8*	*12.61*	*11.94*	170%	**199%**	188%
HT V-Railways		*5.92*	*6.95*	*7.14*	93%	109%	112%
LT I-Residential		*4.19*	*5.84*	*5.26*	66%	92%	83%
LT II A-Commercial upto 20 kW		*5.43*	*7.57*	*7.52*	86%	119%	118%
LT II B-Commercial> 20kW & <=50 kW	*6.35*	*6.8*	*8.19*	*8.48*	107%	**129%**	134%
LT II C-Commercial above 50 kW		*6.78*	*7.84*	*8.7*	107%	**123%**	137%

LT III- LT Industrial upto 20 kW		*5.5*	*7.46*	*6.68*	87%	117%	105%
LT IV- LT Industrial> 20 kW		*6.41*	*7.72*	*7.84*	101%	**122%**	123%
LT V- Advertisement & Hoardings		*16.38*	*16.28*	*17.5*	258%	**256%**	276%
LT VII (A)- Temporary Religious		*2.02*	*2.83*	*2.15*	32%	45%	34%
LT VII (B)- Temporary- others		*13.2*	*15.72*	*15.07*	208%	**248%**	237%
LT IX- Public Service		*5.5*	*7.46*	*7.31*	87%	117%	115%

14. The perusal of the above Table would indicate that the Appellant itself had sought tariff for some categories as high as 256% of the Average Cost of Supply. The Commission did not accept the proposal of the Appellant and had fixed the tariff marginally higher for some categories and lower for other categories. We fail to understand as to how the Appellant is aggrieved by the fixation of higher tariff for certain categories of consumers. It was for

such consumers, whose tariff had been increased by the Impugned Order to approach this Tribunal.

15. It is true that the Commission should endeavour to keep the tariff within +/- 20% of the Average cost of supply in accordance with the Tariff Policy. However, in view of the fact that the tariff period is already over, we are not inclined to disturb the tariff order. Accordingly the issue is decided against the Appellant. However, the State Commission is directed to follow the Tariff Policy to fix the tariffs with ±20% of the average cost of supply (overall average) in future.

16. The Fourth issue before us for consideration is regarding wrongful determination of wheeling charges.

17. The learned Counsel for the Appellant made the following submissions:

i. The State Commission has failed to comply with the provisions of the MYT Regulations, 2011 which mandates the State Commission to proceed as per the approved Business Plan for working out various charges.

ii. The sales on wires and capitalization were approved by the State Commission earlier in the business plan which should have been followed while determining wheeling charges. However, the State Commission while calculating the wheeling charges has taken actual sales to re-determine

estimated future sales on wires and has taken the capex as approved in the business plan. It is submitted that the same has resulted in very high wheeling charges.

iii. The State Commission should have taken a uniform stand and should have considered the actual capitalization as it did while considering the actual sale of wire of the FY 2012 -13. It is pertinent to note that the State Commission has by way of its reply *admitted that it ought to take into account the ground realities rather than mechanically considering* the projections as approved by it in the earlier orders. Accordingly the State Commission should have considered the ground realities faced in laying network and should have considered the actual capitalization during 2012-13 for re-determining estimated future capitalization, and made its projection on such actual basis. This would have kept the wheeling charges lower for the benefit of the Appellant's Consumers.

iv. It is pertinent to note that Tata Power vide its letter dated 17.01.2013 had communicated that they have only been able to achieve a capitalization of Rs. 111.18 Crores. Tata Power had also highlighted the difficulties in the execution of the capital expenditure in its presentation which was made before the State Advisory Committee (SAC) meeting held by the Respondent Commission.

18. In nutshell the main grievance of the Appellant is that the State Commission should have taken a uniform stand and should have considered the actual capitalization for re-determining estimated future capitalization as it did while considering the actual sale on wires of the FY 2012 -13 for re-determination of estimated future sales.

19. The Learned Counsel for the State Commission has made the following submission in support of the approach taken by the Commission in determination of Wheeling Charges:

I. The State Commission observed that the actual sale for FY 2012-13 were lower than that projected in the Business Plan order dated 26.08.2012 in Case No. 165 of 2011. The State Commission could not have ignored the ground realities and therefore considered the actual sales to re-determine estimated future sales on wires for computation of wheeling charges.

II. The State Commission took the capitalization as per the Business plan order considering that the State Commission in its order dated 22.08.2012 in Case 151 of 2011 has instructed Tata Power to complete the capitalization within one year's time frame.

III. Wheeling charges is only one of the components of the tariff determined and is not solely responsible for making Tata Power's tariff uncompetitive.

IV. Tata Power's letter dated 17.01.2013 only informs that from 01.04.2012 to 31.12.2013 only Rs. 111.78 crores was capitalized, nowhere does the said letter informs the State Commission that Tata Power might not be able to achieve the approved capitalization. The State Commission could not have assumed that Tata Power would not incur the approved capitalization in spite of its obligation to do so.

20. The main contention of the Appellant is that the State Commission should have recognised that the Appellant could not incur approved amount of Capex for the year 2012-13 and accordingly should have considered only the actual Capex incurred in laying out the network instead of the projected one. The Learned Counsel for the State Commission on the other hand justified the approach taken by the Commission.

21. The Capital Expenditure (in short Capex) plays a important role in determination of Annual Revenue Requirement of a licensee. Many components of ARR such as depreciation, interest on loan, Return on Equity depends only on the Gross Fixed Assets at the beginning of the tariff period and Capex likely to be incurred during the period. In case the Commission has assumed higher Capex, corresponding impact would also be reflected on the ARR of the Appellant. Lesser Capex, as claimed by the Appellant, would result in lesser ARR of the Appellant and lesser tariff for the consumers. Total Wheeling Charges for a licensee is the arrived at by deducting power purchase cost and supply related costs from the total ARR of the licensee.

22. Notwithstanding the above, the State Commission has to estimate the amount of Capex likely to be incurred during the tariff period after considering the capacity of the licensee from the past performance of the licensee and the amount of the works in progress (WIP). In the present case the Appellant had indicated vide its letter dated 17.01.2013 that from 01.04.2012 to 31.12.2012 only Rs. 111.78 crores was capitalized. The Commission should have considered this along with the progress achieved by the Appellant in working out the Capex for the period.

23. The Commission is directed to carry out true up for the years 2013-14 and 2014-15 and is also directed to determine the ARR and corresponding Wheeling Charges for the year 2015-16 considering the submissions made by the licensee relating to amount capitalised and its capacity to perform based on past performance of license and work out Capex accordingly.

24. The Fifth Issue is regarding amortization of the Entire Regulatory Asset within the MYT Period.

25. The learned Counsel for the Appellant has made the following submissions on the issue:

i. The Appellant in its tariff petition has prayed that recovery of Regulatory Asset should be allowed in such a manner that as against Rs. 1298 crores, Rs. 971.21 crores will remain unrecovered at the end of the MYT period.

ii. The State Commission while dealing with the issue of

Regulatory Assets of Tata Power, ought to have taken an approach similar to and consistent with the approach adopted for Reliance Infrastructure. While the State Commission has heavily relied on the principles contained in the Tariff Policy and various judgments passed by this Tribunal with regards to the creation and liquidation of Regulatory Assets in a time bound manner for the ultimate benefit of the consumer, such principles have been given a complete go by in case of Reliance Infrastructure where regulatory assets have been allowed to be liquidated not only beyond the prescribed period of 3 years but also beyond the current control period despite the fact that such licensee admittedly has a surplus of Rs. 571.55 Crores during FY 2013-14 and Rs.409 Crores during FY 2014-15.

iii. The same has resulted in tariff shock for the consumers of Tata Power and the consumers have started migrating from Tata Power to Reliance Infrastructure. A more spread out recovery of regulatory assets would have ensured to the benefit of the consumers by ultimately lowering the average cost of supply.

iv. The contention of the State Commission that Tata Power has requested that the entire revenue gap of Rs. 1298.58 crores be recovered in FY 2012-13 is completely misleading and baseless.

26. The learned counsel for the State Commission submitted that State Commission spread the total amount of revenue gap

including the past recoveries and revenue gap of FY 2011-12 and FY 2012-13 in equal instalments to be recovered in each year of the control period. The time period for recovery of the regulatory assets have been taken as per the directions given by this Tribunal in the judgment dated 28.07.2011 in Appeal No. 192 of 2010 and judgment dated 11.11.2011 in OP No. 1 of 2011. Any longer period in recovery of the revenue gap would attract unnecessary carrying cost which would eventually be passed on to the consumers by way of tariff.

27. We have considered the submission made by the parties. The Commission has expressed that any longer period in recovery of revenue gap would have attracted unnecessary carrying cost which would eventually be passed on to the consumers and also that the Commission has fixed the period in the light of this Tribunal's various judgments. Therefore, we cannot find fault with the State Commission in recovery of the revenue gap for part period over the control period. However, it seems that the State Commission had lost sight of its argument while fixing the period for recovery of Regulatory Assets for the RInfra for six years. We feel that the State Commission should follow the same policy for all the Distribution Licensees especially where they have licence in common area of supply. If the State Commission is making a deviation, then it should give proper reason for the same and also ensure that its action will not disturb the level playing field between the competing Distribution Licensees. In

this case we cannot pass any order on the tariff determination for RInfra passed in a separate order. However, the State Commission may keep our direction in view for future.

28. Summary of our Findings:

a) Income from gain/loss on Foreign Exchange as part of Non-tariff Income :

The findings of this Tribunal in Appeal no. 212 of 2013 will squarely apply to the present case. Accordingly, this issue is decided in terms of the above findings in favour of the Appellant.

b) Computation of O&M expenses:

The findings of this Tribunal in Appeal no. 212 of 2013 will squarely apply to the present case. Accordingly, this issue is decided in terms of the above findings in favour of the Appellant.

c) Determination of Cross Subsidy:

It is true that the Commission should endeavour to keep the tariff within +/- 20% of the Average cost of supply in accordance with the Tariff Policy. However, in view of the fact that the tariff period is already over, we are not inclined to disturb the tariff order. Accordingly the issue is decided against the Appellant. However, the State

Commission is directed to follow the Tariff Policy to fix the tariffs with ±20% of the average cost of supply (overall average) in future.

d) Wheeling Charges:

The Commission is directed to carry out true up for the years 2013-14 and 2014-15 and is also directed to determine the ARR and corresponding Wheeling Charges for the year 2015-16 considering the submissions made by the Appellant relating to amount capitalised and its capacity to perform based on past performance of licensee and work out Capex accordingly.

e) Amortisation of Regulatory Assets:

The Commission has expressed that any longer period in recovery of revenue gap would have attracted unnecessary carrying cost which would eventually be passed on to the consumers and also that the Commission has fixed the period in the light of this Tribunal's various judgments.

We cannot find fault with the State Commission in recovery of the revenue gap for part period over the control period. However, it seems that the State Commission had lost sight of its argument while fixing the period for recovery of Regulatory Assets for the

RInfra for six years. We feel that the State Commission should follow the same policy for all the Distribution Licensees especially where they have licence in common area of supply. If the State Commission is making a deviation, then it should give proper reason for the same and also ensure that its action will not disturb the level playing field between the competing Distribution Licensees. In this case we cannot pass any order on the tariff determination for RInfra passed in a separate order. However, the State Commission may keep our direction in view for future.

29. In view of the above findings, the Appeal is allowed in part. The Maharashtra Commission is directed to pass the consequential orders in terms of our findings referred to above.

30. However, there is no order as to costs.

31. Pronounced in the open court on this **28th day of November, 2014.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 28th November, 2014
√REPORTABLE/~~NON-REPORTABALE~~

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