Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 147, 148 and 150 of 2013

Dated: 30th May, 2014

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member

In the matter of:
Torrent Power Limited, … Appellant (s)
Electricity House,
Lal Darwaja,
Ahmedabad-380 001,
Gujarat

Versus

Gujarat Electricity Regulatory Commission,
1st Floor, Neptune Tower,
Opp. Nehru Bridge, Ashram Road,
Ahmedabad-380 009,
Gujarat …Respondent(s)

Counsel for the Appellant(s): Ms. Deepa Chawan
Mr. Harkik Luthra
Mr. H.S. Jaggi
Mr. Chetan Bundela

Counsel for the Respondent(s): Mr. Anand K. Ganesan
Ms. Swapna Seshadri for R-1 with
Mr. S.R. Pandey, Legal Adviser,
GERC

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

Appeal nos. 147, 148 and 150 of 2013 have been filed by Torrent Power Ltd. in respect of Ahmedabad distribution, Surat distribution and generation activities respectively. Appeal no. 147 of 2013 has been filed against the order dated 16.4.2013 passed by the Gujarat Electricity Regulatory Commission ("State Commission") for truing up the financials for the FY 2011-12 and determination of tariff for the FY 2013-14 for the Appellant for Ahmedabad distribution. Appeal no. 148 of 2013 has been filed by the Appellant against the order dated 16.4.2013 passed by the State Commission for truing up the financials for the FY 2011-12 and determination of tariff for FY 2013-14 in respect of Surat distribution. Appeal no. 150 of 2013 has been filed by the Appellant against the order dated 16.4.2013 passed by the

State Commission for truing up for FY 2011-12 and determination of tariff for FY 2013-14 for Appellant's generation activities.

2. Since the issues involved in the Appeals are common; a common judgment is being rendered. However, for the sake of brevity, specific figures and impugned order, etc., of Appeal no.147 of 2013 will be referred to by us.

3. The Appellant is aggrieved by disallowance on the following counts:

A. Disallowance of the Approved Revenue Gap on the ground of delay in filing the Petition (raised in Appeal nos. 147 and 148 of 2013):

There was a delay in the filing of the tariff petition by the Appellant before the State Commission both for the FY 2011-12 and the FY 2013-14. The State Commission relying on para 8.1.7 of the National tariff Policy disallowed the revenue gap to the Appellant corresponding to the period of delay. According to the Appellant, the State Commission ought not to have disallowed the approved revenue gap especially as the State Commission had condoned the delay and granted extension to file the petition by 31.12.2012.

B. Disallowance of carrying cost (raised in Appeal nos. 147 and 148 of 2013):

The Appellant has challenged the impugned order on the ground that the State Commission has not allowed the carrying cost on the revenue gap determined. The State Commission has not allowed carrying cost on the

ground that there was no provision for carrying cost in the MYT Regulations. According to the Appellant, this issue is covered by the earlier judgments of this Tribunal reported as 2011 ELR (APTEL)0336 and in Appeal no.190 of 2011.

C. Erroneous treatment of O&M expenses as controllable (raised in Appeal no. 147, 148 and 150 of 2013):

The State Commission in the MYT order dated 6.9.2011 for control period 2011-12 to 2015-16 had approved O&M expenses based on normalized expenses of previous three years with escalation @ 4%. However, there has been variation in actual O&M expenses which has not been allowed.

The Appellant has pointed out two major factors for the variation in O&M expenses.

i) Uncontrollable factors like impact of change in law and higher rate of inflation than assumed in the MYT order.

ii) Expenses which were not part of base data have been necessitated and incurred.

The State Commission has disallowed the variation in O&M expenditure stating that the O&M expenditure is controllable. According to the Appellant, this issue is covered by Tribunal's judgment dated 28.11.2013 in Appeal no. 190 of 2011.

D. Erroneous application of the Regulation retrospectively in computation of interest expenses (raised in Appeal nos. 147, 148 and 150 of 2013):

Following two issues are raised in computation of interest expenses.

a) The impugned order ought not to have computed eligible normative loan by taking into consideration net capitalization i.e. after deduction of written off assets from the total capitalization. This is contrary to the MYT Regulations.

b) The impugned order ought not to have considered depreciation on the entire asset base as repayment of the loans. As per the MYT Regulations, the depreciation of the asset to be considered as repayment of loans availed for creating that corresponding asset. However, the State Commission has erroneously considered the depreciation of the entire asset base as normative repayment of the loan for FY 2011-12. This would result in higher repayments and in turn denial of legitimate interest expenses to the Appellant. The depreciation of assets created prior to

the new Regulations for which loan have to be treated separately, should not be considered for the repayment of the outstanding loans.

E. Erroneous computation of wheeling charges (raised in Appeal nos. 147 and 148 of 2013):

There are two issues raised relating to wheeling charges. These are:

a) Erroneous allocation of wheeling ARR amongst High Tension (HT) and Low Tension (LT), and
b) Erroneous computation of wheeling charge on Rs. per kWh basis instead of Rs. per KW basis.

According to the Appellant the above issues are covered in decision of the Tribunal in Appeal no. 32 of 2011 and 190 of 2011.

F. Erroneous computation of cross subsidy surcharge (raised in Appeal nos. 147 and 148 of 2013):

The Appellant has challenged the impugned order on the ground that cross subsidy surcharge determination by the State Commission is erroneous and the State Commission ought not to have followed the formula as per the National Tariff Policy in the facts of the present case. According to the Appellant, this issue is covered by the decision of the Tribunal in judgment dated 28.11.2013 in Appeal no. 190 of 2011, 162 of 2012 and 163 of 2012, against the Appellant.

G. Non-consideration of the proposal for Tariff Rationalization (raised in Appeal nos. 147 and 148 of 2013):

The Appellant had sought for increase in proportion of demand charges in the tariff which was rejected by the State Commission. According to the Appellant, the existing fixed charges are not depictive of the fixed cost. Thus, the open access consumer avail the standby facility at the cost of other smaller consumers. In case the consumer does not utilize the contracted capacity, the fixed cost of such consumer is borne by other consumers. According to the Appellant, the State Commission has dismissed the plea of the Appellant without dealing with the contentions raised by the Appellant.

4. On the above issues we have heard Ms. Deepa Chawan, Learned Counsel for the Appellant and Shri Anand K. Ganesan, Learned Counsel for the State Commission.

5. On the basis of the contentions of the parties, the following questions would arise for our consideration:

i) **Whether the State Commission has erred in disallowing the approved revenue gap on the ground of delay in filing the tariff Petitions before the State Commission especially as the delay was condoned and the Appellant was granted extension for submission of the Petitions by the State Commission?**

ii) **Whether the State Commission has erred in not allowing the carrying cost on the approved revenue gap?**

iii) **Whether the State Commission has erred in treating O&M expenses as controllable and not allowing the increase in O&M expenditure on**

account of the uncontrollable factors like change in law, higher inflation rate, etc.?

iv) Whether the State Commission has erroneously applied the MYT Regulation retrospectively in computation of the interest expenses?

v) Whether the State Commission has computed the wheeling charges erroneously?

vi) Whether the cross subsidy surcharge has been determined erroneously by the State Commission?

vii) Whether the State Commission was right in rejecting the proposal of the Appellant for tariff rationalization?

6. **The first issue is regarding disallowance of the approved revenue gap due to delay in filing of the Petition by the Appellant.**

7. It is seen that the MYT order dated 6.9.2011 covered a period of 5 years viz. FY 2011-12 to FY 2015-16. The present proceeding concern the truing up of FY 2011-12 i.e. the first year of the control period and determination of tariff for FY 2013-14 i.e. the third year of control period. For truing up of FY 2011-12 and tariff for FY 2013-14, Petition was required to be filed by 30.11.2012. There was a delay of about one month in filing the Petition. The State Commission, however, condoned the delay vide letter dated 4.12.2012 and granted extension to file the truing up Petition by 31.12.2012. Earlier the tariff Petition for FY 2011-12 was also filed with a delay of 3 months. However, the State Commission denied the approved revenue gap of

38.26 crores in respect of Ahmedabad distribution in the true up of FY 2011-12 due to delay in filing of the tariff petition for FY 2011-12 by 3 months. Similarly for FY 2013-14 also revenue gap of Rs. 16.96 crores on prorata basis for one month delay in filing the tariff petition for FY 2013-14 in respect of Ahmedabad distribution has been disallowed. For denying the revenue gap for FY 2011-12 and FY 2013-14, the State Commission has relied on the paragraph 8.1.7 of the National Tariff Policy.

8. According to Ms. Deepa Chawan, Learned Counsel for the Appellant this issue is covered by judgment dated 19.9.2007 of this Tribunal in Appeal no. 70 of 2007 in the matter of MSEDCL Vs. MERC in favour of the Appellant.

9. According to Shri Anand Ganesan, Learned Counsel for the State Commission, there was delay in filing of the tariff petition by the Appellant both for FY 2011-12 and FY 2013-14. In the circumstances relying on paragraph 8.1.7 of the Tariff Policy, the State Commission has denied the revenue gap corresponding to the period of delay.

10. We find that the scheme of MYT Tariff Regulations 2011 is as under:

i) The applicant has to submit the forecast of the Aggregate Revenue Requirement ('ARR') for the entire control period and proposed tariff for the first year of the control period. Based on the forecast of ARR and expected revenue from the existing tariff and charges, the Appellant has to propose tariff that would meet the revenue gap, if any, in the ARR.

ii) The Commission will approve the ARR for all the years of the control period and tariff for the first year of the control period after following the specified procedure.

iii) In the subsequent years of the control period the Applicant files the true up for the previous year and the ARR and tariff for the ensuing year.

iv) The State Commission carries out the true up of the expenses of the previous year according to the Regulations and passes an order as under:

a) the approved gain or loss to the generating company or transmission licensee or distribution licensee on account of controllable factors and the amount of such gains or such loss that may be shared with the consumers in accordance with the Regulations.

b) Components of approved cost pertaining to the uncontrollable factors, which were not recovered during the previous year, shall be passed through as per the Regulations.

c) Tariff determined for the ensuing year.

v) According to the Regulations the tariff petition for truing up of previous year and tariff for ensuing year has to be filed by 30th November of the current financial year and the tariff for the ensuing year has to be made effective from 1st April of the ensuing year.

We find that the Regulations do not specify the treatment to be given to the revenue gap in case of delay in filing the tariff Petition.

11. Let us now examine the findings of the State Commission in the impugned order. The relevant extracts in Appeal no. 147 of 2013 are as under:

"The TPL has depicted a revenue gap of Rs.197.22 crore in the truing up for FY 2011-12 as shown in Table 4.43 above. This includes Rs. 68.90 crore towards revenue gap of earlier years and Rs.42.05 (24.03+18.02) crore towards carrying cost thereon.

The Commission does not consider the carrying cost claimed for TPL as there is no such provision in MYT Regulations.

In the MYT Order dated 6th September, 2011, the Commission considered the gap of TPL Ahmedabad distribution area at Rs. 125.84 crore and of Surat distribution area at Rs. 38.74 crore. Against the consolidated gap of Rs. 164.58 crore, the Commission had revised the tariffs for FY 2011-12 to get additional revenue of Rs. 166.99 crore on an annualized basis.

It is observed that the actual gap of Rs. 38.26 crore for the TPL Ahmedabad distribution area for FY 2011-12 is due to delay of about 3 months in filing of the tariff petition for FY 2011-12 by the licensee and consequently late implementation of the revised tariff.

The Commission observes that the Distribution Licensee is not punctual in filing the tariff petition within the stipulated time. Further, various consumer

organizations also repeatedly represented during the course of hearings that the consumers should not be burdened on account of default by the Distribution Licensee .

Para 8.1.7 of the Tariff Policy provides that,
"...............It is desirable that requisite tariff changes come into effect from the date of commencement of each financial year and any gap on account of delay in filing should be on account of licensee."

In view of the above, although the Commission had condoned the delay in filing the tariff petition and considered the same for determining the tariff, the Commission decides in this truing up exercise that the consumers should not be burdened due to default by the Distribution Licensee. Condonation of delay is to consider the petition on merit instead of rejecting it straight away. But it does not imply acceptance of revenue gap due to delayed filing of the tariff petition.

Accordingly, the Commission decides that the gap of Rs. 38.26 crore for FY 2011-12, which is due to delay in filing the tariff petition and late implementation of revised tariff in the FY 2011-12, should not be carried forward as proposed by the licensee for determination of tariff for FY 2013-14."

Thus, the State Commission in the true up of FY 2011-12 in the impugned order determined a revenue gap of Rs. 38.26 crores for FY 2011-12 but did not allow it to

be passed on in the ARR for FY 2013-14 due to delay of 3 months in filing of the tariff petition for FY 2011-12 in the earlier MYT tariff order dated 6.9.2011.

12. Similarly for FY 2013-14 also the State Commission has observed that there has been delay of 30 days in filing the tariff Petition for FY 2013-14. Even though the Commission had condoned the delay and extended the time period, according to the Sate Commission the condonation of delay is to consider the Petition on merit instead of rejecting it straight away but it does not imply acceptance of the revenue gap due to filing of the tariff petition. Accordingly, the State Commission relying on Paragraph 8.1.7 of the tariff Policy has disallowed gap of Rs. 16.96 crores derived from the total revenue gap on proportionate basis for one month because of delay in filing of the tariff petition by the distribution licensee by one month. Similar findings have been

given by the State Commission in respect of Surat distribution.

13. Thus, the State Commission disallowed the entire revenue gap on true up of FY 2011-12 and part of revenue gap for FY 2013-14 for the delay in filing of the Tariff Petitions for FY 2011-12 and FY 2013-14.

14. Though the Regulations do not specify treatment for delay in filing the tariff petition, the State Commission has relied on the provision of the tariff policy to deny revenue gap due to delay in filing the Petition.

15. Let us examine the Tariff Policy notified by the Central Government in compliance with Section 3 of the Electricity Act, 2003. The relevant para 8.1 (7) is reproduced as under:

"Appropriate Commission should initiate tariff determination and regulatory scrutiny on a suo moto basis incase the licensee does not initiate filings in time. It is desirable that requisite tariff changes come into effect from the date of commencement of each financial year and any gap on account of delay in filing should be on account of licensee."

16. This issue has been considered by this Tribunal in judgment dated 19.9.2007 in Appeal no. 70 of 2007.

"5. We now proceed to examine the tariff policy, paragraph 8.1.7 as extracted above. In our opinion the entire paragraph has to be read to interpret the expression given therein. The intention of the government in this part of the tariff policy is to maintain discipline in the matter of date of commencement of every new tariff. The policy says that it is desirable that MYT tariff should come to effect in the beginning of the financial year. The policy does not say that the tariff changes will come into effect at the commencement of the financial year irrespective of any prohibitive situation that may arise for various reasons. There can be no quarrel that if the tariff changes take place at the beginning of the financial year it becomes convenient

for all the players in the electricity market as well as for the end consumers. In order to make this possible an advice is given to Appropriate Commissions to initiate tariff determination and regulatory scrutiny on a suo moto basis in case the licensee does not initiate filings in time. However, suo moto initiation of tariff determination may not be an easy process. A large amount of data is required for determination of tariff. Without a tariff petition being filed by a licensee the Appropriate Commission may find it quite difficult to collect and collate the necessary data and to fix a tariff. If the appropriate Commission is able to so determine the tariff on suo moto scrutiny, the same may be different from the tariff which could have been framed on an ARR and tariff petition with relevant data filed by a licensee. It is in this context that the tariff policy says that if there is a gap of this nature the licensee should be made to bear the same. This provision has been made to discourage the licensee from delaying its tariff petition and for compelling the Appropriate Commission to go into suo moto determination of tariff in the next financial year.

6. Undoubtedly, the suo moto tariff determination will commence only if the ARR filing is inordinately delayed. It is not expected that whenever ARR filing is delayed the Appropriate Commission would suo moto start initiating the exercise of tariff determination. In our considered view the last clause of para 8.1.7 of the tariff policy comes into play only when the ARR filing is so enormously delayed that the appropriate Commission is made to issue a tariff on its own suo moto regulatory scrutiny.

7. Further "any gap" on account of delay in filing has to be properly understood. The tariff policy is silent about the meaning and calculation of "gap". The sole aim of tariff fixation by an independent body like the Appropriate Commission is to ensure viability of the licensees while maintaining a reasonable price for the consumer. Therefore, the cost of supply has to be met out of revenue earned by sale of electricity. In case the MYT tariff comes into effect a month later than the day on which it was expected, the required annual revenue minus the revenue realized in that month will have to be recovered in the remaining months of that period. In such a situation the increased cost of the new period will have to be distributed over the remaining period of the MYT. The other way of fixing the tariff, in case of a delay, would be to distribute the ARR over the entire tariff period so that some amount of revenue for the delayed period remains under-recovered. Here again the under-recovered amount has to be recovered in order to maintain the viability of the licensee. However, if the under-recovery caused by increase in tariff is recovered in the rest of the MYT period a carrying cost will be involved. This carrying cost will be an additional burden which, in all fairness, should not be imposed on the consumer and has to be on account of the licensee.

8. In the present case the gap between the beginning of the FY and the date when the new MYT becomes effective is nearly a month. The loss of revenue in this given situation is Rs.88 Crores. This loss could be much higher if the delay in tariff fixation had been longer. In a given situation, if the licensee is unable to file the ARR petition due to some reasons will it be proper to say that tariff policy requires such difference to be denied to the licensee forever? The answer

clearly is 'NO'. All that can be denied to a licensee in this situation is the carrying cost and not the legitimate claim towards revenue.

9. It has to be understood that the consumer has to pay for the electricity supplied to him. As per Section 61 of The Electricity Act 2003 the Appropriate Commission fixes the tariff safeguarding, inter alia, interest of consumers and at the same time, recovery of cost of electricity in a reasonable manner. Therefore, there is nothing unjust in recovering the sheer cost of supply of electricity from the consumers. It is not an additional burden on the consumer. The consumer in the present example would have paid the same tariff had the ARR and tariff petition been filed in time. Only, the tariff order comes into effect a month later. The expression used by the Commission namely "financial implications caused solely due to late submission of MYT applications by the licensees should not be passed on to the hapless consumers" indicates misplaced sympathy. In case consumer is made to pay more than the cost of supply he can be described as hapless. Secondly the financial implication caused solely due to late submission is only the delay in recovery and not the increase in tariff. It is not the case of the MERC that the tariff has gone up because of late filing. Only the determination of tariff is delayed because of late filing. The financial implication of the delay is nothing but the carrying cost. The consumer cannot be burdened with this resulting carrying cost because the delay has not been caused on account of their default."

17. The findings of the Tribunal in Appeal no. 70 of 2007 will squarely apply to the present case. Accordingly, the revenue gap for FY 2011-12 and 2013-14 has to be allowed to the Appellant. However, carrying cost, if any, for the period of delay in filing the ARR/Tariff petition shall not be allowed.

18. The second issue is regarding disallowance of carrying cost.

19. According to the Learned Counsel for the Appellant and the State Commission this issue is covered by judgment of the Tribunal in Appeal no. 190 of 2011.

20. The relevant extracts of the judgment dated 28.11.2013 in Appeal no. 190 of 2011 are reproduced as under:

"81. As correctly pointed out by the learned Counsel for the Appellant that while the State Commission passed the tariff order dated 17.1.2009, it had agreed to provide Carrying Cost in future. It is settled law that the carrying cost for legitimate expenditure has to be provided. In fact, this principle has been laid down in Appeal No.203 of 2010 and RP No.13 of 2012 by the Tribunal in its order dated 2.1.2013. The very same issue has been dealt with in another decision in Appeal No.36 of 2008.

82. That apart, this Tribunal again in Appeal No.153 of 2009 dated 30.7.2010 reported in 2010 ELR (APTEL) 0891 and Appeal No. 173 of 2009 dated 13.9.2012 has also dealt the very same issue.

83. The relevant principles which have been laid down in these decisions are extracted below:

(a) We do appreciate that the State Commission intents to keep the burden on the consumer as low as possible. At the same time, one has to remember that the burden of the consumer is not ultimately reduced by under estimating the cost today and truing it up in future as such method also burdens the consumer with carrying cost.

(b) The carrying cost is allowed based on the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow arranged by the distribution company from lenders and/or promoters and/or accruals, has to be paid for by way of carrying cost.

(c) The carrying cost is a legitimate expense and therefore recovery of such carrying cost is legitimate expenditure of the distribution company.

(d) "11.5. The utility is entitled to carrying cost on its claim of legitimate expenditure if the expenditure is:

i) accepted but recovery is deferred e.g. interest on regulatory assets,

ii) claim not approved within a reasonable time, and

iii) Disallowed by the State Commission but subsequently allowed by the Superior authority.

iv) Revenue gap as a result of allowance of legitimate expenditure in the true up.

The State Commission shall decide the claim of the Appellant regard to carrying cost on the above principles.

84. In view of the settled position of law, in the present case, the Appellant falls under sub-category (iv) as referred to above, and as such the Appellant is entitled for the Carrying Cost as per the Order dated 17.1.2009. Accordingly, ordered."

21. The above findings of the Tribunal will apply to the present case too. Accordingly, this issue is decided in favour of the Appellant.

22. The third issue is regarding disallowance of O&M expenses.

23. According to the Appellant, the variation in O&M expenses on account of change in law and higher rate of inflation and expenses not included in the base expenses but have been necessitated and actually incurred during the year. Further, this issue has been decided in favour of the Appellant in the judgment dated 28.11.2013 passed by this Tribunal in Appeal no. 190 of 2011.

24. According to the State Commission, Operation and Maintenance expenses are allowed on normative basis as per Regulations 98.6 of the MYT Regulations. There is no scope for truing up or considering the actual expenses incurred as uncontrollable and allowing the

same in the Tariff. As has been held by the Tribunal in Appeal no. 190 of 2011, the very concept of allowing the O&M on normative basis is that actual expenses are of no relevance thereafter and any variation on the normative O&M expenses is to the account of the Appellant unless there is a specific consequence for such variation provided for in the Regulations itself. Thus, according to the State Commission this issue is covered against the Appellant in Appeal no. 190 of 2011.

25. Let us examine the findings of the Tribunal in Appeal no. 190 of 2011.

"39. It cannot be disputed that the norms with regard to Operation & Maintenance Expenses is covered under Regulation 98.6 of the MYT Regulations of the State Commission. In terms of this Regulation 98.6, the determination of the O&M expenses for 3 years ending 31st March, 2010 subject to prudence check and escalated at the rate of 4% to arrive at the O&M expenses for the

year 2011-12. The O&M expenses for the further period after 2011-12 are to be escalated at the rate of 5.72%.

40. *The determination of O & M expenses under the Regulations of the State Commission is on normative basis. The very concept of allowing the O & M on normative basis is that the actual expenses is of no relevance thereafter and any variation on the normative O & M expenses is to the account of the Appellant unless there is a specific consequence for such variation provided for in the Regulations itself.*

41. *The State Commission has determined the O&M expenses strictly in terms of Regulation 98.6. It is not the case of the Appellant that the normative O&M calculated by the State Commission is not in accordance with Regulation 98.6. So, the main controversy revolves around the normative O&M expenses.*

44. *The reading of the above findings by the State Commission would make it clear that while determining Operation and Maintenance Expenses under Regulation 98.6, the State Commission failed to consider one time pay revision expenses and major overhaul expenses for computing normative O&M expenses for the 2nd control period.*

45. *In fact, the State Commission has accepted that increase in employee's cost due pay revision is*

uncontrollable. On this ground, the State Commission had allowed Rs 65.19 Cr towards employees' cost including pay revision costs of Rs 10.59 Cr for FY 2009-10. However, for the purpose of computing normative cost for 2nd Control period, Commission has considered Rs 54.6 Cr (65.19 - 10.59) as actual employees costs for FY 2009-10. This approach may not be correct.

46. *With reference to one time major overhauling costs, the Appellant had indicated in its petition that it had deferred the major overhaul, which was scheduled for FY 2009-10 to FY 2010-11. Therefore, the actual R&M expenditure during FY 2009-10 was reduced by Rs 6.74 Cr on account of deferment of major overhaul. The State Commission had approved the reduced actual R&M expenditure.*

47. *The above aspect would clearly establish that major overhaul was part of approved O&M expenditure for FY 2009-10. But for its deferment to FY 2010-11, the Appellant would have spent this amount on major overhaul and claimed as part of actual R&M expenditure for FY 2009-10. In that event, the State Commission would have considered the same for arriving the normative O&M expenses for the 2nd control period for the 2 to FY 2015-16.*

48. *This aspect is required to be considered by the State Commission and pass the necessary orders in the light of the above observations. On this issue, we remand the matter to the State*

> *Commission for fresh consideration. This point is answered accordingly."*

26. Thus, the Tribunal has held that the O&M expenses have been allowed on normative basis and the variation in O&M expenses have to be on account of the Appellant unless there is a specific consequence for such variation provided for in the Regulations. However, the Tribunal held that same uncontrollable expenditure which the State Commission failed to consider for computing the normative O&M expenses were required to be reconsidered.

27. Let us now examine the variation in O&M expenses claimed by the Appellant.

28. The Appellant had stated in the Petition that base O&M expenses were arrived at considering escalation factor of 4% for 3 years on average of actual normalized O&M

expenses of FYs 2007-08, 2008-09 and 2009-10. However the actual weighted average inflation rate (considering 60% and 40% weight to WPI and CPI respectively)is 7.54%, 9.96% and 8.86% for FY 2009-10, FY 2010-11 and FY 2011-12 respectively, Further, wage revision has been carried out under Section 12 (3) of the Industrial "Disputes Act, 1947. The variation in R&M and A&G expenses have been on account of higher rate of inflation. The security expenses have increased due to increase in minimum wage revision and vehicle running expenses have increased due to inflation. Certain expenses like loss on sale of assets and repairs of EHV transformers were not part of the base level expenses.

29. We find that the State Commission in terms of Regulation 23.2(h) of the MYT Regulations, 2011 has

considered the entire variation in O&M expenses as controllable.

30. Let us now examine the MYT Regulations, 2011.

31. Regulation 23.1 specifies the uncontrollable factors. Regulation 23.1 is reproduced below:

"23.1 For the purpose of these Regulations, the term comprise of the following factors, which were beyond the control of the applicant, and could not be mitigated by the applicant:

(a) Force Majeure events;

(b) Change in law, judicial pronouncements and Orders of the Central Government, State Government or Commission;

(c) Variation in the price of fuel and/ or price of power purchase according to the FPPPA formula approved by the Commission from time to time;

(d) Variation in the number or mix of consumers or quantities of electricity supplied to consumers: Provided that where there is more than one Distribution Licensee within the area of supply of the applicant, any variation in the number or mix of

consumers or in the quantities of electricity supplied to consumers within the area served by two or more such Distribution Licensees, on account of migration from one Distribution Licensee to another, shall be attributable to controllable factors:

Provided further that if any consumer or category of consumers within the area of supply of the applicant is eligible for open access under sub-section (3) of Section 42 of the Act, then any variation in the number or mix of such consumers or quantities of electricity supplied to such eligible consumers shall be attributable to controllable factors;

(e) Transmission Loss;
(f) Variation in market interest rates;
(g) Taxes and Statutory levies;
(h) Taxes on Income:

Provided that where the applicant or any interested or affected party believes, for any variable not specified above, that there is a material variation or expected variation in performance for any financial year on account of uncontrollable factors, such applicant or interested or affected party may apply to the Commission for inclusion of such variable at the Commission's discretion, under this Regulation for such financial year."

32. Regulation 23.2(h) specifies that variation in Operation and Maintenance expenses are controllable.

33. Thus, the Appellant can claim variation in Operation & Maintenance only to the extent it is covered under the uncontrollable factors specified under Regulation 23.1.

34. The Appellant has stated that one of the reasons for the variation in O&M expenses is due to higher inflation rate based on weighted average of WPI and CPI with weight of 60 and 40 respectively for FYs 2009-10, 2010-11 and 2011-12 is more than 4%. We find that the Regulation 98.6 for O&M expenses provides that O&M expenses shall be derived on the basis of the actual O&M expenses for 3 years ending 31.3.2010. The average of such O&M expenses shall be considered as O&M expenses for FY 2008-09 and shall be escalated at escalation factor of 4% to arrive at the

O&M expenses of FY 2011-12. The O&M expenses for subsequent years will be determined by escalating the base expenses determined for FY 2011-12 at the escalation rate of 5.72%. The Regulations specify fixed escalation factors to arrive at the base year O&M expenses and thereafter for determination of O&M expenses for the subsequent years. There is no provision for true up of escalation factor for 3 year period ending 31.3.2010 and escalation factor of 4% used to arrive at O&M expenses of FY 2011-12. The escalation factor for determining the O&M expenses for subsequent year of the control period from the base year O&M expenses of FY 2011-12 is also fixed at 5.72%. However, under the proviso to Regulation 23.1, if an applicant believes that there is material variation in performance for any financial year on account of uncontrollable factors then such applicant may apply to the Commission for inclusion of such variable and the

State Commission at its discretion will consider the same.

35. We find that the Appellant has not provided evidence to establish that the factors responsible for variation in O&M expenses are covered under Regulation 23.1 and has also not provided material to establish it claim that these factors have affected material variation in its performance on account such uncontrollable factor.

36. We, therefore, decide this issue against the Appellant.

37. The fourth issue is regarding retrospective application of the MYT Regulations in computation of interest expense.

38. The Appellant's contention is that the State Commission ought not have deducted the written off assets from the total capitalization before computing the eligible normative loan and ought not have considered the depreciation on the entire asset base as repayment of loan.

39. According to the Learned Counsel for the State Commission, there is no separate treatment provided in the MYT Regulations for calculating the repayment of loans taken prior to 1.4.2011 and the loans taken after 1.4.2011 and the entire loans are to be treated in a uniform manner for the MYT control period 2011-12 to 2015-16. According to him, the State Commission has calculated the opening loan, the repayment of loan and the interest rate strictly as per the MYT Regulations and there is no infirmity in determination of the interest charges by the State Commission.

40. Let us examine the MYT Regulations, 2011.

41. The relevant Regulations are reproduced below:

"*34. Debt-equity ratio*

34.1 For the purpose of determination of tariff, debt-equity ratio as on the date of commercial operation in case of a new generating station, transmission or distribution line or substation commissioned or capacity expanded after 1.4.2011, shall be 70:30. Where equity employed is more than 30%, the amount of equity for the purpose of tariff shall be limited to 30% and the balance amount shall be considered as loan. Where actual equity employed is less than 30%, the actual equity shall be considered:

Provided that in case of the Generating Company, Transmission Licensee and Distribution Licensee, if any fixed asset is capitalized on account of capital expenditure project prior to April 1, 2011, debt-equity ratio allowed by the Commission for determination of tariff for the period ending March 31, 2011 shall be considered.

Provided further that in case of retirement or replacement of assets, the equity capital approved as mentioned above, shall be reduced to the extent of 30% (or actual equity component based on documentary evidenced, if it is lower than 30%) of the original cost of the retired or replaced asset:"

"39. Interest and finance charges on loan capital

"39.1 The loans arrived at in the manner indicated in Regulation 34 shall be considered as gross normative loan for calculation of interest on loan:

Provided that interest and finance charges on capital works in progress shall be excluded:

Provided further that in case of retirement or replacement of assets, the loan capital approved as mentioned above, shall be reduced to the extent of outstanding loan component of the original cost of the retired or replaced assets, based on documentary evidence.

39.2 The normative loan outstanding as on April 1, 2011, shall be worked out by deducting the cumulative repayment as admitted by the Commission up to March 31, 2011, from the gross normative loan.

39.3 The repayment for the year during the tariff period from FY 2011-12 to FY 2015-16 shall be deemed to be equal to the depreciation allowed for that year."

42. The Regulations provide as under:-

i) On fixed assets capitalized by the State Commission on account of capital expenditure prior to 1.4.2011, the

debt equity ratio allowed by the Commission for the period ending 31.3.2011 shall be considered.

ii) The debt equity ratio for new assets commissioned after 1.4.2011 shall be 70:30, provided that where the equity employed is less than 30%, the actual equity shall be considered. Provided further that in case of retirement or replacement of assets, the equity capital approved shall be reduced to the extent of 30% (or actual equity component based on documentary evidence, if it is lower than 30%) of the original cost of the retired or replaced asset.

iii) Loan arrived as above shall be considered as gross normative loan for calculation of interest on loan. Provided that in case of retirement or replacement of assets, the loan capital shall be reduced to the extent of outstanding loan component of the original cost of the

retired or replaced asset, based on documentary evidence.

iv) The normative loan as on 1.4.2011 shall be worked out by deducting the cumulative repayment admitted by the Commission upto 31.3.2011, from the gross normative loan.

v) The repayment for the year during the control period of FY 2011-12 to FY 2015-16 shall be deemed to be equal to the depreciation allowed for the year.

43. Let us see if the State Commission has complied with the Regulations while determining the interest on loan.

44. In true up for FY 2011-12, the Appellant claimed the gross capitalization of 270.78 crores. The State Commission deducted the value of the written off

assets as furnished by the Appellant in its audited accounts to compute net capitalization of Rs. 257.53 crores. After deducting the Service Line Charges (SLC) borne by the consumers, the balance capitalization worked out to be 190.22 crores. Then the normative debt was worked out at 70% of the balance capitalization at 133.15 crores and normative equity at 30% of the balance capitalization at 57.07 crores. According to the Appellant, the State Commission ought not have deducted the written off assets from the total capitalization before computing the normative loan.

45. According to the second proviso to Regulation 34.1 the normative equity capital shall be reduced by 30% of the original cost of the retired or replaced asset or the actual equity component based on the documentary evidence if it is lower than 30%. Since no documentary proof has been given by the Appellant, the deduction on

account of retirement of asset will be 30% of the original cost of the retired asset i.e. 30% of 13.28 crores in the present case.

46. As per second proviso to Regulation 39.1, the normative loan capital shall be reduced to the extent of outstanding loan component of the original cost of the retired assets based on documentary evidence. The State Commission has, however, deducted the entire cost of the retired asset from the gross capital expenditure. We find that no documentary proof was given by the Appellant regarding outstanding loan component of the retired asset and actual equity deployed on the retired assets. We cannot find fault with the procedure adopted by the State Commission in the absence of the data for the retired asset to deduct the total cost of the retired asset from the gross capital

cost which amounts to taking equity and debt amount in the normative ratio of 70:30 for the retired asset.

47. Regarding repayment of loans, Regulation 39.3 provides that repayment for the year during the tariff period from FY 2011-12 to FY 2015-16 shall be deemed to be equal to the depreciation allowed for that year. The State Commission has approved depreciation of 92.72 crores in the truing up for FY 2011-12. Accordingly, the State Commission has allowed repayment of loan during the FY 2011-12 at Rs. 92.72 crores. The Regulations do not provide for separate treatment of repayment of loan for the existing capital assets and the new assets capitalized during the financial year. Accordingly, we do not find any infirmity in the impugned order regarding repayment of loan.

48. The fifth issue is regarding computation of wheeling charges.

49. It has been submitted by the Learned Counsel for the parties that this issue is covered by the decision of this Tribunal in Appeal no. 32 of 2011 and 190 of 2011.

50. In Appeal no. 190 of 2011 this Tribunal has held as under:

"17. We have carefully considered the submissions made by the parties on this issue. In fact, the categorical submissions made by the State Commission that the apportionment between the LT and the HT consumers would not in any manner affect the Annual Revenue Requirements of the Appellant, which would be entitled to its total annual revenue requirements has not been refuted by the Appellant.

18. The learned Counsel for the Appellant did not dispute this but contended that the issue is being contested as a matter of principle.

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25. It is true that the State Commission has not given any reason or rationale for adoption of this value. However, since the tariff period is already over and the actual amount earned by the Appellant by way of wheeling charges during the period is to be adjusted while carrying out the truing up exercise, we do not intend to interfere with the Impugned Order at this stage. However, we advise the State Commission to consider the same for future. Accordingly, this point is answered as against the Appellant."

51. In the judgment dated 3.7.2013 in Appeal no. 32 of 2011, this Tribunal has held that the State Commission is required to determine the wheeling charges as a combination of fixed charges in Rs. Per KW and energy charges in paise/kWh in accordance with the regulatory provisions specifying the methodology to recover the wheeling charges.

52. The decision of the Tribunal in the above cases would squarely apply to the present case for determination of wheeling charges in future. Accordingly, decided.

53. The sixth issue is regarding cross subsidy surcharge.

54. It has been submitted by the learned counsel for the Appellant and the learned counsel for the State Commission that this issue is covered by the judgment of this Tribunal dated 28.11.2013 in Appeal Nos. 190 of 2011, 162 of 2012 and 163 of 2012. The relevant extract of the finding of this Tribunal are as under:

"75. In view of the above, we are of the view that when the Regulations of the State Commission specifically provides that the Formula specified by the National Tariff Policy shall be followed for calculation of Cross Subsidy Surcharge and when the National Tariff Policy provides for the specific formula, the State Commission is bound to follow its own Regulations. In fact, the State Commission has rightly followed the Formula in National Tariff Policy and correctly followed the Full

Bench Decision in 2007 APTEL(ELR) 1222 in the Case of RVK Energy Private Ltd Vs Central Power Distribution Company, Andhra Pradesh. Accordingly, the same is decided as against the Appellant."

55. Accordingly, this issue is decided in terms of the above findings of the Tribunal against the Appellant.

56. The last issue is regarding proposal of the Appellant for tariff rationalization.

57. According to the Appellant there is a mismatch in the recovery of fixed charges vis-à-vis fixed costs and therefore, requested for appropriate increase in the fixed charges component of the tariff. Further, the fixed costs incurred by the Appellant on fixed cost of purchase of power, Operation & Maintenance of the network and interest, depreciation and Return on Equity

on capital expenditure to establish and augment the network and, therefore, as per the guiding principles of sub-sections (b) and (c) of Section 61 of the Electricity Act, 2003, the fixed cost should ideally be recovered through fixed charges from the consumers.

58. The Appellant has pointed out the following problems due to this anomaly in tariff:

(i) The existing fixed charges being not depictive of the fixed cost, the open access consumers avail the standby facility at the cost of other similar consumes. In case a consumer availing power under open access and also from the distribution licensee does not utilize the contracted capacity for the distribution licensee, the fixed cost of such consumer is being borne by other consumers.

(ii) It is necessary to address issues as part of open access being ushered in:

(a) Fixed charges should be depictive of fixed costs;

(b) Wheeling charges should be depictive of the true cost of wheeling.

(c) Cross subsidy surcharge should be depictive of the actual cross subsidy in tariff.

59. Therefore, the Appellant approached the State Commission with proposal to recover the fixed cost for small consumers (less than 1 MW) by increase in the fixed charges over a period of 5 years commencing from FY 2013-14 and for consumers above 1 MW & above to address the anomaly in tariff structure in the same year (FY 2013-14) by increasing fixed charges and decreasing the energy charges appropriately.

60. According to the Appellant, the consumers of demand above 1 MW have been allowed to buy power from other than the distribution licensee including the power exchange by relying on the Open Access Regulation of the State Commission of 2011. Due to lower fixed charges, the consumers above 1 MW simultaneous maintain the status of retail consumer of the licensee and avails the standby supply facilities without getting out of the licensee's system. If the consumer after availing open access does not utilize the booked capacity and if the recovery of part of fixed charges is to be made from energy charges as per the existing tariff structure, then there would be under recovery of fixed cost from these consumers. This in turn will be compensated by other consumers of the licensee at the time of truing up, against the intentions of Section 42(2) (3) of the Electricity Act, 2003.

61. According to the learned counsel for the State Commission, the Commission had considered the proposal of the Appellant but the same was not accepted by the State Commission for the reason that there should not be increase in demand charges beyond a certain limit in order to keep the tariff hike at reasonable level. Further, the State Commission decided to increase the fixed and energy charges in such a way that tariff hike for all categories of consumers remains moderate, irrespective of usage of electricity, lower or extensive.

62. We find that the Appellant had given a detailed tariff proposal for FY 2013-14 in Chapter 10 of its Petition. The main issues relate to anomaly in recovery of fixed charges vis-à-vis fixed cost and demand side management by shifting of consumption from peak

hours to off-peak hours in view of high cost of power procurement during peak hours.

63. On the first issue regarding fixed charges, the contention of the Appellant is there is mismatch in recovery of fixed charges vis-à-vis fixed cost. For example, in Ahmedabad supply area, fixed cost constitutes 43% of total cost of supply against which only 8% of total sales revenue is recovered from demand charges. The State Commission has allowed open access for consumers of above 1 MW. As the fixed charges are not depictive of the fixed costs and majority of fixed cost is recovered through energy charges, these consumers are availing Open Access for sourcing short term power from Power Exchange while maintaining their status as retail consumers by paying the Contract Demand Charges. Thus, these consumers can utilize the supply from licensee at their

discretion as a standby facility throughout the year without making payment of the real fixed costs. The cost of making this standby facility available to Open Access consumers at subsidized rates is borne by other smaller consumers. In the existing structure, the consumer eligible for open access i.e. large HT consumers cross subsidize smaller LT consumers. To protect the interests of smaller consumers and license, the Electricity Act provides for recovery of cross-subsidy surcharge from such open access consumers. However, cross subsidy surcharge is nil or very low in case of the Appellant, hence, practically no cross subsidy surcharge is available to compensate the recovery of full fixed cost.

64. We find that the Appellant has raised a valid point which has not been considered by the State

Commission. The problem raised by the Appellant is explained in simple words as under:

An Open access consumer of above 1 MW normally draws power from the distribution licensee by paying the demand charges and energy charges, etc. However, it arranges short term power even for few hours during the day, one day in advance from the power exchange whenever the prices in the exchange are low and arranges short term power through traders when the electricity is available at favourable rates. The consumer pays the Demand Charges to the licensee but such Demand Charges are not adequate to recover the fixed cost incurred by the licensee in terms of the cost of network and fixed charges of generating stations from which power has been tied up to meet the full demand of the licensed area including the open access consumers but the capacity is not utilized fully due to non-availing of power by open

access consumer from the distribution licensee. The cross subsidy surcharge decided as per the Regulations is nil or very low. Thus, the burden of non-recovery of full fixed cost of the licensee from the open access consumers is passed on to other consumers who do not seek open access or are not entitled to seek open access. This is a valid point which has not been addressed by the State Commission.

65. Cross Subsidy Surcharge formula specified in the Tariff Policy is based on the assumption that in case of a consumer opting for open access, the distribution licensee could be in a position to discontinue purchase of power at the margin in merit order. Accordingly the cost of supply to the consumer is computed considering the weighted average of power purchase cost inclusive of fixed and variable charges of top 5% power at margin, excluding liquid fuel based generation.

However, in the present case the consumers of 1 MW and above continue to be consumers of the distribution licensee and avail open access only when the market price is favourable. This may lead to stranded long term capacity tied up by the distribution licensee for meeting their obligation to supply to the consumers including those who avail open access in short term only when market rate of power is favourable. The Tariff Policy under clause 8.5.4 provides for additional surcharge for obligation to supply as per Section 42(4) of the Electricity Act which would be applicable if it is conclusively demonstrated that the obligation of the licensee in terms of the existing power purchase commitments, has been and continues to be stranded or there is an unavoidable obligation and incidence to bear the fixed costs consequent to such contract. However, the fixed cost related to the network assets would be recovered through wheeling charges.

66. FY 2013-14 is since over and at this stage the tariff structure cannot be revisited. However, the State Commission is directed to consider this issue in the future tariff orders after giving opportunity of hearing to all concerned. We also appreciate the concern of the State Commission that the demand charges could not be increased steeply as it would result in tariff shock to some of the consumers. In our opinion, the State Commission may consider imposition of additional surcharge provided for under Section 42(4) of Electricity Act to meet the fixed cost of the distribution licensee arising out his obligation to supply. However, this would require detailed examination of the matter by the State Commission and the distribution licensee will also have to furnish requisite data to establish the case that the fixed charges incurred by it to fulfill its obligation to supply to the open access consumes are not fully

recovered from such open access consumers and the proposal to mitigate the problem of passing on the burden of the same on other consumers.

67. The State Commission shall also consider the proposal of the Appellant for appropriate time of the day tariff to reflect the cost of procurement of expensive power during the peak hours which has also not been duly considered in the impugned order in the future tariff order.

68. The Appellant may, therefore, put up a detailed proposal in this regard in future tariff petition and the State Commission shall decide the matter as per law after considering the suggestions and objections of the stakeholders. Accordingly decided.

69. **Summary of our findings:**

(i) Disallowance of approved revenue gap:

This issue is decided in terms of the findings of this Tribunal in Appeal no. 70 of 2007. Accordingly, the revenue gap for FY 2011-12 and 2013-14 has to be allowed to the Appellant. However, carrying cost, if any, for the period of delay in filing the ARR/ tariff petition shall not be allowed.

(ii) Disallowance of carrying cost: This issue is decided in favour of the Appellant in terms of findings of this Tribunal in Appeal no. 190 of 2011.

(iii) Disallowance of O&M expenses: This issue is covered by the judgment of this Tribunal in Appeal no. 190 of 2011. We find that the Appellant has not been able to establish its case that variation in O&M

expenses are covered under Regulation 23.1. As such this issue is decided against the Appellant.

(iv) Retrospective application of MYT Regulation in computation of interest expenses:

We do not find any infirmity in the impugned order.

(v) Computation of wheeling charges:

This issue is covered by judgment of this Tribunal in Appeal no. 190 of 2011. Accordingly, this issue is decided in terms of above judgment in favour of the Appellant.

(vi) Cross subsidy surcharge:

This issue is decided in terms of findings of this Tribunal in Appeal no. 190 of 2011, 162 of 2012 and 163 of 2012 against the Appellant.

(vii) Proposal for rationalization of tariff:

This issue is disposed of with certain directions to the State Commission and the Appellant for future.

70. In view of above, the Appeal Nos. 147 and 148 of 2013 are allowed in part. Appeal no. 150 of 2013 is dismissed. The State Commission is directed to pass the consequential order in Appeal Nos. 147 and 148 of 2013. No orders as to cost.

71. Pronounced in the open court on this ***30th day of May, 2014***.

(Justice Surendra Kumar) **(Rakesh Nath)**
Judicial Member **Technical Member**

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