

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

Appeal no. 212 of 2013

Dated: 27th October, 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
Bombay House, Homi Mody Street
Fort, Mumbai – 400 001**

...Appellant(s)

Versus

**Maharashtra Electricity Regulatory
Commission
World Trade Centre, Centre No.1,
13th Floor, Cuffe Parade, Colaba,
Mumbai - 400005**

...Respondent(s)

**Counsel for the Appellant(s): Mr. Amit Kapur
 Mr. Vishal anand
 Mr. Gaurav Dudeja**

Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Tata Power Corporation Ltd. challenging the impugned order dated 05.06.2013 passed by Maharashtra Electricity Regulatory Commission (“State Commission”) finalizing the true-up for FY 2011-12 and determining the Aggregate Revenue Requirement and Generation Tariff for FY 2012-13 to FY 2015-16. The Appellant has raised the following issues in this Appeal.

i) Wrongly allowing income from gain/loss on Foreign Exchange as a part of Non-Tariff Income:

The State Commission, in accordance with the approach adopted in its previous true-up order in case no. 105 of 2011, has considered gain from corporate treasury function

as part of non-tariff income, for the purpose of truing up of non-tariff income for FY 2011-12. This issue is already covered by the judgment dated 28.11.2013 of this Tribunal in Appeal no. 106 of 2012 in favour of the Appellant.

ii) Wrongful computation of Operation and Maintenance (O&M) expenses:

The State Commission has determined the normative O&M expenses for FY 2011-12 for the purpose of computing the sharing of gains/losses by escalating the approved O&M expenses for FY 2010-11 at the escalation rate approved by the State Commission. The State Commission has trued-up the O&M expenses as per the MYT Regulations, 2005. This Tribunal in its judgment dated 28.11.2013 in Appeal no. 158 of 2012 has held that truing-up for FY 2011-12 will be done as per MYT Regulations 2012. Accordingly, this issue does

not survive and the O&M expenses have to be freshly calculated by the State Commission.

iii) Wrongful disallowance of Auxiliary Consumption of Unit no. 6:

The State Commission has in line with its previous approach for truing-up purposes, considered normative auxiliary consumption of 3.5% for Unit no. 6 for FY 2011-12 as considered for truing-up purpose for FY 2009-10 and FY 2010-11. The difference between the actual auxiliary consumption and normative auxiliary consumption has been considered for computing the sharing of efficiency gain/loss for FY 2011-12. This Tribunal in judgment dated 28.11.2013 in Appeal no. 106 of 2012 Tata Power Vs. Maharashtra Electricity Regulatory Commission has upheld the order of

the State Commission wherein the actual auxiliary consumption was not allowed to Tata Power.

iv) Non-allowance of carrying cost on past recovery:

The State Commission has allowed the revenue gap till 2010-11 along with carrying cost upto FY 2012-13 to be recovered from the Distribution Licensees, viz. BEST, Rlnfra-D and TPC-D in 10 equal instalments commencing from June 2013 to March 2014 but has not allowed carrying cost towards the payment in ten instalments.

3. On the above issues we have heard 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 was correct in disallowing the actual auxiliary consumption of Unit no. 6?**

- iv) Whether the State Commission has erred in not allowing carrying cost on the approved revenue gap of the Appellant till 2010-11 directed to be recovered in ten**

equal instalment from June 2013 to March 2014 from the Distribution Licensees?

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

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.”

9. The findings of this Tribunal in Appeal no. 106 of 2012 will squarely apply to the present case. Accordingly, this issue is decided in terms of the above findings in favour of the Appellant.

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

11. According to Shri Amit Kapur, 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 true-up for FY 2011-12 has to be done as per MYT Regulations, 2011.

12. 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, 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.”*
13. 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.
- 14. The third issue is regarding disallowance of auxiliary consumption for Unit no. 6.**
15. It is fairly admitted by Shri Amit Kapur, Learned Counsel for the Appellant that this issue is covered and decided against the Appellant by the judgment of this Tribunal dated 28.11.2013 in Appeal no. 106 of 2012 as under:

“109.State Commission’s approach relating to auxiliary consumption appears to be sound. Having been enjoyed the gain in lesser auxiliary consumption during previous three years due to higher PLF, the Appellant cannot not complain about loss due to higher auxiliary consumption on account of lower PLF. Loss or gain for same reasons have to be treated in a same way.”

16. Accordingly, this issue is decided against the Appellant in terms of the judgment in Appeal no. 106 of 2012.

17. The fourth issue is regarding carrying cost on past recovery.

18. According to Shri Amit Kapur, Learned Counsel for the Appellant, the State Commission has not followed the settled principle of law that carrying cost is to be allowed based on the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow is arranged by the company from lenders and/or promoters and/or accruals

has to be paid by way of carrying cost. The impact of delay of past recovery of 278.39 crores which the Appellant had sought in one month but granted by the State Commission in 10 instalments during June 2013 to March 2014 has been depicted by him as under.

Instalments	Months	Rs. Cr.	Recovery allowed	Cumulative recovery	Amount Balance	Interest Rate	Interest on Amount not allowed
1	Apr-13		0	0.00		14.39%	0.00
2	May-13		0	0.00		14.39%	0.00
3	June-13	278.39	27.84	27.84	250.55	14.39%	3.00
4	July-13		27.84	55.68	222.71	14.39%	2.67
5	Aug-13		27.84	83.52	194.87	14.39%	2.34
6	Sept-13		27.84	111.36	167.03	14.39%	2.00
7	Oct-13		27.84	139.20	139.20	14.39%	1.67
8	Nov-13		27.84	167.03	111.36	14.39%	1.34
9	Dec-13		27.84	194.87	83.52	14.39%	1.00
10	Jan-13		27.84	222.71	55.68	14.39%	0.67
11	Feb-13		27.84	250.55	27.84	14.39%	0.33
12	Mar-13		27.84	278.39	0.00	14.39%	0.00
Total			278.39				15.02

19. Shri Buddy A. Ranganadhan, Learned Counsel for the State Commission has argued that the Appellant in its Petition had proposed the carrying cost only upto FY 2012-13 which was

allowed by the Commission. The impugned order was issued on 05.06.2013 and the tariff for FY 2013-14 was made effective from 01.06.2013. The carrying cost is allowed whenever the recovery of amount is deferred. In the present case, the State Commission has not deferred the recovery of the amount and has allowed it during FY 2013-14 itself.

20. According to Mr. Buddy A. Ranganadhan, Learned Counsel for the State Commission, the Appellant in its Petition did not consider carrying cost beyond FY 2012-13 and did not pray for the carrying cost even for its own proposed instalment period beyond FY 2012-13. Therefore, there is no merit in the contention of the appellant that carrying cost has been disallowed on the payment to be recovered in ten instalments.

21. According to Mr. Amit Kapur, even assuming that the Appellant has not prayed for interest component on the instalment, Learned Maharashtra Commission has to follow the settled principle of law that the carrying cost is to be 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. This principle has been upheld in catena of judgments by this Hon'ble Tribunal including in Tata Power Vs. MERC, 2011 ELR (APTEL).
22. We find that carrying cost has been allowed by the State Commission upto the end of 2012-13. If the payment on the past dues had to be made in lump sum, at the beginning of FY 2013-14, no carrying cost would have been necessary to

be provided for the FY 2013-14. We find that the Appellant had prayed for lump sum payment of Rs. 279.39 crores within one month of issue of MYT order and the balance payment in 9 equal instalment. However, in this case the payment has been ordered to be made by the Distribution Companies in ten equal instalments from June 2013 to March 2014 and the request of the Appellant for lump sum payment of Rs. 279.39 crores was rejected.

23. We find that the amount which was required to be recovered by the Appellant in the FY 2011-12 is now allowed to be recovered in FY 2013-14. Following the principles laid down by this Tribunal regarding carrying cost, we feel that the carrying cost has to be allowed to the Appellant for the period April 2013 to March 2014. Accordingly, decided.

24. Summary of our findings:

- i) Wrongly allowing income from gain/loss on Foreign Exchange as a part of Non-Tariff Income:**

The findings of this Tribunal in Appeal no. 106 of 2012 will squarely apply to the present case. Accordingly, this issue is decided in terms of the above findings in favour of the Appellant.

- ii) Wrongful computation of Operation and Maintenance (O&M) expenses:**

Operation and Maintenance Expenses for FY 2011-12 have to be re-determined as per the MYT Regulations 2011 in terms of the judgment of this Tribunal dated 28.11.2013 in Appeal no. 158 of 2012.

- iii) Wrongful disallowance of Auxiliary Consumption of Unit no. 6:**

This issue is decided against the Appellant in terms of the judgment of this Tribunal in Appeal no. 106 of 2012.

iv) Non-allowance of carrying cost on past recovery:

The carrying cost is to be allowed for the period from April, 2013 to March, 2014.

25. In view of above the Appeal is allowed in part to the extent indicating as above. No order as to costs.

26. Pronounced in the open court on this **27th day of October, 2014.**

**(Rakesh Nath)
Technical Member**

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REPORTABLE/NON-REPORTABLE

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