Appellate Tribunal for Electricity
(Original Jurisdiction)

Appeal No.190 of 2011
&
162 AND 163 OF 2012

Dated:28th Nov, 2013

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. V J Talwar, Technical Member

APPEAL No.190 of 2011

IN THE MATTER OF

Torrent Power Limited
Torrent House
Ashram Road
Ahmedabad – 380 009

… Appellant

Versus

Gujarat Electricity Regulatory Commission,
1st Floor, Neptune Tower,
Opp. Nehru Bridge, Ashram Road,
Ahmedabad – 380 009

….Respondent(s)

Counsel for Appellant(s): **Ms. Deepa Chawan**
Mr. Gaurav Arora
Mr. Hardik Luthra
Mr. H.S. Jaggi
Mr. Alok Shukla & Mr. Naveen

Counsel for Respondent(s): **Mr. M.G. Ramachandran**

Mr. Anand K. Ganesan
Ms. Swagatika Sahoo
Ms. Sneha Venkataramani
Ms. Swapna Seshadri
Mr. S.R. Pandey for R-2

APPEAL No.162 of 2012

IN THE MATTER OF

Torrent Power Limited
Torrent House
Ashram Road
Ahmedabad – 380 009

… Appellant

Versus

Gujarat Electricity Regulatory Commission,
1st Floor, Neptune Tower,
Opp. Nehru Bridge, Ashram Road,
Ahmedabad – 380 009

….Respondent(s)

Counsel for Appellant(s): **Mr. H.S. Jaggi**
Ms. Deepa Chawan
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Counsel for Respondent(s): **Mr. M.G. Ramachandran**
Mr. Anand K. Ganesan
Ms. Swagatika Sahoo
Ms. Swapna Seshadri
Mr. S.R. Pandey for R-2

APPEAL No.163 of 2012

IN THE MATTER OF

Torrent Power Limited
Torrent House
Ashram Road
Ahmedabad – 380 009

… Appellant

Versus

Gujarat Electricity Regulatory Commission,
1st Floor, Neptune Tower,
Opp. Nehru Bridge, Ashram Road,
Ahmedabad – 380 009

….Respondent(s)

Counsel for Appellant(s): **Mr. H.S. Jaggi**
Ms. Deepa Chawan

Counsel for Respondent(s): **Mr. M.G. Ramachandran**
Mr. Anand K. Ganesan
Ms. Swagatika Sahoo
Ms. Swapna Seshadri
Mr. S.R. Pandey for R-2

JUDGMENT

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

1. The Appellant has filed three Appeals in Appeal No.190 of 2011, 162 of 2012 and Appeal No.163 of 2012 as against the different impugned orders.

2. The Appellant Torrent power Limited in Appeal No.190 of 2011 has challenged the Impugned Order dated 6.9.2011 passed by the Gujarat State Commission approving the Annual Revenue Requirements of the Appellant for the Multi Year Tariff period

for the Financial Year 2010-11 to 2015-16 and determining the Tariff For the Financial Year 2011-12. In the very same order, the State Commission has trued-up the finances of the Appellant for the Financial Year 2009-10 and conducted the Annual Performance Revenue for the Financial Year 2010-11.

3. The Appellant, Torrent Power Limited (Surat) in Appeal No.162 of 2012has filed the Appeal against the Impugned Order dated 2.6.2012 passed by the Gujarat State Commission whereby the State Commission trued-up the financials of the Appellant for the Surat Distribution for the Financial Year 2010-11 and determined the tariff for the Financial year 2012-13.

4. The Appellant, Torrent Power Limited (Ahmedabad) in Appeal No.163 of 2012 has filed the Appeal as against the Impugned Order dated 2.6.2012 passed by the State Commission whereby the State Commission trued-up the financials of the Appellant for the Ahmedabad Distribution area for the Financial Year 2010-11 and determined the Tariff for the Financial year 2012-13

5. Since the issues raised in all these Appeals are common, all these Appeals have been heard together and are being disposed of through this common judgment.

6. The short facts are as follows:

(a) Torrent Power Ltd., the Appellant who is a Distribution Licensee in respect of various areas filed the Petition before the State Commission for approving the Annual Requirements and for Truing-Up of the finances of the Appellant in various Distribution areas.

(b) The State Commission passed the Impugned Orders dated 6.9.2011 and 2.6.2012.

(c) The Appellant has raised the following issues in these Appeals:

(i) Issue Relating to Wheeling Charges;

(ii) Erroneous Determination of Income Tax;

(iii) Treatment of Operation and Maintenance Expenses;

(iv) Erroneous Computation of Cross Subsidy Surcharge;

(v) Carrying Cost.

7. We shall now take each of the above issues one by one.

8. The **First Issue** is relating to **Determination of Wheeling Charges**. The Appellant has urged two grounds on this issue.

(a) The erroneous allocation of Wheeling charges in determination of the Annual Revenue Requirements of the Appellants by the State Commission amongst the High Tension and Low Tension Consumers .

(b) The erroneous Computation of Wheeling Charges by the State Commission as single part charges as against the fixed and a variable charge.

9. On the second ground in respect of Wheeling Charges as single part charges divided between the fixed and variable charges, this Tribunal in Appeal No.32 of 2012 dated 3.7.2013 interpreted the Regulations of the State Commission and held that the State Commission is required to determine the wheeling charges as the combination of fixed and treatment charges in Rs. per KW and variable charges in Rs per kWh in accordance with the regulatory provisions specifying the methodology to recover the Wheeling Charges.

10. The learned Counsel for the State Commission has admitted that the said decision of this Tribunal would apply to the present case also and the issue raised by the Appellant is covered by the above decision of this Tribunal.

11. On the basis of this decision, it is undertaken by the learned Counsel for the State Commission that since the computation of Wheeling Charges would not affect the Revenue

Requirements of the Appellant and are only the manner in which the revenue requirements are to be recovered from the consumers, the wheeling charges for the future years to be fixed by the State Commission will be in terms of the directions issued by this Tribunal in Appeal No.32 of 2012.

12. It is further assured by the learned Counsel for the State Commission that the Revenue Requirements of the Appellant for the period already elapsed, shall be trued-up and ensured that the Appellant is not put to loss on account of single part Wheeling charges which was earlier determined by the State Commission as opposed to two part charges as directed by this Tribunal.

13. In view of the categorical undertaking given by the learned Counsel for the State Commission both through the oral arguments as well as Written Submissions, the second ground would not survive. Accordingly, the same is decided.

14. Let us now take the first ground on the 1st issue relating to allocation of the wheeling charges amongst the High Tension and Low Tension Consumers.

15. Elaborating this ground, the learned Counsel for the Appellant has made the following submissions:

(a) The State Commission in the Impugned order dated 6.9.2011 has allocated 30% of the total Wheeling ARR as

wheeling ARR for the HT voltage level. The wheeling charge for HT voltage level is arrived at by dividing the wheeling ARR of HT voltage level with total units injected at the HT voltage level which includes units used at LT level also.

(b) The Appellant had proposed the methodology for allocation of wheeling ARR between HT & LT voltage level for computation of wheeling charges in its MYT Petition giving the details of the first level of segregation and allocation of ARR between HT and LT Voltage level and also the second level segregation and allocation of HT ARR in proportion to the ratio of contribution to the peak demand by the HT & LT consumers. However, the State Commission has rejected the Appellant's proposal to compute the Wheeling ARR without giving the reasons whatsoever. The State Commission has also computed the Wheeling Charges by arbitrarily allocating 30% of the Wheeling ARR to HT Consumers without providing the basis for the same.

(c) The above issue has already been decided by this Tribunal in Appeal No.68 of 2009 giving appropriate directions to the State Commission but this direction given by this Tribunal has been ignored by the State Commission in the Impugned Order dated 6.9.2011. This

has resulted into lower open access charges and hence it would result into subsidization of Open Access consumers by the other retail consumers. This is against the spirit and provisions of the Act. Therefore, this Tribunal may issue necessary directions to follow the reasoned methodology of allocation of ARR as proposed by the Appellant.

16. The learned Counsel for the State Commission has made the following reply in support of the findings of the State Commission:

a) The Petition filed by the Appellant on the calculation of the wheeling charges and its allocation between wire business and retail business was not in accordance with the Regulations framed by the State Commission.

b) The Appellant was required to follow the allocation matrix for segregation of expenses provided by the Regulations.

c) The Appellant in its multi-year tariff petition did not follow the allocation matrix for segregation of expenses between wire business and retail supply business as given in the Regulations of the State Commission.

d) The Appellant had proposed a two-stage methodology for apportionment of the ARR, firstly between HT level and LT level and the ARR of HT level is

once again apportioned between HT voltage and LT voltage based on the ratio of contribution to the peak. Considering the difficulty in segregating the expenses in the absence of segregated accounts, the State Commission adopted the methodology of considering 30% of the total distribution cost at HT level and the balance distribution cost at LT level instead of the two steps approach proposed by the Appellant.

e) The apportionment between the LT and the HT consumers does not in any manner affect the Annual Revenue Requirements of the Appellant. The only question is as to what proportion the revenue requirement as to be recovered from HT consumers and LT consumers, which the State Commission has determined as 30% and 70% respectively. Further, there is no significant variation between the claim made by the Appellant and the decision of the State Commission. Therefore, it cannot be construed that the decision of the State Commission on this issue is erroneous.

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.

19. Section 49 of the 2003 Act requires the State Commission to determine the wheeling charges for the Open Access Consumers. In order to compute the wheeling charges, the State Commission has segregated the Annual Revenue Requirement of the Appellant in to two parts i.e ARR for the Wire business and ARR for the Supply business. ARR for the Wire Business has been apportioned to HT and LT. The amount apportioned to HT and LT has been divided by HT sales and LT sales respectively to compute per unit wheeling charges for open access consumers. The wheeling rate so arrived is charged from open access consumers. Since the Commission has permitted open access to consumers having demand of more than 1 MW, open access consumers are only on HT.

20. This would show that if the wheeling rate for HT consumer is high, the Appellant would get higher amount during the year. Of course, the total wheeling charges earned by the Appellant would be subtracted from the ARR as non-tariff income. But, it

cannot be disputed that the Appellant would get higher amount during the period and its liquidity would get improved.

21. Let us now quote the relevant portion of the Impugned Order dated 6.9.2011 passed by the State Commission as under:

> ***"9.1** Regulation 88.1 of MYT Regulations, 2011, stipulates that the Commission shall specify the wheeling charges of distribution wires business of the distribution licensee in its ARR & Tariff order.*
>
> *The TPL has allocated the total ARR expenditure of TPL-D to wheeling and retail supply business considering the distribution infrastructure up to the service line as part of wheeling business and the distribution infrastructure from service line to consumer premises as part of the retail supply business. The segregation of components into wheeling and retail supply business has been done by TPL based on the following allocation matrix:*
>
> ***Table 9.1: Allocation matrix for segregation to "Wheeling and Retail Supply" submitted by TPL-D for FY 2011-12***

ARR components	Wire business (%)	Retail business (%)
Power purchase expenses	0	100
O&M	90	10
Depreciation	90	10
Interest on long term loan capital	90	10
Interest on working capital and consumer security deposit	10	90
Bad debts written off	10	90
Income tax	90	10
Transmission charges intra-state	0	100
Contribution to contingency reserve	90	10
Return on equity	90	10
Non-tariff income	10	90

The TPL has not bifurcated the O&M expenses into employee, R&M and A&G expenses, instead it has provided O&M expenses at a composite level.

The Commission, in order to compute the wheeling charges and cross subsidy surcharges, has considered the allocation matrix between the wheeling and retail supply business as per GERC (MYT) Regulations, 2011.

The allocation matrix and the basis of allocation of various cost components of the ARR as per GERC (MYT) Regulations, 2011 are shown below:

Table 9.2: Allocation matrix for segregation to "Wheeling and Retail Supply" for TPL-D for FY 2011-12 as per GERC Regulations

ARR components	Wire business (%)	Retail business (%)
Power purchase expenses	0	100
O&M		
(i) Employee expenses	60	40
(ii) A&G expenses	50	50
(iii) R&M expenses	90	10
Depreciation	90	10
Interest on long term loan capital	90	10
Interest on working capital and consumer security deposit	10	90
Bad debts written off	0	100
Income tax	90	10
Contribution to contingency reserve	100	0
Return on equity	90	10
Non-tariff income	10	90

Based on the above allocation, the approved ARR for wires business and retail supply business are computed as shown below. The O&M expenses are segregated into employee, A&G and R&M expenses in the ratio of average of 2007-08, 2008-09 and 2009-10 actual expenses.

Table 9.3: Allocation of ARR between wheeling and retail supply business for Ahmedabad supply area for FY 2011-12

Cost components	Ahmedabad area for FY 2011-12		
	Total	Wheeling	Retail supply
Power purchase expenses	2257.84	0	2257.84
O&M			
(i) Employee expenses	68.64	41.18	27.46
(ii) A&G expenses	35.36	17.68	17.68
(iii) R&M expenses	82.51	74.26	8.25
Depreciation	106.41	95.77	10.64
Interest on loan	70.57	63.51	7.06
Interest on security deposit	13.04	1.30	11.74
Interest on working capital	6.95	0.70	6.26
Return on equity	146.93	132.24	14.69
Bad debts written off	1.09	0.98	0.11
Income tax	8.52	0.00	8.52
Contingency reserve	0.6	0.60	0.00
Prompt payment rebate	27.17	0.00	27.17
Less: Non-tariff income	51.7	5.17	46.53
Net ARR	**2877.33**	**433.39**	**2443.94**

Table 9.4: Allocation ARR between wheeling and retail supply business for Surat for FY 2011-12

Cost components	Surat area for FY 2011-12		
	Total	Wheeling	Retail supply
Power purchase expenses	1250.23	0.00	1250.23
O&M			
(i) Employee expenses	37.45	22.47	14.98
(ii) A&G expenses	23.86	11.93	11.93
(iii) R&M expenses	25.32	22.79	2.53
Depreciation	45.20	40.68	4.52
Interest on loan	43.31	38.98	4.33
Interest on security deposit	9.12	0.91	8.21
Interest on working capital	0.00	0.00	0.00
Return on equity	74.47	67.02	7.45
Bad debts written off	4.98	4.48	0.50
Income tax	0.36	0.00	0.36
Contingency reserve	0.40	0.40	0.00
Less: Non-tariff income	21.93	2.19	19.74
Net ARR	**1492.77**	**207.47**	**1285.30**

The above allocations of ARR are used for determination of charges and cross subsidy surcharge for FY 2011-12.

9.2 Wheeling charges

The wheeling charges at 11kV voltage level for FY 2011-12 are given in the table below:

Table 9.5: Wheeling charges for 11kV voltage level

Sl. No.	Particulars	Ahmedabad area	Surat area
1	Energy input into 11kV system (MU)	6320	3452
2	Total distribution cost Wired Business (Rs. crore)	433.39	207.47
3	Distribution cost for wheeling at 11kV (HT) (Rs. crore) at 30% of total distribution cost	130.02	62.24
4	Wheeling charge at 11kV (Paise / kWh) (3/1)	21	18

Accordingly, the Commission approves the wheeling charges of 21 paise / kWh for FY 2011-12 for Ahmedabad area and 18 paise / kWh for Surat area. In addition 4% of energy in kind will be deducted from the energy input towards assumed loss in EHT / HT network of distribution licensee.

Wheeling charges worked out for LT voltage level for FY 2011-12 for Ahmedabad and Surat areas are given in the table below:

Sl. No.	Particulars	Ahmedabad area	Surat area
1.	Energy in put into 11kV system (MU)	6320	3452
2.	Losses in 11kV system (at 4%) (MU)	253	138
3.	Energy sales in 11kV system (MU)	1555	246
4.	Energy input into LT system (MU) [1-(2+3)]	4512	3068
5.	Total distribution cost for wheeling business (Rs. crore)	433.39	207.47
6.	Distribution cost at 11kV voltage (HT) level (Rs. crore) (at 30%)	130.02	62.24
7.	Distribution cost at LT voltage level (Rs. crore) (5-6)	303.37	145.23
8.	Wheeling charges at LT voltage level (paise / kWh)	67	47

22. Perusal of this table referred to above as contained in the Impugned Order would indicate that the State Commission has followed segregated the ARR of the Appellant in to Wheeling Business and Retail Business as per the Allocation matrix in accordance with MYT Regulations.

23. The Appellant has no issue with regard to methodology adopted by the State Commission. However, the Appellant is aggrieved only with regard to the so called 'arbitrariness' of the value of 30% considered for allocation of wheeling ARR to HT.

24. According to the Appellant, the State Commission has not given any reason, what so ever, for adoption of this value.

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.

26. The **Second Issue** is relating to **Erroneous Computation of Income Tax.**

27. On this issue, the learned Counsel for the Appellant has made elaborate submissions. However, the learned Counsel for the State Commission has admitted in the Written Submissions that this issue is already covered by the decision of this Tribunal in Appeal No.32 of 2012, wherein this Tribunal has held that the income tax actually paid is to be considered at the time of truing up in terms of Regulation 22 of the MYT Regulations of the State Commission.

28. The State Commission has dealt with the income tax issue in the Impugned Order in terms of the Regulations.

29. The learned Counsel for the State Commission has assured that for the future orders, the judgment in Appeal No.32 of 2012 would be followed and the same would be applied during truing-up.

30. In view of the above assurance given by the Counsel for the State Commission, this issue challenged by the Appellant being covered by the decision in Appeal No.32 of 2012 also would not survive. Accordingly decided.

31. The **Third Issue** is relating to the **Treatment of Operation and Maintenance Charges.**

32. The Appellant has challenged the determination of the Operation and Maintenance Expenses(O&M Expenses) allowed by the State Commission claiming the same to be

inadequate and also submitted that the decision of this Tribunal in Appeal No.32 of 2012 covers the issue raised by the Appellant in this Appeal.

33. This aspect was refuted by the learned Counsel for the State Commission.

34. In order to understand the core of the present issue, some facts are required to be referred to which are as under:

(a) The Appellant filed MYT petition before the State Commission in Case No. 1092/2011. In this petition the Appellant stated that base O&M expenses in the MYT Regulations were arrived at excluding onetime impact of uncontrollable expenses such as impact of wage revision, major overhauling of Generation stations, change in law etc. On this basis, the Appellant has prayed the State Commission to treat such expenses as uncontrollable and to allow the recovery of same over and above normal allowable expenses.

(b) While passing the MYT order dated 6 September, 2011 in Case No. 1092/2011, the State Commission has approved the normalized O&M expenses as the same are based on the normalized expenses of previous three years as submitted by the Petitioner/Appellant. Though the State Commission has approved the O&M expenses

for the 2nd MYT Control Period considering the normalized O&M expenses, the State Commission has not clarified that the uncontrollable expenses would be allowed at actuals in addition to the approved O&M Expenses for MYT 2nd Control period.

(c) The Appellant, therefore, approached the State Commission and filed a clarification Petition on 21.10.2011 seeking clarification for the treatment of O&M Expenses for Torrent Power Limited-Generation and Torrent Power Limited-Distribution (Ahmedabad) and Torrent Power Limited-Distribution (Surat) in the MYT period.

(d) The Respondent Commission has passed the Order dated 14 March, 2012 as under:

> *"We have carefully considered the submission made by the petitioner. As per Regulation 23.2 of the GERC (MYT) Regulations 2011, O&M expenses are categorized as "Controllable". The O&M expenses for generation and distribution business of TPL decided by the Commission in accordance with the Regulations and 85.4 of the GERC (MYT) Regulations 2011. The escalations applied on the average of actual O&M expenses of FY 2007-08 to 2009-10 to arrive at the O&M expense of the years of the MYT period takes care of the wage revision. Moreover, major overhauling of the power station may be taken up by the Petitioner as a capital*

expenditure, which may be approved by the Commission on prudence check. Change in law is attributed as "uncontrollable" in the Regulation 23.1of the GERC (MYT) regulations 2011. The Commission clarifies accordingly."

35. The Appellant is aggrieved from the State Commission's clarificatory order dated 14.3.2012 on two counts viz., (i) the escalation applied on the O&M charges takes care of wage revision; and (ii) Major overhauling of the power station may be taken up as capital expenditure.

36. On the basis of these grievances, the learned Counsel for the Appellant made the following submissions:

(a) The State Commission ought to have refrained from terming the O&M expenses as controllable expenses, as the variation in O&M expenses needs to be analyzed and attributed to the factors, as controllable and uncontrollable, at the time of truing up.

(b) The State Commission has considered the normative O&M expenses while determining the O&M expenses for the MYT second Control Period as referred to in the order dated 6.9.2011.

(c) In the O&M expenses normalized on the basis of past three years actual expenses do not include the impact of wage revision, major overhauling of Generation

stations, change in law etc as these expenses do not occur during past three years.

(d) The suggestion of the State Commission that expenditure towards major overhaul could be treated as capital expenditure cannot be acceded as the expenses on account of major overhauling is to be incurred periodically in the gas based generating station to maintain its standard of performance. As a matter of fact, this expenditure would neither result into extension of its useful life nor increase in its capacity. Hence, the same cannot be treated as capital expenditure.

(e) The expense incurred for major overhauling of its gas generating station is revenue expenditure and the same has been rightly allowed by the State Commission in the impugned order itself for FY 2009-10.

37. In reply to the above submissions, the learned Counsel for the State Commission has made the following submissions:

(a) The norms with regard to O & M expenses is covered under Regulation 98.6 of the MYT Regulations of the State Commission. In terms of the above,, the determination of the O&M expenses is provided for as the average of the actual O&M expenses for three years ending March 31st, 2010, subject to prudence check and

escalated @ 4% to arrive at the O&M 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%. The decision of this Tribunal in Appeal No.32 of 2012 would not apply to the present case because in that case, the Distribution Licensee was not in the existence for more than three years on the date of the effectiveness of the MYT Regulations. Thus, for the Distribution Licensees which have been in operation for less than three years as on the date of effectiveness of the MYT Regulations, the Statutory Regulations itself provide that the determination by the State Commission shall be on case to case basis.

(b) In the present case, the Distribution Licensee has been in existence for a long period of time. It is not the case of the Appellant that the actual expenses of the three years were not available. Consequently, the proviso to Regulation 98.6 has no application to the present case. The State Commission has in fact, determined the O&M expenses simply in terms of the Regulation 98.6.

(c) In the circumstances, the challenge by the Appellant on the issue of the O&M expenses is misconceived. Therefore, there is no merit in the challenge on this issue.

38. We have carefully considered the submissions made by the Counsel for both the parties.

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.

42. According to the Appellant, the State Commission has worked out the Normative O&M expenses on the basis of actual O&M expenses during immediate past three years. These actual

O&M expenses did not include onetime expenses like increase in wage revision, major overhauling etc.

43. In the light of the stand taken by the Appellant, let us refer to the findings of the State Commission in the impugned order on this issue. The same is as under:

"Truing up for FY 2009-10

4.1.8 Fixed Charges

4.1.8.1 Operation and Maintenance (O&M) expenses

The TPL has claimed a sum of Rs. 127.36 crore towards actual O&M expenses in the truing up for FY 2009-10, as against Rs. 136.30 crore approved in the MYT order dated 17th January, 2009 as detailed in the table below:

Table 4.25: O&M expenses of TPL-G (APP) claimed for FY 2009-10

(Rs. crore)

Particulars	***FY 2009-10***		
	MYT Order	***APR Order***	***Actual***
Employee cost	*52.69*	*52.69*	*65.19*
R&M expenses	*60.12*	*60.12*	*47.90*
A&G expenses	*23.49*	*23.49*	*14.27*
Total O&M expenses	***136.30***	***136.30***	***127.36***

The O&M expenses are discussed component wise in the following paragraphs.

(i) Employee expenses

The TPL has claimed a sum of Rs. 65.19 crore towards actual employee cost in the truing up for FY 2009-10, as against Rs. 52.69 crore approved in the MYT order dated 17th January, 2009.

Petitioner's submission

The TPL has submitted that its employee expenses have exceeded the approved values due to one-time impact of Rs. 10.59 crore on account of wage revision settlement arrived at under section 12 (3) of the Industrial Dispute Act, 1947. The TPL has also claimed that this wage revision is to be considered as uncontrollable factor and needs to be trued up at actual in accordance with GERC (MYT Framework) Regulations, 2007 read with the judgment of the Hon'ble Appellate Tribunal for Electricity in Appeal No. 68 of 2009.

Commission's Analysis

The Commission has verified the actual employee cost with the segregated audited accounts submitted by the TPL for FY 2009-10. The gross employee cost is Rs. 82.09 crore as per the segregated accounts. The net employee cost claimed is Rs. 65.19 crore against Rs. 52.69 crore approved in the MYT Order for FY 2009-10. The deviation between approved and net employee cost claimed is thus leading to a Rs. 12.50 crore loss on account of wage revision.

The Commission has termed the deviation on account of wage revision as uncontrollable factor. {emphasis added}

(ii) Repairs & Maintenance (R&M) expenses

The TPL has claimed a sum of Rs. 47.90 crore towards actual R&M expenses in the truing up for FY 2009-10 against Rs. 60.12 crore approved in the MYT Order dated 17th January, 2009.

Petitioner's submission

The TPL has submitted that the actual expenses under R&M are lower by an amount of Rs. 12.21 crore as

compared to the approved expenses. The TPL has mentioned that out of the total of Rs. 12.21 crore ***an amount of Rs. 6.74 crore is on account of deferment of major overhaul to FY 2010-11; considered as uncontrollable factor*** *and the balance amount of Rs.5.47 crore under R&M account is considered as a controllable factor.*

Commission's Analysis

The Commission has verified the actual R&M expenses with the segregated and audited accounts and found them to be correct. As per the MYT Framework Regulations, 2007 the deviation in R&M expenses is considered as a controllable factor.

…….

Multi Year Tariff Order for FY 2011-12 to FY 2015-16

…….

6.1.6 Fixed charges

6.1.6.1 Operation and Maintenance (O&M) expenses for FY 2010-11

In its submission the TPL has projected the O&M expenses for the control period FY 2011-12 to FY 2015-16 as detailed in the table below:

Table 6.28: O&M expenses projected by TPL-G (APP) for the control period FY 2011-12 to FY 2015-16

(Rs. crore)

Particulars	FY 2011-12	FY 2012-13	FY 2013-14	FY 2014-15	FY 2015-16
O&M expenses	134.82	142.53	150.68	159.30	168.41

The O&M expenses consist of Employee expenses, Repairs & Maintenance (R&M) expenses and Administration & General (A&G) expenses.

Petitioner's submission

It is submitted by TPL that it has proposed a composite O&M expense in order to achieve operational flexibility to promote efficient operation instead of bifurcating them into employee expenses, R&M expenses and A&G expenses. The TPL has submitted that it has considered the average O&M expenses for three years ending on 31st March, 2010 and this average is considered as base O&M expense for the FY ending on 31st March, 2009 which escalated @ 5.72% every year in order to arrive at the O&M expense for FY 2011-12 and onwards. It is further mentioned that this methodology has been considered for the O&M components, which normally escalate on account of general inflation. ***The TPL has further submitted that it has not taken into account the one-time expenses such as the wage revision, major overhauling of station, change in law etc., which are uncontrollable factors and would be claimed at actual, over and above the proposed normal allowable components.*** *The TPL has requested the Commission to approve the O&M expenses as projected and allow any expenditure on account of wage revision, major overhauling, change in law, changes in levies / taxes / duties / charges by other authorities at actual as and when it incurred in addition to the expenses projected .*

Commission's Analysis

The Commission has examined the O&M expenses for the control period submitted by TPL and noted that the average actual O&M expenses for the three years ending 31st March, 2010 are considered as base for the FY 2008-09 and that these charges are escalated @ 4% p.a. thereon to arrive at the O&M expenses for FY 2011-12.

However, the TPL has not submitted the details of O&M expenses actual for the years 2007-08, 2008-09 and 2009-10. The O&M expenses projected for the control period are also not in accordance with the Regulation 55 of GERC (MYT) Regulations, 2011.

The Commission has obtained the actual O&M expenses for the three years ending 31st March, 2010 from TPL. The actual O&M expenses furnished by TPL for the three years ending March, 2010, are as given in the table below:

Table 6.29: O&M expenses (actuals) furnished by TPL for the years 2007-08 to 2009-10

(Rs. crore)

Particulars	***FY 2007-08***	***FY 2008-09***	***FY 2009-10***
Employee expenses	*46.89*	*48.86*	*54.60*
R&M expenses	*49.93*	*45.62*	*52.55*
*A&G expenses**	*28.01*	*26.33*	*22.86*
Total O&M expenses	*124.83*	*120.81*	*130.01*
** Includes water charges hitherto included as part of fuel expenses*			
Water charges	*7.10*	*7.23*	*8.59*
Original A&G	*20.91*	*19.10*	*14.27*
A&G including water charges	*28.01*	*26.33*	*22.86*

The Regulation 55.1 of GERC (MYT) Regulations, 2011 specifies that the O&M charges excluding water charges and including insurance shall be derived on the basis of the average of the actual O&M expenses excluding water charges and including insurance for the three year ending 31st March, 2010. Accordingly the Commission has arrived at the permissible O&M expenses for the control period of FY 2011-12 to FY 2015-16, which are as detailed below:

(i) O&M expenses excluding water charges

Table 6.30: O&M expenses excluding water charges for the years FY 2007-08 to FY 2009-10

(Rs. crore)

Particulars	*FY 2007-08*	*FY 2008-09*	*FY 2009-10*	*Three years average considered for FY 2008-09*
Employee expenses	*46.89*	*48.86*	*54.60*	*50.12*
R&M expenses	*49.93*	*45.62*	*52.55*	*49.37*
A&G expenses	*20.91*	*19.10*	*14.27*	*18.09*
Total O&M expenses	*117.73*	*113.58*	*121.42*	*117.58*

The three-year average O&M charges have been considered as O&M expenses for FY 2008-09. These O&M expenses are increased at an escalation factor of 4% per annum to arrive at the O&M expenses for FY 2011-12. Considering these O&M expenses as determined for FY 2011-12 the permissible O&M expenses for the years FY 2012-13 to FY 2015-16 are arrived at by escalating the O&M expenses of FY 2011-12 at 5.72% per annum for each year of the control period.

The O&M expenses approved for the control period FY 2011-12 to FY 2015-16 are given in the table below:

Table 6.31: Approved O&M expenses for the control period FY 2011-12 to FY 2015-16

(Rs. crore)

Particulars	*FY 2011-12*	*FY 2012-13*	*FY 2013-14*	*FY 2014-15*	*FY 2015-16*
O&M expenses	*132.26*	*139.82*	*147.82*	*156.28*	*165.2*

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, the 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 FY 2011-12 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.

49. The **4th Issue** is relating to the **Erroneous Computation of Cross Subsidy Surcharge.**

50. On this issue, assailing the findings given by the State Commission in regard to computation of cross subsidy surcharge as zero, the learned Counsel for the Appellant has made the following submissions:

(a) The Appellant has submitted the methodology for determination of cross subsidy surcharge. But, the State Commission has failed to consider the said proposal submitted by the Appellant. On the other hand, the State Commission has erroneously computed the cross subsidy surcharge as zero as determined in the MYT Order dated 6.9.2011.

(b) The various provisions of the Electricity Act, 2003 provides for introduction of the Open Access within the State which deals with the Open Access. Section 2 (47) provides the definition of the Open Access. Section 2 (62) provide the definition of the term “specified”.

(c) The reading of the above provisions in entirety would reflect the following aspects:

(i) Open access shall be allowed on payment of cross subsidy surcharge;

(ii) Surcharge is tobe determined by the State Commission;

(iii) Surcharge is to be utilized to meet the current level of cross-subsidization;

(iv) Surcharge and cross subsidies shall be progressively reduced;

(v) The category of consumers who are exempted from payment of surcharge is specified;

(vi) It does not provide for any discrimination towards the cost of cross-subsidization to be borne by the retail or open access consumers

(d) The GERC (Terms and Conditions of Intra State Open Access) Regulations, 2011 provides for the computation of cross subsidy surcharge in accordance with the principles and formula stipulated in the Tariff Policy and clarify that the Surcharge is not applicable to Open Access Consumers who has established as Captive Generator.

(e) The Tariff Policy, 2005 has laid down a method of computing the Cross Subsidy Surcharge (CSS) so as to promote open access. Thus, the Tariff Policy stipulates the principles and formula to compute surcharge which are as follows:.

(i) The principle to compute the cross subsidy surcharge so as to compensate the distribution licensee for the existing level of cross-subsidization, which is in accordance with the provisions of the Act.

(ii) The methodology to compute the cost of supply so as to arrive at the Cross Subsidy Surcharge.

(f) The method of computing the cost of supply specified in the Tariff Policy is one of the methods to achieve the principle of compensating the distribution licensee. Hence, the tariff policy uses the word "may be computed" instead of "shall be computed". However, the Commission is required to compute the surcharge so as to achieve the ultimate objective of compensating the distribution license for the existing level of cross subsidization.

(g) The State Commission has erred in specifying the zero cross subsidy surcharge without its computation. The same is against the provisions of GERC (Terms & Conditions of Intra-State Open Access) Regulations,

2011.

(h) In the present scenario, consumers availing the wheeling facility will be permitted to escape from payment of the Cross Subsidy Surcharge as the cross subsidy surcharge has been determined to be zero. This would have twofold effect i.e. In the immediate term it leads to a revenue shortfall for the Appellant. Further, during the truing up, this revenue shortfall is met by the Commission by apportioning it amongst the remaining consumers leading to tariff hike.

(i) The State Commission erroneously followed the decision of this Tribunal in the judgment reported in 2007 ELR (APTEL) 1222 in the case of RVK Energy Private Limited V Central Power Distribution Company of Andhra Pradesh Limited which cannot be followed blindly.

51. The learned Counsel for the State Commission made detailed submissions on the issue.

a) The State Commission has not specified any particular formula for determination of cross subsidy surcharge but the Regulation mandates that it shall follow the formula as specified in the National Tariff Policy notified under Section 3 by the Government of India.

b) This Tribunal in a Full Bench decision in the case of RVK Energy Private Limited v. Central Power Distribution Co. of Andhra Pradesh Ltd., 2007 ELR (APTEL) 1222 has directed all the Regulatory Commissions to follow the formula specified in the National Tariff Policy for determination of cross subsidy surcharge. Accordingly, the same is followed in the impugned order.

c) The term 'C' in the Tariff Policy formula includes the weighted average cost of power purchase of the top 5% margin, excluding the liquid fuel based generation and renewable power. There is no exclusion provided for power purchase from any particular source or sources with take or pay liability such as the one claimed by the Appellant.

d) The decision of the State Commission in the present case is strictly complying the Formula as specified in the National Tariff Policy. It is not that the State Commission decided not to impose the Cross Subsidy Surcharge but by application of the Formula which prescribed the cross-subsidy surcharge the calculation came to be in negative. The application of the said Formula in the absence of the specified Formula in the Regulations cannot be said to be wrong.

e) The National Tariff Policy is a delegated statutory legislation by the Government of India. If the claim of the Appellant if accepted and allowed, it would amount to amending the formula specified in the National Tariff Policy. The State Commission in this case strictly followed the full bench decision of this Tribunal as well as the formula prescribed in the National Tariff Policy.

52. In the light of the above submissions, we have to analyse this issue.

53. From the submissions made by both the parties, it is clear that the Appellant has laid emphasis to convey that zero Cross Subsidy computed by the State Commission cannot meet the current level of Cross Subsidy.

54. On the other hand, the State Commission has laid emphasis on Formula prescribed by the National Tariff Policy and this Tribunal's judgment in the RVK case.

55. Let us see the impugned order giving the details of the computation of the Cross Subsidy Surcharge as specified in the National Tariff Policy which is as under:

"***9.3 Cross Subsidy Surcharge***

The Cross Subsidy Surcharge is based on the formula given in the Tariff Policy as below:

S= T-[1+L/100)+D]

Where,

S is the surcharge

T is the Tariff Payable by the relevant category of consumers;

C is the Weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power

D is the Wheeling Charges

L is the System losses for the applicable voltage level, expressed as percentage.

The Cross Subsidy surcharge based on the above Formula is worked out as shown in the Table below:

Table 9.8: Cross Subsidy Surcharge For FY 2011-12

S.No.	*Particulars*	*Ahmedabad*	*Surat*
1.	*T*	*Rs.4.88/kWh*	*Rs.5.05/kWh*
2.	*C*	*Rs.4.69/kWh*	*Rs.4.69/kWh*
3.	*D*	*Rs.0.21/kWh*	*Rs.0.18/kWh*
4.	*L*	*4%*	*4%*
5.	*S=Cross Subsidy Surcharge*	***(-) 20 Ps/kWh***	***(-)1 PS/kWh***

56. As per the table 9.8, the State Commission applied the Formula of the National Tariff Policy prescribing the Cross Subsidy Surcharge calculation and came to the determination

on the basis of the Tariff Policy, the Cross Subsidy Surcharge has become negative.

57. Let us now refer to the Formula which has been specified in the National Tariff Policy for determination of the Cross Subsidy Surcharge which is as under:

> *"**Surcharge Formula:***
>
> *S= T-[1+L/100)+D]*
> *Where,*
>
> *S is the surcharge*
> *T is the Tariff Payable by the relevant category of consumers;*
>
> *C is the Weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power*
>
> *D is the Wheeling Charges*
>
> *L is the System losses for the applicable voltage level, expressed as percentage.*
>
> *The Cross Subsidy Surcharge should be brought down progressively and, as far as possible, at a linear rate to a maximum of 20% of its opening level by the year 2010-11."*

58. The specific challenge of the Appellant in the present case is that while calculation of the cost 'C' in terms of the Formula, the State Commission needs to exclude the cost of power purchase by the Appellant which is to take or pay liability.

59. In other words, according to the Appellant when the Appellant is bound to purchase the electricity from the Gujarat Urja and when it failed to do so, it is liable to pay the fixed amount to the Gujarat Urja and therefore, the said power purchase cannot be included in the "C" Formula under the National Tariff Policy.

60. This contention on the part of the Appellant is not correct for the following reasons:

61. Firstly the formula in the National Tariff Policy is very clear and specifies what the components which have to be included are and which have to be excluded. In terms of the said Formula, the "C" is specified as under:

> **"C is the Weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power".**

In terms of the above, the "C" includes the weighted average cost of power purchase of the top 5% margin, excluding the liquid fuel based generation and renewable power. There is no exclusion provided for power purchase from any particular source or sources with take or pay liability.

62. Secondly, when the National Tariff Policy specifically excludes two sources, namely (a) liquid fuel based generation and (b) renewable power, the question of excluding any other source does not arise.

63. On the issue of Cross Subsidy Surcharge, the Appellant has argued that the Formula as provided in the National Tariff Policy is not binding and as such the Full Bench of this Tribunal in the RVK case cannot be followed without taking into consideration the factors enumerated under Section 42 of the Act.

64. The question now is whether the Formula as provided in the National Tariff Policy is binding on the State Commission .

65. Let us first see the Regulations as well as the National Tariff Policy.

66. Admittedly, the State Commission has not specified any particular formula for determination of Cross Subsidy Surcharge but the Regulations provides that the Cross Subsidy Surcharge shall be determined by the State Commission in accordance with the Formula specified in the National Tariff Policy.

67. The relevant Regulations are as follows:

> "**24. Cross Subsidy Surcharge**
> …….
>
> *(2) The Cross Subsidy Surcharge shall be determined by the Commission* ***in accordance with the principles*** *and formula stipulated* ***in the Tariff Policy.***
>
> *Provided also that such cross subsidy surcharge shall not be levied in case distribution access is provided to a*

person who has established a captive generation plant for carrying the electricity to the destination of his own use."

68. As per this Regulation, the computation of Cross Subsidy Surcharge shall be in accordance with the principle and Formula stipulated in the National Tariff Policy, 2005. The relevant portion of the National Tariff Policy on this issue is reproduced as below:

> ***8.5. Cross-subsidy surcharge and additional surcharge for open access***
>
> *8.5.1. National Electricity Policy lays down that the amount of cross-subsidy surcharge and the additional surcharge to be levied from consumers who are permitted open access should not be so onerous that it eliminates competition which is intended to be fostered in generation and supply of power directly to the consumers through open access.*
>
> *A consumer who is permitted open access will have to make payment to the generator, the transmission licensee whose transmission systems are used, distribution utility for the wheeling charges and, in addition, the cross subsidy surcharge. The computation of cross subsidy surcharge, therefore, needs to be done in a manner that while it compensates the distribution licensee, it does not constrain introduction of competition through open access. A consumer would avail of open access only if the payment of all the charges leads to a benefit to him. While the interest of distribution licensee needs to be protected it would be essential that this provision of the Act, which requires the open access to be introduced in a time-bound*

manner, is used to bring about competition in the larger interest of consumers.

Accordingly, when open access is allowed the surcharge for the purpose of sections 38,39,40 and sub-section (2) of section 42 would be computed as the difference between (i) the tariff applicable to the relevant category of consumers and (ii) the cost of the distribution licensee to supply electricity to the consumers of the applicable class. 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 the merit order. Accordingly, the cost of supply to the consumer for this purpose may be computed as the aggregate of (a) the 5% power at the margin, excluding liquid fuel based generation, in the merit order approved by the SERC adjusted for average loss compensation of the relevant voltage level and (b) the distribution charges determined on the principles as laid down for intra-state transmission charges.

Surcharge formula:

S = T – [C (1+L/100) + D]

Where

S is the surcharge

T is the Tariff payable by the relevant category of consumers;

C is the Weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power

D is the Wheeling charge

L is the system Losses for the applicable voltage level, expressed as a percentage.

The cross-subsidy surcharge should be brought down progressively and, as far as possible, at a linear rate to a maximum of 20% of its opening level by the year 2010-11.

8.5.2. No surcharge would be required to be paid in terms of sub-section (2) of Section 42 of the Act on the electricity being sold by the generating companies with consent of the competent government under Section 43(A)(1)(c) of the Electricity Act, 1948 (now repealed) and on the electricity being supplied by the distribution licensee on the authorization by the State Government under Section 27 of the Indian Electricity Act, 1910 (now repealed), till the current validity of such consent or authorizations.

8.5.3 The surcharge may be collected either by the distribution licensee, the transmission licensee, the STU or the CTU, depending on whose facilities are used by the consumer for availing electricity supplies. In all cases the amounts collected from a particular consumer should be given to the distribution licensee in whose area the consumer is located. In case of two licensees supplying in the same area the licensee from whom the consumer was availing supply shall be paid the amounts collected.

8.5.4 The additional surcharge for obligation to supply as per section 42(4) of the Act should become applicable only if it is conclusively demonstrated that the obligation of a licensee, in terms of existing power purchase commitments, has been and continues to be stranded, or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract.

The fixed costs related to network assets would be recovered through wheeling charges.

8.5.5 Wheeling charges should be determined on the basis of same principles as laid down for intra-state transmission charges and in addition would include average loss compensation of the relevant voltage level.

8.5.6. In case of outages of generator supplying to a consumer on open access, standby arrangements should be provided by the licensee on the payment of tariff for temporary connection to that consumer category as specified by the Appropriate Commission".

69. The reading of the above Formula under the Tariff Policy indicates the method for calculating the Cross Subsidy Surcharge to be recorded from the consumers who are permitted to Open Access.

70. The National Tariff Policy is a delegated statutory legislation by the Government of India. The Policy has been issued by the Central Government u/s 3 of the Electricity Act. So, the State Commissions are required to abide by the National Tariff Policy.

71. In the present case, as indicated above, the State Commission has not specified any particular Formula for determination of Cross Subsidy Surcharge but there is a specific Regulation that State Commission shall follow the Formula as specified in the National Tariff Policy u/s 3 of the Electricity Act, 2003.

72. Suppose in the Regulations framed by the State Commission gives a different formula than that of the Formula given in the National Tariff Policy, then naturally the State Commissions are bound to follow the Regulations of the State Commission as held by the Hon'ble Supreme Court in the PTC case.

73. As indicated above, the State Commission has in fact through the specified Regulations, which mandates to follow the Formula prescribed by the Tariff Policy, adopted the Formula as specified in the National Tariff Policy for determination of the Cross Subsidy Surcharge. The State Commission has not exempted the payment of Cross Subsidy Surcharge but by application of the Formula it has held that the Cross Subsidy Surcharge does not exceed zero.

74. In other words, it is only by application of Formula that the Cross Subsidy Surcharge in the present case comes to NIL which has been applied by the State Commission.

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.

76. At this stage we would like to clarify that cross subsidy surcharge does not affect the ARR of the Appellant. The Cross Subsidy Surcharge collected by the Appellant is subtracted from its ARR. Thus the revenue of the Appellant would not be affected by less or more CSS.

77. The **5th and last issue** is related to **Carrying Cost**.

78. The Appellant has prayed the State Commission to allow the carrying cost for the unrecovered gap of earlier years but the same was rejected on the ground that there is no provision for allowing the carrying cost on any revenue gap.

79. On this issue, the learned Counsel for the Appellant has submitted the following submissions:

(a) The proposal of the Appellant was in line with the Tariff Order in Petition no. 939 of 2008 passed by the State Commission dated January 17, 2009. In the said order, the State Commission had agreed to adjust any gap between revenue recovery and approved revenue in the subsequent control period with financing cost at an average rate of borrowings during the year to which the variation relates. However, the State Commission had failed to follow its own order dated 17.1.2009.

(b) The carrying cost for the unrecovered gap is the legitimate claim of the Appellant to recoup the financial loss

incurred due to deferment in recovery of gap. The recovery of carrying cost is the settled position of law. The Commission ought to have taken into consideration that once the cost is allowed then; the Appellant was not only entitled to that cost but also is entitled to carrying cost as its legitimate claim.

(c) While passing the order dated 14.3.2012, in the clarificatory Petition, the State Commission has merely stated that it had not allowed carrying cost as its existing Regulations do not allow for the same.

(d) This issue has been decided by this Tribunal in the Judgment in 2011 ELR (APTEL) 336 in the case of Tata Power Company Ltd., Vs MERC. But, this has not been followed by the State Commission.

80. Reiterating the stand taken by the State Commission in the Impugned Order, the learned Counsel for the State Commission submitted that the State Commission has determined the tariff in accordance with the MYT Regulations but in the said Regulations there is no provision for allowing carrying cost of any revenue gap and therefore, the State Commission has not allowed the carrying cost as a pass through on the revenue gap.

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.

85. The State Commission is directed to pass consequential orders on this issue in terms of our observation referred to above.

86. <u>Summary of Our Findings</u>

i. **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.**

ii. **In view of the assurance given by the Counsel for the State Commission, this issue challenged by the Appellant being covered by the decision in Appeal No.32 of 2012 also would not survive. Accordingly decided.**

iii. **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. 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 FY 2011-12 to FY 2015-16. 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 in favour of the Appellant.

iv. **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 as decided by the Full Bench reported in 2007 APTEL (ELR) 1222. Accordingly, the same is decided as against the Appellant.**

v. **Appellant is entitled for the Carrying Cost for the Revenue gap as a result of allowance of legitimate expenditure in the true up as per the Order dated 17.1.2009. Accordingly, ordered in favour of the Appellant.**

87. In view of our above findings, we allow the Appeals in part to the extent indicated above. The State Commission is directed to pass the consequential orders, in terms of our finding on the relevant issues. No order as to costs.

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:28th Nov, 2013
√REPORTABLE/~~NON-REPORTABALE~~