

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

**APPEAL NO.158, 182 and 183 of 2012**

**Dated: 28<sup>th</sup> Nov, 2013**

**Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,  
CHAIRPERSON  
HON'BLE MR. V J TALWAR, TECHNICAL MEMBER**

**APPEAL NO.158 of 2012**

**In the Matter of:**

**The Tata Power Company Limited (Transmission)  
Bombay House, Homi Mody Street, Fort  
Mumbai – 400 001**

**..... Appellant(s)**

**Versus**

**Maharashtra Electricity Regulatory Commission  
World Trade Centre, Centre No. 1,  
13<sup>th</sup> Floor, Cuffe Parade,  
Mumbai – 400 005.**

**..... Respondent(s)**

Counsel for the Appellant : Mr. Amit Kapur  
Mr. Vishal Anand  
Ms. Anupam Varma  
Ms. Awantika Manohor  
Ms. Sadapura Mukherjee  
Mr. Gaurav Dudeja

Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan  
Ms. Richa Bharadwaja  
Mr. Hasan Murtaza  
Mr. Arijit Mitra  
Mr. Raunak Jain

**APPEAL NO.182 of 2012**

**In the Matter of:**

**The Tata Power Company Limited (Generation)  
Bombay House, Homi Mody Street, Fort  
Mumbai – 400 001**

**..... Appellant(s)**

**Versus**

**Maharashtra Electricity Regulatory Commission  
World Trade Centre, Centre No. 1,  
13<sup>th</sup> Floor, Cuffe Parade,  
Mumbai – 400 005.**

**..... Respondent(s)**

Counsel for the Appellant : Mr. Amit Kapur  
Mr. Vishal Anand  
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Ms. Awantika Manohor  
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Ms. Richa Bharadwaja  
Mr. Hasan Murtaza  
Mr. Arijit Mitra  
Mr. Raunak Jain

**APPEAL NO.183 of 2012**

**In the Matter of:**

**The Tata Power Company Limited (Distribution)  
Bombay House, Homi Mody Street, Fort  
Mumbai – 400 001**

**..... Appellant(s)**

**Versus**

**Maharashtra Electricity Regulatory Commission  
World Trade Centre, Centre No. 1,  
13<sup>th</sup> Floor, Cuffe Parade,  
Mumbai – 400 005.**

**..... Respondent(s)**

Counsel for the Appellant : Mr. Amit Kapur  
Mr. Vishal Anand  
Ms. Anupam Varma  
Ms. Awantika Manohor  
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Ms. Richa Bharadwaja  
Mr. Hasan Murtaza  
Mr. Arijit Mitra  
Mr. Raunak Jain

**J U D G M E N T**

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

1. The Tata Power Company Limited, the Appellant herein, has been carrying out business in Generation, Transmission and Distribution of electricity in Mumbai along with some other business in outside the Mumbai area.
2. The Tata Power Company Limited (Transmission-Mumbai) as against the impugned order dated 28.6.2012 has filed Appeal No.158 of 2012. The Appellants (Generation-Mumbai) as against the Impugned Order dated 9.8.2012 has filed Appeal No.182 of 2012. The Appellants (Distribution-Mumbai) as against the Impugned Order dated 26.8.2012 has filed Appeal No.183 of 2012.

3. The above three Appeals are directed as against the Impugned Orders of the Maharashtra State Commission rejecting the Business Plans for 2<sup>nd</sup> MYT Period and ARR filed by the Appellant for the Financial Year 2011-12 under MYT Regulations, 2011 by directing to apply the Maharashtra Tariff Regulations, 2005 which had already been repealed as on 1.4.2011.
4. Though these three Impugned Orders are different, the issues raised by the Appellant in these three Appeals, are common; hence this common judgment is being rendered.
5. The short facts of the case are as follows:
  - (a) On 1.10.2009, the State Commission circulated Draft papers for MYT Regulations for Second Control period namely 2010-11 to 2014-15 to various stake holders including the appellant inviting to attend an interactive consultation on draft MYT Regulations on 9.10.2009.
  - (b) After expiry of nearly one year i.e on 30.8.2010, the State Commission prepared a Draft MYT Regulation of second Control period and issued Public Notice inviting comments from the Public and Stake Holders.
  - (c) On 4.2.2011, the State Commission notified the MYT Regulations, 2011 repealing the Tariff Regulations, 2005. By virtue of the Regulations 101 of

the MYT Regulations, 2011, the Tariff Regulations, 2005 was repealed.

(d) On 23.2.2011, the State Commission issued a 'Removal of Difficulty Order'. By this order, the approval of Business Plans was no longer a pre-condition for filing the Petition for approval of ARR and determination of tariff under the MYT Regulations, 2011.

(e) On 25.3.2011, the State Commission directed all the Licensees and Generating Companies to submit their MYT Business Plans and MYT ARR Petitions for the 2<sup>nd</sup> Control Period for FY 2011-12 to FY 2015-16 latest by 31.3.2011.

(f) Since there was a very short period of time left for submission of the MYT Business Plan, the Appellant requested the State Commission to grant extension of time, for the submission of the MYT Business Plan up to 15.4.2011 and submission of MYT Petitions for these three Companies up to 30.4.2011.

(g) On 27.7.2011, the State Commission through its communication directed the Appellant to file the Business Plan by 30.9.2011 and MYT tariff petitions in terms of the MYT Regulations, 2011.

(h) On 11.8.2011, the State Commission issued notice inviting suggestions and objections on Draft Amendments to the MYT Regulations, 2011.

(i) In compliance with the said directions, the Appellant filed his Petition for approval of Business Plan and MYT Petitions for each Division in accordance with the MYT Regulations, 2011.

(j) The Appellant (Transmission) filed a Petition for Business Plan on 9.8.2011 and ARR Petition on 30.11.2011. The Generation Division filed the Business Plan on 30.9.2011 and ARR Petition on 30.11.2011. The Distribution Division filed the Petition for Business Plan on 31.10.2011 and ARR Petition on 30.11.2011.

(k) On 21.10.2011, the State Commission after notifying the amendments to the MYT Regulations, 2011 introduced Regulation 102 which relates to the transitory provisions.

(l) By these provisions, it was informed that if the State Commission satisfies that there is a difficulty in giving effect to the determination of tariff with effect from April, 01, 2011 under these Regulations the tariff is required to be determined from April, 01, 2012 or any further period under these Regulations, the repealed

Regulations in respect of said tariff determination shall continue to be in force.

(m) On 4.11.2011, the State Commission directed the Appellant to file the Petition for the Financial Year 2011-12 under the MYT Regulations, 2005 on three grounds:

(i) Though Business Plans for the Generation and Distribution businesses have been received the Business Plan Transmission business is yet to be received.

(ii) As such, approval of business plan is likely to be issued only by the end of FY 2011-12.

(iii) MYT Petition can be filed only after the Maharashtra Commission approves the business plan.

(n) Thereafter, the Technical Validation Sessions were conducted by the State Commission in the Petition filed by the Appellants for approval of business plan. Pursuant to the same, various clarifications and additional informations were sought for by the State Commission. The same were submitted by the Appellant.

(o) While the Petition for approval of the Business Plans were pending, the State Commission also started the proceedings with MYT ARR Petitions filed by the Appellant. Thereafter, the Petitions for approval of the Business Plan by the Appellant were admitted by the State Commission on various dates.

(p) On the basis of the particulars furnished by the Appellant and also the Petitions filed by the Appellant through its Divisions, the State Commission passed the impugned orders in the Transmission Division on 28.6.2012, in Generation Division on 9.8.2012 and in Distribution Division on 26.8.2012.

6. These 3 impugned orders are challenged in these Appeals.
7. The learned Counsel for the Appellants has made the submissions which are as follows:

(a) The draft MYT Regulations having gone through rounds of public consultation since August 2009, were notified on 04.02.2011 and brought into effect on 01.04.2011 for FY 2011-12 to 2015-16.

(b) By virtue of Regulation 101 of the MYT Regulations, 2011, MYT Regulations, 2005 were repealed with effect from 01.04.2011.

(c) The Maharashtra State Commission having notified the MYT Regulations, 2011, on 27.07.2011

directed the Appellant to file the Business Plans by 30.09.2011 as per MYT Regulations, 2011. In terms of which the Appellant filed the Business Plan and the Petition for determination of ARR and Tariff as per schedule below:

<b>Business Division</b>	<b>Filing of Business Plan</b>	<b>Filing of ARR Petition</b>
<b>Transmission</b>	09.08.2011	30.11.2011
<b>Generation</b>	30.09.2011	30.11.2011
<b>Distribution</b>	31.10.2011	30.11.2011

(d) The Maharashtra Commission failed to consider that certain legal status and rights of the Appellant had fructified which could not have been undone by the mechanism adopted by the Maharashtra Commission between 01.04.2011 and 21.10.2011 prior to;

- (i) Regulation 102 being notified on 21.10.2011
- (ii) The Impugned Directions being issued on 04.11.2011, and
- (iii) The Impugned Orders dated June-August 2012 being passed.

It is the Appellant's case that such vested legal rights / status could not be rejected by any of the said 3 actions.

(e) The Maharashtra Commission failed to give a legally tenable finding of 'satisfaction' which meets the pre-requisite requirement of 2<sup>nd</sup> Proviso to Regulation 102 for exercising the alleged power either in the Impugned Orders or in letter dated 04.11.2011. In this context, it is worthwhile to note that:-

(i) The second proviso to Regulation 102 (which came into effect on 21.10.2011) mandates that the tariff has to be determined under MYT Regulations, 2011. It is only at the implementation stage that if the Maharashtra Commission is satisfied that there is **difficulty in giving effect to** the tariff determined under MYT Regulations, 2011 that it can choose to act under the said proviso.

(ii) The second proviso to Regulation 102 of the MYT Regulations, 2011 does not contemplate reviving the repealed Tariff Regulations, 2005, which became dead letter on 01.04.2011. It merely contemplates that "the repealed regulations in respect of the said tariff determination shall continue to be in force". Tariff Regulations, 2005 were admittedly repealed on 01.04.2011. Therefore, as on the date of amendment, i.e 21.10.2011, the Tariff

Regulations, 2005 were non-existent. What is dead and gone cannot “continue to be in force” but has to be revived/brought back to life. Regulation 102 does not do so.

(f) Even the Maharashtra Commission’s action establishes that it has taken the so called “**difficulty**” as recorded in the Impugned Orders as an afterthought to aver that :-

(i) Since FY 2011-12 is already over, the tariff cannot be determined under MYT regulation, 2011.

(ii) Since truing up has to be done on the same principles as the original order, therefore truing up has to be done in accordance with Tariff Regulations, 2005.

(g) The Maharashtra Commission has approved the ARR for the next year (FY 2012-13) after the completion of said financial year in respect of Transmission, Generation and Distribution Businesses of the Appellant on:

<b>Business Division</b>	<b>Date of Order in term of MYT Regulations, 2011</b>
<b>Transmission</b>	30.03.2013
<b>Generation</b>	05.06.2013
<b>Distribution</b>	28.06.2013

(h) For the FY 2012-13, the Appellant had recovered the tariff as determined by the Maharashtra Commission in the year 2010 in terms of Tariff Regulations, 2005. However, since the ARR of Appellant has been approved for FY 2012-13 in accordance with MYT Regulations, 2011, the Appellant will be filing the True-up of FY 2012-13 in due course in terms of MYT Regulation 2011. The Maharashtra Commission has also confirmed that it will true up the financials of FY 2012-13 as per MYT Regulations, 2011 which is evident from the Order dated 28.06.2013 passed in the case of Distribution Business of the Appellant, as under:

*“It should be noted that TPC-D has already charged FAC for FY 2012-13 as well as the initial months of FY 2013-14, vis-a-vis the fuel costs considered in the prevailing Tariff Order (Case No. 98 of 2009) and the Regulations considered for that Order (MERC Tariff Regulations, 2005). **However, the ARR for the Control Period from FY 2012-13 to FY 2015-16 has been determined in accordance with MERC MYT Regulations, and hence, post-facto vetting for this period would have to be done vis-a-vis the norms specified in the MERC MYT Regulations and the fuel costs considered in this Order for FY 2012-13 and thereafter. Any difference, positive or negative, due to the change in applicability of Regulations considered for charging FAC and that considered for vetting, vis-a-vis the FAC already charged by TPC-D for these periods,***

***shall be passed through in the second half of FY 2014-15 and spread over the six months of H2 of FY 2014-15, after approval by the Commission.”***

8. In reply to the above submissions made by the Appellant, the State Commission has made elaborate submissions in support of the Impugned Orders.
9. The crux of the submissions of the State Commission are as follows:

(a) Regulation 101.1 saves the MYT Regulations, 2005, as under:

***“101.1 save as otherwise provided in these Regulations...”***

Regulation 102, when notified became part of the Regulations and as per Regulations 101.1 the Regulation 102 has been saved and would be effective.

(b) Last proviso to Regulation 102 (introduced by amendment dated 21.10.2011) read with Regulation 101.1 confers power upon the Maharashtra Commission to determine tariff under MYT Regulations, 2005 if the Commission is satisfied that there is difficulty in given effect to determination of Tariff from 01.04.2011 under the MYT Regulations, 2011 then the 2005 Repealed Regulations shall

continue to apply for the tariff determination beyond 01.04.2011.

(c) This dispensation in Regulation 102 is also a dispensation contemplated in Regulation 1.3 (b) of the MYT Regulations, 2011. It is settled law that the Regulations cannot be challenged in the present proceedings.

(d) The Maharashtra Commission faced a difficulty in giving effect to the determination of tariff under MYT Regulations 2011 due to late filing of the Business Plan and MYT Petition by the Appellant;

(e) The Tariff for FY 2011-12 has been charged based on ARR approved for FY 2010-11 in accordance with MERC Tariff Regulations, 2005. The tariff order passed after the expiry of the year is in fact a true up order. This tribunal in catena of judgments has held that the true up have to be carried out on the same principles as the principle followed in tariff. Since the Tariff recovered by the Appellant during the year 2011-12 was determined as per 2005 Regulations, 'true up' in the form of ARR petition for FY 2011-12 have to be done on the same principles i.e. as per 2005 Regulations.

(f) By the decision dated 04.11.2011, the Maharashtra Commission directed the Appellant to

submit its ARR for FY 2011-12 as per MERC Tariff Regulations, 2005;

(g) The Maharashtra Commission's direction dated 27.07.2011 was clear that MYT Petition has to be filed after the Maharashtra Commission issues the order on the MYT Business Plan in accordance with Regulations 9.2, 18.3, 24.1 and 91.2. Only Regulation 9.2 was kept in abeyance and not the Regulations 18.3, 24.1 and 91.2;

(h) Business Plan for FY 2011-12 to FY 2015-16 could not be approved since the Appellant has filed the Petition 120 days prior to the expiry of the financial year 2011-12.

**10.** Having heard the learned Counsel for both the parties and after examining the records placed before us, the following questions would emerge for our consideration:

**(a) Whether the State Commission has got a jurisdiction to determine the tariff under 2005 Regulations had already been repealed by the Regulations 101 of the MYT Regulations, 2011 w.e.f 1.4.2011?**

**(b) What is the effect of "Difficulty Removal Order" dated 23.2.2011 keeping Regulations 9.2 requiring the licensee to submit business plan for the 2<sup>nd</sup> MYT period in abeyance?**

**(c) Whether the Amendment to MYT Regulations, 2011 could revive the repealed 2005 Regulations and if so, whether such a removal would be effective retrospectively?**

**(d) Whether the State Commission found any difficulty in implementing the MYT Regulations, 2011 so as to invoke 2005 Regulations even though the same has been repealed under Regulation 101 of the Regulations, 2011?**

**11. The First Question relates jurisdiction of the State Commission to determine the tariff under 2005 Regulations which had already been repealed by the Regulations 101 of the MYT Regulations, 2011 w.e.f 1.4.2011.**

**12. On this issue, the learned Counsel for the Appellant contended that Regulation 101 has fully repealed 2005 Regulations. According to him the 2005 Regulations have become dead letter by virtue of repealing under this Regulation. The learned Counsel for the Respondent contended that the Regulation 101 has repealed 2005 Regulations conditionally. Let us quote Regulation 101 of MYT Regulations 2011 as under:**

***“101 Repeal and savings***

*101.1 Save as otherwise provided in these Regulations, the "Maharashtra Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2005" are hereby repealed.*

*101.2 notwithstanding such repeal, any proceedings before the Commission pertaining to the period till FY 2010-11, including review Petitions, shall be governed by MERC (Terms and Conditions of Tariff) Regulations, 2005."*

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.
15. So, this issue is decided accordingly.
16. The **Second Question** for consideration is relating to the effect of "**Difficulty Removal Order**" dated 23.2.2011.

17. The learned Counsel for the Appellant contended that with this order the Commission had kept in abeyance all the provisions in the Regulations relating to business plan. The learned Counsel for the Commission submitted that only Regulation 9.2 had been kept in abeyance and all other provisions had been left untouched and, therefore, were in operation.

18. Let us quote various provisions relating to business plan contained in 2011 Regulations:

***“9 Specific trajectory for certain variables***

*9.1 The Commission shall stipulate a trajectory while approving the Business Plan for certain variables having regard to the reorganization, restructuring and development of the electricity industry in the State.*

*Provided that the variables for which a trajectory may be stipulated include, but are not limited to, Operation & Maintenance expense norms, Generating Station availability, station heat rate, secondary oil consumption, auxiliary consumption, transit losses, transmission losses, supply availability and wires availability, distribution losses and collection efficiency.*

***9.2 The trajectory stipulated by the Commission in the order on Business Plan submitted by the applicant, shall be incorporated by the applicant in its forecast of Aggregate Revenue Requirement and/or expected revenue from tariff and charges under Regulation 8.***

***Regulation 18***

18.3 *The applicant shall provide, based on the approved Business Plan, as part of its application to the Commission, in such form as may be stipulated by the Commission from time to time, full details of its calculation of the Aggregate Revenue Requirement and expected revenue from tariff and charges pursuant to the terms of its licence, and thereafter he shall furnish such further information or particulars or documents as the Commission or the Secretary or any Officer designated for the purpose by the Commission may reasonably require to assess such calculation:*

*Provided that the application shall be accompanied where relevant, by a detailed tariff revision proposal showing category-wise tariff and how such revision would meet the gap, if any, in Aggregate Revenue Requirement for each year of the Control Period.*

*Provided further that the Commission may specify additional/ alternative formats for details to be submitted by the applicant, from time to time, as it may reasonably require for assessing the Aggregate Revenue Requirement and for determining the tariff.*

...

### **19 Time limit for making an application for determination of Tariff**

19.1 *An application for determination of tariff, under a Multi-Year Tariff framework for the second Control Period from April 1, 2011 to March 31, 2016, shall be made to the Commission before the commencement of FY 2011-12, as directed by the Commission.*

### **24 Power procurement plan**

24.1 *The Distribution Licensee shall prepare a five-year plan for procurement of power to serve the demand for electricity in its area of supply and submit such plan to the Commission for approval:*

*Provided that such power procurement plan shall be submitted for the second Control Period commencing on April 1, 2011:*

*Provided further that the power procurement plan, approved as a part of the Business Plan, shall be submitted along with the application for determination of tariff, in accordance with Part B of these Regulations.*

*Provided that the power procurement plan submitted by the Distribution Licensee may include long-term, medium-term and short-term power procurement sources of power, in accordance with these Regulations.*

...

## **91 Sales forecast**

*91.1 The Distribution Licensee shall submit a monthly forecast of the expected sales of electricity to each tariff category/sub-category and to each tariff slab within such tariff category/**sub-category to the Commission for** approval along with the Business Plan, as specified in these Regulations. MYT 91.2 The Distribution Licensee shall **submit the application for determination** of tariff, based on the approved sales forecast in the Order on Business Plan:*

*91.3 The sales forecast shall be consistent with the load forecast prepared as part of the long-term power procurement plan under **Part D** of these Regulations and shall be based on past data and reasonable assumptions regarding the future:*

*Provided that where the Commission has stipulated a methodology for forecasting sales to any particular tariff category, the Distribution Licensee shall incorporate such methodology in developing the sales forecast for such tariff category.”*

The provisions of the aforesaid Regulations are summarised below:

- (i) Regulation 9.2 provides that the trajectory stipulated by the Maharashtra Commission in the Order on Business Plan submitted by an applicant, shall be incorporated by the applicant in its forecast of ARR and/or expected revenue from tariff and charges under Regulation 8.
- (ii) Regulation 18.3 specifies that the utility shall provide full details of calculation of the ARR and expected revenue from tariff and charges, based on the approved business plan.
- (iii) Regulation 19.1 requires licensee to submit the application for determination of tariff for 2<sup>nd</sup> control period 2011-16 under 2011 Regulations before 1.4.2011.
- (iv) Regulation 24.1 specifies that Power Procurement Plan, approved as a part of the Business Plan shall be submitted along with the application for determination of tariff in accordance with the MYT Regulations, 2011.
- (v) Regulation 91.2 specifies that distribution licensee shall submit the application for determination of tariff based on the approved sales forecast in the Order on Business Plan.

19. The above provisions would make it clear that the provisions of Regulation 18.3, 24.1 and 91.2 depends upon the Business plan approved by the Commission under Regulation 9.2. Regulation 19.1 requires the licensee to submit the application for tariff determination for 2<sup>nd</sup> control period before 1.4.2011.

20. Now let us quote the “**Difficulty Removal Order**” dated 23.2.2011 of the Commission:

*“In order to adhere to the timeline specified in Regulation 19.1, difficulty has arisen in giving effect to the provisions of Regulation 9.2 of the Maharashtra Electricity Regulatory Commission (Multi Year Tariff) Regulations, 2011.*

*.....The Commission hereby rules that **Regulation 9.2** of the Maharashtra Electricity Regulatory Commission (Multi Year Tariff) Regulations, 2011 shall be kept in abeyance.”*

21. Reading of the above order would indicate that the Commission felt the impossibility of the task of preparation of business plan for control period by the licensee, getting it approved from the Commission and then framing the tariff petition according to the approved business plan and submitting to the Commission within a period of two months (4.2.2011 to 1.4.2011). Accordingly, it ruled that Regulation 9.2 shall be kept in abeyance.

22. Keeping only Regulation 9.2 in abeyance only indicates towards knee jerk reaction of the Commission. The contention of the State Commission that only Regulations

9.2 was kept in abeyance and all other provisions were in operation, is misplaced.

- 23.** Let us illustrate an example for understanding this issue.
- 24.** The Election Commission had announced the election schedule for a particular area including date of polling and date of counting votes and announcing results. For some reason, the Election Commission postpone the date of polling. Can any person claim that since only date of polling had been postponed and not the date of counting, the Election Commission must announce the results? Counting and announcement of result is natural outcome of polling. Similarly, **other provisions of 2011 Regulations would follow Regulation 9.2. If operation of Regulation 9.2 is suspended, operation of other Regulations would automatically get suspended.**
- 25.** So, the above issue is decided accordingly.
- 26.** The **Third Issue** for our consideration is as to whether the **“amendment to MYT Regulations, 2011 carried out after considerable period (eight months) could revive the repealed 2005 Regulations”**. If so, whether such revival would be effective retrospectively.
- 27.** The State Commission had amended the 2011 Regulations on 21.10.2011 by MYT Regulations, 2011 (1<sup>st</sup> Amendment). Regulation 1 of the Amendment Regulations read as under

**1 Short title and commencement** – (1) *These regulations may be called Maharashtra Electricity Regulatory Commission (Multi Year Tariff) (First Amendment) Regulations, 2011*

**(2) These Regulations shall come into force with effect from the date of their publication in the Official Gazette.**

28. The Amendment Regulations were notified on 21.10.2011.

Therefore, these Regulations came into force on 21.10.2011.

29. A new Regulation 102 had been added to the 2011 MYT Regulations by way of Regulation 6 of the Amendment Regulations as extracted below:

*6. Addition of Regulation 102:- In the MYT Regulations, 2011, after Regulation 101, the following Regulation shall be added, namely:-*

*102. Transitory provisions:*

*Notwithstanding anything to the contrary contained in these regulations, –*

*(a) the tariff order issued by the Commission for the year ending on the 31<sup>st</sup> March 2011 shall continue to operate;*

*and*

*(b) the Business Plan, and Petition for calculation of Aggregate Revenue Requirement and expected revenue from tariff and charges for determination of tariff in all cases covered under these Regulations from April 1, 2011 and onwards up to FY 2015-16 i.e., till March 31, 2016, shall continue to be filed and dealt with under the Maharashtra Electricity Regulatory Commission (Multi Year Tariff) Regulations, 2011.*

*Provided that in case an order of exemption has been issued under Regulation 4.1 then the concerned Generating Company or Transmission Licensee or*

*Distribution Licensee shall file Annual Petitions for approval of ARR and tariff during the period of exemption, in accordance with the MERC (Terms and Conditions of Tariff) Regulations, 2005.*

*Provided also that **where there is no order of exemption** under Regulation 4.1 for a Generating Company or Transmission Licensee or Distribution Licensee and **if the Commission is satisfied that there is a difficulty in giving effect to the determination of tariff with effect from April 1, 2011 under these Regulations** and in the event the tariff is required to be determined from April 1, 2012 or any further period under these Regulations, **the repealed regulations in respect of the said tariff determination shall continue to be in force**, and the provisions of these regulations shall not apply to the determination of tariff for the period till April 1, 2012 or such further period.”*

- 30.** The newly added regulation 102 is again not happily worded and only reflects towards non-application of mind in knee jerk reaction. One such pointer is clause (a) which provides that the *tariff order issued by the Commission for the year ending on the 31<sup>st</sup> March 2011 shall continue to operate.* This clause was unnecessary.
- 31.** According to the learned Counsel for the State Commission the Regulation 102 starts with non-obstante clause ‘*Notwithstanding anything to the contrary contained in these regulations*’. Once the Amendment Regulations had been notified the Regulation 102 became part of MYT Regulations 2011 and the term ‘these regulations’ referred to in the Amendment Regulations are the MYT Regulations 2011.

- 32.** Thus, by virtue of Regulation 102, the repealing provision in Regulation 101 gets overruled and the Tariff Regulations, 2005 came back to life. The learned Counsel cited four authorities on this point. The learned Counsel for the Appellant has also relied on few authorities to bring home his point of view that laws once repealed cannot be put back to life. We feel that the facts of all these authorities do not apply to the present facts of the case.
- 33.** Electricity Act 2003 has repealed the 1910 Act. Section 185 (2)(b) provides that the provisions contained in sections 12 to 18 of the Indian Electricity Act, 1910 (9 of 1910) and rules made there under shall have effect until the rules under sections 67 to 69 of this Act are made.
- 34.** Assuming for the time being that the section 185(2)(b) was not there in the Act, the Government after realising that vacuum has been left in the Act, decided to amend it to bring in the provision. In such a case, the parliament would have added Sections akin to Sections 12 to 18 of the 1910 Act at suitable places, say after section 67 to 69, rather than adding a subsection in Section 185 in the form it stands now. In case the State Commission felt difficulty, it could have added all the relevant provisions of 2005 Regulations in to the MYT Regulations 2011, rather than giving life to 2005 Regulations which is not permissible in law.

35. Further, the State Commission has relied on 2<sup>nd</sup> proviso to the Regulations 102 which provides that if the Commission is satisfied that there is difficulty in giving effect to the determination of tariff with effect from April 1, 2011 under these MYT Regulations 2011, the repealed regulations in respect of the said tariff determination shall continue to be in force.
36. The stand taken by the learned Counsel for the State Commission is not consistent. At one place it is contended that due to non-obstante clause in Regulation 102, the repealing effect of Regulations 101 is wished away. Simultaneously, he relied on the 2<sup>nd</sup> proviso which itself says that repealed Regulations will continue to be in force. If Regulations have been repealed, they cannot be brought back into service. The Commission could have used the phrase '*the 2005 Tariff Regulations would continue to be in force*' instead of '*repealed regulations would continue to be in force*'.
37. Let us quote Repealing and Saving Section 185 of 2003 Act which is reproduced below:

**“185. Repeal and saving.**—(1) *Save as otherwise provided in this Act, the Indian Electricity Act, 1910 (9 of 1910), the Electricity (Supply) Act, 1948 (54 of 1948) and the Electricity Regulatory Commissions Act, 1998 (14 of 1998) are hereby repealed.*

(2) *Notwithstanding such repeal,—*

*(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;*

*(b) the provisions contained in sections 12 to 18 of the Indian Electricity Act, 1910 (9 of 1910) and rules made there under shall have effect until the rules under sections 67 to 69 of this Act are made;*

*(c) the Indian Electricity Rules, 1956 made under section 37 of the Indian Electricity Act, 1910 (9 of 1910) as it stood before such repeal shall continue to be in force till the regulations under section 53 of this Act are made;*

*(d) all rules made under sub-section (1) of section 69 of the Electricity (Supply) Act, 1948 (54 of 1948) shall continue to have effect until such rules are rescinded or modified, as the case may be;*

**38.** From the above, it is to be noticed that sub-section 2 starts with 'notwithstanding such repeal'. Clause (b) brings back Sections 12 to 18 of 1910 Act under certain conditions. The clause did not say Section 12 to 18 of repealed Act. Similarly, clause (c) refers to Indian Electricity Rules made under Section 37 of 1910 Act. It did not say Section 37 of repealed Act.

**39.** On the contrary, Regulations 102 says that the repealed Regulations will continue to be in force. Laws once repealed,

cannot be put back to life unless it is saved in some form in the repealing law itself.

40. Assuming for the time being that the 2005 Regulations have been saved by virtue of non-obstante clause in Regulation 102, even then, as brought out above, the amendment regulations were notified on 21.10.2011 and came in to force on the date of its' notification i.e. on 21.10.2011. It cannot have retrospective effect. Action taken under un-amended Regulations prior to 21.10.2011 cannot be questioned or negated. The Appellant had submitted the Business Plan for Generation and Transmission prior to 21.10.2011. The State Commission was obliged to take action on these business plans.

41. So, this issue is decided accordingly.

42. **The last question is as to "Whether the Commission found any difficulty in implementing the MYT Regulations, 2011?"**

43. The learned Counsel for the Commission explained that the Business Plan and subsequently the Tariff Petition (for the Distribution business) was filed by the Appellant in November 2011 i.e. when FY 2011-12 was already almost over. The Tariff for the year 2011-12 has already been billed and collected as per the pre-existing determination under the 2005 Regulations.

44. The learned Counsel for the Commission stated that in the circumstances, the State Commission was of the view, that in terms of the Regulation 102, that it is difficult to implement the Business Plan and Tariff Proposal retrospectively from 1.4.2011 when the petition for the same has been filed nearly 9 months into the financial year. The true up has to be undertaken on the same principles as the original tariff determination. If the tariff has already been billed and collected on a certain basis, the true up could not be on a completely different basis.

45. The contention of the State Commission is misplaced and is liable to be rejected for the following reasons:

Regarding Distribution, the contention of the Commission is that the year 2011-12 was almost over and the Appellant had collected revenue at the tariff approved for FY 2010-11 determined on the basis of 2005 Regulations. Under the circumstances the tariff determination for FY 2011-12 is nothing but true up exercise. Accordingly, it had to be done on the basis of 2005 Regulations. Such an excuse is liable to be rejected out rightly for the simple fact that the Maharashtra Commission had been approving ARR and tariff only after the relevant year was over. The Maharashtra Commission has approved the ARR for the next year (FY 2012-13) after the completion of said financial year in respect of Transmission, Generation and

Distribution Businesses of the Appellant on the basis of MYT Regulations 2011 as given below:

<b>Business Division</b>	<b>Date of Order in term of MYT Regulations, 2011</b>
<b>Transmission</b>	30.03.2013
<b>Generation</b>	05.06.2013
<b>Distribution</b>	28.06.2013

46. For the FY 2012-13, the Appellant had recovered the tariff as determined by Maharashtra Commission in the year 2010 in terms of MYT Regulations, 2005. For FY 2012-13, it passed tariff order after the year was over on the basis of 2011 Regulations. There was no change in circumstances. If, the Maharashtra Commission did not find any difficulty in approving ARR for 2012-13 after the year was over, what was the difficulty in approving ARR for FY 2011-12 on the same basis?

47. Further, the true up exercise is done only for distribution business. The ARR for Generation and Transmission business should have been approved on MYT Regulations 2011.

48. This issue is also decided accordingly.

**49. Summary of Our Findings**

- i. **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. 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. Accordingly, this issue is decided in favour of the Appellant.

- ii. Keeping only Regulation 9.2 in abeyance only indicates towards knee jerk reaction of the Commission. The contention of the State Commission that only Regulations 9.2 was kept in abeyance and all other provisions were in operation, is misplaced. Other related provisions of 2011 Regulations would follow Regulation 9.2. If operation of Regulation 9.2 is suspended, operation of other related Regulations would

automatically get suspended. Accordingly, this issue is decided in favour of the Appellant.

- iii. At one place it is contended that due to non-obstante clause in Regulation 102, the repealing effect of Regulations 101 is wished away. Simultaneously, he relied on the 2<sup>nd</sup> proviso which itself says that repealed Regulations will continue to be in force. If Regulations have been repealed, they cannot be brought back into service. The Commission could have used the phrase '*the 2005 Tariff Regulations would continue to be in force*' instead of '*repealed regulations would continue to be in force*'. Regulation 102 says that the repealed Regulations will continue to be in force. Laws once repealed, cannot be put back to life unless it is saved in some form in the repealing law itself. Accordingly, this issue is decided in favour of the Appellant.
- iv. For the FY 2012-13, the Appellant had recovered the tariff as determined by Maharashtra Commission in the year 2010 in terms of MYT Regulations, 2005. For FY 2012-13, it passed tariff order after the year was over on the basis of 2011 Regulations. There was no change in circumstances. If, the Maharashtra Commission

did not find any difficulty in approving ARR for 2012-13 after the year was over, what was the difficulty in approving ARR for FY 2011-12 on the same basis? Further, the true up exercise is done only for distribution business. The ARR for Generation and Transmission business should have been approved on MYT Regulations 2011. Accordingly, this issue is decided in favour of the Appellant.

50. In view of our above findings, the Appeal is allowed. The State Commission is directed to issue consequential order taking into account the aforesaid findings.

51. No order as to costs.

*(V J Talwar)*  
*Technical Member*

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

Dated: 28<sup>th</sup> Nov, 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~