

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
(Appellate Jurisdiction)**

**APPEAL NO. 256 OF 2016**

**Dated: 09<sup>th</sup> May, 2019**

**PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON  
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

**IN THE MATTER OF:**

Torrent Power Limited,  
Having its Registered Office at  
Torrent House, Off Ashram Road,  
Ahmedabad – 380009, Gujarat

**.....Appellant**

**VERSUS**

Gujarat Electricity Regulatory Commission  
Having its Office at  
6<sup>th</sup> Floor, GIFT ONE,  
Road 5 C, Zone 5, GIFT City,  
Gandhinagar – 382355.

**..... Respondent**

**Counsel for the Appellant** : Ms. Deepa Chawan  
Mr. Hardik Luthra Luthra  
Mr. Ravindra Chile  
Mr. Tapan

**Counsel for the Respondent** : Ms. Shikha Ohri  
Ms. Ankita Bafna

JUDGMENT

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The present Appeal has been filed by Torrent Power Ltd. (hereinafter referred to as the "Appellant") under Section 111 of the Electricity Act, 2003 challenging the Order dated 31.03.2016 ("Impugned Order") passed by the Gujarat Electricity Regulatory Commission (hereinafter referred to as the 'Commission') in CaseNo. 1554 of 2015 relating to the Truing up of FY 2014-15, Approval of Provisional ARR for FY 2016-17 and Determination of Tariff for FY 2016–17 for Torrent Power Limited – Distribution, Dahej.
  - 1.1 The Appellant has challenged the said order of the Respondent Commission to the extent it relates to erroneous treatment of O & M Expenses as under :-
    - A. Variation in O & M Expenses considered as controllable
    - B. Reduction / deduction of Rs. 2.48 crores from O & M Expense contrary to applicable Statutory Regulations
    - C. Network Augmentation charges paid to GETCO considered as controllable.
2. **Brief Facts of the Case:-**
  - 2.1 The Appellant, Torrent Power Limited (*TPL*) is a company formed under the provisions of the Companies Act, 1956. The Appellant is in the business of generation and distribution of Electricity.
  - 2.2 The Respondent is the Gujarat Electricity Regulatory Commission (GERC, established under the provisions of the Electricity Regulatory

Commission Act, 1998 presently repealed and so continued in office, by virtue of Section 82 of the Electricity Act, 2003.

**3. Questions of Law:-**

The Appellant has raised following questions of law for our consideration:-

**3.1** Whether the methodology adopted by the Respondent Commission in respect of the Impugned Order dated 31.03.2016 in Case No. 1554 of 2015 is in consonance with the provisions of the Act and the relevant Regulations framed there under?

**3.2** Whether the impugned order contravenes any provisions of the Electricity Act, 2003 and the relevant Regulations framed there under?

**3.3** Whether the impugned order dated 31.03.2016 is in conformity with the statutory stipulations relating to the MYT framework?

**3.4** Whether the impugned order is in conformity with settled financial principles?

**3.5** Whether the impugned order is in conformity with Principles of natural justice?

**4. Learned counsel, Ms. Deepa Chawan, appearing for the Appellant has filed following written submissions for our consideration:-**

**4.1** The Appellant in its Tariff Petition had approached the Respondent Commission praying for treating the O & M Expenses as Uncontrollable. However, in the Impugned Order, Respondent Commission has treated the O & M Expenses as Controllable without looking at and considering the variation, the nature of variation, the requirement of undertaking such

expense, the solitary instance of the expense and other relevant nuances of the expenditure. These crucial factors relating to the expenditure, when considered, would have resulted in an exercise by the Respondent Commission of appreciating the nature of the variation rather than terming the variation in O & M Expenses generally as Controllable.

- 4.2** The Appellant has moved the Respondent Commission in respect of considering the variation in O&M expense as uncontrollable and in support thereof, the Appellant has clearly and in detail pointed out the reasoning for the same. The exceptional items submitted by the Appellant have not been disputed by the Respondent Commission in the impugned tariff order, namely, Rs. 2.48 Cr. assets retired and written off is not disputed though no treatment for the variation is given in the impugned order and Rs. 2.48 Cr. is fully deducted. Further, Rs. 4.54 Cr. payment to GETCO is also not disputed but the variation is termed as controllable.
- 4.3** The variation in performance has to be attributed to controllable and uncontrollable factors as per Regulation 22.5. This exercise is to be carried out by the Respondent Commission at the time of truing up exercise in accordance with the GERC (MYT) Regulations, 2011, that are Statutory Regulations. The Respondent commission ought to have refrained from proceeding and dealing with 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.
- 4.4** The Respondent Commission in its Tariff order dated 31.03.2016 has actually ignored the rights conferred on any utility to approach the Regulatory Commission for consideration of any variable not specified in

Regulation 23.1 to be considered as uncontrollable for its inclusion as uncontrollable for such financial year. The GERC (MYT) Regulations, 2011 have to be considered in their entirety and each Regulation cannot be considered in isolation. Provisions like Regulation 22.5 and third proviso to Regulation 23.1 confer a regulatory discretion on the Respondent Commission to consider the nature and rationale of a variation.

**4.5** The proviso to Regulation 22.5 relates to the decision of the Respondent Commission to be in general conformity with the Statutory Regulations, in respect of considering and concluding different tariff items as controllable factors. In normal circumstances, where variations or expected variation performance for variables other than those detailed in Regulation 23.1 are to be considered, such variables are required to be attributed to controllable factors. However, the subsequent Regulation 23.1 which details the uncontrollable factors contains a specific proviso, namely, the third proviso. This third proviso deals with exceptional items which are beyond the control of the utility. The proviso permits the Commission to include a variable at the Commission's discretion under the Regulation 23.1 as uncontrollable. Thus, both the provisions namely, the proviso to Regulation 22.5 and third proviso to Regulation 23.1 operate in different fields and is required to be harmoniously interpreted. Both the provisions are in consonance with and in conformity with each other.

**4.6** The third proviso to Regulation 23.1 is in the nature of an exception to the illustrative cases specified in the principal provision namely, Regulation 23.1. The Appellant has referred the judgment of the Hon'ble Supreme Court in **S. Sundaram Pillai Versus V. R. Pattabiraman, 1985**

**(1) SCC 591** and in ***Dwarka Prasad Vs. Dwarka Das Saraf – 1976 (1) SCC 128*** in respect of interpretation of the proviso to the Regulation.

**4.7** The third proviso to Regulation 23.1 confers a Regulatory discretion on the Respondent Commission which has to be exercised when the utility approaches it. The Appellant approached the Respondent Commission with the case of variation in O&M expenses due to certain exceptional expenses incurred as the subject area of supply is in a developing stage with the network and business of the Appellant also being in a developing stage. Thus, the third proviso is in the nature of a Regulatory power and therefore, a wide discretion is conferred to the Respondent Commission. Therefore, Regulation 23.1 and Regulation 23.2 cannot be read in a strict sense without applying the discretion carved out by the subject proviso. The Appellant has also submitted that it has been a settled position of law that the term “Regulate” is of a wider connotation and meaning and in turn referred to the judgment in ***Adani Power Ltd Vs GERC – 2012 ELR (APTEL) 0452***, wherein the Hon'ble Tribunal after relying on various decisions of the Hon'ble Supreme Court, enunciated the principles in relation to the term “regulate”.

**4.8** The Respondent Commission is a quasi-judicial body. As a Regulator the powers of Ld. GERC though circumscribed by the provisions of the statute under which it is created / continued, are wide. The Hon'ble Supreme Court in a catena of judgments has held the regulatory power to be wide in its ambit. This vital nature of the wide discretion conferred under third proviso to Regulation 23.1, has been ignored by the Respondent Commission in dealing with O&M Expenses.

**4.9** The Appellant has also submitted that it had raised the similar issue in its Appeal No. 68 of 2009 and the same has been dealt with by this Appellate Tribunal at Para 10 of its Judgment dated 23.03.2010. It is also submitted that GERC (MYT Framework) Regulations, 2007 have been repealed with the notification of GERC (MYT) Regulations, 2011. However, the content of both these Regulations, on the issue raised are similar. Regulation 9.6.1 provided some illustrative variations in respect of uncontrollable factors under the 2007 Regulations. Regulation 9.6.2 provided some illustrative variations in respect of controllable factors under the 2007 Regulations. On the issue of the Regulatory domain of the Commission to however consider beyond the factors enumerated in the Regulations, the judgement records as under:

*“10. We note that the classification of various ARR items summarized in para 4.6.2 of the Impugned Order into controllable or uncontrollable items is in line with the MYT Regulations. **It has been rightly admitted by the Commission that if there are any variations in various factors even in the controllable category of ARR items due to the factors enumerated in Regulations 9.6.1 and 9.6.2 (Supra) the same will be considered as an uncontrollable factor.** The Regulations, by way of explanation do detail out various factors which fall beyond the control of the licensee and the same could be considered for allowing variations in the controllable items also. In view of this we do not wish to interfere with this decision of the Commission.”*

**4.10** The discretion under third proviso to Regulation 23.1 conferred as O&M expenses determined based on past trends. It is submitted that O&M expenses in the MTR order have been derived and approved on the basis of past trends as per Regulation 98.6 of GERC MYT Regulations. Therefore, these expenses do not include any exceptional expenses like payments to GETCO of Rs. 4.54 crores or retirement of assets of Rs.2.48 crores, both arising due to the developing nature of the SEZ

which resulted in the work of 220 kV double circuit line for East West connectivity being kept on hold and direction of the STU to the Appellant to create part of the 220 kV network on behalf of GETCO in terms of connectivity with the switchyard of the State Transmission Utility. It is important to note that said connectivity was required to source electricity from 220 kV Substation to cater to the demand of its consumers. Thus, when the MTR order was passed, the O&M expenses were derived on the basis of past trends. This provides an additional rationale for the inclusion of the third proviso to Regulation 23.1 in the Statutory Regulations.

**4.11** The Respondent Commission has followed an inconsistent and legally untenable approach in the very same impugned order. While considering distribution loss, the Respondent Commission has considered the same as uncontrollable since network and business is in developing stage. However, the Respondent Commission has not considered O&M Expenses as uncontrollable on the very same ground and rather ignored the rationale and reasoning given for certain exceptional items. The Respondent Commission was approached by the Appellant on a consistent plea that the subject area of supply was in a developing stage. Therefore, the Appellant had voluntarily and even though, it had outperformed the stipulated distribution loss as approved, not sought any gain on the distribution loss for the area by treating the same as uncontrollable. This aspect found favour with the Respondent Commission while considering the tariff component distribution loss, in the impugned Tariff Order. That being the case, the Respondent Commission in the impugned order has definitely travelled beyond Regulation 23.1 and 23.2 being considered as mandatory norms. Thus, the Appellant has submitted that there is an inconsistency in the



approach of the Respondent Commission whilst interpreting the Regulations 22.5, 23.1 and 23.2.

**4.12** Appellant had approached the Respondent Commission with a specific plea that the SEZ is being developed and the network is yet to be established and load is to be stabilized. Based on this plea and considering the fact that the statute requires the Respondent Commission to consider any variation in any tariff item on its merits, the Appellant had in its Petition clearly stated that the load in the SEZ area is yet to be stabilized and had therefore approached the Respondent Commission to treat distribution loss and O & M Expenses as uncontrollable on the said ground. The Respondent Commission has duly accepted the plea of the Appellant that the load has yet not stabilized and therefore, accepted the prayer of the Appellant that though variation in distribution losses as per the GERC (MYT) Regulations, 2011 is to be considered as controllable, as the network is yet to be established and the load is to be stabilized, the distribution losses are being treated in the impugned order dated 31.03.2016 as uncontrollable. The Appellant has submitted that it has outperformed the Distribution loss trajectory. However, while considering the O & M Expenses and the similar plea of the Appellant, the impugned order does not deal with and consider the contention of the Appellant which has been accepted qua *tariff item* distribution losses namely, that the network is yet to be established and the load is to be stabilized. Selectively, this acceptance of the plea of the Appellant has been ignored while considering the O & M Expenses. The Appellant has submitted that the Respondent Commission ought to have accorded a uniform treatment for the same plea while considering the two tariff item.

**4.13** Regarding reduction / deduction of Rs.2.48 crores from O&M expense contrary to applicable statutory regulations, the Appellant has submitted that in light of the submission made in hereinabove, the specific ground relating to the reduction / deduction of Rs. 2.48 crores from O&M expenses was urged.

In the case of O & M Expenses, the Appellant had approached the Respondent Commission pointing out that the estimated network growth and rise in demand in the Dahej SEZ did not arise. This resulted in the work of erection of 220 kV Double Circuit Line for connectivity of east to west 220 kV sub-station being kept on hold. Meanwhile, in terms of connectivity at 220 kV level with the Switchyard of the State Transmission Utility (GETCO), STU directed part of the said 220 kV network to be created by the Appellant, on behalf of GETCO. In execution of the network development for connectivity the materials which were available or procured for the east – west connectivity project, were utilized to the extent possible. Certain items could not be used due to distinct technical specifications. The part of the material which could be put to future use was transferred to Stores. Some balance items were scrapped. This written off materials valued at Rs. 2.48 crores were a part of the O & M Expenses. The Appellant had therefore prayed that this variation in the O & M Expense be treated as uncontrollable. However, the Respondent Commission in the impugned tariff order has summarily rejected this expenditure itself merely commenting upon the same as *“cannot be considered as efficient planning”* and has come to the conclusion that *“the Consumers cannot be burdened with such losses”*. Thus, the Respondent Commission has gone beyond considering the variation as Controllable and uncontrollable and denied the full amount of Rs. 2.48 crores without giving any treatment under the Regulations

applicable thereby effectively burdening the Appellant with the said deduction of full amount. The impugned order therefore in its treatment of the said expense is contrary to the principles of natural justice.

**4.14** Regarding the treatment given to the Network Augmentation Charges, the Appellant submitted that the specific ground relating to the non-consideration of Rs. 4.54 crores paid to the State Transmission Utility (GETCO), as uncontrollable O&M expenses was also urged. In terms of connectivity at 220 kV level with the Switchyard of the State Transmission Utility (GETCO), the STU directed part of the said 220 kV network to be created by the Appellant on behalf of GETCO. Further, as the work is completed and the cost has been incurred, the Appellant made the provision of Rs. 4.54 crores as part of its O&M expenses for laying this network. The same was duly verified and approved as an item of O & M expense by the Respondent Commission. The Appellant had prayed to treat the variation in the O & M Expense on account of Network Augmentation Charges as uncontrollable as it was beyond the control of the Appellant. It is also pointed out that same was not factored in approved O&M Expenses as O&M expenses were approved based on past trend. Further, this expense was incurred to source higher quantum of electricity to cater to the demand of the consumers of the licensee. However, the Respondent Commission in the impugned tariff order dated 31.03.2016 has treated this expenditure as controllable without dealing with the factors, grounds, reasons and rationale and submissions of the Appellant, regarding treating the said tariff item as uncontrollable. Therefore, the impugned order dated 31.03.2016 in its treatment of the said expense, is contrary to the principles of natural justice.

**4.15** The Appellant submitted that Tariff determination process is a complex process involving various financial, technical, legal socio-economic and Regulatory factors. The Respondent Commission holds a public hearing under Section 64(3) as well as forwards various queries and data gaps to the Appellant. Despite the aforesaid, an amount of Rs. 4.54 crores was classified as controllable, without assigning any reason. The impugned order to the said extent ought to be quashed and set aside

**5. Learned Counsel, Ms. Shikha Ohri, appearing on behalf of Respondent Commission has made following arguments/submissions for our considerations:**

**5.1** The Respondent Commission has undertaken truing up for the FY 2014-15, including computation of gains and losses for the FY 2014-15, based on the submissions of the Appellant and the annual accounts made available by the Appellant. Further, the Respondent Commission has been primarily guided by the following principles for truing up exercise:

- Controllable parameters have been considered at the level as approved under the MYT order, unless the Commission considers that there are valid reasons for revising the same;
- Un-controllable parameters have been revised, based on the actual performance observed.

**5.2** The truing up for the FY 2014-15 has been considered, based on the Gujarat Electricity Regulatory Commission (MYT) Regulations, 2011 (hereinafter referred to as "MYT Regulations, 2011 "). The MYT Regulations, 2011 specify that the Commission shall undertake the truing up of expenses and revenue of licensee for the previous year, i.e., FY 2014-15 in the instant case, based on actuals as per Annual

Accounts for FY 2014-15 and approved values for FY 2014-15 in the MTR Order. The Answering Respondent has analysed the components of the actual energy sales, expenses and revenue under truing up for FY 2014-15 while also determining the controllable and uncontrollable factors.

- 5.3** The Appellant has claimed O&M expenses as uncontrollable. However, the Regulation 23.2(h) of the MYT Regulations, 2011 provides O&M Expenses as controllable factor.
- 5.4** The Appellant has claimed that the project of double circuit line for connectivity of East to West through 220 KV sub-stations was kept on hold as the network development plans were revised due to reduction in estimated demand. The Appellant has approached the State Transmission utility (GETCO) for connectivity at 220KV level at its switchyard and as per discussions with the STU this part of the 220 KV network was to be created by Appellant on behalf of GETCO. The available material for the East to West 220 KV sub-station, which was kept on hold was utilised to the extent possible. However, certain items could not be used due to difference in technical specifications. The material which could be of future use has been transferred to the stores and the balance items have been scrapped and written off to the extent of Rs. 2.48 Crore and claimed as part of O&M expenses. The Appellant had submitted that the variation in O&M expenses on account of the above should be considered as uncontrollable. Hence, in the present Appeal, the Appellant has allegedly claimed the entire O&M expenses as uncontrollable for sharing of gains/losses.
- 5.5** As per the Regulation 23.2 (a) of the MYT Regulations, 2011, the alleged expenses made by the Appellant are mere operational

inefficiencies and resultantly the part of inefficient planning of Appellant in the implementation of a capital expenditure project which cannot be attributed to any change in scope of such project or force majeure events. In the event of inefficient planning by the Appellant for implementing a project, the burden of such losses cannot be transferred to the consumers under the semblance of uncontrolled factors on the part of Appellant. The Answering Respondent therefore did not approve the actual write off Rs.2.48 Crore as part of uncontrollable O&M Expenses and termed the expenses as controllable under Regulation 23.2(h) of the MYT Regulations, 2011.

- 5.6** It is also a settled principle of law that the Appellant cannot take advantage of its wrongful acts resulting from inefficient planning on its own part. This Tribunal has upheld this principle in M/S Ind-Bharath Energies Vs. Maharashtra State electricity, Appeal No. 91 of 2010.

*“...It is well settled principle that no person can take advantage of its own wrong. In Broom's Legal Maxim (10th Edition) at Pg. 191 it is stated;*

*' ..... it is a maxim of law, recognized and established, that no man shall take advantage of his own wrong; and this maxim which is based on elementary principles, is fully recognized in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure...  
12. Let us refer..... ”*

- 5.7** The connectivity of 220 KV sub-station with GETCO Dahej and SUVA sub-stations comprise of the cost of two bays, overhead lines and termination arrangement at switchyard erection of line and supervision charges. As the network is to be owned by GETCO the expenses will be part of O&M Expenses for the Appellant and the TPL-D (D) has made a provision of Rs. 4.54 Crore as part of its O&M expenses in FY 2014 - 15. The Answering Respondent accordingly

approved the O&M Charges at Rs. 9.64 (12.12-2.48) Crore in the Truing up for FY 2014-15.

- 5.8** With regard to variation in the O&M Expenses, as per Regulation 23 of the GERC (MYT) Regulations, 2011, the Answering Respondent has considered the variation in O&M expenses due to inefficient planning as controllable factor within the control of the Appellant. Moreover, the objective behind Statutory Regulations envisaging O&M expenses under controllable factors in relation to the present case is that the purchase of material related to project and planning of transmission system etc. are part of commercial decisions based on prudence of the commercial entity and any failure in the said judiciousness cannot be termed as uncontrollable factors like force majeure events or change in law events.

In this regard, this Tribunal in Appeal No.153 of 2009, titled as **New Delhi Power Ltd. Vs. Delhi Electricity Regulatory Commission**, reported in 2010 ELR (APTEL) 0891 has held that when a certain component of the ARR is allowed on normative basis, then any overachievement or underachievement of the same by the licensee is to be borne by the licensee. If there is underachievement of the same then the loss has to be absorbed by the licensee and at the same time if there is a profit on account of overachievement, then that profit will be accrued to the licensee.

- 5.9** Further, this Tribunal has held in **NTPC Limited vs. Uttar Pradesh Power Corporation Limited** in Appeal No.148 of 2015 that the O&M expenditure as per the relevant Regulations are normative and not based on actuals. Hence, the Appellant cannot choose that in case

one element of O&M Expenses is increased, it is entitled to claim the same and on the other hand if any element is decreased, the benefit of the same will be kept by Appellant. The tariff could be determined either on actuals or on normative basis. Once the Commission by Regulations has directed that O&M Expenses will be normative, the Appellant is not entitled to claim actuals. In view of this, once, the tariff has been fixed on the basis of normative parameters; the same should not be opened, even, if, there is, any variation between normative and actual.

- 5.10** The norms with regard to O&M expenses is covered under Regulation 98.6 of the GERC (MYT) Regulations, 2011. This Tribunal in **Torrent Power Limited Vs. GERC**, Appeal No.190 of 2011 has held with regard to O&M Expenses under MYT Regulations, 2011 that

*39. It cannot be disputed that the norms with regard to Operation & Maintenance Expenses is covered under Regulation 98.6 of the MYT Regulation of the State Commission.*

*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.***

- 5.11** In view of the Regulations 23 and 98.6 of MYT Regulations, 2011 and the judgements of this Tribunal, the O&M expenses are normative and controllable hence, the Appellant has to take suitable measures to control the O&M expenditures and any variation in it has to be borne by the Appellant himself especially in the light of inefficient planning.



- 5.12 In view of above submissions, the Answering Respondent Commission has submitted that the present appeal may be dismissed.
6. **We have heard learned Counsel appearing for the Appellant and the learned Counsel appearing for the Respondent at consideration length of time and considered the written submissions carefully and evaluated the entire relevant material available on record. The following main issue emerges out of Appeal for our consideration:**

“Whether the Impugned Order passed by the State Commission is in consonance with its Regulations relating to the O & M expenses or in any way violates the provisions of the Act and principle of natural justice ”

7. **Our Findings & Analysis:-**

- 7.1 Learned counsel for the Appellant submitted that as per the provisions of the Statutory Regulations, the Appellant had approached the State Commission for truing up exercise for FY 2014-15. The Appellant had requested the Respondent Commission to treat the variation in O&M expenses as uncontrollable as variation in O&M expense is on account of uncontrollable factors. In support of its contention, the Appellant had submitted that SEZ is still in developing stage and demand is yet to be stabilized. Further, the O&M expense have been approved by the Respondent Commission based on past trend. However, the network has increased in the Supply area and Repairs & Maintenance activities have also increased. Further, the counsel has also submitted that variation in O&M expense is on account of certain exceptional items. The Appellant had to write off amount of Rs. 2.48 Crore as network development plan was required to be changed due to reduction in demand. Further, the Appellant was required to incur expense of Rs. 4.54 Crore as directed by the State Transmission Utility towards the

connectivity with STU for sourcing power. However, the Respondent Commission has treated O&M expense as controllable and also deducted Rs. 2.48 Crores from O&M Expenses on the ground that same is on account of operational inefficiency.

**7.2** Learned counsel referred to the 3<sup>rd</sup> proviso to Regulation 23.1 read with Regulation 22.5 and submitted that Respondent Commission ought to have exercised the power in accordance with the provisions of the Regulation. The Appellant has pointed out that simpliciter reliance of the Respondent Commission on Regulation 23.2 (h) ignoring the exception carved out by 3<sup>rd</sup> proviso to Regulation 23.1 is erroneous and contrary to the provisions and intent of the Regulation.

**7.3** Regarding O&M expense of Rs. 2.48 Crore on account of material written off due to change in network plan, the learned counsel for the Appellant submitted that the area was developing and based on the expected consumer demand, the network was planned. However, due to reduction in consumer demand, the Appellant has reviewed its network plan instead of laying the network as per earlier plan. He further submitted that the reduction in consumer demand is beyond the control of the Appellant. Further, the Appellant has shown commercial prudence by revising the network plan and utilizing the available network material. Therefore, it is incorrect to term reduction in anticipated consumer demand and subsequent revision in network plan as operational inefficiency. Therefore, the reliance of the Respondent Commission on Regulation 23.2 (a) for deduction of Rs. 2.48 Crore is misplaced. The reliance on this Tribunal's judgment in M/S Ind-Bharath Energies Vs. Maharashtra State electricity, Appeal No. 91 of 2010 is not applicable in the present case. Accordingly, the deduction of Rs. 2.48 Crore from the actual O&M expense is erroneous.

**7.4** *Per contra*, learned counsel for the Respondent Commission referred to this Tribunal's judgments in New Delhi Power Ltd. Vs. Delhi Electricity Regulatory Commission in Appeal No.153 of 2009 and NTPC Limited vs. Uttar Pradesh Power Corporation Limited in Appeal No.148 of 2015 in support of its contention that O&M expense is to be considered as controllable.

**7.5** Learned counsel for the Respondent Commission referred the judgment of this Tribunal in Appeal No. 190 of 2011 and has contended that the norms with regard to O & M Expenses is covered under Regulations 23 and 98.6 of the MYT Regulations, 2011 and as per the judgment of this Tribunal, the O & M Expenses are normative and controllable and hence, any variation in it has to be borne by the Appellant himself especially in the light of inefficient planning.

**8. Our Findings:-**

**8.1** We are inclined to accept the contentions of the Appellant in respect of interpretation of proviso to the Regulation and to arrive at the harmonious construction of Regulation 23.1 read with Regulation 22 in accordance with the Hon'ble Supreme Court judgments in *S. Sundaram Pillai Versus V. R. Pattabiraman, 1985 (1) SCC 591* and in *Dwarka Prasad Vs. Dwarka Das Saraf – 1976 (1) SCC 128*. Contrary to this, if we accept the Respondent Commission's view, the 3<sup>rd</sup> proviso to Regulation 23.1 becomes nugatory. Further, there is merit in the argument of the Appellant that O&M expenses were approved based on the past trend as per the provisions of the Statutory Regulations and therefore, there is all the more reason to exercise the discretionary power vested with the Commission to deal with the exceptional expenses incurred by the Utility by analyzing the reason.

- 8.2** Admittedly, the variation in O&M expense on account of cost of Rs. 4.54 Crore was incurred towards the network augmentation charge as required by the State Transmission Utility (STU) for laying connectivity to source power to cater to demand of the consumers. This expense is, therefore, beyond the control of the Appellant and has been incurred at the instance of STU and therefore, we find force in the submissions made by the learned counsel for the Appellant that this expense is uncontrollable as being beyond the control of the Appellant.
- 8.3** We agree that O&M expense is to be treated as controllable & normative in normal circumstances but when Statutory Regulations provides for exception, the Statutory Regulations are to be followed to deal with those exceptions. Reference to this Tribunal's judgment in NTPC Ltd Vs Uttar Pradesh Power Corporation Limited in Appeal No. 148 of 2015, it is important to note that order is in relation to additional cost incurred for a tariff item and does not deal with exceptional situation which results in increase of O & M cost which falls within the third proviso of Regulation 23.1. Thus, this judgment is not applicable to the present case when seen in its entirety.
- 8.4** The Respondent Commission has relied on Paragraphs 39 & 40 of the decision of this Tribunal in Appeal No. 190 of 2011. However, paragraph 40 itself supports the case of the Appellant. While, upholding the concept of allowing O & M on normative basis this Tribunal in Paragraph 40 carves out the exception when it states that the O & M expenses would be normative unless there is a specific consequence for such variation provided for in the Regulations itself. In the present case, the 3<sup>rd</sup> proviso to Regulation 23.1 provides for exception and therefore,

instead of terming entire O&M expense as controllable, the Respondent Commission should have considered the exceptional expenses as uncontrollable.

**8.5** In the present case, the Respondent Commission has accepted the plea of the Appellant to treat the variation in technical and commercial losses as uncontrollable on the ground that SEZ is still in developing stage and load is yet to be stabilized. Accordingly, despite the variation in technical and commercial losses is specified as controllable at Regulation 23.2 (c), no gain is shared with Appellant though it has outperformed the approved target. However, the Respondent Commission has not accepted the same plea of the Appellant to treat the exceptional O&M expenses as uncontrollable. The Respondent Commission cannot take such an inconsistent stand.

**8.6** From the above, it is noticed that the estimated network growth and rise in demand in the Dahej SEZ did not arise as expected which resulted into severe mismatch between the scope of works and procurement of materials. It is not in dispute that the planning for 220 kV double circuit line for connectivity East to West sub-station was kept on hold by STU itself and later on, it directed the Appellant to construct part of the said 220 kV network on behalf of STU (GETCO). In execution of the said work, the materials which were available or procured were utilized to the maximum extent possible. However, certain items could not be used due to very distinct technical specifications. The part of materials which could be put to future use were transferred to stores and some items were scrapped. This written off materials valued at Rs.2.48 crores were part of the O& M expenses. We thus opine that the variation in O&M expenses which have arisen due to uncontrollable / extra ordinary reasons, ought to have been treated as uncontrollable. We are unable

to accept the observations of the State Commission that “*the same cannot be considered as efficient planning and the consumers cannot be burdened with such losses.*” In such a circumstances, when STU was closely involved for planning and execution of the said lines and sub-station, the Appellant cannot be penalized on account of the factors which were beyond its control and entirely uncontrollable. We are, therefore, of the considered opinion that the State Commission has not adopted judicious approach in dealing with the issue and has taken a decision of legal infirmity.

**9. Summary of our Findings:-**

Based on above, we decide and conclude as under

- 9.1 The variation in O&M expense is normally to be treated as controllable. However, in exception cases as in hand, the amount of Network Augmentation charges incurred by the Appellant as required by State Transmission Utility (STU) for connectivity needs to be treated as uncontrollable.
  - 9.2 The deduction of Rs. 2.48 crores from O & M Expenses is contrary to applicable Statutory Regulations of the State Commission.
  - 9.3 The Commission should take consistent stand in all matters on the same plea whether related to O&M expenses or the variation in technical and commercial losses.
- 10 Accordingly, the appeal deserves to be allowed.

**ORDER**

Having regard to the facts and circumstances of the case as stated supra, we are of the considered view that the issues raised in the present appeal being Appeal No. 256 of 2016 have merits. Hence, the Appeal is

allowed. The impugned order dated 31.03.2016 passed by Gujarat Electricity Regulatory Commission in Case No. 1554 of 2015 is hereby set aside to the extent challenged in the Appeal.

The State Commission is directed to pass the consequential orders in accordance with law and our findings stated in Para 9.1 to 9.3 above, as expeditiously as possible within a period of four months from the date of receipt of a copy of this judgment and order.

No order as to costs.

Pronounced in the Open Court on this **09<sup>th</sup> day of May, 2018.**

**(S.D. Dubey)**  
**Technical Member**

**(Justice Manjula Chellur)**  
**Chairperson**

**REPORTABLE / ~~NON-REPORTABLE~~**

Pr