Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 28 of 2012

Dated: 11th October, 2012

Present: HON'BLE MR. JUSTICE P S DATTA, JUDICIAL MEMBER
HON'BLE MR. V J TALWAR, TECHNICAL MEMBER,

Maharashtra State Power Generation Company Limited.
Prakashgad,
Plot No. G-9, Bandra (East)
Mumbai-400 051 … **APPELLANT**

VERSUS

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

2. Tata Power Co. Ltd (Generation Business)
Regulation department
Dharavi Receiving station
Labour Camp, Next to Shalimar Industries
Matunga East Mumbai 400019.

3. Reliance Infrastructure Ltd (Generation Business)
Regulatory Department,
7th Floor Devidas Lane, off SVP Road,
Devidas telephone exchange,
Borivali West, Mumbai 40092

4. Prayas (Energy Group)
Amrita Clinic, Athvale Corner,
Lakdipool, Karve Road Junction
Deccan Gymkhana, Karve Road
Pune – 411004

5. Mumbai Grahak Panchayat
Grahak Bhavan, Sant Dynaneshwar Marg,
Behind Cooper Hospital (Vile Parle West)
Mumbai – 4000056

6. The Vidarbha Industries Association
1st Floor, Udyog Bhawan,
Civil Line, Nagpur – 440001

7. The General Secretary,
Thane Belapur Industries Association
Rabale Village, Post Ghansoli,
Plot P – 14, MIDC
Navi Mumbai – 400701 … **RESPONDENTS**

Counsel for the Appellant : Mr Sanjay Sen
Mr. Ramandeep Singh (Rep.)

Counsel for the Respondent : Mr Buddy A Ranganathan for R-1

JUDGMENT

PER MR. V J TALWAR TECHNICAL MEMBER

1. The Appellant Maharashtra State Power Generation Company Limited is a Generation Company wholly owned by the Government of Maharashtra. Maharashtra Electricity Regulatory Commission (for short the Commission) is the 1st Respondent herein. 2nd and 3rd Respondents are the distribution licensees having city of Mumbai as licensed area of supply. Respondents Nos. 4 to 7 are the NGOs and the Consumers' representatives.

2. The present appeal has been preferred by the Appellant Maharashtra

State Power Generation Company Limited against the impugned order dated 15.12.2011 passed by the Commission in Case No. 103 of 2011.

3. The Appellant Company is a generating company, which is engaged in the generation of electricity and is mainly aggrieved by certain directions of the Commission with regard to removal of difficulty in determination of Fuel Adjustment cost (FAC) Charges for its thermal generating stations.

4. The Appellant had filed a petition on 25.07.2011 before the Commission, under Section 62 (4) of the Electricity Act, 2003 and Regulation 85 of MERC (Terms and Conditions for Tariff) Regulation, 2005 and Regulation 100 of MERC (Multi Year Tariff) Regulations 2011, with regard to seeking review of the methodology of Fuel Adjustment Cost (FAC) calculation for its existing power stations. The main prayers of the said petition were as follows:

"

i) Admit this Petition.

ii) Consider the submissions in the Petition and remove the difficulty in working out the correct FAC for its stations.

iii) Allow Appellant to recover the arrears in recovery of FAC.

iv) Condone any shortcoming in the petition and allow the Appellant to submit additional information during the course of proceedings on this petition before the Commission."

5. In its petition before the Commission, the Appellant contended that the procedure and the FAC formula for calculating the Fuel

Adjustment Cost Charge for the Appellant is incorrect as the impact of deviation in secondary oil consumption from the normative value is reflected twice. Thus, the utilities with secondary oil consumption more than the normative value are excessively penalized and the ones' with lower consumption are excessively benefitted.

6. Before taking any action on the petition, the Commission desired to ascertain the methodology for computation of FAC charges adopted by the other generating companies operating in the State. Accordingly, the Commission formed an inter-utility committee wherein it was found that the formula used by the other generating companies in the State viz., The Tata Power Company and the R-Infra were based on the Commission's Tariff Regulations, 2005 and was different from the formula used by the Appellant in its FAC submissions before the Commission for approval. The submissions made by the Appellant were based on Fuel and Other Costs Adjustment (FOCA) methodology formulated in the year 2001. Although this FOCA methodology was changed to FAC model after notification of the MERC Tariff Regulations 2005, the methodology of submissions by the Appellant for periodic claiming of FAC charges remained unchanged.

7. Considering the fact that said formats had been prevalent for a long time, the Commission called a joint meeting with the people who had knowledge regarding the erstwhile formats and the differences with the formats derived under the Regulations, 2005 and constituted a Committee comprising of Shri Suresh Gehani, ABPS, Shri. A D Mahajan, SICOM , Shri. Sandeep Tamhane-, Consultant and Shri.

S.R Karkhanis and, Shri. Kalim Khan of the Commission to examine the issue and give recommendations. The expert Committee in its report made the following observations:

> ***"5.10 …Probably, the utilities, not really having looked up the original FPA formula, have derived incorrect conclusion regarding the "methodology" of calculating REC (Rate of Energy Charge), as it appears from the simplified arithmetical expression. This is evident from the comments of TPC as well as the methodology submitted by MSPGCL, wherein attempts have been made to show that the formula advocates splitting of Station Heat Rate into Coal Heat Rate and Oil Heat Rate****.*
>
> *5.11 The basic difference in arriving at the REC by the existing methodology used in MSEDCL's formats and that through FPA formula is that, in the FPA formula, the cost adjustment related to normative Heat Rate is applied only to the Coal Cost, and then the cost of coal having heat content equivalent to the normative quantity of oil is deducted therefrom. Whereas, in the existing methodology, the entire cost of oil as well as coal fuels is subjected to the said "Normative Heat Rate adjustment"*
>
> *5.12* ***The above difference in calculating methods may cause minor variations in the final amount of REC, which will have <u>positive or negative impact</u>, depending upon many factors, from case to case.*** *Therefore, the amount of FAC chargeable for the said period is likely to vary accordingly.*
>
> *5.13 Final True-up : 5.15.1 The Committee has also looked into the methodology used for True-up at the time of reviewing annual performance and determining the tariff (APR and Tariff determination process).* ***The Committee is of the opinion that, in the final true up of Fuel cost, calculation is done separately for different fuels, i.e., secondary fuel, primary fuel (Coal), and thereby, the utility is allowed all the cost, based on normative performance parameters (Station Heat Rate, Secondary Fuel Oil and Transit Loss) and therefore, chance of under realization of cost does not occur. The Committee has observed that identical methodology for***

truing up of Fuel cost has been used for all the generating utilities. Hence, in case FAC amounts claimed periodically throughout the year varied on account of variance in methodology of REC calculation, the Utilities did not lose any amount after the final true-up exercise was done. In short, in case any utility by a given methodology of calculating the REC has charged less FAC, it will get a higher trued up amount, during the final true up, and vice versa."

8. Based on the data and calculations submitted by the Appellant, the Commission observed that in some of the months the FAC payment calculated by the FOCA approach was higher than that calculated by the Regulatory approach. It was further observed that the differences over the period also varied on account of various other combustion parameters. The Commission accordingly concluded that there would be no point in comparing the merits of the two methods separately at that point of time as the utilities would not lose any amount after final true up exercise is carried out.

9. The Commission passed the Impugned Order dated 15.12.2011 directing that future FAC charges concerning the Appellant are to be computed in accordance with the relevant Tariff Regulations.

10. Aggrieved by the Impugned Order dated 15.12.2011 the Appellant has filed this Appeal.

11. The learned Counsel for the Appellant made the following submissions in support of its claim:

(i) Since the year 2005, post facto approval of the FAC charges has been granted by the Commission. The variable cost so

determined is compared to the base variable cost approved in the tariff order and the difference between the two is used to calculate the FAC charges for the period.

(ii) The earlier FOCA formulation, which the Appellant was subjected to by the Commission, was not correct. The Appellant was ignorant of the said fact and under bonafide believe that the same was envisaged under the Regulation 35.1 (a) of MERC (Terms and Conditions of Tariff) Regulation, 2005. The Appellant came to know of the anomaly only during the pendency of the proceedings before the Commission. As a result of the same the impact on the Appellant of the deviation in secondary fuel oil consumption was getting considered twice. The secondary oil consumption is higher in comparison to the normative limits in most of the power stations of the Appellant thereby resulting in the double disallowance as per the above faulty methodology which was ultimately leading to negative impact on the recovery of fuel cost for the Appellant. The said approach provides double benefit to the stations having lower secondary oil consumption.

(iii) Therefore, even though the methodology of FAC calculations applicable to the TPC and R-Infra were changed to the FAC model in the year 2005, and the said methodology was commensurate to the Tariff Regulations, 2005, the methodology applicable to the Appellant remained unchanged. There were, thus, two formulations for calculation of FAC post 2005. Even the Commission was unaware of the said anomaly, but even

after the Commission became aware of the same, and after recognizing the same, the Commission has denied the Appellant the recovery of the arrears amounting to around Rs. 70 Crores and carrying cost thereof.

(iv) It is pertinent to mention that the formulae used in the earlier FOCA based system and applied to the Appellant and that in the system followed as per the MERC Tariff Regulations by M/s R-Infra and M/s Tata Power Company, were different. The said fact has been categorically observed by the Commission in the impugned order. It was further observed that the Rate of Energy (REC) charge derived through the respective methodologies vary when compared to one another. The responsibility to examine and amend the FOCA formats for the Appellant in order to align them with the relevant tariff regulations was solely on the Commission. The Commission cannot absolve itself of the said responsibility. The said anomaly/ error has a cost effect on the Appellant. The Commission is clearly at fault in not adopting the formats prepared for M/s R-Infra for the Appellant, especially when M/s R-Infra has similar purely coal based thermal power plants. The said action of the Commission is discriminatory, arbitrary and against the principles of natural justice.

(v) In the impugned order, the Commission has finally directed that the future claims of the Appellant should be as per the Tariff Regulations, 2005 or MYT Regulations, 2011, as applicable. However, surprisingly, the Commission has declined to allow

any payment of arrears to the Appellant despite adopting the findings of its own representative in the Committee which upheld the submission of the Appellant that the Appellant was wrongly subjected to methodologies for calculation of Rate of Energy Charge which were inconsistent to the relevant tariff regulations. The Appellant is unable to understand the fact that when the Commission has acknowledged the said anomaly then there was no legal impediment in granting the Appellant the legitimate deferred costs along with the legitimate carrying cost. The Appellant cannot be penalised unnecessarily.

(vi) The denial of payment of arrears to the Appellant is unjustified when there remains no dispute that the Appellant was wrongly subjected to methodologies for calculation of FAC charges when all other utilities were having their charges calculated in accordance to the tariff regulations.

(vii) The Commission in the impugned order has not given any findings with respect to the fact as to the existence of separate formats for M/s R-Infra and the Appellant. New formats ought to have been designed, adopted and shared with the State Distribution Licensee and the Appellant when the same were done for the similar coal based units of M/s R-Infra. Clearly, the Commission was inconsistent so far as the uniform implementation of FAC regime on all utilities in the State of Maharashtra was concerned. Therefore, it is not entirely correct to blame the Appellant for the inconsistent implementation of FAC formats.

(viii) With respect to the observation of the Commission in the impugned order that there could be over recovery in some of the stations of the Appellant, the Commission has failed to examine the fact that even if there may be an over-recovery in some of the stations, however, on a yearly basis the same is leading to an under recovery of Rs. 70 crores per annum. The Commission has completely misunderstood the impact of the earlier prevalent FAC approach, and is trying to justify its own fault in not dealing with the Appellant in a fair and equitable manner, by making such statements. As a result, it has been wrongly, erroneously and deliberately portrayed by the Commission that both the approaches are aligned and that there would be minor differences between the two, in order to shove off its responsibility of being a regulator. Thus, the overall quantum of deferred recovery for the Appellant through FAC mechanism has been wrongly ignored by the Respondent Commission on account of highlighting the miniscule amount of over-recovery in some of the months.

(ix) With respect to the observation of the Commission that the final true-up takes care of the differences in all periodic payments and therefore the Appellant does not lose any amount due to fuel cost variations, it is stated that even though the Appellant agrees to the fact that the final true-up deals with the estimation of normative costs as per the relevant tariff regulations, and any over recovery or vice-versa gets corrected during the said exercise, the Commission has failed to acknowledge the fact

that the prime difference lies in the time of recovery of the expenses.

(x) The Appellant had filed its FY 2010-11 final True up Petition in December, 2011 and order on the said petition has been awarded. The Appellant, therefore, requests this Hon'ble Tribunal to only allow the carrying cost @ 13% rate of interest on the deferred recovery of the FAC arrears for FY 2010-11 which amounts to Rs. 18.42 crores.

12. Per contra, the learned Counsel for the Commission in defending the Impugned Order passed by the Commission made following submissions:

(i) On account of its own fault the Appellant has been computing the FAC charges using the old formats approved under the 2001 Regulations and the Appellant ought not to try and benefit from their own mistake.

(ii) It is a settled principle of law that the ignorance of law is not an excuse. The Appellant had been using the wrong formats for a long time and it has only itself to blame.

(iii) Infact, the Regulations, 2005 and the formats were adopted by the other Utilities in the State and there is no possible excuse for the Appellant to continue with the old formats and then claim carrying cost for the differential which admittedly has been caused only on account of its own act.

(iv) The Appellant has alleged that FOCA system was erroneous. The Appellant had been making FAC submissions under Fuel and other Adjustment Charges (FOCA) system which was issued by the Commission in the Order dated 31.07.2001 in Case No. 15 of 2000 and vide an Order dated 10.01.2002 in Case No. 1 of 2001. The said Orders have not been challenged by the Appellant herein. The said Mechanism has been adopted by MSEDCL/MSPGCL. If the Appellants have been using the erstwhile formats for almost a decade and have not modified their filings even after the 2005 Regulations came into being, it was the Appellant's own fault and the Appellant cannot be permitted to profiteer from its own lapse.

(v) There are no arrears in Fuel Adjustment Charge. In fact, there is an FAC cap of 10% on the applicable tariff and if any shortfall in the same, it is recovered in the next true up.

(vi) Further, it is submitted that that the FAC formats were used by the Appellant ex-post facto approval of the Commission after the FAC had been charged and recovered on a periodical basis. Hence, there would be no question of undertaking anything akin to a "prudence check" at the time of review of the formats. As long as the FAC is recovered within the prescribed levels with a cap of 10%, the scrutiny of the FAC formats need not necessarily be undertaken with a proverbial "magnifying glass". This is particularly so when, in any event, at the time of true-up each element of cost is individually treated, collated and analysed.

(vii) The matter of Fuel Cost Adjustment is being aptly addressed through the True Up Mechanisms and neither the utility nor the consumers have been subjected to any injustice. Hence, there was no question of allowing recovery of arrears and carrying costs.

(viii) In FAC formula, there is no question of carrying costs. Carrying cost can be claimed only when the utility has been wrongly denied any legitimate claim.

(ix) Further, a claim for carrying cost could be raised and adjudicated upon only at the time of the truing up.

(x) It is only at the time of true up that it could be ascertained as to whether there has been any under-recovery at all which needs to be considered. Only if there has been any under-recovery and the utility has been wrongly denied such legitimate recovery could a consideration of carrying cost arise.

(xi) The Appellant had never raised any issue of carrying cost before the Commission. The prayer of the Appellant before the Commission does not contain any reference at all to carrying cost. The issue of carrying cost ought not to be permitted to be raised in the appeal for the first time when the Appellant has deliberately chosen not to ask the Commission for a determination on the same.

(xii) The Appellant had itself submitted before the Commission as under:-

*"8. **The Petitioner submitted that it may be permitted to change the methodology of FAC computation** to that followed by the other utilities in conformity with the MERC Tariff Regulations 2005."*

(xiii) All the judgments of this Hon'ble Tribunal dealing with carrying cost pertain to a situation wherein the projection given by the Appellant as determined by the Commission at the time of tariff fixation has been set aside in appeal. In such situation when the Utility has been held to have been denied of its legitimate claim, carrying cost has been granted.

(xiv) For example, in the tariff fixation if the Utility projects a cost of Rs 100, the Commission determines the same at Rs 90 and it is found that the Commission's determination wrongly denied the Utility its legitimate claim, carrying cost could be considered. However if the Utility projected Rs. 100, the Commission has allowed Rs.100 and at the time of truing up the cost was found to be Rs. 102, in this situation asking for carrying costs would tantamount to profiteering. In any event, the question of Carrying Costs has to be gone into only at the time of truing up after investigating the actual and cannot be raised in the present proceedings.

13. Following undisputed facts would emerge from the above submissions of the parties:

a. The Commission had introduced the methodology for Fuel and Other Charges Adjustment for MSEB as early as 2001 i.e. prior to enactment of the Electricity Act, 2003. The erstwhile MSEB,

the predecessor Board of the Appellant had been submitting requisite information in specified formats devised under FOCA to the Commission for post facto approval.

b. MSEB was unbundled some time during June, 2005, and its functions related to generation were transferred to the Appellant. The Commission notified Maharashtra Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2005 (in short the Tariff Regulations 2005) on 24th August 2005.

c. The concept of Fuel Adjustment Charge (FAC) was introduced in the MERC (Terms and Conditions of tariff) Regulations 2005, on the basis of the methodology defined by the Central Commission. The formula for calculating Rate of Energy Charge (REC) as defined in the said Regulations is based on the concept of Fuel Price Adjustment formula of Central Commission.

d. Regulation 35.1 of the Tariff Regulations 2005 specified the formula for determination of Rate of Energy Charge. Regulation 82.4 of the Tariff Regulations, 2005 requires the distribution licensee to submit the details, in the stipulated formats, to the Commission on a quarterly basis for the FAC charged along with such details of the FAC incurred and the FAC charged to all consumers for each month of such quarter, along with the detailed computations and supporting documents as may be required for verification by the Commission.

e. With Effect from the year 2006, the concept of allowing claim of Fuel Adjustment Cost charges (FAC charges) through post facto approvals of FAC submissions was extended to TPC and RInfra.

f. However, the Appellant continued to furnish the requisite information to the Distribution licensee as per old methodology and formats for determination of FAC. Based on the information furnished by the Appellant, the Distribution Licensee would work out the FAC on quarterly basis and submit to the Commission for post facto approval.

g. The Appellant in its submissions has accepted that it was ignorant of the change in requirement under the regulation 35.1 (a) and bonafide believed that information being submitted was as envisaged under Regulation 35.1 (a) of MERC (Terms and Conditions of Tariff) Regulation, 2005.

h. With the adoption of FAC calculation under FOCA system, the generating stations with secondary oil consumption more than the normative value would be subjected to under recovery and the generating stations with lower consumption of secondary oil would recover more FAC. Thus, instances of under recovery or over recovery would vary from station to station and also from month to month depending upon secondary oil consumption by the station.

i. The final true-up would take care of the differences in all periodic payments and, therefore, neither the Appellant nor the consumers would lose any amount due to fuel cost variations.

j. The Commission was giving post facto approvals to the FAC charged by the concerned Distribution Licensee.

14. In view of the above admitted factual position the only question remains for our consideration is as to whether the Appellant is entitled for 'carrying cost' for the amount it has under recovered during the year 2010-11?

15. The learned Counsel for the Appellant contended that having accepted that the formula used for FAC calculations under FOCA system was erroneous and has resulted in under recovery to the Appellant, the Commission ought to have permitted the Appellant to recover the amount under recovered during the FY 2010-11 as arrears along with the carrying cost.

16. Refuting the claim of the Appellant for 'carrying cost' the learned Counsel for the Commission submitted that the 'carrying cost' can be claimed only when the utility had been denied any legitimate claim. In the present case, the Appellant had been using old formats and formulae for FAC calculations since 2005 in total ignorance to the change in requirement under regulation 35.1(a) of the Tariff Regulations 2005. The Commission had been giving 'post facto' approval to the FAC claimed by the Appellant. Thus there was no denial on any legitimate claim of the Appellant by the Commission. However, a claim of 'carrying cost' could be raised and adjudicated

upon at the time of final true up as it is only at that time when it could be ascertained as to whether there had been any under recovery at all which needs to be addressed. Moreover, in view of 10% Cap on FAC in terms of Regulation 82.6 of the Tariff Regulations 2005, there would be no arrears and hence no 'carrying cost'.

17. Let us examine the relevant regulation 82 of the Tariff Regulations 2005 set out as under:

> ***"82 Fuel surcharge adjustment***
>
> *82.1 With effect from the first day of September, 2005, the Distribution Licensee shall pass on adjustments, due to changes in the cost of power generation and power procured due to changes in fuel cost, through the Fuel Adjustment Cost (FAC) formula, as specified below.*
>
> *82.2 The FAC charge shall be applicable on the entire sale of the Distribution Licensee without any exemption to any consumer.*
>
> *82.3 The FAC charge shall be computed and charged on the basis of actual variation in fuel costs relating to power generated from own generation stations and power procured during any month subsequent to such costs being incurred, in accordance with these Regulations, and shall not be computed on the basis of estimated or expected variations in fuel costs.*
>
> *82.4 The Distribution Licensee shall submit details in the stipulated format to the Commission on a quarterly basis for the FAC charged and, for this purpose, shall submit such details of the FAC incurred and the FAC charged to all consumers for each month in such quarter, along with the detailed computations and supporting documents as may be required for verification by the Commission:*
>
> *Provided that where the FAC is being charged for the first time subsequent to the notification of these Regulations, the*

Distribution Licensee shall obtain the approval of the Commission prior to levying the FAC charge:

Provided further that the FAC charge applicable to each tariff category of consumers shall be displayed prominently at the cash collection centres and on the internet website of the Distribution Licensee:

Provided that the Distribution Licensee shall put up on his internet website such details of the FAC incurred and the FAC charged to all consumers for each month along with detailed computations.

82.5 The formula for the calculation of the FAC shall be as given under: FAC (Rs crores) = ***C*** *+* ***I*** *+* ***B****, Where*

FAC = Fuel Adjustment Cost

C *= Change in cost of own generation and power purchase due to variation in the fuel cost*

I *= Interest on working capital*

B *= Adjustment factor for over-recovery / under-recovery*

Explanation I – for the purpose of this Regulation 82.5, the term ***"C"*** *shall be computed in accordance with the following formula:*

C (Rs. Crores) = $AFC_{,Gen}$ *+* $AFC_{,PP}$*, Where:*

$AFC_{,Gen}$ *: Change in fuel cost of own generation. This change would be computed based on the norms and directives of the Commission, including heat rate, auxiliary consumption, generation and power purchase mix, etc.*

$AFC_{,PP}$ *: Change in energy charges of power procured from other sources.*

This change would be allowed to the extent it satisfies the criteria prescribed in these Regulations and the prevailing tariff order, and subject to applicable norms.

*Explanation II – for the purpose of this Regulation 82.5, the term **"I"** shall mean change in interest on working capital on account of change in fuel cost.*

*Explanation III – for the purpose of this Regulation 82.5, the term **"B"** shall be computed in accordance with the following formula:*

BJ-2 (Rs. Crores) = A_{J-4} + R_{J-2}

Where:

A_{J-4} : Incremental cost in month "J-4".

R_{J-2} : Incremental cost in month "J-4" actually recovered in month "J-2".

82.6 The monthly FAC charge shall not exceed 10% of the variable component of tariff, or such other ceiling as may be stipulated by the Commission from time to time:

Provided that any excess in the FAC charge over the above ceiling shall be carried forward by the Distribution Licensee and shall be recovered over such future period as may be directed by the Commission.

82.7 The calculation for FAC to be charged for the month "J" shall be as follows:

FAC_J (Rs crores) = C_{J-2} + I_{J-2} + B_{J-2}

The FAC would be applicable from the month following the month in which the additional costs are calculated.

82.8 The FAC charge shall be allowed only in respect of approved power purchases of the Distribution Licensee and in respect of power purchases made in accordance with Regulation 25 where the approval of the Commission is not required under these Regulations.

82.9 The total FAC recoverable, as per the formula specified above, shall be recovered from the actual sales in "Rupees per kilowatt-hour" terms: Provided that in case of unmetered consumers, FAC shall be recoverable based on estimated

sales to such consumers, calculated in accordance with such methodology as may be stipulated by the Commission: Provided further that where the actual distribution losses of the Distribution Licensee exceed the level approved by the Commission, the amount of FAC corresponding to the excess distribution losses (in kWh terms) shall be deducted from the total FAC recoverable.

82.10 Calculation of FAC per kWh shall be as per the following formula:

*FAC Rs./kWh = (FAC / (Metered sales + Unmetered consumption estimates + Excess distribution losses)) * 10"*

18. It is not disputed that the instances of under recovery or over recovery of FAC charges would depend upon the secondary oil consumption and would vary from generating station to generating station and also from month to month for the same generating station. In order to understand the issue, the Appellant was asked to furnish the required formats it has been supplying to the Commission under FOCA as well as under Tariff Regulations 2005. However, the Appellant submitted only two sheets in Form 3.3 for August, 2011 and December, 2011. The Commission submitted all the formats furnished by the Appellant to the Commission giving full details of the information regarding FAC calculations for the Month of August 2011. The Commission has also submitted the information furnished by the RInfra and Tata Power in the formats as per Regulation 31.1(a) of the Tariff Regulations, 2005. Analysis of the information submitted to us would reveal that there has been very vide variations in Secondary Oil Consumption in the Month of August 2011 and December 2011 as indicated in the Table below:

Station	Secondary Oil Consumption Ml/kWh		
	Normative	August, 2011	December, 2011
Kapaskheda	2.00	3.504	2.463
Bhusawal	2.00	16.663	1.995
Nasik	3.00	22.219	0.862
Parli	2.00	33.951	1.760
Koradi	2.80	12.222	3.282
Chandrapur	2.00	8.059	0.507
Parli 6	2.00	26.186	0.643
Paras 3	2.00	27.235	4.629
Parli 7	2.00	24.888	3.576
Paras 4	2.00	20.924	0.684

19. It is clear from the above table that the secondary oil consumption vary from generating station to generating station and also from month to month for the same generating station. During August 2011 the secondary oil consumption of all the stations was much higher than the normative value. However, in the month of December, 2011 there were as many six generating stations which had secondary oil consumption lower than the respective normative value. Thus, the stations which had higher secondary oil consumption would under recover and the stations having lower secondary oil consumption would recover more. If the Appellant is entitled for 'carrying cost' for under recovery, it shall also be liable to pay interest on the over recovered amount.

20. Further, analysis of the data submitted by the Commission reveal another important aspect which required consideration. The FAC charge for the Month of August 2011 for various stations of the Appellant calculated as per FOCA formulae is given below:

Station	Variable Charges (Rs/kWh)			
	As per Order	As per data for August 2011	Variation FAC for the Month	Ceiling of FAC at 10% of variable cost
(A)	(B)	(C)	(D=C-B)	(E=0.1xB)
Kapaskheda	1.77	1.7888	0.02	0.177
Paras				
Bhusawal	2.10	2.4912	0.39	0.210
Nasik	2.22	2.9609	0.74	0.222
Parli	1.91	2.6444	0.73	0.191
Koradi	1.61	2.4014	0.79	0.161
Chandrapur	1.56	1.8994	0.34	0.156
Parli 6				
Paras 3				
Parli 7	1.70	2.2605	0.56	0.170
Paras 4	1.46	1.7247	0.26	0.146

21. It is clear from the above table that for most of the stations FAC charges for August 2011 calculated as per FOCA formulae were much above the ceiling limit of 10% of the approved variable charges in terms of Regulation 82.6 of the Tariff Regulations, 2005 which provides that the monthly FAC charge shall not exceed 10% of the variable component of tariff provided that any excess in the FAC charge over the above ceiling would be permitted to be recovered by the Distribution Licensee over such future period as may be directed by the Commission. Thus, excess FAC charges over and above the ceiling limit could be taken care of only when the carrying out of the final true up exercise is undertaken.

22. Thus, it would not have mattered at all even if the FAC charges were computed as per Regulations because of the ceiling limit of 10% and the Appellant would have received the same amount of FAC charges i.e. limited to 10% of variable cost of generation as approved in the relevant tariff order as is evident from the FAC charges computed for the month of December 2011 based on regulatory formulae and reflected in the Table given below.

Station	Variable Charges (Rs/kWh)			
	As per Order	As per data for December 2011	Variation FAC for the Month	Ceiling of FAC at 10% of variable cost
(A)	(B)	(C)	(D=C-B)	(E=0.1xB)
Kapaskheda	1.77	2.52	0.75	0.177
Bhusawal	2.10	3.29	1.19	0.210
Nasik	2.22	3.48	1.26	0.222
Parli	1.91	2.38	0.47	0.191
Koradi	1.61	3.51	1.90	0.161
Chandrapur	1.56	2.48	0.92	0.156
Parli 7	1.70	2.18	0.48	0.170
Paras 4	1.46	1.68	0.22	0.146

Balance amount would have been permitted to be recovered at the time of final true up in accordance with the Regulation 82.

23. Accordingly, the Appellant is not entitled to any ‘carrying cost’ till the final true up exercise is taken up.

24. In view of the above findings, we hold that the Commission has taken a correct view that a claim of ‘carrying cost’ could be raised and

adjudicated upon at the time of final true up as it is only at that time when it could be ascertained as to whether there had been any under recovery at all which needs to be addressed. The Appeal is, therefore, dismissed subject to the above observations. However, there is no order as to costs.

(V J Talwar)
Technical Member

(Justice P S Datta)
Judicial Member

Dated: 11th October, 2012

REPORTABLE/~~NOT REPORTABLE~~