Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal Nos. 148 and 149 of 2014

Dated: 16th February, 2015

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

In the matter of:

Appeal No. 148 of 2014

Torrent Power Limited … Appellant
Torrent House, Off Ashram Road
Ahmedabad – 380 009
Gujarat

Versus

Gujarat Electricity Regulatory Commission. … Respondents
6th Floor, GIFT ONE, Road 5 C
Zone 5, GIFT City
Gandhinagar – 382 355

Counsel for the Appellant : Ms. Deepa Chawan
Mr. H.S. Jaggi
Mr. Ravinder Chill

Counsel for the Respondents: Mr. Suparna Srivastava
Mr. S.R. Pandey
Mr. S.T. Anada

Appeal No. 149 of 2014

Torrent Power Limited … Appellant
Torrent House, Off Ashram Road
Ahmedabad – 380 009
Gujarat

Versus

Gujarat Electricity Regulatory Commission. … Respondents
6th Floor, GIFT ONE, Road 5 C
Zone 5, GIFT City
Gandhinagar – 382 355

Counsel for the Appellant : Ms. Deepa Chawan
Mr. H.S. Jaggi
Mr. Ravinder Chill

Counsel for the Respondents: Mr. Suparna Srivastava
Mr. S.R. Pandey
Mr. S.T. Anada

J U D G M E NT

MR. RAKESH NATH, TECHNICAL MEMBER

The above Appeals have been filed by Torrent Power Ltd. challenging the orders dated 29.04.2014 passed by the Gujarat Electricity Regulatory Commission ("State Commission") in two different cases relating to distribution business of Torrent Power Ltd. at Ahmedabad and Surat. By the said orders, the State Commission has undertaken mid term review of the business plan and Annual Revenue Requirements of the Appellant for the FYs 2014-15 and 2015-16. The Appellant is aggrieved that while undertaking the mid term review, the State Commission has erroneously revised the distribution loss trajectory approved by the State Commission under its Multi Year Tariff ("MYT") order for the control period from FY 2011-12 to FY 2015-16, in violation of its MYT Regulations, 2011.

2. As the issues raised in both the Appeals are similar, a common judgment is being rendered. However, for the sake of brevity we shall be considering the fact relating to Appeal no. 149 of 2014.

3. The brief facts of the case are as under:

a) On 22.03.2011, the State Commission notified the new MYT Regulations 2011 for the second control period from FY 2011-12 to FY 2015-16.

b) The State Commission by order dated 06.09.2011 issued the MYT order for the second control period from FY 2011-12 to 2015-16 based on the MYT Regulations, 2011. In the MYT order dated 06.09.2011, the State Commission fixed the distribution loss trajectory for the MYT period 2011-16.

c) On 30.11.2013, the Appellant filed the petition for mid-term review of the business plan in accordance with Regulation 16.2 of MYT Regulations, 2011. The State Commission after following the due process of law passed the impugned order dated 29.04.2014 in respect of the petition filed for mid-term review of the business plan. In the said order the State Commission lowered the distribution loss targets for the Appellant for the FYs 2014-15 and 2015-16. Aggrieved by the lowering of the distribution loss trajectory for the FY 2014-15 and 2015-16 with respect to the target fixed in the MYT order dated 06.09.2011, the Appellant has filed these Appeals.

4. According to the Appellant the revision of the distribution loss trajectory for FYs 2014-15, 2015-16 is contrary to Regulation 21 of the MYT Regulations 2011 and contrary to the very rationale and framework of the MYT regime. Further, the revision of the distribution loss trajectory by the State Commission denies the Appellant its share of efficiency gains as stipulated under Regulation 25 of the MYT Regulations.

5. On the above issue, we have heard Ms. Deepa Chawan, Learned Counsel for the Appellant and Ms. Suparna Srivastava, Learned Counsel for the State Commission. After

careful consideration of their contentions, following questions arise for our consideration:

i) Whether the State Commission has erred by revising the distribution loss trajectory decided in the MYT order in the mid term review in contravention to the MYT Regulations?

ii) Whether revision of the distribution loss trajectory by the State Commission in the mid term review is contrary to the very objective of MYT framework?

iii) Whether the State Commission by revising the distribution loss trajectory in the mid-term review has wrongly denied the Appellant of its due share of efficiency gains as stipulated under the MYT Regulations?

6. Since all the above issues are interconnected we shall be dealing with them together.

7. **Let us first examine the impugned order dated 29.04.2014.**

7.1 We find that the Appellant had projected the distribution losses for FY 2014-15 and 2015-16 as 5.15% for both the years as per the MYT order passed by the State Commission on 06.09.2011. The Appellant submitted before the State Commission that it had witnessed a higher growth in LT load as compared to the HT load growth which would lead to higher load through LT network leading to higher distribution losses as the technical losses are higher in the LT network. The Appellant submitted that they were compelled to restrict the spending on capital expenditure (capex) for containing the increase in technical distribution losses due to acute financial condition. However, for the purpose of projection, the Appellant proposed the normative distribution loss of 5.15% approved by the Commission in the MYT order dated 06.09.2011 for the entire control period.

7.2 The Commission in the impugned order observed that it had approved distribution losses at 5.15% for the entire MYT period. The actual losses are 4.64% for FY 2010-11 and FY 2011-12 and 4.20% for FY 2012-13 which shows a reducing trend. The average losses for these three years work out to 4.5%. The Commission felt that the very purpose of mid-term review is to consider the performance and review the parameters wherever necessary. Hence, the State Commission considered it reasonable to approve the losses at 4.5% for FY 2014-15 and 2015-16, as against 5.15% approved in the MYT tariff order dated 06.09.2011.

8. Section 61 of the Electricity Act, 2003 provides that the Appropriate Commission shall specify the terms and conditions for determination of tariff, and in doing the so, shall be guided by *inter alia,* principles rewarding efficiency in performance, multi year tariff principles and Tariff Policy.

9. The Tariff Policy provides that MYT framework is to be adopted for any tariffs to be determined from April 1, 2006. The Tariff Policy states that once the revenue requirements are established at the beginning of the control period, the Regulatory Commission shall focus on Regulation of outputs and not the input cost elements. At the end of the control period, a comprehensive review of performance may be undertaken. Clause 8 of the Tariff Policy states that efficiency in operations should be encouraged and gains of efficiency in operations with reference to normative parameters should be appropriately shared between consumers and licensee.

Further, implementation of MYT framework would minimize the risk for utilities and consumers, promote efficiency and appropriate reduction of system losses and attract investments and would also bring predictability to consumer tariffs on the whole by restricting tariff adjustment to known indicators on power purchase prices and inflation indices. The Tariff Policy stipulates introduction of mechanism for sharing of excess profits and losses with the consumers as part of the overall MYT framework.

10. In pursuance of Section 61 of the Electricity Act and provisions of the Tariff Policy, the State Commission has notified MYT Regulations, 2011. Let us now examine the MYT Regulations 2011. The relevant extracts are reproduced below:

"16 Multi-Year Tariff framework

16.1 ……………………..

16.2 The Multi-Year Tariff framework shall be based on the following elements, for determination of Aggregate Revenue Requirement and expected revenue from tariff and charges for Generating Company, Transmission Licensee, Distribution Wires Business and Retail Supply Business:

(i) A detailed Business Plan based on the principles specified in these Regulations, for each year of the Control Period,

shall be submitted by the applicant for the Commission's approval:

Provided that the performance parameters, whose trajectories have been specified in the Regulations, shall form the basis of projection of these performance parameters in the Business Plan:

Provided further that a Mid-term Review of the Business Plan may be sought by the Generating Company, Transmission Licensee and Distribution Licensee through an application filed three (3) months prior to the filing of Petition for truing-up for the second year of the Control Period and tariff determination for the fourth year of the Control Period;

(ii) Based on the Business Plan, the applicant shall submit the forecast of Aggregate Revenue Requirement (ARR) for the entire Control Period and expected revenue from existing tariffs for the first year of the Control Period, and the Commission shall determine ARR for the entire Control Period and the tariff for the first year of the Control Period for the Generating Company, Transmission Licensee, Distribution Wires Business and Retail Supply Business;

(iii) Truing up of previous year's expenses and revenue based on Audited Accounts vis-à-vis the approved forecast and categorisation of variation in performance as those caused by factors within the control of the applicant (controllable factors) and those caused by factors beyond the control of the applicant (uncontrollable factors), shall be undertaken by the Commission:

Provided that once the Commission notifies the Regulations for submission of Regulatory Accounts, the applications for tariff determination and truing up shall be based on the Regulatory Accounts;

(iv) The mechanism for pass-through of approved gains or losses on account of uncontrollable factors as specified by the Commission in these Regulations;

(v) The mechanism for sharing of approved gains or losses on account of controllable factors as specified by the Commission in these Regulations;

(vi) Annual determination of tariff for Generating Company, Transmission Licensee, Distribution Wires Business and Retail Supply Business, for each financial year within the Control Period, based on the approved forecast and results of the truing up exercise."

"19 Business Plan

19.1 The Generating Company, Transmission licensee, and Distribution Licensee for Distribution Wires Business and Retail Supply Business, shall file a Business Plan for the Control Period of five (5) financial years from 1st April 2011 to 31st March 2016, which shall comprise but not be limited to detailed category-wise sales and demand projections, power procurement plan, capital investment plan, financing plan and physical targets, in accordance with guidelines and formats, as may be prescribed by the Commission from time to time:

Provided that a mid-term review of the Business Plan/Petition may be sought by the Generating Company, Transmission Licensee and Distribution Licensee through an application filed three (3) months prior to the specified date of filing of Petition for truing up for the second year of the Control Period and tariff determination for the fourth year of the Control Period."

"21 Specific trajectory for certain variables

21.1 While approving the Business Plan/MYT Petition, the Commission shall stipulate a trajectory for the variables, which shall include, but not be limited to Operation & Maintenance expenses, target plant load factor and distribution losses:

Provided that the Generating Company, Transmission Licensee and Distribution Licensee may seek a review of the trajectory at the time of mid-term review of Business Plan.

22 Truing Up

22.1 Where the Aggregate Revenue Requirement and expected revenue from tariff and charges of a Generating Company or Transmission Licensee or Distribution Licensee is covered under a Multi-Year Tariff framework, then such Generating Company or Transmission Licensee or Distribution Licensee, as the case may be, shall be subject to truing up of expenses and revenue during the Control Period in accordance with these Regulations."

"22.4 In respect of the expenses incurred by the Generating Company, Transmission Licensee and Distribution Licensee during the year for controllable and uncontrollable parameters, the Commission shall carry out a detailed review of performance of an applicant vis-a-vis the approved forecast as part of the truing up.

22.5 Upon completion of the truing up under Regulation 22.4 above, the Commission shall attribute any variations or expected variations in performance for variables specified under Regulation 23 below, to factors within the control of the applicant (controllable factors) or to factors beyond the control of the applicant (uncontrollable factors):

Provided that any variations or expected variations in performance, for variables other than those specified under Regulation 23.1 below shall be attributed entirely to controllable factors.

22.6 Upon completion of the Truing Up, the Commission shall pass an order recording:

(a) the approved aggregate gain or loss to the Generating Company or Transmission Licensee or Distribution Licensee on

account of controllable factors, and the amount of such gains or such losses that may be shared in accordance with Regulation 25 of these Regulations;

(b) Components of approved cost pertaining to the uncontrollable factors, which were not recovered during the previous year, shall be pass through as per Regulation 24 of these Regulations;

(c) Tariff determined for the ensuing year."

"23.2 Some illustrative variations or expected variations in the performance of the applicant, which may be attributed by the Commission to controllable factors include, but are not limited to, the following:

(c) Variations in technical and commercial losses of Distribution Licensee;"

"25 Mechanism for sharing of gains or losses on account of controllable factors

25.1 The approved aggregate gain to the Generating Company or Transmission Licensee or Distribution Licensee on account of controllable factors shall be dealt with in the following manner:

(a) One-third of the amount of such gain shall be passed on as a rebate in tariffs over such period as may be stipulated in the Order of the Commission under Regulation 22.6;

(b) The balance amount, which will amount to two-thirds of such gain, may be utilised at the discretion of the Generating Company or Transmission Licensee or Distribution Licensee."

"102 Distribution Losses

102.1 The Distribution Licensee shall recover the approved level of distribution losses arising from the Retail Supply of electricity:

Provided that the Commission may stipulate a trajectory for distribution losses for Retail Supply of electricity in accordance *with these Regulations as part of the Order on the Business Plan filed by the Distribution Licensee:*

Provided further that any variation between the actual level of distribution losses and the approved level shall be dealt with, as part of the Truing up exercise."

11. The MYT Regulations, 2011 provide for the following in respect of the distribution licensee:

(i) A detailed Business Plan for each year of the control period of five years shall be submitted by the distribution licensee for Commission's approval.

(ii) Based on the Business Plan, the distribution licensee shall submit the forecast of ARR for the entire control period and expected revenue from existing tariffs for the first year of the control period.

(iii) The State Commission shall determine the ARR for the entire control period and the tariff for the first year of the control period.

(iv) Truing of previous year's expenses and revenue based on audited accounts vis-à-vis the approved forecast and variation in performance caused by controllable and uncontrollable factors shall be undertaken by the Commission. Distribution loss has been considered as a controllable factor.

(v) There will be annual determination of tariff for each financial year within the control period based on approved forecast and results of the truing up exercise.

(vi) The gains and losses on account of controllable factors shall be shared between the licensee and the consumers as specified in the Regulations.

(vii) Mid term review of Business Plan may be sought by the distribution licensee.

(viii) While approving the Business Plan/MYT Petition, the Commission shall stipulate the trajectory for the variables which shall include distribution losses. Provided the distribution licensee may seek a review of the trajectory at the time of mid term review of Business Plan.

12. The MYT framework has been devised to give predictability and certainty and to incentivize the efficiency in performance of the distribution licensee. If the norms or the goal

posts are modified or adjusted in the mid term review as per the performance achieved during the past years, it will defeat the very purpose of the MYT framework.

13. The State Commission as a regulator is entitled under the MYT Regulations, 2011 to specify the trajectory for the distribution loss as per Regulation 21.1. The proviso to Regulation 21.1 is in the nature of exception to the main provision. Under the proviso, a distribution licensee may seek a review of the trajectory at the time of mid-term review of business plan which may be considered by the State Commission. The Commission may or may not allow the review of the trajectory. In our opinion if the licensee has not been able to achieve the targets due to its inefficiency, the State Commission will not relax the norms in the mid term review at the request of the licensee. Only if the State Commission is convinced that it is not possible to achieve the targets fixed by it earlier due to some reasons beyond the control of the licensee then it may consider to relax the targets for the remaining years of the Control Period. This provision cannot be relied upon by the State Commission to revise the trajectory for a controllable parameter, namely distribution losses, in the mid term review

based on the past performance of the licensee during the control period to defeat the objective of MYT framework.

14. In S. Sundaram Pillai Versus V. R. Pattabiraman, 1985 (1) SCC 591, it was held that normally a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the preview of the enactment. In other words, a proviso cannot be used to nullify or set at naught the real object of the main enactment. It is settled position of law that a proviso has to be interpreted as an exception.

15. In Reliance Energy Ltd. Vs. MERC & Ors 2007APTEL 164, this Tribunal while considering the deviation from norms of a utility by the Commission instead of being rewarded for better performance, held as under:-

"55. Norms for operation for power stations are determined for the industry based on the technology, industry performance and in order to ensure optimum utilization of machines with efficient and economic operation. Black's Law Dictionary defines norms as: "An actual or set standard determined by the typical or most frequent behavior of a group". We are quite intrigued: once the Commission has specified "norms" how the same can be changed for a particular generator merely because it has consistently performed better. One can understand if the entire industry performs at better operational levels, then observing

the consistent industry average improve, norms for all can be upgraded. It is against natural justice that an individual station, instead of being rewarded for better performance, is made to meet higher targets of performance and exposed to the risk of not achieving it. Achieving exceptionally high levels of efficiencies requires great deal of effort and expertise and must be incentivized. If Commission wishes to revise norms upward, it may also do so but such a revision has to be applied to all players after watching the industry performance over a period of time."

…………….

"57. In view of the foregoing discussions, we do not agree with the reasoning of MERC and, therefore, allow the appeal with regard to the operating norms."

16. The Learned Counsel for the State Commission referred to the Regulation 7 which provides for the inherent power of the Commission stating that the Commission has inherent power under the Regulations to adopt a procedure in conformity with the provisions of the Electricity Act 2003 which is at variance with any of the provisions of the MYT Regulations. Regulation 7 is reproduced below:

"7 Saving of Inherent Power of the Commission

7.1 Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of *justice or to prevent the abuse of the process of the Commission.*

7.2 Nothing in these Regulations shall bar the Commission from adopting in conformity with the provisions of the Act, a procedure, which is at variance with any of the provisions of these Regulations, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient for dealing with such a matter or class of matters."

17. We are not convinced with the arguments of the Learned Counsel for the State Commission. The inherent power conferred on the State Commission under Regulation 7.1 are basically to make orders as has been necessary for meeting the ends of justice or to prevent the abuse of the process. Regulation 7.2 allows the Commission for adopting a procedure in conformity with the Act which is at variance with any provisions of these Regulations. Regulation 7.3 deals with a situation where no regulations have been framed. In our view reliance of the Commission on Regulation 7 is misplaced in the present case where the State Commission had decided the distribution trajectory while issuing the main MYT order dated 06.09.2011.

18. Admittedly there is no abuse of the process of the Commission in the present case. The fixation of distribution trajectory in the main MYT order was as per the provisions of the Act, the Regulations and the Tariff Policy. Therefore, the State Commission cannot rely on Regulation 7 to revise the distribution loss trajectory on the basis of average of distribution loss of previous three years.

19. Learned Counsel for the State Commission has also referred to Regulation 4 regarding ceiling norms and argued that the Commission may provide improved norms for encouraging better performance.

20. Regulation 4 provides that the norms of operation specified under the Regulations are the ceiling norms and this shall not preclude the distribution licensee and the beneficiaries from agreeing to improve norms operation and in case the improved norms are agreed to, such improved norms shall be applicable for determination of tariff. In our opinion the reliance of the State Commission on Regulation 4 is misplaced. This Regulation provides for improved norms of operation, better

than the norms specified by the Commission, in case such improved norms are agreed between the distribution licensee and the consumers. In the present case there is no such agreement between the parties.

21. We find that Regulation 25 provides for a mechanism for sharing of gains or losses on account of controllable factors. The distribution loss is also a controllable factor as per the Regulations. The MYT framework provides for trajectories for controllable parameters which are benchmark. In case the distribution licensee performs better than the benchmark in respect of the controllable factor like distribution loss then it is entitled to an incentive for its efficiency. The amount of the gain due to improved performance is also shared with the consumers. Regulation 25.1 provides the mechanism for sharing of gains on account of controllable factors. According to Regulation 25.1, one-third of the amount of gain has to be passed on as a rebate in tariffs and the balance two-thirds of such gain is to be utilized at the discretion of the distribution company. The State Commission by changing the trajectory in the mid-term review has denied the legitimate benefit due to the

Appellant by way of efficiency gains. This is contrary to Section 61(e) of the Electricity Act, 2003, the Tariff Policy and the MYT framework.

22. Conclusion :

The State Commission by reducing the distribution loss trajectory in the mid-term review for the last two years of the second control period i.e. FY 2014-15 and 2015-16 has acted in contravention to the MYT Regulations and against the principles of the MYT framework. Accordingly the revision of the distribution loss trajectory is set aside.

23. In view of above, the Appeals are allowed and the impugned order is set aside to the extent of revision of the MYT distribution loss trajectory. No order as to cost.

24. Pronounced in the open court on this ***16th day of February, 2015***.

(Rakesh Nath)	**(Justice Mrs. Ranjana P. Desai)**
Technical Member	**Chairperson**

√

REPORTABLE/~~NON-REPORTABLE~~

mk