IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 284 OF 2015 & IA No. 68 of 2016
APPEAL NO. 288 OF 2015 & IA No. 69 of 2016

Dated: 28th May, 2020

Present: HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

IN THE MATTER OF

APPEAL NO. 284 OF 2015 & IA No. 68 of 2016

Indraprastha Power Generation Company Limited
Himadri, Rajghat Power House Complex,
New Delhi - 110002

..... Appellant

VERSUS

1. **Delhi Electricity Regulatory Commission**
Viniyamak Bhawan, C-Block, Shivalik,
Malviya Nagar,
New Delhi – 110017 **..... Respondent No.1**

2. **BSES Yamuna Power Limited**
Shakti Kiran Vihar,
Karkardooma
Delhi - 110092 **..... Respondent No.2**

3. **North Delhi Power Limited Grid Substation,**
Hudson Road, Kingsway Camp,
Delhi – 110009 **..... Respondent No.3**

4. **BSES Rajdhani Power Limited**
BSES Bhawan, Nehru Place,
New Delhi – 110019 **..... Respondent No.4**

5. **Department of Power, Government of NCT of Delhi**
Through its Secretary Power
New Secretariat, I.P. Estate,
New Delhi- 110002

..... Respondent No.5

Counsel for the Appellant … Mr. Anand K. Ganesan
Ms. Swapna Seshadri

Counsel for the Respondent(s)… Mr. Dhananjay Baijal for Res 1
Mr. Aditya Singh
Mr. Aditya Gupta
Mr. Rahul Kinra for Res 2 to 4 for Res 3

APPEAL NO. 288 OF 2015 & IA No. 69 of 2016

Pragati Power Corporation Limited
Himadri, Rajghat Power House Complex,
New Delhi - 110002

..... Appellant

VERSUS

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4. North Delhi Power Limited Grid Substation,
Hudson Road, Kingsway Camp,
Delhi – 110009

..... Respondent No.4

5. New Delhi Municipal Council
Palika Kendra, Sansad Marg,
New Delhi – 110001

..... Respondent No.5

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Mr. Rahul Kinra for Res 2 to 4 for Res 4

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. This matter was heard and reserved for judgment prior to restrictions being imposed due to National Lockdown for containing spread of coronavirus (Covid-19).

2. The propriety of the approach of the Electricity Regulatory Commission changing the parameters for prudence check at the stage of truing-up and the relevance of enhancement of "*reliability*", in contrast to "*efficiency*", in context of capital investment plan for existing generating stations are the prime concerns brought for adjudication in this batch of appeals, the second appeal also raising the argument of perversity, the evidence germane to one of the claims having been glossed over.

3. The appellants in these two separate appeals are companies registered under the Companies Act, 1956, they sharing their registered office in the same premises, being generating companies within the meaning of section 2 (28) of the Electricity Act, 2003. The appellant in first captioned appeal (no. 284 of 2015) is *Indraprastha Power Generation Company Limited* (for short, "*Indraprastha Power Genco*")

which operates and maintains two generating stations viz. Rajghat Power House (*RPH*), it being 135 MW coal based power station and Gas Thermal Power Station (*GTPS*), a 270 MW combined cycle power station. The appellant in the second captioned appeal (no. 288 of 2015) – *Pragati Power Corporation Limited* (for short, "*Pragati Power Genco*") – operates and maintains Pragati-I power plant (330 MW capacity).

4. The Appellants are aggrieved with the tariff determination by Delhi Electricity Regulatory Commission – (hereinafter referred to variously as "*DERC*" or "*State Commission* or "*Commission*"). The first appeal by *Indraprastha Power Genco* assails some parts of the order respecting *RPH* and *GTPS,* the second appeal assailing, on almost similar lines, part of the tariff order dated 29.09.2015 passed by DERC respecting *Pragati, each order passed by DERC* determining the tariff for the financial year (FY) 2015-16, also undertaking truing-up exercise for FYs 2012-13 and 2013-14, at the same time, according approval of revised estimates for FY 2014-15.

5. The Department of Power, Government of NCT Delhi is impleaded as fifth respondent in the first captioned appeal, the other respondents in both the appeals being the distribution companies doing business in National Capital Territory of Delhi drawing electricity from the generating stations of the appellants under different Power Purchase Agreements (PPAs).

6. The appellants had presented these appeals raising a number of issues under broad heads which are more or less common. However, after filing of these appeals, an assurance has been held out by the State Commission that it would reconsider the contentions of the appellants *vis-à-vis* three of the said heads in the next tariff orders, the subjects thereby covered being the grievances of the appellants on account of restricted factoring in of interest on working capital to actual scheduled generation for FY 2015-16 in light of the Normative Annual Plant Availability Factor (NAPAF) in terms of Multi Year Tariff ("*MYT*") Regulations, 2011; the claim of the appellants to incentive for availability over and above the normative availability for FY 2012-13 and FY 2013-14; and the disallowance of "*take or pay charges*" towards Gas Authority of India Limited (*GAIL*) and Coal India Limited (*CIL*). Given the assurance noted above for the said issues being revisited by the State Commission in the next tariff orders, these grievances *vis-à-vis* the impugned orders have not been pressed for consideration or determination by us in the present appeals. We make it clear the fact that such issues as above which have not been pressed for decision by this Tribunal for the periods in question in these appeals will not be treated as forfeiture of the claim by the appellants would be at liberty to press the same for appropriate consideration and adjudication at the stage of next tariff order, it being, in turn, the obligation of the State

Commission to revisit and decide afresh the said in accordance with law without being influenced by its previous dispensation.

7. In appeal no. 284 of 2015 relating to *Indraprastha Power Genco*, the appellant has submitted that it does not press for consideration two other issues arising from non-consideration of the facts that the last unit of Rajghat Power House (*RPH*) was commissioned in May, 1990 and its useful life had come to an end of May 2015, the PPA with the Discoms in its respect having also come to an end accordingly, the recovery of certain dues *qua* the *Indraprastha Station* having also been disallowed. It is the submission of the said appellant that these issues do not survive in view of the appropriate orders having been subsequently passed by the State Commission, the first of the said two issues being covered by order dated 10.12.2019 in petition nos. 24 and 28 of 2016 and the other by order dated 28.03.2018 passed on tariff petition no. 05 of 2018.

8. Given the above facts, the grievances pressed for adjudication common to these two appeals relate to disallowance of certain Capital Expenditure (*Capex*) and statedly revised manner of applying the formula prescribed by the tariff regulations for "*Energy Charge Rate*" (ECR) in the truing-up exercise for FYs 2012-13 and 2013-14. In the second captioned appeal (no. 288 of 2015), *Pragati Power Genco* is aggrieved also on account of disallowance of repair and maintenance (R&M) expenditure on sewage treatment plant and DLN Burners.

Disallowance of Capital Expenditure (Issue common to both appeals)

9. The Objects and Reasons for enactment of the Electricity Act, 2003 show that the intent was to create a new self-contained comprehensive legislation to govern the electricity supply industry which had been suffering from various deficiencies and fault lines, the basic idea being to harmonize and rationalize the provisions of the erstwhile legal framework so as to encourage private sector participation in generation, transmission and distribution of electricity and, at the same time, distance the government from regulatory responsibilities, giving stimulus in the process to the growth of power sector so that the benefits percolate to each nook and corner of the country. The preamble to the enactment, thus, speaks of the expectation for such measures to be taken as are "*conducive to development of electricity industry*", promote "*competition*" therein, protect "*interest of consumers*" and "*supply of electricity to all areas*", rationalize "*electricity tariff*" and ensure "*transparent policies*" regarding subsidies, and evolving "*efficient and environmentally benign policies*". The responsibility of framing National Electricity Policy, Tariff Policy and National Electricity Plan has been placed at the door of the Central Government (Section 3), a broad guideline indicated being that such policy framework, or National Plan, must be so designed as leads to "*development of the power system*" based on "*optimal utilization of resources*". The law, generally speaking, has "*de-licensed*" the

generation of electricity, freely permitting – nay, encouraging – "*captive generation*" and "*co-generation*" processes, the benefits reaped wherefrom over the period are quite vivid.

10. The jurisdiction to regulate "*tariff*" is conferred upon the Electricity Regulatory Commissions by not only vesting in them the power to frame "*regulations*" (section 61 read with sections 178 or 181) but also for "*determination of tariff*" (section 62).

11. For purposes of the discussion that is to follow the provision contained in Section 61, to the extent relevant, may be quoted as under:

> *" The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-*
>
> *…*
>
> *(b) the generation, transmission distribution and supply of electricity are conducted on commercial principles;*
>
> *(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
>
> *(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*
>
> *(e) the principles rewarding efficiency in performance.*
>
> *…"*

12. It is clear from the above scheme, and prescription of the statutory provisions, that legislative intent is to protect the interest of the consumers at large and, at the same time, to ensure that the generator of electricity also gets its legitimate dues by recovering a reasonable cost of electricity, efficient and economical use of resources and good

performance being encouraged through competitive market norms and commercial principles.

13. There are broadly two components of tariff for sale of electricity i.e. *annual capacity (fixed) charge* and *energy (variable) charge*. Necessarily, the calculations require factoring in the capital cost of the project as well, and this includes capital investment required to be made in the existing generating stations for capacity growth.

14. In exercise of the power vested in it, by virtue of Sections 61, 62, 86 and 181(2) of the Electricity Act, 2003, the State Commission has been framing regulations for specifying the terms and conditions for determination of generation of tariff, such regulations being commonly known as *Multi-Year Tariff (MYT) Regulations*. Since the background facts of these appeals take us back to the year 2007, it may be noted that *Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) Regulations, 2007* were notified in May, 2007 for the control period ending with 31st March, 2011 – hereinafter referred to as "*2007 MYT Regulations"*. The said 2007 MYT Regulations were replaced by *Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) Regulations, 2011* – hereinafter referred to as "*2011 MYT Regulations"* notified on 19.01.2012 having come into force from 01.04.2012 for the control period ending with 31.03.2015.

15. The subject of "*capital investment*" planned for an existing generating company during the corresponding control period was provided for in Regulation 5.6 of 2007 MYT Regulations thus: -

> *"5.6 Subject to the provisions of Act, Rules and Policies, the Commission shall approve capital investment plan of an existing generating company for the Control Period commensurate with generation capacity growth. The investment plan shall also include corresponding capitalisation schedule and financing plan. The Commission shall review the actual capital investment at the end of each year of the Control Period. Adjustment for the actual capital investment vis-à-vis approved capital investment shall be done at the end of Control Period."*
>
> [emphasis supplied]

16. More or less, similar prescription on the subject was included in 2011 MYT Regulations, the last limb pertaining to "*review*" of the "*actual investment*" made and consequent "*adjustment*" being covered in slightly different phraseology.

17. It is also necessary to note here that the subject of "*business plan filings*" with particular reference to "*capital investment plan*" was covered in 2007 MYT Regulations as under:

> *"8.3 The Generating Company shall file for the Commission's approval, on 1st April of the year preceding the first year of the Control Period or any other date as may be directed by the Commission, a Business Plan approved by the Board of Directors. The Business Plan shall be for the entire Control Period and shall, interalia, contain*
>
> *(a) Capital Investment Plan: This shall include details of the investments planned by the Generating Company, along with the corresponding capitalisation schedule and financing plan. This plan shall be commensurate with capacity enhancement and proposed efficiency improvements for various plants of the Company;"*
>
> [emphasis supplied]

18. The above clause was also incorporated in 2011 MYT Regulations, the words *"and shall include cost benefit analysis"* being added at the end.

19. The State Commission (DERC) had prepared and notified on 15.03.2010 certain guidelines for approval of Capital investment schemes directing all power utilities functional under its jurisdiction to submit such schemes in accordance with such guidelines. The guidelines refer, *inter-alia*, to the fact that the licenses issued to power utilities contain certain conditions specific to the subject of "*Capital Investments*" and "*Project Implementation*", it being incumbent on the licensee to obtain "*prior approval*" of the Commission for schemes involving major investments and to "*demonstrate to the satisfaction of the Commission*" that:

> *"a. there is a need for the major investment in the Distribution System which the Licensee proposes to undertake:*
> *b. The Licensee has examined the economic, technical and environmental aspects of all viable alternatives to the proposal for investing in or acquiring new Distribution System assets to meet such need; and*
> *c. the licensee has explained all possible avenues and is sourcing funds in the most efficient and economical manner."*
>
> [emphasis supplied]

20. The expression "*major investment*", it was noted in the guidelines, means "*any planned investment in or acquisition of distribution facilities*" the cost of which, when aggregated with all other investments or acquisitions, (if any) forming part of the same overall transaction equals

or exceeds Rupees two crores or such other amount as may be notified by the Commission from time to time. The guidelines, by para 3, set out the procedure to be followed for "*in-principle*" approval of capital investment schemes. It was mandated that the Commission shall grant "*in-principle*" approval "*after examining the necessity*" and "*techno-commercial feasibility*" of capital investment schemes which would be presented with detailed information about the proposed scope of work. It was clearly stated in the guidelines that the Detailed Project Report ("*DPR*") must be accompanied by the requisite supportive documents including technical reports, designed criteria, bill of quantity, item-wise estimated cost and "*all such information, particulars and documents*" as are "*necessary*" for "*scrutiny of scheme*" by the Commission.

21. Para 3.3 of the guidelines indicated the method of scrutiny by the Commission stating thus:

> *"The initial approval of the Commission before implementation of capital works schemes is on 'in-principle' approval mainly keeping in view the following:*
>
> *a) Necessity*
>
> *b) Overall suitability*
>
> *c) Pay back period*
>
> *d) Whether the scheme fits into Central Electricity Authority's (CEA's) overall system planning study for Delhi.*
>
> *e) Whether in-feed to the new sub station proposed will be available from the system of Delhi Transco Ltd. (DTL).*
>
> *f) Whether it meets at least the near future demand growth projections."*
>
> [emphasis supplied]

22. On the specific subject of "*necessity"* of the scheme sub-para "*A*" in Para 3.3 of the guidelines would state the questions to be addressed by the Commission as under:

> *"(i) Whether the proposed capital investment is necessary to set up the infrastructure to meet normal load growth or to reach new consumers or for increasing administrative efficiency?*
>
> *(ii) Whether equipments proposed to be replaced are operating close to their rated capacities and equipments are required to reduce the load on the existing equipments to prolong its life, to increase the reliability of the system and to facilitate the creation of back up facility during scheduled maintenance operation?"*
>
> [emphasis supplied]

23. Since some argument is raised with reference to "*technical justification*" as set out in sub-para "*C*" below para 3.3 of the guidelines, the same may also be quoted as under:

> *"(iv) Whether the scheme conforms to the planning criteria of the Central Electricity Authority for long term and CTU/STU for short term?*
>
> *(v) Whether the scheme meets design criteria in keeping with prevailing norms and standards?*
>
> *(vi) Whether the replacement of old equipment is necessary and, if so, whether the existing equipment has outlived its normal life span? (For example, if the DT meters, installed during FY 2007-08 are proposed to be replaced, then it should be explained why the replacement is required only after 3 years.)*
>
> *(vii) Whether the useful life of the equipment is reasonable?*
>
> *(viii) The average rate of technology obsolescence for that equipment must be mentioned.*
>
> *(ix) Whether the proposed investment would improve the reliability of supply? (The reasons for procurement with justification must be given.)*
>
> *(x) Whether the investment is necessary for reduction in T&D losses?*
>
> *(xi) Whether the capacity planned is commensurate with demand growth?*

(xii) Whether the scheme is being executed in different phases over a period of time? (If so, the schemes completed and the schemes now proposed to be taken up will have to be clearly mentioned.)

[emphasis supplied]

24. It may be added here that the guidelines issued in 2010 reiterated the relevant conditions in the PPAs about procurement of equipments, material or services relating to such "*major investments*" to be made by the generating companies following a "*transparent, competitive, fair and reasonable procedure*". In this regard, the guidelines would specifically refer to the directions separately issued about need for approval prior to purchases and the guidelines on the subject of "*competitive bidding*".

25. It is trite that capital cost of the power project is one of the important ingredients for tariff determination. The guidelines of 2010 issued by DERC cover the subject of "*final approval at the time of capitalization*" as under:

"4. Final Approval at the time of Capitalization

In stage two, the final approval of capital outlay consequent to implementation of a scheme is granted at the time of capitalization, after a diligent and proper prudence check and verification of the actual cost, actual quantity of material used, proper implementation of the scheme and after verifying that all legal clearances like Electrical Inspector's permission etc, have been obtained. At the time of final approval, if the actual expenditure is found to be inflated, whether by inflating the cost by making purchases from Group Companies at high rates or otherwise, then the same shall be corrected.

The final approval of capital cost consequent to implementation of a scheme shall take into consideration the prices emerging through the competitive bidding process and the quantities for all major items as indicated in "in-principle" approvals of various schemes. The utility, seeking final approval, shall furnish copies of the purchase orders, sales

invoices, delivery challans etc. of the manufacturer etc. relating to goods for which capitalization has been proposed.

The utility shall maintain a record of all "in-principle" approvals granted by the Commission, including the quantities of major items contained therein. The Commission shall require the utility to link the quantities contained in purchase orders/work orders placed by them with the quantities contained in various "in-principle" approvals granted by the Commission from time-to-time. The provision for other miscellaneous items required for execution of schemes may be considered on percentage basis. The civil works may be provided as per the site conditions, subject to verification by the Commission or its authorized representative.

At the stage of final approval of the capital investment, the prudence check will contain the following:-

(i) Whether the competitive bidding process has been strictly followed as per the Competitive bidding guidelines issued by the Commission?

(ii) Whether the scope and objectives given at the time of "in-principle" approval have been achieved and whether actual benefits and results achieved are in line with the benefits and results projected in the scheme at the time of "in-principle" approval?

(iii) Whether all legal clearances including Electrical Inspector's certificate have been obtained. "

[emphasis supplied]

26. In the case of *Indraprastha Power Genco*, particularly relating to *GTPS*, the request of the appellant in first captioned appeal for capitalization of expenditure on two particular equipments has been disallowed by the impugned order, they being *Turbovisory Monitoring SYS, 3500 Series* and *Panel Cntrl, DVR* (1150+750)X1250X2295MM the expenditure incurred in such regard being Rs. 0.3 crore and 0.51 crore respectively, out of total expenditure of Rs. 16.98 crore on various such equipments claimed to have been procured in terms of scheme approved by the Commission earlier.

27. In the matter of *Pragati*, the request for capitalization of expenditure incurred in the sum of Rs. 0.36 crore for procurement of "*Relay Test Kit*" has been disallowed, even though it is the case of the corresponding appellant, that such expenditure was covered by a scheme on which *"in-principle"* approval had been earlier accorded.

28. Some confusion prevailed at the hearing as to whether the two equipment relating to *Indraprastha* and one equipment relating to *Pragati*, the capitalization of expenditure incurred whereupon has been disallowed by the impugned orders, were actually covered by previous orders granting *"in-principle"* approval of the State Commission or not. The appellants, however, have submitted requisite supportive documents in such regard before us and to which we may make a brief reference at this stage.

29. As noted earlier, the expenditure on "*Turbovisory monitoring system*" and "*panel control*" which is subject matter of the dispute relating to *Capex* pertains to *GTPS* of *Indraprastha Genco*. The copy of order dated 14.12.2007 on the MYT petition for FY 2008-11, order dated 26.08.2011 for tariff determination for FY 2011-12 and "*in-principle*" approval relating to various *Capex* schemes as communicated by letter dated 15.10.2013 on behalf of the State Commission, when conjointly read, leave no room for doubt that the expenditure in question was part of the scheme that had the *"in-principle"* approval, which was extended

(as spill-over scheme) from time to time, it actually having been incurred during the truing-up period covered by the impugned order. It must, however, be added that though the expenditure on the schemes approved by the tariff order dated 14.12.2007 is tabulated, scheme-wise, in para 4.266, there is no break-up item-wise, noted in the said order. Be that as it may, the deficiency is filled in, to an extent, by the tariff order dated 26.08.2011 whereby the execution of the balance work was allowed to be extended to the next control period.

30. It is the submission of the appellant in the first captioned appeal that the schemes relating to the two equipments in question could not be implemented for *GTPS* during FY 2011-12 for want of sufficient time and, therefore, the details of such *Capex* scheme were included in the petition for determination of tariff for FY 2012-15, specific request having been made for carry-forward of such schemes which had already been approved, by the petition presented on 15.02.2012. A separate petition was filed on 05.11.2012 for approval of *Capex* for *GTPS* Plant for the afore-mentioned period with reference to the tariff order dated 13.07.2012. The *Capex* scheme for MYT period for FY 2012-13 to FY 2014-15 was approved by the State Commission, by its communication dated 15.10.2013, the relevant portion whereof reads as under:

> *"This has reference to letter no. IPGCL/Comml./IDRA l2-15/715 dated 15.11.2012 therewith enclosing the DPR for IPGCL for the period FY 12-13 to FY 14-15. In this context a meeting was held on 21.01.2013 at 11.00 AM.*
>
> *During the course of meeting, IPGCL inform that they have taken up various works for execution out of which some of the work is yet to be completed and*

the same shall be completed in FY 12-13 and thereafter. There is a variation in the amount of the order placed for execution of work viz-a-viz estimated amount on the schemes. Further, the differences are on lower side. The estimated amount of such schemes was Rs. 25.27 crore. However, revised amount works out to be Ps. 19.20 crore (Rs 6.07 crore less than the estimated amount).

It is pertinent to mention the scheme at Sl. No. 1 & 2 regarding Procurement of Inner Casing, Guide Blade Carrier-1, 2 & 3 and HP/LP Turbine Glands for Steam Turbine (WHRU) & Procurement of Steam Turbine Rotor Assembly were executed in anticipation that the scheme was submitted alter public hearing of MYT Period 07-08 to 10-11. Since, the above schemes are already completed and therefore, the same may be considered at the time of capitalization".

31. By the impugned order relating to Indraprastha, particularly on the subject of capitalization of approved scheme for *GTPS*, the State Commission has disallowed the expenditure *vis-à-vis* the above two equipments setting out its reasons as under:

"3.216 The Commission has not considered the Capitalization of Non-approved schemes carried out by GTPS and therefore disallows the same for FY 2012-13 and FY 2013-14. With regard to Approved schemes for FY 2012-13 and FY 2013-14,the Commission noted that the schemes for installation of Turbovisory Monitoring SYS, 3500 Series and Panel Cntrl, DVR (1150+750)X1250X2295 MM are not related to energy efficiency (as referred at Sr. 1 and 6 in Table 3.81) but are for reliability, therefore these two Schemes have not been allowed, in line with the provisions of DERC (Terms and conditions for determination of Generation Tariff) Regulations, 2007. Accordingly, the other approved schemes have been considered by the Commission for capitalization for FY 2012-13."

[emphasis supplied]

32. The disallowance of similar expenditure on "*Relay Test Kit*" in the second captioned appeal relating to *Pragati* has a similar backdrop. This equipment, it has been demonstrated before us, was part of the scheme that had received *"in-principle"* approval of the State Commission by its

order dated 05.03.2013. At the stage of truing-up, by the impugned order dated 29.09.2015, the request for capitalization has been rejected, the reasons having been set out thus:

> *"3.53 The Commission has not considered the Capitalization of Non-approved schemes (Table no. 3.21) carried out by Petitioner and therefore disallowed the same for FY 2012-13 and FY 2013-14. With regard to Approved schemes (Table no. 3.19, 3.20) for FY 2012-13 and FY 2013-14, the Commission observed that the scheme for installation of PHE in gas turbine cooling is for improvement in energy efficiency and therefore the scheme is considered. In regard to scheme related test kit relay, the Commission noted that the scheme is not related with energy efficiency, therefore it has not been allowed, in line with the provisions of DERC (Terms and conditions for determination of Generation Tariff) Regulations, 2011.*"
>
> [emphasis supplied]

33. Noticeably, in both matters the *Capex* has been disallowed not because such expenditure was not part of the schemes respecting which *"in-principle"* approval had not been granted, but because such expenditure has been found to be impermissible, it having no nexus with the objective of "*energy efficiency*". Mercifully, in the first captioned appeal, the State Commission does acknowledge that the expenditure was to bring about "*reliability*", reference in this regard having been made to the provisions of 2011 MYT Regulations.

34. It was the argument of the appellants that at the time of approval of the capital investment plans, the State Commission was fully aware of the principles laid down in MYT Regulations and that no conditions had been imposed at that stage. It has been argued that "*in-principle*" approval for such capital expenditure as above had been accorded even

on the touch stone of the "*reliability*" and not merely on the test of "*efficiency*", particular reference being made to the guidelines of 2010 wherein "*obsolescence*" of the technology of the equipment was one of the factors to be considered. It has been argued that the principles applied in the previous tariff regulations cannot be changed at the stage of truing-up and reliance in this context is placed on three decisions of this Tribunal – Judgment dated 04.12.2007 in Appeal no. 100 of 2007 – *KPTCL v KERC*; Judgment dated 23.05.2007 in Appeal No. 265 of 2006 – *NDPL v DERC*; and Judgment dated 09.05.2008 in Appeal no. 09 of 2008 *KPTCL v KERC*.

35. In the context of second captioned appeal, on the particular issue of disallowance of the capital expenditure on "*Relay Test Kit*" in *Pragati*, it is pointed out that the State Commission has referred, as justification, regulation nos. 6.30-6.34 of 2011 MYT Regulations which instead relate to calculation of "*depreciation*".

36. The impugned order is defended by the respondents, particularly the State Commission, on the submissions that tariff determination is a legislative function and, therefore, a challenge by appeal ought not be entertained by this Tribunal. Reliance is placed on judgment dated 29.11.2019 of the Supreme Court in Civil Appeal No. 4569 of 2003, *Transmission Corporation of Andhra Pradesh Ltd. V Rain Calcining Ltd. & Ors.* and also decision reported as *PTC India Ltd. Vs. CERC* (2010)

4SCC 603. It was argued that in the previous orders granting "*in-principle*" approval, no specific findings were recorded by the State Commission affirming that the capital expenditure intended to be incurred on the above-mentioned equipments (which have been disallowed) would contribute to "*efficiency*". It has been submitted that it is the statutory responsibility of the Commission to carry out a prudence check at the stage of truing-up and there can be no vested right claimed in the previous dispensation, if it was contrary to the regulations.

37. It is further the submission of the respondents that capital expenditure cannot be permitted unless it passes the muster of "*contribution to efficiency*" and that, in the face of such norm, no estoppel can be claimed on the basis of "*in-principle*" approvals. The respondent Commission refers in this context to *ITC Bhadrachalam Paperboards v. Mandal Revenue Officer* (1996) 6 SCC 634.

38. We must reject the argument that the appeals cannot be entertained because of the general principle that tariff determination is a legislative exercise. The observations of the Supreme Court on the subject in the case of *PTC Limited* (supra) and *Transmission Corporation of Andhra Pradesh* (supra) relate to the power of the Electricity Regulatory Commission to frame "*Tariff Regulations*" under Section 61 read with sections 178 or 180,as the case may be of the Electricity Act, 2003. The tariff determination for a generating company, however,

stands on a different footing, it being an exercise undertaken in terms of the jurisdiction under section 62, there being a remedy of appeal available before this Tribunal under Section 111 to a person thereby aggrieved.

39. There can be no quarrel with the proposition that there can be no claim of estoppel against law and further that it is the responsibility of the Regulatory Commission to carry out a prudence check even at the stage of truing-up. We would only add that the responsibility to undertake "*prudence check*" prevails throughout the process undertaken by the Regulatory Commission and this begins even from the stage of "*in-principle*" approval of such schemes as "*capital investment plan*" envisaged for an existing generating company. The fact that the State Commission had laid down guidelines for different stages of the process of capital investment plan only re-inforces this view. In this context, we may also bear in mind the settled principles that truing-up stage is not an opportunity for "re-think" *de novo* on the basic principle premises and issues. This is the view taken consistently by this Tribunal, the decisions dated 04.12.2007, 23.05.2007 and 09.05.2008 as relied upon by the appellants being only illustrative.

40. The moot question which arises for consideration in these appeals is as to whether it is necessary for capital investment plan for an existing generating company to seek approval for or incur additional expenditure

only for achieving "*efficiency improvement*" or, to put it conversely and bluntly, as to whether any such expenditure incurred for existing generating plant as adds to the "*reliability*" – but not necessarily contributing to "*energy efficiency*" – is wholly impermissible.

41. In the particular context of power generation, "*efficiency*" and "*reliability*" are two design considerations that, at times, come in conflict with each other. They connote different meanings and expectations. Generally put, "*reliability*" indicates "*the quality of being able to be trusted or believed because of working or behaving well*"; [see *Cambridge Advanced Learner's Dictionary & Thesaurus © Cambridge University Press*]. Interestingly, the dictionary gives the example of use of the expression by the sentences: "*we aim to further improve the reliability of the electric power grid*"; "*some experts have questioned the reliability of the test*"; and "*there are issues with punctuality and reliability of bus services across the region*". Illustrating the use of the word "*reliability*" as a noun by the sentence "*competence and reliability are pre-requisites for any job*", the dictionary also defines it to mean "*how accurate or able to be trusted someone or something is considered to be*".

42. In contrast, with particular focus on the science of physics, the same dictionary (*Cambridge*) explains the meaning of "*efficiency*" as "*the difference between the amount of energy that is put into a machine in the form of fuel, effort, etc. and the amount that comes out of it in the form of*

movement", simplifying it further by stating that it relates to "*a situation in which a person, system, or machine works well and quickly*" or, even more simplistically, as "*the good use of time and energy in a way that does not waste any*".

43. A debate goes on wherein one side might argue that "*reliability*" can be improved usually at the expense of "*efficiency*". There may be votaries of the view, in the particular context of power industry, that "*efficiency*" may take a back seat till the expected levels of "*reliability*" are achieved.

44. We do not intend to enter into the debate in the nature mentioned above. Suffice it to observe here that, in our considered view, having regard to the Objects and Reasons of the Statute (i.e. Electricity Act, 2003), from the particular stand-point of the consumers' interest, both the "*efficiency improvement*" and "*reliability*" are of equal importance.

45. As has been pointed out, MYT Regulations (both of 2007 and 2011) do envisage capital investment plan for existing generating station to be undertaken. The relevant clauses of the MYT Regulations have been extracted earlier and they leave no scope for doubt that objectives of permitting capital investment in existing projects include not merely "*efficiency improvements*", but also "*capacity enhancement*". Enhancing the levels of "*reliability*" of the systems whereby electricity is generated, transmitted or distributed cannot be kept out of the purview of such

objectives. After all, as noted earlier, the guidance provided by Section 61 of the Electricity Act, does require the Regulatory Commissions to factor in endeavors made, *inter-alia*, for achieving "*good performance*" as well, bearing in mind throughout the "*consumers' interest*" which is the foremost criterion. That even in the scheme of things understood and adopted by the State Commission increasing the "*reliability"* of the system was one of the crucial tests to be applied while examining the "*necessity*" of such scheme stands out from para 3.3 (quoted earlier) of the guidelines notified in 2010. The factors of justification for "*technical decision*" in the guidelines talk not only of "*technology obsolescence*" but, and this is crucial, also require the test of improvement of "*the reliability of supply*" to be applied.

46. In view of the above, while we uphold the contentions of the appellant that capital investment in an existing power project deserves to be allowed not merely on considerations of "*efficiency improvement*", but also so as to contribute to its "reliability", we are constrained to observe that the State Commission has not been fair or just in its dispensation at the stage of truing-up also by being inconsistent in its approach, forgetting the limited scrutiny required to be undertaken at the stage of truing-up. If the approach proposed by the State Commission in its response to the contentions in the appeal were to be accepted, it would render the stage of "*in-principle*" approval of such schemes of capital expenditure a mere formality. By its own admission, it is the responsibility

of the State Commission, to undertake the prudence check. For embarking upon such exercise, the Commission had itself advisedly adopted the guidelines which rendered it a two-stage process. The "*necessity*" of the scheme, under the said guidelines, falls in the first stage – anterior to the grant of "*in-principle*" approval. It has to be borne in mind that such "*in-principle*" approval gives a go-ahead for steps for procurement to be initiated, leading to financial commitments. It is irresponsible to say that wrong approval granted by the Commission will not bind it at the stage of truing-up. Given the expert advice available to the State Commission, ideally speaking, it is expected to take informed decisions. Arithmetical errors, clerical mistakes or decisions based on assumptions due to deficiency in information (deliberate or otherwise) may fall in exceptions. But then, as the scheme of the guidelines of 2010 clearly shows the decision on the subject of "*necessity*" is the starting point. In the present cases, the State Commission had accorded "*in-principle*" approvals, even extending it as spill-over scheme, over several subsequent years in the first matter which, in absence of any case to the contrary being made out, must be treated as a decision taken on the basis of informed advice and proper prudent scrutiny of the materials that have been submitted.

47. The second stage, under the 2010 guidelines, is the stage of "*final approval*" which comes up after the expenditure (as approved) has been incurred and thereby corresponding to the stage of truing-up, para -4 of

the guidelines of 2010, as quoted earlier, not permitting a re-visit to the question of "*necessity*".

48. Thus, in our opinion, the impugned decisions of the State Commission, *vis-à-vis* the two above-mentioned equipment relating to *GTPS* and one above-mentioned equipment relating to *Pragati* disallowing the expenditure at the stage of truing-up falls are vitiated not merely because it was incorrect to do so only on the consideration that such equipment would add to "*efficiency*" and not to "*reliability*" but also for the reason that it was unfair and unjust to go back on the "*in-principle*" approval as to the necessity of such investment as had been accorded at the first stage of the process, the approach of the Commission, being improper, and therefore, liable to be disapproved. The impugned orders to such extent, are bad in law and, thus, must be set-aside with a suitable direction to the State Commission to approve the expenditure incurred on such account and give due benefit thereof to the appellants, by factoring it in the same in the truing-up orders for the relevant period.

Method of calculation of Energy Charge Rate (Issue common to both appeals)

49. As mentioned earlier, the "*tariff*" is comprised of two parts i.e. "*Annual Capacity Charge*" (fixed charge) and "*Energy Charge*" (variable charge). The energy charge, under the 2011 Regulations of DERC, as

are relevant here, covers "*fuel costs*" (Regulation 7.10). The relevant part of the 2011 Regulations on "*Energy Charge Rate*" stipulated thus:

> *"Energy Charge Rate"*
>
> *7.16 The energy (variable) charge shall cover main fuel costs and shall be payable by every beneficiary for the total energy scheduled to be supplied to such beneficiary during the calendar month on ex-power plant basis, at the specified energy charge rate of the month (with fuel price adjustment).*
>
> *7.17 Total Energy charge payable to the generating company for a month shall be:*
>
> *(Energy charge rate in Rs./kWh) x {Scheduled energy (ex-bus)* for the month *in kWh.}*
>
> *7.18 Energy charge rate (ECR) in Rupees per kWh on ex-power plant basis shall be determined to three decimal places in accordance with the following formulae :*
> *(a) For coal based stations*
> *ECR = (GHR – SFC x CVSF) x LPPF x 100/ {CVPF x (100 – AUX)}*
> *(b) For gas and liquid fuel based stations*
> *ECR = GHR x LPPF x 100 / {CVPF x (100 – AUX)}*
> *Where,*
> *AUX = Normative auxiliary energy consumption in percentage.*
> *CVPF = Gross calorific value of primary fuel as fired, in kCal per kg, per liter or per standard cubic meter, as applicable.*
> *CVSF = Calorific value of secondary fuel, in kCal per ml.*
> *ECR = Energy charge rate, in Rupees per kWh sent out.*
> *GHR = Gross station heat rate, in kCal per kWh.*
> *LPPF = Weighted average landed price of primary fuel, in Rupees per kg, per liter or per standard cubic meter, as applicable, during the month.*
> *SFC = Specific fuel oil consumption, in ml per kWh.*
>
> *7.19 The landed cost of coal shall include:*
> *(a) Base cost of coal;*
> *(b) Royalty;*
> *(c) Taxes and duties;*
> *(d) Transport cost by rail / ocean / road / pipeline or any other means;*

For the purpose of computing energy charges, landed cost of coal shall be arrived at after considering normative transit and handling loss of 0.8% on the quantity of coal dispatched by the coal supplier in case of non-pit-head stations and 0.2% on the quantity of coal dispatched by the fuel supplier in case of pit-head stations."

[emphasis supplied]

50. What stands out from the reading of the above provisions of the relevant regulations is that the energy charge is calculated on monthly basis. This is clear from the fact that the formula for such computation factors in the element of "*scheduled energy*" (ex-bus) in terms of kilo watt "*for the month*" to be added (Regulation 7.17). Even further, the calculation of "*Energy Charge Rate*" (ECR), under Regulation 7.8 takes into account the "*Weighted Average Landed Price of Primary Fuel*" (LPPF) to be included, the price so applicable being the one relevant "*during the month*".

51. At the time of filing of the tariff petition for the next control period, the requisite data of "*scheduled energy*" or the "*landed price of primary fuel*" can only be reflected in projections based on assumptions founded in the data for the preceding period. Such calculations, by their very nature, are provisional. The appellants at the stage of truing-up, leading to the impugned orders being passed, presented the data based on actuals. At such stage, the relevant information as to scheduled energy was also available, it being provided by the Delhi State Load Dispatch Center (SLDC). The request of the appellants was for the actual variable cost to be trued-up.

52. The State Commission by the impugned orders has undertaken the exercise of truing-up the "*fuel cost*", purportedly by drawing up annual average of the landed price of primary fuel (LPPF). This has given rise to the grievance that the fuel cost by being averaged cannot be fully recovered. The Respondent Commission, however, defends the decision by arguing that the method applied secures accuracy, such truing-up being not prohibited under the regulations, the procedure followed not suffering from any infirmity.

53. Strangely, the State Commission in its defense refers to Regulation nos. 5.10 and 5.11 of 2011 tariff regulations which read thus:-

> *"5.10 The Commission shall set targets for each year of the Control Period for the items or parameters that are deemed to be "controllable" and which includes:*
>
> *(a) Gross Station Heat Rate;*
> *(b) Normative Annual Plant Availability Factor;*
> *(c) Auxiliary Energy Consumption;*
> *(d) Secondary Fuel Oil Consumption;*
> *(e) Operation and Maintenance Expenses;*
> *(f) Financing Cost which includes cost of debt (interest), cost of equity (return); and*
> *(g) Depreciation.*
>
> *5.11 Any financial loss on account of under performance on targets for parameters specified in Clause 5.10 (a) to (e) is not recoverable through tariffs. Similarly, any financial gain on account of over-performance with respect to these parameters is to the generating company's benefit and shall not be adjusted in tariffs."*

54. We find reference to the above-quoted part of the regulations misplaced as it does not suggest that calculation for true-up is to be based on annual averages and not monthly actuals. The primary fuel cost

is not included in the parameters that are deemed to be "*controllable*". The cost for truing-up of ECR, with particular focus on the grievance as to annual average of primary fuel cost, has no connection whatsoever with "*under performance"* or *"over-performance*".

55. It is not correct to say that averaging of the annual data relating to primary fuel cost adds to the "*accuracy*" in the truing-up. On the contrary, such method of calculation is erroneous, it being in the teeth of the stipulation in the regulations requiring computation from month to month, the words "*during the month*" in relation to the "*LPPF*" being qualifying and crucial. The primary fuel cost is "*variable*", the generator having no control over it. The estimates at the start of the control year are only projections and cannot justify annual average to be drawn for truing-up on the basis of actuals.

56. For the foregoing reasons, the computation of ECR by the State Commission, based on annual average of primary fuel cost is erroneous and not in *sync* with the regulations. Such computation, therefore, must be set-aside necessitating re-computation on this score to be undertaken by the Commission.

Disallowance of Repair and Maintenance (R&M) Expenditure (in case of Pragati)

57. The expenses on Repair and Maintenance (R&M) are determined for purposes of tariff in terms of MYT Regulations, 2011. The claims of

the appellant in second captioned matter (*Pragati*) in this regard, to the extent it related to such expenses on STP and DLN Burners for FY 2015-16, have been disallowed.

58. The appellants' grievance is that, it had submitted the relevant purchase orders and payment vouchers in relation to above-said expenses which have been ignored. The Commission contests the appeal arguing that unsigned purchase orders were submitted, which could not be verified and the disallowance is due to such discrepancy.

59. The impugned order dated 29.09.2015 of the State Commission (particularly paras 4.47 to 4.56), however, is conspicuously silent and bereft of any such reasoning as is being presented in resistance to the appeal. In this view, the impugned order of the State Commission, does not pass the muster of a judicious or judicial order and must be set-aside.

60. At the same time, we must observe, that given the deficiency in the factual inquiry, we refrain from recording any view on merits of the claim of the appellant on this account. We would rather, direct the State Commission to carry out a fresh inquiry into this issue and after giving all concerned a fresh opportunity to present requisite material, take an appropriate decision in light of the relevant regulations and as per law.

Summing Up

61. On the issue of disallowance of *"Capital Expenditure"**:-***

(a) we hold that enhancement of "*reliability*" is an objective of importance similar to that of "*efficiency"* improvement for allowing capital investment plans in relation to existing generating stations. We also hold that the "*necessity*" for such capital investment must be comprehensively examined by the State Commission before according "*in-principle*" approval, the truing-up exercise, being the final stage of approval undertaken after the expenditure has been incurred on which occasion the prudence check would involve scrutiny more from the perspective of propriety of the procurement process, including legal clearances where so required, and an audit about the actual benefits derived in light of the objectives intended to be achieved as reflected in the projections set out in the initial proposal.

(b) The orders passed by the State Commission in relation to each of the appellants, as are impugned by these appeals, to the extent thereby the expenditure on the three components mentioned earlier was disallowed at the stage of truing-up, on the ground that it related to "*reliability*" rather than "*efficiency*", are set-aside. The State Commission is directed to pass consequential orders, granting the benefit, in light of above conclusions.

62. On the issue of method of calculation of "*Energy Charge Rate*" (ECR):-

(a) we disapprove of the method employed by the State Commission in calculating the ECR at the stage of truing-up, by computing the annual average of primary fuel cost. We hold that such computation is to be made on monthly basis, as per actuals, in terms of the formula given in regulation no. 7.18 of 2011 MYT Regulations.

(b) Since the computation of ECR at the stage of truing-up in the impugned orders passed by the State Commission is in deviation from the prescribed formula, the said impugned orders to that extent are set aside.

(c) The State Commission is directed to pass fresh appropriate orders in this regard accordingly in relation to each of the appellants.

63. On the issue of disallowance of "*expenditure on Repair and Maintenance*" (R&M), the factual inquiry *vis-à-vis* claims of the appellant *Pragati* on account of Sewage Treatment Plant and DLN Burners is remitted to the State Commission for fresh adjudication in accordance with law.

64. For the above said purposes, the parties are directed to appear before the State Commission for further proceedings on 04.08.2020.

65. Both appeals and pending applications, if any, are disposed of in above terms.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 28th DAY OF MAY, 2020.

(Justice R.K. Gauba)	**(Ravindra Kumar Verma)**
Judicial Member	Technical Member

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