

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

APPEAL NO. 285 OF 2021

Date : 14.11.2022

**Present: Hon'ble Mr. Justice R. K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

In the matter of:

GIFT Power Company Limited

Through its Director

EPS Building No. 49 A, Block 49, Zone 04,

Gyan Marg, GIFT City,

Gandhinagar, Gujarat – 382 355.

.... Appellant(s)

Versus

Gujarat Electricity Regulatory Commission

(Through its Secretary)

6th Floor, GIFT One, Road 5C,

Zone 5, GIFT City,

Gandhinagar, Gujarat – 382 355.

.... Respondent(s)

Counsel for the Appellant(s) : Ms. Poorva Saigal
Mr. Shubham Arya
Mr. Ravi Nair
Ms. Shikha Sood
Ms. Reeha Singa
Mr. Rakesh Inala

Counsel for the Respondent(s) : Mr. Tabrez Malawat
Mr. Abhijeet Swaroop
Mr. Syed Hamza
Mr. Aamir Siraj for R-1

J U D G E M E N T (Oral)

PER HON'BLE MR. JUSTICE R. K. GAUBA, OFFICIATING CHAIRPERSON

1. The appeal challenges the order dated 01.04.2021, based on majority opinion, of *Gujarat Electricity Regulatory Commission* (“the State Commission”) whereby financials of the appellant for *Financial Year* (“FY”) 2019-20 have been trued up, following a benchmarking approach vis-à-vis another utility operating in the State of Gujarat viz. *Torrent Power Limited – Distribution Dahej*, observing as under:

“4.6 Capital Expenditure, Capitalization and Funding of Capex

Commission’s Analysis...

In line with the process of benchmarking adopted for FY 2018-19 in the Tariff Order for Truing up for FY 2018-19 and determination of Tariff for FY 2020-21 dated 9th October, 2020, the Commission has approved the capitalization of FY 2019-20 for GIFT PCL considering the benchmarking done with TPL-Dahej. The Average of Net Capitalisation (Addition in GFA minus Deletion of GFA minus SLC) per unit incremental sales for the period from FY 2010-11 to FY 2019-20 has been considered for the purpose of benchmarking. The Commission has analysed the Net Capitalisation per unit incremental Sales of TPL-Dahej as shown below:

... ..

4.7 Operation & Maintenance Expenses

Commission’s Analysis

... ..

The Commission in its Tariff Order for Truing up for FY 2018-19 and determination of Tariff for FY 2020-21 had adopted a process of benchmarking for approving the O&M expenses for FY 2018-19 in view of benchmarking adopted for capitalization of assets for FY 2018-19. In line with the approach adopted previously, the Commission has approved the O&M expenses of FY 2019-20 considering the benchmarking done with TPL-Dahej for the O&M expenses per unit of energy sale. The average

O&M expenses per unit Sales for TPL-Dahej from FY 2010-11 to FY 2019-20 is shown below: ...”

2. It is pointed out that the majority decision (there being a dissent) renders similar findings vis-à-vis other tariff elements as well.

3. By order dated 31.07.2019, the State Commission had determined the *Annual Revenue Requirements* (“ARR”) of the appellant for FY 2019-20, on the basis of applicable provisions of *Gujarat Electricity Regulatory Commission (Multi Year Tariff) Regulations 2019* (hereinafter “MYT Regulations, 2016”) holding thus:

“3.6 Fixed Charges

3.6.1 Operation and Maintenance (O&M) Expenses

Commission’s Analysis

The Commission has examined the O&M Expenses projected by GIFT PCL for FY 2019-20 and FY 2020-21. Regulations 86.2 and 94.8 of the GERC (MYT) Regulations, 2016 specify the method of allowing normative O&M Expenses for the MYT Control Period, as reproduced below:

... ..

For projecting the O&M Expenses for FY 2019-20 and FY 2020-21, the Commission has considered the same methodology as adopted by the Commission in the earlier Order dated 3rd December, 2018 in Case No. 1710 of 2018, and has escalated the normative O&M Expenses for FY 2018-19 @ 5.72% to arrive at the normative O&M Expenses for FY 2019-20 and 2020-21, as shown in the Table below:...

3.6.2 Capital Expenditure, Capitalisation and Sources of Funding.....

Commission’s Analysis

Accordingly, the Commission, therefore, finds it appropriate to consider capitalization for FY 2019-20 and FY 2020-21 as Rs. 11.04 Crore, i.e., same

as approved by the Commission for FY 2018-19 in the Tariff Order dated 3rd December, 2018 in Case No.1710 of 2018.

Considering the projected energy sales for FY 2019-20 and FY 2020-21, the Commission is of the view that the licensee may undertake capital expenditure so as to meet the need of the present and future load growth but at the same time it should also adhere to cost effective measures and do optimum investments. Accordingly, the Commission therefore, finds it appropriate to consider capitalization for FY 2019-20 and FY 2020-21 as Rs. 11.04 Crore, i.e., same as approved by the Commission for FY 2018-19 in the Tariff Order dated 3rd December, 2018 in Case No. 1710 of 2018.

Accordingly, the Commission approves the Capex and Capitalisation for FY 2019-20 and FY 2020-21 as Rs. 11.04 Crore, as shown in the Table below:”

4. Indisputably, at the time of passing of the ARR order on 31.07.2019, there was no reference made to any benchmarking, such approach by order dated 01.04.2021, which is impugned here, being by way of a departure from the methodology adopted earlier.

5. In sharp contrast, a learned Member of the State Commission, by his dissent opinion, has held thus:

“Regulation 21 mandates on the Commission that the true up of the generating company or transmission licensee or distribution licensee or SLDC shall be carried out with consideration of Regulations 21.2, 21.3 where comparison of audited performance of the applicant for the previous Financial Year with the approved forecast for such Financial Year with audited accounts, extract of books of account and such other details. The aforesaid Regulations do not stipulate that while truing up the performance parameters of the distribution licensee be derived with consideration of performance parameters/expenses of other distribution licensees of the State as a base and the same shall be applied to the applicant licensee whose truing up is to be carried out by the Commission.

The said Regulation 21 does not provide that the Commission while carrying out true-up of the distribution licensee, the data of different distribution licensee be taken as a base parameter (performance parameter) and compare with approved forecast parameter. Such methodology is not in accordance with GERC (MYT) Regulations, 2016 to verify as performance parameters of the distribution licensee which are dependent on geographic condition of licensee, consumer numbers, consumer mix, load of licensee, consumptions of different consumers, supply networks of licensee, power procurement cost, incremental load, demand of power, operation period of licensee etc.

... ..

The aforesaid decisions of the Hon'ble Supreme Court and Hon'ble APTEL make it clear that it is mandatory for the Commission to follow the provisions of Regulations. In the present case as stated above, Regulation 21 of the GERC (MYT) Regulations specifically provides for the methodology for true-up. Any deviation from the provisions of the prescribed Regulations not in consonance with the decisions of the Hon'ble Supreme Court of India, which is binding under Article 141 of the Constitution of India and Hon'ble APTEL is illegal. Therefore, I am of the view that it is necessary to follow Regulation 21 of the GERC (MYT) Regulations, 2016..... In light of the above, the Tariff Order passed by my learned brethren Chairman Shri Anand Kumar and Member Shri M.M. Gandhi differs from the methodology adopted in other distribution licensee case, and procedure conformity on legal validity specified in the Regulations and, therefore, I do not agree to approve the complete Tariff Order in its present form put up to me, but partially agree."

6. Regulation 21.3 of MYT Regulations, 2016 provided as under:

"21.3 The scope of the trueing up shall be a comparison of the performance of the Generating Company or Transmission Licensee or SLDC or Distribution Licensee with the approved forecast of Aggregate Revenue Requirement and expected revenue from tariff and charges and shall comprise of the following:

(a) a comparison of the audited performance of the Applicant for the previous financial year with the approved forecast for such previous financial year, subject to the prudence check;

- (b) *Review of compliance with directives issued by the Commission from time to time;*
(c) *Other relevant details, if any.”*

7. Clearly, the scope of truing up proceedings is limited to the adjustment of actual income and expenditure for the corresponding period of determination of ARR. It is not open to the Regulatory Commission to change, at the stage of truing up, the basic premise or methodology on the basis of which ARR was determined, the stage of truing up being one only for adjustment of actuals qua the estimated amounts and not meant for introducing new or varied methodology. We may quote Hon’ble Supreme Court on this subject in the judgment reported in the case of *BSES Rajdhani Power Limited vs. Delhi Electricity Regulatory Commission (2022 SCC OnLine SC 1450)* as under:

“53. ‘Truing up’ has been held by APTEL in SLDC v. GERC to mean the adjustment of actual amounts incurred by the Licensee against the estimated/projected amounts determined under the ARR. Concept of ‘truing up’ has been dealt with in much detail by the APTEL in its judgment in NDPL v. DERC wherein it was held as under:—

“60. Before parting with the judgment we are constrained to remark that the Commission has not properly understood the concept of truing up. While considering the Tariff Petition of the utility the Commission has to reasonably anticipate the Revenue required by a particular utility and such assessment should be based on practical considerations. ... The truing up exercise is meant (sic) to fill the gap between the actual

expenses at the end of the year and anticipated expenses in the beginning of the year. When the utility gives its own statement of anticipated expenditure, the Commission has to accept the same except where the Commission has reasons to differ with the statement of the utility and records reasons thereof or where the Commission is able to suggest some method of reducing the anticipated expenditure. This process of restricting the claim of the utility by not allowing the reasonably anticipated expenditure and offering to do the needful in the truing up exercise is not prudence.”

54. This view has been consistently followed by the APTEL in its subsequent judgments and we are in complete agreement with the above view of the APTEL. In our opinion, ‘truing up’ stage is not an opportunity for the DERC to rethink de novo on the basic principles, premises and issues involved in the initial projections of the revenue requirement of the licensee. ‘Truing up’ exercise cannot be done to retrospectively change the methodology/principles of tariff determination and re-opening the original tariff determination order thereby setting the tariff determination process to a naught at ‘true-up’ stage.”

8. At least three decisions of this tribunal have reiterated this principle, they being *Karnataka Power Transmission Company Limited vs. Karnataka Electricity Regulatory Commission & Ors.* (Judgment dated 04.12.2007 in Appeal No. 100 of 2007); *North Delhi Power Limited vs. Delhi Electricity Regulatory Commission [2007 ELR (APTEL) 193]* (Judgment dated 23.05.2017 in Appeal Nos. 265, 266, 267 of 2006); and *State Load Despatch Centre vs. Gujarat Electricity Regulatory Commission & Another* (Judgment dated 30.11.2015 in Appeal No. 33 of 2015).

9. In our considered view, the majority opinion is misdirected and in breach of the discipline required to be maintained at the stage of truing up. Reference to Regulation 6 (General Framework) of MYT Regulations, 2016, wherein the right of the State Commission to “*vary as and when the facts and circumstances so warrant, from the procedures and parameters specified*” to justify the departure made is incorrect as the general power cannot be availed to junk the letter and spirit of specific circumspection prescribed for truing up by Regulation 21.3. The decision rendered on such majority opinion must be set aside and vacated. We order accordingly.

10. For the foregoing reasons, the appeal succeeds. The impugned order is set aside. The matter of truing up is remitted to the State Commission for fresh decision, after hearing the parties in accordance with law.

PRONOUNCED IN THE OPEN COURT ON THIS
14TH DAY OF NOVEMBER, 2022

(Sandesh Kumar Sharma)
Technical Member

tpd

(Justice R.K. Gauba)
Officiating Chairperson