Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 136 of 2010

Dated: 11th July, 2011

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member

In the matter of:

Torrent Power Limited,
Torrent House, Off. Ashram Road,
Ahemdabad 380009. **... Appellant(s)**

Versus

Gujrat Electricity Regulatory Commission.
1st Floor, Neptune Tower, Opp. Nehru Bridge,
Ashram Road, Ahemdabad- 380 009 **... Respondent(s)**

Counsel for the Appellant(s): Ms. Deepa Chawan,
Mr. Hardik Luthra, Mr. H.S. Jaggi
Mr. Samir Shah, Mr. Alok Shukla
Mr. Chetan Bundela

Counsel for the Respondent(s): Mr. Sanjay Sen,
Ms. Shikha Ohri
Mr. S.R. Pandey

JUDGMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

This appeal has been preferred by Torrent Power Ltd. assailing the impugned tariff order dated

31.3.2010 passed in case No. 988 of 2010 by Gujarat Electricity Regulatory Commission (State Commission) on Annual Performance Review (APR) for the FY 2009-10 and Annual Revenue Requirement (ARR) and Tariff for the FY 2010-11 under the Multi Year Tariff Control Period from FY 2008-09 to FY 2010-11.

2. The appellant, Torrent Power Limited, is engaged in the business of generation and distribution of electricity in the State of Gujarat. The State Commission is the respondent.

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

3.1. On 20.12.2007 the State Commission notified the Multi Year Tariff (MYT) Regulations, 2007 for generation and distribution business.

3.2. On 17.1.2009 the State Commission passed the MYT order in case no. 939 of 2008 for Control Period FY 2008-09, 2009-10 and 2010-11. The appellant being aggrieved by the said order dated 17.1.2009 filed the appeal no. 68 of 2009 before this Tribunal. The Tribunal disposed of the appeal by its Judgment dated 23.3.2010.

3.3. On 12.5.2009, the appellant filed petition in case no. 966 of 2009 before the State Commission for APR of FY 2008-09 and determination of tariff for FY 2009-10 under the MYT Control Period for FY 2008-09 to FY 2010-11. On 9.12.2009 the State Commission passed the order in case no. 966 of 2009 which was challenged by the appellant in appeal no. 61 of 2010 before this Tribunal.

3.4. On 15.12.2009, the appellant filed a petition in case no. 988 of 2010 before the State Commission for APR of FY 2009-10 and determination of tariff for FY 2010-11 under the MYT Control period from FY 2008-09 to FY 2010-11. On 31.3.2010 the State Commission passed its order in case no. 988 of 2010 which is impugned in the present appeal.

4. The appellant has raised the following issues in the appeal.

4.1. Non-uniform principles adopted by the State Commission in determining different elements of the tariff:

The State Commission in calculating interest on working capital for the distribution activities of the appellant in Ahmedabad (TPL-D) has deducted the amount of generation business receivables from the

receivables of the TPL-D (Ahmedabad) based on the principles that both generation and distribution business of the appellant form part of a single merged entity. The Regulations do not contemplate any such deductions. On the other hand, the State Commission in another order dated 31.3.2010 in case no. 1001/2010 adopted a different approach in computing gains on account of improvement in auxiliary consumption based on the principles that the generation and distribution businesses of the appellant should be treated as separate businesses. The State Commission has also directed the appellant to maintain separate books of account for its generation and distribution businesses. The Tariff Regulation 66 specifies the formula for calculation of the working capital for the distribution business separately in isolation with the calculation of working

capital requirement for generation business. Accordingly, it is imperative to allow the legitimate component of receivables without any deduction for calculating interest on Working Capital for the distribution business as per the formula given in the Regulations.

4.2. Disallowance of Income Tax to earn Return on Equity as post tax:

The State Commission has computed the income tax by applying tax rate on the Return on Equity (ROE) and not after grossing up the ROE. This amounts to lower recovery of income tax and in turn does not allow the appellant to earn the legitimate post tax ROE of 14%.

4.3. Computation of the wheeling charges: The State Commission has determined the wheeling charges in

terms of paise per kWh whereas the wheeling charges ought to have been determined in terms of capacity to be reserved in Rs per MW. This is contrary to the 2005 Regulations on Open Access in intra-state transmission and distribution.

4.4. Non consideration of Revision sought in O&M expenses on account of uncontrolled factors: In the impugned order the State Commission has treated the O&M expenses as controllable and approved the same at MYT approved values for FY 2009-10 and 2010-11. The State Commission should have considered the estimates submitted by the appellant where the factors responsible for the variation are uncontrollable in nature.

4.5. Disallowance of transit cost: The State Commission has approved transit loss of 1.4% on coal

transportation as approved in the MYT and has not approved the higher transit loss based on actuals. The State Commission ignored the factors responsible for higher transit loss which are beyond the control of the appellant.

4.6. In the original appeal the appellant had also raised the issue of sharing of revenues earned from sale of surplus power for SUGEN Power plants allocated capacity but the same was not pressed and given up by the appellant.

5. On the above issues Ms. Deepa Chavan, learned counsel for the appellant argued extensively assailing the impugned order of the State Commission. On the other hand Ms. Shikha Ohri, learned counsel for the State Commission argued forcefully in support of the findings of the State Commission.

6. After careful consideration of the contentions of both the parties, we have framed the following questions for consideration:

i) Whether the State Commission has erred in not allowing the legitimate amount of receivables for calculating interest on working capital for the distribution business of the appellant in contravention of the Regulations and against its earlier approach of treating generation and distribution business of the appellant separately?

ii) Has the State Commission erred in computing the income tax by applying tax rate on ROE and not grossing up ROE?

iii) Was the State Commission correct in computing the wheeling charges on the basis

of wheeled energy instead of in terms of capacity reserved, contrary to the Regulations?

iv) Was the State Commission correct in treating O&M expenses as controllable and not revising the O&M expenses due to variation caused by uncontrollable factors?

v) Has the State Commission erred in restricting the transit loss on coal to 1.4% as approved in MYT order and not revising the same as per actuals?

7. We will now take up the first issue on interest on working capital for the distribution business of the appellant and the State Commission's taking a different approach on the principles that the generation and distribution business of the appellant form part of a single merged entity.

7.1. This issue has been dealt with by this Tribunal in its Judgment dated 9.5.2011 in appeal no. 61 of 2010. The relevant extracts of the Judgment (paragraph 47) are reproduced below:

> *"In our estimation, the provisions of the Regulations allow the legitimate component of receivables without any deduction for calculations of interest on working capital for the distribution licenses. The same has to be allowed. It bears recalling that while computing gains on account of improvement in auxiliary consumption, the Commission in its order dated 31st March, 2003 computed gains by considering the variable cost of respective generating stations based on the principles that generation and distribution business are two different entities. Further it was the Commission that directed the appellant to maintain separate books of accounts for the two businesses as mandated by the Regulations. If it is so, then it is difficult to appreciate as to how in*

respect of calculating interest on working capital of TPL-D (Ahmedabad) the Commission could deduct the amount of generation receivables from the receivables of TPL-D (Ahmedabad) because the Regulations do not say that where generation and distribution business form a part of single corporate entity deductions have to be made from the receivables of distribution. It is brought to our notice that for calculation of gains on account of auxiliary consumption and maintenance of accounts, the Commission considered each business separately but considered both businesses as part of single entity for calculation of interest on working capital. We therefore reverse the finding of the Commission on this score".

Accordingly, this issue is decided in favour of the appellant.

8. The second issue is regarding disallowance of income tax to earn ROE as post tax.

8.1. This issue has been dealt with in this Tribunal's Judgment dated 23.3.2010 in appeal no. 68 of 2009 (Torrent Power Ltd. Vs. GERC) and further clarified in order dated 5.1.2011 in Revision Petition no. 09 of 2010 filed by the State Commission. We reproduce below the relevant extracts of the Judgment dated 23.3.2010 in appeal no. 68 of 2009:

> *"52. A conjoint reading of the Regulation 7, Regulation 66 of the State Commission and Section 195(A) of the Income Tax Act, 1961 leaves no doubt that the recovery of income tax paid as an expense from the beneficiaries requires to be grossed up in such a manner as to ensure that the actual tax paid is fully recovered through tariff. Grossing up of the return would ensure that after paying the tax, the admissible post tax return is assured to the Appellant. In this way the Appellant would neither benefit nor loose on account of tax payable which is a pass through in the tariff. This would ensure*

that the Appellant earns permissible return of 14% stipulated in Regulation 66 of the Regulations and mandate of Section 195A of the Income Tax Act is also complied with. The National Tariff Policy stipulates that the Regulatory Commission may adopt rate of return as notified by the Central Commission with appropriate modifications taking into view the higher risk involved in distribution and that a uniform approach is desired in respect of return on investment.

53. We agree with the contention of the Respondent Commission that CERC Regulations, 2009 are not applicable in this case of the Appellant. However, the provisions of CERC Tariff Regulations, 2004 will be of relevance. The relevant clause regarding tax on income of these CERC Regulations is extracted below:

> *" 7. Tax on Income: (1) Tax on the income streams of the generating company or the transmission licensee, as the case may be, from its core business shall be computed as an*

expense and shall be recovered from the beneficiaries.

(2) Any under-recoveries or over-recoveries of tax on income shall be adjusted every year on the basis of income-tax assessment under the Income Tax Act, 1961, as certified by the statutory auditors.

Provided that tax on any income stream other than the core business shall not constitute a pass through component in tariff and tax on such other income shall be payable by the generating company or transmission licensee, as the case may be.

Provided further that the generating station-wise profit before tax in the case of the generating company and the region-wise profit before tax in case of the transmission licensee as estimated for a year in advance shall constitute the basis for distribution of the corporate tax liability to all the generating stations and regions.

Provided further that the benefits of tax-holiday as applicable in accordance with the provisions of the Income-Tax Act, 1961 shall be passed on to the beneficiaries.

Provided further that in the absence of any other equitable basis the credit for carry forward losses and unabsorbed depreciation shall be given in the proportion as provided in the second proviso to this regulation.

Provided further that income-tax allocated to the thermal generating station shall be charged to the beneficiaries in the same proportion as annual fixed charges, the income-tax allocated to the hydro generating station shall be charged to the beneficiaries in the same proportion as annual capacity charges and in case of interstate transmission, the sharing of income-tax shall be in the same proportion as annual transmission charges.

54. The above provisions of Regulations, 2004 also make it clear that income tax payable on the

income from the core business of the company is to be treated as an expense and recovered from the tariff payable by beneficiaries. The income earned by the licensee is net of tax and the tax payable is treated as a separate expenditure recoverable from the beneficiaries.

55. In view of the foregoing discussion and analysis, we set aside order of the State Commission in this view of the matter and direct that it allows the income tax by grossing up to ensure the stipulated post tax return by the State Commission to the Appellant".

8.2. This matter was again clarified in R.P. No. 09 of 2009 in connection with appeal no. 68 of 2009 where it was observed as follows:

"10. Regulation 7 clearly stipulated that the tax on income stream of the generating company from its core business shall be computed as expense and shall be recovered from the beneficiaries. The adjustment for under or over recovery of any

amount from beneficiary has to be made by the generating company directly on the basis of income tax assessment under the Income Tax Act as certified by the statutory auditors. Regulation 66(20) only restricts the income tax to be allowed on the permissible return subject to actual payment.

11. This is the only difference in the State Commission's Regulations with reference to the Regulations of 2004 of the Central Commission in respect of Income Tax. The Central Commission's Regulations of 2004 allow income tax as pass through even on income over and above the permissible return on equity due to better performance over the generation norms. However, the State Commission's Regulations allow the income tax on the permissible return. The principle of grossed up tax is applicable to both as decided by this Tribunal in the impugned judgment and in various other cases referred to by the Respondent.

12. Conjoint reading of the Regulations of the State Commission will imply that income tax has to be taken as expense subject to adjustment as per actuals as per audited accounts by the statutory auditors and to the extent of permissible return. However, tax on income on permissible return has to be 'pass through'. Thus the intent of the Regulations is that income on permissible return on core business in the hands of the generating company has to be net of tax. Thus the entire tax inclusive of grossed up tax is relatable to the core activity of the generating company. However, if there is any over-recovery of tax, the generating company has to reimburse the same as the same is adjustable as per actuals as per audited accounts by the statutory auditors.

13. The Tribunal's judgment dated 23.03.2010 in para 52 clearly shows that the Tribunal has considered Regulation 7 and Regulation 66 and Section 195 (A) of the Income Tax Act to arrive at the decision that grossing up of the tax has to be carried out to ensure that after paying the tax, the

admissible post tax return is assured to the Appellant (Respondent in Review Petition), Torrent Power Limited. The Tribunal has also held in the judgment that the Appellant, Torrent Power Limited should neither benefit nor loose on account of tax payable which is a pass through in the tariff. Thus, there is no question of the generating company making profit on account of income tax. The excess recovery of income tax if any has to be reimbursed by the generating company to the distribution company as per the Regulations of the State Commission. In this case the excess recovery of income tax if any has to be adjusted in the true up of the financials. Thus the judgment dated 23.3.2010 needs no review".

This issue is decided accordingly.

9. The third issue is regarding the computation of the wheeling charges.

9.1. This issue has been decided in this Tribunal's judgments dated 23.3.2010 in appeal no. 68 of 2009

and dated 9.5.2011 in appeal no. 61 of 2010 in the matter between the Torrent Power Ltd. Vs. Gujarat Electricity Regulatory Commission. The relevant extracts of the Judgment dated 23.3.2010 are reproduced below:

> *"27. Gravamen of pleas of the Appellant is that whereas the GERC (Open Access in Intrastate Transmission and Distribution) Regulations require levying of wheeling charges in terms of capacity to be reserved in MW the Commission has determined the wheeling charges in terms of paise per unit. Here it is necessary to set out the Regulation 14(i) of the GERC Regulations:*
>
> *(i) Transmission/Distribution (Wheeling) Charges.*
> *The charges for use of the system of the licensee for intra-state transmission or distribution except intervening transmission facilities shall be regulated as under, namely:*
>
> *(i) The annual charges shall be determined by the Commission in accordance with the terms and*

conditions of tariff notified by the Commission from time to time and after deducting the adjustable revenue from the short-term users, these charges shall be shared by the long-term users;

(ii) (a) The charges payable by a short-term users shall be calculated in accordance with the following methodology:
ST RATE= 0.25X(TSC/Av CAP)/365 Where
ST RATE is the rate for short-term open access user in Rs. Per MW per day.

"TSC" means the Annual Transmission/Distribution Charges of the transmission or distribution licensee for the previous financial year determined by the Commission.

"Av CAP" means the average capacity in MW served by the system.

28. The Appellant had also pleaded that in case the capacity is not utilized and payment is made in terms of units transmitted, the transmission/distribution line will not be utilized

and there will be under-recovery which will have to be compensated by other consumers which is not the intention of Section 42(2)(3) of The Act which provides for non-discriminatory open access but not any preferential tariff or treatment at the cost of other retail consumers. In view of the Commission's own Regulations requiring wheeling charges payable on the basis of capacity reserved and not on the basis of paise per unit, we are inclined to agree with the contention of the Appellant. We order accordingly.

29. We are unable to agree with the contention of the State Commission that the capacity in terms of MW at HT and LT was not available as the same has been given at Clause 1.48 of the tariff petition of the Appellant as submitted by Ms Chauhan as under:

clause 1.48:

" The system peak demand of TPL-D for the year FY 2008-09 is 1494 MW. The contract demand for all the HT consumers is about 444 MW. Assuming that total contact demand of HT contributes to the

system peak demand, the total demand of LT contributing to the system peak is computed as 1050 MW. The ratio of HT and LT voltage contribution to the peak i.e. 30:70."

30. We are inclined to agree with the contention of the Appellant that the apportionment charges need to be reviewed to take into account the fact that the consumers at LT level also utilize the HT system whereas HT consumers do not use the LT system.

31. In view of the foregoing we direct the State Commission to re-determine the open access charges in terms of the capacity reserved as per its own Regulations as also review the apportionment of wheeling charges with respect of HT and LT system".

Accordingly, this issue is also decided in favour of the appellant.

10. The fourth issue is regarding O&M expenses on account of uncontrollable factors.

10.1. According to Ms. Deepa Chavan, learned counsel for the appellant, the State Commission should have considered the revised estimates of O&M expenses submitted by the appellant taking into account the variations due to uncontrollable factors.

10.2. According to Ms. Shikha Ohri, the State Commission has considered the O&M expenses as approved by the State Commission in the MYT order dated 17.1.2009, as O&M expenses are considered as controllable. However, the State Commission has already decided that the impact of employees cost due to wage revision will be considered at the time of true up. The data submitted by the appellant is for H1 Quarter only which is not reflecting the actual figure for the whole year. At the time of annual true-up the State Commission will decide the employees' expenses

based on the data submitted by the appellant. O&M expenses were taken as controllable factors in the MYT order dated 17.1.2009. However, any variation in O&M expenses will be decided by the State Commission during the true up. The State Commission will declare which parameters of O&M expenses are controllable and which parameters are uncontrollable.

10.3. In view of the submissions made by the learned counsel for the State Commission we direct the State Commission to consider the submissions of the appellant regarding the variation in cost due to uncontrollable factors at the time of the true up. We also direct the appellant to furnish the data regarding the employees' cost for the whole year to the State Commission for consideration. This issue is decided accordingly.

11. The fifth issue is regarding the transit loss on coal.

11.1. This issue has already been dealt with by this Tribunal in its Judgment dated 23.3.2010 in appeal no. 68 of 2009 which was further clarified in Review Petition no. 9 of 2010 filed by the State Commission. The relevant extracts of the Judgment dated 23.3.2010 are reproduced below:

> *"43. Main plea of the Appellant in case of Transit Coal Losses is that the coal transit losses of 1.4% for the generating stations at Gandhinagar and Wanakbori power stations cannot be the basis of comparison with that of the transit losses in respect of the Appellant because it procures coal directly from the mines unlike in the case of Gandhinagar and Wanakbori which are procuring washed coal. We find force in the plea of the Appellant. Unfortunately, the transit losses in the*

Railway transportation do occur as there is no control of the generators. Coal transportation in open wagons of unwashed coal procured directly from the mines which has much larger lumps of coal are more prone to pilferage unlike the washed coal which cannot be easily pilfered. In view of this ground reality some consideration in coal transit losses for the washed and unwashed mined coal deserves to be given. However, we leave it to the State Commission to decide increased percentage of allowable coal transit losses for the Appellant. We order accordingly".

11.2. This issue was further clarified by this Tribunal in its order dated 5.1.2011 in review petition no. 09 of 2010 in appeal no. 68 of 2009. The relevant extracts of the order dated 5.1.2011 are reproduced below:

"7. On the issue of transit loss for coal, the Tribunal in its judgment has noted that the transit loss was not under the control of the generating company

and has only observed that in view of ground reality same consideration is to be given in coal transit loss for washed and unwashed coal. As submitted by the Appellant-Torrent Power Limited, it procures mainly raw coal of better quality. On the other hand the generating stations of the State owned company procure mainly washed coal. The Tribunal has also left it to the discretion of State Commission to decide increased percentage of allowable coal transit losses for the Torrent Power Limited, Respondent herein. The State Commission has contended that the Tribunal has not indicated the nature of increase of transit loss. We do not feel it would be correct for this Tribunal to determine the transit loss as it would require detailed examination of the documents which do not form part of Appeal/ Review Petition.

8. In our opinion the State Commission is in a better position to determine the same keeping in view the actual information furnished by the Respondent and other relevant documents. Thus we do not find any error apparent on the face of

records with respect to coal transit loss. The State Commission is free to analyze the relevant data and records submitted by Torrent Power Limited and determine the transit loss afresh without linking it to values already adopted for other power plants".

This issue is decided accordingly.

12**. <u>Summary of our findings</u>**

12.1. The issue of interest of interest on working capital for the distribution business has already been decided by this Tribunal in its Judgment dated 9.5.2011 in appeal no. 61 of 2010, directing the State Commission to calculate the working capital for the distribution business without deduction of receivables of TPL-G, according to its Regulations. Accordingly, the State Commission is directed to re-determine the interest on working capital for the distribution business of the appellant.

12.2. The second issue on income tax has also been decided in this Tribunal's Judgment dated 23.3.2010 in appeal no. 68 of 2009 and further clarified in order of Review Petition no. 09 of 2010. The State Commission is directed to allow the income tax on the grossed up ROE, in accordance with the above findings of the Tribunal.

12.3. The third issue regarding the wheeling charges has also been decided in our Judgment dated 23.3.2010 in appeal no. 68 of 2009 directing the State Commission to determine the wheeling charges on the basis of the capacity reserved in accordance with the Regulations. This issue is decided accordingly.

12.4. The fourth issue is regarding O&M expenses. In view of the submissions made by the learned counsel for the State Commission we remand this

matter to the State Commission to consider the submissions of the appellant regarding variation in the O&M expenses due to uncontrollable factors and decide the issue in the annual true-up of the finances. The appellant is also directed to furnish the data regarding the employees cost for the whole year to the State Commission for consideration.

12.5. The fifth issue is regarding transit loss on coal. This issue has already been decided in this Tribunal's Judgment dated 23.3.2010 in appeal no. 68 of 2009 and further clarified in order dated 5.1.2011 in RP no. 09 of 2010 directing the State Commission to re-determine the transit loss keeping in view the actual information furnished by the appellant.

13. We, therefore, allow the appeal and set aside the impugned order to the extent indicated above remitting

the case back to the State Commission on the points indicated above. No order as to cost.

14. Pronounced in the open court on this **11th day of July, 2011.**

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

REPORTABLE / NON-REPORTABLE

vs