Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No.68 of 2009

Dated: March 23, 2010.

Present: - Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Shri H.L. Bajaj, Technical Member

IN THE MATTER OF:
Torrent Power Limited
Torrent House Off Ashram Road
Ahmedabad- 380 009

Versus
Gujarat Electricity Regulatory Commission
Ist floor, Neptune Tower
Opp. Nehru Bridge
Ashram Road
Ahmedabad- 380 009

Counsel for Appellant(s) : * ***Ms Deepa Chawan***
Mr. Alok Shukla
Mr. Navin Raheja
Mr. H.S. Jaggi
Mr. Chetan Bundela

Counsel for Respondent(s) : Mr. Achintya Dwivedi
Ms Mandakini Ghosh
Mr. E.S.R. Pandey,
Legal Officer,GERC
Ms Shikha Ohri
Mr. Sanjay Sen

*Corrections in the name of the learned counsel is done and shown in ***Italics and Bold*** as per order dated 21.04.2010

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No. of corrections

JUDGMENT

Per Hon'ble Member Mr. H.L. Bajaj

The Appellant Torrent Power Ltd. is in the business of power generation and distribution. The Appellant has challenged the order dated January 17, 2009 passed by Gujarat Electricity Regulatory Commission (GERC or the State Commission or the Commission in short) in case No. 939 of 2008 whereby the Commission has determined Annual Revenue Requirement, Wheeling Charges and Retail Supply Tariff for the control period FY 2008-09 to FY 2010-2011 and truing up for the year FY 2007-08. The impugned order dated January 17, 2009 came into effect from February 01, 2009.

2. The Appellant has challenged the Impugned Tariff Order relating to the following issues:

(a) Identification of variables as controllable and uncontrollable in the Impugned Order and timing of their adjustments.

(b) Not considering mix variance in Fuel Price and Power Purchase Adjustment (FPPPA) Charges.

(c) Determination of Wheeling Charges

(d) Specifying Renewable Energy Purchase Obligations discriminately.

(e) Lack of uniformity in principles adopted by the Commission by not incentivizing the Appellant for achieving better distribution loss target but penalizing for not being able to achieve the target transit loss.

(f) Disallowance of Income Tax so as to earn Return on Equity as post tax.

(a) Identification of variables as controllable and uncontrollable in the Impugned Order and timing of their adjustments.

3. Learned Counsel for the Appellant, Ms Deepa Chauhan, has submitted before us that as per Gujarat Electricity Regulatory Commission, Multi Year Tariff Framework Regulations, 2007, (In short MYT Regulations) the Commission is required to identify various ARR items as "controllable" or "uncontrollable". It has been contended that the classification of

ARR items in the Impugned Order is contrary to the MYT Regulations. The Commission is required to specify variables comprised in the ARR and thereafter review the specific variables as part of Annual Performance Review (APR) in terms of MYT Regulation 7.7. The Commission is required to identify the variables in respect of each ARR item and then attribute the variations to the controllable and uncontrollable factors at the time of Annual Performance Review and not while passing the MYT order. She urged that Regulations 9.3, 9.6 and 9.7 have been negated by the Commission. These Regulations deal with Annual Performance Review and contemplate that the Commission would consider various factors for variation in the ARR items and only thereafter these items have to be categorized as uncontrollable factors and controllable factors. The Commission is required to look into the factors which constitute the variations and ascertain whether the factors are beyond the control of the Appellant and could not be mitigated. As an example she illustrated that any variation say in an item like the "employee cost" due to change in law have to be considered as

additional expenses towards employee cost on account of change in law as an uncontrollable factor. She contended that the Commission has classified employee cost in its entirety as controllable although the categorization of ARR items as controllable and uncontrollable before analyzing these factors for variations is not permitted as per Regulations.

4. Learned Counsel stated that as per the Impugned Order "True up will be permitted only in the case of the uncontrollable items on availability of data as per actuals". She contended that this limits the scope of performance review of uncontrollable items to the availability of data as per actuals, which is contrary to Regulation 9.3 read with Regulation 9.7(a) and Regulation 10. Regulation 9.3 clearly sets out that the scope of review is to be undertaken as: (a) comparison of audited performance of the Appellant for previous year with the approved forecast for the previous year (b) comparison of performance of first half of the current year with approved forecast for the current Financial Year.

5. Learned Counsel for the Appellant submitted that the Impugned Order stipulates that " a statement of gains and losses for each controllable item will be presented in the filing for the next control period". She contended that as per this the adjustment of gains/losses due to controllable factors will have to await the filing for the next control period i.e. after 3 years and that this is contrary to Regulation 9.7(b) and Regulation 11 which clearly specify annual review.

6. Per contra the learned counsel Mr. Sanjay Sen appearing for the Commission submits that the Commission in its order has referred to MYT Regulations including mechanism of sharing of gain and losses on account of controllable and uncontrollable factors in Regulations 9.6, 10 and 11 and that the Commission has summarized the classification of ARR items. The Performance Review, true up will be permitted only in case of uncontrollable items on availability of actual data and that regarding controllable items, the Commission will review the

gains and losses on each item and make appropriate adjustments whenever required. Regulation 9.6.2 (e)(ii) of MYT Regulations specify employee cost as "controllable." He stated that if there is any cost which accrues as a result of change of law the same will fall under Regulation 9.6 and will be considered as an uncontrollable factor. The occasion to classify employee cost as uncontrollable will arise only if the Appellant can demonstrate that the variation of employee cost is due to change of law. Under Regulation employee cost is generally recognized as controllable factor and the change in law is a special circumstance and will be considered, if necessary, at an appropriate time. This is not the stage and, therefore, apprehension of the Appellant is misplaced. He stated that the Commission is fully competent to apply Regulations and that the classifications of various ARR items are as per Regulation.

7. Learned counsel for the Commission further contended that the truing up of uncontrollable items will be permitted only in case of uncontrollable items on availability of data as per

actual and duly audited. The Commission will review such actual data and satisfy itself before allowing the true up.

8. It is the contention of the Commission that the Regulations do not specify the timing of adjustment and that it is left to the wisdom of the Commission to specify the timing in the Annual Performance Review and that purpose of MYT will be lost if there is a year on year adjustment of tariff. The Commission holds that the finding of the Commission that statements of gains and losses for each controllable item will be presented in the filing for the next control period is in line with Regulation 9.7 and Regulation 11. Learned counsel for the Commission asserted that the Commission has the ability to pass an order recording the manner and mechanism in which the aggregate gains and losses will be apportioned.

Analysis and decision

9. Before we proceed to analyse and decide this issue it will be expedient to set out the various Regulations of the State Commission referred by the counsel for the parties.

Chapter 7: Forecast

7.6 Upon studying the application, the Commission shall either-

(a) pass an order approving the forecast of aggregate revenue requirement and expected revenue from tariff and charges for the control period, subject to such modifications and conditions as it may specify in the said Order; or

(b) reject the application for reasons to be recorded in writing, if it is not in accordance with the principles contained in Section 61 of the Act or these Regulations and direct the applicant to submit a revised forecast taking into consideration such factors as the Commission may deem appropriate.

7.7 The Commission shall, in its Order passed under Regulation 7.6 above, specify the variables comprised in the aggregate revenue requirement and expected revenue from tariff and charges of the applicant that shall be reviewed by the Commission as part of the annual performance review in accordance with Regulation 9 below:

Provided that such variables shall be limited to the major items of cost and revenue forecast of the applicant that, in the Commission's opinion, could have a material impact on the cost of supply of electricity to consumers in the State over the control period:

Provided further that the variables, as may be stipulated by the Commission under Regulation 8 below, shall form part of the annual performance review, unless exempted by the Commission from such review in its Order.

Chapter 9: Annual review of performance

9.1 Where the aggregate revenue requirement and expected revenue from tariff and charges of a Generating Company or Licensee is covered under a multi-year tariff framework, then such Generating Company or Licensee, as the case may be, shall be subject to an annual performance review during the control period in accordance with this Regulation.

9.3 The scope of the annual performance review shall be a comparison of the performance of the Generating Company or Licensee with the approved forecast of aggregate revenue requirement and expected revenue from tariff and charges and shall comprise 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; and

(b) A comparison of the performance of the applicant for the first half of the current financial year with the approved forecast for the current financial year and

(c) Any other relevant details, if any

9.4 The applicant shall submit the information required for the annual performance review in such form as may be stipulated by the Commission from time to time.

9.5 For the variables stipulated by the Commission under Regulation 7.7, the Commission shall carry out a detailed review of performance of the applicant vis-à-vis the approved forecast, as part of the annual performance review.

9.6 Upon completion of the review under Regulation 9.5 above, the Commission shall attribute any variations or expected variations in performance, for variables stipulated under Regulation 7.7 above, to factors within the control of the applicant (controllable factors) or to factors beyond the control of the applicant (uncontrollable factors):

Explanation: For the purpose of these Regulations, the term uncontrollable factors shall include the following factors which were beyond the control of, and could not be mitigated by, the applicant, as determined by the Commission-

(a) Force Majeure Events;

(b) Changes in law, judicial pronouncements and Orders of the Central Government, State Government or Commission;

(c) Economy-wide influences, such as unforeseen changes in inflation rate, market-interest rates, taxes and statutory levies.

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

(a) Variation in the price of fuel and/ or price of power purchase according to the FCA/FPPPA formula approved by the Commission from time to time;

(b) Variation in the number or mix of consumers or quantities of electricity supplied to consumers;

(c) Expenses on account of Inflation;

(d) Taxes on Income.

Provided that where there is more than one Distribution Licensee within the area of supply of the applicant, then any variation in the number or mix of consumers or in the quantities of electricity supplied to consumers within the area served by two or more such Distribution Licensees shall be attributable to controllable factors:

Provided further that where any consumer or category of consumers within the area of supply of the applicant is eligible for open access under sub-section (3) of Section 42 of the Act, then any variation in the number or mix of such consumers or quantities of electricity supplied to such eligible consumers shall be attributable to controllable factors;

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

(a) Variations in capital expenditure on account of time and/ or cost overruns/ efficiencies in the implementation of a capital expenditure project not attributable to an approved change in scope of such project, change in statutory levies or force majeure events;

(b) Variations in technical and commercial losses, including bad debts;

(c) Variations in the number or mix of consumers or quantities of electricity supplied to consumers as specified in the first and second proviso to clause (b) of Regulation 9.6.1;

(d) Variations in working capital requirements;

(e) Variation in expenses like: (i) Operation & Maintenance expanses , (ii) Employee Cost, (iii) Admn. & General expenses, (iv) Interest & Finance Charges, (v) Return on Equity, Depreciation, (vi) Non-tariff income; However, expenses at (i), (ii) & (iii) are relatable to relevant

Inflation Indices and/or any pay revision agreement in the economy and expenses like (iv) & (v) are relatable to applicable interest rates;

(f) Failure to meet the standards specified in the Standards of Performance Regulations, except where exempted in accordance with those Regulations;

(g) Variations in labour productivity;

(h) Variations in any variable other than those stipulated by the Commission under Regulation 9.6 above.

9.7 Upon completion of the annual performance review, the Commission shall pass an order recording:

(a) the approved aggregate gain or loss to the Generating Company or Licensee on account of uncontrollable factors and the mechanism by 15 which the Generating Company or Licensee shall pass through such gains or losses in accordance with Regulation 10;

(b) the approved aggregate gain or loss to the Generating Company or Licensee on account of controllable factors and the amount of such gains or such losses that may be shared in accordance with Regulation 11;

(c) the approved modifications to the forecast of the Generating Company or Licensee for the remainder of the control period, if any, under Regulation 9.5.

Chapter 10: Mechanism for pass through of gains or losses on account of uncontrollable factors

10.1 The approved aggregate gain or loss to the Generating Company or Licensee on account of uncontrollable factors shall be passed through as an adjustment in the tariff of the Generating Company or Licensee over such period as may be specified in the Order of the Commission passed under Regulation 9.7 (a).

10.2 Nothing contained in this Regulation 10 shall apply in respect of any gain or loss arising out of variations in the price of fuel and power purchase which shall be dealt with as specified by the Commission from time to time.

Chapter 11: Mechanism for sharing of gains or losses on account of controllable factors

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

(a) One-third of the amount of such gain shall be passed on as a rebate in tariffs over such period as may be specified in the Order of the Commission under Regulation 9.7;

(b) One-third of the amount of such gain shall be retained in a special reserve by the Generating Company or Licensee for the purpose of absorbing the impact of any future losses on account of controllable factors under clause (b) of Regulation 11.2; and

(c) The balance amount of gain may be utilized at the discretion of the Generating Company or Licensee.

11. 2 The approved aggregate loss to the Generating Company or Licensee on account of controllable factors shall be dealt with in the following manner:

(a) One-third of the amount of such loss may be passed on as an additional charge in tariffs over such period as may be specified in the Order of the Commission under Regulation 9.7; and

(b) The balance amount of loss shall be absorbed by the Generating Company or Licensee.

Chapter 12: Annual determination of tariff.

12.1 The Commission shall determine the tariff of a Generating Company or Licensee covered under a multi-year tariff framework for each financial year during the control period, at the commencement of such financial year, having regard to the following:

(a) The approved forecast of aggregate revenue requirement including the incentive available for the Generating Company or Licensee and expected revenue from tariff and charges for such financial year, including approved modifications to such forecast; and

(b) Approved gains and losses to be passed through in tariffs, following the annual performance review.

10. We note that the classification of various ARR items summarized in para 4.6.2 of the Impugned Order into controllable or uncontrollable items is in line with the MYT Regulations. It has been rightly admitted by the Commission that if there are any variations in various factors even in the controllable category of ARR items due to the factors enumerated in Regulations 9.6.1 and 9.6.2 (Supra) the same will be considered as an uncontrollable factor. The Regulations, by way of explanation do detail out various factors which fall beyond the control of the licensee and the same could be considered for allowing variations in the controllable items also. In view of this we do not wish to interfere with this decision of the Commission.

11. As far as the timing of truing up is concerned, the Regulation 12.1(b) (supra) clearly stipulates that approved gains and losses are to be passed through in tariff following the Annual Performance Review. In view of this we are not able to agree with the contention of the Commission that the truing up

can wait till the next control period. Control period being three years, it cannot be the case of the State Commission that burden/benefits of the past years be passed on to the consumers of the future. It has to be kept in mind that postponement will entail carrying cost to the consumers as also cash flow problems for the licensee. National Tariff Policy also requires that "uncontrollable costs should be recovered speedily to ensure that future consumers are not burdened with past costs……." (Clause 5.3(h)(4) extracted in para 15.

12. We consider that it is necessary for the Commission to expeditiously carry out the truing up exercise both for controllable and uncontrollable items as soon as the audited data as per actuals is available and give effect to the approved gains/losses to be passed through tariff following the Annual Performance Review as stipulated in clause 12.1(b) of the MYT Regulations. This exercise need not wait for the next control period. We decide accordingly and direct the State Commission

to undertake the truing up at the earliest once the actual audited data is available.

(b) Not considering mix variance in Fuel Price and Power Purchase Adjustment Charges (FPPPA).

13. Grievance of the Appellant is that the State Commission has not allowed the Fuel Price and Power Purchase Adjustment Charges (FPPPA) formula as modified and proposed by the Appellant in its ARR petition. Appellant contends that it had suggested the modified FPPPA formula and the design principles in support of it as the earlier formula evolved by the State Commission does not take into consideration the variations in costs due to changes/variations in the mix of approved power purchase sources. The earlier formula did not take it into consideration the impact on the actual power purchase cost of a distribution licensee, due to variation in the quantum of power supply by various approved sources vis-à-vis the mix estimated by the State Commission in its computation of the approved power purchase cost for the Appellant. The formula proposed by

the Appellant in its petition takes into consideration any difference in the power purchase cost on account of variations in the approved sources of power procurement.

14. Learned counsel Ms Deepa Chauhan submitted that the rationale of evolving the modified fuel price adjustment formula was to ensure that there are timely and complete adjustment in respect of increase in the power purchase cost from the approved sources and that such an approach is in line with The Electricity Act and would safeguard not only the interest of the Appellant but also ultimately that of the consumers.

15. She submitted that clause 5.3(h)(4) of the National Tariff Policy, reproduced below, requires that costs like the fuel cost should be recovered speedily to ensure that future consumers are not burdened with the past costs:

> " *5.3(h)(4) Uncontrollable costs should be recovered speedily to ensure that future consumer are not burdened with past*

costs. Uncontrollable costs would include (but not limited to) fuel costs, costs on account of inflation, taxes and cess, variations in power purchase unit costs including on account of hydro-thermal mix in case of adverse natural events".

16. She said that the Appellant has not challenged this a Appeal on the ground of UI charges and working capital.

17. Learned counsel appearing for the State Commission stated that the State Commission had already approved formula for FPPPA for Torrent Power Ltd. (TPL) vide its order dated July 31, 2007. The State Commission has examined the request of TPL and concluded that the formula already approved covers both fuel price adjustment and power purchase adjustment components and could be applied to the extent required for fuel price adjustment or power purchase adjustment or both and therefore, is not required to be modified. Appellant in its petition has proposed to include (i) change in working capital cost on account of change in power procurement cost and (ii) actual gain and loss on account of UI mechanism. Working capital cost is

approved as per norms provided adequately with reference to the actual capital required and there is no cause to include this element which is not significant in power purchase adjustment formula. UI charges frequently vary both ways and, therefore, are not to be recovered from the consumers on monthly/quarterly basis. This shall be included in the true up and to be approved by the State Commission. In view of this the modified formula was not approved by the State Commission.

18. Raising a preliminary objection learned counsel for the State Commission argued that the Appellant has accepted the earlier formula of the Appellant in its earlier order dated July 31, 2007 in petition No. 915 of 2007and therefore, it is now estopped from challenging the same. In this context learned counsel asserted that the judgment of this Tribunal relied upon by the Appellant (Delhi Transco Ltd. V/s DESRC & Ors), 2009 ELR (APTEL) 0086 is not applicable. Instead learned counsel for the state Commission relied upon order of this Tribunal in case of AP Transco Ltd. v/s NTPC Ltd. in Appeal No. 25 of 2009

delivered on May 05, 2009. Extracts from both these judgments are placed below:

" AP Transco vs NTPC:

15.... (vii) It is a well-settled principle of law that once a matter gets settled between the parties before the judicial forum, the same cannot be reopened ands re-agitated even if a different view has been taken by the superior Court as per the relevant provisions of Rules. This is also laid down by the Supreme Court in Mohd. Azim Ala vs. Union of India reported in 2001 10 SCC 93. The relevant observation in this case is as follows:

> *" Once the matter on the Appellants reached finality, it could not be opened merely on the ground that in some other matter filed at the behest of some other similarly situated persons, the Tribunal or the Court has granted some relief".*

viii) The Appellants' main contention is that there is a continuous cause of action and as such for every cause of action, they have got a right to file a separate petition opposing the FERV methodology. This contention is absolutely wrong because the present case involves the issue relating to the period 2003-04, whereas the cause of action raised in the methodology of FERV for the said period would arise immediately after the order dated December 21, 2000 was passed. There is no fresh FERV issue for the Appellants from March 31, 2004."

Delhi Transco Ltd. vs. DERC & Ors. 2009 ELR (APTEL) 0086.

" 17) Although the appellant did not challenge the earlier tariff orders it did oppose the proposition that was adopted by the Commission namely that the appellant should be denied

the right to recover its revenue requirement to the extent of the past receivables. The Appellant has been asking the Commission to transfer the 80 per cent of the past receivable to it. In fact, the accounts position of the Appellant reflects the factual position namely that the past receivable have not been received by it and these accounts have not been held to be incorrect or flawed by the Commission. It cannot be said that the Appellant has accepted the Commission's method in this regard for such an unduly long time that following the principles in the judgments mentioned above the Appellant can be non-suited on the ground that it is challenging a settled position of fact or law. The view taken by the Commission that past receivables, not received by the Appellant, be deemed to have been received by the Appellant borders absurdity. Since, each Tariff Order is distinct and separate the Appellant would be fully justified in approaching this Tribunal to challenge the impugned order vis-à-vis the year 2006-07".

Analysis and decision

19. We would first like to deal with the preliminary objection raised by the learned counsel for the State Commission that since the Appellant has accepted the earlier formula in the Commission's order dated July 31, 2007, the Appellant is now estopped from challenging the same. This Tribunal in its judgment dated January 13, 2009 in case of Delhi Transco Ltd. vs. Delhi Electricity Regulatory Commission (ELR (APTEL) 0086) has taken a view that each tariff order is distinct and separate, the Appellant would therefore be fully justified in approaching

this Tribunal to challenge the Impugned Order. In view of this we are unable to agree with the contention of the State Commission that the Appellant cannot now challenge the FPPPA formula.

20. It has also been made clear by the Appellant that it has not challenged this Appeal on the ground of Unscheduled Interchange charges and working capital as understood by the State Commission. The Appellant has mainly challenged the formula so as to claim difference in Power Purchase Cost on account of change in the purchase from the approved sources. In its petition before the State Commission the Appellant had pleaded that the then existing FPPPA formula be modified in view of the segregation of business activities and costs into generation business and distribution business so as to account for the Fuel Price Adjustment (FPA) in the generation business and Power Purchase Adjustment (PPA) in the distribution business separately. The Appellant Petitioner had said as below:-

Power Purchase Adjustment.

"9.5 TPL-D sources its power partly from its own generation TPL-G(APP), TPL-G(SUGEN) and partly through purchase from GUVNL. The Power Purchase Cost would vary from the projections incorporated in the TPL-D ARR due to various uncontrollable factors, such as:

1. Demand fluctuations;

2. Forced outage of various units;

3. Power purchase mix variations arising out of thermal-thermal mix and unscheduled outages etc. and

4. Variations in fuel price, fuel transportation and/or handling charges and charges/duties levied by the Government.

9.6 The objective of Power Purchase Adjustment(PPA) is to adjust for the changes in the power purchase in the retail tariff applicable for various categories of consumers.

21. We find that there is rationale in the statement of the Appellant that after segregation into generation and distribution business the formula may need adjustment. Accordingly, we direct the State Commission may de novo reconsider the

proposal of the Appellant and ensure that its concerns are addressed.

(**c) Determination of Wheeling Charges**.

22. Learned counsel for the Appellant has submitted that the Respondent State Commission should have determined the wheeling charges in terms of the capacity to be reserved in terms of rupee per MW but the State Commission has determined the same as paise per kWh and that this is not in conformity with the GERC (Open Access in Intra State Transmission and Distribution) Regulations, 2005 as modified by the State Commission vide notification No. 13 of 2005. Appellant contended that there will be under-recovery in terms of payment not made for the capacity reserved in case the units wheeled are less than the reserved capacity. She has contended that adopting such an approach will tantamount to cross subsidization by the retail consumers to the open access consumers and is therefore, against the spirit of Section 61(c) and 61(d) of The Electricity Act. Moreover, Section 42(3) of The

Electricity Act which provides for non discriminatory open access but does not contemplate any preferential tariff or treatment at the cost of other retail consumers. She contended that the response of the State Commission that it has worked out wheeling charges in terms of energy as capacity in terms of MW/MVA at 11 kV and LT levels were not available and that it has determined the transmission charges in rupee per MW on the basis of total transmission capacity handled by the transmission licensee and that the Statement of the Commission that the appellant has not specified the MW capacity handled by the system is not correct. Appellant asserted that necessary information of capacity handled by it has been furnished in its MYT Petition (para 1.48 page 466 of Appeal Paper Book, Vol. II) and that the same is in line with that considered for the transmission licensee by the State Commission.

23. The Appellant submitted that it has given further segregation of capacity handled and distribution losses between HT and LT consumers for determination of separate charges

to avoid any cross subsidization and judicious recovery of charges without burdening either retail or open access consumers.

24. Learned counsel for the Appellant submitted that segregation of the voltage-wise details were not submitted by the transmission licensee and therefore, the charges have been determined by the state Commission on overall basis requiring open access consumers to pay for the assets used by them. The segregation has not been done by the transmission licensee despite directions of the state Commission. She pleaded that the State Commission be directed to determine the charges on capacity reservation basis. Ms Deepa Chauhan contended that if the consumers of open access are not required to make the payment of the reserved capacity, the open access consumer will tend to reserve higher capacity and cost of maintaining higher capacity will be borne by retail consumers. Appellant is required to make the reserved capacity available at all times. However, the open access consumer is required to pay only for the

utilization, and therefore, the cost of maintaining the network will be borne by the retail consumers in case of lower utilization of the open access capacity reserved.

25. Learned counsel for the Appellant contended that the State Commission has also erred in apportionment of wheeling charges amongst HT and LT consumers. She stated that consumption at lower voltage should also contribute to the cost of higher voltage whereas the consumers at high voltage level need to pay for only the used HT system. In view of this the Appellant had apportioned HT and LT system charges in two steps namely: (a) apportioning ARR of wheeling business to HT and LT voltage level and (b) apportioning the ARR of the HT voltage level again between the HT and LT voltage levels. The State Commission order makes the apportionment between the HT and LT voltage as 30:70 but it does not provide any reason for arriving at this apportionment and, therefore, the impugned order needs to be modified with regard to the wheeling charges.

26. Mr. Sanjay Sen, learned counsel for the Respondent Commission has contended that in view of the fact that voltage-wise expenses were not available, the State Commission was compelled to assume expenses of HT and LT level in the ratio of 30:70 as an interim arrangement till voltage-wise cost details are furnished by the Appellant. Mr. Sen submitted that in case there is any loss to the Appellant on the ground of underutilization of reserve capacity by open access users, the same can be resolved through contractual mechanism between the licensee and open access user. He stated that in case there is any open access user who is reserving capacity and not utilizing the same this issue can be brought out to the Commission for appropriate orders/directions. He stated that the network cost is deemed to have been recovered from retail tariff and as such there cannot be any under-recovery on this account and that if there is any un-recovery of cost, it will be reflected during the truing up exercise.

Analysis and decision

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.

(d) Specifying Renewable Energy Purchase Obligations discriminately.

32. Appellant has submitted that the impugned order imposes obligations on the Appellant to purchase power renewable energy sources to the extent of 4%, 6% and 8% for the years 2008-09, 2009-2010 and 2010-11 respectively as percentage of the total sales. Appellant has contended that whereas it has been wheeling wind energy for captive consumption, the Commission has failed to take into consideration such wheeling of renewable energy towards fulfillment of purchase obligation from renewable energy sources. Counsel for the Appellant further contended

that purchase stipulation of 4% for the year 2008-09 is contrary to Regulation 3.1 of the GERC (Power Procurement from Renewable Sources) Regulations, 2005, reproduced below:

" 3.1 Each Distribution Licensee shall purchase a defined minimum quantum of its total consumption of electricity during year from renewable sources as per the schedule:-

Year	***Minimum Quantum of purchase from renewable sources***
2006-07	*1.0%*
2007-08	*1.0%*
2008-09	*2.0%*

33. Appellant has contended that the Commission has stipulated renewable purchase obligations discriminately and alleged that the Commission has provided differential treatment as regard the renewable purchase obligations as it stipulates higher purchase obligation on the Appellant without giving any reason in support. Appellant submitted that it is imperative

that the Commission undertakes an exercise to consider all the parameters and factors in evolving the renewable purchase obligation of the licensees in the state. In this context, Appellant spelt out case No. 93 of 2007 filed by Indian Wind Energy Association seeking review of renewable purchase specification as per applicable Tariff Regulations, is pending and subjudice before the Commission. The stipulation of renewable power purchase obligation on the Appellant is without any comprehensive study. The Appellant has contended that the Regulations do not permit to add the purported backlog to the present RPO and that the Regulation 3.7 confer on the Commission the power to waive the minimum quantum even if stipulated in the Regulation. She stated that the interpretation of Regulation by the Commission that if the licensee fails to purchase the stipulated percentage in a particular year the shortfall will be added in the next year percentage is erroneous. Regulation 3.2 states as under:

" 3.2 Each Distribution Licensee shall indicate, along with sufficient proof thereof, the proposed quantum of purchase from renewable sources for the ensuing year in the ARR filing. The proposed quantum of purchase shall be as per clause3.1 of this regulation of the approved power purchase quantity for the previous year. Due to increased sale of power in the ensuing year from that of the previous year, there may be a shortfall of the targeted quantum from the quantum that would arise from the increased sale. This amount would need to be added to the targeted quantum for the next year. However credit for excess sale would not be provided in the ensuing year".

34. She stated that the plea of the Commission in its response, that the percentage of RPO approved by the Commission in the MYT year is less than the proposed percentage in the Regulation for the FY 2009-2010, 2010-2011 is not tenable as comparison cannot be made with that of the draft regulations. She refuted the reply of the Commission that the RPO percentage as specified in the regulation will be the obligation of the Appellant including all licensees and will remain same for all on the ground that this is contrary to the impugned order.

35. The Appellant contended that the allegations of the Commission that it has violated the statutory regulations because the Appellant has not purchased renewable energy as specified by the Commission in MYT year for FY 2008-09, submitted that the Appellant is bound by the provisions of the law. Its willingness to comply with the provisions of the regulation is demonstrated by its action as it had signed PPA for purchase of 49.6 MW from renewable generator and also signed agreement for 46.66 MW for wheeling and purchase of surplus power from renewable captive generators. Moreover, the Appellant had made efforts twice by inviting expression of interest from the renewable generators in leading newspaper of Gujarat and major cities on March 06, 2009 and June 03, 2009 for procuring renewable power towards compliance of RPO. The appellant will make necessary statements during ARR process in accordance with the provisions of the regulations. She prayed that the impugned order should be modified to the extent of the appeal.

36. Learned counsel for the Respondent, Shri Sanjay Sen, contended that the shortfall in RPO by the licensee in any year is to be added in the next year's RPO as per Regulation 3.2. He agreed that the Commission under Regulation 3.7 has the power to waive. However, other licensees of the state have complied with the regulations. He submitted that the Commission has allowed tariff @ Rs. 3.37 per unit for the minimum RPO quantity of 4% of the total power purchase requirements whereas the Appellant has purchased less than 1% of total energy requirement. This act of Appellant is in violation of the provisions of Regulations. He submitted that the contention of the Appellant that quantum of wheeling of power by the licensee from wind mills for captive purchases should be considered towards their RPO is not acceptable. Appellant is already recovering network cost from retail tariff and therefore, there is no under-recovery on this ground.

Analysis and decision

37. Main grievance of the Appellant is that, for the year 2008-09, whereas the Regulations provide 2% as minimum quantum of purchase from renewable sources, the State Commission has added the backlog for the years 2006-07 and 2007-08 by relying on Regulation 3.2 of the power procurement from renewable sources regulations. We note that Clause 3.2 of the Notification (supra) stipulates that if due to increased sale of power in the current year from that of the previous year, there may be shortfall of the targeted quantum from the quantum that would arise from the increased sale, such amount resulted due to increased sale would be added to the targeted quantum of Renewable Purchase Obligation for the next year. However, in this Appeal it is not the case. The Appellant has not been able to fulfill its obligations for the years 2006-07 and 2007-08 despite efforts made by it by inviting expression of interest from the renewable generators. This backlog of 2006-07 and 2007-08 cannot be added to the year 2008-09 as per Regulation 3.2 because the short fall has not been caused due to increased

sales in the area of the licensee. We direct that the State Commission may review the targets for the years 2008-09, 2009-10 and 2010-11 depending upon the availability of the power from renewable sources.

(e) Lack of uniformity in principles adopted by the Commission by not incentivising the Appellant for achieving better distribution loss target but penalizing for not being able to achieve the target transit loss.

38. It has been contended by the Appellant that whereas the Commission has considered the approved values of coal transit loss in which the Appellant has under-performed due to factors beyond its control, the Commission has considered the actual values during the truing up of distribution losses where the Appellant has outperformed over and above the approved loss level. Learned counsel for the Appellant argued that the Commission ought to have followed the regulations which require consideration of norms to arrive at incentives where the Appellant has outperformed the approved values.

39. Learned counsel for the Appellant asserted that the coal transit loss of 1.40% for the generating stations at Gandhinagar and Wanakbori power stations cannot be the basis for comparison with the transit losses in respect of the Appellant because whereas the Appellant procures coal directly from the mines, Gandhinagar and Wanakbori power stations are using washed coal. She urged that due consideration should be given on the ground of the type of coal transported in respect of Appellant.

40. As far as the distribution losses are concerned, absence of provision for sharing of gains and losses in the terms and conditions of tariff pleaded by the Commission cannot be held against it as the Regulation 66 enables the Commission to incentivise the distribution licensee for performance better than target specified by the Commission. Learned Counsel also refuted the plea of the Commission that as capital expenditure is being borne by the beneficiaries, the benefit of efficiency accrued

should be passed on to the consumers. She said as far as capital expenditure is concerned it is being borne by the beneficiaries in the entire supply chain of the power sector. Reduction of distribution losses requires efforts like strict timely vigilance, identification of loss area etc. in addition to the capital expenditure. She said that Section 61 of The Electricity Act provides for rewarding efficiency in performance. In view of this the Commission ought to have allowed the claim of the Appellant for the incentive for reduction of distribution losses achieved beyond the approved values.

41. Per contra the Commission has pleaded that the GERC terms and conditions of Tariff Regulations, 2005 stipulate that the coal transit losses in case of non pit head stations is 0.8% and that the Regulations provide certain conditions for which the Commission made deviation from the norm specified in the Regulations. Learned counsel for the Commission submitted that the transit coal losses of 3.88% for the year 2005-06, 1.95% for FY 2006-07 and projected loss at 2.58% for the year

2007-08 is much less than 3.39% claimed by the Appellant for the year 2007-08. The Commission has approved the transit losses of coal as 1.4% in Petition No. 915 of 2007 which is much higher than normative loss of 0.8%. In petition No. 939 of 2008 the Appellant had claimed transit loss as 3.39% which is much higher than the approved transit loss and, therefore, the Commission limited the same to 1.4% as approved in petition No. 915 of 2007. Any further deviation from the norm will affect the consumers adversely and hence has not been allowed.

42. Learned counsel for the Commission stated that as per the Regulations 2005 there is no provision regarding sharing of gain/loss. The Commission had approved T&D loss level at 9.26% for the year 2007-08 based on the submissions made by the appellant. The Commission, at the truing up stage, has approved the actual T&D Losses as 8.75%. It has been urged that the Commission has approved substantial amount of capital expenditure towards creation of new/renovation of network for improvement of the system and therefore, the gains accruing

from the capital expenditure made by the licensee must be passed on to the consumers.

Analysis and decision

1. Coal Transit Losses:

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.

2. Distribution Losses:

44. Appellant has achieved T&D losses of 8.75% against the approved T&D losses level of 9.26% for the year 2007-08. The Commission has not given any benefit to the Appellant for better performance on the plea that as per the Regulations there is no provision regarding sharing of gain/loss. Regulation 66 enables the Commission to incentivise the distribution licensee for performance better than target specified by the Commission. Section 61 of The Act also provides for rewarding efficiency in performance. Extract from GERC Regulation 66 and Section 61 of The Act are given below:

" 61. Tariff regulations.- 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:-

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(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;

……"

GERC Regulation 66: Principles, terms and conditions for determination of tariff along with their application for Distribution Licensee.

"The tariff shall be fixed in such a manner that a licensee ordinarily in any financial year will earn a

permissible return which shall comprise of 14% on equity invested into capital expenditure (apportioned to the quantum for the purpose of performing the business electricity in the present debt equity on structure) plus permitted incentives minus penalties leviable under the Act/Regulations for that year. The incentives would result from normative targets on Aggregate Technical and commercial losses (AT&C) for the licensee. The Commission would define the AT&C targets in line with the regulation on Multi Year Tariff principles.
……"

45. As pointed out by the learned counsel for the Appellant capital expenditure is borne by the beneficiaries in the entire supply chain of the power sector and that reduction of distribution losses requires efforts and therefore, needs to be rewarded. In our view the Regulations incentivise performance better than the norms and disincentivise performance below norms of AT&C loss level. Therefore, we are not in agreement with the plea of the State Commission that the gains of efficiency accrue from the capital expenditure made by licensee and therefore, must be passed on to the consumers. Capital expenditure is anyway made in the entire supply chain.

46. In this view of the matter we direct that the Commission should decide sharing of the gains of efficiency between the Appellant and the Consumers as provided for in Regulation 66 of the State Commission (Supra).

(f) Disallowance of Income Tax to earn ROE as post tax.

47. Learned counsel for the Appellant has submitted that it had claimed Income Tax at applicable tax rate (including the stipulated surcharge and education cess) so as to provide post tax regulatory return of 14%. She alleged that the Commission has erred in construing provisions of Regulation 66 of the Commission. The Commission has considered Regulation 66(20) of the Tariff Regulations to hold that all taxes on income and profit shall be on permissible return relating to the business of electricity as allowed by the Commission. She averred that provisions of Regulation 66(20) cannot be read in isolation of Regulation 7 of the Regulations. It is undoubtedly clear that the Income Tax is a pass through item and return on equity is post tax. The Commission ought to have allowed the Income Tax so as to enable the Appellant to earn return on equity as post tax

in the truing of FY 2007-08 and the MYT control period. She said that it is an established practice throughout the country, even under the repealed statues relating to electricity, that ROE is post tax. Even the Commission itself has also considered ROE as post tax for the purpose of tax while determining tariff for wind energy generation in its order No. 2 of 2006 dated August 11, 2006. She said even the Central Commission approach paper of March 26, 2004 clarifies this issue. Even the recent Central Commission Regulations notified on January 19, 2009 also shed light on this aspect. The Commission in the impugned order has calculated income tax on the approved rates of return on equity which has resulted in a post tax return of 11.55% instead of the stipulated 14% return. She contended that Clause 5.1(a) of the National Tariff Policy stipulates that the state Regulatory Commissions may adopt rate of return as notified by Central Commission with appropriate modification taking into view the higher risk involved in distribution and that a uniform approach is desired in respect of return on investment.

48. Learned counsel for the Respondent Commission submitted that Income Tax has been allowed on approved return @ 33.99% including the stipulated surcharge and education cess, in terms of the Regulations. Any under-recovery or over-recovery of Income Tax is passed through on actual basis. He said that Central Commission Regulations, 2009 is not applicable in the case of Appellant and that the impugned order passed by the Commission in the present petition No. 939 of 2008 is in accordance with the provisions of the terms and conditions of the Tariff Regulations, 2005 and MYT Regulations, 2007 and that the Commission has adopted a uniform principle while deciding the case of the Appellant.

49. Learned counsel also submitted that the Appellant was to provide separate details for income from regulatory business on the basis of actuals and the same may be passed through.

Analysis and decision

50. Main contention of the Appellant is that whereas it had claimed Income Tax rate so as to provide it a post tax regulatory return of 14%, the Commission in the impugned order has calculated Income Tax on the approved rate of return on equity which has resulted in a post tax return of 11.55% instead of this stipulated 14% return. As the Appellant has submitted that provisions of Regulation 66 and Regulation 7 of the GERC (Terms and Conditions of Tariff) Regulations, 2005 have to be read together, relevant extracts of these two Regulations, are extracted below:

Regulation 66: Principles, terms and conditions for determination of tariff along with their application for Distribution Licensee.

> *"The tariff shall be fixed in such a manner that a licensee ordinarily in any financial year will earn a permissible return which shall comprise of 14% on equity invested into capital expenditure (apportioned to the quantum for the purpose of performing the business electricity in the present debt equity on structure) plus permitted incentives minus penalties leviable under the Act/Regulations for that year. The incentives would result from normative targets on Aggregate Technical*

and commercial losses (AT&C) for the licensee. The Commission would define the AT&C targets in line with the regulation on Multi Year Tariff principles.
……."

Regulation 7.1: Tax on Income.

Tax on the income streams of the generating company or the transmission licensee or the distribution licensee, as the case may be, from its core business, shall be computed as an expense and shall be recovered from the beneficiaries.

51. Regulation 7.1 states that tax on the income streams from the core business of the company shall be computed as an expense and the same shall be recovered from the beneficiaries. Regulation 66 stipulates that the tariff shall be fixed in such a manner that a licensee ordinarily in any financial year will earn a permissible return which shall comprise of 14% on equity. Here it is pertinent to advert to the following provision of the Income Tax Act, 1961 regarding Tax on Income.

"Income Payable " net of tax"

195. In a case other than that referred to in sub-section (1A) of Section 192, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then, for the purposes of deduction of tax under those provisions such

income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement."

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.

56. In the result Appeal is allowed in part to the extent indicated in paras 10,12,21,28,30,31,37,43,46 and 55. The State Commission is directed to reconsider the claims of the Appellant in view of our findings in these paras during the process of truing up to give effect to our findings at the earliest. No order as to costs.

57. Pronounced in the open court on the 23rd day of March, 2010.

(H.L. Bajaj)
Technical Member

(Justice M.Karpaga Vinayagam)
Chairperson

Reportable/non-reportable

GB
No. of corrections