

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 3 OF 2015

Dated: 29th October, 2015

**Present: Hon'ble Mr. Justice Surendra Kumar, Judicial Member
Hon'ble Mr. I.J. Kapoor, Technical Member**

IN THE MATTER OF

M.P. Power Management Co. Ltd.

Shakti Bhawan, Vidyut Nagar,

Jabalpur (M.P.) – 482008

Represented by its

Deputy General Manager (Regulatory)

..... Appellant

VERSUS

1. Central Electricity Regulatory Commission,

3rd & 4th Floor, Chandralok Building,

36, Janpath,

New Delhi – 110 001

..... Respondent No.1

2. Torrent Power Ltd.

(Unit- Sugan 1147.5 MW Power Plant),

Torrent House, Off Ashram Road,

Near Income Tax Circle,

Ahmedabad-380009

..... Respondent No.2/
Petitioner

3. Torrent Power Ltd.

(Unit – Ahmedabad Distribution),

Electricity House, Lal Darwaja,

Ahmedabad-380001

..... Respondent No.3

4. Torrent Power Ltd.

(Unit – Surat Distribution),

Torrent House, Station Road,

Surat – 395003

..... Respondent No.4

5. PTC India Ltd.

The Senior Vice President,

2nd Floor, NBCC Tower,

Bhikaji Cama Place,

New Delhi – 110066

..... Respondent No.5

Counsel for the Appellant	...	Mr. G. Umapathy Ms. R. Mekhala Mr. S. Nithya
Counsel for the Respondent(s)...		Mr. Amit Kapur Mr. Apoorva Misra Mr. Janmali Manikala for R-2

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The instant Appeal under Section 111 of the Electricity Act, 2003, has been preferred by M.P. Power Management Co. Ltd. (in short, the '**Appellant**'), against the Impugned Order, dated 1.10.2014, passed by the Central Electricity Regulatory Commission (in short, the '**Central Commission**') in Petition No. 221/GT/2013, whereby, the learned Central Commission has revised the Annual Fixed Charges for Torrent Power Ltd.'s (Respondent No.2) Sugan Power Plant (3 x 382.5 MW) located at Taluka Kamrej Distt. Surat for the period commencing from the date of commercial operation (CoD) of 1st block i.e. 19.7.2009 to 31.3.2014, in terms of the proviso to Regulation 6(1) of CERC (Terms and Conditions of Tariff) Regulations, 2009 (in short, the '**Tariff Regulations, 2009**')

2. The Torrent Power Limited, a power generating company/Respondent No.2 herein, filed a petition before the learned Central Commission for revision of annual fixed charges of Sugan Power Plant (1147.5 MW) for the period from the date of commercial operation to 31.3.2014-Truing up of tariff determined by order, dated 11.1.2010, in Petition No. 109/2009 in accordance with Regulation 6(1) of the Tariff Regulations, 2009, due to impact on account of variation in additional capital expenditure during the years 2009-10 and 2010-11 allowed, vide order, dated 11.1.2010, on projected basis. Regulation 6 (1) of the Tariff Regulations, 2009 provides as under:

"6. *Truing up of Capital Expenditure and Tariff*

(1) *The Commission shall carry out truing up exercise along with the tariff petition filed for the next tariff period, with*

respect to the capital expenditure including additional capital expenditure incurred up to 31.3.2014, as admitted by the Commission after prudence check at the time of truing up.

Provided that the generating company or the transmission licensee, as the case may be, may in its discretion make an application before the Commission one more time prior to 2013-14 for revision of tariff."

3. The learned Central Commission, while passing the impugned order, took the view that it would not be prudent to undertake truing-up of the O&M expenses based on actual, as prayed for by the Appellant and, further, due to deferment of some of the periodic inspections, the repair & maintenance works of the generating station of the Respondent No.2 having been deferred on account of which the actual O&M expenses (other than LTSA/LTMA) incurred for the generating station are less than the normative O&M expenses allowed. Accordingly, the normative O&M (LTSA/LTMA + Other O&M) expenses allowed by the Commission, vide order, dated 11.1.2010, in Petition No.109/2009 had been considered till the end of the tariff period i.e. upto 31.3.2014. In this view of the matter, the learned Central Commission, in the impugned order, decided not to undertake truing up of the O&M expenses based on actual as prayed by the Appellant before the Central Commission.

4. The main grievance of the Appellant in this Appeal is that the learned Central Commission, after hearing the parties, passed the impugned order and, while acknowledging the gain of Rs. 214.26 Crores on account of relaxed O&M norms, denied the truing up of O&M expenditure without any justification. Allowing O&M expenditure over and above the actual, by relaxing the norms is wholly unjust, erroneous and unreasonable and against the spirit of Section 61 of the Electricity Act, 2003. The Respondent No.2 filed the impugned petition, being Petition No. 221/GT/2013, before the Central Commission, praying for revision of tariff of Sugden Power Plant (1147.50 MW) for the period from date of commercial operation to 31.3.2014 on account of revision in capital cost due to

additional capital expenditure incurred from date of commercial operation to 31.3.2011. From the details of O&M expenditure submitted by the Respondent No.2/petitioner, it is evident that the Respondent No.2 earned net gain of about Rs. 214.26 Crores during July 2009 to March 2013 on account of relaxed O&M norms allowed by the learned Central Commission's order, dated 11.1.2010, passed in petition No. 109/2009.

5. The learned Central Commission, relying on the data provided by Torrent power, vide its order, dated 11.1.2010, passed in Petition No. 109/2009, while considering the prayer of the Respondent No.2, allowed relaxed O&M norms by exercising its power under Regulation 44 of Tariff Regulations, 2009. While relaxing the norms, the learned Central Commission directed the Respondent No.2 to maintain a detailed record of maintenance activities of O&M and to submit quarterly statement of O&M expenditure, to facilitate taking a view on O&M cost norms for the advanced class machine in future.

6. The Appellant is bulk procurer and bulk supplier of electricity in the state of Madhya Pradesh. The Respondent No.1 is the Central Electricity Regulatory Commission, which is authorized and empowered to discharge functions under the various provisions of the Electricity Act, 2003. Respondent Nos. 2 to 4 are the power generating companies and the Respondent No.5 is the trading company.

7. The relevant facts for the purpose of deciding this Appeal are as under:

- (a) that the Appellant is a Government Company of State of Madhya Pradesh, engaged in the business of bulk procurement and bulk supply of electricity in the state. The Appellant is having Power Purchase Agreement (PPA) with the Respondent No.2 for purchase of 100 MW power from its Sugan Combined Cycle Gas Power Plant having a capacity of 1147.50 MW located at Taluka Kamrej, Distt. Surat.

- (b) that the plant of the Respondent No. 2 was commissioned on 15.8.2009. On commissioning of the plant, the Respondent No.2 had filed Petition No.109/2009 on 12.6.2009 praying for determination of tariff of the plant for the period from the date of commercial operation (COD) of 1st block up to 31.3.2014 and further praying for higher O&M norms on the ground that plant was having advance F Class turbines, requiring extra care and higher Long Term Maintenance Agreement (LTMA)/Long Term Service Agreement (LTSA) cost etc. and further stated that the higher O&M cost will be compensated by higher efficiency and the result would be a net gain of paisa 4 per unit of electricity.
- (c) that the Appellant filed its reply in Petition No. 109/2009 before the Central Commission opposing the prayer for grant of higher O&M charges above the normative O&M charges. The Central Commission, vide its order, dated 11.1.2010, in Petition No. 109/2009, relying on the data provided by the Respondent No.2, allowed relaxed O&M norms by exercising its power under Regulation 44 of Tariff Regulations, 2009. However, while relaxing the norms, the Central Commission directed the Respondent No.2 to maintain detailed record of maintenance activities of O&M and to submit quarterly statement of O&M expenditure, so as to facilitate Central Commission to take views on O&M cost norms for the advanced class machine in future. Since, at the time of order, 11.1.2010, no previous data for class F turbine was available and the relaxation in norms was allowed considering net resultant gain of paisa 4 per unit, the order, dated 11.1.2010, was not challenged.
- (d) that the Respondent No.2, a power generating company, thereafter, filed impugned petition, being Petition No. 221/GT/2013 before the Central Commission on 16.9.2013, praying for revision of tariff of Sugden Power Plant (1147.50 MW) for the period from CoD to 31.3.2014 on account of revision in

capital cost due to additional capital expenditure incurred from CoD to 31.3.2014.

- (e) that the learned Central Commission directed the respondent no. 2 to submit details of actual O&M expenditure during the hearing of the impugned petition.
- (f) that the Respondent No.2, vide affidavit, dated 7.10.2013, submitted details of O&M expenditure before the Central Commission, which depicted that the Respondent No.2 earned a net gain of about Rs. 214.26 crores during July 2009 to March 2013 on account of relaxed O&M norms allowed by the Central Commission, vide its earlier order, dated 11.1.2010, in Petition No. 109/2009. This is clearly tantamount to unjust enrichment of the Respondent No.2 at the cost of consumers of electricity in the State of Madhya Pradesh. It was, therefore, prayed to limit the allowable O&M expenditure to actuals and to direct the Respondent No.2 to reimburse the excess O&M cost recovered by the Respondent No.2 along with interest to the Appellant.
- (g) that the Appellant, in its reply, dated 13.1.2014, in the impugned Petition No. 221/2103 contended that the Central Commission should revise normative O&M cost considering the actual O&M expenditure incurred and also should direct the Respondent No.2 to reimburse the excess O&M expenses with interest to the Appellant.
- (h) that the Central Commission, vide its Record of Proceedings, dated 6.3.2014, directed the Respondent No.2 to submit additional information with regard to the reasons for actual O&M expenses being lesser than the O&M expenses approved by the Commission with proper justification.
- (i) that the Central Commission, after hearing the parties, passed the impugned order, dated 1.10.2014, as stated above. It acknowledged the gain of Rs. 214.26 crores to the Respondent

No.2, a generating company, on account of relaxed O&M norms, but denied the truing up of O&M expenditure without any justification. According to the Appellant, allowing O&M expenditure over and above the actual by relaxing the norms, is erroneous, unjust and unreasonable and against the scheme of Electricity Act 2003.

- (j) that according to the Appellant, the Respondent No.2 has derived undue advantage on account of relaxation of O&M claims by deriving huge additional benefit at the cost and expense of the consumers. This would defeat the very purpose of tariff fixation which inter-alia entails reasonable compensation for cost of generation and not to derive exorbitant advantage on account of relaxation of norms at the cost of public at large who are required to pay the tariff.

8. We have heard Mr. G. Umapathy, the learned Counsel for the Appellant and Mr. Amit Kapur, the learned counsel for the Respondent No.2 and gone through the written submissions filed by the rival parties. We have deeply gone through the evidence and other material available on record including the impugned order passed by the Central Commission.

9. The only issue which arises for our consideration in the instant Appeal is ***whether the view of the Central Commission that it would not be prudent to undertake truing-up of the O&M expenses based on actuals, as prayed for by the Appellant/ MPPMCL and, further, due to deferment of some of the periodic inspections, the repair & maintenance works of the generating station having also been deferred on account of which the actual O&M expenses (other than LTSA/LTMA) incurred for the generating station are less than the normative O&M expenses allowed is legal, correct and just one?***

10. The following contentions have been made on behalf of the Appellant on this issue:

- (a) that from the details of O&M expenditure submitted by the Respondent No.2, a power generating company, a net gain of about Rs. 214.26 crores during July 2009 to March 2013 on account of relaxed O&M norms allowed by the Central Commission, vide its earlier order, dated 11.1.2010, in Petition No. 109/2009 has accrued to the Respondent No.2.
- (b) that the learned Central Commission has failed to appreciate that vide order, dated 11.1.2010, in Petition No. 109/2009, the Central Commission had allowed higher O&M expenses by exercising 'Power to relax' under Regulation 44 of the Tariff Regulations, 2009, due to which the Respondent No.2 had earned a net gain of about Rs. 214.26 crores during the period from July, 2009 to March, 2013 on account of relaxed O&M norms. This clearly tantamounts to unjust enrichment of the Respondent No. 2 at the cost of consumers.
- (c) that the Respondent No.2 has failed to give proper justification for the need for retaining excess O&M charges claimed as per relaxed norms.
- (d) that the Respondent No.2 has admitted that because of less gas availability, costlier R-LNG and due to scheduled/unscheduled outages the Sugden plant operated at lower EOH during the said period. As a result, (i) Certain service milestones and related expenditure under the LTSA/LTMA Contracts and (ii) O&M expenses towards Repairs and Maintenance accounts were deferred.
- (e) that the Respondent No.2 has tried to justify the retention of excess O&M expenditure on the basis of above vague conjectures and stating that "this expenditure shall be

incurred in immediate future”, which vague reasoning cannot be sustained and is liable to be rejected.

- (f) that the learned Central Commission, even after observing that the actual O&M expenses incurred by the Respondent No.2, the power generator, are less than the normative O&M expenses allowed, has decided not to undertake truing-up of the O&M expenses based on actuals.
- (g) that the approach of the Central Commission as recorded in the impugned order that it would not be prudent to undertake truing-up of the O&M expenses based on actuals, is illegal and unreasonable.
- (h) that non-truing-up of the O&M expenses by the impugned order, is contrary to the provisions laid down in Section 61 of the Electricity Act, 2003 and, in particular, safeguarding the interest of the consumers and the Appellant. The failure to direct the refund of the excess O&M expenses is wholly unjust, unfair and unreasonable and contrary to the Electricity Act, 2003. Further, it is mandatory for truing up of all expenses, especially the relaxed normative O&M cost which was allowed on the basis of exaggerated projection submitted by the Respondent No.2. On such truing up, if it is found that an excess amount has been paid on account of O&M to the Respondent No.2, the Central Commission ought to have directed for refund of the excess O&M expenses.
- (i) that allowing O&M expenditure over and above the actual by relaxing the norms is wholly unjust, erroneous and unreasonable and against the spirit of Electricity Act, 2003.
- (j) that it was the duty cast upon the Respondent No.2 for availing the benefit of relaxation of O&M norms to show that it has actually incurred higher O&M expenditures. On the contrary, the records produced by the Respondent No.2 before the

Central Commission make it abundantly clear that the actual expenditure is much lower than the relaxed norms allowed by the Central Commission. Thus, the Respondent No.2 is not entitled to avail the benefit of relaxation in O&M.

- (k) that the Respondent No.2 is fully responsible for the execution of the power project and there cannot be any benefit conferred on account of inefficiency of the Respondent No.2 in commissioning the project to its full potential. The submission of the Respondent No. 2 that idle capacity of the project led to the deferment of O&M expenses is not legally sustainable.
- (l) That the Respondent No.2 has relied upon the judgment reported in (2011) 11 SCC 34 in the matter of Punjab State Power Corporation Ltd. Vs. Punjab State Electricity Regulatory Commission & Ors and judgment of this Appellate Tribunal in Tata Power Company Ltd. (Transmission) vs. MERC to contend that the Central Commission has rightly allowed the excess O&M expenditure in view of the deferred liabilities to be incurred on account of LTSA/LTMA obligations. These rulings are wholly inapplicable in the facts of the present case. It is clear from these cited judgments that supply of electricity should be conducted on commercial principles keeping in view the interest of the consumers and at the same time, recovery of cost of electricity in a reasonable manner. In the instant case, the admitted higher O&M expenses by the Respondent No.2 would result in recovery of higher cost of electricity which would be against public interest.

11. **Per contra**, the following submissions have been made on behalf of the Respondent No.2:

- (a) that the learned Central Commissions has only deferred the truing up of O&M Expenses for FY 2011-12 to 2013-14 to the subsequent tariff period i.e. 2014-15 to 2018-19. Accordingly,

the O&M expenses of Torrent Power/Respondent No.2 will be trued up as and when the EoH Milestones for the Advanced Class Turbines are met.

- (b) that the earlier tariff order, dated 11.1.2010, had not been challenged and attained finality. It is trite law that the basis of Tariff Determination cannot be challenged at the time of truing up as held by this Appellate Tribunal nor does the Central Commission has the power to re-determine the tariff of Torrent Power retrospectively.
- (c) that the Appellant, having concealed the material fact, had enjoyed benefits for the past four years on account of the Advance Class Turbines equivalent to F Class Turbines on account of improved efficiency. The Appellant, by filing the present appeal, seeking to escape its liability to make payment of 0.17 paise per unit of energy to the Respondent No.2 in lieu of the relaxation of the O&M Norms whilst retaining the savings of approximately Rs 0.40 paise per unit of energy supplied from Torrent's Power.
- (d) that the increased O&M expenditure of the project is on account of advanced class turbines equivalent to F Class Turbines which require periodical service and maintenance. The Respondent No.2 has entered into a **Long Term Service Agreement ("LSTA")** and **Long Term Maintenance Agreement ("LTMA")** with the original equipment manufacturer i.e. Siemens AG Germany for periodical service and maintenance of the Turbines at certain milestones based on the Equivalent Operating Hours. ("*EoH*").
- (e) that the periodic maintenance of the Gas Turbines has been deferred due to idle capacity of the project resulting from scarcity of gas and unwillingness to off take power generated on the basis of **Re-gasified Natural Liquid Gas ("R-NLG")**.

Therefore, the Respondent No.2 could not achieve the milestones of the equivalent operating hours and has deferred the servicing and maintenance of the turbines.

- (f) that relaxation of O&M norms has not resulted in unjust enrichment to Torrent Power/Respondent No.2 and the same is not contrary to the Tariff Regulations 2009. The relaxation of the O&M norms are in accordance with the principles enshrined in Section 61 of the Electricity Act, 2003.
- (g) that the Appellant cannot approbate and reprobate benefits received from relaxation of O&M norms and challenge the relaxation of the same.
- (h) that the Appellant, in its rejoinder to Respondent No.2's reply has not denied that it has received the benefit of Rs 0.41 (forty one paisa) accrued to it.
- (i) that advanced Class Turbines equivalent to F-Class machines achieve efficiency levels in the Order of 50%-60% by targeting a firing temperature of around 1300 C. These technologies assist project developers to obtain competitive advantages in heat rate, emission performance and specific costs. In order to reduce, financial exposure to technical risk, long term service agreements are entered into in order to ensure availability and efficiency levels of operations of advance class machines.
- (j) that there is a significant technological difference between E Class and F Class Gas Turbines. F Class turbines have been designed for fuel firing temperature of the order of 1250 C-1320 C which is much higher than the E Class gas turbine with firing temperature of 1090 C -1100 C.
- (k) that the differential between the actual O&M expenditure incurred by the Respondent No.2 and the related O&M expenditure allowed to the Respondent No.2 is on account of

the fact that the Respondent No.2 had not been able to achieve the EoH milestones for reason beyond its control, and therefore, had to defer the maintenance of its Turbine.

- (l) that the Respondent No. 2 is not entitled to any O&M expenditure over and above what he has incurred. The nature of O&M expenses of the Respondent No.2 are such that such expenses will be incurred only when the project is run. Once the project is operated, the expenses towards O&M will be incurred. Therefore, it is not prudent to true-up tariff at this stage.

12. **Our consideration and conclusion:**

12.1 We have cited above the facts of the matter in hand, the contentions of the rival parties raised during arguments, hence, we do not feel any need to reiterate the same here again. Now, we proceed to the issue requiring our consideration in the matter. We have to examine whether the view of the Central Commission that it would not be prudent to undertake true-up of the O&M expenses based on actuals, as prayed for by the Appellant/ MPPMCL and, further, due to deferment of some of the periodic inspections, the repair & maintenance works of the generating station have also been deferred on account of which the actual O&M expenses (other than LTSA/LTMA) incurred for the generating station are less than the normative O&M expenses allowed is legal, correct and just one?

12.2 The main grievance of the Appellant in this appeal is that the learned Central Commission, in the impugned order, while acknowledging the gain of Rs. 214.26 Crores on account of relaxed O&M norms, has wrongly denied the true-up of O&M expenditure without any justification. Allowing O&M expenditure over and above the actuals, by relaxing the norms is wholly unjust, erroneous and against the spirit of section 61 of the Electricity Act, 2003. The Respondent No.2/petitioner

filed the impugned petition, being Petition No. 221/GT/2013, before the Central Commission, seeking revision of the annual fixed charges of Sugem Power Plant (1147.50 MW) for the period from date of commercial operation to 31.3.2014 on account of truing up of tariff determined by the order, dated 11.1.2010, in Petition No. 109/2009, in accordance with Regulation 6(1) of the Tariff Regulations, 2009, due to impact on account of variation in additional capital expenditure during the years 2009-10 and 2010-11 allowed, vide order, dated 11.1.2010, on projected basis.

12.3 The main contention of the learned counsel for the Appellant is that the Central Commission has failed to appreciate that vide order, dated 11.1.2010, in Petition No. 109/2009, the Central Commission had allowed higher O&M expenses to the Respondent No.2 by exercising 'power to relax' under Regulation 44 of Tariff Regulations, 2009, due to which, the Respondent No.2 had earned net gain of about Rs. 214.26 Crores during July 2009 to March 2013 on account of relaxed O&M norms which has caused unjust enrichment of the Respondent No.2 at the cost of the consumers. Further, contention of the Appellant is that the Respondent No.2/Torrent Power, had not given any proper justification for the need to retain excess O&M charges claimed as per relaxed norms. The Respondent No.2 had tried to justify the retention of excess O&M expenditure on the basis of less gas availability, costlier R-LNG and due to scheduled/unscheduled outages of the Sugem plant operated at lower EOH during the said period stating that this expenditure will be incurred in immediate future. The learned Central Commission, even after observing that actual capital O&M expenditure incurred by the Respondent No.2, the power generator, are less than the normative O&M expenses, had preferred not to undertake truing up of the O&M expenses based on actuals. The said approach of the Central Commission, in the impugned order, is unjust and unreasonable

12.4 One more contention of the Appellant is that the Respondent No.2 is fully responsible for the execution of the power project and there

cannot be any benefit conferred on account of inefficiency of the Respondent No.2 in commissioning the project to its full potential and the contention of the Respondent No.2 that idle capacity of the project had led to the deferment of O&M expenses is not legally sustainable.

12.5 Before we come to the conclusion in the matter, after analyzing facts and other material on record, we think it proper to reproduce the relevant part of the impugned order passed by the learned Central Commission:

“40. We have considered the submissions of the parties. It is observed that the actual O&M expenses incurred are less than the normative O&M expenses allowed and the reasons for the same are as under:

(a) The Long Term Service Agreement (LTSA) and the Long term Maintenance Agreement (LTMA) with the Original Equipment Manufacturer for Sugem project of the petitioner is for 12 years corresponding to Equivalent Operating Hours (EOH) of about 1,00,000 hours for each GT.

(b) The Commission had approved the normative O&M expense norm (in Rs/MW/Year) for LTSA/LTMA during 2009-14 based on the EOH of all the three Gas Turbines.

(c) Under LTSA/LTMA, periodic inspection such as Combustion, Hot Gas Path & Major Inspections is planned based on EOH. However, because of some loss of operating hours in this generating station for reasons such as reduction in availability of allocated domestic Gas, the unwillingness of beneficiaries to off-take capacity available on R-LNG and due to scheduled/unscheduled outages etc., the planned maintenance at the specified interval could not be undertaken. However, these inspections will be undertaken in subsequent period.

(d) The high availability and efficiency of the machines were guaranteed by the OEM based on these routine maintenance/replacements of critical components of GTs and Combustion chambers. The Commission had also taken cognizance of this high availability and efficiency guaranteed by the OEM and raised the bar of target availability for earning incentive from 85% to 88%. The petitioner will have to pay the cost of LTSA/LTMA as it has transferred the risk of any failure of machine to OEM and obtained guaranteed availability and efficiency of GTs.

That after passing of the impugned order, the Torrent Power, a generating company, filed Petition No. 523/MP/2015 seeking

revision of annual fixed charges of the Project (1147.5 MW) from the date of commercial operation to 31.3.2014 - Truing up of tariff determined by the impugned order, dated 1.10.2014, in Petition No. 221/GT/2013. The learned Central Commission, vide its subsequent tariff order, dated 25.6.2015, in the subsequent Petition No. 523/MP/2015 wherein it inter-alia held as under:

“43. We have examined the matter. In consideration of the submissions of the petitioner and since the petitioner will have to incur the remaining amount in the subsequent period, we are of the view that it would not be prudent to undertake the revision of the O&M expenses based on actuals, as prayed for by the respondent. It is also noticed, due to the deferment of some of the periodic inspections, the Repair & Maintenance works of the generating station have also been deferred on account of which the actual O&M expenses (other than LTSA/LTMA) incurred for the generating station are less than the normative O&M expenses allowed. Accordingly, the normative O&M (LTSA/LTMA+ Other O&M) expenses allowed by the Commission vide order dated 11.1.2010 in Petition No.109/2009 has been considered till the end of the tariff period i.e. up to 31.3.2014. This is however subject to the final decision of the Tribunal in the said appeal filed by the respondent MPPMCL.”

12.6 After careful consideration of the matter before us, we find that the learned Central Commission has deferred the truing up of O&M Expenses for FY 2011-12 to 2013-14 to the subsequent tariff period i.e. 2014-15 to 2018-19 and, accordingly, the O&M expenses of Torrent Power/Respondent No.2 will be trued up as and when the EoH Milestones for the Advanced Class Turbines are met. We, further, note that the Appellant had never challenged the earlier tariff order, dated 11.1.2010, passed by the Central Commission and the same had attained finality. It is trite law that the basis of Tariff Determination cannot be challenged at the time of truing up as held by this Appellate Tribunal. Even the learned Central Commission does not have any power to re-determine the tariff of the Respondent No.2 retrospectively.

12.7 The Appellant, in the case in hand, had enjoyed the benefits for the past four years on account of the Advance Class Turbines equivalent to F Class Turbines on account of improved efficiency. We also find that the increased O&M expenditure of the power project of the Respondent No.2 is

on account of advanced class turbines equivalent to F Class Turbines which require periodical service and maintenance. The Respondent No.2 has entered into a Long Term Service Agreement (“LSTA”) and Long Term Maintenance Agreement (“LTMA”) with the original equipment manufacturer for periodical service and maintenance of the Turbines at certain milestones based on the Equivalent Operating Hours. (“EoH”).

12.8 The records of the case, further, depicts that the periodic maintenance of the Gas Turbines of the Respondent No.2 has been deferred due to idle capacity of the project resulting from scarcity of gas and unwillingness to off take power generated on the basis of Re-gasified Natural Liquid Gas (“RNLG”). Therefore, the Respondent No.2 could not achieve the milestones of the Equivalent Operating Hours and had deferred the servicing and maintenance of the turbines. The relaxation of O&M norms has not resulted in unjust enrichment of Torrent Power/Respondent No.2 which cannot be said to be contrary to the Tariff Regulations 2009. We, further, note that the differential between the actual O&M expenditure incurred by the Respondent No.2 and the O&M expenditure allowed to the Respondent No.2 is on account of the fact that the Respondent No.2 has not been able to achieve the milestones based on the Equivalent Operating Hours for reason beyond the control of the Respondent No.2 and, therefore, had to defer the maintenance of the said Turbine. It is true that the Respondent No.2 cannot be held entitled to any O&M expenditure over and above the expenditure which has actually been incurred by the Respondent No.2 but, the nature of O&M expenses for the Respondent No.2 are such that such expenses will be incurred only when the project is operational/run. Once the project is operated, the expenses towards O&M will be incurred.

12.9 After deep consideration of the matter before us and testing the legality of the impugned order passed by the Central Commission, we do not find any illegality or perversity in the impugned order passed by the Central Commission because we are also of the same view as recorded by

the Central Commission in the impugned order that it would not be prudent to undertake the truing-up of the O&M expenses based on actual. The learned Central Commission has rightly refused to undertake the revision of the O&M expenses based on actual as prayed by the Appellant. Due to deferment of some of the periodic inspections, the repair & maintenance works of the generating station of the Respondent No.2 on account of which the actual O&M expenses (other than LTSA/LTMA) incurred for the generating station are less than the normative O&M expenses allowed. **In view of this, the sole issue is, therefore, decided against the Appellant by upholding the view of the Central Commission in the impugned order and the instant Appeal, being Appeal No. 3 of 2015, is liable to be dismissed.**

ORDER

The present Appeal, being Appeal No. 3 of 2015, is hereby dismissed and the impugned order, dated 1.10.2014, passed in Petition No. 221/GT/2013 by the Central Commission is hereby upheld. There shall be no order as to costs.

PRONOUNCED IN THE OPEN COURT ON THIS 29TH DAY OF OCTOBER, 2015.

**(I.J. Kapoor)
Technical Member**

**(Justice Surendra Kumar)
Judicial Member**

√ REPORTABLE/NON-REPORTABLE

vt