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

**(APPELLATE JURISDICTION)**

**APPEAL NO.33 OF 2015**

**Dated: 30th November, 2015**

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson**
**Hon'ble Mr. T. Munikrishnaiah, Technical Member.**

**In the matter of:-**

**STATE LOAD DESPATCH CENTRE,** )
Gujarat Energy Transmission )
Corporation Limited, Sardar Patel )
Vidyut Bhawan, Race Course, )
Vadodara – 390 007. ) **... Appellant**

**AND**

1. **GUJARAT ELECTRICITY REGULATORY COMMISSION,** )
6th Floor, GIFT-1, Road No.5-C, )
Gift City, Gandhinagar – 332 335. )

2. **OPGS POWER GUJARAT PRIVATE LIMITED,** )
6, Sardar Patel Road, Guindy, )
Chennai – 600 032. ) **... Respondents**

Counsel for the Appellant(s) : Mr. M.G. Ramachandran,
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal

Counsel for the Respondent(s) : Mr. Tushar Nagar
Ms. Meghana Aggarwal
Ms. S.R. Pandey
Mr. S.T. Anada (Reps.) for **R-1**

## J U D G M E N T

**PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI - CHAIRPERSON**

**1**. Appellant is the State Load Despatch Centre for the State of Gujarat (**"SLDC"**). It discharges functions under Sections 32 and 33 of the Electricity Act, 2003 (**"the Electricity Act"**). Respondent No.1 is the Gujarat Electricity Regulatory Commission (**"the State Commission"**). Respondent No.2 is the OPGS Power Gujarat Private Ltd. (**"OPGS"**), which is a generating company under the Electricity Act. It has set up a power plant of 2 x 150 MW = 300 MW located at Bhaderswar, District Kutch, Gujarat. In this appeal the SLDC has challenged Order dated 7/11/2014 passed by the State Commission in Petition No.1438 of 2014 read with Order dated 29/4/2014 passed in Petition No.1386 of 2013.

**2**. We shall narrate the facts of the case so that the question involved in this case can be easily understood. On 30/3/2005, the State Commission notified the Gujarat Electricity Regulatory Commission (Levy & Collection of Fees and Charges by SLDC) Regulations, 2005 (**"the said Regulations"**). The said Regulations provided for various aspects including the treatment of scheduling and system operation charges to be paid by open access customers. The said Regulations have been in effect from 30/3/2005. Regulation 4 of the said Regulations *inter alia* provides as under**:**

> *"4. Levy and collection of charges from Generating Companies and Licensees.....*
>
> *xvii Short term open access users of the Grid shall pay such scheduling and system operation charges as may be specified by the Commission.*
>
> *xviii Scheduling and system operation charges recovered from short-term open access users of the Grid shall not be considered in the determination of the charges of the SLDC."*

Thus in terms of the said Regulations, the scheduling and system operation charges are not to be considered in determination of charges of the SLDC.

**3.** In Case No.1386 of 2013, the State Commission by its Order dated 29/4/2014 dealt with the determination of fees and charges for the financial year 2014-15 of the Appellant in regard to its State Load Despatch Functions as well as truing up of the financials for the F.Y. 2012-13 and incidental matters such as mid-term review for the F.Ys. 2014-15 and 2015-16 of the Business Plan. By this order the State Commission while dealing with the SLDC fees and charges *inter alia* decided that such fees and charges under the said Regulations are liable to be adjusted in the revenue requirements of the Appellant in its capacity as SLDC. The State Commission approved the annual charges of SLDC at Rs.1860.51 lakhs for the F.Y. 2014-15 besides Grid connection fees at Rs.10,000/-. The relevant extract of the said order is as follows:

*"The Commission, after detailed examination of the audited annual accounts for FY 2012-13, found that the other Income of SLDC is Rs. 108.72 Lakh, which includes Rs.6.20 Lakh towards interest on staff loans & advances and Rs. 102.52 Lakh towards miscellaneous receipts. The Commission observed that the petitioner has not considered the income from scheduling charges and application charges for Short-Term Open Access users amounting to Rs.946.59 Lakh in the Other Income. The Commission, however, has considered the above income as it forms a part of the total revenue of the SLDC consistent with the practice followed in the earlier years.*

*Table 4.16 : Approved Revenue from Other Income for FY 2012-13.*

| S.No. | Particulars | Approved in the MYT order for FY 2012-13 | Claimed in truing up for FY 2012-13 | Approved in truing up for FY 2012-13 |
|---|---|---|---|---|
| 1. | Interest on Staff Loans & Advances | 7.39 | 6.20 | 6.20 |
| 2. | Miscellaneous Receipts | 2.51 | 102.52 | 102.52 |
| 3. | Scheduling Charges | 106.79 | - | |
| 4. | Other Operating Revenue | | - | 946.59 |
| 5. | Other Operating Revenue | 31.12 | | - |
| | TOTAL | 147.81 | 108.72 | 1055.31 |

*The Commission approves the Other Income at Rs.1055.31 Lakh in the Truing up for FY 2012-13."*

According to the Appellant the decision of the State Commission dated 29/4/2014 was contrary to the provisions contained in the said Regulations which

specifically provided that the short term open access users of the Grid shall pay the scheduling and system operation charges specified by the State Commission and such charges shall not be liable to be adjusted in the determination of charges of SLDC.

**4.** SLDC filed Review Petition being Petition No.1438 of 2014 under Section 94 of the Electricity Act for review of the Order dated 29/4/2014 so far as it provided for adjustment of the charges under the said regulations in determination of charges of SLDC on the ground that there was error apparent on the record.

**5.** By Judgment and Order dated 7/11/2014 the State Commission decided the review petition by partly allowing the same on the issue of revising the figure of "other income". But the State Commission interpreted Clause 4(xviii) of the said Regulations to the effect that scheduling and system operation charges shall not be adjusted while determining the annual

revenue requirements **("ARR")** but are bound to be adjusted at the time of truing up. Following are the relevant observations of the State Commission:

> *"4. We have gone through the submission made by the petitioner. The petitioner emphasized on the stipulation made in Clause 4 (xviii) of the GERC (Levy and collection of Fees and Charges by SLDC) Regulations, 2005, which reads as under:*
>
> > *"xviii. Scheduling and system operation charges recovered from short-term open access users of the Grid shall not be considered in the determination of the charges of the SLDC."*
>
> *According to this Clause, the income received from Short Term Open Access users against scheduling and system operation charges should not be considered in determination of charges of the SLDC. The Commission vide its order dated 29.04.2014 has determined Fees and Charges of SLDC for FY 2014-15 and has determined ARR for FY 2015-16. The ARR determined for FY 2015-16 shall be considered along with Trued up ARR of FY 2013-14 for determination of Fees and Charges for FY 2015-16. Clause 4 (xviii) supra of said Regulations does not apply to Truing Up exercise.*
>
> *5. In view of the above, the plea of the petitioner for making correction in the figure of Trued up ARR for FY 2012-13 is not considered. However, the Commission finds it appropriate to consider Rs. 108.72 Lakh as other income instead of Rs.459.58 Lakh for determination of ARR for FY 2014-15 and FY 2015-16 as was proposed by the petitioner in its Petition No. 1386 of 2013. The revised ARR for FY 2014-15 and FY 2015-16 and revised SLDC Fees and Charges for FY 2014-15 are shown in the Tables below :*
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> *-----*
>
> *-----*
>
> *-----:"*

**6.** Being aggrieved by this order read with Order dated 29/4/2014 the Appellant has approached this Tribunal. The Appellant is aggrieved by the State Commission's decision that the scheduling and system operation charges recovered by the Appellant from short term open access users shall be adjusted at the time of truing up.

**7.** Mr. M.G. Ramachandran, learned counsel for the Appellant assailed the impugned order on the following grounds**:**

a) In terms of the said Regulations, the scheduling and system operation charges recovered from the short term open access users are not to be considered in the determination of charges of SLDC. Despite this, the State Commission has proceeded to hold that such charges shall not be adjusted while determining the ARR (at the beginning) but shall be adjusted at the time of truing up.

b) The decision of the State Commission is erroneous because there is no provision in the said regulations that the short term charges collected shall be adjusted at the time of true up.

c) It is well settled that the State Commission is bound by the statutory regulations ***(PTC India Limited v. Central Electricity Regulatory Commission***[1] *and* ***Haryana Power Generation Corporation Ltd. v. Haryana Electricity Regulatory Commission***[2]***).***

d) It is well settled that the truing up is not the stage where any new methodology can be adopted by the State Commission. The State Commission has to undertake only the financial true up and cannot change the principle followed at the time of initial determination of tariff. ***(Karnataka Power Transmission Company Limited v. Karnataka Electricity Regulatory***

[1] *2010 (4) SCC 603*
[2] *Appeal No.131 of 2011 dated 1.3.2012*

***Commission & Ors.***[3] *and* ***North Delhi Power Limited v. Delhi Electricity Regulatory Commission***[4]

e) The State Commission's interpretation that the adjustment done at the time of true up is only the verification of the actuals is not correct. Regulation 4 (xviii) is clear. Firstly it falls under the Chapter Levy & Collection of Charges. There is no further regulation providing for such collection to be on a provisional basis without adjustment in the beginning but subject to adjustment in future. Regulation 5 deals with the Billing and Collection. There is also no adjustments provided for under the Billing and Collection. In the absence of any regulations providing for adjustment at the time of true up, full effect needs to be given to the above mentioned Regulations 4(xvii) and (xviii).

f) Scheduling and system operations charges relate to services rendered by the SLDC and are specified by the

[3] *Judgment dated 4.12.2007 in Appeal No. 100 of 2007*

[4] *2007 ELR (APTEL) 193*

State Commission. These charges are fees for scheduling and system operations, energy accounting and collection and disbursement of fees etc done by SLDC. These are not unaccounted revenue being earned by SLDC and cannot be considered as Non-Tariff Income, particularly when the said Regulations themselves have decided these to be a service charge and do not provide for adjustment in any other revenue requirements. In the circumstances the impugned order is liable to be set aside.

**8.** We have heard Mr. Nagar, learned counsel appearing for the State Commission. We have carefully considered the written submissions filed by him. Gist of the submissions is as under **:**

a) Section 61 of the Electricity Act casts a compulsory duty on the State Commission to determine tariff. While doing so, the State Commission has to safeguard interest of the consumers, follow commercial/accounting principles and has to also consider economical use of resources.

b) The first commercial/accounting principle is that all regulated entities are to remain revenue neutral. The State Commission has to ensure that no expense or income goes unaccounted.

c) The Appellant's case that the scheduling and system operation charges is an accrual over and above all the accounted incomes / accruals is flawed on account of the following **:**

i) ARR is the determination of an estimated amount which is required for the smooth functioning of a regulated entity whereas true-up is the adjustment of all actual incomes and expenditures for the period for which ARR had been determined. While ARR is a process of determination of tariff, the true-up is based on actual audited income and expenditure statement of the entity. For an entity whose tariff is regulated the true up exercise is an

essential part (***North Eastern Electricity Supply Co. of Orissa Ltd. and Ors. v. Orissa Electricity Regulatory Commission and Ors***.[5]) Hence at the stage of true-up the State Commission has to account for any accruals / incomes booked by the regulated entity. However as per the mandate of Regulations 4 (xvii) and (xviii) the State Commission has rightly considered the income in terms of scheduling and system operation charges.

ii) Regulations framed by the State Commission cannot hold hostage the ability of the State Commission to perform its functions as per the principles laid down under Section 61. The Electricity Act does not say that the tariff can only be determined subject to the regulations. Judgment of the Full Bench of this Tribunal in ***M/s Siel Limited Vs. PSERC and Ors, Appeal No. 4, 13, 14, 23, 25, 26, 35, 36, 54 & 55 of 2005*** supports this proposition.

[5] Appeal Nos. 77, 78 and 79 of 2006, Order dated 13.12.2006

d) The State Commission, in its role as a sector regulator/accountant is duty bound to take into account and adjust any accruals/incomes of the regulated entities at the time of truing up exercise. Any failure of the regulations to address the same cannot be a ground for the State Commission to abdicate its statutory duty to follow commercial/accounting principle while exercising its statutory functions. The State Commission is therefore treating scheduling and system operation charges as part of "other income" which as per the accounting/commercial principles has to be mandatorily considered at the stage of truing up (Section 61 (b)). The appeal is therefore devoid of substance and is liable to be dismissed.

**9**. There is no dispute about the fact that as per Regulation 4 (xviii) of the said Regulations, the scheduling and system operation charges are not to be considered in determination of charges of the SLDC. Grievance of the Appellant is that the State Commission has misinterpreted Regulation 4 (xviii) and

held that scheduling and system operation charges recovered from the short term open access users are not to be adjusted while determining ARR, but shall be adjusted at the time of truing up.

**10.** We must begin with the Constitution Bench Judgment in ***PTC India***. In that case the Constitution Bench was *inter alia* considering whether capping of trading margins could be done by the Central Electricity Regulatory Commission (CERC) by making a regulation in that regard under Section 178 of the Electricity Act. The Constitution Bench considered the CERCs power to make a regulation and the various areas enumerated in Section 79 (1) in which the CERC is mandated to take such measures as it deems fit to fulfill the objects of the Electricity Act. The Constitution Bench observed that a regulation under Section 178 is in the nature of a subordinate legislation. Having discussed what is subordinate legislation the Constitution Bench observed that the CERC can make a regulation fixing a trading margin under Section 79 (1) (f), but making of a regulation in that regard is not a pre-condition

to the CERC exercising its powers to fix a trading margin under Section 79(1)(f). The Constitution Bench clarified that if however the CERC in an appropriate case makes a regulation fixing a cap on the trading margin under Section 178, then whatever measures the CERC takes under Section 79(1)(j) have to be in conformity with it. It is clear from the reasoning of the Constitution Bench that even the State Commission is mandated to follow its regulations if they are in place and cannot sidetrack them or ignore them. Measures it takes must be in tune with and in conformity with the regulations. The relevant paragraphs of ***PTC India*** need to be quoted **:**

> *"54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide ranging responsibilities and objective inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76 (1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Section 76 (1) and 79 (1) one finds that Central Commission is empowered to take measures / steps in discharge of the functions enumerated in Section 79 (1) like to regulate the tariff of generating companies, to regulate the inter-State*

*transmission of electricity, to determine tariff for inter-state transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79 (1), therefore, have got to be in conformity with the regulations under Section 178.*

*55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a pre-condition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject matter of challenge before the Appellate Authority under Section 111 as the levy is imposed by an Order / decision making process. Making of a regulation under Section 178 is not a pre-condition to passing of an Order levying a regulatory fee under Section 79(1)(g). .....*

*56. .....*

*57.*

*58. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case to case basis, the Central Commission thought it fit to make a regulation which has a general application to*

*the entire trading activity which has been recognized, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate Legislation. Such subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an Order of the Central Commission under Section 79 (1) (j).”*

**11.** Mr. Ramachandran, learned counsel for the Appellant has rightly drawn our attention to the judgment of this Tribunal in ***Haryana Power Generation Corporation Ltd.*** where this Tribunal has held that the State Commission is bound by its regulations while fixing tariff. We may quote the relevant paragraph of the said judgment.

“*5. Bare reading of section 61 would make it clear that the State Commissions have been mandated to frame Regulations for fixing tariff under Section 62 of the Act and while doing so i.e. while framing such Regulations, State Commissions are required to be guided by the principles laid down in by the Central Commission, National Electricity Policy, Tariff Policy etc. It also provide that while framing the Regulations, the State Commissions shall ensure that generation, transmission and distribution are conducted on commercial principles; factors which would encourage competition and safe guard consumer’s interest.*

*Once the State Commission has framed and notified the requisite Regulations after meeting the requirement of prior publication under Section 181(3), it is bound by such Regulations while fixing Tariff under Section 62 of the Act and the Central Commission's Regulations have no relevance in such cases. However, the State Commission may follow the Central Commission's Regulations on certain aspects which had not been addressed in the State Commission's own Regulations. The Haryana Electricity Regulatory Commission has framed Terms and Conditions for determination of tariff for generation in the year 2008 and the State Commission is required to fix tariff as per these Regulations. However, as per Regulation 33 of the State Commission has power to relax any of the provisions of these Regulations after recording the reasons for such relaxation. "*

**12.** Present case can be examined in light of the above judgments. Regulation 4 (xvii) states that short term open access users of the Grid shall pay such scheduling and system operation charges as may be specified by the Commission. Regulation 4 (xviii) states that scheduling and system operation charges recovered from short term open access users of the Grid shall not be considered in the determination of the charges of the SLDC. Thus there is a clear embargo prescribed in Regulation 4 (xviii) on considering scheduling and system operation charges recovered from open access users in the determination of the charges of the SLDC. The

State Commission is bound by its regulations. All measures the State Commission takes in respect of determination of charges of the SLDC have to be in conformity with the said regulations particularly Regulation 4 (xviii). The impugned decision of the State Commission is therefore in teeth of ***PTC India***. Moreover there is no provision in the said regulations that the scheduling and system operation charges shall be adjusted at the time of true up.

**13**. The present case can be looked at from another angle also. In ***Karnataka Power Transmission Company*** this Tribunal explained what is truing up and why it is necessary. This Tribunal held that truing up is necessary because invariably the projections at the beginning of the year and actual expenditure and revenue received differ due to one reason or the other. This Tribunal however made it clear that truing up stage is not an opportunity for the Commission to re-think *de novo* on the basic principles, premises and issues involved in the initial projections of revenue requirements of

the licensee. Relevant observations of this Tribunal could be quoted.

> *"We have heard contentions of the rival parties. Basic issue that has to be decided is: whether or not the Commission was correct in carrying out the truing up of revenue requirements and revenues of KPTCL for the tariff period 2000-01 to 2005-06. Invariably, the projections at the beginning of the year and actual expenditure and revenue received differ due to one reason or the other. Therefore, truing up is necessary. Truing up can be taken up in two stages: Once when the provisional financial results for the year are compiled and subsequently after the audited accounts are available. The impact of truing up exercises must be reflected in the tariff calculations for the following year. As an example; truing up for the year 2006-07 has to be completed during 2007-08 and the impact thereof has to be taken into account for tariff calculations for the year 2007-08 or/and 2008-09 depending upon the time when truing up is taken up. If any surplus revenue has been realized during the year 2006-07, it must be adjusted as available amount in the Annual Revenue Requirement for the year 2007-08 or/and 2008-09. It is not desirable to delay the truing up exercise for several years and then spring a surprise for the licensee and the consumers by giving effect to the truing up for the past several years. Having said that, truing up, per se, cannot be faulted, and, therefore, we do not want to interfere with the decision of the Commission in this regard to clean up accounts, though belatedly, of the past. It is made clear that truing up state is not an opportunity for the Commission to rethink de novo on the basic principles, premises and issues involved in the initial projections of revenue requirements of the licensee."*

**14.** Similar view has been taken by this Tribunal in ***North Delhi Power Limited*.**

**15**. Mr. Nagar, learned counsel for Respondent No.1 fairly submitted that there is a lacuna in the said Regulations. He however submitted that the said lacuna will not come in the way of the State Commission in performing its duty as a sector regulator/accountant. We find it difficult to accept this submission, as we have already noted Regulation 4(xviii) clearly states that scheduling and system operation charges shall not be considered in the determination of the charges of the SLDC. So this is not a case where there is no regulation. If there is a regulation the State Commission has to adhere to it **(*PTC India*).** We are in respectful agreement with the view expressed by this Tribunal in ***M/s Siel Limited*** that the Electricity Act nowhere states that tariff can be fixed only after the regulations are framed. It is true that duty imposed on the State Commission to determine tariff could well be discharged without the regulations, if they have not been framed, by seeking guidance from the parameters laid down in Section 61 and where the concerned Commission fails in its public duty to frame regulations its inaction cannot be allowed to harm

the interest of the consumers, generators, licensees. But since Regulation 4 (xviii) is categorical that scheduling and system operation charges should not be considered in the determination of the charges of the SLDC the observations of this Tribunal in ***M/s Seil Limited*** are not attracted to this case. The State Commission is bound by its regulations. If the State Commission is of the opinion that there is a lacuna in the regulation it can amend it or issue a new regulation, but so long as a regulation is in the field it has to follow it and cannot get over it by any other methods.

**16.** Counsel for Respondent No.1 submitted that whereas ARR is the process of determination of tariff, the true up is based on actual audited income and expenditure statement of the entity. True up is the adjustment of actual incomes and expenditure for the period for which ARR had been determined and therefore the State Commission cannot be faulted for considering the scheduling and operation charges in the true up. We are not inclined to agree with the counsel. The State Commission will have to follow its regulations in letter and

spirit. If Regulation 4 (xviii) states that scheduling and system operation charges shall not be considered in the determination of the charges of the SLDC and if in view thereof the State Commission has not considered them in ARR, the State Commission cannot take them into consideration in true up. Such a course will be impermissible. Regulation 4 (xviii) does not make such distinction. Perhaps if there were no regulations stating how scheduling and system operation charges should be treated, the State Commission could have passed appropriate order in connection with them having regard to the provisions of the Electricity Act and other relevant considerations. But once there are regulations the State Commission must follow them. It is rightly contended by counsel for Respondent No.1 that the State Commission as a regulator or auditor has to determine tariff of regulated entities on commercial / accounting principles. It is also true that all regulated entities have to be revenue neutral. The State Commission has to ensure that no expense or income goes unaccounted. But for that purpose the State Commission

will have to frame appropriate regulations. If there is a lacuna it can always cure it by framing a new regulation.

**17.** Moreover, it is well settled that truing up exercise is only the adjustment of actual qua the estimated amounts and not a stage for introducing any new methodology or providing for any new adjustment not envisaged at the time of determination of revenue requirements on estimated basis. There is no regulation providing for such collection to be on a provisional basis without adjustment in the beginning but subject to adjustment in future. If the charges under Regulation 4 (xviii) cannot be adjusted at the time of determination of the revenue requirements in the initial stage, there cannot be any adjustment at the stage of truing up.

**18**. In view of the above, we allow the appeal. We set aside the impugned order dated 7/11/2014 as prayed to the extent it directs that scheduling and operation charges of the Appellant shall be adjusted at the time of truing up with a

direction to the State Commission to recalculate the tariff in terms of this order.

**19**. Appeal is allowed in the aforestated terms.

**20**. Pronounced in the Open Court on this 30th day of November, 2015.

**T. Munikrishnaiah**
**[Technical Member]**

**Justice Ranjana P. Desai**
**[Chairperson]**

√**REPORTABLE/~~NON-REPORTABALE~~**