Court-II

Appellate Tribunal for Electricity, New Delhi
(*Appellate Jurisdiction*)

Appeal No. 244 of 2015 and Appeal No. 246 of 2015

Dated : 03rd June, 2016

Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

In the Matter of:

Appeal No. 244 of 2015

The Tata Power Company Limited (G)
Bombay House,
24, Homi Mody Street,
Fort, Mumbai – 400 001
Maharashtra **... Appellant(s)**

Versus

Maharashtra Electricity Regulatory Commission
World Trade Centre,
Centre No.1, 13th Floor,
Cuffe Parade, Colaba,
Mumbai – 4000 005
Maharshtra **... Respondent(s)**

Counsel for the Appellant(s) : Mr. Amit Kapur,
Mr. Vishal Anand and
Ms. Nishtha Kumar

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan,
Mr. D.V. Raghuvamsy and
Mr. Raunak Jain

Appeal No. 246 of 2015

The Tata Power Company Limited (T)
Bombay House,
24, Homi Mody Street,
Fort, Mumbai – 400 001
Maharashtra **... Appellant(s)**

Versus

Maharashtra Electricity Regulatory Commission
World Trade Centre,
Centre No.1, 13th Floor,
Cuffe Parade, Colaba,
Mumbai – 4000 005
Maharshtra **... Respondent(s)**

Counsel for the Appellant(s) : Mr. Amit Kapur,
Mr. Vishal Anand and
Ms. Nishtha Kumar

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan,
Mr.D.V. Raghuvamsy and
Mr. Raunak Jain

JUDGMENT

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

The Appeal Nos. 244 of 2015 and 246 of 2015 have been filed, under Section 111 of the Electricity Act, 2003, by The Tata Power Company Ltd. (the appellant herein) being dissatisfied against the Impugned Order dated 26.06.2015 in Case No.6 of 2015 and 5 of 2015, passed by the Maharashtra Electricity Regulatory Commission (in short the ***'State Commission'***) in respect of the generation and transmission business of the appellant to the limited extent as mentioned in Paragraph 1.2 (I), (II), (III) and (IV) in Appeal No.244 of 2015 and paragraph 1.2 (I), (II) and (iii) in Appeal No.246 of 2015, respectively.

2) These two appeals are confined to the following three issues:

(a) Disallowance of carrying cost,

(b) Incorrect methodology while considering Delayed Payment Surcharge,

(c) Wrong disallowance of Income Tax

Appeal No. 244 of 2015 has one additional following issue :

(d) Incorrect treatment of Operating and Standby periods of Unit-6 of the appellant.

Since these two appeals have been heard together, we decide them together by this common judgment.

3) The appellant, of Appeal No.244 of 2015, is aggrieved by the Impugned order claiming itself to be the victim of undeserved cash-flow, financial and business crisis caused primarily due to the acts and omissions of the learned State Commission.

4) Both these appeals have been filed by the same appellant, being The Tata Power Company Ltd. one relating to generation business and another transmission business of the appellant. The respondent, Commission, is the State regulator entitled to discharge various functions under the provisions of the Electricity Act, 2003.

5) **The relevant facts of Appeal No.244 of 2015 are as under:**

5.1) That on 10.06.2003, the Electricity Act, 2003 came into force pursuant to which the appellant is required to submit its Aggregate Revenue Requirement (***ARR***) and Tariff Petitions as per procedures outlined in Sections 61, 62 and 64 of the Electricity Act, 2003 and the governing regulations of the State Commission.

5.2) That the learned State Commission notified the Maharashtra Electricity Regulatory Commission (Multi Year Tariff) Regulations, 2011 (hereinafter referred to as the ***'MYT Regulations 2011'***) in the year 2011, which are applicable for determination of tariff in all cases covered under the MYT Regulations 2011 from 01.04.2011 till 31.03.2016.

5.3) That on 30.09.2011, the appellant had submitted its Multi Year Tariff business plan Petition, being Case No.166 of 2011 for the 2nd control period.

5.4) That on 30.11.2011, the appellant filed MYT Petition, being Case No.177 of 2011 (MYT Petition) seeking determination of ARR for the 2nd control period from FY 2011-12 to FY 2015-16.

5.5) That on 09.08.2012, the State Commission issued the business plan order, wherein the appellant was directed to file ARR for FY 2011-12 as per the Tariff Regulations 2005.

5.6) That being aggrieved by order dated 09.08.2012 of the State Commission, the appellant preferred Appeal No.182 of 2012.

5.7) That on 05.06.2012, the State Commission trued up expenses for FY 2011-12 and approved the ARR for FY 2012-13 to FY 2015-16 and retail tariffs and wheeling charges for the period 2013-14 to FY 2015-16 (***MYT Order***), observing that the State Commission would undertake mid-term review of the appellant's performance during the third quarter of FY 2014-15. The appellant, being aggrieved by MYT Order, filed a Review Petition No.90 of 2013 before the State Commission which was disposed of vide order dated 09.10.2013. This MYT order was also challenged by the appellant in Appeal No.212 of 2013 before this Appellate Tribunal and this Appellate Tribunal, vide judgment dated 27.10.2014, partly allowed the claim of the appellant and directed the State Commission to pass consequential orders in terms of the findings recorded therein.

5.8) This Appellate Tribunal vide judgment dated 28.11.2013 allowed the Appeal No.182 of 2012 and directed that the true up for FY 2011-12 would be done as per MYT Regulations 2011.

5.9) That on 01.01.2015, the appellant in pursuance to the directions of the State Commission in MYT order and directions issued by this Appellate Tribunal in Appeal No.212 of 2013 had filed Mid-Term Review Petition being Case No.6 of 2015 for revised truing up for FY 2011-12, 2012-13 and 2013-14, provisional true up of the ARR for FY 2014-15 and revised

ARR and tariff for FY 2015-16 in the generation business of the appellant. This Mid-Term Review Petition (Case No.6 of 2015) has been disposed of by the Impugned Order dated 26.06.2015 of the State Commission which is being assailed in the instant Appeal.

6) **The facts of Appeal No.246 of 2015, relating to transmission business of the appellant are as under:**

6.1) That on 10.06.2013, on coming into force of Electricity Act 2003, the appellant is required to submit its ARR and tariff Petitions as per provisions of the Electricity Act, 2003 and governing regulations of the State Commission. The State Commission notified MERC's (Multi Year Tariff) Regulations 2011) (MYT Regulations 2011) which is required for determination of tariff from 01.04.2011 till 31.03.2016.

6.2) That on 09.08.2011, the appellant filed Case No.168 of 2011, submitting its Multi Year Tariff Business Plan Petition for the second control period.

6.3) That on 28.06.2012, the State Commission issued the business plan order, wherein the appellant was directed to file ARR for FY 2011-12 as per MYT Regulations 2005. Being aggrieved by order dated 28.06.2012 of the State Commission the appellant filed Appeal No.158 of 2012.

6.4) That thereafter, the appellant filed Case No.168 of 2011 (MYT Petition) seeking determination of ARR for MYT period from FY 2011-12 to 2015-16.

6.5) That on 30.03.2013, the State Commission trued up expenses for FY 2011-12 and approved the ARR for FY 2012-13 to FY 2015-16 and retail tariffs and wheeling charges for the period FY 2013-14 to FY 2015-16 (MYT Order), observing that the State Commission would undertake the mid-term review of the appellant's performance during the third quarter of FY 2014-15.

6.6) Being aggrieved by MYT order the appellant filed Review Petition No.70 of 2013 before the State Commission which was disposed of vide order dated 16.08.2013.

6.7) That this Appellate Tribunal vide judgment dated 28.11.2013, allowed the Appeal No.158 of 2012 and directed the State Commission to true up FY 2011-12 as per the MYT Regulations 2011.

6.8) That the appellant thereafter filed Appeal No.133 of 2013 before this Appellate Tribunal and this Appellate Tribunal vide judgment dated 09.04.2014 partly allowed the claims of the appellant and directed the State Commission to pass consequential orders accordingly.

6.9) That on 14.08.2014, application was filed by the appellant for grant of transmission license, the State Commission granted transmission license to the appellant for a period of 25 years from 16.08.2014.

6.10) That on 29.12.2014, the appellant, pursuant to the directions of the State Commission in MYT Order and directions of this Appellate Tribunal filed, a Mid-Term Review Petition being Case No.5 of 2015 for approval of true up for FY 2012-13 and FY 2013-14, provisional true up of ARR for FY 2014-15 and revised ARR and tariff for FY 2015-16 for the transmission business of the appellant, which Petition has been disposed of by the Impugned order dated 26.06.2015, revising the tariff and true up expenses of the appellant against which the present appeal has been preferred.

7) We have heard Mr. Amit Kapur, Mr. Vishal Anand learned counsel for the appellant and Mr. Buddy A. Ranganadhan for the respondent, Commission. We have also gone through the written submissions filed on behalf of the appellant and perused the Impugned Order including the material available on record.

8) The following issues arise in both these appeals:

(a) Whether the State Commission is justified in disallowing the carrying cost?

(b) Whether the incorrect methodology has been applied by the State Commission while considering the delayed payment surcharge?

(c) Whether the State Commission has wrongly disallowed the Income Tax?

(d) Whether the State Commission has given incorrect treatment of operating and standby period of Unit 6 of the appellant?

Our issue-wise consideration and disposal:

Issue(a): Relating to disallowance of carrying cost:

9) On this issue, the following are the contentions raised by the appellant:

9.1) That the expenses or revenues wherein the State Commission had disallowed expenses and revenues based on incorrect principles which have been set aside by this Appellate Tribunal directing the State Commission to determine as per the correct methodology.

9.2) That the State Commission had taken wrong approach which was set aside by this Appellate Tribunal with a direction to re-determine the tariff, the same is not due to any fault of the appellant and accordingly the appellant cannot be penalized for the wrong approach adopted by the State Commission. The carrying cost is allowed based on the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow arranged by the transmission company or generating company from lenders/promoters/accruals is to be paid by way of carrying cost, as held by this Appellate Tribunal in a catena of judgments including judgment dated 15.02.2011 in Appeal No.173 of

2009 – *Tata Power Company Limited Vs Maharashtra Electricity Regulatory Commission*.

9.3) That the tariff regime formulated by the State Commission in the MYT Order was such that maximum recovery was to be allowed for the FY 2015-16. Deviating from the methodology and principle as given in the MYT Order, the State Commission erred in not giving the carrying cost on the gap of FY 2014-15.

9.4) That the learned State Commission had disallowed the carrying cost on the erroneous grounds which were summarized as under:

9.5) That the appellant's claims for carrying cost on account of various judgments of this Appellate Tribunal do not fall under the following categories, except a few which fall under :

(a) Accepted but recovery is deferred

(b) Claim not approved within a reasonable time and

(c) Disallowed by the State Commission but subsequently allowed by superior authority

9.6) That the State Commission has noted that for certain claims, the principles and methodology have been revised by this Appellate Tribunal, however, since the revised methodology and principles have been worked out subsequently and there had been no stay on the State Commission's order, the State Commission has erroneously not considered the carrying cost on such claims.

9.7) That in case this Appellate Tribunal finds no force in the methodology adopted by the State Commission, the said method is set aside and matter is sent for determination before the State Commission as per correct methodology/principles. In fact, had the learned State Commission applied correct methodology at the time of passing the order, then, in that case, there would not have been any reason for re-

determination of tariff and accordingly the question of carrying cost would not have arisen.

9.8) That in the event carrying cost, as claimed by the appellant is not allowed, the same would have a grave financial impact on the revenue of the appellant, which is evident from the table given below:

Impact of disallowances:

Rs. Cr.

Particulars	**Entitlement**	**Approved**	**Impact**
Appeal No. 104 of 2012 dated 28th November, 2013	123.41		
Amount due to the impact of Hon'ble ATE Judgment Appeal No. 158 + Impact of Appeal No. 133 of 2013 dated 9th April, 2014	37.63		
Disallowance of Carrying Cost	**161.03**	**4.69**	**156.34**

9.9) That this Appellate Tribunal should set aside the impugned findings and direct the State Commission to allow the carrying cost of past recoveries. On incentives for higher availability for FY 2012-13 and FY 2013-14 (in Appeal No.246 of 2015) the State Commission failed to consider the carrying cost on incentive in the same year in which the incentive was due, to a transmission utility, irrespective of the year in which they are allowed. Disallowance of carrying cost on incentive would have an adverse effect on the appellant.

9.10) In Appeal No.246 of 2015, the appellant's main contention is that in the event of carrying cost is not allowed to the appellant, the same would have a grave financial impact on the revenue of the appellant, which is evident from the following table :

Impact of disallowances:

Particulars	**Rs. (Crore)**
Appeal No. 104 of 2012 dated 28th November, 2013	40.45
Amount due to the impact of Hon'ble ATE Judgment Appeal No.	16.50

158 + Impact of Appeal No. 133 of 2013 dated 9th April, 2014	
Disallowance of Carrying Cost	56.95

9.11) That the learned State Commission had disallowed the carrying cost on incentive for FY 2012-13 and FY 2013-14. The State Commission, while computing the carrying cost, did not consider the incentive on the higher availability on the ground that the same would be allowed after true up for FY 2014-15. Hence, the State Commission has failed to consider that the expenses and incentives are required to be granted to a utility in the same year in which they become due and not in the year in which they are approved. Hence, this Appellate Tribunal after setting aside the findings of the State Commission in the Impugned Order should allow the carrying cost on past recoveries and FY 2012-13 and FY 2013-14.

10) **Per contra**, following are the contentions of the respondent Commission on this issue:

10.1) That vide Impugned Order, along with undertaking truing up for FY 2012-13 and FY 2013-14, the State Commission has approved the past recoveries arising out of judgments passed by this Appellate Tribunal and calculated carrying cost on it from the middle of that year till middle of FY 2015-16 i.e. the year in which such recovery is allowed to be recovered, in accordance with judgment dated 08.04.2015 in Appeal No.160 of 2012 and Batch in the matter of *Reliance Infrastructure* passed by this Appellate Tribunal.

10.2) That the claim of the appellant for carrying cost on account of recovery arising out of judgment passed by this Appellate Tribunal has been dealt with by the State Commission in paragraph 3.2.9.2 to 3.2.9.6.

10.3) That the State Commission has implemented the judgment of this Appellate Tribunal and consequently approved the past recoveries for the period from FY 2007-08 to FY 2010-11. The State Commission, while

doing so, has allowed carrying cost on certain elements such as de-capitalization of assets approved for FY 2008-09 and refinancing of loans. The methodology for calculation of income tax on PBT basis has been enunciated by this Appellate Tribunal subsequently. Therefore, the State Commission following the dicta laid down by this Appellate Tribunal in judgment dated 15.02.2011 in Appeal No.173 of 2009 in the circumstances under which the carrying cost is to be granted has not allowed any carrying cost while allowing this element.

10.4) That the State Commission has recorded reasons for not considering carrying cost on other elements such as disallowance of treasury income from '*gain on exchange*' as part of non-tariff income. Disallowance of Unit-4 heat rate and disallowance of Unit-6 heat rate.

10.5) That neither in the appeal nor in the submissions, the appellant urged that such reasons recorded in the Impugned Order are wrong. In fact, the thrust of the appellant's arguments is in the light of the tests laid down in Appeal No.173 of 2009, carrying cost ought to have been granted even though the reasons given by the State Commission for not allowing carrying cost have not been challenged. This is not the challenge of the appellant that the reasons recorded in the Impugned Order are wrong.

10.6) That it is evident from the Impugned Order that the claim for carrying cost does not fall into the tests laid down in the judgment in Appeal No.173 of 2009.

11) **Our consideration and conclusion on Issue No.(a):**

11.1) After going through the rival contentions on this issue, relating to disallowance of carrying cost on past recoveries, we find that the main contention of the appellant on this issue is that the State Commission had wrongly disallowed the carrying cost to the appellant which has been subsequently set aside by this Appellate Tribunal by laying down certain

principles for allowing carrying cost and thereafter when the appellant claimed the said carrying cost on past recoveries, as per the rulings given by this Appellate Tribunal, claiming that since the State Commission had adopted wrong methodology which was set aside by this Appellate Tribunal and there was no fault of the appellant, the appellant should be allowed the carrying cost on the past recoveries. Further contention of the appellant is that the carrying cost is allowed on financial principle that whenever recovery of cost is deferred, the financing of the gap in cash flow should be paid by way of carrying cost. One more contention of the appellant is if carrying cost is not allowed, the same would have financial impact on the revenue of the appellant. Since the State Commission had disallowed the carrying cost on incentive for FY 2012-13 and FY 2013-14 and the State Commission, while computing the carrying cost, did not consider the incentive on higher availability on the ground that the same would be allowed after true up for FY 2014-15, the expenses and incentives are required to be granted to a utility in the same year in which they become due and not to be deferred to an year in which they are approved.

11.2) We find from the Impugned Order, along with undertaking for true up for FY 2012-13 and FY 2013-14, that the State Commission has approved the past recoveries arising out of the judgment passed by this Appellate Tribunal and calculated carrying cost on the same from the middle of that year till middle of FY 2015-16, i.e. the year in which such recovery has been allowed to be recovered, in accordance with judgment dated 08.04.2015, in Appeal No.160 of 2012 & Batch, in the matter of Reliance Infrastructure passed by this Appellate Tribunal.

11.3) Further we have gone through the relevant paragraphs 3.3.9.2 to 3.2.9.6 of the Impugned Order and find that the State Commission had implemented the judgment of this Appellate Tribunal and consequently approved the past recoveries for the period from FY 2007-08 to FY 2010-2011. Further the State Commission while doing so, had also allowed

carrying cost on certain elements such as de-capitalization of assets approved for FY 2008-09 and refinancing of loans. In the appeal before us, the appellant is not arguing that the reasons recorded in the Impugned Order are wrong but simply assailing the findings on this issue. This is not a case of deferment of any recovery. In the matter in hand some methodology was adopted by the State Commission rightly or wrongly. This Appellate Tribunal in appeal while setting aside that so called wrong procedure or methodology, while setting aside the same has framed certain principles and guidelines. Due to these reasons all contentions of the appellant on this issue are without merits and are liable to be spurned. This issue is decided against the appellant in each of the appeals.

12) **Issue No.(b): Relating to incorrect methodology while considering delayed payment surcharge:** On this issue, following are the contentions raised by the appellant :

12.1) That the State Commission has wrongly considered the entire Delayed Payment Surcharge (DPC) as non-tariff income, ignoring the following facts:

"*(a) The working capital allowed under Regulation 35.1 only covers delay of two months in payment.*

(b) In cases the recovery of bills is delayed beyond the normative period allowed in working capital, the additional interest which is paid to manage such working capital should not be considered as part of non-tariff income and the cost of such additional financing should be allowed to be retained by the utility.

(c) If the same is allowed as part of non-tariff income, Ld. Commission is ultimately giving benefit to beneficiaries who

defaulted in payment at the first place. In fact, in the new MYT Regulations notified on 08.12.2015, Ld. Commission in Regulation 36.3 has specified that DPC and interest on Delayed Payment will not be considered as part of Non-Tariff Income.

(d) Accordingly carrying cost on the interest on delayed payment, beyond the period of 2 month should be recovered by the Appellant.

12.2) That the said approach is also against the principles upheld by this Appellate Tribunal in *NDPL Vs. CERC*, reported at 2010 ELR (APTEL) 891. As per Regulation 35.1 of the MYT Regulations 2011, for computing the normative working capital, the receivable is considered for two months. The appellant had received Rs.40.33 Crores towards Delayed Payment Surcharge in the FY 2012-13 and Rs.27.19 Crores in the FY 2013-14. The appellant utilized the DPS charges collected beyond two months from the billing dates to financing its own working capital requirements which does not get covered under the tariff order. The learned State Commission ought to have allowed to retain the expenses in accordance with the judgment dated 30.07.2010 passed by this Appellate Tribunal in Appeal No.153 of 2009, titled *NDPL Vs. CERC* (supra) towards financing cost of the principal amount outstanding which was due beyond normative period of two months at the prevailing market lending rate.

12.3) That as per regulatory framework the State Commission treats TPC-D and appellant as separate regulated entities. Accordingly, the Commission has not approved netting off by TPC-D and upheld levy of TPC-D as per the methodology given in the MYT Regulations 2011.

12.4) That the appellant has managed to fund non-payment of transmission tariff from its internal accrual. The State Commission failed to take into

consideration that internal funds also deserved interest. Merely because internal funds were used by the appellant, the appellant cannot be denied interest cost on the same as held by this Appellate Tribunal in *Tata Power Vs. Maharashtra Electricity Regulatory Commission* reported at 2009 ELR (APTEL) 0622.

12.5) That it is evident that only Rs.11.68 Crores of income received from surcharge levied on distribution utilities is to be treated as non-tariff income and the appellant should be allowed to retain Rs.28.20 Crores as a financing cost towards arranging working capital for delayed recovery beyond 45 days.

13) **Per contra**, the following are the contentions raised by the respondents:

13.1) That Regulation 43.1 does not provide any exclusion for income under interest on delayed payment on bills hence, the Commission has considered the actual delayed payment surcharge received from BEST under non-tariff income for the FY 2012-13 and 2013-14.

13.2) That as per appellant, the appellant ought to be compensated for the distribution companies' non-payment beyond 60 days and hence, whenever DPC, it has, in fact, received must be deemed to be funded by the appellant. If this contention is accepted that it has considered DPC collected beyond 60 days for meeting the working capital requirements, the normative working capital requirement claimed by the appellant should have been reduced to the extent of such amount, i.e. the DPC collected beyond 60 days should have been reflected in the working capital requirement computed by the appellant. In any case, the appellant's submission virtually admits that no further interest has been incurred to fund the DPC. The appellant in its arguments admit as under :

"4. The appellant utilized the DPC charges collected beyond two months from the billing dates for financing its own working requirements which does not get covered under the tariff order.

13.3) The State Commission in the Impugned Order (Appeal No.244 of 2015) has given the reasons for considering DPC as non-tariff Income. The relevant part thereof is as under:

"4.1.12.3 In reply to a query, TPC-G submitted that it has received the delayed payment charges (DPC) of Rs.40.33 Crore from BEST for FY 2012-13. As per clause 10.3 of the PPA between TPC-G and BEST, DPC is applicable for any payment delayed beyond 30 days. During the year, BEST has made certain payments beyond 60 days also. TPC-G has considered the DPC of R.19.06 Crore for FY 2012-13 collected from BEST for delay exceeding 30 days but less than 60 days under Non-Tariff Income. Since normative working capital requirement as per MYT Regulations allows receivables for 2 months, hence DPC of Rs.21.27 Crore collected beyond 60 days is considered for meeting working capital requirements.

4.1.12.4 The Commission notes that ***Regulation 43.1*** *specifies the various heads to be considered* ***under Non-Tariff Income, which specifically includes the "e) Interest on delayed or deferred payment bills;"*** *The Regulation does not provide any exclusion for income under interest on delayed payment of bills. Hence, the Commission has considered the actual DPC received from BEST under Non-Tariff Income for FY 2012-13. The Commission has allocated the DPC of Rs.21.27 Crore, which had been considered by TPC-G for funding of working capital requirements, to Units 4 to 7 and Hydro Stations to the extent of Rs.18.56 Crore, and to Unit 8 to the extent of Rs.2.71 Crore.*

4.1.12.5 The Commission has considered the Non-Tariff Income of Rs.32.39 Crore as submitted by TPC-G, and additional DPC of rs.18.56 Crore as discussed above. Accordingly, the Commission has considered Non-Tariff Income for FY 2012-13 as Rs.50.95 Crore. Further, the impact of DPC on Non-tariff income for Unit 8 is dealt in subsequent para."

13.4) That in the Impugned Order, the State Commission while truing up for the FY 2011-12, 2012-13 and 2013-14 has approved the interest on working capital as per the MYT Regulations based on the submissions of the appellant. Accordingly, the appellant's contention that the DPC charge collected beyond 60 days from the billing dates for financing its own working capital requirements, which does not get covered under the tariff order, is also devoid of any merit.

13.5) That the appellant seeks to rely upon the judgment dated 30.07.2010 in Appeal No.153 of 2009, titled *NDPL Vs. DERC* (supra) reported in 2010 ELR 891. This judgment has been distinguished and limited to an interpretation of Delhi Commission's Regulations by subsequent judgment dated 18.05.2015 in Appeal No. 180 of 2013, titled *UPCL Vs. UERC* in the following terms:

"***8. The Second issue is non-consideration of financing cost on LPSC.***

9. According to Appellant, <u>the State Commission while treating LPSC as non-tariff income did not allow financing cost incurred by the Appellant in infusing additional capital due to late payment of bills by the consumers. This approach of State Commission is in contravention of judgment of this Tribunal in Appeal No. 153 of 2009, NDPL Vs. DERC.</u>

10. *According to Learned Counsel for the State Commission Tariff Regulations, 2004 is not only allowing collection inefficiency but also* ***two months billing cycle as part of working capital requirements of the Appellant and interest is being allowed on the same.*** *Hence the delay in collecting the dues from consumers has been factored into while calculating working capital requirement. The Commission asked the Appellant to submit whether the actual short term loans raised by the Appellant exceeded the normative working capital and also to justify the increase in working capital requirement in view of approved collection efficiency target of the Appellant. However, no information on the same was submitted by the Appellant.* ***Judgment passed in Appeal no. 153 of 2009 is not applicable as norms of working capital specified by Delhi Commission does not include capital required to finance such shortfall in collection of current dues.*** *However, Uttarakhand Tariff Regulations includes this component. Collection Efficiency of Appellant for FYs 2010-11 and 2011-12 was 92.56% was 92.67% respectively against 96% and 97% approved by the Commission. Appellant had resort to short term borrowing due to collection inefficiency and the same cannot be passed on to the consumers. Appellant only recognizes portion of delayed payment surcharges as income under non-tariff income which is actually realized from the consumers on cash basis and not the entire amount of DPS billed on accrual basis.*

11. ***We find merits in the argument of the Learned Counsel for the State Commission and reject the contention of the Appellant…"***

14) **Our consideration and conclusion on Issue No.(b):**

14.1) We have detailed above the rival contentions of the parties on this issue No.(b), relating to incorrect methodology while considering delayed payment surcharge by the State Commission. We have carefully and deeply considered the contentions on this issue. The main contention of the appellant on this issue is that the State Commission has wrongly considered the entire delayed payment surcharge as non-tariff income, ignoring working capital allowed under Regulation 35.1, which covers delay of two months in payment, in case the recovery of bill is delayed beyond normative period allowed in the working capital, the additional

interest which is paid to manage the work, such working capital should not be considered as part of non-tariff income and after the same is allowed as part of non-tariff income, it would give benefit to the beneficiaries who defaulted in the payment. Hence, carrying cost on the interest on delayed payment beyond the period of two months should be allowed to be recovered by the appellant. The arguments of the appellant on this issue are without merit because if this contention is accepted then the normative working capital requirement claimed by the appellant should have been reduced to the extent of such amount, i.e. the delayed payment surcharge collected beyond 60 days then should have been reflected in the working capital requirement computed by the appellant. The appellant clearly admits that no further interest has been included to fund the delayed payment surcharge because the appellant utilized the delayed payment charges collected beyond two months from the billing date for financing its own working capital requirement which does not get covered under the tariff order.

14.2) We have gone through the Impugned Order, though of the same date, in these two appeals and we find that sufficient and cogent reasons are recorded in favour of the findings recorded therein. The learned State Commission in the Impugned Order, which is subject matter in Appeal No.244 of 2015, has given the reasons for considering delayed payment surcharge as non-tariff income. The relevant part of which is as under:

"*20. The State Commission having treated the late payment surcharge as a part of the non-tariff income for tariff determination, it would be proper on its part to allow the entire associated financing cost of the outstanding principal amount on which late payment surcharge was charged for the delay beyond the due dates. The Commission, instead of allowing interest/financing cost on the entire outstanding principal amount, has treated the late payment surcharge amount alone, which is nothing but interest cost*

for the delayed payment, as outstanding principal amount itself and allowed ***interest/financing cost on the said amount****. This is a wrong approach. Having considered the entire late payment surcharge as principal outstanding amount beyond due date as a non-tariff income, the* ***State Commission should have allowed the entire cost computed by applying an appropriate financing rate to the said principal amount on which late payment surcharge has been levied.*** *According to the Appellant, the financing cost should have been allowed on Rs.84.89 crores of principal amount which was outstanding beyond the due date rather than on Rs.15.28 crores which is late payment surcharge, as erroneously calculated by the State Commission …*

58. In view of the above discussion, the following is the summary of our findings:

(i) The normative working capital compensates the distribution company in delay for the 2 months credit period which is given to the consumers. The late payment surcharge is only if the delay is more than the normative credit period. For the period of delay beyond normative period, the distribution company has to be compensated with the cost of such additional financing. It is not the case of the Appellant that the late payment surcharge should not be treated as a non-tariff income. The Appellant is only praying that the financing cost is involved due to late payment and as such the Appellant is entitled to the compensation to incur such additional financing cost. ***Therefore, the financing cost of outstanding dues, i.e. the entire principal amount, should be allowed and it should not be limited to late payment surcharge amount alone.*** *Further, the interest rate which is fixed as 9% is not the prevalent*

market Lending Rate due to increase in Prime Lending Rate since 2004-05. Therefore, the State Commission is directed to rectify its computation of the financing cost relating to the late payment surcharge for the FY 2007-08 at the prevalent market lending rate during that period keeping in view the prevailing Prime Lending Rate."

14.3) Further it appears from the Impugned Order that the State Commission while truing up for the FY 2011-12, 2012-13 and 2013-14 has approved the interest on working capital as per MYT Regulations 2011, as per the submissions of the appellant. Accordingly, the appellant's contention that delayed payment surcharge collected beyond 60 days from the billing dates for financing its own working capital requirements which does not get covered under tariff order, is also devoid of merits.

14.4) We have also gone through the proposition of law laid down by this Appellate Tribunal in the case of *NDPL Vs. DERC* (supra) which is not applicable because the judgment relates to the regulations of DERC, hence, the said judgment has been distinguished and limited to an interpretation of Delhi Commission's Regulations by a subsequent judgment dated 18.05.2015 in Appeal No.180 of 2013 in the matter of *UPCL Vs. UERC*. This Appellate Tribunal, while dealing with the collection inefficiency and two months billing cycle as part of working capital requirement and interest has clearly observed that the judgment in Appeal No. 153 of 2009 in the matter of *NDPL Vs. DERC* reported in 2010 ELR 891 is not applicable because the norms of the working capital specified by Delhi Commission do not include capital required to finance such shortfall in collection of current dues. In view of the above discussions, we do not find any merit in the contentions of the appellant, hence, this issue is also decided against the appellant.

15) Issue No.(c), relating to wrong disallowance of Income Tax: On this issue, following are the contentions of the appellant :

15.1) That the learned State Commission, while computing the Income Tax allowable in the ARR for the tariff for the appellant has wrongly –

"(a) Excluded Efficiency Gain and Incentive in the total income of the Appellant since FY 2011-12 contrary to ***regulation 34.2 and 34.3 of the Tariff Regulations 2011:*** *and*

(b) Considered income based on the billed revenue instead of considering the income on accrual basis contrary to the ***Income Tax Act, 1961 and Accounting Standards I and II.***

(c) Not considering entire income while calculating ***Profit before Tax ("PB T")*** *contrary to judgment dated 15.02.2011 of this Hon'ble Tribunal in Appeal No. 173 of 2009* ***Tata power Co. Ltd. Vs. MERC (2011 ELR APTEL 336 at para 31-37)***

(d) Ld. Commission while calculating PBT has failed to consider the entire income of the Appellant, including the Revenue gap after truing up contrary to settled principles of computation as per MYT Order,

(e) Violated settled principles as laid down by this Hon'ble Tribunal whereby Ld. Commission has deviated from its own methodology at the stage of truing up which is impermissible in law, as held by this Hon'ble Tribunal in :

(i) ***Meghalaya State Electricity Board Vs. Meghalaya SERC*** *2010 ELR (APTEL) 940 at para 34; and*

(ii) ***Bangalore Electricity Supply Company Ltd. Vs. Karnataka Electricity Regulatory Commission****: 2009 ELR (APTEL) 1012 para 7."*

15.2) That the learned State Commission while computing the income tax from FY 2011-12 onwards had not considered efficiency gain and incentive in total income of the appellant. The State Commission, in fact, while calculating tax at the stage of true up had wrongly relied on the proviso to Regulation 34.1 of the MYT Regulations 2011. The said proviso is applicable at the time of determination of tariff and not at the stage of truing up. At the stage of determination of tariff, the efficiency gains and incentives cannot be ascertained. Accordingly, at the stage of determination of tariff, the said proviso will be applicable. Once the actual income is known, the tax thereon has to be determined at the stage of truing up in terms of Regulations 34.2 and 34.3 of the MYT Regulations 2011, tax on incentives and efficiency gains will have to be calculated and a pass through will have to be allowed as per Regulations 34.2 and 34.3 of the MYT Regulations 2011. As per these regulations, the income tax has to be allowed by the State Commission based on the income stream of regulated business. Evidently, the efficiency gain and incentives are income stream for appellant and are part of the regulated business.

15.3) That the learned State Commission by not considering the efficiency gain and incentive under Income Tax has allowed less tax in comparison with the actual tax which ought to have been paid by the utility based on the income and entitlement for a particular year. Since the efficiency gain and incentives are considered as legitimate revenue sources and part of tariff consumption, the appellant is mandated by law to pay tax of such income and accordingly, the State Commission should have allowed the tax on the efficiency gain and incentive.

15.4) That as per Section 145 of the Income Tax Act, 1961, income chargeable under the head "*Profits and Gains for business or profession, income from other sources*", shall be computed in accordance with the method of accounting regularly employed by the assessee. The Government has so far notified two Accounting Standards (AS) to be followed by the assessee

following accrual basis of accounting. These standards are more or less on the same pattern as AS-1 and AS-5 issued by the Institute of Chartered Accountants of India. Accordingly, the appellant has been consistently following accrual basis of accounting and the resultant profit and the computed income tax is also on accrual basis. Therefore, income tax should be allowed to the appellant on the income of the generation business accrued for that year.

15.5) The learned State Commission has wrongly considered the income based on billed revenue basis for each FY and not considered the income based on accrual basis.

15.6) that when the truing up is done for a particular year, the State Commission approves the actual ARR for that year which is an income for that business. For the period under consideration namely, FY 2007-08 to 2010-11, the truing up had already been done. Hence, considering the billed revenue as income amount is an incorrect approach of the State Commission. The learned State Commission while considering billed revenue has observed that income which is yet to be "*approved*" cannot be considered as income. Hence, change in methodology at the stage of true up is impermissible as held by this Appellate Tribunal.

15.7) That the learned State Commission has approved the income tax by considering only the billed revenue as total income for the relevant year and accordingly calculated the Profit Before Tax (***PBT***). Since the appellant is facing the revenue shortfall, the income tax is getting deferred. Hence, the approved ARR including income tax will be considered as income for the regulated business while computing income tax in any particular FY.

15.8) That the learned State Commission while calculating PBT has failed to consider the entire income of the appellant, including the revenue gap after truing up while ignoring the observations of this Appellate Tribunal

in *Tata Power Co. Ltd. Vs MERC* reported at 2011 ELR (APTEL) 336 and *Tata Power Co. Ltd. Vs. MERC*, MANU/ET/150/2013.

15.9) That this Appellate Tribunal in *Tata Power Co. Ltd.* reported at 2011 ELR (APTEL)336 while setting aside the aforesaid approach of the State Commission observed that the State Commission should have included income due to incentive and efficiency gains with return on equity and ought to have grossed up the tax computed by it and direct the State Commission to compute income tax entitlement of the appellant by replacing return on equity by regulating profit before tax based on income less permissible expense.

15.10) That the appellant filed its MTR Petition. The learned State Commission directed the appellant to submit income tax based on PBT i.e. income less permissible expense for the period FY 2007-08 to 2011-12 which was subsequently submitted by the appellant based on PBT method. The State Commission in the Impugned Order approved the income tax for the said period on PBT basis relying on the judgment of *Tata Power Co. Ltd. Vs. MERC* reported at 2011 ELR (APTEL) 336. However, while calculating the PBT, the State Commission had inadvertently only considered revenue recovered from sale of power as income. The State Commission has not considered income tax as payable on income, which is yet to be approved by the Commission and yet to be billed or recovered by the appellant but is a part of total ARR of the appellant. Hence, the methodology followed by the State Commission is against the principles laid down by this Appellate Tribunal in the aforesaid judgments. The State Commission has failed to consider that the revenue gap for generating companies does not get adjusted in the surplus in the subsequent year but is recovered within the same year as a separate revenue item, hence, the generation business revenue considered for income tax computation consists of only fixed and variable charges, without the gap surplus of the previous year unlike the transmission and distribution business. Non-consideration of this revenue will deprive the

appellant of the legitimate expenses of the income tax amount on such revenue.

15.11) That the learned State Commission ought to be directed to re-calculate the PBT after considering the entire income of the appellant including the income which is yet to be recovered as revenue gap, as installments in the same FY.

16) **Per contra**, the respondents have argued as under:

16.1) That regarding the issue of disallowance of income tax on efficiency gains, losses and incentives, while truing up the ARR for FY 2011-12 onwards, the first proviso to Regulation 34 of MYT Regulations 2011 clearly provides that "*no income tax shall be considered on the amount of efficiency gains and incentives*". Accordingly, the State Commission has determined the income tax on true up for FY 2011-12 onwards in line with the MYT Regulations 2011 and as such the argument of the appellant that efficiency gains and incentives being legitimate revenue sources and taxable in the hands of the appellant, should, therefore, be allowed as part of tariff, is liable to be rejected.

16.2) That this Appellate Tribunal in Appeal No.104 of 2012 held that any notional or actual income even within regulated business that is not permissible to be considered as regulatory taxable income cannot be allowed as it would amount to allowance of more than warranted regulatory tax liability/profits. Therefore, the MYT Regulations 2011 do not permit income tax on efficiency gains and incentives to be pass through in tariff. Therefore, the appellant's contention that such regulation applies only at the tariff determination stage and not at true up stage is not tenable in law because if the certain item cannot be allowed in tariff, it certainly cannot be allowed in true up.

16.3) That this Appellate Tribunal vide judgment dated 14.01.2016 in Appeal No.262 of 2014 in *PSTCL Vs. PERC*, while dealing with tax on income clearly held that as per the regulation of the State Commission the tax on income, if actually liable to be paid, shall be limited to tax on return on equity allowed excluding incentives. The State Commission in paragraphs 3.2.2.9 and 3.3.2.46, in the Impugned Order, has clearly recorded that for computing income tax liability, the State Commission has considered the regulatory PBT based on the income less permissible expenses and the other provisions of Income Tax Act. Accordingly, only revenue from sale of power is considered. Since income booked as future tariff adjustment has not been considered for truing up purposes. The State Commission has not considered income as payable on such income which is yet to be approved by the State Commission and yet to be billed or recovered. Income tax based on regulated PBT is payable on the actual income. Regarding the appellant's claim on disallowance of income tax due to non-consideration of revenue gap, the State Commission's submissions is that the revenue gap which is approved after truing up a particular year gets recovered in subsequent year. Accordingly, the same is reflected in the revenue in subsequent year and cannot be considered for the year under consideration of truing up.

17) **Our consideration and conclusion on issue No.(c):**

17.1) We have cited above the detailed contentions of the rival parties and relevant provisions of law. Hence, without reiterating the same, we are proceeding towards our own conclusion on this issue.

17.2) Before we proceed further we deem it necessary to reproduce Regulation 34, dealing with tax on income of the MERC (Multi Year Tariff) Regulations 2011 which is as under;

"***34. Tax on Income***

34.1 The Commission, in its MYT Order, shall provisionally approve Income Tax payable for each year of the Control Period, if any, based on the actual income tax paid on permissible return as allowed by the Commission relating to the electricity business regulated by the Commission, as per latest Audited Accounts available for the applicant, subject to prudence check:

Provided that no Income Tax shall be considered on the amount of efficiency gains and incentive earned by the Generating Companies, Transmission Licensees and Distribution Licensees.

Provided further that the Generating company, Transmission Licensee and Distribution Licensee shall bill the Income Tax under a separate head called "Income Tax Reimbursement" in their respective bills.

34.2 Variation between Income Tax actually paid and approve, if any, on the income stream of the regulated business of Generating Companies, Transmission Licensees and Distribution Licensees shall be reimbursed to/recovered from the Generating Companies, Transmission Licensees and Distribution Licensees, based on the documentary evidence submitted at the time of Mid-term Performance Review and MYT Order of third Control Period, subject to prudence check.

34.3 Under-recovery or over-recovery of any amount from the beneficiaries or the consumers on account of such income tax having been passed on to them shall be on the basis of income-tax assessment under the Income-Tax Act, 1961, as certified by the statutory auditors. The Generating Company, or the Transmission Licensee or Distribution

Licensee, as the case may be, may include this variation in its Mid-term Performance Review Petition and MYT Petition of third Control Period:

Provided that tax on any income stream from other than the business regulated by the Commission shall not constitute a pass through component in tariff and tax on such other income shall be borne by the Generating Company or transmission Licensee or the Distribution Licensee, as the case may be."

17.3) The main contention of the appellant is that the State Commission has wrongly excluded efficiency gains and incentives in the total income of the appellant since FY 2011-12 which is contrary to Regulation 34.2 and 34.3 of MYT Regulations 2011. Further, the State Commission has wrongly considered income based on the billed revenue instead of considering the income on accrual basis which is contrary to the Income Tax Act 1961 and AS-1 and AS-2. Further, the State Commission has wrongly not considered the entire income while calculating PBT contrary to the judgment cited above passed by this Appellate Tribunal. Further, the State Commission while calculating PBT has failed to consider the entire income of the appellant including revenue gap after truing up. One more contention of the appellant is that the State Commission has wrongly relied on the proviso to Regulation 34.1 of the MYT Regulations 2011 while calculating tax at the stage of true up. In such a situation, the proviso is applicable at the time of determination of tariff and not at the stage of truing up because at the stage of determination of tariff, the efficiency gain and incentives cannot be ascertained.

17.4) After going through the rival contentions on this issue and deeply studying the Regulation 34 of MYT Regulations 2011, we find that Regulation 34.1 requires that the Commission in its MYT order, shall provisionally approve income tax payable for each year of the control

period, if any, based on actual income tax paid on permissible return as allowed by the Commission relating to electricity business regulated by the Commission as per latest audited accounts available for the applicant/appellant herein, subject to prudence check subject to proviso that no income tax shall be considered on amount of efficiency gains and incentives earned by the generating company, transmission licensees and distribution licensees. There is one more proviso to this Regulation 34.1 which provides that the generating companies, transmission licensees and distribution licensees shall bill the income tax under a separate head called "*Income Tax Reimbursement*" in their respective bills.

17.5) Regulation 34.2 provides that variation between income tax paid and approved, if any, on the income stream of the regulated business of the said generating company, transmission licensee or distribution licensee shall be reimbursed to or recovered from them based on the documentary evidence submitted at the time of mid-term performance review and MYT order of third control period subject to prudence check. Thus Regulation 34.2 clearly provides that in case of variation between the income tax actually paid and approved, the said generation company, transmission licensee or distribution licensee shall be reimbursed to or recovered from them based on the documentary evidence subject to prudence check.

17.6) According to the appellant, Regulation 34.2 is applicable in the appeals in hand whereas the respondents submitted that Regulation 34.1 will apply. Regulation 34.2 clearly deals with the variation between income tax actually paid and approved, if any, subject to reimbursement or recovery on the submission of documentary evidence at the time of mid-term performance review, subject to prudence check. After going through various provisions of the regulation, we do not find any force in the contentions of the appellant on this issue because the learned State Commission in the Impugned Order has mentioned legal, cogent, just

and proper reasons for the said disallowance of income tax, relating to efficiency gains and losses and incentives etc. Further, proviso to Regulation 34.1 of the MYT Regulations 2011 clearly provides that no income tax shall be considered on the amount of efficiency gains and incentives earned by the generating companies, transmission licensees or distribution licensees who are further required to bill the income tax under a separate head called "*Income Tax Reimbursement*" in their respective bills.

17.7) The State Commission has rightly disallowed income tax on accrual basis by giving clear reasons in the Impugned Order stating that for computing income tax liability it has considered the regulated PBT on the income less permissible expense and other provisions of the Income Tax Act. The State Commission has considered only revenue from sale of power. Since income booked as tariff adjustment has not been considered for truing up purposes and State Commission has not considered income tax as payable on such income which is yet to be approved by the Commission and yet to be billed or recovered.

17.8) After going through the case law, cited by the appellant, the said case laws are not applicable to the facts of the matter in hand. They are on different aspects with which we are not concerned in these appeals. We are clearly of the view that income tax based on regulated PBT is payable on the actual income in such situation. In view of the above discussion, on this issue we approve the findings and view expressed by the State Commission in the Impugned Order. This issue is also decided against the appellant in each of the appeals.

18) Issue No.(d), relating to incorrect treatment of operating and standby period of Unit-6 of the appellant: On this issue, the appellant's contentions are as under:

18.1) That the State Commission while calculating auxiliary consumption for Unit-6 has failed to take into consideration the fact that :

"*(a) Ld. Commission has wrongly computed auxiliary consumption based on :-*

(i) Generation of only four months as denominator; and
(ii) Total auxiliary for the year as numerator.

(b) Ld. Commission failed to consider that Unit 6 was under economic shut down due to high cost of generation from 19.07.2013.

(c) Ld. Commission is taking two different stands for Unit 4 and Unit 6 despite the fact that both the Units are not operating. While Unit 4 is shut-down and is used as standby unit and Unit 6 is on economic shut-down.

*(d) Ld. Commission has ignored the Judgment in **Tata Power Co. Ltd. vs. MERC, [MANU/ET/0150/2013]"***

18.2) That the learned State Commission in the Impugned order dated 28.06.2013 for appellant's distribution business (Appeal No.244 of 2015) had for Bombay Electricity Supply and Tramways (BEST) had not considered any generation from Unit-6 during the period FY 2013-14 and 2014-15.

18.3) That both the distribution utilities requested the appellant to shutdown Unit-6 due to high cost of generation and accordingly, Unit-6 had been kept on economic shutdown from 19.07.2013 onwards. Pursuant thereto the appellant had prayed to the State Commission to relax and revise and determine separate norms in its MTR Petition, similar to the norms provided for Unit-4 where the Unit was also under economic

shutdown. The State Commission disallowed the appellant's prayer for Unit-6 relying on the judgment dated 27.10.2014 of this Appellate Tribunal in Appeal No.212 of 2013, titled as *Tata Power Co. Ltd. Vs. MERC*. The ratio of the judgment in Appeal No.212 of 2013 of this Appellate Tribunal could not be applied to the present case because at that stage Unit-4 was operating and therefore, relaxation was not given. In the present case, Unit-6 has been under economic shutdown for 08 months even then the State Commission has not considered any generation or sale of power from Unit-6. The State Commission should have relaxed and revised the norms considering extra ordinary situation of the Unit-6 of the appellant and by doing so the State Commission has deviated from its own methodology and past practice. In the similar circumstance, the learned State Commission in the business plan order for the appellant had relaxed and provided separate norms for Unit-4 which is under standby.

18.4) That the learned State Commission has failed to consider that since Unit-6 was not running for 8 months there was no generation available. However, there are certain auxiliaries which are essential to keep the unit in operating condition. The learned State Commission has ignored the aforesaid contention of the appellant and computed auxiliary consumption for Unit-6 based on the generation of only 4 months as the denominator and total auxiliary for the year as numerator. Unit-6 has been kept under economic shutdown and not complete shutdown to meet the occasional demand in Mumbai based on State Load Dispatch Centre's directions and hence, the gross generation for the year is very low in comparison to the annual auxiliary consumption. The methodology adopted by the Commission in the Impugned Order for the FY 2013-14, where annual generation is considered equal to generation in which the unit is in operating condition and auxiliary consumption for the total year, percentage of auxiliary would become high.

18.5) That the learned State Commission in the MYT order of Tata Power-D and BEST had not considered any generation for Unit-6 in spite of having power to remove difficulties by general or specific order as provided under Regulation 100 of the MYT Regulations 2011. The State Commission in exercise of that power should have prescribed norms for Unit-6 even when it was under economic shutdown.

19) **Per contra**, the following are the contentions made by the respondents on this issue No.(d):

19.1) The main contention of the appellant is that the State Commission has wrongfully computed auxiliary (i) generation of only 4 months as denominator and (ii) total auxiliary consumption as numerator. The appellant in Petition No.6 of 2015 had considered Unit-6 auxiliary consumption for only 4 months during FY 2013-14. According to the appellant itself since Unit-6 was in operation for only 4 months period, generation as well as auxiliary consumption for only 4 months need to be considered for computation of percentage auxiliary consumption for the purposes of sharing of gains/losses. In other words, the appellant seeks to neglect the auxiliary consumption for 8 months period in FY 2013-14.

19.2) That the learned State Commission in the Impugned Order, while dealing with the contention of the appellant relating to Unit-6 operation for 4 months period has in paragraph 5.1.2.13 of the Impugned Order, (subject matter of Appeal No.244 of 2015), has clearly observed that there is no provision in the MYT Regulation 2011 for lowering the performance norms for plant operation at low Plant Load Factor (***PLF***) and accordingly, the Commission has specified in the norms of auxiliary consumption for Unit-6 as 3.5% in the MYT order. The same view of the State Commission has been upheld by this Appellate Tribunal vide judgment dated 27.10.2014 in Appeal No.212 of 2013.

19.3) That the appellant in its notes of arguments, clearly admits that the said matter is covered against the appellant by judgment in Appeal No.212 of 2013 since the appellant's case in that respect is that the State Commission ought to have relaxed and revised the norms considering the extra ordinary situation of Unit-6. It would be inappropriate to ignore auxiliary consumption of balance 8 months period, considering the fact that truing up for the entire year and performance for the entire year needs to be considered while approving sharing of efficiency gains and losses.

19.4) That this contention of the appellant is wrong that the State Commission has considered generation of only 4 months during FY 2013-14 while computing percentage auxiliary consumption. The State Commission has considered generation as well as auxiliary consumption for the entire year viz. FY 2013-14.

19.5) That the appellant has further contended that the State Commission is taking two different stands for Unit-4 and Unit-6 despite the fact that both the units are not operating. Unit-4 is under shutdown and is used as standby whereas Unit-6 is on economic shutdown. The appellant's contention is that separate norms could have been allowed for Unit-6 under economic shutdown period in line with Unit-4. Since the modality of Unit-4 cannot be compared with modality of operation of Unit-6. Unit-4 is a standby unit and comes into operation in case of planned or forced outage of other units. Unit-4 is 150 MW unit installed in 1965. In the last few years there has been negligible generation from Unit-4. Also Unit-4, being a very old Unit, has issues relating to meeting the environmental norms and efficiency of operation. The appellant in recent years has not proposed any capital expenditure scheme for Unit-4. The same is not the case with Unit-6, which is a 500 MW Unit installed in 1990. Although Unit-6 is in operation at low plant load factor due to high cost of its generation and merit order dispatch status. High cost of generation is the only issue which is being faced by Unit-6.

19.6) It may be mentioned that the appellant had submitted many capital expenditure schemes for reliability, improvement, renovation and the modernization of Unit-6 recently. The State Commission has accorded in principle approval to such schemes accordingly, Unit-6 cannot be treated at par with Unit-4. Unit-4 is under total shutdown whereas Unit-6 is considered as operational unit and is required to meet the demand of Mumbai consumers in case of transmission constraints. The appellant never approached the Commission for settlement of Unit-4 charges. Thus the operational modalities on Unit-6 are different from those of Unit-4. Hence, identical treatment cannot be given to these two Units.

19.7) That the State Commission has never approved economic shutdown of Unit-6. The said decision was taken by the appellant itself after considering the request of the distribution licensee. Despite the fact that Unit-6 was out for 8 months for FY 2013-14, the appellant, based on its availability, had claimed full annual fixed charges for the FY 2013-14 and the Commission has approved the same. Thus the appellant has been duly compensated in the necessary expenditure. If separate norms are allowed under shutdown period that would lead to wrongful and unjustified additional burden on the distribution companies and consumers.

20) **Our consideration and conclusion on issue No.(d):**

20.1) We have dealt with the above contentions of the parties along with legal provisions. Without reiterating the same, we are proceeding towards our conclusion on this issue.

20.2) Since the appellant in its Petition in Case No.6 of 2015 (Impugned Petition) had considered Unit-6's auxiliary consumption for only four months during FY 2013-14, the Unit-6 was in operation for only 4 months period hence, generation as well as auxiliary consumption for

only 4 months needed to be considered by the State Commission for computation of percentage of auxiliary consumption for the purpose of sharing gains and losses. From the Impugned Order we find that the State Commission in 5.1.2.13 of the Impugned Order (which is subject matter of Appeal No.244 of 2015), has clearly observed that there is no provision in MYT Regulations 2011 for lowering the performance for plant operation at low PLF and the State Commission has specified the norm of auxiliary consumption for Unit-6 as 3.5% in the MYT order. The said view of the State Commission has been upheld by this Appellate Tribunal's judgment dated 27.10.2014 in Appeal No.212 of 2013. Accordingly, the State Commission has considered the approved normative auxiliary consumption of Unit-6 of 3.5% for truing up purposes. The Commission in the Impugned Order itself has noted that the TPC-G has computed the actual auxiliary consumption for Unit-6 only for 4 months and since Unit-6 did not dispatch power in the remaining 8 months because of higher generation cost, it would not be appropriate to relax the auxiliary consumption norms in the period in which there was no generation. The State Commission has worked out the auxiliary consumption for Unit-6 for 12 months considering actual quantum of auxiliary consumption for 40.46 MU and accordingly considered actual auxiliary consumption as 8.23% for computing the sharing of gains or losses. After going through various provisions of law, counter submissions of the parties and going through the judgment of this Appellate Tribunal in Appeal No.212 of 2013, we are of the view that this issue is clearly covered by the judgment in Appeal No.212 of 2013 pronounced by this Appellate Tribunal. We find merits and substance in the submissions put forth by the respondent State Commission. There is no merit in any of the contentions made by appellant on this issue. This issue is decided against the appellant.

20.3) Since all the issues have been decided against the appellant, the instant appeals are worthy of dismissal and the Impugned Orders there under are liable to be upheld.

O R D E R

Both these appeals, being Appeal Nos. 244 of 2015 and 246 of 2015, are hereby dismissed and the orders impugned there under are hereby upheld.

No order as to costs.

Pronounced in the open court on this ***03rd day of June, 2016.***

(T. Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~