In the Appellate Tribunal for Electricity New Delhi
(Appellate Jurisdiction)

APPEAL NO. 250 OF 2016 & IA NO. 899 OF 2017

Dated: 29th May, 2019

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

In the matter of :-

Adani Transmission (India) Limited
Adani House, Nr. Mithakhali Circle,
Navarangpura,
Ahmedabad – 380009 **... Appellant**

Versus

Maharashtra Electricity Regulatory Commission
World Trade Centre, Centre No. 1,
13th Floor, Cuffee Parade
Mumbai– 400 005 **...Respondent**

Counsel for the Appellant : Mr. Hemant Singh
Mr. Tushar Srivstava

Counsel for the Respondent : Mr. Buddy A. Ranganadhan
Ms. Stuti Krishn

JUDGEMENT

PER HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

1. The present Appeal has been filed by **M/s Adani Transmission (India) Limited** (hereinafter referred to as the **"Appellant**") under Section 111 of the Electricity Act, 2003 challenging the Order dated **28.06.2016** ("Impugned Order") passed by the Maharashtra Electricity Regulatory Commission (hereinafter referred to as the **"State Commission**"), in **Case No. 7 of 2016,** for Multi Year Tariff Petition seeking approval of True up of Aggregate Revenue Requirement (ARR) for FY 2013-14 and FY 2014-15 and Provisional True-up of ARR for FY 2015-16 in accordance with MERC (Multi Year Tariff) Regulations, 2011.

1.1 The present Appeal challenges the legality of the part of the Impugned Order passed by the Maharashtra Electricity Regulatory Commission in Case No. 7 of 2016, by which the said Commission reduced the Aggregate Revenue Requirement (ARR) claimed by the Appellant on account of following issue:

a. Non allowance of Capital Cost of Bus Reactors;

b. Considering Outstanding Delayed Payment Charges (DPC) as Non-Tariff Income for reduction of Allowed ARR;

c. Non allowance of Actual Operations & Maintenance (O&M) Cost; and

d. Disallowance of expenses incurred towards the demerger process.

2. The Appellant has raised the following Questions of Law for our consideration:

a. Whether the Impugned Order has been passed in violation of the provisions of the Electricity Act, 2003 and the applicable Multi Year Tariff Regulations, as promulgated by the Respondent No. 1 Commission itself?

b. Whether the Impugned Order has been passed in blatant violation of the State Commission's earlier orders on the determination of ARR of Transmission Licensees?

c. Whether the Respondent No. 1 Commission has acted in an arbitrary manner, de hors the provisions of the MYT Regulations, in disallowing the capital costs of the bus reactors for determination of ARR?

d. Whether the Respondent No. 1 Commission has incorrectly considered DPC as the non-tariff income of the Transmission Licensees for the purpose of determination of ARR?

e. Whether the Respondent No. 1, Commission has grossly erred in not allowing the Actual O&M cost to the Appellant for determination of its ARR?

f. Whether the Respondent No. 1, Commission has acted in an arbitrary manner by progressively reducing the O&M cost for the third control period, in terms of the MYT Regulations, 2015?

g. Whether the Respondent Commission has granted

differential treatment while allowing actual O&M cost in the matter of RInfra-D in Case No 9 of 2013 using power to relax?

h. Whether the Respondent No. 1, Commission has erred in disallowing the expenses incurred towards the demerger process carried out by APML despite the fact that the said demerger is required under the provisions of the Electricity Act, 2003?

3. In this Appeal, the Appellant, Adani Transmission (India) Limited (ATIL) is questioning the legality and validity of the Order dated 28.06.2016 passed by the Maharashtra Electricity Regulatory Commission, Mumbai in Petition No. 7 of 2016 in the case of Adani Transmission (India) Ltd. v Maharashtra State Distribution Company Ltd & Ors.

4. We have heard at length the learned counsel for the parties and considered carefully their written submissions and arguments put forth during the hearings. Following issues arise in the Appeal for our consideration:

ISSUE NO. 1: Non-allowance of Capital Cost of Bus Reactors (2x80 MVAR bus reactors along with associated bays at Tiroda Substation).

ISSUE NO. 2: Considering Outstanding Delayed Payment Charges (DPC) as Non-Tariff Income for reduction of Allowed ARR;

ISSUE NO. 3: Non allowance of Actual Operations & Maintenance (O&M) Cost

ISSUE NO. 4 : Disallowance of expenses incurred towards the

demerger process

OUR CONSIDERATION AND FINDINGS:

5. ISSUE NO. 1: Non-allowance of Capital Cost of Bus Reactors (2x80 MVAR bus reactors along with associated bays at Tiroda Substation).

5.1 The learned counsel for the Appellant submitted that the basis for Respondent Commission to disallow Capital Cost of Bus reactor is that the Bus Reactors were part of original scope of the generating station, and as such its cost has been factored in the generation tariff. The Appellant counsel further submitted that while disallowing the capital cost pertaining to such system, the Respondent Commission has compared it with assets created through grant or consumer contribution, and as such the capital cost of such assets cannot be allowed to the Appellant as pass through.

5.2 The Appellant has challenged decision of the Respondent Commission on the following grounds:

(a). In detailed Minutes of Meeting dated 26.12.2011, held between the Central Electricity Authority (CEA), Power Grid Corporation of India Limited (PGCIL), MSETCL and APML wherein requirement of Bus Reactor as part of Transmission System is recognised. The relevant extract of the same is as under.

"POWERGRID representative enquired about the provision of 2X80 MVAR bus reactor at Tiroda TPS switchyard by APML

and stated that this would be required for charging the Tiroda-Wardha (bypassed at Warora) 400 KV D/C quad line from both ends. Further provision of line / bus reactor at Warora would provide the flexibility of charging the Tiroda – Warora 400 KV D/c quad line from both ends. Managing Director, Adani Power Maharashtra Limited (APML) informed that the bus reactor at Tiroda is being provided and regarding the provision of line/bus reactors at Warora it would be sorted out with MSETCL"

(b). Based on the above referred MoM, the Appellant's counsel submitted that the Bus Reactors were considered as prerequisites by the system planners/ operators, namely the CEA, Central Transmission Utility (CTU) and STU for charging the Tiroda – Wardha and the Tiroda Warora line. Therefore, Bus Reactors were always envisaged for evacuation of power and not for generation of power and it could not have factored the same under the scope of Generation.

(c). In addition, the learned counsel for the Appellant also submitted the following documents to support its argument that the Bus reactors were always considered as part of transmission system.

i. Minutes of Meeting between CEA, PGCIL, MSETCL and APML.

ii. WRLDC's study Report.

iii. STU letters dated 09.11.2012 and 23.05.2016.

iv. Technical Study carried out by Dr. SA Soman, Indian

Institute of Technology, Mumbai

(d). Learned counsel further contended that the Respondent Commission "amended" the transmission license of the Appellant on 09.07.2015 in Case No. 136 of 2014 thereby making Bus Reactors as part of the transmission assets of the said Appellant. If the intention of the Respondent Commission was to not grant tariff for Bus Reactors, there was no requirement for "amendment" of the transmission license;

(e). Further, the above intention of the Respondent Commission to grant tariff of the Bus Reactors is evident from its order dated 03.07.2014 in Case No. 190 of 2013 wherein it was held that the cost of the Bus Reactors can be considered only upon amendment of transmission license and prudence check. Accordingly, upon the above observation of the Commission itself, the Appellant got the license amended by inclusion of Bus Reactors in Case No. 136 of 2014;

(f). Once license has been granted, the tariff has to be mandatorily granted as per Section 61 (b) of the Electricity Act, 2003;

(g). The Respondent Commission itself recognized that Bus Reactors were essential for smooth functioning and stability of the transmission system. Without the Bus Reactors, the generating station cannot reliably evacuate power through the transmission system;

(h). Several transmission projects have been carved out from a generation projects. Reference was made to the transmission line of M/s Jindal Power Limited (JPL), originating from JPL's generating station in Tamnar, Chhattisgarh wherein tariff has been given from date of grant of license, irrespective of whether the work was within the original scope or not.

(i). If the argument of the Respondent Commission is accepted, it will lead to absurdity as under the circumstance, no tariff could have been granted to these transmission systems wherein transmission system is originally envisaged as part of generating station;

(j). The Respondent Commission has wrongly compared the capital investment in Bus Reactors with assets created through consumer contributions/ grant. The above argument has no merit, as consumer contributions/grant is specific in nature for the purpose of creation of a particular asset, which cannot then be again passed through in tariff. However, in the present case there is actual capital investment and not a grant or contribution from consumers for creation of Bus Reactors;

(k). The Respondent Commission has wrongfully argued that the Appellant changed the balance sheet in order to show Bus Reactors as part of transmission business. In this regard, it is submitted that the Appellant only corrected its balance sheet in accordance with the accounting principles which

cannot be held against the Appellant. It is not relevant whether the transmission system was originally envisaged as part of generating station. What is relevant is that once license is granted for a transmission asset, the capital costs have to be allowed as part of tariff.

5.3 ***Per contra,*** the learned counsel for the Respondent Commission has made following arguments/submissions on the issue raised in the present Appeal for our consideration:

a) The main argument of Appellant is that once the transmission license is amended, the capital cost is always to be allowed by the Commission. It was vehemently submitted that in all the cases where asset become part of license, tariff is not required to be granted as the capital cost of such bus reactors has been funded through Capital Cost of generating Station, tariff of which is determined in accordance with Section 63. Since Capital Cost of Bus Reactors has already been funded through generating station, even after inclusion in the transmission license, capital cost cannot be allowed, as its funding is made by Generating Station. Learned Counsel clarified that in many cases, Government Grant is extended to licensees for creating infrastructure, where such assets funded through such grant is included to be part of license, but tariff for such asset is not allowed to the licensees, as they have not borne capital cost of such licensed asset.

b) The letter from the Chief Electrical Inspector granting

permission for the charging is the documentary evidence which is kept on record on affidavit by the Appellant showing that the Reactors are/were part of the Generating Switchyard. Further Approved Drawings of Generating Station Switch yard includes Two Bus Reactors, clearly establishes that Bus Reactors were part of Generating Station. Hence, the ruling of the Commission disallowing the capital cost of the Reactors is justified.

c) In respect of the audited extracts of APML-T (now ATIL)'s Balance Sheet for FY 2012-13, the Appellant has submitted that, originally, APML was granted Transmission Licence to establish lines for evacuation as well as providing start up power to Tiroda Thermal Power Plant. There was an exercise to carve out the balance sheet of integrated books of account, where inadvertently the Capital Cost of Bus Reactors was not considered as part of the Transmission carved out Balance Sheet. However, thereafter, the Capital Cost of Bus Reactors is included in carved out Transmission Balance Sheets of APML.

d) With respect to the Minutes of Meeting dated 26.12.2011 between CEA, PGCIL, MSETCL & APML and the WRLDC study, the Appellant has stated that, based on the said Meeting and WRLDC study, the Respondent Commission came to the conclusion that the installation and operation of Bus Reactors as a pre-requisite for the evacuation of power

from Tiroda TPS was well recognized by all concerned,

including the Appellant, ever since the inception of the Project Scheme. Their inclusion as part of Transmission Assets was never contemplated earlier. Further, the issue of the transfer of Bus Reactors along with associated Bays as part of the Transmission Business and the recovery of their costs was first brought up by the Appellant during the proceedings related to Case No. 190 of 2013.

e) The above submission by the Appellant and the study carried out by the WRLDC, sequence of events and the material placed on record shows that the two 80 MVAR Bus Reactors and associated Bays were originally envisaged as part of the Generation Project Switchyard along with the other Switchyard equipment since the inception of the Project. The contentions of the Appellant that the Reactors are the part of Transmission is an afterthought, without justification and hence not tenable at this juncture and also in the eyes of the law. The Respondent Commission, while passing the impugned Order, has analyzed the Project and studied the documents and justification given by the Appellant, MSETCL, STU, CEA and the WRLDC to conclude that the Reactors are the part of the Generation switchyard.

OUR FINDINGS:

5.4 After having a careful examination of all the aspects brought before us on the issue raised in Appeal and submissions made by the learned counsel for the Appellant and the Respondent, our

observations are as follows.

(i). Before dealing with the issue, it is necessary to capture the background leading to the amendment of the license. The Appellant had filed an application dated 16.07.2014 with the Respondent Commission for amendment of its Transmission License No. 2 of 2009 granted vide order dated 06.07.2009 (duly amended on 30.03.2011). The Respondent Commission by its order dated 09.07.2015 amended the Transmission License so as to include 2 X 80 MVAR Bus Reactor along with Associated Bays at the Tiroda Sub-Station. Based on such amendment and as suggested by the Respondent Commission in the order passed in Case No. 190 of 2013, the Appellant sought tariff corresponding to the capital cost of Bus Reactor. The Respondent Commission had disallowed the capital cost & ARR corresponding to Bus Reactor on following grounds.

(a). Single Line Diagram of the Tiroda TPS Switchyard approved by the competent authority/STU observed that the approved SLD includes two Bus Reactors (Bus Reactor-1 and Bus Reactor-2) and their associated Bays as part of the Generation Project Switchyard along with other equipment.

(b). In the letter dated 19 April, 2012, the Chief Electrical Inspector has considered two Bus Reactors as part of the Generation Switchyard while granting approval for charging of 400 kV Switchyard at Tiroda.

(c). The audited extracts of APML-T's Balance Sheet for FY 2012-13 did not reflect the capital cost of the Bus Reactors and Bays.

(d). Minutes of Meeting dated 26.12.2011 between CEA, PGCIL, MSETCL & APML and WRLDC study did not have categorical and conclusive recommendations.

5.5 The relevant portion of the decision of the Respondent Commission in its order dated 03.07.2014 passed in case No. 190 of 2013, is as follows:

"***Commission's Ruling:***

The Commission in its MYT Order for APML-T had provisionally approved the capital cost of Rs. 684.60 Crore. The Commission had directed APML-T to submit the duly audited completed capital cost, which is certified based on the audited accounts of the financial year during which the project has achieved CoD for necessary prudence check. The Commission observes that, APML-T vide its submission made under the present Petition has complied with the requirements as stipulated under the MYT Order. The Commission has verified the audited accounts of APML-T for FY 2012-13 for the completed capital cost of APML-T. The Commission now observes that the issue of capital cost for additional bus reactors to the tune of Rs. 23.24 Crore has come up for the first time in the present Petition. The Commission has carefully observed all the submissions regarding the commissioning of the two bus reactors at Tiroda. The Commission has scrutinised the submissions and observed that commissioning of the two bus reactors at Tiroda was necessary for smooth functioning of the transmission line which has been highlighted in various

technical reports, letter correspondence from WRLDC/SLDC, and as stipulated within the Commission's Order in Case No. 51 of 2013. The Commission agrees that without bus reactors 400 kV Tiroda-Warora line could not be charged. The only issue which came before the Commission was the fact that, the two bus reactors were not included as a part of in principally approved scope of work. Hence, the corresponding capex worth Rs 23.24 Crore was not approved earlier. The Commission had highlighted this fact during the TVS, that the two concerned bus reactors at Tiroda are not covered as part of the present Transmission Licence. Though, the Commission understands the technical requirement of the two 400 kV Bus Reactors, however, the same cannot be considered under the cost of additional capitalization, under present process without undertaking regulatory process of amendment of the Transmission Licence. Unless bus reactors and associated bays are included as part of the asset of the Transmission Licensee (APML-T), it would not be appropriate for the Commission to allow the capitalisation of the costs and other associated costs thereof as part of present Mid-Term Review process. However, these costs including cost of additional capitalisation towards bus reactors and associated bays can be considered at the time of final true up at the end of the control period, upon due regulatory scrutiny and prudence check only after amendment to the Transmission Licence to incorporate such assets as a part of the Transmission Licence. Therefore, in this Order, the Commission restricts the capital cost to Rs 684.60 Crore, which relates to the existing Transmission Licence as approved by the Commission."

5.6 It is relevant to note that originally APML was granted Transmission License to establish lines for evacuation as well as providing start up power to Tiroda TPP for which Respondent

Commission has allowed tariff. It is also evident from the above referred extract of the Impugned Order, Bus Reactors were needed for evacuation of power from Tiroda TPS for which necessity had been confirmed and emphasized during the meeting dated 26.12.2011 by CEA, Powergrid and MSETCL. In the State of Maharashtra, STU has been vested with the responsibility of planning the evacuation system from Bus-bar of the Power Plant, be it State Gencos or IPP. Bus reactor is essentially required for the purpose of controlling voltage in the transmission system. In the instant case as well, the Bus Reactor were required for controlling the over voltage issue at Wardha-Worora during charging as well as for the smooth operation of the Transmission System as confirmed in the MoM dated 26.12.2011. Hence, there is no doubt that the Bus Reactors were an integral part of Transmission system.

5.7 Even, the report of Prof. Soman, IIT, Mumbai placed on the record, confirmed that the BUS Reactors are required for smooth operation of Transmission System. It is also relevant to note that as per the PPA between APML, the Generator and MSEDCL, it is the responsibility of the procurer, MSEDCL to evacuate the power from Bus Bar of the power station. This being the case, we are unable to understand how come APML (the Generator) could have anticipated the issue of voltage fluctuation in the transmission system which is not required for the generating plant. At the best, APML as a Generator can participate in the planning process as one of the stakeholders and furnish the details/ information about

generating station, progress w.r.t. construction and commissioning of the plant so as to plan the transmission system in co-ordinate manner. Since, APML was also the Transmission Licensee (different from the Generating Business), it was casted with the responsibility of executing the identified transmission system for which installation of Bus reactors were considered as imperative.

5.8 Here, it is immaterial to get into the details when the said Bus reactors were planned. As a Transmission Licensee, it became responsibility of the APML to install the same as mandated by the STU/ System Planner. Such Bus reactors were installed and due process of getting it included as a part of Transmission Licence was followed by the Appellant in line with the directions of the Respondent Commission. There is no denial of the fact that the expenditure of these Bus reactors was carried out by the Appellant and capitalized in the books of account. Since, APML was operating both as the Generator as well as Transmission Licensee, the account was common for the same. The expenditure of Bus Reactors was allocated and shown in the abstract of the books for Transmission System in Sep 2013. In our view, date of planning or capturing the capital cost in the transmission segment of the books cannot be the basis of denial of the legitimate claim of the Appellant. Though it is not essential, we would also like to make a point here that it is not correct for the Respondent Commission to assume/ presume that bid of APML (the Generator) included the cost of Transmission System. The Generator cannot plan the system and therefore it could not have factored in any cost in the bid. It is only when the requirement of any transmission element

(Bus reactors in the present case) is established by the STU and confirmed to the Licensee, the Licensee is responsible to implement the system. There may be number of reasons for cost being not reflected in the books of transmission. In the present case, it was inadvertently missed out as clarified by the Appellant.

5.9 The other reasons considered by the Respondent Commission for disallowing the cost also appear to be incorrect. Since the location of the Bus reactor was in Tiroda switchyard, it is natural that during the process it is shown as one of the element in the switchyard. However, it is incorrect to infer such inclusion in the SLD of Generation switchyard as ownership/part of Generating plant. There are number of instances where Asset of transmission licensee is situated in the switchyard of the Generating station. Also, the chief electrical inspector is required to grant charging permission as a whole and not in isolation i.e separate for Generation Asset and Separate for transmission asset. This being the case, even the common charging permission dated 19.04.2012 cannot be the basis of denying the Capital cost.

5.10 We would also like to point out that it is duty of the Respondent Commission to ensure the recovery of costs incurred by Licensee duly following the commercial principles as stipulated under Section 61 of the Electricity Act, 2003. The non-consideration of costs merely on the ground of presence of Bus reactor in the SLD of the Generation switchyard or non-inclusion of capital cost initially in the carved out Balance sheet cannot be the basis to

deny the legitimate claims. The approach of the Respondent Commission to blow hot and cold simultaneously cannot be appreciated. On one hand, the Respondent Commission itself has granted the transmission license to the Appellant to incorporate the Bus Reactors and on the other hand, it has denied the capital cost and tariff for the assets for which amendment was allowed.

5.11 In view of above, we opine that the decision of the Respondent Commission to deny the capital cost and consequential tariff to the Appellant is not justified. Accordingly, we hold that the order of the Respondent Commission in this regard suffers from perversity. The Commission has to consider the costs incurred by the Licensee for installation of Bus Reactors and allow corresponding tariff including carrying cost.

6. ISSUE NO. 2: Considering Outstanding Delayed Payment Charges (DPC) as Non-Tariff Income for reduction of Allowed ARR;

6.1 The learned counsel for the Appellant submitted that the concept of DPC has been incorporated into the regulations in order to compensate the Transmission Licensee for the additional cost of raising funds, required to meet the shortfall in revenue inflow, caused as a result of such delay in payment of transmission charges. Such charges are provided in the Regulations 68 of the MYT Regulations, 2011 as compensation to the Transmission Licensee, due to the delay in payments by TSUs and do not consider the same as non-tariff income of Transmission Licensees. Hence, the same cannot be treated as an "Non-tariff Income" of the Transmission Licensee.

6.2 The learned counsel also supported the above argument stating MERC MYT Regulations, 2011 is silent about considering DPC as Non-Tariff Income for Transmission Business. MERC MYT 2015 Regulations specifically provides that DPC is not to be considered as Non-Tariff Income. Therefore, the manner of treatment of DPC can be gathered from the express language of MYT Regulations, 2015 which provided that the DPC is not to be considered for calculation of the non-tariff income of the Transmission Licensees. He submitted that DPC is levied in order to restore the beneficiary to the same economic position had the tariff been realized when it was originally due to the licensee i.e Time Value of Money. Therefore, the said amount cannot at all be considered as a non-tariff "income", as the said amount in effect is the same tariff had it been recovered earlier. Therefore, the deduction of any amount from ARR can only happen if some component of tariff is disallowed or there is some expressly provided non-tariff income received by the licensed entity. DPC is not a non-tariff income as it is merely compensation for delayed tariff recovery.

6.3 It was forcefully argued by the Appellant's counsel that considering DPC as Non-Tariff Income- will incentivize the TSUs to delay the payment, since such consideration of DPC results in reduction of effective Transmission Charges to be paid by TSUs.

6.4 The learned counsel for the Appellant attempted to defend the express exclusion of DPC from the list of Non-tariff Income in MYT Regulations, 2015 stating that the said regulations is applicable for

the period commencing from 01.04.2016 and that subsequent Regulations cannot be compared with the earlier Regulations applicable for different period to contend that the then prevailing Regulations were not clear and therefore the Orders based on the prevailing Regulations are arbitrary and lacking legal or commercial basis. Although the Regulations are revised from time to time, the new Regulations cannot be applied retrospectively and the Orders are required to be issued as under the then prevailing and applicable Regulations.

6.5 ***Per contra,*** the learned counsel for the Respondent argued that DPC is considered as Non-Tariff Income strictly in accordance with MERC MYT 2011 Regulations. In case of Generation business, indicative list of items of Non-Tariff Income is provided in MYT Regulations, 2011, while such indicative list is not provided for transmission business, however, by very nature of income and in accordance with definition of DPC in MYT Regulations, 2011 DPC is considered as Non-Tariff Income. He further submitted that, since provisional Truing up for FY 2015-16 has been undertaken under the MYT Regulations, 2011, the Commission considered it appropriate to consider the DPC (which is a legitimate revenue under the Regulations) under Non-Tariff Income for FY 2015-16.

6.6 Learned counsel for the Respondent Commission has submitted that the Respondent Commission, while dealing with the issue of DPC in the Mid Term Performance Review Orders of other

Transmission Licensees in the State, has ruled in similar manner.

He quoted instances of Jaigad Power Transco Ltd.(Case No. 208 of 2014), Maharashtra State Electricity Transmission Co. Ltd. (MSETCL) and Tata Power Company Ltd. (Case No.5 of 2015).

6.7 Learned counsel for the Respondent Commission vehemently submitted that the present issue is covered against the Appellant in the numerous judgments of this Tribunal including the judgment in the case of Jaigad Transmission Company V/s. Maharashtra Electricity Regulatory Commission dated 17.05.2017 in Appeal No. 250 of 2015 and of the same date in Appeal No. 242 of 2016. The Review petition Nos. 7 & 8 of 2017 was also filed by the Appellant which also came to be dismissed vide common judgment dated 20.02.2018. Further, even on merits of the disallowance, Commission has considered the matter in detail as brought out in the counter affidavit in the present appeal.

OUR FINDINGS:

6.8 After careful examination of all the aspects brought before us and submissions made by the learned counsel for the Appellant and the Respondent Commission, we now deal with the issue herein below.

6.9 The Non-Tariff Income in the State Commission's Tariff Regulations, 2011 is defined as below:

> *"2.1(1) (42) Non-Tariff Income" means income relating to the regulated business other than from tariff, excluding any income from Other Business and, in case of the Retail Supply Business of a Distribution Licensee, excluding income from wheeling and receipts on account of cross-subsidy surcharge and additional surcharge on charges of wheeling;"*

6.10 It is also relevant to note that the Regulation 43.1 and 62.1 of MERC Tariff Regulations, 2011 which pertain to Non-Tariff Income related to Generation Business and Transmission Business respectively. The said Regulation reads as under

Regulation 43.1 of MYT Regulations 2011

"43.1 The amount of non-tariff income relating to the Generation Business as approved by the Commission shall be deducted from the Annual Fixed Cost in determining the Annual Fixed Cost of the Generation Company.

Provided that the Generation Company shall submit full details of its forecast of non tariff income to the Commission in such form as may be stipulated by the Commission from time to time. The indicative list of various heads to be considered for non tariff income shall be as under:

a) Income from rent of land or buildings;
b) Income from sale of scrap;
c) Income from statutory investments;
d) Income from sale of Ash/rejected coal;
e) ***Interest on delayed or deferred payment on bills****;*
f) Interest on advances to suppliers/contractors;
g) Rental from staff quarters;
h) Rental from contractors;
i) Income from hire charges from contactors and others;
j) Income from advertisements, etc.;
k) Any other non tariff income"

(Emphasis Supplied)

Regulation 46.1 of MYT Regulations 2011

62 Non-Tariff Income 62.1 The amount of non-tariff income relating

to the Transmission Business as approved by the Commission shall be deducted from the aggregate revenue requirement in determining annual transmission charges of the Transmission Licensee: Provided that the Transmission Licensee shall submit full details of its forecast of non-tariff income to the Commission along with its application for determination of aggregate revenue requirement."

From the reading of the above provisions it is evident that Commission has not explicitly considered Delayed Payment Charges as Non-Tariff Income while determining ARR for Transmission Business.

6.11 The concept of Delay Payment Charges or interest on delayed payment or late payment surcharge is a well-recognized element across the industries. DPC becomes applicable only when there is delay in payment of Transmission Charges by Transmission System Users (TSUs) after the due date. As per Regulation 35.2 of the MYT Regulations, 2011 of the Commission, the normative working capital covers receivables by the licensees only up to 45 days. Therefore, DPC is levied to compensate the Transmission licensee for the interest cost that is incurred on the additional working requirement due to delay in payment beyond 45 days.

It is relevant to note that this Tribunal has decided similar issue in its judgement dated 30.07.2010 in Appeal No. 153 of 2009 (North Delhi Power Ltd. vs Delhi Electricity Regulatory Commission) as under:

"18. In the light of the above situation, this issue has got to be considered. Late payment surcharge is levied on consumers who do not make timely payment of their electricity bills. Due to the

delay in making the payment, there is a shortfall in cash flow available with the distribution company to incur its expenses. In such a situation, to meet such shortfall in cash flow, the Appellant being a distribution company is constrained to meet the expenses either through internal accruals or borrowings. The State Commission having felt that the delay in payment by the consumers beyond the normal period entails the additional cost which needs to be allowed since the late payment surcharge levied which compensates for such a delayed payment is treated as non-tariff income.

19. According to the MYT Regulations, the non-tariff income is deducted from Aggregate Revenue Requirements to work out the Net Revenue Requirement. Working capital cost for financing the Receivables of revenue within the due date is allowed in tariff determination. As such, no late payment surcharge is leviable or earned for Receivable Liquidated up to due date. The late payment surcharge is levied on consumers who do not make payment within the stipulated period allowed for payment. This compensates the licensee for the interest cost that would be incurred on the additional working capital requirements due to consumers not paying their dues in time. Therefore, the entire late payment surcharges should accrue to the licensee to off-set additional financing costs of incremental working capital requirement beyond the normative two months receivables allowed in working capital. However, as per the Tariff Regulations, the amount received by the Licensee on account of Non-Tariff Income is deducted from the Aggregate Revenue Requirement in calculating the Net Revenue Requirement of the Licensee.

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.

21. It has been strenuously contended by the Learned Senior Counsel for the State Commission that the Appellant has failed to point out any MYT Regulations conferring right to the distribution companies to claim financing cost relating to delayed payments. The Appellant by way of rebuttal has pointed out the Regulation 5.7, 5.23, 5.37 of the MYT Regulations to justify the claim made by the Appellant. Let us quote those Regulations as under

…….

22. On the basis of the above Regulations, it is submitted on behalf of the Appellant that:

(i) the Working Capital cost for financing Receivable Liquidated within due date is allowed in tariff regulations. As such, no late payment surcharge is leviable or earned for receivable liquated up to due date;

(ii) the late payment surcharge is levied in Delhi at 1.5% per month. In the earlier tariff order, the State Commission allowed on entire outstanding amount beyond the due date which goes towards compensating the cost of financing such outstanding amount beyond the due date.

On the other hand, it was submitted on behalf of the State Commission that normative working capital takes into account the fact that the distribution companies will not be paid immediately.

23. In the light of the aspects pointed out on behalf of the Appellant, the reply made on behalf of the State Commission may not be correct for the reasons given below:

(i) The normative working capital compensates the distribution company in delay for the 2 months credit period which is given to the consumers.

(ii) Admittedly, the late payment surcharge is charged only if the delay is more than normative credit period.

(iii) Thus, for the period of delay beyond the normative period, the Distribution company has to be compensated with the cost of such additional financing.

24. It is not the case of the Appellant that the late payment surcharge should be treated as non-tariff income and should be retained by the Appellant. The Appellant is only praying that the financing cost is involved in earning late payment surcharge and as such the Appellant is entitled for 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."

6.12 In view of the above, it is apparent that DPC is in the nature of compensatory charges. This has been recognised by Hon'ble Supreme Court in its judgement dated 14.11.2000 in M/s Consolidated Coffee Ltd. Vs. The Agricultural Income-Tax Officer, Madikeri & Ors AIR 2000 SC 3731. as under

"We cannot, based upon the aforesaid judgment or otherwise, accept the submission of learned counsel for the taxing authorities that the penalty contemplated by Section 42 is analogous to a late payment surcharge/interest. ***A late payment surcharge/interest is necessarily compensatory in character****. A penalty is a punishment."*

Accordingly, if DPC is to be treated as Non-Tariff Income the interest cost towards requirement of additional working capital ought to be allowed in tariff by the Commission. This is needed to prevent creation of a vicious circle by TSUs where they may keep delaying the payment through-out the year and get the benefit of reduction of ARR through deduction of delayed payment surcharge. It is evident that this interpretation of the Regulation by MERC results in recovery of tariff lower than what is legitimately due to the Transmission licensee under Section 62 of the Act. Further, the interpretation of MERC to allow DPC as Non- Tariff Income without the provision for pass through of interest on additional working capital due to delay in payment beyond 45 days is also against the principle of 'recovery of the cost of electricity in a reasonable manner' laid down in Section 61(d) of the Act.

6.13 The Respondents have relied on this Tribunal's judgement dated 11.5.2017 in Appeal No. 250 of 2015 and in Appeal No. 242 of 2016 wherein the Appellant Jaigad Power Transco Limited had made similar contentions with respect to denial of DPC under MYT Regulations, 2011. The relevant extract of the judgement is reproduced below:

"From the above, it can be seen that the State Commission has in general defined NTI at 2.1(1) 42 of Regulations, 2011 as income related to regulated business other than tariff with some specific exclusions like income from other business, wheeling charges and cross-subsidy surcharge/ additional surcharge for on wheeling charges for discoms.

The definition of NTI under Generation Business and Transmission Business is similar except that the indicative list of income to be

considered under NTI is given under Generation Business which includes interest on delayed or deferred payment of bills i.e. DPC.

The DPC is arising out of from the following provisions of the Regulations, 2011:

"68.3 All TSUs shall ensure timely payment of Transmission Tariff to STU so as to enable STU to make timely settlement of claims raised by Transmission Licensees.

68.4 Where there is delay in payment by any TSU, late payment surcharge at the rate of 1.25% per month or part thereof shall be applicable."

Further, the definitions at Regulation 43.1 and 62.1 make it clear that after its prudent check, amount of NTI needs to be approved by the Commission. ***Although there is no specific reference to DPC as non-tariff income in the definition of NTI under clause 62.1, the State Commission is empowered to approve DPC income as NTI under the said clause of the Tariff Regulations, 2011 as it deemed fit.*** *Moreover, this is important for the State Commission to have harmony in various provisions of the said regulations.*

……

Though in the present case, ***it has not been clearly spelt out that the DPC is to be treated as NTI but the State Commission is empowered to approve the NTI and in its due diligence considered DPC as NTI****."*

What thus transpires is that in the above judgement, the Tribunal ought not to have ignored its judgement dated 30.07.2010 in Appeal No. 153 of 2009 (North Delhi Power Ltd. vs Delhi

Electricity Regulatory Commission) and allowed interest on additional working capital requirement as compensation for delayed payment. In the alternative, DPC could not have been interpreted as NTI against the principle of Section 61(d) and recovery of tariff under Section 62 of the Act. Therefore, in terms of the judgement of Delhi Municipal Corporation v Gurunam Kaur reported in AIR 1989 SCC 38, the above decision of the Tribunal is to be treated as given *'per incuriam'* as it was given in ignorance of the judgement of the Tribunal in case of North Delhi Power Ltd. vs DERC and principles of Section 61 and 62 of the Act.

6.14 Further, it is observed that DPC can be clearly differentiated from other NTI sources specified in Regulation 43.1 for Generation Business. While the source of income from other components do not affect the recovery of Tariff from licensed business, DPC affects the total recovery of tariff from licensed business. The Black's Law Dictionary defines Reimbursement as 'To pay back; to make return or restoration of an equivalent for something paid, expended or lost'. According to the dictionary meaning, reimbursement can be considered as repayment of what has already been spent or incurred. Thus, DPC is in fact a compensation in the nature of reimbursement and must not be treated as NTI. In case it is treated as NTI for deduction from ARR, the licensee must be compensated for interest on delayed payment separately.

6.15 As regards statutory provision, MYT Regulations, 2011 does not specifically provide that DPC shall be Non-Tariff Income in case of

Transmission Business. Hence, in our view, it is bereft of any statutory backing. Since the said Regulation is silent, taking recourse of similar provision in generation business does not help. We are of the view that under such circumstance, the Respondent Commission ought to have followed the correct principle based on correct logic and interpretation. The Respondent Commission attempted to support its argument that the list of NTI for transmission business is indicative and therefore treatment similar to that of Generation Business was considered. We cannot accede to such argument. Having open end in the Regulation does not mean that Respondent Commission can apply any Regulation. If the intention was to consider DPC as NTI even for Transmission Business, the Commission would have included the same in the Regulations 46.1 as well. When there is vacuum in the Regulations, the Respondent Commission could have drawn analogy from MYT Regulations, 2015 which has recognized the issue and appropriately incorporated the provision to exclude DPC from NTI.

6.16 Also considering provisions of Section 61, it is incumbent on the Respondent Commission not to disregard the determination of tariff following the commercial principles. Considering DPC as Not-tariff Income is clearly against such principle. All the more when there is no explicit Regulation framed under MYT Regulations 2011.

6.17 In view of above, there is no doubt that such treatment to consider DPC as not tariff income is incorrect. Also, in such a situation a pragmatic way to ensure that Principle of Equity prevails would be

to not consider DPC as Non-Tariff Income. Accordingly we decide that DPC shall not be considered as Non-Tariff Income

7. ISSUE NO. 3: Non allowance of Actual Operations and Maintenance (O&M) Cost

7.1 The learned counsel for the Appellant submitted that the norms for fixing O&M cost, as existing for the second control period i.e upto Mar 2016 have been substantially reduced by the Respondent Commission for the control period commencing from 2016-17. He further submitted that such an arbitrary approach has been adopted by the Respondent Commission despite the well accepted fact that the "Salary and Allowances", which form a significant part of the O&M cost will increase on year to year basis because of inflationary component and beyond the control of the Appellant. Further, the MYT Regulations also envisage fixing of a base level and increasing the same by a fixed percentage each year. Under the circumstances, the Appellant will be left helpless and be constrained to bear any shortfall in recovery of the difference in the O&M cost for entire Control Period which will have huge impact on the safety and security of Transmission system due to insufficient fund for O&M.

7.2 The learned counsel for the Appellant vehemently submitted that it was not covered under Regulation 58.7 of the Draft MYT Regulations, 2015 which provided that new licensee shall be one "*whose transmission project assets are commissioned after March 31, 2016*". For such transmission system, normative O&M cost of

Jaigarh Power Transmission Company Limited (JPTL) was proposed to be made applicable in the draft Regulations. However, when MERC finally notified MYT Regulations, 2015 it *omitted from reference of "which transmission project assets are commissioned after March, 31, 2016".* As a result of the said omission, the O&M norms applicable for Jaigad Power Transmission Ltd. were made applicable for the Appellant. On account of the above, Regulation 58.7 ought to be ignored, and the Commission ought to be directed to make those norms applicable for the Appellant, which result in complete recovery of O&M expenses [Section 61 (b)].

7.3 Learned counsel was quick to submit that this Tribunal has powers to ignore regulations, which powers have been exercised in other cases [DVC VS. CERC &Ors., Appeal Nos. 271, 272, 273, 275 of 2006 & 8 of 2007]. The Appellant also referred to a judgment dated 10.04.2008 of this Tribunal passed in Appeal Nos. 86 & 87 of 2007 (MSPGCL vs. MERC &Ors.) wherein this Tribunal directed the Respondent Commission to conduct a fresh study and come out with achievable norms customized to MSPGCL. In other words, this Hon'ble Tribunal ignored the Tariff Regulations for MSPGCL in order to fulfil the mandate of Section 61 (b) of the Electricity Act, 2003 which provides that generation, transmission and distribution has to be done on commercial principles.

7.4 The Appellant's counsel contended that the Respondent Commission vide an order dated 22.08.2013 passed in Case No. 09 of 2013 has categorically held that O&M expenses in subsequent years cannot be approved at levels lower than the

approved values of the past years. In this case, the Respondent Commission has exercised its powers under Regulation 100 of the MYT Regulations, 2011 thereby relaxing the O&M norms so as to make sure that the said norms are not lower than that approved for the past years. The Appellant sought parity with the treatment meted out by the Respondent Commission qua other licensees in the State of Maharashtra.

7.5 ***Per contra***, the Learned Counsel of the Respondent Commission submitted that the transmission voltage and design parameters of JPTL's Transmission Line and the ATIL Transmission Line are similar and both are part of the Intra State Transmission System. Taking into account the geographical area, number of sub-stations and Transmission Lines operated by MSETCL, its norms could not be applied to the Appellant. Also, at the time of framing the MYT Regulations, an opportunity was given to all the Transmission Licensees including ATIL for submission of their comments. ATIL did not submit its comments on the O&M Expense norms. Accordingly, the Respondent Commission has considered the O&M Expenses of the Appellant as per the MYT Regulations, 2015.

OUR FINDINGS:

7.6 We have carefully considered the rival contentions of the parties on this issue and note that, while formulating the MYT Regulations, 2015, the Respondent Commission in the impugned

order has noted that specific inputs were sought on O&M Expense-

related details from new and existing Transmission Licensees so as to enable the Commission to arrive at appropriate norms for the new Control Period. However, the Appellant did not submit any details in this regard. Further, the Respondent Commission has also observed that the Appellant did not make any submission with regards to O&M expense norms in its comments submitted on draft Regulations circulated along with the discussion paper for stakeholder comments. Therefore, the Appellant willingly chose not to represent before the Respondent Commission on this issue.

7.7. We refer to a similar case, in which the Tribunal in judgement dated 05.04.2019 in Appeal No. 245 of 2015 & IA No. 398 of 2015 has decided as under:

> *"We have carefully considered the rival contentions on this issue and note that the State Commission has to follow its Regulations on all aspects including the O&M expenses. While taking note of the main premise of the Appellant's contention that in case the actual expenses are lower than the norms, then norms should be considered and in cases where the actual expenses are higher than the norms then the actual expenses should be considered. We do not find any force in the above contentions of the Appellant which results into the situation that only the efficiency gains should be considered whereas the efficiency losses should not be considered but under the regulated regime such pick & choose approach cannot be allowed. Additionally, the aforesaid judgments of this Tribunal have duly interpreted on*

similar issues. Accordingly, we opine that findings of the State Commission on the O&M issue is just and right in accordance with law and the Commission's Regulations. Therefore, interference of this Tribunal is uncalled for."

In terms of the above judgement, it is noted that the State Commission has to follow its Regulations on all aspects including the O&M expenses. Further, if the O&M expenses are allowed on actual basis, the whole purpose of specifying norms after following due process of public consultation shall be defeated. Accordingly, we opine that findings of the State Commission on this issue is just and right in accordance with law and the Commission's Regulations. Therefore, this issue is decided against the Appellant.

8. ISSUE NO. 4 : Disallowance of expenses incurred towards the demerger process

8.1 The learned counsel for the Appellant submitted that Adani Power Limited (APL) and Adani Power Maharashtra Limited (APML) were demerged into the Appellant with a view to ring fence the transmission business of APML. He further submitted that in the process of the said demerger, the Appellant incurred certain one-time, non-discretionary expenses on the payment of statutory and legal fees. It is pertinent to mention that the said demerger was carried out with a view to insulate the regulated business from the other non-regulated businesses of the company; to pursue focused growth opportunities, achieve utmost synergy and efficiency of

operations and management of the power transmission business.

8.2 Learned counsel vehemently submitted that one of the principles of determination of tariff as per Section 61 is that the transmission of electricity has to be done on commercial principles, which can only be achieved by proper segregation of accounts by forming a separate company discharging only licensed activities. As such the demerger of APML resulting into the creation of the Appellant was in the interest of consumers, and as such the same was required to be a pass through in tariff. In view of the above submissions, the Appellant had duly furnished before the Respondent Commission, the benefits accruing to the consumers as a result of the abovementioned demerger and therefore, the observation of the Respondent Commission that the Appellant has failed to establish as to how the said demerger of APML and APL into ATIL from April, 2014.

8.3 ***Per contra,*** the learned counsel for the Respondent Commission submitted that as regard disallowance of the demerger expenses, there is no reason for passing on the associated costs on account of statutory and legal fees to the consumers as part of the ARR. As it is of no particular benefit to consumers nor there was any specific direction by the Commission for undertaking demerger, the arguments of the Appellant has no merit.

OUR FINDINGS:

8.4 After having a careful examination of all the material brought before

us on the issues raised in Appeal and submissions made by the Appellant and the Respondent, we are of the considered view that though the demerger scheme was approved by Commission, the said activity was not serving any purpose to the existing business of the Licensed activity. Hence, the Respondent commission's decision to disallow the related demerger expenses is correct and therefore we decide not to interfere in the decision/findings of the Commission in the impugned order.

SUMMARY OF OUR FINDINGS

9. In view of our consideration and findings as stated above, we are of the considered opinion that some issues raised in the instant appeal have merits and hence, Appeal deserves to be allowed partly. Summary of our findings is as follows:

9.1 Regarding non-allowance of Capital Cost of 2x80 MVAR of Bus Reactors with associated bays, we observe that the Respondent Commission has not taken a judicious decision in the matter resulting into financial loss to the Appellant. This issue is therefore, decided in favour of the appellant.

9.2 The delayed payment charges have been considered by the Respondent Commission as Non-tariff Income for reduction of ARR. After careful consideration of all the aspects in the matter, we decide that the delayed payment charges are not to be considered as Non-Tariff Income to be deducted from the allowed ARR. This issue is thus decided in favour of the Appellant.

9.3 Regarding allowance of actual O&M expenses, we are of the

considered opinion that the State Commission is to follow regulations on all aspects including O&M expenses and need not adopt divergent methodology on case to case basis. Accordingly, we hold that the Respondent Commission has taken a just and right decision in accordance with law and its own regulations. Therefore, this issue is decided against the Appellant.

9.4 Regarding disallowance of expenses incurred towards the demerger process, we find that the Respondent Commission has rightly disallowed the demerger expenses claimed by the Appellant. We decide this issue against the Appellant.

ORDER

For the forgoing reasons, the Appeal filed by the Appellant is allowed partly. The impugned order of the Respondent Commission dated 28.06.2016 is set aside to the extent allowed in this judgement and order at Para 9.1 to 9.4. We direct the Respondent Commission (MERC) to accordingly pass consequential orders for revision of tariff in accordance with our findings as stated supra.

The pending IA, if any, shall stand disposed of.

No order as to costs.

Pronounced in the Open Court on this **29th day of May, 2019.**

(S. D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

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REPORTABLE/NON-REPORTABLE

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