BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
APPELLATE JURISDICTIION, NEW DELHI

Appeal No. 129 of 2006

Dated this 23rd day of November 2006

Present : **Hon'ble Mr. Justice E Padmanabhan, Judicial Member**
Hon'ble Mr. H. L. Bajaj, Technical Member

IN THE MATTER OF :

Order dated 6th May 2006 passed by the Gujarat Electricity Regulatory Commission on the petition of Gujarat State Electricity Corporation Ltd. seeking approval of the generation tariffs and operational and financial parameters for its generating stations for the years 2005-06 and 2006-07.

AND

IN THE MATTER OF:

Gujarat State Electricity Corporation Limited
Vidyut Bhawan, Race Course, Vadodara, Gujarat ..... Appellant

Versus

1. Gujarat Electricity Regulatory Commission,
   1st Floor, Neptue Tower, Opp, Nehru Bridge,
   Ashram Road, Ahemdabad.

2. Gujarat Urja Vikas Nigam Limited,
   Vidyut Bhawan, Race Course,
   Vadodara, Gujarat

3. Consumer Education and Research Society,
   Suraksha Sankool, Gandhinagar Highway
   Thaltej,Ahemadabad 380054, Gujarat.

4. Gondal Chamber of Commerce & Industry,
   Udyog Bharti, Udyog Bharti Chowk,
   Gondal 360 311, Gujarat.

5. Shri Dhanji G. Shah,
   Amrutam, Plot No. 345, Hospital Road,
   Bhuj- 370 101, Gujarat.

6. Federation of Kutch Saurashtra,
   Chambers of Commerce & Industry, Center Point,
   Karansinghji Road, Rajkot 360 001, Gujarat

7. Madhya Gujarat Vij Company Ltd.
   Sardar Patel Vidyut Bhawan,
   Race Course, Vadodra – 390 007.

8. Dakshin Gujarat Vij Co. Ltd.
   Nana Varachha road, Kapodra Char Rasta,
   Surat – 395 001.

9. Paschim Gujarat Vij Co. Ltd.
   Laxmi Nagar, Nana Mava Main Road,
   Rajkot.

10. Uttar Gujarat Vij Co. Ltd.
    Visnagar Road, Mehsana – 384 001.

11. Torrent Power AEC Ltd.
    Electricity House, Lal Darwaja,
    Ahmedabad.

12. Torrent Power SEC Ltd.
    Electricity House, Station Road,
    Surat – 395 003. ……Respondents

Counsel for the Appellant	:	Mr. M.G. Ramachandran, Advocate alongwith Mr. Anand K. Ganeshan, Advocate, Mr. Gurdeep Singh, MD, GECL, Mr. M.B. Kaka, Chief Financial Manager (F&A),
Counsel for the Respondents	:	Ms. Sunita Hazarika, Advocate for Ms. Hemantika Wahi, Advocate for Resp. No.1 Mr. Balaram Reddy, Consultant, Tariff, GERC & Mr. S.R. Reddy, Dy. Director, GERC. Mr. Kunal Tandon, Advocate for Mr.Vikas

Mehta, Advocate for Respondent No. 3,
Ms. Sailaja Vachhrajani, Controller of Accounts For respondent No. 2, GUVNL
Mr. T.D. Davda, Addl. C.E. (C&R), Resp. No.7, DGVCL, Surat.

J U D G M E N T

1. This appeal has been preferred by the Gujarat Electricity Corporation Ltd. (hereinafter referred to as GECL) seeking for the review of the tariff order issued by the first respondent GERC (hereinafter referred to Gujarat Electricity Regulatory Commission) dated 6.5.2006 in Petition No. 861 of 2006 and to approve proposed parameters as has been submitted by the appellant before the first respondent Commission and consequently direct that the appellant shall be entitled to the relaxation of norms as prayed for in the tariff petition. No. 861 of 2006 and for other consequential reliefs.

2. According to the appellant, Gujarat Electricity Board (hereinafter referred to as GEB) till 2003 constituted under The Electricity Supply Act, 1948, was generating and distributing power in the State of Gujarat. The Gujarat Electricity Industry (Reorganization & Regulations) Act, 2003 enacted by the Gujarat State Legislature for Restructuring of Power Sector in the said state including, reorganization of the Gujarat Electricity Board. The Electricity Act 2003 came into force on 10.6.2003.

On coming into force of The Electricity Act 2003 and The Gujarat Electricity Industry (Reorganization and Regulations) 2003, GEB was reorganized into Gujarat State Electricity Corporation Limited (a generating company) and Gujarat Energy Transmission Corporation Ltd., (a Transmission company) and four distribution companies. In the place of the erstwhile GEB, Gujarat Urja Vikas Nigam Ltd. (hereinafter referred to as GUVNL) was established to carryout the residual functions of the Gujarat Electricity Board. As a result of the above, the appellant, a generating company, GSECL has been generating and supplying electrical energy generated by it at its various generating stations, to Gujarat Urja Vikas Nigam Ltd (GUVNL).

3. The first respondent Regulatory Commission framed the Gujarat Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2003 and the same was notified by the said State Commission on 31.3.2005. By the said regulations, the state Commission prescribed the terms and conditions for determination of tariff in respect of generating companies and also provided tariff Regulations for the operation and financial norms applicable to the generating company. It is the case of the appellant that the said tariff regulations provided for the operation and financial norms applicable to a generating company. The Regulations also provided for relaxation in the case of existing old generating stations taking into consideration of

its past performance and including the factors such as vintage, size of the units and other factors.

4. The appellant GECL moved the first respondent Regulatory Commission, seeking approval of generation tariff including operational and financial parameters for the generating stations owned and operated by it for the years 2005-06 to 2008-09. On such filing, the state Commission notified the petition, invited objections and suggestions and also held public hearings, besides seeking various clarifications and details from the appellant. The appellant furnished the required particulars apart from making presentation to the State Commission on various aspects which, it was expected to set out in the tariff petition. Respondent Nos. 3 to 6 herein submitted various objections and suggestions before the first respondent Commission in respect of tariff revision sought for by the appellant.

5. On 6.5.2006, the first respondent Commission determined the generation tariff for the sale of electricity generated by the appellant to the second respondent GUVNL. As against the proposal seeking determination of tariff for 2005-2006 to 2008-09, the tariff period was restricted to 2005-06 to 2006-07 by the Commission.

6. According to the appellant, the first respondent Regulatory Commission disallowed various claims resulting in substantial impact on the finances of the appellant apart from declining to relax the claim as sought for by the appellant. The major headings under which adverse impact on the appellant, as enumerated by the appellant are (i) Overall impact resulting in loss to the appellant (ii) Station heat rate (iii) Auxiliary consumption (iv) Specific oil consumption (v) PLF for GSECL plants (vi) Transit loss of coal (vii) Depreciation (viii) Return of equity and (ix) approving operational and financial parameters for F.Y. 2005-06 to F.Y. 2008-09.

7. While elaborating the above adverse impact on the appellant, Mr.M.G.Ramachandran learned counsel leading the arguments for the appellant advanced a number of contentions, which will be considered at the appropriate time. It is contended that without proper application of mind, without considering the material aspect in the proper perspective, the order impugned has been passed by the first respondent Regulatory Commission and tariff fixed by the Commission deserves to be enhanced or modified. Per contra Ms. Sunita Hazirka advocate, Mr. Balaram Reddy, Adviser to the second respondent contended that no interference whatsoever is called for with the order passed by the Regulatory Commission and the appeal is without substance apart from being a misconception and misdirection.

8. Pending the appeal, the four Discoms were impleaded at the instance of the appellant and the four Discoms who distribute power in the State of Gujarat came on record as respondents 7 to 12. On a consideration of entire facts leading to the appeal, the various contentions advanced by the counsels for the appellant and respondents, we are to frame the points for consideration. On behalf of the Discoms as respondents No. 3 & 7, who were impleaded various submissions were also made. The learned counsel for the appellant also raised additional points and submitted written submissions on behalf of the appellant.

9. On a consideration of the submissions made on behalf of the appellant as well as respondents and the contentions advanced, the following points emerge. We frame points hereunder for consideration in this appeal and answer as under :

10. We have considered the respective contentions advanced on either side as well as points raised in the supplemental application and written arguments. After due consideration of the entire matter and in taking into consideration of totality of the circumstances, we shall consider the contentions advanced on behalf of the respondents in this appeal.

11. **Point A -** Whether the appellant is entitled to relaxation claimed in respect of generating stations under Regulation No. 3 of the Terms and

Conditions of Tariff notification No. 12 of 2005 and parameters claimed? The appellant operates generating stations of different vintages including four generating stations, which are as old as 42 years. It is also represented that excepting the four generating stations, which are less than 10 years old and all other generating units are more than 10 years old. 22 generating stations are more than 15 years old while 18 generating stations are more than 20 years old and 12 of the generating stations are more than 25 years old. Nine of the generating stations are more than 30 years old and the remaining four generating stations are more than 40 years old. It is mentioned that the average age of the generating stations works out to 23.7 years according to the appellant.

12. It is also represented that excepting 11 generating stations/units which are of standard 210 MW capacity, other units are of odd standards either 63.5 MW or 70 MW or 75 MW or 120 MW or 140 MW or 200 MW. In all, two of the generating stations are gas based while 22 generating stations are coal based. Six of the generating stations run on other fuel such as LSHS. There are 08 hydel generating stations in all aggregating to 38 generating stations. It is claimed that the normal life of coal based thermal generating units is 25 years and normal life of gas based generating units is only 15 years. In terms of Government of India, Ministry of Power Notification dated 29.3.2004, where the Central Government has fixed rate of depreciation.

13. The performance of the generating stations, according to the appellant, varies with the vintage of the units, older the units, the performance get reduced substantially. However, generating units of less than 210 MW capacity cannot be expected to perform on the same parameters and that of the standard generating units such as 210 MW/ 500 MW etc. The generating stations, which are more that 15 years old were erected and Commissioned with the then available technology and they are not comparable to the present day generating units Commissioned in recent years with much up-gradation and improved technology.

14. In the past, the dominant object of putting up generating units was for a optimum utilization of resources and cost benefit analysis. All the generating units presently owned, operated and controlled by the appellant were established and Commissioned by the erstwhile GEB, which was entrusted with the function of generation and distribution under the then Electricity (Supply) Act 1948 as established. The earlier Board had financial constraints in view of its approach and the object with which it was established, which had deterred modernization/ renovation/ replacement or repair and maintenance of the generating stations. The continued scarcity of power was also required the generators to be kept at the maximum level and there was always

shortage of generation, which resulted in the erstwhile GEB unable to undertake repairs, maintenance or replacement and rendered unviable.

15. The recent power sector reforms and reorganization of the State Electricity Board has now enabled the appellant to continue its operation on commercial lines, which requires the attention, renovation to be carried out, modernization to be undertaken and the up-gradation is felt a necessity. However, there are practical and financial constraints for the appellant as it is required to maintain the generation and supply to GUVNL to maintain supply to the consumers through the distribution licensees. The appellant is operating its various generating stations/units under severe and severer constraints. Yet the appellant is undertaken to operate its generating stations in an efficient manner to the utmost.

16. According to the appellant, the generation of power by generating companies is more akin to manufacturing activity and distinct from the transmission or distribution. The generating companies are not undertaking licensed activities, but they are to generate and supply the electricity to the distribution licensees or to an inter-mediatory company such as GUVNL, which would in turn supply electricity to the distribution licensees. In terms of Section 86 (a) of The Electricity Act 2003, the sale of electricity by Generating companies to a Discom is

regulated by purchase and procurement process or through long term agreements. The generating company is not subjected to be availing of its revenue requirement nor the setting of tariff taken on an annual basis or periodically as is done in respect of a transmission / distribution licensees.

17. In terms of Section 73 of The Electricity Act, 2003, The Central Electricity Authority (hereinafter referred to as CEA) has been constituted and it has undertaken studies and recommended various parameters concerning the technical parameters for operation of generating stations. The appellant placed reliance on various reports and studies undertaken by CEA including the operational parameters of old stations and stations whose capacity is less than 200 MW. Though old stations are required to be discarded and replaced and new generating stations required to be established, however, due to scarcity and to minimize the cost, the appellant continued to operate its generating stations to generate power for the consumers in the State of Gujarat. The continued operation of old generating units which are 25 years old has deteriorated due to poor performance of older units or due to various reasons attributable to basic design deficiencies, lack of appropriate R&M, aging, coal quality deterioration and various other factors. Report of the CEA was placed before the Commission with respect to the operation of smaller units of power, which are extremely poor.

18. The State Regulatory Commission in fact without reservation accepted the report of the CEA and factually while analyzing the tariff held that the yield from old stations of lower capacity, PLF, station heat rate, specific oil consumption, auxiliary consumption etc. do not conform to the norms and the R&M of the units requires to be improved for better performance. The Commission has already directed the appellant to take up repair and maintenance measures to improve the performance of the generating units. It is the grievance of the appellant that the Commission having taken a note of the factual position and conditions of various generating stations, the report of the CEA and the performance of old stations, had not given full effect to the operational parameters for different generating stations while determining the generation tariff by the impugned order dated 6.5.2006.

19. It is contended that the Commission ought to have considered the parameters set out by the appellant in light of CEA report and in a manner consistent with the reality of the situation as well as norms and parameters, which could be applied to comparatively newer generating stations.

20. It is vociferously contended that the PLF (Plant Load Factor) even in respect of old generating units ought to have been treated on par with a

new generating station, which could generate power to its full capacity due to planned and unplanned outages apart from cost of maintenance, shooting up significantly. It is the complaint that the assessment of PLF in respect of all the generating stations had been taken at 80% of total capacity for full fixed cost recovery, cannot be achieved and requires to be interfered in this appeal. Point A is answered in favour of appellant and there will be a direction as set out above.

21. **Point B:** Whether PLF should be taken on actual or notional? The PLF according to the appellant should have been taken on actual basis as against notional parameters approved by the State Commission. The appellant rightly points out that in respect of Ukai, the Commission ought to have fixed the PLF at 72% for the year 2005-06. We find that in respect of Ukai, there is no appreciable difference warranting interference in this respect. However, in respect of Gandhinagar 1-4, Wanakbori 1-6, KLTPS, Dhuvaran 1-6 (oil), the PLF as submitted by the appellant requires to be reviewed by the respondent Commission as there is considerable difference. In the interest of justice and for better function there will be a direction for review of PLF in respect of Gandhinagar 1-4, Wanakbori 1-6, KLPTS, Dhuvaran 1-6, keeping in view the vintage of the units and CEA recommendation.

22. In respect of Hydro stations, it is rightly pointed out even in terms of Regulations framed by the first respondent Commission, fixed charges are recoverable only after the generating station runs three hours, which running depends upon the release of water by the State Government and such release is solely based on the irrigation requirement and they do not consider the peak hour demand as even relevant or as having the bearing on the generation tariff. There is no reason to assume operation of hydel station on a continuous basis even when releasing of water by Irrigation Department is stopped for one reason or other and even if water is available in the reservoir and the hydel generating machines are ready for operation.

23. It is contended that the appellant should have been enabled to recover the fixed cost in respect of hydro stations irrespective of their operation and generation during peak hours. It is further contended that the hydel generation by the appellant should have been treated to identical to private as a private generator who are not placed to such constraints. The discharge of water from the reservoir or dam depends upon the decision of Irrigation Department and it not under the control of the appellant. It is contended that the availability of hydro based station should have been taken up subject to maximum of 80% and should have been adopted as a factor for parameters for recovery of full fixed cost of the generating stations during peak hours. We hold that this claim

merits consideration by us to render substantial justice. Point B is answered in favour of appellant.

24. **Point C:** Whether the claim of station heat rate should be allowed uniformly? Nextly, the learned counsel for the appellant advanced arguments and contended that the first respondent Commission ought not to have fixed the station heat rate for the vintage generating stations at the same level as applicable to a newer generating station. The older generating stations, by the passage of time, station heat rate of such old generating stations would further fall and deteriorate. The same cannot be held to be a deficiency on the part of the appellant. The problem of higher station heat rate is common to all the generating stations throughout India, which factor has been taken note of by various Regulatory Commissions and the CEA, where the generators have been permitted realistic norms. In fact the CERC has allowed higher station heat rates, so also other regulatory Commissions approved higher station heat parameters. That being a decision, it is contended that there is neither reason nor rhyme for the first respondent to have acted differently.

25. The learned counsel for the appellant drew our attention to the approval of station heat rate for various generating stations under their respective regulatory jurisdiction including that of NTPC, who is under the control

of CERC. The learned counsel for the appellant represented that station heat rate for various generating stations of the appellant as hereunder in respect of which there is no controversy:-

Sl. No.	**Station**	**Request of GSECL 2005-06**	**Present Approval 2005-06**	**2006-07**
1.	Ukai 1 & 2	2921	2700	2700
	Ukai 3 to 5	2725	2600	2600
2.	Gandhinagar 1 & 2	3101	2650	2650
	Gandhinagar 3 & 4	2793	2500	2500
3	Gandhinagar 5	2694	2460	2460
4	Wanakbori 1-6	2883	2500	2500
5	Wanakbori 7	2763	2460	2460
6	Sikka	3262	2700	2700
7	KLTPS	3379	3300	3300
8.	Dhuvaran 1-6 (oil)	3415	3200	3200
9	Dhuvaran-7 (gas)	1950	1950	1950
10	Dhuravan-8	-	-	1950
11	Utran (gas)	2182	1950	1950

26. There is force in the submission made by the learned counsel for the appellant. Though, in the view of the first respondent Commission, the difference is very narrow but the cumulative effect of all the generating stations has a bearing which should not have been ignored by the first respondent Commission. The contention advanced in this respect deserves to be appreciated and sustained. Point C is answered as above and station heat rate has to be allowed considering the vintage and present condition of the station in view of the CEA recommendations and

treatment given by CERC for similarly placed stations under its jurisdiction. We, therefore, order Point 'C' accordingly.

27. **Point D:** What is the quantum of auxiliary consumption to be allowed? The learned counsel for the appellant nextly contended that the plant auxiliary consumption in the case of generating units such as Gandhinagar 1 to 4, Sikka, KLTPS, Dhuravan are higher. It is also pointed out that for the thermal power plant, the auxiliary consumption even after the plant is running at low generation, the auxiliary consumption by the first respondent Commission is far less and it should have been fixed between 12-13% depending upon the plant conditions. The CEA report on operation norms for coal/lignite, fired thermal power station, is found to be variant in large scale. According to the appellant, auxiliary consumption should have been fixed at the rate at which it is claimed. Only in respect of Gandhinagar 4 and Dhuravan 1-6 (oil), there is considerable difference in the auxiliary consumption approved by the first respondent Commission. There is considerable difference in respect of Sikka and KLTPS generating station. Though percentage-wise it appears to be of not much dimension / quantity yet the accumulation thereof reflects on the appellants' generation revenue and finances. This requires a modification in respect of the auxiliary consumption of the said generating stations viz. Gandhinagar 1 to 4, Sikka, KLTPS, Dhuravan. Point D is allowed in part.

28. **Point F:** Whether oil consumption should be allowed on actuals as claimed by appellant ? Taking up the specific oil consumption, it is pointed out that when a generating station operates at part loads, specific oil consumption will be more and the Commission should have allowed the specific oil consumption on actual basis as claimed by the appellant. Since higher oil consumption is an admitted fact in case of vintage power plant as well as with respect to smaller plant below 210 MW capacity. It is claimed that the specific oil consumption for the generating units should have been allowed on actual basis subject to adjustment for inefficiency in the operation of units, if any, by the appellant. This contention also deserves acceptance and the direction also required to be issued as claimed by the appellant viz. claims on actual has to be accepted by the Regulatory Commission. Point F is answered in favour of appellant.

29. **Point G :** What percentage of transit loss of coal is reasonable ? Nextly the learned counsel for the appellant contended that the transit loss of coal which is being brought from a longer distance from the eastern States, should have been allowed as sought for by the appellant. The appellant claimed 2.05% in respect of Wanakbori and 2.55% in respect of Sikka, while the Commission allowed 1.5% in respect of Wanakbori and 2% of Sikka generating stations. Taking into consideration of the

distance, the transportation of coal, haulage and the Wagon movement in the railway transportation system, the Commission has liberally allowed transmit loss, which includes storage as well as loading and unloading waste against its regulation of 0.8% for non pit head stations. We, therefore, do not consider it necessary to interfere with the order of the respondent Commission in this regard. Point G is answered accordingly.

30. **Point H :** Whether claims for depreciation, ROE and auxiliary consumption deserves to be sustained ? The learned counsel for the appellant nextly contended that there is no justification to reduce the parameters such as depreciation, auxiliary consumption and return on equity which have already been incorporated in the power purchase agreement after due deliberations. Such reduction, it is contended, will result in huge financial disadvantage to the appellant. We find, there is force in this submission and when PPA have already been entered into, in the absence of any power to interfere or modify the contract already entered, it is not proper for the Commission to reduce the parameters. Therefore, in respect of PPA already entered, we direct Regulatory Commission to give effect to the rate of depreciation, auxiliary consumption and return on equity as agreed to during the currency of power purchase agreement. Point H is answered in favour of appellant.

31. **Point I** : Whether the approach of Regulatory Commission with respect to modernization, replacement is liable to be interfered? With respect to the claim made for modernization and renovation, the approach of the Commission should have been to encourage and represent a perspective instead of curtailing the activity of the generating companies, which may result in retardation of its generating companies. In this respect, this Appellate Tribunal has taken the view that the decision to upgrade or modernize or replacement of the old generating stations, it should be approached as a commercial decision by the generator to invest for the improvement of generation and for reducing the cost of generation. It is the generators' responsibility to raise funds and invest in such modernization of replacement and only at the time of fixation of tariff, the Commission could interfere with respect to such investment subject to prudent check. In this respect we have already held in Appeal No. 84 of 2006 in Karnataka Power Transmission Corporation Vs. Karnataka Electricity Regulatory Commission and it is extracted for future guidance by the first respondent Regulatory :

"6. The functions of the State Commission are enumerated in Section 86 (1) (a) to (k) of The Electricity Act 2003. We notice from the above provision that the role played by the Commission in slashing the investment is not one of the enumerated function Section 86 (2) provides that the Commission shall advise the State Government on all or any of the matters enumerated in clauses (i) to (iv) of the said sub section. Section 86 (4) provides that the State Commission shall be guided by the National

Electricity Policy, National Electricity Plan and Tariff Policy. Section 61 to 66 provides for framing Tariff regulations and determination of tariff. These provisions are also silent in this respect.

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11. Further when the Technical Experts and Engineers, have applied their mind with respect to their proposal and plan it is not for the Commission to examine by appointing another expert Committee. No expert agrees with another expert as presumably either add or comment. By this it shall not be taken that we are commenting upon the expert Committee appointed by Commission. Even the Committee did not opine that the proposed capital investments are not at all required or otherwise not suitable nor an efficient proposal.

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13. Section 11 of The Karnataka Electricity Reforms Act, 1999 also does not spelt out such power on the Commission, as it only enables the Commission to require licensee to formulate prespective plans and schemes for promotion of transmission, generation etc. Section 12 of The Karnataka Electricity Reform Act saves the power of State Govt. to issue policy directives concerning electricity in the State including the overall planning and coordination. Thus viewed from any angle, the power of the Commission to interfere with the proposal of investment by the transmission corporation or for that matter a distribution licensee as well cannot be assumed.

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18. The reference made to the National Electricity Policy and in particular to the draft policy dated 16.03.2005 may not be of any consequence. The utility has proposed to undertake expansion of its network after a study. The draft tariff policy has not been understood properly and at any rate it was only a draft which will not supersede or over rule the statutory provisions of The Electricity Act 2003 or Regulations. Reliance made on Section 91(4) of The Electricity Act 2003 is

a misconception. There is no quarrel with the impartiality of the regulator. It is the jurisdictional issue or the scope of regulator's power vis a vis the utilities internal management and functions and its plans. Legally there could be none who could complain about such proposals

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21. The Commission overlooked the fact that the appellant being transmission utility transmitting power through out the State for the bulk supply as well as distribution as an obligation to maintain the supply as well as quality supply and when the demand increase, either at the level of distribution or at the level of bulk supply it is the transmission licensee who should provide for the supply. This obviously means that the transmission utility has to plan in advance and should be in a position to supply power as demanded from time to time. Section 42, 43 of The Electricity Act 2003 also should not be lost sight of. To meet the ever increasing demand consequent to development and improvement in the status of the consumer public, industrialization, computerization, heavy industries and requirement increases by geometric proportion, it is for the transmission utility or such other utility to estimate the future demands as well, besides improving the quality and standard of maintenance. This is possible only if the utilities have the freedom to plan with respect to their investment, standardization, upgrading of the system. For such a course it is within the domain of those utilities to undertake to plan, invest and execute the projects or schemes of transmission etc. If the view of the Commission is to be sustained, as already pointed out, the same would mean for each and every investment an approval has to be sought by the utility in advance which is not the objective of the act.

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22. The consumers interest also do not arise at this stage for consideration nor they could be an objector in respect of proposal or plan or investment by utility as the liability of the consumers, if any, arise or there could be a passing by way of return on equity or interest etc. as such

contingency arises only when the Regulatory Commission subject to its prudent check allows such expenditure, while fixing the annual revenue requirement and determining the tariff. Till then, the consumers have no say and there could be no objection from their side. When the consumers complain poor service or failure to maintain supply, to face such a situation the utility has to plan in advance, invest in advance, execute the project or scheme for better performance and maintain."

32. We direct the Regulatory Commission to follow the above judgment in this respect atleast for future years to come, which would be in the interest of development of generation in the state of Gujarat and competition to be developed.

33. **Point J:** At what rate R.O.E. is to be allowed ? With respect to the next contention namely claim on return on equity, the Commission in its regulations 2004 specified the return on equity in respect of projects where the recovery through the Central Government plan allocation scheme is available at 14% post tax and for the rest of the project at 16% post tax return on equity. Having framed such a regulation, it is pointed out, there could be no slashing of R.O.E. as investment of generating stations is heavy and equity capital is also required on the higher side. It should not be forgotten that the equity passed on the appellant is very low and the reserves transferred by way of financial restructuring are insufficient to meet the fresh equity investment. In the absence of appropriate internal resources, the appellant will not be able to

undertake R&M activities and the new projects proposed by it and/or approved by the State Commission. We are of the considered view, the Commission ought have allowed 16% return on equity for all the existing generating stations for F.Y. 2005-06 and F.Y. 2006-07. We direct that orders of the Commission stand modified accordingly in this respect. Point J is answered as above.

34. **Point K :** Whether O&M expenses should be allowed on actual basis ? With respect to the claim of operation and maintenance expenses, it is contended that actual cost incurred should have been approved by the Commission. It is brought to our notice that as per the norms prescribed by CERC, the appellant will be entitled to Rs. 48578 lakhs while the appellant has claimed only Rs. 43178 lakhs. Yet the Commission has approved only Rs. 42218 lakhs. This results in the reduction of Rs. 89 lakhs. As such reduction will result in financial constraints and at times the generating plant may suffer or cease to function. Hence, the first respondent Commission ought to have allowed the actuals as claimed by the appellant towards O&M expenses as it is a negligible amount when compared to the generation value of energy. This claim of the appellant is allowed and Point K is answered and there will be a direction accordingly in this respect to the Commission but subject to prudent check.

35. **Point L:** Whether the disallowance of portion of depreciation deserves to be interfered ? Nextly the learned counsel for the appellant contended that the disallowance of depreciation to an extent of Rs. 129 crores for F.Y. 2005-06 and Rs. 133.6 crores for the F.Y. 2006-07 is not justified. The amount of depreciation claimed cannot be said to be on higher side or excessive as without providing for depreciation, the generating company may not be in a position to repay the loans and it may also affect its day to-day cash operations and it will be a financial constraint. The object of providing depreciation shall not be lost sight of. Taking into consideration of our judgment in appeal No. 84 of 2006, we would direct the Commission to allow depreciation as prayed for. It is true that such revisions which we directed, may result in the shooting up of generation tariff to a small extent but it cannot be avoided if the Commission expects the appellant to generate, to supply and to operate generating stations and supply uninterrupted power apart from improving increased demands of the consumer public.

36. The learned counsel for the appellant placed tabulated statement with respect to the details of depreciation. We have also considered the reply affidavit filed on behalf of the respondent Commission, while considering the various contentions advanced. The failure to treat the generating companies as a competent operator may not be a proper approach and the Commission should not have treated the generator as a department

of Government of Gujarat, while it should be treated as a venture and should have been enabled to compete with the other generators and achieve competent standards of performance. Point L is answered as above.

37. In the result, we direct the respondent Commission to modify the generation tariff as indicated above on each of the points set out above and pass orders in respect of the tariff period in question within a period of three months from the date of communication of the order and the same shall be effective from the date of such modification by the Regulator and the appellant shall not be entitled to claim retrospectively.

38. The parties shall bear their respective cost and in other respects we are not interfering with the orders of generation tariff.

Pronounced in open court on this 23rd day of November, 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E Padmanabhan)
Judicial Member

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