

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY,
AT NEW DELHI
(APPELLATE JURISDICTION)**

APPEAL NO. 203 OF 2014

Dated: 19th February, 2016

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member**

In the matter of:-

**Tata Steel Limited,
Northern Town,
Jamshedpur-831001**

...Appellant

Versus

**Jharkhand State Electricity Regulatory Commission,
2nd Floor, Rajendra Jawan Bhawan-cum-Sainik Bazar,
Main Road, Ranchi-834001.**

...Respondent

Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Mr. Punit D. Tyagi
Mr. Ankit P.
Ms. Anushree Bardhan
Mr. Nikhil Singal

Counsel for the Respondent(s) : Mr. Farrukh Rasheed

JUDGEMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

The present Appeal is filed by M/s. Tata Steel Limited (hereinafter referred to as "**Appellant**") under Section 111 of the Electricity Act, 2003, against the Impugned Order dated 04.06.2014 passed by the

Jharkhand State Electricity Regulatory Commission (hereinafter referred to as “**State Commission**”) whereby the State Commission has decided the Annual Revenue Requirements of the Appellant for Multi Year Tariff Period from the financial year 2013-14 to financial year 2015-16 and tried up of the financials of the Appellant for the Tariff Orders 2011-12 and 2012-13.

2. The Appellant is an existing company registered under the provisions of the Companies Act, 1956 having its premises at Jamshedpur in the State of Jharkhand and has a largest integrated steel manufacturing plant at Jamshedpur having a capacity of over 9.7 million tonnes of hot and cold rolled flat and long products.
3. The Respondent in the present Appeal is the State Commission for the State of Jharkhand exercising powers and discharging functions under the provisions of the Electricity Act, 2003.
4. The Appellant has been managing the power distribution system in Jamshedpur area since 1923 in accordance with the then prevailing Electricity Act, 1910 which was repealed after the enactment of Electricity Act, 2003.

5. The State Commission by its order dated 24.03.2004 permitted the Appellant to continue to operate in Jamshedpur area in compliance of Section 14 read with Section 172 of the Electricity Act, 2003.
6. Pursuant to notification of the State Commission's Regulations, 2003, the Appellant again initiated the process for grant of distribution license which was granted on 12.01.2006 w.e.f. 24.03.2004.
7. The Appellant provides and maintains basic civil amenities in the city of Jamshedpur primarily through its 100% subsidiary JUSCO, including the maintenance of electricity distribution services in its licensed area.
8. The Appellant has raised three specific issues on the Impugned Order dated 04.06.2014 passed by the State Commission which are detailed hereunder:
 - (a) **Distribution losses to be allowed:** The Appellant's contention is that the State Commission has not followed the applicable Jharkhand State Electricity Regulatory Commission (Terms & Conditions for Determination of Distribution Tariff) Regulations, 2010 fixing the target loss level to be achieved by the Appellant as the Distribution Licensee and the loss level has been considered on actual basis ignoring the principle that the loss

level is normative and issue of achieving actual loss at lower level as compared to the normative one ought to have been considered as efficiency gain. In case the Distribution Licensee is not able to achieve the normative level of loss as defined in the prevailing Regulations of the State Commission, it is considered as a deficiency in the working of that Distribution Licensee and hence not considered while computing the tariff.

- (b) **Carrying cost to be allowed:** In the Impugned Order dated 04.06.2014, the State Commission has allowed the carrying cost only for the period after the Impugned Order dated 04.06.2014 instead of allowing it from the date of the cost is incurred during the period from FY 2011-12, FY 2012-13 and the intervening period upto the passing of the Impugned Order.
- (c) **Tax pass through to be considered:** As per the Appellant, the State Commission ought to have considered as a consequence of creation of regulatory assets and recovery of the same in a deferred manner with carrying cost.
9. Being aggrieved by Common Tariff Order dated 04.06.2014 passed by the State Commission on true up for financial year 2011-12 and financial year 2012-13 and Annual Revenue Requirement for Multi-

Year Tariff Period from FY 2013-14 to FY 2015-16, the Appellant has preferred the present Appeal before this Tribunal.

10. The issues before us in the above Appeal needing our consideration are:

- (A) Whether the State Commission in its Impugned Order dated 04.06.2014 erred in treating the distribution losses as achieved by the Appellant for the FY 2011-12 & FY 2012-13 at actuals thereby not passing on the incentive to the Appellant in achieving lower distribution losses as compared to the normative level as specified in the prevailing Regulations of the State Commission?
- (B) Whether the State Commission in its Impugned Order dated 04.06.2014 has erred in not allowing carrying cost fully to the Appellant for the relevant period?
- (C) Whether the State Commission has erred in its Impugned Order dated 04.06.2014 in not considering the impact of the regulatory assets creation and deferring the revenue on corporate tax to be paid in future year on such deferred revenue?

11. We have heard at length the Learned Counsel for the Appellant Mr. M.G. Ramachandran and Learned Counsel for the State Commission Mr. Farrukh Rasheed and considered their Written Submissions and arguments put forth during the pleadings before us and our observations are detailed hereunder.
12. As regards the first issue with respect to the distribution loss level and collection efficiency to be considered for various distribution licensees, we shall first have a look at the relevant provisions contained in the State Commission’s Regulations & the relevant extract is reproduced hereunder:

“5.23 Distribution loss and collection efficiency targets to be met during the Tariff Period by various Licensees are as follows:

| Distribution loss Targets | | | | | |
|----------------------------------|----------------|----------------|----------------|----------------|----------------|
| Utility | 2011-12 | 2012-13 | 2013-14 | 2014-15 | 2015-16 |
| JSEB | 19% | 18% | 17% | 16% | 15.5% |
| JUSCO | 5% | 5% | 5% | 5% | 5% |
| SAIL-Bokaro | 17% | 15% | 13% | 11% | 10% |
| TSL | 7% | 6.5% | 6.0% | 5.75% | 5.5% |

| Collection Efficiency targets | | | | | |
|--------------------------------------|----------------|----------------|----------------|----------------|----------------|
| Utility | 2011-12 | 2012-13 | 2013-14 | 2014-15 | 2015-16 |
| JSEB | 100% | 100% | 100% | 100% | 100% |
| JUSCO | 100% | 100% | 100% | 100% | 100% |
| SAIL-Bokaro | 100% | 100% | 100% | 100% | 100% |
| TSL | 100% | 100% | 100% | 100% | 100% |

- 5.33 Various elements of the ARR of the Licensees' will be subject to incentive and penalty framework as per the terms specified in this section. The overall aim shall be to incentivize better performance and penalize poor performance, compared to the norms/benchmarks specified by the Commission;**
- 5.34 The gains/losses shall be computed on aggregate basis for all the controllable items considered collectively on annual basis. The computations shall be based on the data submitted by the Licensee in the Annual Performance Review and audited annual accounts and shall be subject to prudence check by the Commissions;
In case of aggregate gains, the aggregate gain shall be shared between the Licensee and the customers in the ratio of 60:40 respectively;**
- 5.35 The customers share of aggregate gain shall be transferred to the Contingency Reserve created at the beginning of the Control Period;**
- 5.36 In case of aggregate loss, the Licensee shall bear the entire losses.**
- 6.41 The trajectory for distribution losses for various Licensees has been specified in clause 5.23 of these Regulations;**
- 6.45 During the Transition period, tax on income, if any⁷, on the licensed business of the Licensee shall be limited to tax on the allowed return on equity.**
- 6.46 During the Control period, tax on income, if any, on the Licensed business of the Licensee shall be limited to tax on the allowed return on equity and consumer's share in the incentive earned by the Licensee;**
- 6.47 The income tax actually payable or paid shall be included in the ARR. The actual assessment of income tax should take into account benefits of tax holiday, and the credit for carry forward losses applicable as per the provisions of**

the Income Tax Act 1961 shall be passed on to the consumers.”

13. The distribution losses and collection efficiency targets as provided in the Regulations as enumerated above are on normative basis. If the distribution licensee is able to achieve better than normative, it is entitled to retain the same as efficiency gain, as claimed by the Appellant and if the distribution licensee can not achieve the target which results in inefficient performance, the liability is to be taken by the concerned distribution licensee.
14. The Appellant submits that it is well settled principle that once the normative parameters are fixed, the actual can not be considered, particularly, in the absence of any Regulation providing the same and in support of this argument, the Appellant has drawn our attention to the decisions given earlier by this Tribunal in the matters of:
 - (i) Punjab State Power Corporation Ltd. Vs. Punjab State Electricity Regulatory Commission (Judgment dated 18.10.2012 in Appeal Nos. 746 and 122 of 2011);
 - (ii) Haryana Power Generation Corporation Ltd. V/s. Haryana Electricity Regulatory Commission & Anr. (Judgment dated 31.07.2009 in Appeal Nos. 42 and 43 of 2008); and

- (iii) NTPC Ltd. V/s. CERC and Ors. (Judgment dated 14.11.2006 in Appeal No.96 of 2005).
15. The Appellant further states that the State Commission is required to follow the Regulations and can not deviate to the detriment of the Distribution Licensees and in support of the same it has made reference to judgments of the Hon'ble Supreme Court and this Tribunal in the matters of:
- (i) PTC India Ltd. V/s. CERC 2010 (4) SCC 603
- (ii) M/s. Ferro Alloys Corporation Ltd. V/s. OERC (Appeal No. 52 of 2012 in the order dated 23.09.2013)
- (iii) Haryana Power Generation Corporation Ltd. V/s. HERC (Appeal No. 131 of 2011 in the order dated 01.03.2012).
16. The Appellant alleged that the State Commission has ignored the above well settled principle and had proceeded to adjust the loss level on actual basis, therefore, denying the incentive on account of efficiency gain to the Appellant, contrary to the provisions in the Regulations.
17. The Learned Counsel for the State Commission did not dispute that the State Commission did not retain the loss level at the normative

percentage provided for the Appellant in accordance with the prevailing Regulations, however, supported the Impugned Order and read the relevant part which is reproduced below:-

“6.72 In the Tariff Order for FY 2012-13, the Commission had approved the distribution losses at 6.50% for FY 2012-13 as per the Distribution Tariff Regulations 2010. The actual overall losses achieved during FY 2012-13, as per audited accounts are 4.87%. It is pertinent to mention here that projected losses are approved on the basis of assumption of sales growth and increase in service area, while during the year the Petitioner was unable to achieve projected increase in sales – actual energy sales was less by approx. 20% than the projected energy sales in previous Tariff Order. In addition, of the total energy sales excluding sales to other licensees/JUSCO, approx. 85% of the sales are to HT consumers which have low associated losses. Further, even after repeated directives to extend its service area to domestic and rural consumers, the Petitioner has been unable to do so.

6.73 In the previous Tariff Order, the Commission had specified that the distribution loss reduction targets are only ceiling target as the Petitioner is still in pre-stabilisation stage and has a favourable LT:HT ratio. The relevant extract of the Order is summarized below:

‘However the Commission notes that the approved distribution loss of the Petitioner for FY 2011-12 at 5.51% is substantially lower than the target for the year i.e. 7% as the Petitioner is still in the pre-stabilization stage of network planning and strengthening and has a favourable LT:HT ratio. IN such a case the Commission expects that the Petitioner should be able to maintain minimum distribution losses. Thus even though the Commission is approving the distribution loss for FY 2012-13 at 6.50%

provisionally, it would only be a ceiling target subject to true up on the basis of actual losses.'

6.74 Thus, in view of above, the Commission does not find any merit in approving claim of the Petitioner for pass through of efficiency gains on account of loss reduction."

18. The State Commission has fixed different percentage of loss level in their Regulations for different licensees considering their respective peculiarities. It is observed that the loss level of Jharkhand State Electricity Board has been fixed at a much higher level considering its specific position since it is catering to domestic & rural areas and the fact that the distribution licensees are not comparable. The loss level fixed in the above regulations is normative. There is no provision in the Regulations providing for adjustment of loss level from normative to the actual one. In the circumstances, the State Commission was required to follow its applicable Regulations and not to have adjusted the normative loss to actual loss. The concern expressed by the State Commission on the Appellant not extending the supply of electricity in various areas including domestic and rural for which the distribution license has been given and that the Appellant maintains the better consumer mix need to be addressed separately in an independent proceeding and the State Commission is at its liberty to act appropriately in accordance with the law. However, the same can

not be a ground for not allowing the benefit of incentive to the Appellant on achieving lower loss level as compared to that of normative as per the applicable Regulations.

19. To firm up our opinion on this issue in question in the present Appeal, we have considered the following judgments quoted by the Appellant and extracts of these judgments are reproduced below:-

A. PTC India Ltd. Vs. Central Electricity Regulatory Commission, (2010) 4 SCC 603

“92. (i) In the hierarchy of regulatory power and functions under the 2003 Act, Section 178 which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by orders (decisions).

(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entitled to align their existing and future contracts with the said regulation.

(iii) A regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.

(iv) Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer

power of judicial review in the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities as we find from those authorities that in certain cases in England the power of judicial review is expressly conferred on the Tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the Regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity.

(v) If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178.

(vi) Applying the principle of "generality versus enumeration", it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(ze). Accordingly, we hold that the CERC was empowered to cap the trading margin under the authority of delegated legislation under Section 178 vide the impugned notification dated 23.1.2006.

(vii) Section 121, as amended by Electricity (Amendment) Act 57 of 2003, came into force with effect from 27.1.2004. Consequently, there is no merit in the contention advanced that the said section is not yet been brought into force.

Conclusion:

93. For the aforesaid reasons, we answer the question raised in the reference as follows:

The Appellate Tribunal for Electricity has no jurisdiction to decide the validity of the Regulations framed by the Central Electricity Regulatory Commission under Section 178 of the Electricity Act, 2003. The validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.

B. Ferro Alloys Corporation Ltd. Vs. Odisha Electricity Regulatory Commission, 2013 ELR (APTEL) 1342

“80. In view of the settled principles of law as laid down by the Hon’ble Supreme Court, the State Commission ought to have complied with the directions given by this Tribunal by deciding the issue on the basis of the Regulations then prevalent as on the date of the said impugned orders passed by the State Commission on 20th March, 2010 and 18th March, 2011 and not on the Regulations which was yet to come into force.

81. Thus, the State Commission has not followed this settled principle of law but violated the directives of this Tribunal while deciding the issue. Hence, the funding given by the State Commission on the new Regulations which was not prevalent on the date of earlier impugned orders is patently wrong. The same is liable to be set aside.

82. Accordingly the issue is decided against the State Commission.”

C. Haryana Power Generation Corporation Ltd. V/s. Haryana Electricity Regulatory Commission, Judgment of this Hon’ble Tribunal in Appeal No. 131 of 2011

“(a) Section 61 of the Act mandates the State Commissions to frame Regulations fixing terms and conditions for determination of tariff and in doing so it is to be guided by the principles and methodology specified by the Central Commission, the National Electricity Policy and Tariff Policy etc. Once the State Commission has framed the Regulations, it shall determine tariff in accordance with its own Regulations.”

20. In view of the above, loss level to be considered should be the normative one and not actual and should be strictly in accordance

with the relevant provisions contained in the Tariff Regulations, 2010 as notified by the State Commission.

21. On the second issue of carrying cost, the Appellant stated that admittedly, for the period 2011-12 and 2012-13, the Appellant was entitled to higher tariff as against the revenue requirement and the revenue gap was created restricting an increase in tariff by 14.5% w.e.f. 01.06.2014. Accordingly, revenue gap of the previous years, namely 2011-12 and 2012-13 was not allowed to be recovered in the respective years and was deferred to be recovered in future.
22. The Appellant further stated that the regulatory assets were created for the revenue gap of Rs.6.05 crores for the FY 2011-12 and Rs.223.75 crores for the FY 2012-13 and as such, the carrying cost on the above should be allowed from the respective years, namely 2011-12 and 2012-13 till recovery, however, the State Commission in its Impugned Order dated 04.06.2014 has restricted the carrying cost from 01.06.2014 only and the carrying cost for the prior period is not allowed.
23. *The Learned Counsel for the State Commission reiterated its argument in supporting the decision of the State Commission which is*

reproduced below:-

“8.12 Thus, to safeguard the interests of consumers and to provide adequate tariff hike to the Petitioner to at least meet increase in costs due to inflation & rise in power purchase costs partially, the Commission approves an average increase in tariff by 14.5%. This increase is expected to generate additional revenue of approx. Rs. 141.36 Cr and reduce the final revenue gap for FY 2011-12 and FY 2012-13. The balance revenue gap for FY 2011-12 and FY 2012-13 i.e. Rs. 88.44 Cr is to be carried forward as regulatory asset and the Commission shall allow carrying cost on approved regulatory assets.

8.13 Further, as per the provisions of the NTP, the regulatory assets along with the unmet revenue gap for FY 2013-14 i.e. Rs. 199.53 Cr [Rs. 111.09 Cr + Rs. 88.44 Cr] has to be liquidated in a time-bound manner. Accordingly, the Commission directs the Petitioner to submit a revised plan for liquidation of approved regulatory assets & unmet gap along with next tariff petition for consideration of the Commission.

8.14 The applicable tariff schedule for the Petitioner as proposed by the Petitioner and as approved by the Commission is shown in table below.

Table 44: Category-wise Existing, Proposed and Approved Tariff Rates for FY 2013-14

| Consumer Category | Fixed Charges (Rs/month or Rs/kVA/month or part thereof) | | | | Energy Charges (Rs/kWh) | | | |
|------------------------|--|----------|----------|-----------|-------------------------|----------|----------|-----------|
| | Slab | Existing | Proposed | Approved* | Slab | Existing | Proposed | Approved* |
| Domestic | | | | | | | | |
| Domestic DS-I | 220 V single phase up to 5 kW | 10 | 15 | 11 | 0-100 | 1.75 | 2.20 | 1.90 |
| Domestic DS-II | 415 V three phase above 5 kW | 20 | 25 | 22 | 101-400 | 2.95 | 3.70 | 3.20 |
| Domestic DS-III | | | | | 401 & above | 3.25 | 4.10 | 3.50 |
| Domestic DS HT | For all units | 275 | 345 | 300 | For all units | 3.10 | 4.20 | 43.40 |
| Commercial | 220 V single phase up to 5 kW | 25 | 50 | 30 | For all units | 4.60 | 7.35 | 5.00 |
| | 415 V three phase above 5 kW | 75 | 150 | 80 | For all units | | | |

| | | | | | | | | |
|------------------------|-----------------------------|-----|-----|-----|---------------|------|------|------|
| High Tension - I | For all units (Rs/kVA/mnth) | 220 | 375 | 225 | For all units | 3.70 | 6.30 | 4.50 |
| High Tension - II | For all units (Rs/kVA/mnth) | 220 | 375 | 225 | For all units | 3.60 | 6.30 | 4.35 |
| High Tension - III | For all units (Rs/kVA/mnth) | 200 | 375 | 210 | For all units | 3.50 | 6.30 | 4.15 |
| High Tension - IV | For all units (Rs/kVA/mnth) | 200 | 375 | 210 | For all units | 3.50 | 6.30 | 4.15 |
| Utilities/Street Light | For all units | 22 | 30 | 25 | For all units | 3.10 | 3.70 | 3.40 |
| Temporary supply | For all units | 33 | 50 | 35 | For all units | 5.50 | 6.60 | 6.00 |

Note: * As FY 2013-14 is already completed, the approved tariffs are applicable with effect from 1st June 2014 and shall remain in effect till the next tariff schedule is issued by the Commission.

8.15 Based on the above, the consumer category-wise comparison of average cost of supply and average revenue at existing and proposed tariff as submitted by the Petitioner and approved by the Commission is summarised in following table.

Table 45: Average CoS, Average Revenue & Tariff hike for FY 2013-14

| Consumer Categories | Submitted by Petitioner | | | | Approved by the Commission | | | |
|---------------------|---|--|--|--------------------------|---|--|--|--------------------------|
| | Average Cost of Supply incl. past gaps (Rs/kWh) | Average Revenue @ Existing Tariff (Rs/kWh) | Average Revenue @ Proposed Tariff (Rs/kWh) | Proposed tariff hike (%) | Average Cost of Supply incl. past gaps (Rs/kWh) | Average Revenue @ Existing Tariff (Rs/kWh) | Average Revenue @ Approved Tariff (Rs/kWh) | Approved tariff hike (%) |
| Total Domestic LT | 6.22 | 2.88 | 3.63 | 26% | 5.15 | 3.00 | 3.24 | 8% |
| Domestic - DS HT | 6.22 | 3.10 | 4.20 | 35% | 5.15 | 3.10 | 3.40 | 10% |
| Commercial | 6.22 | 4.69 | 7.48 | 60% | 5.15 | 4.66 | 5.06 | 9% |
| High Tension I | 6.22 | 4.65 | 7.92 | 70% | 5.15 | 4.93 | 5.75 | 17% |
| High Tension II | 6.22 | 4.04 | 7.04 | 74% | 5.15 | 4.39 | 5.16 | 18% |
| High Tension III | 6.22 | 3.75 | 6.78 | 81% | 5.15 | 3.85 | 4.52 | 17% |
| High Tension IV | 6.22 | 3.64 | 6.46 | 78% | 5.15 | 5.66 | 6.41 | 13% |
| Street Lights | 6.22 | 3.10 | 3.70 | 19% | 5.15 | 3.10 | 3.40 | 10% |
| Temporary supply | 6.22 | 5.50 | 6.60 | 20% | 5.15 | 5.50 | 6.00 | 9% |
| Total | 6.22 | 3.63 | 6.19 | 70% | 5.15 | 3.81 | 4.36 | 14.5% |

”

24. The Appellant claims that the carrying cost allowed effective from 01.06.2014 is not sufficient and it should be allowed from the time the expenditure was incurred in the financial years 2011-12 and 2012-13.
25. The Appellant submits that there is no reason for denying the same as the creation of regulatory assets is not for any reason attributable to the Appellant and is to avoid tariff shock to the consumers.
26. In support of its argument, the Appellant referred to this Tribunal's Judgment (Punjab State Power Corporation Ltd. V/s. Punjab State Electricity Regulatory Commission) in Appeal Nos. 7, 46, & 122 of 2011 and the relevant extract is reproduced hereunder:

“45. The carrying cost is allowed based on the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow arranged by the distribution company from lenders and/or promoters and/or accruals, has to be paid for by way of carrying cost. This principle has been well recognised in the regulatory practices as laid down by this Tribunal as well as the Hon’ble Supreme Court. In 2007 APTEL 193, this Tribunal has held that “along with the expenses, carrying cost is also to be given as legitimate expense”. Hon’ble Supreme Court in 2007 (3) SCC 33 has also held “the reduction in the rate of depreciation is violative of the legitimate expectation of the distribution company to get lawful and reasonable recovery of expenditure”.

27. After examining the relevant portion of the Impugned Order dated 04.06.2014 and the Appellant's claims, we find that the carrying cost should have been allowed for the prior period also as claimed by the

Appellant. In the reply filed by the Learned Counsel of the State Commission, it has been stated that more or less this issue is under review of the State Commission. However, the Appellant stated that there is no proceeding pending before the State Commission on this issue. In view of the fact that carrying cost is in regard to deferment of the amount determined as admissible to the utility and this being due from FY 2011-12 and FY 2012-13 and further in view of the stand fairly taken by the State Commission in its reply in the present Appeal and during arguments, we find it appropriate to direct the State Commission to allow the Appellant the carrying cost for the prior period as claimed by the Appellant.

28. Now, we are left with the third issue raised by the Appellant which relates to the taxes to be allowed on account of decision of the State Commission to defer certain recoveries of 2011-12 and 2012-13 for not allowing the recovery of the entire revenue requirements thereby creating revenue gap of Rs.6.05 crores for the FY 2011-12 and Rs.223.75 crores for the FY 2012-13. The Appellant submitted that it would be entitled to return on equity on post tax basis after grossing up, on account of deferment of recoveries to future years resulting in higher revenue in future, the Appellant would be required to pay taxes

not only in regard to return on equity of the future years but with additional further taxes on deferred income recovered in the future years. The Appellant further submitted that since the requisite return is not being allowed in the FY 2011-12 and FY 2012-13 to avoid tariff shock to consumers, the Appellant would not be adjusting the full tax recovery in the FY 2011-12 and FY 2012-13.

29. The Appellant has urged that since the higher tax liability had arisen on account of creation of the regulatory assets and being not attributable to the Appellant, the State Commission ought to consider the related tax amount to be allowed as a pass through. The Appellant has relied on the principle of law that a deeming provision should be given its logical conclusion. The Appellant further submitted that the regulatory asset is created and the recovery is deferred without any reason attributable to the Appellant, all the consequences of the above should necessarily be considered. .
30. The Learned Counsel for the Respondent stated that the Appellant had reported a negative Profit Before Tax (PBT) in FY 2011-12 and FY 2012-13 which implies that there was no tax liability on the Return on Equity earned by the Appellant. Therefore, allowing any expense

towards income tax when no such liability actually exists would be against the provisions of Regulations.

31. In the Impugned Order dated 04.06.2014, the State Commission has dealt with the return of equity and taxes and the relevant extract is reproduced below:

“7.53 As per the Distribution Tariff Regulations, 2010, the equity base has been considered equal to 30% of GFA. The GFA has been considered net of consumer contribution. Further, as per the above mentioned regulations, the rate of return on equity for the transition period shall be considered at post-tax rate of 15.50% p.a. However, the Commission notes that as per audited accounts for FY 2012-13, there is no assessable income for tax purposes for the Power Business Division of the Petitioner. Also the audited accounts for the Power Business Division for FY 2011-12 and FY 2012-13 do not include any cost attributable to income tax payable pertaining to the Power Business division. Thus, as there is no income tax chargeable to the power business division, the Commission has not grossed up the post-tax rate by income tax rate for projections for MYT period. However, this is subject to true up based on audited accounts and income tax liability for power business division in subsequent years during MYT period.”

32. The State Commission has proceeded on the basis of tax grossing up for the two years in issue, namely financial years 2011-12 and 2012-13 and in its Impugned Order dated 04.06.2014, the State Commission has not gone into the treatment of tax payable on the deferred revenues in future. The issue of taxes paid on revenue derived from regulatory assets and extra taxes paid on such revenue

would arise in the years in which such revenues are derived. This can not be considered at this stage of the proceedings. Without expressing any opinion on the merits of this claim being raised, the Appellant can urge these aspects in the relevant years in future for consideration by the State Commission. Hence, the Appellant is not entitled to any order on this issue at this stage.

ORDER

In an ultimate analysis, the present Appeal succeeds in part and is allowed subject to observations made as above in respect of concerned issues. The Impugned Order is set aside to the extent it decides two issues regarding (a) allowance of "Distribution Losses" and (b) allowance of "Carrying Cost". The matter is remanded to the State Commission. The State Commission is directed to give hearing to the parties and decide the said two issues afresh in accordance with law. No order as to cost.

Pronounced in the open court on this 19th day of February, 2016.

(I.J. Kapoor)
Technical Member

√
REPORTABLE/NON-REPORTABLE
dk

(Justice Ranjana P. Desai)
Chairperson