

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APPEAL NO. 246 OF 2017

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APPEAL NO. 247 of 2017

Dated: 04th October, 2019

**Present: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

IN THE MATTER OF :

APPEAL NO. 246 OF 2017

Torrent Power Ltd.,
Having its Registered Office at
"Samanvay", 600, Tapovan, Ambawadi
Ahmedabad-380 015,
Gujarat

...Appellant

vs.

- 1. The Secretary,
Gujarat Electricity Regulatory Commission,
6th Floor, GIFT ONE, Road 5C, Zone 5,
GIFT City, Gandhinagar – 382 355 (Gujarat)**
- 2. Surat Citizens' Council Trust,
A-205-206, Tirupati Plaza,
2nd Floor, Nr. Collector Office,
Nanpura, Surat, Gujarat – 395 001**
- 3. Smt. Bhavna Bhaskar Patel,
J 19, Ranchhodnagar, Bodakdev, Vastrapur,
Ahmedabad, Gujarat – 380 054.**

- 4. Akhil Gujarat Grahak Sewa Kendra,**
Karaka Street, Saraspur,
Ahmedabad, Gujarat – 380 018
 - 5. Shri H.J. Patel (Retd. CE. DGVCL),**
At & Po. Talavchara, Ta. Chikhli,
District Navsari, Gujarat – 96529
 - 6. Shri Vijay Patel,**
Vijay411@yahoo.com
 - 7. Consumer Education and Research Society**
Suraksha Sankool, Sarkhej-Gandhinagar
Highway, Thaltej, Ahmedabad – 380054
 - 8. Laghu Udyog Bharati – Gujarat**
307, Ashram Avenue
Behind Kochrab Ashram
Nr. Paldi Cross Road, Ellisbridge
Ahmedabad, Gujarat – 380006
 - 9. Bharatiya Samyawadi Paksh (Markswadi) –
Mansukhbhai Nanjibhai Khorasiya**
Shop No. 303, Arjun Complex
Near Rupali Naher, Bhatar Road
Surat, Gujarat – 395007
 - 10. Utility Users' Welfare Association (UUWA)**
Lakshmi Ginning Compound
Opp. Union Co. Op. Bank Ltd.
Naroda, Ahmedabad, Gujarat – 382330
 - 11. Gujarat Chamber of Commerce & Industry**
Shri Ambica Mills – Gujarat Chamber Bldg.
P.O. Box No. 4045, Ashram Road, Ahmedabad – 380009
 - 12. Shri Amarsing Chavda**
Heritage Bungalow, Near Science City
Ahmedabad – 380060
-Respondent(s)**

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2. **Surat Citizens’ Council Trust,**
A-205-206, Tirupati Plaza,
2nd Floor, Nr. Collector Office,
Nanpura, Surat, Gujarat – 395001
3. **Sh. Brijmohandas N. Shah**
Jeevandeep Flats, Co-op Housing Society Ltd.
Sy. No. 1436/6 B, Ist Floor No. A/1
Near Kadampalli Society, Timaliawad
Nanpura, Surat, Gujarat - 395001
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10. Utility Users' Welfare Association (UUWA)

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Opp. Union Co. Op. Bank Ltd.
Naroda, Ahmedabad, Gujarat – 382 330

10. Shri Amarsing Chavda

Heritage Bungalow, Near Science City
Ahmedabad – 380 060

....Respondent(s)

Counsel for the Appellant	:	Ms. Deepa Chawan Mr. Hardik Luthra Mr. Alok Shukla Mr. Chetan Bundela Mr. Tapan Mr. Nitish Ojha
Counsel for the Respondent (s)	:	Mr. C.K. Rai Mr. Sachin Dubey for R-1 Mr. Jawad Tariq Mr. Ankit Swarup Ms. Tanya Swarup for R-2 Mr. Anand K. Ganesan Ms. Swapna Seshadri Mr. Ashwin Ramanathan Ms. Neha Garg Mr. Amal Nair for R-11

JUDGMENT

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

1. The Appeal No. 246 of 2017 has been filed by the Appellant, Torrent Power Ltd. under Section 111 of the Electricity Act questioning the legality, validity and correctness of the Impugned Order dated 08.06.2017 passed by the Gujarat Electricity Regulatory Commission (hereinafter referred to as the 'Commission') in Review Petition No. 1573 and 1574 of 2017(hereinafter referred to as the 'Review Petition') preferred by Surat Citizens' Council Trust with regard to seeking review of original Tariff order dated 31.03.2016 issued by the Respondent Commission in Petition No. 1552 of 2015 relating to the Truing up of FY 2014-15, Approval of Provisional ARR for FY 2016-17 and Determination of Tariff for FY 2016–17 for Torrent Power Limited – Distribution, Ahmedabad/ Gandhinagar and Surat license area.

1.1 The Appeal No. 247 of 2017 has been filed by the Appellant, Torrent Power Ltd. under Section 111 of the Electricity Act questioning the legality, validity and correctness of the Impugned Order dated 08.06.2017 passed by the Gujarat Electricity Regulatory Commission (hereinafter referred to as the 'Commission') in Review Petition No. 1574 of 2016(hereinafter referred to as the 'Review Petition') preferred by Surat

Citizens' Council Trust with regard to seeking review of original Tariff order dated 31.03.2016 in the original Petition No. 1553 of 2015 relating to the Truing up of FY 2014-15.

2. Earlier this Hon'ble Tribunal has set aside the Commission's orders dated 16.06.2017 and 01.07.2017 vide its judgement in Appeal No. 178 of 2016 and other matters and remanded the Review Petitions for hearing afresh. Consequently, the Respondent GERC has passed the impugned order reviewing the Tariff orders dated 31.03.2016 passed by the Commission in the Petition filed by the Appellant for Truing up of FY 2014-15, Approval of Provisional ARR for FY 2016-17 and Determination of Tariff for FY 2016-17 for Torrent Power Limited –Distribution, Ahmedabad / Gandhinagar and Surat license area on the ground urged in the Review Petitions No. 1573 and 1574 of 2016.

3. Brief Facts of the Case:-

- 3.1. The Appellant, Torrent Power Limited (TPL) is a company formed under the provisions of the Companies Act, 1956. The Appellant is the distribution licensee for Ahmedabad/ Gandhinagar and Surat license area.
- 3.2. The Respondent No. 1 is the Gujarat Electricity Regulatory Commission (GERC), established under the provisions of the Electricity Regulatory

Commission Act, 1998 presently repealed and so continued in office, by virtue of Section 82 of the Electricity Act, 2003.

- 3.3.** The Respondent Nos.2 &3 are the consumers of the Appellant who preferred the said Review Proceedings seeking review of the Order dated 31.03.2016 in Petition Nos. 1552 & 1553 of 2015.
- 3.4.** The Respondent Nos. 4 to 12 were added as party Respondents pursuant to the order dated 30.04.2016 passed by Respondent No.1/Commission in the review proceedings.
- 3.5.** The Respondent No.1 has passed the impugned order in respect of the petitions filed seeking review of Tariff orders passed by the Respondent Commission for Ahmedabad/ Gandhinagar and Surat license area.
- 3.6.** The Appellant has challenged the impugned order of the Respondent Commission to the extent the Respondent Commission has erroneously held the Carrying Cost in abeyance in Review proceedings after having initially allowed the same in the Original Tariff Proceedings.

4. Questions of Law:-

The Appellant has raised following questions of law in the present appeal:

- 4.1.** Whether the impugned order is bad in law for lack of jurisdiction exercised in review?
- 4.2.** Whether the Review Petition which does not disclose any error in respect of carrying cost on the face of the record was maintainable?

- 4.3. Whether Respondent Commission has obviated the essence of Review which is that a reviewing court does not re-hear the matter?
- 4.4. Whether the impugned order is bad in law for reviewing the original Tariff order by keeping Carrying Cost in abeyance and for sitting in Appeal over this Tribunal Judgment on carrying cost?
- 4.5. Whether impugned order contravenes any provisions of the EA 2003 and the relevant Regulations framed there under?
- 4.6. Whether impugned order in respect of carrying cost is contrary to financial principles, this Tribunal's Judgment, Statutory Provisions and subordinated legislation?

5. Learned Counsel, Ms. Deepa Chawan, appearing for the Appellant has made following arguments/ submissions for our consideration:-

- 5.1. The Respondent Commission, as per the MYT Regulations, compares the revenue requirement of the utility with its revenue every year as annual exercise. The gap or surplus, arrived at after truing-up of a particular year, reflects the difference between actual revenue and entitled revenue requirement. This trued up gap /(surplus) gets adjusted in the ensuing year's tariff i.e. while determining the tariff of FY 2016-17, the trued-up gap/ (surplus) of FY 14-15 has been considered along with the estimated gap/(surplus) of FY 2016-17. Thus, the trued-up gap/ (surplus) get addressed after two financial years. This trued-up gap/ (surplus) is to be allowed to the utility with carrying cost as per the principles enunciated by

this Tribunal in its Judgment dated 28.11.2013 in Appeal No. 190 of 2011 and Appeal No. 162 & 163 of 2012.

5.2. In the impugned order the Respondent No. 1 Commission has in Paragraph 22.19.5 referred to the judgement and order of this Tribunal in Appeal Nos. 190 of 2011 and 162 & 163 of 2012. However, the impugned order dated 08.06.2017 erroneously holds that as per the Tribunal's judgement in Appeal Nos. 190 of 2011 and 162 & 163 of 2012 the Respondent No. 1 Commission requires supporting documents, details, evidence to be adduced by the Appellant to verify as to whether the Appellant has incurred the expenses towards the carrying cost as claimed by it or not. The claim towards Carrying Cost is further held to be required to be substantiated by the Appellant specifying clearly that these expenses have been incurred towards the fund (i) arranged from the lenders, and / or (ii) arranged from promoters, and / or, (iii) arranged through internal accruals.

5.3. The Appellant submitted that the perusal of the Judgement in Appeal Nos. 190 of 2011 and 162 & 163 of 2012 reveal that this Tribunal in the said judgement had dealt with the issue of disallowance of Carrying Cost to the Appellant from Paragraph 77 of the said judgement. In Paragraph 83 of the said judgement this Tribunal extracted various principles relating to

grant of carrying cost laid down from the judgements cited and considered in the preceding two Paragraphs, 81 & 82. In Paragraph 84, this Tribunal having considered the legal position came to the conclusion that the case of the Appellant fell in under sub category (iv).

5.4. The Respondent No. 1 Commission in the impugned order has set at naught the said judgement and order of this Tribunal by seeking to purportedly decide the claim of the Appellant on the basis of the principles set out in Paragraph 83, when this Tribunal has already come to the conclusion that the Appellant fell under sub-category (iv) as mentioned in Paragraph 84. The contents of the Paragraph 84 of the judgement by this Tribunal are clear in terms of coming to the conclusion that the Appellant falls under Sub-category (iv) and as such Appellant is entitled for Carrying Cost. To that extent the contents of Paragraph 22.19.6 of the impugned judgement are contumacious. The Respondent No. 1 Commission has been created under the Electricity Act, 2003 and is bound by the hierarchy of orders under the said Act. The orders of this Tribunal were binding on the Respondent No. 1 Commission and have been flouted.

5.5. In impugned Order, the Respondent No. 1/ Commission has also relied on the Judgment and Order dated 28.05.2009 in Appeal No. 111 of 2008 passed by this Tribunal to erroneously arrive at a conclusion that

expenditure has to be proved by the Appellant. In doing so, the Respondent No. 1 Commission has misconstrued the said issue.

5.6. The judgement in Appeal No. 111 of 2008 relied upon in the impugned order, when seen in its entirety would clearly reveals its non-applicability in the present case, wherein this Tribunal has already decided the entitlement of this Appellant to carrying cost in its decision dated 28.11.2013 in Appeal No. 190 of 2011 and others. The impugned order extracts para 7 of the judgement dated 28.05.2009 in Appeal No. 111 of 2008 without considering the vital facts narrated in Paragraph 5 thereof. It is submitted that the judgement referred to and relied upon by the Respondent no. 1 Commission is on the issue of computation of gains/ (losses) for Interest on Working Capital as provided for in the MERC (MYT) Regulations. The said issue and Regulations as referred to therein are not applicable to the present case which relates to Carrying Cost.

5.7. The impugned order also ignores the order of the Respondent Commission dated 03.06.2015 passed in implementation of the Judgment dated 28.11.2013 in Appeal No. 190 of 2011. The Order dated 03.06.2015 issued by the Respondent Commission lays down the methodology adopted by the Respondent Commission for granting Carrying Cost. The amount of gap is approved by the Respondent Commission and period of delay in recovery of the approved gap is also

decided and approved by the Respondent Commission. Regarding the interest rate to be allowed to the utility for the recognized delay on the approved gap, the Respondent Commission has approved the methodology of considering weighted average rate of interest on loans while passing the order dated 03.06.2015 in compliance to the judgment of this Tribunal dated 28.11.2013 in Appeal No. 190 of 2011 and Appeal No. 162 & 163 of 2012.

5.8. The Respondent Commission has adopted the principles of methodology of Carrying Cost approved by it in the Order dated 03.06.2015 while passing the Tariff Order dated 31.03.2016 in Case No. 1554 of 2015. While considering the issue of Carrying Cost on surplus the Respondent No. 1 Commission has awarded Carrying Cost in conformity with its earlier orders and the judgement of this Tribunal in Appeal No. 190 of 2011.

5.9. Thus, there is a contradictory and inconsistent approach adopted by the Respondent No. 1 Commission in the impugned order while considering the tariff item Carrying Cost.

5.10. Keeping the carrying cost in abeyance on the erroneous grounds that this Tribunal has mandated to verify the cost incurred by relying on unrelated judgment and unrelated issues is completely contrary to the judgments of this Tribunal as well as the orders of the Respondent Commission (supra)

on the very issue of recovery of carrying cost. Therefore, the denial of legitimate recovery of carrying cost is to be set aside along with the erroneous findings that the Respondent Commission is mandated by this Tribunal to verify whether the actual carrying cost has been incurred or not.

5.11. Further, the disallowance of carrying cost was not available as a ground for seeking review of the Tariff Order dated 31.03.2016 in Original Tariff Petitions No. 1552 & 1553 of 2015. The Respondent Commission failed to consider and appreciate that the Review Proceedings need to be rejected at threshold for urging the ground of Carrying Cost. The Respondent Commission violated the basic legal principles relating to review while dealing with the matter and the same is not legally tenable. The normal Rule of law is that once a judgment is pronounced and order is made, the Court becomes functus officio. The underlying object of the provisions of Review is neither to enable the court to write a second judgment nor to give a second innings to the party. Therefore, the errors contemplated for undertaking review are those which are self-evident and that review does not result in a re-hearing.

5.12. In fact, the issue of carrying cost was dealt with by the Respondent Commission in its original Tariff Order dated 31.03.2016. One of the Respondents, GCCI objected to the claim of carrying cost raised by the

Appellant in the original Tariff Petition in Case No. 1552 of 2015. Hence, the Respondent Commission had dealt with the objections related to carrying cost and approved the carrying cost as claimed by the Appellant by stating that carrying cost is allowed on uncovered gap as per this Tribunal's decisions. Thus, there was no cause of review as the Respondent Commission had applied its mind and duly considered the decision of this Tribunal and came to the conclusions in the original Tariff order dated 31.03.2016. Therefore, the impugned order holding Review as maintainable is contrary to the nature and scope of the Review Proceedings.

5.13. The impugned order fails to take into consideration the dictum of the Hon'ble Apex Court in a catena of judgments that a party is not entitled to seek review of the judgment merely for the purpose of a re-hearing and fresh decision of the case. The Respondent Surat Citizen Council in the guise of review proceedings sought a rehearing of the proceedings. The Respondent Surat Citizen Council cannot avail this mode of legal redress. The Appellant has also submitted that the review is not maintainable as same does not fall within the ambit and scope of Section 94 of the Act. The reliance is placed upon the judgments of the Apex Court in *Haridas Das Vs Usha Rani Banik (smt) &Ors – 2006(4) SCC 78*, *Haryana State Industrial Development Corporation Limited Vs. Mawasi&Ors – 2012 (7)*

SCC 2000, M/s Northern India Caterers (India) Ltd Vs. Lt. Governor of Delhi – 1980 (2) SCC 167, Kamlesh Verma Vs. Mayawati & Ors – 2013 (8) SCC 320, Saw Chandra Kante Vs. Sheikh Habib – 1975 (1) SCC 674 and M/s Thungabhadra Industries Ltd Vs. Government of Andhra Pradesh – AIR 1964 SC 1372. In view of the above judgements, the Review Petition ought to have been rejected as not maintainable as the ground of carrying cost as the grounds urged and mentioned in the Review Petition as filed were not grounds of Review.

5.14. Without prejudice to the contention of the Appellant that the Respondent Commission had considered all issues raised before it in the original Tariff proceedings, it is also submitted that if an adjudicating authority did not purportedly deal with the submission made by a party, the same cannot be a ground of review. As a matter of fact, the Review Petition cannot be an Appeal in disguise. The Review Proceedings could not have been used as a modality to alter interpretation of the judgment and order of this Tribunal in Appeal No. 190 of 2011 & other matters. Hence, the impugned order is liable to be set aside.

6. Learned Counsel, Mr. C.K.Rai, appearing for the Respondent Commission has made following arguments/ submissions for our considerations :-

6.1. In the impugned order, the Respondent Commission has examined in detail the submissions made by the parties while deciding the

maintainability of review. The Respondent Commission has relied on the judgment of the Hon'ble Supreme Court reported in 1995 (1) SCC 170 Meera Bhanja Vs. Nirmala Kumari Choudhury and came to the conclusion that the expenditure of carrying cost has not been substantiated by way of document etc by licensee. The Commission is of the view that without incurring any expenditure with respect to carrying cost for FY 2016-17, the amount was allowed and therefore it was an error apparent and sufficient cause for review of order.

6.2. In support of maintainability of the review petition, reliance is placed upon the judgments of the Hon'ble Supreme Court in Board of Control for Cricket in India And Another vs. Netaji Cricket Club and Others (2005) 4 SCC 741 and Lily Thomas vs. Union of India (2000) 6 SCC 224. During the hearing, it was considered that the large amount of carrying cost may not be passed on to the consumers without proper prudence check by the Commission. Therefore, the review filed before the Commission was found maintainable.

6.3. With reference to the contention of Appellant about the misinterpretation of this Tribunal Judgment in Appeal No. 190 of 2011 and 162 & 163 of 2012, it is submitted that the Commission has dealt with the contention of the Appellant in the impugned order. In fact, the Commission has not questioned the entitlement of the Appellant for carrying cost but as per the

principles laid down by this Tribunal in Appeal No. 190 of 2011 sought to verify the actual cost incurred by the Appellant.

6.4. The Appellant is misconstruing the judgment of this Tribunal by reading para 83(d)(iv) in isolation instead of harmoniously reading the entire paragraph 83. As per the ratio of the judgment, the Commission is required to verify as to how the gap in cash in flow was bridged by the Appellant by arranging the funds from the lenders and/ or promoters and /or internal accruals and what is the actual cost incurred for serving such bridge finance.

6.5. The judgment passed by this Tribunal in Appeal No. 190 of 2011 necessitates the State Commission to apply prudence check on the claim of the carrying cost by verifying the necessary details. As the Appellant has not substantiated the claim of carrying cost with necessary documents, the State Commission decided not to consider the carrying cost claimed by Appellant, TPL.

6.6. Referring to the Hon'ble Supreme Court' judgment in case of Islamic Academy of Education & Anr. Vs. State of Karnataka &Ors (2003) 6 SCC 697, it is submitted that reliance of the Appellant on the judgment of this Tribunal in Appeal No. 190 of 2011 and the order dated 03.06.2016 to the extent that the impugned order is contrary to the order in Appeal No. 190 of 2011 is completely erroneous. The impugned order passed is in

complete conformity with the aforesaid decision of the Tribunal and same can be seen by reading para 83 & 84 of the Judgment whereas the Appellant's narrow reading / interpretation of the judgment is based on the partial reading of Para 83 (d)(iv) which is not permitted as per the ratio of Islamic Academy of Education & Anr. Vs. State of Karnataka & Ors.

6.7. Further, the issue of carrying cost is subject to prudence check is no more res integra and this Tribunal in 2012 SCC OnLine APTEL 151 in Kerala State Electricity Board Vs. Kerala State Electricity Commission held that carrying cost is to be allowed after prudence check. Hence, the impugned order passed by the State Commission is in conformity with the Electricity Act, 2003 and various judgments of this Tribunal.

6.8. With reference to the contention of the Appellant that the reliance on the judgment dated 28.05.2009 issued by this Tribunal in Appeal No. 111 of 2008 is erroneous as same was passed before the judgment in Appeal No. 190 of 2011 and relates to interest on working capital, it is submitted that the contention of the Appellant is not tenable and liable to be rejected. It is submitted that both judgments are of coordinate benches and are binding upon the parties. These judgments lay down the same principle of prudence check on the expenditure. The Appellant is, therefore, required to substantiate its claim by specifying clearly that the revenue gap was financed by it either (i) Obtaining loan from the lenders

and/ or (ii) Promoters and/or , (iii) internal accruals and the Commission is entitled to look into the source of such accruals.

6.9. It is denied that in the impugned order, the Commission has ignored its earlier order dated 03.06.2015. It is reiterated that there is no conflict with the order dated 03.06.2015 and the impugned order dated 08.06.2017 as in both orders, the Commission has allowed the Carrying cost. In the present case, the Commission has deferred the recovery till it is substantiated by way of necessary documents in consonance with the judgment of this Tribunal and in consonance with the provisions of the EA, 2003.

6.10. With reference to the issue of inconsistent stand of the State Commission raised by the Appellant in the impugned order and the Tariff order issued by the Commission in Case No. 1554 of 2015, it is submitted that there is no inconsistency. As Review Petitions were filed w.r.t. Case no. 1552 and 1553 of 2015, the Commission has passed the impugned order addressing the issues pertaining to Ahmedabad and Surat License areas. Thus, there is no inconsistency. Further, carrying cost in respect of Ahmedabad & Surat license areas and that of Dahej license area is different and distinct. While in case of Ahmedabad & Surat license areas, there is a positive carrying cost, whereas in case of Dahej license area, there is negative carrying cost arising on account of revenue surplus. The

method of allowing carrying cost on surplus amount cannot be compared with the method of allowing carrying cost on revenue gap. Therefore, there is no inconsistent approach adopted by the State Commission in allowing carrying cost.

6.11. The Ld Counsel, who appeared on behalf of Respondent No. 2, Surat Citizen Council Trust, has referred to its reply affidavit wherein he has reiterated issues/ contentions on certain other aspects without impugning the order dated 08.06.2017 passed in Review Petition No. 1573 & 1574 of 2016 in Tariff Petition No. 1552 & 1553 of 2015, respectively.

7. Mr. Anand K. Ganeshan, Ld Counsel appeared on behalf of Respondent No. 11, Gujarat Chamber of Commerce and submitted that they are not against the Appellant's claim of carrying cost but the Appellant is required to furnish the details so as to decide the applicable rate of interest because cost of funding may differ for each source of funding.

8. We have heard learned counsel appearing for the Appellant, learned counsel for the Respondents at considerable length of time. On the basis of the pleadings and submissions available, the following one issue emerge in the instant Appeal for our consideration:-

- Whether the impugned order of the State Commission which has reviewed the decisions of the Original Tariff Order and kept Carrying Cost in abeyance is sustainable in law?

OUR FINDINGS AND ANALYSIS:-

9. We have heard the Learned Counsels on merits at length with reference to impugned order keeping the carrying cost in abeyance during review proceedings and also on the issue of maintainability of the review petition qua the issue of carrying cost. We note that this is the third round of litigation on the original tariff order dated 31.03.2016. The original tariff order was reviewed by the Respondent Commission and passed the orders on 08.06.2017 in the Review Petitions. The Appellant has filed the appeals assailing the maintainability and merits of the orders passed by the Commission in the Review Petitions. This Tribunal vide its judgment dated 30.03.2017 set aside the orders passed by the Commission in Review Petitions and remanded the matter to the Commission with a direction that the original Members of the Commission, who had heard the Petition Nos. 1552 of 2015 and 1553 of 2015 and passed orders dated 31.03.2016, shall hear the aforesaid Review Petitions and pass appropriate order. In turn, the Commission has passed the impugned order dated 08.06.2017. This Tribunal has decided to deal with the issue of carrying cost on merit as well as on maintainability of the impugned order to put the issue on rest.

9.1 In the present case, the Appellant has claimed carrying cost on the trued up gap in accordance with the methodology adopted by the State Commission in its order dated 03.06.2015 allowing carrying cost based on

the principles enunciated by this Tribunal in its judgment dated 28.11.2013 in Appeal No. 190 of 2011 and Appeal No. 162 & 163 of 2012.

9.2 However, in the impugned order, the Commission has referred to the para 83 of the judgment of this Tribunal in Appeal No. 190 of 2011 and Appeal No. 162 & 163 of 2012 and held that as per the principles laid down by the Tribunal, the Commission is required to verify as to how the gap in cash flow was bridged by the Appellant by arranging the funds from the lenders and/or promoters and/or internal accruals and what is the actual cost incurred by the Respondent for servicing such bridge finance. The Commission has further held that as Appellant has not substantiated its claim of carrying cost and in the absence of any supporting documents such claim cannot be admitted by the Commission. The Commission has also referred to cash flow requirement for FY 2014-15 and stated that as Appellant was having the amount more than its requirement of working capital during the whole year, the Appellant did not face any cash flow crunch necessitating him to arrange funds from lenders/promoters/accruals.

9.3 Learned counsel for the Appellant has submitted that in the case of the Appellant Paragraphs 77 to 85 read with Paragraph 86 (v) of the judgement of this Hon'ble Tribunal in Appeal No. 190 of 2011 and other connected matters deal with the issue of the grant of Carrying Cost to the

Appellant. The judgement in Appeal No. 190 of 2011 concludes the right of the Appellant to Carrying Cost in the following words:

*“84. In view of the settled position of law, **in the present case, the Appellant falls under sub-category (iv) as referred to above**, and as such the Appellant is entitled for the Carrying Cost as per the Order dated 17.1.2009. Accordingly, ordered.*

86. Summary of Our Findings

.....
v. Appellant is entitled for the Carrying Cost for the Revenue gap as a result of allowance of legitimate expenditure in the true up as per the Order dated 17.1.2009. Accordingly, ordered in favour of the Appellant.”

The Appeal No. 190 of 2011 was thus, decided in favour of the Appellant. The principles enunciated by this Tribunal in coming to the aforesaid conclusion cannot be reconsidered by the Commission, when this Tribunal has clearly held that the case of the Appellant as regards the gap falls in sub-category (iv). Therefore, the conclusion of this Tribunal could not have been ignored by the Respondent No. 1 Commission. The judgement and order dated 28.11.2013 in Appeal No. 190 of 2011 has attained finality.

9.4 The Learned Counsel for the Appellant has also relied on the judgment of this Tribunal in Appeal No. 308 of 2013 dated 09.10.2015 in the matter of Chhattisgarh State Power Distribution Co. Ltd. Vs. Chhattisgarh State Electricity Regulatory Commission; wherein this Tribunal has held as under:

“31. Our Consideration on this Issue:

31.1 The State Commission has determined the Revenue Gap in the ARR of a licensee after considering the submissions of the stake holders. In case, the Commission decides

not to allow the entire deficit in the ARR or tariff for some reasons or creates some regulatory assets, then the carrying cost is to be allowed to the licensee as per the decision of this Tribunal in various cases. Similarly on true-up or on implementation of the decision of the Appellate Courts if Revenue Gap is found, carrying cost has to be allowed as per the decision of the Appellate in various cases. Similarly, if there is surplus as a result of true-up of accounts of the licensees, interest on the surplus is to be considered by the Commission for reducing the ARR. The principle of time value of money and carrying cost has to be applied both for the deficit as well as surplus discovered after true-up of accounts.

.....

31.3 We find that as a result of implementation of the judgment of this Tribunal for FY 2005-06 and FY 2006-07, amount of ARR and Revenue Gap/surplus position for the Appellant for these years has changed. The Tribunal had also directed for carrying cost on revenue gap. Thus, as a result of the directions of this Tribunal the accounts of FY 2005-06 and FY 2006-07 have been further trued-up and the position of the surplus/deficit of the Appellant has also been changed. Accordingly, the carrying cost has to be allowed for final surplus/deficit which has been determined in the Impugned Order.”

Thus, the value of money is settled financial principle and the same has also been recognized by this Tribunal. The utility gets compensated by way of carrying cost on this very principle i.e. when amount is due and recovery is deferred, the utility gets compensated by way of carrying cost. Thus, when the Commission has arrived at the revenue gap after following due process of truing up exercise, the utility should be compensated for the delay in recovery of its revenue.

- 9.5** The counsel for the Appellant also submitted that impugned order also ignores its own order dated 03.06.2015 passed by it in implementation of the Judgment dated 28.11.2013 in Appeal No. 190 of 2011 and Appeal No. 162 & 163 of 2012. The Commission argued that it has allowed the carrying cost in the present case but recovery is deferred as the objection with respect to substantiation of the carrying cost by way of document has

been raised in the present case. The perusal of the referred order dated 03.06.2015 issued by the Commission reveals that it lays down the methodology adopted by the Commission for granting Carrying Cost. The computation of carrying cost involves three aspects i.e. Quantum of Gap, Period of delay and Rate of Interest. In the present case, the amount of gap is approved by the Commission and period of delay in recovery of the approved gap is also decided and approved by the Commission. Regarding the interest rate to be allowed to the utility for the recognized delay on the approved gap, ideally, the interest rate applicable for short term working capital requirement should have been considered. However, in the present case, the Commission has approved the methodology of considering weighted average rate of interest on loans while passing the order dated 03.06.2015 in compliance to the judgment of this Tribunal dated 28.11.2013 in Appeal No. 190 of 2011 and Appeal No. 162 & 163 of 2012. In the present case, the Appellant has accepted and followed the same methodology as adopted by the Commission.

- 9.6** The Ld Counsel for the Appellant also relied upon the Tariff Order dated 31.03.2016 passed by the Commission in Case No. 1554 of 2015 and submitted that the Commission has adopted the principles of methodology of Carrying Cost approved by it in the Order dated 03.06.2015 while passing the Tariff Order dated 31.03.2016 in Case No.

1554 of 2015. It is also submitted that while allowing the Carrying Cost on surplus the Commission has allowed and awarded Carrying Cost in conformity with its earlier orders and the judgement of this Tribunal in Appeal No. 190 of 2011 and 162 & 163 of 2011. In turn, the Learned Counsel for the Commission has argued that the principle of carrying cost on revenue surplus cannot be equated with the revenue gap, particularly when the amount of carrying cost on gap is high. The Commission has also argued that it is settled rule of law that any relief granted inadvertently cannot create a legal right to claim relief by relying on the judgment of Baswaraj and Anr. Vs Special Land Acquisition Officer reported in (2013) 14 SCC 81. The issue of following the same principle of time value of money and carrying cost on the Revenue Gap or Revenue Surplus is already dealt with by this Tribunal in its judgment in Appeal No. 308 of 2013 dated 09.10.2015. Thus, we don't find any merit in the argument of the Commission.

- 9.7** The learned counsel for the Appellant has also referred to the judgment of the Hon'ble Supreme Court in Uttar Haryana Bijli Vitaran Nigam Ltd. (UHBVNL) Vs. Adani Power Ltd. &Ors. – 2019 SCC Online SC 265 and submitted that the carrying cost is to be allowed based on the financial principle that whenever the entitled revenue requirement remains

unmatched with the actual revenue, the resultant difference attracts carrying cost, due to delay in recovery.

9.8 While assailing the impugned order at length on merits, the Ld Counsel for the Appellant also raised the issue of maintainability and argued that disallowance of carrying cost was not available as a ground for seeking review of the Tariff Order dated 31.03.2016 in Original Tariff Petitions No. 1552 & 1553 of 2015. During the hearing, the Ld Counsel for the Appellant has submitted that once a judgment is pronounced and order is made, the Court becomes functus officio. The Review is neither to enable the court to write a second judgment nor to give a second innings to the party. Therefore, the errors contemplated for undertaking review are those which are self-evident and that review does not result in a re-hearing. It is also submitted that Review Petition cannot be an Appeal in disguise.

9.9 ***Per contra***, the Learned Counsel for the Respondent Commission has argued that reliance on the Hon'ble Supreme Court judgment in UHBVNL is misplaced and not applicable to the facts and circumstance of the case on hand and submitted that in the case of Adani Power (Supra), there was no dispute on the rate (%) or quantum of carrying cost. However, we find that the referred judgment also supports the contention of the Appellant in respect of its claim for carrying cost as settled financial

principle. Further, in respect of rate of interest, the Respondent Commission has already decided the methodology of allowing weighted average interest rate of long term loans. Thus, we don't find any merit in the arguments of the Respondent Commission.

9.10 The Ld Counsel for the Commission further submitted that out of the three issues raised in the Review Petition, the Appellant has not challenged the order with respect to two issues viz. Issue of Common regulatory charge and non consideration of additional revenue earned through FPPPA and has filed the present appeal limited to the third issue of carrying cost only. Thus, as the Appellant has accepted the two issues out of three issues decided by the Commission, therefore, the Appellant having accepted the part of the impugned Review Order on merit cannot question the maintainability of Review petition on one issue as it also emanates from the same review petition. In turn, the Ld Counsel for the Appellant has submitted that review jurisdiction and exercise thereof is defined by the Regulation 72 of the GERC Conduct of Business Regulation read with Section 94 of the Act. It is also argued that in the event review is not maintainable qua a particular ground, the Appellant is not precluded from raising the issue of maintainability of review. In respect of two issues, it is further submitted by the Appellant that regulatory charge was evolved by the Commission to ensure recovery of

gap. In respect of FPPPA, it is clarified that FPPPA pertains to FY 2014-15 and was allowed to be recovered subsequently by the Commission, which has been factored in the order presently. The Appellant submitted that either way it would have been factored in at some point of time. Therefore, not challenging a consequential measure or a modification in the impugned order on these two grounds cannot make a review maintainable.

9.11 The Learned Counsel for the Commission has relied on the decision of the Hon'ble Supreme Court on *Islamic Academic of Education & Anr. Vs. State of Karnataka &Ors.* – (2003) 6 SCC 697, to contend that the Appellant as regards Carrying Cost on Revenue Gap falls under the category mentioned in Para 83 (d) (iv) of the judgement in Appeal No. 190 of 2011, is an assertion of the Appellant contrary to the dictum of the Hon'ble Supreme Court in *Islamic Academic of Education (supra)*. In turn, the Learned Counsel for the Appellant has submitted that the case of the Appellant is in fact, supported by *Islamic Academic of Education (supra)*. The Learned Counsel for the Commission also relied on the Hon'ble Supreme Court Judgment in the case of *Prabha Shankar Dubey Vs. State of MP* (2004) 2 Supreme Court Cases 56. The ratio of the said judgements is to the effect that a judgement has to be read in entirety.

OUR FINDINGS:-

9.12 We note that the issue of carrying cost was dealt with by the Commission in its original Tariff Order dated 31.03.2016. While dealing with the objections related to carrying cost, the Commission has approved the carrying cost as claimed by the Appellant by stating that carrying cost is allowed on uncovered gap as per this Tribunal's decisions. It is the settled position of law that Review Petition cannot be an appeal in disguise. The Hon'ble Apex Court in a catena of judgments has held that a party is not entitled to seek review of the judgment merely for the purpose of a re-hearing and fresh decision of the case. Therefore, we are of the view that the impugned order holding Review as maintainable on the issue of Carrying Cost is contrary to the nature and scope of the Review Proceedings as detailed in Regulation 72 of the GERC Conduct of Business Regulations read with Section 94 of the Act.

9.13 Upon perusal of the judgment of this Tribunal in Appeal Nos.190 of 2011 and 162 & 163 of 2012, it is observed that after deliberating the applicable judgments of this Tribunal and principles laid down in those judgments, this Tribunal has come to the conclusion that carrying cost is to be allowed to the Appellant on the revenue gap as a result of legitimate expenditure in true up. It is to be noted that the Commission has verified all the expenses during true up exercise and approved the same. The

resultant gap is arrived at after this truing up exercise. Thus, it is admitted fact that the recovery of the Appellant is delayed till the Commission allows recovery of this revenue gap. As per well settled financial principle in catena of judgments, carrying cost is to be allowed to compensate the utility for such delayed recovery. From perusal of referred judgment, we agree that rather this Tribunal has categorized the carrying cost on the revenue gap arrived after true up exercise under 83(d)(iv) and allowed the recovery of same. Therefore, we are unable to agree with the Commission that this Tribunal has required the Commission to further verify the carrying cost in the referred judgment of this Tribunal.

9.14 In the impugned order, the Commission has also referred to the judgment of this Tribunal dated 28.05.2009 in Appeal No. 111 of 2008 and stated that this Tribunal has held the carrying cost as legitimate expenditure and same can be allowed only on financial principles once such expenditure is proven by the licensee and extracted para 7 of the judgment. However, as pointed out by the Learned Counsel for the Appellant, the perusal of judgment reveals that the referred para relied upon is with reference to the issue of computation of gains/ (losses) for Interest on Working Capital as provided for in the MERC (MYT) Regulations and not with reference to the carrying cost as stated by the State Commission. Therefore, the Commission has erred in relying on para 7 of this judgment with reference

to the issue of carrying cost as it is on unrelated issue and Regulations. The Learned Counsel of the Commission has also argued that judgment in Appeal No. 111 of 2008 and judgment in Appeal No. 190 of 2011 & Appeal No. 162 & 163 of 2012 are of coordinate benches and are binding upon the parties. However, we are of the view when the decision relied upon is on unrelated issue, the question of its applicability does not arise in the present case.

9.15 The Learned Counsel for the Commission also referred to the judgment of this Tribunal in Kerala State Electricity Board Vs. Kerala State Electricity Regulatory Commission – 2012 SCC Online APTEL 151 and submitted that the issue of carrying cost is subject to prudence check is no longer res integra. The perusal of this order reveals that the issue in that case was with reference to denial of power purchase cost by the State Commission and in turn, this Tribunal directed the State Commission to allow the power purchase cost, which was denied earlier, along with carrying cost. This judgment does not deal with the present issue i.e. whether carrying cost claimed on the approved revenue gap, arrived at after true up exercise, as per the methodology adopted by the Commission for implementing the judgment of this Tribunal allowing carrying cost is further required to be substantiated by the utility. Accordingly, we find that the Commission has not only deviated from its

own methodology but also not followed the order and judgment of this Tribunal in true spirit.

10. SUMMARY OF FINDINGS:-

Based on our analysis and findings in proceeding paragraphs, we sum up our findings as under:-

- 10.1.** We hold that the Review Petition which did not disclose any error in respect of carrying cost on the face of the record was not maintainable.
- 10.2.** We set aside the impugned order to the extent of keeping the recovery of carrying cost in abeyance.
- 10.3.** The Commission is directed to allow the recovery of carrying cost in expeditious manner as deferment in recovery attracts additional cost to the consumers.

ORDER

For the forgoing reasons, we are of the considered opinion that issues raised in the present appeals being Appeal Nos. 246 of 2017 & 247 of 2017 have merits. Hence Appeals are allowed.

The impugned order dated 08.06.2017 in Review Petition No. 1573 of 2016 and 1574 of 2016 passed by Gujarat Electricity Regulatory

Commission is hereby set aside to the extent of our findings under Para No.10, stated supra.

No order as to costs.

Pronounced in the Open Court on this **04th day of October, 2019.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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