IN THE APPELLATE TRIBUNAL FOR ELECTRICITY

(Appellate Jurisdiction)

APPEAL No. 419 OF 2022

Dated: 22.07.2026

Present: Hon`ble Ms. Seema Gupta, Officiating Chairperson
Hon`ble Mr. Virender Bhat, Judicial Member

IN THE MATTER OF:

THE TATA POWR COMPANY LIMITED
Through its Authorized Representative
Jojobera Power Plant,
PO Rahargora,
Jamshedpur-831016 … Appellant

VERSUS

1. JHARKHAND STATE ELECTRICITY REGULATORY COMMISSION
Through its Secretary,
New Police Line Road, Opposite to C.M. House,
Kanke Road, Ranchi,
Jharkhand – 834001.

2. TATA STEEL LIMITED
Through its Managing Director,
Sackchi Boulevard Road,
Northern Town, Bistupur,
Jamshedupur – 831001.
Jharkhand … Respondent(s)

Counsel on record for the Appellant(s) : Mr. Shri Venkatesh
Ms. Nishtha Kumar
Mr. Somesh Srivastava
Mr. Ashutosh Kumar Srivastava
Mr. Vikas Maini
Mr. Suhael Buttan
Mr. Lasya Pamidi for App.1

Counsel on record for the Respondent(s): Mr. Rakesh Kaushik Pathak for Res.1

JUDGEMENT

PER HON'BLE MRS. SEEMA GUPTA, OFFICIATING CHAIRPERSON

1. The captioned Appeal No. 419 of 2022 has been filed by The Tata Power Company Limited**,** assailing the order dated 27.12.2019 (**"Impugned Order"**) passed by Jharkhand State Electricity Regulatory Commission in Case No. 05 of 2018 for Truing up of Tariff for FY 2016-17 and Annual Performance Review **("APR")** of FY 2017-18 for Jojobera generating station (Unit No.2 and 3).

***Brief Background and Facts of the Case*: -**

2. The Appellant, Tata Power Company Limited **("TPCL"**) is a company incorporated under the Indian Companies Act, VII of 1913 and is engaged in the business of generation, transmission and distribution of electricity. The TPCL is supplying power generated from Unit 2 and Unit 3 of Jojobera Power Plant having capacity of 120 MW each to Tata Steel Limited, The Respondent No 2, which is the Distribution Licensee in Jamshedpur in the State of Jharkhand. The unit 2 & 3 of Jojobera Power Plant commenced operations on 01.02.2001 and 01.02.2002, respectively.

3. Respondent No.1, is the State Electricity Regulatory Commission for the State of Jharkhand (herein after referred as " **State Commission/ JSERC**").

4. On 11.01.2012, Appellant filed Petition No. 38 of 2011 before JSERC seeking approval of ARR and MYT Tariff for Unit 2 and Unit 3 of Jojobera TPP for the First Control Period (FY 2012-13 to FY 2015-16). By Order dated 31.05.2012, JSERC approved the Business Plan, ARR and MYT Tariff for First Control period,

however disallowed the recovery of water charges on the grounds of lack of satisfactory evidence.

5. Aggrieved by the disallowance, the Appellant filed Review Petition No. 12 of 2012, on 26.06.2012, providing evidence of payment of water charges and further praying for the allowance of Raw Water Charges based on expected increase rate. Vide Order dated 21.11.2012, the State Commission disposed of the review petition, provisionally allowing Raw Water Charges for the 1st Control Period for Units 2 and 3 at the then-prevailing rate of 5.52/m3, subject to True-up based on actual at the end of year. Subsequently, the Appellant filed multiple petitions for Annual Performance Review and Truing-up of tariff for FY 2011-12, FY 2012-13, FY 2013-14, and FY 2014-15.

6. On 28.10.2016, Appellant filed Petition No. 16 of 2016 for approval of its Business Plan for the 2nd Control Period (FY 2016-17 to FY 2020-21). In 2017, the Appellant also filed Case No. 05 of 2017 for the determination of MYT for the 2nd Control Period, including the Truing-up for FY 2015-16. Vide order dated 19.02.2018, the State Commission passed a common order in Case No. 16 of 2016 and Case No. 05 of 2017, wherein it disallowed certain operational and financial claims of the Appellant. The Appellant challenged this order on two fronts: by filing a Review Petition (Case No. 06 of 2018) before the State Commission on 21.03.2018 and by filing Appeal No. 178 of 2018 before this Tribunal on 06.04.2018.

7. Owing to the pendency of the Review Petition before the State Commission, the Appellant subsequently withdrew Appeal No. 178 of 2018 with the liberty to file a fresh appeal upon the disposal of Review Petition No. 06 of 2018. State Commission, vide Order dated 09.01.2019, partly allowed Review Petition to the limited extent of permitting provisional recovery of water charges for FY 2015-16

and Interest on Working Capital for the Control Period 2017-21, while rejecting all other issues.

8. In the meantime, while the review proceedings were pending, the Appellant filed Case No. 05 of 2018 before the State Commission on 01.10.2018 for Truing-up of tariff for FY 2016-17.

9. On 22.02.2019, the Appellant preferred an appeal No. 274 of 2019, before this Tribunal against the order dated 19.02.2018 passed in Case No. 16 of 2016 and the review order dated 09.01.2019 passed in Case No. 06 of 2018, which is pending adjudication.

10. In the interregnum, proceedings in Case No. 05 of 2018 continued. Following a public hearing on 07.06.2019, the State Commission passed the Impugned Order on 27.12.2019. Aggrieved by the disallowances in the Impugned Order, the Appellant has preferred the present appeal.

ANALYSIS AND DISCUSSION

11. Heard Mr. Shri Venkatesh, learned counsel appearing for the Appellant and Mr. Rakesh Kaushik Pathak, learned counsel appearing for the State Commission and perused the Impugned Order dated 27.12.2019 and written submission/ note of arguments filed by the Appellant/ State Commission and other documents on the record. The Appellant has challenged following eight issues:

A. Partial allowance of water charges for FY 2016-17
B. Disallowance of cost of Secondary Fuel Oil
C. Disallowance of higher transit loss for FY 2016-17 for washed category of Coal
D. Disallowance of Additional Capitalisation

E. Decapitalisation of original assets wrongly considered for FY 2016-17 and consequent reduction in interest on loan and return on equity
F. Incorrect computation of Depreciation on Original Project Cost
G. Disallowance of Tax Liability on savings due to improved performance in Normative Parameters of O&M expenses
H. Denial of Carrying Cost

12. During the arguments, it has been contended on behalf of the Appellant that under some issues, State Commission tried to justify the Impugned Order on altogether new grounds and it is the settled position that the reasoning of an Impugned Order cannot be supplemented at the stage of arguments by altogether new grounds. To permit otherwise is to allow the Commission to retrospectively rationalize its order and placed reliance on the Judgment of this Tribunal dated 28.11.2025 in *Appeal No. 98 of 2021 (Noida Power Co. Ltd.)*.

13. We note that the "new grounds" pertain to reliance placed upon other regulations of the applicable Jharkhand State Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) Regulations, 2015 ("**GTR 2015")**. It is settled law that Regulations framed under Section 181 of the Electricity Act, 2003 are delegated legislation, legislative in character, and binding on the Commission itself, licensees, and all stakeholders until amended or struck down (*PTC India Ltd. v. CERC*, (2010) 4 SCC 603); a tariff order or quasi-judicial determination cannot override such Regulations.

14. It is axiomatic that a State Commission, while exercising its statutory functions under the Electricity Act, 2003, is bound to apply the Regulations framed under Section 181 in their entirety and not in a piecemeal or selective manner. However, to accept the Appellant's contention would either require this Tribunal to ignore binding provisions of the Regulations, which is impermissible

or to remand the matter for fresh consideration strictly in accordance with the applicable Regulations. In exercising appellate jurisdiction under Section 111 of the Act, this Tribunal is mandated to examine the legality, propriety, and correctness of the impugned order on both facts and law, the jurisdiction being co-extensive with that of the forum of first instance (*Southern Power Distribution Cmpany of AP Ltd. v. APERC*, 2022 SCC OnLine APTEL 110; *H-Energy (P) Ltd. v. PNGRB*, 2023 SCC OnLine APTEL 17). Since both parties have made elaborate submissions on the applicability of the various Regulations of GTR 2015, and the appellate jurisdiction is in the nature of a rehearing, we proceed to decide the issue on its merits in light of the binding statutory framework.

ISSUE A . PARTIAL ALLOWANCE OF WATER CHARGES FOR FY 2016-17

15. Learned counsel for the Appellant submitted that the Jojobera Generating Station procures Raw Water from JUSCO, a subsidiary of Tata Steel Limited ("TSL"), which holds the licence from the Government of Jharkhand for the relevant water source. The monthly invoices raised by JUSCO/TSL comprise two components, namely, the Base Water Charges representing TSL's cost of supply and the Water Tax payable to the Government of Jharkhand pursuant to the Notification dated 01.04.2011. For FY 2016-17, the Appellant claimed Raw Water Charges of Rs. 4.11 Crore for Unit 2 and Rs. 3.98 Crore for Unit 3, being the actual amounts paid to TSL. However, under the Impugned Order, the State Commission allowed only Rs. 2.14 Crore and Rs. 2.07 Crore respectively, holding that the balance amount could only be allowed provisionally, subject to the outcome of W.P. (C) No. 4544 of 2011 pending before the Jharkhand High Court, wherein TSL had challenged the Government of Jharkhand Notification dated 01.04.2011 enhancing the Water Tax with effect from 01.04.2011. Subsequently, Jharkhand High Court, by its judgment dated 28.06.2024, dismissed the said writ

petition. Consequently, the Appellant is entitled to recovery of the entire Raw Water Charges actually incurred and paid in accordance with Regulation 7.46 of the GTR, 2015, along with the applicable carrying cost and present issue may be remanded for reconsideration in those terms. Learned counsel for the State Commission agreed for remand of the matter to the State Commission for reconsideration, however submitted that as per Paragraph 5.118 of the Impugned Order, Respondent No.2 had only partially paid the water tax to the Government of Jharkhand so exact amount paid/payable need to be ascertained.

16. In view, of the above submissions, this issue is remanded to the State Commission for reconsideration in accordance with Law keeping in view the water charges actually paid and/or ought to be payable along with applicable carrying cost. Appellant to submit the requisite details, as sought by the State Commission in this regard.

ISSUE B. DISALLOWANCE OF COST OF SECONDARY FUEL OIL

Submissions urged on behalf of Appellant

17. It is submitted that the Regulation 8.4 of the GTR 2015 prescribes the normative Secondary Fuel Oil Consumption for Units 2 and 3 of the Jojobera TPP at 1 ml/kWh. However, the Impugned Order adopts a consumption norm of 0.5 ml/kWh by following the MYT Order dated 19.02.2018, which was based on lower past actual consumption. Such an approach is legally impermissible, as once the statutory Regulations prescribe a specific normative value, the Commission is bound to apply the same, and a tariff order passed under the Regulations cannot dilute, vary, substitute, or rewrite the norm fixed therein. It is well settled that norms prescribed under the Regulations cannot be tinkered with while passing

tariff orders as held in ***“PTC India Ltd. v. Central Electricity Regulatory Commission”, (2010) 4 SCC 603.***

18. Appellant submits that the Impugned Order is also contrary to the normative tariff framework. The very purpose of prescribing normative operating parameters is to maintain certainty during the control period and to incentivise operational efficiency. Once a generating station performs better than the prescribed norm, the benefit of such efficiency cannot be taken away by reducing the normative allowance to match lower actual consumption. Section 5.3(f) of the National Tariff Policy, 2016 also recognises this principle by mandating that operating parameters should be determined on a normative basis and not on the basis of the lower of normative and actual performance, with the object of incentivising efficiency by allowing the generating company to retain the gains arising from better-than-norm performance. Therefore, even assuming that the actual Secondary Fuel Oil Consumption of Units 2 and 3 was lower than 1 ml/kWh, the same could not justify reducing the normative allowance, as the actual consumption may demonstrate efficient operation but cannot constitute a ground to retrospectively substitute or dilute the statutory norm prescribed under the Regulations.

19. State Commission has effectively applied a "lower of normative and actuals" approach, which is contrary to the Regulations, contrary to the National Tariff Policy, and contrary to the settled jurisprudence governing normative tariff determination. The same principle has been consistently affirmed by this Tribunal in its Judgments dated 31.05.2011 in ***Appeal No. 52 of 2008 (NDPL v. DERC)***, dated 30.07.2010 in ***Appeal No. 153 of 2009 (NDPL v. DERC)***, dated 31.07.2009 in ***Appeal Nos. 42 and 43 of 2008 (HPGCL v. HERC)***, and dated 14.11.2006 in ***Appeals No. 94 and 96 of 2005 (NTPC v. CERC)***.

20. It is further submitted that if such an approach is permitted, every normative parameter would become vulnerable to downward revision wherever the actual performance is better than the prescribed norm. This would undermine the certainty envisaged during the control period and convert the normative tariff framework into an actual-cost regime.

21. During the arguments before this Tribunal, fresh justification has been introduced on behalf of State Commission, that the actual Secondary Fuel Oil Consumption of the units, being 0.20 ml/kWh for Unit 2 and 0.28 ml/kWh for Unit 3, was lower in the earlier period and, therefore, the normative value of 0.5 ml/kWh adopted in the MYT Order dated 19.02.2018 was justified; that Regulation 8.5 of the GTR, 2015 conferred upon JSERC the power to modify the operational norms; that Regulation 6.11(d) permitted Secondary Fuel Oil Consumption to be treated as a controllable parameter in respect of which targets could be fixed; that Regulations 16.3 and 16.4 clothed JSERC with the power to remove difficulties and relax the provisions of the Regulations; and that the efficiency gains realised by the generator ought, in any event, to be passed on to the consumers. These contentions, however, stand in stark contrast to the limited defence taken by JSERC in its Reply dated 10.11.2021, wherein the Impugned Order was sought to be justified only on the grounds that the actual Secondary Fuel Oil Consumption was lower and that the MYT Order dated 19.02.2018 was sub judice in Appeal No. 274 of 2019 before this Tribunal. Significantly, none of the aforesaid regulatory grounds, namely Regulation 8.5, Regulation 6.11(d), Regulations 16.3 and 16.4, or the contention relating to sharing of efficiency gains, finds any mention either in the Impugned Order or in the Reply, each of them having surfaced for the first time only in the Note for Arguments dated 20.02.2025.

22. The settled position of law is that the reasoning contained in an Impugned Order cannot be supplemented at the stage of arguments by introducing altogether new grounds, as to permit otherwise would enable the Commission to retrospectively rationalise its order (Judgment of this Tribunal dated 28.11.2025 in ***Appeal No. 98 of 2021 (Noida Power Co. Ltd.)).*** Even on merits, none of the new grounds advanced by JSERC is sustainable. In particular, Regulation 8.5 forms part of the chapter dealing with R&M and contemplates revision of operational norms only in cases where R&M has been undertaken. In the present case, the capital expenditure in question was admittedly neither claimed nor approved under the R&M framework and, therefore, Regulation 8.5 has no application.

23. Regulation 6.11(d) treats Specific Fuel Consumption as a controllable parameter. However, the very next provision, Regulation 6.12, makes it clear that the financial gain or loss arising from controllable parameters shall not be adjusted in tariff. Equally, Regulations 16.3 and 16.4 are inapplicable, as the power to remove difficulty and the power to relax may be exercised only where the Regulations are unclear or unworkable. Regulation 8.4, however, is unambiguous and prescribes a clear normative Secondary Fuel Oil Consumption of 1 ml/kWh for Units 2 and 3 of the Jojobera TPP. The power to relax cannot, in any event, be exercised suo motu to tighten the prescribed norm against the obligated party, particularly when the Appellant was never put on notice of any such proposed exercise. The exercise, therefore, also violates the principles of natural justice. Reliance in this regard is placed on the Judgments of this Tribunal in ***Appeal No. 124 of 2021***, ***Appeal No. 251 of 2006, Reliance Energy Ltd.Vs Maharashtra Electricity Regulatory Commission & Ors***, and ***Appeal No. 130 of 2009, Ratnagiri Gas and Power Pvt. Ltd. Vs Central Electricity Regulatory***

Commission & Ors. Consequently, the disallowance of Secondary Fuel Oil Cost on this basis is liable to be set aside.

Submissions Urged on behalf of Respondent No. 1

24. It is submitted that under Para 6.132 of the MYT Order dated 19.02.2018, JSERC recorded that the Appellant's consumption of secondary fuel oil was lower than that approved during the previous Control Period. Further, Para 6.133 of the said MYT Order notes that the actual LDO consumption for FY 2016–17, as submitted by the Appellant, was 164 KL for Unit-2 and 222 KL for Unit-3, translating to 0.19 ml/kWh and 0.26 ml/kWh respectively. After considering the aforesaid actual operational performance, JSERC, under Para 6.138 of the MYT Order, approved the Specific Fuel Oil Consumption norm at 0.50 ml/kWh for both Unit-2 and Unit-3 for the second Control Period, i.e., FY 2016–17 to FY 2020–21, Further as noted in Para 5.25 of the impugned Order, since Appellant had challenged the aforesaid MYT Order before the APTEL State commission continued to adopt the SFOC norm of 0.50 ml/kWh for both units as approved in the MYT Order. Significantly, Clause 8.5 of "GTR 2015", expressly empowers JSERC to modify the operational norms prescribed under Clause 8.4 after considering the capital investment approved towards Renovation and Modernisation (R&M) activities, while Clause 6.11 authorises JSERC to prescribe annual targets for controllable parameters during the Control Period, and Secondary Fuel Oil Consumption being specifically recognised as a controllable parameter under Clause 6.11(d).

25. Clause 16.4 of GTR 2015 vests State Commission with the power to relax any provision of the Regulations, in public interest and for reasons to be recorded in writing, while Clause 16.3 empowers it to remove difficulties by issuing such general or special orders or directions, consistent with the Act and the

Regulations, as may be necessary or expedient for giving effect to the provisions thereof. Appellant had undertaken certain Renovation and Modernisation measures, including improvement of APH tubes and installation of a Flame Scanner Panel, which have evidently contributed to enhanced operational efficiency and reduced Secondary Fuel Oil Consumption. JSERC has also approved the Additional Capital Expenditure ("ACE") for FY 2016–17, which would further improve performance and reduce the cost of generation. However, the benefits arising therefrom have not been passed on to the consumers.

<u>OUR CONSIDERATION</u>

26. In the Impugned Order, State Commission taking cognizance of MYT Order dated February 19, 2018, approved the Secondary Fuel Oil Consumption as 0.5 ml/kWh for 2nd Control period. Impugned Order had extracted the relevant portion of said MYT Order, which is reproduced here under:

> *"6.137 The JSERC Generation Tariff Regulations, 2015 specifies the following*
>
> *16.4 The Commission may in public interest and for reasons to be recorded in writing, relax and of the provision of these Regulations."*
>
> *6.138 Considering all the above, the Commission has decided to approve the specific oil consumption (of LDO) at 0.5 ml/kWh for each year of the Control Period i.e. from FY 2016-17 to FY 2020-21 for both Unit 2 and Unit 3. This norm may be re-looked based on Petitioner's actual performance during the Control period and as deemed fit by the Commission after due consideration of the actual performance of the Petitioner. In the subsequent APR and True-up Petitions, the Petitioner is directed to also submit details of number of unit-wise start-ups taken after shutdown. Also, details should include monthly quantity of secondary fuel consumed during plat start-up and flame support if required."*

27. The Impugned Order further notes that since the said MYT order has been assailed before this Tribunal and is presently pending adjudication, State

commission is considering the same Secondary Fuel Oil Consumption for these units as approved in MYT Order.

28. The present Appeal also involves the issue pertaining to Secondary Fuel Oil Consumption for these units, for which elaborate submissions have been made by the parties, and as such present Appeal pertains to True up of MYT order for FY 2016-17, this Tribunal proceeds to adjudicate the said issue herein.

29. It is to note from the GTR 2015, dated 20.01.2016, that Secondary Fuel Oil Consumption for the subject project (unit 2 & 3) has been specified under Regulation 8.4, as extracted hereunder:

> *"8.4 **Energy Charges:** The value for operational norms for the existing generating stations have been decided, based on the past operational data of these plants. The norms of operation as given hereunder shall apply for existing thermal power stations in the state:*
> *………*

Jajobera Thermal Power Station (TPCL)

Unit-II

Parameters	***2016-17***	***2017-18***	***2018-19***	***2019-20***	***2020-21***
Normative Annual Plant Availability Factory (%)	*85%*	*85%*	*85%*	*85%*	*85%*
Normative Annual Plant Load Factory (%)	*85%*	*85%*	*85%*	*85%*	*85%*
Gross Station Heat Rate (kCal/kWh)	*2567*	*2567*	*2567*	*2567*	*2567*
Auxiliary Consumption (%)	*10.00%*	*10.00%*	*10.00%*	*10.00%*	*10.00%*
Secondary Fuel Oil Consumption (ml/kWh)	*1.00*	*1.00*	*1.00*	*1.00*	*1.00*

Unit-III

Parameters	*2016-17*	*2017-18*	*2018-19*	*2019-20*	*2020-21*
Normative Annual Plant Availability Factory (%)	*85%*	*85%*	*85%*	*85%*	*85%*
Normative Annual Plant Load Factory (%)	*85%*	*85%*	*85%*	*85%*	*85%*
Gross Station Heat Rate (kCal/kWh)	*2577*	*2577*	*2577*	*2577*	*2577*
Auxiliary Consumption (%)	*10.00%*	*10.00%*	*10.00%*	*10.00%*	*10.00%*
Secondary Fuel Oil Consumption (ml/kWh)	*1.00*	*1.00*	*1.00*	*1.00*	*1.00*

30. Under Regulation 8.5, as extracted hereunder, the State commission is authorised to modify the norms for operation after considering the capital investment approved for any Renovation and Modernisation.

> *"8.5 The commission may modify these norms of operation after considering the capital approved for any Renovation and Modernisation activities in these plants."*

31. Admittedly State Commission, in the MYT order or in the Impugned Order did not rely upon above Regulation, however, during the present proceedings, contention has been raised on behalf of State commission that certain Renovation and Modernisation measures, including improvement of APH tubes and installation of a Flame Scanner Panel has been undertaken which has led to improvement in efficiency and accordingly downward revision in Secondary Fuel Oil consumption is in terms of GTR 2015. On the other hand, the Appellant contends, that these items has been installed as part of Additional Capitalisation and not under Renovation and Modernisation. We note that in terms of GTR

2015, expenditure under Additional Capitalisation and under Renovation and Modernisation are two distinct activities and relevant definitions are extracted as under:

> *"A2: DEFINITIONS AND INTERPRETATION*
>
> *2.1………*
>
> *3) "Additional Capitalization" means the capital expenditure incurred or projected to be incurred, after the date of commercial operation of the project and admitted by the Commission after prudence check, subject to provisions of clause 7.5 and 7.6 of these Regulations.*
>
> ***Renovation and Modernization***
>
> *"7.7 The Generating Company, for meeting the expenditure on Renovation Modernization (R&M) for the purpose of extension of life beyond the useful life of the generating station or a unit thereof, shall make an application before the Commission for approval of the proposal with a detailed Project Report giving complete scope, justification, cost-benefit analysis, estimated life extension from a reference date, financial package, phasing of expenditure, schedule of completion, reference price level, estimated completion cost including foreign exchange component, if any, record of consultation with Beneficiaries and any other information considered to be relevant by the Generating Company.*
>
> *……..*
>
> *7.9 Any expenditure incurred or projected to be incurred and admitted by the Commission after prudence check based on the estimates of Renovation and Modernization expenditure and life extension, and after deducting the accumulated depreciation already recovered from the original project cost, shall form the basis for determination of tariff."*

32. The State Commission, while making such contention, has failed to substantiate how installation of APH tubes, Flame scanner and other such equipment form part of a "Renovation and Modernisation" project. No Detailed Project Report, including these elements and duly approved by the State Commission as an R&M project, has been placed on record. In fact, the Impugned Order itself, under paragraph 5.67, identifies these items as forming part of Additional Capitalisation for the year FY 2016-17. Therefore, from the impugned Order, it is evident that installation of such elements were considered

under Additional Capitalisation, which is an activity distinct from Renovation and Modernisation in terms of GTR 2015. We therefore we do not find any merit in the contention of State Commission that downward revision in secondary fuel oil consumption is in terms of Regulation 8.5, since it is not applicable in the present issue.

33. State Commission, has also contended that as per Regulation 6.11 d, the Specific Oil Consumption is deemed to be controllable performance parameter and accordingly stringent targets can be fixed under the tariff order. Though reliance on such a regulation does not find place either in MYT Order or Impugned Order. Nevertheless, applicability of the referred regulation is deliberated and in this context it is of relevance to reproduce Regulation 6.11 (d) and 6.12, as under

"Performance Targets

6.11 The Commission shall set targets for each year of the Control Period for the items or parameters that are deemed to be "controllable" and which includes:

(a) Gross Station Heat Rate;

(b) Normative Annual Plant Availability Factor

(c) Auxiliary Energy Consumption;

(d) Secondary Fuel Oil Consumption;

(e) Operation and maintenance Expenses;

(f) Financing cost which includes cost of debt (interest), cost of equity (return);

(g) Depreciation

"6.12 Any financial loss on account on underperformance on targets for parameters specified in clause 6.11 (a) to (e) of these Regulations is not recoverable through tariffs. Similarly, any financial gain on account of over-performance with respect to these parameters is to be the Generating Company's benefit and shall not be adjusted in Tariffs."

34. It is to note that the GTR 2015, dated 20.01.2016, is to come into force from the date of its publication in the official Gazette of the Government of Jharkhand and remain in force up to 31st March 2021, unless amended. There is no dispute that GTR 2015 is applicable in the present case. It is also evident from Regulation 8.4 of GTR 2015 as noted above, that for fixing the norms of Secondary Fuel oil consumption for existing generation projects, including the subject project (Unit 2 & 3) past performance data was considered for setting the operational parameters which also includes Secondary Fuel Oil Consumption, just before the start of FY 2016-17 as part of GTR 2015. We are of considered view, that though, as per Regulation 6.11 (d), the State Commission is authorised to fix the Secondary Fuel Oil Consumption targets for the generating stations for each year of control period, however for the existing stations like Patratu, Tenughat and Jajobera (subject Project), the various operational parameters including the Secondary fuel oil consumption is already fixed and the State commission is authorised to modify these norms only considering the capital investment under Renovation & Modernisation and as such No Renovation and Modernisation project seems to have been approved by the State Commission as deliberated in previous paragraphs.

35. Further, the Regulation 8.4 of GTR 2015 constitutes a special provision applicable to existing projects including subject generating project, while Regulation 6.11 is a general provision dealing with controllable performance parameters. The legal maxim, *generalia specialibus non derogant,* is squarely applicable; each enactment must be construed in that respect according to its own subject-matter and its own terms and that a special provision prevails over a general one as per the settled statutory construction **as recognized in South India Corporation v. Secretary, Board of Revenue, AIR 1964 SC 207; J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. State of U.P., AIR 1961 SC 1170).**

This principle has also been applied to resolve any conflict between general and special provisions in the same legislative instrument, and it has been held that in case of conflict, the special provision prevails over the general provision, and the general provision applies only to such cases which are not covered by the special provision.

36. It is trite that Regulations framed by a State Commission under Section 181 of the Electricity Act, 2003 partake the character of subordinate legislation and are binding upon the Commission, licensees, and all stakeholders until duly amended or struck down in accordance with law. A tariff order, being a quasi-judicial determination, is but an application of the Regulations to a given utility or control period; it cannot transgress its parent framework. To permit amendment of normative prescriptions or substantive provisions of the Regulations, unless specially specified, which is not the present case, through the medium of a tariff order would be to confer upon the Commission a power of legislative override in a quasi-judicial proceeding, which the statute does not contemplate. The settled principle of interpretation is that delegated legislation cannot be rendered otiose by executive or quasi-judicial fiat. Accordingly, any modification of the Regulations must be undertaken only through the prescribed statutory process of amendment, after due consultation and notification, and not by way of tariff order. The Commission is duty bound to apply the Regulations as they stand, and any deviation therefrom would be ultra vires the Act. We, therefore, do not find any merit in this contention of State Commission.

37. We also do not find merit in the contention of State Commission, that as per regulation 16.4 of GTR 2015, using its power to relax, lower specific oil consumption for the subject project has been set in the MTR Order and adopted the same in the Impugned Order. The “power to relax” embedded in tariff or

regulatory provisions is a carefully circumscribed jurisdiction conferred upon the Commission to relieve a stakeholder from the rigor of strict application of a regulation in exceptional circumstances. Its doctrinal foundation is remedial, not legislative: it permits the Commission, for recorded reasons, to soften rigidity where adherence to the letter of the regulation would cause hardship, inequity, or defeat the object of the regulation. The power to relax does not authorise the Commission to amend, rewrite, or substitute the regulation itself; such alteration can only be effected through the prescribed statutory process of amendment under Section 178/181 of the Electricity Act. Courts have consistently held that relaxation is an enabling provision to grant relief in individual cases, not a backdoor to legislate. Thus, the meaning of "power to relax" is confined to exceptional dispensation from strict compliance, exercised judiciously and sparingly, in furtherance of justice and the regulatory purpose. The judgments of this Tribunal, as relied upon by the Appellant, in ***Appeal No. 124 of 2021***, ***Appeal No. 251 of 2006, Reliance Energy Ltd. vs Maharashtra Electricity Regulatory Commission & Ors,*** and ***Appeal No. 130 of 2009, Ratnagiri Gas and Power Pvt. Ltd. Vs Central Electricity Regulatory Commission & Ors*** reiterates the settled proposition that the power to relax or remove difficulties cannot be exercised to alter a clear statutory norm or to the prejudice of a regulated entity without following the prescribed statutory procedure. Such powers are intended to meet exceptional situations and cannot be invoked to substitute the normative standards expressly provided under the Regulations.

38. This Tribunal in its various judgements, as also relied upon by the Appellant (**in NTPC v. CERC (Appeals No. 94 & 96 of 2005); HPGCL v. HERC (Appeal Nos. 42 & 43 of 2008), ; NDPL v. DERC (Appeal No. 153 of 2009 and Appeal No. 52 of 2008**)), has taken a consistent view that where the Regulations prescribe normative operational parameters, tariff determination must be carried

out strictly in accordance with such norms. A generating company achieving better operational efficiency than the prescribed norm is entitled to retain the resultant gains, and the Commission cannot, by adopting the lower of normative and actual performance, rewrite the statutory norms or deprive the generating company of the incentive contemplated under the regulatory framework. The same principle squarely applies to the present case.

39. In view of above deliberations, the Impugned Order on the issue cannot be sustained and same is set aside. The matter is remanded to State Commission to work out Secondary Fuel Oil consumption for the subject units strictly in terms of the normative values so specified in the GTR, 2015.

ISSUE C : DISALLOWANCE OF HIGHER TRANSIT LOSS FOR FY 2016-17 FOR WASHED COAL

40. In the Impugned Order, transit loss at Normative Value of 0.8% for domestic coal and 0.2 % for imported coal has been allowed, following the terms of MYT Order dated 19.02.2018. It is further noted that same issue under MYT order has been assailed before this Tribunal and is pending adjudication and since the matter is subjudice, same figure as in MYT order are approved under True up of FY 2016-17. For this issue also, elaborate submissions have been made by parties, we shall proceed to deliberate the issue in the present appeal.

41. It is submitted on behalf of Appellant that the washed coal has higher inherent moisture and consequently attracts a higher transit loss than ordinary domestic coal; the Jojobera TPP procures washed coal (Middling and 2P+T) from the West Bokaro Washery and for FY 2016-17, the actual transit loss claimed by TPCL was 2.74% on Middling coal and 3.36% on 2P+T (by rake). It is contended

that the approach adopted in the Impugned Order is contrary to the principle already laid down by this Tribunal in its Judgment dated 14.11.2013 in Appeal No. 147 of 2012, rendered inter se the same parties and in respect of the same generating station, wherein it was specifically recognised that transit loss in washed coal cannot be treated at par with transit loss in ordinary/unwashed coal; and following the referred judgment of this Tribunal in the True-up Orders dated 28.04.2014, 31.05.2015, 30.12.2016 and 19.02.2018, State Commission consistently allowed transit loss on washed coal subject to a ceiling of 1%, notwithstanding higher actual losses. However, in the Impugned Order for FY 2016–17, this settled approach was not followed.

42. Per Contra, it is submitted on behalf of State Commission that after duly considering the data furnished by the Appellant and undertaking the prudence check, it has determined and recorded the approved coal mix along with the weighted average GCV approved for coal for Unit-2 and Unit-3. The Table 12, 13 and 14 and Paragraph 5.46 of the Impugned Order specifically notes the actual transit loss claimed by the Appellant in its True-up Petition vis-à-vis the normative transit loss approved under the MYT Order. The relevant particulars emerging from the aforesaid tables, as noted below, were submitted by State Commission in its note of arguments.

Comparative Summary of Table 12 with Table 14 for Unit no.2

Particulars of Coal Mix	**%age of Coal Mix**	**Transit Loss %age as claimed by Appellant**	**Actual Transit Loss in %age**
Middling Coal	45.75	2.74	1.258
MCL Coal	43.25	-2.43	-1.051
2-Product+Trailing (By Rake)	6.64	3.36	0.223
Trailing (By Road)	1.31	0.38	0.005

CCL Coal	2.55	-1.56	-0.039
Imported Coal	0.50	1.11	0.005
Total	**100**		**0.401**

Comparative Summary of Table 13 with Table 14 for Unit no.3

Particulars of Coal Mix	**%age of Coal Mix**	**Transit Loss %age as claimed by Appellant**	**Actual Transit Loss in %age**
Middling Coal	43.32	2.74	1.188
MCL Coal	43.17	-2.43	-1.049
2-Product+Trailing (By Rake)	6.40	3.36	0.215
Trailing (By Road)	1.41	0.38	0.005
CCL Coal	5.70	-1.56	-0.089
Total	**100**		**0.27**

43. With regard to lower transit loss for FY 2016-17, it is submitted on behalf of Appellant that these were an isolated deviation and did not reflect the normal operational pattern at Jojobera TPP and data submitted for five years shows that, except for FY 2016–17, actual transit losses for both Unit 2 and Unit 3 consistently exceeded 1% and increased in subsequent years, thereby confirming that washed coal procurement ordinarily entails higher transit loss than the generic 0.8% norm and justifying continuation of the 1% ceiling approach. Accordingly, even while undertaking true-up for FY 2016–17, State Commission should have applied the principle laid down in this Tribunal's judgment dated 14.11.2013, JSERC's earlier consistent treatment, or the relevant operational data.

44. This Tribunal in its judgement dated 14.11.2013 passed in appeal No 147 of 2012, reliance on which has been placed by Appellant, after analyzing several Judgement observed that the judgement dated 07.04.2011 of this Tribunal in

Appeal No 26 of 2008 is squarely applicable to the case in hand and held as under :

> *"28. Conjoint reading of aforesaid findings of the Delhi Commission and this Tribunal would clearly establish that the issue before the Delhi Commission as well as before this Tribunal was related to transit loss in washed coal. The Delhi Commission did not allow higher transit loss in washed coal and permitted 0.8% only as per its own MYT Regulations. This Tribunal took note of the fact that transit loss in washed coal would be higher due to loss of moisture during transport in open wagons and directed the Delhi Commission to reconsider the issue.*
>
> *29. The facts of the case before us squarely fit in to the facts of Delhi Case in Appeal No. 26 of 2008. Accordingly, the ratio laid down in Appeal No. 26 of 2008 would be applicable to this case. The State Commission is, therefore, directed to reconsider the issue of loss in washed coal transit afresh and issue consequential orders."*

45. The Appellant's reliance on this Tribunal's judgment dated 14.11.2013 in Appeal No. 147 of 2012 is misplaced. That said judgment, after considering the earlier decision in Appeal No. 26 of 2008, merely recognised that washed coal may ordinarily entail higher transit loss due to loss of moisture during transport in open wagons, and therefore directed the State Commission to reconsider the issue afresh. The said judgment did not lay down a new normative ceiling or mandate relaxation of the MYT Regulations for washed coal irrespective of actual data. The ratio was one of reconsideration in light of operational realities, not of fixing a uniform higher allowance.

46. In the present case, the actual data for FY 2016-17, as recorded in the Impugned Order and placed before this Tribunal, clearly establishes that the actual transit loss was 0.401% for Unit-2 and 0.27% for Unit-3, which are both lower than the normative transit loss of 0.8% applicable to non-pithead stations for domestic coal as specified under Regulation 8.21 of the GTR, 2015. Once actual transit loss is demonstrably below the normative allowance, there is no

basis to grant a higher ceiling merely on the premise that washed coal generally entails higher losses.

47. The Appellant's submission that FY 2016-17 was an aberration and that subsequent years show higher losses does not alter the position. The true-up exercise is intended to reconcile actuals with norms, and where actuals are lower, the Appellant cannot claim entitlement to a higher normative figure. The Tribunal's earlier directions were to ensure that washed coal transit losses are not mechanically equated with ordinary coal; however, the said directions do not dispense with the requirement of considering the actual operational data for each financial year while undertaking the true-up exercise.

48. Accordingly, the Commission's approach in adopting the normative figures under Regulation 8.21 of the GTR,2015, in light of actual transit losses being lower, is consistent with the statutory framework. We, therefore, find no infirmity is found in the Impugned Order on this issue and same is accordingly upheld.

ISSUE D : DISALLOWANCE OF ADDITIONAL CAPITALISATION

49. It is submitted by the Appellant that for True up of FY 2016–17, it claimed actual Additional Capital Expenditure ("ACE") of Rs. 6.17 Cr. and Rs. 7.40 Cr. for unit 2 and 3 respectively against the ACE approval of Rs. 9.41 Crore for Unit 2 and Rs. 11.86 Crore for Unit 3 respectively in the MYT Order dated 19.02.2018. It is submitted that for the items where actual ACE is less than the MTR approval, lesser has been approved and there is no dispute on this account. The issue pertains with respect to disallowance of Rs. 0.57 Crore for Unit 2 and Rs. 0.67 Crore for Unit 3, aggregating to Rs. 1.24 Crore, in respect of five schemes, namely replacement of APH Tubes, Flame Scanner Panel upgradation, Reheater

coils, Fire Hydrant Line for CHP, and extension work for Conveyor 5, where actual ACE in true up is more than that approved in MTR Order.

50. Paragraph 5.89 of the Impugned Order records the reasons for such disallowance, that no prior approval for increase in cost, time or change in scope has been taken from the State Commission. Relevant portion of Impugned Order is extracted below:

> *"5.89 The Commission after prudence check has approved the addition capitalization for FY 2016-17 as submitted by the Petitioner, however, the Commission has observed that deviation from approved capitalization either cost overrun, time-overrun or change in the scope of work become frequent phenomenon in the past without any prior intimation or approval from the Commission. The Commission has taken the note of the same and directed the Petitioner to adhere to the capitalization plan as approved in the MYT Order dated February 19, 2018 and any deviation need to be communicated to the Commission with proper justification without any delay. Any such instance and negligence in future may be treated as non-compliance of the direction of the Commission and may be dealt accordingly".*

51. We take note that in the Impugned Order, item wise justifications for the change in cost, increased scope and corresponding cost escalation etc. as submitted by Appellant are recorded in Paragraph 5.67 and the disallowance of Rs 1.24 Crore, relating to five schemes, is premised not on any finding that the works were unnecessary, imprudent, or unrelated to the generating station, but merely on the ground that the actual ACE exceeded the item-wise approval in the MYT Order dated 19.02.2018, without prior intimation to the Commission. Paragraph 5.89 of the Impugned Order records only a general observation that deviations from approved capitalization have become frequent, and directs adherence to the MYT Order prospectively.

52. It is significant that the MYT Order itself was passed only on 19.02.2018, i.e., after the close of FY 2016-17. Therefore, the Appellant could not have anticipated during FY 2016-17 the precise item-wise additional capitalisation that would be approved, nor could it have sought prior approval for deviations from an order not yet in existence. To apply the requirement of prior approval retrospectively is contrary to the principle of fairness and regulatory consistency. Directions issued in paragraph 5.89 can only operate prospectively, to govern future deviations once the MYT Order is in place.

53. As such the true-up exercise is not a mere arithmetical approval of figures earlier adopted in the MYT order; it is a substantive regulatory function entrusted to the Commission under the Electricity Act. While the MYT order fixes tariff parameters prospectively on normative basis, the true-up is intended to reconcile those projections with actual audited data, subjecting the same to a prudence check. The Commission is required to examine whether the licensee has acted with efficiency, economy, and due diligence in incurring costs, and whether any deviation from the normative assumptions is justified. The role of the Commission is thus evaluative and supervisory, ensuring that only legitimate and reasonable expenditure is passed through to the consumers.

54. Learned Counsel on behalf of State Commission tried to justify the disallowance citing regulation 7.7 of the GTR of 2015 that Appellant was mandatorily required to submit an appropriate application before the State Commission seeking prior approval of the said proposal, duly supported by a DPR containing, inter alia, the complete scope of work, technical and commercial justification, cost-benefit analysis, estimated extension of useful life from the reference date, financial package, phasing of expenditure, implementation schedule, reference price level, estimated completion cost including the foreign

exchange component, if any, details of consultation with the beneficiaries, and such other particulars as may be required by the Commission. These contentions are simply noted to be rejected; as the referred Regulation 7.7 of GTR 2015 pertains to the proposal related to Renovation and Modernisation while the present issue involves Additional Capital Expenditure Category as already noted in the Impugned Order. Based on the details submitted for Additional Capital Expenditure, State Commission has already approved the ACE for various items under the MYT Order as well as in the Impugned Order. The Disallowance in the Impugned Order is also not on account of absence of DPR as mandated under Regulation 7.7.

55. In view of above deliberations, the disallowance of Rs1.24 Crore under the Impugned Order, being based solely on deviation from the MYT Order without prudence check, is unsustainable. The matter is remanded to the State Commission to undertake a prudence check of the cost incurred, including the change in scope of work for the five schemes/elements, and thereafter pass consequential orders in accordance with law.

ISSUE E: DECAPITALISATION OF ORIGINAL ASSETS WRONGLY CONSIDERED FOR FY 2016-17 AND CONSEQUENT REDUCTION IN LOAN AND INTEREST ON EQUITY

Submissions urged on behalf of the Appellant

56. It is submitted that grievance in treatment of decapitalisation for FY 2016–17 is twofold being erroneous both in computation and methodology. Firstly, while computing the decapitalisation of original assets, JSERC proceeded on the basis of proposed Additional Capitalisation of Rs. 13.56 Crore instead of the Additional Capitalisation of Rs. 12.33 Crore actually approved in the Impugned Order. Once

the approved ACE stood reduced, the historical value for the purpose of decapitalisation ought to have been computed on the same basis.

57. Secondly, the methodology adopted for computing the deemed loan addition is contrary to the scheme of the Regulations and the approach followed in the MYT Order. The current normative loan in the tariff computation pertains only to Additional Capitalisation incurred from FY 2011–12 onwards, whereas the original loan on assets capitalised at COD had already been fully repaid in FY 2009–10 and FY 2010–11, as expressly recorded in Paragraph 5.127 of the Impugned Order. The decapitalisation, however, pertains to the original project cost, on which there is no outstanding loan and which does not even form part of the opening normative loan. Such decapitalisation, therefore, cannot be set off against the loan attributable to current Additional Capitalisation, as the two streams are entirely independent. However, in the Impugned Order, methodology adopted pertains to netting Additional Capitalisation with decapitalisation and thereafter applying the 70:30 debt-equity ratio on the net figure, thereby artificially reducing the deemed loan addition.

58. Appellants further submits that it had specifically raised this issue in its Tariff Petition in Case No. 09 of 2019 for truing-up of FY 2018–19 and determination of APR for FY 2019–20, pointing out that deemed loan addition ought to be computed as 70% of the approved Additional Capitalisation and not 70% of the net additions, since Interest on Loan relates only to Additional Capitalisation from FY 2011–12 onwards whereas decapitalisation relates to the original cost of the project. Accepting this position, JSERC, in its True-up Order dated 09.09.2020 for FY 2018–19, corrected the methodology and allowed deemed loan addition equivalent to 70% of the approved Additional Capitalisation. Accordingly, the decapitalisation in the Impugned Order ought to be computed proportionately with

reference to the Additional Capitalisation finally allowed and the decapitalisation of original assets should not be netted against fresh Additional Capitalisation for the purpose of deemed loan addition when the original loan already stands repaid, with consequential corrections to the Interest on Loan, Return on Equity, closing GFA and other tariff elements.

Submissions Urged on behalf of Respondent No. 1

59. It is submitted that the Appellant is seeking to derive benefits on all fronts without passing on the corresponding gains to the consumers. While proposing the historical value of the replaced assets by computing the de-inflated cost of the proposed Additional Capital Expenditure (ACE) through retrospective discounting up to FY 2000–01, i.e., the year of commissioning of the units, however, the Appellant has failed to appreciate that the assets sought to be removed had already undergone substantial depreciation of nearly 50%–60%, whereas the newly replaced assets would carry a fresh useful life of approximately 25 years. The addition of such assets would increase the capital cost of the project and consequently the tariff, while simultaneously enhancing the operational life, efficiency and generation capability of the units, thereby reducing the cost of generation. However, the benefits arising from such technological improvements and efficiency gains have not been passed on to the consumers.

60. The actual loan pertaining to the assets capitalised as on the COD had already been fully repaid by the petitioner and the normative loan approved pertained only to the additional capitalisation from FY 2011–12 onwards, the opening normative loan for FY 2016–17 was rightly considered as being equal to the closing normative loan for FY 2015–16, as approved in the MYT Order dated 19.02.2018. The State Commission has consistently adopted the same

methodology as followed in the earlier tariff orders for determining the deemed loan repayment for FY 2016–17 and, in accordance with regulation 7.23 of the GTR, 2015 and the MYT Order, approved the applicable interest rates of 13.02% for Unit-2 and 12.33% for Unit-3 under Paragraph 5.129 of the Impugned Order. In contrast, the Appellant is seeking to treat the additional capitalisation as an additional deemed loan, while failing to correspondingly deduct the value of the decapitalised assets from the normative loan.

OUR CONSIDERATION

61. With regard to computation of decapitalisation value for ACE under the True up FY 2016-17, it is understood that historic value of each item under ACE has been worked out by the method of retrospective discounting considering the cost of that item in the ACE, due to non-availability of historic value of each item of ACE in the Original project cost, and there is no dispute on such determination. The only dispute pertains to whether the ACE cost as approved in MYT order or the actual ACE approved at the true up stage to be considered for working out the historic cost for the purpose of decapitalisation of that particular item/element. The issue of approval of ACE for FY 2016-17 in the Impugned Order is being remanded for fresh consideration, however this aspect of computation needs deliberation.

62. Learned counsel on behalf of State Commission in its written note of arguments, seems to contest the methodology adopted for working out the historic value citing consumer interest without substantiating the justification for adopting the ACE cost as approved in MYT order instead of actual approved ACE in the Impugned Order. It is an admitted position that historic value of each item under ACE is not available and retrospective discounting has been

accepted/adopted for working out the Historic value of that item for decapitalisation purpose in the Impugned Order by State Commission. In our view, as additional capitalisation is to be allowed on the basis of actual cost, subject to prudence check, consequently for working out the historic value for that item for the purpose of decapitalisation, actual approved cost should be considered.

63. Accordingly, this sub-issue is remanded to the State Commission to work out the historic cost of an item for the purpose of decapitalisation based on the actual cost of ACE approved for that item in the True up Order, in terms of the amount so worked under Issue D pursuant to the remand in the present judgement.

64. With regard to methodology for working out component of loan under ACE is concerned, the Appellant has disputed the netting off of Additional Capitalisation cost with decapitalisation cost and then applying Debt : equity ratio on such net off amount. There is as such no dispute with regard to rate of interest considered on the loan Component. The present case pertains to a typical scenario, where the actual loan on the assets capitalised as on COD has been entirely repaid by the Appellant, the normative loan approved is only on additional capitalisation since FY 2011-12 as noted in Paragraph 5.127 of the Impugned Order. There is merit in the submission of Appellant that Debt : equity ratio only on net off amount of ACE would artificially lower the loan component of Additional Capitalisation so approved. Accordingly, the Debt/ normative loan should be worked out on the actual cost of ACE for the purpose of calculating Interest on loan or other parameters under tariff determination and decapitalisation of that item worked out as per above deliberations should be

carried out in Gross Fixed Asset/ net fixed asset with corresponding treatment of debt, if any and of equity.

65. Accordingly this sub-issue is also remanded to the State Commission to consider the loan and equity components on the basis of actual cost of ACE approved and work out corresponding components of tariff as deliberated above in accordance with law.

ISSUE G : INCORRECT COMPUTATION OF DEPRECIATION ON ORIGINAL PROJECT COST

66. It is submitted by the Appellant that in its True-up Petition, the Appellant computed depreciation separately on the Original Project Cost, the Additional Capitalisation approved from FY 2011–12 to FY 2015–16, and the actual Additional Capitalisation for FY 2016–17. In respect of the Additional Capitalisation from FY 2011–12 onwards, Appellant submits that it placed before the State Commission that since such assets will attain cumulative depreciation of 70% only in the fag end of their useful life, with the result that the balance depreciable value gets compressed into the last one to four years, leading to a sharp increase in the depreciation rate causing a tariff shock to consumers so accordingly prayed before JSERC to invoke Regulation 16.3 and permit the remaining depreciable value as on 01.04.2016 relating to the approved Additional Capitalisation from FY 2011–12 onwards to be spread over the balance PPA life of 30 years, i.e., up to 1 February 2031 for Unit 2 and 1 February 2032 for Unit 3, instead of the prescribed useful life of 25 years.

67. The State Commission in Impugned Order, did not agree with this proposition on the ground that the Appellant had not undertaken a detailed residual-life study to justify a departure from the prescribed methodology and held that depreciation would instead be computed in accordance with the 2015. The

Appellant, in the present Appeal, has not challenged the rejection of its proposal and has expressly reserved liberty to approach the Commission afresh upon placing the necessary residual-life material on record.

68. However, in the present Appeal, Appellant is aggrieved by the manner in which the State Commission computed the depreciation on the Original Project Cost as balance depreciable value of the Original Project Cost as on 01.04.2016 has been spread over a balance life of 15 years, meaning thereby the useful life of 30 years, which is contrary to Regulation 7.32, under which the balance depreciation was required to be spread only over the remaining useful life of 10 years. In effect, State Commission extended the depreciation of Original Project Cost over the very 30-year PPA-life, treatment which it had rejected and which the Appellant had never sought for those assets. Significantly, the Impugned Order contains no reasoning on this aspect, as Paragraph 5.101 deals only with the rejection of the Appellant's request under Regulation 16.3 and is completely silent on the correctness of the Commission's own computation of depreciation on the Original Project Cost, thereby rendering the Impugned Order non-speaking on the issue in question. It is prayed that The Impugned Order be set aside on this aspect with a direction to State Commission to work out depreciation of the Original Project cost in terms of GTR 2015.

69. Per contra, it is submitted by the learned counsel for Respondent No.1 that the methodology proposed by the Appellant for the calculation of depreciation is contrary to the provisions of GTR 2015 and Appellant has been advised to undertake a detailed study to ascertain the residual life of the assets in support of its proposal for changing the methodology for calculation of depreciation. regulation 7.28 to 7.33, read with Appendix-I of GTR 2015, prescribe a specific methodology for the calculation of depreciation expense for existing generating stations and in case Appellant is aggrieved by the same, it was required to

challenge the said methodology in the writ jurisdiction rather than proposing new methodology before the JSERC. The JSERC has also observed the same under Para 5.100 and, under Para 5.101 of the impugned Order.

70. The regulation 7.32 of GTR 2015 which provides the methodology for calculating the Depreciation, is extracted hereunder:

> *"7.32. In case of existing projects, the balance depreciable value as on 1st April 2016 shall be worked out by deducting the cumulative depreciation as admitted by the Commission up to 31st March 2016 from the gross depreciable value of the assets.*
>
> *The rate of depreciation shall be continued to be charged at the rates specified in Appendix-I until cumulative depreciation reaches 70%. Thereafter, the remaining depreciable value shall be spread over the remaining life of the asset, such that the maximum depreciation does not exceed 90%."*

71. Useful life in respect of generating station from COD has been defined in Regulation 2.1 (45), of GTR 2015, in which life of Coal/Lignite based thermal station is considered 25 years. Thus in terms of applicable regulation, the life of subject generation project is 25 years.

72. It has been submitted on behalf of the Appellant, that when depreciation is computed over the correct remaining useful life of 10 years, the depreciation on the Original Project Cost for FY 2016–17 works out to Rs. 3.36 Crore for Unit 2 and Rs. 5.11 Crore for Unit 3, as against only Rs. 2.27 Crore and Rs. 3.77 Crore allowed by the Commission for these units respectively. In paragraph 5.101 of the Impugned Order, State Commission has not accepted the methodology suggested by the Appellant for the additional capitalisation, for considering the balance useful life up to the PPA, making the total useful life of plant as 30 years for this purpose. We however note that there is variation between the depreciation claimed by the Appellant and that approved in the Impugned Order for the Original project Cost, which according to Appellant is on account of

considering the balance useful life up to PPA time period. From the Impugned Order, the methodology adopted, for computation of depreciation for original project cost i.e. Whether life of project considered as 25 years or 30 years is not discernible, nor has it been confirmed by learned counsel of the State Commission that depreciation over original project cost for FY 2016-17 has been computed considering balance useful life of 10 years only since project was commissioned in 2016.

73. In view of these observation, issue is remanded to State Commission to consider the balance life of project in terms of Regulation 7.29 & 7.32 of GTR 2015, if not done already or assign the reasons for disallowance in the depreciation of Original Project Cost. We make it clear that we have not expressed any observation on the methodology to be adopted for depreciation of additional Capitalisation as same is under consideration by the State Commission and has not been assailed in the present appeal.

ISSUE H : DISALLOWANCE OF TAX LIABILITY ON SAVINGS DUE TO IMPROVED PERFORMANCE IN NORMATIVE PARAMAETERS OF O&M EXPENSES

74. At paragraph 5.145 of the Impugned Order, State Commission has approved the tax liability on gain on O&M expenses, and at Paragraph 5.146, it is noted that *"based on final outcome of the Judgement in High Court in case No WPC No 4544 of 2011, tax liability on savings in O&M will be recalculated".* Since the said writ petition has now been dismissed on 28.06.2024, It is submitted by State Commission that the issue be remanded to the State Commission for final determination in accordance with law on the basis of the actual tax liability.

75. Appellant is in agreement for remand of the matter, however Appellant is aggrieved by the inclusion of Water Charges in the savings figure being contrary to the scheme of the applicable Regulations, which has directly reduced both the

savings for the year and the consequential tax liability. It is submitted that Water Charges are not a normative component but are allowable on actual basis under Regulation 7.46 and being an actual-basis item, they cannot in law generate savings against a normative benchmark and, therefore, could not have been brought within the computation contemplated under Regulation 7.49.

76. We note, that in terms of Regulation 7.46, the water Charges, for thermal generating stations are allowed separately, and therefore we find merit in the submissions of Appellant, that actual water charges cannot be considered as part of savings, which accrue over Normative Parameters. The issue of allowance of water charges is being remanded to the State Commission as deliberated above in Issue A, present issue is also remanded to the State Commission for recomputation of tax liability in savings in O&M in accordance with the Regulations.

ISSUE I : DENIAL OF CARRYING COST

77. Issue pertains to denial of carrying cost on the gap approved for FY 2016–17 on the ground that the True-up Petition had not been filed within the timeline prescribed under the GTR 2015. Relevant paragraph of the Impugned Order, is extracted hereunder :

> ***"Gap/Surplus for FY 2016-17***
>
> *5.151 In accordance to Clause 6.16 and Clause 6.18 of the JSERC Generation Tariff Regulations, 2015 as reproduced below.*
>
> *"6.15 Where after the truing up, the tariff recovered exceeds the tariff approved by the Commission under these regulations, the generating company shall refund to the beneficiaries as the case may be, the excess amount so recovered shall be as specified in the Clause 6.18 of this regulation.*

6.17 Where after the truing up, the tariff recovered is less than the tariff approved by the Commission under these regulations; the generating company licensee shall recover from the beneficiaries the under-recovered amount shall be as specified in the Clause 6.18 of this regulation.

6.18 The amount under-recovered or over-recovered, along with simple interest at the rate equal to the bank rate as on 1st April of the respective year, shall be recovered or refunded by the generating company in six equal monthly instalments starting within three months from the date of the tariff order issued by the Commission."

5.152 As per timelines specified in the Generation Tariff Regulations, 2015, the Petitioner is required to provide the True-up petition for FY 2016-17 by November 30, 2017. However, the Petitioner has filed the petition in October 10, 2018. The Commission is of view that since the Petitioner has not filed the petition within the time, carrying cost on gap created in FY 2016-17 is not allowed."

78. Learned counsel for the Appellant has contended that such denial of carrying cost is unsustainable, as no delay is attributable to the Appellant and submitted various time lines as noted below :

a) State Commission notified the GTR 2015 on 20.01.2016, in which Regulation 6.3(a) required the filing and approval of an MYT Business Plan as a prerequisite to the tariff determination process.
b) The Appellant filed Petition No. 16 of 2016 for approval of its Business Plan for the 2nd Control Period (FY 2016-17 to FY 2020-21) on 20.10.2016.
c) In 2017, the Appellant also filed Case No. 05 of 2017 for the determination of MYT for the 2nd Control Period, including the Truing-up for FY 2015-16.
d) MYT Order came to be passed only on 19.02.2018, almost at the end of FY 2017–18.

e) The Appellant filed the True-up Petition for FY 2016-17 on 01.10.2018, i.e., within about 7½ months of the MYT Order, and as such until the MYT Order was issued, the normative benchmarks for the control period were not available and True-up Petition for FY 2016–17 could not have been filed.

f) True up order for FY 2016-17 was passed on 27.12.2019

79. From the above it is evident that Appellant has filed Business Plan and MYT petition for FY 2016-17, in Oct 2016/2017 after 9 months of notification of GTR which is after the start of the said Financial year. We also take note that State Commission passed the MYT order in February 2018. Further, the State Commission passed the True up order after 14 months of filing the True up petition for FY 2016-17.

80. The denial of carrying cost solely on the ground of delayed filing of the true-up Petition overlooks the statutory sequence and the settled principle of *lex non cogit ad impossibilia*—the law does not compel the impossible. The obligation to file a true-up petition by 30 November 2017 presupposed the existence of the MYT Order for FY 2016-17. In the absence of such order, reconciliation of actuals against normative benchmarks was impossible. The MYT Order was in fact passed only on 19.02.2018, after the FY 2016-17, and our attention has not been brought to any observation in the MYT order with regard to non sticking of time lines for filing Petition for ARR of FY 2016-17, which led to delay in passing of MYT Order or Appellant was put to terms for such delayed filing. Subsequently, Appellant filed its true-up petition after seven and a half months of passing of MYT Order. This period is comparable to the eight-month window contemplated by the Regulations for filing true up petition after the close of the financial year. The Commission itself took fourteen months to dispose of the true-up petition.

81. Carrying cost under Regulation 6.18 of the GTR, 2015 is a statutory entitlement, representing the time value of money on under-recoveries or over-recoveries. It is not a discretionary indulgence. The Appellate Tribunal has consistently held that denial of carrying cost amounts to denial of legitimate compensation for regulatory lag (***UPPCL v. UPRVUNL*, Appeal No. 128 of 2014; *GMR Warora v. CERC*, Appeal No. 111 of 2017 & batch**). The principle is once a revenue gap is admitted in true-up, carrying cost follows as a matter of course, unless delay is attributable to the licensee's own default.

82. The denial of carrying cost in the impugned order is unsustainable. In view of above deliberations, we hold that the Appellant is entitled to carrying cost on the approved gap for FY 2016-17. The matter is remanded to the State Commission to compute and allow carrying cost in terms of the applicable Regulation.

CONCLUSION

In view of the above deliberations, decision on all the issues is summarized in following table:

Issue	**Conclusion**
Issue A: Water Charges for FY 2016-17	Issue is remanded to the State Commission for reconsideration in accordance with law keeping in view the water charges actually paid and/or ought to be payable.
Issue B : Disallowance of Cost of Secondary Fuel Oil on Normative Basis	Impugned Order is set aside. The matter is remanded to State Commission to work out Secondary Fuel Oil consumption for the subject units strictly in terms of the normative values so specified in the GTR 2015.
Issue C: Disallowance of Higher Transit Loss for FY	Impugned order upheld

2016-17 for Washed Category of Coal	
Issue D: Disallowance of Additional Capitalisation	Disallowance on the elements under the issue is set aside and matter is remanded to the State Commission to undertake prudence check of the cost incurred including the change in scope of Work for these elements.
Issue E : Decapitalisation of Original Assets for FY 2016-17 and Consequent Reduction in Interest on Loan and Return on Equity	The issue is remanded to the State Commission for two sub-issue : i) to consider the decapitalisation of the item based on the its ACE approved under True up. ii) The Debt/ normative loan should be considered on the actual cost of ACE approved for the purpose of calculating Interest on loan or other parameters under tariff determination and decapitalisation of that item should be carried out in Gross Fixed Asset/ net fixed asset with corresponding treatment of debt, if any and of equity in the Original Project Cost .
Issue F : Incorrect Computation of Depreciation on Original Project Cost	Issue is remanded to the State Commission to consider the balance life of project strictly in terms of Regulation 7.29 & 7.32 of GTR 2015, if not done already or assign the reasons for disallowance in the depreciation of Original Project Cost.
Issue G : Disallowance of Tax Liability on Savings due to Improved Performance in Normative Parameters of O&M Expenses	Issue is remanded to the State Commission for recomputation of tax liability in savings in O&M in accordance with the Regulations.

Issue H: Denial of Carrying Cost	Appellant is entitled to carrying cost on the approved gap for FY 2016-17 in terms of applicable Regulation.

We direct the State Commission to expeditiously pass consequential orders upon remand of the issue as deliberated above, along with applicable carrying cost preferably within a period of three months from the date of receipt of this Order. Appellant to furnish any additional information or material that may be required by the State Commission without delay.

The subject appeal and associated IAs, if any, are hereby disposed of in the above mentioned terms.

PRONOUNCED IN THE OPEN COURT ON THIS 22nd DAY OF JULY 2026.

(Virender Bhat)
Judicial Member

(Seema Gupta)
Officiating Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

Pr/dk/ag/ak