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Draft Tariff Guidelines, 2019 for Determination of Tariff for BOT Operators operating in Major Port Trusts and previously governed by 2005 Tariff Guidelines.

Preamble

The then Ministry of Shipping, Road Transport & Highways (MSRTH) issued Tariff Guidelines of 2005 for tariff fixation of Major Port Trusts and BOT operators vide its letter No.PR-14019/5/2003-PG d2,ated 14 March 2005.The Tariff Guidelines of 2005 were to remain in force for a period of 5 years unless reviewed earlier or extended. The Tariff Authority for Major Ports (TAMP) and the Ministry of Shipping (MOS) in the Government of India took efforts to evolve Tariff Guidelines for fixation of tariff on normative basis for Major Port Trusts and the BOT Terminals operating thereat. Efforts of MOS and TAMP to formulate revised Tariff Guidelines on normative basis, could not materialise as the Study undertaken in this regard pointed out the difficulties in application of uniform norms to BOT Terminals. The Study also recognised that any move from cost plus approach prescribed in 2005 Tariff Guidelines to normative approach would adversely impact on the operations of some players. In the circumstance, a need was felt to look at an alternative model of Tariff Guidelines. In the meanwhile, the validity of the Tariff Guidelines of 2005 was extended from time to time.

The Government has already issued Tariff Policy, 2015 effective from 13 January 2015 for Major Port Trusts who were earlier governed by the Tariff Guidelines of 2005. The Government hereby issues the following Tariff Guidelines, 2019for the BOT operators operating in Major Port Trusts who are presently governed by the Tariff Guidelines of 2005, broadly following the principles of Tariff Policy, 2015 issued for Major Port Trusts:

1. PRELIMINARY

- 1.1. These directions are issued to the Tariff Authority for Major Ports (the “TAMP”) under Section 111 of the Major Port Trusts Act, 1963 as

amended from time to time (the "MPT Act"), for regulation of tariffs for BOT operators operating at Major Ports to which the provisions of the MPT Act apply.

- 1.2. This Tariff Guidelines may be called 'Tariff Guidelines, 2019 for Regulation of Tariff for BOT operators operating in Major Port Trusts'.
- 1.3. This Tariff Guidelines will be applicable to all Build, Operate, Transfer (BOT) Terminal operators operating in Major Port Trusts who were previously governed by the Tariff Guidelines of March 2005.
- 1.4. This Tariff Guidelines will apply for regulating the tariff for the services listed under Section 48 of the Major Port Trusts Act, 1963 which are authorised by the concerned Major Port Trusts to BOT operators under Section 42 (3) of the Major Port Trusts Act, 1963.
- 1.5. This Tariff Guidelines shall come into effect prospectively from the date of issue, and shall remain in force until these are further reviewed.
- 1.6. This is a broad Tariff Policy framework. The TAMP will, in consultation with all the concerned BOT operators and Major Port Trusts issue Working Guidelines along with the formats for filing the proposal to operationalise this Tariff Guidelines framework.
- 1.7. Unless the context otherwise requires, various terms used herein will have the same definition as in the MPT Act, 1963, and the Indian Ports Act, 1908, as amended from time to time.
- 1.8. **The BOT operator shall continue to abide by the provisions contained in the existing Concession Agreement entered into with the concerned Major Port Trust. Simultaneously, the BOT operator shall unconditionally agree to abide by these guidelines, by way of a separate Agreement with the concerned Major Port Trust.**
- 1.9. If any difficulty arises in giving effect to this Tariff Guidelines, the Central Government may in consultation with BOT operators, Major Port Trusts

and TAMP make such orders, as may appear to be necessary for removing the difficulty.

2. DETERMINATION OF SCALE OF RATES

- 2.1. Each BOT operator will assess the Annual Revenue Requirement (ARR) as on the financial year ending on 31st March or 31st December, as the case may be as followed by the BOT Operator for maintaining its Accounts. The ARR is the average of the sum of Actual Expenditure as per the final Audited Accounts of the immediate preceding three years (Y1), (Y2) and (Y3) at the time of submitting the proposal plus Return at 16% of Capital Employed including capital work-in-progress obtaining from the Audited Accounts of Y3, duly certified by a practicing Chartered Accountant / Cost Accountant.
- 2.2. 'Royalty/ Revenue share' payable to the landlord port by the BOT operator will not be allowed as an admissible cost for tariff computation as decided by the Govt. in the Ministry of Shipping vide its Order No.PR-14019/6/2002-PG dated 29 July 2003. In those BOT cases where bidding process was finalised before 29 July 2003, the tariff computation will take into account royalty / revenue share as cost subject to maximum of the amount quoted by the next highest bidder for tariff fixation.
- 2.3. Actual Expenditure will be the total expenditure as reflected in the Audited Annual Accounts of the BOT operators duly certified by a practicing Chartered Accountant / Cost Accountant, subject to following adjustments:
 - (i). Royalty/ Revenue share payment to be excluded to the extent not admissible in tariff fixation complying with provisions prescribed at clause 2.2. above.
 - (ii). Interest on loans, provision for bad and doubtful debts, provision for slow moving inventory etc., are to be excluded.

- 2.4. Expenditure for each of the three years Y1, Y2 and Y3 is to be determined in the above manner. Thereafter, simple average of the expenditure shall be worked out, as indicated herewith $[(Y1 + Y2 + Y3) / 3]$.
- 2.5. Capital Employed will comprise of Gross Fixed assets [as arrived as per the Indian Generally Accepted Accounting Principles (IGAAP)] plus capital work in progress as on 31 March / 31 December of the year Y3 reported in the Audited Annual Accounts and working capital as per norms prescribed in clause 2.6. of this Tariff Policy.
- 2.6. Working capital will comprise of inventory, sundry debtors and cash balances. Limit on inventory for capital spares will be one year's average consumption and in case of other items of inventory the limit will be six months' average consumption of stores excluding fuels. This, however, will not be applicable for customized spares. Insurance on spares shall be part of the equipment procurement cost. Limit on cash balance will be one month's cash expenses. Advance payment of Revenue Share / royalty to the landlord port flowing from the contractual obligations will be recognised as a part of sundry debtors. Advance payment of lease rental / license fee to landlord port flowing from the contractual obligations will be recognised as part of sundry debtors.
- 2.7. Return on Capital Employed is to be computed at 16%.
- 2.8. The ARR so assessed as on 31 March or 31 December of Y3, as the case may be, will be indexed by 100% of the Wholesale Price Index (WPI) applicable as communicated by TAMP to the BOT operators to arrive at the indexed ARR for the immediate subsequent year.
- 2.9. The ARR determined by the BOT operators as per clause 2.8 above is the ceiling Annual Revenue Requirement based on which the BOT operators will draw the Scale of Rates (SOR).
- 2.10. For drawing the SOR, the traffic to be considered would be the average of the actual traffic handled by the BOT operator during the years Y1, Y2 and

- Y3. The actual traffic should be duly certified by the concerned Major Port Trust.
- 2.11.1. Based on the Annual Revenue Requirement as assessed as per Clause 2.9 above and taking into account the traffic as per Clause 2.10 above, the BOT operator will have the flexibility to determine the rates to respond to the market forces based on its commercial judgment and draw the SOR within the ceiling of Annual Revenue Requirement, duly certified by a practising Chartered Accountant/ Cost Accountant. The BOT Operator shall have option to draw SOR to achieve revenue lower than the ceiling ARR. In this regard, BOT operators will make a detailed working of income estimation indicating each of the tariff items in the proposed SOR for corresponding traffic as in clause 2.10 above and establish itself that the sum of the revenue so determined from all the tariff items in the SOR is within the ceiling of the ARR determined in clause 2.9. above duly certified by a practicing Chartered Accountant/ Cost Accountant.
- 2.11.2. If in the opinion of TAMP, the ceiling tariff proposed by the BOT operator for cargo/ container/ service/ equipment is higher than the highest ceiling reference tariff fixed by TAMP under the 'Revised Guidelines for determination of tariffs for Projects at Major Ports, 2013', in the concerned Major Port Trust, TAMP may restrict the proposed tariff to the highest ceiling reference tariff, so applicable in the Port, **in consultation with the concerned Major Port Trust and BOT operator.**
- 2.12. Status quo shall be maintained in the existing conditionalities prescribed in the SOR of the respective BOT operators. If the BOT operator is of the view that any of the existing conditionalities need to be modified / deleted or new condition to be added due to operational or any other contingency, the BOT operator may propose such modification with justification and capture the financial / revenue impact, if any, in the ARR.
- 2.13. The SOR will be indexed annually to inflation to the extent of 60% of the variation in Wholesale Price Index (WPI) announced by the Government of India occurring between 1st January to 31 December of the relevant year.

Such adjusted SOR will come into force from 1st May of the relevant year to 30th April of the following year.

- 2.14. The indexed SOR shall remain valid for 3 years subject to annual indexation as mentioned in clause 2.13.
- 2.15. For good and sufficient reasons, BOT operator may propose revision ahead-of-schedule either for general revision or partial revision of its SOR.

3. PERFORMANCE STANDARDS OF BOT OPERATORS

The BOT operators shall also commit Performance Standards for cargo related services in terms of average ship berth day output, average moves per hour in case of container handling. It is not necessary to commit cargo-wise ship berth day output. The BOT operator may commit overall ship berth day output.

4. UNADJUSTED PAST PERIOD SURPLUS, PAST PERFORMANCE ANALYSIS

- 4.1.1. The Scale of Rates of some of the BOT operators have not been reviewed due to litigations pending in the High Courts on the Tariff Orders passed by TAMP. The surplus/ deficit over and above the admissible costs and permissible return, if any, arising during the period of litigation will be subject to the orders of the respective High Courts.

Alternatively, MOS, concerned Major Port Trusts, concerned BOT operators and TAMP may decide on the treatment of past period surplus arising during the period of litigation.

- 4.1.2. In case of operators who have not gone to the Courts, the surplus/ deficit upto the period of migration to this Guidelines shall be dealt with as per Clause 2.13 of the 2005 Tariff Guidelines.

- 4.2.1. The Scale of Rates of BOT operator to be valid for 3 years is arrived based on the indexed Annual Revenue Requirement and actual average traffic during the years Y1, Y2 and Y3. During the next review of Scale of Rates

of BOT operator (subsequent to first tariff revision under the current Tariff Guidelines, 2019), the actual revenue and actual traffic will be compared with the ARR and the traffic relied upon in the immediate previous tariff cycle. If, on such review, variation in both physical and financial parameters is more than +/- 20%, then from the actual surplus/ deficit over and above the admissible costs and permissible return, 20% of the surplus/ deficit will be allowed to be retained/ borne by the BOT operator and balance surplus/ deficit will be shared equally between the operator and the users by way of adjustment in the Annual Revenue Requirement of the tariff cycle under consideration.

- 4.2.2. During the review of past period, the actual income earned by the operator based on their audited accounts will be considered and not any notional income.

5. PROCEDURE FOR FILING AND PROCESSING THE PROPOSAL

- 5.1. The SOR, along-with conditionalities governing them, for services rendered and Performance Standards shall be formulated by the individual BOT operators, in accordance with the Tariff Guidelines as amended from time to time.
- 5.2. Each BOT Operator shall submit the proposed SOR and Performance Standards, 90 days prior to the expected date of implementation of its SOR.
- 5.3. The concerned BOT operator as well as TAMP shall host the proposal along with the draft SOR and the proposed Performance Standards in its website giving the designated email address of TAMP for comments of the concerned Major Port Trust and relevant stakeholders / users within 15 days' time. In case any financial data is confidential in nature, the BOT operator may, for reasons to be recorded in writing request TAMP not to host such data on its website.

- 5.4. The BOT operator shall submit its replies on the comments received from the concerned Major Port Trust and port users to TAMP not later than 15 days from the last date of receipt of their comments.
- 5.5. In case there are no objections from Major Port Trust or the users for a proposal, TAMP need not organize any joint hearing. In case of objections raised by the Major Port Trust/ port users, TAMP shall give an opportunity of hearing to the concerned parties of the port. Hearing/s of a case or proposal will be organised, jointly with the BOT operator, port and users either at the Office of the Authority or at the concerned Major Port Trust.
- 5.6. TAMP will pass a speaking order and notify the SOR along with Performance Standards proposed by the BOT operator in the Official Gazette within 60 -75 days from the date of filing.
- 5.7. The consultative process shall not be followed in a tariff case which is specifically required to be reviewed to implement the Central Government policy directive issued under section 111 of the MPT Act. This would be limited to such items/ part of tariff to which the directive applies.
- 5.8. Unless otherwise different arrangement is specifically mentioned in the respective tariff orders, revised/ modified charges will come into effect after expiry of 30 days from the date of gazette notification. In exceptional cases retrospective effect may be given for reasons to be recorded.
- 5.9. The SOR notified by TAMP shall remain valid for 3 years subject to annual indexation as mentioned in clause 2.13. of the Tariff Guidelines,2019.

6. OTHER ASPECTS

- 6.1. The tariff proposal for fixation/ revision of rates received will be registered as a case.
- 6.2. TAMP will maintain a list of organisations to be consulted on tariff proposals of that BOT operator. It will review and update the list from time to time, in consultation with the concerned BOT operator and Major Port

Trust.

- 6.3. Users will not be required to pay charges for delays beyond a reasonable level attributable to the BOT operator.
- 6.4. Users shall pay interest on delayed payments and the BOT operator shall pay interest on delayed refunds at the same rate.
 - 6.5.1. The rate of interest will be 15% p.a.
 - 6.5.2. The delay in payments by user will be counted beyond 10 days after the date of raising the bills. This provision will not apply to the case where payment is to be made before availing of the services/ use of port properties as stipulated in the MPT Act, 1963 and/ or prescribed as a condition in the tariff.
 - 6.5.3. The delay in refunds by the BOT operator will be counted beyond 20 days from the date of completion of services or on production of all documents required from the user, whichever is later.
- 6.6.1. All US dollar denominated tariff will be recovered in Indian Rupees after conversion of charges in US dollar terms into its equivalent Indian Rupees at the Reference rate notified by the Reserve Bank of India or the market buying rate notified by State Bank of India as may be specified from time to time.
 - 6.6.2. The day of entry of the vessel into port limits shall be reckoned as the day for such conversion. In respect of charges on containers, the day of entry of the vessel in the case of import containers and the day of arrival of containers into the port in the case of export containers shall be reckoned as the day for such conversion.
 - 6.6.3. A regular review of exchange rate shall be made once in 30 days from the date of arrival in the cases of vessels staying in the port for longer period. The basis of billing shall change prospectively with reference to the appropriate exchange rate prevailing at the time of review.

- 6.7.1. Whenever a specific tariff for a new service/ cargo/ equipment/ facility is not available in the SOR, of that particular operator, the concerned BOT operator can approach TAMP for notification of tariff for the said new cargo/ equipment/ service adopting the tariff and performance standards if any fixed for comparable cargo/ equipment/ service in any Major Port Trust or BOT operator governed under this Tariff Guidelines. If there is no rate available in any Major Port Trust or BOT operator governed under this Tariff Guidelines or if the rate available is not representative enough of the proposed new cargo/ service/ equipment/ facility, then the operator may file the proposal for notification of tariff for the said new cargo/ equipment/ service/ facility with reference to optimal capacity assessed following the principles of 2008 guidelines or based on rated capacity or technical specification of service/ facility/ equipment. If determination of tariff based on the above prescribed options is not available, then the operator after giving sufficient reasons may propose rates based on cost plus 16% return formula.
- 6.7.2. Proposal for notification of rate for use of a new facility or a new service shall be forwarded to the TAMP at least 60 days prior to the expected date of commissioning of the new cargo facility or a new service. For determination of tariff for new cargo / new service, TAMP will follow normal consultation process as prescribed.
- 6.7.3. Simultaneously with the submission of proposal, the proposed rate can be levied on an ad hoc basis till the rate is finally notified.
- 6.7.4. The ad hoc rate to be operated and the Performance Standards to be applied in the interim period must be based on the approach outlined in clause 6.7.1 of this Guidelines and it must be in consultation with the concerned user(s).
- 6.7.5. The final rate fixed by the TAMP for new cargo / service for which rate is not prescribed in the SOR will ordinarily be effective only prospectively. The interim rate adopted in an ad hoc manner will be recognised as such

unless it is found to be excessive requiring some moderation retrospectively.

- 6.8. TAMP will continue to furnish clarification on matter involving fixation of tariff/ Scale of Rates of BOT operators.
- 6.9. The rates prescribed in the Scale of Rates are ceiling levels; likewise, rebates and discounts are floor levels. The BOT operators may, if they so desire, charge lower rates and/ or allow higher rebates and discounts.
- 6.10. Subsequent to the Notification of SOR, the BOT operators may also, if they so desire, rationalise the conditionalities prescribed in the SOR.

7. REVIEW OF ORDERS

Application for review of any tariff order will be entertained to the extent of errors apparent on the face of records considered in the relevant proceedings, or for any justifiable reasons provided such an application is filed within 30 days of the notification in the Official Gazette.

8. GRIEVANCE REDRESSAL

In the event any user has any grievance regarding non-achievement by the BOT operator of the Performance Standards as notified by the TAMP, he may prefer a representation to TAMP which, thereafter, shall conduct an inquiry into the representation and shall forward its findings to the concerned Port Trust and BOT operator. The Major Port Trust and BOT operator concerned will be bound to take necessary action on the findings as per the provisions of the respective Concession Agreement.

9. MANDATORY DISCLOSURES BY BOT OPERATORS

All the BOT operators shall furnish to TAMP annual reports on cargo traffic handled, ship berth day output as well as the tariff realized for its terminal.

For the container terminal, BOT operators shall furnish to TAMP annual reports on container traffic handled, average moves per crane hour, average dwell time for containers as well as the tariff realised for its terminal. The annual reports shall be submitted by the BOT operators within 60 days following the end of each of the year. Any other information which may be required by TAMP shall also be furnished to them from time to time.
