

**BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION
BAYS No. 33-36, SECTOR-4, PANCHKULA- 134112, HARYANA**

HERC/Petition No. 18 of 2021

**Date of Hearing : 01.09.2021
Date of Order : 13.09.2021**

IN THE MATTER OF

Petition under Regulation 83 of the HERC (Terms and Conditions for Determination of Tariff for Generation, Transmission, Wheeling and Distribution & Retail Supply under Multi Year Tariff Framework) Regulations, 2019 and on all other enabling provisions in this behalf, seeking amendment of Regulations 15.3, 20.1 & 25 of the MYT Regulations, 2019.

Petitioner

Association of Power Producers (APP)

Present on behalf of Petitioner

Sh. Sanjay Sen, Sr. Advocate

Quorum

Shri R.K. Pachnanda

Shri Pravindra Singh Chauhan

Shri Naresh Sardana

Chairman

Member

Member

ORDER

The present petition has been filed by the Association of Power Producers (APP) seeking amendments in the MYT Regulations, 2019, to provide for pass-through of income tax/MAT in the ARR / Tariff of the power generating companies whose tariff is determined by the Commission under Section 62.

Brief background:

1. HERC (Terms and Conditions for Determination of Tariff for Generation, Transmission, Wheeling and Distribution & Retail Supply under Multi Year Tariff Framework) Regulations, 2019 was framed and notified by the Commission on 31 October, 2019. The same is applicable for the second control period i.e. 1.04.2020 to 31.03.2025. These regulations provide for various financial and technical / operating norms as well as the terms for determination of ARR / Tariff(s) for the licensee(s) and power generating company in Haryana. The tariffs under these regulations are determined under section 62 of The Electricity Act, 2003.
2. In addition to other terms and conditions, regulation 20.1 provides that, "the rate of return on equity shall be decided by the Commission keeping in view the incentives and penalties and on the basis of overall performance subject to a ceiling of 14%.....". Further, regulation 25 of the

MYT Regulations, 2019 provides that “Income Tax, if any, on the income stream of the generating company or the licensee shall not be treated as expense or a pass-through component in the tariff and shall be payable by the generating company or the licensees on their own”.

Petitioner’s submissions

3. The petitioner herein, is aggrieved by the above statutory provisions notified by the Commission after due deliberations, stakeholders / public consultation and after following the due process specified for framing and notifying Regulations as per The Electricity Act, 2003. The case of the petitioner is that the dispensation that the income tax shall be borne by the generating companies out of the ROE, is not in conformity with the CERC (Terms and Conditions of Tariff) Regulations, 2019 and the regulations of quite a few other State Electricity Regulatory Commissions including that of Himachal, Punjab, Maharashtra, Chhattisgarh, Rajasthan, Gujarat , MP, Uttarakhand, Bihar, Jharkhand, West Bengal, Andhra Pradesh, Telangana, Kerala, Tamil Nadu, JERC (Goa & UTs) and Delhi . It has been further submitted that the impugned regulation of the Haryana Commission will reduce the effective return on equity to about 10.48% which would be a deterrent for attracting fresh investments as well as expansion and modernization of power generating projects in Haryana.

Additionally, the petitioner referred to the National Electricity Policy as well as National Tariff Policy 2016, in support of its submission, that taxes are to be treated as an uncontrollable factor, hence, ought to be a pass-through component in the tariff. Accordingly, the petitioner has prayed as under:

4. Prayers of the petitioner:

- a) Admit the present petition; and
- b) Issue the necessary process under law, including that of previous publication, for amendment of Regulations 15.3, 20.1 & 25 of the MYT Regulations, 2019; and
- c) Amend Regulation 15.3 and make Income Tax/MAT a part of the ARR of the generating companies; and
- d) Amend Regulation 20.1 to provide a minimum rate of RoE at 16%, post-tax to the generating companies; and
- e) Amend Regulation 25 to align the same with Regulation 31 of the CERC Tariff Regulations, 2019; and/or
- f) Amend the MYT Regulations, 2019 in such other manner, that Income Tax/MAT is reimbursed to the generating companies with a post-tax RoE of 16%; and/or
- g) Pass any other order(s) that this Hon’ble Commission may deem fit in the facts and circumstances of the present case in favor of the petitioner.

5. Commission’s Order:

The Commission heard at length, the submissions and arguments of the learned counsel Shri Sanjay Sen, putting in appearance for the petitioner i.e. Association of Power Producers. Shri Sen built up his case for seeking amendments in certain regulations of the HERC MYT

Regulations, 2019. The crux of his arguments is that despite the fact that the State Commission(s), while framing regulations in exercise of the legislative functions cast upon them by the Act, can make departures from the CERC regulations in vogue. The reason being the nature of section 61(a) of The Electricity Act, 2003, as it provides that the appropriate commission shall be guided by the principles and methodologies specified by the CERC for determination of the tariff applicable to generating companies and transmission licensees. However, he argued that the overall architecture of the dispensations impacting tariff design ought to be aligned to that of the Central Commission.

The learned counsel cited examples from other SERCs in the country wherein the base rate of return on equity is grossed up by the corporate income tax / MAT to arrive at the effective RoE on the eligible equity capital admitted by the SERCs. The learned counsel further relied on few case laws (citations not placed on record) wherein it has been observed that unless income tax is reimbursed over and above the ROE, the guaranteed rate of ROE gets reduced, and therefore, the regulation providing for the guaranteed ROE gets defeated. Taking his arguments further, Shri Sen submitted that in the 'cost plus' determination of tariff u/s 62 of The Electricity Act, 2003 (unlike adoption of tariff u/s/ 63 discovered through a transparent process of bidding), the Commission ought to provide for minimum 16% post tax return to ensure viability of the generating companies on a sustained basis.

The Commission has taken note of the submissions and arguments of the petitioner and observes as under:

- i) The power sector regulators as well as the statutory forum created under section 166 (2) of The Electricity Act, 2003 viz. Forum of Regulators, is seized with the issue of RoE, grossed up by applicable tax rate, in the light of its cascading impact on the tariff payable by the electricity consumers.
- ii) The effective or even the base RoE ought not to be viewed in isolation but has to be aligned with the macro parameters including risk free interest rates, term lending interest rates as well as the cost of capital.
- iii) There is a strong case of linking base RoE (pre-tax) with performance and risk profile of different businesses i.e. generation (could be different for hydro and others), transmission, distribution and trading.

It needs to be noted that for the power sector where return on equity has been guaranteed by the regulators, there is nothing like guaranteed return and hence 'equity' is also considered as risk capital i.e. if the company / firm is not performing efficiently the owners of the equity deployed do not get any return. In fact, after meeting all the expenses and statutory payments

including repayment of term loans and interest thereto, if the company has incurred losses, the same to that extent, erodes its equity capital and the net worth as well.

Having observed as above, the Commission, at this stage is not commenting on the merits of the case as the same involves amending certain provisions of the MYT Regulations, 2019. As the petitioner is already aware that for framing and notifying a Regulation the Commission has to follow a specific process including drafting a discussion paper, inviting objections / suggestions from stakeholders / public and holding a public hearing and previous publication of the same too. The same procedure has to be followed by the Commission for amending or re-enacting any regulation as such.

In view of the above, the Commission, as also prayed for by the petitioner, directs the officer(s) concerned of the Commission to prepare a consultation paper for revisiting the MYT Regulations, 2019, including but not limited to the issue raised in the present petition. The Commission shall place the approved consultation paper in public domain for inviting objections / suggestions / comments from all stakeholders and any other interested persons. After holding a public hearing in the matter, the Commission will take a final view in the matter.

In terms of the above, the present case brought before the Commission is disposed of.

This Order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 13th September, 2021.

Date: 13.09.2021
Place: Panchkula

(Naresh Sardana)
Member

(Pravindra Singh Chauhan)
Member

(R.K Pachnanda)
Chairman