

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

**HERC/Petition No. 19 of 2021**

**Date of Hearing : 29.09.2021**

**Date of Order : 04.10.2021**

**IN THE MATTER OF**

Petition under Regulation 79 of HERC (Terms and Conditions for Determination of Tariff for Generation, Transmission, Wheeling and Distribution & Retail Supply under Multi Year Tariff Framework) Regulations, 2019, seeking relaxation of Regulation 25.

**Petitioner**

JSW Energy (Kutehr) Ltd.

**Present on behalf of Petitioner**

Sh. Aman Anand Dixit, Advocate, JSW

Sh. Anurag Agarwal, JSW

**Quorum**

**Shri R.K. Pachnanda**

**Shri Naresh Sardana**

**Chairman**

**Member**

**ORDER**

**Brief Background:**

1. The present petition has been filed by JSW Energy (Kutehr) Ltd. seeking relaxation in the MYT Regulations, 2019, inter alia, to provide for pass-through of income tax/MAT in the ARR of generating companies whose tariff is determined by the Commission under Section 62 of the Electricity Act, 2003.
2. The petitioner has submitted as under: -
  - i. The petitioner, JSW Energy (Kutehr) Ltd., is one of the shortlisted bidders against the Expression of Interest (EOI No. 1/HPPC/LT Hydro Power 500 MW) dated 03.07.2018, invited by Haryana Power Purchase Centre on behalf of the distribution licensees in Haryana i.e. UHBVNL and DHBVNL.
  - ii. The petitioner has sought relaxation in the provisions of Regulation 25 of the MYT Regulations, 2019, which do not admit income tax as an expense or a pass through in tariff and provides that the same shall be payable by the generator.
  - iii. That HERC MYT Regulations, 2019 framed by the Commission provide a ceiling of 14% on Return on Equity (ROE), as per Regulation 20.1 and further provide that income Tax (as per Regulation 25) shall be borne by the generating companies on their own.
  - iv. In the aforesaid context, the petitioner states that admittedly, the bids by all the generators were submitted considering the CERC Regulations, as at the relevant time, there were no regulations notified by this Hon'ble Commission for determination of tariff. The bids were

admittedly evaluated on the basis of CERC Regulations and a merit order was prepared accordingly. The tariff regulations were notified by this Hon'ble Commission after the submission of the bids. The CERC Tariff Regulations provide for a post-tax return on equity of 16.5% for hydro power plants, while under the tariff regulations of this Hon'ble Commission, there is a cap of 14% on RoE (Regulation 20) and bar on reimbursement of income Tax/MAT on the RoE (Regulation 25).

- v. The issue of applicability of the CERC norms versus the norms notified by this Hon'ble Commission and related issues have been deliberated and discussed at length between the procurer and the petitioner. The petitioner submits that it has agreed to the jurisdiction of this Hon'ble Commission and also the applicability of the HERC tariff regulations, subject to reimbursement of income tax/MAT. The petitioner states that unless this relaxation is given, the quoted tariff will become unviable and the entire bid process would stand frustrated.
- vi. The petitioner has submitted that pre- tax return on equity of 14% effectively translates to a RoE of only about 10% net of tax. At this rate, the petitioner has submitted that the investment will be unviable.
- vii. It has been submitted that all SERC's and the CERC have provisioned for reimbursement of income tax/MAT on RoE, to attract investment in the generation sector, as is mandated by the Tariff Policy, 2016. This Commission itself, for renewable sources (hydro power generation also qualifies as a renewable source of energy as per Ministry of Power) has provisioned for reimbursement of income tax/MAT. Additionally, there are various decisions of the Hon'ble APTEL, passed in the context of Regulations of other SERC's wherein, the Hon'ble APTEL has taken a view 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. As such, the approach of providing post tax return on equity also has been judicially considered and approved. Reliance in this regard has been placed on the decisions of the Hon'ble APTEL.
- viii. That levy of income tax/MAT is not something which is in control of either the generator or the procurer. It is for this reason that income Tax, for generating companies and licensees has been made a pass-through in the ARR/tariff, by all the other regulations prevailing in the country, including the Hon'ble Central Electricity Regulatory Commission.
- ix. That the MYT Regulations, 2019 of this Hon'ble Commission for the transmission business (which admittedly carries the lowest risk in the entire value chain) has allowed income Tax/MAT apart from the ROE and specifically made it a part of the ARR of the transmission licensee (see Regulation 6.5).
- x. In this backdrop, coupled with the admitted position that the bids by all bidders were submitted as per the CERC norms, the applicant states that this is a fit case where the

Commission should exercise its powers and relax the applicability of Regulation 25 to the present case in such manner that the income tax/MAT of RoE is reimbursed to the applicant/generator.

- xi. Prayer of the petitioner is as under:
  - i. Relax the provisions of Regulation 25 of the HERC Tariff Regulations, 2019 in the present case in such manner that income tax/MAT is reimbursed to the petitioner/generator; and/or
  - ii. Pass such order(s) that the Commission may deem just fit and proper in favor of the petitioner.

**Commission's Order:**

- 3. The case was heard as scheduled on 29.09.2021, through video conferencing, in view of THE Covid-19 pandemic.
- 4. The counsel for the petitioner, Mr. Aman Anand, briefly presented his case. The learned counsel brought to the notice of the Commission a similar matter decided by the Commission in PRO 18 of 2021, wherein the case was disposed of with directions to the officers of the Commission to prepare a consultation paper for inviting comments from the stakeholders/general public. He prayed that the present matter/case may be kept pending till the outcome of the proposed amendment of the MYT Regulations 2019.
- 5. Upon hearing the learned counsel for the petitioner, the Commission observes that the relief sought by the petitioner tantamounts to amendment of the HERC MYT Regulations, 2019. The petitioner may note that the regulations are notified by the Commission in exercise of delegated legislative function, and hence due process, including prior publication, has been prescribed for the purpose.

The commission, in the order passed by it, in case no PRO 18 of 2021 dated 13.09.2021, had instructed that *"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."*

Accordingly, the Commission, in the due course of time, will finalize the draft and place the same in the public domain for inviting comments/objections from the stakeholders/general public. Subsequent to the consultation, the Commission will take a final view in the matter.

- 6. In view of the procedural requirements for notifying as well as amending Regulations, the Commission has taken note of the fact that the Regulations notified by the Commission is not appealable under section 111 of the Electricity with Act, 2003. However, it may be subjected to

judicial review in the court(s) of competent jurisdiction. Hence, keeping the instant case pending, as prayed for by the learned counsel, shall serve no purpose. The petitioner herein, may file its comments/observations and objections as and when the proposed amendment is made available in the public domain for stakeholder/public consultation.

Accordingly, the present case brought before the Commission is disposed of.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 04<sup>th</sup> October, 2021.

**Date: 04.10.2021**  
**Place: Panchkula**

**(Naresh Sardana)**  
**Member**

**(R.K Pachnanda)**  
**Chairman**

HEERC