

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 24/RP/2022
in
Petition No. 146/GT/2020

Coram:

Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member

Date of Order: 12th January, 2023

IN THE MATTER OF

Review of Commission's Order dated 9.5.2022 in Petition No. 146/GT/2020 in the matter of revision of tariff for the period 2014-19 and determination of tariff for the period 2019-24 in respect of Dulhasti Power Station (390 MW).

AND

IN THE MATTER OF

NHPC Limited
NHPC Office Complex, Sector-33,
Faridabad (Haryana)- 121003.

....Petitioner

Vs

1. Punjab State Power Corporation Limited,
The Mall, Near Kali Badi Mandir,
Patiala - 147 001 (Punjab)
2. Haryana Power Purchase Centre,
Shakti Bhawan, Sector - 6
Panchkula-134 109 (Haryana).
3. BSES Rajdhani Power Limited,
BSES Bhawan,
Nehru Place, New Delhi-110 019.
4. BSES Yamuna Power Limited,
Shakti Kiran Building, Karkardooma,
Delhi-110 072.
5. Tata Power Delhi Distribution Limited,
33 kV Sub-Station Building, Hudson Lane,
Kingsway Camp, New Delhi-110 009.



6. Power Development Department,
New Secretariat, Jammu -180 001 (J&K).
7. Uttar Pradesh Power Corporation Ltd.,
Shakti Bhavan, 14, Ashok Marg,
Lucknow - 226 001 (Uttar Pradesh).
8. Ajmer Vidyut Vitaran Nigam Limited,
Old Powerhouse, Hatthi Bhatta,
Jaipur Road, Ajmer - 305 001 (Rajasthan).
9. Jaipur Vidyut Vitaran Nigam Limited,
Vidyut Bhawan, Janpath,
Jaipur - 302 005.
10. Jodhpur Vidyut Vitaran Nigam Limited,
New Powerhouse, Industrial Area,
Jodhpur - 342 003, Rajasthan
11. Uttaranchal Power Corporation Limited,
Urja Bhawan, Kanwali Road,
Dehradun – 248 001 (Uttarakhand).
12. Engineering Department,
1st Floor, UT Secretariat, Sector 9-D,
Chandigarh – 160 009.

....Respondents

Parties Present:

Shri Ved Jain, Advocate, NHPC
Shri Piyush Kumar, NHPC
Shri S.K. Meena, NHPC
Shri Jitender Kumar, NHPC
Shri R.D. Shende, NHPC
Shri Mohit Mudgal, Advocate, BRPL
Shri Sachin Dubey, Advocate, BRPL
Ms. Aanchal, Advocate, BRPL

ORDER

Petition No. 146/GT/2020 was filed by the Review Petitioner, NHPC Limited, for the truing-up of tariff of Dulhasti Hydroelectric Power Station (390 MW) (in short “the generating station”) for the period 2014-19, in accordance with the provisions of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (in short 'the 2014 Tariff Regulations') and for determination of the



tariff for the generating station for the period 2019-24, in accordance with the provisions of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 (in short 'the 2019 Tariff Regulations') and the Commission vide order dated 9.5.2022 (in short the 'impugned order') disposed of the said petition. Aggrieved by the impugned order dated 9.5.2022, the Review Petitioner has filed this Review Petition on the ground that there is error apparent on the face of the record on the following issues:

(A) *Error in grossing up of Return on Equity with Minimum Alternate Tax (MAT) by the Commission instead of the Effective Tax Rate;*

(B) *Error in disallowing impact of GST on security charges;*

Hearing dated 12.8.2022

2. The Review Petition was heard through virtual conferencing, on 12.8.2022. During the hearing, the learned counsel for the Review Petitioner made detailed submissions in the matter. Considering the submissions of the Review Petitioner, the Review Petition was 'admitted' on the issues raised in paragraph 1 above vide order dated 24.8.2022 and notice was served the Respondents, with directions to complete pleadings, in the matter. **No reply has been filed by the Respondents, despite notice.** The Review Petitioner vide affidavits dated 18.10.2022 and 13.9.2022, has filed certain additional information.

Hearing dated 2.11.2022

3. The matter was heard on 2.11.2022. During the hearing, the learned counsel for the Review Petitioner made detailed oral submissions in the matter and prayed that error apparent on the face of the order dated 9.5.2022 may be reviewed. During the hearing, the learned counsel for the Review Petitioner made detailed oral submissions in the matter and accordingly, prayed that the error apparent on the face of the order dated 9.5.2022 may be rectified. The learned counsel for the Respondent,



BRPL prayed for grant to time to file its reply, which was accepted by the Commission. The Commission, after hearing the learned counsel for the Review Petitioner directed the Petitioner, to furnish the 'Tax Audit Report and Income Tax assessment order for the 2014-19 tariff period' after serving copy on the Respondents and accordingly reserved its order in the matter. The Review Petitioner vide affidavit dated 1.12.2022 has filed the said information.

4. Based on the submissions of the parties and the documents available on record, we proceed to examine the issues raised by the Review Petitioner in the subsequent paragraphs.

(A) Error in grossing up of Return on Equity with Minimum Alternate Tax (MAT) by the Commission instead of the Effective Tax Rate;

Submissions of the Review Petitioner

5. The Review Petitioner, in the Review petition, has submitted the following:

- (a) The Commission has grossed up Return on Equity (ROE) with MAT rate (which was applicable tax rate for the Petitioner's company during 2014-19) and not with effective Tax Rate, and the same is not in accordance with Regulation 25 (3) of the 2014 Tariff Regulations.
- (b) The concept of effective Tax Rate was introduced by the Commission to allow the pre-tax ROE of 15.5%/16.5% for the period 2014-19 and considering the applicable tax rate, instead of the effective tax rate, is not in line with the provisions of the said Regulations. By using the applicable tax rate for grossing up of base rate of ROE, the Commission has moved back to the 2009 Tariff Regulations.
- (c) The Review Petitioner has grossed up the ROE with effective Tax Rate as per Regulation 25(3) of the 2014 Tariff Regulations, which is based on actual tax paid together with any additional tax demand, including interest thereon, duly adjusted for any refund of tax including interest received from the income tax authorities pertaining to the tariff period 2014-15 to 2018-19 on actual gross income of any financial year.
- (d) The actual tax paid is excluding the tax on other income stream and penalty, if any, arising on account of delay in deposit or short deposit of tax amount by the generating company, which is as per Regulation 25(3) of the 2014 Tariff Regulations. Although the Review Petitioner's company fall under the MAT



regime, but as effective Tax Rate calculated as per provisions of Regulation 25 (3) for grossing up of ROE for truing up purpose, the effective Tax may be higher or lower as compared to MAT rate.

(e) By claiming the effective Tax rate in place of the MAT rate, the Review Petitioner is adopting the tax neutral approach, which is the basic intention of the Tariff Regulations.

(f) In view of above, it is clear that the Commission, while grossing up the ROE, has considered the MAT rate, in place of the effective Tax Rate, which is a gross error.

6. Accordingly, the Review Petitioner has submitted that there has been an under recovery of Rs.1339.03 lakh in ROE (pre- tax) for the period 2014-19 on account of the error, while grossing up of ROE in paragraph 40 of the impugned order dated 30.4.2022 and the same may be reviewed.

7. We have examined the matter. The ROE worked out and allowed by impugned order dated 9.5.2022 and the ROE, ought to have been allowed, as per submissions of the Review Petitioner, are tabulated below:

	<i>(Rs. in lakh)</i>				
	2014-15	2015-16	2016-17	2017-18	2018-19
ROE allowed by impugned order dated 9.5.2022 (a)	41474.07	41674.73	41674.73	41674.73	41783.99
ROE ought to have allowed by Commission	41897.24	41998.56	41666.78	41946.90	42111.80
Difference {(a) – (b)}	(-) 423.17	(-) 323.83	(+) 7.95	(-) 272.17	(-) 327.81

8. Regulation 24 of the 2014 Tariff Regulations, relating to ROE is extracted below:

“24. Return on Equity: (1) Return on equity shall be computed in rupee terms, on the equity base determined in accordance with regulation 19.

(2) Return on equity shall be computed at the base rate of 15.50% for thermal generating stations, transmission system including communication system and run of the river hydro generating station, and at the base rate of 16.50% for the storage type hydro generating stations including pumped storage hydro generating stations and run of river generating station with pondage:

Provided that:

i. in case of projects commissioned on or after 1st April, 2014, an additional return of 0.50 % shall be allowed, if such projects are completed within the timeline specified in Appendix-I:



ii. the additional return of 0.5% shall not be admissible if the project is not completed within the timeline specified above for reasons whatsoever:

iii. additional RoE of 0.50% may be allowed if any element of the transmission project is completed within the specified timeline and it is certified by the Regional Power Committee/National Power Committee that commissioning of the particular element will benefit the system operation in the regional/national grid:

iv. the rate of return of a new project shall be reduced by 1% for such period as may be decided by the Commission, if the generating station or transmission system is found to be declared under commercial operation without commissioning of any of the Restricted Governor Mode Operation (RGMO)/ Free Governor Mode Operation (FGMO), data telemetry, communication system up to load dispatch centre or protection system:

v. as and when any of the above requirements are found lacking in a generating station based on the report submitted by the respective RLDC, RoE shall be reduced by 1% for the period for which the deficiency continues:

vi. additional RoE shall not be admissible for transmission line having length of less than 50 kilometers.”

9. Also, Regulation 25 of the 2014 Tariff Regulations provides as under:

“Tax on Return on Equity: (1) The base rate of return on equity as allowed by the Commission under Regulation 24 shall be grossed up with the effective tax rate of the respective financial year. For this purpose, the effective tax rate shall be considered on the basis of actual tax paid in the respect of the financial year in line with the provisions of the relevant Finance Acts by the concerned generating company or the transmission licensee, as the case may be. The actual tax income on other income stream (i.e., income of non-generation or non-transmission business, as the case may be) shall not be considered for the calculation of “effective tax rate”

(2) Rate of return on equity shall be rounded off to three decimal places and shall be computed as per the formula given below:

Rate of pre-tax return on equity = Base rate / (1-t)

Where “t” is the effective tax rate in accordance with Clause (1) of this regulation and shall be calculated at the beginning of every financial year based on the estimated profit and tax to be paid estimated in line with the provisions of the relevant Finance Act applicable for that financial year to the company on pro-rata basis by excluding the income of non-generation or non-transmission business, as the case may be, and the corresponding tax thereon. In case of generating company or transmission licensee paying Minimum Alternate Tax (MAT), “t” shall be considered as MAT rate including surcharge and cess.

(3) The generating company or the transmission licensee, as the case may be, shall true up the grossed-up rate of return on equity at the end of every financial year based on actual tax paid together with any additional tax demand including interest thereon, duly adjusted for any refund of tax including interest received from the income tax authorities pertaining to the tariff period 2014-15 to 2018-19 on actual gross income of any financial year. However, penalty, if any, arising on account of delay in deposit or short deposit of tax amount shall not be claimed by the generating company or the transmission licensee as the case may be. Any under- recovery or over recovery of grossed up rate on return on equity after truing up, shall be recovered or refunded to beneficiaries or the long-term transmission customers/DICs as the case may be on year to year basis.”



10. Further, the observations of the Commission, in the Statement of Objects and Reason (SOR) to the 2014 Tariff Regulations, 2014 on this issue, are as follows:

*“25.6 The Commission observed that various stakeholders have suggested to retain the existing pre-tax return on equity approach. On the other hand, beneficiaries have suggested that utilities should recover income tax from their profit and not separately from the beneficiaries. The Commission has analysed the suggestions and observations received from various stakeholders and observed that both the approaches have their own merits and demerits. However, the major disadvantage, which the Commission envisages in implementation of post-tax approach is the incremental effect of income tax liability, which will arise as the reimbursement of income tax shall again be considered as income in the hands of the generator/licensee and the same will defeat the entire purpose of adopting this approach. Thus, with due regard to the suggestions of the stakeholders and the complexities involved in computing income tax liability, it will be appropriate to retain the existing pre-tax rate of return approach. **In order to pass on the benefits and concessions available in income tax, the income tax rate to be considered for grossing up purpose shall be Minimum Alternate Tax (MAT) rate, if the generating company, generating station or the transmission licensee is paying MAT, or the effective Tax Rate, if the generating company or the transmission licensee is paying income tax at corporate tax rate. Accordingly, the Commission has decided to allow pre-tax rate of return on equity which shall be grossed up with the effective tax rate of the financial year or MAT rate and the tax on other income stream will not be considered for the calculation of the effective tax rate.**”*

11. It is noticed that tax on ROE, has been defined in Regulation 25 of the 2014 Tariff Regulations. It is also noticed that in case the generating station is paying MAT (Minimum Alternate Tax), the rate of ROE is required to be grossed up with MAT rate only and the MAT rate does include surcharge and cess. Further, as per observations in the SOR to the 2014 Tariff Regulations (as quoted above), it is evident that in order to pass on the benefits and concessions available in income tax, the income tax rate to be considered for the purpose of grossing up shall be the MAT rate, if the generating company, generating station or the transmission licensee is paying MAT. On perusal of the documents and the submissions of the Review Petitioner, it was observed that the Review Petitioner is covered under MAT regime and since the Petitioner was paying MAT (Minimum Alternate Tax), the grossing up of ROE is required to be done based on the MAT rate. Since the provisions of the aforesaid regulations, mandates the grossing up ROE with the MAT rate, if the generating



company is paying MAT, the Commission in impugned order dated 9.5.2022 had considered the same, while working out the ROE and grossing up the ROE based on MAT rate. As the ROE had been worked out and allowed in terms of the aforesaid regulations read with the SOR to the said regulations, we find no force in the submissions of the Review Petitioner, to review the impugned order. Accordingly, we hold that there is no error apparent on the face of the impugned order dated 9.5.2022 and review on this ground is not maintainable. Similar issue raised by the Review Petitioner in Review Petition No.19/RP/2022, was rejected by the Commission vide order dated 5.1.2023. In the above background, the prayer of the Review Petitioner for review of the impugned order dated 9.5.2022, is therefore rejected.

(B) Error in disallowing impact of Goods and Services Taxes (GST) on security charges

12. The Commission in paragraphs 74 and 75 of the impugned order dated 9.5.2022 has disallowed the impact on GST for the period 2014-19 as under:

“66. The matter has been considered. It is observed that the Commission while specifying the O&M expense norms for the 2014-19 tariff period had considered taxes to form part of the O&M expense calculations and, accordingly, had factored the same in the said norms. This is evident from paragraph 49.6 of the SOR (Statement of Objects and Reasons) to the 2014 Tariff Regulations, which is extracted hereunder:

“49.6 With regards to suggestion received on other taxes to be allowed, the Commission while approving the norms of O&M expenses has considered the taxes as part of O&M expenses while working out the norms and therefore the same has already been factored in...”

67. Further, the escalation rates considered in the O&M expense norms under the 2014 Tariff Regulations is only after accounting for the variations during the past five years of the 2014-19 tariff period, which in our view, takes care of any variation in taxes also. It is pertinent to mention that in case of reduction of taxes or duties; no reimbursement is ordered. In this background, we find no reason to allow the prayer for grant of additional O&M expenses towards payment of GST.”

Submissions of the Review Petitioner

13. The Review Petitioner has submitted that the Government of India (GOI) has implemented the GST Act, 2017, with effect from 1.7.2017 all over India, except the State of J&K, which was implemented from 8.7.2017. The Review Petitioner has



further submitted that while disallowing the impact of GST on Security services, in the impugned order, the Commission has erred on the following counts:

(a) Taxes on security expenses are not included in the normative O&M expenses for the period 2014-19; and

(b) GST on security services is a 'change in law' and escalation rates does not take care of the 'change in law' i.e., imposition of GST on security services in the State of J&K.

14. In support of the above, the Review Petitioner has submitted the following:

a) Service Tax was first introduced in the year 1994 through Finance Act, 1994. As per Section 64 (1) of Finance Act, 1994, Service Tax was applicable to the whole of India except the State of Jammu and Kashmir. In view of this provision, any services rendered within the State of J&K, either by a person residing within the State or outside the State, was not leviable to Service Tax. Accordingly, Service Tax was not leviable/payable in Pre-GST Regime on Security services received by the units of the Petitioner, located in the State of J&K.

b) Further, as per the provisions of J&K General Sales Tax Act, 1962 and Rules framed thereunder, Security services were not falling in the definition of goods or services as defined in Section 2(h) of the said Act. Therefore, Security services were not eligible to any tax i.e. WCT under J&K General Sales Tax Act, 1962 or Service Tax in the State of J&K in pre-GST regime.

(g) With the introduction of GST w.e.f. 8.7.2017 in the State of J&K, Security services are being subjected to GST @18%.

(h) Section 9 (3) of CGST Act, 2017 read with entry No. 5 of N/N 13/2017 – CGST (rate) further provides that GST shall be paid by recipient of service, under reverse charge, on all services supplied by the Central Government, State Government, Union territory or local authority, which also includes Security services. Accordingly, the units located in the State of J&K, where the Security services are obtained from the State Police Department/CISF, which are covered under the definition of the Government, are discharging GST under reverse charge. There was no tax on security services in the past and thus, the imposition of GST in Security services is a 'change in law' and therefore, the impact of GST on Security services was not factored under the normative O&M expenses notified for this generating station for the period 2014-19.

Accordingly, the Review Petitioner has submitted that the impact of GST on Security services for Rs 1031.91 lakh (out of total impact of GST) may be allowed:



15. We have examined the matter. It is evident from the submissions of the Review Petitioner and the documents on record, that in terms of the provisions of J&K General Sales Tax Act, 1962 and the Rules framed thereunder, Security Services were not falling in the definition of 'goods' or 'services', as defined in Section 2(h) of the said Act and therefore, the same were not eligible to any tax i.e. WCT under J&K General Sales Tax Act, 1962 or Service Tax in the State of J&K in pre-GST Regime. However, with the introduction of GST in J&K w.e.f. 8.7.2017, Security services are being subjected to GST @18%. Thus, no service tax was applicable on the Security services prior to 8.7.2017, in the State of J&K and therefore same has admittedly not been factored in by the Commission, while framing the O&M expense norms for the generating station of the Review Petitioner, located in the State of J&K, for the period 2014-19. It can, therefore, be concluded that due to the implementation of GST on Security services, the Petitioner has been obligated to pay GST on Security services for this generating station. These aspects were inadvertently not considered by the Commission while passing the impugned order dated 9.5.2022. This according to us, is an error apparent on the face of the order and review on this count is maintainable. Therefore, review on this ground is allowed and the impugned order dated 9.5.2022, is modified, as stated below:

16. The additional impact of GST on Security services (out of total impact of GST) for 2017-19, is detailed below:

	<i>(Rs in lakh)</i>		
	2014-15	2015-16	Total
Total Impact of GST	470.67	856.49	1327.15
Impact of GST on Security Services-CISF in above	338.56	693.36	1031.91



17. Accordingly, the additional O&M expenses towards impact of GST on Security Services is allowed as claimed by the Review Petitioner and the total O&M expenses allowed for the period 2014-19 is revised as under:

	<i>(Rs. in lakh)</i>				
	2014-15	2015-16	2016-17	2017-18	2018-19
Normative O&M Expenses allowed in order dated 9.5.2022 Petition No. 146/GT/2020	13746.97	14660.32	15634.36	16673.10	17780.86
Additional impact of GST on Security Services allowed	-	-	-	338.56	693.36
Total O&M expenses	13746.97	14660.32	15634.36	17011.66	18474.22

18. Accordingly, the table under para 79 of the impugned order dated 9.5.2022 is revised as under:

Interest in Working capital (IWC)

	<i>(Rs. in lakh)</i>				
	2014-15	2015-16	2016-17	2017-18	2018-19
Working capital for O&M Expenses (one month)	1145.58	1221.69	1302.86	1417.64	1539.52
Working capital for Maintenance Spares @15% of O&M expenses	2062.05	2199.05	2345.15	2551.75	2771.13
Working capital for Receivables	15896.87	15794.63	15624.41	15487.76	15393.13
Total working capital	19104.50	19215.37	19272.43	19457.14	19703.79
Rate of Interest on Working Capital (%)	13.50	13.50	13.50	13.50	13.50
Interest on Working Capital	2579.11	2594.07	2601.78	2626.71	2660.01

Annual Fixed Charges allowed for the 2014-19 tariff period

19. Consequent upon revision of the O&M expenses, as above, the annual fixed charges allowed for the generating station in the table under paragraph 80 of the impugned order dated 9.5.2022, stands revised as under:



(Rs. in lakh)

	2014-15	2015-16	2016-17	2017-18	2018-19
Depreciation	26882.89	27000.30	27034.89	27056.88	27261.85
Interest on Loan	10698.18	8838.35	6800.72	4556.55	2178.72
Return on Equity	41474.07	41674.73	41674.73	41674.73	41783.99
O&M Expenses	13746.97	14660.32	15634.36	17011.66	18474.22
Interest on Working Capital	2579.11	2594.07	2601.78	2626.71	2660.01
Total	95381.22	94767.77	93746.47	92926.53	92358.79

20. Accordingly, Review Petition No. 24/RP/2022 is disposed of in terms of the above.

Sd/-
(Pravas Kumar Singh)
Member

Sd/-
(Arun Goyal)
Member

Sd/-
(I. S. Jha)
Member

