

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 38/2010

**Coram
Shri S.Jayaraman, Member
Shri M. Deena Dayalan, Member**

DATE OF HEARING: 29.4.2010

DATE OF ORDER: 3.8.2010

In the matter of

Miscellaneous petition under Regulations 44 "Power to Relax" of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 for relaxation of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009.

And in the matter of

Power Grid Corporation of India Ltd., Gurgaon

.... Petitioner

Vs

1. Bihar State Electricity Board, Patna
2. West Bengal State Electricity Board, Calcutta
3. Grid Corporation of Orissa Ltd., Bhubaneswar
4. Damodar Valley Corporation, Calcutta
5. Power Deptt., Govt. of Sikkim, Gangtok
6. Jharkhand State Electricity Board, Ranchi
7. Assam State Electricity Board, Guwahati
8. Meghalaya State Electricity Board, Shillong
9. Govt. of Arunachal Pradesh, Arunachal Pradesh
10. Power & Electricity Deptt., Aizwal
11. Electricity Department, Govt. of Manipur, Imphal
12. Department of Power, Govt. of Nagaland, Nagaland
13. Tripura State Electricity Corporation Ltd., Agartala

14. Rajasthan Rajya Vidyut Prasaran Nigam Ltd., Jaipur
15. Ajmer Vidyut Vitran Nigam Ltd., Rajasthan
16. Jaipur Vidyut Vitran Nigam Ltd., Jaipur
17. Jodhpur Vidyut Vitran Nigam Ltd., Rajasthan
18. Himachal Pradesh State Electricity Board, Shimla
19. Punjab State Electricity Board, Patiala
20. Haryana Power Purchase Centre, Haryana
21. Power Development Deptt., Jammu
22. Uttar Pradesh Power Corporation Ltd., Lucknow
23. Delhi Transco Ltd., New Delhi
24. Chandigarh Administration, Chandigarh
25. Uttarakhand Power Corporation Ltd., Dehradun
26. BSES Yamuna Power Ltd., New Delhi
27. BSES Rajdhani Power Ltd., New Delhi
28. North Delhi Power Ltd., New Delhi
29. NDMC, New Delhi
30. North Central Railway, Allahabad
31. Karnataka Power Transmission Corporation Ltd., Bangalore
32. Bangalore Electricity Supply Company Ltd., Karnataka
33. Gulbarga Electricity Supply Company Ltd., Karnataka
34. Hubli Electricity Supply Company Ltd., Karnataka
35. Mangalore Electricity Supply Company Ltd., Karnataka
36. Chamundeshwari Electricity Supply Corporation Ltd., Mysore
37. Transmission Corporation of Andhra Pradesh Ltd., Hyderabad
38. Eastern Power Distribution Company of Andhra Pradesh Ltd., Andhra Pradesh
39. Southern Power Distribution Company of Andhra Pradesh Ltd., Andhra Pradesh
40. Central Power Distribution Company of Andhra Pradesh Ltd., Andhra Pradesh
41. Northern Power Distribution Company of Andhra Pradesh Ltd., Andhra Pradesh
42. Kerala State Electricity Board, Thiruvananthapuram
43. Tamil Nadu Electricity Board, Chennai
44. Electricity Department, Pondicherry
45. Electricity Department, Goa
46. Madhya Pradesh Tradeco, Jabalpur
47. Madhya Pradesh Audyogik Kendra Vikas Nigam (Indore) Ltd., Indore
48. M/s Jindal Powers Ltd., NOIDA
49. Maharashtra State Electricity Distribution Co. Ltd., Mumbai
50. Gujarat Urja Vikas Nigam Ltd., Baroda
51. Electricity Department, Daman
52. Electricity Department, Silvassa
53. Chhattisgarh State Electricity Board, Chhattisgarh

... Respondents

The following were present:

1. Shri M.G Ramchandran (Advocate) PGCIL
2. Shri U.K Tyagi , GM (commercial) PGCIL
3. Shri Rajeev Gupta (Manager) PGCIL
4. Shri R.B Sharma (Advocate) BSEB
5. Shri Pramod Chaudhary, MPPTCL.

ORDER

The petitioner, Power Grid Corporation of India Ltd., has submitted that the Commission has notified the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009, (hereinafter "2009 regulations"), in accordance with which tariff based on capital cost of the transmission project shall be determined. These regulations shall remain in force for a period of five years with effect from 1.4.2009. Regulation 15(3) of 2009 regulations provides that Return on Equity (ROE) shall be computed by grossing up the base rate with the normal tax rate for the year 2008-09 applicable to the concerned generating company or transmission licensee.

2. The petitioner has submitted that when the 2009 regulations were issued by the Commission, the prevailing MAT rate of 10% (excluding surcharge and education cess) was applicable. Thereafter, as per the Finance Act of 2009, the applicable MAT rate was increased to 15% (excluding surcharge and education cess). Accordingly, the rate of pre-tax return on equity works out to 18.674% in place of 17.481%. The petitioner has further submitted that since the 2009 regulations are applicable with effect from 1.4.2009 and revised rate of MAT has

been made effective from this date, revision in the pre-tax rate of ROE based on the new rate of MAT as per the Finance Act, 2009 is called for. Unless the revision of MAT rate is effected in computing the ROE, the cash flow of the petitioner would be adversely affected as it would be required to pay revised rate of MAT @15% whereas cash would be generated through ROE based on MAT @ 10%. The Petitioner has further submitted that the revision of rate of pre-tax return on equity as per the Finance Act, 2009 would save both the petitioner and the beneficiaries from an additional exercise and also avoidance of the accumulation of arrears in respect of revision of ROE for all the five years of the tariff period 2009-14. The petitioner has submitted that the estimated arrears in the control period 2009-14 that would mount on the beneficiaries would be about Rs.1200 crore including Rs.200 crore on account of the interest component. The Petitioner in its affidavit dated 11.3.2010 has submitted that further revision in MAT rate was announced in budget 2010-11 as per the new proposal, revised rate of MAT applicable is 18% +7.5% surcharge+3% education cess and accordingly, pre-tax ROE works out to 19.358%. The Petitioner has accordingly prayed for invocation of the power under Regulation 44 of 2009 regulations to relax Regulations 15(3) and allow grossing up the base rate with the revised MAT rate of 15% + 10% surcharge+3% education cess as per the Finance Act,2009. The Petitioner has further prayed that for the balance period of the current tariff block, grossing up may be allowed as per the tax rate

prescribed under the relevant Finance Acts and differential impact, if any, may be allowed to be directly adjusted with the beneficiaries annually.

3. Reply to the petition has been filed by APDCL (Assam Power Distribution Company Ltd) and Bihar State Electricity Board (BSEB). APDCL submitted that the issue of tax reimbursement has not caused any operational constraint for which change of the regulations has become necessary. BSEB has submitted that the Petitioner's prayer to seek relaxation of Regulation 15(3) of 2009 regulations is solely guided by commercial considerations with the aim to get the expenses on this account earlier than actually due in accordance with the said regulations. The respondent has further submitted that the return on equity with respect to the actual tax rate in line with the relevant Finance Acts of the respective year during the tariff period shall be trued up separately for year of tariff period alongwith the tariff petition filed for the next period in accordance with the proviso to Regulation 15(3).

4. During the hearing of the petition on 30.3.2010, the Commission directed the Petitioner to explain the provision of law under which the petition was filed. The counsel for the petitioner in the written submission dated 11.5.2010 has submitted that the relief prayed for can be entertained and redressed by the Commission by virtue of the very nature of powers the Commission exercises as a regulator; the power to relax; exercise of inherent powers; and the power to modify the regulations which have been retained by the Commission in the 2009

regulations and the conduct of business regulations governing the exercise of powers by the Commission. The learned counsel has relied on the judgement of the Supreme Court in Uttar Pradesh Power Corporation Limited v National Thermal Power Corporation Limited {(2000) 6 SCC 235}, Hindustal Steel Limited v A. K. Roy {(1968) 3 SCC 513}, the judgement of the Appellate Tribunal for Electricity in NTPC Ltd v Madhya Pradesh Electricity Board {2007 ELR APTEL 7} and in MP Power Trading Company Limited v Torrent Power Ltd and others {2009 ELR APTEL} in support of the contention that the discretion to relax is a judicial discretion to be exercised by the Central Commission based on the circumstances of the case.

5. Regulation 15 of the 2009 Regulations provides as under:

“15. Return on Equity. (1) Return on equity shall be computed in rupee terms, on the equity base determined in accordance with regulation 12.

(2) Return on equity shall be computed on pre-tax basis at the base rate of 15.5% to be grossed up as per clause (3) of this regulation:

Provided that in case of projects commissioned on or after 1st April, 2009, an additional return of 0.5% shall be allowed if such projects are completed within the timeline specified in Appendix-II:

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

(3) The rate of return on equity shall be computed by grossing up the base rate with the normal tax rate for the year 2008-09 applicable to the concerned generating company or the transmission licensee, as the case may be:

Provided that return on equity with respect to the actual tax rate applicable to the generating company or the transmission licensee, as the case may be, in line with the provisions of the relevant Finance Acts of the respective year during the tariff period shall be trued up separately for each year of the tariff period along with the tariff petition filed for the next tariff period."

6. Regulation 15(2) of the 2009 regulations provide that the applicable rate of return on equity shall be calculated by grossing up the base rate with the normal tax rate for the year 2008-09 applicable to the concerned generating company or the transmission licensee. The rationale behind grossing up with the normal tax rate for the year 2008-09 was that the applicable tax rates for various years of the tariff period was not expected to change to a great extent and tariff impact on account of any slight variation in the tax rate would be taken care of at the time of truing up. Regulation 6 of 2009 Regulations provide for truing up of expenditure as under:

"(1) The Commission shall carry out truing up exercise along with the tariff petition filed for the next tariff period, with respect to the capital expenditure including additional capital expenditure incurred up to 31.3.2014, as admitted by the Commission after prudence check at the time of truing up.

Provided that the generating company or the transmission licensee, as the case may be, may in its discretion make an application before the Commission one more time prior to 2013-14 for revision of tariff.

X X X X X X X X

(5) Where after the truing up the tariff recovered is less than the tariff approved by the Commission under these regulations the generating company or the transmission licensee, as the case may be, shall recover from the beneficiaries or the transmission customers, as the case may be, the under-recovered amount along with simple interest at the rate equal to the short-term Prime Lending Rate of State Bank of India as on 1st April of the respective year."

Thus as per the provisions of Regulation 15 read with Regulation 6 of the 2009 regulations, under-recoveries made by the generating companies or transmission licensees on account of variation in the applicable tax rate on year to year basis can be recovered after truing up which will be carried out while approving the tariff for the next tariff period. The generating companies or transmission licensees are at liberty to come one more time prior to 2013-14 for the revision. This scenario was provided in the regulations on the basic premise that there would not be wide variation between the tariff approved by the Commission for a generating station or transmission asset and tariff arrived at after the truing up exercise for the said generating station or transmission asset.

7. After the notification of the 2009 regulation on 20.1.2009, the MAT rate which was 10% for the financial year 2008-09 has been increased to 15% for the Financial Year 2009-10 and 18% for the Financial Year 2010-11. This substantial change in the MAT rate has serious impact on the funds position of the generating company/ the transmission licensee and the beneficiaries. The generating companies/transmission licensees are required to pay income tax in the relevant financial year. If requisite fund is not made available to them for meeting this statutory obligation, they will face problem in cash flow as they will be able to get the under-recovered amount (along with simple interest at the rate equal to the short-term Prime Lending Rate of State Bank of India as on 1st April of the respective year) from the beneficiaries in just six instalments after the

truing up exercise at the end of the tariff period. On the other hand, the beneficiaries and long term transmission customers will have to pay a huge amount of tax arrears in just six instalments and may result in tariff shock to the consumers. In order to address the situation, the Commission has already taken a decision in Petition No.17/2010 for amending the 2009 regulations. The relevant portion of the said order is extracted as under:

“We are of the view that this issue of ‘grossing up the base rate with the normal tax rate for the year 2008-09’ is generic in nature and therefore, it will be appropriate to make suitable provisions in the 2009 regulations to cater to any future changes in the tax rate. Accordingly, we direct the staff of the Commission to prepare and submit draft amendment to the 2009 regulations for allowing grossing up of base rate of return with the applicable tax rate as per the Finance Act for the relevant year and direct settlement of tax liability between the generating company/transmission licensee and the beneficiaries/long term transmission customers on year to year basis. Any under/over recovery on account of direct settlement of tax liability shall be subject to the final adjustment at the time of true up exercise.”

The same order shall be applicable in this petition also.

8. The petitioner has approached the Commission under Regulation 44 of the 2009 regulations for relaxation of the provisions of Regulation 15(3) for allowing the current applicable MAT rate of 16.955% including surcharge and education cess and is not limited to the petitioner only. In view of our directions in Petition No.17/2010 as extracted above, we are not inclined to invoke our power under Regulation 44 of the 2009 regulations in case of the petitioner as the prayer of the petitioner will be taken care of after amendment of the regulations.

9. The petition is disposed of in terms of our directions in para 7 above.

Sd/-
[M. DEENA DAYALAN]
MEMBER

sd/-
[S.JAYARAMAN]
MEMBER