

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 44/RP/2022**

**In**

**Petition No. 143/GT/2020**

**Coram:**

**Shri I.S. Jha, Member**

**Shri Arun Goyal, Member**

**Shri Pravas Kumar Singh, Member**

**Date of Order: 18<sup>th</sup> August, 2023**

**In the matter of**

Review of the order dated 29.8.2022 in Petition No. 143/GT/2020 (truing up of tariff for the tariff period 2014-19 in respect of Bairasiul Power Station (180 MW)).

**And**

**In the matter of**

NHPC Limited,  
NHPC Office Complex, Sector 33,  
Faridabad, Haryana – 121 003

**...Review Petitioner**

**Vs.**

1. Punjab State Power Corporation Limited,  
The Mall, Near Kali Badi Mandir,  
Patiala-147001

2. Haryana Power Utilities (UHBVNL & DHBVNL),  
Shakti Bhawan, Sector-6,  
Panchkula-134109

3. BSES Rajdhani Power Ltd.,  
BSES Bhawan, Nehru Place,  
New Delhi-110019

4. BSES Yamuna Power Ltd.,  
Shakti Kiran Building, Karkadooma,  
Delhi-110072

5. Tata Power Delhi Distribution Ltd.  
Grid Sub-station Building,  
Hudson Lines, Kingsway Camp, Delhi-110009

6. Himachal Pradesh State Electricity Board,  
Vidyut Bhawan, Kumar House,  
Shimla - 171 004

**...Respondents**



**Parties present:**

Shri Ved Jain, Advocate, NHPC  
Shri Ankit Gupta, Advocate, NHPC  
Shri Ravi Kant Singh, Advocate, NHPC  
Shri Mohd. Faruque, NHPC  
Shri Piyush Kumar, NHPC  
Shri Deepak K. Dey, NHPC  
Shri Sachin Dubey, Advocate, BRPL & BYPL

**ORDER**

Petition No.143/GT/2020 was filed by the Petitioner, NHPC Limited for trueing-up of tariff of Bairasiul Hydroelectric Power Station (180 MW) (in short 'the generating station') for the period 2014-19 in terms of Regulation 8(1) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (in short 'the 2014 Tariff Regulations') and the Commission vide its order dated 29.8.2022 (in short 'the impugned order') disposed of the same. Aggrieved by the impugned order, the Petitioner has sought review of the impugned order dated 29.8.2022 on the ground of error apparent on the face of the order, raising the following issues:

- (a) *To rectify the error in grossing up of return on equity during 2014-19 and allow the return on equity as mentioned in para-15.*
- (b) *To revise the AFC for the period 2014-19 based on revised return on equity.*

**Hearing dated 24.1.2023**

2. The Review Petition was heard on 24.1.2023. During the hearing, the learned counsel for the Review Petitioner made detailed oral submissions and accordingly, the Review Petition was 'admitted' on the issues raised in paragraph 1 (a) above vide order dated 17.2.2023 and notice was served on the Respondents. The Commission also directed the Review Petitioner to substantiate its claim by furnishing the working and impact of grossing up of Return on Equity (ROE). In



response, the Review Petitioner vide affidavit dated 20.2.2023 has filed the said information.

3. The Respondent BRPL has filed its reply vide affidavit dated 21.4.2023 and the Review Petitioner has filed its rejoinder to the same vide affidavit dated 12.5.2023.

### **Hearing dated 31.5.2023**

4. During the hearing of the Review Petition on 31.5.2023, the learned counsel for the parties, made oral submissions in the matter. Accordingly, the Commission reserved its order in the matter after permitting the parties to file their written submissions. The Review Petitioner and the Respondent BRPL have filed their written submissions on 28.6.2023 and 30.6.2023, respectively.

5. 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***

6. 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 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 2014 Tariff 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) ROE has been grossed up with effective tax rate as per Regulation 25(3) of the 2014 Tariff Regulations, 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 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, as per Regulation 25(3) of the 2014 Tariff Regulations. Although the Review Petitioner is under the MAT regime, and effective Tax Rate is calculated as per provisions of said Regulation 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) The Commission, while grossing up the ROE, has considered the MAT rate, in place of the effective tax rate, which is a gross error leading to an under recovery of Rs. 56.76 lakh in ROE (pre-tax) for the period 2014-19. Therefore, grossing up of ROE in paragraph 42 of the impugned order may be reviewed.

#### ***Reply of the Respondent, BRPL***

7. The Respondent BRPL vide affidavit dated 21.4.2023 has submitted following:
- (a) The truing up exercise is to be carried out by the Review Petitioner in respect of grossing up rate of ROE at the end of every financial year based on the actual tax paid including interest thereon, duly adjusted for any refund of tax including interest received from the income tax authorities. In the present case, no such details have been furnished by the Review Petitioner, as to ascertain whether any under-recovery or over-recovery of the grossed-up rate of return was either claimed or refunded on year-to-year basis from/to the beneficiaries.
  - (b) The Review Petitioner had filed the balance sheet and other financial statement for the period 2014-19 at the time of truing up of the tariff and the statement of profit & loss account shows that it has not paid any income tax and claimed tax benefits on account of the tax holiday for enterprises engaged in infrastructure development etc. as per section 80 IA of the Income Tax Act, 1961 as well as the other benefits like the higher depreciation allowed in initial years under the Income Tax Act, 1961.
  - (c) The Review Petitioner itself has opted for the provision of section 115 JB of the Income Tax Act, 1961 (MAT provisions) and was aware that the grossing up of the tax is not permissible as the it is not paying any tax and has continued with the undue benefits of grossing up.



- (d) The issue was raised before the Commission and a detailed reply relying on the financial statement filed by the Review Petitioner has been furnished, but the Commission did not consider the reply filed by the Respondent on this issue and grossed up the ROE on MAT basis, without looking into the balance sheet and financial statement filed by the Review Petitioner.
- (e) To gross up rate of ROE in accordance with clause 3 of Regulation 25 of the 2014 Tariff Regulations, and to examine whether the Review Petitioner has performed its statutory responsibility to undertake true-up of the grossed-up rate of ROE at the end of every financial year, based on actual tax paid.
- (f) The impugned order was passed contrary to the applicable regulations, since the Review Petitioner is not paying any tax, but still have claimed grossed up ROE and the same has been allowed. Therefore, the Review Petitioner be directed to refund the tax collected from the beneficiaries along with interest thereon.

### ***Rejoinder of the Review Petitioner***

8. The Review Petitioner in its rejoinder affidavit dated 12.5.2023 has submitted that as per Regulation 25(3) of the 2014 Tariff Regulations, the generating company or the transmission licensee, as the case may be, shall true up the grossed up ROE 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. Accordingly, the consideration of the prescribed MAT rate in place of the effective tax rate calculated on the basis of the actual tax paid, is against the provisions of the 2014 Tariff Regulations. Accordingly, the Review Petitioner has submitted that in view of the above explanation, paragraph 42 of the impugned order is required to be modified as under:

**(Rs. In Lakh)**

	<b>2014-15</b>	<b>2015-16</b>	<b>2016-17</b>	<b>2017-18</b>	<b>2018-19</b>
Normative Equity Opening	8134.71	8381.64	8503.95	8521.39	8519.69
Addition of Equity due to Additional capitalization (B)	246.93	122.31	17.44	(1.69)	(2.59)



	2014-15	2015-16	2016-17	2017-18	2018-19
Normative Equity Closing (C)	8381.64	8503.95	8521.39	8519.69	8517.10
Average Equity (D) =(A+C)/2	8258.17	8442.79	8512.67	8520.54	8518.40
Return on Equity (Base Rate) (E)	16.500%	16.500%	16.500%	16.500%	16.500%
Effective Tax rate for the year (%) (F)	21.760%	21.948%	21.328%	21.851%	22.157%
Rate of Return on Equity (Pre-tax) (G)= (E) /(1-F)	21.089%	21.140%	20.973%	21.114%	21.197%
ROE (H) = (D)*(G)	<b>1741.57</b>	<b>1784.81</b>	<b>1785.36</b>	<b>1799.03</b>	<b>1805.65</b>

9. The Review Petitioner has submitted that the impugned order has resulted in an under-recovery of Rs.56.76 lakh in ROE (pre-tax) for the period 2014-19. Similar submissions have been made by the parties in their written submissions.

### **Analysis and Decision**

10. We have examined the matter. The difference between the ROE allowed vide impugned order dated 29.8.2022 and the ROE claimed by the Review Petitioner in the Review Petition, are tabulated below:

	<i>(Rs. in lakh)</i>				
	2014-15	2015-16	2016-17	2017-18	2018-19
Return on Equity (allowed by the Commission in order dated 29.8.2022) (a)	1723.98	1771.04	1785.70	1787.35	1791.59
Return on Equity (as claimed by the Review Petitioner) (b)	1741.57	1784.81	1785.36	1799.03	1805.65
Difference {(a) – (b)}	(-)17.59	(-)13.77	(+)0.34	(-)11.68	(-)14.06

11. 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.”

12. 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.”*



13. In the Statement of Objects and Reason (SOR) to the 2014 Tariff Regulations, the Commission has observed 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.**”*

14. 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, 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 is observed that the Review Petitioner was covered under MAT regime and since the Review 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 29.8.2022 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 29.8.2022 and review on this ground is not maintainable. It is pertinent to mention that similar issue raised by the Review Petitioner in Petition No. 19/RP/2022 and Petition No. 42/RP/2022, were rejected by the Commission vide orders dated 5.1.2023 and 16.7.2023 respectively. In the above background, the prayer of the Review Petitioner, for review of the impugned order dated 29.8.2022 is rejected.

**(B) To revise the AFC for the period 2014-19 based on revised return on equity.**

15. Since the prayer (a) of the Review Petitioner has been rejected as above, the question of revision of the annual fixed charges, for the period 2014-19 does not arise.

16. Review Petition No. 44/RP/2022 (in Petition No. 143/GT/2020) is disposed of in terms of the above.

Sd/

**(Pravas Kumar Singh)  
Member**

Sd/

**(Arun Goyal)  
Member**

Sd/

**(I.S. Jha)  
Member**

