

ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

**R.P.No.2 of 2016 in O.P.No.13 of 2015
Dated: 26-08-2016**

Present

**Sri Justice G. Bhavani Prasad, Chairman
Dr. P. Raghu, Member
Sri P. Rama Mohan, Member**

Between:

**Transmission Corporation of Andhra Pradesh
Limited**

... Petitioner

The review petition has come up for hearing finally on 30-07-2016 in the presence of Sri P. Shiva Rao, learned Standing Counsel for the petitioner, Sri Dinesh Paruchuri, Director (Finance) representing the Petitioner, Sri K. Gopal Choudary, Amicus Curiae and Sri M. Venugopala Rao, Senior Journalist. After carefully considering the material available on record and after hearing the arguments of the persons present and the Standing Counsel, the Commission passed the following:

O R D E R

A petition for review of the order dated 07-11-2015 in O.P.No.13 of 2015 on the file of this Commission in the matter of True-up of Transmission Business for the second control period FY 2009-10 to FY 2013-14.

1. The Transmission Tariffs for the second control period FY 2009-10 to FY 2013-14 were fixed by the order of the erstwhile Andhra Pradesh Electricity Regulatory Commission dated 20-03-2009 in O.P.No.21 of 2008. The Transmission Licensee/the State Transmission Utility approached the erstwhile Commission in terms of Regulation 5 of 2005 and after a widely publicized public notice and consideration of the objections/suggestions of 67 persons received in response

thereof, the Commission passed the order. The Commission noted that as per Regulation 5 of 2005, the assets and capital used in the transmission business is known as Regulated Rate Base and the Weighted Average Cost of Capital (WACC in percent) is worked out based on (a) debt-equity ratio (b) cost of debt and (c) return on equity. The WACC is applied on Regulated Rate Base to arrive at the Return on Capital Employed (ROCE) for each year of the control period. Accordingly, AP Transco computed the Return on Capital at 12.5 percent using 75:25 debt equity ratio with cost of debt and return on equity at 12 percent and 14 percent respectively. The erstwhile Commission modified the Regulated Rate Base in its computations as detailed in the order and the cost of debt was specifically stated to have been placed at 10 percent instead of 12.5 percent as filed by the AP Transco, based on existing loan profile and the likely future interest rates.

2. After the constitution of this Commission for the residual State of Andhra Pradesh, the AP Transco (as it now exists) filed an application for true-up of expenses relating to transmission business for the second control period in O.P.No.13 of 2015. Following the same procedure of a wide public notice and consideration of the objections/suggestions of five stakeholders, this Commission passed the order now sought to be reviewed. The issues arising concerning the Return on Capital Employed were considered in depth and the Commission has specifically observed in Para 34 of the order that the Licensee has not furnished the reasons for variation in cost of debt from the approved levels for different years of the control period and that the Licensee should have controlled the cost of debt and reduced the actual Weighted Average Cost of Capital to achieve efficiency in management of its finances. Instead, the Licensee's average cost of debt is higher than the cost of debt approved in the Tariff Order and thus the actual Weighted Average Cost of Capital is higher than the Weighted Average Cost of Capital approved in the Tariff Order for the second control

period. Hence, the Commission decided to adopt 11% Weighted Average Cost of Capital as approved in the Tariff Order for each year of the second control period for the purpose of true-up also. Similarly, the Commission has considered in detail the claims of the Licensee on true-up expenditure on account of Taxes on Income. The Licensee claimed Rs.496.58 crores against NIL provision in the Tariff Order and as per Regulation 10.4 of the Regulation 5 of 2005, expenditure on account of taxes being uncontrollable item, the Licensee can claim variation in this account. However, this expenditure should be limited to tax on capital component of Regulated Rate Base as per Regulation 16 of Regulation 5 of 2005. Accordingly, the Commission computed the return on equity and limited the tax on income to the income-tax payable on this amount for each year of the control period. The Commission in fact exercised its power under Regulations 25.1 and 25.2 of Regulation 5 of 2005 liberally to compensate the Licensee for the actual wage cost despite its classification as a controllable item and it ultimately concluded as follows:

“55. Therefore, the request of the petitioner Transmission Corporation of Andhra Pradesh Limited for a true up of ‘287 cr. (deficit) for FY2009-10 to FY2013-14 towards the 46.11% share of residual State of Andhra Pradesh against the Southern Power Distribution Company of Andhra Pradesh Limited and Eastern Power Distribution Company of Andhra Pradesh Limited is not accepted. The petitioner is found liable to refund an amount of ‘271.34 cr. towards the 46.11% share of the residual State of Andhra Pradesh to the two distribution companies in proportion to their utilization of the services of the petitioner and such refund shall be given effect to by the petitioner in the form of adjustment in the transmission charges that become payable by the Southern Power Distribution Company of Andhra Pradesh Limited and the Eastern Power Distribution Company of Andhra Pradesh Limited respectively during the FY2016-17 at 50% of the transmission charges that become payable each month, till such liability is totally discharged. It is open to the petitioner to pursue any reliefs to which it is entitled regarding the income-tax paid for the FY2009-10 to FY2013-14 in consequence of the implementation of this order of refund. The petition is ordered accordingly”.

3. The review petitioner after describing the background of the request contended that Weighted Average Cost of Capital which depended on cost of debt is totally uncontrolled item and with reference to the State Bank of India base rate with an increase of 2.5% in the second control period, the Licensee claimed to have secured debt with interest of about 10% in the earlier years and 12% in the later years of the control period. The cost of debt therefore be considered as per actual as the revised base rate is very much in the public domain. The finding of the Commission that it is a controlled item and there was no material on record to accept the claim of the Licensee is not correct. The Licensee also claimed that 14% is the post tax return on equity provided by the erstwhile Andhra Pradesh Electricity Regulatory Commission and not 14% pre-tax return on equity as assumed by this Commission. A mistake is apparent on the face of the record and the carrying cost was accordingly incorrectly allowed, which needs to be proportionately increased. Therefore, the review petitioner requested that the Commission may allow relaxation for a sum of Rs.187 crores towards Return on Capital Employed, income tax and carrying cost for the erstwhile State of Andhra Pradesh which consequently make it Rs.86 crores for the residual State of Andhra Pradesh.

4. The review petition was returned with reference to patent inconsistency between section 94 (1) (f) of the Electricity Act, 2003 and section 10 (4) of the Andhra Pradesh Electricity Reform Act, 1998 read with Regulation 49 of the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 due to which a petition for review cannot lie beyond 30 days. The Licensee re-presented the petition differing with the view of the Commission and requested to consider the period of limitation as 90 days, as provided by Regulation 49 of the Regulations. The review petition was taken on file subject to the questions on limitation and maintainability. A wide public notice was given to all the stakeholders

through the websites of the Commission and the Licensee. Sri K. Gopal Choudary, learned counsel was requested to act as *Amicus Curiae* to assist the Commission, to arrive at appropriate and correct conclusions. Subsequently, Sri M. Venugopala Rao, Senior Journalist and Convenor, Centre for Power Studies submitted his objections orally and in writing. Sri Dinesh Paruchuri, Director (Finance), AP Transco, Sri P. Shiva Rao, learned Standing Counsel for the petitioner, Sri K. Gopal Choudary and Sri M. Venugopala Rao made detailed submissions on the questions involved. The Licensee filed a memo on 30-07-2016 claiming that it was not possible to state that the Return of Equity (ROE) is on pretax or post tax based on either ARR filings made by AP Transco or the Commission's order in O.P.No.21 of 2008.

5. The point for consideration is whether the review petitioner is entitled to have the approved true-up computation in O.P.No.13 of 2015 reviewed to have relaxation of Rs.187 crores for the erstwhile State of Andhra Pradesh under the head of Return on Capital Employed, Income-tax and Carrying Cost, while leaving open the questions of limitation and maintainability?

6. The Tariff Order dated 20-03-2009 in O.P.No.21 of 2008 and the True-up Order dated 07-11-2015 in O.P.No.13 of 2015 were passed in tune with sections 61 and 62 of the Electricity Act, 2003 and Regulation 5 of 2005 of this Commission. Regulation 5 of 2005 specifically provides for the Terms and Conditions for determination of Transmission Tariff and the Multi-Year Tariff framework and Approach were duly covered by Regulation No.10 thereof. While the Return on Capital Employed was specified as Controllable item, Taxes on Income were specified as Uncontrollable item in Regulation 10.4. Regulation 10.5 specifically states that the Transmission Licensee shall be eligible to claim variations in "uncontrollable" items depending on the available data as per actuals and as per Regulation 10.6, Gains and losses on variations in controllable items should be presented if they are on account of uncontrollable factors. However, Regulation 10.8 specifically states that

notwithstanding anything contained in the Regulation, the gains or losses in the controllable items in the ARR on account of *force majeure* factors shall be passed on as an additional charge or rebate. The manner of calculation of Return on Capital Employed is stated in Regulation 13 which specifically states that the Debt Equity Ratio and Cost of Debt shall be determined at the beginning of the control period after considering the Transmission Licensee's proposals, present cost of debt, market conditions and other relevant factors. Taxes on Income are dealt with in Regulation 16 which specifically states in Regulation 16.1 that Taxes on Income, if any, on the income stream of the licensed business of the Transmission Licensee shall be treated as an expense and shall be recoverable through ARR. Regulation 16.2 further specifies that Taxes on Income actually payable and paid to be included in the ARR shall be limited to Tax on Return on Equity component of the Return on Capital Employed. Regulation 25 of-course saves the power of the Commission to make such orders as may be necessary to meet the ends of justice or to prevent abuse of process of the Commission to adopt a procedure at variance with any of the provisions or to exercise such powers and discharge such functions in a manner it deems fit for which no regulation has been framed. A reading together of the provisions of Regulation 5 of 2005 on the issues involved herein thus clearly shows that tax on income is an uncontrollable item and variations in taxes on return on equity component of Return on Capital Employed only can be passed through and nothing else. Similarly the debt equity ratio and cost of debt are determined at the beginning of the control period on the strength of the Licensee's proposals regarding the then cost of debt, the then market conditions and all other relevant factors then obtaining and once these components forming the basis for WACC and Return on Capital Employed are thus settled, Return on Capital Employed so calculated becomes a controllable item. Gains or losses can be passed on as an additional charge or rebate only on account of *force majeure* factors and not otherwise.

7. In Torrent Power Limited Vs. Gujarat Electricity Regulatory Commission, the Hon'ble Appellate Tribunal for Electricity decided the Appeal No.136 of 2010 on 11-07-2011 with reference to the MYT Regulations, 2007 of the Gujarat State Electricity regulatory Commission and it referred to its earlier judgments and the issue before it with reference to the contents of the specific regulations under consideration in that case. In the case before the Commission, regulations therein were interpreted as intending that income on permissible return on core business in the hands of the generating company has to be net of tax. Even under those regulations, it is clear that the entire taxes were relatable to the core activity of the generating company and what the review petitioner seeks herein is consideration of the quantum of tax on post tax basis and not on pre tax basis. But what was adopted by the Commission was strictly in terms of the language of the regulation and the directions in the judgment of the Hon'ble Appellate Tribunal for Electricity in Appeal No.136 of 2010 were on the specific language of the regulation under consideration therein and they cannot be considered to be laying down any principles of universal application. Regarding the observations of the Hon'ble Appellate Tribunal for Electricity on the employees' cost due to wage revision, as already stated, the impact of the wage revision has already been considered by this Commission.

8. In the case of The Chairman, Tamil Nadu Electricity Board Vs. Madras Cements Ltd., & others, the Hon'ble Appellate Tribunal for Electricity in Appeal No.8 of 2012 dated 19-04-2012 referred to the regulation framed by the State Commission therein providing for invocation of inherent powers of the Commission etc., and as already stated Regulation 25 of Regulation 5 of 2005 provides similar powers to this Commission. However, it is to be remembered that where there are express provisions, question of invoking any inherent powers does not arise and exercise of inherent jurisdiction cannot be against any express provisions of law or contrary to

the necessary implications arising out of such provisions. Invoking inherent powers provided by the Regulation cannot arise in this case, in view of the specific provisions of the Regulation already referred to concerning the Return on Capital Employed, Income-tax, Carrying Cost etc.

9. The review petitioner refers to the Central Electricity Regulatory Commission or the other State Electricity Regulatory Commissions allowing higher cost of debt and even the erstwhile Commission allowing higher cost of debt. Any such extraneous factors cannot be considered herein as relevant. When the Transmission Tariff Order dated 20-03-2009 fixing the debt equity ratio and the cost of debt for reasons specified in the order has become final by efflux of time in the absence of any challenge and Regulation 5 of 2005 specifically mandates these factors to be determined in the first year of the control period, the subsequent variation in the rates of interest by the State Bank of India or anybody else cannot be considered as *force majeure* events as the regulation in question specifically mandates the fixation of these elements on the basis of the market conditions, cost of debt and other relevant factors obtaining at the time of determining the cost of debt, at the beginning of the control period. The possibility of variation in the cost of debt or market conditions or relevant factors cannot be considered to be unknown or not thought of at the time of framing the regulations. In fact, Para 60 of the Tariff Order dated 20-03-2009 specifically states that the cost of debt was calculated at 10% based on not only the then existing loan profile but also the likely future interest rates. The interest rates gaining an upward ascent can be no reason to either violate the specific language of the regulation or the assumption by the erstwhile Commission based on the then available evidence or all other relevant factors to be considered a mistake apparent on the face of the record requiring a review.

10. Even regarding the benefits of tax sought to be claimed based on the norms and the Tariff Order of the Central Electricity Regulatory Commission as justifying its request, such extraneous factors cannot override the specifics of the regulation governing this subject. The conflict about pre-tax or post tax on return on equity also becomes equally superfluous when the conclusions of the erstwhile Commission or this Commission in the Tariff Order or True-up Order were not shown to be in violation of Regulation 5 of 2005 in any manner. While in the absence of any data, the Tariff Order made a ‘nil’ entry against taxes, on the data provided in the true-up petition, the taxes on income were calculated specifically in Para 41 in terms of the existing regulation. If the views of this Commission are not acceptable to the review petitioner on either cost of debt or taxes that were permitted, the appropriate remedy would have been an appeal and not a petition for review which lies only when there is an error apparent on the face of the record or when there is discovery of evidence which has material bearing on the questions in issue, which could not be produced in spite of due diligence earlier or for any other sufficient reason. Such sufficient reason was judicially interpreted to be of a similar nature as the first two grounds on the principle of *ejusdem generis*.

11. Thus a close and careful examination of the issues involved shows the questions attempted to be raised to be not within the scope of a review petition. The review petitioner failed in establishing any patent violation of Regulation 5 of 2005 in the True-up order or any contradiction with any admitted or proved data or material before the Commission. In the absence of any strong ground for review, the petitioner has to fail.

12. The Commission records with appreciation the zeal and commitment of Sri Dinesh Paruchuri, Director (Finance) of the petitioner in his efforts to protect the interests of the petitioner and also the invaluable guidance received from the inputs

provided by the learned *Amicus Curiae* Sri K. Gopal Choudary, learned Standing Counsel for the petitioner Sri P. Shiva Rao and the learned energy expert Sri M. Venugopala Rao.

13. The petition is dismissed accordingly. No costs.

This order is corrected and signed on this the 26th day of August, 2016.

Sd/- P. Rama Mohan Member	(on leave) Dr. P. Raghu Member	Sd/- Justice G. Bhavani Prasad Chairman
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