

**Appellate Tribunal for Electricity**  
**(Appellate Jurisdiction)**

**R.P. No. 2 of 2015 in**  
**Appeal No. 163 of 2015**

**Dated: 15<sup>th</sup> May, 2015**

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson**  
**Hon'ble Mr. Rakesh Nath, Technical Member**

**In the matter of:**

**Power Transmission Corporation of  
Uttarakhand Limited  
Vidyut Bhawan, Near ISBT Crossing  
Saharanpur Road, Majra  
Dehradun – 248 002 (Uttarakhand)**

**... Review Petitioner**

**Versus**

**1. Uttarakhand Electricity Regulatory  
Commission  
Vidyut Niyamak Bhawan  
Near ISBT, Majra  
Dehradun (Uttarakhand) – 248 171**

**...Respondent(s)**

**2. Bhilangana Hydro Project Limited  
B-37, IIIrd Floor, Sector 1  
Noida – 201 301  
Gautam Budh Nagar (U.P.)**

**3. State Load Dispatch Centre  
SE (System Control), Power Transmission  
Corporation of Uttarakhand Limited  
Vidyut Bhawan, Near ISBT Crossing  
Saharanpur Road, Majra  
Dehradun – 248 002 (Uttarakhand)**

**Counsel for the Appellant(s) :** Mr. Sitesh Mukherjee  
Mr. Sarul Jain  
Mr. Kunal Kaut (Rep.)  
Mr. Kartikya Dubey (Rep.)

**Counsel for the Respondent(s):** Mr. Buddy A. Ranganadhan  
Mr. Rabhuvamsy for R-1

Mr. Sanjay Sen, Sr. Adv.  
Ms. Shikha Ohri  
Mr. Hemant Singh  
Mr. Tushar Nagar  
Ms. Meghana Aggarlwa for R-2

## **ORDER**

### **RAKESH NATH, TECHNICAL MEMBER**

This Review Petition has been filed by Power Transmission Corporation of Uattrakhand Limited (“**PTCUL**”) in Appeal no. 163 of 2013 seeking review of the judgment dated 29.11.2014 passed by this Tribunal in Appeal no. 163 of 2013 filed by the Review Petitioner/Appellant together with Appeal no. 128 of 2013 and Appeal no. 129 of 2013 both titled Bhilangana Hydro Power Limited Vs. PTCUL and others to the extent of issues related to disallowance of Return on Equity and the issue of declaration of 220 kV D/C Bhilangana - Ghansali line as an intra-State line.

2. According to the Review Petitioner the Tribunal has not given any finding regarding declaration of 220 kV Bhilangana - Ghansali line as intra-State line and the State Commission's jurisdiction to determine the transmission charges for this line, and also on the issue of disallowance of Return on Equity ("**ROE**") on the funds deployed from the Power Development fund ("**PDF**") by the State Government which were raised in the Appeal no. 163 of 2013.
3. Shri Sanjay Sen, Learned Senior Counsel for Respondent no.2 has submitted that Respondent no.2 had filed an Appeal before the Hon'ble Supreme Court being Civil Appeal no. 2368-2370 of 2015 challenging the impugned judgment of the Tribunal. The issue regarding the jurisdiction of the State Commission has been raised by the Respondent no.2 in the Appeal filed before Hon'ble Supreme Court. Hon'ble Supreme Court by order dated 09.03.2015 has admitted the Appeal. Therefore review against the impugned judgment of this Tribunal on the issue of jurisdiction is not maintainable. However, the Review on the issue of ROE which has not been raised in the Appeal is maintainable. On the issue of ROE it is submitted by Shri Sanjay Sen that the State Commission has been disallowing any ROE on funds deployed by the State Government out of PDF since 2008. He also

referred to the order dated 29.04. 2013 wherein the Petitioner (PTCUL) was directed to bring up evidence that PDF in past has been funded through contribution from the State Government under Section 5 of the PDF Act in addition to be funded by the Cess on Hydro Generation..

4. Shri Sitesh Mukherjee, Learned Counsel for Review Petitioner referred to (1964) 5 SCR 174, in Thungabhadra Industries Ltd. Vs. Government of AP in which it was held –

*“Order 47 Rule 1(1) of the Civil Procedure Code permits an application for review being filed “from a decree or order from which an appeal is allowed but from which no appeal has been preferred.” In the present case, it would be seen, on the date when the application for review was filed the appellant had not filed an appeal to this Court and therefore the terms of Order 47. Rule 1(1) did not stand in the way of the petition for review being entertained. Learned counsel for the respondent did not contest this position. Nor could we read the judgment of the High Court as rejecting the petition for review on that ground. The crucial date for determining whether or not the terms of Order 47. Rule 1(1) are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the court hearing the review petition would come to an end.”*

5. Shri Sitesh Mukherjee stated that the present Review Petition was filed by PTCUL on 29.12.2014 and the Review Petition was admitted and

notice issued on 09.01.2015 whereas Appeal before the Hon'ble Supreme Court was filed by the Respondent no.2 on 28.01.2015 after the Review Petition was filed and admitted by this Tribunal. Therefore, as per the findings in Thungabhadra Industries the Review Petition is admissible.

6. We find that the judgment in Thungabhadra Industries relate to order 47 Rule 1(1). Under order 47 Rule 1(2), a party who is not appealing from a decree or a order may apply for a review of judgment notwithstanding the pendency of an Appeal by some other party except where the ground of such Appeal is common to the Applicant and the Appellant, or when, being Respondent, he can present to the Appellate Court the case on which he applies for the review. Thungabhadra case will not be applicable to the present case which relates to order 47 Rule(1)(2).
7. We feel that the issue regarding jurisdiction of the State Commission has been raised by the Respondent no.2 in the Appeal filed before the Hon'ble Supreme Court against the judgment of this Tribunal dated 29.11.2014. Therefore review is not maintainable on the same issue before this Tribunal in terms of order 47 Rule 1(2). However on the issue of Return on Equity which has not been raised in the Appeal before the Hon'ble Supreme Court, the review is maintainable.

8. Let us take up the issue relating to ROE.
9. Learned Counsel for Review Petitioner has submitted as under:-
  - i) it is clear that the State Commission in has treated funds provided by the State Government from PDF (which essentially is collected by levy of cess on sale of power under the PDF Act) as a substitute for return on equity on the amount of equity contributed by the State Government from PDF. The State Commission while doing so has completely overlooked the settled position of law on this issue as held by this Tribunal in the case of Uttaranchal Jal Vidyut Nigam Ltd. v. Uttaranchal Electricity Regulatory Commission (Appeal no. 189 of 2005) on 14.09.2006.
  - ii) Furthermore, as per the PDF Act, Cess referred to as 'Duty' are the funds collected by the Government for the purpose of the Act on the saleable energy generated from the existing and notified generating Hydro Power Plants of the generating company of the State of Uttaranchal which have been in commercial operation for over ten years. It is pertinent to note, that the investment made in the project of the Appellant by The State Government is not automatically provided for under the Act. The proceeds of the duty collected under the PDF Act ("**The Act**") are credited to the

Consolidated Fund of the State Government. As per the act, these funds remain under the control of the State Government and are utilized by the State Government in carrying out its functions or in the administration of the Act and / or any fund provided by the State Government for the development of Hydro Power Projects, development of Electricity Evacuation System and extension of Transmission System etc. by the State Government or its agency. Therefore, the funds are utilized for development of Hydro Power Projects in the State Sector, development of electricity evacuation System and extension of Transmission System etc. and any other purpose which the State Government notifies in the official Gazette from time to time.

- iii) Without Prejudice, it is submitted that the amount credited in the said fund is from different sources as provided in section 6(2) of which funds collected as duty under section 3 are first credited to the consolidated fund of the State Government and the State Government may if the State Assembly by appropriation so provides credit so proceeds to the fund after certain deduction as provided in the section 4 of the Act and further section 5 of the Act provides that the State Government after appropriation by State

Assembly credit by way of grant, or loans such sum as government may consider necessary hence, the fund may comprises of proceeds under section 4 or section 5 or the sums realized by government in out its function or in administration of the Act or the funds the state government may provide for evacuation of electricity system and extension of transmission system, the duty collected under section 3 is only a part of the fund and all the sum in said fund is not recovered necessarily from the consumers. Further, as the duty collected is credited to state consolidated fund any deposit of the duty collected from the consumer would necessarily loose its character as a sum recovered from the consumer. PTCUL is funded by the State Government as its owner. PTCUL is entitled to ROE on its equity share capital under the regulation 20 of UERC (Terms & Condition of Transmission Tariff) Regulation, 2004. The regulation does not provide for any exemption in awarding ROE on the source of funding by the State Government.

- iv) In addition and without prejudice to the above, the State Commission's reasoning of not allowing ROE on the amount provided by the State Government from PDF as it would



tantamount to double loading on consumers in the State of Uttarakhand, is entirely misplaced in the context of the present case since the power generated by BHPL is not being sold to consumers in the State of Uttarakhand. BHPL is selling the power from its Hydro Project out of the State of Uttarakhand through a PPA with Tata Power Trading Corporation Limited which in turn is selling the power in Punjab.

- vi) Moreover, the contribution of Rs. 6 crores 57 lacs from the GoU towards construction of the 220KV D/C Bhilangana III/(Ghuttu)-Ghansali has been treated as equity by PTCUL and has also been acknowledged as equity and not grant/subsidy by the State Commission. We find that this issue has been dealt with by this Tribunal in judgment dated 14.09.2006 in Appeal no. 189 of 2005 Uttaranchal Jal Vidyut Nigam Ltd. v. Uttaranchal Electricity Regulatory Commission (Appeal no. 189 of 2005) on 14.09.2006. The relevant excerpts on the said judgment is reproduced below:

*“Para 22....One another contention being that the Government has levied CESS and that CESS is an element in substitution of ROE and therefore, the disallowance of ROE is not liable to be interfered. In this respect Mr. M. G. Ramachandran, the learned counsel, added that the appellant is not being deprived of funds*

*since the CESS collected is earmarked for generation projects by the State government.”*

.....

*“Para 25. The contention of Mr. M. G. Ramachandran, the learned counsel for the respondent Commission, is that CESS collected by the Government is a substitute for ROE. With respect, to the learned counsel, such an argument cannot be sustained. CESS is being levied by the Government of Uttaranchal in exercise of its legislative powers. The CESS is collected on the consumption of electricity. It is nothing but a duty on the consumer which the State Government levies and collects. The sum total of such collection of CESS goes to State exchequer, though it may ultimately go for implementation of projects for generations etc. That does not mean that it is an income to the generator or the appellant undertaking or a substitute for ROE. What is allocated by the State Government is from its revenue which it collected by way of CESS or it may be under any other head. CESS cannot be equated to ROE. Such a contention is not only misconception but born out of frustration. One another argument advanced by Mr. M. G. Ramachandran, the learned counsel for the Commission, also in our view cannot be sustained. If ROE is to be allowed, the appellant is to pay income tax on such return payable under the Income Tax Act. On CESS collected by the Government, no income tax is levied and therefore it is better to get CESS rather than realization of ROE. We will not at all be justified in sustaining such a contention which is not legally sustainable. CESS is different from return on equity which the appellant generator is entitled to as per statutory provisions. It may be that, the appellant may be liable to pay income tax but that does not mean that it should be denied of ROE. There is nothing to suggest that once ROE is sustained the appellant could be denied of State allocation of funds. As already pointed out, the CESS collected by virtue of state enactment and it is the levy by legislation and the same cannot be taken as a substitute for ROE. Such a contention advanced for the Respondent is a misconception and it is legally untenable.”*

10. The Tribunal has upheld the findings of the State Commission in the impugned order but has not given any finding relating to disallowance of ROE on the funds deployed by the State Government from PDF towards capital cost of the project. We feel that the findings of this Tribunal in Appeal no. 189 of 2005 will be applicable to the present case. If the State Commission has not provided the amount as a grant and has invested the amount as equity, ROE has to be allowed as per the Regulations of the State Commission. Accordingly this issue is decided in favour of the Petitioner.
11. In view of above the Review Petition is partly allowed. The State Commission is directed to pass consequential order at the earliest.
12. Pronounced in the open court on this **day of 15<sup>th</sup> May, 2015.**

**(Rakesh Nath)**  
**Technical Member**

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**REPORTABLE/NON-REPORTABLE**

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**(Justice Ranjana P. Desai)**  
**Chairperson**