

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No.215 OF 2016
APPEAL No.283 OF 2016
AND
APPEAL No.139 OF 2018

Dated: 19.07.2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

APPEAL No. 215 OF 2016

UJVN LTD.

"UJJWAL" Maharani Bagh, GMS Road
Dehradun - 248006

... Appellant

Versus

1. UTTARAKHAND ELECTRICITY REGULATORY COMMISSION
ISBT Chowk, Majra,
Dehradun, Uttarakhand - 248171

2. UTTARAKHAND POWER CORPORATION LIMITED
Victoria Cross Vijeyta Gabar Singh Bhawan,
Kanwali Road, Balliwala Chowk,
Dehradun – 248001, Uttarakhand

3. HIMACHAL PRADESH STATE ELECTRICITY BOARD
Vidyut Bhawan, Kumar House
Shimla, Himachal Pradesh - 171004

... Respondents

Counsel for the Appellant(s) : Amit Anand Tiwari, Sr. Adv.
Saushriya Havelia
Tanvi Anand

Counsel for the Respondent(s) : Buddy A. Ranganadhan for Res. 1
Pradeep Misra for Res.2

APPEAL No. 283 OF 2016

UJVN LTD.

“UJJWAL” Maharani Bagh, GMS Road
Dehradun - 248006

... Appellant

Versus

1. UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

(Through Secretary)

ISBT Chowk, Majra,
Dehradun, Uttarakhand - 248171

2. UTTARAKHAND POWER CORPORATION LIMITED

(Through Secretary)

Victoria Cross Vijeyta Gabar Singh Bhawan,
Kanwali Road, Balliwala Chowk,
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... Respondents

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Saushriya Havelia
Tanvi Anand

Counsel for the Respondent(s) : Buddy A. Ranganadhan for Res. 1
Pradeep Misra for Res.2

APPEAL No. 139 OF 2018

UJVN LTD.

“UJJWAL” Maharani Bagh, GMS Road
Dehradun - 248006

... Appellant

Versus

1. UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

(Through Secretary)

ISBT Chowk, Majra,
Dehradun, Uttarakhand - 248171

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J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The appellant, a company wholly owned by the Government of the State of Uttarakhand and engaged in the business of generation of power in the State, has filed the three captioned appeals against the true-up orders passed by the 1st respondent Uttarakhand Electricity Regulatory

Commission (in short “Commission”) of the Financial Year (FY) 2013-14, 2014-15 and 2015-16. A common legal issue arises for determination by this tribunal in all these three appeals which is formulated as under:-

“Whether the respondent Commission has correctly denied the appellant company Return on Equity (RoE) on the investment of Rs.341.39 crores made by the State Government in it from the Power Development Fund?”

2. Accordingly, all the three appeals were clubbed together and are being disposed off vide this common order.

3. Appeal No.215/2016 is directed against the order dated 11.04.2015 passed by the Commission in appellant’s tariff petition Nos.37/2014 to 46/2014 as well as order dated 22.01.2016 in appellant’s review petition No.58/2015 for true-up of FY 2013-14, Annual Performance Review (APR) for FY 2014-15 and Annual Fixed Charges for FY 2015-16.

4. In appeal No.283/2016, challenge is to the order dated 05.04.2016 passed by the Commission in appellant’s tariff petition No.47/2015 for true-up of FY 2014-15, APR for FY 2015-16 and Multi Year Tariff (MYT) for second control period i.e. 2016-17 to 2018-19.

5. Appeal no.139/2018 is directed against the order dated 29.03.2017 passed by the commission in appellant’s tariff petition No.61/2016 for true-up of FY 2015-16, APR for FY 2016-17 and Annual Fixed Charges for FY 2017-18.

6. In all these impugned orders, the respondent Commission has denied the appellant Return on Equity (RoE) on the investment made by the State Government in it from the Power Development Fund (PDF) collected by the government in terms of the Uttaranchal Power Development Fund Act, 2003.

7. Additionally, in appeal No.215/2016 the appellant has also assailed the orders of the Commission on the ground that the Commission has erroneously allowed only 50% of the excess IDC and price variation component of capital cost for MB-II HEP power project. Be it noted here that the appellant had assailed the findings of the Commission in this regard in the review petition No.58/2015 which also came to be dismissed by the Commission vide order dated 22.01.2016.

8. First, we shall proceed to deal with the common legal issue which arose for determination in all the three appeals and which has already been noted in Para No.1 hereinabove.

9. As already stated hereinabove, the appellant is a generating company wholly owned by the State Government. It is engaged in the business of generation of power in the State of Uttarakhand and operates various generating stations within the State located at Dhakrani, Dhalipur, Chibro, Khodri, Kulhal, Ramganga, Chilla, Maneri Bhali-I (MB-I), Maneri Bhali (MB-II) and Khatima etc. Electricity generated by these generating stations is supplied to Uttarakhand Power Corporation Limited (2nd respondent) which is the sole distribution licensee in the State and also to Himachal Pradesh State Electricity Board (HSEB). In these appeals we are

concerned with MB-II power project of the appellant company. It is not in dispute that the equity component of this power project MB-II is Rs.689.22 crores out of which Rs.341.39 crores has been invested by the State from the fund available with the State in form of PDF.

10. It is vehemently argued on behalf of the appellant that since the funds infused by the government in the company are not in the form of a grant but in the form of share capital i.e. equity, it is entitled to RoE on the same. The learned counsel for the appellant submitted that the Commission has failed to consider the law settled by this Tribunal in order dated 15.05.2015 passed in Review Petition No.2/2015 which had arisen out of appeal No.163/2015, wherein this Tribunal has dealt with the identical issue i.e. disallowance of RoE on investments made from PDF and relying upon its earlier decision in appeal No.189/2005 has held as under:-

“10... 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 (sic) has not provided the amount as 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 the favour of Petitioner.”

11. The learned counsel further argued that the Commission has erred in not considering the Regulation 25 of the UERC Tariff Regulations, 2004, which governs the computation of RoE. He would submit that the Regulation does not make a distinction on the basis of the source from

which the funds have been invested in the form of share capital and provides that RoE has to be computed on the entire equity basis. He argued that the investment made by the State Government in the form of equity is entitled to the same treatment as capital on which RoE should be given in terms of above noted Regulation 25 and the source of equity fund is totally irrelevant for determination of RoE.

12. The learned counsel further pointed out that the State Government has also advanced a loan of Rs.34.02 crores to the appellant for the MB-II power project upon which it is required to pay interest @9.5% per annum and the interest on the said loan capital is being considered by the Commission while determining tariff for the said project even though the loan amount has also been advanced from Power Development Fund. This, according to the learned counsel, exposes the fallacy of the Commission's reasoning in denying RoE on the investment made by State Government in the appellant's power project from PDF.

13. On behalf of the respondent Commission it is argued that the Commission has been consistent right from the 28.11.2008 in holding that the amount invested by the State Government using the funds from PDF even into the share capital of appellant company have to be disallowed for RoE for the reasons that the funds in the PDF were contributed by the consumers themselves and allowing RoE on the same would tantamount to double burden for the consumers. The learned counsel also referred to letter dated 15.07.2013 issued by the State Government to the appellant, the relevant portion of which is reproduced hereunder:-

“(a) in the Hon’ble Governor has agreed to grant Rs 15.56 Cr., as the share capital of the government in MB-II project; and (b) “The aforementioned grant should not be used elsewhere. Moreover, if any amount is saved out of the grant, at the end of the financial year, then the same shall be returned to the Government with immediate effect”.

14. The argument of the learned counsel is that the letter ex-facie reveals that the investment made by the government was in the nature of grant and not in the nature of equity share capital attracting RoE.

15. The learned counsel also distinguished the judgments of this Tribunal relied upon on behalf of the appellant stating that the judgment in appeal No.163/2015 is not applicable to the facts of the present case as it was rendered in a situation where the power was being sold outside the State of Uttarakhand. Further, according to the learned counsel, the judgment in appeal No.189/2005 dealt with cess collected by the State Government and not with the utilization of amount collected as Power Development Fund.

16. On these submissions, the learned counsel sought dismissal of the appeals.

17. We have given out thoughtful consideration to the rival contentions of the learned counsels and have perused the entire record. We have also gone through the written submissions filed by the learned counsels.

18. Before dealing with the rival submissions of the parties, we find it profitable to quote the relevant portion of the impugned orders which contains the reasoning of the Commission in disallowing RoE to the appellant on the funds invested by the State Government from PDF:-

“The Commission has not been allowing Return on Equity on funds deployed by the GoU out of PDF fund for various reasons recorded in the previous Tariff Orders. In line with the approach considered in previous Tariff Orders, the Commission is of the view that unlike other funds available with the Government collected, through taxes and duties, PDF is a dedicated fund created in accordance with the provisions of the PDF Act passed by the GoU and the amount is collected directly from the consumers through the electricity bills as the same forms part of the power purchase cost of UPCL, which in turn is loaded on to the consumers. PDF Act and Rules made thereunder, further, clearly indicate that money available in this fund has to be utilized for the purposes of development of generation and transmission assets.

Thus, the Commission has not deviated from its earlier approach and is of the view that the money for the purpose of this fund is collected by the State Government through cess imposed on the electricity generated from old hydro generating stations which are more than 10 years old as discussed above. The cost of such cess is

further passed on to UPCL which in turn recovers the same from ultimate consumers of electricity through tariffs.”

19. Uttaranchal Power Development Fund Act, 2003, was enacted by the State Government in the year 2003 to authorize the government to levy and collect duty on saleable energy generated by hydro power projects for the development of hydro power projects, electricity evacuation system and extension of transmission system in the state sector. As per Section 6 of the Act, the funds so collected under the Act shall be under the control of the State Government. Section 4 provides that the duty levied / collected from existing and notified generating hydro power plants under Section 3 of the Act, shall first be credited to the Consolidated Funds of the State and the State Government may, if the State Assembly by appropriation so provides, credit such proceeds to the fund from time to time, after deducting the expenses of collection, for being utilized exclusively for the purpose of the Act.

20. Section 5 of the Act provides that the State Government may, after appropriation by State Assembly, credit by way of grant or loans, such sums of money as the State government may consider necessary, to the fund i.e. Power Development Fund. Section 7 makes it mandatory for the State Government to utilize the fund for development of hydro power projects in the state sector, development of electricity evacuation system and extension of transmission system etc. as well as for any other purpose. Section 9 of the Act empowers the State Government to administer the fund and take decisions for its investment in the hydro power projects as

well as to allocate / disburse required sums from the fund to the concerned departments / institutions responsible for development of hydro power projects in the state sector and implementation of projects related to development of electricity evacuation system and extension of transmission system etc.

21. Thus, the said Act empowers the State Government to levy / collect duty on the saleable energy generated from existing and notified hydro power plants to be credited at first to the Consolidated Fund of the State and from there to be infused in the Power Development Fund by way of grant or loans which shall be utilized for development of hydro power projects, electricity evacuation system and extension of transmission system in the State.

22. In appeal No.189/2005, this Tribunal was dealing with the cess collected by the Government and it was argued that the cess collected by government is a substitute for RoE and therefore, RoE cannot be allowed on the same. The argument was repelled by this Tribunal on the following reasoning:-

“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.”

(Emphasis supplied)

23. In these appeals before us, we find that the PDF comprises of money collected by the State Government as duty levied on the saleable energy generated by the hydro power plant in the State under a proper legislation i.e. the Uttaranchal Power Development Fund Act, 2003. Therefore, it also cannot be taken to be substitute of RoE in view of the ratio of the above referred judgment of this Tribunal.

24. In the judgment dated 14.09.2006 passed in above noted appeal No.189/2005, this Tribunal has allowed RoE on normative basis on the capital / investment made by the State Government in the power plant even in the absence of any specification by the State Government regarding allocation of the investment as equity or loan or subsidy or grant. The case of the appellant in these appeals is on better footings than the case of the appellant in appeal No.189/2005. Here, it is manifest that the money was invested by the State Government in the appellant's generating station from the PDF as share capital i.e. equity. There is nothing on record to show that it was either a grant or a loan from the state government to the appellant. The reasoning of the Commission that investment into the appellant's power project from the PDF even into the share capital does not

attract RoE, is totally flawed and erroneous. It also runs contrary to the reasoning of this Tribunal in appeal No.189/2005.

25. The reliance placed in this regard by the Commission's counsel upon the contents of the letter dated 15.07.2013 issued by the State Government to the appellant is totally misplaced. We have already noted the relevant portion of the letter in Para No.13 hereinabove. The interpretation sought to be given to the same by the learned counsel for the Commission is fallacious, to say the least. A bare reading of the letter would reveal that the sum of Rs.15.56 crores was decided by the State Government to be invested in the appellant's power project MB-II as share capital. Mere use of word "grant" does not make the said amount grant from State Government to the power project. The said word "grant" has been used to indicate that the State Government has sanctioned the said amount to be invested as share capital in MB-II project of the appellant.

26. The learned counsel for the Commission had also referred to letters dated 17.10.2013 and 11.03.2014 whereby an amount of Rs.34 crores was sanctioned as a loan to the appellant company for MB-II project. We wonder as to how these letters advance the case of the respondent Commission. To the contrary, these advance the case of the appellant. This loan amount of Rs.34 crores is not a part of the sum of Rs.341.39 crores invested by the State Government in the appellant's power project as share capital from the PDF. In case the State Government intended to provide the said sum of Rs.341.39 crores also as loan or grant to the appellant, it would have said so specifically in the communications in this regard to the appellant, as had been done in the letters dated 17.10.2013

and 11.03.2014 relating to the loan of Rs.34 crores. In fact, it is argued by the appellant's counsel that the Commission has considered the interest on the said loan capital while determining the tariff for MB-II power project and since the said loan amount has also been advanced from PDF, there is no logic or reason in denying RoE on the investment as share capital from the same fund. We entirely agree with the submissions of the learned counsel in this regard.

27. We also find it profitable to quote Regulation 25 of UERC Tariff Regulations, 2004 which govern the computation of RoE:-

“25. Return on Equity

Return on equity shall be computed on the equity base determined in accordance with regulation 18 and shall be @ 14% per annum.

Provided that equity invested in any foreign currency shall be allowed a return on equity up to the prescribed limit in the same currency and the payment on this account shall be made in Indian Rupees based on the exchange rate prevailing on the due date of billing.

Explanation: The premium raised by the generating company while issuing share capital and investment of internal resources created out of free reserve of the existing generating station, if any, for the funding of the

project, shall also be reckoned as paid up capital for the purpose of computing return on equity, provided such share capital, premium amount and internal resources are actually utilized for meeting the capital expenditure of the generating station and forms part of the approved financial package.”

28. Bare reading of the said regulation would reveal that it does not make any distinction on the basis of the source of the fund invested as equity or share capital upon which RoE has to be computed. We note that the only criteria for allowing RoE is whether the investment in the power project is in the form of equity / share capital or not. The only consideration is the nature of the investment and not the source of the investment. Once it is found that the investment in the power project by the State Government is in the nature of equity or share capital, RoE has to be computed on the same irrespective of the source from which the investment was made by the State Government.

29. Our attention was drawn by the appellant’s counsel to Para No.VIII of the letter dated 15.07.2013 issued by the State Government to the appellant which reads as under:-

“VIII. In any event, UJVNL shall ensure that, according to determined rules, it gets Return on Equity from the Tariff, on the investment (including Power Development Fund) made by the of the Government in projects till date, present and in future and the same be deposited in the treasury of

the Government as per rules. The yearly project wise report of the amount obtained and collected from ROE shall be made available to the Government.”

30. It is manifest from the perusal of above noted portion of the said letter that the State Government itself required the appellant to ensure that it gets RoE on the invested amount. This further substantiates the claim of the appellant that it is entitled to RoE on the said invested amount by the State Government in its power project as share capital from the power development fund.

31. Thus, we find the reasoning of the Commission that the investment from PDF as equity or share capital in the power project cannot be considered for computing RoE, totally perverse and not sustainable. We hold and clarify that RoE shall be computed on investment made by the State Government in a power project as equity or share capital (not as loan or grant) irrespective of the source from which the investment has been drawn.

Denial of 50% of the excess IDC and 50% of price variation component of capital cost for MB-II project in appeal No.215/2016:

32. Learned counsel for the appellant argued that the Commission has erred in allowing only 50% of excess IDC and 50% of price variation for the delay in completion/commissioning of the project for the last six months even though such delay also was caused on account of uncontrollable factors which were duly communicated to the Commission vide letters

dated 25.02.2015 and 30.03.2015. He would submit that the appellant had in these two letters duly explained the reasons for delay in commissioning the project but the Commission has overlooked these two letters and has based its order merely on the report submitted by the consultant appointed by it. Thus, according to the learned counsel, the impugned orders in the appeal in question are vitiated by lack of application of mind on the part of the Commission on the aspect under consideration and cannot be sustained.

33. Learned counsel for the respondents would submit that the two letters, to which reference is made on behalf of the appellant, were also reviewed by the expert consultant appointed by the Commission before submitting his report. He argued that the Commission has based its findings on the aspect under consideration on the submissions made by the appellant during the course of the hearing as well as the report of the expert consultant and therefore, no infirmity can be found in the impugned orders in this regard.

34. We find that the Commission has based its findings on the aspect under consideration in the order dated 11.04.2015 as well as in the order dated 22.01.2016 on the review petition merely on the report of the expert consultant appointed by it. It has not made any endeavor to examine the case of the appellant independently to ascertain whether the consultant had actually perused the material produced by the appellant. The approach of the Commission is not acceptable. The Commission is the final adjudicatory authority and not the consultant appointed by it. The consultant was appointed by the Commission to examine the contentions of

the appellant and to give his opinion. It was for the Commission to scrutinize the opinion of the consultant in the light of the material produced by the appellant and to assess on its own independently as to whether the delay occurred in commissioning of the project of the appellant was due to controllable or non-controllable factors. We do not find any reference or discussion on the above noted two letters dated 25.02.2015 and 30.03.2015 sent by the appellant to the Commission thereby explaining the reasons of delay in commissioning of the project.

35. In view of these facts and circumstances of the case, we find it appropriate to remand the matter back to the Commission for a fresh consideration on the said aspect and to pass a fresh order upon hearing the parties again.

Conclusion

36. Hence, in the light of the above discussion, the impugned orders in all the three appeals cannot be sustained and are hereby set aside. All the three appeals are hereby allowed.

37. We hold and clarify that RoE has to be computed on any investment made by the State Government in a power project as equity / share capital (not as loan or grant) irrespective of the source from which the investment has been drawn. Accordingly, the Commission has erred in denying RoE to the appellant on the sum of Rs.341.39 crores invested by the State Government in its power project as share capital from Power Development Fund. The Commission shall now do the needful at the earliest and preferably within two months from the date of this order.

38. Additionally, the appeal No.215/2016 is remanded back to the Commission for a fresh consideration on the claim of appellant regarding excess IDC and price variation component of capital cost for MB-II power project for the period last six months before the date of its commissioning. This exercise shall also be done by the Commission within two months from the date of this order after hearing the parties again.

Pronounced in the open court on this the 19th day of July, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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