

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

**Appeal No. 02 of 2013**

**Dated: 6<sup>th</sup> September, 2013**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson  
Hon'ble Mr. Rakesh Nath, Technical Member**

**In the matter of:**

**Haryana Vidyut Prasaran Nigam Limited,**

Shakti Bhawan, Sector-6,

Panchkula-134112

... **Appellant**

Versus

1. **Haryana Electricity Regulatory Commission,**  
Bays No. 33-36, Sector-4,  
Panchkula-134 112.
2. **Uttar Haryana Bijli Vitran Nigam Limited,**  
Vidyut Sadan, C-16, Sector-6,  
Panchkula-134112
3. **Dakshin Haryana Bijli Vitran Nigam Limited,**  
Vidyut Nagar, Hissar-125 005  
Haryana.

Counsel for the Appellant(s) : Mr. M.G. Ramachandran,  
Mr. Anand K. Ganesan  
Ms. Swapna Seshdri,  
Ms. Swageetika Sahoo with  
Mr. S.K. Aggarwal &  
Mr. Pushpendra Singh (Rep.)

Counsel for the Respondent(s) : Ms. Shikha Ohri for HERC  
Mr. Hoshiyar Singh (Rep.) for R-3

**JUDGMENT**

**RAKESH NATH, TECHNICAL MEMBER**

Haryana Vidyut Prasaran Nigam Ltd., the transmission licensee has filed this Appeal challenging the order passed by Haryana Electricity Regulatory Commission dated 2.11.2012 regarding certain components of tariff applicable to the Appellant for the FY 2010-11.

2. The State Commission is the Respondent no. 1. The Distribution licensees are the Respondent nos. 2 and 3.

3. The brief facts of the case are as under:

- a) The transmission tariff applicable to the Appellant for the FY 2010-11 was determined by the State Commission vide orders dated 16.4.2010 and 30.11.2010. In the said

orders the State Commission allowed return on equity at 10% as against 14% admissible to the Appellant as per the Tariff Regulations.

- (b) Aggrieved by the order of the State Commission on the aspect of Return on Equity and certain other aspects, the Appellant filed an Appeal against those orders of the State Commission in Appeal being no. 102 of 2010 before this Tribunal.
- (c) The Tribunal by its judgment dated 18.4.2012 after considering the provision of the Tariff Regulations, decided that Return on Equity of 14% is required to be allowed in accordance with the Regulations.
- (d) The State Commission by the impugned order dated 2.11.2012 has passed consequential

order allowing return on equity at 14% as directed by the Tribunal but has reduced the equity base from Rs. 986.43 crores to Rs. 760.54 crores on which the return has been allowed by deducting the equity deployed in capital works in progress.

- (e) Aggrieved by reduction of equity base in the impugned order dated 2.11.2012, the Appellant has filed this Appeal.

4. Shri M.G. Ramachandran, learned counsel for the Appellant has made the following submissions:

(A) The State Commission while implementing the decision of the Tribunal in judgment dated 18.4.2012 should not have expanded the scope of the remand proceedings and reopened and

decided the matter concerning the equity base on which the increased rate of return on equity @ 14% instead of 10% was to be allowed.

(B) The State Commission in the tariff order dated 16.4.2010 for FY 2010-11 had determined equity base of Rs. 986.43 crores which included the equity deployed on capital works in progress as has been the practice followed by the State Commission in the past.

(C) The State Commission erred in reducing the capital base as also the equity base on which return is allowed by excluding the capital expenditure incurred on works in progress.

(D) The Tariff Regulations, 2008 provide for allowing servicing of equity base as per the

equity deployed as distinguished from the capitalized assets so as to provide for return on the money invested by the utilities.

5. Ms. Shikha Ohri, learned counsel for the State Commission argued that the State Commission while passing the impugned order observed that an inadvertent error had crept in calculation of the equity amount on which return was to be allowed to the Appellant. The State Commission in the original Tariff Order had allowed Return on Equity even on that portion of equity that had been used to fund assets which had not formed part of the transmission assets till date. Till the assets were commissioned and put to use, no service could be said to have been provided by the licensee to the consumers and hence no tariff could be recovered for such assets. Accordingly, the equity capital locked in capital works in progress was

excluded for the purpose of calculating return on equity @ 14%.

6. After hearing the Learned Counsel for the Appellant and the Learned Counsel for the State Commission, the questions that arise for our consideration are:

- i) Whether the State Commission has erred in re-determining the equity base of the Appellant in the remand proceedings when the remand was limited to allowing return on equity at 14% instead of 10% according to Tariff Regulations?
- ii) Whether the State Commission has erred in reducing the equity base by excluding the equity deployed by the Appellant on the capital works in progress and not put to use?

7. Since both the issues are intertwined, we would take them up together.

8. Let us first examine the findings of the Tribunal in its judgment dated 18.4.2012 allowing a higher Return on Equity to the Appellant. The relevant portion of the judgment is as under:

*“46 In this Case the Commission’s decision to allow RoE @ 10% lacks transparency. In case the Commission had decided to allow RoE at less/higher rate than 14%, it should have declared before hand and sought comments on the same. In this case the Commission’s decision to allow ROE @ 10% is contrary to the Regulations, and we must direct the Commission to allow Return on Equity @ 14% in accordance with Tariff regulations 2008. Once the Regulations have been framed the Commission has to act in accordance therewith”.*

***“73 Summary of our findings:***

*74. Our findings on various issues raised in this Appeal is summarized in the Table given below:*

<b>Issue</b>	<b>Our findings</b>
<i>Rate of Depreciation</i>	<i>To allow depreciation and AAD as per Commission's Tariff Regulations 2008.</i>
<i>Debt redemption obligation and other interest cost</i>	<i>Against the Appellant</i>
<i>Financial Impact of the judgment of this Tribunal in Appeal No. 27 of 2007</i>	<i>Against the Appellant</i>
<i>Interest on working capital</i>	<i>In favour of the Appellant</i>
<i>Rate of Return on Equity</i>	<i>In favour of the Appellant</i>
<i>Interest on Capital Works</i>	<i>Against the Appellant</i>
<i>Income from Short term Open Access Customers</i>	<i>Against the Appellant</i>
<i>Depreciation on BBMB and IP Station assets</i>	<i>Against the Appellant</i>
<i>Incentives</i>	<i>Commission is in the process of finalising the relevant Regulations and availability based Incentive scheme to be implemented from next financial year.</i>

*75. The Appeal is accordingly partly allowed to the extent mentioned above. However, there is no order as to costs”.*

9. Thus, the Tribunal decided to allow return on equity @ 14% instead of 10% in accordance with Tariff Regulations, 2008. However, there was no discussion or finding by the Tribunal in the judgment on whether the equity deployed by the Appellant on the capital

works in progress would form part of the equity base on which return is allowed or not as it was not a matter under consideration in the Appeal.

10. Let us now examine the impugned order dated 2.11.2012. The relevant extracts of the order are reproduced as under:

***“A. Financial Impact of APTEL order dated 18th April, 2012 on the ARR of FY2010-11***

*In compliance of the order of the Hon’ble Appellate Tribunal for Electricity in case number 102 of 2011, the Commission has recalculated the ARR of the Transmission and SLDC business of HVPNL for FY 2010-11. The details are provided below:-*

***1. Return on equity (ROE) and Income tax***

*The Hon’ble Appellate Tribunal for Electricity in the aforesaid judgment held that return on equity in accordance with the HERC tariff Regulation, 2008, is to be allowed on the equity.*

*While considering the present review on the issue of ROE, it has come to the notice of the Commission that an inadvertent error has crept in calculation of the equity amount on which return is to be allowed to the licensee. The Commission has been allowing return on equity to HVPNL even on that portion of equity that has been used to fund assets which have not formed part of transmission assets till date. It is noted that tariff is payable by the consumers/ beneficiaries in lieu of the transmission service provided to them by the licensee for use of the transmission assets. Till the assets are commissioned and put to use, no service can be said to have been provided by the licensee to the consumers and hence no tariff can be recovered for such assets.*

*Regulation 12 of the HERC Tariff Regulations, 2008 states that “ Actual expenditure incurred on the date of completion of the project shall form the basis for fixation of Tariff”. Further, project has been defined in regulation 3(o) as “ Transmission*

*system comprising specified transmission lines, substations and associated equipments”.*

*Hence till such time the transmission assets at various stages of construction are commissioned, they cannot be considered as part of transmission system or income earning assets of transmission business which qualify for cost recovery through tariff.*

*Otherwise also, it is an accepted principle that an asset shall earn only when it provides a service and in this case it is the transmission service which is sought to be provided. And such service can be provided by an asset only when it is completed, commissioned and put to the designated service and all these activities cannot precede each other in any manner.*

*The Commission is of the view that certain portion of equity is utilized to fund the capital works in process and hence is not yet put to use. The equity deployed in the assets in use of the transmission*

*licensee i.e. income earning assets are only eligible for computing return. Therefore, such equity capital that is locked in CWIP will have to be excluded for the purpose of calculating ROE. Hence, based on the information available from the audited account of the licensee for the relevant year, the Commission has worked out the admissible Return on equity in accordance with the HERC regulations, 2008. The details are presented below:”*

11. The crux of the findings of the State Commission in the impugned order are:

- i) It came to the notice of the State Commission that an inadvertent error had crept in calculation of the equity amount on which return is to be allowed to the Appellant.
- ii) The State Commission has been wrongly allowing Return on Equity even on portion of equity that has been used to fund assets that

have not formed part of the transmission assets.

- iii) Tariff is payable by consumes on assets which are commissioned and put to use and not on assets which have not been commissioned.
- iv) According to the Regulations, till such time a transmission asset is commissioned it cannot form part of transmission system and qualify for cost recovery.
- v) Equity deployed on transmission assets which are yet to be commissioned or equity locked in capital works in progress has to be excluded for the purpose of calculating return on equity.
- vi) Accordingly, the State Commission based on the audited accounts has calculated the

equity on which return is to be allowed after excluding the equity base on capital works in progress and allowed return on equity at 14% on the equity thus calculated.

12. Thus, the State Commission has allowed the Return on Equity @ 14% as per the directions of the Tribunal but has re-determined the equity base after excluding the equity component of the expenditure incurred on capital works in progress and not yet put to use.

13. The question arises whether the State Commission could revise the equity base in pursuance of the remand order?

14. According to the learned counsel for the Appellant the State Commission should not have re-determined the equity base in the present case of limited remand.

He also referred to judgment of the Tribunal dated 10.8.2010 in Appeal no. 37 of 2010 in the matter of Meghalaya State Electricity Board vs. Meghalaya State Electricity Regulatory Commission.

15. In the above case, the State Commission had gone beyond the scope and remand order by erroneously truing up the financial accounts of the Appellant for the FY 2008-09 when the remand order passed by the Tribunal was only with regard to true up for the FY 2007-08. In this judgment, the Tribunal laid down the following principles based on the various authorities of the Hon'ble Supreme Court.

*“(i) The Court below to which the matter is remanded by the Superior Court is bound to act within the scope of remand. It is not open to the Court below to do anything but to carry out the terms of the remand in letter and spirit.*

*(ii) Ordinarily, the Superior Court can set aside the entire judgment of the Court below and remanded to the subordinate court to consider all the issues afresh. This is called 'Open Remand'. The subordinate court can decide on its own afresh on the available materials.*

*(iii) The Superior Court can remand the matter on specific issues with a specific direction through a "Remand Order". This is called 'Limited Remand Order'. In case of Limited Remand Order, the jurisdiction of the Court below is confined only to the extent for which it was remanded".*

16. In the above judgment the Tribunal held that the court below to which the matter is remanded will carry out the terms of the remand in letter and spirit and in limited remand the jurisdiction of the court below is confined only to the extent to which it was remanded.

17. Mr. M.G. Ramachandran, learned counsel for the Appellant has also referred to the findings of the

Tribunal in its Judgment dated 10.5.2010 in the matter of Damodar Valley Corporation vs. Central Electricity Regulatory Commission.

18. In the above judgment dated 10.5.2010, the Tribunal on the basis of the findings of Hon'ble Supreme Court in various cases had laid down the following principles of limited remand.

*“(i) When a matter is remanded by the superior court to subordinate court for rehearing in the light of observations contained in the judgment, then the same matter is to be heard again on the materials already available on record. Its scope cannot be enlarged by the introduction of further evidence, regarding the subsequent events simply because the matter has been remanded for a rehearing or do novo hearing.*

*(ii) The court below to which the matter is remanded by the superior court is bound to act within the scope of remand. It is not open to the*

*court below to do anything but to carry out the terms of the remand in letter and spirit.*

*(iii) When the matter comes back to the superior court again on appeal after the final order upon remand is passed by the Court below, the matter/issues finally disposed of by order of remand, cannot be reopened.*

*(iv) Remand order is confined only to the extent it was remanded. Ordinarily, the superior court can set aside the entire judgment of the court below or it can remand the matter on specific issues through a "Limited Remand Order". In case of Limited Remand Order, the jurisdiction of the court below is limited to the issue remanded. It cannot sit on appeal over the Remand Order.*

*(v) If no appeal is preferred against the order of Remand, the issues finally decided in the order of remand by the superior court attains finality and the same can neither be subsequently re-agitated before the court below to which remanded nor*

*before the superior court where the order passed upon remand is challenged in the Appeal.*

*(vi) In the following cases, the finality is reached:*

*(a) The issue being not challenged before the superior court, or*

*(b) The issue challenged but not interfered by the superior court, or*

*(c) The issue decided by the superior court from which no further appeal is preferred.*

*These issues cannot be re-agitated either before the court below or the superior court”.*

19. In the above judgment also, the Tribunal has held that in case of limited remand order the jurisdiction of the Court below is limited to the issue remanded and it could not sit on appeal over the remand order. If no appeal is preferred against the order of remand, the issue decided in the order of remand by the superior court attains finality.

20. In this case the decision of the Tribunal in judgment dated 18.4.2012 was limited to allowing return on equity at 14% instead of 10% as per the Tariff Regulations. The State Commission by the impugned order has also implemented the decision of the Tribunal of allowing return on equity @ 14%. However, the State Commission found that an inadvertent error had crept in calculation of the equity amount on which the return of 14% is allowed as in its earlier order dated 16.4.2010, the State Commission had also included the equity amount on capital works which were in progress and not put to use in the equity base on which return on equity was allowed. The State Commission deducted the equity related to transmission works not yet commissioned from the total paid up equity for transmission and allowed 14% return on equity on this amount, i.e. the State

Commission allowed the return on equity deployed on the transmission assets which had been commissioned and put to use.

21. The State Commission in the earlier tariff order had decided Return on Equity of Rs. 986.43 i.e. @ 10% on the average equity base including the capital works in progress. In the impugned order, the State Commission has decided Return on Equity of Rs. 1064.76 crores i.e. @ 14% on average equity base of Rs. 7605.40 crores excluding the transmission assets which had not yet commissioned.

22. Let us now examine the Tariff Regulations to examine if the return has to be allowed on the equity deployed on the capital works in progress or capital works which have not been commissioned.

23. The relevant Tariff Regulations are reproduced below:

*“ 12. **Capital Cost-** (1) the actual expenditure incurred on the date of completion of the project shall form the basis for fixation of final tariff. Investments made prior to 1/04/2008 in the case of the existing projects shall be accepted for reckoning capital cost on the basis of audited accounts. The final tariff shall be determined based on the capital expenditure allowed by the Commission and the expenditure actually incurred up to the date of commercial operation of the project and shall include capitalized initial spares, subject to ceiling norms of 1.5% percent of plant and equipment cost”.*

*“14. **Debt Equity Ratio-** (1) In case of the existing projects, debt equity ratio considered by the Commission for the period ending 31.3.2008 shall be considered for determination of tariff with effect from 1.4.2008:*

*Provided that in cases where the tariff determined by the Commission for the period ending 31.3.2008 has not considered the debt equity ratio, the same shall be as may be decided by the Commission:*

*Provided further that in case of the existing projects where additional capitalization has been completed on or after 1.4.2008 and admitted by the Commission under Regulation 13, equity in the additional capitalization to be considered shall be,-*

- (a) 30% of the additional capital expenditure admitted by the Commission; or*
- (b) equity approved by the competent authority in the financial package, for additional capitalization; or*
- (c) actual equity employed, whichever is the least:*

*Provided further that in case of additional capital expenditure admitted under the second proviso, the Commission may consider equity of more than 30% if the transmission licensee is also to satisfy the*

*Commission that deployment of such equity of more than 30% was in the interest of general public.*

- (2) *In case of the projects for which investment approval was accorded prior to 1.4.2008 and which are likely to be declared under commercial operation during the period after 1.4.2008 the debt and equity in the ratio of 70:30 shall be considered:*

*Provided that where equity actually employed to finance the project is less than 30%, the actual debt and equity shall be considered for determination of tariff:*

*Provided further that the Commission may in appropriate cases consider equity higher than 30% for determination of tariff, where the transmission licensee is able to establish to the satisfaction of the Commission that deployment of equity higher than 30% was in the interest of general public.*

(3) *In case of the projects for which investment approval is accorded on or after 1.4.2008, debt and equity in the ratio of 70:30 shall be considered for determination of tariff:*

*Provided that where equity actually employed is more than 30%, equity in excess of 30% shall be treated as notional loan:*

*Provided further where deployment of equity is less than 30%, the actual debt and equity shall be considered for determination of tariff.*

*(4) The debt and equity amount arrived at in accordance with above clause (1), (2) or (3), as the case may be, shall be used for calculation of interest on loan, return on equity, advance against depreciation and foreign exchange rate variation.”*

**“17. Return on Equity.-** (1) *Return on equity shall be computed on the equity base determined in accordance with regulation 14 @ 14% per annum or*

*as determined by the Commission from time to time.*

*Provided that equity invested in foreign currency shall be allowed a return upto 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.*

- (2) The premium raised by the transmission licensee while issuing share capital and investment of internal resources created out of free reserve of the transmission licensee, 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 premium amount and internal resources are actually utilized for meeting the capital expenditure of the project and forms part of the approved financial package”.*

24. Regulation 12 clearly stipulates that the capital cost will be based on the actual expenditure incurred

on the date of completion of the project. The basis of the equity base is stipulated in the Regulation 14, which clearly indicates that equity base will comprise the existing projects and those projects which are declared under commercial operation.

25. It has also been a settled position that return is to be allowed only on such assets that are commissioned and put to use and not on works which are in progress and not yet put to use. The consumers could not be expected to pay the return on equity capital deployed on the projects which had not been commissioned and put to use. The capital deployed on a work can only be serviced when it is commissioned and put to use to provide the service.

26. According to the Appellant, the State Commission should have simply allowed 14% return on equity on

the equity base determined in the earlier tariff order which was challenged by them in the Appeal before the Tribunal and which had included the equity on the capital Works in Progress and by recalculating the capital base the State Commission had violated the principles laid down by this Tribunal for limited remand. In other words even if the mistake in calculating the equity base in the original tariff order had been noticed by the State Commission it should have ignored the same and allowed return on equity on the transmission assets which had not been put to use and were still under execution. This in our view is not a sound proposition.

27. The Tribunal had not gone into the issue of correctness of equity base of the Appellant on which return had to be allowed. The Tribunal's decision was only with regard to return on equity of 14% as per the

Tariff Regulations of 2008. When the Tariff Regulations of 2008 provide for Return on Equity base for the transmission assets which had been commissioned, the State Commission could not have ignored the mistake that had come to its notice in calculating the equity base in the original tariff order. In correcting a mistake in computing the equity base, the State Commission has not violated the principles of remand.

28. The Tribunal had also directed to allow 14% Return on Equity in accordance with the Tariff Regulations, 2008. The Tariff Regulations provide for allowing return on equity deployed on the transmission assets which have been commissioned. Thus, if the State Commission has excluded the equity deployed on the capital works in progress from the

total equity, it has not violated the directions of the Tribunal.

29. The State Commission has to safeguard the consumers' interest and at the same time ensure recovery of the cost of electricity in a reasonable manner as per Section 61(d) of the Electricity Act. Thus, the State Commission could not have ignored the error that had crept in computing the equity base of the Appellant and allowed a return on equity on the assets which are yet to be commissioned or put to use against the provisions of its Tariff Regulations and burdening the consumers by a higher tariff.

30. In this case the State Commission had not gone into the re-determining the ratio already laid down by the Tribunal but has corrected the error in computing the equity base and followed the decision of the

Tribunal by allowing a higher return on equity of 14% as per its Regulations.

31. In view of above, we decide both the issues as against the Appellant.

32. **Summary of our findings:**

**i) In correcting the equity base on which Return on Equity has to be allowed to the Appellant in the remand order in accordance with its Regulations, the State Commission has not interfered with the ratio decided by the Tribunal and has not violated the principles laid down by this Tribunal on the issue of limited remand.**

**ii) The Appellant is not entitled to Return on Equity deployed on the transmission assets which are under execution and are yet to be**

**commissioned during the year in question as per the Tariff Regulations.**

33. In view of above, the Appeal is dismissed as devoid of any merits. However, there is no order as to costs.

34. Pronounced in the open court on this **6<sup>th</sup> day of September, 2013.**

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

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

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**REPORTABLE/~~NON-REPORTABLE~~**

VS