

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APPEAL NO.5 OF 2017

Dated: 15.11.2022

**Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

In the matter of:

STAR WIRE (INDIA) VIDYUT PRIVATE LTD.

8C/6 WEA, Abdul Aziz Road,
III Rd Floor, Karol Bagh,
New Delhi - 110005

... Appellant(s)

VERSUS

1. HARYANA ELECTRICITY REGULATORY COMMISSION

Bays No.33-36, Sector-4,
Panchkula, Haryana-134112

2. HARYANA POWER PURCHASE CENTRE,

Shakti Bhawan, Sector-6,
Panchkula, Haryana-134109.

... Respondent(s)

Counsel for the Appellant (s) : Mr. Buddy A. Ranganadhan
Ms. Nandini Tomar

Counsel for the Respondent (s) : Mr. Justline George
Ms. Srishti Agarwal for R-1

Mr. Ritu Apurva for R-2

J U D G M E N T (Oral)

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. The appellant operates a bio-mass based power project with capacity of 9.9. MW, its power plant being located in the State of Haryana. It has certain contractual arrangement for sale of power to, and purchase by, the

second respondent i.e *Haryana Power Purchase Centre* for a period of 20 years, the *Power Purchase Agreement* (“PPA”) having been executed on 22.06.2012, the tariff payable being as determined by the first respondent i.e. *Haryana Electricity Regulatory Commission* (“the State Commission”). It has come up, by the present appeal, feeling aggrieved by rejection of its objections (Case No.HERC/PRO-12/16) which had been filed initially for clarifications but later, under directions, treated as a review petition vis-à-vis the generic tariff order dated 20.11.2013 on issues pertaining to computation of *Plant Load Factor* (“PLF”) and depreciation, reference in this context being made to the *Haryana Electricity Regulatory Commission (Terms & Conditions for Determination of Tariff for Renewable Energy, Renewable Purchase Obligations and Renewable Energy Certificates) Regulations, 2010* (in short “RE Tariff Regulations 2010”). The order dated 18.10.2016 which is impugned by the appeal at hand was rendered on the basis of opinion of the Chairperson of the State Commission, the other Member having dissented, agreeing with the contentions of the appellant, the Chairperson having exercised his casting vote in terms of Section 92(3) of the Electricity Act, 2003, in favour of his own opinion.

2. Regulation 35 of RE Tariff Regulations 2010 deals with the subject of PLF, providing as under:-

“35. Plant Load Factor – (1) Threshold Plant Load Factor for determining fixed charge component of Tariff shall be”

1. *During Stabilisation – 60%*
2. *During the remaining period of the first year (after stabilization) : 70%*
3. *From 2nd Year onwards : 80%*

(2) The stabilization period shall not be more than 6 months from the date of commissioning of the project.”

3. It is clear from the bare reading of the above regulations that PLF is to be computed at 60% for the stabilization period which per Clause (2) is

six months and at 70% for the balance period of the first year. The average PLF indisputably works out to 65%. By the generic tariff order dated 20.11.2013, applicable to power plants commissioned during FY 2013-14, the tariff for first year was computed at PLF of 70%. It is pointed out that by a subsequent generic tariff order issued by the same commissioned on 13.08.2014, for power plants commissioned during FY 2014-15, the PLF of first year of tariff has been taken as 65% which has been the view pressed for acceptance by the appellant.

4. The issue of depreciation is covered by Regulation 14 of RE Regulations 2014 as under:-

“Depreciation – (1) The value base for the purpose of depreciation shall be the Capital Cost of the asset admitted by the Commission. The salvage value of the asset shall be considered as 10% and depreciation shall be allowed up to maximum of 90% of the Capital Cost of the asset.

(2) Depreciation per annum shall be based on ‘Differential Depreciation Approach’ over loan tenure and period beyond loan tenure over useful life computed on ‘Straight Line Method’. The depreciation rate for the first 10 years of the Tariff Period shall be 7% per annum and the remaining depreciation shall be spread over the remaining useful life of the project from 11th year onwards.

(3) Depreciation shall be chargeable from the first year of commercial operation.

Provided that in case of commercial operation of the asset for part of the year, depreciation shall be charged on pro rata basis”.

5. It appears from the plain reading of the above regulation that the value base for the purpose of depreciation is the capital cost of the asset, the salvage value being 10%, depreciation being allowed up to 90%, the rate of depreciation for first ten years of the life of the project being 7% per annum, the remainder being spread over the remaining life of the asset from 11th year onwards. It is pointed out that by the subsequent generic tariff order dated 30.08.2019 applicable, for power plant commissioned during FY 2014-15, the computation of depreciation has been allowed for

first ten years of operation at 7% of the total value (100%) of the asset. By contrast, the generic tariff order dated 20.11.2013 computed the depreciation for first ten years life of the project at 7% of 90% on the value of the asset.

6. The above two issues were agitated by the appellant through the petition which has resulted in order dated 18.10.2016, the dissent view taken by a Member sitting with the Chairperson having accepted the contentions, the learned Chairperson whose view has prevailed, on account of casting vote, having rejected, *inter alia*, referring to the facts that the appellant had actively participated in the proceedings which had led to the relevant orders being passed on the subject since 2007, structuring of the tariff being prerogative of the Commission, the view taken on the two subjects being correct, the contentions of the appellant being “in violation of *Doctrine of Promissory Estoppel*”.

7. Having heard the learned counsel on both sides, we are of the view that the opinion expressed by the learned Chairperson, which has become the order of the Commission on account of casting vote, is wholly erroneous. The clear norms set out in the relevant regulations show that the approach is incorrect. The PLF for first year cannot be taken as 70% on account of the Regulation 35 itself stipulating that it would be 60% for the stabilization period i.e. six months of the first year. This view was accepted by the same Commission for its subsequent generic tariff order dated 13.08.2014, showing inconsistency.

8. Similar is the position vis-à-vis the computation of depreciation. Regulation 14 does not envisage the computation for 10 years of the

project to be at 7% of the 90% value of the asset. The rule has to be applied as it stands. It has been correctly followed in the subsequent tariff order dated 13.08.2014.

9. There is no occasion to invoke “*Doctrine of Promissory Estoppel*”. At any rate, rule of estoppel does not apply against the law. The regulations have been misread by the Chairperson and this has resulted in a fallacious approach being adopted.

10. For above reasons, the appeal is allowed. The impugned order is set aside. The State Commission is directed to pass consequential orders, bearing in mind the observations recorded above.

11. The appeal is disposed of in above terms.

Pronounced in open court on this 15th Day of November, 2022

(Sandesh Kumar Sharma)
Technical Member

pr/tp

(Justice R.K. Gauba)
Officiating Chairperson