

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL Nos. 66 & 75 of 2016

Dated : 25th September, 2024

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

In the matter of:

APPEAL No. 66 of 2016

M/s Gill Acqua Hydro Power Generation Company Pvt. Ltd.

Through its Director

B-6/10, Safdarjung Enclave,

New Delhi – 110029

...Appellant

Versus

1. Punjab State Power Corporation Limited

Through its Chairman – cum – Managing Director

PSEB Head Office,

The Mall, Patiala - 147001

2. Punjab Energy Development Agency

Through its Director

Solar Passive Complex,

Plot No. 1 & 2, Sector-33D,

Chandigarh – 160034

3. Punjab State Electricity Regulatory Commission

Through its Secretary

SCO 220-21, Sector 34A,

Chandigarh - 160022

...Respondents

Counsel for the Appellant(s) : Vishal Gupta
Kumar Mihir for App. 1

Counsel for the Respondent(s) : Anand K. Ganesan
Swapna Seshadri for Res. 1

Aditya Grover
Arjun Grover
Manisha for Res. 2

Sakesh Kumar for Res. 3

APPEAL No. 75 of 2016

Punjab State Power Corporation Limited

The Mall, Patiala – 147001

Punjab

...Appellant

Versus

1. Gill Acqua Hydro Power Generation Company Pvt. Ltd.

II Floor, B-6/10, Safdarjung Enclave,
New Delhi – 110029

2. Punjab Energy Development Agency

Solar Passive Complex,
Plot No. 1 & 2, Sector-33D,
Chandigarh – 160034

3. Punjab State Electricity Regulatory Commission

SCO 220-21, Sector 34A,
Chandigarh - 160022

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Counsel for the Appellant(s) : Anand K. Ganesan
Swapna Seshadri for App. 1

Counsel for the Respondent(s) : Vishal Gupta
Kumar Mihir for Res. 1

Aditya Grover
Arjun Grover
Manisha for Res. 2

Sakesh Kumar for Res. 3

JUDGMENT

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The above captioned appeals arise out of common order dated 22nd January, 2016 passed by Punjab State Electricity Regulatory Commission (hereinafter referred to as "Commission") in Petition No. 51 of 2015 filed by M/s Gill Acqua Hydro Power Generation Company Pvt. Ltd. (in short Gill Acqua) and relates to 6 MW small hydel generating station on the Madhopur Beas Link-III (in short "MBL-III") in the State of Punjab established by M/s Gill Acqua. Accordingly, both the appeals are taken up for disposal vide this common judgement.

2. M/s Gill Acqua is a company incorporated under the provisions of the Companies Act, 1956. It has established a 3 MW small hydel generating station on the Madhopur Beas Link-III in the State of

Punjab. This is a part of total 9 MW capacity which is being established by the Company at the said location.

3. Punjab State Power Corporation Limited (in short “PSPCL”) is a company incorporated under the provisions of the Companies Act, 1956. It is an unbundled entity of the erstwhile Punjab State Electricity Board and has been vested with the functions of generation and distribution of electricity in the State of Punjab.

4. Punjab Energy Development Board (in Short “PEDA”) is a designated agency in the State of Punjab for development of power projects as well as to conduct the competitive bidding process on behalf of the PSPCL for procurement of electricity from the solar generation projects.

5. The above noted power project (hereinafter referred to as MBL-III) was allotted to Gill Acqua under NRSE Policy, 2006 of the Government of Punjab. By way of notification dated 24th November, 2006, the Government of Punjab notified the NRSE Policy 2006 providing for various incentives and benefits to renewable energy projects to be established in the State. The policy provided for the terms and conditions based on which the projects were to be established, the benefits to be granted and also the tariff based on

which the power was to be procured by the Distribution Licensees from the projects to be established under the policy. It also provided a scheme wherein the project developers could self-identify sites for development of mini/micro hydel projects if the same are not included in the list of projects identified by PEDDA. The relevant portion of the policy reads as under :-

“Small / Micro Hydro projects:

*By virtue of its topographic location the State has an extensive irrigation canal network with untapped estimated potential of 200MW. The State Government is committed to exploit the total potential by the year 2012. **In addition to the sites already identified by PEDDA, private investors may also apply for self-identified sites in case of small/micro hydel projects if the same are not included in the list of projects identified by PEDDA.**”*

6. Even though, it was open to Gil Acqua to proceed on the basis of the sites identified by PEDDA, it decided to proceed with self-identified site for establishing the mini hydro project at Madhopur – Beas Link in Gurdaspur District in the State of Punjab. Thus, it was the obligation of Gill Acqua to examine the suitability of the site and other conditions affecting the project. Based on the application under the self-identified scheme under the NRSE Policy, 2006, the project in question i.e. MBL-III for 3 MW was allocated to Gill Acqua by PEDDA on 21st May, 2009. It would be pertinent to mention here

that M/s Gill Acqua had entered into a Memorandum of Understanding dated 10th July, 2007 also with PEDDA and PSPCL for setting up of the said 3 MW mini hydel project MBL-III.

7. In terms of the letter of allotment dated 21st May, 2009, the project was to be commissioned within 500 days and Gill Acqua was also to sign a Power Purchase Agreement (PPA) with PSPCL in terms of the tariff order dated 18th December, 2007 issued by the Commission. The allotment letter also mandated Gill Acqua to sign an Implementation Agreement and to supply a fix quantum of energy share of saleable electricity from the said project to PSPCL.

8. Accordingly, Gill Acqua entered into an Implementation Agreement with PSPCL which provided for the terms and conditions for implementation of the project. Subsequently, Gill Acqua also executed a tripartite Agreement dated 28th May, 2009 with PSPCL and Punjab Irrigation Department. As per the said Implementation Agreement, the project was to be commissioned by Gill Acqua and synchronized with the grid of PSPCL by 23rd September, 2010.

9. A PPA dated 4th June, 2009 was entered into between Gill Acqua and PSPCL (through its predecessor-in-interest Punjab State Electricity Board) for sale of electricity offered by Gill Acqua in terms

of NRSE Policy, 2006 and the tariff order dated 13th December, 2007. As per the PPA also, the scheduled date of synchronization of the project with the grid was 23rd September, 2010. The tariff for supply of electricity provided in the PPA was Rs.3.70 per KWH for the year 2008-09 with 3% annual escalation upto financial year 2011-12, as per the rates approved by the Commission in its order dated 23rd December, 2007. The last escalated tariff was to remain in force during the remaining terms of PPA with the provisions that any enhancement in tariff after the last escalation shall be as determined and approved by the Commission.

10. It appears that the completion of the project got delayed due to various factors and accordingly, Gill Acqua sought extension for completion of the project from time to time which were granted by PEDDA subject to conditions of the Implementation Agreement, Tripartite Agreement and further subject to specific undertaking for not making any claims on account of delay in completing the project. The last extension was granted till 31st March, 2016.

11. Meanwhile, the Tripartite Agreement dated 28th May, 2009 was amended and addendum to it was signed by the parties on 8th August, 2012 wherein Gill Acqua agreed to provide additional

protective measures and to carry out maintenance of banks of the river at its own cost. In the said addendum, the petitioner also agreed that it is fully aware of the future schemes of erstwhile Punjab State Electricity Board (now PSPCL) and Punjab Irrigation Department and reiterated that the entire associated risk due to this shall be to its account. Gill Acqua also signed an undertaking dated 10th July, 2012 to the effect that it will not lodge any claim on PEDDA, Punjab Irrigation Department or another department of State Government for any kind of loss incurred/to be incurred on account of any change in hydrology of the canal after the approval of drawings, time taken for completion of approval procedure till signing of addendum to the Tripartite agreement and shall complete the project within 455 days from signing the said addendum. Accordingly, the revised date of commissioning was worked out as 7th November, 2013.

12. The Govt. of Punjab issued a fresh New and Renewable Sources of Energy (NRSE) Policy, 2012 on 28th December, 2012 to replace the previous NRSE Policy 2006. This Policy of 2012 provided that the NRSE projects shall be entitled for tariff as per tariff orders of the Commission and shall be governed by RE Regulations.

13. It appears that the project site was flooded during the construction in the year 2014. Due to additional work of raising the banks on account of flooding of the project site, Gill Acqua approached PEDDA in December, 2014 to extend the date of commissioning up to December, 2015 which was allowed by PEDDA subject to compliance of all the terms and conditions of the Implementation Agreement, addendum to the Tripartite Agreement and the undertaking. In December, 2015 another extension was sought by Gill Acqua till 31st March, 2016 which also was agreed to by PEDDA subject to compliance of similar conditions as imposed while granting the earlier extension.

14. Before completing the project, M/s Gill Acqua approached the Commission with Petition No. 51 of 2015 under Section 62 and 86(1) (e) of the Electricity Act, 2003 seeking revision of tariff for the said MBL-III small hydel project. In the petition, Gill Acqua had prayed (i) for revising the tariff provided in the PPA signed with PSPCL on 4th June, 2009 for supply of electricity from its MBL-III small hydel project to align the same with the tariff determined under the latest tariff orders and (ii) to consider the project under NRSE Policy, 2012 in view of the revised commissioning timelines

allowed by PEDDA, even though it was originally allotted as per the provisions of NRSE Policy, 2006.

15. In the impugned order dated 22nd January, 2016, the Commission refused to equate the project of Gill Acqua to the projects commissioned/to be commissioned in the financial year 2015-16 and, therefore held it not entitled to revision in tariff. As regards the prayer of Gill Acqua to treat its project being established under NRSE Policy, 2012, the Commission observed that the same does not fall within its purview.

16. At the same time, the Commission proceeded to grant escalation in tariff to Gill Acqua for its said mini hydle power project MBL-III on the ground that the renewable projects need to be promoted and that PSPCL had shortfall of renewable power and had procured Renewable Energy Certificates (REC) in the past. For these reasons, the Commission granted higher tariff to Gill Acqua than that provided in the PPA.

17. As already noted herein above, both Gill Acqua as well as PSPCL have assailed the said order of the Commission by way of two separate appeals. M/s Gill Acqua has filed Appeal No. 66 of 2016 feeling aggrieved by rejection of its claim for revision of tariff

and aligning it with the tariff determined in the latest tariff orders passed by the Commission under NRSE Policy, 2012.

18. PSPCL has filed Appeal No. 75 of 2016 feeling aggrieved by grant of increase in tariff to Gill Acqua over and above the tariff mentioned in the PPA.

19. We have heard the Learned Counsels appearing for the parties in detail and have perused the impugned order. We have also gone through the written notes/submissions filed on behalf of the Gill Acqua and PSPCL.

20. We find it necessary to note at the outset that even though, as per the claims of Gill Acqua, the completion of the project had got delayed not due to its fault but on account of inordinate time taken by PEDDA in approval of drawings for the project yet it did not invoke the Force Majeure Clause of the PPA. Thus the case of Gill Acqua is not founded upon any Force Majeure Event but on the claim that since the extended COD of its project was 31st March, 2016, it comes under the purview of NRSE Policy 2012 issued on 26th December, 2012 and therefore, entitled to tariff as per latest tariff orders passed by the Commission notwithstanding the tariff fixed in the PPA dated 4th June, 2009 executed by it with the

PSPCL. In essence, the prayer of Gill Acqua before the Commission was to discard the generic tariff fixed in the tariff order dated 18.12.2007 passed in pursuance to NRSE Policy, 2006 duly accepted by the parties by adopting the same in the PPA and to declare a project specific tariff for its MBL-III project on account of the same having been commissioned in the year 2016 subsequent to the notification of NRSE Policy 2012. The Commission, while refusing to equate the project of Gill Acqua with the projects set up under NRSE Policy 2012, has proceeded to grant it escalated tariff than what has been agreed to by the parties in the PPA.

21. In this view of the matter and on the basis of the contentions of the parties as well as rival submissions made on their behalf by their Learned Counsels, an important question of law having very wide ramifications arises for our consideration in these two appeals, which is as under :-

(i) Whether the State Commission has power and jurisdiction to re-open, re-visit or review a concluded PPA entered between a power generator and a distribution licensee in order to determine a higher tariff for the power project than agreed to in the PPA.

22. Learned Counsel for Gill Acqua argued that any agreement

pertaining to supply of electricity concerning regulated entities i.e. Distribution Licensees, Transmission Licensees and Trading Licensees is necessarily subject to review or revision by the appropriate Commission at any point of time. He would submit that Section 62(4) of the Electricity Act, 2003 makes clear the legislative intent in so far as the permissibility to amend tariff prescribed in the PPA is concerned in as much as the said provision expressly envisaged that 'ordinarily' no tariff or part of any tariff may be amended more frequently than once in any financial year. It is his submission that in appropriate cases, the Commission is not precluded from exercising its powers conferred by Section 62 of the Act. He argued that in view of various judgements of the Hon'ble Supreme Court as well as this Tribunal, the State Commissions have power to interfere with/re-open the PPA if the need so arises in the facts and circumstances of a particular case. To buttress his submission, Learned Counsel has cited the judgements of the Hon'ble Supreme Court in PTC India Ltd. Vs. CERC (2010) 4 SCC 603, A.P. TRANSCO Vs. Sai Renewable Power (P) Ltd., (2011) 11 SCC 34 and Gujarat Urja Vikas Nigam Limited vs. Solar Semi-Conductors Power Company (Pvt.) Ltd., (2017) 16 SCC 498 as

well as the judgements of this Tribunal in Gujarat Urja Vikas Nigam Limited Vs. Green Infra Corporate Wind Power Limited 2015 SCC Online Aptel 15, Tarini Infrastructure Limited Vs. Gujarat Urja Vikas Nigam Limited, 2012 SCC Online APTEL 119, Junagadh Power Projects Private Limited Vs. Gujarat Urja Vikas Nigam Limited, 2013 SCC Online APTEL 146, Gujarat Urja Vikas Nigam Limited Sardar Patel Vs. Gujarat Electricity Regulatory Commission, 2013 SCC Online APTEL 67.

23. Pointing out the expression “any escalation in tariff after the last escalation shall be determined and approved by the Commission” in Clause 2.1(i) of the PPA, Learned Counsel further argued that manifestly the Commission retained in itself the power to re-determine the tariff in individual cases where need for such re-determination arises and, therefore, it cannot be said in this case that the Commission had no power to re-determine the tariff for Gill Acqua in respect of its project MBL-III.

24. On behalf of the PSPCL, it is vehemently argued by its counsel that there is an absolute bar upon the State Commission to review/re-visit the tariff agreed to between the parties in a duly concluded PPA. He would submit that the PPA between the parties

is a binding document and it is not open to the generator to seek unilateral increase in tariff. According to the Learned Counsel, it is a settled position of law that the State Commission had no power to vary the tariff fixed under a PPA and even if the State Commission proceeds to re-determine the tariff in a particular case, the parties cannot be forced to sell/purchase electricity at such re-determined tariff and the parties shall remain bound by the provisions of the PPA. To buttress his submissions, Learned Counsel cited the judgements of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited Vs. Solar Semiconductor, (2017) 16 SCC 498, Gujarat Urja Vikas Nigam Limited Vs. EMCO Limited, (2016) 11 SCC 182, Haryana Power Purchase Centre Vs. Sasan Power Limited and Ors., (2023) SCC Online SC 577, Gujarat Urja Vikas Nigam Limited and Ors. Vs. Renew Wind Energy (Rajkot) Private Limited and Ors. (2023) SCC Online SC 411 as well as judgements of this Tribunal in M/s Ginni Global Limited Vs. Himachal Pradesh Electricity Regulatory Commission in Appeal No. 39 of 2018 decided on 15th December, 2012 and M/s. Gadre Marine Export and Anr. Vs. Maharashtra Electricity Regulatory Commission and Ors. In Appeal No. 313 of 2018 decided on 22nd

February, 2024.

25. We have considered the rival submissions made by the Learned Counsel and gone through the judgements cited at the bar.

26. We find that Sections 61, 62, 63, 64 and 86 of the Electricity Act, 2003 are relevant for the purposes of adjudicating the issue under consideration and the same are reproduced herein below :-

“Section 61. (Tariff regulations):

The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
- (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*
- (e) the principles rewarding efficiency in performance;*
- (f) multi year tariff principles;*
- (g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;]*

(h) *the promotion of co-generation and generation of electricity from renewable sources of energy;*

(i) *the National Electricity Policy and tariff policy:*

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.

Section 62. (Determination of tariff): --- (1) *The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –*

(a) *supply of electricity by a generating company to a distribution licensee:*

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) *transmission of electricity ;*

(c) *wheeling of electricity;*

(d) *retail sale of electricity:*

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) *The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.*

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

Section 63. (Determination of tariff by bidding process):

Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.

Section 64. (Procedure for tariff order): --- (1) *An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.*

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,-

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person concerned.

(5) Notwithstanding anything contained in Part X, the tariff for any inter- State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.

(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order.

Section 86. (Functions of State Commission): --- (1) The State Commission shall discharge the following functions, namely: -

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from

other sources through agreements for purchase of power for distribution and supply within the State;

(c) facilitate intra-State transmission and wheeling of electricity;

(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

(g) levy fee for the purposes of this Act;

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;

(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;

(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary; and

(k) discharge such other functions as may be assigned to it under this Act.”

27. A bare reading of these legal provisions would reveal that Section 61 of the Act lays down the principles for determination of tariff whereas Section 62 of the Act deals with different kinds of tariff to be determined by the appropriate Commission for different entities as well as for different purposes. Section 63 relates to determination

of tariff through a transparent process of bidding. Section 64 of the Act, prescribes the manner in which determination of tariff is required to be made by the Commission.

28. Section 86 of the Act prescribes the functions of the Commission. As per Section 86(1)(a) of the Act, one of the primary function of the Commission is determination of tariff whereas as per Section 86(1)(b), it is also the function of the Commission to regulate the price of sale and purchase of electricity between the generating companies and Distribution Licensees through power purchase agreement. The Supreme Court has held in several judgements that the power of the Commission regarding tariff determination/fixation is a statutory function.

29. A PPA is a contract executed between a power generator and a Distribution Licensee whereby the former agrees to sell the power generated in its generating stations and the later agrees to purchase the same on the terms and conditions as stated in the agreement. The tariff at which such power is to be sold/purchased is an essential term of a PPA. In our view, upon execution of the PPA it becomes a binding contract between the power generator and the Distribution Licensees and both are bound by its terms and conditions as well as

the obligations cast upon them under the agreement. A PPA is a creation of both the parties and, therefore, their rights/obligations flow from the terms and conditions contained therein.

30. The sanctity of the power purchase agreement had come up for consideration before the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd. vs. Solar Semi-Conductors Power Company (Pvt.) Ltd., (2017) 16 SCC 498 in which, Hon'ble Justice Kurian Joseph, speaking for the Bench, held as under :-

“37. This Court should be specially careful in dealing with matters of exercise of inherent powers when the interest of consumers is at stake. The interest of consumers, as an objective, can be clearly ascertained from the Act. The Preamble of the Act mentions “protecting interest of consumers” and Section 61 (d) requires that the interests of the consumers are to be safeguarded when the appropriate Commission specifies the terms and conditions for determination of tariff. Under Section 64 read with Section 62, determination of tariff is to be made only after considering all suggestions and objections received from the public. Hence, the generic tariff once determined under the statute with notice to the public can be amended only by following the same procedure. Therefore, the approach of this Court ought to be cautious and guarded when the decision has its bearing on the consumers.

38. Regulation 85 provides for extension of time. It may be seen that the same is available only in two specified situations – (i) for extension of time prescribed by the Regulations, and (ii) extension of time prescribed by the Commission in its order for doing any act. The control period is not something prescribed by the Commission under the Conduct of Business Regulations. The control period is also not an order by the Commission for doing any act. Commissioning of a project is the act to be performed in terms of the obligation under the PPA and that is between the producer and the purchaser viz. Respondent 1 and appellant. Hence, the Commission cannot extend the time stipulated under the PPA for doing any act contemplated under the agreement in exercise of its exercise of its powers under Regulation 85. Therefore,

there cannot be an extension of the control period under the inherent powers of the Commission.

39. The Commission being a creature of statute cannot assume to itself any powers which are not otherwise conferred on it. In other words, under the guise of exercising its inherent power, as we have already noticed above, the Commission cannot take recourse to exercise of a power, procedure for which is otherwise specifically provided under the Act.

40. Extension of control period has been specifically held to be outside the purview of the power of the Commission as per EMCO. This appeal is hence, allowed. The impugned orders are set aside. However, we make it clear that this judgment or orders of the Appellate Tribunal or Commission shall not stand in the way of Respondent 1 taking recourse to the liberty available to them for redetermining of tariff if otherwise permissible under law and in which case it will be open to the parties to take all available contentions before the Commission.”

(Emphasis supplied)

31. Hon’ble Justice R. Banumathi, in a separate but concurrent note has observed of this aspect as under :-

“65. It is contended that Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees and the terms and conditions of the PPA cannot be set to be inviolable. Merely because in PPA, tariff rate as per Tariff Order (2010) is incorporated that does not empower the Commission to vary the terms of the contract to the disadvantage of the consumers whose interest the Commission is bound to safeguard. Sanctity of PPA entered into between the parties by mutual consent cannot be allowed to be breached by a decision of the State Commission to extend the earlier control period beyond its expiry date, to the advantage of the generating company-respondent No. 1 and disadvantage of the appellant. Terms of PPA are binding on both the parties equally.

66. In Gujarat Urja Vikas Nigam Limited v. EMCO Limited and Another (2016) 11 SCC 182, facts were similar and the question of law raised was whether by passing the terms and conditions of PPA, the respondent can assail the sanctity of PPA. This Court held that Power Producer cannot go against the terms of the PPA and that as per the terms of the PPA, in case, the first respondent is not able to commence

the generation of electricity within the 'control period' the first respondent will be entitled only for lower of the tariffs.

67. The first respondent placed reliance upon *Gujarat Urja Vikas Nigam Limited v. Tarini Infrastructure Limited and Others* (2016) 8 SCC 743. In the said case, this Court was faced with the substantial question of law viz. whether the tariff fixed under a PPA (Power Purchase Agreement) is sacrosanct and inviolable and beyond review and correction by the State Electricity Regulatory Commission. In that case, respondent No.1 thereon-power producer had entered into a PPA with the appellant therein-distribution licensee for sale of electricity from the generating stations to the extent of the contracted quantity for a period of 35 years at Rs. 3.29 per KWH subject to escalation of 3% per annum till date of commercial operation. However, later the power producer found that the place from where the power was to be evacuated was at a distance of 23 kms. as opposed to a distance of 4 kms, envisaged in the concession agreement entered into between the Respondent-power producer and Narmada Water Resources Department (Respondent No.2 therein). On this ground the respondent had sought revision of tariff by the State Electricity Commission. This Court held that Section 86(1)(b) of the Act empowers State Commission to regulate price of sale and purchase of electricity between generating companies and distribution licensees through agreements for power, produced for distribution and supply and that the state commission has power to re-determine the tariff rate when the tariff rate mentioned in the PPA between generating company and distribution licensee was fixed by State Regulatory Commission in exercise of its statutory powers. Relevant portion of the paras (17) and (18) of the judgment, read as under: (SCC pp.756 & 758)

“17. As already noticed, Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees through agreements for power produced for distribution and supply. As held by this Court in *V.S. Rice & Oil Mills v. State of A.P.* AIR 1964 SC 1781, *K. Ramanathan v. State of T.N.* (1985) 2 SCC 116 and *D.K. Trivedi & Sons v. State of Gujarat* 1986 Supp. SCC 20 the power of regulation is indeed of wide import. ...

18. All the above would suggest that in view of Section 86(1)(b) the Court must lean in favour of flexibility and not read inviolability in terms of PPA insofar as the tariff stipulated therein as approved by the Commission is concerned. It would be a sound principle of interpretation to confer such a power if public interest dictated by the surrounding events and circumstances require a review of the tariff.

The facts of the present case, as elaborately noted at the threshold of the present opinion, would suggest that the Court must lean in favour of such a view also having due regard to the provisions of Section 41 and 21 of the General Clauses Act, 1898. ..."

In the facts and circumstances of that case and that the tariff rate of Rs.3.29/- per KWH was subject to escalation and subject to periodic review. Evacuation was changed from a distance of 4 kms. to 23 kms. from its switch yard. On account of the same, respondent No.1 therein had incurred an additional cost of about Rs.10 crores which was not envisaged in the Concession Agreement. In such facts and changed circumstances, this Court thought it apposite to take a lenient view and allow the State Commission to re-determine the tariff rate.

68. In exercise of its statutory power, under Section 62 of the Electricity Act, the Commission has fixed the tariff rate. The word 'tariff' has not been defined in the Act. Tariff means a schedule of standard/prices or charges provided to the category or categories for procurement by licensee from generating company, wholesale or bulk or retail/various categories of consumers. After taking into consideration the factors in Section 61(1)(a) to (i), the State Commission determined the tariff rate for various categories including Solar Power PV project and the same is applied uniformly throughout the State. When the said tariff rate as determined by the Tariff Order (2010) is incorporated in the PPA between the parties, it is a matter of contract between the parties. In my view, respondent No.1 is bound by the terms and conditions of PPA entered into between respondent No.1 and the appellant by mutual consent and that the State Commission was not right in exercising its inherent jurisdiction by extending the first control period beyond its due date and thereby substituting its view in the PPA, which is essentially a matter of contract between the parties."

(Emphasis supplied)

32. Manifestly, the previous judgement of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited Vs. Tarini Infrastructure Limited, upon which heavy reliance was placed by the Learned Counsel for Gill Acqua has been noted, discussed and differentiated in this case.

33. The observations of the Hon'ble Supreme Court in the above noted judgements fortify the view that PPA executed between the power generator and a Distribution Licensee is a sacrosanct document, the terms and conditions of which are binding upon the parties. Its sanctity cannot be permitted to be breached even by the decision of the State Commission in order to escalate the tariff provided under it to the advantage of the generating company and to the dis-advantage of the Distribution Licensee as well as the consumers. The interests of the consumers is paramount and Section 61(d) of the Electricity Act, 2003 requires the Commission to safeguard such interests while specifying the terms and conditions for determination of tariff.

34. The question of law formulated by us in foregoing paragraph no. 21 stands answered accordingly.

35. In the instant case, undisputedly M/s Gill Acqua has set up its power project MBL-III under NRSE Policy, 2006 notified by the Government of Punjab. We note that in pursuance to said policy, the Commission had passed a tariff order dated 13th December, 2007 applicable to the projects set up under the said policy, determining

the tariff applicable for all such projects. The relevant portion of the said order are quoted hereinbelow :-

“Accordingly, the Commission approves rates as indicated in the GOP NRSE Policy subject to the following observations :

- a. These rates will be considered the minimum rates that a NRSE developer can claim. It is entirely possible that NRSE projects adopting different technologies and/or fuels might need enhanced rates for their encouragement. Therefore, individual developers would be free to approach the Commission for determination of such rates. The Commission will, at that stage, decide whether rates are to be approved individually in each case or generically for a category of cases.*
- b. The tariff rate for purchase of power by the Board/Licensee during the year 2007-08 shall be*

<i>• Biomass, Urban/Municipal/Ind. liquid /solid waste to energy and wind power projects</i>	<i>366 P/Unit</i>
<i>• Mini/ Micro Hydel, Bagasse/Biomass based Co-generation</i>	<i>359 P/Unit</i>
<i>• Solar energy</i>	<i>735 P/Unit</i>

- c. The Commission notes that an important element of Government’s policy is to encourage NRSE sector by offering attractive rates initially for a period of 5 years and in case there is no further revision in subsequent policies, rates payable to such projects would be those applicable to PSEB’s HT consumers. The effect of this stipulation is that attractive tariff rates intended to encourage investment in this sector will be made available to developers in perpetuity. It is entirely understandable that such rates must be available over the period of pay back of any particular project and even beyond that to allow entrepreneurs earn reasonable profits on their investment. However, enhancement of these rates in perpetuity is not justified and is against the long term interests of the consumers. Accordingly, the Commission holds that rates as*

prescribed in the Policy will be applicable for a period of 5 years (upto 2011-12) after which the last escalated tariff shall continue and the Commission will determine the manner in which further enhancement in tariff, if any, by way of encouragement to the sector is to be effected.....

12. The Policy provides that private developers will file a petition before the Commission for approval of tariff which would then be given effect by licensees for signing the PPAs within 45 days. On the other hand, the directive of July 2007 issued by the State Govt. enjoins that the Commission shall not decide the tariff of NRSE projects on a case to case basis. Clearly the provisions of the Policy and the directive contradict each other. The Commission has in this order already approved the rates that will be applicable to developers of NRSE power, wheeling costs thereof and the manner in which sale can be effected to third parties. In the light thereof, individual developers need not, in future, file separate petitions before the Commission and so long as PPA's conform to the findings of the Commission in this order they would be free to approach the licensees for signing of PPAs on that basis."

36. The parties accepted the said tariff order dated 13th December, 2007 and even incorporated its terms related to tariff in the Power Purchase Agreement dated 4th June, 2006. There is reference to the said tariff order in the recital at page 1 of the said PPA in following words :-

"WHEREAS, the Punjab State Electricity Regulatory Commission (PSERC) has vide its order dated 13.12.07 approved the purchase of power by the Board from the NRSE projects located in the State of Punjab on the terms and at the rates approved in the said order under NRSE Policy, 2006."

37. Clause 2.1.0 of the PPA relates to tariff and is extracted herein below :-

“2.1.0 Sale of Energy by Generating Company

2.1.1 The Board shall purchase and accept all energy made available at the interconnection point from the Generating Company’s facility, pursuant to the terms & conditions of this Agreement at the following rates approved by the Commission in its order dated 13.12.07:-

(i) Rs.3.70/-KWH (for the year 2008-09) with 3% annual escalation up to 2011-12. At the end of the above specified escalation period, the tariff payable shall be the last escalated tariff for the year 2011-12 and shall remain in force during the remaining term of the PPA. Any enhancement in tariff after the last escalation shall be as determined and approved by the Commission.

(ii) The escalated tariff will be applicable from 1st day of April, each year. The rate would be uniform throughout the day for the entire year. No additional payments shall on any account be payable by the Board.”

38. When the tariff determined by the Commission by way of tariff order dated 13th December, 2007 for various types of power projects was accepted by the parties i.e. M/s Gill Acqua & PSPCL by incorporating the same in the PPA dated 4th June, 2006 executed between them, the tariff so fixed in the said tariff order became a matter of contract between the parties. Both Gill Acqua as well as PSPCL are bound by each and every terms/conditions of the PPA including the clause related to tariff.

39. Mere fact that the extensions in completion of the project claimed by Gill Acqua were agreed to by PEDDA and the COD of the project was extended till 31st March, 2016 does not entitle Gill Acqua

to claim benefit of higher tariff under NRSE Policy, 2012. It is for the reason that the power project MBL-III was allocated to Gill Acqua and was set up under the NRSE Policy, 2006 and, therefore, it continued to be governed by the said policy. The NRSE policy of 2012 is applicable to only those projects which were allocated and registered under the said policy and would not apply to the projects which have been allocated and registered under the previous policy of 2006.

40. In view of the same, the power project of Gill Acqua continued to be covered under NRSE Policy of 2006 as well as the tariff order dated 13th December, 2007 as incorporated in the PPA dated 4th June, 2006 executed by it with PSPCL, even though it achieved its commercial operation on 31st December, 2016.

41. Now coming to the determination of tariff done by the Commission for the project in question vide the impugned order. A bare reading of the above noted provisions of the tariff order dated 13th December, 2007 as well as clause 2.1.1 (i) of the PPA clearly indicates that the Commission had taken a conscious decision to determine only generic tariff and at the same time, the Commission also clothed itself with the power to determine and approve any

enhancement in tariff after 2011-12. Therefore, we concur with the submissions of the Appellant's counsel that by incorporating the line "any escalation in tariff after the last escalation shall be determined and approved by the Commission" in clause 2.1.1(i) of the PPA, the Commission manifestly retained in itself the power to re-determine the tariff in individual cases after 2011-12 where need for such redetermination arises. That is exactly what the Commission has done in this case. The Commission has not gone beyond the provisions of PPA in determining the tariff for the appellants' project. The tariff has been fixed strictly in consonance with clause 2.1.1(i) of the PPA. There has been no change in the tariff for Appellants' project in contravention of any of the clauses of the PPA. Hence, there is no reason or occasion for the PSPCL to be aggrieved by the tariff determined by the Commission for project of Appellant M/s Gill Aqua in the impugned order.

42. Hence, we are of the opinion that the Commission rightly refused to equate the project MBL-III of Gill Aqua with the projects set up under NRSE Policy, 2012. We also find that the tariff determined by the Commission for the said project is not in contravention of any of the provisions of the PPA but is strictly in

consonance with the clause 2.1.1(i) of the PPA. Therefore, we do not find any error or infirmity in the impugned order of the Commission.

43. Resultantly, both the appeals are found devoid of any merit and are dismissed.

Pronounced in the open court on this 25th day of September, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

Js