

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

**APL No. 244 OF 2022 & IA No. 1148 OF 2024 & IA No. 922 OF 2022
& IA No. 1243 OF 2022 & IA No. 1523 OF 2024 & IA No. 1931 OF
2024 & IA No. 1930 OF 2024**

**APL No. 286 OF 2023 & IA No. 895 OF 2022 & IA No. 1921 OF 2022
& IA No. 130 OF 2024 & IA No. 1159 OF 2024**

APL No. 288 OF 2023 & IA No. 988 OF 2022 & IA No. 1154 OF 2024

Dated: 17.01.2025

**Present: Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon`ble Ms. Seema Gupta, Technical Member (Electricity)**

In the matter of:

**APL No. 244 OF 2022 & IA No. 1148 OF 2024 & IA No. 922 OF 2022 & IA No.
1243 OF 2022 & IA No. 1523 OF 2024 & IA No. 1931 OF 2024 & IA No. 1930 OF
2024**

**Damodar Valley Power Consumers
Association & Ors. Appellant(s)**

Versus

**West Bengal Electricity Regulatory
Commission & Anr. Respondent(s)**

Counsel on record for the Appellant(s) : Rajiv Yadav for App. 1 to 38

Counsel on record for the Respondent(s) : Mandakini Ghosh for Res. 1

Nehal Jain
Shri Venkatesh
Shryeshth Ramesh Sharma
Bharath Gangadharan
Ashutosh Kumar Srivastava
Nihal Bhardwaj
Siddharth Nigotia
Shivam Kumar
Kartikay Trivedi
Aashwyn Singh
Punyam Bhutani

Suhael Buttan
Priya Dhankar
Himangi Kapoor
Vineet Kumar
Nikunj Bhatnagar
Manu Tiwari
Harsh Vardhan
Anant Singh
Abhishek Nangia
Kunal Veer Chopra
Vedant Choudhary
Mohit Gupta
Aditya Tiwari for Res. 2

**APL No. 286 OF 2023 & IA No. 895 OF 2022 & IA No. 1921 OF 2022 & IA
No. 130 OF 2024 & IA No. 1159 OF 2024**

Inox Air Products Private Limited **Appellant(s)**

Versus

**West Bengal Electricity Regulatory
Commission & Anr.** **Respondent(s)**

Counsel on record for the Appellant(s) : Dipali Sheth
Keyur Talsania
Shubham Mehta for App. 1

Counsel on record for the Respondent(s) : Mandakini Ghosh for Res. 1

Shri Venkatesh
Shryeshth Ramesh Sharma
Bharath Gangadharan
Ashutosh Kumar Srivastava
Nihal Bhardwaj
Siddharth Nigotia
Shivam Kumar
Kartikay Trivedi
Punyam Bhutani
Suhael Buttan
Himangi Kapoor
Vineet Kumar
Nikunj Bhatnagar
Manu Tiwari
Harsh Vardhan
Anant Singh

Abhishek Nangia
Kunal Veer Chopra
Nehal Jain
Vedant Choudhary
Mohit Gupta
Aditya Tiwari for Res. 2

APL No. 288 OF 2023 & IA No. 988 OF 2022 & IA No. 1154 OF 2024

Dinman Polypacks Private Limited **Appellant(s)**

Versus

**West Bengal Electricity Regulatory
Commission & Anr.** **Respondent(s)**

Counsel on record for the Appellant(s) : Basudeb Biswas
Rahul Podda for App. 1

Counsel on record for the Respondent(s) : Mandakini Ghosh for Res. 1

Shri Venkatesh
Shryeshth Ramesh Sharma
Bharath Gangadharan
Ashutosh Kumar Srivastava
Nihal Bhardwaj
Siddharth Nigotia
Shivam Kumar
Kartikay Trivedi
Aashwyn Singh
Punyam Bhutani
Suhael Buttan
Priya Dhankar
Himangi Kapoor
Vineet Kumar
Nikunj Bhatnagar
Manu Tiwari
Harsh Vardhan
Anant Singh
Abhishek Nangia
Kunal Veer Chopra
Nehal Jain
Vedant Choudhary
Mohit Gupta
Aditya Tiwari for Res. 2

ORDER

IA No. 1148 OF 2024 IN APL No. 244 OF 2022
IA No. 1159 OF 2024 IN APL No. 286 OF 2023
IA No. 1154 OF 2024 IN APL No. 288 OF 2023

(for Vacation of Stay)

PER HON'BLE SMT. SEEMA GUPTA, TECHNICAL MEMBER (ELECTRICITY)

1. The application being IA No.1148 of 2024 in Appeal No. 244 of 2022 is filed by Damodar Valley Corporation, the Respondent No 2 in the appeal (here-in-after referred as “**Applicant/DVC**”) seeking vacation of stay of the impugned order granted by this Tribunal on 21.06.2022.

2. The application being IA No.1159 of 2024 in Appeal No. 286 of 2023 is filed by Damodar Valley Corporation, the Respondent No 2 in the appeal (here-in-after referred as “**Applicant/DVC**”) seeking vacation of stay of the impugned order granted by this Tribunal on 06.06.2022.

3. The application being IA No.1154 of 2024 in Appeal No. 288 of 2023 is filed by Damodar Valley Corporation, the Respondent No 2 in the appeal (here-in-after referred as “**Applicant/DVC**”) seeking vacation of stay of the impugned order granted by this Tribunal on 01.07.2022.

Brief background of the cases is as under:

4. Appeal No. 244 of 2022 by Damodar Valley Power Consumers' Association ("**Appellant-Association**"), Appeal No. 286 of 2023 by Inox Air Products Private Limited ("**Appellant – Inox**") and Appeal No. 288 of 2023 by Dinman Polypacks Private Limited ("**Appellant-Dinman**") have been filed against Order dated 05.05.2022 in Case No. TP-71/16-17 ("**Impugned Order**") passed by West Bengal Electricity Regulatory Commission ("**WBERC**" / "**Respondent No. 1/State Commission**"), whereby the WBERC has determined the tariff for distribution and retail supply for Damodar Valley Corporation ("**DVC**" / "**Respondent No. 2**" / "**Applicant**") for the control period FY 2017-18 in respect of the consumers within the State of West Bengal.

5. The Impugned Order dated 05.05.2022 determined the tariff for the distribution and retail supply for 2017-18 based on the projections submitted by the Applicant in 2016 and the WBERC while determining the tariff for 2017-18 directed that all rates and tariff mentioned shall be effective from 01.04.2017 and any adjustment in energy bills from the period 01.04.2017 till date shall be made by DVC in eight instalments in the bills for the month of June 2022 and onwards.

6. This Tribunal, in Appeal No. 286 of 2023 passed an Interim Order on 06.06.2022 (hereinafter referred as "**First Stay Order**") and granted stay on the recovery of arrears as per tariff determined by WBERC in the impugned order. Further, by its order dated 21.06.2022 in Appeal No. 244 of 2022, this Tribunal granted stay in terms of the order passed by it on 06.06.2022 in Appeal No. 286 of 2023. Similarly, in Appeal No. 288 of 2023, this Tribunal granted stay of the impugned order on

01.07.2022 in terms of the order passed by it on 06.06.2022. Through all the above orders, this Tribunal granted an *ex parte ad interim* stay on the direction of WBERC for payment of tariff arrears determined under the Impugned Order subject to the condition that the Appellants; i.e. Appellant - Association, Appellant –Inox and Appellant –Dinman shall pay full tariff at the rate determined in the Impugned Order for the period commencing from the date of the Impugned Order.

7. During the pendency of the present batch of Appeals before this Tribunal, on 08.10.2022, the Applicants filed the Annual Performance Review (“**APR**”) Petition before WBERC for truing up of the ARR and tariff for the control period FY 2017-18 based on the actual audited figures.

8. This Tribunal, on 17.10.2022 observed that in rendering the Impugned Order for determination of tariff for 2017-18 after more than five years, WBERC has ignored the audited accounts which were available for FY 2017-18, *prima facie*, on a plea that an order on ARR must mandatorily be based on projections only. Since the actual data for FY 2017-18 was available and since the delay was not attributable to the Appellants in the present batch of matters, this Tribunal stayed the Impugned Order till a final decision was taken on the Interim Applications filed by the Appellants (hereinafter referred as “**Second Stay Order**”). Being aggrieved by the Second Stay Order, the Applicants approached the Hon’ble Supreme Court *vide* C.A. Nos. 8091-98 of 2022 seeking to set aside the Second Stay Order. On 23.11.2022, the Hon’ble Supreme Court passed an order and directed

that the interim arrangement in the “**First Stay Order**” shall stand restored during the pendency of the present batch of Appeals and the Appellants shall pay the full tariff at the rate as determined by WBERC starting from the date of the Impugned Order. The Supreme Court also clarified that pendency of the appeal before the Appellate Tribunal should not be an impediment for the WBERC to consider the issue relating to True up charges which is pending before it and pass appropriate order in accordance with law.

9. Parallely, the consumers/ consumer associations of the Applicant i.e. DVC had filed Writ Petitions being W.P.A. No. 9857 of 2022 and batch of matters titled as ‘*H.P. Ispat Pvt. Ltd. & Anr. v. WBERC & Ors.*’ before the Hon’ble High Court of Calcutta challenging the Impugned Order. On 17.02.2023, the Hon’ble High Court of Calcutta passed its Judgment in the said batch of Writ Petitions, while dismissing the same.

10. In view of the Supreme Court Order dated 23.11.2022 (“**First SC Order**”) and the Order dated 17.02.2023 passed by the Hon’ble High Court of Calcutta, the Applicant had filed Interim Applications (I.A. No. 429 of 2022 filed in Appeal No. 244 of 2022; I.A. No. 435 of 2022 filed in Appeal No. 286 of 2023 and I.A. No. 438 of 2022 filed in Appeal No. 288 of 2023) seeking vacation of the Stay Order. This Tribunal vide its order dated 31.03.2023 rejected the said Interim Applications filed by the Applicant observing as under :

“While it is true that the Order of this Tribunal dated 17.10.2022 was alone under challenge before the Supreme Court and not the earlier dated 06.06.2022, the Supreme Court, in its Order dated 23.11.2022,

took note of both the interim orders of this Tribunal dated 06.06.2022 and 17.10.2022 and, while setting aside the Order dated 17.10.2022, restored the earlier Order dated 06.06.2022 (whereby recovery of arrears was alone stayed by this Tribunal).

It is, therefore, difficult for us to accept the submission of Mr. M.G. Ramachandran, learned Senior Counsel for the Respondent-Applicant, that, since the earlier Order dated 06.06.2022 was interim in character, it was open to them to file a petition to have the said order vacated. While the submissions urged on behalf of the Respondent-Applicant cannot be readily brushed-aside, the aforesaid order of the Supreme Court dated 23.11.2022, a final order which is binding on this Tribunal, disables us from hearing the petition to vacate stay, since the directions of the Supreme Court is for the interim arrangement made by it to continue till the Appeals are finally heard and decided.

For the aforesaid reasons, and in the light of the Order of the Supreme Court in Civil Appeal No. 8091-8098 dated 23.11.2022, we must express our inability to vacate the earlier interim order dated 06.06.2022. The IAs stand dismissed accordingly.”

11. Being aggrieved thereby, the Applicant challenged the Order dated 31.03.2023 passed by this Tribunal *vide* C.A. No. 3164-3171 of 2023 before the Hon'ble Supreme Court, which were listed before the Hon'ble Supreme Court on 15.05.2023 (hereinafter referred as “**Second SC Order**”), wherein, while disposing of the said Civil Appeals, it was held as under:

“1. These appeals can be disposed of with a direction to the West Bengal Electricity Regulatory Commission to consider the issue relating to truing up charges pending before it without being influenced by any of the proceedings pending before the Appellate Tribunal for Electricity (in short “APTEL”) or any other Forum or order(s) passed by the APTEL or any other Forum.

2. *Needless to state that before passing any orders, the learned Commission would give an opportunity of being heard to parties concerned.*

3. *The appeals are disposed of accordingly.”*

12. Pursuant to the directions of the Hon'ble Supreme Court in its order dated 15.05.2023 ("**Second SC Order**"), the WBERC passed its Order in Case No. APR – 106/22-23 filed by the Applicants on 08.10.2022 seeking APR for FY 2017-18 (in terms of the trued-up figures available for FY 2017-18) based on the audited annual accounts for the concerned year (herein after referred as "**APR Order**") The Applicant, in view of the "**APR Order**", and Supreme Court Order dated 15.05.2023 ("**second SC order**"), filed IA bearing No. 2527 of 2023 in Appeal No. 244 of 2022; IA 2528 of 2023 in Appeal No. 286 of 2023 and IA 2530 of 2023 in Appeal No. 288 of 2023 under Order XXXIX Rule 4 of the Code of Civil Procedure, 1908 ("**CPC**") before this tribunal seeking vacation of the First Stay Order.

13. This Tribunal, on 05.04.2024, dismissed the Applications filed by the Applicant observing mainly the interim order of Supreme Court in Civil Appeal No. 8091-8098 dated 23.11.2022, which directed the Interim order of this Tribunal to remain in force during pendency of the Appeals.

14. Being Aggrieved by order dated 05.04.2024 of this Tribunal, the Applicants carried the matter before the Hon'ble Supreme Court by way of C.A. Nos. 5890-93 of 2024. The Hon'ble Supreme Court on 17.05.2024, disposed of the aforesaid Civil Appeals ("**third SC Order**") holding as under:

“ ...

5. The order passed by this Court on 23.11.2022 was an interim arrangement pending disposal of appeals before the Tribunal. Considering the subsequent development of the WERC's order dated 18.09.2023, there was definitely an occasion to either re-consider the interim order or to dispose of the appeals pending before the Tribunal. Taking note of the large number of appeals pending before it, the Tribunal observed that the present appeals cannot be taken up out of turn. We respect this decision of the Tribunal.

6. We only clarify that the order of this Court dated 23.11.2022 shall not stand in the way of the Tribunal reconsidering the interim order dated 06.06.2022 in the light of WBERC's order dated 18.09.2023 or to hear the appeals on merit. We leave it to the Tribunal to adopt such course as it considers appropriate.

7. Needless to say, we have not expressed any opinion on the merits of the matter.

15. The Applicant has filed the present Applications seeking vacation of the Stay Orders passed by this Tribunal on 06.06.2022 in Appeal No. 286 of 2023; on 21.06.2022 in Appeal No. 244 of 2022 and on 01.07.2022 in Appeal No. 288 of 2023.

Submissions by the Applicant (Respondent No 2)

16. Shri Venkatesh, learned counsel for the Respondent No.2 submitted that the APR Order passed by WBERC on 18.09.2023, is based on actual audited data which corrected the earlier projections relied upon in the Impugned Order and upon scrutiny of the actual audited accounts of the DVC for FY 2017-18, determined that the actual recoverable amount was higher than the amount previously assessed. This development invalidates the Appellants primary contention that the

projections utilized in the impugned order resulted in an inflated tariff; on the contrary, the APR Order reveals that the actual tariff of the DVC, based on the actual audited figures, is significantly higher than the tariff assessed by the WBERC in the Impugned Order as given below :

S. No	Items	Unit	Order dated 05.05.2022	Order dated 18.09.2023
1.	ARR approved	Rs Cr.	3712.78	3774.48
2.	Revenue Gap of 2009-14	Rs Cr.	53.66	53.66
3.	Revenue Gap of 2006-07	Rs Cr.	184.85	184.85
4.	Carrying Cost	Rs Cr.	162.77	162.77
5.	Net ARR approved (1+2+3+4)	Rs Cr.	4110.05	4171.76
6.	Approved Sale	MU	8198.66	7405.59
7.	Per Unit Rate (5/6)	Rs/kWh	5.01	5.63

17. Therefore, the APR Order, constitutes a material change in circumstances warranting a reconsideration of the interim stay granted by this Tribunal. Learned counsel further contended that under the regulatory framework of the WBERC, as provided under the WBERC (Terms and Conditions of Tariff) Regulations, 2011 ("Tariff Regulations"), the tariff determination order, i.e., the ARR Order (based on projections), is subsequently subsumed within the APR Order (based on actual audited accounts). The Tariff Regulations provide the framework for how the ARR, initially determined through projections, is periodically reviewed and modified through the APR to ensure alignment with actual operational realities. Accordingly, the grievances raised by the Appellants have been duly addressed and accounted for by the WBERC in the APR Order 18.09.2023, which is based on the actual audited figures of the DVC and in accordance with the regulatory framework

established by the WBERC and issues raised in the appeals challenging the Impugned Order have become infructuous due to subsequent developments, particularly the issuance of the APR Order dated 18.09.2023.

18. Learned counsel for the Applicant submitted that until May 2022, DVC was only recovering the tariff that had been determined by WBERC for the erstwhile control period of FY 2016-17, which were significantly lower than the tariffs determined in the Impugned Order. Consequently, until May 2022, the consumers of DVC were enjoying the benefits of the lower tariff being charged by DVC. Furthermore, despite the delayed adjudication spanning of nearly six years, no carrying cost has been awarded to DVC for the belated recovery.

19. Learned counsel submitted that due to the interim stay, DVC has been prevented from recovering legitimate tariff arrears, resulting in financial distress and operational challenges. Additionally, certain consumers have disconnected their services, leaving substantial arrears unpaid. These outstanding dues risk becoming bad debts, thereby causing irreparable financial loss to DVC, which is further aggravated by regulatory limitations on recovering such debts through tariffs. This financial hardship arises directly from the continued enforcement of the stay order, highlighting the need for adjudication of the Applications for Vacation of Stay in the light of the change in circumstances. “Undue hardship” is normally related to economic hardship. “Undue” which means something which is not merited by the conduct of the claimant or is very much disproportionate to it. Undue

hardship is caused when the hardship is not warranted by the circumstances. In this regard, learned counsel placed its reliance on the decision in “**Monotosh Saha v. Special Director, Enforcement Directorate & Anr.**”, 2008 (12) SCC 359.

20. Learned counsel for the Applicant submitted that the Appellant-Inox has raised a plea in the appeals that WBERC erred in retrospectively determining the tariff for FY 2017-18, in contravention of the framework prescribed under the Electricity Act, 2003, and the Tariff Regulations. In this regard, it is submitted that Regulation 2.10.2 of the Tariff Regulations stipulates that tariff adjustments are typically implemented for future periods. Notably, the Impugned Order was issued pursuant to the Order dated 13.01.2022 passed by the Calcutta High Court, which remains unchallenged by the Appellants.

21. Learned Counsel, referring to the supreme court decision in “**Kanoria Chemicals & Industries Ltd. v. State of U.P.**,” (1992) 2 SCC 124, submitted that retrospective effect for tariff revisions is permissible under statutory provisions, such as Section 60(5) of the Electricity (Supply) Act, 1948 (as amended). Learned counsel contended that this tribunal itself, has upheld retrospective tariff determination as justified, particularly for delays in fixing tariffs for specific years. In support of this contention, learned counsel places reliance on the following judicial precedents:

- (i) Judgment dated 26.05.2006 in Appeal No. 4 of 2005 & Batch -
Siel Limited v. PSERC & Ors.

(ii) Judgment dated 31.05.2013 in Appeal No. 179 of 2012 - **Kerala HT and EHT Consumers v. KSERC & Anr.**

(iii) Judgment dated 22.08.2014 in Appeal No. 111 of 2013 - **Snam Alloys Pvt. Ltd. & Ors. v. JERC & Anr.**

Section 62 and 64(6) of the Electricity Act, 2003, permit retrospective tariff implementation by empowering commissions to specify the effective period of tariff orders.

22. Learned counsel for the Applicant also submitted that the Appellant- Inox only became a consumer of DVC in July 2019 and since then until May 2022, Appellant-Inox procured power from DVC at the previously determined tariff. After issuance of the impugned Order, DVC raised bills on Inox for electricity supplied during the period from July 2019 to May 2022, seeking recovery of the differential tariff amount in eight instalments commencing from June 2022. The contention raised by Appellant-Inox that it cannot be subjected to retrospective recovery of tariff arrears is devoid of merit and is liable to be dismissed by this Commission. Learned counsel also submitted that for Appellant – Dinman, interim stay order was granted by this Tribunal on 01.07.2022, however, Appellant – Dinman has failed to appear before this Tribunal during the course of hearing of the present batch of Applications and accordingly, the interim stay Order being enjoyed by it merits vacation.

Submission by Appellants in APL 244 OF 2022 (Appellant - Association) & APL 286 of 2023 (Appellant – Inox)

23. Learned counsel for the Appellants submitted that for change in circumstances and undue hardship under Order 39 Rule 4 of the CPC, pursuant to WBERC's Order dated 18.09.2023 ("APR Order"), DVC has failed to provide sufficient pleadings or evidence to meet the two criteria required to be satisfied under law for vacating the stay i.e., i) change in circumstance; or ii) undue hardship.

24. Learned counsel for the Appellants submitted that the APR order dated 18.9.2023 for FY 2017-18 does not provide immediate financial benefit to DVC as in the said APR order, the State Commission has provided for the adjustment of the revenue gap of Rs. 782 crore or any part thereof with the ARR of FY 2020-21 or any subsequent years, as may be decided by the commission and as such no recovery of the Rs. 782 crore revenue gap has been ordered through a tariff hike or otherwise. Even if the 'stayed amount' had been considered in the APR, thereby resulting in higher revenue gap, it would still be adjusted in the future. The future adjustment of past revenue gaps or surpluses aligns with Regulations 2.10.2 and 2.6.6 of the WBERC Tariff Regulations, 2011, preventing retrospective tariff revision. Such a mechanism is part of regulatory tariff regime and does not entail any hardship. Notably, ₹782 crore revenue gap includes ₹53 Crore pertaining to FY 2009-14 and ₹181 crore pertaining to FY 2006-07. Accordingly, the adjustment or recovery of the revenue gap for these earlier tariff periods has also been deferred to a future period.

25. The notional revenue gap amount, which may decrease or even reduce to nil due to revenue surplus in intervening years, does not constitute undue hardship. The actual adjustment/recovery of the cumulative revenue gap/surplus has occurred later in the ARR order dated 13.3.2024 for FY 2023-26. In this order, the State Commission has only adjusted Rs. 689 crores of the Rs. 782 crores from FY 2017-18. Thus, recovery of the entire Rs. 782 crores determined in the APR order for FY 2017-18 has not yet been ordered. The future adjustment of past period revenue gaps does not cause a tariff shock, as such adjustments are incorporated into the current year's Annual Revenue Requirement (ARR) and recovered through a per-unit tariff increase in monthly bills during the said ARR period. The adjustment of past period revenue gaps/surpluses pertaining to FY 2006-09 to FY 2017-18, as reflected in the ARR order for FY 2023-26, has resulted in a tariff increase of 15 paise per unit. This Tribunal, in its order dated 05.04.2022, held that the deferred recovery/ future adjustment did not constitute a change in circumstances. Learned counsel for the Appellant relying on the supreme court judgment in "**Paper Products Ltd. v. CCE**", (2007) 7 SCC 352, submitted that the finding of this Tribunal remains undisturbed by the Hon'ble Supreme Court's order dated 17.5.2024, as its validity was not challenged by the Applicant -DVC before the Supreme Court.

26. Regarding the contention of the Applicant that few consumers are leaving the network of DVC, learned counsel for the Appellant submitted that Applicant DVC's Affidavit dated 29.8.2024 confirms that 9

consumers were disconnected for non-payment of current energy bills under Regulation 4.1 of the WBERC Supply Code. Among these, 4 consumers namely M/s Alaknanda Sponge Iron Ltd, Vaishnavi Ispat Pvt. Ltd., K. B. Sponge & Iron Ltd., and Shivam Meltech Pvt. Ltd were members of Association (DVPCA) at the time of the appeal. The Tribunal's stay order dated 21.6.2022 applied only to consumers who were DVPCA members when the appeal was filed. Further, DVC's Affidavit dated 21.08.2024 has disclosed that it has already initiated NCLT, Kolkata proceedings against Alaknanda Sponge Iron Ltd, K. B. Sponge & Iron Ltd., and Shivam Meltech Pvt. Ltd. for arrears recovery. Such NCLT proceedings were made possible because of the balanced protective mechanism devised by this Tribunal in the order dated 6.6.2022/ 21.6.2022, by expressly stipulating that the stay on recovery of past arrears was *"subject to the condition that the appellant pays full tariff at the rate as determined by the impugned order for the period commencing with date of impugned order and continuous to do so month by month against the periodic bills that are raised under the contract between the parties"*.

27. It is further contended that this Tribunal, vide its order dated 07.10.2024 observed that *"the only manner in which the interests of the 2nd Respondent-DVC can be protected is by directing the Appellant-Association to take necessary steps to have such of those members, who were its members on the date of institution of appeal, arrayed as co-appellants in the present appeal, for, once these members are also arrayed as co-appellants, they would be bound by any order of restitution which this Tribunal may pass, cases the appeals were to be*

dismissed later.” Thereafter, in compliance of the said order dated 7.10.2024, 38 consumers have filed applications seeking impleadment as co-appellants with a specific undertaking that they “*shall be bound by the outcome of the present Appeal in their individual capacity*”. The said impleadment applications were allowed by this Tribunal, vide order dated 18.11.2024. Therefore, DVC’s interest is protected in the event of the present appeal being dismissed as such co-appellants would be bound in law to abide by the order of restitution, if any.

28. Learned counsel for the Appellants submitted that besides other grounds, APL 286 of 2023 (by Appellant –Inox) relied on Regulation 2.10.2 regarding revision of tariff from prospective date, and stay order dated 06.06.2022 passed by this Tribunal in said Appeal was adopted in the current appeal on 21.06.2022. The Regulation 2.10.2 of the West Bengal Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2011 (“WBERC Regulations”) states that tariff revisions shall ordinarily take effect prospectively, except in cases where compelling reasons necessitate retrospective revision. This interpretation has been affirmed by this Tribunal in its Order dated November 11, 2011, in OP No. 1 of 2011, wherein it directed the WBERC to initiate tariff proceedings annually in accordance with the timelines prescribed under its Regulations and to ensure that the annual tariff is determined prior to the commencement of the relevant Financial Year. The WBERC has failed to provide any cogent or compelling reasons for the retrospective determination of tariff as required under the aforementioned Regulation.

29. No change in circumstances has arisen due to the APR order for FY 2017-18 as stay orders dated 06.06.2022/21.06.2022 were predicated on the retrospective revision of tariff effective from 01.04.2017 and this retrospective revision remains unaddressed by the APR order dated 18.09.2023. Learned counsel relied on the judgment in “**Madhavlal Narayanlal Pittie and Others v. Madhavlal Narayanlal Pittie and Others**”, 2017 SCC Online 1796. Learned Counsel further asserted that the State Commission, while discharging functions under section 86 of Electricity Act 2003 should be in conformity with Regulations under Section 181 thereof and relied upon the judgement in “**PTC India Ltd. v. Central Electricity Regulatory Commission**”, (2010) 4 SCC 603.

30. Learned counsel further submitted that by seeking vacation of stay, DVC is essentially seeking a right to enforce the retrospective bills raised by it that are contrary to Regulation 2.10.2. Even if the APR order dated 18.09.2023 had permitted retrospective revision, it would still violate Regulation 2.10.2. Notably, the State Commission has deliberately avoided any retrospective revisions in ARR/APR orders since the stay orders in these appeals. The APR order dated 18.9.2023, itself, has deferred recovery / adjustment of the partial revenue gap stayed amount, it is anomalous to contend that such APR order has provided a fresh basis to seek enforcement of retrospective bills *in praesenti*. Vacation of stay would create disparities for FY 2017-18 arrears: namely (i) revenue gap of Rs. 782 cr. to be recovered in future in a staggered manner and without delayed payment surcharge; and (ii) the stayed amount in terms of the retrospective bills with delayed

payment surcharge. This would result in a situation where consumers would be worse off as a result of the stay order and/or due to State Commission's omission to undertake a complete APR exercise (including the stayed arrears).

31. Thus, there is no material change in circumstances that justifies vacating the stay granted by the Interim Order, further, the Appeals are at its final stage, and vacating the stay now would cause unnecessary delays. The Repeated applications by DVC to vacate the stay only prolong proceedings without cause. Learned counsel for Appellant – Inox asserted that vacating the stay would render their Appeal infructuous, as the Appellant's principal grievance concerns the retrospective tariff determination. Allowing recovery before final adjudication would impose an undue burden on the Appellants.

Discussion and Analysis

32. Heard Shri Venkatesh, learned counsel for the Applicant (Respondent No 2), Shri Amit Kapoor & Shri Rajiv Yadav, learned counsel for the Appellant– Association and Ms Dipali Seth, learned counsel for the Appellant–Inox at length. The main contentions raised by the Applicant is of changed circumstances after passing of the APR order dated 18.09.2023 for FY 2017-18 based on actual audited figures thus satisfying requirements of the second proviso to Order 39 Rule 4 of the CPC for modification of the stay order, undue hardship caused to the applicant on account of non-recovering of past dues and more so as no carrying cost has been granted for the period from 01.04.2017 till

passing of the impugned order dated 05.05.2022; no restriction on this Tribunal to review its Stay order in view of Hon'ble Supreme court order dated 17.05.2024. On the other hand, learned counsels for the Appellants have strongly contended that there is no change in circumstance as APR Order dated 18.09.2023 has directed the adjustment of the revenue gap of Rs. 782 crore or any part thereof with the ARR of FY 2020-21 or any subsequent years. The learned counsel for the Appellant-Inox has also contended that retrospective application of Tariff in the impugned order; plea of which raised by them in their appeal, has not been addressed in the APR order, and thus, APR order dated 18.09.2023 does not constitute change in circumstances. The contentions raised by parties on both the sides are deliberated as under:

33. During the proceedings of second vacation stay application of the Applicant earlier, this Tribunal by its order dated 05.04.2024 dismissed the stay application of the Applicant mainly on the basis that interim order of the Supreme Court in Civil Appeal No 8901-8098 dated 23.11.2022 directed that interim order passed by this Tribunal on 06.06.2022 to remain in force during the pendency of the present appeal, which puts restrictions on this Tribunal to hear the Vacate Stay application of the Applicant. This Tribunal has also made observation that vacate stay application does not meet the requirement of Order 38 Rule 4 of CPC regarding change in circumstances, which has been referred by learned counsel for the Appellants. Relevant Extract of the order is reproduced below:

“However, the said order of the WBERC dated 18.09.2023 itself records that the entire recoverable amount of around Rs.782.23 Crores shall be adjusted the aggregate revenue requirement for the year 2020-21 or any subsequent year as may be decided by the Commission. The interim order put in place by the order of the Supreme Court in Civil Appeal No. 8091-8098 dated 23.11.2022, which order is to operate during the pendency of the appeals before this Tribunal, relates to FY 2017-18. The subsequent event of a true up order being passed, more so when recovery in terms of the said order was to be effected from the ARR of 2020-21, evidently does not have any bearing on the interim order passed in an appeal preferred against the ARR order passed by the WBERC for FY 2017-18. This would not constitute a change in circumstances justifying a second vacate stay petition being filed.”

34. This Tribunal had also expressed its inability to accede to the request of applicant to hear the main appeal out of turn, as Applicant has contended that stay order of this Tribunal has disabled the Applicant to recover huge sum of money, in view of huge pendency of Appeals of Previous years on the file of this Tribunal.

35. The Supreme Court in its order dated 17.05.2024 in Civil Appeal No 5890-5893 of 2024 filed by applicant challenging the order dated 05.04.2024 of this Tribunal, took cognizance of the predicament of this Tribunal in the order dated 05.04.2024 and observed as under:

“5. The order passed by this Court on 23.11.2022 was an interim arrangement pending disposal of appeals before the Tribunal. Considering the subsequent development of the WERC's order dated 18.09.2023, there was definitely an occasion to either re-consider the interim order or to dispose of the appeals pending before the Tribunal. Taking note of the large number of appeals pending before it, the Tribunal observed that the present appeals

cannot be taken up out of turn. We respect this decision of the Tribunal.”

36. The order of the Supreme Court makes it clear that there was definitely an occasion for this tribunal to reconsider its interim order in view of the subsequent development i.e, the WBERC order dated 18.09.2023. In the light of the order of the Supreme Court, we must proceed on the basis that the order of the WBERC dated 18.09.2023 is a change in circumstances justifying review of the earlier interim orders of this Tribunal dated 06.06.2022, 21.06.2022 and 01.07.2022.

37. The main issue before this Tribunal while granting the interim stay of the impugned order, was based on the contentions of the Appellants' that the tariff determined in the impugned order, based on projections could be an exaggerated tariff, and in case such a determination has been done based on actuals, this would have been lower, and accordingly interim protection was granted by this Tribunal. In fact, from the APR order of FY 2017-18, the tariff determined based on actual audited figures is higher at Rs 5.63/ Kwh as compared to that determined as Rs 5.01/Kwh based on projections in the impugned order and which in our opinion addresses the main concerns of the Appellants. It is also a fact that till the impugned order was passed by WBERC on 05.05.2022, which determined the ARR of FY 2017-18, the tariff applicable for the year FY 2016-17, which we are told is lower than the tariff determined in the impugned order, was extended for subsequent years. Recovering of adjustment of tariff since 01.04.2017 till passing of the impugned order is allowed to be recovered in eight installments

without carrying cost for this period. Thus, the consumers not only had to pay lower tariff till passing of the impugned order, but adjustments was also without carrying cost from 01.04.2017 till passing of impugned order dated 05.05.2022; timely completion of the exercise of determination of tariff could have obviated this problem.

38. Learned counsel for the Appellants have contended that in the APR order dated 18.09.2023 passed by WBERC, the revenue gap of Rs782 crore is to be adjusted with the Aggregate Revenue requirement (ARR) for the year 2020-21 or any subsequent year, as may be decided by the State commission and therefore, even if the stayed amount was considered in the APR order for FY 2017-18, leading to a higher revenue gap, it would also have been adjusted in the future, thus, resulting in no change in circumstances. In this context, we observe that the State Commission, while determining the ARR for FY 2017-18, (impugned order) has allowed recovery of adjusted amount (revenue gap) in eight installments, while the same State Commission in the APR order for FY 2017-18, has directed adjustment of revenue gap from the ARR order in future years and therefore, we are of the view that these matters need detailed deliberation and shall be considered during the hearing of the Appeals. However, the fact remains that the interim Stay granted by this Tribunal has disabled the applicant in recovering the arrears in eight installments starting from the month of June 2022, which could have been completed much before the date of the APR order dated 18.09.2023, which had different methodology than the ARR Order as far as adjustment of revenue gap is considered. This would undoubtedly

constitute “undue hardship” in terms of the second proviso to Order 39 Rule 4 of the CPC necessitating review of earlier interim orders.

39. Regarding the contention of learned counsel for the Appellants for the retrospective application of Tariff as per the impugned order; on a query, it has been fairly stated by the learned counsel for the Appellant-Association that plea of retrospective application of tariff has been taken only by the Appellant – Inox in its Appeal. We agree with the contention of the Appellants, specially of Appellant – Inox that retrospective application of tariff, as allowed in impugned order, has not been addressed in the APR order dated 18.09.2023, however, the contention raised including legal propositions necessitates detailed deliberation and shall be taken up when the main appeals are heard.

40. It is a fact that Appellant – Dinman did not make appearance and put forth their submissions during the course of hearing of the present batch of applications, however the orders passed now shall be applicable for the interim order dated 01.07.2022 passed in their Appeal No 288 of the 2019 as it was passed on the basis of interim stay order dated 06.06.2022 (APL 286 of 2023), vacation of which has been sought in the present applications.

41. In view of the above deliberation, we are of the view that instead of complete vacation of stay, and with a view to protect the interest of the Appellants, the *ex-parte ad* interim orders passed by this Tribunal dated 06.06.2022 (in APL 286 of 2023), 21.06.2022 (in APL 244 of 2022) and 01.07.2022 (in APL 288 of 2023) should instead be modified to the extent that 50% of the arrears based on the tariff as determined in

Impugned Order are to be paid within 30 days of this order and balance 50% shall remain stayed. However, we note that few consumers in the past have left the distribution system of DVC subsequent to interim orders of this Tribunal, and therefore, with a view to ensure that Respondent No.1-DVC is not left high and dry in case the main Appeals were to be dismissed later, we direct that, for the balance 50% of the arrears, which are directed to be stayed, the Appellants shall give unconditional Bank Guarantee of equivalent amount from a scheduled bank within 30 days of this order. Needless to state that the Appellants shall comply with the direction of payment of full tariff as per interim orders dated 06.06.2022, 21.06.2022 and 01.07.2022. It is also clarified that the above interim arrangement is subject to the result of the main appeal. The IAs are disposed of accordingly. The captioned Appeals are to be included in the 'List of Finals to be taken up from there, in their turn.

Pronounced in open court on this 17th Day of January, 2025

(Seema Gupta)
Technical Member (Electricity)

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE/NON-REPORTABLE

ts/ag