

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

**APPEAL NO. 137 OF 2015 &
IA NO. 219 OF 2015**

Dated: 05th March, 2020

**Present: HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER
HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER**

IN THE MATTER OF

**Bamunara Industries Welfare Association
C/o RTF Limited, Lenin Sarani,
Durgapur – 713210 (Burdwan)**

..... Appellant

VERSUS

**1. West Bengal Electricity Regulatory Commission
Poura Bhawan (3rd Floor),
Block-FD, 415-A, Bidhannagar,
Kolkata – 700 106**

..... Respondent No.1

**2. Durgapur Projects Limited
1593, Rajdanga Main Road
Kolkata - 700107**

..... Respondent No.2

Counsel for the Appellant ... Mr. Rajiv Yadav
Mr. Rahul Chouhan

Counsel for the Respondent(s)... Mr. Pratik Dhar Sr. Adv.
Mr. C.K. Rai
Mr. Paramhand Sahani for Res 1

Mr. Buddy A Ranganadhan
Mr. Ranjay Dubey
Ms. Priya Puri for Res 2

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. By this appeal, challenge has been brought to order dated 04.03.2015 of first Respondent i.e. West Bengal Electricity Regulatory Commission (hereinafter variously referred to as “*WBERC*” or “*State Commission*”) in case No. TP-55/13-14 thereby determining Multi Year Tariff (MYT) for the period beginning with financial year (FY) 2014-15 upto FY 2016-17 by which the appellant, representing a set of industrial consumers, claims to be adversely affected. The grievances of the Appellant relate to alleged inherent inconsistency in the approach on account of “*excessive allowance of power purchase cost*”; non-compliance of Tariff Regulations in matter relating to “*Provisional Determination of Project Cost*” of specific units; incorrect treatment of “*non-tariff income*”; and, erroneous “*recurring*” allowance of “*interest on working capital loan*” provided by Government of West Bengal without scrutiny as to delay in repayment.

2. The Appellant is an association of industrial consumers operating in the area of supply of Durgapur Projects Limited (second Respondent), which, in turn, is a Government Company owned and controlled by the Government of State of West Bengal. Durgapur Projects Limited (“*DPL*”) is engaged in generation, transmission and distribution of electricity, statedly having a license under Section 28 of Indian Electricity Act, 1910 and has

become a deemed licensee for distribution of electricity in Durgapur area of West Bengal in terms of Section 14 of the Electricity Act, 2003.

3. During the course of hearing, it was brought out that *DPL* has been engaged in the business of generation of electricity, its generating stations having come up as different units, most of which (units I to V) have already been decommissioned, one unit (unit no. VI) having suffered from long outages its operation not having fully stabilised, the issues raised by the appeal at hand concern the power generation through the two remaining units (VII & VIII) which have had the capacity of 300 MW and 250 MW respectively. It may be added that, as per the submissions at the hearing, even unit no. VI has since been decommissioned, the generation continuing through unit no. VIII only. Unit no. VI was commissioned in 1987, unit no. VIII having come up later.

4. Concededly, *DPL* also sells electricity generated by it to the State Distribution Companies (DISCOM), reference in which context has been made to certain arrangement with West Bengal State Electricity Distribution Company Limited ("*WBSEDCL*"). Though *DPL* would claim it being in a position to provide electricity on the strength of its own generating capacity to the 25 industrial consumers who are the members of the Appellant association and with whom it has a total contract demand of about 225 MVA, for short-term needs that are bound to arise for various reasons, it has an arrangement with *WBSEDCL* (the State DISCOM) for purchase of power as well. In this context, it may also be noted that aside from Power Purchase

Agreement (PPA) between *DPL* and the State DISCOM, *DPL* has also entered into a Member-Client Agreement with another entity – RPTCL – for purchase of power, on as and when required basis, through Indian Energy Exchange (IEX).

5. In view of the opinion that we would proceed to eventually render by this judgment, it is appropriate that we take note of the submissions of the Appellant on the first three issues at this stage.

6. On the first issue of *excessive allowance of power purchase*, the Appellant had pointed out, by objections submitted before the Commission, that *DPL* had purchased power, to the extent of shortfall, from WBSEDCL at Rs. 5.06 per KW in FY 2012-13, though power was available through IEX during the same period at Rs. 2.88 per KW. It was pointed out that the Commission had observed in the Tariff Order for the period FY 2011-12 and FY 2012-13 that *DPL* was obliged to purchase short-term power after comparison with the short-term market, observing thus:

“8.14 DPL shall purchase short term power from WBSEDCL if it is found to be comparable with the short-term market or less. If it is day ahead basis procurement then such comparable rate will that of exchange if WBSEDCL agreed so. Otherwise procurement shall be done from exchange if it is available in the exchange. In case of weak-ahead purchase corresponding market segment of exchange shall be the benchmark for comparability. For procurement above seven days tender shall be done. However, if through a long term PPA the short term requirement is met from WBSEDCL based on a principle that will ensure comparable price with market then such can be done subject to the condition that such PPA is being approved by the Commission.”

[emphasis supplied]

7. The above view was reiterated, noting the objection of the Appellant, in the impugned order holding thus:

“In the light of the above submissions, it is humbly prayed that the short term power purchase be disallowed in the MYT order. In the unlikely case of short term power purchase in the fourth control period, the same can be allowed based on actuals through the FPPCA, MVCA and APR mechanisms.

The Commission agrees with the objector’s view. DPL shall procure short-term requirement of power from the sources wherever it is cheaper.”

[emphasis supplied]

8. The Appellant submits that ignoring the view formulated as above, the State Commission has allowed the provision for purchase of power at excessive rates of Rs. 5.64, Rs. 6.19 and Rs. 6.81 respectively per unit for the three financial years of MYT, this being based on projections of WBSEDCL.

9. The Appellant points out from the accounts (actuals) for FY 2014-15 and FY 2015-16, and similar accounts (estimated) for FY 2016-17 submitted in the Aggregate Revenue Requirements (ARR) petition of DPL for FY 2017-18, that electricity was available at much cheaper rates through IEX as compared to electricity purchased from WBSEDCL.

10. On the second issue of *provisional determination of project cost* of two units, the Appellant refers to Regulation No. 2.8.1.4.13 of West Bengal Electricity Regulatory Commission (Terms and Conditions) of Tariff Regulations, 2011 (hereinafter referred to as “*West Bengal Tariff Regulations, 2011*”), which reads thus:-

“2.8.1.4.13 - Within three years of COD of the last unit of a generating station the generating company or the licensee shall submit a detailed report showing whether the provisions of different penalty(ies) or incentive(s) of contractual conditions are applied or not. The fact of waiver or non-application of penalty or incentive shall be specifically mentioned. Such analysis shall be given against each such provision specifically as stipulated in the contract. Only on submission of such reports, the final project cost of the generating station will be determined. Till submission of such report, the submitted project cost as mentioned in any tariff application will be reduced by at least 5% as per the discretion of the Commission. On submission of such report, the Commission will finally decide the final project cost to be approved for capitalization for the purpose of the tariff determination and such fresh capitalization on the basis of approved project cost will be considered from the date of approval of the project cost.”

[emphasis supplied]

11. It has been pointed out by the Appellant, and not disputed by the counsel for the Respondent Generator, that detailed report necessary in terms of the Regulations for determination of the project cost have not been submitted till date. We must observe here itself that no explanation whatsoever was offered even before us for the inordinate delay and default by the Respondent generator on such account.

12. The focus of the submissions of the Appellant, however, is on the stipulation in the Regulations, as quoted above, for provisional project cost to be allowed, by reduction to the extent of “*at least 5 per cent*”, though “*as per the discretion of the Commission*” on account of such default. It is the lament of the Appellant that the expression “*at least*” preceding the minimum reduction of “*5 per cent*” indicates that the expectation of the Commission is that it would gradually increase the rate of reduction should the default in submission of the detailed report continue. It is also the submission of the Appellant that corresponding to the reduction in terms of the above-quoted

regulation from the project cost for calculation of capital expenditure, there should also be proportionate disallowance of Interest During Construction (IDC). The submissions of the Appellant to such effect were not accepted by the Commission.

13. On the third issue of “*Non-Tariff Income*”, it needs to be noted that the Respondent GENCO admittedly is a multi-unit company which is engaged in certain businesses other than that of generation in sale of electricity. The expression “*Non-Tariff Income*” is defined by West Bengal Tariff Regulations, 2011 as under:

“(lxxi) “Non-Tariff Income” means income relating to the core-business other than from tariff, excluding any income from the following activities:-

- a) Other business, if applicable;*
- b) Auxiliary Services, if applicable;*
- c) Wheeling of electricity, if any;*
- d) Receipts on account of cross subsidy surcharge and additional surcharges on charges of wheeling*
- e) Income from Unscheduled Interchanges;”*

[emphasis supplied]

14. The Tariff Regulations allow deduction of *Non-Tariff income* from the Gross Aggregate Revenue Requirements by providing thus:

“5. Non Tariff Income

5.1 The amount of non-tariff income as approved by the Commission shall be deducted from the gross aggregate revenue requirement in calculating the aggregate revenue requirement from retail sale of electricity of the distribution licensee:

Provided that the distribution licensee shall submit full details of his forecast of non-tariff income to the Commission along with his application for determination of tariff.”

[emphasis supplied]

15. As is clear from the bare reading of the Regulation, the projections may be based on “forecast”, but there has to be some nexus with the data available for the period immediately preceding, the claim for such deduction apparently being subject to approval by the Commission.

16. It was submitted before the Commission at the hearing that *DPL* had projected the amounts of Rs.816.84 lakh, 825.60 lakh and 833.14 lakh as Non-Tariff Income for FY 2014-15, FY 2015-16 and FY 2016-17 respectively. The Commission noted (para 3.3.1.12) that a close scrutiny of the audited accounts for the preceding periods (FY 2011-12 and 2012-13) revealed non-tariff income to Rs. 1037.47 lakh, 1768.46 lakh respectively. The projections were thus found to be lower than the previous actual receipts.

17. It was argued before the Commission by the Appellant that non-tariff income may be considered based on past trends. The Commission concluded as under:

“The Commission agrees with the point and considers non-tariff income after applying a growth rate on last audited value available on this head where the growth rate is considered at 1% less rate of the average growth rate on this head for last five years.”

[emphasis supplied]

18. The submission of the Appellant is that forgetting the letter and spirit of the above view formulated by the Commission, it failed to exercise prudence check by not undertaking a critical scrutiny and instead allowed non-tariff income treating the last audited account for FY 2012-13 and escalating it by

a “*growth rate of one percent less than the average growth rate*” of non-tariff income for the preceding five years. The Appellant seeks to demonstrate the disconnect by a tabular statement based on actual amounts of non-tariff income earned by *DPL* during FY 2013-14, FY 2014-15 and FY 2015-16 respectively.

19. The common answer to all the three above-noted grievances of the Appellant, as submitted by the Counsel for Respondent GENCO, is that the impugned order is based on “*projections*”, the actual expenditure and receipts to be considered for tariff determination at the stage of truing up. It is the argument of the Respondent that it is not fair to criticise the view taken by the State Commission in the impugned order on the strength of wisdom and knowledge gained by the subsequent events.

20. No doubt, determination of provisional tariff does involve exercise which is based on estimates. Without doubt, suitable corrections would need to be made, based on actuals, only at the stage of truing up. But, as observed by us earlier, even in guess work, there has to be some basis and the usual practice is to go by the statistics of the period which precedes. Determination of tariff by the Commission is a function which requires, like any other statutory function, to be discharged with responsibility. The Commission is bound by the law and the regulations framed by it as indeed by the principles which it adopts. Similar discipline has to be maintained also at the stage of determination of provisional tariff. Such exercise cannot be undertaken totally divorced from reality or the principles that are settled.

After all, the Commission embarks upon “*prudence check*” in which there is no space for whims, caprice or imprudence.

21. The submission of the learned counsel for the Respondent is that it is not fair to criticise an order based on “*projections*” by analysis founded in actuals for the subsequent period. Such criticism will be unjust also because it is based on *hind-sight*. But then, the problem that plagues the decision of the Commission on the three above-noted issues stems not from the comparison with the statistics for the subsequent periods, but for the reason that the Commission has not followed the principles it was aware of or had itself formulated in the same very order. This has rendered the impugned order unjust, inherently contradictory, arbitrary and vitiated.

22. As has come out very clearly, the rule that the Respondent GENCO would purchase power for making up the shortfall only from such source where it was available at cheaper rate had been laid down in the Tariff Order for the previous period. When projections sounding a discordant note on this issue were placed before the Commission, it reiterated the said principle accepting the objection of the Appellant. Since sufficient data was available, there is no reason why, in the concluding part of the impugned order, the same very principle was given a total go by. The argument of the Appellant that the Respondent GENCO was indulging in profiteering unconscionably, at the cost of the consumers, by selling power to the State DISCOM and purchasing at the same time in the name of shortfall at rates higher than those available through IEX cannot be lightly brushed aside. The State

Commission clearly has failed to undertake the scrutiny in this regard responsibly.

23. Coming to the second issue (*provisional determination of project cost*), if Regulations stipulate detailed report regarding final project cost to be submitted “*within three years of COD*”, there is no reason why such report should not have come up even though almost three decades seem to have passed by. In its arguments, the Respondent GENCO submitted that since there was a delay in completion of the project, the invocation of penalty clauses in the EPC contract has led to issues which are not yet settled, negotiations in which regard have continued. On pointed query, however, it was conceded that there is no litigation pending on such dispute before any forum. We find the explanation for non-submission of project cost details within the prescribed period or within reasonable period thereof specious. Such plea is unacceptable having regard to the inordinate delay in compliance. We fail to understand as to why the State Commission has found it difficult to enforce its own Regulations *qua* the Respondent GENCO.

24. Undoubtedly, the relevant Regulation (no. 2.8.1.4.13) of West Bengal Tariff Regulations, 2011 does give “*discretion*” to the Commission for deciding upon the extent to which the provisional project cost is to be reduced for purposes of tariff determination. For some reasons which are not even offered to be properly explained before us, the State Commission has chosen to go by the minimum reduction prescribed i.e. 5 per cent, from one control period to the next. When law or rules vest in an authority certain

discretion, the exercise of such discretion also has to be based on some logic or principles. The choice of the minimum prescribed rate of reduction smacks of no serious thought being given to the reasons for continued default or for a case being made out for the rate of reduction to be gradually increased, so as to enforce compliance. We wish to say no more on this issue.

25. On the third issue of “*Non-Tariff Income*”, we need not even go into the later figures. The disparity between the statistics for preceding periods (FYs 2011-12 and 2012-13) should have put the Commission on guard. As in the case of first issue, the Commission in the present context has also failed to live up to its task by deciding upon a particular principle and then ignoring it altogether at the time of actual determination. This inherent contradiction puts the entire exercise under a serious cloud.

26. We may now take up the last issue – *recurring payment of interest on capital borrowed from the Government of West Bengal*. In this context, the following part of the West Bengal Tariff Regulations, 2011 are relevant:

“5.6.5 Interest on Working Capital

5.6.5.1 The working capital requirement shall be assessed on normative basis @ 18% on summation of annual fixed charge, fuel cost and power purchase cost reduced by the amount of depreciation, deferred revenue expenditure, return on equity and other non cash expenditures such as, the provision for bad-debt, reserve for unforeseen exigencies, special appropriation exigencies, special appropriation against any withheld amount of previous year, arrear on account of adjustment due to Annual Performance Review, FPPCA, etc. of a generating company or a licensee, as the case may be. If there is recovery through Monthly Fuel Cost

Adjustment or Monthly Variable Cost Adjustment then for working capital requirement the above normative basis shall be 10% instead of 18%.

5.6.5.2 Rate of interest on working capital so assessed on normative basis, shall be equal to the short-term prime lending rate of State Bank of India or adjusted base rate for short term lending as on the 1st April of the year preceding the year for which tariff is proposed to be determined or at the actual rate of borrowing whichever is less.”

27. The Respondent GENCO has sought to explain that the loan in question taken from the State Government was drawn not only for the project, but also for the other purposes, taken in phases on various terms and conditions with *moratorium* clause for repayment. It is submitted that revenue loans are not subject to coverage of advance against depreciation and cannot be considered through ARR to facilitate the repayment of loan except the interest component. It has also been submitted that the loan has neither been repaid nor claimed through advance against depreciation.

28. The State Commission, in its written submissions, has justified the impugned order to the extent it relates to this issue by submitting that it has allowed interest on borrowed capital to service the loan taken from the Government of West Bengal after considering the repayment during previous years “*matching with*” the depreciation and advance against depreciation allowed previously. It seeks to highlight that repayment of loan during 2008-09 was less than the depreciation allowed and for such reason interest credit was charged for the amount of Rs. 248.89 lakh, which was deducted from the gross revenue requirement for the year.

29. Suffice it to observe here that we are not convinced or satisfied with the scrutiny by or explanation of the Commission. There is no examination of the tenure of the loan, the amount taken, the purposes for which it was sanctioned or deployed or the reasons for non-payment etc. The submission of the Respondent GENCO that a request has been made to the State Government to convert the loan into equity is something which is irrelevant for judicial scrutiny of the impugned order. The further argument that MYT order is a projection for future only seeks to reduce the prudence check to an *ad hoc* exercise. It may be *ad hoc* scrutiny. But then, it cannot be treated as an empty formality.

30. While we do find substance in the contentions urged by the Appellant on all the four above noted issues, we are conscious that the control period for the impugned order has already come to an end. As is the normal course, truing-up exercise, and similar determination by MYT orders for the subsequent periods, would be the next logical stages. Finding solace in the fact that opportunity still exists for suitable corrections to be made of the errors committed in the past, keeping in mind that re-opening of the billing based on the impugned order would lead to a lot of confusion, we refrain from passing any directions *vis-à-vis* the impugned order. We, however, direct that the State Commission shall undertake a proper and more responsible prudence check on the question of tariff determination respecting the Respondent GENCO in the Tariff Order to be passed for the

future period hereafter, bearing in mind the observations recorded by us, particularly on the four issues which have been raised by the Appellant.

31. The appeal is disposed of in above terms. Applications, if any pending, are rendered infructuous and stand disposed of accordingly.

PRONOUNCED IN THE OPEN COURT ON THIS 05th DAY OF MARCH, 2020.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member