COURT-II

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

IA NO. 136 OF 2020 IN
APPEAL NO. 41 OF 2020

Dated: 26th February, 2020

Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member

In the matter of:

GVK Power (Goindwal Sahib) Limited …Appellant(s)

Versus

Punjab State Power Corporation Limited & Anr. …Respondent(s)

Counsel for the Appellant(s) : Mr. Sajan Poovayya, Sr. Adv.
Mr. Amit Kapur
Mr. Vishrov Mukerjee
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Mr. Ameya Vikram Mishra For App1

Counsel for the Respondent(s) : Mr. Sakesh Kumar
Mr. Gitanjali N Sharma For Res1

Mr. Parag Tripathi, Sr. Adv.
Ms. Suparna Srivastava For Res2

ORDER

PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

1. This is an Application seeking stay of operation of the Order dated 17.01.2020 passed by the Punjab State Electricity Regulatory Commission **("Central Commission")** whereby the State Commission in Petition NO. 54 of 2017 has determined the completed capital cost of GVK's 540 MW power project located in Punjab as under:

S.No.		*Claimed by GVK*	*Recomm-ended by Joint Auditor*	*Approved by the Ld. PSERC**
1.	Land	123.77	123.77	96.75
2.	Preliminary Expenses	0.25		0.25
3.	Boiler Turbine Generator Package including Engineering, Erection, Civil Works, Taxes and	1050.22	1050.17	1050.17
4.	Balance of Plant including Engineering, Erection, Civil Works, Taxes and	927.40	895.06	783.57
5.	Spares for BTG Package.	0.11		0.11
6.	Non-EPC.	337.31	285.56	204.60
7.	Start-Up Expenses	31.68	15.00	0
7.	Power and Water for Construction.	32.57	32.57	32.10
8.	Consultancy and Engineering charges	54.13		11.03
9.	Pre-operative Expenses	186.55	126.56	74.04
10.	Insurance	16.56	16.56	16.56
11.	Capital Cost excluding IDC & Financing Charges	2760.55	-	2269.18

12.	Interest During Construction (IDC)	1474.84	1455.77	777.50
13.	Financing Charges	31.99	31.99	11.69
14.	Total Capital Cost	4267.38	4103.83	3058.37

2. The prayer of Applicant/Appellant as follows:-

a) Stay Order dated 17.01.2020 passed by PSERC in petition No. 54 of 2017 till the final disposal of the present Appeal.

b) PSPCL be directed not take any coercive steps including recovery of excess amounts paid during the pendency of the Appeal.

c) Pending final disposal of the Appeal, the provisional tariff of Rs. 2.20 per kWh be paid to GVK.

3. Submissions of the Appellant

3.1 At outset the learned senior counsel appearing for the Appellant submitted that the State Commission has determined the completed capital cost of the Project contrary to settled principles of law and regulatory principles. The commissioning of the Project was delayed on account of various Force Majeure events including the cancellation of the Tokisud Capital Coal Blocks pursuant to the Judgement of the Hon'ble Supreme Court in the case of Manohar Lal Sharma vs. The Principal Secretary & Others reported as (2014) 9 SCC 516 ("***ML Sharma Judgment***") and the subsequent cancellation order dated 24.09.2014 reported as (2014) 9 SCC 614 ("***Cancellation Order***"). GVK's claim of force majeure was allowed by Arbitral Tribunal appointed by the State Commission. The Arbitral Tribunal vide its

Awards dated 10.04.2017 extended the Schedule Commercial Operations Date ("SCOD") till actual date of commissioning i.e. 16.04.2016. The Arbitral Awards are binding and enforceable as a decree of Court in terms of Section 35 and 36 of the Arbitration and Conciliation Act, 1996 read with BCCI vs Kochi Cricket Association : (2018) 6 SCC 287 and HCC vs Union of India: (2019) SCC OnLine SC 152.

3.2. The extension of SCOD has been upheld by the State Commission in the Impugned Order. The SCOD was extended for a period from 04.01.2020 to 25.09.2015 (68 months and 21 days). Accordingly, the cost-overrun ought to have been allowed by the State Commission which was wrongly disallowed. The State Commission has limited GVK's claim for Interest during Construction ("IDC") to Rs 777.50 instead of actuals i.e. Rs 1474.84 Crore. The State Commission ought to have allowed the IDC claimed by GVK on actuals as the time overrun and cost overrun was a direct consequence of force majeure events including the cancellation of the captive coal blocks pursuant to the ML Sharma Judgement.

3.3. The failure of the State Commission to allow costs overrun on account of force majeure events including cancellation of the captive coal blocks is contrary to :

(a) Regulation 12 of the CERC Tariff Regulations 2014 in terms of which uncontrollable factors leading to cost escalation impacting IDC, IEDC and cost escalation include force majeure Events and change in law events. It is pertinent to note that cancellation of the captive coal block has been held to be a change in law event by this Tribunal by way of its judgment dated 21.12.2017 in Appeal

No. 193 of 2017 titled GMR Kamalanga Energy Limited v CERC. Change in law is an uncontrollable event as well.

(b) Settled law as per this Tribunal in judgment dated 27.04.2011 in Appeal No. 72 of 2010 titled Maharashtra State Power Generation Co. Ltd. Vs. MERC ("MSPGCL Judgment") wherein it has been held that if the delay in achieving COD is on account f reasons beyond the control of the generating company, the generating company is entitled to time and cost overruns.

(c) Judgement of this Tribunal in Appeal No. 107 of 2006 dated 19.10.2006 titled KPTCL vs KERC & Ors wherein it was held that Arbitral Awards are valid and binding.

3.4. It is the legal duty of the State Commission to give effect to / implement the Arbitral Awards. This position of law has been settled by the Hon'ble Supreme Court of India in:-

(a) Board of Control for Cricket in India vs Kochi Cricket Pvt. Ltd and etc. reported as ((2018) 6 SCC 287 wherein the Hon'ble Supreme Court has deprecated the concept of automatic stay on arbitral awards by virtue of simply filing a petition under Section 34 of the Arbitration Act 1996, (prior to the 2015 Amendment) and has stressed on enforcement/giving effect to arbitral awards.

(b) Hindustan Construction Co. Ltd. & Anr. v. Union of India & Ors. reported as (2019) SCC OnLine SC 152, wherein it was observed that retrospective resurrection of an automatic stay would turn the clock backwards contrary to the object of the Arbitration Act and the 2015 Amendment Act.

3.5 In this context, it is submitted that the State Commission is bound by the findings of the Arbitral Award dated 10.04.2017 and ought to give due regard the Arbitral Award dated 10.04.2017 in the determination of the completed capital cost by considering the cost overrun occurred due to the Force majeure events. Furthermore, the State Commission has wrongly determined the capacity charges contrary to the provisions of the PSERC (Terms and Conditions of Tariff) Regulations 2005. ("PSERC Tariff Regulations 2005"). In terms of Regulation 20 read with Regulation 37 of the PSERC Tariff Regulations 2005, the components and norms as laid down by Central Electricity Regulatory Commission ("CERC") ought to applied in determining the Annual Fixed Charges. However, the State Commission has applied the norms as provided in the PSERC Regulations 2005 to determine the capacity charges.

3.6. The State Commission has arbitrarily and without justification disallowed costs pertaining to works carried out by GVK Projects and Technical Services Ltd ("GVKPSTL") on the ground that GVKPTSL is a sister concern of GVK. It is submitted that the works were awarded to GVKPTSL pursuant to a competitive bidding process. Further, there are no adverse findings/observations regarding the competitive bidding process carried out by GVK in the Impugned Order or by the Joint Auditor.

3.7 The State Commission has determined final completed capital cost of the Project substantially lower than the in-principle approval granted by it vide Order dated 29.04.2008 and this Tribunal's judgment dated

08.04.2009, in-spite of the Project being impacted by Force Majeure and change in law events, which have led to cost and time overruns.

3.8 It is submitted by the learned senior counsel of the Appellant that the GVK has a prima facie case as the Order dated 17.01.2020 is contrary to the PSERC Tariff Regulations, CERC Tariff Regulations, the findings of the Arbitral Award dated 10.04.2017 and settled regulatory principles. The State Commission has sought to disallow costs incurred by GVK at each instance as evident from the cherry picking of findings of the Joint Auditor Report which recommend disallowance of cost and ignoring findings which recommend allowing certain costs of GVK. Furthermore, costs incurred by GVK for works carried by GVKPTSL have been disallowed merely on the basis that GVKPTSL is a sister concern of GVK. There is a clear case of bias and prejudice against GVK.

3.9 It is submitted that the balance of convenience lies in GVK's favour since the completed capital and the final tariff as determined by the State Commission in Order dated 17.01.2020 i.e. Rs 1.419 per kWh is substantially lower than the provisional tariff of Rs 2.20 per kWh as fixed by Ld. PSERC vide Order dated 28.03.2018. It is likely that PSPCL would deduct the excess amount paid to GVK from the amounts payable by it in terms of the Monthly Bills raised by GVK.

3.10 It is submitted by the learned senior counsel of the Appellant that irreparable harm would be caused to GVK if Order dated 17.01.2020 is not stayed since the Project is under severe financial stress on

account of the various force majeure events impacting the Project including the cancellation of the captive coal blocks leading to time and cost overruns and under-recovery of tariff on account deductions made by PSPCL from monthly tariff bills. GVK is unable to service its debt and has become a non-performing asset since August 2017. GVK is currently under the process of finalizing its resolution plan with the consortium of lenders as per the revised RBI Circular dated 07.06.2019. The lender meeting is scheduled on for 10.02.2020 on which date the lender will decide the future course of action. The erroneous determination of completed capital cost and tariff payable by PSPCL to GVK by the State Commission would lead to under-recovery of the cost and jeopardize the resolution process.

3.11 It is submitted by the learned senior counsel of the Appellant that if the Impugned Order is not stayed and PSPCL is permitted to deduct amounts allegedly due, GVK will be referred to NCLT under Insolvency and Bankruptcy Code.

4. **Submissions of the Respondent No.1**

4.1 That it is submitted by way of the present Appeal, the Appellant has challenged the order of the Commission whereby the Commission has determined the completed capital cost of the Appellant's thermal power generating station Annual Fixed Cost (AFC)/Capacity charges and energy charges from actual CoD till end of FY 2016-17. The Appellant has filed the present application seeking stay of the operation of the order dated 17.01.2020 of the Commission.

4.2 That it is submitted that the Commission has determined the completed capital cost of the thermal station which would be the tariff for the year 2016-2017, needed to be paid by the State utility, Respondent no.2. It is submitted that the determination of capital cost or tariff is ordinarily not stayed by the Appellate court and would only be the subject matter of adjudication of the Appeal on merit. It is only during the final adjudication that this Hon'ble Tribunal would go into determination of each cost element specifically and the reasons given thereto. The same would only be interfered with, if the determination by the expert body suffers from any infirmity or illegality, as held by the Hon'ble Supreme Court in Transmission Corporation of Andhra Pradesh Ltd. Vs. M/s. Rain Clacining Ltd. & Ors. 2020 (1) Scale 561.

4.3 It is submitted that the capital cost of the project has been found to be Rs. 3058.37 crore by the Commission as against Rs. 4267.38 crore claimed by the Appellant, after due prudence check, and thorough examination.

4.4 It is further submitted that the Commission has followed all the legal, regulatory and financial principles and has arrived at a just, equitable and well-reasoned cost after following the due process of law detailed out in the impugned order.

4.5 The Commission has given due effect to both the Arbitration Awards dated 10.04.2017 in claim petition no.1 & 2 and their time and cost impact on the implementation of the project.

A. The first Arbitration Award in claim petition no.1 allowed extension in SCOD from 04.01.2010 to 25.06.2014. The said

award considered three events as force majeure on the plant side and three events on the coal mine end. The two events impacting the cost of the project on the plant side were (a) poor soil conditions requiring vibro compaction (b) handing over the land for railway corridor for which 6 months and 33 months & 15 days respectively were allowed. (c) The third event was the land licensing agreement for the Railways at GVK project site (16.03.2012 to 23.01.2014) which did not impact the cost. Further other events in Railway approval at the Tokisud Coal Mine Site were considered as force majeure and the Arbitral Tribunal granted extension of SCOD from 04.01.2010 to 25.06.2014. However, these had no effect on the capital cost of the GVK project at Goindwal Sahib.

The Commission in the impugned Order has allowed the full costs for Vibro-compaction in the plant and residential area amounting to Rs.10.38 crore and Rs.2.45 crore respectively as claimed by GVK. Regarding Railways Siding works against the originally allowed amount of Rs. 35 crore, the Commission has allowed Rs.60.34 crore as per the estimates vetted by the Indian Railways alongwith supervision/departmental charges of Rs.2.58 crore demanded by Railways. Further, the Commission has also allowed Rs.21.36 crore demanded by Railways for O&M charges for 10 years maintenance of Khadur Sahib Railway Siding and paid for by GVK. The Commission has also allowed Rs.0.70 crore for vehicles, computers, furniture etc. and provisions demanded by the Railways for Khadur Sahib Railway Station. The cost of retaining wall constructed by GVK for protection of the lead line on both sides (0.725 km on each

side) has not been allowed because GVK did not produce any demand or approval of the Railways or duly vetted estimates from the Railways or the supervision charges paid for the same. Therefore, the cost for the same has not been allowed.

B. The second Arbitration Award in claim petition no.2 considered the cancellation of Tokisud North Coal Block allotted to the project by the Hon'ble Supreme Court of India as change in law and force majeure events and granted extension of SCOD from the date of Coal Order till COD is actually achieved. The coal order was issued by the Hon'ble Supreme Court on 24.09.2014. Unit 1 & 2 of the project were commissioned on 06.04.2016 and 16.04.2016 respectively. The Commission in the impugned Order has allowed the capital expenditure and IDC for the complete period under force majeure after prudence check.

C. No escalation has been claimed by GVK in the contracted amounts for Engineering Procurement and Construction (EPC) works i.e. Boiler Turbine Generator (BTG) (Rs. 1155 crore) and Balance of Plant (BOP) (Rs. 918.12 crore) which were carried out by BHEL & Punj Llyod Ltd (PLL) respectively. An amount of Rs.114.64 crore is the unpaid liability of GVK under BTG and Rs.1.51 crore under spares which shall be considered as and when paid. Further, there are some pending works in BOP. GVK has filed a petition no. 70 of 2017 for capital investment plan amounting to Rs.230 crore for the MYT period FY 2017-18 to FY 2019-20. It has been submitted by GVK that all the works covered in this petition are pending/spill over works of the project and no new works have been claimed.

D. The Non EPC works of Rs. 135 crore as provided in the PPA are stated to have been allotted by GVK through competitive bidding to GVK Projects and Technical Services Ltd. (GVKPTSL). This sister concern of GVK bid for the same for Rs.160 crore with a discount of 15.625% i.e.Rs.135 crore. Against this, GVK has claimed Rs. 337.31 crore. The Commission after prudence check on merit allowed Rs. 204.60 crore on merits for the Non EPC works. The details of what has been allowed by the Commission is given in para 9.7.11, 9.11.5, 9.15.2, 9.16.1, 9.34.6, 9.34.11, 9.35, 9.36, 9.37, 9.38, 9.39 and 9.41 of the Order.

E. The Commission has also allowed Rs.74.04 crore for pre-operative expenses increasing the same on pro-rata basis from Rs.50 crore provided in the PPA to allow for the extension in time. This amount of Rs. 50 crore was upto the SCOD of the project i.e. 20.11.2013. Considering the Arbitration Awards, the Commission allowed Rs. 24.04 crore additionally on pro-rata basis for the period from SCOD (20.11.2013) to date of commissioning i.e. 16.04.2016 excluding 90 days from 26.06.2014 to 24.09.2014 which are not covered in the said two Arbitration Awards.

The Commission has also allowed other expenses namely, start-up expenses, power and water for construction, consultancy & engineering and insurance on merits after due prudence check, taking into account the cost and time over run allowed by arbitration awards.

4.6 It is submitted that the Commission in its order has duly considered delay beyond the control of GVK for calculating the interest during construction. The Commission has allowed the interest upto 16.04.2016 except for the period from 26.06.2014 to 24.09.2014. The reasons for not allowing interest in its order for this period of 90 days have been recorded in the impugned order and the same is re-produced as under:-

> *"The Commission has held earlier that the period from 26.06.2014 to 24.09.2014 i.e. 90 days does not count towards the extension in SCOD allowed in the two Arbitration Awards. Interest during Construction for the period from 26.06.2014 to 24.09.2014 wherein there was no Force Majeure or change in Law has therefore been disallowed. Accordingly, IDC is not considered for the period from 26.06.2014 to 24.09.2014."*

Thus, the Commission has not allowed IDC claimed by GVK for the period 26.06.2014 to 24.09.2014 as there was no force majeure for this period as per the arbitration awards. Please refer to para 10 (7) of this reply for the details regarding this issue.

4.7 That the Commission has duly honoured the arbitral award dated 10.04.2017 by giving GVK its claim for vibro compaction and cost for Railway related items and interest during construction on the entire amount approved after prudence check. As such there is no violation of the awards.

4.8 That the appellant has submitted that Regulation 20 and 37 of the PSERC (Terms and Conditions for determination of Tariff),

Regulation 2005 ought to have been applied for the components and norms as laid down by CERC. The relevant paras of the Regulation 20 and 37 of PSERC (Terms and Conditions for determination of Tariff), Regulation 2005 are produced below for reference:-

Regulation 20 'Cost of Generation'

> *(1) While determining the cost of each thermal/gas/hydro electric generation located within the state, the Commission shall be guided, as far as the feasible, by the principles and methodologies of CERC, as amended from time to time.*

Regulation 37 'Generation Tariff'

> *The component of generation tariff shall be as laid down in the Central Electricity Regulatory Commission (Term and Condition of Tariff) Regulations,2009 as applicable from time to time.*

It is submitted that the Commission has calculated capacity charges based on the of PSERC (Terms and Conditions for determination of Tariff), Regulation 2005. In para 26 of the Commission's order dated 17.1.2020 it has been stated that the Hon'ble Appellate Tribunal for Electricity, while disposing off appeal no 30 & 35 of 2014 filed by M/s Everest Power Pvt. Limited vide order dated 12th November 2014 (which is in consonance with the principles laid down by the Hon'ble APTEL in Order dated 01.03.2013 in Appeal No. 131 of 2011), held that where the State Commission has framed the requisite Regulations, it is bound by such Regulations for fixing the tariff u/s 62 of the Electricity Act. The relevant paragraph of the aforesaid Order of this Hon'ble Tribunal is reproduced below for reference;

"79. Both the parties contractually agreed that the State Commission is the appropriate Commission for tariff determination for the said project which holds good statutorily also. Under the State Commission's Tariff Regulations, the State Commission while determining the cost of generation of Generating Stations located within the State, the Commission shall be guided, as far as feasible by the methodologies of Central Commission as amended from time to time.

80. These Regulations also provide that the components of generation tariff shall be as laid down by the Central Commission's Regulations.

81. In this context, it is to be noted that in the Tripartite Agreement entered into between Everest Power, PTC and Punjab Power, they have agreed to replace Article 3.1 of the PSA.

82. The relevant Article 3.1 in the Tripartite Agreement is as follows:

> *"The parties agree that the Commission shall determine the tariff for the sale of the contracted capacity by PTC to PSPCL and consequently the tariff for the sale of the contracted capacity by EPPL to PTC in terms of the Regulations of the Commission and as per the orders dated 17.08.2012 and 06.11.2012 passed by the Commission in Petitions no. 34 of 2011, 55 of 2012. Such tariff shall be the applicable tariff for the sale and*

purchase of the electricity under the PPA and the PSA……..……"

83. *The perusal of this Article would make it evident that the tariff in the instant case has to be determined as per Regulations of the appropriate Commission thereby meaning the Punjab State Electricity Regulatory Commission (Terms & Conditions for Determination of Tariff) Regulations, 2005.*

84. *The decision taken by the State Commission that the State Commission's Regulations alone would be applicable is in consonance with the principles laid down by this Tribunal in Appeal No.131 of 2011 in the matter of Haryana Power Generation Corporation Ltd (HPGCL) v Haryana Electricity Regulatory Commission in the order dated 1.3.2013.*

85. *The relevant observations made by this Tribunal in the above judgment is as under:*

> *"5. Bare reading of section 61 would make it clear that the State Commissions have been mandated to frame Regulations for fixing tariff under Section 62 of the Act and while doing so i.e. while framing such Regulations, State Commissions are required to be guided by the principles laid down in by the Central Commission, National Electricity Policy, Tariff Policy etc. it also provide that while framing the regulations, the State Commissions shall ensure that generation, transmission and distribution are conducted on commercial."*

86. The conclusion arrived at by the Tribunal in the above decision is that while the State Commission has framed the requisite Regulations, it is bound by such Regulations while fixing the tariff u/s 62 of the Electricity Act and the Central Commission's Regulations have no relevance in such cases.

87. In the present case, as pointed out by the State Commission, already the Regulations have been framed by the State Commission and therefore, the applicable Regulations are only State Commission's Regulations and not the Central Commission's Regulations.

88. In view of above, the contention of the Appellant Everest Power that the State Commission ought to have applied the Central Commission's Regulations while determining the tariff of the project is entirely misplaced."

Thus, the Commission has rightly applied the norms as provided in the PSERC (Terms and Conditions for determination of Tariff), Regulation 2005 for calculation of AFC/capacity charges. Further, the State Commission follows the Central Commission's Regulations on those aspects which have not been addressed in the State Commission's own Regulations.

4.9 That it is submitted that the Commission has issued a detailed and reasoned Order on merits. The Commission has fully considered various submissions made by both the parties in the petition along with the report of the Joint Auditor. The Commission has conducted a

prudence check and after due analysis has given its findings on each component. The submissions made by GVK in its petition No. 54 of 2017 filed before the Commission for determination of the capital cost and later during the course of hearings were lacking in many respects and information had to be called for repeatedly from GVK to decide various issues. GVK submitted different information every time in its submissions and its replies remained inconsistent throughout the adjudication of the petition.

The Joint Auditor made his recommendations based on accounting principles. Whereas, the Commission has allowed the expenditure on merits for various works as per Regulations after prudence check. Application of Regulatory principles falls within the preview of the Regulators.

It is submitted that neither GVK nor PSPCL were in agreement with the Joint Auditor's Report in its entirety and it was left to the Commission to do a complete prudence check as per Regulations, and accepted principles of law.

4.10 That the appellant's grounds for challenge and the Commission's reply to each is given below;

S. No.	Head	As per schedule-11 of the PPA (Rs.	Amount Claimed by GVK	Amount allowed by PSERC (Rs.	Difference (Rs.	Grounds for Challenge

		crore)	(Rs. crore)	crore)	crore)	
1.	Land	109.35	123.77	96.75	27.02	The finding with respect to land is contrary to PSERC Order's dated 29.04.2008 wherein in-principle approval was granted for 715 Acres. PSERC has reduced the land requirement to 600 and Acres has reviewed/revised its own order, after the same has achieved finality.

Reply of the Commission

The Commission's in-principle allowance of 715 acres in Order dated 29.04.2008 in petition no. 04 of 2007 was based on GVK's application to MoEF. When MoEF vide its Environmental Clearance dated 09.05.2008 limited the land

for the project to 600 Acres, GVK should have brought it to the notice of the Commission and the Hon'ble APTEL where the Appeal was pending. GVK has tried to hide this from both the courts. The Commission cannot go beyond MoEF and CEA norms. The Commission in the impugned order dated 17.01.2020 has allowed Rs. 96.75 crore as per costs of various parcels of land indicated by GVK and as detailed in the impugned Order considering that MoEF Environmental Clearance issued on 09.05.2008 for GVK's 2x270 MW project limited the land to 600 acres including ash dyke and green belt. The PPA was signed much later by GVK with PSPCL on 26.05.2009.

(Para 5.4 of the impugned order refers)

2.	BoP Works	955.00	927.40 Revised to 920.48	783.57	136.91	The amounts disallowed were paid as to sub-contractors of the BOP contractor in order to ensure that the works were carried out in a timely manner and due to failure of the BOP Contractor to carry out the works.

Reply of the Commission

The Commission has allowed Rs. 783.57 crore for the BoP contract on the basis of vouchers/bills supplied by GVK. GVK stated that advance payment has been made though bills

	have not been raised, the Commission cannot allow such expenses for which there is no proof in terms of vouchers/bills. It is pertinent to mention that GVK has claimed Rs. 60 crore for pending BoP works in petition no. 70 of 2017 filed by GVK for additional capitalization which is under adjudication of the Commission. The Commission will allow the same on merits/prudence check as and when the expenditure is actually incurred and claimed by GVK. **(Para 7.4 of the impugned order refers)**					
3.	Non-EPC	135.00	337.31	204.60	132.71	The cost overruns for Site Grading, Ash Pond, Residential Colony, Coal handling facilities were account of force majeure events i.e. poor soil conditions, which was held to be an event of force majeure in terms of Arbitral Award dated 10.04.2017. As regards Railways, PSERC disallowed cost on the basis of the railway approved estimates, inspite of GVK providing documents/information of actual cost incurred to

						PSERC.

Reply of the Commission

Non-EPC works of Rs. 135 crore as provided in the PPA were allotted by GVK to its sister concern i.e. GVK Projects and Technical Services Ltd. (GVKPTSL) through competitive bidding. GVKPTSL bid for the same for Rs. 160 crore with a discount of 15.625% i.e. Rs. 135 crore. Against this, GVK has claimed Rs. 337.31 crore. The Commission has allowed Rs. 204.60 crore for Non-EPC works in the impugned order. Site grading has been done by GVK for the entire area of the project i.e. 1075 acres, therefore proportionate expenses have been allowed. The Ash Pond has been built much larger than the specifications permitted by MoEF i.e. on 244 acres as compared to 130 acres for ash dyke including green belt permitted by MoEF. Therefore the expenses for Ash Pond have also been allowed proportionately.

The residential colony rates have increased six fold in some instances. The Commission has allowed the vibro compaction in the residential area in full as per the Arbitral Award and has restricted quantities and rates to the original. The non-EPC works have been carried out in the same period when EPC works i.e. BTG and BoP have been carried out. There has been no escalation in the costs of EPC works carried out by BHEL (BTG) and BoP (Punj Llyod Ltd.) whereas in non-EPC works carried out by GVK Projects and Technical Services Ltd., the increase is from Rs. 135 crore to

	Rs. 337.31 crore i.e. 2.5 times. Further, GVK has enhanced the coal storage facility from 30 days to 45 days and then to 60 days and claimed an additional Rs. 2.83 crore for the same. The Commission disallowed the same as there is no need to store coal for 60 days going by the experience of PSPCL in running thermal power stations of similar size and CEA norms in the matter. The entire amount certified by the railways has been allowed. Also, the amount of supervision charges as demanded by railways has been allowed in full along with ten years O&M charges. The cost of the retaining wall has not been allowed because no approval or demand of the Indian Railways for the same has been provided. **(Para 9.7 of the impugned order refers)**					
4.	Start-Up Expenses	15.00	31.68	0	31.68	GVK is entitled to cost of fuel incurred for generating infirm power in terms of Regulation 9 (g) read with Regulation 18 of the CERC Tariff Regulations 2014. PSERC has wrongly relied on the terms of the Restated and Amended PPA to disallow the said cost. Terms of a PPA cannot override

						Regulations.

Reply of the Commission

The cost of infirm power has already been paid by PSPCL to GVK as energy charges. As per the PPA no further payments are required to be made. The cost of power/electricity and water consumed during construction has been allowed.

(Para 11.3 of the impugned order refers)

5.	Consultancy and Engineering	7.50	54.13	11.03	43.10	Increase in the Consultancy and Engineering charges are on account of the time overruns in commissioning the project due to force majeure event and increase in cost ought to be allowed as completed capital cost.

Reply of the Commission

The Commission has allowed Rs. 11.03 crore for consultancy and engineering expenses paid to Tata Consulting Engineers Ltd. for project evaluation against Rs. 7.50 crore as per the PPA. The Commission has therefore allowed both time and cost overrun for the same.

Payment amounting to Rs. 28.84 crore claimed for GVK Technical and Consultancy Services Ltd. for salaries etc. has

not been allowed as there is no provision in the PPA for the same. Similarly, other claims of GVK for Rs. 1.30 crore and Rs. 2.44 crore for payment to the Lender's Engineers i.e. Lahmeyer International and the Management and Trusteeship fees of IDBI Bank Ltd. respectively are not allowable.

(Para 13.3 of the impugned order refers)

6.	Pre-operative expenses	50.00	186.55	74.04	112.51	The increase in cost is on account of events held to force majeure in the Arbitral Award dated 10.04.2017 for which time overrun has been allowed by PSERC

Reply of the Commission

The claimed amount of Rs. 186.55 crore shown by GVK includes Rs. 23.94 crore paid to Railways comprising of Rs. 21.36 crore for ten years O&M charges for the maintenance of Khadur Sahib Railway Station and Rs. 2.58 crore for supervision/departmental charges demanded by Railways, which have been allowed under the head 'Payment to Railways'. As against remaining amount of Rs. 162.61 (186.55-23.94) crore, the Commission has allowed Rs. 74.04 crore after allowing time overrun from the date of SCOD i.e. 20.11.2013 to actual date of commissioning i.e. 16.04.2016 increasing the same on pro-rata basis against Rs. 50.00 crore provided in the PPA upto SCOD on 20.11.2013.

(Para 10.4 of the impugned order refers)						
7.	Interest During Construction	365.19	1474.84	777.50	697.34	GVK is entitled to IDC on actual since the time overrun was due to event of force majeure as held by the Arbitral Award dated 10.04.2017. Even otherwise, the methodology followed by PSERC is computing IDC is contrary to Regulation 11 (A) of the CERC Tariff Regulations

Reply of the Commission

GVK has argued that the methodology followed by the State Commission is contrary to Regulation 11(A) of CERC Regulation. This statement of GVK is not correct. The

Commission in its order in para 20.3.6 of order said that interest during construction had been calculated as per Regulation 11(A) of CERC Regulation,2014. In the said regulation it has been provided that only IDC on actual loan may be allowed beyond the SCOD to the extent, the delay is found beyond the control of generating company or the transmission licensee, as the case may be, after due prudence and taking into account prudent use of funds. There is no provision in the said regulations regarding normative IDC on normative loans as claimed by GVK. GVK has not only diverted amounts from the loan granted for the project to other businesses such as mutual fund investment etc. but has also paid huge advances to the BOP contractor against prudent commercial norms and now in dispute in with that party. The Commission cannot allow interest paid on loans used for other businesses and for advances not adjusted. Detailed reasons in this regard are discussed in para 20.3.4 and 20.5.1 of Order.

The Arbitral Tribunal vide its award on 10.4.2017 has only allowed extension of SCOD till actual COD achievement I,e 16.4.2016 which has been considered while calculating the IDC. The Commission has rightly followed Regulation (11A) of the CERC Tariff Regulations for computing IDC. Under the circumstances,

(a) IDC has been allowed to GVK for the entire period allowed by the arbitral awards.

(b) All Expenses have been allowed after prudence check

<table>
<tr><td colspan="8">and IDC calculated accordingly.
(c) GVK has diverted part of the loans for other businesses on their own admission.
(d) GVK has given advance to suppliers beyond commercial prudence.
(e) GVK has claimed IDC for loans for works which have not been executed.
(Para 20.3 of the impugned order refers)</td></tr>
<tr><td>8.</td><td>Financing Charges</td><td>70.00</td><td>31.99</td><td>11.69</td><td>20.03</td><td colspan="2">PSERC has wrongly computed the outstanding debt to be Rs. 1151.12 crores and proportionately reduced the financing charges.</td></tr>
<tr><td colspan="8">Reply of the Commission
GVK had paid finance charges on loans which have been used for other businesses and expenditure not approved by the Commission. Accordingly, finance charges have been proportionately allowed for the amount of loan which has been used and allowed for the purpose of construction of the Thermal Power Plant.
(Para 21 of the impugned order refers)</td></tr>
</table>

4.11 That the appellant has miserably failed to show that the balance of convenience, lies in its favour. It is submitted that the pendent-lite and final tariff are required to be seen in different lights as the factors deciding the same are different. The final tariff is the one which is

decided after examining the relevant accounts and the legal and regulatory provisions applicable thereto.

4.12 That it is submitted that the appellant's project availability in FY 2016-17 was a mere 4.7% for which AFC has been determined in the impugned Order. GVK's project availability was 42% in 2017-18 and 66% in 2018-19 as against the minimum availability of 75% as per the PPA. The capacity charges will go up with increased availability.

4.13 It would be pertinent to note that GVK has contended that the final tariff (fixed cost) will be Rs. 1.419 per kWh. This contention of GVK is not correct. The fixed cost as per the applicable CERC Regulations will work out Rs. 1.532 per kWh on the basis of declared availability of 19.71051 MUs (4.7%) by GVK during FY 2016-17 which translates to Rs. 1.723 per kWh on the basis of 17.53205 MUs of energy scheduled by PSPCL during the said period. The fixed cost will be higher will be higher with the increased availability declared by GVK.

However, the consumers of the State are being presently burdened due to the higher provisionally fixed cost of Rs. 2.20 per kWh allowed for the GVK's project as an interim measure. The final tariff is the one which is decided after examining the relevant accounts and the legal & regulatory provisions applicable thereto. As such, in the interest of justice, the impugned Order, which is on merits and passed by the Commission after due diligence, is required to be implemented. The application for stay is devoid of any merit and is liable to be dismissed. As such, no stay is warranted.

4.14 It is submitted that the Commission has applied its mind carefully and decided the matter prudently in terms of law.

5. Submissions of the Respondent No.2

5.1 That in the present Appeal before this Hon'ble Tribunal, the Appellant has challenged the final Tariff Order dated 17.1.2020 passed by the Respondent No.1 Commission in Petition No.54/2017 whereby, the Commission has approved the capital cost of the Appellant's 2x270 MW thermal power project at Goindwal Sahib, District Taran Taran in the State of Punjab and has alsodetermined the capacity charges and energy chargesfor the Financial Year 2016-17. The Appellant is aggrieved qua the disallowances made in the claimed capital cost under the impugned Order as also the determination of capacity charges and has contended, inter alia, that,

(i) the impugned Order violates the letter and spirit of the relevant statutory and regulatory provisions governing tariff determination;

(ii) the disallowance of actual interest during construction (IDC) incurred by the Appellant on account of various force majeure events in effect negates the Arbitral Awards dated 10.4.2017

extending the Schedule Commercial Operation Date (SCOD) of the project;

(iii) the denial of IDC on actuals is contrary to the financing agreements and the terms of the Power Purchase Agreement entered into with Respondent No.2;

(iv) the actual capital expenditure incurred has been wrongly slashed down based on assumptions and conjectures;

(v) the Joint Auditor Report placed before the Commission has been relied on in an arbitrary manner by adopting the pick and choose approach without any basis; and

(vi) the Commission has ignored Judgment dated 8.4.2009 of this Hon'ble Tribunal approving the provisional project cost by reducing actual cost incurred under various heads which have previously been allowed by this Hon'ble Tribunal.

Accordingly, the Appellant has prayed for setting aside of the impugned Tariff Order dated 17.1.2020and for allowing completed capital cost for its project as Rs.4267.38 crores. The answering Respondent disputes and denies the above contentions made by the Appellant and craves leave to submit a detailed Reply to the Appeal as may be directed by this Hon'ble Tribunal.

5.2 That alongwith the present Appeal, the Appellant has also filed the above Application seeking stay of the impugned final Tariff Order. The reliefs sought in the interim, besides stay of the Order, are as under:

(i) a direction to Respondent No.2 not to take any coercive steps including recovery of excess amounts paid during pendency of the Appeal; and

(ii) pending final disposal of the Appeal, the provisional tariff of Rs.2.20/kWh be paid to the Appellant.

The Appellant's prima facie case for interim relief has been pleaded in the Application as under:

(i) that the Arbitral Awards dated 10.4.2017 are binding and enforceable as a decree of Court but have not been given effect to in the impugned Tariff Order;

(ii) that the capacity charges for the Financial Year 2016-17 have wrongly been determined as per PSERC Tariff Regulations, 2005 instead of the CERC Tariff Regulations, 2014;

(iii) that the cost for works carried out by the Appellant's sister concern have wrongly been disallowed without any adverse observations on the competitive bidding process;

(iv) that despite the impact of force majeure and change in law leading to cost and time overrun, the final completed capital cost is substantially lower than that approved in principle; and

(v) that there is cherry picking from Joint Auditor Report which recommends disallowance of costs and ignoring findings which allow certain costs, which shows clear case of bias and prejudice against the Appellant.

The Appellant has also pleaded balance of convenience and irreparable harm and injury in support of its relief for interim stay, which is more particularly averred in detail hereinbelow.

5.3 That in response to the notice issued by this Hon'ble Tribunal in the above Application, the answering Respondent No.2 respectfully submits that the Appellant's project has been implemented under the Amended and Restated Power Purchase Agreement dated 26.5.2009 [hereinafter, the "Restated PPA"] entered into with Respondent No.2 and all rights and obligations of the parties flow thereunder. Briefly stated, under the Restated PPA,

(i) the Appellant has been bound to achieve Commercial Operation Date (COD) for Unit-I within 36 months of financial closure and for Unit-II after 6 months from commissioning of

Unit-I. Since the financial closure of the Appellant's project has taken place on 21.5.2010, the SCOD of the two Units have been agreed to be on or before 20.5.2013 and 20.11.2013 respectively;

(ii) that Respondent No.2 has been obligated to purchase entire power generated from the Appellant's project (the contracted capacity) on and from the COD and for which Respondent No.2 is required to pay the tariff agreed under the PPA [Clause 4.3.1.];

(iii) that the said tariff is to be paid in two parts comprising of capacity charges (based on capital cost as approved by the Commission) and energy charges and is to be determined for any Contract Year by the Respondent No.1 Commission in accordance with Schedule 6 and upon an application for determination of tariff made by the Appellant-Seller; and

(iv) that in the event a Unit is not commissioned as per the agreed COD due to a force majeure event, the time for achieving COD may be extended [Clause 12] and if the agreed COD is not achieved due to a change in law event, then corresponding adjustments in tariff are required to be carried out [Clause 13].

5.4 That the issue at hand concerns the approval of capital cost for the Appellant's project and determination of capacity charges for the Financial Year 2016-17. The Restated PPA has defined 'capital cost' to mean,

> *"the actual capital cost of the Project on a relevant date which shall not be later than the Commercial Operation Date of the Power Station as certified by the auditors appointed jointly by jointly by by the Seller and Procurer and as approved by PSERC."*

The PPA thus contemplates actual capital cost to be,

(i) first audited by the auditors jointly appointed by the parties and,

(ii) thereafter approved by the Respondent No.1 Commission (after prudence check)

The capital cost certified by the Joint Auditor is thus subject to approval by the Respondent No.1 Commissionand cannot be pleaded as the only benchmark for approval of completed capital cost for the project. Even otherwise, the Joint Auditor's report is a requirement under the Restated PPA and as such is binding as between the parties thereto and the Respondent No.1 Commission must still carry out the prudence check in discharge of its regulatory functions. It follows that while carrying out such prudence check, the Commission may accept the certification of the Joint Auditor either partially or fully

or may even reject some of it in toto. Such a consideration as part of prudence check cannot be alleged as 'cherry-picking' as has wrongly been done by the Appellant in the present Application.

5.5 That the approval of the aforesaid capital cost has been undertaken by the Respondent No.1 Commission in two stages on Petitions filed by the Appellant in that behalf:

(i) in-principle approval vide Order dated 29.4.2008 passed in Petition No.4/2008:

Rs.2622.48 crores as modified by this Hon'ble Tribunal vide Order dated 8.4.2009 passed in Appeal No.104/2008 to Rs.2963.8 crores; and

(ii) final determination after prudence check vide the impugned Order passed in Petition No.54/2017: Rs.3,058 crores.

It may be mentioned here that while applying for in-principle approval of the capital cost, the Appellant has been aware of the regulatory position that the tariff is to be based on the actual capital cost found prudent by the Commission and that the in-principle approval is only for providing guidance to the Appellant as project developer and facilitate the lenders and financial institutions to finalize the funding and financing agreements. The in-principle approval has thus been

an estimation of costs likely to be incurred by the Appellant in project implementation. The settled legal position regarding such estimation of costs also requires the Commissions to be slow in interfering with the estimation of costs drawn by the project developer and they can always correct the discrepancies at the time of actual determination of the cost after it has been incurred. Suffice it to say, the in-principle approval of capital cost granted to the Appellant (as modified by this Hon'ble Tribunal) has only been an estimation of costs which, upon being incurred, are to be finally approved after prudence check. The absolute sacrosanctsy now sought to be accorded to it by the Appellant without permitting any scope for prudence check, is thus completely misplaced and is not liable to be entertained by this Hon'ble Tribunal.

5.6 That Respondent No.2 submits that the in-principle approval of the project capital cost had been given by the Respondent No.1 Commission based on the supporting data submitted by the Appellant so that the cost determined could be as close as possible to the project cost finally incurred. Respondent No.2 craves leave to refer to the following components of the in-principle approval which are relevant for the present purposes:

(a) with respect to the land requirement for the project, the Commission had noted that while seeking the clearance of Ministry of Environment and Forest (MOEF), the Appellant had indicated the requirement of land as 715 acres. The subject land requirement was found to be sufficient by the Commission and after taking into account some land already acquired for it by the State Government, an amount of Rs.109.35 was approved for the same;

(b) the Appellant, after inviting competitive bids, had issued a letter of intent to M/s BHEL for supply of BTG package at a cost of Rs.1070.58 crores, inclusive of taxes and duties, which the Commission had considered as reasonable for the purpose of estimating project capital cost;

(c) for the Balance of Plan (BOP) package, the Commission had accepted the negotiated price of Rs.1005 crores arrived at by the Appellant after inviting bids, subject to the condition that it was to be reduced by Rs.50 crores if the Appellant eventually chose *"induced draft cooling tower"*;

(d) the IDC cost of Rs.286.36 crores was accepted by the Commission based on the assumptions as per the standard terms in respect of the loans to be availed for the project.

5.7 That with the estimates of the project capital cost of Rs.2315.12 crores, IDC of Rs.286.36 crores, financing charges and contingency of Rs.21 crores and the debt equity ratio of 80:20, the Commission approved the in-principle project capital cost as under:

> *"Based on the above, item-wise estimates of project capital cost as submitted by M/s GVK and approved by the Commission are depicted in tabulated form in the Annexure. The Commission notes that with the issuance of LOI for BTG and BOP packages, nearly 79% of the estimated project capital cost gets firmed up. Another 15% of the capital cost is accounted for by land cost (4%) and IDC (11%) thereby firming up nearly 94% of the total cost of the project. Another sum of Rs.35 cores for the railway siding can also be considered as firm. The balance infirm amount comes to Rs.116.19 cores (approx.4.4%) which includes Rs.51 crores for non EPC cost (excluding railway siding). On the above basis, the Commission accords 'in principle' acceptance to the estimated project capital cost of Rs.2622.48 crores. This approval will, however, not be construed as approval/ratification of any other aspect separately covered under an applicable law."*

In this manner, with nearly 94% of the project cost already firmed up, the Respondent No.1 Commission accorded its approval for in-principle project cost of Rs.2,622.48 crores; this in-principle approval was based on the project SCOD of 20.5.2013 and 20.11.2013 for its

two units as agreed under the Restated PPA. In an Appeal filed before this Hon'ble Tribunal [being Appeal No.104/2008], the estimated capital cost of the project was revised by this Hon'ble Tribunal vide Order dated 8.4.2009 to Rs.2,963.8 crores. This approved in-principle estimated project cost of Rs.2963.8 crores which was incorporated in Schedule 11 of the Restated PPA dated 26.5.2009.

5.8 That Respondent No.2 submits that while undertaking project implementation based on the aforesaid approved in-principle cost, the Appellant raised issues of force majeure and change in law events having affected its project and filed two Petitions before the Respondent No.1 Commission seeking extension of project SCOD on that account:

(i) Petition No.65/2013 wherein, the force majeure events pleaded were, inter-alia, approval of railway drawings, availability of the land to enter upon and commence mining operation, poor soil condition, etc.

(ii) Petition No.33/2015wherein, the force majeure events pleaded were de-allocation of coal blocks by the Hon’ble Supreme Court on 25.8.2014 and promulgation of Ordinance by the Government of India on 24.9.2014.

In its Rejoinder filed in Petition No.65/2013, the Appellant submitted that the force majeure events which were in force at the time of filing of the Petition had ceased to exist on 26.6.2014 and it had started towards working of the project in right earnest:

> *"29. It is submitted that all the Force Majeure events claimed in the present Petition viz. approvals of drawings by railways and handing over of forest land by forest department, GOI to the Company have ended. A table showing various Force Majeure events which have impacted the Project along with start date and end date and the time over is set out below:*
>
> *……*
>
> *30. It may be noted that all the Force Majeure events have been concluded and the Petitioner is working towards commissioning of the Project in right earnest. In fact, without prejudice to the rights of the Petitioner, it has pursued the issue of coal supply with Coal India Limited, which has agreed to arrange for 1.5 lac tonnes of coal for testing and commissioning. Out of the said amount, for procuring 75000 tonnes of coal, an MoU has been entered into with the Central Coal Field on 02.06.2014, allocation was done on 18.06.2014 and a release order was given on 09.07.2014. The Petitioner has started lifting the coal from 12.07.2014 and so far 23000 MT of coal is lifted from Ashoka and Piparvar mines of Central Coal Fields."*

Thus, between the two claims of force majeure/change in law events, there was a period of hiatus during which the Appellant had

proceeded with its work of implementing the project; the said period could not by any stretch of imagination be considered for extension of time in achieving the project SCOD.

5.9 That vide Order dated 12.8.2015, the Respondent No.1 Commission referred the controversy in the aforesaid Petitions for resolution through arbitration (except with regard to interim arrangement) which culminated into passing of Arbitral Awards dated 10.4.2017. The Learned Arbitral Tribunal granted extension of project SCOD as under:

(i) under Claim Petition No.1: extension of SCOD from 4.1.2010 to 25.6.2014;

(ii) under Claim Petition No.2: extension of SCOD from 24.9.2014 (i.e. date of Coal Order) till actual COD.

Thus, under the Arbitral Awards, there was no force majeure relief granted or available to the Appellant from 26.6.2014 to 23.9.2014 i.e. for 90 days. As stated hereinabove, it was also an admitted position of the Appellant that the force majeure events earlier affecting its project implementation had ceased to exist prior to the passing of the Judgment by the Hon'ble Supreme Court. As such, it was never open to the Appellant to subsequently contend, as it is now seeking to do

before this Hon'ble Tribunal, that the gap between its two claims had overlapped and/or subsumed with the other. Being aggrieved by the aforesaid Awards, Respondent No.2 preferred Arbitration Applications bearing Nos.122/2017 and 123/2017 before the Learned Commercial Court at Patiala, seeking setting aside of the Arbitral Awards, which are presently pending adjudication and are listed on 5.2.2020 for final hearing. Further, vide common Order dated 1.2.2016 passed in Petition Nos.65/2013 and 33/2015, the Respondent No.1 Commission allowed the Appellant to declare COD of the project based on interim fuel arrangement stated to be available with the Appellant for running the plant for 2 to 2.5 years. Being aggrieved by the said Order, PSPCL filed Appeal Nos.68/2016 and 69/2016 before this Hon'ble Tribunal which are presently pending adjudication and are listed for final hearing on 6.2.2020.

5.10 That the units of the Appellant's project were commissioned on 16.4.2016 and 6.4.2016 respectively. The Appellant was now required to file a Petition before the Respondent No.1 Commission for approval of the capital cost actually incurred while commissioning its project and also for determining the capacity charges for the purpose of computation of tariff to be paid by Respondent No.2 for the energy supplied from the project. However, the Appellant failed to do so and

the power purchase bills were raised on Respondent No.2 with capacity charges @Rs.1.926/kWh based on the in-principle capital cost approved by the Commission. The Appellant ultimately filed the Petition [being Petition No.54/2017] for final approval of capital cost in November, 2017 i.e. 19 months after commissioning of its project. The said Petition was thereafter amended and the amended Petition was admitted by the Commission vide Order dated 13.2.2018. In this manner, for almost 2 years from its project commissioning on 16.4.2016, the Appellant continued to raise power purchase bills upon Respondent No.2 with capacity charges @Rs.1.926/kWh without any urgency for seeking approval of the capital cost actually incurred by it, even when it was its own stated case that the project implementation hadsuffered force majeure and change in law events which had resulted in cost and time overruns. It belies all comprehension as to how this conscious and voluntary act of omission on part of the Appellant can be now pleaded as a contributory factor to the Appellant's project being under severe financial stress.

5.11 That a perusal of the Petition filed before the Respondent No.1 Commission would show that a very high completed capital cost of Rs.4,441 crores (almost 48% more than the approved in-principal

capital cost) was claimed with a prayer for grant of provisional tariff. However, there was no plea as regards any alleged on-going financial stress or the project having become a non-performing asset or NPA. It was only orally during the initial hearings in the Petition that it was submitted by the Appellant that its generation asset was being severally stressed and was on the verge of being declared a non-performing asset unless the tariff as claimed, whether provisional or final, was not allowed for it; there was no data submitted before the Commission to substantiate its plea. Considering that the completed project cost of Rs.4,441 crores being claimed by the Appellant was highly inflated and thus inadmissible and prudence check thereof was yet to be carried out by the Commission, Respondent No.2 objected to the grant of any provisional tariff at that stage and submitted [in its detailed Reply filed on 20.3.2018] as under:

> *"40. ……...The Respondent submits that an inflated project cost for which prudence check is yet to be undertaken by this Hon'ble Commission, cannot result in an unfair tariff burden on the Respondent and its consumers in clear violation of the mandate under Section 61 of the 2003 Act. It is submitted that the Hon'ble Supreme Court in Keshavlal Khemchand & Sons (P) Ltd. v. Union of India, [(2015) 4 SCC 770] has defined a 'non-performing asset' as an asset which ceases to generate income and has held that an asset is treated as non-performing*

when interest is overdue for at least two quarters. It is submitted that since the fixed cost of Rs.1.926/Kwh as per the approved capital cost is being paid to the Petitioner since April, 2016 till date, the asset of the Petitioner cannot be regarded to be even near to becoming non-performing. If despite such tariff payment the Petitioner's generation asset is stressed as claimed by it, then the consequences of commercial practices of the Petitioner cannot be permitted to be loaded on to the consumers of the State. The Petitioner is therefore not entitled to receive any provisional tariff on the basis of inadmissible and erroneous plea of its generation asset becoming a non-performing asset; even otherwise, no provisional tariff is at all permissible for the reasons more particularly set out below."

5.12 That thereafter, the Appellant filed an Affidavit dated 24.3.2018 before the Respondent No.1 Commission wherein it sought to allege arbitrary payments and deductions by Respondent No.2 from the bills raised by the Appellant. The Appellant contended that owing to shortfall in tariff being received by it from Respondent No.2, its generation asset had become a non-performing asset from August, 2017 onwards in terms of the applicable Reserve Bank of India (RBI) norms; no explanation was given as to why the Appellant had not come forward with its tariff filing after commissioning its project as it was required to do under the applicable Regulations as also under the Restated PPA and had allowed its project to become an NPA.

The deliberate omission to approach the Commission despite suffering the so-called financial stress leads to a reasonable assumption that perhaps what was ailing the project was not the "lower tariff" but some other commercial compulsions because of which regulatory scrutiny was being deferred. Respondent No.2 submits that seeking the final tariff after almost two years of commercial operation of its project and after the project having become an NPA was a conscious business decision of the Appellant for which the Appellant alone was responsible and no defaults at all could be attributed to Respondent No.2. By its own acts of commission and omission, the Appellant had brought the project to a debt-ridden status and its survival, as stated in the above Affidavit, nowdepended on getting relief in the form of interim tariff from the Commission to the extent of 95% of completed capital cost. It was in these unfortunate but urgent circumstances that the Respondent No.1 Commission, vide Order dated 28.3.2018, was constrained to approve provisional tariff with capacity charges as Rs.2.20/kWh and energy charges as per Order dated 1.2.2016 passed in Petition No.33/2015. Since the final tariff determination was to be later undertaken by the Commission after prudence check so as to allow only permitted costs to be passed on to the consumers in the State,

Respondent No.2 considered it appropriate at that stage not to challenge the grant of provisional tariff which was only interim and was to be soon replaced with the final tariff.

5.13 That Respondent No.2 craves leave to reproduce the following extracts of the above Order dated 28.3.2018 to demonstrate the nature and extent of the provisional tariff allowed to the Appellant:

> *"GVK has come to the proper forum (PSERC) for tariff determination for FY 2016-17 in October, 2017 and it is only in February, 2018 that any urgency has been displayed and that too only because of the revised RBI Guidelines.*
>
> *…….*
>
> *The Commission notes that pursuant to its Order dated 01.02.2016 common to both petitions (33 of 2015 and 65 of 2013), the COD of the project was achieved on 16.04.2016. The Commission is of the view that the petitioner should have approached it within a reasonable time after the COD of the project on 16.04.2016for determination of tariff/provisional tariff for the project under the relevant Regulations. Instead of filing the petition before the Commission for determination of tariff, the petitioner approached PSPCL which going beyond its jurisdiction, determined the fixed cost for the project as 1.926 per kWh. The petitioner filed the petition no. 54 of 2017 for determination of tariff for FY 2016-17 on 22.09.2017 in the Commission citing Regulations which were not relevant. Thereafter, the petitioner filed the amended petition on*

08.02.2018 i.e. almost two years after the COD of the project. This shows the irresponsible attitude of the petitioner.

The Commission is yet to carry out a prudence check on the Completed Capital Cost indicated by the petitioner. The IDC cost itself is purported to have risen to 30% of the cost of the project against the earlier approved IDC of approximately 12%. However, noting the submissions of the petitioner regarding the stringent stipulations under the new RBI Guidelines, their financial hardship and the views of PSPCL, the Commission finds it appropriate to allow the provisional tariff of the project with capacity charges as Rs. 2.20 per kWh and the energy charges based upon the Order dated 01.02.2016 common to petition no. 33 of 2015 and 65 of 2013. This is without prejudice to the final determination of tariff for FY 2016-17 by the Commission on merits after prudence check in petition no. 54 of 2017. The above provisional tariff shall be payable from the date of this order."

It becomes clear from the aforesaid that,

(i) there was no urgency on part of the Appellant for seeking approval of its completed capital cost and tariff; rather, the Commission found its attitude irresponsible;

(ii) prudence check on completed capital cost indicated by the Appellant was yet to be carried out;

(iii) the only reason for allowing a provisional tariff was the stringent stipulations under the RBI Guidelines and the pleaded financial hardship; and

(iv) the provisional tariff was subject to final tariff determination on merits after produce check.

This meant that once the final tariff was determined on merits after prudence check, it was not open for the Appellant to insist upon any other dispension, more so for the one qua which no prudence check had been carried out. In fact, upon determination of final tariff, the provisional tariffhas ceased to exist and its acceptance or otherwise by Respondent No.2 is no longer of any consequence. It is pertinent to mention here that the Appellant having been the beneficiary of the provisional tariff for almost 2 years, it cannot now contend that Respondent No.2 has never challenged the same.

5.14 That in its Affidavit dated 28.3.2018, the Appellant had alleged the following arbitrary deductions by Respondent No.2 from its power purchase bills:

> *"5. I say that PSPCL is presently paying capacity charges at Rs.1,926 per unit, considering a capital base of Rs.2,963 Crores including debt of Rs.2,222 Crores with interest rate at 12.75% p.a. From this amount, PSPCL has been arbitrarily*

making payments and deductions from the bills raised by GVK which includes:

(i) Deductions towards penalty for the Contract Year 2016-17 from the monthly tariff bills;

(ii) Deductions on account of surface transportation charges;

(iii) Disallowing landed cost of the coal;

(iv) Disallowing auxiliary consumption in violation of CERC Tariff Regulations; and

(v) Other deduction such as transit loss of coal, water charges, compensation as per IEGC, etc. to a tune of Rs.15.25 cr. in full."

The Appellant had also stated that it had filed Petition No.68/2017 before the Respondent No.1 Commission challenging the above deductions. The said Petition has since then been decided by the Commission vide Order dated 6.3.2019, relevant extracts whereof are reproduced below for ready reference of this Hon'ble Tribunal:

"10.6.3 The Commission notes that it has been provided in the Schedule 6 of the Amended and Restated PPAdated 26.05.2009 that the monthly capacity chargesbased on the capital cost and the monthly energy charges, shall be calculated and paid as approved by PSERC as per CERC (Terms and Conditions of tariff) Regulations as applicable. During the course of hearings, both the parties agreed that the said CERC Regulations cannot be made applicable in the instant case as the project is located in the State of Punjab and supplies the entire power generated to the State utility.

10.6.4 Accordingly, it is clarified that upto FY 2016-17, the applicable Regulations shall be the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2005 and thereafter from FY 2017-18 onwards, the applicable Regulations shall be the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Generation, Transmission, Wheeling and Retail Supply Tariff) Regulations, 2014 as amended from time to time, for supply of electricity by GVK to PSPCL.

…

10.6.8 The clause 1.2.2 under 'SCHEDULE 6: TARIFF' of the Amended and Restated PPA dated 26.05.2009 provides that monthly capacity charges shall be paid as per CERC (Terms and Conditions of Tariff)Regulations as applicable. However, as clarified above and agreed by both parties, PSERC regulations are applicable. ……."

It becomes clear from the aforesaid that it was with the agreement of both the Appellant and Respondent No.2 that the PSERC Tariff Regulations, 2005 were made applicable to the capacity charges determination for the Financial Year 2016-17. That being so, the Appellant cannot be permitted to impugn the final Tariff Order dated 17.1.2020 on the ground that the CERC Tariff Regulations, 2014 have not been made applicable while determining the capacity charges for Financial Year 2016-17.

5.15 That in its aforesaid Order dated 6.3.2019, the Respondent No.1 Commission also decided the issue as regards various deductions agitated therein by the Appellant. To the extent the said Order was acceptable to Respondent No.2, an amount of Rs.104.94 crores was paid by it to the Appellant in total 5 installments dated 13.5.2019, 16.5.2019, 24.5.2019, 28.6.2019 and 17.7.2019, along with interest of Rs.19.01 crores on 7.8.2019. The Appellant challenged the said Order before this Hon'ble Tribunal in Appeal No.189/2019 on the findings with respect to calculation of capacity charges after inclusion of 9% normative auxiliary consumption, testing charges of coal, IEGC compensation for backing down power and surface transportation charges. Respondent No.2 also filed an Appeal against the said Order before this Hon'ble Tribunal [being Appeal No.192/2019] on the issues of calculation of GCV on ARB total moisture, rebate reversal rate and interest on rebate.Both the said Appealsare pending adjudication before this Hon'ble Tribunal.In this manner, the issue as regards alleged deductions made by Respondent No.2 from the power bills of the Appellant has become sub-judice before this Hon'ble Tribunal and any payments, if at all, to be received by the Appellant are subject to outcome of the above said Appeals. As such, the Appellant cannot be permitted to plead a case of balance of

convenience in its favour by contending that an amount of Rs.560 crores is recoverable by it from Respondent No.2 (omitting to take into account the Rs.104.94 crores already received by it with interest). When admittedly both parties have challenged the above said Order dated 6.3.2019 and the matter is sub-judice before this Hon'ble Tribunal, there cannot be a case for any absolute rights fructifying in the Appellant's favour to receive the alleged deductions from power purchase bills.

5.16 That it is further submitted that for the period from passing of provisional Tariff Order dated 28.3.2018 till the determination of final tariff vide the impugned Order dated 17.1.2020 i.e. for a period of almost 2 years, the Appellant continued to receive tariff from Respondent No.2with capacity charges @ Rs.2.20/kWh. Importantly, the said provisional tariff was not challenged by the Appellant nor was any revision therein sought from the Respondent No.1 Commission; no urgency was shown even subsequently when RBI Circular dated 7.6.2019 now being pleaded by it was issued. This meant, and rightly so, that the provisional tariff obtained by citing the then RBI Circular and the need for lenders' satisfaction was to reasonably bring the project out of dire financial stress. The details of tariff received by the

Appellant for the energy supplied to Respondent No.2 since the grant of provisional tariff which shows that the Appellant received Rs.1279.809 crores towards fixed charges.It could therefore never be the case that despite having received the tariff as aforesaid, the project continued to remain an NPA and failed to service its debts towards the lenders in terms of the financing agreements. During this period, the RBI Circular based on which the plea for urgent Order for granting provisional tariff was made, was quashed by the Hon'ble Supreme Court vide Order dated2.4.2019; however, this fact was never brought to the notice of the Respondent No.1 Commission and the Appellant continued to receive capacity charges of Rs.2.20/kWh throughout.

5.17 That notwithstanding the above, the situation once again being pleaded today (identical to that at the time of grant of provisional tariff) is that the project is an NPA, there is an RBI Circular requiring urgent compliances, the lenders are stressing on a Resolution Plan and that if the (now non-existent) provisional tariff with capacity charges of Rs.2.20/kWh is not granted, the project would be referred to insolvency proceedings.Thus, once again, the grant of an interim tariff pending adjudication of the present Appeal is being pleaded as a *fate accompli,* except that now a detailed prudence check of the

completed capital cost has been carried out which has revealed many claims which have been highly inflated, unsubstantiated and inadmissible where many transactions have been found to be lacking in the desirability of dealings at arms length. It may be mentioned here that at the time of grant of in-principle approval, the data submitted by the Appellant as regards its estimated project cost has been taken as the basis and at the time of grant of provisional tariff, there has been no prudence check by the Commission and as such, the Appellant has been receiving tariff for almost 4 years with capacity charges @ Rs.1.926/kWh and Rs.2.20/kWh, both of which have been found after prudence check to be inadmissible. Needless to say, the consumers in the State have borne the brunt of these inadmissible capacity charges arising out of sheer financial mismanagement on part of the Appellant and yet the prayer before this Hon'ble Tribunal is that the same arrangement must continue. Respondent No.2 submits that it is the consumers in the State that have been suffering harm and injury in the form of inadmissible capacity charges being passed on to them for the energy purchased from the Appellant's project and the same may not be allowed by this Hon'ble Tribunal to continue during the pendency of the present Appeal.

5.18 That it is submitted that the prudence check conducted by the Respondent No.1 Commission is a regulatory exercise as a part of its regulatory mandate, independent of any objections filed thereto and is undertaken by the Commission so as to ensure that only that cost is passed on in the tariff as has been prudently incurred in establishment of projects so that a balance may be maintained between the commercial interests and the public interest of the consumers. The dictionary meanings of the word 'prudent' is "sensible and careful when you make judgments and decisions and avoiding unnecessary risk". The prudence check of the capital cost, thus, has to be looked into considering whether the Appellant has been careful in its judgments. In this regard, while addressing an issue on fixation of tariff under the Electricity Regulatory Commissions Act, 1998, the Hon'ble Supreme Court in *West Bengal Electricity Regulatory Commission v. CESC Ltd. [(2002) 8 SCC 715]* has opined as under:

> *"94….The 1998 Act mandates the Commission to take into consideration the efficient management by the licensee of its Company, as also the interests of consumers while determining the tariff, therefore, if these two factors which go in favour of the consumers are in conflict with the definition of expenditure*

"properly incurred" in Schedule VI to the 1948 Act then it is for the Commission to reconcile this conflict and decide whether to accept the expenditure reflected in the accounts of the Company or not. In this process the Commission in our opinion is not bound by the auditors' report.……

96. The High Court further came to the conclusion that in view of the fact that there is no challenge to the accounts of the Company by the consumers, the said accounts of the Company should be accepted by the Commission. Here again we are not in complete agreement with the High Court. There may be any number of instances where an account may be genuine and may not be questioned, yet the same may not reflect good performance of the Company or may not be in the interest of the consumers. Therefore, there is an obligation on the Commission to examine the accounts of the Company, which may be genuine and unchallenged on that count still in the light of the above requirement of Sections 29(2)(g) to (h). In the said view of the matter admitting that there is no challenge to the genuineness of the accounts, we think on this score also the accounts of the Company are not ipso facto binding on the Commission. ……"

Thus, the Hon'ble Supreme Court has categorically held that notwithstanding any certification by an auditors to the accounts of a company, a State Electricity Regulatory Commission, is still duty bound to conduct its own independent prudence check so as to examine the genuineness of the said accounts and to ascertain as to

what expenditure has been incurred by the said company 'prudently' to maintain a balance between the consumer interest and the commercial interest of the generating company. This necessary act of balancing interest also finds mention in the recent Judgement of the Hon'ble Supreme Court in All India Power Engineer Federation v. Sasan Power Ltd., (2017) 1 SCC 487, wherein the Hon'ble Supreme Court has held as under:

> *"26…..the moment electricity tariff gets affected, the consumer interest comes in and public interest gets affected. This is in fact statutorily recognized by the Electricity Act in Sections 61 to 63 thereof. Under Section 61, the appropriate Commission, when it specifies terms and conditions for determination of tariff, is to be guided inter alia by the safeguarding of the consumer interest and the recovery of the cost of electricity in a reasonable manner. For this purpose, factors that encourage competition, efficiency and good performance are also to be heeded….."*

Thus, it is imperative that in matters related to tariff, the consumer interest be balanced with commercial interests of the entity.

5.19 That besides, the commercial entity, after adjudication of the dispute may very well get its figures trued up at a subsequent stage;however, the consumer is burdened with the interim directions.The Hon'ble

Supreme Court thus, in Raunaq International Ltd. v. I.V.R. Construction Ltd., (1999) 1 SCC 492 has held as under:

> *"24. Dealing with interim orders, this Court observed in CCE v. Dunlop India Ltd. [(1985) 1 SCC 260 : 1985 SCC (Tax) 75 : (1985) 2 SCR 190] (SCR 190 at p. 196) that an interim order should not be granted without considering the balance of convenience, the public interest involved and the financial impact of an interim order. Similarly, in Ramniklal N. Bhutta v. State of Maharashtra [(1997) 1 SCC 134] the Court said that while granting a stay, the court should arrive at a proper balancing of competing interests and grant a stay only when there is an overwhelming public interest in granting it, as against the public detriment which may be caused by granting a stay. Therefore, in granting an injunction or stay order against the award of a contract by the Government or a government agency, the court has to satisfy itself that the public interest in holding up the project far outweighs the public interest in carrying it out within a reasonable time. The court must also take into account the cost involved in staying the project and whether the public would stand to benefit by incurring such cost."*

The aforesaid decision of the Hon'ble Supreme Court applies squarely in the present case while considering the plea of the Appellant seeking interim stay. This is more so when, the Appellant has been receiving tariff for almost 4 years since its commissioning

without any prudence check on account of its delayed and irregular tariff filing and the consumers in the State have been burdened with the said tariff for these 4 years.

5.20 That Respondent No.2 further submits that after filing its Tariff Petition and during the course of proceedings for tariff determination, the Appellant filed Affidavits dated 17.12.2018, 24.3.2018, 14.6.2019, 1.8.2019, 27.11.2019, 3.12.2019 and 6.12.2019 which showed several discrepancies in amounts claimed as capital costs. On queries from the Commission, the amounts under various items continued to change under each Affidavit and yet, the final figure remained the same. It has been noted in the impugned Order [in para 9.34.2] that the Appellant's submissions in the Petition to the Commission on oath had been full of mistakes, calculation errors and the figures had been changed frequently;for many claims, the supporting bills/vouchers were not submitted.This was so even when the project had been commissioned in April, 2016 itself and the tariff filing had been done 2 years thereafter with all costs on actuals and computations being available with the Appellant. Respondent No.2 in its Reply dated 20.3.2018 and subsequent Replies filed in reply to the above said Affidavits highlighted the said glaring mistakes and submitted, inter-alia, thatit was reasonably expected out of any

generating company to carry out accurate assessment of the costs being presented before the Regulatory Commission so as to avoid any financial errors which could have substantial implications while determining tariff, ultimately to be borne by the consumers of RespondentNo.2.

5.21 That however, the Appellant, owing to its casual approach,had claimed huge sums in the Tariff Petition which have later on been stated to be 'inadvertent errors', at the costs of the consumers.Even when the Respondent No.1 Commission deputed two of its officers to visit the plant of the Appellant on 26.4.2019 and 5.7.2019 for verification of facts, the said officers noted that some of the works related to BOP (EPC) and non-EPC were incomplete or not in use. Thus, it appeared that the expenditure on this account has been claimed in excess of payments actually made.The said observations of the Commission were duly recorded by it in its Order dated 19.7.2019. In these circumstances, the Respondent No.1 Commission, vide its Order dated 19.7.2019, reduced the provisional fixed charges to Rs.1.926/kWh (i.e. as per the in-principle approval) in consumer interest, which was stayed by this Hon'ble Tribunal vide Order dated 26.7.2019 passed in Appeal No.258/2019.The same has been recorded in the impugned Order as under:

"2.10 The Commission vide Order dated 19.07.2019 observed that there are discrepancies in the amounts claimed as capital cost of the project which was evident from the various affidavits and information filed by GVK. The Commission, therefore, keeping in view the interest of the Consumers was constrained to revise the provisional fixed charges from Rs.2.20 to Rs.1.926 per kWh with immediate effect till the final decision of the petition. This order of the Commission was stayed by the Hon'ble APTEL vide its Order dated 26.07.2019."

In this manner, the Appellant continued to receive the provisional tariff of Rs.2.20/- per kWh till the passing of the impugned tariff Order.

5.22 That in the meantime the Joint Auditor appointed by the parties had submitted its Report before the Respondent No.1 Commission on 14.10.2019. The said Report was also examined by a Committee constituted by Respondent No.2 which observed that the Report was based on too many assumptions and too many limitations and disclaimers were to be kept in view while reading the Report. Further, one of the most important cost elements being the IDC wherein a cost overrun of Rs.1109.65 crores was being claimed by the Petitioner had been mechanically approved by the Joint Auditor whereas as per the data available with Respondent No.2, there were several differences in the dates of disbursal of loans and date of payments to the vendors which had significant impact in the IDC

allowed. As such, the Auditor's Report was also subject to strict scrutiny by the Respondent No.1 Commission while undertaking approval of the completed capital cost.

5.23 That vide the impugned final Tariff Order dated 17.1.2020, the Respondent No.1 Commission approved the completed capital cost for the Appellant's project after due prudence check and determined the capacity charges for Financial Year 2016-17 as per the PSERC Tariff Regulations, 2015 (as agreed by the Appellant). In the said Order, the Commission noted at the outset [in para 2.1] that the provisional tariff had been allowed to the Appellant *"considering the stringent stipulations under the new RBI guidelines and the financial hardship of the petitioner, without prejudice to the final determination of Tariff for FY 2016-17 on merits"*.The Commission then proceeded with item-wise analysis of the Appellant's claims and adjudicated the same after considering the submission of the parties, the Joint Auditor Report and after carrying out due prudence check. It may be mentioned here that this Hon'ble Tribunal in its Judgement dated 13.1.2011 in Kerala State Electricity Board v Kerala State Electricity Regulatory Commission, Appeal No. 177 of 2009 has held as under:

> *"20. At the outset, it shall be stated that the State Commission while examining the accounts is not bound by the audited accounts. The accounts may be genuine as per the Auditor's*

Report. But, it is the State Commission which has to examine the accounts to ascertain the performance of the licensee in relation to the desirability of the expenditure in the interest of the consumers. This point has already decided by the Judgment of this Tribunal in Appeal No. 94 of 2008 as well as the decision of Hon'ble Supreme Court in West Bengal Electricity Regulatory Commission vs. CESC Ltd. (2002) (8)SCC 715."

Thus, it is completely wrong on part of the Appellant to contend that the Respondent No.1 Commission, while undertaking the regulatory exercise of prudence check was bound to allow the capital expenditure as certified by the Joint Auditor.

5.24 That Respondent No.2 craves leave to refer to the following observations and findings of the Commission which are relevant at the present interim stage to demonstrate that neither prima facie case nor balance of convenience exists in favour of the Appellant:

Land:

5.25 That while deciding the Appellant's claim as regards land required for the project and cost for the same, the Commission observed as under:

"5.4.2The Ministry of Environment & Forests (MoEF) issued the environmental clearance on 09.05.2008 after the Order of the Commission dated 29.04.2008. The clearance provided that the land requirement for the project will be limited to 600 acres out of which 130 acres is for ash dyke and 160 acres for the greenbelt for the power plant. GVK had filed Review Petition before the Commission, which was decided vide Order dated 06.08.2008. Thereafter, GVK had filed an Appeal No.104 of 2008 before the Hon'ble APTEL. GVK neither intimated Hon'ble APTEL nor the Commission regarding the area of land having been limited to 600 acres in the environmental clearance issued by MoEF. On being questioned, GVK in the hearing on 11.12.2019 submitted that it had approached MoEF for enhancement of land from 600 acres to 715 acres as allowed by the Commission in the Order dated 29.04.2008 but MoEF did not agree. GVK has submitted that their request for enhancement of land from 600 acres to715 acres is still pending with MoEF.

…….

5.4.4 CEA norms for land use in the 12th Plan Period were one acre per MW for the main plant area and a maximum of 1.42 acres per MW in total, including the land needed outside the main plant area to provide for railway siding and water intake etc. Thus, taking into consideration the fact that GVK obtained 39.0811 (37.9875+1.0936) acres separately for the railway siding and water corridor, the land requirement for the GVK Goindwal Sahib 2x270 MW project works out to 579.08 acres [540 (@ one acre/MW) + 39.08 acres]. However, since the

environmental clearance allows a maximum of 600 acres of land for the 2x270 MW project, the Commission decides to allow 600 acres of land for the present facility….

5.4.5 Accordingly, the Commission allows the land and its cost for the 2x270 MW project as hereunder:

Table 5: Project area and cost of land

Item	*As per Schedule-11 of the PPA*	*Claimed by GVK*	*Approved by the Commission*
Land	*715*	*754.08 acres (715 + 39.08)*	*600 acres*
Cost	*109.35*	*123.77*	*96.75*

It becomes clear from the aforesaid that even when immediately after the grant of in-principle approval, the area of 600 cares as against 715 acres applied for by the Appellant was approved by MoEF, the Appellant still claimed cost for 715 acres as part of its completed capital cost. Applying the applicable norms of Central Electricity Authority and after prudence check, the Commission approved Rs.96.75 crores for 600 acres of land approved for the project.

Boiler, Turbine generator (BTG):

5.26 That while examining the Appellant's claim under BTG contract, the Commission noted as under:

"6.4.1 …….. On 10.07.2018, GVK stated that bank statements evidencing the payment of Rs. 1213.39 crore to BHEL, referring to Annexure-4 (page 447) of its submissions dated 05.03.2018 in response to the interim Order dated 13.02.2018, have been submitted to the Commission. However, a perusal of Annexure-4 which is the IDBI Account Ledger Report from 01.04.2010 to 31.01.2018 running into 26 pages, reveals that the total amount as mentioned on page 472 is Rs. 884.20 crore. In its submission dated 27.06.2019, GVK changed this figure to Rs. 872.47 crore intimating that the balance payment to BHEL was paid through initial advance against the BTG contract prior to financial closure paid out of equity infusion of Rs.125.02 croreand another Rs.46.48 crore was paid through IDBI non-EPC construction account, thus totaling to Rs.1043.97 crore. Also in the same submissions dated 27.06.2019, GVK increased the amount of Rs. 1213.39 crore to Rs. 1237.78 crore further stating that after mutual discussions between GVK and BHEL, the BTG contract price was settled for Rs. 1155 crore as per details given therein, where the foreign exchange component was taken as Rs. 41 for one USD and Rs. 57.50 for one Euro.

6.4.3 ……. In its submissions dated 27.11.2019, GVK has requested for shiftingof Rs. 7.05 crore from pre-commissioning works to BTG contract thereby increasing the contract value from Rs. 1164.86 crore to 1171.91 crore. However, GVK has not changed the BTG Contract value of Rs. 1164.86 crore in the Annexure P-5 (break-up of completed capital cost as per

Schedule-11 of the PPA) of the said submissions dated 27.11.2019.

……

6.4.5 GVK has been continually changing the amounts in its various Affidavits, as brought out above. The Commission takes the BTG contract value at Rs. 1164.86 crore. Against this, the joint auditor has traced the payments made to BHEL as Rs. 1050.17 crore (Rs. 1043.98 crore by bank payments, Rs. 5.15 crore as TDS Recoveries and Rs. 1.04 crore as electricity recoveries). This was also borne out by the prudence check conducted in the Commission. Rs. 114.64 crore is unpaidliability to be considered on merits later and Rs. 1.62 crore for spares is dealt with separately further on. Accordingly, the Commission allows Rs. 1050.17 crore for the BTG works:

Table 10: Cost of BTG works

As per Schedule-11 of the PPA	*Claimed originally in the Petition*	*Revised claim by GVK*	*Approved by the Commission*
1070.58 revised to 1155.00	*1166.48*	*1050.22*	*1050.17”*

Thus, the claim as regards payments made under the BTG contract kept varying; however, the Commission, after prudence check allowed only those payments which were traceable to ledgers and had actually been incurred.

Balance of Plant (BOP):

5.27 That the position as regards the claims made under the BOP contract awarded for the project was also as aforesaid as is evident from the following:

> *"7.1.2 GVK submitted that M/s Geotech Consultancy Pvt. Ltd. conducted the initial soil investigation and issued its report in 1999……*
>
> *7.4.5 …….. GVK has been changing the figures of BOP works in almost all its submissions. This casts a doubt on the veracity of the submissions made by GVK.*
>
> *7.4.6 GVK has added the extra works of (i) vibro compaction, (ii) extra piling length, (iii) HCSD system and (iv) SCADA system whereas the scope of service building has been shifted from BOP contract to Non-EPC works. As regards the works at (i) and (ii) above, the same are stated to have been necessitated because of poor soil conditions as per the soil investigation studies carried out by the consultants in the year 2009. Earlier also in the years 1999 and 2002, the soil investigation studies are stated to have been carried out but the poor soil conditions could not be captured at that time. Considering the necessity of soil improvement suggested by the Consultants and that the Arbitral Award allowed 6 months' time for the same, the Commission allows the expenditure for these works.*
>
> *…..*

7.4.13 The ledgers and invoices checked in the Commission and by the Joint Auditor reveal that the payment of Rs. 862.72 crore has been made comprising of Rs. 840.07 crore by bank payment, Rs. 16.36 crore as electricity charges paid by GVK on behalf of PLL and Rs. 6.29 crore as TDS recovery. From the copy of the ledger provided by GVK, an amount of Rs. 1.50 crore pertains to a refund by PLL. GVK made an advance payment of Rs. 287.75 crore to PLL which is 31.34% of the estimated cost of Rs. 918.12 crore against the prudent commercial practice of 11.5% amounting to Rs. 105.71 crore. However, the advance payment of Rs. 77.65 crore made by GVK remains unadjusted as on 16.04.2016. Thus, the allowable amount for BOP works is as follows:

Table 19: Allowable amount for BOP works

(Rs. crore)

S. No.	*Particulars*	*Amount*
1.	*Payment made by GVK*	*862.72*
2.	*Less: Advance refunded by Punj Lloyd Ltd.*	*(-)1.50*
3.	*Less: Unadjusted Advance*	*(-)77.65*
4.	*Net payments made*	*783.57*

It was a categoric submission of the Appellant that the initial soil investigation was carried out by it over the project land in 1999 whereas its case before the Learned Arbitral Tribunal was that possession of project land had been handed over to it only in 2009. Clearly, one of the above submissions was a deliberate

misrepresentation and mis-statement on oath on part of the Appellant and yet it is the Appellant who is audaciously claiming that the Commission disregarded the findings in the arbitral awards. Further, the figures submitted by it under the BOP package kept changing, leading naturally to a doubt on the veracity of its submissions.Notwithstanding, since the Learned Arbitral Tribunal had allowed six months' time for carrying out soil improvement, the Respondent No.1 Commission allowed the same to the Appellant and after checking the ledger and invoices, also allowed the cost for the same. The Appellant is therefore wrong in contending that the Arbitral Awards have not been given effect to by the Commission; rather, it is the Appellant who has submitted an incorrect picture before the Learned Arbitral Tribunal as regards the handing over of possession of the project land and has wrongly obtained relief in that behalf.

Non-EPC Works:

5.28 That while examining the non-EPC works carried out by the Appellant and the claims made by the Appellant towards cost overruns in that behalf, the Respondent No.1 Commission observed as under:

> *"9.7.1…….. The Commission notes that GVK transferred the scope of Service Building costing Rs. 36.88 crore from BOP works to non-EPC works, where it was actually built at a cost of*

Rs. 18.66 crore. The railway siding works were to be done by the Indian Railways or the approved railway contractor. However, GVK allotted the railway siding works to GVK Projects and Technical Services Ltd.(GVKPTSL) under the supervision of the Railways agency Aarvee.

9.7.2 The aforementioned bifurcation of non-EPC works was approved by the Commission for Rs. 86 (35+51) crore and Rs. 49 crore was approved in addition by Hon'ble APTEL for site grading and ash pond. These have been so stated in Schedule-11 of the PPA at serial number 9 and 10. GVK has given the bifurcation of the 11 works in the table for non-EPC works with individual costs for each item stating them as 'APTEL approved'. Only Rs. 49 crore for site grading and ash pond were part of APTEL's Order dated 08.04.2009 in Appeal no.104 of 2008. As such, this is a misrepresentation of facts by GVK as explained earlier in this Order.

9.7.3 GVK has stated that the non-EPC works were carried out by GVKPTSL, through competitive bidding. GVK has submitted a copy of the Financial Express dated 13.06.2009, wherein an advertisement has been published by GVK inviting bids for non-EPC works along with copies of the bids received against the same i.e. Kalsi Brothers, Mohali and Vertex Projects Limited, Secunderabad. The non-EPC works were allotted to Vertex Projects Ltd. at a cost of Rs. 135 crore. Vertex Projects Ltd. had given a discount of 15.625% on the bid price of Rs. 160 crore. In the submissions dated 25.07.2018, GVK has mentioned that non-EPC works were to be started in August, 2009 by Vertex

(now known as Crescent EPC Projects and Technical Services Limited). The address of Vertex Projects Limited is the same as that of GVK and the website and e-mail address mentioned as www.gvk.com andprojects@gvk.com respectively. On 27.06.2019, GVK informed that the non-EPC works were allotted to GVK Projects and Technical Services Ltd. (earlier Vertex Project Ltd. and subsequently, Crescent EPC Projects and Technical Services Ltd).

9.7.4 The non-EPC works of Rs. 337.78 crore are submitted to have been carried out after incorporating 10 scope change Orders as per details provided by GVK in its submission dated 04.12.2019. However, the total amount of non-EPC works earlier submitted is Rs. 337.31 crore out of which works worth Rs. 325.08 crore mentioned under the head 'non-EPC works' have been carried out by GVK Projects and Technical Services Limited, a sister concern of GVK. The remaining works amounting to Rs. 12.23 crore have been executed by other agencies under the head 'non-EPC worksDirect'. As only two bids were received by GVK in the competitive bidding, one out of which was from the sister concern, GVK ought not to have allotted the work to GVKPTSL. Thereafter, GVK increased the scope of non-EPC works from the bid allotted price of Rs. 135 crore to Rs. 337.31 crore through various scope change orders. This appears to be inappropriate.

9.7.8 The Commission notes firstly that GVK was fully aware of the location of the land being acquired for the project and had in its possession 54 acres since 1999. Therefore, the quantity of

earth filling required for site grading was known to it and accordingly the amount of Rs. 49 crore which included site grading and ash pond was sought in petition no. 04 of 2007 before the Commission which was not allowed. Subsequently Hon'ble APTEL allowed the same in the Appeal No. 104 of 2008. Secondly, at that point of time in April, 2008 the in principle land allowed for the project was 715 acres. Thereafter, in May, 2008, MoEF in the environmental clearance restricted the land requirement for the project to 600 acres. This restriction was not brought to the notice of Hon'ble APTEL or the Commission. The land acquired for the project was 1114 acres including 54 acres already available with GVK. In the hearing on 11.12.2019, GVK confirmed that site grading was carried out for the entire plant area. Thus, while funds for the site grading were allowed by Hon'ble APTEL for 715 acres against the requirement of 600 acres, actually 1075 acres of land covering the plant area were graded. 1075 acres includes 54 acres acquired by GVK in 1999, 1014 acres through land award of Govt. of Punjab dated 12.08.2008 and 7 acres purchased directly by GVK later which was missing in the land award. In this extra soil excavated from the increased size of ash pond was stated to have been utilized. Thirdly, GVK did not think it proper to bring to the notice of the Commission at that time, the requirement of extra work for site grading which resulted in a threefold increase in the cost of site grading work from Rs. 21.94 crore to Rs. 63.62 crore and seek revised approval considering that the provision in the PPA as brought out above unambiguously provides that GVK shall not be

entitled to any financial compensation by reason of the unsuitability of the Site for whatever reason. Fourthly, the entire work was given to the sister concern of GVK without following principles of financial propriety. TheCommission cannot allow the expenditure claimed by GVK for site grading of the entire site and restricts the same to the original estimates for site grading as included in Rs.49 crore allowed by Hon'ble APTEL for site grading and Ash Pond."

The above observations and findings of the Commission show several irregularities, misrepresentation of facts, inflated costs, inappropriate contracts and unilateral actions taken without regulatory approval by the Appellant.As such, the Commission has rightly carried out the prudence check and has declinedto pass on the Appellant's claims on each of these accounts to the consumers in the State and for which the Commission cannot be faulted with.

5.29 That the Appellant's claim for land requirement for ash pond had also been fraught with misrepresentation, inflated costs and financial carelessness as is evident from the following:

"9.7.9 The justification given by GVK regarding usage of 244 acres land for Ash Pond appears to be relevant only on considering the expansion of the project for the third Unit. GVK's submission that as per the CEA's 'Report on the Land

Requirement of Thermal Power Stations' of December, 2007, the land required for ash pond/dyke for the plant size of 2x500 MW Thermal Power Station is 500 acres, is not correct. As per the said report, the area of 500 acres is required for ash dyke including green belt. In the CEA's September, 2010 Report on 'Review of Land Requirement for Thermal Power Stations', the 250 acres have been provided for Ash disposal area and 130 acres for green belt i.e. a total of 380 acres for a project of 2x500 MW capacity. Even considering the report of CEA referred to by GVK wherein requirement of land for ash dyke including green belt has been mentioned as 500 acres for 2x500 thermal project, the requirement of land for ash pond including green belt works out to 270 acres for GVK's 2x270 MW project on proportionate basis. Therefore, the area of 244 acres for ash dyke alone would be way beyond that specified in the CEA report. If the CEA report for 2010 is considered, the requirement for both ash dyke and green belt for a 2x270 MW plant on a proportionate basis works out to 205 acres. The MoEF clearance for the project dated 09.05.2008 had limitedthe total land for the project to 600 acres, out of which 130 acres was specifically mentioned for ash dyke and 160 acres for green belt i.e. 290 acres for 2x270 MW thermal power project. As per the MoEF/CEA norms, 125 - 150 acres of land is enough for ash pond for 2x270 MW thermal power project. It is clear that GVK has developed the ash pond of a much higher capacity on 244 acres than the 130 acres provided in the Environmental Clearance issued by MoEF. Therefore, the

Commission cannot allow the enhancement in the claim/cost for the ash pond.

9.7.10 GVK, in its original submissions in this petition claimed Rs. 112.45 crore against Rs. 49 crore originally approved for Site grading and Ash pond but later brought this figure down to Rs. 98.74 crore. This indicates financial carelessness."

5.30 That even with respect to the claim regarding railway siding work, there was a case of inflated claim and inappropriate contracting noted by the Commission where the representations made at the time of grant of the in-principle approval were found to be incorrect. Accordingly, applying prudence check and verifying the costs claim in detail based on cogent yardsticks, the Commission allowed only the Appellant's claim to the extent set out as under:

"9.11.1 …… The Commission notes that GVK had indicated that the railway siding work will be carried out either by Indian Railways or their approved contractor M/s BARSYL, Secunderabad as brought out in the Commission's Order dated 29.04.2008. However, the Railway siding works have actually been carried out by GVK Projects Technical Services Ltd., a sister concern.

9.11.2 From the documents submitted by GVK, it is clear that despite the cost enhancement of Rs. 86.59 (121.59-35) crore, GVK itself has submitted estimates worth only Rs. 60.34 crore

to the railway authorities for the railway siding works comprising the development of Khadur Sahib Railway Station, Lead Line and the railway siding inside the plant yard area. However, the scope change order dated 02.11.2012 issued to its sister concern GVKPTSL was for Rs. 88.30 crore. The Joint Auditor has not taken cognizance of the estimates vetted by the railways amounting to Rs.60.34 crore for railway siding works as submitted by GVK while recommending the costs tobe allowed for railway siding works amounting to Rs.103.29 crore. The lead line cost has increased approximately 7 times from Rs.5.32 crore as per original work order dated 04.08.2009 to Rs.35.40 crore in the scope change order dated 02.11.2012 against which the bills of Rs.28.90 crore have been claimed. Both the work order quantity and rates have been escalated in the case of lead line works. The Joint Auditor has recommended allowing Rs.16.18 crore for the lead line works. For railway works in the plant yard area, though quantities of a few works has decreased, there is escalation in the rate for almost all the works. The cost of the work in the plant yard area has increased from Rs.9.72 crore as per original work order dated 04.08.2009 to Rs.29.13 crore in the scope change order dated 02.11.2012 i.e. an increase of 3 times. Against this, the bills of Rs. 46.99 crore have been claimed and the Joint Auditor has recommended Rs.41.04 crore to be allowed. For the work of Khadur Sahib railway station, the Joint Auditor has considered the cost of works as per the scope change order dated 02.11.2012 amounting to Rs.38.81 crore against which bills of Rs. 29.12 crore have been claimed and the same has

been recommended to be allowed by the Joint Auditor. The Joint Auditor has stated that the work of the railway station was not included originally in the DPR. However, it is seen that in the Commission's Order dated 29.04.2008, the upgradation of Khadur Sahib railway station is included in the non-EPC works. In addition to this, the Joint Auditor has allowed Rs.15.28 crore for the construction of the retaining wall on both sides of the lead line. GVK has not explained why the rates as well as quantities of the lead linecould increase so much when the length of lead line is claimed to have increased from 3.52 to 5.4 km. The quantity of works in plant yard area has decreased in most of the items in the scope change order dated 02.11.2012 whereas there is increase in the rates. However for the lead line work, the claim in the bills is Rs. 28.90 crore which is less than the scope change order cost of Rs.35.40 crore. For the plant yard area, the claim in the bills is Rs.46.99 crore against the scope change order cost of Rs.29.13 crore. For the Khadur Sahib Station works, the claim in the bills is Rs.29.12 crore against the scope change order cost of Rs.38.81 crore. None of these differences in the scope change and actual claim have been explained. The railway siding work has also been carried out by a sister concern of GVK against the same scope change order dated 02.11.2012.

……

9.11.4 The Railways, which is an Indian Governmental Instrumentality, have assessed their supervision charges of Rs. 2.58 crore based upon the amount of Rs. 60.34 crore as brought out in the foregoing paras. It would be seen that the

work was supervised by the railway approved contractor (Aarvee) and the supervision charges were to be paid to him by the Railways. Had the railway siding work cost more than the amount of the vetted estimates i.e. Rs.60.34 crore, the railway siding contractor would have asked for enhancement of payment for the supervision work from the railways and consequently a demand for the same would have been raised by the Railways on GVK. GVK has not produced any such document from the Railways. The claim of Rs. 2.58 crore has been discussed hereinafter.

9.11.5 In view of the above, the Commission allows the costof the railway siding works on the basis of the estimates vetted by the railways, an Indian Governmental Instrumentality, submitted by GVK which are for the entire railway siding work including the additional works done at the Khadur Sahib station, lead line and the plant yard area, based upon which the amount of departmental charges has been worked out and demanded by the railways from GVK."

Thus, the Respondent No.1 Commission while disallowing the costs as stated above duly took note of the fact that there has been deviations on part of the Appellant even from the representations made by it at the time of the in-principle cost approval and the same coupled with the mistakes and change in facts and figures from that submitted in its Tariff Petition raised a doubt on the veracity of the same.

Date of commercial operation:

5.31 That with respect to the date of commercial operation of the project, the Appellant had sought to claim a continuous period of force majeure even when there had been a hiatus between its two claims of force majeure allowed by the Learned Arbitral Tribunal as has been set out hereinabove. This was done notwithstanding its own submission on affidavit before the Commission that the force majeure events under the first claim had ceased to exist. Rightly disallowing the Appellant's plea in this behalf, the Respondent No.1 Commission held as under:

> *"19.6 The Commission does not agree with the view of GVK. The activities pertaining to testing, trial run and synchronization are to be carried out prior to the SCOD or the extended SCOD as the case may be, and not thereafter. The period of extension in SCOD in the two Arbitration awards is unambiguous with specific dates. As such, the Commission holds that the period from 26.06.2014 to 24.09.2014 i.e. 90 days does not count towards the extension in SCOD allowed in the two Arbitration Awards……."*

The natural corollary of the above was that under each of the heads of cost over run, this period of 90 days was not liable to be included and the Commission's findings and disallowances in that behalf under

the impugned Tariff Order cannot be faulted with. The Appellant thus, has wrongly contended before this Hon'ble Tribunal that the Commission has erred in ignoring the effect of the Arbitral Awards. It is submitted that the date of commercial operation for the purpose of capital cost approval is subject to the outcome of the Arbitration Applications [Nos.122/2017 and 123/2017] before the Learned Commercial Court, Patiala.

Interest During Construction (IDC):

5.32 That the Appellant's claim of IDC was adjudicated by the Respondent No.1 Commission as under:

> *"20.3.1 During verification of the data, GVK submitted that the total amount of equity of Rs. 1118.06 crore has been invested in the project and total loan taken is Rs.3149.33 crore. The total capital investment of the project works out to Rs. 4267.39 crore as per GVK. The Commission has examined each component of the hard cost and has approved the same at Rs 2269.18 crore in the foregoing paras. GVK has supplied the statement regarding break-up of Debt-Equity during the course of examination of the accounts. As per the submission, equity invested by GVK is Rs.1118.06 crore. The Commission for the purpose of determination of Interest during construction period deducted the equity of Rs 1118.06crore from the hard cost of*

Rs. 2269.18 crore. The Term loan has been worked out as under:

Table 67: Determination of Term Loan

(Rs. crore)

S.No.	*Particulars*	*Amount*
1.	*Total Hard Cost*	*2269.18*
2.	*Less:-Equity invested*	*1118.06*
3.	*Term Loan (1-2)*	*1151.12*

20.3.2 Accordingly, term loan works out to Rs.1151.12 crore. GVK claimed interest from the date of the loan transferred by the respective Banks to its loan account.

20.3.3 The Commission has held earlier that the period from 26.06.2014 to 24.09.2014 i.e. 90 days does not count towards the extension in SCOD allowed in the two Arbitration Awards. Interest during Construction for the period from 26.06.2014 to 24.09.2014 wherein there was no Force Majeure or change in Law has therefore been disallowed. Accordingly, IDC is not considered for the period from 26.06.2014 to 24.09.2014."

Thus, the Respondent No.1 Commission, while allowing the IDC to the Appellant had taken into consideration the prudently incurred hard cost and had rightly deducted the equity component from the same to determine the actual cost prudently incurred by the Appellant from its term loans and accordingly calculated the IDC thereon. Proceeding as such, the Commission allowed the Appellant's claim of IDC as under:

"20.4 …….. Accordingly, the Commission determines the interest during construction (IDC) on the following basis:

i. Rate of Interest has been considered and taken as claimed by the Petitioner.

ii. Amount of payments made out of loan have been considered as per petitioner's claim and as admitted by the Commission.

iii. Period for interest has been considered from the date of payment to 16.4.2016 except the period 26.6.2014 to 24.9.2014.

20.4.2 The Commission determines Interest During Construction (IDC) amounting to Rs. 478.81 crores upto 16.04.2016 (excluding period from 26.06.14 to 24.09.2014) against term loan of Rs 734.49 crore."

There was no infirmity in the above computation methodology adopted by the Commission as has wrongly been contended by the Appellant.

5.33 That in view of the detailed submissions made hereinabove, it is respectfully submitted that there is no prima-facie case made out by the Appellant for this Hon'ble Tribunal's consideration of the present Application. Further, the balance of convenience is clearly against the Appellant as it is the Appellant who has been enjoying a tariff of Rs.1.926/kWh for almost 2 years and Rs.2.20/kWh for the remaining

2 years since the COD of its project and is yet again pleading a case of a threat of becoming an NPA. Rather, the balance of convenience clearly lies in favor of the consumers of Respondent No.2 who have been unjustly burdened by a tariff for the last 4 years without any prudence check by the Commission and now, once the said prudence check has been completed revealing inflated costs and incorrect financial figures, the Appellant is still pressing for the non-existent provisional tariff of Rs.2.20/kWh. As regards the misplaced case of the Appellant that based on the impugned Tariff Order Respondent No.2 is likely to recover monies from the Appellant for the excess amounts paid during the FY 2016-2017, it is most respectfully submitted that as per the calculations of Respondent No.2 based on the impugned Tariff Order, currently there is no amount recoverable from the Appellant by Respondent No.2 for the said year; for the subsequent Financial Years 2017-2018 and 2018-2019, the capacity charges are yet to be determined by the Respondent No.1 Commission. As such, there is no question of any imminent threat of recovery warranting any urgent grant of interim Order by this Hon'ble Tribunal.

6. We have gone through the interim application for stay filed by the Appellant, the submissions made by the Appellant and Respondent No.1 and 2 and also have heard the learned senior counsel Shri Sajan Poovayya appearing for the Appellant and Shri Sakesh Kumar appearing for the first Respondent and Shri Parag Tripathi appearing for the second Respondent.

i) The Appellant had submitted that the balance of convenience lies in GVK's favour since the completed capital and the final tariff as determined by the State Commission in Order dated 17.01.2020 i.e. Rs 1.419 per kWh is substantially lower than the provisional tariff of Rs 2.20 per kWh as fixed by Ld. PSERC vide Order dated 28.03.2018. It is likely that PSPCL would deduct the excess amount paid to GVK from the amounts payable by it in terms of the Monthly Bills raised by GVK.

ii) It is submitted by the learned senior counsel of the Appellant that irreparable harm would be caused to GVK if Order dated 17.01.2020 is not stayed since the Project is under severe financial stress on account of the various force majeure events impacting the Project including the cancellation of the captive coal blocks leading to time and

cost overruns and under-recovery of tariff on account deductions made by PSPCL from monthly tariff bills. GVK is unable to service its debt and has become a non-performing asset since August 2017. GVK is currently under the process of finalizing its resolution plan with the consortium of lenders as per the revised RBI Circular dated 07.06.2019. The lender meeting is scheduled on for 10.02.2020 on which date the lender will decide the future course of action. The erroneous determination of completed capital cost and tariff payable by PSPCL to GVK by the State Commission would lead to under-recovery of the cost and jeopardize the resolution process.

iii) It is submitted by the learned senior counsel of the Appellant that if the Impugned Order is not stayed and PSPCL is permitted to deduct amounts allegedly due, GVK will be referred to NCLT under Insolvency and Bankruptcy Code.

iv) The Respondents have vehemently opposed the stay application and have submitted that the only reason for allowing the provisional tariff was stringent stipulation under the RBI guidelines and financial hardship the project was facing. In fact, upon determination of the

completed cost and the tariff thereof, the provisional tariff is ceased to exist and its acceptance is no longer of any consequence.

v) The Respondent No.2 have also submitted that balance of convenience clearly lies in favour of the consumers who have been unjustly burdened by a tariff for the last four years without any prudence check by the Commission and now once the said prudence check has been completed revealing inflated cost and incorrect financial figures the Appellant is still pressing for the non-existent provisional tariff of Rs. 2.2 /kWh.

vi) They have further submitted that as per calculations based on the Impugned Tariff order currently there is no amount recoverable from the Appellant by Respondent No.2 for the said year, for the subsequent financial year 2017-18 and 2018-19, the capacity charges are yet to be determined by Respondent No.2 Commission. As such there is no question of any imminent threat of recovery warranting any urgent grant of interim order by the Tribunal.

vii) The Appellant has raised issues regarding determination of capital cost at Rs. 3058.37 Crores of the project, much lower than the capital

cost of Rs. 4267.38 Crores claimed by GVK. First and Second Respondents made submissions defending the Impugned Order passed by the State Commission.

At this stage we are of the view that it would be inappropriate to express any premature opinion on these issues as all the issues require to be looked into in great detail during the ensuing hearing of the main appeal. As of now, for the purpose of disposal of the interim application for stay, we can only say that prima facie on the basis of submission made before this Tribunal by all parties and also preliminary hearing that we had regarding interim application, we do not see any convincing reasons, for granting stay as prayed by Appellant in its application. The Interim Application for Stay is not allowed, and, accordingly stands disposed of.

We are of the opinion that after determination of the capital cost by the State Commission the provisional order which is purely an interim arrangement ceases to exist and provisional tariff for Rs. 2.20/kWh will be replaced by the tariff on the basis of the final capital cost as determined by the State Commission as per the Impugned Order till the final outcome of the appeal in hand.

We also direct the PSPCL/first Respondent not to take any coercive steps, regarding recovery of excess amounts paid, during the pendency of the instant Appeal.

(Ravindra Kumar Verma)
Technical Member

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

1. While agreeing with the conclusion and operative part of the order penned by the learned Technical Member (Hon'ble Mr. Ravindra Kumar Verma), I find it necessary to add some more to the reasoning. The Order drafted by the learned Technical Member takes note comprehensively of the requisite background facts gathering copiously from the pleadings in the main appeal, the application and the notes of arguments given in writing and, therefore, the same would not bear repetition. For all such purposes, the said part of the order should suffice.

2. The main appeal challenges the Order dated 17.01.2020 of Punjab State Electricity Regulatory Commission (PSERC/ State Commission) on the Petition (No. 54 of 2017) of the Appellant (Generating Company) determining the tariff under Sections 62 & 86 of Electricity Act, 2003, the grievances of the Appellant essentially pertaining to disallowances of certain components of Capital Expenditure (CAPEX) such decision, according to the Appellant, being erroneous because all such claims were supported by report of Joint Auditors, the reasons for delay (also a factor having a bearing on the claim on account of "Interest During Construction") having been upheld by the arbitral award. By the application (IA No. 136 of 2020) at hand, the Appellant seek stay of the operation of the said order till final disposal of the main appeal, the request also being for direction to the respondent, Punjab State Power Corporation Limited (PSPCL), a distribution licensee (Discom), not to take any coercive steps including recovery of excess amount paid and pending final decision in appeal the provisional tariff of Rs. 2.20/kW to continue to be paid to the Appellant.

3. In above context, for clarity, we may add that a previous Order dated 19.07.2019 of the State Commission passed in the course of

proceedings in the same petition (No. 54 of 2017) fixing provisional tariff is under challenge before us by a previously instituted Appeal No. 258 of 2019. The order impugned in the said earlier appeal had been rendered at a stage when report of Auditors jointly appointed by the parties had still not come before the Commission for consideration. A stay against the interim order was granted by the co-ordinate Bench (of which learned Technical member was a Member) by Order dated 26.07.2019, such interim relief having enforced provisional tariff of Rs. 2.20/kW. The said interim stay against the interim order has continued to be operative till date.

4. We note that as many as seventeen components of CAPEX came up for consideration of the State Commission in the exercise leading to the impugned order being passed. One of the said components (working capital margin) was disallowed since the claim in that regard was not pressed. The Ld counsel for the Appellant, while questioning the impugned order of the Commission on merits and seeking an interim relief, has focused on some of the major components that include BTG contract, BOP contract, Non-EPC contract, Preliminary & Pre-operation expenses, and Interest During Construction (IDC). The grievances essentially are that the arbitral award upholding the

contentions vis-à-vis the delay in completion of the project and the report of the Joint Auditors have been jettisoned, unjustifiably and unreasonably.

5. Though the Respondent Discom while resisting the main appeal also questions the import and effect of the arbitral award on the dispute that is raised, we have examined, in the context of the prayer for interim relief, the contentions about error(s) in disallowances on the assumption that the entire delay in completion of the project was for reasons that cannot be attributed to the Appellant. We cannot accept the argument of the Appellant, not the least at this stage, that the report of the Joint Auditors should have been accepted by the Commission without any objections thereto being entertained. Suffice it to observe that prudence check is a responsibility of the Commission and the same cannot be abandoned only because Auditors appointed by the parties have come up with a certain analysis of the data (provided or not provided)

6. We note that, on all the major areas, the Commission has given reasons for disallowances which cannot be lightly brushed aside, not the least without detailed scrutiny. To illustrate this, we may note that

the absence of proof in form of vouchers/bills has led to disallowance in relation to BoP works. The Ash Pond, the development of which is covered by claim on account of Non-EPC, has been found to be built beyond necessary dimensions or proportions, this assumably leading to wastage. There are observations about unnecessary enhancement of coal storage facility and construction of retaining wall. In the context of IDC, the Commission has observed diversion of funds taken as loan for other businesses, with some advances having been made imprudently to BoP contractor.

7. The State Commission is a statutory body and we will have to presently proceed on the assumption that it has undertaken the scrutiny with a sense of responsibility, particularly as no explanation even for forming *prima facie* view was offered at the hearing vis-à-vis lacunae in above nature. The scrutiny of the matter in respect of these major components will be an exercise that would need to be done only at the hearing on the main appeal.

8. On the basis of provisional capital cost of Rs. 2963.81, the capacity charges would have worked out at Rs. 1.92/kW It is the submission of the Appellant itself that the State Commission, on its application, had allowed by Order dated 28.03.2018 such charge to be claimed at

Rs. 2.20/kW recognizing the financial stress of the project. While the matter of determination was still pending, on the request of the parties, joint auditors were allowed by the Commission to examine the relevant records and certify the actual capital cost of the project up to the date of commissioning. The report of Joint Audit was awaited when the State Commission, by its earlier Order dated 19.07.2019, reduced the provisional tariff to Rs. 1.92/kW. It is against such backdrop that on the earlier appeal this Tribunal had stayed the operation of the Order dated 19.07.2019 permitting the capacity charges to continue at Rs. 2.20/kW. That situation no longer prevails. The joint audit report was submitted and, *inter-alia,* on the basis of its scrutiny, the Commission has rendered impugned its decision.

9. It is, *prima facie,* not correct that the State Commission has rejected the Joint Audit Report outright. Even from the statistics shown by the Appellant, it is clear some that benefits on its basis have been accorded. The Joint Audit, we may reiterate, does not bind the State Commission which has to undertake its own prudence check. To do otherwise would amount to abdication of the responsibility.

10. Given the illustrations of *prima facie* wasteful expenditure or, shall we say, expenditure which has not been properly justified yet, and, most

importantly, in absence of requisite proof of certain expenditure which is substantial in nature, we are not inclined to grant a stay against the determination by the impugned order during the pendency of the main appeal.

11. The reference to the inability of the Appellant to service its debt, it consequently having become a non-performing asset, consortium of its lenders having initiated process that might lead to a reference under Insolvency and Bankruptcy Code are pointer only to the financial distress that the Appellant faces. But, a claim to higher capacity charge cannot be allowed by an interim arrangement only to bail an entity out of such distress. Tariff determination is to be made not on considerations of mercy but in accordance with law and regulations and, most importantly, after prudence check.

12. The Appellant fails to make out a *prima-facie* case. Interim relief beyond what has been allowed by the order prepared by the learned Technical Member, to which this order is an addendum, cannot be granted.

(Justice R.K. Gauba)
Judicial Member

COMMON ORDER

The application for interim relief (IA No. 136 of 2020) is disposed of in terms of directions in the operative part of the Order recorded by learned Technical Member.

Pronounced in the Open Court on this ***26th day of* February, *2020.***

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

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REPORTABLE/NON-REPORTABLE

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