

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

**(APPELLATE JURISDICTION)**

**IA NOs. 134 OF 2021 & 189 OF 2021 IN**  
**APPEAL NO. 41 OF 2020**

**Dated: 27<sup>th</sup> April 2021**

**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**

Through its Authorised Signatory  
Pot No. 10, Palgah Colony,  
Sardar Patel Road  
Secunderabad 500 003

.... Appellant

***Versus***

**1. Punjab State Electricity Regulatory Commission**

Through its Secretary  
Site No. 3, Sector 18-A,  
Madhya Marg  
Chandigarh 160 018

**2. Punjab State Power Corporation Limited**

Through its Chairman-cum-Managing Director  
The Mall, PSEB Head Office  
Baradari, Patiala  
Punjab 147 001

... Respondents

Counsel for the Appellant (s):

**Mr. Sajan Poovayya, Sr. Adv**

Mr. Vishrov Mukerjee

Mr. Janmali Manikala

Mr. Girik Bhalla

Mr. Pratibhanu Kharola

Counsel for the Respondent (s):

**Mr. Sanjay Sen, Sr. Adv.**

Mr. Sakesh Kumar

Ms. Mandakini Ghosh

Ms. Gitanjali Sharma for R-1

**Mr. Parag Tripathi, Sr. Adv.**  
Ms. Suparna Srivastava  
Mr. Tushar Mathur  
Ms. Meera Menon for R-2

## **ORDER**

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

1. This order will decide two interlocutory applications – IA no. 134/2021 moved by the appellant for issuance of directions to the regulatory commission to comply with the Orders dated 26.02.2020 and 10.07.2020 and IA no. 189/2021 moved by second respondent for clarification of the said Orders dated 26.02.2020 and 10.07.2020. They have been filed in the appeal which challenges the final Tariff Order dated 17.1.2020 (also referred to as the “1<sup>st</sup> Tariff Order”) passed by the first respondent, Punjab State Electricity Regulatory Commission (for short, “the PSERC” or “the Commission”) on Petition No.54/2017 which had been filed by the appellant (“GVK”) for considering the capital cost of its Thermal Power Project as of 16.04.2016 and for determination of tariff for the year 2016-17 in respect of the supply of power generated by it (the appellant) to second respondent Punjab State Power Corporation Ltd. (for short, “PSPCL” or “the Procurer”). By the order impugned in the main appeal, the Commission approved the completed capital cost for the power project, and also determined the capacity charges and energy charges for the Financial Year (FY) 2016-17. The prime ground of challenge to the said order is to the substantially reduced capital cost of the Power Project, it having a direct bearing on the tariff determination.
2. For clarity in further discussion, it may be noted here that before passing of the impugned Tariff Order and during the pendency of Petition No.54/2017, all tariff payments made to the appellant were provisional with fixed charges at Rs.2.20 per unit from 20.3.2018 in terms of the interim Order dated 20.3.2018 passed by the Commission. By the above said Order dated 17.01.2020, however, PSERC determined the tariff @ Rs.1.532 for the FY 2016-17 to be charged by the appellant. It is not disputed that provisional tariff

payments were made to the appellant for subsequent FYs as well at the same rate as fixed by interim order dated 20.03.2018 till the impugned order was passed on 17.01.2020.

3. The appellant had moved, with the appeal, an application (IA no. 136/2020) seeking interim relief as under:

- a. *Stay of the order dated 17.01.2020 passed by the Ld. PSERC in Petition no. 54/2017 till the final disposal of this appeal.*
- b. *a direction to PSPCL not to take any coercive steps including recovery of excess amounts paid during pendency of the Appeal; and*
- c. *pending final disposal of the Appeal, the provisional tariff of Rs.2.20/kWh be paid to the Appellant*

4. The afore-said application (IA no. 136/2020) was disposed of by order dated 26.02.2020 based on two opinions, the main penned by the first of us (the Technical Member) and the other separate but concurring opinion authored by the second of us (the Judicial Member), the latter meant to supplement the former. In the main opinion, it was *inter alia* held thus:

*“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.*

(emphasis supplied)

5. In the separate opinion, added as supplement, it was *inter alia* observed thus:

*“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.*

...

*“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.*

...

*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.”*

6. It is clear that by order dated 26.02.2020, this tribunal declined to grant any stay of the Impugned Tariff Order. The tariff determined

by the order impugned was allowed to come into effect but, at the same time, limited protection was afforded by directions to the second respondent inhibiting recovery of such amounts as would resultantly become paid in excess (i.e. difference between provisional tariff and the final tariff) “*during the pendency of the instant Appeal*”.

7. It is the contention of the second respondent PSPCL that the interim arrangement for subsequent period was beyond the scope of Petition No.54/17 (which related to FY 2016-17) it in-fact being subject matter of Petition No.69/2017 which pertained to subsequent control period (FY 2017-18 to 2019-20), the appellant being guilty of delayed tariff filings for the subsequent tariff years, and since Petition No,54/2017 was the only live Petition at that time, all interim Orders, even for the subsequent years, were passed therein.
8. Pertinent to note that, the PSERC, by an interim Order dated 20.03.2020 passed in Petition No.69/2017 (for FY 2017-18 to 2019-20), directed that in order to maintain continuity of payments for subsequent tariff years, the tariff as determined by the Commission for FY 2016-17 under the 1<sup>st</sup> Tariff Order was to be the provisional tariff applicable for all tariff payments to be made by the second respondent during the Control Period of FY 2017-18 to FY 2019-20 till the pendency of Petition No.69/2017. Under the above interim Order, the appellant continued to receive capacity charges/tariff payments till September, 2020.
9. In due course, truing-up petitions had come to be filed including Petition no. 32/2019 for FY 2016-17 and Petition no. 34/2019 for FY 2017-19. On 07.07.2020, the appellant approached this tribunal by application (IA no. 757/2020) seeking reliefs as under:
  - (a) *List the present appeal (Appeal No. 41 of 2020) challenging Impugned order dated 17.01.2020 passed by the Ld. PSERC in Petition No. 54 of 2017 on 08.07.2020 or any other date as per this Hon’ble Tribunal’s convenience;*

*(b) Pass such order(s) as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case.*

10. It is stated that in the averments, the appellant alluded to the need for a stay on all the tariff proceedings then pending before the Commission (in Petition Nos.69/2017, 32/2019, 34/2019 and 14/2020) so that till this appeal was decided, it could continue to receive interim tariff at the AFC for FY 2016-17 as determined by the Commission in the impugned Tariff Order, the submissions reading thus:

*“10. It is submitted that this Hon'ble Tribunal has granted protection against recovery of amounts paid prior to 26.02.2020. Therefore, continuing with the true up proceedings in relation to periods for which tariff has already been paid would be prejudicial and defeat the purpose of the interim order passed by this Hon'ble Tribunal.”*

11. But at the hearing the only prayer pressed was for early hearing of matter raising concerns about the effect of limited protection given. By order dated 10.07.2020, the said application was disposed of it being observed:

*“... To allay the apprehensions of the Applicant/Appellant, we add that the order dated 26.02.2020 is open-ended and as was fairly conceded by the counsel for the Respondents, it would subsist till it is varied, vacated or modified by us.”*

12. It is vivid that by the above order this tribunal did not grant any stay against the proceedings before the Commission though it was clarified that the Order dated 26.02.2020 whereby interim protection had been granted to the appellant qua recoveries of overpaid amounts by second respondent was to remain in force till the said Order was varied, vacated or modified.

13. It has been submitted by the parties that subsequently by Order dated 05.08.2020 (to be referred hereinafter as the “2<sup>nd</sup> Tariff Order”) PSERC disposed of Petition No.69/2017 filed by the Appellant for determination of tariff for the Control Period of FY 2017-18 to FY 2019-20. There can be no dispute as to the fact that

with the said event the interim Orders passed by the Commission in Petition No.69/2017, including the Order dated 20.3.2020 providing for an interim/provisional tariff ceased to exist, they having merged with the said 2<sup>nd</sup> Tariff Order. Further, by Order dated 7.9.2020 (also referred to as the “the 1<sup>st</sup> True-up Order”) followed by Order dated 17.9.2020 (referred to hereinafter as “the 2<sup>nd</sup> True-up Order”), PSERC disposed of Petition Nos.32/2019 and 34/2019 (for true-up of tariff for FY 2016-17 and FYs 2017-2019 respectively). It is stated that by the said Orders, the Commission trued-up the tariff of the appellant from FY 2016 to FY 2019 with an AFC payable at Rs.539.62 for FY 2016-17, Rs.612.09 Cr. for FY 2017-18 and Rs.467.40 Cr. for FY 2018-19. Such subsequent orders are subject-matter of appeals filed in due course.

14. Against the above backdrop, the appellant (GVK) filed the application (IA no. 134/2021) at hand making the following prayers:

- (a) *Allow the present application and issue appropriate directions to Ld. PSERC to comply with Orders dated 26.02.2020 and 10.07.2020 passed by this Hon’ble Tribunal in Appeal No. 41 of 2020*
- (b) *Direct Ld. PSERC to pass necessary orders in accordance with the PSERC Tariff Regulations 2014 and this Hon’ble Tribunal’s Orders dated 26.02.2020 and 10.07.2020 in Appeal No. 41 of 2020; and*
- (c) *Pass such order(s) as this Hon’ble Tribunal may deem fit and proper in facts and circumstances of the present case.*

15. In sharp contrast, it is the contention of the second respondent (PSPCL) that by virtue of the interim protection granted to the appellant, an amount of Rs.809 Crores has been retained by it for the period from April, 2017 till September, 2020, which is liable to be recovered from it and that, out of the said sum, merely an amount Rs.8 Cr. pertains to the FY 2016-17, the remaining Rs.801 Cr. pertaining to excess tariff paid during FY 2017-18 till date, which period is not the subject matter of the present appeal.

16. The contesting respondent in appeal (PSPCL), thus, has moved application (IA 189/2021) seeking the following reliefs:

- (a) *allow the present Application of Respondent No.2 and clarify that the Orders dated 26.02.2020 and 10.07.2020 passed in the present Appeal are applicable with respect to FY 2016-17 only and not beyond;*
- (b) *pass such other/further order(s) as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.*

17. The clarification being sought is that the interim Orders dated 26.2.2020 and 10.7.2020 passed in the present appeal are applicable with respect to FY 2016-17 only and not beyond and that for the tariff for subsequent FYs, the Tariff Orders passed by the Commission for the said years are to govern the tariff payments between the appellant and second respondent. The case of second respondent essentially is that the direction against “*coercive action*” passed by this tribunal only extends to excess payments made for FY 2016-17 and that the second respondent is well within its rights to recover excess charges retained by the appellant for FY 2017-18 and beyond.

18. It is argued by the second respondent that with the passing of the Tariff orders for the subsequent years, the appellant is bound to receive tariff only at the rates prescribed in the said Tariff Orders and cannot be allowed to retain any tariff charges over and above the prescribed rates as per the applicable Tariff Orders. It is submitted that if the appellant was to be allowed to maintain its tariff payments as per the impugned Order or if the direction of this tribunal prohibiting the second respondent from initiating recovery of excess tariff payments was allowed to operate with respect to the subsequent tariff years which are not the subject matter of the present appeal, then the whole process of tariff determination undertaken by the Commission while passing the 2<sup>nd</sup> Tariff Order and the true-up Orders would be rendered nugatory and otiose and it would also lead to a situation where the consumers of second respondent, despite Tariff Orders of the Commission, will continue to be burdened by excess tariff which cannot be allowed.

19. The prime arguments of the second respondent (PSPCL) are as under:

- (i) No interim order can be passed granting a relief which cannot be given in the final relief [*Cotton Corporation of India Ltd. v United Industrial Bank Ltd. & Ors.* (1983) 4 SCC 625]. The final relief sought in this petition is for setting aside of the impugned order dated 17.01.2020 whereby tariff for FY 2016-17 was determined and, therefore, tariff orders for other years cannot be decided.
- (ii) An order passed fixing tariff for one tariff year can never automatically or *ipso facto* be applied for other tariff years and so the issue necessarily has to be adjudicated for the specific tariff year in question.
- (iii) It is settled law that in matters involving tax, which is an annual recurring feature, adjudication for one year, in no manner, binds, the adjudication of the subsequent year, such adjudication at best having a persuasive value [*Municipal Corpn. Of City of Thane v Vidyut Metallics Ltd. and Anr.* (2007) 8 SCC 688].
- (iv) It is well settled proposition of law that tariff determination for each tariff year is a separate adjudication [*Delhi Transco Ltd. v Delhi Electricity Regulatory Commission*, Appeal No. 133 of 2007 in judgment dated 13.01.2009 and *Welspun Renewable Energy Private Limited Vs. Tamil Nadu Electricity Regulatory Commission & Ors.*, Appeal No.118/2016 in Judgment dated 11.11.2019].
- (v) There is no merit in the case of the appellant as also *prima facie* held by order dated 26.02.2020.
- (vi) Public interest at stake must reign supreme, it involving propriety of retention of large amount of Rs. 809 crores, under the cover of the interim order dated 26.02.2020, only the sum of Rs.8 crore pertaining to FY 2016-17.

20. It appears that the spirit behind the direction against recovery of excess during pendency of the main appeal has either not been understood or not appreciated. There is no quarrel with above noted

propositions of law. Tariff determination for each year is an independent exercise. But the computation of capital cost in the first effective year is an element that is bound to affect the tariff determination for control periods that follow the first year. In this view of the matter, the later determinations would draw strength from previous orders and there is a nexus and continuity. We have not determined or tinkered with the tariff for subsequent years. Instead, we have allowed the determination made by the Commission to become effective. It is only the accounting for payments received by the appellant under the provisional orders which is held up, the recovery of excess having been stopped for the time being.

21. The chronology of events is important. The Commission by Order dated 28.03.2018 had directed PSPCL to pay GVK at the rate of Rs. 2.20 per unit until pendency of Petition No. 54 of 2017. After filing of Petition No. 54 of 2017, GVK filed Petition No. 69 of 2017, *inter alia* seeking determination of tariff for the Control Period from FY 2017-18 to FY 2019-20. However, owing to pendency of Petition No. 54 of 2017, PSERC by Order dated 30.04.2018 directed that hearing in Petition No. 69 of 2017 would be conducted after final disposal of Petition No. 54 of 2017. Therefore, until final order came to be passed in Petition No. 69 of 2017, GVK was entitled to the fixed charges of Rs. 2.20 per unit as fixed in Petition No. 54 of 2017. Thus, until passing of the impugned order, GVK received interim tariff in accordance with the orders passed by PSERC in Petition No. 54 of 2017 for the subsequent period as well.
22. The main appeal challenges the final order dated 17.01.2020 passed in Petition No. 54 of 2017. In this view, the amounts received by GVK pursuant to Orders in Petition No. 54 of 2017 necessarily form part of this appeal and are covered by the interim protection granted by this Hon'ble Tribunal by Orders dated 26.02.2020 and 10.07.2020. The purport of the said orders is that all amounts received by GVK up to 26.02.2020 are protected from recovery.
23. We cannot ignore the crucial facts that Petition 54 of 2017 pertained to determination of the Completed Capital Cost of GVK's Project and the tariff for FY 2016-17 and that it is only after the determination of the completed cost that the tariff for the particular

year can be fixed. Since the Project was commissioned on 16.04.2016, during FY 2016-17, the determination of tariff for FY 2016-17 is dependent on completed capital cost. In this view of the matter, it is not wholly correct to contend that the scope of Order dated 26.02.2020 is to be limited only to FY 2016-17. Indisputably, by way the main appeal, GVK has challenged the findings of the Commission determining completed capital cost of Rs 3058.37 Crore seeking instead the “*completed capital cost of Rs. 4267.38 Crores*” to be allowed.

24. The outcome of the main appeal would have a direct bearing on the capital cost of the Project which, in turn, would impact the tariff determination proceedings for GVK over the entire life (25 years) of the Project. The limited interim protection against recovery of excess in terms of interim or provisional orders granted on 26.02.2020 is ancillary to and in the aid of the final relief of computation of the capital cost of the Project as claimed by GVK.
25. In our considered view, both applications at hand were wholly unnecessary, there being no ambiguity in orders dated 26.02.2020 and 10.07.2020, the deficiency, if any, being in proper and dispassionate understanding of their import at the end of the parties.
26. As observed earlier, the tariff determined by the order impugned in this appeal has not been touched by us by the order dated 26.02.2020. On the contrary, it was allowed to become operational. Similarly, the said order cannot be construed, by any stretch of logic, as affecting the tariff determination for subsequent periods. In this view, the arguments to above effect are of no avail to PSPCL. As is clear, a limited protection against recovery of amounts rendered by impugned (final tariff) order to have been paid (in terms of provisional tariff) in excess was granted. The order did not say the such protection was limited to the payments made for FY 2016-17. Instead, the order used the qualifying words “*during the pendency of the instant Appeal*”. The intent is clear. The provisional tariff was in vogue till this tribunal stepped in and paved the way for the final tariff to become applicable *albeit* subject to decision on appeal challenging the said final determination. The provisional tariff had been applied by the Commission for

subsequent period, without demur by PSPCL, till the final tariff order was issued for FY 2016-17. Later, the final tariff has become effective for subsequent years as well. Naturally, validity of such adoption of final (impugned) tariff would largely hinge on the decision on appeal at hand where the crucial question of capital cost of project is to be examined. For these reasons, the reference to payments made “*during the pendency of the instant Appeal*” should have left no one in doubt that the inhibition against recovery was not restricted to FY 2016-17 but to all such payments as had been made till the passing of order dated 26.02.2020.

27. As is rightly pointed out by the appellant, the material on record reveals that it has been the understanding of PSPCL as well that by the order dated 26.02.2020, limited protection against recovery of what is described as excess payment received by the appellant was granted and such protection pertained to such payments made (in terms of interim provisional tariff applied under earlier orders since modified by the impugned decision) during period ending with December 2019. In its reply dated 23.12.2020 in Appeal No. 228 of 2020 (against subsequent order), it pleaded thus:

*“6. ...Thus, while rejecting the Appellant's prayer for stay of the 1<sup>st</sup> Tariff Order, this Hon'ble Tribunal directed Respondent No.2 not to take any coercive steps against the Appellant including recovery of any excess amount paid by it during the pendency of the said Appeal. As such, under the directions of this Hon'ble Tribunal, the Appellant was permitted to retain the tariff payments with capacity charges @Rs.2.20/kWh from March, 2018 till Dec-2019.”*

*[...]*

*11. ...Thus, this Hon'ble Tribunal clarified that the Order dated 26.2.2020 passed by it granting interim protection to the Appellant with respect to the recoveries of overpaid amounts computed as per the 1st Tariff Order of the Respondent No.1 Commission was to remain in force till the said Order was varied, vacated or modified. The benefit of the said Order thus, could not ensue in favour of the Appellant towards tariff payments to be made by Respondent No.2 in accordance with the adjudicated AFC (provisional or final) for the subsequent financial years”*

subsequent to the passing of the 1st Tariff Order i.e. Control Period of FY 2020-21 to FY 2022-23 onwards.”

(emphasis supplied)

28. In view of the above, we do find that though the application is for seeking clarifications, PSPCL in effect presses for modification and partial vacation of the interim protection granted in favour of GVK by Order dated 26.02.2020 which, in the given circumstances, we are not inclined to do.

29. At the same time, we find no good reasons to issue any further directions particularly in the nature claimed by the appellant in its application. It does appear that the PSERC, by its subsequent Order dated 22.12.2020 in Petition No. 33 of 2020 (seeking approval of Annual Performance Review for FY 2019-20), has reduced the Interest on Working Capital from Rs. 83.16 Crores, as claimed by GVK in terms of Regulation 34 of PSERC Tariff Regulations 2014 to Rs. 27.86 Crore and that, while doing so, the Commission has observed that GVK has recovered excess interim tariff during the period from April 2018 to March 2020 and as such it is not entitled to Interest on Working Capital on normative basis. It is the contention of the appellant that such view taken is an attempt to indirectly effect recovery of the excess amounts paid by PSPCL to GVK, contrary to the intent and purport of the interim directions passed by this tribunal by Orders dated 26.02.2020 and Order dated 10.07.2020. But, by such interlocutory applications moved with reference to subsequent decisions of the regulatory authority, the scope of the appeal cannot be enlarged. Such subsequent order, if erroneous, will have to be challenged by independent pursuit of appropriate remedy in accordance with law. It definitely cannot be used to seek directions to control or influence the proceedings pending before the Commission at this stage of the process. The least that we wish to say on the grievances raised by the appellant by the application at hand is that we hope and trust that the Regulatory Commission, as indeed the parties before it, will abide by the directions of this tribunal in the orders passed, bearing in mind not only their letter but also the spirit thereof in which regard, we further hope, this order would come in aid.

30. The two applications (IA nos. 134 and 189 of 2021) mentioned at the outset are disposed of with above observations.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING**  
**ON THIS 27<sup>th</sup> DAY OF APRIL, 2021.**

**(Justice R.K. Gauba)**  
Judicial Member

**(Ravindra Kumar Verma)**  
Technical Member