

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)
APPEAL NO. 104 OF 2020

Dated: 18th August, 2022

Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

M/s Malana Power Company Limited
Through its Managing Director
Bhilwara Towers, A – 12,
Sector – I, NOIDA – 201 301

..... **Appellant**

Versus

1. Himachal Pradesh State Electricity Board Limited
Through its Chief Engineer-Commercial
Vidyut Bhawan, Shimla – 171 004
2. Himachal Pradesh State Load Dispatch Centre
Through its Chief Engineer (SLDC)
Totu, Shimla-171011
3. Himachal Pradesh Electricity Regulatory Commission
Through its Secretary,
Regulatory Commission,
Kusumpati, Shimla -171009

..... **Respondents**

Counsel for the Appellant(s) : Mr. Basava P. Patil, Sr.Adv.
Dr. Seema Jain
Mr. Dushaynt Mahant
Mr. Vimlesh Kumar
Mr. Geet Ahuja

Counsel for the Respondent(s): Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Amal Nair

Ms. Kriti Soni
Mr. Jai Dhanani
Mr. Utkarsh Singh for R-1

Mr. Pradeep Misra
Mr. Manoj Kumar Sharma for R-3

J U D G M E N T

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The present Appeal has been filed by M/s Malana Power Company Limited (hereinafter "Appellant" or "MPCL") assailing the Multi Year Tariff (MYT) Order dated 29.06.2019 ("Impugned Order") passed by Himachal Pradesh Electricity Regulatory Commission (hereinafter referred to as the "HPERC" or the "State Commission" or the "Respondent Commission") in Tariff Petition No.28 of 2019 for the Control Period 2019-20 to 2023-24. The Appellant is aggrieved by the determination of single wheeling charge for 66 kV and above voltage levels inter-alia same wheeling charge for all open access consumers connected at voltage of 66 kV and above, contrary to the Regulations specified by the State Commission.

Parties: -

2. The Appellant is a Private Generating Company within the meaning of Section 2(28) of the Electricity Act, 2003, and is engaged in the business of setting up a grid connected Hydro Electric Project (HEP) in the State of Himachal Pradesh.

3. Respondent No.1 is Himachal Pradesh State Electricity Board Limited (in short "HPSEBL"), formed after the reorganisation of erstwhile Himachal

Pradesh State Electricity Board (HPSEB) under the Electricity Act, 2003, Respondent No.2 is Himachal Pradesh State Load Despatch Centre (HPSLDC) entrusted with the function of integrated operation of the Power System in the State of Himachal Pradesh and Respondent No.3 is Himachal Pradesh Electricity Regulatory Commission established under the Electricity Act, 2003 having jurisdiction to regulate and adjudicate the matter under reference.

Factual Matrix: -

4. The Appellant, engaged in the business of generation of electricity, has setup a HEP with Pondage with an installed capacity of 86 MW (2X43MW) on Malana Nallah, a glacier fed tributary of Parbati River in District Kullu, Himachal Pradesh.

5. On 28.08.1993, the Appellant signed Memorandum of Understanding (MOU) with the Government of Himachal Pradesh (in short "GoHP"), as per the condition incorporated therein, the Appellant shall supply 12% of the net power generated, free of cost, from the said HEP to the State of Himachal Pradesh or its Agent and further that the Himachal State Utility shall have the first option to purchase the whole or part of the remaining power generated from the project at the rate to be mutually agreed upon and/or in accordance with the guidelines of the Central Government.

6. Subsequently, in succession of the MOU, the Appellant signed an Implementation Agreement ("IA-1997") on 13.03.1997 with GoHP for implementation and operation of the said 86 MW hydro power project of the Appellant.

7. Thereafter, on 03.03.1999, in terms of the Implementation Agreement, the Appellant entered into an Agreement (“Agreement-1999”) with erstwhile HPSEB, for 40 years from the Commercial Operation Date (COD), thereby incorporating the modalities for free power, evacuation of remaining power, wheeling charges etc.

8. The Agreement-1999 provided that the HEP shall be connected to the State Grid at 132 kV Bajaura sub-station in District Kullu for evacuating the electricity to the Powergrid s/s at Nalagarh i.e. the interconnecting delivery point also located in the State of Himachal Pradesh for the purpose of transmission of electricity to other State(s) through Inter-State Transmission System (ISTS).

9. As per one of the conditions incorporated in the Agreement-1999, the Appellant shall provide GoHP free energy for each Billing Month @ 15 % for first 12 years from the COD and 20% for next 28 years. The remaining energy was agreed to be wheeled outside the State on payment of the following wheeling charges: -

1.) For first 12 years from the COD –

- i) 6 Paise per kWh, if the COD is achieved on or before 30.09.2002, or
- ii) 8 Paise per kWh, if the COD is achieved on or after 01.10.2002 but on or before 30.09.2003, or
- iii) 10 Paise per kWh, or at the per kWh rate as shall be charged by Powergrid for wheeling and/or transfer of transferable energy from the Interstate Point to Delivery Point(s) from time to time, whichever is higher, if the COD is achieved on or after 01.10.2003.

2.) After 12 years from the COD -

10 Paise per kWh, or at the per kWh rate as shall be charged by Powergrid for wheeling and/or transfer of Transferable Energy from the Interstate Point to Delivery Point(s) from time to time, whichever is higher.

10. The said HEP Project was commissioned on 05.07.2001, therefore, in terms of the Agreement dated 03.03.1999, the specified free power was supplied to GoHP and the balance power was wheeled through the 132 kV substation at Bajaura to Powergrid s/s at Nalagarh on payment of wheeling charges at the rate of 6 Paise per kWh.

11. In the year 2010, erstwhile HPSEB was re-organised and the assets and functions of HPSEB came to be vested in two utilities namely, HPSEBL and HPPTCL. The generation and distribution of electricity in the State of Himachal Pradesh was vested in HPSEBL and the transmission along with load despatch functions was vested in HPPTCL.

12. Accordingly, some EHV assets and substation network in the State of Himachal Pradesh came to be vested in HPSEBL, including the 132 KV Bajaura sub-station along with associated electric lines of 132 kV from Bajaura, although the Extra High Voltage Lines were integral part of the transmission system and should have been completely vested in HPPTCL. By vesting the 132 KV Line in HPSEBL, the wheeling of the Appellants power remained with HPSEBL.

13. The State Commission had determined the transmission charges for 132 kV system of the erstwhile HPSEB prior to the reorganisation at Rs. 43621/- per MW per month i.e. approximately 6 Paise per unit in 2008, 2009

and approximately 9 Paisa per kwh in 2010. After reorganisation the charges determined were 40.12 Paisa per Unit for the same system which increased every year and were 66.70 Paisa per kwh up to 2018-19. The charges before reorganisation were based on the charges agreed upon in the Agreement between the Petitioner and erstwhile HPSEB.

14. Even after the re-organisation of HPSEB in the year 2010, the injection of electricity from the generating station of the Appellant, the conveyance of electricity outside the State through the 132 KV Line of HPSEBL from Bajaura substation to Nalagarh substation continued on payment of charges @ 6 paisa per kwh to HPSEBL in terms of the Agreement-1999.

15. However, HPSEBL approached the State Commission praying that the Appellant be directed to pay wheeling charges as determined by the State Commission.

16. The State Commission vide Order dated 30.3.2019 directed the Appellant to pay the wheeling charges as determined through the Tariff orders already issued for HPSEBL for conveyance of its power from the 132 kV substation of HPSEBL at Bajaura to Nalagarh substation of Powergrid, being aggrieved by the order making the Appellant liable to pay distribution charges for using the asset of HPSEBL which is otherwise carrying out transmission of electricity, the Appellant filed Appeal No 160 of 2019 before this Tribunal.

Our Analysis & Observation: -

17. The Appellant, through the captioned Appeal, has assailed the Impugned Order to the extent that the State Commission has determined common wheeling charges and distribution losses for voltage levels of 66 kV, 132 kV and 220 kV, the Appellant submitted that it is contrary to the provisions of Electricity Act, 2003 and the HPERC (Terms and Condition for determination of tariff) Regulations regarding determination of separate voltage-wise wheeling charges and distribution losses.

18. The Appellant submitted that HPSEBL has failed to comply with the direction issued on several occasions by the State Commission to provide voltage wise cost of its assets instead HPERC, in the absence of cost allocation at each voltage level, has allocated the cost on certain relevant parameters including “usage pattern” inter alia allocated the cost for “categories” instead of the “voltage wise allocation”.

19. Our attention was invited to various judgment of this Hon’ble Tribunal wherein the State Commissions were directed to determine separate wheeling tariff and distribution losses for each voltage level.

20. Subsequently, the State Commission issued the Impugned Order for the Control Period 2019-20 to 2023-24, wherein it was held that:

“The Long Term and Medium Term Open Access entail firm allocation of wheeling capacity by HPSEBL to the consumers availing Open Access as well as Generators. Accordingly, the charges for these customers has been determined based on Capacity Basis (Per MW) as against the Short Term Open Access Customers for which the wheeling charges has been determined based on per unit basis.....”

21. The Appellant submitted that the wheeling charges determined by the Impugned Order are still erroneous being contrary to the Regulations as well as other orders issued by HPERC, the Regulations issued by State Commission prescribe for voltage wise determination of wheeling charges and losses and the Impugned Order has not determined the wheeling charges separately for voltage level of 66 kV and above, all voltage levels of 66 kV and above have been clubbed together and a single wheeling charge has been determined.

22. Therefore, by the captioned Appeal, the only issue emerging out is whether the State Commission is right in determining the common wheeling charge for voltage levels of 66kV and above and distribution losses clubbed for voltage level of 132kV and 220 kV. If the answer to above, is in affirmative, the Appeal stands devoid of merit.

23. The State Commission countered the submissions of the Appellant, thereby submitting that it has determined the wheeling charges and losses of the distribution system owned by HPSEBL, the Appellant, being availing Short Term Open Access (STOA), has to pay the STOA charges and losses for the system for selling its power as determined by the State Commission from time to time, also added that the power flow in the system is as per the law of physics and not according to the claim of the appellant that its power is flowing through a particular line and/or substation only.

24. It was further added by the State Commission that, in the absence of the data, the Commission has determined voltage wise wheeling tariff based on data furnished and certain assumptions taken through the petition filed by the distribution licensee, proposing voltage wise losses for each year of

the control period and for determination of voltage wise wheeling tariff. It was also informed that the distribution licensee i.e. HPSEBL, contrary to the requirement of the regulations, did not submit the proposal for wheeling tariff and also failed to furnish the data of cost segregation across all voltage levels, therefore, the Commission determined the wheeling charges for four different broader voltage levels i.e. EHT (66 kV and above), HT (33 kV), HT (11 kV to less than 33 kV) and other voltage levels (less than 11 kV) of the distribution system of the HPSEBL after considering certain reasonable assumptions.

25. We fail to understand the contention of the Respondent Commission that on one side it is the mandate of the Regulation to furnish the data for each voltage level by the HPSEBL, on the other side the Commission has utterly failed in forcing compliance of its Regulations and the directions given by it in this regard, even when vested with sufficient powers to take punitive action, if required.

26. We refrain ourselves from commenting on the submission of the State Commission that Commission does not agree to the argument put forth by the appellant that the Commission has overloaded the wheeling charges of 66 kV on 132 kV. Once the tariff determined is common for voltage levels of 66kV and above, clearly indicates that the wheeling tariff is clubbed together as also loading the tariff of one voltage level over the other.

27. The only defence put forth by the State Commission is that even when entire data was not provided by HPSEBL, it has determined voltage wise wheeling charges at four broader levels for the benefit of Open Access consumers/ customers and therefore, the Appellant's reliance upon orders

of this Tribunal directing the State Commission for determining the voltage wise wheeling charges is not correct.

28. We are totally in disagreement to the defence taken by the State Commission, its failure in directing and ensuring that HPSEBL provides the requisite data and information as sought for in a time bound manner cannot be taken as a plea for not determining the voltage wise wheeling charges and distribution loss. The Appellant cannot be penalised for the unjust and unreasonable act of HPSEBL and the State Commission.

29. On the contrary, the HPSEBL submitted that the Appellant filed Petition No. 449/MP/2014 before the Central Electricity Regulatory Commission ("Central Commission") praying that certain charges levied by the Agreement-1999 ought not to be proceeded with, separately, HPSEBL also filed a counter claim being Petition No. 169/MP/2015, the Central Commission disposed of both the matters *vide* a common order dated 10.03.2017 observing that the matter shall be dealt with by the State Commission, thereafter, the State Commission on 03.04.2017 by a letter clarified that its various tariff orders determining the wheeling charges over the years would govern the field.

30. The HPSEBL, therefore, submitted that the contention of the Appellant that the wheeling charges and losses to be applied to it should be in accordance with the Agreement-1999 is not correct and also the provisions of the Agreements have to be aligned with the statutory regulations as decided by the Hon'ble Supreme Court of India. (Ref: PTC India Ltd versus Central electricity Regulatory Commission and Others (2010) 4 SCC 603).

31. At this stage, we are adjudicating only on whether the State Commission is bound and shall determine the wheeling charges and losses voltage wise.

32. It is important to note here, the provisions made under the relevant Regulations i.e. HPERC (Terms and Conditions for determination of Transmission Tariff) Regulations, 2011, Regulation 15 is quoted as under, provide for voltage wise determination of wheeling charges and losses:

“15. Distribution Losses

(1) The target distribution loss levels for the State to be achieved by the distribution licensees at the end of control period and year-wise loss reduction trajectory for the control period shall be fixed for the distribution licensee in the multi year tariff order: Provided that profits arising from achieving loss level better than specified in the loss reduction trajectory for the State shall be shared in the ratio of 60:40 with the licensee and the contingency reserve: Provided further that any financial loss on account of under performance with respect to distribution loss targets shall be to the licensee’s account.

(2) *The licensee shall propose circle-wise baseline distribution loss levels and loss reduction trajectory for each year of the control period. The Commission shall examine the filings made by the licensee for the distribution loss trajectory for Wheeling & Retail Supply Tariff Regulations Himachal Pradesh Electricity Regulatory Commission each year of the control period and approve the same with modification as it may consider necessary.*

(3) ***The distribution licensee shall also propose voltage-wise losses for each year of the control period for the determination of voltage-wise cost of supply and determination of voltage-wise wheeling tariff. The Commission shall examine the filings made by the licensee for the voltage wise distribution loss trajectory for each year of the control period and approve the same with modification as it may consider necessary: Provided that till the actual data on voltage wise losses are not available, the distribution licensee shall submit best estimates of the voltage wise losses.***

33. It is clear from the above that the State Commission shall determine the wheeling charges and losses on voltage wise basis, against the petition filed by the distribution licensee. The State Commission is bound by its own Regulations and therefore, shall determine the wheeling charges and the losses voltage wise, ensuring compliance from the distribution licensee for furnishing all relevant information and data.

34. The HPSEBL argued before us that the Appellant has relied on Regulation 15 (1) of the Himachal Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Transmission Tariff) Regulations, 2011, claiming that these Regulations do not apply to the answering Respondent and are applicable to the Himachal Pradesh state Transmission Co Ltd (hereinafter being referred to as “HPPTCL”), and also these Regulations are not a mandate on the State Commission to determine the wheeling charges for every voltage as is being raised by the Appellant. Also, the entire Regulation 15 applies to distribution losses and the trajectory to be fixed by the State Commission for reduction of such losses, the Appellant is selectively reading a portion of Regulation 15 (3) to contend that unless the State Commission determines voltage wise cost of supply and voltage wise wheeling tariff for each voltage separately, the tariff order of the State Commission cannot be sustained.

35. We find no merit in the contention of the HPSEBL, in case these Regulations are not applicable on the Appellant, then, clearly the provisions of Agreement-1999 shall prevail and the wheeling charges shall have to determined accordingly.

36. The HPSEBL, further, submitted that he has engaged a consultant, M/s CRISIL and the same is under process, upon finalisation, the report

would be placed before the State Commission, however, on being asked no time limit has been indicated thereby.

37. We strongly decline the contentions of the Respondents, namely, the HPSEBL and the State Commission.

38. This Tribunal through various judgments has directed the State Electricity Regulatory Commissions to determine the voltage wise wheeling charges and losses in a time bound manner, reliance is placed on the following judgments:

1. *Director Abhijeet Ferrotech Limited vs APERC (Appeal No. 248 of 2018)*
2. *Kerala High Tension and Extra High Tension Industrial Electricity Consumers Association vs KSERC (Appeal No. 179 of 2012)*
3. *Mawana Sugars Limited vs PSERC (Appeal No. 142 & 168 of 2013)*
4. *Steel Furnace Association of India vs PSERC (Appeal No. 176,191,237 & 245 of 2012)*
5. *Punjab State Power Corporation Limited vs Punjab State Electricity Regulatory Commission & Ors.*

39. In Appeal no. 248 of 2018 (*Director Abhijeet Ferrotech Limited vs APERC*), this Tribunal has held that:

“25. The issue involved in the present appeal is entirely covered by various other judgments of this Tribunal wherein it has been held

that tariff has to be determined voltage-wise. Some of the said judgments of this Tribunal are provided herein below:

- i. Judgment dated 26.05.2006 in Appeal Nos. 04, 13, 14, 23, 25, 26, 35, 36, 54 and 55 of 2005, titled as Siel Limited v. PSERC & Ors.;*
- ii. Judgment dated 30.05.2011 in Appeal No. 102 of 2010, titled as TATA Steel Ltd. v. OERC & Ors.;*
- iii. Judgment dated 23.09.2013 in Appeal Nos. 52, 67 of 2012, titled as Ferro Alloys Corporation Limited v. OERC & Anr.;*

26. Further, as per Section 61(g) of the Electricity Act, 2003, the tariff applicable to a consumer has to reflect the amount of actual cross subsidies in built in the said tariff. The same is for the reason that the Act contemplates progressive reduction in cross subsidies. For the purposes of effecting progressive reduction in cross subsidies, it is necessary that actual cross subsidies can be ascertained from the tariff of a consumer. The same can only happen in the event separate consumer tariff for each voltage levels, is determined by the Commission.

27. We are inclined to record here that State Commission has miserably failed in complying with the directions passed by this Tribunal in various Judgements but also failed to implement the provisions of the Tariff Policy,2016 which clearly mandates that:

“Clause 8.3(2)

- a) **Separate consumer tariff at each voltage level has to be determined in order to fulfil the mandate of Section***

61(g) of the Electricity Act 2003, which is to reflect actual cost of supply;

b) *Separate consumer tariff at each voltage level is required in order to ascertain the actual cross subsidies in built in a consumer's tariff;*

c) *Without specifying a separate consumer tariff for consumers connected at each voltage level, a progressive reduction in actual cross subsidies is not possible as the said component is not known;*

d) *The retail/ effective tariff or average billing rate at a particular voltage level cannot exceed more than 20% of the actual cost of supply of a distribution licensee at the said voltage level.”*

28. *We, further, reject the submission of the Respondent No. 2 for not determining the tariff voltage wise that the transmission system in the State operates in a ring mode comprising of 400kV, 220kV and 132kV system and as such, it is only the transmission loss for the entire transmission network which can be determined. In fact, as per Central Electricity Authority Regulations, ABT meters are to be installed at the interface points of 132 kV, 220kV and 400kV and also at places where EHT network gets connected to the distribution system of the distribution licensees making power loss easily accessible for the Distribution Licensee. Many Distribution Companies in the Country (list of 22 of such company have been provided by the Appellant) have fixed voltage wise tariffs for HT consumers though such Licensees may also be similarly placed.*

*In the light of the foregoing paragraphs, it is clear that this Tribunal has, time and again, been consistently held that the State Commissions have to necessarily determine voltage wise tariff depending upon different category of consumers, and the principle of which has also been upheld by the Hon'ble Supreme Court in **Punjab State Power Corpn. Ltd. v. Punjab State Electricity Regulatory Commission**, (2015) 7 SCC 387 as stated above.”*

40. Accordingly, the State Commission is bound to determine wheeling charges separately for each voltage level and in case of non-furnishing of information and data by the distribution licensee, should ensure compliance by the licensee, HPSEBL in the instant case.

ORDER

41. For the foregoing reasons as stated above, the captioned Appeal No. 104 of 2020 is allowed, the Impugned Order dated 29.06.2019 (“Impugned Order”) passed by Himachal Pradesh Electricity Regulatory Commission (hereinafter referred to as the “HPERC” or “State Commission”) in Tariff Petition No.28 of 2019 for the Control Period 2019-20 to 2023-24 is hereby set aside to the extent of its applicability for the Appellant in respect of wheeling charges.

42. We remit the matter, involving the issue of determination of wheeling charges voltage wise, to the State Commission for a fresh decision for determining separate wheeling charges for voltage levels 66 kV and above.

43. Needless to add that the wheeling charges as applicable under the Agreement-1999 shall continue to be levied on the Appellant till such time

the State Commission determine voltage wise wheeling charges subject to adjustment to the differential in the applicable tariff for the period in question, to be determined and recovered.

44. The issue having persisted for long, we would expect the State Commission to pass the fresh order in terms of above directions expeditiously, not later than three months from the date of this judgment. The Commission shall also ensure that the order it passes pursuant to our directions is scrupulously complied with expeditiously and in a time-bound manner and for this purpose shall have recourse to all enabling powers available to it under the law.

The appeal is disposed of in above terms.

Pronounced in the Open Court on this 18th day of August, 2022.

(Sandesh Kumar Sharma)

Technical Member

(Justice R.K. Gauba)

Officiating Chairperson

REPORTABLE/NON-REPORTABLE

pr/mkj