

THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

**APPEAL NO. 343 OF 2021 &
IA NO. 1688 OF 2021**

Dated: 24.11.2022

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

In the matter of:

NOIDA POWER COMPANY LIMITED

[Through Its Authorized Representative]

Plot No. E.S.S., Knowledge Park – IV,

Greater Noida,

Uttar Pradesh – 201310

... Appellant(s)

VERSUS

UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION

[Through Its Secretary]

Vidyut Niyamak Bhawan, Vibhuti Khand,

Gomti Nagar, Lucknow

Uttar Pradesh – 226010

... Respondent(s)

Counsel for the Appellant (s) : Mr. Saajan Poovayya, Sr. Adv.
Mr Amit Kapur
Mr. Vishal Gupta
Ms. Debolina Roy
Mr. Sagnik Maitra
Ms. Alvia Ahmed

Counsel for the Respondent (s) : Mr. C.K. Rai
Mr. Sumit Panwar for R-1

Mr. Anand K. Ganesan
Mr. Amal Nair for Intervener

J U D G M E N T (Oral)

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. The appellant, *Noida Power Company Limited*, is a licensee engaged in the business of distribution and retail supply of electricity in the Greater Noida area of the State of Uttar Pradesh, its license granted originally under

the provisions of Indian Electricity Act, 1910 having continued under the relevant provisions of Electricity Act, 2003. It has come up by the appeal at hand questioning the legality, validity and propriety of the order passed by respondent, *Uttar Pradesh Electricity Regulatory Commission* (“UPERC” or “the State Commission”) on 26.08.2021 on Petition no. 1684 of 2021, the said petition having been presented by the appellant for approval of its *Annual Revenue Requirement* (“ARR”) for *Financial Year* (“FY”) 2021-22, *Annual Performance Review* (“APR”) for FY 2020-21 and in truing up for FY 2019-20.

2. The truing up for FY 2019-20 is a follow-up on the ARR order for the corresponding period earlier passed on 03.09.2019.

3. The prime contention raised by the appellant is that the State Commission while truing up has changed the rules or methodology which had been applied in the initial tariff (ARR) determination, it having the effect of retrospective revision of tariff, being impermissible. It is also submitted that the State Commission has proceeded on the wrong assumption that the license of the appellant is to expire on 30.08.2023.

4. The appeal has been resisted by the respondent State Commission and an intervener (Rama Shanker Awasthi) the latter having been an objector before the State Commission in the proceedings from which impugned order arises, he having been given opportunity of being heard, pursuant to his application (IA no. 634 of 2022), by Order dated 16.09.2022.

5. Indeed, the assumption of the State Commission that the license of the appellant would come to an end on 30.08.2023 is no longer correct in as much as in challenge to multi-year tariff Order dated 26.11.2020 passed on Petition no. 1526 of 2019 for control period FY 2020-21 to FY 2024-25, the view to such effect taken by the State Commission was challenged by Appeal no. 72 of 2021 which has since been decided by this tribunal by judgment dated 23.08.2022, the finding returned being that the tenure of the license of the appellant would continue, by virtue of the provisions of Electricity Act, 2003, till 09.06.2029.

6. During the course of submissions, it was pointed out that in the ARR order dated 03.09.2019, for FY 2019-20, the State commission had allowed certain claims of the appellant following certain principles or methodology, on subjects inclusive of capital expenditure (“Capex”) on distribution assets at 132 kV and above voltage, land, vehicles, infrastructure in the nature of offices (control room and customer care) at Knowledge Park-IV and I; short term power purchase cost; cost incurred on purchase of renewable power; revenue generated through unmetered sales; efficiency gain on loan swapping; miscellaneous expenses (loss on sale of fixed assets), expenses incurred due to *change in law* (GST), regulatory surcharge and electricity duty claimed as revenue renewables in working capital; cost of funding of delayed payment surcharge, *et al.*

7. The methodology adopted in the ARR Order dated 03.09.2019 seems, on *prima facie* consideration of the matter, to be materially distinct from the one adopted in the impugned truing up order at hand. The learned counsel appearing for the appellant illustrated this by referring to the disallowance of Capex on distribution assets at 132 kV and above voltage and on land procurement. Similarly, it is pointed out that in the Tariff Order dated 03.09.2019, the State Commission had followed the methodology of approving short term power purchase cost based on aggregate rate of round the clock (RTC) and peak power, while in the truing up order, a different principle has been followed, it now being based on sources, and resultantly a substantial portion of the power purchase cost statedly been kept out. Similar seems to be the new treatment in the power purchase cost incurred on renewable power. Further, by illustration, it is shown that in the ARR order of 03.09.2019, the State Commission had allowed full sale under the head of unmetered sales whereas at the stage of truing up unmetered sales over and above the norms have been disapproved following an approach adopted by a subsequent order dated 09.12.2016 in proceedings wherein the appellant was not involved as a party. The grievances of the appellant are that as a result of the change of methodology, it has been disallowed its claims to the extent of Rs. 146.0 crores, this being inclusive of the denial of Capex to the extent of Rs. 72.0 crores.

8. On the discipline to be followed at the stage of truing up, Hon'ble Supreme Court has ruled, by its judgment reported as *BSES Rajdhani Power Ltd v Delhi Electricity Regulatory Commission* (2022 SCC Online SC 1450), as under:

“52. As noticed above, a tariff order is quasi-judicial in nature which becomes final and binding on the parties unless it is amended or revoked under Section 64(6) or set aside by the Appellate Authority. Apart from this, we are also of the view that at the stage of ‘truing up’, the DERC cannot change the rules/methodology used in the initial tariff determination by changing the basic principles, premises and issues involved in the initial projection of ARR.

...

56. Revision or re-determination of the tariff already determined by DERC on the pretext of prudence check and truing up would amount to amendment of the tariff order, which can be done only as per the provisions of sub-Section (6) of Section 64 of the 2003 Act within the period for which the Tariff Order was applicable. In our view, DERC cannot amend the tariff order for the period 01.04.2008 to 31.03.2010 in the guise of ‘true-up’ after the relevant financial year is over and the same is replaced by a subsequent tariff Order. This would amount to a retrospective revision of tariff when the relevant period for such tariff order is already over. Therefore, we hold that it is not permissible to amend the tariff order made under Section 64 of the 2003 Act during the ‘truing up’ exercise.”

9. It is also the grievance of the appellant that the approach of the State Commission in the impugned order is contrary to its own regulations. It is pointed out that under the *Uttar Pradesh Electricity Regulatory Commission (UPERC) Rooftop Solar PV Regulations, 2019* (for short, “RSPV Regulations, 2019”), the net metering units are to be considered, per regulation 12, for *Revenue Purchase Obligation* (“RPO”) computation, this not having been done in the truing up order. It is further the contention of the appellant that in terms of regulation 9 and 11.2 of *UPERC MYT Regulations,*

2014 (“MYT Regulations, 2014”), the losses on account of controllable factors are to be shared equally between the licensee and consumers. It is pointed out that the State Commission, by the impugned order, has totally disallowed the costs incurred over and above normative costs instead of permitting sharing.

10. It is also the submission of the appellant that under UPERC MYT Regulations, 2014, the income tax from the other business is to be excluded as non-tariff income, the State Commission having construed the income on interest on fixed deposits (“FDs”) from shareholders funds as non-tariff income. Further, regulation 35 of MYT Regulations, 2014 do not seem to provide for creation of regulatory surplus or carrying cost thereupon. The State Commission has created regulatory surplus and carrying cost thereon, the correctness of which view is questioned. It is also pointed out that regulation 19.2(2) of MYT Regulations, 2014 acknowledges procurement of power from power bank, the State commission having disallowed the power banking claim in entirety. In the same context reference is made to regulation 32 of MYT Regulations, 2014 whereunder refund of income tax paid earlier but never claimed in ARR is claimed for adjustment. The grievance of the appellant is that refund of income tax of Rs. 11.48 crores, never claimed by the appellant nor allowed by the State Commission in the earlier orders on ARR, has been deducted from the admissible income tax for the period to which truing up pertains.

11. There are similar grievances raised *vis-à-vis* the ARR for FY 2021-22 on the subjects of Capex on 132 kV and above voltage assets; Capex on vehicle; Capex over and above Rs. 10 crores; operation & maintenance (O&M) expenses; writing off the bad or doubtful debts; computation of debt-equity ratio; and disallowances of medium-term power purchase cost.

12. Reliance is placed on *Gujarat Urja Vikas Nigam Ltd v Solar Semiconductor Power Co (India) Pvt Ltd & Ors (2017) 16 SCC 498* wherein it was held as under:

“60. In the case at hand, rights and obligations of the parties flow from the terms and conditions of the Power Purchase Agreement (PPA). PPA is a contract entered between the GUVNL and the first respondent with clear understanding of the terms of the contract. A contract, being a creation of both the parties, is to be interpreted by having due regard to the actual terms settled between the parties. As per the terms and conditions of the PPA, to have the benefit of the tariff rate at Rs.15/- per unit for twelve years, the first respondent should commission the Solar PV Power project before 31.12.2011. It is a complex fiscal decision consciously taken by the parties. In the contract involving rights of GUVNL and ultimately the rights of the consumers to whom the electricity is supplied, Commission cannot invoke its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the interest of GUVNL and ultimately the consumers.”

13. It is the submission of the appellant that by the tariff order, the State Commission has not only violated its own regulatory framework but also the terms of approved contracts for purchase of power, this being impermissible in view of ruling of Hon’ble Supreme Court in *Maharashtra State Electricity Distribution Co Ltd vs. Maharashtra ERC & Ors. (2022) 4 SCC 657*:

“178. The proposition that Courts cannot rewrite a contract mutually executed between the parties, is well settled. The Court cannot, through

its interpretative process, rewrite or create a new contract between the parties. The Court has to simply apply the terms and conditions of the agreement as agreed between the parties, as observed by this Court in Shree Ambica Medical Stores and Ors. v. Surat People's Co-operative Bank (supra), cited by Ms. Divya Anand. This appeal is an attempt to renegotiate the terms of the PPA, as argued by Ms. Divya Anand as also other Counsel. It is well settled that Courts cannot substitute their own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed. The explicit terms of a contract are always the final word with regard to the intention of the parties, as held by this Court in Nabha Power Ltd. (NPL) vs. Punjab State Power Corporation Ltd. (supra) cited by Ms. Anand.”

14. The broad submission resisting the appeal has been that there has been no change in the methodology or premises of the ARR tariff Order dated 03.09.2019.

15. Having heard the learned counsel of all sides, and having regard to some of the departures that have been pointed out from the approach earlier taken in the ARR order, we are of the considered view that the matter deserves to be remitted to the State Commission for a revisit, particularly in light of the settled principles of the circumscribed limits within which truing up can be done and the binding effect of the existing regulations, as indeed of the terms of the contract executed with the agencies from which power is sourced.

16. For the forgoing reasons, the appeal is allowed. The impugned order dated 26.08.2021 passed by the State Commission in Petition no. 1684 of 2021 is set aside. The matter stands remitted to the State Commission for fresh consideration and decision on the truing up for FY 2019-20 and ARR

2021-22. Needless to add that it will be desirable that the matter is decided expeditiously and thus, we request the State Commission to give its fresh decision under this remit, as early as possible, preferably within one month of this judgment. Bearing in mind the approach we have taken, deferring particularly to the request of the learned counsel for the parties, we have avoided recording any opinion on the issues that have been agitated, lest the same prejudice either side.

17. Contentions of all parties are kept open.

18. The appeal and pending applications are disposed of in above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 24TH DAY OF NOVEMBER, 2022.

(Sandesh Kumar Sharma)
Technical Member

vt/mkj

(Justice R.K. Gauba)
Officiating Chairperson