

PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SITE NO. 3, BLOCK B, SECTOR 18-A MADHYA MARG, CHANDIGARH

Petition No. 01 of 2023
Date of Order: 05.09.2023

Petition under Section 86(1)(f) of Electricity Act, 2003 seeking directions to the Respondent No. 1, Punjab State Power Corporation Limited to pay Capacity Charges for the months of April and May 2020 to the Petitioner, GVK Power (Goindwal Sahib) Limited as per the Revised Energy Accounts dated 05.08.2022 issued by the Respondent No. 2, Punjab State Load Despatch Centre pursuant to the Commission Order dated 22.07.2022 in Petition No. 15 of 2020 filed by the Petitioner.

AND

In the matter of: GVK Power (Goindwal Sahib) Limited Paigah House, 156-159 Sardar Patel Road, Secunderbad, 540003.

...Petitioner

Versus

1. Punjab State Power Corporation Limited (PSPCL) Through its CMD, PSEB Head Office. The Mall, Patiala (Punjab).
2. Punjab State Load Dispatch Centre (PSLDC) Through its Chief Engineer, SLDC, Building near 220 KV Grid Station, PSTCL, Ablowal, Patiala, 147001-Punjab

...Respondents

Commission: Sh. Viswajeet Khanna, Chairperson
Sh. Paramjeet Singh, Member

GVK: Sh. Janmali Manikala, Advocate

PSPCL: Sh. Sakya Singha Chaudhari, Advocate

PSLDC: Sh. Vivek Goyal, Addl.SE

ORDER

1. The Petitioner GVK has filed the present petition u/s 86(1)(f) of Electricity Act, 2003 for adjudication of its dispute regarding the non-payment of capacity charges by PSPCL for the months of April and May 2020 to GVK as per the revised Energy Accounts dated 05.08.2022 issued by PSLDC pursuant to the Commission's Order dated 22.07.2022 in Petition No. 15 of 2020. The submissions of GVK are summarized as under:

1.1 GVK is a generating company engaged in the business of generating electricity and has set up a 2x270 MW thermal power plant at Goindwal Sahib and is supplying power to PSPCL under the Amended and Restated PPA dated 26.05.2009.

1.2 On 29.03.2020, PSPCL issued a 'Force Majeure Notice' to GVK under Article 12 of the PPA claiming the nation-wide lockdown imposed by the Order dated 24.03.2020 issued by the Ministry of Home Affairs and the Order dated 22.03.2020 issued by the Department of Health and Family Welfare, GoP due to the outbreak of Covid-19 Pandemic as an event of Force Majeure. The PSPCL's claim was disputed by GVK. In continuation to the same, PSLDC vide an email dated 01.04.2020, while stating that PSPCL had issued the FM Notice in terms of the PPA and is not giving any requirement since such date, instructed GVK to not declare DC till further restoration of power by PSPCL. Further, on 02.04.2020, PSLDC issued a notice to generating companies, including GVK to discontinue their generating facility immediately from PSPCL/PSTCL system till Covid-19 epidemic lasts. Thereafter, on 07.04.2020, PSLDC issued final SEA for the month of March 2020, stating that in view of notices under Force Majeure issued by

PSPCL, the DC of IPPs for 30.03.2020 and 31.03.2020 has not been considered while preparing the SEA.

- 1.3 On 06.07.2020, GVK submitted the monthly tariff invoice of Rs. 47,53,54,107 each on PSPCL against power supplied during the months of April and May 2020. However, as the availability has been considered as zero, PSPCL has withheld capacity charges payable to GVK for April and May 2020 (till 25.05.2020). Since the actions of PSLDC were contrary to PSLDC's statutory duty under the Act and the Grid Code, GVK filed Petition No. 15 of 2020 challenging the arbitrary and unreasonable actions of PSLDC.
- 1.4 In the meanwhile, TSPL and NPL approached the Hon'ble High Court by way of CWP Nos. 7519 and 7715 of 2020, respectively *inter-alia* seeking quashing of similar FM notices dated 29.03.2020 and 14.04.2020 issued by PSPCL. Vide Judgment dated 04.07.2022, the Hon'ble High Court allowed CWP Nos. 7519 and 7715 of 2020, quashed the impugned actions/notices and directed PSLDC to do the needful in accordance with law.
- 1.5 Relying on the Hon'ble High Court's findings in the Judgment dated 04.07.2022, the Commission passed the Order 22.07.2022 in Petition No. 15 of 2020 and directed PSLDC to revise the SEAs appropriately. In terms of the above directions, on 05.08.2022, PSLDC issued revised SEAs for the months of March, April and May 2020 for GVK's Project.
- 1.6 Accordingly, on 09.08.2022, GVK raised a Supplementary Tariff bill towards LPS against delayed payment of tariff bills for the months from April 2020 to October 2021 on PSPCL. However, on 07.09.2022, PSPCL denied GVK's claim for Capacity Charges and

interest thereon on account of revision of its Plant Availability Factor for FY 2020-21 by PSLDC with the plea that the Capacity Charges have to be worked in terms of the Force Majeure clause in the Amended and Restated PPA on account of Force Majeure event faced by PSPCL.

- 1.7 In terms of the directions passed by the Commission and the revised SEAs issued by PSLDC on 05.08.2022, PSPCL was obligated to release payments towards tariff claimed by GVK for the months of April and May 2020. As a consequence of GVK's availability having been considered as 'zero' by PSLDC (which has been set aside by the Commission), PSPCL's actions are illegal and contrary to the terms of the PPA. The amounts could not have been withheld by PSPCL without raising a dispute within 30 days of receipt of the Bills.
- 1.8 Moreover, once the force majeure notices issued by PSPCL to the generating stations in the State of Punjab on account of Covid-19 and consequent actions of PSLDC in treating the availability of the generating stations as 'zero' have been set aside, PSPCL was obligated to pay the Capacity Charges to GVK in terms of the PPA. The directions of the Hon'ble High Court in the Judgment dated 04.07.2022 are binding on PSPCL. Accordingly, the present petition has been filed seeking directions to PSPCL to release payment of Rs. 94,79,13,226 Crores towards balance Capacity Charges along with LPS.
- 1.9 Further, in terms of Article 11.3.4 of the PPA, for payments made beyond the due date (i.e., 30 days from the date of receipt of the Bill), PSPCL is liable to pay LPS on the outstanding amount.

Despite GVK raising Supplementary Bills dated 09.08.2022 towards LPS applicable from the due date of the monthly bills and sending repeated reminders, PSPCL has not released any payments towards LPS to GVK.

1.10 Non-payment of dues has adversely impacted the financials of GVK. On 10.10.2022, the Hon'ble NCLT admitted C.P. (IB) No. 43/7/HDB/2020 and put GVK under Corporate Insolvency Resolution Proceedings. The Interim Resolution Professional was appointed vide Order dated 10.10.2022. Considering the financial hardships that are caused to the generating companies on account of non-payment/delayed payments of bills by the distribution licensees, the Hon'ble Tribunal in the Order dated 05.12.2018 in the case of "*TANGEDCO v. Central Electricity Regulatory Commission*" (IA No. 1428 of 2018 in Appeal No. 289 of 2018), were pleased to direct TANGEDCO to pay 80% of its dues in the interim. The same dispensation may be allowed to GVK's Project which has been adversely impacted due to non-payment of capacity charges and LPS by PSPCL.

1.11 The prayers of GVK are as under:

- "a) Direct PSPCL to release payments towards capacity charges for the period of April and May 2020 in terms of the Monthly Bills dated 06.07.2020 issued by GVK;*
- b) Direct PSPCL to release payments towards Late Payment Surcharge;*
- c) In the interim, direct PSPCL to release payment of 75% of the Monthly Bills dated 06.07.2020 raised by GVK towards capacity charges for the months of April and May 2020 during the pendency of the present Petition; and/ or*
- d) Pass any such other and further reliefs as the Commission deems just and*

proper in the nature and circumstances of the present case.”

2. On 31.03.2023, PSPCL filed its reply to the petition submitting that the reliefs sought by GVK are not maintainable and deserves to be dismissed at the very threshold. The submissions of PSPCL are summarised as under:

2.1 GVK has sought directions from the Commission for payment of capacity charges on the ground that the force majeure notice dated 29.03.2020 issued by PSPCL to GVK has been set aside by the Hon'ble Punjab and Haryana High Court's judgment dated 04.07.2022 in CWP No. 7519 of 2020 and CWP No. 7715 of 2020, thereby, obligating PSPCL to pay the capacity charges to GVK in terms of the PPA dated 26.05.2009. However, since GVK has not challenged the force majeure notice dated 29.03.2020 issued by PSPCL, the same is subsisting and binding and the claim of GVK in the present petition is thus not maintainable.

2.2 The Commission's Order dated 22.07.2022 in Petition No. 15 of 2020 cannot be assumed to have the effect of quashing of the force majeure notice. The issue under Petition No. 15 of 2020 was limited to the actions of PSLDC. The relevant portion of the Petition No. 15 of 2020 filed by the Petitioner is extracted herein below:

“55. GVK has also disputed the declaration of force majeure by PSPCL. GVK reserves its right to take appropriate action with regard to the force majeure notices issued by PSPCL. It is submitted that present petition is limited to PSLDC”

2.3 Moreover, GVK cannot seek directions towards payment of capacity charges on the basis of the judgment dated 04.07.2022

passed by the Hon'ble High Court in a matter where GVK was not even a party.

2.4 PSLDC had updated the SEA pursuant to the Commission's Order dated 22.07.2022 in Petition No. 15 of 2020. However, such updation of SEA does not by default make PSPCL liable to make the payment of the capacity charges. PSPCL vide its letter dated 07.09.2022 had responded to the GVK's letter dated 09.08.2022 claim to release the balance capacity charges for the months of April and May 2020, together with interest. It was informed that the amount claimed by GVK pursuant to the Commission's Order dated 22.07.2022 stands disputed due to the following reasons:

"PSPCL would like to point out that the capacity charges have to be worked out in terms of the force majeure clause in the PPA for the period falls in March 2020 to May 2020 on account of Force Majeure situation faced by PSPCL due to Covid-19 and the same has already been informed vide PSPCL's Force Majeure Notice dated 29.03.2020. Therefore, the claim of Rs. 95 crores (based on AFC of FY 2020-21 determined in Petition 14 of 2020) towards Capacity Charges may not be the correct amount recoverable by GVK, pursuant to Hon'ble PSERC's order dated 22.07.2022.

Further, it is informed that Force Majeure Notice issued to other IPPs including NPL and TSPL has been decided by the Punjab & Haryana High Court and the same has been under challenge before the court in LPA filed by PSPCL against order dated 4.7.2022. The force majeure notice dated 29.03.2020 had been issued to GVK as per PPA and has not been faulted with by the Hon'ble PSERC.

In view of the position stated above, the amount claimed by GVK pursuant to the order dated 22.07.2022 in Petition No. 15 of 2020 stands disputed."

2.5 PSPCL vide a subsequent letter dated 12.09.2022 had informed GVK that in reference to its letter dated 09.08.2022 asking PSPCL to release arrears, including interest total amounting to Rs. 131.25 crores for FY 2020-21 & FY 2021-22, PSPCL had disputed the amount claimed by GVK as far as claims are concerned with the decision in Petition 15 of 2020, for which letter dated 07.09.2022 had been issued by PSPCL. Without prejudice to above, it is submitted that PSPCL is not liable to make any payment towards the capacity charges along with interest; the amount of the invoices stood confirmed, if at all, only in August 2022.

2.6 Further, Corporate insolvency resolution process pursuant to the section 7 of Insolvency and Bankruptcy Code, 2016, under Company Petition CP (IB) No. 43/7/HDB/2020 has been initiated against GVK. Without prejudice, in case the Commission grants any interim relief to GVK, then such amount may be deposited with the Commission, subject to the final disposal of the matter.

3. PSLDC filed its reply on 11.04.2023 submitting that it has already implemented the Commission's Order by revising the SEAs for the period March to May 2020. Therefore, the name of PSLDC may be deleted from array of parties.
4. On 11.04.2023, GVK filed a copy of Supreme Court judgment dated 20.03.2023 dismissing the SLPs filed by PSPCL, and submitting that:
 - 4.1 On 30.01.2023, Hon'ble High Court of Punjab & Haryana has dismissed the LPA No. 767 & 770 of 2022 filed by PSPCL challenging the judgment dated 04.07.2022 in CWP No. 7519 of 2020 and Batch) holding that PSPCL is required to pay the capacity

charges to the generators towards availability declared by them at the time of lock down due to Covid-19 pandemic.

4.2 Subsequently, PSPCL challenged the above judgment dated 30.01.2023 before the Supreme Court by way of SLP Nos. 4067 & 4125 of 2023. However, the Supreme Court vide judgment dated 20.03.2023 has dismissed the SLPs at the admission stage itself, thereby confirming the findings of the High Court of Punjab & Haryana in Order dated 30.01.2023 and 04.07.2022.

4.3 Thus, the issue i.e. liability of PSPCL to make payments towards capacity charges to GVK for the month of April and May 2020 as per revised SEAs dated 05.08.2022 stands settled in terms of Supreme Court's judgment dated 20.03.2023.

5. On 29.06.2023, GVK filed its rejoinder to PSPCL's reply, which is summarised as under:

5.1 PSPCL is under an unfettered obligation to pay Capacity Charges to GVK and Judgments passed by the High Court are binding on PSPCL qua GVK:

a) It is an undisputed position that PSPCL's obligation to pay Capacity Charges to GVK is linked with the declaration of availability / declared capacity of GVK's generating station. If the generating station of GVK is available to generate and supply power upto the contracted capacity to PSPCL, PSPCL is bound to pay Capacity Charges to GVK. Therefore, as soon as the SEAs were revised by SLDC on 05.08.2022 pursuant to the Commission's Order in Petition No. 15 of 2020 to reflect the original declared capacity of GVK's generating station, PSPCL was obligated to release the Capacity Charges to GVK. It bears

mention that the said Order has not been challenged by PSPCL and has attained finality.

- b) Further, the Hon'ble High Court in Judgment dated 04.07.2022 in CWP No. 7519 of 2020 (*Talwandi Sabo Power Ltd. v. Union of India & Ors.*) and CWP No. 7715 of 2020 (*Nabha Power Ltd. v. State of Punjab & Ors.*) has held that PSPCL's liability to make payment of capacity charges is unfettered even in the event of force majeure. It bears mention that the above judgments have attained finality and have been upheld by the Hon'ble Supreme Court vide Order dated 20.03.2023 in SLP (C) Nos. 4067 and 4125 of 2023.
- c) Since the terms of the Power Purchase Agreements entered by TSPL and NPL with PSPCL relating to force majeure and payment of capacity charges are *para materia* to the terms of the Amended and Restated PPA entered between GVK and PSPCL. Therefore, the findings of the Hon'ble High Court are squarely applicable in the present case.
- d) PSPCL's invocation of force majeure on account of COVID-19 led lockdown and consequent reduction in demand has been set aside by the Hon'ble High Court vide Judgment dated 04.07.2022 in the case of TSPL and NPL. The said Judgment has attained finality in terms of the Order dated 20.03.2023 passed by the Hon'ble Supreme Court. Thus, a similar invocation of force majeure in GVK's case cannot be sustained more so when the Petition-15 Order was passed by this Hon'ble Commission in terms of the Judgment dated 04.07.2022 passed by the Hon'ble High Court. It is

trite that PSPCL being 'State' cannot take such an arbitrary and discriminatory stand in GVK's case.

e) Accordingly, since the Order in Petition No. 15 of 2020 has been passed pursuant to and in accordance with the Hon'ble High Court's Judgment dated 04.07.2022, the findings passed by the Hon'ble High Court *qua* TSPL and NPL are squarely applicable in the present case.

5.2 PSPCL is also liable to pay LPS to GVK. PSPCL's liability to pay Capacity Charges commences from the due date after issuance of the monthly invoices for the months of April and May 2020 on 06.07.2020 to PSPCL claiming Capacity Charges basis the actual availability declarations made by GVK. In terms of Article 11.3.4 of the Amended and Restated PPA, payments made beyond the Due Date (i.e., 30 days from the date of receipt of the Bill) attract LPS. It bears mention that despite GVK raising Supplementary Bills dated 09.08.2022 towards LPS applicable from the due date of the monthly invoices and sending repeated reminders, PSPCL has not released any payments towards LPS to GVK.

6. In the hearing held on 12.07.2023, after hearing the Counsel of the parties, the petition was admitted with directions that the respondents may file further reply/submissions, if any, within two weeks with a copy to the petitioner and the petitioner may file rejoinder thereto within one week thereafter with a copy to the respondents. However, no additional reply/submission was filed by either of the party. After hearing the parties on 30.08.2023, the order was reserved with directions that parties may file written submissions, if any, immediately. PSPCL has submitted its written submissions on 04.09.2023 reiterating its earlier submissions made in the matter.

7. Findings and Decision of the Commission

The Commission has carefully gone through the petition, reply by PSPCL, rejoinder by the Petitioner and the arguments thereon by the parties. The petition is for seeking directions to PSPCL to release payments towards capacity charges for the period of April and May 2020 to GVK as per the revised State Energy Accounts (SEA) dated 05.08.2022 issued by PSLDC, pursuant to the Commission's Order dated 22.07.2022 in Petition No. 15 of 2020 filed by the Petitioner, along with the applicable Late Payment Surcharge on the same. The Commission examines the same as under:

7.1 Payment of Capacity Charges:

The Commission, keeping in view the Order dated 04.07.2022 passed by the Hon'ble High Court in a similar cases of M/s TSPL and NPL, had directed the Punjab State Load Dispatch Centre (PSLDC) to proceed to act in accordance with its defined duties/obligations under the Electricity Act, 2003 and Grid Code Regulations in context of scheduling the energy and to revise the SEA appropriately. It has been submitted that In terms of the above directions, PSLDC has issued revised SEAs on 05.08.2022, for the months of March, April and May 2020 for the Petitioner's Project, which are not disputed by any of the parties.

However, PSPCL's contention is that updating of SEA does not by default make it liable to make the payment of the capacity charges as they have to be worked in terms of the Force Majeure clause in the Amended and Restated PPA on account of Force Majeure event faced by PSPCL. The force majeure notice dated 29.03.2020 issued by PSPCL is still subsisting, as the same has not challenged by the

Petitioner. Whereas, it's the case of the Petitioner that, the Judgment dated 04.07.2022 by the Hon'ble High Court, setting aside the similar force majeure notices on the account of Covid-19 issued to other IPPs in the State, has attained finality in view of the Hon'ble Supreme Court judgment dated 20.03.2023 dismissing the SLPs at the admission stage, confirming the findings of the High Court of Punjab & Haryana.

The Commission refers to the Article 11.2.2 of the PPA, where under it is specified that "Each Monthly Bill and Provisional Bill shall include Availability and energy account for the relevant Month as per REA" making it amply clear that payment of monthly bills is to be made as per the Energy Account prepared by the PSLDC. Further, on the issue of the Force Majeure Notice issued by PSPCL to the Petitioner citing the purported Majeure Event, the Commission notes that the following Judgment dated 04.07.2022 by the Hon'ble Punjab and Haryana High Court in case of TSPL and NPL (CWP No. 7519 of 2020 and 7715 of 2020) has attained finality:

"[68]. The impugned actions on behalf of Punjab State Load Dispatch Centre are contrary to the decision dated 06.04.2020 passed by the Ministry of Power, wherein it has been expressly stated that notwithstanding the lockdown, the obligation to pay for capacity charges as per power purchase agreement shall continue. Despite the aforesaid decision, PSPCL has not withdrawn impugned notices and SLDC has not acted in terms of defined duties arising out of Electricity Act, 2003 and Punjab State Electricity Regulatory Commission (Punjab State Grid Code) Regulations, 2013. The orders passed by the Ministry of Power have the force of law and are binding in nature.

.....

[70]. The impugned actions on behalf of PSPCL and PSLDC are contrary to the guidelines issued by the Ministry of Home Affairs under the Disaster Management Act, 2005. Section 72 of the Disaster Management Act overrides any other law for the time being in force. On the one hand, the petitioners were directed to remain available to generate power under Disaster Management Act, 2005 (and expose itself to criminal prosecution for violation), whereas on the other hand, PSPCL has invoked force majeure and denying the lawful claims of the petitioners while complying with the provisions of Disaster Management Act, 2005 and guidelines issued by the competent authority.

.....

[71]. It can be noticed that impugned notices are contrary to the terms of the Power Purchase Agreement inasmuch as that PSPCL has invoked force majeure on the ground of "impact on cash flows" and "financial constraints". If the aforesaid assertion is tested at the threshold of Article 12.4 of the Power Purchase Agreement, where any "insufficiency of finances or funds or the agreement becoming onerous to perform" is expressly excluded as a force majeure event. The reduction in load/demand in the State of Punjab due to imposition of lockdown, does not fall under the ambit of force majeure as the same does not affect performance of PSPCL for fulfilling the obligations arising out of Power Purchase Agreement..... In the event of agreement becoming onerous to perform, it does not qualify as an event of force majeure and there has to be a legal or physical impossibility in procuring power from the petitioners in view of ratio laid down in *Energy Watchdog Vs. CERC*, (2017) 14 SCC 80. Capacity charges are unfettered even in the event of invocation of force majeure.

.....

[74]. Evidently, as per Ministry of Home Affairs notice dated 24.03.2020, power generation, transmission and distribution units and services were exempted

from the lockdown. PSPCL issued the impugned notice dated 29.03.2020 in utter disregard to the aforesaid order dated 24.03.2020. The alleged drastic reduction in load/demand would not constitute a force majeure event under the Power Purchase Agreement.

[75]. Capacity charges cannot be denied to the petitioners. The obligation to pay capacity charges is sacrosanct and the same cannot be repudiated even in the case of invocation of force majeure event by PSPCL. Capacity charges include various expenditures such as cost towards financial obligations of the project, salary of direct and indirect employees, consumables (excluding coal), operation and maintenance etc.

.....

{77} in the light of aforesaid contractual position, the petitioners have absolute right to claim capacity charges in terms of Articles 4.3 and 4.4 of the Power Purchase Agreements. Force Majeure in terms of Article 12 of the Power Purchase Agreements, does not envisage such provision for non-payment of capacity charges. The parties cannot resile from their payment obligations on account of force majeure.”

The Order of the Commission dated 22.07.2022 in Petition No. 15 of 2020 was based on the above High Court Order which has been upheld upto the Supreme Court and has attained finality. Accordingly, the Commission is of the view that the capacity charges for the impugned period are payable to the Petitioner as per the revised State Energy Accounts issued by PSLDC, pursuant to the Commission’s Order dated 22.07.2022 in Petition No. 15 of 2020 filed by the Petitioner.

7.2 Issue of Payment of Late Payment Surcharge (LPS)

Further, the Commission refers to the Article 11.3.4 of the PPA

which reads as under:

“11.3.4 In the event of delay in payment of a Monthly Bill by the Procurer beyond its Due Date month billing, a Late Payment Surcharge shall be payable by the Procurer to the Seller at the rate of two (2) percent in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with Monthly rest), for each day of the delay”

As is evident, PPA mandates payment of LPS on the outstanding payments beyond the due date. Therefore, the LPS shall be payable on the impugned amounts starting from the due date of Bills submitted by the Petitioner upon uploading of revised SEA by PSLDC, seeking release of its pending capacity charges, till the date of actual payment.

In view of the above, PSPCL is directed to pay the capacity charges to the Petitioner for the impugned period as per the SEA prepared by the SLDC in compliance of the Commission’s Order dated 22.07.2022 in Petition No. 15 of 2020 along with applicable Late Payment Surcharge as per observations/directions contained above.

The Petition is disposed of accordingly with the above directions.

Sd/-

(Paramjeet Singh)
Member

Sd/-

(Viswajeet Khanna)
Chairperson

Chandigarh

Dated: 05.09.2023