

**BEFORE THE HIMACHAL PRADESH ELECTRICITY
REGULATORY COMMISSION, SHIMLA**

Review Petition No. 105/2012

(Date of Decision: 27th Nov., 2012)

In the Matter of:

Review Petition under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 63 of the Himachal Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2005, for Review of the 1st APR Order for 2nd MYT Control Period dated 24th April 2012

AND

In the Matter of:

- 1) The Baddi Barotiwala Nalagarh Industries Association, Baddi, District Solan; (H.P.)
- 2) The Parwanoo Industries Association (PIA), Parwanoo, District Solan;(H.P.)
- 3) The Kala Amb Chamber of Commerce and Industries (KACCI), District Sirmour; (H.P.)
- 4) The Federation of Himachal Industries, Baddi (FHI) Tehsil Nalagarh District Solan (H.P.)

..... Petitioners

Vs

The Himachal Pradesh State Electricity Board Ltd.

.....Respondent

**CORAM
SUBHASH C. NEGI
CHAIRMAN**

Counsels:-

for the Petitioner/applicant:

Sh. Rakesh Bansal
(Authorised Representative)

for the respondents:

Sh. Romesh Chauhan
(Authorised Representative)
Er. Yog Raj Sharma
Chief Engineer (Commercial)

Consumer Representative
(u/s 94 of the Electricity
Act, 2003)

Er. P.N. Bhardwaj

Order

(Last heard on 30.10.2012 and Orders reserved)

A1: Background

Purpose of the order

- 1.1 The Himachal Pradesh State Electricity Board Limited (hereinafter referred to as 'HPSEBL') had filed petitions with the Himachal Pradesh Electricity Regulatory Commission (hereinafter referred to as 'the Commission' or 'HPERC') for approval of its Revised Aggregate Revenue Requirement (ARR) for FY13 and determination of Wheeling & Retail Supply Tariff for FY13 under the 2nd MYT Control Period (FY12 to FY14). The HPSEBL had also filed Applications for the True Up of FY11 and for the True Up of the 1st MYT Control Period (FY09 – FY11).
- 1.2 The Commission, after considering the applications filed by the HPSEBL and hearing the issues raised in the public hearings and going through all relevant documents available on record, and in exercise of the powers vested in it under sections 62, 64 and 86 of the Electricity Act, 2003 (referred in brief as "the Act"), read with the Himachal Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2011 and the Himachal Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Hydro Generation Tariff) Regulations, 2011, passed a consolidated order on Annual Performance Review (APR) for FY13 and True up of FY11 and 1st MYT Control Period dated 24 April 2012.
- 1.3 Being aggrieved by the aforesaid order dated 24th April, 2012, the Baddi Barotiwala Nalagarh Industries Association (BBNIA); the Parwanoo Industries Association (PIA), the Kala Amb Chamber of Commerce and Industries (KACCI) and the Federation of Himachal Industries Baddi (FHI) have jointly filed this Review Petition under section 94(1)(f) of the Act, read with Regulation 63 of the Himachal Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2005, seeking review of the said order dated 24th April, 2012 passed by the Commission.

Power to Review

- 1.4 The powers of the Commission to review its own orders flow from section 94(1)(f) of the Electricity Act, 2003 and are the same as are conferred on a civil court by the Code of Civil Procedure (CPC). These have been spelt out in section 114, read with Order 47, of the CPC. Thus the review application has to necessarily meet the requirements

of section 114 and Order 47 of the CPC.

- 1.5 As per the said provisions, the specific grounds on which an order already passed can be reviewed are:-
- (a) if there are mistakes or errors apparent on the face of the record, or
 - (b) on discovery of new and important matter or evidence which, after due diligence, was not within the knowledge or could not be produced at the time of making the order, or
 - (c) if there exist other sufficient reasons.
- 1.6 The power of review, legally speaking, is permissible where some mistake or error apparent on the face of record is found and the error apparent on record must be such an error which may strike one on a mere looking at the record and would not require any long drawn process of reasoning. A review cannot be equated with the original hearing of a case. A review petition has a limited purpose and cannot be allowed to be an appeal in disguise and it cannot be exercised on the ground that decision was erroneous on merits. But simultaneously the materials on record, which on proper consideration may justify the claim, cannot be ignored.
- 1.7 Hon'ble Supreme Court and various High Courts have held that review jurisdiction is not a substitute for an appeal and cannot be exercised for reconsideration of issues already decided by a court in its original order. The error and mistake for correction in review proceeding should be apparent on the face of the record and the same should be self evident.
- 1.8 The third ground of review under Order 47 of the CPC namely "for any other sufficient reason", there needs to be new grounds other than those considered in the original order of the Commission dated the 24th April, 2012. It is a well settled principle that the expression "any other sufficient reason" will have a meaning analogous to grounds specified immediately before. This provisions of Order 47 of CPC cannot be used to nullify the specific requirements stipulated in the earlier portions of the same provision.
- 1.9 The clerical or arithmetical mistakes in judgments or orders or errors arising therein from any accidental slip or omission may at any stage be corrected by the Commission under section 152 of the CPC, either on its own motion or on an application of any of the parties. The use of word "may" shows that no party has a right to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the court. Such discretion is required to be exercised judiciously to make corrections necessary to meet the ends of justice. The word "accidental" qualifies the slip/ omission. Therefore, this provision

cannot be invoked to correct an omission which is intentional, however erroneous. Because section 152 does not countenance a re-argument/rehearing on merits of fact or law, the Commission has the limited powers to correct any clerical or arithmetical mistakes in its judgments or orders, or errors arising therein from any accidental slip or omission.

A2: COMMISSION'S OBSERVATIONS ON VARIOUS ISSUES RAISED IN THE REVIEW PETITION

Roll Back of Demand Charges

- 2.1 In the review petition, the petitioners have prayed to the Commission for review of the Commission's Annual Performance Review (APR) Order for FY13 dated the 24th April, 2012 for the purpose of .-
 - (a) considering the lowering of the percentage of demand charges component to total tariff and to also roll back the demand charges to the earlier level of Rs 240/KVA/month
 - (b) designing the demand charges on basis of load factor, so that differential tariff arising on account of different load factors may result in similar overall tariff or in other words demand factor for industries with lower load factors be reduced

Response of the Board

- 2.2. The HPSEBL, in its response, states that under the two part tariff, demand charges are meant to cover the costs, which are primarily fixed in nature, which includes employees expense; A and G Expenses and depreciation etc. and as such demand charges cannot be reduced. Further the reduction in demand charges would require alternate mode of recovery to ensure full recovery of the approved revenue requirement. Thus in the present circumstances, it may not be feasible to make any adjustment.

Commission's View

- 2.3 A review cannot be equated with the original hearing. Load and demand factors of Industries are characterised by their respective nature, loading conditions and consumption patterns. These vary from industry to industry and even within the same nature of industries with different loads and demands. The demand and load factors that the Commission is constrained to adopt for the purpose of tariff determination are of average nature, in which case, some consumers are likely to benefit while others may not. In other words tariffs are determined so that Industries having large load factor are charged less per unit while the small load factor industries pay a smaller overall bill. Similarly large demand Industries are charged more per KVA while small demand Industries are charged less per KVA. Apart from this

the reduction of demand charges at this stage would require comprehensive process to ensure recovery of the approved ARR.

A review petition has a limited purpose and cannot be allowed to be an appeal in disguise and it cannot be exercised on the ground that the decision was erroneous on merits.

Night Time Concession

- 2.4 In the review petition, the petitioner, has prayed to the Commission for the review of the Commission's Annual Performance Review (APR) Order for FY13 dated the 24th April, 2012 for increasing the night time concession to Rs 1.00 per unit based on load factor and also have a percentage of energy charges based rate of night time concession rather than absolute value. The petitioner has also prayed for introduction of a lower night time tariff.

HPSEBL response

- 2.5 Any change in night time duration at the stage of review will only lead to under recovery of the approved ARR. The review of the night time concession duration requires to be detailed based on overall practical considerations and commercial viability. In the absence of specific inputs from Industrial Associations regarding willingness of Industries to shift the load during night times and envisaged quantum of load that would be shifted, it would be difficult to prepare a proper proposal inviting detailed analysis of impact of shifting of load on revenue projections of the HPSEBL.

Consumer representative's view

- 2.6 Sh. P.N. Bhardwaj, the Consumer Representative, also supports that the night time concession duration, can be worked out only after consideration of the seasonal load curves and it would impact the ARR of Board and also the consumers. Hence, he is of the view that such proposal should be considered for future tariff determination.

Rejoinder

- 2.7 Sh. Rakesh Bansal, representing the petitioners the PIA, BBNIA, FHI, CII, urges that in the event if the review of the impugned tariff is not possible, the Commission may consider lowering of the percentage of demand charges and night time charges and also change night time duration in future tariff determination. He also suggests that category of consumers requiring power between 100 KVA to 2000 KVA are severely affected by levying demand charges at par with higher LS consumers and hence a separate category with lower charges for such consumers can be an alternate solution for future.

Commissions view

- 2.8 In para 3.38 of the Commission's Orders dated 24th April, 2012, the Commission had observed as follows:-

"...in Appeal No. 113 of 2005 filed by HPSEBL, the Hon'ble APTEL in its judgement dated July 6, 2006 has held that revision of Night Time Concession duration to be done by the HPSEBL was required to be detailed, based on overall practical considerations and commercial viability, incorporating the adverse affect on revenues, factoring the likely impact on ARR calculation, and load curves showing availability and demand both for summers and winters along with frequency patterns during these seasons....."

- 2.9 The Hon'ble APTEL judgement has clearly stipulated the reasons for effecting Night time concession.

- 2.10 In view of afore said-

For the reason that the determination of tariff is a long drawn process and for the reason that the principles for determination of tariff, as adopted by the Commission for the Multi Year Control Period shall remain consistent for the control period so as to give regulatory certainty, therefore review of Tariff Order cannot be undertaken.

- 2.11 The Review prayer being based on merit does not sustain. There is no accidental slip or omission by the Commission in its APR Orders dated the 24th April, 2012.

- 2.12 There is no mistake or error made by the Commission which is apparent on face of record, nor there is discovery of new and important matter or evidence which after due diligence was not within the knowledge of the petitioner nor which could be produced by the petitioner at the time of making the Order, nor there exists other sufficient reason for the Commission to Review its own Orders. The Commission decides the petition accordingly.

- 2.13 Keeping in view the submissions made by the petitioners the Commission, would expect the HPSEBL to take into account the submissions made by the petitioner in the next tariff petition to be filed by it and to prepare data in consultation with the SLDC regarding load curves showing availability and demand for different times of the day, both for summer and winter alongwith frequency patterns to design tariff for different block of the day and possibilities of shifting load to night.

-Sd-

Subhash C Negi
Chairman