

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

In the matter of:-

M/s Tangnu Romai Power Generation (P) Ltd.  
House No. 835, Excel Society, Sector-48  
Chandigarh-160047 through Sh. Rohit Sharma, (Authorized signatory)  
Block-12, Flat No. 3, Phase-III, New Shimla.

.....Petitioner

Versus

1. The State of H.P. through its  
Principal Secretary (MPP & Power)  
HP Govt. Shimla-171002.
2. The HP State Electricity Board Ltd; through its  
Secretary (ED Pers.)  
Vidyut Bhawan, Shimla-171004 (H.P).

.....Respondents

**(Petition No. 107/2014  
Decided on 06 .09.2014)**

**CORAM**

**SUBHASH C.NEGLI,  
CHAIRMAN**

Counsels:-

for the petitioner

Ms. Jyotsana Rewal Dua ,Advocate

for the Respondent No.1

Sh. Shanti Swaroop Bhatti, Legal Consultant

for the Respondent No.2

Sh. Ramesh Chauhan, Authorised Representative.

**ORDER**

(Last heard on 26.7.2014 and orders reserved)

The petition No.107/2014, has been filed by M/s Tangnu Romai Power Generation (P) Limited, a Company incorporated under the Companies Act, 1956, having its registered office at House No. 835, Excel Society Sector 48, Chandigarh, through Sh. Rohit Sharma S/o Sh. Madan Lal R/o Hari Vishram, Lower Panthaghati, Shogi Road, Kasumpti, Shimla-12, its authorized signatory (hereinafter referred as the “petitioner Company”) seeking permission to move out from the Power Purchase Agreement under REC Mechanism (PPA-REC) executed on 15.3.2013 by the Himachal Pradesh State Electricity Board Ltd. (hereinafter referred as “the Respondent Board”) and the petitioner Company.

2. The petitioner Company executed Implementation Agreement (IA) with the State Govt. i.e. Respondent No. 1 on 9.7.2007 for execution of 6 MW Tangnu Romai -II Hydro Power Project (in brevity the Project), on Sundru Khad a tributary of river Pabbar, near village Janglikh, Tehsil Chirgaon, Distt. Shimla. According to the petitioner Company, the Project was due for commissioning in July 2014. Clause 5.3 of the IA reads as under:-

*“5.3. Mode of sale of power: - The Second Party shall be free to dispose of power from the Project (s), after allowing royalty in the shape of free power to the First Party in any manner they like in accordance with the provisions contained in the Electricity Act, 2003 and the rules, regulations made thereunder”.*

3. The petitioner Company executed the Power Purchase Agreement under REC Mechanism (PPA-REC) with the Respondent Board on 15.3.2013, whereunder the petitioner Company agreed to sell and the respondent Board agreed to purchase entire electric energy (excluding the Govt. Supply) received from the Project at the interconnection point for a period of two years at the rate not exceeding the Average Pooled Purchase Power Cost (APPC) i.e. Rs. 2.20 per Kwh for F.Y. 2012-2013 and for subsequent years not exceeding the Average Pooled Power Purchase Cost as approved by the Commission from time to time. These rates are stipulated to be firm and final.

4. The clauses 6.2 and 10.1 of the PPA read as under:-

**Clause 6.2:-**

*“..... The HPSEBL shall pay for the Net Saleable Energy delivered by the Company to the HPSEBL at the interconnection Point @ not exceeding Pooled Cost of Purchase of Power i.e. Rs. 2.20 (Rupees two and twenty paise) per Kilowatt hour for FY 2012-13 and for subsequent years not exceeding the Pooled cost of power purchase, as approved by the Commission from time to time. These rates shall be firm and final.*

**Clauses 10.1 and 10.2:-**

*“10.1 The Agreement shall become effective upon execution and delivery by the Parties hereto and unless earlier terminated pursuant to provisions of the Agreement, shall have a term from the date hereof, until two years after the Synchronization Date of the first Unit of the Project.*

*In case the parties mutually agree to enter into Power Purchase Agreement under preferential tariff after expiry of the term of this PPA ( including extended term) of the balance useful life of the project, parties will enter into Power Purchase Agreement and the tariff for which shall be approved by the Commission.*

*10.2 However, this Agreement may be extended on mutually agreed basis”.*

5. The petitioner Company submits that in terms of the PPA, the petitioner Company was to get the tariff rates which are Rs. 2.20 per kwh for FY 2012-13 and for subsequent years at the APPC rates determined for the respective years under this mode by the Commission, and at the time of execution of the Agreement the generic tariff was Rs. 2.95 per kwh. The petitioner Company had also legitimate expectation that by the sale of REC it will get minimum Re. 1 per kwh as REC benefits from market. Thus, in all petitioner Company had expectation with reasons for such expectation that it will get Rs. 2.20 + Rs. 1 = Rs. 3.20 per kwh.

6. The petitioner Company has moved the present petition, under Section 10 (2) and Clauses (b) and (e) of sub-section (1) of Section 86 of the Electricity Act, 2003; and also invoking the inherent power of the Commission, conferred under Regulation 68 of the HPERC (Conduct of Business Regulations) 2005, for seeking permission to move out of the Power Purchase Agreement under R.E.C. Mechanism (PPA-REC), based on APPC, on the grounds:-

- (a) that the recent orders passed by the Commission ( i.e. for F.Y. 2010-11, 2011-12 and 2012-13) are indicative of the fact that the APPC rates are going down. The applicable APPC rates for FY 2011-12 was Rs. 2.23 Kwh, for FY 2012-13 was Rs. 2.20 Kwh and for the FY 2013-14 was Rs. 2.17 Kwh. It is apparent that the APPC rates are going down and are expected to continue going further down;
- (b) that the obligated entities are not purchasing the Renewable Energy Certificates (REC), so much so that there is huge backlog pending for sale of these certificates in the market from 2011 onwards;
- (c) that the petitioner will have to sell its electricity merely at APPC, rates, which will not be sufficient to sustain the Project. The Regulations 2010 do not lay down that Power Purchase Agreements executed under REC mechanism, once entered cannot be rescinded. Hence to meet ends of justice, petitioner's REC based PPA needs to be rescinded. The rescission of the REC based PPA will be for the purpose of saving the project from becoming a non-performing asset and will be an action for encouraging and promoting renewable sources of energy projects as mandated under Sections 61 and 86 of the Electricity Act 2003, read with paras 5.2.20 and 5.8.4. of the National Electricity Policy, and paras 4, 5.3, and 6.4 of the Tariff Policy.
- (d) that the project has not been commissioned as yet. The energy as yet has not been generated from the project so far. Therefore, in stricto -senso the PPA in question has not come into force and has not been acted upon. No loss or injury shall be caused to anyone not even to the respondent, in case the petitioner is permitted to rescind the REC based PPA and is permitted to supply power to any other licensee or consumer at a sustainable tariff. The petitioner Company has merely signed

the PPA in question and has not derived any benefit etc. under the same. On the other hand the petitioner Company invested huge amount for development of the project, and will incur huge financial losses if the PPA is not rescinded;

- (e) that the Commission has inherent power to rescind the REC Agreement in exercise of its powers vested in it under regulation 68 of the HPERC (Conduct of Business) Regulations, 2005, to meet the ends of justice and prevent the abuse of the process of law. In its support the petitioner Company has cited decision of the Hon'ble APTEL dated 2.1.2013 rendered in Appeal Nos. 96 and 130 of 2012.

7. In response to the petition, the Respondent Board submits:-

- (a) that as per the construction schedule annexed to the PPA, the petitioner Company was to commission its project by December, 2013 and the project has not been completed till date;
- (b) that as per Article 3.3 of the PPA, executed on 15.3.2013, the petitioner Company has entered into an agreement with the Board on dated 20.9.2013 for interim arrangement for execution, operation and maintenance of Interconnection Facilities and further as per the estimates approved by the Board, the petitioner Company was asked to deposit a sum of Rs. 455 lacs at first instance and the petitioner Company deposited the amount of Rs. 455 lacs with the Sr. Accounts Officer (Banking) HPSEBL, Shimla. A sum of Rs. 197.92 lacs is to be reimbursed to the petitioner Company as per the Himachal Pradesh Electricity Regulatory Commission (Promotion of Generation from the Renewable Energy Sources and Conditions for Tariff Determination) Regulations, 2012 and balance amount of Rs. 257.08 lacs has to be borne by the petitioner Company. The petitioner Company has not so far given any intimation to the respondent Board regarding its readiness to inject power and also regarding the arrangements finalized by him for disposal of power beyond the interconnection Point;
- (c) that the regulations do not permit the petitioner Company to exit from the PPA already executed. The PPA being executed on 15.3.2013 and the Himachal Pradesh Electricity Regulatory Commission (Promotion of Generation from the Renewable Energy Sources and Conditions for Tariff Determination) Regulations, 2012 issued on 17.12.2012 are applicable and thereunder it is specified that the tariff option adopted in Power Purchase Agreement shall be irrevocable and binding and Regulation 12 (5) reads as under:-

*“ The parties shall, while arriving at a mutual understanding about sale/purchase of power, also mutually decide the tariff option to be adopted, and shall, before submitting the joint petition for approval of the proposed Power Purchase*

*Agreement under regulation 8, also reflect the same in the proposed Power Purchase Agreement:-*

*Provided that the tariff option adopted in the Power Purchase Agreement shall be irrevocable and binding”.*

- (d) that the HPSEBL has decided that it will not allow the Power Producers to withdraw from existing PPAs or to cancel the existing PPA because if this trend is set, then the respondent Board would not be able to meet its RPO obligation. There are approximately 30-40 projects which are to be commissioned in near future and the PPAs of maximum have already been executed and they may also approach the Commission for seeking the exit. As such, the respondent Board will end in default in meeting the R.P.O. for the future years and shall have to pay penalty for incurring such default.
- (e) that the respondent Board has already tied up this power in its Power Purchase Requirement and if the IPP is allowed to exit from the PPA, then the respondent Board shall have to procure costly power from the market and thus the financial burden on the respondent Board will increase and in the process, the consumers of the State would be ultimate sufferers.

8. During the hearing M/s Jyotsana Rewal Dua Advocate, representing the petitioner Company, has reiterated the contents of the petition and also stressed that the impact of the proposed rescission in relation to the RPO of the Board shall be very negligible, as the project will generate merely 6MW electricity, and on the other hand if the petitioners Company is not allowed to withdraw from the PPA, the petitioners project is likely to become unsustainable and non-performing asset.

9. The power Purchase Agreement falls in the realm of contract. The parties are bound to be governed by agreements signed by them. The parties can hardly deny the facts as existed at the relevant time, just because it may not be convenient now to adhere to those terms. Conditions of contract cannot be altered/avoided on presumptions or assumptions or the parties on having a second thought that a term of a contract may not be beneficial to them at a subsequent stage. They would have to abide by the existing facts, correctness of which, they can hardly deny. But to decide whether the parties are bound by the rights and obligations stated in the contract, it is material to peruse documents executed by the parties and their conduct of acting upon such agreements over a long period.

10. The Apex Court in **Rajasthan State Industrial Dev. And Investment Corporation V/s Diamond and Gem Dev. Corporation Ltd APR 2013 SC (Civil) 917** has observed that:-

*“A party cannot be permitted to “blow hot-blow cold”, “fast and loose” or” approbate or re approbate” where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is stopped from denying the validity of, or the binding effect of such*

*Contract, or conveyance, or order upon himself, this rule is applied to ensure equity, however, it must not be applied in such a manner, so as to violate the principles of, what is right and, of good conscience”.*

11. The **Hon’ble Apex Court in case of Travancore Devaswom Board V/s. Thanth International (2004) SCC 44** , after putting reliance on its previous decisions rendered in **Continental Construction Co. Ltd V/s State of Madhaya Pradesh AIR 1988 SC 1166; Rajasthan State Mines & Minerals Ltd V/s. Eastern Engineering. Enterprises (AIR 1999 SC 3627)** ,has held that a contract is not discharged merely because it turns out to be difficult to perform or its performance has become onerous. It was further held that there is no general liberty reserved to the Court to absolve a party from liability to perform his part of the contract merely on account of an un contemplated turn of events, which rendered the performance of contract onerous, like an abnormal rise or fall in prices, a sudden depreciation of currency or unexpected obstacle to the execution of the contract.

12. The upshot of the above decision is that the Court can relieve a contracting party from the obligations of a contract under section 56 of the Contract Act,1872 only by reason of a supervening event or untoward happenings beyond the control of the parties which renders the contract impossible of performance after the same was made. The performance of a contract becomes impossible if it is rendered impracticable from the point of view of the object and purpose which the parties had in view at the time of entering into the contract or if an unfortunate event or change of circumstance upsets or destroys the very foundation upon which the parties rested their bargain. It is not sufficient for a contracting party invoking the doctrine of frustration to show that the supervening event has made the contract onerous or difficult to perform.

The mere fact that a contract has been rendered more onerous does not itself give rise to frustration. There is no frustration where performance of the contract remains physically and legally possible though commercially unprofitable. The Law is settled that the doctrine of impossibility of performance or frustration cannot be applied to cases of commercial transactions. Impossibility of performance cannot be called commercial impossibility. Thus commercial impossibility will not excuse a party from performing the contract. Mere increased cost of performance or losing in a transaction does not make the contract impossible. In other words a man is not prevented from performing the contract by mere economic unprofitableness.

13. Admittedly in the instant case, the PPA was executed consciously by the parties on 15.3.2013, with the clear stipulation that the petitioner Company shall sell and the respondent Board shall purchase the power (excluding the Govt. Supply) received from the Project at the Interconnection Point @ not exceeding the APPC i.e. Rs. 2.20 per Kwh for the year 2012-13 and for subsequent years not exceeding APPC as approved by the Commission from time to time. Electricity generation is not a licensed business

under the Electricity Act, 2003 and therefore the generator can sell power to any one and anywhere and pursuant to such provision the para 5.3 of the IA provides full liberty to the generator to dispose power in any manner it likes. Therefore, the petitioner Company had the option to sell power to any licensee, including HPSEBL, on regulated tariff on long term basis or sell to the third party within and outside the State or to the exchange or under the REC framework introduced by the Central Electricity Regulatory Commission, for promotion of renewable, in 2010, the relevant portion of the Regulation 5 reads as under:-

**“5. Eligibility and Registration for Certificates:-**

*(1) A generating company engaged in generation of electricity from renewable energy sources shall be eligible to apply for registration for issuance of and dealing in Certificates if it fulfills the following conditions:-*

*(a) xx            xx                            xx*

*(b) xx            xx                            xx*

*(c) it sell the electricity generated either (i) to the distribution licensee of the area in which the eligible entity is located, at a price not exceeding the pooled cost of power purchase of such distribution licensee, or (ii) to any other licensee or to an open access consumer at a mutually agreed price, or through power exchange at market determined price.*

*Explanation:- for the purpose of these regulations, ‘Pooled Cost of Purchase’ means the weighted average pooled price at which the distribution licensee has purchased the electricity including cost of self generation, if any, in the previous year from all the energy suppliers long-term and short-term, but excluding those based on renewable energy sources, as the case may be”*

The above provisions indicate that even within the REC framework the petitioner Company had the option to sell it to any other licensee or to an open access consumer at mutually agreed price or to sell through power exchange and yet it chose to sell it to local distribution licensee HPSEBL on APPC.

14. Regulation 12(5) of the HPERC (Promotion of Generation from the Renewable Energy Sources and Conditions for Tariff Determination) Regulations, 2012, lays down that the tariff option adopted in the PPA is irrecoverable and binding. Per Clause 10.1 of the PPA the agreement becomes effective upon execution and delivery by the parties and is to have a term from the date hereof, until two years after the Synchronization Date of the first unit of the Project. Per Construction Schedule annexed to the PPA, the Petitioner Company was to commission its project by December, 2013 and the project has not been completed till date. Profit and loss is a consequence of the commercial activities. Merely commercial impossibility or loosing in a transaction cannot excuse the petitioner Company from performing the contract.

15. The Tariff Policy providing for REC framework and the CERC and HPERC Regulations on REC are in vogue and therefore is continuing. The Govt. of India, CERC, State ERCs and Forum of Regulators are making all out efforts to make the scheme of REC more effective as a promotional measure. Petitioner Company is yet to start generation and, therefore, its apprehensions are unfounded. Validity of REC is proposed to be increased from present one year to two years. Floor price for trading of REC remains unchanged. There is no change in the Policy and the Regulations as was obtaining since 2010.

16. It is appropriate to point out that it is wrong to say that the APPC rates are going down. In its recent order the Commission has fixed Rs. 2.24 per Kwh APPC for FY 2014-15. Moreover the term of the PPA is merely for 2 years from the Synchronization Date of the project and thereafter on the expiry of the said term of the PPA under REC, the petitioner Company would be at liberty to rescind the PPA under the REC Mechanism and to enter into Power Purchase Agreement under preferential tariff for the balance useful life of the project.

In view of the findings referred to in the preceding paras of this Order, the Commission concludes that there is no merit in the petition and hence the petition is dismissed.

**(Subhash C. Negi),  
Chairman**