

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

In the matter of :-

M/S Astha Projects (I) Pvt. Ltd;
Gyamba House, south End, Lane-IV,
Sector-1, New Shimla 171 009 (H.P).

...Petitioner

Versus

- (1) The Himachal Pradesh State Electricity Board,
Vidyut Bhawan, Shimla-171004
- (2) The Government of Himachal Pradesh
through Principal Secretary (MPP & Power) H.P.
Shimla-171002.
- (3) The Himachal Pradesh Energy Development Agency
(HIMURJA)
SDA Complex, Kasumpati, Shimla (H.P.) 171009
(through its Director)

... Respondents

Review Petition No. 108 of 2010

(Decided on 17th January, 2015)

**CORAM
SUBHASH C NEGI
CHAIRMAN**

Counsels: -

for petitioners:

Sh.Ajay Vaidya, Advocate,

for respondents:

Sh.Ramesh Chauhan,
Authorized Representative of HPSEBL
Respondent No. 1

Sh.Shanti Sawarup,
(Legal Consultant) for Respondent.No.2

Sh.Pardeep Bhonat
Sr. Project Officer for Respondent No.3

ORDER

(Last heard on 7th January, 2015 and orders reserved)

M/s Astha Projects (I) Pvt. Ltd; Gyamba House, South End, Lane-IV, Sector-1, New Shimla 171 009 (H.P). through Sh. S.N.Kapoor its Director (hereinafter referred as “the petitioner”), has moved the Petition No. 108 of 2010 under clause (f) of sub-

section (1) of section 94 of the Electricity Act, 2003, read with Order 47 Rules 1 and 3 of the Code of Civil Procedure, 1908 and regulation 63 of the HPERC (Conduct of Business) Regulations, 2005, seeking review of the Order dated 22.05.2010, passed in Petition No. 62 of 2008 and 207 of 2009, whereby the tariff of Rs. 2.50 p.kwh, fixed in relation to the Dehar Hydro Electric Project of 5 MW capacity, located on Dehar khad in Distt. Chamba (H.P) was increased by 3 paise per unit, on account of impact of additional 1% of royalty payable for Local Area Development i.e. to say fixing the tariff at Rs. 2.53 p.kwh and other claims for impact of 15% mandatory water release down stream of diversion structure, forest, fisheries charges and service tax were not acceded to.

2. During the pendency of this review petition, the Board moved, before the Hon'ble H.P. High Court 8 writ petitions registered as petition Nos. 7649 of 2010; 8285 of 2010; 8426 of 2010; 8427 of 2010; 8472 of 2010; 8492 of 2010; 8531 of 2010 and 8532 of 2010; assailing the Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewal Sources and Co-Generation by Distribution Licensee) (First Amendment) Regulations, 2007 and order dated 18.12.2007 made thereunder and also other orders reviewing the orders passed, by this Commission, on different dates in favour of certain Independent Power Producers in each petition fixing enhanced tariff for the tariff already mutually agreed in the respective PPAs. The Hon'ble High Court stayed the operation of the aforesaid Regulations and orders and further stayed the proceedings in relation to the aforesaid petitions specifically and also in general proceedings in relation to similar cases pending before this Commission. Ultimately the said writ petitions were disposed of by a common judgement dated 6th August 2013 delivered by the Hon'ble Division Bench of the H.P.High Court in **CWP No. 8426 of 2010 i.e. the Himachal Pradesh State Electricity Board Ltd. Vrs. the Himachal Pradesh Electricity Regulatory Commission and another**, upholding the validity of the Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewal Sources and Co-Generation by Distribution Licensee) (First Amendment) Regulations, 2007 and also of the reviewing orders passed, on different dates, by this Commission enhancing tariff in favour of the petitioners. The proceedings on this review petition, therefore, remained stayed during the period in which related issues were under adjudication before the Hon'ble High Court.

3. The petitioner asserts that there are certain legal and factual inaccuracies in the impugned order, which require Commission's consideration and further assails the said impugned order, alleging that the Commission has failed to consider the grounds and the petitioner was not granted time to submit the rejoinder to the reply filed by the Himachal Pradesh State Electricity Board (hereinafter referred as "the Board" or "Respondent No.1"), which would have enabled the petitioner to point out the error in the Board's calculations, due to which the petitioner has to suffer huge financial loss. Now the petitioner is also seeking permission to place more documents in support of its claim for differential amount on account of forest and fisheries charges.

4. In response to this review petition, the respondent Board submits that the review petition is not maintainable and deserves to be dismissed for the reasons that:-

- (a) the petitioner is praying for a substitution of the order sought to be reviewed by a fresh order;
- (b) the grounds for the review are the same which had already been considered while making the original order, now sought to be reviewed;
- (c) the petitioner cannot expect the Commission to sit in appeal over its own judgment while exercising the power under review;
- (d) as in review proceedings the scope of interference is very limited, the review can be granted only in case of glaring omission, patent mistake or the like grave error and not for rehearing the case;
- (e) no such relief can be granted on the grounds of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be addressed by him when the order was passed or made, without strict proof of such allegation. Thus, the petitioner cannot be permitted to adduce fresh evidence by way of documents sought to be placed on record. The Annexure-P-5, was in the custody of the petitioner at the time when the proceedings of the main petition were pending adjudication before the Commission, but the petitioner did not opt to file the same before the Commission. The petitioner is now barred to raise such plea under the review proceedings in view of the provisions as contained under Order 47 rule 4(2)(b) of the CPC;
- (f) so far as the affording of opportunity to file rejoinder is concerned, it was the duty of the petitioner to move the Commission for grant of time for the same, which opportunity, the petitioner failed to avail, therefore, the petitioner cannot

cure the said lapse on its part by way of the review proceedings.

5. In the meanwhile, the GoHP, issued clarification in relation to the State Policy regarding the 15% minimum water discharge vide its decision dated 21.4.2012. This Commission, after taking note of the fact that the GoHP issued revised policy decision dated 21.4.2012, stating that policy of minimum 15% water release will not apply retrospectively on projects which are commissioned prior to 9.9.2005 and also on those which are not commissioned, but Implementation Agreement (IA)/Power Purchase Agreement (PPA), are signed prior to 9.9.2005, clubbed the petitions, including the present petition, due to common issue of release of water, and decided on 10th September, 2014, holding that:-

“46 Therefore, PPAs already concluded can be reopened under regulation 6(1) of the Regulations 2007 prospectively i.e. tariff will be applied prospectively. Prudent cost allowed under forest and fisheries and LADA expenses will be recovered in tariff prospectively. Whatever tariff required to be enhanced to give effect to minimum 15% release is to be determined by the Commission and hence will be applied prospectively, after so determined and from actual implementation of directions thereafter, whichever is later. Obligation to release water as per directions of the State Govt./State Pollution Control Board is already cast upon the developer as per IA, even at the fixed tariff of Rs. 2.50 per unit applicable on projects where IA/PPA are signed till June 2006.

47 Therefore, revised enhanced tariff will be applicable w.e.f. the date of determination of such revised tariff by the Commission and actual implementation of 15% release directions thereafter. On the same lines, revised tariff based on the decision in relation to the policy change, with respect to PPAs/projects from where power is purchased by the HPSEBL, taken by the State Govt. dated 18.4.2012 and conveyed to the CMD, HPSEBL by letter dated 21.4.2012 will also apply prospectively from the date of passing the order by the Commission, including interim Order, if any, unless the parties have implemented the decision dated 18.4.2012/21.4.2012 before such Order of the Commission, in which event revised tariff will apply from such date of actual implementation of the

revised policy reflected in the GoHP letter dated 21.4.2012 on IA/PPAs signed before 9.9.2005.

48. *Both the policy decisions i.e. dated 9.9.2005 and 18/21.4.2012 are in public interest, the earlier one on environmental considerations and the later one (limited to projects having PPAs with HPSEBL) on the tariff consideration. Therefore, tariff allowed pursuant to 9.9.2005 policy on projects which are commissioned after 9.9.2005 but IA/PPA signed before 9.9.2005, are withdrawn in view of decision dated 18.4.2012/21.4.2012 so that benefit of reduction in tariff, due to reduction in water release, where ever provision as per TEC/MoU/IA/PPA is less than 15%, is passed on to the consumers. Higher tariff was allowed to projects to compensate the reduction in generation due to release of additional water to comply the 15% minimum release of water down stream and since now release will continue to be as per TEC/MoU/IA/PPA as per revised policy, additional tariff shall be withdrawn. For the generator, the policy is revenue neutral and hence there is no loss or gain due to any change in condition of water release.”*

6. The Hon’ble Appellate Tribunal in its two judgments delivered in **Appeal Nos. 18 and 30 of 2009 –Ispat .Industries Ltd; Mumbai V/s Maharashtra Electricity Regulatory Commission Mumbai (2009 ELR (APTEL) 0618)** and review petition **No, 5 of 2008-Maharashtra State Electricity Distribution Co. Ltd; Mumbai V/s Erotex Industries and Exports (Ltd) and one another (2009 ELR (APTEL) 0700)**, has concluded that section 94(1)(f) of the Electricity Act, 2003 empowers the Commission to review its decisions, directions and orders and provides that they are vested with the same power which is given to a Civil Court under Order 0.47 rule 1 of the Code of Civil Procedure, 1908. Thus the power of the Commission to review its own orders flows from Section 94(1)(f) of the Electricity Act, 2003, read with regulation 63 of the HPERC (Conduct of Business) Regulations, 2005, as the same is conferred on a Civil Court by the Code of Civil Procedure (CPC). These powers have been spelt out in Section 114, read with Order 47, of the CPC. The review application has, therefore, to necessarily meet the requirements of Section 114 and Order 47 of the CPC.

7. 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.

8. 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.

9. 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 of its own motion or on the 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 on merits of fact or law, the Commission has the limited powers to correct any clerical or arithmetical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission.

10. The Commission now keeping in view the legal position as set out in paras 6 to 9 of this order and the response of the Board proceeds to examine itemwise claims made by the review petitioner, as under:-

I. Mandatory release of Water discharge:-

Petitioner’s observations:-

- (a) The petitioner submits that the observation in para 13,14, and para 15 of impugned order does not seem to be in consonance with the written submissions

as advanced by the petitioner on the ground that the petitioner furnished the data calculated on the basis of release of 15% incoming discharge, not for the entire year, but for the lean period of three months i.e. December, January and February, which is evident from the annexure annexed with the written statement, submitted in the original petition. Further the petitioner was not granted time to submit its rejoinder to the reply, as filed by the Board and due to the erroneous calculation by the Board on the 15% mandatory water release the petitioner has to suffer huge financial loss.

- (b) The Board, while arriving at the conclusion on the basis of data for mandatory discharge of 15% of water, has taken the DPR projections wrongly. The petitioner had conceived the Dehar (5 MW) SHEP on the basis of the discharge available in the stream at that time and had prepared the DPR accordingly and submitted to the HIMURJA/HPSEB for approval. At the time of submission of DPR, there was no provision in HP Govt. Hydro Policy for any mandatory sacrificial discharge. However, the HPSEB, while processing the DPR, directed the petitioner vide their letter No. HPSEB/CE/C&A/ CC-Dehar/2002-3263-64, dated 15.01.2002 to account for mandatory water release of 0.20 cumecs of water for the existing Kuhl for irrigation, watermills and drinking water requirements of the local village downstream the intake weir for the purpose of power potential studies. The capacity of the Kuhl was 0.196 cumecs and accordingly the petitioner had to account for the release of sacrificial discharge of 0.20 cumecs from the desilting tank to the river for supply to the Kuhl as per the actual sketch. The DPR was accordingly approved after accounting for 0.20 cumecs of discharge for the Kuhl.
- (c) Subsequently as per the Hydro Policy of 2006, all the IPPs were directed to release minimum flow of 15% of the lean discharge throughout the year on account of “the fragile ecology and environment and also to address issues concerning riparian rights, drinking water, health, aquatic life, wild life, fisheries, silt and even to honour the sensitive religious issues like cremation and other rites etc. on the river bank”. With this renewed provision of Hydro Power Policy, the petitioner is to mandatorily release additional 15% of the leanest discharge of water throughout the year in addition to 0.20 cumecs being released specifically for the requirement of the Kuhl as stated in the preceding sub- para. In order to abide by the provisions of the Hydro Power Policy 2006,

the petitioner has to necessarily release additional 15% discharge for meeting the other requirements, as 0.20 cumecs is exclusively required for the drinking water/ irrigation requirements.

- (d) The Board considered a sacrificial discharge of 0.159 cumecs only out of the discharge in the original DPR submitted by the petitioner while working out the energy projections. The discharge of 0.159 cumecs does not even meet the requirements of drinking water, irrigation of the villages while the other requirements as per the hydro power policy remain uncovered. Further since the Kuhl for the irrigation and drinking water requirements of the local villages is taking off just below the intake the take off point for the Kuhl will go dry in case only 0.159 cumecs is released which will be contrary to the provisions of the Hydro Power Policy, 2006. The discharge, as per the approved DPR, has not even been considered by the Board.
 - (e) As per the original DPR submitted by the petitioner on the basis of discharge, as observed at the time this self identified SHEP was conceived, the annual energy projections were 34.652 MU while as per the approved DPR projections after releasing 0.20 cumecs for irrigation/drinking water requirements, the generation has been depicted as 31.804 MU. The generation gets reduced to 29.49 MU after the mandatory release of 15% discharge as per the hydro power policy, 2006. The sketch and data projections are placed on record.
 - (f) According to comparative statement of DPR projection and actual discharge and generation for the last six years, the data submitted by the Board is nowhere near to these figures and the Board has taken the basis to arrive at its conclusion taking the capacity of the petitioner's project is 5.00 M.W. which has ultimately resulted in incorrect and wrong submissions on behalf of the Board.
11. The petitioner has also filed the rejoinder asserting that-
- (a) the calculations as are submitted by the respondent Board are not based on actual data, as is submitted by the petitioner accounting to DPR and approved DPR is already on record. The data has been calculated on the basis of release of 15% incoming discharge, not for the entire year, but for the lean period of three months i.e. December, January & February, which is evident from annexures to the written statement in the original petition;
 - (b) the respondent Board while arriving at the conclusion on the basis of data for mandatory discharge of 15% of water, has taken the DPR projections wrongly.

The respondent Board has taken the basis to arrive its conclusion, taking the capacity of the petitioner's project at 4.50 MW, whereas the capacity of the petitioner's project is 5.00 MW, which has ultimately resulted in incorrect and wrong submission on behalf of the respondent Board.

Board's response:-

12. The respondent Board has made the submissions opposing the review petition stating that in view of the State Govt. notification dated 21.04.2012, the condition of 15% discharge of water is not applicable to the petitioner Further-

- (a) the element of discharge of water for drinking purpose and irrigation to the extent of 0.2 cumecs has already been taken into account while preparing the DPR of the project and thus the availability of the water for generation purpose has been worked out after deduction of the discharge required for drinking/irrigation purpose as is advent from the relevant page of DPR. Therefore, the arithmetical calculations as highlighted by the petitioner are nothing but an attempt to mislead the Commission with a view to derive undue benefit to which the petitioner is not entitled under law;
- (b) per directions of the Commission, respondent Board has submitted hard copy of the calculations for the perusal of the Commission. As per stipulation in the I.A., the petitioner was under obligation to maintain continuous flow of the water discharge for drinking and irrigation purpose in the river bed, as may be directed by the Pollution Control Board in exercise of its statutory powers. The said discharge has now been quantified at 15% of the minimum discharge in lean period, hence the petitioner has not been burdened with any additional condition and 15% discharge would not affect the generation in any way.

The objective required to be met with by the notification of the Govt. of H.P. dated 16.07.2005, reads as follows:-

“Whereas the diversion of huge quantities/ volumes of water from the rivers by the Hydel Projects has minimized water flow or even dried up the main river beds or water courses channels which consequently is not only damaging the water courses but also causing irrigation problems and health hazards water borne diseases due to decreased volume of water and is cause of pollution of water stream rivers sources”.

To meet with the above requirement, the Govt. of H.P. mandated minimum 10% of flow of water in lean season into the main body which was subsequently raised to 15% vide notification dated 9.9.2005. Since 0.2 cumecs of discharge has already been provided in the DPR to meet with the above requirement mandated by the Govt. of H.P. vide notification dated 16.07.2005 and 9.9.2005, therefore, the 15% discharge which comes out to 0.159 cumecs is on lesser side, hence the contention of the petitioner for adding 15% discharge to the already provided discharge of 0.2 cumecs for the same purpose cannot be accepted in any manner whatsoever.

Directorate of Energy (H.P.)'s response:-

13. The Directorate of Energy (HP), has adopted the reply and written submission made by the respondent No. 1 i.e. the respondent Board, and also furnished the hydrological data and calculations pertaining to the impact of 15% mandatory water discharge on generation of power from the project of the petitioner, highlighting that as per approved DPR the gross annual generation was 31.803 MU with 72.60% PLF. After considering 15% release of water down stream of diversion structure, the gross annual generation works out as 30.279 MU with 69.13% PLF. The perusal of hydrological data and calculations pertaining to the project of petitioner shows that the impact of 15% mandatory release of water down stream of diversion structure, generation loss works out to 1.524 MU, which is not causing any impact. As the PLF after considering the 15% sacrificial discharge is still 69.13%, there is no loss to be accrued to the petitioner as alleged in the petition. Hence, averments made by the petitioner are not tenable and are liable to be rejected.

14. In this case M/s Astha Project(I) Pvt. Ltd. entered into an Implementation Agreement (IA) with the GoHP on 30.3.2000 to establish, operate and maintain at their cost Dehar Hydro Electric Power Project, located on Dehar Khad, in Distt. Chamba (H.P.). The Power Procurement Agreement (PPA) was executed with the HPSEBL, on 21st April, 2004, stipulating that the Board shall pay for the Net Saleable energy delivered to the Board at the interconnection Point at a fixed rate of Rs. 2.50, per Kwh. The project was commissioned in FY 2007-08. This Commission vide its order dated 22.5.2010, passed in Petition Nos. 62 of 2008 and 207 of 2009, increased the tariff of Rs. 2.50 per Kwh, in relation to the said project, by 3 paise per unit, due to the impact

of the additional 1% of the royalty payable for Local Area Development Fund and other claims for impact of the 15% mandatory release of water down the stream of diversion structure, forest, fisheries charges and service tax were not exceeded.

15. From the above, it is clear that in relation to the Dehar Hydro Electric Project, the IA was signed on 30.3.2000 and the PPA was signed on 21st April 2004, before the 9.9.2005 and the project was commissioned in FY 2007-08, after the 9.9.2005. Per the Cabinet decision dated 18.4.2012, conveyed to the CMD, HPSEB Ltd. on 21.4.2012, the projects where IAs/PPAs are signed before 9.9.2005, but are commissioned after 9.9.2005, minimum discharge is required to be determined in these cases based on long term study and till such time minimum discharge, as provided in the TEC/MOU/PPA, in each case, is to apply and not 15%. Further as stated in para 47 of the Common Order dated 10th September, 2014 (supra) the revised enhanced tariff is to be applicable prospectively w.e.f. the date of determination of such revised tariff by the Commission, unless the parties have implemented the decision dated 18.4.2012/21.4.2012, before such order of the Commission, in which event revised tariff will apply from the date of the actual implementation of 15% release directions thereafter.

16. While making the original Order, now sought to be reviewed, the Commission has already taken into consideration the impact of mandatory 15% water release and has concluded that the sacrificial discharge considered at the stage of TEC stage is more than the mandatory release of water, the claim for compensation by the petitioner company is not tenable.

So far as the affording of opportunity to file rejoinder is concerned, it was the duty of the petitioner to move the Commission for grant of time for the same, which opportunity, the petitioner failed to avail, therefore, that cannot be the ground for review of the impugned Order.

17. In view of the forgoing discussion and the response of the HPSEBL and of the Directorate of Energy (HP), the averments made by the review petitioner are not found to be tenable and hence deserve to be rejected.

II. Forest and Fisheries Charges:

Petitioner's Observation:

18. The petitioner has received letter dated 30.06.2008 (**Annexure P-5**) from the Department of fisheries and revenue for the payment of charges on account of fisheries

and forest land. The charges for the fisheries have been demanded to the tune of Rs. 7.4 lacs, while the lease money charges for the forest land are still to be worked out by the Department. The mandatory charges are required to be paid by the petitioner in the near future.

Board's response

19. The respondent Board asserts that it has already made detailed submissions, in opposition to the stand of the petitioner in the reply filed to the main petition, stating that the revised forest charges are based on the percentage of forest cover. Since the forest cover is project specific, therefore, the details of the forest cover, and of the compensation payable prior to the revision of charges and after the revision of charges for the project needs to be considered for impact on tariff. Similarly fisheries charges are based on tail race capacity. The compensation paid by the petitioner after notification dated 30.4.2007, needs to be ascertained by the petitioner to arrive at the differential amount to be considered for the impact of the tariff. The differential amount as desired by the order of the Commission has neither been worked out nor any details of the charges, which would have been required to be paid by the Company, are given in support of their claim.

20. The letter dated 3rd June, 2008 (**Annexure-P-5**) was in the custody of the petitioner at the time when the proceeding of the main petition were pending adjudication before the Commission, but the petitioner did not opt to file the same before the Commission. The petitioner is now barred to raise such plea under the review proceedings, in view of the provisions contained under Order -47 Rule 4(2) (b) of the Code of Civil Procedure.

Commission's view:-

21. It is settled Law that a review petition has a limited purpose and cannot be allowed to be in disguise and the power to review cannot be exercised on the ground that the decision was erroneous on merits. While passing the impugned Order, now sought to be reviewed, the Commission has already dealt with this issue. The petitioner Company has still not supplied any detailed information as required vide Commission's Order dated 29.10.2009. Thus on this account also the impugned order cannot be reviewed.

III Local Area Development Fund

Board's Observations

22. The HPSEBL submits that while increasing the tariff by 3 paise due to the impact of additional 1% of the royalty payable for Local Area Development Fund, the Commission has erred in not considering the very important legal aspect of the matter that in terms of Clause 8.8 of the PPA, increasing free energy by 1% falls with the meaning of Clause 8.8 of the PPA and the said increase is to be passed through in ARR, and as such tariff could not be increased. Therefore, the impugned order needs to be reviewed to the extent that the parties are relegated to the same position, which they occupied prior to the passing of the impugned order.

Petitioner's response

23. The petitioner Company in rebuttal submits that the HPSEBL should not be permitted to challenge the order of the Commission and seek review of the order in the present proceedings filed by the petitioner for reviewing of the order on various other grounds. The original order has not been challenged and it has become final.

Commission's View

24. This Commission while passing the original order has already deliberated this issue in details and similar orders have been made in number of cases. It is settled law that while exercising power under review the Commission cannot sit in appeal over its own judgement, and rehear the matter. Hence this issue cannot be reopened by way of review proceedings.

In light of the above discussion and limited scope of the review petition, the Commission declines to review the impugned Order.

-Sd-
(Subhash C.Negi)
Chairman