

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

In the matter of :-

M/S DSL Hydrowatt Limited
Corporate office at Empire House,
D.N. Road Fort Mumbai ; and
Registered office at
121, Industrial Area Baddi, Distt. Solan (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, Kasumpti, Shimla (H.P.) 171009
(through its Director)
... Respondents

Review Petition Nos. 121 of 2010
and 134 of 2010
(Decided on **17th January, 2015**)

CORAM
SUBHASH C NEGI
CHAIRMAN

Counsels: -

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| 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 DSL Hydrowatt Ltd. having its Corporate office at Empire House, 214, Dr. D.N. Road Fort, Mumbai-40001 and registered office at 121, Industrial Area, Baddi, Distt. Solan, (Himachal Pradesh) through Sh. Bhavin Sheth its Director (hereinafter

referred as “the petitioner”), has moved the Petition No. 121 of 2010 (subsequently amended Petition No. 134 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 13.05.2010, passed in Petition Nos. 11 of 2008 and 205 of 2009, whereby the tariff of R`. 2.50 p.kwh, fixed in relation to the Sarabari Hydro Electric Project of 4.50 MW capacity, located on Sarabari Khad in Distt. Kullu, (H.P) was increased by 8 paise per unit, on account of impact of 15 % mandatory water release down the stream of diversion structure, i.e. to say fixing the tariff at Rs. 2.58 p.kwh and other claims for forest fisheries charges, service tax and local development charges were not acceded to.

2. 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 Ltd. (hereinafter referred as “the respondent Board or “the 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, service tax and local development charges.

3. 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.

4. Since there was delay of 13 days in moving the review Petition No. 121 of 2010, the petitioner moved the Interlocutory Application for condonation of the said delay. Subsequently the petitioner also moved the amended petition No. 134 of 2010, which after condonation of delay, has been admitted for consideration on 28.08.2010.

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, wherever 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. 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-2, 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.

7. The respondent Board has also made the additional submissions opposing the review petition stating that:-

- (a) the Board filed the reply based on the available information in respect of the 15% water discharge mandated in the Hydro Policy, 2006. The State Govt. vide its notification dated 21.04.2012 has clarified that the notification dated 9.9.2005 of the Deptt. of Pollution Control, regarding mandatory release of water down the stream of power projects, has been made prospective for projects commissioned after 9.9.2005. It has further been clarified that in case the projects which have entered into PPA/IA before issuance of notification dated 9.9.2005 but are not commissioned, the minimum water discharge, as

agreed or accounted for as per TEC/MOU/IA/PPA (where no specific condition quantifying water discharge has been imposed) or as per any specific condition in MOU/IA/PPA, shall be applicable till based on a long term study the minimum water discharge in their cases will be determined. The Board has also been asked by the Govt. Of H.P. to approach this Commission for review of orders passed in the tariff petitions with respect to various PPAs where enhancement has been due to retrospective imposition of the lean period discharge;

(b) at the time of filing original petition for allowing redetermination of the tariff, the petitioner had sought invocation of the provisions of the HPERC (Power Procurement from Renewable Sources and co-generation by Distribution Licensee)(First Amendment) Regulations, 2007 which empowers the Commission to review or modify the Power Purchase Agreement entered between the parties in order to promote Co-generation. The said provisions are synonymous to the provisions of sections 61(h) and 86(1) (e) which confines the promotion of co-generation and generation of electricity from renewable sources of energy to the following parameters:-

- (1) by providing suitable measures for connectivity with the grid;
- (2) by sale of electricity to any person and to specify purchase of electricity from such sources; and
- (3) by prescribing being percentage of the total consumption of electricity in the area of the distribution licensee.

All these aspects had duly been considered while fixing the tariff at the time of the execution of the PPA, therefore, no further indulgence of the Commission was required and the enhancement ordered by the Commission is beyond the scope of the provisions aforesaid, hence the same deserves to be reviewed and parties be directed to relegate back to the position which they occupied prior to the passing of the order dated 13.05.2010 in petition Nos.11 of 2008 and 2005 of 2009.

8. The petitioner has filed the rejoinder to the aforesaid additional submissions made by the respondent Board stating that the issues now sought to be raised by the respondent Board cannot be raised in the present proceedings for dismissing the original petition, for the reason that-

- (a) there is no notification dated 9.9.2005 issued by the Deptt. of Pollution Control Board, but it is an intra department communication and has no legal binding effect on the parties;
- (b) the stand of respondent Board to dismiss the original petition and review petition is abuse of process of law and is not sustainable under the law;
- (c) the respondent Board, which is the Govt. Company is expected to act bonafide and with responsibility and it cannot be permitted to wriggle out of the binding earlier original orders of the Commission, which have not been challenged and have become final;
- (d) the powers to review of the Commission are pari-materia with the powers of the Civil Court Section 114, read with Order 47 rule 1, of the CPC which provides for review and also regulation 63 of the HPERC (Conduct of Business) Regulations, 2005 postulates a review only on the application of the person aggrieved. The Commission does not have any power to suo-moto recall the order dated 13.5.2010, passed in the original petition, as the power to review is not an inherent power;
- (e) a quasi-judicial order, once passed and having become final cannot be reviewed by the Authority passing that order, unless power to review has been specifically conferred. Thus the Commission can only exercise such powers which are conferred upon it by the Electricity Act, 2003.

9. To examine the averments made by the respective parties the Commission directed the parties to submit:-

- (a) soft copies of calculations pertaining to impact on generation of 15% mandatory water discharge;
- (b) copy of 75% dependable water discharge as per approved DPR.

10. The parties have furnished the said details. The petitioner has filed the energy calculations of 15% mandatory water discharge and energy calculations in 75% dependable year of the Sarbari-I (4.5 MW) SHEP. The respondent Board has filed the calculations indicating the impact on account of 15% water discharge and also the provisions, already existing in the Implementation Agreement, executed on 04.05.2003, regarding minimum discharge of water immediately down the stream of the

river/barrag/dam of the said project for downstream requirements. However, the respondent Board has stated that the Techno Economic Clearance (TEC) Unit of the Board, which was at the relevant time functioning under the Control of the Board, has now been transferred to the Directorate of Energy, along with all connected documents. Therefore, the said Directorate is appropriate Authority to respond in this matter.

11. The Directorate of Energy (HP), has adopted the reply and written submissions made by the respondent No. 2 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 27.02 MU with 78.54% PLF. After considering 15% release of water down stream of diversion structure, the gross annual generation works out as 25.754 MU with 65.33% 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 1.266 MU, which is not causing any impact. As the PLF after considering the 15% sacrificial discharge is still 65.33%, 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.

12. 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.

13. 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.

14. 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.

15. Clerical or arithmetical mistakes in judgments or orders or errors arising therein from any accidental slip or omission may at any stage also 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 facts 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.

16. In view of the above discussion and limited scope of review, the Commission, now keeping in view the pleadings made by the parties, proceeds to examine the claim raised by the petitioner in its review petition.

I Mandatory release of water discharge.

17. The petitioner has by and large reasserted and reaffirmed its previous averments made in the original petition. He asserts that there is discrepancy apparent on the face of record/order of the Order as passed on 13.05.2010 and the petitioner seeks the review of the said Order on the ground that the tariff enhancement of 8 Paise per unit as assessed by the Board on account of impact of 15% mandatory release of water downstream of diversion structure and relied upon by the Commission has not been correctly assessed and require reconsideration, redetermination by the Commission.

18. The petitioner submits that the Commission's observations in paras 13, 14 and 15 of the impugned order are factually not in consonance with the written submissions, as advanced by the petitioner, on the ground that the petitioner has submitted data calculated on the basis 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 in the original petition.

19. The petitioner further asserts that he was not been granted time to submit its rejoinder to the reply as filed by the Board which would have enabled the petitioner to point out the error in Board's calculations due to which the petitioner has to suffer huge financial loss.

20. In this case M/s DSL Hydrowatt Limited entered into an Implementation Agreement (IA) with the GoHP on 04.05.2003 to establish, operate and maintain at their cost Sarabari Hydro Electric Power Project, with installed capacity of 4.5 MW located on Sarabari Khad, a tributary of Ravi River, in Distt. Kullu (H.P.). The Power Procurement Agreement (PPA) was executed with the HPSEBL, on 18th March, 2006, 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 13.05.2010, passed in Petition Nos. 11 of 2008 and 205 of 2009, increased the tariff of Rs. 2.50 per Kwh, in relation to the said project, by 8 paise per kWh on account of the impact of the 15% mandatory release of water down the stream of diversion structure, subject to the condition that either party on the actual data available for the period of 10 years may approach the Commission to review the said increase and other claims for forest

fisheries charges, service tax and local development charges were not acceded to. The said increase was effective w.e.f. 13.5.2010, on which the Order increasing tariff was passed.

21. From the above, it is clear that in relation to the Sarabari Hydro Electric Project, the IA was signed on 04.05.2003 before the 9.9.2005, though the PPA was executed on 18th March, 2006, 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 Commission's Order dated 10.09.2014 (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. In view of decision dated 18.4.2012/21.4.2012, enhancement in tariff allowed pursuant to 9.9.2005 policy on projects, which are commissioned after 9.9.2005, but IAs/PPAs are signed before 9.9.2005, is has been withdrawn., w.e.f. the 25th April, 2014, i.e. the date on which the Commission took cognizance of the State Govt. clarification contained in the letter dated 21.4.2012 and stayed the operation of the orders passed in the tariff petitions with respect to the PPAs, where enhancement has been granted on account of 15% mandatory water release, unless the parties have implemented the revised Policy, reflected in the GoHP letter dated 21.4.2012, on the IAs/PPAs signed before 9.9.2005.

22. As a off shoot of this Order, the enhancement in tariff in relation to the Sarabari HEP allowed on account of impact of 15% mandatory water release stands withdrawn w.e.f.25.4.2014 and the Commission's order dated 13.05.2010 is modified to that extent.

II Forest and Fisheries charges, Service tax and Local Area Development chargers.

23. The impugned order clearly stipulated that the claims are required to be supported by the requisite data/calculations and supporting documents. The petitioner

did not furnish any documentary proof or work sheets in support of its claim and in the absence of sufficient documentary proof, it is not possible for the Commission to accede to the claim raised by the petitioner. Now the petitioner is seeking permission to place on record documents and calculations, which were relevant for the adjudication of the original petition. These documents and calculations now sought to be placed on record were in custody of the petitioner at the time of the proceedings in the original petition were pending for adjudication before the Commission. Since the review petition has a limited scope and it cannot be equated with the original hearing, these issues cannot be reopened by way of review petition.

Consequently the tariff in relation to Sarabari HEP shall be Rs. 2.50 per kWh with effect from 25.4.2014.

-Sd-
(Subhash C.Negi)
Chairman