

BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION,
SHIMLA

Petition No. 160/06

(Decided on 30th Jan., 2008)

CORAM
YOGESH KHANNA

In the matter of :

Application moved by the HPSEB under section 94(1) (f) of the Electricity Act, 2003 read with regulation 63 of the HPERC (Conduct of Business) Regulations, 2005, for Review of order dated 3rd July, 2006, on determination of Annual Revenue Requirement (ARR) Transmission and Bulk Supply Tariff and Distribution and Retail Supply Tariff for the Himachal Pradesh State Electricity Board for the (FY 2006-07).

AND

In the matter of:-

The Himachal Pradesh State Electricity Board

...Petitioner

Order

(Last heard on 4.1.2008 and order reserved)

Before taking up the above review petition into consideration, it is essential to summarize the facts leading to this petition. Review application under section 94(1)(f) of the Electricity Act, 2003 (hereinafter referred as “the Act”) has been filed on 2.8.2006 before this Commission by the Himachal Pradesh State Electricity Board (hereinafter referred as “the Board”) which is a deemed licensee under the first proviso of section 14 of the Electricity Act, 2003, for distribution and supply of electricity in the State of Himachal Pradesh, seeking review of the Commission order dated 3rd July, 2006 (hereinafter referred to as the “impugned order”) in Petition No. 345/2005 relating to the determination of Annual Revenue Requirement (ARR) Transmission and Bulk Supply Tariff and Distribution and Retail Supply Tariff, of the Board for the financial year 2006-07. As the additional facts were brought on record by the Board, the review petition came up for

admission hearing on 26.9.2006. In the meantime an appeal bearing No. 209 of 2006 was also moved by the Board before the Hon'ble Appellate Tribunal for Electricity against the impugned order and the Hon'ble Appellate Tribunal vide its order dated 5th Sept, 2006, was pleased to adjourn the appeal without fixing a date. In view of the order of the Hon'ble Appellate Tribunal the review petition filed by the Board before this Commission was admitted for consideration on 26.9.2006. The Hon'ble Appellate Tribunal vide its order dated 20th Sept, 2006 recalled its order dated 5th Sept., 2006 passed in Appeal No. 209 of 2006 and decided to hear the appeal preferred by the Board alongwith another appeal No. 206/2006 filed by the Himachal Steel Association.

2. It is evidently clear from the Full Bench decision of Allahabad High Court and also Delhi High Court in cases Behari Lal V/s Gobardhan Lal AIR 1948 All 353 & Hari Singh V/s Seth AIR 1996 Del. 21, that where an application for review has been presented by a party, and later on appeal is preferred from the same order, whether by the same party or by other party, the Court to which the application for review is made is not thereby deprived of jurisdiction to entertain the application. But the power exists so long as the appeal is not heard because once the appeal is heard, the order on appeal is the final and the application for review of judgment of the court of the first instance can no longer be proceeded with. The Commission, therefore, taking note of the aforesaid High Court decisions and of the Hon'ble Appellate Tribunal's order dated 20th Sept., 2006, withheld further proceedings on the review petition pending before this Commission. Subsequently on 20th July, 2007 the Hon'ble Appellate Tribunal passed in appeal No. 209 of 2006 the following order.

“As far as the Appeal No. 209/06 is concerned, Mr M.G. Ramachandran, Learned Counsel for the appellant states that the matter is under review. He further states that he will submit all the actual figures to the Commission to facilitate the review process.

Let the review proceeding be over.”

In pursuant to the Hon'ble Appellate Tribunal order the review petition has been recalled and the notices have been sent to all stakeholders. In the meanwhile the Board, has also filed the true-up petition, which is pending for

consideration of this Commission and almost all the issues raised in this review petition, have also been taken up in the true-up petition.

3. The Commission's powers to review its own orders flow from section 94(1)(f) of the Electricity Act, 2003 and are the same as those 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. For the review application to be admitted, it necessarily has to meet the requirements of section 114 and Order 47 of the CPC.

4. As per these 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;
- b) On discovery of new and important matter or evidence which, after due diligence was not within knowledge or could not be produced at the time of making the order;
- c) If there exist other sufficient reasons;

5. As regard the third ground of review under order 47 of the CPC namely "for any other sufficient reason", there need to be new grounds other than those considered in the original order of the Commission dated 3.7.2006. It is a well settled principle that the expression "any other sufficient reason" will have a meaning analogous to grounds specified immediately before. This portion or order 47 cannot be used to nullify the specific requirements stipulated in the earlier portion of the same provision, as mentioned in para 4 of this Order.

6. It may be pointed out here that Hon'ble Supreme Court and Hon'ble 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.

7. 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 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 the decision was erroneous on merits. But simultaneously the materials on record, which on proper consideration may justify the claim, cannot be ignored.

8. Given this unambiguous position of law as spelt out in the fore going paras of this order it has to be now seen whether the arguments in the review application under consideration meets these requirements for admissibility for review of the Order. The Commission, therefore, would like to consider and dispose off all issues one by one raised by the Board as under:

A. GoHP 12% share in HPSEB Hydel Stations

The Commission would like to point out that the Board in its revised Tariff Petition submitted on June 3rd, 2006 had not claimed this as a Power Purchase Cost. As this is a claim which was not in the original petition, it cannot be entertained in the review petition. *The Commission shall consider this cost during the true-up process for which the Board has already filed its petition..*

B. Power Availability from NJHEP

The Commission had estimated the power availability from NJPC station to HPSEB based not on only last year's generation data as stated by Board in its review petition but based on the generating plant's Design Energy (DE), which also captures the hydrological uncertainties associated with hydro generation.

In technical validation sessions with the Board officials, the Commission had asked for Board to provide the details of expected sources of the unallocated share power. In response the Board had informed the Commission that it expected to procure about 155 MU of power from various NHPC stations and 180 MU from NJPC station.

This fact was taken into consideration and the corresponding power purchase costs were allowed in the Tariff Order for FY-07. The Commission appreciates the fact that these are estimates and that the actual values may be different. *The variations shall be taken care of by the Commission during the true-up process for which the Board has already filed in its petition.*

C. Power Availability from Dehar

Projection of power availability for Dehar was done based on the plant's Design Energy which is about 3228 MU. Based on HPSEB's share, the energy available to HPSEB has been projected as 48.4 MU. *However the Commission shall consider the variations between the projected and the actual power purchase cost during the true-up process for which the Board has already filed petition.*

D. Power Availability from Private Micros

The power availability from private micros has not been considered in the Tariff Order as no past data and no basis of projection of the available energy from these plants was provided to the Commission and any evidence provided to justify the projected power purchase cost from these generating plants.

If the power availability from the Private Micro generating plants is taken into consideration in the month-wise Merit Order Dispatch, it has the effect of replacing power procurement from costlier sources such as Equity power of GoHP in NJPC plant. This means that the cost of power purchase for the State's own use is reduced by Rs.8.66 Crores to Rs.600.56 Crores. Also, the amount of power available with HPSEB for sale outside the State of HP increases and the additional profits from this are estimated to be Rs.12.28 Crores. Thus, taking into consideration the availability of power from Private Micro generators would lead to a reduction of Rs.20.94 in the revenue requirement of the Board. *However, the Commission will consider the cost of power purchase and the proceeds from the sale of this power in the true up exercise, based on actual numbers, for which the Board has already filed its petition.*

E. Power Purchase cost of Yamuna Station

The necessary order in respect of rate of power purchase from the Yamuna Stations in the year FY-07 at 37p/unit has been issued. *Its impact would be accounted for during the true up process.*

F. Merit Order Considered by the Commission

The Commission has prepared a month-wise Merit Order and the same fact has been stated in the Para 7.38 of the tariff order for the year 2006-07. Hence, the month-wise variations in demand and supply have been considered while preparing the Merit Order. For estimating the market price at which the HPSEB may be able to sell its surplus power outside the state, the Commission has considered the Board's existing agreements with PTC. The Commission appreciates the fact that the actual market price over the year may vary in an unpredictable manner. *The Commission would consider the variations during the true up exercise for which the Board has already filed its petition.*

G. Employee Cost

For calculation of Basic Salary the Commission had first calculated approved per employee salary for 2005-06. It has then escalated the per employee basic salary by 4% on account of expected wage hike. After this the Commission had projected the basic salary for year 2006-07 by multiplying per employee basic salary with projected number of employees for year 2006 -07 as submitted by the Board under its retirement pattern.

The Commission had put a cap on DA at 21% level (11% of old basic and 10% of the new basic) in the tariff order for 2006-07 as per the DA declared by the Government at the time of preparing of tariff order. The Commission had clearly mentioned in its tariff order that it is putting a cap at DA at existing level and will not allow any increase in DA as a part of ARR. The Government has increased DA from 21% to 24% in July 2006.

The Commission had also given reasoning for putting a cap on the DA expenses of the employee in para 8.9 for the same and listed here under for the Board's benefit:-

“The Commission would like to cite the Appellate Tribunal for Electricity judgement dated 26th May 2006 against appeals 4, 13, 14, 23, 25, 26, 35, 36, 54 & 55 of 2005 against PSERC which has upheld the PSERC's judgement along similar lines. The judgement unambiguously upholds the disallowance of part of the employee costs by PSERC and is quoted for reference;

“143. At the same time we make it clear that in case the employees of the Board do not improve their efficiency, the aforesaid employees cost allowed by the Commission will remain capped till the performance of the Board employees improve.

145. In the circumstances, we decline to interfere with the decision of the Commission disallowing increase in the employees cost....” ”

The Commission finds no justification in reviewing the above issue in view of the position brought out in the order.

H. HPSEB Development Fund

The Commission had directed for creation of the fund to be used to meet the following purposes:-

- (a) Capital Investment - HPSEB/successor entities are required to design appropriate schemes and seek approval of the Commission. The licensee is also required to submit monthly / quarterly returns of the progress of the schemes and withdraw fund resources on the approval of the fund.

- (b) True Up – Admission or approval of any revenue gap for the past year by the Commission will be adjusted from the resources of the fund
- (c) Studies – Any proposal or studies mandated by the Commission or proposed by the utility during the year can also avail of the fund.

The total allocation to the fund was in addition to the ARR approved for the year 2006-07 and therefore the Board has no legitimate right on this fund till such time the Commission allowed the same. ***The Commission would consider the actual cash flows revised ARR during the true up process and issue appropriate directions with respect to Development Fund.***

I. Clarifications

Power Available from External Sources: The Commission agrees with the Board's contention about the uncertainty in the actual power that may be available to HPSEB from the various generating plants. ***The Commission will consider the actual cost of power purchase and revenues from sale of power during the true up process for which the Board has already filed its petition.***

Realization from outside State sale of power: The Commission realizes that the rate at which HPSEB is able to sell power outside the State is governed by market forces and prevailing grid conditions, and is thus unpredictable. ***The Commission shall look into the cost, revenues and volumes of the sale of power outside the State and allow all justifiable costs after prudence check while processing the true up petition submitted by the Board..***

Power Intensive Units: The Commission has already expanded the definition of PIUs in the tariff order for 2007-08.

Lower Voltage Supply Surcharge: The Commission has already issued appropriate order with respect to LVSS in a separate petition filed by M/s Auro Spinning Mills, Baddi

Voltage wise Categorization: The tariffs have been designed based on the voltage wise cost of supply. The COS model specifies HT to include voltages ≥ 11 KV but less than 66KV. Voltages less than 11 KV have been classified as LT for the purpose of the tariff order only. Therefore the request of the Board to include 2.2 KV as HT cannot be accepted as it is not compatible with the COS model and the resultant tariffs.

Delay in issuance of Tariff Order: The Commission would like to point out to the Board the abysmal quality of its tariff filing. Some of the major discrepancies were pointed out in the Para 2.18 through Para 2.21 of the Tariff Order

Regarding the timeliness and quality of Board's response to the Commission's queries, the Commission would also quote Para 2.5 through Para 2.10 for the Board's benefit.

The Commission also held Admissibility Hearing for the admission of the Petition, and admitted the petition on March 18, 2006 and issued an interim order to the Board specifying April 10, 2006 as the last date for supplying additional information/clarifications and justifications as sought by the Commission.

The Board, on April 10, 2006 sought an extension up to April 29, 2006 for supplying the requisite information. The same was granted by the Commission.

The Board, on April 29, 2006 sought further extension up to May 10, 2006 for submitting the information sought by the Commission. The Commission granted the extension.

The information/clarifications were submitted by the Board on May 10, 2006. The Commission conducted the second technical validation session on May 24, 2006 wherein the Commission pointed out omissions and inconsistencies in the information submitted and asked the Board to submit the updated and corrected Tariff Formats and the revised ARR figures. The Board requested for time up to June 2, 2006 for filing the required data and clarifications and the Commission granted the same.

The information/clarifications were submitted by the Board on June 2, 2006. The Commission conducted a third Technical Validation session on June 13, 2006 and held a meeting with the Board to point out omissions and inconsistencies in the information submitted. The Commission directed the Board to submit the corrected data asked for. The Board submitted its reply on 16th June 2006.

Besides the technical validation sessions the Commission regularly interacted with the Board officials for information and clarifications.

9. In the circumstances of this case, the limited scope of power of review and pendency of the true up petition, the Commission does not find any ground or justification to review the impugned order at this stage.

The review petition is dismissed.

This order is made and signed on this day 30th Jan., 2008.

(Yogesh Khanna)
Chairman