

BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION,
KEONTHAL COMMERCIAL COMPLEX, KHALINI, SHIMLA-171002

In the matter of: -

Approvals for supply of power to Power Intensive Units
in Himachal Pradesh.

(Suo Motu Case No 175/08)

(Order made on 11.8.2009)

CORAM:-
YOGESH KHANNA
CHAIRMAN

Counsel for the Himachal Pradesh
State Electricity Board, Shimla
the respondent Board

Sh. Narinder Singh Thakur
Advocate

Order

(Last heard on 4.7.2009 and orders reserved)

The facts, in brief, involved are that the news item titled “Nod for 2 mega steel units in Sirmour”, appearing in the Tribune dated 14th July, 2008, reported that the State Government of Himachal Pradesh has consented for setting up two steel units in Distt. Sirmour, which together will consume 88 MW of power. This clearance has been accorded despite the fact that the Himachal Pradesh State Electricity Board (hereinafter referred to as “the Board”) is facing a widening demand/supply gap. Consequently the Board will have to buy short term power at very high rates and supply it to such power intensive units at a relatively lesser tariff. The Board is also resorting to imposing power cuts in winter months due to shortage of power. Clearance to supply power to such large power intensive units is likely to have an impact on the Annual Revenue Requirement (ARR) of the Board and is also likely to adversely affect the interest of other power consumers in the State.

2. Taking cognizance of the said newspaper report, also taking into consideration the fact that it is likely to impact the Annual Revenue Requirement (ARR) and tariff of the Board, the Commission initiated proceedings suo motu under regulation 11 of the Himachal Pradesh Electricity

Regulatory Commission (Conduct of Business) Regulations, 2005 and directed the Board-

- (a) to explain reasons for approving and encouraging such power intensive units, keeping in mind the precarious power availability situation in winter months;
- (b) to furnish the details of the criteria adopted by it for concurring to such proposals as well as the arrangements made for meeting this bulk demand;
- (c) to furnish information in relation to –
 - (i) total quantum of power (in MW) approved by the State Level Single Window Clearance and Monitoring Authority for various industries during the last two years;
 - (ii) the total load released till date against such approvals;
 - (iii) the total load for which Power Availability Certificate (PACs) have been issued; and
 - (iv) the balance quantum yet to be processed.

The Board was also asked to spell out the steps taken by it to meet this demand.

3. In response to the said directions Sh. R.K. Dhiman, Chief Engineer (Commercial), HPSEB states that the State Level Single Window Clearance and Monitoring Authority in its 32nd meeting has approved 28 MW load to M/S J.B. Rolling Mills, Kala Amb, for setting up industrial unit for manufacture of M.S. Flat/Angle/ Channels/ Patras etc. and 60 MW load to M/S Valley Iron and Steel Co. for setting up Industrial Unit for manufacture of Stainless Steel Billets, Flats, H.R. Coils etc and the period for the supply is specified by the Board upto Dec., 2009. He also states that the power demand of the prospective units is in consonance with the National Industrialization Policy of the Government of India and the Government of India, with a view to promote industrialization in the State of Himachal Pradesh, has awarded package giving a number of incentives viz. tax holiday etc. to the industrial units. The Board to meet the Industrial load as well as all other kind of load growth in the Sirmour area, has finalised transmission master plan for the system upgradation and setting up of 220 kV Sub-station.

This has been included in the capital investment plan, submitted to this Commission alongwith MYT petition of the Board for FY 2009-10 and FY 2010-11. As regards the precarious situation of power in the winter months, Sh. Dhiman admits that the respondent Board is deficit in power during winter months and the power is also very expensive. To meet the power requirements the short term purchase of power from the market has to be resorted to by the Board by incurring additional expenditure. This position may continue till the FY 2011-12.

4. Further from the pleadings in this case it is clear that the total power commitments as ending on 16.2.2009, through State Level Single Window Clearance and Monitoring Authority of the State Government, is 864.648 MW and out of this total power commitment 272.271 MW is in respect of Power Intensive Units (PIUs). The total projected availability of power from all sources with the Board on yearly basis, during forthcoming years, is stated to be as under:-

FY 2009-10	FY 2010-11	FY 2011-12	FY 2012-13	FY 2013-14
3366MW	3773MW	5751MW	6508MW	7203 MW

The Board is power deficit in winter months and power surplus in summer months. In compliance to sections 5.56 and 5.57 of the approved MYT Order for the first control period (FY 09-11), the Board has entered into banking arrangements with the various States and total banking energy will be around 700 MW including reverse banking and this will compensate the above deficit. Keeping in view this banking arrangement for surplus energy in summer months, the Board has considered the release of PACs to these PIUs as per decision taken in the 32nd meeting of SLWC & MA. The execution of the works under the Master Plan for the evacuation and supplying power is to be co-ordinated with the actual demand of load in relation to which the commitment has been made. Moreover, the commitments of load through SLWC are being made accordingly for instance in BBNP area after the commissioning of 220/66 kV Nalagarh Sub-Station, in Giri-Paonta and Nahan areas after the augmentation of Giri Sub-Station and also similarly in other areas. The supply of power to M/s J.B. Steel Industries, Kala Amb for setting

up industrial unit for manufacture of M.S flat/angle/channels/Patras etc. is proposed to be made through 132 kV Giri-Abdullah Feeder. The HVPNL has also consented that the Board may utilize the section of 132 kV Giri-Abdullah line in Himachal area and Haryana will not draw any power through this line. Thus the power will be made available to M/S J.B. Steel Industries, Kala Amb within the stipulated period as per the commitment made by the Board. The work for providing power to M/S Valley Iron & Steel Co. for setting up industrial unit is also in pipeline and will be released within the stipulated period.

5. The power intensive units hardly provide any employment and use power only as raw material with appended harmonic destabilization on Grid these appear in the negative list. In this regard the Board pleads that under the Electricity Act, 2003 (hereinafter referred as “the Act”) it is universal supply obligation of the distribution licensee to supply the power to every consumer, whosoever requests for electricity from the distribution licensee, subject to the payment of the charges and tariffs as may be determined by the Commission. On the other hand, the Act, provides for a penalty to be imposed on the distribution licensee for failure to fulfill the universal supply obligation. Thus the distribution licensee pleads that it cannot refuse to supply electricity to any person requiring such supply on the ground of unwarranted use of electricity by the person or that the consumer or industry is on the negative list and is not required in the State. It is not for the distribution licensee, but it is for the State Government, to determine whether a particular consumer is required in the State or not.

6. After going through the pleadings and hearing Shri. Narinder Singh Thakur the Learned Counsel for the Board and Shri. P.N. Bhardwaj the Consumer Representative, appointed under section 94(3) of the Act, the Commission observes that in view of section 86 of the Act and the verdicts of the Apex Court in **WB Electricity Regulatory Commission V/s CESC Ltd. 2002 (8) SSC 715 & BSES Ltd; V/s Tata Power Corporation Ltd and others (2004) SCC 185**, the Commission has full jurisdiction to take note of the tariff related issues and the Commission is totally justified in going into all questions, which have impact on the tariff of the Utility. After coming into

force of the Act and the constitution of the Commission section 86, besides section 62, cast mandatory obligation and duty on the Commission to determine non differential tariff, and in doing so it is required to be guided by the parameters referred in clauses (a) to (i) of section 61. Further under sub-section (4) of section 86 of the Act, the Commission is also to be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published under section 3. The APTEL in **Appeal No. 131 of 2005, decided on 31.3.2006 Udyog Nagar Factory Owners Association V/s BSEB Rajdhani Limited and Delhi Electricity Regulatory Commission, 2007 (APTEL) 492 and in Appeal No. 277 of 2006 decided on 24.4.2007 - Jayaswals NECO Ltd. Siltara Growth Centre, Chattisgarh V/s Chattisgarh State Electricity Regulatory Commission Raipur, 2007 (APTEL) 186**, has laid that the Commission cannot accord any preferential treatment to any consumer of electricity in determination of the tariff. The Hon'ble APTEL in its subsequent decision rendered on 21.10.2008 in **Appeal No. 147 of 2007 – Government of Himachal Pradesh V/s the Himachal Pradesh State Electricity Board, 2008 ELR (APTEL) 0886**, makes it clear that the Commission is not to discriminate between two consumers except on basis laid down in section 62 (3) of the Act, which reads as under:-

“(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.”

7. The aims and objectives of the National Electricity Policy make it evident that electricity is an essential requirement for all facets of our life. It has been recognized as basic human need. It is a critical infrastructure on which the socio-economic development of the country depends. Supply of electricity at reasonable rate to rural India is essential for its overall development. Equally important is availability or reliable and quality power at competitive rates to Indian Industry to make it globally competitive and to enable it to exploit the tremendous potential of employment generation.

8. Plain reading of section 3 of the Act shows that it is incumbent on the Central Government to prepare a National Electricity Policy and Tariff Policy from time to time in consultation with the State Governments and the Central Electricity Authority for development of the power system. In compliance to section 3 of the Act, the Central Government notified its National Electricity Policy (para 2.0) dated 12th Feb., 2006, which aims at achieving the following objectives:-

- (i) Access in electricity:- Available for all households in next five years.
- (ii) Availability of power:- Demand to be fully met by 2012. Energy and peaking shortages to be overcome and adequate spinning reserve to be available.
- (iii) Supply of reliable and quality power of specified standards in an efficient manner and at reasonable rates.
- (iv) Per capita availability of electricity to be increased to over 1000 units by 2012.
- (v) Minimum lifeline consumption of 1 unit/household/day as a merit good by 2012.
- (vi) Financial turnaround and commercial viability of electricity sector.
- (vii) Protection of consumers' interests.

9. Sub-section (4) of Section 3 of the Act of 2003 requires the Central Electricity Authority (CEA) to frame a National Electricity Plan once in five years and revise the same from time to time in accordance with the National Electricity Policy. Section 73(a) of the Act of 2003 provides that formulation of short term and perspective plans for development of the electricity system and co-ordinating the activities of various planning agencies for the optimal utilization of resources to subserve the interests of the national economy shall be one of the functions of the Central Electricity Authority. The plan prepared by Central Electricity Authority and approved by the Central Government can be used by prospective generating companies, transmission utilities and transmission/ distribution licensees as a reference documents.

10. The policy sets 2010 as a target to provide adequate infrastructure for electricity connectivity to all households and aims to supply power for all by 2012. The other objectives of the policy are to overcome energy and peaking shortage, create adequate spinning reserves, ensure supply of affordable, reliable and quality power, to increase per capita electricity consumption to over 1000 units by 2012 and provide a minimum daily lifeline consumption of 1 unit per household as a merit good by 2012 to ensure a financially and

commercially viable electricity sector with equal emphasis on consumer protection. It also talks about greater competition and private sector participation, adoption of technology in all aspects of the sector, and strengthening of regulatory capacity. In addition to sections 62 and 86 of the Act, sections 23 and 60 of the Act empower the Commission to issue directions to licensees, which read as under:-

“Section 23. Directions to licensees.- If the Appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply, securing the equitable distribution of electricity and promoting competition, it may, by order, provide for regulating supply, distribution, consumption or use thereof.

Section 60 Market domination.- The Appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry.”

11. As per Article 39 of the Constitution, which is part of the directive principles of the State Policy, it is the duty of the State to have a Policy to secure ownership and control of material resources of the community, which need to be distributed in the best possible manner to subserve the common good. The electricity generated and distributed in the State of Himachal Pradesh is the material resource of the community and, therefore, the State Government and the respondent Board, having the O&M of the State Government needs to secure ownership and control of electricity and is required to distribute/supply electricity at reasonable price in a manner as permissible under the law in force.

12.. Power commitment, by way of issuance of the Power Availability Certificate, is the contractual obligation to supply the electricity to prospective entrepreneurs on some future dates. The general principle is that once a representation has been made by one party and the other party acts on that representation and makes investment and, thereafter the other party resiles, such act cannot be stated to be fair and reasonable.

13. When the State Government makes representation and invites the entrepreneurs by showing various benefits for encouraging to make investment by way of industrial development of the backward areas or the hill

areas, and thereafter, the entrepreneurs on the representation so made bonafidely make investment and thereafter if the State Government resiles from such benefits, then it is certainly an act of unfairness and arbitrariness. The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facets pointed out above), but must be free from arbitrariness not affected by bias or actuated by malafides. In view of this it becomes necessary for the State Government and its functionaries to be very vigilant in making future commitments and in providing incentives to the prospective entrepreneurs to make their investments in setting up their industrial units in the State.

14. Normally before such a project is undertaken, a detailed consideration of the need, viability, financing and cost-effectiveness of the proposed project and offers received takes place at various levels in the Government. If there is a good reason why the project should not be undertaken, then the time to object is at the time when the same is under consideration and before a final decision is taken to undertake the project. If breach of law in the execution of the project is apprehended, then it is at the stage when the viability of the project is being considered that the objection before the appropriate authorities must be *raised*. The Commission expects that if such objection or material is placed by the licensee Board before the Government, the same would be considered before a final decision is taken. This is the appropriate time when all aspects and all objections should be considered. It is only when valid objections are not taken into account or ignored that the Commission may intervene.

15. This Commission has given anxious thought to various contentions canvassed on behalf of the Board and it hereby concludes that the Board is facing widening demand/supply gap (especially in winter months) and to meet the power requirements the Board will have to buy short term of power from market at very high rates and supply it to power intensive units at a relatively lesser tariff. Consequently the Board will have to incur additional expenditure

and this position may continue till the FY 2011-12. This will certainly impact the tariff determination in relation to the Board and is also likely to adversely affect the interest of other power consumers in the State. The Commission, therefore, records a note of caution that the respondent Board while considering the proposals for issuance of such Power Availability Certificate on the recommendations of the State Level Single Window Clearance and Monitoring Authority should examine the disproportionate and adverse impact on its ARR as also to the stability of the Grid and ask the Government to make provision for subsidy in case the Single Window Institution rides rough shod on the Board's objection. Our understanding is that adequate evaluation of each case is not being made by the power Board before it gives its views in the Single Window Authority. In future, in case negative list Industry or power Intensive Industry is supported in these structures, the power Board needs to get a commitment from the Government to mitigate the uncovered costs from year to year.

It is so ordered.

(Yogesh Khanna)
Chairman