

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

In the matter of :-

M/s Usaka Hydro Power Pvt. Ltd;
240, Okhla Industrial Estate
Phase-III, New Delhi 110020.

.....Petitioner

Versus

The Himachal Pradesh State Electricity Board Ltd. thro' its
Executive Director (Personnel)
Vidyut Bhawan, Shimla-171004.

..... Respondent

Misc. Application No. 29/2015 alongwith
Petition No. 30/2015

(Decided on 4th June, 2015)

CORAM
SUBHASH C. NEGI
CHAIRMAN

Counsels: -

for petitioner: Sh. Ajay Vaidya, Advocate,

for respondent: Sh. Ramesh Chauhan,
Authorized Representative
Er. Sunil Grover CE (SO& P)
Er. R.K. Punshi (Consultant)

ORDER

(Last heard on 14th May, 2015 and orders reserved)

M/s Usaka Hydro Power Pvt. Ltd; having its registered office at 240, Okhla Industrial Estate Phase-III, New Delhi 110020, (hereinafter referred as “the petitioner”) which is a Generating Company and is operating and maintaining the Suman Sarwari, HEP (2.50 MW) located on Sarwari Khad in Kullu Distt. (HP) (hereinafter referred as “the project”) has moved an application for condonation of delay of 470 days in filing petition, seeking review of the Commission’s Order dated 31.10.2013 passed in petition No. 91of 2013.

2. An Implementation Agreement (IA) was entered into by the petitioner with the Govt. of Himachal Pradesh on 28th August, 2002, for the execution of the project and the Power Purchase Agreement (PPA) was executed on 23.12.2005 by the petitioner with the Himachal Pradesh State Electricity Board, the predecessor- in

-interest of the Himachal Pradesh State Electricity Board Ltd. (hereinafter referred as “the respondent Board”) for sale / purchase of energy generated from the project.

Supplementary Implementation Agreement (SIA), enhancing the capacity of the project by 2.50 MW, was entered into on 30.7.2010. The first 2.50 MW unit of the project was commissioned on 31.10.2012 and the second 2.50 MW unit of the project was commissioned on June, 2013.

3. Subsequently, the petitioner company and the Respondent Board arrived at an understanding for sale/purchase of additional power generated consequent to capacity enhancement after synchronization of both the units of the project, in accordance with the provisions of Regulation 16 (5) of the HPERC (Renewable Energy Sources and Terms and Conditions of Tariff Determination) Regulations, 2012. For an initial period of 5 (five) years or such mutually agreed extended period, such additional power shall be sold/purchased at a rate not exceeding APPC under REC mechanism and thereafter (i.e. after exit from REC mechanism) for the balance term of the long term agreement at the same terms and conditions, including tariff, as contained in the original PPA dated 23.12.2005. Accordingly, the parties moved the joint petition No. 91 of 2013, seeking approval of the Short/Medium Term Supplementary Power Purchase Agreement (under REC Mechanism) in respect of the additional capacity of 2.5 MW for 2nd unit of the project.

4. Some contradictory provisions were noticed in the draft Supplementary Agreement submitted by the parties in the said joint petition. Unit wise apportionment of energy was not envisaged in the case because entire net saleable energy was proposed to be sold to the Respondent Board, for the entire term of the Agreement i.e., 40 years from the date of synchronization of the first unit of the project. Accordingly, the Commission, vide its Order dated 7.8.2013, advised the parties to redraft/modify the draft of the Supplementary PPA. Subsequently, the Commission vide its Order dated 31st October, 2013, accorded its approval, subject to suitable modifications in clauses 8.8; 10.1 and 16.5 of the existing PPA dated 23.12.2005 and further all other terms and conditions, including the tariff at a fixed rate of Rs.2.50 per Kwh, in respect of the Long-term PPA already executed on 23rd December, 2005 were to remain in force. The parties, accordingly, executed the Supplementary Agreement on 12.11.2013.

5. The present application, seeking review of the Commission's, consent Order dated 31.10.2013, based on which the SPA dated 12.11.2013 stands executed by the parties, has been filed alongwith an application to condone the delay of 470 days.

6. The explanation offered by the petitioner for the delay is as follows:-

“(2) That the review application is late due to the fact that the petitioner could not completely decipher order as passed by this Commission and was under bonafide impression that as soon as it exit the PPA under REC mechanism the new unit of 2.50MW will be signed according to new tariff rates as determined by this Commission. It is only a week ago that when the petitioner was preparing its provisional balance sheet for the current financial year it was pointed out in discussion that the tariff rate of the entire capacity of the project has been ordered to be governed by the provisions of old PPA of 23.12.2005.

(3) That thereafter seeking the advice which was conveyed to the applicant in this month only, the applicant prepared the review petition and filed without any delay.”

7. This Application has been stoutly opposed by the respondent Board by submitting:-

(a) that the application is incomplete as it has not specified the period of delay in filing the Review petition for which condonation is being sought and the Sl. No. 2 of the application is also incomplete. However, whatever has been alleged is misleading and just an attempt to derive undue benefit;

(b) that the review petition is to be filed within 30 days of issue of order (i.e. 31.10.2013), where as it has been filed on 1.3.2015 and delay is of more than a year i.e. about 470 days. This inordinate delay should not be allowed by the Commission, particularly when the petitioner has failed to justify this delay with justifiable reasons;

(c) that the petitioner has adequate knowledge from the beginning i.e. from the date of issue of order that he has been allowed a tariff of Rs. 2.50 per unit and accordingly had also executed the Supplementary Agreement dated 12.11.2013 and there is no confusion in the implication of the order. The present petition is nothing but an afterthought just to derive

undue benefit from the Commission knowing fully well that the petitioner otherwise is not legally entitled for the same;

(d) that the plea of the petitioner that he has failed to take clarification/advice from the relevant quarters for such long period (of more than a year) is not justified and, therefore, the petition needs outright rejection which is accordingly prayed.

8. On the basis of the respective contention, both the parties argued at length.

9. Before dealing with the merits of the explanation for condonation of delay of 470 days, it would be worthwhile to refer to the judgment of Hon'ble Supreme Court reported in AIR 2014 SC 746, where the guidelines were given while considering the condonation of delay Petition. In this decision the following principles have been laid down:-

(a) where a case has been presented in the Court beyond the period of limitation, the Applicant has to explain to the Court as to what was the sufficient cause which prevented him to approach the Court within the period of limitation;

(b) the term "sufficient cause" means that the party should not have acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of the case. The Applicant must satisfy that he was prevented by any sufficient cause from prosecuting his case. Unless a satisfactory explanation showing sufficient cause is furnished, the Court should not allow the Applications for condonation of delay;

(c) of course, the expression "sufficient cause" should be given a liberal interpretation to ensure that substantial justice is done. But, the concept of liberal interpretation would apply only to a case when there is no negligence or inaction or lack of bona fide which can be imputed to the party concerned;

(d) in case a party is found to be negligent or for want of bona fide on its part or found to be negligent, or for want of bona fide on his part in the facts and circumstances of the case or found to have not acted diligently or remained inactive, there cannot be any justification to condone the delay.

10. In the light of the above guidelines laid down by the Hon'ble Supreme Court, while considering the Application to condone the delay, let us now see the merits of the explanation offered by the Applicant.

11. The impugned order has been passed on 31.10.2013, but the review petition has been filed only on 7.3.2015. This period has not been satisfactorily explained. The mere statement that the petitioner could not completely decipher the order passed by the Commission and it is only a week ago when the petitioner was preparing the provisional balance sheet for the current financial year, it came to its knowledge that the tariff rate of the entire capacity of the project has been ordered to be governed by the provisions of old PPA of 23.12.2005, cannot be construed to be sufficient cause for the delay. Apart from this, especially when the petitioner executed the Supplementary Agreement on 12.11.2013, the petitioner cannot be deemed to be ignorant about the Commission's consent order dated 31.10.2013 and its implications.

12. As pointed out by the Hon'ble Supreme Court, even though, the expression sufficient cause should be given liberal interpretation to ensure that substantial justice is done, we cannot apply that concept in the present case because there is an unexplained and inordinate delay due to lack of diligence and inaction on the part of the Applicant. Once a period of limitation expires, the right accrues to the respondent Board to enjoy the fruits of the impugned order and the said right should not be lightly to be disturbed. Since the applicant is found to be negligent, the Commission is unable to accept the explanation offered by the Applicant as it does not show the sufficient cause.

Accordingly, the Application to condone of delay is dismissed, Consequently, the Appeal is also rejected.

(Subhash C. Negi)
Chairman