

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

In the matter of:

M/s Yogindera Powers Ltd.
Village & P.O. Jalari,
Tehsil & Distt. Kangra
HP-176038

.....**Petitioner**

Versus

The HP State Electricity Board Ltd.
through Executive Director(Personnel)
Kumar House, Shimla-171004

.....**Respondent**

Petition No.72 of 2017

(Decided on **23rd February, 2018**)

CORAM:

**S.K.B.S NEGI
CHAIRMAN**

**BHANU PRATAP SINGH
MEMBER**

Counsel:-

for petitioner:

Sh. Ajay Vaidya, Advocate

for respondent

Sh. Kamlesh Saklani
(Authorized Representative)

ORDER

(Last heard on 03.02.2018 and Orders reserved)

This petition has been filed by M/s Yogindera Power Ltd., having its registered office at Village and Post Office Jalari, Tehsil & Distt. Kangra (HP) through Sh. Alok Dangwal its Authorised Signatory (hereinafter referred as “the Petitioner”), who is operating and maintaining the Baner Sangam (5.00MW HEP) located on Baner, a tributary of Beas river, in Kangra Distt. H.P. (hereinafter referred as “the Project”)

2. The Petitioner executed the Implementation Agreement with GoHP on 5th August, 2010 and the Petitioner and the Himachal Pradesh State Electricity Board Ltd.(HPSEBL)(hereinafter referred as “the Respondent”) filed a joint petition before the

Commission for approval of Power Purchase Agreement under REC Mechanism as per the provisions of the Electricity Act, 2003 and related Regulations. The Commission granted its approval to the said PPA vide Order dated 15th December, 2012 and directed the parties to execute the PPA within 60 days from the date of the said Order. But the PPA approved by the Commission on 15th December, 2012 has not been executed between the Petitioner and Respondent Board yet.

3. The Project has been commissioned on 3rd June, 2016 and since then the Petitioner is availing Short Term Open Access for sale of power generated from it to inter and intra-State buyers. The Petitioner by way of a letter dated 11.08.2017 requested the Respondent Board regarding sale of long term power and to sign PPA for the same. In response to the said letter, the Respondent replied to the Petitioner that in case the PPA has to be signed it will be regulated by the HPERC (Power Procurement from Renewable Sources and Co-generation by the Distribution Licensee) Regulations, 2007 (hereinafter referred as “the Regulations, 2007”) in terms of the letter dated 11.04.2014 already issued in this regard, wherein it was made clear to the Petitioner that the HPSEBL on the request of the Petitioner Company is ready to cancel the PPA under REC mechanism, which was approved by the Commission vide Order dated 15.12.2012 in the Petition No. 178 of 2012, subject to certain conditions especially that the PPA shall be cancelled only if M/s Yogindera Power refunds the fee paid by the HPSEBL for filing the joint petition and further in case the Petitioner intends to enter into long term PPA with the HSPEBL, the applicability of tariff and other terms and conditions shall be governed by the Regulations, 2007.

4. On 11th August, 2017 and again on 13th September, 2017, the Petitioner requested the Respondent Board to guide the Petitioner, so that the Petitioner could sell its power to the Respondent Board on long term basis. In response to this letter, the Respondent Board again quoted the same clarification as already given in the HPSEBL letter dated 11.04.2014 and the Respondent Board also informed the Petitioner that the Project Specific Tariff is not applicable for this Project as the Commission has fixed the Tariff of Rs. 2.95 per kWh up to 5 MW capacity under the Regulations, 2007 and only the tariff of Rs. 2.95 per kWh shall be applicable to the Petitioner’s Project.

5. With this background the petitioner has now prayed:-

- (a) to quash and set aside the letter dated 11.04.2014 issued by the Respondent Board being illegal against the spirit of the Act and regulations;

- (b) hold that the fact that in future a long term PPA between the Petitioner and Respondent will be governed by the regulations as is applicable on the signing date of such PPA.

6. The Respondent Board in its short reply to the petition has questioned the maintainability of the petition on the ground that as the tariff falls under the tariff regulations of 2007, and not under the HPERC (Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2012, (in short the Regulations, 2012). In its support, the respondent Board submits that in the present case the PPA has been approved on 15.12.2012, prior to the commencement of Regulations, 2012 which came into force on 18.12.2012. Clause (i) of Sub-regulation (2) and sub-regulation (3) of regulation 3 of the said Regulations read as under:-

“(2) *These regulations shall not apply in the following cases: -*

(i) *where long term agreement for disposal/use of energy have either already been signed by the renewable energy generator or have been approved by the Commission and the capacity of the project has not been enhanced subsequent to signing/ approval of such agreement;*

(ii) xxx xxx xxx xxx xxx

(iii) xxx xxx xxx xxx xxx

(3) *Notwithstanding anything contained in sub-regulations (1) and (2)-*

(a) *where long term agreements have been executed between the renewable energy generators and the licensee, before the setting up of the Commission, the provisions of such agreements shall continue to be applicable;*

(b) *where, after the setting up of the Commission, the power purchase agreement has been approved by the Commission prior to the commencement of these regulations, the tariff shall be in accordance with the terms and conditions of such approved power purchase agreement read with the Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Cogeneration by Distribution Licensee), Regulations,2007,irrespective of the date on which such agreement is actually executed”..*

7. With regard to the issue of maintainability of the petition it can be stated that Hon'ble APTEL in its verdict rendered in **Gujrat Urja Vikas Nigam Ltd. V/s Gujrat Electricity Regulatory Commission 2015 ELR (APTEL) 28** has concluded that whenever the State Commission, as a preliminary issue, feels that it is necessary to hear the issue on the basis of the submissions made by both the parties with reference to the question of maintainability of the petition, the State Commission is competent to decide the issue of maintainability of the petition, even at the admission stage, without going into the merits of the matter.

8. During hearing both the Counsels argued at length on maintainability of the petition Shri Ajay Vaidya, Advocate for the petitioner urges that the petitioner, keeping in view the Order passed by the Commission in petition No. 34 of 2015, holding that so long as agreement is not executed, the mere approval of its terms has no significance, is under bonafide belief that since there is no PPA between the parties and the tariff for long term sale of power would be governed by the Regulations and tariff as applicable on the date of signing of the PPA and this has been communicated to the Respondent Board, but the Respondent Board is insisting that the PPA has to be signed in accordance with the Regulations, 2007. Further the learned Advocate also cited the decision dated 30/11/2014 of the **Hon'ble APTEL rendered in Appeal No. 318 of 2013 –M/s Batot Hydro Power Ltd. V/s HPERC and another.**

9. In rebuttal Shri Kamlesh Saklani, representing the Respondent Board, reiterates the earlier averments as mentioned in para 6 of this Order and also asserts that as there is no contract between the parties, the question of any dispute does not arise and the provisions of section 86(1)(f) of the Electricity Act, 2003 cannot be invoked. The provisions relating to sale under REC mechanism as appearing in the RE Regulations, 2012 were also read out in support of their stand relating to impugned letter of 11.04.2014.

10. We have gone through the petition, reply and rejoinder filed by the Petitioner, in detail and after hearing the parties we find that:-

- (a) the Petitioner has relied upon the Commission's Order of 10/07/2015 which was passed in relation to the petition No. 34 of 2015 filed by the petitioner with Commission, the operative part of which reads as under:-

“The impugned order, approving the PPA under REC Mechanism, was issued on the joint petition of the HPSEBL and the petitioner Company and the parties are yet to execute the Agreement in consonance with the said approval. So long as the Agreement is not executed, the mere

approval of its terms has no significance. The parties are free to execute or not to execute the agreement. To constitute an agreement contracting minds of both the parties must be ad-idem. It is settled law that any contract which is not based on free violation of the parties or has been induced by force or coercion is void. Thus it is entirely the sweet will of the parties to decide as to whether they would execute or enter into the agreement or not. The Commission will have the jurisdiction to approve the terms of the power procurement by the Licensee only after both the parties i.e. the distribution licensee and the Generator agree to execute the PPA or enter into any agreement. That situation has not yet arisen”.

The Order quoted is required to be read not in part, but has to be read as a whole in the context in which it has been passed. In the present case the Petitioner has only picked up a sentence from the said earlier Order and has ignored the remaining part, whereby it has been clearly concluded that the Commission has the jurisdiction only to approve the terms of the power procurement by the Licensee, after both the parties i.e. the Distribution Licensee and the Generator agree to execute the PPA or enter into agreement. The parties are free to execute or not to execute the agreement. In other words, the terms and conditions approved will have to be incorporated as and when the Agreement is executed. As such the Commission’s Order dated 10/07/2015 as referred to by the Petitioner only implies that after the approval of the PPA by the Commission, none of the party can force the other party to execute the PPA. However, this does not in any way imply that the express provisions of the regulations can be overlooked while approving the long term agreement if a fresh petition for the same is filed before the Commission. Accordingly none of the parties can seek the rate which is more beneficial to it as compared to the rate approved in the PPA even if the parties mutually agree to seek approval from the Commission for execution of PPA at a belated stage;

- (b) the PPA has not been executed yet. In the absence of the Agreement, no dispute has arisen between the parties for resolution by the Commission under section 86(1)(f) of the Act;

- (c) the question whether the IPP is entitled to the tariff under regulations of the day when the PPA is signed, irrespective of the date of approval accorded by the Commission, has been adequately dealt in the RE Regulations of 2012 as well as the RE Regulations of 2017. In this connection we would like to refer to the provisions of regulation 15 of RE Regulations of 2012 and regulation 16 of RE Regulations of 2017, the relevant extracts of which are also reproduced below:

Regulation 15 of RE Regulations, 2012;-

“.....

(A) If the first Power Purchase Agreement for sale/purchase of power under REC mechanism from a SHP was executed by the parties and/or approved by the Commission before the commencement of these Regulations__

(a) where the capacity of the SHP does not exceed 5 MW, the tariff shall be Rs. 2.95 per kWh and such rate shall be subject to adjustment in accordance with relevant orders of the Commission under which the rate of Rs. 2.95 per kWh was determined under the HPERC (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007.

.....”

Regulation 16 of RE Regulation, 2017;-

“.....

(a) If the first power purchase agreement for sale/purchase of power under REC mechanism from a small hydro projects was executed by the parties and/or approved by the Commission before the commencement of these Regulations, the provisions of the Himachal Pradesh Electricity Regulatory Commission (Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2012, shall be applicable irrespective of the fact whether the project has, or has not, commenced its operation, in the same manner as if the power purchase agreement for the residual life of the project would have been approved prior to commencement of these Regulations.

.....”

A perusal of the above provisions of both the aforesaid regulations clearly establishes that both the regulations support a uniform principle that in case where a PPA is approved by the Commission under REC mechanism, the tariff under the RE Regulations prevalent on the date of such approval shall prevail for the purpose of applicability of tariff under the long term PPA, beyond the period(s) for which the PPA(s) under REC mechanism is/are

approved. This underlying principle provides a level playing field, without any discrimination, to all the developers for whom PPAs, whether under REC mechanism or under long term arrangement, for sale of power to the licensee are approved in the same time frame. In case these principles were not to be followed, it could lead to discrimination between the developers for whom the PPAs are approved in the same time frame under two different mechanisms. In this case, after receipt of joint petition from the parties, the first PPA under REC mechanism was approved on 15th December, 2012 i.e. before the commencement of RE Regulations, 2012. As such in accordance with the relevant provisions of the RE Regulations, as reproduced above, even if the parties intend to enter into a PPA under long term arrangement, the developer shall be eligible to a rate of Rs. 2.95 per kWh only, which shall be subject to adjustment in accordance with relevant orders of the Commission under which the rate of Rs. 2.95 per kWh was determined under the HPERC (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007. In view of the express provisions in the RE Regulations, the decision rendered by the Hon'ble APTEL in M/s Batot Case (Supra) as relied upon by the petitioner, is also not applicable in the present case. Hence we find no reason to interfere with the Respondent Board's impugned letter dated 11.04.2014, now sought to be quashed and set aside.

In view of the above findings and foregoing discussion, we conclude that this petition is not maintainable. The petition is disposed of accordingly.

--Sd/-
(Bhanu Pratap Singh)
Member

--Sd/-
(S.K.B.S. Negi)
Chairman