

BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION
SHIMLA

In the matter of :-

M/s Leond Limited
Skipton Villa, The Ridge
Shimla, HP
through Sh. Arun Kumar its
Authorised Signatory

....Petitioner

Versus

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

....Respondents

Petition No. 8 of 2018

(Decided on 30th June, 2018)

CORAM

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

**BHANU PRATAP SINGH
MEMBER**

Counsels: -

for petitioner:

Sh. Ajay Vaidya, Advocate

for respondents:

Sh. Kamlesh Saklani
(Authorised Representative)

ORDER

(Last heard on 26.05.2018 and Orders reserved)

This petition has been filed by M/s Leond Limited having its registered Office at Skipton Villa, The Ridge, Shimla, HP, through Sh. Arun Kumar S/o Late Shri Kamleshwar Pandit, its Authorised Signatory (hereinafter referred as “the Petitioner”), who is operating and maintaining the LEOND HEP of (1.00MW), subsequently enhanced capacity of (2.00MW), located in Distt. Kangra (HP)(hereinafter referred as “the Project”)

2. The petitioner has moved this petition under Section 94 (1) (f) of the Electricity Act, 2003(hereinafter referred as “the Act”), read with regulation 45 of the Himachal Pradesh Electricity Regulatory Commission (Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2017 (hereinafter

referred as “ the impugned Regulations”), seeking review of the impugned Regulations stating that-

- (a) the objections and suggestions, which were put forward by the petitioner has not been dealt with by a speaking and reasonable order and the same has resulted in prejudice to the petitioner’s interest.
- (b) the petitioner executed the PPA with the Himachal Pradesh State Electricity Board Ltd. on long term basis in respect of Leond 2 MW SHP on 29th September, 2017. The petitioner had signed the IA with HP Govt. in respect of Leond SHEP (2MW) on 15.02.2012 and due to delay in obtaining the different clearances from Govt., the commissioning of the Project was delayed and finally the project was commissioned on November, 2017. It is further submitted that the petitioner Company has till date invested more than Rs. 19.50 Crores in developing the project;
- (c) the petitioner could not have achieved the COD due to the fact that when clearances are not with the petitioner, the construction work of the project was not possible and it is evident from the various documents that petitioner has taken every step to complete the project in time, but the facts and circumstances will demonstrate that it is on the part of other Government Departments that the petitioner’s project could not start in time.
- (d) the petitioner has raised the objections against the provisions of the impugned regulations as under:-
 - (i) Regulation 26(2): This Commission has allowed post tax Return on Equity of 17 %. CERC has allowed 14% ROE with grossing up with MAT which works out to 17.56%. CERC has worked out only one tariff without AD benefit for SHPs considering that SHPs are not allowed the AD benefit. But the Commission has not considered this fact and states that AD benefits would not be adjusted. When it is not available to SHPs as such it cannot be considered as adjusted;
 - (ii) Regulation 29: It is stated that the normative tariff determined will be inclusive of all taxes and duties whereas the CERC allows it as exclusive of all taxes and duties;

- (iii) Regulations 34: The Normative Capital Cost as specified herein is very much on the lower side and is totally unjustified in view of the costs incurred by recently commissioned projects;
- (iv) Regulations 35 and 36; these regulations provide for the Free Energy accounting in Net Saleable Energy and determination of Tariff. The regulations provide that the max quantum of free energy in any year will be limited to 13% (12% +1%). Developers had requested for adjustment of year wise free energy with lower rate of free power in initial years to repay debt and agreed for higher rate of free power in the last few years so that the quantum to be received in 40 years remains the same and GoHP had agreed to their request. However, the Commission has wiped out the gain in staggering of free power;
- (v) Regulations 39: This Commission has retained the O&M charges of Regulations 2012 with annual escalation which are less than that of CERC rates;
- (vi) The parameters of 1% loss clubbed for auxiliary consumption and transformation loss for SHPs upto 5MW capacity is on lower side because in SHPs upto 5MW capacity it has been observed to be more than 2%;
- (vii) Energy Loss of 0.7% of the net generation in Regulation 38(1) is on lower side, transmission losses upto inter connection point are 2% as per CEA norms. It is submitted by the petitioner that this parameter should be kept as 2% for losses in project lines;
- (viii) the Assam Electricity Regulatory Commission is giving a tariff of Rs. 4.91 for SHPs upto 5MW and Rs. 4.14 for projects above 5MW to 25MW.
- (ix) the provisions made in the draft regulations for linking applicability of new tariff under these regulations with the date of signing of IA may be deleted. The control period should be as 01.04.2017 instead of 01.10.2017.

3. That the respondent has filed short reply under which the maintainability of the petition has been disputed inter alia on the following grounds: -

- i) that the first Implementation Agreement (IA) between Government of Himachal Pradesh and the petitioner (2.00MW) SHEP on dated 15.02.2012 and the supplementary implementation agreement stands signed between the parties supra on 21.04.2017. After the approval of the Power Purchase Agreement (PPA), vide order dated 24.08.2017 in petition No. 41 of 2017 under Regulation 2012, the same stands executed between HPSEBL and Leond Hydro Power (P) Limited on dated 29.09.2017;
- ii) that the present petitioner has been granted tariff in accordance with the Himachal Pradesh Electricity Regulatory Commission (Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination), Regulations, 2012 keeping in view the regulations in the *strict senso* and the project of the petitioner is *ifso facto* covers under the regulations, 2012;
- (iii) in view the facts and circumstances narrated herein above, the present petition filed by the petitioner is not maintainable and deserve to be dismissed at this stage.

4. The petitioner has prayed that the impugned Regulations may be modified/amended to the extent that these do not apply to the project of the petitioner and further to hold that petitioner's project will be governed by the impugned Regulations. That the Himachal Pradesh Electricity Regulatory Commission (Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2012, specified norms and other provisions for the Renewable Energy projects for the control period extending upto 30.09.2017 and thus it become necessary to put in place the new regulations commencing from 01.10.2017.

5. The Commission in exercise of the power conferred under Section 61, sub-section (1) of Section 62, clauses (a),(b) and (e) of sub-section(1) of Section 86 and clause (zd) of sub-section(2) of section 181 of the Act, published the draft HPERC (Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination), Regulations, 2017 on 19.08.2017 in the Rajpatra Himachal Pradesh accordingly.

6. As required vide sub-section (3) of the Section 181 of the Act, read with sub-regulation (5) of regulation 16 of the HPERC (Conduct of Business) Regulations, 2005 and rule 3 of the Electricity (Procedure for Previous Publication) Rules, 2005, the Commission invited public objections and suggestions by way of insertions in two Newspapers i.e. “Amar Ujala” and “The Tribune” on 20th August, 2017 and the full text of the draft RE Regulations, 2017 alongwith Explanatory Memorandum thereon, was also made available on the Commission’s website www.hperc.org. A time of 21 days was allowed for filing objections and suggestions in relation to the said draft RE Regulations, 2017. Subsequently a public hearing was held on 16.09.2017, wherein many stakeholders requested the Commission for adjournment of the hearing to enable them to present their view points in a better way. Taking into consideration the request for adjournment of the public hearing by the stakeholders, the Commission decided to conduct another public hearing on the subject matter. Accordingly, the Commission again invited the fresh/additional public objections and suggestions by way of insertions in two Newspapers i.e. “Times of India” and “Danik Bhaskar” on 20.09.2017 and extended the filing/submission date of objections/ suggestions upto 29.09.2017 and subsequently second public hearing was held on 07.10.2017.

7. The Commission received comments/suggestions on the draft RE Regulations, 2017 from stakeholders including the petitioner Company. During the public hearings, the stakeholders and their representatives also presented their views.

8. This Commission after considering the objections received and also the objections raised in the public hearing and in exercise of the powers conferred by Section 61, Sub-section (1) of Section 62, clause (a), (b) and (e) of Sub-section (1) of Section 86 of Clause (zd) of Sub-section (2) of Section 181, of the Electricity Act, 2003 made the impugned Regulations i.e. the Himachal Pradesh Electricity Regulatory Commission (Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2017.

9. Through this petition, the petitioner has now sought the amendment/modification in the regulations, on the ground that-

- (a) the project of petitioner was not completed due to non-availability of clearances from various Departments; not within its control;
- (b) the impugned regulations are at variation with the CERC Regulations.

10. The issue raised at sub-para (a) of the preceding para of the Order is the project specific issue. The petitioners have not been able to show that there has been a problem which is industries wide and spread over the whole State or major part of the State, necessitating the amendment/modification in the regulations. There cannot be a general Order for addressing issues which are specific to some individual project developers. The Apex Court in its judgment delivered in **Gujarat Urja Vikas Nigam Ltd. Vs. Solar Semiconductor Power Company (INDIA) Private Limited 2018 ELR (SC) 32** has observed that, if some of the developers could not complete the projects, it is not adequate justification why the regulations should be modified to give relief to some of the developers. This becomes more anomalous especially when a discussion paper has already been made for making the regulations and public hearing has already been completed.

11. With the regard to the issue raised in sub-para (b) preceding para 9 of this Order, it is pointed out that in accordance with the Electricity Act, 2003 even though the State Commission, while specifying the terms and conditions for the determination of tariff, shall be guided by the principles and methodologies specified by the Central Commission for determination of tariff applicable to generating companies, yet the State Commissions have the power to frame their own regulations in this regard. It is, therefore, not mandatory for the State Commission to follow the CERC Regulations.

Section 181 (2) of the Act gives powers to the State Commission to frame regulations specifying terms and conditions for determination of Tariff under Section 61 of the Electricity Act, 2003. Similarly, Section 178(2) of the Electricity Act, 2003 gives powers to the Central Commission to frame regulations specifying terms and conditions for determination of Tariff under Section 61 of the Electricity Act, 2003. The powers of Central Commission under Section 178 and powers of State Commissions under Section 181 are independent of each other. Section 61 of the Electricity Act, 2003 requires the Appropriate Commission to specify terms and conditions for determination of Tariff and while doing so it shall be, inter alia guided by the principles and methodologies specified by the Central Commission. If the intention of the legislature was that the State Commission would adopt the provisions of the regulations framed by the Central Commission, the legislature would have used the term 'shall follow' rather than the term "shall be guided by" in Section 61 of the Electricity Act, 2003, the same principle has been laid down by **the Appellate Tribunal for Electricity in case of Haryana Vidyut Prasaran Nigam Vs. Haryana Electricity Regulatory 18 April, 2012, Judgment in Appeal No. 102 of 2011 cited in para 7(e) of the**

Appellate Tribunal’s judgment dated 04/12/2015–Chattishgarh State Power Distribution Co. Ltd, Raipur v/s Chattishgarh State Electricity Regulatory Commission 2016 ELR (APTEL) 0357 and the relevant extract is reproduced below:

“ As pointed out earlier in paras 5 and 6 above, once the State Commission have notified its Regulations in accordance with the provisions of the Act, the Central Commission’s Regulations would have no relevance in the matter and the State Commission would have to follow its own Tariff Regulations for determination of Tariff for licensees and generating Companies.....

The crux of the above discussions is that the State Commissions are independent statutory bodies having full powers to frame its own Regulations specifying terms and conditions for determination of Tariff and once such Regulations are notified, the State Commission is bound by these Regulations.”

12. The Commission has accordingly framed its own regulations for the purpose by taking into account the various State specific situations as well as the provisions made in the CERC RE Tariff Regulations, 2017 after duly balancing the consumers’ interests in the State and the need for promotion of generation of electricity from renewable sources and also to encourage efficiencies. Since the regulations framed by the Commission and those specified by the CERC are applicable under different situations, the question of having two different tariff plans for a particular State/Region does not arise. The Commission otherwise also observed that there are not many SHPs in the State which may, in actual practice, be governed by the CERC Regulations, 2017.

13. The Commission further observe on scrutiny of this petition finds that-

- (a) the contents of this petition are factually incorrect. In the description of the parties, read with supporting affidavit and copy of Authorization (Annexure P-1) Sh. Arun Kumar is the authorised signatory of the petitioner Company and per Implementation Agreement (Annexure P-3), the petitioner Company, having registered office at Skipton Villa, the Ridge, Near Ritz, Shimla, is authorised to build own and operate the LEOND HEP of 1.00MW (subsequently enhanced capacity of 2 MW) located in Distt. Kangra, HP. But in the first opening para of the petition the petitioner Company is shown to have its registered office at 6, Shiv-Wastu, Tejpal Scheme, Road No-5, Vile Parle (East) Mumbai-400057 and the objective of the petitioner Company is shown to build own and operate Raura Hydro Electric Project in Distt. Kinnaur (HP); Further Sh. V.S.V.A. Rao has been shown its Authorised signatory;

- (b) the very opening para of the petition reads as under.-
“Application under Section 94(1)(f) of the Electricity Act, read with clause 45 of the Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations”.

From this it can be inferred that the petition is designed-

- (i) to seek amendment/modification in the HPERC (Promotion of Generation from Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, stating that the Commission has not considered the objections raised and suggestions made, in the public hearing and disposed of the same by a non-speaking order, without consideration of the relevant facts pleaded by the petitioner. The petitioner’s statement is misleading and he has not intentionally annexed the copy the Commission’s Order disposing of the public objections, wherein all the objections raised by the petitioner has been duly considered;
- (ii) on the one hand the petitioner is questioning the legality of the Regulations and on the other hand he is praying for relaxation under regulations 45 of the Regulations (ibid), without making out a specific case.
- (c) that the petitioner Company has concealed the fact that it has also challenged the validity of the aforesaid regulations by seeking judicial review under Article 226 of the Constitution of India, by way of a writ petition No. 1339 of 2017, which is pending for adjudication, before the Hon’ble High Court. In other words, the petitioner Company, being aware of the proper procedure, has deliberately filed this petition seeking modification/amendment in the Regulations;
- (d) that this Commission has unnecessarily been pleaded as respondent and the stakeholders have not been impleaded.

14. The framing of the Regulations is a legislative jurisdiction; making of the relaxation/removal of difficulties orders is an administrative function. The regulatory/adjudicatory process and the Legislative process cannot be inter-mingled. This

Commission has repeatedly laid down in various cases e.g. **petition No. 90 of 2015- M/s Bhawani Renewable Energy Pvt. Ltd. Vs. HP State Electricity Board & Others, decided on 19.11.2015, and Petition Filing No. 6 of 2016- The Himalaya Power Producers Association Vs. HP State Electricity Board Ltd. decided in 03.08.2016**, that there is no requirement to file a petition for making amendments in regulations or invoking the executive power to relax/remove difficulties;

15. In light of the above discussion, this Commission declines to entertain this review petition as the regulations/adjudicatory process and the Legislative process cannot be intermingled.

This petition is disposed of accordingly.

--Sd/-
(Bhanu Pratap Singh)
Member

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