

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

In the matter of:-

The Government of Himachal Pradesh
Through Pr. Secretary (MPP&Power)
Shimla -171002.

...Applicant

V/s

- (1) M/s Himachal Small Hydro Power Association
Office at B-99, Sector-3, New Shimla.

...Respondent No.1

- (2) The Himachal Pradesh State Electricity Board Ltd.
Vidyut Bhawan, Kumar House, Shimla-171004

...Respondent No.2

AND

The Himachal Pradesh State Electricity Board Ltd.
Vidyut Bhawan, Kumar House, Shimla-171004

... Applicant

V/s

- (1) M/s Himachal Small Hydro Power Association
Office at B-99, Sector-3, New Shimla.

...Respondent No.1

- (2) The Government of Himachal Pradesh
Through Pr. Secretary (MPP&Power)
Shimla -171002.

...Respondent No.2

Review Petition Nos. 81 and 83 of 2011

(Decided on 24th Oct., 2011)

CORAM
Subhash Chander Negi
Chairman

Counsels:

For the Govt. of H.P. and the
HPSEBL applicants in
Review Petition Nos. 81 and
83 of 2011

Sh. M.G. Ramachandran
Sr. Advocate
with Sh. Anand Ganesen
Advocate

For the Himachal Small Hydro
Power Association respondent/
defendant in Review Petition
Advocate

Sh. Arjit Maitra
Sr. Advocate
With Sh. Ajay Vaidya Nos. 81 and 83 of 2011

Order

(Last heard on 3.9.2011 and orders reserved)

These two review petitions have been moved challenging the Order dated 24.1.2011 passed by this Commission in Petition No. 89/2010 filed by the Himachal Small Hydro Power Association, an Association of Independent Power Producers, seeking the orders of this Commission to harmonise the tariff of the 5 MW to 25 MW segment in line with the orders of the Central Electricity Regulatory Commission (in brevity referred as “the CERC”) taking into account that a number of other State Electricity Regulatory Commissions have undertaken a similar task, post enunciation of a new tariff regime by the CERC.

2. In response to the said petition it was contended by the Government of Himachal Pradesh vide its letter dated 16.7.2010, conveyed to the Commission that the State Government has changed its Policy on power procurement and execution of the Power Purchase Agreements (PPAs), in relation to Small Hydro Electric Projects upto 5 MW, and henceforth the Himachal Pradesh State Electricity Board Ltd. (in brevity referred as “HPSEB Ltd”.) and the Independent Power Producers (in brevity referred as “IPPs”) will enter into the Power Procurement Agreements (PPAs) with mutual consent and approach the

Commission for tariff fixation and accordingly directed the Commission, under section 108 of the Electricity Act, 2003, (in brevity referred as “the Act”) -

- (a) to discontinue henceforth the practice of fixing of uniform levelised tariffs and the tariff petitions by the concerned parties should be on a project specific basis in future;
- (b) not to revise the rate of Rs. 2.50 p.u, the pre-determined base rate, whenever approached by way of revision petition, rather the Commission should resort to project specific tariff fixation;
- (c) all cases, where rates have been enhanced to Rs. 2.87 p.u should also be considered for project specific tariff fixation.

3. This Commission vide its impugned Order dated 24.1.2011, passed in **Petition No. 89/2010-Himachal Small Hydro Power Association V/s Government of H.P. and others** took the judicial notice of the aforesaid directions and para 4 thereof concluded as under:-

“4. The Commissions have been set up as a independent body to carry out statutory functions. It is well settled that in the discharge of such functions it cannot be directed to decide matters in particular manner. The word used in Section 108 is “guided” and not “bound”. To guide only means to show the way. It is not a ground which has to be obeyed. The Commission will always be happy to take into account the directions of the Government, but the manner of such doing has to be left to the Commission. If the Commission has to perform a statutory function or has to discharge a statutory obligation, how can it do so, if it follows any such direction, which takes away its basic function from it. It is well known that directions issued to the quasi-judicial authority which place a fetter as to how that authority is to be exercised, would be ultra vires and therefore, void.”

4. The State Government, in the present review petition No. 81 of 2011, has again urged that considering the nature and scope of section 108 of the Act, **the decision of the Hon’ble APTEL dated 18.9.2009, rendered in appeal Nos. 50 of 2008 M/S Techman Infra Ltd V/s HPERC and Ors; and Appeal No. 65 of 2008 - HPSEB V/s HPERC and Ors; 2009 ELR (APTEL) 1025, and also the Supreme Court decisions rendered in Kusuman Hotels (P) Ltd V/s KSEB (2008) 13 SCC 213; and Real Food Products V/s Andhra Pradesh State Electricity Board (1995) 3 SCC 295; Pawan Alloys V/s Uttar Pradesh State Electricity Board (1997) 7 SCC 251; Naresh Kumar Madan V/s State of Madhya Pradesh (2007) 4 SCC 766;** the nature of the Policy Directive issued and the Scheme of the

Act, the impugned Order of the Commission dated 24.1.2011 is contrary to the position of law and suffers from errors apparent on the face of record. Further the State Government contends that the State Government has exercised sovereign role in the best interest of the consumers in the State. It is for the State Government to decide in public interest the policy with regard to the utilisation of the resources in the State. The projects being developed in the State have unique features including environmental impact, relief and rehabilitation measures, forest clearances, safety measures, impact on water availability and fisheries etc. All such features cannot be generalised for all the projects and even the costs, expenses and obligations of the Government as well as the project developers will greatly vary in all such cases from project to project. The matters of policy including the resources to be utilised by the State are within the decision making power of the State Government and such decisions are mandatory in nature. Thus the Regulations of the Commission are to be consistent with the policy decisions of the State Government. Furthermore, the Central Commission Regulations only deal with the macro level of the norms and parameters and are not even State specific. The Central Commission Regulations do not make generic tariff to be fixed in all cases but it is only an indicative tariff that can be determined. The said regulations are not based on each individual State specific parameters. In such circumstances, when sections 61 and 62 of the Act require the Commission to determine the tariff for a generating Company having regard to optimum investment, protection of consumer interest, recovery of only reasonable costs and expenses, providing competition etc. the Commission ought to adopt the methodology prescribed in policy directives.

5. Apart from the above, it is also submitted on behalf of the State Government that insinuations and critical observations made by the Commission in the impugned order dated 24.1.2011, against the State Government are totally unwarranted, needless, unprovoked and uncalled for. Such observations and insinuations are contrary to comity of the functions vested in the State Government and the Commission under the Act. Thus all such unwarranted allegations, insinuations and observations are required to be expunged. It is further urged that the HPSEB Ltd, apart from paying the tariff, is also required to bear the

transmission costs (wheeling and losses) till point of sale. Depending upon the location, the transmission losses and charges involved, these costs would vary and for more remote locations, the cost would be much higher even upto Rs. 2 p.u only for transmission of electricity. There were also issues of not having transmission arrangements in place and thus paying for deemed generation charges without even consuming electricity. As a result, the cost of this power, compared to current level, would not be competitive for purchase and consequently, the compulsory purchase obligations would have the effect of increasing the consumer tariff within the State. The determination of project wise tariff, i.e. the tariff being reflective of the costs and expenses incurred by the particular project is essential to ensure that the consumers in the State do not pay unreasonably high tariff on account of compulsory purchase obligation of the HPSEB Ltd. and at the same time the project developer should only receive reasonable cost for generation and sale of electricity. The Commission has not dealt with the above aspect in the impugned order dated 24.1.2011, which is an error apparent on the face of the record. Further, the binding decision of the Hon'ble Appellate Tribunal with regard to the project wise tariff determination and the decisions of the Hon'ble Supreme Court in regard to the nature of policy directives needs to be considered and there are sufficient reasons for review of the impugned order dated 24.1.2011.

6. In the other review petition No. 83/2011, the HPSEB Ltd. has more or less reiterated the submissions made by the State Government and has too challenged the impugned order almost on the similar grounds urged on behalf of the State Government in the review petition No. 81/2011.

7. The Learned Sr. Advocate Sh. M.G Ramachandran, appearing on behalf of the review applicants has also pointed out that in the impugned order, especially in para 48, the Commission has fixed, for projects of exceeding 5 MW capacity i.e. the 5 MW to 25 MW projects, the provisional rate equivalent to the rate fixed for the projects upto 5 MW capacity as given by its orders post APTEL decision, i.e. @ Rs. 2.95 p.u, without harmonisation and undergoing tariff fixation exercise as envisaged under the Act and the regulations framed thereunder. Further the Commission has wrongly assumed that starting from 1st July, 2011, the generic tariff as specified by the CERC in its Order dated 3rd December, 2009 as

applicable to the State of Himachal Pradesh, shall be valid for all projects in that range which fulfill the necessary conditions prescribed by the CERC Order (ibid). These are the sufficient grounds for revisiting the impugned order. Both these issues although have not been raised as the grounds in the review petitions, but these issues have been raised during the course of arguments.

8. The Himachal Small Hydro Power Association, the respondent in both the review petitions, has vehemently opposed the review petitions and denied that there are sufficient reasons for the Commission to review its order dated 24th January, 2011. It is strenuously urged that the review petitions suffer from palpable legal infirmities and are misconceived, and, deserve to be dismissed on the following grounds:-

- (i) that the applicants themselves admit that the “impugned order” itself did not determine the tariff applicable to Small Hydro Projects. The Regulations would have to be notified by the Commission in regard to the purchase of electricity by the distribution licensee i.e. the HPSEB Ltd. from renewable sources incorporating the terms and conditions to be decided by the Commission. The present review petitions have been filed only to preempt the actions or functions that the Commission may undertake in future;
- (ii) that the applicants have no locus standi to file review petitions because mere observations made in the impugned order against the illegality and ill effects of the State Government Policy, purported to be issued under section 108 of the Act, cannot be challenged or reviewed;
- (iii) that alternate remedy is inbuilt in section 111 of the Act and without exhausting it the applicants should not have rushed to this Commission. The Hon’ble APTEL has held in its judgment dated 18th Sept., 2009 passed in **M/s Techman Infra Ltd. V/s HPERC and ors 2009 (ELR) APTEL 1025** that the promoter and the Board shall be entitled to apply for a site specific fixation of Capital Cost in case either of them find the normative Capital Cost to be unsuitable for the project. The same principle may even be followed

by the Commission, as and when it determines the generic tariff for Small Hydro Projects of the capacity of 5 MW to 25 MW. If either the HPSEB Ltd. or the State Government is in any way aggrieved by the generic tariff as and when determined or when the promoter or the HPSEB Ltd. apply for the site specific fixation of Capital Cost, in case either of them find the normative Capital Cost to be unsuitable for the project, at that point of time the HPSEB Ltd. or the State the Government can file a review or challenge the respective decision before the Appellate Tribunal for Electricity;

- (iv) the charges or transmission losses are applicable even in case of buying of power from conventional sources. Therefore, these charges/transmission losses are not relevant to the matter of fixation of generic tariff vis-à-vis project specific tariff. These charges, being unavoidable, are to be recovered by the Utility in its ARRs. The Act provides that the STU/Distribution Licensee are bound to provide evacuation arrangements to the IPPs within their State. Further the component of transmission charges/losses for evacuation and sale of renewable power is less than 1% of the total obligation on this account. Being minuscule these are not worth consideration for the purposes of review petitions;
- (v) that the reasons put forth by the applicants are manifestly erroneous. The decisions of the Hon'ble Supreme Court on the nature and scope of policy directive, as quoted by the State Government, are not applicable to the directions under the Electricity Act, 2003. The decisions, of the Hon'ble Supreme Court, as quoted by the State Government, are in regard to Section 78-A of the Electricity (Supply) Act, 1948, which now stands repealed under section 185(1) of the Electricity Act, 2003. The Statement of Objects and Reasons of the Electricity Act, 2003 clearly and expressly makes mention for distancing of the Government from regulatory functions. No direction of the State Government can fetter the statutory functions of the Commission and if it does purport to do so then such a direction of the State Government would be ultra vires of the Act. The State Government

has no jurisdiction under law to direct the Commission to discontinue fixation of uniform levelised tariff or that the tariffs are to be determined on a project specific basis;

- (vi) that the impugned order is not contrary to the decision of the Hon'ble Appellate Tribunal, as the said Tribunal did not strike down or set-aside or interfere with the order that there should be generic tariff for projects of upto 5 MW, as specified by the Commission in its order dated 18th Dec., 2007. In this context, the State Government's statement is misleading;
- (vii) that both review petitions are outside the scope of review proceedings under the law laid down by the Supreme Court;
- (viii) that there are no grounds, which have been raised by the present review applicants which were not raised by them during the proceedings and hearings of the petition No. 89 of 2010. None of the suggestions and objections of the present review applicants remain to be dealt with. The Commission, while passing the impugned order, has dealt with and answered each and every suggestion, objection and opposition and issued the detailed reasoned and specific order. The State Government has failed to make out any ground which could be sustained for not having in place a generic tariff based on the Central Commission's framework. The Commission considered the need for harmonisation of regulations across various States based on the already conducted detailed studies and investigation by the Central Commission on State and region specific basis. Nothing new has been pointed out by the present review applicants, which could not be pointed out by them at the time, when the order dated 24.1.2011 was passed. No error, whatsoever, that is permissible under law in review proceedings, has been shown by the present review applicants in their review petitions;

- (ix) that the review can not be appeal in disguise as the Hon'ble Supreme Court has held in number of its judgments that the decisions can not be corrected in review proceedings. The review petitions are to be confined to the scope and ambit of Order 47 Rule 1 the Code of Civil Procedure.

9. Sufficient opportunity has been given to the parties to address, in extenso, the issues involved in this case. Sh. M.G. Ramachandran, the Learned Senior Counsel for the review applicants has cited various decisions of the Apex Court, has advanced arguments and has made written submissions, in support of his contentions. Per Contra Sh. Ajay Vaidya, Advocate representing the Himachal Small Hydro Power Association, the respondent in both the review petitions, has also advanced counter arguments/written submissions. This Commission has taken into consideration the said submissions and counter-submissions, while determining the issues involved, in the relevant subsequent paras of this Order.

10. Before proceeding to consider the applications for review it must be said, at the outset, that this Commission must adhere to the well settled principles of review. The Commission, therefore, is to spell out the scope of the power of the Commission to review the Order. The scope and authority of review is derived from the section 94(1)(f) of the Electricity Act, 2003 and regulation 63 of the Himachal Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2005, read with section 114 and Order 47, Rule 1, of the Code of Civil Procedure, 1908 ("CPC"). A person aggrieved by an order, from which no appeal has been preferred or no appeal is allowed, may prefer a review on the following grounds:-

- (a) discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced at the time when the order was passed or made, or
- (b) mistake or an error apparent on the face of the record, or
- (c) any other sufficient reason.

11. As mistake(s) or error(s) apparent on the face of record cannot be defined precisely and exhaustively and there is an element of indefiniteness inherited in these terms, it is left to the discretion of the Court to determine the same judicially on the basis of facts of the case. However, the error must be one that speaks for itself and is difficult to be ignored. However, the exercise of review is not permissible in the case of an erroneous order so as to render the order as “reheard and corrected”. The law has made clear distinction between what is an erroneous decision and an error apparent on the face of the record. While the first can be corrected by only a higher forum, the latter can be corrected by exercise of power of review. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all errors committed by the Subordinate Court.

12. The scope of review has been settled by the Hon’ble Supreme Court in the case of **Parsion Devi V. Sumitri Devi, (1997) 8 SCC 715; Aribam Tuleswar Sharma Vs Aribam Pishak Sharma AIR 1979 SC 1047; Raja Shatrunji V. Mohd. Azmat Azim Khan (1971)2SCC 200; Smt. Meera Bhanja Vs. Nirmala Kumari Choudhury AIR 1995 SC 455; and has also been followed by the Appellate Tribunal for Electricity in its orders (dated 17.11.2006) in Appeal no.40 of 2006; dated 23.11.2006 in Appeal Nos. 80 to 197 of 2006; and Appeal No.226 of 2006; and dated 31.10.2007 in appeal Nos. 159 of 2005; 162 and 167 of 2006. This Commission has further followed the verdicts of the Hon’ble Supreme Court and the APTEL in this Commission’s decision’s dated 4.01.2008, rendered in review petition No. 135/07 – M/s HIM Steels Ltd; V/s H.P. State Electricity Board; dated 2.9.2008 in review petition No. 120 of 2008; and dated 24.2.2009 rendered in review petition No. 205/08 – HPSEB V/s Padamvati Steels Ltd.**

13. In **Aribam Tuleshwar Sharma V/S Aribam Pishak Sharma (AIR 1979 SC 1047)**, followed in case **Meera Bhanja V. Smt. Nirmal Kumari Chaudhary (AIR 1995 SC 455)**, and in **Haridas V/S Usha Rani Banik (AIR 2006 SC 1634)**, it has been reiterated that an error apparent on the face of the record of acquiring jurisdiction to review must be such an error which may strike one on a mere looking at the record and would not require any long drawn process of reasoning. The following observations in connection with an error apparent on the face of the record in the case of **Satyanarayan Laxminarayan Hedge V. Mallikarjun Bhavanappa Tiruymale (AIR 1960 SC 137)** are also noted:-

“An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the Superior Court to issue such a writ.”

14. Relying upon the judgments in the cases of **Aribam’s (supra) and Smt. Meera Bhanja (supra) the Hon’ble Supreme Court in the case of Parsion Devi V. Sumri Devi (1997(8)SCC 715)** has observed as under: -

“Under Order XLVII, Rule 1, CPC a judgment may be open to review inter alia, if there is a mistake or an error apparent on the face of the record. An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order XLVII, Rule 1, CPC. In exercise of the jurisdiction under Order XLVII, Rule 1, CPC it is not permissible for an

erroneous decision to be reheard and corrected. A review petition, it must be remembered, has a limited purpose and cannot be allowed to be an appeal in disguise.”

15. To sum up, 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 one 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 decision was erroneous on merits.

16. Now with the factual and legal background, as set out in the foregoing paras of this Order, the Commission proceeds to examine the issues raised in the present review petitions before this Commission.

Policy Directions vis-à-vis the Tariff fixation

17. Sh. M.G. Ramachandran, Sr. Advocate, representing the State Government and the HPSEB Ltd, has addressed the issue regarding the maintainability of the review petition by citing in his favour Apex Court decisions rendered in :-

- (i) **Kusumam Hotels (P) Ltd. Vs KSEB(2008)13SCC 213,**
- (ii) **Real Food Products Vs. AP.S.E.B (1995) 3 SCC 295.**
- (iii) **Pawan Alloys Vs. U.P.S.E.B (1997) 7 SCC 251.**
- (iv) **Naresh Kumar Madan Vs State of H.P. (2007) 4 SCC 766,**
- (v) **DERC Vs BSES Yamuna Power Ltd (2007) 3 SCC 33.**

18. Sh. Ajay Vaidya, Advocate representing, the Himachal Pradesh Small Hydro Association the respondent, has strongly refuted the arguments addressed on behalf of the petitioners, by stating that the decisions relied upon by the Learned Counsel, representing the review applicants, are distinguishable and are not relevant in the present context, especially the provisions of the Electricity Act, 2003, and those too stand considered in the subsequent decisions dated 11.2.2011 of the **Delhi High Court in Nand Kishore Garg and Another Vs. Govt. of NCT, (2011 ELR (Delhi), 745); and the APTEL judgment dated 31.1.2011 in Polyplex Corporation Ltd Vs. UERC (2011 EIR (APTEL) 0195).**

19. The points in relation to the policy directive, canvassed before the Commission at the time of hearing of petition No. 89/2011, have been re-canvassed in the review petitions. The review applicants want this Commission to reconsider the issue afresh. A review cannot be equated with the original hearing of a case. There are no grounds which have been raised by the present review applicants, which were not raised by them during the proceedings and hearings of the petition No. 89 of 2010. This Commission, while passing the impugned Order, has already dealt with and answered each and every suggestion, objection raised by the parties and has issued the detailed reasoned and specific Order.

20. It would be worthwhile to make reference to various decisions of the Hon'ble Apex Court and the superior forums i.e. APTEL referred to in the succeeding paras of this Order.

21. The legal position that emanates from verdicts of the Apex Court and Appellate Tribunal for Electricity is that the Legislature has conferred regulatory power to determine the tariff on a regulatory body. It has a sacrosanct purpose. In **WBERC V/s CERC 2002 8 SCC 715; AIR 2002 SC 3588** it is concluded that the State Commission is the sole authority to determine the tariff, of course, as per the procedure in the Act. The word "Tariff" has not been defined in the Act. "Tariff" is a cartel of commerce and normally, it is a book of rates. It will mean a schedule of standard prices or charges provided to the category or categories of customers specified in the Tariff. **(Para 16. BSES Ltd. Tata Power Co. (2004)**

I SCC 195; Paras 27 and 28 of judgment dated 8.7.2010 in Transmission Co. of AP V/s Sai Renewable and others 2010 ELR SC 0697).

22. If one takes “Tariff” as a subject matter one finds that under Part VII of 2003 Act, actual determination/fixation of tariff is done by the Appropriate Commission under section 62, whereas, section 61 is the enabling provision for framing regulations containing generic propositions in accordance with which the Appropriate Commission has to fix the tariff.

23. In this context **PTC India Ltd. Vs CERC AIR 2010 SC 1338; 2010 ELR (SC) 0269** highlights the role of the regulatory Commission, which pertains to decision making and specifying the terms and conditions of tariff determination. It would be useful to reproduce a passage therefrom, wherein the Apex Court has held that :-

“17. The term “Tariff” is not defined in the 2003 Act. The term “Tariff” includes within its ambit not only the fixation of rates but, also the rules and regulations relating to it. If one reads section 61, with section 62 of the 2003 Act, it becomes clear that the Appropriate Commission shall determine the tariff in accordance with the provisions of the Act, including the terms and conditions which may be specified by the Appropriate Commission under section 61 of the said Act. If we read section 62, with section 64, it becomes clear that although Tariff fixation like price fixation is legislative in character, the same under the Act is made appealable vide section 111. These provisions, namely sections 61, 62 and 64 indicate the dual nature of functions performed by the Regulatory Commissions viz. decision making and specifying terms and conditions for tariff determination.”

24. The Hon’ble **Supreme Court in its judgment dated 8.7.2010 in Transmission Co of A.P. V/s Sai Renewable Power Ltd. and ors. 2010-ELR SC 0697** has highlighted that the basic policy of both the Central as well as the State Government was to encourage private sector participation in generation, transmission and distribution of electricity on the one hand and to further the objective of distancing the

regulatory responsibilities of the Regulatory Commission from the Government and of harmonising rate, rationalisation of the provisions of the existing laws relating to electricity in India, on the other hand. The Objects and Reasons of the Electricity Act, 2003 are definite indicators of such legislative intent. These Objects and Reasons clearly postulated the need for introduction of private sector into the field of generation and distribution of energy in the State. Efficiency of the performance and economic utilization of resources to ensure satisfactory supply to the public at large is the paramount concern of the State as well as of the Regulatory Commission.

25. From the aforesaid decision of the Apex Court it is explicit that the power available to the Government to issue directions has two restrictions. Firstly, the policy direction has to be on the matters related to electricity in the State including overall planning and coordination. Secondly, all such policy directions have to be issued by the State Government in consonance with the object sought to be achieved by the Act and accordingly should not adversely affect or interfere with the functions and powers of the Regulatory Commission including, but not limited to, determination of structure of tariff for supply of electricity to the consumers.

26. The APTEL in its latest judgment in the **Polyplex Corporation Ltd. Uttrakhand V/S UERC and others dated 31.1.2011 – 2011-ELR (APTEL) 0195**, which is also cited by the Himachal Small Hydro Power Association respondent in their support, has clinched this issue by holding that-

- (a) the tariff Policy is to be notified by the Central Government in consultation with the State Government and the CEA. Thus the State Government has no jurisdiction to issue any policy decision. The State Government being a major Stakeholder, due weightage should be placed on its suggestions, while determining tariff, but not in terms of section 108 of the Act; and
- (b) the State Commission is an independent statutory body, therefore, the policy directions issued by the State Government are not binding on the State Commission. The State Government by

issuing directions to the State Commission cannot curtail the powers of the State Commission in the matters of determination of tariff.

27. In other words the APTEL holds that section 108 of the Act itself recognises that Government Policy is only a guidance to the State Commission. Therefore, the State Commission is not bound by the said policy direction. The guidance available to the State Commission on Tariff matters is from the National Electricity Policy and the Tariff Policy. The State Government cannot issue a policy on tariff matters. The Hon'ble APTEL in its judgment delivered in **M/S Poddar Alloys (P) Ltd Vs Uttranchal ERC and Anr. ELR 2007 (APTEL) 86** has recognized that any direction made by a higher Forum has to be complied with by the lower Forum, otherwise, the hierarchy becomes meaningless as has been held by the Supreme Court in **Tirupati Balaji Developers (P) and others Vs State of Bihar and Ors. AIR 2004 SC 2351**. Thus the functional propriety demands that when the APTEL has given its verdict on an issue, the same is to be considered and implemented by the Commission, and the judicial discipline has to be maintained.

28. The Commission has the jurisdiction to determine the tariff, which takes within its ambit the "purchase price" for procurement of electricity generated by the non-conventional energy developers/generators and the State Government does not have the jurisdiction to issue any policy direction in the matter of tariff, as the guidance available to the State Commission on tariff matters is from the Electricity Policy and the National Tariff Policy and not from the directions of the State Government. If such a policy direction has been issued, it is not binding upon the State Commission, especially when it is inconsistent with the National Policy/Tariff Policy. Section 108 of the Act, which is a general provision, cannot be permitted to override a special provisions relating to tariff as contained in sections 61, 62, read with section 86 (1)(b) of the Electricity Act, 2003. The Apex Court in para 17 in **Transmission Corporation of Andhra Pradesh Ltd and Ans. V/s Sai Renewable Power Pvt. Ltd. Ors, 2010 ELR (SC) 0 697**, has observed that –

“Determination of Tariff is a function assigned legislatively to a competent forum/authority. Whether it is by exercise of legislative or subordinate legislative power or a policy decision, if the Act so requires, but it generally falls in the domain of legislative activity and the Courts refrain from adverting into this arena”.

Further the Apex Court in case of **Narinder Chand Hem Raj and ors. V/s Lt. Governor, Administrator, Union Territory of Himachal Pradesh and ors (reported in (1971) 3 SCC 747)** relied upon in para 38 of its judgment rendered in **PTC India Ltd. V/s CERC 2010 ELR (SC) 0269: AIR 2010 SC 1338** has concluded that no Court can direct a subordinate Legislative body or Legislature to enact a law or to modify the existing law and if Courts cannot direct, much less no Tribunal (or any other authority) under the directive purported to be issued under section 108 of the Act, can do so. However, the APTEL in **Polyplex Corporation Ltd. Uttrakhand V/s UERC and others (Supra)** directs that the due weightage should be placed on suggestions of the State Government, being a major stakeholder, and as such the State Regulatory Commission will have to consider suggestions of the State Government while determining the tariff but not in terms of directions under section 108 of the Act. The word used in section 108 is “guided” and not “bound”. To guide means to show a way and it is not direction to be obeyed.

29. In view of the above detailed discussion, it can be safely stated that the conclusions, in relation to the issuance of the policy directions, already drawn in the impugned Order, which are in consonance with the verdicts of the Apex Court and APTEL i.e. the higher Forum, referred to in the preceding paras of this Order, cannot be corrected or interfered with in the present review proceedings.

Fixation of Provisional tariff for 5-25 MW Projects.

30. The Commission finds some substance in the submissions made, during the course of arguments of these petitions by the Learned Counsel for the review petitioners that the

Commission has fixed, for projects of exceeding 5 MW capacity i.e. 5 MW to 25 MW capacity, the provisional rate equivalent to the rate fixed for the projects upto 5 MW capacity i.e. the rate of Rs. 2.95 p.u. without harmonising and undergoing tariff fixation exercise as envisaged under the Act and the regulations framed thereunder. No tariff can be fixed in vacuum. In the present case the Commission is yet to undertake an exercise for fixation of benchmarks for determination of the generic tariff for the hydro projects exceeding 5 MW capacity, as all the projects upto 25 MW cannot be treated at par. Thus the provisional tariff fixed in relation to projects of 5 MW to 25 MW capacity cannot be considered to be in consonance with the provisions of the Act and the regulations framed thereunder. Thus the error has crept in the impugned Order.

31. Even if the Central Regulations are to be adopted, the Commission, after detailed analysis, was required to adopt the Central Regulations. Section 61 of the Act stipulates that the Commission shall specify the terms and conditions for determination of tariff and in so doing it shall be guided by the principles listed in Clause (a) to (i) of the said section. While section 79 specifies the functions of the Central Commission, section 86 lays down the functions of the State Commission. Section 79, inter alia, provides that the Central Regulatory Commission shall discharge the functions to regulate tariff of the generation companies owned or controlled by the Central Government and the Central Commission is also to regulate the tariff of generating companies, other than those, owned and controlled by the Central Government in case such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State. Similarly, section 86, inter alia, provides that the State Commission shall discharge the functions of determining the tariff for generation, supply, transmission and wheeling of electricity, wholesale or bulk or retail, as the case may be, within the State. Thus sections 79 and 86, besides section 62, cast a mandatory obligation and duty on

the respective Commissions to determine tariff. From the combined reading of sections 61, 62, 79, 86, 178(2)(a) and 181(2)(zc), it is amply clear that though the power to lay the terms and conditions for tariff determination flow from section 61 of the Act, yet principles and methodologies specified by the Central Commission does not become automatically applicable to the tariff determination by the State Commission, unless the Central regulations are adopted by the State Commission. This process involves adoption, after detailed analysis and consideration of the Central Commission regulations and also the fulfillment of requirement of the previous publication i.e. the invitation and consideration of the public objections under sub-section (3) of section 181 of the Electricity Act, 2003.. In the absence of that exercise no assumption can be made that the CERC Order would be applicable to the Small Hydro Projects in this State with effect from 1st July, 2011.

32. In this respect, it is suffice to note that after taking cognizance of the decision of the Hon'ble **Supreme Court in Bahvnagar University V/s Palitana Sugar Mills (P) Ltd; 2003 (2) SCC 111**, the Hon'ble **APTEL in its decision in BSES Rajdhani Ltd V/s DERC and Anr. 2007 ELR (APTEL) 1370** has laid that the Regulatory Commission being a statutory authority exercising statutory powers is required to act in the manner, the statutory provisions of the Act and statutory regulations prescribe. When the Regulatory Commission, a statutory authority, is required to determine tariff fixation in the particular manner and in terms of statutory regulations as well as the provisions of the Act; it shall be done only in that manner or not at all.

33. The Hon'ble Appellate Tribunal in its decision dated 2.4.2009 rendered in **Appeal No. 51 of 2008 –Tamil Nadu Electricity Board Chennai V/s Tamil Nadu Electricity Regulatory Commission 2009 ELR (APTEL) 0412** has held that the failure to adhere to procedure for passing a Tariff Order is error apparent and can be a ground to set aside in review. Thus a mistake on the part of the Commission would include a mistake in the nature of understanding

and may call for review of the impugned order. Further an application for review would also be available if there exists sufficient ground therefor. What constitutes sufficient reasons would depend on the facts and circumstances of the case. The words “sufficient reason” in Order 47 rule 1 of the CPC are wide enough to include a misconception of fact or law by a Court. Thus the assumption that the CERC Order specifying the generic tariff, as applicable to the State of Himachal Pradesh, shall be valid for all projects within the range, as prescribed in the said CERC Order, cannot hold good and the fixation of provisional tariff for projects 5 MW to 25 MW without undertaking harmonizing phase and laying the benchmarks for the purpose cannot be sustained in law.

34. On a careful consideration of the contents of the review petitions, submissions made and the arguments and counter arguments advanced by the Learned Counsels for the parties, the Commission finds-

- (a) that the erroneous decisions, if any, can be corrected by the Appellate Authority and not by the reviewing authority. A review cannot be equated with the original hearing of a case. The points, in relation to the policy directive, canvassed before the Commission at the time of hearing of petition No. 89/2010 have been re-canvassed in the review petitions. The review petitioners want this Commission to reconsider the issue, afresh and in support of the same they have made lengthy submissions for the consideration of this Commission, which is not permissible in the review. While passing the impugned Order, the State Commission has already taken into consideration all facts, circumstances and legal position put forth by the applicants and it has made conclusions thereon after assigning elaborate and appropriate reasons. The Commission, therefore, does not find

merits in considering the issues afresh at the review stage. Accordingly, the Commission rejects the same.

- (b) The scope of review is very limited. The power of review is permissible where some mistake or error apparent on the face of record is found. The error crept in the impugned order, in relation to the fixation of provisional tariff for Small Hydro Projects of 5 MW to 25 MW capacity and application of the CERC Order dated 3rd December, 2009 needs to be rectified.

35. The upshot of the above discussion is that –

- (i) the impugned order has to be sustained, excepting to the extent of applicability of the CERC Order laying the generic conditions for the Small Hydro Projects in the State of Himachal Pradesh and the fixation of provisional tariff of Rs. 2.95 p.u. for the hydel projects having capacity of 5 MW to 25 MW as stated in paras 30 to 33 of this Order.
- (ii) as a consequence and to make it clear the Commission orders following modifications in last two paras i.e. 48 and 49 of the impugned Order with effect from the 24th January, 2011:-
- (a) in para 48.- for the last two sentences appearing in the first portion, “The present period can be suitably covered for the purposes of determination by HPERC by mutatis mutandis application of the CERC Regulations and Tariff Order to be applied from July 1, 2011 on these entities. Six months is sufficient period for the necessary ground work to be done”, and for whole of the second portion, the following shall stand substituted:-

“Though the power to lay the terms and conditions for tariff determination flow from section 61 of the Act, yet principles and methodologies specified by the Central Commission do not become

automatically applicable to the tariff determination by the State Commission, unless the Central Regulations are adopted. This process involves adoption after detailed analysis and consideration of the Central Commission Regulations. This Commission is yet to undertake an exercise for fixation of benchmarks for determination of tariff including generic tariff for the hydro projects exceeding 5 MW capacity, as all the projects upto 25 MW cannot be treated at par. Thus the fixation of provisional tariff in relation to projects of 5 MW to 25 MW capacity, therefore, cannot be in consonance with the provisions of the regulations framed thereunder. Thus the contention raised by the petitioners to provide for the provisional tariff for projects from 5 MW to 25 MW capacity cannot be acceded to"; and

(b) in para 49, item (iii) shall stand omitted.

36. Before parting with this case, this Commission would like to make it clear that this matter was last heard on 3.9.2011 and as prayed by Sh. Ajay Vaidya, Advocate, appearing for the respondent, 2 weeks time was allowed to make counter written submissions in response to the written submissions made by Sh. M. G. Ramachandran the Senior Advocate, for the review applicants. The said counter written submissions, on behalf of the respondent have been filed on 16.9.2011. The detailed Order had to be made out and finalized after taking into consideration the aforesaid counter submissions. Despite the due diligence, this exercise in making out and pronouncement of this Order, has taken time.

Ordered accordingly.

(Subhash Chander Negi)

Chairman