

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

**In the matter of :-**

M/s Yogindera Power Ltd.  
Village & Post Office Jalari,  
Tehsil & Distt. Kangra (HP)  
through Sh. vivek Sharma  
( Authorised Signatory )

**....Petitioner**

**Versus**

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

**....Respondent**

**Petition No. 9 of 2018**

**(Decided on 30<sup>th</sup> June, 2018)**

**CORAM**

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

**BHANU PRATAP SINGH  
MEMBER**

Counsels: -

for petitioner:

Sh. Ajay Vaidya, Advocate

for respondent:

Sh. Kamlesh Saklani  
(authorised Representative)

**ORDER**

(Last heard on 26.05.2018 and Orders reserved)

This petition has been filed by M/s Yogindra Power Ltd. having its registered Village & Post Office Jalari, Tehsil & Distt. Kangra (HP) through Sh. Vivek Sharma S/o Sh. B.D. Sharma, Authorised Signatory (hereinafter referred as “the petitioner”), who is operating and maintaining Baner-Sangam HEP of 5.00MW capacity 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 have 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 Implementation Agreement with GoHP on 5<sup>th</sup> 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 15<sup>th</sup> 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 15<sup>th</sup> December, 2012 has not been executed between the Petitioner and Respondent Board yet.
- (c) the Project has been commissioned on 3<sup>rd</sup> 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 Respondent i.e.. 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 the petitioner Company refunds the fee paid by the Respondent 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.
- (d) On 11<sup>th</sup> August, 2017, and again on 13<sup>th</sup> 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;

- (e) with the above background the petitioner prayed this Commission:-
- (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; and
  - (b) to hold 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.

The said petition 72 of 2017 has been dismissed on the ground that the PPA has not been executed yet, in the absence of the Agreement, no dispute has arisen for resolution by the Commission under Section 86(1)(f) of the Act;

- (f) the petitioner could not have achieved the COD due to the fact that when clearances were 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;
- (g) the petitioner has raised the objections against the provisions of the impugned regulations as under:-
- (i) Regulation Z(K) and (L) are not as per the CERC Regulations and the project cost has been enhanced by including the project line and bay etc.
  - (ii) 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;

- (iii) 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;
- (iv) 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;
- (v) 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;
- (vi) Regulations 39: This Commission has retained the O&M charges of Regulations, 2012 with annual escalation which are less than that of CERC rates;
- (vii) 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%;
- (viii) 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;
- (ix) 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.

- (x) 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 present petitioner had filed a petition No. 72 of 2017 titled as M/S Yogindra Powers Limited versus HPSEBL wherein the Commission vide order dated 23.02.2018 has pleased to disposed of the petition on the ground of maintainability. The copy of the same has annexed as Annexure R-1. It is further submitted that the commission while disposing of the petition ibid, held that the petitioner was entitled to tariff under HPERC (Power Procurement from Renewable Sources and Co-Generation by Distribution Licensee) Regulations, 2007;
- ii) that the present petitioner by way of this instant petition has only reiterated the whole things which has already been discussed in the earlier petition and just abusing the process of law. It is submitted that the Commission has pleased to notified the Himachal Pradesh Electricity Regulatory Commission (Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulation, 2017 and under clause 3(2) following proviso has been inserted: -

“(2) these Regulations shall not apply in the following cases:

- (i) Where long term agreements for disposal/use of energy have either already been signed by the renewable energy generators or have been approved by the Commission, or the joint petitions for the approval of the power purchase agreements have been filed before the Commission, prior to the date of commencement of these Regulations’  
Provided that in case the capacity has been enhanced subsequent to signing/ approval of such agreement(s), the applicability of these regulations shall be ascertained, based on the such criteria, separately for the original capacity and addition capacity.”

Hence, Regulations, 2017 cannot be applicable to the project of the petitioner.

- i) That it is further submitted that in clause 3(3) (b) the following has been specified:

(b) where after the setting up of the Commission, the joint petition for approval of the power purchase agreement has been filed before 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 (Promotion of Generation from the Renewable Energy Sources and Terms and conditions for Tariff Determination) Regulation, 2007 and Himachal Pradesh electricity Regulatory Commission (Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulation, 2012, as may be relevant, irrespective of the data on which such agreement is actually approved by the commission and/or is executed. The relevant part of the Regulations, 2017 has annexed as Annexure R-2.

- (ii) in view of 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. 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 powers 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](http://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; 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 petitioner has 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. This Commission further observe on scrutiny of this petition finds that:-

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, 2017 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 have 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.

14. The framing of the Regulations is a legislative jurisdiction; making of the relaxation/removal of difficulties 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;

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

This petition is disposed of accordingly.

**--Sd/-  
(Bhanu Pratap Singh)  
Member**

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