

BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION,
SHIMLA

M/s. A Power Himalayas Ltd; (M/s. Regency Carbide (P) Ltd; subsidiary captive consumer)
River View lane, Poanta Sahib, Distt. Sirmour
(H.P.)

...Petitioner

V/s

The Himachal Pradesh State Electricity Board
Vidyut Bhawan, Shimla-4.

...Respondents

Petition No. 44 of 2008

(Decided on 23.1.2009)

CORAM
YOGESH KHANNA
CHAIRMAN

Counsels-

for the petitioner

Sh. Ajay Vaidya,
Advocate

for the respondents

Sh. Satyen Vaidya,
Advocate.

ORDER

(Last heard on 20.12.2008 and orders reserved)

M/S. A Power Himalayas Ltd; Regency Complex, River View Lane, Poanta Sahib, Distt. Sirmour (H.P.), a company incorporated under the Companies Act, 1956(hereinafter referred as “the petitioner”) entered into, on 10.8.2000, an Implementation Agreement with the Government of Himachal Pradesh, whereby the petitioner was granted right to establish, operate and maintain the Hydro Project on River Solang, Distt. Kullu with an installed capacity of 1.00 MW. The petitioner company was promoted by M/S Regency Carbide (P) Ltd; to consume power, being generated by Solang Hydro Project at 19-Industrial Area, Poanta Sahib, having connected load from Himachal Pradesh State Electricity Board (hereinafter referred as “the Board”) on 1,875 KW (2,100 kVA).

2. The Government of Himachal Pradesh, under the energy policy, permitted the captive use of subsidiary or a holding company, with an Agreement to be signed between the petitioner company and the Board, for wheeling, banking and captive use of power, which Agreement was executed on 11.8.2000 i.e. to say prior to the formation of the Himachal Pradesh State Electricity Regulatory Commission. The said Agreement stipulates for wheeling charges @ 2% on the quantum of energy wheeled plus charges of energy debited to the banking account as per item (ii) of clause 8.5 of the Agreement at the rate corresponding to the difference highest overall per unit at which the Board will get the power from the other projects/sources during the billing month in which banked energy is delivered to the petitioner company. The detailed mechanism in this regard is given in Article 8 of the said Agreement.

3. The petitioner company was to be connected with 33 kV Grid under the captive use arrangement. While operations of Solang SHP started from July, 2002 onwards, the tariff of the captive consumer i.e. M/S. Regency Carbide (P) Ltd; became two part tariff. T.O.D tariff was introduced by this Commission w.e.f. 1st Nov., 2001, when the Commission prescribed separate energy charges for the peak load hours, night hours and the remaining normal period. Clause 8.11 of the Agreement dated 11.8.2000, stipulates in clear terms that in case the Board adopts TOD and/or frequency linked energy account of the tariff, the adjustment under the said Agreement shall also be made on such time blocks matching with the TOD/frequency accounting. The said clause 8.11 reads as under:-

“8.11. Subject to the provisions of section 7.16, all the adjustments under the Agreement shall be made on monthly basis. However, in case the Board adopts the TOD and/or frequency linked Energy account/tariff for its consumers, the adjustments under the Agreement shall also be made on such time blocks matching with the TOD/frequency accounting. Detailed modalities in this regard would be mutually agreed between the Parties at an appropriate time, and a supplementary agreement will be executed.”

4. The modalities for time block-wise accounting are to be mutually finalised and Supplementary Agreement is to be executed. The petitioner company submits that in accordance with the provisions in clause 7.16 and

8.11 of the Agreement the matter regarding signing of the Supplementary Agreement was taken up with the Board. But the Board decided that adjustments for the consumption as well as the demand charges shall be done tentatively and vide its letter dated 27.12.2002 directed its officers for taking necessary action as per the mechanism/instructions contained in the said letter which inter alia, states that energy consumption (excluding meter rent, electricity duty and service rent) as per the average per kVAh rate at which M/S Regency Carbide is getting the power from the Board shall be worked out from the total energy consumed every month and the kVAh energy deliverable by the petitioner company at the inter connection point less 2% shall be charged as per average kVha rate and the credit of the same shall be given in the monthly bills of M/S Regency Carbide Pvt. Ltd. The final adjustment was to be done as per clause 8.11 of the PPA.

5. The petitioner company has made various representations to the Board to revise the energy bills and also to sign the Supplementary Agreement. Despite several meetings with the Member (Operation) and the concerned Chief Engineer and taking action/accepting all points suggested, the requisite Supplementary Agreement has not been executed. In the final meeting held on 13.7.2006, in the chamber of Member (Operation) of the Board it was conveyed that the draft proposal submitted by the petitioner company was in order and the parties will jointly file the amendments for the Supplementary Agreement before the Commission, so that order of the Chief Engineer (Comml.) as per letter dated 27.12.2002 is finalised and bills are amended accordingly.

6. The Board did not file any petition for approval of Supplementary Agreement, and the petitioner company has therefore, preferred this petition, seeking direction to the Board to revise all the energy bills since the commissioning of the Solang SHEP and to sign Supplementary Agreement and to pay interest @ 18% p.a on the amount not adjusted under captive use from the date of commissioning of the project.

7. In response to the petition the Board has stated that the Board was never averse for the execution of the Supplementary Agreement, as the Board has gracefully invited the petitioner company, from time to time, for discussions. The matter was likely in the verge of mutual settlement of

various issues but the matter remained unresolved because of the retirement of the Member (Operation) and the concerned Chief Engineer. Keeping in view of these facts, intentions and efforts put in by the Board, the Board prayed for directions to the parties to mutually work out the modalities for signing the Supplementary Agreement within specific time frame of 45 days, and to get the same approved from this Commission.

8. The Commission accepted the prayer of the Board and asked the parties to pursue the negotiation process, but after the expiry of a period of three months thereafter the Learned Counsels, appearing for both the parties, have stated that the negotiations have not been fully result reoriented. Hence the matter was listed for arguments.

9. After going through the pleadings and hearing the Learned Counsels, the Commission observes that in the present case the agreement was executed on 11.8.2000, prior to the formation of this Commission. The **Supreme Court in India Thermal Power Limited v. State of M.P. Mir 2000 SC 1005**, has held that the agreements entered into by the Electricity Board and the generators are statutory and binding on the successor APTRANSCO, the DISCOM as well as the Commission. The Commission cannot either nullify or modify the concluded contracts in purported exercise of its alleged regulatory powers vested in it.” Further in **Mst. Rafiquennessa v. Lal Bahadur Chetri AIR 1964 SC 1511**, the **Hon’ble Supreme Court** held, that ‘where vested rights are affected by any statutory provisions, the said provision should normally be construed to be prospective in operation and not retrospective, unless not disputed by him that the legislature is competent to take away vested rights by means of retrospective legislation. Similarly, the legislature is undoubtedly competent to make laws which override and materially affect the terms of contracts between the parties; but the argument is that unless a clear and unambiguous intention is indicated by the legislature by adopting suitable express words in that behalf, no provision of a statute should be given retrospective operation if by such operation vested rights are likely to be affected. These principles are unexceptionable and as a matter law, no objection can be taken to them”. Relying upon the aforesaid verdicts of the Apex Court, and the **APTEL its earlier decisions dated 2nd June 2006 in Appeal Nos. 1, 2, 5 of 2005 in Small Hydro Power Developers**

Association V/s A P Electricity Regulatory Commission; and Rithwik Energy Systems Ltd; V/s Transmission Corporation of A.P., 2008 ELR (APTEL) 237. APTEL in its decision dated 5th Oct., 2007, rendered in Vemagiri Power Generation Ltd; Bangalore V/s Transmission Corporation of A.P. Ltd (2007 ELR (APTEL) 1580; has concluded that the Commission has no jurisdiction to re-open/amend the PPAs, once approved, without the unqualified consent of the parties to the agreement. Keeping in the above referred decisions of the Hon'ble Apex Court and the APTEL the Commission, therefore, does not have the power to look into agreements entered into and concluded prior to its formation as the Act or the Regulations do not provide for the same and a retrospective uses of the power may result in vested rights being affected.

10. The argument that even though no Supplementary Agreement has been executed, the requisite modalities have been evolved and are being broadly used in actual practice, as clear from the fact that time block-wise generation data as mutually signed by both the parties has been enclosed with the petition, is of no avail. The agreement executed by the IPP with the HPSEB on 11.8.2000 for captive use and banking of power is quite explicit. The provisions of the Agreement should be implemented by both the parties. So far Clause 8.11 of the said agreement is concerned, the same clearly provides that in case the Board adopts TOD and/or frequency linked energy account of the tariff, the adjustment under the said agreement shall also be made on such time blocks matching with the TOD/frequency accounting. The TOD tariff was introduced by HPERC w.e.f. 1st Nov., 2001 when the Commission prescribed separate energy charges for the peak load hours, night hours and the remaining normal period. The modalities for time block-wise accounting are to be mutually finalised and Supplementary Agreement is to be executed. The Commission accordingly has no option but to give effect to the agreement for captive use and banking of power executed between the petitioner company and the respondent Board.

11. In the result, this Commission directs the Board, to finalise, in consultation with the petitioner company, and also keeping in view the tentative arrangements contained in the Board's letter dated 27.12.2002, the

modalities for time block wise accounting and to revise all the energy bills since the commissioning of the Solang (SHEP) and sign the Supplementary Agreement, in accordance with the provisions of Clause 8.11 of the main Agreement within a period of three months reckoned from the date of this order and to furnish the copy of the Supplementary Agreement so executed, to this Commission within a period of two weeks from the date of its execution.

It is to ordered.

(Yogesh Khanna)
Chairman