

BEFORE THE HIMACHAL PRADESH REGULATORY COMMISSION

Review Petition No.135/07

In the matter of:-

M/S H.M. Steel Ltd;
Trilokpur Road, Kala Amb, Distt. Sirmour

M/S J.B. Rolling Mills (P) Ltd;
Trilokpur Road, Kala Amb, Distt. Sirmour

M/S Sri Rama Steels Ltd;
Baddi Road, Barotiwala, Distt. Solan, H.P.

...Petitioners

The H.P. State Electricity Board,
Vidyut Bhawan, Shimla-4.

... Respondents

(Date of decision 4.1.2008)

Petition under section 94(1)(f) of the Electricity Act, 2003, read with regulation 63 of the HPERC (Conduct of Business) Regulations, 2005 for review of the Tariff Order dated 16.4.2007 determining tariff for the Himachal Pradesh State Electricity Board for the financial year 2007-08.

Present for	Petitioners	Sh. P.S. Bhullar, Advocate Sh. P.C. Dewan Sh. D.R. Sood
	Respondent	Sh. Bimal Gupta, Advocate Er. R.K. Punshi Consultant
	Consumer Representative (under section 94 of the Electricity Act, 2003)	Sh.P.N. Bhardwaj.

Order

(Last heard on 1.12.2007 and order reserved)

M/S H.M. Steel Ltd; Kala Amb, Distt. Sirmour, M/S J.B. Rolling Mills (P) Ltd; Kala Amb Distt. Sirmour and M/S Sri Rama Steels Ltd, Barotiwala, Distt. Solan, (collectively referred as “petitioners”), who are all consumers under the Power Intensive Units category (PIU Category), have filed this petition seeking review of the Tariff Order dated 16.4.2007 for the financial year 2007-08 (hereinafter referred as “Impugned order”) made by this Commission, determining the tariff to be recovered by the Himachal Pradesh State Electricity Board, (hereinafter referred as “the respondent Board”) from the consumers in the

State of Himachal Pradesh. The Commission vide its order dated 30.3.2007, passed in Review Petition No. 173 of 2006 filed by H.M. Steel Ltd, while upholding the PIU classification, amended the previous tariff order for the FY 2006-2007 dated 3.7.2006, by relegating the PIU demand charges to that being recovered from the Large Industries. The present tariff order i.e. the impugned order has resulted in an increase in the tariff to be recovered from the PIU category in the FY 2007-2008, qua the tariff to be recovered from the Large Scale Industrial Power Supply Category.

2. The petitioners, through this review petition, have sought the review of the increase in the tariff on the grounds:-

- (a) that there is no basis or ground for increase of energy charges.
- (b) that the introduction of a two part tariff in peak load exemption charge resulting in levy of additional demand charges during peak load is not sustainable in law; on account of the following reasons :-
 - (i) that the demand charges are meant to cover the cost of installation and investment and consumers have to meet the said cost. As a matter of fact no additional investment is incurred on any installation or supplying a part of the contracted demand during peak hours;
 - (ii) that the consumers willing to draw peak load hours need to obtain an exemption and after obtaining the same can run their units during peak load hours subject to paying a charge for the energy consumed during peak hours in any month based on different rates for the said period;
 - (iii) that the consumer agrees to pay differential tariff for consuming in peak load hours, there is no justification for penalizing him if he elects not to consume during peak hours. Further it would be incorrect to assume that power is in effect blocked by consumers and not consumed.
- (c) that the categorization of Petitioners as PIU does not satisfy the criteria under the Electricity Act, 2003, although section 62(3) empowers the Commission to classify consumers.
- (d) that the assessment of revenue from sale of power outside State and assessment of revenue mobilization from sale of power to PIUs at revised tariff, is questionable;
- (d) that the Respondent Board's request for two part tariff structure in peak load exemption charges was made after filing ARR(on 7.3.2007) and not in original ARR. As a result the affected consumers were denied an opportunity to respond to request and there was no public hearing on the issue. The fact, that the regulations require a hearing on such issues, the issue be re-examined after hearing the Petitioners.

3. In the light of the observations made in the preceding para, the petitioners have prayed that:-

- (1) the variable charges of 240 paise per unit on the PIUs may be relegated to the level of the Large Supply Consumers;
- (2) the Additional Demand Charges of Rs. 50/- per KVA in peak load hours may be withdrawn;

- (3) the load factor incentive may be built in the tariff;
- (4) since the petitioners are helping the respondent Board to contain the theft on line losses, suitable incentives may be given in the tariff of the PIU and Large Supply Consumer Category;

4. The respondent Board has counteracted the claim of the petitioners and has supported the tariff order dated 16.4.2007, stating that in view of the tariff philosophy and design of the tariff structure, as elaborated in para 5.9 of the Tariff Order, 2001-02, the Commission has approved application of TOU charges (demand charges plus energy charges) as a part of tariff structure in the tariff order for 2007-08. The higher tariff proves that the power intensive units (PIUs) operates/runs at different levels (generate harmonics, increase power system instability, increase thermal loading of power system elements etc.) which is not similar to the level of other HT/EHT industries. As such, the nominal increase made by the Commission in the energy rates of PIU categories is justified and should not be relegated to the level of the Large Supply Consumers. Further in the matter of granting peak load exemptions to LS Category of consumers, the respondent Board has taken liberal view and all the industrial consumers, who are applying for peak load exemption are getting the exemption from the respondent Board. Before the approval of two part tariff for PLEC, the majority of the industrial consumers were taking the peak load exemption from the Board irrespective of their demand during peak load hours. In order to meet up the above demand of the industrial consumers, the Board had to reserve the above requirement of load. There was a general tendency on the part of industrial consumers to take peak load exemption whether it is required or not as no charges are to be paid by them on account of peak load exemption and this resulted into non-utilisation of full peak load requirements by the Board to its industrial users. After the approval of the two part tariff during peak load hours comprising of demand charges and energy charges, the consumers have now started applying for withdrawal/reduction in their peak load exemption. The Commission has rightly curbed this tendency on the part of the industrial consumers by providing two part tariff for PLEC. The Commission has fixed energy charges for the PIU category slightly higher than the energy charges of Large Industrial Power supply, but the demand charges have been made applicable to the level of Large Industrial Power Supply. In the neighboring states, the tariff for PIU is much higher than for the other categories. In Punjab, the minimum charges for PIU is Rs. 328/- KVA compared to Rs. 119/- for general H.T. industry. In Uttranchal, the fixed charge for PIU industry is Rs. 350/- KVA compared to Rs. 125/KVAh for general H.T. industry. The respondent Board has stressed that the KVAh based tariff has been introduced in the Tariff Orders since 2001-02 to provide incentives to induce consumers to operate their equipment at a higher power factor. This is due to the fact that the power factor of the system is governed primarily by the load characteristic and the system configuration (i.e. the transmission and distribution system) with the power being the dominant player. Usually the design of the system incorporates elements, such as installation of capacitor banks and transposing of transmission lines, the power factor is significantly determined by the load characteristic i.e. the consumers load profile. The KVA based demand charges automatically benefit the consumers who have a higher power factor.

5. In the rejoinder, one of the petitioners i.e. M/s H.M. Steel Ltd. has reiterated that the demand charges represent the recovery of the investment of the supplier (HPSEB) on creating the infrastructure for the contract demand of the petitioner, which is more than 14000 KVA and no extra expenditure is incurred for supply of just 4000 KVA to the petitioner in the peak load hours; and as such the additional levy of Rs. 50/- per KVA is not justified. The application of two part tariff in the peak hours was not contained in the original ARR proposal and could not, therefore, be debated upon by the various objectors and affected parties. Other issues raised by the petitioners like load factor incentives have not been replied to by the respondents.

6. Before the Commission clinches the point in issue it would be desirable to spell out the scope of the power of the Commission to review the tariff determined. 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

7. As mistake(s) or an error(s) apparent on the face of record cannot be defined precisely and exhaustively and there is an element of indefiniteness inherited in the 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.

8. The scope of review has been settled by Hon’ble Supreme Court in the case of Parsion Devi V. Sumitri Devi, (1997) 8 SCC 715, Aribam Tuleshwar 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 NO.80 to 197 of 2006 & Appeal No.226 of 2006. The Hon’ble Commission is in no way restricted in exercising its powers to conclude that the order suffers from a mistake of fact or law and review its order.

9. 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.”

10. 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) 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.”

11. 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.

12. Arguments were advanced by the Learned Counsels for the parties. Written submission were also made. Though number of points raised at the hearing, discussion was confined to the sole basic question whether the impugned order suffers from a mistake of a fact or an error apparent on the face of the record and such mistake or error is so material that it may cause miscarriage of justice; and further there is ample justification to review the previous order. The Commission proceeds to consider various points which were raised before it.

13. Issue No.1 Categorization of PIU – Whether the petitioner PIUs can be categorized as a separate class from other HT/EHT (L.S) industries?

The Hon'ble Supreme Court in its decision dated 26.3.2002 in the case of the Association of Industries Electricity Users V/s State of AP & Others, 2002 – AIR (SC)-1361; 2002-SCC-3.711; and the Andhra Pradesh High Court in Ferro Alloys Corporation Ltd. V/s APSE Board AIR 1993 AP 183; The Hon'ble Appellate Tribunal for Electricity in Appeal No. 124, 125, 177 of 2005 and 18 of 2006 directed against the orders of Uttranchal Electricity Regulatory Commission (UERC) and this Commission also in Review Petition No. 173 of 2006 – M/S H.M. Steel Ltd Kala Amb has considered the question of classification of PIU and has held that the Commission is justified in making separate categorization of steel units on the plea that in the induction/arc furnaces, the magnitude of current changes abruptly and sometimes periodically cause changes, large swings in power and consequent voltage fluctuations. This category relates to supply of power to industries where power is substantially utilized as raw material when cost of end product is compared to the cost of power. The classification of “Power Intensive Industries” is not only founded on an intelligible differentia distinguishing the HT category-I consumers, but the differentia has also its rational relation to the object sought to be achieved by section 62(3) of the Electricity Act, 2003 which is the enabling provision to classify the consumers and to fix differential tariffs. So long as the classification is not invalid and the fixation of tariff is not arbitrary, the classification and the fixation are immune from challenge. The classification is based upon a reasonable differentia and bears rational relationship to the object sought to be achieved by exercising the power vested under section 62(3) of the Act and thus it is valid one. The PIUs come under a separate category different from HT category and, therefore,

fixation of separate tariff for them, whether it is less or more than for the consumers under H.T. category. PIU category can not be discriminatory much less arbitrary because the classification as held supra has a rational nexus sought to be achieved by virtue of powers conferred under section 62(3) of the Act.

14. Issue No.2 Re. Higher tariff rate for Peak Load Supply.

The Hon'ble APTL(E) in its decision dated 26.5.2006 – M/S Siel Limited V/s PSERC and others (disposing of ten appeals, including seven appeals filed by Power Intensive Industrial Consumers) has approved the PSERC tariff order dated 14.6.2005, making the provision for higher tariff for Peak Load Supply, Para 131 of the aforesaid APTL (E) decision dated 26.5.2006, reads as under:-

“131:- Learned counsel for some of the industrial consumers submitted that the Board has wrongly allowed peak hour exemption charges to be recovered from the consumers. In the impugned tariff order dated November 30, 2004 for the year, 2004-05 it has been pointed out by the Commission that there is an acute shortage of power in the State of Punjab, especially during peak load hours. The Commission also pointed out that the over drawl of power under Availability Based Tariff (ABT) regime during the peak hours, costs much higher than the average power purchase cost. The Commission while considering the matter recorded as under:-

“The Commission has considered the matter and notes that there is no denying the fact that there is acute shortage of power in the State especially during peak load hours. Overdrawing under ABT during this period costs much higher than the average power purchase cost and goes upto even Rs. 6/- per unit. The Commission also notes that recoveries made through PLEC are duly accounted for in the tariff income of the Board. As such, both the additional cost of power purchase during peak hours and the recoveries through PLEC are duly taken care of in the Board's expenditure and receipts. The system therefore, does not require any change in this regard. The existing rate of PLEC is also not considered unreasonably high especially in view of the exorbitant extra costs of power purchase involved. The Commission further notes that in acute shortage situation of power in peak hours, the PLEC has to be based on extra load reserved by the consumer and not as per actual use. This is because if the Board reserves the load for the consumer, it is committed to supply that power and has to make arrangement accordingly to fulfill this commitment. In view of the commitment of the Board which in any case stands, it is not so material whether the extra power is actually drawn by the consumers or not.

We do not find any error in the reasoning of the Board and we affirm the same. The contention of the Industrial Consumers is rejected.”

15. The Commission observes that due to shortage in the peak capacity and power system constraints, the industrial, water pumping and Agricultural pumping consumers are normally not permitted by HPSEB to use electricity during peak load hours. Excessive drawl during peak hours results into lowering of system frequency and may result in grid failure. Excess power supply during peak hours is arranged from most expensive sources and under ABT regime the cost of such power is much higher than average power purchase cost. However, these categories of consumers can request for an exemption from the restrictions to use electricity during peak load hours. In such cases where exemption is granted a charge called the peak load exemption charge (PLEC) is applied. Peak load exemption charges only in the form of higher energy charges and without any demand charges resulted into large scale blocking of peak load capacity of

HPSEB system by the industrial consumers as they had to pay only the charges when power is used during peak load hours and that too to the limited extent of its use. Utility has to plan and arrange for this capacity as well as demand of power, once it is sanctioned to such industries. Also that much load has to be kept reserved for them. Moreover, the Commission has also built in the tariff structure, concessional tariff during night hours to flatten the load curve of the system.

It is a matter of design of tariff structure to have two part tariff for peak load charges, both for peak load exemption and peak load violation for better demand side managements. As a result of levy of these additional demand charges for peak load exemption for all L.S consumers including PIU's various such consumers have managed to get a reduction in their peak load demand sanctions in the first three months of tariff order 2007-08 to the extent of 41MVA, which of course utility can allot to other genuine consumers in waiting.

16. Issue No. 3 Whether the PIU should be differentiated for charging differential tariff than of LS Industrial consumers.

Total sale within the State for the year 2007-08 as per tariff order 2007-08 is 4978 MU, out of which 510 MU is for PIU. After assuming 17.5% T&D losses as per tariff order, the total requirement of power for sale within State is 6034 MU out of which for PIU it is 618 MU. The growth rate of consumption for industries including PIU is about 20% in the State. There are about 55 PIUs as against 777 L.S (above 100KW) industries and 33000 SMS (upto 100 KW) industries in the State.

Consumption pattern of industries in the State, as per tariff order 2007-08 figures submitted by the Board, is as follows:-

- (a) 59% of total consumption within State is of large supply industries (numbering about 832) (more than 100KW) including PIUs.
- (b) 17.3% of the large supply consumption is of 55 units of PIUs.
- (c) Connected load of PIUs is 27% of total connected load of large supply industries.
- (d) Growth rate of consumption of PIUs is about 20% per annum.

On the other hand power scenario in the State as per tariff order 2007-08, data supplied by the Board, is as follows:-

Total energy requirement for sale within State	6034 MU
Power available from own stations of HPSEB	1824 MU
Power purchase from other sources including H.P. Govt. equity and free power at market rates	4338 MU
Power purchase from market	441 MU

About 70% of requirement of power within State is being met from purchase by HPSEB. In the process of PIU industries load variation is very high since load is drawn during steel melting. Therefore, equipment such as transformers, breakers, cables etc. have to be selected of higher ratings capacities than normal load of the system.

17. The Commission has allowed ARR on the merit order dispatch and has not restricted the HPSEB for purchase of power from any source, including market purchase and UI purchase which at present is about Rs. 10.50 per unit, to meet its requirement within State. Requirement of power for power intensive category of PIU is definitely having impact on average power purchase cost of the utility, affecting other consumer categories. As such in the present scenario

of HPSEB Commission is of the opinion that this category should be charged slightly higher as compared to other large industry category.

18. Electricity Act, 2003, section 61, provides some guidelines to Commissions for determination of tariff, some of which are as follows:-

- 61(c) “the factors which would encourage competition, efficiency, economical use of resources, good performance and optimum investments.”
- 61(d) Safeguarding of consumer’s interest and at the same time, recovery of the cost of electricity in a reasonable manner.
- 61(g) that the tariff progressively, reflects the cost of supply of electricity and also reduces the cross subsidies within the period to be specified by the Commission.
- 61(i) The national electricity policy and tariff policy.

Commission is designing its tariff keeping in view the above said guiding principal, and national policies. There are about 18 lacs consumers within the State of H.P. out of which about 55 are PIU consumers. The Commission has to safeguard the interest of consumers at large. There is overall shortage of power with the utility and 70% of the demand has to be met through purchase of power which includes high cost power also as unrestricted purchase has been allowed by the Commission. Peak load power apart from being costly is restrained due to grid constraints. In winter peak load demand is short by about 10 lac units/day inspite of purchase allowed from all sources available with utility. The national tariff policy provides for reducing cross subsidy to $\pm 20\%$ by 2010-11, which is being achieved by the Commission since at present it has been achieved upto + 31%. While safeguarding the consumer’ interest at large and recovery the cost of supply in a reasonable manner, economical use of resources, the Commission is also endeavoring to achieve the target of reduction of cross subsidy to desired level by 2010-11.

19. 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 petitioners have tried to prove an error in Table 106, of the Tariff Order to the extent that the revenue mobilization from sale of power of PIU at revised tariff is shown to be only Rs. 3.34 Cr. whereas at the existing rates it is Rs. 176.29 crores. The Commission has re-examined the aforesaid figures in the said Table and has concluded that these figures in the last column of the Table relate to additional revenue mobilization due to revised tariff under various categories. This fact is further substantiated by figures given in para 9.72 and Table 96 of the impugned tariff. Thus there is no mistake apparent on face of record. In the instant case the petitioners have failed to show any other mistake or error apparent on the face of record. As far as the energy charge upgrade is concerned no definitive answer is available which will satisfy the need for equity of all stakeholders. The Commission is, therefore, of the view that justice will prevail, if the aspect of this energy charge upgrade in the tariff order is not fiddled with. The question whether, fixing the energy charge of PIU’s and LS categories would constitute an error or a mistake apparent on the face of record or would it be something which could only be rectified in terms of an appellate activity and not be covered by the parameters of a review. 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. 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.

20. With this background and the circumstances of this case and judgments cited and submissions made by the parties, the Commission finds no reasons to accept the review petition. Hence the review petition is rejected.

Announced in open Court.

File be consigned in the record room.

(Yogesh Khanna)
Chairman.