

BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION  
SHIMLA

M/S Him Kailash Hydro Power Pvt. Ltd.  
having its registered office at Prathppadu, Pentapadu Mandal,  
West Godavari District, Andhra Pradesh

...Petitioner

V/s

- (1) The Himachal Pradesh State Electricity Board,  
Vidyut Bhawan, Shimla-171004  
... Respondent No.1
- (2) The Government of Himachal Pradesh  
through the Principal Secretary (MPP &Power) H.P.  
Shimla-171002.  
... Respondent No.2
- (3) The Himachal Pradesh Energy Development Agency  
(HIMURJA)  
SDA Complex, Kasumpati, Shimla (H.P.) 171009  
... Respondent No.3

Petition No. 139/2010  
(Decided on 3.12.2010 and released on 17.12.2013)

**CORAM**  
**YOGESH KHANNA**  
**CHAIRMAN**

Present: -

for petitioners:	Sh.CH. V. Narasimha Raju Managing Director Sh. K.K. Mohanty Project –in-charge
for respondent No.1:	Sh.Ramesh Chauhan (authorized representative)
for respondent No. 2	Sh. K.S. Chauhan Dy. D.A.
for respondent No. 3	Sh. Pardeep Bhanot P.O.

## Order

(Last heard on 20.11.2010 and order reserved)

M/S Him Kailash Hydro Power Pvt. Ltd. having its registered office at Prathppadu, Pentapadu Mandal, West Godavari District, Andhra Pradesh, a company incorporated under the Companies Act, 1956, (hereinafter referred as “the petitioner company”) under clause (f) sub-section (1) of section 94 of the Electricity Act, 2003, read with regulation 63 of the Himachal Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2005, seeking review of the Order dated 8.6.2010, passed in Petition Nos. 53 of 2008 and 5 of 2010, whereby the tariff of ₹ 2.50 p.kwh, in relation to the Sahu Hydro Electric Project of 5.00 MW capacity located in Chamba District (H.P), was increased by 5 paise per unit, i.e. to say fixing it at ₹ 2.55 p.kwh.

2. The petitioner company submits that the calculations as furnished by the Himachal Pradesh State Electricity Board (hereinafter referred as the “the Board”) in the original petition and thereafter the observations of the Commission on the loss of energy generation based on mandatory 15% discharge are factually incorrect. Even after considering the mandatory release on the basis of 15% of the incoming discharge of three lean months, i.e. December, January and February, the generation loss of the company works out to 2.0 MU and 0.226 MU, as assessed by the Board. The total loss on account of mandatory release of water over a period of 40 years corresponding to generation loss of 2.00 MU is ₹ 20.00 crores, which in terms of available energy works out to 22 paise per unit. The petitioner company was not granted time to submit the rejoinder to the reply filed by the Board, which would have enabled the petitioner company to point out the error in Board’s calculations, due to which the petitioner company has to suffer huge financial loss. There is discrepancy apparent on the face of the record i.e. para 10 of the impugned order, which needs to be rectified.

3. In response to this review petition, the respondent Board submits that the review petition is not maintainable for the reasons that:-

- (a) the petitioner company is praying for a substitution of the order sought to be reviewed by a fresh order;

- (b) the grounds for the review are the same which had already been considered while making the original order, now sought to be reviewed;
- (c) the petitioner company can not expect the Commission to sit in appeal over its own judgment while exercising the power under review;
- (d) as in review proceedings the scope of interference is very limited, the review can be granted only in case of glaring omission, patent mistake or the like grave error and not for rehearing the case;
- (e) no such relief can be granted on the grounds of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be addressed by him when the order was passed or made, without strict proof of such allegation;
- (f) the PPA executed between the parties is a binding and subsisting contract which is legally enforceable and the same cannot be reopened.
- (g) that the data/calculations, as furnished by the respondents to the original petition, demonstrate that the petitioner company is not put to any loss on account of 15% discharge of water as per requirement of Government of Himachal Pradesh Hydro Policy, 2006. Due to sacrificial discharge, 0.226 MU of energy is lost which can be easily be covered up by over loading the machines during the high flow season. Further clause 13.3 of the Implementation Agreement executed by the petitioner company costs obligation on the petitioner company to ensure minimum flow of water immediately downstream of the weir/barrage/dam for down stream requirements as may be directed by the Government/State Pollution Control Board. The respondent Board, therefore, refutes the contention that 15% discharge of water is a new concept introduced by Government of Himachal Pradesh in 2006 but only thing which the Government has decided by way of said policy is that the

minimum discharge has been quantified at 15% of the total discharge of water down the stream of the weir/barrage/dam, and there is no additional impact of 15% discharge of water on the project.

4. To examine the averments made by the respective parties, the Commission directed the parties to submit:-

(a) soft copies of calculations pertaining to impact on generation of 15% mandatory water discharge;

(b) copy of 75% dependable water discharge as per approved DPR;

The petitioner company has furnished the said details -

5. The Hon'ble Appellate Tribunal in its two latest judgments delivered in **Appeal Nos. 18 and 30 of 2009 – Ispat Industries Ltd Mumbai V/s Maharashtra Electricity Regulatory Commission Mumbai (2009 ELR (APTEL) 0618 and review petition No, 5 of 2008 Maharashtra State Electricity Distribution Co. Ltd Mumbai V/s Erotex Industries and Exports (Ltd) and one another (2009 ELR (APTEL) 0700**, has concluded that section 94(1)(f) of the Electricity Act, 2003 empowers the Commission to review its decisions, directions and orders and provides that they are vested with the same power which is given to a Civil Court under Order 0.47 rule 1 of the Code of Civil Procedure, 1908.

6. The Commission has certainly the power to review, its own order on account of some mistake or error apparent on the face of record, or on any of the sufficient reasons. The arguments of the respondent Board that the PPA, being a concluded contract cannot be re-opened has no relevance as the same, after due deliberation, already stands disposed of vide **Commission's Order dated 29<sup>th</sup> Oct, 2009 passed in petition No. 11/2008 M/s D.S.L. V/s HPSEB and others** wherein it has been concluded that the Commission has the power to re-open the PPAs concerning non conventional energy projects, within the framework of the Act and the regulations framed thereunder.

7. The scope and authority of review is derived from 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. 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 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.

8. The law in relation to the scope of review has been settled by the Hon'ble Supreme Court in case of **Parsion Devi V/s Sumitri Devi (1997) 8 SCC 715, Aribam Tulsehwar Sharma V/s Aribam Pishak Sharma AIR 1979 SC 1047, Raja Shatrunji V/s Mohd Azmat Azim Khan (1971) 2 SCC 200, Smt. Meera Bhanja V/s Nirmala Kumari Chaudhary 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, dated 31.10.2007 in appeal Nos. 159 of 2005, 162 and 167 of 2006.**

9. 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 cannot be exercised on the ground that the impugned order was erroneous on merits. But simultaneously the materials available on record, a proper consideration of which may justify the claim, cannot be ignored.

10. In view of the above discussion and limited scope of review, the Commission, now keeping in view the pleadings made by the parties, proceeds to examine the claim raised by the petitioner company in its review petition.

#### **Submissions of the Petitioner**

11. In the written submissions (MA No.5/2010), it had submitted that the provisions of the GoHP Hydro Policy of 2006 and the Implementation Agreement require him to release 15% of the incoming discharge through out

the year and the water release and energy generation calculations for 75% dependable year were accordingly worked out and placed on record as Annexure P-1 to the written submissions. The Commission in the impugned Order dated 08.062010 has allowed a hike in tariff by 2 paise per unit as per the impact assessment carried out by the Board, which is based on the average discharge for the lean period of three months i.e. December, January and February. The petitioner company submits that even after considering the mandatory release on the basis of 15% of the incoming discharge of average of three lean months, the generation loss to the petitioner company works out to 2.00 MU and not 0.226 MU as assessed by the Board. The total loss on account of mandatory release of water over a period of 40 years corresponding to generation loss of 2.00 MU is ₹ 20.00 Crores which in terms of available energy works out to 22 Paise per unit. A calculation supporting the said rate of 22 Paise per unit is annexed for the consideration of the Commission.

12. The applicant was not granted time to submit its rejoinder to the reply as filed by the Board which would have enabled the petitioner company to point out the error in Board's calculations due to which the petitioner company has to suffer huge financial loss.

13. The calculations given by the petitioner company are relevant for the adjudication of the review petition in Petition No.53 of 2008. The petitioner company submits that the document annexed with this review petition may be taken on record and be read as part and parcel of the petition No.53 of 2008. No prejudice will be caused to any of the parties if this document is taken on record.

14. There is discrepancy apparent on the fact of record/order in para 10 of the Order as passed on dated 08.06.2010 and the petitioner seeks the review of the said Order on the ground that the tariff enhancement of 2 Paise per unit as assessed by the Board on account of impact of 15% mandatory release of water downstream of diversion structure and relied upon by the Commission has not been correctly assessed and require reconsideration, redetermination by the Commission.

#### **Response of the Board**

15. The calculations as furnished by the respondents to the original petition demonstrate that the petitioner company is not put to any loss on account of

15% discharge of water as per requirement of Hydro Policy notified by the GoHP in 2006. Due to sacrificial discharge, 0.226 MU of Energy is lost which can be easily covered up by overloading the M/Cs during the high flow season. These submissions were also made by the replying respondents in opposition to the averments made by the petitioner company in the original petition, which are reiterated and re-affirmed.

16. In addition, the respondent Board submits that clause 13.3 of the Implementation Agreement executed by the petitioner company with the Govt. of H.P reads as under:-

“The company shall ensure minimum flow of waster immediately downstream of the weir/barrage/dam for downstream requirements as directed by the Govt./State Pollution Board”.

17. Therefore, it is wrong to allege on the part of the petitioner that the 15 % discharge of water is a new concept introduced by the H.P.Govt. Hydro Policy 2006 but only thing which the Govt. has decided by way of the said policy is that the minimum discharge has been quantified at 15% of the total discharge in lean period. The petitioner company was under legal obligation to maintain minimum discharge of water downstream of the weir/barrage/dam, therefore, there is no additional impact of 15% discharge of water on the project. Hence, the averments made in this behalf by the petitioner company being devoid of any merit, deserve to be rejected and accordingly prayed.

#### **Commission's view**

18. On the examination of the hard and soft copies of the calculations submitted by the parties the Commission observes:-

- (1) that 10 day discharge for the II and III period of December taken by the Board are 2.53 and 2.69 respectively, whereas the same have been taken as 1.66 and 1.41 respectively by the petitioner. On examining the 75% dependable discharge as per approved DPR (supplied by the petitioner) it is found that the aforesaid discharges taken by the Board are not correct and the discharges for the II and III 10 day period as per the approved DPR are 1.66 and 1.41 respectively. This error on the part of the Board has resulted in the difference in average of the 3 lean months to be considered to

calculate the net discharges for the sacrificial discharge impact assessment calculations, thereby resulting in different net discharges, Energy and losses..

- (2) that the efficiency of hydro generating set considered by the Board in the calculation is 87.5%, whereas the same has been considered 80.5 % by the petitioner. On further scrutiny it was found that the Board has taken 87.5% machine efficiency for the purpose of calculation of net energy after considering 15% sacrificial discharge, whereas it has taken 80.5% for the purpose of gross energy generation (without considering 15% sacrificial) as per DPR. This is an error on the part of the Board. The net total annual energy should also have been calculated at hydro generating efficiency of 80.5%.
- (3) on considering the correct discharge and machine efficiency at 80.5%, the net annual energy comes to 22.85 as calculated by the petitioner company. As a result the loss in generation per year comes to 2 MUs in place of 0.226 MU calculated by the Board which increases the tariff by 22 Paise per Unit.

The Commission, therefore, allows an increase of 20 Paise on over and above 2 Paise which has already been allowed vide Commission's Order dated 8.6.2010.

(Yogesh Khanna)  
Chairman