

BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION  
SHIMLA

M/S Dharamshala Hydro Power Ltd.  
having its registered office at Plot No. 30-A, Road No.1,  
Film Nagar, Jubilee Hills, Hyderabad 500033 (A.P.)

...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, Kasumpti, Shimla (H.P.) 171009  
... Respondent No. 3

Petition No.142/2010  
(Decided on 3.12.2010 and released on 17.12.2013)

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

Counsels: -

for petitioners:	Sh.Nimish Gupta, Advocate,
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 Dharamshala Hydro Power Ltd. having its registered office at Plot No. 30-A, Road No.1, Film Nagar, Jubilee Hills, Hyderabad-500033 (A.P.) 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 5.6.2010, passed in Petition No. 97 of 2008 and 208 of 2009, whereby the tariff of ₹ 2.50 p.kwh, in relation to the Maujhi Hydro Electric Project located on Maujhi Khad, a tributary of Beas river, in Kangra District (H.P), with 4.50 M.W capacity, was increased by 14 paise per unit, i.e. to say fixing it at ₹ 2.64 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. The generation loss to the petitioner company is 4.194 MU, based on which the tariff enhancement on account of impact of 15% mandatory release of water works out to 33 paise per unit, but the Commission in the impugned order has allowed a hike in tariff by 14 paise per unit as per the impact carried out by the Board, which is based on generation loss of 1.75 MU. The petitioner company was not granted time to file rejoinder to the Board’s response, which would have enabled the petitioner company to point the error in Board’s calculations due to which the petitioner company has suffered the financial loss. Further during the pendency of the petition No. 97 of 2008, the State Government has levied additional one percent (1%) free power from the hydel project which would be provided and earmarked for a Local Area Development Fund on IPPs. This additional burden comes out to giving free energy of 3,19,330 units per annum. Thus there is discrepancy apparent on the face of record, which needs to be removed.

3. No response has been received from the respondent Nos. 2 and 3 i.e. the Government of Himachal Pradesh and the Himachal Pradesh Energy Agency (HIMURJA). Only the respondent No.1 i.e. the Himachal Pradesh State Electricity Board has filed its response. Thus the Commission has no other option than to proceed further on the basis of the response filed on behalf of the Board. 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) 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 per requirement of the Government of Himachal Pradesh Hydro Policy, 2006. Due to sacrificial discharge, 1.75 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 stipulates that the petitioner company shall ensure minimum flow of water immediately downstream of the weir/barrage/dam for down stream requirement as may be directed by the Government/State Pollution Control Board. Therefore, it is wrong to allege that 15% water discharge requirement was a new concept.

4. To examine the averments made by the respective parties, the Commission directed the petitioner 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 accordingly 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 19 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 the impugned order that 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. The observations in para 13 of the impugned Order dated 5.6.2010 seems not to be in consonance with the written submissions as advanced by

the petitioner company on the ground that the petitioner company has submitted the data calculated on the basis of release of 15% incoming discharge, not for the entire year, but for the lean period of three months i.e. December, January and February which is evident from the Annexure P-1 annexed to the written submissions.

12. As per the water release and energy generation calculations for 75% dependable year, which were placed on record as Annexure P-1 to the written submissions (MA No.206 of 2010), the generation loss to the petitioner company is 4.194 MU, based on which the tariff enhancement on account of impact of 15% mandatory release of water works out to 33 paise per unit. However, the Commission in the impugned Order dated 5.6.2010 has allowed a hike tariff by 14 paise per unit as per the impact assessment carried out by the Board, which is based on generation loss of 1.75 MU.

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

14. After filing of the petition (No.97 of 2008), the Government of Himachal Pradesh vide Notification No.MM-F(1)-2/2005-V dated 30.11.2009 had levied additional one percent(1%) free power from the hydel power projects, which would be provided and earmarked for a Local Area Development Fund (LADF), on the IPPs. This will be applicable on projects which are commissioned/under implementation and which are to be allowed in future. The additional burden works out to giving free energy of 3, 19, 330 units per annum. The Commission has appreciated that the inclusion of these provisions by the Government Policy has impact on the tariff and such differential amount is to be considered for evaluating the compensation in terms of determination of tariff.

#### **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 15% discharge of water as per requirement of Hydro Policy notified by the Govt. of Himachal Pradesh in 2006. Due to sacrificial discharge, 1.75 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 respondent in opposition to the averments made by the petitioner company in the original petition, which are reiterated and reaffirmed.

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

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

17. Therefore, it is wrong to allege on the part of petitioner that 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 views**

#### **Mandatory release**

No file could be retrieved from the CD given by the petitioner, therefore, Commission consider data/calculations given in the soft and hard copy given by the Board and hard copy supplied by the petitioner

18. On examining the available discharge for 75% dependable year taken by both the Board and petitioner company it is found that discharges taken by the Board for II 10 day period of August is 5.174 cubic, whereas the petitioner company has taken it as 2.578 cubic. On cross checking this discharge with the one taken in the DPR (submitted by the petitioner company), it is found that that the discharge for II 10 days period for the month of August is 2.578 cubic as taken by the petitioner company.

19. It is further found that the Board in its calculations have taken combined hydro generating efficiency as 87.5% for calculating the net annual energy, whereas the combined efficiency has been taken as 80.75% for

calculating the gross energy (without 15% sacrificial discharge) as per approved DPR. This is an error on the part of the Board as the combined machine efficiency should be same while calculating the energy generated with and without sacrificial discharge i.e. it should be 80.75% taken in the DPR. The gross energy (15% sacrificial discharge) as per DPR taken by both the parties is 34.14 MUs. The energy of 3 lean months should be .406 MU as compared to .41MU taken by the petitioner company. Therefore, net annual energy taken after considering 15% sacrificial discharge works out to be 29.85 MUs. The loss due to 15% mandatory sacrificial release should be 4.29 MU as calculated by the petitioner, in comparison to 1.751 computed by the Board.

In view of above the Commission accedes to the request of the petitioner for compensation of 33 paise per unit on account of 15% sacrificial water discharge.

**LADF:**

20. Additional 1% royalty as per GoHP notification dated 30.11.2009 for the Local Area Development Fund has to be borne by the petitioner company and as stated in the notification this additional burden shall be a pass through in the tariff. The impact on account of 1% increase in royalty is 3 paise per unit. The Board shall pay the same to the petitioner company.

In view of above discussions and taking into consideration the conclusion drawn in the Commission's Order dated 29.10.2009 passed in **petition No. 11 of 2008 M/s D.S.L. Hydrowatt Ltd V/s HPSEB Ltd. and others** and in the order dated 5.6.2010 passed in petition Nos. 97 of 2008 and 208 of 2009 and further submissions made, calculations/data supplied by the parties, the Commission hereby orders:-

- (a) Compensation on account of impact of 15% mandatory release of water, downstream of diversions structure shall be 33 paise per unit in place of 14 paise given by the Commission vide its Order dated 5.6.2010 and
- (b) the impact of additional 1% of royalty under Government notification dated 31.11.2010 for Local Area Development Fund shall be a pass through in tariff and increase on account of the same shall be 3 paise per unit.

In view of above the tariff of Rs.2.50 per unit shall be 36 paise per unit.

(Yogesh Khanna)  
Chairman