

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

Petition No. 21 of 2021

Institution on 23.02.2021

Heard on 11.11.2021

Decided on **15.12.2021**

In the matter of:-

M/s Changer Vidyut Kranti (P) Ltd., through its
Sh. Devinder Singh (Authorized Signatory),
Chankyapur, Ghuggar, Palampur,
Distt. Kangra, HP-176061

.....Petitioner

Versus

1. The State of Himachal Pradesh, through its
Secretary (MPP & Power),
to the Govt. of Himachal Pradesh,
Shimla-171002
2. The HP State Electricity Board Ltd. through its
Managing Director, Vidyut Bhawan,
Shimla-171004
3. The HIMURJA , through its
Director, Urja Bhawan,
SDA Complex, Kasumpti, Shimla-171009

.....Respondents

CORAM

**DEVENDRA KUMAR SHARMA
CHAIRMAN**

**BHANU PRATAP SINGH
MEMBER**

**YASHWANT SINGH CHOGAL
MEMBER (LAW)**

Petition under section 62, 86 and 94 of the Electricity Act, 2003, read with
HPERC (Power Procurement from Renewable Energy Sources and
Cogeneration by the Distribution Licensee) Regulations, 2007.

Counsel:

For Petitioner:

Ms Narvada Kashyap, Advocate

For Respondent No.1:

Sh. Shanti Swaroop Bhatti,
Consultant (Legal)

For Respondent No.2: Sh. Surinder Saklani, Advocate
a/w Sh. Kamlesh Saklani,
(Authorised Representative)

For Respondent No.3: Ms. Kamlesh Shandil, Advocate

ORDER

M/s Changer Vidyut Kranti (P) Ltd. a generating Company having its registered Office at Chankyapur, Ghugger, Palampur, Distt. Kangra (hereinafter referred as “the Petitioner”) is operating and maintaining a Small Hydro Power Project on Lower Baijnath Kuhl, a tributary of river Beas in Kangra Distt. (hereinafter referred as “the Project”. The Petitioner has entered into Implementation Agreement on 27.12.2000 with the Respondent No.1 and Power Purchase Agreement dated 27.12.2000 (hereinafter referred as “the PPA”) with the predecessor-in-interest of the Himachal Pradesh State Electricity Board Ltd. (hereinafter referred as “the Respondent No.2”). The Petitioner has moved the present Petition seeking the directions of the Commission to amend the PPA dated 27th Dec., 2000, to the effect that the tariff and other terms and conditions of the PPA shall be subject to the provisions of the Regulations framed by the Commission’s on power procurement from renewable sources as and when such regulations are framed and the tariff clause in the PPA be ordered to be substituted @ Rs. 2.95 paise per unit in the amended PPA from May, 2013 i.e. the CoD of the Project.

2. The facts, in brief, are that the Petitioner has been granted, right to establish operate and maintain at its cost 1 MW Lower Baijnath Kuhl Hydro Electric Project in Kangra Distt., by the State of Himachal Pradesh, as per the Hydro Policy of the State Govt. and the Petitioner entered into the Implementation Agreement dated 27.12.2000 (IA) with the State Govt. and the Power Purchase Agreement dated 27.12.2000 (PPA)(Annexed as Annexures P-2

and P-3) with the predecessor-in-interest of the HPSEBL i.e. the Respondent No.2. It is averred that the Commission passed an order on Small Hydro Power Projects Tariff and Other related issues dated 18th December,2007(hereinafter referred as “the SHP Order”) under Regulation 6 of the Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Energy Sources and Cogeneration by the Distribution Licensee) Regulations, 2007(hereinafter referred as “the R.E. Regulations of 2007”) relating to the purchase of electric power generated by the SHPs in the State of Himachal Pradesh. The SHP Order dated 18th Dec., 2007 is applicable to future agreements and to the existing agreements executed after 1st July, 2006, with the clear stipulations that the rate of Rs. 2.87 per unit, as given in the SHP Order dated 18th December, 2007, will be applicable to those cases which were revised vide the Commission’s Order dated 09.2.2010 to Rs. 2.95 per unit. Also averred that on the basis of Order dated 29.10.2009 passed in **Petition No. 20 of 2008 – (M/s DSL Hydrowatt Ltd. v/s HPSEB and Others)**, the Commission has the power to revisit the PPAs on case to case basis and the case of the Petitioner squarely falls under the amended R.E. Regulations and needs to be revised, so as to fulfill the mandate of the Electricity Act, 2003. Also averred that the maintainability to revise tariff and failure to provide escalation under the original PPA are burdensome clauses, which merits reconsideration as the Developers while signing the PPA had little or no bargaining ability, with the State Govt.

3. Further averred that the Petitioner fulfills criteria set out in Hydro Project and has the legitimate expectation and right of being considered for the rate of Rs.2.95 per unit alongwith all other hydel developers having capacity upto 5 MW and the non-consideration of the Petitioner’s concern for the rate of Rs.2.95 per unit is totally arbitrary, irrational, discriminatory and against the well-settled law and cannot stand the test of judicial scrutiny at the touchstone of

Articles 14 and 19 (1)(g) of the Constitution of India. The decision making process by the Respondents and the action taken pursuant thereto are open to judicial review and being violative of Article 14 are liable to be quashed. According to the Petitioner, they fulfill the criteria set out in Hydro Power Policy and has legitimate expectation for enhanced tariff of Rs.2.95 per unit as applicable to projects upto 5 MW capacity and non-consideration of rider stipulation in the PPA (as provided in relation to the PPAs executed after 01.07.2006) is discriminatory and contravenes Article 14 of the Constitution. Further, the Respondents have an obligation to act fairly and objectively but have failed to carry out their duties in just, fair, transparent and objective manner. The Petitioner has prayed that the PPA dated 27.12.2000, as entered into by the parties, may be directed to be amended to the effect that the tariff shall be subject to the provisions of the Commission's RE Regulations and the tariff be substituted @ Rs. 2.95 per unit with effect from May, 2013 i.e. from the CoD of the Project.

4. The Petition has been resisted by the Respondents. The Respondent No.2 in its reply has averred that Petitioner has signed the PPA on 27.12.2000 and Clause 6.2 thereof provides that the Board shall pay the tariff of Rs.2.50 per kWh, which rate shall be firm and fixed and shall not be changed due to any reason, whatsoever. As such, the tariff of Rs. 2.50 per kWh is firm and fixed for the term of the PPA i.e. 40 years after the Synchronization Date of the first Unit of the Project. Further averred that the RE Regulations of 2007 clearly provide that the Commission may determine the tariff where the PPA has already been approved prior to the commencement of the said Regulations or after approval of the PPA there is change in statutory Laws or Rules or the State Govt. Policy. In both the situations, the PPA should have been approved by the Commission. The Commission has been set up in 2001 and is vested with the

powers to regulate electricity purchase and procurement process of the distribution licensee under section 86 (1)(b) of the Electricity Act, 2003. The Petitioner has signed the PPA on 27.12.2000 and thus there is no question of approval of the PPA by the Commission. Hence, the tariff as agreed in the PPA dated 27.12.2000 cannot be reviewed on the basis of the RE Regulations of 2007, else it would affect the commercial interest of the HPSEBL and consequently the interest of the consumers. As per the replying Respondent, by no stretch of imagination, the Petitioner can be similarly situated to the Independent Power Producers, who have signed PPA after 2006. Furthermore, the Petitioner is seeking generic levelled tariff of Rs. 2.95 per kWh determined by the Commission under the RE Regulations of 2007, by relying on the provisions contained in the RE Regulations, which cannot be granted to the Petitioner in view of the provisions of the PPA. The Petitioner being signatory to the PPA is bound to adhere to the same and there is no violation of any constitutional provisions. The judgments as relied upon are not applicable in the present case. Further that the Petition in the present form is not maintainable.

5. The Respondent No.3 in their reply have denied that economic viability is computed on the basis of full discharge of the water. Further that the Petitioner cannot make 100% use of water flowing in the stream as people have rights of use for irrigation, drinking purposes etc. Further that the project has been envisaged on irrigation khal and such fact was known to him when the Project DPR was prepared. It is averred that role of Respondent No.3 (HIMURJA) is well defined in Implementation Agreement which has been followed by execution of PPA between Petitioner and Respondent No.2. It is averred that the Commission vide Order dated 18.12.2017 Annexure P-4 has clearly held in Para 5.35 that the order shall be applicable to all the PPAs (not exceeding 5MW) which have been approved by the Commission with a specific clause that “ Tariff

and other terms and conditions of the PPA shall be subject to the provisions of Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Co-generation by the Distribution Licensee) Regulations, 2007 and also the Power Purchase Agreement to be approved by the Commission hereinafter. It is averred that Petitioner has signed PPA with HPSEBL for 40 years at a fixed Tariff of Rs. 2.50 per unit which has been signed on mutual agreed terms and conditions between the parties. Therefore, the plea of reopening of PPA for Tariff revision is not justified. It is averred that Petitioner had requested to enhance the capacity of the Project to 2 MW suggesting that there is enough water in the Kuhal. Hence, the prayer for revision on account of mandatory release is not tenable. According to them, there may be various changes in the price and other norms with passage of time and revision on such reasons will become endless process. In nutshell, the claim is denied.

6. The Respondent No. 1 has adopted the reply filed by Respondent No.2.

7. In the Rejoinder, the Petitioner has reiterated the averments made in the Petitioner and have denied the contents of reply. It is averred that the Petitioner had no bargaining power at the time of signing of the original PPA and that the climate change has started affecting the water availability and viability of the Project and also that the changed tax policies, implementation of GST, maintenance costs and LADA fund have affected the rate of Rs.2.50 per unit. Further the mandate of 15% release of water is another severe blow to the Project of the Petitioner.

8. On the basis of the Pleadings, the following issue arises for determination in the present Petition:-

- i) Whether the claim of the Petitioner for enhanced tariff of Rs.2.95 per kWh is sustainable in the eyes of Law?

9. We have heard Ms. Narvada Kashyap, Ld. Vice Counsel of the Petitioner, Sh. Shanti Swaroop, Consultant (Legal) for the Respondent No.1, Sh. Kamlesh Saklani, Authorised Representative for the Respondent No.2 and Ms. Kamlesh Shandil, Ld. Counsel for Respondent No.3 and have perused the entire case file carefully including the written submissions of the Petitioners.

10. At the outset, it would be appropriate to state that in order to promote renewable energy, the GoHP notified on 22.11.1994, a special promotional Scheme for development of Small Hydro Projects (SHPs) which was amended from time to time, and per Policy dated 06.05.2000, the SHPs upto 5 MW have an option to sell power to the Board at a fixed rate of Rs.2.50 per unit, for which they had to sign Implementation Agreement (IA) with the Govt. of H.P. and Power Purchase Agreement with the Board. Therefore, the tariff being part of Project allotment condition followed by the PPA, the parties are bound by the same being binding contract. The State Commission, while finalizing Model PPA and also approving specific PPA under section 86(1)(b) of the Electricity Act has also concurred in the said rate.

11. The Commission in discharge of its duties under the Act has made the RE Regulations for determination of tariff of SHPs upto 25 MW in 2007 as amended on 12.11.2007. The aforesaid Regulations were made applicable for the PPAs approved by it from July, 2006 onwards. Based on these Regulations, the Commission issued Small Hydro Projects tariff and other related issues Order dated 18.12.2007 fixing tariff of Rs. 2.87 per unit. The Commission, pursuant to the Order dated 18.09.2009 of the **Hon'ble APTEL in Appeal Nos. 50 and 65 of 2008 in the matter M/s Techman Infra Ltd. v/s HPERC and others**, has modified the Tariff for SHPs vide Order dated 09.02.2010 raising the tariff from Rs.2.87 per unit to Rs.2.95 per unit.

12. It is also relevant to mention here that the independent Power Producers (IPP) who had signed PPAs before July, 2006, on the fixed tariff of Rs.2.50 per unit filed Petitions to reopen their PPAs and sought increase in their tariff to Rs.2.95 per unit at par with those who signed PPAs after July, 2006 onwards, under the RE Regulations of 2007. Some IPPs also moved Petitions seeking re-determination of the tariff due to various factors such as escalation of prices, tariff prevalent in the adjoining States, increase in the PLR rates, provisions for change of royalty, 15% mandatory water release, levy of additional charges, Awards, LADA, compensatory fisheries charges and change in Law and policy etc. However, this Commission has declined to accept the claim of such IPPs, who had signed the PPAs before July, 2006, on the tariff of Rs.2.50 per unit. The Hon'ble APTEL has upheld the validity of this Commission's Order passed in pursuance of the RE Regulations 2007 and the SHP Order dated 18.12.2007 in **Appeal Nos. 50 & 65 of 2008- Techman Infra Ltd. v/s HPERC & Others; and Appeal No. 179 of 2010, M/s Patikari Power Ltd. v/s HPERC & Others.** The Hon'ble High Court of Himachal Pradesh has also upheld the validity of the RE Regulations, 2007 in its judgment dated 6th August, 2013 in **CWP No. 8426 of 2010- The Himachal Pradesh State Electricity Board Ltd. v/s the Himachal Pradesh Electricity Regulatory Commission & Others.**

13. The Himachal Pradesh Electricity Regulatory Commission was established on 30.12.2000. It is by now settled that the PPAs executed prior to setting up of the Electricity Regulatory Commission are beyond the purview of the power of the Commission to re-open.

14. In the case in hand, in pursuance of the Implementation Agreement (IA) dated 27.12.2000, the Petitioner has executed the Power Purchase Agreement (PPA) dated 27.12.2000 with the HPSEB, the predecessor-in-interest of the

Respondent No.2, for the sale of power to be generated from the Project at the firm and fixed rate of Rs.2.50 per kWh.

15. This Commission relying upon the judgment of the Hon'ble APTEL dated 14th Sept., 2006, in **Appeal No. 189 of 2005- Uttaranchal Jal Vidyut Nigam Ltd. & Others** and the Judgement dated 30.10.2007, rendered in **Appeal No. 61 of 2007- Himurja Pvt. Ltd., New Delhi v/s Uttaranchal Electricity Regulatory Commission, Dehradun and the Uttaranchal Power Corporation Ltd. 2007, ELR (APTEL) 1645**, has held in case of **M/s DLS Hydrowatt Ltd. v/s HPSEB and Others** decided on 29.10.2009 that the Commission lacks the power to look into the PPAs entered into or concluded prior to its setting up the Commission and such agreements are to be complied with in accordance with the stipulations made in the said PPAs. Even otherwise, the Petitioner in Para 5 of the Petition has himself quoted para 42 of the judgment dated 14th September, 2006, passed in Appeal No. 189 of 2005- Uttaranchal Jal Vidyut Nigam Ltd. v/s Uttaranchal Electricity Regulatory Commission and others, which reads as under:-

“42: Factually there was no Regulatory Commission for the State of Uttaranchal during the relevant period. Therefore, the question of approval of PPA or non-approval is inconsequential. Contract concluded in terms of PPA is binding on the parties and the same could not be reopened by the Regulatory Commission on any later date nor the Commission is the authority to interfere with the terms of PPA entered between the parties.”

16. It is held in the Hon'ble Supreme Court judgment in Travancore Devaswom Board V. Thanth International, reported as (2004) 13 SCC 44, in paras 12 and 13 as under:

“12. The law on the subject is well settled. In the case of Alopi Parshad & Sons Ltd. V. Union of India this Court has held that the Contract Act, 1872 does not enable a party to a contract to ignore the express covenants thereof. It is held that the Contract Act does not

permit a party to claim payment of consideration for performance of contract at rates different from the stipulated rates, on some vague plea of equity. It is held that in the performance of a contract, one often faces, in the course of carrying it out, a turn of events which are not anticipated e.g. an abnormal rise or fall in prices, sudden depreciation of currency, an unexpected obstacle to execution or the like. It is held that these do not affect the bargain that has been made. It is held that there is no general Page 61 of 87 Appeal No. 179 of 2010 & IA No. 248 of 2011 liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an unanticipated turn of events, the performance of the contract has become onerous. It is held that compensation quantum meruit is awarded when the price is not fixed by the contract. It is held that for work done or serviced rendered pursuant to the terms of contract, compensation quantum meruit cannot be awarded.

13. *The above lawfully governs this case. In this case the contract between the parties laid down the price. Clause 2 specifically provides that this price was to remain firm till May 1991. As stated above, the circumstances enumerated by the respondents were not such as frustrated the contract. Merely because performance had become more onerous was not a ground for nonperformance or for claiming enhancement of price.”*

16. It is held that a contract is not frustrated merely because the circumstances in which the contract was made underwent a change. It was further held that there is no general liberty reserved to the Courts to absolve a party from liability to perform his part of the contract merely on account of an unanticipated turn of events, which rendered the performance of the contract onerous, like an abnormal rise or fall in prices, a sudden depreciation of currency or unexpected obstacle to the execution of the contract.

17. The Power Purchase Agreement fall in the realm of contract. The parties are bound by the agreements signed by them. The parties to the agreement can

hardly deny the facts as existed at the relevant time, just because it may not be convenient now to adhere to those terms. Similarly, conditions of contract cannot be altered/avoided on presumptions or assumptions of the parties on having a second thought that a term of a contract may not be beneficial to them at a subsequent stage. Here it would be apt to point out that Hon'ble APTEL in its decision dated 23.04.2012 rendered in **Appeal No. 179 of 2010- M/s Patikari Power Pvt. Ltd. v/s HPERC**, in light of the Apex Court rulings in **Alopi Parshad v/s the Union of India (1960) 2 SCR 793** and **Continental Construction Co. Ltd v/s State Of Madhya Pradesh (1988) 3 SCC 82** and Madras High Court judgment rendered in **SAP Devasthanam v/s Sabapathi Pillai (AIR) 1962 Mad. 132** has held that a low return on equity could not be a reason for review of the PPA.

18. There is nothing on the record, much less, supported by any documentary evidence to sustain the plea that the Power Purchase Agreement dated 27.12.2000 was the result of undue influence or duress. On the other hand, the record indicates that the Petitioner had voluntarily signed the Interim Agreement with State Government and the PPA with the Respondent No. 2 on 27.12.2000 and executed the project willingly which was beneficial for the Petitioner at the material time. It is also on record that the Petitioner voluntarily signed the PPA and there was no misuse of the dominant position by the Respondent No.2 while entering into the PPA with the Petitioner. Therefore, the plea has been set up only to claim the benefit of the revised tariff in relation to the SHPs to which the power procurement Regulations of 2007 are applicable now.

19. It is a settled law that the State in the exercise of its power cannot resort to the theory of 'take it or leave it'. While entering into a contract, the State cannot on account of individual's lesser bargaining power, put unfair and unreasonable conditions under a contract, the performance of which are against

the interest or financial viability of the company or such individual or is against the public interest.

20. Thus having examined all the dimensions of the matter, it is crystal clear and undisputably established that the agreement relied upon by the Petitioner is a valid subsisting agreement. It is in force. It is neither repudiated nor terminated. It is binding upon both the parties. Once the agreement is held to be binding, the Petitioner is estopped from contending that in the absence of escalation Clause in the agreement or lack of bargaining power while signing the agreement or the change in the tax regime etc. as alleged, the PPA may be reopened. Otherwise also, every time when any agreement is entered into, all the negotiations are voluntarily held and then the agreement is formalized in a carefully drafted contract, as such, the claim of the Petition lacks merit. Once the parties have created a legally binding contract on 27.12.2000 and have acted upon the same for a considerable long time, it cannot be said that the agreement is too vague or uncertain to be performed.

In view of the above, the Petitioner has failed to establish that they are entitled for the enhanced tariff of Rs.2.95 per kWh as claimed. The issue is accordingly answered in negative against the Petitioner.

Final Order

In view of our above discussion and findings, we do not find any merits in this Petition. The Petition is accordingly dismissed. The file after needful be consigned to records.

Announced
15.12.2021

-Sd-	-Sd-	-Sd-
(Yashwant Singh Chogal)	(Bhanu Pratap Singh)	(Devendra Kumar Sharma)
Member(Law)	Member	Chairman