

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

In the matter of :-

M/s DLI Power (India) Pvt. Ltd.
6, Shiv-Wastu, Tejpal Scheme,
Road No.5, Vile Parle (East), Mumbai-

....Petitioner

Versus

The HP State Electricity Board Ltd. thro' its,
Executive Director (Personnel)
Vidyut Bhawan, Shimla-171004

....Respondent

Petition No. 10 of 2018

(Decided on 30th June, 2018)

CORAM

**S.K.B.S NEGI
CHAIRMAN**

**BHANU PRATAP SINGH
MEMBER**

Counsels: -

for petitioner:

Sh. Ajay Vaidya, Advocate

for respondents:

Sh. Kamlesh Saklani
(Authorised Representative)

ORDER

(Last heard on 26.05.2018 and Orders reserved)

This petition has been filed by M/s DLI Power (India) Pvt. Ltd. having its registered Office at 6, Shiv-Wastu, Tejpal Scheme, Road No. 5, Vile Parle (East) Mumbai through Sh. V.S.V.A Rao S/o Late V.S. Rao Authorised Signatory (hereinafter referred as “the Petitioner”), who is operating and maintaining Raura HEP located in Distt. Kinnaur (HP)(hereinafter referred as “the Project”)

2. The petitioner has moved this petition under Section 94 (1)(f) of the Electricity Act, 2003(hereinafter referred as “the Act”), read with regulation 45 of the Himachal Pradesh Electricity Regulatory Commission(Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2017 (hereinafter referred as “ the impugned Regulations or “RE Regulations, 2017”), seeking review of the impugned Regulations stating that-

- (a) the rights of the petitioner have been affected by the action of this Commission, by denying legitimate tariff to the petitioner’s project as

- determined under Regulations 14 and 20 to 41 of the impugned Regulations;
- (b) the petitioner is setting up Raura SHP (12MW) in Distt. Kinnaur, Himachal Pradesh, in pursuance to the Policy of the Government of Himachal Pradesh and as per the Implementation Agreement (IA) signed with the Government of Himachal Pradesh (GoHP) on 24th March 2008. This Agreement is going to be in force up to a period of 40 years from the Scheduled Commercial Operation Date of the project;
- (c) the petitioner is aggrieved with certain provisions of the Regulations 2017 such as Clause 11(2)- Special Provisions for Small Hydro Projects- wherein the Commission ruled that the “the tariff determined under the regulations 14 and 20 to 41 shall be applicable only for such small hydro projects where:-
- (i) the 1st Implementation Agreement has been signed on or after 1st January 2015;
 - (ii) no power purchase agreement, whether under REC Mechanism or otherwise, has been approved by the Commission before the date of commencement of these Regulations; and
 - (iii) the RE generator implementing the small hydro project has neither filed joint petition for approval of PPA before the Commission nor has commenced the operation of the project, prior to the date of commencement of these Regulations.
- (d) the Interconnection Sub-station is an important pre-requisite. A SHP cannot be completed without this facility to be provided by the Licensee. The case of Raura SHP clearly shows that eligibility for Regulations and signing PPA should not be dependent on date of first IA as detailed hereinafter-
- (i) the HPPTCL Interconnections Sub-Station at Karcham was specified in the first IA dated 24.03.2008 and the transmission corridor (approximately 2 km) was acquired by the petitioner Company in Year 2011. However, the said Sub-station did not come up and the location was subsequently changed. It was re-located approx 300 M from Raura SHP switchyard;
 - (ii) the said Interconnection Sub-station (re-named as Urni Switching Station) was planned to be ready in April 2015 as per the targets fixed by the HPPTCL in their Master Plan. However, its construction

started in Year 2015 and is still continuing. Urni S/S is to be finally connected to 66/220/400 kV Wangtoo Sub-station but the connecting transmission line work has not started;

- (iii) the Site Visit Report by the Directorate of Energy dated 18.07.2017 clearly states progress of the SHP to be in order while the uncertainty on transmission line of HPPTCL still prevails and according to DoE, the evacuation of power is not possible till December 2019;
- (iv) due to the delay in providing Interconnection facility, Raura SHP has been forced upon with continued time and cost overrun. As a result, the project needs to be compensated by allowing eligibility and executing PPA under the Regulations 2017 with no linkage with the signing of the first IA.

3. That the Respondent has filed short reply under which the maintainability of the petition has been disputed inter alia on the following grounds:

- i) that the Implementation Agreement (IA) for the 8 MW SHP was signed between the Government of Himachal Pradesh and the petitioner Company on dated 24.03.2008 which clear falls under the HPERC (Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2012. Subsequently, supplementary implementation agreement (SIA) for 4 MW stands signed on 01.02.2008. Respondent has submitted that the Regulations, 2017 shall be applicable to the 4 MW only in case HPSEBL decides to purchase power from the additional 4 MW capacity;
- ii) that there is no error apparent on the face of the record where under which the petitioner is asking for the reviewing the Regulations under clause 45. The Commission has notified the Regulations, 2017 after affording an opportunity of personal hearing to all the concerned stake holders and their suggestions, objections, if any, were duly kept in the consideration. Hence, there is no scope for the any review/ modification of the Regulations, 2017.
- (iii) in view the facts and circumstances narrated herein above, the present petition filed by the petitioner is not maintainable and deserve to be dismissed at this stage.

4. The petitioner Company has prayed that the impugned Regulations may be modified/amended to the extent that these do not apply to the project of the petitioner and

further to hold that petitioner's project will be governed by the impugned Regulations. The Himachal Pradesh Electricity Regulatory Commission (Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2012, specified norms and other provisions for the Renewable Energy projects for the control period extending upto 30.09.2017 and thus it become necessary to put in place the new regulations commencing from 01.10.2017.

5. The Commission in exercise of the powers conferred under Section 61, sub-section (1) of Section 62, clauses (a),(b) and (e) of sub-section(1) of Section 86 and clause (zd) of sub-section(2) of section 181 of the Act, published the draft HPERC (Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination), Regulations, 2017 on 19.08.2017 in the Rajpatra Himachal Pradesh accordingly.

6. As required vide sub-section (3) of the Section 181 of the Act, read with sub-regulation (5) of regulation 16 of the HPERC (Conduct of Business) Regulations, 2005 and rule 3 of the Electricity (Procedure for Previous Publication) Rules, 2005, the Commission invited public objections and suggestions by way of insertions in two Newspapers i.e. "Amar Ujala" and "The Tribune" on 20th August, 2017 and the full text of the draft RE Regulations, 2017 alongwith Explanatory Memorandum thereon, was also made available on the Commission's website www.hperc.org. A time of 21 days was allowed for filing objections and suggestions in relation to the said draft RE Regulations, 2017. Subsequently a public hearing was held on 16.09.2017, wherein many stakeholders requested the Commission for adjournment of the hearing to enable them to present their view points in a better way. Taking into consideration the request for adjournment of the public hearing by the stakeholders, the Commission decided to conduct another public hearing on the subject matter. Accordingly, the Commission again invited the fresh/additional public objections and suggestions by way of insertions in two Newspapers i.e. "Times of India" and "Danik Bhaskar" on 20.09.2017 and extended the filing/submission date of objections/ suggestions upto 29.09.2017 and subsequently second public hearing was held on 07.10.2017.

7. The Commission received comments/suggestions on the draft RE Regulations, 2017 from stakeholders including petitioner Company. During the public hearings, the stakeholders and their representatives also presented their views.

8. This Commission after considering the objections received and also the objections raised in the public hearing and in exercise of the powers conferred by Section 61, Sub-section (1) of Section 62, clause (a), (b) and (e) of Sub-section (1) of Section 86 of Clause

(zd) of Sub-section (2) of Section 181, of the Electricity Act, 2003 made the impugned Regulations i.e. the Himachal Pradesh Electricity Regulatory Commission (Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2017.

9. Through this petition, the petitioner has now sought the amendment/modification in the regulations, on the ground that-

- (a) the project of petitioner was not completed due to non-availability of clearances from various Departments; not within its control;
- (b) the impugned regulations are at variation with the CERC Regulations.
- (c) due to the delay in providing Interconnection facility the petitioner is faced the time and cost over run.

10. The issue raised at sub-para (a) and (c) of the preceding para of the Order are the project specific issue. The petitioners have not been able to show that there has been a problem which is industry wide and spread over the whole State or major part of the State, necessitating the amendment/modification in the regulations. There cannot be a general Order for addressing issues which are specific to some individual project developers. The Apex Court in its judgment delivered in **Gujarat Urja Vikas Nigam Ltd. Vs. Solar Semiconductor Power Company (INDIA) Private Limited 2018 ELR (SC) 32** has observed that, if some of the developers could not complete the projects, it is not adequate justification why the regulations should be modified to give relief to some of the developers. This becomes more anomalous especially when a discussion paper has already been made for making the regulations and public hearing has already been completed.

11. With the regard to the issue raised in sub-para (b) preceding para 9 of this Order, it is pointed out that in accordance with the Electricity Act, 2003 even though the State Commission, while specifying the terms and conditions for the determination of tariff, shall be guided by the principles and methodologies specified by the Central Commission for determination of tariff applicable to generating companies, yet the State Commissions have the power to frame their own regulations in this regard. It is, therefore, not mandatory for the State Commissions to follow the CERC Regulations.

Section 181 (2) of the Act gives powers to the State Commission to frame regulations specifying terms and conditions for determination of Tariff under Section 61 of the Electricity Act, 2003. Similarly, Section 178(2) of the Electricity Act, 2003 gives powers to the Central Commission to frame regulations specifying terms and conditions for determination of Tariff under Section 61 of the Electricity Act, 2003. The powers of Central Commission under Section 178 and powers of State Commissions under Section 181 are independent of each other. Section 61 of the Electricity Act, 2003 requires the

Appropriate Commission to specify terms and conditions for determination of Tariff and while doing so it shall be, inter alia guided by the principles and methodologies specified by the Central Commission. If the intention of the Legislature was that the State Commission would adopt the provisions of the regulations framed by the Central Commission, the Legislature would have used the term ‘shall follow’ rather than the term “shall be guided by” in Section 61 of the Electricity Act, 2003, the same principle has been laid down by **the Appellate Tribunal for Electricity in case of Haryana Vidyut Prasaran Nigam Vs. Haryana Electricity Regulatory 18 April, 2012, Judgment in Appeal No. 102 of 2011 cited in para 7(e) of the Appellate Tribunal’s judgment dated 04/12/2015–Chattishgarh State Power Distribution Co. Ltd, Raipur v/s Chattishgarh State Electricity Regulatory Commission 2016 ELR (APTEL) 0357** and the relevant extract is reproduced below:

“As pointed out earlier in paras 5 and 6 above, once the State Commission have notified its Regulations in accordance with the provisions of the Act, the Central Commission’s Regulations would have no relevance in the matter and the State Commission would have to follow its own Tariff Regulations for determination of Tariff for licensees and generating Companies.....

The crux of the above discussions is that the State Commissions are independent statutory bodies having full powers to frame its own Regulations specifying terms and conditions for determination of Tariff and once such Regulations are notified, the State Commission is bound by these Regulations”.

12. The Commission has accordingly framed its own regulations for the purpose by taking into account the various State specific situations as well as the provisions made in the CERC RE Tariff Regulations, 2017 after duly balancing the consumers’ interests in the State and the need for promotion of generation of electricity from renewable sources and also to encourage efficiencies. Since the regulations framed by the Commission and those specified by the CERC are applicable under different situations, the question of having two different tariff plans for a particular State/Region does not arise. The Commission otherwise also observed that there are not many SHPs in the State which may, in actual practice, be governed by the CERC Regulations, 2017.

13. The Commission further observe on scrutiny of this petition finds that-

(a) the very opening para of the petition reads as under.-

“Application under Section 94(1)(f) of the Electricity Act, read with clause 45 of the Promotion of Generation from the Renewable

Energy Sources and Terms and Conditions for Tariff Determination) Regulations”.

The petition is designed to seek amendment/modification in the HPERC (Promotion of Generation from Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2017. The framing of the Regulations is a legislative jurisdiction; making of the relaxation/ removal of difficulties is an administrative function. The regulatory/ adjudicatory process and the Legislative process cannot be inter-mingled. This Commission has repeatedly laid down in various cases e.g. **petition No. 90 of 2015- M/s Bhawani Renewable Energy Pvt. Ltd. Vs. HP State Electricity Board & Others, decided on 19.11.2015, and Petition Filing No. 6 of 2016- The Himalaya Power Producers Association Vs. HP State Electricity Board Ltd. decided in 03.08.2016**, that there is no requirement to file a petition for making amendments in regulations or invoking the executive power to relax/remove difficulties;

- (b) that the petitioner Company has concealed the fact that it has also challenged the validity of the aforesaid regulations by seeking judicial review under Article 226 of the Constitution of India, by way of writ petition No. 2783 of 2017, which is pending for adjudication, before the Hon'ble High Court. In other words, the petitioner Company, being aware of the proper procedure, has deliberately filed this petition seeking modification/amendment in the Regulations;
- (c) that this Commission has unnecessarily been pleaded as respondent and the HPPTCL/DoE have not been impleaded as respondents.

14. In light of the above discussion, this Commission declines to entertain this petition as the regulatory/adjudicatory process and the Legislative process cannot be intermingled.

This petition is disposed of accordingly.

--Sd/-
(Bhanu Pratap Singh)
Member

--Sd/-
(S.K.B.S. Negi)
Chairman