

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

Petition No: 198 of 2014
Date of Institution: 03.11.2014/22.11.2024
Arguments Heard on: 30.11.2024
Decided on: 10.12.2024

CORAM:

DEVENDRA KUMAR SHARMA
CHAIRMAN.

YASHWANT SINGH CHO GAL
MEMBER (Law).

SHASHI KANT JOSHI
MEMBER .

M/s Jala Shakti Limited,
House No. 135, Upper Julakari,
Chamba, H.P.**Petitioner.**

Versus

The State of Himachal Pradesh, through its,
Principial Secretary (MPP & Power)
To the Government of Himachal Pradesh,
Shimla, HP-171002.**Respondent No. 1.**

The HP State Electricity Board Ltd. through its,
Chief Engineer (System Operation),
Vidyut Bhawan, Shimla, HP-171004.**Respondent No. 2.**

The HIMURJA. Through its,
Director,
SDA Complex, Kasumpti, HP-171009.**Respondent No. 3.**

Petition under the Section 62, 86 and 94 of Electricity Act, 2003 read with Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Co-generation by the Distribution Licensee) Regulations, 2007 (First Amendment) for issuance of appropriate directions/ orders on the submission made hereinafter.

Present:-

Sh. Ajay Vaidya, Ld. Counsel for the Petitioner.

Sh. Kamlesh Saklani, Authorised Representative for the Respondent No. 2.

None for the Respondent No. 1.

ORDER

This petition has been remanded by the Hon'ble APTEL vide order dated 08.11.2024 in Appeals No. 309 of 2017 and 326 of 2017.

Para 33 of the order is reproduced as under:

“33. Appeal No. 326 of 2017 stands allowed. The Commission shall accord the fresh approval to the PPA between the Appellant and the 2nd Respondent including therein the specific rider “tariff and other terms & conditions of the PPA shall be subject to the provisions of HPERC Regulations, 2007”. The approval would date back to the date of initial approval i.e. 28th March 2005 and accordingly, the Appellant would be covered by tariff Regulations, 2007 as well as the tariff order dated 18th December, 2007. Needless to say that the entire exercise shall be completed by the Commission within one month from the date of the judgement.”

2. Accordingly, the petition No.198 of 2014 was taken up for hearing on 22.11.2024. The Ld. Counsel and Authorized Representative for the parties were directed to file additional submissions, if any, within 3 days. The petitioner and the HPSEBL have submitted the additional submissions. A rejoinder has also been filed by the petitioner.

3. The Petitioner filed Petition No. 198 of 2014 in the Commission on 27.09.2014 for increase of tariff for the power generated and

delivered by it from the Project from Rs. 2.50 per unit to Rs. 2.95 per unit as determined by the Commission vide order dated 09.02.2010 and in alternate to re-determine the tariff upwards considering the Project specific capital cost in view of order dated 09.02.2010.

4. The said petition was disposed off by the Commission vide order dated 19.09.2015 that the tariff cannot be revised.

5. The brief facts of the case are as under:-

“2. The Petitioner executed Implementation Agreement (IA), to establish, operate and maintain the said project, with the Govt. of HP (Respondent No. 1) on 18th Nov. 2002, and also moved a joint petition i.e. Petition No. 199/2004 with the Himachal Pradesh State Electricity Board, the predecessor of Himachal Pradesh State Electricity Board Limited (Respondent No. 2), for approval of the Power Purchase Agreement (in brevity “the PPA”). The Commission accorded its approval on 28.03.2005 to the PPA, subject to the following observations that:-

- (i) The Model PPA approved by the Commission vide its Order dated 24th March, 2003 provides for Government Guarantee and the same can only be omitted from the PPA with the approval of the Commission for which purpose the parties need to file a joint application.*
- (ii) The Construction Schedule attached as Appendix ‘B’ to the Implementation Agreement by the Government of Himachal Pradesh and the Company for implementation of the project be made a part of the PPA.*
- (iii) The interconnection point in clause 2.2.46 of the PPA has been specified as 33 kV sub-station at Jarangla instead of 33 kV sub-station at Ghorla mentioned in clause 2.1(p) of the Implementation Agreement. An amendment to the IA is required to be obtained first before effecting this change.”*

3. The PPA was ultimately executed on 11.01.2007. There is a gap of 2 years from the date of the approval of the PPA under sub-section (1)(b) of section 86 of the Electricity Act, 2003 (in brevity “the Act”) till the date of the execution of the PPA, which provided that the

Respondent No.2 shall pay for the Net Saleable Energy delivered by the petitioner to the Respondent Board at the Inter-connection Point at fixed rate of Rs.2.50 (rupees two and paise fifty only) per kWh. This rate is stated to be firm and fixed without indexation and escalation and is not to be changed due to any reason, whatsoever. The said rate is to remain applicable for a term of forty (40) years after the synchronization date of the first unit of the Project. The date of the synchronization of this project is 16th May, 2013.

- 4. In the meanwhile on 18th June, 2007, the Commission notified the Regulations for Power Procurement from Renewable Sources and Co-generation by the distribution licensee, under which the Commission may determine tariff by a general Order for Small Hydro Projects not exceeding 5 MW capacity and by a special Order for Small Hydro Projects of more than 5MW and not exceeding 25 MW capacity, on individual project basis. These Regulations were not applicable to the PPAs, which were approved prior to the commencement of the Regulations and were not subjected to the provisions of the Commission's Regulations.*
- 5. On 18th Nov., 2007, the Commission amended the Regulations (ibid) by introducing a provision under which the Commission in order to promote generation of electricity from renewable sources could review or modify the PPA approved prior to the commencement of the Regulations or where after the approval of the PPA there is change in statutory laws, or rules or the State Govt. policies.*
- 6. Subsequently the Commission decided to determine the tariff for Small Hydro Energy Projects, based on cost plus approach with certain performance benchmarks and the Commission vide its Order dated 18.12.2007 worked out the relevant parameters and determined the levelised tariff for Small Hydro Projects upto 5 MW for 40 years from the date of commercial operation of the SHPs @ Rs. 2.87 per unit. For determination of levelised tariff for these projects the Commission approved the capital cost at Rs. 6.5 crores per MW and also determined a normative value of 45 percent for the Capacity Utilization Factor (CUF) for the purpose of tariff determination.*

7. *The said Order dated 18.12.2007 was challenged by way of Appeal No. 50 of 2008, **Techman Infra Ltd., New Delhi V/s HPERC & Ors.** and Appeal No. 65 of 2008- **the Himachal Pradesh State Electricity Board V/s the Himachal Pradesh State Electricity Regulatory Commission and another**, and the Hon'ble APTEL vide its Order dated 18.9.2009 (2009 ELR (APTEL) 1025) passed in the said Appeals upheld the Commission's orders with the observations that the capital cost of 6.5 crores per MW shall be treated as normative capital cost in all such cases as are found suitable to all parties. The promoters of hydel power in the State of Himachal Pradesh as well as the Himachal Pradesh State Electricity Board shall be entitled to apply to the Commission for fixing project specific capital cost for any project in case the normative capital cost is not suitable to either of them. Similarly if CUF of 45 percent for a specific project is contested by other party, it may approach the Commission with site specific CUF. The Commission was also directed to remove arithmetical errors while re-computing the levelised tariff. As a sequel to the APTEL Judgment dated 18.09.2009, passed in **Techman Infra case (Supra)**, the Commission re-determined the tariff vide its Order dated 09.02.2010 @ Rs.2.95 per unit."*
6. The said order dated 19.09.2015 passed by the Commission in Petition No. 198/2014 was assailed before the Hon'ble APTEL in Appeal No. 326 of 2017.
7. Meanwhile, one another Petition No. 9 of 2016 was also filed in the Commission by the Petitioner on 03.02.2016 with the following prayer:-

"It is, therefore, respectfully prayed that this Petition may kindly be allowed and PPA as entered by the parties may kindly be directed to be amended with the rider i.e. Tariff and other terms and conditions of the PPA shall be subject to the provisions of the Commission's regulation on power procurement from renewable sources, as and when such

regulations as framed and the tariff clause in the PPA may kindly be ordered to be substituted @ Rs. 2.95 paisa per unit in the amended PPA from May, 2013 i.e. from the date of commissioning. Such other or further order as may be deemed just and proper may kindly be passed in favour of the Petitioner.”

8. The Petition No.9 of 2016 was disposed off by the Commission vide order dated 03.08.2016 observing that the Petition is not maintainable and declined to admit and entertain the same on the principles of res-judicata.

9. The Order dated 03.08.2016 in Petition No. 9 of 2016 was also assailed by the Petitioner before the Hon'ble APTEL in Appeal No. 309 of 2017.

10. The Hon'ble APTEL has disposed off both the Appeal Nos. 309 of 2017 and 326 of 2017 vide common judgement dated 08.11.2024 as mentioned above. Paras 30 and 33 of judgement dated 08.11.2024 passed by the Hon'ble APTEL are reproduced as under:-

“30. Considering the above discussion, we are of the firm view that the impugned order of the Commission cannot be sustained. The same is hereby set aside. The Commission shall accord the fresh approval to the PPA between the Appellant and the 2nd Respondent including therein the specific rider “tariff and other terms & conditions of the PPA shall be subject to the provisions of HPERC Regulations, 2007”. The approval would date back to the date of initial approval i.e. 28th March 2005 and accordingly, the Appellant would be covered by tariff Regulations, 2007 as well as the tariff order dated 18th December, 2007. Needless to say that the entire exercise shall be completed by the Commission within one month from the date of the judgement.

33. Appeal No. 326 of 2017 stands allowed. The Commission shall accord the fresh approval to the PPA between the Appellant and the 2nd Respondent including therein the specific rider "tariff and other terms & conditions of the PPA shall be subject to the provisions of HPERC Regulations, 2007". The approval would date back to the date of initial approval i.e. 28th March 2005 and accordingly, the Appellant would be covered by tariff Regulations, 2007 as well as the tariff order dated 18th December, 2007. Needless to say that the entire exercise shall be completed by the Commission within one month from the date of the judgement."

11. It is, therefore, apparent from the order of the Hon'ble APTEL dated 08.11.2024 that the Commission has been directed to accord fresh approval to the PPA between the Petitioner and the Respondent/HPSEBL by including a specific rider "tariff and other terms & conditions of the PPA shall be subject to the provisions of HPERC Regulations, 2007". The approval would date back to the date of initial approval i.e. 28th March 2005 and accordingly, the Appellant would be covered by tariff Regulations, 2007 as well as the tariff order dated 18th December, 2007. Further the Commission has to accord the approval within one month from the date of the judgement.

12. The Commission notified the HPERC (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007 on 18.06.2007 (HPERC Regulation 2007). On the basis of the above Regulations the Commission determined tariff vide SHP order dated 18.12.2007 for projects upto 5.0 MW capacity @ Rs. 2.87 per unit.

13. The SHP order dated 18.12.2007 was challenged in Appeals No. 50 and 65 of 2008 by M/s Techman Infra Ltd., New Delhi Vs. HPERC & Ors. and the Himachal Pradesh State Electricity Board Vs.

the Himachal Pradesh State Electricity Regulatory Commission and another. The Hon'ble APTEL disposed off the above appeals vide Order dated 18.09.2009 and directed as under:-

“25) During the hearing it came to our notice that although the Regulations stipulated fixing of levelised tariff, there is no Regulation which requires the Commission to choose the period of 40 years for fixing such levelised tariff. The problem of negative cash flow in the initial years may be solved by various ways like (i)reducing the length of the period during which the levelised tariff will apply say 25 years or (ii) by breaking up the levelised tariff period into two parts – the first 10 years and the remaining years (iii) or both so that negative cash flow is substantially reduced if not eliminated altogether. Therefore, in case any hydel power generator or purchaser of power requires project specific determination of levelised tariff as mentioned in paragraph 21 above, the Commission may also take into account prayer in this regard by the generator / purchaser of power.

26) In view of our above analysis we allow both the appeals in part with the following directions:

- (i) The capital cost of Rs.6.5 Crores/MW shall be treated as normative capital cost in all such cases as are found suitable by all parties.*
- (ii) The promoters of hydel power in the State of Himachal Pradesh as well as the Himachal Pradesh State Electricity Board shall be entitled to apply to the Commission for fixing project specific capital cost for any project in case the normative capital cost is not suitable to either of them. Similarly, if CUF of 45% for a specific project is contested by either party, it may approach the Commission with the site specific CUF.*
- (iii)The Commission shall factor in the cost of making up the deficit in the years in which the revenue falls short of cash flow to allow return on equity and enable repayment of loan.*
- (iv)The Commission shall factor into the additional return which can be gained by the hydel projects in the years in which the levelised tariff exceeds cost of generation including the return on equity, depreciation, O&M etc.*

(v) The Commission while giving effect to directions (ii), (iii) & (iv) above, shall consider if the period of fixed levelised tariff can be reduced to about 25 years.

(vi) Commission may also consider breaking up the period of levelised tariff into two parts as suggested in paragraph 25 above.

(vii) The Commission shall remove arithmetical errors while re-computing the levelised tariff.”

14. In the circumstances, as directed by the Hon'ble APTEL vide order dated 18.09.2009 in appeals No.50 & 65 of 2008, the SHP order dated 18.12.2007 was modified by the Commission vide order dated 09.02.2010 that the tariff for the SHPs upto 5.00 MW shall be Rs. 2.95 per kWh.

15. We have heard Sh. Ajay Vaidya, Ld. Counsel for the Petitioner and Sh. Kamlesh Saklani, Authorised Representative for the Respondent No. 2 and have perused the entire record carefully.

16. Sh. Ajay Vaidya Ld. Counsel for the Petitioner has contended that the Hon'ble APTEL has directed the Commission to accord the fresh approval of PPA to the Petitioner and the 2nd Respondent/ HPSEBL including therein the specific rider “tariff and other terms & conditions of the PPA shall be subject to the provisions of HPERC Regulations, 2007” and that the approval shall date back to the date of initial approval i.e. 28th March, 2005 and accordingly, the Petitioner would be covered by tariff Regulations, 2007 as well as the tariff order dated 18th December, 2007 and that entire exercise has to be

completed by the Commission within one month from the date of the judgement. He has also submitted that prayer of the Petitioner in Petition No. 198 of 2014 was two fold viz:-

- i) Tariff as per Tariff Regulations, 2007 be provided.
- ii) Project specific tariff be also allowed.

17. In so far as the alternate prayer of the Petitioner regarding the project specific tariff, the Hon'ble APTEL in para 32 of the judgement dated 08.12.2024 has held as under:-

“32. We do not find any error or infirmity in the said order of the Commission. Essentially, the prayer of the Appellant in both the petitions was identical i.e. to get the benefit of tariff determination in the tariff order dated 18th December, 2007 which was issued in pursuance to the tariff Regulations, 2007 notified on 18th June, 2007. Therefore, the Commission has rightly held the said petition barred under the practice of res judicata as enunciated in Section 11 of Code of Civil Procedure, 2019 which was applicable at the relevant time. The Appeal No. 309 of 2017 is, thus, found devoid of any merit and liable to be dismissed.”

18. In fact, the Hon'ble APTEL has directed the Commission to accord the approval of PPA as per HPERC Regulations 2007 and SHP's Order dated 18.12.2007 and the Commission is under the mandate to proceed accordingly.

19. Though Sh. Kamlesh Saklani, Authorised Representative has submitted that the proceedings before the Commission are premature as the HPSEBL intends to assail the judgement of the Hon'ble APTEL dated 08.11.2024 before the Hon'ble Supreme Court and the

implementation of order of the Hon'ble APTEL may kindly be awaited till the Hon'ble Supreme Court takes up the Appeal, but said submission of the HPSEBL can't be accepted for the reason that neither any appeal has been filed before the Hon'ble Supreme Court nor any order staying the operation of the order dated 08.11.2024 of the Hon'ble APTEL has been produced. Otherwise also, it is trite that mere filing of an appeal does not operate as stay or suspension of the order appealed against nor the proceedings in the court below can be stayed. In this regard, reliance has been placed in the judgements of the Hon'ble Supreme in *Collector of Customs, Bombay Vs. Krishna Sales (P) Ltd.* 1994 Supp (3) SCC 73, *Atmaram Properties (P) Ltd. Vs. Federal Motors (P) Ltd.* (2005) 1 SCC 705, *Madan Kumar Singh Vs. Distt. Magistrate, Sultanpur* (2009) 9 SCC 79 and *H.G. Rangangoud Vs State Trading Corporation of India Ltd. and others* 2012 (1) SCC 297 and the ratio laid down therein is applicable to the facts and circumstance of the present case.

20. Once the Hon'ble APTEL has directed the Commission to specifically accord fresh approval to the PPA which was initially approved vide order 28.03.2005 with a specific rider that tariff and other terms and conditions of the PPA shall be subject to the provisions of the HPERC Regulations, 2007 and that the Petitioner would be covered by the HPERC Regulations, 2007 and SHP Order

dated 18.12.2007 (Tariff Order 2017) and the entire exercise has to be completed within one month, this Commission is bound to accord the approval to the PPA as directed.

21. In this circumstances, the Commission accords approval to the PPA between the Appellant and the HPSEBL w.e.f. the date of initial approval i.e. 28.03.2005 that the tariff and other terms and conditions of the PPA shall be subject to the provisions of HPERC Regulations, 2007 and tariff order dated 18.12.2007. The project of the Petitioner has been commissioned on May 2013 and the Petitioner shall be entitled to the Tariff of Rs.2.95/kWh from the date of commissioning of the Project when the power was actually delivered to the HPSEBL. The parties are directed to execute SPPA within a period of 30 days from the date of this order with the above terms and conditions that the approval shall date back to initial approval of PPA i.e. 28.03.2005.

22. It is relevant to mention here that the Petitioner had been vigilant in pursuing the present matter and successive Petitions were filed and also assailed the Commission's order before the Hon'ble APTEL. Therefore, this order shall not be quoted as a precedent in future for calming the enhanced tariff for those projects which have not approached the Commission in this regard within time.

Let a copy of this order be supplied to the Joint Petitioners forthwith.

The file after needful be consigned to records.

Announced
10.12.2024

-sd-
(Shashi Kant Joshi)
Member

-sd-
(Yashwant Singh Chogal)
Member (Law)

-sd-
(Devendra Kumar Sharma)
Chairman

HPDPERC