

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

Review Petition No: 46 of 2022 in Petition No. 49 of 2021

Date of Institution: 25.07.2022

Arguments Heard on: 27.10.2022

Decided on: 16.11.2022

M/s Varun Jal Vidyut Shakti Pvt. Ltd. through
Sh. Arun Kumar Sharma, Director,
House No. 13, Patrakar Vihar,
Kachi Ghati, Shimla 171010

.....**Petitioner**

Versus

The HP State Electricity Board Ltd. through,
Chief Engineer (System Operation)
Vidyut Bhawan, Shimla-171004

.....**Respondent**

**Petition under the provisions of Section 94 of the Electricity Act,
2003, for the review of order dated 24.03.2022 and 18.05.2022
passed by the Commission in Petition No. 49 of 2021 and 23 of
2022 in respect of Power Purchase Agreement of Banu Small HEP
(5 MW).**

CORAM

DEVENDRA KUMAR SHARMA
CHAIRMAN

YASHWANT SINGH CHOGAL
MEMBER (Law)

SHASHI KANT JOSHI
MEMBER

Present:-

Sh. Arun Kumar Sharma, Director of the Petitioner in person.

Sh. Kamlesh Saklani, Authorised Representative for the Respondent.

ORDER

This review Petition has been filed under Section 94 (1) (f) of the
Electricity Act 2003 (Act for short) for reviewing the Order dated 24.03.2022
and 18.05.2022 passed in Petition No. 49 of 2021 and Suo-moto Petition No. 23

of 2022 averring that Petition No. 49 of 2021 was filed before the Commission for the approval of Long Term Power Purchase Agreement on generic levelled tariff for sale of power to be generated at the project which was decided on 24th March 2022 (Annex P-2).

2. It is averred that the Order dated 24.03.2022 was reviewed by the Commission on its own motion in Suo-motu Petition No. 23 of 2022 decided on 18.05.2022 wherein the rate of tariff determined under para 17 of the Order dated 24.03.2022 in Petition No. 49 of 2021 has been reduced. Para 17 of the Order dated 24.03.2022 in Petition No. 49 of 2021 is reproduced as under:-

“ 17. The Petitioner is disposed of accordingly that the Project is for capacity of 5 MW and the tariff as applicable shall be Rs. 4.28 per unit without considering the impact of subsidy and royalty structure applicable to this Project i.e. (6+1)% for 1st 12 years and (12+1)% for the remaining useful life of the Project.

3. It is averred that the Petitioner is aggrieved of the Order dated 18.05.2022 (in Suo-motu Petition No. 23 of 2022) as there are errors apparent on the face of record, which is against natural justice and fair play besides inequitable and against the public policy. Therefore, the review is being sought on the following grounds:-

- a. Calculations of Tariff for the project is determined at Rs. 4.28 per unit but no calculations has been supplied with the order.

- b. The tariff calculations are based on incorrect interpretation of the normative defined in the Regulations which is in violation of principal of equity, natural justice, fair play and public policy.
- c. Under the Regulations, annual O&M charges during first year of operation for Small Hydro Power Projects (SHPs for short) upto 5 MW are allowed as Rs. 208.90 lakh ($41.78 \times 5 = 208.90$). For projects with a capacity 5 MW and above, Operation and Maintenance (O&M for short) charges allowed as per normative shall be calculated slab wise i.e. Rs. 208.90+ Rs. 31.34 x additional capacity above 5 MW meaning thereby that SHPs with capacity of 5 MW shall get annual O&M charges as Rs. 208.91lakh + Rs. 31.34 x 0 = 208.90 lakh.
- d. The capacity of the Project of the Petitioner has been considered as 5 MW in the review order passed by the Commission and, therefore, the project of the Petitioner is entitled to Rs. 208.90 lakh annual O&M charges during first year of the operation.
- e. The O&M charges should have calculated slab-wise, confirming to public policy and Regulations.
- f. Besides the error of according lesser gross annual O&M charges to the project of higher capacity as compared to the project with lower capacity, the same will be prejudicial and injurious to the project of the Petitioner as the banker's of the Project has put on hold the

disbursement of loan reassessing the financial viability of the Project. The copy of the letter is annexed and Annexure P-4.

- g. The tariff calculated by the Commission yields lesser gross revenue to the SHPs with higher capacity as compared to project with marginally lower capacity project, despite having similar production characteristics.
- h. No fair chance has been provided to the Petitioner and the principal of audi altrum partem has been vitiated.
- i. Tariff of Rs.4.67 as determined is required to be set aside.

4. It is also averred that the draft PPA with additions and alterations was received by the Petitioner with Order dated 18.05.2022 (Annexure P-5). As per the Petitioner, it was mentioned in the Petition No.49 of 2021 that 33 kV switch yard of Binwa Nagar Power House is the interconnection point for the project in accordance with Techno-Economic Clearance (TEC for short) accorded to the Project and as specified in Implementation Agreement (IA for short) dated 15.02.2012. It is averred that the HP Power Transmission Corporation Limited has also confirmed the interconnection point of the Project at 33 kV switch yard of Binwa Power House (Annexure P-6).

5. It is averred that the HPSEBL while conveying grant of connectivity of the Project has changed the interconnection point to 33 kV Sub-station at

Bajnath and mentioned 33 kV yard of Binwa Power House as interfacing point.

6. It is averred that the Commission vide letter dated 25.05.2022 had directed the HPSEBL to sort out the matter of interconnection point with the Petitioner in a time bound manner (Annexure P-7) but the Respondent without giving an opportunity of being heard to the Petitioner has rejected the request of the HPSEBL. It is also averred that 33 kV switch yard of Binwa Power House is as per Hydro Power Policy of the State and the Regulations framed by the Commission for the connectivity and the change of interconnection point of the Project is arbitrary and against the public policy.

7. The Respondent Board has resisted the Petition by filing reply raising preliminary submissions that the Petition is neither maintainable nor competent in the eyes of law as the Power Purchase Agreement was approved as per provision to the Act and the Regulations framed there under. Further that the Order dated 18.05.2022 in Suo-motu Review Petition No. 23 of 2022 has been passed in exercise of the power conferred in the Commission under the Act and that the Petitioner had not objected for reviewing of Order dated 24.03.2022, therefore, the successive review of the order is not permissible/maintainable in law in as much as that mere possibility of two views cannot be a ground for successive review of the order. Also averred that the power of review can be exercised for correction of a mistake but not to substitute a view. Also averred that under Section 86(1) (b) of the Electricity Act, 2003,

the Commission has wide powers to regulate the Electricity purchase and procurement process of the Distribution Licensees including the price at which electricity shall be procured from the generating companies/ licensee/other sources.

8. It is also averred that Regulation 33-B of the Himachal Pradesh Electricity Regulatory Commission (Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2017 provides categorization of Tariff determination of the SHPs having installed capacity of more than 100 kW as under:-

(i)	Above 100 kW to 2 MW capacity
(ii)	Above 2 MW but below 5 MW capacity
(iii)	5 MW to 25 MW capacity

9. It is averred that in terms of the above, the Commission has determined the tariff vide tariff Order dated 22.12.2020 which has attained the finality.

10. On merits, it is denied that Order dated 18.05.2022 is against the Principles of natural justice, fair play or is inequitable and against the public policy. Also averred that the grounds as made out by the Petitioner for review are totally baseless and hypothetical. Further averred that in terms of the Connection Agreement dated 09.06.2022 signed by the Petitioner, the interconnection point of the Project of the Petitioner has been fixed at 33/11 kV bay of Binwa Power House at 33/11 kV Baijnath Sub-station and as per the agreement, the power of the Project of the Petitioner is to be evacuated in

a joint mode with 33 kV Binwa Power House and the modalities of sharing the dedicated transmission line and interconnection facilities are to be governed by a joint mode evacuation agreement signed between the Project developer and Chief Engineer (Generation) HPSEBL.

11. In rejoinder, the contents of the reply have denied and those of the Petition had been reaffirmed.

12. We have heard Sh. Arun Kumar Sharma, Director of the Petitioner and Sh. Kamlesh Saklani, Authorised Representative for the Respondent and perused the record carefully.

13. Sh. Arun Kumar Sharma, Director of the Petitioner has submitted that the interconnection point for the Project had been fixed at Binwa Nagar in terms of Implementation Agreement dated 15.02.2012 and the Techno economic clearance dated 05.10.2011 but the same has been arbitrarily changed to Baijnath which is likely to cause huge financial lose to the Petitioner. Accordingly to him, once the interconnection point had been agreed at a particular point, and no objection to the same had been made in Petition No. 49 of 2021 by the Respondent, there was no occasion for the HPSEBL/Respondent or the Commission to change the same when the approved draft PPA for execution after order in Petition No. 49 of 2021.

14. Sh. Kamlesh Saklani, Authorised Representative for the Respondent has submitted that the Petition in neither competent nor maintainable in as much as that the Commission has Suo-moto reviewed the Order dated

24.03.2022 passed in Petition No. 49 of 221 vide Order dated 18.05.2022 in Petition No. 23 of 2022 and now review of the Order passed in review Petition is not permissible.

15. Before we advert to the submissions of Sh. Arun Kumar Sharma, Director, it is relevant to refer that the present Review Petition for reviewing the orders dated 24.03.2022 in Petition No. 49 of 2022 is not maintainable being barred by time.

16. We have gone through the submissions and have also perused the record carefully. The following points arise for determination in the present Review Petition:-

1. Whether the Review Petition is within time?
2. Final order.

17. For the reasons to be recorded hereinafter in writing, our point wise findings are as under:-

Point No. 1: No.

Point No. 2: (Final Order) :- Review Petition dismissed per operative part of the Order.

REASONS FOR FINDINGS

18. Point No. 1

It is none of the case of the Petitioner Company that the impugned order has been passed behind its back. On the contrary, Regulation 21(7) of

the HPERC (Conduct of Business) Regulations 2005, as amended from time to time, provides that all the final Orders of the Commission shall be communicated within 7 days to the parties in the proceeding under the signature of the Secretary or an officer empowered in this behalf by the Chairperson or the Secretary. It is also none of the case of the Petitioner that it had not received the copy of the final Order within 7 days from the Commission.

19. The careful perusal of the file reveals that final Order in Petition No. 49 of 2021 was passed on 24.03.2022 and Suo-moto Petition No. 23 of 2022 was disposed off on 18.05.2022. The present Review Petition has been filed on 25.07.2022 i.e. after a delay of about 122 days from the date of passing order dated 24.03.2022 and 67 days from passing of final order dated 18.05.2022 in Suo-moto Petition No. 23 of 2022. However, there is not even an iota in the Petition explaining the reason of not filing the Review Petition immediately after receipt of the copy of orders dated 24.03.2022 and order dated 18.05.2022 respectively and for days together thereafter.

20. As per Section 94 (1) (f) of the Electricity Act, 2003, the Appropriate Commission shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 for the purpose of any enquiry or proceedings and for reviewing its decisions, directions or orders. Neither Section 114 nor Order 47 of Code of Civil procedure, 1908 specify any period of limitation for filing of Review Petition. Similarly, Regulation 63 of

HPERC (Conduct of Business) Regulations, 2005, as amended from time to time and Section 94 of the Electricity Act, 2003 also do not specify any time limit within which a Petition for Review has to be filed.

21. Therefore, in the absence of any prescribed period of limitation for filing the Review Petition under Section 94 of the Electricity Act, 2003, Regulation 63 of the HPERC (Conduct of Business) Regulations, 2005 and Section 114 and Order 47 of Code of Civil Procedure, 1908, the Petitioner was required to file the Review Petition within the time stipulated under the Limitation Act, 1963. Article 124 of the Schedule to the Limitation Act, 1963 provides that the limitation period for review of a judgment by the Court is 30 days from the date of the decree or the order. Here, it is relevant to refer to Sub-section (2) of Section 29 of the Limitation Act, 1963 which provides as under:

“Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.”

22. Section 3 of the Limitation Act, 1963 provides that every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been setup as a defence. In the present Review Petition, the Respondent has not set up the limitation as defence but said silence on the part of Respondent is of no help to the Petitioner and if the Review Petition is not within time, the same can't be said to be maintainable.

23. Section 5 of the Limitation Act, 1963 provides for extension of the period of limitation that any appeal or any application may be admitted after the prescribed period, if the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period and merely because the time limit is not provided for preferring Review in Section 94 of the Electricity Act and Regulations 63 of HPERC (Conduct of Business) Regulations, 2005 does not mean that such power can be exercised at any time. Rather, it should be exercised within a reasonable time. It is so because the law does not expect a settled thing to be unsettled after a long lapse of time. Where the legislature does not provide for any length of time within which the Review may be done, Suo-moto or otherwise, it is plain that the exercise of such power within reasonable time is inherent therein.

24. No doubt an application explaining the delay in filing the Review Petition and for condoning the delay was filed by the Petitioner on

28.10.2022, after the order was reserved in the Petition on 27.10.2022, interalia, that after getting a copy of order dated 18.05.2022 in Suo-moto Petition No. 23 of 2022, alongwith the copy of draft PPA from the Commission, the Petitioner gathered that the interconnection point of the Project was changed to Baijnath Sub-station and that the Petitioner was under a bonafide belief that in case said aspect is brought to the notice of the Commission, the Commission will take Suo-moto cognizance to sort out the matter mutually and accordingly, a representation dated 24.05.2022 was made by the Petitioner to the Commission. Further that the Commission issued directions to the HPSEBL to sort out the matter on the basis of representation dated 24.05.2022 but on 15.07.2022, the representative of the Petitioner was informed orally that matter will not be decided mutually and rather the same will be decided unilaterally. Hence, the delay of 36 days or so which is neither intentional nor wilful. An affidavit supporting the application was also filed.

25. The grounds set out in the said application for condonation of delay are not satisfactory for the reasons that both the orders dated 24.03.2022 in Petition No 49 of 2021 and order dated 18.05.2022 in Suo-moto Petition No. 23 of 2022 were passed by the Commission after hearing the Petitioner and the copies of the orders were supplied to the Petitioner within the time stipulated under the HPERC (Conduct of Business) Regulations 2005. The Suo-moto Petition No. 23 of 2022 was initiated in order to correct error on

face of record regarding the Installed Capacity of the Project and was not concerning the interconnection point. Therefore, the Petitioner has technically sought Review of order dated 24.03.2022 in Petition No. 49 of 2021 and as observed above, there is not even iota in the present Review Petition about the delay and when the Petitioner was asked about the delay during final hearing of the Petition, the application for condonation of delay was made on 28.10.2022, only after the matter had been concluded in 27.10.2022 and order had been reserved. Therefore, the averments made in the application dated 28.10.2022 for condonation of delay are afterthought and do not ameliorate the sufferings of the Petitioner.

26. In this regard, It is relevant to refer to the law laid down by Hon'ble Supreme Court in Surjeet Singh Sahni V/s State of UP and others 2022 SCC Online SC 249 that a mere representation does not extend the period of limitation. Para 5 of the Judgement is being reproduced as under:-

“As observed by this Court in catena of decisions, mere representation does not extend the period of limitation and the aggrieved person has to approach the Court expeditiously and within reasonable time. If it is found that the writ petitioner is guilty of delay and latches, the High Court should dismiss it at the threshold and ought not to dispose of the writ petition by relegating the writ Petitioner to file a representation and/or directing the authority to decide the representation, once it is found that the original writ Petitioner is guilty of delay and latches.

Such order shall not give an opportunity to the Petitioner to thereafter contend that rejection of the representation subsequently has given a fresh cause of action.”

27. As observed above, the orders sought to be reviewed were passed in Petition No. 49 of 2021 on 24.03.2022 and on 18.05.2022 in Suo-moto Petition No. 23 of 2022. The Petition has been filed only on 25.07.2022, after about 122 days after passing of the order dated 24.03.2022 in Petition No. 49 of 2021 and 67 days after passing order dated 18.05.2022 in Suo-moto Petition No 23 of 2022. There is no explanation for such huge delay in the Review Petition and even no prayer is made that the delay be condoned has been made.

28. As provided under Article 124 of the Limitation Act, 1963, the Review Petition is required to be filed within a period of 30 days from the date of receipt of copy of Order and for not filing the same within stipulated period, the Petitioner was required to file an application under Section 5 of the Limitation Act, 1963 explaining delay of each and every day and for condoning such delay. Since no explanation for delay has been provided and no application for condoning the delay has been filed alongwith the Review Petition and the application dated 28.10.2022 is after thought and said application also does not after any satisfactory explanation of delay, the

present Review Petition is hopelessly barred by time and not maintainable. Point No. 1 is accordingly answered against the Review Petitioner.

29. There is one another aspect of the matter. The Petitioner is aggrieved of the interconnection point of the Project. The grant of connectivity for the Power Project is governed under the HPERC (Grant of Connectivity, Long Term and Medium Term Intra State open excess and related matters) Regulations, 2010. Therefore, if the Petitioner so advised, may file a separate Petition under the aforesaid Regulations.

30. Point No. 2 (Final Order)

In view of our aforesaid discussion and findings, the Review Petition is beyond the limitation period and, as such, the same is dismissed being hopelessly barred by time.

The file after needful be consigned to records.

Announced
16.11.2022

-Sd-
(Shashi Kant Joshi)
Member

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

-Sd-
(Devendra Kumar Sharma)
Chairman