BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION SHIMLA

In the matter of :-

M/S Bhavani Renewable Energy Private Ltd.
D-21, First Floor, Panchsheel Enclave,
New Delhi-110017

…Petitioner

Versus

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

(2) M/s Bonafide Himachalies Hydro Power Developers Association
Sai Bhawan, Sector-IV, Phase-II,
New Shimla-171009

(3) M/s Growel Energy Company Ltd.,
1, Electronic Complex, Chambaghat,
Solan-173213

(4) M/s Himadri Hydro Power Project (P) Ltd.,
Electronic Complex, Chambaghat,
Solan-173213

…..Stakeholders/Objectors/Respondents

Review Petition No. 90 of 2015

(Decided on **19th November, 2015**)

CORAM
S.K.B.S. Negi
CHAIRMAN

Counsels: -

for petitioner: Ms. Madakani Ghosh, Advocate
alongwith Sh. K.K. Vaidya, G.M.

for respondents: Sh. Ramesh Chauhan,
Authorized Representative of HPSEBL,

ORDER

(Last heard on 7th November, 2015 and orders reserved)

M/s Bhavani Renewable Energy Ltd. having its Corporate office at D-21, First Floor, Panchsheel Enclave, New Delhi-110017 through Sh. K.K. Vaidya its General Manager (hereinafter referred as "the review petitioner"), has moved this Petition bearing No. 90/2015 under clause (f) of 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 30.06.2015, determining the generic levellised tariff for Small Hydro Projects, under Regulation 13 of the Himachal Pradesh Electricity Regulatory Commission (Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2012, and providing mechanism for the adjustment of accelerated depreciation benefit and capital subsidy in the generic levellised tariff for Small Hydro Projects.

2. M/s Bhavani Renewable Energy Pvt. Ltd. in petition No. 90/2015 submits that the Commission in its impugned Order dated 30.06.2015 has failed to consider the following points and prays for review and recalculation of the tariff /impact of the accelerated depreciation determined vide impugned Order dated 30.06.2015:-

I. that the Commission has failed to take into account the tariff Order dated 31.03.2015, issued by the Central Electricity Regulatory Commission (CERC), wherein it has been clarified that the SHPs cannot avail accelerated depreciation;

II. that the Commission has considered 20% additional depreciation under section 32(1)(ii-a) of the Income Tax Act, for the cost of plant and machinery only, which on normative basis has been considered as 70% of the project cost;

III. that the Commission has erroneously considered annual rate of depreciation to be 15% on basis of incorrect reading of the Income Tax Act;

IV. that the Commission has acted contrary to the CERC pattern for considering capitalization in the second half of year. Only 50% of these deprecation values are considered in the first year on the CERC pattern. However, this Commission has considered the energy for the second half of the first year which mainly comprise of winter months with lean discharges has been taken as 30%. The same for the first six months of the last year i.e. 41st year of project life, has been taken as 70% of the annual generation. This is irrational and erroneous.

3. On this review petition the Commission invited the views of the respondents, i.e. stakeholders/objections in the original Order, and only the Himachal Pradesh State Electricity Board Ltd.(HPSEBL), has responded stating that, from the averments made in the petition, it is evident that no claims have been sought by the petitioner against HPSEBL. The petitioner by and large has contested the impugned Order passed by the

Commission on 30.06.2015, whereby the Commission has been pleased to devise the mechanism for adjustment of accelerated depreciation benefit and capital subsidy. Though the said impugned Order has received finality, but still if the Commission feels it appropriate to review the said Order, the HPSEB Ltd. would like to pray that the following two issues may kindly be kept in view, while deciding the review petition:-

(a) a provision be made in the Regulations vide which all the SHPs are bound to avail the accelerated depreciation, if available under law, so that the consumers of the State are not burdened with additional cost of tariff;

(b) the HPSEBL be allowed to purchase the power only from the SHPs who are willing to avail the benefit of Accelerated Depreciation, if available under law and the provision under the Renewable Power Purchase Policy, 2015 may be amended accordingly.

4. The petitioner has filed the rejoinder to the response filed on behalf of the HPSEBL stating that the prayer of the Board seeking amendment of regulations is beyond the scope of the review sought by the petitioner and may not be entertained at this stage. Further the petitioner has, by and large, reiterated the averments made in the review petition.

5. The Commission has heard the learned Counsels for the parties and carefully considered the submissions made by the rival parties.

6. In light of the rival contentions referred to above urged by the learned Counsels for parties, the following questions would arise for consideration:-

I. Whether the prayer of the Board seeking amendment is beyond the scope of the review petition?

II. Whether the review petition is maintainable, if so to what extent?

7. The Commission shall now deal with each question one by one.

8. First question for consideration is whether the prayer of the Board, seeking amendment to the Regulations, is beyond the scope of the review petition. To answer this question it is apt to state that section 86 of the Electricity Act, 2003 (“the Act,” in short), which governs the other provisions of the Act, so far as the State Commission is concerned it is a conglomeration of administrative, regulatory, legislative, judicial and advisory powers of the State Commission. These functions are vested with the

Commission, which exercises its powers under its jurisdiction in terms of the Statute. The discharge of the function of the Commission must be within the domain of Law, which has been engrafted in the Act. Simply because a Commission has many powers, it cannot be said that while exercising one power it oversteps its limit in that power and assumes another jurisdictions. This was what has been exactly said in **West Bengal Electricity Regulatory Commission V/s Central Electricity Commission AIR 2002 SC 3588.** In that case the High Court while hearing appeal in its appellate jurisdiction vested in the Statute, since repealed, exercised the writ jurisdictional power under Article 226, which was deprecated by the Hon'ble Supreme Court.

9. It is now a well settled principle of Law that a subordinate Legislation validly made becomes a part of the Act and should be read as such. The framing of regulations is a legislative function under section 181 of the Act; whereunder the Commission is vested with the power to make regulations, after meeting the requirement of previous publication, and the regulations so framed are also required to be laid down before the State Legislature under section 182. Further the validity of the regulations may alone be challenged by seeking judicial review under Article 226 of Constitution of India and not by way of appeal under section 111 of the Act.

10. The Commission under section 181 of the Act has been vested with the power to make, amend and repeal the regulations on the subjects authorised under various provisions of the said Act. Action to make or amend the regulations is initiated when the Commission is satisfied that there is need for such regulations or amendment to the regulations. Any person including respondent Board, being a statutory body and vested with specific function, is at liberty to approach by way of a representation to the Commission with concrete proposal for making or amending any regulations which is considered necessary to enable it to discharge its statutory functions.

11. While exercising the regulatory powers the Commission has to decide the matters on the basis of an existing rights and obligations of the parties. The Commission decides on the regulations as would be applicable during a future period, and, therefore, proceeds on certain assumptions. Thus the regulatory/adjudicatory process and the Legislative process cannot be intermingled.

12. In light of the foregoing discussion, the prayer of the Board seeking amendment to the Regulations, which is purely legislative in nature, is beyond the

scope of the review, which is part of the adjudicatory process. This question is answered accordingly.

13. The Second question which now comes up for consideration is whether the review petition is maintainable, if not to what extent. To answer this question, it is necessary to consider, the relevant provisions of the Law and the verdicts of the Hon'ble APTEL made thereon.

14. The Hon'ble Appellate Tribunal for Electricity in its two 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),** followed in number of cases by this Commission, has concluded that section 94(1)(f) of the Act, 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 47 rule 1 of the Code of Civil Procedure, 1908. Thus the power of the Commission to review its own orders flows from section 94(1)(f) of the Act, read with regulation 63 of the HPERC (Conduct of Business) Regulations, 2005, as the same is conferred on a Civil Court by the Code of Civil Procedure (CPC). These powers have been spelt out in Section 114, read with Order 47, of the CPC. The review application has, therefore, to necessarily meet the requirements of Section 114 and Order 47 of the CPC.

15. As per the said provisions, the specific grounds on which an Order already passed can be reviewed are-

(a) if there are mistakes or errors apparent on the face of the record, or

(b) on discovery of new and important matter or evidence which, after due diligence, was not within the knowledge or could not be produced at the time of making the order, or

(c) if there exist other sufficient reasons.

16. 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 it cannot be exercised on the ground that decision was erroneous on merits. But simultaneously the materials on record, which on proper consideration may justify the claim, cannot be ignored.

17. Clerical or arithmetical mistakes in judgments or orders or errors arising therein from any accidental slip or omission may at any stage also be corrected by the Commission under Section 152 of the CPC, either of its own motion or on the application of any of the parties. The use of word "may" shows that no party has a right to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the Court. Such discretion is required to be exercised judiciously to make corrections necessary to meet the ends of justice. The word "accidental" qualifies the slip/omission. Therefore, this provision cannot be invoked to correct an omission which is intentional, however erroneous. Because Section 152 does not countenance a re-argument on merits of facts or law, the Commission has the limited powers to correct any clerical or arithmetical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission.

18. 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 in its review petition, as under:-

I. SHPs are not eligible for Accelerated Depreciation

The Commission in its Order dated 30.06.2015 has already addressed the issue of the stakeholder regarding applicability of accelerated depreciation. The Commission's views at para.- 6 (g) of order dated 30.06.2015 is reproduced as under:-

> *"The sub-regulation (5) of regulation 21 of RE Regulations provides that it shall be assumed that the renewable energy generator shall avail the benefit of accelerate depreciation and accordingly the tariff, which accounts for the accelerated depreciation, shall be applicable unless the renewable energy generator establishes, to the satisfaction of the distribution licensee, that he has not availed or is not entitled to such a benefit. The onus of establishing to the satisfaction of the distribution licensee, that the generator has not availed or is not entitled to such a benefit vests with the generator. In this connection Commission's view under sub para (a) of this para may however also be seen."*

In this connection, reference is however invited to para 6 (c) of the Order dated 30.06.2015 vide which the Commission has amply expressed its views on the subject

and has also concluded that the determination of two rates by the Commission (with and without accelerated depreciation) does not in any way debar the distribution licensee and the generator to mutually agree in the PPA that the generator shall avail accelerated depreciation, if available under the law, and to incorporate suitable conditions in the PPA. Even otherwise, the respondent Board does not obviously need any directions/permissions from the Commission to take decisions in a prudent manner.

II The calculation of 20% income tax on 70% of the project cost translating to 14% additional on the entire cost of the Project is erroneous.

The stakeholder has already raised this issue in the regulatory process (Order dated 30.06.2015) i.e. related to mechanism for adjustment of accelerated depreciation benefit and capital subsidy, consequent to the Principal Order dated 20.05.2013. The Commission has already addressed this issue. The Commission's views under para-6 (d) of Order dated 30.06.2015 is reproduced as under:-

> *"The Commission has considered the matter and decides to account for this 20% additional depreciation on the cost of plant and machinery only. As per the formulae given by the CERC for indexation of capital cost in their RE Regulations, the cost of plant and machinery is considered to be equal to 70% of the project cost. The Commission finds it appropriate to consider the plant and machinery cost as 70% of the capital cost for this purpose. Accordingly the calculations shall be based on 20% additional depreciation on 70% of the capital cost, which converts to 14% additional deprecation on the entire cost of the project."*

The CERC has considered the additional depreciations as 20% alongwith 80% AD for other technologies without considering any adjustment on account of different cost component of project(s), whereas, the Commission has considered as 14% depreciation rate on plant and machinery component, on normative basis.

III The Commission has erroneously considered annual rate of depreciation to be 15% on basis of incorrect reading of the Income Tax Act.

The Commission in its order dated 30.06.2015 in para-6 (e) on the similar issue raised by M/s Bhavani Renewable Energy Pvt. Ltd. has taken its view, reproduced as under:-

> "*The rate of 15% appears in the table attached with the Income Tax Rules (new appendice under Rule 5 of Income Tax Rules) which specifies the rates of depreciation for various categories of assets from*

2006-07 onwards. The rate of 15% is considered most appropriate for this purpose keeping in view the fact that for some items such as time of day energy meters, automatic voltage control etc. forming a part of SHP, the depreciation is applicable at the rates which are as high as 80%. It is also pointed out that since the generic levellised tariffs are to be determined on normative basis, it may neither be feasible nor appropriate to go into detailed calculations in each case. The comment that the proposed rate is unreal and fictitious is thus not based on facts."

IV. The State Commission has acted contrary to the CERC's decision considered only 30% of generation instead of 50% of generation for the first year

The petitioner submitted that the Commission has considered 30% of energy in the first year and 70% in the last year. By doing so, the Commission artificially lowers the tariff for the present set of consumers and the consumers in the latter pay more.

The Commission in its Principal Order dated 20.05.2013 at para 24.3 (ii) has already addressed this issue and the finding of the Commission is reproduced as under:-

"M/s Techman has observed that while working out the benefit of accelerated depreciation, the accelerated depreciation has been taken as 50% during the first year and the quantum of saleable energy in the first year has been taken as 30% of the annual saleable energy. In this connection the Commission would like to invite attention to the clause(3) of sub-regulation (4) of Regulation 21 of the RE Tariff Regulations, 2012, which provides that in case of generic levellised tariff, capitalization of renewable energy projects shall be considered during second half of the financial year. In accordance with the provisions of the Income Tax Act, the depreciation has been restricted to 50% of the annual depreciation. As regards the normative saleable energy, the same has been taken as 30% for the second half of the first year, keeping in view, the fact that the second half of the financial year comprises the lean discharge period during which the energy generation is considerably lower than 50% of the annual generation.

The issue raised at serial No. IV is not the subject matter of present referred regulatory process.

19. Apart from the observations made in the preceding paragraph it is apt to point out that:-

(i) the second proviso to the rule 5(1A) of the Income Tax Rules provides an option to the concerned undertakings to claim depreciation as per the rates specified in Appendix- 1A or Appendix - 1 of the said Rules, subject to certain specified conditions. The Appendix-1 covers all the tangible assets and as such would include the SHPs also even if no separate rates have been specified for the SHPs under the Appendix-I. In certain situations the assesses engaged in generation of electricity are also allowed a further sum equal to 20% of the actual cost of such machinery or plant as deduction under clause (ii) of section 32(1) of the Income Tax Act;

(ii) by stating that cost of plant and machinery comprises approximately 21% to 36% of the capital cost of the project, the review petitioner has obviously confused the term plant and machinery under the Income Tax Act with the cost of electomechnical component of the project. The term plant and machinery under the Income Tax Act has a wider scope and is not limited to the cost of electromechnical equipment only;

(iii) the decision of the Commission to consider only 30% of generation instead of 50% of generation for the last 6 months of the financial year is based on the actual ground realities and hardly needs any review even though the impact of this factor may otherwise be very negligible.

20. The review, as stated hereinbefore, has a limited scope and cannot be allowed to be an appeal in disguise and it cannot be exercised on the ground that the decision was erroneous on merits.

The Commission, therefore, declines to review the impugned Order and the review petition is dismissed.

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