

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

Suo-Moto Review Petition No: 23 of 2022 in Petition No. 49 of 2021

Date of Filing: 02.04.2022

Arguments Heard on: 30.04.2022

Decided on: 18 .05.2022

The HPERC in its own motion
Vidyut Aayog Bhawan, Kasumpti,
Shimla-171009

Versus

1. M/s Varun Jal Vidyut Shakti (P) Ltd. through
Sh. Arun Kumar (Director),
House No.13, Patrakar Vihar,
Kachi Ghati, ShimlaRespondent No. 1
2. The HP State Electricity Board Ltd. through,
Chief Engineer (System Operation)
Vidyut Bhawan, Shimla-171004Respondent No. 2

CORAM

**DEVENDRA KUMAR SHARMA
CHAIRMAN**

**BHANU PRATAP SINGH
MEMBER**

**YASHWANT SINGH CHOGAL
MEMBER (Law)**

Suo-Moto Petition under the provisions of Section 94 of the Electricity Act, 2003 for the review of order dated 24.03.2022 passed in Petition No. 49 of 2021 in respect of Power Purchase Agreement of Banu Small HEP (3x1.66MW) of M/s Varun Jal Vidyut Shakti (P) Ltd.

Present:-

Sh. Arun Kumar, Director for Respondent No.1.

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

ORDER

This Suo-Moto Review Petition for reviewing Order dated 24.03.2022 in Petition No.49 of 2021 has been initiated by the Commission on the interpretation of the generation capacity of Banu Small Hydro Electric Project

(HEP for short). A Petition under Section 86(1)(b) of the Electricity Act, 2003 (Act for Short) being Petition No. 49 of 2021 was filed by Respondent No.1 M/s Varun Jal Shakti (P) Ltd. against Respondent No.2 Himachal Pradesh State Electricity Board Ltd. for the approval of Power Purchase Agreement (PPA for short). Said Petition was contested by Respondent No.2. The Commission vide Order dated 24.03.2022 allowed the Petition and approved the PPA to be signed between the HPSEBL and the Respondent No.2 subject to the conditions that the tariff of the Project shall be the tariff which would be in the Control Period of Scheduled Commercial Operation Date (SCOD) of the Project and also that the present tariff of the 3rd Control Period in respect of the Project comes to Rs.4.67 per unit on the analogy that the Project is for the capacity of less than 5 MW generation which is inconsequential as SCOD of the Project is beyond 30.09.2023 and generation, if any, will be only after the SCOD of the Project and the tariff of the said Control Period would be applicable.

2. In the original Petition No. 49 of 2021, it has been averred that the capacity of the Project is 3x1.66 MW which comes to 4.98 MW. Therefore, if the said capacity is taken into consideration, the Project is for the generation capacity of less than 5 MW and for such capacity tariff is Rs.4.67 per unit as per the 3rd Control Period.

3. Upon notice of the Suo-Moto Petition, the Respondent No.1 HPSEBL has submitted by way of reply that the capacity of the Project is 5.00 MW which is reflected in IA dated 15.02.2012, SIAs dated 18.09.2019 and 13.01.2021 and in

terms of Regulation 2 (j) of HPERC (Promotion of Generation from Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2017, the installed capacity for the purpose of tariff determination is summation of the name plate capacities of all the units of generating station reckoned at the renewable energy generator terminals or the capacity for which the renewable energy generator has executed the Implementation Agreement whichever is higher. It is also averred that in the IA, the installed capacity is mentioned as 5.00MW, therefore, the installed capacity of the Project is 5.00MW for the purpose of tariff determination.

4. The Respondent No.2 in its reply to the Suo-Moto Petition has submitted that the installed capacity of the Project is specified as 3 units of 1666 kW each i.e. upto 5 MW and that the Govt. of India (GoI for short) has made it mandatory to register each generating unit with GoI who have connectivity to the Grid or wish to have connectivity to the Grid and that the 3 units of the Projects having capacity of 1.66 MW each have been registered with Central Electricity Authority, GoI on 20.09.2021 and thus, the aggregate capacity comes to 4.98 MW and Project falls in the category of the capacity of 2 MW but below 5 MW and order dated 24.03.2022 is required to be implemented.

5. We have heard Sh. Kamlesh Saklani, Authorised representative for Respondent No.1 and Sh. Arun Kumar, Director of Respondent No.2 and have also perused the record carefully.

6. The Implementation Agreement (IA for short) dated 15.02.2012 shows that the Respondent No.2 had initially signed a MOU for setting up Project of 2 MW on Banu Khad but later on the Respondent No.2 submitted the DPR for setting up a Project of 5.00MW. Not only this, the Govt. of HP (GoHP for short) has enhanced the capacity of the Project from 2 MW to 5MW on 19.11.2011 as evident from IA dated 15.02.2012. The Supplementary Implementation Agreement (SIA for short) dated 18.09.2019 shows that the Techno-Economic Clearance in respect of the Project was given for a capacity of 5.00MW vide letter No.DOE/CE/(Energy)/TEC-Banu/2011-5625-33 dated 15.10.2011 which was also incorporated in the SIA dated 13.01.2021 showing that the capacity of the Project is 5 MW. This fact is also evident from letter dated 28.09.2021 of the Respondent No.1 and letter dated 15.07.2021 of the HIMURJA. The office Order dated 05.10.2011 of the Directorate of Energy also shows that the capacity of the Project is 5MW.

7. Reference can also be made to Regulation 2 (j) of the HPERC (Promotion of Generation from Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2017 which provides as under:-

“2 (j) ‘Installed capacity’ or ‘IC’, for the purpose of tariff determination, means the summation of the name plate capacities of all the units of the generation station, reckoned at the renewable energy generator terminals or the capacity for which the renewable energy generator has executed implementation agreement with with the State Government, whichever is higher,”

8. However, the Respondent No.2 in the Petition No. 49 of 2021 mentioned the capacity of the Project as 3x1.66 MW to show that the Project is for the capacity of less than 5 MW which infact is contrary to the letter dated 28.09.2021 of the Respondent No.1 and letter dated 15.07.2021 of the HIMURJA, the office Order dated 05.10.2011 of GoHP, Implementation Agreement dated 15.02.2012, SIAs dated 18.09.2019, 13.01.2020 and RE Tariff Regulations, 2017 which has led to the passing of Order dated 24.03.2021 by the Commission treating the generation capacity of the Project less than 5 MW.

9. The tariff is different for the Projects above 100 kW to 2 MW, above 2 MW but below 5 MW and the Projects 5 MW to 25 MW capacity as per HPERC order dated 22.12.2020. Once the capacity of the Project is 5 MW from the very beginning when IA was signed, the Project has to be treated for the purpose of tariff as a Project having capacity of 5MW and above.

10. Therefore, there is error apparent on the face of record in the Order dated 24.03.2022 in Petition No. 49 of 2021 qua the capacity of the Project which is 5 MW and not 4.98 MW as averred in Petition No. 49 of 2021.

11. Now the question arises as to whether the said order can be reviewed by the Commission. In this regard, it can be stated that the power of the Commission to review its own orders flows from Section 94(1)(f) of the Act, read with the Regulation 63 of the HPERC (Conduct of Business) Regulations, 2005 (CBR 2005 for short) and Section 114 read with Order 47 of the Code of Civil Procedure 1908 (CPC for short).

12. As per the said provisions, the specific grounds on which orders may be reviewed are-

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

13. Thus, the power of review, legally speaking, is permissible where some mistake or error apparent on the face of the record is found. The error on the face of record must be such an error which may strike one on mere looking at the record and would not be equated with the original hearing of a case. Also, review has a limited purpose 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. It is held in **Parsion Devi and Others V/s Sumitri Devi and Others (1997) 8 SCC 715, 1997 Supp 4 SCR 470** as under:

“Under Order 47, Rule-1, CPC, a judgment may be open to review inter alia if there is a mistake or an error apparent on the fact of the record. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power or review under Order 47, Rule-1, CPC. In exercise of the jurisdiction under Order 47, Rule-1, CPC, it is not permissible for an erroneous decision to be reheard and corrected. A review petition, it must be remembered, has a limited purpose and cannot be allowed to be an appeal in disguise.”

It is further held that:-

“There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter can be corrected only by exercise of the review jurisdiction.”

14. It is apparent from letters dated 28.09.2021, 15.07.2021, office order dated 05.10.2021, Implementation Agreement and Supplementary Implementation Agreements dated 12.05.2012, 18.09.2019, 13.01.2021 respectively that the capacity of the Project was approved to be 5 MW from the very beginning. However, knowing all this, the Joint Petitioner No.2 mentioned the capacity as 3x1.66 MW (4.98 MW), which has led the Commission to presume that the Project is for the capacity of less than 5 MW and thereby getting the advantage of higher tariff.

15. The tariff as per 3rd Control Period for the Project above 2 MW to 5 MW is Rs.4.67 per unit and for Projects of 5 MW and above, the tariff of 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 remaining useful life of the Project. Thus for a Project having capacity of 5 MW, the tariff as allowed by the Commission vide order dated 24.03.2022 was erroneously made on the pleadings of Respondent No.1 that Project is for the capacity less than 5 MW. Thus, there is an error apparent on the face of record in Order dated 24.03.2022 in Petition No. 49 of 2021 and in exercise of powers under Section 94 of the Act and Section 114 read with Order 47 CPC and Regulation 63 of the CBR, 2005,

the Order dated 24.03.2022 in Petition No. 49 of 2021 is required to be reviewed to the extent that the capacity of the Project is 5 MW and the applicable tariff as per 3rd control Period would be Rs.4.28 per unit.

16. Since the SCOD of the Project is beyond the 3rd Control Period and the Power Purchase Agreement is required only for the purpose of the loan and the generation would be only after 3rd control period, certainly the tariff as would be applicable beyond the 3rd Control Period in which SCOD of the Project is Scheduled will be applicable.

17. The Petition is disposed of accordingly that the Project is for the 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 remaining useful life of the Project.

18. All other conditions of the Order dated 24.03.2022 shall remain unchanged.

19. A copy of this order be placed immediate before Order dated 24.03.2022 in Petition No. 49 of 2021 for reference and record.

This file be tagged with Petition No. 49 of 2021 and be consigned to record.

Announced
18.05.2022

--Sd/-

(Yashwant Singh Chogal)
Member(Law)

--Sd/-

(Bhanu Pratap Singh)
Member

--Sd/-

(Devendra Kumar Sharma)
Chairman