The HPPCL Versus the HPSEBL

CMA No. 311 of 2024
in
Petition No. 110 of 2024

16.12.2024

Present: Sh. V. Mukherjee, Sh. Vikas Chauhan and Sh. Pratyush Singh, Ld. Counsel for the Petitioner.
Sh. Sumit Dhiman, Authorised Representative for the Respondent No. 1.

ORDER

This order would dispose off an application filed by the Applicant/ Review Petitioner (Applicant for short) seeking amendment of the Review Petition No. 110 of 2024.

2. A Joint Petition being Petition No. 48 of 2024 for approval of Power Purchase Agreement (PPA for short) was filed by the Himachal Pradesh State Electricity Board Limited (HPSEBL/ Respondent for short) and the Himachal Pradesh Power Corporation Limited (the Applicant for short) in respect of 32 MWac Solar Power Project at Pekhubella, Distt. Una, H.P. (Project for short) which was allowed by the Commission vide order dated 12.04.2024 allowing tariff of Rs. 2.90 per unit. The Applicant has sought review of order dated 12.04.2024 in Petition No. 48 of 2024 that the negotiated rate of Rs. 3.49 per unit, as agreed between the HPPCL and the HPSEBL be granted.

3. According to the Applicant, post filing of Review Petition No. 110 of 2024, certain developments have taken place and numerous

correspondences have been exchanged between the parties which have direct bearing on Petition and thus, it has become necessary to amend the review Petition for proper adjudication of the controversy. Also that no injustice would be caused to the Respondent in case the amendment as prayed is allowed.

4. It is averred that the following is required to be added in para 1 of Review Petition:

> *"The review of the Order dated 12.04.2024 has been sought on account of the error apparent on the face of the record, in terms of the following:*
>
> *(a) The Electricity Act 2003, the HPERC (Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2017 (as amended from time to time) ("**HPERC RE Tariff Regulations**"), specifically under Regulations 13 and 18, as well as a catena of case law on the subject, amply demonstrate that it is open to parties to choose between two routes for tariff, either a project specific tariff determination process or tariff discovery through competitive bidding. In the present case, the parties specifically opted for a project specific tariff determination. This in the humble submission of the Petitioner, has been overlooked by this Hon'ble Commission while passing the Order dated 12.04.2024.*
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> *(b) The tariff discovered through competitive bidding process under Section 63 of the Electricity Act, 2003 has been wrongly applied as a benchmark for a cost-plus project set up under Section 62 of the Electricity Act 2003, where a project specific determination under the extant HPERC Regulations was sought.*
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> *(c) The Order dated 20.05.2023 in Petition No.17 of 2023 passed by this Hon'ble Commission has been wrongly applied to the facts of the present case, even though the same was pertaining to tariff discovered through competitive bidding and a case where tariff was determined as per the regulations.*
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> *(d) The mutually-determined tariff of Rs.3.50 as calculated by the parties, pursuant to the directions of this Hon'ble Commission, in fact, is based on the norms provided in the HPERC RE Tariff Regulations and*

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hence ought not to have been disregarded while passing Order dated 12.04.2024."

5. Further, in para 7 (iii) the following is required to be added:

*"It is relevant to note that the Meeting was held pursuant to a Detailed Project Report ("**DPR**") having been carried out. As per Clause 6.3.2 of the DPR, the Capacity Utilisation Factor ("**CUF**") of the Project was stated to be 23.53%. A copy of Minutes of Meeting held on 24.01.2024 between HPPCL and HPSEBL is annexed hereto and marked as **Annexure B.** A copy of the Detailed Project Report dated 22.02.2023 of the Project is annexed hereto and marked as **Annexure C."***

6. Further, in para 7 (iv) of the Review Petition, the following is required to be added:

*"A copy of Order dated 20.05.2023 passed by this Hon'ble Commission in Petition No. 17 of 2023 is annexed hereto and marked as **Annexure D.**"*

7. Also that in para 7 (vii) the following is required to be added:

*"vii. (a) On 03.05.2024, HPSEBL wrote to HPPCL seeking consent for execution of PPA at the tariff of Rs. 2.90 per unit approved by this Hon'ble Commission in Order dated 12.04.2024. A copy of Letter dated 03.05.2024 from HPSEBL to HPPCL is annexed hereto and marked as **Annexure E.***

vii. (b) On 08.05.2024, HPPCL wrote to HPSEBL inter alia stating that: -

(i) HPPCL vide Letter dated 09.05.2024 has sought additional time of 2 months from 11.05.2024 to 11.07.2024 from this Hon'ble Commission for processing and finalization/ implementation of Order dated 12.02.2024.

(ii) In the meantime, it was requested that HPPCL shall supply the power generated from the Project to HPSEBL on the approved rates by this Hon'ble Commission from synchronization of the Project.

*A copy of Letter dated 08.05.2024 from HPPCL to HPSEBL is annexed hereto and marked as **Annexure F.***

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vii.(c) On 09.05.2024, HPPCL wrote to this Hon'ble Commission inter alia stating that: -

(i) The decision of signing of PPA with HPSEBL at the rate approved vide Order dated 12.04.2024 or selling of power from the Project on Power Exchange was under process.
(ii) The Project has been synchronized with the Grid on 15.04.2024 and in the meantime, HPPCL shall supply power from the Project to HPSEBL on the approved rates by this Hon'ble Commission.
(iii) It was requested that the additional time of 2 months from 11.05.2024 up to 11.07.2024 for processing and finalization / implementation of Order dated 12.04.2024 may be allowed.

A copy of Letter dated 09.05.2024 from HPPCL to this Hon'ble Commission is annexed hereto and marked as ***Annexure G.***

vii. (d) On 28.05.2024, HPPCL filed Petition No. 109 of 2024 before this Hon'ble Commission seeking additional time of 2 months from 11.05.2024 up to 11.07.2024 for processing and finalization / implementation of Order dated 12.04.2024. A copy of Petition No. 109 of 2024 is annexed hereto and marked as ***Annexure H.***

vii. (e) On 15.06.2024, in response to HPPCL's email dated 14.06.2024 submitting the anticipated generation schedule for 15.06.2024, the Power Controller, HP-ALDC stated that no PPA had been signed between HPSEBL and HPPCL till date and no power could be scheduled in the absence of a valid PPA. HPPCL was requested to amend the portion of the schedule wherein it was stated that power is being scheduled to HPSEBL and share the same for HPSLDC's reference. A cop of HP-ALDC's email dated 15.06.2024 is annexed hereto and marked as ***Annexure I.***

vii. (f) On 01.07.2024, HPPCL filed the present Review Petition No. 110 of 2024 before this Hon'ble Commission seeking reconsideration of Order dated 12.04.2024 passed in Petition No. 48 of 2024.

vii. (g) On 22.07.2024 and 20.08.2024, HPPCL reiterated its request to HPSEBL made vide Letter dated 08.05.2024, requesting that HPPCL shall supply the power generated from the Project to HPSEBL on the approved rates by this Hon'ble Commission from synchronization of the Project. A copy of

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Letter dated 22.07.2024 from HPPCL to HPSEBL is annexed hereto and marked as ***Annexure J.*** *A copy of Letter dated 20.08.2024 from HPPCL to HPSEBL is annexed hereto and marked as* ***Annexure K.***

vii. (h) *On 24.08.2024, this Hon'ble Commission in Petition No. 109 of 2024 granted 15 days' time to HPPCL and HPSEBL for implementation of Order dated 12.04.2024 and sign the PPA within 15 days. A copy of Order dated 24.08.2024 passed by this Hon'ble Commission in Petition No. 109 of 2024 is annexed hereto and marked as* ***Annexure L.***

vii. (i) *On 04.09.2024, HPPCL wrote to HPSEBL seeking deputation of a representative from HPSEBL for recording and signing of Joint Meter Reading and check meters installed in the Project in terms of Article 4.3 of the PPA approved vide Order dated 12.04.2024. A copy of Letter dated 04.09.2024 from HPPCL to HPSEBL is annexed hereto and marked as* ***Annexure M.***

vii. (j) *On 07.09.2024, HPPCL wrote to HPSEBL and Himachal Pradesh Energy Management Centre ("****HPEMC****") inter alia stating that:*

(i) *HPPCL has decided to enter into an interim Short Term PPA with HPSEBL for one year from 15.04.2024 to 31.03.2025, as per the approved tariff in Order dated 12.04.2024, subject to final outcome of the present Review Petition.*

(ii) *This arrangement would also regularize and settle the energy accounting and billing of power generated from the Project for the period since Commercial Operation Date ("****COD****") i.e., 15.04.2024 onwards and which will be part of the final PPA subject to the approval of this Hon'ble Commission.*

(iii) *Accordingly, HPSEBL was requested to sign the interim Short Term PPA.*

A copy of Letter dated 07.09.2024 from HPPCL to HPSEBL and HPEMC is annexed hereto and marked as ***Annexure N.***

vii. (k) *On 07.09.2024, HPEMC in response to HPPCL's letter dated 07.09.2024 and requested HPPCL to take up the matter of signing of PPA for the Project with HPSEBL. A copy of Letter dated 07.09.2024 from HPEMC to HPPCL is annexed hereto and marked as* ***Annexure O.***

vii. (l) On 07.09.2024, HPPCL wrote to this Hon’ble Commission inter alia requesting for:

(i) Time extension for signing of Short Term PPA till HPSEBL authorizes / designates an office for signing of the interim PPA as per approved rate of Rs. 2.90 per unit vide Order dated 12.04.2024, subject to final outcome of the Review Petition.

(ii) Directions be issued to HPSEBL for singing the interim PPA immediately and to settle the energy accounting and billing of energy generated for the Project since COD i.e., 15.04.2024 onwards, which will be part of final PPA subject to the approval of this Hon’ble Commission.

A copy of Letter dated 07.09.2024 from HPPCL to this Hon'ble Commission is annexed hereto and marked as ***Annexure P.***

vii. (m) On 16.09.2024 and 24.09.2024, HPPCL wrote to HPSEBL reiterating the request for signing of interim Short Term PPA as the rate approved vide Order dated 12.04.2024. It was further stated that this arrangement would regularise and settle the energy accounting and billing of power generated from the Project for the period since COD, i.e., 15.04.2024 onwards, which will be part of the final PPA. A copy of Letter dated 16.09.2024 from HPPCL to HPSEBL is annexed hereto and marked as ***Annexure Q.*** *A copy of Letter dated 24.09.2024 from HPPCL to HPSEBL is annexed hereto and marked as* ***Annexure R.***

vii. (n) On 24.09.2024, HPSEBL responded to HPSEBL’s Letter dated 16.09.2024 inter alia stating that: -

(i) Request to sign a Short Term PPA for the Project is not in line with the Order dated 12.04.2024.

(ii) If HPPCL intends to execute the PPA in terms of Order dated 12.04.2024, it may approach HPSEBL along with necessary documents and authorization.

A copy of Letter dated 24.09.2024 from HPSEBL to HPPCL is annexed hereto and marked as ***Annexure S.***

vii. (o) On 22.10.2024, HPPCL responded to HPSEBL’s letter dated 24.09.2024 and requested to execute the PPA on the approved rate as per Order dated 12.04.2024. A copy of the PPA and authorization letter for signing of the PPA was also

*enclosed. A copy of Letter dated 22.10.2024 from HPPCL to HPSEBL is annexed hereto and marked as **Annexure T.***

vii. (p) On 26.10.2024, HPSEBL responded to HPPCL's letter dated 22.10.2024 inter alia stating that:

(i) On 25.10.2024, during hearing in present Review Petition, this Hon'ble Commission observed that time granted for execution of the PPA had expired and parties were directed to file a fresh Joint Petition for execution of PPA.

(ii) Therefore, further extension to be sought from this Hon'ble Commission for completion of PPA signing for the Project.

(iii) PPA will be effective from the date of its signing and any power generated by the Project before this date will not be governed retrospectively by the PPA. Accordingly, certain clauses of the PPA have become redundant and require amendment as mentioned therein.

(iv) Both parties to seek a revised order from this Hon'ble Commission concerning the effective date an already approved tariff of the PPA.

(v) Accordingly, it was requested that a joint petition / application be prepared to seek additional time for PPA execution and proposed amendments from this Hon'ble Commission.

*A copy of Letter dated 26.10.2024 from HPSEBL to HPPCL is annexed hereto and marked as **Annexure U.***

*vii. (q) On 05.11.2024, in response to HPPCL's email dated 05.11.2024 submitting the anticipated generation schedule for 06.11.2024, the Power Controller, HP-ALDC reiterated that no PPA had been signed between HPSEBL and HPPCL till date, and further stated in the absence of a PPA, HPSEBL would not be considering any emails for scheduling of power and no power could be scheduled in the absence of a valid PPA. HPPCL was requested to not mention HPSEBL's share of power and refrain from sending further emails to HPSEBL. A copy of HP-ALDC's email dated 05.11.2024 is annexed hereto and marked as **Annexure V**."*

8. Further, para 8 (b) of the Review Petition is required to be modified as under:-

> *"**Impact of Lower Tariff**: This lower tariff adversely affects the financial viability of the Pekhubella Solar Power Plant, potentially leading to reduced returns on investment and challenges in meeting financial obligations. In fact, the lower tariff goes to the very root of the matter, altering the entire sub-stratum and consideration of the contract entered into between the parties, thereby dislodging all foreseeable risks and costs of the Project."*

9. Also that in para 8 (c) of the Review Petition, the following is required to be added:-

> *"Section 62 of the Electricity Act 2003 envisages projects being set up on a cost-plus basis. While it is preferable that competitive bidding be adopted especially for projects above 5MW, however, the extant law does not entirely preclude the projects to be set up under the regulations, especially if the project falls within the exceptions provided, including where regulators will determine tariff basis established norms.*
>
> *In the present case, the parties have opted for the Section 62 route, and incorporated the same in the draft PPA, whereby tariff is to be determined in terms of the relevant regulations of this Hon'ble Commission. That based on the such regulations, calculating the tariff based on the norms provided therein, the parties had jointly sought a tariff Rs.3.50 per unit along with the cost of land if levied in the future by the Government, under the Minutes of Meeting dated 24.01.2024. The extant regulations do no permit any benchmarking of tariff in case of Section 62 cost-plus projects and hence no ceiling or benchmark tariff rate, especially derived from Section 63 discovered tariff, ought to be made applicable to the present case."*

10. According to the Petitioner at para 9, the following para is to be added:-

> ***"A. Tariff for the Project ought to be determined as per the Applicable Regulations***
>
> *9.(a) HPPCL and HPSEBL had approached this Hon'ble Commission under Petition No. 48 of 2024 seeking approval of their PPA and approval of the negotiated tariff between the parties for supply of power from the Project to*

HPSEBL. However, this Hon'ble Commission vide Order dated 12.04.2024 has determined the Project tariff of Rs. 2.90 per unit basis the following:

(i) The calculation of Tariff is not in the domain of the Petitioner as this power is exclusively vested with the Hon'ble Commission under the Electricity Act, 2003.

*(ii) The high cost of tariff will not be in the interest of consumers, thus, said tariff should be more or less in line with the tariff discovered by Solar energy Corporation of India ("**SECI**") on tariff based competitive bidding process.*

(iii) Order dated 20.05.2023 in Petition No. 17 of 2023, wherein it was held that any procurement of Solar Power exceeding 5 MW need be by way of open bidding and that too on SECI approved / discovered rate. However, keeping in view the peculiar geographical, topographical and climatic conditions, this Hon'ble Commission authorized such procurement with an additional 15% cost, over and above the SECI determined rate.

(iv) Tender issued by SECI on 13.10.2023 for tariff based competitive bidding and rate discovered pursuant thereto of Rs. 2.53 per unit.

(v) This Hon'ble Commission permitted 15% additional cost over and above the SECI determined rate vide Order dated 20.05.2024 in Petition No. 17 of 2023 and accordingly determined the rate of Rs. 2.90 per unit for the Project in the present case.

9.(b) It is submitted that under the Electricity Act 2003, generation is a delicensed activity. However, procurement of power can be done in the following ways:

(i) Determination of tariff by the Appropriate Commission [Section 62]; and

(ii) Adoption of tariff by bidding process [Section 63].

Thus, there are two routes for power projects to come up. One is known as cost-plus route of Section 62 and other the tariff based competitive bidding which is encouraged under section 63. The power projects which come up through the latter route are governed by guidelines framed by the central government wherein transparency of the bidding process is the hallmark.

*9.(c) In this regard, it is noteworthy that Paragraph 5.2 of the Revised Tariff Policy dated 28.01.2016 ("**RTP**") provides that all future procurement of power by Distribution Licensees must be through competitive bidding **except in cases where:***

(i) Where there is an expansion of existing projects; or

(ii) *When a State Government-owned or controlled company is the designated developer and* ***where regulators will determine tariff basis established norms.***

9.(d) *As regards modes of procurement of power namely, under Section 62 and Section 63 of the Electricity Act 2003, Hon'ble Supreme Court in* ***TATA Power Company Limited Transmission v. MERC*** *(2023) 11 SCC 1(Para 88, 92 121-122)* ***("Tata Power Judgment")*** *held that* ***procurement through Section 63 cannot be considered as the dominant mechanism to the exclusion of determination of tariff under Section 62.*** *Further, the Hon'ble Supreme Court held that* ***while the RTP is a material consideration under Section 61, it cannot override the express functions of the regulatory commission in determination/adoption of tariff or selection of the mechanism for procurement of power (unless provided by regulations notified).*** *The relevant extracts are reproduced below:*

"88. Section 63 indicates that the provision would be invoked after the tariff has been determined by the bidding process. There is nothing in Sections 62 or 63 that could lead us to interpret that Section 63 is the dominant route for determination of tariff. Both the provisions provide alternative modalities through which tariff can be determined. The non obstante clause in Section 63 must be read in the context of Sections 61 and 62. Section 62 bestows the Commission with wide discretion to determine tariff. Section 63 seeks to curtail this discretion where a bidding process for tariff determination has already been conducted. Section 63 contemplates that in such situations where the tariff has been determined through the bidding process, the Commission cannot by falling back on the discretion provided under Section 62 negate the tariff determined through bidding. This interpretation of Section 63 is fortified by the use of the phrase "such" in Section 63 — the Commission is bound to "adopt" "such" tariff determined through bidding.

92. Thus, the appropriate Commission is not mandated to adopt the tariff determined through the bidding process irrespective of the fulfilment of the statutory requirements. The Commission can reject the tariff determined through the bid if the tariff process is not : (i) transparent; and (ii) in accordance with the guidelines issued by the Central Government. Thus, if the Commission does not adopt the tariff determined through bidding, and if the decision is challenged, the bidding process can be reviewed substantively (on the ground of transparency) and procedurally (on the ground of compliance with the Central Government guidelines) to determine if the Commission could have exercised its discretion to determine the tariff under

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Section 62 while rejecting the tariff determined under Section 63. Therefore, Section 63 can only be invoked after the tariff has been determined through bidding. The terms and conditions notified by the appropriate Commission under Section 61 will have to be referred for the purpose of choosing the modality of tariff determination that the Commission should undertake. In view of the above discussion, the argument of the appellant that a reading of Sections 61, 62 and 63 indicates that the TBCB route is the dominant route of tariff determination does not hold merit.

121. While the determination and regulation of tariff falls within the exclusive domain of the Regulatory Commission, it is crucial to note that Sections 61 and 86 stipulate that the Commission shall be guided by NTP while specifying terms and conditions for determining tariff. The State Commission while exercising its power to make regulations under Section 181(2)(zd) on the terms and conditions for determination of tariff under Section 61 must conform to the provisions of the Act. Thus, while framing regulations under Section 181(2)(zd), the Commission must be guided by the principles mentioned in Section 61, which includes the NEP and NTP.

[….]

122. This Court in Reliance Infrastructure [Reliance Infrastructure Ltd. v. State of Maharashtra, (2019) 3 SCC 352] has already held that NTP is one of the material considerations. NTP is one of the many guidelines that the Commission must necessarily consider while regulating tariff. The State and the Central Government only have an advisory role in the regulation of tariff. The Electricity Regulatory Commissions Act, 1998, which was consolidated with other statutes on electricity while enacting the Electricity Act, 2003, was enacted to distance the governments from the determination of tariffs. Further, the Act does not seek to centralise the power to regulate tariff with the Centre. One of the objectives of the Act was to provide the "States enough flexibility to develop their power sector in the manner they consider appropriate". Thus, since the appropriate Commissions possess full autonomy in the determination and regulation of tariff, and the States have been provided flexibility to develop their power systems for intra-State transmission of electricity, the NTP 2016 shall be one of the material considerations. Further, even in the letter dated 15-3-2021, the MoP only "strongly recommended" that the states adopt TBCB for the development of intra-State transmission systems."

9.(e) Accordingly, from the provisions of the RTP,read along with the Tata Power Judgment, the following position emerges:

(i) Distribution licensees are not mandated to procure power through competitive bidding.

(ii) RTP does not place any bar on Distribution Licensees in procuring power through either Section 63 or Section 62. Section 63 cannot be considered as the dominant mechanism for procurement of power.

9.(f) The Electricity Act,2003 provides detailed guidelines on the subject of "Tariff" in Part-VII. Section 61 sets out the prime principles to be followed in such exercise by the regulatory authorities, as under:

"61. Tariff regulations.–The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:–

(a) …;

(b) the generation, transmission, distribution and supply of electricity are conducted on ***commercial principles****;*

(c) the factors which would encourage competition, efficiency, economical use of the resources, ***good performance and optimum investments****;*

(d) safeguarding of consumers' interest and ***at the same time, recovery of the cost of electricity in a reasonable manner;***

(f) …

(e) …

(g) ***that the tariff progressively reflects the cost of supply of electricity*** *and also reduces cross-subsidies in the manner specified by the Appropriate Commission;*

(h) the promotion of co-generation and ***generation of electricity from renewable sources of energy;***

(i) the National Electricity Policy and tariff policy:"

(Emphasis Supplied)

9.(g) The power projects which are established for operation on cost-plus basis under Section 62 of the Electricity Act, 2003 have the statutory assurances of reasonable returns through the guidelines provided in Section 61 (as quoted above), which form the basis of tariff

regulations that are framed to guide the process of regulatory commissions.

9.(h) *Once procurement of power from cost plus projects is permitted and the parties have mutually agreed and negotiated the tariff between them, the Hon'ble Commission is legally obligated to determine the tariff for the Project as per the applicable regulations. Accordingly, this Hon'ble Commission was bound to determine the Tariff for the Project in terms of principles laid down under Section 61 and Section 62 of the Electricity Act, 2003, which mandates determination of tariff in terms of the applicable regulations.*

9.(i) *In this regard, it is noteworthy that for procurement of power under Section 62 of the Electricity Act, this Hon'ble Commission, in exercise of power vested in it by Sections 61, 66, 86 and 181 of the Electricity Act, 2003, framed the HPERC RE Tariff Regulations. Accordingly, the Project's tariff was to be determined in accordance with the HPERC RE Tariff Regulations. Reliance in this regard is placed on the Hon'ble Supreme Court in* ***PTC India Ltd v. CERC*** *(2010) 4 SCC 603, wherein it was held that an order passed by a Commission has to be in accordance with the applicable regulations, as under:*

> *"54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide-ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that the Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licences, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under*

Section 79(1), therefore, have got to be in conformity with the regulations under Section 178.

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation.

56. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. ***However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulations under Section 178****.”*

(Emphasis Supplied)

In terms of the foregoing, it is submitted that the Hon’ble Commission’s approach of considering the tariff discovered by SECI through competitive bidding as a benchmark for determination of tariff in the present case is in contravention to Electricity Act 2003 and the HPERC RE Tariff Regulations.

9.(j) It is further submitted that under the HPERC RE Tariff Regulations, the following position of regulatory framework is discernible:

(i) *Tariff to be determined by this Hon'ble Commission for the Project is to be in accordance with the HPERC RE Tariff Regulations.*

(ii) *In terms of Regulation 8(2) of HPERC RE Tariff Regulations, in the event of* ***parties arriving at a mutual understanding on various issues of the PPA, including the tariff option under Regulation 13, the parties will file a joint Petition before the Hon'ble Commission for approval of the proposed PPA.***

(iii) *Under Regulation 13(4), in case of renewable energy sources other than small hydro projects, such as solar PV projects, the tariff options under Regulation 18 are available to the parties intending to enter into a PPA;*

(iv) *As per Regulation 13(5) of the HPERC RE Tariff Regulations, the* ***parties will, while arriving at a mutual understanding about the sale / purchase of power also mutually decide the tariff option to be adopted and will before submitting the joint Petition for approval of the proposed PPA under Regulation 8, also reflect the same in the proposed PPA. Provided that the tariff option adopted in the PPA will be irrevocable and binding****;*

(v) *Regulation 15 sets out the methodology and considerations for this Hon'ble Commission to determine the project-specific levellised tariff, including the capital cost, the normative CUF, technology-specific parameters, financial norms, etc.;*

(vi) *Regulation 18(4) provides that the renewable energy generator and the distribution licensee intending to sell/purchase power from the projects based on the renewable energy sources, for the entire useful life of the project, may, at the time of filing joint petition for the approval of the power purchase agreement, mutually agree to be governed by the generic levellised tariff, if the Commission has already determined or expressed its intention, by order, to determine such a rate for that technology,* ***or in absence of Commission having expressed any such intention, for determination of project specific tariff by the Commission.***

(vii) *Financial principles as laid down under Part IV of the HPERC RE Tariff Regulations inter alia including:*

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- *Regulation 21-C: Capital Cost: capital cost shall be inclusive of all the expenses required to be incurred as per prudent practices upto the commissioning of the project.*
- *Regulation 22-C: Subsidy or incentive or grant/budgetary support by the Central/ State Government.*
- *Regulation 23-C: Debt-Equity Ratio: The normative debt equity ratio shall be 70:30.*
- *Regulation 24-C: Loan and Finance Charges and Interest Rate.*
- *Regulation 25-C: Depreciation.*
- *Regulation 26-C: Return on Equity.*
- *Regulation 27-C: Interest on Working Capital.*
- *Regulation 28-C: Operation and maintenance expenses.*
- *Regulation 29-C: Taxes and duties.*

9.(k) From the above, it is evident that the HPERC RE Tariff Regulations allow the parties to a PPA to mutually agree on, inter alia, the tariff option under Regulation 13 opted for tariff determination, and Regulation 13(4) allows the parties to adopt any of the tariff options set out under Regulation 18.The tariff option opted for is required to be reflected in the PPA and is irrevocable and binding. It is noteworthy that the HPERC RE Regulations do not mandate competitive bidding to the exclusion of tariff determination under Section 62.

9.(l) Considering that the parties may adopt any tariff option under Regulation 18, it is submitted that Regulation 18(4)inter alia provides that the parties to opt for the generic levellised tariff, in the absence of which, this Hon'ble Commission is required to undertake a project-specific tariff determination, i.e., if this Hon'ble Commission has not determined the generic levellised tariff, it is mandated to determine the tariff for a project specifically in accordance with Regulation 15.

9.(m) It is submitted that, in the present case, under the draft PPA submitted by the parties for approval before this Hon'ble Commission, and approved vide the Order dated 12.04.2024, the parties, under Article 6.1.1 of the draft PPA, intended to choose the tariff as specified by the Hon'ble HPERC, with an interim tariff of Rs. 3/unit. Relevant provisions of the PPA are extracted as follows: -

> *"6.1.1 The tariff to be charged & its associated Terms and Conditions for the electricity supplied from the Pekhubella SPP 32 MWac at the interconnection point shall be as per the Tariff Regulation/Notification/orders/directions issued/to be issued by the HPERC from time to time [...]*

[...]

6.1.5 Till the tariff is finalized by Hon'ble HPERC, HPSEBL shall pay interim charges @ Rs. 3.00/kWh which shall be adjusted as per tariff finalized by Hon'ble HPERC."

Basis the provisions of the HPERC RE Tariff Regulationsand the PPA, it is evident that the parties intended this Hon'ble Commission to determine the tariff for the Project, in the form ofa project-specific determination.

9.(n) It would be apposite to note at this stage that this Hon'ble Commission vide its Order in Suo-motu Petition No. 01/2024 dated 14.03.2024 has determined the generic tariff @ Rs. 3.47 or Rs. 3.52 (depending on location of the project) for solar PV projects for up to 5 MW capacity and whereas for projects exceeding 5 MW capacity such as the Pekhubella Project, no generic tariff has been determined. Therefore, this Hon'ble Commission is bound by its own regulations and the PPA to determine the specific tariff for the Project in accordance with Regulations 15of HPERC RE Tariff Regulations. Under such circumstances, application of normative tariff / considering the tariff discovered by SECI through competitive bidding as a benchmark, is contrary to and in the teeth of the HPERC RE Tariff Regulations.

9.(o) Without prejudice, it is submitted that this Hon'ble Commission ought to have considered the mutually-determined tariff of Rs. 3.49/unit, computed specifically for the Project, pursuant to the directions of this Hon'ble Commission, and in accordance with the norms set out under the HPERC RE Tariff Regulations itself. Notably, such mutually-determined tariff is also in line with the generic tariff of Rs. 3.47 and Rs. 3.52 (depending on location of the project) determined by this Hon'ble Commission vide Order dated 14.03.2024. HPPCL vide its submissions dated 23.02.2024 has placed on record the detailed computation of tariff and craves leave of this Hon'ble Commission to file further detailed computation, as and when directed.

*9.(p) It is submitted that under the cost-plus regime, all input cost of generation (Capex and Opex) is considered as an automatic pass through in tariff subject to prudence check by the Hon'ble Commission. The Hon'ble Appellate Tribunal for Electricity ("**Hon'ble Tribunal**") in various Judgments has held **that tariff is reflection of the actual cost and unless there is imprudence in the manner in which cost is incurred, the expenditure claimed by the generating company under Section 62 PPA should be passed***

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***on in tariff**. In this regard reliance is placed upon the following judgments passed by the Hon'ble Tribunal:*

*(i) Judgment dated 06.05.2011 passed in Appeal No. 170 of 2010, titled **Madhya Pradesh Power Generation Company Limited v. MPERC &Ors**.:*

"There is no difference with Mr. Ramachandran's submission that while determining the tariff, the Commission has to bear in mind the principles laid down in Section 61 and that the tariff has to be determined on cost plus basis so that a reasonable return on investment ensures to the investors."

*(ii) Judgment dated 23.11.2007 passed in Appeal No. 273 of 2007 titled **Damodar Valley Corporation v. CERC &Ors**:*

"Cost of electricity would also include actual cost of supply of electricity plus reasonable profit of the utility, since as per principle enshrined in clause (b) of Section 61, the generation, transmission, distribution and supply of electricity are to be conducted on commercial principles."

*(iii) In **Dodson-Lindblom Hydro Power Pvt. Ltd. v. MERC** [2011 SCC On Line APTEL 156], the Hon'ble Tribunal while explaining the scope of prudence check has held that all such expenditure which are justifiable having regard to the industry norms and which a prudent businessman would have incurred on his business at the stage at which it was incurred will be considered prudent and shall be allowed to be pass through in tariff.*

In this regard, in the present case, the following is noteworthy:

*(i) The tariff (i.e Levelized cost of energy (LCOE)) in the DPR was based on the insolation considered as per NASA data as 1945 kWh/m2, however actual Global Horizontal Irradiance ("**GHI**") available in HP is 1451 kWh/m2 as per Berra-Dol SPP (Data sheet attached as Annexure-A) which is around 25% lower than the considered value in DPR and have to achieve the minimum annual guaranteed energy for the Project irrespective of GHI variation. A copy of Global Horizontal Irradiance in terms of NASA Data, Berra Dol SPP established at Himachal Pradesh and a SPP established at Tamil Nadu is annexed hereto and marked as **Annexure P-[•].***

(ii) Moreover, the tariff has to be computed by considering the actual awarded works for the Project through competitive tendering / bidding process, which has been worked works out

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as Rs. 4.12/unit, Rs. 3.98/unit & Rs. 3.49/unit based on different parameters. A detailed calculation sheet has been annexed hereto and marked as ***Annexure P-[•].***

(iii) Further, other factors may also pose challenges in ascertaining the financial viability of the solar power project. As regarding higher cost of derived per unit rate of energy, the following factors mainly attribute to this higher cost:

- *Insolation level in HP area is less than that for area in Gujarat& Rajasthan. This fact is also substantiated through GHI data.*
- *Transportation costs are comparatively higher.*
- *Land availability & Land development costs are also comparatively higher.*

(iv) Further in the present case, cost of land is not included. However, if the same is sought by the Government of Himachal Pradesh, the same will additionally be leveraged over and above to derive the new tariff.

(v) As per HPSEBL in case of current scenario of power purchase, SECI rates quoted by various agencies under CPSU scheme are at Rs.2.68/unit including the trading margin of 7 paisa/Unit at NR Periphery. Thus, cost at Discom Periphery is working out as Rs.4.72/Unit, if relevant effective rebates as being received by HPSEBL against its General Network Access as per regulations are considered. However, if waiver is not considered the cost comes to Rs 5.20/Unit.

(vi) Therefore, further reduction of per unit cost below Rs. 3.49/unit will not be possible subject to condition that land cost if demanded by the Government at a later stage shall be added further to derive new applicable tariff.

In view of the foregoing, it was only after detailed deliberation the representatives of both HPPCL and HPSEBL agreed that HPSEBL will purchase the entire power from the Project at the minimum tariff of Rs. 3.50/unit subject to the approval of this Hon'ble Commission.

B. This Hon'ble Commission has erred in applying the tariff discovered by bidding process under Section 63 as the benchmark, while determining the tariff in terms of section 62 of the Electricity Act, 2003

9.(q) This Hon'ble Commission vide Order dated 12.04.2024 has erred in relying upon the Tender issued by SECI on 13.10.2023 for tariff

*based competitive bidding and rate discovered pursuant thereto of Rs. 2.53 per unit plus 15% additional cost over and above the SECI determined rate vide Order dated 20.05.2024 in Petition No. 17 of 2023 ("**Petition 17 Order**")to determine the rate of Rs. 2.90 per unit for the Project in the present case.*

9.(r) As established above, in terms of Regulation 8(2) read with Regulation 13 and 15 of the HPERC RE Tariff Regulations, this Hon'ble Commission was bound to determine the tariff after taking into consideration the mutually agreed rate by HPPCL and HPSEBL for approval of the proposed PPA in line with the applicable regulations. Notably, the aforesaid Regulations have no connection whatsoever with the tariff based competitive process of section 63 of the Electricity Act, 2003.

9.(s) Admittedly, in Order dated 12.04.2024, this Hon'ble Commission has noted that HPPCL and HPSEBL have arrived at consensus to purchase the entire power from the Project at Rs. 3.50 per unit. However, it is here that a departure from the HPERC RE Tariff Regulations has been taken by this Hon'ble Commission, whereby in the Petition 17 Order, in terms of which any procurement of Solar Power exceeding 5 MW has been directed to be way of open bidding and that too on the SECI approved / discovered rates.

9.(t) It is humbly submitted that this Hon'ble Commission has erred by applying the Petition 17 Order in the present case. The Petition 17 Order applies to procurement via competitive bidding under Section 63 of the Electricity Act, 2003. However, as established above, under law and the HPERC RE Tariff Regulations, both routes for tariff, i.e., competitive bidding or determination as per regulations is available to the parties. In the present case, the parties expressly chose to exercise their right to opt for a project-specific tariff determination under Section 62. Therefore, application of the Petition 17 Order, rendered in the entirely distinguishable context of procurement via the Section 63 route by way of competitive bidding, to an application for determination of tariff under Section 62, is a factual error apparent on the face of record and is contrary to the HPERC RE Tariff Regulations.

9.(u) It is submitted that Section 62 of the Electricity Act,2003 relates to Section 61 where the tariff is to be determined as per the regulation specified by the Hon'ble Commission. On the contrary the tariff to be determined / discovered through competitive bidding is to be as per Section 63 of the Electricity Act 2003. It is submitted that both these sections i.e. Section 62 and Section 63 while dealing with the

determination of tariff operate in a completely different manner and cannot be merged by this Hon'ble Commission.

9.(v) *It is well settled that if the law requires something to be done in particular manner, then such thing has to be done in that manner only, as held in the following judgments:*

*(i) **Tata Chemicals Ltd. v. Commr. of Customs**, (2015) 11 SCC 628 -*

*"18. The Tribunal's judgment has proceeded on the basis that even though the samples were drawn contrary to law, the appellants would be estopped because their representative was present when the samples were drawn and they did not object immediately. This is a completely perverse finding both on fact and law. On fact, it has been more than amply proved that no representative of the appellant was, in fact, present at the time the Customs Inspector took the samples. Shri K.M. Jani who was allegedly present not only stated that he did not represent the clearing agent of the appellants in that he was not their employee but also stated that he was not present when the samples were taken. In fact, therefore, there was no representative of the appellants when the samples were taken. In law equally the Tribunal ought to have realised that there can be no estoppel against law. **If the law requires that something be done in a particular manner, it must be done in that manner, and if not done in that manner has no existence in the eye of the law at all**. The Customs Authorities are not absolved from following the law depending upon the acts of a particular assessee. Something that is illegal cannot convert itself into something legal by the act of a third person."*

(Emphasis Supplied)

*(ii) **Babu Verghese v. Bar Council of Kerala**, (1999) 3 SCC 422 -*

*"31. **It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all**. The origin of this rule is traceable to the decision in Taylor v. Taylor [(1875) 1 Ch D 426 : 45 LJCh 373] which was followed by Lord Roche in Nazir Ahmad v. King Emperor [(1936) 63 IA 372 : AIR 1936 PC 253] who stated as under:*

"[W]here a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."

32. This rule has since been approved by this Court in Rao Shiv Bahadur Singh v. State of V.P. [AIR 1954 SC 322 : 1954 SCR 1098] and again in Deep Chand v. State of Rajasthan [AIR 1961 SC 1527 : (1962) 1 SCR 662] . These cases were considered by a three-Judge Bench of this Court in State of U.P. v. Singhara Singh [AIR 1964 SC 358 : (1964) 1 SCWR 57] and the rule laid down in Nazir Ahmad case [(1936) 63 IA 372 : AIR 1936 PC 253] was again upheld. This rule has since been applied to the exercise of jurisdiction by courts and has also been recognised as a salutary principle of administrative law."

(Emphasis Supplied)

9.(w) Notably, while deciding a similar case on as to whether the Maharashtra Electricity Regulatory Commission, while determining the tariff in terms of section 62 of the Electricity Act, 2003, could have applied the tariff discovered by bidding process under section 63 as the benchmark, the Hon'ble Appellate Tribunal for Electricity vide Judgment dated 02.05.2022 in Appeal No. 381 of 2018 titled ***Cogeneration Association of India v. MERC &Ors.,*** *held as under:*

"22….It bears repetition to say that concededly the RE Tariff Regulations do not include the bid discovered tariff of Section 63 as one of the benchmarks or touchstones. ***The use of such benchmark by the Commission demonstrates that its decision is articulated by extraneous consideration falling outside tariff regulation which had been framed by it and which it was duty bound to follow. It is not a case where there was a vacuum in the Tariff Regulations for which Commission could have looked elsewhere to find a fair solution. The Tariff Regulations, 2015 had been in force and complied with scrupulously in the preceding three control periods. There was no justification for any departure from such dispensation or foray outside the extant framework of the Tariff Regulations.***

23. Even otherwise, adoption of Approach-2 was misguided since the Commission failed to bear in mind ***that price discovery methodology through competitive bidding route functions on the principles of bidders placing the competitive bid considering the scale and size of their power project and individual risk appetite, the final price discovered through the***

bid being for specific and individual Power Purchase Agreements rather than being a safe method for determining generic tariff*. *The approach is wrong since it seeks to place the generators of different States and their projects of different vintage on the same pedestal which has the obvious potential to result in deficient recovery of their prudent costs. *This is explicit even from the facts at hand wherein the adoption of bid discovered tariff of Rs. 4.99/unit means only Rs. 0.82/unit will be recovered towards fixed charges which have been otherwise computed by the Commission at Rs. 2.28/unit, variable cost having been determined at Rs. 4.17/unit.*

24. ***It was incorrect on the part of the State Commission to justify the impugned decision only with reference to its responsibility to take care of consumer interest. As observed earlier, consumer interest is prime but has to be balanced against other considerations including the legitimate expectation of the generators for reasonable returns on their cost of generation. By the approach taken, the State Commission has abandoned its own Tariff Regulations making them redundant. This renders the impugned decision incorrect, unjust and unlawful****."*

(Emphasis Supplied)

Accordingly, similar dispensation ought to be granted in the present case and this Hon'ble Commission ought to reconsider the Tariff determined vide Order dated 12.04.2024 in line with the mutually negotiated tariff and as per the HPERC RE Tariff Regulations.

9.(x) It is further submitted that this Hon'ble Commission has erred in applying the rate of Rs. 2.53 discovered pursuant to SECI tariff based competitive bidding, without taking into consideration the CUF, location and capital cost of the Project. Regulation 15 read with Chapter IV of the HPERC RE Tariff Regulations requires these project-specific parameters and financial principles to have been factored in whilst determining the project-specific tariff.

9.(y) Without prejudice, it is submitted that even if the tariff was to be determined with reference to a benchmark determined via competitive bidding, the rates discovered pursuant to the SECItender dated 13.10.2023 considered by this Hon'ble Commission in the Order dated 12.04.2024, are not a suitable benchmark. HPPCL's Project is of a far lower capacity than the capacities awarded under the SECI tender and does not benefit from economies of scale. Its financial considerations vary significantly, and the tariffs are

incomparable, as evidenced by the levellised tariff set by this Hon'ble Commission itself in the Petition 17 Order, which is approximately Re. 1/- higher than the tariffs discovered under the SECI tender dated 13.10.2023.

9.(z) *It is further submitted that the rates discovered via competitive bidding cannot operate as a 'cap' on the determination of the Project's tariff. The Hon'ble Tribunal in its judgment dated 25.10.2024 in Appeal No. 326 of 2021 titled **Amplus Sun Solutions Private Ltd. v. Haryana Electricity Regulatory Commission & Ors.** held that tariff discovered through competitive bidding route depends upon various factors including location and size of the project. Hence, at most, a trend can be discerned from the discovered rates, and they cannot be considered a cap while determining project-specific tariff. Relevant extract is as follows: -*

*"29. The Petition No. PRO 59 of 2020 was filed by Amplus before the State commission for determination of project specific tariff for supply of power from its 50 MW Solar Power Project at Bhiwani, Haryana under Section 62 of the Electricity Act read along with "HERC RE Regulations 2017". **Thus, the distinction needs to be made between tariff determination under Section 62, Benchmark cost / cost discovered by other regulatory commission vis-àvis project specific tariff determination by HERC. On the objection submitted by various objectors and citing the cost discovered/benchmarked by other Commissions/ MNRE, the State Commission in the impugned order has stated that "provision for competitive bidding (Section 63 of the Act) does not take away the powers of the Commission under section 62 of the Act. The commission exercises prudence check before admitting capital cost to remove padding of CAPAX, if any, including disallowing Capital cost that is not permissible under the Regulations in vogue. Further the Tariff discovered through competitive route depends upon various factors including location and size of the project. Hence at most a trend can be discerned from the various rates discovered. However, they cannot be considered as a 'cap' while determining project specific tariff as in present case"; which is a settled law**. Amplus has claimed a capital cost of Rs 275.4 Crore which includes 75 MW DC module Cost against contracted AC capacity of 50 MW and claimed an AC CUF of 25.91% and after adjustment of 0.5% of plant availability and 1% grid availability the final CUF of the project is claimed as AC CUF of 25.52%."*

(Emphasis Supplied)

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9.(aa) This Hon'ble Commission vide Order dated 12.04.2024 in Petition No. 48 of 2024 at para 11 had observed that "In any case, the Pekhubella Solar Generating Station should be cost effective as the land has been provided by the GoHP". However, it is noteworthy that the Government of Himachal Pradesh, Revenue Department vide letter dated 05.07.2024 has recommended to transfer the Government land for setting up of Solar Power Projects on lease basis as per the provisions of the Himachal Pradesh Lease Rules, 2013 as amended from time to time. Further, HPPCL is in receipt of letter dated 29.07.2024 from the Government of Himachal Pradesh (Department of MPP & Power) to take necessary action in the matter. A copy of Letter dated 29.07.2024 with the enclosed correspondence dated 05.07.2024 is annexed hereto and marked as ***Annexure P-[•].***

9.(bb) This Hon'ble Commission vide Order dated 12.04.2024 has decided that the tariff discovered through competitive bidding process being lower will have to be adopted, as against the tariff calculated on the basis of financial principles and technology-specific parameters as detailed in DPR and in HPERC RE Tariff Regulations, the prime quoted justification being the consumer interest. In this regard, reliance is placed on judgment of the Hon'ble Supreme Court in ***Andhra Pradesh Electricity Regulatory Commission v. R.V.K. Energy (P) Ltd.*** *(2008) 17 SCC 769 (Para 90) wherein it was held that while consumer interest is a consideration for determination of tariff, it is not the sole criteria. The interest of generating companies is as equally important.*

C. HPSEBL is liable to pay tariff from the COD of the Project for the power consumed from the Project as per the rate determined by this Hon'ble Commission

9.(cc) HPPCL and HPSEBL had filed a Joint Petition (No. 48 of 2024) dated 20.10.2023 for approval of the PPA for supply of power from the Project to HPSEBL on Long-Term basis. Vide Order dated 12.04.2024, this Hon'ble Commission approved the PPA and determined the tariff for the Project at 2.90 per unit. Considering, the implementation of the Order dated 12.04.2024 and execution of PPA was under consideration by HPPCL and subsequently, HPPCL filed the present Review Petition seeking reconsideration of the tariff approved by this Hon'ble Commission in Order dated 12.04.2024, HPPCL has been seeking extension in time for execution of the PPA with HPSEBL from this Hon'ble Commission.

9.(dd) *Meanwhile, the Project was synchronised with the State Grid on 15.04.2024 and power is being supplied to HPSEBL from 15.04.2024 onwards. HPPCL, vide letters dated 08.05.2024, 22.07.2024, 20.08.2024, 07.09.2024, 16.09.2024, 24.09.2024 and 22.10.2024 has repeatedly requested HPSEBL for execution of a Short Term PPA for the period from 15.04.2024 to 31.03.2024 at the tariff of Rs. 2.90 per unit approved vide Order dated 12.04.2024, subject to the outcome of the present Review Petition.*

9.(ee) *However, HPSEBL vide letter dated 26.10.2024 refused to execute a Short Term PPA, the same not being in line with the Order dated 12.04.2024 which was for a Long Term PPA. Notably, HPSEBL has also stated that any power supplied from the Project to HPSEBL prior to 26.10.2024 would not be governed retrospectively by the PPA and sought amendments including to the effective date of the PPA. Accordingly, as the time granted in Order dated 24.08.2024 (in Petition No. 109 of 2024) had expired, HPSEBL stated that a fresh Joint Petition would need to be filed for before this Hon'ble Commission seeking extension of time for execution of the PPA and approval of the amended PPA.*

9.(ff) *It is submitted that the Project has been supplying power to HPSEBL from 15.04.2024 onwards, which is admittedly being consumed by HPSEBL. However, in the absence of a PPA, no payment has been made by HPSEBL to HPPCL for the energy supplied by the Project.A copy of details providing power scheduled to HPSEBL from HPPCL's Project is annexed hereto and marked as* ***Annexure P-[•].*** *HPSEBL reserves its rights to produce the provisional energy bills raised on HPSEBL from April 2024, with the leave of this Hon'ble Commission.*

9.(gg) *It is noteworthy that in terms of the PPA approved by this Hon'ble Commission vide the Order dated 12.04.2024,sale of power and energy accounting were to commence from the date of the Project's synchronisation with the state grid. However, despite the Project achieving COD and being synchronised with the grid on 15.04.2024, and despite extensions in time being granted by this Hon'ble Commission for executing the PPA,HPSEBL refused to execute the PPA. Further, HPSEBL unilaterally sought to introduce amendments to the PPA approved by this Hon'ble Commission in a bid to have it come into effect from the date of execution.*

9.(hh) *HPSEBCL's refusal to execute the PPA in line with the Order dated 12.04.2024, is in contravention of the Hon'ble Commission's directions, as the PPA already stands approved at a tariff of Rs. 2.90 per unit and the parties were directed to execute the PPA. Further,*

HPSEBL is precluded from seeking any unilateral amendments to the PPA and the same is impermissible in law.

9.(ii) At this stage, HPSEBL having consumed the power supplied from HPPCL's Project, it ought not to be permitted to withhold tariff. In this regards reliance is placed upon the decision of the Hon'ble Tribunal in Judgment dated 24.01.2013 passed in Appeal No. 170 of 2012 titled as ***Bangalore Electricity Supply Company Limited v. Reliance Infrastructure Ltd. & Ors.,*** *wherein it was held that where the Licensee has enjoyed the benefit of the energy that has gone into the system and has recovered tariff in respect of the same, the claim of the generator qua the charges for the power supplied cannot be said to be illegal:-*

"23. It is an admitted fact that the Appellant has enjoyed the benefit of energy that has gone into the system and which could not be regulated. It is also an admitted fact that the Appellant has derived benefit from the same and recovered tariff in respect of the same. Therefore, the claim of the RInfra for the required charges for the power injected into the Grid cannot be said to be illegal."

9.(jj) The Hon'ble Tribunal in a catena of judgments has held that generators must be compensated for energy supplied to licensees, even in the absence of a PPA. Reliance in this regard, is placed on Judgment dated 22.10.2024 in Appeal No. 103 of 2021 titled ***Greenko Maha Wind Energy Pvt. Ltd., v. Maharashtra Electricity Regulatory Commission****, wherein the Hon'ble Tribunal, relying on its Judgment dated 28.08.2024 in Appeal No. 187/2017 titled* ***Green Energy Association v. MERC and Ors.*** *held that consumption of energy by a licensee without making payment for the same amounts to unjust enrichment and is contrary to the doctrine of legitimate expectation. Relevant extracts are as follows: -*

"28. We are unable to affirm these findings of the Commission in the impugned order. We have held hereinabove that in this case, ***EPA remained to be executed between appellant and the MSEDCL not due to any fault / inaction on the part of appellant but on account of arbitrary as well as unjust approach of the MEDA****. Further, in paragraph 19 of the impugned order, already reproduced hereinabove, the Commission has observed that in absence of a valid EPA or agreement, even though generator provides forecast / schedule as per RE F&S Regulations, such schedule cannot be accepted as there is no identified counter party to use such energy injected into the grid.* ***However, in the instant case, the injection of power into the grid from subject WTG by the appellant and its***

scheduling has been duly accepted by MSEDCL without any demur for 5 years till the WTG was disconnected on 11.06.2020. *Admittedly, MSEDCL did not intimate the appellant at any point of time that the energy pumped from the subject WTG into the grid cannot be accepted as the same is being done without a valid EPA. Moreover, the WTG was formally commissioned on 31.10.2015 in pursuance to the PTC issued by MSEDCL itself on the recommendation of MEDA and connected to the MSEDCL Grid at common metering point at 220/33 KV Khanapur Sub-Station. Since then, MSEDCL continued to receive energy from the WTG uninterruptedly, without asking the appellant to produce registration certificate from MEDA and to execute EPA.* ***It is not the case of MSEDCL that it has not supplied the power received from subject WTG to its consumers for gain. In fact, for some period of time, it has also issued credit notes to appellant for such power. Therefore, in such a scenario MSEDCL cannot be permitted to evade payment to the appellant for the power received in its grid from the WTG in question.*** *Even otherwise also, we note that the issue with regards to entitlement of power generator for compensation with regards to the power injected into the grid in the absence of a valid EPA had come up for consideration before this Tribunal recently in appeal No.187/2017 titled Green Energy Association v. MERC and Ors. decided on 28.08.2024. We find it apposite to reproduce the entire discussion on this issue in the said judgment as under: -*

[...]

29. ***Appling the concept of quasi-contracts as well as the doctrine of unjust enrichment / legitimate expectation, as explained in the above noted judgment by this Tribunal, to the instant case, we see no reason for denying compensation to the appellant for the power injected from the subject WTG into the grid from the date of its commissioning till 11.06.2020 when it was disconnected****. Therefore, the appellant is found entitled to the credit notes from MSEDCL for the energy supplied from the subject WTG till its disconnection.*

30. Thus, considering the above discussion, we find the impugned order the Commission absolutely erroneous and not sustainable either on facts or on law. The same is hereby set aside. Accordingly, the appeal stands allowed. The impugned communication dated 05.06.2020 issued by 3rd respondent MSLDC is hereby quashed. The subject WTG is deemed to have been registered with MEDA with effect from 23.11.2015. MEDA is directed to issue a formal

registration certificate in this regard to the appellant within one week from today. ***The 2nd respondent MSEDCL is also directed to execute the requisite EPA with the appellant within two weeks from today and reconnect the said WTG to the grid within one week thereafter. Needful to state here that the terms / conditions of the EPA shall be as were applicable in 2015-16.*** *MSEDCL is also directed to issue credit notes for the energy supplied from the said WTG into the grid with effect from the date of this commissioning i.e. 31.10.2015 till 11.06.2020 when it was disconnected."*

(Emphasis Supplied)

9.(kk) Further, this Hon'ble Commission has held in its Order dated 24.03.2023 in Petition No. 77 of 2022 titled ***M/s Sai Engineering Foundation v. HPSEBL & Anr.*** *that, even in case where the Petitioner was precluded from filing the joint petition for PPA approval in time due to reasons beyond its control, but had been supplying power to HPSEBL, it was entitled to be compensated at the generic levellised tariff. With regard to grant of interest, the same was denied solely on the ground that the Petitioner had not been diligent in bringing certain material facts to this Hon'ble Commission's attention, which is not the present case. Relevant extracts are as follows:*

"23. [...] The following points arise for determinations in the Petition: -

Point No. 1:

Whether the Petitioner had submitted the application on 13.01.2021 to the Respondent No. 1 to file Joint Petition for approval of PPA under generic levellised tariff but the Joint Petition could not be filed well before 31.03.2021 due to the reasons beyond the control of the Respondent No. 1.?

Point No. 2

If Point No. 1 is answered in affirmative, whether orders dated 23.10.2021 in Petition No. 37 of 2021 and order dated 21.02.2022 in Review Petition No. 1 of 2022 have resulted in injustice to the Petitioner and the Petitioner is entitled for the actual long term levellised tariff w.e.f. 01.04.2021?

Point No. 3

Whether the Petitioner is also entitled to the interest @ 12% per annum on deferential amount of Rs. 5447499/- from the date of filing of the Petition?

Point No. 4 (Final Order)

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

Point No. 1: Yes

Point No. 2: Yes

Point No. 3: No

Point No. 4: Petition partly allowed per operative part of the order.

[...]

36. Now the question arises whether or not the Commission may grant the actual Long Term Levellised Tariff w.e.f. 01.04.2021 to 26.09.2021 to the Petitioner. Undisputedly, the power has been supplied by the Petitioner to the Respondent No. 1 without any interruption. The stand of the Respondents is that the Petitioner has already sought review of the Order dated 23.10.2021 in a Review Petition and further/successive review is not possible and the remedy lies with the Petitioner to approach next higher forum and the relief claimed in the present Petition can't be granted. The another contention of the Respondent No. 1 is that they have already made the payment to the Petitioner for the energy of the period w.e.f. 01.04.2021 to 26.09.2021 and have already got authenticated the RE power procured by it against Renewable Power Purchase Obligations (Solar & Non-Solar) in view of Petition No. 41 of 2022, allowed vide order dated 28.11.2022, wherein the Respondent No. 1 has not considered the power procured from the Project during the period from 01.04.2021 to 26.09.2021 as RE (green) power. However,fact remains that the Petitioner had submitted the application well in time on 13.01.2021 with the Respondent No. 1 for filing the Joint Petition for approval of the PPA under Generic Levellised Tariff w.e.f. 01.04.2021 but the filing of Joint Petition has been delayed on the part of Respondent No. 1 due to the Covid-19 Pandemic which was beyond the control of the parties. ***The Petitioner has sustained huge loss of Rs. 54,47,499/- for want of non issuance of certificate by Respondent No. 2, without any fault of the Petitioner. Therefore, even if the RE Power has been authenticated against Renewable Power Purchase obligation in view of Petition No. 41 of 2022 and the Power from the Project has not been considered for said purpose by the Respondent No. 1, the Petitioner can't be made to suffer. The Respondent No. 1 can take corrective measures to undone the harm. Hence, the contention of the Respondent No. 1 has no merits.***

[...]

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*46. The Petitioner, has also claimed interest on the delayed amount but **this commission is not inclined to allow the accrual of interest for the reasons that the Petitioner was also not vigilant about its rights as neither the application dated 13.01.2021 was brought to the notice of the commission at the time of filing of Petition No. 37 of 2021 nor at the time of filing of Review Petition. Had this vital aspect been brought to the knowledge of the Commission, the Commission would have allowed the Sale and Purchase w.e.f. 01.04.2021 on long term basis.** In the circumstances, Points No. 1 and 2 are answered in favour of the Petitioner and against the Respondents. Point No. 3, on the other hand is answered against the Petitioner."*

9.(ll) Once HPSEBL had agreed to purchase the power supplied from the Project at tariff of Rs. 3.50 per unit (in terms of Minutes of Meeting dated 24.01.2024) and the matter for determination of tariff for the Project is sub-judice, including extension of time for execution of PPA, HPSEBL cannot refuse to accept the power supplied from the Project by HPPCL. Notably, this Hon'ble Commission in terms of Regulation 18(5)(i) may, direct the parties to incorporate in the PPA, a provisional tariff based on the generic levellised tariff, if any, notified by the Central Commission for that technology(ies), for the relevant timeframe, or any other rate as may be considered appropriate by this Hon'ble Commission.

9.(mm) Additionally, it is noteworthy that the Project is connected to HPSEBL's grid, i.e., HPSEBL exercised complete control over operationalisation of the Project's connectivity. HPSEBL's never disconnected the Project from the grid and continued to consume power from the Project, whilst refusing to execute the PPA with HPPCL and without making any payment for the energy consumed.

9.(nn) In view of the foregoing, it is submitted that HPSEBL's refusal to execute a PPA, whilst simultaneously consuming the power generated from the Project amounts to unjust enrichment and is contrary to HPPCL's legitimate expectation to be compensated for the power supplied from the Project. Notably, the correspondence between the parties demonstrates that HPSEBL is only seeking to avoid its payment liability for the power it has willing consumed, and never objected to. Therefore, HPSEBL cannot be allowed to evade its liability to compensate for the power consumed by it from 15.04.2024 onwards, which admittedly has been done pursuant to the mutual understanding that HPSEBL would take supply of power from the Project. The matter has admittedly remained sub-judice since the filing of the Joint Petition, and HPPCL has been regularly

following up at both fronts, i.e., before this Hon'ble Commission, as well as with HPSEBL. Once the jurisdiction of this Hon'ble Commission was invoked by way of the Joint Petition, HPSEBL ought not to be permitted to renege from its commitment to off take power from the Project and make due payments thereof. Accordingly, HPSEBL ought to be held liable to compensate HPPCL for the power consumed from the Project for the period from 15.04.2024 onwards at the rate as determined by this Hon'ble Commission along with interest."

11. Further, Para 14 of the Review Petition is required to be amended as follows:-

Sr. No.	Particulars	Page No.
1.	**Annexure A:** HPERC Order dated 12.04.2024	79-87
2.	**Annexure B:** Copy of Minutes of Meeting held on 24.01.2024 between HPPCL and HPSEBL	88-95
3.	**Annexure C:** Copy of the Detailed Project Report dated 22.02.2023.	96-305
4.	**Annexure D:** Copy of Order dated 20.05.2023 passed by the Hon'ble Commission in Petition No. 17 of 2023.	306-321
5.	**Annexure E:** Copy of Letter dated 03.05.2024 from HPSEBL to HPPCL.	322
6.	**Annexure F:**Copy of Letter dated 08.05.2024 from HPPCL to HPSEBL	323
7.	**Annexure G:** Copy of Letter dated 09.05.2024 from HPPCL to this Hon'ble Commission.	324-325
8.	**Annexure H:** Copy of Petition No. 109 of 2024 filed by HPPCL before this Hon'ble Commission.	326-329
9.	**Annexure I:** Copy of HP-ALDC's email to HPPCL dated 15.06.2024	330-331
10.	**Annexure J:** Copy of Letter dated 22.07.2024 from HPPCL to HPSEBL.	332
11.	**Annexure K:** Copy of Letter dated 20.08.2024 from HPPCL to HPSEBL.	333
12.	**Annexure L:** Copy of Order dated 24.08.2024 passed by this Hon'ble Commission in Petition No. 109 of 2024.	334-336
13.	**Annexure M:** Copy of Letter dated 04.09.2024 from HPPCL to HPSEBL.	337
14.	**Annexure N:** Copy of Letter dated 07.09.2024 from HPPCL to HPSEBL and HPEMC.	338-339
15.	**Annexure O:** Copy of Letter dated 07.09.2024 from HPEMC to HPPCL.	340
16.	**Annexure P:** Copy of Letter dated 07.09.2024 from	341-343

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	HPPCL to this Hon'ble Commission.	
17.	**Annexure Q:** Copy of Letter dated 16.09.2024 from HPPCL to HPSEBL.	344
18.	**Annexure R:** Copy of Letter dated 24.09.2024 from HPPCL to HPSEBL.	345
19.	**Annexure S:** Copy of Letter dated 24.09.2024 from HPSEBL to HPPCL.	346
20.	**Annexure T:** Copy of Letter dated 22.10.2024 from HPPCL to HPSEBL.	347-348
21.	**Annexure U:** Copy of Letter dated 26.10.2024 from HPSEBL to HPPCL.	349-358
22.	**Annexure V:** Copy of HP-ALDC's email to HPPCL dated 05.11.2024.	359-360
23.	**Annexure W:** Copy of Global Horizontal Irradiance in terms of NADA Data, Berra Dol SPP established at Himachal Pradesh and a SPP established at Tamil Nadu.	361-362
24.	**Annexure X:** Copy of detailed calculation sheet setting out the tariff calculation for Pekhubella SPP.	363-365
25.	**Annexure Y:** Copy of Letter dated 29.07.2024 with the enclosed correspondence dated 05.07.2024.	3636-367
26.	**Annexure Z:** Copy of detailed providing power scheduled to HPSEBL from HPPCL's Project.	368

12. Further averred that Para 21.2 is required to be amended as under:

> *"2. The petition for determining the tariff for the Pekhubela Solar Power Plant was initially filed with the Hon'ble Himachal Pradesh Electricity Regulatory Commission (HPERC). This petition was a result of negotiation between the HPPCL and HPSEBL, where both parties agreed upon a tariff of Rs. 3.50 per unit. Despite this mutual concurrence, HPERC has granted a tariff of Rs. 2.90 per unit in its final order. As such it is prayed that, HPERC reconsider its decision and allows the tariff of Rs. 3.50 per unit along with transmission line cost and cost of land, if levied in future by the Government.*
>
> *2.a Direct HPSEBL to compensate HPPCL for the power consumed from the Project for the period from the Commercial Operation Date, i.e., 15.04.2024 onwards, at the rate as determined by this Hon'ble Commission, along with interest."*

13. According to the Petitioner, the proposed amendments are necessary for the adjudication of the matter and determination of real

controversy and do not setup a new case. Also mentioned that certain changes are proposed to be made in the original Review Petition to elaborate on the facts and the grounds already pleaded to bring consistency in the amended Review Petition which has been annexed as Annexure1. Further, the application has been made bonafide in the interest of justice and in case the amendments, as prayed, are not allowed, the Petitioner will suffer irreparable loss and injury.

REPLY OF THE RESPONDENT

14. The application has been resisted by filing the reply that the primary purpose of Review is to correct the errors apparent on the face of the record of the order under order XLVII Rule 1 of Code of Civil Procedure and that the Review proceeding cannot be used to rehear issues or raise new contentions which were not part of the original Review Petition. Also that allowing the present Petition would distort the limited scope of review and convert it into Appellate proceedings, which is impermissible.

15. It is averred that the amendment application has been filed at the concluding stage of the review petition, without providing any cogent or valid explanation for the inordinate delay and the timing of this application indicates a deliberate attempt to delay the final adjudication of the Review Petition.

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16. It is also averred that a Review Petition is required to be confined to correcting the errors apparent on the record or considering new evidence that was not available despite due diligence at the time of the original proceedings and that the Applicant by seeking to add fresh grounds and issues has attempted to broaden the scope of the Review Petition, which is contrary to established legal principles.

17. It is also averred that the procedural framework under Order VI Rule 17 CPC, requires that amendments should be sought at the earliest stage and must be necessary to decide the real controversy between the parties but the amendment application seeks to introduce new grounds, which were neither pleaded nor argued earlier, rendering the application procedurally untenable. Further averred that allowing the amendment application would undermine this principles of amendment opening the door for protracted litigation and additional judicial scrutiny.

18. It is also averred that for an amendment to be permissible in review proceedings, the Petitioner must demonstrate that the grounds sought to be introduced are based on new and important facts or evidence which were not available earlier despite due diligence. In *Meera Bhanja v. Nirmala Kumari Choudhury* (1995) 1 SCC 170, the Hon'ble Supreme Court has held that lack of diligence is a valid

ground to reject an amendment. It is averred that the Petitioner has failed to meet the above criterion, as no new material evidence has been brought to light in support of the amendment application.

19. Further, the Respondent has already filed replies and presented arguments based on the original grounds raised in the Review Petition and thus, allowing the proposed amendments would unfairly prejudice the Respondent by requiring it to reframe its submissions and engage in additional litigation. Also averred that in *Ramesh Kumar Agarwal v. Rajmala Exports Pvt. Ltd.* (2012) 5 SCC 337, the Hon'ble Supreme Court has held that amendments which prejudice the case of the opposing party or disrupt the proceedings should not be allowed.

20. According to the Respondent, filing an amendment application at the advanced stage of the Review Petition constitutes an abuse of the process of law and the Hon'ble Supreme Court in *S.J.S. Business Enterprises v. State of Bihar* (2004) 7 SCC 166 has observed that procedural mechanisms should not be misused to delay justice or gain an undue advantage. The present application appears to be a tactic to derail the adjudication process and cause undue hardship to the Respondent.

21. It is also averred that the review proceedings cannot be used as a backdoor to reopen settled issues. The Hon'ble Supreme Court in

Lily Thomas v. Union of India (2000) 6 SCC 224, held that a Review Petition is not an avenue to reargue the merits of the case or introduce grounds that were available earlier but not raised.

22. According to the Respondent, the timing of the amendment application suggests that it is a deliberate attempt to delay the final adjudication of the Review Petition. Further, the Hon'ble Supreme Court in *K.K. Velusamy v. N. Palanisamy* (2011) 11 SCC 275, has cautioned against dilatory tactics which waste judicial resources and prolong proceedings unnecessarily and the present application falls squarely within this mischief.

23. Further averred that the proposed amendments significantly alter the original character and nature of the review petition. In *B.K. Narayana Pillai v. Parameswaran Pillai* (2000) 1 SCC 712, the Hon'ble Supreme Court has held that amendments which change the fundamental nature of the pleadings should not be permitted, particularly when raised belatedly. Also that in cases involving regulatory disputes, procedural adherence is critical to ensure timely and equitable resolution. Not only this, the Hon'ble Supreme Court in *P.K. Palanisamy v. N. Arumugham* (2009) 9 SCC 173 has observed that amendments in regulatory or quasi-judicial proceedings must be

examined stringently to avoid misuse. The present application fails to meet this standard.

24. Further, the principles of equity, fairness, and justice mandate that amendments should not be allowed to perpetuate unfair advantage or prejudice. In *Ramesh Kumar v. Kesho Ram* (1992) 2 SCC 623, the Hon'ble Supreme Court underscored the need to balance the interests of both parties. Also averred that allowing the amendment would tilt the balance unfairly in favor of the Petitioner and that the underlying dispute involves issues of public interest in the electricity sector, where expeditious resolution is critical. In *Ramrao v. All India Backward Class Bank Employees Welfare Assn.* (2004) 2 SCC 76, the Hon'ble Supreme Court has highlighted that public interest demands the swift resolution of cases involving public utilities.

25. We have heard, Sh. V. Mukhrjee, Sh. Vikas Chauhan and Sh. Pratyush Singh, Ld. Counsel for the Petitioner and Sh. Kamlesh Saklani, Authorised Representative for the Respondent in detail.

26. At the very outset, it is necessary to state that the Hon'ble Supreme Court in Sanjay Kumar Aggarwal Versus State Tax Officer Review Petition (Civil) No. 1620 of 2023 in Civil Appeal No. 1661 of 2020 decided on 31.12.2023 has held that a power to review cannot be exercised as an Appellate power and has to be strictly confined to

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scope of review under Order XLVII Rule 1 of the Code of Civil Procedure. An error apparent on the face of the record must be an error which on mere looking of order should strike and should not require long drawn process of hearing where may be considerably two opinions.

27. The Hon'ble Supreme Court in the case of Life Insurance Corporation of India v. Sanjeev Builders (P) Ltd. and another (2022) 16 SCC 1 has laid down the guidelines to be kept in mind for amendment of pleadings under order VI Rule 17 of the Code of Civil Procedure that all the amendments which are necessary for determining the real question of controversy are to be allowed, provided it does not cause injustice or prejudice to other side or does not change the nature of the suit or sets up an entirely new case. Para 71 of the above law is reproduced as under:-

> ***"71.*** *Our final conclusions may be summed up thus:*
>
> ***71.1.*** *Order 2 Rule 2 CPC operates as a bar against a subsequent suit if the requisite conditions for application thereof are satisfied and the field of amendment of pleadings falls far beyond its purview. The plea of amendment being barred under Order 2 Rule 2CPC is, thus, misconceived and hence negatived.*
>
> ***71.2.*** *All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word "shall", in the latter part of Order 6 Rule 17CPC.*
>
> ***71.3.*** *The prayer for amendment is to be allowed:*
>
> ***71.3.1.*** *If the amendment is required for effective and proper adjudication of the controversy between the parties.*
>
> ***71.3.2.*** *To avoid multiplicity of proceedings, provided*
>
> *(a) the amendment does not result in injustice to the other side,*

(b) by the amendment, the parties seeking amendment do not seek to withdraw any clear admission made by the party which confers a right on the other side, and

(c) the amendment does not raise a time-barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

71.4. *A prayer for amendment is generally required to be allowed unless:*

71.4.1. *By the amendment, a time-barred claim is sought to be introduced, in which case the fact that the claim would be time-barred becomes a relevant factor for consideration.*

71.4.2. *The amendment changes the nature of the suit.*

for amendment is mala fide, or

71.4.4. *By the amendment, the other side loses a valid defence.*

71.5. *In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.*

71.6. *Where the amendment would enable the court to pin-pointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment should be allowed.*

71.7. *Where the amendment merely sought to introduce an additional or a new approach without introducing a time-barred cause of action, the amendment is liable to be allowed even after expiry of limitation.*

71.8. *Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.*

71.9. *Delay in applying for amendment alone is not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.*

71.10. *Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint, the amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.*

71.11. *Where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the*

> *amendment should be allowed. (See Vijay Gupta v. Gagninder Kr. Gandhi [Vijay Gupta v. Gagninder Kr. Gandhi, 2022 SCC OnLine Del 1897] .)"*

28. The present application for amendment is, therefore, required to be examined and considered in view of the above guidelines and the scope of the Review Petition.

29. The Applicant/ Petitioner in the Review Petition has sought the following reliefs:

1. That this Review Petition may kindly be allowed.
2. The Petition for determining the tariff for the Pekhubella Solar Power Plant was initially filed with the Hon'ble Himachal Pradesh Electricity Regulatory Commission (HPERC). This Petition was a result of negotiations between HPPCL and HPSEBL, where both parties agreed upon a tariff of Rs. 3.49 per unit. Despite this mutual concurrence, HPERC has granted a tariff of Rs. 2.90 per unit in its final order. As such it is prayed that, HPERC reconsider its decision and align the granted tariff with the negotiated rate of Rs. 3.49 per unit.
3. To condone any delay/ error/ omission and to give opportunity to modify/ rectify the same.
4. To pass any other order/s as the Commission may deem fit and appropriate under the circumstances of the case and in the interest of justice.

30. Though, it is mentioned in the above prayer of the Review Petition that the Petition for determination of tariff for Pekhubella Solar Power Project was filed with the Commission but at the same time, it has been mentioned that the Petition was a result of negotiations where both parties agreed on tariff of Rs. 3.49 per unit but the

Commission granted tariff of Rs. 2.90 per unit. The aforesaid prayer as reproduced in para 29 above, however, is contrary to the prayer made in the Joint Petition for approval of PPA (Petition No. 48 of 2024) which is reproduced as under:-

i. Take the accompanying filing of Power Purchase Agreement on record.
ii. Consider and approve the Power Purchase Agreement in respect of Pekhubella SPP 32 MWac.
iii. Pass such orders as Hon'ble Commission may deem fit, just and proper in the facts and circumstances of the case.

31. Thus, in the entire Joint Petition for approval of PPA, there was not even an iota that the Petitioner had sought project specific determination of tariff in respect of Pekhubella Solar Power Project and rather, the contention of the Petitioner in the said Petition was that the GoHP vide Notification No. MPP-F (10)-43/2023 dated 21st September, 2023 has notified that the solar power produced by HP State Govt. entities i.e. HPPCL and HIMURJA shall be mandatorily purchased by HPSEBL at HPERC rate discovered through competitive bidding process. However, if a hybrid project has Solar Power component, the tariff for purchase of Solar Power by HPSEBL exceeding 5 MW shall be as determined by the HPERC (Commission). It is undisputed that the Pekhubella SPP (Project) is not a hybrid Solar Power Project as only the solar power is being generated in the Project.

32. Accompanied to the Petition, no doubt was a draft PPA wherein it was mentioned in Clause 6.1.5 that till the tariff is finalized by the HPERC, the HPSEBL shall pay interim charges of Rs. 3.0 per kWh which shall be adjusted as per tariff finalized by the Hon'ble HPERC. However, there was not even an iota in the Petition that a prayer for tariff determination had been made in the Joint Petition and as observed above, the parties had mutually agreed for tariff, hence in the absence of prayer, there was no occasion for the Commission to determine the project specific tariff.

33. Undisputedly, the Project is not a hybrid power project and as mentioned by the Petitioner in Petition No. 48 of 2024, the GoHP vide Notification No. MPP-F (10)-43/2023 dated 21st September, 2023 has clearly stipulated that the power from the Solar Power Projects by the HP State Government entities (which the Applicant is) for the Solar Power Projects shall be mandatorily purchased by the HPSEBL at the HPERC rate discovered through competitive bidding process and if a hybrid project has solar power as component, the tariff for purchase of solar power by the HPSEBL exceeding 5 MW shall be determined by the HPERC. Since, the Pekhubella Solar Power Project is standalone Solar Power Project, as such, the project specific tariff was not

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required to be determined in respect of Pekhubella Solar Power Project.

34. Though in the application, the Applicant has also tried to project that the Commission in respect of the Solar PV Projects has determined the generic levellized tariff of Rs. 3.47 per unit to Rs. 3.52 per unit depending upon the location of the Project in Suo Moto Petition No. 1 of 2024 vide order dated 14.03.2024 but said contention of the Applicant is not attracted to the case in hand as the Commission vide the above order has determined the generic levellized tariff in respect of the Projects not exceeding 5 MW capacity as the GoHP vide notification No. MPP-F(1) 2/ 2005-XV dated 20.01.2022 has made the solar power mandatorily purchasable by the HPSEBL in respect of the Solar Projects not exceeding 5 MW. The Applicant, therefore, cannot claim parity with such Project upto 5 MW capacity.

35. Significantly, the Commission vide order dated 20.05.2023 in Petition No. 17 of 2023 has accorded permission to the HPSEBL for procurement of 250 MW Solar Power through tariff based competitive bidding from the grid connected Solar PV Projects located within the State of Himachal Pradesh under Section 63 of the Electricity Act, 2003. In said order, which has also been relied upon by the Applicant in support of the application, the Commission has observed that the

installation of Solar Power Generating Stations in HP should be cost effective vis-à-vis the cost of the solar power generated elsewhere in the country and the Petitioner shall have to specify in the bidding document that the tariff quoted by the bidders for grid-connected solar PV power plants shall not be more than the latest tariff of SECI plus 15% over and above said tariff keeping in view the peculiar geographical, topographical and climatic conditions of the State. It was also observed in said order that in terms of the provisions of the Section 63 of the Act, the Commission shall have to examine whether the process of procurement of Solar Energy is as per the Guidelines of the Government of India and Section 63 of the Electricity Act, 2003 so as to arrive the lowest tariff and for selection of the successful bidder and the Petitioner shall have to take the approval of the Commission under Section 63 of the Electricity Act, 2003 before according Letter of Award to the prospective successful bidders.

36. Incidentally, the Applicant is a party to said Petition No. 17 of 2023 being Respondent No. 2. Said order has not been assailed by any of the parties before the Hon’ble APTEL. The Project of the Applicant is of 32 MWac Solar Power and falls within the ambit of the aforesaid order and, therefore, the Commission has allowed the tariff to the Applicant in Petition No. 48 of 2024 on the principles stated in

order 20.05.2023 in Petition No. 17 of 2023. Therefore, different yardsticks cannot be applied for the Project of the Applicant/ Petitioner.

37. By way of present application, the Applicant has tried to introduce new facts regarding Detailed Project Report (DPR), Capacity Utilization Factor (CUF) as mentioned in para 7 (b) of the application for amendment, supplying of power to the Respondent from the date of synchronization of the Project as observed in sub-para (ii) of para 7 (vii) (b) and para 7 (vii) (c) (i), (ii) and (iii), submission of schedule of electricity to the HPSEBL, as mentioned in paras 7 (vii) (e), (vii) (g), (vii) (i), (vii) (j) (i), (ii) and (iii), (vii) (k) but as mentioned above, the simple prayer in the Joint Petition was for approval of PPA on mutually agreed tariff and there was no mention regarding the synchronization of the Project in the Petition or supplying of energy without entering the PPA which is yet to be signed.

38. Similarly, the Applicant in paras 7 (vii) (l) (i) and (ii), (vii) (m), (vii) (n) (i) and (ii), (vii) (o), (vii) (p) (iii), (vii) (q) and paras 9 (dd), 9 (ee), 9 (ff), 9 (gg), 9 (ii), 9 (jj), 9 (ll), 9 (mm) and 9 (nn) has tried to introduce the facts/ details of proposal of Applicant to sign the PPA for a period of one year and synchronization and supplying of power but the signing of PPA for one year was neither in the purview of the Applicant or the Respondent as the Commission has never allowed signing of

interim agreement and rather, the PPA is required to be signed for the useful life of the Project. The PPA is yet to be signed, hence supplying energy from the date of synchronization is of no consequence. Such claim, if any, may be raised in appropriate proceedings in case the PPA is signed.

39. It appears that Applicant needs to introduce all these facts as mentioned in paras 37 and 38 above, in order to justify the supply of power without signing the PPA from the retrospective date. Since, all such detail was not part of the original Petition for approval of PPA, introduction of all such facts regarding supplying of Power from the date of synchronization and submission of schedule etc. is beyond the scope of Order in the Joint Petition against which review has been sought. As such, the paras 7 (b), sub-para (ii) of para 7 (vii) (b) and para 7 (vii) (c) (i), (ii) and (iii), (vii) (e), (vii) (g), (vii) (i), (vii) (j) (i), (ii) and (iii), (vii) (k), (vii) (l) (i) and (ii), (vii) (m), (vii) (n) (i) and (ii), (vii) (o), (vii) (p) (iii), (vii) (q) and paras 9 (dd), 9 (ee), 9 (ff), 9 (gg), 9 (ii), 9 (jj), 9 (ll), 9 (mm) and 9 (nn) will introduce all together a new case which cannot be gone into in the Review Petition as the scope of Review Petition is only to correct any error apparent on the face of the record or any new evidence which could not be brought despite exercise of due diligence.

40. Similarly, the Applicant has also tried to introduce in para 14 copies of various letters being detail of index but most of the detail pertain to the subsequent events after order dated 12.04.2024 in Petition No. 48 of 2024, as such, the detail in para 14 can be permitted only to the extent of order dated 12.04.2024, copy of minutes of meeting dated 24.01.2024 and order dated 20.05.2023 passed in Petition No. 17 of 2023 (documents at Sr. No. 1 to 4). Rest of the correspondence has no bearing with the controversy and cannot be allowed to be introduced by way of amendment having not been part of the original application for approval of PPA. Similarly, the addition of Para 21.2 (a) in Review Petition shall also tantamount to the introduction of new case and cannot be allowed.

41. The Applicant in other paras of the Application i.e. Paras 9 (d), 9 (e), 9 (i), 9 (p) (i), (ii) and (iii), 9 (v) (i) and (ii), 9 (w), 9 (z) and 9 (kk) has quoted the extracts of the judgments of the Hon'ble Supreme Court. It is cardinal rule of the pleadings that the law cannot be pleaded. However, the submissions being legal are ordered to be made part of the amended Petition but the applicability of the law stated therein to the facts and circumstances of the present application shall be considered at the time of consideration of the present Review Petition.

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42. It is relevant to mention here that despite order dated 12.04.2024 vide which 30 days time was accorded for signing the PPA, the PPA was not signed. On the prayer of the Applicant, additional time of 15 days was granted vide order dated 24.08.2024 in Petition No. 109 of 2024 but even during extended period, the PPA has not been signed. Now, the Respondent (HPSEBL) has also filed an application before the Commission for according permission for signing the PPA as per order dated 12.04.2024 passed in Petition No. 48 of 2024.

43. It is held in M. Revanna v. Anjanamma (Dead) by legal representatives and others (2019) 4 SCC 332 that an application for amendment may be rejected if it seeks to introduce totally different, new and inconsistent case or changes the fundamental character of the suit.

44. It has also been held by the Hon'ble Privy Council in Ma Shwe Mya v. Maung Mo Hnaung (AIR 1922 P.C. 249) that the courts should be liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is cause to the other side or on the ground that the prayer for amendment was not a bonafide one. The observations of the Hon'ble Privy Council are as under:

> *"The provisions as to amendement are those that are to be bound in the Code of Civil Procedure of 1908. Section 153 of that Code enacts that "The Court may at any time and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings in a*

suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding," and by Order VI, r. 17, "The Court may at any stage of the proceedings, allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties." The real question in vontroversy between the parties in these proceedings was the existence and the character of an agreement alleged to have been made in 1912 for the delivery of certain sites of oil well specified and identified by the numbers stated in the plaint, which could only have been delivered in respect of that subsequent bargain. When one that contract has been negative, to permit the plaintiff to set up and establish another and an independent contract altogether would, in their Lordships' opinion, be to go outside the provisions established by the Code of Civil Procedure, to which reference has been made. It would be a regrettable thing if, when in face the whole of a controversy between two parties was properly open, rigid rules prevent its determination, but in this case their Lordships think that the rales do have that operation and that it was not open to the Court to permit a new case to be made."

45. Thus, the provisions of amendment are intended to secure the proper administration of justice and it is, therefore, essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable on distinct cause of action to be substituted for another, nor to change by means of amendment, the subject-matter of the suit.

46. Therefore, the proposed amendments at paras 7 (b), sub-para (ii) of para 7 (vii) (b) and para 7 (vii) (c) (i), (ii) and (iii), (vii) (e), (vii) (g), (vii) (i), (vii) (j) (i), (ii) and (iii), (vii) (k), (vii) (l) (i) and (ii), (vii) (m), (vii) (n) (i) and (ii), (vii) (o), (vii) (p) (iii), (vii) (q) and paras 9 (dd), 9 (ee), 9

(ff), 9 (gg), 9 (ii), 9 (jj), 9 (ll), 9 (mm), 9 (nn) and para 14 Sr. No. 5 to 26 and addition in Para 21.2 (a) of the application cannot be allowed as the same shall introduce altogether a new case and change the entire nature of the Review Petition. Thus, the prayer to the aforesaid extent is declined.

47. Rest of the amendments are allowed to be incorporated in the amended Review Petition. Let the amended Review Petition be filed within 14 days with advance copy to the Respondent. The Respondent shall file amended reply within a week thereafter. The application for amendment is accordingly allowed in part.

48. The observations made herein above are strictly for disposal of the present application and shall have no bearing on the Review Petition.

49. The CMA is disposed off accordingly. Be registered and tagged to the Review Petition.

List on **17.01.2025** at **11:00 AM** for hearing.

-Sd-	**-Sd-**	**-Sd-**
(Shashi Kant Joshi)	**(Yashwant Singh Chogal)**	**(Devendra Kumar Sharma)**
Member	**Member (Law)**	**Chairman**

HPERC