

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

In the Matter of:

M/s DSL Hydrowatt Ltd. having its corporate Office at Empire House, 214 Dr. D.N. Road Fort, Mumbai and registered Office at Sarbari Small Hydro Projects, Village Nagujhore, PO Dogri, Distt. Kullu H.P.

....Petitioner

Versus

The Himachal Pradesh State Electricity Board Ltd., thro' its
Executive Director (Personnel),
Kumar House, Shimla-171004

....Respondent

Review Petition No. 26/2016

(Decided on 06.10.2016)

Coram

Sh. S.K.B.S Negi
Chairman

Counsels:-

For petitioner

Sh. Ajay Vaidya Advocate
Alongwith Sh. M.N. Ramacandra its Director

For respondent

Sh. Ramesh Chauhan
Authorized Representative

ORDER

(Last heard on 17.09.2016 and Orders reserved)

1 PURPOSE OF THE ORDER

- 1.1 M/s DSL Hydrowatt Ltd. having its corporate Office at Empire House, 214 Dr. D.N. Road Fort, Mumbai and registered Office at Sarbari Small Hydro Projects, Village Nagujhore, PO Dogri, Distt. Kullu (HP) (through Sh. Deepak Bhandari S/o Sh. D.R.

Bhandari) has moved this petition, bearing No. 26 of 2016, under section 94(1)(f) of the Electricity Act, 2003, read with Order 47 Rule 1 of the Code of Civil Procedure, seeking review of the Order dated 28.04.2016, passed in petition No. 29 of 2010, on the determination of Capital Cost and levelised tariff @ Rs. 2.92 kWh for 5.4 MW Sarbari-II, Small Hydro Plant located on Sarbari Khad, a tributary of Beas River in Kullu Distt. (HP), for the useful life of the Project i.e. 40 years from the commissioning of the Project i.e. August, 2010.

- 1.2 The Review petition was accompanied by the Interim Relief Application, bearing IA No. 57 of 2016 and the Commission, after hearing the HPSEB Ltd., (hereinafter also referred as the “Respondent Board”), allowed, during the pendency of the review petition, the payment of provisional tariff @ Rs. 2.95 per kWh, as permitted vide the Commission Order dated 7.7.2010, subject to the condition that the adjustment will be done in terms of the Order dated 28.04.2016, unless it is modified otherwise, and also subject to the condition that the petitioner shall pursue this review petition with full promptness and due diligence, failing which the Commission may recall that Order.
- 1.3 The Respondent Board objected the maintainability of the review petition stating that the Commission may not exercise the powers of review particularly when the grounds of review are same and had been considered in original proceedings. In its support the decision of the Hon’ble Apex Court rendered in the **State Bank of India v/s Gracure Pharmaceutical Ltd. reported as AIR2014SC731**, has been cited, wherein it is held that if a plaintiff is entitled to seek reliefs against the defendant in respect of the same cause of action, the plaintiff can not split the claim as to omit one part of the claim and sue for the other.
- 1.4 In the present case the petitioner has raised the following two issues, concerning the consideration of factors for the purpose of determination of project specific levelised tariff:-
 - (i) Royalty/ Free Power to the Govt. of H.P.
 - (ii) Outage factor.

Though both these issues have been considered at length in paras 5.2.1 to 5.2.4 of the impugned Order, yet the findings thereon has been questioned on the basis of alleged erroneous assumptions. The decision of the Hon’ble Apex Court cited by the Respondent Board is based on distinct facts. In that case the earlier suit was for recovery of amount and subsequent suit was for damages filed against the appellant bank and its officers. That decision is totally irrelevant in the present context.
- 1.5 The Commission’s powers to review its own Orders flows from Section 94(1)(f) of the Electricity Act, 2003 and are the same as those conferred on a Civil Court by the Code of Civil Procedure (CPC). These powers have been spelt out in Section 114, read with Order 47, of the CPC. Thus, the review application has to necessarily meet the requirements of Section 114 and Order 47 of the CPC.
- 1.6 As per the said provisions, the specific grounds on which an Order already passed can be reviewed are:-

- (a) if there are mistakes or errors apparent on the face of the record, or
 - (b) on discovery of new and important matter or evidence which, after due diligence was not within the knowledge or could not be produced at the time of making the Order, or
 - (c) if there exist other sufficient reasons.
- 1.7 The power of review, legally speaking, is permissible where some mistake or error apparent on the face of record is found and the error apparent on record must be such an error which may strike one on a mere looking at the record and would not require any long drawn process of reasoning. A review cannot be equated with the original hearing of a case. A review petition has a limited purpose and cannot be allowed to be an appeal in disguise and it cannot be exercised on the ground that decision was erroneous on merits. But simultaneously the materials on record, which on proper consideration may justify the claim, cannot be ignored.
- 1.8 Furthermore, clerical or arithmetical mistakes in judgments or orders or errors arising therein from any accidental slip or omission may at any stage be corrected by the Commission under Section 152 of the CPC, either of its own motion or on the application of any of the parties. The use of word “may” shows that no party has a right to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the Court. Such discretion is required to be exercised judiciously to make corrections necessary to meet the ends of justice. The word “accidental” qualifies the slip/ omission. Therefore, this provision cannot be invoked to correct an omission which is intentional, however erroneous. Because Section 152 does not countenance a re-argument on merits of fact or law, the Commission has the limited power to correct any clerical or arithmetical mistakes in its judgments or orders, or errors arising therein from any accidental slip or omission.
- 1.9 Bearing the legal provisions, as brought out in the preceding paras, in mind the Commission, on examination of the matter, finds that the review petition filed by the petitioner comes within the scope of the powers conferred on the Commission under the law and as such it considers the petition as maintainable.

2 ISSUES RAISED IN THE REVIEW PETITION

The various issues raised by the petitioner in its review petition, views of stakeholders submitted against the petition to the Commission and the replies of the petitioner on these issues have, along with Commission’s views thereon, been summarized hereunder:-

2.1 Issue No. 1 – Consideration of Royalty/ Free Power to the GoHP while determining project specific levellised tariff

Computation as per the impugned Order

- 2.1.1 The petitioner in its original tariff petition claimed that the tariff computation should account for free power payable to the Govt. of Himachal Pradesh as per Implementation Agreement i.e. at 12% for the first 12 years, 18% for next 18 years and 30% for the balance period. However since the Hydro Policy and Tariff Policy of GoI specifies that the maximum royalty to be provided shall be limited to 13% in any year including 1% for the Local Area Development Fund (in short LADF), the Commission declined to accept any claim beyond the aforesaid limits. The Commission has accordingly calculated the tariff assuming 12% royalty excluding 1% additional free power for LADF. Further, as per the Order, the Commission has also calculated the tariff at 13% free power comprising of 12% royalty and 1% additional free power for LADF subject to the condition that the tariff with LADF shall be applicable if the petitioner actually provides additional free power to LADF.

Contentions of the Petitioner on the issue

- 2.1.2 As per the review petition, the petitioner contended that for determination of tariff in HPERC SHP 2007 Order dated 18.12.2007 and for all the projects commissioned prior to the notification of the HPERC (Promotion of Generation from Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2012 free power of 18% from the 13th year onwards and 30% for the remaining life of the project has been considered as a pass through in tariff. Since the Commission is guided by the HPERC SHP 2007 Tariff Order and the plant has been commissioned in August 2010, i.e. before the notification of HPERC 2012 Regulations, like other projects, the pass through benefit should also be applicable to the petitioner's Sarbari II Project.

Objections raised by HPSEBL

- 2.1.3 The HPSEBL in its written submissions filed on 23.07.2016 stated that the Commission has rightfully limited the Royalty /Free Power to 13%, including 1% for LADF, for any year in accordance with the provisions of the Hydro Policy and Tariff Policy notified by the GoI and published in the Gazette of India dated 31-3-2008.

Petitioner's rejoinder

- 2.1.4 The views expressed by the petitioner in its petition were re-asserted and reiterated by the petitioner in its rejoinder filed on 16.08.2016. The petitioner, however, did not make any submission, written or oral, on this subject during the hearing on 17.09.2016.

Commission's view

- 2.1.5 The petitioner in its tariff petition claimed that the tariff computation should account for free power payable to the Govt. of Himachal Pradesh at 12% for the first 12 years, 18% for next 18 years and 30% for the balance period. However, the Commission while determining the tariff for 5.4 MW Sarbari II SHP, as per the Tariff Order dated April 28, 2016, has considered the maximum permissible free power limited to 13%, including

1% for LADF. This is in consonance with the Hydropower Policy, 2008 and the Tariff Policy 2006 (as amended in 2008) of the GoI.

- 2.1.5.1 The Hydropower Policy clearly specifies that any free power beyond 13% should have to be arranged by the developers from their own resources and would not be a pass through in tariff. The relevant extract from the Hydropower Policy, 2008 is as follows:

“The dispensation accorded under the Hydro Policy of 1998, regarding 12% free power to be provided to the host State Government, will, however, be supplemented by an additional 1% in accordance with Clause (h) below. Any free power beyond 13%, would be met by the developers from their own resources and would not be a pass through in tariff.”

- 2.1.5.2 Similarly, the Tariff Policy of 2006 was amended in the year 2008 to include a provision to the effect that any expenditure incurred by the project developer (except free power upto 13%) would neither be included in the project cost nor be passed through in the tariff. The relevant provision is as follows:-

“5.1 (i) Any expenditure incurred or committed to be incurred by the project developer for getting project site allotted (except free power up to 13%) would neither be included in the project cost, nor any such expenditure shall be passed through tariff.”

The Tariff Policy issued by the GoI in January, 2016 also does not materially alter this provision.

- 2.1.5.3 As per Section 61(i) of the Electricity Act 2003, the Commission, for the determination of the tariff, is to be guided by the National Electricity Policy and Tariff Policy. As mentioned above, the Tariff Policy limits the free power to be allowed in the tariff to 13%. The Commission, while determining the tariff for Sarbari II Project, as far as possible, has been guided by the HPERC SHP Tariff Order 2007. However the said HPERC SHP Tariff Order of 2007 was meant for hydro projects below 5 MW capacity and is not directly applicable to Sarbari-II SHP which is of 5.4 MW capacity. In this connection, the Commission would also like to point out that effective annual percentage rate of the royalty allowed under the SHP Order of 18-12-2007 shall, on NPV basis, work out to less than 12% i.e. less than the rate allowed by the Commission to the petitioner in the impugned Tariff Order dated 28-04-2016.

- 2.1.5.4 The Hydropower Policy, 2008 and the Tariff Policy, 2006 (as amended in 2008) were notified by the GoI in the year 2008 i.e. well before signing of the Implementation Agreement on 28.02.2009 and achieving the COD of the Project. The provisions made in the Implementation Agreement for providing the royalty at 12% for the first 12 years, 18% for next 18 years and 30% for the balance period shall not override the aforesaid provisions of Central Government Hydro and Tariff Policies. However, in case the Tariff

Policy notified by the GoI undergoes a change to provide for free power at a maximum rate which is different from what has been considered by the Commission in its Order dated 28-04-2016, the parties will be entitled to suitable adjustment in the tariff.

The Commission, therefore, declines to accept the petitioner's claim in this regard.

2.2 Issue No. 2 – Consideration of Outage factor for the purpose of determining project specific levelled tariff for the plant

Computation as per the Order

- 2.2.1 As per the Order, the gross generation of energy from the plant has been considered 30.38 MU i.e. the gross generation for 75% dependable year given in the Detailed Project Report of the plant. Further, auxiliary consumption (including transformational losses) of 1.00% and transmission losses of 0.70% have been assumed in accordance with the HPERC SHP Tariff Order 2007. Royalty of 12% has also been considered while determining the annual net saleable energy of the plant at the interconnection point. The details of the generated energy considered in the Tariff Order dated 28 April 2016 for a tariff year, after providing royalty/ free power to the GoHP, has been shown in the Table as under --

Description	Unit	At 12% royalty
Gross Generation	MU	30.38
Auxiliary Consumption	MU	0.30
Transmission Losses	MU	0.21
Royalty	MU	3.58
Net Saleable Energy	MU	26.28

Contention of the Petitioner on the issue

- 2.2.2 The petitioner has submitted that the Commission has, for the purpose of calculation of net saleable units, erroneously overlooked the outage factor of 5%, as even in the HPERC SHP Tariff Order 2007, the Order by which the Commission is guided by, has considered 95% availability of the plant assuming 5% outage factor. Therefore in accordance with the HPERC SHP Tariff Order 2007 the same should be considered for the determination of the tariff.

Objections raised by HPSEBL

- 2.2.3 The HPSEBL in its written submissions has stated that as far as outage of 5% is concerned, the petitioner as per its tariff petition has mentioned that they are maintaining

a CUF of 61% for its plant. As such the outage seems to have been included by the Commission in the CUF considered in the Tariff Order dated 28 April 2016 pertaining to the plant. In SHP Order dated 18-12-2007, the Commission has set up the limit of 45% CUF of SHPs.

Petitioner's Rejoinder

2.2.4 The Petitioner in its rejoinder submitted that ---

- (i) the cumulative shut down per machine per year on account of non-availability of the HPSEB grid varies from 100 hours to 232 hours and these shut downs do not qualify for deemed generation as the clause for 'Deemed Generation' clearly states that the annual shut down has to exceed 480 hours per year;
- (ii) basically, the provision for deemed shut down is to take care of unduly long shut downs necessitated due to major calamities resulting in extensive damage to transmission line or failure of critical equipment in sub-station leading to prolonged period of non-availability of the grid. And it was stated that the shut downs are due to short duration interruptions due to minor problems in the HPSEB grid. The provision of 5% shut down covers these minor shut downs. The year wise durations of shutdowns have also been furnished by the petitioner.

The Petitioner again requested that the Commission may consider these aspects while taking a decision on the review petition.

Additional submissions made by the HPSEBL

2.2.5 In response to the petitioner's rejoinder, the HPSEBL has furnished the actual values of CUF achieved by the project since its commissioning. These figures show that the project has achieved a very good CUF ranging from 67% to 75% except for the first year of its commissioning.

2.2.6 During the course of hearing, Sh. M.N. Ramachandra, the Director of the petitioner company, urged that--

- (i) the HPERC in its Order of 18.12.2007 while determining the generic tariff for SHPs upto 5 MW considered a CUF of 45% based on the average flow for 75% dependable year and down time of 5%;
- (ii) the CERC in its 2009 Regulations also adopted 45% CUF based on the assumptions made by various SERCs.;
- (iii) technically 75% dependable year flows depict the quantum of flows which shall be available for at least 75% of times. It is, therefore, not necessary that

generation based upon 75% dependable year flows shall be available in all the years;

- (iv) only 5% of reduction in the generation corresponding to 75% dependable year flows is being requested which should be allowed.;
- (v) the Project has during last five years, achieved average annual gross generation of about 33.82 MU as against the generation of 30.38 MU for a 75% dependable year. Even though the generation for the last five years i.e. from FY12 to FY16 has been more than the generation corresponding to 75% dependable year, the same cannot be taken as basis for determining the tariff for 40 years as this higher generation could be due to melting of glaciers and the same may go down in the subsequent years due to the long term effects of global warming in support of the claim. It was also stated that the generation during the months of April 2016 to August 2016 was 17.93 MU only as against the average of 22.57 MU for the same months in the last five years;
- (vi) the HPERC in its Order dated 18.12.2007 considered CUF 45% even though the average generation as per the DPRs for about 130 IPPs was stated to be of the range of 68% to 73%, it was stated that HPERC has done so to avoid a risk of under recoveries. It was further stated that in case the 5% outage being claimed by petitioner is not allowed it may also expose the petitioner to the risk of under recovery in the subsequent years.

Commission's view

2.2.7 The Commission agrees with the petitioner that the generation at the project may vary from year to year and if the outage time of 5% as claimed by him is not allowed it can expose the petitioner to some risk of under recovery in the subsequent years. At the same time it can also not overlook the fact that the actual generation of the project in the last 5 years as per data referred to in para 2.2.5 of this Order and also conceded to by the petitioner himself in the course of hearing, the actual generation has been considerably higher than the generation corresponding to 75% dependable year as considered in the impugned Order.

2.2.7.1 In case, during any financial year, the quantum of energy received at the interconnection point, alongwith the deemed generation actually allowed, if any, as projected at the interconnection point by accounting for the deemed auxiliary consumption, transformation losses and project line losses, for that financial year, is less than 29.87 MU (i.e. the annual generation of 30.38 MU for a 75% dependable year adjusted by auxiliary consumption and transformation losses [1%] and project line losses [0.7%]), such energy for that year shall be escalated by 5% to account for the impact of outages in that year. The energy so escalated, for a year shall however be restricted to a maximum of 29.87 MU, and the energy so restricted shall be considered for computing the net saleable energy for that year by taking into account the royalty and LADF applicable for that year. The difference viz-a-viz the summation of the month wise net saleable energy shall be

paid against the supplementary bill to be raised in the month of April succeeding the financial year. The difference in the net saleable energy on the above lines shall also be payable at the normal rate applicable for that year. However, if the energy so received at the interconnection point alongwith the deemed generation, if any, allowed as projected at the interconnection point for that financial year is equal to or exceeds 29.87 MU, no escalation shall be made in the aforesaid manner for the outage in that year. The escalation/adjustment in this manner is being allowed to be made at the interconnection point instead of referring to the gross generation for the sake of simplicity with an explicit assumption that the entire gross generation, after meeting the auxiliary consumption, transformation losses and project line losses shall be injected at the interconnection point.

2.2.7.2 For such periods of the first and last financial years of operation of the project, which may not constitute part of a full financial year, the cut off limit of 29.87 MU shall be suitably modified on the basis of the generation based on 75% dependable year for the ten daily periods for which the project is expected to be in operation, which shall be adjusted by auxiliary consumption and transformation losses [1%] and project line losses [0.7%].

2.2.7.3 In case the permissible rate of royalty or LADF undergoes change during middle of financial year, the additional net saleable energy, if any, to be paid for a year by the HPSEBL on account of the impact to outages in the aforesaid manner shall be computed by considering, for this limited purpose, weighted rates of royalty and LADF for that year. Such weighted rate(s) shall be computed on the basis of total energy actually injected at the interconnection point and quantum of royalty and LADF payable on such total quantum in that year. These weighted average rate(s) shall be followed only for computing the additional net saleable energy payable for the year to account for the outages for that year on above lines. This shall however not, in any case, alter the monthwise computation of the free power and the net saleable energy based on the energy actually received at the interconnection point, or for the net saleable deemed generation, if any, shall be continued to be done as per normal practice.

3 The interim Order dated 28th May, 2016, is vacated with the modification to the extent that the periods of 30 days and 3 months, as mentioned in para 5.10.7 of the impugned Order, will now be reckoned from the date of issuance of this Order.

The review petition and connected applications are accordingly disposed of.

Shimla
Dated 06th October, 2016

S.K.B.S. Negi
Chairman