

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

In the matter of :-

The Himalaya Power Producers Association
Gyamba House, South End,
Lane-IV, Sector-1,
New Shimla-171009

....Petitioner

Versus

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

....Respondent

Petition Filing No. 6 of 2016

(Decided on **3rd August, 2016**)

CORAM

S.K.B.S. Negi
CHAIRMAN

Counsels: -

for petitioner:

Sh. Ajay Vaidya
Advocate

for respondent:

Sh. Ramesh Chauhan
(authorised Representative)

ORDER

(Last heard on 30.07.2016 and Orders reserved)

The Himalaya Power Producers Association Gyamba House, South End, Lane-IV, Sector-1, New Shimla-171009 (hereinafter referred as “the petitioner”) has moved this petition under Section 94 (1)(f) of the Electricity Act, 2003, read with Regulation 63, of the HPERC (Conduct of Business) Regulations, 2005, and Order 47 Rule 1 of the CPC, seeking review of the Order dated 24.07.2015, passed by this Commission, in the matter of Renewable Power Purchase Policy, 2015 formulated by the Himachal Pradesh State Electricity Board Ltd.(hereinafter referred as “the Respondent Board”).

2. The brief facts leading to the filing of this petition are that as the Renewable Energy contributes to macro policies and strategies on energy security, climate change and environment protection. The generation of electricity from renewable sources has been considered the key component of the Govt. Policy of sustainable development of

Himachal Pradesh and to achieve the sustainable development transparent, objective, efficient and equitable policy, having normative parameters, aimed at balancing promotion of renewable development in the public interest i.e. most competitive price at which the energy is delivered to the consumers and also technical efficiency of specific renewable sources from consumers and utility, become necessary.

3. The Respondent Board took a policy initiative and submitted, for the concurrence of this Commission, the Policy framework for purchase of power from Small Hydro Projects (SHPs) suggesting that the Respondent Board shall undertake power procurement from SHPs, after taking into consideration, in respective areas in Himachal Pradesh, the load growth location of load centres, evacuation costs, line losses, landed costs etc. on broad parameters suggested in the policy.

4. The suggestions/objections on the proposed policy framework for purchase of power from SHPs and also on the procurement policy framework for Solar PV and waste to energy projects, were invited, from public and the stakeholders. The suggestions/objections, so received from them (including the Petitioner Association in this petition), were duly considered, and in accordance with the provisions of Section 61 and section 86(1)(b) and (e) of the Electricity Act, 2003, paras 5.1 and 6.4 of the National Tariff Policy, 2006 (as amended on 04.03.2014), the Respondent Board, with the concurrence of this Commission accorded on 24.07.2015, and formulated the policy for purchase of power from renewable sources.

5. This petition has been moved seeking review of the concurrence of the Commission, accorded on 24.07.2015, to the Policy for Purchase of Power from Renewable Sources, formulated by the Respondent Board, stating that sub-para (8) of para 3 of the said Policy, was not in the draft policy, as has been issued for inviting objections/suggestions from the public at large nor it was agitated by the Respondent Board in their submissions or at the time of hearing. The petitioner further asserts that every person before an authority, exercising adjudicatory power, has a right to know the case which he is required to meet. If the relevant material is not disclosed to a party, there is prima-facie unfairness. It is apparent that sub-para (8) of para 3 of the Power Purchase Policy is formulated on grounds at variance from the draft circulated for comments and same being based on extraneous considerations is bad in law. The petitioner has, therefore, prayed that sub-para (8) of para 3 of the said Policy, concurred in by the Commission vide Order dated 24.07.2015, may be reviewed and be deleted in the interest of justice and fair play.

6. In response to this petition, the respondent Board submits that-
- (i) the impugned Order sought to be reviewed by way of the present petition is not an order which has been passed by the Commission in exercise of its quasi judicial/adjudicating functions under the statute i.e. Electricity Act, 2003 or the Regulations framed thereunder, hence the same cannot be reviewed under Order 47 Rule 1 of the CPC, read with section 91 (1) (f) of the Electricity Act, 2003;
 - (ii) the challenge to any policy decision lies before the Hon'ble High Court of H.P. under Article 226 of Constitution of India and there is no provision under Electricity Act, 2003, which empowers the Commission to review policy matters. The Commission in petition No. 90/2015 decided on 19.11.2015 in the matter titled as **M/s Bhiwani Renewable Energy Ltd. Vs. HPSEB Ltd.** has held the similar view. Hence the petition is not maintainable and deserves outright rejection.
7. Sufficient time and opportunity has been given to the parties to make elaborate submissions, in support of their assertions.
8. The main issue raised in the review petition is focused on the contention of the petitioner that the Commission, while concurring the power purchase policy formulated by the Respondent Board, should have followed the principles of natural justice by giving details, containing all minute details of the proposed draft policy, in the notices issued to various stakeholders, including the petitioner, for ascertaining their views with regard to the proposed policy, but, this was not done and as such is violative of procedure and the principles of natural justice. Hence, the petitioner asserts that the impugned Order dated 24.07.2015, according Commission's concurrence, is bad in law, and he prays that the said Order be reviewed and amended by deleting sub-para (8) of para 3 thereof.
9. The first question arises for consideration is whether the prayer of the petitioner, through a review petition, seeking amendment to the Power Procurement Policy formulated by the Respondent Board and concurred in by the Commission is beyond the scope of the review petition, as contemplated under section 94 (1)(f) of the Electricity Act, 2003, read with regulation 63 of the HPERC (Conduct of Business) Regulations, 2005 and Order 47 Rule 1 of the Civil Procedure Code? To answer this question, it is necessary to consider relevant provisions of Law. The Hon'ble APTEL in its various decisions, has concluded that section 94 (1)(f) of the Electricity Act, 2003 empowers the Commission to review its decisions, directions or Orders and provides that it is vested

with the same power which is given to a Civil Court under Order 47 rule 1 of the Code of Civil Procedure, 1908. Thus the power of the Commission to review its own orders flows from section 94 (1)(f) of the Electricity Act, 2003, as the same is conferred on a Civil Court by the Code of Civil Procedure (CPC). These powers have been spelt out in Section 114, read with Order 47, of the CPC. The review application has, therefore, to necessarily meet the requirements of section 114 and Order 47 of the CPC, whereunder the power of review, legally speaking, is permissible where some mistake or error apparent on face of record is found. A review petition has limited purpose and cannot be allowed to be an appeal in disguise and it cannot be exercised on the ground that the decision was erroneous on merits.

10. It is fairly stated that the power to review is exercisable only in adjudicatory jurisdiction and not in legislative jurisdiction. In this case, therefore, the necessary question needs to be addressed is whether the impugned order is the outcome of the exercise of the power of the Commission under regulatory power or under the adjudicatory power?

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

12. It is not deniable that the Commission has manifold powers, namely, administrative, supervisory and adjudicatory, but each power has to be exercised in appropriate level and manner, as contemplated in the statute. If we look at section 86 of the Electricity Act, 2003, we can easily find that the said section is a conglomeration of administrative, legislative, judicial and advisory powers of the State Commission. These four jurisdictions are vested in the Commission which exercises its powers under any of the jurisdictions in terms of the statute. Here it would be appropriate to quote para 24 of the APTEL decision rendered in **MP Power Generation Co. Ltd. V/s MPERC 2011 ELR (APTEL) 1041**.

“24. If we analyse different provisions of this Act, which are relatable to the appropriate Commission it would appear that the regulatory Commission is a peculiar statutory body having within itself four functions, (a) Administrative, (b) Legislative (c) Judicial and (d) Advisory. In its administrative jurisdiction, it controls and specifies the functions of the generating utilities, transmission utilities, distribution utilities and traders of Electricity. Normally, it does not

have any concern with any individual consumer. Its legislative function extends to bringing about different types of Regulations pursuant to the provisions of the Act and to carry out the purpose of the Act and its Regulations include determination of terms and conditions of Tariff Regulations, Conduct of Business Regulations, MYT Frame Work Regulations, to name a few. It is on the basis of these Regulations that an appropriate Commission determines Tariff of transmission utilities or of distribution utilities and when it does so it does exercise quasi-legislative power. Under Section 178 of the Electricity Act, 2003, the Central Electricity Regulatory Commission is vested with the power to make regulations and regulations framed by them are required to be laid down before the Parliament under Section 179 which has Authority to make any modification. Similarly, the State Commission has been vested with the power to make regulations to carry out the purpose of the Act under Section 181 and -----

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The Regulations framed by the State Commission or the Central Commission do partake the character of subordinate or delegate legislation under the law and all such subordinate legislations have the force of the statutory law. Therefore, the regulations framed by an appropriate Commission are deemed to be legislative enactments having the approval of Legislature when it is put to use by notification.”*

13. The Hon’ble Apex Court in its decision in **PTC India V/s CERC, reported, as (2010) 4 SCC 603**, has concluded that the validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.
14. Since the formulation of the Policy is the part of the Legislative process, whatever is applicable to the framing of the regulations is also applicable to the formulation or concurrence of the Policy decisions.
15. Filing of the petition is not the proper process for initiating the amendments to the existing policy. The petitioner is seeking amendment in the power procurement policy, formulated by the Respondent Board, in order to address the problems arising out of the provisions of sub-para (8) of para 3 of the policy. Section 21 of the General Clauses Act, clearly provides that power to issue notification, Orders, rules, bye laws, includes a power exercisable in the same manner to add or amend or vary or rescind. Action to make or amend the policy is initiated when the authority formulating the policy is satisfied that there is need for such a policy or its amendment. Unquestionably, the Respondent Board

has power to amend, modify rescind or repeal its policy, with the concurrence of the Commission under section 86(1)(b) of the Electricity Act, 2003, in the same manner as the Central Legislature or State Legislature derives its authority from the Constitution to enact a law, to modify or amend or rescind or repeal and any of these functions falls within the Legislative jurisdiction.

16. What the Commission is really asked to do, through this petition, is to direct the Respondent Board to bring out the amendment in the policy, formulated by the Respondent Board. It virtually implies that the policy framed by it is deficient, short of achieving its purpose and defeats the objective of the Act, the National Tariff Policy and the National Electricity Policy. The Respondent Board, being a statutory body and vested with specific statutory functions, is at liberty to approach the Commission, wherever required, for its concurrence in making the amendment, which is considered necessary to enable it to discharge its statutory functions effectively. There is no requirement to file a petition for the said purpose. This Commission has taken the similar view in Review **petition No. 90 of 2015- M/s Bhawani Renewable Energy Private Ltd. V/s The HP State Electricity Board ltd & others, decided on 19th November, 2015.**

17. The Commission has heard the Learned Counsels and has given the thoughtful consideration to their submissions in regard to the observance of the principle of natural justice and it is evincible from the factual exposition that para 2.1 of the draft policy, which provided that the HPSEBL shall sign the PPAs (as feed in tariff) within six months from the date of the notification of the RE Procurement Policy, read as under-

“HPSEBL shall purchase power from all such Projects wherein Implementation Agreement has already been signed or is in the advance stage and the IPP so choose to sell power to HPSEBL on long term basis on regulated tariff structure as per HPERC Order dated 20.05.2013 and read with order dated 01.08.2014. HPSEBL shall sign PPAs with such IPPs within six months from date of issue of Notification of this policy with underline conditions that such projects shall commence generation within four years from the date of signing of PPA. Thereafter there will be no binding on HPSEBL to purchase power from such IPPs. However, while signing the PPAs following criteria shall be followed”

After having considered the objections received, thereon, the Commission liberalized the provisions of signing of the PPAs as feed-in-tariff i.e. the period upto 31.03.2017, instead

of six months as proposed by the HPSEBL, by incorporating sub-para (8) of para 3 of the Renewal Power Purchase Policy, 2015, formulated by the Board. From the facts available on record, it is clear that while concurring in the Renewable Power Purchase Policy, 2015, formulated by the Respondent Board, the public objections and suggestions were duly called for and with respect to draft proposal the objections/suggestions so received, including the objections received from the petitioner, were duly considered. Considering from this angle, the contention raised by the petitioner is not tenable.

18. There is no warrant for imposing a requirement of a personnel hearing when the Commission discharges a legislative function. In **Maharashtra State Electricity Distribution Company Ltd. V/s MERC 2012 ELR (Bomb) 0133-** it has been held that Subordinate Legislation, it is well settled, can be challenged only on the ground of manifest arbitrariness. There is no question of the Commission being required to grant a personal hearing when it discharges a legislative function of framing of regulations and no requirement of personal hearing has been imported under the Act. The previous publication in Section 181 (3) is enforced by the Electricity (Procedure for Previous Publication) Rules, 2005, which require the publication of a draft, specification in a notice of a date on or after which the draft will be taken into consideration and the consideration of objections and suggestions. This process was followed in the present case and the objections and suggestions of the petitioner were duly considered.

19. The Constitution Bench of the Supreme Court in **K.T. Plantation Pvt. Ltd. and Anr. V/s State of Karnatka (2011) 8 (SCALE) 583** has held that 'Delegated Legislation', which is legislation in character, cannot be questioned on the ground of violation of the principles of Natural Justice, especially in the absence of any statutory requirement. The Legislature as its delegate is also not legally obliged to give any reasons for its action while discharging its legislative function.

For these reasons and following these settled principles of law, the Commission finds no merit in the contentions which have been raised on behalf of the petitioner. Hence, the Commission declines to entertain this petition.

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