

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 318 of 2013

Dated: 30th November, 2014

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

In the matter of:

Batot Hydro Power Limited,

214, Empire House,
Dr. DN Road, A.K. Nayak Marg,
Fort, Mumbai-400 001

... Appellant

Versus

1. **Himachal Pradesh Electricity Regulatory Commission,**
Keonthal Commercial Complex,
Khalini, Shimla-171 002

2. **Himachal Pradesh State Electricity Board Limited,**
Vidyut Bhawan, Kumar House,
Shimla-171 004

...Respondent(s)

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
Ms. Swapna Seshadri
Ms. Mandakini Ghosh

Counsel for the Respondent(s) : Mr. Pradeep Misra,
Mr. Daleep Kr. Dhayani,
Mr. Suraj Singh
Mr. Manoj Kumar Sharma,
Ms. Shashank Pandit
Ms. Rinku Gautam (Rep.) for R-1
Ms. Suparna Srivastava for R-2

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Batot Hydro Power Limited challenging the order dated 5.9.2012 passed by the Himachal Pradesh Electricity Regulatory Commission (“State Commission”) in Petition filed by the Appellant.

2. The Appellant is a Hydro Power Project. The State Commission is the Respondent no. 1 and the Himachal Pradesh Electricity Board is the Respondent no. 2.

3. The brief facts of the case are as under:

3.1 On 6.5.2002, the Government of Himachal Pradesh by Notification fixed a tariff for Small Hydro Plants willing to supply power to the State at Rs. 2.50 per unit for a period of 40 years. Thereafter, on 24.10.2002 an Implementation Agreement was executed between

Weizmann Limited, the original entity who was granted the right to develop a 3.5 MW Small Hydro Plant and the State Government. A Power Purchase Agreement was entered into between the said Weizmann Limited and the Respondent no. 2 on 1.11.2002. The parties also filed a joint petition for approval of the said PPA before the State Commission.

3.2 On 8.8.2003 on formation of the Special Purpose Company Batot Hydro Power Limited, Appellant, herein, a Tripartite Agreement was executed on 8.8.2003 amongst Weizmann Limited, Batot and HIMURJA, the State Government agency for development of Small Hydro Projects wherein the Appellant undertook the responsibility of setting up the 3.5 MW Small Hydro Plant.

3.3 On 24.3.2003, the State Commission passed the Order holding that it would not review the tariff fixed at

Rs. 2.50 for Small Hydro Plants fixed by the State Government.

3.4 The State Commission by an Order dated 6.9.2003 in a batch of *suo motu* cases declared the PPAs signed between the Small Hydro Plants developers and Respondent No. 2 so far being without the approval of the State Commission are *void abinitio, non est* and *inoperative*. The State Commission further directed all the Developers who had signed PPAs to submit their PPAs for approval of the State Commission as per the prescribed procedure. Certain developers subsequently filed join petition along with the Respondent No. 2 before the State Commission for approval of the PPA. The State Commission approved the then prevalent preferential tariff at Rs.2.50 per unit to be paid to the Developers. However, the Appellant was not a party to

the above as power plant of the Appellant was getting delayed due to certain unavoidable circumstances.

3.5 On 4.3.2006, the Appellant and the Respondent no. 2 filed a joint Petition being No. 78 of 2006 before the State Commission for approval of PPA.

3.6 By an Order dated 15.7.2006, the State Commission approved the PPA stipulating a few conditions. The tariff approved was Rs.2.50 paisa per unit subject to State Commission's Regulations on power procurement from renewable sources as and when such Regulations are framed. Due to certain reasons, the project of the Appellant got inordinately delayed and the fresh PPA could not be entered into between the Appellant and the Respondent No. 2 in terms of the Order dated 15.07.2006.

3.7 On 18.6.2007 The State Commission notified the Regulations for Power Procurement from Renewable Sources and Co-Generation by Distribution Licensee.

3.8 On 18.12.2007 The State Commission had passed a generic tariff order wherein the tariff for hydro power was increased from Rs.2.50 per unit to 2.87 per unit. On 9.2.2010, the generic Tariff Order dated 18.12.2007 was modified by the State Commission and the tariff was enhanced to Rs.2.95 per unit. There was a further modification vide Order dated 10.02.2010 wherein after giving corrections regarding change in rate of tax, etc. the tariff was increased from Rs.2.95 per unit to Rs.2.98 per unit.

3.9 On 4.1.2012, the Appellant and the Respondent No. 2 executed a short term PPA under REC mechanism wherein the Annual Pooled Purchase Cost was Rs.2.23

paisa per unit and the validity of the PPA was only up to 31.3.2012. On 16.6.2012, the hydro power plant of the Appellant was declared as commercially operative.

3.10 On 2.7.2012, the Appellant and the Respondent No. 2 filed Petitions praying for approval of execution of a PPA under REC mechanism for a period of 3 years and praying for cancellation of approval of PPA issued by State Commission on 15.7.2006.

3.11 On 5.9.2012, the State Commission passed the impugned order approving the PPA under REC mechanism with prevalent APPC rate at Rs.2.20 paisa per unit for Financial Year 2012-13 for a tenure of 3 years and for such longer period as may be mutually agreed between the parties from time to time. For the residual period, the State Commission held that the Appellant would be paid the tariff at Rs.2.50 per unit as per the earlier Order dated 15.7.2006 approving the

earlier PPA and deleted certain clause (clause 4) in the earlier order dated 15.7.2006.

4. Aggrieved by the above impugned order, the Appellant has filed this Appeal.

5. The Appellant has made the following submissions:

(a) The only issue before the State Commission was regarding approval of the short term PPA executed between the Appellant and the Respondent No. 2 for supply of power under the REC Mechanism. There was no issue as to what would be the tariff applicable for sale of power after the expiry of the REC Mechanism.

(b) The Appellant's power plant only got commissioned on 16.6.2012 and the prevalent tariff as on this date as determined by the State Commission itself is Rs. 2.98 per unit.

Therefore, to apply the tariff of Rs. 2.50 on the Appellant would be extremely unfair. The final order approving the PPA between the Appellant and the Respondent No. 2 on 4.8.2007 provided that tariff and other terms and conditions of the PPA shall be subject to the provisions of the Commission's Regulations on Power Procurement from Renewable Sources as and when such Regulations are framed. Therefore, there can be no question of asking the Appellant to supply at Rs. 2.50 per unit at this stage.

- (c) In another case relating to M/s. AT Hydro Pvt. Ltd. , the State Commission had given the benefit of the revised tariff in force.
- (d) The State Commission itself had expressly provided in its Renewable Energy Regulations,

2012 coming into force from 18.12.2012 that the Tariff for residual period after sale/purchase under REC mechanism, if PPA has been approved by the State Commission or PPA executed between the parties, prior to coming into force of the said Regulations, for project capacity not exceeding 5 MW, the tariff shall be Rs.2.95 per unit subject to adjustments as per relevant orders of the State Commission.

- (e) The State Commission cannot force the generator to sell its power at a particular tariff. The Hon'ble Supreme Court in **Tata Power Company Ltd v. Reliance Energy Limited & Ors**, (2009) 16 SCC 659 has held that a generating company cannot be forced to supply power or enter into a contract for

selling power with any person and exercises the freedom to enter into any such contracts for sale of power.

6. In its reply, the State Commission has submitted that while approving the PPA the State Commission in its order dated 15.7.2006 had inadvertently mentioned clause 4. When it came to the notice of the Commission at the time of approval of PPA for REC, it rectified the mistake. The State Commission has inherent power to review its order. The Appellant cannot take benefit of the inadvertent mistake committed by the Commission.

7. The Respondent no. 2 has also supported the impugned order. According to the Respondent no. 2, the Appellant and the Respondent no. 2 had filed two joint petitions before the State Commission, one seeking approval of execution of PPA under REC mechanism for 3 years and the other one to seek cancellation of

approval of PPA issued by the Commission on 15.7.2006. Therefore, there was no error in the State Commission giving the directions regarding supply of power at Rs. 2.50 per unit after completion of supply under REC.

8. We have heard Ms. Swapna Seshadri, learned counsel for the Appellant and Shri Pradeep Misra, learned counsel for the State Commission and learned counsel for the Respondent no. 2.

9. The following issues arise for our consideration:

(i) Whether the State Commission is correct in giving directions forcing the generating company to supply power to the distribution licensee in future at a particular tariff?

(ii) Whether the State Commission can pass an order deviating from the Regulations which provide

for power to be supplied to the distribution licensee at a particular tariff?

(iii) Whether the State Commission can hold that since the parties filed a joint petition for approval of a PPA with a tariff of Rs. 2.50 per unit, the same will be binding on the parties for all time to come even if the PPA was never executed.

(iv) Whether the State Commission can enforce the tariff of Rs. 2.50 per unit by an earlier PPA entered into the year 2002 which had been held *void abinitio, non est* and *inoperative* by the State Commission by its order dated 6.9.2003?

(v) Whether the State Commission is justified in holding that the clause 4 in its order dated 15.7.2006 was an inadvertent error in the impugned order passed after six years of the earlier order?

10. All the above issues are interconnected and, therefore, being dealt with together.

11. We find that the Appellant and the Respondent no. 2 had entered into PPA on 24.10.2002 for supply of electricity at Rs. 2.50 per unit. However, the State Commission by order dated 6.9.2003 declared all such PPAs without the approval of the State Commission as *void abinitio, non est and inoperative*. The State Commission further directed the developers who had entered into the PPAs to submit their PPAs for approval of the State Commission as per the prescribed procedure. Certain developers filed petitions before the State Commission for approval of PPA. In these proceedings, the State Commission approved the PPA at the preferential of tariff of Rs. 2.50/unit. However, the Appellant had not filed its

Power Purchase Agreement as its project was getting delayed due to certain unavoidable circumstances.

12. On 4.3.2006, the Appellant and the Respondent no. 2 filed joint petition before the State Commission for approval of PPA. The State Commission by order dated 15.7.2006 approved the PPA and tariff of Rs. 2.50/unit subject to the following condition:

“Tariff and other terms and conditions of the PPA shall be subject to the provisions of the State Commission’s regulations on power procurement for renewable sources as and when the regulations are framed”.

13. The State Commission further on the application filed by the Appellant approved certain modification in the PPA regarding deleting the condition of requirement of Government guarantee by order dated 4.8.2007.

14. However, the modified PPA could be entered into between the parties in terms of the orders dated 15.7.2006 and 4.8.2007.

15. It was only on 16.6.2012 that the Appellant's power project was commissioned. Thereafter, on 2.7.2012, the Appellant and the Respondent no. 2 filed the following petitions before the State Commission:

- a)** Petition No.86 of 2012 praying for approval of execution of PPA under REC mechanism for a period of 3 years;
- b)** Petition No.104 of 2012 praying for canceling the approval of PPA issued by State Commission on 15.07.2006 read with subsequent Order dated 04.08.2007 and taking into consideration joint petition filed on 16.05.2012 for PPA under REC mechanism for maximum period and thereafter on

preferential tariff for balance project life out of 40 years.

16. Let us examine the impugned order dated 5.9.2012.

17. In the impugned order the State Commission has approved the PPA under REC mechanism with prevalent APPC rate at Rs.2.20 paisa per unit for Financial Year 2012-13 for a tenure of 3 years and for such longer period as may be mutually agreed between the parties from time to time. For the residual period, the State Commission held that the Appellant would be paid the tariff at Rs.2.50 per unit as per the earlier Order dated 15.7.2006 approving the earlier PPA and deleted the clause in the earlier order which had stated as follows “**Tariff and other terms and conditions of the PPA shall be subject to the provisions of the Commission’s regulations on power procurement**

from renewable sources as and when such regulations are framed”.

18. We feel that the State Commission has wrongly decided to delete the Clause regarding tariff subject to the provisions of the Commission's Regulations in its earlier order dated 15.07.2006. This Clause kept in the earlier order was in consonance with the provisions of the Act and the 2007 Regulations (as amended). The State Commission has to determine the tariff according to the principles laid down under Section 61 of the Electricity Act 2003. The tariff of Rs. 2.50 decided by the State Government in the year 2000 cannot be the tariff for the Appellant's power plant as the same was not determined as per the Regulations of the State Commission. The State Commission's order dated 15.07.2006 specifically introducing the condition of

tariff subject to the Regulations of the State Commission was in consonance with the provisions of the Electricity Act and was perfectly legal.

19. Similar issue was decided by this Tribunal in its judgment dated 17.10.2014 in Appeal no. 198 of 2013 in the matter of M/s. KKK Hydro Power Ltd. Vs. Himachal Pradesh Electricity Regulatory Commission & Others. The relevant extracts are reproduced below:

“36. Summary of our findings:

(i).....

ii) As per the 2007 Regulations the tariff of the project for which PPA was entered into on 30.03.2000 and the plant was commissioned on 05.08.2004 prior to the notification of the Regulations will not be redetermined as per these Regulations. However, the State Commission as per the second proviso to the

Regulation 6 as amended on 27.11.2007 is empowered to modify the PPA for reason of change in statutory laws or rules or the State Government Policy. However, the 1.9 MW capacity which is an extension of the 3 MW capacity project will be subject to the tariff determined as per the 2007 Regulations.

iii) The Agreement for augmentation of capacity by installing of additional 1.9 MW capacity plant as extension to the 3 MW plant was entered into after the formation of the State Commission. Therefore, the tariff under the Agreement had to be determined by the State Commission. The Tariff of Rs.2.50 per kWh agreed to in the PPA dated 30.03.2000 was for capacity of 3 MW which was based on the State Government's Policy. The tariff of Rs.

2.50 per kWh was not determined as per the principles laid down under Section 61 of the Electricity Act, 2003. Therefore the tariff of 1.9 MW capacity has to be determined by the State Commission as per its 2007 Regulations and the subsequent tariff orders. Legally, the tariff as decided by the State Government prior to the enactment of the Electricity Act, 2003 cannot be made applicable to 1.9 MW capacity which was planned, approved and commissioned after the constitution of the State Commission and notification of the 2007 Regulations.”

20. The findings of Tribunal in Appeal no. 198 of 2013 will be applicable to the present case. In this case the PPA dated 01.11.2002 entered to earlier between the Appellant and the Respondent no. 2 was held as *void*

abinitio, non est and inoperative by the State Commission by its order dated 06.09.2003.

21. We find that the impugned order regarding tariff of Rs. 2.50 per kWh to be made applicable after the completion of arrangement to sell power through REC mechanism is contrary to the provisions of the Act and the Regulations. The applicable tariff has to be as determined under the 2007 Regulations. The State Commission cannot enforce the conditions of the PPA dated 01.11.2002 which had been held *void, nonest and inoperative* by the State Commission by order dated 06.09.2003.

22. We feel that the clause no. 4 introduced by the State Commission in its order dated 15.7.2006 was not an error and it was in fact in consonance with the provisions of the 2003 Act.

23. Summary of our finding:

(i) Clause 4 introduced by the State Commission in its earlier order dated 15.7.2006 was in consonance with the provisions of the 2003 Act and its deletion in the impugned order is illegal.

(ii) The State Commission cannot enforce the conditions of the PPA dated 01.11.2002 which had been held *void, nonest and inoperative* by the State Commission by order dated 06.09.2003.

(iii) The Appellant is entitled to tariff determined as per the 2007 Regulations.

24. The Appeal is allowed and the impugned order is set aside to the extent of application of tariff of Rs. 2.50/kWh after the expiry of the present arrangement between the Appellant and the

Respondent no. 2 under REC Mechanism. No order as to costs.

25. Pronounced in the open court on this **30th day of November, 2014.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

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REPORTABLE / ~~NON-REPORTABLE~~

Vs