

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No.288 OF 2017

Dated: 29.05.2025

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

M/s Biological E. Ltd.

VPO Nihal Garh, Rajban Road,
Ponta Sahib,

Distt. Sirmaur (HP) 173025

Kehar Singh Chauhan S/o Sh. D.S. Chauhan,

DGM / Authorized signatory

of the Appellant Company.

...Appellant

Versus

1. Himachal Pradesh Electricity Regulatory Commission

Through its Secretary

SDA Complex, Kusumpti,

Shimla- 171009

Email: secy-perc-hp@nic.in

2. The HP State Electricity Board Ltd.

Through its Executive Director (personal),

Kumar House,

Shimla – 171 004

Email: mdhpseblshimla@gmail.com

... Respondent (s)

Counsel on record for the Appellant(s) : Ajay Vaidya

Counsel on record for the Respondent(s): Pradeep Mishra for Res. 1

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. This appeal arises out of the order dated 05.10.2016 passed by 1st respondent Himachal Pradesh Electricity Regulatory Commission (hereinafter referred to as "the Commission") thereby providing the mechanism for adjustment of charges paid by the consumers under clause 3.2.2 of Himachal Pradesh Electricity Supply Code 2009 against the other charges payable by the consumers and refund of the balance, if any, to the consumers.
2. Brief facts giving rise to the appeal are enumerated hereunder.
3. The Appellant is a large supply consumer of electricity in the State of Himachal Pradesh.
4. The Commission had notified Himachal Pradesh Electricity Supply Code 2009 (hereinafter referred to as "2009 Supply Code") on 29.05.2009. Clause 3.2.2 of the 2009 Supply Code provides that consumer shall apply for the grant of Power Availability Certificate (PAC) on payment of Advanced Cost

Share (ACS) towards Infrastructure Development Charges (IDC) calculated at the rate of Rs.1000/KVA of the contract demand applied for.

5. It appears that vide letter dated 08.04.2011, the 2nd respondent Himachal Pradesh State Electricity Board (in short “HPSEB”) sought clarification regarding the mechanism for adjustment of Advanced Cost Share towards Infrastructure Development Charges paid by consumers as per clause 3.2.2 read with clause 3.2.5 of the 2009 Supply Code stating that there was no specific provision for adjustment/recovery of IDC under the HPERC (Recovery of Expenditure for Supply of Electricity) Regulations, 2005 (hereinafter referred to as “Recovery of Expenditure Regulations, 2005”), then in force.

6. Accordingly, the Commission issued a detailed clarification on this aspect vide order dated 02.05.2011. Thereafter, Recovery of Expenditure Regulations, 2005, were replaced by HPERC (Recovery of Expenditure for Supply of Electricity) Regulations, 2012 (hereinafter referred to as “Recovery of Expenditure Regulations, 2012”).

7. The clarificatory order dated 02.05.2011 was set aside by this tribunal vide judgment dated 18.12.2015 in appeal nos.188 of 2014, 189 of 2014, 190 of 2014, 191 of 2014, 192 of 2014, 194 of 2014 and 195 of 2014 with the

direction to the Commission to issue notices to the appellants in these appeals as well as other industrial consumers in the State of Himachal Pradesh and also to issue public notice seeking objections/comments and to pass a fresh order after giving reasonable opportunity of been heard to such consumers.

8. In pursuance to the order dated 18.12.2015 of this Tribunal, the Commission issued a letter dated 05.04.2016 to HPSEB asking it to submit a formal self-contained reference indicating the points on which clarification is sought along with the views of the Board thereon. Accordingly, on such reference having been made by HPSEB, the Commission registered *suo motu* case number 25/2016 and by invoking the provisions contained in clause 9.5 and 9.6 of 2009 Supply Code proposed a mechanism for adjustment of amount received from prospective consumers as per clause 3.2.2 of the said Code for grant of PAC. Thereafter, public notice was issued in the newspapers on 25.05.2016 inviting objections/suggestions on the said proposed mechanism. Letters dated 27.05.2016 were also issue to major stakeholders in the State of Himachal Pradesh inviting comments/suggestions in relation to the said proposed mechanism. Notably, such notices were issued to all the appellants who had earlier approached this Tribunal by way of appeal nos.188, 189, 190, 191, 192, 194 and 195 of 2014. Public hearing was also

held by the Commission on 03.09.2016 to elicit the views of stakeholders as well as other interested persons.

9. Upon considering the submission (oral as well as written) made by the stakeholders during the public hearing, the Commission issued the order dated 05.12.2016 thereby providing mechanism for adjustment of ACS towards IDC received from the prospective consumers for grant of PAC at the rate of Rs.1000/kVA as per para 3.2.2 of 2009 Supply Code as under :-

“16. Commission’s Views:

After taking into consideration the written submissions made/referred in para-12 and oral submissions made, by the stakeholders in the public hearing, the observations/findings of the Commission thereon are as under:-

(i) The present regulatory process is initiated for limited purpose i.e. to clarify the mechanism of adjustment of Advance Cost Share, received by the distribution licensee as per the provisions of the Supply Code, 2009. The submissions made by the

stakeholders are not relevant in this case and are not in conformity with the main purpose of the proposed mechanism under consideration. It does not tend to impose any new charges, but only made the provisions for the adjustment of the amount received for grant of Power Availability Certificates (PAC). The rationalization of the PAC rates/charges are beyond the scope of the present proposal. If any consumer is aggrieved by the wrong implementation of the provisions of the Recovery of Expenditure Regulations of 2005, the consumer can invoke the mechanism, set-up for redressal of his grievances under the Electricity Act, 2003 in the form of the Consumers Grievances Redressal Forum, established under Section 42 of the Act. The Ombudsman is yet another Forum which can be approached, in case of the Consumers Grievances Redressal Forum (CGRF) does not satisfy the consumers. In this regard, the Commission, in its earlier Orders, disposing the petitions filed before it, has also already held that a complete mechanism has

been provided in sub-sections (5) and (6) of Section 42 of the Electricity Act, 2003, for Redressal of Grievances of the individual consumers in the form of Consumer Grievances Redressal Forum (CGRF), set-up and Ombudsman appointed under Section 42 of the Electricity Act, 2003.

(ii)As regard the submissions that this mechanism be applicable after the enforcement of the Supply Code, 2009, the Commission points out that the proposed mechanism relates to adjustment of the amount received per para 3.2.2 of the Supply Code, 2009 and shall obviously be applicable only from the commencement of the said Code.

(iii) On the issue of demand notices, issued by the distribution licensee for the recoveries of Infrastructural Development Charges on the strength of the Commission's clarificatory Order dated 02.05.2011, it is pointed out that the Hon'ble APTEL in their order dated 18.12.2015 have set-aside the said order, alongwith findings recorded therein that all the

consequential actions or the subsequent orders or the consequential demand notices or bills raised by the Respondent Board on the strength of aforementioned impugned clarificatory order, dated 02.05.2011, have also been quashed or set-aside. This adequately settles the points raised by some of the stakeholders. However, this shall in no way debar the distribution licensee to make recoveries in accordance with the provisions of the Recovery of Expenditure Regulations, 2005 or the Recovery of Expenditure Regulations, 2012 as may be relevant.

(iv) With regard to suggestion of distribution licensee i.e. HPSEBL to elaborate the term “various lump-sum amounts” used in the proposal (refer item A (i) under Category –II in para-9 of this Order), the Commission likes to clarify that this term would include all the amounts recoverable by the distribution licensee, except for the cost of service line or payment of monthly installments under the Recovery of Expenditure Regulations, 2005.

In light of the foregoing discussions, the Commission, by invoking the provisions contained in paras 9.5 and 9.6 of the Supply Code, 2009, hereby orders that the amount received or to be received as per para 3.2.2 of the Supply Code, 2009 for grant of the Power Availability Certificate (PAC) in respect of the Contract Demand applied by consumers/applicants be adjusted in accordance with the mechanism proposed in para-9, read with item (iv) under para-16 of this Order.

It is so ordered.”

10. This order of the Commission has been assailed by the industrial consumer namely M/s Biological E. Ltd. by way of the present appeal.

11. We have heard learned counsels for the appellant as well as learned counsels for the respondents. We have also perused the impugned order as well as the written submissions filed by the learned counsels. We note here that the appellant has not filed any written submissions.

12. The appellant has assailed the impugned order dated 05.10.2016 of the Commission on following grounds: -

“(i) The impugned order of the Commission is against the provisions of the Electricity Act, 2003.

(ii) The impugned order, in so far as it relates to invoking of provisions contained in paragraph 9 and 16 of the Supply Code 2009 by the Commission is not in accordance with the spirit of Electricity Act, 2003 nor in consonance with the Regulations framed by the Commission and National Tariff Policy.

(iii) The impugned order is erroneous for the reason that there is no provision either in 2005 Regulations or in the Electricity Act, 2003 for recovery of Infrastructural Development Charges from the prospective consumer of electricity who applies for a fresh electricity connection.

(iv) The impugned order is heavily loaded in favour of the distribution licensees vis-à-vis the consumers and

fails to protect the interests of the consumers and therefore is ultra vires the provisions of the Electricity Act, 2003 as well as the Constitution of India.

(v) The Commission has erred in not ensuring transparency while exercising its power and discharge its function as required under sub-section 3 of section 86 of the Electricity Act, 2003 while issuing the impugned order as it has failed to adequately describe and define the term “infrastructure” except by a general statement that cost of certain common system actually erected or to be erected for supply of power to the applicants on pro rata sharing basis for which the cost is to be borne by the applicants on pro rata sharing basis.

(vi) The Commission has erred in applying its mind to the fact that there being no provision for any unreasonable recovery in section 46 of the Electricity Act, 2003 as well as the 2005 Regulations.

(vii) The impugned order is otherwise also arbitrary, unreasonable, unjust, illegal, without jurisdiction, bad in law and against the facts and circumstances of the case and therefore, liable to be quashed.”

13. Clause 3.2 of 2009 Supply Code reads as under:-

“Power Availability Certificate.-

3.2.1 Where the new or additional load exceeds 100 kW, the applicant will submit the feasibility clearance i.e. Power Availability Certificate (PAC) along with the Application and Agreement form. The form of application for feasibility clearance/PAC will be available free of cost in the designated offices of the licensee and on its website.

3.2.2 The consumer shall apply, for grant of Power Availability Certificate, on payment of

(i) the earnest money equivalent to the 10% of the initial security as specified is the Himachal

Pradesh Electricity Regulatory Commission
(Security Deposit) Regulations, 2005; and

(ii) advance cost share, towards infrastructural developmental charges, calculated @ Rs. 1000 per. kW/kVA of the load applied for.

3.2.3 The licensee will grant the Power Availability Certificate within forty five days from the receipt of request or such extended period as approved by the Commission.

3.2.4 The Power Availability Certificate mentioned in para 3.2.3 shall be valid for a period as may be mutually agreed by the licensee and the applicant, but not exceeding three years Provided that the validity period may be extended from time to time as may be manually agreed upon the applicant and the licensee.

3.2.5 The applicant may, after grant of Power Availability Certificate mentioned in para 3.2.3, submit

the application to give supply of electricity to the premises and the licensee shall adjust the amount of the earnest money towards initial security payable under the Himachal Pradesh Electricity Regulatory Commission (Security Deposit) Regulations, 2005 and the advance cost share towards initial estimated amount payable under the Himachal Pradesh Electricity Regulatory Commission (Recovery of Expenditure for Supply of Electricity) Regulations, 2005.”

14. It is to be noted that the said Electricity Supply Code has been issued by the Commission in exercise of its powers conferred by section 50 and clause (x) of sub-section (2) of section 181 of the Electricity Act, 2003 in discharge of its regulatory functions. Therefore, the Code is in the nature of regulations issued by the Commission under Section 181 of the Electricity Act, 2003. As per clause 3.2.2 of the Code, a consumer seeking new or additional load exceeding 100KW is required to first apply for grant of PAC on payment of earnest money equivalent to 10% of initial security as specified by the Commission and ACS towards IDC calculated as per rate of Rs.1000/KW/kVA

of the load applied for. As per clause 3.2.5, the distribution licensee is required to adjust the amount for earnest money as well as ACS towards IDC after the submission of application for supply of electricity by the consumer.

15. Manifestly the Supply Code does not provide any mechanism for adjustment of these charges by the distribution licensee. It is for this reason that upon request for the 2nd respondent HPSEB, the Commission had issued clarificatory order dated 02.05.2011 specifying the mechanism for adjustment/recovery of IDC. However, since the said order was issued without calling for suggestions/objections from the stakeholders and without hearing them, it was set aside by this Tribunal vide order dated 18.12.2015 passed in appeal nos.188 of 2014, 189 of 2014, 190 of 2014, 191 of 2014, 192 of 2014, 194 of 2014 and 195 of 2014. The relevant portion of the said order of this Tribunal is extracted hereinbelow: -

“All the instant Appeals, being Appeal Nos. 188 of 2014, 189 of 2014, 190 of 2014, 191 of 2014, 192 of 2014, 194 of 2014 and 195 of 2014 are hereby allowed and the impugned clarificatory order, dated 2.5.2011, along with findings recorded therein is hereby set-aside. All the consequential actions or the subsequent

orders or the consequential demand notices or bills raised by the Respondent Board on the strength of the aforementioned impugned clarificatory order, dated 2.5.2011, are also hereby quashed or set-aside. We hereby direct the State Commission to issue notices to the Appellants and other industrial consumers of the state of Himachal Pradesh and also issue public notice seeking their objections or comments and, thereafter, giving reasonable opportunity of hearing to such kind of consumers including the Appellants to pass the order afresh without being influenced in any way with the findings recorded in the impugned clarificatory order, dated 2.5.2011. We hope and trust that the learned State Commission shall abide by the principles of natural justice and then pass the order in a judicial and judicious way without being influenced by any of the findings recorded in the aforesaid impugned clarificatory order. In the facts and circumstances of the matter, we do not propose to impose any costs.”

16. Accordingly, the Commission issued a fresh order dated 05.10.2016 (which has been impugned in these appeals) after issuing notices to all the stakeholders, the general public and also upon hearing their views/submissions during public hearing, which has been impugned in this appeal.

17. We have already reproduced the relevant portion of the impugned order hereinabove.

18. It is evident that the impugned order does not impose any new charges but only has provided mechanism for adjustment of ACS received by the distribution licensee from prospective consumers as per clause 3.2.2 of 2009 Supply Code, which was missing in the Supply Code as well as the Recovery of Expenditure Regulation, 2005. Therefore, patently the impugned order also has been issued by the Commission in exercise of its regulatory functions under Section 181 of the Electricity Act, 2003 and not in exercise of its adjudicatory functions under Section 86(1)(f) of the Act.

19. We have already extracted hereinabove the grounds on which the impugned order has been assailed by the appellant in this appeal. It is limpid that the appellant is challenging the legality/validity of the clause 3.2.2 of the

2009 Supply Code as well as the mechanism evolved by the Commission vide impugned clarificatory order dated 05.10.2016 for adjustment of ACS received by the distribution licensees from prospective consumers under the said clause 3.2.2 of the Code. It is well settled that the legality and validity of regulations or the orders issued by State Electricity Commission in exercise of its regulatory functions cannot be assailed before this Tribunal by way of appeal under Section 111 of Electricity Act, 2003. A reference may be had to the judgment of the Supreme Court in PTC India Limited V/s CERC 2010 4 SCC 603 wherein it has been held as under: -

“93. For the aforesaid reasons, we answer the question raised in the reference as follows:

The Appellate Tribunal for Electricity has no jurisdiction to decide the validity of the Regulations framed by the Central Electricity Regulatory Commission under Section 178 of the Electricity Act, 2003. The validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.”

20. Therefore, the appeal is not maintainable in so far as the appeal is challenging the legality and validity of the relevant clause of 2009 Supply Code as clarified vide the impugned clarificatory order dated 05.10.2016.

21. In view thereof, we hold that the appeal is not maintainable and is dismissed as such.

Pronounced in the open court on this the 29th day of May, 2025.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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REPORTABLE / NON-REPORTABLE

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