

BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION AT PANCHKULA

Case No. HERC/Review Petition No. 1 of 2024

Date of Hearing : 12.04.2024
Date of Order : 12.04.2024

In the Matter of

Review Application under Section 94 (1) (f) of the Electricity Act, 2003 read with Regulations 57, 65 and 68 of the Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2019 seeking review /recalling / modification of Order dated 05.01.2024 passed in case no. HERC/Petition No. 66 of 2023 in proceedings under Section 86(1)(b) and Section 63 of the Electricity Act, 2003 read with Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2019 filed for approval of source and adoption of tariff for procurement of 67 MW solar power from 7 nos. Grid Connected Solar PV Power Projects at the discovered tariff of Rs. 3.37/kWh through Competitive bidding.

Petitioner (Review applicant)

Haryana Power Purchase Centre, Panchkula (HPPC)

Respondent

Nil

Present on behalf of the Petitioner

1. Ms. Sonia Madan, Advocate
2. Shri Deepak Popli, Chief Engineer, Commercial, UHBVNL
3. Shri Gaurav Gupta, Xen, HPPC

Quorum

Shri Naresh Sardana

Member

ORDER

Brief Background of the case

1. The present petition has been filed by HPPC seeking review/recalling/modification of the Order dated 05.01.2024 passed by this Commission in petition bearing no. HERC/Petition no.-66 of 2023 and grant the source approval and approval of PPA for procurement of 67 MW solar power from 7 nos. Grid Connected Solar PV Power Projects at the tariff of Rs. 3.37/kWh discovered through competitive bidding.
2. **The review applicant's submissions:-**
 - 2.1 That the petition no 63 of 2023 was filed before this Commission praying for approval of source & of the PPA for the procurement of 67 MW solar power from 7 nos. Grid Connected Solar PV Power Projects, selected under tariff based competitive bidding process, as per the guidelines issued by MNRE, GOI, for a period of 25 years along with the adoption of tariff i.e. Rs 3.37/kWh.

- 2.2 That the Hon'ble Commission vide Order dated 05.01.2024 rejected the approval of source while observing that the tariff of Rs. 3.37/kWh discovered by HPPC, through bidding is not competitive and aligned to the prevalent market conditions.
- 2.3 That the petitioner had not been afforded sufficient time to place on record the relevant documents establishing that the tender process was conducted transparently and the discovered tariff is aligned to the market trend thereby giving sufficient cause to file the instant petition. Further, the ceiling was approved considering basic cost, duties/taxes and also transmission cost and losses. Despite the same, the offered quantum was not even 1/3rd and the bids were selected for 67 MW only out of 500 MW.
- 2.4 That, as per the Draft Solar Policy, 2023 issued by Government of Haryana, 6 GW of solar power installations by 2030, is aimed. Development of solar projects by independent power producers is being actively encouraged. There are clear directives of the Government to make efforts to boost the contribution of solar energy in Haryana's power mix, foster involvement from the private sector, incorporate new technologies, and promote the integration of solar power in the agricultural sector. In view of the same, the approval of setting up of solar plants in the State are pertinent to further the economic growth and to achieve the targets set up by the State Government.
- 2.5 That the Himachal Pradesh Electricity Regulatory Commission, Shimla, vide its order dated 04.11.2023 examined the cost of the setting up of solar plant at length. In the ibid order, the HPERC considered total capital cost as Rs. 396.91 Lakh/MW and allowed the levelized as Rs. 3.67 per kWh. The ibid order establishes that the tariff discovered under the bid is reasonable and aligned to market trend.
- 2.6 That Joint Electricity Regulatory Commission for UT of J&K and Ladakh, vide its order dated 22.11.2022 approved tariff of Rs. 4.65 per unit for solar plants to be set up PM-Kusum scheme.
- 2.7 That the offered quantum against a bid of 500 MW is only 67 MW establishes that the ceiling tariff is not exorbitant. Considering the ceiling of Rs. 3.38 per MW, the bids were expected to be only slightly lesser than the ceiling. As such, the presumption of this Hon'ble Commission qua any collusion among bidders may not be entirely justified. Presuming without conceding that there is a possibility of collusion amongst bidders, such eventuality is beyond the control of the petitioner as the bidding is conducted through online Portal. The Hon'ble Commission did not ask for any query/ made explicit any observation as stated in the impugned order so as to give opportunity to the petitioner to effectively address the same. As such, there exists sufficient cause to review the impugned order.

- 2.8 That a salient fact which could not be brought before the Hon'ble Commission earlier is the impact on transmission charges with coming into force of CERC GNA Regulations. These regulations have been framed by the Central Electricity Regulatory Commission to facilitate non-discriminatory open access to licensees or generating companies or consumers for use of inter-State transmission system through General Network Access (GNA). With coming in force of said regulations, the transmission charges, now leviable in the form of GNA charges, have increased substantially. Taking into account, GNA charges and losses, the cost of solar power may reach equivalent to the quoted tariff. In addition, thereof, the Government will not be able to meet its objective to install solar plants in the State.
- 2.9 That the solar generation within the State will also reduce the distribution losses as these solar power plants shall be sourced to the nearest load center/distribution system through the interconnection point at STU/Discom substation. Additionally, the state shall also be eligible to the 50% share of GST of the total project cost.
- 2.10 That there are associated environmental benefits (less pollution), social benefits (local employment opportunities) and investment inflows with setting up of solar plants in the State, which if monetized, complete range of benefits will far outweigh the tariff cost.
- 2.11 That there is sufficient cause to review the present Order as there is ample evidence to hold that the tariff offered by selected bidders is aligned to market trend, the bidding was conducted transparently and the establishment of solar plants is essential to meet the directives of the Government of Haryana and as such, the approval of solar power as sought in instant petition, is in larger interest of the State.
- 2.12 That the following prayers have been made: -
- a. Review/ Recall Order dated 05.01.2024 and grant approval of source for the procurement of 67 MW solar power from 7 nos. Grid Connected Solar PV Power Projects as per the Guidelines for tariff based competitive bidding process for procurement of power from Grid connected Solar PV Power projects issued by MNRE, GOI as amended from time to time for a period of 25 years along with the approval of PPA; and/or
 - b. Pass any other order(s) and or direction(s), which the Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.

Proceedings in the Case

3. The case was heard on 12.04.2024 in the courtroom of the Commission, wherein the review applicant (HPPC) mainly reiterated the contents of its review petition, which for the sake of brevity have not been reproduced here. Additionally, Ms. Sonia Madan, the

learned counsel for the petitioner cited an order dated 24.11.2023 of the Hon'ble Rajasthan Electricity Regulatory Commission, to advance its argument that offer of the same tariff by all the bidders in a bidding does not always tantamount to cartelization. Further, Shri Deepak Popli, Chief Engineer, Commercial, UHBVNL, present during the hearing, upon the enquiry from the Commission informed that in UHBVNL and DHBVNL, 7 applicants and 14 applicants, respectively, have walked in to express interest to install generation capacity of 12.96 MW and 26.6 MW, respectively, in the State of Haryana, at tariff of Rs. 3.11/kWh and no Performance based Incentive (PBI) has been offered to them. It was further informed that these applicants have even deposited the Performance Bank Guarantee (PBG).

Commission's Order

4. The Commission heard the arguments of the review applicant at length as well as perused the written submissions placed on record.
5. The Commission has considered it appropriate to settle the issue of maintainability of the present review petition filed against the Commission's impugned order dated 05.01.2024 (Petition No. 66 of 2023). The Commission has examined the judgement of Hon'ble Supreme Court in matter of Kamlesh Verma v. Mayawati and others [(2013) 8 SCC 320] which spells out the scope of a review petition i.e. it is much more restricted and in order to be maintainable, the conditions precedent laid down for the purpose under Order 47 Rule 1 of Code of Civil Procedure 1908 must be satisfied. The summary of principles set by the Apex court are reproduced hereunder: -

"When the review will be maintainable:

- (i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;*
- (ii) Mistake or error apparent on the face of the record;*
- (iii) Any other sufficient reason.*

When the review will not be maintainable:

- (i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.*
- (ii) Minor mistakes of inconsequential import.*
- (iii) Review proceedings cannot be equated with the original hearing of the case.*
- (iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.*
- (v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.*

- (vi) *The mere possibility of two views on the subject cannot be a ground for review.*
- (vii) *The error apparent on the face of the record should not be an error which has to be fished out and searched.*
- (viii) *The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.*
- (ix) *Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.”*

Further, Hon'ble Supreme Court in case of Jain Studios Limited through its President vs. Shin Satellite Public Co. Ltd. [2006(3) RCR (Civil) 601], has held that *“the same relief cannot be sought by an indirect method by filing a review petition. Such petition, in my opinion, is in the nature of 'second innings' which is impermissible and unwarranted and cannot be granted.”*

The conditions precedent laid down for the purpose of entertaining review application under Order 47 Rule 1 of Code of Civil Procedure 1908 as well the ratio decided by the Hon'ble Supreme Court in its various judgements giving guidelines for exercise of the power of review, were analyzed in detail by Hon'ble APTEL in its judgement dated 17.04.2013 (Review Petition no. 12 of 2012 in Appeal No. 17 of 2012). The operative part of the ibid judgement is as under:-

“46 To sum Up

- (a) *This is not a case where there is an apparent error on the face of the record. The grounds urged by the learned counsel for the Review Petitioner would relate to the merits of the matter on the basis of the alleged erroneous conclusions. This would be the province of the court of appeal. If the decision by this Tribunal is not correct, then the same cannot be corrected by this Tribunal in this Review Petition.*
- (b) *The Review Petitioner has simply sought in the Review Petition for a fresh decision of the case on rehearing the entire matter. This is not permissible under the Review jurisdiction. The so called erroneous decision cannot be characterised as an apparent error on the face of the record. Without indicating even remotely any apparent error, the Review Petitioner cannot be allowed to re-agitate the entire matter on merits.*
- (c) *The Review Petitioner is unable to make a distinction between an Appeal and Review Petition. The issues raised by the Appellant/Review petitioner in this Review petition have already been dealt with and decided in our judgment. So, raising the same issues, which have already been decided, cannot be raised in the*

Review Petition as the same could be raised only in an Appeal since the scope of the Review Petition is very limited.

.....
“48. In this case also, as observed earlier, we are constrained to refer to the conduct of the Appellant which is highly reprehensible. As such, in this case also, we feel that some cost has to be imposed on the Review Petitioner.”

In the present case, the petitioner has not pointed out any errors apparent on the face of record or discovery of new and important matter of evidence, as the grounds for entertaining the review application, which have been enshrined in the Order 47 Rule 1 of Code of Civil Procedure 1908. The review petitioner has primarily put forth its arguments to emphasize that the tariff offered by selected bidders is aligned to market trend, the bidding was conducted transparently and the establishment of solar plants is essential to meet the objectives set out in the Haryana Solar Policy issued by the Government of Haryana.

The Commission has perused the impugned order dated 05.01.2024 (petition no. 66 of 2023), which was passed in exercise of the powers “to regulate” bestowed by Section 86 (1) (b) of the Electricity Act, 2003. The Commission has decided as under:-

“In view of the above, the Commission is of the considered view that the tariff of Rs. 3.37/kWh discovered by HPPC, through bidding is not competitive and aligned to the prevalent market conditions. Therefore, the Commission, rejects the petition filed by HPPC for adoption of Tariff under section 63 of the Electricity Act, 2003 and for source approval. The Commission is mindful that such decisions are in the best interest of the electricity consumers of Haryana, which are to be supplied continuous, reliable and cost-effective power. This Commission has been entrusted with the statutory functions to balance the interest of all stakeholders, so as to ensure that quality power is made available to the consumers at a reasonable rate.

The Commission has taken note of the order (s) of Hon’ble HPERC and JERC (J&K and Ladakh) placed on record by the counsel in the hearing held on 05/01/2023. The Commission has perused the orders and observe that in the case of HPERC the determined tariff was generic not having any co-relation with the market forces which is sine quo non in the case of Haryana. Further, the order of JERC is based on negotiations subject to “written consent on acceptance of this rate” (Rs. 4.65/unit).

Hence, both the orders are on a different footings and not strictly comparable with the present case.

The Commission has further observed that SJVN, in November 2023, has allotted contract to supply 750 MW renewable energy with storage @ Rs. 4.38/kWh. Renewable energy with storage @ Rs. 4.38/kWh is reasonable for meeting peaking demand and HPPC may also explore such possibilities.

HPPC, if required, may invite fresh Competitive Bids for reasonable and competitive rates, after following the due process prescribed for the purpose and design the bid document (seek approval, if required), in such a way that the tariff discovered is the least cost option that stands the scrutiny of market forces and avoids the pitfall such as that witnessed in the present case i.e. quoted tariff was uniformly 1 paise/unit below the ceiling tariff. Such co-incidence, if at all, impinges upon and fails when tested on the anvil of transparency as it tantamount to collusion, that ought to be avoided.

It is evident from the above that the Commission was aware of the tariff decided by HPERC and JERC as well as the impact of GNA charges on the power transmitted through inter-state transmission system, cited by the review applicant to establish that the tariff discovered by it under the bid is reasonable and aligned to market trend. Therefore, neither there appears to be any error apparent on the face of the record nor discovery of any new/material fact which was not considered while passing the impugned judgement. In this regard, it is also pertinent to note that the Ministry of Power vide its orders no. 23/12/2016-R&R dated 23.11.2021, 30.11.2021, 01.12.2022 and 06.12.2022, had granted waiver of Inter-State Transmission (ISTS) charges on the transmission of electricity generated from solar and wind sources of energy. Accordingly, the HPPC may follow up the Ministry of Power as well as Central Electricity Regulatory Commission, seeking the implementation of ibid waivers.

Further, the argument of transparency in the bidding process taken by the review applicant falls flat in view of the fact that the quoted tariff is uniformly 1 paise/unit below the ceiling tariff. The Commission has already given its observation on the same in its impugned order.

In this regard, the Commission further observes that in the present bidding documents ceiling tariff of Rs. 3.38/- per unit was kept, keeping in view of another petition (no. 48 of 2023) filed in the Commission seeking revision of levelized tariff from Rs. 3.11/kWh

to Rs. 3.38/kWh for purchase of power under Component A of PM Kusum Scheme (Pradhan Mantri Kisan Urja Suraksha evam Utthaan Mahabhiyan) having capacity of 500 kW to 2MW. The Commission, vide its order dated 22.12.2023, while rejecting the prayer to increase the tariff, had directed the Discoms that after exercising due-diligence and ascertaining the extent to which support is required in the tariff of Rs. 3.11/kWh in order to promote the scheme, they may consider to meet the extra tariff out of the Performance based Incentives (PBI) received from the ministry. The Commission has also taken note of the submissions of the Chief Engineer, Commercial, UHBVNL, present during the hearing that even without offering PBI, 7 bidders of 2 MW each, have expressed interest to install generation capacity of 14 MW at tariff of Rs. 3.11/kWh in March, 2024. This gives a clear picture that the tariff sought to be approved does not align even with the promotional KUSUM Scheme tariff of component A. Thus, the price of Rs. 3.37/kWh discovered in the bidding under the present case, fails to muster the Commission's prudence check exercised in discharge of its function prescribed under Section 86 (1)(b) of the Electricity Act, 2003 i.e. 'regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licenses or from other sources through agreements for purchase of power for distribution and supply within the State;'.

The bounden duty cast on the State Commissions has been further fortified by the recent judgement of Hon'ble Supreme Court dated 08.01.2024 in case no. CIVIL APPEAL NO.6503 OF 2022 in the matter of Jaipur Vidyut Vitran Nigam Ltd. & Ors. vs. MB Power (Madhya Pradesh) Limited & Ors., wherein the powers of the Commission under Section 86 (1) (b) of the Electricity Act, 2003 was upheld. Hon'ble APEX court, in consonance with its judgement dated 11.04.2017 in the matter of "Energy Watchdog v. Central Electricity Regulatory Commission and others" (2017) 14 SCC 80=2017 INSC 338), has held as under:-

"78. We are, therefore, of the considered view that the learned APTEL has grossly erred in holding that the State Commission has no power to go into the question, as to whether the prices quoted are market aligned or not and also not to take into consideration the aspect of consumers' interest."

"83. We further find that it cannot be read from the orders of this Court that the State Commission was bound to accept the bids as quoted by the bidders till the bucket was filled. Firstly, no such direction can be issued by this Court de hors the provisions of Section 63 and 86(1)(b) of the Electricity Act and the Bidding 64 Guidelines. In any

event, vide order dated 19th November 2018, this Court had specifically directed the State Commission to decide the tariff under Section 63 of the Electricity Act having regard to the law laid down both statutorily and by this Court. As such, the State Commission was bound to take into consideration the Bidding Guidelines and specifically clause 5.15 thereof.”

“105. In any case, the High Court, by the impugned judgment and order, could not have issued a mandamus to the instrumentalities of the State to enter into a contract, which was totally harmful to the public interest. Inasmuch as, if the power/electricity is to be procured by the procurers at the rates quoted by the respondent No.1-MB Power, which is even higher than the rates quoted by the SKS Power (L-5 bidder), then the State would have been required to bear financial burden in thousands of crore rupees, which would have, in turn, passed on to the consumers. As such, we are of the considered view that the mandamus issued by the Court is issued by failing to take into consideration the larger consumers’ interest and the consequential public interest. We are, therefore, of the view that the impugned judgment and order passed by the High Court is not sustainable in law and deserves to be quashed and set aside.”

Regarding the emphasis by HPPC on the importance of establishment of solar plants in Haryana in order to meet the directives of the Government of Haryana, it is reiterated that this Commission is conscious of the efforts required to promote generation of electricity from renewable sources of energy. However, HPPC has lost sight of entering into the PPA dated 20.02.2023 entered into with M/s. Greenyana Solar Pvt. Ltd. with ceiling tariff of Rs. 2.75/kWh. Promotion of RE can not be looked into in isolation and endeavor should be to strike a balance keeping in view the best interest of the electricity consumers of Haryana, who are to be supplied continuous, reliable and cost-effective power, which can be done by inviting fresh bids by re-fixing ceiling tariff aligned with market conditions.

6. The Regulations/Statutes and Case Laws encompass the scope of Review Jurisdiction in very narrow confines. Hence, it is not open for the petitioner to re-agitate the issues without identifying errors apparent or bringing to the table new facts and figures that were not available at the time of passing of the impugned order. A manifest illegality must be shown to exist or a patent error must be shown in an order to review a judgement. No such grounds or patent error have been shown by the review petitioner. The bar against re-consideration of its own decision is a settled principle in adjudicatory

jurisprudence. Once a case has been finally heard and adjudicated upon by the authority concerned, the resultant adjudication can be re-opened for consideration only in appellate jurisdiction.

In terms of the above discussions, the present petition seeking review of the Commission's order dated 05.01.2024, is dismissed after testing it on the anvil of the scope of review jurisdiction of this Commission.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 12.04.2024.

Date: 12.04.2024
Place: Panchkula

(Naresh Sardana)
Member