

**BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION  
BAYS No. 33-36, SECTOR-4, PANCHKULA- 134112, HARYANA**

**Case No. HERC/RA-5 of 2019**

**Date of Hearing : 01.05.2019**

**Date of Order : 01.05.2019**

**In the Matter of**

Application under Section 94(1) (f) of the Electricity Act, 2003 read with Regulations 17, 78 and 85 of the Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 for reviewing and recalling the order dated 08.03.2019 passed by the Commission in Case No. HERC/PRO-15 of 2016 passed in proceedings under section 86(1)(b) of the Electricity Act, 2003 seeking approval for procuring power at regulated tariff from Chanju-1 Hydro Electric Project (36 MW), Himachal Pradesh.

**Petitioner**

Haryana Power Purchase Centre (HPPC)

**Respondent**

M/s IA Hydro Energy Pvt. Ltd. (IAHEPL)

**Present On behalf of the Petitioner**

1. Ms. Sonia Madan, Advocate, HPPC
2. Shri Rajiv Mishra, XEN/HPPC.
3. Shri Saurav Kumar, AE/HPPC.
4. Shri Ravi Juneja, HPPC
5. Shri Randeep Singh, HPPC
6. Shri Rohit Kumar, HPPC/AE

**Present On behalf of the Respondent**

Shri. S.K. Goyal, CEO, M/s IA Hydro Energy Pvt. Ltd. Raipur (CG)

**Quorum**

<b>Shri Jagjeet Singh,</b>	<b>Chairman</b>
<b>Shri Pravindra Singh Chauhan,</b>	<b>Member</b>

**ORDER**

**Brief Background of the Case**

1. The present petition has been filed by HPPC seeking review of the Order of the Commission dated 08.03.2019 in case no. HERC/PRO-15 of 2016.
2. The petitioner submitted as under:-

- a. That HPPC filed a petition (Case No. HERC/PRO-15 of 2016) before this Commission seeking approval for the procurement of power from Chanju-1 Hydro Electric Project (36 MW), Himachal Pradesh of M/s. IA Hydro Energy Pvt. Ltd.
- b. That HPPC vide letter dated 18.02.2019, requested amendment of clause 3.3.2 of the PPA only to the extent that a timeline of 30 days was defined for exit of both the parties. The amended clause was proposed as under -  
*“The Purchaser/Company will have the right to terminate this Agreement within 30 days of the order regarding initial determination of tariff by HERC pursuant to the First Tariff Petition filed by the Company under HERC Tariff Regulations in compliance of condition precedent at clause 3.1.1(ii) if the tariff so determined by the Commission is not acceptable.”*
- c. That the hearing in the matter was held on 20.02.2019. At the time of hearing none of the parties raised any objection with respect to amended clause 3.3.2. The Commission also did not put forth any query on the said clause and thus, HPPC had no occasion to explain the true import of said clause and prominence of its incorporation in the PPA.
- d. That the Commission vide its order dated 08.03.2019, has directed removal of clause 3.3.2 of the PPA. The operative part of the Order dated 08.03.2019 is reproduced hereunder for ready reference –  
*“a) Clause 3.3.2 & Clause 9.1.3. (ii)(b): The Commission considered the exit clause of 30 days sought in clause 3.3.2 of the PPA. The Commission also observed that the ceiling tariff has already been decided by the Commission in its Order dated 10.04.2018. The generator is already giving power supply at average power purchase cost (APPC) to be adjusted against the final tariff determined by the Commission. Thus, both HPPC and generators have the fair idea of the range within which the tariff shall be determined by the Commission. In case the tariff to be determined by the Commission exceeds the ceiling tariff agreed upon, the applicable tariff is to be capped at the ceiling tariff. Thus, retaining unprecedented exit clause is likely to put at risk both the parties i.e. the HPPC regarding quantum of power from the much needed Hydro sources as well as the generator for their such exit.*  
*In view of the above, the Commission is of the considered view that the exit provision sought in clause 3.3.2 of the PPA is unprecedented. Accordingly, clause 3.3.2 and 9.1.3 (ii) (b) contained in the draft PPA shall be removed. Needless to point out that in case of any difficulty to either party arising from the tariff or for that matter any other dispute, mechanism*

*for seeking relief is available under the relevant clause of the Electricity Act, 2003.”*

- e. That the Commission had wrongly observed that retaining exit clause is likely to put at risk both the parities, i.e. HPPC regarding quantum of power from the much needed Hydro sources as well as the generator for their such exit. HPPC has options for meeting its power obligations at competitive prices and thus, by retaining the exit clause, there is no risk regarding quantum of power from the much needed Hydro sources. Moreover, the Respondent has not expressed/substantiated any difficulty vis-à-vis the said exit clause. In that view of the matter, the concern of the Commission in passing orders for deletion of exit clause is unjustified and unnecessary.
- f. That the order of the Commission with respect to deletion of exit clause after having approved the said clause of the PPA at an earlier stage is against the law. The law does not permit the Regulator to retrospectively alter the PPA, especially when the same has been approved by the Regulator in compliance with the provisions of the Act. The Commission thus, erred in passing an order for deletion of the clause 3.3.2 of the PPA at a later stage, for it is estopped from doing so once the same had been duly approved by the Commission in preceding application of HPPC.
- g. That vide order dated 10.04.2018, the Commission while directing parties to recast PPA, had ordered initiation of conciliatory proceedings between the parties with respect to terms and conditions of PPA. The terms and conditions proposed thereafter were therefore, a result of the settlement arrived at between the parties. Thus, the incorporation of timeline of 30 days in exit clause was a result of deliberation of parties, which was done to secure the interest of the parties. The Order of the Commission dated 10.04.2018 directed HPPC to ensure that the power procured is competitive. The subsequent removal of the clause 3.3.2 by the commission is in teeth of the intent and spirit of the Order of the Commission dated 10.04.2018 and is therefore, illegal and patently contradictory to the findings of the Commission.
- h. That an addition was proposed by HPPC only to the effect that both the parties shall give their concurrence for acceptance within 30 days of initial determination of tariff by the Commission. However, the Commission erred in ordering complete deletion of Clause 3.3.2 of the PPA. The said order of the Commission is *per se* illegal as a court or Tribunal cannot

grant a relief that is not asked for, therefore while rejecting the modification, the Commission acted beyond its jurisdiction in removing or deleting the Exit Clause all together.

- i. That, even if the concern of the Commission with respect to risks associated with exit from PPA is presumed, the Commission could have considered the range of tariff (between APPC and ceiling tariff) to be read into the Exit Clause. However, by no means, the deletion of complete clause is justifiable and reasonable keeping in view the interest of the parties. It is further pertinent to note that the proposed amendment by the parties to the said clause prescribing a time period for such termination (i.e. within 30 days from the date of determination of initial tariff by the Commission) vanquishes such risk flowing to either party due to such termination. Thus, the analysis given by the Commission deserves to be reviewed in that light.
- (ii) Clause 1.1 of the PPA i.e. Definition of wheeling charges
  - a. That the HPPC vide letter dated 18.02.2019, requested amendment of clause 1.1 of the PPA only to the extent that definition of Wheeling charges shall exclude losses and thus, the word 'and losses' was proposed to be omitted for the said clause. The said amendment was proposed keeping in consideration that the instant project is connected with the HPESB (Discoms network) not with STU, where the tariff is pooled one. The tariff usually has an increasing trend in such cases on account of higher losses in the distribution network. Thus, inclusion of losses in the definition of Wheeling charges shall escalate the cost of power thereby burdening the consumers of the State.
  - b. That the Commission in the Order dated 08.03.2019 failed to consider the significance of the proposed amendment in the definition of wheeling charges and without giving an opportunity to HPPC to explain the same, ordered that wheeling charges actually incurred by the generators in cash shall not be subjected to the capping of 2% and shall be reimbursed as such.
  - c. That the Order of the Commission to the effect to amend clause 9.2.5 that wheeling charges actually incurred by the generators in cash shall not be subject to the capping of 2% and shall be reimbursed as such fails to take into account the interests of the consumers at the large and is therefore, contrary to the object of the Electricity Act, 2003. The amendment in the definition of wheeling charges which exclude losses and capped the same

@ 2% was proposed after due deliberation between the parties. The Commission is well aware of the fact that the project of the M/s I.A. Energy is connected with the HPESB (Discoms network) not with STU, where the tariff is pooled one. In such cases, the tariff is prone to escalations on account of higher losses in the distribution network, thereby burdening consumers of the State.

- d. That HPPC is aggrieved by the deletion of Clause 3.3.2 of the PPA and Order of the Commission to the effect that Wheeling Charges incurred in cash shall not be subject to the capping of 2% and shall be reimbursed as such. While deleting the said clause, the Commission did not give opportunity to HPPC to explain the true significance and import of proposed amendments.
- (iii) That it is a well settled legal position that a review petition is maintainable where any of the issues raised have not been considered or decided in an order. Reliance in this regard is placed upon the judgment cited as "*Mota Mandir Trust vs. State of Maharashtra*" [(2006) 9 SCC 379]. The order dated 08.03.2019 does not take into account various crucial facts and submissions of HPPC as mentioned hereinabove, and as such, the same is liable to be reviewed/ recalled to the extent that the Clause 3.3.2 & amendment proposed in clause 9.2.5, as proposed by HPPC in its letter dated 18.02.2019 shall be allowed to be retained in PPA. The incorporation of exit provision in PPA is in the interest of both the parties.
- (iv) In view of the above submission, the petitioner has prayed as under:-
- (a) Pass an appropriate order to the effect that the Clause 3.3.2, as proposed by HPPC in its letter dated 18.02.2019 shall be allowed to be retained in PPA ;
  - (b) Pass an appropriate order to the effect that a cap of 2% shall be maintained on all Wheeling charges in reference to STU; and
  - (c) Pass any such other or further directions as this Hon'ble Commission may deem fit and proper.

### **Proceedings in the Case**

3. The case was heard on 01.05.2019, wherein the Petitioner i.e. HPPC reiterated the contents of its Review Petition, which for the sake of brevity has not been reproduced herein.
4. Per contra, IAHEPL emphasized the need for reimbursement of wheeling charges paid in cash to HPSEB @ 65 paise per unit for transmission of power

from delivery point (Ex-Generating Bus) up to the sub-station of CTU at Himachal State periphery for injection of power into Grid.

5. M/s. IAHEPL further submitted that while signing of PPA between HPPC & IAHEPL the ceiling limit for Wheeling/ Transmission losses at 2% was imposed by HPPC, however, nothing was specified about payment of wheeling charges in cash. Moreover, the Commission has approved Levelised Tariff @ Rs. 4.50 per Unit Ex-Generating Bus for 35 years, therefore, the wheeling charges payable from the delivery point to the substation of CTU at Himachal State periphery to be paid / reimbursed by HPPC as per actuals in line with power transmission agreement signed by IAHEPL with Himachal State Government and wheeling charges approved by HPERC from time to time.

#### **Commission's Analysis and Order**

6. In Order to examine the scope of review jurisdiction, the Commission has perused the provision of Regulation 78(2) of the HERC (Conduct of Business) Regulations, 2004 including its subsequent amendments, which empowers the Commission to exercise review jurisdiction. The relevant regulation is reproduced below:-

78 (2) "REVIEW OF THE DECISIONS, DIRECTIONS, AND ORDERS:

*The Commission may review its Orders or decisions if:-*

- (a) There exists an error apparent on the face of the record, or*
- (b) Any new and important matter of evidence was discovered which after the exercise of due diligence, was not within the knowledge of or could not be produced by the party concerned at the time when the Order or decision was made, or*
- (c) For any other sufficient reasons".*

The Commission has examined the submission of the petitioner on the anvil of the above statute for exercising review jurisdiction. It has been submitted by the petitioner that the Commission ordered for the removal of the exit clause no. 3.3.2 without any of the party concerned raising the issue. Further, it has been argued that the Commission after recording approval to the PPA including the said clause, is estopped from removing/altering the said clause.

After anxious consideration, the Commission observes that the contention of the petitioner that the Commission had earlier approved the PPA along with clause 3.3.2 is not correct. The clause no. 3.3.2 of the initialled PPA submitted for the approval of the Commission is reproduced as under:-

*“3.3.2 The Purchaser/Company will have the right to terminate this Agreement in case the tariff determined by the Commission initially pursuant to the Petition filed by the Company under HERC Tariff Regulations in compliance of condition precedent at clause 3.1.1 (ii), is not acceptable.”*

The petitioner also cannot argue that merits of the said clause was not considered, as the Commission after due deliberations and after recording the reason in writing, considered it appropriate to delete the said clause in the interest of both the parties.

Further, the Commission has also perused the judgment of Hon'ble Delhi High Court in Aizaz Alam Versus Union of India & Others (2006 (130) DLT 63: 2006(5) AD (Delhi) 297. The relevant extract from the aforesaid judgment is reproduced below:-

*“We may also gainfully extract the following passage from the decision of the Supreme Court in Meera Bhanja V. Nirmala Kumari Choudhury, where the Court, while dealing with the scope of review, has observed:*

*The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1, CPC. The review petition has to be entertained on the ground of error apparent on the face of record and not on any other ground (emphasis added). An error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on points where there may conceivable be two opinions. The limitation of powers of courts under Order 47 Rule 1, CPC is similar to the jurisdiction available to the High Court while seeking review of the Orders under Article 226.*

*Applying the above principles to the present review petition, there is no gainsaying that the review of the Order passed by this Court cannot be sought on the basis of what was never urged or argued before the Court (emphasis added). The review must remain confined to finding out whether there is any apparent error on the face of the record. As observed by the Supreme Court in *Lily Thomas and Ors. V Union of India & Ors.*, the power of review can be used to correct a mistake but not to substitute one view for another (emphasis*

added). That explains the reason why Krishna Iyer, J. described a prayer for review as “asking for the moon” *M/s Northern India Caterers (India) Ltd. V. Lt. Governor of Delhi*”.

7. The Commission has examined the review sought by the petitioner including maintainability tested on the anvil of the aforesaid Regulations / Case Laws and observes as under:-

a) Clause 3.3.2 of the PPA i.e. Exit Clause

The HPPC has submitted that the impugned order of the Commission dated 08.03.2019 with respect to deletion of exit clause is against the law and the concern of the Commission in passing orders for deletion of exit clause is unjustified and unnecessary. HPPC further submitted that during the hearing none of the parties raised any objection with respect to amended clause 3.3.2. The Commission also did not put forth any query on the said clause and thus, HPPC had no occasion to explain the true import of said clause and prominence of its incorporation in the PPA.

In this regard, the Commission observes that the direction for deletion of exit clause was given in the impugned order dated 08.03.2019 after careful examination of all facts and circumstances of the case and justification for doing so was also explained in the impugned order. The relevant extract of the Order of the Commission is reproduced below:-

**“a) Clause 3.3.2 & Clause 9.1.3. (ii)(b):** *The Commission considered the exit clause of 30 days sought in clause 3.3.2 of the PPA. The Commission also observed that the ceiling tariff has already been decided by the Commission in its Order dated 10.04.2018. The generator is already giving power supply at average power purchase cost (APPC) to be adjusted against the final tariff determined by the Commission. Thus, both HPPC and generators have the fair idea of the range within which the tariff shall be determined by the Commission. In case the tariff to be determined by the Commission exceeds the ceiling tariff agreed upon, the applicable tariff is to be capped at the ceiling tariff. Thus, retaining unprecedented exit clause is likely to put at risk both the parties i.e. the HPPC regarding quantum of power from the much needed Hydro sources as well as the generator for their such exit.*

*In view of the above, the Commission is of the considered view that the exit provision sought in clause 3.3.2 of the PPA is unprecedented. Accordingly, clause 3.3.2 and 9.1.3 (ii) (b) contained in the draft PPA shall be*

*removed. Needless to point out that in case of any difficulty to either party arising from the tariff or for that matter any other dispute, mechanism for seeking relief is available under the relevant clause of the Electricity Act, 2003.”*

b) Clause 1.1 of the PPA i.e. Definition of wheeling charges

The HPPC has submitted that the impugned order of the Commission dated 08.03.2019 to the extent of the directions given that Wheeling Charges incurred in cash shall not be subject to the capping of 2% and shall be reimbursed as such, fails to take into account the interests of the consumers at the large and is therefore, contrary to the object of the Electricity Act, 2003.

In this regard, the Commission observes that the Commission in its Order dated 10.04.2018 in case no. HERC/PRO-15 of 2016 had approved the procurement of power from M/s. IAHEPL at Levelised Tariff @ Rs. 4.50 per Unit Ex-Generating Bus for 35 years. Therefore, wheeling charges for transmission of power from delivery point (Ex-Generating Bus) up to the sub-station of CTU at Himachal State periphery for injection of power into Grid, were required to be borne by HPPC. The Commission in its Order dated 10.04.2018 (HERC/PRO-15 of 2016), while granting the source approval, observed the following at para 8:-

*“.....The Commission however observes that there would be additional costs on account of wheeling/ Transmission charges to be paid to the State Utility of Himachal Pradesh. As such, in order to address the issue raised by the intervener, HPPC may ensure that the negotiated price is reasonable and that they would not be able to source power at a rate lower than that of the projects selected by them.”*

The Commission observes that negotiated price mentioned in the ibid order ought to have the agreement between both the parties. However, in the present case, the Generator has argued that wheeling charges payable in cash to HPSEB for transmission of power from delivery point to CTU was never agreed between the parties and also that nothing has been specified about payment of wheeling charges in cash. Accordingly, after careful examination of all facts and circumstances of the case, the Commission in the impugned order has retained the capping of wheeling charges and losses at 2% of the energy transmitted and directed that *“wheeling charges actually incurred by the generators in cash shall not be subjected to the capping of 2% and shall be reimbursed as such.”*

8. In view of the above discussions, the Commission observes that all crucial facts and submission of the Petitioner was duly considered while passing the impugned Order dated 08.03.2019. Further, there is no error apparent on the fact of the Order warranting any Review. Therefore, the judgment cited by the Petitioner ("Mota Mandir Trust vs. State of Maharashtra (2006) 9 SCC 379") can be differentiated on fact and circumstances of the present case. Hence, the judgement cited by the petitioner does not apply in the present case brought before this Commission.
9. The Review Petition is accordingly dismissed as the same is beyond the scope of review jurisdiction of this Commission.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 01st May, 2019.

Date: 01.05.2019  
Place: Panchkula

(Pravindra Singh Chauhan)  
Member

(Jagjeet Singh)  
Chairman