

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

In the matter of:

Petition seeking review of the order of the Commission dated July 8, 2016 in the petition for adjustment of tariff for Vanala SHPs (15 MW) unit of M/s Him Urja Pvt. Ltd. as per Section 61 & 62 of the Electricity Act, 2003.

In the matter of:

M/s Him Urja Pvt. Ltd.

.... Petitioner

And

In the matter of:

Uttarakhand Power Corporation Ltd.

...Respondent

CORAM

Shri Subhash Kumar Chairman

Shri K.P. Singh Member

Date of Hearing: September 20, 2016

Date of Order: September 20, 2016

The Order relates to the Petition dated 01.09.2016 filed by M/s Him Urja Pvt. Ltd. (hereinafter referred to as "Petitioner" or "Generator" or "MS/ HUPL") for review of the Commission's Order dated 08.07.2016 in the matter of revision in tariff on account of adjustment of subsidy for Vanala Small Hydro Power Project (15 MW) .

1. Background & Submissions

- 1.1. The Commission had vide its Order dated 14.04.2014 specified project specific tariff of Rs. 4.00 per unit for Vanala SHP in accordance with UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Cogenerating Stations) Regulations, 2010.
- 1.2. The Petitioner had challenged the above Order before the Hon'ble Appellate Tribunal for Electricity in Appeal No. 178 of 2014. Among other issues the Petitioner had contested that

the capital subsidy which had not actually been received should not be deducted while determining total cost of the project. The Hon'ble Appellate Tribunal for Electricity had dismissed the appeal on various grounds. However, the Hon'ble Tribunal permitted the Petitioner to approach the UERC for adjustment of the amount of capital subsidy in accordance with the Regulations.

- 1.3. The Petitioner had filed a Petition seeking revision of tariff on account of adjustment of subsidy not received from MNRE in respect of its Vanala SHP. During the proceedings the Petitioner acceded to the fact that subsidy was not released by MNRE since the requisite criteria was not qualified by its SHP. Further, the Petitioner also submitted that it may get subsidy from MNRE since it had not been denied for the same in perpetuity. The Commission vide its Order dated 08.07.2016 decided as following:

"Accordingly, the Commission is of the view that redetermination of the tariff without deduction of subsidy from capital cost, as requested by the Petitioner, shall be considered subsequent to ascertainment of refusal of subsidy by the MNRE. Till such time existing levelised tariff as determined by the Commission shall remain applicable. Hence, the Petitioner's prayer in this regard is, hereby, rejected."

- 1.4. The instant Petition dated 01.09.2016 has been filed for review of the above mentioned Order dated 08.07.2016 on the following grounds:

"

- (a) *It is respectfully submitted that the petitioner is seeking adjustment of the tariff on account of increase in capital cost of the project necessitated by the non deduction of the capital subsidy which has not been received by the petitioner. The relief sought for is in accordance with the regulation 16 (3) of the UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations, 2010, as amended from time to time. The petitioner has not been able to get subsidy as it could not fulfill obligation of testing and performance of MNRE due to various reasons like silt and natural disaster which are beyond control of the petitioner and not attributable to it, therefore the default is due to reasons beyond control of the petitioner.*
- (b) *The petitioner prays that the carrying cost as per the discounting factor adopted for determining the tariff may kindly be allowed. It is based on principle of equity.*
- (c) *In the alternative the petitioner prays that the increased tariff may be allowed for the period from the date of commissioning of the project till today with carrying cost as above subject to adjustment in future.*

- (d) *The petitioner is passing through extreme financial hardship as both the projects are damaged and all revenue streams have dried up and the petitioner has to incur huge expenses on restoration of the project. Therefore the revision if allowed will go long way to mitigate the hardship.*"

1.5. The Petitioner was heard on 20.09.2016, wherein, the Petitioner reiterated its submissions.

2. Commission's Views and Decision

2.1 Powers of Commission and Grounds for Review

2.1.1 Before going into the merits of the Petition, the Commission first looks into the powers vested in it to review its Orders in order to establish the maintainability of the Petition. In this regard, reference is drawn to section 94(1)(f) of the Electricity Act, 2003 which specifically empowers the Commission to undertake review, which can be exercised in the same manner as a Civil Court would exercise such powers under section 114 and Order XLVII of the Code of Civil Procedure, 1908 (CPC).

2.1.2 The powers available to the Commission in this connection have been defined in section 114 and Order XLVII of the CPC. Under the said provisions, review of the Order is permitted on three specific grounds only, namely:

- (a) Discovery of new and important matter or evidence, which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time of passing of the Order.
- (b) Mistake or error apparent on the face of the record; or
- (c) Any other sufficient reasons.

2.1.3 The application for review has to be considered with great caution to ensure that it fulfill one of the above requirements to be maintainable under law. On the discovery of new evidence, the application should conclusively demonstrate that (1) such evidence was available and was of undoubted character; (2) that it was so material that its absence might cause miscarriage of justice; (3) that it could not be with reasonable care and diligence brought forward at the time of proceedings/passing of Order. It is well settled that new evidence discovered, if any, must be one, relevant, and second, of such character that had it been given, it might possibly have altered the judgment.

2.1.4 With regard to mistake or error apparent on the face of the record, the error should be apparent enough to be noticed and presented before the Court to take cognizance of

the same during review proceedings. However, if it is a case that the Petitioner was not able to properly explain a legal position at the time of proceedings, it does not make a ground for a review.

2.1.5 With regard to any other sufficient reason, the Courts have interpreted these words that such reasons should be at least analogous to those specified immediately above the clause. The courts have interpreted this phrase on the facts and circumstances of each case. It is a well-settled law that a review of the Orders of the Court/ Commission should be used sparingly after examining the facts placed before the Court. An erroneous view or erroneous judgment is not a ground for review, but if the judgment or order completely ignores a positive rule of law and the error is so patent that it admits of no doubt or dispute, such an error must be corrected in the review. A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected, but lies only for a patent error. A review can only lie if one of the grounds listed above is made out.

2.1.6 The above legal position emerges out of various judgments of Supreme Court, notably, Smt. Meera Bhanja Vs. Smt. Nirmala Kr. Chaudhary [(1995) 1 SSC 170], Ajit Kumar Rath Vs. State of Orissa and others [(1999) 9 SSC 596] and Devendra Pal Singh Vs. State and another [(2003) 2 SSC 501]. With this background on legal provisions of the Review Petition, the Commission has examined the issues raised by the Petitioner to ascertain whether the issues raised by the Petitioner qualify for review or not.

2.1.7 The Petitioner's review petition is based on the fact that the MNRE's subsidy was not obtained by it due to occurrences of natural calamities and increase in silt profile which were not in control of it, accordingly, necessary adjustment in tariffs be allowed to it at least for the period from the date of commissioning of the project till date. In this regard, it may be noted that in accordance with the regulations, the Commission has already taken a view on this issue at Para 2.4 & 2.5 of the Order dated 08.07.2016 as follows:

"2.4 Further, reason for not availing the subsidy from MNRE is on account of not meeting the certain predetermined criteria. From the above mentioned submission of the Petitioner, it is apparent that the generator's prospects of obtaining subsidy from MNRE still exists since it has not been denied in perpetuity. Regarding prayer of the Petitioner for revision of capital

cost and corresponding redetermination of tariff of its Vanala SHP, the Commission is of the view that considering the capital subsidy from MNRE levelised tariff had already been determined by the Commission for life of the SHP. Redetermination of tariff without considering the subsidy, as requested by the Petitioner, and levying of the same for the period till ascertainment of grant or permanent denial of subsidy to the Petitioner by MNRE may become futile in the event subsidy is granted to the Petitioner which shall further reinstate the tariff since the existing approved tariff is based on the similar eventuality. Since the tariff of the project has been determined for life of the project in accordance with the Regulations, frequent changes in the same, as envisaged above, may frustrate the intent of uniform levelised tariff for the renewable energy based project. Further, this would also set a precedence allowing other RE generators to approach the Commission to get their tariffs revised each year which would defeat the intent of a generic tariff. Revision in tariff in accordance with the Regulations may be carried out once the subsidy is received or it is established that the developer will no longer be getting any subsidy from MNRE in future. The same is the intent of the Regulations also which says that corrections in tariffs would be carried out by the Commission if MNRE reduces the amount of subsidy.

2.5 Accordingly, the Commission is of the view that redetermination of the tariff without deduction of subsidy from capital cost, as requested by the Petitioner, shall be considered subsequent to ascertainment of refusal of subsidy by the MNRE. Till such time existing levelised tariff as determined by the Commission shall remain applicable. Hence, the Petitioner's prayer in this regard is, hereby, rejected."

2.1.8 Apparently, no new fact has been brought out by the Petitioner since the issue submitted in its instant Petition has already been decided as above. The issue/fact resubmitted by the Petitioner is not a ground for filing a review petition as these grounds have already been dealt with in the earlier orders of the Commission and no new grounds, evidence or mistakes apparent on the face of record were raised by the Petitioner and thus, it is concluded that the three grounds for review are not fulfilled in any way.

2.1.9 The Petitioner submitted that the RE Regulations permit change in tariff from time to time. Further, that the project specific tariff has been determined for its SHP and it was not a normative/generic tariff. Therefore, there is an error apparent in the Commission's Order dated 08.07.2016. In this regard, it is hereby clarified that the

project specific tariff approved for the SHP was a levelised tariff. Further, the RE Regulations also do not provide for truing up of tariffs every year except in cases of additional capitalization for developers who have opted for project specific tariff. In this regard, Regulation 15(3) & (4) of RE Regulations, 2013 are reproduced hereunder:

“(3) Subsidy available from MNRE, to the extent specified under Regulation 24, shall be considered to have been utilized towards pre-payment of debt leaving balance loan and 30% equity to be considered for determination of tariff.

Provided further that it shall be assumed that the original repayments shall not be affected by this prepayment.

(4) The amount of subsidy shall be considered for each renewable source as per the applicable policy of MNRE. If the amount of subsidy is increased or reduced by MNRE, then necessary corrections in tariffs would be carried out by the Commission provided the reduction in subsidy amount is not due to the inefficiency of the generating company.”

The Regulations clearly specify that necessary corrections in tariffs will only be made if the amount of subsidy is either increased or reduced by MNRE. It does not anywhere say that it is only for generic tariff. The principle applies equally to the generator opting for project specific tariff or opting for generic tariff. Hence, till it is established that either no subsidy would be eligible to a generator or subsidy amount is reduced by MNRE, no corrections will be made in tariffs. Hence, the Petitioner’s contention in this regard is not tenable and rejected accordingly.

2.1.10 The Petitioner during the hearing also referred to the Judgments of Hon’ble Supreme Court and Hon’ble APTEL providing change in tariff stipulated in the PPA. However, ground for revision in tariff as proposed by the Petitioner is not similar in the instant case as considered in the above referred Judgment of superior authorities.

2.1.11 Based on the above analysis, the Commission decides that the petition for review is not maintainable. Accordingly, the Review Petition filed by M/s HUPL, being not maintainable, is hereby dismissed.

2.2 Ordered accordingly.

(K.P. Singh)
Member

(Subhash Kumar)
Chairman