Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 120 of 2008 & IA No. 152 of 2008

Dated : 21st July, 2009

Coram : Hon'ble Mrs. Justice Manju Goel, Judicial Member
Hon'ble Mr. H. L. Bajaj, Technical Member

In the matter of:

Himachal Pradesh State Electricity Board
Vidyut Bhawan,
Shimla – 171 004 … Appellant(s)

Versus

1. **Himachal Pradesh State Electricity Regulatory Commission**
   Keonthal Commercial Complex,
   Khalini, Shimla – 2

2. **M/s Jai Parkash Hydro Power Ltd. (JHPL)**
   C-16, Sector-I, SDA Housing Colony,
   New Shimla – 171 009 … Respondent(s)

Counsel for the appellant(s) : Mr. Yogender Handoo
Mr. Maninder Singh
Mr. Tajender Bhatia

Counsel for the Respondent(s) : Mr. Sanjay Sen

Mr. Samiron Borkataky
Ms. Shikha Ohri
Ms. Ruchika Rathi

Mr. S. B. Upadhyay, Sr. Adv.
Mr. Jaiprakash
Mr. Pawan Upadhyay
Mr. Shiv Mangal Sharma
Mr. Rohit Kumar Yadav
Mr. Puneet Parinar
Ms. Anisha Upadhyay

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

The appeal challenges the order of the Himachal Pradesh Electricity Regulatory Commission (Commission for short) dated 24th February, 2007 in Petition No. 338 of 2005 and the order of the Commission dated 07.02.08 in Review Petition No. 75 of 2007 & Review Petition No. 94 of 2007.

Facts:

02) The appellant is engaged, inter alia, in the business of providing electricity to consumers throughout the State of Himachal Pradesh. The respondent No.2 is a hydro power developer and is a wholly owned subsidiary of Jaiprakash Industries Limited. On 23.11.91 a Memorandum of Understanding was signed between the Government of Himachal Pradesh and Jaiprakash Industries

Limited for development of the run-of-the-river 300 MW Baspa II hydro project.

03) Jaiprakash Industries Limited filed a Detailed Project Report (DPR) for setting up the projects at a capital cost of Rs.883 Crores. Subsequently, an Implementation Agreement was entered into on 01.10.92 which envisaged incorporation of the respondent No.2 for the purpose of building and operating the project undertaken by Jaiprakash Industries Limited. On 04.06.97 a Power Purchase Agreement (PPA for short) was entered into between the appellant and the respondent No.2 for purchase of power from the plant to be set up on river Baspa. The plant became commercially operational on 08.06.03. On 21.11.05 the respondent No.2 filed a petition before the Commission for fixation of tariff being petition No. 338 of 2005 on which the impugned order dated 24.02.07 was passed. A review petition, being petition No. 94 of 2007 was dismissed by the Commission vide impugned order dated 07.02.08.

The issues:

04) The appellant has challenged the tariff fixation on the following points:

a) incentive on secondary energy
b) incentive on higher plant availability

c) incentive on higher plant availability during financial year 2005-06 & 2006-07 when plant was out of operation

d) Escalation in O&M charges

e) outstanding balance

f) cost of infirm energy

g) interconnection expenditure

h) interest on loan

05) We proceed to examine submission on each point.

a) Incentive on secondary energy:

The Commission has fixed primary energy rate at Rs.2.63/unit and secondary energy rate at Rs.2.97/unit. According to the PPA secondary energy rate has to be fixed as under:

> *"8.9.1 INCENTIVE FOR SECONDARY ENERGY*
>
> *The per unit rate for saleable secondary energy (i.e. 88% of the secondary energy available at interconnection point at Jhakri) shall be calculated by dividing 10% return on equity with normative saleable Secondary energy amounting to 155 MU at Jhakri. The charges for the saleable Secondary energy for any tariff year shall not exceed 10% Return on Equity. The above energy figures take into account the release of five cusec of water to be ensured by the company immediately down stream of the*

barrage, auxiliary consumption and losses upto Jhakri as well as the 12% free energy on the component of Secondary energy. In case of tariff period/last tariff year the annual ceiling of 10% ROE shall be reduced on pro-rata basis."

06) The appellant contends that return on equity has been defined as "*return on equity at a per annum rate of 16% calculated from the COD of the project*". The appellant contends that 10% return on equity in the clause 8.9.1 of the PPA should be interpreted as 10% of 16% return on equity. Thus while the Commission has calculated the 10% return on equity at Rs.46.01 Crores, the appellant wants the same to be calculated at Rs.7.36 Crores being 10% of the 16% return which was 73.63 Crores.

07) The respondent No.2, however, contends that the interpretation offered by the appellant is misconceived. We are not able to agree with the appellant. The fallacy in the interpretation of the appellant becomes clear when the clauses 2.2.103 & 8.7.3 of the PPA are read they stand as under:

RETURN ON EQUITY (ROE)
Means return on the Equity at a per annum rate of 16% calculated from the COD of the Project (or with respect to

any portion invested on a later date, with the approval of the Board from the date such portion was invested). This will be calculated as per Section 8.7.3. The 16% return on equity in respect of the period from COD of the unit(s) to COD of the Project shall be calculated on the proportionate amount of the equity for the unit(s).”

RETURN ON EQUITY

Return on Equity for each tariff year from the initial tariff year onwards will be calculated at a per annum rate of 16% (sixteen percent) of the equity component of the capital cost as per approved financial package. The return on equity for the tariff period and the last tariff year shall be worked out on proportionate basis for actual number of days for which such return on equity is to be determined.”

08) While in clause 2.2.103 the term used is “*16% return on equity*” in clause 8.7.3 the term used is 16% of the equity component. The appellant itself contended that “16% return on equity” means 16% of the equity component of the capital cost. Therefore, “*10% return on equity*” appears in clause 8.9.1 has to be interpreted as 10% of the equity component. It will not be proper to read ‘10% return on equity’ as ‘10% of the return on equity’. Hence, the conclusion of the appellant on this aspect has to fail.

09) In the rejoinder, the appellant has taken the pleas that Clause 39 of the Central Electricity Regulatory Commission Regulations dated 26.03.2004 specifically states that the secondary energy rate shall be equal to primary energy rate whereas the secondary energy rate calculated by the Commission is 2.97 per unit which is higher than the primary energy rate which is 2.63 per unit. This plea had not been raised before the Commission and the Commission had no opportunity of dealing with this contention.

10) The Central Electricity Regulatory Commissions Regulations are not attracted to the present case. The Tariff Regulations of Himachal Pradesh State Electricity Commission does not have any such Rule. On the other hand, Rule 2 (iii) of the Himachal Pradesh Electricity Regulatory Commission (Terms and Conditions for determination of tariff) Regulations 2004 gives precedence to the bilateral agreements between the State Government and the generating company and to power purchase agreements. Where a PPA has been approved by the Commission, the tariff fixed by such PPA has to be adopted by the Commission as the tariff. Regulation 2(iii) of the Himachal Pradesh Electricity Regulatory Commission is extracted below:

> "*(3) Where tariff has been determined bilaterally between the State Government and the generating company and*

the power purchase agreement has been approved by the Commission based upon such tariff, the Commission shall adopt such tariff together with the terms and conditions of such approved power purchase agreement."

11) Further the Ministry of Power issued a clarificatory letter dated 15.02.2008 conveying therein that the provisions of tariff policy would not alter legal enforceability of already concluded contract unless and until altered on mutually agreed terms and conditions. Accordingly, the challenge to the fixation of secondary energy rate on the ground that it is hit by Regulation 39 of CERC Tariff Regulations has to be rejected.

b) Incentive on higher plant availability:

Incentive in paragraph 5.10 of the impugned order the Commission has dealt with incentive for higher plant availability. The Commission here recalls clause 8.10 of the PPA. In case the plant availability exceeds a normative level of 90% the respondent No.2 is entitled to incentive @ 0.35% of equity component of the capital cost as per approved financial package for each percentage increases in the plant availability above 90% normative level during the year when the plant availability is more than 90%. The clause also says that the amount of this incentive payable for any tariff year shall not exceed 2% ROE for a tariff year. The contention of the appellant

is that the Commission has interpreted 2% Return On Equity in the same manner it has interpreted 10% Return On Equity in determining secondary energy rates. The interpretation of the appellant is incorrect as found above. The appellant's challenge to the Commission's impugned orders, relating to incentive on higher plant availability, therefore has also to fail.

(c) Incentive on higher plant availability during the FY 2005-06 and 2006-07 when admittedly the plant was out of operation during the period on 19.01.2006 to 02.05.2006:

12) In its review order, the Commission considered the plea of the appellant that during the period of 19.01.06 to 02.05.06 the plant was not in operation and therefore no incentive on account of higher plant availability could be granted to the appellant. Paragraph 4.8 of the review order deals with the issue. In paragraph 4.8.1 the Commission has set out the plea of the Board regarding the plant remaining out of operation during 19.01.06 to 02.05.06. The Commission says that a committee was constituted for determining whether inoperation of the plant was due to force majeure event. Commission expressed the following view:

> *"The commission would take a view on the Board's contention once the said committee decides on the non-functioning of Baspa-II power plant w.e.f. 19.01.2006 to*

02.05.2006. The Board wil submit the report of the committee for consideration of the Commission by 30th June, 2008"

13) The respondent No.2 submits that the said committee has held the inoperation as a force majeure event. The respondent No.2 also contends that the deemed plant availability on account of force majeure has to be considered at 90% and that higher plant availability for the FY 2005-06 and 2006-07 has been allowed by the Commission as per the provisions of the PPA. Therefore, the plea of the appellant that higher plant availability has been wrongly calculated is incorrect.

14) **The other issues :**

(d) Escalation in O&M charges:

This issue has also been taken care of in the MYT order for the period 2009-12 and therefore need not be dealt with in this appeal.

(e) Arrears:

We are informed at the bar that the question of arrear is being taken care of in the Multi Year Tariff (MYT) order for the period

of 2009-12 and therefore need not be considered in this appeal.

(f) Cost of infirm energy:

The respondent No.2 has admittedly not raised any bill for infirm energy. Accordingly, dealing with this issue need not arise.

(g) Inter-connection expenditure:

This ground is not pressed.

(h) Interest on loan:

This ground is not pressed.

15) In view of the above, the appeal fails and the same is accordingly dismissed.

16) With this the Interlocutory Application No. 152 of 2008 also stands disposed of.

17) Pronounced in open court on this ***21st day of July, 2009***.

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member