

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Review Petition No 2/2013
In
Petition No 43/MP/2012**

**Coram
Shri V S Verma, Member
Shri M Deena Dayalan, Member**

**Date of Hearing: 18.07.2013
Date of Order : 10.10.2013**

In the matter of

Petition seeking review of the Order dated 31.01.2013 passed by this Hon'ble Commission in Petition No. 43/MP/2012 titled as "Himachal Sorang Power Limited versus Powergrid Corporation of India Limited

And in the matter of

Himachal Sorang Pvt. Ltd.

Review Petitioner

Vs

Power Grid Corporation of India Ltd

Respondent

Parties Present

1. Shri Amt Kapur, Advocate, HSPL
2. Shri Apoorva Mishra, Advocate, HSPL
3. Shri Sidhartha Das, HSPL
4. Shri Haziq Beg, HSPL
5. Shri U K Tyagi, PGCIL
6. Shri V Thiagarajan, PGCIL

ORDER

The Review Petitioner, (for the purpose of this order referred to as "the petitioner"), seeks review of the Commission's order dated 31.1.2013 in Petition No 43/MP/2012 (the original petition) on the ground that in the proceedings of the original petition the petitioner inadvertently missed to produce certain material documents which go to the root of the matter. The petitioner has further prayed to

hold that long-term access of the petitioner should commence only from March 2013. The prayers made by the petitioner are reproduced below:

- “(a) Admit the present Review Petition;*
- (b) At the time of hearing of this Review Petition, summon this Hon'ble Commission's records of the Petition No. 43/MP/2012;*
- (c) Review the Order dated 31.01.2013 in terms of the submissions made in the present review Petition to hold that LTOA of the Review Petitioner could commence only from March 2013;*
- (d) Pass such order as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.”*

2. The petitioner, a generating company, has implemented a 100 MW (2 x 50) run-of-the-river hydro electric power project on the Sorang Nallah tributary of Satluj river, in the State of Himachal Pradesh (Sorang HEP). The petitioner executed the Bulk Power Transmission Agreement dated 21.10.2009 (BPTA) with the respondent to avail long-term access for evacuation of power. As per the BPTA, long-term access was to commence earlier of the two dates, May, 2011 or the actual date of commercial operation of the first unit of Sorang HEP. It was agreed under the BPTA that the power generated at Sorang HEP was to be evacuated through a LILO of one circuit of 400 kV D/C Karcham Wangtoo-Abdullapur transmission line, to be constructed by the petitioner at Sorang, which was being executed by Jaypee Powergrid Ltd. and which joins with the transmission network of the respondent at Abdullapur sub-station.

3. In the original petition, the petitioner submitted that it was anticipating delay in the commissioning of Sorang HEP on account of geological surprises which were the *force majeure* events under the BPTA. Accordingly, the petitioner primarily sought extension of the date of commencement of open access from

May, 2011 to September, 2012, which was said to be the expected date of commissioning of Sorang HEP, though it had also sought certain incidental reliefs.

4. In the reply/affidavit, the respondent had brought out that the petitioner had initially sought revision of the date of commencement of open access from May, 2011 to January, 2012 because of the anticipated delay in commissioning of Sorang HEP and subsequently made another request for revision of the date to May, 2012. The respondent had stated that the petitioner's request was declined at the NRPC forum. Subsequently, the petitioner by its letter dated 7.7.2011 represented to CTU that the open access should commence upon commissioning of the Karcham Wangtoo-Abdullapur transmission line. The respondent agreed to the proposal of the petitioner to revise the date of commencement of open access to coincide with date of commercial operation of Karcham Wangtoo - Abdullapur transmission line, which was 1.4.2012.

5. The Commission on consideration of the material available on record concluded that Sorang HEP was delayed on account of improper planning and execution of the works by the petitioner for which the respondent could not be made to suffer. The Commission by its order dated 31.1.2013 decided that the petitioner was liable to pay the transmission charges with effect from 1.4.2012, the date of commercial operation of Karcham Wangtoo-Abdullapur transmission line. The basis for the Commission's decision was that the petitioner vide its letter dated 7.7.2011 addressed to the respondent, had specifically asked for linking of the commencement of long-term access with the date of commercial operation of Karcham Wangtoo – Abdullapur transmission line.

6. The petitioner in the review petition has argued that it submitted an application under letter dated 24.11.2011 addressed to the respondent “for connectivity for Sorang HEP to inter-State transmission system” in which September, 2012 was indicated as the time for completion of Sorang HEP. The petitioner has submitted that in Schedule A of the PERT chart, it specifically mentioned that the dates of commissioning of first and second units would be 10.9.2012 and 8.10.2012, respectively. The petitioner has also submitted the data regarding connectivity was processed by the respondent as per the Approved Procedure under the Connectivity Regulations for signing of Connection Agreement. The petitioner has further submitted that the respondent vide its letter dated 31.1.2012, addressed to Jaypee Powergrid Ltd. forwarded the draft Connection Agreement for the latter’s concurrence clearly mentioning in the draft Connection Agreement that the date of commissioning of Sorang HEP was September, 2012. The petitioner has submitted that the respondent granted connectivity under letter dated 14.2.2012 pursuant to its application dated 24.11.2011 wherein again the date of commissioning of Sorang HEP was shown as September, 2012. The petitioner has submitted that after concurrence of Jaypee Powergrid the Connection Agreement was signed on 6.3.2012 in which the date of commissioning of Sorang HEP has been shown as September, 2012.

7. Based on the above submissions, the petitioner has urged that after acceptance of the date of connectivity of Sorang HEP as September, 2012, the respondent cannot take a contrary stand that long-term access for Sorang HEP was to commence from a date earlier than September, 2012. The petitioner has further submitted that the respondent cannot unilaterally change the date agreed under the tripartite Connection Agreement signed between Jaypee Powergrid Ltd.,

the respondent and the petitioner to its own advantage and the petitioner's disadvantage.

8. The petitioner has further submitted that in the additional affidavit dated 8.10.2012 filed in the original petition, the petitioner had mentioned that a tripartite Connection Agreement dated 6.3.2012 and the Transmission Service Agreement dated 29.5.2012 had been executed. However, the petitioner could not inadvertently mention that as per the petitioner's application dated 24.11.2011 for grant of connectivity, the respondent's letter dated 14.2.2012 granting connectivity and the Connection Agreement, the commissioning date of Sorang HEP had been considered as September, 2012. The petitioner has submitted that it inadvertently failed to place these documents on record. Since there are relevant documents with regard to the commissioning of Sorang HEP, the impugned order needs to be reviewed.

9. The petitioner has submitted that in accordance with clause (7) of Regulation 8 of the Open Access Regulations, a period of six months is allowed to a generating station to inject infirm power before it achieved the date of commercial operation of Sorang HEP. Accordingly, the petitioner has pointed out that since it was granted connectivity from September, 2012, it is entitled to achieve commissioning of Sorang HEP by March, 2013. Regulation 8(7) of Open Access Regulations is reproduced hereunder:

"(7) Notwithstanding anything contained in clause (6) of this regulation and any provision with regard to sale of infirm power in the PPA, a unit of a generating station, including a captive generating plant which has been granted connectivity to the grid shall be allowed to inject infirm power into the grid during testing including full load testing before its COD for a period not

exceeding six months from the date of first synchronization after prior permission of the concerned Regional Despatch Centre"

10. It has been further stated by the petitioner that in the order dated 31.1.2013, the Commission has relied upon the petitioner's letter dated 7.7.2011 wherein the petitioner had requested the respondent to intimate the date of commercial operation of Karcham Wangtoo-Abdullapur transmission line.

11. The respondent in its reply has stated that the petitioner did not ever apply for grant of connectivity but submitted the application for signing of the Connection Agreement as required under the connectivity Regulations. It has been stated that the petitioner in the application had mentioned September, 2012 as the anticipated date of completion of project (Sorang HEP) and this date was adopted in the communications that followed since the respondent could not have changed the date to any other date. The respondent has stated that signing of the Connection Agreement is a technical requirement which has become effective from 1.4.2010 when the Connectivity Regulations were enforced. The respondent has clarified that in none of the documents relied upon by the petitioner it was agreed that the long-term term access would commence in September, 2012 or the transmission charges would be payable from that date.

12. At the hearing on 18.7.2013, learned counsel for the petitioner submitted that LILO through which the petitioner has to connect to Karcham Wangtoo-Abdullapur transmission line of Jaypee Power Grid is not yet ready from the end of Jaypee and hence levy of the transmission charges on the petitioner is unjust and amounts to profiteering. Learned counsel further submitted that some components of work on the transmission line of Jaypee Power Grid which is an

inter-State transmission licensee has to be done by Jaypee Power Grid and the petitioner cannot get the same done unilaterally. Learned counsel also submitted that since Jaypee Power Grid is under the control of the respondent who also performs the statutory functions of the Central Transmission Utility to maintain and coordinate the transmission system, it is implicit that the respondent is responsible for the preparedness of the LILO and the said responsibility is clearly demonstrated and recorded in the recitals of the Connection Agreement.

13. After hearing the parties, the Commission directed respondent to file an affidavit demonstrating as to how it was not responsible for construction of LILO, also giving latest status of LILO.

14. The respondent filed the affidavit dated 16.8.2013, pursuant to the directions of the Commission. The respondent has stated that LILO of Karcham-Wangtoo transmission line is a dedicated transmission line to be built by the petitioner as agreed to under the BPTA. The respondent has refuted the submission of the petitioner that since LILO is not ready, there is no justification for levying the transmission charges as the transmission line for which long-term access has been granted is available for use. The respondent has submitted that completion of LILO being constructed by the petitioner as a dedicated transmission line is its own responsibility and the respondent does not have any role in the matter. The respondent has stated that the Connection Agreement cannot override the BPTA for the reason that there was no provision for grant of connectivity at the time of signing of the BPTA.

15. We have given our conscious thought to the rival submissions. The foremost question that is required to be decided is the maintainability of the Review Petition.

16. The petitioner has sought review of the order dated 31.1.2013 on the ground that certain documents, Annexure 3 to Annexure 8 of the Review Petition, which are stated to go to the root of the matter, were not inadvertently brought on record in the proceedings in the original petition. The issue needs to be examined on the touchstone of sub-rule (1) of Rule 1, Order 47 of the Code of Civil Procedure. Sub-rule (1) is extracted below for convenience of reference:

“1 Application for review of judgment— (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.”

17. Under sub-rule (1), an application for review may be made by a person under any of the following circumstances, namely –

(a) On the discovery of new and important matter or evidence which was not within his knowledge, or which, after the exercise of due diligence could not

be produced by him at the time when the decree was passed or order was made, or

(b) On account of some mistake or error apparent on the face of the record, or

(c) For any other sufficient reason.

18. "Discovery" of new and important matter or evidence is the first essential condition for invoking the review jurisdiction. "Discovery" refers to discovery made after the order was passed, since the order sought to be reviewed was passed because sub-rule (1) allows review on the ground that the new and important matter or evidence was not within his knowledge or could not be produced "at the time the order was passed". The petitioner has stated that it had made submissions in the proceedings in the original petition based on the documents now relied upon. Considering these submissions of the petitioner, it cannot be held to be the case of "discovery" of the documents after passing of the order dated 31.1.2013. The documents relied upon by the petitioner as new evidence in the review petition were already in its possession and within its knowledge when the order dated 31.1.2013 was passed. For the same reason, it cannot be held that these documents now being relied upon are "new" evidence. Therefore, the essential conditions for review are not satisfied.

19. Further, review can be sought only on the ground that new and important evidence could not be produced by the party seeking review after exercise of due diligence. It is, therefore, to be seen whether the petitioner could not produce these document despite exercise of due diligence. The petitioner has stated that it

inadvertently did not produce the documents. There is no averment that the petitioner took reasonable care and diligence and yet the documents could not be produced. It, therefore, can reasonably be inferred that the documents though within the knowledge of the petitioner were not produced since the petitioner considered that the evidence already produced by him was probably adequate. Accordingly, the circumstances only show lack of due diligence on the part of the petitioner. The requirement of the exercise of due diligence at the appropriate time constitutes the very basis for maintaining the application for review. The petitioner has failed to make a case of exercise of due diligence. This is another factor which goes against the petitioner's plea for review.

20 It is not the case of the petitioner that there is any mistake or error apparent on the face of the record, necessitating review of the order dated 31.1.2013. The petitioner has neither pleaded that there exists "any other sufficient reason" for review of the order.

21. In the above circumstances, the Review Petition is not maintainable, as it does not fall within the parameters laid down under sub-rule (1) of Rule 1 of Order 47 of the Code of Civil Procedure. The object of the petitioner seems to be nothing more than a re-attempt by producing additional and supplementary evidence in the hope that it may succeed.

22. The petitioner has now prayed that the Commission should hold that long-term access could commence from March, 2013. In the original petition, the petitioner had claimed that long-term access should be effective from September, 2012 when Sorang HEP was to be commissioned. The petitioner while seeking

review has sought to expand the scope of the original petition. For this reason also, the Review Petition is not maintainable.

23. It is the principle that the new evidence sought to be produced should be such that it should entitle the person seeking review to get the order modified. Therefore, we examine whether the new documents meet this test.

24. The petitioner was granted long-term access under the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2004 (Open Access Regulations 2004) and consequently the BPTA was signed between the petitioner and the respondent. Under the BPTA, the long-term access was to commence in May, 2011 or the date of commercial operation of the first unit of Sorang HEP, whichever was earlier. The petitioner under the BPTA had agreed to pay the transmission charges from the date of commencement of long-term access. Since the commercial operation of Sorang HEP was delayed beyond May, 2011, under the BPTA the date of commencement of long-term access was May, 2011 and the petitioner became liable to pay the transmission charges from that date. However, the petitioner had been representing to defer time for commencement of long-term access to a future date on the ground of delay of commissioning of Sorang HEP. The last request made by the petitioner in this regard was contained in the letter dated 7.7.2011. In this letter, the petitioner suggested to the respondent that date of commencement of long-term access be considered from the date when Karcham Wangtoo – Abdullapur transmission line was commissioned and was ready for evacuation of its power. Karcham Wangtoo – Abdullapur transmission line was declared under commercial operation on 1.4.2012. Since the respondent had agreed to the petitioner's proposal made in

the letter dated 7.7.2011, the Commission in the order dated 31.1.2013 decided 1.4.2012 as the date of commencement of long-term access and for payment of the transmission charges by the petitioner.

25. The petitioner has submitted that since under the various documents, including the Connection Agreement, the respondent had accepted September, 2012 as the date of commercial operation of Sorang HEP, the respondent is estopped from claiming 1.4.2012 as the date of commencement of long-term access.

26. We have examined the submission of the petitioner and the submission of the respondent. Whether the petitioner has relied upon the Connection Agreement, the respondent has submitted that the Connection Agreement cannot over-ride the BPTA for the reason that there was no provision for grant of connectivity at the time of signing of the BPTA. In our considered view these documents do not alter the position already settled by the Commission. In the communications that followed, the respondent has not made any mention that the date of commencement of long-term access would stand deferred to September, 2012 or any other date. The respondent has just accepted the anticipated date of commercial operation of Sorang HEP as September, 2012 as indicated by the petitioner in the additional information for signing the Connection Agreement. The date of commercial operation of Sorang HEP and the date of commencement of long-term access are two different aspects; the former is a part of the Connection Agreement whereas the latter has been consciously agreed to under the BPTA. Therefore, the Connection Agreement does not and cannot over-ride the BPTA which inter-alia specifies the commercial terms and conditions for grant of long-

term access. Such a conclusion can also be drawn from the communications that followed the petitioner's letter dated 24.11.2011 which culminated into signing of the Connection Agreement. Recital (D) of the Connection Agreement states the purpose of its signing as "to record the terms and conditions upon which the Parties will carry out their respective Connection Works, in addition to the estimated cost required to be carried out by the CTU for works related to the interconnection, in accordance with Connection Agreement." Under clause 2.3 of the Connection Agreement, the petitioner had agreed to pay the Monthly Transmission Tariff including ULDC/NLDC charges, for use of Inter-State Transmission System, as and when Long term access, Medium-term open access or Short-term open access is availed by the applicant (petitioner), in accordance with the relevant regulations of the Commission. In the instant case, long-term access has been granted to the petitioner under the Open Access Regulations, 2004. The Commission has already decided that the date of commencement of long-term access as 1.4.2012, which is the date from which the petitioner is deemed to be availing long-term access.

27. At the hearing it was submitted on behalf of the petitioner that some components of work on the transmission line were to be done by Jaypee Power Grid, an inter-State transmission licensee, but had not been completed and consequently LILO could not be completed. It was further submitted that since Jaypee Power Grid was under the control of the respondent in the capacity of the Central Transmission Utility, the respondent has to be held responsible for non-preparedness of LILO. The respondent in its affidavit dated 16.8.2013, has denied its role or responsibility in construction of LILO of Karcham-Wangtoo transmission

line and has pointed out that LILO is a dedicated transmission line to be built by the petitioner as agreed to under the BPTA.

28. This is a new issue which was neither raised in the proceeding in original petition nor even in the Review Petition but has been taken up at the hearing for the first time. In the normal course, this issue cannot be considered in the review proceedings. Nevertheless, we find merit in the submission of the respondent that the preparedness of LILO is the responsibility of the petitioner itself. Under the BPTA, the petitioner had agreed that LILO required for evacuation of power from Sorang HEP “shall be built, owned, operated and maintained by M/S Himachal Sorang Power Pvt. Ltd. in coordination with M/s Jaypee or its designated agency.” Therefore, the petitioner is required to coordinate with Jaypee Powergrid Ltd. on every aspect of LILO from the stage of construction. The petitioner has not stated, even orally, the efforts made by it with Jaypee Powergrid Ltd. for construction or early completion of LILO and the reasons for which these efforts did not meet with success, requiring intervention of the respondent as the Central Transmission Utility.

29. In the written submission filed by the petitioner, it has relied upon the judgments of the Hon’ble Supreme Court in B. L. Sreedhar Vs K. M. Munireddy [(2003) 2 SCC 355] and Ramdev Food Products (P) Ltd Vs Arvindbhai Rambhai Patel [(2006) 8 SCC 726] which are the authority for the proposition that in case a person has waived its rights, such person cannot claim the right indirectly on ground of acquiescence. The petitioner’s argument is that the respondent by signing the Connection Agreement and accepting September, 2012 as the date for connectivity, has waived its right to claim the transmission charges under the

BPTA from a date earlier than September, 2012. There is no merit in the submission. We have already held that the purposes of the BPTA and the Connection Agreement cover the different fields. We have further held that the BPTA is not superseded by the Connection Agreement. In the correspondence that preceded the Connection Agreement, the respondent has not, explicitly or implicitly, agreed to any date for commencement of long-term access. In the circumstances, it is not possible to hold that the respondent waived any part of its right to claim the transmission charges from the date later than 1.4.2012. Therefore, reliance on the above noted judgments of the Hon'ble Supreme Court by the petitioner is highly misplaced.

30. In the light of above discussion, the Review Petition fails and is hereby dismissed.

Sd/-
(M DEENA DAYALAN)
MEMBER

Sd/-
(V S VERMA)
MEMBER