

BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION
SHIMLA

In the matter of :-

M/s Nuziveedu Seed Ltd;
having its corporate office at NSL ICON,
4th Floor 8-2-684/2/A, Road No.12,
Banjara Hills, Hyderabad-500034

...Petitioner

V/s

- (1) The Himachal Pradesh State Electricity Board,
through Secretary, Vidyut Bhawan, Shimla-171004
- (2) The Government of Himachal Pradesh
through the Principal Secretary (MPP &Power),
Shimla.
- (3) The Himachal Pradesh Energy Development Agency
(HIMURJA)
SDA Complex, Kasumpati, Shimla (H.P.) 171009
(through its Director)

... Respondents

Petition Nos. 175/2009 and 170 of 2010
(Decided on 23.11.2010 and released on 17.12.2013)

CORAM
YOGESH KHANNA
CHAIRMAN

Counsels: -

for petitioners:

Sh.Ajay Vaidya,
Advocate,

for respondents No.1

Sh. Ramesh Chauhan
(authorized representative)

for respondents No. 2

Sh. K.S. Chauhan
Dy. D.A.

for respondents No. 3

Sh. Pardeep Bhanot
P.O.

Consumer Representative
(u/s 94 of the Electricity Act)

-None-

Order

(Last heard on 23.10.2010 and Order reserved)

M/s Nuziveedu Seed Ltd; having its corporate office at NSL ICON, 4th Floor 8-2-684/2/A, Road No.12, Banjara Hills, Hyderabad-500034 and also at 504, Vikrant Towers, 4 Rajendra Place, New Delhi-110008 which is a Company incorporated under the Companies Act, 1956, (hereinafter referred to as “the petitioner Company”), entered into, with the Government of Himachal Pradesh, an Implementation Agreement (I.A) on 28.10.2002 to establish, operate and maintain at their cost Masli Small Hydro Electric Project located on Peja Khad in Distt. Shimla (H.P.) with an installed capacity of 5.00 MW (hereinafter referred to as the “project”). Subsequently the petitioner company executed on the 30th December, 2004 a Power Purchase Agreement (in short PPA), with the Himachal Pradesh State Electricity Board (hereinafter referred to as “the Board”), stipulating that the Board shall pay for the net saleable energy delivered by the petitioner Company to the Board at the inter-connection point at a fixed rate of Rs.2.50 (rupees two and fifty paise) per kilowatt hour. Clause 15 of the PPA stipulates that the PPA can be amended only with the written consent of both the parties. In other words, the PPA contained specific stipulations to the extent that the terms of the agreement can be indisputably altered or modified with the unqualified consent of the parties to the agreement.

2. As per practice prevalent in the State of Himachal Pradesh, the entrepreneurs i.e. Independent Power Producers (IPPs), after signing the MOUs, execute the Implementation Agreements with the State Government. Subsequently the entrepreneurs execute the Power Purchase Agreements with the Board, with the stipulation that the entrepreneurs will abide by the terms and conditions of the Implementation Agreements executed by them with the State Government and the Board shall purchase the power generated by the Independent Power Producers at the rate as fixed by the Government of Himachal Pradesh in the year 2000 @ Rs.2.50/Kwh with no escalation.

3. Subsequently the State Government has reviewed its earlier policy and formulated “Hydro Policy of Himachal Pradesh, 2006,” making it obligatory

for the developers to cater to stipulations such as mandatory 15% water release, Local Area Development Charges (LADC), payment of revised compensation to fisheries and towards use of forest land etc. The new policy maintained the tariff at the rate of Rs. 2.50/kwh

4. The Electricity Act, 2003 (hereinafter called “the Act”) and the National Electricity Policy provide the policy framework for promotion of non-conventional energy sources (NCES) and also section 61 (h) of the Act requires the Electricity Regulatory Commissions to promote co-generation and generation of electricity from renewable sources of energy and further in section 86 (1) (e) of the Act, the State Electricity Regulatory Commission is mandated to promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the Grid and sale of electricity to any person and also to specify for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of distribution licensee.

5. In compliance with the statutory provisions in the Act, the policy guidelines given in the National Electricity Policy and the National Tariff Policy and directions given by the APTEL, the Commission made the Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007. Regulation 5 of the regulations (ibid) provides that energy from renewable sources (including upto 25 MW capacity hydro projects) and co-generation, available after the captive use and third party sale outside the State, shall be purchased by the distribution licensee. Sub-regulation (1) of regulation 6 of the regulations (ibid) (as amended on 12th November, 2007), which provides for the determination of tariff for electricity from renewable sources, reads as under:-

“6. Determination of tariff of electricity from renewable sources. –

(1) The Commission shall, by a general or special order, determine the tariff for the purchase of energy from renewable sources and co-generation by the distribution licensee:

Provided that the Commission may determine tariff-

(i) by a general order, for small hydro projects not exceeding 5 MW capacity; and

- (ii) by a special order, for small hydro projects of more than 5 MW and not exceeding 25 MW capacity, on individual project basis:

Provided further that -

- (i) where the power purchase agreement, approved prior to the commencement of these regulations, is not subject to the provisions of the Commission's regulations on power procurement from renewable sources, or
- (ii) where after the approval of the power purchase agreements; there is change in the statutory laws, or rules, or the State Govt. Policy ;

the Commission, in order to promote co-generation or generation of electricity from renewable sources of energy, may, after recording reasons, by an order, review or modify such a power purchase agreement or a class of such power purchase agreements”.

6. The second proviso to sub-regulation (1) of regulation 6 of the regulations (ibid) read with clauses (b) and (e) of sub-section (1) of section 86 of the Act, empowers the Commission to review or modify the PPA or class of PPAs, where after the approval of the PPA there is change in-

- (a) statutory laws;
- (b) rules; or
- (c) State Government Policy.

7. Pursuant to the provisions of regulation 6 of the said regulations, referred to in the proceeding paras, the Himachal Pradesh Electricity Regulatory (hereinafter referred as “the Commission”) Commission, issued an Order dated 18th Dec., 2007, determining the general tariff, for Small Hydro Projects, not exceeding 5 MW capacity, (hereinafter referred as the “SHP Order”), relating to purchase of power generated by the Small Hydro Projects in the State of Himachal Pradesh, and the allied issues linked with non-conventional energy sources based on generation and co-generation. The said SHP Order fixed the rate of Rs, 2.87/Kwh, which is applicable to future agreements and to the existing agreements, approved by the Commission in and after the year 2006 with the specific clause that “the tariff and other terms and conditions of the PPA shall be subject to the provisions of the

Commission's regulations on the power procurement from renewable sources and co-generation by the distribution licensees.

8. Being aggrieved by the SHP Order dated 18th Dec., 2007, a number of Independent Power Producers, moved petitions for upward revision of the generalized tariff of Rs. 2.87/Kwh, mainly on the ground of inflation of construction cost, requirement of mandatory release of 15% water discharge, levy of forest charges, w.e.f. 30th Oct., 2002, revision of fisheries charges w.e.f. 30.4.2007 and levy of Local Area Development charges, referred in the Hydro Policy of Himachal Pradesh, 2006. As all the above mentioned petitions arose out of the same SHP Order dated 18th December, 2007 and similar issues were involved, the Commission clubbed the said petitions for consideration and disposal of the generic common issues involved therein; as under i.e. to say:-

- (I) Whether the Commission has power and jurisdiction to re-open the once approved Power Procurement Agreements (PPAs) voluntarily entered into by the IPPs with the HPSEB? If so, to what extent?
- (II) Whether the State Government is the essential party in the proceedings for revising the concluded contracts referred to in issue No.1?
- (III) Whether the agreements executed with a party having dominance over the other party to the agreement can be vitiated as void for being executed without free consent and under duress?
- (IV) Whether each petition needs to be dealt with on merits separately?

9. After due consideration of the submissions made, documents produced and arguments advanced by the respective learned Counsels on behalf of the petitioners, the Commission vide its Order dated 29th Oct., 2009, passed in **Petition No. 11/2008-M/S D.S.L Hydrowatt Ltd V/s HPSEB and others** concluded that:-

- (i) the Commission has the power to re-open the concluded PPAs for the purpose of incentivising the generation from non-conventional energy

projects, within the framework of the Act and the regulations framed thereunder (as spelt out in para 30 of the said Order);

- (ii) policy formulation is the prerogative of the State Government. By virtue of the provisions of section 108 of the Act, in the discharge of its functions, the State Commission is to be guided by such directions in the matters of policy involving public interest as the State Government may give to it. The Implementation Agreements and Power Procurement Agreements, which are based on the State Govt. Hydro Policies, are the key documents. Even though the State Electricity Regulatory Commission is the sole authority to determine the tariff, as per procedure provided for in the Act, the Power Purchase Agreements can not be re-opened, without hearing the State Government as well as the Himachal Pradesh Energy Development Agency (HIMURJA); which are the essential parties in the power procurement process;
- (iii) the undue influence does not make a contract/agreement void. It only makes the contract/agreement voidable. Thus this cannot be assumed that the agreements were result of undue influence, unless the petitioners bring on record the specific instances to prove the execution of PPAs by them under undue influence and the tariff fixed thereunder was unreasonable or unconscionable. On the basis of the generic statements alone no conclusion can be drawn that the special clause relating to generalized tariff in the PPAs should not be enforced;
- (iv) each petition needs to be dealt with on merits. The Commission, can review or modify the concluded PPAs, prospectively, within the scope of the second proviso to sub-regulation (1) of regulation 6 of the regulations (ibid) to cater to the stipulations such as mandatory release of 15% water discharge, payment of revised compensation to fisheries and towards use of forest land; and the LADA charges. While revising the tariff construction cost inflationary factor need not be taken into consideration, and only the narrow area of Govt. policy changes and their impact on tariff is to be quantified prospectively.

10. Further the Commission decided to consider each petition on its merits and to issue individual projectwise orders based on the furnishing of

necessary data / detailed calculations (alongwith supporting documents) on an affidavit with respect to the claims regarding mandatory release of water discharge, payment of differential amount on account of compensation to fisheries and towards the use of forest land; and also the levy of LADA charges.

11. In the meanwhile, the Commission issued the Order dated 10.2.2010, supplementing the provisions of the SHP Order dated 18.12.2007, wherein the adjustments on account of the change in the Minimum Alternate Tax/ Income Tax and Royalty, were dealt with.

12. The petitioner Company has moved petition i.e. No. 175 of 2009 for increasing the tariff, in relation to its project i.e. Masli, Small Hydro Project set up in Shimla District, from Rs. 2.50 per unit to Rs. 2.87 per unit. Subsequently moved petition No. 170 of 2010, seeking enhancement of tariff of Rs. 2.50 per unit to Rs. 3.42 per unit, on the basis of calculations involving the requirement of mandatory release of 15% water discharge, levy of forest and fisheries charges; local area development charge and change in taxes/cess etc. The State Government of H.P. and the Himachal Pradesh Energy Development Agency (HIMURJA) which is the nodal agency in the development of SHPs in the State have also been impleaded as a necessary party.

13. No response has been received from the Government of Himachal Pradesh and the Himachal Pradesh Energy Development Agency (HIMURJA). Only the response from the Board has been received.

14. In its response, the Board states tht Clause 6.2 of the PPA that the rate of Rs. 2.50 (rupees two and paise fifty) p.Kwh is firm and fixed without indexation and escalation and is not to be changed due to any reason whatsoever. The mutually agreed conditions of the agreement have culminated into statutory contract, the same are binding on the parties and the Commission can not either nullify or modify the concluded contract in purported exercise of the regulatory power vested in it.

15. The Hon'ble APTEL in its decisions, **M/s Reliance Energy Ltd V/s Tata Power Corporation (2007) APTEL, 662 and RVK Energy Pvt Ltd V/s Central Power Distribution Co. of A.P. Ltd (2007) ELR (APTEL), 1222** has concluded that it is the mandate under section 86 (1)(e), read with

section 61 of the Act and preamble thereto and the various policy guidelines to promote generation of electricity from renewable sources. In another case of **M/s Rithwik Energy Systems Ltd V/S Transmission Corporation of A.P. Ltd and others 2008 ELR (APTEL) -0237**, APTEL has clearly ruled that PPAs can be re-opened for the purpose of giving thrust to non-conventional energy projects.

16. Moreover the question pertaining to the extent and power and the jurisdiction of the Commission to re-open the once approved Power Procurement Agreements (PPA) voluntarily entered into by the IPPs with the Board as stated in para 9 of this Order has already examined in depth while deciding the batch of petitions on 29th Oct., 2009 i.e. **M/S DSL Hydrowatt Ltd V/S HPSEB and others**, which has not been challenged set aside by way of appeal and till date holds good. This Commission is bound by its own as well as the decisions of the Hon'ble APTEL. In view of this the averments of the Board that the PPAs being concluded contracts cannot be reopened, holds no water.

17. The Commission now keeping in view the response of the Board on the merits proceeds to examine itemwise claims made by the petitioner company, :-

(I) Mandatory release of water discharge-

18. Sub-para (B) of para 30 of the Commission's Order dated 29.10.09 passed in **petition No. 11 of 2008- M/s DSL Hydrowatt Ltd V/s HPSEB and others** reads as under:-

“B Mandatory release of 15% water discharge. -

Even though the risk on account of change in Government policy with respect to minimum flow of water immediately down stream of the project was allocated in the IA/PPA and the IPPs have agreed to it at the time of signing the agreement, the Commission, in order to incentivise the SHP generation, feels it prudent to factor in the impact of the mandatory release of water in the tariff. For this it needs to be ascertained as how much this mandatory release of discharge (which is average of 3 lean months i.e. December, January, February) has affected the project. Thus the hydrological data in the DPRs of individual project needs to be analyzed to assess the impact on generation and on the tariff;”

Submissions of petitioner

19. The Hydro Power Policy-2006 and the various provisions of the Agreement require the petitioner company to maintain a minimum flow down stream of the diversion structure throughout the year, at the threshold value of not less than 15% water flow immediately down stream of the diversion structure of the project all the times including lean seasons from November to March to the main river/water body. Thus, this directive requires the petitioner company to mandatory release and maintain not less than 15% (could be more if desired by the Government) of the available discharge immediately downstream of the diversion structure without allowing the company to utilise it for power generation and in consequence, forego equivalent generating potential of the project in terms of power generation, resulting in financial loss to the petitioner company. The petitioner company further clarifies that the calculation of release of 15% incoming discharge, is not for the entire year, but for the lean period of three months i.e December, January and February which is evident from the details annexed with the petition No. 170 of 2010.

20. The Commission in para 30 (B) of the **Order dated 29.10.2009 passed in petition No. 11 of 2008- M/s DSL Hydrowatt Ltd V/s HPSEB and others**, had desired the hydrological data in the DPR to assess the impact on generation and the tariff considering the mandatory release of discharge on the basis of average of three lean months i.e. December, January and February. Perusal of the provisions of the Hydro Policy 2006 and the Implementation Agreement neither reveals that any modification of the mandatory release downstream of diversion structures limiting to 15% of the minimum observed discharge in contrast to earlier 15% of the incoming discharge at different time, nor refers to considering average of three lean months discharge to calculate the mandatory release quantum. Evidently, the petitioner company is liable to comply with the requirement of the Hydro Policy 2006 and the Implementation Agreement requiring him to release 15% of the incoming discharge throughout the year and the impact on generation and the tariff is to be accordingly worked out. The water release and energy generation calculations of 75% dependable year as per the DPR are annexed as Annexure P-I.

21. During the lean season, the discharge of water, in any case, is barely adequate to operate even one turbine out of two installed in the project. As is evident from the evaluation the 15% mandatory release reduces the available discharge to be level as low as required to operate one turbine during January and February forcing total shut down of the plant during these two months in addition to reducing the generation in other months of the year except during full flow season. The evaluation demonstrates that the loss of generation on account of the 15% mandatory release is 1.3 MU leaving the balance generation of 245 MU with the petitioner company for sale to the Board as against the total of 257 MU available without the mandatory release. As intended in the Order, the petitioner company is required to be compensated against the loss of 1.3 MU against the balance available 257 MU that works out to 9.53% of the available generation and the terms of cost per kwh, the same amount to Rs. 0.13 per unit (paise thirteen only).

Response of the Board.-

22. The Board has submitted that fresh grounds for re-determination of tariff as furnished by the petitioner may kindly be rejected in accordance with provisions of Order 6 Rule –16 (b) (c) of CPC.

The petitioner in original petition had been seeking enhancement of the tariff to the extent of Rs. 2.87 per unit by taking aid and assistance of the orders passed by the Hon’ble Commission on 18.12.2007, but by introducing fresh grounds for re-determination of tariff, the petitioner is now seeking enhancement of tariff from Rs. 2.50 per unit to Rs. 3.42 per unit on the basis of calculations made out by the petitioner to its suitability, which is not permissible under law and deserve to be dismissed.

Commission’s View

23. The Commission vide its **Order dated 29th Oct., 2009 in case of petition No. 11/08 M/s D.S.L. Hydrowatt Ltd V/s HPSEB Ltd and others** concluded that :-

“The Commission, can review or modify the concluded PPAs, prospectively, within the scope of the second proviso to sub-regulation (1) of regulation 6 of the regulations (ibid) to cater to stipulations such as mandatory release of 15% water discharge, payment of revised compensation to fisheries and towards use of forest land; and the

LADA charges. While revising the tariff construction cost inflationary factor need not be taken into consideration, and only the narrow area of Govt. policy changes and their impact on tariff is to be quantified prospectively.

Now in view of the foregoing conclusions, the Commission would proceed to consider each petition on its merits and will issue individual project wise orders based on the furnishing of necessary data / detailed calculations (alongwith supporting documents) on an affidavit with respect to the claims regarding mandatory release of water discharge, payment of differential amount on account of compensation to fisheries and towards the use of forest land; and also the levy of LADA charges”.

24. Subsequently the Commission has allowed increase tariff as compensation to the IPP's on account of impact of 15% mandatory release of water on the basis of calculation carried out by the Board after ascertaining the correctness of methodology of the impact assessment.

25. The present petition is similar to the one which have been considered for the aforesaid order and therefore, is required to be addressed accordingly and therefore, the contention of the Board that this petition be dismissed is not tenable.

26. The Commission as stated in its earlier Orders on similar cases at the cost of repetition states that it is constrained to allow upgrades in tariff based on a change of goal posts/ change in law which will impact on tariff in a “before” & “after” scenario. It is reiterated that even though DPR energy projections are generally oriented with bankability/ viability considerations of the project but wherever no other projection is available, this will need to be considered as a basis for calculating the impact of mandatory release impact assessment, subject to a caveat that it will have only marginal relevance in the present context and cannot be used across the board where other more relevant parameters are available.

27. The Commission does not agree with the contention of the petitioner that since neither the policy 2006 or IA stipulates average of three lean months for calculating sacrificial discharge, it is, therefore, labile to release 15% of the incoming discharge throughout the year. The H.P. Government through a

separate notification has clearly stated that 15% mandatory release of water shall be calculated on the basis of average of three lean months and the matter has been accordingly addressed and settled in the Commission's aforesaid Order dated 29.10.2009.

28. The petitioner however, has submitted calculations based on average of 3 lean months. While scrutinizing the calculations the Commission found that the soft copy given by the petitioner did not carry any calculations but was mere scanned copy of the text of the petition and some documents attached with the petition.

29. The Commission thereafter has examined the hard copy submitted by the petitioner company and hard and soft copy submitted by the Board and observes :-

- (a) that mandatory release impact assessment by the Board and the petitioner company has been carried out based upon the 75% dependable discharge as approved in the DPR and deducting the sacrificial discharge from it (which is average on 3 lean months) to get the net discharge available for power generation. The loss in generation has been assessed by the Board by calculating the energy generation on the net discharge and comparing it with energy generation without 15% sacrificial discharge as per the approved DPR. Similar methodology has also been followed by the petitioner company in its calculations. The available discharges as submitted by petitioner are fractionally higher to that of the Board if compared at fourth decimal place which neither impacts the average of three lean months nor the net discharge;
- (b) that total energy generated as per DPR (without) considering 15% sacrificial discharge considered by both the parties is same i.e. 25.795 MU. The annual loss of revenue on account of minimum release as works out by the petitioner is almost equal to same works out by the Board. The per unit impact on tariff on this account based on this annual loss works out to 13 paise per unit which is same as claimed by the petitioner.

30. In view of the above, the Commission allows the increase of 13 paise per unit as compensation for 15% the mandatory release of water discharge.

However, either party, on the availability of the actual data available for a period of 10 years, can approach the Commission to review the said increase.

II. Forest and Fisheries charges.-

31. Sub-paras “C” and “D” para 30 of the aforesaid Order dated 29.10.09 passed in **petition No. 11 of 2008- M/s DSL Hydrowatt Ltd V/s HPSEB and others** read as under :-

“C Forest Charges

The forest charges were applicable w.e.f. 30th Oct., 2002 and these were revised vide notification dated 9.1.2004. The revised forest charges are based on the percentage of forest cover. Since the forest cover is project specific, therefore, the details of the forest cover, the compensation payable prior to the revision of charges and after the revision of charges for each project needs to be ascertained to arrive at the differential amount to be considered for impact on tariff;”

D Fisheries. The State Government through a notification dated 30th April, 2007 revised the fisheries charges. The fisheries charges are based on length of tail race capacity. Since this amendment is with “immediate effect”, the information w.r.to compensation paid by these projects after the issuance of notification and which was supposed to be paid prior to notification needs to be ascertained to arrive at the differential amount to be considered for impact on the tariff;”

Submissions by the petitioner

32. That the petitioner’s Small Hydro Project had to bear the additional burden of paying forest charges to the Government on account of Net Present Value as per GoHP notification dated 9.1.2004 and compensation charges to Fisheries Department as per Hydro Policy 2006 @ Rs. 0.50 lacs per MW capacity and in addition, an amount calculated @ Rs. 0.50 lacs per km length between the diversion weir and tail race, which comes to approx. 2 kms for the project. The amount paid to fisheries department is 15,00,000/- and to the forest department is s. 24,63,437/-. This additional burden of Rs. 15,00,000/ and Rs. 24,63,437/- was not taken into consideration while fixing the tariff of Rs. 2.50 per unit in the year 2000. The Commission has appreciated that the inclusion of these provisions by the Government policy has impacted on the

tariff and such differential amount is to be considered for evaluating the compensation.

33. Accordingly, the petitioner company deserves to be allowed the above compensation and consequently the tariff has to be enhanced from Rs. 2.50 per unit in the proportion of the above additional expenditure of Rs. 3963437/ with respect to the approved capital cost of Rs. 24,11.91 lacs. The differential amount on the basis of the above comes to 1.6% and is Rs. 0.04 per unit.

Response of Board

34. In this context the response of the Board is the same as given in relation to the petitioner's claim for mandatory release of water discharge in paras 22 of this Order.

Commission's View

35. The petitioner Company has claimed an amount of Rs. 39.63 lacs as compensation on account of forest and fisheries. It is observed that the claim is not the differential amount on account of change in policy and it seems to be total amount payable by the petitioner company. No documentary proof of differential amount as stipulated in Commission's **Order dated 29.10.2009 passed in petition No.11 of 2008- M/s DSL Hydrowatt V/s HPSEB and others** has been furnished.

36. In light of the above the Commission concludes that the claims of the petitioner Company on account of forest and fisheries charges are not tenable.

III. Local Area Development Charges (LADC)

Submissions by the petitioner

37. The Petitioner's project is liable to bear the additional burden of pay compensation in terms of LADA charges @ 1% of the approved Capital cost of the Project of Rs.2411.91 lacs. This additional burden was not taken into consideration while fixing the tariff @ Rs.2.50 per unit in the year 2000. The Commission has appreciated that inclusion of this provision is to be given due recognition and its impact be considered on tariff. The compensation payable on this account in terms of Hydro Policy 2006 and the Implementation Agreement comes to Rs. 24.11 lacs being 1% of the approved capital cost. On this ground the petitioner company deserves to be compensated and consequently the tariff has to be enhanced from Rs. 2.50 per unit. The differential amount is Rs. 0.25 per unit. The differential amount is Rs. 0.25

per unit, being the percentage as calculated with respect to the approved capital cost.

Response of the Board

38. In this context the response of the Board is the same as given in relation to the petitioner's claim for mandatory release of water discharge in paras 22 of this Order.

Commission's view.

39. The petitioner Company has not given proof in support of payment of LADC. Keeping in view the above, the Commission concludes that in the absence of adequate proof of payment on account of LAD charges, the claim of petitioner Company cannot be considered. However, as the claim has arisen on account of the change in policy, it is payable. The net present value of the additional tariff components levelised over a period of 40 years to off set the loss on account of LADC, shall be as per the following formula:-

$$x = \frac{PV}{8.80075 y} \text{ whereas}$$

PV is the total amount in lacs paid on account of Local Area Development Charge minus amount payable for local area development works specified in the approved DPR

x is Additional tariff component in Rs./unit levelised over a period of 40 years to offset the loss on account of LADC.

y is Annual saleable energy units in lacs (as per approved DPR).

This tariff component shall be subject to the production of sufficient documentary proof to the satisfaction of the Board and shall be payable from the of date of complete payment of LADC or Commercial Operation Date which ever is later.

IV. Minimum Alternate Tax

Submissions by the petitioner

40. That post Govt. of H.P. notification dated 6th May, 2000, additional taxation has been imposed through change in rate of Minimum Alternate Tax

(MAT) on book profits payable by the petitioner company. The rate as applicable in financial year 2000-2001 (GoHP Notification of May 2000 for Rs. 2.50 per unit) has been increased from 8.25% to the current rate of 16.995%. the differential component of the MAT as calculated comes out to be 8.745% and the additional per unit cost on this account during the initial 10 years based upon the profit before tax (PBT) as per approved DPR works out as follows:

| Year from COD | Paise per unit |
|---------------|----------------|
| 1 | 11.00 |
| 2 | 11.70 |
| 3 | 12.4 |
| 4 | 13.00 |
| 5 | 13.60 |
| 6 | 14.3 |
| 7 | 14.9 |
| 8 | 15.5 |
| 9 | 15.5 |
| 10 | 15.4 |

41. The petitioner, therefore, pleads to be compensated for this additional liability accrued due to change in Government Policy and accordingly, the Commission is requested to order this additional payment through the tariff.

Response of Board

42. In this context the response of the Board is the same as given in relation to the petitioner's claim for mandatory release of water discharge in paras 22 of this Order.

Commission's View

43. As pointed out in Order dated 29.10.2010 passed in petitioner No.11 of 2008 M/s DSL Hydrowatt Ltd V/S HPSEB and others, the Commission has already stated in clear terms that the Commission shall, after consideration of each petition on its merits, issue individual project-wise order based on furnishing of necessary data/documents with respect to the claim regarding mandatory release of water discharge, payment of differential amount on

account fisheries and forest and local area development charges. However, Commission considers change in MAT after the signing of the PPA as change of goal post and therefore, feels that the IPP should be compensated as has been done for all the IPPs, falling within the ambit of Commission's on SHPs Order dated 18.12.2007, through the supplementary order dated Feb., 10, 2010.

44. The Commission, therefore, concludes that any change in MAT from the one existing at the time of signing of PPA in the first 10 years of the generation of the project shall be payable by the respective party as per the following formula –

(Total amount on account of revised effective MAT) – (Total amount on account of MAT at the time of signing of PPA)

The adjustment on account of change in the MAT shall be subject to the furnishing, to the satisfaction of the Board, of documentary proof of the actual payment by the petitioner Company to the Board and shall be made at the end of each financial year as per the above formula.

V. Service Tax

45. That the impact of increase in Service Tax comes out to be paise 9.2 per unit due to the increase in the Service Tax rates as compared to Service Tax which was taken into consideration in the year 2000. In the year 2000 the rate of Service Tax was 5% which was increased to 8% and then 12.36% in year 2008-09. Currently the rate of Service Tax is 10.30%.

46. In addition, the Service Tax on construction service was imposed from the year 2004-05 with a provision to tax the civil construction on the basis of 33% of the over all cost and the erection at full value. The petitioner had to bear this additional burden on account of change in Government Policy and deserves to be compensated as per the actual cost incurred as on date. The impact of service tax paid so far is duly incorporated in the books of the petitioner company. The further payments on this account have been considered based on the balance contract value payable to the contractors. The total impact works out to Rs. 8679600/-, which is 3.68% of the approved capital cost of Rs. 24.11 lacs. The differential amount is paise 9.2 per unit being the 1.68% as calculated with respect to the approved capital cost and is

requested to be paid to the petitioner company over and above Rs.0.04 per unit.

Response of Board

47. In this context the response of the Board is the same as given in relation to the petitioner's claim for mandatory release of water discharge in paras 22 of this Order.

Commission's View

48. As pointed out in para 10 of this Order, the Commission has in its **Order dated 29.10.09 passed in petition No. 11 of 2008 M/s DSL Hydrowatt Ltd V/s HPSEB and others**, stated in clear terms that the Commission shall, after consideration of each petition on its merits, issue individual project-wise order based on furnishing of necessary data/documents with respect to the claim regarding mandatory release of water discharge, payment of differential amount on account fisheries and forest and local area development charges. Therefore, the claim of the petitioner Company with respect to service tax does not fall within the ambit of the said order. Besides this the petitioner Company has not furnished any documentary proof or work sheets in support of its claim. It is pertinent to point out that the said Order clearly stipulates the claims are required to be supported by the requisite data/ calculations and supporting documents. Keeping in view the limited scope of reopening of the concluded PPAs, as stated in the Commission's aforesaid Order dated 29.10.2009 and in the absence of sufficient documentary proof, it is not possible for the Commission to accede to this claim raised by the petitioner Company.

VI. Construction Cess

49. The petitioner company project has been made to bear the additional burden of paying construction cess @ 1% of the total construction cost of the civil work to labour department vide letter No. (A)4-6/2007-BOCW-PT-1(D) on dated 2.3.2009. This clause was not in the IA which was signed with the respondent No.1. This additional burden of Rs. 15,00,000/- was not taken into

consideration while fixing the tariff @ Rs. 2.50 per unit in the year 2000. the Commission has appreciated that inclusion of this provision is to be given due recognition and its impact be considered on tariff. On this ground the petitioner company deserves to be compensated and consequently the tariff has to be enhanced from Rs. 2.50 per unit.

Response of the Board

51.. In this context the response of the Board is the same as given in relation to the petitioner's claim for mandatory release of water discharge in paras 22 of this Order.

Commission's View

52 The Commission views are similar to one given w.r.to service tax in the para 48 of this Order. Therefore, keeping in view the limited scope of reopening of the concluded PPAs, as stated in the Commission's aforesaid Order dated 29.10.2009 and in the absence of sufficient documentary proof, it is not possible for the Commission to accede to this claim raised by the petitioner Company.

VII. Local Area Development Fund

52. That the petitioner's project has been made to bear the additional burden of paying compensation in terms of LADF charges @ 1% free power for the Local Area Development Fund on sustained and continued basis over the life of the project vide notification issued on 3011.2009 on the approved capital cost of Rs. 2411.91 lacs. This additional burden was not taken into consideration while fixing the tariff @ Rs. 2.50 per unit in the year 2000. The Commission has appreciated that inclusion of this provision is to be given due recognition and its impact be considered on tariff. The compensation payable on this account in terms of Hydro Policy 2006 and the Implementation Agreement comes to Rs. 2411 lacs being 1% of the approved capital cost. On this ground the petitioner company deserves to be compensation and consequently the tariff has to be enhanced from 2.50 per unit. The differential amount is Rs. 0.25 per unit, being the percentage as calculated with respect to the approved capital cost.

Response of the Board

53. In this context the response of the Board is the same as given, in relation to the petitioner's claim for mandatory release of water discharge, in paras 22 of this Order.

Commission's view.

54. The additional 1% royalty as per GoHP notification dated 30.11.2009 for Local Area Development Fund (LADF) has to be borne by the petitioner Company and as stipulated in the notification this additional burden shall be a pass through in the tariff, the impact on account of 1% increase in royalty is 3 paise /unit. The same shall be paid by the Board to the petitioner Company.

Conclusion.

55. In view of the above discussions and taking into consideration the conclusions drawn in the Commission **Order dated 29.10.2009 passed in petition No. 11 of 2008 M/s DSL Hydrowatt Ltd V/s HPSEB and others** and further submissions made, calculations/data supplied by the parties i.e. the petitioner company and the Board, hereby orders :-

- (i) that the tariff shall be enhanced by 13 paise on account of impact of 15% mandatory release of water down stream of diversion structure. However, either party on the actual data available for a period 10 years may approach the Commission to review the said increase;
- (ii) that the claims for forest, fisheries, service tax and construction cess are not acceded to;
- (iii) that any change in MAT after signing of PPA in the first 10 years of the generation of the project shall be payable by the respective party as per the following formula: –

(Total amount on account of revised effective MAT) – (Total amount on account of MAT at the time of signing of PPA)

The adjustment on account of change in the MAT shall be subject to the furnishing, to the satisfaction of the Board, of documentary proof of the actual payment and shall be made at the end of each financial year as per the above formula;

- (iv) that the additional tariff component to offset the loss on account of LAD charge shall be calculated as per the following formula:-

$$x = \frac{PV}{8.80075 y} \text{ whereas}$$

PV is the total amount in lacs paid on account of Local Area Development Charge minus amount payable for local area development works specified in the approved DPR

x Additional tariff component in Rs./unit levelised over a period of 40 years to offset the loss on account of LADC.

y is Annual saleable energy units in lacs (as per approved DPR).

This tariff component shall be subject to the production of sufficient documentary proof to the satisfaction of the Board and shall be payable from the of date of complete payment of LADC or Commercial Operation Date which ever is later.

- (v) that the impact of the additional 1% of the royalty payable under Government notification dated 30.11.2009 for Local Area Development Fund shall be pass through in the tariff and increase on account of same shall be 3 paise/unit;

In view of the above, the tariff of ₹ 2.50, shall be increased by 16 paise per unit.

This order shall be applicable from the date it is made.

(Yogesh Khanna)
Chairman