

BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY
COMMISSION, SHIMLA.

In the matter of-

M/s Jala Shakti Limited
H. No. 135, Upper Julakari,
Chamba (H.P.)
(through Sh. Mahashu Ram Thakur
S/o Kunj Lal, authorised signatory)
.....Petitioner

Versus

1. The State of Himachal Pradesh thro' its
Principal Secretary (MPP & Power)
to the GoHP, Shimla-171002
2. The HP State Electricity Board Ltd. thro' its
Executive Director (Pers.)
Vidyut Bhawan, Shimla-171004
3. The Himachal Pradesh Energy Dev. Agency (HIMURJA),
SDA Complex, Kasumpti, Shimla-171009
.....Respondents

Petition No. 198 of 2014
(Decided on 19th **September, 2015**)

CORAM

Subhash C. Negi
CHAIRMAN

Counsels:-

for the petitioner	Sh. Ajay Vaidya, Advocate
for the Respondent No.1	Sh. Shanti Sawaroop Bhatti, (Legal Consultant)
for the Respondent No. 2	Sh. Ramesh Chauhan, (Authorised Representative)
for the Respondent No.3	Sh. Pardeep Bhanot, Sr. Project Officer

ORDER

(Last heard on 3rd Sept., 2015 and orders reserved)

M/s Jala Shakti Limited, which is a limited company incorporated under the Companies Act, 1956, having its registered office at H. No. 135, Upper Julakari, Chamba (H.P.) (hereinafter referred as “the petitioner”) is operating and maintaining,

Dunali Hydro Electric Power Project (hereinafter referred as “the project”) with an installed capacity of 5MW on Baleni-Ka-Nala Khad a tributary of the River Ravi, in Chamba Distt. Himachal Pradesh.

2. The petitioner executed Implementation Agreement (IA), to establish, operate and maintain the said project, with the Govt. of HP (Respondent No. 1) on 18th Nov., 2002, and also moved a joint petition i.e. Petition No. 199/2004 with the Himachal Pradesh State Electricity Board, the predecessor of the Himachal Pradesh State Electricity Board Ltd.(Respondent No.2), for approval of the Power Purchase Agreement (in brevity “the PPA”). The Commission accorded its approval on 28.03.2005 to the PPA, subject to the following observations that:-

- “(i) The Model PPA approved by the Commission vide its Order dated 24th March, 2003 provides for Government Guarantee and the same can only be omitted from the PPA with the approval of the Commission for which purpose the parties need to file a joint application.
- (ii) The Construction Schedule attached as Appendix ‘B’ to the Implementation Agreement by the Government of Himachal Pradesh and the Company for implementation of the project be made a part of the PPA.
- (iii) The interconnection point in clause 2.2.46 of the PPA has been specified as 33 kV sub-station at Jarangla instead of 33 kV sub-station at Ghorla mentioned in clause 2.1(p) of the Implementation Agreement. An amendment to the IA is required to be obtained first before effecting this change.”

3. The PPA was ultimately executed on 11.01.2007. There is a gap of 2 years from the date of the approval of the PPA under sub-section (1)(b) of section 86 of the Electricity Act, 2003 (in brevity “the Act”) till the date of the execution of the PPA, which provided that the Respondent No.2 shall pay for the Net Saleable Energy delivered by the petitioner to the Respondent Board at the Inter-connection Point at fixed rate of Rs.2.50 (rupees two and paise fifty only) per kWh. This rate is stated to be firm and fixed without indexation and escalation and is not to be changed due to any reason, whatsoever. The said rate is to remain applicable for a term of forty (40) years

after the synchronization date of the first unit of the Project. The date of the synchronization of this project is 16th May, 2013.

4. In the meanwhile on 18th June, 2007, the Commission notified the Regulations for Power Procurement from Renewable Sources and Co-generation by the distribution licensee, under which the Commission may determine tariff by a general Order for Small Hydro Projects not exceeding 5 MW capacity and by a special Order for Small Hydro Projects of more than 5MW and not exceeding 25 MW capacity, on individual project basis. These Regulations were not applicable to the PPAs, which were approved prior to the commencement of the Regulations and were not subjected to the provisions of the Commission's Regulations.

5. On 18th Nov., 2007, the Commission amended the Regulations (ibid) by introducing a provision under which the Commission in order to promote generation of electricity from renewable sources could review or modify the PPA approved prior to the commencement of the Regulations or where after the approval of the PPA there is change in statutory laws, or rules or the State Govt. policies.

6. Subsequently the Commission decided to determine the tariff for Small Hydro Energy Projects, based on cost plus approach with certain performance benchmarks and the Commission vide its Order dated 18.12.2007 worked out the relevant parameters and determined the levelised tariff for Small Hydro Projects upto 5 MW for 40 years from the date of commercial operation of the SHPs @ Rs. 2.87 per unit. For determination of levelised tariff for these projects the Commission approved the capital cost at Rs. 6.5 crores per MW and also determined a normative value of 45 percent for the Capacity Utilization Factor (CUF) for the purpose of tariff determination.

7. The said Order dated 18.12.2007 was challenged by way of Appeal No. 50 of 2008, **Techman Infra Ltd., New Delhi V/s HPERC & Ors.** and Appeal No. 65 of 2008- **the Himachal Pradesh State Electricity Board V/s the Himachal Pradesh State Electricity Regulatory Commission and another**, and the Hon'ble APTEL vide its Order dated 18.9.2009 (2009 ELR (APTEL) 1025) passed in the said Appeals upheld the Commission's orders with the observations that the capital cost of 6.5 crores per MW shall be treated as normative capital cost in all such cases as are found suitable to all parties. The promoters of hydel power in the State of Himachal Pradesh as well as

the Himachal Pradesh State Electricity Board shall be entitled to apply to the Commission for fixing project specific capital cost for any project in case the normative capital cost is not suitable to either of them. Similarly if CUF of 45 percent for a specific project is contested by other party, it may approach the Commission with site specific CUF. The Commission was also directed to remove arithmetical errors while re-computing the levelised tariff. As a sequel to the APTEL Judgment dated 18.09.2009, passed in **Techman Infra case (Supra)**, the Commission re-determined the tariff vide its Order dated 09.02.2010 @ Rs.2.95 per unit.

8. With the background as set out in the preceding paras of this Order, the petitioner has now moved this petition to increase the tariff of the power generated and delivered to the Respondent No. 2 from the project from Rs.2.50 per unit, (as given in PPA) to Rs. 2.95 per unit (as provided in the Commission's Order dated 09.02.2010, consequent to the APTEL Order dated 18.9.2009), or in the alternative to re-determine the tariff upwards considering the project specific capital cost.

9. The petitioner submits that subsequent to the 6th May, 2000, when the State Govt. had fixed and notified the tariff of Rs. 2.50 per unit for Small Hydro Projects, the cost of construction/ implementation of the project has increased substantially, mainly due to manifold increase in the cost of steel, cement, labour and wages. The inflationary trends are continuing. The project was targeted to be completed by 01.08.2010, but was completed on 16.5.2013. The construction of the project was started by the petitioner in time but certain clearances/approvals, which the GoHP was to accord, were accorded late and due to this factor the project could only be completed in May, 2013. This delay is alleged to be attributed to the time consuming departmental clearances; approval of DPR; issuance of the NOCs by the Deptt. of Fisheries and late execution of the PPA. The delay entailed in completion of the project has increased the project cost. The cloud burst on 20th/21st August, 2012 and incessant rainfall/landslides, resulting in damage of power house area, necessitated the additional capitalization. Further local people also stopped construction work many time for their unreasonable demands. Apart from this the huge escalation of interest, mandatory release of 15% water, onerous and burdensome clauses in the PPA, and change in MAT has also increased the production cost.

10. The petitioner urges that the normative project cost fixed by the Commission vide SHP Order dated 18.12.2007 for computing tariff on SHPs @ Rs. 6.50 crores per MW is woefully inadequate as compared to actual project cost i.e., Rs.12.08 crores per MW by the petitioner. The petitioner has, therefore, moved this petition seeking re-determination of the tariff upward from the Rs. 2.50 paise per unit and for modification of the PPA, taking into account the increase in-

- (a) Capital cost of the project.
- (b) Additional Capitalization
- (c) Debt-equity Ratio
- (d) Interest & Finance charge
- (e) Working capital
- (f) Interest on working capital
- (g) Depreciation
- (h) Return on equity
- (i) O&M expenses
- (j) Time overrun

11. In response to the petition the Respondent No. 2, submits that the petition, being devoid of any merits, deserves to be dismissed on the ground that the petitioner and the Respondent Board executed a PPA, duly approved by the Commission on a joint petition, for a term of 40 years after the synchronization date of the first unit of the project, providing that the tariff at a fixed rate of Rs.2.50 per Kw is without indexation and escalation and is not to be changed due to any reason, whatsoever, thus petitioner company is under legal and contractual obligation to comply with the said provision and cannot claim-redetermination of tariff.

12. The respondent Board further submits that –

- (a) the State Govt. had formulated and issued a State Policy for promotion of Small Hydro Projects, 2000 whereunder the developer had the following options:-
 - (i) power produced could be either used by the developer for captive use within the State or outside the State, or could be sold to the respondent Board, which is the State distribution agency;
 - (ii) if the developer opted to sell to the Respondent No. 2, it had to purchase and the tariff for such purchase is Rs.2.50 per unit, which is firm and final.

- (iii) the generator had to pay royalty for the project site allotted to him in the shape of free power @ Rs.10% for first 15 years and 12% for balance useful life of the project but if the power is sold to the Respondent Board the royalty is exempted for first 15 years;
- (b) in accordance with the State Policy of 2000 for promotion of SHPs, the petitioner, on his application, was allotted the project subsequent to which the following documents/agreements were signed by both the parties:-
 - (i) IA dated 18.11.2002
 - (ii) Approval of PPA by the Commission on 28.03.2005
 - (iii) PPA dated 11.01.2007

In all these three documents, the tariff was of Rs. 2.50 per unit and Completion Schedule as per of IA and PPA;

- (c) the Commission had approved the tariff rate to the petitioner per the GoHP State Policy, as at that time the Commission had not framed the Regulations on Power Procurement from Renewable Sources and Co-generation by the Distribution Licensee. Further that no stipulation had been made by the Commission in the Interim Order vide which PPA had been approved, that the said project would come under the Regulations as and when framed by Commission;
- (d) the contention of the petitioner that Judgment of APTEL imparted in Appeal Nos. 50/2008 & 65/2008 was applicable to their PPA is totally baseless and without any ground as the tariff applicable on their project is not covered under Regulations on Power Procurement from Renewable Sources and Co-generation by Distribution licensee, Regulations, 2007.
- (e) the Hon'ble APTEL has also applied the rationale of its judgment rendered in Appeal No. 198/20013- **M/s KKK Hydro V/s HPERC**. In that case it was held that the tariff of Rs. 2.50 per unit on 3 MW capacity of project allotted in 2000 and PPA signed on 30.03.2000 cannot be

revisited. The same ratio needs to be applied in the present case because the site was allotted on 18.11.2002 and the PPA was approved on 28.03.2005 and signed on 11.01.2007.

- (f) in the matter of Patikari Project (2012 ELR (APTEL) 1120), the Hon'ble APTEL has taken a similar view that the tariff of Rs. 2.25 per unit was known to the developer while allotting the project and signing the PPA and the tariff cannot be revisited because there is cost escalation and hence not allowed. Thus the same principle should be made applicable in the present case also.

13. The petitioner, in its rejoinder to the reply filed by the Respondent Board, states that in compliance to the Commission's approval Order dated 28.03.2005, the petitioner took various steps. The Govt. Guarantee clause though approved in the Model PPA dated 24th March, 2003 had to be got deleted as the petitioner company had little bargaining power with the GoHP and the Himachal Pradesh State Electricity Board. The petitioner company, left in a do or die situation, had to move joint petition for deletion of the said Govt. Guarantee Clause. Further in order to fulfill the (iii) condition, in relation to the change of the interconnection point, the petitioner company had to run from pillar to post for amending the IA. The IA could not be amended for considerable time due to conceivemat of the New Power Policy, 2006, and consequently PPA could only be executed on 11.01.2007, under duress, as a result of which the petitioner company had to execute the project in the same time zone of the group of developers, who were covered under the Power Procurement Regulations. It is further stated that the delay caused in execution of the PPA cannot be attributed to the petitioner nor it was intentional but due to the various factors, which were beyond the control of the petitioner company despite making best efforts which had rendered the petitioner project unviable. The tariff of Rs. 2.50 per unit was never viable for the petitioner, but the petitioner had to bear the burnt of the increased capital cost due to delay in signing the PPA and further implementing the project in the time zone covered under the tariff announced by the Commission on 18.12.2007.

14. It is further asserted that the Commission has the power to reopen the concluded PPA and condone the delay in execution of the PPA. Further the APTEL Judgment rendered in **Techman Infra case (Supra)** is applicable, as the completed project cost

of the petitioner has run so high upto more than 12 crores per MW. The review on account of change of State Govt. Policy is also maintainable.

15. After examining the contentions of the parties, the Commission framed the following questions for consideration:-

- (a) Whether the Commission can review the already concluded PPA entered into between the petitioner company and the Respondent No. 2 ?
- (b) Whether there was undue influence or misuse of dominant power by the Respondent No. 2, in concluding the PPA with the petitioner company for sale of power from its hydro project ?
- (c) Whether the Order dated 18.09.2009 passed in Appeal Nos. 50 of 2008 and 65 of 2008- **Techman Infra Ltd. V/s HPERC & others and the Himachal Pradesh State Electricity Board V/s HPERC & another** (2009 ELR (APTEL) 1025; is applicable to the present case and if so to what extent ?

Issue No.1

16. The first issue is regarding reopening of the already concluded PPA. Party to agreement is bound to discharge obligations agreed upon. In **Har Shankar and Ors. v. Dy. Exercise and Taxation Commissioner, AIR 1975 State Commission 1121 and Mohinder Singh Gill and Anr. v. Chief Election Commissioner, New Delhi & Ors. 1978(1) SCC 405**, it has been laid down that once an offer is accepted the contractual rights of party get accrued. The Apex Court decision in the **State of Maharashtra v. Ramdas Shrinivas Nayak-1982 (2) SCC 463**, supports the view that once the price quoted in the bid is accepted it cannot be withdrawn and, therefore, the bidder cannot take a different stand. Thus, after a particular alternative tariff determination mode is adopted, it is legally not open for parties to seek the redetermination of the tariff through the left out mode. In view of this the redetermination for redetermination of the tariff under Section 62(1)(a), cannot be acceded to.

17. This issue has elaborately been dealt with in the Commission's Judgment dated 29th Oct., 2009 rendered in **M/s DSL Hydrowatt Ltd. V/s HP State Electricity Board**. The petitioner in the instant case was also one of the petitioners in the petitions

dealt with in that Judgment. The relevant extracts of that Judgment are reproduced below:-

“23. After going through the pleadings and hearing the Learned Counsel, the Commission observes that the Hon’ble Supreme Court in **India Thermal Power Ltd. State of MP, AIR 2000 SC 1005**, has held that the agreements as are entered by the Electricity Board and the generators are statutory contracts and are binding on the successor APTRANSCO and the DISCOM, as well as the Commission. The Commission cannot either nullify or modify the concluded contracts in purported exercise of the regulatory powers vested in it. Further in **M/s Refiquennessa V/s Lal Bahuder Chetri AIR 1964 SC 1511**, the Hon’ble Supreme Court held, that -

“where vested rights are affected by any statutory provisions, the said provisions should normally be construed to be prospective in operation and not retrospective, unless the provision in question relates merely to a procedural matter. It is not disputed by him that the Legislature is competent to take away vested rights by means of retrospective legislation. Similarly the Legislature is undoubtedly competent to make laws which override and materially affect the terms of contracts between the parties; but the agreement is that unless a clear and unambiguous intention is indicated by the Legislature by adopting suitable express words in that behalf, no provision of the statute should be given retrospective operation if by such operation vested rights are likely to be affected. These principles are unexceptionable and as a matter of law no objection can be taken to them.”

24. Relying upon the aforesaid verdicts of the Apex Court, the APTEL, in its earlier decision dated 2nd June, 2006 (in appeal Nos. 1,2,5 of 2005 in **Small Hydro Power Developers Association V/s AP Electricity Regulatory Commission & Rithwik Energy Systems Ltd., V/s Transmission Corporation of AP, 2008 ELR (APTEL) 237**; in its decision dated 5th October, 2007, rendered in **Vemagiri Power Generation Ltd., Bangalore V/s Transmission Corporation of A.P. Ltd., (2007) ELR (APTEL) 1580**, has concluded that the Commission has no jurisdiction to re-open the PPAs once approved, without the unqualified consent of the parties to the agreement.

25. With reference to the PPAs which are executed after the setting up of the Commission and prior to the commencement of the regulations it would be

worthwhile to cite the verdict of the Apex Court given in **Delhi Development Authority, New Delhi and another V/s Joint Action Committee of Allottees of SFS flats & ors. AIR 2008 SC 1343**, which states that if the relationship between the parties arises out of the contract, the terms and conditions of the contract can be altered or modified but these cannot be altered or modified unless there exists any provision either in the contract or in law and the parties must be *ad idem* so far as the terms and conditions are concerned. Under Clause 15 of the Model PPA, the parties, with written consent can amend/modify the stipulations contained therein. In other words when there is change in the circumstances involved parties to the bilateral contracts are always at liberty to mutually modify their contracts, subject to the approval of the Commission, as the original agreements are executed with the approval of the Commission under section 86 (1) (b) of the Act. The regulatory Commission, has to act within the four corners of the Electricity Act, 2003 - **Reliance Energy Ltd. V/s Tata Power Corporation 2007 APTEL 662**. This is the mandate to the Commission under section 86(1) (e), read with the section 61 (h), of the Act and preamble thereto and the various policy guidelines to promote generation of electricity from renewable sources. Further, APTEL in **RVK Energy Pvt. Ltd. V/s Central Power Distribution Co. of AP Ltd., (2007) ELR (APTEL) 1222** has stressed that the Regulatory structure needs to encourage entrepreneurs to set up generation stations by visionary orders. In order to promote generation of electricity from renewable sources of energy, second proviso to sub- regulation (1) of regulation 6 of 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 a change in –

- (i) Statutory laws;
- (ii) Rules; and
- (iii) State Govt. Policy.

26. Ratio decided in **Chhatisgarh Biomass Energy Developers Association, Distt. Raipur Vs Chhatisgarh State Regulatory Commission (Appeal No. 20 of 2006)** decided by APTEL on 07.09.2006 is that “where the Power Purchase Agreements (PPAs) between the distribution licensees and generating companies utilizing renewable sources of energy are in conformity with MNES

*guidelines or various policy guidelines, the agreements are not required to be tinkered with but where the agreements are one sided and not in consonance with the MNES guidelines, it is the bounden duty of the appropriate Commission to issue appropriate directions". Further paras 34 & 35 of the APTEL decision in Appeals, 90,91,92,93,108,109,110 & 111 of 2006 – **Rithwik Energy Systems Ltd., V/s Transmission Corporation of Andhra Pradesh Ltd., and others**, state in clear terms that –*

"34. A distinction, however, must be drawn in respect of a case, where the contract is re-opened for the purposes of encouraging and providing renewable sources of energy projects pursuant to the mandate of section 86(1) (e) of the Act, which required the State Commission to promote co-generation and generation of electricity from renewable sources of energy.

35. Therefore, it is the bounden duty of the Commission to incentivise the generation of energy through renewable sources of energy. PPAs can be re-opened only for the purpose of giving thrust to non-conventional energy projects and not for curtailing the incentives."

18. In other words this Commission in its aforesaid Order dated 29th Oct., 2009 has already observed that the Commission cannot either nullify or modify the concluded contracts in purported exercise of the regulatory powers vested in it. Even to comply with the mandate under section 86(1)(e), read with section 61 (h) of the Act and preamble thereto and the various policy guidelines, to promote generation of electricity from renewable sources, this Commission has limited power to reopen the concluded PPAs for the purpose of incentivising the generation from non-conventional energy projects, within the framework of the Act and the Regulations. Second proviso of sub-regulation (1) of Regulation 6 of the Regulations (ibid) read with 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 statutory laws, rules and State Govt. Policy. The Hon'ble High Court of HP, has upheld the validity of the Regulations (ibid), vide its Judgment dated 16.08.2013, rendered in CWP No. 7646 of 2010- **The Himachal Pradesh State Electricity Board Ltd V/s Himachal Pradesh Electricity Regulatory Commission & another**. Thus, while revising the tariff, the construction cost, inflationary factor and the like need not be taken into account and

only the narrow area of the Govt. policy changes and their impact on tariff is to be quantified.

19. The Commission would like to bring out, in line with the Govt. policies and in order to impart clarity of applicability of tariff to all the stakeholders, that the determination of generic tariff by the Commission neither binds the Respondent No. 2 to procure power from the generators nor compels generators to sell power to the distribution licensee. As per the Govt. policy, it is now not binding for the distribution licensee i.e., Respondent No. 2 to purchase power from the generators. Accordingly, the generator and the licensee need to arrive at mutual understanding about the sale/purchase of power and also about the PPA including the tariff options i.e., the generic levelled or project specific levelled, before filing joint petition with the Commission for approval of the PPA. The option for tariff is one of the commercial aspects, wherein interest of the project developers as well as utility needs to be protected. Both the project developers as well as the utility need to have certainty in respect of adequate cost flows and reasonable cost liability. Thus the tariff should give certainty, confidence and flexibility to both utility and the project developer. Such option should be available to the parties only till the signing the PPA and be exercised on mutual consent of the parties at the time of arriving at mutual understanding on PPA related issues before the submission of the proposed PPA for approval of the Commission and the option once exercised should be firm and final. Ordinarily it takes considerable time before actual physical work is started because statutory clearances, land acquisitions and arranging of finances etc. take substantial time. This is an adequate period to know the project and accordingly firm up the choice/option by the parties. In case of project specific tariff determination, the utility may get unnecessarily burdened if the tariff so determined is more than the generic levelled tariff determined based on the benchmarks in the regulations which would be taken as reference to the utility while signing the PPA; on the other hand, if the project specific tariff as determined by the Commission is much less than the generic levelled tariff, the generator may not have incentive for efficiency. The tariff period as well as the useful life for SHPs in Himachal Pradesh, as per existing regulatory framework, is 40 years. The period of 40 years has been considered primarily by on account of policy of the GoHP, wherein the Implementation Agreements with the generators are signed for 40 years.

20. In case the generator has been careful in its Judgments and decisions while executing the project or has been careful and vigilant in executing the project, the profits earned by reason of his efficient and economical efforts, are to be its own and are not to be shared or passed on to any body else. Obviously the loss on account of the inefficient performance and delayed completion of the project will have to be borne by the developer of the project. As such the re-determination of the tariff on this account can amount to rewarding inefficiencies of the generator and delayed completion of the project.

21. Since it is now not binding for the generator and the licensee to sell/purchase power from any project(s), the licensee may find it difficult to decide, in anticipation of the determination of tariff, about purchase of power from a particular project. Such situations may deprive the generator as well licensee from the opportunity to sell and purchase power at pre-determined rates. The normative capital cost includes all expenditure including escalations and IDC etc. and, therefore, if the project is implemented diligently and faithfully, the generator is able to recover its cost and even earn profits through tariff as envisaged and also the utility gets power as per its power procurement planning. Inefficiencies, if any, shall have to be at the generator's own cost even though in such a case, the utility also suffers due to non availability of power as per standard date planned.

22. From the facts available on record it is evident that on the joint petition (i.e., Petition No. 199/2004), moved by the petitioner company and the predecessor of the Respondent No.2, the Commission accorded its approval on 28.03.2005 to the PPA, and the PPA was executed on 11.01.2007, and there is gap of 2 years from the date of the approval of the PPA, under section 86(1)(b) of the Act, till the date of the execution of the PPA. The petitioner company, simply states that the company could only execute the Supplementary Implementation Agreement with the State Govt. on 25.07.2006 and could complete the formalities for change of the Inter-connection Point, only in Nov., 2006. This data is insufficient to explain the justification for the delay of 2 years in execution of PPA, after the Commission's approval.

23. Per Contra, the Respondent No.2, submits that no action on their part attributes to delay in execution of the PPA and it furnishes the details of events and dates after the approval of the PPA, as under:-

Sr. No	Date	Petition Letter No.	No./	Details of event
1.	28.03.2005	Order on Petition No. 199/2004		Approval of Power Purchase Agreement to be executed by HPSEB with M/s Jala Shakti Ltd. Hyderabad in respect of Dunali HEP (5 MW capacity) situated in Chamba Distt. under section 86(1)(b) of Electricity Act, 2003.
2.	05.04.2005	Letter HPSEB/ CE(PSP)/ Dunali/ 2005-22 dated 5-4-2005	No.	Chief Engineer (PSP) has requested M/s Jal Shakti Ltd. to implement the Commission directions imparted in order dated 28.3.2005 for amendment in Implementation Agreement.
3.	26.07.2006	Letter of M/s Jala Shakti Ltd dated 26.7.2006		M/s Jala Shakti has intimated that as per the directions of the Commission, the IA has been amended by entering it into Supplementary IA with GoHP on 27.7.2006 wherein the Inter-connection point has been amended to 33 KV sub-station at Jarangla, and requested intimation of the date of signing of PPA.
4.	04.08.2006	Letter of Chief Engineer (PSP) vide letter No. HPSEB(SECCTT)/CE/(PSP)/Dunali /06-1205 dated 04-08-2006		Chief Engineer (PSP) has requested M/s Jala Shakti Ltd. to supply a copy of IA which has been signed by the Company with the GoHP on dated 25-07-2006, wherein the Interconnection point has been amended to 33kV Sub-Station at Jarangla, so that the case can be processed in accordance with the direction of the Commission and the joint petition be filed before HPERC for the approval of PPA in respect of Dunali (5MW) HEP.
5.	05.08.2006	Letter of M/s Jala Shakti Ltd. dated 05.08.2006		M/s Jala Shakti has intimated that the H.P.E.R.C. has approved the PPA for Dunali S.H.E.P. (5MW) as per order dated 28-03-2005. Since State Govt. guarantee shall not be available for future projects, as such, they are ready to sign the PPA with the Board without the provision of State Govt. guarantee and also filed a joint petition praying that the Commission may allow deleting the clause relating to the provision of State Govt. Guarantee for the approved PPA. A copy of supplementary IA signed with GoHP on 25-07-2006 has also been supplied wherein the interconnection point has been amended as per H.P.E.R.C.'s order dated 28-03-2005.
6.	07.08.2006	Chief Engineer (PSP) vide letter		Chief Engineer (PSP) has requested M/s Jala Shakti Ltd. to depute authorised signatory to visit

- No. HPSEB/ SECCTT)/CE/ (PSP)/Dunali/06-1230 dated 07-08-2006 this office on 08-08-2006 at 3 PM to sign the joint petition for the deletion of Govt. guarantee from the approved PPA of Dunali HEP (5MW).
7. 11.08.2006 Chief Engineer (PSP) vide letter No.HPSEB (SECTT)/CE/(PSP) /Dunali/06-1299 dated 11-08-2006 HPSEBL has filed the joint petition for deletion of clauses relating to provision of State Govt. guarantee from the approved PPA in respect of Dunali Hydro Electric Project (5MW) in petition No. 199/2004.
 8. 26.09.2006 HPERC MA No. 171/06 in case No. 199/04 The HPERC has issued the order for deleting clauses relating to the State Govt. guarantee in respect of Dunali HEP. Further, the Hon'ble Commission in this order has specified that a separate order will be issued with regard to changing the location of interconnection point in the PPA.
 9. 16.11.2006 HPERC MA No. 171/06 in case No. 199/04 The HPERC has issued the order and approved the change in interconnection point from 33 kV Sub-station at Gharola to 33kV sub-station at Jarangla and orders that supplementary agreement dated 25-07-2006 shall also form a part of the approved PPA in respect of Dunali HEP (5MW).
 10. 18.11.2006 Letter of M/s Jala Shakti Ltd dated 18.11.2006 M/s Jala Shakti Ltd., has requested HPSEBL thro' Chief Engineer (PSP) to give the suitable date for signing for PPA.
 11. 23.11.2006 Letter of M/s Jala Shakti Ltd. dated 23.11.2006 M/s Jala Shakti Ltd., has requested HPSEBL to give suitable date for signing the PPA as they have complied with the observation of Commission as per order dated 28.03.2005.
 12. 30.11.2006 Chief Engineer (PSP) vide letter No. HPSEB (SECCTT)/CE/(PSP)/Dunali/06-2592 dated 30.11.2006 HPSEBL has written a letter to Jala Shakti Ltd. to depute authorised representative of the Company to attend this office on 05-12-2006 to process check the document/papers jointly for signing the PPA in respect of Dunali HEP (5MW).
 13. 29.12.2006 Addl. SE, Himurja, Letter No. HIMURJS/ SHP-IA/SRS(29) 2003-7865 dated 29.12.2006 Himurja, Shimla has intimated HPSEBL the schedule synchronization and schedule commercial operation date of Dunali HEP (5MW).
 14. 12.12.2006 Letter of M/s Jala Shakti Ltd dated 12.12.2006 M/s Jala Shakti Ltd., response to letter dated 30.11.2006, had intimated HPSEBL that they have complied with the observations as pointed out by HPSEBL and resubmitted the draft joint petition.

- They had further requested for giving the suitable date for signing of the PPA.
- | | | | |
|-----|------------|---|---|
| 15. | 11.01.2007 | Power Purchase agreement dated 11.01.2007 | PPA signed on 11.0.2007 after scrutiny of the documents submitted by M/s Jala Shakti Ltd. |
| 16. | 05.02.2007 | HPSEB(SECTT)/CE/PSP/Dunali HEP (5MW) | Three copies of the PPA in respect of Dunali HEP (5MW) sent to HPERC for approval please. |

24. Considering the information furnished by the petitioner and the counter information furnished by the Respondent Board, before this Commission, it is evident that the petitioner itself has not seriously pursued the matter in executing the PPA, after the Commission approval accorded on 28.03.2005 and the claim for the re-opening of the concluded PPA on that account, is baseless.

25. In relation to the petitioner's contention that subsequent to be fixation of the tariff of Rs.2.50 per unit for SHPs, the construction/ implementation cost of the project has increased substantially mainly due to manifold increase in the cost of building material and labour wages. The huge escalation of interest, mandatory release of 15% water, onerous and burdensome clauses in the PPA has increased the production cost and the tariff of Rs. 2.50 is woefully inadequate and renders the project unviable. It is apt to state that obligation to release water as per directions of the State Govt./State Pollution Control Board is already cast upon the developer as per IA. The IA, which is the integral part of the PPA, provides that the basic responsibility for obtaining the statutory/non-statutory clearance within a period of six period, after the signing of the IA, or on payment of liquidated damages @Rs.1000/- per hour per month within the extended period not exceeding 180 days, rests with the developer. Thus in view of express provisions either the delay in clearances/approvals /NOCs by the State Govt. or Department of Fisheries etc. and the provisions for release of 15% water release cannot be the ground for revisiting the tariff. The parties to the contract entered into the agreement knowing fully well its implementations and a contracting party, having contracted, cannot go back to the agreement simply because it does not suit him to abide by it, or merely the circumstances, in which the agreement was made, have altered. It is not sufficient for a contracting party, invoking doctrine of frustration, to show that the supervening event has made the contract onerous or difficult to perform. He must prove impracticability and impossibility of the contract. There is no frustration

where performance of the contract remains physically and legally possible though commercially unprofitable.

26. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates differently from the stipulated rates on some vague plea of equity. The parties to the contract to execute contract are often faced, in the course of carrying it out, with a turn of events which they did not anticipate, wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution or the like. There is no general liberty reserved to the Courts to absolve a party from liability to perform his part of the contract merely because on account of a un-contemplated turn of events, the performance of the contract may become onerous. A contracting party cannot be relieved from the performance of his part of the contract, if the frustration of the contract is self generated or the disability is self induced.

27. The law is settled that the doctrine of impossibility of performance or frustration cannot be applied to cases of commercial transactions. The mere fact that a contract has been rendered more onerous does not of itself give rise to repudiation of the contract. Impossibility of performance cannot be called commercial impossibility. Merely commercial impossibility will not excuse a party from performing the contract. Mere increased cost of performance or losing a transaction does not make the contract impossible. A man is not prevented from performing his contract by mere economic unprofitableness.

28. It is evident from the pleadings of the parties that the State Govt. Policy for Small Hydro Projects, 2000, clearly stipulated that the developer had the option to sell the power generated by them to the State distribution agency and if the developer opts to sell to the said distribution agency, the distribution agency should have to purchase the same at the tariff of Rs. 2.50 per unit, which was to be firm and final and the generator had to pay royalty for the project site allotted to him. In accordance with the State Policy of 2000, the petitioner company, on its application, was allotted the project, and subsequently to which IA on 18.11.2002, was executed. The petitioner company, alongwith the Respondent No.2, moved a joint petition No. 199/2004 for approval of the PPA and the Commission accorded its approval on 28.03.2005; and the

PPA was executed on 11.01.2007. In all these documents the tariff was of Rs. 2.50 per unit. Further no stipulation has been made in the Commission's Order approving the PPA, that the project will come under the Regulations as and when framed. Thus the tariff of Rs. 2.50 per unit was known to the developer from the date of allotment of project site, and well before the signing of the IA on 18.11.2002 and PPA on 11.01.2007 and the synchronization of project on 16.05.2013. The tariff cannot be revisited because there is cost escalation. Further there are no facts on record, much less, supported by any evidence to sustain the plea that the delay in signing the PPA was attributed to any reasons beyond the control of the petitioner. Though the petitioner asserts that the cloud burst on 20th & 21st August, 2012 and incessant rainfall/landslides, resulting in damage of power house area, necessitated the additional capitalization, yet there is nothing in the pleadings to prove that the petitioner ever pressed into service the provisions of Article 12 of the PPA, wherein the Party claiming that it has been rendered unable to perform any of its material obligations under the agreement by Force Majeure, it has to notify that event to the other Party, within 5 days of the occurrence, giving the particulars and satisfactory evidence in support of its claim. Moreover, clause 12.5 specifically provides that delay in non-performance by a Party caused by the occurrence of the event of Force Majeure shall not give rise to any claim for damages or additional expenses occasioned thereby.

29. Accordingly the first issue is decided against the petitioner company.

Issue No.2

30. The second issue is regarding the exercise of the undue influence or misuse of dominant power by Respondent No.2 in concluding the PPA.

31. Perusal of the events and the documents indicate that right from the allotment of the site and signing of the IA on 18.11.2002, the clear undertaking of the petitioner was that the tariff of electricity to be purchased from its project would be Rs. 2.50 per unit fixed without any escalation and indexation. The Commission notices that the petitioner was clear about the financial viability of the project at the tariff agreed with the State Govt. and had option not to proceed with the project at that time. The State Commission, without going into the exercise of determination of tariff, accorded its approval to the tariff proposed by the petitioner and the Respondent No. 2 on

28.03.2005. Subsequently, the PPA was executed on 11.01.2007. Relying on the PPA, the petitioner raised and synchronized the project in May, 2013. It is only on 26.09.2014, when he moved this petition, the petitioner has raised the issue that he was forced to implement the project at an unviable tariff and there was misuse of dominant power by Respondent No. 2.

32. There are no facts on the record, much less, supported by any documentary or any other evidence to sustain the plea that the Power Purchase Agreement was a result of undue influence or duress by the State Govt. or the Respondent No. 2 upon the petitioner. On the other hand, the available documents indicate that the petitioner had voluntarily signed the IA with State Government and the PPA with the Respondent No. 2 and executed the project willingly.

33. After examining the sequence of events and the documents submitted by the petitioner the Commission finds that there was no undue influence or misuse of dominant position by the Respondent No. 2 in entering into the PPA with the petitioner and the plea has only been made to claim the benefit of the revised tariff in relation to the SHPs to which that the power procurement Regulations of 2007 are applicable.

34. The petitioner has voluntarily entered into the IA with the State Govt. continued to pursue the project even after preparation of the DPR and finalization of the PPA, instead of availing itself of the liberty to drop the project, commissioned the project in May, 2013 and after expiry of the period of more than one and half year he has approached the State Commission to re-determine the tariff. Thus the petitioner has failed to raise objection regarding the alleged undue influence by the Respondent No. 2, in executing the PPA within a reasonable time. Accordingly this issue is decided against the petitioner.

Issue No. 3

35. The third issue is regarding applicability of the Order dated 18.09.2009, passed in Appeal Nos. 50 of 2008 and 65 of 2008. **Techman Infra Ltd. V/s HPERC and others 2009 ELR (APTEL) 1025** to the present case. In that case the renewable energy generators had challenged the findings of the Commission in its order regarding determination of generic tariff of hydro projects upto 5 MW capacity. The Hon'ble Tribunal has held that where the generic capital cost and the Capacity Utilization Factor

(CUF) was found unsuitable by either of the parties, one had option to apply to the State Commission for fixing the site specific capital cost and Capacity Utilization Factor. The findings in that case are not applicable to the instant case where PPA has already been concluded and approved by the State Commission.

36. It would be useful to quote para 33 of the Judgment rendered by the Hon'ble APTEL in **M/s Patikari Power Ltd. V/s HPERC & others 2012 ELR (APTEL) 1120, which reads as under:-**

“Let us take up the first lower ROE at the fixed Tariff of Rs. 2.25/kWh. Admittedly, the ROE expected from the project at the Tariff of Rs. 2.25/kWh was in the knowledge of the Appellant at the time of submission of the DPR to the Respondent No. 2 in December, 2000. Despite this the Appellant filed a joint application before the State Commission for approval the PPA and Tariff @ Rs. 2.25/kWh and subsequently entered into the PPA with the Respondent No. 2 on 5th July, 2004. In the light of the above rulings of the Hon'ble Supreme Court lowering of the expected return could not be the reason for review of the concluded contract between the parties. Even though we feel that renewable energy projects deserve a reasonable ROE, in the circumstances of the present case, lower ROE then envisaged in the Regulations could not be a reason for reopening of the PPA. In this case the Appellant was aware of the return it was likely to get at the hydrology projected in the Detailed Project Report. Despite this, the Appellant proceeded with the project and voluntarily signed the PPA.”

37. In relation to the applicability of the Judgment of APTEL, rendered in Appeal Nos. 50 of 2008 and 65 of 2008 i.e. **M/s Techman Infra Case (Supra)** to the present case, the Respondent No. 2 asserts that this contention raised by the petitioner company is totally baseless and without any ground, as the tariff applicable on their project is not covered under Regulations on the Power Procurement from Renewable Sources and Co-generation by the Distribution Licensee, Regulations, 2007. Moreover the Hon'ble APTEL while taking decision in **M/s Patikari Power Ltd. V/s HPERC and other (2012 ELR (APTEL) 1120**, has taken a similar view that the tariff of Rs. 2.25 per unit in that case was known to the developer, while allotting that project and signing of the PPA, and that tariff cannot be revised because there is cost escalation and hence cannot be allowed.

This aspect cannot be overlooked that Hon'ble APTEL's Judgment in M/s Patikari case (Supra), had the opportunity to consider its earlier verdict delivered in **M/s Techman Infra case (Supra)**, The Commission, therefore, decides this issue also against the petitioner company.

38. **Summery of findings**

- (i) The Commission cannot either nullify or modify the concluded contracts in purported exercise of the regulatory powers vested in it. Even to comply with the mandate under section 86(1)(e), read with section 61 (h) of the Act and preamble thereto and the various policy guidelines, to promote generation of electricity from renewable sources, this Commission has limited power to reopen the concluded PPAs for the purpose of incentivising the generation from non-conventional energy projects, within the framework of the Act and the Regulations. Second proviso of sub-regulation (1) of Regulation 6 of the Regulations (ibid) read with 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 statutory laws, rules and State Govt. Policy. The Hon'ble High Court of HP, has upheld the validity of the Regulations (ibid), vide its Judgment dated 16.08.2013, rendered in CWP No. 7646 of 2010- **The Himachal Pradesh State Electricity Board Ltd V/s Himachal Pradesh Electricity Regulatory Commission & another**. Thus, while revising the tariff, the construction cost, inflationary factor and the like need not be taken into account and only the narrow area of the Govt. policy changes and their impact on tariff is to be quantified.
- (ii) In case the generator has been careful in its Judgments and decisions while executing the project or has been careful and vigilant in executing the project, the profits earned by reason of his efficient and economical efforts, are to be its own and are not to be shared or passed on to any body else. Obviously the loss on account of the inefficient performance and delayed completion of the project will have to be borne by the developer of the project. As such the re-

determination of the tariff on this account can amount to rewarding inefficiencies of the generator and delayed completion of the project.

- (iii) The normative capital cost includes all expenditure including escalations and IDC etc. and, therefore, if the project is implemented diligently and faithfully, the generator is able to recover its cost and even earn profits through tariff as envisaged and also the utility gets power as per its power procurement planning. Inefficiencies, if any, shall have to be at the generator's own cost even though in such a case, the utility also suffers due to non availability of power as per standard date planned.
- (iv) From the facts available on record it is evident that on the joint petition (i.e., Petition No. 199/2004) moved by the petitioner company and the predecessor of the Respondent No.2, the Commission accorded its approval on 28.03.2005 to the PPA, and the PPA was executed on 11.01.2007, and there is gap of 2 years from the date of the approval of the PPA, under section 86(1)(b) of the Act, till the date of the execution of the PPA. The petitioner company, simply states that the company could only execute the Supplementary Implementation Agreement with the State Govt. on 25.07.2006 and could complete the formalities for change of the Inter-connection Point, in Nov., 2006. This data is insufficient to explain the justification for the delay of 2 years in execution of PPA, after the Commission's approval.
- (v) Considering the information furnished by the petitioner and the counter information furnished by the Respondent Board, before this Commission, it is evident that the petitioner itself has not seriously pursued the matter in executing the PPA, after the Commission approval accorded on 28.03.2005 and the claim for the re-opening of the concluded PPA on that account, is baseless.
- (vi) The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates differently from the stipulated rates

on some vague plea of equity. That obligation to release water as per directions of the State Govt./State Pollution Control Board is already cast upon the developer as per IA. The IA, which is the integral part of the PPA, provides that the basic responsibility for obtaining the statutory/non-statutory clearance within a period of six period, after the signing of the IA, or on payment of liquidated damages @Rs.1000/- per hour per month within the extended period not exceeding 180 days, rests with the developer. Thus in view of express provisions either the delay in clearances/ approvals /NOCs by the State Govt. or Department of Fisheries etc. and the provisions for release of 15% water release cannot be the ground for revisiting the tariff. The parties to the contract entered into the agreement knowing fully well its implementations and a contracting party, having contracted, cannot go back to the agreement simply because it does not suit him to abide by it, or merely the circumstances, in which the agreement was made, have altered.

- (vii) The law is settled that the doctrine of impossibility of performance or frustration cannot be applied to cases of commercial transactions. The mere fact that a contract has been rendered more onerous does not of itself give rise to repudiation of the contract. Impossibility of performance cannot be called commercial impossibility. Merely commercial impossibility will not excuse a party from performing the contract. Mere increased cost of performance or losing a transaction does not make the contract impossible. A man is not prevented from performing his contract by mere economic unprofitableness.
- (viii) There are no facts on the record, much less, supported by any documentary or any other evidence to sustain the plea that the Power Purchase Agreement was a result of undue influence or duress by the State or the Respondent No. 2 upon the petitioner. On the other hand, the available documents indicate that the petitioner had voluntarily signed the IA with State Government and the PPA with the Respondent No. 2 and executed the project willingly.

(ix) The Judgment rendered in **Techman Infra case (Supra)** is not applicable to the instance case where PPA has already been concluded as approved by the State Govt. Moreover the Hon'ble APTEL while taking decision in **M/s Patikari Power Ltd. V/s HPERC and other (2012 ELR (APTEL) 1120**, has taken a similar view that the tariff of Rs. 2.25 per unit in that case was known to the developer, while allotting that project and signing of the PPA, and that tariff cannot be revised because there is cost escalation and hence cannot be allowed. The aspect cannot be overlooked that Hon'ble APTEL's Judgment in **M/s Patikari case (Supra)**, had the opportunity to consider its earlier verdict delivered in **M/s Techman Infra case (Supra)**.

This petition is disposed of accordingly with liberty to the petitioner to approach the Commission under second proviso to sub-regulation 1 of regulation 6 of the regulation (ibid), with the supporting data thereto.

Place: Shimla,
Dated:19.09.2015

(Subhash C. Negi)
Chairman