

BEFORE THE H.P.ELECTRICITY REGULATORY COMMISSION SHIMLA

Coram

S.S. Gupta

Suo Motu Case No.8/2003

In the matter of

Execution of the Power Purchase Agreement by HPSEB with M/s Veecon IPA Gastechnik Ltd; B-58, Shivalik, P.O. Malviya Nagar. New Delhi-110 017 in respect of Jagat Sukh Hydroelectric Project (4.8 MW capacity), situated in Kullu District. of Himachal Pradesh.

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| 1. HPSEB thro' its Secretary, Shimla-171 004 | Respondent No.1 |
| 2. M/s Veecon IPA Gastechnik Ltd; New Delhi-110 017 | Respondent No.2 |

Suo Motu Case No.9/2003

In the matter of

Execution of the Power Purchase Agreement by HPSEB with M/s Astha Projects (India) Ltd., 8-2-704/B/15 Sai Enclave Road No.12, Banjara Hills, Hyderabad-500 034 in respect of HUL Hydroelectric Project (2.5 MW capacity), situated in Chamba District. of Himachal Pradesh.

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| 1 HPSEB thro' its Secretary, Shimla-171 004 | Respondent No.1 |
| 2. M/s Astha Projects (India) Ltd., Hyderabad-500 034 | Respondent No.2 |

Suo Motu Case No.10/2003

In the matter of

Execution of the Power Purchase Agreement by HPSEB with M/s DLI Power (India) Pvt. Ltd., Building No.1, Visava Enclave, DP Road, Dundh, Pune-411 007 in respect of SECHI Hydroelectric Project (3.0 MW capacity), situated in Shimla District. of Himachal Pradesh.

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| 1. HPSEB thro' its Secretary, Shimla-171 004 | Respondent No.1 |
| 2. M/s DLI Power (India) Pvt. Ltd., Pune-411 007 | Respondent No.2 |

Suo Motu Case No.11/2003

In the matter of

Execution of the Power Purchase Agreement by HPSEB with M/s Weizman Ltd. Empire House, 214 Dr.D.N.Road, Ent A.K.Nayak Marg, Fort, Mumbai-400 001 in respect of Balij Ka Nala Hydroelectric Project (3.5 MW capacity), situated in Chamba District. of Himachal Pradesh.

1. HPSEB thro' its Secretary, Shimla-171 004
2. M/s Weizman Ltd., Mumbai-400 001

Respondent No.1
Respondent No.2

Suo Motu Case No.12/2003

In the matter of

Execution of the Power Purchase Agreement by HPSEB with M/s Nuziveedu Seeds Ltd. B-5-821, Ist Floor, 104, Deshi Square Hyderguda, Hyderabad-500 029 (A.P.) in respect of Masli Hydroelectric Project (5.0 MW capacity), situated in Shimla District. of Himachal Pradesh.

1. HPSEB thro' its Secretary, Shimla-171 004 Respondent No.1
2. M/s Nuziveedu Seeds Ltd., Hyderabad-500 029 (A.P.) Respondent No.2

Suo Motu Case No.13/2003

In the matter of

Execution of the Power Purchase Agreement by HPSEB with M/s Aleo Manali Hydro Power (P) Ltd., B-173, Sector-41, NOIDA-201 303 NCR Delhi in respect of Aleo Hydroelectric Project (3.0 MW capacity), situated in Kullu District. of Himachal Pradesh.

1. HPSEB thro' its Secretary, Shimla-171 004 Respondent No.1
2. M/s Aleo Manali Hydro Power (P) Ltd. Noida-201303 Respondent No.2

Suo Motu Case No.14/2003

In the matter of

Execution of the Power Purchase Agreement by HPSEB with M/s Patikari Power Pvt. Ltd., 2, Rajdoot Marg, Chanakyapuri, New Delhi-110 021 in respect of Patikari Hydroelectric Project (16.0 MW capacity), situated in Mandi District. of Himachal Pradesh.

1. HPSEB thro' its Secretary, Shimla-171 004 Respondent No.1
2. M/s Patikari Power Pvt. Ltd., New Delhi-110 021 Respondent No.2

Suo Motu Case No.15/2003

In the matter of

Execution of the Power Purchase Agreement by HPSEB with M/s Astha Projects (India) Ltd., 8-2-704/B/15, Sai Enclave Road No. 12, Banjara Hills, Hyderabad-500 034 in respect of Dehar Hydroelectric Project (5.0 MW capacity), situated in Chamba District. of Himachal Pradesh.

1. HPSEB thro' its Secretary, Shimla-171 004 Respondent No.1
2. M/s Astha Projects (India) Ltd., Hyderabad-500 034 Respondent No.2

June 5, 2003

July 19, 2003

Present:

Case No:8/2003:	For Respondent No.1 :	Sh.Anil Tanwar Advocate	Sh.Anil Tanwar Advocate
	:For Respondent No.2:	None	None
Case No:9/2003:	:For Respondent No.1:	Sh.Anil Tanwar Advocate	Sh.Anil Tanwar Advocate
	:For Respondent No.2:	Sh.Rajnish Maniktala Advocate	Sh.K.D.Shreedhar Sr. Advocate
Case No:10/2003:	:For Respondent No.1:	Sh.Anil Tanwar Advocate	Sh.Anil Tanwar Advocate
	:For Respondent No.2:	Sh.Hemant Kaushik Rep.	Sh.S.Vaidya Rep.
Case No:11/2003:	:For Respondent No.1:	Sh.Anil Tanwar Advocate	Sh.Anil Tanwar Advocate
	:For Respondent No.2:	Sh.Rajnish Maniktala Advocate	Sh.K.D.Shreedhar Sr. Advocate
Case No:12/2003:	:For Respondent No.1:	Sh.Anil Tanwar Advocate	Sh.Anil Tanwar Advocate
	:For Respondent No.2:	Sh.Rajnish Maniktala Advocate	Sh.K.D.Shreedhar Sr. Advocate
Case No:13/2003:	:For Respondent No.1:	Sh.Anil Tanwar Advocate	Sh.Anil Tanwar Advocate
	:For Respondent No.2:	Sh.A.K.Goel Rep.	Sh.A.K.Goel Rep.
Case No:14/2003:	:For Respondent No.1:	Sh.Anil Tanwar Advocate	Sh.Anil Tanwar Advocate
	:For Respondent No.2:	Sh.Naresh Gupta Advocate	Sh.Vinod Thakur Advocate
Case No:15/2003:	:For Respondent No.1:	Sh.Anil Tanwar Advocate	Sh.Anil Tanwar Advocate
	:For Respondent No.2:	Sh.Rajnish Maniktala Advocate	Sh.K.D.Shreedhar Sr. Advocate
	:Consumer Representative :	Sh P N Bhardwaj (U/S 26 of ERC Act,1998) (All Cases)	Sh P N Bhardwaj (U/S 94(3) of Eley Act,1998) (All Cases)

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ORDER

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The matter was last heard on 19th July, 2003 and the order reserved.

1.0 Background:

1.1 Chief Engineer (PSP), HPSEB, Shimla, supplied the details of the projects for which power purchase agreements have been signed after the constitution of HPERC i.e. 6-1-2001 onwards. The suo motu case Nos. are given against each:

Sr. No.	Name and particulars of Respondents with whom agreements (PPA) have been executed.	Name of HEP	Distt.	Capacity	Date of execution of PPA	Suo Motu Case No.
1.	M/s Dharamshala Hydro Power Ltd. 21/35 West Patel Nagar, New Delhi-110 008.	Maujhi	Kangra	4.5 MW	9.7.2002	-
2.	M/s Veecon IPA Gastechnik Ltd., B-58 Shivalik, P.O. Malvia Nagar, New Delhi-110017.	Jagat Sukh	Kullu	4.8 MW	26.11.02	8/2003
3.	M/s Astha Projects (India) Ltd. 8-2-704/B/15 Sai Enclave Road No.12, Banjara Hills, Hyderabad-500034.	HUL	Chamb a	2.5 MW	21.12.02	9/2003
4.	M/s DLI Power (India) Pvt.Ltd. Building No.1, Visava Enclave DP Road, Dundh, Pune-411007.	Sechi	Shimla	3.0 MW	17.2.03	10/2003
5.	M/s Weizman Ltd. Empire House, 214 Dr.D.N.Road, Ent A.K. Nayak Marg, Fort Mumbai-400001.	Balij Ka Nala	Chamb a	3.5 MW	1.11.02	11/2003
6.	M/s Nuziveedu Seeds Ltd. B-5-821 1 st Floor 104 Deshi Square Hyderguda Hyderabad (A.P) 500029.	Masli	Shimla	5.0 MW	1.2.03	12/2003
7.	M/s Aleo Manali Hydro Power (P) Ltd. B-173 Sector-41, Noida-201330 NCR Delhi.	Aleo	Kullu	3.0 MW	7.1.03	13/2003

Sr. No.	Name and particulars of Respondents with whom agreements (PPA) have been executed.	Name of HEP	Distt.	Capacity	Date of execution of PPA	Suo Motu Case No.
8.	M/s Patikari Power Pvt.Ltd. 2, Rajdot Marg, Chanakya Puri, New Delhi-110021.	Patikari	Mandi	16 MW	14.1.03	14/2003
9.	M/s Astha Projects(India) Ltd.,8-2-704/B/15, Sai Enclave Road, No.12, Banjara Hills, Hyderabad-500034.	Dehar	Chamb a	Supplem entary 3.0 MW increased to 5MW	31.01.03	15/2003

1.2 All the above power purchase agreements except serial No.1 “Mauji Project 4.5 MW with M/s. Dharamshala Hydro Power Ltd, Delhi on 9-7-2002”, have been executed without obtaining the prior approval of the Commission as required under Section 22 (1)(c) of The Electricity Regulatory Commissions Act, 1998, hereinafter referred to as “the 1998 Act”, and Regulation 27(iii) of HPERC CBR, 2001. The non feasance on the part of the IPP and the HPSEB led to the issuance of notices on Commission’s own motion to show cause why the power purchase agreements supra executed by them be not held or declared void ab initio non est or inoperative. The nature of the cases and the issues involved being more or less similar they were clubbed up for hearing on the same date i.e. the 5th June 2003.

1.3 The controversy and the issues raised by the IPPs and the HPSEB in their written pleadings revolve around the nature and the scope of jurisdiction of HPERC. The written replies of the Respondents question the very jurisdiction of the State Commission in regulating the power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the generating Companies, generating stations or from other sources for transmission, sale, distribution and supply in the State without omission of sub-section (2) of Section 43A of the Electricity (Supply) Act, 1948, hereinafter referred to as “ the 1948 Act”. They also contend that the HPERC cannot discharge functions under Section 22 (1)(c) of 1998 Act until the issuance of notification under Section 51 of the Act, by Government of India to omit sub section (2) of Section 43 A of the 1948 Act in respect of the State of Himachal Pradesh and since all the PPAs were

signed before the date of gazette notification by the Govt. of India on 5-2-2003 the Power Purchase Agreements can not to be looked into by the HPERC except in case No.10/03 in respect of Sechi Hydro Electric Project which was signed on 17-2-2003. In the case of this project also, the HPSEB came to know about the gazette notification of the Govt. of India, omitting Section 43A (2) of the 1948 Act on 24-2-2003 during the course of hearing on the Model Power Purchase Agreement for small hydro power plants upto 5 MW in the Commission's Court. The Respondents in respect of this project contended that the PPA supra was executed on 17-2-2003 under bonafide belief and was not intentional because the Board had no intimation or notice regarding issuance of the said notification. Both IPPs as well as HPSEB have also attributed the instructions and pressure from GoHP and Himurja for signing the PPAs.

2.0 The issues arising out of the written pleadings were posed to the learned counsels for the Respondents for unambiguous and clear answers in their own manner as follows:

- i) Does Section 43A(2) of 1948 Act preclude the jurisdiction of HPERC to regulate the power purchase and procurement process including the price under section 22 (1)(a)(c) and (d) of 1998 Act?
- ii) What is the implication of omission or non-omission of Section 43A(2) of the 1948 Act on the jurisdiction of the commission in regulating the power purchase and procurement process including the price? Does it affect the powers of the Commission to regulate and fix the tariff in any manner?
- iii) Does the ignorance of issuance of the notification to omit Section 43A(2) of 1948 Act by GOI under Section 51 of 1998 Act condone the illegality committed in executing the PPA in respect of Sechi HEP on 17-2-2003 under the alleged bonafide belief and unintentional pleading? HPERC had supplied copies of this notification to Principal Secretary (MPP & Power)-cum-Chairman, HPSEB under the cover of HPERC letter dated 15-2-2003.
- iv) Are the instructions issued by GoHP to sign PPAs legal and binding on the Respondents? What is the locus standi of State Government in such matters?

2.1 The principal issue is “ Does Section 43A (2) of 1948 Act preclude the jurisdiction of the HPERC to regulate the power purchase and procurement process under Section 22 (1) (a), (c) & (d) of 1998 Act and what are the implications of omission or non-omission of Section 43A (2) of the 1948 Act on the jurisdiction of HPERC for regulating power purchase and procurement process including the price and if it affects the powers of the Commission to regulate and fix the tariff in any manner”.

3.0 Contentions of Respondent Board in case Nos. 8 to 15 of 2003:

3.1 Shri Anil Tanwar, the learned counsel for HPSEB in all the cases, read out from paras 1, 2 and 3 of the written reply as well as Section 43A of the 1948 Act and Section 51 of 1998 Act. He pleaded that the notification issued by the Central Government in the official gazette appointed 5-2-2003 as the date for omission of sub Section (2) of Section 43A of 1948 Act. All PPAs except in respect of Sechi Project were signed before 5-2-2003 strictly in accordance with the instructions of GoHP issued on 23-9-2002, copy of which was sent to HPERC as well among others. He read out the instructions of the GoHP dated 23-9-2002 vide which directions were given to HPSEB that till notification omitting sub section (2) of Section 43A of 1948 Act under Section 51 of 1998 Act, the HPSEB may be allowed to approve and sign PPAs which were pending with HPSEB. Cabinet decision was also conveyed to the effect that HPERC will not reopen the matter where HPSEB had executed the PPAs in respect of Projects before setting up of HPERC. He concluded that Section 51 of 1998 Act cannot be termed as inconsistent because it has been inserted as a saving provision. It saves all acts done till a definite date i.e. the date when sub section (2) of Section 43 A of 1948 Act stood omitted. Therefore, all the PPAs signed before omission of sub section (2) of Section 43A of 1948 Act are legal. However, the PPA signed in respect of Sechi Project after the date of omission i.e. 5-2-2003 was done under bonafide belief and was unintentional.

4.0 Contentions of Respondent IPPs in case Nos. 9, 11, 12 and 15 of 2003:

4.1.1 Mr. Rajnish Maniktala, learned counsel for the following IPPs, submitted that the PPAs were signed in respect of various projects on the dates mentioned against each as below:

- i) (Case No.9/03) M/s. Astha Projects (India)Ltd.Hyderabad 21-12-2002
- ii) (Case No.11/03) M/s. Weizman Ltd. Mumbai 1-11-2002
- iii) (Case No.12/03) M/s. Nuziveedu Seeds Ltd, Hyderabad. 1-02-2003
- iv) (Case No.15/03) M/s. Astha Projects (India)Ltd.Hyderabad 31-01-2003

Learned Counsel quoted from Sections 51 and 52 of the 1998 Act to make a point that 1998 Act was a special Act and prevails over the general Act but where there was some implied repeal as provided in Section 51 read with Section 52 of the Act, the principles of statutory interpretation as contained in the textbook on principles of statutory interpretation by Justice G.P.Singh may be referred to. He also cited two authorities of the Hon'ble Supreme Court of India reported in AIR 1963 SC 1561 and 1979 SC 262 that wherever there were any inconsistencies they should be regarded as implied repeal of the corresponding provisions of the special Act. He also read Section 43A of 1948 Act to make a point that the tariff is to be determined by the Board before the issuance of notification by the Central Govt. under Section 51 of 1998 Act and since all the above PPAs were signed and approved before the date of notification on 5-2-2003, they cannot be said to be void, invalid and illegal.

4.2 **Contention of Respondent IPP in case No.10/2003:**

Shri Hemant Kumar Kaushik, appearing for DLI Power India Ltd., pleaded that the PPA was signed in good faith on directions from Himurja and tremendous pressure for financial closure. He pleaded for justice.

4.3 **Contention of Respondent IPP in case No.13/2003:**

Shri Ashwani Kumar Goel speaking for case No. 13/2003 submitted that the Agreement had been signed before 5-2-2003. GoHP have complete jurisdiction over the approval and signing of the PPAs. He further went on to submit that since the hearing on the Model PPA was postponed from 30-11-2002 it was presumed by him that it was done predominantly because sub section (2) of Section 43A of the 1948 Act had not been omitted and, therefore, HPERC did not have the power to approve the PPAs. He pleaded for vacation of the stay on the operation of the PPA.

4.4 Contention of Respondent IPP in case No.14/2003

Shri Naresh K. Gupta, learned counsel for M/s. Patikari power Pvt. Ltd., Delhi reiterated the written pleadings made by them in the reply affidavit dated 20-5-2003. He wanted time for submitting the written statement of arguments which has since been received. He also referred to the judgment of Allahabad High Court reported in – AIR 1972 All 146 Para 14 in case titled “Turabuddin Haji Niaz Ahmed and others vs. the Commissioner, Meerut Division, Meerut and others” to make a point that it is a well accepted rule of interpretation that the Court should place harmonious construction to give full effect to the various provisions of the Act and to avoid any interpretation which would render any provision of the Act nugatory. The Counsel concluded by submitting that Section 51 of 1998 Act cannot be termed as inconsistent because it has been inserted as a saving provision, though not phrased in that manner. It saves all acts done till a definite date i.e. the date when Section 43A (2) of 1948 Act stood omitted. Keeping this in mind the respondents signed PPA on 14-1-2003 and the same is legal.

5.0 Contention of Consumer Representative in all cases:

5.1 Mr. P.N.Bhardwaj, authorised by the Commission under Section 26 of the 1998 Act to represent the interest of the consumers in the proceedings before it, strongly opposed the power purchase agreements which in his opinion had been signed illegally and were non-est ab-initio. He submitted that the Section 22 (1) (c) of 1998 Act delegates power only to the Commission to regulate power purchase including the price. With the 1998 Act in position, reference to Section 43A of 1948 Act was uncalled for. He went on to submit that Section 43A does not prevent the Commission in discharging its functions under Section 22 (1)(c) of 1998 Act and non-omission of sub section (2) of Section 43A of 1948 Act nowhere means that the Commission cannot decide the tariff. The Commission has the powers to decide the tariff within the norms regarding operation and Plant Load Factor as laid down by the Central Electricity Authority and in accordance with the depreciation rates and reasonable return as determined by GOI and that the Respondents have twisted the facts of the cases. HPSEB had cited Section 43A of the 1948 Act as the anchor plank of their arguments. Section 22 (1) (c) of the 1998 Act gave no power to HPSEB to sign and approve

PPAs. Sub section (2) of Section 43A of the 1948 Act nowhere stopped the Commission from approving the power purchase and procurement process including the price. Mr. Bhardwaj cited Supreme Court judgment reported in JT 2002 (7) SC 578 in case of WBERC Vs. C.E.S.C. Ltd., wherein the Hon'ble Supreme Court has held that the primary object of 1998 Act was to create an independent regulatory authority with the power of determining the tariff bearing in mind the interest of the consumers whose rights were till then totally neglected.

5.2 Mr. Bhardwaj pleaded in conclusion that the Respondents have twisted the facts and the illegality had been committed in signing and approving the PPAs without the approval of the Commission. The Commission had full powers and the jurisdiction to regulate the power purchase and procurement process including the price at which the power shall be procured from the generating companies etc. Consumers have not been given a hearing before the Commission before signing of PPAs and they are not in consumer interests.

6.0 History Of Cases

6.1 In order to have the critical appreciation of the issues involved, the arguments, statements, counter-arguments and counter-statements advanced, it is necessary to go into the background of the matter of signing and approving the power purchase agreements after the constitution of the Commission on 30-12-2000 and coming into existence w.e.f. 6-1-2001.

6.2 Commission issued draft guidelines for approval of Power Purchase Agreements (for hydro electric projects upto 5 MW) on July 11, 2001. The guidelines **issued** in exercise of powers conferred under sub section (1) (c) of Section 22 of 1998 Act read with Regulations 27(i)(c) and 27(iii) of HPERC CBR, 2001 related to the preparation of PPAs of mini/micro hydro power plants upto 5 MW and the manner of submission of PPAs by the Respondents concerned for the approval of the Commission. Directions were also issued to HPSEB to prepare a model PPA for SHPPs and submit the same to the Commission for approval. The intent of the Commission was to examine individual PPAs at arms length basis without the need for it to undertake detailed scrutiny and to approve all subsequent PPAs as long as they conformed to the approved model PPA. Until such time the model PPA was approved, the

PPAs filed with the Commission were to carry a clause of review following Commission's orders after inquiry and public hearing in case the model PPA required any modification or alteration.

- 6.3 Only one PPA in respect of Sr. No. 1 'Mauji HEP' was approved with such a review clause.
- 6.4 Schedule to HPERC Conduct of Business Regulations, 2001 provided for fees to be paid for approval of PPA @ Rs.15000/- per MW.
- 6.5 Instead of proposing the date to be appointed for omission of sub section (2) of Section 43A of the 1948 Act to the Central Government as required in Section 51 of 1998 Act, the GoHP issued directions to HPSEB vide letter No.MPP-F(2)16/2002 dated 23-9-2002 that they are allowed to sign all the Power Purchase Agreements (PPAs) currently pending with them as per the policy approved by the government on 27-08-2000. Full text of the above letter is reproduced herebelow:

"NO.MPP-F(2)16/202

Confidential

Government of Himachal Pradesh
Department of MPP & Power

From:

Principal Secretary (Power) to the
Government of Himachal Pradesh.

To

The Chairman,
H.P.State Electricity Board,
Vidyut Bhawan, Shimla.

Dated Shimla- 171 002, the 23 September, 2002.

Sub: Power of H.P. State Electricity Regulatory Commission to accord approval to enter into arrangement for purchase/sale of electricity under present conditions.

Sir,

I am directed to convey that the proposal regarding powers of H.P. Electricity Regulatory Commission to accord approval to enter into arrangement for purchase sale of electricity under prevalent conditions was considered by the government of Himachal Pradesh.

2. It was observed that the Government vide notification No.MPP-A(7)-1/2000 dated 30th December, 2002 issued directions under Section 22(1)C of HPERC Act, 1998 but the Commission can discharge these functions only w.e.f. such date as the Govt. of India may issue Gazette Notification under Section 51 of HPERC Act, 1998 vide which sub section 2 of Section 43A of the Electricity(Supply) Act, 1948 (54 of 1948) shall be omitted in respect of State of Himachal Pradesh as has been notified in the case of other States like Andhra Pradesh, Karnataka, Uttar Pradesh, West Bengal, Madhya Pradesh and Delhi etc. In this context the Government considered the entire matter and the following decisions have been arrived at:

“Till notification omitting sub section (2) of Section 43A of the Electricity (Supply) Act, 1948 under Section 51 of the HPERC Act, the HPSEB may be allowed to approve and sign PPAs which are pending with HPSEB. The Cabinet further decided that HPERC will not to re-open the matter where HPSEB has executed the PPAs in respect of Projects before setting up of HPERC”.

3. It is, thus, made clear that even after the enforcement of HPERC Act, 1998 in the State, the HPSEB can sign and finalise the PPAs under Section 43 of Electricity (Supply) Act, 1948 till sub section 43A of the Electricity (Supply) Act, 1948 is omitted under Section 51 of HPERC Act, 1998 by Central Government.

4. Keeping in view the decision of Government you are allowed to sign the PPAs in respect of those projects for which the PPAs are pending in the HPSEB. While doing so the policy for signed PPAs approved by the government on 27-8-2000 may be taken into consideration.

5. I am further directed to convey to you that the above decision of the government may please be implemented in letter and spirit and the implementation report be sent to this Department at an early date.

Yours faithfully,

Sd/-

Secretary (Power) to the
Govt. of Himachal Pradesh

Dated Shimla-2, the 23 Sept., 2002.

No.MPP-F(2)16/2001
Copy forwarded to: -

1. Secretary, HP Electricity Regulatory Commission, Keonthal Commercial Complex, Khalini, Shimla-171 002 for information and necessary action.
2. C.E.O., Himurja, Himachal Pradesh, Shimla for information and necessary action.
3. Additional Secretary (GAD) to the Govt. of Himachal Pradesh, Shimla-2 for information and necessary action.
4. Chief Engineer (PSP & SO), HPSEB, Vidyut Bhawan, Shimla for information and necessary action.

Sd/-
Secretary (Power) to the
Govt. of Himachal Pradesh”

- 6.6 However, no specific direction was given to HPERC under Section 39 of 1998 Act not to look into the PPAs of the projects signed after it came into being. At the same time HPSEB was given the Authority to sign and finalise all the PPAs currently pending with it as per the policy of GoHP approved on 27-8-2000.
- 6.7 Sub section. (2) of Section 43A of the 1948 Act was omitted vide notification dated 5-2-2003 by the Central Government, contents of which are reproduced as hereunder:

“MINISTRY OF POWER

NOTIFICATION

New Delhi, the 5th February, 2003

S.O.134(E)- In exercise of the powers conferred by Section 51 of the Electricity Regulatory Commission Act, 1998 (14 of 1998), the Central Government hereby appoints with effect from the date of publication of this notification, as the date on which sub-section (2) of Section 43A of The Electricity (Supply) Act, 1948 (54 of 1948) shall be omitted in respect of the State of Himachal Pradesh.

[F.No.25/24/98-R&R]

AJAY SHANKAR,

Jt. Secy.”

7.0 History of Legislation

7.1 Before proceeding to examine the contentions of the Respondents it would do good to give the history of power sector legislation earlier to the Electricity Act, 2003.

7.2 Up to 15h October 1991 the entire regime of the Indian Electricity Act, 1910, hereinafter referred to as “the 1910 Act”, and the 1948 Act, revolved around the role of the public sector, the primary role in electricity supply being entrusted to the State Electricity Boards which were charged with broad and basic duties set forth in Section 18 of the 1948 Act. The Act of 1948 was in effect a nationalizing and controlling Act since government was almost invariably in control of the electricity sector. With the advent of liberalisation in 1991, the provisions of 1948 Act were amended by the Parliament by the Electricity Laws (Amendment) Act, 1991 (50 of 1991) and the definition of “generating Company” was completely changed and a new sub section 4A was inserted in Section 2 which reads as under:-

“ (4A) “Generating Company” means a Company registered under the companies Act, 1956 (1 of 1956) and which has among its objects the establishment, operation and maintenance of generating stations”.

7.3 Section 15 A was amended and sub-section (1) thereof was omitted. The objects of generating Company were changed and sub section (2) was substituted in Section 15A. These read as under:-

“ (2) The objects of a Generating Company shall include-

(a) establishment, operation and maintenance of generating stations and tie-lines, sub-stations, and main transmission lines connected therewith;

(b) operation and maintenance of such generating stations, tie lines, sub-stations and main transmission lines as are assigned to it by the competent government or governments.”

7.4 A new Section being 43A was inserted which reads as under:-

“[43A, Terms, conditions and tariff for sale of electricity by Generating Company:-

(1) A Generating Company may enter into a contract for the sale of electricity generated by it-

- (a) with the Board constituted for the State or any of the States in which a generating station owned or operated by the Company is located;
- (b) with the Board constituted for any other State in which it is carrying on its activities in pursuance of sub-section (3) of Section 15A; and
- (c) with any other person with consent of the competent government or governments.

(2) The tariff for the sale of electricity by a Generating Company to the Board shall be determined in accordance with the norms regarding operation and the plant Load Factor as may be laid down by the Authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined, from time to time, by the Central Government, by notification in the Official Gazette.

Provided that the terms, conditions and tariff for such sale shall, in respect of a Generating Company, wholly or partly owned by the Central Government, be such as may be determined, by the Central Government and in respect of a Generating Company wholly or partly owned by one or more State Governments be such as may be determined, from time to time, by the government or governments concerned.]”

7.5 This was accompanied by a policy statement in the form of the Resolution dated 22nd October 1991. The opening para of this Resolution gives indication of the objectives:

“With the objective of bringing in additionality of resources, for the capacity addition programme in the electricity sector, Government have formulated a policy to encourage greater participation by privately owned enterprises in the electricity generation, supply and distribution field. The policy, in this regard has widened the scope of private investment in the electricity sector, and has introduced modifications in the financial, administrative and legal environment, for the private enterprises in the electricity sector towards making investments in the sector by private units attractive. Based on this policy, a scheme has been

framed to encourage private enterprises' participation in power generation, supply and distribution, the details of which are given below": -

Clause 2.2 of the Resolution provided that up to hundred percent foreign equity participation can be permitted for projects set up by foreign private investors in the Indian electricity sector. Clause 4.5 provided that generating companies can enter into contract for sale of electricity generated by it with the State Electricity Board in any State where it owns/operates generating station(s) or in any other State it is carrying on its activity or with any other person with the consent of the competent government.

7.6 By Notification dated 30th March 1992, issued in exercise of powers conferred by sub-Section (2) of Section 43A, the Central Government determined the factors in accordance with which the tariff for sale of electricity by the generating companies to the Board and to other persons shall be determined. This notification was subsequently amended and Clause 3.0 was added which reads as under: -.

“ 3.0 General

3.1 The tariff for sale of electricity by a Generating Company to a Board may also be determined in deviation of the norms, other than the norms regarding operation and Plant Load Factor, specified in this notification subject to the conditions that-

- (a) the overall per unit tariff of electricity calculated on the basis of the norms in deviation does not exceed the per unit tariff calculated on the basis of the norms specified in this notification
- (b) the concerned State Government has, after satisfying itself, recommended that the deviations made are justified; and
- (c) the Central Government after satisfying itself that the overall per unit tariff is in accordance with condition (a) above, approves the deviations.

3.2 In case a Generating Company is permitted by the competent Government to supply electricity direct to a consumer in terms of clause (c), sub section (1), section 43A of the said

Act, such sale shall be at mutually negotiated rates, agreed upon between the generating Company and the other person(s), subject to the approval of the competent Government.

3.3 This notification shall be applicable for determining the tariffs for sale of electricity from such generating stations, whose financial package for investment is approved by the Authority, on or after the date of its publication in the Official Gazette”.

- 7.7 As a result, even norms framed by the Central Government could be deviated from provided same were approved by the State Government or the Central Government as the case may be.
- 7.8 In 1996, the Central Government with a view to restructuring the power sector organized two conferences of Chief Ministers to discuss various issues in the power sector and outcome of these meetings was adoption of Common Minimum National Action Plan for power (CMNPP). The CMNPP has recognized that the gap between demand and supply of power is widening and acknowledged that financial position of the State Electricity Boards is fast deteriorating and the future development in the power sector cannot be sustained without viable State Electricity Boards and improvement of their operational performance. The CMNPP identified creation of Regulatory Commission as a step in this direction and specifically provided for establishment of the Central Electricity Regulatory Commission (CERC) and State Electricity Regulatory Commissions (SERCs). After the finalisation of the national agenda contained in CMNPP, the Ministry of power assigned the task of studying the restructuring needs of the regulatory system to Administrative Staff College of India (ASCI), Hyderabad. The ASCI report recommended the creation of independent Electricity Regulatory Commission both at the Centre and the States. To give effect to the aforesaid proposals, the Electricity Regulatory Commissions Ordinance was promulgated on 25th April 1998, which subsequently became the Electricity Regulatory Commissions Act, 1998.
- 7.9 Having noticed the background in which the 1998 Act was enacted, we may now notice the provisions of the 1998 Act on which Respondents have relied, and which call for interpretation in this case.

- 7.10 Section 2 (1) defines “utility” to mean any person or entity engaged in the generation, transmission, sale, distribution or supply, as the case may be, of energy. Section 17 provides for establishment and incorporation of State Commission which shall consist of not more than 3 members including the Chairperson. Sub section (5) of Section 17 requires that the Chairperson and members of the State Commission shall be persons of ability, integrity and standing who have adequate knowledge of, and have shown capacity in dealing with problems relating to engineering, finance, commerce, economics, law or management. Sub-section (6) provides that the Chairperson and members of the State Commission shall be appointed by the State Government on the recommendation of the Selection Committee constituted as per Section 18.
- 7.11 Section 22 enumerates the powers and functions of the State Commission. Sub-section (1) of Section 22 provides that subject to the provisions of Chapter III, the State Commission shall discharge the following functions, namely:-
- “a) to determine the tariff for electricity, wholesale, bulk grid or retail, as the case may be, in the manner provided in Section 29;
 - b) to determine the tariff payable for use of transmission facilities in the manner provided in Section 29;
 - c) to regulate power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the Generating Companies, generating stations or from other sources for transmission, sale, distribution and supply in the State;
 - d) to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of this Act”.
- 7.12 Section 29 provides that notwithstanding anything contained in any other law, the tariff for intra State transmission of electricity and the tariff for supply of electricity grid, wholesale, bulk or retail, as the case may be, in a State shall be subject to the provisions of the Act and the tariff shall be determined by the State Commission of that State in accordance with the provisions of the Act. The State Commission is obliged to take into consideration various factors

while determining the tariff as set out in sub sections 2, 3, and 4 of Section 29 which read as under:

“2. The State Commission shall determine by regulations the terms and conditions for the fixation of tariff, and in doing so shall be guided by the following, namely;

- a) the principles and their application provided in Sections 46, 57 and 57A of the Electricity (Supply) Act, 1948 (54 of 1948) and the Sixth Schedule thereto;
- b) in the case of the Board or its successor entities, the principles under Section 59 of the Electricity (Supply) Act, 1948 (54 of 1948);
- c) that the tariff progressively reflects the cost of supply of electricity at an adequate and improving level of efficiency;
- d) the factors which would encourage efficiency, economical use of the resources, good performance, optimum investments, and other matters which the State Commission considers appropriate for the purpose of this Act;
- e) the interests of the consumers are safeguarded and at the same time the consumers pay for the use of electricity in a reasonable manner based on the average cost of supply of energy;
- f) the electricity generation, transmission, distribution and supply are conducted on commercial principles;
- g) national power plan formulated by the Central Government.

(3) The State Commission, while determining the tariff under this Act, shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer's load factor, power factor, total consumption of energy during any specified period or the time to which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) The holder of each license and other persons including the Board or its successor body authorised to transmit, sell, distribute or supply electricity wholesale, bulk or retail, in the State shall observe the methodologies and

procedures specified by the State Commission from time to time in calculating the expected revenue from charges which he is permitted to recover and in determining tariffs to collect those revenues”.

7.13 Section 23 provides that the provisions of Sections 9, 10 and 12 shall apply to a State Commission and shall have the effect, subject to the modification that reference to “Central Commission” shall be construed as reference to a “State Commission”. Section 9 lays down the procedure for proceedings of the Central Commission. Section 12 lays down that the Central Commission shall, for the purpose of any enquiry or proceedings under the Act, have the powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 in respect of the matters mentioned therein. Section 24 provides for constitution of the State Advisory Committee consisting of not more than 21 members to represent the interests of commerce, industry, transport, agriculture, labour, consumers, non-governmental organizations and academic and research bodies in the energy sector. Section 25 sets out the objects of the State Advisory Committee. Section 26 stipulates that the Commission can authorise any person as it deems fit to represent the interest of the consumers in all the proceedings before it. Section 27 provides for an appeal to the High Court in following terms: -

“ 27. Appeal to High Court in certain cases: -

- (1) Any person aggrieved by any decision or order of the State Commission may file an appeal to the High Court.
- (2) Except as aforesaid, no appeal of revision shall lie to any court from any decision or order of the State Commission.
- (3) Every appeal under this Section shall be preferred within sixty days from the date of communication of the decision or order of the State Commission to the person aggrieved by the said decision or order.

Provided that the High Court may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that the aggrieved person had sufficient cause for not preferring the appeal within the said period of sixty days.

7.14 Section 39 provides that in the discharge of its functions, the State Commission shall be guided by such directions in matter of policy involving public interest as the State Government may give to it in writing. If any question arises as to

whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final. Section 51 of the Act provides that with effect from such date as the Central Government may, by notification, in the Official Gazette appoint, sub-section (2) of Section 43A of the Electricity (Supply), Act 1948 shall be omitted. Section 52 under the caption “overriding effect” read as follows:

“52. Overriding effect:- Save as otherwise provided in Section 49, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act”.

7.15 Section 57 provides that the State Government may, by notification in the Official Gazette, make rules to carry out the provision of the Act. Section 58 vests in the State Commission power to make regulations to carry out the purposes of the Act. Section 58 reads as follows:

“58. Power of State Commission to make regulations:-

(1) The State Government may, by notification in the Official Gazette, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act.

(2) In particular and without prejudice to the generally of the foregoing power, such regulations may provide for all or any of the following matters, namely:-

a) the duties and powers of the Secretary under sub- section (1) of Section 21;

b) the salary, allowances and other conditions of services of the Secretary, Officers and other employees under sub-section (3) of Section 21;

c) the terms and conditions of consultants appointed under sub-section (4) of Section 21;

d) the manner in which charges for energy may be determined under sub-section (2) of Section 29;

e) any other matter which is to be, more may be specified”.

7.16 Section 59 provides that the Rules made by the State Government and the Regulations made by the State Commission under the Act shall be laid as soon as may be, after it is made, before each house of the State legislature where it

consists of two Houses, or where such legislature consists of one House, before that House.

7.17 In exercise of the power under Section 58 the HPERC has framed regulations known as H P Electricity Regulatory Commission (Conduct of Business) Regulations, 2001. Chapter IV of the Regulations deals with the tariff regulations. Sub-Regulations (ii), (iii) and (xvi) are material for the purpose of these cases and reproduced below:-

“ 27.(ii) Neither the Board nor the utilities for transmission (intra-state transmission), distribution and supply of power shall charge any tariff without prior approval of the Commission.

Provided that the existing tariff being charged by generating companies shall continue to be charged after the date of effect of these regulations for such period as may be specified by a notification without prejudice to the powers of the Commission to take up any matter relating to tariff falling within the scope of Section 22 of the Act.

(iii) Any transmission or distribution utility, henceforth proposing to procure and purchase power, including the price at which power may be purchased, from any Generating Company, Generating Station or from any other source for transmission, distribution and supply in the State, shall take approval from the Commission, before entering into such contract.

(xvi) Board/Utility found to be charging a tariff different from the one decided by the commission shall be deemed to have not complied with the directions of the Commission and shall be liable to penalties under Section 45 of the Act without prejudice to any other penalty to which it may be liable under any other Act. Any excess charges of tariff by Board/Utility in any year shall be dealt with as per the directions of the Commission.

7.18 Section 22 (1)(d) refers to the obligations of the Commission by which the objectives and purposes of the Act are achieved. By Section 26 of the 1998 Act for the first time, the consumer is given a right of participation in and in fixing the input tariff viz. the tariff of generating companies. Section 22(1)(a) of the Act covers all the tariffs and this would include the price at which the

generating Company would sell the power to a Board under PPA. Having regard to the provisions of Section 22 (1)(a) read with Section 29 it cannot be disputed that no other authority would have jurisdiction to determine the tariff except the State commission.

- 7.19 One of the important facets of the 1998 Act, is that the earlier procedure for determination of tariff as set out in Section 43A of the 1948 Act is completely done away with. The scheme of Section 43A was that the terms and conditions of the contract for sale of electricity by generating companies to the Board could be negotiated by the Board with the generating companies but the tariff for sale of electricity was to be determined as per Section 43A(2), in accordance with the norms regarding the operation and Plant Load Factor as may be laid down by the Authority and in accordance with the rate of depreciation and reasonable return and such other factors which would be determined by the Central Government notified in the official Gazette.
- 7.20 Section 22(1) requires the State Commission to determine the tariffs of electricity. Section 22(1)(c) confers powers on the State Commission to regulate power purchase and procurement process of the transmission utilities and distribution utilities and provides that such regulation would include the price at which it shall be procured from the generating companies, generating stations and from other sources for transmission, sale, distribution and supply in the State . The words “including price” are significant and indicate that all the terms and conditions of the PPAs are subject matter of the Regulation. Section 22(1) (d) refers to the function of the State Commission to promote competition, efficiency and economy in the activities of the electricity industry and to achieve the objects and purposes of the Act.
- 7.21 We shall first consider the scope of the word “regulate” as propounded by the Hon’ble Supreme Court. In *Indu Bhushan Vs Rama Sundari*, AIR 1970 SC 228 the Court observed:
- “ The dictionary meaning of the word regulation in Short Oxford Dictionary is “ the act of regulating” and the word “regulate” is given the meaning “to control, govern, or direct by rule or regulations”. This entry thus, gives the power to Parliament to pass legislation for the purpose of directing or controlling all house accommodation in cantonment areas. Clearly, this power to direct or

control will include within it all aspects as to who is to make the construction under those conditions, the construction can be altered, who is to occupy the accommodation and for how long, on what terms is to be occupied, when an order what circumstances the occupant is ceased to occupy it, and the manner in which the accommodation is to be utilized. All these are ingredients of regulation of house accommodation and we see no reason to hold that this word “regulation” has been used in this wide sense in this entirety”.

7.22 In *K Ramanathan Vs State of Tamil Nadu* (AIR 1985 SC 660) the Supreme Court’s interpretation of word “regulate” was as follows:

“ The word ‘regulation’ cannot have any rigid or inflexible meaning as to exclude ‘prohibition’. The word ‘regulate’ is difficult to define as having any precise meaning. It is a word of broad import, having a broad meaning, and is very comprehensive in scope. There is a diversity of opinion as to its meaning and its application to a particular state of facts, some courts giving to the term a somewhat restricted and other giving to it a liberal construction. The different shades of meaning are brought out in *Corpus Juris Secundum* vol 76 at P-611:”

“Regulate” is variously defined as meaning to adjust, order or govern by rule method, or established mode, to adjust or control by rule, method, or established mode or governing principles or laws, to govern by rule, to govern by, or subject to certain rules or restrictions, to govern or direct according to rule, to control govern or direct by rule or regulations. “Regulate” is also defined as meaning, direct, to direct by rule or restriction, to direct or manage according to certain standard laws, or rules, to rule, to conduct, to fix, to establish, to restrain, to restrict, see also *Webster’s Third New International Dictionary*, Vol II p 1913 and *Shorter Oxford Dictionary* Vol II 3rd Edn. P1784.

It has been said that the power to regulate does not necessarily include the power to prohibit and ordinarily the word regulate is not synonymous with the word prohibit. This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the things, subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control and involves the adoption of a rule or guiding principle to be followed, or the making of a rule

with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word regulation cannot have any inflexible meaning as to exclude prohibition. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the court must necessarily keep in view the mischief which the legislature seeks to remedy”.

7.23 Some of the material observations and rulings of Hon’ble Supreme Court of India in the land mark judgement, the first of its kind in the statutory interpretation of Electricity Regulatory Law in SLP (C) NOs. CC 6293 & CC 6307 dated 2002 titled WBERC VS. C.E.S.C. Ltd reported in JT 2002 (7) SC 578 wherein the Hon’ble Supreme Court has held that the primary object of 1998 Act was to create an independent regulatory authority with the power of determining the tariff bearing in mind the interest of the consumers whose rights were till then totally neglected, have been extracted as under:

“While considering this question, it is relevant to notice that so far as the 1948 Act is concerned, the consumers had no such specific right. But we notice that the 1998 Act brought about a substantial change in the manner in which the determination of tariff has to be made. It not only took away the right of the licensee or a utility to determine the tariff, but also conferred the said power on the Commission. This was done because one of the primary objects of the 1998 Act was to create an independent regulatory authority with the power of determining the tariff, bearing in mind the interests of the consumers whose rights were till then totally neglected. The fact that the Commission was obligated to bear in mind the interests of the consumers is also indicative of the fact that the Commission had to hear the consumers in regard to fixation of tariff. This right of the consumers is further supported by the language of Section 26 of the Act, which specifically mandates the Commission to authorise any person as it deems fit to represent the interest of the consumers in all proceedings before it. If the above provision of the Act is read in conjunction with Sections 22 and 29 read with Section 58(2)(d) of the 1998 Act, it is clear that the Commission while framing the regulations must keep in mind the

interest of the consumers for the purpose of determining the tariff. At this stage, it may be worthwhile to notice the mandate of the Parliament in Section 37 of the 1998 Act to the Commission that the Commission should ensure transparency while exercising its powers and discharging its functions which also indicates that the proceedings of the Commission should be public which, in itself, shows participation by interested persons.

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A combined reading of these provisions of the Act, rules and regulations, clearly shows that the statute has unequivocally provided a right of hearing/representation to the consumers, though the manner of exercise of such right is to be regulated by the Commission. This right of the consumers is neither indiscriminate nor unregulated as erroneously held by the High Court.

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As noticed above, though normally price fixation is in the nature of a legislative function and the principles of natural justice are not normally applicable, in cases where such right is conferred under a statute, it becomes a vested right, compliance of which becomes mandatory. While the requirement of the principles of natural justice can be taken away by statute, such a right when given under the statute cannot be taken away by courts on the ground of practical convenience, even if such inconvenience does in fact exist.

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Tariff Determination:

The next question which arises for our consideration is under the 1998 Act which determines the tariff. The Commission proceeded on the basis that under the 1998 Act i.e. under Section 22 read with Section 29, it was the Commission which had the Authority to determine the tariff. As per this understanding, the Commission had also laid down the terms and conditions under which it had to determine the tariff.

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For deciding this question we will have to first notice the objects and reasons of enacting the 1998 Act. A perusal of the same shows that the Parliament felt that in spite of the existing enactments, it was necessary to bring about a new law which would facilitate the implementation of reforms contemplated by it, which

reforms pertained to fundamental issues facing the power sector, namely, lack of rational retail tariff, high level cross subsidies, poor planning and operation, inadequate capacity, neglect of consumer, limited involvement of private sector's skills and resources and the absence of an independent regulatory authority. The view of the Administrative Staff College of India (ASCI) which strongly recommended the creation of an independent electricity regulatory commission both at the Centre and the State are also noticed. It is with the above object, an Ordinance was promulgated on 25th April, 1998 which later came to be replaced by the 1998 Act. We also notice that while promulgating the said Ordinance it was mentioned that one of the salient features of establishing the Central and State Electricity Commissions was to determine the tariff for electricity, wholesale, bulk, grid and retail, apart from determining the tariff payable for use of the transmission facilities. Therefore, it is to be seen that in spite of the fact that the 1948 Act was in existence, the Parliament thought that it was necessary to constitute a regulatory authority both at the Centre and the State, which was to be an autonomous independent body. We have earlier noticed the composition of this body and the statutory provisions made in the Act to protect the autonomy of this Commission. Therefore, from the Objects and Statements of this Act, as also from the provisions of this Act, it is clear that this is an enactment specially to provide for a procedure for determining the tariff for electricity, as also to confer the power of determination of tariff on an expert body like the Commission. In this regard we take note of Section 22(1)(a) of the 1998 Act, which in specific terms lays down that the Commission shall discharge the function of determining the tariff for electricity in the manner provided in Section 29. A plain reading of this Section leaves no room for doubt that so far as the State commission is concerned, the Act has solely entrusted the responsibility of determining the tariff to it. Section 29 firstly requires the Commission to determine the tariff in accordance with the provisions of that Act. It then requires the Commission to frame Regulations providing for the terms and conditions for fixation of tariff. In exercise of this latter power of framing the Regulations, the Commission is mandated to be guided by the factors mentioned in clauses (a) to (g) of sub-section (2) of Section 29. Thereafter sub-section (3) of Section 29 mandates the State Commission not to show any undue preference while determining the

tariff to any consumer of electricity subject, of course, to the exceptions found in the said sub-section. Sub-section (4) mandates the holder of a licence or other person to distribute or supply electricity, by observing the methodologies and procedures specified by the State Commission from time to time while supplying electricity and in collecting the revenue. Sub-section (5) of that Section provides if the State Government wants any subsidy to be given to any class of consumers in the tariff determined by the Commission, then the State Government is obligated to pay such subsidy in the manner in which the State Commission may direct.

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Section 30 the 1998 Act provides that if the Commission wants to depart from the factors specified in clauses (a) to (d) of Section 28 or (a) to (f) of sub-section (2) of Section 29, the Commission shall record reasons for such departure in writing. A collective reading of these Sections namely 22, 29 and 30, in our opinion, leaves no room for doubt that under the 1998 Act, it is the Commission and the Commission alone which is authorised to determine the tariff and in our opinion the State Commission in this case rightly understood its statutory obligation.

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It is seen that Sections 22 and 29 of the 1998 Act are special laws and the 1948 Act is only a general law in regard to determination of tariff. Consequently, because of the accepted principle in law that a general law yields to a special law, the provisions of the 1998 Act must prevail.

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This court in the case of Allahabad Bank Vs. Canara Bank & Anr. (2000 (4) SCC 406 at 427) after following an earlier judgement of this Court held:

“Alternatively, the Companies Act, 1956 and the RDB Act can both be treated as special laws, and the principle that when there are two special laws, the latter will normally prevail over the former if there is a provision in the latter special Act giving it overriding effect, can also be applied. Such a provision is there in the RDB Act, namely, Section 34. A similar situation arose in Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corpn. Of Maharashtra Ltd. (1993 (1) SC 310) where

there was inconsistency between two special laws, the Finance Corporation Act, 1951 and the Sick Industries Companies (Special Provisions) Act, 1985. The latter contained Section 32 which gave overriding effect to its provisions and was held to prevail over the former”.

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Having carefully considered the provisions of the Act as also the arguments advanced in this regard, we are of the opinion that under the 1998 Act, it is the Commission concerned and in the instant case the State Commission of West Bengal, which is the sole authority to determine the tariff, of course, as per the procedure in the said Act.

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We have already noticed that it is the Commission which has the Authority to determine the tariff taking into consideration the principles enunciated in the said Section, as also in the Regulations framed by the Commission in this regard. In this process, the Commission will have to take into consideration the findings recorded in collateral proceedings. However, it is not correct to state that the said finding in the collateral proceedings will be ipso facto binding on the Commission. This is because of the fact that the object of determination of the cost of the project by the CEA and the fixation of tariff by the commission are not entirely the same. There is no obligation on the part of the CEA to take into consideration the efficiency of the Company which is putting up the project, as also the interest of the consumers while determining the cost of the project, whereas the Commission while determining the tariff has to take into consideration these factors also. Therefore, in our opinion, the power of the Commission to determine the correct value, of the factors to be taken note of by it, cannot be restricted by mandating the Commission to be bound by a finding in a collateral proceeding. Such finding is a piece of evidence before the Commission, which even though has a strong evidentiary value, is ipso facto not binding on the Commission. The Commission could for good reasons decide to differ from it. The Commission is an independent autonomous body, therefore, its power to examine a piece of evidence cannot, in any manner, be restricted.

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Herein we notice that the objects of the 1948 Act are entirely different from the objects of the 1998 Act. The 1948 Act under Schedule VI does not contemplate taking into account the factors like good performance of the Company as also the consumers' interests in its expenditure while considering a particular expenditure as 'properly incurred expenditure'. While the 1998 Act specifically mandates that these factors also should be taken into account while considering whether a particular expenditure is "properly incurred expenditure" or not,

8.0 The Electricity Act, 2003 (No. 36 of 2003), hereinafter referred to as "the 2003 Act", has been enacted and the provisions of this Act (except Section 121) have been brought into force w.e.f. June 10, 2003. With the coming into force of the Electricity Act, 2003, the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 stand repealed.

8.1 The Commission was of the view that since the hearing in the above case was held on June 5, 2003 and the order has not so far been issued while the 2003 Act, has come into force on June 10, 2003, another opportunity should be given to the respondents to be heard on the impact and effect of the 2003 Act, on the above cases. Notices were, therefore, issued for hearing on July 19, 2003.

8.2 Before discussing and examining the contentions of the Respondents, it shall be highly relevant to reproduce the preamble, transitional provisions contained in Sections 14, 61 and 172, tariff matters in Sections 62, 63 and 64 and the repeal and saving provisions in Section 185(1) and 2(a) of the 2003 Act.

Preamble: "An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and

establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.

8.3 Transitional provision contained in Section 14 of the 2003 Act requires the Commission to grant a licence to any person:-

- to transmit electricity as a transmission licensee; or
- to distribute electricity as a distribution licensee; or
- to undertake trading in electricity as an electricity trader,

in any area as may be specified in the licence:

Provided that any person engaged in the business of transmission or supply of electricity under the provisions of the repealed laws or any Act specified in the Schedule on or before the appointed date shall be deemed to be a licensee under this Act for such period as may be stipulated in the licence, clearance or approval granted to him under the repealed laws or such Act specified in the Schedule, and the provisions of the repealed laws or such Act specified in the Schedule in respect of such licence shall apply for a period of one year from the date of commencement of this Act or such earlier period as may be specified, at the request of the licensee, by the Appropriate Commission and thereafter the provisions of this Act shall apply to such business:

8.4 Section 61 of the Act provides that the Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;
- (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;
- (e) the principles rewarding efficiency in performance;
- (f) multi-year tariff principles;

- (g) that the tariff progressively reflects the cost of supply of electricity and also reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission;
- (h) the promotion of co-generation and generation of electricity from renewable sources of energy;
- (i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948 (54 of 1948), the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this Section, whichever is earlier.

- 8.5 Transitional provisions contained in Section 172 of the Act stipulates that a State Electricity Board constituted under the repealed laws shall be deemed to be the State Transmission Utility and a licensee under the provisions of this Act for a period of one year from the appointed date or such earlier date as the State Government may notify, and shall perform the duties and functions of the State Transmission Utility and a licensee in accordance with the provisions of this Act and rules and regulations made hereunder:

Provided that the State Government may, by notification, authorise the State Electricity Board to continue to function as the State Transmission Utility or a licensee for such further period beyond the said period of one year as maybe mutually decided by the Central Government and the State Government.

The proviso in sub-section (b) of this Section provides that all licences, authorisations, approvals, clearances and permissions granted under the provisions of the repealed laws may, for a period not exceeding one year from the appointed date or such earlier period, as may be notified by the Appropriate Government, continue to operate as if the repealed laws were in force with respect to such licences, authorisations, approvals, clearances and permissions, as the case may be, and thereafter such licences, authorisations, approvals, clearances and permissions shall be deemed to be licences, authorisations, approvals, clearances and permission under this Act and all provisions

of this Act shall apply accordingly to such licences authorisations approvals, clearances and permissions.

8.6 Section 62 of the Act requires the Commission to determine the tariff in accordance with the provisions of this Act for-

- supply of electricity by a generating Company to a distribution licensee;
- transmissions of electricity;
- wheeling of electricity;
- retail sale of electricity.

8.7 Section 64 of the Act lays down the 'Procedure for tariff order'.

8.8 Sub-section (1) of Section 185 of the Act repeals the Indian Electricity Act, 1910 (9 of 1910), the Electricity (Supply) Act, 1948 (54 of 1948) and the Electricity Regulatory Commissions Act, 1998 (14 of 1998).

Sub-section (2)(a) of Section 185 of the Act saves anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions for this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

9.0 Supplementary Contentions of Respondents:

9.1 The matter was further heard on the 19th July, 2003 when Shri Anil Tanwar, learned Counsel was present for Respondent No.1 Board, in all the above cases. Shri K.D.Shreedhar, Sr. Advocate was present for case Nos. 9/03, 11/03, 12/03 and 15/03. Shri Shyam Vaidya appeared for Sechi Project, Shri A.K.Goel for Aleo Manali and Shri Vinod Thakur vice Shri Naresh Gupta, Advocate for Patikari Project. Shri P.N.Bhardwaj was authorised by the Commission to represent the interests of consumers as required under Section 94(3) of the 2003 Act.

9.2 Shri Anil Tanwar, the learned Counsel for Respondent No.1 in all the above cases, referred to Section 185(1) and (2)(a) to contend that the Commission

cannot now announce the order since the 1998 Act, together with the 1948 Act, had been repealed. He was asked by the Commission to refer to the first proviso to Section 82 of the 2003 Act, which clearly provides that the State Electricity Regulatory Commission established by the State Government under Section 17 of the 1998 Act and the enactments specified in the Schedule and functioning as such immediately before the appointed day shall be the State Commission for the purposes of this Act. The Commission pointed out that the continuity of the processes of law is manifest thro' transitional and saving provisions contained in Sections 14, 61, 172 and 185 of the 2003 Act and it could never be the intention of the legislature to create an impasse or break in the processes of law particularly relating to the reforms in power sector. Shri K.D.Shreedhar, the learned Senior Counsel for the above said four cases, referring to the same Section 185(2)(a) correlated the corresponding provision contained in Section 86(1)(b) of the 2003 Act which was exactly identical to the language of Section 22(1)(c) of the repealed Act of 1998. According to him, the situation is not the least altered. Shri S. Vaidya, Director, DLI appearing for Case No.10/03 Sechi Project, again feigned ignorance of the issuance of the notification of February 5, 2003 by the Government of India. He reiterated what his predecessor Shri Kaushik had stated in the hearing held on 5-6-2003. He, however, suggested that without waiting for the orders of the Commission with regard to the validity and the legality of the PPAs the respondent Board and the Respondents should be allowed to re-submit the PPAs after carrying out the modifications as directed by the Commission's orders on Model PPA dated 24-3-2003. Shri A.K.Goel appearing for Case No: 13/2003 pleaded for incentivising non-conventional energy sources and promotion of eco-generation. Shri Vinod Thakur appearing for case No.14/03 wished to adopt the arguments addressed by Shri M.G.Ramachandran in another case No.25/03. Shri P.N.Bhardwaj, consumer representative pleaded for a lenient view and submitted that even though the act of signing and approving the PPAs was illegal keeping in view the eco-friendly and distributed generation from the Small Hydro Power Projects, they should be allowed to re-submit the same with modifications as suggested by the representative of DLI in case No.10/03. On this point, the Commission enquired from Respondent No.1 Board if it could do the needful earlier than the possible time of 15 days to 1 month likely to be

taken in announcing the order. Shri Bhagwan Sahai, Director (PSP), HPSEB, present in the court on permission from the Commission, submitted that the Model PPA approved by the Commission had been sent to the government for its approval. The Commission, observed that there was no point in resubmitting the PPAs if it was going to take more time and unless the PPAs already signed and approved were declared as void ab initio, inoperative or non est.

9.3 The Commission has heard the arguments and notices that there is nothing new in the arguments. They are but reiteration of what has already been submitted in the hearing of 5-6-2003.

10.0 Discussion:

10.1 Let us now discuss the pith and the substance of the entire gamut of matters relating to signing and approval of PPAs after the constitution and coming into being of the H.P. Electricity Regulatory Commission with effect from 6th Jan., 2001 and then also discuss the implication of omission or non-omission per se of sub-section (2) of Section 43A of 1948 Act on the very power and jurisdiction of the Commission in approving the PPAs which, in essence, is the core question to be determined while deciding the feasibility or non-feasibility, validity, or invalidity, legality or illegality of the PPAs so signed between the Respondents and approved by HPSEB. Before assessing the effect and the impact of 2003 Act on the cases under consideration, let us discuss first the status of impugned PPAs in the light of provisions of the repealed laws and then seek to establish the correlation, correspondence and the consistency thereof with the 2003 Act. Sub-section (2) of Section 43A of 1948 Act in other words is in the eye of controversy in all the cases. Sub section (2) of Section 43A of 1948 Act merely stipulates that the tariff for the sale of electricity by a generating Company to the Board shall be determined in accordance with the norms regarding operation and the plant load factor as may be laid down by the Authority (CEA) and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined, from time to time, by the Central Government by notification in the official gazette.

10.2 Section 51 of the 1998 Act provides that the Central Government may by notification omit Section 43A (2) of the 1948 Act in relation to a particular state with effect from such date as it may appoint. Section 43A (2) of the 1948 Act

provides that tariff for sale of electricity by a generating Company and a State Electricity Board shall be determined in accordance with the norms laid down by the Central Electricity Authority and the Central Government. A notification regarding the norms has been issued by the Central Government. Section 43A (2) of the 1948 Act has been omitted for the State of Himachal Pradesh with effect from 5-2-2003.

- 10.3 The functions under Section 22(1) of the 1998 Act have been conferred on HPERC by virtue of its formation. They relate inter-alia to the determination of tariff in the manner provided in Section 29 of the 1998 Act, regulating the power purchase and procurement process including the price at which the power from the generating Company shall be procured and to promote competition, efficiency and economy in the activities of the electrical industry to achieve the objects and purposes of the Act.
- 10.4 The present functions of HPERC are thus limited to Section 22(1) and 29 of the 1998 Act. Section 22 (3) of the Act requires HPERC to exercise its functions in conformity with the national power plan.
- 10.5 A PPA between a generating Company and State Electricity Board comprises of a number of terms and conditions. A PPA relates to several conditions, inter-alia, the amount of electricity to be sold/purchased, the tariff that is applicable to every unit generated or deemed to be generated, 'take or pay obligations', the duration of the PPA, the damages payable for failure to supply, securities for payments, responsibilities of the Respondents for construction, operation & maintenance, force majeure and modalities of dispute resolution. However, all these conditions are steps in the directions of facilitating the "power purchase and procurement process of the transmission and distribution utilities" like HPSEB. This function is clearly within the domain of Section 22(1) (c) of the 1998 Act. The function of regulating the purchase and the procurement process would not directly fall under any of the functions listed in Section 22(2) of the 1998 Act, which had not been conferred on HPERC. Although Section 43A (2) of the 1948 Act, had not been omitted for Himachal Pradesh before 5-2-2003, this does not limit the functions of HPERC to regulate the power purchase and procurement process. In the Commission's view, the applicability of Section 43A (2) in so far as the State of Himachal Pradesh is concerned does not preclude HPERC from approving PPAs executed or amended after the

formation of HPERC between a generating Company and HPSEB, except to the restriction in determination of tariff as discussed below.

- 10.6 Taking the circumstances into account and harmoniously construing Sections 22(1), 29 and 51 of the 1998 Act with Section 43A (2) of the 1948 Act, it is important to also give effect to Section 22(1) and 29 of the 1998 Act so as not to make them otiose until Section 43A (2) of the 1948 Act is omitted by a notification under Section 51 of the 1998 Act. Hence, it may be argued that the meaning of the phrase 'regulate' would include all things ancillary to the power purchase and procurement process, except the power to fix tariff as long as the tariff fixed conforms to the broad parameters laid down pursuant to Section 43A (2) of the 1948 Act. If the tariff fixed deviates from the norms prescribed under Section 43A (2) of the 1948 Act, then HPERC needs to ensure that it meets those norms. The moment Section 43A (2) of the 1948 Act is omitted, HPERC will have a much wider function with regard to the fixation of tariff. Hence, it's arguable that in the absence of omission of Section 43(A)(2) of the 1948 Act, the role of HPERC to determine tariff for sale of electricity between a generating Company and HPSEB is restricted.
- 10.7 From the discussion in the foregoing, the law settled by the Hon'ble Supreme Court is that the power to determine the tariff was taken away from the utility and conferred upon the Commission. The Commission was obligated to bear in mind the interest of consumers and the Commission had to hear the consumers in regard to fixation of tariff. The Commission has to ensure the transparency while exercising its powers and discharging its functions. Normally price fixation is in the nature of legislative function and the principles of natural justice are not normally applicable, in cases where such right is conferred under a Statute, it becomes a vested right compliance of which becomes mandatory and cannot be taken away by the Courts. The Hon'ble Supreme Court has held in no unmistakable terms that it is the Commission and the Commission alone which is authorised to determine the tariff. The Hon'ble Supreme Court has further held that Sections 22 and 29 of the 1998 Act are special laws and the 1948 Act is only a general law in regard to determination of tariff and consequently because of the accepted principles of law that a general law yields to a special law, the provision of 1998 Act must prevail. In case of *Alahabad Bank Vs Canara Bank and Anr.* (2000(4) SCC 406 of 427)

the Hon'ble Supreme Court has held the principle that where there are two special laws, the later will normally prevail over the former if there is a provision in special Act giving it the overriding effect.

10.8 Section 43A of 1948 Act together with the non-omission of sub-section (2) has been the central theme of the written pleadings and the oral and written arguments of almost all the respondents. Its non-omission until 5-2-2003 and its relation with Sections 51 and 52 of 1998 Act have been interpreted variously on the sidelines to hold the contention that there is an implied repeal of Section 22(1)(c) until sub-section (2) of Section 43 of 1948 Act is omitted under Section 51 of 1998 Act.

10.9 Having carefully considered the provisions of the Act as also the arguments advanced in this regard, and the law laid down by Supreme Court in the WBERC case discussed in para 7.23, the Commission remains unconvinced and with respect to the learned Counsels, is unable to accept the contentions raised by them. The Authorities cited by Shri Rajnish Maniktala, the Ld. Counsel for respondents in case No.9/03 and others, are not relevant and applicable in the facts and circumstances of these cases and the question of general law vis-a-vis special law and the implied repeal raised by him, has been settled by the Hon'ble Supreme Court in WBERC case. The Authorities cited by him have been perused by the Commission but are not of any avail to the respondents. The Commission is satisfied beyond a reasonable doubt that under the 1998 Act the HPERC is the sole authority to determine the tariff, of course, as per the procedure laid down in the said Act. Even if it is assumed for discussion purpose that both the 1948 and 1998 Acts are the special laws, the law having the overriding effect in Section 51 shall prevail over the former. It is, therefore, settled beyond shadow of doubt that Commission and the Commission alone is the competent authority for determination of tariff as set out in Section 43A of the 1948 Act. The only effect of sub section (2) of Section 43A of 1948 Act before omission was that the tariff for the sale of electricity by a Generating Company to the Board had to be determined in accordance with the norms regarding operation and the plant load factor as may be laid down by the Central Electricity Authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined, from time to

time, by the Central Government by notification in the official gazette. Even while the Commission is the sole Authority for determination of tariff, it was obligated to determine the tariff in accordance with the norms laid down by the Authority and the rates and other factors as determined by the Central Government. Such a situation obtained prior to February 5, 2003 when the notification was issued by the Ministry of Power wherein the Central Government appointed February 5, 2003 as the date on which sub section (2) of Section 43A of the 1948 Act, was omitted in respect of State of Himachal Pradesh. However, after the omission of sub section (2) supra, the Commission can deviate from the norms and the rates prescribed under Section 43A (2) of 1948 Act and the HPERC will have a much wider function with regard to the fixation of tariff. Even without omission of the said sub-section, it makes little difference so far as the powers of the State Commission are concerned in view of the non-obstante clause contained in Section 29 of the 1998 Act. Sub section (2) of Section 29 of 1998 Act does not refer to Section 43A (2) of 1948 Act at all. In any event, Section 43A (2) of 1948 Act would lose its entire efficacy in view of the direct conflict with the 1998 Act. Therefore, even in the absence of notification of deletion of Section 43A(2) of 1948 Act, the provision of 1998 Act would clearly override Section 43A (2) of 1948 Act as it conflicts with the 1998 Act. Thus, there is clear legislative intent to make all tariffs subject to determination by the Regulatory Commission. As observed by Hon'ble Supreme Court, from the objects and statements of the 1998 Act and provisions thereof, it is clear that this is an enactment specially to provide for a procedure for determination of tariff for electricity as also to confer the power of determination of tariff on an expert body like the Commission. Sub section (2) of Section 43A of 1948 Act, thus, does not preclude the jurisdiction of HPERC to regulate the power purchase and procurement process including the price and to achieve the objects and purposes of the Act under sub section 22(1)(a), (c) and (d) of 1998 Act. The jurisdiction of the Commission in regulating the power purchase and procurement process including the price is unrestricted, unlimited and uninhibited by the omission or non-omission of sub section (2) except to the restriction in determination of tariff to the norms and the rates before the omission and un-restricted and much wider after the omission. In no

way, does it affect the power of the Commission to regulate and fix the tariff in any manner except as discussed above.

11.0 Conclusion

11.1 The Commission is satisfied beyond a reasonable doubt that the discussion hereinabove together with the judgement of Hon'ble Supreme Court in WBERC Vs CESC case shall provide convincing and conclusive answers to the contentions raised by the Ld. Counsels for Respondents in terms of 1998 Act.

11.2 The notices made or issued under the repealed law of 1998 are deemed to be the notices made or issued under the corresponding provisions of this Act in so far as they are not inconsistent with the provisions of this Act. The corresponding provisions contained in sub section (1) (c) of Section 22 of the repealed 1998 Act can be found in the sub section (1)(b) of Section 86 of the 2003 Act. Both are reproduced for better appreciation and test of consistency:

1998 Act:

“Section 22. Functions of State commission. - (1)(c) to regulate power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the generating companies, generating stations or from other sources for transmission, sale, distribution and supply in the State.”

2003 Act:

“Section 86. Functions of State commission. – (1)(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State.”

11.3 With respect to the learned Counsel for respondent Board, the Commission is unable to accept his contention and perception of discontinuity and dead end in the reforms process due to enactment of the 2003 Act. The first proviso to Section 82 of the 2003 Act clearly provides that the State Electricity Regulatory Commission established by the State Government under Section 17 of the 1998 Act and functioning as such immediately before 10th June, 2003 shall be the State Commission for the purposes of this Act. The continuity of the process of

law is manifest thro' transitional and saving provisions in Sections 14, 61, 172 and 185 of the Act. The legislature could never contemplate statutory impasse in such a vital subject. The provisions relating to regulation of power purchase and procurement process including the price at which power shall be procured from the generating companies and others in Section 22(1)(c) of 1998 Act and Section 86 (1)(b) of 2003 Act are almost identical with total correspondence and inter-se and intra-se consistency. The saving provision in Section 185(2) (a) of 2003 Act saves among other acts, the reserved order too. The learned Senior Counsel for case Nos. 9, 11, 12 & 15/03 agrees with such an interpretation by the Commission. The arguments addressed by the representatives in case Nos. 10 and 13/03, Shri Shyam Vaidya and Shri A.K.Goel respectively are not relevant to the issues under consideration. Shri Vinod Thakur, learned Counsel adopted the arguments addressed by Shri M.G.Ramachandran, Advocate in another case which go to corroborate the Commission's comprehension of the issue.

- 11.4 This Commission after holding public hearing in the matter approved the Model PPA for small hydro electric power plants upto 5 MW capacity being executed by the IPPs in the private sector in the State of Himachal Pradesh subject to modifications as ordered in Chapter 7 of that order which took care of consumer interests. All the PPAs except in respect of Patikari Project (16 MW) are to be covered by the Model PPA with modifications approved by the Commission on 24-3-2003. The PPAs upto 5 MW approved and signed by HPSEB, however, are not in conformity with the approved Model PPA, not approved by the Commission, not filed in accordance with the manner of submission laid down in the draft guidelines in this respect and nor accompanied by the fees as per the Schedule "Fees Structure" of HPERC's Conduct of Business Regulations, 2001. They have been signed in blatant contravention of the provisions of 1998 Act and the regulations made thereunder by strange and subjective interpretation of the law. While the Commission has been deprived of the fees required to accompany the filing of such PPAs, the rights of consumers have been totally neglected by signing PPAs without submission to the Commission which is mandated to bear in mind the interests of consumers. Similarly the PPA signed and approved on 17-2-2003 in respect of Sechi Project (3 MW) with M/s. DLI Power India Ltd. after the notification of February 5, 2003 is deliberate and

mischievous contravention of the Act. The ignorance of the issuance of the notification to omit Section 43 A (2) of 1948 Act by Central Government is untenable particularly when the copy of this notification was sent to the Principal Secretary (Power)-cum-Chairman, HPSEB on February 15, 2003 even while not obliged to do so. The ignorance of law otherwise also cannot be an excuse but could be a plea for those who wish to break the law.

- 11.5 The Commission deems the entire passage of proceedings in the above cases done and taken under the corresponding provisions of this Act.
- 11.6 On the basis of the discussion in the foregoing, cumulative consideration of the aforementioned provisions of the law and for the reasons assigned, it is abundantly clear that the respondent Board acted beyond its jurisdiction in utter disregard to the provisions of 1998 and 2003 Acts by signing and approving the impugned PPAs with the prospective Independent Power Producers. Such approvals by the Board are unsustainable in law. All the four issues in para 2 are decided against the respondents. All the Power Purchase Agreements in para 1.1 (except at Sr.No.1) signed and approved in suo motu case Nos. 8 to 15 Sr. Nos. 2 to 8 and Supplementary PPA at Sr. No.9 in para-1.1 supra are held void ab initio, non est and inoperative and ordered as such.
- 11.7 Precious time and resources of the Commission have been wasted in pursuing suo motu the above cases of unlawful acts of non-feasance to their logical conclusion. This perhaps could have been avoided by some application of mind, respect for law and diligence on the part of all the Respondents. The Commission has reasons to feel that such contraventions were deliberate acts of mischief and need to be condemned in no unambiguous words.

12.0 Directions:

- 12.1. (1) All the respondents in respect of PPAs enumerated in para 1 (except Sr. No.8 Patikari Project) are directed to file the PPAs strictly in accordance with manner of submission laid down in draft guidelines in this respect and in conformity with the model PPA, approved with modifications by the Commission vide its order of 24-3-2003, along with the fees within 4 weeks from to-day unless extended by the Commission on application from respondents.

- (2) The respondents in case No. 14/2003 PPA at Sr. No.8 “Patikari Project” shall file the PPA in accordance with the manner of submission laid down in the draft guidelines for Power Purchase Agreements (for hydro electric projects upto 5MW) issued by the Commission on July 11, 2001 and the prescribed fees as per Schedule “Fees Structure” of HPERC’s Conduct of Business Regulations within 4 weeks from to-day unless extended by the Commission on application from respondents.
- (3) Any contravention of above directions shall attract provision of Section 142 of the 2003 Act.

Let copy of this Order be placed on record of each case.

It is so ordered.

Shimla: the 6th September, 2003.

(S.S.Gupta)
Chairman