

**BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION,  
SHIMLA**

**Review Petition Nos. 91/2009, 168/2009,**

**176/2009 & 179 /2009**

**In the Matter of:**

Applications under section 94(1) (f) of the Electricity Act,2003, read with regulation 63 of the HPERC(Conduct of Business) Regulations,2005, seeking review of the order dated 30.03.2009 passed in tariff petition No.256/2007 and the order dated 10.09.2009, passed in review petition No.83/2009, moved by M/S Jaiprakash Hydro Power Venture Limited.

**AND**

**In the Matter of:**

The Himachal Pradesh State Electricity Board,  
through its Secretary, Vidyut Bhawan, Shimla –171004.

**..... Petitioner**

**V/s**

M/s Jaiprakash Hydro Power Limited,  
JUIT Complex, Wagnaghat,  
P.O. Dumehar Bani, Kandaghat - 173215  
Distt. Solan (H.P.)

**.....Respondent**

**Review Petition No.91/2009 and Petition No.176/2009**

**AND**

M/s Jaiprakash Hydro Power Limited,  
JUIT Complex, Wagnaghat,  
P.O. Dumehar Bani, Kandaghat - 173215  
Distt. Solan (H.P.).

**.....Petitioner**

**V/s**

The Himachal Pradesh State Electricity Board,  
through its Secretary, Vidyut Bhawan, Shimla –171004.

**.....Respondent**

**Review Petition No.168/2009**

**AND**

The Himachal Pradesh State Electricity Board,  
through its Secretary, Vidyut Bhawan, Shimla –171004.

..... **Petitioner**

**V/s**

M/s Jaiprakash Hydro Power Limited,  
JUIT Complex, Waknaghat,  
P.O. Dumehar Bani, Kandaghat - 173215  
Distt. Solan (H.P.)

.....**Respondent**

**Review Petition No.179/2009**

**Order Passed on June 23, 2010**

**CORAM**

**Sh. Yogesh Khanna, Chairman**

**Counsels:-**

For the petitioner/applicant:

Sh. Bimal Gupta, Advocate in  
Petition Nos.91/2009, 176/2009 and 179/2009  
Sh. Pawan Upadhyay Advocate, in  
Petition No.168/2009

For the respondents:

Sh. Pawan Upadhyay Advocate, in  
Petition Nos.91/2009,176/2009 and 179/2009

Sh. Bimal Gupta, Advocate in  
Petition No.168/2009

**ORDER**

(Last heard on 09.04.2010 and Order reserved)

## **A1: BACKGROUND**

### **Purpose of the order**

- 1.1 M/S Jai Prakash Hydro Power Ltd., Juit Complex, Wagnaghat, P.O. Dumehar Bani, Tehsil Kandaghat, Distt. Solan, Himachal Pradesh (hereinafter referred as "JHPL.") filed an application (i.e. petition No.256/2007) with the Himachal Pradesh Electricity Regulatory Commission (hereinafter referred as "the Commission") under sections 62 and 86 of the Electricity Act, 2003, (hereinafter referred as "the Act" ), read with the HPERC (Terms and Conditions for Determination of Hydro Generation Tariff ) Regulations, 2007, seeking determination of tariff for sale of electricity generated at Baspa-II, 300 MW Hydro Power Plant, on River Baspa, a tributary of River Satluj, in Distt. Kinnaur, Himachal Pradesh (hereinafter referred to as the "Project" or "Baspa-II") to the Himachal Pradesh State Electricity Board (hereinafter referred as "the Board" ), a deemed licensee under the Act, engaged in generation, transmission and distribution of electricity in the State of Himachal Pradesh. The Commission after considering the application filed by the generation company and hearing the objections received from the Board and the issues raised in the hearings and going through the documents, available on record, and in exercise of the powers vested in it under section 62 and section 86 of the Act, and also in compliance to the Commission's hydro generation tariff regulations, referred to above, passed the tariff order dated March 30, 2009 and granted tariff for 300 MW Baspa-II Hydro Power Plant for the Control Period of FY-2008-09 to FY-2010-11.
- 1.2 Being aggrieved by the aforesaid tariff order dated 30.03.2009, JHPL, moved review petition No.83/2009 and the Board moved review petition No.91 of 2009, both under section 94(1)(f) of the Act, read with regulations 63 of the HPERC (Conduct of Business) Regulations, 2005, seeking review of the order dated 30.03.2009 passed in petition No.256/2007. The Commission vide its order 10.09.2009 disposed off the review petition moved by JHPL. As regard the Board's petition, on the condition that some of the issues raised by the Board have also been the subject matter of the petition moved by the Board before the APTEL and the APTEL having pronounced the decision, the Commission gave an opportunity to the petitioner Board to amend or file the revised petition, if it chooses to do so. The Board filed the revised petition, namely Petition No.176/2009 ( in petition No.91 of 2009) and during the hearing held on 7.11.2009 stated that the Board is also filing on that date another petition i.e. petition No.179/2009, seeking review of the order dated 10.09.2009 passed in review petition No.83/2009. In the meanwhile JHPL has also moved another petition under section 94(1) (f) of the Act, namely petition No.168/2009, seeking review of the Commission's order dated 10.09.2009 passed in review petition No.83/2009.
- 1.3 With the factual matrix, as brought out in the preceding paras, and keeping in view the fact that all the above petitions, i.e. petition Nos.91, 168, 176 of 2009 and petition No.179/2009 arise out of the same Tariff Order dated 30.03.2009, passed in petition No.256/2007, and involved similar questions, the

Commission feels it convenient to hear these petitions together, and therefore it orders clubbing of these petitions and decides to dispose of the aforesaid petitions by a common order.

### **Power to Review**

- 1.4 The Commission's powers to review its own orders flow from section 94(1)(f) of the Electricity Act, 2003 and are the same as those conferred on a civil court by the Code of Civil Procedure (CPC). These have been spelt out in section 114 read with Order 47 of the CPC. The review application has to necessarily meet the requirements of section 114 and Order 47 of the CPC.
- 1.5 As per the said provisions, the specific grounds on which an order already passed can be reviewed are: -
  - (a) if there are mistakes or errors apparent on the face of the record, or
  - (b) on discovery of new and important matter or evidence which, after due diligence was not within knowledge or could not be produced at the time of making the order, or
  - (c) if there exist other sufficient reasons.
- 1.6 The power of review, legally speaking, is permissible where some mistake or error apparent on the face of record is found and the error apparent on record must be such an error which may strike one on a mere looking at the record and would not require any long drawn process of reasoning. A review cannot be equated with the original hearing of a case. A review petition has a limited purpose and cannot be allowed to be an appeal in disguise and it cannot be exercised on the ground that decision was erroneous on merits. But simultaneously the materials on record, which on proper consideration may justify the claim, cannot be ignored.
- 1.7 It may be pointed out here that Hon'ble Supreme Court and various High Courts have held that review jurisdiction is not a substitute for an appeal and cannot be exercised for reconsideration of issues already decided by a Court in its original order. The error and mistake for correction in review proceeding should be apparent on the face of the record and the same should be self evident.
- 1.8 As regard the third ground of review under Order 47 of the CPC namely "for any other sufficient reason", there need to be new grounds other than those considered in the original order of the Commission dated 30-3-2009. It is a well settled principle that the expression "any other sufficient reason" will have a meaning analogous to grounds specified immediately before. This provision of Order 47 of CPC cannot be used to nullify the specific requirements stipulated in the earlier portions of the same provision.
- 1.9 Before the Commission proceeds to here and dispose of the aforesaid petitions,

it would like to consider the following basic questions:-

- (A) Whether review of review orders is maintainable?
- (B) Whether the Commission has the jurisdiction to re-hear the issues already decided by it, if so, to what extent?

**Point (A): Maintainability of the review of review orders:-**

- 1.10 This issue has also engaged the attention of the Hon'ble Supreme Court as well as of the Hon'ble APTEL in various cases. Section 94(1) of the Electricity Act, 2003, provides that the Appropriate Commission shall, for the purpose of any enquiry and proceedings under the Act, have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, in respect of matters enumerated in clauses (a) to (g) thereof. . Further Clause (f) of said sub-section (1) provides for reviewing its decisions, directions or orders by the Commission. It is settled Law that even in terms of the Civil Procedure Code, no review of review is maintainable. It has been so held by the Apex Court in **Abhaimaligai Vs. K.Santh Kumaran 1998 (7) SCC 386; Lily Thomas Vs UOI 2000(6) SCC 224; and the Delhi Administration Vs Gurdip Singh 2000(7)SCC 296**. The verdicts of the Hon'ble Apex Court have been constantly relied upon by the Hon'ble APTEL in its various verdicts given in **Appeal No.99 of 2006 Urla Industries Association Vs. the Chhatisgarh State Electricity Regulatory Commission decided on 12.09.2006;(2007 APTEL 331); in Appeal No.119 of 2005 the Power Grid Corporation of India Limited Vs the Central Electricity Regulatory Commission and others decided on 09.12.2005-(2007 APTEL 1140); and in Appeal No.25/2009 and IA No.37- the Transmission Corporation of AP Hyderabad and others Vs. the National Thermal Power Corporation, New Delhi decided on 5.5.2009;(2009 ELR (APTEL) 0445)**.
- 1.11 In view of the above cited decisions there is no scope to hold that, even in terms of section 94 (1) of the Act, review of review is not maintainable. This point is answered accordingly.

**Part (B):- Scope of re-hearing the issues**

- 1.12 Clerical or arithmetical mistakes in judgments or orders or errors arising therein from any accidental slip or omission may at any stage be corrected by the Commission under section 152 of the CPC, either of its own motion or on the application of any of the parties. The use of word "may" shows that no party has a right to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the Court. Such discretion is required to be exercised judiciously to make corrections necessary to meet the ends of justice. The word "accidental" qualifies the slip/ omission. Therefore, this provision cannot be invoked to correct an omission which is intentional, however erroneous. Because section 152 does not countenance a re-argument on merits of fact or law, The Commission has the limited power to make correction of clerical or arithmetical mistakes in judgments or orders, or errors arising therein from any

accidental slip or omission.

- 1.13 In light of above discussion, the review petition no.168/2009 moved by the petitioner company, seeking review of the Commission's order dated 10.09.2009, can only be looked into, whenever it is considered necessary for meeting the ends of justice, to make correction of clerical or arithmetical mistakes or errors arising therein from any accidental slip or omission. Other un-disposed off petitions moved by the Board i.e. petition no.91 and 179 of 2009, can be taken up as review petition, under clause (f) of sub-section (1) of section 94 of the Act, read with regulations 63 of the HPERC (Conduct of Business) Regulations, 2005, to review the Commission order dated 30.03.2009 passed in tariff petition 256/2007, excluding the issues disposed by the Commission Order dated 10.09.2009 passed in review petition no.83/2009 and also the issues decided by the Hon'ble APTEL in Appeal No.120 of 2008.

## **A2: COMMISSION'S OBSERVATIONS ON VARIOUS ISSUES RAISED IN THE REVIEW PETITION AND OTHER APPLICATIONS**

### **Secondary Energy**

- 2.1 The Board has submitted that the saleable energy delivered by the project at interconnection point after COD in the FY 2003-04 is 990.76 MU vis-à-vis 993.88 MU considered by the Commission in its Order dated 30<sup>th</sup> March, 2009. The secondary energy has been calculated as difference between the actual generation of 993.88 MU and saleable primary energy of 940.41 MU, which comes to 53.47 MU against the actual secondary energy of 50.35 MU.
- 2.2 The Commission observes that in Form 20 of the tariff petition filed by JHPL for first MYT period (FY2004 to FY2008), the primary energy and secondary energy has been shown as 940.41 MU and 50.34 MU, respectively. The JHPL annual report of FY 2003-04 and the SLDC independently confirms that saleable energy delivered by the project at interconnection point after COD in the FY 2003-04 is 990.76 MU. The Commission in its tariff order dated 30<sup>th</sup> March, 2009 has inadvertently considered saleable energy as 993.88 MU. This is an error on the face of the record and needs to be corrected. The Commission therefore, corrects the error and now approves secondary energy for FY 2003-04 as 50.35 MU.

### **O&M Expenses and Return on Equity**

- 2.3 The Board has submitted that for the first year of the operation (FY2003-04), when plant is running for partial year, the O&M Expenses and Return on Equity have to be given based upon the number of days plant runs as per the Section 8.7.2 (b) and 8.7.3 of the PPA.
- 2.4 Section 8.7.2 (b) of the PPA reads as-
- “For the tariff period, the O&M charges shall be worked out on the pro-rata basis for actual number of days falling in the such period, at the rate 1.25% of the capital cost for 365 days.”*
- 2.5 “Tariff Period” is defined by the PPA as follows;
- “means the period beginning from COD of the project and ending on 31<sup>st</sup> March, of the same financial year”*
- 2.6 Section 8.7.3 of the PPA reads as-
- “Return on Equity for each year from the initial tariff year onwards will be calculated at a per annum rate of 16% (sixteen percent) of the equity component of the capital cost as per approved financial package. The return on equity for the tariff period and the last tariff year shall be worked out in proportionate*

*basis for actual number of days for which such return on equity is to be determined”.*

2.7 From the above it is clear that Section 8.7.2 (b) and 8.7.3 will be applicable when the project (entire three units) has achieved COD.

2.8 However, for the period when only Unit I or Unit I and II is commissioned, primary energy charges (i.e. O&M Expenses, Return on Equity and Interest on Working Capital) will be determined as per clause 8.16.2 (i), (iii) and 8.17 of the PPA.

2.9 Section 8.16.2 (i) of the PPA reads as-

*“The per unit rate for net saleable primary energy during the period with commercial operation of one unit shall be worked out taking in to account the components of Primary energy charges as per Section 8.7 for a full year based up on capital cost of one unit as per section 8.4.2 and net saleable design energy of the project for full year with one unit commissioned. The Annual Design Energy of the project with one unit having achieved commercial operation shall be 698.08 MU as per details in Schedule IX and corresponding net saleable design energy shall be 604.22 MU.”*

2.10 Section 8.16.2 (iii) of the PPA reads as-

*“.....Design Energy for a part of the month shall be taken on proportionate basis for actual number of days on basis of monthwise generation given in Schedule IX-A.”*

2.11 Section 8.17 of the PPA reads as-

*“The tariff for period starting from COD of the second unit to COD of the project shall be calculated on the basis of similar lines as applicable for the period from COD of the first unit to COD of the second unit as per Section 8.16. The Annual Design Energy of the project with two unit having achieved COD shall be 993.88 MU as per Schedule IX and corresponding net saleable design energy shall be 860.25 MU.”*

2.12 The Commission observes that in the MYT Order dated 30th March, 2009 it has inadvertently approved O&M Expenses and Return on Equity for the FY 2003-04 based on the energy generation for the entire FY 2003-04.

2.13 The Commission corrects this error and now approves O&M Expenses and Return on Equity for FY04 based on energy while Unit – I (24 May 2003 – 28 May 2003) or Unit I and Unit –II (29 May 2003 – 7 June 2003) had achieved COD and based on the Number of Days post COD of the Project (8 June 2003 – 31 March 2004).

2.14 The Commission has also revised the Interest on Working Capital for FY 2003-04 based on the similar approach.

**Table 1: O&M Expenses and Return on Equity for FY2003-04**

<b>Particulars</b>	<b>Approved in the MYT Order dated 30 March 2009</b>	<b>Now Approved</b>
O&M Expenses	16.98	16.05
Return on Equity	65.20	61.63
Interest on Working Capital	5.37	5.06
<b>Total</b>	<b>87.55</b>	<b>82.74</b>

### **Interest Rate on Working Capital**

- 2.15 The Board has submitted that the Commission in its MYT Order dated 30th March, 2009 has erroneously considered Interest Rate for working capital as 10.75% while the relevant PLR at that time was 10.50%
- 2.16 The Commission for calculating the interest on working capital has considered the SBI PLR prevalent as on 1 April, 2003 in accordance with Clause 18 of the Himachal Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Hydro Generation Tariff) Regulations, 2007 reproduced below:

#### ***“Interest on Working Capital.-***

*Rate of interest on working capital shall be on normative basis and shall be equal to the short-term prime lending rate of the State Bank of India as on 1st April of the relevant year. The interest on working capital shall be payable on normative basis notwithstanding that the generating station has not taken working capital loan from any outside agency or has exceeded the working capital loan based on the normative figures.”*

- 2.17 The SBI PLR prevalent as on 1st April 2003 was 10.75%, which was reduced by 25 basis point to 10.50% w.e.f. 5th May, 2003. There is no error evident on the face of the tariff order and therefore rejects the Board’s claim.

### **Incentives on Higher Plant Availability**

- 2.18 The Board has submitted that the Commission in its MYT Order dated 30th March, 2009, has wrongly calculated plant availability for FY 2005-06 and FY2006-07. The Board has submitted that the Commission has considered plant availability as 95.65% and 98.83% for FY 2005-06 and FY 2006-07, respectively. The Board submitted that plant availability was 77.89% during FY 2005-06 and 91.01% during FY 2006-07, even if the outage of plant w.e.f. 19th January, 2006 to 2nd May, 2006 is considered as force majeure event.
- 2.19 The Commission observes that the Board had raised this issue in its review petition against the tariff order dated 26 February 2007. The Board had

submitted that

*“The Board submits that as per Clause 5.10.2 read with Clause 5.10.3, of the Tariff Order, incentive on higher plant availability of Rs. 9.20 crores for FYs 2005-06 and 2006-07 has been based upon actual generation data for that year. The Board points out that the plant remained out of operation during the period 19.01.2006 to 02.05.2006. A Committee was also constituted vide Chief Engineer (PSP), HPSEB, Shimla office order No. HPSEB (SECTT)/ CE (PSP)/ Baspa-II/2006- 3389-92 dated 22.12.06 for determining as to whether in-operation of the plant due to land slide was covered under the force majeure event or not. The Board contends that decision of the said committee is still awaited and non-functioning of Baspa-II power plant w.e.f. 19.01.2006 to 02.05.2006 has implication for two tariff orders i.e. 2005-06 and 2006-07.”*

2.20 The Commission in its order dated 07-02-2008 on review petition had said that -

*“The Commission would take a view on the Board’s contention once the said Committee decides on the non-functioning of Baspa-II power plant w.e.f. 19.01.2006 to 02.05.2006. The Board will submit the report of the Committee for consideration of the Commission by 30th June, 2008.”*

2.21 However, the Board appealed against the Commission’s Order dated 26 February 2007 in the Hon’ble Appellate Tribunal for Electricity. The Hon’ble Appellate Tribunal for Electricity in its order dated 21<sup>st</sup> July, 2009 in appeal No.120 of 2008 filed by the Board, rejected the Board’s contention and the judgement of the Hon’ble Appellate Tribunal for Electricity on the above mentioned issue has not been challenged by the Board.

2.22 As the judgement of Hon’ble Appellate Tribunal for Electricity is still valid, the Commission is not in a position to undertake any review of the decision given by the Hon’ble Appellate Tribunal for Electricity and the Board needs to approach the appropriate forum.

### **Income tax**

2.23 Due to the revision of Return on Equity and Incentive on secondary Energy for FY 2003-04 and the Income Tax approved for FY 2003-04 will also change. The MAT approved in the Review Order dated 10-09-2009 and approved in this order for FY2003-04 is shown below:

**Table 2: Income Tax for the Period FY 2003-04 (Rs Cr)**

Particulars	Approved in Review Order	Now Approved
Income Tax	4.21	4.18

### **Payment of Bills for Incentives on Higher Plant Availability & Secondary Energy**

2.24 The Board has sought clarification as to whether the payment of incentives on

account of saleable secondary energy billed by M/s JHPL as per actual generation is to be disbursed as per provisions of PPA or only after its truing up by this Hon'ble Commission at the end of control period.

- 2.25 The Commission in the MYT order in Paras 5.70 and 5.71 has stated that the incentive for secondary energy generation and incentive for higher plant availability shall be billed by the Petitioner to the Board as per the actual generation and actual plant availability in the applicable tariff year as per the provisions of the PPA. The amount of bills is to be paid on receipt of the bills and the Commission shall true up the incentives at the end of the control period.

### **Export of Energy by the Board to JHPL**

- 2.26 The Board has submitted that as per Clause 8.1 of PPA entered into between JHPL and the Board, JHPL was permitted to draw energy for start up and maintenance of the project from the Board's system metered at the station and paid for at the same tariff at which the Board purchases the energy from JHPL and the said amount was required to be adjusted in the corresponding months bill accordingly. The Board has stated that during the FY 2003-04 to FY 2008-09, the Board has exported the energy to JHPL details of which is shown in table below. However, the Commission in its MYT Order dated 30th March, 2009, has missed this important aspect and which has resulted into an error.

**Table 3: Energy Exported by HPSEB to JHPL**

S. No	Period	Energy Exported (MU)
1	FY04	0.1
2	FY05	0.14
3	FY06	0.25
4	FY07	0.39
5	FY08	0.43
6	FY09	0.3

- 2.27 Clause 8.1 of PPA reads as under-

*“During such period as may occur from time to time, as the project is partially or totally unable to operate, the company may draw energy required for start up and maintenance of the Project from the Board's system metered at the station and paid for at the same tariff at which the Board purchases energy from the Company and adjust the same in corresponding month's bill accordingly. For this purpose, overall rate of energy shall be calculated on the basis of capacity charges, primary energy charges and saleable design energy for that tariff year/tariff period.”*

- 2.28 The Commission agrees with the Board's contention and is revises the amount payable to JHPL by the Board for FY 2003-04- FY 2007-08. With regard to period for FY 2008-09 onwards, the Commission will consider this while truing up for the MYT Control Period.

### **Infirm energy supplied by JHPL to the Board should be used for reduction of Capital Cost of JHPL**

- 2.29 The Board has submitted that JHPL has supplied 8.08160 MU of saleable infirm energy prior to COD of the project and as per Clause 8.2 of PPA the saleable infirm energy charges payable by the Board were to be reduced from the Capital Cost of the project. The Board has submitted that in terms of Clause 8.2 of PPA, it was incumbent and duty of generator i.e. JHPL to raise the bill for infirm saleable energy to the Board in the same manner as they are raising the bills of energy sold to the Board after COD, but it appears that with malafide intention and knowing fully well that in terms of Clause 8.2 of PPA the energy charges of infirm saleable energy before COD by the Generator to HPSEB was to be reduced from the capital cost and consequently tariffs payable, JHPL has intentionally not raised the bills, which has resulted into financial losses to the Board both retrospectively and prospectively which losses still continuing and subsisting. The Board has submitted that JHPL may be directed to raise the bill of infirm saleable energy sold to the Board before COD.
- 2.30 The Commission observes that the Board raised this issue in its review petition against the Order dated 24 February 2007, where the Commission had rejected the Board's contention. This issue was also raised in the appeal No. 120 of 2008, filed in the Hon'ble Appellate Tribunal for Electricity, where it was rejected. Therefore, there is no reason to review the Commission's decision on this matter and the Board's plea is rejected.

### **Truing Up of Interest cost for FY 2003-04 – FY 2007-08 and amortisation of cost of debt restructuring**

- 2.31 The Board has submitted it has not been given an opportunity to review the information submitted by the JHPL for truing up of interest cost for FY 2003-04 – FY 2007-08 and amortisation of cost of debt restructuring against the queries raised by the Commission and therefore could not file its comments. The Board has requested the Commission to reconsider the true up of interest cost for FY 2003-04 – FY 2007-08 and amortisation of cost of debt restructuring approved in the MYT Order dated 30th March, 2009.
- 2.32 The Commission has trued up interest cost for FY 2003-04 – FY 2007-08 and cost of debt restructuring based on the analysis of the documents submitted by JHPL. As the Board is not able to point any error in the Commission's approved figures, the Commission retains the same.

### **Annual Fixed Charge for Baspa II HEP for FY 2003-04-FY 2007-08**

- 2.33 The revised total Annual Fixed Charges with the components of the capacity charges, primary energy charges and incentives and taxes recomputed for the period FY 2003-04 to FY 2007-08 are summarized below:

**Table 4: Annual Fixed Charges for the Period FY2003-04 to FY 2007-08 (Rs Cr) now approved**

Particulars	FY04	FY05	FY06	FY07	FY08
<b>Capacity Charges</b>					
Interest on outstanding loans	117.59	116.25	102.52	98.17	89.84
Depreciation/Advance against Depreciation	55.21	65.96	83.10	83.52	81.63
Interest on normative loan related to debt restructuring expenditure	0.37	3.36	5.19	5.44	5.44
Application fee	0.05	0.05	0.05	0.05	0.05
Less: Adjustments for ICF payments	7.83	5.80			
<b>Sub-total Capacity Charges (A)</b>	<b>165.39</b>	<b>179.82</b>	<b>190.86</b>	<b>187.18</b>	<b>176.96</b>
<b>Primary Energy Charges</b>					
O&M Charges	16.05	19.17	20.32	21.54	22.84
RoE	61.63	73.63	73.63	73.63	73.63
Interest on Working Capital	5.06	5.14	5.25	5.68	6.80
<b>Sub-total Primary Charges (B)</b>	<b>82.74</b>	<b>97.95</b>	<b>99.20</b>	<b>100.85</b>	<b>103.26</b>
<b>Incentives and Taxes</b>					
Incentive for Secondary Energy	14.95	0.00	0.00	21.22	21.14
Incentive for Higher Plant Availability	7.70	9.20	9.20	9.10	9.20
Minimum Alternative Tax	4.18	4.39	7.36	11.06	10.95
<b>Sub-total Incentives and Taxes</b>	<b>26.83</b>	<b>13.59</b>	<b>16.46</b>	<b>41.48</b>	<b>41.29</b>
<b>Total Annual Fixed Charges</b>	<b>274.95</b>	<b>291.36</b>	<b>306.69</b>	<b>329.66</b>	<b>321.52</b>
<b>Energy Exported by HPSEB to JHPL (MU)</b>	<b>0.10</b>	<b>0.14</b>	<b>0.25</b>	<b>0.39</b>	<b>0.43</b>
<b>Total Primary Energy and Capacity Charges (A+B)</b>	<b>248.12</b>	<b>277.77</b>	<b>290.07</b>	<b>288.03</b>	<b>280.23</b>
<b>Design Energy (MU)</b>	940.41	1041.93	1028.50	1050.05	1050.05
<b>Rate Per Unit (Rs / Unit)</b>	2.638	2.666	2.820	2.743	2.669
<b>Adjustment for Energy Exported (Rs Cr)</b>	0.026	0.037	0.071	0.107	0.115
<b>Net Payable by HPSEB</b>	274.93	291.32	306.62	329.55	321.40

**Arrears payable by the Board**

- 2.34 The Commission has recomputed the arrears payable by the Board and the carrying costs, based on the Annual Fixed Charges (AFC) / Net Payable by the Board approved by the Commission now and the payments made by the Board for the period FY 2003-04 to FY 2007-08.
- 2.35 The computations of the arrears payable by the Board till 31st March, 2008 are detailed in the table below:

**Table 5: Arrears Payable by the Board (Rs Cr)**

Particulars	FY04	FY05	FY06	FY07	FY08
Net Payable by the Board	274.93	291.32	306.62	329.55	321.40
Payment made by HPSEB excluding rebate	207.11	250.84	264.02	330.74	390.84
Opening balance	0.00	70.54	118.29	172.05	184.58
Additions/(Subtractions)	67.82	40.49	42.60	-1.19	-69.43
Closing balance base amount	67.82	111.02	160.89	170.86	115.14
Interest rate (%)	8%	8%	8%	8%	8%
Interest	2.71	7.26	11.17	13.72	11.99
<b>Closing balance of payment</b>	<b>70.54</b>	<b>118.29</b>	<b>172.05</b>	<b>184.58</b>	<b>127.13</b>

### MYT Control Period (FY2008-09 –FY 2010-11)

2.36 The Commission in its MYT Order dated 30<sup>th</sup> March, 2009 had determined the Annual Fixed Charges for each year of the Control Period (FY 2008-09 – FY 2010-11). The Commission in its Order dated 10<sup>th</sup> September, 2009 on review petition filed by JHPL had approved the following Annual Fixed Charges for each year of the Control Period:

**Table 6: Annual Fixed Charges for the Period FY 2008-09 to FY 2010-11 (Rs Cr) approved in the review order**

Particulars	FY09	FY10	FY11
<b>Capacity Charges</b>			
Interest on outstanding loans	71.72	46.16	52.60
Depreciation/Advance against Depreciation	89.48	89.48	89.48
Interest on normative loan related to debt restructuring expenditure	5.20	4.60	3.90
Repayment of normative loan related to debt Restructuring expenditure	8.85	8.85	8.85
Application fee	0.08	0.08	0.08
Financing charges related to HPSEB arrear payment	0.00	0.00	0.00
Less: Adjustments for ICF payments			
<b>Sub-total Capacity Charges</b>	<b>175.33</b>	<b>149.18</b>	<b>154.91</b>
<b>Primary Energy Charges</b>			
O&M Charges	24.21	25.66	27.20
RoE	73.63	73.63	73.63
Interest on Working Capital	6.52	6.04	6.34
<b>Sub-total Primary Charges</b>	<b>104.36</b>	<b>105.33</b>	<b>107.17</b>
<b>Incentives and Taxes</b>			
Incentive for Secondary Energy	0.00	0.00	0.00
Incentive for Higher Plant Availability	0.00	0.00	0.00
Minimum Alternative Tax	10.12	10.12	15.18

Particulars	FY09	FY10	FY11
<b>Sub-total Incentives and Taxes</b>	<b>10.12</b>	<b>10.12</b>	<b>15.18</b>
<b>Total Annual Fixed Charges</b>	<b>289.81</b>	<b>264.63</b>	<b>277.26</b>

### **MAT for FY 2009-10 and FY 2010-11**

- 2.37 In the review petition filed by the JHPL, JHPL has pointed out error on account of MAT rate considered by the Commission for FY 2009-10 and FY 2010-11 in its review order dated 10th September, 2009.
- 2.38 The Commission observes that it has inadvertently considered revised MAT rate of 15% applicable from FY 2010-11 instead of FY 2009-10. The Commission further observes that MAT rate has been further revised to 18% from FY 2010-11 onwards. The Commission therefore revises the MAT approved for the FY 2009-10 and FY 2010-11 in this order.

### **Revised Annual Fixed Charges (Capacity Charges, Primary Energy Charges and Incentives and Taxes) for the MYT control period**

- 2.39 As FY 2008-09 and FY 2009-10 for the MYT Control Period are already over, the Commission in this order has considered the actual secondary energy, actual plant availability for calculation of incentive and MAT for FY 2008-09 and FY 2009-10. The Commission has also considered the actual payment made by the Board excluding rebate as per joint reconciliation statement prepared by the Board and JHPL for FY 2008-09 and provisional statement submitted by the Board for payment to JHPL in FY 2009-10 while determining the arrears amount. However, the Commission has not considered any revision of interest rate vis-à-vis approved interest rate in the MYT order as the Commission will review them at the end of the Control Period.

**Table 7: Annual Fixed Charges for the Period FY 2008-09 to FY 2010-11 (Rs Cr) now approved**

Particulars	FY09	FY10	FY11
<b>Capacity Charges</b>			
Interest on outstanding loans	71.72	46.16	52.60
Depreciation/Advance against Depreciation	89.48	89.48	89.48
Interest on normative loan related to debt restructuring expenditure	5.20	4.60	3.90
Repayment of normative loan related to debt Restructuring expenditure	8.85	8.85	8.85
Application fee	0.08	0.08	0.08
<b>Sub-total Capacity Charges</b>	<b>175.33</b>	<b>149.18</b>	<b>154.91</b>
<b>Primary Energy Charges</b>			
O&M Charges	24.21	25.66	27.20
RoE	73.63	73.63	73.63
Interest on Working Capital	6.52	6.04	6.34

Particulars	FY09	FY10	FY11
<b>Sub-total Primary Charges</b>	<b>104.36</b>	<b>105.33</b>	<b>107.17</b>
Secondary Energy (MU)	81.40	88.97	0
Plant Availability (%)	99.65	99.83	0
<b>Incentives and Taxes</b>			
Incentive for Secondary Energy	24.17	26.41	0.00
Incentive for Higher Plant Availability	9.20	9.20	0.00
Minimum Alternative Tax	12.01	18.20	18.21
<b>Sub-total Incentives and Taxes</b>	<b>45.38</b>	<b>53.82</b>	<b>18.21</b>
<b>Total Annual Fixed Charges</b>	<b>325.80</b>	<b>309.25</b>	<b>280.35</b>

### Interest on Arrears

- 2.40 In the second review petition filed by the JHPL, JHPL has claimed interest on arrears in accordance with the clause 10.11 of the PPA.
- 2.41 Though in terms of section 94(1) of the Act, review of review is not maintainable, yet the Commission has the power under section 152 of the CPC to clarify the position for meeting the ends of justice.
- 2.42 Clause 10.11 of the PPA, reads as under:-

*“In case the Board does not make the payment of any bill within the due date of payment, the outstanding amount of such bill shall bear interest accrued for the number of days between the due date of payment and actual date of payment at a rate equal to the rate being charged from time to time by State Bank of India for 90 days unsecured loans to commercial borrowers plus three(3) percent per annum plus interest tax subject to the provisions contained in Section 10.16”.*

- 2.43 Clause 2.2.43 of the PPA defines due date of payment, which reads as under-

*“Due Date of Payment means with respect to any bill, the date by which the amount of such bill is required to be paid. This date shall:-*

- (a) *in case of any monthly bill for any billing month, be 30 days from the billing date or from the date of presentation of the bill to the Bankers/designated officer of the Board, whichever is later.*
- (b) *in case of any supplementary or any other bill, be 35 days from the date of presentation of bill to the designated officer of the Board or of the Company, as the case may be”.*

2.44 Interest is a natural corollary of any delayed payment. Sometimes different interest rates are prescribed so as to differentiate between normal or compensatory rate of interest and a penal rate of the interest. Para 8 of Punjab High Court decision rendered in case of CIT V/s Shyam Lal Narula (AIR 1963 Pb 411) reads as under:-

*“8. The words “interest” and “compensation” are sometimes used interchangeably and on other occasions they have distinct connotation. “Interest” in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owned to another. In its narrow sense “interest” is understood to mean the amount, which one has contracted to pay for use of borrowed money. In whatever category “interest” in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for use or forbearance of money. In this sense, it is compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it, has become payable.”*

2.45 This decision of the Punjab & Hry .High Court, has been approved by the Supreme Court in Central Bank of India V/s Ravindre & Ors (2002) SCC 367 and the decision of the Supreme Court has been followed by the Appellate Tribunal for Electricity in Appeal No.15 of 2007, decided on 5.2.2008- Maharashtra State Elecy. Distt. Co. Ltd. Bandra (East) Mumbai V/s Maharashtra Electricity Regulatory Commission, Mumbai 2008 ELR (APTEL) 0110.

2.46 In view of the above quoted decisions, the interest is basically intended to compensate the party who was entitled for payment of amount due. There is no reason why the Board should not pay interest from the date payment becomes due. In this regard there appears no ambiguity in the provisions of Clause 10.11, read with Clause 2.2.43, of the PPA.

2.47 From the above, it is clear that interest as per clause 10.11 is applicable only for arrears on account of bills raised by the JHPL. JHPL can raise bills only as per the tariff/ recovery schedule approved by the Commission. The 8% rate of interest, mentioned in the tables showing the computation of arrears, is de facto the carrying cost allowed by the Commission.

2.48 The Commission in its order dated 24 February 2007 had determined Annual Fixed Cost of Baspa II HEP for FY 2003-04 – FY 2007-08 which has resulted in arrears for the previous years. The Commission had directed the Board to pay the arrears in 7 years.

2.49 JHPL filed review petition against the 24 February, 2007 order issued by the Commission. The Commission in its order dated 7 February 2008 on review petition directed the Board to pay entire arrear amount in two installments in FY 2008-09.

- 2.50 The Commission in its MYT order dated 30 March, 2009 determined revised Annual Fixed Cost for FY 2003-04 and for the MYT control period FY 2010-11 and re-determined total arrears till FY 2007-08.
- 2.51 The Commission observes that as on 31st March 2009, the Board had paid an excess amount of approximately 15 Cr (as per the Annual Fixed Cost approved by the Commission till FY 2008-09 in MYT order). Thus the Board had complied with the Commission Order of paying entire arrear amount in FY 2008-09 and there were no arrears against the bills raised by the JHPL in accordance with the tariff determined by the Commission till the revision of the MYT Order.
- 2.52 JHPL filed a review petition against the MYT Order issued by the Commission. The Commission in its Order dated 10 September, 2009 on review petition filed by JHPL again revised the Annual Fixed Cost for the FY 2003-04 –FY 2010-11, which resulted in fresh arrears becoming payable by the Board to JHPL.
- 2.53 The Commission understands that the Board has not paid the arrears to JHPL in compliance to the order dated 10 September 2009. The Commission assumes that bills would have been raised by JHPL, for payment of arrears arising on account of revised annual fixed cost approved by the Commission, during September 2009 for which the due date of payment would tentatively be 31st October 2009. The Commission decides that interest rate applicable on the arrears will be as per clause 10.11, from 1st November 2009 till the payment of arrears by the Board. However, this is subject to true up based on the actual billing date, which shall be basis of calculation of interest in terms of clause 10.11 of the PPA.
- 2.54 Under Clause 10.11 of the PPA, interest rate applicable is short term SBI PLR plus three percent plus interest tax. The Commission had observed that SBI has stopped notifying short term PLR. Accordingly, the Commission had constituted a committee, having representatives of JHPL and the Board, to resolve mutually the manner in which the interest rate is to be evolved. However, the committee could not agree on any mutually acceptable rate. The Commission, therefore, now decides to consider long term SBI PLR, which is also the basis for calculating interest on working capital, as a substitute for the short term SBI PLR plus three percent plus interest tax, mentioned in the PPA.
- 2.55 Based on the revised capacity charges now approved by the Commission and payment made to JHPL by the Board in FY 2008-09 and FY 2009-10 (provisional), the Commission approves following arrears payable by the Board:

**Table 8: Arrears Payable by the Board (Rs Cr)**

Particulars	FY09	FY10	FY11
Opening Balance	127.13	70.56	87.25
Payable by the Board for the year	325.80	309.25	280.35
Payment made by HPSEB excluding rebate and adjustment	389.98	299.76*	

Particulars	FY09	FY10	FY11
for energy export			
Closing balance base amount	62.96	80.05	
Interest rate (%)	8%	8%, 11.75% <sup>#</sup>	11.75%
Interest	7.60	3.51 <sup>#</sup> (till 31 <sup>st</sup> Oct 2009@ 8%) 3.69 <sup>#</sup> (1 <sup>st</sup> Nov 2009 onwards)	
<b>Closing balance of payment</b>	<b>70.56</b>	<b>87.25</b>	

\*Provisional

<sup>#</sup>Assumed applicable from 1<sup>st</sup> November, 2009 (subject to true up based on actual billing date)

- 2.56 As of 1<sup>st</sup> April 2010, the Board has to pay arrears of Rs 87.25 Cr to JHPL. The Commission directs the Board to pay the entire arrears by 30 September, 2010. The interest payable on arrears by the Board till 30 September, 2010 will be allowed as a pass through in the ARR of the Board. However, any interest payable on arrears post 30 September, 2010 will not be allowed to pass through in the ARR.
- 2.57 The review petition and other applications are accordingly disposed off.

Sd/-  
(Yogesh Khanna)  
Chairman

Dated: 23-06-2010