

BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION
SHIMLA

In the matter of :-

M/S Ginni Global Private Ltd; having its
Corporate Office at SP 2/1-2/2
RIICO Industrial Area Neemrana
Distt. Alwar, Rajasthan and registered
Office at 2nd Floor, Shanti Chamber,
11/6B, Pusa Road,
New Delhi-110005.

...Petitioner

V/s

- (1) The Himachal Pradesh State Electricity Board,
Vidyut Bhawan, Shimla-171004
- (2) The Government of Himachal Pradesh
through Principal Secretary (MPP &Power) H.P.
Shimla-171002.
- (3) The Himachal Pradesh Energy Development Agency
(HIMURJA)
SDA Complex, Kasumpati, Shimla (H.P.) 171009
(through its Director)

... Respondents

Petition Nos. 70 of 2008
and 202 of 2009
(Decided on 22.5.2010)

CORAM
YOGESH KHANNA
CHAIRMAN

Counsels: -

for petitioners:

Miss Sampada Narang and
Sh.Ajay Vaidya,
Advocates,

for respondents:

Sh.Narinder Singh Thakur,
Advocate

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

Sh.P.N.Bhardwaj

Order

M/S Ginni Global Private Ltd; having its Corporate Office at SP 2/1-2/2 RIICO Industrial Area Neemrana Distt. Alwar, Rajasthan and registered Office at 2nd Floor, Shanti Chamber, 11/6B, Pusa Road, New Delhi-110005. (hereinafter referred as “the petitioner Company”), entered into, with the Government of Himachal Pradesh, an Implementation Agreement (I.A) on the 14th May, 2003, to establish, operate and maintain at their cost Tarila Hydro Electric Project at Taraila, in Distt. Chamba (H.P.) (5.00 M.W) (hereinafter referred as the “project”). Subsequently the petitioner Company entered into on 7th June, 2004, a Power Purchase Agreement (in short PPA), with the Himachal Pradesh State Electricity Board (hereinafter referred to as “the Board”), stipulating that the Board shall pay for the net saleable energy delivered by the petitioner Company to the Board at the inter-connection point at a fixed rate of Rs.2.50 (Rupees two and fifty paise per kilowatt hour). Clause 15 of the PPA stipulates that the PPA can be amended only with the written consent of both the parties. In other words, the PPA contained specific stipulations to the extent that the terms of the agreement can be indisputably altered or modified with the unqualified consent of the parties to the agreement.

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

3. Subsequently the State Government has reviewed its earlier policy and formulated “Hydro Policy of Himachal Pradesh, 2006,” making it obligatory for the developers to cater to stipulations such as mandatory 15% water release, Local Area Development Charges (LADC), payment of revised compensation to fisheries and towards use of forest land etc. The new policy maintained the tariff at the rate of Rs. 2.50/kwh

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

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

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

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

Provided that the Commission may determine tariff-

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

Provided further that -

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

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

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

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

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

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

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

9. After due consideration of the submissions made, documents produced and arguments advanced by the respective learned Counsels on behalf of the petitioners, the Commission vide its Order dated 29th Oct., 2009, concluded that:-

- (i) the Commission has the power to re-open the concluded PPAs for the purpose of incentivising the generation from non-conventional energy projects, within the framework of the Act and the regulations framed thereunder;

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

10. Further the Commission decided to consider each petition on its merits and to issue individual projectwise orders based on the furnishing of necessary data / detailed calculations (alongwith supporting documents) on an affidavit with respect to the claims regarding mandatory release of water discharge, payment of differential amount on account of compensation to

fisheries and towards the use of forest land; and also the levy of LADA charges. The said data /calculations and documents were to be furnished by the petitioners, within a period of two weeks' time reckoned from the date of the said order i.e. 29th Oct., 2009, which period at the request of the parties, stands extended upto 16th April, 2010.

11. In the meanwhile, the Commission issued the order dated 10.2.2010, supplementing the provisions of the SHP Order dated 18.12.07; wherein the adjustments on account of the change in the Minimum Alternate Tax/ Income Tax and royalty, were dealt with.

12. Now the petitioner Company has moved petition i.e. M.A. No. 202 of 2009 for increasing the tariff, in relation to its project, to the extent of Rs. 0.42 per unit without impleading that Himachal Pradesh Energy Development Agency (HIMURJA), which is the nodal agency in the development of SHPs in the State. The Commission had, therefore, to ask the Government of Himachal Pradesh as well as the Himachal Pradesh Energy Development Agency (HIMURJA), to furnish their response to the petition moved by the petitioner Company.

13. No response has been received from the Government of Himachal Pradesh. The responses from the Board and the HIMURJA have been received. The Commission now keeping in view the responses of the Board and HIMURJA, proceeds to examine itemwise claims made by the petitioner Company, as under:-

I. **Mandatory release of water discharge-** Sub-para (B) of para 30 of the Commission's Order dated 29.10.09 reads as under:-

“B Mandatory release of 15% water discharge. -

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

Submissions of petitioner

In this regard, the petitioner Company submits that the Government of Himachal Pradesh vide its notification dated 9th November, 2005 made it mandatory for all IPPs to release and maintain a minimum flow down-stream of the diversion structure, throughout the year, at the threshold value of not less than 15% water flow, without allowing the petitioner Company to utilize it for power project generation and as a consequence it has to forgo equivalent power generation potential. This has adversely affected the project and has reduced the power generation potential drastically.

The petitioner Company further stresses that during the lean season, the discharge of water, is barely adequate to operate even one turbine out of two installed in the project. The mandatory release of water reduces the machine load below 1200 kW and thus requires a total shut down of the plant as per the recommendations of the machinery manufacturer for about 50 days. This has resulted in reduction in power generation and increased cost of production, adversely affecting the financial viability, potentiality and economic stability of the project.

It is concluded that during the monsoon period of high flows, the generation shall stand reduced in the balance months as well. Due to mandatory release of water by 15% net sale of power shall reduce from 26.51 MU, as estimated in DPR, to 24.53 MU i.e. net loss of 1.98 MU per annum. This loss of generation of electricity is bound to affect the project adversely and requires a hike in tariff to the extent of Rs. 0.25 per unit to compensate the said loss of power generation. Detailed calculations of power tariff before and after the mandatory 15% water release have also been annexed to the said petition i.e. petition No. 202 of 2009. According to the petitioner Company the difference between the two tariff (i.e. Rs. 3.25 and Rs. 3.00) is the hike in tariff needed to compensate loss in power generation due to mandatory release of 15% water.

Response of the Board.-

In the response, the Board contends-

- (a) that the amended Government Hydro Policy clearly states that the Company has to ensure minimum flow of 15% of lean period water

discharge. For the purpose of determination of minimum discharge, the average discharge in the lean months i.e. from December to February shall be considered. As per the Board's calculations there is marginal loss of 1.76 MU to the petitioner Company after considering 15% minimum discharge, which can be easily recovered by over loading the plant during the peak season;

- (b) that as per the Board's calculations for the months of January and February, availability of energy as per the DPR projection shall be in the range of 0.406 to 0.407 MU even after taking into consideration 15% mandatory water discharge. Moreover the projection made by the petitioner Company in its calculations indicates the power generation in the range 0 MU to 0.23 MU in the months of January and February;
- (c) that the project has already been commissioned and the Board has got all actual generation data of the project. The generation for this project for the months of January and February for the period 2007-08, 2008-09 and 2009-10 has been recorded and claimed through energy bills by the Company to the tune of 0.76 MU, and 0.28, 1.09 and 1.44; and 0.52 and 1.36 MUs respectively. This clearly indicates that there is no impact of 15% mandatory release of water discharge as per amended Hydro Policy on this project;
- (d) that the Commission, while taking up the CUF @ 45% in its order dated 18.12.2007, has already clarified that the factor of 15% water discharge as provided in the GoHP Hydro Policy, has been taken into consideration. The Government of Himachal Pradesh earlier in its general response to the various petitions including the present one had submitted that the total assessed energy can easily be covered by the IPPs by over loading the machines during the high flow period as the turbine/unit(s) are being generally operated on 20% over load capacity during the peak flow season. The same is also evident from the submissions made by the petitioner Company, wherein plants has been utilised at 20% overloading during the months of July, August and September.

In view of the above, the claims by the petitioner Company on account of 15% mandatory release, as worked out by the Company to the tune of Rs.0.25 per unit, merits no consideration.

Response of HIMURJA

The response of the HIMURJA on this issue is similar to the one submitted by the Board.

Commission's View

The Commission has categorically mentioned in sub-para (B) of para 30 of its Order dated 29.10.09 that the mandatory release of water discharge is average of 3 lean months as clarified by the Government of H.P. vide its notification No. MPP-F(2)-16/2008 dated 29.1.09. The Commission observes that mandatory release impact assessment by the Board has been carried out based upon the 75% dependable discharge as approved in the DPR and deducting the sacrificial discharge from it (which is average in 3 lean months) to get the net discharge available for power generation. The loss in generation has been assessed by calculating the energy generation on the net discharge and comparing it with energy generation without 15% sacrificial discharge as per the approved DPR. Total loss on account of mandatory release of water during the lean season as per the Board's calculation is 17.63 crores which works out to 15 paise per unit.

As the energy bills of the previous months raised by the petitioner Company to the Board and the DPR based calculations of the Board as well as that of the petitioner Company itself show generation in the months of January and February, the contention of the petitioner Company that the mandatory release during the months of January and February forces total shutdown of the plant during these two months is not correct.

This project has been commissioned in the year FY 2007-08, the actual generation data is available for barely for 3 years period only, which is grossly inadequate, and, therefore, cannot be relied upon for mandatory release impact assessment. Thus, the Commission, at present has no option, but to rely upon the mandatory water release impact assessment based on the DPR projections. The Board's contention that loss on account of 15% mandatory release can easily be covered by overloading the plant during the peak season is not

tenable. The Commission is constrained to allow upgrades in tariff based on a change of goal posts/ change in law which will impact on tariff in term of what an entrepreneur calculates in a “before” & “after” scenario. Additionally, DPR energy projections are generally oriented with bankability/ viability considerations of the project but wherever no other projection is available, this will need to be considered as a basis, subject to a caveat that it will have only marginal relevance in the present context and cannot be used across the board where other more relevant parameters are available.

In view of the above, the Commission allows the increase of 15 paise per unit as per the mandatory release impact assessment carried out by the Board. However, either party, on the availability of the actual data for a period of 10 years, can approach the Commission to review the said increase.

II. Minimum Alternate Tax

Submissions by the petitioner

Subsequent to the GoHP notification dated 6th May, 2000 small hydro projects, have been subjected to additional taxation under various Union budgets. Specific instances of these are the levy of MAT tax on book profits @ 10.3%. It is pertinent to note that from the financial year 2009-2010, the MAT rate has been increased to 15% (i.e. effective rate 16.995% including cess. An increase in the tariff to the extent of 0.08 paise per unit is needed to neutralise the impact of MAT tax alone. Tariff calculations before (Rs. 2.92 per unit) and after (Rs.3.00 per unit) imposition of MAT tax are annexed to the petition; i.e. petition No. 202 of 2009.

Response of the Board

Though the Commission’s Order dated 29.10.2009 does not require any submission for the calculation and impact on account of MAT, the petitioner Company has claimed the impact of increased MAT @ 0.08 paise per unit. This additional cost is not justified due to reasons that without supplying the actual rate of the MAT, which have been taken into consideration at the time of working out the cost of Rs. 2.50/unit, there is no justification of taking into account the differential component of MAT as calculated by the Company, at the present rate.

Response of HIMURJA

The response of the HIMURJA on this issue is similar to the one made by the Board.

Commission's View

As pointed out in para 10 of this Order, the Commission has already stated in clear terms that the Commission shall, after consideration of each petition on its merits, issue individual project-wise order based on furnishing of necessary data/documents with respect to the claim regarding mandatory release of water discharge, payment of differential amount on account fisheries and forest and local area development charges. However, the Commission considers change in MAT after the signing of the PPA as change of goal post and, therefore, feels that the IPP should be compensated as has been done for all the IPPs, falling within the ambit of Commission's on SHPs order 18.12.2007, through the supplementary order dated Feb., 10, 2010.

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

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

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

III. Local Area Development Charges (LADC)

Submissions by the petitioner

The State Government policy for small hydro power projects in the State, requires the IPPs such as the petitioner Company to spend 1% of the total project cost on the local developmental activities on account of the LAD charges. The petitioner Company has spent a total amount of Rs. 45,10,054/- on LAD charges, but has restricted its claim to Rs. 34.89 lacs i.e. 1% of the project cost.

Response of Board

The petitioner Company has claimed Rs. 34.89 lac for LADA charges. Even if there is any marginal impact on account of LADA charges it can be covered by overloading the machines during high flow season.

Response of HIMURJA

Response of the HIMURJA on this issue is similar to the one submitted by the Board.

Commission's view.

The petitioner Company has restricted its claim to an amount of Rs. 34.89 lacs against Rs. 45.10 lacs spent. The petitioner Company has given details of payment of 3.00 lacs out of which 2.00 lacs have been given to the Minjar fair and there is no expense details of balance one lac. The Commission points out that there is a procedure and structure which has been laid down by the Government of Himachal Pradesh through notification for payment on account of local area development and the aforesaid payment of Rs. 3.00 lac can not be considered as payment under LADC.

In view of above, the Commission concludes that in the absence of proper and sufficient documentary proof of payment on account LADC as per the Government framework the petitioner Company's claim cannot be considered. However, as the claim has arisen on account the change in policy, it is payable. The net present value of the additional tariff components levelised over a period of 40 years to off set the loss on account of LADC, shall be as per the following formula:-

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

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

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

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

This tariff component shall be subject to the production of sufficient documentary proof to the satisfaction of the Board and shall be payable from

the of date of complete payment of LADC or Commercial Operation Date which ever is later.

IV. Forest and Fisheries charges.- Sub-paras “C” and “D” of para 30 of Order dated 29.10.09, read as under :-

“C Forest Charges

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

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

Submissions by the petitioner

The petitioner has paid a sum of Rs. 28,07,258/- to the forest department for the diversion of the forest land for the project and an amount of Rs. 10,50,000/- to the fisheries department on account of breeding/feeding grounds lost. The department of fisheries charges compensation @ Rs. 0.50 lakh per kilometer of breeding/ feeding grounds lost and Rs. 0.50 lakh per megawatt capacity of power set up. This change has been made in the policy in the year 2007.

Response of Board

In response the Board submits that the revised forest charges are based on the percentage of forest cover. Since the forest cover is project specific, therefore, the details of the forest cover, the compensation payable prior to the revision of charges and after the revision of charges for the project needs to be considered for impact on tariff. The differential amount as desired vide Commission’s Order dated 29.10.2009 has neither been worked out nor any details of the charges which would have been required to be paid by the

Company are given in support of their claim. Therefore no claim on this account is justified.

Further the fisheries charges are based on length of tail race capacity. Since the amendment dated 30.4.07 in relation to fisheries charges is with immediate effect, the compensation paid by the petitioner Company after the issuance of the notification and which was supposed to be paid prior to notification needs to be ascertained by the petitioner to arrive at the differential amount to be considered for the impact on the tariff. The petitioner Company has not supplied any detailed information as required/desired by the order of the Commission. However, it is understood that the revised charges with reference to fisheries are lower than the charges prescribed prior to the notification. Hence no claim on this account is admissible.

Response of HIMURJA

Response of the HIMURJA on this issue is similar to the one submitted by the Board.

Commission's View

The petitioner Company has attached letter from the Conservator of Forests, H.P. Shimla addressed to the C F (Policy & Law) H.P., Shimla confirming the payment of Rs. 28,07, 258 but has not mentioned any differential amount for forest compensation as required under Commission's Order dated 29.10.09. Apparently this seems to be the total forest compensation paid by the petitioner Company and not the differential amount. The claim of Rs.10.5 lacs on account of fisheries is without any documentary proof and seems to be the total amount to be paid by the petitioner Company on account of fisheries charges. Thus the Commission concludes that the claims of the petitioner on account of forest and fisheries are not tenable.

V. Service Tax

Submissions by the petitioner

The Central Govt. by notification imposed service tax on construction contract services w.e.f. 10.9.2004. Effective rate of service tax on construction contract is 3.40%. After notification of power tariff of Rs. 2.50 per unit, the Central Government has also started levying service tax on

testing, erection & project consultation charges. The petitioner has incurred a sum of Rs. 54,38.564/- on account of service tax alone. Service tax is an additional statutory levy which has adversely affected the project cost and therefore needs to be compensated by approving a higher tariff for the electricity generated.

Response of Board

It is submitted that the order dated 29.10.2009 of the Commission does not require any submission for the calculation and impact on account of service tax.

It is, further submitted that differential worked out on the MAT and Service Tax etc., if any, can easily be covered considering the overloading capacity of the plant during the peak season.

Response of HIMURJA

Submissions of the HIMURJA on this issue are similar to the one submitted by the Board.

Commission's View

As pointed out in para 10 of this Order, the Commission, in its order dated 29.10.09, has already stated in clear terms that the Commission shall, after consideration of each petition on its merits, issue individual project-wise order based on furnishing of necessary data/documents with respect to the claim regarding mandatory release of water discharge, payment of differential amount on account fisheries and forest and local area development charges. Therefore, the claim of the petitioner Company with respect to service tax does not fall within the ambit of the said order. Also the Commission has not considered the service tax in its tariff determination order dated 18.12.07. Besides this the petitioner Company has not furnished any adequate documentary proof. Keeping in view the limited scope of reopening the concluded PPAs, as stated in the Commission's Order dated 29.10.2009 and in the absence of the documentary proof, it is not possible for the Commission to accede to this claim raised by the petitioner Company.

14. The averments of the Board with regard to the overloading of plant, carry no weight since the Commission is constrained to allow upgrades in tariff based on a change of goal posts/ change in law which will impact on tariff in term of what an entrepreneur calculates in a "before" & "after"

scenario. Additionally, DPR energy projections are generally oriented for bankability/ viability considerations of the project but wherever no other projection is available, these will need to be considered as a basis, subject to a caveat that they will have only marginal relevance in the present context and cannot be used across the board where other, more relevant parameters are available.

Conclusion.

15. In view of the above discussion and taking into consideration the conclusions drawn in the Commission's Order dated 29.10.2009 and further submissions made, calculations/data supplied by the parties i.e. the petitioner Company, the Board and the Himurja, the Commission hereby orders that:-

- (i) the the tariff of Rs. 2.50 paise fixed, in relation to this project shall be enhanced by 15 paise on account of impact of 15% mandatory release of water down stream of diversion structure. However either party on the actual data available for a period of 10 years may approach the Commission to review the said increase.
- (ii) the additional tariff component to offset the loss on account of LAD charge shall be calculated as per the following formula:-

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

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

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

y is Annual saleable energy units in lacs (as per approved DPR).
This tariff component shall be subject to the production of sufficient documentary proof to the satisfaction of the Board and shall be payable from the of date of complete payment of LADC or Commercial Operation Date which ever is later.

- (iii) the claims for forest, fisheries and service tax are not acceded to;

- (iv) any change in MAT after signing of PPA in the first 10 years of the generation of the project shall be payable by the respective party as per the following formula: –

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

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

In view of above, the tariff of Rs. 2.50, shall be increased by 15 paise per unit.

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

(Yogesh Khanna)
Chairman