

**BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY  
COMMISSION**

**PETITION NO. 11/2010**

**Coram:**

**Shri Yogesh Khanna**

**Chairman**

**In the matter of:**

An application for determining of tariff on the additional cost incurred on Baspa-II Hydro Electric Plant.

**And**

**In the matter of:-**

Jaiprakash Power Ventures Limited (JPVL)

(Formerly known as Jaiprakash Hydro Power Ltd.)

JUIT Complex, Wagnaghat,

P.O Dumehar Bani,

Kandaghat- 173215, Distt. Solan (H.P)

..... Applicant/Petitioner

Versus

1. Himachal Pradesh State Electricity Board Ltd.  
(Formerly Himachal Pradesh State Electricity Board)  
Vidyut Bhawan, Shimla-171004. .... Respondent No.1
  
2. State of Himachal Pradesh,  
Through Chief Secretary  
Shimla. .... Respondent No. 2
  
3. State of Himachal Pradesh,  
Through Principal Secretary (Power)  
Shimla. .... Respondent No. 3

Present for petitioner	Shri S.B. Upadhyay, Sr. Advocate, and Shri Pawan Upadhyay, Advocate
For respondent No.1	Shri Bimal Gupta, Advocate
For respondent No.2 & 3	Shri K. S. Chauhan Deputy District Attorney
For Consumer Representative [U/s 94(3) of the Electricity Act, 2003]	Er. P.N. Bhardwaj

### **ORDER**

(Last heard on 20.12.2010 and orders reserved)

1. M/s Jaiprakash Power Ventures Limited (JPVL) (formerly known as Jaiprakash Hydro Power Ltd.)(JHPL) ( hereinafter called as **“the petitioner”** ) had made this application/petition under sections 62 and 86 of the Electricity Act, 2003( hereinafter referred as **“the Act”** ) for determination of tariff for Baspa II Hydro Electric Plant (hereinafter referred to as **“the Project”**or **“Baspa-II HEP”**) considering the impact of additional cost due to Force Majeure events, the additional cost of Inter-Connection Facility (ICF) paid to the Satluj Jal Vidyut Nigam Ltd. (SJVNL) and the additional compensation paid for the land for the Project paid to landowners during the period FY 06-07 to FY09-10. The petitioner has made the specific prayers as under:-

- “ (a) to take on record the name of the Company as Jaiprakash Power Ventures Ltd. w.e.f 23.12.09.
- (b) to approve the addition of capital expenditure of Rs.96.75 crores in the capital cost of Baspa-II HEP towards cost of protection work of Pothead Yard due to Force Majeure event and determine the payment of tariff thereon; and
- (c) to adjust the claim of Rs.27.09 crores received towards capacity charges as part of Insurance Claim against the payment of tariff from the addition of capital cost of Rs.96.75 crores; and
- (d) to include the additional expenditure of Rs.1, 80, 35,726/- in the capital cost of Baspa-II HEP for the purpose of determination of tariff for FY 10

onwards and also make a suitable provision for the additional expenditure that may arise on the advice of the SJVNL to the applicant for payment, to form part of the capital cost for the purpose of tariff; and

- (e) to include the additional compensation paid for land amounting to Rs.7,93,34,966/- in the capital cost of Baspa-II HEP for the purpose of determination of tariff from FY'08 onwards; and
- (f) to allow payment of interest on new arrears due from Himachal Pradesh State Electricity Board ( hereinafter referred to as "**HPSEB**" or "**Board**") on account of tariff determined for the additional capital cost from FY 07 onwards in line with clause 10.11 of the PPA; and
- (g) to direct the HPSEB to reimburse the service tax payable to the SJVNL of Rs. 78, 61,378/- and also allow reimbursement of Service Tax w.e.f. January, 2010 onwards; and
- (h) to allow 0.25% additional O&M expenses being paid to the SJVNL plus service tax; and
- (i) to pass such other and further order(s) as this Commission may deem fit and proper in the premises of case."

2. The Project with a total capacity of 300 MW comprises of 3 units of 100 MW each. The dates of commercial operation of these units are as follows:-

Unit-1 (100 MW) 24.5.2003

Unit-2 (100 MW) 29.5.2003

Unit-3 (100 MW) 08.6.2003

3. The capital cost and tariff for the Project for the period FY 04-FY 08 was determined by the Himachal Pradesh Electricity Regulatory Commission (hereinafter referred to as "**the Commission**") by its order dated 24.02.2007 in Petition No.338/2005 in terms of Power Purchase Agreement (in brevity "**PPA**") dated 4<sup>th</sup> June, 1997 executed between M/s Jaiprakash Hydro Power Limited (JHPL) and the HPSEB. Review applications were filed before the Commission by the JHPL as well as the HPSEB seeking review of the Commission's order dated 24.02.2007 and an order on these

review applications was passed by the Commission on 07<sup>th</sup> February, 2008. Subsequently, the Commission by an order dated 30.03.2009, passed in Petition No. 256/2007, tried up the applicant's performance for the previous years FY04-FY08 and also determined the tariffs for the Project for each year of the control period FY09 - FY11 under the Multi Year Tariff regime. Review applications on the order dated 30.03.2009 were also filed both by the Board and the JHPL. The Commission finally by its order dated 23.06.2010 revised the total Annual Fixed Charges for the Project for the period FY04-FY08 and the control period FY09-FY11.

4. The petitioner has now preferred the present application seeking determination of tariff on the additional cost incurred on Baspa-II HEP as under:-

**I. Addition in the capital cost due to Force Majeure event**

- (a) Fall of boulders on Pothead Yard on 19.01.2006 caused suspension of generation of energy from 19.01.2006 to 02.05.2006 resulting in capital expenditure towards restoration of damaged works and protection works by way of cladding of hill over the Pothead Yard to avoid such damage to Pothead Yard in future. The Board accepted the event as Force Majeure and also on 22.07.2008 constituted a Committee, in terms of clause 17.7 of the PPA for settlement of claim under Force Majeure, comprising of representative of petitioner, representative of the Board and an external Expert as Joint representative. The three member Committee, on 20.03.2009, issued its report recommending the addition of aggregate capital expenditure of Rs.96.75 crore for the purpose of O&M and other components of tariff with the following annual allocation :-

Year	Annual Allocation (Rs. Cr.)	Aggregate Capital Expenditure (Rs. Cr.)
FY 06-07	46.34	46.34
FY 07-08	40.24	86.58
FY 08-09	10.17	96.75

- (b) The Board, after examining the said report, vide its letter dated 02.12.2009 informed the petitioner that-

*“Based upon the recommendations of the Committee for determination of cost of damage due to force majeure event (19.01.2006) at Power House site Baspa-II HEP, the Managing Committee has accepted the cost of Rs.96.75 crores towards restoration/ protection works as a consequence to force majeure event, to be added to capital cost for computation of O&M and other related components of tariff, subject to the following condition:.*

*HPSEB shall be immune to any kind of loss or damage, direct or indirect, suffered by JHPL as a consequence of these protection works in life time of PPA.”*

## **II. Additional cost of interconnection facility**

- (a) The CEA issued techno economic clearance to Baspa-II HEP on 29.04.1994, subject to the petitioner entering into an agreement with the SJVNL for terminating the 400 KV transmission lines in Jhakri Switchyard and accordingly an agreement was signed by the petitioner with the SJVNL on 8<sup>th</sup> May, 2003 for establishment of Inter Connection Facility (ICF) at Jhakri by the SJVNL. As per the said agreement the cost of ICF as approved by the CEA was to be borne by the petitioner.
- (b) The CEA vide its letter dated 21<sup>st</sup> July 2003 approved the cost of ICF as on 10.05.2003 at Rs.62.87 crore excluding the works which were yet to be executed. The petitioner paid the cost of Rs.62.87 crore as directed by the CEA and provided a Bank Guarantee of Rs.7 crore in favour of the SJVNL for the balance capital expenditure in respect of ICF which was yet to be incurred. The SJVNL vide its letter dated 01.07.2009 has claimed additional amount of Rs.1, 80, 35,726/- towards the additional expenditure, which has been paid by the petitioner in October 2009. The SJVNL in the aforesaid letter has also advised that the expenditure on account of escalation for civil work beyond first quarter, cost of land and disputed payment are not yet billed as these are under dispute/subjudice.

### III. O& M Charges and Service Tax for ICF

- (a) As per the aforesaid ICF Agreement, the O&M charges for ICF are payable by the petitioner to the SJVNL. The SJVNL is charging O&M @ 1.5% p.a. of cost of ICF with 6% Escalation per annum. The petitioner is regular in payment of above said charges to the SJVNL in terms of the agreement. The SJVNL vide its letters dated 10.12.2009 intimated that the Service Tax audit team from the Central Excise, Chandigarh conducted audit of the SJVNL and advised that service tax is liable to be paid on O&M charges for ICF provided to the petitioner. The said payment falls under the Management, Maintenance and Repair service which were made Taxable vide Notification No.7/2003 dated 20.06.2003 and the definition of “the Management, Maintenance and Repair Services” was amended to cover maintenance of immovable property within its scope w.e.f. 16.06.2005. Accordingly, the SJVNL has asked the petitioner to pay Service Tax and interest on the same as under:-

(i)	Service Tax for the period from 16.6.2005 to 31.03.2009	Rs.52,31,690/-
(ii)	Interest for delayed payment	Rs.15,44,252/-
(iii)	Service Tax w.e.f. 01.04.2009 to 30.11.2009 (payable by 22.12.2009)	Rs.9,59,739/-
	Total	Rs.77,35,681/-

- (b) The SJVNL vide its letter dated 13<sup>th</sup> January, 2010 have raised additional bill of Rs. 1,25,697/- towards service tax for the month of December, 2009 and interest for the period from 23<sup>rd</sup> December, 2009 to 22<sup>nd</sup> January, 2010 with which the total amount payable to the SJVNL works out to be Rs. 78,61,378/- (Rs. 77,35,681+ Rs. 1,25,697).
- (c) Based on the above, the petitioner has prayed-
- (i) to include the aforesaid additional expenditure of Rs.1,80,35,726/- in the capital cost for the purpose of tariff for FY10 onwards and also make a suitable provision for the additional expenditure that might be advised by

the SJVNL to the petitioner for payment, to form part of the capital cost for the purpose of tariff.

- (ii) to include the aforesaid service tax of Rs. 78, 61,378/- in the Tariff for FY10 and also allow reimbursement of Service Tax w.e.f. January, 2010.
- (iii) to allow reimbursement to the petitioner on actual basis the additional burden of 0.25% on account of difference in the O&M charges and service tax thereon being paid to the SJVNL as the Commission has allowed O&M charges @1.25% of capital cost to be escalated @6% p.a. as provided in the PPA to the petitioner but petitioner is paying O&M charges to the SJVNL @1.50% on ICF cost escalated @6% per annum.

#### IV. **Additional Compensation paid for Land**

- (a) 13.9116 hectare of land was acquired for the Project through Land Acquisition Collector, Kalpa at Reckongpeo, as per following awards:-

i)	Award No. 1/95 dated 11.09.1995	:	0.1765 hact.
ii)	Award No. 2/95 dated 11.09.1995	:	2.4827 hact.
iii)	Award No. 3/95 dated 11.09.1995	:	10.9423 hact.
iv)	Award No. 4/97 dated 30.04.1997	:	0.3101 hact.
			.....
	Total	:	13.9116 hact.
			.....

The compensation amount awarded for this aforesaid land was Rs.23,63,060/-.

- (b) 38 landowners having total area 7.2843 hectare (against Award No: 3/95) challenged the award amount in the District Court, Rampur.
- (c) As per the directions from the Deputy Commissioner , Kinnaur , a meeting was held in his office on 25.05.2007 wherein it was decided that both the parties will withdraw the case(s) filed in the Court within 30 days and the Company will pay the compensation @ Rs. 3.80 lacs per bigha.
- (d) In addition, land measuring 1.8412 hectare was also acquired for the Project. Before the issue of award by the Collector Land Acquisition, the decision to

increase the rates based on out of court settlement had been taken. A meeting was held under the Chairmanship of the then Deputy Commissioner, Kinnaur on 25.02.2008 and a rate of Rs. 4.50 lacs per bigha was settled.

- (e) Further a payment of Rs. 4,49,026/- had also been made by the petitioner Company to Land Acquisition Collector, Rampur, Bushar on 24.05.2007 towards award No. 1/2004 to 6/2004 dated 07.03.2007 in respect of compensation for acquisition of land for Baspa-II HEP.
- (f) The petitioner has prayed for inclusion of the aforesaid additional compensation of Rs.7, 93, 34,966/- in the capital cost for the purpose of tariff as under-

(Rs. Cr.)

Year	Amount paid	Cumulative Amount paid
FY 07-08	6.83*	6.83
FY 08-09	1.10	7.93

\* (Rs. 6, 78, 60,940 + Rs. 4, 49,026/-)

5. The petitioner has submitted that the computation of Tariff on the capital expenditure of Rs.96.75 crore on account of aforesaid Force Majeure event, the additional capital expenditure of Rs.1.80 crore in respect of ICF paid to the SJVNL and additional compensation paid for land amounting to Rs. 7.93 crore aggregating to Rs.106.48 crore (Rs.96.75 crore + Rs.1.80 crore + Rs. 7.93 crore) has been worked out as under-

- (a) Phasing of capital expenditure

(Rs. Cr.)

Year	Annual Capital Expenditure				Cumulative Capital Expenditure
	Force Majeure	Paid to SJVNL	Compensation for Land	Annual Total	
FY06-07	46.34	-	-	46.34	46.34
FY07-08	40.24	-	6.83	47.07	93.41
FY08-09	10.17	-	1.10	11.27	104.68
FY09-10	-	1.80	-	1.80	106.48



- (b) The annual expenditure incurred has been funded on a normative Debt: Equity ratio of 70:30.
- (c) The interest on the normative loan has been taken at annual weighted average rate on Rupee Term Loans for FY'07, FY'08, FY'09 and FY'10 onwards and repayment of normative loan to be repayable in 11 years (4 installments in each year).
- (d) The interest other components of tariff namely, O&M, ROE, Interest on Working Capital, Incentives for plant availability and secondary energy etc. have been taken as per the provisions of PPA dated 04.06.1997.

6. Based on the above, the petitioner has calculated the Annual Charges as under-

(Rs Cr.)

Description	FY 07	FY 08	FY 09	FY 10 onwards
Capital Expenditure	46.34	93.41	104.68	106.48
Equity Component	13.90	28.01	31.40	31.94
Loan Component	32.44	65.39	73.28	74.54

(Rs Cr.)

S.No	Components Of Tariff	FY07	FY08	FY09	FY10	FY11
<b>A. Capacity Charges</b>						
	1. Interest on Loans	3.25	6.18	6.70	6.10	5.42
	2. Depreciation	1.99	4.02	4.50	4.58	4.58
	3. Advance against Depreciation	0.71	1.43	1.61	1.63	1.63
	<b>Sub-total Capacity Charges</b>	<b>5.95</b>	<b>11.63</b>	<b>12.81</b>	<b>12.31</b>	<b>11.63</b>
<b>B. Primary Energy Charges</b>						
	1. O & M expenses	0.58	1.16	1.41	1.52	1.61
	2. Return on Equity	2.22	4.32	5.01	5.11	5.11
	3. Interest on working capital	0.20	0.40	0.45	0.46	0.45
	<b>Sub Total Primary Energy Charges</b>	<b>3.01</b>	<b>5.88</b>	<b>6.88</b>	<b>7.10</b>	<b>7.18</b>

C. <u>Incentives and Taxes</u>					
1. Incentive for Plant Availability	0.28	0.54	0.63	0.64	0.64
2. Incentive for Secondary Energy	0.64	1.24	1.64	2.27	2.31
3. Income Tax- MAT	0.37	0.73	0.85	1.36	1.36
Sub Total - Incentives and Taxes	1.29	2.51	3.13	4.27	4.31
Total Annual Charges	10.25	20.02	22.81	23.68	23.12

7. The Commission vide interim order dated 20.02.2010 admitted the petition and directed the petitioner to publish, under section 64(2) of the Act, salient features of the petition for the information of all the stakeholders in the State of Himachal Pradesh. The notices in the newspapers were published by the petitioner on 12.03.2010 and 16.03.2010.
8. Subsequent to the publication of the initial disclosure by the petitioner, the Commission invited suggestions and objections from the public on the petition, filed by the petitioner. The interested parties/ stakeholders were asked to file their objections and suggestions on the Petition by 08.04.2010. The Commission received no objections from any of the stakeholders by the stipulated date i.e. 08.04.2010, which on request from the Board was further extended to 10.05.2010 by the Commission vide interim order dated 04.05.2010. The Board finally filed the objections to the petition on 10.05.2010, which were replied to by the petitioner vide affidavit dated 17.06.2010.
9. The public hearing on the petition was held on 31.07.2010 at the Commission's Court Room in Shimla. The petitioner made a visual presentation in relation to their claim for determination of tariff on additional cost incurred by them on the Project. Sh. P.N. Bhardwaj, the Consumer Representative, raised an objection that the power house site was shifted to a new location, other than proposed in the DPR prepared by the Board, and further there was no acknowledgement of any failure regarding proper and adequate monitoring of protection works related to Pothead Yard. The Board requested more time to argue and make submissions in the matter. The petitioner on the next date of hearing of the case on 28.08.2010 submitted that it has not received

the copy of the submissions from the respondent Board on which the arguments were stated to be held and prayed for short adjournment of the hearing. The respondent Board admitted that further written submissions in the case were yet to be made by them. The Commission, therefore, fixed the next date of hearing on 18.09.2010. However, on the said date of hearing, the respondent Board sought permission of the Commission for placing on record the decision taken on 25.08.2010 by its Whole Time Members deciding to withdraw the approval granted to the recommendations of the Committees constituted for determining Force Majeure factors and for grant of six week's time to file revised reply, which was strenuously contested by the petitioner. The Commission directed both the parties to submit the written arguments, citing the authentic judicial pronouncements in support of their submissions and fixed the date of next hearing on 23.10.2010. Simultaneously, to continue with the process of tariff determination, the petitioner was directed to furnish certain information duly supported by the documentary proof. The written submissions in compliance of the interim Order dated 18.09.2010 were filed by the petitioner as well as the respondent Board vide their affidavits dated 21.10.2010. In the meantime, the Board stated on affidavit that while preparing the case for argument and while going through the report of the Committee and averments made in the petition, necessity has arisen that the petitioner be directed to file certain documents before the Commission and also to supply a copy of the same to the Board and prayed for issuance of direction to that effect.

10. On 23.10.2010, both the parties in view of the non availability of their Counsels, prayed for adjournment which was accepted by the Commission and the case was fixed for arguments on 20.11.2010 with the direction to the parties to submit information/data/documents in relation to certain issues by 15.11.2010. A group consisting of officers of the Commission, the respondent Board and the petitioner Company was also constituted by the Commission in order to validate data on these issues so that information deficiencies were quickly dealt with.
11. On 20.11.2010, the additional information/documents submitted by the parties in compliance of the interim Order dated 23.10.2010, was taken on record. On the said date Shri S. B. Upadhyay, the Learned Counsel for the petitioner, also made submissions with regard to the decision of the respondent Board to review the earlier

decision of the predecessor Board to withdraw the approval of the report, of the Committee constituted on 22.12.2006, declaring the event of 19.01.2006 as a Force Majeure event and also of the report, of the Committee constituted on 22.07.2008, recommending additional cost of Rs. 96.75 crore towards restoration/protection works, as a consequence to the said Force Majeure event, to be added to the capital cost for computation of O& M and other related components of the tariff.

12. In light of the submissions made on behalf of the petitioner and also the additional documents and the information supplied by the parties, the Commission in its interim Order dated 20.11.2010 afforded the final opportunity to the respondent Board to make its submissions within two weeks, with a copy to the petitioner to enable it to file by the 13.12. 2010 the rejoinder, if it chooses to do so. The Commission listed the case for presentation by the Board on 20.12.2010 and also observed in the said Order that this is the last opportunity granted to the respondent Board to respond on matters connected with the Force Majeure, its volte face, gold plating issues vis-à-vis the geological fault lines and the approval of additional capitalization into the system.
13. The written submissions were filed by the respondent Board with the Commission on 04.12.2010. The rejoinder to the Board's reply dated 04.12 2010 was filed by the petitioner on 18.12.2010 and the final hearing of the matter was held on 20.12.2010, wherein the respondent Board also made its presentation touching the technical aspects i.e. the design and adequacy of protection works as well as the insurance aspects of the claim raised by the petitioner for additional cost of the Project. After hearing the arguments, orders were reserved.
14. In the light of the rival contentions urged by the respective parties following questions would arise for consideration in this case –
  - (a) Whether the respondent Board is authorised to annul the decision of its predecessor Board, with regard to the acceptance of the event of major rock fall on 19.01.2006 as Force Majeure event?
  - (b) Whether the Commission, while determining the tariff, has (without resorting to Article 18 of the PPA, as in the present case) power to club the tariff

fixation under section 62 and adjudication of the disputes under section 86 (1) (f) of the Act?

- (c) Adequacy of the claim for additional cost.

### **First & Second Issue**

15. The first two issues relating to annulment of the decision of the predecessor Board with regard to the acceptance of the events, i.e. the major rock fall on 19.01.2006, as Force Majeure event and clubbing of tariff fixation under section 62 with the adjudication of the disputes under section 86 (1) (f) of the Act, are the vital issues and as such are taken and into consideration together at priority. At the outset, it has to be taken note of the relevant clause 17 of the PPA, which read as under:

#### *“ARTICLE 17- FORCE MAJEURE”*

##### *17.1 DEFINITION OF FORCE MAJEURE*

*Force Majeure shall mean any event or circumstances or combination of events or circumstances referred to in this Clause 17.1 that wholly or partly prevents or unavoidably delays and partly in the performance of its obligations under this Agreement, but only if and to the extent that such events and circumstances are not within the reasonable control, directly or indirectly, of the affected Party and could not have been avoided even if the affected party had taken reasonable care. Force Majeure includes the following events and circumstances to the extent they, or their consequences, satisfy the above requirements:*

##### *(a) Non Political Force Majeure Events*

- (i) any material effect of the natural elements or other acts of God, including lightning, fire, earthquake, volcanic eruption, floods, landslide, storms, cyclones, typhoons, tornado.*

*(ii) to (vi) xxx*

##### *(b) Political Force Majeure Event*

*xxx*

##### *17.2 xxx*

### 17.3 NOTIFICATION OBLIGATIONS

- (a) *The party claiming Force Majeure shall give notice in writing to the other Party of the occurrence of the Force Majeure event as soon as reasonably practicable, but not later than seven days after the time on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. Notwithstanding the above if the event of the Force Majeure results in a breakdown of communications rendering it not reasonably practicable to give notice within the applicable time lime specified herein, then the Party claiming Force Majerure shall give such notice as soon as reasonably practicable after the reinstatement of communications, but not later than forty eight hours after such reinstatement. Such notice shall include full particulars of the event of Force Majeure, of its effects on the Party claiming relief and the remedial measures proposed; and that Party shall give the other Party regular reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the situation.*
- (b) *If the Party in receipt of Force Majeure Notice disputes the degree to which the Force Majeure Event has affected the construction or operation of the Project, as the case may be, such dispute shall be settled as per Article 18.*
- (c) *The Party claiming Force Majeure shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure, and (ii) the cessation of the effects of such event of Force Majeure on the enjoyment by such Party of its rights or the performance by it of its obligations under this Agreement within seven days after becoming aware of each of (i) and (ii) above.*

### 17.4 DUTY TO MITIGATE

*The Party affected by the event of Force Majeure shall use its reasonable efforts to mitigate the effects of any event of Force Majeure as soon as practicable; provided, however, that no Party shall be under obligation under*

*this provision to settle any strike or other labour dispute it considers to be unfavourable to it.*

*17.5 FAILURE OR DELAY CAUSED BY FORCE MAJEURE – GENERAL CONSEQUENCES*

*(a) to (h) xxx*

*17.6 OTHER CONSEQUENCES OF FORCE MAJEURE CONDITIONS UNDER SECTION 17.1 (b)*

*(a ) to (d) xxx*

*(e) Any notice delivered in accordance with Section 17.6 (a), 17.6 (b), 17.7 (c) or 17.6(d) shall be referred to as a “Force Majeure (FM) Notice.”*

*(f) If the Party in receipt of the FM Notice, within thirty (30) days of its receipt, disputes the degree to which the Force Majeure Event has affected the construction or operation of the Project, as the case may be, such dispute shall be dealt as per provisions of Article 18. Party issuing the FM Notice shall have the option, but not the obligation, within 120 days of the other Party’s receipt of the FM Notice, subject to the Lenders’ rights, to deliver a Buy-out Notice. Upon receipt of the Buy-out Notice under this para (f), the Board shall purchase the Project from the Company pursuant to Article 14 and Schedule II. Until such time as such final payment is received by the Company, notwithstanding anything to the contrary contained herein, this Agreement shall remain in full force and effect.*

*(g) The additional cost for completion of project due to any Force Majeure Event including inter-alia the additional or extra work required to be done, interest and escalation during the extended period of project completion shall be worked out after deducting receivables from the insurance proceeds. The net additional amount shall be added to the Project completion cost for all purposes including, but,*

*not limited to the tariff calculation, subject to provisions of Section 17.7.*

- (h) In case of Force Majeure Event after the completion of any unit(s)/project, the parties shall take action as per sub-para (d) above and in such a situation the additional capital cost required for remedial and alternative measures to remove/remedy the Force Majeure Event shall be added to the project completion cost for all purposes including, but, not limited to tariff calculation for subsequent period of operation. Additional capital cost shall be worked out after deducting receivables from insurance proceeds from the total cost of additional works, subject to provisions of Section 17.7.*

#### *17.7 PROCEDURE TO SETTLE FORCE MAJEURE CLAIMS*

*17.7.1 Neither party shall raise any claim on account of Force Majeure for value of less than Rupees ten lacs at any instance, during construction period. Any claim exceeding Rupees ten lacs shall be referred to a committee comprising one representative each from the Board and the Company and one more representative nominated jointly by the parties.*

*17.7.2 The aforesaid committee shall verify/examine and decide such claims and its decision/award shall be final and binding on both the parties.*

*17.7.3 During the total construction period of the project, any excess expenditure on Force Majeure as admitted and allowed by the committee over and above Rupee five crores shall form part of the capital cost of the project, for computation of the tariff and other purposes of this Agreement.*

*17.7.4 During operation of the project, each individual claim above only Rupees one crore after adjustment of receivables from insurance at a time shall be referred to the committee and any excess expenditure by the Company over Rupees one crore to overcome the Force Majeure event and as agreed by the committee shall be added to the capital cost of the subsequent period for operation for the purpose of computation of tariff and other purposes of this Agreement.*



*17.7.5 Committee shall also decide the extent to which the additional cost on account of Force Majeure shall be considered for the purposes of computation of O&M charges.”*

16. Clause 18 of the PPA, provides for “the Good faith negotiations” and stipulates that in the event of a dispute, disagreement or difference between the parties, in respect of which a procedure for resolution of dispute is not otherwise provided for in the PPA, the provisions of this clause are to be invoked. This clause provides for settlement through Disputes Resolution Board or by way of arbitration proceedings under the Arbitration and Conciliation Act, 1996. These provisions are to be read with the provisions of section 86 (1) (f), and section 158 of the Electricity Act, 2003, read with the Conduct of Business Regulations framed thereunder.

### **Factual Matrix**

17. From the pleadings made by the parties, it is clear that the respondent Board vide its office order dated 22.12.2006 had constituted a Committee of its officers namely, the Chief Engineer (Projects), the Chief Engineer (Designs), the Chief Engineer (Generation) and a Sr. Geologist to ascertain and report on the actual position in regard to the Force Majeure Event, which occurred in the Pothead Yard area of the Baspa-II HEP on 19.01.2006 in the form of a major rock fall. The said Committee visited the Project area for site inspection on 22<sup>nd</sup> and 23<sup>rd</sup> March, 2007 and after due deliberations requisitioned necessary documents/ data from the Board. After in depth study of these documents, and further clarifications by the petitioner, the Committee in its report concluded that in its opinion the rock fall is attributed to the natural/weather conditions that prevailed, due to which the rock conditions deteriorated and ultimately resulted into failure, in spite of protection measures already provided by the project authorities, hence falls under Force Majeure Event. The Whole Time Members (WTM) of the Board, in its 360<sup>th</sup> Meeting held on 16.06.2008 considered the report of the Committee and accepted the major rock fall that occurred on 19.01.2006 in the Pothead Yard area of the Power House of Baspa-II HEP as Force Majeure Event . In the said meeting the WTM also approved the constitution of Committee in pursuance of clause 17.7 of the PPA for settlement of claims of the petitioner under this Force Majeure Event and the said Committee (hereinafter also referred to as “**Aggarwal Committee**”) was constituted by the

Board vide its office order dated 22.07.2008. The Aggarwal Committee in its recommendations fixed the additional cost of Rs.96.75 crore towards protection /restoration works, as a consequence of the aforesaid Force Majeure event, to be added to capital cost for computation of O&M and other related components of tariff. The Board accepted the said cost of Rs.96.75 crore and the Commission and the petitioner were informed of this decision by the Chief Engineer (Commercial) of the Board vide letters dated 19.12.2009 and 02.12.2009 respectively. However, subsequently the respondent Board vide letter dated 06.09.2010 informed the petitioner that it has decided to withdraw the approvals granted to the recommendations of the above mentioned Committees on the Force Majeure issue on the Baspa-II HEP.

18. The petitioner's claim for additional capitalization and determination of tariff thereof is based on the reports of the Committees constituted by the Board vide its orders dated 22.12.2006 and 22.07.2008. The petitioner has contended that the action of the respondent Board, in reviewing its earlier decision and withdrawing the approvals granted to the recommendation of the aforesaid Committees, is illegal and unjustified. In these circumstances the first question that arises in this connection is whether the respondent Board is empowered under law to annul the decision of its predecessor Board with regard to acceptance of the event of major rock fall on 19.01.2006 as Force Majeure event and additional cost of Rs.96.75 crore recommended by the Aggarwal Committee towards protection/restoration works as a consequence of the said Force Majeure Event.

**Submissions on behalf of the Petitioner**

19. The petitioner submits-
- (a) that the review and reversal of the action on the part of the respondent Board is illegal and un-justified act and has been done to frustrate the cause of the petitioner. For the better appraisal of the matter in issue, the petitioner gives a date-wise sequence of events and also submits that in the present case the pleadings in all aspects were completed in June 2010, when the petitioner filed its rejoinder. After the completion of the pleadings the matter was fixed for final hearing on 31.07.2010. The respondent Board instead of submitting its arguments preferred to take a date and thereafter the Board attempted to take a 'U' turn to avoid arguments by reviewing and

reversing the decision of its predecessor Board, where the Event was accepted as Force Majeure Event. Order 6 Rule 17 of the Code of Civil Procedure, which deals with the amendment of plaint, categorically provides that no amendment shall be permitted after the commencement of the trial. In the present case even that stage of trial has surpassed and the case has reached the stage of final arguments;

(b) the Transfer Scheme formulated in accordance with the provisions of sections 131-133 of the Act, clearly provides that the transferee company is obliged to act upon the decision of its predecessor Board. The said purported withdrawal of approval granted to the recommendations of the Committee is without authority and therefore, is non est and void ab initio. Once the issue of Force Majeure was referred to the Committee and the Committee assessed the Force Majeure claim and submitted its report, the respondent Board had no authority to decide either way as the report of the Committee is final and binding on both the parties as per the provisions of the PPA. The respondent Board immediately after accepting the report became **functus officio** not to sway of its power to reconsider the issue again. Such reconsideration is only possible in cases where the Statute grants such liberty to the transferee by vesting in it the power of review. A quasi judicial order once passed and having become final cannot be reviewed by the authority passing that order unless power of review has been specifically conferred. The Hon'ble Supreme Court, while defining the term quasi judicial and administrative order, has settled the dispute by holding that when civil consequences ensues there is hardly any distinction between an administrative order and a quasi judicial order. The petitioner in his support has cited the verdicts of the Apex Court reported as **AIR 1970 SC 1273; AIR 1987 SC 2186; AIR 1966 SC 828 and 1991 (4) SCC 485 and also the verdict of the High Court of Delhi in V. K. Garg V/s Lt. Governor, 140 (2007) DLT 69;**

(c) that the plain reading of the aforestated provisions in the PPA makes it amply clear that-

(i) once the issue of Force Majeure is reported to the respondent Board it has no authority to reject the same, it can however dispute the same and invoke the provisions of Article 18 of the PPA. The respondent Board decided to accept the Event as Force Majeure and did not dispute the same in terms of Article 17.3(b) of the PPA;

(ii) the respondent Board constituted a Committee in terms of Article 17.7.1 of the PPA to determine the quantum of damages. Under Article 17.7.2 of the PPA the Report of the said Committee is final and binding upon the parties.

Since the said report is final and binding on the parties, therefore, the entire dispute now raised by the respondent Board falls in the zone of the “accepted matter” which can not, therefore, be disputed and agitated upon. The Hon’ble Supreme Court in **2002(4) SCC 45**, has admitted that an accepted matter is outside the scope of dispute and can not be adjudicated upon. In these circumstances by reviewing the decision, the respondent Board is simply disregarding the Concluded PPA which simply it cannot do as per the Order of the Ministry of Power duly confirmed by the Hon’ble **Appellate Tribunal in Appeal No. 120/2008**. The respondent Board is acting in contradiction of the Article 17.7.2 which makes the present dispute between the parties as settled and final and binding;

(d) that the decision of the respondent Board can not be reviewed and withdrawn since no inherent power of review has been conferred upon the respondent Board. The respondent Board being a transferee has to comply with and discharge the obligations of the decision taken by its predecessor. Therefore the decision to withdraw the recommendation of the Committee is illegal, without any authority and non est and void ab initio.

#### **Submissions on behalf of the respondent Board**

20. In response, the respondent Board urges that the duty cast upon the Directors of the Company includes the administrative control of the respondent Board as well as the functions of the Company as are governed by the Act. In terms of Part-III, Part-IV, Part-V and Part-VI of the Act, the respondent Board has power to issue orders and in a like manner this power includes power to sanction, to add, amend, vary or rescind any order so issued. Since grant of approval to the reports of the Committee by the Whole Time Members was and is purely an administrative and executive function of the respondent Board as such if the respondent Board has power to do certain act then it itself has power under section 21 of the General Clauses Act to undo or correct, amend, add, vary or rescind the act on account of approvals or orders passed by the respondent Board. In this context the respondent Board relies upon the judgments of

the Supreme Court reported as **State of UP V/s Lucknow Development Authority and others AIR 1989 SC 997; R.R.Verma V/s Union of India AIR 1980 SC, 1461, para 5; G. Siri Nivasan V/s State of AP (2005) 13 SCC P. 712 and Videsh Sanchar Nigam Ltd. and another versus Ajit Kumar Kar and other 2008 (11) SCC 591.**

**Arguments on behalf of the Petitioner**

21. Shri S. B. Upadhyay, the Learned Counsel appearing for the petitioner, by and large, reiterated the averments already made and vehemently asserts that decision of the respondent Board to review earlier decisions of the predecessor Board is not inconsonance with law. The respondent Board constituted the ‘Aggarwal Committee’ in terms of the provisions of the PPA; and it further constituted another Committee to ascertain the quantum of Force Majeure claim and also accepted the reports of the said Committees. After acceptance of the said reports the issue concerning the Force Majeure event can no longer be re-opened, as under clause 17.7.2 of the PPA the report of the Committee is final and binding upon the parties. The learned counsel for the petitioner also stressed that the decision of the Board cannot be reviewed and withdrawn, since no inherent power of review has been conferred upon the respondent Board under the Transfer Scheme formulated in pursuance of the provisions contained in sections 131-133 of the Act and the transferee is obliged to act upon the decisions of its predecessor Board. Even the general power to review the administrative decisions can be exercised only in cases where the earlier decisions are attributed to some elements of fraud, misrepresentation or any bonafide mistake. In the present case there is nothing on record to show that the earlier reports of the Committee set up by the predecessor Board or the acceptance thereof was vitiated by the exercise of some fraud or misrepresentation or there existed any bonafide mistake.

**Counter submissions of the respondent Board**

22. Shri Bimal Gupta Advocate, appearing for the respondent Board, forcefully controverts the arguments put forth by the petitioner urging-
- (a) that the reason to review the decisions dated 16.6.2008 and 16.10.2009 of the transferor Board whereby the transferor Board, had approved the report of the Committees pertaining to alleged Force Majeure events, is that the actual and factual position regarding the alleged Force Majeure event was not placed before the

authorities approving the report. The matter has been re-examined recently, after constitution of the HPSEBL, by its Board of Directors on the basis of the objections raised by the Consumer Representative before the Commission;

(b) that under the Arbitration and Conciliation Act, 1996, wherein in number of agreements entered into between the parties, such type of clause i.e. as clause 17.7.2 of the PPA, do exist, but despite that parties can/are entitled to initiate the arbitration proceedings against the decisions which are also made binding under such agreements as has been provided in Clause 17.7.2 of PPA. In view of this there is no merit in the submissions made by the petitioner that review is not possible in view of Clause 17.7.2 of PPA;

(c) that no doubt the transferee company i.e. the HPSEBL has taken over all the assets and liabilities of transferor Board, but that itself does not create any bar or impose any such restriction upon the transferee company to the effect that they cannot undo any action or decision of the transferor Board which on the face of it is against the public policy of India and against the interests of public at large. Ultimately it will be the consumers who will be paying the alleged additional cost of the project by way of tariff. In the interest of public at large the decision of the then Board has been reviewed and there is no illegality or irregularity in reviewing the orders of transferor Board approving the reports of the Committees;

(d) that it is well known proposition of law that power to do itself includes power to undo also and the petitioner cannot take benefit of any of the clauses of the scheme of transfer.

#### **Reply of the Petitioner to the counter submissions of the Respondent Board**

23. To wrap up, the Learned Counsel, appearing for the petitioner, vehemently reiterates,-
- (a) that the respondent Board has no valid reasons to review the decisions dated 16.06.2008 and 16.10.2009 taken by the erstwhile Himachal Pradesh State Electricity Board after detailed examination of the matter. The respondent Board has alleged that the actual and factual position regarding the alleged Force Majeure events was not placed before the authorities approving the report. It is respectfully submitted that the two committees constituted by the erstwhile Board comprised of its own senior

officers of the level of the Chief Engineer, who were fully abreast of all the details. No outsider was associated with the Committee appointed by the Board to ascertain whether the event of 19.1.2006 was a Force Majeure Event. Similarly, the reports of the Committees were processed for approval of the Board by its own officers. It is, therefore, illogical to suggest that the actual and factual position was not placed before the Board who approved the two reports of the Committees. Besides, apart from making a bald statement that the actual and factual position was not placed before the authorities approving the Committee's report, the respondent Board has not brought out a single fact substantiating alleged withholding from the approving authority. It is submitted that all facts, including those now being presented by the respondent Board in support of review of the decision of the Board, were within the knowledge of the Board when it approved the recommendations of the Aggarwal Committee as these facts were duly considered in the report of the Aggarwal Committee. The applicant has elaborately dealt with these facts and other issues in the written submissions and the documents filed before this Commission along with its affidavit dated 21.10.2010. The incident that took place on 19.1.2006 caused extensive damage to the Pothead Yard installations, and other structures/equipment, resulting in closure of the Power House for 103 days at a stretch. It is preposterous for the respondent Board to suggest that there was no event or a Force Majeure Event. It just amounts to turning a blind eye to the facts. The event that took place on 19.1.2006 falls into the category of Force Majeure Event as defined in clause 17.1 read with clause 17.2 of the PPA;

(b) that Clause 17.7 of the PPA is specific to the procedure for settlement of Force Majeure claims. The procedure envisages constitution of a Committee to decide the claims on account of Force Majeure events and accords finality to the decision/award of the Committee. The petitioner's claim was considered by the Aggarwal Committee constituted under clause 17.7.1 of the PPA. The Aggarwal Committee unanimously recommended addition of cost of Rs. 96.75 crore on account of Force Majeure events that occurred on 19.1.2006. The recommendation of the Aggarwal Committee is final, binding and conclusive in accordance with the procedure agreed to between the parties under clause 17.7.2 of the PPA. Accordingly, the Board accorded its approval to the recommendations made by the Aggarwal Committee;

(c) that all the matters covered under the PPA have to be dealt with as per the provisions of the PPA. The general rules and Acts will only apply when any matter/ procedure is not covered under the PPA;

(d) that in accordance with clause (f) of sub-section (1) of section 86 of the Act, this Commission has jurisdiction to adjudicate upon the disputes between the licensees and generating companies or refer any dispute for arbitration. The power of adjudication or arbitration of disputes under the Act is exercisable in case a dispute can be legitimately raised. Where by virtue of an agreement between the parties, the decision of a specified authority on any matter has been accorded finality, no dispute can justifiably be raised by any of the parties on the matter becoming final;

(e) that the assets, rights and obligations of the Board have been transferred to the respondent Board under the transfer scheme. By virtue of the provisions of the Statute, the Act under which the respondent Board is created and is functioning, it cannot repudiate the liabilities of the Board transferred to it. The respondent Board is bound by the liabilities transferred to it under the transfer scheme by virtue of clause (b) of sub-section (3) of section 131 of the Act;

(f) that the respondent Board as a successor of the Board is also barred under the general provisions of law pertaining to waiver and estoppels. Neither the Act, nor the transfer scheme nor the PPA provides for review of the matters settled by the Board, in any manner whatsoever. There is no provision of re-examining the settled matters by constituting another Committee i.e. the technical committee;

(g) that the decision of the respondent Board to review the earlier decisions of the Board is illegal and contrary to the provisions of PPA as well as the Act, the transfer scheme and the general law of Contract. The review has been conducted *de hors* the provisions of the law and in contradiction to the terms and conditions of the PPA. The respondent Board is now disregarding the report of its own experts, and has sought to review its earlier decisions.

### **Commission's Views**

24. The factual position, as derived from the pleadings of the parties, reveals that the petitioner's main contention is that a major rock fall from the adjoining hill occurred



in Baspa-II HEP Pothead yard area, resulting in extensive damage to Pothead installation and closure of the power house on 19.01.2006, and the applicant notified the incident to the Board on 20.01.2006. The Board set up on 22.12.2006 a Committee, comprising of its senior officers and a Geologist to ascertain and report on the actual position in regard to the Force Majeure event. The Committee after thorough examination and numerous visits to site concluded the said event as “the Force Majeure Event”. After the acceptance of rock fall as Force Majeure event, the respondent Board constituted another Committee (i.e. Aggarwal Committee under provisions of Article 17.7 of the PPA for settlement of Force Majeure claim. The Aggarwal Committee on 20.03.2009 recommended additional cost of Rs. 96.75 crore towards restoration/protection works for computation of tariff thereon and its report was also accepted by the Board on 02.12.2009. Based on the aforesaid report of the Aggarwal Committee, as accepted by the Board, the petitioner has filed the present petition seeking determination of tariff on the additional cost of Rs.96.75 crore and after additional capital expenditure. The Board filed its response on 10.05.2010 and the matter was further listed for hearing on 31.07.2010, but other proceedings remained adjourned till 28.08.2010. In the meanwhile the Board (as reconstituted under the provisions of sections 131 – 133 of the Act), reviewed its earlier decision and retrospectively, annulling the approval conveyed earlier by the Board on 02.12.2009. The action of the respondent is not inconsonance with the provisions of the Order 6 Rule 17 of the Code of Civil Procedure which stipulates that no amendment in pleadings shall be permitted after commencement of trial. In the present case even that stage of trial has surpassed and case reached at the stage of final arguments.

25. The provisions of the Code of Civil Procedure in its *strico sensu* are not applicable in tariff determination proceedings before the Commission, as the technical procedures cannot whittledown the exercise of statutory powers. The Commission, while determining the tariff, has to take into consideration the principles enunciated in the Act and is to follow the procedure as laid down in the Act, and the Regulations, framed thereunder. There is nothing in the Act, which mandates the Commission to follow the Code of Civil Procedure, excepting the matters contained in sub-section (1) of section 94 of the Act. The Commission has specified, under section 92 of the Act, the procedure in respect of the transaction of its business. Regulation 68 of the

Conduct of Business Regulations of the Commission provides that nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Commission. The Regulations further provide that there is nothing which bars the Commission from adopting a procedure, which is at variance with any of the provisions of the said Regulations. In **W.B. Electricity Regulatory Commission Vs. CESC Ltd** “(AIR, 2002 SC 3588), it is concluded that-

“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.”

26. The proceedings before the Commission for fixation of tariff under section 62 and the proceedings for the adjudication of disputes, between the generators and licensees, under section 86(1) (f) of the Act cannot be treated at par. Firstly the disputes under section 86 (1) (f) are to be considered and settled in light of the bilateral terms and conditions agreed to by the parties. Secondly there should be a actual dispute and the respective parties should have gone into the process of “Good Faith Negotiations Clause” in terms of the agreement entered into by them. The Hon’ble Apex Court in its verdict **Gujrat Urja Vikas Nigam Limited V/s ESSAR Power Limited, 2008 ELR (SC) 0001**, has held that it is in the discretion of the State Commission whether the dispute should be decided by itself or keeping in view the technical nature or requirement of expertise to settle such issues should be referred to an Arbitrator. Section 86(1) (f) of the Act being special provision overrides the general provision in section 11 of the Arbitration Act. Procedural and other matters relating to such proceedings are to be governed by the Arbitration and Reconciliation Act, 1996 unless there are conflicting provisions in the Act of 2003. Thirdly it is the cardinal principle of interpretation of Statues that various sections of an enactment are not to be read or interpreted in isolation. Per the provisions of section 61 (d) of the Act, as laid down by the Hon’ble APTEL in its order dated 03.06.2010 passed in **Appeal No. 134 of 2008- NTPC Limited V/s CERC (para 33)**, while determining the tariff, the

consumers interest should be safeguarded. Hence the tariff should be so determined that it should be the cheapest at the consumers end. This is the basic object of the Electricity Act, 2003. Every case of additional capitalization, which will give rise to the tariff, is to be seen in the light of the above objective. The increase in tariff is not to be borne by the Board alone, but is to be ultimately passed on to the end of the consumers. It necessarily follows that the whole balancing rights and obligations of the consumers, at large, on one hand and the licensee on the other hand are to be viewed to achieve the aims and objectives of the Act. The Commission, therefore, concludes that in view of the varied nature of issues and involvement of different parties and objectives to be attained, both proceedings cannot be taken together in one go.

27. A holistic reading of the Act, leads to the conclusion that the Regulations should only satisfy two conditions namely, that they are consistent with the Act and that they are made for carrying out the purposes of Act. Moreover, it is ruled by the Hon'ble Appellate Tribunal for Electricity in the **Himachal Pradesh State Electricity Board V/s Uttra Khand ERC and others 2010 ER (APTEL) 1059**, that-

“It is settled law that the method of determination is provided under the Electricity Act and regulations will prevail any clause of the agreements between the parties. The State Commission is expected to take all factors associated with the process of tariff determination that would necessarily mean, among others legitimate components of cost, depreciation, return on equity and taxes etc.”

28. In light of the above pronouncements, the Commission, in discharge of its duties, is required to consider the material and documents placed before it and not to unnecessary burden itself, in sorting out the issues arising out of the conduct of the parties violating the terms and conditions of the bilateral agreements. Therefore, the vital issues are to be settled strictly in accordance with provisions of the PPA. It is abundantly clear that the jurisdiction of the Commission to adjudicate these issues will come up only after the parties raise the specific dispute, after exhausting the procedure set out in the PPA, as laid down in Article 18 thereof. Clause 18 of the PPA, provides for “the Good faith negotiations” and stipulates that in the event of a dispute, disagreement or difference between the parties, in respect of which a

procedure for resolution of dispute is not otherwise provided for in the PPA, the provisions of this clause are to be invoked. This said clause 18 of the PPA provides for settlement through Disputes Resolution Board or by way of arbitration proceedings under the Arbitration and Conciliation Act, 1996. These provisions are to be read with the provisions of section 86 (1) (f), and section 158 of the Electricity Act, 2003, read with the Conduct of Business Regulations framed thereunder.

In light of the above discussion, it is abundantly clear that the Commission, while determining the tariff, cannot club for its consideration disputes of the nature as involved in this case and as such there remains no need to consider and conclude the other issue whether the Board is competent to annul and withdraw, the decision of its predecessor Board.

### **Third Issue**

29. The Commission now proceeds to consider the adequacy of the claim for additional cost in terms of the issues/objections filed by the Board/ Consumer Representative, the petitioner's response to these objections along with the Commission's views in the matter.

### **Change in location of the Power House**

30. The Board has stated that the consumer representative Sh.P.N.Bhardwaj at the time of admission of the petition has raised an objection that the power house site was shifted to a new location other than proposed in the DPR prepared by the HPSEB and further there was no acknowledgement of any failure regarding proper and adequate monitoring of protection works related to Pothead Yard. So on this issue, the petitioner be directed to produce original approved drawings vis-à-vis the DPR showing exact approved location of the Power House site and Pothead Yard by the competent authority in line with relevant provision of the DPR to facilitate the Board to offer comments.

### **Petitioner's Reply**

This aspect, interalia, has already been looked into by the Committee constituted by the Board in terms of clause 17.7 of the PPA for settlement of claims under Force

Majeure while dealing with the location of the Pothead Yard as is evident from the following findings of the said Committee: -

(a) As stated on page 12 of (Part I) of their report dated March, 2009

*“HPSEB’s DPR of 1987 is based on Geological studies conducted by GSI for HPSEB during its Field Season 1983-84. Subsequent studies by GSI for HPSEB were conducted during Field Season 1987-88, which were not incorporated by the Board, in its DPR, by itself. In fact when the Project was allotted to JHPL, this GSI report was complied with by JHPL in its DPR of 1992. DPR of 1992 takes full cognizance of geological features of pothead site brought in Plate No. – III of Geotechnical Report of GSI for the field season 1987-88 by Shri P.M Jalote. It would become evident from examination of this Plate that geology of the rock face is identical with that of the cavity of the power plant and accordingly design criteria for protection works was worked out and adopted.”*

(b) As stated on page 307 of their report dated March, 2009

*“1.1 The Techno Economic clearance (TEC) to Baspa Stage II H.E Project (300MW) was accorded by Central Electricity Authority (CEA) on 29.04.1994 which was based on the proposal submitted by the Company through HPSEB letter dated 02.06.1992 and as updated from time to time in accordance with the discussion/correspondence with CEA/CWC/HPSEB.*

*1.2(i) In our Detailed Project Report (DPR) submitted to CEA/HPSEB, the underground power house was located 200m South – East of the one proposed by HPSEB. This location was selected by JHPL in pursuance of the suggestion made by Shri. P.M Jalote of GSI in his report for the field season 1987-88 submitted to HPSEB. At the earlier site proposed by HPSEB, rock mass contained gneissese schist comprising gneisses, quartzites, garnetiferous biotite schist and thin bands of graphite schist. The rock was also intersected by shear zones and by basic intrusions. In the present proposal as suggested GSI to HPSEB and adopted by JHPL, the power house cavity was essentially in the gneisses with quartzites.”*

The above mentioned facts were also accepted by the Committee appointed by the Board, in respect of the Force Majeure Event at Baspa Pothead Yard, and comprising

of Board's representative, company's representative and a joint representative (outsider). The Committee report was subsequently approved by the full Board of the HPSEB. It has been further stated that the request of the HPSEB to have original approved drawings vis – a- vis DPR showing exact approved location of the Power House Site and Pothead Yard by the competent authority in line with relevant provision of DPR to facilitate the HPSEB to offer comments on the instant issue is totally uncalled for and unwarranted at this stage in view of fact that the change in location of the Power House and the Pothead Yard was (i) made on the recommendation of the GSI and (ii) was covered in the DPR submitted to the CEA for TEC, the application for which was forwarded to the CEA by HPSEB on 02.06.1992. Since the said application to the CEA along with DPR was sent by the HPSEB, it deems to carry the approval of the Board. Further upon according approval of TEC by the CEA, the revised location of the Power House and Pothead Yard carries the approval of the CEA as well.

#### **Commission's Views**

The Commission observes that the location of the Power House and the Pothead Yard in the DPR of 1992, submitted to the Central Electricity Authority (CEA) for according Techno Economic Clearance (TEC), was based on geological studies conducted by the GSI for the Field Season 1987-88 whereas the Board's DPR of 1987 is based on geological studies conducted by the GSI during its Field Season 1983-84. Further the DPR of 1992 was forwarded to the CEA for according TEC through the Board itself and the said TEC was accorded by the CEA on 29.04.1994 based on the proposal submitted by the petitioner through HPSEB letter dated 02.06.1992 and as updated from time to time in accordance with the discussion/correspondence with the CEA/CWC/HPSEB. The Commission, therefore, does not find any merit in the objection raised by the Board with regard to change in the location of the power house.

#### **Installation of instruments for monitoring and undertaking of regular monitoring/maintenance measure ensuring rock stability for the future.**

31. The Board has submitted that in the recommendation of the Committee on Force Majeure, it was mentioned that JHPL shall ensure installation of instruments as indicated in Drg. No Baspa-II/PPI/06/102A and undertake regular

monitoring/maintenance measure ensuring rock stability for the future on the suggested lines and submit the inspection report to the HPSEB periodically. It is thus clear that M/s JHPL have not adhered to this measure previously in terms of proper foresight and planning and engineering at the construction and operation stages.

### **Petitioner's Reply**

As per the recommendation of Committee on Force Majeure, an early action was taken to procure these instruments. The instruments have been installed at site and only some associated cabling work is in progress which will be completed shortly. Thereafter periodical readings of these instruments will be taken which will also be submitted to the Board. The objection put forth by the Board that JHPL have not adhered to this measure previously in terms of proper foresight and planning and engineering at the construction and operation stages is wrong and hence denied. At that stage concrete cladding only upto El 1853m to protect the toe of the rock and providing steel shed supported on the above cladding were considered necessary and provided. These did not require any monitoring instrumentation. The elaborate cladding and protection works were carried out post the Force Majeure Event to avoid any such untoward incident in future and as stated above the Company has already installed the instrument for monitoring of rock stability and is carrying out the regular monitoring of the same.

### **Commission's Views**

The petitioner has submitted that at the construction stage concrete cladding only upto El 1853m to protect the toe of the rock and providing steel shed supported on the above cladding were considered necessary and provided for the Project and that these measures did not require any monitoring instrumentation. The petitioner has further submitted that post the Force Majeure event of 19.01.2006, the instruments as per recommendation of the Committee on Force Majeure have been installed at site and periodical readings of these instruments will be taken and also submitted to the respondent Board after completion of the associated cabling work which is on advance stage of completion. The Commission, therefore, is of the opinion that the objection of the Board for not adhering to this measure previously in terms of proper

foresight and planning and engineering at the construction and operation stages is not relevant to the present proceedings of the case.

**Impact of incentives on account of higher plant availability in terms of clause 17.5 (f) of PPA read with clause 8.10 of PPA.**

32. The Board has stated that the Commission in its Review order dated 07.02.2008 had observed that-

*“The Commission would take a view on the Board’s contention once the said Committee would decide on the non-functioning of Baspa-II Power Plan 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 30<sup>th</sup> June, 2008.”*

The Board, therefore, submits that the impact of incentive on account of higher plant availability in terms of clause 17.5 (f) of the PPA read with clause 8.10 of the PPA may also be considered before finalisation of the petition under consideration. However, the same issue already stands submitted by the Board in its review petition No.91 & 179 of 2009 and the Board’s objection on this account needs the settlement.

**Petitioner’s Reply**

This issue was covered by the Board in its appeal filed before the Appellate Tribunal for Electricity against tariff order dated 24.02.2007 and review order dated 7.02.2008 passed by the HPERC. The Hon’ble Appellate Tribunal for Electricity vide its order dated 21.07.2009 has passed the following order on this issue:

*“Incentive on higher plant availability during the FY 2005-06 and 2006-07 when admittedly the plant was out of operation during the period on 19.01.2006 to 02.05.2006:*

*In its review order, the Commission considered the plea of the appellant that during the period of 19.01.06 to 02.05.06 the plant was not in operation and therefore no incentive on account of higher plant availability could be granted to the appellant. Paragraph 4.8 of the review order deals with the issue. In Paragraph 4.8.1 the Commission has set out the plea of the Board regarding the plant remaining out of operation during 19.01.06 to 02.05.06. The Commission*



*says that a committee was constituted for determining whether inoperation of the plant was due to force majeure event. Commission expressed the following view:*

*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 30<sup>th</sup> June 2008.*

*The respondent No.2 submits that the said committee has held the in operation as a force majeure event. The respondent No.2 also contends that the deemed plant availability on account of force majeure has to be considered at 90% and that higher plant availability for the FY 2005-06 and 2006-07 has been allowed by the Commission as per the provisions of the PPA. Therefore, the plea of the appellant that higher plant availability has been wrongly calculated is incorrect.”*

Further the Hon'ble Appellate Tribunal while concluding the said order held as under:

*“In view of the above, the appeal fails and the same if accordingly dismissed.”*

The petitioner, therefore, submits that the issue of incentives on account of higher plant availability in terms of clause - 17.5 (f) of PPA read with clause 8.10 of PPA already stands disposed off by the Hon'ble Appellate Tribunal vide its order dated 21.07.2009.

### **Commission's Views**

In addition to what has been stated by the petitioner, the Commission observes that the above issue was also raised by the Board during the proceedings relating to review of the Commission's order dated 30.03.2009 and the order dated 10.09.2009 passed in review petition No.83/2009. The review petitions were disposed by the Commission vide its Order dated 23.06.2010 and relevant paragraphs 2.21 and 2.22 of the said Order, are reproduced below:-

*“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."*

The Commission is, therefore, of the view that the Board could have approached the appropriate forum for settlement of this issue.

**Adjustment of Rs. 27.09 crore already recovered by M/s JHPL through insurance**

33. The Board has submitted that the adjustment of Rs.27.09 crore already recovered by M/s JHPL through insurance may be adjusted against the amount of Rs.96.75 crore as per the recommendation made by the Committee towards restoration/protection works as a consequent to force majeure event. It is further, added that Company may ensure the Board whether the insurance during construction/during operation period have been covered under insurance in line with the relevant clause of the PPA i.e. Article 12 read with Schedule IV of the PPA.

**Petitioner's Reply**

In this regard the Force Majeure Committee in its report dated March, 2009 has, inter-alia, recommended at page 23 of their report as under:-

*"JHPL has been compensated to the extent of Rs. 27.09 crore towards capacity charges by the Insurance Co., their separate claim lodged with the Board shall be reduced to the extent of compensation received by them from the Insurance Company."*

Keeping in view the above recommendation of the Committee the amount of insurance claim of Rs. 27.09 crore received towards capacity charges may be adjusted by the Commission against the tariff as might be fixed in respect of additional cost incurred on Baspa-II HEP. The petitioner further submits that the insurance during construction period and operation period have been covered in the insurance policies

procured by the Company in line with the relevant clauses of the PPA i.e Article 12 read with Schedule IV of the PPA.

### **Commission's Views**

The Commission is in agreement with the submission of the petitioner and has adjusted the amount of Rs. 27.09 crore received towards capacity charges against the Annual Fixed Charge as determined in respect of additional cost incurred on Baspa-II HEP.

### **Acceptance of Additional cost on account of damages to the Barrage Works by the flash flood under investigation by the Board**

34. The Board has submitted that it will not accept any additional cost on account of damage to the Barrage works by the flash flood which is being investigated by the Board. As the firm can claim all its claim through insurance as provided in the insurance clause of the PPA i.e. Article 12 read with Schedule IV of the PPA.

### **Petitioner's Reply**

The petitioner submits that it is premature and unwarranted on behalf of the Board to state in their objections at this stage 'that the HPSEB will not accept any additional cost on account of damage to the Barrage works by the flash flood' until the completion of the investigation by the dispute resolution committee constituted in terms of Article 18 of the PPA. The petitioner submits, before the Commission, a copy each of the letter (notice) dated 26.08.2006 sent by the Company to the Board in terms of clause 18.1 (b) of PPA for Resolution of Disputes and the Board's acknowledgement thereto vide their letter dated 29.08.2007.

The petitioner further submits that the cost incurred by the Company in respect of the restoration and protection works carried out by the Company at the Barrage site post the Force Majeure Event (i.e Flash Flood in the river Baspa on 5<sup>th</sup> July 2005) will be claimed from the Board after the completion of investigation by the Board.

### **Commission's Views**

The Commission believes that in view of letters dated 26.08.2006 and 29.08.2007 mentioned in para 27.5.2 above, the issue under the Force Majeure Event of 5<sup>th</sup> July,

2005 is still under consideration of the Board. Further it needs to be also noted that the PPA provides a well defined procedure for settlement of such claims and the Commission is bound to honour the PPA. Therefore, as and when the petitioner approaches the Commission after the completion of investigation of the said Force Majeure Event by the Board, the Commission shall proceed to decide the matter in accordance with the relevant provisions of the PPA. This has also been made amply clear by the Commission in para 3.11.4 of its Order dated 24<sup>th</sup> February, 2007 wherein the Commission had observed as under-

*“3.11.4 The PPA clearly spells out the framework for admissibility of an event as a force majeure event and the parties concerned have failed to settle the force majeure claim as per clause 17.7 of the PPA. The Commission would consider cost implications, if any, of the event as and when the claim is settled by the parties in accordance with the provisions of the PPA.”*

#### **Additional cost of Inter Connection Facility**

35. The Board has submitted that as per the clause 8.4.1 of the PPA it is mentioned that no additional cost on basic sealed cost shall be admissible other than geological surprises and uncertainties subject to the satisfactory proof by the petitioner and verification by the Board to a maximum limit of Rs.8.8 crore. Accordingly the petitioner is not entitled to any cost on account of ICF.

#### **Petitioner’s Reply**

The petitioner reiterates the submissions made on this account in its petition dated 20.01.2010 and denies the objections raised by the Board. It has been further stated that the provisions of Article 8.4.1 of the PPA based on which the objection has been raised by the Board are meant for application up to the COD of the Baspa project and not thereafter i.e during the operation period of the Project. The need for payment of additional cost of ICF amounting to Rs.1,80,35,726/- to the SJVNL has arisen on receipt of the SJVNL’s letter dated 01.07.2009 by the Company and payment thereof by the Company in October, 2009, which is more than 6 years after the COD of the Baspa Project and can not ipso- facto relate back to the period upto COD of the project for which the provisions of Article 8.4.1 are meant for.

### **Commission's Views**

The petitioner in its petition has stated that the TEC for the Project was accorded by the CEA subject to the petitioner entering into agreement with the SJVNL for terminating the 400KV transmission lines in Jhakri Switchyard and accordingly an agreement was signed with SJVNL on 08.05.2003 as per which the cost of ICF as approved by the CEA was to be borne by the petitioner. It has been further stated in the petition that the Commission vide its Order dated 24.02.2007 approved the capital cost of Rs. 1533.96 crore for the Project, inter-alia including the inter connection facility set up by the SJVNL at Rs. 62.87 crore and now the SJVNL vide letter dated 01.07.2009 has claimed an additional amount of Rs.1,80,35,726/-towards the additional expenditure for ICF and payment thereof has also been made by the petitioner in October, 2009. The petitioner has also referred to the Commission's observation made in para 3.3.2 of the review Order dated 07.02.2008, wherein it is stated that the Commission would take a view of any further capital expenditure on the inter connection facility on its merit in subsequent tariff proceedings, and requested for inclusion of Rs.1,80,35,726/- in the capital cost for FY 10 onwards and also to make a suitable provision for the additional expenditure that may arise on the advice of the SJVNL to the applicant for payment, to form part of the capital cost for the purpose of tariff.

The Commission considers it relevant to point that the M/s Jaiprakash Hydro Power Limited in its first tariff filing for the Project had claimed Rs.62.87 crore on account of the ICF as per the demand raised by the SJVNL as per their letter dated 21.07.2003, against the amount of Rs. 17.76 crore provided in the approved DPR. The Board had then also raised the same objection on the admissibility of additional cost for ICF and the Commission's views on the matter recorded under para 3.9.3 of its Order dated 24.02.2007, are as under:-

*“3.9.3 The Commission observes that there was a provision of Rs. 17.76 crores for ICF at Jhakri in the TEC approved project cost by the CEA at December, 1993 price level. The CEA has allocated cost of Rs. 62.87 crores to Baspa II for the ICF provided at Jhakhri by SJVNL vide its letter dated 21.07.2003 addressed to the Addl. Chief Secretary, GoHP, Deptt. of MPP & Power. The cost of the ICF in the project is externally determined, being linked to the cost of ICF as provided in the project cost of the*

*Nathpa Jhakhri Project (NJP) to be finally approved by the CEA. The project cost of NJP is in no way controllable by the petitioner. The Commission, therefore, considers it just to compensate the petitioner for the difference between the chargeable cost of ICF to Baspa II by CEA, and the provisions made on this account in the TEC approved cost at December, 1993 price level escalated as per the provisions of the PPA like any other cost element.”*

The matter was also taken up by the Board in the review petition filed against Order dated 24.02.2007, which was disposed of by the Commission vide Order dated 07.02.2008. The Commission in para 4.2.2 of the Order dated 07.02.2008 had observed as under:-

*“4.2.2 The Commission has already expressed its views on the basis of approving an incremental amount towards cost of ICF facility in the project capital cost over and above the cost accounted for in the basic cost agreed to in the PPA, in paras 3.9.3 and 4.8 of the Tariff Order. This plea of HPSEB in its review petition, therefore, does not merit any consideration in the instant case of review, and hence not admitted.*

The Commission, therefore, is of the view that the petitioner is entitled to the additional cost amounting to Rs.1,80,35,726/- paid to SJVNL for the ICF.

With regard the petitioner’s request for making a suitable provision for the additional expenditure that may arise on the advice of the SJVNL to the Applicant for payment, to form part of the capital cost for the purpose of tariff, the Commission would take a view on any further capital expenditure on its merits and taking into consideration the principles followed in this regard in the past.

#### **Service Tax payable to SJVNL**

36. The Board has submitted that M/s JHPL has raised the total amount of Rs.78,61,378/- payable to the SJVNL as Service Tax for the period 16.06.2005 to 31.03.2009 and 01.04.2009 to 30.11.2009 including interest for delayed payments. In this context, it is stated that the service tax is not covered under the PPA and hence is not liable to be paid.

### **Petitioner's Reply**

The petitioner reiterates the submissions made on this account in its petition dated 20.01.2010 and denies the objections raised by the Board.

### **Commission's Views**

The petitioner in its petition dated 20.01.2010 submitted that SJVNL in its letter dated 10.12.2009 have stated that the service tax audit team from Central Excise, Chandigarh conducted audit of the SJVNL and advised that service tax is liable to be paid on O&M charges for maintenance of ICF provided to the petitioner. It has further been stated that the payments on account of service tax on O & M charges of ICF fall under the Management, Maintenance and Repair Services, which were made taxable vide notification 7/2003 dated 20.06.2003 and the definition of "Management, Maintenance and Repair Services" was amended to cover maintenance of immovable property within its scope w.e.f. 16.06.2005. Accordingly, the SJVNL advised the petitioner to pay service tax and interest thereon and the total amount payable to SJVNL works out to Rs. 78,61,378/- and the petitioner had requested to include this amount in the tariff for FY10 and also allow reimbursement of service tax w.e.f. January, 2010.

The petitioner in terms of the requirement of the TEC accorded to the Project by the CEA entered into an agreement with the SJVNL on 08.05.2003 for terminating the 400 KV transmission lines from the Project in Jhakri Switchyard and as per the said agreement the cost of ICF as approved by the CEA and the O&M charges for ICF are payable by the petitioner to the SJVNL. It is also observed from the SJVNL's letter dated 10.12.2009 that opinion was provided to the SJVNL by the consultant M/s S. Mehanti & Co. Chartered Accountants, Chandigarh vide letter dated 18.09.2009 that service tax is payable for ICF w.e.f. 16.06.2005. The Commission would also like to mention that the situation has essentially arisen on account of change in law after the COD of the Project and in such circumstances the increase in costs are allowed either through tariff or otherwise. Under the circumstances stated above, the Commission is of the view that the petitioner is entitled to the cost actually paid to the SJVNL on account of service tax on O&M charges for maintenance of ICF from time to time and the recovery of the cost shall be through the tariff mechanism.

### **Additional O&M expenses being paid to SJVNL**

37. The Board has submitted that M/s JHPL has contended that the Commission has allowed O&M charges @ 1.25% of Capital cost to be escalated @ 6% per annum as provided in the PPA and requested to allow them payment of O&M charges @1.50% on ICF cost escalated @ 6% per annum in line with the payments on O&M charges being made by JHPL to SJVNL. In this context, the Board objects that the Board is governed under clause 8.7.2 of PPA, as such the contention of M/s JHPL on this issue is not agreed to by the Board and hence denied.

### **Petitioner's Reply**

The petitioner reiterates the submissions made on this account in its application dated 20.01.2010 and denies the objections raised by the Board.

### **Commission's Views**

The petitioner in its application dated 20.01.2010 has submitted that the Commission has allowed O&M charges @1.25% of capital cost to be escalated @6% p.a. as provided in the PPA to the petitioner but petitioner is paying O&M charges to the SJVNL @1.50% on ICF cost escalated @6% p.a. and service tax thereon out of payment of O&M charges @ 1.25% of capital cost allowed to the petitioner and has requested for reimbursement of the additional burden of 0.25% and service tax being paid to the SJVNL on actual basis.

The petitioner in terms of the TEC accorded to the Project by the CEA entered into an agreement with SJVNL on 08.05.2003 for terminating the 400 KV transmission lines from the Project in Jhakri Switchyard and as per the said agreement the cost of ICF as approved by the CEA and also the O&M charges for ICF are payable by the petitioner to the SJVNL. Further as per clause 6.1 of Article 6 of the aforesaid agreement base O& M Charges are equivalent to 1.5 % of the cost the works for the period commencing from commissioning date and ending on the following March 31, which as per clause 6.2 shall be escalated @ 6 percent per annum for the subsequent financial years. The petitioner has also stated that it is regular in payments of O& M charges to the SJVNL in terms of the agreement for ICF. The Commission is of the view that the provisions of the PPA relating to O& M expenses would not apply to the



ICF facility which has been constructed and is being operated by a separate agency i.e. the SJVNL under a separate agreement.

### **Additional cost paid as land compensation**

38. The Board has submitted that M/s JHPL is claiming its right for additional cost on account of land compensation at this belated stage, which are not even covered under any of the tariff orders issued from time to time and also the same is not covered under any of the clauses of the PPA. As such the contention of M/s JHPL's claim is not acceptable and hence denied. It is also added that such issue has never been raised by M/s JHPL till date.

### **Petitioner's Reply**

The petitioner reiterates the relevant submissions as made on this account in its petition dated 20.01.2010 and denied the objections raised by the Board. It has been also further stated that the entire compensation towards land has been paid by the company pursuant to the directions /orders of the State Government /Courts and as such the same can not be objected by the Board. As regards the objection of the Board about belated claim, the Company submits that the last payment of the claim towards compensation of land has been made in FY 08-09 on 02<sup>nd</sup> July, 2008 and thereafter at the first opportunity of filing any tariff application, the same have been included in the petition.

### **Commission's Views**

The Commission observes that the capital cost to be admitted for the purpose of tariff determination has to be determined in accordance with the provisions of the PPA signed by the applicant with the Board on June 4, 1997. The said PPA does not provide for admissibility of the claim of the petitioner for additional cost on account of land compensation. The Commission, therefore, agrees with the contention of the Board.

### **Interest on arrears due from HPSEB on account of Additional Capital Cost**

39. The contention of the petitioner is not acceptable to the Board, as the Board has been paying the arrears in compliance to the Commission orders/interim order issued from

time to time. As such the application of clause 10.11 of the PPA does not come into picture.

### **Petitioner's Reply**

The petitioner has stated that the additional cost of Rs. 106.48 has been incurred from FY 2006-07 onwards as per details given below-

**(Rs. Cr.)**

FY	Annual Capital Expenditure				Cumulative Capital Expenditure
	Force Majeure	Paid to SJVNL	Compensation for Land	Annual Total	
FY 06-07	46.34	-	-	46.34	46.34
FY 07-08	40.24	-	6.83	47.07	93.41
FY 08-09	10.17	-	1.10	11.27	104.68
FY 09-10	-	1.80	-	1.80	106.48

The applicant further submits that it has prayed for fixation of tariff on the additional cost from FY 2007 onwards based on the above yearwise breakup of the additional cost incurred by the Company. Since the payment for the tariff so fixed will be made by the respondent Board after the approval of tariff by the Commission, the Company reiterates its request to approve interest on new arrears due upto the date of fixation of tariff in the subject application in line with the provisions of clause 10.11 of the PPA.

### **Commission's View**

The petitioner has claimed interest on arrears in accordance with the clause 10.11 of the PPA. The Commission is of the view that clause 10.11 of the PPA is applicable only when the respondent Board fails to make payment of the arrears involved in accordance with the payment schedule which the Commission may specify taking all relevant factors into consideration. However, the Commission is allowing interest at SBI PLR on the pending payments.

### **Additional Capacity and Primary Energy Charges from FY07-FY11**

40. The Board objects that M/s JHPL have not elaborated the reasons for incorporation of additional capacity and primary energy charges from FY 07-FY 11 whereas capacity

charges, primary energy charges, incentives and taxes to be paid are being governed as per tariff orders issued by the Commission. The Board prays the Commission to direct M/s JHVL to provide supporting details on this account to justify its claim since many of the issues related to tariff are still under adjudication of the Commission and it is not possible to ascertain at this stage as to how much additional capacity and primary energy charges are to be paid as claimed by M/s JHPL.

### **Petitioner's Reply**

The tariff on the additional cost of Rs. 106.48 Crs. has been computed by the petitioner in the application dated 20.01.2010 on standalone basis in line with the provisions of the PPA. The petitioner, therefore, denies the objections raised by the Board on this account and requests the Commission to approve the tariff accordingly.

### **Commission's Views**

The petitioner has preferred the application seeking determination of tariff on the additional cost incurred on Baspa-II HEP. Clause 17.7 of the PPA provides that the additional capital cost shall be added to the capital cost of the project for the subsequent period of operation for the purpose of computation of tariff and accordingly the Commission has determined the Annual Fixed Charges in consolidated manner and not on standalone basis.

41. The Aggarwal Committee fixed Rs. 96.75 crore towards protection/restoration works, as a consequence to Force Majeure event of 19.01.2006, to be added to capital cost for computation of O&M and other related components of tariff. The Commission during the course of hearing of the petition directed the petitioner to submit certain information/data/ documents which inter-alia also included the details of the amount spent on slope protection works prior to commissioning of the Project. In response the petitioner vide affidavit dated 12.11.2010 submitted the details of the works executed on Pothead Yard slope protection amounting to Rs. 2,67,05,295/-. These works essentially became obsolete on execution of the protection works executed after the Force Majeure Event of 19.01.2006 and accordingly the amount of Rs. 2,67,05,295/- needs to be deducted/disallowed for the purpose of tariff.

42. The respondent Board in the submissions made vide affidavit dated 04.12.2010, has submitted that the petitioner was under an obligation in terms of Schedule IV of the PPA to take the insurance on full replacement value and that on the basis of analysis carried out by the insurance consultant, the respondents are entitled to reimbursement of an amount of Rs.47.45 crore as capacity charges and Rs.2,64,25,000/- as incentive for plant availability which was received by the petitioner from insurance Company.

The petitioner in response submits that it had insured the project as required under clause 12.2 of the PPA and Financial Agreement with the lenders. The Insurance policy obtained by the applicant under the PPA was also scrutinized by the Aggarwal Committee. The project cost of Rs. 1667.34 Crore comprises Hard Cost of Rs. 890.72 crore and Soft Cost of Rs. 776.62 crore and the insurance cover of Rs. 1215.72 crore obtained by the petitioner includes the project cost of Rs. 890.72 crore and loss of profit of Rs. 325.00 crore. The petitioner further submits that the fundamental flaw in the report of the insurance consultant is that it proceeds on the assumption that insurance cover was obtained against the project cost of Rs. 1215.72 crore whereas in fact the insurance cover covered the project cost of Rs. 890.72 crore. The petitioner further submits that it is not clear from the report of the insurance consultant as to how the capacity charges had been computed as Rs. 47.45 crore and that the claim for loss of profit due to business interruption is not related to sum insured for material damage cover and is based on turnover/ gross profit.

The respondent Board vide affidavit dated 27.12.2010 submitted the reply of the insurance consultant engaged by the respondent Board, from perusal of which it is observed that there is no merit in the respondent's contention that they are entitled to reimbursement of an amount of Rs.47.45 crore as capacity charges. The insurance consultant in the aforesaid reply has also stated that as per MYT Order and the PPA, there is provision for supply of mandatory 12% total power generated at the interconnection point and that since the petitioner has received claim on loss of gross profits so it is proper to assume that total power equivalent to money received on account of total energy at interconnection point, hence the respondent Board/Govt. of Himachal Pradesh (the GoHP) is entitled to receive 12 % of the amount so received by the petitioner irrespective of the fact whether the petitioner took insurance for 12

% of power or not. The said consultant has also stated that 12% free power cannot be insured vide Business Interruption/FLOP/ Consequential Loss Policy as rules make it mandatory that this insurance can be taken only in conjunction with Material Damage Policy and further that since the respondent Board /HP Govt. has no insurable interest in the property of the Project hence the insurance policy for 12% free power could not have been obtained by the respondent Board /H.P. Govt. The petitioner in response submits that proceeds of claim towards loss of gross profit against the said claim does not include loss of energy to the extent of 12% being supplied free to the GoHP/ respondent Board. The loss has been assessed as per provisions of the PPA and as there is no revenue loss to the JPVL in respect of 12 % free energy supply to the GoHP/ respondent Board, the same has not been considered as loss of revenue/gross profit by surveyors/insurers under the loss of Gross Profit Section of the Policy. The insurance cover available to the JPVL is for loss of gross profit based on its share of 88% of the total power delivered at ICF and accordingly the JPVL got the insurance cover and received the claim for loss of generation during the period of Force Majeure from 19.01.2006 to 02.05.2006.JPVL cannot insure for the free supply of 12% power to the GoHP/ respondent Board as its balance sheet and P& L does not cover the gross profit-sales for the said 12% free power. The GoHP / Board could have taken insurance for the same. The Commission has considered the respective submissions and has also taken note of the fact that the Aggarwal Committee in its report has also mentioned that the PPA does not cover compensation towards loss of 12% free power has come to the conclusion that the GoHP/ Board ought to have taken insurance cover for the 12% free power.

43. The insurance consultant engaged by the respondent Board in the reply filed by the respondent Board vide affidavit dated 27.12.2010 has also submitted that premium paid by the petitioner, on loss of Gross Profit derived from revenue paid by the respondent Board and received by the petitioner, is not O&M Expenses within meaning Schedule IV (Part-II) read with Article of the PPA. The petitioner has been wrongfully taking advantage of this part of premium in determining tariff under Article 8.5 as explained in Article 8.7. of the PPA. The petitioner may please be directed to refund benefit so drawn since COD to the respondent Board. The petitioner in response has submitted that the O&M is part of tariff in terms of clause

8.7.2 of the PPA and is not linked to actual expenditure incurred by the petitioner. The Commission agrees with the clarification provided by the petitioner.

44. Based on the foregoing discussions, the additional capital cost allowed for the purpose of AFC is as under-

**Approved Additional Capital Cost (Rs. Cr.)**

FY	Annual Capital Expenditure			Deletion against slope protection works prior to COD of Project	Cumulative Capital Expenditure
	Force Majeure	Paid to SJVNL	Annual Total		
FY06-07	46.34	-	46.34	2.67	43.67
FY07-08	40.24	-	40.24	-	83.91
FY08-09	10.17	-	10.17	-	94.08
FY09-10	-	1.80	1.80	-	95.88

45. **Tariff Determination**

The petitioner has submitted that tariff on the additional cost of Rs. 106.48 Crs. has been computed by them on standalone basis in line with the provisions of the PPA. The Commission has determined the AFC for the additional cost in consolidated manner and not on standalone basis as the additional capitalization has an impact on the depreciation and hence the AAD, which impacts the AFC.

**(a) Debt Equity Ratio**

The Commission has considered normative debt equity ratio of 70:30 for funding of the additional capitalization in terms of Regulation 13 of Himachal Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Hydro Generation Tariff) Regulations, 2007.

**Table 1: Additional Capital Expenditure Funding (Rs. Cr.)**

Funding	70:30 Debt Equity Funding				
	FY07	FY08	FY09	FY10	Total
Yes Bank Loan	25.75				<b>25.75</b>
Normative Loan	4.82	28.17	7.12	1.26	<b>41.37</b>
Normative Debt	<b>30.57</b>	<b>28.17</b>	<b>7.12</b>	<b>1.26</b>	<b>67.12</b>
Normative Equity	<b>13.10</b>	<b>12.07</b>	<b>3.05</b>	<b>0.54</b>	<b>28.76</b>

**(b) Interest on loans**

The additional capitalization is funded through a loan of Rs 25.75 Cr drawn from Yes Bank and the balance capital expenditure has been met by utilizing the funds in the Trust & Retention A/c.

**Yes Bank Loan**

As per the loan documents submitted by the petitioner, the loan is for a duration of 9 years with 36 quarterly repayments with repayments on 15 July, 15 Aug, 15 Sept and 15 Oct. On perusal of the tariff petition, the Commission observed that the loan has been repaid in 12 quarters as against 36 months mentioned in the loan agreement. The Commission for tariff determination has considered the actual repayments done by the petitioner. The rate of interest applicable on the loan was 9.85% from 30.09.2006 to 31.03.2007 which was reset to 10.50% from 31.03.2007 to 24.10.2009. The last repayment installment was on 24.10.2009.

**Table 2: Yes Bank Repayment and Interest (Rs. Cr.)**

<b>Yes Bank Loan</b>	<b>FY07</b>	<b>FY08</b>	<b>FY09</b>	<b>FY10</b>	<b>FY11</b>
Opening Balance	0.00	25.75	17.42	9.08	0.00
Addition	25.75	0.00	0.00	0.00	0.00
Principal Repayment	0.00	8.33	8.33	9.08	0.00
Closing Balance	25.75	17.42	9.08	0.00	0.00
Interest Payment	1.27	2.20	1.32	0.41	0.00
Interest Rate	9.85%	10.50%	10.50%	10.50%	-

**Normative Loan**

The balance capital expenditure has been met utilizing the funds in the Trust & Retention A/c. The normative loan amount considered is Rs 41.37 Cr. The drawn schedule is as per the funding shown in Table 1. The tenure of the loan considered is 11 year with 4 quarterly repayments with repayments on 15 July, 15 Aug, 15 Sept and 15 Oct. The rate of interest considered is the annual weighted average rate of interest on approved rupee terms loans for FY07, FY08, FY09, FY10 and FY11.



**Table 3: Normative Loan Repayment and Interest (Rs. Cr.)**

<b>Normative Loan</b>	<b>FY07</b>	<b>FY08</b>	<b>FY09</b>	<b>FY10</b>	<b>FY11</b>
Opening Balance	0.00	4.82	29.23	32.58	30.09
Addition	4.82	28.17	7.12	1.26	0.00
Principal Repayment	0.00	3.76	3.76	3.76	3.76
Closing Balance	4.82	29.23	32.58	30.09	26.32
Interest Payment	0.27	3.53	3.53	2.40	3.03
Interest Rate	11.27%	11.47%	10.33%	7.59%	10.88%

**Interest on loans due to additional capitalization**

The additional interest on loans approved by the Commission on account of additional capitalization is detailed in Table 4.

**Table 4: Additional Interest on Loans (Rs.Cr.)**

<b>Particulars</b>	<b>FY07</b>	<b>FY08</b>	<b>FY09</b>	<b>FY10</b>	<b>FY11</b>
Interest on outstanding loans	1.54	5.73	4.84	2.81	3.03

**(c) Depreciation**

The depreciation and advance against depreciation has been determined as per as per Section 8.6.5.1 of the PPA. The addition to the GFA has been considered as per the capitalisation approved by the Commission. The depreciation and AAD computed as per the additional capitalization and additional loan repayment approved is as detailed in Table 5.

**Table 5: Depreciation and AAD considering additional Capex (Rs Cr.)**

<b>Advance Against Depreciation</b>		<b>FY07</b>	<b>FY08</b>	<b>FY09</b>	<b>FY10</b>	<b>FY11</b>
1/12th of the Loan(s)	A	95.07	95.07	95.07	95.07	95.07
Repayment of the Loan(s) as considered for working out Interest on Loan	B	83.52	93.73	139.72	123.20	114.12

Minimum of the Above	C	83.52	93.73	95.07	95.07	95.07
Less: Depreciation during the year	D	66.90	68.70	69.79	70.04	70.08
A	E=C-D	16.62	25.02	25.29	25.03	24.99
Cumulative Repayment of the Loan(s) as considered for working out Interest on Loan	F	194.82	288.55	428.26	551.46	665.58
Less: Cumulative Depreciation	G	271.16	356.49	451.30	546.63	641.75
B	H=F-G	0.00	0.00	0.00	4.83	23.83
Advance Against Depreciation		16.62	25.02	25.29	25.03	24.99
<b>Depreciation + AAD</b>	Rs. Cr.	<b>83.52</b>	<b>93.73</b>	<b>95.07</b>	<b>95.07</b>	<b>95.07</b>

The Additional Depreciation and AAD approved by the Commission on account of additional capitalization is detailed in Table 6.

**Table 6: Additional Depreciation and AAD Approved (Rs. Cr.)**

Particullars	FY07	FY08	FY09	FY10	FY11
Depreciation/Advance against Depreciation	0.00	12.09	5.59	5.59	5.59

**(d) O&M Charges**

O&M charges have been approved as per the provisions of the PPA. The O&M expenses have been determined as per the capitalisation approved. The O&M expense for additional capitalisation for interconnection facility has been determined at 1.25% of additional capitalisation as per the service agreement signed between the petitioner and the SJVNL.

The Commission, in this order has not considered 0.25% additional O&M expenses being paid by the petitioner to the SJVNL as per the term of the service agreement signed between the petitioner and the SJVNL. The Commission shall consider these expenses on submission of documentation in support of the actual payments made by the petitioner to the SJVNL.

The additional O&M expenses on account of additional capitalisation are shown in Table 7.

**Table 7: Additional O&M Expenses Approved (Rs. Cr.)**

<b>Addl. O&amp;M Expenses</b>	<b>FY05</b>	<b>FY06</b>	<b>FY07</b>	<b>FY08</b>	<b>FY09</b>	<b>FY10</b>	<b>FY11</b>
FY07 Capex			0.55	0.58	0.61	0.65	0.69
FY08 Capex				0.50	0.53	0.57	0.60
FY09 Capex					0.13	0.13	0.14
FY10 Capex ICF						0.02	0.02
0.25% O&M for ICF	0.00	0.00	0.00	0.00	0.00	0.00	0.00
<b>Additional O&amp;M Expenses</b>	<b>0.00</b>	<b>0.00</b>	<b>0.55</b>	<b>1.08</b>	<b>1.27</b>	<b>1.37</b>	<b>1.45</b>

**(e) Return on Equity**

The additional capitalization is considered to be funded through normative equity of 30%. The infusion of normative is considered as per the approved capital expenditure detailed in Table 1. The return on equity has been computed at 16% as per Section 8.7.3 of the PPA.

**Table 8: Return on Equity Approved (Rs. Cr.)**

<b>Return on Equity</b>	<b>FY07</b>	<b>FY08</b>	<b>FY09</b>	<b>FY10</b>	<b>FY11</b>
Equity	460.19	473.29	485.36	488.41	488.95
Additional Equity	13.10	12.07	3.05	0.54	0
Total Equity	473.29	485.36	488.41	488.95	488.95
<b>RoE</b>	<b>74.68</b>	<b>76.69</b>	<b>77.90</b>	<b>78.19</b>	<b>78.23</b>

The additional return on equity approved by the Commission on account of additional capitalization is detailed in Table 9.

**Table 9: Additional Return on Equity Approved (Rs. Cr.)**

<b>Annual Fixed Charges</b>	<b>FY07</b>	<b>FY08</b>	<b>FY09</b>	<b>FY10</b>	<b>FY11</b>
RoE	1.05	3.06	4.27	4.56	4.60

**(f) Interest on Working Capital**

The interest on working capital has been determined as per Section 8.7.4 of the PPA, considering the impact of additional capitalization and is detailed in Table 10.

**Table 10: Interest on Working Capital (Rs. Cr.)**

<b>Working Capital</b>	<b>FY07</b>	<b>FY08</b>	<b>FY09</b>	<b>FY10</b>	<b>FY11</b>
O & M expenses ( 1 Month Expenses)	1.84	1.99	2.12	2.25	2.39
Maintenance Spares	0.00	0.00	3.06	3.24	3.44
Receivables (2 Month Avg)	55.65	57.92	57.58	54.69	49.51
Total Working Capital	57.49	59.91	62.76	60.19	55.33
<b>Interest on Working Capital</b>	<b>5.89</b>	<b>7.34</b>	<b>7.69</b>	<b>7.37</b>	<b>6.78</b>

The additional Interest on working capital approved by the Commission on account of additional capitalization is detailed in Table 11.

**Table 11: Additional Interest on Working Capital Approved (Rs Cr.)**

<b>Particular</b>	<b>FY07</b>	<b>FY08</b>	<b>FY09</b>	<b>FY10</b>	<b>FY11</b>
Interest on working capital	0.08	0.54	0.43	0.42	0.38

**(g) Incentive for Secondary Energy and Higher Plant Availability**

The incentive for Secondary Energy and Higher Plant Availability has under gone a change due to change in equity position due to normative debt equity considered for the additional capitalization. The change in incentive for Secondary Energy and Higher Plant Availability is shown in Table 12.

**Table 12: Additional Incentive for Secondary Energy and Higher Plant Availability (Rs. Cr.)**

<b>Annual Fixed Charges</b>	<b>FY07</b>	<b>FY08</b>	<b>FY09</b>	<b>FY10</b>	<b>FY11</b>
Incentive for Secondary Energy	0.60	1.16	1.48	1.65	0.00
Incentive for higher plant availability	0.26	0.50	0.56	0.58	0.00

**(h) Income Tax**

The income tax determined by the Commission on account of additional capitalization is detailed in

Table 13. The MAT rate for FY 11 has been considered as 19.93%.

**Table 13: Additional Income Tax due to additional capitalisation (Rs. Cr.)**

Particular	FY07	FY08	FY09	FY10	FY11
<b>Minimum Alternative Tax</b>	0.17	1.81	1.23	1.91	1.62

46. **Additional Annual Fixed Charges for Baspa-II HEP**

The total additional Annual Fixed Charges with the components of the capacity charges, primary energy charges and incentives and taxes detailed above are summarized below.

**Annual Fixed Charges (Rs. Cr.)**

Annual Fixed Charges	FY07	FY08	FY09	FY10	FY11
<b>Capacity Charges</b>					
Interest on outstanding loans	1.54	5.73	4.84	2.81	3.03
Depreciation/Advance against Depreciation	0.00	12.09	5.59	5.59	5.59
<b>Sub-total capacity charges</b>	<b>1.54</b>	<b>17.82</b>	<b>10.44</b>	<b>8.40</b>	<b>8.63</b>
<b>Primary Energy Charges</b>					
O&M Charges	0.55	1.08	1.27	1.37	1.45
RoE	1.05	3.06	4.27	4.56	4.60
Interest on working capital	0.08	0.54	0.43	0.42	0.38
<b>Sub-total primary charges</b>	<b>1.67</b>	<b>4.68</b>	<b>5.98</b>	<b>6.35</b>	<b>6.43</b>
Incentive for Secondary Energy	0.60	1.16	1.48	1.65	0.00
Incentive for higher plant availability	0.26	0.50	0.56	0.58	0.00
<b>Total Annual Fixed Charges before MAT</b>	<b>4.08</b>	<b>24.16</b>	<b>18.46</b>	<b>16.98</b>	<b>15.06</b>
<b>Minimum Alternative Tax</b>	0.17	1.81	1.23	1.91	1.62
<b>Total Annual Fixed Charges</b>	<b>4.25</b>	<b>25.98</b>	<b>19.70</b>	<b>18.90</b>	<b>16.68</b>

47. **Recovery of Arrears from HPSEBL**

(a) The Commission has computed the arrears payable by the Board and the carrying costs based on the Annual Fixed Charges (AFC) determined for the period FY 2006-07 to FY2011 on account of the approved additional capitalisation.

(b) The arrears have been determined after adjusting the insurance claim of Rs. 27.09 crore received towards capacity charges as submitted by the petitioner. The insurance claim has been adjusted against the AFC determined for FY06-07.

(c) The computations of the arrears payable by the Board till 31<sup>st</sup> December, 2010 are detailed in Table 14.

**Table 14: Recovery of Arrears (Rs. Cr.)**

<b>Recovery of Arrears from HPSEB</b>	<b>FY07</b>	<b>FY08</b>	<b>FY09</b>	<b>FY10</b>	<b>FY11</b>
Additional AFC As of Now	4.25	25.98	19.70	18.90	16.68
Less: Insurance Received	27.09				
Total Additional AFC	-22.84				
Payment made by HPSEB excluding rebate	0.00	0.00	0.00	0.00	0.00
Opening Balance	0.00	-23.76	1.36	21.95	43.85
Additions/Deletion	-22.84	25.98	19.70	18.90	16.68
Payments	0.00	0.00	0.00	0.00	0.00
Closing Balance - Base Amount	-22.84	2.22	21.05	40.84	60.53
Interest Rate	8.00%	8.00%	8.00%	9.56%	11.75%
Interest	-0.91	-0.86	0.90	3.00	4.60
Closing Balance - for Repayment	<b>-23.76</b>	<b>1.36</b>	<b>21.95</b>	<b>43.85</b>	<b>65.12</b>

\* Interest computed for the period 1 Apr 2010 to 31 Dec 2010.

48. As of 31<sup>st</sup> December 2010, the Board has to pay arrears of Rs 65.12 Cr to JPVL. The Commission directs the Board to pay the entire arrears by 31 March, 2011. The interest payable on arrears by the Board till 31 March, 2011 will be allowed as a pass through in the ARR of the Board. However, any interest payable on arrears post 31 March, 2011 will not be allowed to pass through in the ARR.
49. With regard to the prayer for taking on record the name of the petitioner Company as Jaiprakash Power Ventures Limited w.e.f. 23.12.2009, the Commission has already acceded to the request of the petitioner by a separate order dated 23.10.2010 passed in Petition No. 166/2010.
50. Petition no. 11/2010 is disposed of in terms of the above order.

(Yogesh Khanna)  
Chairman

Dated: 24-01-2011