

BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY
COMMISSION SHIMLA

In the matter of :-

1. The HP State Electricity Board Ltd.,
Vidyut Bhawan, Shimla-171004
V/s
M/S Him Kailash Hydro Power Pvt. Ltd
Village Prathppadu, Pentapadu Mandal,
West Godhavari Distt. Andhra Pradesh.
The State of HP, thro' its, Pr. Secy. (Power)
HP Govt., Shimla-171002.
The HP Energy Development Agency (HIMURJA)
SDA Complex, Kasumpti, Shimla-171009.
Review Petition No. 11 of 2014
2. The HP State Electricity Board Ltd.,
Vidyut Bhawan, Shimla-171004
V/s
M/S Ginni Global Ltd;
2nd Floor, Shanti Chamber,
11/6B, Pusa Road, New Delhi-110005.
The State of HP, thro' its, Pr. Secy. (Power)
HP Govt., Shimla-171002.
The HP Energy Development Agency (HIMURJA)
SDA Complex, Kasumpti, Shimla-171009.
Review Petition No. 12 of 2014
3. The HP State Electricity Board Ltd.,
Vidyut Bhawan, Shimla-171004
V/s
M/S Gothawmi Hydro Eletric. Co. (P) Ltd.,
301, Archana Arcade, St, John's Road,
Secandrabad, Andhara Pradesh-500025.
The State of HP, thro' its, Pr. Secy. (Power)
HP Govt., Shimla-171002.
The HP Energy Development Agency (HIMURJA)
SDA Complex, Kasumpti, Shimla-171009.
Review Petition No. 14 of 2014.

4. The HP State Electricity Board Ltd.,
Vidyut Bhawan, Shimla-171004

V/s

M/S Nizubeedu Seeds Ltd.,
NSL, ICON, 4th Floor, 8-2-684/A,
Road No. 12, Banjara Hills, Hyderabad-500034.

The State of HP, thro' its, Pr. Secy. (Power)
HP Govt., Shimla-171002.

The HP Energy Development Agency (HIMURJA)
SDA Complex, Kasumpti, Shimla-171009.

Review Petition No. 15 of 2014

5. The HP State Electricity Board Ltd.,
Vidyut Bhawan, Shimla-171004

V/s

M/S Dharamshala Hydro Power Ltd;
Plot No. 30-A, Road No.1, Film Nagar, Jublee Hills,
Hyderabad-500033.

The State of HP, thro' its, Pr. Secy. (Power)
HP Govt., Shimla-171002.

The HP Energy Development Agency (HIMURJA)
SDA Complex, Kasumpti, Shimla-171009.

Review Petition No. 16 of 2014

6. The HP State Electricity Board Ltd.,
Vidyut Bhawan, Shimla-171004

V/s

M/S Harison Hydel Construction Co. (P) Ltd;
Regd. Office at Akhara Bazar, Kullu (H.P.)-175101.

The State of HP, thro' its, Pr. Secy. (Power)
HP Govt., Shimla-171002.

The HP Energy Development Agency (HIMURJA)
SDA Complex, Kasumpti, Shimla-171009.

Review Petition No. 30 of 2014

7. The HP State Electricity Board Ltd.,
Vidyut Bhawan, Shimla-171004

V/s

M/S Ascent Hydro Projects Ltd;
6, Shiv-Wastu, Tejpal Scheme, Road No. 5
Vile Parle (East) Mumbai-400 057.

The State of HP, thro' its, Pr. Secy. (Power)
HP Govt., Shimla-171002.

The HP Energy Development Agency (HIMURJA)
SDA Complex, Kasumpti, Shimla-171009.

Review Petition No. 62 of 2014

8. The HP State Electricity Board Ltd.,
Vidyut Bhawan, Shimla-171004
V/s
M/S Patikari Power Pvt. Ltd;
1st House, Bhumian Estate, Nav Bahar,
Bhumian Road, Chotta Shimla, Shimla-171002.
The State of HP, thro' its, Pr. Secy. (Power)
HP Govt., Shimla-171002.
The HP Energy Development Agency (HIMURJA)
SDA Complex, Kasumpti, Shimla-171009.
- Review Petition No. 64 of 2014**
9. M/S DSL Hydrowatt Limited
121, Industrial Area Baddi, Distt. Solan HP
V/s
The HP State Electricity Board Ltd.,
Vidyut Bhawan, Shimla-171004
The State of HP, thro' its, Pr. Secy. (Power)
HP Govt., Shimla-171002.
The HP Energy Development Agency (HIMURJA)
SDA Complex, Kasumpti, Shimla-171009.
- Review Petition No. 121 of 2010**
10. M/s Astha Projects (I) Pvt. Ltd.,
Gyamba House, South End, lane-IV,
Sector-I, New Shimla-171009
V/s
The HP State Electricity Board Ltd.,
Vidyut Bhawan, Shimla-171004.
The State of HP, thro' its, Pr. Secy. (Power)
HP Govt., Shimla-171002.
The HP Energy Development Agency (HIMURJA)
SDA Complex, Kasumpti, Shimla-171009.
- Review Petition No. 108 of 2010**
11. M/S Mangalam Energy Development Co. Pvt. Ltd;
Plot No. 8, Block-A, First Floor, Shivalik,
Malivaya Nagar, New Delhi-110007
V/s
The HP State Electricity Board Ltd.,
Vidyut Bhawan, Shimla-171004.
The State of HP, thro' its, Pr. Secy. (Power)
HP Govt., Shimla-171002.
The HP Energy Development Agency (HIMURJA)
SDA Complex, Kasumpti, Shimla-171009.
- Review Petition No. 137 of 2010**

12. M/S Sarabai Enterprises Pvt. Ltd;
Village Sarabai, P.O. Bhunter, Distt. Kullu (H.P.)
V/s
The HP State Electricity Board Ltd.,
Vidyut Bhawan, Shimla-171004.

The State of HP, thro' its, Pr. Secy. (Power)
HP Govt., Shimla-171002.

The HP Energy Development Agency (HIMURJA)
SDA Complex, Kasumpti, Shimla-171009.

Petition No. 26 of 2011

(Review Petition Nos. 11/14, 12/14, 14/14, 15/14, 16/14, 30/14, 62/14, 64/2014, 121/10 108/10 and Petition Nos. 137/10, 26/2011)

(Decided on 10th September, 2014)

CORAM

**SUBHASH C. NEGI
CHAIRMAN**

Counsels: -

for petitioners:

Sh. Bimal Gupta, Advocate
Sh. Ramesh Chauhan
Authorised representative
(in Review petition Nos. H, 12, 14, 15 &
16, 30, 62 & 64/2014)
Sh. Ajay Vaidya, Advocate,
(in Review petition Nos. 108, 121, 137
of 2010 and petition No. 26 of 11)

for respondents :

Sh. Ajay Vaidya Advocate
(in Review petition No. 11/14, 30/14 &
62/14)
Ms. Jyotsna R. Dua, Advocate
(in Review petition No. 12, 15 of 2014)
Sh. Nimish Gupta Advocate
(in Review petition No. 14 of 2014)

Sh. Tarun Johri Advocate
(in Review petition No. 64 of 2014)

Sh. Bimal Gupta, Advocate
Sh. Ramesh Chauhan
Authorised representative
(in Review Petition Nos.121,137, 108 of
2010 and Petition No. 26 of 2011)

for the State Govt.

Sh. Shanti Sawaroop Bhatti
Legal Consultant

Review petition Nos. 11, 12, 14, 15 , 16, 30,62,64 of 2014, 108, 121, 137 of 2010 and Petition No. 26 of 2011.

for HP Energy Development Agency (HIMURJA)

Sh. Pardeep Bhanot, Sr., PO,
(in Petition no. 26 of 2011 and Review petition Nos. 108, 121, 137 of 2010, 11, 12, 14, 15 , 16, 30,62,64 of 2014)

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

Er. P.N.Bhardwaj,

ORDER

(Last heard on 26.07.2014 and orders reserved)

These petitions arise out of formulation of the policy by the Government of Himachal Pradesh (in short GoHP) in 2005, regarding release of a minimum normative quantum of water down-stream the project and the consequent impact of such policy on tariff of the projects allotted prior to introduction of such minimum quantum. Prior to 2005 also, condition of release of water was applicable but there was no minimum normative quantity laid down. If the developer sells power to the Himachal Pradesh State Electricity Board Ltd.(hereinafter referred as “the Board” or “the HPSEBL”), tariff fixed by the GoHP. was Rs. 2.50 per unit upto 5 MW projects. The Himachal Pradesh Electricity Regulatory Commission (hereinafter referred as “the Commission”) made the HPERC (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007 (hereinafter referred as “the Regulations”) for determination of tariff, for Small Hydro Projects (SHPs) and in accordance with the provisions of the said Regulations, revised tariff, on account of policy changes, including minimum 15% water release, after signing of Power Purchase Agreement (PPA) on fixed rate of Rs. 2.50, was allowed by the Commission by a generic order dated 29.10.2009, followed by case specific orders in relevant cases. Subsequently, the GoHP issued revised policy decision dated 21.4.2012, stating that policy of minimum 15% water release will not apply retrospectively on projects which are commissioned prior to 9.9.2005 and also on those which are not commissioned but the Implementation Agreement (IA)/Power Purchase Agreement (PPA) are signed prior to 9.9.2005 and,

therefore, the increased tariff allowed by the Commission is required to be reviewed and withdrawn. Accordingly, there are three sets of petitions involved, which are clubbed due to common issue of release of water, as under:-

- (i) Cases where the Commission has issued revised consequential tariff due to changes in policies and law, including minimum 15% release of water and the generators, not satisfied by the orders increasing the tariff, have filed petitions to review these orders;
- (ii) Cases where the Board has filed petitions for review of tariff increase allowed to generators on account of 15% water release due to policy change in view of restatement of policy applicability with respect to minimum 15% release of water as per letter dated 21.4.2012;
- (iii) Cases where the generators have filed petitions for tariff increase to give effect to policy revision, including 15% water release, which are under adjudication and the Board now have filed objections on specific policy of 15% minimum release, in view of the revised policy decision dated 21.4.2012.

2. To appreciate and analyse the petitions in proper perspective, the background and brief facts of these cases, as derived from relevant records, are as under:-

- (a) In order to promote renewable energy, the GoHP notified, on 22.11.1994, a special promotional scheme for development of Small Hydro Projects (SHPs) which was amended, from time to time, and as per policy dated 6.5.2000, SHPs up to 5 MW have an option to sell power to the Board at a fixed rate of Rs. 2.50 per unit, for which they have to sign Implementation Agreement (IA) with the GoHP as well as Power Purchase Agreement (PPA) with the Board. Therefore, the tariff was part of project allotment condition followed by PPA, which is binding contract. The State Commission, while finalizing Model PPA and also approving specific PPA under Section 86(1)(b) of the Electricity Act, 2003 (hereinafter referred as “the Act”) also concurred in the said rate.

- (b) The Commission in discharge of its duties under the Act, made the Regulations for determination of tariff of SHPs up to 25 MW in 2007, as amended on 12.11.2007, and these Regulations were made applicable for the PPAs approved by it from July 2006 onwards. Based on these Regulations the Commission issued the order on Small Hydro Projects Tariff and other Issues, Order dated 18.12.2007 (hereinafter referred as “the SHP order”) fixing tariff of Rs. 2.87 per unit, which was subsequently revised to Rs.2.95 per unit.
- (c) The Regulations of 2007 also provide for review of concluded PPAs approved by the Commission, as per 2nd proviso to Regulation 6 (1), which reads as under:-
- “Provided further that -*
- (i) where the power purchase agreement, approved prior to the commencement of these regulations, is not subject to the provisions of the Commission’s regulations on power procurement from renewable sources, or*
- (ii) where after the approval of the power purchase agreements; there is change in the statutory laws, or rules, or the State Govt. Policy ;*
- the Commission, in order to promote co-generation or generation of electricity from renewable sources of energy, may, after recording reasons, by an order, review or modify such a power purchase agreement or a class of such power purchase agreements”.*
- (d) The IAs provide that water will be released down the stream and diversion structure of the hydel projects as per orders of the Govt., and no normative or specific quantification was provided. As a practice, release of water was decided while appraising/approving the DPR or granting TEC. However, tariff was fixed at Rs. 2.50 per unit irrespective of release of water down the stream.
- (e) In the year 2005, the GoHP, in the Department of Pollution Control, in exercise of the powers delegated to it by the Central Govt. to issue directions under the Environment (Protection) Act, 1986 (Act No. 29 of 1986), issued directions through notification dated 16.7.2005 in the

Deptt. Of Pollution Control to existing and upcoming hydel projects to release and maintain a minimum flow immediately down the stream of diversion structures of hydel projects, throughout the year, at the threshold value of not less than 10% of the minimum inflow observed in the lean seasons to the main river water body whose water is being harnessed by these projects and subsequently on 9.9.2005 this quantum of 10% was increased to 15% .

- (f) The H.P. Hydro Power Policy 2006, notified on 11.12.2006, inter alia provided for release of minimum of 15% water at all the times, which was amended on 18.3.2009, to average of discharge of lean months of December, January and February and subsequently was aligned with policy of 9.9.2005 by amendment in Power Policy dated 26.7.2011.
- (g) The IPPs, who had signed PPAs before July 2006 on the fixed tariff of Rs. 2.50 per unit, filed petitions to reopen their PPAs and sought increase of their tariff to Rs. 2.95 per unit at par with those who signed PPAs after July 2006 onwards, under the Regulations of 2007.
- (h) The Commission in its order dated 29.10.2009 passed in Petition No. 11 of 2008 **M/s Hydrowatt Ltd. V/s the H.P. State Electricity Board & others**, held that in accordance with provisions contained in 2nd proviso to regulation 6(1) of its Regulations of 2007, it can reopen concluded PPAs, prospectively, to cater to the policy changes and accordingly impact of policy of 15% water release was to be considered on merit of each case viz-a-viz actual provisions for release of water as per DPR/TEC and wherever such minimum 15% required quantum was more than actual provisions, the increase in tariff to be allowed to meet this additional requirement of mandatory obligation policy.
- (i) Aggrieved by the orders of the Commission, the Board filed 8 (Eight) writ petitions in the Hon'ble High Court of Himachal Pradesh and the Hon'ble High Court vide its judgement dated 16.8.2013, rendered in the CWP No. 7649 of 2010, **the Himachal Pradesh Electricity Board Ltd. V/s the Himachal Pradesh Electricity Regulatory Commission & others** dismissed the said petitions on merit, upholding the validity of Regulations of 2007 and the orders issued thereunder, and also orders making increases in tariff.

- (j) During the period the petitions were pending before Hon'ble High Court and Hon'ble High Court had stayed the pending proceedings before the Commission, the State Govt. i.e. the Council of Ministers in its meeting held on 18.4.2012, considered the decision regarding applicability of notification dated 9.9.2005 and decided that:-
- (i) the notification will apply prospectively only on the project commissioned after 9.9.2005.
 - (ii) in case of projects in relation to which PPA/IAs have been entered into before 9.9.2005 but commissioned after 9.9.2005, minimum discharge will be determined based on a long term study and till then the minimum discharge as agreed or accounted for as per TEC/MoU/IA/PPA (where no quantified discharge has been imposed) or as per specific condition in MOU/IA/PPA, shall apply.
- (k) Based on the Cabinet decision, dated 18.4.2012, conveyed on 21.4.2012, the Board was asked to approach the Commission for review of orders passed in tariff petitions with respect to PPAs where tariff increase was granted due to retrospective imposition of lean period discharge, and accordingly the Board has filed these petitions, as well as the counter to the petitions pending, to review the tariff so increased. Considering the importance of the issue involved, the Commission passed the interim order dated 25.4.2014 to the extent that the operation of the order passed in the tariff petitions with respect to the PPAs, where enhancement has been granted on account of 15% mandatory water release, shall remain stayed till the disposal of these petitions, unless altered or modified.
3. The IPPs have contested these petitions on the grounds inter alia that reviews are time barred, no amendment to notification dated 9.9.2005 has been carried out by way of notification; such policy directions are not binding on the Commission and the Commission, after deciding the tariff, cannot revisit the matter covered in the tariff orders, which has attained the finality.

4. Shri Ajay Vaidya, Advocate, representing the respondent in Review Petition No.11/2014, argues that review petitions moved by the Board are not maintainable as the Government letter dated 21.04.2012, conveying the decision taken by the Council of Ministers on 18.4.2012, cannot be deemed to be a notification. He further submits that the Commission exercises the powers of the Civil Court under section 94(1)(f) of the Electricity Act, 2003 and as such it has to restrict its jurisdiction to the pleadings of the parties. In the absence of any prayer in the pleadings, the issuance of the Interim order dated 25.4.2014, so far it stays the operation of the orders passed in tariff petitions with respect to PPAs, where enhancement has been granted on account of the 15% mandatory water release, is beyond the pleadings. He further pleads that the review petitioner is at liberty to claim such interim relief by way of Appeal i.e. by invoking the provisions of section 111 of the Electricity Act, 2003 and not by way of present review petition. In support of his above contentions he has cited the decision dated 24.5.2013 rendered by the High Court of Himachal Pradesh in CWP 8170 of 2012 i.e. **M/s Llyod Electrical and Engineering Ltd. Vs. State of H.P.**; and the decisions of the Apex Court i.e. decision dated 3.1.2011 in SLP(C) No.16036 of 2010. **Ranbir Singh Vs. Executive Engineer; (2011) 15 SCC 45**; decision dated 14.9.2012 in CA No.6509 of 2012. **Press Council of India Vs. Union of India & another; (2012) 12 SCC 62** and decision dated 12.2.2013, in Civil Appeal Nos. 7252-7253-in the **Rajasthan State Industrial Development & Investment Corporation & Anr. Vs. Diamond and Gem Development Corporation Ltd. & Anr.(AIR 2013 SC 1241)**.

5. Ms. Jyotsna R. Dua, Advocate, representing M/s Ginni Global (P) Ltd., respondent in Review Petition No.12/2014 and M/s Nuziveedu Seeds Ltd. in Review petition No.15/2014, contends that the condition of 10% mandatory discharge of water by the project/ the power developers was imposed on 16.07.2005 not by the Department of MPP & Power administering the Electricity Act, 2003, but by the Department of Pollution Control, in exercise of the powers conferred by a special Statute i.e. section 5 of the Environment (Protection) Act, 1986. The said notification was further amended vide notification issued on 9.9.2005, whereby the 10% mandatory discharge of

water was enhanced to 15%. All other terms and conditions of original notification dated 16.7.2005, still remain operative and have not been amended till date and as such notification dated 16.07.2005, in relation to other terms and conditions, is to continue to be applicable to all existing and future projects and in case of failure of the project /the power developers to abide by the said notification, recourse to penal provisions of the Statute will have to be taken. The notification dated 9.9.2005 has not been amended. The decision taken by the Council of Ministers on 18.4.2012, as reflected in GoHP letter dated 21.4.2012, addressed to the HPSEB Ltd; has not resulted into any notification. The Department of MPP & Power has no authority or power in law to change the actions and duties discharged by another Govt. Department in exercise of its statutory duties.

6. While contesting the matter on merits Ms. Jyotsna Rewal Dua, Advocate asserts that the communication dated 21.4.2012, is not a notification. therefore, it cannot substitute the lawfully issued notification dated 16.7.2005 issued under section 5 of the Environmental (Protection) Act, 1986 and in her support she cites the the following decisions of-

- (a) H.P.High Court dated 24.5.2013 in **M/s Lloyd Electric and Engineering Co. Ltd. Vs. State of H.P. 2013(2) Shimla Law Cases 1009**(paras 5,6 & 11).
- (b) Supreme Court dated 23.2.1999 in **Union of India and others Vs. Diljeet Singh and another. (1999) 2 SCC 672** (para 11).
- (c) Supreme Court dated 14.8.2013 in **State of Jharkhand and others Vs. Jitendra Kumar Srivastava and another 2013(12) SCC 210**.

7. She further, with reference to Review petition No. 15 of 2014, argues that for the Masli SHEP (5 MW), located in Shimla Distt. and commissioned on 24th December 2012, the Original IA was executed on 28.10.2002, and subsequently vide clause 7.9 of the Implementation Agreement i.e. Supplementary Implementation Agreement, executed on 5.8.2013, it is made mandatory upon the Developer of the Project to release and maintain 15% water discharge. Thus by this specific condition, the Developer of the Project is still liable to comply with this condition.

8. Ms. Jyotsna Rewal Dua, Advocate, opposes these petitions saying that these are hopelessly time barred. Order being sought to be reviewed was passed on 22.5.2010, whereby an increase of Rs. 0.15 per unit was allowed to cater to stipulation of release of 15% water discharge. The order was announced on 22.5.2010 itself. This order was challenged by the Board before High Court alongwith order dated 29.10.2009. The writ petition preferred by the Board (CWP 8427/10) alongwith other Writ petitions stands dismissed by the High Court vide judgement dated 6.8.2013 **the HP State Electricity Board Ltd., V/s the HP Electricity Regulatory Commission**. In fact the Board preferred an SLP against the dismissal of the writ petition. During the arguments before the Apex Court, this SLP was withdrawn on the ground that review petition has been filed by the Board. There was no stay against the order dated 22.5.2010. Therefore, if the Board wanted to review the order, it could have done so within the stipulated period. The Order was in their knowledge as is apparent from the reply filed in Ginni Global case, i.e. petition No.12/2014. The grounds taken for condoning the delay are factually incorrect as is apparent from the detailed submissions made in reply to the application seeking condonation of delay in filing the review petition. Even if it is considered that cause of action to file the review occurred on 21.4.2012 i.e. the date of issuance of the communication, then also the review is time barred having been filed in January 2014.

9. In addition to above, the aforesaid learned Advocate argues that:-
- (i) the H.P. Pollution Control Department, which issued the Notification dated 16.7.2005, has not been impleaded as an essential party; and in the absence of the H.P. Pollution Department, no effective decision can be pronounced;
 - (ii) on the one hand the direction in letter dated 21.4.2012 is stated to be prospective in effect, but on the other hand the State Government vide Clause 7.9 of the Supplementary IA, on 5.8.2013 in M/s Nazeevedu Seeds Case, binds down the Power Producer to maintain a minimum 15% water discharge;
 - (iii) the Letter dated 21.4.2012 has only come to the notice of the power producers for the first time on the receipt of the notice of review

petitions and the petitioners have been releasing 15% water discharge till now. On that score the power producers are entitled to the enhanced tariff.

- (iv) the Interim order dated 25.4.2014 is being wrongly interpreted. Under the garb of the interim order passed on 25.4.2014, even MAT charges which are admittedly due to the project proponents/the power producers, have been suspended. MAT is not subject matter of review in the present cases. The Board has wrongly presumed that interim order dated 25.4.2014 completely stays the operation of order dated 22.5.2010, wherein payment of MAT was also ordered. She, therefore, prays the Commission to direct the Board not to withhold other benefits to which the project proponents/the power producers have been held entitled to under previous orders.

10. Shri Mahesh Sirkek, Chief Engineer (Comm.), HPSEBL undertakes to look into the matter. The Board shall ensure that under the garb of the aforesaid Interim stay granted on 25.4.2014, amount or benefits, excepting the increase on account of 15% mandatory water discharge, to which the power producers have been held entitled, will not be withheld.

11. Sh.Tarun Johri, Learned Advocate, representing M/s Patikari Power Pvt. Ltd., the respondent in Petition No.64 of 2014 contends that the said review petition is not maintainable, for the reasons that-

- (a) it is barred by limitation, as it has been filed belatedly after a gap of four years from the date of passing of impugned order dated 16.7.2010;
- (b) the passing of subsequent clarification dated 21.4.2012, cannot be ground for seeking review of an order passed by the judicial/quasi-judicial authority;
- (c) the GoHP letter dated 12.4.2012 even taken as policy of the State Govt., is not binding on the State Commission;
- (d) the impugned order dated 16.7.2010, has attained finality in the eyes of law through order dated 23.4.2012, passed by the Hon'ble APTEL in Appeal No. 179/2010.

12. Shri Bimal Gupta, the Learned Advocate, representing the Board, argues that the respondents are only resisting the review petitions on the ground of non-existence of any mistake or an error apparent on the face of records but they are ignoring the fact that under Order 47 Rule (1) of the CPC the review petitions can be entertained also on the ground of any other sufficient reason. Thus the materials on record, which on proper consideration may justify the claim of the applicant/petitioner, cannot be ignored. According to him the Commission has to apply the principle of review applicable in Civil Cases differently to tariff related matters. Unlike the civil disputes, which are between individuals and where the power of Civil Court is limited to the pleadings and evidence on record, in a tariff related matters to arrive at a conclusion on what is the reasonable and prudent cost for providing a service, the power of the Commission is greater than that of a Civil Court. Accordingly, the power of the Commission to review is to be interpreted in a manner so as to ensure that all reasonable and prudent checks are made in terms of the commercial prudence and contractual understanding between the parties in question. In view of this, matter needs consideration on merits.

13. Shri Shanti Swaroop Bhatti, representing the State Government, filed written submissions on behalf of the State Govt. as under:--

- (1) that Hydro Electric Projects (HEPs) are designed based on TEC, which considers the Hydrology, including need to release water downstream. Projects are made on the basis of design, which takes into account technical parameters. Hence, in most of the earlier commissioned Dam Projects, the dam design was finalized, much before the notification dated 09.09.2005 came into operation and these do not have any provision to regulate minimum release in lean season.
- (2) that it would be pertinent to mention here that NHPC and PSEB, through CWPs No. 405/2006 and 533/2006, had challenged the applicability of this notification requiring 15% minimum discharge. The Hon'ble High Court had granted stay on the applicability of 15% discharge, in respect of Chamera-I & II and Baira Suil Projects, in Chamba and Shanan Project of PSEB. The Hon'ble High Court was also pleased to constitute a committee headed by Chief Secretary, Government of Himachal Pradesh, to look into the issue of minimum discharge. The said committee had concluded that there is a need

to determine the amount of water, on Project to Project basis, after a long term study.

- (3) that as per estimation of HPSEBL the impact of 39 smaller Projects will be to the tune of more than Rs. 5 Crore, per annum and 22 paise per unit hike on tariff, in case of Baspa-II alone. The entire burden of the increased tariff of all Projects, prior to 09.09.2005 which have been commissioned and had already entered into MoU/IA/PPA, will be on consumers of the State. On the other hand, the Department of Environment Science and Technology has pleaded that to exempt all projects, which have been commissioned or had already entered into MoU/IA/PPA on the date of issuance of notification dated 09.09.2005, from the provision of the mandatory release of minimum 15% discharge of lean season downstream of river, would not only be detrimental to fragile Himalayan Flora & Fauna, but also against the fundamental spirit of initiative taken by State Government in the direction of Environment Protection and Conservation.
- (4) that keeping in view all relevant aspects on the issue, the State Government is again collecting material information from concerned departments/ authorities, to take appropriate decision in the Public Interest, as to whether the impugned notification requires proposed amendment in accordance with decision of CMM dated 18.04.2012, which stood conveyed to HPSEBL vide letter dated 21.04.2012 or revert to the position prior to the said notification on the issue of mandatory discharge of water by HEPs in the State. The matter is under active consideration of the State Government and the decision shall be conveyed accordingly to the Commission, as and when, taken by the Government.
- (5) that in so far as the Supplementary Implementation Agreement dated 05.08.2013 is concerned, in respect of Masli Projects for release of 15% water, it is submitted that the issue of discharge of water comes into play after commissioning of the Project. As is evident from the Commission's order dated 30.06.2014, the said Project was commissioned on 24th December, 2012 and thereafter in pursuance of the notification dated 09.09.2005, the Supplementary implementation Agreement, was rightly executed on 05.08.2013 to ensure 15% discharge of water. Thus, the Masli Project is regulated by the terms and conditions agreed upon between the parties, including mandatory release of 15% water downstream as per H.P. Power Policy, 2006.

(6) that the decision of CMM dated 18.04.2012, contained in letter dated 21.04.2012 written to the Chairman-cum-Managing Director, HPSEBL, shall remain in force and be treated applicable to all projects falling within the ambit of said decision dated 18.04.2012, for all intents and purpose till the decision otherwise, is taken by the State Government.

14 With the back ground, as delineated in foregoing paras, pleadings made and arguments advanced by the parties, the following issues arise for consideration and determination:-

- (i) Whether a revision of tariff is distinct from a review of a tariff order?
- (ii) Whether Commission, in framing the tariff, exercises the adjudicatory power of a Civil Court or it exercises the wide jurisdiction to apply prudency check?
- (iii) Whether the Commission, after deciding the tariff, can revisit the matter covered in the tariff order, which has acquired finality?
- (iv) Whether the delay caused in filing the application should be taken into consideration by the Commission for the purpose of exercising its tariff determination power?
- (v) Whether the review petitions, filed by the Board, to review the tariff, based on the State Govt. letter dated 21.4.2012 is maintainable?
- (vi) Whether the policy decision taken by the GoHP, contained in its letter dated 21.4.2012 is ipso facto binding on the Commission for effecting amendment/revision of tariff?
- (vii) What is the impact of the GoHP letter dated 21.4.2012 and will it constitute the basis for the tariff re-determination prospectively or retrospectively, and if so from which date?

15. Now let us to consider these issues one by one.

16. **Issues (i), (ii) and (iii)**

First, second and third issues are interconnected and are being dealt with together.

17. Shri Bimal Gupta, the Advocate, representing the Board argues that the respondents are only resisting the review petitions on the ground of non-existence of any mistake or an error apparent on the face of record, but they are ignoring the fact that the Commission has to apply the principle of review applicable in Civil Cases differently to tariff related matters. Unlike the civil disputes, which are between individuals and where the power of Civil Court is limited to the pleadings and evidence on record, in a tariff related matters to

arrive at a conclusion on what is the reasonable and prudent cost for providing a service, the power of the Commission is greater than that of a Civil Court. Accordingly, the power of the Commission to review is to be interpreted in a manner so as to ensure that all reasonable and prudent checks are made in terms of the commercial prudence and with contractual understanding between the parties in question.

18. Fixation of tariff is a primary function to be performed by the statutory authority in furtherance to the provisions of the relevant law. The 2003 Act contains separate provisions for performance of dual functions of the Commission viz decision making and specifying terms and conditions for tariff determination. Sections 61 and 62, read with Section 86 (1)(b), deal with the fixation of tariff and regulate the electricity purchase and procurement process of the distribution licensee, including the price at which the electricity can be procured from the generating companies or licensees or from other sources for distribution and supply within the State. The Apex **Court in PTC India Ltd. V/s CERC 2010 ELR (SC) 269 (p.38)** has held that the price fixation exercise is a legislative in character. Section 61 is the enabling provision for framing regulations by the Commission; the determination of terms and conditions of tariff has been left to the domain of the Regulatory Commission under Section 61 of the Act; whereas actual Tariff determination by the Regulatory Commission is covered by Section 62 of the Act. This aspect is very important for deciding the present case. Specifying the terms and conditions for determination of tariff is an exercise which is different and distinct from actual tariff determination in accordance with the provisions of the Act for supply of electricity by a generating company to a distribution licensee for transmission of electricity or for wheeling of electricity or for retail sale of electricity. Thus the Commission is a decision making as well as the regulation framing authority, former function being administrative and later being legislative in character.

19. Tariff fixation is the diverse nature of jurisdiction. The Act provides for extensive power to be exercised by the Commission in regard to the tariff fixation proceedings. The Hon'ble Supreme Court in **U.P. Power Corporation Ltd. NTPC Ltd. & Ors 2009 ELR (SC) 013 (P-36)** has concluded that:-

“Making of a tariff is a continuous process. It can be amended or altered by the Central Commission. If any occasion arises therefor. The said power can be exercised not only on an application filed by the generating companies but also by the Commission on its own motion”.

20. Thus while fixing tariff under Section 62(1) or making any alteration or amendment in the tariff under Section 62(4), read with Section 64(6), the Commission does not exercise the adjudicating powers of a Civil Court, even though under Sections 111(1) and 111(6), the Tribunal has appellate and revisional powers. This view gets support from the decision rendered by the Hon'ble Apex Court in **Transmission Corporation of Andhra Pradesh Ltd. And Anr. V/s Sai Renewable Power Ltd. & Ors. 2010 ELR SC 0697.**

21. Section 94(1) of the 2003 Act, provides that the Appropriate Commission shall, for the purpose of any inquiry or proceedings under the Act, have same powers as are vested in a Civil Court under the Code of Civil Procedure, 1980, in respect of matters enumerated in Clauses (a) to (g). Section 94 (1) (f) provides for reviewing its decisions, directions or orders by the Commission. While exercising this power of review, the Commission is to act in the same manner as if it were a review under the Code of Civil Procedure.

22. Hon'ble Apex Court has ruled in another case that the power of the Commission to review, alter or amend the electricity tariff is not akin to Section 114 or Order 47 Rule 1 of the Civil Procedure Code or Order 2 Rule 2 and principles of resjudicata even do not apply (**2009 AIR SCW 5869(A); 2009 (6)SCC 235; 2009(3) Scale,620**).

23. In view of the above discussion, contention of Shri Bimal Gupta, Learned Counsel for the Board, deserves to be accepted as the Revision of a Tariff must be distinguished from a review of a Tariff Order. While making amendment/alternation under Section 62 (4), read with Section 64 (6), the Commission discharges its administrative/legislative functions and it in strict sense does not exercise adjudicating powers of a Civil Court. The provisions of review as envisaged under Section 114 or Order 47 Rule 1 and the principle of resjudicata do not apply. Hence the Commission can revisit the matter covered in the tariff order, even where it has acquired finality.

Issues (i), (ii) and (iii) are disposed of accordingly.

Issue (iv)

24. Section 62(4) and Section 64(6) confers a wide jurisdiction on the Regulatory Commissions. Section 64 (6) of the Act stipulates that the Tariff Order shall, unless amended or revoked earlier, ordinarily continues to be in force for a period specified in the Tariff Order. Section 62(4) lays down only one limitation that the tariff shall not ordinarily be amended more frequently than once in a financial year. The generic

levelized tariff, fixed in relation to the SHPs is to continue till the date on which the project life expires, unless it is amended or revoked earlier. The Act does not provide for the manner in which petition is to be filed before the Commission or the manner in which the revision of the tariff is to be made. The Commission, apart from entertaining an application for review filed by a party, may exercise its suo-motu jurisdiction. While the Commission exercises a suo-motu jurisdiction, the period of limitation does not apply. There cannot, however, be any doubt, whatsoever, that while exercising such jurisdiction; the Commission must act within a reasonable time. In the present case proceedings in relation to the reopening of the PPAs to cater the policy changes, including the 15% water discharge down stream, remained stayed by the Hon'ble High Court and after the disposal of the writ petitions before the High Court, the Board has started the process for implementation of the GoHP instructions, contained in the State Govt. letter dated 21.4.2012, addressed to them. In view of this, the limitation of time, as contended by the power developers cannot stand in the way for making amendments or alternation in the tariff already determined. This issue is answered accordingly.

Issue (v)

25. Before considering the question of maintainability of the petition, to review the tariff, based on the State Govt. letter dated 21.4.2012, it is necessary to scan the events leading to issuance of the said communication.

26. The Govt. of Himachal Pradesh, in the Department of Pollution Control, in exercise of its power to issue directions under section 5 of the Environment (Protection) Act, 1986, issued directions dated 16.7.2005 to the developers of the existing and upcoming hydel projects to release and maintain a minimum flow immediately down the stream of diversion structure of hydel projects throughout the year at the threshold value of not less than 10% of the minimum inflow observed in the lean season to the main water body of the river, water of which is being harnessed by the hydel projects. This quantum of 10% was increased to 15% by amending the direction subsequently on 9.9.2005. The Hydro Power Policy, 2006, as notified on 11.12.2006, also laid down this condition as a State Policy.

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

- (a) statutory laws;

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

28. The Commission issued the SHP Order dated 18th Dec., 2007, determining the general tariff for Small Hydro Projects not exceeding 5 MW capacity, for purchase of power generated by the Small Hydro Projects in the State of Himachal Pradesh. Being aggrieved by this SHP Order dated 18th Dec., 2007, a number of Independent Power Producers, including the petitioners (excepting the Board) in this case, moved petitions for upward revision of the generalized tariff of Rs. 2.50/Kwh, mainly on the ground of inflation of construction cost, requirement of mandatory release of 15% water discharge, levy of forest charges, w.e.f. 30th Oct., 2002, revision of fisheries charges w.e.f. 30.4.2007 and levy of Local Area Development charges, referred in Hydro Policy of Himachal Pradesh, 2006. The Commission clubbed the said petitions for consideration and disposal of the generic common issues involved therein. The State Government responded effectively. The review of the PPAs on account of maintenance of the mandatory 15% of water flow down the stream was objected to because release of water is a precondition in the allotment/ I.A. Loss of energy claimed due minimum 15% release could be easily recovered by the IPPs by overloading their plants during high flow periods. Almost all the projects commissioned by the IPPs till date were/are being operated on upto 20% over load continuously during peak flow season and all IPPs have, as a matter of practice, been constructing power plants with significant over load capacity upto 30-35%. The mandated release was proposed to be 15% of the minimum flow which was in the range of 1/4th to 1/8th of the design flow, the reduction in flows during winter due to such mandated discharge shall only be in the range of 2% to 3% of the design flow or 4% to 6% of the design flow of one machine, which cannot be a cause of shutdown of the power plant as claimed by the petitioners.

29. The Commission vide its order dated 29th October, 2009 passed in **M/s DSL Hydrowatt Ltd. V/s the HP State Electricity Board Ltd. and others** came to conclusion that it can review or modify the concluded PPAs, prospectively, within the scope of the second proviso to sub-regulation (1) of regulation 6 of the Regulations (ibid) to cater to the stipulations such as mandatory release of 15% water discharge. The Commission re-determined the tariff, on the petitions of IPPs, by taking into consideration the impact of policy changes, on case to case basis and wherever required tariff was enhanced, primarily on account of impact of mandatory release of 15% water down the stream. The Board filed the writ petitions challenging the validity of the Regulations and orders making increase. Pending disposal of the writ

petitions, the Hon'ble High Court stayed all proceedings of similar cases before this Commission. Ultimately, the Division Bench of the Hon'ble High Court of the HP, upheld the validity of the Regulations (ibid) and the Orders made thereunder and also the orders making increases in the tariff, vide its judgment dated 16.08.2013, rendered in the CWP No. 7649 of 2010- **The Himachal Pradesh Electricity Board Limited Vs Himachal Pradesh Electricity Regulatory Commission & another.**

30. In the meanwhile the Govt. of HP on the proposal of the Board have taken a decision clarifying that with respect to projects having PPA with the Board signed up to July 2006, direction of release of 15% water down the stream issued on 9.9.2005 will be applicable prospectively on projects commissioned after 9.9.2005 and further that in the cases of projects where PPAs / IAs have been signed before 9.9.2005, but not commissioned, the minimum release of water will be in accordance with the TEC/MoU/IA/PPA till the time decisions on case to case basis is taken based on long term study. The Government vide its letter dated 21.4.2012, addressed to the Board also directed the Board to approach this Commission for review of the tariff where enhancement has been allowed by the Commission on account of mandatory 15% water release policy. The said letter reads as under:-

*No-MPP-E (I) 3/2011
Government of Himachal Pradesh
Department of MPP & Power*

*From Principal Secretary (Power) to the
Government of Himachal Pradesh*

*To The Chairman-Cum-Managing Director
HPSEBL Kumar House,
Shimla-4*

Dated- Shimla-2 21.4.2012

*Subject:- 15% mandatory release of water and increase in tariff on this
account of the IPPs who have signed PPAs with HPSEBL up to 1st
July, 2006.*

Sir,

*I am to refer to your letter no. HPSEBL/CE-Comm./SHP/2010-12698
Dated 19-10-2010 on the subject cited above and to say that the matter of
applicability of Department of Pollution Control Notification dated 09.09.2005,
regarding 15% mandatory release of water downstream of power projects has been
engaging the attention of the Government for some time past. The matter was
considered by the Council of Ministers in its meeting held on 18.4.2012 and the
following has been approved:-*

- (i) *“the impugned notification has only prospective effect for projects commissioned after 09.09.2005.*
- (ii) *In case of projects which have entered into PPA/IA before the issuance of notification dated 09.09.2005 but not commissioned, a minimum discharge as agreed or accounted for as per TEC/MOU/IA/PPA (where no specific condition quantifying water discharge has been imposed) or as per any specific condition in MOU/IA/PPA shall be applicable till, based on a long term study, the minimum discharge in their case is determined.*

In view of the above, you are requested to approach HPERC for review of the orders passed in the tariff petitions with respect to various PPAs where enhancement has been granted due to retrospective imposition of the lean period discharge. Necessary action in the matter may be taken accordingly under intimation to this department.

Yours faithfully,

---Sd---

*Principal Secretary (Power) to the
Govt. of Himachal Pradesh.*

31. Conditions regarding release of water down stream constitute the terms and conditions of the allotment of project site and its operation as incorporated in the I.As and subsequently as a policy incorporated in Hydro Power Policy of 2006 and also issued as directions to the projects under the delegated power in Section 5 of the 1986 Act. The Board has been asked by the State Govt. to approach this Commission for review of increased tariff allowed. The aforesaid instructions contained in the GoHP letter dated 21.4.2012, raises the substantial questions impacting the determination of the tariff and hence the petitions filed by the Board seeking redetermination of the tariff are maintainable and needs consideration of merits. This issue is answered in favour of the Board.

ISSUE (vi)

32. With respect to policy of release of water, the State Govt. in its written submissions has stated that the HEPs are designed based on TEC, which considers the hydrology, including need to release water down stream and in the commissioned projects, the dam designs have been finalised before the notification of 9.9.2005 and these do not have any provision to regulate minimum release in the lean season.

33. It is a general principle that water release of certain quantity downstream is essentially required to meet the community and consumptive requirements and

environmental/ecological considerations. Therefore, one of the conditions of project allotment, as incorporated in the I.As is the obligation to release water. Standard Clause in the I.As (Clause 13.3) stipulates that:-

“the Company shall ensure minimum flow of water immediately downstream of the weir/barrage/down or downstream requirements as directed by the Government/State Pollution Control Board”.

34. In the year 2005, Govt. of H.P. issued directions to the existing and the upcoming hydel projects to release minimum of 10% water of lean season discharge by way of notification dated 16.7.2005, the relevant extract of which is as under:-

*“Government of Himachal Pradesh,
Department of Pollution Control,*

No. PC-F(2)-1/2005

Dated Shimla-2,

16.07.2005

Notification

Directions of the State Government

“Now, therefore, with a view to prevent, control and abate environmental pollution in exercise of the powers conferred by the provisions of the section 5 of the Environment (Protection) Act, 1986 directions are hereby issued under section 5 of aforesaid Act to existing and upcoming Hydel Projects to release and maintain a minimum flow immediately downstream of diversion structures of Hydel Projects throughout the year at the threshold value of not less than 10% of the minimum inflow observed in the lean seasons to the main river, water body whose water is being harnessed by these projects failing which the Government will be constrained to have recourse of Section 15 of the Environment (Protection) Act, 1986 and Section 45-A of the Water (Prevention and Control of Pollution) Act, 1974. It is hereby ordered that an officer not below the rank of Senior Environmental Engineer so authorized by the H.P. State Environment Protection Pollution Control Board shall be responsible to monitor verify or gauge the volume of water released by the Hydel Projects. It is mandatory for all hydel projects to make necessary measurements by installing appropriate instruments devices and to keep records of inflow on day to day basis. Including the total inflow in the diversion structure and the water released immediately downstream of the diversion structure.

The Hydel Projects shall also submit quarterly reports to the H.P. State Environment Protection and Pollution Control Board.

The Himachal Pradesh State Environment Protection and Pollution Control Board, H.P. State Electricity Board, HIMURJA, Irrigation-cum-Public Health

Department, Fisheries Department are hereby directed to impose /include conditions of minimum flow of water as specified above upon the Hydel projects in their respective NOC's consent and agreements memorandum of understanding".

The condition of minimum flow of water shall be complied within a month of issue of this notification and compliance to these directions shall be reported complied with accordingly."

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35. Section 5 of the Environment (Protection) Act, 1986, under which these directions are issued, reads as under:-

"5 POWER TO GIVE DIRECTIONS:

Notwithstanding anything contained in any other law, but subject to the provisions of this Act, the Central Government may, in the exercise of its powers and performance of its functions under this Act, issue directions in writing to any person, officer or any authority and such person, officer or authority shall be bound to comply with such directions.

Explanation- For the avoidance of doubts, it is hereby declared that the power to issue directions under this section includes the power to direct—

- (a) the closure, prohibition or regulation of any industry, operation or process; or*
- (b) stoppage or regulation of the supply of electricity or water or any other service".*

(emphasis supplied)

36. It is apparent from the provisions of the Act of 1986 and the notification dated 16.7.2005 that it is not a statutory notification in performance of statutory obligation under the Act. The Act provides for enabling powers to the Central Government., which power has been delegated by the Central Government to the State Government, to issue directions to any person, officer or any authority and such direction has to be issued in writing. It is not necessary that it is issued in the form of notification. In the present case the directions are issued to existing and upcoming projects to release water and also the directions are issued to the relevant State Govt. agencies to incorporate this condition of water release in their NOC or consent letter or agreement. This clearly implies that the State Govt. agencies are responsible for compliance of the directions with respect to future projects/upcoming projects where NOCs/consents/ agreements are yet to be done i.e. after 16.7.2005.

37. Plain reading of Section 5 of the Act and the Directions issued by the GoHP dated 16.7.2005 makes it abundantly clear that the issuance of Directions under Section 5 is in the realm of the policy of the State Govt. It is apparent from the contents of the said letter dated 21.4.2012 that:-

- (i) the decision is taken by the State Govt. i.e. Council of Ministers in its meeting held on 18.4.2012;
- (ii) the decision is specific with reference to the State Govt. policy as contained in the directions issued on 9.9.2005 by the Department of Pollution Control and therefore it is amendment to the policy as contained in directions dated 9.9.2005;
- (iii) the amended policy direction is issued, in writing, only to The CMD, HPSEB Ltd. in response to his proposal dated 19.10.2010 and, therefore, applicable only to the projects where SHPs have PPAs with Board for supply for power within the State;
- (iv) the Board has been asked to approach the Commission for review of orders allowing enhanced tariff under various PPAs by applying 15% water release retrospectively in view of the Cabinet decision that:-
 - (a) the decision of 9.9.2005 shall not apply to projects commissioned before 9.9.2005.
 - (b) the projects where IAs/PPAs are signed before 9.9.2005 but are commissioned after 9.9.2005, minimum discharge will be determined in those cases based on long term study and till such time minimum discharge, as provided in the TEC/MoU/IA/PPA in each case, will apply and not 15%.

38. It is clear that the applicability of directions dated 9.9.2005 issued by the State Govt. has been decided by the State Govt. on 18.4.2012 and is limited to the projects where power is being purchased by the Board for supply to consumers in the State. It is not amendment of the directions per se issued dated 16.7.2005/9.9.2005 and further that directions issued to any person or officer are required to be issued in writing as required under Section 5 of the Act, 1986 and accordingly are issued in writing on 21.4.2012 to The CMD, HPSEBL only.

39. The State Govt. in its written submissions states:-

- (i) that applicability of directions have been stayed by Hon'ble High Court with respect to hydro projects of NHPC and Shanan Project of the Punjab State Electricity Board and hence they are not releasing minimum 15% water;

- (ii) that the committee constituted under the chairmanship of the Chief Secretary, as ordered by the Hon'ble High Court, have concluded that there is a need to determine the amount of water, on project to project basis, after a long term study;
- (iii) that huge burden of tariff increase on the projects commissioned before 9.9.2005 or where MoU/IA/PPAs are signed before 9.9.2005 will be on consumers of the State, if applied retrospectively;
- (iv) that the decision as to whether impugned notification should be amended as per policy dated 18.4.2012 which decision has been conveyed to The HPSEBL on 21.4.2012, is yet to be taken after studying material information;
- (v) that the Cabinet decision of 18.4.2012, conveyed in writing to CMD, HPSEBL on 21.4.2012, shall remain in force, till the decision otherwise is taken, and will be applicable on all projects concerned with the Board.

40. The above submissions and the substance of the letter dated 21.4.2012 imply that the decision of the Cabinet dated 18.4.2012 shall be applicable to all the projects, including its own generation projects, from where the Board purchases power for supply within the State and for which tariff is determined by the Commission. This decision is in public interest to avoid burden of higher tariff to the consumers of the State. There is no policy change per se by way of amending the notification of 9.9.2005 by applying decision of 18.4.2012. However, specific directions are issued with respect to NHPC and PSEB projects on the basis of stay orders of Hon'ble High Court and the project supplying power to consumers of the State regarding applicability of 9.9.2005 directions. Therefore, there is no issue as to whether decision as contained in letter dated 21.4.2012 is applicable/ enforceable or not; it not being in the shape/form of general notification. The HPSEBL and IPPs, being parties to PPAs, are relevant parties to this decisions and hence HPSEBL shall convey the decision of the State Govt. as such, to each of the IPPs having bearing of such decisions. It is for the Power Department and Pollution Control Department to co-ordinate to comply and carry out the State Govt.(Cabinet) policy decision dated 18.4.2012.

41. The Hon'ble Supreme Court in **APTRANSCO vs. Sai Renewable Energy Pvt.Ltd. (2011) 11 SCC 34** has held that State Commission is not bound by any policy directions issued by the Government under the Act if such directions hamper the statutory functions of the Commission.

42. Further, the Hon'ble APTEL in **Polyplex Corportion vs. Uttrakhand Electricity Regulatory Commission in Appeal No.41, 42 and 43 of 2010** has held that:-

*“The State Commission is independent statutory body. Therefore **the policy directions issued by the State Government are not binding on the State Commission, as those directions cannot curtail the power of the State Government (sic Commission) in the matter of determination of tariff. The State Government may have given any such policy direction in order to cater to the popular demand made by the public but while determining Tariff the State Commission may take those directions or suggestions for consideration but it is for the State Commission which has statutory duty to perform either to accept the suggestion or reject those directions taking note of the various circumstances. It is purely discretionary on the part of the State Commission on acceptability of the directions issued by the State Government in the matter of determination of Tariff**”.*

43. Admittedly, the directions in GoHP letter dated 21.4.2012, are to the Board and are not directions to the Commission under Section 108 of the Act. Water availability and its potential is the key determinant in project design and consequent designed energy generation, which forms the basis for tariff determination. Laying down conditions relating to minimum quantum of water release is a State Policy and, therefore, it has to be taken in to account while determining tariff in hydro projects. The Regulations of 2007 provides for addressing the situations arising out of such policy pronouncements and amendments thereto. The findings in the above case would not apply to the present petitions. However, the State Commission in discharge of its functions under the Act has to be guided by the directions of the State Government but the same are not mandatory and the State Commission being an independent statutory Authority is not bound by any policy directions which hampers with its statutory functions. Whenever directions are issued by the State Govt. the parties must be given an opportunity to place their views before the Commission with reference to the direction. Admittedly, this opportunity had been given to parties and other stakeholders, irrespective of whether the decision dated 21.4.2012 is of the nature of policy directions or not.

This issue is disposed of accordingly.

Issue (vii):

44. This Commission, in the matter of **M/s DSL Hydrowatt Vs HPSEBL** etc. in its decision dated 29.10.2010 held that:-

“32. It would be apt to state that there may be the issues connected with their application in a retrospective manner. The Act or the regulations do not provide for a retrospective use of the power, and further exercise of such power may result in vested rights being affected.

33. Thus each petition needs to be dealt with on merits. -----and only the narrow area of Govt. policy changes and their impact on tariff is to be quantified prospectively”.

45 The Commission also, in the said Order held that:-

“30 B Mandatory release of 15% water discharge. -

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

This decision of the Commission was upheld by the Hon’ble High Court of H.P. in the **case of HPSEBL Vs dated 6.8.2013(ibid). Paras 59 and 60 thereof read as under:-**

“59. *In PTC, India (supra) the Supreme Court has held that regulations under 2003 Act can even override the existing contracts including the Power Purchase Agreements and even existing Power Purchase Agreements had to be modified and aligned with the said regulations. The State Commission has ordered reopening of the tariff prospectively. Therefore, it cannot be said that the existing Power Purchase Agreements have been reopened retrospectively. The Section 62(4) provides amendment of tariff as per restrictions contained in that provision. It is the stand of the State Commission that only 15% mandatory water*

discharge, payment of revised compensation to fisheries and towards use of forest land and LADA charges imposed under 2006 Policy after execution of Power Purchase Agreements have been taken into consideration for revising the tariff. It is specific stand of the State Commission that no other factor has been considered for revision of tariff. The petitioner has not assailed the tariff on the ground that after taking various factors into consideration the decision of the State Commission on merits for fixing tariff is wrong. The petitioner has assailed amended tariff on the ground of jurisdiction which it has failed.

60. *The tariff is to be determined, amended in accordance with the 2003 Act, Rules and Regulations. The State Commission has the power to determine the tariff and amend the tariff. The contract, if any, regarding tariff is to be considered by the State Commission in accordance with 2003 Act, Rules and Regulations and not under common law by Civil Court as contended by the learned counsel for the petitioner. The petitioner and the Independent Power Producer of their own cannot fix the tariff. It is the duty of the State Commission to fix the tariff. The petitioner has failed to make out any case for quashing of amended regulations dated 12.11.2007, order dated 29.10.2009 of the State Commission and Annexure P-14 in all the petitions. In view of above, all the aforesaid points are answered against the petitioner.”*

46 Therefore, PPAs already concluded can be reopened under regulation 6(1) of the Regulations 2007 prospectively i.e. tariff will be applied prospectively. Prudent cost allowed under forest and fisheries and LADA expenses will be recovered in tariff prospectively. Whatever tariff required to be enhanced to give effect to minimum 15% release is to be determined by the Commission and hence will be applied prospectively, after so determined and from actual implementation of directions thereafter, whichever is later. Obligation to release water as per directions of the State Govt./State Pollution Control Board is already cast upon the developer as per IA, even at the fixed tariff of Rs. 2.50 per unit applicable on projects where IA/PPA are signed till June 2006.

47 Therefore, revised enhanced tariff will be applicable w.e.f. the date of determination of such revised tariff by the Commission and actual implementation of 15% release directions thereafter. On the same lines, revised tariff based on the

decision in relation to the policy change, with respect to PPAs/projects from where power is purchased by the HPSEBL, taken by the State Govt. dated 18.4.2012 and conveyed to the CMD, HPSEBL by letter dated 21.4.2012 will also apply prospectively from the date of passing the order by the Commission, including interim Order, if any, unless the parties have implemented the decision dated 18.4.2012/21.4.2012 before such Order of the Commission, in which event revised tariff will apply from such date of actual implementation of the revised policy reflected in the GoHP letter dated 21.4.2012 on IA/PPAs signed before 9.9.2005.

48 Both the policy decisions i.e. dated 9.9.2005 and 18/21.4.2012 are in public interest, the earlier one on environmental considerations and the later one (limited to projects having PPAs with HPSEBL) on the tariff consideration. Therefore, tariff allowed pursuant to 9.9.2005 policy on projects which are commissioned after 9.9.2005 but IA/PPA signed before 9.9.2005, are withdrawn in view of decision dated 18.4.2012/21.4.2012 so that benefit of reduction in tariff, due to reduction in water release, where ever provision as per TEC/MoU/IA/PPA is less than 15%, is passed on to the consumers. Higher tariff was allowed to projects to compensate the reduction in generation due to release of additional water to comply the 15% minimum release of water down stream and since now release will continue to be as per TEC/MoU/IA/PPA as per revised policy, additional tariff shall be withdrawn. For the generator, the policy is revenue neutral and hence there is no loss or gain due to any change in condition of water release.

49 The stand taken by State Govt. (Power Deptt.) in its submissions w.r.t. Masli Project is that it has correctly signed SIA on 5.8.2013, even after policy revision dated 21.4.2012, providing for 15% release of water because issue of release of water comes into play only after commissioning and since project was Commissioned on Dec.2012, SIA has been signed accordingly. However, at the same time, State Govt. has submitted that the decision of the Cabinet dated 18.4.2012 w.r.t. HPSEBL purchases from SHPs. shall remain in force. The Commission has no mandate to question the SIA signed by parties mutually agreeing to release 15% water but no enhanced tariff on account of release of 15% water shall be available to the project because no such tariff is admissible as per 21.4.2012 policy (Cabinet decision) because IA is signed before 9.9.2005 and the Commission cannot grant any tariff in violation of the State Policy and burden the consumers. Parties can act at their own wisdom to sign SIA as per 21.4.2012 policy.

50 On behalf of the Patikari Hydro Electric Project, it has been submitted that the HPSPCB, while according the consent to operate the 16 MW Patikari Hydro

Electric Project, has stipulated the condition that the power developer shall release and maintain 15% minimum flow as per the directions in its notification dated 9.9.2005. In case parties to IA agree for 15% release, the Commission welcomes the step but such SIA shall not lead to supplementary PPA because the Commission has no mandate to allow higher tariff as per policy 21.4.2012 till the time case to case study is conducted and a considered decision in each case is taken by the State Govt. and conveyed to HPSEBL. Parties may sign SIA as per 21.4.2012 Policy. In order to avoid any tariff implications and also the contradictory positions, the Commission advises the HPSEBL to take up the matter with State Govt. in the Power Department to follow the Cabinet decision and review the SIA already signed and also comply this policy while signing SIAs with projects where PPAs are with HPSEBL. Where these are no PPAs with HPSEBL, State Govt. and IPP may sign any terms under SIA, including 15% release, as the Govt. so decides.

Summary of findings:

51. (a) The Commission has to apply the principle of review applicable in Civil Cases differently to tariff related matters. Unlike the civil disputes, which are between individuals and where the power of a Civil Court is limited to the pleadings and evidence on record, in a tariff related matters to arrive at a conclusion on what is the reasonable and prudent cost for providing a service, the power of the Commission is wider than that of a Civil Court. Accordingly, the power of the Commission to review is to be interpreted in a manner so as to ensure that all reasonable and prudent checks are made in terms of the commercial prudence and with contractual understanding between the parties in question.
- (b) Section 61 is the enabling provision for framing regulations by the Commission; the determination of terms and conditions of tariff has been left to the domain of the Regulatory Commission under Section 61 of the Act; whereas actual tariff determination by the Regulatory Commission is covered by Section 62 of the Act. Specifying the terms and conditions for determination of tariff is an exercise which is different and distinct from actual tariff determination in accordance with the provisions of the Act. Thus the Commission is a decision making as well as the regulation framing authority. Former function is administrative and latter is legislative in character.

- (c) The Revision of a Tariff must be distinguished from a review of a Tariff Order. While making amendment/alternation under Section 62 (4), read with Section 64 (6), the Commission discharges its administrative/legislative functions and in strict sense does not exercise adjudicating powers of a Civil Court. The provisions of review as envisaged under Section 114 or Order 47 Rule 1 and the principle of resjudicata do not apply. Hence the Commission can revisit the matter covered in the tariff order, which has acquired finality.
- (d) Making of a tariff is a continuous process. It can be amended or altered by the Commission. If any occasion arises therefore. The said power can be exercised not only on an application filed by the generating companies but also by the Commission on its own motion. The limitation of time, as contended by the power developers cannot stand in the way for making amendments or alternation in the tariff already determined.
- (e) The conditions regarding release of water down-stream constitute the terms and conditions of the allotment and operation of project site as incorporated in the I.As and also forming part of Hydro Power Policy of 2006 and also issued as directions to the projects under the delegated power in Section 5 of the 1986 Act. The Board has been asked by the State Govt. to approach this Commission for review of tariff allowed. The aforesaid instructions contained in the GoHP letter dated 21.4.2012, raises the substantial questions impacting the determination of the tariff and hence the petitions filed by the Board seeking redetermination of the tariff are maintainable and needs consideration on merits.
- (f) It is apparent from the provisions of the Act and the notification dated 16.7.2005 that it is not a statutory notification in performance of statutory obligation under the Act. The Act provides for enabling powers to the Central Government., which power has been delegated by the Central Government to the State Government, to issue directions to any person, officer or any authority and such direction has to be issued in writing. It is not necessary that it is issued in the form of notification. In the present case the directions are issued to existing and upcoming projects to release water and also the directions are issued to the relevant State Govt. agencies to incorporate this condition of water release in their NOC or consent letter or agreement. This clearly implies that the State Govt. agencies are responsible

for compliance of the directions with respect to future projects/upcoming projects where NOCs/consents/ agreements are yet to be done i.e. after 16.7.2005.

- (g) The decision of the Cabinet dated 18.4.2012 shall be applicable to all the projects, including its own generation projects, from where the Board purchases power for supply within the State and for which tariff is determined by the Commission. This decision is in public interest to avoid higher tariff to the consumers of the State. There is no policy change per se, by way of amending the notification of 9.9.2005 by applying decision of 18.4.2012; but specific application of directions on certain projects on the basis of stay orders of Hon'ble High Court and the project supplying power to consumers of the State has been made. Therefore, there is no issue as to whether decision conveyed by letter dated 21.4.2012; will apply or not, it not being in the shape/form of general notification. The HPSEBL shall convey the decision of the State Govt., as such, to each of the IPP having bearing of such decisions. It is for the Power Department and Pollution Control Department to co-ordinate to comply and carry out the State Govt. (Cabinet) policy decision dated 18.4.2012.
- (h) Admittedly, the directions in GoHP letter dated 21.4.2012, are to the Board and are not directions to the Commission under Section 108 of the Act. Water availability and its potential is key determinant in design of project and tariff and has to be taken in to account. Regulations of 2007 provides for addressing situations arising out of policy changes. For the IPPs, issue of release of water is revenue neutral and hence there is no question of gains or loss to IPPs. The State Commission in discharge of its functions under the Act has to be guided by the directions of the State Government but the same are not mandatory and the State Commission being an independent statutory Authority is not bound by any policy directions which hampers with its statutory functions. Whenever directions are issued by the State Govt. the parties must be given an opportunity to place their views before the Commission with reference to the direction. Admittedly, this opportunity had been given to parties and other stakeholders ever otherwise.
- (i) Both the policy decisions i.e. dated 9.9.2005 and 18/21.4.2012 are in public interest, the earlier on one environmental considerations and the later one (limited to PPAs with HPSEBL) on the tariff consideration. Therefore, tariff allowed pursuant to 9.9.2005 policy on projects which are

commissioned after 9.9.2005 but IA/PPA signed before 9.9.2005, are withdrawn in view of decision dated 18.4.2012/21.4.2012 so that benefit of reduction in tariff, due to reduction in water release wherever provision as per TEC/MoU/IA/PPA is less than 15%, is passed on to the consumers of the State.

- (j) Stand taken by the State Govt. w.r .t. Masli project that since SIA has been rightly signed on 5.8.2013 for 15% release will not necessarily lead to enhanced tariff because enhanced tariff is not admissible as per policy of 21.4.2012 and therefore Commission cannot grant such tariff in departure of policy. The HPSCB, while according the consent to operate to 16 MW Patikari Hydro Electric Project, has stipulated the condition that the power developer shall release and maintain 15% minimum flow as per, the directions in its notification dated 9.9.2005. In case parties to IA agree for 15% release, the Commission welcomes the step but such SIA shall not lead to supplementary PPA because Commission has no mandate to allow higher tariff as per policy 21.4.2012 till the time case to case study are conducted and a considered decision in each case is taken by the State Govt. and conveyed to HPSEBL. It is left to the parties to IA/SIA to agree for any condition without encumbering tariff. However, in order to avoid any tariff implications and also to have contradictory positions, Commission advises the HPSEBL to take up the matter with Power Department to follow the Cabinet decision and review the SIA already signed and also comply this policy while signing SIAs with projects where PPAs are with HPSEBL. Where these are no PPAs with HPSEBL, State Govt. and IPP may sign any terms under SIA, including 15% release as the Govt. so decided.

Conclusion:

52. In view of the above findings-

- (a) the cases i.e. Petition No. 121, 108 and 137 of 2010, where the Commission has issued revised consequential tariff due to changes in policies and law, including minimum 15% release of water and the generators, not satisfied by the Orders increasing the tariff, have filed review petitions against such orders, the Commission would proceed with each petition on its merits and will issue individual project wise orders based on data/calculations, already furnished, with respect to the claims regarding mandatory release of water

- discharge, payment of differential amount on account of compensation to fisheries, forest land use and levy of LADA charges, if involved, therein;
- (b) the cases i.e. Petition No. 26 of 2011, where the generator has filed petition for tariff increase due to policy revision, including 15% water release, which is under adjudication, and the Board now has filed objections on specific policy of 15% minimum release, in view of the revised policy decision dated 21.4.2012, the Commission shall proceed to consider the petition on its merit, vis-à-vis the findings recorded in this case.
- (c) the Petitions Nos. 11, 12, 14, 15, 16, 30, 62 and 64 of 2014, i.e. the cases where the Board has filed petitions for review of tariff increase allowed to generators due to policy change, in view of restatement of applicability of Policy with respect to minimum 15% release of water as per letter dated 21.4.2012, are partly allowed to the extent as indicated below:-
- (1) **Review Petition No. 11 of 2014. (HPSEBL V/s M/s Him Kailash Hydro Power Ltd.)**

In this case, M/s Him Kailash Hydro Power Ltd. entered into an Implementation Agreement (IA) with GoHP on 30.9.2000 to establish, operate and maintain at their cost, Sahu Hydro Electric Project, with installed capacity of 5 MW located on Sahu Khad, a tributary of Ravi River, in Distt. Chamba (H.P). The Power Procurement Agreement (PPA) was executed with the HPSEB, on 28th April 2004, stipulating that the Board shall pay for the Net Saleable energy delivered to the Board at the interconnection Point at a fixed rate of Rs. 2.50, per Kwh. The Project was commissioned on 22.4.2008. This Commission vide its order dated 8.6.2010, passed in Petition Nos. 53 of 2008 and 5 of 2010, increased the tariff of Rs. 2.50 per Kwh, in relation to the said project, by 5 paise per unit, out of which 3 paise per Kwh increase was due to the impact of the additional 1% of the royalty payable for Local Area Development Fund and 2 paise per kwh increase was on account of the impact of the 15% mandatory release of water down the stream of diversion structure, subject to the condition that either party on the actual data available for the period of 10 years may approach the Commission to review the said increase. The said increase was effective w.e.f. 8.6.2010, on which the Order increasing tariff was passed. Subsequently the Commission vide its Order dated 3.12.2010, passed in review petition No. 139 of 2010 and conveyed to the parties on 9.12.2013, allowed an increase of 20 paise over and above 2 paise on account of impact of 15% mandatory release of water, which had already been allowed vide Commission order dated 8.6.2010.

From the above, it is clear that in relation to the Sahu Hydro Electrical Project, the IA was signed on 30.9.2000 and the PPA was signed on 28th April 2004, before the 9.9.2005 and the project was commissioned on 22.4.2008, after the 9.9.2005. Per the Cabinet decision dated 18.4.2012, conveyed to the CMD, HPSEB Ltd. on 21.4.2012, the projects where IAs/PPAs are signed before 9.9.2005, but are commissioned after 9.9.2005, minimum discharge is required to be determined in these cases based on long term study and till such time minimum discharge, as provided in the TEC/MOU/PPA, in each case, is to apply and not 15%. Further as stated in para 47 of this Order, the revised enhanced tariff is to be applicable prospectively w.e.f. the date of determination of such revised tariff by the Commission, unless the parties have implemented the decision dated 18.4.2012/21.4.2012, before such order of the Commission, in which event revised tariff will apply from the date of the actual implementation of 15% release directions thereafter. In view of decision dated 18.4.2012/21.4.2012, enhancement in tariff allowed pursuant to 9.9.2005 policy on projects, which are commissioned after 9.9.2005, but IAs/PPAs are signed before 9.9.2005, is withdrawn., w.e.f. the 25th April, 2014, i.e. the date on which the Commission took cognizance of the State Govt. clarification contained in the letter dated 21.4.2012 and stayed the operation of the orders passed in the tariff petitions with respect to the PPAs, where enhancement has been granted on account of 15% mandatory water release, unless the parties have implemented the revised Policy, reflected in the GoHP letter dated 21.4.2012, on the IAs/PPAs signed before 9.9.2005.

As a off shoot of this Order, the enhancement in tariff in relation to the Sahu HEP, allowed on account of impact of 15% mandatory water release stands withdrawn w.e.f.25.4.2014 and the Commission's Orders dated 8.6.2010 and 3.12.2010 are modified to that extent. The Commission, therefore, allows an increase of 3 paise per unit on account of the impact of the additional 1% of the loyalty payable under the Govt. notification dated 30.11.2009 for the Local Area Development Fund, which shall be pass through in tariff . Consequently the tariff in relation to Sahu HEP shall be Rs. 2.53 per kwh with effect from 25.4.2014.

(2) Review Petition No. 12 of 2014 (HPSEBL V/s M/s Ginni Global Private Ltd.).

In this case, M/s Ginni Global Private Ltd. entered into an Implementation Agreement (IA) with GoHP on 14.5.2003 to establish, operate and maintain at their cost, Taraila Hydro Electric Project, with installed capacity of 5 MW, located at Taraila, in Distt. Chamba (H.P). The Power Procurement Agreement (PPA) was

executed with the HPSEB, on 7th June, 2004, stipulating that the Board shall pay for the Net Saleable energy delivered to the Board at the interconnection Point at a fixed rate of Rs. 2.50, per Kwh. The Project was commissioned on 15.11.2007. This Commission vide its order dated 22.5.2010, passed in Petition Nos. 70 of 2008 and 202 of 2009, increased the tariff of Rs. 2.50 per Kwh, in relation to the said project, by 15 paise per unit, on account of the impact of the 15% mandatory release of water down the stream of diversion structure, subject to the condition that either party on the actual data available for the period of 10 years may approach the Commission to review the said increase. The said increase was effective w.e.f. 22.5.2010, on which the Order increasing tariff was passed. Subsequently the Commission vide its Order dated 3.12.2010, passed in review petition No. 135 of 2010 and conveyed to the parties on 19.12.2013, did not accede to the request for further increase on account of impact of 15% mandatory release of water, which had already been allowed vide Commission order dated 22.5.2010.

From the above, it is clear that in relation to the Taraila Hydro Electrical Project, the IA was signed on 14.5.2003 and the PPA was signed on 7th June 2004, before the 9.9.2005 and the project was commissioned on 15.11.2007, after the 9.9.2005. Per the Cabinet decision dated 18.4.2012, conveyed to the CMD, HPSEB Ltd. on 21.4.2012, the projects where IAs/PPAs are signed before 9.9.2005, but are commissioned after 9.9.2005, minimum discharge is required to be determined in these cases based on long term study and till such time minimum discharge, as provided in the TEC/MOU/PPA, in each case, is to apply and not 15%. Further as stated in para 47 of this Order, the revised enhanced tariff is to be applicable prospectively w.e.f. the date of determination of such revised tariff by the Commission, unless the parties have implemented the decision dated 18.4.2012/21.4.2012, before such order of the Commission, in which event revised tariff will apply from the date of the actual implementation of 15% release directions thereafter. In view of decision dated 18.4.2012/21.4.2012, enhancement in tariff allowed pursuant to 9.9.2005 policy on projects, which are commissioned after 9.9.2005, but IAs/PPAs are signed before 9.9.2005, is withdrawn, w.e.f. the 25th April, 2014, i.e. the date on which the Commission took cognizance of the State Govt. clarification contained in the letter dated 21.4.2012 and stayed the operation of the orders passed in the tariff petitions with respect to the PPAs, where enhancement has been granted on account of 15% mandatory water release, unless the parties have implemented the revised Policy, reflected in the GoHP letter dated 21.4.2012, on the IAs/PPAs signed before 9.9.2005.

As a off shoot of this Order, the enhancement in tariff in relation to the Taraila HEP, allowed on account of impact of 15% mandatory water release stands withdrawn w.e.f.25.4.2014 and the Commission's Order dated 25.5.2010 is modified to that extent. Consequently the tariff in relation to Taraila HEP shall be Rs. 2.50 per kwh with effect from 25.4.2014.

(3) Review Petition No. 14 of 2014, (HPSEBL V/s M/s Gowthami Hydro Electric Company (P)Ltd.

In this case, M/s Gowthami Hydro Electric Company (P) Ltd. entered into an Implementation Agreement (IA) with GoHP on 20.7.2004 to establish, operate and maintain at their cost, Andhra Stage II Small Hydro Electric Project, with installed capacity of 5 MW located in Distt. Shimla (H.P). The Power Procurement Agreement (PPA) was executed with the HPSEB, on 30.3.2005, stipulating that the Board shall pay for the Net Saleable energy delivered to the Board at the interconnection Point at a fixed rate of Rs. 2.50, per Kwh. The Project was commissioned on 12.6.2009. This Commission vide its order dated 3.12.2010, passed in Petition Nos. 143 of 2010 and conveyed on 19.12.2013, increased the tariff of Rs. 2.50 per Kwh, in relation to the said project by 14 paise per unit, out of which 3 paise per Kwh increase was due to the impact of the additional 1% of the royalty payable for the Local Area Development Fund and 11 paise per kwh increase was on account of the impact of the 15% mandatory release of water down the stream of diversion structure, subject to the condition that either party on the actual data available for the period of 10 years may approach the Commission to review the said increase. The said increase was effective w.e.f. 3.12.2010, on which the Order increasing tariff was passed.

From the above, it is clear that in relation to the Andhra Stage II Small Hydro Electrical Project, the IA was signed on 20.7.2004 and the PPA was signed on 30.3.2005, before the 9.9.2005 and the project was commissioned on 12.6.2009, after the 9.9.2005. Per the Cabinet decision dated 18.4.2012, conveyed to the CMD, HPSEB Ltd. on 21.4.2012 the projects where IAs/PPAs are signed before 9.9.2005, but are commissioned after 9.9.2005, minimum discharge is required to be determined in these cases based on long term study and till such time minimum discharge, as provided in the TEC/MOU/PPA, in each case, is to apply and not 15%. Further as stated in para 47 of this Order the revised enhanced tariff is to be applicable prospectively w.e.f. the date of determination of such revised tariff by the Commission, unless the parties have implemented the decision dated 18.4.2012/21.4.2012, before such order of the Commission, in which event revised tariff will apply from the date of the actual implementation of 15% release directions

thereafter. In view of decision dated 18.4.2012/21.4.2012, enhancement in tariff allowed pursuant to 9.9.2005 policy on projects, which are commissioned after 9.9.2005, but IAs/PPAs are signed before 9.9.2005, is withdrawn, w.e.f. the 25th April, 2014, i.e. the date on which the Commission took cognizance of the State Govt. clarification contained in the letter dated 21.4.2012 and stayed the operation of the orders passed in the tariff petitions with respect to the PPAs, where enhancement has been granted on account of 15% mandatory water release, unless the parties have implemented the revised Policy, reflected in the GoHP letter dated 21.4.2012, on the IAs/PPAs signed before 9.9.2005.

As a off shoot of this Order, the enhancement in tariff in relation to the Andhra Stage II Small HEP, allowed on account of impact of 15% mandatory water release stands withdrawn w.e.f.25.4.2014 and the Commission's Order dated 3.12.2010 is modified to that extent. The Commission, therefore, allows an increase of 3 paise per unit on account of the impact of the additional 1% of the loyalty payable under the Govt. notification dated 30.11.2009 for the Local Area Development Fund, which shall be pass through in tariff. Consequently the tariff in relation to Andhra Stage II Small HEP shall be Rs. 2.53 per kwh with effect from 25.4.2014.

(4) Review Petition No. 15 of 2014, (HPSEBL V/s M/s Nuziveedu Seed Ltd.

In this case, M/s Nuziveedu Seed Ltd. entered into an Implementation Agreement (IA) with GoHP on 28.10.2002 to establish, operate and maintain at their cost, Masli Small Hydro Electric Project, with installed capacity of 5 MW, located on Peja Khad in Distt. Shimla (H.P). The Power Procurement Agreement (PPA) was executed with the HPSEB, on 3rd December, 2004, stipulating that the Board shall pay for the Net Saleable energy delivered to the Board at the interconnection Point at a fixed rate of Rs. 2.50, per Kwh. The Project was commissioned on 21.12.2012. After commissioning of the project and issuance of the State Govt. clarification dated 21.4.2012, the Supplementary Agreement (SIA) was executed on 5.8.2013 making mandatory upon the developer of the Power Project to release and maintain 15% water discharge. This Commission vide its order dated 23.11.2010, passed in Petition Nos. 175 of 2009 and 170 fo 2010 conveyed to the parties on 19.12.2013, increased the tariff of Rs. 2.50 per Kwh, in relation to the said project by 16 paise per unit, out of which 13 paise per Kwh increase was due to the impact of the additional 1% of the royalty payable for the Local Area Development Fund and 11 paise per kwh increase was on account of the impact of the 15% mandatory release of water down the stream of diversion structure, subject to the condition that either party on the

actual data available for the period of 10 years may approach the Commission to review the said increase. The said increase was effective w.e.f. 21.12.2012 i.e. the date of commissioning of the project.,

From the above, it is clear that in relation to the Masli Hydro Electrical Project, the IA was signed on 28.10.2002 and the PPA was signed on 3rd December, 2004, before the 9.9.2005 and the project was commissioned on 21.12.2012, after the 9.9.2005. Per the Cabinet decision dated 18.4.2012, conveyed to the CMD, HPSEB Ltd. on 21.4.2012 the projects where IAs/PPAs are signed before 9.9.2005, but are commissioned after 9.9.2005, minimum discharge is required to be determined in these cases based on long term study and till such time minimum discharge, as provided in the TEC/MOU/PPA, in each case, is to apply and not 15%. Further as stated in para 47 of this Order, the revised enhanced tariff is to be applicable prospectively w.e.f. the date of determination of such revised tariff by the Commission, unless the parties have implemented the decision dated 18.4.2012/21.4.2012, before such order of the Commission, in which event revised tariff will apply from the date of the actual implementation of 15% release directions thereafter. In view of decision dated 18.4.2012/21.4.2012, enhancement in tariff allowed pursuant to 9.9.2005 policy on projects, which are commissioned after 9.9.2005, but IAs/PPAs are signed before 9.9.2005, is withdrawn., w.e.f. the 25th April, 2014, i.e. the date on which the Commission took cognizance of the State Govt. clarification contained in the letter dated 21.4.2012 and stayed the operation of the orders passed in the tariff petitions with respect to the PPAs, where enhancement has been granted on account of 15% mandatory water release, unless the parties have implemented the revised Policy reflected in the GoHP letter dated 21.4.2012, on the IAs/PPAs signed before 9.9.2005. The signing of the SIA is not sufficient unless and until the Supplementary PPA is executed. As concluded in para 50 of this Order, the Commission cannot grant the tariff in departure of the Policy 21.4.2012, till the time case to case study is conducted and a considered decision in each case is taken by the State Govt.

As a off shoot of this Order, the enhancement in tariff in relation to the Masli HEP, allowed on account of impact of 15% mandatory water release stands withdrawn w.e.f.25.4.2014 and the Commission's Order dated 23.11.2010 is modified to that extent. The Commission, therefore, allows on increase of 3 paise per unit on account of the impact of the additional 1% of the loyalty payable under the Govt. notification dated 30.11.2009 for the Local Area Development Fund, which shall be pass through in tariff . Consequently the tariff, in relation to Masli HEP, shall be to

RS. 2.53 per kwh with effect from 21.12.2012 i.e. the date of commissioning of the project.

(5) Review Petition No. 16 of 2014. (HPSEBL V/s M/s Dharamshala Hydro Power Ltd.)

In this case, M/s Dharamshala Hydro Power Ltd. entered into an Implementation Agreement (IA) with GoHP on 16th May, 2001 to establish, operate and maintain at their cost, Maujhi Hydro Electric Project, with installed capacity of 4.5 MW, located on Maujhi Khad, a tributary of Beas River, in Distt. Kangra (H.P). The Power Procurement Agreement (PPA) was executed with the HPSEB, on 24.6.2004, stipulating that the Board shall pay for the Net Saleable energy delivered to the Board at the interconnection Point at a fixed rate of Rs. 2.50, per Kwh. The Project was commissioned on 15.11.2007. This Commission vide its order dated 5.6.2010, passed in Petition Nos. 97 of 2008 and 208 of 2010, increased the tariff of Rs. 2.50 per Kwh, in relation to the said project, by 14 paise per unit, on account of the impact of the 15% mandatory release of water down the stream of diversion structure, subject to the condition that either party on the actual data available for the period of 10 years may approach the Commission to review the said increase. The said increase was effective w.e.f. 5.6.2010, on which the Order increasing tariff was passed. Subsequently the Commission vide its Order dated 3.12.2010, passed in review petition No. 142 of 2010 and conveyed to the parties on 19.12.2013 increased the tariff by 22 paise per unit out of which, increase of 19 paise, over and above 14 paise on account of impact of 15% mandatory release of water already allowed vide Commission order dated 5.6.2010, and 3 paise per kwh increase due to the impact of the additional 1% of the royalty payable for the Local Area Development Fund.

From the above, it is clear that in relation to the Maujhi Hydro Electrical Project, the IA was signed on 16th May 2001 and the PPA was signed on 24.6.2004, before the 9.9.2005 and the project was commissioned on 15.11.2007, after the 9.9.2005. Per the Cabinet decision dated 18.4.2012, conveyed to the CMD, HPSEB Ltd. on 21.4.2012, the projects where IAs/PPAs are signed before 9.9.2005, but are commissioned after 9.9.2005, minimum discharge is required to be determined in these cases based on long term study and till such time minimum discharge, as provided in the TEC/MOU/PPA, in each case, is to apply and not 15%. Further as stated in para 47 of this Order, the revised enhanced tariff is to be applicable prospectively w.e.f. the date of determination of such revised tariff by the Commission, unless the parties have implemented the decision dated 18.4.2012/21.4.2012, before such order of the Commission, in which event revised

tariff will apply from the date of the actual implementation of 15% release directions thereafter. In view of decision dated 18.4.2012/21.4.2012, enhancement in tariff allowed pursuant to 9.9.2005 policy on projects, which are commissioned after 9.9.2005, but IAs/PPAs are signed before 9.9.2005, is withdrawn, w.e.f. the 25th April, 2014, i.e. the date on which the Commission took cognizance of the State Govt. clarification contained in the letter dated 21.4.2012 and stayed the operation of the orders passed in the tariff petitions with respect to the PPAs, where enhancement has been granted on account of 15% mandatory water release, unless the parties have implemented the revised Policy, reflected in the GoHP letter dated 21.4.2012, on the IAs/PPAs signed before 9.9.2005.

As an off shoot of this Order, the enhancement in tariff in relation to the Maujhi HEP, allowed on account of impact of 15% mandatory water release stands withdrawn w.e.f.25.4.2014 and the Commission's Orders dated 5.6.2010 and 3.12.2010 are modified to that extent. The Commission, therefore, allows an increase of 3 paise per unit on account of the impact of the additional 1% of the loyalty payable under the Govt. notification dated 30.11.2009 for the Local Area Development Fund, which shall be pass through in tariff. Consequently the tariff in relation to Maujhi HEP shall be Rs. 2.53 per kwh with effect from 25.4.2014.

(6) Review Petition No. 30 of 2014. (HPSEBL V/s M/s Harison Hydrel Construction Company Pvt.Ltd.

In this case, M/s. Harison Hydrel Construction Company Pvt.Ltd. entered into an Implementation Agreement (IA) with GoHP on 2nd August, 2002 to establish, operate and maintain at their cost, Brahm Ganga Hydro Electric Project, with installed capacity of 5 MW located on Brahm Ganga Khad, a tributary of Parbati River, in Distt. Kullu (H.P). The Power Procurement Agreement (PPA) was executed with the HPSEB, on 8th June 2004, stipulating that the Board shall pay for the Net Saleable energy delivered to the Board at the interconnection Point at a fixed rate of Rs. 2.50, per Kwh. The Project was commissioned on 2.4.2008. This Commission vide its order dated 10.6.2010, passed in Petition Nos. 43 of 2008 and 209 of 2009, increased the tariff of Rs. 2.50 per Kwh, in relation to the said project, by 15 paise per unit, on account of the impact of the 15% mandatory release of water down the stream of diversion structure, subject to the condition that either party on the actual data available for the period of 10 years may approach the Commission to review the said increase. The said increase was effective w.e.f. 10.6.2010, on which the Order increasing tariff was passed.

From the above, it is clear that in relation to the Brahm Ganga Hydro Electrical Project, the IA was signed on 2nd August, 2002 and the PPA was signed on 8th June, 2004, before the 9.9.2005 and the project was commissioned on 2.4.2008, after the 9.9.2005. Per the Cabinet decision dated 18.4.2012, conveyed to the CMD, HPSEB Ltd. on 21.4.2012, the projects where IAs/PPAs are signed before 9.9.2005, but are commissioned after 9.9.2005, minimum discharge is required to be determined in these cases based on long term study and till such time minimum discharge, as provided in the TEC/MOU/PPA, in each case, is to apply and not 15%. Further as stated in para 47 of this Order, the revised enhanced tariff is to be applicable prospectively w.e.f. the date of determination of such revised tariff by the Commission, unless the parties have implemented the decision dated 18.4.2012/21.4.2012, before such order of the Commission, in which event revised tariff will apply from the date of the actual implementation of 15% release directions thereafter. In view of decision dated 18.4.2012/21.4.2012, enhancement in tariff allowed pursuant to 9.9.2005 policy on projects, which are commissioned after 9.9.2005, but IAs/PPAs are signed before 9.9.2005, is withdrawn., w.e.f. the 25th April, 2014, i.e. the date on which the Commission took cognizance of the State Govt. clarification contained in the letter dated 21.4.2012 and stayed the operation of the orders passed in the tariff petitions with respect to the PPAs, where enhancement has been granted on account of 15% mandatory water release, unless the parties have implemented the revised Policy, reflected in the GoHP letter dated 21.4.2012, on the IAs/PPAs signed before 9.9.2005.

As a off shoot of this Order, the enhancement in tariff in relation to the Brahm Ganga HEP, allowed on account of impact of 15% mandatory water release stands withdrawn w.e.f. 25.4.2014 and the Commission's Order dated 10.6.2010 is modified to that extent. Consequently the tariff in relation to Brahm HEP shall be Rs. 2.50 per kwh with effect from 25.4.2014.

(7) Review Petition No. 62 of 2014. (HPSEBL V/s M/s Ascent Hydro Projects Ltd.

In this case, M/s Ascent Hydro Projects Ltd. entered into an Implementation Agreement (IA) with GoHP on 3rd August, 2001 to establish, operate and maintain at their cost, Sechi Hydro Electric Project, with installed capacity of 4.5 MW, located on Sechi Khad, in Distt. Kullu (H.P). The Power Procurement Agreement (PPA) was executed with the HPSEB, on 25th October, 2007, stipulating that the Board shall pay for the Net Saleable energy delivered to the Board at the interconnection Point at a fixed rate of Rs. 2.50, per Kwh. The Project has not yet been commissioned. This Commission vide its order dated 22.5.2010, passed in Petition Nos. 267 of 2008 and

206 of 2009, increased the tariff of Rs. 2.50 per Kwh, in relation to the said project, by 23 paise per unit, out of which 3 paise per Kwh increase was due to the impact of the additional 1% of the royalty payable for Local Area Development Fund and 20 paise per kwh increase was on account of the impact of the 15% mandatory release of water down the stream of diversion structure, subject to the condition that either party on the actual data available for the period of 10 years may approach the Commission to review the said increase. The said increase was effective w.e.f. 22.5.2010, on which the Order increasing tariff was passed

From the above, it is clear that in relation to the Sechi Hydro Electrical Project, the IA was signed on 3rd August, 2001, before the 9.9.2005 and the project has not yet been commissioned. Per the Cabinet decision dated 18.4.2012, conveyed to the CMD, HPSEB Ltd. on 21.4.2012, the projects where IAs/PPAs are signed before 9.9.2005, but are commissioned after 9.9.2005, minimum discharge is required to be determined in these cases based on long term study and till such time minimum discharge, as provided in the TEC/MOU/PPA, in each case, is to apply and not 15%. Further as stated in para 47 of this Order, the revised enhanced tariff is to be applicable prospectively w.e.f. the date of determination of such revised tariff by the Commission, unless the parties have implemented the decision dated 18.4.2012/21.4.2012, before such order of the Commission, in which event revised tariff will apply from the date of the actual implementation of 15% release directions thereafter. In view of decision dated 18.4.2012/21.4.2012, enhancement in tariff allowed pursuant to 9.9.2005 policy on projects, which are commissioned after 9.9.2005, but IAs/PPAs are signed before 9.9.2005, is withdrawn, w.e.f. the 25th April, 2014, i.e. the date on which the Commission took cognizance of the State Govt. clarification contained in the letter dated 21.4.2012 and stayed the operation of the orders passed in the tariff petitions with respect to the PPAs, where enhancement has been granted on account of 15% mandatory water release, unless the parties have implemented the revised Policy, reflected in the GoHP letter dated 21.4.2012, on the IAs/PPAs signed before 9.9.2005.

As a off shoot of this Order, the enhancement in tariff in relation to the Sechi HEP, allowed on account of impact of 15% mandatory water release stands withdrawn w.e.f. 25.4.2014 and the Commission's Orders dated 22.5.2010 and 3.12.2010 are modified to that extent. The Commission, therefore, allows an increase of 3 paise per unit on account of the impact of the additional 1% of the royalty payable under the Govt. notification dated 30.11.2009 for the Local Area

Development Fund, which shall be pass through in tariff . Consequently the tariff in relation to Sechi HEP shall be Rs. 2.53 per kwh with effect from 25.4.2014.

(8) Review Petition No. 64 of 2014. (HPSEBL V/s M/s Patikari Power Private Ltd.

In this case, M/s Patikari Power Private Ltd. entered into an Implementation Agreement (IA) with GoHP on 09.11.2001 to establish, operate and maintain at their cost, Patikari Hydro Electric Project, with installed capacity of 16 MW, located on Bakhil Khad, a tributary of Beas River, in Distt. Mandi (H.P). The Power Procurement Agreement (PPA) was executed with the HPSEB, on 5th July, 2004, stipulating that the Board shall pay for the Net Saleable energy delivered to the Board at the interconnection Point at a fixed rate of Rs. 2.25, per Kwh. The Project was commissioned on 6.2.2008. This Commission vide its order dated 16.7.2010, passed in Petition Nos. 184 of 2008 and 201 of 2009, increased the tariff of Rs. 2.25 per Kwh, in relation to the said project, by 29 paise per unit, out of which 2 paise per Kwh increase was due to the impact of the additional 1% of the royalty payable for Local Area Development Fund and 27 paise per kwh increase was on account of the impact of the 15% mandatory release of water down the stream of diversion structure, subject to the condition that either party on the actual data available for the period of 10 years may approach the Commission to review the said increase. The said increase was effective w.e.f. 16.7.2010, on which the Order increasing tariff was passed.

From the above, it is clear that in relation to the Sahu Hydro Electrical Project, the IA was signed on 9.11.2001 and the PPA was signed on 5th July, 2004, before the 9.9.2005 and the project was commissioned on 6.2..2008, after the 9.9.2005. Per the Cabinet decision dated 18.4.2012, conveyed to the CMD, HPSEB Ltd. on 21.4.2012, the projects where IAs/PPAs are signed before 9.9.2005, but are commissioned after 9.9.2005, minimum discharge is required to be determined in these cases based on long term study and till such time minimum discharge, as provided in the TEC/MOU/PPA, in each case, is to apply and not 15%. Further as stated in para 47 of this Order, the revised enhanced tariff is to be applicable prospectively w.e.f. the date of determination of such revised tariff by the Commission, unless the parties have implemented the decision dated 18.4.2012/21.4.2012, before such order of the Commission, in which event revised tariff will apply from the date of the actual implementation of 15% release directions thereafter. In view of decision dated 18.4.2012/21.4.2012, enhancement in tariff allowed pursuant to 9.9.2005 policy on projects, which are commissioned after 9.9.2005, but IAs/PPAs are signed before 9.9.2005, is withdrawn., w.e.f. the 25th

April, 2014, i.e. the date on which the Commission took cognizance of the State Govt. clarification contained in the letter dated 21.4.2012 and stayed the operation of the orders passed in the tariff petitions with respect to the PPAs, where enhancement has been granted on account of 15% mandatory water release, unless the parties have implemented the revised Policy, reflected in the GoHP letter dated 21.4.2012, on the IAs/PPAs signed before 9.9.2005.

As a off shoot of this Order, the enhancement in tariff in relation to the Patikari HEP, allowed on account of impact of 15% mandatory water release stands withdrawn w.e.f.25.4.2014 and the Commission's Order dated 16.7.2010 is modified to that extent. The Commission, therefore, allows an increase of 3 paise per unit on account of the impact of the additional 1% of the loyalty payable under the Govt. notification dated 30.11.2009 for the Local Area Development Fund, which shall be pass through in tariff. Consequently the tariff in relation to Patikari HEP shall be Rs. 2.27 per kwh with effect from 25.4.2014.

- (d) except to the extent as indicated in this Order, the interim stay granted vide Commission Order dated 25.4.2014 stands vacated.
- (e) no order as to costs.

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(Subhash C. Negi),
Chairman