

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

In the matter of :-

M/s Gehra Hydro Power Private Ltd.
(Erstwhile M/s Gehra Hydro Power Ltd.)
through Sh. Dhanajay Gahlowt
(its Authorized Representative) having its
registered office at Plot No.304-L-III,
3rd Floor, Road No.78, Jublee Hills, Hyderabad.
Telangana-500096

.....Petitioner

Versus

1. The HP State Electricity Board Ltd. thro' its,
Chief Engineer (Commercial)
Vidyut Bhawan, Shimla-171004Respondent No.1
2. Himachal Pradesh Energy Development Agency
(HIMURJA) Urja Bhawan,
SDA Complex Kasumpti, Shimla-171009Respondent No.2
3. The Director
Directorate of Energy (DoE) HP Govt.,
Shanti Bhawan, Phase-III, New Shimla-171009
.....Respondent No.3
4. The Govt. of Himachal Pradesh thro' its
Principal Secretary (MPP& Power),
Shimla-171002Respondent No.4

Petition No. 79 of 2019
(Decided on **28th January, 2021**)

CORAM

DEVENDRA KUMAR SHARMA
CHAIRMAN

BHANU PRATAP SINGH
MEMBER

Counsels: -

- | | |
|-------------------------|--|
| for Petitioner: | Ms. Shikha Ohri/Matrugupta Mishra/
Mohd. Aman Sheikh (Praxis Counsel) Adv.
a/w Sh. L.S. Mehta Advocate and
Sh Dhanajay Gahlowt, authorized Representative |
| for Respondent No.1: | Sh. Surinder Saklani, Standing Counsel
a/w Sh. Kamlesh Saklani(Authorised Representative) |
| for Respondent No.2& 4: | Sh. Nipun Sharma, Advocate and
Ms. Kamlesh Shandil, Advocate |
| for Respondent No.3: | Sh. Shanti Swaroop Bhatti (Legal Consultant) |

ORDER

(Last heard through video conferencing held on 22nd December, 2020 and Orders reserved)

The petitioner M/s Gehra Hydro Power Private Ltd. a Company incorporated under the Companies Act, 1956 and a Generating Company in terms of section 2 (28) of the Electricity Act, 2003, having its registered office at Plot No. 304-L-III, 3rd Floor, Road No. 78, Jubilee Hills, Hyderabad, Telangana-500096 (hereinafter referred as “the petitioner”) is setting up a 2 MW Small Hydro Power Project, in District Chamba, (HP) (hereinafter referred as “the project”) has moved the above captioned petition seeking a direction to the Himachal Pradesh State Electricity Board Ltd. (hereinafter referred as “the Respondent No.1” or “ HPSEBL”) to execute a fresh Power Purchase Agreement (PPA) with the petitioner in terms of the Implementation Agreement (IA) dated 31.05.2016 and for determination of tariff in terms of section 62 of the Electricity Act, 2003, read with the Himachal Pradesh Electricity Regulatory Commission (Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2017 (hereinafter referred as “the RE Regulations, 2017”).

2. The Respondent No.1, i.e. Himachal Pradesh State Electricity Board Ltd. (HPSEBL) is a Company incorporated under the Companies Act, 1956 and is the Distribution Licensee in the State of Himachal Pradesh. The Respondent No. 2 i.e. the Himachal Pradesh Energy Development Agency (HIMURJA) is responsible for the promotion and sustainable development of renewable energy within the State of Himachal Pradesh. The Respondent No.3, the Directorate of Energy HP and the Respondent No.4 i.e. the State Govt. of Himachal Pradesh are responsible inter alia to exploit the vast hydro-electric potential in the State through allotment of power projects and execution of the Implementation Agreements with the power producers.

3. The facts in brief, per submissions made by the petitioner, are as under:-

- (a) The petitioner is setting up a 2 MW Small Hydro Power Project in Distt. Chamba (HP). A Memorandum of Understanding (MOU) was executed between the petitioner and the Govt. of HP in 1996 to carry out detailed investigations of the Gehra Hydro Project. Subsequently, an Implementation Agreement (IA) dated 16.05.2001 was executed by the petitioner and the petitioner was not able to commission the project, within the timeframe

stipulated in the IA. Accordingly, the State Govt. vide its letter dated 03.01.2006 terminated the aforesaid Implementation Agreement.

- (b) Thereafter, the petitioner made a representation before the Respondent No.2 (HIMURJA), with regard to setting aside of the termination Order and permitting the petitioner to execute the Project, within the agreed time frame. The State Govt. vide its Cabinet decision dated 21.12.2006, decided to restore the Project and the Respondent No. 2 informed the petitioner that in order to restore the Project, the petitioner was required to pay penalty charges of Rs.9,92,667/- and to furnish security charges amounting to Rs.1,00,000/- only.
- (c) The petitioner paid the penalty charges and deposited fresh security, and executed an Implementation Agreement dated 07.06.2007, for the Project.
- (d) The petitioner, with the Respondent No.1 (HPSEBL), filed a joint petition No. 173 of 2008 for approval of Power Purchase Agreement (PPA), for the supply of power from the Project and this Commission approved on 23.08.2008 the PPA for the sale of entire power generated from the Project at the generic tariff of Rs. 2.87 per kWh in terms of RE Regulations, 2007, but the PPA was never executed by the petitioner.
- (e) The petitioner could not again commission the Project within the time frame, which was committed by way of the IA dated 07.06.2007, as well as the approved unsigned PPA. The IA dated 07.06.2007 was cancelled by the State Govt. and the security of Rs.1,00,000/- deposited by the petitioner was forfeited. The Respondent No. 2 issued the Termination Order on 11.11.2011.
- (f) The petitioner vide its letter dated 12.02.2014, informed the Principal Secretary (NES) Govt. of HP (i.e. Respondent No.4) and the HIMURJA i.e. the Respondent No.2 the requisite statutory approvals are in place and the unwarranted delays in the acquisition of private land is due to the demand of un-reasonable compensation by the land owners. The petitioner reiterated its strong commitment towards commissioning of the project and thereby requested to cancel the termination Order and also agreed to deposit the penalty @ Rs.10,000/- per MW per month from 07.06.2008 till date and also engaged local influential residents of the project site, with experience in civil construction with regard the Hydro Projects.

- (g) HIMURJA through a letter dated 08.07.2014 informed the petitioner that the Council of Ministers vide its decision dated 25.06.2014 have decided to restore the project subject to fulfillment of certain conditions. The petitioner fulfilled the conditions specified in the aforesaid order and executed an Implementation Agreement dated 31.05.2016, with the State Govt.
- (h) Per averments of the petitioner the IA dated 31.05.2016 is not in the continuation of the earlier IAs dated 16.05.2001 and 07.06.2007, and is a new IA executed with the revised royalty and LADF Clauses.
- (i) The petitioner also executed the Supplementary Implementation Agreement (SIA) dated 04.08.2016 for change in name from M/s Gehra Hydro Power Limited to M/s Gehra Hydro Power Private Ltd.
- (j) On 10.11.2018 and 20.11.2018, the petitioner requested the Respondent Board for a fresh Long Term Power Purchase Agreement and on 25.03.2019 the Respondent Board informed the petitioner that the Commission has already approved the tariff @ Rs.2.87 per unit vide Order dated 23.08.2008 in petition No. 173 of 2008, subject to the RE Regulations, 2007 and the SHP Order dated 18.12.2007 and advised the petitioner for filing the petition for condonation of delay in execution of the PPA already approved by the Commission.
- (k) The petitioner informed the Respondent Board that earlier IAs dated 16.05.2001 and 07.06.2007 stand terminated and new IA/SIA stand executed. Hence the PPA is required to be executed on the basis of IA dated 31.05.2016 and RE Regulations, 2017 and also per the revised construction schedule, whereunder the construction work was to start from July, 2019 and the Project was expected to be commissioned in December, 2020.
- (l) The petitioner by the instant petition alleges the abuse of dominant position by the Respondent Board as it is compelling the petitioner to execute a PPA at a tariff @ Rs.2.87 per Unit, for the power to be supplied from the project. The tariff of Rs. 2.87 per Unit or Rs.2.95/Unit, determined under RE Regulations, 2007, would cause grave injustice to the petitioner and the project will not be financially viable for the petitioner. A new PPA has to be executed in terms of IA dated 31.05.2016 and by following the principles enunciated under section 62 of the Electricity Act, 2003.

In view of the facts mentioned hereinbefore, the petitioner approached this Commission-

- (a) to direct the Respondent Board to execute a fresh Power of Purchase Agreement with the petitioner for the supply of power from the Project;
- (b) to approve the tariff of project, in terms of section 62 of the Electricity Act, 2003 and the RE Regulations, 2017; and
- (c) to pass the order, as the Commission may deem fit and proper under the facts and circumstances of this case.

4. At the admission stage the Shri Surinder Saklani, the Counsel of the Respondent Board, objected the maintainability of the petition stating that the State Govt., which has cancelled and restored the IAs executed by the petitioner in this case, from time to time and is a necessary party, has not been impleaded as a Respondent in this matter. The Commission, therefore, ordered the petitioner to implead the State Govt. as a party in this petition and the respondents to file their response to the petition.

5. In response to the petition, the Respondent No.1, i.e. HPSEBL submits that as the petition is bereft of the merits it deserves to be dismissed stating that-

- (a) The Govt. of HP, in accordance with the Policy Guidelines of the Govt. of India, entered into MOU on 16.11.1996 with the petitioner to carry out a detailed investigation of M/s Gehra Hydro Electric Project of 2.00MW capacity on Gehra Khad, in Distt. Chamba and pursuant to the said MOU the petitioner executed the Implementation Agreement (IA) dated 16.05.2001 with the State Govt. Thereafter various communications were exchanged between the parties regarding the signing of the PPA. The said IA dated 16.05.2001 was cancelled by the Govt. of HP and on the basis of the representation of the petitioner, the cancelled IA was restored. Another IA for the same Project was signed on 07.06.2007, between the same parties, on the restoration of the project by depositing the penalties applicable, where under 6th December, 2009 was fixed as the Scheduled Commercial Operation Date of the project.
- (b) On the joint petition No. 173 of 2008, for the approval of the PPA as required under section 86 (1) (b) of the Electricity Act, 2003, the Commission approved the PPA vide its Order dated 23.08.2008 with the tariff of Rs. 2.87

per kWh in terms of RE Regulations, 2007. Article 6.2 of the approved PPA fixed the tariff of Rs.2.87 per kWh without indexation and escalation. But for the reasons best known to him, the petitioner never came up to the Respondent Board to execute the approved PPA.

- (c) The project was again cancelled by the State Govt. in the year 2013 and security deposited was forfeited. The petitioner again represented to the State Govt. on 12.02.2014 for the revival of the Project. The Council of Ministers vide its decision on 25.06.2014 decided to restore the Project to the same party. The IA dated 31.05.2016 was signed subject to the submission of penalty/extension Charges w.e.f. 06.06.2008 to 05.07.2014 amounting to Rs. 14.60 lakhs.
- (d) It is absolutely wrong to allege that on the termination of the IA dated 07.06.2007, the PPA dated 23.08.2008 has become null and void. The fact of the matter is that on the omission of the petitioner to execute the Project, the State Govt. was compelled to terminate the IA with the forfeiture of the security and on the petitioner's request, the Govt. restored the project by levying penalty.
- (e) The IA dated 31.05.2016 does not mechanically mean the project is allotted denovo. It is the revival of the Project with a certain set of terms and conditions set forth in the IA. The revival of the project by the GoHP to the petitioner is not the *ipso facts* allotment of the fresh projects to the new proponent. As the parties are the same to whom originally the project was allotted in the year 1996, wherein the GoHP had signed MOU and subsequently signed IAs in the year of 2001 and 2007. Hence, the termination Clause of the PPA on the termination of IA is not applicable in the present case. The project stands revived to the petitioner.
- (f) The issue of the approval of the PPA by the Commission is not *res Integra* and this Commission in the matter of the **Batot Hydro Vs. HPSEBL, in Review Petition No. 20 of 2013 decided on 18.06.2013** held as under:-

“16. Approval of the PPA is neither a mechanical process nor it is a rubber stamping of the proposed contract, the Commission has to apply its mind from the point of factual, technical and legal prudence and to decide with reasons in a speaking manner.”

- (g) The petitioner is leveling baseless allegations on the Respondent Board qua the abuse of its dominant position. The Respondent Board has never abused its dominant position. It is a regulated entity under the Himachal Pradesh Electricity Regulatory Commission and the Regulations framed by the Commission are applicable to the Respondent Board in toto. The Respondent Board cannot act in violation of Regulations framed by the Commission. The Commission has approved the PPA and according to Clause 6.2 of the PPA tariff @ Rs.2.87 per kWh was fixed. Hence it is incorrect to allege that the Respondent Board is abusing its position. Further, it is incorrect to say that the tariff @ Rs. 2.87 per kWh was fixed in accordance with the RE Regulations, 2007 and the same is not applicable to the petitioner's project. The conduct of the Respondent Board is very much legal, non-arbitrary and reasonable one and its every action is in conformity with the Regulations framed by the Commission, from time to time, and the insistence of the Respondent Board to sign the long term PPA in terms of the RE Regulations, 2007, are bona fide one and cannot be termed as arbitrary or against the principle of natural justice.

6. In the rejoinder to the reply filed by the Respondent No.1, i.e. HPSEBL, the petitioner submits that-

- (a) From the bare perusal of the Clauses 12.1, 13.1, 19.1 and 19.2 of the IA dated 31.05.2016, it can be seen that there has been a novation of the contract. The IA dated 31.05.2016 provides for the charges not contemplated in the IAs dated 16.05.2001 and 07.06.2007. Therefore, the Model PPA and tariff approved under the cancelled/terminated IAs cannot be now adopted for the Project being developed under IA dated 31.05.2016. The mere fact that the parties and project in the IA are common, does not make the IA dated 16.05.2016 a reiteration of the previous IAs.
- (b) The Respondent No.1, i.e. HPSEBL is misrepresenting the restoration of the Implementation Agreement. The RE Regulations, 2007 has been repealed and replaced by the RE Regulations, 2012 which were further repealed and replaced by the RE Regulations, 2017. The tariff of Rs. 2.87 per Unit or Rs. 2.95 per unit, determined under the RE Regulations, 2007, to a project expected to be commissioned in the year 2020, would cause grave injustice

to the petitioner and the project would not be financially viable for the petitioner. A new PPA has to be executed between the petitioner and the Respondent No.1, in terms of the IA dated 31.05.2016 and by following the principles enshrined under section 62 of the Electricity Act, 2003.

- (c) The reliance placed by Respondent No.1 upon the Order dated 18.06.2013 passed by this Commission, in Review Petition No. 20 of 2013, in the case of Batot Hydro Power Ltd. is entirely misplaced. The facts of the Batot case are entirely different from the present case. In that case, no new IA was executed. The Generating Company executed a short-term PPA with the HPSEBL under the RE mechanism for few years, which is not the case here. Further, the Order passed by the Commission was partly set aside by the Hon'ble APTEL in its Order dated 30.11.2014 passed in Appeal No. 318 of 2013. The Hon'ble Tribunal in that case in fact held that the State Commission has to determine the tariff according to the principles laid down under section 61 of the Electricity Act, 2003 and in accordance with the Tariff Regulations. The APTEL decision dated 30.11.2014 is now pending before the Hon'ble Supreme Court of India.
- (d) The PPA approved by the Commission for the petitioner's project in the year 2008, was on the basis of the IA dated 07.06.2007 and in terms of Regulations, 2007. The new applicable and effective IA i.e. IA dated 31.05.2016 is all together with a fresh IA and fresh PPA is required to be executed in accordance with the said IA and the RE Regulations, 2017.
- (e) The Respondent No.1 is abusing its dominant position by insisting on the tariff of Rs. 2.87 per kWh is applicable to the petitioner's project.
- (f) The Respondent No.1 has merely denied the contentions of the petitioner (in paras 2, 7, 8.4 to 8.8, 8.12 to 8.14) without providing any elaborated response and justification of the same. The Respondent No.1 is not executing a fresh PPA in consonance with the IA dated 31.05.2016 and RE Regulations, 2017 and is acting arbitrarily in abuse of its dominant power.
- (g) The Respondent No.1, being a regulated entity under the Himachal Pradesh Electricity Regulatory Commission is itself acting contrary to the fundamental principles of determination of tariff as envisaged under the

Electricity Act, 2003. Despite the new IA of 2016 insistence upon the tariff determined in the year 2008, is itself against the very notion of determination of balanced and reasonable tariff.

- (h) The Model unsigned PPA, with the tariff of Rs.2.87, as approved by the Commission by the Order dated 23.08.2008, was based on the IA dated 07.06.2007, has become infructuous w.r.t. the petitioner's project, since a new and fresh IA has been executed between the petitioner and the State Govt. which is neither a modification nor is a continuation of the previously executed IAs, as the terms and clauses in the fresh IA put the additional financial burden on the petitioner.

7. In the short reply dated 04.03.2020, the Respondents No. 2 and 4, submit that the Petitioner is required to execute the PPA as agreed upon in the IA, executed between the petitioner and the GoHP. The PPA is required to be executed between the petitioner and the Respondent No. 1 i.e. HPSEBL independently and as per law. The Respondents No. 2 and 4 are not parties to the PPA and have no role to play in the execution of the same. Hence they are not necessary parties in the petition.

8. Subsequently Sh. Atul Kumar, vice Sh. Nipun Sharma, Advocate appearing for the Respondent No.2 (HIMURJA) and Respondent No.4 i.e. the State Govt. prayed for the leave to file the detailed reply. The Commission vide its Interim Order dated 07.03.2020, followed by the interim Order dated 30.07.2020, granted the prayer to file the detailed reply/Supplementary Affidavit.

9. The Respondent Nos. 2 and 4 filed the Supplementary reply stating-

- (i) that the HIMURJA (Respondent No.2), is a State Nodal Agency to handle the private participation in the development of State's small hydro potential up to 5.00MW and to promote utilization of renewable energy. In 2006 the State Government formulated the processes and mechanism that govern Private Sector involvement in electricity production by notifying the Hydro Power Policy. The HIMURJA plays a central role in this process by allocating identified and self identified Small Hydro Power Project sites in Private Sector. After receiving allotted project sites, the Private Investor has to sign a Memorandum of Understanding (MoU) with the State Government. Thereafter the project developer has to prepare a Detailed Project Report (DPR) and Techno-Economic Clearance (TEC) for the DPR is accorded by

the HPSEBL (now DoE). After according to TEC, an Implementation Agreement is signed by the project developer with the Government. Thereafter, the project developer starts the process for securing the required statutory/non-statutory clearances and has to start the construction activities within six months from the date of signing of IA after obtaining the required NOCs/Clearances from concerned departments;

- (ii) that the Government of Himachal Pradesh in accordance with the policy guidelines of the Government of India had entered into Memorandum of Understanding (MOU) on 16.11.1996 with the petitioner to carry out detailed investigations of the Gehra Hydro Electric Project 2.0 MW capacity, located on Gehra Khad in Distt. Chamba, Himachal Pradesh. Pursuant to the MOU, an Implementation Agreement dated 16.05.2001 stands executed between the Government of Himachal Pradesh and the petitioner. The said IA dated 16.05.2001 was cancelled by the Government of Himachal Pradesh and on the basis of the representations of the petitioner, the same was restored by the Govt. vide letter NES-A(4)/2006 dated 04.01.2007. Another IA was signed on 07.06.2007 for the same project with the same party on the restoration of the project after depositing the penalties as applicable. As per the approved construction schedule, the project was to be commissioned by 6th December, 2009. The project was again cancelled by the State Government vide letter No. NES-F(2)-6/2013 dated 31.10.2013 and security charges amounting Rs. 1.00 lakh of the project were forfeited. However, it is relevant to submit here that the petitioner again approached the Govt. of HP and in pursuance to the revival request of the petitioner, the matter was taken up in the Council of Ministers meeting dated 25.06.2014 and the Council of Ministers had taken the decision for the restoration of 2.00 MW Project and accorded in principle approval vide letter No. NES-F (2)-26/2006 dated 30.06.2014. Therefore, on the restoration of the project to the same party, IA dated 31.05.2016 was signed between the Govt. of HP through the Special Secretary (NES) to the Govt. of HP-cum-CEO, HIMURJA and M/s Gehra Hydro Power Ltd. subject to the submission of penalty/extension charges w.e.f. 06.06.2008 to 05.07.2014 amounting Rs. 14.60 lakhs;
- (iii) that so far as PPA is concerned the same has to be executed between the Developer and HPSEBL and the Respondents No. 2 and 4 have never

received any communication about the same from the petitioner. The PPA is required to be executed between the petitioner and the Respondent No. 1 i.e. HPSEBL independently and as per law and the Respondents No. 2 and 4 have no role to play in the execution of the same.

10. In the rejoinder the Petitioner disputes and denies all averments, contentions and allegations made by the Respondent Nos. 2 and 4 in their reply and supplementary affidavit, stating that-

- (a) The Respondent Nos. 2 and 4, in their reply dated 04.03.2020, have agreed with the stand of the petitioner and have admitted that the petitioner and the HPSEBL are required to execute a PPA as per the terms and conditions of the IA dated 31.05.2016 executed between the petitioner and Govt. of HP;
- (b) The Respondent Nos. 2 and 4 in their Supplementary Affidavit dated 25.08. 2020, have agreed with the stand of the petitioner and have admitted that the PPA is required to be executed between the petitioner and the HPSEBL. However, the Respondents Nos. 2 and 4 have contended that they have never received any communication regarding the PPA from the petitioner. It is incorrect and wrong that they have never received any communication regarding the PPA from the petitioner. The Order dated 23.08.2008 passed by the Commission in Petition No. 173 of 2008 is available on the website of the Commission. The petitioner in all meetings of the monitoring Committee for the Projects duly informed the Respondent No. 2 regarding the status of approvals/clearances obtained for the Project. The petitioner by its letter dated 04.06.2009 submitted the progress report for the period from 01.05.2009 to 31.05.2009, wherein the fact of the model PPA was specifically mentioned. The PPA approval order also finds mentioned in the letter dated 20.02.2009 sent by the petitioner to the Respondent No. 2. The Petitioner also by its letter dated 12.02.2014, informed Respondents No. 2 and 4, regarding the clearances and approvals obtained by the developer for the period. Furthermore, in a letter dated 11.02.2019, the Respondent No. 2 itself noted the request of the Petitioner for the execution of a fresh PPA, in terms of the current Regulations and sought the latest status of the project since, 31.05.2016, i.e after the execution of the fresh IA with the GoHP.

The petitioner vide its letters dated 20.11.2018 and 02.05.2019 informed the Respondent No. 4 regarding the approval of the model PPA, by the Commission and its consequential termination by virtue of the termination of the IA dated 07.06.2007 (Clause 10.7.3). The petitioner accordingly sought the support of the Respondent No.4 for the execution of a fresh PPA with the HPSEBL. In 2014, the petitioner once again approached the GoHP with the request to revive the project, and the project was restored. The petitioner had entered into a new and fresh IA on 31.05.2016 and thereafter SIA on 04.08.2016 with the GoHP; the petitioner by letters dated 20.06.2019 and 02.10.2019 informed the Respondent No.2 regarding the issues faced by it for the execution of a fresh PPA with HPSEBL;

- (c) the Respondent Nos. 2 and 4, in their reply and supplementary affidavit, have not denied that there has been a novation of the Contract. The IA dated 31.05.2016 is neither an extension nor modification of IA dated 07.06.2007, as the Clauses incised in both the IAs are different and unique to each other. A bare perusal of the IA dated 31.05.2016 demonstrates beyond doubt that it is a fresh agreement and not a restoration of the IAs dated 16.05.2001 and 07.06.2007. Therefore, the model PPA and the tariff approved under the cancelled /terminated IAs cannot be now adopted for the Project developed under IA dated 31.05.2016.

11. The Respondent No.1, the HPSEBL, has filed the sur-rejoinder/reply to the rejoinder filed by the petitioner to the reply and supplementary Affidavit by Respondents No. 2 and 4, and refutes and denies the contentions of the petitioner in toto. The Respondent No.1 submits-

- (a) that M/s Gehra 2.0 MW SHEP was restored as per the Cabinet decision dated 25.06.2014, subject to the submission of penalty/extension charges w.e.f. 07.06.2008 to 05.07.2014 amounting to Rs. 14.60 Lac. The IA dated 31.05.2016 is explicitly clear that the Project was restored and not allotted afresh to the petitioner;
- (b) that it is specifically denied that the Respondents Nos. 2 and 4 in their reply have admitted or agreed with the stand of the petitioner qua the execution of the fresh PPA. The PPA was approved by the Commission on the joint petition filed by the petitioner and the HPSEBL and with no stretch of the

imagination, it can be said that the approval of PPA is either a mechanical process or it is a mere rubber stamping of the proposed contract. Hence the terms and conditions of the PPA already approved vide Commission's Order dated 23.08.2008 are applicable to this Project;

- (c) that it is admitted case of the petitioner that the PPA was approved by the Commission and duly communicated to the parties concerned. The copy of the approved PPA had been supplied to the Respondent Nos. 2 and 4 for their reference and record;
- (d) that it is denied that on the signing of the IA dated 31.05.2016, the PPA duly approved by the Commission on 23.08.2008 lost its relevance. The project was restored at the cost of penalty/extension charges, fresh PPA cannot be executed between the HPSEBL and the petitioner. Furthermore, it is the admission on the part of the petitioner that in 2014, the petitioner once again approached the GoHP, with the request to revive the project and the project was restored accordingly;
- (e) that the Respondents No. 2 and 4 have categorically stated in their reply and supplementary affidavit for the execution of PPA between the HPSEBL and the petitioner, the appropriate course of action in accordance with law is to be adopted. The Petitioner is trying to mislead the Commission on this issue;
- (f) the present is the case of revival/restoration of the project and terms and conditions of the approved PPA dated 23.08.2008 are fully applicable.

12. With the background, as delineated in the foregoing paragraphs, the main issues which have arisen for our consideration and determination are:-

- (i) Whether the IA dated 31.05.2016 is in the continuation of the earlier IAs dated 16.5.2001 and 7.06.2007 or a fresh IA has been executed with the same party without making a fresh allotment?
- (ii) Whether after the termination of the original IA, the PPA approved is still binding?

Both these issues being interlinked are taken up together.

13. Sufficient opportunity has been given to the parties to address, in extenso, the issues involved in this case. Ms. Shikha Ohri, the Learned Senior Counsel for the petitioner has advanced arguments and has made written submissions, in support of her contentions. Per contra Sh. Kamlesh Saklani, representing, the HPSEBL, has also advanced the counter

arguments /written submissions. This Commission, while determining the issues involved, has taken into consideration. The said submissions and counter submissions, in the relevant subsequent paras of this Order.

14. During the hearing of this case, Ms. Shikha Ohri, the Learned Senior Advocate, appearing for the petitioner reiterates, by and large, the submissions made in the petition and the rejoinder to the reply filed on behalf of the respondents. She submits that the present petition has been moved seeking a direction to the Respondent Board to execute a fresh PPA with the petitioner in terms of the Implementation Agreement dated 31.05.2016 and for determination of tariff in terms of Section 62 of the Electricity Act, 2003, read with the RE Regulations, 2017.

15. Ms. Shikha Ohri Advocate, in support of the petition, states that-

- (a) Initially IA dated 16.05.2001 was executed by the petitioner with the State Govt. for setting up a 2.0 MW Ghera HEP in Chamba Distt. on account of uncontrollable and unforeseeable events, the petitioner was not able to commission the project within the timeframe provided in the IA and the State Govt. terminated the aforesaid IA. Thereafter, on the request of the petitioner, the State Govt. cancelled the Termination Order and restored the project on 20.12.2006, subject to the payment of the penalty of Rs. 9,92,667/- and furnishing the fresh security of Rs.1,00,000/-. The petitioner paid the penalty and furnished the fresh security and executed IA dated 07.06.2007, in accordance with the new Hydro State Policy with the provisions for the payment of the royalty on water usages, in the shape of the free power to the State Govt.
- (b) Pursuant to the IA dated 07.06.2007, the petitioner and the Respondent Board filed a joint petition No. 173 of 2008 for the approval of the PPA and the Commission accorded its approval on 28.03.2008, in terms of the IA 07.06.2007 and fixed the tariff @ Rs.2.87/kWh in terms of the Regulation 6 of RE Regulations of 2007. Clause 10.7.3 of the undated and unsigned PPA, as approved by the Commission, stipulated that "*the Agreement shall get terminated in the event of termination of the IA, without any liability to either party on this account*".
- (c) Although the petitioner was committed to commissioning the project within the stipulated time frame, however, on account of various uncontrollable events, the petitioner could not commission the project. The IA dated

07.06.2007 was terminated vide Order dated 11.11.2013, thereby cancelling the allotment of the project and forfeited the security amount deposited by the petitioner. Hence in terms of Clause 10.7.3 of the unsigned PPA, the PPA stands terminated on the termination of the IA dated 07.06.2007.

(d) Keeping in view the fact that the petitioner had already obtained the requisite clearances/approvals, the petitioner reiterated its strong commitment towards commissioning of the project and requested the State Govt. to cancel the termination Order dated 11.11.2013 and also agreed to pay penalty @ Rs. 10,000 per MW per month from 07.06.2008 till date. The State Govt. restored the projects on 25.06.2014, subject to the fulfillment of certain conditions. The petitioner in compliance with the conditions imposed, executed the IA dated 31.05.2016.

(e) The IA dated 31.05.2016 is not in the continuation of the earlier IAs dated 16.05.2001 and 07.06.2007, but is altogether a fresh IA, for the reason that-

(i) in the IA dated 31.05.2016, the State Govt. recognized that a new PPA was to be executed in terms of the new IA, the Clause 2.1(p) of which, reads as under:-

“(p) Power Purchase /Wheeling Agreements” shall mean the agreement(s) to be signed between the second party and HPPTCL/concerned parties, as per Clauses 12.3 and 12.4 hereunder.”

This position has also been affirmed by the State Govt. and HIMURJA in their reply dated 04.03.2020;

(ii) perusal of the IA of 2016, demonstrates beyond doubt that it is a fresh agreement and not a mere reiteration of the IAs dated 16.05.2001 and 07.06.2007 and provides for additional liabilities as-

(1) Clause 12.1 of the IA of 2016, is at variance with Clause 13.1 of the IA dated 2007 and provides for 2% royalty on water usage, in the shape of free power levied for a period of 12 years; and 12% beyond 12 years for next 18 years and 18% beyond 18 years;

(2) under Clause 19.1 of the IA of 2016, 1% of the project cost is to be contributed to the LADF; and Clause 19.2, 1% of the free power is to be provided towards LADF.

(f) The PPA and tariff approved under the cancelled/terminated IAs cannot be now adopted for the project being developed under the IA dated 31.05.2016.

The tariff of Rs. 2.87/ per unit or Rs. 2.95 per unit, determined under the RE Regulations of 2007, would cause grave injustice to the petitioner and the project shall be financially unviable for the petitioner. A new PPA has to be executed between the petitioner and the Respondent Board, in terms of the IA dated 31.05.2016 and by following the principles enshrined under Section 62 of the Electricity Act, 2003.

- (g) The reliance of the Respondent Board on the Order dated 18.06.2013 passed in the Review Petition No. 20 of 2013, i.e. the Batot Hydro case, is entirely misplaced, as the facts of that case are entirely different from the present case. In the Batot case, no new IA was executed and the generating Company executed a short term PPA under the REC Mechanism for a few years, which is not the case here. Further, the Commission Order dated 18.06.2013, has been partly set aside by the Hon'ble APTEL by an Order dated 30.11.2014 holding that the State Commission has to determine the tariff according to the principles laid down under Section 61 of the Electricity Act, 2003 and in accordance with the tariff Regulations.
- (h) The mere fact that the parties and the project in the IA are common, does not make the IA dated 31.05.2016, a reiteration of the previous IAs.
- (i) Under the Electricity Act, 2003, the tariff can be determined by only two modes (i) Cost Plus (Section 62) and (ii) the tariff based on competitive bidding (Section 63). Thus under no circumstances, the tariff which was determined in 2007 under the repealed RE Regulations can be made applicable to a Project being set-up in 2019; as on account of inflation and escalation in the market rates, as well as the development of the technologies, the cost of the project has increased at a tremendous rate. Therefore, to ensure the economic viability of the project, it is necessary to execute a fresh PPA and approve a new tariff in accordance with the provisions of the Electricity Act, 2003 and the regulations framed thereunder.
- (j) Irrespective of a generic tariff offer, a project developer retains the right to request for determination of a project specific tariff in terms of Section 62 of the Electricity Act, 2003. As the Hon'ble Tribunal, vide its judgment dated 18.09.2009 rendered in **Tech-man Infra Ltd. Vs. H.P. Electricity Regulatory Commission and others (Appeal Nos. 50 & 65 of 2008)** has held that for a tariff to be a balanced tariff, the Commission is required to

balance the efficient and economic development of renewable energy with the interest of Consumers as well as fairness to investors.

In view of the above Ms. Shikha Ohri, Learned Advocate for the petitioner, prays for the grant of reliefs as prayed for in the petition.

16. Per contra Sh. Kamlesh Saklani, representing Respondent No.1 i.e. HPSEBL, strongly refutes the arguments put forth on behalf of the petitioner and submits that, keeping in view of the following factual background, there is no merit in the present case and the same deserves to be dismissed for reasons that-

- (a) in accordance with the policy guidelines of the Govt. of India, the State Govt. entered into an MOU on 16.11.1996 with the petitioner to carry out investigations of the Ghera HEP of 2.00 MW and executed IA dated 16.05.2001. Thereafter, various communications were exchanged in between the parties regarding the signing of the PPA. The IA dated 16.05.2001 was cancelled by the GoHP and on the basis of the representations of the petitioner, the same was restored on 27.01.2007. The IA dated 07.06.2007 was signed for the same project, with the same parties, subject to payment of the penalties as applicable for the project, wherein 6th December, 2009 was fixed as the Scheduled Commercial Operation Date.
- (b) The petitioner had submitted all the necessary documents for the signing of the PPA and joint petition No. 173 of 2008, for this purpose was filed for the approval of the PPA under Section 86 (1) (b) of the Electricity Act, 2003 and this Commission accorded its approval on 23.08.2008. Article 6 of the approved PPA deals with the sale and purchase of the energy and according to Article 6.2 tariff @ Rs. 2.87 paise /kWh was fixed without indexation and escalation.
- (c) The Respondent Board, after the approval of the PPA, made various communications with the petitioner qua signing of the PPA in terms of the approval accorded under the prevalent Regulations, but the petitioner, for the reasons best known to him, never came up to the Respondent Board to execute the PPA. Keeping in view the conduct of the petitioner the IA dated 07.06.2007 was cancelled in the year 2013 and security deposited was forfeited.

- (d) The petitioner again approached the State Govt. vide its letter dated 12.02.2014 for the revival of the project, the relevant extract of which is as under:-

“so we request you to cancel the termination Order issued by the above referred letter and we are ready to deposit the extension fee @ Rs. 10,000/- p. MW per month from 07.06.2008 till date.

In this regard, Mr. Shailender Thakur will personally meet you and explain on the revival plan being undertaken by both of us in implementing this project.

In view of the above, we again reiterate our strong commitment, willingness as also sincerity to start the construction activities and successfully set up the Gehra SHP on canceling the Termination Order.”

- (e) In pursuant to the revival request of the petitioner, the GoHP in the Council of Ministries meeting held on 25.06.2014 decided to restore the project to the petitioner i.e. the same party. Subject to the submission of penalty/extension charges w.e.f. 06.06.2008 to 05.07.2014 amounting to Rs. 14.60 lacs. So on the restoration of the project, the IA dated 31.05.2016 was signed.
- (f) The revival of the project by GoHP to the petitioner is not the *ipso-facto* allotment of the fresh project, as the parties are the same to whom the originally the project was allotted in the year 1996, wherein the GoHP had signed MOU and subsequently, signed IAs in the year of 2001 and 2007. Hence the clause of the termination of the PPA on the termination of the IAs not applicable in the present case.
- (g) The issue of the approval of the PPA by the Commission is not res-Integra and this Commission in the matter of the **Batot Hydro Versus HPSEBL in Review Petition No. 20 of 2013 decided on 18.06.2013** held that-
- “16. Approval of the PPA is neither a mechanical process nor it is a rubber stamping of the proposed contract. The Commission has to apply its mind from the point of view of factual, technical and legal prudence and to decide with reasons with a speaking manner.”*
- (h) The arguments of the petitioner, regarding the affirmation of the GoHP / HIMURJA qua the signing of PPA, under the current regulations are misplaced and misconceived. The GoHP/HIMURJA has categorically stated that the PPA is required to be executed between the petitioner and HPSEBL strictly in accordance with the law.

- (i) Since the Commission has accorded approval to the PPA under RE Regulations, 2007, terms and conditions of the said regulations are applicable to the present project. The Regulations framed by the Commission under the Electricity Act, 2003 are binding not only on the parties but also upon the Regulatory Commission itself. Regulation 3 of the HPERC (Promotion of Generation from Renewable Energy Sources and Terms and Conditions of Tariff Determination) Regulations, 2012 provides for the scope and application of the said Regulations. Sub-regulation (3)(b) of regulation 3 of RE Regulations, 2012 reads as under:-

“ 3 Scope and extent of application.-

xxx xxxx xxx xxx

(3)Notwithstanding anything contained in sub-regulations(1)and(2)-

(a) xxx xxx xxx xxx

(b) where after the setting up of the Commission, the power purchase agreement has been approved by the Commission prior to the commencement of these regulations, the tariff shall be in accordance with the terms and conditions of such approved power purchase agreement read with the Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Cogeneration by Distribution Licensee), Regulations,2007, irrespective of the date on which such agreement is actually signed.

Similar Clause has been inserted in the RE Regulations, 2017, which reads as under:-

“3. Scope and extent of application.—(1) xxx xxxx xxx

(2) These regulations shall not apply in the following cases:-

- (i) where long term agreements for disposal/use of energy have either already been signed by the renewable energy generators or have been approved by the Commission, or the joint petitions for the approval of the Power Purchase Agreements have been filed before the Commission, prior to the date of commencement of these Regulations:*

From the afore mentioned provisions, it is clear that the terms and conditions of the PPA, as has already been approved by the Commission on 23.08.2008, whereby the tariff @ Rs. 2.87 kWh was granted is applicable to the petitioner's project.

- (j) The Hon’ble Apex Court, vide its judgment rendered in **All India Power Engineer Federation Vs. Sassan Power (2017)1 SCC 487**, the emphasis that while determining the tariff, the protection of the Consumer interest is to

be kept in view, as the Consumer is one who is ultimately at the receiving end.

- (k) In the present case the conduct of the petitioner, itself had been attributable to the delay in non-implementation of the project. The Hon'ble Apex Court in the case **Keshav Prasad Singh Versus State of Bihar (2007) 11 SCC 447** has held that party at default wrong cannot be permitted to take advantage of its own wrong/fault to get the order in its favor.
- (l) In the facts and circumstances mentioned herein before, there are no merits in the present petition, the same needs to be dismissed.

17. We, in view of the foregoing discussion and submissions made, arguments addressed, the decisions/ judgments cited on behalf of the Petitioner and the Respondents and after considering the pleadings and various issues raised therein by the parties, proceed to consider and decide on merits, that:-

- (a) it is amply clear that admittedly IAs dated 16.05.2001 and 07.06.2007 were terminated due to the reason that the Petitioner, though committed to commissioning of the project within the stipulated timeframe, failed to start construction activities to set up 2MW Ghera SHEP and on the basis of his representations the project was restored, subject to the payment of the penalties and forfeiting of the security amount already deposited by him. As the Petitioner has failed to abide by the construction schedule, the construction schedule had to be re-fixed and marginal changes had to be made in conformity with the prevalent State Hydro Policy/Regulations in force. Further, letter dated 12.02.2014 addressed by the petitioner to the State Govt., containing the request for the revival of the projects, specifically mentioned in clear terms that the Petitioner undertook to pay extension fee @ Rs.10,000 per MW per month w.e.f. from 07.06.2008 till date and also reiterated his strong commitment, willingness, as well as the sincerity to start the construction activities and to successfully set up the project on cancellation of the termination orders. The State Govt. vide its letter dated 08.07.2014 restored the cancellation of Gehra (2MW) SHEP to the original allottee subject to certain conditions. Allotment of the project by the State Govt., was not a fresh. Hence, the IA dated 31.05.2016 cannot be treated a fresh and new IA executed on the allotment of a new project, as contemplated by the Petitioner and allotment of the project was not a fresh.

- (b) The Commission has accorded its approval to the PPA under the RE Regulations, 2007, formulated as per the Electricity Act, 2003 and the terms and conditions of the said regulations are applicable to the present project. The Petitioner submitted all the necessary documents to the HPSEBL and filed a Joint Petition No. 173 of 2008 for the approval of the PPA and the Commission accorded its approval on 23.08.2008. After approval of the PPA the Petitioner, despite the exchange of various communications addressed by the HPSEBL, never came up to execute the PPA, in terms of the approval accorded by the Commission. The approval of the PPA is neither a mechanical process nor it is a rubber stamping of the proposed contract. The Commission, while according its approval had to apply its mind from the point of view of the factual technical and legal prudence. Moreover, the Order dated 30.11.2014 passed by the Hon'ble APTEL partly setting aside the Commission Order dated 18.06.2013 passed in Review Petition No. 20 of 2013 i.e. in the Batot Hydro case and holding that the State Commission has to determine the Tariff according to the principles laid down under section 61 of the Electricity Act, 2003 and in accordance with the Tariff Regulations, stand challenged by way of an Appeal filed by the HPSEBL, which is still pending for adjudication before the Hon'ble Supreme Court.
- (c) Regarding the alleged affirmation of the GoHP/ HIMURJA qua the signing of the PPA, under the current regulations and in terms of the IA dated 31.05.2016, we observe that keeping in view of the facts that the PPA, as required to be executed in accordance with the approval accorded under section 86 (1) (b) of the Electricity Act, 2003, is still to be signed and executed by the parties, the GoHP/ HIMURJA has accordingly submitted that the PPA is required to be executed in accordance with the law.
- (d) The Commission has accorded its approval under the RE Regulations, 2007 and the terms and conditions of the said approval are applicable to the Petitioner's project for the reason that Regulation 3 of the RE Regulations, 2012 and Regulation 3 of the RE Regulations, 2017, provides, where the PPA has been approved by the Commission prior to the commencement of the aforesaid regulations, the tariff shall be in accordance with the terms and conditions of the approved PPA, read with RE Regulations, 2007.

- (e) On the request of the Petitioner, the termination orders of the IAs were cancelled by the Govt. of HP and the project stood revived and restored on the fulfillment of the conditions and the payments of the penalty, subject to which the IAs termination orders were cancelled. Hence, the question of termination of the approved PPA under its Clause 10.7.3 does not arise. The allotment of the project was not a fresh.
- (f) The project stood revived and restored to the same party to whom the project was originally allotted in the year 1996, where after the GoHP had signed the MoU and subsequently signed the IAs in the year 2001 and 2007, of course with the revised construction schedule and realigning the provision with the prevalent State Govt. Hydro Policy and Regulations in force. Thus, the revival of the project cannot be treated as a fresh allotment, rather the IA dated 31.05.2016 is in continuation of the earlier IAs dated 6.05.2001 and 07.06.2007.
- (g) In the present case, the conduct of the petitioner itself attributes to the delay in the implementation of the project and in the non-execution of the approved PPA. The Petitioner is now estoppel to claim any benefit contrary to the specific commitments or undertakings made, as the party at default/ wrong cannot be permitted to take advantage of its own wrong/ faults in its favor.
- (h) The rights and obligations of the parties flow from the terms and conditions of the PPA. Section 86 (1) (b) of the Electricity Act, 2003 empowers the State Commission to regulate the price of sale and purchase of the electricity between the generating company and the terms and conditions of the PPA cannot be set to be inviolable. Merely because in PPA, the tariff rate as per tariff order is incorporated that does not empower the Commission to vary the terms of the contract to the disadvantage of the Consumers, whose interest the Commission is bound to safeguard. The sanctity of the PPA entered into between the parties by mutual consent cannot be allowed to be breached by the decision of the State Commission. The Apex Court in its judgment rendered in **Gujrat Urja Vikas Nigam Versus Solar Semiconductor Power Corporation Pvt. Ltd. and Others (2018 ELR SC 32)** has observed that:-

“ 27. xxxx xxx xxxx xxxx xxxx
*In the present case, admittedly, the tariff incorporated in PPA
between the generating company and the distribution licensee is the*

tariff fixed by the State Regulatory Commission in exercise of its statutory powers. In such a situation it is not possible to hold that the tariff agreed by and between the parties, though finds mention in a contractual context, is the result of an act of volition of the parties which can, in no case, be altered except by mutual consent. Rather, it is a determination made in the exercise of statutory powers which got incorporated in a mutual agreement between the two parties involved.”

The Hon’ble APTEL vide its Judgment dated 28.09.2015 passed in **Appeal Nos. 198, 199, 200 and 291 of 2014-Gujarat Urja Vikas Nigam Limited Versus Green Infra Corporate Wind Power Limited and Others** held that:-

“18 (m) in PTC India v. Central Electricity Regulatory Commission (“PTC India”) and in Transmission Corporation of Andhra Pradesh Ltd. and Anr. v. Sai Renewable Power Pvt. Ltd. and Ors. (“Sai Renewable”), the Supreme Court has held that inroads into contracts entered into between the parties is to be by a regulation notified under sections 178 or 181 of the Electricity Act, and it is not open to the parties to seek variation of the contracts. In PTC India, the Supreme Court has held that the contractual terms can be intervened only by Regulations and not by orders or adjudicating exercise of the powers. In Sai Renewable, it is held that the terms of PPA are binding. The orders of this Tribunal which that Regulatory Commission can issue orders modifying the terms and conditions of the PPA are in the teeth of PTC India and Sai Renewable.”

- (i) The Tariff rate is determined under section 62 read with section 86 (1) (b) by the State Commission after taking into consideration the factors in section 61 sub-clause (a) to (i) of the Act. When the said rate, as determined by the Commission is incorporated in PPA on the request of the parties, it is a matter of contract between the parties. The State Commission, in the exercise of the powers under section 62 of the Act, may conceivably re-determine the tariff, but it cannot force either the generating companies or the licensee to enter into a contract based on such tariff nor can it vary the terms of the contract invoking inherent jurisdiction.

In view of the settled position of law, barely due to an increase in the project cost on account of inflation and escalation in the market could not be a reason for review of the PPA. However, the State Commission has the power to revise the

Tariff in concluded PPA, keeping in view the changes in the circumstances of the case which are uncontrollable and revision in Tariff is required to meet the objectives of the Electricity Act. The State Commission has the duty to incentivize the generation of electricity from renewable sources of electricity and if the renewable energy projects are facing the closure of the plant on account of abnormal circumstances, than what was envisaged by the State Commission while passing the generic tariff order applicable for a long period then the Commission could revisit to avert the closure of such plants. In such, a situation the petitioner can approach the State Commission with materials and data in support of its claims and the State Commission would consider the same after giving the opportunity of hearing to all concerned. However, in the present case, the petitioner has failed to stick to the project construction schedule inspite of the renewal of the project by the Govt. of HP.

18. In view of the above findings, it is concluded that the Implementation Agreement dated 31.05.2016 is in the continuation of the earlier Implementation Agreements dated 16.05.2001 and 07.06.2007 and has been executed with the same party to whom the project was originally allotted, without making any fresh allotment. The PPA approved by the Commission on 23.08.2008, on the request of the parties is still in force and the PPA approval is binding.

19. Before parting with this case, the Commission would like to make it clear that this matter was last heard on 22.12.2020 and as prayed by Sh. Kamlesh Saklani, representing the respondent Board, one week's time was allowed to make counter arguments in response to the written arguments made by Ms. Shikha Ohri, the Sr. Advocate for the petitioner. The said written arguments on the behalf of Respondent Board have been filed on 29.12.2020. The detailed order had to be made out and finalized after taking into consideration the aforesaid counter arguments. Despite the due diligence, the exercise in making out and procurement of this order, has taken time.

Ordered accordingly.

-Sd-
(Bhanu Pratap Singh)
Member

-Sd-
(Devendra Kumar Sharma)
Chairman