BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION
SHIMLA

In the matter of :-

M/S Gowthami Hydro Electric Company (P) Ltd.
301, Archana Arcade, St John's Road,
Secunderabad (A.P.) 500025

…Petitioner

V/s

(1) The Himachal Pradesh State Electricity Board,
through Secretary, Vidyut Bhawan, Shimla-171004

(2) The Government of Himachal Pradesh
through the Principal Secretary (MPP &Power),
Shimla.

(3) The Himachal Pradesh Energy Development Agency
(HIMURJA)
SDA Complex, Kasumpati, Shimla (H.P.) 171009
(through its Director)

… Respondents

Petition Nos. 143/2010
(Decided on 3.12.2010 and released on 17.12.2013)

CORAM
YOGESH KHANNA
CHAIRMAN

Counsels: -

for petitioners:	Sh.Ajay Vaidya, Advocate,
for respondents No.1	Sh. Ramesh Chauhan (authorized representative)
for respondents No. 2	Sh. K.S. Chauhan Dy. D.A.
for respondents No. 3	Sh. Pardeep Bhanot P.O.
Consumer Representative (u/s 94 of the Electricity Act)	-None-

Order

(Last heard on 23.10.2010 and Order reserved)

M/S Gowthami Hydro Electric Company (P) Ltd. 301, Archana Arcade, St John's Road, Secunderabad (A.P.) 500025, which is a Private Limited Company incorporated under the Companies Act, 1956, (hereinafter referred to as "the petitioner company"), executed with the Government of Himachal Pradesh, an Implementation Agreement (I.A) on 20.7.2004 to establish, operate and maintain at their cost Andhara Stage-II Small Hydro Electric Project located in Distt. Shimla (H.P.) with an installed capacity of 5.00 MW (hereinafter referred to as the "project"). Subsequently the petitioner company executed on the 30th March, 2005 a Power Purchase Agreement (in short PPA), with the Himachal Pradesh State Electricity Board (hereinafter referred to as "the Board"), stipulating that the Board shall pay for the net saleable energy delivered by the petitioner company to the Board at the inter-connection point at a fixed rate of ₹ 2.50 (rupees two and fifty paise) per kilowatt hour. Clause 15 of the PPA stipulates that the PPA can be amended only with the written consent of both the parties. In other words, the PPA contained specific stipulations to the extent that the terms of the agreement can be indisputably altered or modified with the unqualified consent of the parties to the agreement.

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

3. Subsequently the State Government has reviewed its earlier policy and formulated "Hydro Policy of Himachal Pradesh, 2006," making it obligatory for the developers to cater to stipulations such as mandatory 15% water release, Local Area Development Charges (LADC), payment of revised

compensation to fisheries and towards use of forest land etc. The new policy maintained the tariff at the rate of ₹ 2.50/kwh

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

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

> "6. Determination of tariff of electricity from renewable sources. –
>
> (1) The Commission shall, by a general or special order, determine the tariff for the purchase of energy from renewable sources and co-generation by the distribution licensee:
>
> Provided that the Commission may determine tariff-
>
> (i) by a general order, for small hydro projects not exceeding 5 MW capacity; and
>
> (ii) by a special order, for small hydro projects of more than 5 MW and not exceeding 25 MW capacity, on individual project basis:

Provided further that -

(i) where the power purchase agreement, approved prior to the commencement of these regulations, is not subject to the provisions of the Commission's regulations on power procurement from renewable sources, or

(ii) where after the approval of the power purchase agreements; there is change in the statutory laws, or rules, or the State Govt. Policy ;

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

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

(a) statutory laws;

(b) rules; or

(c) State Government Policy.

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

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

(I) Whether the Commission has power and jurisdiction to re-open the once approved Power Procurement Agreements (PPAs) voluntarily entered into by the IPPs with the HPSEB? If so, to what extent?

(II) Whether the State Government is the essential party in the proceedings for revising the concluded contracts referred to in issue No.1?

(III) Whether the agreements executed with a party having dominance over the other party to the agreement can be vitiated as void for being executed without free consent and under duress?

(IV) Whether each petition needs to be dealt with on merits separately?

9. After due consideration of the submissions made, documents produced and arguments advanced by the respective learned Counsels on behalf of the petitioners, the Commission vide its Order dated 29th Oct., 2009, passed in **Petition No. 11/2008-M/S D.S.L Hydrowatt Ltd V/s HPSEB and others** concluded that:-

(i) the Commission has the power to re-open the concluded PPAs for the purpose of incentivising the generation from non-conventional energy projects, within the framework of the Act and the regulations framed thereunder (as spelt out in para 30 of the said Order);

(ii) policy formulation is the prerogative of the State Government. By virtue of the provisions of section 108 of the Act, in the discharge of its functions, the State Commission is to be guided by such directions in the matters of policy involving public interest as the State Government may give to it. The Implementation Agreements and Power Procurement Agreements, which are based on the State Govt. Hydro Policies, are the key documents. Even though the State Electricity Regulatory Commission is the sole authority to determine the tariff, as per procedure provided for in the Act, the Power Purchase Agreements can not be re-opened, without hearing the State Government as well as the Himachal Pradesh Energy Development Agency (HIMURJA); which are the essential parties in the power procurement process;

(iii) the undue influence does not make a contract/agreement void. It only makes the contract/agreement voidable. Thus this cannot be assumed that the agreements were a result of undue influence, unless the petitioners bring on record the specific instances to prove the execution of PPAs by them under undue influence and the tariff fixed thereunder was unreasonable or unconscionable. On the basis of the generic statements alone no conclusion can be drawn that the special clause relating to generalized tariff in the PPAs should not be enforced;

(iv) each petition needs to be dealt with on merits. The Commission, can review or modify the concluded PPAs, prospectively, within the scope of the second proviso to sub-regulation (1) of regulation 6 of the regulations (ibid) to cater to the stipulations such as mandatory release of 15% water discharge, payment of revised compensation to fisheries and towards use of forest land; and the LADA charges. While revising the tariff construction cost inflationary factor need not be taken into consideration, and only the narrow area of Govt. policy changes and their impact on tariff is to be quantified prospectively.

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

discharge, payment of differential amount on account of compensation to fisheries and towards the use of forest land; and also the levy of LADA charges.

11. In the meanwhile, the Commission issued the Order dated 10.2.2010, supplementing the provisions of the SHP Order dated 18.12.2007, wherein the adjustments on account of the change in the Minimum Alternate Tax/ Income Tax and Royalty, were dealt with.

12. The petitioner Company has moved petition i.e. No. 143 of 2010 for increasing the tariff, in relation to its project i.e. Andhara State-II, Small Hydro Project set up in Shimla District, from ₹ 2.50 per unit. The State Government of H.P. and the Himachal Pradesh Energy Development Agency (HIMURJA) which is the nodal agency in the development of SHPs in the State, have also been impleaded as a necessary party. The Commission had, therefore, to ask the Government of Himachal Pradesh and the Himachal Pradesh Energy Development Agency (HIMURJA), to furnish their response to the petition moved by the petitioner company.

13. No response has been received from the Government of Himachal Pradesh and the Himachal Pradesh Energy Development Agency (HIMURJA). Only the response from the respondent No.1 i.e. the Board has been received.

14. In its response, the Board states tht Clause 6.2 of the PPA that the rate of ₹ 2.50 (rupees two and paise fifty) per unit is firm and fixed without indexation and escalation and is not to be changed due to any reason whatsoever. The mutually agreed conditions of the agreement have culminated into statutory contract, the same are binding on the parties and the Commission can not either nullify or modify the concluded contract in purported exercise of the regulatory power vested in it. In its support the Board has cited the decision of the **Apex Court rendered in India Thermal Power Ltd V/s State of M.P AIR 2000 SC 1005**; and APTEL decision rendered in **appeal No. 189/05 Uttaranchal Jal Vidyut Nigam Ltd V/s Uttaranchal Electricity Regulatory Commission and Others decided on 14th September, 2006.** It is also alleged that the HPERC (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007, framed by the Commission, are in not in consonance with

the provisions of section 175 of the Electricity Act, 2003, as the provisions regulate 6 of regulation (ibid) are in direct conflict with the provisions of the Contract Act, 1872. In view of this Board asserts that this Commission lacks jurisdiction or the power to re-open the already concluded contracts.

15. Both the decisions relied upon by the respondent Board are distinguishable for the reasons that the PPAs involved in the said decisions, were entered into, without the approval of the Commission, as the Commissions were not in existence. After the setting up of the Commissions and with the enactment of the provisions especially in section 61 (h), 86(1)(b) and (e) of the Electricity Act, 2003, the position has changed to a great extent. It is well known principle of law, that the specific provisions override the general provisions. Section 175 of the Electricity Act, 2003 contains the general provisions and the provisions of section 61(h), 86(1)(b) & (e) of the said Act are specific one. Thus the provisions of the regulations are in consonance of law provisions of the Act. Further the Hon'ble APTEL in its subsequent decisions, **M/s Reliance Energy Ltd V/s Tata Power Corporation 2007 APTEL, 662 and RVK Energy Pvt Ltd V/s Central Power Distribution Co. of A.P. Ltd (2007) ELR (APTEL), 1222** has also concluded that it is the mandate under section 86 (1)(e), read with section 61 of the Act, and preamble thereto and the various policy guidelines to promote generation of electricity from renewable sources. In another case of **M/s Rithwik Energy Systems Ltd V/S Transmission Corporation of A.P. Ltd and others 2008 ELR (APTEL) 0237,** the APTEL has clearly ruled that PPAs can be re-opened for the purpose of giving thrust to non conventional energy projects.

16. Moreover the question pertaining to the extent and power and the jurisdiction of the Commission to re-open the once approved Power Procurement Agreements (PPA) voluntarily entered into by the IPPs with the Board as stated in para 9 of this Order has already examined in depth while deciding the batch of petitions on 29th Oct., 2009 i.e. **M/S DSL Hydrowatt Ltd V/S HPSEB and others**, which has not been challenged set aside by way of appeal and till dated holds good. This Commission is bound by its own as well as the decisions of the Hon'ble APTEL. In view of this the averment of

the Board that the PPAs being concluded contracts cannot be reopened holds no water.

17. The Commission now keeping in view the response of the Board on the merits proceeds to examine itemwise claims made by the petitioner company, as under:-

(I) <u>Mandatory release of water discharge-</u>

18. Sub-para (B) of para 30 of the Commission's Order dated 29.10.09 passed in **petition No.11 of 2008 M/s DSL Hydrowatt Ltd V/s HPSEB and others** reads as under:-

> "*B <u>Mandatory release of 15% water discharge. -</u>*
>
> *Even though the risk on account of change in Government policy with respect to minimum flow of water immediately down stream of the project was allocated in the IA/PPA and the IPPs have agreed to it at the time of signing the agreement, the Commission, in order to incentivise the SHP generation, feels it prudent to factor in the impact of the mandatory release of water in the tariff. For this it needs to be ascertained as how much this mandatory release of discharge (which is average of 3 lean months i.e. December, January, February) has affected the project. Thus the hydrological data in the DPRs of individual project needs to be analyzed to assess the impact on generation and on the tariff;"*

<u>Submissions of petitioner</u>

19. The Hydro Power Policy-2006 provides that all the existing and upcoming hydro projects in the State of Himachal Pradesh shall maintain a minimum flow down-stream of the diversion structure, throughout the year, at the threshold value of not less than 15% water flow immediately down-stream of the diversion structure of the project all the time including lean season from November to March to the main river/water body whose water is being harnessed by the project. This Petitioner Company as such is under obligation to mandatory release and maintain not less than 15% (could be more if desired by the Government) of the available discharge immediately downstream of the diversion structure without allowing the Company to utilise it for power generation. As a result of this directive, during the lean season discharge of water is inadequate to operate even one machine out of the two installed for the project. The mandatory release of water shall reduce the machine load

below 1500 kW i.e. 60% and thus requires a complete shutdown of the plant as per the recommendations of the Machinery Manufacturer for about 29 days.

20. It is further submitted that due to mandatory release of water by 15%, the energy generation based on 75% dependable year (as per the DPR) shall reduce from 34.58 MU to 31.99 MU resulting in net loss of 2.59 MU per annum. This loss of generation of electricity shall affect the project adversely and requires a tariff hike of paise 20.24 per unit to compensate the said loss of generation.

Response of the Board.-

21. It is stated that the mandatory release of water to the extent of 15% of water discharge during lean period is not a new concept, which is alleged to have been introduced by the Govt. of Himachal Pradesh vide its notification dated 16.7.2005 followed by notification dated 9.9.2005 The aforesaid notifications only quantified the water discharge to the extent of 15%, which discharge otherwise was required to be maintained by the petitioner in terms of clause 13.3 of the implementation agreement entered between the petitioner and the Govt. of Himachal Pradesh. The intent of maintaining this discharge is for achieving the basic requirement of irrigation, drinking and for avoiding pollution of water streams for which purpose the water discharge was mandated earlier. Therefore, it is wrong to allege that the Hydro Policy 2006 has put any additional burden on the petitioner which would tantamount to suffering of loss of generation. The 15% water discharge is inclusive of the discharge which the petitioner was required to maintain as per clause 13.3 of IA. Therefore, the averments of the petitioner seeking enhancement of the tariff to the extent of 20.24 paise per unit are without basis, hence not maintainable and thus deserve to be dismissed which is accordingly prayed.

Commission's View

22. The Commission under Clause 30(B) its Order dated 29th Oct., 2009 in case of **petition No. 11/08 M/S DSL Hydrowatt. Ltd V/s HPSEB Ltd** reads as under:-

> "(B) Even though the risk on account of change in government Policy with respect to minimum flow of water immediately down stream of the project was allocated in the IA/PPA and the IPPs have agreed to it

at the time of signing the agreement, the Commission, in order to incentivise the SHP generation, feels it prudent to factor in the impact of the mandatory release of water in the tariff. For this it needs to be ascertained as how much this mandatory release of discharge (which is average of 3 lean months i.e. December, January, February) has affected the project needs to be analyzed to assess the impact on generation and on the tariff."

23. Subsequently the Commission has allowed increase in tariff as compensation to the IPPs on account of impact of 15% mandatory release of water on the basis of calculation carried out by the Board after ascertaining the correctness of methodology of the impact assessment as stated in the earlier orders.

24. The present petition is similar to the ones which have been considered for the aforesaid orders and therefore, is required to be addressed accordingly.

25. The Commission on similar issue has stated in its earlier Orders the states that it is constrained to allow upgrades in tariff based on a change of goal posts/ change in law which will impact on tariff in a "before" & "after" scenario. The Commission decided to consider DPR hydrology as the basis for 15% mandatory release impact assessment. It is reiterated that even though DPR energy projections are generally oriented with bankability/ viability considerations of the project, but wherever no other projection is available, this will need to be considered as a basis, subject to a caveat that it will have only marginal relevance in the present context and cannot be used across the board where other more relevant parameters are available.

26. The Commission has examined the hard and soft copies of calculations given by the petitioner company and the soft copy of calculations given by the Board and concludes: -

(a) that the mandatory release impact assessment by the Board and the petitioner company has been carried out based upon the 75% dependable discharge as approved in the DPR and deducting the sacrificial discharge from it (which is average on 3 lean months) to get the net discharge available for power generation. The loss in generation has been assessed by calculating the energy generation on the net discharge and comparing it with energy generation without

15% sacrificial discharge as per the approved DPR. However, the petitioner company seems to have done calculations on the basis of overload capacity. Therefore, the total annual energy loss on account of mandatory release of water as calculated by the Board is 1.318 MU whereas the petitioner company claims it to be 2.59 MU. The net annual energy, after considering 15% sacrificial discharge as calculated by the Board, is 30.828 MU whereas the petitioner company has after taking overload capacity calculated it as 31.99 MU. The total energy (without considering 15% sacrificial discharge) as per approved DPR has been taken as 32.146 MU by the Board, whereas the same has been taken as 34.58 MU by the petitioner taking into consideration overload capacity of 15%.

(b) that the petitioner has not considered the energy for One 10 day (III) period of January and One 10 day (I) & One (III) 8 days period of February and has left them blank in hard as well as soft copies. Also instead of considering 11 days discharge it has considered 10 days discharge for the months having 31 days. As a result the net energy after considering the 15% sacrificial discharge is lower than what it should be, therefore, resulting in higher energy loss which is claimed by the petitioner company. The Commission does not agree with the contention of the petitioner as it has been found that the project has actually generated power during January and February of 2010. Also the discharge data depicted in the DPR is based on 75% dependable year and it can not be construed that discharge shall always be as low as depicted in the DPR.

27. The Commission also observes that premise of calculating the loss on overloading capacity is not correct. The impact assessment should be carried out on the basis of rated capacity which is approved at the time of TEC. Therefore, the calculations submitted by the petitioner are not correct. The Commission examined the calculations submitted by the Board and found them correct. The available discharges on 75% dependable year taken by both the parties are same. Based on these discharges the net annual energy, after considering 15% sacrificial discharge as calculated by the Board, is 30.828. The gross energy (without considering 15% sacrificial discharge) has been

taken as 32.146 resulting in annual energy loss of 1.318 MU which increases the tariff of ₹ 2.50/unit by 11 paise/unit.

28. In view of the above, the Commission allows the increase of 11 paise per unit as per the mandatory release of water discharge impact assessment carried out by the Board. However, either party, on the availability of the actual data available for a period of 10 years, can approach the Commission to review the said increase.

II. Fisheries charges.-

29. Sub-paras "D" of para 30 of Order dated 29.10.09 passed in **petition No.11 of 2008 M/S DSL Hydrowatt Ltd V/s HPSEB** read as under :-

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

Submissions by the petitioner

30. Subsequent to GoHP notification dated 6th May,2000, Small Hydro Projects vide Secretary, Fisheries to the Govt. of H.P. letter No.Fish-F(5-1/2004-II dated 30.12.2005) the petitioner are subjected to additional burden of paying compensation charges to Fisheries Department @ ₹ 1.00 lakh per Kilometer of breeding/feeding grounds lost and ₹1.00 lakh per Megawatt capacity of power set up. These charges were not prescribed at the time of approval of the PPA. Later on vide Secretary, Fisheries to the Govt. of H.P. letter No. Fish-F(5-1/2008-II dated 7.5.2008 these charges in respect of power projects where MOU/IA were signed after the notification of new power policy on 11.12.2006 were reduced to ₹ 0.50 lakh per Kilometer of breeding/feeding grounds loss and ₹ 0.50 lakh per Megawatt capacity of power set up. The additional charges @ ₹ 1.00 lakh per kilometre of breeding/feeding grounds lost and ₹ 1.00 lakh per Megawatt capacity of power

set up are thus applicable to the petitioner company and were not considered while fixing the tariff of ₹ 2.50 per unit. Keeping this aspect, the present tariff requires to be enhance.

31. That the petitioner company also submits that it has received letter dated 3.9.2005 from the Department of Fisheries for the payment of charges on account of fisheries. The charges for the fisheries have been demanded to the tune of ₹ 8.5 lacs and are still under consideration of the said Department. The mandatory charges are required to be paid by the petitioner company in the near future. The petitioner company prays that the respondent Board may be directed to take into account in tariff or reimburse these charges to the petitioner company on actual payment as and when the company pays these charges.

Response of Board

32. That the fisheries charges are based on length of tail race capacity. Since the amendment dated 30.4.2007, in relation to fisheries charges, is with immediate effect, the compensation paid by the petitioner company after the issuance of the notification and which was supposed to be paid prior to notification needs to be ascertained by the petitioner company to arrive at the differential amount to be considered for the impact on the tariff. Hence no claim on this account is justified and the same is denied.

Commission's View

33. The petitioner company has claimed an amount of ₹ 8.5 lacs as compensation on account of fisheries as and when the petitioner company pays these charges. The claim is not for the differential amount on account of change in policy and it seems to be total amount payable by the company.

34. In light of the above the Commission concludes that the claims of the petitioner Company on account of the fisheries charges yet to be paid are not tenable.

III. Local Area Development Charges LADC

Submissions by the petitioner

35. That as per the Hydro Power Policy-2006, the Petitioner's project is liable to bear the additional burden of payment of compensation in terms of LADA charges @ 1% of the approved Capital cost of the Project of ₹ 3050

lacs. This additional burden was not taken into consideration while fixing the tariff @ ₹ 2.50 per unit.

36. The compensation payable on this account in terms of Hydro Policy-2006 comes to ₹ 30.50 lacs, being 1% of the approved Capital Cost. On this ground the petitioner company deserves to be compensated and consequently the tariff has to be enhanced from ₹ 2.50 per unit. The petitioner company also states that it has already paid ₹ 10.00 lacs on account of LADA charges to the concerned Authorities and has furnished documentary thereof. According to the petitioner company in the DPR there is no provision of LADA works and as such the amount of ₹ 10.00 lacs is the differential paid by the petitioner and balance of ₹ 20.50 lacs is payable on demand.

Response of the Board

37. The Board submits that the petitioner company has not supplied the full details of expenditure incurred on account of LADA charges, hence the claim on this account of IPP is not justified and the same is denied.

Commission's view.

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

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

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

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

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

This tariff component shall be subject to the production of sufficient documentary proof to the satisfaction of the Board and shall be payable from the date of complete payment of LADC or Commercial Operation Date which ever is later.

IV. Additional royalty

Submissions by the petitioner

39. That as per GoHP notification dated 30.11.2009 the petitioner is under obligation to provide 13% free power out of which 1% (one percent) is earmarked for Local Area Development Fund(LADF). The notification states that this additional 13% free power shall be a pass through in tariff. As per the Implementation Agreement/PPA and the earlier Hydro Policy the petitioner was not required to pay any royalty for the first fifteen years and thereafter 10% royalty was payable for the balance period of 25 years. On this ground the petitioner Company deserves to be allowed the additional burden through enhancement of tariff.

Response of the Board

40. The averments to the effect that petitioner company is under obligation to provide 13% free power out of which 1% is earmarked for local area development fund are misleading and appears to have been made only with a view to derive undue benefit. In fact the factual position of the matter is entirely different Clause 13.1 of the Implementation Agreement entered between the petitioner company and the Govt. of Himachal Pradesh on 20th July,2004 provides as follows:-

> "13.1 The royalty in lieu of water usage in the shape of free energy @ 10% of deliverable energy shall be leviable. This royalty is however waived off for a period of 15 years from the COD in case of projects that sell power to Board/make captive use for their existing/new industry within the State. In case of the projects, which make captive use of the power outside the State or make third party sale outside the State, the royalty @ 10% of the deliverable energy shall be leviable from the COD".

41. From the provisions aforesaid it is amply clear that the petitioner company was under obligation to provide free energy @ 10% of deliverable energy as royalty in lieu of water usages but the same was waived off for a

period of 15 years from the COD as the petitioner company is selling the entire generated power to the Board. Therefore, in view of the decision of the Govt.of H.P. notified vide notification dated 30.11.2009, the petitioner company has to provide 1% free power for LADF and not 13% as alleged by the petitioner. Provision of 1% free power for LADF is negligible and the revenue collected on this account has to be spent on the development of the area where the project has been brought up and the rights of the inhabitants have been infringed to same extent, therefore, the petitioner company cannot claim hike of tariff on this account.

Commission's View

42. The petitioner Company has not given any documentary proof to substantiate that it is governed by change in royalty provisions in the GoHP Hydro Policy, 2006. Moreover HIMURJA has clearly stated that the petitioner Company is not subject to increase in royalty and the royalty rates are 0% for the first 15 years and 10% thereafter. Therefore, the claim of petitioner Company on account of aforesaid change is not acceded to. However, additional 1% royalty as per GoHP notification dated 30.11.2009 for Local Area Development Fund (LADF) has to be borne by the petitioner company and as stipulated in the notification this additional burden shall be a pass through in the tariff, the impact on account of 1% increase in royalty is 3 paise /unit. The same shall be paid by the Board to the petitioner Company.

V. Change in Tax Structure – (a) Minimum Alternate Tax-

Submissions by the petitioner

43. That subsequent to GoHP notification dated 6th May,2000, small hydro projects have been subjected to additional taxation under various union budgets. The effective rate of MAT which was 7.69% during the year of approval of PPA i.e. A.Y.2004-05 has increased to 19.93% during A.Y.2011-12. The rate of Service Tax, which was 5% in the year 2000, increased to 8% and then 12.36% in the year 2008-09. Currently the rate of Service Tax is 10.30%. On this ground also this petition deserves to be allowed and recovery of additional burden on account of MAT and Service Tax needs to be allowed as a part of "increase in tariff" to be determined by the Hon'ble Commission.

Response of Board

44. The Board states that in term of Clause 8.8 of the PPA the petitioner company is entitled to seek reimbursement of the statutory taxes levy, duties, cess or any kind of imposition including tax on generation of electricity whatsoever imposed by the Government on production of requisite documents in support of such claim, therefore, the petitioner cannot claim enhancement of tariff on this account.

Commission's View

45. As pointed out in para 10 of this Order, the Commission in its order dated 29the Oct., 2009 passed in **Petition No. 11 of 2008 M/ S DSL Hydrowatt Ltd V/s HPSEB** has already stated in clear terms that the Commission shall, after consideration of each petition on its merits, issue individual project-wise order based on furnishing of necessary data/documents with respect to the claim regarding mandatory release of water discharge, payment of differential amount on account fisheries and forest and local area development charges. However, Commission considers change in MAT after the signing of the PPA as change of goal post and therefore, feels that the IPP should be compensated as has been done for all the IPPs, falling within the ambit of Commission's on SHPs Order dated 18.12.2007, through the supplementary order dated Feb., 10, 2010.

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

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

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

(b). Service Tax

Submissions by the petitioner

47. The impact of increase in Service Tax comes out to be paise 9.2 per unit due to the increase in the Service Tax rates as compared to Service Tax which was taken into consideration in the year 2000. In the year 2000 the rate of Service Tax was 5% which was increased to 8% and then 12.36% in year 2008-09. Currently the rate of Service Tax is 10.30%. In addition, the Service Tax on construction services was imposed from the year 2004-05 with a provision to tax the civil construction on the basis of 33% of the over all cost and the erection at full value. The total impact works out to ₹ 87.39 lacs which is 3.68% of the approved capital cost of ₹ 2375 lacs and the differential amount is 9.2 paise per unit.

Response of Board

48. The order of the Commission does not require any submission for the calculation and impact on account of service tax. The petitioner Company has not provided detailed calculation regarding impact on account of service tax. Even if there is any impact on account of service tax, it can be covered by considering the overloading capacity of the plant during the peak season.

Commission's View

49. As pointed out in para 10 of this Order, the Commission in its order dated 29th Oct., 2009 passed in **petition No. 11 of 2008 M/S DSL Hydrowatt Ltd V/s HPSEB and others** has already stated in clear terms that the Commission shall, after consideration of each petition on its merits, issue individual project-wise order based on furnishing of necessary data/documents with respect to the claim regarding mandatory release of water discharge, payment of differential amount on account fisheries and forest and local area development charges. Therefore, the claim of the petitioner Company with respect to service tax does not fall within the ambit of the said order. Also the Commission has not considered the service tax in its tariff determination order dated 18.12.07. Besides this the petitioner Company has not furnished any sufficient documentary proof or work sheets in support of its claim. It is pertinent to point out that the said Order clearly stipulates the claims which are required to be supported by the requisite data/ calculations and supporting documents. Keeping in view the limited scope of reopening the concluded PPAs, as stated in the Commission's Order dated 29.10.2009 and the absence

of sufficient and adequate documentary proof, it is not possible for the Commission to accede to this claim raised by the petitioner Company.

Conclusion.

50. In view of the above discussions and taking into consideration the conclusions drawn in the Commission **Order dated 29.10.2009 passed in petition No. 11 of 2008 M/S DSL Hydrowatt Ltd V/s HPSEB** and further submissions made, calculations/data supplied by the parties i.e. the petitioner Company and the Board, the Commission, hereby orders :-

(i) that the tariff shall be enhanced by 11 paise on account of impact of 15% mandatory release of water down stream of diversion structure. However, either party on the actual data available for a period 10 years may approach the Commission to review the said increase;

(ii) that the claims for fisheries and service tax are not acceded to;

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

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

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

(iv) that the additional tariff component to offset the loss on account of LAD charge shall be calculated as per the following formula:-

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

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

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

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

This tariff component shall be subject to the production of sufficient documentary proof to the satisfaction of the Board and shall be payable from the of date of complete payment of LADC or Commercial Operation Date which ever is later.

(v) that the impact of the additional 1% of the royalty payable under Government notification dated 30.11.2009 for Local Area Development Fund shall be pass through in the tariff and increase on account of same shall be 3 paise/unit;

In view of the above, the tariff of ₹ 2.50, shall be increased by 14 paise per unit.

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

(Yogesh Khanna)
Chairman