BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION, SHIMLA

In the matter of:-

M/S Sri Sai Krishna Hydro Energies Private Ltd
having its registered office at Plot No. 226
Road No. 78, Phase-III.
Jubliee Hills, Hydrabad.(A.P)

…Petitioner

V/s

(1) The State Government of Himachal Pradesh,
through Principal Secretary (MPP&Power)
to the Govt. of H.P.Shimla-171002

(2) The Himachal Pradesh State Electricity Board Ltd.
through its Executive Director (Personnel)
Kumar House, Shimla-171004.

…Respondents

Petition No. 183 of 2009

(Decided on 20th August, 2010)

CORAM
YOGESH KHANNA,
CHAIRMAN

Counsels:-

for the petitioner	Sh. Ajay Vaidya, Advocate
for the respondents	Sh. Narinder Singh Thakur, Advocate.

ORDER

(Last heard on 31.7.2010 and Order reserved)

M/S Sri Sai Krishna Hydro Energies Private Ltd., having its registered office at Plot No. 226, Road No. 78, Phase-III, Jubliee Hills, Hydrabad,(A.P.), (hereinafter referred as "the petitioner") a Company incorporated under the Companies Act, 1956 ("hereinafter referred as the petitioner"), signed, on 22.12.2005, an Implementation Agreement with the Government of Himachal Pradesh, whereunder the petitioner was granted right to establish, operate and maintain the Luni-III Hydro Electric Project on Luni Khad, a tributory of Binwa river in Distt. Kangra (H.P.) with an installed capacity of 05.00 MW (hereinafter referred as "the project"). In

pursuance of the said Implementation Agreement and also under the provisions of section 86 (1) (b) of the Electricity Act, 2003, (hereinafter referred as "the Act") the petitioner and the Himachal Pradesh State Electricity Board (hereinafter referred as "the Board") filed the joint petition bearing No. 154/2006, before the Himachal Pradesh Electricity Regulatory Commission (hereinafter referred as "the Commission") for approval of the Power Purchase Agreement (for brevity "PPA") to be executed between the Board and the Petitioner in respect of the Luni-III Hydro Electric Project. The Commission approved the Power Purchase Agreement on 12th July, 2006, subject to the following observations:-

> "Tariff and other terms and conditions of the PPA shall be subject to the provisions of the Commission's regulations on power procurement from renewable sources, as and when such regulations are framed."

2. The PPA was executed by the petitioner Company and the Board on the 14th January, 2008, with the stipulation that the Board shall pay for the net saleable Energy delivered by the petitioner company to the Board at the inter-connection point at a fixed rate of Rs.2.50(rupees two and paise fifty only) per kWh .

3. Subsequently in compliance with the statutory provisions in the Act [i.e. section 61(h) and section 86 (1)(e)], the policy guidelines given in the National Policy and in the National Tariff Policy and the directions given by the Hon'ble **APTEL in its decision dated 18th May, 2007 rendered in appeal No. 124 of 2006 – M/s Rajshree Sugars and Chemicals Ltd V/s Tamilnadu Electricity Commission,** the Commission made the Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Co-generation by the Distribution Licensee) Regulations, 2007 and issued thereunder an Order on the Small Hydro Power Projects and Tariff and other related issues on the 18th December, 2007 (hereinafter called "the SHP Order") as a result of which the levelised tariff rate, at which the Board is required to purchase power from private parties/ joint sector Companies setting up micro hydel projects/ stations, stands refixed at rupees 2.87 per unit. Para 5.35 of the said SHP Order reads as under:-

"5.35. This Order shall be applicable to all such Power Purchase Agreements (not exceeding 5 MW) which have already been approved by the Commission with a specific clause that "Tariff and other terms and conditions of the PPA shall be subject to the provisions of the Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007" and also to the Power Purchase Agreements to be approved by the Commission hereinafter".

4. The SHP Order dated 18.12.2007, was challenged before the Appellate Tribunal for Electricity (hereinafter referred to as "the Appellate Tribunal") by way of **Appeal No. 50 of 2008 filed by M/S Techman Energy Ltd and in Appeal No. 65 of 2008 filed by the Himachal Pradesh State Electricity Board** and the said appeals were disposed off by a common Order passed by the **Appellate Tribunal vide its Order dated 18th Sept; 2009**. In light of the directions given by the Appellate Tribunal, the Commission vide its Order dated 9.2.2010 reconsidered the SHP Order and recalculated the tariff of Rs.2.95/unit by rectifying the arithmetical errors pointed out by the appellants. The closing para of the said order reads as under :-

> "The Commission is aware that after issuance of the SHP Order dated Dec.,18,2007 and till the issuance of this order, the hydel power producers and the Board, have executed and signed the Power Procurement Agreements with the provision of the tariff of Rs.2.87/Unit for the power produced by the SHPs in this State .In order to give the benefit of increase of tariff of Rs.2.95/unit from Rs.2.87/unit to the hydel power producers, who have executed the PPAs with the stipulation of Rs.2.87/unit, such hydel power producers and the Board are directed to modify the clauses in PPAs, in accordance with law.

5. The petitioner Company, under bonafide belief that the petitioner Company will automatically be able to receive the payment of enhanced tariff as fixed in the SHP Order dated 18th Dec., 2007, raised the bills, but the respondent Board chose not to make the payments in accordance with the enhanced tariff, rather it continued to make the payment at the earlier rate of Rs.2.50 per unit . Subsequent representations made by the petitioner Company remained un-responded.

6. In these circumstances, the petitioner Company has approached this Commission, to direct the respondents -

(i) to pay the petitioner Company, the differential unpaid amount calculated @ of Rs. 2.95 paise per unit according to the SHEP Order dated 18th Dec., 2007; (modified vide Commission Order dated 9.2.2010) w.e.f. the date of achieving commercial operation of its unit for generation with the interest @18% till the final payment; and

(ii) to make consequential modifications in the PPA.

7. In its reply to the petition the respondent Board submits that the petitioner company is not fully covered under the SHP Order dated 18.12.2007 as much as the PPA executed on 14.1.2008 does not incorporate the observations made by the Commission in its order dated 12.07.2006, conveying its approval , and hence the rate of Rs. 2.87 or Rs.2.95 per unit is not applicable in this

case. Further the capital cost per DPR/TEC needs to be considered for working out the levelised tariff for this project .

8. The petitioner Company, through a rejoinder, has reiterated the averments made in the petition and has stated that the averments made by the respondent Board are factually incorrect and the provisions of SHP Order dated 18th December, 2007 are applicable to their project under para 5.35 thereof. Moreover, the PPA has been executed with the clear cut stipulation that tariff shall be subject to the provisions of the Commission's regulations on power procurement from renewable sources as and when such regulations are framed. The said order, which has been, made by the Commission on the joint petition moved by the Board and the petitioner, is binding on both parties.

9. This Commission had an occasion to consider this preposition in a similar petition **No. 136 of 2009 M/S Vamshi Hydro Energies Private Ltd V/s State of H.P. and another, decided on 10.12.2009,** whereby it has been clearly concluded that there remain no doubt as to applicability of SHP order dated 18.12.2007 to such cases where the PPAs were approved subject to the provisions of the Commission's regulations on power procurement from renewable sources, as and when such regulations are made.

10. Interest is a natural corollary of any delayed payment. Sometimes different interest rates are prescribed so as to differentiate between normal or compensatory rate of interest and a panel rate of the interest. Para 8 of **Punjab High Court decision rendered in case of CIT V/s Shyam Lal Narula (AIR 1963 Pb 411) reads as under:-**

> *"8. The words "interest" and "compensation" are sometimes used interchangeably and on other occasions they have distinct connotation. "Interest" in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owned to another. In its narrow sense "interest" is understood to mean the amount, which one has contracted to pay for use of borrowed money. In whatever category "interest" in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for use or forbearance of money. In this sense, it is compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it, has become payable."*

11 This decision of the Punjab & Hry .High Court, has been approved by the **Supreme Court in Central Bank of India V/s Ravindre & Ors (2002) SCC 367** and the decision of the Supreme Court has been followed by the Appellate Tribunal for Electricity in **Appeal No.15 of 2007, decided on 5.2.2008- Maharashtra State Elecy. Distt. Co. Ltd. Bandra**

(East) Mumbai V/s Maharashtra Electricity Regulatory Commission, Mumbai 2008 ELR (APTEL) 0110.

12 In view of the above quoted decisions, the interest is basically intended to compensate the party who was entitled for payment of amount due. There is no reason why the Board should not pay interest from the date payment becomes due. In the PPA, executed by the parties in this case, there are sufficient provisions covering for billing and payments under the Agreement and to sort out the issues relating to late payments . In view of the bilaterally settled provisions in the PPA, the Commission declines to make any direction to the Board in regard to the payment of interest, and thus interest if payable should be calculated and dealt with in accordance existing provisions contained in the PPA.

13. In view of the position set out in the preceding paras of this order and earlier decision dated 10.12.2009 rendered in petition No. 136 of 2009, there remains no doubt, as to the applicability of SHP Order dated 18.12.2007, as modified on 9.2.2010, to the PPA executed by the petitioner Company with the Board on 14th January,2008 in relation to the Luni-III HEP located on Luni Khad a tributary of the Binwa River, in Kangra District. The Commission, therefore, directs the Board:-

(i) to pay to the petitioner Company, w.e.f. the date of commercial operation of the generation of the unit, the differential unpaid amount calculated at the rate of Rs. 2.95 per unit; and

(ii) to make the consequential modifications in the executed PPA.

(Yogesh Khanna)
Chairman