BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION, SHIMLA.

In the matter of-

M/s K.K.K. Hydro Power Ltd.
1-41, DLF Industrial Area Phase-1,
Faridabad, Haryana-121003

…….Petitioner

Versus

1. HP State Electricity Board Ltd. thro' its
Executive Director (Pers.)
Vidyut Bhawan, Shimla-171004
……Respondent No. 1

2. The State of Himachal Pradesh thro' its
Principal Secretary (MPP & Power)
to the GoHP,Shimla-02
……Respondent No. 2

3. The Himachal Pradesh Energy Dev. Agency (HIMURJA),
SDA Complex, Kasumpti, Shimla-171009
……Respondent No. 3

Suo-Motu Petition No. 193 of 2014
(Decided on 11th **June, 2015**)

CORAM

Subhash C. Negi
CHAIRMAN

Counsels:-

for the petitioner	Sh. Raj Kumar Mehta, Sr. Advocate with Sh. Ajay Vaidya, Advocate
for the Respondent No.1	Sh. Bimal Gupta , Advocate with Sh. Ramesh Chauhan (Authoirsed Representative)
for the Respondent No. 2	Sh. Shanti Sawaroop Bhatti, (Legal Consultant)
for the Respondent No.3	Sh. Pardeep Bhanot, Sr. Project Officer

ORDER

(Last heard on 14.5.2015 and Orders reserved)

The Hon'ble Appellate Tribunal for Electricity (APTEL), New Delhi, vide its judgment dated 17.10.2014, delivered in Appeal No. 198 of 2013 and IA No. 433 of 2013, titled as **M/s K.K.K. Hydro Power Ltd., V/s. HPERC and others,** (communicated to this Commission on 30.10.2014), set aside the Commission's Order dated 5.7.2013, passed in petition Nos. 6 of 2011 and 118 of 2012 in relation to Baragran Hydro Electric Project,

located on Sanjoin Nallah, tributary of river Beas in Kullu Distt. (HP) (hereinafter referred as "the project") and this Commission has been directed to pass consequential order within three months from the date of the communication of the copy of the said judgment. Pursuant to the said judgment the tariff of the project is to be the weighted average of the respective tariff and the design energy envisaged for the 3 MW and 1.9 MW capacities in the approved Detailed Project Report (DPR) of the project w.e.f. COD of 1.9 MW plant, i.e. 10.7.2008.

2. Brief facts, which are relevant for the disposal of this matter, are that one Implementation Agreement (IA) was executed between the State Govt. of Himachal Pradesh and M/s K.K.K. Hydro Power Ltd. i.e., the Petitioner Company on 30.3.2000, where under the Company was granted right to establish, operate and maintain at their cost Baragran Hydro Electric Project, with an installed capacity of 3 MW, on Sanjoin Nallah, a tributary of the Beas river, in Kullu Distt. (HP). Simultaneously the petitioner company executed the Power Purchase Agreement (PPA) with the predecessor-in-interest of the Himachal Pradesh State Electricity Board Ltd. (hereinafter referred as "the Respondent Board") on 30.3.2000 for the sale of net saleable energy from the said project @Rs. 2.50 per kWh. The said Project of 3.00 M.W, capacity was commissioned on the 5th August, 2004.

3. Subsequently, the petitioner Company and the State Government signed a Supplementary Implementation Agreement (SIA) on 5.7.2007, to revise the capacity of the Project from 3 M.W to 4.9 M.W w.e.f. 26.6.2006. As a sequel to the SIA, a joint petition No. 241/2007, for approval of the PPA, agreeing to a fixed rate of Rs. 2.50 p. unit was filed before the Commission and the Commission approved on 4.12.2007, the said PPA with the conditions, one of which, relevant in the present context, is as follows:-

> *"(v) 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 Cogeneration by Distribution Licensee) Regulations, 2007."*

The parties executed the PPA on 11.3.2008, at a tariff of Rs. 2.50 per kWh, for the entire net saleable energy generated from 4.90 MW capacity after incorporating specific conditions on the above lines. The PPA also provided for the fact that PPA for 3 MW capacity dated 30.03.2000 will cease to operate only for billing purpose.

4. In June, 2010 the petitioner Company filed a petition No. 94 of 2010 seeking for direction to the respondent Board to sign Supplementary PPA, incorporating the enhanced generic tariff as determined vide SHP Orders dated 18.12.2007 and 9.2.2010. The said petition was subsequently dismissed as withdrawn.

5. The petitioner moved a petition No. 6/2011 before the Commission in the year 2011 requesting that the respondent Board be directed to release, alongwith interest, the arrears amounting to Rs. 2,77,50,960 towards difference between earlier tariff of Rs. 2.50 paise per kWh and Rs.2.95 per kWh, for the period with effect from 11.3.2008 based on the Supplementary PPA executed by it with the respondent Board on 10.9.2010. It was stated that the respondent Board passed the energy bill of Rs. 2,77,50,960 towards the arrears and agreed to release the said amount in 5 equal instalments of Rs. 55,50,195/- and the first instalment was received by the petitioner on 28.2.2011. The respondent Board stopped the disbursement of the future instalments and informed the petitioner Company that the payment of the bill supplied in the month of March, 2011, will be made@ Rs. 2.50 p. kWh. The Company received on 3.5.2011, the payment of April, 2011@Rs. 2.50 p. kWh.

6. The respondent Board contested the petition, submitting that the Commission's order dated 4.12.2007 is erroneous as the Commission lacks the jurisdiction to reopen the PPAs executed prior to the date of constitution of the Commission and it cannot be taken to cover the entire energy generated by the petitioner and the revised tariff should only be for the energy generated by the additional capacity. The respondent Board also contended that the Commission has the suo-motu power to recall and rectify the inadvertent error arising in the Commission Order and prayed for the modification of Order 4.12.2007, according approval to the PPA for the entire energy generated from 4.90 MW capacity. The respondent Board also moved petition No. 118 of 2011 requesting the Commission to recall and modify Order dated 4.12.2007, stating that if a person is harmed by any mistake, he should be restored to the position, as he would have occupied but for that mistake.

7. During the pendency of petition No. 6 of 2011, when the matter attained the concluding stage, the petitioner Company filed **CWP No. 7203/2011-M/s K.K.K. Hydro Ltd. Vs. HPSEBL, the Chief Engineer (Comm.) and this Commission,** seeking indulgence of the Hon'ble High Court, for instructing the respondent Board, to release the amount of Rs. 2, 77,50,960/- arrears already admitted by it. The Hon'ble High Court, vide its interim Order dated 30.8.2011 ordered that there will be a stay of all further proceedings before the Commission. However, it was made clear that there will be no further payments

by the Electricity Board to the petitioner, without obtaining the Orders from the High Court and claim for interest was to be passed at the time of the disposal of the writ petition.

8. After the written submissions having been made on behalf the respondents before the Hon'ble High Court, the petitioner Company prayed for withdrawal of the writ petition filed by it and the petitioner Company was permitted to withdraw the petition, without any directions in relation to the payment of interest.

9. After hearing the parties at length, this Commission considered and dismissed petition No. 6 of 2011 moved by the petitioner and the petition No. 118 of 2012 moved by the respondent Board, vide its Order dated 5th July, 2013, where by the Commission declined:-

(a) to make any direction to the respondent Board to pay arrears of the bills for supply of power to it according to new tariff rate fixed for Small Hydro Electric Power i.e. at the rate of Rs. 2.95 per unit as claimed by the petitioner company,
(b) to recall and modify the consent Order dated 4.12.2007 passed by this Commission in petition No. 241/2007.

10. The said Order of the Commission was challenged by way of Appeal No. 198 of 2013, before the Hon'ble Appellate Tribunal for Electricity. The Hon'ble Tribunal has held that the Commission has correctly exercised its jurisdiction to examine the validity of the Supplementary PPA dated 10.9.2010 entered into between the parties purportedly on the basis of State Commission's Order dated 4.12.2007. The Hon'ble Tribunal further held that the tariff of the project for 3 MW capacity which PPA was entered into on 30.3.2000 and the plant was commissioned on 5.8.2004, prior to the notification of 2007 Regulations, will not be re-determined as per the said Regulations. However, the State Commission as per the second proviso to Regulation 6 (as amended on 27.11.2007) is empowered to modify the PPA for reason of change in the statutory laws or the rules of the State Govt. The 1.9 MW capacity, which is an extension of the 3 MW capacity project, will be subject to the tariff determined as per the 2007 Regulations. The tariff, as decided by the State Govt. prior to the enactment of the Electricity Act, 2003, cannot be made applicable to 1.9 MW, which was planned, approved and commissioned after the constitution of the State Commission and notification of the 2007 Regulations. As the 1.9 MW capacity has been planned and executed to exploit the additional power potential available at the same project site and entire capacity of the project is injected and evacuated from the same bus bars, a common tariff has to be determined for the power plant as a whole. Accordingly, the tariff

of the project will be weighted average of the respective tariff and the design energy envisaged for the 3 MW and 1.9 MW capacity in the approved Detailed Project Report of the Project w.e.f. CoD of 1.9 MW plant i.e., 10.7.2008. Consequently the petitioner Company will be entitled to the payment of arrears on account of difference in the tariff for the project as per APTEL Judgment and the tariff at which the payment has already been made. The Hon'ble Tribunal did not make any direction in relation to the payment of the interest to the petitioner Company

11. The Hon'ble Tribunal vide its judgment dated 17.10.2014 has allowed the Appeal in part and has set aside the Commission Order dated 5th July, 2013, with the directions to the State Commission to pass consequential Order, within a period of 3 months of the communication of the copy of the said Judgment. The Registry of the Hon'ble APTEL, has communicated the said Judgment to this Commission on 30.10.2014. Before the communication of the said judgement, this Commission took cognizance of the APTEL Judgment dated 17.10.2014, and initiated the suo-Motu action on 21.10.2014, asking the parties to this Lis, to file their respective claims, alongwith the necessary design energy details and other supporting documents.

12. The petitioner Company submits that in accordance with the APTEL Judgment dated 17.10.2014, the petitioner Company has sent the required calculations alongwith the tariff based on weighted average of the respective tariff and other documents to the respondent Board vide their letter dated 28.10.2014, and has furnished its calculations, as under:-

DPR Design energy for project capacity	**Units**	**Ratio/weight AVG**	**Respective Tariff Rate**	**Effective tariff** **(as per ratio per paisa/unit)**
3MW	19.26 MU /PA	65.06756757	2.50	162.668918977
1.9 MW	10.3 4 MU/ PA	34.93243243	2.95	103.050675674
				265.719594651 (Say 266 paisa per unit)

13. The respondent Board submits that in the present case the basic infrastructure was already in existence and only some electro-mechanical equipments etc. with 1.9 MW units have been installed to enhance the capacity of the project from 3 MW to 4.9 MW and the tariff for 1.9 MW additional capacity has to be determined keeping the actual cost incurred by the petitioner for augmentation of the project, which is the basic component for tariff determination as has also been observed by this Commission in its order 18.12.2007, wherein this Commission has taken maximum capital cost per MW as 6.5 Crores. However, the respondent Board filed the energy figures as under:-

		Actual generated energy (MU)										
Installed capacity (MW)	**Designed Energy (MU)**	**2004-05**	**2005-06**	**2005-06**	**2006-07**	**2007-08**	**2008-09**	**2009-10**	**2010-11**	**2011-12**	**2012-13**	**2014-15**
3.0	**16.17**	**6.93**	**17.02**	**20.64**	**20.8**	**-**	**-**	**-**	**-**	**-**	**-**	**-**
1.9 Additional capacity added (w.e.f. 14.7.08)	10.34	-	-	-	-	-	-	-	-	-	-	-
4.9	26.50	-	-	-	-	19.10	24.67	30.72	30.96	29.83	26.31	23.03

14. As per the above data, the parties submitted the design energy corresponding to 3 MW and 1.9 MW capacities as under:-

Capacity of the Project	Annual Design Energy Data submitted by the Petitioner (MU).	Annual Design Energy Data submitted by the Respondent Board (MU).
3 MW	19.26	16.17
1.9 MW (additional)	10.34	10.34
Total	…….	26.50

15. The Commission, having observed the variation in the data submitted by parties, considered it appropriate to refer to the DPRs for the project with capacity of 3 MW (October 97) and 4.9 MW (October 2005) according to which the annual generation has been shown as 21.89 MU and 27.90 MU for 3 MW and 4.9 MW capacities respectively. With this background and to have more clarity and understanding of the submissions made by the parties on this issue, the Commission, even though the decision of the case had earlier been reserved, reheard the matter on 14th May, 2015 and on the said hearing the parties made their submissions in writing as well as orally.

16. The petitioner submitted that their submission to the respondent Board "with calculation of common tariff is based upon net energy as given in the salient features of respective DPR's i.e. for 3 MW i.e. 19.26 MU/PA & 1.90 MW i.e. 10.34 MU/PA" They also stated that the observation of the Commission to the extent that as per **the DPRs for the project with capacities of 3MW (October 1997) and 4.9 MW (October 2005) and the annual generation on 10 daily basis for 75% dependable year corresponding to 3 MW and 4.9 MW capacities as per these DPR's has been depicted as 21.89 MU (Table 6.1) and 27.90 MU (Table 4.1) respectively, "**does not seem to be in accordance with the various factors to be considered on the grounds as the figure pertaining to 27.90 MU/PA has been taken out of one of the different calculations done in the table 4.1. Which pertains to capacity of 5.90 MW capacity (2.90 MW +3.00 MW), but which is not implemented

capacity as project of only 4.90 MW capacity has been commissioned and the design energy for same enclosed as in table 4.1 is 26.51 MU/PA and the BOARDs submission also has been based upon same design energy i.e. 26.51 (i.e. 3 MW is 10.34 MU/PA and 1.90 MW is 16.17 MU/PA)".

17. The respondent Board submitted that the data given in their earlier submissions was based on its interpretation of para 36(iv) of the APTEL's order dated 17.10.2014 and the figure of annual generation i.e. 16.17 MU for 3 MW was taken from **Sr. No. 4 of Table 4.2 (**containing the comparison of various parameters from 75% dependable discharge series) **of the DPR 4.9 MW capacity (October 2005).** It also stated that it has now been observed that 16.17 MU, as depicted in the said Table in the DPR of October 2005, is not the design energy as calculated in DPR for 3 MW (1997) but reflects only the generation allocated to the machines for 3 MW under the studies for optimization of capacity. It has further been stated that the annual design energy for 3 MW capacity which is actually 21.89 MU as per **Table 6.1 of the DPR of 3 MW (Oct., 1997)**. In relation to the annual design energy for 4.9 MW project, it has been stated that as per **Table 4.1 of the DPR (Oct 2005)** the annual generation arrived at with 100% plant availability is 27.90 MU and that if the plant availability is taken as 95%, the same shall get reduced to 26.5 MU as per its foot note.

18. In order to comply with the APTEL order dated 17.10.2014, the Commission now proceeds further to compute the weighted average rate for the purchase of net saleable energy by the Respondent Board from the petitioner's 4.9 MW project. The Commission finds that the annual design energy corresponding to 3 MW and 1.9 MW and the rates applicable for respective energy components shall be the main inputs that shall be required for arriving at the weighted average rate for the net saleable energy to be purchased by the Respondent Board from the 4.9 MW project. Hence the Commission proceeds to deal with each of these parameters in the succeeding paragraphs of this order.

19. The petitioner has carried out its calculations for the weighted average rate by adopting the rate of Rs. 2.50 per kwh for the net design energy corresponding to 3 MW capacity as given in the DPR for 3 MW (Oct., 1997) and Rs. 2.95 per kwh for 1.9 MW capacity. The Respondent Board has also agreed to the rate of Rs. 2.50 per kwh for the annual design energy of 3MW capacity. There is thus no difference of opinion between the parties about the applicability of rate of Rs. 2.50 per Kwh even though the parties had otherwise given different sets of energy quantums on which the rate shall be applied. The Hon'ble APTEL have upheld in its order dated 17.10.2014 that the tariff of 3 MW capacity cannot be modified except what is permissible under the PPA and the 2007 Regulations i.e.

change in statutory laws, or rules or the State Government Policy. As regards the rate of Rs. 2.95 per kwh claimed by the petitioner for the 1.9 MW capacity, the Respondent Board pleads that this rate should be determined on the basis of incremental cost for this capacity. The Commission had determined generic levellised tariff of Rs. 2.95 per kwh for the SHPs upto 5 MW capacity under the 2007 Regulations, The Commission finds that Hon'ble APTEL have clearly stated in para 32 of its order dated 17.10.2014 that the tariff for 1.9 MW capacity has to be as per "the tariff order of the State Commission i.e. Rs. 2.95 per kWh". The Commission accordingly decides to compute the weighted average rate on the basis of the rates of Rs. 2.50 per kWh and Rs. 2.95 per kwh for the annual design energy figures for 3 MW capacity and 1.9 MW capacity respectively.

20. The next step would be to quantify the annual design energy figures for 3 MW and 1.9 MW capacities. The Commission observes that the parties have relied upon different figures in their written submissions and as such finds it appropriate to discuss the relevance of various DPR figures. As already concluded by the Commission in its order dated 05.07.2013 and also by the Hon'ble APTEL in their order dated 17.10.2014, the project for 4.9 MW capacity is a composite project consisting of 3 MW capacity commissioned in 2004 and additional 1.9 MW capacity which was planned in October 2005 and thereafter commissioned in March 2008. Even though the whole project has to be operated in an integrated mode, the petitioner continues to be under an obligation to supply the net saleable energy corresponding to the 3 MW capacity at the rate and other terms and conditions given in the PPA for 3 MW capacity. The annual design energy for the 3 MW capacity, which had been planned and commissioned much before planning of the 4.9 MW project, and for which separate PPA was also executed by the petitioner with the erstwhile HPSEB in 2000, has, therefore, to essentially remain unaltered for all intents and purpose of the matter under consideration. As such the design energy for 1.9 MW capacity has to be essentially computed by subtracting the annual design energy for 3 MW capacity from the same for 4.9 MW capacity. During the course of hearing on 14.05.2015, both the parties (petitioner and Respondent Board) agreed that the total design energy figures for 3 MW capacity and 4.9 MW capacity are shown in table 6.1 and 4.1 of respective DPRs and proceedings were also recorded accordingly. Subsequently Shri Pawan Kumar Kohli, representing M/s K.K.K. Hydro Power Ltd. communicated that the petitioner company had only agreed with the Board's submissions to the extent of 16.17 MU from 3 MW capacity and 10.34 MU from 1.90 MW capacity, which also has been taken from Table 6.1 of the DPR only. The Commission observes that the petitioner now wants the Commission to adopt the figures 16.17 MU and 10.34 MU, as submitted by the Respondent Board earlier,

as design energy for 3MW and 1.9 MW capacities even though the Respondent Board has adequately clarified in the hearing on 14.5.2015 that the aforesaid figures submitted earlier by them do not represent the annual design energy figures but only represent the energy quantum allocated to these capacities in the studies for optimization of the capacity of the project. The Commission also observes that it is a fact, based on the documentary evidence (DPRs), that the annual design figures for 3 MW and 4.9 MW capacities are shown in Table 6.1 and Table 4.1 of the respective DPRs and this fact does not, in any way, get diluted or negated even if the petitioner disowns the proceedings recorded by the Commission in its Interim Order in relation to the aforesaid design energy.

21. The Commission feels that any formulation for computing the annual design energy for 1.9 MW capacity, other than that discussed above shall be irrelevant and out of context. As such, the Commission shall compute the design energy for 1.9 MW capacity by subtracting the annual design energy for 3 MW capacity as given in the DPR (October 1997) for 3 MW from the annual design energy for 4.9 MW project as given in the DPR (October 2005) for 4.9 MW capacity. After having set out the methodology to be adopted for ascertaining the annual design energy figures, the Commission proceeds further to quantify the same in the following sub-paragraphs by duly taking into account the submissions made during hearing held on 14th May, 2015 by the parties:-

(a) In relation to the annual design energy for 3MW capacity, the petitioner has clarified that the figure of 19.26 MU for 3 MW capacity had been submitted on the basis of annual saleable energy given in Section II- Salient features in the DPR for 3 MW project (October 97). The Respondent Board, in its submissions has submitted a figure of 21.89 MU based on Table 4.1 of the DPR for 3MW (October, 1997). There is thus a consensus between these parties at least to the extent that the annual design energy for 3 MW capacity has to be picked up from the DPR for 3 MW project (Oct 1997). The difference in the aforesaid figures of 21.89 MU and 19.26 MUs is attributable to the sole reason that whereas the figure of 21.89 MU corresponds to the total annual generation, the figure of 19.26 MU corresponds to the annual saleable energy under the same DPR. The Commission observes that the gross generation figures for both the capacities would be more relevant for the purpose of arriving at the weighted average rate. The Commission, therefore, decides that the figure of 21.89 MU, as shown in Table 6.1 of the DPR (October 1997), shall be considered for computing the weighted average rate.

(b) In relation to the annual design energy for 1.9 MW capacity, it emerged that the figure of 10.34 MU, submitted earlier by the parties, as design energy for 1.9 MW, actually corresponds to the energy considered against the capacity under the studies for optimization of project capacity. Since 1.9 MW capacity forms a part of the total capacity of 4.9 MW, the design energy which can be attributed to 1.9 MW capacity would best be worked out by deducting the annual design energy corresponding to 3 MW capacity from the total design energy corresponding to 4.9 MW capacity. The Commission also considers that the figure of 10.34 MU earlier submitted by the parties in respect of additional 1.9 MW capacity is totally irrelevant in the present context and the same cannot be considered as annual design energy for 1.9 MW capacity. It is otherwise also a well known fact that the energy for the incremental capacity expressed as a %age of total generation would always be lower than that for the base capacity. The Respondent Board has submitted that the total generation for the 4.9 MW capacity is 27.90 MU at 100% plant availability and 26.50 MU at 95% plant availability. The petitioner objected this figure of 27.90 MU stating that the figure of 27.90 MU corresponds to the 5.9 MW capacity instead of 4.9 MW which was actually executed. The petitioner seems to have confused itself with the figure of 27.93 MU at 90% plant availability as given in set 6 (5.9MW capacity) of Table 4.1 to which reference has never been invited by the Commission. The Commission, therefore, observes that the plea raised by the petitioner to the extent that the figure of 27.90 MU pertains to the capacity of 5.90 MW capacity is not factually correct. In fact, as brought out by the HPSEBL also on 14.05.2015, this figure pertains to the annual generation corresponding to 4.9 MW capacity at 100% plant availability, as given in set 4 (4.9MW capacity) of Table 4.1 of DPR (Oct., 2005) The Commission would also like to point out that if the figure of 27.90 MU is to be considered for 5.9 MW capacity, the same for 4.9 MW capacity would obviously be still lower. After going through the submissions made by the parties, the Commission finds that both the generation figures for 75% dependable year, as submitted by Respondent Board on 14.05.2015 for 4.9 MW capacity (i.e.27.90 MU at 100% plant availability), and 26.50 MU at 95% plant availability) are factually correct. Since the annual generation of 21.89 MU under the DPR of 3 MW capacity is based on 100% plant availability, the Commission is of the opinion that it will only be appropriate, and also in the interest of equity and fair play that the figure corresponding to 100% plant availability is taken into account for the 4.9 MW capacity also. Accordingly, the Commission decides to compute the annual generation for 1.9 MW capacity by taking into account annual generation figures for 75% dependable year, at 100% plant availability i.e. 27.90 MU for

4.9 MW capacity and 21.89 MW for 3 MW. As such, the annual design energy for 1.9 MW capacity shall be taken as 6.01 MU (27.90-21.89 MU).

22. In view of the foregoing discussion, the Commission determines the weighted average rate for purchase of net saleable energy by the respondent Board from the petitioner's 4.9 MW project as under:-

1	Total annual design energy for 4.9 MW capacity at 100% plant availability for 75% of dependable year.	27.90 MU
2	Total annual design energy for 75% dependable year corresponding to 3 MW at 100% of plant availability.	21.89 MU
3	Annual design energy attributed to 1.9 MW capacity (1-2)	6.01 MU
4	Energy for 3 MW capacity expressed as % of total energy for 4.9 MW capacity (Item 2/1*100)	78.46%
5	Energy attributed to 1.9 MW capacity expressed as % of the total energy generated for 4.9 MW (Item3/1*100)	21.54%
6	Rate applicable for the energy for the net saleable energy corresponding to 3 MW capacity(item 4)	Rs. 2.50/Kwh.
7	Rate applicable for the net saleable energy corresponding to 1.9 MW capacity (item 5)	Rs. 2.95/Kwh
8	Weighted average rate for the net saleable energy to be purchased by respondent Board from the Petitioner's 4.9 MW project.	Rs. 2.597 per kwh. (Rounded to Rs. 2.60 per kWh)

23. The weighted average rate, as per item 8 of the Table under the preceding para of this Order shall be applicable for the net saleable energy purchased at the inter-connection point by the respondent Board from the petitioner's 4.9MW project from time to time starting from the date of commissioning of the 1.9MW plant i.e. 10.7.2008.

24. The terms and conditions associated with the two constituent rates of Rs. 2.50 per kWh and Rs. 2.95 per kwh considered for arriving at the weighted average rate shall be applicable for the respective energy components expressed as fixed ratios of total energy as given against items 4 and 5 the Table under para 22 of this Order, i.e. 78.46% and 21.54% respectively. In case any adjustment in respect of any of these two tariffs is required to be made as per the respective tariff, the weighted average rate shall have to be recomputed by taking into account the impact of such adjustments on the corresponding proportions of net saleable energy (i.e. in a fixed ratio of 78.46 and 21.54), as aforesaid. The Commission therefore, directs the petitioner and the respondent Board to reconcile accounts, based on the above rates, so as to enable the petitioner to raise the bills accordingly.

25. The petitioner is claiming the interest at the rate 18 percent p.a., with effect from 11.3.2008. Hon'ble High Court as well as the Hon'ble APTEL, have not passed any orders in relation thereto. Thus the question arises for consideration by this Commission whether any order for payment of interest is required to be passed by it and if so from what date and at what rate the payment of interest should be allowed.

26. 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 penal 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."*

This decision of the Punjab and Haryana 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 Electricity Distribution Co. Ltd. Bandra (East) Mumbai V/s Maharashtra Electricity Regulatory Commission, Mumbai 2008 ELR (APTEL) 0110.**

The interest is not a tax or penalty, but it forms part of the principle of equity based upon the doctrine of restitution as per the decisions of the **Hon'ble Supreme Court in South Eastern Coalfield Ltd Vs. State of MP (2003) 8 SCC 648.** In that case the Supreme Court considered the nature of the claim towards interest. The Supreme Court held, that the successful party, finally held entitled to a relief assessable in terms of money at the end of litigation, is entitled to be compensated by award of interest at a suitable

reasonable rate. The Supreme Court also held that the doctrine of restitution is attracted and that interest is a normal relief to be given in restitution.

The relevant observation of this judgment is as follows.-

> "*21. Interest is also payable in equity in certain circumstances. The rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement. Interest in equity has been held to be payable on the market rate even though the deed contains no mention of interest. Applicability of the rule to award interest in equity is attracted on the existence of a state of circumstances being established which justify the exercise of such equitable jurisdiction and such circumstances can be many."*

In <u>Ghaziabad Development Authority V/s Union of India & Anr. (2006) 6 SCC 113.</u> The Apex Court has held that the interest is payable on the principles of justice, equity and good conscience. The relevant observation is as follows:-

> *"We are therefore, of the opinion that the interest on equitable grounds can be awarded in appropriate cases. The rate of interest awarded in equity should neither be too high nor too low. The Authority does not have justification for resisting refund of the claimant's amount with interest."*

In <u>Ghaziabad Development Authority Vs. Balbir Singh (2004) 5 SCC 65</u>, it is held that the interest must be granted on equity. The relevant observation is as follows:-

> *"While so awarding, it must be shown that the relationship between the amount awarded and the default/unjustifiable delay/harassment. The principle that the interest must be granted, would apply where the refund of the amount is being claimed and the direction is to refund amounts with interest."*

The Hon'ble APTEL taking into consideration the aforesaid cases has given the gist of the principles relating to the payment of interest laid down by the Hon'ble Apex Court in para 18 of its judgment rendered in **<u>Ispat Industries Ltd Vs. Maharashtra Electricity Regulatory Commission 2010 ELR (APTEL) 0930;</u>**, as under;-

" (i) Even in the case of security deposit, the interest is payable. Since, the amount is held as security, the security amount should bear the same interest as admissible on fixed deposit of scheduled banks.

(ii) In an action by way of restitution, it is the duty of the Court to give full and complete relief to the party. In other words, the Court has not only the power but also has a duty to Order for interest.

(iii) The interest on equitable grounds can be awarded in appropriate cases. The rate of interest awarded in equity should neither be too high nor too low.

(iv) The general provision of Section 34 of Civil Procedure Code being based upon justice, equity and good conscience would authorize the redressal forum like the State Commissions as well as the National Commissions to grant interest appropriately.

(v) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation by calling it by any name. It can be called interest, compensation or damages. This is the principle of Section 34 of the Code of Civil Procedure.

(vi) It is well-settled law that when the party is entitled to the principal amount, which was retained by the other party, the said party is entitled to get back the principal amount as well as the interest."

In **Biomass Energy Development Association, Hyderabad V/s APERC & Ors. reported as 2015 ELR (APTEL) 340** the Hon'ble APTEL, has an occasion to deal with the similar proposition i.e., whether the State Commission, ought to have allowed interest on the arrears of differential amount payable by the respondent DISCOM, consequent to the Appellate Tribunal Judgment. In that case only issue arose for consideration was whether the State Commission, in the impugned order, dated 6th August, 2013, ought to have allowed interest on the arrears of the differential amounts payable by the Respondents-Distribution Licensees, consequent to the impugned order, dated 6th August, 2013, giving consequential effect to the State Commission's order, dated 31st March, 2009, in OP No. 5/2009, based on this Appellate Tribunal's judgments/orders, dated 20th December, 2012 and 30th April, 2013 in review. In that case the Hon'ble APTEL was unable to accept the Appellants contention for payment of interest on differential amounts payable, in pursuance to the impugned order, dated 6th August, 2013, because the amount

payable to the Appellants has been determined for the first time by the State Commission in its order, dated 22nd June, 2013. Therefore, when there was no amount determined payable to the non-conventional developers, the amount of interest for the past period on the ground that they were entitled to the said amount from the back date was found wholly unsustainable. In that case *The Hon'ble Tribunal held that* –

> *" if tariff remained in dispute in litigation before this Appellate Tribunal, High Court or Supreme Court, and tariff is finally determined by respective State Commission or Central Commission, no power generating company or distribution licensee is entitled to any interest over any differential amount, if any, payable in that regard since as a result of judgment of Higher Forums or Higher Courts, State Commission or Central Commission was bound to give effect to same and fix or determine tariff accordingly, in which case no interest could be said to be payable on any differential amount, if any, payable by generating company or distribution licensee. Hence this Tribunal was fortified in holding this view in light of NTPC u. M.P. State Electricity Board & Ors." 2011 ELR (SC)1485.*

In view of above quoted decisions, when the party is entitled to the principal amount, which was retained by the other party, the said party is entitled to get back the principal amount as well as the interest. Thus the interest is basically intended to compensate the party who was entitled for the payment of amount due and when there was no amount determined payable, no interest for the past period is payable on any differential amount. The interest on equitable ground can be awarded for the period after the payment becomes due in appropriate cases. The rate of interest awarded in equity should neither be too high nor too low. The State Commission has therefore, the authority to grant interest appropriately.

27. Before proceeding to deal with the question as to whether the petitioner is entitled to the interest, if so at what rate, it also becomes necessary to have a look at the circumstances and facts involved in this case. For determination of tariff for additional capacity of 1.9 (MW), the parties, in the absence of the specific provisions in the regulations, were required either to move proper petition for review in the tariff or in the alternative they were to get appropriate provisions incorporated in PPA for approval of the Commission. No such exercise either to move any petition or to incorporate any provisions in the PPA in conformity with the consent given by the Commission, has been made. To the contrary confusion and contradictions have arisen from the wrongful assumptions and interpretation of the condition No. (v) in the Commission's approval order dated 4.12.2007

by the parties and execution of the Supplementary PPA dated 10.9.2010, not in conformity with the provisions of the regulations subject to which the Commission accorded its approval. All this led to prolonging the disposal of this matter. In June, 2010, the petitioner Company filed a petition No. 94 of 2010 seeking for direction to the respondent Board to sign Supplementary PPA, incorporating the enhanced generic tariff as determined vide SHP Orders dated 18.12.2007 and 9.2.2010. The said petition was dismissed as withdrawn. However the Supplementary PPA was executed on 10.9.2010, modifying the tariff of Rs. 2.50 p. kWh to the tariff of Rs. 2.95 p. kWh as per SHP Order dated 9.2.2010, without prejudice to the rights of the HPSEB Ltd., as available under the law.

28. After execution of the Supplementary PPA, the petitioner company approached the respondent Board to release the payment of arrears of Rs. 2,77,50,960/- towards difference of the tariff of Rs. 2.50 p. kWh and Rs. 2.95 kWh, w.e.f. 11.3.2008. i.e. the date of which in PPA for enhanced capacity of 4.9 MW as executed. The respondent Board stopped disbursement of arrears and intimated the petitioner company that the payment of the energy supplied in Month of March, 2011, will be made @ Rs. 2.50 p. kWh. The petitioner company moved petition 6 of 2011, seeking direction of this Commission to the respondent Board to pay arrears of the bills, alongwith interest, according to the revised new tariff of Rs. 2.95 p. kWh. The respondent Board contested the petition stating that the Commission lacks jurisdiction to reopen the PPA executed prior to the constitution of the Commission and further that approval order dated 4.12.2007, cannot be taken to cover the entire energy generated from the project and the revised tariff should only be for the energy generated by the additional capacity. When the matter attained the concluding stage, the petitioner company filed **CWP No. 7203/2011-M/s K.K.K. Hydro Ltd. Vs. HPSEBL, the Chief Engineer (Comm.) and this Commission,** seeking indulgence of the Hon'ble High Court, for instructing the respondent Board, to release the amount of Rs. 2,77,50,960/- arrears already admitted by it. The Hon'ble High Court, vide its interim Order dated 30.8.2011 ordered that there will be a stay of all further proceedings before the Commission. However, it was made clear that there will be no further payments by the Electricity Board to the petitioner, without obtaining the Orders from the High Court and claim for interest was to be passed at the time of the disposal of the writ petition.

29. The petitioner was pursuing contradictory proceedings, seeking directions of this Commission to the respondent Board for release of arrears of the differential price based on the Supplementary PPA executed on 10.9.2010 and also praying the Hon'ble High Court by way of writ petition for the direction to this Commission for not holding any enquiry

into the circumstances under which the tariff at the rate of Rs. 2.95 per unit has been fixed in the Supplementary PPA. The petitioner withdrew the petition before the Hon'ble High Court and subsequently after the decision of the Hon'ble High Court moved petition before the Commission for adding new facts, all this led to prolonging the disposal of this case. The petitioner cannot take advantage of its own act of non-fulfilment of conditions precedent to the execution of the Supplementary Power Procurement Agreement dated 10.9.2010. It is well settled principle that no person can take advantage of its own wrong. In Broom's Legal Maxim (10^{th} Edition) at Pg.191 it is stated that:-

> *"……. it is a maxim of law, recognized and established, that no man shall take advantage of his own wrong and this maxim which is based on elementary principle, is fully recognized in courts of law and equity, and, indeed, admits of illustration from every branch of legal procedure".*

30. In light of the above undisputed facts and the principles laid by the Courts, the Commission now proceeds to decide the question relating to the entitlement of the petitioner for the payment of interest. The verdict of **the Hon'ble APTEL given in Biomass Energy Development Association V/s APERC & Others (Supra)** would squarely apply to the present case before this Commission as well. In the present case the tariff is being determined by the Commission on the directions of the Hon'ble APTEL made vide its judgment dated 17.10.2014. The Tariff remained in dispute before the Commission, High Court and APTEL. The Hon'ble APTEL has remitted this matter to this Commission for determination of the Tariff in relation to 1.9 MW additional capacity, as per terms of regulations 2007, and also to workout weighted average of the respective tariffs and the design energy envisaged for the 3 MW and 1.9 MW capacity in the approved Detailed Project Report of the Project w.e.f. CoD of 1.9 MW plant i.e., 10.7.2008. Consequently the petitioner Company will now be entitled to the payment of arrears on account of difference in the tariff for the project as per APTEL Judgment and the tariff at which the payment has already been made. Neither the High Court while dismissing the writ petition, nor the APTEL while remitting the case has given any directions for awarding the interest on the differential amount. The Hon'ble APTEL has made final verdict for determination of the tariff vide its order dated 17.10.2014 and the Commission is now for the first time determining the tariff, by this Order. Therefore, when there was no amount determined payable to the petitioner, the claim for amount of interest for the past period on the ground that they are entitled to the said amount from the back date i.e., the CoD of 1.9 MW plant is wholly unsustainable. Thus in this case the petitioner becomes entitled to the

interest on the differential amount from the date on which the Commission finally fixes the tariff and the differential amount is determined and becomes due. Taking note that the Hon'ble APTEL has already fixed the time limit of 3 months from the date of the communication of its judgment, the Commission, holds that the petitioner company will be entitled for interest w.e.f. the date of the expiry of the period of 3 months succeeding the date of communication of the APTEL Judgment dated 17.10.2014, to this Commission by the Registry of the Hon'ble APTEL that is w.e.f. date of expiry of three months after 30.10.2014.

31. In this case the petitioner company is claiming interest at the rate of 18 percent pa. Para 8.3 of the PPAs dated 30th March, 2000 and 11th March, 2008, which provides for late payments, reads as under;

> *"In case the undisputed amount of a bill is not paid within the Due date of Payment, the unpaid and undisputed amount shall bear penalty of 1.5% per month. For this purpose the month shall be considered to be comprising of thirty days. The penalty shall be payable for each day of delay in making such payment beyond the Due Date of Payment."*

32. The petitioner's claim can be considered only on the basis of statutes applicable to the transaction providing for the payment of interest. Admittedly the petitioner has based its claim on the basis of clause 8 relating to "Billing and Payments" in the PPA. The claim made by the petitioner i.e. the entitlement of interest @ 18% is misconceived. The above quoted provisions, fixing the rate of 1.5% per month (as contained in the PPA) cannot be invoked for the reason that the amount payable to the petitioner will become due for payment only after it is determined and the bill, in relation thereto, is raised; and undisputed amount of the bill is not paid, within the prescribed period. In the present case no such eventuality has arisen so for. There is nothing on record to show that any provision apart from this exists in contract between the parties for payment of interest in such situations. Thus, it would be fair to allow interest equal to the prevalent Base Rate of the State Bank of India plus 350 basis points, as contemplated under the HPERC (Terms & Conditions for Determination of Hydro Generation Tariff) Regulations, 2011.

33. Summary of findings-

(1) The weighted average rate for the Net saleable energy to be purchased at the inter-connection-point by the Respondent Board from the petitioner's 4.9 MW Project, from the date of commissioning the 1.9 MW plant, that is w.e.f 10.7.2008,

shall be Rs. 2.597 kWh (rounded to Rs. 2.60 per Kwh). The terms and conditions associated with the two constituent rates of Rs. 2.50 per kWh and Rs. 2.95 per kwh considered for arriving at the weighted average rate shall be applicable for the respective energy components expressed as fixed ratios of total energy as given against items 4 and 5 the Table under para 22 of this Order, i.e. 78.46% and 21.54% respectively. In case any adjustment in respect of any of these two tariffs is required to be made as per the respective tariff, the weighted average rate shall have to be recomputed by taking into account the impact of such adjustments on the corresponding proportions of net saleable energy (i.e. in a fixed ratio of 78.46 and 21.54) as determined, as aforesaid.

(2) When the party is entitled to the principal amount, which was retained by the other party, the said party is entitled to get back the principal amount as well as the interest. Thus the interest is basically intended to compensate the party who was entitled for the payment of amount due and when there was no amount determined payable, no interest for the past period is payable on any differential amount. The interest on equitable ground can be awarded for the period after the payment becomes due in appropriate cases. The rate of interest awarded in equity should neither be too high nor too low. The State Commission has therefore, the authority to grant interest appropriately

(3) When there was no amount determined payable to the petitioner, the amount of interest for the past period on the ground that they are entitled to the said amount from the back date i.e., the CoD of 1.9 MW plant is wholly unsustainable. Thus in this case the petitioner becomes entitled to the interest on the differential amount from the date on which the Commission finally fixes the tariff and the differential amount is determined and becomes due. Taking note that the Hon'ble APTEL has already fixed the time limit of 3 months from the date of the communication of its judgment, the Commission, holds that the petitioner company will be entitled for interest w.e.f. the date of the expiry of the period of 3 months succeeding the date of communication of the APTEL Judgment dated 17.10.2014, to this Commission by the Registry of the Hon'ble APTEL i.e. after expiry of 3 months from 30.10.2014, to be computed at the rated equivalent to the prevalent Base Rate of the State Bank of India plus 350 basis point.

34. Before parting with this Order, the Commission would like to record that despite of the best efforts, the Commission could not make and pronounce this consequential order

within three months from the date of the communication of the copy of the APTEL judgment dated 17.10.2014, per directions of the Hon'ble Tribunal. Pursuant to the said judgment the tariff of the project was to be the weighted average of the respective tariff and the design energy envisaged for the 3 MW and 1.9 MW capacities in the approved Detailed Project Report, w.e.f. the CoD of the 1.9 MW plant i.e., 10.7.2008. For the adjudication of this issue, the parties to this case were asked to file their respective claims, alongwith the necessary design energy details and other supporting documents. The Commission, having noticed the variation in the data furnished by the parties, felt it appropriate to refer and examine the DPRs for the project with capacity of 3 MW (Oct., 1997) and 4.9 MW (Oct., 2005) and had to seek clarification from the respective parties, this exercise consumed some time. However, this Commission, as a matter of abundant caution, has made the provision for payment of interest on the differential amount, as if this Order has been made immediately on the expiry of the period of 3 months preceding the communication of the copy of the APTEL Judgment dated 17.10.2014.

(Subhash C. Negi)
Chairman