

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

In the matter of:-

M/s Ascent Hydro Projects Ltd.
House No.16, HP Officers Colony (West End)
Panthaghati, Shimla-171009

.....**Petitioner**

Versus

The HP State Electricity Board Ltd.
thro' its Chief Engineer (System Operation)
Vidyut Bhawan, Shimla-171004

.....**Respondent**

Petition No. 99 of 2020
Heard on 24th July, 2020
Decided on 7th Sept., 2021

CORAM

DEVENDRA KUMAR SHARMA
CHAIRMAN

BHANU PRATAP SINGH
MEMBER

YASHWANT SINGH CHOGAL
MEMBER

Counsel: -

For the Petitioner:	Sh. Arijit Maitra, Advocate
For the Respondent:	Sh. Surinder Saklani, Standing Counsel a/w Sh. Kamlesh Saklani, (Authorised Representative)

ORDER

This Petition has been moved by M/s Ascent Hydro Projects Ltd., a generating Company registered under the Companies Act, 1956, having its Registered Office at 6, Shiv-Wastu, Tejpal Scheme, Road No.5, Vile Parle (East), Mumbai-400057 and Himachal Pradesh Office at House No.16, HP Officers Colony (West End), Panthaghati, Shimla-171009, through Sh. Shyam Vaidya, S/o Late Sh. G.L. Vaidya, its Managing Director (hereinafter referred as "the Petitioner") seeking implementation of the Order dated 22.05.2010 passed in Petition No. 267 of 2008 (Revised No.

206 of 2009) and Order dated 26.04.2019 passed in PetitionNo. 23 of 2018 by the Himachal Pradesh Electricity Regulatory Commission (hereinafter referred as “the Commission”) in relation to the Petitioner’s Sechi Small Hydro Project of 4.5 MW capacity, located on Sechi Khad, a tributary of Satluj river, in Kullu Distt. HP (hereinafter referred as “the Project”).

2. Per the Petition, the factual matrix of this case is that-

2.1 The Petitioner is a generation Company, having a Hydro Power Plant of the capacity of 4.5 MW (Sechi SHEP) and selling electricity generated by its said plant to the Himachal Pradesh State Electricity Board Ltd. (hereinafter referred as “the Respondent or the Respondent Board”) in accordance with the PPA dated 25.10.2007, executed between the Petitioner and the Respondent Board, pursuant to the Implementation Agreement dated 03.08.2001 and the Supplementary Implementation Agreement dated 18.05.2007, entered into between the Petitioner and the State Govt. of HP. Per clause 6.2 of the said PPA, the Respondent Board shall have to pay for the Net Saleable Energy delivered by the Petitioner to the Respondent Board at the Interconnection Point at the rate of Rs.2.50 per kWh which is firm and fixed without indexation and escalation and is not to be changed due to any reason whatsoever.

2.2 The Commission, vide its Order dated 18.12.2007 determined a generic tariff for small hydro projects, not exceeding 5 MW capacity for sale of power in the State of Himachal Pradesh at the fixed rate of Rs.2.87 per kWh. This order was made applicable to such PPAs which have already been approved by the Commission with the clause that “tariff terms and conditions of the PPA shall be subject to the HPERC (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007 (hereinafter as “the RE Regulations, 2007”) and also the PPAs to be approved thereafter.

- 2.3 The SHP Order dated 18.12.2007 was challenged before the Hon'ble APTEL by way of **Appeal No. 50 of 2008 by M/s Techman Energy Ltd. and in Appeal No. 65 of 2008 by the HP State Electricity Board Ltd.** and the said appeals were disposed of by a common Order dated 18.09.2009, upholding the Commissions Order dated 18.12.2007 with the directions to this Commission to reconsider the issues of negative cash flow of the power producers, periodicity of levelled tariff and to remove the arithmetical errors, identified by the Hon'ble APTEL.
- 2.4 The Commission vide its Order dated 09.02.2010 after taking into consideration the directions given by the Hon'ble APTEL and the submissions made by the parties in Appeal before Hon'ble APTEL recalculated the tariff at Rs.2.95 per kWh by rectifying the arithmetical errors on account of royalty, Minimum Alternate Tax, transmission losses and moratorium; and further vide its Order dated 10.02.2010, the Commission after taking into consideration the fact that subsequent to the issuance of SHP Order dated 18.12.2007 there had been material changes in the statutory provisions in relation to taxes and royalty (on free power), made the supplementary Order by devising formula for adjustment on account of change in the rate of MAT and Income tax.
- 2.5 Being aggrieved by the SHP Order dated 18.12.2007, the Independent Power Producers, signing the PPAs before the 1st July, 2006 on a fixed tariff of Rs.2.50 per kWh moved Petitions, to reopen their PPAs and seeking increase in tariff to Rs. 2.95 per kWh at par with the IPPs, who signed the PPAs, after July, 2006 onwards, mainly on the ground of inflation of construction cost, requirement of the mandatory release of 15% water discharge, levy of forest charges, revision of

fisheries charges and levy of local area development charges referred in the State Hydro Power Policy of Himachal Pradesh, 2006.

- 2.6 The Petitioner Company also moved Petition No. 267 of 2008 (revised No. 206 of 2009) to reopen its PPA and seeking increase in the tariff on account of mandatory release of 15% water discharge, forests and fisheries charges, LAD charges, change in royalty, additional 1% royalty for LADA, increase in MAT structure and service tax structure.
- 2.7 The Commission in **Petition No. 11 of 2008- M/s Hydrowatt Ltd.V/s HPSEBL and others** considered the issue of reopening of the PPAs and vide its Order dated 29.10.2009, held that-
- (i) under 2nd proviso to regulation 6(1) of the HPERC RE Regulations, 2007, the Commission can reopen concluded PPAs prospectively to cater the policy changes;
 - (ii) impact of policy of 15% water release was to be considered on merit of each case vis-à-vis actual provisions for water release as per DPR/TEC;
 - (iii) each Petition was to be considered on merit on furnishing necessary data/detailed calculations.
- 2.8 This Commission vide its Order dated 22.05.2010 passed in Petition No. 267 of 2008 (revised No. 206 of 2009) allowed increase in tariff of Rs.2.50 per kWh by 20 paise on account of water discharge and 3 paise on account of LAD charge and for MAT, formula was devised, stating-
- (i) that the tariff shall be enhanced by 20 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 of 10 years may approach the Commission to review the said increase;

- (ii) that the claims for forest, 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 power from the project shall be payable by the respective party as per the following formula:

$$- \frac{(\text{Total amount on account of revised effective MAT}) - (\text{Total amount on account of signing of PPA})}{8.80075 y}$$

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 above formula;

- (iv) that the additional tariff component to offset the loss on account of LADA 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 is Additional tariff component in Rs/unit levellised 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 whichever is later;

- (v) that the impact of the additional 1% of the royalty payable under Govt. notification dated 31.11.2009 for Local Area Development Fund shall be pass through in the tariff and increase on account of the same shall be 3 paise/unit;

In view of the above, the tariff of Rs. 2.50 shall be increased by 23 paise per unit. The Order shall be applicable from the date it is made.

- 2.9 The Respondent Board i.e. HPSEBL filed Writ Petitions before the High Court of Himachal Pradesh bearing CWP Nos. 7649, 8285, 8426, 8427, 8472, 8492, 8531 and 8532 of 2010, challenging the HPERC (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) (First Amendment) Regulations, 2007, Order dated 29.10.2009, Order dated 22.05.2010 and other Orders making increase in the tariff. The Hon'ble High Court of Himachal Pradesh dismissed the aforesaid Writ Petitions filed by the HPSEBL, vide its Judgment dated 06.08.2013.
- 2.10 The Respondent Board filed Review Petitions No. 11 of 2014, 12 of 2014, 14 of 2014, 15 of 2014, 16 of 2014, 30 of 2014, 62 and 64 of 2014 (including Review Petition No. 62 of 2014 relating to the SECHI Project HEP of the present Petitioner), seeking review of the number of the Commission's Orders allowing enhancement in tariff, due to the 15% mandatory water discharge, with respect to various PPAs where enhancement had been granted due to retrospective imposition of the lean period discharge. These Petitions had arisen out of the formulation of the Policy of Himachal Pradesh in 2005, regarding the release of the minimum normative quantum of water downstream diversion structure of the project and the consequent impact of such policy on the tariff of projects allotted prior to the introduction of such minimum quantum.

2.11 In order to promote renewable energy, the GoHP notified on 22.11.1994 a special promotional scheme for development of the Small Hydro Projects (SHPs), which was amended, from time to time, and per policy dated 06.05.2000, the SHPs upto 5 MW had an option to sell power to the Board at a fixed rate of Rs.2.50 per kWh, for which they had to sign Implementation Agreement (IA) with the GoHP as well as the Power Purchase Agreement (PPA) with the Board. Therefore, the tariff was part of the project allotment condition followed by PPA, which is binding contract. The Commission, while finalizing Model PPA and also approving specific PPA under section 86(1)(b) of the Electricity Act, 2003, concurred in the said rate. In 2007, the Commission made the HPERC (Power Procurement from for Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007 for determination of tariff of the SHPs upto 25 MW and the said Regulations were made applicable to the PPAs approved by the Commission from July, 2006 onwards. The IAs provide that water will be released down the stream and diversion structure of the hydel projects as per Orders of the State Govt. and no normative or specific quantification was provided. As a practice, the release of water was decided while appraising/approving the DPR or granting the TEC. However, the tariff was fixed at Rs.2.50 per kWh irrespective of release of water down the stream. In the year 2005, the GoHP, the Deptt. Of Pollution Control, issued directions under the Environment (Protection) Act, 1986, to existing and upcoming hydel projects to release and maintain minimum flow immediately downstream of the diversion structure of the hydel projects, throughout the year at the threshold value of not less than 10% of the minimum inflow observed in the lean season in the main water body, whose water is being harnessed and subsequently on 09.09.2005 the quantum was raised to 15%.

2.12 Prior to 2005, the condition of release of water was applicable, but there was no minimum normative quantum laid down. If the developers sell power to the HPSEB, the tariff fixed by the GoHP was Rs.2.50 per kWh upto 5 MW Projects. In 2007, the Commission made the RE Regulations, for determination of the tariff for SHPs and in accordance with the RE Regulations, 2007 the revised tariff on account of policy changes (including minimum 15% water release) after signing of the PPA on fixed rate of Rs.2.50 per kWh was allowed by the Commission by a generic Order dated 29.10.2009, followed by a case specific Order in relevant cases.

2.13 On 18.04.2012 the State Cabinet took the decision on Notification dated 09.09.2005 relating to water discharge as under-

- (i) the notification is to apply prospectively only on projects commissioned after 09.09.2005;
- (ii) where IAs/PPAs are executed before 09.09.2005, but the projects are commissioned after 09.09.2005, minimum discharge is to be determined, based on long term study and till then minimum discharge is to be as per TEC/MOU/IA/PPA.

Subsequently, the GoHP issued revised Policy decision dated 21.04.2012 stating that the Policy of minimum 15% water release will not apply retrospectively on projects which are not commissioned prior to 09.09.2005 and those which are not commissioned, but the Implementation Agreements (IAs) are signed prior to 09.09.2005 and, therefore, the increased tariff allowed by the Commission is required to be reviewed and withdrawn. The GoHP asked the Respondent Board to approach the Commission for review of orders passed in Tariff Petitions with respect to the PPAs, where tariff increase was granted due to the retrospective imposition of lean period discharge and accordingly the Board has filed the aforesaid Review Petitions. Considering the importance of these issues

involved, the Commission passed the Interim Order dated 25.04.2014 to the extent that the operation of the Orders passed in the Tariff Petitions with respect to the PPAs, where enhancement has been granted on account of 15% mandatory water release, shall remain stayed till the disposal of the Review Petitions, unless altered or modified.

2.14 This Commission, taking note of the fact that the directions in GoHP letter dated 21.04.2012 were to the Board and were not directions to the Commission under section 108 of the Electricity Act, 2003 and water availability and its potential is the key determinate in project design and consequent designed generation, which forms the basis for tariff determination, gave to parties and other stakeholders, irrespective of whether the decision dated 21.04.2012, is of the nature of policy or not, and after, due consideration, the Review Petitions No.11,12, 14,15,16,30,62 and 64 of 2014, filed by the Respondent Board, with respect to minimum 15% release of water as per letter dated 21.04.2012, were partly allowed on 10th Sept., 2014 and the Commission Orders were modified to that extent.

2.15 In the Review Petition No. 62 of 2014 (**HPSEBL V/s M/s Ascent Hydro Projects Ltd.**), the enhancement in tariff in relation to the Sechi HEP allowed on account of impact of 15% mandatory water release stood withdrawn w.e.f. 25.04.2014 and the Commission Order dated 22.05.2010 was modified to that extent. The Commission, therefore, allowed an increase of 3 paise p.u. on account of the impact of the additional 1 % of the Royalty payable under the Govt. notification dated 30.11.2009, for the Local Area Development Fund, which was to be pass-through in tariff. Consequently, the tariff in relation to Sechi HEP is Rs.2.53 per kWh w.e.f. 25.04.2014.

2.16 The Respondent Board filed on 24.03.2014 SLPs alongwith Stay Application before the Hon'ble Supreme Court challenging the HP

High Court Judgment dated 06.08.2013 but the Stay Application has been dismissed. During the pendency of the Writ Petitions before the Hon'ble High Court, the operation of the orders passed by the Commission and proceedings before the Commission on the Review Petitions, filed by the IPPs, remained stayed. The Commission disposed of the Review Petitions filed by the IPPs by a common Order dated 10.09.2014, whereby the increase allowed on account of impact of 15% mandatory water release was withdrawn w.e.f. 25.04.2014.

- 2.17 The Commission Order dated 10.09.2014 stand challenged by the IPPs, before the Hon'ble APTEL and the verdict thereon is yet awaited.
- 2.18 Significantly, the Petitioner Company alongwith two other power producers moved Petition No. 91 of 2016, to initiate appropriate proceedings against the Respondent Board under Sections 142 and 146 of the Electricity Act, 2003, for non-compliance of the Commission Orders dated 22.05.2010, 10.06.2010 and 10.09.2014 and to impose penalty and to direct the Respondent Board to make payments pursuant to the aforesaid Orders alongwith interest @ 1.5% p.m. and further interest. During the admission hearing of the said Petition, the Respondent Board contended that the said Petition was not maintainable and deserved outright dismissal, as the allegations leveled against the Respondent Board did not constitute the contravention of any provisions or directions issued under the Act and according to Order dated 10th Sept., 2014, the revised bills were required to be raised by the IPPs, alongwith the data of minimum 15% water discharge from their respective projects, but the Petitioners have not raised the revised bills and have not furnished the requisite water data. Further, the operation of the Commission Order remained

suspended due to the stay order of the High Court and the Impugned Order is still under adjudication before the Hon'ble APTEL. Hence, the question of non-compliance of the provisions of the Act or any directions issued thereunder did not arise. However, the Petitioners were asked to submit the water discharge data, alongwith supporting documents. The Commission, taking a lenient view afforded sufficient time to the Petitioner to furnish the water discharge data with supporting documents. The Petitioner, though, made the additional submissions in relation to their projects but had not been serious to furnish the water discharge data with supporting documents.

2.19 The Commission vide Order dated 14th March, 2017 disposed of the said Petition No. 91 of 2016. Para 6 of the Order is reproduced as under:-

“ Mere change in the tariff is not sufficient for initiating the penal proceedings under sections 142 and 146 of the Act. The petitioner should have raised the revised bills and in the absence of any valid reasons the DISCOM must have declined to entertain the revised bills. From the contents of the petition, it is not clear whether the Respondent Board declined to entertain the petitioner's claim and petitioners exhausted the specific remedy available to them under the PPA; especially when the PPA provides in Article 8 specific billing procedure and provisions for adjustments through supplementary bills, and also for resolution of billing disputes, failing which the provisions of Article 13 are to be attracted with respect to the disputed amount of such bills. Only after exhausting the dispute resolution mechanism laid down in PPA, the recourse could be taken to section 86(1)(f) of the Electricity Act, 2003, and the provisions of sections 142 and 146 of the said Act, could not be invoked directly”.

2.20 Subsequently on 28th May, 2018, the Petitioner submitted the documentary evidence with regard to mandatory release of minimum 15% water discharge stated to be duly certified by the State Pollution Control Board vide certificate dated 19.05.2017 alongwith bills dated 25.05.2018 for the period 1st March, 2012 to April, 2014, for an amount of Rs.80,34,660/- on account of 15% water release and for an amount of Rs.73,30,433/-being interest @ 1.5% p.m. The Petitioner made the request on 28.05.2018, to commence the Good Faith Negotiations, per provisions of Article 13 of the PPA and the Negotiation Meeting was conducted on 12.02.2019. During the discussion the HPSEBL informed that it could not process the request for release of payment on account of 15% mandatory release of water, due to the fact that the SLPs are still pending before the Hon'ble Supreme Court in a similar case. The representative of M/s Accent Hydro Projects Ltd., apprised that the Hon'ble High Court had dismissed the CWP No. 7649 alongwith other Writ Petitions by Order dated 06.08.2013 and Stay Application in SLP was dismissed by the Hon'ble Supreme Court vide Order dated 01.04.2015 in SLPs and is also of the firm opinion that there is no stay granted by the Hon'ble High Court or Supreme Court and payment for the period from 22.05.2010 to 25.04.2014 may be settled to meet the honest billing dispute resolution claims raised by the Petitioner in consonance with the mechanism set out in the PPA as per the HPERC Order dated 14.03.2017 passed in Petition No. 91 of 2016. The Petitioner stated that mere filing of Appeal does not operate as stay as per the settled law. The meeting ended with the statement that the HPSEBL will get the matter examined from their Legal Unit and shall inform the outcome to the Petitioner in due course of time. Subsequently, on furnishing the undertaking by the Petitioner i.e. M/s Accent Hydro Project Ltd. that the Petitioner will abide by the subsequent Orders, if

any, passed by the Appropriate Commission or Courts, the HPSEBL informed the Petitioner Company that the proposal has been considered and the management of the HPSEBL is of the opinion that the outcome of Hon'ble APTEL in Appeal No. 8 of 2015 and Hon'ble Supreme Court in Appeal No. 3326-3345 may be awaited. The Petitioner has also requested the HPSEBL through its letters dated 01.06.2019 and 24.09.2019, to make the payments towards MAT pursuant to the HPERC Order dated 14.03.2017.

2.21 With the background and above factual matrix, delineated in the preceding paras of this Order, the Petitioner has moved this petition, praying this Commission-

- (a) to direct the HPSEBL to pay the amount on account of 15% mandatory water release, as per the HPERC Orders from the CoD to April, 2014, as allowed by the Commission;
- (b) to direct the HPSEBL to pay the impact of MAT, as directed by the Commission vide its Orders dated 22.05.2010 and 26.04.2019.

3. In response to the Petition, the Respondent Board has submitted as under:-

- (a) the Respondent Board, being aggrieved by the Judgment, of the Hon'ble High Court of HP dated 06.08.2013, has filed the SLPs before the Hon'ble Supreme Court and the matter is still under adjudication;
- (b) the Good Faith Negotiation Meeting was conducted on 12.02.2019, with the Petitioners and the Respondent Board informed that the Board is of the opinion that the outcome of Appeal No. 8 of 2015 before the APTEL and the Supreme Court Appeal No. 3326-3345 of 2015 be awaited;
- (c) regarding the impact of 15% mandatory water release, the Respondent Board concedes that there is no stay on the Orders of the High Court of HP and the Board is ready to pay the

amount on account of 15% mandatory water release, subject to the decision of the Hon'ble Supreme Court on the pending SLPs;

- (d) as per the Commission Order dated 22.05.2010, either party on the actual data available for a period of 10 years may approach the Commission to review the said increase of 20 paise per unit. Since the actual data of more than 9 years is available, the Commission may consider to review the said increase;
- (e) regarding MAT bills, the Respondent Board states that the Petitioner has submitted MAT bills on 24.09.2019 and as the True-up of the said financial years has been concluded, the Respondent is facing hardship on this account of processing MAT bills.

4. The Petitioner Company, in its rejoinder to the reply of the Respondent Board has submitted that the reply of the Respondent Board is entirely misleading and averred as under:-

- (a) The Commission Orders are required to be implemented as there is no stay on the Orders sought to be implemented. The Hon'ble Supreme Court of India has dismissed the Stay Application of the Respondent Board and hence there is absolutely no ground on which the Respondent Board could decline to give effect to the Orders passed by this Commission.
- (b) The plea raised by the Respondent Board to seek review of 20 paise increase based on actual data is misplaced. The Respondent is not entitled in law to deprive the Petitioner of the increase of 20 paise per unit on the ground that the Respondent Board is in possession of actual generation data for the period of more than 9 years for a review of the quantum of increase of 20 paise as has been awarded by this Commission vide its Order dated 22.05.2010. Per the Commission's observations

that the SECHI Project of the Petitioner was yet to be commissioned and as such the generation data was not available to draw any analysis, the Commission allowed the increase of 20 paise per kWh as per the mandatory release of water discharge impact assessment carried out by the Board, with the liberty to either party to approach the Commission to review the said increase on the availability of the generation data for a period of 10 years. Thus, the payment of increase of 20 paise p.u. is neither subject to nor conditioned upon review of the actual data available for a period of 10 years. The Respondent Board has to comply with and affect the increase of 20 paise per kWh in the tariff and only thereafter, it can initiate any proceedings seeking review of the increase based on purported actual data after the period of 11 years from the passing of Order dated 22.05.2010.

- (c) Mere pendency of Appeals filed by the Respondent Board before the Hon'ble Supreme Court challenging the Commission's Order dated 22.05.2010, could not be a ground for the Respondent Board to prefer review based on actual data for a period of more than 9 years. If the argument of the Respondent Board to seek review based on actual data for a period of more than 9 years is to be accepted, then in that event all tariff Orders for generation Utilities which have been passed since the enactment of the 2003 Act, can be reopened at any point of time. Apart from this, the aforesaid argument of the Respondent Board would be contrary to the verdict of the Hon'ble Supreme Court given in **U.P. Power Corporation Ltd. V/s NTPC Ltd. (2009) 6 SCC 235** for the reasons that-

“ (i) the Commission should not have been asked to revisit the tariff after five years and when every body had arranged its affairs;

- (ii) framing of tariff is made in several stages and GENCOs get enough opportunity to put forth their case and hence can not be permitted to re-agitate the question after passing of many stages;*
 - (iii) additional costs may be absorbed in the new tariff, as some consumers may not continue to be the consumers and some new consumers might have come in. There is no reason as to why they should bear the brunt;*
 - (iv) Such quick-fix attitude was not contemplated as framing of forthcoming tariff is put subject to fresh regulations and not to the old regulations.*
- (d) The so-called 9 years of actual data is based on liberty granted by the Commission vide Order dated 22.05.2010 and the liberty sought to be taken advantage of by the Respondent is contrary to the law laid down by the Hon'ble Supreme Court in **Kewal Chand Mimani V/s S.K. Sen (2001) 65 SCC 512** holding that liberty can not be used as means to achieve an advantage which is not otherwise available in the law. Thus the question finally decided can not be reopened.
- (e) With regard the MAT claim, the Petitioner submits that MAT bills were submitted to the Respondent Board on 9th Oct., 2015, and also submitted ITRs with challans on 24.06.2017 and resubmitted the bills with additional documents on 06.09.2018 and only reminders were sent out on 1st June, 2019 and 24th Sept., 2019. Thus, the statement of the Respondent Board is factually incorrect that the Petitioner has submitted bills of MAT on 24.09.2019, after the True-up has been carried on and is facing hardship on account of processing the MAT bills, after the True-up for the relevant financial years had been carried on. The Petitioner submits that out of an ARR of some Rs.6000 crores, the HPSEBL is facing hardship to release a payment of

Rs.17 lakhs for the MAT bills submitted in the year, 2015 is a misleading statement. In a similarly placed Petition No. 100 of 2020, the Respondent Board in the matter of M/s Harison Hydel Construction Ltd., the MAT for FY 2015-16 and FY 2016-17 has already released the payment of MAT bills per Orders of the HPERC. The Respondent Board cannot treat two different IPPs differently, where the claims towards MAT are based on Commission's similar Orders.

5. In rebuttal the Respondent Board has filed the Sur-rejoinder to the rejoinder filed by the Respondent Board averring that-

- (a) the generation of power from the Petitioner's project w.e.f. 2012 to 2014, i.e. the period prior to the Commission's Order for withdrawal of increase in tariff on account of 15% mandatory water discharge should have been on the lower side as compared to the generation recorded post-withdrawal Order i.e. during the period from 2014 onwards;
- (b) so far as MAT is concerned, the Petitioner has never raised any bill after 2014. The differential net bills can not be processed, because the bills are to be raised as per the stipulations made in the Commission's Order dated 22.05.2010;
- (c) unless the Lis is decided finally, the Order can not be given effect.

6. The Petitioner Company, has filed the Sur-sur-rejoinder to the Sur-rejoinder i.e. counter to the rejoinder of the Respondent Board averring that-

A. Mandatory Release of water

- (a) The Respondent is factually incorrect while stating that the quantum of generation from the project during 2012-2014, should have been lower than the quantum of generation after the year 2014. The Respondent has

speculated the quantum for the period after 2014 i.e. when the Commission withdrew the increase in tariff on account of mandatory water release, hence the requirement of water release was not in existence.

- (b) The Respondent has presented the quantum of generation by the power plant of the Petitioner from 01.02.2012 (CoD) till 25.04.2014 (date of withdrawal of tariff increase, since the mandatory water release, ceased to exist). The Respondent has not disputed the generation between the period i.e. 2012 to 2014. Hence the Respondent has admitted the quantum of generation by the power plant during the period 2012-2014. Therefore, no question survives for review of the tariff enhancement of 20 paise per kWh for the mandatory release during the said period, since the Respondent has admitted the quantum of generation during the said period as follows-

Period	Total Quantum of Energy generated by the petitioner
2012-13	17456900 MUS
2013-14	19261100 MUS
2014-15	17896600 MUS

- (c) The scope of the present Petitions is limited to the period from 01.02.2012 (CoD) till 25.04.2014 (withdrawal of enhancement in tariff), hence the contention that the quantum of generation after 2014 is lower than the period prior to 2014 is beyond the scope of the present petition.
- (d) The quantum of generation of Hydro Power Project is dependent upon various factors and cannot be the same in each year as the water availability is dependent upon the act of God.

- (e) the Commission in its Order dated 22.05.2010 has assessed the mandatory water release impact based upon 75% dependable discharge as approved in the DPR and by deducting the sacrificial discharge from it (which is average of 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 on account of mandatory release of water over a period of 40 years as per the calculations given by the Respondent Board itself (and taken into account by the Commission in its Order dated 20.05.2010) is Rs. 17.04 Crores which, in terms of energy worked out to 20 paise per unit. Hence the tariff increase based on actual data for a period of 10 years does not arise, since the Commission has withdrawn the tariff increase from the tariff year 2014 itself. The Petitioner has not disputed at all the quantum data presented by the Respondent.
- (f) The contentions of the Respondent that it has filed an appeal against the Commission's Order and the said Order cannot be implemented is *ex-facie* legally untenable. Mere filing of an appeal does not operate as a stay or suspension of the Order appealed against. In its support, the Petitioner has cited the verdicts of Hon'ble Supreme Court and the APTEL as under-
- (i) **Collector Of Customs, Bombay vs M/S. Krishna Sales (P) Ltd. 1994 Supp(3) SCC 73;**
 - (ii) **Federation of Karnataka Chamber of Commerce and Industry Federation House V/s Karnataka ERC 2013 SCC online APTEL, 59;**

- (iii) Atma Ram Properties (P) Ltd. V/s Federal Motors (P) Ltd. (2005) 1 SCC 705;
- (iv) Madan Kumar Singh V/s District Magistrate Sultanpur (2009) 9 Scc 79.

B. Minimum Alternate Tax

The Respondent has not disputed any bill raised by the Petitioner Company on the Respondent prior to the period 2014 on account of MAT. Hence, the Respondent has admitted all the claims of the Petitioner's MAT bills raised prior to 2014 and has not raised any counter claim. It is for the Respondent to raise the counter claim, which the Respondent has not done. The Respondent can not make a claim in a Sur-rejoinder (after seven years) without raising any claim on the Petitioner. The Respondent as a clear afterthought has raised a speculative and imaginary contention in a proceeding on the Petition filed by the Petitioner that it is the Petitioner which after the year 2014 has to pay amount to the Respondent on account of MAT. As such, even if there is any claim of the Respondent after the period 2014, the same cannot be adjudicated in the present Petition, especially such claim may be severely time barred under the Limitation Act, 1963.

7. The Petitioner has placed on record, in support of its Sur-sur-rejoinder, the following documents.-

- (a) Water Discharge Data (of April, 2021 releasing water in excess) to demonstrate that the Petitioner is continuously releasing 15% water as is mandated in the law.
- (b) NGT Order dated 03.12.2019 and Order dated 07.09.2020 passed in OA No. 425 of 2019- in the matter of **Vijay Kumar V/s State**

of HP holding that HEPs (upto 25MW) whereunder the power producers are mandatorily required to comply with 15% water release.

The Petitioner submits that pursuant to the aforesaid Order dated 03.12.2019 of the National Green Tribunal (NGT), even after the year 2014, the requirement of mandatory release of water was there though the Commission had withdrawn the 20 paise increase per unit. The NGT had vide its Order dated 07.09.2020 taken up the issue of enforcement of requirement of releasing minimum water downstream by the HEPs in Himachal Pradesh. As such, the Commission's Order dated 10.09.2014 withdrawing the 20 paise increase per kWh on the premise of the absence of a requirement of mandatory release of water, is legally sustainable. The Petitioner has preferred an Appeal No. 8 of 2015, before the Hon'ble APTEL. The Petitioner submits that the Respondent is factually incorrect while stating that the quantum of generation from the Petitioner's project during the period 2012 to 2014 should have been lower than the quantum of electricity generated after the year 2014 and as such has speculated that the quantum of generation after 2014 should have been higher as compared to the quantum of generation during the period 2012 to 2014.

8. The Respondent never raised the issue as to whether or not the Petitioner is releasing mandatory water in the Good Faith Negotiations that were directed by this Commission, but as an afterthought, has raised this issue. The contention of the Respondent Board is completely misleading and devoid of any merit and deserves to be rejected. The renewable energy generators are expected to invest money towards installation of generation capacity, pay salaries to their employees and undertake maintenance activities of their plants, require a continuous cash flow. To not to pay

revised tariffs on account of water release and MAT is a clear breach of contract. The illegal and inequitable approach of the Respondent Board refusing to comply with the binding Orders of this Commission to pay the enhanced tariff on account of mandatory water discharge as well as the differential MAT liability will drive many to bankruptcy proceedings as they will not be able to service their debts.

9. We have heard Ld. Counsel for the parties and perused the record carefully. The following issues arise for consideration and determination.-

- (1) Whether in view of the pendency of Appeals, before the Hon'ble Supreme Court and the APTEL, the Respondent Board is justified to keep the implementation of the orders passed by the Commission in abeyance?
- (2) Whether the Petitioner Company is entitled to the benefit of increase in tariff due to the 15% mandatory water release from the CoD of the project i.e. 01.03.2012 to 25.04.2014 i.e. the date of withdrawal of the enhancement in tariff by the Commission, alongwith carrying cost?
- (3) Whether the Petitioner Company is entitled for the reimbursement of the MAT, as directed by the Commission vide its Order dated 22.04.2010 and 26.04.2019, alongwith carrying Cost?

10. Now let us consider these issues one by one.

Issue No.1 Whether in view of the pendency of Appeals before the Hon'ble Supreme Court and the APTEL, the Respondent Board is justified to keep the implementation of the Orders passed by the Commission in abeyance?

11. From the averments made by parties to this Petition, it is evident that the Commission vide its Order dated 22.05.2010, passed in Petition No. 267 of 2008 (Revised Petition No. 206 of 2009), allowed increase in tariff of Rs. 2.50 per kWh by 20 paise on account of 15% mandatory water discharge and 3 paise on account of LAD charges. The Respondent Board i.e. HPSEBL filed a bunch of Writ Petitions before the Hon'ble High Court of Himachal Pradesh, challenging the HPERC RE Regulations, 2007, and other Orders

including the impugned Order dated 22.05.2010. The Hon'ble High Court dismissed the aforesaid Petitions filed by the Respondent Board, vide its Order dated 06.08.2013. The Respondent being aggrieved by the Order passed by the High Court of HP, filed SLPs, before the Hon'ble Supreme Court of India, which are still pending for adjudication.

11.1 Subsequently, taking into consideration revised HP Govt. Policy decision dated 21.04.2012, the Commission passed the interim Orders dated 25.04.2014 to the extent that the operation of Orders passed in the Tariff Petitions with respect to the PPAs, where enhancement in tariff has been granted on account of 15% mandatory water release, shall remain stayed till the disposal of the Review Petitions, unless allowed or modified. In **Review Petition No. 62 of 2014 HPSEBL V/s M/s Ascent Hydro Project**, the enhancement in relation to the SECHI HEP, allowed on account of 15% mandatory water release stood withdrawn w.e.f. 25.04.2014 and the Commission Order dated 22.05.2010 was modified to that extent, vide this Commission's Order dated 10.09.2014, which now stands challenged by the IPPs, before the Hon'ble APTEL and the verdict thereon is yet awaited.

11.2 The Petitioner requested the Respondent Board to release the payment on account of 15% mandatory release of water for the period from 1st March, 2012 to 25th April, 2014, but the Respondent Board declined to release the payment due to the fact that the SLPs are still pending and stated that the outcome of the decision of the Hon'ble Supreme Court in Appeals No. 3326-3345 and Hon'ble APTEL in Appeal No. 8 of 2015 may be awaited.

11.3 Sh. Arijit Maitra, learned Advocate, appearing for the Petitioner, has strenuously argued that the contention of the Respondent Board that it has filed an Appeal against the Commission Order and the said Order cannot be implemented is ex-facie legally untenable and the refusal on the part of the Respondent Board to implement the aforesaid Order of

the Commission is unlawful and contrary to the Law settled by the Hon'ble Supreme Court that without obtaining an order of stay, an order cannot be refused to be implemented. As well known, mere filing of an appeal does not operate as a stay or suspension of the order appealed against. In his support, he has cited the verdicts of the Hon'ble Supreme Court rendered in **Collector of Customs, Bombay V/s Krishna Sales (P) Ltd. 1994 Supp (3) SCC 73, Atmaram Properties (P) Ltd. V/s Federal Motors (P) Ltd (2005) 1 SCC 705 and Madan Kumar Singh V/s Distt. Megistrate, Sultanpur (2009) 9 SCC 79**. Sh. Arijit Maitra also submits that the Hon'ble APTEL in **Federation of Karnataka Chamber of Commerce and Industry Federation House V/s Karnataka ERC, 2013 SCC online APTEL 1: [2013] APTEL 59**, has implemented the law settled by the Supreme Court stating that "the contention of the Appellant that the Commission should not have implemented the directions of the Appeal No. 15 of 2009 while an Appeal against the said Order is pending in the Supreme Court is misconceived.

- 11.4 Sh. Arijit Maitra, Advocate for the Petitioner further highlights the fact that the Hon'ble Supreme Court of India by its Order dated 01.04.2015 in SLPs (arising out of the Hon'ble High Court of HP Judgment and Order dated 06.08.2013, under which the Commission Order dated 22.05.2010 was challenged) has dismissed the Stay Application filed by the Respondent Board.
- 11.5 The Respondent Board, also concedes that there is no stay on the Orders of the High Court of HP and submits that the Board is ready to pay the amount on account of 15% mandatory water release, subject to the Hon'ble Supreme Court decision on the pending SLPs.
- 11.6 The Petitioner has also furnished an undertaking to the extent that in case the payment on account of claim regarding 15% mandatory release of water due from the HPSEBL, as per HPERC Order dated

22.05.2010, 10.09.2014 and 14.03.2017 is made by the HPSEBL, the Petitioner will abide by the subsequent Orders to be made in future by the Commission and the Courts.

11.7 In view of the above discussion, law cited by the Ld. Counsel for the Petitioner and taking into consideration that there is no stay granted by the Hon'ble Supreme Court and dismissal of Writ Petitions by the Hon'ble High Court and undertaking furnished by the Petitioner, the arguments addressed by the Petitioner have merits. Accordingly, we are of the considered view that the Respondent Board is not justified to keep the implementation of the Order of the Commission in abeyance and decide this issue in favour of the Petitioner.

Issue No.2 Whether the Petitioner Company is entitled to the benefit of increase in tariff due to the 15% mandatory water release from the CoD of the project w.e.f. 01.03.2012 to 25.04.2014, i.e. the withdrawal of enhancement in tariff by the Commission alongwith the carrying cost?

12. The next issue pertains to the implementation of the Commission Order dated 22.05.2010 passed in Petition No. 267 of 2008 (Revised Petition No. 206 of 2009) and Order 26.04.2019 in Petition No. 23 of 2018. The Commission, after taking into consideration the conclusions drawn in Commission's Order dated 29.10.2009 passed in **Petition No. 11 of 2008- M/s Hydrowatt Ltd. V/s HPSEBL and others** and further submissions made, calculations/data supplied by the Petitioner, the HPSEBL and the Himurja, passed the Order dated 22.05.2010 stating that-

“The tariff shall be enhanced by 20 paise per kWh on account of impact of 15% mandatory release of water down the stream of diversion structure. However, either party on the actual data available for a period of 10 years may approach the Commission to review the said increase.”

12.1 The aforesaid Order was effective from the date on which the Order allowing the increase was made by this Commission. The said increase in tariff was challenged by the Respondent Board by way of

8 Writ Petitions before the Hon'ble High Court of HP, which were disposed of by the Hon'ble High Court on 06.08.2013. The Respondent Board filed SLPs alongwith the Stay Application before the Hon'ble Supreme Court, challenging the said Order of the HP High Court dated 06.08.2013 and the Stay Application was dismissed by the Hon'ble Supreme Court. During the pendency of the Writ Petitions, the operation of the Orders passed by the Commission and proceedings before the Commission in the Review Petitions filed by the IPPs, remained suspended. The Commission disposed of the Review Petitions filed by the IPPs by a common Order dated 10.09.2014 after disposal of above Writ Petition vide Order dated 06.08.2013, whereby the increase on account of impact of 15% mandatory water release was withdrawn w.e.f. 25.04.2014.

- 12.2 The Commission Order dated 10.09.2014 also stands challenged by the IPPs before the Hon'ble APTEL and verdict, thereon is yet awaited. The Hon'ble Supreme Court of India by its Order dated 01.04.2015 in SLPs dismissed the Stay Application filed by the Respondent Board. The submission of the Respondent Board is that the payment to the Petitioner is subject to the raising of bills. From the above facts, it is amply clear that the revised bills on account of enhancement in tariff due to the impact of 15% mandatory water release, could have been raised after 06.08.2013 i.e. the date on which the Writ Petitions filed by the Respondent Board were dismissed by the Hon'ble High Court of HP. The Petitioner has claimed for reimbursement of the enhancement in tariff for the period w.e.f. 1st March, 2012 (i.e. CoD of the project) to 25.04.2014 (i.e. date w.e.f. which the enhancement in tariff was withdrawn). The Petitioner submitted on 28th May, 2018, the documentary evidence in regard to mandatory release of minimum 15% water discharge duly certified by the State Pollution Control Board vide Certificate dated 19.06.2017

alongwith bills dated 25.05.2018 for the period from the 1st March, 2012 to April, 2014 for an amount of Rs.80,34,660/- on account of 15% water release and for an amount of Rs.73,30,433/- being interest @ 1.5% p.m.

- 12.3 It would be appropriate to examine the relevant provisions of the PPA to reach to a just conclusion. Article 8 of the PPA deals with Billing and Payment. The relevant clauses of Articles 8 and 10 of PPA are reproduced below:-

ARTICLE -8
BILLING AND PAYMENT

“ 8.1 The Company shall prepare the monthly bills for the Saleable Deemed Generation and the Net Saleable Energy in accordance with the jointly signed statements as per Sections 7.16 and 7.17, respectively and shall furnish the same to the Board in triplicate, on or after 5th day of each succeeding month. The bills for supply of Energy by the Board to the Company pursuant to Section 6.1 shall be prepared by the Board and served on the Company in the same manner.

The Board shall make payments of the bills raised on above basis within 30 days from the Date of Presentation of the bill by the Company to the Board. The Date of Presentation of the bill shall mean the date on which the bill is received by the designated office of the Board as notified from time to time. The payments shall be made through crossed cheques drawn on the banks acceptable to the Company and the Board.

xxxx xxx xxx xxx xxx

8.2 **REBATE**

xxx xxx xxx xxx xxx

8.3 LATE PAYMENTS

In case the un-disputed amount of a bill is not paid within the Due Date of Payment, the unpaid and un-disputed amount shall bear penalty at a rate 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.

8.4 SUPPLEMENTARY BILLS

The adjustments, if any, on account of errors and omissions in the billing for a month, shall be made through supplementary bills, which shall also be paid/adjusted on the above lines but through crossed cheques only.

8.5 BILLING DISPUTES

- (a) Notwithstanding any dispute as to all or any portion of monthly bill/supplementary bill submitted by the Company to the Board, the Board shall pay the undisputed amount of the bill by the Due Date of Payment; provided that the amount of the bills is based on joint meter readings/jointly signed statements and applicable tariff.
- (b) In case of dispute on any of the bills, the Board shall notify the Company of any disputed amount within 15 days of receipt of bills, and the Company shall rectify the errors/shortcomings or otherwise notify its rejection of the disputed amount, with reasons thereto, within 5 days of the reference by the Board, failing agreement on which the

provisions of Article 13 shall apply with respect to the disputed amount of such bill. If resolution of any dispute requires the Company or the Board to reimburse to the Board or to the Company, the amount to be reimbursed shall bear interest, for the number of days from the Due Date of Payment by the Board or by the Company upto the Date of Reimbursement, at the rate equivalent to the prevailing Prime Lending Rate of the State Bank of India.

xxx x x x xxx xxx xxx

8.7 DATE OF PAYMENT/DATE OF REIMBURSEMENT

For the purpose of this Article, the Date of Payment/Date of Reimbursement shall mean the date on which the crossed cheque is delivered in person to the representative of the Company or the Board, as the case may be, or the day immediately succeeding the day on which such a cheque is sent through the registered post.

8.8 LEVIES, TAXES, DUTIES, CESS ETC

Any statutory taxes, levy, duties, cess or any other kind of imposition(s) including tax on generation of electricity, whichever is imposed/charged by any Government (Central or State) and/or any other Local body/authorities on generation of electricity after the Effective Date shall be reimbursed by the Board to the Company on the quantum of Net Saleable Energy.

8.10 SET OFF OF AMOUNT

Any amount due to one Party by the second Party may be set off against the amount(s) due to the second Party by the first Party. However, such set off of amounts due to a

Party may not be applied against amounts that may become due at a future date to the second Party by the first Party.

ARTICLE-10

TERM, EVENTS OF DEFAULT AND TERMINATION

10.4 The occurrence and continuation of any of the following events, unless any such event occurs as a result of Force Majeure event or a breach by the Company of its obligations, shall constitute the “Board Event of Default”-

xxxx xxxx xxxx xxxx xxxx

- (c) if the Board fails to make, payment of undisputed amount of the monthly bill amounting to Rs. one lac and above within three months after the Due Date of Payment for that monthly bill;
- (d) the Board commits material breach of the Agreement.”

xxx xxx xxx xxx xxxx

12.4 Bare reading of the above Clauses in the PPA, would reveal that while it was incumbent on the part of the Petitioner to prepare the bills in triplicate and raise the revised bills for differential amount by serving on the Board in the designated office and the Board was duty-bound to make payment or in the alternative for any valid reasons, the Board must have declined to entertain the revised bills. From the contents of the present Petition and the counter filed by the Board, it is not clear whether the Respondent Board declined to entertain the Petitioner’s claim for enhanced tariff on account of 15% mandatory water release especially when the PPA provides in Article 8 specific billing procedure and provisions for adjustment through supplementary bills and also for resolution of billing disputes. But the Respondent Board

only informed the Petitioner vide its letter dated 13.12.2019, that “the management of the HPSEBL is of the opinion that the outcome of the APTEL Appeal No. 8 of 2015 and Hon’ble Supreme Court Appeal No. 3326-3345 of 2015 may be awaited.

12.5 This Commission, while considering Issue No.1 in this case, has already concluded that the contention of the Respondent Board not to implement the Commission’s Order dated 22.05.2010, on the ground that an Appeal is pending against the Order appealed against, is misconceived. Further, in its pleadings, the Respondent Board has conceded that there is no stay on the orders sought to be implemented and the Board is ready to pay the amount on account of 15% mandatory water release, subject to the Supreme Court decision on the pending SLPs. The Petitioner has also furnished on 24th Sept., 2019 the undertaking that the payment on account on this claim regarding 15% mandatory release of water is due from the HPSEBL as per Hon’ble HPERC’s Orders dated 22.05.2010, 10.09.2014 and 14.03.2017 and if the payment is made by the Petitioner, the Petitioner i.e. M/s Ascent Hydro Projects Ltd. will abide by any subsequent Orders as may be passed in future by the appropriate Commission and the Courts.

12.6 The Petitioner has submitted that-

- (a) the Commission directed increase of 20 paise per kWh in the tariff of the Petitioner’s project i.e. Sechi Small Hydro Project of 4.5 MW capacity, payable by the Respondent, vide the Commission’s Order dated 22.05.2010 and the said order is required to be implemented, which the Respondent is refusing to do so on fictitious grounds. The Supreme Court has already dismissed the stay application moved by the Petitioner. Thus, there is absolutely no legal ground on which the Respondent Board could decline to give effect to the aforesaid order;

- (b) so far as raising of the bills is concerned, the bills, claiming enhanced tariff towards mandatory discharge of water, alongwith the generation data, duly certified by the State Pollution Control Board, have been furnished, annexed to the Petition, hence the submission of the Respondent Board that the payment to the Petitioner is subject to the raising of bills stands fully satisfied;
- (c) the arguments that the dispute has to be first decided by the Supreme Court and then only the payment will be made by the Respondent Board, is patently wrong and unlawful. Further, the implementation of the Order of the Commission has been delayed for a period of 11 years.
- (d) the contention of the Respondent Board that they would like to seek a review of enhanced tariff on the actual data available for a period of 10 years is misconceived. Firstly the direction of the Commission to the Respondent Board to pay enhanced tariff to the Petitioner is neither subject to nor conditioned upon a review of the data available for a period of 10 years. Secondly, the claim of the Petitioner is only for the period from its commissioning i.e. 1st March, 2012 till 25.04.2014 (i.e. the date on which enhancement on account of 15% mandatory release was withdrawn) and, therefore, the availability of data for a period of 10 years does not arise;
- (e) the Petitioner is in Appeal before the Hon'ble APTEL challenging the withdrawal of the enhancement in tariff from 25.04.2014. The present Petition is limited for period from its commissioning in the year 2012 till the Order of the Commission passed in 2014, withdrawing the enhanced tariff. Hence there will be no impact of decision of the APTEL in Appeal, on the claim raised in the present Petition. The Respondent Board is

bound in law to make the payment arising out of this Commission's Order dated 22.05.2010 forthwith to the Petitioners alongwith appropriate interest/carrying cost to be awarded by this Commission.

12.7 Contra Shri Surinder Saklani, the Learned Advocate representing the Respondent Board has reiterated the contents of the Board's response to the Petition, rejoinder and additional submissions made by the Respondent. The Respondent Board has not placed on record any material to refute the arguments addressed on behalf of the Petitioner and to establish that the revised bills raised on account of enhancement in tariff due to the 15% mandatory water release alongwith the generation data presented by the Petitioner on 28th May, 2018 were deficient or incorrect or the Board has notified, the disputed amount, in terms of Clause 8.5 (b) of the PPA, to the Petitioner to rectify the errors/shortcomings or otherwise notified its rejection of the disputed amount, with reasons thereto.

12.8 Therefore, keeping in view the above discussion, perusal of record and submissions made and the specific provisions contained in Article 8 of the PPA, it is held as under:-

- (a) the Respondent Board is bound to implement the Order dated 22.05.2010 passed in Petition No. 267 of 2008 (Revised Petition No.206 of 2009), subject to outcome of the decision of the SLPs pending in the Hon'ble Supreme Court and Appeals before the Hon'ble APTEL;
- (b) the bills dated 25.05.2018 for the period 1st March, 2012 to 25th April, 2014 on account of 15% mandatory water release are to be taken as presented and received in the designated office of the Respondent Board on 28th May, 2018 and the due date of payment shall be the date on which the period of 30 days, after the presentation of the aforesaid bills, expires;

- (c) for non-payment for bill amount the Petitioner shall be entitled to the payment of interest under Clause 8.5 of the PPA, at the rate equivalent to the Prime Lending Rate of the State Bank of India for the period intervening the Due Date of Payment and Actual Date of Payment i.e. to say the day on which a cheque is sent to the Petitioner through registered post or is delivered in person to the representative of the Petitioner Company. The interest to be paid shall not be a pass-through;
- (d) in view of undue delay, on the part of the Petitioner, in the presentation of bills, the Petitioner shall not be entitled to claim the interest/carrying cost w.e.f. 01.03.2012 as claimed by the Petitioner.

Issue No.3 Whether the Petitioner Company is entitled to reimbursement of the MAT, as directed by the Commission vide its Order dated 22.04.2010 and 26.04.2019, alongwith carrying Cost?

13. MAT was introduced on 01.04.1988 but was withdrawn w.e.f. 01.04.1991. On 01.04.1997 MAT was reintroduced in the Income Tax Act, 1961, by insertion of Section 115 JA. However, MAT was not applicable to power generating Companies till 31.03.2001. Section 115 JA of the Income Tax Act, was withdrawn w.e.f. 01.04.2001 and MAT was reintroduced by insertion of Section 115 JB in the Income Tax Act and made applicable to all corporate entities including power generating companies.

13.1 The PPA was signed on 25.10.2007. At that time the Hydro Plant of capacity of 4.5 MW (Sechi HEP) was exempt from the payment of Income Tax for a period of 10 years from the Commercial Operation Date (CoD) under Section 80 –1 A of the Income Tax Act, 1961.

13.2 The Petitioner commenced the generation of power w.e.f. 1st March, 2012 and is, therefore, entitled to tax holiday from FY 2012-13 onwards for a period of 10 years as per section 80 -1 A of the Income Tax Act.

13.3 This Commission vide its Order dated 22.05.2010, passed in Petition No. 267 of 2008 (Revised Petition No. 206 of 2009), stated-

“(iii) that any change in MAT, after signing of PPA in the first 10 years of the generation of power from 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 the signing of the PPA)

The adjustment on account of change in the MAT shall be subject to 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.”

13.4 As a sequel to the Commission's Order dated 22.05.2010, the Petitioner submitted the bill for an amount of Rs.17.87 lacs for reimbursement of MAT payable to the Petitioner for the financial years 2012-13, 2013-14, and 2014-15, on 9th October, 2015, alongwith the working sheet. Further, the petitioner furnished on 06.09.2018 the necessary details of the documents such as ITR for the assessment years 2013-14, 2014-15 and 2015-16, asked for by the Respondent Board, to enable the Respondent Board to process their bills and to reimburse the payment of the MAT.

13.5 Contra, the Respondent Board submits that the Petitioner have submitted the MAT bill on 24.09.2019. The True-up for the year 2012 to 2014 has already been completed and there being a cash flow problem facing the Respondent Board, which is hindering to make of payments to the Petitioner.

13.6 The Petitioner in its rejoinder to the response of the Respondent Board has submitted that the MAT bills were presented to the Respondent Board on 9th Oct., 2015 and also furnished on 24.06.2017 the complete copies of the ITRs and the documents, as asked for by the

Respondent Board, and the bills were resubmitted on 06.09.2018, with additional documents. Only the reminders were sent on 01.06.2019 and 24th Sept., 2019. Thus the statement of the Board that the MAT bills were only raised on 24.09.2019 is misleading.

- 13.7 Sh. Arjit Maitra the Learned Advocate, appearing for the Petitioner, argues that in case the contention of the Respondent Board that True-up for the years 2012 to 2014 is already complete and due to cash flow, it feels handicapped to process the MAT bills is to be accepted, then the Respondent Board will be exempted from making payment to any party on the premise that True-up for the years in question has been completed. He has also submitted that the contention of the Board is not only misleading but is to be abhorred which does not benefit a public utility and deserves to be rejected in limine. This is an illegal and inequitable approach.
- 13.8 Sh. Arjit Maitra further argues that the fact that the renewable energy generators are expected to invest money towards installing generation capacity, pay salaries to their employees and undertake maintenance of their plants, requires a continuous cash flow. To not to pay revised Tariff on account of water release and MAT, is a clear breach of Contract. As per him, it is very likely that this situation will drive many to bankruptcy proceedings, as they will not be able to service their debts.
- 13.9 We have gone through the records and observe that the contention of the Respondent Board that the Petitioner has submitted the MAT bills only on 24.09.2019, is incorrect, as the Petitioner has already annexed copies of the MAT bills raised in October, 2015, alongwith the copies of its letters submitting additional documents/ITRs, asked for by the Respondent Board from time to time.

13.10 The contention of the Respondent Board that the True-up for the particular years has already been completed, before the presentation of the revised bills by the Petitioner has also no merits. Firstly the Respondent Board itself challenged the Commission Order dated 22.05.2010 by way of Writ Petitions and procured the stay from the Hon'ble High Court and after the dismissal of Writ Petitions, delayed the implementation of the Order of the Commission for one reason or the other. Secondly, the claim for the reimbursement of MAT, rests on the concept that any advance Income Tax payable for the income from the project only had to be reimbursed by the Board. Per Commission Order dated 22.05.2010, the adjustments on account of the change in the MAT, is subject to the furnishing to the satisfaction of the Board, of documentary proof of the actual payment. Hence on the presentation of the bills, the Board had to satisfy itself that the Petitioner has made the actual payment of the MAT. Where the Petitioner claims the reimbursement of the MAT paid, the Board has to reimburse the MAT to the Petitioners per concessions provided under the Income Tax Act. It is immaterial whether the accounts for the particular year have been tried up or not.

13.12 Per Article 8 of the PPA dated 25.10.2007, the Respondent Board, on receipt of the Supplementary MAT bills from the Petitioner, was required to process the bills as envisaged in the specific bills procedure and provisions for adjustment and resolution of the billing disputes. Even after the 6th September, 2018, when the Petitioner submitted the revised bills alongwith additional information/documents asked for by the Board, the Board has neither processed the bills nor accorded its satisfaction per the Commission Order dated 22.05.2010, nor notified the rejection of the MAT claims to the Petitioner.

- 13.12 It is a matter of great concern that the implementation of Commission Orders has been taken up in a casual manner and payment/adjustment has been considerably delayed i.e. a delay of 11 years till date. It is settled law, that the legitimate claims should not be rejected barely on technical grounds.
- 13.13 There is no discrimination, as alleged by the Petitioner, as the Respondent Board has released the MAT bills raised by M/s Harison Hydel Constructed Company Limited, in relation to their Brahamgana Project (5MW) HEP, the FY 2015-16 and FY 2016-17, as these bills were raised in conformity with the stipulations laid down in Commission's Order dated 10.06.2010 passed in Petition No. 43 of 2008 (Revised Petition No. 209 of 2009).
- 13.14 On examining the record and submissions made by the Ld. Counsel appearing for the Parties on Issue No.3, it is held as under:-
- (a) the Petitioner is entitled to the reimbursement of the MAT, as directed by the Commission vide its Order dated 22.05.2010 and 26.04.2019;
 - (b) the MAT bills, are to be taken to be presented on the **6th Sep., 2018** and due date for the reimbursement of the MAT, shall be the due date, on which the period of 30 days, after the presentation of the bills, expires;
 - (c) the Petitioner shall be entitled for interest under Clause 8.5 of the PPA for the period from the due date of reimbursement by the Board upto date of actual reimbursement, at the rate equivalent to the Prime Lending Rate of the State Bank of India;
 - (d) the amount of interest payable to the Petitioner shall not be a pass through.

14. Summary of Finding

- (i) the Respondent Board is not justified to keep in abeyance the implementation of the Orders passed in Petition No. 267 of 2008 (Revised Petition No. 206 of 2009) as the mere filing of appeal does not operate as a stay or suspension of the Order appealed against;
- (ii) the Respondent Board is bound to implement the Commission's Orders dated 22.05.2010 and the bills dated 25.05.2018, for the period 1st March, 2012 to 25th April, 2014, on account of 15% Mandatory Water Release Obligation, are to be taken to have been presented to the Board on 28th May, 2018, and the due date of payment shall be the date on which the period of 30 days, after the presentation of the bill, expires. The Petitioner shall be entitled to the payment of interest under Clause 8.5 of the PPA at the rate equivalent to the Prime Lending Rate of the State Bank of India for the period intervening the Due Date of Payment and the Actual Date of Payment and the paid interest shall not be pass through in the Aggregate Revenue Requirement (ARR) of the Board;
- (iii) the Petitioner is entitled to the reimbursement of MAT, as directed by the Commission vide its order dated 22.05.2010 and 26.04.2019. The MAT bill shall be taken to be presented on the 6th Sep., 2018 and the Petitioner shall be entitled for interest for the period from the Due Date of payment up to the date of reimbursement @ equivalent to the prevalent Prime Lending Rate of the State Bank of India and the payment of interest shall not be a pass-through in the Aggregate Revenue Requirement (ARR) of the Board.

5. In view of the above findings, there are merits in the Petition. Consequently we allow the Petition and direct the Respondent Board to implement Order dated 22.05.2010 passed in Petition No. 267 of 2008

(Revised Petition No. 206 of 2009) and the Order dated 26.04.2019 passed in Petition No. 23 of 2018 within three months, reckoned from the date of the issuance of this Order. This decision will be subject to the outcome of the Appeals pending before the Hon'ble APTEL and also in Appeals pending in the Hon'ble Supreme Court. It is made clear that this Order shall not be quoted as precedent in other cases which would be considered on merits of respective case. It is also made clear that the non-compliance of this direction, without prejudice to any other action permissible under the Law, shall be considered to be the non-compliance of the directions given by the Commission, for the purpose of initiation of the penal action under Section 142 of the Electricity Act, 2003.

16. Before parting with this case, the Commission would like to make it clear that the matter was last heard on 24th July, 2021 and both the Petitioner and the Respondent Board putforth their respective arguments and Order stood reserved, giving liberty to the contesting parties to file their written submissions. The Petitioner filed the written submissions on 06.08.2021. Therefore, the detailed Order had to be made out and finalised, after taking into consideration the aforesaid written submissions. Hence, despite the due diligence, the exercise in making out and pronouncement of this Order has taken some time.

-Sd- (Yashwant Singh Chogal) Member(Law)	-Sd- (Bhanu Pratap Singh) Member	-Sd- (Devendra Kumar Sharma) Chairman
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