BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION
SHIMLA

In the matter of :-

M/S Mangalam Energy Development Co. Pvt. Ltd;
110, 1st Floor, Bhanot Corner, Pam Posh Enclave,
Greater Kailash-1, New Delhi

…Petitioner

V/s

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

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

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

… Respondents

Petition Nos. 5/2009 and 212/2009
(Decided on 08-06-2010)

CORAM
YOGESH KHANNA
CHAIRMAN

Counsels: -

for petitioners:	Sh.Ajay Vaidya, Advocate,
for respondents:	Sh.Narinder Singh Thakur, Advocate
Consumer Representative (u/s 94 of the Electricity Act)	Sh.P.N.Bhardwaj

Order

M/S Mangalam Energy Development Co. Pvt. Ltd; 110, 1st Floor, Bhanot Corner, Pam Posh Enclave, Greater Kailash-1, New Delhi (hereinafter referred to as "the petitioner Company"), entered into with the

Government of Himachal Pradesh, an Implementation Agreement (I.A) on 18.9.2002 to establish, operate and maintain at their cost Palor Hydro Electric Project on Palor Khad a tributary of Giri river in Sirmour District H.P. with an installed capacity of 3.00 MW (hereinafter referred to as the "project"). Subsequently the petitioner Company entered into, on 20th July, 2004, a Power Purchase Agreement (in short PPA), with the Himachal Pradesh State Electricity Board (hereinafter referred to as "the Board"), stipulating that the Board shall pay for the net saleable energy delivered by the petitioner Company to the Board at the inter-connection point at a fixed rate of Rs.2.50 (Rupees two and fifty paise) per kilowatt hour. Clause 15 of the PPA stipulates that the PPA can be amended only with the written consent of both the parties. In other words, the PPA contained specific stipulations to the extent that the terms of the agreement can be indisputably altered or modified with the unqualified consent of the parties to the agreement.

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

3. Subsequently the State Government has reviewed its earlier policy and formulated "Hydro Policy of Himachal Pradesh, 2006," making it obligatory for the developers to cater to stipulations such as mandatory 15% water release, Local Area Development Charges (LADC), payment of revised compensation to fisheries and towards use of forest land etc. The new policy maintained the tariff at the rate of Rs. 2.50/kwh

4. The Electricity Act, 2003 (hereinafter called "the Act") and the National Electricity Policy provide the policy framework for promotion of non-conventional energy sources (NCES) and also section 61 (h) of the Act requires the Electricity Regulatory Commissions to promote co-generation and generation of electricity from renewable sources of energy and further in

section 86 (1) (e) of the Act, the Electricity Regulatory Commission is mandated to promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the Grid and sale of electricity to any person and also to specify for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of distribution licensee.

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

> "6. Determination of tariff of electricity from renewable sources. –
>
> (1) The Commission shall, by a general or special order, determine the tariff for the purchase of energy from renewable sources and co-generation by the distribution licensee:
>
> Provided that the Commission may determine tariff-
>
> (i) by a general order, for small hydro projects not exceeding 5 MW capacity; and
>
> (ii) by a special order, for small hydro projects of more than 5 MW and not exceeding 25 MW capacity, on individual project basis:
>
> Provided further that -
>
> (i) where the power purchase agreement, approved prior to the commencement of these regulations, is not subject to the provisions of the Commission's regulations on power procurement from renewable sources, or

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

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

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

(a) statutory laws;

(b) rules; or

(c) State Government Policy.

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

8. Being aggrieved by the SHP Order dated 18th Dec., 2007, a number of Independent Power Producers, including the petitioner in this case, moved petitions for upward revision of the generalized tariff of Rs. 2.87/Kwh, mainly on the ground of inflation of construction cost, requirement of mandatory release of 15% water discharge, levy of forest charges, w.e.f. 30th Oct., 2002, revision of fisheries charges w.e.f. 30.4.2007 and levy of Local Area

Development charges, referred in Hydro Policy of Himachal Pradesh, 2006. As all the above mentioned petitions arose out of the same SHP Order dated 18th December, 2007 and similar issues were involved, the Commission clubbed the said petitions for consideration and disposal of the generic common issues involved therein; as under i.e. to say:-

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

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

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

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

9. After due consideration of the submissions made, documents produced and arguments advanced by the respective learned Counsels on behalf of the petitioners, the Commission vide its Order dated 29th Oct., 2009, concluded that:-

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

(ii) policy formulation is the prerogative of the State Government. By virtue of the provisions of section 108 of the Act, in the discharge of its functions, the State Commission is to be guided by such directions in the matters of policy involving public interest as the State Government may give to it. The Implementation Agreements and Power Procurement Agreements, which are based on the State Govt. Hydro Policies, are the key documents. Even though the State Electricity

Regulatory Commission is the sole authority to determine the tariff, as per procedure provided for in the Act, the Power Purchase Agreements can not be re-opened, without hearing the State Government as well as the Himachal Pradesh Energy Development Agency (HIMURJA); which are the essential parties in the power procurement process;

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

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

10. Further the Commission decided to consider each petition on its merits and to issue individual projectwise orders based on the furnishing of necessary data / detailed calculations (alongwith supporting documents) on an affidavit with respect to the claims regarding mandatory release of water discharge, payment of differential amount on account of compensation to fisheries and towards the use of forest land; and also the levy of LADA charges. The said data /calculations and documents were to be furnished by the petitioners, within a period of two week's time reckoned from the date of the said order i.e. 29th Oct., 2009 which period, at the request of the parities, stands extended upto 16th April, 2010.

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

12. Now the petitioner Company has moved petition i.e. M.A. No. 212 of 2009 for increasing the tariff, in relation to its project i.e. the Palor Hydro Project set up on Palor Khad a tributary of the Giri river in Sirmour District, from Rs. 2.50 per unit to rupees 3.91 per unit; without impleading the Himachal Pradesh Energy Development Agency (HIMURJA) which is the nodal agency in the development of SHP in the State. The Commission had, therefore, to ask the Government of Himachal Pradesh and the Himachal Pradesh Energy Development Agency (HIMURJA), to furnish their response to the petition moved by the petitioner Company, i.e. petition No. 212 of 2009.

13. No response has been received from the Government of Himachal Pradesh. The responses from the Board and the HIMURJA have been received. The Commission now keeping in view the responses of the Board and HIMURJA, proceeds to examine itemwise claims made by the petitioner Company, as under:-

(I) Mandatory release of water discharge- Sub-para (B) of para 30 of the Commission's Order dated 29.10.09 reads as under:-

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

Submissions of petitioner

The petitioner Company submits that the petitioner Company under the Himachal Pradesh Hydro Policy of 2006 and Implementation Agreement (IA), signed by the petitioner Company, is required to maintain a minimum flow

down-stream of the diversion structure, throughout the year, at the threshold value of not less than 15% water flow, The Hydro Policy of Himachal Pradesh, 2006 and the Implementation Agreement neither contemplates any modification of the mandatory release nor refers to consideration of average of three lean months discharge to calculate the mandatory release quantum. Therefore, the petitioner Company is required to adhere to the provisions for the mandatory release and maintain not less than 15% (could be more if desired by the Government) of the available discharge immediately downstream of the diversion structure, not allowing the Company to utilize it for power generation and in consequence, forego equivalent generating potential of the project in terms of power generation, resulting in financial loss to the petitioner Company and thereby the impact on generation and the tariff is to be accordingly worked out.

The petitioner Company further stresses that during the lean season, the discharge of water, is barely adequate to operate even one turbine out of two installed in the project. The 15% mandatory release reduces the available discharge to a level as low as to operate one turbine during January and February, forcing total shut down of the plant during these two months, in addition to reducing the generation in other months of the year except during full flow season. The evaluation of the petitioner Company demonstrates that the loss of generation on account of the 15% mandatory release is 3.91 MU. Therefore, the petitioner Company is required to be compensated against the loss of 3.91 MU which works out to 12.24% of the available generation and in terms of cost per Kwh, the same amounts to Rs. 0.306 per unit.

Response of the Board.-

In response, the Board contends-

(a) that the amended Government Hydro Policy clearly states that the Company has to ensure minimum flow of 15% of lean period water discharge. For the purpose of determination of minimum discharge, the average discharge in the lean months i.e. from December to February shall be considered. The loss on account of 15% mandatory release, as calculated by Board is 0.164 MU which is marginal and loss can easily be covered by overloading the plant during the peak season.

(b) that as per the Board's calculations for the month of January and February, availability of energy as per the DPR projection shall be in the range of 0.44 to 0.576 MU even after taking into consideration 15% mandatory water discharge. The projection made by the petitioner Company in its calculations indicating the power generation loss of 3.9 MU is wrong and denied in the absence of any authentic proof;

(c) that the Commission, while taking up the CUF @ 45% in its order dated 18.12.2007, has already clarified that the factor of 15% water discharge as provided in the GoHP Hydro Policy, has been taken into consideration. The Government of Himachal Pradesh earlier in its general response to the various petitions, including the present one, had submitted that the total assessed energy can easily be covered by the IPPs by over loading the machines during the high flow period as the turbine/unit(s) are being generally operated on 20% over load capacity during the peak flow season. The same is also evident from the submissions made by the petitioner, wherein plants has been utilised at 20% overloading during the months of July, August and September;

In view of the above, the claims raised by the petitioner Company on account of 15% mandatory release as worked out by the petitioner Company to the tune of Rs. 0.306 per unit merits no consideration.

Response of HIMURJA

The response of the HIMURJA on this issue is similar to the one submitted by the Board.

Commission's View

The Commission has categorically mentioned in sub-para (B) of para 30 of its Order dated 29.10.09 that the mandatory release of discharge is average of 3 lean months, as clarified by the Government of H.P. vide its notification dated 29.1.09. Inspite of this the petitioner Company has calculated the same on the basis of release of 15% incoming discharge through out the year. Therefore, the calculations done by the petitioner Company are not correct.

On examining the response of the Board the Commission observes that the mandatory release impact assessment by the Board has been carried out

based upon the 75% dependable discharge as approved in the DPR and deducting the sacrificial discharge from it (which is average on 3 lean months) to get the net discharge available for power generation. The loss in generation has been assessed by calculating the energy generation on the net discharge and comparing it with energy generation without 15% sacrificial discharge as per the approved DPR. The loss on account of mandatory release of water during the lean season as per Board's calculations 1.64 Cr. which works out at 2 paise per unit.

The Polar project of the petitioner Company is still to be commissioned and therefore no data with respect to actual generation is available to draw any analysis. Thus the Commission, at present has no option, but to rely upon the mandatory water release impact assessment based on DPR projects.

The Board's contention that loss on account of 15% mandatory release can easily be covered by overloading the plant during the peak season is not tenable. The Commission is constrained to allow upgrades in tariff based on a change of goal posts/ change in law which will impact on tariff in term of what an entrepreneur calculates in a "before" & "after" scenario. Additionally, DPR energy projections are generally oriented with bankability/ viability considerations of the project but wherever no other projection is available, this will need to be considered as a basis, subject to a caveat that it will have only marginal relevance in the present context and cannot be used across the board where other more relevant parameters are available.

In view of the above, the Commission allows the increase of 2 paise per unit as per the mandatory release impact assessment carried out by the Board. However, either party, on the availability of the actual data available for a period of 10 years, can approach the Commission to review the said increase.

II. Forest and Fisheries charges.- Sub-paras "C" and "D" of para 30 of Order dated 29.10.09 read as under :-

> *"C Forest Charges*
> *The forest charges were applicable w.e.f. 30th Oct., 2002 and these were revised vide notification dated 9.1.2004. The revised forest charges are based on the percentage of forest cover. Since the forest cover is project specific, therefore, the details of the forest cover, the*

compensation payable prior to the revision of charges and after the revision of charges for each project needs to be ascertained to arrive at the differential amount to be considered for impact on tariff;"

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

Submissions by the petitioner

It is urged by the petitioner Company that under the GoHP Notification dated 9.1.2004 the petitioner's Small Hydro Project has to bear the additional burden of paying forest charges to the Government on account of. The amount paid to forest department is Rs. 2.039 Lacs. The compensation charges to the Fisheries Department as per Hydro Policy 2006 are @ Rs. 0.50 lacs per MW capacity and in addition, an amount calculated @ Rs. 0.50 lacs per Km length between the diversion weir and tail race, which comes to approx. 2 Kms for the project is also required to be paid. The amount paid to the fisheries department is Rs. 10 lacs. The additional burden on account of forest and fisheries amounting to Rs. 12.039 lacs was not taken into consideration while fixing the tariff of Rs. 2.50 per unit in the year 2000. Thus petitioner Company deserves to be allowed the above compensation and consequently the tariff has to be enhanced from Rs. 2.50 per unit in the proportion of the above additional expenditure of Rs. 12.039 lacs with respect to the approved capital cost of Rs. 1961.73 lacs. The differential amount on the basis of the above comes to 1% and is one paise per unit.

Response of the Board

In response the Board submits that the revised forest charges are based on the percentage of forest cover. Since the forest cover is project specific, the details of the forest cover, the compensation payable prior to the revision of charges and after the revision of charges for the project need to be considered for impact on tariff. The petitioner Company has stated that Rs. 2.04 lacs have been deposited with the Forest Department. The differential amount as desired vide Commission's Order dated 29.10.2009 has neither been worked

out nor any details of the charges which would have been required to be paid by the Company are given in support of their claim. Therefore no claim on this account is justified.

Further the fisheries charges are based on length of tail race capacity. Since the amendment dated 30.4.07, in relation to fisheries charges, is with immediate effect, the compensation paid by the petitioner Company after the issuance of the notification and which was supposed to be paid prior to notification needs to be ascertained by the petitioner Company to arrive at the differential amount to be considered for the impact on the tariff. The petitioner Company has not supplied any detailed information as required/desired by the order of the Commission. However, it is understood that the revised charges with reference to fisheries are lower than the charges prescribed prior to the notification. Hence no claim on this account is admissible.

Response of HIMURJA

Response of the HIMURJA on this issue is similar to the one submitted by the Board.

Commission's View

The petitioner Company has claimed an amount of Rs. 12.039 lacs as additional forest compensation which seems to be the total compensation paid by them to the forest department and has not given the differential amount as required under sub-para (B) of para 30 of the Order dated 29.10.09. Moreover, the petitioner Company has not furnished any documentary proof in support of the payment of the differential amount made in relation thereto. The claim of 10 lacs on account of fisheries also seems to be the total amount paid by the petitioner Company. Also no documentary proof of the differential amount paid by petitioner Company has been supplied.

In light of the above the Commission concludes that the claims of the petitioner Company on account of forest and fisheries are not tenable.

III. Other Claims

Local Area Development Charges (LADC)

Submissions by the petitioner

Under the State Government Hydro Policy 2006 and the Implementation Agreement, the petitioner's project has been made to bear the

additional burden of paying compensation in terms of LAD charges @ 1% of the approved capital cost of Rs. 1961 lacs. This additional burden was not taken into consideration while fixing the tariff @ Rs. 2.50 per unit in the year 2000.

The compensation payable comes to Rs. 19.61 lacs being 1% of the approved capital cost. On this ground the petitioner Company deserves to be compensated and consequently the tariff has to be enhanced from Rs. 2.50 per unit. The differential amount, as calculated is Rs. 0.25 per unit, being the percentage as calculated with respect to the approved capital cost.

Response of the Board

The petitioner Company has claimed Rs. 19.61 lacs for LAD charges, but there is no detail in support of its payment to authorities concerned neither there is any evidence showing expenditure. The utilization of the LAD charges, if any, by the petitioner has not been supplied, hence claim on LAD charge is denied. Even if there is any marginal impact on account of LAD charges it can be covered by overloading the machine during high flow season.

Response of HIMURJA

Response of the HIMURJA on this issue is similar to the one submitted by the Board.

Commission's view.

As petitioner Company has not given any documentary proof in support of payment of LADC, the Commission is unable to ascertain the actual amount paid on this account by the petitioner Company.

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

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

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

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

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

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

IV. Change in royalty

Submissions by the petitioner

As per the Himachal Pradesh Hydro policy, 2006 and Implementation Agreement, the petitioner's project has been made to bear the additional burden of paying royalty in terms of free power from 13th year onward @ 12% for the next 18 years i.e upto 30th year and thereafter @ 18% for the balance period of 10 years. The royalty provisions prevailing as per earlier GoHP policy applicable in year 2000 exempted royalty payment for the first 15 years and from 16th year onwards, till the end of the term, 10% royalty was payable. Due to the change in the GoHP policy, the additional burden is stated to be as under:-

(1) Year 13, 14 & 15 : 12% of the delivered energy;

(2) Year 16 to year 30: 2 % of delivered energy;

(3.). Year 31 to year 40 : 8% of delivered energy;

The impact of change in GoHP policy, has been worked out on the basis of delivered energy in the approved DPR. The total of annual difference from 13th year onwards till the 40th year works out to 30.79 MU as per the design energy. The average annual difference from the commercial operation date (COD) over the entire term of 40 years works out to 0.77 MU. On this ground the petitioner Company deserves to be compensated and consequently, the tariff has to be enhanced from Rs. 2.50 per unit. The differential amount as per generation upto design energy works out to paise 09 per unit. The petitioner Company has prayed the Commission to pass orders for payment on this basis from the COD over the above Rs. 2.50 per unit.

The petitioner's project has been made to bear the additional burden of paying royalty in terms of free power and this additional 1% royalty has now to be paid by the petitioner Company for Local Area Development Fund (LADF) vide GoHP notification issued dated 30.11.2009. The said notification stipulates that this additional burden shall be a pass through in the tariff. On this ground the petitioner Company deserves to be allowed the pass through cost at actual energy supplied on month to month basis.

Response of the Board

The Order of the Commission does not require any submission for the calculation and impact on account of change in royalty. Even if, there is any marginal impact on account of change in royalty, it can be covered by overloading the plant during high flow season.

Response of HIMURJA

The order of the Commission does not required any submission for the calculation and impact on account of change in royalty for the reason that there is no change in the royalty rates and the same are to be charged @ 0% for the first fifteen years and 10% thereafter as per IA. The marginal impact on account of additional royalty can be covered by overloading the plant during high flow season.

Commission's View

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

V. Minimum Alternate Tax

Submissions by the petitioner

Consequent upon the issuance of the Government of Himachal Pradesh Notification dated 6th May, 2000, additional taxation has been imposed through the change in rate in Minimum Alternate Tax (MAT) on book profit is payable by the Company. The rate as applicable in FY 2000-2001 has been increased from 8.25% to the current rate of 16.995%. Therefore, the petitioner Company deserves to be compensated for additional liability accrued on account of the change in the MAT. The additional component of MAT, as calculated comes out to be 8.745% and the additional per unit cost in this account during initial 10 years based upon the profit before tax (PBT) as per approved DPR as paise 11 to paise 15.4 per unit.

Response of the Board

Though the Commission's Order dated 29.10.2009 does not require any submission for the calculation and impact on account of MAT, the petitioner Company has claimed the impact of increased MAT from 8.25% as applicable during the year 2000-01 and current rate of 16.99% and on this differential component it has worked out the additional cost of paise 11 to paisa 15.4/unit. This additional cost is not justified due to reasons that the actual rate of the MAT, which has been taken into consideration at the time of working out the cost of Rs. 2.50/unit, has not been supplied. The Board submits that there is no justification of taking into account the differential component of MAT as calculated by the Company, at the present rate.

Response of HIMURJA

The response of the HIMURJA on this issue is similar to the one submitted by the Board.

Commission's View

As pointed out in para 10 of this Order, the Commission has already stated in clear terms that the Commission shall, after consideration of each petition on its merits, issue individual project-wise order based on furnishing of necessary data/documents with respect to the claim regarding mandatory release of water discharge, payment of differential amount on account fisheries and forest and local area development charges. However, Commission considers change in MAT after the signing of the PPA as change

of goal post and therefore, feels that the IPP should be compensated as has been done for all the IPPs, falling within the ambit of Commission's Order on SHPs dated 18.12.2007, through the supplementary order dated Feb., 10, 2010.

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

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

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

VI. Service Tax

Submissions by the petitioner

The impact of increase in service sax comes out to be paise 9.2 per unit due to the increase in the Service tax rates as compared to service tax which was taken into consideration in the year 2000. In the year 2000 the rate of service tax was 5% which was increased to 8% and then 12.36% in year 2008-09. Currently the rate of Service Tax is 10.30%. In addition, the service tax on construction services was imposed from the year 2004-05 with a provision to tax the civil construction on the basis of 33% of the over all cost and the erection at full value. The total impact works out to Rs. 787 lacs, which is 4.01% of the approved capital cost of Rs. 19.61 lacs, and the differential amount is 10 paise per unit, being calculated with respect to the approved capital cost, to be paid by the petitioner Company.

Response of the Board

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

Response of HIMURJA

Submissions of the HIMURJA on this issue are similar to the one submitted by the Board.

Commission's View

As pointed out in para 10 of this Order, the Commission has already stated in clear terms that the Commission shall, after consideration of each petition on its merits, issue individual project-wise order based on furnishing of necessary data/documents with respect to the claim regarding mandatory release of water discharge, payment of differential amount on account of fisheries and forest and local area development charges. Therefore, the claim of the petitioner Company with respect to service tax does not fall within the ambit of the said order. Also the Commission has not considered the service tax in its tariff determination order dated 18.12.07. Besides this the petitioner Company has not furnished any documentary proof or work sheets in support of its claim. It is pertinent to point out that the said Order clearly stipulates the claims are required to be supported by the requisite data/ calculations and supporting documents. Keeping in view the limited scope of reopening the concluded PPA, as stated in the Commission's Order dated 29.10.2009 and the absence of the documentary proof, it is not possible for the Commission to accede to this claim raised by the petitioner Company.

VII. Interest Cost

Submissions by the petitioner

The Company has obtained a total loan of Rs. 11.68 crores from IREDA at interest rate of 11.50%. As already on the record the Project is delayed mainly on account of delay from the respondent No.1 to provide the land, to the petitioner Company, required for the project components. This delay of providing land has caused a significant loss to the Company in terms of generation loss on a daily basis, which revenue would have accrued to the Company has the permissions come in time. Due to this delay, on the loan availed from IREDA, the Company incurred an interest cost overrun of Rs. 1,65,32,142. This entire amount was funded by IREDA at a high interest rate of 13.50%. As such, the Company on account of the aforesaid delays is now funding the interest cost overrun, which has to be repaid to IREDA in addition to the principle amount of outstanding loan at a very high interest rate as

outlined above. On this ground the petitioner Company deserves to be allowed and consequently the Commission is requested to pass orders for payment against this additional burden of interest which the Company has to bear due to the delay on the part of respondent No.1 which comes out to be Rs. 24055172/- and tariff has to be increased on this ground is 30 paise per unit.

Response of the Board

The order of the Commission does not require any submission for the calculation and impact on account of interest cost. Hence this para is wrong and denied.

Response of HIMURJA

The response of the HIMURJA on this issue is similar to the one submitted by the Board.

Commission's View

The Commission in the sub para A of para 30 of its Order dated 29th Oct., 2009 has concluded that any inflation in cost of construction/increase in implementation of projects i.e. increase in capital cost shall not be considered for any tariff upgrades and individual project-wise petition shall be considered on its merit based on furnishing of necessary data/documents only with respect of claim regarding mandatory release of water discharge payment of differential amount on account of fisheries and forest and Local Area Development charges. Therefore, the claim of the petitioner Company is not acceded to as this matter has been amply discussed and settled in the Commission's Order dated 29.10.2009.

14. The averments of the Board with regard to the overloading of plant carry no weight since the Commission is constrained to allow upgrades in tariff based on a change of goal posts/ change in law which will impact on tariff in term of what an entrepreneur calculates in a "before" & "after" scenario. Additionally, DPR energy projections are generally oriented for bankability/ viability considerations projections of the project but wherever no other projection is available, these will need to be considered as a basis, subject to a caveat that they will have only marginal relevance in the present context and cannot be used across the board where other more relevant parameters are available.

Conclusion.

In view of the above discussion and taking into consideration the conclusions drawn in the Commission Order dated 29.10.2009 and further submissions made, calculations/data supplied by the parties i.e. the petitioner Company, the Board and HIMURJA the Commission, hereby orders:-

(i) that the tariff shall be enhanced by 2 paise on account of impact of 15% mandatory release of water down stream of diversion structure. However, either party on the actual data available for a period 10 years may approach the Commission to review the said increase;

(ii) that the claims for forest, fisheries, service tax and interest cost overruns are not acceded to;

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

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

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

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

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

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

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

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

The adjustment on account of change in the MAT shall be subject to the furnishing, to the satisfaction of the Board, documentary proof of

the actual payment and shall be made at the end of each financial year as per the above formula.

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

(v) In view of the above the tariff of Rs.2.50, shall be, therefore, increased by 5 paise per unit.

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

(Yogesh Khanna)
Chairman