

BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION
SHIMLA

In the matter of :-

1. M/S DSL Hydrowatt Limited
Corporate office at Empire House,
D.N. Road Fort Mumbai ; and
Registered office at
121, Industrial Area Baddi, Solan (H.P.)

V/s

H.P. State Electricity Board,
Vidyut Bhawan, Shimla-171004

Petition No. 11/08

2. M/S Jala Shakti Limited
Regd. Office at Park Plaza (N), 71 Park Street,
Kolkata-700016 ; and
Head office at Plot No. 45,
Sagar Society, Road No.2
Banjara Hills, Hyderabad- 500034

V/s

H.P. State Electricity Board,
Vidyut Bhawan, Shimla-171004

Petition No. 20/08

3. M/S Jala Shakti Limited
Regd. Office at Park Plaza (N), 71 Park Street,
Kolkata-700016 ; and
Head office at Plot No. 45,
Sagar Society, Road No.2
Banjara Hills, Hyderabad- 500034

V/s

H.P. State Electricity Board,
Vidyut Bhawan, Shimla-171004

Petition No. 21/08

4. M/S Harison Hydel Construction Co (P) Ltd;
Regd. Office at Akhara Bazar, Kullu (H.P.)-175101

V/s

H.P. State Electricity Board,
Vidyut Bhawan, Shimla-171004

Petition No. 43/08

5. M/S Him Kailash Hydro Power Pvt. Ltd
Regd. Office at Village Prathipadu,
Pentapadu Mandal,
West Godhavari Distt.
Andhra Pradesh.

V/s

H.P. State Electricity Board,
Vidyut Bhawan, Shimla-171004

Petition No. 53/08

6. M/s Astha Projects (I) Pvt. Ltd.,
D-24 (Basement), Pamposh Enclave,
Greater Kailash-I, New Delhi-110048
Regd. Office/Head office at E-11,
11nd Floor, Greater Kailash-I,
New Delhi-110048.

V/s

H.P. State Electricity Board,
Vidyut Bhawan, Shimla-171004

Petition No. 62/08

7. M/S Ginni Global Ltd;
2nd Floor, shanty Chamber,
11/6B, Pusa Road,
New Delhi-110005.

V/s

H.P. State Electricity Board,
Vidyut Bhawan, Shimla-171004

Petition No. 70/08

8. M/S Dharamshala Hydro Power Ltd;
Regd. Office : Plot No. 30-A, Road No.1,
Film Nagar, Jublee Hills, Hyderabad-500 033

V/s

H.P. State Electricity Board,
Vidyut Bhawan, Shimla-171004

Petition No. 97/08

9. M/S Virender Dogra Power Projects (P) Ltd;
7, Green Colony, Old Shahpur Road,
Pathankot (Punjab)

V/s

H.P. State Electricity Board,
Vidyut Bhawan, Shimla-171004

Petition No. 183/08

10. M/S Patikari Power Pvt. Ltd;
1st House, Bhumian Estate,
Nav Bahar, Bhumian Road,
Chotta Shimla, Shimla171002

V/s

H.P. State Electricity Board,
Vidyut Bhawan, Shimla-171004

Petition No. 184/08

11. M/S Ascent Hydro Projects Ltd;
6, Shiv-Wastu, Tejpal Scheme,
Road No. 5, Vile Parle (East) Mumbai-400 057
Administrative office at
Building No.2, RH-1, Visava Enclave, D.P. Road,
Aundh, Pune-4112007

V/s

H.P. State Electricity Board,
Vidyut Bhawan, Shimla-171004

Petition No. 267/08

12. M/S Sarabai Enterprises Pvt. Ltd;
Village Sarabai, P.O. Bhunter,

Distt. Kullu (H.P.)

V/s

H.P. State Electricity Board,
Vidyut Bhawan, Shimla-171004

Petition No. 268/08

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

V/s

H.P. State Electricity Board,
Vidyut Bhawan, Shimla-171004

Petition No. 5/09

Petition Nos. 11/08, 20/2008, 21/2008, 43/08, 53/08,62/2008, 70/2008, 97/08,
183/08, 184/08, 267/08, 268/08, 5/09

(Decided on 29th October,2009)

CORAM
YOGESH KHANNA
CHAIRMAN

Counsels: -

for petitioners:

Sh.Ajay Vaidya, Advocate,
(in petition Nos 11, 43, 53, 62, 97, 183,
267 & 268 of 2008)

Sh. Tarun Johri, Advocate,
(in petition No. 184/08)

Sh.Vivek Thakur, Advocate
(in petition Nos 20 & 21 of 2008)

Miss Sampada Narang, Advocate and
R.G.Sood (in petition No.70 of 2008)

for respondents :

Sh. Narinder Singh Thakur,
Advocate

Consumer Representative
(u/s 94 of the Electricity Act)

Sh.P.N.Bhardwaj

Order

All the above mentioned petitions arise out of the order on Small Hydro Power Projects Tariff and Other Issues dated 18th December, 2007 (hereinafter referred as the “SHP Order”) made by the Himachal Pradesh Electricity Regulatory Commission (hereinafter referred to as “the Commission”) under regulation 6 of the Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007 (hereinafter referred to as “the regulations”) relating to purchase of power generated by the Small Hydro Projects in the State of Himachal Pradesh and allied issues linked with non-conventional energy sources (in short referred to as “NCES”) based on generation and co-generation plants.

2. In these petitions the petitioners, who have entered into Power Purchase Agreements, prior to the commencement of the SHP Order, pray for refixation of price for the purchase of power at the revised rate given in the SHP order dated 18.12.2007. Since these petitions raise identical and common issues, these are consolidated and taken up together for hearing. It needs to be pointed out that the Commission passed the impugned SHP order to give effect to the provisions of the Electricity Act, 2003, the National Electricity Policy and the MNES guidelines and to give impetus to the generation from non-conventional energy sources.

3. The impugned SHP order is applicable to future agreements and to the existing agreements, executed after 1st July, 2006, with the clear stipulation that the rate given in the SHP order will be applicable to these cases. The impugned SHP Order does not interfere with other present and existing contracts/agreements executed between Independent Power Producers (in short IPPs) and the distribution licensee i.e. HPSEB. The petitioners are governed by the existing contracts and, therefore, they are not affected by the impugned SHP order. Thus the contracts signed before the passing of the impugned SHP order have to be implemented in accordance with the stipulations made therein and they will remain in force and the impugned SHP order would be applicable to the new contracts between the NCES based generators and the distribution licensee.

4. The Ministry of Non-Conventional Energy Sources (MNES) at the Central level and the Himachal Pradesh Energy Development Agency (HIMURJA) at the State level develop non-conventional energy sources in the country. During the year 1994-95 the Ministry of Non-Conventional Energy Sources (MNES), Government of India, issued policy guidelines to all the State Governments conveying the various incentives to encourage investment in the sector of non-conventional/renewable sources of energy. The said policy directions contained promotional and fiscal incentives for the power generation from renewable sources of energy, which also included fixation of purchase price for the power generated from such sources and inter alia provided that -

- (a) the base-electrical-energy-purchase price for 1994-95 shall be maximum of Rs. 2.25/kWh;
- (b) the base price shall be escalated at the rate of 5% every year for a period of 10 years.

Pursuant to the said policy guidelines the Department of Science and Technology and Environment, GOHP, issued its notification in November, 1994, followed by notifications in August and September, 1999, to incentivise the development of micro hydel power projects. The price of power was fixed at Rs. 2.25 per unit and the HPSEB would have to purchase the power @ Rs. 2.25 per unit if the developers were desirous of selling the power to the HPSEB. Further, GoHP vide notification dated May, 6, 2000, announced a scheme for private/joint sector participation, in the Micro Hydel Power Projects of capacity upto 3 MW (revised to 5 MW in Dec., 2000) whereby the HPSEB was required to purchase power from private parties/joint sector companies setting up Micro Hydel projects/ stations at the rate of Rs. 2.50 per unit. MNES guidelines issued in 1993 set the tariff of Rs. 2.25/kWh (for base year 1994-95) with annual escalation of 5% for first 10 years. However, tariff fixed by GoHP in the year 2000 remains fixed @ Rs. 2.50/kWh with no escalation.

5. As per practice prevalent in the State of Himachal Pradesh, the entrepreneurs i.e. the Independent Power Producers (IPPs) after signing the

MOUs, execute the Implementation Agreements with the State Govt. Subsequently the entrepreneurs executed the Power Procurement Agreements with the HPSEB, with the stipulation that the entrepreneurs will abide by the terms and conditions of the Implementations Agreements executed by them with the State Govt. and the Board shall purchase the power generated by the IPPs at the rate of Rs. 2.25 per unit fixed for base year 1994-95 with an escalation of 5% for the first 10 years and refixed by the GoHP in the year 2000 @ Rs. 2.50/kwh with no escalation. 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 PPAs contained specific stipulations to the extent that the terms of the agreement can be indisputably altered or modified with the consent of the parties to the agreement. (Reference may be made to letter No. 45/2/2006 – R&R dated 15th Feb., 2008, issued by the Ministry of Power, G.O.I., which clarified that the provisions of the Tariff Policy would not alter legal enforceability of the already concluded contracts, unless it is mutually allowed on agreeable terms and conditions.)

6. 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, LADA, 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.

7. The Electricity Act, 2003 (hereinafter called as “the Act”) and National Electricity Policy provide the policy frame work for promotion of non-conventional energy sources (NCES) and also in section 61 (h) of the Act, requires 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 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 specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee”.

8. The National Electricity Policy issued under Section 3 of the Act, has a statutory flavour. Section 3 of the Act provides that the Central Government shall from time to time, prepare the National Electricity Plan (NEP) and Tariff Policy based on optimal utilization of resources such as coal, natural gas nuclear substances or materials, hydro and renewable sources of energy.” The non-conventional sources of energy (NSE) are denied the advantage of economies of scale of conventional projects. Non-conventional technologies have to be developed before they could be competitive in cost efficiency and performance with the conventional sources. This has also been acknowledged in para 5.12 of the NEP, which makes references to the Act, making SERCs responsible to prescribe a percentage of total consumption of electricity in the area of a distribution licensee to be purchased from non-conventional energy sources and to determine a differential price for such purchase. The policy also stipulates that: -

“Such purchase by the Distribution Company will be through competitive bidding process. Considering the fact that it will take some time before non-conventional technologies compete, in terms of cost, with conventional sources, the Commission may determine an appropriate differential price to promote these technologies”.

9. Thus the Commission only with a view to promote non-conventional technologies may specify differential price for purchases/power procurement by the distribution licensees from conventional and non-conventional sources of energy and minimum purchase stipulation as a percentage of total consumption of electricity in the area of distribution licensees.

10. The Central Government is targeting that by the year 2012, 10% of generation capacity will be from renewable sources of energy. This includes small hydro power plants of capacity less than 25 MW.

11. The **APTEL** in its decision dated 18th May, 2007, in **Appeal No. 124 of 2006 M/S Rajshree Sugars and Chemicals Ltd; V/s Tamilnadu Electricity Regulatory Commission**, has concluded as under: -

“In accordance with the preamble, section 61(h) of the Electricity Act, 2003, spirit of the Constitution and concern for the environment, it is the bounden duty of the Regulatory Commission to frame regulations with a view to give fillip to the production of power through renewable

sources of energy. While framing the regulations, the regulatory Commissions must have regard to the thrust and spirit of the aforesaid provisions of the Constitution and the Electricity Act, 2003, the National Electricity Policy and MNES guidelines. The regulations should be fashioned in such a manner that it should be possible to built up sizable capacity through clean renewable sources of energy”.

12. While disposing off the said Appeal the Hon’ble Tribunal also gave directions u/s 121 of the Act to all the Electricity Regulatory Commissions of the country to frame regulations, in the light of the observations made by the APTEL, within three months.

13. In compliance with the statutory provisions in the Act, the policy guidelines given in the National Policy and 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 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, subject to the condition that the quantum of purchase shall be minimum 20% of the total consumption of energy from the renewable source during a year. The sub-regulation (1) of regulation 6 (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”.

14. Considering the importance of the matter and to arrive at a fair and just solution to the issues raised in the petitions, this Commission requested the State Government to offer its comments. The State Government has responded effectively and has prayed that it may be made party to all the petitions. The review of the PPAs has been objected to-

- (i) in regard to maintenance of the mandatory 15% of water flow down the stream, stating that keeping in mind the serious concern of the State Government on account of its fragile ecology and environment and also to address issues concerning riparian rights, drinking water, health, aquatic life, wild life, fisheries, silt and even to honour the sensitive religious issues like cremation and other religious rites on the river banks, the provision has now been modified and mandated release down stream of the diversion structure has been limited to 15% of the minimum observed discharge in contrast to earlier 15% of the incoming discharges at different time. This is intended to reduce the claimed loss of energy which can be easily recovered by the IPPs by overloading their plants during high flow periods. Almost all the projects commissioned by IPPs till date are being operated on upto 20% over load continuously during peak flow season and all IPPs have, as a matter of practice, been constructing power plants with significant over load capacity upto 30-35%. All the mandated release is now proposed to be 15% of the minimum flow which is in the range of $\frac{1}{4}^{\text{th}}$ to $\frac{1}{8}^{\text{th}}$ of the design flow, the reduction in flows during winter due to such mandated discharge shall only be in the range of 2% to 3% of the design flow or 4% to 6% of the design flow of one machine, which cannot be a cause of shutdown of the power plant as claimed by the petitioners;
- (ii) in relation to LADA charges, it is stated that the provisions have been made to take care of the local development needs of people of the area

which may arise as a result of the execution of the project but charges are @ 1% of the project cost and don't materially alter the profitability of the project due to inbuilt over loading of the project during peak flow season and conservative 75% dependability of the flows used for calculation of the returns of the project;

- (iii) the State Government is of the considered view that fixation of group tariff for SHEPs is neither in the interest of IPPs nor in the interest of the Board/buyer, in view of the wide variation in the project cost. Thus the tariff determination of projects, of capacity of more than 2 MW, should be on a case to case basis.

15. With the background, as set out in the foregoing paras, the preliminary issues, that have to be gone into by the Commission, are: -

- (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?

16. Issue No.1: Whether the Commission has the power and the jurisdiction to re-open the once approved Power Procurement Agreements voluntarily entered into by the IPPs with the HPSEB? If so, to what extent?

For the purpose of consideration of this issue, the Power Procurement Agreements can be grouped as: -

- (i) the PPAs executed prior to the setting up of this Commission, i.e. to say without the approval of the Commission.
- (ii) the PPAs executed after the setting up the Commission, but before 1st July, 2006;

- (iii) the PPAs executed after 1st July, 2006, but before the commencement of the HPERC (Power Procurement from Renewable Sources and Co-generation by the Distribution Licensee) Regulations, 2007 i.e 21st June, 2007, with the stipulation that the price to be paid by the licensee shall be as per the regulations (ibid); and
- (iv) the PPAs executed after the commencement of the regulations (ibid).

17. With reference to the PPAs executed prior to the setting up of the Commission, the law is very clear. Hon'ble APTEL had an occasion to deal with the situations arisen in the context of PPAs executed, when there was no Regulatory Commission. It would be interesting to note para 42 of the judgement dated 14th September, 2006, passed in **Appeal No. 189/05-Uttaranchal Jal Vidyut Nigam Ltd. V/s Uttaranchal Electricity Regulatory Commission and others**, which reads as under:-

“42: Factually there was no Regulatory Commission for the State of Uttaranchal during the relevant period. Therefore, the question of approval of PPA or non-approval is inconsequential. Contract concluded in terms of PPA is binding on the parties and the same could not be reopened by the Regulatory Commission on any later date nor the Commission is the authority to interfere with the terms of PPA entered between the parties.”

18. The said decision has been relied upon by the Hon'ble APTEL in its subsequent decision dated 30.10.2007 given in **Appeal No. 61/2007 – Him Urja Pvt. Ltd. New Delhi V/s Uttarakhand Electricity Regulatory Commission, Dehradun and Uttaranchal Power Corporation Ltd. 2007 ELER (APTEL) 1645**. The Commission, therefore, does not have the power to look into agreements entered into and concluded prior to its setting up as the Act or the Regulations do not provide for the same and a retrospective use of the power may result in vested rights being affected.

19. In regard to the PPAs executed after 1st July, 2006, with clear stipulation that the price to be paid by the licensee shall be as per HPERC (Power Procurement from Renewable Sources and Co-generation by the Distribution Licensee) Regulations, 2007 and the PPAs executed after the commencement of the regulations, (ibid) there would be no difficulty as those

agreements will be governed by the provisions of the regulations (ibid) and regulation 6 as amended on 12th Nov., 2007 empowers the Commission to reopen the concluded PPA. In the light of this, the position now remains to be spelt out with reference to the PPAs, which were executed after setting up the Commission and before 1st July, 2006.

20. Sh.Tarun Johri, Advocate for M/s Patikari Power Private Ltd. (in Petition No.184/08) has forcefully argued that the petition is maintainable, firstly because the conditions of the open bid permit the increase of the tariff of Rs. 2.25 per unit, and secondly the Commission has the jurisdiction under the clause (b) of sub-section (1) of section 86 of the Act to regulate electricity purchase and procurement of the distribution licensee including the price at which the electricity is to be procured from the generating companies. Thirdly, the petitioner has argued that by virtue of the provisions of the first proviso to sub-regulation (1) of regulation 6 of the HPERC (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007, the Commission has the power to determine the tariff by a general order for small hydro projects upto 5 MW capacity; and by a special order for small hydro projects of more than 5 MW and above not exceeding 25 MW capacity, on individual project basis. The learned counsel argued that the tariff can be redetermined by the Commission under the said provisions of the regulations (ibid). In support of his argument that the concluded contracts can be re-opened, he has cited the decisions of the Apex Court in **the Central Inland Water Transport Co. Ltd., and another V/s Brojo Nath Ganguly and another (1986) 3SCC 156; Kumari Shrilekha Vidyarthi & others V/s State of UP and others (1991) 1 SCC 212; LIC of India & another Vs Consumer Education and Research Center and others (1995) 5 SSC 482; Hindustan Times Vs State of UP (2003) 1 SCC 591; Ambica Construcion V/s UOI (2006) 13 SCC 475, and decisions of APTEL in appeal Case No. 20 of 2006 - Chhatisgarh Biomas Energy Developers Association, Chhatisgarh (decided on 7th September, 2006); in appeal Nos. 4,5,6,8,9,10,12,13 & 23 of 2006 - Transmission Corporation of A.P and another V/s A.P State Electricity Regulatory Commission (decided on 28.09.2006) and appeal Nos.,90,91,92,93,108,109,110 & 111 of 2006 – Rithwik Energy System Limited V/s Transmission Corporation of**

AP Ltd.(decided on 28.09.2006) 2008 ELR, (APTEL) 237. Sh. Ajay Vaidya, Miss Sampada Narang and Sh. R.G. Sood, appearing for other petitioners, have adopted the arguments made by Sh. Tarun Johri in petition No. 184/08.

21. Sh. Narinder Singh Thakur, Advocate, representing the Board, has made general submissions in relation to the sanctity of the contract and has asserted that the concluded PPAs should not be reopened without the unqualified consent of the Board, which is the party to the contract, and in his support has cited the APTEL decision dated 05.10.2007, in **Vemagiri Power Corporation Ltd. Banglore V/s Transmission Corporation of AP Ltd., 2007 ELR (APTEL) 1580.** Besides this he also points out that the tariff rates as prevalent in the adjoining States should not be taken into consideration because there is a difference of hydrology and geographical conditions prevalent therein. He has also stressed that each petition should be considered on its merit.

22. Sh.P.N. Bhardwaj, the Consumer Representative has made a detailed presentation, touching the major points urged by the petitioners demanding the upward rise of the generalised tariff, fixed in the PPAs executed by/with the Board.

23. After going through the pleadings and hearing the Learned Counsel, the Commission observes that the Hon'ble Supreme Court in **India Thermal Power Ltd. State of MP, AIR 2000 SC 1005,** has held that the agreements as are entered by the Electricity Board and the generators are statutory contracts and are binding on the successor APTRANSCO and the DISCOM, as well as the Commission. The Commission cannot either nullify or modify the concluded contracts in purported exercise of the regulatory powers vested in it. Further in **M/s Refiquennessa V/s Lal Bahuder Chetri AIR 1964 SC 1511,** the Hon'ble Supreme Court held, that -

“where vested rights are affected by any statutory provisions, the said provisions should normally be construed to be prospective in operation and not retrospective, unless the provision in question relates merely to a procedural matter. It is not disputed by him that the Legislature is competent to take away vested rights by means of retrospective legislation. Similarly the Legislature is undoubtedly competent to make laws which override and materially affect the terms of contracts between the parties; but the agreement in that unless a clear and unambiguous intention is indicated by the Legislature by adopting suitable express words in that behalf, no provision of the

statute should be given retrospective operation if by such operation vested rights are likely to be affected. These principles are unexceptionable and as a matter of law no objection can be taken to them.”

24. Relying upon the aforesaid verdicts of the Apex Court, the APTEL, in its earlier decision dated 2nd June, 2006 (**in appeal Nos. 1,2,5 of 2005 in Small Hydro Power Developers Association V/s AP Electricity Regulatory Commission & Rithwik Energy Systems Ltd., V/s Transmission Corporation of AP, 2008 ELR (APTEL) 237**; in its decision dated 5th October, 2007, rendered in **Vemagiri Power Generation Ltd., Bangalore V/s Transmission Corporation of A.P. Ltd., (2007) ELR (APTEL) 1580**, has concluded that the Commission has no jurisdiction to re-open the PPAs once approved, without the unqualified consent of the parties to the agreement.

25. With reference to the PPAs which are executed after the setting up of the Commission and prior to the commencement of the regulations it would be worth while to cite the verdict of the Apex Court given in **Delhi Development Authority, New Delhi and another V/s Joint Action Committee of Allottees of SFS flats & ors. AIR 2008 SC 1343**, which states that if the relationship between the parties arises out of the contract, the terms and conditions of the contract can be altered or modified but these cannot be altered or modified unless there exists any provision either in the contract or in law and the parties must be ad idem so far as the terms and conditions are concerned. Under Clause 15 of the Model PPA, the parties, with written consent can amend/modify the stipulations contained therein. In other words when there is change in the circumstances involved parties to the bilateral contracts are always at liberty to mutually modify their contracts, subject to the approval of the Commission, as the original agreements are executed with the approval of the Commission under section 86 (1) (b) of the Act. The regulatory Commission, has to act within the four corners of the Electricity Act, 2003 - **Reliance Energy Ltd. V/s Tata Power Corporation 2007 APTEL 662**. This is the mandate to the Commission under section 86(1) (e), read with the section 61 (h), of the Act and preamble thereto and the various policy guidelines to promote generation of electricity from renewable sources. Further, APTEL in **RVK Energy Pvt. Ltd. V/s Central Power Distribution**

Co. of AP Ltd., (2007) ELR (APTEL) 1222 has stressed that the Regulatory structure needs to encourage entrepreneurs to set up generation stations by visionary orders. In order to promote generation of electricity from renewable sources of energy, second proviso to sub- regulation (1) of regulation 6 of 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 a change in –

- (i) Statutory laws;
- (ii) Rules; and
- (iii) State Govt. Policy.

26. Ratio decidendi in **Chhatisgarh Biomass Energy Developers Association, Distt. Raipur Vs Chhatisgarh State Regulatory Commission (Appeal No. 20 of 2006)** decided by APTEL on 07.09.2006 is that “where the Power Purchase Agreements (PPAs) between the distribution licensees and generating companies utilizing renewable sources of energy are in conformity with MNES guidelines or various policy guidelines, the agreements are not required to be tinkered with but where the agreements are one sided and not in consonance with the MNES guidelines, it is the bounden duty of the appropriate Commission to issue appropriate directions”. Further paras 34 & 35 of the APTEL decision in Appeals, 90,91,92,93,108,109,110 & 111 of 2006 – **Rithwik Energy Systems Ltd., V/s Transmission Corporation of Andhra Pradesh Ltd., and others**, state in clear terms that –

“34. A distinction, however, must be drawn in respect of a case, where the contract is re-opened for the purposes of encouraging and providing renewable sources of energy projects pursuant to the mandate of section 86(1) (e) of the Act, which required the State Commission to promote co-generation and generation of electricity from renewable sources of energy.

35. Therefore, it is the bounden duty of the Commission to incentivise the generation of energy through renewable sources of energy. PPAs can be re-opened only for the purpose of giving thrust to non-conventional energy projects and not for curtailing the incentives.”

From the above it is abundantly clear that 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 frame work of the Act and the Regulations framed thereunder,as is spelt in para 30 of this order.

27. Issue No.2: Whether the State Government is the essential party in the proceedings for revisiting the concluded contracts; referred in Issue No.1?

As per practice prevalent in the State of Himachal Pradesh, the entrepreneurs i.e. the Independent Power Producers (IPPs) after signing the MOUs, execute the Implementation Agreements with the State Govt. Subsequently the entrepreneurs execute the Power Procurement Agreements with the HPSEB, with the stipulations that the entrepreneurs will abide by the terms and conditions of the Implementations Agreements executed by them with the State Govt. and the Board is to purchase the power generated by IPPs at the rates fixed in the PPAs. The Himachal Pradesh Energy Development Agency (HIMURJA), at the State level develops non-conventional energy sources in accordance with guidelines and directions issued by the Ministry of Non-conventional Energy Sources (MNES) to the Government of India and policy laid down by the State Government.

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.

28. Issue No. 3 Whether the agreements with the party having dominance over the other party to the agreement can be vitiated as void for being executed without free consent and under duress?

It is contended by the Learned Counsels for the petitioners that the agreements have been entered into with the State Government or with the HPSEB, which is the instrumentality of the State Government, under undue influence and compelling circumstance as they in comparison to their counterpart lack bargaining power. They are either to enter into the contracts on the terms and conditions offered to them or to quit their projects. Thus they in a monopolistic and dominating position the State Government and the Board were in a position to dominate the will of the petitioners. On such submissions the petitioners allege that Clause relating to generalized tariff in the PPA should not be enforced. Undue influence is defined in section 16 of the Contract Act,1872, which is as under:-

“16 “Undue influence” defined – (1) A contract is said to be induced by “undue influence” where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other”.

29. The Hon’ble APTEL in its decision in **North Eastern Electricity Supply Company of Orissa Ltd V/s Tata Sponge Iron Ltd Orissa and Orissa Electricity Regulatory Commission** (in Appeal No. 231 of 2006 and 233 of 2006 decided on 3.2.2009) 2009 ELR (APTEL)-0161 held that undue influence does not make a contract agreement void. It only makes the contract/ agreement voidable. Thus this cannot be assumed that 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 PPA should not be enforced.

30. Issue No. 4. Whether each petition needs to be dealt with on merits separately?

In these petitions, the petitioners have sought the review of the generalized tariff stipulated in the PPAs mainly on the grounds of inflation of construction cost, requirement of mandatory release of 15% water discharge; levy of forest charges, w.e.f. 30th October 2002, revision of fisheries charges w.e.f. 30.4.2007 and levy of Local Area Development Charges, in Hydro Policy in 2006. It is, therefore, necessary to consider item wise, the impact of the said changes.

A. Inflation of construction cost

The petitioners have urged that subsequent to 6th May,2000, when the State Govt. had fixed and notified the tariff of Rs.2.50 per unit for purchase of power by the Board from Small Hydro Projects, the cost of construction/implementation projects has increased mainly due to manifold increase in the cost of steel, building material and wages etc.,and thus the inflation factor should be taken into account. By going deep into the matter the Commission finds that any increase in tariff on account of inflation of construction/ implementation cost , need not be considered for the reasons:-

(a) that the decision of the State Government in the year 2000 was to specify a tariff of Rs.2.50/kwh based on what it felt at that point of time was prudent price. This price was worked out based on negotiations with a set of IPPs interacting with the Government as a quasi-SHP Association. The tariff of Rs.2.50/kwh in the year 2000 could have been much higher as compared to the one calculated on particular methodology e.g cost plus bench mark approach adopted by the Commission, in the year 2007;

(b) that when the first Model PPA was finalized by the Commission it took a considered view that it would be convenient for all concerned to give Regulatory sanctity to this figure of Rs.2.50/kwh as had been approved by the State Government and was being universally accepted, the State Government functioning as a surrogate of the Commission;

(c) that most of the projects whose PPAs were signed prior to July,2006 were good projects in terms of the infrastructure cost on account of their better

location, better hydrology, interconnection with the grid etc. and therefore do not require benefit of inflation;

(d) that on one hand the SHE projects like Dehar, Maniji and Manjal were commissioned in the year 2004-2005 and therefore, the capital cost, would not be adversely impacted by the inflation, on the other hand the SHE projects which have delayed their commissioning do not deserve the benefit of inflation in the capital cost;

(e) that all the IPPs were supposedly aware of capital costs and impact of inflation thereon at the time of the execution of the MOU/IA/PPA and, therefore, their pleadings with reference to inflation in subsequent years are not justifiable;

(f) that the Commission has two poles in tariffs worked out in 2000 and 2007 at Rs.2.50 /kwh and Rs.2.87 /kwh respectively which would totally require that any analysis discard any range beyond Rs.2.87 /kwh as of 2007 Any inflation recognizing intervention on the data would be extreme that it would raise the limits far beyond the given numbers determined for 2007;

(g) that the projects under consideration being early projects did not face any problem in availing capital subsidy.

In view of the above, the Commission feels that it would not be proper to use inflation as a factor for any tariff upgrades but the Commission would do a determination based on the regulations being looked at in a narrow sense. This would be in consonance with the Government decision not to escalate beyond Rs.2.50 /kwh as on 2000 A.D. The Commission further feels that any changes in Government policies and taxation structure or levies and fees, constructed post to the 2000 determination, should be credited to the IPPs as they had entered into contracts with the system based on certain set of guidelines If the goal posts have been moved by the Government, the IPPs should be compensated ipso facto without any hesitation. Thus a view has to

be taken on the list of parameters which may have impacted the profitability of the IPPs

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;

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;

E Local Area Development Charge.

It is assumed that LADA charges will have to be paid and due recognition to this will need to be undertaken in the individual project work-sheets and its impact be considered on tariff;

F Other Consideration

Most of the IPPs have applied for redetermination of tariff provided in their IAs executed between 2000 and 2003, and in this process of compensation to IPPs, the IPP gains on account of delay in commissioning of their projects, they would get paid extra for their inefficiency and this, therefore, would be a distortion. The factors like convenient interconnection points and the benefit of the subsidy availed are also to be kept in mind.

31. These PPAs have been executed at different times and in different set of circumstances. There is difference of hydrology and geographical conditions in each project. The treatment of the law is not exhaustive as different consequences are required to be taken into consideration and applied having regard to the notice of the statutory provisions. (**Southern Petrochemical Industries Co. Ltd. V/s Electricity Inspector, 2007 ELR (SC) 1166**). Each plant requires to have its own operational parameters based on its technology, machinery, location, requirement of steam, characteristic of power used. (**South Indian Sugar Mills Association (Karnatka) Bangalore V/s Karnataka Electricity Regulatory Commission (2007) APTEL 126.**)

32. It would be apt to state that there may be the issues connected with their application in a retrospective manner. The Act or the regulations do not provide for a retrospective use of the power, and further exercise of such power may result in vested rights being affected.

33. Thus each petition needs to be dealt with on merits. The Commission, can review or modify prospectively the concluded PPA, within the scope of

the second proviso to sub-regulation (1) of regulation 6 of the regulations (ibid), as elaborated in the preceding paras, to cater to the stipulation such as mandatory release of 15% water discharge ; payment of revised compensation to fisheries and towards the use of forest land and the LADA charges and while revising the tariff, the construction cost inflationary factor need not be taken into account and only the narrow area of Govt. policy changes and their impact on tariff is to be quantified prospectively .

Conclusions:

34. Before issuing the final directions, it may be useful to summarise the conclusions arrived at in this order:-

(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 regulation framed thereunder;

(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 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.

Now in view of the foregoing conclusions, the Commission would proceed to consider each petition on its merits and will issue individual project wise 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 shall be furnished by the petitioners, within a period of two weeks time reckoned from the date of this order.

Yogesh Khanna
Chairman.