

In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

Appeal No. 325 of 2016 & IA No. 676 of 2016

Dated: 18th May, 2017

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member

In the matter of :-

M/s DSL Hydrowatt Pvt. Ltd.
Empire House, 214, Dr. D. N. Road
Fort, Mumbai
Maharashtra

... Appellant

Versus

1. Himachal Pradesh Electricity Regulatory
Commission
Khalini, Shimla- 171 002
Himachal Pradesh

...Respondent No 1

2. Himachal Pradesh State Electricity
Board
Kumar House, Shimla- 171 004
Himachal Pradesh

...Respondent No 2

Counsel for the Appellant(s): **Mr. M G Ramachandran**
Ms. Poorva Saigal
Ms. Anushree Bardhan
Ms. Ranjitha Ramachandran
Mr. Shubham Arya

Counsel for the Respondent(s): **Mr. Pradeep Misra**
Mr. Manoj Kumar Sharma for R-1

Mr. Anand K Ganesan
Mr. Sandeep Rajpurohit for R-2

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal is being filed by M/s DSL Hydrowatt Pvt. Ltd. (hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 challenging the Order dated 6.10.2016 (“**Impugned Order**”) passed by the Himachal Pradesh Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”), in Review Petition No. 26 of 2016 related to determination of project specific tariff for sale of electricity from the 5.4 MW Sarbari - II Small Hydro Plant (hereinafter referred as the ‘SHP’) to Himachal Pradesh State Electricity Board Ltd. (Respondent No.2) for the useful life of the plant (i.e. 40 years) starting from 2010-11. The present Appeal is concerning about non-consideration of outage factor of 5% on normative basis for all the years and non- consideration of the royalty actually to be paid to the Government of Himachal Pradesh (GoHP) above 13%.
2. The Appellant, M/s DSL Hydrowatt Pvt. Ltd. is a company incorporated under the provisions of the Companies Act, 1956, having its registered office at Sarbari Small Hydro Projects, Village Nagujhore, Distt. Kullu, Himachal Pradesh (HP).
3. The Himachal Pradesh Electricity Regulatory Commission is the Electricity Regulatory Commission for the State of Himachal Pradesh, exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.

4. The Respondent Nos. 2, Himachal Pradesh State Electricity Board Ltd. (HPSEBL) is the beneficiary of the SHP of the Appellant.

5. Facts of the present Appeal:

- a) The Appellant has established 5.4 MW SHP in the State of Himachal Pradesh with Commercial Operation Date (COD) of the SHP as 25.8.2010. This project was earlier envisaged with installed capacity of 4.5 MW which was subsequently increased to 5.4 MW with the approval of GoHP. On 28.2.2009 Implementation Agreement (“IA”) was signed between the Appellant and GoHP for SHP based on Detailed Project Report (DPR) submitted by the Appellant to GoHP.
- b) The State Commission on 18.6.2007 notified Himachal Pradesh Electricity Regulatory Commission (HPERC) (Power Procurement from Renewable Sources and co-generation by Distribution Licensee) Regulations, 2007 (hereinafter referred to as ‘Regulations, 2007’). The State Commission on 18.12.2007 issued generic tariff order for purchase of energy by Respondent No. 2 i.e. HPSEBL from Small Hydro projects of upto 5 MW capacity (hereinafter referred as ‘Generic Tariff Order, 2007’).
- c) The Appellant on 23.3.2010 filed Petition No. 29 of 2010 with the State Commission for determination of capital cost and levellised tariff for the useful life (40 years) of the SHP. The State Commission on 07.7.2010 passed an Interim Order allowing provisional tariff of Rs. 2.95/kWh in the said petition.

- d) The Appellant and the Respondent No. 2 entered into Power Purchase Agreement (PPA) dated 23.8.2010 for sale of power by the Appellant to the Respondent No.2 from the SHP.
- e) On the directions of the State Commission, the Appellant filed the amended Petition No. 29 of 2010 on 23.8.2013 for determination of tariff for sale of power from the SHP. The State Commission vide its Order dated 28.4.2016 (hereinafter referred as 'Tariff Order') determined the levellised tariff of the SHP at the interconnection point for a period of 40 years from COD (i.e. 25.8.2010). This order did not consider at all the outage factor of the plant (5%) and royalty payable in excess of 13% in the computation of project specific tariff.
- f) The Appellant on 25.5.2016 filed Review Petition No. 26 of 2016 against the Tariff Order. The State Commission vide order dated 6.10.2016 (Impugned Order) partly allowed the application of outage factor (5%) for the years when the energy injected at the interconnection point is less than 29.87 MUs and again denied the royalty payable in excess of 13% in the computation of tariff.
- g) Aggrieved by the Impugned Order read with the Tariff Order, the Appellant has preferred the present appeal.

6. QUESTIONS OF LAW

The Appellant has raised the following question of law in the present appeal:

Whether in the facts and circumstances of the case, the State Commission is right in restricting the consideration of the outage factor of the project specific levellised tariff namely only when generation being less than 29.87 MUs of saleable energy and not otherwise as a normative factor?

7. We have heard at length the learned counsel for the parties and considered carefully their written submissions, arguments put forth during the hearings etc. Gist of the same is discussed hereunder.
8. The learned counsel for the Appellant has made following arguments/submissions for our consideration on the issues raised by it:
 - a) The State Commission has wrongly inter-related normative parameters of outage factor/ shut down permitted for machine availability and quantum of generation. These are independent and unrelated to each other. The State Commission's decision to apply outage factor/ shutdown period of 5% to the years when annual generation is less than 29.87 MUs is not justified. This covers the situation when the generation is 28.37 MUs and above. In case generation is less than 28.37 MUs in a particular year, the factor of 5% shutdown/outage factor is not sufficient. Accordingly, 5% shutdown/outage factor is to be provided uniformly for all 40 years.
 - b) The above decision is against the fundamental concept of tariff determination in hydro power projects and specifically for small hydro projects (upto 25 MW) which are non-conventional and are to

be promoted under Section 86 (1) (e) read with Section 61 (h) of the Electricity Act, 2003.

- c) The State Commission failed to appreciate that for project specific tariff determination, certain normative parameters are to be considered which are independent of each other. These are water flow, outage factor/shut down, auxiliary consumption and transformation losses. Water availability during entire period of PPA has been considered based on normative parameter (75% dependable water flow) and is entirely to the risk of the Appellant. The Appellant is entitled only to per unit tariff for quantum of energy supplied irrespective of normative quantum of energy determined by the State Commission. Thus, the water flow availability to generate upto 29.87 MUs cannot be considered for adjustment any year in the other normative parameters such as outage factor/shut down. The normative 5% outage factor/shut down period is given considering that the power plant cannot run round the clock 365 days a year and year on year basis for 40 years.
- d) The SHP of the Appellant will be given tariff based on the availability of the machines i.e. with reference to availability of 95%. In case of non-availability of water, the Appellant is entitled to declare availability after considering normative shut down period of 5%. Accordingly, shut down period of machine is not related to increase or decrease of generation based on water flow for a particular year.
- e) The State Commission failed to appreciate that the State Commission should have adopted the same principle as prescribed in Generic Tariff Order, 2007 while determining the project specific

tariff. The State Commission in the Tariff Order has stated that it has been guided by the similar parameters mentioned in Generic Tariff Order, 2007 even for higher capacity SHPs i.e. more than 5 MW. Further, the basic principles of tariff determination cannot be fundamentally different.

- f) The State Commission has also disallowed royalty/free power obligation beyond 13%. As the allotment of SHP was controlled by GoHP, therefore, the Appellant had no option but to meet the free power conditions. Therefore, there is no justification to exclude free power obligation beyond 13%. The Appellant will have no capacity to absorb higher royalty percentage to GoHP.
 - g) This is particularly when the State Commission is determining tariff for sale to Respondent No. 2, the Distribution Licensee in the State of HP and free royalty power is also to GoHP. The SHP is entitled to promotional measures under Section 86 (1) (e) read with Section 61 (h) of the Electricity Act, 2003, hence entire royalty should have been considered for tariff determination by the State Commission. Accordingly, the provisions of National Tariff Policy (NTP) do not create prohibition for the State Commission to consider promotional measures. 13% free power as per NTP is generally applicable for projects allotted under two stage bidding process.
- 9.** The learned counsel for the Respondent No. 1 and 2 have made following arguments / submissions on the issues raised in the present Appeal for our consideration:

- a) The project specific tariff determined by the State Commission, for the SHP, of the Appellant is based on norms and parameters applicable to the Appellant. Once the project specific tariff is determined, the generic tariff has no application to the Appellant. The Appellant has taken the advantage of project specific capital cost (Rs. 8.46 Cr/MW) as against Rs. 6.5 Cr/MW in generic tariff order for upto 5 MW.
- b) The State Commission has allowed gross generation of 30.38 MUs (as in DPR) per annum as claimed by the Appellant based on 75% dependable year and Capacity Utilisation factor (CUF) of 61%. The figure of 29.87 MUs has been arrived by the State Commission based on auxiliary consumption & transformation loss of 1% and project line losses of 0.7%. The contention of the Appellant that 5% outage factor/shut down period shall be applicable to all years is misconceived and liable to be rejected as the State Commission has determined the project specific tariff which is based on individual cost parameters and not on normative or generic basis. The State Commission has adopted financial parameter from Generic Tariff Order, 2007 and not the operational parameters. The operational parameters are project specific including design energy which have not been disputed by the Appellant.
- c) The State Commission based on design energy and net saleable energy found it prudent that all costs and expenses of the Appellant for SHP are recovered. The Appellant cannot have any grievance of any loss being suffered or non-recovery of loss and expenses once the design energy and net saleable energy are achieved. The outage factor/shut down period is to take care of outages in the

system and the same has been taken care by the State Commission and given due adjustment up to the design energy. The outage factor of 5% should not be given when the Appellant has achieved the full design energy and has recovered the total costs and expenses for the year.

- d) The State Commission has correctly applied the outage factor/ shut down period only upto the design energy. The SHP in the last 5 years has achieved annual gross generation of about 33.82 MUs much above against 30.38 MUs for 75% dependable years. The State Commission to protect the interest of the consumers has allowed 5% outage factor only in years when average generation is less than 29.87 MUs. There is no merit in the contention of the Appellant seeking additional normative generation even when there is no actual loss which is not allowed in a project specific tariff determination.
- e) This Tribunal in Appeal No. 94 and 96 of 2005 vide judgment dated 14.11.2006 and in Appeal No. 42 and 43 of 2008 vide judgment dated 31.7.2009 has held that Regulatory Commission cannot adopt the principle of normative or actual whichever is better.
- f) The issue of free power obligation beyond 13% {12% royalty & 1% Local Area development Fund (LADF)} by the Appellant to be factored in tariff is also misconceived. The Appellant has various obligations towards GoHP for which the Appellant was allowed to set up the SHP. These obligations cannot be passed on to the consumers in the form of tariff. Thus the quantum of royalty to be limited to 13% (including LADF) which was as per NTP and Hydro

Power Policy, the policies which were prevalent when project was envisaged and commissioned. The State Commission has adopted the specific provision from the NTP. Further, as per IA signed between the Appellant and the GoHP, it is agreed that the royalty power is to be borne by the Appellant.

10. After having a careful examination of all the aspects brought before us on the issues raised in Appeal and submissions made by the Appellant and the Respondents for our consideration, our observations are as follows:-

- a. The present case pertains to decision of the State Commission vide its Impugned Order regarding non-consideration of outage factor/shut down period of 5% on normative basis for all the years and non- consideration of the royalty actually to be paid to the Government of Himachal Pradesh (GoHP) above 13%.
- b. On Question No. 6 i.e. Whether in the facts and circumstances of the case, the State Commission is right in restricting the consideration of the outage factor of the project specific levellised tariff namely only when generation being less than 29.87 MUs of saleable energy and not otherwise as a normative factor?, we observe as follows:**
 - i. The relevant provisions of Regulations, 2007 which enables the State Commission to determine the tariff of the SHP of the Appellant are produced below:

“6. Determination of Tariff for 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, or the State Transmission Utility or the transmission licensee, engaged in the activity of bulk purchase and sale of electricity to the distribution licensee;

Provided that the Commission may determine tariff including augmentation costs of the grid beyond interconnection point-

(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, unless otherwise provided in the PPA, the PPA approved by the Commission, prior to the commencement of these regulations, shall continue to apply for such period as mentioned in the PPA:

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.....

(3) While deciding the terms and conditions of tariff for energy from renewable sources and co-generation, the Commission shall, as far as possible, be guided by the principles and methodologies specified by the Central Commission, the National Electricity Policy, the Tariff Policy and the tariff regulations notified by the Central Commission.

Provided that the Commission, may for sufficient reasons and after exercising due diligence and applying prudency check, deviate from the terms and conditions of the generation tariff notified by the Central Commission:

.....

.....

(5) While determining the tariff, the Commission shall consider appropriate operational and financial parameters.

.....

.....”

From Regulation 6 (1) (ii) as above, it is clear that the State Commission is empowered to determine the tariff of the SHP (5.4 MW) of the Appellant and shall be guided as per the provisions provided at Regulations 6 (3)/(5) above.

- ii. The State Commission in the Tariff Order at para 1.2.6 & 5.2 has observed as below:

“1.2.6 For the purpose of determining the tariff in this order, the Commission has been guided by the policies mentioned in the HPERC RE Regulations 2007. The parameters for tariff determination can be classified as technical or financial parameters. The technical parameters would vary with each individual project and, therefore, in this Tariff Order as well, the Commission has considered project specific technical parameters. As regards the financial parameters, even though there may be some justification owing to efficiencies of scale for adopting the parameters which are slightly less liberal as

compared to the SHPs of smaller capacities i.e. up to 5MW, the Commission has been guided by the similar parameters mentioned in the HPERC SHP Tariff Order 2007 even for the higher capacity SHPs i.e. more than 5MW.”

5.2 Design energy and net Saleable Energy

5.2.1 Month wise details of design energy of the project at 75% dependable year including 15% mandatory discharge as provided in DPR are as under:

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.....

5.2.2 The Petitioner has claimed 30.38 MU as gross generation in its petition. Based on the analysis of the DPR, the Commission has allowed the gross generation of 30.38 MU for the calculation of Tariff in this order.

The State Commission based on various cost components approved the capital cost of the SHP of the Appellant. The State Commission also allowed the gross generation of 30.38 MUs and net saleable energy at the interconnection point based on Auxiliary Consumption of 1%, transmission losses of 0.70% and royalty (12%/13%) to GoHP. The levellised tariff so determined is a single part tariff applicable to the saleable energy at interconnection point. The State Commission in the Main Order had not considered the outage factor/shut down period of 5% on normative basis for which the Appellant has filed the Review Petition.

- iii. The State Commission in the Impugned Order issued against the Review Petition on the issue of outage factor/ shut down period of 5% has held as below:

Commission's view

2.2.7 The Commission agrees with the petitioner that the generation at the project may vary from year to year and if the outage time of 5% as claimed by him is not allowed it can expose the petitioner to some risk of under recovery in the subsequent years. At the same time it can also not overlook the fact that the actual generation of the project in the last 5 years as per data referred to in para 2.2.5 of this Order and also conceded to by the petitioner himself in the course of hearing, the actual generation has been considerably higher than the generation corresponding to 75% dependable year as considered in the impugned Order.

2.2.7.1 In case, during any financial year, the quantum of energy received at the interconnection point, alongwith the deemed generation actually allowed, if any, as projected at the interconnection point by accounting for the deemed auxiliary consumption, transformation losses and project line losses, for that financial year, is less than 29.87 MU (i.e. the annual generation of 30.38 MU for a 75% dependable year adjusted by auxiliary consumption and transformation losses [1%] and project line losses [0.7%]), such energy for that year shall be escalated by 5% to account for the impact of outages in that year. The energy so escalated, for a year shall however be restricted to a maximum of 29.87 MU, and the energy so restricted shall be considered for computing the net saleable energy for that year by taking into account the royalty and LADF applicable for that year. The difference viz-a-viz the summation of the month wise net saleable energy shall be paid

against the supplementary bill to be raised in the month of April succeeding the financial year. The difference in the net saleable energy on the above lines shall also be payable at the normal rate applicable for that year. However, if the energy so received at the interconnection point alongwith the deemed generation, if any, allowed as projected at the interconnection point for that financial year is equal to or exceeds 29.87 MU, no escalation shall be made in the aforesaid manner for the outage in that year. The escalation/adjustment in this manner is being allowed to be made at the interconnection point instead of referring to the gross generation for the sake of simplicity with an explicit assumption that the entire gross generation, after meeting the auxiliary consumption, transformation losses and project line losses shall be injected at the interconnection point.”

The State Commission has allowed the Review filed by the Appellant to a limited extent for the years where there is a shortfall in energy (i.e. w.r.t 29.87 MUs) at interconnection point after considering auxiliary consumption and line losses on the approved gross generation (i.e. 30.38 MUs). The State Commission while applying prudence has allowed outage factor/ shut down period upto 5% on shortfalls below 29.87 MUs at interconnection point in a particular year. This has been done by the State Commission keeping in view that the Appellant is able to recover full charges at the level of injection of 29.87 MUs at the interconnection point. The Appellant is also paid for energy generation beyond the approved energy generation as per DPR at the same levellised tariff. Further the CUF (67% to 75%) achieved by the Appellant and as admitted

by it before the State Commission is much higher than that as considered in DPR (61%).

This is a project specific tariff determined by the State Commission as per Regulations, 2007 and guided by the principles of Generic Tariff Order, 2007. The State Commission while doing so has clearly reasoned out for the application of outage factor/shut down period of 5% in case of SHP of the Appellant.

- iv. The Appellant has also raised the issue that the decision of the State Commission is in contravention to the Section 86 (1) (e) read with Section 61 (h) of the Electricity Act, 2003. The quoted Sections are reproduced below:

“61. The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

.....

.....

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

.....

.....

86. (1) The State Commission shall discharge the following functions, namely: -

.....

.....

(e) promote cogeneration 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 licence;

From the perusal of the Generic Tariff Order, 2007, Tariff Regulations, 2007, the Tariff Order and the Impugned Order, we find that the State Commission has taken due care in applying the above mentioned Sections of the Electricity Act, 2003 and has not acted in contravention to the said provisions.

- v. In view of the discussions as above, we are of considered opinion that the State Commission after applying the prudence check is right in restricting the consideration of the outage factor/ shut down period of 5% only when generation is less than 29.87 MUs at inter-connection point and not as a normative factor for all the years even when generation is more than 29.87 MUs.
- vi. In view of the above this issue is decided against the Appellant.
- vii. The Appellant has also raised one more issue regarding non-consideration of royalty/ free power to GoHP above 13% while determining the tariff of SHP. Regulation 6 of the Regulations, 2007 provides as below:

“6. Determination of Tariff for 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, or the State Transmission Utility or the transmission licensee, engaged in the activity of bulk purchase and sale of electricity to the distribution licensee;

Provided that the Commission may determine tariff including augmentation costs of the grid beyond interconnection point-

(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:

.....

.....

(3) While deciding the terms and conditions of tariff for energy from renewable sources and co-generation, the Commission shall, as far as possible, be guided by the principles and methodologies specified by the Central Commission, the National Electricity Policy, the Tariff Policy and the tariff regulations notified by the Central Commission.

Provided that the Commission, may for sufficient reasons and after exercising due diligence and applying prudency check, deviate from the terms and conditions of the generation tariff notified by the Central Commission:

The State Commission in the Main Order on this issue had held as below:

“5.2.4 The Petitioner in its petition has claimed 12% of free power for the first 12 years, 18% for next 18 years and 30% for the balance period. However the Hydro Policy and Tariff Policy of Gol specify that the maximum royalty to be provided shall be limited to 13% in any year including 1% for LADF. The

Commission declines to accept any claim beyond the aforesaid limits. The Commission has accordingly calculated the tariff assuming 12% royalty excluding 1% additional free power for LADF. Further the Commission has also calculated the tariff using 13% royalty including 1% additional free power for LADF, however this tariff would be applicable only for the time periods where the additional free power for LADF is actually provided by the Petitioner. “

The State Commission in the Impugned Order on this issue has held as below:

“Commission’s view

2.1.5 The petitioner in its tariff petition claimed that the tariff computation should account for free power payable to the Govt. of Himachal Pradesh at 12% for the first 12 years, 18% for next 18 years and 30% for the balance period. However, the Commission while determining the tariff for 5.4 MW Sarbari II SHP, as per the Tariff Order dated April 28, 2016, has considered the maximum permissible free power limited to 13%, including 1% for LADF. This is in consonance with the Hydropower Policy, 2008 and the Tariff Policy 2006 (as amended in 2008) of the Gol.

2.1.5.1 The Hydropower Policy clearly specifies that any free power beyond 13% should have to be arranged by the developers from their own resources and would not be a pass through in tariff. The relevant extract from the Hydropower Policy, 2008 is as follows:

“The dispensation accorded under the Hydro Policy of 1998, regarding 12% free power to be provided to the host State Government, will, however, be supplemented by an additional 1% in accordance with Clause (h) below. Any free power beyond 13%, would be met by the developers from their own resources and would not be a pass through in tariff.”

2.1.5.2 Similarly, the Tariff Policy of 2006 was amended in the year 2008 to include a provision to the effect that any expenditure incurred by the project developer (except free power upto 13%) would neither be included in the project cost nor be passed through in the tariff. The relevant provision of the Tariff Policy of 2006 is as follows:-

“5.1 (i) Any expenditure incurred or committed to be incurred by the project developer for getting project site allotted (except free power up to 13%) would neither be included in the project cost, nor any such expenditure shall be passed through tariff.”

The Tariff Policy issued by the GoI in January, 2016 also does not materially alter this provision.

2.1.5.3 As per Section 61(i) of the Electricity Act 2003, the Commission, for the determination of the tariff, is to be guided by the National Electricity Policy and Tariff Policy. As mentioned above, the Tariff Policy limits the free power to be allowed in the tariff to 13%. The Commission, while determining the tariff for Sarbari II Project, as far as possible, has been guided by the HPERC SHP Tariff Order 2007. However the

said HPERC SHP Tariff Order of 2007 was meant for hydro projects below 5 MW capacity and is not directly applicable to Sarbari-II SHP which is of 5.4 MW capacity. In this connection, the Commission would also like to point out that effective annual percentage rate of the royalty allowed under the SHP Order of 18-12-2007 shall, on NPV basis, work out to less than 12% i.e. less than the rate allowed by the Commission to the petitioner in the impugned Tariff Order dated 28-04-2016.

2.1.5.4 The Hydropower Policy, 2008 and the Tariff Policy, 2006 (as amended in 2008) were notified by the Gol in the year 2008 i.e. well before signing of the Implementation Agreement on 28.02.2009 and achieving the COD of the Project. The provisions made in the Implementation Agreement for providing the royalty at 12% for the first 12 years, 18% for next 18 years and 30% for the balance period shall not override the aforesaid provisions of Central Government Hydro and Tariff Policies. However, in case the Tariff Policy notified by the Gol undergoes a change to provide for free power at a maximum rate which is different from what has been considered by the Commission in its Order dated 28-04-2016, the parties will be entitled to suitable adjustment in the tariff.

The Commission, therefore, declines to accept the petitioner's claim in this regard."

From the above it is clear that the Implementation Agreement dated 28.2.2009 was signed between Appellant and GoHP after the issuance of Hydro Power Policy, 2008 and Tariff Policy, 2006 (as amended in 2008). The Appellant in the Implementation Agreement had agreed to provide royalty in the form of free power payable to

the GoHP at 12% for the first 12 years, 18% for next 18 years and 30% for the balance period of the PPA. This has been done despite the fact that Hydro power policy and Tariff Policy which was known to the parties at that point of time regarding provision limiting to 13% including LADF.

- viii. Clause 5.4.1. and 5.4.2 of the IA dated 28.02.2009 provide as below;

“5.4.1 The royalty in the shape of free power shall be levied @ 12% Free Power of the Deliverable Energy of the Project for the period starting from the date of synchronization of the first generating unit and extending upto 12 years from the date of Schedule Commercial Operation of the Project, @ 18%_Free Power of Deliverable Energy of the Project for a period of next 18 years and @ 30% Free Power of the Deliverable Energy for the balance Agreement Period beyond 30 years. The royalty in the shape of free power shall start accruing to the First Party from the Scheduled Commercial Operation Date/synchronization of first generating unit, whichever is earlier.

5.4.2 In case the First Party levies any duty/tax on generation and supply of power, the same shall be borne by the Second Party except for royalty power which shall be borne by the First Party.”

From above, it is clear that the royalty power shall be borne by the Appellant.

- ix Regulations, 2007 provides that while determining the tariff, the State Commission is to be guided by the National Electricity Policy and the Tariff Policy which is also in consonance with Section 61 of the Electricity Act, 2003. The Hydro Power Policy as well as the Tariff Policy clearly states that free power beyond 13% cannot be loaded in capital cost/tariff. Thus, the State Commission has rightly taken into account the prevailing policies and regulations while deciding the issue.
- x. In view of our discussions at 10. b. vii - ix above, we are of considered opinion that there is no merit even in this issue raised by the Appellant. This issue is also decided against the Appellant.

ORDER

We are of the considered opinion that the issues raised in the present appeal and IA have no merit as discussed above. The Appeal and I.A. are hereby dismissed.

The Impugned Order dated 6.10.2016 passed by the State Commission is upheld.

No order as to costs.

Pronounced in the Open Court on this **18th day of May, 2017.**

(I.J. Kapoor)
Technical Member

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REPORTABLE/NON-REPORTABLE

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(Mrs. Justice Ranjana P. Desai)
Chairperson