

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 19th April, 2012

Present: **HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,**
CHAIRPERSON,
HON'BLE V J TALWAR, TECHNICAL MEMBER

Appeal No.9 OF 2011

In the Matter of:

Himachal Pradesh State Electricity Board
Vidyut Bhawan,
Shimla (HP)

.....Appellant

Versus

1. Himachal Pradesh Electricity Regulatory Commission
Keonthal Commercial Complex,
Khalini
Shimla (HP)

2. Jai Prakash Hydro Power Ltd (JHPL)
C-16, Sector-1,
SDA Housing Colony,
New Shimla (HP)

.....Respondents

Counsel for the Appellant

Mr. R K Mehta,
Mr. A David
Mr. Antaryami Upadhyay
Mr. S Laksi Singh
Mr. Anish Singh

Counsel for the Respondent

: Ms. Surbhi Sharma for R-1
Ms. Shikha Ohri for R-1
Mr.S.B. Upadhyay,Sr Adv for R-2
Mr. Pawan Upadhyay for R-2
Mr. Pawan Kishore Sing for R-2
Mr. Jayesh Gaurav for R-2
Mr. Param Kumar Mishra for R-2

Appeal No.178 of 2010

In the Matter of:

**Jaiprakash Power Ventures Ltd
JUIT Complex, Waknaghat
PO-Dumehar Bani,
Kandaghat, Solan (HP)**

.....Appellant

Versus

**1. Himachal Pradesh Electricity Regulatory Commission
Keonthal Commercial Complex,
Khalini
Shimla (HP)**

**2. Himachal Pradesh State Electricity Board
Vidyut Bhawan,
Shimla (HP)**

.....Respondents

**Counsel for the Appellant : Mr.S.B. Upadhyay, Sr Adv
Mr. Pawan Upadhyay
Ms. Anisha Upadhyay
Mr. Pawan Kishore Singh
Mr. Jayesh Gaurav
Mr. Param Kumar Mishra**

**Counsel for the Respondent : Ms. Surbhi Sharma for R-1
Ms. Shikha Ohri for R-1
Mr. R K Mehta for R-2
Mr. A David for R-2
Mr. Antaryami Upadhyay for R-2
Mr. Anish Singh for R-2**

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

**1. Himachal Pradesh State Electricity Board (Electricity Board)
is the Appellant in Appeal No.9 of 2011. Jai Prakash Power
Ventures Ltd, a successor company of M/s Jai Prakash**

Hydro Power Limited is the Appellant in Appeal No.178 of 2010.

2. The Himachal Pradesh Electricity Regulatory Commission and M/s Jai Prakash Hydro Power Limited (Hydro Power) are the 1st and 2nd Respondents respectively in Appeal No.9 of 2011. The Himachal Pradesh Electricity Regulatory Commission and the Himachal Pradesh State Electricity Board are the 1st and 2nd Respondents respectively in Appeal No.178 of 2010.
3. The Appellant, Himachal Pradesh State Electricity Board has filed the Appeal in Appeal No.9 of 2011 as against the correctness of the MYT order dated 30.3.2009 determining the tariff for sale of electricity generated by Baspa II HEP of 2nd Respondent Hydro power to the Appellant for the MYT control period of 2008 - 2011 as well as against the Clarificatory order dated 23.6.2010 passed by the State Commission.
4. M/s Jai Prakash Hydro Power Limited has filed the composite Appeal in Appeal No.178 of 2010 as against MYT Order dated 30.3.2009, the order dated 10.9.2009 passed in the Review Petition and the order dated 23.6.2010 passed in clarificatory petition.

5. Since the impugned MYT order dated 30.3.2009 and impugned clarificatory order dated 23.6.2010 are the subject matter of both these Appeals, the common judgment is being rendered.
6. For the sake of convenience, Himachal Pradesh State Electricity Board the Appellant in Appeal no. 9 of 2011 and (2nd Respondent in Appeal no. 178 of 2010) would be referred to as the Appellant Electricity Board and M/s Jai Prakash Hydro Power Limited the Appellant in Appeal no. 178 of 2010 (2nd Respondent in Appeal no. 9 of 2011) is being referred to as the Respondent Hydro Power. Himachal Pradesh Electricity Regulatory Commission the Respondent no. 1 in both the Appeals is referred to as the State Commission herein after.
7. The brief facts of the case are as follows:
 - (a) Jai Prakash Hydro Power Limited is a Generating Company.
 - (b) On 23.11.1991, a Memorandum of Understanding was signed between the Government of Himachal Pradesh and Hydro Power for development of 300 MW Hydro-electric Power Plant BASPA-II on river Baspa in Kinnaur District.

- (c) On 4.6.1997, a Power Purchase Agreement was signed between the Appellant Electricity Board and the Respondent Hydro Power for sale of power from Baspa II HEP of the Respondent Hydro Power. On completion of the project, Hydro Power commenced its generation of electricity on 8.6.2003 and sale thereof to the Appellant Electricity Board.
- (d) Himachal Pradesh Electricity Board is the sole purchaser of the electricity generated by the Baspa II HEP of Jai Prakash Hydro Power Limited.
- (e) A supplementary Agreement between the Hydro Power and Electricity Board was executed on 26.2.2003 agreeing to the capital cost of the project at Rs 1550 Crores for the purpose of Tariff and Payment mechanism of sale of power to the Board.
- (f) On 7.7.2003 the Respondent Hydro Power submitted first bill for sale of power to the Electricity Board after Commercial Operation Date as per provisions of PPA based on the agreed cost of project of Rs 1550 Crores.
- (g) The State Commission in its interim order dated 19.7.2003 issued directions to the Appellant Electricity Board for payment of revenue realized from sale of

power received from the project to the Respondent Hydro Power till the Tariff is approved by the State Commission.

- (h) On 6.9.2003 the State Commission set aside the Supplementary Agreement dated 26.2.2003 and directed the Electricity Board to continue payment of revenue realized from sale of power of the project to the Respondent Hydro Power till the approval of the tariff by the Commission.
- (i) On 21.11.2005, the Respondent Hydro Power filed its first Tariff Petition before the State Commission for approval of Capital Cost of the project and for fixation of tariff with effect from the date of commercial operation of the project.
- (j) On 24.2.2007, the First Tariff order determining the Capital cost of the Baspa II HEP and tariff for the financial years 2003-04 to 2007-08 was passed by the State Commission. In this order, the State Commission quantified the amount of arrears to be paid by the Electricity Board to Jai Prakash Hydro Power Limited and also awarded the carrying cost for such arrears at the rate of 8%.

- (k) Both the Appellant Electricity Board and the Respondent Hydro Power filed petitions for review of the order dated 24.2.2007 on Determination of the Capital Cost and Tariffs for 300 MW Baspa II HEP. In its review petition the Respondent Hydro Power requested for early payments of the arrears and for review of interest rate of 8% awarded by the Commission on the ground that it was not in consonance with the Article 10.11 of the Power Purchase Agreement.
- (l) In the Review order dated 7.2.2008, the State Commission directed the Electricity Board to pay the whole amount of arrears during the year 2008-09 in two instalments. In regard to application of the provisions of Article 10.11 of the PPA the State Commission observed that the necessary adjustments shall be made during processing of the subsequent petition along with necessary adjustments in the arrears payable.
- (m) Subsequently, the Respondent Hydro Power filed a Tariff Petition for Multi Year Tariff (MYT) for the control period 2009 to 2011.
- (n) The State Commission passed the MYT order on this petition on 30.3.2009. However, the State

Commission did not make any adjustments towards interest on arrears as observed in its Review Order dated 7.2.2008 and merely allowed the interest only at the rate of 8%.

- (o) Aggrieved over this MYT order dated 30.3.2009, the Respondent Hydro Power filed for a Review in Petition No.83 of 2009. The Appellant Electricity Board also moved a review petition no. 91 of 2009 seeking review of MYT Order dated 30.3.02009.
- (p) On 10.9.2009, the Review Petition filed by the Respondent Hydro Power was disposed of. In this order, the State Commission recomputed the arrears payable by the Board and the carrying costs, based on the Annual Fixed Charges (AFC) approved by the Commission in its review order dated 10.9.2009 and the payments made by the Board for the period FY04 to FY08. The Commission also directed the Board to pay the entire arrears of prior period as per the order dated 7.2.2008 but again restricted the rate of interest at the rate of 8%.
- (q) The State Commission permitted the Appellant Electricity Board to amend or file revised petition as some of the issues raised in the review petition were also the subject matter of Appeal No. 120 of 2008 filed

before this Tribunal and this Tribunal's judgment had been pronounced.

- (r) Again both the parties filed separate clarificatory petitions against this review order dated 10.9.2009 under Section 152 of the Civil Procedure Code. In these petitions, the State Commission passed order on 26.3.2010 holding that though there was no scope for review of the review order, under Section 152 of Civil Procedure Code, the State Commission has got limited powers to make corrections of the mistakes committed in the earlier judgments. It further directed that the Board is liable to pay the interest from the date of the CoD as per Clause 10.11 of the PPA. However, State Commission kept the interest rate @ 8% for the period from CoD of the project to 30.10.2010 and revised it to SBI long term PLR only for the period from 01.11.2009 till the payment of arrears by the Board.
- (s) Having aggrieved over this order, both the parties have filed these Appeals before this Tribunal on different grounds.
- (t) As mentioned earlier, Himachal Pradesh Electricity Board has filed Appeal in Appeal No.9 of 2011 and Jai Prakash Hydro Power Limited has filed the Appeal

in Appeal No.178 of 2010 as against the impugned orders dated 30.3.2009, 10.9.2009 and 23.6.2010.

8. Let us first deal with the Appeal No.9 of 2011 filed by the Himachal Pradesh State Electricity Board as against the order dated 30.3.2009 determining the tariff for the control period 2008 - 11 and the Review Order dated 23.6.2010.
9. The following issues have been raised by the Appellant Electricity Board in the present Appeal.
 - (a) Truing Up of Interest Cost for the Financial year 2003-04 and Financial Year 2007-08.
 - (b) Amortization of Cost of Debt Restructuring
 - (c) Incentive for Higher Plant Availability
 - (d) Infirm Energy
 - (e) Payment of Interest on Arrears
10. The contentions raised by the Appellant in 1st and 2nd issues raised in this Appeal are same which and related to non-supply of information by the Respondent. Therefore, we would deal with these issues together. These issues relate to **Truing up of interest cost** and **Amortization of Cost of Debt Restructuring.**
11. The learned Counsel for the Appellant Electricity Board has made the following submissions:

- (a) The State Commission had categorically observed in the order dated 30.3.2009 that there were certain errors in the information submitted by the Respondent Hydro Power and therefore, the State Commission called upon the Respondent Hydro Power to submit further information and accordingly the Respondent Hydro Power submitted the information to the Commission without submitting the copies of the said information to the Appellant Electricity Board.
- (b) Because of the fact of non-supply of information, which was brought to the notice of the Commission by the Appellant Electricity Board in its Review Petition before the State Commission, the Appellant was unable to respond to the information submitted by the Respondent Hydro Power.
- (c) The State Commission decided the issue on the information supplied by Respondent Hydro Power and without giving an opportunity to the Board to respond to the same.
- (d) The State Commission had held that the Board was not able to point out any error in the figures supplied by the Respondent Hydro Power and proceeded to approve the claims of the Respondent Hydro power on the basis of the analysis of the documents

submitted by the Respondent, which were not supplied to the Appellant. Thus, the order of the State Commission with regard to truing up of the interest cost had been passed in violation of the principle of natural justice.

- (e) The purported claim of Respondent Hydro Power that the information was supplied to the Appellant Electricity Board is wrong. The documentary proof of submission of copies of the information to the Appellant show that the copies were submitted to the office of Chief Engineer (PSP) between August 2008 to February 2009. The office of Chief Engineer (PSP) was disbanded on 30.9.2008 and all the works handled by this office were transferred to other wings of the Board. Thus the Appellant was not aware of the details of the information supplied by the Respondent Hydro Power.

12. The learned senior counsel for the Respondent Hydro Power vehemently opposed the contentions of the Appellant Electricity Board and made the following reply submissions on these issues:

- (a) The ground on which the Appellant has raised this point relating to the alleged non supply of the relevant documents filed by the Respondent Hydro Power

before the State Commission is wrong. In fact, all sort of documents were duly furnished to the Appellant Electricity Board and the same were in possession of the Appellant. The Respondent Hydro Power has also filed an Affidavit to this effect before this Tribunal on 25.7.2011 in support of its contention that the said documents were duly furnished to the Electricity Board at the time when they were filed before the State Commission. In the Affidavit, it has been clearly stated that all the documents in MA No.45 were furnished to the Appellant on 17.3.2009 and other documents referred to by the Appellant were also furnished to the Appellant on various dates i.e. 20.8.2008, 10.10.2008, 19.12.2008, 21.2.2009 and 6.2.2009 simultaneously when they were filed before the State Commission. As a matter of fact, the State Commission also was conscious of this fact that the necessary documents had supplied to the Appellant and only on that basis, the State Commission observed in impugned order dated 23.6.2010 that the Electricity Board was not able to point out any error in the approved figures in respect of truing-up of interest cost for the period Financial Year 2003-04 to 2007-08 and Amortization of cost of debt restructuring. Hence, the contention of the Appellant on this issue has no basis.

(b) As regards the closure of office of Chief Engineer (PSP) on 30.9.2008 as claimed by the Appellant, the learned Counsel for the Respondent Hydro Power in its affidavit dated 14.12.2011 submitted a copy of the Review petition filed by the Appellant on 12.6.2009. This review petition was filed before the State Commission by the Chief Engineer (PSP) on behalf of the Appellant Electricity Board. The Appellant has mentioned in para 1 of this review petition that “ a copy of the Tariff Order dated 30.3.2009 was delivered in the office of Chief Engineer (PSP) on 13.4.2009 though received on in the Board office on or before 6.4.2009. After receiving the Tariff order, the same was examined in the office of Chief Engineer (PSP), a wing of the petitioner”. These facts would clearly reveal that the claim of the Appellant Electricity Board about non-receipt of information and closure of office of Chief Engineer (PSP) is factually incorrect.

13. We have considered the submissions of both the parties on these issues. It is noticed that the Respondent Hydro Power through the Affidavit specifically stated that during the proceedings in the MYT application for the control period from 2008 – 11, the copies of all the miscellaneous documents were supplied to the Appellant when the same were filed before the State Commission.

In fact, along with the original application, 09 additional copies were duly filed before the State Commission. On the basis of the averments made in the said application, the interest for Financial year 2003-04 to 2007-08 and debt restructuring were approved by the State Commission. On perusal of the impugned order dated 30.3.2009, it is clear that the State Commission has referred to the complete details provided in the application. On the basis of the information furnished by the Respondent Hydro Power, the interest and debt restructuring expenses have been approved.

14. If actually the Appellant was aggrieved over the alleged non supply of documents to the Appellant, the Appellant could have filed necessary application before the Commission for giving a direction to the Respondent Hydro Company to furnish the copies. As a matter of fact, this issue was never raised before the Commission. Therefore, this contention relating to the alleged non supply of documents cannot be accepted especially in the light of the affidavit filed by the Respondent Hydro Power before this Tribunal to the effect that all the documents have been furnished to the Appellant in time. As a matter of fact, as pointed out by the Learned Senior Counsel for the Hydro Power, the State Commission has categorically observed in its order dated 23.6.2010 that no error was pointed out by the Appellant on the

documents submitted by the Respondent Hydro Power before the State Commission. The relevant observations are as follows:

“ The Commission has trued up interest cost for Financial Year 2003-04 to Financial Year 2007-08 and cost of debt restructuring based on the analysis of the documents submitted by JHPL. As the Board is not able to point out any error in the Commission’s approved figures, the Commission retains the same”.

15. Only in the Second Review Petition filed by the Electricity Board on 4.11.2009, the Appellant Electricity Board raised the issue for the first time about the non supply of the necessary documents. The Respondent Hydro Power filed a reply on 18.11.2009 to the said new ground taken by the Appellant in the Second review petition. In reply, the Respondent Hydro Power categorically denied and stated that all the documents were submitted to the Appellant simultaneously at the filing of the same with the State Commission. The said reply filed by the Respondent Hydro Power is as follows:

“5 (xi) & (xii) The Respondent respectfully submits that copies of all the Miscellaneous Application (MA’s) had been supplied to HPSEB simultaneous to filing with Hon’ble Commission. Moreover the Hon’ble Commission in the MYT order dated 30.03.2009 has covered complete details from MA’s filed by Respondent, based on which interest and debt restructuring expenses have been approved. As such,

the Respondent respectfully submits that there is no merit in these grounds for consideration by the Hon'ble Commission”.

16. Therefore, there is no merit in the ground urged by the Appellant relating to Truing up of cost as well as Amortization of cost of debt restructuring. Accordingly, the same is rejected.
17. Let us deal with the issues 3 and 4 together. The **3rd issue is Incentive for Higher Plant Availability**. In respect of this issue, the Appellant Electricity Board has made the following submissions:

“(a) The State Commission has computed the incentive on higher plant availability to the tune of Rs.9.10 Crore and Res.9.20 Crores on 95.65% and 98.83% plant availability considering the deemed availability as 90% for the period 19.1.2006 to 2.5.2006. During the period from 19.1.2006 to 2.5.2006, the Plant was not in operation. Therefore, no incentive on account of higher plant availability could be granted to Respondent Hydro Power on the basis of the deemed plant availability. Hence the plant availability shall have to be considered as zero for the purpose of determination of incentive on account of higher plant availability in terms of Article 17.5 (f) of the PPA.

- (b) In view of the above, the plant availability during the Financial Year 2005-06 has to be taken as 77.89% and during the Financial Year 2006-07, the same has to be taken as 91.01% considering 0% availability during force majeure period for the purpose of payment of incentive on account of higher plant availability.
- (c) Without prejudice to the above, it is to be stated that as per Clause 8.10 of the PPA, the amount of incentive payable for any Tariff year shall not exceed 2% of the Return on Equity. Therefore, the State Commission should have restricted the amount of incentive on account of Higher Plant Availability to Rs.1.63 Crores instead of allowing a sum of Rs.9.20 Crores for the Financial Year 2006-07.”

18. The **4th issue is related to Infirm Energy**. In respect of this issue following submissions have been made by the Appellant.

“(a) The Respondent Hydro Power supplied 8.08160 MUs of the saleable infirm energy prior to commercial operation date of the Project. As per Clause 8.2 of the PPA, the saleable infirm Energy charges paid to the Respondent Hydro Power are to be reduced from the Capital cost of the project.

- (b) The capital cost of the project has a cumulative prospective effect on the tariff of the project till the life of the project.
- (c) In terms of the clause 8.2 of the PPA, it was incumbent upon the Respondent Hydro Power to raise the bill for infirm saleable energy on the Electricity Board in the same manner as they are raising the bills for energy sold to the Electricity Board after commercial operation date.
- (d) Knowing fully well that in terms of Clause 8.2 of the PPA, the energy charges of infirm saleable energy before commercial operation date was to be reduced from the capital cost, the Respondent Hydro Power deliberately had not raised the bills which had resulted in financial losses to the Electricity Board. The contention of the Respondent Hydro Power that this issue has already been decided in Appeal No.120 of 2008 by this Tribunal cannot be accepted since the said decision requires reconsideration in view of the fact that there was no discussion arrived in this judgment with regard to infirm energy.”

19. In respect of these issues 3 and 4, the reply made by the Learned Senior Counsel for Respondent Hydro Power is as follows:

(a) “In respect of the issue namely Determination of incentive for higher plant availability in violation of Clause 8.10 of the PPA as well as the issue relating to the cost of the infirm energy, this Tribunal has already adjudicated in Appeal No.120 of 2008 on 21.7.2009 and decided as against the Appellant. Admittedly, the Appellant did not file any Appeal against the said judgment of Appeal No.120 of 2008 and hence, the issues decided by this Tribunal had attained finality and therefore, the said issues cannot be raised again.”

20. We have considered these submissions. As pointed out by the learned Senior Counsel for the Respondent in respect of these issues i.e. Higher Plant Availability and Infirm Energy, the Tribunal in the earlier proceedings in Appeal No.120 of 2008 decided in the judgment dated 21.7.2009 as against the Electricity Board. It is not disputed that, no further Appeal was filed against the said decision.

21. Let us now refer to the relevant portion of the findings in the said judgment of this Tribunal in respect of these issues:

“(b) Incentive on Higher Plant Availability:

Incentive in Paragraph 5.10 of the impugned order the Commission has dealt with incentive for higher plant availability. The Commission here recalls clause 8.10 of the PPA. In case the plant availability exceeds a normative level of 90% the Respondent No.2 is entitled to incentive @ 0.35% of equity component of the capital cost as per approved financial package for each percentage increases in the plant availability above 90% normative level during the year when the plant availability is more than 90%. The Clause also says that the amount of this incentive payable for any tariff year shall not exceed 2% ROE for a tariff year. The contention of the Appellant is that the Commission has interpreted 2% Return on Equity in the same manner it has interpreted 10% Return on Equity in determining secondary energy rates. The Interpretation of the Appellant is incorrect as found above. The Appellant’s challenge to the Commission’s impugned orders, relating to incentive on higher plant availability, therefore, has also to fail.

(c) Incentive on higher plant availability during the FY 2005-06 and 2006-07 when admittedly the plant was out of operation during the period 19.01.2006 to 02.05.2006

(12) In its review order, the Commission considered the plea of the Appellant that during the period of 19.01.06 to 02.05.06, the plant was not in operation and therefore, no incentive on account of higher plant availability could be granted to the Appellant. Paragraph 4.8 of the Review Order deals with the issue. In paragraph 4.8.1 the Commission has set out the plea of the Board regarding the Plant remaining out of operation during 19.01.06 to 02.05.06. The Commission says that a committee was constituted for

determining whether in operation of the plant was due to force majeure event. Commission expressed the following view:

“The Commission would take a view on the Board’s contention once the said committee decides on the non-functioning of Baspa-II power Plant w.e.f. 19.01.2006 to 02.05.2006. The Board will submit the report of the committee for consideration of the Commission by 30th June, 2008”.

13. The Respondent No.2 submits that the said committee has held the inoperation as a force majeure event. The Respondent No.2 also contends that the deemed plant availability on account of force majeure has to be considered at 90% and that higher plant availability for the FY 2005-06 and 2006-07 has been allowed by the Commission as per the provisions of the PPA. Therefore, the plea of the Appellant that higher plant availability has been wrongly calculated is incorrect.

14. The Other Issues

(d)

(e)

(f) Cost of Infirm Energy

The respondent No.2 has admittedly not raised any bill for infirm energy. Accordingly, dealing with this issue need not arise”.

22. As indicated above, no further Appeal was filed by the Electricity Board. Hence this finding has attained finality. The Learned Counsel for the Appellant Electricity Board

submits that this Judgment requires reconsideration as there has been no discussions whatsoever with regard to infirm energy and as such the observations of the Tribunal are '*per-incurium*'. The Learned Counsel for the Appellant has submitted that '*per-incurium*' decisions are the decisions given in ignorance or in forgetfulness of some statutory provisions or authority binding on the court concerned, or a statement of law caused by inadvertence or conclusion that has been arrived at without application of mind or proceeded without any reason so that in such a case some step in the reasoning on which it is based, is found on that account to be demonstrably wrong.

23. In view of the submission made by the Appellant that the findings of this Tribunal in regard to infirm energy was without discussion and so it was '*per-incurium*', we are duty bound to relook in to the merits of the claim of the Appellant Electricity Board on this aspect.

24. The case of the Appellant Electricity Board rests on the interpretation of Article 8.2 of the PPA. According to the Appellant Electricity Board it was incumbent on the part of the Respondent Hydro Power to raise the bills for infirm saleable energy sold to the Appellant Electricity Board in accordance with Article 8.2 of PPA. It is further contended

that though the Respondent had full knowledge that the energy charges for infirm saleable energy before Commercial Operation Date was to be reduced from the Capital Cost which in turn would have impact on the tariff, it had preferred not to raise the bills for such infirm energy.

25. Let us examine the relevant provisions of the PPA. Article 10 of the PPA deals with Billing and Payment and Article 8 of the PPA deals with Sale and purchase of the Energy. Clause 10.1 deals with monthly bills & Clause 8.2 of the PPA deals with infirm energy. These clauses are quoted below:

“ARTICLE 10

BILLING AND PAYMENT

10.1 MONTHLY BILLS

The Company shall prepare bills in triplicate in accordance with the jointly signed statement referred to in Section 9.20 and furnish one copy of the same along with jointly signed meter readings as per section 9.4 and jointly signed statement to each of the following, on or after each billing date **commencing with the first billing date following the COD** of unit No. 1.

Article 8

SALE AND PURCHASE OF THE ENERGY

.....

8.2 Infirm energy

*The saleable portion of the energy generated by each unit of the project from date of synchronization of the unit with the grid to the commercial operation date of that unit **shall be paid for by the Board to the Company** at overall per unit rate applicable for the initial period. This overall per unit rate shall be arrived at after taking into consideration the capacity charges, the primary charges and saleable design energy for initial tariff period. **Pending determination of this per unit rate, the payment shall be made on provisional basis at the Bulk supply tariff of the Board.** The Adjustment shall be done after CoD of the project. The capital cost shall however be reduced by an amount equal to the value of the saleable infirm energy on the above basis.*

26. Bare reading of the above clauses would reveal that while it was incumbent on the part of the Respondent Hydro Power to prepare bills for sale of energy after CoD as per Clause 10.1, the Board was duty bound to make payment of infirm energy at Bulk supply rate of the Board pending determination of tariff for initial period in accordance with Clause 8.2 of the PPA. The Respondent Hydro Power would not know the Bulk supply rate of the Appellant Board to raise the bills for the infirm power. Thus it was the Appellant Board who failed to make the payment for infirm energy at its Bulk supply rate and get the reduction in capital cost of the project. Since no payment was made by the Appellant Electricity Board towards the infirm energy, there was no reduction in the capital cost.

27. The Appellant Electricity Board has stated in its Rejoinder Affidavit dated 26.4.2011 that in the earlier judgment given by this Tribunal (in Appeal no. 120 of 2008) this aspect was not considered since the Appellant had not submitted the cost benefit analysis. Thus, the Appellant has admitted through affidavit dated 26.4.2011 that it did not submit the requisite details to the Tribunal for proper analysis in earlier appeal. Clearly, the Appellant himself was at fault on two counts, (1) firstly, by not making payment for infirm energy at Bulk supply rate as per clause 8.2 of the PPA and (2) secondly, by not supplying cost benefit analysis before this Tribunal in its earlier Appeal no. 120 of 2008. Despite this, the Appellant has chosen to claim that the judgment of this Tribunal in Appeal No. 120 of 2008 was '*per-incurium*'. This approach on the part of the Appellant is to be deprecated.
28. As such, there is no merit in the contention urged by the Electricity Board on both these issues. Accordingly, the same is rejected.
29. The **5th issue is payment of Interest on Arrears** as per the provision of the Article 10.11 of the PPA.
30. This issue is common in both the Appeals in No.178 of 2010 and Appeal No.9 of 2011.

31. M/s Jai Prakash Hydro Power Limited has filed the Comprehensive Appeal No.178 of 2010 assailing the correctness of the MYT Tariff order dated 30.3.2009, the order dated 10.9.2009 passed in the Review Petition and the order dated 23.6.2010 passed in the Clarificatory Petition.
32. The issue which Respondent Hydro Power has raised in this Appeal is about the applicability of the rate of interest which Respondent Hydro Power is entitled on its outstanding amount as per the Article 10.11 of the PPA which is quoted as under:

“10.11 In case the Board does not make the payment of any bill within the due date of payment, the outstanding amount of such bill shall bear interest accrued for the number of days between the due date of payment and actual date of payment at a rate equal to the rate being charged from time to time by State Bank of India for 90 days unsecured loans to commercial borrowers plus three (3) percent per annum plus interest tax subject to the provisions contained in Section 10.18”.

33. On this issue, the Appellant Electricity Board has made the following submissions:

“(a) The Payment of Interest on Arrears as per Article 10.11 of the PPA has been claimed by Respondent Hydro Power only in the second Review Petition which was disposed of

on 23.6.2010. In this order, the State Commission has specifically held that review of the review is not maintainable. Even then, the State Commission has invoked the provision of Section 152 of the CPC to give direction for payment of interest on arrears. This order is wrong because what can not be done directly cannot be permitted to be done indirectly. The correction of the order on merits by allowing the claim which had been earlier impliedly rejected, is not permissible in exercise of the powers Under Section 152 of the CPC.

- (b) Interest is payable only on the outstanding amount. Article 10.1 required the Respondent Hydro Power to raise the bills at tariff calculated as per Article 8 of PPA. The Respondent Hydro Power had been raising the bills calculated taking in to account the project cost of Rs 1550 Cr agreed to by the parties in the Supplementary Agreement dated 26.2.2003. This agreement had been set aside by the State Commission as void by its order dated 6.9.2003. Consequently, the bills raised by the Respondent Hydro Power also became null and void. Since there were no bills raised by the Respondent Hydro Power, question of arrears would not arise.

(c) The State Commission in its order dated 23.6.2010 has specifically directed the Electricity Board to pay the entire arrears by 30.9.2010 holding that the interest payable on arrears by the Board till 30.9.2010 will be allowed as a pass through in the ARR of the Board. In view of the above time bound directions, the Appellant had no other option but to make interest of payment amount in order to avoid any further liability. The payment of the said amount will not take away the right of the Appellant to question the validity of the said directions.”

34. In respect of this issue, the reply made by the Learned Senior Counsel for Respondent Hydro Power is as follows:

“(a) With regard to the issue regarding direction for payment of arrears, in fact, the Appellant has already paid the entire arrears of Rs.87.25 Crores to Respondent Hydro Power by 30.9.2010 in compliance of the Commission’s order dated 26.3.2010 and as such, raising the issue at this stage has no relevance as financial obligations of the Appellant has already been discharged.

(b) It is not correct to state that the issue regarding rate of interest as per Article 10.11 of PPA was raised for the first time in the 2nd review petition. This issue had been raised by the Respondent Hydro Power in its petition filed earlier for review of State Commission’s

first Tariff Order dated 24.2.2007. The State Commission had recognized the same in its review order dated 7.2.2008 wherein the State Commission had observed that in regard to the provisions of Article 10.11 of the PPA, necessary adjustments shall be made during processing of the subsequent petition along with necessary adjustments in the arrears payable.”

35. We have given our anxious consideration to these rival submissions. Admittedly, the State Commission passed MYT order dated 30.3.2009 without making adjustments towards rate of interest on arrears as indicated by the State Commission in the review order dated passed earlier by the State Commission on 7.2.2008 by allowing the carrying cost @ 8% per annum. Therefore, the Jai Prakash Hydro Power Limited was constrained to file the Review Petition on this point. The State Commission disposed of the said Review through the order dated 10.9.2009. Though the State Commission recomputed the arrears payable by the Board, it did not revise the rate of interest and kept it @ 8% per annum. Therefore, the Appellant again filed the application for U/S 152 of the Code of Civil Procedure read with Regulation 63 of HPERC (Conduct of Business) Regulation 2005, which was disposed of by the impugned order dated 23.6.2010. In this order the State Commission

directed for the payment of interest at SBI long term PLR from 1.11.2009 onwards till the payment of the arrears is made. The State Commission did not change the interest rate for the earlier period i.e. from the date of commissioning till 31.10.2009 in which period, the payment had been made only @ 8% per annum. Hence, Respondent Hydro Power feeling aggrieved over this order dated 23.6.2010 wherein the State Commission disregarded the terms of the PPA i.e Article 10.11 of the PPA which provides for payment of interest on arrears at the rate equal to SBI PLR of 90 days unsecured loan to commercial borrowers plus 3% per annum and allowed interest@ 8% per annum only from the date of commissioning of the project till 31.10.2009 and @ 11.5% per annum thereafter till the payment of arrears, has filed this present Appeal No.178 of 2010.

36. As mentioned earlier, the very same impugned order has been challenged in Appeal No.9 of 2011 by the Appellant Electricity Board on the ground that order passed by the State Commission dated 23.6.2010 providing relief to Respondent Hydro Power in the Second Review is wrong. According to the Appellant Electricity Board, the said order was passed modifying the earlier order in second review petition even though the review of review is not maintainable under Section 94 (i) of the Electricity Act. It is

further pointed out that Section 152 of the CPC can be invoked only for correction of clerical and administrative mistakes and the same cannot be invoked to modify the order earlier passed. With regard to this legal position, the Learned Counsel for the Appellant Electricity Board has cited the following authorities:

- (a) UPSRTC vs Imtiaz Hussain (2006) 1 SCC 380
- (b) State of Punjab Vs Darshan Singh (2004) 1 SCC 328
- (c) Dwarka Das Vs State of M.P. (1999) 3 SCC 500
- (d) K Rajamouli Vs A.V.K.N. Swamy (2001) 5 SCC 37

37. In the light of the above rival contentions, we have to consider the following question “whether the State Commission is justified in enhancing the rate of interest on arrears from 8% to 11.5% as provided under Article 10.11 of the PPA in the second Review?”
38. According to Respondent Hydro Power it is entitled for interest at SBI 90 days unsecured loan (short term PLR) plus 3% for outstanding amount. However, the State Commission while admitting that the arrears were accumulated and were payable by the Board, had only allowed interest at the rate of 8% per annum only from Commercial Operation Date till 31.10.2009 and at rate of 11.5% for the period 1.11.2009 to date of payment of arrears. This decision of the State Commission is not in consonance with Article 10.11 of the PPA which provide for

rate of interest at SBI 90 days unsecured loan (short term PLR) plus 3% per annum.

39. On the other hand, the Appellant Electricity Board has opposed this claim contending that the interest is payable only at the outstanding amount; Article 10.1 requires the Respondent Hydro Power to raise the bills at tariff calculated as per Article 8 of the PPA, the Respondent Hydro Power had been raising the bills calculated taking into account the project cost of Rs.1550 Crores agreed to by the parties in the Supplementary Agreement dated 26.2.2003 but this Agreement had been set aside by the State Commission as void by its order dated 6.9.2003 and consequently the bills raised by the Respondent Hydro Power become null and void and therefore, the question of arrears would not arise.
40. In the light of the above submissions, let us see the background to understand the issue in the proper prospective.
41. M/s Jai Prakash Hydro Power Limited (Hydro Power) a Generating Company entered into an Implementation Agreement on 1.10.1992 with the Government of Himachal Pradesh for setting up Baspa-II Hydro Electric Project on river Baspa, a tributary of river Sutlej in Himachal Pradesh.

42. Pursuant to the said Implementation Agreement dated 1.10.1992 a Power Purchase Agreement (PPA) was executed between the Respondent Hydro Power and the Appellant Electricity Board on 4.6.1997.
43. A supplementary Agreement between Respondent Hydro Power and the Appellant Electricity Board was executed on 26.2.2003 agreeing to the cost of the project at Rs 1550 Crores for the purpose of Tariff and Payment mechanism of sale of power to the Appellant Electricity Board.
44. The first unit of Baspa-II Hydro Electric Project was commissioned on 24.5.2003. The second unit was commissioned on 29.5.2003. The third unit was commissioned on 8.6.2003.
45. On 7.7.2003 the Respondent Hydro Power submitted first bill for sale of power to the Board after CoD as per provisions of PPA based on the agreed cost of project of Rs 1550 Crores.
46. On 19.7.2003 the State Commission issued directions to the Appellant Electricity Board for payment of revenue realized from sale of power received from the project to the Respondent Hydro Power till the Tariff is approved by the Commission.

47. On 6.9.2003 the State Commission set aside the Supplementary Agreement dated 26.2.2003 and directed the Appellant Electricity Board to continue to make payment of revenue realized from sale of power of the project to the Respondent Hydro Power till the approval of the tariff by the Commission. The relevant portions of the State Commission's Order dated 6.9.2003 is quoted as under:

“14.1 On the basis of discussion in the foregoing, cumulative consideration of aforesaid provisions of the law and for the reasons assigned, all the issues framed in para 5 are decided against the Respondents. It is abundantly clear that the Respondents Board and the Company acted beyond their jurisdiction in utter disregard to the provisions of 1998 Act by signing and the Board approving the impugned Supplementary Agreement. Such approval by the Board is unsustainable in law. The Supplementary Agreement dated 28-2-2003 is herewith held void ab initio, non est and inoperative and ordered as such.

.....

Directions of the Commission

.....

4. Until the approval of the Commission as at (3) above, the Respondent Board shall continue to pay to the Company the revenue realised from sale of energy from Baspa Stage II Project as per the Interim Order of 19.07.2003.”

48. Thus, the State Commission had directed the Appellant Electricity Board to pay revenue realized from sale of power

from the project to the Respondent Hydro Power. To implement these directions following steps would be required to be taken:

- Power received from project would be sold by the Board to its consumers or in case HP is surplus in power to other licensees outside the state:
- Revenue to be collected from the consumers or other licensees for such sale of power by the Board:
- Revenue thus collected to be paid to the Respondent Hydro Power

49. In order to finalise the arrangement for implementation this direction of the State Commission, the parties held a meeting on 3.4.2004 and decided as under:

“(i) The present arrangement of payment for the summer months viz., April to October, when energy delivered by M/S JHPL is by and large sold outside the State, shall continue and the revenue realized by the Board on account of such sale of power after accounting for wheeling charges and transmission losses shall be passed on to the Company

(ii) During the winter month viz., November to March, when energy delivered by JHPL is used within the State, the average sale rate of power within the State as arrived at on the basis approved date (sic rate) for

the previous year, shall be adopted for releasing the payment to the Company during such winter months.”

50. From the above it is clear that the Respondent Hydro Power would not know in advance the rate at which its power is likely to be sold outside the State. As such it would not be able to raise bills in accordance with the Article 8 of the PPA. In actual terms, the above direction of the Commission's has suspended the operation of Article 10.11 of the PPA till the Commission decides the tariff.
51. Admittedly the Respondent Hydro Power was entitled for payment for sale of power from its project as per the provisions of the PPA. It was entitled for payment at tariff calculated as per Article 8 of PPA. Article 8 of PPA detailed the methodology and parameters for determination of tariff. Close examination of the PPA and in particular Article 8 would reveal that approval of the State Commission for fixing the tariff was not required and understandably so. PPA was executed in June 1997 i.e. before the enactment of Electricity Regulatory Commissions Act 1998 and Electricity Act 2003. As such PPA did not contain the requirement of the approval of the State Commission. Himachal Pradesh Electricity Regulatory Commission was established in the Year 2001 under Electricity Regulatory Commission Act, 1998 as a single member Commission. After enactment of Electricity Regulatory Commission Act,

1998, the capital cost and the tariff was required to be approved by the State Commission. The State Commission in its order dated 6.9.2003 did not set aside the PPA. It had only set aside the Supplementary Agreement fixing the cost of project at Rs 1550 Crores. It did not question the validity of Article 8 or Article 10.11 of the PPA. In fact, whole of PPA was kept intact. The sole impact of the Commission's directive was, as mentioned above, that the Article 10.11 of PPA would not be operative till the Commission approves the capital cost and the tariff for the project.

52. The Respondent Hydro Power filed a petition before the Commission on 21.11.2005 for approval of the Cost of the project fixing tariff for sale of power from the project to the Board for the period from CoD to FY 2007-08.
53. The State Commission passed an Order dated 24.2.2007 approving the cost of the project at Rs 1534 Cr for the purpose of tariff as against agreed cost of Rs1550 Cr in supplementary Agreement. In this order the State Commission has taken the cognizance of the arrears to be paid by the Board to the Respondent Hydro Power and also allowed interest on such arrears at 8% per annum as carrying cost. The portion of the order related to arrears and interest thereon is reproduced below for ready reference:

5.15 Arrears payable by HPSEB for the period FY 2003-04 to FY 2005-06

5.15.1 Based on the various components of the Annual Fixed Charges (AFC) approved in this chapter in the above heads for the period FY 2003-04 to FY 2005-06, the Commission has taken note of the considerable variation between the payments made by the Board to the applicant for each of these years and payments due for payment by the Board.

5.15.2 Variation between the AFC approved for the year by the Commission in this Order as summarized in succeeding para 5.16 and the payment made by HPSEB for each of these years is indicated in the table below:

(Rs. Crores)

Description	2003-04	2004-05	2005-06
Annual Fixed Charges	271.66	306.61	329.74
Payments made by HPSEB, excluding rebate	200.22	252.23	269.58
Difference	71.44	54.38	60.16

5.15.3 **This amounts to a total of Rs. 186 crores. Similar reconciliation would be required for the period FY 2006-07 as well once the actual data on generation is available for the period.**

5.15.4 Similar to the approach followed by the Commission in para 5.12 above, **the Commission has provided recovery of the principal amount of the expenditure incurred along with the carrying cost at 8% upto FY 2006-07 for recovery over a period of seven years starting from FY 2007-08. The computations are indicated in the table below:**

Description	Unit	2003-04	2004-05	2005-06	2006-07
Opening balance	Rs. Cr.	0	74.30	136.81	210.32
Additions	Rs. Cr.	71.4	54.4	60.2	0.0
Payments	Rs. Cr.	0.00	0.00	0.00	0.00
Closing balance base amount	Rs. Cr.	71.44	128.69	196.97	210.32
Interest rate	%	8%	8%	8%	8%
Interest	Rs. Cr.	2.86	8.12	13.35	16.83
Closing balance of payment	Rs. Cr.	74.30	136.81	210.32	227.15

5.15.5 *The closing balance of payment for FY 2006-07 of Rs. 227.15 would need to be paid to JHPL by HPSEB through a recovery mechanism over seven years starting FY 2007-08. This translates to an amount of Rs. 32.45 crores per year. This amount would be further adjusted based on the actual generation data available for the period FY 2006-07. Considering that the arrear amount is significant and could considerably distort future tariffs of the project if this amount is allowed for recovery from future tariffs, the Commission has decided to compensate the applicant for this amount outside the tariff mechanism of the project.*

5.15.6 *HPSEB would pay this amount to the applicant in equal monthly installments to the applicant from FY 2007-08 onwards, along with the bills due for payment as per tariffs under this Order. Subsequently, HPSEB would include this amount for approval of the Commission along with payment details, as a separate item of expenditure in its yearly Aggregate Revenue Requirement for the corresponding year for determination of retail tariffs.*

54. By this Order, the State Commission had not only recognised the admissibility of the arrears, but also permitted interest on such arrears at 8% as carrying cost. Thus the State Commission had realized that the Respondent Hydro Power was entitled for certain Annual Fixed Charges (AFC) as per the PPA and it had not been getting the same. Accordingly the Respondent Hydro Power was entitled for the carrying cost of the differential amount (arrears).
55. It is important to note that the Appellant Electricity Board did not challenge the admissibility of arrears in its review petition no. 94 of 2007 before the State Commission.
56. The first tariff order of the State Commission dated 24.2.2007 was challenged by the Appellant before this Tribunal in Appeal No. 120 of 2008 and the issue related to admissibility of arrears was not raised by the Appellant in this Appeal No. 120 of 2008. In this Appeal the Appellant Electricity Board had, in fact, accepted an amount of Rs 227.15 Crores as arrears including interest as determined by the State Commission for the period up to FY 2006-07. For verification, we have gone through the original pleadings contained in the Appeal Paper Book in Appeal No.120/2008, the Appellant had challenged only the directions of the Commission given in review order dated

7.2.2008 reducing the number of instalments from seven to two only. The submissions made by the Appellant in Appeal No. 120 of 2008 is reproduced below:

“ R. Because the Ld Commission failed to appreciate that in the impugned order dated 24.02.2007, the Ld. Commission had permitted the appellant to repay the outstaying balance for Financial Year 2006-07 of Rs 227.15 crores in instalments of Rs 32.45 crores per year for next years. However, without even considering the burden the amount would out on the appellant, the Ld. Commission vide order dated 7.2.2008 in Review Petition directed the appellant to pay the whole amount of arrears in the Financial year 2008-09 in two instalments. It is respectfully submitted that this payment of arrears in financial year 2008-09 puts unnecessary burden on the State Exchequer and the payments would be made by the appellant in equal instalments for next seven years.”

57. The above pleadings would indicate that the liability was not questioned. Having accepted its liability to pay the arrears including interest as worked out by the Commission in its order dated 24.2.2007, the Appellant Electricity Board cannot now question the admissibility of arrears and interest thereon.
58. Again the Appellant Electricity Board did not challenge the admissibility of arrears in its objections on MYT petition of the Respondent Hydro Power for control period 2009-11 filed before the State Commission. In fact the Appellant had

objected to the quantum of arrears claimed by the Respondent in MYT petition for 2009-11. Further it did not make any objection on the interest payable determined by the State Commission in its tariff order dated 7.2.2008.

59. Thus the issue of admissibility of arrears and interest for delayed payment has attained finality and as such, the same cannot be permitted to be raised again.
60. The question of interest on arrears raised by the Respondent Hydro Power in its second review petition before the State Commission has been dealt with at length by the State Commission. Relevant portion of the State Commission's findings in the impugned order dated 23.6.2010 is quoted below:

“ Interest on Arrears

2.41 In the second review petition filed by the JHPL, JHPL has claimed interest on arrears in accordance with the clause 10.11 of the PPA.

2.42 Though in terms of section 94(1) of the Act, review of review is not maintainable, yet the Commission has the power under section 152 of the CPC to clarify the position for meeting the ends of justice.

2.43 Clause 10.11 of the PPA, reads as under:-

“In case the Board does not make the payment of any bill within the due date of payment, the outstanding amount of such bill shall bear interest accrued for the number of days between the due date of payment and actual date of payment at a rate equal to the rate being charged from time to time by State Bank of India for 90 days unsecured loans to commercial borrowers plus

three(3) percent per annum plus interest tax subject to the provisions contained in Section 10.16”.

2.44 *Clause 2.2.43 of the PPA defines due date of payment, which reads as under-*

“Due Date of Payment means with respect to any bill, the date by which the amount of such bill is required to be paid. This date shall:-

(a) in case of any monthly bill for any billing month, be 30 days from the billing date or from the date of presentation of the bill to the Bankers/designated officer of the Board, whichever is later.

(b) in case of any supplementary or any other bill, be 35 days from the date of presentation of bill to the designated officer of the Board or of the Company, as the case may be”.

2.45 *Interest is a natural corollary of any delayed payment. Sometimes different interest rates are prescribed so as to differentiate between normal or compensatory rate of interest and a penal rate of the interest. Para 8 of Punjab High Court decision rendered in case of CIT V/s Shyam Lal Narula (AIR 1963 Pb 411) reads as under:-*

“8. The words “interest” and “compensation” are sometimes used interchangeably and on other occasions they have distinct connotation. “Interest” in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owned to another. In its narrow sense “interest” is understood to mean the amount, which one has contracted to pay for use of borrowed money. In whatever category “interest” in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for use or forbearance of money. In this sense, it is compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it, has become payable.”

2.46 *This decision of the Punjab & Haryana .High Court, has been approved by the Supreme Court in Central Bank of India V/s Ravindre & Ors (2002) SCC 367 and the decision of the Supreme Court has been followed by the Appellate Tribunal for Electricity in Appeal No.15 of 2007, decided on 5.2.2008- Maharashtra State Elec. Distt. Co. Ltd. Bandra (East) Mumbai V/s Maharashtra Electricity Regulatory Commission, Mumbai 2008 ELR (APTEL) 110.*

2.47 *In view of the above quoted decisions, the interest is basically intended to compensate the party who was entitled for payment of amount due. There is no reason why the Board should not pay interest from the date payment becomes due. In this regard there appears no ambiguity in the provisions of Clause 10.11, read with Clause 2.2.43, of the PPA.*

2.48 *From the above, it is clear that interest as per clause 10.11 is applicable only for arrears on account of bills raised by the JHPL. JHPL can raise bills only as per the tariff/ recovery schedule approved by the Commission. The 8% rate of interest, mentioned in the tables showing the computation of arrears, is de facto the carrying cost allowed by the Commission.”*

61. Thus the State Commission in the impugned order dated 23.6.2010 has clarified that it had allowed carrying cost for delay in payment of accumulated arrears. Question is now limited to carrying cost i.e. at what rate the State Commission should have allowed the carrying cost? The State Commission has adopted a carrying cost at 8% in accordance with approach adopted by the Commission in Para 5.12. of the tariff order dated 24.2.2007. Para 5.12 of this order dealt with the payment of certain principle

amount to be paid. We feel that this approach of the State Commission is not correct.

62. We are of the opinion that the interest rate prescribed in Article 10.11 has two components viz., Compensatory component as SBI short term PLR and Penal component as plus 3%. Having accepted that the Respondent Hydro Power is required to be compensated for loss of revenue it had suffered due to delay in payment, the State Commission should have allowed carrying cost at compensatory component of Article 10.11 of PPA i.e. at SBI short term PLR (as per Article 10.11 of PPA minus 3% penalty rate). Since Article 10.11 of PPA was (apparently) under suspension by virtue of the Commission's order dated 6.9.2003, Board could not be held at fault for delay in making payment and directed to pay interest at penal rate of plus 3%. Simultaneously, the Respondent Hydro Power would also be required to be compensated for the loss it had suffered due to delay in full payment. Therefore, the Respondent Hydro Power was entitled for carrying cost at SBI short term PLR only. Penal rate of Article 10.11 at SBI PLR plus 3% per annum would not be justified. This would apply to the accumulated arrears up to 2006-07 only.
63. The State Commission issued first tariff order in February 2007 for FY 2007-08. After issuance of this tariff order,

Article 10.11 of PPA would become fully operational and interest rate as per this article i.e. interest at SBI short term PLR plus 3% would be payable to the Respondent Hydro Power.

64. It is true that the order passed by the State Commission in the Review of the Review Order allowing the interest as per Article 10.11 of the PPA for the portion of the period is not legally valid since Section 152 of the CPC which has been invoked by passing this order cannot be used to modify the effect of the earlier order. This is settled law laid down by this Tribunal as well as the Hon'ble Supreme Court. However, Respondent Hydro Power, the Appellant in Appeal No.178 of 2010 has claimed that he filed the Appeal comprehensively, challenging all the three orders i.e. (1) the impugned order dated 30.3.2009 (2) the review order dated 10.9.2009 and (3) the second review order dated 23.6.2010 and has deposited three court fees accordingly. Therefore, all the orders namely 30.3.2009, 10.9.2009 and 23.6.2010 are subject matters of these Appeals.
65. Hence we are empowered to go into the legality of the other impugned orders passed by the Commission in the order 30.3.2009 and 10.9.2009 even assuming that the last order passed in Clarificatory Petition Review on 23.6.2010

is nonest in view of the fact that review of the order of the review order is not permissible under law.

66. We have already concluded that the first tariff order passed by the State Commission in February, 2007 for the FY 2007-08 and after issuance of this tariff order, Article 10.11 of the PPA would become fully operational. Once Article 10.11 comes into play, we have to hold that the interest rate as per this Article would be payable to the Respondent Hydro Power. Therefore, the impugned order relating to this issue is set-aside. The matter is remanded to the State Commission for redetermining the interest rate as per this Article in the light of our observation made above and pass the consequential orders accordingly.
67. Before parting with this case, we are constrained to refer to one more aspect relating to the conduct of the Appellant Electricity Board, firstly, on account of misrepresentation regarding the non-supply of relevant documents by the Respondent Hydro Power and secondly on account of the unfair plea raised by the Electricity Board that the judgment of this Tribunal in Appeal No. 120 of 2008 was *per-incurium*.

68. In this context, we would like to refer to some of the observations made by Hon'ble Supreme Court in a number of authorities to the effect that the statutory authorities are expected to show remorse or regret when their officers act negligently. The Hon'ble Supreme Court has laid down the following principles:

- a. *It is high time that Government and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens.*
- b. *Statutory authorities exist to discharge statutory functions in public interest. They should be responsible litigants. They cannot raise frivolous and unjust objections, nor act in a callous and high handed manner. They cannot behave like some private litigants with profiteering motives. Nor can they resort to unjust enrichment.*
- c. *It must be remembered that the State is not an ordinary party trying to win a case against some of its own citizens by hook or by crook. The interest of the State is to meet honest claims and never to score a technical point or overreach a weaker party to avoid a just liability and secure an unfair advantage.*

69. We are constrained to remind the Appellant that above guidelines have not been followed by the Appellant in this case for the best reasons known to it. Therefore, we are compelled to record our "displeasure" over the conduct of the Appellant. Though we thought of imposing heavy costs on the Appellant due to their improper conduct, we refrain

from doing so, since we hope that the Appellant at least in future would not commit such mistakes.

70. Summary of Our Findings:

- i) In respect of the issue relating to the Truing up of Interest cost and Amortization of cost of Debt Restructuring, we hold the contention of the Electricity Board that the copies of the requisite documents/information furnished to the State Commission were not supplied by the Jai Prakash Hydro Power Limited is factually incorrect. The materials available on record would clearly show that those documents were supplied to the Electricity Board.**

- ii) In respect of the issues namely Incentive for Higher Plant Availability and Cost of Infirm Energy, this Tribunal in Appeal No.120 of 2008 had already decided as against the Electricity Board. Admittedly, the findings in that Appeal have not been challenged in the Appeal filed by the Board. In view of the above, the judgement rendered in Appeal No.120 of 2008 has attained finality. Even otherwise the claim on these issues has no merit.**

iii) Since the Article 10.11 of PPA was (apparently) under suspension by virtue of the Commission's order dated 6.9.2003, Board could not be held at fault for delay in making payment and it can not be directed to pay the interest at penal rate of plus 3%. Simultaneously, the Respondent Hydro Power would also be required to be compensated for the loss it had suffered due to delay in making full payment. Therefore, the Respondent Hydro Power was entitled for carrying cost at SBI short term PLR only. Penal rate of article 10.11 at SBI PLR plus 3% per annum would not be justified. This would apply to the accumulated arrears up to 2006-07 only. After issuance of first tariff order in February 2007, Article 10.11 of PPA would become fully operational and interest rate as per this article i.e SBI short term PLR plus 3% per annum would be payable to the Respondent Hydro Power.

71. In view of the above findings, we do not find any merit in Appeal No.9 of 2011 filed by the Himachal Pradesh Electricity Board. Therefore, the same is dismissed. We find merit in the grounds raised in the Appeal No.178 of 2010 filed by Jai Prakash Hydro Power Limited. Therefore, the said Appeal No.178 of 2010 is allowed.

72. Accordingly, we direct the State Commission to pass consequential orders in terms of the findings rendered by this Tribunal as referred to above.
73. However, there is no order as to costs.

(V.J. Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 19th April, 2012

✓ ~~REPORTABLE/NON-REPORTABLE~~