Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 179 of 2010 & IA No. 248 of 2010

Dated: 23rd April, 2012

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member

In the matter of:

M/s. Patikari Power Ltd.
1st House, Bhumain Estate,
Nav Bahar, Bhumian Road,
Chotta Shimla, Shimla-171002
H.P. **... Appellant**

Versus

1. **Himachal Pradesh Electricity Regulatory Commission**
   Keonthal Commercial Complex,
   Khalini, Shimla-171 002.

2. **H.P. State Electricity Board,**
   Vidyut Bhawan, Shimla-171 004

3. **The Government of Himachal Pradesh,**
   Through the Principal Chief Secretary (MPP & Power),
   H.P. Shimla-171 002

4. **The Himachal Pradesh Energy Development Agency,**
   (Himurja)
   Through its Directror,
   SDA Complex, Kasumpati,
   Shimla, (H.P.) 171 009 **... Respondents**

Counsel for the Appellant(s): Mr. Tarun Johri,
Mr. Ankur Gupta
Mr. Joseph Kodianthara
Mr. M.P. Vinod

Counsel for the Respondent(s): Ms. Surbhi Sharma
Mr. Sushil Sharma
Mr. Ramesh Bahu
Mr. Sushil Sharma for R-1
Mr. M.G. Ramachandran,
Mr. Anand K. Ganesan
Mr. M.T. George for R-2

JUDGMENT

MR. RAKESH NATH, TECHNICAL MEMBER

This appeal has been filed by M/s. Patikari Power Ltd. against the order dated 16.7.2010 passed by the Himachal Pradesh State Electricity Regulatory Commission ("State Commission") in the matter of determination of tariff for a small Hydro Electric Power Station set up by the appellant.

2. The appellant is a generating company and has set up a small Hydro Electric Power Station of 16 MW capacity in the State of Himachal Pradesh. The State Commission is the first respondent. Himachal Pradesh State Electricity Board, the purchaser of power from the appellant, is the second respondent. The Government of Himachal Pradesh and the HIMURJA, a State Government agency responsible for

promotion of renewable sources of energy are the third and the fourth respondents respectively.

3. The facts of the case are as under:

3.1. The Government of Himachal Pradesh in the year 1999 invited proposals from Indian/International companies for implementation of Hydro Electric Projects in the Private Sector on 'Build, Own, Operate and Maintain (BOOM)' basis for various projects which, *inter alia,* included the 16 MW Patikari Hydro Electric Project. It also stated that the State Electricity Board, the respondent no. 2 herein, would buy the whole of power generated by the Project at rate and conditions to be decided by the State Government and the rate would not be less than Rs. 2.25 per kWh.

3.2. M/s. East Indian Petroleum Ltd. ("EIPL"), predecessor in interest of the appellant, filed a

proposal for development and implementation of Patikari Hydro Electric Project and subsequently a Memorandum of Understanding ("MOU") was executed by the State Government on 21.6.2000 in favour of M/s. EIPL for review of the Detailed Project Report ("DPR") prepared by the respondent no. 2 for implementation of the Project.

3.3. M/s. EIPL on 9.11.2001 entered into an Implementation Agreement ("IA") with the Government of Himachal Pradesh. The IA envisaged incorporation of a separate public/private Limited company for implementation of the Project. Accordingly, a Tripartite Agreement dated 9.11.2001 was also executed between the State Government, M/s. EIPL and the appellant to, *inter alia,* build, own, operate and maintain the Project.

3.4. The appellant after obtaining various statutory clearances for implementation of the Project approached the respondent no. 2 for determination of tariff in terms of the global invitation of tender.

3.5. In January, 2003 the State Government and the respondent no. 2 prescribed the tariff for the power generated from the Project at Rs. 2.25 per kWh. On 14.1.2003 the appellant executed a Power Purchase Agreement ("PPA") with the respondent no. 2 at a tariff of Rs. 2.25/Kwh.

3.6. The State Commission having already been constituted on 6.1.2001, vide its order dated 5.9.2003 held the PPA dated 14.1.2003 executed between the appellant and the respondent no. 2 as void ab-initio, non-est and inoperative and directed the parties to file a PPA in accordance with the PPA guidelines issued

by the State Commission. Accordingly, after obtaining the approval of the State Commission, the appellant and the respondent no. 1 entered into a PPA on 5.7.2004.

3.7. On 18.6.2007 the State Commission notified the Regulations for power procurement from renewable sources and cogeneration by the distribution licensee. According to the Regulations, the Commission may determine tariff by a general order for small hydro projects not exceeding 5 MW capacity and by special order for small hydro projects of more than 5 MW and not exceeding 25 MW capacity, on individual project basis. These Regulations were not applicable to the PPAs, which were approved prior to commencement of the Regulations and were not subjected to the provisions of the State Commission's Regulations.

3.8. On 12.11.2007, the State Commission amended the above Regulations by introducing a proviso under which the State Commission in order to promote generation of electricity from renewable sources could review or modify the PPAs approved prior to commencement of the Regulations or where after the approval of the PPA there is change in statutory laws, or rules or the State Government's Policy.

3.9. The appellant commissioned the project in the beginning of the year 2008 at a cost of Rs. 117.60 crores as against the approved cost of Rs. 125.90 Crores by the respondent no. 2.

3.10. The appellant in August 2008 filed a petition being no. 184 of 2008 before the State Commission under Section 62 and 86 of the Electricity Act, 2003, praying for determination of tariff in respect of Patikari

Hydro Electric Project. Similar petitions were also filed by other project developers.

3.11. The State Commission by its common order dated 29.10.2009 disposed of the petition no. 184 of 2008 & batch and decided to consider each petition for review or modification of already concluded PPA on merits in terms of its Regulations.

3.12. The appellant in compliance with the order dated 29.10.2009 submitted an application being Petition no. 201 of 2009 praying for determination of tariff.

3.13. The State Commission by its order dated 16.7.2010 partly allowed the Petition nos. 184 of 2008 and 201 of 2009. The State Commission only passed the benefit of change in law/change in State Government Policy to the appellant after the date of

execution of the PPA dated 5.7.2004 @ 29 paise/kWh prospectively but did not determine the tariff in respect of the Project. Aggrieved by the impugned order dated 16.7.2010, the appellant has filed this appeal.

4. Learned Counsel for the appellant has submitted as under:-

4.1. The Global Invitation for investment in Hydro Power Generation in Himachal Pradesh dated 19.4.1999 had clearly stated that for projects upto 25 MW capacity the incentives would be as per the policy of the Ministry of Non-Conventional Energy Sources, Govt. of India and after supply of 12% of the energy generated from the project free of cost to the State Government in lieu of surrender of potential site, the remaining energy would be bought by the

Electricity Board at rates and conditions to be decided by the State Government and the rate would not be less than Rs. 2.25 per kWh. This prompted the appellant to develop the project. The Global Invitation never stated that the tariff would be fixed at Rs. 2.25/kWh. The appellant in a bonafide belief that the tariff would not be less than Rs. 2.25/kWh and the same would be subjected to escalation as per the policy of Ministry of New & Renewable Energy, as also it would reflect the actual cost incurred and the mandated Return on Equity, derived its interest to develop the project.

4.2. The MOU dated 21.6.2000 entered into between M/s. EIPL and the State Government entitled the appellant to review the DPR with the data provided by the respondent no. 2. Although the MOU had stated that the energy would be sold @ Rs. 2.25/kWh, it

never stated that the MNRE policy guidelines would not be applicable to the Project. The MNRE guidelines of 1993 provided for tariff for base year of 1994-95 at Rs.2.25 per kWh with escalation of 5% per annum for 10 years. Thereafter, the tariff will be equal to the purchase price or HT tariff prevalent in the state whichever is higher.

4.3. The techno-economic clearance to the Project was granted to the appellant only on 27.9.2001 wherein the project cost had been approved by the respondent no. 2 at Rs. 125.90 Crores. Thus, the tariff had been fixed by the respondent no. 2 prior to submission of the DPR by the appellant and according of the techno-economic clearance by the respondent no. 2. The logical expectation of the appellant was that only after detailed survey and investigation leading to finalization

of DPR, the tariff would be ascertained and the PPA would be executed.

4.4. The appellant was forced to implement the project at the tariff of Rs. 2.25/kWh without taking into account the DPR and the financial viability of the Project.

4.5. The appellant had approached the State Government for fixation of tariff reflecting the actual capital cost and ensuring Return on Equity as mandated by the Tariff Regulations, Ministry of Power Guidelines, etc. However, the State Government had refused to determine the tariff as per the DPR. The appellant having invested enough time and money for development and implementation was left with no choice but to enter into a PPA with the respondent no. 2 on 14.1.2003 which was executed in the hope

that after or just before the completion of the Project the regulatory regime would fix the tariff on the basis of applicable rules and regulations. There was, thus, enough evidence to suggest that the PPA had been concluded by undue influence and there was a misuse of dominant power by the respondent no. 2.

4.6. The appellant, after spending time and money on formation of DPR, getting statutory environment and forest clearances and survey and investigation of the Project, etc., was only left in a 'take it or leave it' situation.

4.7. The DPR was prepared by the appellant on the basis of Design Discharge Data of last 15 years as provided by the respondent no. 2 and on the basis of preliminary survey and investigation carried out by the respondent no. 2. The appellant carried out

explorations and validations regarding civil works proposed by the Electricity Board (R-2) in their DPR, the hydrological data included by the Electricity Board in their DPR was assumed to be correct and river discharge pattern was adopted accordingly in the revised DPR. The DPR envisaged that at the current rate of tariff, the Return on Equity would not be in accordance with law and the Tariff Regulations. However, on attaining commercial operation, it was realized that the design discharge in the river channel was much less than the data provided by the respondent no. 2, which led to drastic reduction in Capacity Utilization Factor ("CUF") making the project economically unviable.

4.8. The Project return after 3 years of operation are almost negligible and the appellant has been burdened with the hike in interest rate as also suffering the

hydrological and change of law risk. The developer has to financially support the project with additional equity investment so as to service the debt and ensure that the project does not become a non-performing asset.

4.9. It is a settled law that State in exercise of its power cannot resort to the theory of 'take it or leave it'. While entering into a contract, the State cannot on account of individual's lesser bargaining power, put unfair and unreasonable conditions under a contract, the performance of which conditions are against the interest or financial viability of the company or such individual or is against public interest.

4.10. The Tariff Regulations, 2007 for Power Procurement from Renewable Sources specifically empowers the State Commission to re-open the concluded PPAs and determine the tariff of the

Projects, in order to promote generation of electricity from renewable sources of energy. Inspite of this, the State Commission decided not to determine the tariff of appellant's project. On the other hand, the State Commission has already decided to enhance the tariff in respect of projects below 5 MW capacity to Rs. 2.87 per kWh.

4.11. Even dehors the above Regulations, the State Commission has powers to reopen the concluded PPA between the appellant and the respondent no.2.

4.12. Further, the benefits of change in law or policy of the State Government should have been allowed by the State Commission to the appellant with retrospective effect i.e. from the date when the change in policy or law came into effect rather than prospectively i.e. from the date of the impugned order.

5. Learned counsel for the respondent no. 2 has submitted as under:

5.1. The Global Invitation by the State Government dated 19.4.1999 did not provide for tariff based on the MNRE guidelines, but only the incentives to be provided to the project developer to be based on the MNRE guidelines. Only in view of the appellant agreeing to develop the project on the terms contained in its bid, the State Government allotted the project to the appellant. In the absence of the details of the bid submitted by the appellant and the tariff quoted in the bid, there cannot be any question of the appellant claiming a higher tariff.

5.2. MOU dated 21.6.2000 entered into between the appellant and the State Government provided liberty to the appellant to undertake the DPR and based on the

findings thereof and the techno-economic-feasibility of the project, decide to implement the project or withdraw from the project, without any liability. The appellant was fully aware at that stage that the tariff would be Rs. 2.25/kWh. Thus the State Commission has correctly held that the PPA was not signed under undue influence exercised over the appellant.

5.3. The PPA was negotiated and finalized between the appellant and the respondent no. 2 and the draft of the PPA was filed with the State Commission by way of a joint petition for approval.

5.4. The PPA dated 5.7.2004 which was entered into after approval by the State Commission provided for tariff of Rs. 2.25/kWh without any escalation.

5.5. The Tariff Regulations, 2007 are prospective in nature and do not affect the applicability of the existing PPAs.

5.6. The PPA provides for binding rights and obligations of the parties and cannot be avoided on vague grounds of being onerous or difficult to perform. There is no ground whatsoever for the appellant to contend that the performance of the PPA dated 5.7.2004 would be illegal or would violate any provision of law.

6. After considering the rival contentions of the parties, the following questions would arise for our consideration:

i) Whether there was undue influence or misuse of dominant power by the respondent no. 2 in concluding the PPA with the

appellant for sale of power from its hydro project?

ii) Whether the State Commission can review the already concluded PPA entered into between the appellant and the respondent no. 2 before the formation of the Tariff Regulations?

iii) Whether the State Commission has erred in not determining the tariff of the power project of the appellant considering the actual capital cost and the actual capacity utilization of project based on lower discharge available in the river compared to that envisaged in the Detailed Project Report?

iv) Whether the State Commission has erred in not allowing increase in tariff due to change in law, rules and policy of the State

Government retrospectively from the date of such change in law/rules/Government policy instead of allowing the same prospectively?

7. The first issue is regarding undue influence or misuse of dominant position by the respondent no. 2.

8. Let us first examine the sequence of events and facts of the case.

8.1. H.P. Government in the year 1999 invited proposals to implement hydro projects including Patikari Hydro Electric Project, in the private sector on BOOM basis. It was indicated that:

i) The incentives available to the project developers would be as per the policy of Ministry of Non-Conventional Energy Sources, Government of India;

ii) 12% free energy to be provided to the State Government;

iii) The Electricity Board would buy the remaining power at rates and terms & conditions to be decided by the State Government and the rate would not be less than Rs. 2.25/kWh;

iv) The project developer would be permitted to withdraw from the project after submission of DPR without surrender of Earnest Money Deposit if the project was not found attractive.

8.2. A Memorandum of Undertaking (MOU) was entered into between the State Government and M/s. East India Petroleum Ltd., the predecessor in interest of the appellant, on 21.6.2000 for development of the Patikari Hydro Electric Project. The main features of the MOU were as under:

a) The company would submit the DPR of the project within 6 months;

b) In the event of project being not found feasible, the company would be at liberty to withdraw from the project before expiry of validity of the MOU i.e. 12 months after signing of the MOU. In such a case the earnest money deposit would be returned to the company;

c) After the company was satisfied of the techno-economic viability of the project they would have to intimate the State Government accordingly and an Implementation Agreement would be signed between the State Government and the company;

d) The company would provide 12% of the net energy generation free of cost to the State

Government and the remaining energy would be purchased by the Electricity Board at Rs. 2.25/kWh.

8.3. In December 2000, i.e. after about six months from the date of MOU, the appellant submitted the DPR of the Project to the respondent no. 2. The appellant in the DPR stated as under:

"As per the MOU a tariff of Rs. 2.25 per kWh is offered to the company which will only ensure an IRR of 5.26%. This does not meet the Ministry of Power Guidelines of ensuring minimum 16% of equity for IPPs to make the project financiable/bankable".

8.4. On 27.9.2001, the respondent no. 2 accorded techno-economic clearance to Patikari Project at a capital cost of Rs. 125.9 Crores.

8.5. On 9.11.2001 the Implementation Agreement (IA) was entered into between the State Government and East India Petroleum Ltd., the predecessor in interest of the appellant. The main features of the IA were as under:

a) The company would incorporate a separate company for implementation of the Project;

b) Agreement period would be 40 years from the date of commercial operation of the project;

c) Energy generated by the project excluding the free power to the State Government had to be sold to the Electricity Board for which a separate PPA had to be entered into.

Accordingly, on 9.11.2001 a Tripartite Agreement was signed between the appellant, M/s. East India Petroleum Ltd. and the State Government under which

the rights and obligations of the IA were transferred to the appellant.

8.6. On 14.1.2003 the appellant entered into a PPA with the respondent no.2 for sale of energy at Rs. 2.25 per kWh. However, the State Commission by its order dated 5.9.2003 held the PPA dated 14.1.2003 as void and inoperative and directed the parties to file a PPA in accordance with the guidelines issued by the State Commission. Subsequently, on 19.4.2004 the State Commission accorded approval to the PPA on the basis of a joint petition filed by the appellant and the respondent no. 1 under Section 86(1)(b) of the Electricity Act, 2003 . The parties were also directed to execute the PPA. The draft PPA submitted to the State Commission indicted a tariff of Rs. 2.25 per/kWh.

8.7. Accordingly, on 5.7.2004, the appellant and the respondent no. 1 entered into a PPA for sale of energy from Patikari Project. The tariff agreed to in the PPA was at a fixed rate of Rs. 2.25/kWh without any indexation or escalation. The term of the agreement was 40 years after the date of synchronization of the first unit of the Project. On the basis of above PPA the appellant obtained debt from the Banks for execution of the Project.

8.8. The project received the environmental clearance on 1.11.2004 and forest clearance on 20.2.2007. The project was commissioned in January, 2008.

8.9. In the meantime, the State Commission notified the Tariff Regulation for purchase of renewable energy by the distribution licensee on 18.06.2007. The Regulations were amended on 12.11.2007.

Subsequently, the State Commission by its order dated 18.12.2007 determined the generic tariff in respect of small hydro projects not exceeding 5 MW capacity as Rs. 2.87/kWh.

8.10. In August, 2008 the appellant filed a petition before the State Commission for refixation of the tariff of the project. The State Commission by its order dated 29.10.2009 decided as under:-

a) The State Commission has power to reopen the concluded PPAs for the purpose of incentivising the generation from non-conventional energy projects, within the framework of the Act and the Regulations;

b) PPAs cannot be reopened without hearing the State Government as well as HIMURJA, the state agency for promotion of renewable energy sources,

who were necessary parties in the power procurement process;

c) This cannot be assumed that the agreements were result of undue influence, unless the petitioner bring on record specific instances to prove the same.

d) The State Commission can review or modify prospectively the concluded PPA, within the scope of the second proviso of sub-regulation (1) of regulation 6 of the Tariff Regulations, 2007. Accordingly, each generating company has to furnish the necessary documents to the State Commission to consider the revision in tariff on merits.

8.11. Subsequently, the appellant filed a petition being no. 201 of 2009 in September, 2009 before the State Commission for revision of the tariff for sale of power from its project to the respondent no. 2.

8.12. The State Commission by the impugned order dated 16.7.2010 only allowed the increase in tariff on account of change in law, rules and policy of the State Government prospectively.

9. Perusal of the above events and the documents would indicate that right from the date of signing of the MOU dated 21.06.2000 the clear understanding of the appellant was that the tariff of electricity to be purchased from its project would be Rs.2.25/kWh fixed without any escalation or indexation. When the DPR was submitted by the appellant in December, 2000 to the first respondent, it was clear to the appellant, as would be evident from the executive summary of the DPR, that the tariff offered to the appellant was Rs.2.25/kWh and this tariff would not ensure ROE of 16%. Subsequently, the appellant

along with the respondent no.2 filed a joint petition in the year 2004 before the State Commission for approval of the PPA at a fixed tariff of Rs.2.25/kWh under Section 86(1)(b). The State Commission without going into the exercise of determination of tariff accorded its consent to the tariff proposed by the appellant and the respondent no.2 on 19.04.2004. Subsequently, the PPA was signed on 05.07.2004. The appellant also raised loan for the project on the strength of the PPA. It was only in August, 2008, i.e. about 4 year after the signing of the PPA that the appellant has raised the issue that he was forced to implement the project at an unviable tariff and there was misuse of dominant power by the respondent no.2.

10. Learned counsel for the appellant has argued that after investing money on survey and investigation and

in obtaining environmental and forest clearances they were left in a 'take it or leave it' position. We notice that the time between the signing of MOU on 21.06.2000 and submission of the DPR in December, 2000 was only 6 months. Thus, in December, 2000, the appellant was clear about the financial viability of the project at the tariff agreed in the MOU signed with the State Government. The appellant had option not to proceed with the project at that time as per the terms of MOU. In six months period only a part of pre-project expenditure would have been incurred. The environment and forest clearances were received on 01.11.2004 and 20.2.2007 respectively, i.e. after about four to seven years of preparation of the DPR. Following the approval of the draft PPA by the State Commission, the appellant filed a joint petition with the respondent no. 2 before the State Commission in

the year 2004 for approval of the draft PPA with a fixed tariff of Rs. 2.25 per kWh without any escalation. The PPA was signed on 05.07.2004. This indicates that even after preparation of the DPR the appellant willingly pursued the process of obtaining of environment and forest clearance, signed the PPA and executed the project. It was only in August 2008 after the notification of the Tariff Regulations, 2007, determination of generic tariff for hydro projects of capacity not exceeding 5 MW, and about more than six months of commissioning of the Project that the appellant filed a petition before the State Commission for determination of tariff.

11. There are no facts on the record, much less, supported by any documentary or any other evidence to sustain the plea that the Power Purchase Agreement was a result of undue influence or duress by the State

or the respondent no.2 upon the appellant. On the other hand, the available documents indicate that the appellant had voluntarily signed the MOU with State Government and the PPA with the respondent no.2 and executed the project willingly.

12. After examining the sequence of events and the documents submitted by the appellant, we are in agreement with the findings of the State Commission that there was no undue influence or misuse of dominant position by the respondent no.2 in entering into the PPA with the appellant.

13. Learned counsel for the appellant has referred to the findings of the Hon'ble Supreme Court in the following cases in support of his argument on use of undue influence by the respondent no. 2-:

i) Hindustan Times and Others vs. State of U.P. and Another reported as (2003) 1 SCC 591;

ii) LIC of India vs. Consumer Education & Research Centre reported as (1995) 5 SCC 482;

iii) Shrilekha Vidyanthic (Kumari) vs. State of U.P. reported as (1991)1 SCC 212.

In our opinion, the findings in the above cases are not relevant to the present case where the appellant voluntarily entered into an MOU with the State Government, continued to pursue the project even after preparation of the DPR in December, 2000 instead of availing itself of the liberty available to it to drop the project entered into a PPA voluntarily on 05.07.2004, commissioned the project in January, 2008 and only in August, 2008 approached the State Commission to determine the tariff. Thus, the appellant has failed to raise objection regarding the

alleged undue influence by the respondent no.2 in entering into the PPA within a reasonable time.

14. Learned counsel for the respondent no. 2 has relied on decisions of the Hon'ble Supreme Court in the case of Transmission Corporation of Andhra Pradesh Ltd. & Another vs. Sai Renewable Power Pvt. Ltd. & Others reported as 2010 ELR (SC) 0697. The relevant extract is reproduced below:

> *44. The Tribunal in para 45-47 of its order has used the expression "out of compulsion some of the developers entered into Power Purchase Agreement with APTRANSCO accepting the terms and conditions set out in order dated 20th June, 2001". We are afraid that there is hardly any material on record to substantiate such a finding. What was the compulsion and what were the facts which persuaded the Tribunal to take such a view are conspicuous by their very absence. A compulsion*

leading to execution of a contract is a matter entirely based upon facts. It is difficult for this Court, originally, to infer duress or compulsion in absence of specific pleadings and materials in that behalf. It may also be noticed at the cost of repetition that the order dated 20th June, 2001 was never questioned by any of the parties to any favourable results. Even in these proceedings there is no challenge to the said order which, admittedly has been acted upon and has attained finality. The power generators/Non-Conventional Energy developers have executed the PPAs without any protest and, in fact, did nothing to challenge such agreements or any part thereof, till passing of the impugned order of 2004. There were some proceedings, without questioning the validity and effectiveness of the order dated 20th June, 2001, carried out by some of the generators before the Andhra Pradesh High Court. Certain interim directions were passed in those proceedings, as already noticed, but finally all proceedings culminated into dismissal of the Writ Petitions and/or reference back to the Regulatory

Commission for grant of a hearing as per the directions contained in the order of the High Court.

The above decision of the Hon'ble Supreme Court will apply to the present case where there are no facts or documents on record to establish that the PPA was entered into under duress or undue influence.

15. Accordingly, the first issue is decided against the appellant.

16. The second and third issues regarding reopening of the already concluded PPA and determination of tariff by the State Commission are interconnected and we shall consider them together.

17. Let us first examine the Tariff Regulations, 2007 on Procurement of Power from Renewable Sources.

17.1. The Regulation 6(1) of the Tariff Regulations dated 18.06.2007 stipulated that for hydro projects of more then 5 MW and not exceeding 25 MW, the State Commission would determine the tariff on case to case basis. Further, the second proviso to the regulation 6 of the Regulations, 2007 as was originally there stipulated that the PPA approved by the State Commission prior to commencement of the Regulations would continue to apply for the period mentioned in the PPA, unless otherwise provided in the PPA.

17.2. The second proviso to the Regulation 6(1) was amended on 12.11.2007 by the State Commission to provide for review or modification of the concluded PPA by the State Commission under certain conditions. The relevant paragraph of the amended Regulation 6 is reproduced below:

"Regulation 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:

i. where the power purchase agreement, approved prior to the commencement of these regulations, is not subject to the provisions of

the Commission's regulations on power procurement from renewable sources; or

ii. *where, after the approval of the power purchase agreements, there is a change in the statutory laws or rules or the State Government Policy;*

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

17.3. Thus, according to the above Regulations, the State Commission is empowered to determine the tariff and review or modify the PPA in the present case where the PPA was entered into between the appellant, a renewable energy generator, and the respondent no.2 prior to the notification of the Regulations.

18. The State Commission has, however, not agreed to determine the tariff but allowed the enhancement in

tariff to the tune of 29 paise/kWh caused by change in law, rules and the State Government Policy.

19. Let us now examine the findings of State Commission. The relevant paragraphs of the impugned order are reproduced below:

> *"24. This Commission in its Order dated 29th October, 2009 has already stated that the Commission cannot either nullify or modify the concluded contracts in purported exercise of the regulatory powers vested in it. Even to comply with the mandate under Section 86(1)(e), read with section 61 (h) of the Act, and preamble thereto and the various policy guidelines, to promote generation of electricity from renewable sources, the Commission has limited power to reopen the concluded PPAs for the purpose of incentivising the generator from non-conventional energy projects, within the framework of the Act and the regulations. Thus while revising the tariff, the construction cost, inflationary factor and the like need not be taken into account and only the*

narrow area of the Government policy changes and their impact on tariff is to be quantified prospectively.

26. The fact cannot be ignored that in the present case the tariff of Rs. 2.25 Kwh and supply of 12% free power to the GoHP stood bilaterally settled, between the petitioner company and the GoHP and the petition company pleaded for retaining the same as per the provisions of Implementation Agreement. The Commission accorded, on 29.3.2004, its approval to the PPA; extending the provisions of the Commission Orders dated 24.3.2003 and 12.1.2004, in respect of Model Power Purchase Agreement for Small Hydro Power Projects upto 5 MW, apply to all the Small Hydro Projects upto and including 25MW, except the provisions relating to the tariff and 12% free power, wherever already settled bilaterally between the IPPs and the GoHP and the Commission did not wish to interfere with the provisions relating to tariff and the free power and gave its unconditional

acceptance to the tariff of Rs. 2.25 Kwh for the net saleable energy outlines in clause 6.2 of the PPA.

27. Party to agreement is bound to discharge obligations agreed upon. In Har Shamkar and Ors. vs. Dy. Excise and Taxation Commissioner, AIR 1975 State Commission 1121 and Mohinder Singh Gill and Anr. vs. Chief Election Commissioner, New Delhi & Ors. 1978 (1)SCC 405, it has been laid down that once an offer is accepted the contractual right of party get accrued. The Apex Court decision in the State of Maharashtra V/s Ramdas Shriniwas Nayak-1982 (2)SSC 463, supports the view that once the price quoted in the bid is accepted it cannot be withdrawn and, therefore, the bidder can not take a different stand. Thus after a particular alternative tariff determination mode is adopted, it is legally not open for parties to seek the redetermination of the tariff through the left out mode. In view of this the prayer of the petitioner for redetermination of the tariff under section 62(1)(a), cannot be acceded to".

20. Thus the State Commission did not accept the contention of the appellant for re-determination of tariff for the following reasons:

i) The Commission has limited power to re-open the concluded PPAs for the purpose of incentivising generator from non-conventional energy projects, within the framework of the Act and the Regulations.

ii) The tariff of Rs. 2.25 per kWh was bilaterally settled between the appellant and the State Government and the respondent no. 2 and the appellant had pleaded before the State Commission for retaining the same at the time of seeking approval of the PPA.

iii) Party to agreement is bound to discharge obligations agreed upon.

The State Commission only allowed modification in PPA to the extent of change in law, rules and policies of the State Government subsequent to conclusion of the PPA, specifically provided for in the Tariff Regulations. We also feel that even though the Regulations provide wide powers to the State Commission to review a concluded PPA to promote generation of electricity from renewable sources of energy, it can do so within the framework of the law.

21. Learned counsel for the appellant has referred to the following findings of the Tribunal and the Hon'ble Supreme Court regarding power of the State Commission to reopen the concluded PPA even in the absence of specific Regulations:-

i) Chhattisgarh Biomass Energy Developers vs. Chhatisgarh State Electricity Regulatory Commission

in Appeal no. 20 of 2006 by the Tribunal's order dated 7.9.2006;

ii) Rithwik Energy Systems Ltd. vs. Transmission Corporation of AP Ltd. & Ors. in Appeal no. 90 of 2006 & batch vide Tribunal's judgment dated 28.9.2006.

iii) Transmission Corporation of Andhra Pradesh & Another vs. Andhra Pradesh State Electricity Regulatory Commission & Ors. in Appeal no. 4 of 2006 by the Tribunal.

iv) U.P. Power Corporation Ltd. vs. National Thermal Power Corporation reported as (2009) 6 SCC 235.

v) Techman Infra Ltd. vs. Himachal Pradesh Electricity Regulatory Commission & Ors. in Appeal no. 50 of 2008 and Himachal Pradesh Electricity Board vs. HPERC & Anr. in Appeal no. 65 of 2008 vide Tribunal's judgment dated 18.9.2009.

22. In case referred to above at i) in Appeal no. 20 of 2006, the renewable energy generators had challenged the order passed by the State Commission determining the tariff for procurement of power by the distribution licensee from renewable sources of energy. The State Commission had not framed any Tariff Regulations. This case is not relevant to the present case where the State Commission had earlier approved the tariff and PPA on the basis of a petition jointly filed by the renewable energy generator and the Electricity Board.

23. The case referred to above at ii) in Appeal no. 90 of 2006 & batch, the State Commission had determined the tariff in the already concluded PPAs to the detriment of the renewable energy generators. The findings of the Tribunal in this case will not be of any assistance to the appellant in the present case where

the PPA and tariff between the parties was approved by the State Commission as a joint petition filed by the parties.

24. The case referred to above at iii) in Appeal no. 4 of 2006 pertains to the challenge to order of the State Commission determining the tariff in the concluded PPA to the detriment of the renewable energy generators. The findings in this case will not be of any assistance to the appellant in the present case where PPA and tariff was approved by the State Commission on the basis of a joint petition filed by the parties.

25. In the case referred to above at iv) above in the matter reported in (2009) 6 SCC 235 the learned counsel for the appellant has relied on the following findings of the Hon'ble Supreme Court:

> *"Making of tariff is a continuous process. It can be amended or altered by the Central Commission, if*

any occasion arises therefore the said power can be exercised not only on an application filed by the generating company but by the Commission on its own motion".

The above finding does not provide any help to the appellant as it does not lay down a ratio for reopening a concluded PPA by the State Commission.

26. The case referred to above at v) above relates to findings of the Tribunal in Appeal no. 50 and 65 of 2008 in which the renewable energy generators had challenged the findings of the State Commission in its order regarding determination of generic tariff of hydro projects upto 5 MW capacity. The Tribunal had held that where the generic capital cost and Capacity Utilization Factor was found unsuitable by either of the parties, one had option to apply to the State Commission for fixing site specific capital cost and

Capacity Utilization Factor. The findings in this case are not applicable to the present case where PPA has already been concluded and approved by the State Commission and the project being of more than 5 MW capacity, no generic tariff has been decided by the State Commission.

27. Let us now examine the provisions of the Act and National Electricity Policy/Tariff Policy relating to promotion of generation of electricity from renewable sources of energy.

28. Section 61(h) provides for specification of the terms and conditions for determination of tariff by the Appropriate Commission for promotion of generation of electricity from renewable sources of energy.

29. Section 86 (e) of the 2003 Act provides for promotion of generation of electricity from renewable

sources of energy by providing suitable means for connectivity with the grid and sale of electricity to any person, and also specify a percentage of total consumption of electricity from renewable sources in the area of a distribution licensee.

30. The National Electricity Policy provides for urgent need for promotion of non-conventional sources of energy and adequate promotional measures to be taken for their sustainable growth. The tariff policy stipulates procurement of energy from non-conventional energy sources at preferential tariff determined by the State Commission. Thus the Act, National Electricity Policy and Tariff Policy lay emphasis on the promotion of renewable energy sources.

31. Learned counsel for the respondent no. 2 has referred to findings in the following cases:

(a) In the matter of Alopi Parshad vs. Union of India reported as (1960) 2 SCR 793. The relevant findings of Hon'ble Supreme Court are reproduced below:

> *"21. Section 56 of the Indian Contract Act provides that:*
>
> *" A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."*
>
> *Performance of the contract had not become impossible or unlawful; the contract was in fact performed by the Agents, and they have received remuneration expressly stipulated to be paid therein. The Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for*

performance of the contract at rates different from the stipulated rates, on some vague plea of equity.

The parties to an executor contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate--a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point-not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true contraction it does not apply in that situation. When it is said that in such circumstances the court reaches a conclusion which is 'just and reasonable' (Lord

Wright in Constantine Steamship Line Ltd. V. Imperial Smelting Corporation Ltd. 1942 AC 154 at p. 186) or one which justice demand's (Lord Sumner in Hirji Mulji v. Chenong Yue Steamship Co. Ltd. (1926) AC 497 (510) this result is arrived at by putting a just construction upon the contract in accordance with an 'implication..... from the presumed common intention of the parties :speech of Lord Simon in British Movietonews Ltd. V. London and District Cinemas Ltd., 1952 AC 166 at pp. 185 and 186".

"22. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous. That is the law both in India and in England, and there is, in our opinion, no general rule to which recourse may be had, as contended by Mr. Chatterjee, relying upon which a party may ignore the express covenants on account of an

uncontemplated turn of events since the date of the contract".

(b) Continental Construction Co. Ltd. v. State of Madhya Pradesh, reported as (1988) 3 SCC 82: The relevant findings of the Hon'ble Supreme Court are reproduced below:

"5. ……..In this case, the contractor having contracted, he cannot go back to the agreement simply because it does not suit him to abide by it. The decision of this Court in M/s. Alopi Parshad v. Union of India may be examined. There it was observed that a contract is not frustrated merely because the circumstances, in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates differently from the stipulated rates, on some vague plea of equity. The parties to an executor contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected

obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous.

6. It was argued on behalf of the appellant that since specific issues were framed and referred by the District Judge to the arbitrator, the same had been answered by a non-speaking award, there is no mistake of law apparent on the face of record and the District Judge erred in setting aside the award by looking into the terms of the contract which, it was submitted, neither formed part of the award nor appended to it. We are unable to agree. This being a general question, in our opinion, the District Judge rightly examined the question and found that the appellant was not entitled to claim for extra cost in view of the terms of the contract and the arbitrator misdirected himself by not considering this objection of the State before giving the award".

10. The question about specific reference on a question of law was examined by this Court recently in the case of Tarapore and Company V. Cochin Shipyard Ltd., Cochin. There it was observed that if the agreed fact situation, on the basis of which agreement was entered into, ceases to exist, the agreement to that extent would become otiose. If rate initially quoted by the contractor became irrelevant due to subsequent price escalation, it was held in that case that contractor's claim for compensation for the excess expenditure incurred due to the price rise could not be turned down on ground of absence of price escalation clause in that regard in the contract. Agreement as a whole has to be read. Reliance was placed very heavily on this decision on behalf of the appellant before us. It has to be borne in mind that in the instant case there are specific clauses referred to hereinbefore which barred consideration of extra claims in the event of price escalation. That was not so in Tarapore and Company case. That made all the difference. The

basis of bargain between the parties in both these two cases were entirely different."

(c) Rajasthan State Mines & Minerals Ltd. vs. Eastern Engg. Enterprises, reported as (1999) 9 SCC 283: The relevant findings are reproduced below:

"44. .....

(h) The award made by the Arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the Court. He cannot award an amount which is ruled out or prohibited by the terms of the agreement. Because of a specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of a wider arbitration clause such claim amount cannot be awarded as the agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement. This aspect is absolutely

made clear in Continental Construction Co. Ltd. by relying upon the following passage from M/s. Alopi Parshad Vs. Union of India which is to the following effect (SCC p.88, para 5)

"There it was observed that a contract is not frustrated merely because the circumstance, in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executor contract are often face, in the course of carrying it out, with a turn of events which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an uncontemplated turn of events, the

performance of the contract may become onerous".

(d) Travancore Devaswom Board V. Thanth International, reported as (2004) 13 SCC 44:

The findings of the Hon'ble Supreme Court are as under:

"12. The law on the subject is well settled. In the case of Alopi Parshad & Sons Ltd. V. Union of India this Court has held that the Contract Act, 1872 does not enable a party to a contract to ignore the express covenants thereof. It is held that the Contract Act does not permit a party to claim payment of consideration for performance of contract at rates different from the stipulated rates, on some vague plea of equity. It is held that in the performance of a contract, one often faces, in the course of carrying it out, a turn of events which are not anticipated e.g. an abnormal rise or fall in prices, sudden depreciation of currency, an unexpected obstacle to execution or the like. It is held that these do not affect the bargain that has been made. It is held that there is no general

liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an uncontemplated turn of events, the performance of the contract has become onerous. It is held that compensation quantum meruit is awarded when the price is not fixed by the contract. It is held that for work done or serviced rendered pursuant to the terms of contract, compensation quantum meruit cannot be awarded.

13. The above lawfully governs this case. In this case the contract between the parties laid down the price. Clause 2 specifically provides that this price was to remain firm till May 1991. As stated above, the circumstances enumerated by the respondents were not such as frustrated the contract. Merely because performance had become more onerous was not a ground for non-performance or for claiming enhancement of price.

14. The principles laid down in the above decision have since been reaffirmed in the decisions in the

case of Continental Construction Co. Ltd. V. State of M.P. and Rajasthan State Mines & Minerals Ltd. V. Eastern Engg. Enterprises".

(e) S.A.P. Devasthanam v. Sabapathi Pillai, reported as AIR 1962 Mad. 132:

The findings of the Court are as under:

"15. It is also settled that the theory of frustration or impossibility of performance of a contract cannot be applied to cases of commercial transactions. In other words, the impossibility referred to in s.56 is not commercial impossibility. In his treatise on "Impossibility of performance", 1941 Edn Roy Grenville McElroy states at p. 194 under the heading "Commercial Impossibility is not frustration".:

"So far as existing authorities to, no change in economic conditions, however serious, and however deeply it may affect the contract, can by itself amount to impossibility such as to avoid it. There is no implied condition as to 'commercial impossibility'. It is false and misleading, therefore,

to use the term 'frustration' to describe such a situation."

This question was considered by the House of Lords in the case of Tennants (Lancashire) Ltd. V. Wilson and Co. Ltd. 1917 AC 495. Earl Loreburn put the matter very clearly,

' I do not consider that even a great rise of price hinders delivery. If that had been intended different language would have been used, and I cannot regard shortage of cash or inability to buy at a remunerative price as a contingency beyond the seller's control. The argument that a man can be excused from performance of his contract when it becomes 'commercially impossible, which is forcibly criticized by Pickford L.J. seems to me a dangerous contention, which ought not to be admitted unless the parties have plainly contracted to that effect. The learned author, Roy Granville McElroy, also referred to the following observations of Lord Summer in Larrinage and Co. v. Society Franco Americanie 1924-29 Com Cas 1, 18 and 19:

"All the uncertainties of a commercial contract can ultimately be expressed, though not very accurately, in terms of money, and rarely, if ever, is it a ground for inferring frustration of an adventure, that the contract has turned out to be a loss or even a commercial disaster for somebody….. No one can tell how long a spell of commercial depression may last: no suspense can be more harassing than vagaries of the foreign exchanges, but contracts are made for the purpose of fixing the incidence of such risks in advance, and their occurrence only makes it the more necessary to uphold a contract and not to make them the ground for discharging it."

In Halsbury's Laws of England, Vol. 8, Simonds Edn. At Page 186, paragraph 320, it is stated that,

"The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration."

And reference is made to the decision in Hangkam Kwingtong Wog v. Liu Lan Fong, 1951 AC 707 in support of this proposition Jagadisan J. when dealing with commercial impossibility in his judgment in S.A. No. 366 of 1958: (AIR 1962 Mad 122 referred to this decision, and further referred to Blackburn Bobbin Co. Ltd. V. Allen (T.W.) Sons, 1918-1 KB 540 & Re Commptoir Commercial, Annersois and Power Son & Co. 1920-1 KB 868, for the proposition that there is no frustration where performance of the contract remains physically and legally possible though commercially unprofitable. Thus the law is settled that the doctrine of impossibility of performance or frustration cannot be applied to cases of commercial transactions. Impossibility of performance cannot be called commercial impossibility. Merely commercial impossibility will not excuse a party from performing the contract. Mere increased cost of performance or losing in a transaction does not make the contract impossible. A man is not prevented from performing his contract by mere economic upprofitableness."

(f) Eacom's Controls (India) Ltd. v. Bailey Controls Co. , reported as AIR (1998) Del. 365:
In this case the Court has held as under:

"21. In Halsbury's Laws of England, Fourth Edition, Volume 9, paragraph 455, it has been stated that a contract is not discharged merely because it turns out to be difficult to perform or onerous.

22. In Continental Construction Co. Ltd. V. State of Madhya Pradesh, (1988) 3 SCC 82: (AIR 1988 SC 1166), the Supreme Court while examining its earlier decision in M/s. Alopi Parshad and Sons Ltd. V. Union of India, AIR 1960 SC 588, held that a contract is not frustrated merely because the circumstances in which the contract was made underwent a change. It was further held that there is no general liberty reserved to the Courts to absolves a party from liability to perform his part of the contract merely on account of an uncontemplated turn of events, which rendered the performance of the contract onerous, like an abnormal rise or fall in prices, a sudden

depreciation of currency or unexpected obstacle to the execution of the contract.

23. This view also finds support from the decision of the Supreme Court in Naihati Jute Mills Ltd. V. Khyaliram Jagannath, AIR 1968 SC 522, in which it was held that a contract is not frustrated because the circumstances in which it was made are altered, or because the performance of the same become onerous on account of an unforeseen turn of events.

24. The upshot of the above said decisions is that the Court can relieve a contracting party from the obligations of a contract under Section 56 of the Contract Act only by reason of a supervening event or untoward happening beyond the control of the parties which renders the contract impossible of performance after the same was made. The performance of a contract becomes impossible if it is rendered impracticable from the point of view of the object and purpose which the parties had in view at the time of entering into the contractor if an untoward event or change of circumstance upsets or destroys the very foundation upon which the

parties rested their bargain. It is not sufficient for a contracting party invoking the doctrine of frustration to show that the supervening event has made the contract onerous or difficult to perform. He must prove the impracticability and impossibility of the contract. A contracting party cannot be relieved from the performance of his part of the contract if the frustration of the contract is self generated or the disability is self induced."

(g) Ocean Tramp Tankers Corporation v. V/O Sovfracht, reported as (1964) 1 All ER 161:

The relevant extracts are as under:-

"It has frequently been said that the doctrine of frustration only applies when the new situation is "unforeseen" or "unexpected" or "uncontemplated", as if that were an essential feature. But it is not so. It is not so much that it is "unexpected", but rather that the parties have made no provision for it in their contract. The point about it, however, is this: If the parties did not foresee anything of the kind happening, you can readily infer that they have made no provision for it. Whereas, if they did foresee it, you would expect when to make

provision for it. But cases have occurred where the parties have foreseen the danger ahead, and yet made no provision for it in the contract. Such was the case in the Spanish Civil War when a ship was let on charter to the Republican Government. The purpose was to evacuate refugees. The parties that she might be seized by the Nationalists. But they made no provision for it in their contract. Yet, when she was seized, the contract was frustrated: see W.J. Tatem, Ltd. V. Gamboa (5). So, here, the parties foresaw that the canal might become impassable. It was the very thing that they feared. But they made no provision for it. So the doctrine may still apply, if it be a proper case for it.

We are thus left with the simple test that a situation must arise which renders performance of the contract "a thing radically different from that which was undertaken by the contract": see Davis Contractors, Ltd. V. Fareham U.D.C. (6), per LORD RADCLIFFE. To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provide for the

situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the old situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more expensive. It must be positively unjust to hold the parties bound. It is often difficult to draw the line. But it must be done, and it is for the courts to do it as a matter of law: ass Tasakiroglou & Co., Ltd. V. Noblee & Thori G.M. b.H. (7) per VISCOUNT SIMONDS and per LORD REID."

32. In view of above findings let us examine the claim of the appellant in the circumstances of the present case. In the present case the contention of the appellant is that the project has become unviable due to i) low rate of Return on Equity than permissible

under the law at the tariff of Rs. 2.25 per kWh fixed prior to the commissioning of the project, and ii) lower energy generation than design energy due to lower water inflows actually received at the hydro project during the two years of operation compared to the hydrology provided by the respondent no. 2 at the DPR stage. According to learned counsel for the appellant, the developer has to financially support the project with additional equity inflows/ investment so as to service the debt and to ensure that the project does not become a non-performing asset.

33. Let us take up the first lower ROE at the fixed tariff of Rs. 2.25/kWh. Admittedly, the ROE expected from the project at the tariff of Rs. 2.25/kWh was in the knowledge of the appellant at the time of submission of the DPR to the respondent no. 2 in December, 2000. Despite this the appellant filed a

joint application before the State Commission for approval the PPA and tariff @ Rs. 2.25/kWh and subsequently entered into the PPA with the respondent no.2 on 5.7.2004. In the light of the above rulings of the Hon'ble Supreme Court lowering of the expected return could not be the reason for review of the concluded contract between the parties. Even though we feel that renewable energy projects deserve a reasonable ROE, in the circumstances of the present case, lower ROE then envisaged in the Regulations could not be a reason for reopening of the PPA. In this case the appellant was aware of the return it was likely to get at the hydrology projected in the Detailed Project Report. Despite this, the appellant proceeded with the project and voluntarily signed the PPA.

34. Let us now examine the issue relating to lower energy generation due to lower water inflows then

envisaged at DPR stage. Generation at a hydro station is planned according to the expected inflows corresponding to 90% dependable year. According to the appellant, the design energy of Patkari Hydro Electric Project corresponding to 90% dependable year discharge is 78.81 MU. The project was commissioned in January, 2008. The discharge in the river during the lean months of the FY 2008-09 was around 74% of the corresponding 90% dependable year discharges. In the FY 2009-10, there was practically no rain in the catchment area of Patikari Project during the monsoon months. During the FY 2009-10 the actual generation at the project was 36.52 MU as against the design energy of 78.81 MU.

35. Let us examine the findings of the State Commission with regard to re-determination of tariff considering the hydrology aspect. The State

Commission in the impugned order recorded the concern raised by the appellant regarding hydrology as under:-

> *"(d) that the petitioner company has commissioned the project in January, 2008 and the discharge hydrological data reveals that the Design Energy of the project is less than what was expected/expressed in the TEC, accorded by the Board, and stipulated in the PPA and therefore, will have to be recalculated and revised based on the norms and expected realistic hydrology of Bakhli Khad on which the project is constructed, and which is a purely rain fed rivulet. Moreover, in view of the precarious financial position of the petitioner the non-redetermination of the tariff will lead the project becoming a sick unit."*

Thereafter the State Commission decided not to raise the tariff except for impact of the Government Policy changes under paragraphs 24, 26 and 27 of the

impugned order as reproduced under paragraph 19 of this judgment.

Thus the State Commission decided not to reopen the already concluded PPA but did not specifically deal with the hydrology aspect in the impugned order.

36. The tariff of a hydro project is dependant mainly on capital cost and water inflows in the river. In the present case the completed cost of the project was within the cost approved by the respondent no.2 However, the inflows are reported to be much lower than the anticipated at the DPR stage. Admittedly, the hydrology/DPR of the project was provided by the respondent no. 2 for revalidation to the appellant. The appellant was allowed only one year as per the terms and conditions of the MOU dated 21.06.2000 entered into with the State Government to revalidate the

Detailed Project Report including the hydrology. The period of one year is grossly inadequate to validate the hydrology as discharge series for several years is required for establishing the expected inflows for the design of the project. According to the learned counsel for the appellant, they had completely relied upon the hydrological data as provided by the respondent no.2 at the time of submissions of the tender for development of the project and in preparation of the DPR. Thus if the river discharge is much lower that that envisaged at the planning/tendering stage it would tantamount to change in the circumstances and the basic parameters on the basis of which the appellant developed the project and which is dependant on nature and are beyond the control of the appellant.

37. Ld. Counsel for the appellant has submitted that due to lower generation at Patikani hydro electric project due to less infows, the appellant had to infuse additional finances to pay the debts and the project could become a non-performing asset. There is point in the submissions made by the appellant that it will not serve the object of the Act regarding promotion of renewable sources of energy if the existence of such a project is endangered due to change in the fact situation on the basis of which the appellant developed the project and which is dependent on nature and beyond its control. This aspect requires reconsideration by the State Commission. We also notice that the validity of PPA is for 40 years and the project has to sustain operations for such a long period. We, therefore, feel that the State Commission should consider the aspect of low discharge.

38. Even though the information submitted by the appellant for the last 2 years of operation indicates lower generation than the design generation, the data for river discharge has not been submitted along with the discharge expected as per the DPR. Moreover, the data of limited period of less than two years is inadequate to conclusively establish the issue in favour of the appellant.

However, we give liberty to the appellant to approach the State Commission with upto date supporting data to establish their case regarding low discharge in the river and the State Commission would consider the same after giving opportunity of hearing to all concerned.

39. The fourth issue is regarding allowance of impact of change in law, rules and policy of the State

Government on tariff retrospectively from the date of change in such law/rules/policy instead of prospectively i.e. from the date of the impugned order.

40. The State Commission has allowed impact on account of the following changes in the State Government Policy after the approval of the PPA on 19.4.2004:

i) Government of Himachal Pradesh's Notification dated 9.11.2005 making it mandatory for all the Independent Power Projects to release 15% water discharge for maintaining minimum environmental flow in river;

ii) Local Area Development charge to be paid to Local Area Development Authority by the project developer by State Government's notification dated 27.12.2006;

iii) Additional 1% free power to be earmarked for Local Area Development Fund by the Project Developer as per State Government's notification dated 30.11.2009;

41. The State Commission has allowed additional tariff of 29 paise per kWh on account of 15% release of water and additional 1% free power (S.No. i & iii above) but has made it applicable from the date of order i.e. 16.7.2010. As regards additional tariff component to offset the loss on account of Local Area Development charges (S.No. ii above), the State Commission has decided a formula based on the additional cost of Area Development Charges and has allowed to be paid from the date of complete payment of Local Area Development charges by the appellant or the

commercial operation Date of the Project, whichever is later.

42. The State Commission's Regulations were notified on 18.6.2007 and were amended on 12.11.2007. The appellant's project was commissioned in January, 2008. While the State Commission has allowed the additional tariff on account of LAD charges from the date of actual payment or COD of the project whichever is later, it chose to allow the increase in tariff on account of 15% releases for maintaining environmental flows and 1% additional free power from the date of the impugned order. The State Commission has also not given any reason for prospective application of the order. We feel that these charges should have been allowed from the date 15% environmental flows were effected by the hydro project of the appellant in compliance with the State

Government's notification and 1% additional free power supplied by the appellant according to the State Government's notification, i.e. both these amendments should be made effective from the date of implementation of the State Government's policy by the appellant.

43. Learned counsel for the respondent no. 2 has argued that they have filed a Writ Petition being CWP No. 8285 of 2010 and CMP No. 12411 of 2010 before the High Court of Himachal Pradesh against amended Regulation 6 of the Regulations, 2007 and consequent order dated 16.7.2010 passed by the State Commission invoking the powers under Regulation 6. The High Court by order dated 21.12.2010 has admitted the Writ Petition and granted stay of operation of order dated 16.7.2010 as far as the appellant is concerned.

44. We notice that the respondent no. 2 had filed the Writ Petition challenging the amendment to the Regulation 6 and praying for setting aside the amendment of Regulation 6 and consequent orders dated 29.10.2009 and 16.7.2010 after the appellant filed this appeal before the Tribunal. In view of the stay granted by the High Court of Himachal Pradesh of operation of the impugned order, implementation of our order will be subject to order of the High Court.

45. **Summary of findings:**

i) The appellant has not been successful in establishing that there was any undue influence or misuse of dominant position by the respondent no. 2 in making the appellant enter into the PPA with

the respondent no. 2 for sale of power from Patikari Hydro Electric Project.

ii) The State Commission can review the already concluded PPA entered into between the appellant, a renewable energy generator, and the respondent no. 2 according to its own regulations. The appellant has sought the review on two grounds viz., a) lower Return On Equity expected under the fixed tariff of Rs. 2.25/kWh; and b) lower water discharge in the river than expected as per the hydrology provided by the respondent no. 2. In view of the settled position of law, lower return on equity could not be a reason for review of the PPA. However, there is point in the contention of the appellant that it had relied upon the hydrological data provided by the respondent no.2 at the time of submission of

tender for development of the project. One year period given to the appellant to validate the hydrological data was grossly inadequate. Thus if the actual river discharge is much lower than that envisaged at the planning/tendering stage it tantamounts to change in the basic parameters on the basis of which the appellant developed the project. In view of this we give liberty to the appellant to approach the State Commission with material and data in support of their case regarding the low discharge in the river and the State Commission would consider the same after giving opportunity of hearing to all concerned.

iii) On the fourth issue regarding effective data of revision of tariff on account of change in State Government Policy we decide that the same should be made effective from the date of implementation

of the State Government Policy by the appellant and not prospectively as decided by the State commission.

46. The appeal is allowed in part as indicated above, without cost.

47. Pronounced in the open court on this 23rd day of April, 2012.

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

REPORTABLE / NON-REPORTABLE

vs