

Judgment in Appeal No. 220 of 2013

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

Appeal No.220 of 2013

Dated: 1st July, 2014

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Justice Surendra Kumar, Judicial Member

In the matter of:

Himalaya Power Producers Association
Having its Registered Office at:
Himurja, SDA Complex,
Block No.8, Kasumpti,
Shimla, (Himachal Pradesh)
Through its Authorized Representative
Mr. Pushpinder Singh

.....

Appellant

Versus

1. Himachal Pradesh Electricity
Regulatory Commission,
Keonthal Commercial Complex,
Khalini Shimla-171002.
Himachal Pradesh.

.....

Respondent

2. Himachal Pradesh State Electricity Board Ltd.
Vidyut Bhawan,
Shimla.
Himachal Pradesh -1710004.

.....

Respondent/
Petitioner

Counsel for the appellant(s) : Mr. Sanjay Sen, Sr. Adv.
Ms. Shikha Ohri

Counsel for the respondent(s) : Mr. Pradeep Misra for R-1
Mr. Anand K. Ganesan for R-2

JUDGMENT

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The present appeal has been preferred by the appellant Himalaya Power Producers Association against the order dated 22.06.2013, (hereinafter referred to as the "impugned order") passed by the Himachal Pradesh Electricity Regulatory Commission, (hereinafter referred to as the "State Commission") in Petition No. 63 of 2013, by which the State Commission has arrived at the Average Pooled Power Purchase Cost (APPC) applicable for the FY 2013-14 on the power purchase cost

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incurred by the respondent no.2, Himachal Pradesh State Electricity Board Ltd. (hereinafter called the "HPSBL") in the year 2012-13.

2. The main ground of challenge, by the appellant in the present Appeal is that the State Commission has erroneously included electricity procured through banking ('banked energy') for the purposes of calculation i.e. 'APPC' whereas the energy procured from banking sources ought not to be included in the APPC. According to the appellant, such inclusion results in artificially reduced APPC which has an unpropitious effect.

3. According to the respondent no. 2-HPSEBL, it as a distribution licensee, has tied up for purchase of electricity from various sources to meet the demand of the consumers in the State of Himachal Pradesh. The tie up is on capacity basis. However, there are variations in the quantum available to HPSEBL and the demand in the State, which may be higher or lower. For this purpose, one of the methodology adopted by HPSEBL is of banking of energy. Electricity is banked by HPSEBL with other entities and distribution licensees in the country by supplying electricity during surplus period and correspondingly procuring electricity from such entities during deficit period of HPSEBL. In other words, as and when electricity is available at surplus with the HPSEBL, the same is supplied to other entities with an agreement for such entity to supply equivalent quantum of electricity when electricity is in deficit for the HPSEBL.

4. The relevant facts for the purpose of deciding this Appeal are as under:-

- (i) that the appellant is a registered association of persons who are involved in the development and promotion of activities of hydro power projects in the State of Himachal Pradesh. One of the major objectives of the association is to alleviate and resolve various problems faced by small hydro power projects.
- (ii) that the respondent no.1 is the State Electricity Regulatory Commission which is exercising powers and discharging functions

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under the provisions of Electricity Act, 2003. The respondent no.2-Himachal Pradesh State Electricity Board Limited is the distribution licensee in the State of Himachal Pradesh.

- (iii) that the State Commission has passed the impugned order while determining the Average Pooled Power Purchase Cost (APPC) for FY 2013-14 under the Renewable Energy Certificate (REC) mechanism as provided under Regulation 5(1) of the CERC (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010, which specifies that a generating company engaged in generation of electricity from renewable energy sources shall be eligible to apply for registration for issuance of and dealing in Certificates if it fulfills inter alia the following conditions:

It sells the electricity generated either (i) to the distribution licensee of the area in which the eligible entity is located, at a price not exceeding the pooled cost of power purchase of such distribution licensee, or (ii) to any other licensee or to an open access consumer at a mutually agreed price, or through power exchange at market determined price.

Explanation.- for the purpose of these regulations 'Pooled Cost of Purchase' means the weighted average pooled price at which the distribution licensee has purchased the electricity including cost of self generation, if any, in the previous year from all the energy suppliers long-term and short-term, but excluding those based on renewable energy sources, as the case may be.

- (iv) that distribution licensee HPSEBL has filed a Petition No. 63/2013 before the State Commission to review methodology for determination of the APPC rates for the current and ensuing years and approval of the APPC rates for the FY 2013-14. The respondent No.2/HPSEBL in its petition prayed for inclusion of the banking sale in calculation of APPC. According to the respondent no.2, the definition of the APPC under the CERC (Terms and Conditions for Recognition and Issuance of Renewable Energy

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Certificate for Renewable Energy Generation) Regulations, 2010 provides that the purchase of electricity should be from all energy suppliers, short term and long term and includes own generation but excluding renewable sources. Since the sale component has no impact on the determination of APPC, it should be kept out of purview of determination of the APPC, even if it is banking sale. Thus, respondent no.2 sought for inclusion of contra banking and return banking along with inward/forward (considered by the State Commission for calculation of APPC in the previous FY 2012-13).

- (v) That the HPSEBL has given details of Power Purchase Cost for FY 2012-13, the abstract of which is as under:-

Power Purchase Cost of FY 2012-13 (April, 2012 to Feb. 2013)		
Details	MU	Rs. Crore
HPSEB Stations	1256.55	181.74
BBMB Stations	557.00	27.17
NTPC Stations	1319.94	394.73
NHPC Stations	327.09	82.08
From other Stations	2086.30	499.64
Free Power and Equity Power	1098.92	318.69
From Private Micros	112.61	24.77
Banking	983.26	0.00
Bilateral Purchase	0.02	0.01
PXI/IEX	61.04	12.54
Total Power Purchase Cost	7802.73	1541.37

Proposed APPC rates by the HPSEBL = 198 paise per unit

- (vi) That the HPSEBL's calculation of the APPC rates for FY 2013-14 are based on the following:-
- (i) the actual purchase (quantum and costs) for FY 2012-13 for eleven months i.e. (April 2012 to February 2013) has been considered, as details for March, 2013 are not yet available,
 - (ii) the arrears pertaining to past periods (paid in FY 2012-13) have been excluded as these are not recurring in nature,

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- (iii) the Unscheduled Interchange(UI) Purchase has also not been included in line with the philosophy approved by the Commission in previous years,
 - (iv) the PGCIL/Transmission charges/ULDC/other charges has also not been included in line with the philosophy approved by the Commission in previous year,
 - (v) the rates of own generating stations have been taken from the MYT order 2nd Control Period dated 19th July, 2011.
- (vii) that the State Commission issued a public notice on 19.04.2013 in the newspapers inviting objections/suggestions on the aforesaid petition from the stakeholders putting details of the whole petition on the website of the Commission as well as on the HPSEBL's website. Thereafter, the Commission received comments/suggestions from various stakeholders vide M.A. No. 87 of 2013 in Petition No. 63 of 2013.
- (viii) that the State Commission, in its previous APPC order dated 16.07.2012, had considered only the forward banking purchase. The HPSEBL has requested the Commission to review the methodology for consideration of various components of banking power on different aspects. HPSEBL also requested the State Commission to consider the following:-
- (a) Contra banking for determination of APPC.
 - (b) Forwarding banking for determination of APPC.
 - (c) All banking purchases at zero cost for determination of APPC.
- (ix) that almost all the objectors/stakeholders in their objections/suggestions mainly stated as under:-
- (a) that banking is neither sale nor purchase, since it is only a deferred utilization or storage of the energy. Banking

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energy should not be considered as purchase of energy since no transaction of money takes place in the banking.

- (b) that banking is beneficial to the HPSEBL, since purchase in the winter otherwise would be at a higher rate than the APPC.
- (c) that the HPSEBL does not bear loss of any opportunity cost because rate of energy in winter is higher as compared to monsoon months when surplus energy is available with HPSEBL. This energy from the HPSEBL's own power station has lower cost and no opportunity loss is caused to the HPSEBL through banking.
- (d) that Govt. of Himachal Pradesh as well as the HPSEBL have been facing problem in getting an attractive rate for sale of surplus power in summer, as per the recent trends in the last couple of years which consequently has seen a steep fall in the revenue of the Govt. from the sale of power. There is, therefore, no loss of any opportunity cost. The banking rather helps the HPSEBL as it has to purchase corresponding lower quantum of power in winter at higher rates and thus saving the overall power purchase cost.
- (e) that in Table 2 of the petition, the banking energy is shown as 983.26 MU at zero cost, whereas this energy is already included in the quantum of energy purchased from various sources in the aforesaid Table. Therefore, quantum of this energy should be excluded from the total energy purchased from the other sources. This quantum has, therefore, been already accounted for and cannot be added again in the total power purchase and as such after taking the quantum 983.26MU as banking from the total power purchase of 7802.75MU as shown in the petition, the actual quantum of power purchase should read as 6819.49 MU only and the APPC shall work out to Rs. 2.26 per unit.

5. The learned State Commission after consideration of the rival submissions made before it has observed as under:-

“6.3 Commission's view

The issue of considering the quantum of banking power, while finalizing the APPC rates has already been debated at length in the Commission's earlier order dated 16.07.2012 for the APPC rates for the FY 2012-13 in which it has been very clearly stated that:-

Total power purchased is disposed off/utilized by way of sale, within and outside State and by way of banking. Power purchase only is

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relevant for the APPC and disposal/utilization of power is not relevant in the context of determination of the APPC. Banking has three components i.e. (i) certain quantum of energy out of total purchases is banked during the year and the same quantum is received back during the same year is called contra banking; (ii) certain quantum of energy is borrowed from other Discoms during the year which is to be returned in the subsequent year is known as forward banking under purchase category and (iii) quantum sold during the year under forward banking will be received back in the next financial year is called return banking under purchase category.

Where the outward banking (banking sale) is from out of power purchased during the year from energy supplier (long term and short term), its cost is already paid. Therefore, if the same quantum is received as inward banking (contra banking purchase), such quantum and price should not be included over and above the quantum or price already taken into account, out of which such power has been banked. Out of the total banking power of 1072.28 MUs (Eleven months figure) indicated under para 6.1(xii) only 627.99 MUs is contra banking for FY 2012-13. It is true that the Commission had taken cost of banking power, whether purchase or sale, as zero because in the absence of firm cost of such power any notional cost leads to distorted results in profit/loss in the balance sheet. It is also true that banking arrangement as a practice in the State is rolling arrangement involving contra, forward and return banking which is with various Discoms in the region. For the purpose of the APCC only the weighted pooled price of previous year is required to be taken into account, therefore, the Commission is of the view that against the total banking purchase of 1072.28 MUs (Eleven months figure), only 627.99 MUs is contra and this quantum shall not be counted in the total power purchase quantum during the year. However, 355.28 MUs (Eleven months figure) has been received as inward banking during the year over and above quantum taken into account as purchased from the energy supplier, therefore, this is an additional power purchase. Since there is no criteria for determination of rate and as a prudent practice the Commission had taken such banking sale and purchase at zero cost, this quantum of energy shall be treated as additional purchase at zero cost.

The Commission, therefore, decided not to accept the new methodology proposed by the HPSEB Ltd. to consider the contra banking quantum also at zero cost during the year for determination of the APPC rates.

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13. Accordingly, the Commission considers the relevant power purchase expenses of the FY 2012-13 eligible for calculation of weighted average pooled price for FY 2013-14 submitted in the Petition no. 63/2013 and MA

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No. 87/2013 by the Distribution License and accordingly the Commission determines the rate of the APPC for FY 2013-14 as given below:-

<i>Eligible Power Purchase Expenses of FY 2012-13 for determination of the APPC rates for FY 2013-14</i>		
<i>Details</i>	<i>MU</i>	<i>Rs. Crore</i>
<i>HPSEB Stations</i>	<i>1376.01</i>	<i>199.41</i>
<i>BBMB Stations</i>	<i>596.61</i>	<i>34.24</i>
<i>NTPC Stations</i>	<i>1458.73</i>	<i>432.72</i>
<i>NHPC Stations</i>	<i>353.30</i>	<i>92.93</i>
<i>From other Stations</i>	<i>2215.77</i>	<i>547.45</i>
<i>Govt. Free Power & Equity Power</i>	<i>1149.75</i>	<i>333.43</i>
<i>From Private Micros</i>	<i>117.32</i>	<i>25.81</i>
<i>Bilateral Purchase</i>	<i>0.02</i>	<i>0.01</i>
<i>PXI/IEX</i>	<i>61.89</i>	<i>20.48</i>
<i>Banking</i>	<i>451.11</i>	<i>0.00</i>
<i>Total Power Purchase Cost</i>	<i>7780.51</i>	<i>1686.48</i>

Computed APPC rate = 217 paise per unit

Based on the above, the average pooled purchase cost (APPC) for FY 2013-14 works out to 217 paise per unit and is so approved by the Commission. These prices are firm and final and will not be trued up.

14. *This order shall be applicable for FY 2013-14 and shall continue for further period with such variation or modification as may be ordered by the Commission for the next financial year.*

Commission orders accordingly."

6. The appellant has assailed the impugned order chiefly on the point that APPC has to be determined by the State Commission under the Renewable Energy Certificate Scheme in terms of the HPERC (Renewable Power Purchase Obligation and its Compliance) Regulations, 2010 and the CERC (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable energy Generation) Regulations, 2010 as one of the eligibility criteria prescribed under the aforesaid Regulations, for a renewable energy generator to be eligible under the Renewable Energy Certificate Scheme is that it should sell electricity generated to the

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distribution at a price not exceeding (subsequently amended to “equal to”) the pooled cost of power purchase of such distribution licensee. Thus, determination of APPC assumes significance. Under the aforesaid Regulations, ‘pooled cost of purchase’ means the weighted average pooled price at which the distribution licensee has purchased the electricity including cost of self generation, if any, in the previous year from all the energy suppliers long-term and short-term, but excluding those based on renewable energy sources as the case may be.

6.1. The State Commission, contrary to the provisions of the Electricity Act, 2003 and Regulations framed thereunder, has **passed the impugned order considering banked energy for calculation of the APPC**. The submission of the appellant in this appeal is that banking is neither sale nor purchase of power. Banking is only a deferred utilization or storage of the energy. Banking energy cannot be considered as purchase of energy. It is a cashless transaction, an arrangement or facility which permits the distribution licensee to store or bank surplus energy with other Discoms for subsequent utilization. Unlike a purchase or a sale, there is no consideration or price exchanged for banking. Banking operates on energy to energy basis. Illegal and arbitrary inclusion of inward banked energy in determination of APPC leads to an artificially reduced APPC. The State Commission by assuming the price of inward/forward banking energy as zero has further led to determination of a lower APPC, prejudicially affecting the members of the appellant association. As a result of the aforesaid incorrect calculation, APPC has been incorrectly determined @ Rs. 2.17/- per unit in the impugned order instead of Rs. 2.30 per unit.

6.2. One more submission of the appellant is that the State Commission in the impugned order has calculated APPC in the following manner:-

“Pooled power purchase cost (-) cost of power sourced from renewable sources.

Power purchased including power purchased through inward/forward banking (-) power purchased from renewable energy.”

Thus, by including the energy received through inward/forward banking, the denominator of the abovementioned formula has been artificially increased leading to a lower APPC.

7. We have heard at length Shri Sanjay Sen, learned Senior Advocate for the appellant, Shri Pradeep Misra, learned counsel for the respondent no.1 and Shri Anand K. Ganesan, learned counsel for the respondent no.2 and have meticulously perused the record and respective written submissions filed by the rival parties.

8. In this matter, the only issue which arises for our consideration is whether the State Commission has erroneously included electricity procured through banking (banked energy) for the purposes of calculation of Average Pooled Power Purchase Cost (APPC)?

9. **DISPOSAL OF THE ISSUE RELATING TO INCLUSION OF BANKED ENERGY FOR CALCULATION OF APPC**

9.1. Following contentions have been raised on behalf of the appellant:-

9.2. that the CERC (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable energy Generation) Regulations, 2010 clearly specify for calculation of pooled cost of power while considering following integral components:-

- a. weighted average pooled price;
- b. distribution licensee has purchased electricity;
- c. the period under consideration is the previous year;
- d. energy procured from renewable energy sources to be excluded.

9.3. that in the present case, however, the State Commission has ignored the first two components of the calculation and also erred in ignoring the fact that banking of energy does not involve any purchase of electricity. It is a cashless transaction and is a facility available to respondent

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no.2/distribution licensee for storing energy with other discoms for subsequent consumption. Further, by assuming the price of such inward/forward banking energy as zero, the State Commission has infact led to determination of a lower APPC, prejudicially affecting the members of the appellatant association.

9.4. that the State Commission has erroneously passed the impugned order in violation of the objects and purposes of the CERC (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable energy Generation) Regulations, 2010. The Statement of objects and Reasons of the said Regulations clearly provides that the price of electricity component of renewable energy generation would be equivalent to the APPC of the distribution licensee. Further, the floor price and forbearance price have also been computed with reference to the APPC. The stated objective of the floor price is to ensure that the minimum viability requirements for the renewable energy projects can be achieved if the electricity component is sold at a price equivalent to APPC. Sale of electricity component at a price below the APPC could leave viability gap and eventually lead to fixation of higher floor price of REC for sale in the power exchanges.

9.5. that the clear intent behind determination of APPC under the CERC (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 was to ensure that the renewable energy projects remain viable. Sale of electricity by the renewable energy generator at APPC to the distribution license was meant to ensure that the minimum viability requirements of the project are met.

9.6. that the State Commission, by including the banked energy in calculation of APPC, has infact led to determination of a lower APPC, in contravention of the provisions of the CERC Regulations. The delicate balance between the commercial viability of a renewable energy project

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and the distribution licensee's appetite to purchase expensive renewable energy has not been maintained in the impugned order.

9.7. that the object behind the CERC (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 was to ensure that sale of electricity at a price not exceeding the APPC ensures project viability of renewable generators and the eligibility to participate in the Renewable Energy Certificate Scheme incentivizes addition of renewable energy sources in the country. However, by the impugned order, the State Commission has determined an incorrect and lower APPC, threatening the viability of renewable energy projects in the State. Further, absence of checks and audits by the State Electricity Regulatory Commissions across the country regarding compliance of the renewable purchase obligations by the "obligated entities" is threatening the entire REC scheme. This double whammy is prejudicially affecting the survival of renewable energy generators in the State

9.8. that the State Commission in its order dated 24.04.2012 has acknowledged that banking arrangements involve Power Grid cost and open access costs etc. The State Commission ought to have either considered the cost of the banked power or should have excluded the entire quantum of banked power from the calculation of pooled power purchase cost.

9.9. that different methodologies are being adopted by the State Commissions across the country for calculation of APPC.

9.10. that the respondent no.2-distribution licensee recognized energy sent out to States under banking arrangement as revenue from sale of power in its P&L statement. Therefore, methodology of assigning price to energy sent out under banking arrangement exists with HPSEBL. However, revenue from supply of power under banking arrangement is not claimed as revenue for the purpose of ARR calculations. Further, HPSEBL recognized energy received from various States under banking arrangement as expense owing

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to purchase of power in the P&L statement implying thereby that methodology of assigning cost to energy received under banking arrangement exists with HPSEBL. However, cost of power purchase under banking arrangement is not accounted for the purpose of ARR calculations. Further, the clause pertaining to settlement rate says that *banking arrangement shall be on purely energy to energy transaction basis and shall be considered as cashless transaction. However, any unadjusted quantum by the end of banking cycle shall be settled @ Rs 5.25 per kWh*, implies that methodology of assigning cost to energy received under banking arrangement exists with HPSEBL. Thus, APPC ought to have been calculated by including such costs of banking or by excluding banked power entirely.

9.11. that the principles of *res judicata* are not applicable to the present case because APPC is determined each year by the State Commission and the appellant is at liberty to challenge such determination for any year. The appellant had raised objections before the State Commission categorically pleading that banked energy ought not to be included in the calculation of APPC. The appellant association's case before the State Commission and before this Appellate Tribunal is that inclusion of banked energy in the calculation of APPC leads to an artificially reduced APPC.

10. Per contra learned counsel for the respondent no.2 has made the following submissions:-

10.1. Banking is divided into three major categories, namely,

- (a) Contra banking wherein the electricity supplied under the banking arrangement is also received within the same year;
- (b) Forward banking wherein certain quantum of energy is procured from a third party entity during the year which is to be returned by the HPSEBL in a subsequent year; and
- (c) Return banking wherein certain quantum of electricity supplied by the HPSEBL during the year which will be received back in a subsequent year.

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10.2. For the purposes of calculation of the APPC, the State Commission had passed the order dated 16.07.2012 applicable for the year 2012-13 wherein the State Commission examined the aspect of treatment of energy available under banking facility for the purposes of calculation of APPC. The State Commission had in the order dated 16.07.2012 followed the following principle with regard to banked energy:-

- (a) Only the purchase of electricity is relevant for the purposes of calculation of APPC and the disposal/utilization of electricity is not relevant.
- (b) All electricity purchased from generating companies is taken towards the power purchase cost of HPSEBL irrespective of whether such quantum of electricity is used for distribution to the consumers at large or sold to other states for the purposes of banking.
- (c) In case of contra-banking, since the quantum received is during the same year and the purchase of electricity for supply to other states is already included in the power purchase cost, the banking quantum received is not included for the purposes of APPC.

10.3. The State Commission in the order dated 16.07.2012 held as under:

"13. Total power purchased is disposed off/utilized by way of sale, within and outside State and by way of banking. Power purchase only is relevant for APPC and disposal/utilization of power is not relevant to the context of determination of APPC. Banking has three components i.e. (i) certain quantum of energy out of total purchases is banked during the year and the same quantum is received back during the same year is called contra banking; (ii) certain quantum of energy is borrowed from other discoms during the year which is to be returned in the subsequent year is known as forward banking under purchase category and (iii) quantum sold during the year under forward banking will be received back in the next financial year is called return banking under purchase category.

Where the outward banking (banking sale) is from out of power purchased during the year from energy supplier (long term and short term), its cost is already paid. Therefore, if the same quantum is received as inward banking (contra banking purchase), such quantum and price should not be included over and above the quantum or price already taken into account, out of which such power has been banked. The above figures

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indicate that out of the total inward banking (banking purchase) of 739.43 MU, only 570.76 MU is contra banking for 2011-12. It is true that Commission had taken cost of banking power, whether purchase or sale, as zero because in the absence of firm cost of such power any notional cost leads to distorted results in profit/loss in the balance sheet. It is also true that banking arrangement as a practice in the State is rolling arrangement involving contra, forward and return banking which is with various discoms in the region. For the purpose of APPC only the weighted pooled price of previous year is required to be taken into account, therefore, the Commission is of the view that against the total banking purchase of 739.43 MU, only 570.76 MU is contra and this quantum shall not be counted in the total power purchase quantum during the year. However, 168.67 MU has been received as inward banking during the year over and above quantum taken into account as purchased from the energy supplier, therefore, this is an additional power purchase. Since there is no criteria for determination of rate and as a prudent practice the Commission had taken such banking sale and purchase at zero cost, this quantum of energy shall be treated as additional purchase at zero cost."

10.4. that the State Commission's order dated 16.07.2012 had become final and binding. The State Commission, in the impugned order, has followed exactly the same methodology as adopted in its earlier order dated 16.07.2012.

10.5. that the HPSEBL has sought for a change in the methodology followed by the State Commission by including the contra-banking also in the power purchase quantum. The appellant before the State Commission had only objected to the change in the methodology proposed by HPSEBL and main objection raised was that there was double counting of the quantum of electricity in the new methodology proposed by HPSEBL. There was no issue raised whatsoever on the existing methodology being erroneous, which is now sought to be raised in the present appeal.

10.6. that the State Commission has in the impugned order rejected the change in the methodology proposed by HPSEBL and it has strictly followed the same methodology which was followed in the order dated 16.07.2012.

10.7. that the purchase of electricity by HPSEBL is fully accounted for in the APPC. The electricity received through banking transactions is to be returned by HPSEBL by purchase in the subsequent year. Such purchase of electricity is

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counted towards the APPC of HPSEBL. If value is given to the electricity received through banking also, it would amount to double counting of electricity whereas the consumers get the benefit of electricity only once.

10.8. that the appellant has not found any fault with the principle followed by the State Commission, namely, to include in the APPC the electricity purchased by the HPSEBL in the year of purchase and to take the cost in the year of electricity received through banking at zero cost. Unless, there is fundamental flaw in the methodology followed, the same ought not to be interfered with.

10.9. that the appellant's contention that the quantum of electricity received ought not to be considered by the State Commission for the purposes of calculation of APPC, is misconceived. For calculation of APPC, the State Commission is required to include all sources of power as is available with HPSEBL. The APPC is only a derivative figure and normally the same methodology adopted for approval of the Annual Revenue Requirements and the power purchase cost of HPSEBL needs to be adopted. However, in the present case, the State Commission has already given the substantial benefit to the Appellant Association by not considering contra banking or return banking for the purposes of APPC.

10.10. that the contention, that banking amounts to the storage of electricity and cannot be treated as a source of power purchase as stated, is also misconceived. As in the present case, the electricity is actually available to HPSEBL during a financial year when HPSEBL requires the electricity. The said electricity has been accounted for and has been supplied to the consumers in the State of Himachal Pradesh. It cannot be that the said quantum of electricity is actually procured, accounted for and supplied to the consumers but the same ought not to be taken for calculating the total quantum of electricity that is available with HPSEBL during the year only for the purposes of calculation of the APPC. The only aspect is with regard to the cost of the electricity. Since there can be no notional cost attributed to such banked electricity and the cost, if any, is to be included in the total power purchase cost of HPSEBL when the corresponding electricity is supplied

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to the third party, the State Commission has correctly taken the price of the banked energy as available with HPSEBL at zero cost.

10.11. that the methodology followed has in the facts of the past year or two resulted in reduction of APPC as there has been a roll-over of banked energy is not correct. The banking is a continuous transaction. The principle of banking of energy is that the electricity received is to be returned. Whether in a year or two, there is a roll-over of banked energy is irrelevant to consider the principle to be followed. It could also be that more electricity is purchased for banking as compared to the quantum received. Even when banked energy is rolled over, its return is only postponed. It is not that electricity is not to be received. On the other hand, the quantum of electricity to be returned would only increase in the subsequent years in future to compensate for the roll over and thereby increase the APPC substantially.

10.12. Further, the contention that the practices adopted in some of the other States are different, is no reason for setting aside the methodology followed by the State Commission. So long there is no perversity in the methodology followed by the State Commission, there is no ground for setting aside the same merely because there is a different methodology followed in other States.

10.13. In any event, the actual quantum in a year or two cannot be considered or be a reason to set aside the principle, when the principle as such is correct and fair.

11. The main grievance of the appellant Power Producers Association in this appeal is that the learned State Commission ought not to have included electricity procured through banking (banked energy) for the purposes of calculation of Average Pooled Power Purchase Cost (APPC) because such inclusion results into artificially reduced APPC. The distribution licensee/HPSEBL has tied up for purchase of electricity from various sources to meet the demand of the consumers in the State of Himachal Pradesh. The tie-up is on capacity basis, however, there are variations in the quantum available to distribution licensee and the demand in

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the State, which may be higher or lower. For this purpose, one of the methodologies adopted by the distribution licensees is banking of energy. The electricity is banked by distribution licensee, namely, HPSEBL with other entities and distribution licensees in the country by supplying electricity during surplus period and correspondingly procured electricity from such entities during deficit period of the distribution licensee. In other words, as and when electricity is available at surplus with distribution licensee, the same is supplied to other entities with an agreement for such entity to supply equivalent quantum of electricity when electricity is in deficit for the distribution licensee/HPSEBL.

12. We may clarify that the State Commission has passed the impugned order while determining the APPC for FY 2013-14 under the Renewable Energy Certificate (REC) mechanism as provided under Regulation 5(1) of the CERC (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 which provides that a Generating Company engaged in generation of electricity from renewable energy sources shall be eligible to apply for registration for issuance of and dealing in certificates if it fulfills, inter alia, the following conditions:

It sells the electricity generated either (i) to the distribution licensee of the area in which the eligible entity is located, at a price not exceeding the pooled cost of power purchase of such distribution licensee, or (ii) to any other licensee or to an open access consumer at a mutually agreed price, or through power exchange at market determined price.

The explanation to this Regulation 5(1) further provides that 'Pooled Cost of Purchase' means the weighted average pooled price at which the distribution licensee has purchased the electricity including cost of self generation, if any, in the previous year from all the energy suppliers long-term and short-term, but excluding those based on renewable energy sources

13. In the instant case, the distribution licensee, HPSEBL, filed the impugned petition before the State Commission to review the methodology for determination of the APPC rates for the current and ensuing years and approval of the APPC rates for FY 2013-14 making prayer in the said petition for inclusion of the banking sale in calculation of the APPC.

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14. The definition of APPC under the aforesaid Regulation 5 of the CERC, 2010 Regulations provides that purchase of electricity should be from all energy suppliers short term and long term and includes all generations but excluding renewable sources. According to the distribution licensee, since the sale component has no impact on the determination of APPC, it should be kept out of purview of determination of APPC even if it is banking sale. The distribution licensee has sought for a change in the methodology followed by the State Commission by including the contra-banking and return banking also in the power purchase quantum. The only objection to the said sought change in the methodology proposed by the distribution licensee before the State Commission, raised by the appellant was that there would be double accounting of the quantum of electricity in the new methodology proposed by the distribution licensee. The learned State Commission has in the impugned order rejected the change in the methodology proposed by the distribution licensee-respondent no.2 and the State Commission even in the impugned order has strictly followed the same methodology which was followed by the Commission in its earlier order dated 16.07.2012 whereby the APPC had been determined applicable for 2012-13. Thus, the distribution licensee sought for inclusion of contra banking and return banking along with inward/forward banking (considered by the State Commission for calculation of APPC in the previous year FY 2013). By the impugned order, the said prayer of the distribution licensee-respondent no.2 has been rejected, citing the guidelines and reasons recorded in its earlier order dated 16.07.2012 by which the calculation of APPC applicable for year 2012-13 was made.

15. We may further make it clear that the distribution licensee - respondent no.2 has sought a change in the methodology by filing the impugned petition praying for including the contra banking and return banking also in the power purchase quantum which has not been accepted by the State Commission in the impugned order. The learned counsel for the appellant has vehemently contended that the State Commission, by including the banked energy in calculation of APPC, has infact led to determination of a lower APPC, which is in contravention of the provisions of CERC Regulations, 2010. The delicate balance between the

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commercial viability of a renewable energy project and the distribution licensee's appetite to purchase expensive renewable energy has not been maintained in the impugned order. Further emphasis of the learned counsel for the appellant is that the distribution licensee recognized the energy sent out to States under banking arrangement as revenue from sale of power in its P & L statement. Therefore, methodology of assigning price to energy sent out under banking arrangement exists with the distribution licensee. However, revenue from supply of power under banking arrangement is not claimed as revenue for the purpose of ARR calculations. However, the distribution licensee recognized energy received from various States under banking arrangement as expense owing to purchase of power in the P&L statement, implying thereby that methodology of assigning cost to energy received under banking arrangement exists with distribution licensee. However, cost of power purchase under banking arrangement is not accounted for the purpose of ARR calculations. Thus, APPC ought to have been calculated by including such cost of banking or by excluding banked power entirely.

16. On consideration of the aforesaid contention of the appellant, we are unable to accept the said contention because the learned State Commission, for the purposes of calculation of APPC, applicable for the year 2012-13, had passed the order dated 16.07.2012 after examining the various aspects of the treatment of energy available under banking facility for the purpose of calculation of APPC. Certain principles with regard to the banked energy were considered by the State Commission in its detailed and well reasoned order dated 16.07.2012 and we do not think it proper to reiterate the same just to increase the volume of this judgment. The State Commission's order dated 16.07.2012 had become final and binding on all concerned and the State Commission even in the impugned order has followed exactly the same methodology as adopted in its earlier order dated 16.07.2012 to which we fully agree in letter and spirit.

17. We may further note that the purchase of electricity by the distribution licensee is fully accounted for in the APPC. The electricity received through banking transactions is to be returned by the distribution licensee by purchase in the subsequent year. Such purchase of electricity is accounted towards the APPC

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of the distribution licensee. If value is given to the electricity received through banking also, it would amount to double counting of electricity whereas the consumers get the benefit of electricity only once.

18. We do not find any fault with the principle adopted by the State Commission in the impugned order, namely, to include in the APPC the electricity purchase by the distribution licensee/HPSEBL in the year of purchase and to take the cost in the year of electricity received through banking at zero cost. Since there is no fundamental flaw in the methodology followed by the State Commission, we do not find any sufficient reason to interfere therewith.

19. We are unable to accept the appellant's contention that the quantum of electricity received ought not to be considered by the State Commission for the purpose of calculation of APPC. The State Commission is required to include all sources of power as available with the distribution licensee. The APPC is only a derivative figure and normally the same methodology adopted for approval of the Annual Revenue Requirements and the power purchase cost of distribution licensee needs to be adopted. We may further note that in the present case, the State Commission has already given substantial benefit to the Appellant Association by not considering the contra banking or return banking for the purpose of determination of APPC. The appellant's contention that banking amounts to storage of electricity and the same cannot be treated as a source of power purchase is also mis-conceived. In the present case, the electricity is actually available to distribution licensee during financial year when it requires the electricity. The said electricity has been accounted for and has been supplied to the consumers but the same ought not to be taken for calculating the total quantum of electricity available with the distribution licensee during the year only for the purposes of calculation of APPC. We may further observe that there can be no notional cost attributed to such banked energy and the cost, if any, has to be included in the total power purchase cost of the distribution licensee when the corresponding electricity is supplied to the third party. In our view, the State Commission has correctly taken the price of the banked energy as available with the distribution licensee/HPSEBL at a zero cost. The banking is a continuous

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transaction. The principle of banking of energy is that the electricity received by the distribution licensee is to be returned. When the banked energy is rolled over, its return is only postponed. It is not that electricity is not to be received. The quantum of electricity to be returned would only increase in the subsequent years in future to compensate for the roll over and thereby increase the APPC substantially.

20. In view of the above discussion, we do not find any merits in the submissions or contentions of the Appellant Association. We approve the reasonings and findings recorded in the impugned order by the State Commission. Findings are based on legal, just and proper analysis of the material and evidence on record. This issue is decided against the appellant and the instant appeal is liable to be dismissed.

21. SUMMARY OF FINDINGS

The learned State Commission has legally and correctly included electricity procured through banking (banked energy) for the purposes of calculation of Average Pooled Power Purchase Cost (APPC) applicable for the year 2013-14. Thus, the contention of the appellant Power Producers Association that the energy procured from banking sources ought not to be included in the determination of Average Pooled Power Purchase Cost (APPC) cannot be accepted though it is lucrative one. Merely because such inclusion results in artificial reduction of APPC, as pleaded by the appellant, the said contention cannot be legally accepted. Electricity is banked by the distribution licensee with other entities and the distribution licensees in the country by supplying electricity during surplus period and correspondingly procured electricity from such entities during deficit period of the distribution licensee. In other words, as and when electricity is available at surplus with the distribution licensee like HPSEBL in the present case, the same is supplied to other entities with an agreement for such entity to supply equivalent quantum of electricity when electricity is in deficit for the distribution licensee like HPSEBL. We approve the methodology adopted by the learned State

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Commission to include electricity procured through banking (banked energy) for the purposes of calculation of Average Pooled Power Purchase Cost (APPC).

22. In view of the above discussions, the instant appeal is dismissed and the impugned order dated 22.06.2013 is hereby affirmed. No order as to costs.

Pronounced in open Court on this 1st day of July, 2014.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

√ **REPORTABLE/NON-REPORTABLE**
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