

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated:12th Nov, 2014

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

APPEAL NO.30 OF 2014

In the Matter of:

M/s. Everest Power Pvt Ltd
Ground Floor,
145-146 Udyog Vihar
Phase-IV, Gurgaon-122 015
Haryana

..... Appellant

Versus

- 1. Punjab Electricity Regulatory Commission**
SCO 220-221, Sector-34-A,
Chandigarh-160 022 (India)
- 2. Punjab State Power Corporation Ltd**
The Mall, Patiala
PIN-147 001
Punjab
- 3. PTC India Ltd.,**
2nd Floor, NBCC Tower,
15th Bhikaji Cama Place,
New Delhi-110 066

...Respondent(s)

Counsel for the Appellant(s) : Mr. Tarun Johri

Counsel for the Respondent(s): Mr. Varun Pathak
Mr. Raheel Kohli for R-3
Mr. Sanjay Sen, Sr Adv.
Mr. Matrugupta Mishra
Ms. Ruth Elwin
Ms. Shikha Ohri for R-1
Mr. Anand K Ganesan
Ms. Swapna Seshadri
Ms. Mandakini Ghosh for R-2

APPEAL NO.35 OF 2014

In the Matter of:

**Punjab State Power Corporation Limited
The Mall,
Patiala-147 001**

..... Appellant

Versus

- 1. Everest Power Private Limited
Ground Floor, 145-146,
Udyog Vihar, Phase IV,
Gurgaon-122 015**
- 2. PTC India Limited
2nd Floor, NBCC Tower,
15, Bhikaji Cama Place,
New Delhi-110 066**

**3. Punjab State Electricity Regulatory Commission
SCO No.220-221, Sector-34-A,
Chandigarh-160022**

...Respondent(s)

Counsel for the Appellant(s) : Mr. Anand K Ganesan
Ms. Swapna Seshadri
Ms. Mandakini Ghosh

Counsel for the Respondent(s): Mr.Varun Pathak
Mr. Raheel Kohli for R-2
Mr. Tarun Johri for R-1
Mr. Sanjay Sen, Sr Adv
Ms. Shikha Ohri
Ms. Ruth Elwin
Mr. Matrugupta Mishra for R-3

J U D G M E N T

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

- 1. M/s. Everest Power Private Limited (Everest Power) is the Appellant in Appeal No.30 of 2014 and Punjab State Power Corporation Limited (Punjab Power) is the Appellant in Appeal No.35 of 2014.**

2. Both the parties namely Everest Power and Punjab Power have filed these two Appeals as against the common Order dated 27.11.2013.
3. Aggrieved over the respective portion of the Impugned Order dated 27.11.2013, passed by the Punjab State Commission, both the parties have filed these Appeals. Hence, this common judgment is being rendered.
4. The common facts which have been referred to in both the Appeals are as follows:
 - (1) M/s. Everest Power is the Generating Company. It has developed 100 MW Malana-II Hydro Electric Project in District Kullu in the State of Himachal Pradesh.
 - (2) M/s. Punjab State Power Corporation (Punjab Power) is the successor Company of the erstwhile Punjab State Electricity Board. It is entrusted with the responsibility of the generation and distribution of power in the State of Punjab.
 - (3) M/s. PTC India Limited (one of the Respondents in these Appeals) is a Trading Licensee and has been

granted inter State Trading licence in electricity by the Central Commission.

(4) M/s. Everest Power Private Limited (Everest Power) entered into a Power Purchase Agreement dated 25.7.2005 with the PTC for sale of entire capacity of electricity generated by the project.

(5) After execution of the said Power Purchase Agreement, PTC subsequently entered into a Power Sale Agreement with Punjab Power on 23.3.2006 for sale of the entire electricity generated by the project of the Everest Power. The Power Sale Agreement envisages determination of tariff by the Appropriate Commission based on the completed cost of the project.

(6) The predecessor of the Punjab Power namely Electricity Board filed a Petition before the Punjab State Commission for approval of the PSA dated 23.3.2006 signed between the State Electricity Board and the PTC for purchase of power from the project of the Everest Power and determination of tariff and related matters. Accordingly, the State Commission by the Order dated 24.1.2007 granted conditional

approval to the said PSA holding that as and when tariff is determined by the appropriate Commission such tariff or capped tariff discussed in the Order whichever was lower, shall be applicable.

(7) The State Commission further directed that any changes if required to be made at a later stage in respect of approvals granted by the Commission in the order dated 24.1.2007, shall be subject to the prior approval of the State Commission.

(8) The project achieved Commercial Operation on 12.7.2012.

(9) In the mean time, the PTC filed a Petition before the State Commission under Punjab State Conduct of Business Regulations, 2005 for approval to allow the Punjab Power to purchase electricity in accordance with the tariff calculated as per Central Commission Tariff Regulations, 2009. This Petition was disposed of by the State Commission by the Order dated 17.8.2012.

(10) In this order, the State Commission examined the issues including the Maintainability of the Petition

before the State Commission, capping of tariff and determination of tariff and status of PSA dated 23.3.2006 in respect of which conditional approval was accorded through the Order dated 24.1.2007 passed by the State Commission.

(11) In this order dated 17.8.2012, the State Commission directed the parties to get the PSA suitably amended and incorporate the directions of the State Commission issued in the Order dated 24.1.2007 and thereafter they may file an Application for determination of tariff along with the Audited accounts of the project cost and other relevant documents.

(12) Pursuant to the above said order dated 17.8.2012, the PTC communicated to the Punjab Power its willingness to make suitable amendments as directed by the State Commission.

(13) On receipt of the letter, the Punjab Power requested the PTC through the letter dated 29.8.2012 to submit the amended draft of the PSA. Accordingly, the PTC had submitted the proposed amendments through the letter dated 21.9.2012. The Punjab Power accepted all the amendments except the one

relating to the determination of the tariff as per Clause 10.1 of the PSA.

(14) In view of the above, the PTC filed a Petition for Review of the Order dated 17.8.2012 praying for a modification of the directions thereby holding that the Clauses relating to tariff in the PSA may not be amended as a pre condition for filing of the determination of tariff Petition.

(15) In fact, in this Petition both the parties filed joint written submissions seeking the same prayer.

(16) The State Commission disposed of the said Review Petition by the Order dated 6.11.2012 by modifying the last part of the Order dated 17.8.2012 by directing the parties to suitably amend the PSA and incorporate the directions issued in 24.1.2007 order except in respect of the condition relating to Article 10.1 of the PSA.

(17) Thereupon, the Tripartite Agreement was executed by the Everest Power, the Punjab Power and PTC on 3.1.2013 in compliance with the order of the State Commission dated 6.11.2012.

(18) At this stage, the Everest Power filed an Interlocutory Application for grant and fixing of provisional tariff.

(19) On 17.1.2013, the State Commission decided the said Interlocutory Application for fixing of interim provisional tariff fixing as Rs.3.58 per unit to be paid by the Punjab Power to the Generating Company, the Everest Power pending the final determination of tariff by the State Commission.

(20) In the said Petition the Everest Power filed another IA on 11.2.2013 under section 142 of the Electricity Act and the State Commission's Conduct of Business Regulations, 2005 for taking action against the Punjab Power for breach of the Interim Order dated 17.1.2013 for non payment of the provisional tariff granting pending disposal of the tariff Petition.

(21) Ultimately, the State Commission passed the Impugned Order dated 27.11.2013 and disposed of the tariff petition filed by the Everest Power and determined the tariff fixed as provisional tariff applicable for supply of electricity by Everest Power to the Punjab Power.

(22) In this Impugned Order dated 27.11.2013, the State Commission has come to the conclusion that the capped tariff is not applicable.

(23) Aggrieved by the disallowance of the various issues while determining the tariff in the Impugned Order, the Everest Power has filed the Appeal No.30 of 2014.

(24) Challenging the finding rendered by the State Commission in the Impugned Order dated 27.11.2013 holding that the capped tariff is not applicable, the Punjab Power has filed this Appeal No.35 of 2014.

5. The crux of the arguments made by the learned Counsel for the Everest Power in Appeal No.30 of 2014 are as follows:

(1) The State Commission has committed wrong in holding that the tariff of the project should be determined only as per the State Commission's Regulations which is the State Commission (Terms and Conditions for Determination of Tariff) Regulations, 2005 and not as per the Central Commission (Terms and Conditions of Tariff) Regulations, 2009. In fact, in the Tripartite Agreement, the parties have agreed that the tariff

should be determined as per the Central Commission's Regulations.

(2) The State Commission has erred in not considering the fact that evacuation scheme for the project got changed due to change in law after execution of the PPA and PSA. In addition to that, the State Commission has failed to take into consideration the judgment of this Tribunal dated 2.1.2013 in Appeal No.81 of 2011. This Tribunal in this judgment has held that earlier it was planned that both M/s.ADHPL and Everest Power would construct their respective dedicated line to Parbati Pooling Point. The Everest Power also got Long Term Open Access for supply to Punjab State Electricity Board. However, due to delay in execution of the Parbati Pooling Point, changes were made with regard to the point of injection. As such, the change in evacuation system was not at the volition of the Everest Power, the State Commission should have considered the change in law and should have consequently allowed transmission charges billed to the EPPL by M/s. ADHPL to be reimbursed by the Punjab Power.

- (3) The State Commission erred in creating a legal fiction of existence of Banala Delivery Point though physically such Delivery Point is targeted for completion only in April, 2016 as stated in the Impugned Order.
- (4) The State Commission has committed wrong in not holding minimum lean season discharge as mandated by the Ministry of Environment & Forests as 'Change in Law' under PPA/PSA.
- (5) The State Commission ought not to have disallowed the additional 1% free power which has not only been mandated by the Hydro Power Policy, 2008 of Government of India but also by the Notification of the Government of Himachal Pradesh dated 5.10.2011.
- (6) The State Commission ought to have allowed contribution of 1.5% of the Project Cost towards Local Area Development Fund (LADF) under 'Change in Law'.
- (7) The State Commission should have allowed the claim of Everest Power for interest during

construction on equity in excess of 30%. Similarly, it must have allowed the amount towards the interest on UI receivables as 'other income' from AFC.

(8) The State Commission has committed wrong in considering the project cost under 'Techno-Economic Clearance' (TEC) as the base cost for calculating O&M expenses thereby wrongly interpreting the Central Commission's Regulations, 2009 under which the 'Original Project Cost' is the cost as admitted by the Commission.

(9) The State Commission should have allowed FD income as 'income from investment' as part of AFC of 2012-13. It should have also allowed interest on loan considering the actual year wise loan repayment.

(10) The State Commission erred in fixing the rate of secondary energy at the rate of 75 paise/kWh though as per the Central Commission's Tariff Regulations, 2009 which the State Commission has applied for determination of rate of Secondary Energy, the Secondary Energy should be paid at the rate of 80 paise/kWh.

6. On these grounds, the Appellant in Appeal No.30 of 2014 prayed for setting aside the Impugned Order in respect of the issues raised in this Appeal and for passing consequential orders.
7. Similarly, the gist of the arguments advanced by the Punjab State Power in Appeal No.35 of 2014 is as follows:
 - (1) The State Commission has determined the tariff contrary to the terms and conditions contained in the Order dated 24.1.2007 passed by the State Commission. This order dated 24.1.2007 has been passed in exercise of statutory powers of the State Commission u/s 86 (1) (b) of the Act to approve the power purchase of Punjab Power from Everest Power.
 - (2) The Order dated 24.1.2007 passed by the State Commission in fact, approves the power purchase with a specific condition that the tariff determined by the appropriate Commission or the capped tariff i.e. Rs.2.64 Paise per kWh, whichever is lower, would be applicable. This order has been completely ignored by the State Commission.

- (3) In terms of the above order dated 24.1.2007, the tariff was to be determined by the appropriate Commission without referring to the capping provisions. Once the tariff is determined if the same is higher than the capped tariff, the capped tariff alone would be applicable.
- (4) The Order dated 24.1.2007 passed by the State Commission had become final and binding including on the State Commission itself. It was not open to the State Commission to nullify the said order dated 24.1.2007 in collateral proceedings. As a matter of fact, the order dated 24.1.2007 has been virtually set aside in collateral proceedings to the prejudice of the Punjab Power and the consumers at large.
- (5) The State Commission by the subsequent order dated 17.8.2012 reiterated that the Order dated 24.1.2007 had attained finality. Therefore, the said Order could not be varied or set aside in collateral proceedings. The State Commission has actually ignored the rights and obligations of the parties under the PPA and PSA.

- (6) In pursuance of the Order passed by the State Commission on 6.11.2012, the Tripartite agreement was entered into between the Punjab Power and Everest Power and PTC on 3.1.2013. This Agreement provided that the tariff would be as determined by the State Commission. This order is against the earlier orders which provided the tariff would be determined by the appropriate Commission.
- (7) There is no provision in the Tripartite agreement that the capping would be removed. Only Article 10.1 of the PSA was replaced by the tripartite agreement. No other clause including the basic provisions of the capping and schedule "E" of the PPA was agreed to be amended by all the parties. After capping was to be removed, the simple Clause would have been that all the provisions of the capping in the PPA and PSA would be removed.
- (8) All obligations in regard to site and geological risks was that of Everest Power as per the PPA and Everest Power is not entitled to additional cost incurred due to geological surprises encountered during the execution of the project.

- (9) The interest rates as claimed by Everest Power are excessive and have been allowed by the State Commission without proper prudence check.
8. Let us first deal with the issues raised by Punjab Power in Appeal No.35 of 2014 in which main issue has been raised relating to capping provisions.
9. On this point, the State Commission has rendered the following findings:

“9. Interlocutory Application dated 11.02.2013

The petitioner filed another IA dated 11.02.2013 in this petition under Section 142 of the Act read with applicable regulations of Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 for taking penal or other appropriate legal action against PSPCL for wilful violation and breach of the Interim Order dated 17.01.2013 by wrongly interpreting the said Order and for non-payment of interim / provisional tariff granted pending disposal of the Tariff Petition, for payment of pending bills and to continue to pay the bills for supply of power. It was further prayed in the IA to direct PSPCL to pay such interim tariff with surcharge based on the normative date of billing as per PPA / PSA which is 5th of next month for each month at the interim tariff along with refund of the wrongly deducted rebate and in future without deducting the rebate, pending determination of the final tariff by the Commission. The Commission vide Order dated

13.02.2013 on the prayer of the parties allowed time up to 19.02.2013 to sort out the issues mutually and directed the respondents to file reply by 19.02.2013. PTC filed its reply on 26.02.2013. During hearing on 26.02.2013, PSPCL again reiterated that no clear cut orders have been issued at any time by this Commission to the effect that capped tariff shall have no application and only the tariff fixed by this Commission shall be payable. The Commission vide its Order dated 27.02.2013 observed that this Commission had passed a Order dated 17.08.2012 in Petition No.34 of 2011 and it was observed on page 39 of *ibid* Order that:

“It is necessary to bear in mind that for determination of tariff the Commission is guided by the statute and the regulations and not so much by the Contract between the parties. In this context, the terms of the PSA including those relating to capping etc. will not come in the way of the Commission’s exercise of jurisdiction for determination of tariff”.

Subsequently petition No.55 was filed by PTC for reviewing Order dated 17.08.2012 to modify / alter / review the direction given in the last para of the said Order. The parties filed an agreed written submissions dated 06.11.2012 and in view of these agreed written submissions last para of Order dated 17.08.2012 was modified as under:-

“In view of the above findings and decisions of the Commission, respondent No.1 and petitioner need to get PSA suitably amended and incorporate the directions of the Commission

issued vide its Order dated 24.01.2007 except in respect of condition no.10.1 related to tariff of the electricity generated by 100 MW Malana-II HEP of EPPL which shall now be amended to incorporate in the Power Sale Agreement as under:-

‘The tariff of the Project would be such as would be determined by the Punjab State Electricity Regulatory Commission.’

In pursuance to above Order dated 06.11.2012, the parties signed a Tripartite Agreement on 3rd day of January, 2013 and article 10.1 of the PSA was substituted as under:-

“The tariff for the contracted capacity payable by PSPCL to PTC including all aspects of the tariff element would be determined by the Commission and also trading margin and other charges payable additionally to PTC shall be as per the decision and approval of the Commission”.

This Commission also passed an Order dated 17.01.2013 in the Interlocutory Application filed in Petition No.54 of 2012 under Section 94 (2) of the Electricity Act, 2003 for grant of interim / provisional tariff. The interim / provisional tariff has been worked out as 358 paise per kwh by the Commission whereas the capped tariff for first 5 years from COD had been fixed at ₹ 2.64 / kWh. The last part of para (4) on page 8 of this Order is as under:-

“Accordingly, to ensure that this Project does not become a NPA, the Commission directs respondent No.1 to forthwith make payment of

the pending bills at the aforesaid tariff and also continue to make payment(s) at the same rate for the electricity supplied / to be supplied and billed by respondent No.2 as an interim measure, till the disposal of the petition, subject to final adjustments”.

From the conjoint reading of above Orders of the Commission, it is concluded that capped fixed tariff shall have no application / relevance henceforth and the tariff as determined by the Commission shall be payable by PSPCL to PTC for the electricity supplied. This applies in case of interim / provisional tariff also. To remove any doubt, it is clarified that capped fixed tariff wherever mentioned in the PSA shall have no application whatsoever, so far as PSA dated 23.03.2006 as amended is concerned”.

10. According to the Punjab Power, the Appellant in Appeal No.35 of 2014, the State Commission did not deal with the Order dated 24.1.2007 and has not explained as to why the Order dated 24.1.2007 need not be followed and when the said order dated 24.1.2007 which was reaffirmed through the order dated 17.8.2012, is binding on all the parties including the State Commission and the same cannot be set aside in the collateral proceedings.
11. The learned Counsel for the State Commission has made elaborate submissions for justifying the said findings.

12. For deciding the said issue, it would be better to refer to the earlier order passed by the State Commission.
13. The project achieved Commercial Operation Date on 12.7.2012. In the meantime, the PTC filed a Petition before the State Commission under the relevant State Commission's Regulations and u/s 26 (i) (b) , 86 (1)(k) of the Act, 2003 for approval to allow the Punjab Power to purchase electricity in accordance with the tariff calculated as per the Central Commission's Tariff Regulations, 2009.
14. This Petition was disposed of by the State Commission by the Order dated 17.8.2012. In this order, the State Commission examined the issues including the maintainability of the Petition before the State Commission, capping of tariff and determination of tariff and also with regard to the status of the PSA dated 23.3.2006 as well as the conditional approval accorded in the Order dated 24.1.2007 passed by the State Commission.
15. In this order, the State Commission decided with regard to capping of determination of tariff and status of the PSA as follows:

“(ii) Capping & determination of tariff

‘.....that for determination of tariff the Commission is guided by the statute and the Regulations and not so much by the contract between the parties. In this context, the terms of the PSA including those relating to capping etc. will not come in the way for the Commission’s exercise of jurisdiction for determination of tariff....’

(iii) Status of PSA

‘....Further, the issue whether the PSA is void or voidable is not a matter before the Commission. The Commission is not adjudicating the interpose dispute between the parties. This not a proceeding under Section 86(1)(f) of the Act. The failure of Respondent No.1 to incorporate amendments directed by the Commission in its Order dated 24.01.2007 make the PSA non-implementable by Respondent No.1, as the inter se tariff/costs agreed thereto will not be allowed in the future ARR of the Respondent No.1.

Therefore, it is in the interest of respondent No.1 that it secures incorporation of the conditions/observations contained in the Order dated 24.01.2007. If the Respondent No.1 fails to get the Commission’s directions incorporated, given in the order dated 24.1.2007, the additional costs incurred by Respondent No.1 will not be recognized in the ARR of Respondent No.1. The Commission believes that the PSA can be cured and made fully operational by incorporating amendments directed by the Commission in its Order dated 24.01.2007. The Commission appreciates that the PSA is a contract between the Petitioner and Respondent No.1. In that contract there is an element (i.e. the tariff) that

requires determination by the Commission under the relevant provisions of the Act. The Commission has not determined the same in the past and had directed that certain amendments be incorporated in the PSA.

Therefore, it is a conditional approval of the PSA, and the approval becomes effective only when the conditions are fulfilled and the PSA can thereafter be operationalized...”

16. On the basis of these reasonings, the State Commission through the Order dated 17.8.2012 directed the parties to get the PSA suitably amended and incorporate the directions in the order dated 24.1.2007 and then to file fresh petitions along with audited accounts.
17. Pursuant to this order dated 17.8.2012, the Punjab Power requested the PTC to submit the amended draft to the PPA as per the directions of the State Commission. Accordingly, the proposed amendment was submitted by the PTC. However, Punjab Power though accepted all the amendments has not accepted the one relating to the determination of the tariff as per Clause 10.1 of the PSA. Therefore, the PTC filed a Review Petition before the Commission and during the course of the proceedings; both the parties filed joint submissions praying for the Common Relief. Accordingly, the State Commission disposed of the Review Petition by the Order dated 6.11.2012 directing that the

Petition may be filed along with audited accounts of the project cost and other relevant documents of the project for determination of the tariff.

18. In accordance with the Order, the Tripartite Agreement was executed by the Everest Power, Punjab Power and the PTC on 3.1.2013. Thereupon, the Everest Power filed a Petition before the State Commission for fixation of interim provisional tariff.
19. On 17.1.2013, the State Commission decided the said Petition. In this Order, the State Commission passed the order for grant of interim provisional tariff which has been worked out at Rs.3.58 paise per kWhr by the State Commission whereas the capped tariff for first five years from the Commercial Operation Date has been fixed as Rs.2.64 per kWh.
20. Accordingly, during the pendency of the Petition No.54 of 2012, the payments have been released at the rate of Rs.3.58 paise per unit as per interim tariff after deducting the rebate.

21. At this stage, the Everest Power filed an Application on 3.4.2013 u/s 94 (1) (f) of the Act, 2003 read with Punjab State Conduct of Business Regulations, 2005 for subsequent directions considering the order dated 17.1.2013 on the matter relating to transmission due to changed circumstances.
22. The Everest Power also filed a Petition in Petition No.259 of 2009 before the Central Commission for determination of transmission charges payable to the ADHPL.
23. Ultimately, the Central Commission in its order dated 1.6.2011 directed the payment of ADHPL transmission charges as per the Central Commission's Regulations. Against the above order, the ADHPL filed the Appeal in Appeal No.81 of 2011 before this Tribunal. During the pendency of the Appeal, this Tribunal directed payment on the basis of the audited capital cost as per the Central Commission's Regulations till final order. Ultimately, this Tribunal had rendered the judgment dated 2.1.2013 and directed the Central Commission to carry out prudence check of the ADHPL capital cost and determine the tariff as per the Central Commission's Regulations.

24. As against this judgment, the ADHPL filed a Civil Appeal in the Hon'ble Supreme Court.
25. Ultimately, the State Commission heard the arguments of the Everest Power and Punjab Power at length on 7.5.2013 on the issue of determination of transmission charges and decided through the order dated 9.5.2013 to take-up the issue along with the issue of determination of tariff from the project at the time of final disposal of the Petition filed by the Everest Power.
26. Taking into all these factual aspects, the State Commission held that capped fixed tariff as fixed on 24.1.2007 has no application.
27. Challenging this finding, the Punjab Power has argued that the Impugned Order dated 27.11.2013 in the Petition No.54 of 2012 determining the tariff required to be paid by the Punjab power to Everest Power is contrary to the Order dated 24.1.2007.
28. It was further submitted by the Punjab Power that the basic condition of the State Commission's order dated 24.1.2007 i.e. of approving the capped tariff has been nullified through the Impugned Order dated 27.11.2013.

29. We are unable to accept this argument advanced by the Punjab Power, the Appellant in Appeal No.35 of 2014 for the following reasons.
30. It is to be pointed out that the Order dated 24.1.2007 passed by the State Commission granted only conditional approval to the PSA subject to carrying out of certain amendments to PSA/PPA by Punjab Power. The said order also approved tariff credits and redemption mechanism so that the entire tariff corresponding to then appraised cost would be redeemed over the entire length of PPA/PSA.
31. It cannot be debated that any changes that are required to be made at a later stage shall be subject to the approval of the State Commission.
32. The chronological events enumerated earlier would reveal that the State Commission by the Order dated 17.8.2012 directing the parties to amend the PSA incorporating the amendments directed in the order dated 24.1.2007 and thereafter to file a tariff petition for determination of tariff before the State Commission.
33. It is also noticed that in the subsequent order passed on 6.11.2012 in the Review Petition, the State Commission

granted approval to the joint written submissions filed by both the parties after hearing them.

34. Through the said joint written submissions dated 6.11.2012 Clause 10.1 of the PSA alone was agreed to be amended namely the tariff of the project would be such as would be determined by the Punjab State Commission. The State Commission clarified through the Order dated 27.2.2013 in the following observations:

“From the conjoint reading of above orders of the Commission, it is concluded that capped fixed tariff shall have no application/relevance henceforth and the tariff as determined by the Commission shall be payable by PSPCL to PTC for the electricity supplied. This applies in case of interim/provisional tariff also. To remove any doubt, it is clarified that the capped fixed tariff wherever mentioned in the PSA shall have no application whatsoever, so far as PSA dated 23.03.2006 as amended is concerned.”

35. The said order was in fact in the form of clarifications and conclusions based upon the deliberations in the previous Petition No.34 of 2011. This order has not been appealed by any of the parties.
36. In view of the above findings given by the State Commission relating to the capping, determination was given as early as on 27.2.2013 itself through the clarifications.

37. The Punjab Power cannot contend now that the Order dated 24.1.2007 passed by the State Commission granting approval to the procurement process as the said order was not challenged and as such it has become final and binding.
38. At the risk of repetition, it is to be stated that the said order granted only conditional approval to the PSA subject to carrying out of certain amendments to the PSA/PPA by the Punjab Power.
39. The State Commission subsequently amended its order dated 24.1.2007 through the Order dated 17.8.2012 in Petition No.34 of 2012 and also by the Order dated 6.11.2012 in Review Petition No.55 of 2012.
40. Therefore, the Order dated 24.1.2007 has got to be read in the light of the amendment carried out by the parties to the PSA by joint written submissions filed by both the parties as approved by the State Commission through the Order dated 6.11.2012 and the Tripartite Agreement entered into between the parties incorporating the said order in the said agreement.
41. During the pendency of the Review Petition No.55 of 2011 filed by PTC to review the Order dated 17.8.2012, Everest

Power, Punjab Power and PTC filed a joint submission dated 6.11.2012 before the State Commission as under:

“Witten submission by M/s. PTC India Limited, M/s. PSPCL and M/s. Everest Private Limited:

1. *That in compliance with the order passed by the Hon’ble Commission in Petition No.34/2011 dated 17th August, 2012, the aforementioned parties had agreed to all the amendments in Power Sale Agreement except amendment relating to tariff.*
2. *That the parties are now agreeable in respect of the condition No.10.1 related to tariff of the electricity generated by 100 MW Malana-II HEP of EPPL and represent that the following amended provision to be incorporated in the Power Sale Agreement in place of 10.1:*

The Tariff of the Project would be such as would be determined by the Hon’ble Punjab State Electricity Regulatory Commission.”

Respectively prayed accordingly to file amended PSA.”

42. The State Commission vide its order dated 6.11.2012 in the Review Petition No.55 of 2012 considered the above joint submissions by the parties and modified its order dated 17.8.2012 as under:

“In view of the above findings and decisions of the Commission, Respondent No.1 and Petitioner need to

get PSA suitably amended and incorporate the directions of the Commission issued vide its Order dated 24.01.2007 except in respect of the condition No.10.1 related to tariff of the electricity generated by 100 MW Malana-II HEP or EPPL which shall be now amended to incorporate in the Power Sale Agreement as under:-

‘The Tariff of the Project would be such as would be determined by the Punjab State Electricity Regulatory Commission.’

Accordingly, the Petition may be filed along with audited accounts of the Project cost and other relevant documents for 100 MW Malana-II Hydro Electric Project before this Commission for determination of tariff under relevant provisions of the Act and Regulations.’

43. In compliance of the order dated 6.11.2012, the parties entered into a Tripartite Agreement dated 3.1.2013 amending Claim 10.1 of the PSA to be read as follows:

“The tariff for the contracted capacity payable by PSPCL to PTC including all aspects of tariff element would be determined by the Commission and also trading margin, and other charges payable additionally to PTC shall be as per the decision and approval of the Commission”.

44. The said amendment was also made in Clause 10.1 of the PPA on 22.2.2013 as under:

“Article 10.1 of the PPA is amended on terms of the Tripartite Agreement entered into between PSPCL, PTC and EPPL on 3rd January, 2013 and shall be read as under:

“From the Commercial Operation Date (COD) of the first Unit of the Project, the Tariff for the Contracted Capacity payable by PTC to the Company (EPPL) including all aspects of the tariff elements would be determined by the Appropriate Commission and other charges payable additionally to the Company shall be as per the decision of the Appropriate Commission. The actual payments shall be made against the monthly bills issued by the Company for each month. All Tariff payment by PTC shall be in Indian Rupees.”

45. It is argued by Shri Anand Ganesan, learned Counsel or Punjab Power that schedule E of the PPA was not amended and, therefore, the capped tariff remained valid even after the amendment of the PSA. Further, the PPA was not amended and, therefore, the capped tariff remained valid in terms of the PPA.

46. We find that Schedule E forms part of the PPA that is enclosed as an Annexure to the PSA. As per the provisions of the PPA, the Article supersedes the schedules in case of any inconsistency among them. The governing Clause of Schedule E which is Clause 10.1 under Article 10, was amended by the State Commission on the joint submissions of the parties vide order dated 6.11.2012 and subsequently vide Tripartite Agreement dated 3.1.2013 entered by the

parties in compliance of the order dated 6.11.2012. With the said amendment, the Schedule E under the PPA/PSA stands inapplicable.

47. Thus, the conjoint reading of the orders passed by the State Commission would reveal that the capped fixed tariff has no application or relevance to the present tariff as determined by the State Commission which shall be payable by the Punjab Power to PTC for the electricity supplied.
48. In view of the above discussions, the argument advanced by Punjab Power, the Appellant in appeal No.35 of 2014 with regard to capping has no merits.
49. Therefore, we do not find error or infirmity in the findings rendered in the Impugned Order on this issue.
50. The Punjab Power has submitted that all objections in regard to site and geological risk was that of the Everest Power in terms of the PPA. Thus, the State Commission ought not to have allowed additional cost incurred by Everest Power on account of geological surprises. Further, the force majeure clause of the PPA would allow an additional time and not compensation for curing the force majeure. Shri Anand Ganesan, learned Counsel for the Punjab Power has

referred to Clause 5.2, 5.11 and 11.5 of the PPA in this regard.

51. Let us examine the PPA.

52. “Capital Cost” is defined as the completed cost of the project as approved by the Appropriate Commission which shall be ceiling cost of the project for the purpose of determination of Tariff payment.

53. Article 5 relates to construction of the project. Clauses 5.2 and 5.11 are reproduced as under:

“5.2 The Site

5.2.1 The Company agrees that, before entering into this Agreement, it has had sufficient opportunity to investigate the Site and has carried out a complete investigation thereof. The Company agrees that it shall bear full responsibility for Site condition (including but not limited to its geological condition and the adequacy of the road, rail or other transportation links to the Site) and the acquisition of title to the Site, free of all encumbrances. The Company agrees that it shall not be released from any of its obligations under this Agreement or be entitled to any extension of time or financial compensation by reason of the unsuitability of the Site or the Company’s title to the Site.

5.11 Abandonment Due to Unforeseen Circumstances

5.11.1 The parties agree that during the construction of the Project, the Project/s design may be subjected to changes arising due to unforeseen and unpredictable conditions limited to geological, hydrological and hydro geological structures, ground water and geophysical configuration of the areas below the surface of the Ground and such changes may also involve additional work. If the Company determines in its sole discretion, and the same is certified by an Expert, that the construction of the project must be terminated permanently due to above mentioned conditions, the Company shall be entitled to abandon the project, provided that such abandonment occurs not later than eighteen (18) months from the date of Financial Close. In the event that the Company decides upon such abandonment, the Company shall promptly notify PTC of such decision and along with such notice, provide PTC the certification by the Expert with all supporting/relevant information. The PPA shall stand terminated upon the expiry of thirty (30) days from the receipt of such notification and documents from the Company.

5.11.2 The parties agree that if the Project is revived within eighteen (18) months of abandonment, the Company shall give a notice to PTC of such a revival within 30 days of such revival and offer the Billable Power and Billable Energy to PTC at the same terms and conditions, including but not limited to the tariff, as contained in this Agreement:

Provided that if PTC does not confirm in writing its acceptance to such notice by the Company within thirty (30)days of its receipt, the Company shall be free to sell the entire capacity and electricity from the Project to third parties:

Provided further that if PTC confirms in writing its acceptance to such notice by the Company within thirty

(30) days of its receipt, then the parties agree that this Agreement shall stand revived upon the date of PTC's acceptance (and the parties shall do such further acts as may be needed to ensure revival of this Agreement).

54. Clause 5.2 relates to responsibility of the Generating Company for site conditions and that the Generating Company would not be released from its obligation under the PPA or be entitled to any extension of time or financial compensation by reasons of unsuitability of site or company's title to the site.
55. Clause 5.11 gives right to the Generating Company to terminate the construction of project due to unforeseen and unpredictable conditions due to geological, hydrological and geophysical configuration below the surface of work. However, if the project is revived within 18 months of abandonment, the Company shall offer the energy to PTC at the same terms and conditions.
56. Clauses 5.2 and 5.11 as applicable during construction of the project relate to obligation of the developer to the Agreement and that it would not be released from its obligation due to unsuitability of the site for which it will not claim extension of time or compensation and laid conditions for abandonment of the project due to unforeseen

circumstances. These Clauses do not bar determination of capital cost of the project taking into account the increase in cost due to unforeseen geological, hydrological or geophysical conditions encountered during the construction of the project. In the present case, the developer has already developed the project and supplying power to Punjab Power and there is no applicability of Clause relating to abandonment of the project. It is also pertinent to point out that the State Commission has determined the Capital Cost of the Project for the first time in the Impugned Order and not prior to that.

57. Clause 11.1.2 defines the Force Majeure which includes any geological surprises which will not lead to abandonment under Article 5.11 and could not reasonably have been foreseen.
58. None of the above Clauses of the PPA will be of any help to Punjab Power that the capital cost of power project would not be enhanced due to unforeseen geological surprises encountered by the Generating company during the execution of the project.
59. We feel that a hydro project may experience geological surprises which could not be foreseen at the time of pre-

construction investigations and if it is established that a geological surprises could not be seen reasonably foreseen or averted within reasonable control of the project developer, then the Generating Company would be entitled to additional cost on account of such geological surprises.

60. In view of the above, we do not find any merit in the contention of the Punjab Power that Everest Power is not entitled to additional cost in determination of the completed capital cost for the purpose of tariff determination on account of geological surprises encountered during the execution of the project.
61. We find that the State Commission appointed a Consultant to vet the capital cost of the project including time and cost over run during the execution of the project 'attributable' or 'not attributable to the generating company. The Consultant after detailed examination recommended capital cost of Rs.879.17 Crores (Hard cost of Rs.647.47 Crores, Soft Cost of Rs.231.70 Crores) against the Everest Power's claim of Rs.981.92 Crores.
62. We find that after completion of project components, trial run operation commenced from 3.8.2011. During testing, leakages were observed in HRT and Pressure Shaft and the

Power Plant had to be shut down from 2.10.2011 to 11.7.2012 due to damages in components like Dam, HRT, Pressure shaft and Power House for carrying out the repairs. The Consultant came to the conclusion that the time lost in repair of damages in dam, pressure shaft and power house are attributable to Everest Power on account of inadequate safety margin in the design. However, damage to HRT on account of presence of shear zone parallel to HRT invert at shallow depth which was difficult to be identified on the basis of geological features exhibited on excavated HRT Section and therefore attributable to geological surprises. Since the time taken to repair the damages in HRT was more than the time taken to repair the damages in dam, pressure shaft and power house, the Consultant recommended IDC for the period 2.10.2011 to 11.7.2012 to be included in the Capital Cost.

63. We find that the State Commission has allowed cost and time over run due to geological surprises during construction of Dam due to actual level of foundation rock lower than the anticipatory level and geological conditions during the construction of dam, HRT, pressure shaft and power house complex were poorer as compared to what was envisaged in the DPR. The State Commission has, thus allowed

additional cost incurred for geological surprises/conditions of the project as per the recommendations of the Consultant up to the synchronization of the project. We do not find any infirmity in the same.

64. The State Commission has also analysed the cost of repairs works post synchronization damages to the components of Dam, HRT, pressure shaft and power house. The State Commission has disallowed the cost of repair of left bank protection works of dam due to cloud burst, damage to civil works on account of cavity formation in crown and left wall as attributable to Everest Power. However, the State Commission has allowed cost of repairs to damage to invert lining of HRT due to presence of shear zone at shallow depth parallel to HRT which was found during detailed investigation after damages to HRT invert as the Commission felt that it is not a general practice to investigate the invert and therefore, it was not attributable to Everest Power. Thus, the State Commission allowed Rs.1107 lacs spent on rectification of HRT while Rs.1387 lacs for rectification of damaged works in dam, pressure shaft, surge shaft and power house were disallowed.

65. We agree with the State Commission regarding disallowance of cost of rectification of damages works in dams, pressure shaft, surge shaft and power house. However, we do not agree that the cost of repairs to damages to HRT due to shear zone at shallow depth parallel to HRT should have been allowed. We feel that it is very unusual to have a shear zone parallel to HRT causing damages to HRT during testing and commissioning. If the shear zone was present at shallow depth parallel to HRT below the invert, it should have been detected during the excavation and lining of the HRT. We feel that the failure of HRT during trial run is due to lack of investigation and diligence on the part of Everest Power during the construction of the project. In our opinion, the Consultant and the State Commission have erred in their findings that the damages to HRT post construction and during testing and commissioning of the project was beyond the control of Everest Power.

66. Therefore, the cost of rectification of the damages of HRT invert should have been disallowed. Accordingly, the increase in IDC and financing charges for delay in commissioning of the project after synchronization to COD

due to damages to HRT and other components of the project after completion of the project should be disallowed.

67. Except the cost of repair of damages to HRT which we feel is attributable to Everest Power, other hard costs as approved by the State Commission appears to be in order. Accordingly, the cost of time over run up to the time when Power Plant had to be shut down for repairs due to damages in HRT and other component has been correctly allowed.

68. Another issue raised by the Punjab Power is **high rate of interest on loan.**

69. According to the Punjab Power, the rate of interest claimed by Everest Power was 13.74% and 13.55% for 2012-13 and 2013-14 respectively which is very high. We find that the Tariff Regulations stipulate that for new investments, rate of interest paid/payable or the State Bank of India Advance Rate as on April 1 of the relevant year whichever is lower has to be allowed. We find that the State Commission has allowed interest on loan being lower of actual interest paid/payable or amount of interest as per SBI advance rate. Thus, the State Commission has allowed the interest as per the Regulations.

70. We therefore, reject the contention of the Punjab Power regarding high interest rate.

71. In view of the above, **Appeal No.35 of 2014 is allowed in part** only with regard to **cost of repairs for HRT and IDC/Financing Charges on account of time overrun for the period of shut down of the power project for repairs of HRT and other project components.** In regard to the other issues raised by the Punjab Power, the Impugned Order is upheld.

72. Let us now refer to the issues raised by the **Everest Power in its Appeal No.30 of 2014.** The following are the issues:

- (1) Application of Tariff Regulations- CERC (Terms and Conditions of Tariff) Regulations vs Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations;
- (2) Disallowance of Rs.30.222 Crores being 50% of IDC and Financing Charges;
- (3) Disallowance of Escalation;
- (4) The claim as against geological surprises and for construction of road and bridges have been disallowed;
- (5) Local Area Development Fund which was claimed has been denied;

- (6) The claim for outside cost on account of change in construction methodology of HRT, Surge Shaft and Pressure Shaft have been denied;
- (7) The claim towards rectification work of Dam intake and desalting chambers have been disallowed;
- (8) The claims towards rectification works undertaken for power plant civil works have been denied;
- (9) Expenses towards travelling and conveyances have been allowed only in part without allowing the entire claim;
- (10) The State Commission wrongly deducted an amount of Rs.89.63 lac fixed as 15% of the cost of temporary buildings as per CEA guidelines from the capital cost of the project;
- (11) Reduction of transmission charges paid to M/S.ADHPL prior to COD amounting to Rs.25.84 Crores.
- (12) The findings with reference to the transmission system are not valid as the State Commission failed to

consider the change of power evacuation scheme as 'Change in Law'.

(13) The claim for change in law on account of mandatory discharge of 0.5 cumecs water required to be released by the project has been denied.

(14) 1% of the additional free power has not been provided for Local Area Development over the entire life of the project;

(15) Claim for IDC on equity in excess of 30%.

(16) The reduction of UI receivables under 'other income' from annual fixed charges;

(17) The Everest Power claimed Rs.1415.04 lacs as Operation and Maintenance Expenses based on the actual capital expenditure incurred but the State Commisison fixed the Operation and Maintenance Expenses at the rate of 2% worked out to Rs.1266.94 lacs for full year and Rs.912.89 lacs for the period from 12.7.2012 to 31.3.2013;

(18) Incorrect calculation of Interest on loan;

(19) The State Commission should have allowed secondary energy at the rate of 80 paise/kWh but wrongly fixed the rate of secondary energy as 75 paise/kWh which is not in consonance with the Central Commission's Tariff Regulations, 2009

73. Now let us deal with these issues one by one.

74. The 1st **Issue** relates to the **Application of Tariff Regulations- CERC (Terms and Conditions of Tariff) Regulations vs Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations.**

75. According to the Everest Power, the Appellant in Appeal No.30 of 2014, the tariff of the project should be determined as per the Central Commission's Regulations, 2009 and not as per the State Commission's Regulations, 2005.

76. It is contended by the Appellant that the State Commission ought to have applied the Central Commission's Regulations for the purpose of determination of tariff of its projects since the Punjab State Commission's Regulations are applicable only to the projects within the State and for the projects situated outside the State, the tariff determined should be as

provided in the PPA and PSA which indicates the Central Commission's Tariff Regulations.

77. It cannot be disputed that once the Regulations for determination of tariff have been framed by the State Commission under section 61 and 181 of the Electricity Act, 2003, the same would be applicable. For undertaking the tariff determination exercise u/s 61, 62 and 64 of the Electricity Act, the State Commission cannot distinguish between a project situated outside the State or within the State with regard to applicability of the Regulations.
78. It is an admitted fact that the entire electricity to be generated by Everest Power from the 100 MW Malana-II HEP, except the free electricity to home State is to be supplied to the Punjab Power, the Distribution Licensee for distributing the electricity in the State of Punjab.
79. Both the parties contractually agreed that the State Commission is the appropriate Commission for tariff determination for the said project which holds good statutorily also. Under the State Commission's Tariff Regulations, the State Commission while determining the cost of generation of Generating Stations located within the State, the Commission shall be guided, as far as feasible by

the methodologies of Central Commission as amended from time to time.

80. These Regulations also provide that the components of generation tariff shall be as laid down by the Central Commission's Regulations.

81. In this context, it is to be noted that in the Tripartite Agreement entered into between Everest Power, PTC and Punjab Power, they have agreed to replace Article 3.1 of the PSA.

82. The relevant Article 3.1 in the Tripartite Agreement is as follows:

*“The parties agree that the Commission shall determine the tariff for the sale of the contracted capacity by PTC to PSPCL and consequently the tariff for the sale of the contracted capacity by EPPL to PTC in terms of the Regulations of the Commission and as per the orders dated 17.08.2012 and 06.11.2012 passed by the Commission in Petitions no. 34 of 2011, 55 of 2012. Such tariff shall be the applicable tariff for the sale and purchase of the electricity under the PPA and the PSA.
.....”*

83. The perusal of this Article would make it evident that the tariff in the instant case has to be determined as per Regulations of the appropriate Commission thereby

meaning the Punjab State Electricity Regulatory Commission (Terms & Conditions for Determination of Tariff) Regulations, 2005.

84. The decision taken by the State Commission that the State Commission's Regulations alone would be applicable is in consonance with the principles laid down by this Tribunal in Appeal No.131 of 2011 in the matter of Haryana Power Generation Corporation Ltd (HPGCL) v Haryana Electricity Regulatory Commission in the order dated 1.3.2013.
85. The relevant observations made by this Tribunal in the above judgment is as under:

“5. Bare reading of section 61 would make it clear that the State Commissions have been mandated to frame Regulations for fixing tariff under Section 62 of the Act and while doing so i.e. while framing such Regulations, State Commissions are required to be guided by the principles laid down in by the Central Commission, National Electricity Policy, Tariff Policy etc. it also provide that while framing the regulations, the State Commissions shall ensure that generation, transmission and distribution are conducted on commercial principles; factors which would encourage competition and safe guard consumer's interest. Once the State Commission has framed and notified the requisite Regulations after meeting the requirement of prior publication under Section 181(3), it is bound by such Regulations while fixing tariff under Section 62 of

the Act and, the Central Commission's Regulations have no relevance in such cases. However, the State Commission may follow the Central Commission's Regulations on certain aspects which had not been addressed in the State Commission's own Regulations. The Haryana Electricity Regulatory Commission has framed Terms and Conditions for determination of tariff for generation in the year 2008 and the State Commission is required to fix tariff as per these Regulations. However as per Regulation 33 the State Commission has power to relax any of the provisions of these Regulations after recording the reasons for such relaxation."

86. The conclusion arrived at by the Tribunal in the above decision is that while the State Commission has framed the requisite Regulations, it is bound by such Regulations while fixing the tariff u/s 62 of the Electricity Act and the Central Commission's Regulations have no relevance in such cases.
87. In the present case, as pointed out by the State Commission, already the Regulations have been framed by the State Commission and therefore, the applicable Regulations are only State Commission's Regulations and not the Central Commission's Regulations.
88. In view of above, the contention of the Appellant Everest Power that the State Commission ought to have applied the

Central Commission's Regulations while determining the tariff of the project is entirely misplaced.

89. The **2nd Issue** is relating to disallowance of Rs.30.222 Crore being 50% of IDC and financing cost.
90. The Everest Power has claimed Interest during Construction of Rs.246.68 Crores and Financing Charges of Rs.5.86 Crores up to the Commercial Operation Date. The State Commission held that the Everest Power paid interest during construction amounting to Rs.186.43 Crores up to the second quarter of the year 2011-12 i.e. the period when initial trial run of the units was carried out.
91. In August/September, 2011 trial run tests were conducted. In the beginning of October, 2011 damages in some components of the project were observed. After rectification, the project was commissioned on 12.7.2012. The State Commission disallowed Rs.30.1286 Crores being 50% of IDC and financing charges for the period between 2.10.2011 upto COD of the project. According to the Everest Power, since the Consultant appointed by the State Commission had held that the damage to HRT was beyond the control of the Everest Power and was on account of geological issues, there was no reason for the State

Commission to disallow the IDC and FC for the period October, 2011 to July, 2012.

92. We find that on this issue, the State Commission, on the strength of the judgment in Appeal No.72 of 2010 in the case of Maharashtra State Power Generation Co Ltd vs MERC and Others held only 50% of the IDC and FC for the above period has to be allowed.
93. According to the Appellant, the State Commission although has observed that the delay for the period under construction is not on account of the Generating Company, has wrongly held that the Everest Power has to bear 50% of the Interest during Construction (IDC). The State Commission has ignored to notice the fact that Everest Power has already suffered significant losses due to delay in commercial operation date, since it is yet to receive any payment towards Return on Equity.
94. This issue has already been discussed and decided against Everest Power by us holding that the entire cost of IDC and FC for the period October, 2011 to July, 2012 has to be borne by the Everest Power. We feel that condition (i) of principles of prudence check i.e. delay due to factors entirely attributable to the Generator as laid down in the judgment in

Appeal No.72 of 2010 relied upon by the State Commission will be applicable in the present case for the period October, 2011 to July, 2012.

95. The **3rd issue** is. **Disallowance of Escalation**

96. The Appellant, Everest Power has claimed that escalation ought to have been allowed by the State Commission w.e.f. 1.10.2005 since as per EPC contract the price variation was to apply if commencement of date of contract was delayed beyond 1.10.2005.

97. According to the State Commission, the State Commission felt that the price should be firm at least up to the scheduled completion period for the EPC contract. The contract for construction of infrastructure, main civil and hydro mechanical works was signed by the Everest Power with L&T on 26.3.2005. The contract completion date in the contract was specified as 36 months from the date of commencement of work reckoned as one week after the financial closure of the project. The State Commission accordingly felt that escalation should be allowed only after March, 2008.

98. The contract date in the contract was specified as 36 months from the date of commencement of the work. The State Commission accordingly felt that the escalation should be allowed only after March, 2008. The State Commission in the Impugned Order disallowed the escalation provided in the EPC contract of the project.
99. As per the contract, the price variation was to apply if the commencement date of the contract was delayed beyond 1.10.2005. M/s. Lahmeyer the Consultant in its report has specifically stated that the delay in commencement date was due to delay in grant of Forest Clearance and not because of any of the reasons attributable to the Everest Power.
100. In view of the above, it is submitted by the Appellant the condition of EPC contract which was awarded through ICB route should have been given full effect to and consequently the escalation as envisaged in the EPC contract should have been included in the capital cost of the project.
101. Admittedly, the cost of labour, equipment hire charges cost of fuel and construction material had increased beyond the estimations as envisaged in the EPC contract.

102. In addition to this, Government of Himachal Pradesh revised the minimum wages from Rs.70 per day per labour to Rs.125/- and Rs.145 per day for surface and underground works respectively which was beyond the control of the Everest Power. With a result, the Everest Power actually incurred the additional cost on infrastructure and main works even till March, 2008.

103. The State Commission has observed in respect of escalation on infrastructure and major works as follows:

“Accordingly, the Commission allows Rs.24462.74 lac under Major Civil & Hydro Mechanical Works. Further, out of Rs.348 .56 lacs under provisions, the Commission has disallowed provisions of Rs.173.00 lacs and deferred provision of Rs.175.56 lacs, to be considered after the Petitioner furnishes audited accounts for the same.”

104. The construction works at ground could not start pending forest clearance from the Ministry of Environment and Forest. In fact, Ms. Lahmeyer also noted that initially delay in start of construction work for about nine months was on account of delay in granting Forest clearance by the Ministry of Environment and Forest which is not attributable to the Generating Company.

105. The Everest Power has in fact, borne such cost within the terms and conditions of the contract. It has not gone beyond the contract to make any payments to the Contractor. As such, the sanctity of one of the Clauses of the contract should not be questioned in isolation of the overall contractual terms negotiated between the Everest Power and EPC contractor. All the terms and conditions of the contract are integral and should be read and interpreted cohesively rather than being analyzed in isolation.

106. Since we feel the additional cost of infrastructure and the main works has actually been increased, the State Commission should consider the same and pass an order in accordance with the law on the basis of the audited accounts to be furnished by the Everest Power.

107. Accordingly, ordered.

108. The 4th Issue is **Disallowance of claims for Roads and Bridges against the Geological Surprises.**

109. The Appellant's claim for Rs.7.17 Crores incurred against geological surprises comprises of Rs.4.92 Crores for additional cutting of hill slopes and the claim of Rs.2.25

Crores for construction of road tunnel has been disallowed by the State Commission in the Impugned Order.

110. According to the Appellant, the land slips occurred repeatedly despite all precautions taken. According to the Appellant there was no other way but to resort to a road tunnel, which could be completed in a short span of time. If the Everest Power had adhered to the original plan of the road, at the time taken for construction of that particular road or stretch would have been much higher and would have led to inordinate delay in main works of the project.

111. Therefore, as per the Appellant, it was in the interest of the project that the road works should be completed by introducing the road tunnel to provide a quicker and safer means of communication for accessing various project components which could not have been foreseen at the time of DPR and thus introduction of road tunnel has been necessitated solely due to geological reasons.

112. We find that the Consultant in its report has come to the conclusion that as the variation in quality of excavation material in open works like approach road and geological surprises resulting into provision of road tunnel would only be attributable to inadequate investigations and improper

planning and not geological surprises and hence the amount of Rs.7.17 Crores should not be included in Capital Cost particularly considering very high unit rate of approach road construction.

113. Based on the recommendations of the Consultant, the State Commission has disallowed the amount of Rs.716.73 Lac claimed on account of encountering geological surprises. As regards Rs.406.45 lacs included as provision to be spent later, the same would be considered after Everest Power furnishes the audited accounts and accordingly the same was deferred.

114. We are in agreement with the findings of the State Commission that the additional expenditure claimed for purported geological surprises on account of additional cutting of hill slopes and construction of road tunnel is due to lack of planning and inadequate investigation. Therefore, there is no merit in the claim of the Everest Power.

115. The 5th Issue is Disallowance of Local Area Development Fund.

116. The Everest Power has claimed Rs.14.25 Crores towards Local Area Development Fund (LADF) which has been

denied by the State Commission on the following basis. The relevant observations in the Impugned Order are as under:

“EPPL has claimed Rs. 1425 lac (1.5% of completed cost) as Local Area Development Fund, in view of provisions in Hydro Power Policy, 2006 of Government of Himachal Pradesh. As PPA and PSA for entire capacity of the Project were executed prior to this policy, retrospective application of the same for providing LADF does not appear to be legally sustainable and is therefore disallowed by the Commission.”

117. The claim of Rs.14.25 Crores by the Everest Power as LADF on the basis of the provisions of hydro Policy, 2006 issued by the Government of Himachal Pradesh. It is held by the State Commission that in the present case, the PPA and PSA for the entire capacity of the project were executed prior to this policy and therefore, the claim for LADF does not appear to be legally sustainable and consequently, the said claim was disallowed.

118. As pointed out by the Appellant, the State Commission has failed to take into consideration the fact that a change in law had occurred in as much as the Notification which was issued by the Government of Himachal Pradesh dated 5.10.2011 pursuant to the Hydro Policy, 2006 of Himachal Pradesh.

- 119.** The said notification provides that 1.5% of the cost of hydro project above 5 MW shall be contributed towards Local Area Development Funds. These provisions have been made applicable for new as well as ongoing projects.
- 120.** According to the Appellant, Everest Power, it had already paid a part amount of Rs.1.00 Crore to Government of Himachal Pradesh in this regard as part payment of demand of Rs.1.5% of the completed capital cost based on the demand raised by the Government of Himachal Pradesh.
- 121.** Everest Power has claimed the amount under change in law provision. We find that the PPA and PSA clearly states that the 'Change in Law' caused by Govt of Himachal Pradesh shall not be treated as 'Change in Law' under the agreement and shall not result in any tariff adjustment. We, therefore, find no reason to allow the amount contributed by the Everest Power towards Local Area Development Fund.
- 122.** Accordingly, this issue is decided as against the Appellant.
- 123.** The **6th Issue** is relating to additional cost due to **change in construction methodology in HRT, Shaft and Surge Pressure Shaft.**

124. The Appellant on this issue, has claimed Rs.6.86 Cores for Change in Construction methodology. This claim has been disallowed by the State Commission since the EPC contract cost is deemed to include cost of construction methodology to address different rock classification.

125. This has been denied on the following basis:

“EPPL has claimed Rs. 12208.71 lac under this head. This includes Rs. 685.63 lac due to change in construction methodology of HRT, which the Commission feels, is not justified as EPC contract cost is deemed to include cost of construction methodology to address different rock classification. Accordingly, the Commission is inclined to disallow the aforementioned amount of Rs. 685.63 lac”

126. As per the contract, the construction methodology for excavation of Head Race Tunnel (HRT) envisaged drilling using Drill Jumbos providing rock bolting support by deploying jack hammers and mucking by using loaders and tippers. The excavation of HRT was started by the contractor using the contract stipulated methodology and equipment. Due to small size of the tunnel the progress of excavation was very much on lower side. As such, it was felt that in order to meet the overall project schedule, it was necessary to review and reduce the cycle time of HRT

excavation by decreasing the time for support erection and mucking.

127. Under those circumstances, the Appellant asked the contractor to modify the construction methodology using the following alternative system. Accordingly, the contractor through the modification in the excavation methodology deployed additional equipments for excavation for supporting, muck loading and muck transportation operations. Due to this, the tunnel excavation progress rate increased to more than 100 m/face/month in place of an average progress of 30-50 m/face/month which was possible with the conventional drill blast method. This Deployment of additional equipment by the contractor in the interest of work progress resulted in the expenditure amounting to Rs 6.86 Cr incurred by the Appellant.

128. Only on the request of Appellant, the contractor incurred additional cost to revise the construction methodology. According to the Appellant had this not been done, it would have led to further delay and increased the interest on construction.

129. We find that the Consultant has reviewed the cost considered for the variation and has recommended that the

cost of Rs.6.86 Crores for change in methodology is not justified as EPC contract cost is deemed to include the cost of construction methodology to address different rock classification. Consequently, the State Commission has disallowed the additional cost for the same reason.

130. We do not find any infirmity in the findings of the State Commission and therefore, are not inclined to interfere with the finding of the State Commission in this regard.

131. The 7th Issue is relating to Dam Intake & Desilting Chamber.

132. On this issue, the Appellant has claimed Rs.3.65 crores incurred on rectification works after synchronising of units. The State Commission held that the damages to left banks protection works at the dam location was due to cloud burst which cannot be treated as a geological surprises as Dam Protection should be designed for extreme weather conditions and any extra expenditure on account of rectification of the same cannot be passed on to the consumers.

133. According to M/s. Lahmeyer, the Dam Protection works should be designed considering the extreme weather

condition and hence the damage to dam protection works is attributable to the Generating Company.

134. The Appellant has submitted that the left bank protection work at the Dam location was conservatively designed to withstand extreme weather conditions. The treatment was nearing completion and however on 17.8.2011 due to unprecedented and unexpected rainfall in the dam area the already constructed reservoir protection works was severely damaged and this cannot be attributable to any design inadequacy but due to unexpected severe cloudburst.

135. Therefore, the failure of reservoir slope protection measures during the trial run period of the plant shall be attributed to the force majeure and not due to any inadequate design.

136. On this issue, the State Commission has given the following findings:

“EPPL has claimed Rs. 9166.05 lac out of which Rs. 8990.49 lac has been incurred and Rs. 175.56 lac has been kept as provision. This amount includes Rs. 364.63 lac incurred on rectification works after synchronising of units. As the dam protection works should be designed for extreme weather conditions, the Commission attributes this extra expenditure of

Rs. 364.63 lac to EPPL and hence disallows the same.

Further, provision of Rs. 175.56 lac would be considered after the petitioner furnishes the audited accounts for the same and accordingly, the same is deferred. Thus the Commission allows Rs. 8625.86 lac under this subhead”.

137. We do not find any infirmity in the findings of the State Commission and confirm the same.

138. The 8th Issue is relating to **Power Plant Civil Works disallowance of Rs.3.32 Crores towards Rectification Work.**

139. According to the Appellant during the excavation of Main Access Tunnel (MAT) a large cavity was formed due to the presence of a 20 m thick shear zone which had no surface manifestation. The cavity was subsequently treated by providing steel ribs, MS plates, and concrete back filling of adequate thickness etc for releasing the pore water pressure from the cavity walls.

140. After the said treatment the cavity remained stable. However, the clean water was coming out of a few drainage holes till the post synchronization failure of HRT invert along Face.

141. Therefore, the formation of cavity along the MAT was due to the presence of a shear zone which had no surface manifestation. Therefore, according to the Appellant, it falls under the geological surprise category.

142. Thus, the Everest Power's claim for rectification of power plant after synchronization of unit has been denied as follows:

“EPPL has claimed Rs. 3200.10 lac which includes Rs. 331.76 lac for rectification of power plant after synchronising of units. The Commission attributes the above extra expenditure of Rs. 331.76 lac to inadequate safety margin in the design and thus disallows the same. Therefore, against expenditure of Rs. 3200.10 lac, the Commission allows Rs.2868.34 lac under this head”.

143. The findings of the State Commission are that the extra expenditure of Rs.3.32 Crores towards rectification was due to the inadequate safety margins in the design.

144. This finding in our view does not suffer from any infirmity.

145. Accordingly, this issue is decided as against the Appellant.

146. The **9th Issue** is relating to **Disallowance of Rs.3.06 Crores towards Travel Expenses.**

147. The State Commission has disallowed Rs.3.06 Crores out of Rs.4.31 Crores claimed for Travelling & Conveyance expenses.

148. According to the Appellant, the State Commission has wrongly disallowed Rs.3.06 Crores towards the cost of travelling and conveyance expenses out of the total approved expenses of Rs.4.31 Crores incurred by the Everest Power.

149. We find that the Everest Power had claimed travelling and conveyance charges of rs.4.31 Crores under 'Establishment'. However, the Consultant felt that some of the expenses including travelling and conveyance expenses were wrongly booked and shifted the travelling and conveyance expenses to 'Miscellaneous head'. The Consultant on prudence check recommended travelling and conveyance expenses of Rs.1.25 Crores to be included under 'Miscellaneous' head. The Consultant recommended approval of Rs.12.91 Crores under miscellaneous expenses as against Rs.12.50 Crores as per the CEA guidelines. Thus, the Consultant has recommended the miscellaneous expenses of 12.91 Crores including travelling and conveyance expenditure of Rs.1.25 Crores after prudence check.

150. The State Commission after disallowing Rs.28 lacs on account of donations, allowed Rs.12.63 Crores under 'miscellaneous' head which included travelling and conveyance expenses of Rs.1.25 Crores. We find that the expenses under 'Miscellaneous' expenses approved by the State Commission are reasonable and in line with the CEA guidelines. Therefore, we find no reason to interfere with the travel expenses allowed by the State Commission.

151. The **tenth Issue** is relating to **Receipt and Recoveries: Disallowance of Rs.0.896 Crores receivable for Scrap Value of Temporary Works.**

152. According to the Appellant, the State Commission has wrongly deducted the notional recoveries on account of sale of scrap value of temporary works instead of actual recoveries from the capital cost of the project.

153. It is submitted by the Appellant that it had already deducted actual recoveries of Rs.0.49 Crores realized by Everest Power by resale of temporary structures material and same has already been reduced by Everest Power from the Capital Cost of the Project. Without considering the above reduction, the State Commission has further reduced the notional amount of Rs.0.896 Crores as per CEA guidelines.

The estimation of scrap value of temporary works as per CEA guidelines is only on notional basis for estimating the DPR cost.

154. We do not find any infirmity with the State Commission deducting Rs.89.63 lacs as 15% of the cost of temporary buildings as per CEA guidelines from the capital cost of the project. The State Commission in the Impugned Order has held that though Everest Power had stated that it had deducted Rs.49.00 lacs on this account but the deduction is not available in the date furnished by Everest Power.

155. In view of this, we do not find any reason to interfere with the Impugned Order.

156. Accordingly this issue is decided as against the Everest Power.

157. The 11th issue is relating to the **Reduction of Transmission Charges Paid to M/s. ADHPL prior to COD amounting to Rs.25.84 Crores.**

158. On this issue, the State Commisison has disallowed the transmission charges of Rs.25.84 Crores paid by the Everest Power to AD Hydro Power during testing period prior to commercial operation date since the State

Commission is allowing the cost of transmission line from project bus-bar up to delivery point at Banala.

159. According to the Appellant the State Commisison has wrongly disallowed Rs.25.84 Crores that has actually been incurred by the Everest Power prior to commercial operation date for use of transmission lines of AD Hydro Power which was necessary for synchronizing and stabilizing the project without which the project could not have achieved the commercial operation.

160. On this issue, the Consultant M/s. Lahmeyer has submitted the report recommending that the cost incurred prior to commercial operation date of the project payable to M/s. ADHPL as per the Tribunal's interim order dated 10.6.2011 should be payable to the Appellant.

161. However, it is noticed that despite this, the State Commisison disallowed this amount of Rs.25.84 Crores incurred by the Everest Power prior to commercial operation date for use of the transmission line of the Hydro Power. The report of the Consultant is as follows:

“(b) M/s Lahmeyer in its Report inter-alia held as follows:

"In the interim order of Hon'ble Appellate Tribunal for Electricity,(APTEL) dated June 10, 2011,.....it was directed to pay transmission charge to ADHPL for wheeling the Maiana II injected energy / power on the basis of Audited Capital Cost and CERC regulation till final order. Accordingly, the wheeling charge of Rs. 2.27 crore per month has been worked out by AD Hydro Private Limited (ADHPL).

*.....
In consideration of above, the Consultant is of the view that*

*.....
wheeling charge of ADHPL line as per Hon'ble APTEL's interim order dated June 10, 2011 should be payable to EPPL till finalisation of the matter by Hon'ble Supreme Court, where after the transmission charges as rationalised by Hon 'b/e Supreme Court shall be payable, as the change in transmission line system is as per CEA's instructions."*

162. This report is in line with the Interim Order passed by this Tribunal. Despite this, the State Commission rejected the recommendation and disallowed the amount of Rs.25.84 Crores.

163. It is now contended by the Appellant that the State Commission on the one hand has disallowed the transmission charges paid by the Everest Power to AD Hydro Power prior to commercial operation date of the project and on the other hand, it has deducted the UI

receivables of Rs.34.87 Crores earned by Everest Power prior to commercial operation date.

164. It cannot be disputed that the said UI receivables has become possible only because of the use of such transmission line constructed by the AD Hydro Power. Therefore, the disallowance of the transmission charges of Rs.25.84 Crores paid by the Everest Power to AD Hydro Power is not valid.

165. Therefore, we hold that the Appellant is entitled to the said transmission charges which have been actually paid by the Appellant to the AD Hydro Power for using the transmission line during testing period prior to commercial operation date. However, this will be subject to adjustment if the charges are re-determined as a result of outcome of Appeal regarding sharing of transmission charges pending before the Hon'ble Supreme Court.

166. Therefore, this issue is accordingly ordered in favour of the Appellant.

167. The 12th Issue is Impact of Change in Law due to change in project's power evacuation scheme.

- 168.** According to the Appellant, the State Commission has failed to consider the Evacuation, Scheme for the project got changed due to 'Change in Law'.
- 169.** It is noticed that the Evacuation Scheme as approved in 14th Meeting of the Standing Committee on transmission system planning in 2002, got modified/amended in 2008 i.e. after execution of the PPA/PSA. This was reflected in the CEA meeting held on 10.4.2008 and the 26th meeting of Standing Committee on transmission system planning dated 13.10.2008 and the grant of Section-68 permission to Everest Power on 17.6.2008.
- 170.** As per the decision taken in the meeting dated 10.4.2008, the Ministry of Power directed the Appellant to construct the tie line up to Chhaur which is 18 Km from the Generator bus bar.
- 171.** It was further directed to do LILO 220 kV D/C AD HEP-Nalagarh transmission line constructed by M/s. ADHPL at Chhaur so that the power can be transmitted to the Power Grid Pooling Point at Nalagarh through the transmission line of M/s. ADHPL.

172. Accordingly, the said transmission line was constructed by the AD Hydro Power which was approved in the 26th Standing Committee Meeting dated 13.10.2008. However, the Hydro Power (ADHPL) refused to grant the connectivity to the project from its 220 KV transmission line and imposed onerous conditions over and above the CERC Regulations.

173. The Everest Power left with no other option filed a Petition before the Central Commission for giving necessary directions to the AD Hydro Power to grant connectivity to the project from Hydro Power transmission line. The Central Commission by the Order dated 1.6.2011 directed the AD Hydro Power to grant connectivity to the project on the terms and conditions as stipulated in the Central Commission's Regulations, 2009.

174. Aggrieved by this Order, the AD Hydro Power preferred Appeal No.81 of 2011 before the Tribunal. This Tribunal during the pendency of the Appeal passed the Interim order on 10.6.2011 directing the AD Hydro Power to provide connectivity to the Everest Power's project. It was also directed in the Interim Order that the cost of construction of the transmission line may be taken as a capital cost and transmission tariff may be calculated as per Central

Commission's Regulations, 2009 which would become payable to the AD Hydro power for using its transmission lines by the Everest Power.

175. Ultimately, this Appeal filed by the AD Hydro Power was dismissed on 2.1.2013 upholding the Order of the Central Commission and remanded for calculation of transmission tariff to the Central Commission as per the Central Commission Regulations, 2009 and in the mean time, the Everest Power was directed to pay transmission charges to Hydro Power as per the interim order.

176. As against this judgment, the AD Hydro Power preferred an Appeal to Hon'ble Supreme Court. The Hon'ble Supreme Court through its order dated 8.3.2013 stayed the direction of remand to the Central Commission as directed by this Tribunal.

177. The Hon'ble Supreme Court directed that the interim arrangements made by the Tribunal would be applicable and the arrears to be paid to the AD Hydro Power by the Everest Power.

178. Due to the paucity of the funds, the Everest Power filed civil Appeal seeking extension of time for payment. Accordingly,

time was granted. Subsequently, the Everest Power tendered Rs.5.00 Crores on 26.12.2013 to AD Hydro Power. That apart, fixed deposits amount to Rs.2.28 crores as payment security has also been encashed by the AD Hydro Power.

179. These factors have not been taken into consideration by the State Commission especially the fact that the evacuation scheme for the project got changed due to the effect of change of law in as much as at the time of execution of PPA/PSA, the scheme of evacuation as approved by the 14th Standing Committee Meeting got modified in the year 2008. This was reflected in the meeting held by CEA on 10.4.2008 as well as the 26th Meeting of the Standing Committee dated 13.10.2008 and the Section 68 permission dated 17.6.2008.

180. In view of the above, the financial impact of such change of law as claimed by the Appellant Everest Power should be compensated to Everest Power by the State Commission.

181. From the Impugned Order, it is evident that the State Commission has not taken into consideration of the judgment dated 2.1.2013 passed by this Tribunal in Appeal No.81 of 2011 filed by the Hydro power.

182. The relevant observations are as follows:

"27. We find that the whole issue has arisen due to circumstances created by delay in execution of Parbati Pooling Station by Power Grid, constraints in providing right of way for laying transmission line in hilly terrain and forest area and need for optimizing the transmission corridor in the forest and hilly area, in view of scarce availability of land and environmental consideration."

*28. We notice from the records of the case that earlier it was planned that both Attain Duhangan and Ma/ana - II Hyde/ Projects would construct their respective dedicated lines to Parbati Pooling Station from where power would be transmitted through the Inter-State transmission network of Power Grid to the destination of choice of the respective generating companies. On that understanding the Appellant and the Respondent No.1 started execution of their projects. Respondent No.1 also got long term open access for supply to Punjab State Electricity Board from Parbati Pooling Station of Power Grid. However, due to delay in execution of the Parbati Pooling Station changes were made in the point of injection of power. The Appellant was first to get the approval under Section 68 for execution of its dedicated transmission line to Nalagarh sub-Station of Power Grid, as its Hydei project was ahead of the project of the Respondent No.1. **When Respondent No.1 approached the CTU/Power Grid and CEA for alternative transmission arrangements in view of delay in execution of Parbati Pooling Station, they were asked to tie up with the Appellant and utilize the spare capacity of the Appellant's transmission line to transmit its power upto Nalagarh.***

29. According to the Electricity Act, the CTU has to do planning and coordination relating to inter-State transmission

system with the generating companies and other agencies, CEA also has the responsibility under the plan for optimum utilisation of the resources and also coordinate with the planning agencies and the generating companies, etc. Accordingly, CEA and POWERGRID coordinated with the Appellant and the Respondent No 1 to devise a system of interconnecting the dedicated transmission system of the Respondent No.1 with the dedicated transmission system of the Appellant and evacuation of power of the former through the latter's transmission system up to Naiagarh with the consent of the parties."

"30. In the above circumstances, the Respondent No.1 was left with no other alternative but to evacuate its power through the dedicated transmission system of the Appellant. In the various meetings taken by the CEA, Power Grid and also Government of Himachal Pradesh and Ministry of Power, Government of India which were attended by the representatives of the Appellant and the Respondent No.1 it was decided that the Appellant and the Respondent No.1 would mutually decide the commercial issues of sharing the At lain Duhangan - Naiagarh line. At no time the Appellant opposed giving access to the Respondent No.1 on its transmission system. In fact they communicated to the Ministry of Power, Government of India vide their letter dated 18.6.2008 their no objection to Malana II establishing their 220/132 kV sub-station and loop-in-loop-out of one circuits of Ailain Duhangan - Naiagarh at the sub-station of the Respondent No.1. However, despite meetings held between the parties, the settlement could not be reached as the Appellant wanted the settlement at its own terms and conditions. We feel that when the Appellant has accepted to provide access on its dedicated transmission system to the Respondent No.1 and the latter having no other alternative, the Respondent

No.1 could not be left remediless. Electricity Act, 2003 is a complete code and within the provisions of the Act we have to find remedy to the issues raised in this Appeal.

183. The reading of the above judgments rendered by this Tribunal would make it clear that this Tribunal had held that the change in the evacuation scheme for the electricity generated from the project was not as per the volition of Everest Power but the Everest Power was left with no other option but to evacuate the power through the transmission system of the AD Hydro Power.

184. Under those circumstances, the State Commisison should have taken into consideration the contention of the Everest Power after taking note of this Tribunal's judgment and keeping in view of the change in delivery point could have directed for inclusion in the tariff of the electricity generated by the project the element of transmission cost also.

185. It is also noticed that the State Commisison has not taken into consideration the recommendations of its Consultant M/s. Lahmeyer in which the Consultant has referred to change in evacuation arrangement of the project under change in law. The same is as follows:

"Originally, the power from Malana II HEP was proposed to

*be evacuated to PGCIL's Panarsa Pooling Station which involved construction of 38 km long double circuit 220 kV transmission line.
However, in the meeting convened by Chairperson CEA on April 10, 2008, it was informed that due to delay in the Parbati Project and consequently its associated evacuation system, the pooling station at Panarsa would not be materialized in the time frame of Malana II HEP and it was proposed to evacuate the power of Malana II HEP by LILO connection at Chhaur through 220 kV D/C line from AD Hydro-electric Project to Naiagarh sub station."*

.....
In consideration of above, the Consultant is of the view that the completed cost of transmission line from Maiana II HEP Chhaur substation including cost of sub station should be considered in the capital cost of Maiana II HEP till the start of operation of HPTCL line from Ma/ana II HEP to Banala pooling station. Further, wheeling charge of ADHPL line as per Hon'ble APTEL's interim order dated June 10, 2011 should be payable to EPPL till finalisation of the matter by Hon'ble Supreme Court, 'where after the transmission charges as rationalised by Hon'ble Supreme Court shall be payable, as the change in transmission line system is as per CEA's instructions."

186. The above fact situation would make it explicit that the change in evacuation system occurred not because of any action or inaction of Everest Power but has occurred due to the directions of the CEA and Ministry of Power who directed that the energy generated by the Appellant's project would be evacuated by the AD Hydro Power transmission

line. The said direction came after the execution of the PPA/PSA which is in the nature of change in law.

187. Consequently, the financial impact of which as per the provisions of PPA/PSA has to be compensated to the Everest Power.

188. In this context, the definition of the change in law referred to in Clause 12.1 of the PSA has to be quoted. The same is as under:

"12.1 Definitions

A change in law pursuant to Article 12 of the PPA shall lead to Tariff Adjustment Payments pursuant to this Agreement. Additionally, for the purposes of this Agreement, Change in Law would mean:

(i) the adoption, promulgation, amendment, re-enactment or repeal after February 27, 2004, of any Law or a change in its interpretation, or

(ii) the imposition by any Government Instrumentality of any material condition in connection with the issuance, renewal, modification, revocation or non-renewal (other than for cause) of any Consent after February 27, 2004, that in either of the above cases:

(a) results in any change in PTC's Trading Margin either directly in the form of a levy or indirectly through a change in

PTC's operating costs;

(b) results in any change in respect of Tax;

(c) results in any change in the Company's revenue or costs directly attributable to the Project; or

(d) requires the Company to undertake capital expenditure for the Project in order to perform its obligations under the Power Purchase Agreement with PTC...."

189. The above definition would clearly indicate that if any change occurs in consent, direction or approval granted by the Government instrumentalities then as per the aforesaid provision of PSA/PPA, it would qualify as change in law. In such an event, the Everest Power would have to be appropriately compensated for it under the procedure and mechanism provided under Clause 12.4 of the PSA.

190. In view of the above since we find force in the contention of the Everest Power with reference to change in law arising out of the change in the evacuation system, the financial impact of the same in the shape of transmission charges and losses payable to AD Hydro Power may be made pass through. Till the finalisation of transmission charges for sharing of transmission line of AD Hydro Power, the charges as per the interim order of the Tribunal may be reimbursed

to the Appellant subject to adjustment on the outcome of the Appeal pending before the Hon'ble Supreme Court. Accordingly, the notional transmission cost from Chhaur to Banale allowed by the State Commission has to be deducted from the Capital Cost.

- 191.** Accordingly, this issue is decided in favour of the Appellant.
- 192.** The 13th Issue is regarding change in law on account of mandatory 0.5 cumecs discharge.
- 193.** According to the Everest Power the State Commission erred in not holding minimum lean season discharge as mandated by the Ministry of Environment & Forests vide environment clearance dated 21.6.2005 as 'Change in Law' under PPA/PSA. The State Commission disallowed the same stating that PPA was executed on 25.7.2005 whereas the Environment Clearance was issued on 21.6.2005. However, the triggered date for effectuating change in law is 27.2.2004.
- 194.** We find that the trigger date of change in law as per Article 12.1.1 of the PPA is 27.2.2004. Accordingly, the condition in environmental clearance issued on 21.6.2005 would be covered under 'Change in Law'. Accordingly, this issue is

decided in favour of the Appellant. Thus, the design energy of the Appellant may be decided after accounting for the mandatory 0.5 cumecs discharge.

195. The 14th Issue is relating to 1% of additional free power to home State.

196. The Appellant claimed 1% additional free power from the Hydro Projects in terms of Clause 10.1 (h) of the Hydro Power Policy, 2008 issued by the Government of India. The Everest Power further claimed that the tariff policy mandated on 31.3.2008 also included the additional 1% free power to the home State for contribution towards Local Area Development Fund constituted by the State Government which has already been constituted and the guidelines were issued for the management of the said through its Notification dated 5.10.2011.

197. The grievance of the Appellant is that the State Commission over looked the above facts and disallowed 1% additional free power merely stating that as per the Central Commission's Tariff Regulations, 2009, the bidding process has not been carried out for allotment of the project to the Everest Power.

198. According to the learned Counsel for the State Commission the Central Commission's Tariff Regulations, 2009 provided that in case where the site of the Hydro Project is allotted to a developer by the State Government, following two stage transparent process of bidding, the free energy shall be taken as 13% and in the present case this condition was not fulfilled.

199. We find that the Central Commission's Regulations provide that where the site of a hydro project is awarded to a developer by a State Government by following a two stage transparent process of bidding, the free energy shall be taken as 13%. In other cases, the free energy is to be taken as 12%. The State Commission's Regulations provide that for generation tariff the State Commission shall be guided as far as feasible by the Central Commission's Regulations.

200. Since the Appellant's project is not awarded through a transparent process of bidding, the Appellant is entitled to 12% free power. Thus, we do not find any infirmity in the State Commission's order in allowing free power of 12% only.

201. Accordingly, this issue is decided as against the Appellant.

202. The 15th Issue relating to **Interest during Construction on Equity in excess of 30%.**

203. According to the Appellant, the State Commission erred in disallowing the claim of the Appellant for IDC on equity in excess of 30% based on the Central Commission's Regulations, 2009 as per the weighted average rate of interest on actual loan portfolio which forms part of Capital Cost as quantified and certified by the Statutory Auditor of Everest Power as Rs.13.09 Crores.

204. The State Commission has dealt with IDC in the Impugned Order as under:

“E. Interest during Construction / Financing Charges(IDC/FC)

EPPL has claimed IDC of Rs. 24668.55 lac and FC of Rs. 585.60 lac up to Commercial operation Date. The Commission observes from quarterly details of IDC paid that EPPL has paid IDC amounting to Rs.18642.82 lac up to second quarter of year 2011-12 i.e. the period when initial trial run of the units was carried out.

.....
Accordingly, the Commission allows Rs. 21655.69 lac as IDC after deducting 3012.86 lac calculated as 50% of the difference of the IDC as on the 12.07.2012 (CoD)

i.e. Rs. 24668.55 lac and Rs. 18642.82 lac upto 2nd quarter of FY 2011-12. On similar lines, the Commission allows the financing charges as Rs. 576.26 lac, as against Rs. 585.60 lac claimed by EPPL, after deducting 50% of the financing charges incurred during the period October, 2011 to 11.07.2012.”.

205. Thus, the State Commission has considered the entire IDC of Rs.24668.55 lacs claimed by the Appellant and allowed Rs.21655.69 lacs after deducting 50% of the different in IDC as on 12.7.2012 (COD)and upto 2nd quarter of FY 2011-12. Thus, the State Commission has considered the entire claim of IDC of the Appellant. We therefore, do not find any merit in the claim of the Appellant.

206. However, as per our directions in this judgment IDC has to be recomputed after disallowing the entire IDC from the date of outage of the Power Plant for repairs till COD.

207. Therefore, we do not find merit in the claim of the Appellant in this regard.

208. Accordingly, this issue is decided as against the Appellant.

209. The **16th Issue** relates to Reduction of **UI Receivables under other Income from Annual Fixed Charges.**

210. The Appellant is aggrieved by the reduction of interest earned on UI receivables from Annual Fixed Charges (AFC).

211. According to the Appellant, the State Commission erred in reducing the interest earned on UI receivables from AFC for the FY 2012-13 as the State Commission has already reduced the amount of UI receivables by the Appellant for the infirm power injected prior to COD from the capital cost of the project.

212. As the said UI receivables have been totally deducted from Capital Cost, the Appellant has not been allowed tariff on the amount of UI receivables already reduced from capital cost as a result of which the Appellant is not getting any return on equity or interest on loan on the amount of UI receivables already reduced by the State Commission from the Capital Cost and the AFC.

213. It is not logical that the Everest Power should be denied tariff on the amount of UI Receivables and at the same time also be made to pass on the interest received from NRLDC for the delay in receiving UI receivables to Punjab Power. On this basis, the Appellant prayed to allow Rs.1.6387 Crores towards interest on UI receivables under 'Other Income' from AFC.

214. According to the learned Counsel for the State Commission, the State Commission approved the non tariff income as per Regulation 34 and as such there is no infirmity in the finding.

215. Let us refer to the Regulation 34 of the Punjab State Commission (Terms and Conditions for Determination of Tariff) Regulations, 2005 regarding non tariff income. The same is as follows:

“Regulation 34 – Non Tariff Income

Following components of income shall be treated as non-tariff income for the generating company or the licensee (s) as applicable:

.....

Miscellaneous receipts

.....

Interest on investments, fixed and call deposits and bank balances

.....”

216. On perusal of the Regulations as well as the Impugned Order, the State Commission followed the Regulations and considered the interest from the banks on deposits and interest on over due trade receivables for the FY 2012-13 is to be taken as non tariff income. Accordingly, the State

Commisison approved the non tariff income of Rs.184.20 lacs for the FY 2012-13.

217. In view of the above, the receipts from interest from banks on deposits and interest on overdue trade receivables are infirm source of receipts and consequently, the income from these sources has not been considered for the FY 2013-14.

218. This finding has been rendered by the State Commission under Regulation 34 of the State Regulations, 2005.

219. This finding in our view, is perfectly justified and as such, this issue is decided as against the Appellant.

220. The **17th Issue** is relating to **Operation and Maintenance (O&M) Expenses.**

221. The Appellant claimed Rs.1415.04 lacs as Operation and Maintenance expenses (O&M expenses) for the period 12.7.2012 to 31.3.2013 in respect FY 2012-13 and Rs.2076.17 lacs for FY 2013-14 based on the actual expenditure incurred by the Everest Power amounting to Rs.98192.07 lacs.

222. According to the Appellant, the State Commission wrongly applied and calculated Central Commission's Tariff

Regulations, 2009 for determining the O&M expenses by taking a figure of cost of the project as in “Techno-economic Clearance (TEC)” and calculating 2% of the said amount for grant of O&M expenses for the year 2012-13 and 2013-14. It is claimed by the Appellant that the State Commission should have allowed Rs.14.15 Crores for the period 12.7.2012 to 31.3.2013 and Rs.20.76 Crores for 2013-14 on the actual capital cost of Rs.981.92 Crores.

223. It is also pointed that the actual O&M expenses incurred by the Appellant is higher than the approved O&M expenses in the year 2013-14. Further Central Commission’s Tariff Regulations, 2014 have also recognised higher O&M expenses in respect of projects up to 200 MW where the provisions for O&M expenses has been increased from 2% to 4% of the project cost with annual escalation of 6.64% per annum instead of 5.72% in the 2009 Regulations.

224. At the end, the Appellant prays that it may be allotted at least O&M expenses based on the original project cost as per the Central Commission’s Regulations as amended from time to time.

225. According to the learned Counsel for the State Commission, the calculations have been correctly made by

the State Commission as per the relevant Regulations of the Central Commission.

226. Let us refer to the said Regulations.

227. Regulation 19 (f) (v) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (as amended) reads as under:

“In case of the hydro generating stations declared under commercial operation on or after 1.4.2009, operation and maintenance expenses shall be fixed at 2% of the original project cost (excluding cost of rehabilitation & resettlement works) and shall be subject to annual escalation of 5.72% per annum for the subsequent years”.

228. As per the above Regulation, O&M expenses shall be fixed at the rate of 2% of the “original project cost (excluding cost of rehabilitation and resettlement works)”. The Commission envisaged the DPR cost of Rs. 63346.83 lacs as the original cost of the Project. Based on this, O&M expenses at the rate of 2% worked out to Rs.1266.94 lacs for full year and Rs. 912.89 lacs for the period 12.07.2012 to 31.03.2013.

229. As regards O&M Expenses, Regulation 28 of the Punjab State Electricity Regulatory Commission (Terms and

Conditions for determination of Tariff) Regulations, 2005 (as amended) provide as under:

“Regulation 28

(1) ‘Operation & Maintenance expenses’ or ‘O&M expenses’ shall mean repair and maintenance (R&M) expenses, employee expenses and administrative & general expenses (A&G) including insurance.

(2) O&M expenses for distribution licensee (s) shall be determined by the Commission as follows:

(a) O&M expenses as approved by the Commission for the year 2011-12 (true-up) shall be considered as base O&M expenses for determination of O&M expenses for subsequent years.

(b) Base O&M expenses (except employee cost) as above shall be adjusted according to variation in the average rate (on monthly basis) of Wholesale Price Index (all commodities) over the year to determine the O&M expenses for subsequent years.

Provided that any expenditure on account of license fee, initial or renewal, fees for determination of tariff and audit fee shall be allowed on actual basis over and above the A&G expenses approved by the Commission.

(c) In case of a new distribution licensee (s), the Commission shall make suitable assessment of base O&M expenses of the new licensee(s) and allow O&M expenses for subsequent years for

the new licensee (s) on the basis of such estimation and principle as given in clause (b) above. However, for employee cost the principle specified in clause (3) below will be followed.

(3) The employee cost for a distribution licensee (s) shall be determined as follows:

(a) The employee cost as claimed by the distribution licensee (s) shall be considered in two parts:

(i) Terminal Benefits such as Death-cum-Retirement Gratuity, Pension, Commuted Pension, Leave Encashment, LTC, Medical reimbursement including fixed medical allowance in respect of pensioners and share of BBMB employee expenses and

(ii) all other expenses accounted for under different sub-heads of employee cost taken together.

The cost component of terminal benefits and BBMB expenses shall be allowed on actual basis and increase in all other expenses under different sub-heads shall be limited to increase in Wholesale Price Index (all commodities) as per clause (2) (b) above.

(b) Exceptional increase in employee cost on account of pay revision etc. shall be considered separately by the Commission.

(c) The additional employee cost in case of New installations/Network for the year of installation shall be considered separately by the Commission on case to case basis keeping in

view the principles and methodologies enunciated in these Regulations.

(4) (a&b).....

(5) (a) For the determination of O&M expenses (except employee cost) for generating company, the Commission shall allow O&M expenses (except employee cost) in accordance with clause (2). The employee cost will, however, be determined keeping in view the provisions contained in clause (3).

(b) In case of a new generating company (s), the Commission shall make suitable assessment of base O&M expenses of the new licensee (s) and allow O&M expenses for subsequent years for the new licensee (s) on the basis of such estimation and principle as given in clause (2) (b) above. However, for employee cost the principle specified in clause (3) above will be followed.

(6) O&M expenses excluding employee expenses for gross fixed assets added during the year shall be considered for a period of six months in cases where Commercial Operation Date of the assets is not available otherwise from the date of commissioning on pro-rata basis.

(7) O&M expenses excluding employees cost for a company/licensee(s) performing generation and/ or distribution and trading functions shall be determined by the Commission on the norms and principles indicated at clause (2) above. The employee cost will, however, be determined keeping in view the provisions contained in Clause (3).

(8) O&M expenses of assets taken on lease/hire-purchase and those created out of the consumers' contribution, shall be considered in case the generating company or the licensee has the responsibility for its operation and maintenance and bears O&M expenses."

230. The perusal of the above Regulations would make it evident that in case of a new generating company, the State Commission is required to make suitable assessment of base O&M expenses and allow O&M expense for subsequent years on the basis of such estimation and principle as given in Clause (2) (b). However, for employee cost the principle specified in clause 3 of the said Regulations will be followed.

231. As per the information furnished by the Everest Power before the State Commission it is stated that it was not feasible to determine the base for allowable O&M expenses for the FY 2012-13. Though the expenses for the part of the of FY 2012-13 are available, the same are insufficient for making suitable assessment of base O&M expenses as per Punjab State Electricity Regulatory Commission Regulations, 2005.

232. In view of the above, the State Commission considered it appropriate to apply Central Commission's Regulations,

2009 as mandated in the present case and allow the O&M Expenses amounting to Rs.912.89 lacs for the part of the FY 2012-13 which was worked out as 2% of the original cost of the project i.e. Rs.63346.83 lacs.

233. In view of the above situation, we cannot conclude that the calculation made in respect of O&M expenses by the State Commission is wrong.

234. Accordingly, this issue is decided as against the Appellant.

235. The **18th Issue** relates to **Interest on Loan**.

236. The Appellant claimed Rs.6199.47 lacs as interest on loan for the part of period 2012-13 and 8349.44 lacs for 2013-14.

237. According to the Appellant, the State Commission has wrongly calculated the interest of loan for 2012-13 and 2013-14 by considering the repayment of Rs.60.475 Crs during FY 2012-13, whereas the same was converted from a short term loan to long term loan.

238. According to the State Commisison the interest amount of Rs.6199.47 lacs and Rs.8349.44 lacs on loans claimed by the Appellant for the period 12.7.2012 to 31.3.2013 and FY 2013-14 respectively have been worked out by considering

the respective opening balance of loans, closing balance of loans and the weighted average rate of interest as 13.74% for FY 2012-13 and 13.55% for FY 2013-14.

239. According to the Appellant, it informed the State Commission about the year wise loan repayment schedule under which loan repayment from commercial operation date to 31.3.2013 is Rs.23.7919 Cr and for 2013-14 is Rs.37.9285 Cores and the State Commisison should have considered updated loan repayment as informed by the Appellant based on which the interest on loan should have been worked out.

240. The State Commission referred to Regulation 26 of the State Commission's Regulations, 2005 which provide for the calculation with regard to interest on loan. The same is as follows:

“Interest & Finance charges on loan:

(1) For Existing Loan Capital, Interest and finance charges shall be computed on the outstanding Loans, duly taking into account the rate of interest & schedule of repayment as per the Terms & Conditions of relevant agreements. The rate of interest shall be the actual rate of interest paid/payable by the Licensee (s)

or the State Bank of India Advance rate as on April, 1 of the relevant year, wherever is lower.

(2) For New investments, Interest & finance charges shall be computed on the loans, duly taking into account the rate of interest and schedule of repayment as per the Terms & Conditions of relevant agreements. The rate of interest shall be the actual rate of interest paid/payable by the Licensee (s) or the State Bank of India Advance rate as on April, 1 of the relevant year, wherever is lower.

(3) The interest rate on the amount of equity above 30% treated as loan shall be the weighted average rate of interest on loan capital of the generating company/licensee.

Provided that interest and finance charges of renegotiated loan agreements shall not be considered, if they result in higher charges.

Provided further that interest and finance charges on works in progress shall be excluded and shall be considered as part of the capital cost.

(4) Interest charges on security deposits, if any, made by the consumers with a generating company/licensee, shall be considered at the rate specified by the Commission from time to time.

(5) In case any moratorium period is availed of, depreciation provided for in the tariff during the years of moratorium shall be treated as repayment during those years and interest on loan capital shall be calculated accordingly.

(6) The Commission shall allow obligatory taxes on interest, commitment charges, finance charges

(including guarantee fee payable to the Govt.) and any exchange rate difference arising from foreign currency borrowings, as finance cost.

(7) Any saving in costs on account of subsequent restructuring of debt shall be shared between the consumers and the generating company/licensee in such ratio as may be decided by the Commission. ”

241. As per the above Regulations, the Interest & Finance Charges have to be computed for existing loan capital on the outstanding loans after taking into account the rate of interest and schedule of repayment as per the terms & conditions of relevant agreements.

242. The Regulations further provides that the rate of interest shall be the actual rate of interest paid/payable by the Generating Company as per State Bank of India Advance Rate as on April, 1 of the year whichever is lower.

243. In the Petitions in respect of the FY 2012-13, the opening balance of loans is taken as 62708.33 lacs and the interest on loan availed by the Appellant is depicted as Rs.6199.47 lacs for FY 2012-13.

244. The State Commisison approved the opening balance of loans as Rs.60127.01 lacs being 70% of the approved capital cost. By considering repayment of loan amounting to

Rs.6047.50 lacs, the closing amount of loans works out as Rs.54079.51 lacs.

245. Considering the opening balance of loans, closing balance of loans and by applying weighted average rate of interest of 13.74%, the interest on loans for the period 12.7.2012 to 31.3.2013 works out to Rs.5653.41 lacs.

246. The State Commission has approved the said amount namely 5653.41 lacs as interest on loan for the FY 2012-13 being lower of actual interest paid or payable or amount of interest as per SBI advance rate i.e. 14.75% as on 1.4.2012.

247. In respect of the FY 2013-14, the Appellant in the Petition referred to the opening balance of loans as Rs.62529.42 lacs and interest on loan availed by the Appellant was depicted as 8349.44 lacs for FY 2013-14. The State Commission approved the closing balance of loan as Rs.54079.51 lacs for FY 2012-13. By considering the opening balance of loan amount to Rs.54079.51 lacs and repayment of Rs.2224.47 lacs for FY 2013-14, the closing amount of loans works out as Rs.51855.04 lacs. Considering the opening balance of loans, closing balance of loans and by applying weighted average rate of interest of

Rs.13.55%, the interest on loans works out as Rs.7177.06 lacs.

248. Having considered these particulars, the State Commission accordingly approved amount of Rs.7177.06 lacs as interest on loan for FY 2013-14 being lower of actual interest paid/payable or the amount of interest as per SBI advance rate i.e. 14.45% as on 01.04.2013.

249. With regard to the Appellant's claim that the revised loan details were submitted to the State Commission through email and the same have not been considered by the State Commission, it is submitted by the learned Counsel for the State Commission that the arguments of the Counsel on behalf of the Appellant Everest Power as well Punjab Power were heard at length on 8.10.2013 and 15.10.2013.

250. After hearing the arguments of the parties at length, the State Commission closed the hearing of the Petition and reserved the judgment. The parties were directed to file written arguments by 30.10.2013. It is noticed that the Impugned Order was passed by the State Commission on 27.11.2013, long after the last date of filing of final written submissions by the parties.

251. Though the Punjab Power claimed that the State Commission is allowed the higher interest for the loans, the State Commission has in fact, acted in accordance with the relevant Regulations of the Punjab State Commission's (Terms and Conditions for Determination of Tariff) Regulations, 2005.

252. So, in view of the above, we do not find any infirmity in the findings rendered by the State Commission in regard to the issue of interest on loan.

253. Accordingly the same is decided as against the Appellant.

254. The **Last issue** is **Secondary Energy**.

255. According to the Appellant, the State Commission should have allowed secondary energy at the rate of 80 paise/kWh but wrongly fixed the rate of secondary energy as 75 paise/kWh which is not in consonance with the Central Commission's Tariff Regulations, 2009.

256. According to the State Commission in the Petition filed earlier by then State Electricity Board (Now Punjab Power) in connection with purchase of power from 100 MW Malana II HEP and determination of tariff, the Commission fixed secondary charge of 75 paise/kWh which is quite

reasonable. This was applicable through 40 years operation of the project as per the PSA. In the absence of any submission to the contrary by the parties, the State Commission decided to countenance the same.

257. As this rate stands already decided by the Commission, we feel that fixing the Secondary Energy rate as 75 Paise/kWh is quite reasonable and no interference in the said fixation is warranted.

258. Therefore, this issue is also decided as against the Appellant.

259. Summary of Our Findings

Appeal No.35 of 2014

(a) The conjoint reading of the various orders passed by the State Commission would reveal that the capped tariff has no application or relevance to the present tariff as determined by the State Commission which shall be payable by Punjab power to PTC for the electricity supplied.

(b) We do not find merit in the contention of Punjab Power that Everest Power is not entitled to

additional cost in determination of completed Capital Cost for the purpose of tariff determination on account of geological surprises encountered during the execution of the project.

(c) We feel that failure of HRT during trial run is due to lack of investigation and diligence during the construction of the project. Therefore, the cost of repairs of HRT and IDC & FC for the period the power plant was shut down for repairs due to damages in HRT and other components of the project till the COD of the project has to be disallowed.

(d) The interest rate has been decided by the State Commission as per its Regulations.

Appeal No.30 of 2014

(a) The State Commission's Regulations would be applicable to determination of tariff of the Appellant's power project.

(b) There is no merit in the claim of the Appellant for IDC & FC for the period October, 2011 to July,

2012 as we have held that damage to the HRT was not beyond reasonable control of the Appellant.

(c) The escalation to the EPC contractor due to delay in accounting of the Environment and Forest Clearance has to be allowed as per the terms of the contract.

(d) There is no merit in the claim of the Appellant regarding roads and bridges against geological surprises.

(e) PPA and PSA indicate that 'Change in Law' caused by Govt of Himachal Pradesh shall not be treated as 'Change in Law'. We, therefore find no merit in the claim of the Appellant for the claim towards Local Area Development Fund.

(f) We do not find any infirmity in the State Commission disallowing the cost of change in construction methodology in HRT, Surge Shaft and Pressure Shaft.

(g) We do not find any infirmity in the disallowance of damage to the dam protection

works. This issue is decided against the Appellant.

(h) There is no infirmity in the finding of the State Commission that extra expenditure of Rs.3.32 Crores towards rectification of power plant after synchronisation of units is not admissible. This issue is also decided against the Appellant.

(i) We do not find any reason to interfere with the travel expenses allowed by the State Commission.

(j) We do not find any infirmity with the State Commission deducting Rs.89.63 lacs as 15% of the cost of temporary buildings as per the CEA guidelines from the Capital Cost.

(k) Appellant is entitled to transmission charges that have been actually paid by the Appellant to AD Hydro Power for using the transmission lines during testing period prior to COD. However, the amount will be subjected to adjustment on outcome of the Appeal pending before the Hon'ble

Supreme Court regarding sharing of transmission charges on AD Hydro's transmission lines.

(l) The transmission charges and losses payable to AD Hydro have to be passed through to the Appellant due to effectuating of 'Change in Law' due to change in evacuation scheme of the power plant as per the directions in Paragraph 190.

(m) The issue regarding change in law on account of mandatory 0.5 cumecs discharge is decided in favour of the Appellant. Thus, the design energy of the Appellants may be decided after accounting for the mandatory 0.5 cumecs environmental discharge.

(n) We do not find any infirmity in the findings of the State commission regarding 12% free power.

(o) We do not find any merits in the claim of the Appellant regarding IDC on equity in excess of 30%.

(p) We do not find any infirmity in the State Commission's decision in reduction of interest on

UI receivables from AFC which has been done as per the Regualtions.

(q) The issue regarding O&M expenses is decided against the Appellant.

(r) There is no infirmity in the findings of the State Commission in regard to interest on loan.

(s) We find that the rate of 75 paise/KWh for secondary energy is reasonable.

260. In view of the above, Appeal No.30 of 2014 and 35 of 2014 are allowed in part.

261. The State Commission is directed to pass consequential order within 30 days of the date of this judgment.

262. No order as to costs.

263. Pronounced in the Open Court on this **12th day of November, 2014.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:12th Nov, 2014 ✓ ~~REPORTABLE/NON-REPORTABLE~~