

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

**Appeal No. 198 of 2013
& IA no. 433 of 2013**

Dated: 17th October, 2014

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

In the matter of:

**M/s. K.K.K. Hydro Power Ltd.
1-41, DLF Industrial Area Phase-I
Faridabad, Haryana – 121 003**

...Appellant (s)

Versus

**Himachal Pradesh Electricity
Regulatory Commission
Khalini, Shimla - 2**

...Respondent(s)

**Himachal Pradesh State Electricity
Board Ltd.,
Kumar House
Shimla – 171 004**

**State of Himachal Pradesh
Through Principal Secretary
(MPP & Power) To the Government
of Himachal Pradesh
Shimla – 2**

**The Himachal Pradesh Energy
Development Agency
(HIMURJA) SDA Complex
Kasumpti, Shimla – 171009, (H.P.)**

Counsel for the Appellant(s) : Mr. R.K. Mehta
Mr. Ajay Vaidya
Mr. Elangbam P.S.
Ms. Ishita Choudhuri Dasgupta

Counsel for the Respondent(s): Mr. Sanjay Jain, Sr. Adv.,
Ms. Shikha Ohri
Ms. Ruth Elwin
Mr. Antaryami Upadhyay
Mr. Hemant Singh for R-1
Mr. Anand K. Ganesan and
Ms. Swapna Seshadri for R-2
Mr. Rinku Gautam (Rep. – R-1)

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

The present Appeal has been filed by M/s. K.K.K. Hydro Power Ltd., a generating company, against the order dated 05.07.2013 passed by Himachal Pradesh Electricity Regulatory Commission (“State Commission”) in a petition filed by the Appellant for payment of arrears for electricity supplied to the Respondent no. 2.

2. The State Commission is the Respondent no.1. Himachal Pradesh State Electricity Board (“Electricity Board”) is the Respondent no.2. The State Government and Himachal Pradesh Energy Development Agency, a State nodal agency for development of hydro projects in the State are the Respondent no.3 and 4 respectively.

3. The brief facts of the case are as under:
 - 3.1 The Appellant is a generating company which has set up a small hydro project in the State of Himachal Pradesh.

 - 3.2 On 30.03.2000, an Implementation Agreement (“IA”) was executed between the Appellant and State Government of Himachal Pradesh whereby the

Appellant was granted right to establish, operate and maintain Baragaran Hydro Electric Power Project with a capacity of 3 MW. IA provided for royalty to the State Government @ 10% of deliverable energy to be levied commencing from the date falling 15 years from the Commercial Operation Date (“COD”).

3.3 On the same day i.e. 30.03.2000, a Power Purchase Agreement (“PPA”) was executed between the Appellant and the Electricity Board, the 2nd Respondent herein, on the basis of the IA dated 30.03.2000 for sale of electricity from its 3 MW project. Under the said PPA, the Appellant had to sell power to the Electricity Board at a fixed rate of Rs. 2.50 per kWh.

3.4 On 05.08.2004, the 3 MW project was commissioned. On 05.02.2005, the Appellant sought approval of the

State Government for augmentation of the project capacity from 3 MW to 4.90 MW.

3.5 In the meantime the State Government notified new policy (2006 policy) providing for new and more stringent royalty terms for the hydro projects viz. no royalty for 12 years and thereafter royalty @ 12% of delivered energy for 18 years and beyond 18 years royalty @ 18%, in place of royalty @ 10% commencing after 15 years.

3.6 Vide letter dated 06.09.2006, the Appellant requested the State Government to modify Supplementary IA and instead of imposing royalty terms as per 2006 policy on entire 4.9 MW capacity, it should be segregated in a manner that separate royalty terms are applicable on the 3 MW project as per earlier policy and on balance

- 1.9 MW proposed augmentation project as per 2006 policy. However, the State Government did not agree to the request of the Appellant to confine the higher royalty only to the additional capacity of 1.9 MW. Thereafter, the Supplementary IA was executed for the entire quantum of 4.9 MW in terms of the 2006 Policy on 05.07.2007.
- 3.7 As required in the Supplementary IA, the Appellant and the Board after due deliberation, mutually agreed to submit a Joint Petition before the State Commission for approval of draft PPA for the entire capacity of 4.9 MW.
- 3.8 On the above Joint Petition, by order dated 04.12.2007, the State Commission approved the draft PPA for revised capacity of 4.9 MW with the condition that the tariff and other terms and conditions of the PPA would

be subjected to the provisions of the Power Procurement from Renewable Sources and Co-generation by Distribution Licensee Regulations 2007, hereinafter referred to as 2007 Regulations.

3.9. By order dated 18.12.2007, the State Commission fixed the tariff of Small Hydro Plants @ Rs. 2.87 per unit. The order had a direction regarding applicability of the order to PPA already approved by the State Commission with the specific clause that tariff shall be subject to provisions of the 2007 Regulations for Renewable Energy Sources or PPA to be approved by the State Commission hereinafter.

3.10 Pursuant to the approval granted by the State Commission by order dated 04.12.2007, PPA was executed between the Appellant and the Electricity

Board for 4.9 MW capacity on 11.03.2008 incorporating a clause that the PPA signed earlier for 3 MW on 30.03.2000 shall cease to be in operation for the purpose of billing only after signing of PPA of the revised capacity of 4.9 MW and tariff would be as per the 2007 Regulations for Renewable Energy Sources. The additional capacity of 1.9 MW was commissioned by the Appellant on 10.07.2008, thereby the entire 4.9 MW capacity was commissioned.

3.11 Order dated 18.12.2007 of the State Commission was challenged by Hydro Project Developer and the Electricity Board before this Tribunal in Appeal nos. 50 of 2008 and 65 of 2008 but the direction regarding applicability of the order was not challenged. These Appeals were disposed of by the Tribunal by judgment

dated 18.09.2009 with some directions to the State Commission.

3.12 In implementation of the Tribunals judgment dated 18.09.2009, the tariff for Small Hydro Projects was enhanced to Rs. 2.95/kWh by the State Commission by order dated 9/10.02.2010.

3.13 In June, 2010, the Appellant filed a Petition being no. 94 of 2010 before the State Commission for direction to the Electricity Board to execute the Supplementary PPA incorporating the enhanced tariff determined vide order dated 9/10.02.2010.

3.14 On 10.09.2010, Supplementary PPA was executed between the Appellant and the Electricity Board modifying the tariff of Rs. 2.50/unit with tariff of Rs.

2.95/unit in terms of the orders dated 04.12.2007, 18.12.2007 and 9/10.02.2010.

3.15 In view of signing of the Supplementary PPA, Petition no. 94 of 2010 was dismissed as withdrawn by the State Commission.

3.16 After execution of the Supplementary PPA dated 10.09.2010, the Electricity Board started making payment @ Rs. 2.95 per unit against the current bills, but the arrears for the period from 11.03.2008 to 10.09.2010 were not paid by the Board. Therefore, the Appellant filed a Petition being no. 6 of 2011 before the State Commission with the only prayer for direction to the Electricity Board for payment of arrears.

3.17 During the pendency of the above Petition (no.6 of 2011), the Electricity Board passed the bill for Rs.2,77,50,960 towards the arrears on account of difference of tariff of Rs. 2.50/kWh and Rs. 2.95/kWh for the period 11.03.2008 (date of PPA) to 10.09.2010 (date of Supplementary PPA) and directed release of the said amount in 5 equal instalments of Rs. 55,50,192/-. The first instalment was paid on 26.02.2011.

3.18 On 27.07.2012, the Electricity Board filed a Petition being no. 118 of 2012 before the State Commission praying for rectification/modification of the order dated 04.12.2007 by which the draft PPA was approved by the State Commission.

3.19 The State Commission by impugned order dated 05.07.2013 disposed of the Petition no. 6 of 2011 and 118 of 2012 holding that the Supplementary PPA was not in line with the approval accorded by the State Commission nor the approval had been obtained before its execution and therefore, it cannot be enforced by the State Commission.

3.20 After the impugned order, the Appellant was informed by the Electricity Board (Respondent no.2) that subsequent to the impugned order, the Supplementary PPA dated 10.09.2010 has become inoperative and unenforceable and hence the terms and conditions contained in the PPA dated 11.03.2008 including rates for royalty for entire capacity of 4.9 MW would be applicable. Thus, the Appellant would be entitled to

tariff of Rs. 2.50/kWh even with revised rate of royalty being applicable for the entire capacity of 4.9 MW.

3.21 Aggrieved by the impugned order dated 05.07.2013, the Appellant has filed this Appeal.

4. The Appellant has made the following submissions:

4.1 The State Commission has completely disregarded the orders dated 04.12.2007 and 18.12.2007 and thus given a complete go by to the well established concepts of Finality, Limitation, Judicial discipline, Legitimate expectation and Promotion of Renewable Sources of Energy.

4.2 The Petition no. 6 of 2011 was filed by the Appellant for payment of arrears from 11.03.2008 to 10.09.2010

along with interest. During the pendency of the petition, the Electricity Board decided to make payment of arrears in five equal instalments and made payment of first instalment on 28.02.2011. Thus, the only dispute that remained between the parties was with regard to payment of interest on arrear amount. By the impugned order dated 05.07.2013, the State Commission held that the Supplementary PPA was not in line with the approval accorded by the State Commission nor the approval had been obtained from the State Commission, even though there was no challenge to the Supplemental PPA dated 10.09.2010. The State Commission in the proceedings filed by the Appellant for recovery of arrears had no jurisdiction to reopen/nullify the orders dated 04.12.2007 and 18.12.2007 as well as Supplementary PPA dated 10.09.2010, even though the State Commission's

previous orders had become final and had been duly acted upon by the parties.

4.3 The Petition filed by the Appellant before the State Commission was in the nature of execution proceedings. It is the well established position of law that the executing Court cannot go behind the decree.

4.4 The State Commission has wrongly interpreted its order dated 04.12.2007 and 18.12.2007.

4.5 The findings and conclusion of the State Commission in the impugned order are contrary to the view taken by the State Commission in all other cases of Small Hydro Projects.

4.6 As held by the Tribunal in (2008) ELR 237 in case of Rithwik Energy Systems, the PPAs can be re-opened only for the purpose of giving thrust to non-conventional energy projects and not for curtailing incentives.

5. In reply to above, the Electricity Board has submitted as under:

5.1 2007 Regulations did not apply to the PPA executed between the parties prior to constitution of the State Commission.

5.2 The order dated 04.12.2007 was not a final order passed by the State Commission. The said order provided that parties were required to file another petition before the State Commission with amendments to the PPA and seek the approval of the State

Commission. This never occurred. Thus, the PPA cannot be said to be approved by the State Commission.

5.3 The Regulations only provided for de novo determination of tariff for PPAs which were to be executed by the Electricity Board for the projects to be established in the State. The Regulations did not provide for the application of tariff for expansion projects.

5.4 Merely because there is an expansion in the existing project of the Appellant, the same could not render in a situation where the binding and concluded tariff is increased. The Appellant had agreed for a tariff of Rs. 2.50/kWh and, therefore, it is not open for the appellant to claim a higher tariff.

5.5 The Supplemental PPA dated 10.09.2010 entered into between the parties is neither in line with the prior approval granted by the State Commission nor the same was approved by the State Commission.

5.6 The reliance on the part of the Appellant that on increase in water charges, royalty etc., the Appellant should be entitled to the increased tariff of Rs. 2.95 per unit is misconceived. The tariff of Rs.2.95 per unit is not on account of royalty, water charges, etc., but on account of increased costs and expenses including capital costs.

6. The State Commission has also filed written submissions in support of impugned order.

7. On the above issues we have heard Shri R.K. Mehta, Learned Counsel for the Appellant, Mr. Anand K. Ganesan, Learned Counsel for the Respondent no. 2 and Ms. Shikha Ohri, Learned Counsel for the State Commission. They also filed written submissions. After carefully examining the contentions of the parties, the following questions would arise for our consideration.

i) Whether the State Commission had jurisdiction to pass an order negating the Supplemental PPA dated 10.09.2010 executed between the Appellant and the Electricity Board in the Petition filed by the Appellant for recovery of arrears wherein the Supplemental PPA was not challenged by either of the parties?

ii) Whether the State Commission erred in interpreting its orders dated 04.12.2007 and 18.12.2007?

iii) Whether the Appellant is entitled to tariff of Rs. 2.50 per unit as per the PPA dated 30.03.2000 despite the State Government imposing the condition of higher royalty as per the 2006 policy for the entire capacity of 4.9 MW of the Appellant's project and the 1.9 MW capacity of the project was commissioned on 10.07.2008 after the notification of the 2007 Regulations?

8. All the above issues are interconnected and hence being dealt with together.

9. Let us examine the impugned order dated 05.07.2013. We find that a combined order has been passed in

Petition no. 6 of 2011 filed by the Appellant seeking directions to the Electricity Board to pay arrears of bills along with interest in accordance with Supplementary PPA on the new tariff rates fixed for Small Hydro Projects and Petition no. 118 of 2012 filed by the Electricity Board for rectification/modification of certain part of order dated 04.12.2007 passed by the State Commission. The findings of the State Commission in the impugned order are as under:

- 9.1 Harmonious reading of Implementation Agreement and Supplemental Implementation Agreement clearly establish that Baragaran HEP (3 MW) for which IA was signed on 30.03.2000 and Baragaran HEP (4.9 MW) is the same project and it is not a new project. Supplemental IA is supplemental to original IA and it does not supersede the original IA. Capacity addition of

1.9 MW does not make additional capacity as a separate project.

9.2 The parties instead of agreeing upon a Supplementary PPA on the line of Supplementary IA agreed upon a fresh/revised PPA. The protection provided to the original PPA, under the preamble/recital of fresh PPA after capacity revision, maintains the rights and obligations and the quantum of energy the then 3 MW project generated or was designed to generate.

9.3 The State Commission approved the PPA, proposed by the parties as such, including the tariff of Rs. 2.50 per unit for net saleable energy from the total revised capacity of 4.9 MW.

9.4 The Commission approved the proposed PPA of the parties with five conditions as per its order dated 04.12.2007. In compliance of these observations, the parties obtained specific approvals on the first four conditions from the State Commission which was approved on 25.02.2008. However, no orders were obtained on condition no. (v) even though the 2007 Regulations were notified on 21.06.2007 and the State Commission 's tariff order for Small Hydro Projects based on the 2007 Regulations was issued on 18.12.2007. The condition no. (v) was as under:

“Tariff and other term sand conditions of the PPA shall be subject to the provisions of the Himachal Pradesh Electricity Regulatory Commission (Power Procurement for Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007”.

9.5 Thereafter the parties executed the PPA as such, but with only modifications as per State Commission's order dated 25.03.2008 i.e. observation i) to iv). This clearly implies that original PPA was not superseded and was given protection under 3rd part of the preamble and tariff for incremental energy resultant to capacity revision also remained same at Rs. 2.50 per unit because the project remained the same and only capacity expansion was done.

9.6 The Supplementary PPA was executed by the parties on 10.09.2010 modifying the tariff of Rs. 2.50/kWh to Rs. 2.95 per kWh as per the State Commission's orders dated 18.12.2007, 09.02.2010 and 10.02.2010. However, the PPA was approved by the State Commission on 04.12.2007 with observation regarding

applicability of tariff as per 2007 Regulations, even though tariff in the relevant clause of PPA approved was specific i.e. Rs. 2.50 per unit and was executed by parties accordingly for Rs. 2.50 per unit only.

9.7 The harmonious reading of the State Commission's order regarding applicability of order dated 18.12.2007 indicates that these regulations and orders issued thereunder will apply prospectively for the PPAs, except that these will apply to those PPAs which were approved by the State Commission with the specific condition that tariff and other terms and conditions of the PPA shall be subject to the provisions of 2007 Regulations notified on 21.06.2007. The scope of the expression "tariff and other terms and conditions" is large and not limited to per unit purchase rate of energy as is generally construed from the word tariff. This is

apparent from the content and scope of 2007 Regulations as well as State Commission's order dated 18.12.2007. The State Commission determined terms and conditions as contained in Model PPA prepared by the Electricity Board and approved by the State Commission on 24.03.2003 with amendments from time to time. However, the State Commission initiated process for determination of tariff and other terms and conditions as per provisions of the Regulations of 2007 and decided all fresh/new PPAs shall be approved subject to provisions of the Regulations.

9.8 The IA and Supplemental IA and the PPA dated 30.07.2000 and 11.03.2008 clearly states that the project is one and only capacity revision was allowed and the PPA was also consequential to capacity revision. Therefore, it is not a new PPA being signed

after 15.07.2006 with generic stipulation of being subjected to the 2007 Regulations. However, the consequential PPA on account of capacity revision was signed after the Regulations came into force. The Regulations and the orders issued thereunder did not provide for tariff and other conditions to regulate or govern the purchase of incremental energy generated consequent to capacity revision. As per second proviso to the Regulation 6, there is no power to review the PPA signed prior to existence of the State Commission. Since the energy generated from the original capacity of 3 MW does not fall within the purview of the State Commission's Regulations, only issue to be seen is how the incremental energy granted should be regulated for purchase in the absence of specific provisions in the 2007 Regulations.

9.9 Second proviso to Regulation 6 of 2007 Regulations provides that any review is neither automatic nor it is at the will of the parties alone and it has to be with the specific approval of the State Commission with reasoned orders. PPA dated 11.03.2008 was already a Supplementary to PPA dated 30.03.2000 on account of capacity revision so as to provide for purchase of incremental energy also at the same tariff. Therefore, Supplementary PPA at best is required to be reviewed for Supplementary energy consequent to capacity revision, which requires approval of the State Commission.

9.10 The State Commission does not have power to look into the agreement entered into or concluded prior to its setting up and such agreements are to be complied in

accordance with stipulations made therein and they will remain in force.

9.11 The State Commission has power to rectify its inadvertent, genuine and bonafide mistakes crept in the order passed by it and the State Commission has to judicially determine the mistake or error apparent on the face of record in the instant case.

9.12 The revised PPA, sought to be approved by the State Commission, was designed to amend qua capacity enhancement and no other provision such as rate of tariff etc., were required to be altered as is evident from clause 6.2 of the draft PPA submitted for approval which envisaged a fixed rate of Rs. 2.50 per unit. The parties evaded to move an application for determination of tariff on enhanced capacity, if any required, as there

was no such provision in the 2007 regulations, subject to which the consent was accorded. For factoring in additional capitalization for capacity enhancement and impact of subsequent clauses in the IA for free supply of power in lieu of water royalty, the parties were required to move separate Petition, to get sufficient provisions incorporated in the PPA.

9.13 Thus, there is no mistake or error on the part of the State Commission to include clause (v) in the approval order dated 04.12.2007. Pursual of the State Commission's order dated 04.12.2007 makes it clear that the Commission conveyed its consent for the PPA subject to certain observations and it as for the parties to finalise and execute the PPA accordingly. The confusion has arisen from the wrongful assumption and interpretation of the said Clause (Clause V) by the

parties and execution of the Supplementary PPA dated 10.09.2010 not in conformity with the provisions of the Regulations subject to which the State Commission ascended its approval. Thus, there is no need to recall and modify the consent order dated 04.12.2007.

9.14 The model PPA approved by the State Commission vide order dated 24.03.2003 and further modified vide orders dated 06.09.2003, 12.09.2004 and 27.05.004 is mere guiding and facilitating process as such it has no binding effect as the stipulations contained therein do not become applicable automatically, unless the parties adopt the same by incorporating suitable provisions in the PPA. The model PPA per se is generic in nature and its amendments normally will have prospective applicability. If it impacts concluded PPAs, the parties

may have to adopt the Model PPA, with the approval of the State Commission.

9.15 The PPA of 2000 does not empower the parties to unilaterally change the terms of the agreement. Clause 15 of the PPA stipulates that the PPA can be amended only with the written consent of both the parties. After the coming into force of the Electricity Act, 2003, the Electricity Board has no power to fix or vary the tariff. It is the State Commission which has been assigned the function of determination of tariff. There is a statutory duty cast upon on the regulated utilities to align their existing and further contracts with the Regulations and the PPA can be amended/modified in terms of the agreement only with the consent of both the parties and wherever any modification invokes tariff, such

modification and amendment can be made only with the approval of the State Commission.

9.16 There is no room for assumptions/presumption that the tariff laid down under the said Regulations and the order dated 18.12.2007 issued thereunder, would be applicable to the entire capacity of the projects which enhance their capacities partially. For factoring in the additional capitalization for capacity enhancement, the parties in the absence of specific provisions in the Regulations were required to move proper petition for review of tariff for approval of the Commissions. Both the parties have neither worked out the terms and conditions of their PPA in conformity with consent given by the Commission nor they have moved any Petition for review of their tariff to factor in additional capitalization for capacity enhancement or to consider

impact of provision for free power in lieu of water royalty.

9.17 The Petitioner (Appellant herein) cannot seek the relief for release of arrears on the basis of the Supplementary PPA dated 10.09.2010 which is not in line with the approval accorded by the State Commission.

9.18 The Petitioner (Appellant herein) is claiming arrears in terms of the Supplementary PPA dated 10.09.2010 which is not lawful as it neither has the State Commission's approval nor it meets the test of law. Therefore, the State Commission cannot enforce the Supplementary PPA.

10. The crux of the findings of the State Commission is that the Supplementary PPA dated 10.09.2010 is not in

consonance with the approved order dated 04.12.2007 and the 2007 Regulations and therefore the tariff determined by the Commission for small hydro projects as per the 2007 Regulations will not be applicable to the Appellant's power plant. The additional unit of 1.9 MW set up by the Appellant to augment the capacity of the project to 4.9 MW is a part of the same power project and it will be governed by the tariff of Rs. 2.50/unit as per the PPA dated 30.03.2000 for 3 MW unit. The State Commission is not empowered to open the PPA dated 30.03.2000 which was entered into by the parties prior to the constitution of the State Commission. The State Commission also rejected the Petition filed by the Electricity Board for rectification/modification of its order dated 04.12.2007 holding that there is no mistake or error to include Clause v) in the approval order dated 04.12.2007.

11. Let us examine the issue relating to jurisdiction of the State Commission in going into the validity of the Supplementary PPA in a petition filed by the Appellant regarding payment of arrears.

12. According to Learned Counsel for the Appellant, the State Commission in a petition filed by the Appellant for recovery of arrears had no jurisdiction to reopen the orders dated 04.12.2007 and 18.12.2007 and Supplementary PPA dated 10.09.2010 when State Commission's previous orders had become final and acted upon by the parties.

13. We do not find force in the contention of the Appellant regarding jurisdiction of the State Commission for the following reasons:

- i) The Respondent Electricity Board had also filed a petition being no. 118 of 2012 for rectification/modification of certain part of the order dated 04.12.2007 passed by the State Commission based on which the Supplementary PPA was executed between the parties. The impugned order was a common order on the petitions filed by the Appellant and the Electricity Board. The Electricity Board had contended before the State Commission that the State Commission did not have jurisdiction to reopen the PPA executed prior to the date of constitution of the State Commission and therefore order dated 04.12.2007 cannot be taken to cover the entire energy granted by the additional capacity of 1.9 MW and, therefore, order dated 04.12.2007 be recalled and the inadvertent error

- arising therefrom be rectified. Consequently, the State Commission had to interpret its order dated 04.12.2007.
- ii) The Appellant had claimed the arrears based on the Supplementary PPA dated 10.09.2010 which was entered into between the parties purportedly on the basis of the order of the State Commission dated 04.12.2007. Since the payment of arrears was contested by the Electricity Board, it was necessary for the State Commission to go into the validity of the Supplementary PPA dated 10.09.2010 to see whether it was as per its directions given in its approval order dated 04.12.2007 and the Regulations, especially as the Supplementary PPA itself had not been approved by the State Commission.
14. Therefore, the issue relating to jurisdiction raised by the Appellant is rejected.

15. Let us now examine the PPA dated 30.03.2000 entered into between the Appellant and the Electricity Board for supply of power from 3 MW capacity project.

16. The tariff agreed to in the PPA dated 30.03.2000 was firm and fixed at the rate of Rs. 2.50 per kWh on net saleable energy. However, Article 8.8 of the PPA provided that any statutory tax, levy, duties, cess or any kind of imposition(s) whatsoever imposed/charged by the Government (Central/State) and/or any other local bodies/authorities on generation of electricity after the Effective Date i.e. date of signing of the Agreement, shall be reimbursed by the Electricity Board on the quantum of Net Saleable Energy. Thus, according to PPA, the Appellant is entitled to claim reimbursement on account of any statutory tax, levy, duties, cess or

any kind of imposition by the Government and/or local bodies on generation of electricity after 30.03.2000 on the energy supplied from 3 MW capacity. However, since the PPA of the 3 MW plant was entered into prior to the constitution of the State Commission and it was commissioned on 05.08.2004, prior to the notification of the 2007 Regulations, the Appellant is not entitled to claim tariff for its 3 MW unit on the basis of the tariff determined by the State Commission as per the 2007 Regulations.

17. Let us examine the 2007 Regulations.
18. 2007 Regulations were notified on 18.06.2007 and came into effect from the date of the publication in the State Gazette. The Amendment dated 12.11.2007 to the 2007 Regulations provided that where the PPA approved prior to the commencement of these

Regulations is not subjected to the provision of the 2007 Regulations or where, after the approval of the PPA there is change in statutory laws or rules or the State Government Policy, the commission in order to promote generation of electricity from renewable sources of energy may after recording reasons, by an order, review or modify such PPA.

19. We notice that the 1.9 MW capacity plant was planned after the commissioning of the 3 MW capacity as an extension to the existing plant. The Appellant sought approval of the State Government for addition of 1.9 MW capacity and enhancement of the installed capacity of the power project to 4.9. MW on 05.02.2005. The Supplementary IA for entire quantum of 4.9 MW was entered into between the Appellant and the State Government on 05.07.2007 as per the 2006 State Policy under which the Appellant had to provide for levy

of higher quantum of free power for the entire 4.9 MW capacity. The 1.9 MW capacity was commissioned on 11.07.2208 after the 2007 Regulations came into effect and after issuance of the tariff order dated 18.12.2007.

20. Let us now examine the tariff order dated 18.12.2007 passed by the State Commission in pursuance to the 2007 Regulations.

21. The tariff order dated 18.12.2007 considers the impact of changes in the State Government Policy, 2006 and additional levies imposed under the new Policy on the hydro projects which were non existent when the rate of Rs. 2.50/kWh was decided in May, 2000. It is stated in the tariff order dated 18.12.2007 that the new Policy has not considered the impact of these charges as the

tariff has been maintained at the same level. The relevant paragraph is reproduced below:

“Subsequently, The State Government has reviewed earlier policy and formulated “Hydro Policy of Himachal Pradesh-2006”, making it obligatory for the developers to cater to stipulations such as mandatory 15% water release, LADA, compensation to fisheries, Payments towards use of forest land etc. which were non existent when rate of purchase was announced in May, 2000. The new policy with retrospective effect, does not seem to have considered the impact of these changes as per the energy tariff has been maintained at Rs. 2.50/unit.”

22. By the above order dated 18.12.2007, the State Commission determined tariff of Rs. 2.87/unit after considering the normative capital cost, normative operational and financial parameters, additional expenditure incurred by the project developer on account of LADA charges, forest and fisheries levies and free power as per the 2006 Policy of the State Government. The tariff order was to be applicable to such PPAs which have been approved by the State

Commission with specific Clause that the tariff and other terms and conditions of the PPA shall be subject to the provisions of the 2007 Regulations. The relevant paragraph of the tariff order is as under:-

"5.35 This order shall be applicable to all such Power Purchase Agreements (not exceeding 5 MW) which have already been approved by the Commission with a specific clause that "Tariff and other terms and conditions of the PPA shall be subject to the provisions of the Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007" and also the Power Purchase Agreements to be approved by the Commission hereinafter."

23. Subsequently, the tariff was revised to Rs. 2.95/kWh w.e.f. 18.12.2007 by order dated 9/10.02.2010 as per the directions of this Tribunal in judgment dated 18.09.2009 in Appeal nos. 50 of 2008 and 65 of 2008.

24. In this background, let us now examine the State Commission's order dated 04.12.2007 on the joint petition filed by the Electricity Board and the Appellant for approval of the PPA. The PPA was approved subject to five observations. Condition v) is relevant to the present case which is reproduced as under.

“the Commission under sub-section (1) (b) of Section 86 of the Electricity Act, 2003 grants consent to the said PPA, subject to the following observations:

(v) Tariff and other terms and conditions of the PPA shall be subject to the provisions of the Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Cogeneration by Distribution Licensees) Regulations, 2007.”

25. Let us now examine the application of the 2007 Regulations to the project of the Appellant.

26. It is clear from the 2007 Regulations that the tariff of the 3 MW plant for which PPA was entered into on 30.03.2000 and the plant was commissioned on 05.08.2004 prior to notification of the 2007 Regulations, will not redetermined as per these Regulations. However, the State Commission as per the second proviso to the Regulation 6 as amended on 27.11.2007 is empowered to modify the PPA for reason of change in statutory laws or rules or the State Government Policy. However, the 1.9 MW capacity which is an extension of the 3 MW capacity project will be subject to the tariff as per the 2007 Regulations. 1.9 MW capacity was planned and approved after the commissioning of the 3 MW capacity and was commissioned on 10.07.2008 after the notification of the 2007 Regulations and determination of tariff by order dated 18.12.2007 as per the 2007 Regulations.

The State Commission in its order dated 18.12.2007 has given reasons why the tariff for the new hydro projects should not be pegged at Rs. 2.50/kWh as per the 2000 Policy of the State Government. The tariff determined as per the 2007 Regulations considers the normative capital cost, other normative operational and financial parameters, LADA and other levies imposed by the State Government and the revised free power as per the 2006 Policy. All these parameters would be applicable to the 1.9 MW capacity which was commissioned after the notification of the 2007 Regulations and issuance of tariff order dated 18.12.2007.

27. The State Commission in the impugned order held that there was no mistake or error on the part of the State Commission to include Clause (v) in the approval order

dated 04.12.2007 but by its own interpretation of Clause (v) made it ineffective. If the State Commission had to approve the tariff of Rs. 2.50/kWh as per the PPA, there was no need to add Clause (v) to the approval of the PPA.

28. The Agreement for the augmentation of capacity by installing an additional 1.9 MW capacity plant as extension to the 3 MW plant was entered into after the formation of the State Commission and enactment of the Electricity Act, 2003. Therefore, the tariff under the agreement had to be approved by the State Commission. The tariff of Rs. 2.50/kWh agreed to in the PPA dated 30.03.2000 was for capacity of 3 MW which was based on the State Government's Policy. The tariff of Rs. 2.50/kWh was not determined as per the principles laid down under Section 61 of the Electricity

Act, 2003. Therefore, when the additional capacity of 1.9 MW was to be added subsequent to the commissioning of the 3 MW capacity and subsequent to the notification of 2007 Regulations its tariff has to be determined by the State Commission as per its 2007 Regulations and the subsequent tariff orders. Legally, the tariff of Rs.2.50 per Kwh as decided by the State Government prior to enactment of the Electricity Act, 2003 cannot be made applicable to 1.9 MW capacity which was planned, approved and commissioned after the constitution of the State Commission and notification of the 2007 Regulations. Therefore, the tariff of 1.9 MW capacity has to be decided as per the 2007 regulations.

29. The State Commission had correctly added condition no. v) to its approval of the PPA jointly proposed by the

parties. However, the State Commission has in the impugned order wrongly interpreted condition no., v) of its own order dated 04.12.2007 to bring its effect to naught. We have now interpreted the order dated 04.12.2007 under which the tariff was subject to the provisions of the 2007 Regulations, by applying the 2007 Regulations.

30. We agree with the State Commission that the tariff of 3 MW capacity cannot be modified by the State Commission except what is permissible under the PPA and the 2007 Regulations i.e. change in statutory laws, or rules or the State Government Policy. However, we do not agree with the finding of the State Commission that the 1.9 MW capacity being part of the same hydro project is also subjected to the same tariff as decided by the State Government under its Policy of 2000. After

the enactment of the Electricity Act, 2003 and constitution of the State Commission, the tariff decided by the State Government in the year 2000 will not be valid in law and, therefore, cannot be applied on the new unit commissioned on 11.07.2008 by the State Commission. The tariff for 1.9 MW capacity which was commissioned on 10.07.2008 has to be as per the tariff order dated 18.12.2007, as amended by order dated 9/10.02.2010 issued by the State Commission pursuance to its 2007 Regulations.

31. According to the State Commission, the parties had obtained specific approvals on conditions i) to iv) of the order dated 04.12.2007. However, no orders were obtained on condition no. v). We find that in condition i) to ii) the State Commission had specifically directed that the parties have to file a joint application for

necessary approval. For condition iii), the State Commission had directed that the construction schedule needs to be got approved from the competent authority as per the standard Implementation Agreement and attached as such with the PPA. Condition iv) was regarding missing page 2 of the Implementation Agreement. All the conditions i) to iv) were, therefore, required to be approved by the State Commission as per its directions in the order. However, there was no direction for putting up the PPA for approval again to the State Commission after incorporating the tariff and terms and conditions as per the 2007 Regulations. The parties as per their understanding of the order dated 04.12.2007 entered into PPA dated 11.03.2008 and Supplementary PPA dated 10.09.2010. Therefore, no adverse inference can be drawn against the Appellant for not obtaining

approval of the State Commission for tariff agreed to between the parties as per the understanding of the order dated 04.12.2007.

32. We find that Supplementary Agreement was signed by mutual consent of the parties on 10.09.2010 modifying the tariff of Rs. 2.50/kWh with tariff of Rs. 2.95/kWh. It was only when the State Commission made queries regarding circumstances in which tariff of Rs. 2.95 was agreed, then the Electricity Board filed a Petition for recalling/modifying the condition v) of the order dated 04.12.2007, which was ultimately rejected by the State Commission. As already held, the tariff of 3 MW capacity for which PPA was entered into on 30.03.2000 could not have been modified by mutual consent. However, the tariff for 1.9 MW capacity has to be as per

the tariff order of the State Commission i.e. Rs. 2.95/kWh.

33. According to Learned Counsel for the Electricity Board, the tariff of Rs. 2.50 was binding on the parties and was in compliance of the regulatory requirements. We do not agree with the contention of the Learned Counsel for the Electricity Board. The PPA dated 30.03.2000 was for a capacity of 3 MW. It is not the case where the capacity of 3 MW plant was enhanced to 4.9 MW by enlarging the capacity of the unit from 3 MW to 4.9 MW. In this case the 3 MW plant was commissioned on 05.08.2004. Thereafter, the 1.9 MW plant was planned and approved and was commissioned on 10.07.2008. The tariff of the 1.9 MW plant cannot be the same as decided by the State Government for 3 MW unit prior to the constitution of the State Commission. After the

constitution of the State Commission, the tariff for the 1.9 MW plant is to be determined by the State Commission according to the principles laid down under Section 61 of the Electricity Act. The tariff of Rs. 2.5/kWh based on the State Government Policy of 2000 and not determined as per the Electricity Act, 2003 cannot be applied to the 1.9 MW plant which was commissioned subject to the enactment of the 2003 Act and constitution of the State Commission.

34. According to Shri Mehta, Learned Counsel for the Appellant, higher Royalty has been levied on the capacity of the project which was commissioned prior to the 2006 Hydro Policy of the State Government and, therefore, the tariff determined by the State Commission vide orders dated 18.12.2007 as amended by order dated 9/10.02.2010 should be made applicable

to even the existing capacity of 3 MW. We are not in agreement with the contention of the Learned Counsel for the Appellant. The tariff determined by the State Commission vide orders dated 18.12.2007 and 9/10.02.2010 not only accounts for higher Royalty rates but also capital cost of the new capacity and other operational and financial parameters which cannot be applied to old unit commissioned on 05.08.2004, PPA for which was entered into prior to the constitution of the State Commission. The parties have acted on the PPA dated 30.03.2000 and energy from the 3 MW capacity was supplied to the Electricity Board from 05.08.2004 till the notification of the 2007 Regulations and passing of the tariff order dated 18.12.2007. Thus, rights have been vested in the parties in accordance with law then existing prior to the constitution of the State Commission for supply from the 3 MW capacity.

Just because the expansion unit was commissioned subsequent to the notification of the 2007 Regulations, it does not give right to the Appellant to claim higher tariff for the 3 MW plant as per the 2007 Regulations.

35. As the 1.9 MW capacity has been planned and executed to exploit the additional power potential available at the same project site and the entire capacity of the project is injected and evacuated from the same bus bars, a common tariff has to be determined for the power plant as a whole. Accordingly, the tariff of the project will be weighted average of the respective tariffs and the design energy envisaged for the 3 MW and 1.9 MW capacity in the approved Detailed Project Report of the Appellant's project w.e.f. COD of 1.9 MW plant i.e. 10.07.2008. The Appellant will be entitled to the payment of arrears on account of

difference in the tariff for the project as per the above directions and the tariff at which payment has already been made. Accordingly decided.

36. Summary of our findings

- i) The State Commission has correctly exercised its jurisdiction to examine the validity of the supplementary PPA dated 10.09.2010 entered into between the parties purportedly on the basis of State Commission's order dated 04.12.2007. The impugned order was a common order on the petitions filed by the Appellant for payment of arrears and the Electricity Board seeking modification of the order dated 04.12.2007 based on which the Supplementary Agreement was signed. Since payment of arrears was contested by the Electricity Board it was necessary for the State**

Commission to go into the validity of the Supplementary PPA dated 10.09.2010 to see whether it was as per its directions given in its approval order dated 04.12.2007 and the Regulations, especially as the Supplementary PPA itself had not been approved by the State Commission.

- ii) As per the 2007 Regulations the tariff of the project for which PPA was entered into on 30.03.2000 and the plant was commissioned on 05.08.2004 prior to the notification of the Regulations will not be redetermined as per these Regulations. However, the State Commission as per the second proviso to the Regulation 6 as amended on 27.11.2007 is empowered to modify the PPA for reason of change in statutory laws or rules or the State Government**

Policy. However, the 1.9 MW capacity which is an extension of the 3 MW capacity project will be subject to the tariff determined as per the 2007 Regulations.

- iii) The Agreement for augmentation of capacity by installing of additional 1.9 MW capacity plant as extension to the 3 MW plant was entered into after the formation of the State Commission. Therefore, the tariff under the Agreement had to be determined by the State Commission. The Tariff of Rs.2.50 per kWh agreed to in the PPA dated 30.03.2000 was for capacity of 3 MW which was based on the State Government's Policy. The tariff of Rs. 2.50 per kWh was not determined as per the principles laid down under Section 61 of the Electricity Act, 2003. Therefore the tariff of 1.9 MW capacity has to be determined by the State Commission as per its**

2007 Regulations and the subsequent tariff orders. Legally, the tariff as decided by the State Government prior to the enactment of the Electricity Act, 2003 cannot be made applicable to 1.9 MW capacity which was planned, approved and commissioned after the constitution of the State Commission and notification of the 2007 Regulations.

- iv) As the 1.9 MW capacity has been planned and executed to exploit the additional power potential available at the same project site and the entire capacity of the project is injected and evacuated from the same bus bars, a common tariff has to be determined for the power plant as a whole. Accordingly, the tariff of the project will be weighted average of the respective tariffs and the design energy envisaged for the 3 MW and 1.9 MW**

capacity in the approved Detailed Project Report of the Appellant's project w.e.f. COD of 1.9 MW plant i.e. 10.07.2008. The Appellant will be entitled to the payment of arrears on account of difference in the tariff for the project as per the above directions and the tariff at which payment has already been made.

37. In view of above, the Appeal is allowed in part as indicated above and the State Commission's impugned order is set aside. The State Commission is directed to pass consequential order within 3 months of communication of this judgment. No orders as to costs.

38. Pronounced in the open court on this 17th day of October, 2014.

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

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