



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP Nos.7649, 8285, 8426, 8427, 8472,
8492, 8531 and 8532 of 2010-J.

Judgment reserved on : 02/23.07.2013.

Date of decision: 06.08.2013.

1. CWP No.7649 of 2010.

Himachal Pradesh State Electricity Board Limited.Petitioner.

Versus

Himachal Pradesh Electricity Regulatory Commission and another.

....Respondents.

2. CWP No.8285 of 2010.

Himachal Pradesh State Electricity Board Limited.Petitioner.

Versus

Himachal Pradesh Electricity Regulatory Commission and another.

....Respondents.

3. CWP No.8426 of 2010.

Himachal Pradesh State Electricity Board Limited.Petitioner.

Versus

Himachal Pradesh Electricity Regulatory Commission and another.

....Respondents.

4. CWP No.8427 of 2010.

Himachal Pradesh State Electricity Board Limited.Petitioner.

Versus

Himachal Pradesh Electricity Regulatory Commission and another.

....Respondents.

5. **CWP No.8472 of 2010.**

Himachal Pradesh State Electricity Board Limited.Petitioner.

Versus

Himachal Pradesh Electricity Regulatory Commission and another.

....Respondents.

6. **CWP No.8492 of 2010.**

Himachal Pradesh State Electricity Board Limited.Petitioner.

Versus

Himachal Pradesh Electricity Regulatory Commission and another.

....Respondents.

7. **CWP No.8531 of 2010.**

Himachal Pradesh State Electricity Board Limited.Petitioner.

Versus

Himachal Pradesh Electricity Regulatory Commission and another.

....Respondents.

8. **CWP No.8532 of 2010.**

Himachal Pradesh State Electricity Board Limited.Petitioner.

Versus

Himachal Pradesh Electricity Regulatory Commission and another.

....Respondents.

Coram

The Hon'ble Mr. Justice A.M. Khanwilkar, Chief Justice.

The Hon'ble Mr. Justice Kuldip Singh, Judge.

***Whether approved for reporting?*¹ Yes**

Whether the reporters of the local papers may be allowed to see the Judgment?

For the Petitioner(s) : Mr. Shrawan Dogra, Advocate with Ms.Nishi Goel, Advocate.

For the Respondents : Mr. N.K.Sood, Senior Advocate with Mr.Aman Sood, Advocate, for respondent No.1 in CWP Nos.8426, 7649,8285,8427,8472, 8492, 8531 and 8532 of 2010.

Mr.Ajay Vaidya and Ms. Jyotsna Rewal Dua, Advocates, for respondent No.2 in CWP No.8426 of 2010.

Ms.Jyotsna Rewal Dua, Advocate, for respondent No.2 in CWP No.8427 of 2010.

Mr.Ajay Vaidya, Advocate, for respondent No.2 in CWP Nos.7649, 8492, 8531 and 8532 of 2010.

Mr.Nimish Gupta, Advocate, for respondent No.2 in CWP No.8472 of 2010.

Mr.Tarun Johri, Advocate with Ms.Akanksha Sharma, Advocate, for respondent No.2 in CWP No.8285 of 2010.

Kuldip Singh, Judge.

This judgment shall dispose of CWP Nos. 7649, 8285, 8426, 8427, 8472, 8492, 8531 and 8532 of 2010 as common questions of law are involved in the petitions.

2. In all petitions, Annexure P-2 Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) (First Amendment) Regulations, 2007 dated 12.11.2007 and Annexure P-13 order dated 29.10.2009 of respondent No.1 reviewing order dated 18.12.2007 have been assailed. Annexure P-14 passed by respondent No.1 on different dates in favour of respondent No.2 in each petition fixing enhanced tariff

has also been assailed. In order to appreciate the controversy, it is necessary to give relevant facts of each petition.

CWP No.7649 of 2010.

3. It has been pleaded that Electricity Act, 2003 (for short '2003 Act') came into force on 10.06.2003. The respondent No.1 in purported exercise of powers under Sections 62, 86 and 181 of the Act vide notification dated 18.06.2007 framed Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007 (for short '2007 Regulations'). The regulation 6 provides determination of tariff for electricity from renewable sources. The first amendment in the 2007 Regulations was carried through by Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) (First Amendment) Regulations, 2007 (for short 'Amended Regulations') which were notified on 12.11.2007. The second proviso to sub-regulation (1) of Regulation 6 was amended through amended regulation.

4. In State of Himachal Pradesh many projects were established for generation of electricity from renewable sources of energy before coming into force of the 2003 Act. There had been separate Power Purchase Agreements (PPAs) between the Independent Power Producer (IPP) and the then Himachal Pradesh State Electricity Board which are being honoured by the petitioner. An Implementation Agreement (IA) is entered between the State Government and the Independent Power Producer (IPP) before a project is established. Implementation Agreement contains broad terms and conditions for establishment of power project in the State. The respondent No.2, an

Independent Power Producer, has also established a power project in the State of Himachal Pradesh from renewable sources of energy and has executed an Implementation Agreement with the State of Himachal Pradesh. Clause 13.3 of the Implementation Agreement of respondent No.2 provides that the Company shall ensure minimum flow of water immediately downstream of the weir/barrage/dam for downstream requirements as directed by the Government/State Pollution Control Board.

5. In order to give incentives to the power producers in the power sector for non-conventional/renewable sources of energy, the Central Government decided to fix rates at which power generated by Small Hydro Power Producers was to be purchased. The Ministry of Non-Conventional Energy Sources (MNES), Government of India, issued policy guidelines for this purpose. On the basis of these policy guidelines, the Department of Science and Technology and Environment, Government of India, issued notification dated 22.11.1994 which was revised on 13.08.1999 and 29.08.1999 giving incentives for the development of micro hydel power projects. As per these notifications, the price of the power was fixed at ` 2.25 per unit if the developers were desirous of selling the power to petitioner. On 06.05.2000 the rate was increased to ` 2.50 per unit with no escalation for projects upto 3MW. On 29.12.2000 the incentives available to Small Hydro Projects upto the capacity of 3MW were extended to the projects having capacity upto 5MW.

6. In the year 2003, respondent No.1 approved Model Power Purchase Agreement for Small Hydro Power Projects upto 5MW approving tariff per unit for purchase of power generated from renewable

sources of energy ` 2.50 per unit. It has been pleaded that even if Power Purchase Agreement is framed on the basis of Model Power Purchase Agreement, still the mutually agreed Power Purchase Agreement is required to be approved by respondent No.1 on joint petition filed by concerned Independent Power Producer and petitioner before Power Purchase Agreement is finalized and executed between the parties.

7. The respondent No.2 for the sale of power, on 18.03.2006 has entered into a Power Purchase Agreement with petitioner knowingfully well the tariff fixed for Small Hydro Power Projects from renewable sources. The para 6.2 of Power Purchase Agreement provides that Board shall pay for the net saleable energy delivered by the Board at the interconnection point at a fixed rate of ` 2.50 per unit/per kilowatt hour. This rate is firm and fixed without indexation and escalation and shall not be changed due to any reason whatsoever. The Power Purchase Agreement dated 18.03.2006 executed between petitioner and respondent No.2 was approved by respondent No.1 before its execution. In all Power Purchase Agreements approved by respondent No.1 after July, 2006, there was a stipulation that the terms and conditions of the Power Purchase Agreements would be subject to Regulations intended to be framed by the Commission in near future.

8. The State of Himachal Pradesh reviewed its earlier policy and formulated Hydro Policy of Himachal Pradesh, 2006 (for short '2006 Policy') making it obligatory for developers to cater to stipulations such as mandatory 15% water release, LADA charges, payment of revised compensation to fisheries and towards use of forest land etc. The new policy maintained the tariff at the rate of ` 2.50 per unit/per kilowatt hour.

9. The 2007 Regulations contained second proviso to sub-regulation 6(1) providing inapplicability of the provisions of Regulations in question with respect to concluded contracts executed before the framing of such Regulations. However, impugned amendment dated 12.11.2007 nullified the said inapplicability clause. Therefore, respondent No.1 vide order dated 18.12.2007 determined a generic tariff at the rate of ` 2.87 per unit for Small Power Projects upto 5 MW

10. Techman Infra Limited another IPP filed Appeal No.50 of 2008 against the order dated 18.12.2007 before Appellate Tribunal for Electricity (APTEL). The petitioner also challenged order dated 18.12.2007 before APTEL as Appeal No.65 of 2008. Appeal No.50 of 2008 and Appeal No.65 of 2008 were decided by APTEL by common order dated 18.09.2009 and partly allowed the appeals.

11. The respondent No.1 in pursuance of order dated 18.09.2009 of APTEL took up the matter again and passed order dated 09.02.2010 and increased generic tariff for Small Hydro Projects upto 5 MW at ` 2.95 per unit as against ` 2.87 per unit determined vide order dated 18.12.2007. The petitioner filed Review Petition No.85 of 2010 against the order dated 09.02.2010 which was dismissed on 31.07.2010.

12. It has been pleaded that in cases where PPAs were executed before notification of the 2007 Regulations or in cases with respect to PPAs containing no stipulation to the effect that tariff would be as determined on the basis of Regulations to be framed by respondent No.1, the new tariff determined by respondent No.1 cannot be made effective to the PPAs executed before the date of order or before coming into force of 2007 Regulations.

13. The respondent No.2 after order dated 18.12.2007 filed Petition No.11 of 2008 for re-determination of tariff. Some other IPPs also filed similar petitions before respondent No.1 for re-determination of tariff even where the PPAs were executed much before the date of notification of 2007 Regulations. The respondent No.1 on 29.10.2009 held that respondent No.1 has authority to reopen even concluded contracts. It was also held that tariff would be re-determined separately in individual cases. The petition No.11 of 2008 of respondent No.2 was taken up separately and vide order dated 13.05.2010, respondent No.1 enhanced the tariff by 08 paise per unit from ` 2.50 per unit to ` 2.58 per unit primarily on account of impact of 15% mandatory release of water down stream etc. The respondent No.2 filed Review Petition No.121 of 2010 against the order dated 13.05.2010 which is still pending before respondent No.1.

14. It has been alleged that concluded contract between petitioner and Independent Power Producer cannot be changed without the mutual consent of the parties or where for such change authority is given in the contract. It has been alleged that respondent No.1 could not have exercised such authority nor regulation authorizing such action could be made by respondent No.1. The assumed illegal power gathered by respondent No.1 by way of impugned amendment cannot be allowed to change the concluded contract. The impugned action of respondent No.1 is contrary to common law.

15. The mandate to release particular quantity of water gives no cause to respondent No.2 to claim re-determination or enhancement of tariff as determination of tariff had already been done after due consideration and such determination had been agreed by petitioner

and respondent No.2. The petitioner has, thus, assailed Annexures P-2, P-13 and P-14 dated 13.05.2010.

16. The respondent No.1 has filed reply and has taken some preliminary submissions. It has been stated that tariff regulations for Small Hydro Projects were made on 18.06.2007 in pursuance of powers conferred on respondent No.1 under Section 62 read with Section 181 of the Act. The respondent No.1 has jurisdiction to make regulations in matters relating to tariff. The challenge to regulations by petitioner is not based on lack of jurisdiction. The petitioner has not identified any provision of the Act to which the amended regulations notified by respondent No.1 can be held to be inconsistent with. The regulations were amended after public hearing. The petitioner participated in the said proceedings, but did not raise any issue which now has been raised in the petition.

17. The petitioner does not bear the cost of power purchase and as such is not immediately affected by the application of the amended regulations. The amended regulations have negligible impact on the consumer tariff in the State of Himachal Pradesh. The petitioner is not a person aggrieved. The respondent No.1 has passed additional costs that are incurred by the developer of a power project on account of local area development charges, forest charges and increase in mandatory release of water etc. In normal Power Purchase Agreements and other supply contracts, new taxes and levies are always passed on to the buyers. The proviso to regulations clearly underlines the role of respondent No.1 in the process for considering the effect of change in statutory laws, rules or government policy on tariff.

18. On merits, it has been pleaded that 2007 regulations have not been challenged by the petitioner. As regards regulation 6, the respondent No.1 has taken the stand that the determination of the tariff is a legislative function which is discharged by respondent No.1 under the 2003 Act. The respondent No.1 does not become *functus officio* once it has determined tariff and/or approved Power Purchase Agreement. The respondent No.1 has power to revisit tariff, if so required. The role and function of respondent No.1 has to be seen in the light of mandate of Section 61 (c) (h) of 2003 Act which mandates the respondent No.1 to promote investment in generation as well as co-generation and generation of electricity through renewable sources by giving promotional tariff. The respondent No.1 under Section 86(1) (e) of 2003 Act has power to promote co-generation and generation of electricity from renewable sources.

19. The State Government after the execution of Power Purchase Agreement by respondent No.2 on 18.03.2006 brought 2006 Policy and changed the policy in relation to water release, LADA and payment of revised compensation to fisheries and towards use of forest land. At the time of execution of Power Purchase Agreement, the respondent No.2 could not have agreed to enhance statutory payments which were introduced by subsequent policy. The function of determination of tariff was vested with respondent No.1, Power Purchase Agreements executed had to be approved by respondent No.1 in discharge of its statutory functions. The respondent No.1 has not visited any of the cost parameters that were involved in fixing the tariff at `2.50 per unit per kilowatt hour except allowing new statutory levies which were not in existence on the date when the tariff was fixed and Power

Purchase Agreement was approved. The fixing of tariff pursuant to approval of Model Power Purchase Agreement does not in any manner affect the statutory jurisdiction of respondent No.1 to regulate tariff of a generating company for sale to a distribution licensee.

20. The project has a lifecycle of nearly 40 years, therefore, it cannot be said that respondent No.1 will not have the ability to revisit tariff during those 40 years. The respondent No.1 has defended the regulations and amendment carried out in the regulations, so also all decisions taken by respondent No.1. It has been reiterated that respondent No.1 has jurisdiction to frame the regulations, carry out amendments in the regulations in conformity with the 2003 Act and to revisit tariff fixed in the Power Purchase Agreements between petitioner and power producers.

21. The respondent No.2 has filed separate reply and has taken several preliminary objections. It has been pleaded that Section 86(1)(e) of 2003 Act empowers respondent No.1 to promote co-generation and generation from renewable sources of energy by providing suitable measures of connectivity with the grid and sale of electricity to any person, and also to specify percentage of renewable energy to be procured as renewable purchase obligation for distribution licensee. The Section 61(h) of 2003 Act further authorizes respondent No.1 to specify the terms and conditions for determination of tariff, and in doing so, shall be guided by co-generation and generation of electricity from renewable sources. The Section 181 of 2003 Act empowers respondent No.1 to make regulations. The respondent No.1 was well within its powers to frame regulations and fix tariff even in the presence of executed contracts between petitioner and respondent No.2. It has been pleaded that no

fundamental or constitutional right of the petitioner has been infringed, the writ petition is not maintainable.

22. On merits, it has been pleaded that 2006 Policy was formulated after the Power Purchase Agreement between petitioner and respondent No.2. Therefore, at the time of execution of the Power Purchase Agreement, the respondent No.2 could not have agreed to enhance statutory payments which were introduced after the execution of the Power Purchase Agreement between petitioner and respondent No.2. It has been pleaded that as per Clause 8.8 of the Power Purchase Agreement between petitioner and respondent No.2, the petitioner is under obligation to reimburse to respondent No.2 levies, taxes, duties, cess etc. imposed by the Government subsequent to the execution of Power Purchase Agreement. The respondent No.2 has defended regulations and the amendment carried out in the regulations. The respondent No.2 has also defended increase in tariff allowed by respondent No.1 in favour of respondent No.2. The petitioner has filed separate rejoinders.

CWP No.8285 of 2010.

23. The pleaded case in CWP No.8285 of 2010 of the petitioner is almost similar as pleaded in CWP No.7649 of 2010. However, in CWP No.8285 of 2010 Power Purchase Agreement between respondent No.2 and petitioner, according to petitioner, was executed on 05.07.2004. Similarly, after the order dated 18.12.2007 of respondent No.1, respondent No.2 filed petition for re-determination of tariff which was registered Petition No.184 of 2008 and was decided by respondent No.1 vide separate order dated 16.07.2010 and enhanced the tariff by 29 paise per unit from ` 2.25 per unit to ` 2.54 per unit primarily on account of

impact of 15% mandatory release of water downstream etc. The respondent No.2 has filed Appeal No.179 of 2010 before Appellate Tribunal for Electricity against the order dated 16.07.2010 seeking further enhancement, which appeal is still pending. The petitioner has, thus, assailed Annexures P-2, P-13 and P-14 dated 16.07.2010 on almost similar grounds as pleaded in CWP No.7649 of 2010. The respondents have filed no reply(s).

CWP No.8426 of 2010.

24. In this petition also, petitioner has almost taken the same pleas as in CWP No.7649 of 2010. However, in this petition, Power Purchase Agreement between respondent No.2 and petitioner was executed on 21.04.2004. The respondent No.2 after order dated 18.12.2007 of respondent No.1 filed Petition No.62 of 2008 for re-determination of tariff. Several Independent Power Producers also filed petitions for re-determination of tariff even where Power Purchase Agreements were executed before notification of 2007 Regulations. The respondent No.1 on 29.10.2009 answered the common question by holding that respondent No.1 had authority to reopen even concluded contracts. The Petition No.62 of 2008 was taken up separately by respondent No.1 and on 22.05.2010 in the case of respondent No.2 tariff was enhanced by 3 paise per unit from ` 2.50 per unit to ` 2.53 per unit primarily on account of impact of 15% mandatory release of water downstream etc. The respondent No.2 was not satisfied with the enhancement given by respondent No.1, therefore, respondent No.2 had filed Review Petition No.108 of 2010 seeking review of order dated 22.05.2010 which is still pending. The petitioner has, thus, assailed Annexures P-2, P-13 and P-14 dated 22.05.2010. The respondent No.1

has filed reply and has taken similar stand as pleaded by respondent No.1 in reply filed in CWP No.7649 of 2010. The respondent No.2 has also filed the reply and has taken similar stand as taken by respondent No.2 in CWP No.7649 of 2010. The petitioner has filed common rejoinder to the replies of respondents No.1 and 2 with submission to adopt the rejoinders filed by petitioner in CWP No.7649 of 2010.

CWP No.8427 of 2010.

25. The petitioner in this petition has also taken almost similar pleas as taken by petitioner in CWP No.7649 of 2010, but Power Purchase Agreement between respondent No.2 and petitioner was executed on 07.06.2004. The respondent No.2 after the order dated 18.12.2007 of respondent No.1 filed Petition No.70 of 2008 for re-determination of tariff. Several Independent Power Producers filed petitions for re-determination of tariff even where Power Purchase Agreements were executed before notification of 2007 Regulations. The respondent No.1 on 29.10.2009 answered the common question by holding that respondent No.1 had authority even to reopen concluded contracts. The Petition No.70 of 2008 was taken up separately by respondent No.1 and on 22.05.2010 in the case of respondent No.2 tariff was enhanced by 15 paise per unit from ` 2.50 per unit to ` 2.65 per unit primarily on account of impact of 15% mandatory release of water downstream etc. The respondent No.2 was not satisfied with the enhancement given by respondent No.1, therefore, respondent No.2 filed Review Petition No.135 of 2010 seeking review of order dated 22.05.2010 which is still pending. The petitioner has, thus, assailed Annexures P-2, P-13 and P-14 dated 22.05.2010. The respondent No.1 has filed reply on the same lines as in reply filed in CWP No.7649 of

2010. The respondent No.2 has not filed reply. The petitioner has filed common rejoinder to the replies of respondents No.1 and 2 with submission to adopt the rejoinders filed by petitioner in CWP No.7649 of 2010.

CWP No.8472 of 2010.

26. In this petition also, the petitioner has taken similar pleas as taken by petitioner in CWP No.7649 of 2010, but Power Purchase Agreement between respondent No.2 and petitioner was executed on 24.06.2004. The respondent No.2 after the order dated 18.12.2007 of respondent No.1 filed Petition No.97 of 2008 for re-determination of tariff. Several Independent Power Producers also filed petitions for re-determination of tariff in their cases even where Power Purchase Agreements were executed much before the date of notification of 2007 Regulations. All these petitions were taken together for determination of question as to whether respondent No.1 had jurisdiction and power to re-determine the tariff, particularly, in respect of the concluded contracts. The respondent No.1 vide order dated 29.10.2009 answered the common question by holding that respondent No.1 had authority to reopen even the concluded contracts. The Petition No.97 of 2008 was taken up independently and on 05.06.2010, the tariff in the case of respondent No.2 was enhanced 14 paise per unit from ` 2.50 per unit to ` 2.64 per unit primarily on account of impact of 15% mandatory release of water downstream etc. The respondent No.2 was not satisfied with the enhancement made by respondent No.1, therefore, respondent No.2 filed Review Petition No.142 of 2010 seeking review of the order dated 05.06.2010 for further enhancement of tariff. The Review Petition is still

pending. The petitioner has, thus, assailed Annexures P-2, P-13 and P-14 dated 05.06.2010.

27. The respondent No.1 has filed the reply on the same lines as in CWP No.7649 of 2010. The respondent No.2 has filed separate reply and took several preliminary objections. The respondent No.2 has pleaded that 2007 Regulations as amended vide notification dated 12.11.2007 are valid. The petitioner having submitted to the jurisdiction of respondent No.1 is estopped from challenging the said regulations. The respondent No.1 has been empowered to frame regulations consistent with 2003 Act. The framing of regulations is a legislative function of respondent No.1. The petition is not maintainable on account of delay and laches. The petition is only an afterthought and a counter-blast to the orders passed by respondent No.1 for reopening the concluded Power Purchase Agreement. The making of tariff is a continuous process which can be amended or altered. The said power can be exercised by respondent No.1 on the application of generating Company or on its own motion. The Power Purchase Agreement dated 24.06.2004 between petitioner and respondent No.2 was one sided contract. It is the duty of the respondent No.1 to invoke Section 86(1)(e) to issue appropriate directions with a view to promote generation of electricity from renewable source of energy. This calls for reopening of Power Purchase and wheeling agreements by respondent No.1. The impugned regulations do not infringe any constitution right of petitioner. The orders dated 29.10.2009 and 05.06.2010 passed by respondent No.1 have attained finality without any appeal.

28. On merits, it has been pleaded that one of the legislative function of respondent No.1 is to frame regulations which would promote

co-generation and generation of electricity from renewable sources of energy. The respondent No.1 has power and jurisdiction to reopen Power Purchase Agreements. The impugned regulations are in conformity with 2003 Act and National Electricity Policy, 2005, which mandates the promotion of generation of electricity through renewable source or non-conventional source of energy. The State Government has reviewed its earlier policy and formulated 2006 Policy making it obligatory to the developers to cater to stipulations such as mandatory water release of 15% of the minimum river flow observed, LADA charges and compensation to fisheries, payment towards use of forest land as lease to Revenue Department etc. which were not in existent when tariffs were announced in 2000. The 2006 Policy has come into effect with retrospective effect and has not considered the impact of these changes on fixed tariff. There is no illegality in amending the regulations. The petitioner has filed common rejoinder to the replies of respondents No.1 and 2 with submission to adopt the rejoinders filed by petitioner in CWP No.7649 of 2010.

CWP No.8492 of 2010.

29. The petitioner has taken almost similar pleas in this petition as taken in CWP No.7649 of 2010, but Power Purchase Agreement between respondent No.2 and petitioner was executed on 20.07.2004. The respondent No.2 after the order dated 18.12.2007 of respondent No.1 filed Petition No.5 of 2009 for re-determination of tariff. Several Independent Power Producers also filed petitions for re-determination of tariff even where Power Purchase Agreements were executed before the notification of 2007 Regulations. All these petitions were taken up together for determination of common question as to whether the

respondent No.1 had jurisdiction and power to determine the tariff, particularly in respect of concluded contracts. The respondent No.1 vide order dated 29.10.2009 answered the common question that it has authority to reopen even concluded contracts. The Petition No.5 of 2009 was taken separately and as per order dated 08.06.2010, the tariff in the case of respondent No.2 was enhanced by 5 paisa per unit from ` 2.50 per unit to ` 2.55 per unit primarily on account of impact of 15% mandatory release of water downstream etc. The respondent No.2 was not satisfied with the enhancement made by respondent No.1 and filed Review Petition No.137 of 2010 seeking review of order dated 08.06.2010, which petition is still pending. The petitioner has, thus, assailed Annexures P-2, P-13 and P-14 dated 08.06.2010.

30. The respondent No.1 has filed reply on similar lines as in reply filed in CWP No.7649 of 2010. The respondent No.2 has also contested the petition by filing separate reply which is on same lines as filed by respondent No.2 in CWP No.7649 of 2010. The petitioner has filed common rejoinders to the replies of respondents No.1 and 2 with submission to adopt the rejoinders filed by petitioner in CWP No.7649 of 2010.

CWP No.8531 of 2010.

31. The petitioner in this petition has also taken similar pleas as taken by petitioner in CWP No.7649 of 2010, but Power Purchase Agreement between respondent No.2 and petitioner was executed on 28.04.2004. The respondent No.2 after the order dated 18.12.2007 of respondent No.1 filed Petition No.43 of 2008 for re-determination of tariff. Several Independent Power Producers also filed petitions for re-determination of tariff even where the Power Purchase Agreements

were executed before the notification of 2007 Regulations. The respondent No.1 on 29.10.2009 answered the common question by holding that respondent No.1 had authority to reopen even concluded contracts. The Petition No.43 of 2008 was taken up separately by respondent No.1 and vide order dated 10.06.2010, tariff in the case of respondent No.2 was enhanced by 15 paise per unit from ` 2.50 per unit to ` 2.65 per unit primarily on account of impact of mandatory release of 15% water downstream etc. The petitioner has, thus, assailed Annexures P-2, P-13 and P-14 dated 10.06.2010.

32. The respondent No.1 has contested the petition by filing reply on the same lines as filed by respondent No.1 in CWP No.7649 of 2010. The respondent No.2 has also contested the petition by filing reply on the same lines as filed by respondent No.2 in CWP No.7649 of 2010. The petitioner has filed common rejoinder to the replies of respondents No.1 and 2 with submission to adopt the rejoinders filed by petitioner in CWP No.7649 of 2010.

CWP No.8532 of 2010.

33. In this petition also, petitioner has taken similar pleas as taken by petitioner in CWP No.7649 of 2010, but Power Purchase Agreement between respondent No.2 and petitioner was executed on 28.04.2004. The respondent No.2 after the order dated 18.12.2007 of respondent No.1 filed Petition No.53 of 2008 for re-determination of tariff. Several Independent Power Producers also filed petitions for re-determination of tariff even where Power Purchase Agreements were executed before notification of 2007 Regulations. The respondent No.1 on 29.10.2009 held that it had authority to reopen even concluded contracts. The respondent No.1 proceeded to decide Petition No.53 of

2008 separately and vide order dated 08.06.2010 enhanced the tariff in the case of respondent No.2 by 5 paise per unit from ` 2.50 per unit to ` 2.55 per unit primarily on account of impact of 15% mandatory release of water downstream etc. The respondent No.2 was not satisfied with the enhancement made by respondent No.1 and filed Review Petition No.139 of 2010 seeking review of order dated 08.06.2010, which is still pending. The petitioner has, thus, assailed Annexures P-2, P-13 and P-14 dated 08.06.2010.

34. The respondents No.1 and 2 have contested the petition by filing separate replies on the same lines as filed by them separately in CWP No.7649 of 2010. The petitioner has filed common rejoinder to the replies of respondents No.1 and 2 with submission to adopt rejoinders filed by petitioner in CWP No.7649 of 2010.

35. We have heard learned counsel appearing for the parties. We have also gone through the written submissions of the learned counsel for the parties. Mr. Shrawan Dogra, Advocate, for the petitioner, has submitted that the State Commission had framed the Himachal Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2004, dated 08.06.2004 (for short '2004 Regulations') in exercise of powers conferred by sub-section (1), and clause (zd) of sub-section (2) of Section 181 and all other enabling powers under the Act. The Regulation 4 of said regulations provides for determination of tariff, whereas, Regulation 5 provides guiding factors for determination of tariff. The State Commission after framing 2004 Regulations has exhausted its power for framing regulations providing terms and conditions for determination of tariff and has no jurisdiction for framing 2007 Regulations. In any case, 2004 Regulations still hold the

field as those have not been repealed by 2007 Regulations. The 2004 Regulations do not provide revisiting of State Commission to determine tariff in concluded contracts. The delegatee has no powers other than powers delegated. The State Commission has no jurisdiction to amend, alter or modify the Power Purchase Agreements by framing regulations. The amendment carried out by the State Commission in 2007 Regulations retrospectively taking away vested rights of the parties by way of Power Purchase Agreements is wrong, illegal and without jurisdiction. The dispute with respect to concluded contracts can be determined by Civil Court or in a given situation by the High Court while exercising extraordinary jurisdiction.

36. Mr. Shrawan Dogra, Advocate, further submitted that the Power Purchase Agreements have been executed by the Independent Power Producers with the petitioner after approval of the State Commission. The concluded contracts between petitioner and Independent Power Producers cannot be reopened by the State Commission. The power to frame regulations under 2003 Act to the State Commission cannot be extended to the extent to empower itself to revisit tariff after reopening concluded contracts between the petitioner and Independent Power Producers. Only with the mutual consent of the parties the concluded contracts can be reopened. There is nothing in concluded Power Purchase Agreements between petitioner and Independent Power Producers authorizing the State Commission to reopen concluded contracts.

37. Ms. Jyotsna Rewal Dua, Advocate, has submitted that petitioner has challenged amended regulations dated 12.11.2007, but 2007 Regulations dated 18.06.2007 have not been challenged. In other

words, jurisdiction of State Commission to frame 2007 Regulations dated 18.06.2007 has not been questioned. The authority having power to frame the regulations has power to amend the regulations. The petitioner while challenging the amended regulations dated 12.11.2007 has not pleaded violation of any specific provision of 2003 Act for framing those regulations. The fixing of tariff by the State Commission under 2003 Act is not static. The State Commission in a given situation is under obligation to intervene, amend and modify the tariff in accordance with 2003 Act, Rules and Regulations. The State Commission has taken note of 2006 Policy requiring the Independent Power Producers to fulfill some new conditions. In that scenario, the State Commission has revised the tariff which cannot be said to be illegal.

38. Mr. Ajay Vaidya, Advocate, while reiterating the submissions made by Ms. Jyotsna Rewal Dua, Advocate, has submitted that petitioner cannot derive advantage from Power Purchase Agreements even though executed with the approval of the State Commission. He has submitted that Independent Power Producer had no bargaining power while executing Power Purchase Agreement. The State Commission has jurisdiction to amend 2007 Regulations dated 18.06.2007 by way of amendment dated 12.11.2007. At the time of execution of Power Purchase Agreements, the new obligations required to be fulfilled by Independent Power Producers under 2006 Policy were not in existence, therefore, the new obligations could not be factored in the Power Purchase Agreements approved by the State Commission. Under these circumstances, according to learned counsel, re-determination of tariff by the State Commission after 2006 Policy cannot be said to be wrong, illegal. Ms. Akanksha Sharma, Advocate, has reiterated the submissions

made by Ms. Jyotsna Rewal Dua, Advocate and Mr. Ajay Vaidya, Advocate.

39. Mr. N.K. Sood, Senior Advocate, appearing on behalf of the State Commission, in all the petitions, has fairly submitted that the State Commission is neither to advance the case of the petitioner nor of other respondents. The Commission is to project its case before the Court. He has submitted that the State Commission has jurisdiction to amend 2007 Regulations by way of amendment dated 12.11.2007 and thereafter to revisit tariff. According to Mr. Sood, the tariff fixed by the State Commission is always open to amendment, modification in accordance with law in case of change in factors for determination of tariff. The determination of tariff cannot be construed to the extent that once tariff is fixed then under no circumstance tariff can be changed. The State Commission will be failing in its duty for not re-determining the tariff even if it is so required in law. The learned Senior Advocate has supported all orders passed by the State Commission and regulations framed and amended by the State Commission from time to time.

40. On the basis of submissions made by learned counsel for the parties, the following points emerge for determination:-

- (i) Whether the Himachal Pradesh Electricity Regulatory Commission (HPERC) had jurisdiction under the Electricity Act, 2003, to amend the Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Co-generation by Distribution Licensees, Regulations), 2007, by the Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Co-generation by Distribution Licensees) (First Amendment), Regulations 2007 retrospectively taking away vested rights crystallized by way of concluded contract in the form of Power Purchase Agreements.
- (ii) Whether HPERC created under the Electricity Act, 2003, can give to itself powers to adjudicate upon the

subject-matter of dispute falling under the jurisdiction of Civil Court or extraordinary jurisdiction of the High Court like adjudication of the effect of Power Purchase Agreement, a concluded contract.

(iii) Whether Power Purchase Agreement which is required to be approved by HPERC before executing by both the parties is a statutory contract and whether HPERC has jurisdiction to amend, alter or modify such Power Purchase Agreement by framing regulations.

41. In order to appreciate the controversy, it is appropriate to refer to certain relevant provisions of the Act:-

“61. Tariff regulations.-The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;
- (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;
- (e) the principles rewarding efficiency in performance;
- (f) multi-year tariff principles;
- (g) that the tariff progressively, reflects the cost of supply of electricity, and also, reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission;
- (h) the promotion of co-generation and generation of electricity from renewable sources of energy;
- (i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948 (54 of 1948), the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.”

“62. Determination of tariff.- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for

- (a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees,

for a period not exceeding one year to ensure reasonable prices of electricity;

- (b) transmission of electricity;
- (c) wheeling of electricity;
- (d) retail sale of electricity;

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedure as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee."

"64. Procedure for tariff order.- (1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commissioner shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,-

- (a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;
- (b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person concerned.

(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the same may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.

(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order."

"86. Functions of State Commission.- (1) The State Commission shall discharge the following functions, namely:-

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

(c) facilitate intra-State transmission and wheeling of electricity;

(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;

(g) levy fee for the purposes of this Act;

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;

(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;

- (j) fix the trading margin in the intra-State trading of electricity, if considered, necessary;
- (k) discharge such other functions as may be assigned to it under this Act.

(2) The State Commission shall advise the State Government on all or any of the following matters, namely:-

- (i) promotion of competition, efficiency and economy in activities of the electricity industry;
- (ii) promotion of investment in electricity industry;
- (iii) reorganization and restructuring of electricity industry in the State;
- (iv) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government;

(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published under section 3."

"173. Inconsistency in laws.- Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 (68 of 1986) or the Atomic Energy Act, 1962 (33 of 1962) or the Railways Act, 1989 (24 of 1989)."

"174. Act to have overriding effect.- Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

"181. Powers of State Commissions to make regulations.- (1) The State Commissions may, by notification, make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the following matters, namely:-

- (a) period to be specified under the first proviso of section 14;
- (b) the form and the manner of application under sub-section (1) of section 15;
- (c) the manner and particulars of application for licence to be published under sub-section (2) of section 15;
- (d) the conditions of licence under section 16;
- (e) the manner and particulars of notice under clause (a) of sub-section (2) of section 18;
- (f) publication of the alterations or amendments to be made in the licence under clause (c) of sub-section (2) of section 18;
- (g) levy and collection of fees and charges from generating companies or licensees under sub-section(3) of section 32;

- (h) rates, charges and the terms and conditions in respect of intervening transmission facilities under proviso to section 36;
- (i) payment of the transmission charges and a surcharge under sub-clause (ii) of clause (d) of sub-section(2) of section 39;
- (j) reduction and elimination of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 39;
- (k) manner and utilization of payment of surcharge under the fourth proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 39;
- (l) payment of the transmission charges and a surcharge under sub-clause(ii) of clause (c) of section 40;
- (m) reduction and elimination of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (c) of section 40;
- (n) the manner of payment of surcharge under the fourth proviso to sub-clause (ii) of clause (c) of section 40;
- (o) proportion of revenues from other business to be utilized for reducing the transmission and wheeling charges under proviso to section 41;
- (p) reduction and elimination of surcharge and cross-subsidies under the third proviso to sub-section (2) of section 42;
- (q) payment of additional charges on charges of wheeling under sub-section (4) of section 42;
- (r) guidelines under sub-section (5) of section 42;
- (s) the time and manner for settlement of grievances under sub-section (7) of section 42;
- (t) the period to be specified by the State Commission for the purposes specified under sub-section(1) of section 43;
- (u) methods and principles by which charges for electricity shall be fixed under sub-section(2) of section 45;
- (v) reasonable security payable to the distribution licensee under sub-section(1) of section 47;
- (w) payment of interest on security under sub-section (4) of section 47;
- (x) electricity supply code under section 50;
- (y) the proportion of revenues from other business to be utilized for reducing wheeling charges under proviso to section 51;
- (z) duties of electricity trader under sub-section (2) of section 52;
- (za) standards of performance of a licensee or a class of licensees under sub-section (1) of section 57;
- (zb) the period within which information to be furnished by the licensee under sub-section (1) of section 59;
- (zc) the period within which the cross-subsidies shall be reduced and eliminated under clause (g) of section 61;
- (zd) the terms and conditions for determination of tariff under section 61;

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(ze) details to be furnished by licensee or generating company under sub-section(2) of section 62;

(zf) the methodologies and procedures for calculating the expected revenue from tariff and charges under sub-section (5) of section 62;

(zg) the manner of making an application before the State Commission and the fee payable therefor under sub-section (1) of section 64;

(zh) issue of tariff order with modifications or conditions under sub-section (3) of section 64;

(zi) the manner by which development of market in power including trading specified under section 66;

(zj) the powers and duties of the Secretary of the State Commission under sub-section (1) of section 91;

(zk) the terms and conditions of service of the secretary, officers and other employees of the State Commission under sub-section(2) of section 91;

(zl) rules of procedure for transaction of business under sub-section (1) of section 92;

(zm) minimum information to be maintained by a licensee or the generating company and the manner of such information to be maintained under sub-section(8) of section 128;

(zn) the manner of service and publication of notice under section 130;

(zo) the form of preferring the appeal and the manner in which such form shall be verified and the fee for preferring the appeal under sub-section(1) of section 127;

(zp) any other matter which is to be, or may be, specified.

(3) All regulations made by the State Commission under this Act shall be subject to the condition of previous publication.”

42. Regulation 6 of 2007 Regulations is as follows:-

“6. Determination of Tariff for electricity from Renewable sources:

(1) The Commission shall, by a general or special order, determine the tariff for the purchase of energy from renewable sources and co-generation by the distribution licensee, or the State Transmission Utility or the transmission licensee, engaged in the activity of bulk purchase and sale of electricity to the distribution licensee;

Provided that the Commission may determine tariff including augmentation costs of the grid beyond interconnection point-

(i) by a general order, for small hydro projects not exceeding 5 MW capacity;

and

(ii) by a special order, for small hydro projects of more than 5 MW and not exceeding 25 MW capacity, on individual project basis:

Provided further that, unless otherwise provided in the PPA, the PPA approved by the Commission, prior to the commencement of these regulations, shall continue to apply for such period as mentioned in the PPA:

Provided further that the Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.

(2) The Commission shall determine the tariff separately for each category of renewable source mentioned in clause (m) of regulation 2.

(3) While deciding the terms and conditions of tariff for energy from renewable sources and co-generation, the Commission shall, as far as possible, be guided by the principles and methodologies specified by the Central Commission, the National Electricity Policy, the Tariff Policy and the tariff regulations notified by the Central Commission.

Provided that the Commission, may for sufficient reasons and after exercising due diligence and applying prudence check, deviate from the terms and conditions of the generation tariff notified by the Central Commission:

(4) While determining the tariff, the Commission may, to the extent possible consider to permit an allowance based on technology, fuel, market risk, environmental benefits and social contribution etc., of each type of renewable source.

(5) While determining the tariff, the Commission shall consider appropriate operational and financial parameters.

(6) The tariff for small hydro projects not exceeding 5 MW capacity determined by the Commission shall be applicable for a period of 40 years from the date as notified by the Commission;

(7) The tariff for small hydro projects not exceeding 5 MW capacity, determined by the Commission is subject to review after every 5 years and such revised tariff shall be applicable to power purchase agreements entered into after that date.”

43. The Regulation 3 of Amended Regulations vide which amendment has been carried out in Regulation 6 of 2007 Regulations with effect from 12.11.2007 is as follows:-

“3. Amendment of regulation 6.- In sub-regulation (1) of regulation 6 of the said regulations,-

- (a) the words “or the State Transmission Utility or the transmission licensee, engaged in the activity of bulk purchase and sale of electricity to the distribution licensee” shall be omitted;
- (b) in the first proviso the words “ including augmentation costs of the grid beyond interconnection point” shall be omitted;
and

(c) for the second proviso, the following proviso shall be substituted, namely:-

"Provided further that,-

(i) where the power purchase agreement, approved prior to the commencement of these regulations, is not subject to the provisions of the Commission's regulations on power procurement from renewable sources; or

(ii) where, after the approval of the power purchase agreements, there is change in the statutory laws, or rules, or the State Govt. Policy;

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

44. As per Section 61 of 2003 Act, the State Commission shall specify the terms and conditions for determination of tariff and shall be guided by factors mentioned in that Section. The Section 61(h) provides that the State Commission shall take into consideration the promotion of co-generation and generation of electricity from renewable sources of energy. The Section 62 provides determination of tariff in accordance with 2003 Act. Sub-section (4) of Section 62 provides for amendment of tariff as per restrictions provided therein. The procedure for tariff order is provided in Section 64 and sub-section (6) of Section 64 provides that a tariff order shall, unless amended or revoked continue to be in force for such period as may be specified in tariff order. The functions of the State Commission are provided in Section 86 and clause (e) of sub-section (1) of Section 86 is to promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person and also specify for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee. The Section 174 of the Act provides overriding effect of the Act, whereas,

Section 181 provides powers of State Commission to make regulations.

Clause (zd) of sub-section (2) of Section 181 refers to the terms and conditions for determination of tariff under Section 61. The Central Commission has also more or less similar powers under 2003 Act.

Points No.(i),(ii) & (iii).

45. The Points No.(i),(ii) and (iii) are interconnected and overlapping, therefore, all of them are taken up collectively for determination. The Section 181 provides making of regulations consistent with 2003 Act and Rules by the State Commission to carry out the provisions of 2003 Act. On behalf of the petitioner, it has been contended that State Commission has framed 2004 Regulations and, therefore, exhausted the power given to it under 2003 Act. The 2007 Regulations have been framed beyond the regulations making power of the State Commission. The 2007 Regulations do not provide repeal of 2004 Regulations and, therefore, 2007 Regulations cannot co-exist in the presence of 2004 Regulations covering the same field. These contentions have no force. In the first place, the petitioner has not challenged the validity of 2007 Regulations. The petitioner has challenged the validity of amendment carried out in 2007 Regulations on 12.11.2007. The Regulation 7 of 2007 Regulations provides notwithstanding anything contained contrary in the HPERC (Terms and Conditions for determination of Tariff) Regulations, 2004, and in the HPERC (Terms and Conditions for Open Access) Regulations, 2005, framed by the Commission under Section 181 of the Act, 2007 Regulations dated 18.06.2007 shall have overriding effect. Therefore, the field covered by 2007 Regulations dated 18.06.2007 has overriding effect over 2004 Regulations.

46. It has been contended on behalf of the petitioner that the State Commission has no jurisdiction under 2003 Act to amend regulations by way of amendment carried out in the regulations on 12.11.2007 to take away vested rights crystallized in the form of Power Purchase Agreements between petitioner and Independent Power Producers. The reliance has been placed upon **Mst. Rafiquenessa versus Lal Bahadur Chetri (since deceased) and after him his legal representatives and others AIR 1964 SC 1511**. In that case, efficacy of Section 5 of the Assam Non-Agricultural Urban Areas Tenancy Act, 1955, was considered by the Supreme Court. The Assam Non-Agricultural Urban Areas Tenancy Act, 1955, was passed and published in the gazette on 06.07.1955 during the pendency of the appeal. It has been held what is prohibited by Section 5(1)(a) is the eviction of the tenant, and so, inevitably, the section must come into play for the protection of the tenant even at the appellate stage when it is clear that by the proceedings pending before the appellate Court, the landlord is seeking to evict the tenant, and that obviously indicates that the pending proceedings are governed by Section 5(1)(a), though they may have been initially instituted before coming into force of the Assam Non-Agricultural Urban Areas Tenancy Act, 1955. It has been held that the High Court was right in coming to the conclusion that the dispute between the parties must be governed by the provisions of Section 5(1) (a). This judgment in no case supports the case of petitioner.

47. In support of the submissions that regulations cannot be framed retrospectively unless specifically provided in 2003 Act, the learned counsel for the petitioner has relied upon **Hukam Chand etc.**

versus Union of India and others AIR 1972 SC 2427, wherein it has been held as follows:-

“6.....Perusal of Section 40 shows that although the power of making rules to carry out the purposes of the Act has been conferred upon the Central Government, there is no provision in the section which may either expressly or by necessary implication show that the Central Government has been vested with power to make rules with retrospective effect. As it is Section 40 of the Act which empowers the Central Government to make rules, the rules would have to conform to that section. The extent and amplitude of the rule making power would depend upon and be governed by the language of the section. If a particular rule were not to fall within the ambit and purview of the section, the Central Government in such an event would have no power to make that rule. Likewise, if there was nothing in the language of S.40 to empower the Central Government either expressly or by necessary implication, to make a rule retroactively, the Central Government would be acting in excess of its power if it gave retrospective effect to any rule. The underlying principle is that unlike Sovereign Legislature which has power to enact laws with retrospective operation, authority vested with the power of making subordinate legislation has to act within the limits of its power and cannot transgress the same. The initial difference between subordinate legislation and the statute laws lies in the fact that a subordinate law making body is bound by the terms of its delegated or derived authority and that Court of law, as a general rule, will not give effect to the rules, thus made, unless satisfied that all the conditions precedent to the validity of the rules have been fulfilled (see Craies on Statute Law, p.297 Sixth Edition).”

The learned counsel for the petitioner has also relied upon

the State of Madhya Pradesh and others versus Tikamdas AIR 1975

SC 1429, in which it has been held as follows:-

“5.....There is no doubt that unlike legislation made by a sovereign Legislature, subordinate legislation made by a delegate cannot have retrospective effect unless the rulemaking power in the concerned statute expressly or by necessary implication confers power in this behalf.....”

49. In Bihar State Electricity Board and another versus Usha Martin Industries and another (1997) 5 SCC 289 after noticing Electricity (Supply) Act, 1948, it has been held that the tariff is fixed by exercise of statutory powers. It is not fixed as a result of any bargaining by and between the Board and the consumers. The consumer has no option but to pay the tariff fixed by the Board in exercise of the powers conferred by Section 49. Again, in **Pawan Alloys & Casting Pvt. Ltd., Meerut versus U.P. State Electricity Board and others (1997) 7 SCC**

251, it has been held that the Board exercises its statutory powers under Section 49(1) of the Act by fixing uniform rates of tariff for electricity charges.

50. The Supreme Court in **West Bengal Electricity Regulatory Commission versus CESC Ltd. (2002) 8 SCC 715** and after noticing the Electricity Regulatory Commissions Act, 1998 and other statutory provisions held that collective reading of Sections 22, 29, 30 leaves no room of doubt that under the 1998 Act, it is the Commission and the Commission alone which is authorized to determine the tariff and the State Commission has rightly understood its statutory obligation. In **BSES Ltd. versus Tata Power Co. Ltd. and others (2004) 1 SCC 195**, it has been held that the legal position has undergone a complete change with the enforcement of the Electricity Regulatory Commissions Act, 1998. In view of Section 29 of the Act, the tariff for intra-State transmission of electricity and tariff for supply of electricity in wholesale, bulk or retail has to be determined by the Electricity Regulatory Commission of the State and a licensee cannot by its unilateral action enhance the charges.

51. In **Binani Zinc Limited versus Kerala State Electricity Board and others (2009) 11 SCC 244**, the Supreme Court has held as follows:-

"31. The State Electricity Boards are entitled to frame tariff in terms of the provisions contained in the 1948 Act. The tariff so framed is legislative in character. The Board as a statutory authority is bound to exercise its jurisdiction within the four corners of the statute. It must act in all fields including the field of framing tariff by adopting the provisions laid down in the 1948 Act or the Rules and the Regulations framed thereunder."

"41. We have, however, no hesitation in finding that the State Electricity Board had the requisite jurisdiction to revise a tariff till such time as the Commission was constituted and the purposes of the 1998 Act could be achieved through it. Till the time the Regulatory Commission was not constituted by the State of Kerala, the power to determine tariff remained with the Board under the Electricity (Supply) Act, 1948 as it was not repealed by the

Electricity Regulatory Commissions Act, 1998. Parliament could not have intended to bring about a situation where no authority would be empowered to determine the tariff between the date of coming into force of the ERC Act, 1998 and the constitution of the Commission. It is only after the Regulatory Commission is constituted that it will be the sole authority to determine the tariff."

52. **In Transmission Corporation of Andhra Pradesh Limited and another versus Sai Renewable Power Private Limited and others (2011) 11 SCC 34**, the Supreme Court has held as follows:-

"36. Fixation of tariff is, primarily, a function to be performed by the statutory authority in furtherance to the provisions of the relevant laws. We have already noticed that fixation of tariff is a statutory function as specified under the provisions of the Reform Act, 1998; the Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003. These functions are required to be performed by the expert bodies to whom the job is assigned under the law. For example, Section 62 of the Electricity Act, 2003 requires an appropriate Commission to determine the tariff in accordance with the provisions of the Act. The Regulatory Commission has been constituted and notified under the provisions of Section 3 read with Section 11 of the Reform Act, 1998 which in terms of Sections 11(1) (c) and (e) is expected to fix the tariff as well as the terms of licence."

53. There is no doubt that under the Electricity (Supply) Act, 1948 (for short '1948 Act') the Board had the jurisdiction to fix the tariff. The State Commission has the power to determine the tariff under the Electricity Regulatory Commission Act, 1998. In fact, power and jurisdiction of the State Commission to determine and fix the tariff under 2003 Act has not been disputed by any side, what has been argued on behalf of the petitioner is that concluded contract, tariff fixed with the approval of the Commission between petitioner and Independent Power Producers before the enforcement of 2007 Regulations in the form of Power Purchase Agreements cannot be reopened by the State Commission through backdoor by amending Regulation 6 of 2007 Regulations on 12.11.2007. The argument of the petitioner is that Regulation 6 of 2007 Regulations cannot be amended by the State Commission retrospectively to revisit concluded contracts between

petitioner and Independent Power Producer. The very jurisdiction of the State Commission to amend Regulation 6 of 2007 has been questioned.

54. In all the petitions, the Power Purchase Agreements of Independent Power Producers with the petitioner with the approval of the State Commission are before the amendment of Regulation 6. Therefore, relevant facts of CWP No.7649 of 2010 on the point are enough to understand the controversy. In CWP No.7649 of 2010, Power Purchase Agreement between petitioner and respondent No.2 was executed on 18.03.2006 fixing tariff at the rate of ` 2.50 per unit per kilo watt per hour. There is no dispute that Power Purchase Agreement dated 18.03.2006 was approved by the State Commission before execution. Thereafter, Regulation 6 of 2007 Regulations dated 18.06.2007 was amended with effect from 12.11.2007 empowering the State Commission to revisit tariffs already fixed.

55. The question arises whether Power Purchase Agreement dated 18.03.2006 and similar agreements are statutory contracts or not.

In India Thermal Power Ltd. versus State of Madhya Pradesh and others (2000) 3 SCC 379, the Supreme Court has held as follows:-

"11. It was contended by Mr.Cooper, learned Senior Counsel appearing for appellant GBL and also by some counsel appearing for other appellants that the appellant/PPPs had entered into PPAs under Sections 43 and 43-A of the Electricity Supply Act and as such they are statutory contracts and, therefore, MPEB had no power or authority to alter their terms and conditions. This contention has been upheld by the High Court. In our opinion the said contention is not correct and the High Court was wrong in accepting the same. Section 43 empowers the Electricity Board to enter into an arrangement for purchase of electricity on such terms as may be agreed. Section 43-A(1) provides that a generating company may enter into a contract for the sale of electricity generated by it with the Electricity Board. As regards the determination of tariff for the sale of electricity by a generating company to the Board, Section 43(1)(2) provides that the tariff shall be determined in accordance with the norms regarding operation and plant-load factor as may be laid down by the authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined from time to time by the Central Government by a notification in the Official Gazette. These provisions clearly indicate that the agreement can be on such terms as may be agreed by the parties except that the tariff is to be

determined in accordance with the provision contained in Section 43-A(2) and notifications issued thereunder. Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43-A(2). Opening and maintaining of an escrow account or an escrow agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining escrow accounts that obligation cannot be regarded as statutory.”

(emphasis supplied)

Thus, simply Power Purchase Agreement dated 18.03.2006 or similar agreements were approved by the State Commission that by itself is not enough to term such Power Purchase Agreements as statutory contracts.

However, the term contained in the PPA in question regarding determination of tariff is certainly a statutory arrangement.

56. In **PTC India Limited versus Central Electricity Regulatory Commission, through Secretary (2010) 4 SCC 603**, one of the question before the Supreme Court was whether capping of trading margin could be done by CERC (Central Commission) by making a regulation in that regard under Section 178 of 2003 Act. The Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006, were notified on 23.01.2006 which came into force from the date of their publication in the official gazette. The Supreme Court has held as follows:-

“55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the

absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation.”

“56. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulations under Section 178.”

“57. One must keep in mind the dichotomy between the power to make a regulation under Section 178 on the one hand and the various enumerated areas in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfil the objects of the 2003 Act. Applying this test to the present controversy, it becomes clear that one such area enumerated in Section 79(1) refers to fixation of trading margin. Making of a regulation in that regard is not a precondition to the Central Commission exercising its powers to fix a trading margin under Section 79 (1)(j), however, if the Central Commission in an appropriate case, as is the case herein, makes a regulation fixing a cap on the trading margin under Section 178 then whatever measures the Central Commission takes under Section 79(1)(j) have to be in conformity with Section 178.”

“58. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case-to-case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognized, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate legislation. Such subordinate legislation can even override the existing contracts including power purchase agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an order of the Central Commission under Section 79(1)(j).”

“66. While deciding the nature of an order (decision) vis-à-vis a regulation under the Act, one needs to apply the test of general application. On the making of the impugned 2006 Regulations, even the existing power purchase agreements (PPA) had to be modified and aligned with the said Regulations. In other words, the impugned Regulations make an inroad into even the existing contracts. This itself indicates the width of the power conferred on CERC under Section 178 of the 2003 Act. All contracts coming into existence after making of the impugned 2006 Regulations have also to factor in the capping of the trading margin. This itself indicates that the impugned Regulations are in the nature of subordinate

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legislation. Such regulatory intervention into the existing contracts across the board could have been done only by making regulations under Section 178 and not by passing an order under Section 79(1)(j) of the 2003 Act. Therefore, in our view, if we keep the above discussion in mind, it becomes clear that the word "order" in Section 111 of the 2003 Act cannot include the impugned 2006 Regulations made under Section 178 of the 2003 Act."

"79. Applying the above judgments to the present case, it is clear that fixation of the trading margin in the inter-State trading of electricity can be done by making of regulations under Section 178 of the 2003 Act. Power to fix the trading margin under Section 178 is, therefore, a legislative power and the notification issued under that section amounts to a piece of subordinate legislation, which has a general application in the sense that even existing contracts are required to be modified in terms of the impugned Regulations. These Regulations make an inroad into contractual relationships between the parties. Such is the scope and effect of the impugned Regulations which could not have taken place by an order fixing the trading margin under Section 79(1)(j). Consequently, the impugned Regulations cannot fall within the ambit of the word "order" in Section 111 of the 2003 Act."

57. The summary of findings is given in Para 92 which reads as follows:-

"92. (i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by orders (decisions).

(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation.

(iii) A regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.

(iv) Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities as we find from those authorities that in certain cases in England the power of judicial review is expressly conferred on the tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity."

(v) If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178.

(vi) Applying the principle of “generality versus enumeration”, it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(ze). Accordingly, we hold that CERC was empowered to cap the trading margin under the authority of delegated legislation under Section 178 vide the impugned Notification dated 23-1-2006.

(vii) Section 121, as amended by the Electricity (Amendment) Act 57 of 2003, came into force with effect from 27-1-2004. Consequently, there is no merit in the contention advanced that the said section has not yet been brought into force.”

58. The framing of regulations under Section 181 has the effect of interfering and overriding the existing contractual relationship between petitioner and Independent Power Producer. The regulations can even override the existing contracts including the Power Purchase Agreements. The existing Power Purchase Agreements are to be modified in terms of the regulations framed under Section 181 and all enabling powers of the State Commission. The 2007 Regulations dated 12.11.2007 amending 2007 Regulations have not been assailed on the ground that said regulations contravene any specific provisions of 2003 Act or any other statutory provision. The thrust of challenge is that regulations cannot be amended to reopen concluded contracts. The impugned order dated 29.10.2009 would show that the State Commission held that it has power to review or modify the concluded Power Purchase Agreements prospectively under amended Regulation 6 to cater to stipulations such as mandatory release of 15% water discharge, payment of revised compensation to fisheries and towards use of forest land and LADA charges. The 2006 Policy referred by the petitioner and the Independent Power Producers in the petitions has introduced the aforesaid charges after the execution of Power Purchase Agreements.

59. In **PTC India (supra)**, the Supreme Court has held that regulations under 2003 Act can even override the existing contracts

including the Power Purchase Agreements and even existing Power Purchase Agreements had to be modified and aligned with the said regulations. The State Commission has ordered reopening of the tariff prospectively. Therefore, it cannot be said that the existing Power Purchase Agreements have been reopened retrospectively. The Section 62 (4) provides amendment of tariff as per restrictions contained in that provision. It is the stand of the State Commission that only 15% mandatory water discharge, payment of revised compensation to fisheries and towards use of forest land and LADA charges imposed under 2006 Policy after execution of Power Purchase Agreements have been taken into consideration for revising the tariff. It is specific stand of the State Commission that no other factor has been considered for revision of tariff. The petitioner has not assailed the tariff on the ground that after taking various factors into consideration the decision of the State Commission on merits for fixing tariff is wrong. The petitioner has assailed amended tariff on the ground of jurisdiction which it has failed.

60. The tariff is to be determined, amended in accordance with the 2003 Act, Rules and Regulations. The State Commission has the power to determine the tariff and amend the tariff. The contract, if any, regarding tariff is to be considered by the State Commission in accordance with 2003 Act, Rules and Regulations and not under common law by Civil Court as contended by the learned counsel for the petitioner. The petitioner and the Independent Power Producer of their own cannot fix the tariff. It is the duty of the State Commission to fix the tariff. The petitioner has failed to make out any case for quashing of amended regulations dated 12.11.2007, order dated 29.10.2009 of the

State Commission and Annexure P-14 in all the petitions. In view of above, all the aforesaid points are answered against the petitioner. ◇

61. The result of above discussion is that there is no merit in the petitions and, therefore, all petitions being CWP Nos. 7649, 8285, 8426, 8427, 8472, 8492, 8531 and 8532 of 2010, are dismissed, so also the pending applications, if any. Interim orders, if any, are vacated.

(A.M. Khanwilkar)
Chief Justice.

August 6, 2013.
(krt)

(Kuldip Singh)
Judge.

High Court