

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

**Appeal No. 43 of 2011**

**Dated: 06<sup>th</sup> February, 2012**

**Present: HON'BLE MR. JUSTICE M.KARPAGA VINAYAGAM, CHAIRPERSON  
HON'BLE MR. V J TALWAR, TECHNICAL MEMBER**

**In The Matter Of**

**Himachal Pradesh State Electricity Board Limited,  
Vidyut Bhawan,  
Shimla-171 004**

**... Appellant(s)**

**Versus**

- 1. M/s. Jai Prakash Power Ventures Limited  
(JPVL) C-16, Sector-1,  
SDA Housing Colony,  
New Shimla**
  - 2. State of Himachal Pradesh  
Through Chief Secretary,  
Shimla**
  - 3. State of Himachal Pradesh  
Through Principal Secretary (Power),  
Shimla**
  - 4. Himachal Pradesh Electricity Regulatory Commission  
Keonthal Commercial Complex,  
Khalini, Shimla**
- .Respondent(s)**

**Counsel for Appellant(s):** Mr. Raj Kumar Mehta,  
Mr. Antharyami Upadhyay  
Mr. A. David

Counsel for Respondent(s): Mr. S.B. Upadhyay, Sr Adv  
Mr. Jayesh Gaurav for R-1  
Mr. Pawan Upadhyay,  
Mr. A.B Chugh, Jt Director (Finance)  
Mr. Param Mishra  
Mr. Joginder Sidwani (Reps)  
Mr. R K Narang  
Mr. Ankit Sibbal

## **JUDGMENT**

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

1. Himachal Pradesh State Electricity Board Limited (Electricity Board) is the Appellant. M/S. Jai Prakash Power Venture Limited (Jai Prakash Power) the generating Company is the First Respondent. The State government and its officers are the 2nd and 3<sup>rd</sup> Respondent. Himachal Pradesh Electricity Regulatory Commission (State Commission) is the fourth Respondent.
2. Aggrieved by the order dated 24.01.2011 passed by the State Commission allowing the Additional Capitalisation of Rs.95.88 Crores for Baspa II HEP of the Jai Prakash Power (R-1) towards the cost of Protection Works of Pothead Yard due to the Force Majeure event, the Himachal Pradesh State Electricity Board Limited has filed this Appeal.
3. The short facts of the case are as follows:

- (a) M/S. Jai Prakash Power Ventures Limited (Jai Prakash Power) a generating Company (R-1) entered into an Implementation Agreement on 1.10.1992 with the Government of Himachal Pradesh (R-2) for setting up Baspa-II Hydro Electric Project on river Baspa, a tributary of river Sutlej in Himachal Pradesh.
- (b) Pursuant to the said Implementation Agreement dated 1.10.1992, a Power Purchase Agreement (PPA) was executed between the Jai Prakash Power (R-1) and Himachal Pradesh State Electricity Board, the predecessor of the Appellant on 4.6.1997.
- (c) Accordingly, the first unit of Baspa-II Hydro Electric Project was commissioned on 24.5.2003. The second unit was commissioned on 29.5.2003. The third unit was commissioned on 8.6.2003.
- (d) In the year 2005, Jai Prakash Power (R-1) filed petition before the State Commission(R-4) for determination of capital cost and tariff for sale of electricity generated from its Baspa-II Project for the Financial Year 2007-08. During the pendency of the said petition, i.e. on 19.1.2006, a major Rock Fall from the adjoining hill had occurred in Baspa-II Pothead Yard. As a result of this Rock Fall, there was an extensive damage caused to the

Pothead Yard resulting in the closure of the power house for a few months.

- (e) In accordance with Article 17.3 (a) of the PPA, the Jai Prakash Power (R-1) informed the Appellant Electricity Board on 20.1.2006, about this Force Majeure event resulting in extensive damage to equipment and civil works. On 1.2.2006 the Appellant Electricity Board directed its Chief Engineer (Projects) for site inspection and to verify the Force Majeure event.
- (f) On 2.3.2006 the Jai Prakash Power (R-1) informed the Appellant Electricity Board that the estimated cost of the replacement of damaged equipment and restoration of damaged civil works would be about Rs.21 Crores.
- (g) On 19.4.2006 The Jai Prakash Power (R-1) submitted to the Appellant Electricity Board a Scheme Report for carrying out protection of the hill to avoid occurrence of any rock fall in future at an estimated cost of Rs 66.30 Crores)
- (h) On 23.5.2006, Jai Prakash Power (R-1) sent another letter informing Electricity Board, the Appellant that the estimated cost of the Protection works as per the revised scheme would come to Rs.75.25 Crores.

- (i) On receipt of these letters, on 22.12.2006, the Electricity Board (the Appellant) constituted an internal Committee to ascertain and report on the actual position with regard to the alleged Force Majeure event. This internal Committee was comprised of 4 members i.e. 3 Chief Engineers of the Appellant Board viz., Chief Engineer (Project), Chief Engineer (Design), Chief Engineer (Generation) and a Geologist.
- (j) On 21.7.2007, the said Internal Committee after thorough examination and numerous visits to the site submitted its Report to the Appellant Board confirming that the said Rock Fall was due to Force Majeure Event despite sufficient protection measures taken by the Jai Prakash Power (R-1) earlier.
- (k) On 16.6.2008, the above finding given in the Report submitted by the said Committee was accepted by the Electricity Board (Appellant) as recorded in the minutes of the 360<sup>th</sup> meeting of the Whole Time members of the erstwhile Electricity Board.
- (l) In pursuance of the acceptance of the said finding, on 22.7.2008 the Appellant Board, in accordance with Article 17.7.1 of the PPA, constituted a three member Committee (Aggarwal Committee) having one Representative each from the Appellant Electricity

Board and the Jai Prakash Power (R-1) and an External Expert, to assess the quantum of the damage for finalising the settlement of the claim of the R-1.

- (m) On 20.3.2009, the Aggarwal Committee, after detailed enquiry submitted its detailed Report, running in four Volumes, approving the settlement of Force Majeure claim towards the Additional Capital Expenditure to the tune of Rs.96.75 Crores and recommended that this expenditure to be added in the Capital Cost of the Project for computation of the O&M charges and other related components of tariff.
- (n) On 16.10.2009 the Electricity Board (the Appellant) accepted the said report also. Accordingly on 2.12.2009, the Electricity Board, the Appellant informed Jai Prakash Power (R-1) about its acceptance of the cost of Rs.96.75 Crores towards the Protection Work as a consequence to the Force Majeure Event to be added to the capital cost for the computation and operation and maintenance of expenses and other related components of tariff. Besides this, the Appellant informed about their decision to State Commission also through the letter dated 19.12.2009.
- (o) In the light of the above circumstances, the Jai Prakash Power (R-1) filed a Petition on 20.1.2010 before the

State Commission for determination of tariff claiming the additional cost of Rs.96.75 Crores towards the capital expenditure as accepted by the Appellant Electricity Board. This Petition was entertained and registered as case No.11 of 2010.

- (p) The State Commission after admitting the said Petition directed the Jai Prakash Power (R-1) to publish the application and issued notices on 20.2.2010. At this stage, a consumer representative appointed by the Commission filed his objections stating that the Power House site was shifted to a new location and damage had occurred only due to the said improper farsightedness in planning the area.
- (q) On 10.5.2010, the Electricity Board, the Appellant filed its short reply and sought extension of time for filing the detailed reply.
- (r) During the pendency of the said Petition filed by the 1<sup>st</sup> Respondent for determination of tariff, the Electricity Board was unbundled on 10.6.2010 under the transfer scheme formulated in accordance with Section 131 of the Electricity Act 2003. Consequently a new entity under the provisions of the Companies Act in the name of Himachal Pradesh Electricity Board Limited (the

Appellant) was constituted to discharge the obligations of the erstwhile State Electricity Board.

- (s) On 16.8.2010, the Management Committee of the new Board directed its Member (Project) to re-examine the issue of the applicability of the Force Majeure from all aspects and to bring it up for review before the Board. Accordingly, the Member (Project) after examining the documents and other materials including the Report of the earlier Committees viz., the Internal Committee and the Aggarwal Committee submitted his Report to the effect that the event in question did not qualify as a Force Majeure event.
- (t) On receipt of this Report, a meeting was convened on 25.8.2010 by the newly constituted Board and in the said meeting, earlier decision taken by the Predecessor Board was recalled and the fresh decision was taken annulling the approval conveyed earlier by the Board regarding Force Majeure event. This decision was conveyed by the Appellant to the Jai Prakash Power on 6.9.2010. Besides this, the Appellant also filed an application on 16.9.2010 before the State Commission to place on record the subsequent developments and the fresh decision taken in the Board meeting on 25.8.2010.

- (u) On 21.10.2010, the First Respondent filed its objection and questioned the legality and propriety of the Board to annul the earlier decision.
- (v) The State Commission, thereupon heard arguments of the both and as directed both the parties have filed their respective written submissions.
- (w) Then on 24.1.2011, the State Commission after considering the submissions and the documents, passed the impugned order approving the additional capital cost in favour Jai Prakash Power(R1) as claimed by it while rejecting the fresh plea taken by the Appellant on the ground that the insertion of a new case at the stage of final arguments would not be permissible. On being aggrieved by this order, the present Appeal has been filed by the State Electricity Board.

4. The Learned Counsel for the Appellant has urged the following contentions assailing the impugned order:

- (a) The State Commission was not justified in determining the Additional Capitalisation merely on the basis of the earlier decision taken by the Board accepting the recommendation of the Committee with regard to Additional Capitalisation holding that there was a Force Majeure without considering the fact that the said

decision had been subsequently cancelled by the Managing Committee of the Board in the meeting held on 25.8.2010.

- (b) Having taken a view that while determining the tariff, the State Commission could not go into the issue raised by the Appellant with regard to the admissibility of the claim of the Jai Prakash Power, the State Commission ought to have rejected the claim towards Force Majeure event.
- (c) The State Commission ought to have deferred the tariff proceedings and decided the issue at the first instance over the validity of the subsequent decision taken by the Board annulling its earlier decision. The State Commission has failed to do this.
- (d) The State Commission ought to have first examined the question of admissibility of the claim of the Respondent for Additional Capitalisation towards protection works due to Force Majeure, on the basis of the provision of the PPA as well as the 2007 Regulations before allowing the Additional Capitalisation through the impugned order. The State Commission has wrongly allowed the claim of the 1<sup>st</sup> Respondent for Additional Capitalisation as the same is contrary to the Regulations 13 of 2007 Regulations as well as the provisions of the PPA.

- (e) The State Commission ought not to have allowed the Additional Capitalisation of Rs.95.88 Crores towards the Force Majeure event without deducting the full amount of Rs.68.04 Crores received by the Jai Prakash Power (Respondent) towards the insurance proceeds and deducting only a sum of Rs.27.09 Crores out of the insurance proceeds. This is in violation of clause 8.7.2 of the PPA.
- (f) The State Commission wrongly allowed the claim of the 1<sup>st</sup> Respondent for Additional Capitalisation of Rs.95.88 Crores in the capital cost of Baspa-II Hydro Electric Plant towards the protection work due to Force Majeure in spite of the report of the Member (Projects) of the Board to the effect that the said event did not qualify as a Force Majeure.
- (g) The State Commission without recording any finding that the Rock Fall event qualify as a Force Majeure event and without verifying the necessity and quantum and cost of the alleged protection work, has allowed Additional Capitalisation merely on the basis of the earlier decision of the Board which had been subsequently cancelled.

5. In reply to the above contentions, the following submissions have been made on behalf of the Jai Prakash Power (R-1).

- (a) The plea raised by the Appellant that the issue whether the Electricity Board (the Appellant) is authorised to annul the decision of its predecessor Board with regard to the acceptance to the event of Rock Fall as a Force Majeure was not decided, is not correct. In fact the State Commission in the impugned order considered the said issue in detail and rightly held that in view of the acceptance of the Force Majeure event by the Predecessor Board and there being no specific issue was raised within the parameters of the Power Purchase Agreement, the said issue has become irrelevant in terms of Clause 17.3 of the PPA.
- (b) The Appellant Board did not ever dispute the occurrence of the Force Majeure event. Hence the State Commission need not adjudicate upon the said issue in view of the clause 17.3 (b) of the PPA. Clause 17.3 (b) of the PPA provides that if the party on receipt of Force Majeure notice disputes the degree to which the Force Majeure event has affected the construction or the operation of the project, such a dispute shall be settled through Arbitration as per article 18. Admittedly, in this case, the dispute had not been raised within seven days as per the said clause. Therefore, this issue becomes redundant as correctly held by the State Commission.

- (c) In the light of the transfer of scheme read with Section 131 of the Electricity Act, the new Board is responsible for the liabilities and obligations of erstwhile board. The new Board instead of complying with such obligations cannot simply brush aside the same by cancelling the earlier decision taken by the predecessor Board. The predecessor Board was vested with the powers to take decisions as per the provision of the PPA. Once the decision was taken and communicated to the Jai Prakash Power, the Appellant Board becomes functus officio and thereafter the said decision cannot be recalled.
- (d) Jai Prakash Power (1<sup>st</sup> Respondent) had taken all precautionary measures at the time of the construction of the project. During construction stage, Geo Technical Evaluation was carried out, geological mapping was done and the foliations were found to be dipping upstream. Due to such a favourable dip direction, the chances of rock sliding towards the Pothead Yard area were remote. These things have been noticed by the 1<sup>st</sup> Committee appointed by the Board. This Committee gave a detailed report categorically holding that there was a Force Majeure event. This was never questioned by the Board. On the other hand, after receipt of the said Report, as per provisions of Article 17.7.2 of the PPA,

another Committee (Aggarwal Committee) was constituted by the Appellant Electricity Board for assessing the damage and to submit its report for settlement of the claim of 1<sup>st</sup> Respondent. Accordingly, the Report was submitted by the Aggarwal Committee recommending inclusion of an expenditure of Rs 96.75 Crore in the Capital Cost. This Report was also accepted by the Appellant Electricity Board. This cannot be cancelled by getting the mere opinion of the Director(Project) of the Appellant.

- (e) The Appellant's contention that the decision taken by the Commission was contrary to Regulation 13 of 2007 Regulations as well as the provisions of the Power Purchase Agreement is also incorrect. The relationship between the parties is governed by the terms and conditions provided in the PPA dated 4.6.1997. This PPA was approved by the State Commission. The PPA being a concluded PPA which was entered into earlier would over-ride the Regulations framed subsequently. Admittedly, the said Regulations had come into force only on 10.10.2007. Further, Regulation 5 of these Regulations provides that in the case of existing generating stations, the terms and conditions of the PPA are applicable for determination of the tariff. In view of

the above, Regulation 13 of the Regulations 2007 is not applicable to this case.

- (f) The State Commission has to determine the tariff in consonance with the terms and conditions of the concluded Power Purchase Agreement read with Section 61 and 62 of the Electricity Act and also based upon the report of the First Committee and recommendation of the Assessing Committee. The State Commission is vested with the vast powers under section 62 of the Act to determine the tariff. Besides, inherent powers are also vested with the State Commission. Accordingly, the State Commission in exercise of those powers took into consideration all the materials available on record submitted by both the parties and determined the tariff.
- (g) Further, the contention of the Appellant that without deducting the full amount of Rs.68.40 crores received by the Jai Prakash Power (R-1) towards the insurance proceeds and deducting only a sum of Rs.27.09 Crores out of the insurance proceeds, State Commission wrongly allowed the entire amount towards the Additional Capitalisation which is contrary to clause 17.7.4 of the PPA is totally misconceived. The said amount of claim of Rs.68.40 Crores was towards the

insurance of the loss of the profit due to business interruption and not towards the damage caused by the Force Majeure Event. The amount received from the Insurance company towards the loss to Pothead Yard amounting to Rs.15.83 crores was duly accounted for and balance amount only in respect of the damage had been claimed. The State Commission has dealt with these aspects adequately and decided correctly and as such the impugned order does not call for any interference.

6. We would now frame the following questions for consideration in the light of the rival contentions urged by the learned counsel for both the parties.
  - (a) Whether the State Commission was justified in determining the Additional Capitalisation on the basis of the earlier decisions of the Electricity Board accepting the recommendation of the Committee with regard to Additional Capitalisation which had been subsequently cancelled by the Managing Committee of the Board in the meeting held on 25.8.2010?
  - (b) Whether the State Commission was justified in allowing the claim of the Respondent Jai Prakash Power for Additional Capitalisation of the sum of Rs.95.88 Crores in the capital cost of Baspa-II Hydro Electric Plant

towards protection works of Pothead Yard due to Force Majeure event contrary to the provisions of the PPA dated 4.6.1997?

- (c) Whether the State Commission, having taken the decision that it cannot go into the issue with regard to admissibility of the claim of the Jai Prakash Power (Respondent), while determining the tariff as that the said dispute would require a separate adjudication under section 86 (1) (f) is proper to decide the tariff proceedings without considering the issue regarding the validity of the decision of the Board annulling its earlier decision?
- (d) Whether the State Commission was justified in allowing the claim of the Respondent for Additional Capitalisation towards the protection works due to Force Majeure event contrary to the provision of the Regulation 13 of the 2007 Regulations?
- (e) Whether the State Commission erred in allowing the Additional Capitalisation of the sum of Rs.95.88 Crores in the capital cost towards the protection works due to Force Majeure event without deducting the full amount of Rs.68.40 crores received by the Respondent Jai Prakash Power towards the insurance proceeds and deducting only a sum of Rs.27.09 crores out of the

insurance proceeds in violation of the relevant provisions of the PPA?

7. The learned Counsel for both the parties in explaining their stand on the above issues have cited number of authorities.

8. The learned Counsel for the Appellant has cited the following judgements :

(a) (1980) 3 SCC 402 in the case of R R Verma

“The Principle that power to review must be conferred by Statute is not applicable to the decisions purely of an administrative nature”

(b) (2006) 1 SCC 46 in the case of Shaikh Salim

“All the rules of procedure are hand maid of justice”.

(c) (2000) 5 SCC 141 Jai Mangal Oran

Subsequent developments which are relevant have an important bearing on the orders even at the appellate stage”.

(d) (2010) 3 SCC 470 Sheshambal

Subsequent developments should be taken into consideration to mould the relief suitably”.

(e) (2010) ELR APTEL 0833

“While determining the tariff, the consumer’s interest should be safeguarded. Every case of additional capitalisation which will give rise to the tariff has to be seen in the light of the above said objective”.

9. The Learned Counsel for the Respondent has cited the following judgements:

(a) WB Electricity Regulatory Commission Vs CESC (AIR, 2002 SC 3588)

“The power of the Commission to determine the correct value, of the factors to be taken note of by it cannot be restricted by mandating the Commission to be bound by a finding in a collateral proceeding, such finding is a piece of evidence before the Commission, which even though has a strong evidentiary value is ipso facto not binding on the Commission. The Commission could for good reasons decide to differ from it”

(b) Gujrat Urja of Vikas Nigam Limited V/s ESSAR Power Limited, 2008 ELR (SC 0001)

“it is in the discretion of the State Commission whether the dispute should be decided by itself or keeping in view the technical nature or requirement of expertise to settle such issues should be referred to an Arbitrator Section 86 (1) (f) of the Act being special provision overrides the general provision in Section 11 of the Arbitration Act. Procedural and other matters relating to such proceedings are to be governed by the Arbitration and Reconciliation Act 1996 unless there are conflicting provisions in the Act of 2003. Thirdly, it is the cardinal principle of interpretation of Status that various sections

of an enactment are not to be read or interpreted in isolation”

(c) Judgement in Appeal dated 03.06.2010 passed in Appeal No.134 of 2008-NTPC Limited V/s CERC

“while determining the tariff the consumers interest should be safeguarded. Hence the tariff should be so determined that it should be the cheapest at the consumers end. This is the basic object of the Electricity Act, 2003. Every case of additional capitalisation, which will give rise to the tariff, is to be seen in the light of the above objective. The increase in tariff is not to be borne by the Board alone, but it is to be ultimately passed on to the end of the consumers. It necessarily follows that the whole balancing rights and obligations of the consumers, at large, on one hand and the licensee on the other hand are to be viewed to achieve the aims and objectives of the Act”.

(d) (2010) ELR APTEL 1059 Himachal Pradesh State Electricity Board V/s Uttarakhand ERC and Others:

“It is a settled law that the method of determination is provided under the Electricity Act and regulations will prevail any clause of agreements between the parties. The State Commission is expected to take all factors associated with the process of tariff determination that would necessarily mean among others legitimate components of cost, depreciation, return on equity and taxes etc”

(e) AIR 1987 (SC) 2186 held

“It is now well established that a quasi judicial authority cannot review its own order, unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction. The vice Chancellor in considering the question of approval of an order of dismissal of the Principal, acts as a quasi judicial authority. It is not disputed that the provisions of the UP State Universities Act, 1973 or of the Statutes of the University do not confer any power of review on the Vice Chancellor. In the circumstances, it must be held that the Vice Chancellor acted wholly without jurisdiction in reviewing her order dated January 24, 1987 by her order dated March 7, 1987. The said order of the Vice Chancellor dated March 7, 1987 was a nullity”

(f) The Hon'ble SC judgement in 2007 (2) SCC 181

“The Supreme Court further observed that any action having civil consequences would be considered as a quasi judicial order. The Supreme Court accordingly has held as under: “48”. In any event, when civil consequences ensue, there is hardly any distinction between an administrative order and a quasi judicial order. There might have been difference of opinion at one point of time, but it is now well settled that a thin demarcated line between an administrative order and quasi judicial order now stands obliterated”.

(g) The Hon'ble Supreme Court in a case reported in 2003 (5) 413 has held that **“a right created under must be communicated for conferring and**

**enforceable right”**. In the present case the right was duly conferred and therefore, it becomes enforceable. This view of the Hon’ble Supreme Court was reiterated by the Supreme Court in the Sethi Auto Service Station Case 2009 (1) SCC 180 Para 16.

- (h) While defining the term *functus officio*, the SC in *Govt of Uttar Pradesh Vs Raja Mohammad Amir*, AIR 1961 SC 787 held in para 6 as under: “The Scheme of the Act shows that where a person is simply seeking the opinion of the Collector as to the proper duty in regard to an instrument, he approaches him under Sec 31. It is not properly stamped and the person executing the document wants to proceed with the effectuating the document or using it for the purposes of evidence, he is to make up the duty and under Sec 32 the Collector will then make an endorsement and the instrument will be treated as if it was duly stamped from the very beginning. But if he does not want to proceed any further than seeking the determination of the duty payable, then, no consequence will follow, and an executed document is in the same position as an instrument which is executed and unstamped and after the determination of the duty the Collector becomes *functus officio* and the provisions of Section 33 have no application. The provisions of that Section are a subsequent stage when something more than mere asking the opinion of the collector is to be done”
- (i) In Appeal No.120/2008 this Tribunal has examined the effect of the concluded Power Purchase Agreement on the parties. In Para 10 and 11 of the said Judgement it is held as under:

“10. The Central Electricity Regulatory Commissions Regulations are not attracted to the present case. The Tariff Regulations of Himachal Pradesh State Electricity Commission does not have any such Rule. On the other hand, Rule 2 (iii) of the Himachal Pradesh Electricity Regulatory Commission (Terms and Conditions for determination of tariff) Regulations 2004 gives precedence to the bilateral agreements between the State Government and the generating company and to power purchase agreements. Where a PPA has been approved by the Commission, the tariff fixed by such PPA has to be adopted by the Commission as the tariff. Regulation 2 (iii) of the Himachal Pradesh Electricity Regulatory Commission is extracted below:

“(3) Where tariff has been determined bilaterally between the State Government and the generating company and the power purchase agreement has been approved by the Commission based upon such tariff, the Commission shall adopt such tariff together with the terms and conditions of such approved power purchase agreement”.

11 Further the Ministry of Power issued a clarificatory letter dated 15.2.2008 conveying therein that the provisions of tariff policy would not alter legal enforceability of already concluded contract unless and until altered on mutually agreed terms and conditions. Accordingly, the

challenge to the fixation of secondary energy rate on the ground that it is hit by Regulation 39 of CERC Tariff Regulations has to be rejected”.

10. Before dealing with the questions framed in the earlier paragraphs, it would be desirable to see as to how the State Commission has dealt with the relevant issues and decided the same.

11. The State Commission on the basis of the pleadings of the parties framed three questions viz.,

*“(1) Whether the Electricity Board is authorised to annul the decision of its predecessor Board with regard to the acceptance to the event of major Rock Fall on 19.1.2006 as a Force Majeure?*

*(2) Whether the State Commission while determining the tariff has the power to club the tariff fixation under section 62 and adjudication of dispute under section 86 (1) (b) of the Act ?*

*(3) Whether the quantum of the claim for additional cost is adequate?”*

12. The main contention of Jai Prakash Power (R-1) urged before the State Commission is that a major Rock Fall from the adjoining hill had occurred in Baspa-II Hydro Electric Plant Pothead Yard area on 19.1.2006 which resulted in the extensive damage to Pothead yard installation and closure of the power

house; immediately thereafter the same was intimated to the Electricity Board on 20.1.2006; which in turn constituted a Committee to visit the spot and to ascertain the reasons with regard to the same; in pursuance of this, the Committee visited the spot and sent a report finding that the damage was caused due to Force Majeure event; after accepting the said report, the Electricity Board constituted the 2nd Committee to assess the loss; then the said Assessing Committee after assessment, recommended the additional cost of Rs.96.75 Crores for Protection Work for computation of tariff; this Report was also accepted by the Board and that only thereupon the Jai Prakash Power (R-1) filed the Petition before the State Commission seeking determination of tariff on the additional cost of Rs.96.75 Crores as accepted by the Electricity Board and as such they are entitled to the said claim.

13. It is now strenuously argued before this Tribunal by the Learned Senior Counsel for the 1<sup>st</sup> Respondent that even though at the fag end of the proceedings before the State Commission, the Electricity Board made its fresh plea with a request to the Commission to ignore the earlier Reports contending that the earlier decision was subsequently cancelled by the Board, the State Commission after making a detailed analysis of the relevant facts as contained in the earlier report as well as legal position passed the impugned order dated 24.1.2011 approving the Additional Capitalisation cost in favour of the Jai Prakash

Power (R-1) and after rejecting the fresh plea of the Electricity Board (Appellant) with regard to cancellation of earlier decision on the ground that the insertion of a new case at the stage of final hearing would not be permissible under law and as such this order is perfectly justified.

14. Let us now refer to the discussion and findings of the State Commission on the relevant issues which are as under:

*“24. The factual position, as derived from the pleadings of the parties, reveals that the petitioner’s main contention is that a major rock fall from the adjoining hill occurred in Baspa-II HEP Pothead Yard area, resulting in extensive damage to Pothead installation and closure of the power house on 19.01.2006, and the applicant notified the incident to the Board on 20.01.2006. The Board set-up on 22.12.2006 a Committee, comprising of its senior officers and a Geologist to ascertain and report on the actual position in regard to the Force Majeure event. The Committee after thorough examination and numerous visits to site concluded the said event as “the Force Majeure Event”. After the acceptance of rock fall as Force Majeure event the respondent Board constituted another Committee (i.e. Agarwal Committee under provisions of article 17.7 of the PPA for settlement of Force Majeure claim. The Agarwal Committee on 20.03.2009 recommended additional cost of Rs.96.75 crore towards restoration/ protection works for computation of tariff thereon and its report was also accepted by the Board on 02.12.2009. Based on the aforesaid report of the Agarwal Committee, as accepted by the Board, the petitioner has filed the present petition seeking determination of tariff on the additional cost of Rs.96.75 Crore and after additional*

*capital expenditure. The Board filed its response on 10.05.2010 and the matter was further listed for hearing on 31.07.2010, but other proceedings remained adjourned till 28.08.2010. In the meanwhile the Board (as reconstituted under the provisions of Section 131-133 of the Act), reviewed its earlier decision and retrospectively, annulling the approval conveyed earlier by the Board on 02.12.2009. The action of the Respondent is not in consonance with the provisions of the Order 6 Rule 17 of the Code of Civil Procedure which stipulates that no amendment in pleadings shall be permitted after commencement of trial. In the present case even that stage of trial has surpassed and case reached at the stage of final arguments.*

*25. The provisions of the Code of Civil Procedure in its stricto sensu are not applicable in tariff determination proceedings before the Commission, as the technical procedures cannot whittledown the exercise of statutory powers. The Commission while determining the tariff has to take into consideration the principles enunciated in the Act and is to follow the procedure as laid down in the Act, and the Regulations, framed there under. There is nothing in the Act, which mandates the Commission to follow the Code of Civil Procedure excepting the matters contained in sub-section (1) of Section 94 of the Act. The Commission has specified, under Section 92 of the Act, the procedure in respect of the transaction of its business. Regulation 68 of the Conduct of Business Regulations of the Commission provides that nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Commission. The Regulations further provide that there is nothing which bars the Commission from adopting a procedure, which is at variance with any of the provisions of the said Regulations. In W.B. Electricity Regulatory Commission Vs. CESC Ltd. (AIR, 2002 SC 3588), it is concluded that:-*

*“the power of the Commission to determine the correct value , of the factors to be taken note of by it, cannot be restricted by mandating the Commission to be bound by a finding in a collateral proceeding, such finding is a piece of evidence before the Commission, which even though has a strong evidentiary value is ipso facto not binding on the Commission. The Commission could for good reasons decide to differ from it”.*

*“26. The proceedings before the Commission for fixation of tariff under Section 62 and the proceedings for the adjudication of disputes, between the generators and licensees under Section 86 (1) (f) of the Act cannot be treated at par. Firstly, the disputes under Section 86 (1) (f) are to be considered and settled in the light of the bilateral terms and conditions agreed to by the parties. Secondly, there should be a actual dispute and the respective parties should have gone into the process of “Good Faith Negotiations Clause” in terms of the agreement entered into by them. The Hon’ble Apex Court in its verdict Gujrat Urja Vikas Nigam Limited V/S ESSAR Power Limited, 2008 ELR (SC 0001), has held that it is in the discretion of the State Commission whether the dispute should be decided by itself or keeping in view the technical nature or requirement of expertise to settle such issues should be referred to an Arbitrator Section 86 (1) (f) of the Act being special provision overrides the general provision in section 11 of the Arbitration Act. Procedural and other matters relating to such proceedings are to be governed by the Arbitration and Reconciliation Act, 1996 unless there are conflicting provisions in the Act of 2003. Thirdly it is the cardinal principle of interpretation of Status that various sections of an enactment are not to be read or interpreted in isolation. Per the provisions of Section 61 (d) of the Act, as laid down by the Hon’ble APTEL in its order dated 03.06.2010 passed in Appeal No.134 of 2008-NTPC Limited V/S CERC (Para 33), while determining the tariff*

*the consumers interest should be safeguarded. Hence the tariff should be so determined that it should be the cheapest at the consumers end. This is the basic object of the Electricity Act, 2003. Every case of additional capitalisation, which will give rise to the tariff, is to be seen in the light of the above objective. The increase in tariff is not to be borne by the Board alone, but is to be ultimately passed on to the end of the consumers. It necessarily follows that the whole balancing rights and obligations of the consumers, at large, on one hand and the licensee on the other hand are to be viewed to achieve the aims and objectives of the Act. The Commission therefore, concludes that in view of the varied nature of issues and involvement of different parties and objectives to be attained, both proceedings cannot be taken together in one go.*

*27. A holistic reading of the Act, leads to the conclusion that the Regulations should only satisfy two conditions namely, that they are consistent with the Act and that they are made for carrying out the purposes of Act. Moreover, it is ruled by the Hon'ble Appellate Tribunal for Electricity in the Himachal Pradesh State Electricity Board V/S Uttara Khand ERC and others 2010 ER (APTEL)1059, that-*

*“It is settled law that the method of determination is provided under the Electricity Act and regulations will prevail any clause of the agreements between the parties. The State Commission is expected to take all factors associated with the process of tariff determination that would necessarily mean among others legitimate components of cost, depreciation, return on equity and taxes etc.”*

*28. In light of the above pronouncements, the Commission, in discharge of its duties, is required to consider the material and documents placed before it and not to unnecessary burden itself, in sorting out the issues arising out of the conduct of the parties violating the terms*

*and conditions of the bilateral agreements. Therefore, the vital issues are to be settled strictly in accordance with provisions of the PPA. It is abundantly clear that the jurisdiction of the Commission to adjudicate these issues will come up only after the parties raise the specific dispute, after exhausting the procedure set out in the PPA, as laid down in Article 18 thereof. Clause 18 of the PPA, provides for “the Good faith negotiations” and stipulates that in the event of a dispute, disagreement or difference between the parties, in respect of which a procedure for resolution of dispute is not otherwise provided for the in the PPA, the provisions of this clause are to be invoked. The said clause 18 of the PPA provides for settlement through Disputes Resolution Board or by way of arbitration proceedings under the Arbitration and Conciliation Act, 1996. These provisions are to be read with the provisions of Section 86 (1) (f), and Section 158 of the Electricity Act, 2003, read with the Conduct of Business Regulations framed there under.*

*In the light of the above discussion, it is abundantly clear that the Commission, while determining the tariff cannot club for its consideration disputes of the nature as involved in this case and as such there remains no need to consider and conclude the other issue whether the Board is competent to annul and withdraw, the decision of its predecessor Board”.*

15. As referred to above, the State Commission in the paragraph 24 to 28 has given the specific findings with regard to the issues comprehensively in the impugned order dated 24.1.2011.
16. Let us now see the gist of those findings:
  - (a) **The Rock Fall which occurred on 19.1.2006, was reported and intimated by the Jai Prakash Power to**

**the Electricity Board immediately on 20.01.2006. On receipt of this information, the Board set up an internal Committee comprising of three Chief Engineers of the Board and a Geologist. This Committee, after thorough examination concluded that the said event was a Force Majeure event and sent a Report to the Board. Accepting the said Report, the Electricity Board constituted 2nd Committee for assessing the amount of loss for settlement of the Force Majeure claim. Accordingly, the second Committee through its report, recommended additional capitalisation of Rs.96.75 Crores towards the Protection of the Pothead yard and also recommended the inclusion of this amount in capital cost of the project for determination of O&M charges and other related components of tariff and this report was also accepted by the Board.**

- (b) On that basis, the Jai Prakash Power filed the Petition before the State Commission seeking the determination of tariff on the additional cost of Rs.96.75 Crores. The Electricity Board filed its response on 10.5.2010. Ultimately after several hearings, the matter was adjourned on 28.10.2010 for final hearing. During the pendency of the proceedings, the Electricity Board on its own**

**reviewed its earlier decision retrospectively annulling the approval conveyed earlier by the Board. This action of the Board taking a different stand is not in consonance with the provisions of the Order 6 Rule 17 of the Code of Civil Procedure.**

- (c) Though the Code of Civil Procedure is not entirely applicable to the Tariff Regulations, the State Commission while determining the tariff has to take into consideration of the legal principles in the Act and follow the procedure contemplated under the Act and the Regulations. Regulation 68 of the Conduct of Business confers the inherent powers to the State Commission to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process. In the light of the said provisions, the Commission has to decide the issue under the procedure laid down for fixation of tariff under section 62 of the Act.**
- (d) The Commission can adjudicate the disputes/issues only when the parties raise specific disputes in accordance with the procedures set out in the PPA. Admittedly, no dispute had been raised as per the procedure contemplated in Article 17 and 18 of the PPA. The Article 18 of the PPA provides that the**

**disputes raised in time could be settled through Disputes Resolution Forum. Admittedly without raising any dispute, the Committees were constituted and their reports about Force Majeure event and quantum of damages were also accepted by the Electricity Board.**

- (e) Therefore, in the absence of the said dispute raised in accordance with the PPA, at the appropriate stage, the State Commission will settle the issues only on the basis of the Reports submitted to the Board by the Committees with regard to the claim made by the Jai Prakash Power and their acceptance by the Board. Accordingly, the Jai Prakash Power is entitled to the additional cost of Rs.96.75 Crores as recommended by the Assessing Committee.**

17. The Learned Counsel for the Appellant vehemently assailed the findings of the State Commission by submitting that in the absence of the decision to the issue with reference to the competency of the Electricity Board to annul the earlier decision of its predecessor Board with regard to acceptance of the event of major Rock Fall on 19.1.2006 as a Force Majeure event, the State Commission could not go into the other question with reference to adequacy of the claim.

18. On this point elaborate arguments were advanced by the learned Counsel for the Appellant.
19. Though this argument advanced by the Learned Counsel for the Appellant at the first blush looks attractive, the deep analysis over this issue in the light of the factual background would make it clear that there is no substance in this argument.
20. The reading of the impugned order in entirety makes it clear that the State Commission considered this issue and concluded that in view of the acceptance of the Force Majeure Event by the predecessor Board and there being no specific issues were raised within the parameters of the Power Purchase Agreement, the issue relating to the competency of the Board to annul the earlier decision that too during the pendency of proceedings before the Commission has become irrelevant in terms of various Clauses of the PPA and as such the competency of the Electricity Board to annul and withdraw the decision of the Board need not be gone into at this stage.
21. Since the State Commission has found that the issue relating to the competency of the Electricity Board to annul the earlier decision has become irrelevant in terms of various clauses of the PPA, it would be appropriate to refer to the various clauses of the PPA and analyse the above aspect:

- (i) Article 17.3 (a) of the PPA deals with the obligations and the responsibility upon the Respondent to notify the event of Force Majeure within a stipulated period of 07 days time to the Appellant.
- (j) Article 17.3 (b) stipulates a condition that in case the Appellant after the receipt of the notice of Force Majeure event disputes the said event, the dispute shall be referred to and be settled as per the provisions of Article 18 through the arbitration. Let us now quote Article 17.3 (a) and (b) which is as under:

**“17.3 NOTIFICATION OBLIGATIONS**

- a. *The party claiming Force Majeure shall give notice in writing to the other Party of the occurrence of the Force Majeure event as soon as reasonably practicable, but not later than seven days after the time on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. Notwithstanding the above, if the event of the Force Majeure results in a breakdown of communications rendering it not reasonably practicable to give notice within the applicable time lime specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after the reinstatement of communications, but not later than forty eight hours after such reinstatement. Such notice shall include full particulars of the event of Force Majeure, of its effects on the Party claiming relief and the remedial measures proposed; and the Party shall give the other Party regular reports on*

*the progress of those remedial measure and such other information as the other Party may reasonably request about the situation.*

**b.** *If the Party in receipt of Force Majeure Notice disputes the degree to which the Force Majeure Event has affected the construction at operation for the project, as the case may be such dispute shall be settled as per Article 18”.*

(ii) Article 17.4 refers to the duty to mitigate the event of Force Majeure. Article 17.4 is quoted below:

*“The Party affected by the event of Force Majeure shall use its reasonable efforts to mitigate the effects of any event of Force Majeure as soon as practicable; provided, however, that no Party shall be under obligation under this provision to settle any strike or other labour dispute it considers to be unfavourable to it”*

(iii) Article 17.6 refers to the other consequences of Force Majeure conditions which is quoted below:

*(a) Prior to the COD of the Project, if the construction of the Project is seriously and adversely affected for a continuous period of 160 Days or greater due to the occurrence of a Direct Indian Political Force Majeure Event, under Section 17.1 (b) (v), or for a continuous period of 365 days or greater due to the occurrence of other Force Majeure events under Section 17.1 (a) or 17.1 (b) (i) to (iv), the Company may, for so long as such an event is continuing, deliver a notice to the Board informing the Board in reasonable detail of the nature, duration, and impact on the Company (including a description*

*of the delay in construction) of the Force Majeure Event.*

*(b) Prior to the COD of the Project, if the construction of the Project is seriously and adversely affected for a continuous period of 190 days or greater due to the occurrence of a Direct Indian Political Force Majeure Event under Section 17.1 (b) (v), or for a continuous period of 365 days or greater due to the occurrence of other Force Majeure events under Section 17.1 (a) or 17.1 (b) (I to iv), the Board may, for so long as such an Event, is continuing, deliver a notice to the Company informing the Company in reasonable detail of the nature, duration, and impact (including a description of the delay in construction) on the Board of such Force Majeure Event.*

*(c) After the COD of the Project, if the operation of the Project is seriously and adversely affected for a continuous period of 180 Days or greater due to the occurrence of a Direct Indian Political Force Majeure event under Section 17.1 (b) (v), or for a continuous period of 365 days or greater due to the occurrence of other Force Majeure events under Section 17.1 (a) or 17.1 (b) (I to iv), the Company may, for so long such any of the Political Force Majeure Event is continuing, deliver a notice to the Board informing the Board in reasonable detail of the nature, duration and impact in the company of the Force Majeure Event.*

*(d) After the COD of the Project, operation of the Project is seriously and adversely affected for a continuous period of 180 Days or greater due to the occurrence of a Direct Indian Political Force*

*Majeure Event under above Section 17.1 (b) (v) or for a continuous period of 365 days or greater due to the occurrence of other Force Majeure events under Section 17.1 (a) or 17.1 (b) (I to iv), the Board may, for so long as such Force Majeure is continuing, deliver a notice to the Company informing the Company in reasonable detail of the Board's understanding of the nature, duration, and impact on the Board of the Force Majeure Event.*

*(e) Any notice delivered in accordance with Section 17.6 (a), 17.6 (b), 17.6 (c) or 17.6 (d) shall be referred to as a Force Majeure (FM) Notice”.*

*(f) If the Party in receipt of the FM Notice, within thirty (30) Days of its receipt, disputes the degree to which the Force Majeure Event has affected the construction or operation of the Project, as the case may be, such dispute shall be dealt as per provisions of Article 18. Party issuing the FM Notice shall have the option, but not the obligation, within 120 Days of the other Party's receipt of the FM Notice, subject to the Lenders' rights, to deliver a Buy-out Notice. Upon receipt of the Buy-out Notice under this para (f), the Board shall purchase the Project from the Company pursuant to Article 14 and Schedule II. Until such time as such final payment is received by the Company, notwithstanding anything to the contrary contained herein, this Agreement shall remain in full force and effect.*

*(g) The additional cost for completion of project due to any Force Majeure Event including inter-alia the additional or extra work required to be done, interest and escalation during the extended*

*period of project completion shall be worked out after deducting receivables from the insurance proceeds. The net additional amount shall be added to the Project completion cost for all purposes including, but, not limited to the tariff calculation, subject to provisions of Section 17.7.*

***(h) In case of Force Majeure Event after the completion of any unit(s)/project, the parties shall take action as per Sub-para (d) above and in such a situation, the additional capital cost required for remedial and alternative measures to remove/remedy the Force Majeure Event shall be added to the Project completion cost for all purposes including, but, not limited to tariff calculation for subsequent period of operation. Additional capital cost shall be worked out after deducting receivables from insurance proceeds from the total cost of additional works, subject to provisions of Section 17.7. {emphasis added}***

- (iv) The above provision provides that in case of Force Majeure Event after the completion of the project, the additional capital cost required for remedial and alternative measures to remove/remedy the Force Majeure Event shall be added to the project completion cost for all purposes including, but, not limited to tariff calculation for subsequent period of operation. Additional capital cost shall be worked out after deducting receivables from insurance proceeds from the total cost of additional works.

- (v) Article 17.7 deals with the Procedure to settle Force Majeure claim which is quoted below:

***17.7.1 Neither party shall raise any claim on account of Force Majeure for value of less than Rupees ten lacs at any instance, during construction period. Any claim exceeding Rupees ten lacs shall be referred to a Committee comprising one representative each from the Board and the Company and one more representative nominated jointly by the parties. {emphasis added}***

***17.7.2 The aforesaid Committee shall verify/examine and decide such claims and its decision/award shall be final and binding on both the parties.***

***17.7.3 During the total construction period of the Project, any excess expenditure on the Force Majeure as admitted and allowed by the Committee over and above Rupee five Crores shall form part of the capital cost of the project, for computation of the tariff and other purposes of this Agreement.***

***17.7.4 During operation of the project, each individual claim above only Rupees one crore after adjustment of receivables from insurance at a time shall be referred to the Committee and any excess expenditure by the Company over Rupees one Crore to overcome the Force Majeure event and as agreed by the Committee shall be added to the capital cost of the project for the subsequent period of operation for the purpose of computation of tariff and other purposes of this Agreement.***

***17.7.5 Committee shall also decide the extent to which the additional cost on account of Force Majeure shall be considered for the purpose of computation of O&M charges.***

As quoted above, Article 17.7.1 provide for constituting a Committee to settle claims exceeding Rs 10 Lakh. Article 17.7.2 provides that the Committee appointed to settle the Force Majeure shall decide such claims and its decision shall be final and binding on both the parties. Article 17.7.4 provides for additional capitalisation of any expenditure exceeding Rs 1 Crore, after adjusting the insurance claims, for the purpose of computation of tariff for subsequent period.

22. The above Articles thus provide for the details of the procedure to be followed when the Force Majeure Event had occurred and reported to the party who would decide about the Force Majeure Event and provide relief to the party who claimed the loss suffered due to the Force Majeure Event. The gist of the procedure as provided in the above Articles in brief is as follows:

- (a) Party claiming Force Majeure relief shall give notice to other party about the event within 7 days after the said event had occurred.

- (b) Such notice should contain full particulars of the Event of Force Majeure of its effects on the party claiming relief and the remedial measures proposed.
- (c) If the party on receipt of Force Majeure notice disputes the degree to which the said event had affected the construction for the operation for the project, the said party can refer such dispute to Dispute Resolution Board or to the Arbitrator and the same shall be settled as per Article 18 of the PPA.
- (d) If the party does not dispute the said event on receipt of the Force Majeure Event notice, it shall constitute a Committee to ascertain and to send a report on the actual position with regard to the Force Majeure Event.
- (e) If the such Committee after inspection sends a report that the said event was Force Majeure Event, the party who called for the report shall accept the report. After acceptance, it can appoint another Committee namely “Assessing Committee” to ascertain the quantum of the damages in order to finalise the settlement of the claims.
- (f) If the Assessing Committee after enquiry sends a report quantifying the damages, the party shall accept the said decision and recommend the said quantum for computation of the tariff as the said decision of the

Committee becomes final and binding on both the parties.

23. The above procedure would reveal that the Force Majeure event can be disputed by the party immediately after receipt of the notice of Force Majeure event. Without raising such a dispute, if the party constitutes Committee to decide about the event and the quantum of the claim and when the said Committees decide that it was a Force Majeure Event and fix the quantum of the claim, the said decision shall be final and binding on both the parties. In other words, on the plain reading of the above said clauses of the PPA, it is crystal clear that once the notice of Force Majeure is issued and received by the Board, it should have raised the dispute only at that stage and referred the said dispute to the Arbitration as per the provisions of the Article 18 of the PPA. On the other hand, if the Board decides to accept the event as a Force Majeure and did not dispute the same in terms of the Article 17.3 (b) of the PPA, the Board shall appoint a Assessing Committee whose report under Article 17.7.2 of the PPA becomes final and the same is binding on both the parties.
24. In the light of the provisions of the PPA, we shall now see the factual aspects in order to decide whether the belated decision taken by the Board to cancel the earlier decision of acceptance of the Reports of the Committees would become relevant or not.

25. In the instant case on 19.1.2006, the Rock Fall had occurred. On 20.1.2006 i.e. the next date, Jai Prakash Power (R-1) sent a notice to the Electricity Board (Appellant) intimating about the Force Majeure event under terms of Article 17.3 (a) of the PPA. On receipt of this notice without raising any dispute over the said issue under article 17.3 (b) and without referring the matter for arbitration as per the provision of Article 18, the Electricity Board set-up an internal Committee on 22.12.2006 comprising of its own three Chief Engineers and a Geologist to make inspection and send a report with regard to actual position of the Force Majeure. This Committee after numerous site visits and examination of all the data sought from and supplied by Jai Prakash Power (R-1), submitted its Report on 21.7.2007 concluding that the event was a Force Majeure Event. This report was accepted in 'toto' by the Electricity Board on 16.6.2008.
26. Thereupon after the acceptance of the report of the internal Committee, the Electricity Board (Appellant) constituted another Committee (Aggarwal Committee) under Article 17.7.1 of the PPA on 22.7.2008 to quantify the damages for settlement of the Force Majeure claim. Then the said 2<sup>nd</sup> Committee after detailed inquiry submitted its report on 20.3.2009 assessing and approving the settlements of the Force Majeure claim to the tune of Rs.96.75 Crores for protection works and recommended that the expenditure to be added to the capital cost of the project for computation of the tariff thereof. Admittedly till such time, the

Electricity Board did not raise any dispute either over the Force Majeure event or over the correctness of the Reports of its own internal Committee. On the other hand, the Electricity Board convened a meeting and decided to accept the Report of the Aggarwal Committee and also approved Rs.96.75 Crores as additional cost incurred towards the protection works. This acceptance was recorded in the minutes of the meeting dated 16.10.2009. This was also intimated by the Electricity Board to the Respondent Jai Prakash Power by the letter dated 2.12.2009. Thus, in the present case, the procedure contemplated had been followed, the Reports of both the Committees were accepted by the Board and the same was intimated by the Board to Jai Prakash Power(R1) by the letter.

27. Let us now quote the letter dated 2.12.2009 sent by Appellant to 1<sup>st</sup> Respondent which is as under:

***“Himachal Pradesh State Electricity Board***

*No.HPSEB/CE(Comn)/PSP/Baspa-II/2009/608387 dated 2.12.2009*

To

*M/s. Jai Prakash Hydro-Power Ltd  
JUIT Complex, Wagnaghat, PO-Dumehar Bani,  
Kandghat, Distt, Solan-173 215 (HP)*

*Subject:Report of the Committee Constituted by the HPSEB for settlement  
of claims under Force Majeure event of Baspa-II HEP (300 MW)*

*Dear Sir,*

*I have been directed to convey the decision of the Board on the above cited subject as under:*

*(1) Based upon the recommendations of the Committee for determination of cost of damage due to Force Majeure event (19.01.2006) at Power House site Baspa-II HEP, the Managing Committee has accepted the cost of Rs.96.75 Cr. Towards protection/restoration works as a consequence to Force Majeure event, to be added to capital cost for computation of O&M and other related components of tariff, subject to the following condition.*

**Condition No.II** *“HPSEB shall be immune to any kind of loss or damage, direct or indirect, suffered by JHPL as a consequence of these protection works in life time of PPA”.*

*(2) M/S. JHPL has recovered the compensated Business Loss/Interruption to the extent of Rs.27.09 Cr. Towards capacity charges from the insurance company. In addition to above, M/S. JHPL has taken insurance cover for the loss of business towards 88% components of generation loss including capacity charges.*

*In view of above, it is decided that M/S. JHPL shall secure all the compensation stipulated under Clause 17.5 (f) of Power Purchase Agreement (PPA) through the insurance cover and HPSEB shall not pay any compensation under Clause 17.5 (f) of PPA during closure of Power House due to Force Majeure in the present claim as well as for any claim in future.*

*Accordingly, M/s. JHPL shall confirm the operation of this Clause 17.5 (f) of PPA during Force Majeure event on the above lines to HPSEB.*

*Yours faithfully,  
Sd/-*

*Chief Engineer (Comn)  
HPSEB, Vidyut Bhawan,  
Shimla -171 004”*

28. As mentioned above, through this letter, the Electricity Board informed the Jai Prakash Power(R1) that the Managing Committee has accepted the cost of Rs.96.75 crores towards the protection works as a consequent to the Force Majeure

event to be added to the capital cost as recommended by the Committees constituted by the Electricity Board. Only on that basis, Jai Prakash Power(R1), filed a Petition before the State Commission on 20.1.2010 for determination of tariff in respect of additional cost as accepted by the Electricity Board (Appellant).

29. That apart, even before such a Petition was filed before the **State Commission**, the Electricity Board (Appellant) sent a letter to the State Commission on 19.12.2009 intimating the acceptance of the Reports of both the Committees and the intimation about the said acceptance conveyed to the Jai Prakash Power. The said letter is as follows:

***“Himachal Pradesh State Electricity Board***

*No.HPSEB/CE(Comn)/PSP/Baspa-II(FM)/2009/17086 Dated 19.12.09*

To

*The Secretary,  
HPERC, Keonthal Complex,  
Khalini, Shimla-171 002*

***Subject: Report of the Committee constituted by the HPSEB for settlement of claims under Force Majeure event of Baspa-II HEP (300 MW)***

*Madam,*

*Baspa-II HEP (300 MW) was allotted to M/S. JHPL for execution in the Private Sector during the year 1991-92. Power Purchase Agreement was signed in June 1997 and all the three units of the Project were commissioned during May/June 2003. HP Govt is getting 12% free power from the company as royalty and remaining 88% is being purchased by HPSEB at the bus bar rates as per the provisions contained in the Power Purchase Agreement and tariff fixed by HP Electricity Regulatory*

*Commission from time to time. During the Commercial Operation of the Project, major rock fall took place on 19.1.2006 at 7.30 A.M in the Pothead Yard area of the power house causing extensive damages in the Pothead Yard installations and also to other structures/equipments which had resulted in closure of the power house.*

*In pursuant to Article 17 of the PPA, JHPL informed the board that a Force Majeure event had taken place at project site resulting in power house closure. The board after verifying the event of Force Majeure/resultant damage, constituted an internal committee to ascertain and report on the facts in regard to Force Majeure Event that occurred on 19.1.2006.*

*Based upon the recommendation of this Committee, the board constituted Committee in pursuance to Clause 17.7 of PPA relating to settlement of the claims under Force Majeure vide its order of 22.7.08. The Committee comprises of the following:*

- (i) Er. C.L Agarwal, Joint Representative . Retd. Retd. Engineer-in-Chief ,PSEB*
- (ii) Er. Deepak Nakhashi, Representative of HPSEB . Chief Engineer (P&M)*
- (iii) Shri R.L Gupta, Representative of JHPL*

*Later on due to ill health of Er. Deepak Nakhashi, the representative of the HPSEB was substituted by **Er. B.S. Negi, the then Chief Engineer (PSP), & now Member (Project).***

***The above Committee had submitted its report on 20.3.09, on the settlement of claims under Force Majeure Event occurred on 19.1.2006. This report was quite exhaustive and comprises of four Volumes and as such considerable time had been consumed for scrutinizing this report. This report was placed before the WTM of the Board for consideration and approval on 26.8.09.***

*The WTM of the Board approved this report in the 7<sup>th</sup> meeting held on 16.10.09 and took the following decisions:*

- 1. The Managing Committee noted that the Whole Time Members of the board in the 360<sup>th</sup> Meeting held on 16.08.2008 approved the major rock fall occurred on 19.01.2006 in the Pothead Yard*

*area of the Power House of Baspa-II (300 MW) HEP as "Force Majeure Event". In the above meeting the WTM also approved the constitution of Committee in pursuance of Clause 17.7 of PPA for Settlement of Claims of M/s.JHPL under Force Majeure Event. The Committee has submitted the Report and recommended additional cost of Rs.96.75 crore towards protection/restoration works as a consequence to Force Majeure Event, to be added to capital cost for computation of O&M and other related components of tariff. The Managing Committee approved this cost.*

2. *The Managing Committee approved the recommendation and further added that this decision should be intimated to M/S. JHPL.*

*The above decision was conveyed to M/s. JHPL vide letter No.HPSEB/CE (Comm) PSP-Baspa-II/2009-16083-87 dated 02.12.2009 (copy enclosed).*

*The copy of the complete report is enclosed herewith for your kind perusal please.*

*Delay in submitting the report may kindly be condoned keeping in view the facts narrated above.*

DA/As above.

Yours faithfully,

Sd/-

19.12.2009

Chief Engineer (Comm)  
HPSEB, Vidyut Bhawan  
Shimla-4"

30. The reading of the above letter sent to the State Commission would reveal that the Appellant Electricity Board on being informed by the Jai Prakash Power about the Force Majeure Event constituted an internal committee to ascertain the factual position with regard to Force Majeure Event and after receipt of the report of the said Committee finding that the event was a Force Majeure event, it constituted second Committee under

Clause 17.7.1 of the PPA relating to settlements of the claims and the second committee also submitted its report which was quite exhaustive and comprised of four Volumes recommending Additional Capitalisation of Rs 96.75 Crores to be added in the capital cost of the project for the purpose of computation of O&M charges and other tariff related charges. This report was placed before the whole time members (WTM) of the Managing Committee of the Appellant Electricity Board and in turn, the Managing Committee approved and accepted the recommendation regarding the additional cost of Rs.96.75 Crores as a consequent to the Force Majeure event to be added to the capital cost for computation thereon. In this letter sent to the State Commission, the Appellant Electricity Board had claimed that it had thoroughly scrutinised and examined the voluminous report of the Aggarwal Committee consuming considerable time before recommending its adoption.

31. As such, on the date of the petition filed before the State Commission by the Jai Prakash Power on 20.1.2010 and on the date of the entertainment of the said petition on 20.2.2010 by the State Commission, the materials available on record before the State Commission are (1) the Reports of both the Committees, (2) the acceptance of the recommendations by the Electricity Board recorded in the Minutes of the meeting and (3) the letters sent to the Jai Prakash Power(R1) as well as to the State Commission intimating the acceptance of the said Reports of the

Committees. Thus, it is clear that till then no dispute had been raised by the Electricity Board with regard to the event on receipt of the Force Majeure notice or with reference to the correctness of either of the Committee Reports regarding the Force Majeure Event or the quantum of the claim.

32. As mentioned above, the Petition was entertained on 20.2.2010 by the State Commission. On 22.2.2010 a consumer representative submitted his objections to the petition. The Electricity Board filed the reply on 10.5.2010. Even in that reply, the Electricity Board neither objected to the event of Force Majeure nor to the reports of the Committees and its acceptance. After filing the short reply, they only sought time to file the detailed reply. Thus, it has become evident that the stage for raising any dispute with regard to the Force Majeure event, had already crossed.
33. During the pendency of the proceedings before the State Commission, there was a change in the constitution of the Board which was re-structured under the transfer scheme which was formulated for unbundling of the Board under provision 131, 132 and 133 of the Act, 2003. Three Companies were established under Company Act 1956 to look after Generation, Transmission and Distribution business of erstwhile State Electricity Board. Thus as a new entity, in the name of Himachal Pradesh State Electricity Board Limited was established and it became deemed

a distribution licensee under 5<sup>th</sup> proviso to Section 14 of 2003 Act. This was on 10.6.2010. In the meantime, the Petition filed by the 1<sup>st</sup> Respondent was posted periodically before the State Commission for hearing on several dates. When the matter was finally posted on 31.7.2010, the arguments were heard by the State Commission. The Jai Prakash Power (R-1) had finished his elaborate arguments. On that day, the Learned Counsel appearing for the Appellant Board requested for further time for making his reply arguments. Accordingly, the matter was adjourned to 28.8.2010.

34. At that stage, the newly constituted Board of the Appellant held a meeting on 16.8.2010 and setup a single member 'Committee' with its own Director (Project) as Member to examine the issues raised by the Consumer Representative in regard to Force Majeure event and to submit its report. Accordingly, the report was submitted. The newly constituted Board held another meeting on 25.8.2010 for consideration of the Report submitted by its Director (Project) on the Force Majeure event. In the said meeting, the Appellant reviewed and reversed the earlier decision annulling the approval made by the Board in favour of the Jai Prakash Power(R1) accepting the additional cost. Thereupon the Appellant Board filed an application before the State Commission on 16.9.2010 and brought to the notice of the State Commission the additional facts to the effect that the fresh decision was taken by the Board to withdraw the earlier

decisions to accept the 1<sup>st</sup> Report dated 16.6.2008 and the 2<sup>nd</sup> Report dated 16.10.2009. Opposing this move, Jai Prakash Power(R-1) filed its reply and questioned the competency of the newly constituted Board to annul the decisions taken earlier. Then the State Commission heard the arguments from both the parties. After hearing both the parties and after considering the materials available on record, the State Commission passed the impugned order on 24.1.2011 approving the Additional Capital Cost in favour of Jai Prakash Power(R1).

35. From the above narration of events, the following factual aspects which are not disputed would emerge:

- (a) The Event of Force Majeure had been accepted by the Electricity Board by appointing two Committees which have recommended for the approval of the claim made by the Respondent.
- (b) The Electricity Board (Appellant) did not raise any dispute over the Force Majeure event on receipt of the notice sent by the Jai Prakash Power under clause 17.3 of the PPA notifying about the Force Majeure Event. Only when a dispute is raised at that stage, the said dispute could be referred and settled under Arbitration under clause 18. If the Force Majeure event has been accepted without raising any dispute at that stage, then the party concerned has to follow the procedure under

clause 17.7 for settlement of the Force Majeure claim in favour of the other party. In this case, without raising any dispute, under clause 17.3 (b), the party crossed that stage by entering into clause 17.7 to follow the procedure for settlement of the Force Majeure claim by constituting the Committees.

(c) In this case on 16.6.2008, the Appellant Electricity Board considered the Report of the first Committee and accepted the findings of the Committee with regard to Force Majeure event. Then another Committee had been constituted as required under Clause 17.7.1 for assessment of the damages. Accordingly, the Second Committee assessed the damages and recommended the additional cost of Rs.96.75 Crores towards the restoration works as capital cost. This 2<sup>nd</sup> Committee's Report also was accepted by the Electricity Board without raising any objection on 16.10.2009. As per clause 17.7.2 read with 17.7.4 of the PPA, such assessment and acceptance of such assessment shall be final and binding.

(d) After accepting these reports of the Committees, the Electricity Board (Appellant) sent a letter dated 2.12.2009 to the Jai Prakash Power (1<sup>st</sup> Respondent) intimating the said acceptance. Thereupon, the

Appellant Board sent intimation to the State Commission also about the acceptance of these reports of the Committee through its letter dated 19.12.2009. Only thereupon on 20.12.2009 the Jai Prakash Power (R-1) filed its Petition for determination of tariff on the basis of that acceptance.

- (e) During the proceedings of the Petition, the Electricity Board filed its reply on 10.5.2010 without raising any dispute with reference to the Force Majeure event.
- (f) Only at the fag end of the proceedings before the State Commission that too when the Petition was posted for reply arguments of the Electricity Board (Appellant) it brought to the notice of the State Commission through the application in the said proceedings filed on 16.9.2010 that the Appellant held a meeting on 25.8.2010 and took a fresh decision to withdraw the earlier decision taken by the Board on 16.6.2008 and 16.10.2009. Thus, it is clear that the objection relating to Force Majeure event was raised only on 16.9.2010 for the first time through an application and not earlier.

36. Now, in the light of the above undisputed factual scenario, two questions would arise:

- i. Having constituted the 1<sup>st</sup> Committee, on receipt of Force Majeure notice from Jai Prakash Power(R1) without raising any dispute over the event; having accepted the said Committee's report finding that the event was a Force Majeure event, and having constituted a Assessing Committee whose report was also accepted by the Electricity Board which is final and binding upon both the parties under clause 17.7.2 of the PPA, why the State Electricity Board had to take a 'U' turn by taking a belated and fresh decision to take a contrary stand before the State Commission with reference to the Force Majeure event?
- ii. Having raised no dispute over the Force Majeure; having accepted the recommendations of the two Committees for approving additional cost in favour of the Jai Prakash Power and having thought it fit to inform this to the State Commission by the detailed letter dated 19.12.2009 to the State Commission, why the State Electricity Board has to take a decision to annul the earlier decision without getting permission from the State Commission especially when the proceedings with reference to the same issue was already pending before the State Commission?

37. On a careful consideration of the above factual background, it is evident that both erstwhile Electricity Board and the present Electricity Board were conscious of the various facts including the issue of the event as Force Majeure which was accepted by the Board after due consideration. In fact, the erstwhile Electricity Board had examined the event and the quantum of damages at various levels by the different team of officers for a period of almost 4 years. Those details are as follows:

- (a) The erstwhile Board after receipt of Force Majeure notice from the Jai Prakash Power on 20.1.2006, considered the said notice by keeping the same with them for 11 months without raising any dispute. Then on 12.12.2006 after they were convinced about the particulars regarding the event contained in the notice, decided to constitute an internal Committee to examine as to whether the event was a Force Majeure Event and accordingly constituted.
- (b) The said first Committee visited the site several times and examined the issue for a period of 07 months. After due inquiry, it submitted its report on 21.7.2007 to the Electricity Board with a finding that the event was a Force Majeure event.
- (c) After receipt of the said report, the Electricity Board took another 11 months to consider the said report and

ultimately accepted the said report on 16.6.2008. After a month, i.e. on 22.7.2008, the Electricity Board constituted another Committee to assess the damages due to the Force Majeure event. The second Committee conducted the detailed inquiry, and took 1 year and 6 months to assess the quantum of the damage. Thereupon on 22.3.2009, it sent a detailed report running in 4 volumes quantifying the damages to the Electricity Board.

- (d) After 07 months, after thoroughly scrutinising the report of the 2<sup>nd</sup> Committee, the Appellant Electricity Board accepted this report also on 16.10.2009.
- (e) Thereupon, after 02 months i.e 2.12.2009, the Electricity Board communicated the said decision to the Jai Prakash (Respondent). On that basis, the Jai Prakash Power filed a petition on 20.01.2010. However, the Appellant Board filed its reply only on 10.5.2010 without raising any dispute with reference to the Force Majeure event. When the proceedings were about to be concluded, the Appellant Board on 16.9.2010 filed an application bringing to the notice of the State Commission that the Board of Directors took a fresh decision cancelling the earlier decision taken on 25.8.2010. Admittedly, before the decision for

cancelling the earlier decision was taken, the Appellant did not give any opportunity of hearing to the Jai Prakash Power (Respondent) to oppose the said proposed cancellation.

- (f) Similarly, the Appellant Board had not even taken care to inform and seek permission from the State Commission that they have got proposal to reconsider the earlier decision through the Management Committee even though the proceedings were pending before the State Commission and even though the State Electricity Board had earlier thought it fit to inform the State Commission about the decision to accept the recommendation of the Committees through its letter dated 19.12.2009 even before the Petition by the Jai Prakash(R1) being filed.

38. With regard to the above failure, no explanation has been put forth by the Appellant either before the State Commission or before this Tribunal.

39. The Appellant has contended that the issue with reference to the authority of the Electricity Board to annul the earlier decision of its predecessor Board was not decided by the State Commission and that without deciding the same, State Commission could not grant the relief sought for. This contention is totally untenable. As mentioned earlier, the State Commission has specifically

dealt with this issue and held that in view of the acceptance of the Force Majeure event by the predecessor Board and there being no specific issue was raised within the parameters of the Power Purchase Agreement, the said issue would become irrelevant, in terms of Clause 17.3 of the PPA as the decision by the Committee is binding on both the parties.

40. As correctly pointed out by the State Commission, the competency of the Electricity Board to withdraw the decision of the Transferor Board became insignificant. The State Commission has rightly held that the State Commission would have to decide the issue only on the basis of the relevant clauses of the PPA. As per the PPA, the parties are bound by the terms and conditions of the PPA. Any dispute or disagreement should also be as per the terms and conditions of the said PPA. When this disagreement or dispute belatedly raised is not as per the agreed terms of the PPA, the same has to be necessarily ignored.
41. In the present case, the Appellant had not acted in terms of the PPA while taking the fresh decision. Therefore, the State Commission was right in ignoring the subsequent decision taken by the Appellant Board. It is unfortunate on the part of the Appellant Board to request the State Commission to ignore the earlier decision taken by the Board as per the PPA and take note of the subsequent decision and come to the conclusion on

that basis. This belated fresh prayer which is completely contrary to the earlier decision taken as per the procedure contemplated by the PPA and its earlier stand would not only reflect the conduct of the Appellant Board which has changed its original stand but also would amount to praying the State Commission to pass an order in violation of the PPA.

42. In our view, no fresh decision could be taken or even processed by the Appellant Board without the prior approval or permission from the State Commission. In this case as mentioned above when the matter was posted for final hearing by the State Commission which was seized of the entire matter, the conduct of the Appellant Board to take decision to annul the earlier decision without even informing the State Commission in our view, would amount to showing disrespect to the State Commission which is a quasi-judicial authority.
43. At this stage, the following aspects which are significant have to be noted:
  - i. The State Commission has to decide the case as per the pleadings made by the parties. In the absence of the permission to amend the pleadings which is completely contrary to the earlier pleadings, the State Commission cannot be compelled to decide the said issue over the new pleadings.

- ii. Through the application dated 16.9.2010 in which it is mentioned about the fresh decision, the Appellant had sought four weeks time to file amended reply for giving reasons for prayer for such amendments. The matter was finally heard only on 20.12.2010. Till then no such reply was filed.
- iii. By virtue of two Minutes of the Meetings dated 16.6.2008 and 16.10.2009, the Electricity Board had accepted both the Reports of the Committee respectively. This was also intimated to the Jai Prakash Power(R1) on 02.12.2009 and to State Commission on 19.12.2009 i.e. only then the Petition was filed by the Jai Prakash Power (R-1) i.e. on 20.1.2010 before the State Commission. There was no provision in the PPA for reversal of the earlier decision to accept the reports of the Committees appointed under clause 17.
- iv. Under those circumstances, withdrawal of the earlier decision or cancellation of the earlier acceptance will not have any impact on the proceedings before the State Commission, since the State Commission has to decide the Petition in terms of the PPA read with provisions of the Electricity Act, 2003 alone.

44. The above aspects would make it clear that the change of stand taken by the Appellant Board before the State Commission had taken place only after the State Commission was seized of the matter that too at the fag end of the proceedings i.e. on 25.8.2010.
  
45. The Learned Counsel for the Appellant has raised the issue which pertains to the invocation of the provision of Article 18 of the PPA read with Section 86 (1) (f) of the Electricity Act. This contention is also misconceived. For invocation of the Article 18 of the PPA, there must be a dispute. As mentioned earlier, no dispute had at any point of time been raised by the erstwhile Board during the long period of 4 years when the event of the Force Majeure was under consideration by the Board. During the said period, the Committees were constituted by the Board to consider the event of Force Majeure and to quantify the damages. In the absence of any dispute, no provision in the PPA would provide for referring the same for negotiation under Article 18. As mentioned above, the alleged dispute for the first time was raised before the State Commission only on 16.9.2010 when already the proceedings were commenced before the State Commission which has seized of the matter relating to the Committee Reports. At that stage, taking a fresh decision by the Appellant on 25.8.2010 without even informing the Commission that too after the final arguments advanced by the Respondent before the State Commission on 31.7.2010 and after getting the

adjournment for making their reply would not affect the proceedings pending before the State Commission. As there is a limitation for invoking Article 18, the belated disagreement cannot be adjudicated at the sweet will of the Appellant.

46. As indicated above, Article 17.3 (b) of the PPA, provides the condition under which Article 18 can be invoked. It reads as under:

*“If the part in receipt of Force Majeure notice disputes the degree to which the Force Majeure event has affected the construction or operation of the project as the case may be, such dispute shall be settled as per Article 18”*

47. The above condition had not been complied with. Admittedly, no dispute on receipt of the Force Majeure notice was raised by the Appellant and as such there was no occasion for invoking Article 18. The State Commission in the impugned order rightly observed that the disputes under section 86 (1) (f) of 2003 Act are to be considered in the light of the condition agreed to by the parties and therefore, there should have been actual dispute raised and the parties should have gone into the process of good faith negotiations in terms of the PPA entered into between them.
48. In the present case as mentioned earlier, there was no dispute with regard to Force Majeure Event raised till the matter reached the stage of final hearing on 31.7.2010 before the State

Commission. Appellant only on 25.8.2010 in the meeting allegedly recalled earlier decision over the two Reports of the Committed on 16.6.2008 and 16.10.2009 by which the said reports were accepted by the Board. In that context, in the light of the submission made by the Appellant the following question would arise for consideration:

*“Whether recalling of those two decisions by the Board are of such a nature that the Commission must adjudicate the said issue at the first instance or else the entire decision of the Commission would be non-est ?”*

49. As mentioned earlier we are more concerned with the provisions of the PPA. Article 17.3 and 17.7 of the PPA would clearly stipulate that in case of dispute of the event, the matter would be referred to the Arbitration. When the dispute under Article 17 (3) (b) had not been raised on the receipt of Force Majeure notice, there was no need to refer the matter for arbitration under article 18. If at all any reference under article 18 was required to be made, then the Appellant who is a party raising the dispute should have initiated for arbitration. However, in the present case, the Electricity Board without raising the dispute and without initiating the process for Arbitration, set-up an internal Committee on 22.12.2006 comprising of its own senior level officers to ascertain the actual position and to report in regard to Force Majeure event. Accordingly, the said Committee conducted detailed inquiry and submitted its report on

21.7.2007. This report had been accepted by the Board on 16.6.2008. Then the Assessing Committee was constituted. Its report also was accepted on 16.10.2009. Till then, at no point of time, the erstwhile Board refuted the said reports. Hence, the decision taken on 25.8.2010 by the Electricity Board recalling the earlier decision dated 16.6.2008 and 16.10.2009 to accept the Report of the Committees would not affect either the proceedings before the State Commission or the correctness of those Reports. Admittedly, the present Electricity Board had only recalled the earlier decision of the Electricity Board and not the reports of the Committees which are in accordance with the PPA.

50. As indicated earlier, no dispute was raised by the Appellant at the appropriate stage as per the provision of the PPA. The State Commission could only take note of those disputes which are raised as per the terms of the PPA. PPA executed by the parties was a concluded PPA. Therefore, the same would be binding on the parties. In such a situation, the State Commission has to see the dispute only in terms of the PPA and not otherwise.
51. Admittedly, the pleadings were completed in the proceedings before the Commission and the final arguments were also advanced by the Jai Prakash Power(R1). It is not disputed that after the conclusion of the arguments made by the Jai Prakash Power(R1) on 31.7.2010, the Appellant merely took time to

submit its reply arguments. Even on that date, the Appellant had not indicated to the State Commission that they had a proposal to reconsider their earlier decision. After getting adjournment under the garb of submitting its reply arguments, the Board convened a meeting of its whole time Directors on 25.8.2010 and took a “U” turn by deciding to recall the earlier decision where the Board had accepted the Reports of both the Committees. Only thereafter, the Appellant filed an application on 16.9.2010 in the pending proceedings bringing to the notice of the State Commission about the fresh decision of its whole time Directors dated 25.8.2010. Even on that date, the Appellant got time from the State Commission for filing the necessary petition for amending the earlier plea, However, no such petition was filed till the conclusion of the final arguments.

52. As indicated above, the conduct of the Appellant amounts to over reaching the jurisdiction of the State Commission. Knowing fully well that the Learned Commission has seized of the entire matter and was in the process of considering the reports of the Committee which were not disputed, the Appellant even without allowing the Commission to adjudicate upon the same and without getting the permission to reconsider the earlier decisions has hurriedly recalled the earlier decision by taking their own parallel proceedings. No justification had been shown in the application filed on 16.9.2010 as to what new material had come to the notice of the Board warranting it to change its decision. All

the materials were already available on record before the State Commission which were collected during the period of several years on which many officers of the Commission had applied their mind and approved the event as a Force Majeure Event. Similarly, no justification had been shown either before the State Commission or before the Tribunal as to what sort of investigation was conducted and which expert body had conducted such investigation to take a different decision for annulling its earlier position. It was also not explained that what was the constitution of the said expert committee and what type of examination was conducted by such expert committee that compelled the Appellant to change its stand. This is very unfortunate.

53. There is one more aspect to be noticed in this context. Before filing its application on 16.9.2010 informing the change of stand, the Appellant Board sent a letter to the Jai Prakash Power(R1) on 6.9.2010 communicating the fresh decision taken on 25.8.2010 to withdraw the earlier decision. The contents of that letter is as follows:

***“Himachal Pradesh State Electricity Board***

*No.HPSEB/CE(Comn/SERC-Baspa-II/2010/9013-21 dated 6.9.2010*

To

*M/s. Jai Prakash Hydro-Power Ltd  
JUIT Complex, Wagnaghat, PO-Dumehar Bani,  
Kandghat, Distt, Distt-Solan-173 215 (HP)*

*Subject: Review of Decision on Force Majeure issue of 300 MW Baspa Project taken in 360<sup>th</sup> (2008-09) & 7<sup>th</sup> (2009-100) meeting of WTM held on 16.06.2008 & 16.10.2009*

*It is informed that the above issue was discussed in the 3<sup>rd</sup> meeting of BOD of HPSEB held on 25.08.2010 in which the various discrepancies in the report submitted by the Committees constituted in the past by the BOD for giving its recommendation on force majeure on the 300 MW Baspa Project was deliberated. The HPSEB Ltd has decided to withdraw the approvals granted to the recommendation of the Committee in 360<sup>th</sup> and 7<sup>th</sup> meeting of WTM held on 16.6.2008 and 16.10.2009 respectively, sent earlier to you vide letter No.HPSEB/CE(Comn)/PSP/Baspa-II/ 2009-16083-87 dated 2.12.2009, on the Force Majeure issue on the 300 MW Baspa Project.*

*The decision of the B.O.D dated 25.8.2010 in this regard is enclosed herewith for your reference and record.*

*Yours faithfully,  
Sd/-6.9.10*

*Chief Engineer (Comn)  
HPSEB, Vidyut Bhawan,  
Shimla -4"*

54. Perusal of this letter clearly shows that there is no indication on what basis the earlier decision taken by the erstwhile Board was cancelled by the present Board.
55. In the letter dated 6.9.2010, there is a reference about the fresh decision taken by the Board of Directors on 25.8.2010. Let us now see the said minutes of the meeting recorded on 25.8.2010:

*" The above issues have been deliberated in BOD, issue wise, in detail and after deliberation the BOD is in agreement with the issues raised by Consumer Representative, Project Wing and Commercial Wing vis-a-*

*vis the provisions of the PPA and therefore, arrived at the following conclusions:*

*Conclusions:*

*The Rock fall event which resulted in damaging of the pothead yard equipments and closure of the project w.e.f 19.1.2006 to 01.05.2006 cannot be termed as a Force Majeure event as per the provisions of PPA under Clause 17.1, as there is no effect of the natural element or any other act of God triggering the rock fall. However, the action of the company qua serving the notice under Clause 17.3 (a) intimating the event of rock fall within the specified time limit and regular reports on the progress of the remedial measures are in consonance with the provisions of PPA.*

*Similarly, the action of the Company under Clause 17.4 of the PPA to mitigate the damages so caused and reinstating the project in terms of the obligations casted upon the firm is also not disputed. The expenditure on account of this mitigation was worked out by the company to the tune of Rs.18,26,80,225 and out of this amount the company got reimbursement of Rs.15,83,28,277 from Insurance Company under Clause 12.6.1 of the PPA. The balance amount of company and the company claimed adjustment of an amount of Rs.1,43,51, 948 to be included in capital cost of the project in terms of the provisions of Clause 17.7.4 of the PPA. The recommendations of the Committee for the Force Majeure event and extension of the same beyond the re-commissioning stage is not tenable and hence the company is not entitled to claim the amount of Rs.96.75 Crore which is stated to have been spent by the Company for additional construction works of providing slope protection etc. on the ground of Force*

*Majeure, without seeking approval from the competent authority.*

*In view of the conclusions aforesaid, the BOD decides as follows:*

- (a) To withdraw the approvals granted to the recommendation of the Committees in 360<sup>th</sup> & 7<sup>th</sup> Meeting of WTM held on 16.06.2008 & 16.10.2009.*
- (b) To authorise Chief Engineer (Comn) to file suitable reply before the Hon'ble Commission indicating the status of the case and contest the petition of M/s.JPVL Ltd. On merit"*

56. The above reference also would not indicate that some other valid expert body had been constituted to go into the correctness of the reports of the earlier Committees and on the basis of the conclusion of the said expert body's report, the final conclusion to withdraw the earlier Committee's report dated 16.6.2008 and 16.10.2009 was arrived at.

57. As indicated above, on the basis of this conclusion arrived at by the Board of Directors (whole time Directors), the Electricity Board filed an application on 16.9.2010 for placing on record the fresh decision taken by the whole time Directors on 25.8.2010. It would be proper to refer to the relevant portions in the said application in order to find out the actual basis for taking the different stand to withdraw the earlier approval. We will refer to the relevant paragraphs for the same:

*"3. That the applicant Respondent most humbly submits that a bare perusal of the petition filed by the non-applicant-*

- petitioner would show that the non-applicant/petitioner is seeking addition in capital cost and determination of tariff on the basis of additional cost due to Force Majeure events, additional cost of inter-connection facility paid to SJVNL, is basically based on report dated 20.5.2009 wherein the committee has perhaps without considering certain important factors like shifting of power-house site to new location other than proposed in DPR prepared by the HPSEB Ltd and other important aspects of the matter have concluded that the event occurred on 19.1.2006 as Force Majeure and recommended additional cost of Rs.96.75 crore towards protection/restoration of work by further recommending that the same be added to the capital cost for computation of O&M and other components of the tariff.*
- 4. That the applicant Respondent most humbly submits that since the entire petition is based upon the Committee report dated 20.3.2009, approval of which report has been withdrawn by the Whole Time Directors of the HPSEB Ltd while reviewing the decision taken on Force Majeure issue of 300 MW Baspa Project taken on 16.6.2008 and 16.10.2009.*
  - 5. That in view of the withdrawal of the reports of the Committees, the applicant-Respondent shall have to re-examine the entire pleading advanced by the Petitioner and thereafter to file a detailed reply of the Petition. **It is humbly submitted that for re-examining the matter and for filing a detailed reply to the petition, the applicant respondent needs about 6 weeks.** The Applicant humbly prays that keeping in view the aforesaid fact further time of six weeks may kindly be granted to the applicant to file the detail reply to the Petition filed by the non-applicant petitioner. This will cause no prejudice to any party as filing of reply by the applicant respondent is necessary for proper adjudication of Lis between the parties”*

58. The paragraph 5 of this application would reveal that the Respondent Board has decided to seek time from the Commission to re-examine the entire case put forward by the Jai Prakash and thereafter to file a detailed reply. It is specifically stated in the said paragraph that ***“it is humbly submitted that for re-examining the matter and for filing a detailed reply to the petition, the Applicant Respondent needs six weeks”***. So, this prayer would show that they sought permission to re-examine the matter and to file the detailed reply. As such, no conclusion can be arrived at with regard to the earlier decision without re-examination. They simply filed an application with a prayer for re-examination. In this Petition, no order had been passed by the State Commission granting any such permission to re-examine the matter. Consequently, the reply had also not been filed by the Electricity Board before the Commission after re-examination. Thus, it is clear that the Board of Directors have decided to withdraw the Reports, without getting any expert opinion after re-examining the matter on the basis of the permission granted by the State Commission. Thus, it is clear that Committees' reports given by the First Committee as well as the Second Committee are intact and they have not been disturbed. As a matter of fact, as indicated above, the said decision taken by the Committee under Clause 17.7 (a) becomes final and binding upon the parties.

59. This would indicate that mere decision to withdraw the approval for the Committees recommendations would not be sufficient to hold that Committee's Recommendations are not final. It is to be reiterated that the notice of Force Majeure event sent by the Jai Prakash Power was never questioned by the Electricity Board initially and on the contrary, the Electricity Board had appointed two Committees and obtained recommendary reports from them. Under Clause 17.7.2, the said recommendation and decision taken by the Committee set up under Article 17.7.1 become final and binding regardless of the fact whether it is accepted by the Board of Directors or not. In this case, belatedly, the Board has taken a decision to withdraw the approval which will not affect the Committee's report and also the decision to withdraw has been taken by the Board without the permission of the State Commission which already has taken cognizance of the entire matter.
60. Since the report submitted by the Committee established in terms of Article 17.7.1 of PPA is final and binding upon the parties, the entire dispute belatedly raised now by the Electricity Board falls in the zone of the accepted matter which cannot be disputed and agitated upon.
61. Further, as mentioned above, the Appellant had filed an application on 16.9.2010 merely mentioning about its decision to withdraw the earlier decision of the Board in regard to

acceptance of the recommendations of the Aggarwal Committee and specifically asked for permission for re-examining the issue and to file a detailed reply. This would indicate they have only taken a decision to withdraw the approval but they have not made any re-examination with reference to the correctness of the earlier decision. On the other hand, they wanted permission from the Commission for re-examination to consider the correctness of the earlier decision and to file a reply. Admittedly, the permission for reconsideration had not been granted. Consequently the Electricity Board has not chosen to file any reply with reference to the said aspect. Therefore, the question of annulling the decision of the predecessor board that too after the said decision accepting the Reports conveyed to the State Commission as well as to the Jai Prakash Power who acted upon the said decision by filing a petition for making such claim would not arise.

62. This aspect could be viewed from yet another angle. Once a issue of Force Majeure was referred to the Committee and the Committee assessed the Force Majeure claim and submitted its report, the Electricity Board had no authority to decide either way to accept or to reject the reports of the Committee as they are final and binding upon both the parties as per Article 17.7.2 of the PPA. Once the Board received the reports of the Committees which were accepted in the meeting, the Board becomes functus officio as the PPA does not confer any power

for reconsideration. Such reconsideration is only possible where the PPA itself grants such liberty to any of the Parties to PPA.

63. One more interesting feature is to be noticed in this context. One Mr. B S Negi, the Member (Project) of the Appellant Electricity Board was Appellant's representative to the Aggarwal Committee which recommended for the claim of Rs.96.75 Crores. Mr Negi headed the Project Division of the Appellant Board as Member (Project) during relevant time. However, the very same Project Division of Appellant Board upon being directed to examine the issue raised by the consumer representative regarding Force Majeure event, gave its report within seven days to the whole time Directors suggesting to annul and withdraw the decision of the predecessor board. This is quite strange.
64. The Appellant has not given any explanation as to why the decision taken by the Aggarwal Committee in which the Member (Project), heading Project Division, was one of the Members, was recommended to be annulled by the very same Project Division. It is also noticed as indicated earlier, that considerable time was spent by the Aggarwal Committee to arrive at the conclusion and also considerable time was consumed by the Board scrutinising the Report before adoption. However, strangely the Project Division took only seven days to arrive at the conclusion negating the opinions of earlier

Committees and the Board also hurriedly accepted this conclusion within a day. Therefore, the decision of the Board of whole time Directors to withdraw the earlier recommendations given by the Committee cannot be given due credence. Therefore, the decision for so called withdrawal cannot be accepted and cannot be acted upon.

66. In other words, it has to be stated that the Board in the present case has attempted to revise the decision which had been decided by the earlier Committees after due consideration and after following the procedure laid down in the PPA in the matter. This fresh decision was taken by the Board by acting in violation of the provisions of the Scheme and the PPA. Therefore, the delayed decision for the withdrawal would not affect the present proceedings before the State Commission and as such, we have to hold that the said purported withdrawal of approval granted to the recommendation of the Committee is without any authority.

67. The Appellant has contended that the incident in question is not a Force Majeure event on the following grounds ;

- i. failure of slope behind Pothead Yard cannot be termed as force majeure*
- ii. the power house site was shifted to new location other than proposed in the DPR prepared by the Board*
- iii. Improper fore site and planning and design failure*

*iv. Slope protection work undertaken by the Respondent not to be covered under mitigation and restoration of force majeure event*

68. According to the Jai Prakash Power(R1), it had taken all precautionary measures at the time of the construction of the project. During the construction stage, Geo Technical Evaluation was carried out, geological mapping was done and the foliations were found to be dipping upstream. Due to such a favourable dip direction, the chances of rock sliding towards the Pothead Yard area were nil and this aspect was carefully considered by the Committee and gave a finding with reference to that and there was no reason to reject this finding. It is noticed that the Board's first Committee while examining and accepting the cause of slope failure in spite of the adequate protection measures taken by the Jai Prakash Power concluded that the event falls under Force Majeure Event. Article 17.2 of the PPA excluded only two conditions namely (1) delay in delivery of the plant, machinery etc (2) delay in performance by any contractor. The question of Rock fall on account of peculiar and unanticipated geological conditions do not fall within the scope of these two conditions.

69. As a matter of fact, Mr. P M Jalote, Director, Engineering Geology in his comprehensive report to the Board of Geotechnical aspects of the Project in 1987-88 had recommended shifting of the Power House further inside 200

Mts so that the Power House could be located in the same type of rock. Based on the recommendations of Mr. Jalote, the DPR for Power House was prepared with Power House site shifted as recommended by Shri Jalote so as to be located entirely in the granite gneisses. However, this aspect of change of location of power house was not clearly brought out in Jai Prakash Power's DPR submitted to the Board. The DPR submitted by Jai Prakash Power was recommended by the Board to the Central Electricity Authority (CEA). Ultimately, the CEA finally approved the same. This aspect has also been analysed in detail by the Agarwal Committee in its report. The following facts were also relevant on the aspect of change in location of Power House and pothead yard:

- a. *The change is recommended by GSI, a body constituted by the Central Government. Based on the recommendation of GSI, the change was incorporated in the DPR prepared by the Jai Prakash Power (R-1). Then the DPR was submitted to the Electricity Board for further processing and taking the matter with the CEA for grant of TEC.*
- b. *The Board after examining the DPR, forwarded it to CEA recommending the grant of TEC. Accordingly, the TEC was granted by the CEA by the letter dated 29.4.1994. Thus, the revised location of the Power House carried the approval of the CEA as well.*

70. The above facts would reveal that the Appellant Board has agreed for change of location which was finally agreed to by the CEA. Therefore, objection by the consumers' representative

regarding the change of location leading to Rock Fall cannot be considered as relevant in view of the approval of the CEA on the recommendation of the Electricity Board. Only after noticing that the above said facts, the Appellant Board itself has decided to withdraw the said objection before the State Commission with regard to change in location which was the foundation stone for the withdrawal of the earlier recommendation by the Committee in respect of the Force Majeure.

71. According to the Appellant, the first Committee reached erroneous conclusion that the event in question qualified as a Force Majeure event since it did not take in to account the correct data in to consideration and in case the correct data supplied by the Jai Prakash Power was taken into consideration the 1<sup>st</sup> Committee would not have come to this conclusion. This contention is also misconceived. The first Committee constituted by the Board was an internal Committee comprised of only its own four senior level officers. They examined the issue after taking considerable time. The Report of the first committee was scrutinised by the Appellant Board for more than 11 Months taking it to consideration the report along with the data submitted to the Committee. The Appellant Board did not raise the issue of consideration of correct data at that time and on the other hand it accepted the Report and then constituted Assessing Committee in terms of Article 17.7.1 of PPA. Now it is not open

to the Appellant to contest and claim that the report of the first Committee was erroneous as it was based on wrong data.

72. Thus, it is clear that the Electricity Board has hurriedly annulled the decision of the predecessor in respect of the Force Majeure event. Jai Prakash Power (R-1) has pointed out that additional safety measures were taken in the pothead yard installation providing the protection. Those details regarding the arrangements are as follows:

- (i) Construction of concrete cladding wall up to EL.1853m (Pothead Yard at EL. 1813m)*
- (ii) Construction of steel shed supported on above cladding wall.*
- (iii) Diversion of surface flow water at top of hill away from the hill face by constructing open drains;*
  - a. Concrete/masonry fill under overhangs and around large boulders*
  - b. Filling visible surface cracks/crevices with concrete/mortar*
  - c. Providing rock anchors and drainage holes in approachable sloping area*
  - d. Chain link fabric fixed with shotcrete at local places.*

73. The above said additional protection works provided on the rock face of the pothead site had been accepted by the First Committee appointed by the Board. That apart, one of the

terms of the reference to the Aggarwal Committee, the Assessing Committee was “to determine the expenditure of protection works on the basis of essential requirements for protection and safety of equipments in the Power House area”. The said Aggarwal Committee meticulously went into these aspects and recommended the addition of assessed cost of Rs.96.75 Crores to the capital cost of the project towards protection works as a consequent to the Force Majeure event. Therefore, it is wrong on the part of the Appellant to attribute improper far sight, planning and design failure after the occurrence of the Rock fall.

74. In accordance with the various terms and reference made by the First Committee, while adjudicating upon the said reference it had taken full two years to examine various documents submitted by both the parties.
75. After careful consideration, the 1<sup>st</sup> Committee has made the following observations regarding the protection measures which were taken by the Jai Prakash Power (R-1). They are as follows:

***OBSERVATIONS MADE BY THE FIRST COMMITTEE***

*The First Committee duly taking cognizance of geology of the area and geology of the affected hill slope considered the protective measures adopted on the basis of geotechnical evaluation and had opined as under:*

***Geology of the Area:***

*The Project area is located in great Himalayan Range showing a great variations in the height. The area shows young topography with convex hill slopes, escarpments, cliffs and gorges. The rock type in the area comprise of a variety of metamorphic, rocks like gneisses, garnetiferous, mica schist and quartzite.*

*In general, the Kinnaur area is experiencing the high grade of weathering since past times due to natural erosional agencies like wind, heavy precipitation/snow fall etc.*

### **Geology of Affected Hill Slope**

*The rocks exposed in this area are essentially gneisses with minor alternate bands of schist rock and quartzites with hill slope almost vertical. The general trend of rock varies between N 10° E-S 10° W to North-South with dips of 40° to 50° due easterly direction. At places the hill slope is overlain by shallow silty soil overburden where the local vegetation is grown which cannot be disturbed.*

*The rock exposed along the slope is competent enough and hence may not require any special attention. Overall rock conditions are good. Moreover, the rock is dipping towards eastern side (i.e. upstream direction) having a negligible rather no chances of sliding toward the Pothead Yard location. The exploratory data in Power House area was studied which shows no adverse features encountered at this location. No shear zone, fault/thrust like structures have been found on surface along the affected slope which show the good and competent rock conditions.*

*“Keeping in view the rock mass conditions that were observed along the affected hill slope, the protection measures taken by the Project authorities, appear adequate, since it could not be apprehended that such huge block may be dislodged from the parent rock of stable conditions”.*

### **The Cause of Slope Failure**

*The Cause of the slope failure was studied in detail during the site visit and with reference to the documents provided by M/s JPHP Ltd for the protection measures taken pre-rock fall stage.*

*It is inferred that heavy snowfall/precipitation has played a major role in occurrence of the rock fall. It is reported that heavy snowfall (Annex 17) has occurred from 16<sup>th</sup> Jan to 18<sup>th</sup> Jan, 2006 and this rockfall occurred on 19<sup>th</sup> Jan, 2006. Because of heavy snowfall during that period which accumulated at the top of hill, saturated the rock mass which resulted in hydrostatic pressure/shearing along the planes of rocks and this rockfall phenomena occurred.*

*Therefore, it is observed that heavy snowfall enhanced the rockmass saturation and lubrication along planes which played major role in the occurrence of such a huge rock fall.*

*Besides above, other prevailing factors also contributed to some extent i.e. variation in weather conditions from day to day and gradual process of wind erosion, since past.*

*The Committee again met on 21.7.2007 in the office of Chief Engineer (Projects) and concluded the findings as below:*

**Conclusion:**

*After going through above facts and findings, the committee is of the opinion that this rockfall is attributed to the natural/weather conditions that prevailed, due to which the rock conditions deteriorated & ultimately resulted into failure, inspite of protection measures already provided by the Project Authorities, hence falls under Force Majeure Event”.*

76. Similarly, the Agarwal Committee also recognised the additional protection works and accordingly dealt with in its report.

77. One of the terms of reference to the Agarwal Committee set-up by the Board for assessment of the claim of the Force Majeure event was “to determine the expenditure of protection works on the basis of essential requirements for protection and safety of equipments/instruments in the Power House Area”. The Agarwal Committee meticulously went into these aspects and recommended for addition of assets of Rs.96.75 Crores to the Capital Cost towards the protection works. The relevant findings of the Agarwal Committee is as follows:

*“ Regarding adequacy of Protection Works undertaken during construction stage, Committee agrees with the findings of report of Force Majeure Committee comprising three Chief Engineers and a Geologist vide its order dated 22.12.2006 (181-274), which infers that protection measures undertaken during construction stage were adequate to take care of the then prevailing site conditions:*

*(i) Pothead site besides having Pothead Yard, also comprises important/vulnerable installation viz. pump house for fire fighting, 22 KV gantry for external power supply for “start –up” of power plant, station auxiliaries, diesel generating sets for backup to drainage/dewatering system/start up power/auxiliaries, tunnel carrying power and control cables as well as GIB ducts, main access tunnel and also first gantry tower for power evacuation. All these installations are of vital importance for efficient operation of the power plant and require sound protection system to ensure its safety and availability. With this in view, it was considered essential that protection works undertaken by JHPL to safeguard these installations from RD (-) 80 m to RD (+) 110 m are in order.*

*(ii) JHPL has confirmed that the design criteria adopted are adequate and safe during the operation period of the power plant defined in PPA”.*

78. In spite of the meticulous analysis made by two Committees constituted by the Board, the Board of Directors has convened the meeting on 25.8.2010 and hurriedly took ‘U’ turn of its predecessor board merely on the basis of the observations of the Consumer’s Representative alleging the change of location of Power House resulting in the Force Majeure event. As a matter of fact, one of the reasons adduced by the Appellant for annulling the decision about the Force Majeure taken earlier was the change in location of the Power House.
79. In this regard it is to be reiterated that during the course of adjudication before the Commission, the objection with regard to change of location of power house was withdrawn by the Appellant in its written submissions. As a matter of fact, this aspect of change in location in Power House was approved by the Predecessor Board in 1991 to 1994. On the basis of the approval and recommendation of the Board, the TEC was granted by the CEA. Therefore, the Appellant had to withdraw the said written objection. This amply demonstrated that the conduct of the Appellant has been inconsistent and wrong while taking the decision on 25.8.2010 for annulment of the earlier decision. In case the Appellant is allowed to change its decision about the annulment of the decision of Aggarwal

Committee regarding settlement of claim due to Force Majeure event, which was binding on both the parties under Article 17.7.2 of the PPA, no finality could be assumed for the same. In that event, the Appellant may again take a 'U' turn on the same in the same manner as it has acted on the aspect of its approval about the change in the location of the power house.

80. In the light of above findings the 1<sup>st</sup> three questions are answered in favour of Jai Prakash Power(R1).
81. Next question before us for our consideration is this. "Whether the State Commission was justified in allowing the claim of the Respondent for Additional Capitalisation towards the protection works due to Force Majeure event contrary to the provision of the Regulation 13 of the 2007 Regulations?"
82. The Appellant has contended that the earlier decision taken by the Board was contrary to Regulation 13 framed by the State Commission as well as the provisions of the Power Purchase Agreement.
83. This argument made by the Appellant has no basis. The Appellant has failed to produce a single clause of Power Purchase Agreement which was ignored by the State Commission while passing the impugned order.
84. The relationship between the parties is governed by the terms and conditions enshrined in Power Purchase Agreement

executed between the parties on 4.6.1997. The PPA being a concluded contract would govern over the State Commission Regulations which were not in existence at the time of the execution of the PPA. Even the tariff order for the initial past 5 years start from 2003 to 2008 after the commercial operation date of the project was passed by the Commission only on 24.2.2007 on the basis of the PPA. Admittedly, the Regulations to the contrary had come into force only on 10.10.2007. Even the Regulations duly recognised the terms and conditions of the concluded PPA and stipulates those terms and conditions as per the PPA would prevail.

85. As per Regulation 5 it is categorically stipulated that in case of existing generating stations, the terms and conditions of the PPA are applicable for the determination of the tariff. Regulation 5 is reproduced below:

*“Where the Commission has, at any time prior to the notification of these Regulations, approved a power purchase agreement (PPA) or arrangement between a generating Company and a beneficiary, or has adopted the tariff contained therein for supply of electricity from an existing generating station then the tariff for supply of electricity by the generating Company to the distribution licensee shall be in accordance with such PPA or arrangement for such period as may be so approved or adopted by the Commission, to the extent of existing installed capacity as contained in the PPA”.*

86. In view of the above, it has to be held that the Regulation 13 of the State Commission Regulation is not applicable in the case of the project of the Respondent. Therefore, the arguments advanced by the Appellant on these aspects would fail.

87. The Appellant has contended that the impugned order is invalid since it has failed to verify the necessity, quantum and cost of protection works while passing the said order.

88. The language appearing in clause 17.7.4 of the PPA stipulates that the expenditure of more than Rupees 1 Crore to overcome the Force Majeure event as suggested by the Committee shall be added to the capital cost. In those circumstances, the Appellant prepared the terms of reference for the Committee which included the protection of works as well. The said term of reference was framed strictly as per the provisions of the Power Purchase Agreement which provided the expenditure incurred to overcome the Force Majeure event. The said terms of reference framed by the Appellant is as follows:

- (i) To verify the extent to which the additional cost on account of Force Majeure is to be considered for the purpose of computation of O&M charges as per various stipulations PPA, which comprises mainly expenditure on restoration of damages caused due to land slide at the Power House site of Baspa-II and protection works required for the safety of the Project.*
- (ii) To determine the expenditure of protection works on the basis of essential requirement for protection &*

*safety of the equipment/ instruments in the power house area.*

- (iii) To verify the requirements of insurance policies procured by M/s. JHPL and claim of Reimbursements received / to be received by the Company for reinstatement or renewal of such losses or damages with reference to the provisions stipulated under Article 12 of PPA.*
- (iv) To examine the adequacy of the insurance policies procured by the company to meet with the losses of such magnitudes in future with reference to the provisions stipulated under Article 12 of the PPA.*
- (v) To make recommendation to take preventative actions and procure proper insurance cover to avoid occurrence of such events/ losses in future”.*

89. The said terms of reference given to the Committees are strictly as per the Power Purchase Agreement. Admittedly, the Second Committee while adjudicating the said reference have taken full two years and examined various documents submitted by both the parties. The Committee held nine meetings at Shimla and examined various documents filed by both the parties. The said Committee examined the issues relating to the cost of the protection works required for protection of the project. On consideration of all these materials, the Committee has concluded that there is a Force Majeure event and the protection works incurred expenditure of Rs.96.75 crores. Therefore, the contention urged on this point by the Appellant has no basis.

90. The Commission is vested with the powers under section 62 to determine the tariff. That apart, inherent power is also vested with the Commission. The Commission has to determine the tariff in concurrence with the terms and conditions of the concluded Power Purchase Agreement. Section 61 of the 2003 Act mandates the State Commission to frame Tariff Regulations and while doing so, the Commission shall be guided by the following:

- (i) The Principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
- (ii) The generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
- (iii) The factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
- (iv) Safeguarding of consumer's interest and at the same time, recovery of the cost of electricity in a reasonable manner;"*

91. The above guidelines would indicate that the State Commission has to maintain a balance between parties so that the generators also may not suffer unnecessarily. The State Commission has also to take note of the terms and conditions of the approved PPA while determining the tariff. The State Commission has to determine the tariff under the terms and conditions of the concluded Power Purchase Agreement read

with Section 61 and 62 of the Electricity Act and also based upon the reports and recommendations of the Committee constituted by the Appellant.

92. In the present case, as quoted above, there were two Reports of the Expert Committee constituted by the Board and the Commission has to necessarily give due weightage to the said Reports. It is a settled law that they cannot brush aside the said report of the Committees constituted by the Appellant merely because some other opinion has come at the fag end of the proceedings.
93. As a matter of fact, it has been held by the Hon'ble Supreme Court in AIR 2002 SCC 3588 for disregarding the report of the Expert Committee, the Commission has to give reasonings. As per this rulings, if the Commission is satisfied with the report of the Committee it can accept the same or in case of disagreement, the Commission has to give sufficient reasonings to disregard the said report. In the present case, the Commission accepted the report of the Committee and there is no reason for the Commission to disregard the Reports of those Committees which were the well reasoned reports.
94. The Commission could not straightway reject the reports of the Expert Committee constituted by the Appellant in terms of the PPA. As a matter of fact, the said Committee comprised of the Experts of the respective fields. Therefore, those reports

prepared by them were valid and has a binding effect. Considering the correctness of those reports, the Appellant correctly accepted the Report. Now the Appellant is trying to find fault with the Reports on getting some opinion from the Director (Project) without constituting different Committee for a fresh inspection and to give a fresh report.

95. Therefore, it is not correct on the part of the Appellant to contend that the Commission was bound to reject the reports of the Force Majeure Committee and Aggarwal Committee on the reasons that those reports suffer from infirmity.
96. Next question for our consideration is this “Whether the State Commission erred in allowing the Additional Capitalisation of the sum of Rs.95.88 Crores in the capital cost towards the protection works due to Force Majeure event without deducting the full amount of Rs.68.40 crores received by the Respondent Jai Prakash Power towards the insurance proceeds and deducting only a sum of Rs.27.09 crores out of the insurance proceeds in violation of the relevant provisions of the PPA?”
97. The Appellant has contended that without deducting the full amount of Rs.68.40 Crores received by the Jai Prakash Power (R-2) towards the insurance proceeds, the State Commission in violation of Clause 17.7.4 of the PPA has deducted only a sum of Rs.27.09 Crores out of the insurance proceeds. This contention is also untenable. The claim of Rs.68.40 Crores is

toward the insurance of the loss of profit due to business interruption and not towards the Protection Work. The said claim included an amount of Rs.27.09 Crores towards the capacity charges. This amount was earlier re-imbursed to the Respondent Jai Prakash Power by the Appellant as part of the tariff in terms of the provision of the PPA and was surrendered back to the Appellant Board, settlement of the claim for loss of profit due to business interruption. The amount received by the Jai Prakash Power from the insurance Company towards the loss to pothead yard amounting to Rs.15.83 Crores was duly accounted for and balance amount only in respect of the damaged project was claimed by the Respondent Jai Prakash Power in terms of Clause 17.7.4 of the PPA.

98. We have quoted the various judgments cited by the Appellant. The principles enshrined in the judgements referred to by the Appellant are not disputed but one thing is to be pointed out that the decisions cited by the Appellant would not be of any help to the Appellant as those decisions would not apply to the present fact of the case. The Learned Counsel for the Appellant has cited the judgement held in 1996 (4) SCC 104 in the case of Election Commission of India & Anr Vs. Dr. Subramaniam Swamy. The said judgement is not applicable since this Tribunal has decided to adjudicate upon the issues

by itself considering the fact that the present Chairman of the State Commission of the HPERC is the same person who was the Managing Director of the Appellant Board during the relevant period.

99. The Learned Counsel for the Appellanthas cited another authority in 2006 (1) SCC 46 in the case of Shaikh Salim Haji Abdul Khayumsab Vs Kumar and Others. The said judgement was relied upon by the Appellant to show that the rules of procedure are only hand maid and not the mistress of justice. The said judgement therefore, goes against the Appellant who are not following the rules of procedure and are trying to create a new procedure. No benefit to Appellant as amount in dispute is pass through.
100. The Learned Counsel for the Appellant has also cited two other judgement in the case of Jai Mangal Oran & Sheshambal in (2000) 5 SCC 141 and (2010) 3 SCC 470 to plead that the subsequent developments required to be taken note of, even at the stage of appeal. The Appellant would not get any help from these judgements since the Regulatory Commission has to act in terms of the Power Purchase Agreement, read with provisions of the Electricity Act, 2003. The entire act and conduct of the Appellant in withdrawing and annulling the

decision were outside the scope of the PPA and therefore, they were rightly ignored by the Commission.

101. **Summary of Our Findings**

- a. **The reading of the impugned order in entirety makes it evident that the State Commission considered the issue of annulment of its earlier decision by the Board and correctly concluded that in view of the acceptance of the Force Majeure Event by the predecessor Board and there being no specific issues were raised within the parameters of the Power Purchase Agreement, the issue relating to the competency of the Board to annul the earlier decision that too during the pendency of proceedings before the Commission has become irrelevant in terms of various Clauses of the PPA and as such the competency of the Electricity Board to annul and withdraw the decision of the Board need not be gone into at this stage since it became insignificant.**
  
- b. **The procedure laid down in Article 17 of the PPA would reveal that the Force Majeure event can be disputed by the party immediately after receipt of the notice of Force Majeure event. Without raising such a dispute, if the party constitutes Committee to decide about the event and the claim and when the said Committee decides that it was a Force Majeure Event and claim is**

**legal, the said decision shall be final and binding on both the parties. In other words, on the plain reading of the above said clauses of the PPA, it is crystal clear that once the notice of Force Majeure is issued and received by the Board, it should have raised the dispute immediately and referred the dispute to the Arbitration as per the provisions of the Article 18 of the PPA. On the other hand, if the Board decided to accept the event as a Force Majeure and did not dispute the same in terms of the Article 17.3 (b) of the PPA, the Board shall appoint a Committee whose report under Article 17.7.2 of the PPA becomes final and the same is binding on both the parties. Thereafter, the dispute with regard to event cannot be raised as the stage for raising the said dispute has already been crossed.**

- c. As correctly pointed out by the State Commission, the competency of the Electricity Board to withdraw the decision of the Transferor Board became insignificant. The State Commission has rightly held that the State Commission would have to decide the issue only on the basis of the relevant clauses of the PPA. As per the PPA, the parties are bound by the terms and conditions of the PPA. Any dispute or disagreement should also be as per the terms and conditions of the said PPA. When this belated disagreement or dispute is not as**

**per the agreed terms of the PPA, the same has to be necessarily ignored.**

- d. Regulation 5 of State Commission's 2007 Regulations categorically stipulates that in case of existing generating stations, the terms and conditions of the PPA are applicable for the determination of the tariff. In view of the Regulation 5, it has to be held that the Regulation 13 of the State Commission Regulations which permits Additional Capitalisation only under certain circumstances is not applicable in the present case.**
- e. The Appellant has contended that without deducting the full amount of Rs.68.40 Crores received by the Jai Prakash Power (R-2) towards the insurance proceeds, the State Commission in violation of Clause 17.7.4 of the PPA has deducted only a sum of Rs.27.09 Crores out of the insurance proceeds. This contention is also misconceived. The claim of Rs.68.40 Crores is toward the insurance of the loss of profit due to business interruption and not towards the Protection Work.**

102. In view of the above findings, there is no merit in the Appeal. Consequently, the Appeal is liable to be dismissed being devoid of merits.

103. The stay order passed by this Tribunal on 29<sup>th</sup> March 2011 stands vacated and the Appellant is directed to make balance payment to the Jai Prakash Power (R-1) by 31<sup>st</sup> March 2012.
104. With these observations, the Appeal is dismissed. However, there is no order as to costs.

**(V J Talwar )  
Technical Member**

**(Justice M. Karpaga Vinayagam)  
Chairperson**

Dated: 6<sup>th</sup> February, 2012

✓REPORTABLE/NOT REPORTABLE