(2011) 09 SHI CK 0194

In the High Court Of Himachal Pradesh

Case No : CWP No. 6880 of 2010

Aleo Manali Hydro Power Pvt. Ltd. APPELLANT

Vs

State of H.P. and Others RESPONDENT

Date of Decision : 13-09-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 162, 166, 166(1), 299
General Clauses Act, 1897 — Section 23, 23(1), 23(5)
Himachal Pradesh General Clauses Act, 1968 — Section 22

Citation : (2011) 09 SHI CK 0194

Hon'ble Judges : Kuldip Singh, J

Bench : Single Bench

Judgement

Kuldip Singh, J.—This judgment shall dispose of CWP No. 6880 of 2010, CWP No. 6537 of 2010 and CWP No. 7361 of 2010.

2. The Petitioner in CWP No. 6880 of 2010 has prayed for quashing of guidelines contained in letter dated 10.2.2009 Annexure PR, amended guidelines Annexure PT dated 10.11.2010 being inoperative against Petitioner for allotment of Jobrie Hydro Electric Project. The prayer has also been made for quashing notice inviting proposals dated 5.8.2010 Annexure PS. The direction has also been sought against Respondents No. 1 and 2 to allot the Jobrie Hydro Electric Project in favour of the Petitioner, execute Memorandum of Understanding as well as pre implementation agreement in terms of the original Hydro Power Policy, 2006. In alternative, prayer has been made to permit the Petitioner to participate in the bidding process, in case the Petitioner is not declared the highest bidder then the Petitioner be reserved the right of first refusal, in case it decides not to match the bid of the highest bidder.

3. The Petitioner in CWP No. 6537 of 2010 has prayed for quashing of NIT Annexure P-15 in so far as it includes Nesang 10 MW Hydro Power Project in District Kinnaur with direction to the Respondents to allot the said project to Petitioner in terms of 2006 Hydro Power Policy and in accordance with the terms

and conditions in advertisement dated 7.1.2006.

4. The Petitioner in CWP No. 7361 of 2010 has prayed for quashing of communication Annexure P-10 dated 21.7.2010 and Annexure P-15 with respect to 12 MW Ropa Small Hydro Electric Power Project in District Kinnaur with further direction to Respondent to allot the said project to the Petitioner in terms of 2006 Hydro Power Policy and in terms of advertisement dated 7.1.2006.

CWP No. 6880 of 2010:

5. The case of the Petitioner is that as per Hydro Power Policy, 2006 (for short 2006 Policy) of Respondent No. 1, Power Projects above 5 MW capacity were categorized as follows:

CATEGORY-I: Projects above 5MW-100 MW installed capacity Projects to be allotted through MoU route.

CATEGORY-II: Projects above 100 MW installed capacity Projects to be allotted through ICB route

The Respondent No. 1 as per 2006 Policy issued a Global Notice Inviting Proposals (NIPs) for 28 projects and self Identified projects on 7.1.2006 and on 19.4.2006. The last date for submission of bids with respect to self identified project was 30.6.2006. In NIP, the projects were categorized into three parts. Part-III is of self identified projects (above 5MW). The Jobrie Hydro Electric Project which Petitioner intended to execute and commission falls in Category-I of Part-III of NIP. The Petitioner self identified Jobrie project in the year 2004-05 with tentative installed capacity of 5.5. MW. The tentative installed capacity was subject to the Techno Economic Clearance (TEC) to be accorded by the competent authority after carrying out the inspection.

6. The Petitioner in April, 2006 approached a Technical Consultant i.e. Small Hydro Engineers Consultants Private Ltd. and entrusted to it the work of investigations of proposed Jobrie Hydro Electric Project, Manali. The Consultant was called upon to prepare the Pre Feasibility Report (PFR)/Detailed Project Report (DPR) and other necessary reports and documents connected with the Jobrie Project. The Petitioner submitted tender with respect to Jobrie Project on 29.6.2006. The Petitioner spent considerable amount on preliminary investigation in order to become eligible for staking claim for the allotment of Jobrie Hydro Electric Project as a self identified project. Thus, definite identifiable positive Intellectual Property Rights (IPR) accrued in favour of the Petitioner in Jobrie Hydro Electric Project.

7. On the basis of investigations carried out by the technical consultants of the Petitioner, a brief project proposal was prepared. The Petitioner applied to Respondent No. 3 on 19.6.2006 requesting for the issuance of bid document. The Petitioner in terms of NIP submitted its bid on 29.6.2006 for self identified Jobrie Hydro Electric Project having 5.5. MW as per preliminary estimates. The Petitioner deposited requisite fees in the sum of Rs. 2,00,000/- for tender

purchase and Rs. 5,50,000 (Rs. 1,00,000/- per MW) as security as per NIP towards non-refundable process fee.

8. The Petitioner on 22.5.2007, 16.6.2007 and 9.7.2007 gave some clarifications to Respondents, they were called upon to allot the project to the Petitioner and to sign the Memorandum of Understanding (MoU) as per 2006 Policy. Some correspondence was exchanged in between Petitioner and Respondents No. 1 to 4 for joint inspection of the site. The Petitioner legitimately expected that in terms of 2006 Policy, they would be allotted the project as the Petitioner had spent huge amount, time, efforts and completely displaced itself on account of 2006 Policy. A legitimate expectation had lawfully arisen in favour of the Petitioner that Jobrie self identified project would be allotted to the Petitioner as the Petitioner had identified IPR in the project.

9. In the meantime, the joint inspection of the site was carried out. The technical team of Respondents No. 2 and 3 cleared the site and approved the project proposal. The Petitioner believed that technical team of Respondents No. 2 and 3 submitted positive report to the Respondents. However, the Petitioner was not invited to sign the MoU nor Jobrie project was allotted to the Petitioner, although, the Petitioner satisfied all requisite parameters.

10. In the meantime the Petitioner came to know that Respondent No. 1 was contemplating to allot power project of capacity of more than 5 MW, through the competitive bid route. The Petitioner immediately addressed letter dated 15.12.2009 to the Chief Minister and requested for allotment of Jobrie project to Petitioner. This request was repeated on 14.3.2010.

11. The Petitioner some time in August, 2010 learnt that Respondent No. 1 through Principal Secretary (MPP & Power) had issued communication dated 10.2.2009. The Petitioner was also shocked to read NIP which had been got published by Respondent No. 1 in several newspapers on 5.8.2010. The guidelines dated 10.2.2009 were stated to have been communicated by Respondent No. 1 to Respondents No. 2 and 4 in respect of the allotment of self identified category above 5 MW projects. The guidelines dated 10.2.2009 are not applicable to Petitioner for allotment of self identified Jobrie power project to Petitioner. The Respondents are under obligation to execute MoU and other connected documents in favour of the Petitioner regarding Jobrie project.

12. The guidelines dated 10.2.2009 are arbitrary, discriminatory and same cannot be permitted to take away the Intellectual Property Rights of the Petitioner in the Jobrie power project. The Respondents are estopped by their acts, deeds and acquiescence from denying the allotment of the Jobrie project to the Petitioner. The Respondent No. 1 has discriminated the Petitioner by adopting a discriminatory and arbitrary policy of pick and choose as the project of the Petitioner is one of the only three projects out of a minimum of 16 to 20 self identified projects which were advertised and qua which open bids were invited by the State Government for allotment through bidding.

13. The guidelines dated 10.2.2009 have drastically changed 2006 policy regarding self identified projects above 5 MW. As per guidelines dated 10.2.2009 self identified projects such as Jobrie project are also now to be allotted through bidding as opposed to the earlier notified policy guidelines where the process of bidding was neither declared or specified or required to be followed for self identified projects.

14. The acquired IPR of Petitioner in Jobrie project cannot be permitted to be taken away by the guidelines dated 10.2.2009. The Respondents have no right to advertise the Jobrie power project of Petitioner and to notify the bids qua the same and allot the same in favour of any person other than the Petitioner through bid process.

15. The guidelines dated 10.2.2009 have not been notified nor advertised or posted on the relevant websites of the Respondents. According to the guidelines dated 10.2.2009 the Petitioner will be only given a 30% leverage in matching the free power to be given to the Government from the project. The guidelines are vague, ambiguous and arbitrary. The Respondent No. 1 has put the Petitioner in an absolute no win situation. It shall now be possible for any other Independent Power Producer (IPP) to outbid the Petitioner-company who has invested amount, time, energy and effort on the project in identifying the Jobrie project.

16. The Respondent No. 1 has amended guidelines dated 10.2.2009 by further guidelines dated 10.11.2010. The guidelines dated 10.11.2010 for the same reasons are highly discriminatory, arbitrary, ambiguous and not operative against the Petitioner and its vested interest in the matter of allotment of Jobrie Hydro Electric Power Project to Petitioner under 2006 Policy. The Petitioner is entitled to allotment of Jobrie project under 2006 policy without its right being affected in any manner by further guidelines dated 10.2.2009 and 10.11.2010.

17. In alternative, the Petitioner has submitted that Petitioner be afforded the first right of refusal and it should be allowed to match the highest bid. Only in case the Petitioner does not match the highest bid then alone the Jobrie project should be permitted to be allotted to other higher bidder. It has also been submitted that in case the higher bidder surrenders its rights in the Jobrie power project at any later stage, then the Petitioner should again be afforded the first right of refusal qua the Jobrie power project. The Respondent No. 1 cannot be allowed to gift away the project by giving an elusive non-existent alleged 30% incentive so as to allegedly match the highest bidder. Jobrie power project being self identified project should be allotted to the Petitioner in terms of 2006 Policy and original advertisement.

18. The Respondent No. 1 in the reply by way of preliminary submissions has stated that the Government has formulated 2006 Policy and allotment of the Hydro projects in the State is done in consonance with the State Hydro Policy and also keeps in view National Hydro Policy, 2008. The Government took policy decision to allot the Hydro Projects in Himachal Pradesh through International

Competitive Bidding Route (ICB) keeping in view the financial future of the State which is dependent on revenue to larger extent from harnessing of its power resources. The power policy is in public interest and is binding on the Petitioner. It is not open for the Petitioner to challenge the same. The policy cannot be termed as final at any time in view of frequent changes in the economic, social and technical area which changes the policy parameters to the best benefit of the State. The Petitioner''s right in the allotment of the project is subject to specified conditions. The State Government has given preferential rights to self identified project developers in which they will be given right of refusal as specified in the policy. The petition is not maintainable in larger public interest.

19. On merits, it has been stated that policy stipulates that projects will be allotted on the basis of tentative installed capacity as mentioned in NIP. However, in case the capacity of the projects increases/decreases upon firming up of the potential as per TEC accorded by the competent authority, the Company shall be required to sign the fresh/revised MoU/IA with the Government as the case may be. In all such cases, the royalty, upfront premium and other charges shall be levied according to the approved norms of the Government for the revised capacity.

20. No allotment has been made by the Government in respect of any proposal received from the interested parties for the sites initially identified/cleared by the erstwhile HPSEB, who was a nodal agency of the State Government for the allotment of projects. In fact, 22 proposals were received in response to NIP for self identified and 28 identified projects. The proposals were examined by Respondent No. 3, conducted site visits to all the above sites out of which Respondent No. 3 has initially cleared only three projects for allotment through Competitive Bidding Process in line with the policy issued on 10.2.2009. Accordingly, the Government on 5.8.2010 invited Global Bids for three projects namely Nesang, Jobrie and Malana-III. The current policy decision of the government is not in conflict with any law nor it is malafide.

21. The policy guidelines regarding processing and self identified projects were issued by the government in larger public interest. The interest of the State is supreme. The policy decision of the Government is not illegal or arbitrary. It has been denied that Petitioner has acquired any IPR in the project. The State is within its jurisdiction to frame policy in the larger public interest. The Petitioner has no locus standi to challenge the current policy decision/guidelines to regulate the allotment of the project. The right of the Petitioner has not been infringed by issuing policy guidelines by the State Government.

22. The evaluation of the offer shall be done as per the evaluation criteria set up by the Government and being applied by the HPSEB for allotment of the project under ICB. The identifier will be allowed to participate in the bidding and no processing fee shall be charged from him for the self identified project. The bid document shall be issued free of cost against the cost of bid document/ processing fees deposited by the bidder. In case the identifier is not able to quote

the highest bid in its offer applied under ICB, he will be offered the project at the highest bid received if his offer is short of the highest bid by 30% of the highest bid. In case it is short by more than 30%, his right on the project shall be forfeited and the project shall go to the highest bidder. The amount to be reimbursed for PFR/DPR can be decided on project to project basis, based on the details of such expenditure to be submitted by the self identifier. However, it shall be restricted to the maximum limit of Rs. 25,00,000/-. Before the self identified projects are offered for allotment on ICB, the potential proposed by the Companies shall be re-assessed by the HPSEB/HPPCL, so the optimal value of potential is put to bidding and claims for different potential are avoided. The project shall be offered for bidding on the amended potential. Upfront premium at the rate of Rs. 20,00,000/- per MW shall be charged from all the self identified projects above 5 MW as per prevailing policy provisions for allotment of projects on ICB basis. It has been reiterated that policy provisions have been issued in larger public interest.

23. The Respondent No. 2 has adopted the reply of Respondent No. 1. The Respondent No. 4 in the reply has stated that the petition relates to the project above 5 MW which is not in the purview of Respondent No. 4. The Respondent No. 5 in the reply has submitted that government of H.P. has notified proposals from eligible bidders vide NIP dated 5.8.2010 for 5 MW Jobrie project etc. Jobrie project is to be governed as per the policy guidelines dated 10.2.2009 for allotment of self identified project. The Respondent No. 5 has submitted its bid on 21.1.2011. The technical/financial bid were opened on the same day. The Petitioner in fact also participated in the bid. After the completion of scrutiny, the date for opening of price bid was kept on 16.3.2011. The price bids were made by all the three bidders including the Petitioner and Respondent No. 5 for Jobrie 12 MW Hydro Electric Project. The Respondent No. 5 was declared highest bidder. The bid process makes the allotment process transparent and the same offers maximum advantage to the State Government. 2006 Policy nowhere contemplated that a project of installed capacity of above 5 MW will be allotted to IPP which identifies the same on first come first serve basis. 2006 Policy provides that all potential projects/sites shall be advertised through NIP in various newspapers for global invitation of bids. The NIP dated 7.1.2006 is not in consonance with 2006 Policy which came into force on 11.12.2006.

24. It has been denied that Petitioner has incurred any expenditure on the project. The project was never allotted to the Petitioner. The act of the Respondent No. 1 is in accordance with law as State largesse''s cannot be distributed arbitrary. The policy decision of the State is in accordance with law. The Petitioner has filed rejoinder to the reply of Respondent No. 1 and has reiterated the stand of legitimate expectation, promissory estoppel etc.

CWP No. 6537 of 2010

25. The Petitioner has stated that Respondent No. 1 in order to explore and utilize its vast hydro power potential, framed 2006 Policy which was notified on

11.12.2006. 2006 Policy provided two ways of participation for private sector in small hydro development programme (i) Projects identified by the IPPs as self identified (ii) Projects identified by HIMURJA. The applications for new projects were to be received after every six months on the basis of the advertisements which will also be for self identified projects. In terms of Chapter IV of 2006 Policy, the IPPs under self identified scheme were required to complete a lot of formalities before allotment of projects such as clearances from different departments, securities, fees and most important of all PFR of the proposed project. After the allotment of the project, the IPP was required to deposit by way of security, an amount of Rs. 1,00,000/- per MW of installed capacity subject to a maximum of Rs. .50,00,000/-.

26. The Respondent No. 1 on 7.1.2006 and 19.4.2006 got published advertisements globally inviting bids for setting up of Hydro Power Projects for some already identified and rest for IPPs to identify. It was also notified that on ''first come first serve'' basis, the projects would be allotted provided the new projects would not overlap with the already identified projects and are not in wild life sanctuary, reserved area. The bids were to be opened on 30.6.2006.

27. The Petitioner after lot of exercise identified Nesang project in District Kinnaur. A preliminary study was initially done by the Petitioner with its technical team, which gave the clearance for the possibility for setting up of the project. The Petitioner appointed technical expert for preparing PFR. The study was positive which confirmed generation of about 10 MW power from Nesang (Tagla) Khad Hydro Electric Project, which is a tributary of Satluj River in District Kinnaur. It was also verified that the project would be viable.

28. The Petitioner after paying Rs. 2,00,000/- purchased tender documents on 1.6.2006; the Petitioner submitted its bid on 21.6.2006 along with requisite documents including PFR. The process fee of Rs. 10,00,000/- was also deposited along with the bid. The bid was opened on 30.6.2006. The Petitioner was only bidder for the site identified by it.

29. The site was inspected by HPSEB (Board) on 4.10.2007 and gave a go ahead for the project as identified by the Petitioner. The Petitioner in turn informed the clearance so granted by the Board to Respondent No. 1 vide letter dated 15.1.2008. The Petitioner had been waiting for the report to be submitted by the Board. The petitioner visited the concerned office of Respondent No. 1 for moving the case of the Petitioner and even made a representation on 29.12.2009.

30. In July 2010, the Petitioner came to know through newspaper report that Nesang 10 MW project identified by the Petitioner has been advertised afresh by Respondent No. 1 under new terms and conditions. The Petitioner represented against the decision of the re-advertisement to Respondent No. 1 on 20.7.2010 but without any response. The new advertisement imposed fresh terms and conditions for Nesang 10 MW project which has been challenged in the writ petition.

31. It has been stated that the Petitioner has spent huge time, money and identified and applied for Nesang Power Project as per the advertisement dated 7.1.2006. The Petitioner was the only bidder for the project and the bid was opened on 30.6.2006. The formalities were being completed by the Respondents for implementation of the project with the Petitioner. There was no delay on the part of the Petitioner for allotment of the project in its favour. Therefore, the project identified by the Petitioner cannot be put up for inviting fresh bids. The action of the Respondents is highly arbitrary and capricious.

32. The Respondent No. 1 is bound to allot the project to the Petitioner in accordance with the terms and conditions which were applicable as on the date of advertisement dated 7.1.2006 under which the project was advertised. No new policy guidelines, terms and conditions can be imposed upon the Petitioner for the project in question. The acceptance of process fee in terms of policy under which Nesang project was advertised on 7.1.2006 was sine qua non for allotment of project. The Respondents have accepted process fee amounting to `10,00,000/- from Petitioner for the project. In these circumstances, the Respondents have erred in re-advertising Nesang project. The new terms and conditions cannot be imposed upon the Petitioner. It has been stated that in terms of the new terms and conditions, a fixed upfront charge of `.20,00,000/- per MW capacity of the project has been imposed. This condition was not there in 2006 Policy when fixed premium of `1,00,000/- per MW was paid. There are other drastic changes in the new terms and conditions which will adversely affect the Petitioner. The Respondents are bound to allot the project to Petitioner in terms of notification dated 7.1.2006 under which Nesang project was advertised.

33. The Respondent No. 1 as a welfare State can change its policies but cannot apply the same arbitrarily as has been done in the present case. The project was advertised in terms of the earlier existing policy, the Petitioner participated in accordance with the terms and conditions as laid down in the advertisement and in the policy. In terms of the provisions of the policy, the project stood allotted to the Petitioner. It cannot be included in the list of fresh projects and put up for inviting fresh bids. The Respondent No. 1 in an attempt to get revenue cannot defeat the vested rights of the Petitioner and cannot act illegally. The entire action of the Respondent No. 1 is unconstitutional.

34. The Respondents No. 1 and 2 filed reply and in preliminary submissions have stated that the Government has formulated 2006 Policy as amended from time to time. The allotment of Hydro Projects in Himachal Pradesh is done in consonance with the State Hydro Policy and also keeps in view the National Hydro Policy, 2008. The current policy governing the allotment in question has been framed keeping in view the interest of the State.

35. The State Government has taken a policy decision to allot the Hydro Projects in Himachal Pradesh through ICB for not only generating more revenue to the State, but to give enough healthy competition. The financial future of the State is dependent on the revenue to a larger extent from exploitation of its power

resources. The policy decision is well informed and guided by the public interest. The policy decision of the Government is not in conflict with any law nor it is malafide. The petition is not maintainable.

36. The proposals received under self identified category above 5 MW by the Government will be offered for allotment to IPPs on ICB basis as per the prevailing policy with additional conditions in supersession to all the policy decisions taken in this regard earlier. Now for above 5 MW projects, the evaluation of the offer shall be done as per the evaluation criteria set up by the State Government and being applied by the Board for allotment of project under ICB. The identifier will be allowed to participate in the bidding and no process fee shall be charged from him for the self identified project. The bid document shall be issued free of cost against the cost of bid document, processing fee deposited by the bidder. In case the identifier is not able to quote the highest bid in its offer under ICB, he will be offered the project at the highest bid if his offer is short of the highest bid by 30% of the highest bid. In case it is short by more than 30%, his right on the project shall be forfeited and the project shall go to the highest bidder.

37. The additional condition was also that the amount to be reimbursed for PFR/ DPR can be decided on project to project basis, based on the details of such expenditure to be submitted by the self identifier. However, it shall be restricted to the maximum limit of Rs. .25,00,000/-. Before the self identified projects are offered for allotment on ICB, the potential proposed by the companies shall be re-assessed by the Board/HPPCL, so that the optimal value of potential is put to bidding and claims for different potential are avoided. The project shall be offered for bidding on the amended potential. The assessing agency shall be given at least two months time to complete this exercise and shall also provide a certificate regarding the accuracy of the potential of the project finally assessed by the agency. The upfront premium at the rate of Rs. .20,00,000/- per MW shall be charged from all the self identified projects above 5 MW as per the prevailing policy provisions for allotment of projects on ICB basis.

38. The State Government has advertised the projects to be allotted on ICB basis keeping in view of the current policy of the State Government. The Petitioner can participate in the same and would be given right of refusal as specified in the policy. The self identified proposals for allotment were invited by erstwhile Board which was nodal agency of the State Government for allotment of the project. However, no allotments were made. Thereafter, the State Government after the current policy came in existence, had advertised various self identified schemes along with the other projects as referred in the NIT and the process for allotment of the said projects will be done strictly as per the prevailing policy. The decision of the Government to advertise the project in question is in the public interest and is not in any way jeopardized the interest of the Petitioner.

39. The Respondents in response to advertisements dated 7.1.2006 and 19.4.2006 had not taken any action after the joint inspection conducted by the

Board. No letter of approval/letter of intent was issued. In the meantime, 2006 policy underwent a change keeping in view the interests of various stake holders, State and public at large. The new policy guidelines were issued on 10.2.2009 regarding processing and allotment of self identified Hydro Electric Projects and 2006 Policy to that extent was amended.

40. The change in the policy was necessitated in view of the lack of complete transparency in the bidding process under 2006 Policy. The projects categorized under self identified projects under 2006 Policy were to be allotted on ''first come first serve'' basis. This process was less transparent and was an impediment to competitive bidding and, therefore, prejudicial to the interests of the State. The process was such that it would lead to a situation where a bidder would fail only on account of the fact that he did not move first. The 2006 Policy was limited in favour of private participants as against the State. In order to generate more revenue amendments were made in 2006 Policy on 10.2.2009. The Respondent No. 3 in the reply highlighted the changes in favour of the State in view of the amendments carried out on 10.2.2009 in 2006 Policy. At the same time the identifier who first identified the self identified project has been given concessions while amending 2006 policy on 10.2.2009. The amendment was gazetted on 10.2.2009.

CWP No. 7361 of 2010:

41. This petition has been filed with respect to Ropa Small Hydro Electric Project 12MW on Ropa Khad, a tributary of Satluj River in District Kinnaur. In substance, more or less the same grounds have been taken in this petition as in CWP No. 6537 of 2010. Therefore, it is not necessary to repeat all those grounds. It has been stated that around 16.11.2010 the Petitioner became aware of the minutes of the meeting held by the Respondent wherein a decision was taken to invite global bids for self identified Ropa 12 MW project on the ground that Ropa 12 MW project cannot be considered as self identified project and was ordered to be put up for global bidding as self identified project.

42. The Respondents No. 1 and 2 have filed the reply by taking more or less the same defence as taken by them in CWP No. 6537 of 2010. It has been stated that 22 proposals were received in response to NIP for self identified and 28 identified projects. The proposals were examined by the Board and conducted site visit to all the above sites, out of which the Board has initially cleared only three projects for allotment through competitive bidding process in line with the policy issued on 10.2.2009. Accordingly, the H.P. Government vide NIP dated 5.8.2010 invited global bid for three projects namely Nesang, Jobrie and Malana. The decision regarding the allotment of the project in question is yet to be taken by the government and, therefore, the petition is pre-mature.

43. The Clause IX of Chapter-IV of 2006 Policy authorizes the H.P. Government to reject any or all offers without assigning any reason. The clause XXVII of Chapter IV of 2006 Policy provides that the incentives/concessions offered by the

Non-Conventional Engineer System (MNES) /Himachal Pradesh Government would be applicable for all small hydel projects upto 5 MW. The final decision of the actual capacity of the project shall rest with the H.P. Government. No projects under Part-III of 2006 Policy under self identified project above 5 MW described in NIP dated 7.1.2006 was allotted.

44. I have heard the learned Counsel for the parties. In CWP No. 6880 of 2010, it has been contended that 2006 Policy provides that project from 5MW to 100 MW are to be allotted through MoU route. The projects above 100 MW are to be allotted only through ICB route. The State cannot adopt ICB route for the allotment of Jobrie project which is above 5MW but below 100 MW. The Petitioner has spent Rs. .78,60,523/- for preparation of PFR for discharge, measurements and consultancy. The Petitioner displaced itself to its disadvantage at the instance of State, therefore, principles of promissory estoppel, legitimate expectation have come into play in favour of the Petitioner. The NIPs 7.1.2006, 19.4.2006 and 2006 Policy compliment each other and are applicable to the case of the Petitioner.

45. The 2006 Policy was notified by the Governor on 11.12.2006. The source of power is traceable to Article 162 of the Constitution. 2006 Policy is applicable prospectively to the future power producers and retrospectively to the present power producers. The NIP clearly draws a distinction between Hydro Projects which have already been identified and those which are yet to be identified.

46. The guidelines dated 10.2.2009 are contrary to 2006 Policy and NIPs under which the Petitioner applied for allotment. These guidelines were neither issued nor published in terms of Section 23 of the General Clauses Act. They are not notified nor they have been issued in the name of Governor of the State. It is nowhere mentioned in the guidelines dated 10.2.2009 that they have been issued in public interest. The projects below 100 MW can only be allotted through MoU route and not through ICB route.

47. The guidelines dated 10.2.2009 have been deleted, replaced and superseded by decision/policy dated 10.11.2010, which has not been published in accordance with Section 23 of the General Clauses Act nor issued in terms of Article 162 of the Constitution of India. The Petitioner has acquired Intellectual Property Rights in the project. The alleged benefits given to the Petitioner for considering its case under ICB route are illusory. The Petitioners in CWP No. 6537 and 7361 of 2010 also made submissions on the similar lines as by the Petitioner in CWP No. 6880 of 2010.

48. On behalf of the State, it has been contended that the allotment of the projects prior to December, 2006 above 5 MW were to be governed by the terms and conditions of the NIPs and bid document. As per 2006 Policy, projects above 5 MW and upto 100 MW were to be allotted through MoU route and projects above 100 MW were to be allotted through ICB route. The NIP dated 5.8.2010 is based on policy guidelines dated 10.2.2009. After the amendment of the policy,

MoU route stands abolished for projects above 5 MW, now projects above 5 MW are to be allotted through ICB route. The condition No. 3 Chapter-2 of bid document dated 7.1.2006 authorises the Government to amend/modify the document or impose additional conditionality at any stage. The projects above 5 MW if allotted through MoU route would cause heavy revenue loss in crores to the Government.

49. The Respondent No. 5 in CWP No. 6880 of 2010 has submitted that the projects above 5 MW are governed by 10.2.2009 policy guidelines which are more transparent and have been issued in larger public interest and for the benefit of the State. It has been submitted that Respondent No. 5 is the highest bidder for Jobrie project on the basis of the advertisement dated 5.8.2010. The Petitioner was given opportunity to bid for NIP dated 5.8.2010.

50. The NIPs for the projects in question were issued on 7.1.2006 and 19.4.2006. The last date for submission of bid document was 30.6.2006. The Petitioners in accordance with the NIPs submitted bid document before 30.6.2006 for their respective projects. In all the three petitions, the projects are above 5 MW but below 100 MW. The projects are covered in Category-I Part-III of bid document, which provides that letter of allotment shall be issued to successful/selected bidders asking them to execute MoU with the Government of Himachal Pradesh. As per the terms and conditions of the MoU, the developer shall be required to achieve various mile stones. The developer shall submit DPR within a period of 24 months in projects upto 50 MW from the date of signing of the MoU to the Government of H.P. for appraisal by the State Government/ Central Electricity Authority. The developer shall execute the implementation agreement (IA) with the Government within a period of 42 months from the date of signing of the MoU. The successful bidders shall be required to deposit upfront premium for projects above 5 MW to 50 MW at the rate of `1,00,000/- per MW. The security deposited at the time of signing of MoU shall be refunded. The condition No. 3 of Chapter-2 of bid document provides that the Government reserves the right to amend/modify the bid document or impose additional conditionality as it may deem fit at any stage. The Government also reserves the right to reject any/ all bids or terminating the bidding process at any stage without assigning any reason. The Chapter-3 specifies 30.9.2006 tentative date for issue of letter of award of project.

51. It is common case of the parties that the sites were inspected but the projects were not allotted to the Petitioners. The 2006 Policy was notified on 11.12.2006 and made applicable with immediate effect to the prospective power producers and retrospectively to the present power producers. The 2006 Policy also provides that all provisions, notifications/addendum and amendments made in this regard have been superseded. The 2006 Policy was amended on 10.2.2009. The Respondent No. 1 issued fresh NIP on 5.8.2010 stating therein that the projects of the Petitioners would be governed by the policy guidelines issued on 10.2.2009 for allotment of self identified projects. In brief, the three

projects involved in the petitions would be allotted through ICB route instead of MoU route.

52. It is admitted fact that 2006 Policy has been notified in the name of the Governor, H.P. on 11.12.2006. The Article 162 of the Constitution of India provides that the executive power of the State shall extend to the matters with respect to which the legislature of the State has power to make laws. The Article 166 of the Constitution of India provides that all executive actions of the Government of a State shall be expressed to be taken in the name of the Governor. The policy guidelines dated 10.2.2009 were addressed from the Principal Secretary (MPP& Power) to the Govt. of H.P. to the Principal Secretary (NES) to the Govt. of H.P. It is not the case of the Petitioners that the Principal Secretary (MPP&Power) to the Govt. of H.P. is not competent, authorized to act on behalf of the Governor under the rules of business.

53. The Article 166(1) of the Constitution of India is directory and not mandatory. It has been held by the Constitution Bench in P. Joseph John Vs. The State of Travancore-Cochin, that Clauses (1) and (2) of Article 166 are directory only and non-compliance with them does not result in the order being invalid and in order to determine whether there is compliance with these provisions all that is necessary to be seen is whether there has been substantial compliance with those requirements. The NIP dated 5.8.2010 placed on record by the Petitioners is in the name of the Governor, which also stipulates that the projects appearing at serial Nos. 16 to 18 which are projects in question, shall be governed as per the policy guidelines issued by the Government of H.P. vide No. MPP-F(2)-4/2005-III-Loose dated 10.2.2009 for allotment of self identified project. This indicates that the Governor has also put seal of approval on policy guidelines dated 10.2.2009 while referring those guidelines in the NIP dated 5.8.2010. Thus, in these circumstances, it cannot be said that the policy guidelines dated 10.2.2009 were not issued properly and no fault can be found to this effect in the policy guidelines dated 10.2.2009.

54. The next contention raised by the Petitioners is that guidelines dated 10.2.2009 were not issued and published in terms of Section 23 of the General Clauses Act. The Section 23 of General Clauses Act provides that whereby any Central Act or Regulation, a power to make rules or byelaws is expressed to be given subject to the conditions of the rules or byelaws being made after previous publication, then the provisions as provided in Sub-section (1) to (5) of the Section shall apply. The Section 23 of the General Clauses Act is not applicable in the case in hand as the Central Act or Regulation is not involved in the present case. The Section 22 of the Himachal Pradesh General Clauses Act, 1968 (for short 1968 Act) provides similar provision with respect to Himachal Pradesh Act. There is nothing on record that 2006 Policy or policy guidelines dated 10.2.2009 were issued under any Himachal Act. Therefore, Section 22 of 1968 Act is also not applicable.

55. The Petitioners on the point of publication have relied Harla Vs. The State of

Rajasthan, where it has been held that it would be against the principles of natural justice to permit the subjects of a State to be punished or penalized by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognizable way so that all men may know what it is; or, at the very least, there must be some special rule or Regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The Supreme Court further held that in the absence thereof any law, rule, Regulation or custom cannot come into being in this way. Promulgation or publication of some reasonable sort is essential.

56. In Bharat Sanchar Nigam Limited and Anr. v. BPL Mobile Cellular Limited and Ors. (2008) 13 SCC 597, the Supreme Court has discussed the importance of publication. In para 56 of the report, the Supreme Court has held as follows:

Why publication is necessary so as to enable the parties to take recourse thereto has been considered by this Court in B.K. Srinivasan and Others Vs. State of Karnataka and Others, in the following terms: (SCC pp.672-73, para 15)

15. There can be no doubt about the proposition that where a law, whether parliamentary or subordinate, demands compliance, those that are governed must be notified directly and reliably of the law and all changes and additions made to it by various processes. Whether law is viewed from the standpoint of the ''conscientious good man'' seeking to abide by the law or from the standpoint of Justice Holmes'' ''unconscientious bad man'' seeking to avoid the law, law must be known, that is to say, it must be so made that it can be known. We know that delegated or subordinate legislation is all-pervasive and that there is hardly any field of activity where governance by delegated or subordinate legislative powers is not as important if not more important, than governance by parliamentary legislation. But unlike parliamentary legislation which is publicaly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to the Government or other official dignitary. It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation. Where the parent statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customarily recognised official channel, namely, the Official Gazette or some other reasonable mode of publication. There may be subordinate

legislation which is concerned with a few individuals or is confined to small local areas. In such cases publication or promulgation by other means may be sufficient.

57. The Supreme Court in Akhil Bhartiya Upbhokta Congress Vs. State of Madhya Pradesh and Others, has held as follows:

65. What needs to be emphasized is that the State and/or its agencies/ instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/ decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State.

58. The purpose of publication is to notify law and all changes and additions made to it. In Harla (supra), the Supreme Court has held that there must be some special rule or Regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. Promulgation or publication of some reasonable sort is essential. In BSNL (supra), the Supreme Court has approved B.K. Srinivasan and Others Vs. State of Karnataka and Others, where it has been held that if the subordinate legislation does not prescribe the mode of publication or mode prescribed is unreasonable, it will take effect only when it is published through the customarily recognised official channel, namely, the Official Gazette or some other reasonable mode of publication. The subordinate legislation which is concerned with a few individuals or is confined to small local areas, in such cases, publication or promulgation by other grounds may be sufficient.

59. In 2006 Policy or policy guidelines dated 10.2.2009 mode of publication has not been prescribed. In that situation, applying the principle laid down in ''B.K. Srinivasan'' noticed in BSNL (supra), the guidelines dated 10.2.2009 will take effect from the date of publication in official channel namely the Official Gazette or some other reasonable mode of publication. In ''B.K. Shrinivasan'', it has also been held that subordinate legislation which is concerned with a few individuals or is confined to small local areas, in such cases, publication or promulgation by other grounds may be sufficient. In Harla (supra), customary channel by or through which the knowledge can be acquired with exercise of due and reasonable diligence has also been approved. The NIP published on 5.8.2010 stipulates that projects of the Petitioners shall be governed as per the policy

guidelines issued by the Government of H.P. vide No. MPP-F(2)-4/2005-III-Loose dated 10.2.2009. The note in the NIP further provides for details of terms and conditions eligibility etc. see website http://admis.hp.nic.in./doe.

60. The invitation to website for further details now a days is very common in advertisements. The Respondent No. 1 in the NIP published on 5.8.2010 has clearly given the reference of policy guidelines dated 10.2.2009. In these circumstances visit to website mentioned in the NIP published on 5.8.2010 was sufficient to have the knowledge of policy guidelines dated 10.2.2009. It is not the case of the Petitioners that despite visiting the website mentioned in NIP published on 5.8.2010 the policy guidelines dated 10.2.2009 were not made available to them. Thus, taking the cases of the Petitioners at their best policy guidelines dated 10.2.2009, so far Petitioners are concerned, were published atleast on 5.8.2010 when NIP for the projects in question were published. Therefore, the contention of the Petitioners that the policy guidelines dated 10.2.2009 were not published, is rejected.

61. The Petitioners have next invoked IPR, legitimate expectation and promissory estoppel to claim allotment of the projects in question in their favour. In support of this plea, the Petitioners have contended that they have spent sufficient time, energy, amount on the projects and have thus acquired IPRs in the projects. On the basis of the bid document, 2006 policy, the Petitioners have projected the case of legitimate expectation and promissory estoppel against Respondent No. 1 so as to claim allotment of projects in question in favour of the Petitioners.

62. The Petitioner in CWP No. 6880 of 2010 has not pointed out specific IPR whether the IPR is for patent, design, trademark, copyright or industrial know-how etc. The Petitioner has used expression IPR loosely in CWP No. 6880 of 2010 without elaborating the claim on the basis of IPR. The Petitioners have responded to the NIPs dated 7.1.2006 and 19.4.2006. The Petitioners submitted to NIPs dated 7.1.2006 and 19.4.2006 and to 2006 Policy for allotment of projects. In NIPs, bid document and 2006 Policy, there is nothing to infer claim on the basis of alleged IPR. The claim on the basis of alleged IPR if established may be actionable in Civil Court but it cannot be made a base for allotment of projects on the basis of NIPs 7.1.2006, 19.4.2006, 5.8.2010, 2006 policy and policy guidelines dated 10.2.2009 or 10.11.2010. Moreover, in CWP No. 6537 of 2010 and 7361 of 2010 the Petitioners have not made their claim on the basis of IPR. The Petitioners have failed to make out any case for allotment of projects in their favour on the basis of alleged IPRs.

63. The Petitioners are also claiming the projects on the basis of legitimate expectations and promissory estoppel. The Petitioner in CWP No. 6880 of 2010 has contended that an amount of `78,60,523/- has been spent on the project on the representation of the State and, therefore, on the basis of legitimate expectation and promissory estoppel, the Petitioner is entitled to allotment of Jobrie project and in mid way terms, conditions and policy cannot be changed to the detriment of the Petitioner. The Petitioner in CWP No. 6880 of 2010

submitted the tender for Jobrie project on 29.6.2006. The stand of the Respondent No. 1 is that nobody asked the Petitioner to make investment in the project.

64. The Petitioner in CWP No. 6880 of 2010 has placed on record Annexure PC (Colly.) to establish the expenses incurred on Jobrie project. In Annexure PC, there is only one document dated 24.4.2006 amounting to Rs. 4,25,389/- which is prior to submission of tender document on 29.6.2006 by Petitioner, rest of the documents in Annexure PC are of the years 2008, 2009 and 2010. The last document of Annexure PC indicates detail of expenses incurred on Jobrie Hydro Electric Project amounting to Rs. 78,60,523/- which includes salaries, professional charges, travel and tour expenses. There is nothing on record what was actually spent by the Petitioner on Jobrie project in between 7.1.2006 and 29.6.2006 initial date of NIP and the date of submission of the tender. There is no proof of payment or amount allegedly spent on Jobrie project as projected in Annexure PC. This becomes relevant when Respondent No. 1 in the reply has not specifically admitted the payments allegedly made by the Petitioner with respect to expenses allegedly incurred on Jobrie project. The Petitioners in other two petitions have placed nothing on record to establish that they have incurred some expenses on the projects.

65. On behalf of the Petitioners it has been submitted that the State cannot be permitted to wriggle out of the promise extended to the Petitioners for allotment of projects through MoU route, the conditions cannot be changed midway to the detriment of the Petitioners. It has been submitted that Supreme Court in catena of decisions has upheld the principle of promissory estoppel and legitimate expectations.

66. In Union of India and Ors. v. M/s Anglo Afghan Agencies etc. AIR 1968 SC 718 the Supreme Court has held as follows:

We hold that the claim of the Respondents is appropriately founded upon the equity which arises in their favour as a result of the representation made on behalf of the Union of India in the Export Promotion Scheme, and the action taken by the Respondents acting upon that representation under the belief that the Government would carry out the representation made by it....

The Supreme Court continued:

Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an exparte appraisement of the circumstances in which the obligation has arisen....

67. The Supreme Court in Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, has held as follows:

The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Govt. would be held bound by the promise and the promise would be enforceable against the Govt. at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution.

The Supreme Court also held:

Mere claim of change of policy would not be sufficient to exonerate the Government from the liability, the Government would have to show what precisely is the changed policy and also its reason and justification so that the Court can judge for itself which way the public interest lies and what the equity of the case demands.

68. The Supreme Court in State of Bihar and Others Vs. Kalyanpur Cements Ltd., on the doctrine of promissory estoppel has held as follows:

35. In our opinion, the aforesaid statement of law covers the submissions of Dr. Dhawan and Mr. Dwivedi that in order to invoke the aforesaid doctrine, it must be established that:

(a) a party must make an unequivocal promise or representation by word or conduct to the other party;

(b) the representation was intended to create legal relations or affect the legal relationship, to arise in the future;

(c) a clear foundation has to be laid in the petition, with supporting documents;

(d) it has to be shown that the party invoking the doctrine has altered its position relying on the promise;

(e) it is possible for the Government to resile from its promise when public interest would be prejudiced if the Government were required to carry out the promise;

(f) the Court will not apply the doctrine in abstract....

The Supreme Court continued:

77. In Petrochemical (supra), this Court has clearly reiterated the promissory estoppel would apply where a party alters his position pursuant to or in furtherance of the promise made by a State. It is also clearly held that such a policy decision can be expressed in notifications under statutory provisions or even by executive instructions. Whenever the ingredients for invoking the principle of promissory estoppel are established, it could give rise to a cause of action. Not only may it give rise to a cause of action but would also preserve a right. The relevant observations are as under:

121. The doctrine of promissory estoppel would undoubtedly be applicable where an entrepreneur alters his position pursuant to or in furtherance of the promise made by a State to grant inter alia exemption from payment of taxes or charges on the basis of the current tariff. Such a policy decision on the part of the State shall not only be expressed by reason of notifications issued under the statutory provisions but also under the executive instructions. The Appellants had undoubtedly been enjoying the benefit of (sic exemption from) payment of tax in respect of sale/consumption of electrical energy in relation to the cogenerating power plants.

122. Unlike an ordinary estoppel, promissory estoppel gives rise to a cause of action. It indisputably creates a right. It also acts on equity. However, its application against constitutional or statutory provisions is impermissible in law...

* * * * *

130. We, therefore, are of the opinion that doctrine of promissory estoppel also preserves a right. A right would be preserved when it is not expressly taken away but in fact has expressly been preserved.

79. We are also unable to accept the submission with the decisions dated 06.01.2001 and 05.03.2001 had been taken due to the change in the national policy. This was sought to be justified by Dr. Dhawan on the basis of the Conferences of Chief Ministers/Finance Ministers. It is settled law as noticed by Bhagwati, J in Motilal Padampat (supra) that the Government cannot, claim to be exempt from liability to carry out the promise, on some indefinite and undisclosed ground of necessity or expediency. The Government is required to place before the Court the entire material on account of which it claims to be exempt from liability. Thereafter, it would be for the Court to decide whether those facts and circumstances are such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from liability. It is only when the Court is satisfied that the Court would decline to enforce the promise against the Government. However, the burden would be upon the Government to show that it would be inequitable to hold the Government bound by the promise. The Court would insist on a highly rigorous standard of proof in the discharge of this burden.

69. The Supreme Court in Kusumam Hotels (P) Ltd. Vs. Kerala State Electricity Board and Others, has held as follows:

It is now a well-settled principle of law that the doctrine of promissory estoppel applies to the State. It is also not in dispute that all administrative orders ordinarily are to be considered prospective in nature. When a policy decision is required to be given a retrospective operation, it must be stated so expressly or by necessary implication. The authority issuing such direction must have power to do so. The Board, having acted pursuant to the decision of the State, could not have taken a decision which would be violative of such statutory directions.

The Supreme Court continued:

The law which emerges from the above discussion is that the doctrine of promissory estoppel would not be applicable as no foundational fact therefor has been laid down in a case of this nature. The State, however, would be entitled to alter, amend or rescind its policy decision. Such a policy decision, if taken in public interest, should be given effect to. In certain situations, it may have an impact from a retrospective effect but the same by itself would not be sufficient to be struck down on the ground of unreasonableness if the source of power is referable to a statute or statutory provisions. In our constitutional scheme, however, the statute and/or any direction issued thereunder must be presumed to be prospective unless the retrospectivity is indicated either expressly or by necessary implication. It is a principle of the rule of law. A presumption can be raised that a statute or statutory rule has prospective operation only.

70. In Shree Sidhbali Steels Ltd. and Others Vs. State of U.P. and Others, it has been held as follows:

Normally, the doctrine of promissory estoppel is being applied against the Government and defence based on executive necessity would not be accepted by the court. However, if it can be shown by the Government that having regard to the facts as they have subsequently transpired, it would be inequitable to hold the Government to the promise made by it, the court would not raise an equity in favour of the promisee and enforce the promise against the Government. Where public interest warrants, the principles of promissory estoppel cannot be invoked. The Government can change the policy in public interest. However, it is well settled that taking cue from this doctrine, the authority cannot be compelled to do something which is not allowed by law or prohibited by law. There is no promissory estoppel against the settled proposition of law. Doctrine of promissory estoppel cannot be invoked for enforcement of a promise made contrary to law, because none can be compelled to act against the statute. Thus, the Government or public authority cannot be compelled to make a provision which is contrary to law.

71. The Supreme Court in State of Haryana and Ors. v. M/s Mahabir Vegetable Oils Pvt. Ltd. 2011 (1) SLJ 376 has held as follows:

24. The doctrine of Promissory Estoppel is an equitable remedy and has to be moulded depending on the facts of each case and not straight jacketed into pigeon holes. In other words, there cannot be any hard and fast rule for applying the doctrine of Promissory Estoppel but the doctrine has to evolve and expand itself so as to do justice between the parties and ensure equity between the parties i.e. both the promissor and the promisee.

72. In CWP No. 6537 of 2010, the Respondent No. 3 has highlighted the difference between revenue models under 2006 Policy and the power policy 2009 i.e. after policy guidelines dated 10.2.2009. This has not been contradicted by filing rejoinder. The difference in 2006 Policy and after policy guidelines dated

10.2.2009 highlighted by Respondent No. 3 in CWP No. 6537 of 2010 is as follows:

Old Power Policy, 2006:

(i) Fixed upfront premium of ` 1,00,000/- per MW.

(ii) Royalty in the form of free power from the project to the Government of Himachal Pradesh @ 12% of deliverable energy of the project for 1 to 12 years @ 18% of deliverable energy of the project for a period of next 18 years and thereafter @ 30% of the deliverable energy for the balance agreement period beyond 30 years.

(iii) The SIP was free to sell the balance power with the first right-of-refusal remaining with the Respondent State.

New Power Policy, 2009:

(i) Fixed upfront premium of `.20,00,000/- per MW

(ii) Royalty in the form of free power from the project to the Government of Himachal Pradesh @ 12%(+ 1%) upto 12 years of deliverable energy of the project, @ 18%(+1%) of deliverable energy of the project for a period of next 18 years and in the balance 10 years @ 30% (+1%).

(iii) Additional free power at a uniform percentage rate of the deliverable energy in all the three times bands of royalty charges during the entire operation period of the project over and above the royalty charges, to be bid by interested parties.

(iv) The developer was free to dispose of remaining power after meeting commitments of royalty in shape of free power and additional free power, upto a maximum of 40% of deliverable energy through merchant sale.

(v) The State Government is to have the right-of-refusal on sale of remaining power after meeting commitments of royalty in shape of free power and additional free power and merchant sale of power.

73. The Respondents No. 1 and 2 in CWP No. 6537 of 2010 have stated that proposals received under self identified category above 5 MW by Government will be offered for allotment to IPPs on ICB basis as per the prevailing policy for projects above 5 MW with following additional conditions in supersession to all the policy decisions taken in this regard earlier, which are as follows:

(i) The evaluation of the offer shall be done as per the evaluation criterion set by the State Government and being applied by the HPSEB for allotment of project under ICB.

(ii) Identifier will be allowed to participate in the bidding and no processing fee shall be charged from him for the self identified project and bid document shall be issued free of cost against the cost of bid document/processing fees deposited by the bidder. The bid information regarding the project being self identified and status of the DPR/prefeasibility report.

(iii) In case the identifier is not able to quote the highest bid in its offer under ICB, he will be offered the project at the highest bid received if his offer is short of the highest bid by 30% of the highest bid. In case it is short by more than 30%, his right on the project shall be forfeited and the project shall go to the highest bidder.

(iv) The amount to be reimbursed for PER/DPR can be decided on project to project basis, based on the details of such expenditure to be submitted by the self identifier. However, it shall be restricted to the maximum limit of ` 25 lakh.

(v) Before the self identified Projects are offered for allotment on ICB, the potential proposed by these companies shall be re-assessed by the HPSEB/ HPPCL, so the optimal value of potential is put to bidding and claims for different potential are avoided. The Project shall be offered for bidding on the amended potential. The assessing agency shall be given at least two months time to complete this exercise and shall also provide a certificate regarding the accuracy of the potential of the project finally assessed by the agency.

(vi) Upfront premium at the rate of ` 20 lakh per MW shall be charged from all the self identified Projects above 5 MW as per prevailing policy provisions for allotment of projects on ICB basis.

74. The Supreme Court in M.P. Oil Extraction and Another Vs. State of M.P. and Others, has held as follows:

41. After giving our careful consideration to the facts and circumstances of the case and to the submissions made by the learned Counsel for the parties, it appears to us that the Industrial Policy of 1979 which was subsequently revised from time to time cannot be held to be arbitrary and based on no reason whatsoever but founded on mere ipse dixit of the State Government of M.P. The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State. This Court, in no uncertain terms, has sounded a note of caution by indicating that policy decision is in the domain of the executive authority of the State and the court should not embark on the unchartered ocean of public policy and should not question the efficacy or otherwise of such policy so long the same does not offend any provision of the statute or the Constitution of India. The supremacy of each of the three organs of the State i.e. legislature, executive and judiciary in their respective fields of operation needs to be emphasised. The power of judicial review of the executive and legislative action must be kept within the bounds of

constitutional scheme so that there may not be any occasion to entertain misgivings about the role of judiciary in outstepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set-up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective fields.

75. In Punjab Communications Ltd. Vs. Union of India and Others, the Supreme Court has held as follows:

...The result is that a change in policy can defeat a substantive legitimate expectation if it can be justified on Wednesbury reasonableness. We have noticed that in Union of India and others Vs. Hindustan Development Corpn. and others, also it was laid down that the decision-maker has the choice in the balancing of the pros and cons relevant to the change in policy. It is, therefore, clear that the choice of the policy is for the decision-maker and not for the court. The legitimate substantive expectation merely permits the court to find out if the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made.

76. On the point of principle of natural justice where policy decision in ecomonic matters is concerned, the Supreme Court in BALCO Employees Union (Regd.) Vs. Union of India and Others, has held that in taking of a policy decision in economic matters at length, the principles of natural justice have no role to play. While it is expected of a reasonable employer to take all aspects into consideration including welfare of the labour before taking any policy decision, that by itself will not entitle the employees to demand a right of hearing or consultation prior to the taking of the decision. The Supreme Court also held that the policies of the Government ought not to remain static. With the change in economic climate, the wisdom and the manner for the Government to run commercial ventures may require reconsideration. What may have been in the pubic interest at a point of time may no longer be so. Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In the case of a policy decision on economic matters, the courts should be very circumspect in conducting any enquiry or investigation and must be most reluctant to impugn the judgment of the experts who may have arrived at a conclusion unless the court is satisfied that there is illegality in the decision itself.

77. The Supreme Court in Pallava Granite Industries (India) (P) Ltd. v. Union of India and Ors. (2007) 15 SCC 30 has held as follows:

41. As stated above, G.O. No. 1290 was a decision to grant a mining lease in favour of the Appellants. Even assuming for the sake of the argument that G.O. No. 1290 constituted a grant by itself still, as held in the above decisions, such a grant cannot fetter or hamper future executive action/decision to revoke the

grant in public interest. In the present case, the State Government detected an important source of revenue in the form of granite reserves. It is true that at one point of time the State Government decided to exploit the granite through private parties. However, later on with globalization, the State Government decided to go for global tender. This course of action was open to the State Government. The State Government decided to exploit the granite through its agency, namely APMDC. The object was to earn commercial profits and revenue. APMDC was given liberty either to excavate the granite on its own or through joint ventures. The land belongs to the State Government. The granite belongs to the State Government. Therefore, a mere decision in G.O. No. 1290 to grant mining leases to the Appellants cannot hamper or fetter the power of the Government to exploit the resources through its own agency. In the circumstances, we do not find any mala fides in the decision of the Government reserving the area admeasuring acres 61.50 for exploitation by APMDC, either on its own or through its joint ventures/partners.

The Supreme Court further observed in para 43 of the report that the rights, if any, under G.O. No. 1290 were inchoate rights. These rights never stood crystallised. No mining lease was ever granted by the State Government to the Appellants. In the circumstances, there was no bar in reserving an area admeasuring acres 61.50 for exploitation of galaxy granite through State public sector undertaking.

78. The Supreme Court on Sethi Auto Service Station and Another Vs. Delhi Development Authority and Others, on legitimate expectation has held as follows:

33. It is well settled that the concept of legitimate expectation has no role to play where the State action is as a public policy or in the public interest unless the action taken amounts to an abuse of power. The court must not usurp the discretion of the public authority which is empowered to take the decisions under law and the court is expected to apply an objective standard which leaves to the deciding authority the full range of choice which the legislature is presumed to have intended. Even in a case where the decision is left entirely to the discretion of the deciding authority without any such legal bounds and if the decision is taken fairly and objectively, the court will not interfere on the ground of procedural fairness to a person whose interest based on legitimate expectation might be affected. Therefore, a legitimate expectation can at the most be one of the grounds which may give rise to judicial review but the granting of relief is very much limited.

79. In Shimnit Utsch India Pvt. Ltd. and Another Vs. West Bengal Transport Infrastructure Development Corporation Ltd. and Others, it has been held that the Government policy can be changed with changing circumstances and only on ground of change, such policy will not be vitiated. The Government has discretion to adopt a different policy or alter or change its policy calculated to serve public interest and make it more effective. Choice in the balancing of the pros and cons relevant to the change in policy lies with the authority. But like any discretion

exercisable by the Government or public authority, change in policy must be in conformity with Wednesbury reasonableness and free from arbitrariness, irrationality, bias and malice.

80. The Supreme Court on legitimate expectation in Bajaj Hindustan Ltd. Vs. Sir Shadi Lal Enterprises Ltd. and Another, has held as follows:

41. The power to lay policy by executive decisions or by legislation includes power to withdraw the same unless it is by mala fide exercise of power, or the decision or action taken is in abuse of power. The doctrine of legitimate expectation plays no role when the appropriate authority is empowered to take a decision by an executive policy or under law. The court leaves the authority to decide its full range of choice within the executive or legislative power. In matters of economic policy, it is settled law that the court gives a large leeway to the executive and the legislature. Granting licences for import or export is an executive or legislative policy. The Government would take diverse factors for formulating the policy in the overall larger interest of the economy of the country. When the Government is satisfied that change in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down a new policy.

81. In APM Terminals B.V. Vs. Union of India (UOI) and Another, one of the question before the Supreme Court in substance was whether despite the contractual right vested in the Appellant as well as in the Petitioner in the transferred cases to participate in future tender processes for development work within the port area, could such right be taken away and/or curtailed by a unilateral policy decision of the Central Government. The Supreme Court in para 67 of the report has held that a change in policy by the Government can have an overriding effect over private treaties between the Government and a private party, if the same was in the general public interest and provided such change in policy was guided by reason. The Supreme Court in para 69 of the report approved Shimnit Utsch India Pvt. Ltd. and Another Vs. West Bengal Transport Infrastructure Development Corporation Ltd. and Others,

82. In view of legal position noticed above, it is clear that on economic policy matters State cannot be forced to stick to policy framed at one point of time. The State has right to amend the policy affecting the revenue in the changed circumstances keeping in view new developments, changes, requirements and even in the interest of State. The policy guidelines dated 10.2.2009 have been framed by the State keeping in view the larger interest of the State. The larger public interest overrides individual interest. The rights of the Petitioners were not crystallized for allotment of the projects. The Petitioners have only inchoate rights which cannot be said indefeasible rights. The policy guidelines dated 10.2.2009 will earn more revenue to the State. The Petitioners have not projected the case of bias and malice, of course they have taken the plea of arbitrariness and discrimination which has not been substantiated. The Petitioners have not based their case that change in policy is in violation of some

statute.

83. The identifier who has identified the project has been given some concessions in the amended policy guidelines. The policy of first come first serve while dealing State largesse''s is not sound and transparent policy. On the contrary, open bidding which has now been introduced by way of amendment for projects above 5 MW in no way can be termed irrational or arbitrary or discriminatory. As per the policy guidelines dated 10.2.2009 all proposals received under self identified category above 5 MW will be offered for allotment to IPPs on ICB basis with additional conditions specified in the policy guidelines dated 10.2.2009. The interest of the Petitioners in this way has been protected in the policy guidelines dated 10.2.2009. The change in policy is in public interest. Thus, even if it is assumed that the Petitioners had some right earlier for allotment of the projects in their favour, such right is now subject to policy guidelines dated 10.2.2009, which in the changed scenario are not irrational, arbitrary or discriminatory rather they are in the larger economic interest of the State. Therefore, the policy guidelines dated 10.2.2009 are upheld. The Petitioners are bound by the policy guidelines dated 10.2.2009.

84. The Petitioners in CWP No. 6880 of 2010 have also raised grievance against decision/guidelines dated 10.11.2010 and more particularly serial No. 20 of said decision. The decision/guidelines dated 10.11.2010 are in consonance with Para-3 Chapter-2 of bid document which gives power to the Government to amend/modify the bid document or impose additional conditionalities as it may deem fit at any stage. The Para 3 Chapter-2 of the bid document has not been challenged by Petitioner in CWP No. 6880 of 2010, rather claim in the petition has been projected on the basis of bid document. The projects have not been allotted to the Petitioners, therefore, serial No. 20 of decision/ guidelines dated 10.11.2010 is nothing but modification/additional conditions in the bid document. In the light of above discussion, the Petitioner in CWP No. 6880 of 2010 has no case for alternative relief also as prayed in the petition. Thus, seen from any angle, there is no merit in the petitions.

85. In view of above, all petitions being CWP No. 6880 of 2010, CWP No. 6537 of 2010 and 7361 of 2010 are dismissed. Interim orders are vacated and all pending applications are disposed of.

