

Before

**UTTARAKHAND ELECTRICITY REGULATORY COMMISSION**

**Petition No. 24 of 2019**

**In the matter of:**

Petition seeking Review of the order of the Commission dated 10.04.2019 in Petition No. 31 of 2017 seeking determination of project specific Tariff for Tanga Small Hydro Power Project (5 MW) unit of M/s Himalaya Hydro Pvt. Ltd., under Section 94(1)(f) of the Electricity Act, 2003 and Regulation 54 of the UERC (Conduct of Business) Regulation 2014.

**In the matter of:**

M/s Himalaya Hydro Pvt. Ltd.

...Petitioner

**AND**

**In the matter of:**

Uttarakhand Power Corporation Ltd.

... Respondent

**CORAM**

**Shri D.P. Gairola      Member (Law)**

**Shri M.K.Jain         Member (Technical)**

**Date of Hearing: September 03, 2019**

**Date of Order: September 17, 2019**

The Petition was filed by M/s Himalaya Hydro Pvt. Ltd. (hereinafter referred to as "M/s HHPL" or "the Petitioner") for review of the Order dated 10.04.2019 passed by the Commission in the matter of determination of Project specific Tariff for 5 MW Tanga SHP of M/s HHPL, on river Seragad, District Pithoragarh, Uttarakhand under Section 94(1)(f) of the Electricity Act, 2003, and Regulation 54 of the UERC (Conduct of Business) Regulation 2014 read with the applicable provisions of the Code of Civil Procedure, 1908. The Petitioner in the above Petition had prayed the following:

- a. Admit the present Review Petition,
- b. Review the impugned Order dated 10.04.2019 on the issues raised and revise the tariff in

terms of the submissions made.

- c. Pass such further order(s) as deemed fit and proper.

## **1. Background**

- 1.1 M/s HHPL filed a Petition seeking determination of project specific tariff for its 5 MW Tanga Small Hydro Power Project, on Seragad River, Pithoragarh District, Uttarakhand and the Commission vide its Order dated 10.04.2019 determined the project specific tariff for the 5 MW Tanga SHP of M/s HHPL.
- 1.2 M/s HHPL on 10.06.2019 filed a Petition seeking review of the above referred Order dated 10.04.2019. Copy of the Petition was forwarded to Uttarakhand Power Corporation Ltd. (hereinafter referred to as "UPCL" or "the Respondent") for submission of comments. In response, UPCL vide its letter dated 01.08.2019 submitted its comments in the matter. Hearing was also conducted in the matter on 03.09.2019 at the Commission's office.
- 1.3 The Commission has considered the replies/information submitted by the Petitioner as well as the contentions raised by the Respondent and the same have been discussed at appropriate places in the Order alongwith the Commission's views on the same.

## **2. Petitioner's Submissions**

- 2.1 The Petitioner submitted that it is a "generating company" in terms of Section 2(28) of the Electricity Act, 2003, and has established and commissioned in March, 2017 its Tanga Small Hydro Power project of 5MW installed capacity on river Seragad, District Pithoragah, Uttarakhand.
- 2.2 The Petitioner submitted that it had filed a Petition for determination of project specific tariff as per applicable tariff Regulations and the said Petition was disposed off by the Commission by the Impugned Order dated 10.04.2019 allowing a project specific Tariff of Rs. 5.97 per unit. The Petitioner submitted that there are certain aspects of the project specific Tariff Petition that have not been considered by the Commission, which are errors apparent on the face of the record.
- 2.3 The Petitioner submitted that the present Review Petition is filed for seeking review of some aspects decided in the order dated 10.04.2019, under Section 94(1)(f) of the

Electricity Act, 2003 and Regulation 54 of the UERC (Conduct of Business) Regulation 2014 read with the applicable provisions of the Code of Civil Procedure, 1908.

2.4 The Petitioner submitted that the Commission has laid down certain well established legal precedents and principles while considering the project cost for determination of project specific Tariffs for Small Hydro Projects located in the State in its earlier orders, which have been disregarded in the instant case of Tanga SHP, causing prejudice to the Review Petitioner, and had also erred in the face of the facts and records submitted.

The Petitioner submitted that the Commission in its previous orders for determining project specific tariff had considered revised DPR cost or revised cost approved by the particular project's lending agency as the base cost and then applied the test of prudence to the cost over and above the base cost.

The Petitioner submitted that in case of Tanga SHP, the Petitioner's lending agency is IREDA (Indian Renewable Energy Development Agency Ltd), which is a Govt. of India owned financial institution under the Ministry of New and Renewable Energy (MNRE). M/s IREDA approved a revised cost of Rs. 68.73 Crore vide sanction letter dated 17, March, 2015, which was necessitated due to unprecedented catastrophic floods of June, 2013, and M/s IREDA had also sanctioned loan of Rs. 11.37 Crore to fund the Interest During Construction vide its letter dated 31.03.2014 due to the unprecedented floods of June, 2013, which are also part of the record.

The Petitioner submitted a summary of earlier orders of the Commission showing the instances wherein the Commission has taken revised DPR Cost as the base cost, and final cost allowed was above the revised DPR cost as follows:

**Summary of Project Specific Costs that were previously considered and allowed by the Commission (In Rupees Crore)**

S. No.	Name	Revised DPR Cost	Claimed Cost	Allowed Cost
1	Vanala SHP (Him Urja Pvt. Ltd.)	100.77	118.58	112.45
2	Sarju - III SHP (Uttar Bharat HPP Ltd.)	89.55	125.92	118.41
3	Sarju - II SHP (Uttar Bharat HPP Ltd.)	124.14	192.84	151.49
4	Tanga SHP Review Petitioner	68.73	76.35	58.95

The Petitioner submitted that only in the instant case, the final cost allowed for the Petitioner's Tanga SHP is well below the revised DPR cost, which is an error that is required to be corrected by the Commission. The Petitioner submitted that in case of Tanga SHP, the revised DPR cost was Rs. 68.73 Crore as approved by IREDA which was necessitated due to the damage suffered by the project during the unprecedented floods of June, 2013, and therefore totally beyond the control of the Petitioner. The Petitioner also submitted that the bulk of the additional project cost of Tanga SHP is on account of Interest During Construction which the Review Petitioner has paid to IREDA, which in turn was necessitated due to the floods of June, 2013.

The Petitioner submitted that the Electricity Act, 2003, the Tariff Regulations notified by the Commission and various Judgements of Hon'ble Aptel have enshrined the legal principle that, the generating companies must be allowed to recover their annual fixed charges. The actual cost incurred by the Petitioner was Rs. 76.35 Crore, whereas the cost approved by the Commission was Rs. 58.95 Crore only, which is way below even the revised DPR cost of Rs. 68.73 Crore, which is against the Commission's own established legal precedents and principles. As a result of this, the Review Petitioner is put to great injustice and hardship as it is unable to recover even the fixed charges on the base cost of Rs. 68.73 Crore approved by M/s IREDA its lending agency.

The Petitioner also submitted that the Tariff for Tanga SHP has been fixed at a CUF of 46.9%, inspite of the submissions that the Petitioner's lending agency M/s IREDA had considered a lower CUF of only 45%. The Review Petitioner also submitted that it was unable to evacuate power at the Respondent's 33 kV transmission line due to frequent grid failures, and abnormally high voltage levels, which is beyond the control of the Review Petitioner. The Petitioner submitted that the above amounts to an error apparent on the fact of the record and also in law, and is liable to be reviewed by the Commission.

- 2.5 The Petitioner further submitted that the Commission in the Impugned Order has disallowed 50% of average Preliminary & Pre-operative expenses for a period of 36 months from FY 2004-05 to FY2006-07 by erroneously concluding that the Review Petitioner had started processing the forest land clearance on 02.01.2006. In this regard the Petitioner submitted that the Review Petitioner was neither asked nor given an

opportunity by the Commission to clarify when it had started the process to obtain forest land clearance with the Govt. of Uttarakhand, and as a result an error has been made which is prejudicial to the interests of the Petitioner, and also against the principles of natural justice.

The Petitioner through the instant Review Petition submitted a copy of the forest land clearance document dated 30.06.2004, showing that the proceedings for land acquisition from the forest department, GoU, started almost immediately after the Implementation Agreement was signed in April, 2004. The Petitioner submitted that they had in fact acted promptly after the IA was signed with Govt of Uttarakhand on 28.04.2004 and had completed various preliminary works necessary to prepare and file the land acquisition proposal with the Dept. of Forests, Govt. of Uttarakhand on 30.06.2004 which was thereafter processed by various departments of the Govt of Uttarakhand as per government norms. Once the land proposal was moved by the Petitioner on 30.06.2004, the matter was entirely within the purview of GoU and the Govt. of India as per their norms, and the Petitioner had no control over the process. The Petitioner submitted that they had made payments of Rs. 3,02,548/- and Rs. 27,14,250/- on 02.01.2006 after receipt of letter dated 07.12.2005 from the Nodal Office, GoU towards lease, which is reflective of the fact that the Review Petitioner has acted with promptness, whenever it was within its control. Thereafter Nodal Office, GoU vide letter dated 17.01.2006 informed Govt. of India, followed by notification by GoU on 20.02.2006. The Petitioner submitted that DFO, Pithoragarh vide letter dated 10.03.2006 directed the Petitioner to enter into lease agreement and make certain payments, which was complied immediately.

The Petitioner submitted that in view of the above, the Commission has erred in holding that the Petitioner started the process for forest land clearance in January, 2006 and had erroneously disallowed 50% of the Preliminary & Pre-operative Costs for 36 months from FY-2004-05 to FY 2006-07, which amounts to an error apparent on the fact of the record, and is liable to be reviewed by the Commission.

- 2.6 The Petitioner further submitted that the Commission has observed in the Impugned Order that it took the Petitioner almost 45 months to get clearance from the forest department, GoU, i.e. from 09.04.2009 to 10.01.2013.

The Petitioner submitted that the Commission had noted that the Petitioner had obtained a report from its consultant recommending a tunnel in April, 2009 and had sought clearance from the Government Authorities in October, 2009 and had disallowed the six month period from April, 2009 to October, 2009 as a delay that was fully controllable, thereby disallowing 100% of the average IDC and preliminary & preoperative expenses during the 6 month period. In this regard, the Petitioner contended that it could not immediately rush to the government authorities after receipt of the consultant report and seek permission for tunnel construction, because introduction of a tunnel into the project at that stage of construction was a major disruption to the overall project, and had to be done by the Petitioner with due deliberation and consideration, and after the consultant had recommended the tunnel from a geological perspective, the Petitioner had to conduct survey and study various issues related to tunnel alignment, the feasibility of the new location of the surge shaft, the new alignment of penstock etc. and understand its overall impact on the project, which necessarily takes some time. Since introduction of the tunnel into the scheme was a highly disruptive issue that suddenly came up when the construction of the project was well underway and significant progress had already been achieved, the Petitioner had to necessarily proceed with due deliberation and caution. The Petitioner submitted that this delay cannot be termed as a deliberate delay in approaching forest department of GoU for obtaining change of land use permissions, and accordingly, it is an error apparent on the face of the record, and is liable to be reviewed by the Commission.

The Petitioner further submitted that the Commission has observed in the Impugned Order that it took about 39 months, i.e. October, 2009 to January, 2013 for the Petitioner to get the permission for tunnel construction from the authorities of GoU, and has summarily held that it should not have taken more than 12 months for the Petitioner to get the clearance, thereby disallowing 27 months of time as delay that was fully controllable, and thereby disallowing 100% of the average IDC and preliminary & preoperative expenses during this period.

In this regard, the Petitioner submitted that they acted with promptness in pursuing the case for obtaining the clearance for tunnel construction from the forest department, GoU. The same is evidenced by the fact that the Petitioner had acted with

promptness whenever it was required to submit any information or documentation to the Government or to make any payment to the Government as shown in the two instances below:

- a. The Review Petitioner was requested by Nodal Office, Dehradun, GoU to submit a geological report conducted by the government geologist vide letter dated 20.05.2011. The Review Petitioner thereafter requested the Government Geologist to visit the project site and he submitted his report vide letter dated 08.08.2011 which was then submitted to Nodal Office, Dehradun vide letter dated 18.08.2011.
- b. The Nodal Office, Dehradun vide letter dated 30.07.2012 had requested the Petitioner to deposit Rs. 2,11,926 on account of CAF and the same was promptly paid by the Petitioner vide its letter dated 07.08.2012.

The Petitioner submitted that apart from the above-mentioned two instances, where the Petitioner was required to arrange a geology report or make payment to the GoU, the Petitioner had no role to play while the matter was being considered by the agencies of the GoU and GoI. This is evidenced by the various inter-government communications between departments of GoU and GoI, where the Petitioner had no role to play and, therefore, the delay was completely beyond its control, and the Petitioner cannot be held responsible for the time taken by GoI and GoU for their internal communications and deliberations. The Petitioner submitted that after the application was filed by the Petitioner for forest clearance before the Government Authorities, the matter was deliberated by various Government agencies, through several letters (which were submitted in the petition as well) as summarized below, which clearly shows that the process was beyond the control of the Review Petitioner.

Date	Letter	Summary
24-01-2011	Nodal Office, Dehradun, Govt. of Uttarakhand, to DFO Pithoragarh	For his report on forest land proposal
10-03-2011	Nodal Office, Dehradun to Chief Conservator Of Forests ,Lucknow	Forest Land Proposal for tunnel clearance
13-05-2011	Conservator Of Forests Lucknow, Govt. of India to Nodal Office, Dehradun	For Geological Report by Government Geologist
20-05-2011	Nodal Office, Dehradun to Petitioner	For Geological Report by Government Geologist
27-06-2011	Petitioner to Government Geologist, Mining Dept, Pithoragarh	Requesting Geological Report
08-08-2011	Geologist to Petitioner	Report of Government Geologist.
18-08-2011	Petitioner to Nodal Office, Dehradun	Submitting Report of Government Geologist
25-10-2011	Add Chief Conservator Of Forests, Lucknow, Govt. of India, To Nodal Officer, Dehradun	Proposal for sanction
24-04-2012	Nodal office, Dehradun to Add Chief Conservator Of Forest, Lucknow	For SUBSTANTIVE sanction
30-07-2012	Nodal office ,Dehradun to Petitioner	For deposit of amount of Rs.2,11,926/- in A/C of CAF
07-08-2012	Petitioner to Nodal office Deharadun	Deposited amount of Rs.2,11,926/- in A/C of CAF
08-08-2011	Nodal office, Deharadun to Add Chief Conservator Of Forests ,Lucknow	For consideration of Proposal modification
05-10-2012	Add Chief Conservator Of Forests , Lucknow To Nodal office, Deharadun	Proposal modification sanction imposed another one condition
10-01-2013	DFO Pithoragarh to Petitioner	Finally giving forest clearance for tunnel work

The Petitioner submitted that there was no policy or Regulations that mandates that forest land clearances must be given within 12 months by Government Authorities from the time of application, and it is a gross injustice on the Petitioner to be summarily held to such a standard. The Petitioner drew the attention to various reports of GoI showing that forest clearance for various hydro electric and transmission line projects are taking several years and in no case was done within 12 months. The Petitioner submitted that in view of the above facts and records, it is an error and prejudicial to the Petitioner for the Commission to summarily hold that it should have obtained forest clearance for tunnel construction within 12 months, without even giving an opportunity to the Petitioner to present its case, which is also against the principles of natural justice, and also an error apparent on the face of the record and liable to be corrected by the Commission.

2.7 The Petitioner submitted that the Commission has observed that as per the revised DPR prepared after the floods of June, 2013, the expected date of commissioning was July, 2016 whereas the actual COD was 20.03.2017, i.e. a delay of 8 months, and accordingly

had disallowed the average interest cost and average preliminary & pre-operative expense for the period of 8 months from August, 2016 to March 2017.

The Petitioner submitted that they had done everything possible to complete the project in a timely manner despite the disruption and damage to the project due to the unprecedented floods of June, 2013. There was no road access to the project site until March, 2014, and only thereafter it was possible to prepare the revised DPR under difficult circumstances, which was necessitated due to a major natural calamity. At the time the revised DPR was prepared it was impossible to exactly predict unanticipated/uncontrollable delay in obtaining financial closure, manufacturing of generators and other project restoration activities, therefore there was bound to be some variation between estimated timeframe and the actual time taken for completion due to various unforeseen and uncontrollable events.

The Petitioner submitted that after preparing the revised DPR, it approached IREDA for additional loan and completed financial closure in the form of additional loan of Rs. 12 Crore, which IREDA sanctioned only in March, 2015 with disbursements taking place in April, 2015. Further, with the monsoon season of 2015 starting in June and continuing upto October, 2015, the Petitioner could not fully mobilize its contractors until after the monsoon ended (due to the extremely hostile conditions - heavy rainfall, landslides and flood like situation at the project site). Therefore, this delay in obtaining financial closure and mobilization of contractors after the floods of June, 2013 was beyond the control of the Petitioner. Furthermore, the two numbers of 2.5 MW generators and other electro-mechanical equipment were lost during the floods of June, 2013. These generators had to be remanufactured by M/s WEG and supplied/erected by M/s BFL Hydro Ltd. The Petitioner submitted that the generators were custom designed and manufactured for every hydro project and is a time consuming and complicated process. Since the original generators were manufactured in Brazil and the new generators supplied were of different design, which had to be matched with the turbines and other equipment previously supplied, this process could only be completed in July, 2016 as per WEG and BFL Hydro's manufacturing schedule.

The Petitioner submitted that it was extremely risky to transport this heavy equipment (each generator weighing about 13 tons) to the project site during the

monsoon season of 2016 as there was considerable risk of the equipment being stranded, damaged or lost during transit in the hostile Himalayan terrain during the monsoon season, therefore, the Petitioner and its electro-mechanical equipment supplier M/s BFL decided to transport the generators only after the end of the monsoon season of 2016 in November, 2016 and thereafter the equipment was erected, tested and commissioned in a short period of only 4 months time. The Petitioner submitted that the Commission on the one hand has taken CoD date from the revised DPR and on that basis penalized Petitioner for 8 month delay, but on the other hand, the project cost in the said revised DPR (as approved by IREDA) has not been accepted by the Commission. In view of the above, the Petitioner submitted that the above amounts to an error apparent on the face of the record and is also against the principles of natural justice as no opportunity was given to the Petitioner to explain the cause of delay and deductions were made by the Commission summarily, and hence, the same is liable to be reviewed by the Commission.

2.8 The Petitioner further submitted that the Commission observed that as per the audited financial statements submitted, Rs. 68.24 Lakh were booked under other income from FY 2011-12 to FY 2016-17 and the Commission deducted the entire amount from the Capital Cost of the Tanga SHP. In this regard the Petitioner submitted that as per the said audited financial statements, Rs. 28.77 Lakh was incurred as expenses from FY 2011-12 to FY 2015-16 which were also reported in the Profit & Loss statements, which would have otherwise been capitalized and added to the project cost, and as per accounting principles this Rs. 28.77 Lakh must be deducted from the interest income of Rs. 68.24 Lakh, and only the remaining amount of Rs. 39.47 Lakh may be reduced from the project cost. The Petitioner submitted that the above amounts to an error apparent on the fact of the record, and is liable to be reviewed by the Commission.

2.9 The Petitioner further submitted that the Commission while calculating total cost of Tanga SHP has reduced Rs. 221 Lakh as recoveries from the insurance company. In this regard, it submitted that total settlement of Rs. 221 Lakh against the claim for damages was paid by insurance company for reinstatement of lost equipment to the manufacturer and was not paid to the Petitioner, which is also evident from the financial statements as no entry for claims received is occurring in the audited financial statements, and,

therefore, the same cannot be reduced from the capital cost. The Petitioner submitted that it is an error for the Commission to reduce the insurance settlement from the capital cost as the same is wrongfully impacting the E&M capital cost which, and accordingly is liable to be reviewed by the Commission.

2.10 The Petitioner submitted that the Commission has allowed Rs. 3414.92 Lakh against Rs. 3560.43 Lakh of cost actually incurred by the Petitioner under the head of Civil Works, thereby reducing Rs. 145 Lakhs from civil works cost on the basis of bills considered by the Commission.

The Petitioner submitted that at the time of submission of the details of bills for the civil works cost, the Petitioner had to deal with a huge volume of bills of various denominations that were accumulated over a period of about nine to ten years. The Petitioner had submitted details of more than 1500 numbers of bills, of which about 1100 numbers were bills below Rs. 2 Lakh which added up to value of Rs. 614 Lakh. Due to the extremely large number of small bills accumulated over nine to ten years it was very voluminous work and further due to the time constraints, details of a few small bills were inadvertently missed, even though the cost was legitimately incurred by the Petitioner towards civil works and the same was reflected in its audited financial statements. Despite the above, the Commission had summarily deducted Rs. 85 Lakh worth of expenditure incurred by the Petitioner towards civil works, without giving it an opportunity to explain or being directed to present details of these small bills, which is against the principles of natural justice and also an error on the face of the records and financial statements submitted.

The Petitioner submitted that details of said small bills aggregating to value of Rs. 76.87 Lakh, to be brought on record, so that the error in the reduction of civil cost may be corrected. Further, some bills with value higher than Rs.2 Lakh (aggregating to about Rs. 60 Lakh) have also been disallowed from the civil works cost by the Commission even though details of the same were submitted which is an error apparent on the face of the record and, therefore, liable to be corrected. The Petitioner submitted that an amount of Rs. 33.81 Lakh pertains to purchase of steel from M/s Kashi Vishwanath Steel, Kashipur, Uttarakhand. These bills were very old (about nine years) and since some of them could not be traced, the Petitioner had submitted a certified copy

of ledger statement and letter number KVS/2018-19/665 dated 23.01.2019 from M/s Kashi Vishwanath Steel, whereby the said vendor had confirmed the said steel purchase of Rs. 33.81 Lakh.

The Petitioner submitted that the above mentioned bill of Rs. 33.81 Lakh has been erroneously disallowed by the Commission, even though M/s Kashi Vishwanath Steel had provided detailed ledger statement and letter confirming the purchase, and no opportunity was given to the Petitioner to present its case, which is against the principles of natural justice and also an error on the face the record, and is liable to be corrected by the Commission. The Petitioner through its Review Petition submitted copies of four invoices/bills worth Rs. 14.47 Lakh of M/s Kashi Vishwanath Steel.

2.11 The Petitioner further submitted that it had submitted details of Rs. 38.32 Lakh of expenditure on miscellaneous fixed assets, of which the depreciated value is Rs. 15.65 Lakh. However, the Commission has only allowed Rs. 10.35 Lakh and disallowed Rs. 5.31 Lakh, which is an error apparent on the face of the record and liable to be corrected by the Commission.

### **3. Respondent's submission**

3.1 UPCL, the Respondent submitted that the petition has been filed u/s 94(1)(f) of the Electricity Act, 2003 read with Regulation 54 of UERC (Conduct of Business) Regulations, 2014, seeking review of the Order dated 10.04.2019, however, the petition does not qualify to be a review and is basically an appeal in disguise.

3.2 UPCL submitted that from the Review Petition filed by M/s HHPL, it appears that there is no error apparent on record so as to qualify the petition as a review, infact the grounds in the submissions made by the Petitioner itself shows that there is no error apparent on record. In the Review Petition, only errors like arithmetical and typographical can be corrected and no fresh application of mind can be done, and if the matter requires re-appreciation and reconsideration of the facts then it cannot be said that there is an error apparent on record. The current Petition is beyond the scope of section 114 and order 47 of the Civil Procedure Code.

3.3 UPCL submitted that the Commission does not lay down any principle while determining the tariff, infact the project specific tariff is determined as per the principles

laid down in the Regulations, and the Commission only applies the regulation and scrutinize the facts in light of the same and the clarifications in particular cases given by the Hon'ble ATE. UPCL submitted that it is wrong on the part of the Petitioner to state that the Commission had in its previous orders for determining the project specific tariff considered revised DPR cost or revised cost approved by lending agency as the base cost for applying the prudence check. The Petitioner is misinterpreting and misapplying the order dated 10.4.2014 passed in matter of M/s Him Urja Pvt. Ltd. (Vanala SHP), and even if for the sake of argument the contents are accepted the said consideration could only be relevant in light of the relevant facts and circumstances in any particular case, and if the Commission does not find it prudent or realistic to consider the same in the present matter, it cannot be a ground for seeking review. UPCL submitted that the project specific tariff is fixed on the basis of actual capital cost after applying the prudence check, and as brought at relevant portions of the Impugned Order, the Commission has considered the revised DPR while determining the Capital Cost for Tanga SHP. UPCL submitted that if the Commission as per its own adjudication arrived at the actual capital cost, as per the Regulations, it cannot be said that this is an error apparent on record.

UPCL submitted that it is wrong to say that the Commission has laid down any principles regarding the revised cost approved by IREDA in the matter of Vanala SHP. The contentions about the lending agency made by the Petitioner are totally irrelevant, and the Petitioner is making submissions on the basis of assumptions and against the provisions of applicable Regulations.

UPCL further submitted that it is wrong to say that there are any established principles and precedents as stated by the Petitioner hence the question of going against the same does not arise, and if the Commission has gone against settled principles, then it is not a ground for seeking review, and accordingly, the present petition is nothing but an appeal in disguise. UPCL also submitted that the CUF determined by the Commission is as per the Regulations and the consideration of CUF as approved by the Petitioner's lending agency, i.e. M/s IREDA is totally irrelevant for the purpose of determining the project specific tariff.

3.4 UPCL, with respect to Petitioner's contention regarding partial disallowance of

preliminary and pre-operative expenses for the period from FY 2004-05 to FY 2006-07 by the Commission, submitted that the Petitioner was given sufficient opportunity for making submissions, as the matter was fixed for hearing and after final hearing wherein the Petitioner advanced its arguments, the Impugned Order was passed. UPCL submitted that the Petitioner cannot be permitted to file any additional evidence as no reassessment of evidence can be done in a Review Petition, further the documents proposed to be submitted was always within the knowledge and possession of the Petitioner, however, the said documents were not filed. The contention regarding approvals and forest clearance are totally irrelevant for the purpose of present Petition, hence, no detailed submission regarding these facts is being made. UPCL submitted that the Petitioner cannot question the judgment of the Commission of allowing 50% of the preliminary and pre-operative cost after prudence check and cannot call upon the Commission to reconsider and re-determine the same in the Review Petition.

3.5 UPCL further submitted that the Petitioner's contention regarding delay in obtaining clearances for tunnel construction are beyond the scope of Review Petition. The contentions of the Petitioner itself shows that the Commission after considering the evidence on record gave a finding about disallowing 100% of average IDC and preliminary and pre-operative expenses during April, 2009 to October, 2009, and once the Commission has held that there was a deliberate delay, the Petitioner cannot question the finding in a Review Petition by calling it an error apparent on the face of the record. Further, the Petitioner himself has mentioned that, the Commission on observing that Petitioner took 39 months in obtaining forest clearance has held that it should not have taken more than 12 months, which shows the Petitioner is aware that the Commission gave its findings after considering the matter and no justification or reasons as given by the Petitioner now can be considered for considering the findings as an error apparent. The Petitioner cannot be permitted to file any additional evidence as no reassessment of evidence can be done in a Review Petition, and the documents proposed to be submitted was always within the knowledge and possession of the Petitioner.

3.6 UPCL further submitted that the Petitioner with respect to deduction of Rs. 68.24 Lakh as other income, has given its own explanation against the finding of the Commission, and the contention made by the Petitioner itself shows that the Commission after observation

and applying the mind made such deductions, and if the Petitioner is aggrieved by the said finding, he ought to have filed an appeal against the same and cannot by mere stating the same as an error apparent file the Review Petition.

3.7 UPCL further submitted that with respect to insurance recoveries, the Petitioner tried to give its own explanation against the findings of the Commission, and the contention made by the Petitioner itself shows that the Commission after observation and analysis directed such deductions, and still if the Petitioner is aggrieved by the said finding, he ought to have filed an appeal against the same and cannot by mere stating the same as an error apparent file the Review Petition.

3.8 UPCL further, with respect to the contention of the Petitioner regarding wrong disallowance of Rs. 145.00 Lakh of hard cost under civil work, submitted that the Commission had already deliberated on the same, and the Petitioner is making wrong contentions about the non filing of bills. The said documents cannot be accepted now, there is serious doubt about their authenticity, there is no explanation as to why the same were not produced before, and even otherwise the Petitioner cannot be permitted to produce these documents now.

3.9 UPCL further, with respect to disallowance of Rs. 5.31 Lakh on account of miscellaneous fixed assets, submitted that the Commission after analysis has worked out the same, and the Petitioner cannot consider the same as an error apparent on record, and if the Petitioner is aggrieved by the said finding, he ought to have filed an appeal.

3.10 UPCL further submitted that there is no error apparent on record neither any loss nor prejudice is caused to the Petitioner. The fact that the Petitioner's project has again incurred natural disaster and is not operative at the moment, there is only possibility that the present tariff may go even higher so as to be totally unviable commercially. If the project continues to incur cost so repeatedly and within such short span of time then it is necessary that commercial viability of the project must be assessed and it should be ascertained if at all this project should be permitted to make additional expenditure. Considering that this phenomenon of damage caused to the plant even when huge expenditure on account of protection are being permitted, and also the frequency of natural disaster, the Commission should make a provision in the Regulation for ascertaining the financial viability of the project as the same would be in the interest of

the State of Uttarakhand.

3.11 UPCL submitted that the Petitioner is not entitled to any relief or the reliefs as sought in the Petition, and the Petition is not maintainable and is liable to be dismissed with cost.

3.12 The Commission forwarded the comments of UPCL to the Petitioner for submitting its counter reply on the comments of UPCL, and the Petitioner vide its letter dated 30.08.2019 submitted the same. Further, the Commission vide its letter dated 26.07.2019 sought certain additional information from the Petitioner for analyzing the submissions made in the Review Petition, in response to which the Petitioner vide its reply dated 06.08.2019 submitted the requisite information.

3.13 The Petitioner's replies on the comments of UPCL, alongwith additional information submitted during the course of proceedings, and Commission's view on the same, have been dealt at subsequent paras of this Order.

#### **4. Commission's Views & Decisions**

4.1 Before considering the Petitioner's contentions on merits of the case, it is necessary to analyse the power of the Commission for review of its order. Review of an order of the Commission can only be done if the Petitioner fulfils one of the grounds for review in accordance with the provisions of the Code of Civil Procedure, 1908. Section 114 of the Code of Civil Procedure (in short CPC) provides for a substantive power of review by a civil court and consequently by the appellate courts. Section 114 of the Code although does not prescribe any limitation on the power of the court but such limitations have been provided for in Order 47, Rule 1 of the CPC.

The grounds on which review can be sought are enumerated in Order 47, Rule 1 of CPC, which reads as under:

*"1. Application for review of judgment*

*(1) Any person considering himself aggrieved:-*

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*

*(b) by a decree or order from which no appeal is allowed, or*

*(c) by a decision on a reference from a Court of Small Causes,*

*and who, from the discovery of new and important matter or evidence which, after the*

*exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.*

Hence, the circumstances where review lies are:

- (a) cases in which appeal lies but not preferred,
- (b) cases in which no appeal lies,
- (c) decisions on reference from Court of Small Causes; and

The grounds for review are:-

- (i) discovery of new and important matter or evidence or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or
- (ii) mistake or error apparent on the face of the record, or
- (iii) any other sufficient reason.

4.2 The Respondent vide its letter dated 01.08.2019 submitted its comments in the matter, claiming that the present review Petition is not maintainable on the grounds stated below:

- a) The Petition had been filed under Section 94(1)(f) of the Electricity Act, 2003 and Regulation 54 of CBR, 2014 and the same cannot be applied in the present matter.
- b) That bare reading of the Petition makes it clear that there is no error apparent on record so as to qualify the Petition as a review, infact the grounds in the submissions made by the Petitioner itself shows that there is no error apparent on record. In a Review Petition only errors like arithmetical and typographical can be corrected and no fresh application of mind can be done, if the matter requires re-appreciation and reconsideration of the facts then it cannot be said that there is an error apparent on record.
- c) That the Petition is beyond the scope of section 114 and order 47 of the Civil Procedure Code.

d) That the Petitioner has declared Petition to be within limitation, which the Commission is required to verify as no prayer for condonation of delay has been made, the same, if found, beyond limitation be rejected.

4.3 Several judgments have been cited on this aspect which reiterates the same principles. The principles laid down by the Hon'ble Supreme Court in **Kamlesh Verma Vs. Mayawati & Ors** in this regard are being reproduced hereunder:

*"20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:*

*20.1. When the review will be maintainable: (i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the Petitioner or could not be produced by him; (ii) Mistake or error apparent on the face of the record; (iii) Any other sufficient reason.*

*The words "any other sufficient reason" have been interpreted in **Chhajju Ram v. Neki, AIR 1922 PC 112** and approved by this Court in **Moran Mar BasseliosCatholicos v. Most Rev. Mar Poulouse Athanasius &Ors. (1955) 1 SCR 520**, to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in **Union of India v. Sandur Manganese & Iron Ores Ltd. &Ors.***

*20.2. When the review will not be maintainable:*

- i. A repetition of old and overruled argument is not enough to reopen concluded adjudications.*
- ii. Minor mistakes of inconsequential import.*
- iii. Review proceedings cannot be equated with the original hearing of the case.*
- iv. Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.*
- v. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.*
- vi. The mere possibility of two views on the subject cannot be a ground for review.*
- vii. The error apparent on the face of the record should not be an error which has to be fished out and searched.*
- viii. The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.*
- ix. Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."*

4.4 While going into the merits of the Petitioner's contentions, the Commission is guided by the principles as aforesaid. It is clear from the nature of issues raised by the Petitioner at this stage in the Review Petition and also in its submissions before the Commission during the course of the hearing that the Petitioner has agitated upon the issues related to time overruns dealt with by the Commission, CUF, and other expenses disallowed in the impugned Order.

The Commission has given detailed reasons in its Order dated 10.04.2019 in support of the views on the determination of Tariff in accordance with the provisions of the Act/Regulations after taking into consideration the submissions of the Petitioner. Review lies only for correcting patent error or discovery of new and important matter or evidence which could not be produced by the parties at the time of the earlier proceedings or mistake or error apparent on the face of the record. Keeping the above discussion in view, the Commission has dealt accordingly with the Petitioner's contention as detailed in the following paras.

**A. Established legal precedents and principles laid down by Hon'ble APTEL & the Commission regarding project cost in previous "project specific" Tariff orders have not been followed in the instant case of Tanga SHP.**

4.5 The Petitioner submitted that the Commission has allowed a cost of only Rs. 58.95 Crore, which is well below the revised DPR cost of Rs. 68.73 Crore that was approved by M/s IREDA in March, 2015, after the catastrophic floods of June, 2013. The Petitioner submitted that the Commission by allowing a cost of only Rs. 58.95 Crore as against the revised DPR base cost of Rs. 68.73 Crore, and actual incurred cost of Rs. 76.35 Crore, has gone against its own well established principles and precedents, and this has greatly prejudiced the legitimate right of the Review Petitioner to recover its Annual Fixed Charges as enshrined in the Electricity Act, 2003, various judgements of Hon'ble ATE etc. As discussed herein above in the Petitioner's submission, the Petitioner has pointed towards earlier instances of project specific Tariff determined by the Commission wherein the final cost allowed was above the Revised DPR cost, and only in case of Tanga SHP, the final cost allowed is well below the Revised DPR cost, which is an error that is liable to be corrected by the Commission.

4.6 In this regard, the Commission in its Impugned Order dated 10.04.2019 has already

detailed the approach and methodology while arriving at the Capital Cost allowable for the Petitioner's Tanga SHP. The Commission, as set out in the Impugned Order, after considering all the documents on record including the revised DPR, had approved the Capital Cost for Tanga SHP. The relevant portion of the Impugned Order is summarized below:

"3.3.3 ...

*Accordingly, the Commission in order to establish the claims of the Petitioner and to have a more realistic approach to analyze the claimed cost, asked the Petitioner to provide copies of all the invoices exceeding Rs. 2.50 Lakh alongwith the other information. The Commission, subsequently, also sought details of expenses below Rs. 2.50 Lakh from the Petitioner.*

3.3.4 *The Commission analyzed the revised DPR submitted by the Petitioner prepared after the floods of June 2013, wherein it was stated that total expenditure on project till March, 2014 based on the audited balance sheet of the Petitioner was Rs. 4784.10 Lakh (including IDC of 1259.27 Lakh) and additional cost required to revive and complete the project after the floods of June, 2013, will be Rs. 1179.08 Lakh. Further, additional IDC due to delay in project works consequent to floods of June, 2013, was projected as 780.82 Lakh in the aforesaid revised DPR.*

3.3.5 *The Petitioner in its submissions submitted that it had to incur additional cost to cater to the geological surprise that necessitated the construction of HRT in place of power channel. In this regard, the Commission is of the view that from the submissions of the Petitioner it is evident that they took bonafide clearance from various authorities for construction of HRT, and accordingly, the need for the same cannot be denied. Therefore, actual expense under this head is allowable to the Petitioner subject to prudence check.*

...

3.3.8 *The Commission, as discussed above, in order to establish the actual expenditure incurred on the Tanga SHP, examined the invoice/details submitted by the Petitioner and based on the same and also the cost envisaged in the revised DPR, the actual allowable capital cost as on CoD has been worked out."*

From a plain reading of above quoted paras, the approach of the Commission to arrive at the capital cost of Tanga SHP is quite clear, and does not leave any room for ambiguity. The Petitioner's contention that legal precedents, and approach of the

Commission as followed in earlier orders, have not been followed in case of Tanga SHP is irrelevant and without any basis.

The Commission would like to mention here that in case of project specific Tariff each and every element of cost is analyzed from the perspective of prudence, and as such benchmarking vis-a-vis DPR cost is not done. The DPR cost, and elements stated therein can be used by the Commission to form an opinion for establishing the prudence of a cost element, but it cannot be said that the costs stated therein ought to have been considered in toto without any analysis and checking for prudence. As can be seen from the relevant paras of the Impugned Order quoted above, the Commission has duly taken into account the cost estimates envisaged in the revised DPR of Tanga SHP, prepared after the catastrophe of June, 2013, and on the basis of same had considered the additional works required to complete the project after the floods of June, 2013, which includes additional works related to protection of power plant. The Commission, accordingly, in view of the above denies the contention of the Petitioner that set principles have not been followed and the cost envisaged in the revised DPR has been ignored.

4.7 Further, as detailed in the Impugned Order, against the hard cost of Rs. 4473.07 Lakh, the Commission has allowed 4100.96 Lakh, after reducing the recoveries from insurance company amounting to Rs. 221 Lakh, which the Petitioner did not reduce from the capital cost claimed for Tanga SHP. For making the comparison on similar lines, if the amount of insurance recoveries is excluded, then the Commission had effectively allowed a hard cost of Rs. 4321.96 Lakh against the cost claimed of Rs. 4473.07 Lakh by the Petitioner. The relevant portion of the Impugned Order is reproduced hereunder:

*“3.3.18 Further, the Petitioner also submitted that at the time of flood of June, 2013, the project was in construction stage and the total flood losses were estimated at approximately Rs. 500 Lakh against which an insurance claim was settled at Rs. 221 Lakh. The Commission has, accordingly, based on the submission of the Petitioner adjusted the recovery of insurance claim of Rs. 221 Lakh from the allowable project cost of Tanga SHP as on CoD.*

*3.3.19 Accordingly, based on the analysis as dealt in the preceding Paras, the hard cost of the project works out to Rs. 4100.96 Lakh as against Rs. 4473.07 Lakh claimed by the Petitioner and the same is presented in the Table given below:*

Table 3.3: Hard Cost allowed by the Commission (Rs. In Lakh)

S. No.	Particulars	Amount (Rs. in Lakh)
1	Land	38.10
2	Civil Works	3414.92
3	Power Plant & Electro-mechanical equipments	858.60
4	Miscellaneous Fixed assets	10.35
6	Less: Recoveries from Insurance Company	-221
7	Net Hard Cost Allowed	4100.96

”

As can be seen from above the disallowance under the hard cost claimed by the Petitioner vis-à-vis that allowed by the Commission is Rs. 151.11 Lakh (Rs. 4473.07-4321.96 Lakh) without considering the amount of insurance recovery. Further, the revised DPR cost for these cost elements is of Rs. 4257.96 Lakh which is also less than the cost allowed by the Commission in the Impugned Order as discussed above. Thus it can be seen that the Commission had already allowed the Hard Cost for the Petitioner’s project which is greater than the Hard Cost envisaged in the revised DPR for the reasons stated in the Impugned Order. Apart from the same, the Commission has reduced the recoveries from insurance company amounting to Rs. 221 Lakh from the hard cost allowed by the Commission, and as this reduction has also been challenged by the Petitioner in the current review, therefore the same has been dealt at relevant paras of this Order.

It is pertinent to mention here that the capital cost of a project broadly comprises of Hard Cost and Soft Cost. Hard cost are costs that are directly associated with the project and accrues as and when the physical work of the project progresses, whereas Soft Cost such as Interest During Construction and preliminary and pre-operative expenses accrues on periodic basis whether or not any physical progress of the project is there, and these costs are typically incurred to keep the works of the project running at any point of time. In the instant case of Tanga SHP, as discussed above, the Commission had allowed the majority of the Hard Cost claimed by the Petitioner for Tanga SHP, and the major disallowance is on account of soft cost, i.e. IDC and preliminary & pre-operative expenses. The Commission has already dealt in detail in the Impugned Order, the reason for disallowing the time overrun for the Petitioner’s project, and the Petitioner through the instant Review Petition has also challenged the disallowance on the said

grounds, and accordingly, the same have been dealt with at relevant paras of this Order.

- 4.8 It can be seen that out of the total project cost of Rs. 7635.55 Lakh claimed by the Petitioner for Tanga SHP, almost 34%, i.e. Rs. 2620.48 Lakh comprise of IDC which is time linked cost. The Petitioner has made an irrelevant comparison of the cost allowed by the Commission in case of other SHP's without looking into the fact that each project took different time frame to complete and the proportion of Soft Cost on the total cost of those projects was also different. The Petitioner should understand that the peculiarity of each and every case is different, and only after analysis and prudence check of the information available before the Commission, the costs are allowed, be it a Hard Cost or Soft Cost.
- 4.9 In view of the above discussion, as far as the question of not following the established legal precedents and principles laid down by Hon'ble APTEL and the Commission regarding project cost in previous "project specific" Tariff orders is concerned, the Commission denies the same of being frivolous and without any legal backing.

Based on the above contentions, there are no grounds for review that are fulfilled, and there is no error apparent from the record. Hence, the issue is rejected.

- 4.10 The Petitioner also submitted that the tariff has been fixed at a CUF of 46.9% even though the Petitioner had submitted that M/s IREDA had considered a lower CUF of only 45%. Further the Petitioner had also submitted in its Petition that it was unable to evacuate power over the UPCL's 33kv transmission line due to frequent grid failures, abnormally high voltage levels which are beyond the control of the Petitioner, and, as a result of which the Petitioner was unable to generate power at design CUF of 46.9%. The Petitioner submitted that it is an error apparent on the face of the record and also in law, and is liable to be reviewed by the Commission.
- 4.11 In this regard, the Commission asked the Petitioner to submit the basis alongwith calculations for the CUF considered by its lending agency IREDA, in response to which the Petitioner submitted that it owns both Tanga SHP and Motighat SHP which are cascading projects located on the same river. Motighat SHP is located upstream of Tanga SHP and was commissioned in 2011 and its average CUF is about 30%. Since Motighat SHP is the upstream project its tail-race discharge flows into the intake of Tanga SHP. As

M/s IREDA is the lending agency for both projects, it was aware of the actual CUF of Motighat SHP and frequent natural calamities which the area was prone to, which have similar impact on Tanga SHP as well. Therefore, while considering the CUF of Tanga SHP for project appraisal, it has considered the actual CUF of Motighat SHP and the conditions prevailing in the project location, as well as the minimum 40% and 45% CUF prescribed in the UERC, RE Regulations.

4.12 The Commission, in this regard, in the Impugned Order dated 10.04.2019 has held as under:

*“3.2.1 The Petitioner submitted the revised DPR prepared after the calamity of June 2013 for its Tanga SHP and stated that the CUF envisaged in the said DPR was considered as 46.90%. The Petitioner, as discussed earlier, requested the Commission to consider the CUF of the plant as 45% as assessed by M/s IREDA, the lending agency of the Petitioner’s project, after the natural calamity of June 2013.*

...

**3.2.3** *The Commission examined the revised DPR of the Petitioner’s SHP wherein the CUF of the plant was stated as 46.90% (based on 90% dependable year considering the flow data for 7 years from 2006 to 2012), as against the Petitioner’s submission of 45% as discussed above. The yearly generation as per the aforesaid DPR based on 90% dependable year was envisaged as 20.54 MUs. The RE Regulations, 2013 does not specify whether the design PLF would be based on 90% dependable year. In this regard, reliance was placed on Regulation 3(2) of UERC RE Regulations, 2013 which specifies as under:*

*“Save as aforesaid and unless repugnant to the context or if the subject matter otherwise requires, words and expressions used in these regulations and not defined, but defined in the Act, or the UERC (State Grid Code) Regulations or the Commission’s Regulations on determination of Tariff shall have the meanings assigned to them respectively in the Act or the State Grid Code or the Commission’s Regulations on determination of Tariff.”*

*Hence, reliance is placed on Regulation 3(25) of UERC (Terms and Conditions for Determination of Tariff) Regulations, 2011 that defines design energy as under:*

*“Design Energy” means the quantum of energy which can be generated in a 90% dependable year with 95% installed capacity of the hydro generating station;”*

*Accordingly, the Commission has relied upon the generation in the 90% dependable year as*

*calculated in DPR which is 20.54 MUs which has also been considered by the Petitioner in its tariff calculations, and which is also in accordance with the Regulations. This in turns translates to a CUF of 46.90% which is higher than the normative CUF of 45% specified in the RE Regulations, 2013. Hence, the CUF of 46.90% in accordance with the Regulations has been considered as the CUF for recovery of AFC of the Petitioner's plant. Further, from the submissions made by the Petitioner to re-consider the CUF as 45%, the Commission is of the view that there is no merit in deviating from the CUF of 46.90%, as envisaged in the revised DPR, since the Regulations without any ambiguity clearly spells out the basis for considering the CUF for the generating stations, and accordingly, no change in the same has been carried out by the Commission."*

As can be seen from above, the Commission has already dealt in detail regarding the CUF in the Impugned Order dated 10.04.2019, after considering the submissions made by the Petitioner to consider the CUF as 45%, which was also approved by their lending agency, i.e. M/s IREDA.

4.13 From the submissions made by the Petitioner it appears that no new fact is brought on record, rather the Petitioner is trying to reopen the already concluded issue, which is not permissible through a review. The Commission, in the current review proceedings, also provided an opportunity to provide a scientific basis alongwith hydrology data and calculations for claiming the CUF of 45% for Tanga SHP, in response to which the Petitioner has again reiterated its submissions made earlier without any supporting calculations and data.

4.14 It is explicitly clear from a plain reading of the Impugned Order that the issue of CUF has already been dealt in detail therein, and as such no new fact or information has been brought before the Commission that merits the review on this ground, and accordingly, the grounds of review contested by the Petitioner for revision in approved CUF is summarily rejected as being frivolous and without any legal backing.

Based on the above, contentions of the Petitioner with regard to the issue of CUF do not fulfill the grounds for review as there is no error apparent from the record. Hence, the issue is rejected.

## **B. Preliminary & Preoperative Expenses Partly Disallowed**

4.15 With respect to the preliminary & pre-operative expenses, the Petitioner submitted that

the Commission has disallowed 50% of average preliminary & pre-operative expenses for a period of 36 months from FY 2004-05 to FY 2006-07 by erroneously concluding that the Review Petitioner had initiated forest land clearance case on 02.01.2006 which amounts to an error apparent on the fact of the record, and is liable to be reviewed by the Commission.

4.16 The Petitioner submitted a copy of the forest land clearance proposal document dated 30.06.2004, showing that the Petitioner had started the process for acquisition of land from the forest department, GoU, almost immediately after the Implementation Agreement was signed in April, 2004. The Petitioner submitted that once the land proposal was moved by the Petitioner on 30.06.2004, the matter was entirely within the purview of GoU and the GoI as per their norms, and the Petitioner had no control over the process.

4.17 The Respondent submitted that there is no violation of natural justice in the views taken by the Commission as the Petitioner was allowed sufficient opportunity, and only after conducting a hearing in the matter, the Impugned Order was passed. The Respondent also submitted that, the Petitioner cannot be permitted to file any additional evidence as no reassessment of evidence can be done in a Review Petition, further the documents proposed to be submitted was always within the knowledge and possession of the Petitioner, hence also the said documents cannot be filed.

4.18 Replying to the Respondents submission, the Petitioner submitted that the Petitioner has not filed any additional evidence for reassessment of evidence, the evidence filed by the Petitioner is acceptable under the provision of Order 47 rule 1 of the C.P.C; 1908. The Petitioner cited a judgement of the Hon'ble Supreme Court in the matter of Susana Rani David & another versus Esther Jaspersw Amiinatahn & other, 2016 (116) All LR 557, wherein the Apex Court has ruled as under:

*“Discovery of new and important matter or evidence-During course of hearing before the Apex Court appellants relied on a Sale Deed dt. 29.6.2001 executed by Defendant No. 4-The Sale Deed not exhibited before any Court-Held, Sale deed is permitted to be placed on record-Upon filing the review application before the High Court, the High Court shall permit the appellants to do the needful to get the sale deed exhibited.”*

The Petitioner submitted that they have a right to file the evidence for

appropriate disposal of matter in question in the Review Petition, and the same is liable to be accepted and can be taken on record.

4.19 The Commission, in the Impugned Order dated 10.04.2019, with regard to disallowance of preliminary & preoperative expenses for the period from FY 2004-05 to FY 2006-07, held as under:

“3.3.22

...

*The Petitioner signed the initial IA with GoU on 28.04.2004. As a prudent business practice, the Petitioner must have started the preliminary execution of activities related to Tanga SHP including land allotment etc. right after the signing of IA with GoU in the year 2004, as executed PPA with UPCL existed on that date. However, the Petitioner applied for land allotment on 02.01.2006, and got the letter of assurance regarding land allotment on 08.10.2006. In this regard, the Commission is of the view that the time overrun pertaining to FY 2004-05 to FY 2006-07 cannot be fully attributed to the Petitioner, as till the actual allotment of land for the project no substantial progress could have been expected from the Petitioner related to Tanga SHP. However, it is also to be noted that the Petitioner started the proceedings for land acquisition quite late after the signing of initial IA with GoU, i.e., almost after two years, which had eventually led to delay in getting the land allotted for the Tanga SHP. Accordingly, the Preliminary & Pre-operative expenses has been partially disallowed to the Petitioner for the period commencing from FY 2004-05 to FY 2006-07, i.e. 36 months, in accordance with the principles laid down in the Hon'ble ATE's above referred Order. Accordingly, in the absence of any satisfactory justification of the Petitioner, the Commission has disallowed 50% of average Preliminary & Pre-operative expense for a period of 36 months as discussed above.”*

4.20 As can be seen from the above, the Commission based on the records available with it at the time of passing of the Impugned Order dated 10.04.2019, held that the IA with the GoU was entered into by the Petitioner on 28.04.2004, still the Petitioner applied for land clearance on 02.01.2006, i.e. almost after a period of 2 years after signing of IA, therefore, the preliminary & preoperative expenses for the period from FY 2004-05 to FY 2006-07 was partially disallowed in light of the Hon'ble ATE's Order dated 27.04.2011.

The Petitioner in the instant Review Petition has brought on record the forest land clearance document dated 30.06.2004, which shows that the Petitioner had infact

started the proceedings for land acquisition in the year 2004 itself. The Commission, however, in the absence of availability of record at the time of passing of Impugned Order, considered the date of paying of requisite lease rent and compensatory afforestation for allotment of land for Tanga SHP by the Petitioner on 02.01.2006, as the date of initiation of proceedings for acquisition land from the GoU.

The letter dated 30.06.2004 brought before the Commission through the instant Review Petition constitutes the new and important matter or evidence on record, and accordingly, the contention raised by the Petitioner in this regard qualifies for review. The Commission is of the view that, had this document been available at the time of passing the Impugned Order, the partial disallowance of preliminary & pre-operative expense for the period from FY 2004-05 to FY 2006-07 would have not been done, as considering the said document it appears that the delay in land acquisition was beyond the control of the Petitioner. Accordingly, the Commission allows the review on this ground, and the partial disallowance of 50% preliminary & pre-operative expenses is hereby set aside and the same is allowed in full for the aforesaid period through this Review Order.

The rate of revised Tariff and the date of applicability have been discussed at subsequent paras of this Order.

#### **C. Time taken for obtaining clearance for tunnel construction**

4.21 With regard to the time taken for obtaining the clearance for construction of tunnel, the Petitioner submitted that the delay of six months from April, 2009 till October, 2009 cannot be termed as a deliberate delay, as the Petitioner could not immediately rush to the Government Authorities after receipt of the report from their consultant and seek permission for tunnel construction. The Petitioner submitted that introduction of tunnel into the project at that late stage of construction was a major disruption to the overall project, and had to be done by the Petitioner with due deliberation and consideration, and disallowance of the time taken, and thereby disallowing 100% of the average IDC and preliminary & pre-operative expenses during the same period by the Commission amounts to an error apparent on the fact of the record and is liable to be reviewed by the Commission.

- 4.22 The Petitioner further submitted that the Commission has observed in the Impugned Order that it took about 39 months, i.e. from October, 2009 to January, 2013 for the Petitioner to get the permission for tunnel construction from the Uttarakhand Government Authorities, and has summarily held that it should not have taken more than 12 months for the Petitioner to get the clearance, thereby disallowing 27 months of time as delay that was fully controllable, and thereby disallowing 100% of the average IDC and preliminary & preoperative expenses during this period, which is an error apparent on the face of record and needs to be corrected.
- 4.23 The Petitioner submitted that they acted with promptness in pursuing the case with the Government Authorities, and as discussed in preceding paras, the Petitioner cited out a summary of correspondences with and between, the GoU & GoI in the matter. The Petitioner also submitted that there are no instances available in the GoI website wherein such clearances have been obtained within a period of 12 months as considered by the Commission for determination of Tariff for Tanga SHP.
- 4.24 The Petitioner in response to Respondent's submission in this regard, submitted that it is an error apparent on the face of records/correspondence considering the fact that the Petitioner had no role to play during this process as it was totally an inter-governmental process and Petitioner could not be held liable for the time taken during this process. Further, whenever the Petitioner was asked to act during the process, they acted promptly in the best interest of the project.
- 4.25 The Commission, with respect to disallowance of the excess time taken by the Petitioner in obtaining clearance for construction of tunnel from the Govt. Authorities, in the Impugned Order held as under:

“ ...

*The Commission observed that it took almost 45 months to the Petitioner to get the clearance from the forest department GoU, i.e. from 09.04.2009 till 10.01.2013. The Petitioner got the report from their consultant, regarding the tunnel construction, in April, 2009 itself, and after passage of almost 6 months the Petitioner applied with authorities of GoU, to seek clearance for construction of tunnel, in October, 2009, and finally got the clearance in January 2013. In this regard the Commission is of the view that the period of 6 months from April, 2009 to October, 2009 was fully controllable and the Petitioner should have acted promptly in their own interest, and, therefore, the*

*Commission disallows the period of delay of 6 months as being fully controllable.*

*The Petitioner submitted that, the tunnel work could only be completed after change of land use permission granted in January, 2013, which directly impacted the time frame for the construction of the surge-shaft and penstock, as their location and alignment was interlinked with the construction and alignment of the tunnel. In this regard, the Commission is of the view that from the submissions of the Petitioner it appears that they are trying to put the blame of the entire delay on government authorities for delay in construction of tunnel, whereas, as discussed above, the Petitioner themselves initially delayed the process of applying for tunnel construction clearance by almost 6 months. Further, even after that it took another 39 months to the Petitioner in getting the final clearance. However, the Petitioner through its submissions has tried to shift this entire delay of entire 39 months on the Government authorities. In this regard, the Commission is of the view that the approach of the Petitioner in getting the clearance for tunnel construction appears to be very lackadaisical, as they being a developer, were expected to correspond and follow up with various clearance authorities for getting the early clearances for their project. It appears, rather than acting pro-actively in the matter of tunnel clearance, the Petitioner waited for the same to happen at its own pace which led to a delay of 39 months as discussed above.*

*The Commission agrees that there can be legitimate delay in getting these type of clearances, where different Govt. departments are involved and feasibility reports etc. needs to be prepared, but still there is no question of such delays extending to almost 39 months. The Commission is of the view that this clearly depicts negligence of the Petitioner in getting the clearance and if the Petitioner would have acted proactively, then it should not have taken a period of more than 12 months to obtain the clearance. Accordingly, the Commission, considers a period of 12 month as legitimate period for getting the approval from the authorities, and disallows a period of 27 months out of total 39 months as being fully controllable.*

*Hence, in accordance with the principles laid down in the Hon'ble ATE's above referred Order and in the absence of any satisfactory justification of the Petitioner, the Commission disallows average interest cost and average preliminary & pre-operative expense for a period of 33 months (6 months plus 27 months) as discussed above."*

4.26 The Commission, analysed the submissions made by the Petitioner in this regard and observed that the Petitioner has not submitted any new information or brought any new evidence on record to qualify its contention to be considered under review. The Petitioner through its submission has re-iterated the facts and information which were earlier submitted by it during the course of Tariff proceedings, and also taken into account by

the Commission while approving the Tariff for Tanga SHP, which is evident from the extract of Impugned Order dated 10.04.2019 as stated above.

4.27 In view of the above discussion, the Commission observed that the submissions made by the Petitioner in this regard are mere re-iteration of earlier submissions made by them, and it appears that the Petitioner in the guise of review is trying to re-open the already concluded issue without bringing any fresh evidence or information on record that was not available earlier. The Commission is of the view that the Petitioner's contention in this regard does not hold merit to be considered under review, and accordingly, the same is rejected.

Hence, the contention of the Petitioner is rejected as there is no ground of review that is being fulfilled, and there are no errors apparent on the face of the record.

**D. Delay of 8 months from August, 2016 to March, 2017**

4.28 The Petitioner in this regard submitted that the Commission in the Impugned Order observed that as per the revised DPR prepared after the floods of June, 2013, the expected date of commissioning was July, 2016 whereas the actual COD is 20.03.2017, i.e. a delay of 8 months, and, accordingly, disallowed the same as fully controllable. The Petitioner submitted that they had done everything possible to complete the project in a timely manner despite the great disruption and damage to the project due to the unprecedented floods of June, 2013. There was no road access to the project site until March, 2014, and only thereafter it was possible to prepare the revised DPR under difficult circumstances, which was necessitated due to a major natural calamity. At the time the revised DPR was prepared it was impossible to exactly predict the delay in obtaining financial closure, manufacturing of generators and other project restoration activities, therefore, there was bound to be some variation between the estimated timeframe and the actual time taken for completion due to various unforeseen and uncontrollable events, and accordingly, the disallowance by the Commission is an error apparent on the face of the record liable to reviewed by the Commission.

4.29 In this regard, the Commission in the Impugned Order dated 10.04.2019 has held as under:

*"Further, the Commission is of the view that the period of delay of 8 months from July, 2016, i.e. as*

*per the schedule given in the revised DPR till the CoD, i.e. 20.03.2017 cannot be assumed to be uncontrollable as no proper justification for said period of delay has been provided by the Petitioner, and accordingly, the delay on account of said period of 8 months has been disallowed by the Commission as being fully controllable.*

*Accordingly, the Commission disallows the average interest cost and average preliminary & pre-operative expense for the period of 8 months from August, 2016 to March, 2017. Therefore, the total disallowance of time overrun on account of fully controllable factors attributable to the Petitioner works out to 41 months, as discussed above, and the Commission disallows the average interest cost and average preliminary & pre-operative expense for said 41 months as discussed in following paras."*

In view of the above, it can be seen that the issue has already been dealt in detail by the Commission in the Impugned Order, and the Commission has already given its views on the same. The submissions made by the Petitioner in the present review are mere re-iteration of the information submitted at the time of Tariff proceedings and as such no new facts or information based on discovery of fresh evidence has been brought on record that warrants the issue to be considered under review.

4.30 Further, the Petitioner submitted that two Nos. of 2.5 MW generators and other electro-mechanical equipment were lost during the floods of June, 2013. These generators had to be remanufactured by M/s WEG and supplied/erected by M/s BFL Hydro Ltd. which are custom designed and manufactured for every hydro project, and is a time consuming and complicated process. Since the original generators were manufactured in Brazil and the new generators supplied were of different design which had to be matched with the turbines and other equipment previously supplied, this process could only be completed in July, 2016 as per WEG and BFL Hydro's manufacturing schedule. The Petitioner further submitted that it was extremely risky to transport this heavy equipment (each generator weighing about 13 tons) to the project site during the monsoon season of 2016 as there was considerable risk of the equipment being stranded, damaged or lost during transit in the hostile Himalayan terrain during the monsoon season. If the generators had sustained any damage during transport or lost, then the project would have been set back by another 18 months, therefore, the Review Petitioner and its electro-mechanical equipment supplier M/s BFL were constrained to take a decision in the best interests of the project to transport the generators only after the end of the monsoon season of 2016 in

November, 2016 and thereafter the equipment was erected, tested and commissioned in a short period of only 4 months time.

In this regard, the Commission would like to state that the Petitioner was well aware of the scheduled CoD as stated in the revised DPR of Tanga SHP and also about the loss of generators during the calamity of 2013, and had sufficient information of the topography and weather conditions at project site. The Petitioner, considering the same should have acted diligently, and planned its activities in a manner, such that E&M equipments could have been procured and transported to project site before the onset of monsoon, rather than waiting for the monsoon to get over, and then start the transportation process of equipments.

4.31 Further, the Petitioner also contended that, as per the principles of natural justice if the base timeline for project completion is taken as per revised DPR, then the base project cost should also be as per the revised DPR, as otherwise it is unfair and prejudicial to the Petitioner to be penalized on both counts. The Commission, in this regard would like to state that the Petitioner is trying to equate two different things in a single mould. The Commission, as per the Regulations, only after considering the prudence analysis of each and every fact available before it expresses its views on an issue, and there is no concept of minimum cost or any laid down principle for benchmarking of DPR cost to arrive at the allowable cost of the project. As discussed in the preceding paras, the hard cost of the project is one element, and the soft cost is other. The same methodology or approach may not hold good for both the cases as on the one hand hard cost is the cost that would have been incurred otherwise also even if the project is completed on time, however, the extra burden of soft cost depicts the inefficiencies in the execution of the project, that may or may not be within the control of the Petitioner. Similarly, the scheduled date of commissioning is another factor that requires separate analysis, based on which a tentative scheduled date could be anticipated. The Commission, in the instant case has been very clear in examining the issue of delay beyond the schedule given in the revised DPR, and as such there is no ambiguity or otherwise in the views expressed by the Commission. The Commission, based on the records and information available before it, doesn't find it prudent to allow the period of delay beyond the scheduled date of completion as per the revised DPR while allowing the capital cost of Tanga SHP.

Moreover, no new evidence or information has been brought on record by the Petitioner, that warrants the issue to be considered in review.

4.32 Accordingly, in view of the above discussion, the ground of review raised by the Petitioner with respect to disallowance of time overrun from August, 2016 to March, 2017 is rejected and the contention of the Petitioner in this regard is denied as there are no grounds of review which are being fulfilled.

**E. Rs. 68.24 Lakh of other income reduced from capital cost**

4.33 The Petitioner submitted that the Commission, as per the audited financial statements, has deducted Rs. 68.24 Lakh booked by the Petitioner under the head other income from FY 2011-12 to FY 2016-17, from the capital cost of the Tanga SHP. The Petitioner submitted that as per the said audited financial statements, an amount of Rs. 28.77 Lakh was incurred as expenses from FY 2011-12 to FY 2015-16 which were reported on the Profit & Loss statements, which would have otherwise been capitalized and added to the project cost, and accordingly, submitted that Rs. 28.77 Lakh must be deducted from the interest income of Rs. 68.24 Lakh, and only the remaining amount of Rs. 39.47 Lakh may be reduced from the project cost. The Petitioner submitted that the above amounts to an error apparent on the fact of the record, and is liable to be reviewed by the Commission.

4.34 The Petitioner further, at the time of making the additional submission before the Commission submitted that expenditure of Rs. 4,88,217 in FY 2013-14, Rs. 6,26,317 in FY 2014-15, and Rs. 3,05,727 in FY 2016-17 was also charged to P&L account of respective years, but the same was inadvertently left out while making the submissions in the Review Petition, and therefore, the total expenditure charged to P&L account prior to COD is Rs. 42.80 Lakh, and the same should be reduced against the interest income of Rs. 68.24 Lakh. The Petitioner submitted a revised statement to this effect vide its mail dated 06.09.2019 for consideration of the Commission.

4.35 In this regard, the Commission is of the view that there is an inadvertent error in not considering the said amount of expenditure incurred during the pre-construction period of the Tanga SHP, as is evident from the audited financial statements, while determining the Tariff. It is pertinent to mention here that the Petitioner ought to have claimed the said expenses as part of the preliminary and pre-operative expenses which they did not, and

also the Commission while determining the Tariff inadvertently skipped the same. The methodology suggested by the Petitioner for adjusting the said expenses against the income is not correct, as revenue and expense are two separate heads, and the Regulations talks about adjusting the revenue earned during the pre-construction period to be adjusted from the Capital cost, and that does not cover expenses of any nature to be adjusted against the said revenue. The Commission, accordingly, has allowed the said unclaimed expenses to be part of the capital cost by adding the same in the preliminary & pre-operative expenses claimed by the Petitioner at the time of Tariff proceedings, and the said additional expenses shall be subject to adjustment in the same manner as the earlier claimed preliminary & pre-operative expenses by the Petitioner on account of time overrun disallowed by the Commission in the Impugned Order dated 10.04.2019, and further modified through current Review Order. Further, the Commission out the aforesaid claim of Petitioner has disallowed the business promotion expenses amounting to Rs. 0.99 Lakh, as the same is not an allowable expense to be passed on in the Tariff, and, accordingly, allows an additional expenditure of Rs. 41.99 Lakh under the head preliminary & pre-operative expenses.

#### **F. Recoveries from insurance**

- 4.36 The Petitioner submitted that while calculating the total cost allowed in the Impugned Order, the Commission has reduced Rs. 221 Lakh as recoveries from the insurance company, which infact was against the claim for damages which was paid by insurance company for reinstatement of equipment lost to the manufacturer directly, and not paid to the Review Petitioner. This has wrongfully affected the E&M cost of Tanga SHP, and amounts to an error apparent on the fact of the record, and is liable to be reviewed by the Commission.
- 4.37 The Commission, in this regard, asked the Petitioner to submit the documentary evidence showing that the amounts have been paid directly to the manufacturer of equipments by the insurance company, and further, the equipment manufacturer has adjusted the said recovery from insurance company while raising the invoices on the Petitioner Company for supply of equipments.

The Petitioner, in response to the same submitted that the insurance company disbursed this amount in three instalments directly to suppliers, i.e. to M/s BFL & WEG

Industries in October 2015, June 2016, and in March 2017. The Petitioner also submitted that the insurance claim discharge vouchers/receipts for the three payments are showing that the insurance company has directly paid the amount to the suppliers, i.e. M/s BFL/WEG Industries, to reinstate/replace equipment that was previously supplied and lost in the flood, and as this was a reinstatement of previously supplied equipment, only the original invoices pertaining to the original supply have been recognized for the purpose of capitalizing assets and fresh invoices have not been accounted for this purpose by the Petitioner.

4.38 In this regard, the Commission in the Impugned Order dated 10.04.2019 has held as under:

*“3.3.18 Further, the Petitioner also submitted that at the time of flood of June, 2013, the project was in construction stage and the total flood losses were estimated at approximately Rs. 500 Lakh against which an insurance claim was settled at Rs. 221 Lakh. The Commission has, accordingly, based on the submission of the Petitioner adjusted the recovery of insurance claim of Rs. 221 Lakh from the allowable project cost of Tanga SHP as on CoD.”*

In this regard, the Commission, based on the information and records available at the time of passing of Impugned Order dated 10.04.2019, concluded that the said recovery of Rs. 221 Lakh was received by the Petitioner, and then the same was paid to the equipment supplier (OEM), and, accordingly, reduced the same from the project cost of Tanga SHP allowable to the Petitioner. The Petitioner, in the instant Review Petition has submitted documents showing that the insurance proceeds have been received directly by the equipment supplier (OEM), and also submitted that no fresh invoice has been accounted for the equipments that have been reinstated by the equipment supplier in lieu of the said insurance proceeds. The submissions of the Petitioner in this regard is a new and important matter or evidence in the matter, which must have been available earlier also, but was not presented for consideration due to ignorance, and, accordingly, the Commission allows the same through current Review Order. The Commission is of the view that, had the same documents/information been available at the time of original Tariff proceedings, the amount of insurance proceeds would not have been deducted from the capital cost allowable for Tanga SHP by the Commission.

In view of the above discussion, the Commission allows the review on the ground

of wrongful deduction of insurance proceeds, and accordingly, the inadvertent deduction of Rs. 221 Lakh, on account of insurance proceeds, from the Hard Cost of Tanga SHP is hereby set aside and the Hard Cost of the project shall be reinstated with the even amount for the purposes of Tariff determination.

**G. Disallowance of Rs. 145 Lakh of hard cost under the head of Civil Works.**

4.39 The Petitioner submitted that the Commission had allowed Rs. 3414.92 Lakh against Rs. 3560.43 Lakh of cost actually incurred by the Review Petitioner under the head Civil Works thereby reducing Rs. 145 Lakh from civil works cost on the basis of bills considered by the Commission.

4.40 The Petitioner submitted that they had submitted details of more than 1500 numbers of bills, of which about 1100 numbers were bills below Rs. 2 Lakh which added up to a value of Rs. 614 Lakh. That due to the extremely large number of small bills accumulated over nine to ten years it was very voluminous work and further due to the time constraints, details of a few small bills were inadvertently missed, even though the cost was legitimately incurred by the Petitioner towards civil works and the same was reflected in its audited financial statements. The Petitioner submitted that the Commission had summarily deducted Rs. 85 Lakh worth of expenditure incurred by the Petitioner towards civil works, without giving it an opportunity to explain or being directed to present details of these small bills, which is against the principles of natural justice and also an error on the face of the records and financial statements submitted. In this regard, the Petitioner submitted details of similar small bills aggregating to value of Rs. 76.87 Lakh, and requested that the same be brought on record, so that the error in the reduction of civil cost may be corrected.

4.41 The Petitioner further submitted that some bills with value higher than Rs. 2 Lakh (aggregating to about Rs. 60 Lakh) have also been disallowed from the civil works cost by the Commission even though details of the same were submitted, which is an error apparent on the face of the record, and therefore liable to be corrected. The Petitioner submitted that the Commission has erroneously disallowed Rs. 33.81 Lakh which pertains to purchase of steel from M/s Kashi Vishwanath Steel. The Petitioner submitted that the bills for the same could not be traced at that time, and the Petitioner submitted the ledger

statement confirming the purchase as provided by M/s Kashi Vishawanath Steel, for consideration of the Commission.

4.42 The Petitioner was apprised by the Commission during the current review proceedings that the claim of Petitioner regarding disallowance of Rs. 33.81 Lakh in the absence of bills from M/s Kashi Vishawanath Steel is a gross error of understanding on the part of the Petitioner, as the Commission has duly allowed the same based on the ledger confirmation of the vendor submitted before the Commission during the Tariff proceedings. The Petitioner was also informed that the Commission had disallowed the amounts towards bills of ACC Ltd. for purchase of cement, one bill of petty contractor related to civil works, and other correction in the bill details based on the invoices submitted by the Petitioner, aggregating to around Rs. 60 Lakh. The Petitioner in response to the same, submitted as follows:

- Since, the invoice no. 3598654639 of ACC Limited amounting to Rs. 10,01,680 was not properly legible, the Petitioner substantiated the expenditure by the purchase order which was placed with ACC Limited on 21.09.2009 for 5272 bags of cement at the rate of Rs. 225/bag and Rs. 11,86,200 of payment was made on 22.09.2009 (as shown in RTGS counter slip enclosed). On 18.11.2009, ACC Limited revised the price to Rs. 190/bag and supplied the cement vide invoice No.3598654639 with invoice value of Rs.10,01,680. The balance amount with ACC Limited was adjusted in subsequent purchase. The Petitioner submitted the details of RTGS & communication with the vendor in conformity to the same.

- The invoice no. 3598654961 of ACC Ltd. amounting to Rs. 23,69,920 wherein the site address had been mentioned as Motighat, comprise of cement purchases, out of which Rs. 17,63,640 Lakh of cement was utilized by Tanga SHP and booked into its expenditure account, with the remaining being utilized by Motighat SHP, and accordingly the Petitioner has claimed an amount of Rs. 17,63,640 Lakh in Tanga SHP.

- The Petitioner submitted civil contractor Dharmendra Singh's bill dated 20.05.2016 for Rs. 4,76,278 for supply of 20 mm aggregate to be utilized in civil construction works, alongwith payment detail, and requested the Commission to consider the same.

4.43 The Commission, in this regard, in the Impugned Order dated 10.04.2019 held as under:

*“3.3.10 The total invoices submitted by the Petitioner under the head civil works amounted to Rs. 2801.41 Lakh. Further, the Petitioner also submitted details of invoices less than 2 Lakh amounting to Rs. 613.50 Lakh. Accordingly, the Commission has considered an amount of Rs. 3414.92 Lakh under the head civil works against the Petitioner’s claim of Rs. 3560.43 Lakh. Further, as discussed above, in order to work out the head wise expenditure under each head of civil works, the Commission has pro-rated the amount of capital cost, as per the actual bills & details of expenses less than Rs. 2 Lakh submitted by the Petitioner, in the ratio of head wise expense claimed by the Petitioner under the head civil works.*

*...”*

As can be seen from above, the Commission based on the records and information available before it at the time of determination of Tariff for Tanga SHP, had considered the detail of expenses below Rs. 2 Lakh as submitted by the Petitioner in its Tariff Petition, and for expenses above Rs. 2 Lakh, the actual invoices were verified, and accordingly, the same were allowed after prudence check.

4.44 The Commission analysed the submissions made by the Petitioner in the current Review Petition and is of the view that the details of Rs. 76.87 Lakh submitted by the Petitioner for small value invoices pertaining to civil works, appears to be legitimate, and depicts the bonafide expenditure made by the Petitioner for its Tanga SHP. Further, the justification and information submitted by the Petitioner, with respect to invoices of ACC Ltd. and civil contractor Dharmender Singh, which have been disallowed by the Commission earlier, also appears to be in order. The Commission in this regard is of the view that these expenses appears to be legitimately incurred by the Petitioner for its Tanga SHP, and were earlier disallowed in the absence of any information with regard to the same. The Petitioner’s submission in this regard, is an important information for the purpose of review, and merits review of the Impugned Order dated 10.04.2019 issued by the Commission.

4.45 In view of the above, the Commission allows additional Rs. 76.87 Lakh for detail of invoices below Rs. 2 Lakh now submitted by the Petitioner, and Rs. 32.42 Lakh on account of invoices/explanation submitted by the Petitioner as discussed above, thus totalling to Rs. 109.29 Lakh.

## H. Disallowance of Rs. 5.31 Lakhs of account of Miscellaneous fixed assets

- 4.46 The Petitioner in this regard submitted that the details of Rs. 38.32 Lakh of expenditure on Miscellaneous fixed assets was submitted during the tariff proceedings, of which the depreciated value was Rs. 15.65 Lakh. However, the Commission has only allowed Rs. 10.35 Lakh and disallowed Rs. 5.31 Lakh, which is an error apparent on the face of the record and liable to be corrected by the Commission.
- 4.47 The Commission during the current review proceedings asked the Petitioner to resubmit the details with respect to the miscellaneous fixed assets claimed by it, in response to which apart from the details submitted earlier, the Petitioner submitted additional invoices not submitted earlier by them amounting to Rs. 7.15 Lakh, the depreciated value of which was Rs. 4.60 Lakh.
- 4.48 The Commission with respect to Miscellaneous Fixed Assets, held as under in the Impugned Order dated 10.04.2019:

*"3.3.17 Further, the Petitioner has also claimed miscellaneous fixed assets amounting to Rs 15.66 Lakh, against which an amount of Rs. 10.35 Lakh could be verified from the invoices submitted by the Petitioner. Accordingly, the Commission allows an amount of Rs. 10.35 Lakh under the head miscellaneous fixed assets for Tanga SHP as on CoD."*

As can be seen from above, the Commission while determining the Tariff of Tanga SHP, has allowed the depreciated value of miscellaneous fixed assets based on the invoices produced by the Petitioner in support of the same, and accordingly allowed an amount of Rs. 10.35 Lakh against the Petitioner's claim of Rs. 15.66 Lakh.

- 4.49 The Petitioner in the current Review Petition has submitted the additional invoices in support of its claim the depreciated value of which is Rs. 4.60 Lakh. The Commission is of the view that the same can allowed in the current review, as had the same been available at the time of original Tariff proceedings, the cost would have been allowed. The Commission, in view of the above and in light of discussion in the preceding paras of this Order, allows an addition in the miscellaneous fixed assets amounting to Rs. 4.60 Lakh.

## 5. Revised Tariff and date of applicability

- 5.1 The Commission, as discussed herein above, allows the review on the 5 grounds of review raised by the Petitioner as follows:

1. Preliminary & Preoperative Expenses Partly Disallowed.
2. Rs. 68.24 Lakh of other income reduced from capital cost.
3. Recoveries from insurance.
4. Disallowance of Rs. 145 Lakh of hard cost under the heading of Civil Works.
5. Disallowance of Rs. 5.31 Lakhs of account of Miscellaneous fixed assets.

5.2 Further, as discussed in the Impugned Order dated 10.04.2019, the IDC arrived at after reducing the penal interest had been prorated in the ratio between the “actual capital cost allowed (Hard Cost)” and “the capital cost claimed by the Petitioner (Hard Cost)”. The relevant portion of the Order dated 10.04.2019 is reproduced hereunder:

*“3.3.26 The IDC arrived at after reducing the penal interest has been prorated in the ratio between the “actual capital cost allowed (Hard Cost)” and “the capital cost claimed by the Petitioner (Hard Cost)””*

Accordingly, in view of the above, the amount of IDC allowed earlier by the Commission has been adjusted to give effect to the additional cost allowed in the current Review Order.

5.3 The summary of Capital Cost of Tanga SHP allowed earlier vide Impugned Order dated 10.04.2019, and now allowed by the Commission is given in the Table below:

**Capital Cost allowed by the Commission (Rs. in Lakh)**

S. No.	Particulars	Approved in Tariff Order dated 10.04.2019 (Amt. Rs. in Lakh)	Approved now after review (Amt. Rs. in Lakh)
1	Land	38.10	38.10
2	Civil Works	3414.92	3524.21
3	Power Plant & Electro-mechanical equipments	858.60	858.60
4	Miscellaneous Fixed assets	10.35	14.94
5	Preliminary & Pre-operative expenses	337.01	430.51
	Less: Recoveries from Insurance Company	-221	0
6	Net Hard Cost Allowed	4437.98	4866.36
7	Interest During Construction	1525.92	1673.21
8	Less: Other Income	68.24	68.24
<b>Total</b>		<b>5895.65</b>	<b>6471.32</b>

5.4 Accordingly, the Commission approves the revised levelised Tariff of Tanga SHP as Rs. 6.44 per unit, as against the levelised Tariff of Rs. 5.97 per unit earlier approved by the Commission vide its Impugned Order dated 10.04.2019. The revised levelised Tariff will

be applicable w.e.f 20.03.2017 being the date of CoD of the project, and shall be valid for a period of 35 years.

- 5.5 The difference in the levelised Tariff approved by this Order and the levelised Tariff being paid to the Petitioner till date, on the basis of Impugned Order dated 10.04.2019, is hereby allowed to be recovered by the Petitioner from UPCL as arrears for the past period who shall pay the same in 03 equal installments, commencing from October, 2019 in accordance with this Order.
- 5.6 Therefore, in light of the provisions in the Statutes, the facts of the case, the submissions of the Petitioner and precedents set by the Hon'ble Supreme Court and the Hon'ble ATE, the Commission partially allows the Review petition with respect to grounds stated at para 5 above, thus revising the tariff already allowed vide its Tariff Order dated 10.04.2019 as discussed in preceding paras of this Order.
6. Ordered accordingly.

**(M.K. Jain)**  
**Member (Technical)**

**(D.P. Gairola)**  
**Member (Law)**