



IN THE HIGH COURT OF SIKKIM AT GANGTOK
(CVIVIL EXTRA-ORDINARY JURISDICTION)

DATED : 14.10.2010

CORAM

HON'BLE MR. JUSTICE P.D. DINAKARAN, CHIEF JUSTICE

Writ Petition (C) No. 40 of 2005

1. Nar Bahadur Bhandari,
Resident of Gangtok,
East Sikkim.
2. Shri Anil Lachenpa,
Resident of Lachen, North Sikkim
Presently residing at Tibet Road,
P.O. & P.S. Gangtok,
Sikkim.
3. Shri Bal Chand Sarda,
Resident of M. G. Marg,
P.O. & P.S. Gangtok,
East Sikkim.

... Petitioners

-versus-

1. The State of Sikkim,
Represented by the Chief Secretary,
Government of Sikkim,
Gangtok.
2. The Principal Chief Engineer-cum-Secretary
to the Govt. of Sikkim,
Energy & Power Department,
Gangtok.

3. M/s. Teesta Urja Ltd.,
119, Jorbagh,
New Delhi - 110 003, India.
 4. The Union of India,
Represented by the Secretary,
Ministry of Power,
New Delhi.
 5. The Secretary to the Govt. of India,
Ministry of Forest & Environment,
New Delhi.
 6. Chairman,
Central Electricity Authority,
Sewa Bhavan,
R. K. Puram,
New Delhi - 110 066.
- ... Respondents.

For the petitioners : Mr. M. Z. Ahmed, Sr. Advocate
with Ms. B. Dutta, Advocate.

For the respondents : Mr. A. Mariarputham, Advocate
General, with Mr. J. B. Pradhan,
Addl. Advocate General and Mr. S.
K. Chettri, Asstt. Govt. Advocate
for the State-respondents.

Mr. Karma Thinlay Namgyal,
Central Govt. Counsel for
respondents No. 4, 5 and 6.

Mr. Jayanta Mitra, Sr. Advocate
with Mr. Tarun Johri, and Ms.
Sunita Pradhan, Advocates for
respondent No. 3.



JUDGMENT

Dinakaran, CJ

I. The core issue

1. The core issue that arises for consideration in this Writ Petition is: Whether the Agreement dated 18.07.2005 entered into between the State of Sikkim and M/s. Teesta Urja Ltd. (respondent No.3), for setting up a Hydro Electric Project - Teesta Stage III based on the policy of State/Letter of Intent dated 26.02.2005, is contrary to law, guidelines, and mandatory instructions of the Ministry of Power, Government of India and opposed to public interest?

II. Public Interest Litigation

2. This is a Public Interest Litigation. The first petitioner was the former Chief Minister of the State of Sikkim during the period 1979 to 1984. He was subsequently elected as a Member of Parliament and then again was the Chief Minister until 1994; the second petitioner is an active member and office bearer of the Sikkim Pradesh Congress Committee; and the third petitioner is the Treasurer of the Sikkim Pradesh Congress Committee and was also the former Mayor of Gangtok and former Member of the Legislative Assembly of Sikkim.

3. Heard Mr. M. Z. Ahmed, learned Senior Counsel for the petitioners, Mr. A. Mariarputham, learned Advocate General for respondents No. 1 and 2, Mr. Jayanta Mitra, learned Senior Counsel for respondent No. 3 and Mr. Karma Thinlay Namgyal, learned Central Government Counsel for respondents No. 4, 5 and 6.


III. The Case of the Petitioners

4. The relevant and undisputed factual matrix of the case is stated as follows: -

(i) The proposal for carrying out Hydro Electric Projects in the State of Sikkim originated in the year 1974. The Sikkim State became part of the Indian Union in the year 1975 by the 36th Amendment of the Constitution of India. An expert team was constituted by Central Water Commission (CWC) to formulate the proposal and make suggestions for carrying out such investigations for establishing Hydro Electric Generation Schemes in Sikkim particularly in Teesta and Rangit Valleys of Sikkim.

(ii) CWC prepared a detailed Project Report for the 1200 MW Teesta Stage-III Hydro Electric Project in the year 1987. The Ministry of Power, Government of India





requested the Government of Sikkim's concurrence to carry out the execution of the Project under the Central Sector with National Hydroelectric Power Corporation Ltd. (NHPC) as the implementing agency in October 1987 by a letter dated 12.10.1987. The State Government forwarded its concurrence to the said proposal on 14.03.1988.


(iii) The Detailed Project Report was drawn by NHPC for the purpose of obtaining Techno Economic Clearance in December 1990.

(iv) In the year 1991, the Government of India announced a new liberalized policy whereby, the Government of India permitted entry of private parties in the field of power generation and consequently, certain private parties expressed their interest in executing Teesta Stage-III Hydro Electric Project for generating 1200 MW electricity.

(v) The Government of Sikkim, to secure its interest in a better manner, invited interested parties for implementation of the aforesaid project.

(vi) The State Government without taking any policy decision or carefully examining the proposals of the private parties in detail, arbitrarily withdrew its original proposal to execute the project with NHPC.






(vii) Government of Sikkim thus proposed to invite bidding from the interested developers across the globe, to develop the said Power Project on 'Build, Own, Operate and Transfer' (BOOT) basis in the year 1993, and also sought permission from the Central Government to execute the above project on BOOT basis. Based on such invitation several interested parties came forward to execute the Teesta Stage-III Hydro Electric Power Project for generating 1200 MW electricity. Of them seven private parties were short listed. For taking further decision in the matter, a High Level Committee was formed to evaluate the bids and offers.

(viii) The Ministry of Power, Government of India in their letters dated 18.01.1995 and 15.02.1995, stipulated a mandate that after 18.02.1995, private power projects whose total estimated cost exceeded Rs.100 crores, would have to be awarded only through process of competitive bidding.

(ix) Thereafter, by letter dated 02.08.1996, the Government of India clarified that competitive bidding will not be necessary for selection of the private company partner in joint venture projects, where the State Electricity Board/Public Sector Undertakings hold the major share in






the joint venture company, i.e. a minimum of 51% equity share. By the said letter dated 02.08.1996, the Government of India also invited attention to their earlier letter dated 28.06.1996, which contemplates that International Competitive Bidding (ICB) be followed for award of Engineering, Procurement and Construction (EPC) contracts for projects awarded through the MOU/LOI route, and that, in case of joint venture projects between State Electricity Board/Public Sector Undertaking and a private company, International Competitive Bidding may be followed, only in cases where the private project developer has not been selected through competitive bidding.

(x) By letter dated 10.01.1997, Ministry of Power, Government of India made it clear that MOU/LOI signed on or before 18.02.1995 by the State Government/State Electricity Boards with independent power producers for implementation of the project by the latter, would alone be considered by the Central Electricity Authority (CEA) for accord of their clearance and 31.03.1996 would be the deadline for such 'in-principle' clearance; and that where the project cost is more than Rs.100 crores, the techno-economic clearance by CEA is mandatory.







(xi) Out of seven parties, only three parties submitted their bids and in view of repeated requests by other parties, the final date was fixed as 24.12.1997. The bidding process continued for a long period of time but none of the bids submitted were attractive and beneficial for the State.

(xii) The State, therefore, once again proposed to allot the Teesta -III along with Teesta I and II to NHPC in November, 2002. NHPC was willing to execute the project on Build, Own and Operate (BOO) basis, as per the guidelines of the Government of India. But the State-respondents wanted the project to be developed on Build, Own, Operate and Transfer (BOOT) basis. Hence, the matter was referred to a Negotiation Committee which was constituted in January, 2003 for carrying out negotiation with NHPC. But no settlement could be arrived before the Negotiation Committee.

(xiii) In the year 2003, the new Electricity Act, 2003 came into force, which facilitated development of Hydro-power Projects liberally. Government of India announced the 50,000 MW Hydro Power Initiative to harness the untapped hydro potential in the country.






(xiv) In October, 2003, the Ministry of Power clarified that in case NHPC is unable to meet the requests of the State Government, the State would be well within its right to either allot the projects to Independent Power Producers or to develop the projects under joint sector in partnership with developers.

(xv) Based on the new liberal policy, the Cabinet of the State met on 25.05.2004 and decided to speed up the efforts to tap the hydro power potential in the State. Accordingly, a High Powered Hydro Power Committee was constituted on 15.06.2004 to expedite development of the Hydroelectric projects in the State of Sikkim.

(xvi) The Government of Sikkim, thereafter, announced the Power Policy, which proposed that the projects above 25 MW capacity would be developed on BOOT basis under joint sector with Government of Sikkim holding 25% of equity share in the projects and the partners would have to arrange the funds for equity participation by Government and Government shall repay the loan from the revenues accruing from the free power.

(xvii) The High Power Committee constituted by Notification dated 15.06.2004 recommended 13 projects in the State of Sikkim, one of them being Teesta Stage-III





Hydro Electric Project and the same was recommended to the consortium led by M/s. Athena Projects Private Limited.


(xviii) The Cabinet Note dated 21.02.2005 proposing award of 13 projects to various developers as recommended by the High Powered Hydro Power Committee was considered and approved by the Cabinet in its meeting held on 22.02.2005.

(xix) On 26.02.2005 the Cabinet approved the Policy of the State Government in the matter of awarding contract to Athena Projects Private Ltd. – a Consortium for the development of Teesta Stage-III Hydro Electric Power Project, 1200 MW electricity production, one of the major power projects in the country, on BOOT arrangement.

(xx) On 06.04.2005, M/s. Athena Projects Private Limited informed the Government that it has incorporated the Company, Teesta Urja Limited, respondent No.3 herein, as a **Special Purpose Vehicle** for implementation of the project.

(xxi) The Government of Sikkim by its letter dated 20.04.2005 approved the formation of the Company, whereunder, M/s. Athena Projects Private Limited along with its consortium partners would hold 74% of the equity





of Teesta Urja Limited and the Government of Sikkim would hold 26% of the equity of Teesta Urja Limited.


(xxii) The Government of Sikkim, thereafter, entered into an Agreement with Teesta Urja Ltd. (respondent No.3) on 18.07.2005, for the development of Teesta Stage-III Hydro Electric Power Project, for production of 1200 MW electricity, one of the major power projects in the country.

5.1 Mr. M.Z. Ahmed, learned Senior Counsel for the petitioners, with the above backdrop of the case, contends that the very policy of the State Government, as chalked out by the Cabinet in the Letter of Intent dated 26.02.2005, is contrary to public interest and also various guidelines issued by the Ministry of Power, Government of India dated 18.01.1995, 28.06.1996, 02.08.1996, 09.01.1997 and 10.01.1997, which mandate:

(i) that after 18.02.1995, private power projects whose total estimated cost exceeded Rs.100 crores, would have to be awarded only through International Competitive Bidding (ICB);

(ii) that International Competitive Bidding (ICB) would have to be followed for award of Engineering, Procurement and Construction (EPC) contract for projects routed through the Memorandum of Understanding/Letter







of Intent route after 18.02.1995. In the case of joint venture projects, between the State Electricity Boards/Public Sector Undertakings and a private company, ICB may be followed only where the private project developer has not been selected through competitive bidding;

(iii) that projects routed through Memorandum of Understanding /Letter of Intent signed on or before 18.02.1995 by the State Governments/State Electricity Boards with Independent Power Producers (IPPs) for implementation of projects by the latter, would be considered by Central Electricity Authority (CEA) for accord of their clearance and that, where project cost exceeding Rs.100 crores, Central Electricity Authority's **techno-economic clearance** would be required;

(iv) that International Competitive Bidding (ICB) is not necessary for selection of private company partner in joint venture projects between the State Electricity Boards / Public Sector Undertakings and a private company, where State Electricity Board/Public Sector Undertaking holds the majority share in the joint venture company, i.e. a minimum of 51 % of equity shares of the joint venture company. In the instant case, the State Government holds



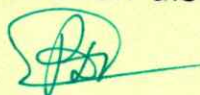



only 26 % of the equity shares and, therefore, International Competitive Bidding (in the matter of EPC contract/turnkey contract) could not be dispensed with;

(v) that the Central Electricity Authority's techno-economic clearance is also mandatory as per Section 29 of the Electricity (Supply) Act, 1948 and Section 8 of the Electricity Act, 2003, but the same has not been complied with in the instant case;

(vi) that the impugned Agreement dated 18.07.2005 is contrary to the recommendations of the Carrying Capacity Study of Teesta Basin in Sikkim by the Centre for Inter-Disciplinary Studies of Mountain & Hill Environment (CISMHE), University of Delhi, an Expert Body constituted by the Ministry of Environment and Forests, Government of India, which thoroughly weighed the impacts of the impugned project on ecology and environment as well as biodiversity in Teesta Basin in Sikkim.

5.2 Mr. M. Z. Ahmed, the learned Senior Counsel for the petitioners, further contends that the Teesta Urja Ltd. (respondent No.3), has not declared technical and financial capacity of its Board of Directors. If the project ultimately fails, not only the State Government, but the Nation also would suffer






on account of ecological and environmental imbalance, as the forest lands are diverted for the purpose of the impugned project. That apart, the private parties, whose lands would be acquired for the impugned project, would also be put into irreparable loss and hardship. In any event, it is argued that 12% free power to the State for the first 15 years and 15% free power to the State from the 16th to the end of the 35th year, as provided in the Agreement, would not compensate the loss that would be caused to the eco-friendly environment and biodiversity conditions that prevail in the impugned Teesta basin.

5.3 According to Mr. M.Z. Ahmed, learned Senior Counsel for the petitioners, the impugned Agreement dated 18.07.2005 is illegal, because the Letter of Intent dated 26.02.2005, which is also called the Policy of the State, was issued to Athena Projects Private Limited, the leader of the consortium members, while the Agreement was signed by a third party namely Teesta Urja Limited (respondent No.3), the Special Purpose Vehicle, who is in no way connected with the Letter of Intent dated 26.02.2005.

5.4 In any event, it is contended that the Special Purpose Vehicle (SPV) Teesta Urja Limited (respondent No.3) could not be treated as a Public Sector Undertaking as the State does not possess 51 % of equity shares but has got only limited interest in





the said Special Purpose Vehicle i.e. 26 % of the equity shares, whereas the consortium members of Athena Projects Private Ltd. have 74 % of equity shares with them.


5.5 The decision making process adopted in awarding the impugned contract is therefore, arbitrary, discriminatory and illegal.

6. The petitioners have also filed two miscellaneous applications, viz. Civil Misc. Application No.114 of 2006 and No. 127 of 2006 for amendment of the prayers, whereunder, the petitioners propose to challenge the policy of the State Government drawn by the Letter of Intent dated 26.02.2005 and raise additional pleadings respectively. But the petitioners did not press the C.M.A No. 114 of 2006 and, therefore, the same was dismissed as withdrawn by order dated 17.03.2008. The C.M.A. No.127 of 2006, for raising additional pleadings, was ordered vide this Court's order dated 17.03.2008.

IV. Case of the State Government

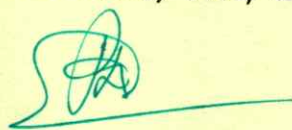
7. Mr. A. Mariarputham, learned Advocate General appearing for the respondents No. 1 and 2 (viz. State of Sikkim) contends:






(i) that the above writ petition is politically motivated, and therefore, the same is not a Public Interest Litigation. In this regard, the learned Advocate General invited my attention to the earlier order of the Division Bench of this Court dated 28.04.2008, made in a similar Public Interest Litigation viz. W.P.(C) No. 25 of 2006, filed by the very same writ petitioners on the same cause of action, challenging the resolution of the Cabinet dated 22.02.2005 and the consequential Letter of Intent dated 26.02.2005 (viz. the Power Policy of the Government of Sikkim) for implementing 13 Hydro Electric Projects, including the impugned Teesta Stage III Hydro Electric Project;

(ii) that after the new enactment of the Electricity Act, 2003, the Central Government liberalized the National Electricity Policy, encouraging private participation in implementing such projects liberally, smoothly and effectively; and that the Central Government has given discretion to the respective State Governments to work out their own modalities. The new National Electricity Policy dated 12.02.2005 of the Central Government, is made in compliance with Section 3 of the Electricity Act, 2003, and





the same provides for private participation for speedy implementation of the Hydro Electric Projects in the country;

(iii) that the terms of Letter of Intent dated 26.02.2005 (viz. the Power Policy of the Government of Sikkim) and the Agreement dated 18.07.2005 of the impugned project would financially benefit the State, Nation as well as public at large to the maximum;

(iv) that since the petitioners had withdrawn their CMA No. 114 of 2006 for amendment, challenging the Cabinet decision dated 22.02.2005 and consequential Letter of Intent dated 26.02.2005 (viz. the Power Policy of the Government of Sikkim) as well as Agreement dated 18.07.2005, they had given up their rights to challenge the implementation of the impugned Teesta Stage-III Hydro Electric Project. In this regard, the learned Advocate General invites my attention to the order dated 17.03.2008 passed by the Division Bench of this Court in CMA No. 114 of 2006;

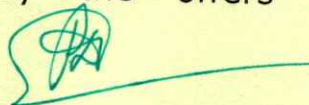
(v) that the petitioners have no locus standi to challenge the implementation of the impugned Teesta




Stage-III Hydro Electric Project as they had neither shown any interest in the development of the impugned Teesta Stage-III Hydro Electric Project; nor was a competitor along with M/s. Athena Consortium; nor was one among those other entities who showed their interest, namely,

- (i) NHPC,
- (ii) NTPC,
- (iii) Sutlej Jal Vidyut Ltd., and
- (iv) Cosmos Electric Supply Pvt. Ltd. Consortium etc.

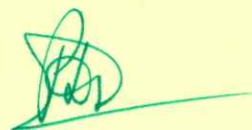
(vi) that the Hydro Electric Power Projects in the State of Sikkim are decades-old proposals. Wide publicity was given inviting participation of developers of Hydro Electric Power Projects under joint venture, even before the Electricity Act, 2003 came into force. Forty one (41) developers showed their interest for implementing the Hydro Electric Power Projects; but many of them were not willing to accept the terms proposed by the Government of Sikkim. After the new Electricity Act, 2003 came into force, extensive exercises were taken by the Government of Sikkim during the period of November, 2004 and February, 2005, inviting various developers to present their credentials and plans before the High Powered Hydro Power Committee, constituted to study the offers of the






developers and also to determine the terms of the policy of the Government of Sikkim in this regard. It is only on the recommendations of the said High Powered Hydro Power Committee, a Letter of Intent dated 26.02.2005, which is the policy of the State of Sikkim, was drawn and approved by the Cabinet; pursuant to which an Agreement dated 18.07.2005 was also executed for implementation of the impugned Teesta Stage-III Hydro Electric Project. Thus the power policy of the Government of Sikkim namely, the Letter of Intent dated 26.02.2005, drawn and approved by the Cabinet was well within the public domain;

(vii) that the power policy of the State of Sikkim was drawn in consonance with the National Power Policy of the Central Government, which was formulated in compliance with Section 3 of the Electricity Act, 2003 and, therefore, no malafide could be attributed either against the High Powered Hydro Power Committee or the Cabinet or the Government of Sikkim in formulating the said power policy of the State, as the same is not contrary to or in contravention to the law of land; nor the petitioners have alleged malafide in the selection of M/s Athena Consortium among the five developers, who envisaged interest in






Teesta Stage-III Hydro Electric Project, and agreed with all the terms of the Power Policy of the Government of Sikkim; because the other developers viz. NTPC, NHPC and Sutlej Jal Vidyut Ltd. were not willing to accept the terms of the Power Policy of Government of Sikkim; the Cosmos Electric Supply Pvt. Ltd., even though had agreed with the terms of the Power Policy of the Government of Sikkim, wanted 45 years instead of 35 years for BOOT basis;

(viii) that in the absence of any such allegation of malafide in formulating the public policy of the Government of Sikkim, based on well defined reasons and the interest of the people, by the High Powered Hydro Power Committee, or in selection of the M/s Athena Consortium for implementing the impugned project, it may not be proper to have a judicial scrutiny of the said policy decision dated 26.02.2005 or the consequential agreement dated 18.07.2005 by way of a judicial review, as this Court is concerned with only the decision making process but not the decision itself while exercising its powers under Article 226 of the Constitution of India;

(ix) that the implementation of the impugned Teesta Stage-III Hydro Electric Project is, therefore, neither






irrational, nor arbitrary, nor malafide, nor unreasonable, nor against any provisions of law, nor opposed to public policy, nor opposed to public interest; and therefore no reasonable person could have any grievance against the impugned project;

(x) that the letters dated 18.01.1995, 02.08.1996 and 09.01.1997 issued by the Ministry of Power, Government of India relied upon by the petitioners are all related to clarifications provided under the Electricity (Supply) Act, 1948 and the policy framed thereunder, requiring to adopt competitive bidding process for selection of private participants to the joint venture power projects; but the said letters do not survive after the National Power Policy dated 12.02.2005 formulated under Section 3 of the Electricity Act, 2003;

(xi) that the impugned project is not violative of any provisions of the Electricity Act, 2003, the National Electricity Policy 2005, the Forest Conservation Act, 1980, the Environmental (Protection) Act, 1986, the Wild Life (Protection) Act, 1972 and the Biological Diversity Act, 2002 or any of the policies, guidelines, circulars, instructions, or proceedings of the competent statutory authorities under





the said statutes, nor in violation to any of the provisions of Sikkim State Financial Rules, 1979. In this regard, Mr. Mariarputham, learned Advocate General invited my attention to Sections 3, 7, 8 and 185 of the Electricity Act, 2003 and the National Electricity Policy, 2005;

(xii) that the power policy of the State of Sikkim drawn as Letter of Intent dated 26.02.2005 in consonance with the National Electricity Policy dated 12.02.2005 is nothing but Open Axis Policy to develop their own public private partnership model.


(xiii) that the State Government had taken a decision on 22.02.2005 to proceed with the Letter of Intent dated 26.02.2005 and to entrust the impugned project to the respondent No. 3, because NHPC was not willing to implement the impugned project on BOOT basis; but they were willing to undertake the impugned project on BOO basis which is not favourable to the State Government and therefore, the contention of the petitioners that the Government of Sikkim deliberately avoided NHPC is misleading;



(xiv) that the National Power Policy, 2005 permits the State Government to frame its own policy in consonance with the National Electricity Policy, 2005 formulated under Section 3 of the Electricity Act, 2003. The Government of Sikkim, therefore, as recommended by the High Powered Hydro Power Committee, decided to invite the private participants who evinced interest in Hydro Power Projects, as per the terms of the Power Policy of the Government of Sikkim, i.e. the Letter of Intent dated 26.02.2005 without preferring competitive bidding process, as otherwise it would consume further time and cause more delay in implementation of Hydro Electric Projects, because such competitive bidding process requires a Detailed Project Reports (DPR) to be prepared, consisting of various technicalities and related studies. The Government of Sikkim is, therefore, well within its jurisdiction to formulate its own power policy for implementing the impugned Hydro Power Project;


(xv) that before executing the impugned Agreement dated 18.07.2005 between the State and 3rd Respondent, Teesta Urja Ltd., the State Government also approved the proposal of floating the Special Purpose Vehicle namely 3rd






respondent promoted by consortium led by Athena Projects Private Ltd. to implement the 1200 MW Teesta Stage-III Hydro Electric Project, of course, after due scrutiny by the High Powered Hydro Power Committee with regard to the technical knowledge and financial eligibility of various consortium partners of Athena Projects Pvt. Ltd;

(xvi) that the Power Policy of the State, namely, the Letter of Intent dated 26.02.2005 and the Agreement dated 18.07.2005 entered between the Government of Sikkim and respondent No. 3, prescribes definite time schedule for implementing the project and also provides that the 3rd respondent shall arrange for funds for the State Government towards their 26% of equity share in the 3rd respondent Company, a Special Purpose Vehicle, and that the same be repaid out of the income of the Government of Sikkim from free energy allotted to the Government, namely 12 % of the production of electricity during the first 15 years and 15 % of production of electricity during the remaining 16th to 35th years and thereafter, to transfer the entire project to the State of Sikkim, at a zero cost, apart from providing several socio-economic benefits to the natives of the State.





(xvii)that the Letter of Intent dated 26.02.2005 (viz. Power Policy of the Government of Sikkim) as well as the Agreement dated 18.07.2005 ensure the public interest of the State of Sikkim;

(xviii)that the various proceedings of the competent statutory authorities, namely,

- (a) Ministry of Power, Government of India,
- (b) Ministry of Environment and Forest,
Government of India, and
- (c) Centre for Inter-Disciplinary Studies of
Mountain and Hill Environment (CISMHE)
and their Carrying Capacity Study of Teesta
Basin in Sikkim;

are all in favour of implementation of the impugned Teesta Stage-III Hydro Electric Project;

(xix) that the impugned project is more advantageous to the public, State as well as the Nation and therefore, the writ petition is liable to be dismissed; and

(xx) that, if any interference to the implementation of the impugned project, therefore, would only cause great hardship and loss to the public interest.




V. Case of the respondent No. 3 - Private Participant - Special Purpose vehicle.

8. Mr. Jayanta Mitra, learned Senior Counsel, appearing for the 3rd respondent and supporting the arguments of the learned Advocate General, contends:

(i) that Athena Projects Private Ltd. was amongst the five Private Participant Companies short listed for implementing the impugned Teesta Stage III Hydro Electric Project pursuant to the invitation made by the State of Sikkim across the globe;

(ii) that even though the Letter of Intent dated 26.02.2005 was addressed to Athena Projects Pvt Ltd. necessary approval of the State Government was obtained for floating Teesta Urja Pvt. Ltd., a Special Purpose Vehicle (SPV), for effective implementation of the Scheme retaining 74 % equity shares for constituents of Athena Consortium and allotting 26 % equity shares to the State Government. Therefore, the agreement dated 18.07.2005 entered between the State Government and the Teesta Urja Pvt. Ltd is valid in law;






(iii) that the 3rd respondent has thus identified the experts for different nature of work involved in the project and entrusted the Engineering, Procurement and Construction Contracts (EPC Contracts), to taking into consideration their merit, experience, technical knowledge, expertise, etc. through International Competitive Bidding (ICB);

(iv) that the report of the Centre for Inter-Disciplinary Studies of Mountain and Hill Environment (CISMHE) and their Carrying Capacity Study of Teesta Basin in Sikkim as well as the clearance obtained by the Ministry of Environment and Forests, Government of India for the impugned project, both for diversion of forest land and acquisition of private land, are in favour of implementing the impugned project; and till date there is no complaint from whomsoever as to any violation of any of the terms of the Power Policy of the Government of India in terms of the agreement or any of the conditions of the clearance given by any of the statutory authorities;

(v) that the impugned project can not be compared to any other civil or mechanical projects where the nature





of contract works are predetermined and do not involve any study and research as in the impugned project;

(vi) that the 3rd respondent has already spent a substantial amount of Rs.3348.24 crores as on 31.07.2010 and per day expense of the project is about Rs.10 crores. 70 % of the project has almost been completed; and for the remaining works, orders have already been placed with the respective EPC contractors through ICB. Any interference with the impugned project at this stage would be against public interest.

(vii) that the impugned project is based on the administrative decision taken by the Cabinet of the State Government which culminated into a State Policy as Letter of Intent dated 26.02.2005 and the same is well within the provisions of Central Electricity Policy, 2005 formulated under section 3 of the Electricity Act, 2003 and therefore there is no infraction from any of the instructions, circulars, guidelines issued under the provisions of:

- (a) the Electricity Act, 2003,
- (b) the National Electricity Policy, 2005,
- (c) the Forest Conservation Act, 1980
- (d) the Environmental (Protection) Act, 1986,



- (e) the Wild Life (Protection) Act, 1972 and
- (f) the Biological Diversity Act, 2002.

(viii) that the change/changes of consortium members of the Athena Projects Private Ltd. is/are all supported with genuine and bonafide reasons; and also got the due approval of the State Government for such change/changes; and

(ix) that more than 70% of the impugned Teesta Stage-III Hydro Electric Project has already been completed incurring huge investment; and, therefore, any attempt by the petitioners to stall the impugned project would cause irreparable loss to respondent No. 3 and would also be against the public interest.

VI. Case of the Central Government, i.e. respondents No. 4, 5 and 6

9. Mr. Karma Thinlay, learned Central Government Counsel appearing for the 4th, 5th and 6th respondents, adopting the arguments of learned Advocate General and Mr. Jayanta Mitra, learned Senior Counsel, contends,



(i) that the 4th respondent Ministry of Power, Government of India is in favour of implementing the scheme;

(ii) that the impugned project is well protected by the **National Electricity Policy, 2005** notified by the Union of India on 12.02.2005, which is formulated under Section 3 of the Electricity Act, 2003 inviting public private partnership model; and

(iii) that there is no illegality or violation of any of the guidelines of the Central Government Authority, namely respondents No. 4, 5 and 6.


VII. Consideration, Findings and Decisions

10. I have given my careful consideration to the submissions made on behalf of all the parties.

11. In the light of the above rival contentions, the following issues arise for my consideration:-

(i) Whether the petitioners are bonafide in filing the above Public Interest Litigation?




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- (ii) Whether the petitioners have locus standi to challenge the implementation of the impugned 1200 MW Teesta Stage-III Hydro Electric Project?
- (iii) Whether the Agreement dated 18.07.2005 entered into between the State of Sikkim and M/s Teesta Urja Ltd. (respondent No.3) for setting up a Hydro Electric Project - Teesta Stage III based on the policy of State, Letter of Intent dated 26.02.2005, is contrary to law, guidelines and mandatory instructions of the Ministry of Power, Government of India and opposed to public interest?

12.1 **Issue No. (i): Whether the petitioners are bonafide in filing the above Public Interest Litigation?**

Concededly the petitioners had filed another Public Interest Litigation, W.P.(C) No. 25 of 2006 also before this Court, challenging thirteen (13) Hydro Electric Projects in the Teesta Basin, including the impugned Teesta Stage-III Hydro Electric Project on the identical grounds raised in the present W.P.(C) No. 40 of 2005: viz.

- (i) that the Government of Sikkim failed to follow various instructions, guidelines issued by the Ministry of





Power, Government of India in its letters dated 18.01.1995, 02.08.1996 and 09.01.1997;


(ii) that the State Government deliberately departed from the National Electricity Policy dated 12.02.2005 of the Government of India by not accepting the offer given by NHPC. The reasons for refusing to accept the offer of the NHPC by the Government of Sikkim is not genuine and in the interest of the State as well as the Nation;

(iii) that the Government of Sikkim erred in framing its own power policy, in contrary to the National Power Policy, 2005 of the Ministry of Power, Government of India as well as the instructions, guidelines and directions issued by the Ministry of Power, Government of India in selecting the private participants;

(iv) that the Government of Sikkim acted according to their own whims and fancies;

(v) that the power policy of the Government of Sikkim dated 26.02.2005 i.e. the Letter of Intent and the Agreement dated 18.07.2005 entered thereunder are arbitrary, unreasonable and contrary to the public interest and violative of Articles 14, 16, 19 and 21 of the Constitution of India, placing reliance on the contentions in





the present writ petition, namely, W.P.(C) No. 40 of 2005, etc.

12.2 The Division Bench of this Court, however, by Order dated 28.04.2008 dismissed the said W.P.(C) No. 25 of 2006. The Order dated 28.04.2008 passed by the Division Bench in W.P.(C) No. 25 of 2006, reads as hereunder:

"This is a Public Interest Litigation challenging award of certain contracts for execution of works in North Sikkim intended for the purpose of augmenting the power supply. We find that the last order passed in this matter was on 17.03.2008 and the first one is dated 23.06.2006. The writ petition has been simply kept pending and adjournments have been obtained.

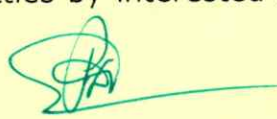
It is now a settled principle which all Courts follow for their own perseverance that no PIL is to be entertained unless it cannot but be entertained.

There are no details given in the petition; not even the date of award of the contracts could be told by the learned counsel appearing for the writ petitioners.

The writ petitioners are thoroughly politically coloured. The first writ petitioner is no less than the ex-Chief Minister of Sikkim; the two other writ petitioners are businessmen (as submitted in Court by Id. Counsel for the petitioners) of naturally, the same political leaning.

No businessman who was willing to tender a higher amount, or who says that he was interested in one particular project, but the Government kept him out of sharing in the Government largesse by treating him unjustly and unfairly has come before the Court. Allegedly public interest litigations of this nature cannot be entertained. We have grave doubt whether it can form the subject matter of PIL at all because the business interest will always be private interest.

No notice should be issued in a matter of this nature. Applications of this nature should be discouraged by nipping those in the bud so that the Court has time for dealing with its proper work, i.e. litigation proper, and is not drawn into political battles by interested parties, who





must fight such battle amongst the people, and in the streets. This writ petition is dismissed in limine without any order as to costs.

The respondents are not called upon. Since the main petition is dismissed the modification application follows suit.

Sd/-
(A.N. Ray, CJ)


Sd/-
(A.P. Subba, J)"

12.3 The Division Bench of this Court, by Order dated 28.04.2008, thus held that the grievances of the petitioners are politically motivated; and consequently, the relief sought for was not bonafide. The petitioners have not preferred appeal against the said Order dated 28.04.2008 and therefore the said Order dated 28.04.2008 in W.P.(C) No. 25 of 2006 had become final. Hence, the present W.P.(C) No. 40 of 2005 filed by the same petitioners on identical grounds is also neither bonafide nor in the public interest.

12.4 Issue No. (i), therefore, is answered in the negative.

13.1 **Issue No. (ii): Whether the petitioners have locus standi to challenge the implementation of the impugned 1200 MW Teesta Stage-III Hydro Electric Project?**

Concededly the impugned Teesta Stage-III Hydro Electric Project has been implemented as per the terms of the Agreement



dated 18.07.2005, which had been entered into pursuant to the policy of the Government of Sikkim viz. the Letter of Intent dated 26.02.2005, which is in consonance with the National Power Policy dated 12.02.2005 formulated in compliance with Section 3 of the Electricity Act, 2003. Even though the petitioners made an application, Civil Misc. Application No. 114 of 2006 for amendment of the prayer, proposing to challenge the Letter of Intent dated 26.02.2005 (viz. the Power Policy of the Government of Sikkim) and the Agreement dated 18.07.2005, the said Civil Misc. Application No. 114 of 2006 was withdrawn as not pressed; and therefore this Court dismissed the said Civil Misc. Application No. 114 of 2006 by an Order dated 17.03.2008, which reads as hereunder:

"CM APPL No. 114/2006

Learned counsel for the petitioner submits that the amendment application No. 114/2006 is not pressed; as such, the same is hereby dismissed without any order as to costs.

.....

Sd/-
(A.N. Ray, CJ)

Sd/-
(A.P. Subba, J)"

13.2 The petitioners, thus, having withdrawn the said Civil Misc. Application, challenging the Letter of Intent dated 26.02.2005, as not pressed, has no locus standi to challenge the





implementation of the impugned Teesta Stage III Hydro Electric Project.

13.3 Issue No. (ii) is answered in the negative.

14. **Issue No. (iii): Whether the Agreement dated 18.07.2005 entered into between the State of Sikkim and M/s Teesta Urja Ltd. (respondent No.3) for setting up a Hydro Electric Project – Teesta Stage III based on the policy of State, Letter of Intent dated 26.02.2005, is contrary to law, guidelines and mandatory instructions of the Ministry of Power, Government of India and opposed to public interest?**

This is the core issue raised in this writ petition and requires serious consideration from different perspective, viz.,

(i) actions taken by the Government of Sikkim for implementing the impugned Teesta Stage-III Hydro Electric Project with reference to the National Electricity Policy 2005, directions, instructions and guidelines of the Ministry of Power, Government of India, **prior to** the enactment of the Electricity Act, 2003;

(ii) actions taken by the Government of Sikkim for implementing the impugned Teesta Stage-III Hydro Electric Project with reference to the National Electricity Policy 2005 and



the directions, instructions and guidelines of the Ministry of Power, Government of India, **after** the enactment of the Electricity Act, 2003;

(iii) actions taken by the Government of Sikkim for implementing the impugned Teesta Stage-III Hydro Electric Project with reference to formulation of the Power Policy of the Government of Sikkim, i.e. the Letter of Intent dated 26.02.2005;

(iv) actions taken by the Government of Sikkim with reference to selection of the respondent No.3 for implementing the impugned Teesta Stage-III Hydro Electric Project;

(v) actions taken by the Government of Sikkim for implementing the impugned Teesta Stage-III Hydro Electric Project with reference to the terms and conditions of the agreement dated 18.07.2005;

(vi) actions taken by the Government of Sikkim for the compliance of statutory requirements and conditions prescribed for statutory clearance by the 3rd respondent;

(vii) incorporation and functioning of the respondent No.3 with respect to the implementation of the impugned project;

(viii) whether the implementation of the project requires any interference by this Court by way of Judicial Review; and

(ix) Decision.

15.1 (i) **Actions taken by the Government of Sikkim for implementing the impugned Teesta Stage-III Hydro Electric Project with reference to the National Electricity Policy 2005, directions, instructions and guidelines of the Ministry of Power, Government of India, prior to the enactment of the Electricity Act, 2003.**

15.2 The hydro power potential in the State of Sikkim was, concededly, first conceived in the year 1974 when Sikkim was not a part of the Indian Union. The then Political Officer of Sikkim, who was also the then representative of the Government of India in Sikkim, discussed hydro power potential in Sikkim with the Ministry of Irrigation and Power, Government of India. It was then decided that the Central Water Commission should formulate proposals to carry out surveys for hydro power potential in Teesta and Rangit Valley in the State of Sikkim. The Central Water Commission after careful and numerous site inspections, survey, investigation and study, prepared a Detailed Project Report for the impugned 1200 MW Teesta Stage-III Hydro Electric Project in the year 1987.






15.3 The Ministry of Power, Government of India requested the concurrence of the Government of Sikkim to carry out the Teesta Stage-III Hydro Electric Project under the Central Sector with NHPC. The Government of Sikkim accorded its concurrence in March 1988. The NHPC thereafter prepared a Detailed Project Report with some changes and submitted the same to the Central Electricity Authority for their Techno Economic Clearance. In December, 1990 the Central Electricity Authority apprising the said Detailed Project Report formulated by NHPC and concluded that the impugned Teesta Stage-III Hydro Electric Project was technically and economically viable. **Therefore, CEA had given their Techno Economic Clearance for the impugned Teesta Stage-III Hydro Electric Project.**


15.4 The Government of India announced a new liberalized power policy in October, 1991 permitting private parties to float and incorporate power generation companies. This impressed the Government of Sikkim and to secure interest of the State and its people, the Government solicited offers from private parties for the development of the impugned Teesta State-III Hydro Electric Project, expecting the terms to be better than the terms agreed to by the NHPC.

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15.5 As several private parties evinced their interest, the Government of Sikkim withdrew its consent given to the NHPC for execution of the impugned project under Central Sector. But the NHPC again through the Ministry of Power, Government of India pursued the Government of Sikkim for executing the project. The Government of Sikkim, however, informed NHPC and the Ministry of Power, Government of India the terms on which the private parties were willing to develop the impugned project and as NHPC was not willing to agree to the said terms, the Ministry of Power, Government of India permitted the State of Sikkim in the year 1993 to go ahead and develop the impugned project by approaching any of the private parties of its choice or in joint sector. The Government of Sikkim thus invited bids from interested parties across the world by following the International Competitive Bidding process to develop the impugned project under BOOT basis.

15.6 By January, 1995, seven (7) offers were received in response to the invitation of tenders by the Government of Sikkim. A High Level Committee was constituted by the State for evaluation of the Bids. At the same time, the Government of India, by letter dated 18.01.1995, issued guidelines to the effect that all future projects should come through the process of





competitive bidding. The Central Electricity Authority was asked not to entertain, in future, proposals which have not been processed through the competitive bidding procedure.

15.7 Government of Sikkim, therefore, appointed M/s Wapcos Ltd., a Government of India undertaking, to prepare the questionnaires in accordance with the guidelines of the Government of India and the questionnaires so prepared were issued to all the interested bidders in August, 1996. Ultimately, three (3) parties namely, Reliance, EDF and L & T were short listed and their offers though found to be comprehensive were not up to the expectations of the Government of Sikkim. However, the offers of Reliance, EDF and L & T were once again referred to M/s Wapcos Ltd. for evaluation.

15.8 In the meanwhile, Government of India issued another guideline dated 02.08.1996, that after 18.02.95 the private power projects whose total estimated cost exceeded Rs.100 crores would have to be awarded through the process of competitive bidding; however, it was clarified that competitive bidding shall not be necessary for selection of private company partner in joint venture projects in cases where the State Electricity Board/Public Sector Undertaking held major share of the joint venture company. It was also clarified that in a case of

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joint venture project between State Electricity Board/Public Sector Undertaking and a private company, International Competitive Bidding is to be followed only in cases where the private project developer has not been selected through competitive bidding. Hence the Government of Sikkim sought approval of the Ministry of Power, Government of India through the Central Electricity Authority.

15.9 As there was delay in getting the approval of the Ministry of Power, the Government of Sikkim again decided to pursue the NHPC for developing the impugned project on the terms as desired by the Government of Sikkim and which were agreed to by other developers for developing the Hydro Electric Projects in the State of Sikkim, namely Teesta Stages-IV and VI etc. However, the NHPC was agreeable for execution of the impugned project only on Build, Operate and Own (BOO) basis; but not on Build, Operate, Own and Transfer (BOOT) basis. Hence, a negotiating Committee was constituted for reaching an agreement on the terms and conditions with NHPC.

15.10 The Additional Secretary, Ministry of Power, Government of India convened a joint meeting on 13.10.2003 between the State of Sikkim, NHPC and Central Electricity

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Authority. The decision of the said joint meeting held on 13.10.2003 reads as hereunder:

"POWER DEPARTMENT
GOVERNMENT OF SIKKIM

**SUB: DEVELOPMENT OF TEESTA STAGE I, II & III
HYDRO ELECTRIC PROJECTS THROUGH NHPC.**

The Government of Sikkim had issued a "letter of Intent" vide no: 554/P/Gen/95/531 dated 2nd December 2002 (Flag - A) to NHPC for development of Teesta stage-I, II & III Hydro Electric Projects subject to acceptance of following terms and conditions by the NHPC: -

- (i) **12% free power shall be provided to the State as royalty upto 15 years and 15% thereafter.**
- (ii) **2% of the gross profit directly to the State Government.**
- (iii) 10% equity share to SPDC.
- (iv) **100 % employment opportunity to the local Sikkimeses depending upon the suitability, eligibility and qualification criteria.**
- (v) **All Civil works other than major works of specialised nature shall be offered to local contractors.**
- (vi) NHPC shall not deploy surplus staffs from other States to the projects without the approval of the State Government.

NHPC however failed to respond to the State Governments offer. And on 13th October 2003 PCE Cum Secretary & other Senior officers of Power Department attended the meeting chaired by the Additional Secretary, Ministry of Power in Delhi. The meeting was attended by the representatives from NHPC and CEA also. **During the meeting Power Department explained the reasons of the State Government as regards to above terms to be fulfilled by NHPC before the State Government could agree to award the projects. In fact it was explained that there are IPPs showing interest towards developing the projects in much better terms. IPPs, were not only ready to adhere to the conditions but were ready to take up the projects in joint venture with the State Government as a minor partner and also in BOOT arrangement for certain**



period and revert back the project to the State Government at free of cost.

On the other hand NHPC officials explained their compulsion for not agreeing to our terms. Their stand was that NHPC has to sustain a large manpower and they have to engage this manpower in the new projects. Therefore, employment from the State can only be considered after redeploying their existing manpower. As for the BOOT arrangement and other propositions, it was simply out of questions as NHPC had a set guideline for entire country.

Concluding the meeting Additional Secretary, Ministry of Power told Power Department that Government of Sikkim can use its option and explore other possibility to the best of its advantage. The Additional Secretary, Ministry of Power further informed that the State Government can develop the project either under Joint Venture with the chosen IPPs or allot the project to the IPP through bidding process.

In the background as explained above it is submitted that **the LOI issued to NHPC be withdrawn as awarding the projects to NHPC in the existing guidelines serves little interest from the State's point of view.** In this connection, it may be pertinent to mention here that SPDC/ Power Department has been exploring the possibility of getting resourceful and reputed IPPs who can develop the projects under better terms and conditions which will benefit the State Government. In fact, a few companies had been short listed and negotiations are in advance stage. However, due to changes in Central Ministry it is apprehended the negotiations shall stand stalled for a couple of months or so before the IPPs get a clear picture of the policies of the new Government at the Centre.

In view of above, it is therefore advisable to withdraw the aforementioned LOI for which the State Government's approval may kindly be sought while we continue carrying forward our negotiations with IPPs for development of Mega Projects in Teesta Basin.

Submitted for further action please.

Sd/- 4/6/04
(P. Wangchen)
Chief Engineer "
(emphasis supplied)






15.11 It is apparent from the minutes of the joint meeting held on 13.10.2003 between the State of Sikkim, NHPC and Central Electricity Authority that :

- (i) (a) the Government of Sikkim was particular to get 12% free power to the State as royalty upto 15 years and 15% thereafter;
- (b) 2 % of the gross profit directly to the State Government;
- (c) 100% employment opportunity was to be given to the local Sikkimese depending upon their suitability, eligibility and qualification criteria.
- (d) All civil works other than major works of specialized nature would be offered to local contractors, etc.;

(ii) the Independent Power Producers (IPP) were not only ready to adhere to the conditions but were also ready to take up the projects in joint venture with the State Government as a minor partner and also in BOOT arrangement for certain period and revert back the project to the State Government free of cost;

(iii) on the other hand NHPC did not agree to the said terms. BOOT arrangement and other propositions

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were also found to be simply out of question as NHPC had set guidelines for the entire country;

(iv) the Additional Secretary, Ministry of Power, Government of India further informed the State Government that it could develop the project either under joint venture with the chosen IPPs or allot the project to the IPPs through bidding process; and

(v) the Letter of Intent issued to NHPC in the existing guidelines serves little interest from the State's point of view.

15.12 **I am, therefore, convinced that NHPC did not agree with the terms of the Government of Sikkim and therefore the contention of the petitioners that Government of Sikkim deliberately avoided NHPC is not correct.**

16.1 (ii) **Actions taken by the Government of Sikkim for implementing the impugned Teesta Stage-III Hydro Electric Project with reference to the National Electricity Policy 2005 and the directions, instructions and guidelines of the Ministry of Power, Government of India, after the enactment of the Electricity Act, 2003.**

16.2 The Electricity Act, 2003 was enacted and came into force from 10.06.2003 to consolidate the laws relating to





generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies etc.

16.3 The Electricity Act, 2003, thus, envisaged the growth of electricity industry through private licensees, with the policy of encouraging private sector participation in generation, transmission and distribution and with the objective of distancing the regulatory responsibilities from the Government to the Regulatory Commissions. The need for harmonizing and rationalizing the provisions in

- (i) the Indian Electricity Act, 1910;
- (ii) the Electricity (Supply) Act, 1948; and
- (iii) the Electricity Regulatory Commissions Act, 1998

is a new self-contained comprehensive legislation. Accordingly, the new legislation replaced the then existing laws referred to above and gave the State enough flexibility to develop their power sector in the manner they consider.

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16.4 Section 3 of the Act empowers the Central Government to prepare National Electricity Policy and tariff policy in consultation with the State Governments and the Authority for development of the power system based on optimal utilization of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy.

16.5 Section 7 of the Act provides that any generating company may establish, operate and maintain a generating station without obtaining a licence under this Act if it complies with the technical standards relating to connectivity with the grid referred to in clause (b) of Section 73.

16.6 Section 8 of the Act provides for setting up hydro electric generating station, and the same reads as hereunder:

"8. **Hydro-electric generation.**- (1) Notwithstanding anything contained in section 7, any generating company intending to set-up a hydro-generating station shall prepare and submit to the Authority for its concurrence, a scheme estimated to involve a capital expenditure exceeding such sum, as may be fixed by the Central Government, from time to time, by notification.

(2) The Authority shall, before concurring in any scheme submitted to it under sub-section (1) have particular regard to, whether or not in its opinion, -

(a) the proposed river-works will prejudice the prospects for the best ultimate development of the river or its tributaries for power generation, consistent with the requirements of drinking water, irrigation, navigation, flood-control, or other public purpose, and for this purpose the Authority shall satisfy itself, after consultation with the State Government, the Central Government, or such other agencies as it may deem



appropriate, that an adequate study has been made of the optimum location of dams and other river-works;

(b) the proposed scheme meets the norms regarding dam design and safety.

(3) Where a multi-purpose scheme for the development of any river in any region is in operation, the State Government and the generating company shall co-ordinate their activities with the activities of the persons responsible for such scheme in so far as they are inter-related."

16.7 Section 185 of the Act deals with the repeal and savings clauses, which reads as hereunder:

"185. Repeal and saving.- (1) Save as otherwise provided in this Act, the Indian Electricity Act, 1910 (9 of 1920), the Electricity (Supply) Act, 1948 (54 of 1948) and the Electricity Regulatory Commissions Act, 1998 (14 of 1998) are hereby repealed.

(2) Notwithstanding such repeal,-

(a) **anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorization or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;**

(b)
to
(e)

(3)
to
(5) "

16.8 After the enactment of the new Electricity Act, 2003, the Central Government, in compliance with Section 3 of the Electricity Act, 2003, formulated the National Electricity Policy, 2005 dated 12.02.2005, the important provisions of the same reads as hereunder: -

"MINISTRY OF POWER

RESOLUTION

New Delhi, the 12th February, 2005

National Electricity Policy

No.23/40/2004-R&R(Vol. II)

INTRODUCTION

1.1 In compliance with section 3 of the Electricity Act 2003 the Central Government hereby notifies the National Electricity Policy.

1.2

to

5.2.4

Hydro Generation

5.2.5 Hydroelectricity is a clean and renewable source of energy. Maximum emphasis would be laid on the full development of the feasible hydro potential in the country. The 50,000 MW hydro initiative has been already launched and is being vigorously pursued with DPRs for projects of 33,000 MW capacity already under preparation.

5.2.6 Harnessing **hydro potential speedily will also facilitate economic development of States, particularly** North-Eastern States, **Sikkim**, Uttaranchal, Himachal Pradesh and J & K, since a large proportion of our hydro power potential is located in these States. **The States with hydro potential need to focus on the full development of these potentials at the earliest.**

5.2.7 Hydel projects call for **comparatively larger capital investment. Therefore, debt financing of longer tenure would need to be made available for hydro projects. Central Government is**

committed to policies that ensure financing of viable hydro projects.

5.2.8

to

5.7

5.8.1 To meet the **objective of rapid economic growth and "power for all" including household electrification**, it is estimated that an investment of the order of Rs.9,00,000 crores at 2002-03 price level would be required to finance generation, transmission, sub-transmission, distribution and rural electrification projects. Power being most crucial infrastructure, public sector investments, both at the Central Government and State Governments, will have to be stepped up. Considering the magnitude of the expansion of the sector required, a sizeable part of the investments will also need to be brought in from the private sector. **The Act creates a conducive environment for investments in all segments of the industry, both for public sector and private sector, by removing barrier to entry in different segments. Section 63 of the Act** provides for participation of suppliers on competitive basis in different segments which will further encourage private sector investment. Public service obligations like increasing access to electricity to rural households and small and marginal farmers have highest priority over public finances.

5.8.2

5.8.3

5.8.4 **Capital is scarce. Private sector will have multiple options for investments. Return on investment will, therefore, need to be provided in a manner that the sector is able to attract adequate investments at par with, if not in preference to, investment opportunities in other sectors.** This would obviously be based on **a clear understanding and evaluation of opportunities and risks.** An appropriate balance will have to be maintained between the interests of consumers and the need for investments.

5.8.5

to

5.8.8



5.8.9 Role of private participation in generation, transmission and distribution would become increasingly critical in view of the rapidly growing investment needs of the sector. The Central Government and the State Governments need to develop workable and successful models for public private partnership. This would also enable leveraging private investment with the public sector finances. Mechanisms for continuous dialogue with industry for streamlining procedures for encouraging private participation in power sector need to be put in place."

(emphasis supplied)


16.9 As per the National Electricity Policy, 2005 formulated in compliance with the Section 3 of the Electricity Act, 2003, the Central Government notified that: -

(i) harnessing hydro potential speedily will facilitate economic development of States, particularly North-Eastern States, **Sikkim**, Uttaranchal, Himachal Pradesh and J & K;

(ii) the States with hydro potential need to focus on the full development of these potentials at the earliest;

(iii) the Central Government is committed to policies that ensure financing of viable hydro projects;

(iv) a huge investment is required to finance generation, transmission, sub-transmission, distribution and rural electrification projects to meet the objective of rapid



economic growth and 'power for all' including household electrification;

(v) a conducive environment for investments in all segments of the industry, both for public sector and private sector, required to be created by removing barrier to entry in different segments;

(vi) capital is scarce. Private sectors will have multiple options for investments. Return on investment will, therefore, need to be provided in a manner that the sector is able to attract adequate investments at par with, if not in preference to, investment opportunities in other sectors; and

(vii) Mechanisms for continuous dialogue with industry for streamlining procedures for encouraging private participation in power sector need to be put in place.

16.10 By operation of laws, namely, Section 185 of the Electricity Act, 2003, I am convinced that the instructions, directions and guidelines issued by the Ministry of Power, Government of India under the letters dated 18.01.1995 and






02.08.1996, referred to above, which were made under the earlier enactments, namely,

- (i) the Indian Electricity Act, 1910;
- (ii) the Electricity (Supply) Act, 1948; and
- (iii) the Electricity Regulatory Commissions Act, 1998

requiring the State Government to adopt method of competitive bidding process in selecting the private partners, are no longer valid and relevant for selection of the public/private partners/developers after the enactment of the Electricity Act, 2003 and formulation of the new National Electricity Policy, 2005 dated 12.02.2005, which alone is currently occupying the field for the development of the power sector and such participation by the private sector in the power sector.

16.11 Therefore, after the enactment of the new Electricity Act, 2003 and formulation of the National Electricity Policy, 2005, the Central Government authorized the State Governments to work out their own models.

16.12 **The Government of Sikkim, having experienced great delay and difficulty in developing the Hydro Electric Project in the State through competitive bidding process or route, rightly decided to develop their own model of a joint venture company with the participation of the private**



developers as per the National Electricity Policy, 2005, which were formulated in compliance with Section 3 of the Electricity Act, 2003.

17.1 (iii) **Actions taken by the Government of Sikkim for implementing the impugned Teesta Stage-III Hydro Electric Project with reference to formulation of the Power Policy of the Government of Sikkim, i.e. the Letter of Intent dated 26.02.2005.**

17.2 As provided under clause 5.8.9 of the National Electricity Policy, 2005, the Government of Sikkim prepared its own power policy to develop workable and successful models for public-private partnership, namely Letter of Intent dated 26.02.2005, which reads as hereunder:

“
GOVERNMENT OF SIKKIM
ENERGY & POWER DEPARTMENT
KAZI ROAD, GANGTOK - 737 101

No.34/GOS/E&P/2004-05/254 Dated 26/02/2005

To

Athena Projects Private Limited,
119, Jorbagh,
New Delhi - 110 003.

SUB : LETTER OF INTENT FOR DEVELOPMENT OF
1200 MW TEESTA STAGE-III HEP IN SIKKIM
ON BOOT ARRANGEMENT.

Ref : 1. Your Letter No.ATR/GOS/SP/4914 dated
Sept. 14, 2004.
2. Our Letter No.SPDC/39/2004-05/460 dated
Nov.20, 2004.
3. Your Letter No.ATR/GOS/SP/171204 dated
Dec. 17, 2004.





4. Your Letter No.ASG/EPD-GOS/05117 dated Jan. 17, 2005.
5. Your Letter No.ASG/EPD-GOS/5122 dated Jan. 22, 2005.
6. Your Letter No.ASG/EPD-GOS/5129 dated Jan. 29, 2005.
7. Your Letter No.ASG/EPD-GOS/5131 dated Jan. 31, 2005.

Dear Sir,

Please refer to your above letters regarding interest shown by you for development of Teesta Stage-III Hydro Power Project. In this connection, I am pleased to inform you that the Government has approved allotment of above project to Athena Projects Private Limited - Consortium, **to be developed on BOOT arrangement under joint sector as per the terms and conditions of the State Government.** Therefore, this letter of intent is placed in your favour as you are the leader of the consortium, subject to acceptance of following terms and conditions :-

1. **Royalty at the rate of 12% of net energy or money equivalent thereof would be charged for the first 15 years. Beyond 15 years of operation a royalty of 15% of net energy will be made available to the Government of Sikkim free of charge by the developer.**
2. **The projects shall be offered for a period of 35 years from the date of their commercial operations at the end of which they shall be reverted back to the Government of Sikkim at free of cost in good condition** or extend further on mutually agreed terms as per decisions of the Government of Sikkim.
3. Sale of Power shall be the responsibility of the IPP.
4. The IPP shall be responsible for laying transmission lines for connectivity to the nearest Grid Sub-Station of the State Government at the appropriate voltage. However, if the State Grid System is not adequate to transmit this power outside the State, the IPP has to make its own arrangements to connect to the nearest Grid Station of Power Grid Corporation of India Ltd.
5. **The SPDC/Govt. of Sikkim shall invest 26% in the total equity. Upon request from the Govt. of Sikkim, the IPP shall arrange this fund to invest towards its share of equity in the project, which shall be repaid along with the agreed**

rate of interest from the sale proceeds of the free power.

6. The IPP shall have to enter into an agreement with the State Govt., within a period of 180 days from the date of issue of this "Letter of Intent", if the IPP finds the project viable.
7. **The IPP shall have to provide employment to the Local skilled, semi skilled and unskilled manpower** as per the eligibility criteria including business and contract opportunity to the locals.
8. **The IPP shall deposit a sum of Rs.1,20,00,000.00 (Rupees one crore twenty lakh only) @ Rs.10,000.00 per MW of the installed capacity towards non-refundable processing fee by a Demand Draft in favour of the Secretary, Energy & Power Department, Government of Sikkim** within a period of thirty days from the date of issue of this "Letter of Intent", failing which, it will be presumed that you are no more interested in this project and the State Govt. shall be free to withdraw this LOI from you.
9. The IPP shall have **to pay wheeling charges in the event of using infrastructure facilities of the State Government.** The wheeling charges shall be as determined by the competent authority.
10. The IPP shall not be permitted to transfer the project or sell the project to others without prior permission of the Government of Sikkim.
11. The IPP shall achieve the financial closure within a period of 12 months from the date of agreement. In the event that it is confirmed as impossible or impractical to achieve Financial Closure or if the Financial Closure is not achieved on or before the expiry of twelve (12) months from the effective date, for the reasons other than those attributable to the Government, the Government reserves the right to terminate the Agreement.
12. The IPP shall commission the project within a period of 48 to 60 months from the date of financial closure. In the event of failure on the part of IPP to commission the project within the targeted period, i.e. within 72 months from the date of agreement, the IPP shall be liable to pay a penalty @ Rs.10,000.00 (Rupees Ten Thousand) per MW per month to the Government of Sikkim for the period beyond 72 months from the date of Agreement.





13. The IPP may surrender the allotment of the project back to the Government of Sikkim if on completion of the DPR within the stipulated time frame; it has grounds to establish that the project is not techno-economically viable. However, on such surrender, the Government of Sikkim shall not compensate towards expenditures incurred by the IPP.
14. **In the event of stoppage of construction on the main project components by the developer, for a period of more than twelve months for reasons not covered under Force Majeure and for reasons attributable to the developer and/or abandonment of the projects by the developer, the Government shall, after giving due opportunity to the developer to resume the work, have the right to terminate the Agreement.** In the event of termination of the Agreement under this clause, the Government shall have the **option to take over the Project.** At the time of signing of agreement, PERT chart giving the details of works as milestones should be specified in the Agreement.
15. **The cost involved in any studies of basin development/ protection like Dam Break analysis, etc. to be carried out by the State Govt. would be shared by the IPPs in proportion to the Installed Capacity of the project.** For these studies, cost of establishment/running hydrological stations or instrumentation would also be shared by the IPP.
16. **Resettlement & Rehabilitation Plan shall be prepared and implemented by the Govt. of Sikkim at the cost of IPP.**
17. The IPP shall share with the Govt. of Sikkim all the data of the studies made by them in this project.
18. **Liabilities on account of investigation studies for this project by the State and the Central Govt. have to be reimbursed by the IPP after financial closure.**
19. **The IPP shall adopt villages in and around project area in consultation with the Govt. of Sikkim.**
20. **The IPP shall submit details about the equity participation and technical responsibilities of its**



consortium members at the time of financial closure of the project.

21. The jurisdiction of the project shall be the Court of Sikkim.

Your acceptance for development of this project under the above terms & conditions may be communicated within one month time from the date of issue of this LOI. Subsequently, you have to enter into an agreement with the State Govt. for development of Teesta Stage-III Hydro Power Project within a period of 180 days from the date of issue of this letter of intent. In case, if you are not able to enter into an agreement within above stipulated period, the project may be withdrawn and suitable penalty shall be charged.

Kindly acknowledge the receipt of this letter of intent.


Thanking you,

Yours faithfully,
Sd/-
(D.D. PRADHAN)
PCE-CUM-SECRETARY"

(emphasis supplied)

17.3 The salient features of the Power Policy of the Government of Sikkim, i.e. the Letter of Intent dated 26.02.005, are as follows:

(i) that the Independent Power Producer (IPP) provides for 12% of net energy to the State Government as royalty for the first 15 years or money equivalent thereto and beyond 15 years of operation, a royalty of 15% of net energy to the State Government free of charge by the developer;




(ii) that the project would be offered for a period of 35 years from the date of their commercial operation and at the end of such period the project would be reverted back to the Government of Sikkim free of cost in good condition;

(iii) that the Government of Sikkim would have 26% of equity share under the IPP, the respondent No.3 company, a Special Purpose Vehicle. The Independent Power Producer (IPP), the respondent No.3 would arrange the said funds also for the State to invest as equity share in the project which would be repaid along with the agreed rate of interest from the sale proceeds of the free power;

(iv) that the IPP, respondent No.3 would provide employment to the local skilled, semi skilled and unskilled manpower;

(v) that the IPP, respondent No.3 would deposit Rs.1,20,00,000/- (Rupees one crore twenty lakhs) and Rs.10,000/- (Rupees ten thousand) per MW for installation capacity towards non-refundable processing fee in favour of the Secretary, Energy and Power Department, Government of Sikkim






(vi) that the IPP, respondent No.3 shall pay wheeling charges in the event of using infrastructure facilities of the State Government;

(vii) that the IPP, respondent No.3 shall not be permitted to transfer the project or sell the project to others without prior permission of the Government of Sikkim;

(viii) that the IPP, respondent No.3 shall achieve the financial closure within a period of 12 months from the date of agreement. In the event that it is confirmed as impossible or impractical to achieve Financial Closure or if the Financial Closure is not achieved on or before the expiry of twelve (12) months from the effective date, for the reasons other than those attributable to the Government, the Government reserves the right to terminate the Agreement;

(ix) that the IPP, respondent No.3 would commission the project within a period of 48 to 60 months and in the event of failure on the part of the respondent No.3 to commission the project within the targeted period, namely, 72 months from the date of Agreement, the respondent No.3 Company would be liable to pay a penalty of Rs.10,000/- (Rupees ten thousand) per MW per month to







the State Government for the period beyond 72 months from the date of Agreement;

(x) that the IPP, respondent No.3 may surrender the allotment of the project back to the Government of Sikkim if on completion of the DPR within the stipulated time frame; it has grounds to establish that the project is not techno-economically viable. However, on such surrender, the Government of Sikkim shall not compensate towards expenditures incurred by the IPP.

(xi) that in the event of stoppage of the construction of the main project by the developer for a period of more than 12 months for reasons attributable to the developer, the Government shall, after giving due opportunity to the developer to resume the work, have the right to terminate the Agreement and also shall have the option to take over the project;

(xii) that the cost involved in the studies of basin development/protection like Dam Break analysis etc. would be shared by the IPP, respondent No.3 in proportion to the installed capacity of the project;





(xiii) that the resettlement and rehabilitation plan would be prepared and implemented by the State Government at the cost of the IPP, 3rd respondent;

(xiv) that the IPP, respondent No.3 shall share with the Government of Sikkim all the data of the studies made by them in this project;

(xv) that the liabilities on account of investigation studies of the project would to be reimbursed by the IPP, 3rd respondent;

(xvi) that the IPP, respondent No.3 would adopt villages in and around the project area in connection with the Government of Sikkim; and

(xvii) that the IPP, respondent No.3 would submit details about the equity participation and technical responsibilities of its consortium members at the time of financial closure of the project.

17.4 Even clause 27 (7) of the Sikkim Finance Rules, 1979, contemplates that contracts should be placed only after tenders have been openly invited **whenever practicable and advantageous**. In the instant case, the past experience of the





State of Sikkim is that inviting tenders openly was not successful. Hence, I do not see any violation of the provision of the Sikkim Financial Rules, 1979 also.

17.5 It is pertinent to note that these salient features were formulated on the recommendation of the High Powered Hydro Power Committee constituted by the Government of Sikkim and these recommendations were placed for consideration of the NHPC; but NHPC was not agreeable for the same.

17.6 I am, therefore, convinced that **these terms of the power policy of the Government of Sikkim, viz. the Letter of Intent dated 26.02.2005, are fully in consonance with the National Electricity Policy, 2005 dated 12.02.2005 and provides for a transparent, fair and reasonable method for identifying the IPP, which is apparently beneficial to the State of Sikkim.**

18.1 (iv) **Actions taken by the Government of Sikkim with reference to selection of the respondent No.3 for implementing the impugned Teesta Stage-III Hydro Electric Project.**

18.2 The Power Policy of the Government of Sikkim as recommended by the High Powered Hydro Power Committee and

approved by the Cabinet and thereafter adopted by the State Government, was communicated to various established developers in the country and pursuant to which, five developers, namely:

- (i) Athena Projects Pvt. Ltd.,
 - (ii) NTPC,
 - (iii) NHPC,
 - (iv) Sutlez Jal Vidyut Ltd. and
 - (v) Cosmos Electric Supply Pvt. Ltd.
- Consortium,

out of 17 Hydro Power Developers, evinced their interest, in the impugned Hydro Power Project. Among the said five developers, three had shown specific interest in the impugned Teesta Stage-III and two have shown general interest in all the Mega Hydro Electric Projects. The comparative statement of evaluation of the offers made by the said 5 Hydro Power Developers is stated as follows:

“


Comparative Statement of Hydro Power Developers

Sl. No.	Name of Developer	Consortium partners	Turnover during 2004 (Rs. Crore)	Net worth (Rs. Crore)	Business line	Experience in Hydro	Max. power developed	HEP under Constn	Terms of State Govt.	Offers submitted for
1. to 11	...	...	...	...	...	...	...	...	...	...
12	Athena Consortium	APGENCO, L&T, IL&FS & PTC	18751.00 (combined)	8,403.00	Infrastructures, power generation & trading	Yes	More than 2000 MW HEP	...	<u>Agreed</u>	Teesta - III HEP
13	Cosmos Electric	Leighton (Australia)	More than 35000.00	10,023.00	Infrasru-ctres,	Yes	More than 2000 MW	...	<u>Agreed but</u>	Teesta - III HEP

	Supply Pvt. Ltd. Consortium	Hochtief & Muller (Germany), Adani			Hydro Projects, Power Trading, Export/ Import		HEP		<u>want period to be 45 years</u>	
14	NTPC	...	...	...		Yes	...	...	<u>As per GOI</u>	All Mega HEP (2000 MW)
15.	NHPC	...	...	...		Yes	...	...	<u>As per GOI</u>	All Mega HEP
16	Sutlej Jal Vidyut Ltd.	...	...	...		Yes	...	...	<u>As per GOI</u>	<u>Teesta - III HEP</u>
17	...	...	...	...	...	...	...	...	...	...

(emphasis supplied)


18.3 The High Powered Hydro Power Committee evaluated the comparative statement of these five developers and concluded that only the offer received from M/s Athena Consortium was in full compliance with the terms of the policies and protects the interest of the State of Sikkim; because the Cosmos Electric Supply Pvt. Ltd. Consortium wanted a period of 45 years instead of 35 years for BOOT and the other three developers namely, NTPC, NHPC and Sutlej Jal Vidyut Ltd. were not agreeable to the terms of the Power Policy of the State of Sikkim, as they agreed only for the terms of Government of India Policy i.e. for BOO basis and not for BOOT basis. Hence the High Powered Hydro Power Committee after careful consideration and evaluation of the offers of all the five developers selected and recommended Athena Consortium, to be the joint venture partner of the State of Sikkim for the development of the



impugned Teesta Stage-III Hydro Electric Project on a transparent, fair and reasonable process, taking the large interest of the State of Sikkim into consideration.

18.4 It is, therefore, apparent on the face of the records that the experience of the State Government since 1993 in identifying the Independent Power Producer to be the joint venture partner of the State of Sikkim for the development of the impugned 1200 MW Teesta III Hydro Electric Project through competitive bidding process was not successful. The Government of Sikkim was also conscious of the pre-requisite condition, for competitive bidding process in the case of Hydro Electric Projects, that a bankable and upto date Detailed Project Report (DPR) consisting of various technical details about the project as also its estimated completion cost should be ready, so that the competitive bidder could visualize the risk element involved in the development of the said project. The State Government having been mindful of time and cost factor involved in preparing and updating the bankable DPR, had rightly taken a policy decision within the purview of the National Electricity Policy, 2005 formulated under Section 3 of the Electricity Act, 2003, and worked out their own models, of course, with the





approval of the Ministry of Power, Government of India as per the minutes of the Joint Meeting held on 13.10.2003.

18.5 Accordingly, **the decision of the State Government sounds reasonable. No reasonable person could have any grievance against the Power Policy of the Government of Sikkim or against the process of selection of respondent No. 3 for implementing the impugned project, as rightly contended on behalf of the State of Sikkim, as the same were transparent, fair and reasonable.**

19.1 (v) **Actions taken by the Government of Sikkim for implementing the impugned Teesta Stage-III Hydro Electric Project with reference to the terms and conditions of the agreement dated 18.07.2005.**

19.2 Pursuant to the Power Policy of the State of Sikkim, i.e. the Letter of Intent dated 26.02.2005 and the selection of respondent No.3 as Independent Power Producer (IPP) to be the joint venture partner of the State of Sikkim for development of the impugned 1200 MW Teesta Stage-III Hydro Electric Project, the State of Sikkim and the respondent No.3 have entered into an Agreement dated 18.07.2005, the relevant provisions of the said Agreement reads as hereunder:





"AGREEMENT"

This DEED of AGREEMENT (hereinafter referred to as the "Agreement") is made on this the day of 18th (Eighteenth) of the month of July in the Year 2005 (Two Thousand and Five) at Gangtok, Sikkim;

By and between

The Governor of Sikkim, through the Principal Chief Engineer cum Secretary to the Government of Sikkim, Energy & Power Department, hereinafter referred to as the **"Government"**, (which expression shall, unless excluded by or repugnant to the context, mean and include its successors, administrators and permitted assigns) of the **FIRST PART**

AND

Teesta Urja Limited, a public limited company incorporated under the Companies Act, 1956, having its registered office at 119, Jor Bagh, New Delhi 110 003, India, (hereinafter referred to as the **"Company"** which expression shall, unless excluded by or repugnant to the context, mean and include its successors, administrators and permitted assigns) of the **SECOND PART**

WHEREAS

1. Athena Projects Private Limited, a company incorporated under the Companies Act, 1956, having its registered office at 119, Jor Bagh, New Delhi 110 003, India, had along with its consortium members, submitted a detailed proposal to the Government for the development of 1200 MW Teesta Stage III Hydroelectric Project, North Sikkim (the "Project");
2. Government after due examination of the proposals received from various parties and after determining that Athena and its consortium members are best placed and have the requisite capabilities to implement the Project, has issued a letter of intent vide letter No.34/GOS/E&P/2004-05/255 dated February 26, 2005 to the leader of the Consortium, Athena Projects Private Limited for the development of 1200 MW Teesta Stage-III Hydro Power Project on a Build, Own, Operate and Transfer ("BOOT") basis, under joint sector with the Government/SPDC;
3. Athena Projects Private Limited has vide its letter dated 6th April, 2005 informed the Government that



it has incorporated the Company, Teesta Urja Limited, as a Special Purpose Vehicle (SPV) for the implementation of the Project. The Government has vide its letter 34/GOS/E&P/2004-05/595 dated 20th April, 2005 approved the formation of the Company for the purpose of the development of the Project;

4. The Company has carried out at its own cost, the feasibility studies in respect of the Project and has submitted the Pre-Feasibility Report (Techno Economic Appraisal) vide their letter no. ASG/GOS-E&P/50414 dated April 18, 2005 in respect of the same to the Government. Accordingly, the Government and the Company have satisfied themselves about the techno-economic feasibility of the Project;
5. **The Company agrees to supply power free of cost to the Government @12% (Twelve percent) of the electricity generated at the Generation Point(s) or money equivalent thereof, from the project for the first 15 (fifteen) years of operation and @15% (Fifteen percent) or money equivalent thereof for 16th (Sixteenth) to 35th (Thirty Fifth) year from the date of commencement of the commercial production. However, the State Government, at its discretion may receive the money in lieu of free power at a rate to be mutually agreed from time to time.**

NOW, THEREFORE, in consideration of the premises and mutual covenants and conditions set forth herein, it is agreed by and between the Parties hereto as follows: -

Article 1

INTERPRETATIONS AND DEFINITIONS

1. INTERPRETATIONS

.....

- 1.2.39 **"Power Purchase Agreement (PPA)"** means a contractual agreement to be signed by the Company with an electricity consumer, trader or any other parties permitted under the statute to purchase the power.

.....

Article 2

TERM OF THE AGREEMENT

2.1 Effectiveness.

.....

2.2 Agreement Period.

- 2.2.1 This Agreement **shall remain in force for a period of 35 (Thirty five) years from the Commercial Operation Date of the Project** unless terminated earlier in accordance with the provisions of the Agreement.

.....

Article 3

OBLIGATIONS OF THE GOVERNMENT

.....

3.6 Rehabilitation and Resettlement Plan

The Company shall, wherever required and subject to the approval of any competent authority, prepare a rehabilitation and re-settlement plan in coordination with the Government for local residents that might be adversely affected or displaced due to construction of the Project at the Site as on the Effective Date. The cost of preparation and implementation of the above plan shall be borne by the Company and implemented under the supervision of the Government.

.....

Article 4

OBLIGATIONS OF THE COMPANY

4.1 Mode of Sale of Power

The Company shall have the option to dispose of power from the Project after allowing for Government Supply in any one or more of the following modes;





- (i) to make captive use for the industry to be set up in the State of Sikkim; or
- (ii) to sell power outside the State of Sikkim; and
- (iii) To make third party sale within the State of Sikkim with the permission of the Government of Sikkim.

The Company shall pay the necessary wheeling charges including charges on account of transmission losses prevalent at that time towards the energy transmitted, in case the company uses the Sikkim's Transmission/ distribution system for transfer of power up to the appropriate delivery point/interstate point as per (i) to (ii) above, as the case may be.

4.2 Government Supply

- 4.2.1 The royalty in the shape of free power shall be levied @12% (Twelve percent) of the Deliverable Energy (Net generation measured at the Generation Point) of the Project or money equivalent thereof, from the project for the first 15 (Fifteen) years of operation and @ 15% (Fifteen percent) or money equivalent thereof for the period from 16th (Sixteenth) to 35th (Thirty Fifth) year for the period starting from the date of COD of the Project and at such times as may be mutually agreed upon for the period that may be extended in terms of Clause 2.2.2.
-
-

4.7 Commissioning of the Project

The Company shall achieve the Financial Closure within 12 (Twelve) months from the date of signing of this agreement. The Commercial Operation of the Project shall be achieved within a period of 60 (Sixty) months from the date of the Financial Closure. The Company shall start the construction of the project within 6 (Six) months from the date of the Financial Closure.

The Company shall initiate the process for obtaining Environment Clearance within one month from the date of signing this Agreement and shall keep the Government informed of the status and progress in respect of Environment Clearance on a monthly basis.



In the event the Company obtains Environment Clearance from the Ministry of Environment and Forests (MoEF) within 12 (Twelve) months from the date of signing of this Agreement, but is unable to achieve the Financial Closure within 12 (Twelve) months from the date of signing of this Agreement, then the time period for achieving the Financial Closure shall stand extended up to the end of 6 (six) months from the date of Environment Clearance. However, in the event of delay in obtaining the Environment Clearance from MoEF beyond 12 (Twelve) months from the date of signing of this Agreement, for reasons not attributable to the Company, the Government shall extend the period for achieving the financial closure, which shall have to be achieved, within 6 (six) months from the date of Environment Clearance.

In case the Company is unable to commission the Project within the aforesaid time period for reasons exclusively attributable to the Company, **the Company shall be liable to pay a Penalty @ Rs.10,000/- (Rupees Ten thousand) per MW Per Month** to the Government for delay beyond the aforesaid time period for the Commercial Operation of the Project.

4.8 Environmental Impact Assessment(EIA)

The Company shall be liable to carry out Environmental Impact Assessment (EIA), in association with the Forests, Wild Life & Environment Management Department of the Government, as required under the Environmental (Protection) Act, 1986 through consultant(s) drawn from a reputed organization and obtain the consent of State Pollution Control Board.

4.9 Equity Participation

4.9.1 Subscription of Equity by the Government

The Company shall allocate 26% (Twenty Six percent) of the Company's equity share to Government by way of execution of an equity subscription agreement between the Company and Government, which shall be executed within a period of 6 (six) months from the date of signing of the Agreement.

Upon execution of such an equity subscription agreement, Athena as defined in the Definitions Clause 1.2.5 shall, on request from the Government



without the requirement of sovereign guarantees, arrange the funding for equity participation of Government in the Project at the mutual agreed terms.

The proceeds from such sale of Free Power and the dividends in respect of Government's equity in the Project, whether in part or full at the discretion of the Government, would be utilized for repayment of the funding arranged by Athena for financing the equity participation of the Government, and Government shall execute all the necessary agreements as desired by the providers of such funding.

However, if the Government arranges its own equity, then Government shall be allowed to do so, provided that such arrangement shall not be detrimental to the Company's interests and the equity subscriptions shall be made pro-rata with the other equity participants.


4.9.2 Subscription of Equity by the members of the Consortium

The balance 74 % (Seventy Four percent) of equity shares of the Company shall be subscribed by Athena. The Share holdings of each constituent of Athena and their responsibilities shall be communicated by the Company to the Government of Sikkim at the time of Financial Closure. The Company shall not change the constitution of the Athena consortium without prior permission from the Government. If the Company fails to submit the share holding agreement with the members of the Athena at the time of Financial Closure, then the Government can terminate this agreement."

(emphasis supplied)

19.3 The significant features of the Agreement dated 18.07.2005 provides that:

- (i) supply of power free of cost to the Government of Sikkim @ 12% of the electricity generated from the



project for the first 15 year and thereafter @ 15% from the 16th to 35th year;

(ii) the Government of Sikkim, at its discretion, may receive money in lieu of free power at a rate to be mutually agreed;

(iii) for Rehabilitation and Resettlement Plan in coordination with the Government of Sikkim for local residents who are adversely affected and displaced due to the construction of the project;


(iv) cost of preparation and implementation of the said plan shall be borne by the 3rd respondent;

(v) the Company is to adopt villages along with vicinity of the project;

(vi) the Company shall provide the facilities for the benefit of the villages such as road connectivity , power connectivity, schools, health care, water security, sanitation, religious/ social/ community development and maintenance;

(vii) the responsibility of evacuation of power from the project to the point of consumption lies with the company;





(viii) the company shall provide finances for Catchment Area Treatment Plan as determined by the Government of Sikkim;


(ix) the company is to achieve the financial closure in 12 months from the date of agreement and has to start the construction of the project within six months;

(x) the commercial operation of the project will be achieved within a period of 60 (sixty) months from the date of the financial closure;

(xi) the company has to initiate the process for obtaining environmental clearance within one month of signing of the agreement, if the company obtains environmental clearance from the Union of India but is unable to achieve financial closure within a period of 12 months then the time period shall be extended upto six months from the date of environment clearance, if environment clearance is delayed beyond 12 months for reasons not attributable to the company the Government of Sikkim shall extend the period;

(xiii) if the company is unable to commission the project within the said period the company shall be liable to pay the penalty;





(xiii) the company shall allocate 26 % of its equity share to the Government of Sikkim;

(xiv) the company would arrange the funding for equity participation of the Government of Sikkim in the project at the mutually agreed terms;

(xv) the proceeds from the sale of the power share of the Government of Sikkim and the dividends in respect of the Government of Sikkim equity in the project whether in part or full at the discretion of the Government of Sikkim would be utilized for repayment of the funding arranged by Athena Project Pvt. Ltd. for financing the equity participation of the Government of Sikkim;

(xvi) the company shall not change the constitution of M/s Athena Consortium;

(xvii) the company shall not be permitted to transfer or sale the project;

(xviii) the Government of Sikkim has a right to terminate the agreement, if it is eventually confirmed that financial closure for the project is impossible or impractical to achieve or if the construction of the project has not commenced before the expiry of the six month from the date of achieving of financial closure;



(xix) after the expiry of agreement period of 35 years, the project including its all assets and works shall be transferred to the Government of Sikkim free of cost and in good operating condition; and

(xx) the interest of the State of Sikkim has been taken into consideration and safe guarded.

19.4 **I am, therefore, convinced to the terms and conditions of the said Agreement dated 18.07.2005, which are neither irrational nor arbitrary nor unreasonable nor against any provisions of law nor opposed to public policy nor opposed to public interest. And they are reasonable and in consonance with the Electricity Act, 2003 and the National Electricity Policy, 2005 and also ensures the interest of the public as well as of the State.**

20.1 (vi) **The compliance of statutory requirements by the Government of Sikkim; and compliance of conditions prescribed in statutory clearance by the 3rd respondent.**

20.2 The Centre for Inter-Disciplinary Studies of Mountain & Hill Environment, University of Delhi under the directions of Ministry of Environment & Forests, Government of India, after inspection of the site, survey and detailed study, submitted a





Carrying Capacity Study of Teesta Basin in Sikkim with regard to the implementation of the impugned Teesta Stage-III Hydro Electric Project.

20.3 Pursuant to the said Carrying Capacity Study of Teesta basin in Sikkim, a meeting of the Steering Committee was held on 25.04.2005. The relevant portion of the minutes of the meeting reads as hereunder:-

"Chairperson, Smt. Meena Gupta requested Dr. Bhaskar of CISHME to clarify the recommendation specifically in respect of Teesta Stage-III, IV & VI, as these projects are below Chungthang area. **It was clarified that site clearance for survey & investigation for these projects may be allowed.**"

(emphasis supplied)

20.4 Thereafter, the Carrying Capacity Study of Teesta Basin in Sikkim was again reviewed by the Steering Committee on 25.09.2006 and the relevant portion of the minutes of the meeting reads as hereunder: -

"Dr. Bhaskar summarized the findings of all Principal investigators and concluded that North Sikkim is geologically, seismically, ecologically and biologically extremely sensitive and fragile. Any proposed hydro-electric projects in this region would have adverse impacts and would cause damage to the nascent and pristine ecosystems. The glacial moraines, temporarily forming glacial lakes and debris cones are potential source of hazards in North Sikkim. **He suggested that the height of the dam should not exceed 80 m from riverbed level especially in north Sikkim as the available literature indicate that dam with 80 m height in such type of geological condition may trigger reservoir induced seismicity.**"

"All members of the study team expressed their concern about the environmental clearance given for Teesta Stage-III



H.E. project by the Ministry without taking into consideration the reservations and recommendations of the Carrying Capacity Study report. Dr. Bhowmic explained that the decision for granting site clearance to this project was taken in the 3rd steering committee meeting held in New Delhi on 25th April, 2005. **The team had recommended for the site clearance of Teesta Stage -II, IV & VI as these projects are below Chungthang area. The EIA report of Stage - III was prepared by WAPCOs and Expert Committee did not find any thing wrong to stop the project.**

(emphasis supplied)

20.5 Based on the minutes of the Steering Committee dated 25.04.2005 and 25.09.2006 relating to the Environment and Ecology, Earthquake Engineering, Fisheries, Water Technology, etc. the Expert Appraisal Committee recommended Environmental Clearance for the Teesta Stage-III Hydro Electric Project as referred to above. As per the said recommendation, the Ministry of Environment and Forests, Government of India accorded the Environmental Clearance. However, against the said environmental clearance, an appeal was preferred under Section 11(1) of the National Environment Appellate Authority Act, 1997, namely, Appeal No.8 of 2006 and the National Environment Appellate Authority in its order dated 05.07.2007 held as hereunder: -


"That **the EIA report has made a detailed examination of the geological conditions of the project area and related aspects.** A perusal of EIA report and EMP reveals that EIA report throws evidence to proper assessment of the environmental impact of the project. **The various Environment programme such as Muck Management Plan, Forest and Wildlife**



Conservation Plan, Fish Management Plan etc. prove the point of view of the Respondents that comprehensive analysis of the impact of the project on the local environment has been done in the EIA Report. Necessary attention has been paid to preservation of aquatic ecology of the river system by assuring minimum flow of water in the system. **This Authority note that the Expert Committee on River Valley projects of the MoEF has examined the report on the Carrying Capacity Study on Teesta River System and recommended the project for approval of Respondent No.1 (MoEF). All these analyses and precautionary programme confirms the comprehensive coverage of EIA Report and protective nature of EMP."**

20.6 Thus, the National Environment Appellate Authority, which is the statutory and expert authority, relating to the grant of Environmental Clearance satisfied with and confirmed the grant of Environmental Clearance to the impugned Teesta-III Hydro Electric Project, after dealing with all the issues raised comprehensively.

20.7 Simultaneously, the Forest Advisory Committee, Government of India granted in-principle approval for the impugned Project, vide the letter dated 12.10.2007. In continuation of the said in-principle approval dated 12.10.2007 and in compliance of the various conditions imposed therein, the Ministry of Environment and Forests, Government of India conveyed its approval under Section 2 of the Forest (Conservation) Act, 1980 by the letter dated 02.11.2007 for



diversion of 83.0405 hactres of forest land (68.3130 hactres surface forest are and 14.7275 hactres underground forest area) for construction of 1200 MW Teesta Stage-III Hydro Electric Project by M/s. Teesta Urja Limited in North District of Sikkim, of course, after holding a public hearing on 08.06.2006 at Chungthang, which is a condition precedent. The stringent conditions are imposed in the said approval dated 02.11.2007, which read as hereunder:-

"F.No.8-142/2006-FC
Government of India
Ministry of Environment & Forests
(FC Division)

Paryavaran Bhawan, CGO Complex,
Lodhi Road, New Delhi-110003

Dated: 2nd November, 2007

To
The Principal Secretary (Forest)
Government of Sikkim
Gangtok, Sikkim.

Sub: Diversion of 83.0405 ha of forest land **(68.3130 ha surface forest area and 14.7275 ha underground forest area)** for construction of **1200 MW Teesta Stage-III Hydro Electric Project by M/s Teesta Urja Limited in North District of Sikkim.**

Sir,


I am directed to refer to your Letter no. 1096(1070)FCA/FEWMD dated 13.12.2006 on the above mentioned subject, wherein prior approval of the Central Government t for the diversion of 83.0405 has of forest land (63.3130 ha surface forest area and 14.7275 ha unjde3rground forest area) for construction of 1200 MW Teesta Stage-III Hydro Electric Project by M/s Teesta Urja Limited in North District of Sikkim, was sought, in accordance with Section 2 of the Forest (Conservation)



Act, 1980. The said proposal has been examined by the Forest Advisory Committee constituted by the Central Government under Section 3 of the aforesaid Act.


2. After careful consideration of the proposal of the State Government of Sikkim and on the basis of the recommendations of the Forest Advisory Committee, the Central Government **granted in principle approval to the said proposal vide letter of even no dated 12-Oct 2007**, subject to certain conditions. The compliance of these conditions was submitted by Nodal Officer cum Chief Conservator of Forests, Sikkim, vide letters No. 786(1070) dated 18.10.2007 and 801(1070) dated 24.10.2007. **After consideration of the proposal and compliance of various conditions by the State Government, the Central Government hereby conveys its approval under Section 2 of the Forest (Conservation) Act, 1980** for the diversion of 83.0405 ha forest land (63.3130 ha surface forest area and 14.7275 ha underground forest area) for construction of 1200 MW Teesta Stage-III Hydro Electric Project by M/s Teesta Urja Limited in North District of Sikkim.

1. **Legal Status of the Forest land shall remain unchanged.**
2. **Compensatory Afforestation shall be raised and maintained over double the degraded forest land at the cost of the User Agency.**
3. **The State Government shall charge the Net Present Value of the forest area diverted under this proposal from the User Agency as per the orders of the Hon'ble Supreme Court of India** dated 30.10.2002 and 01.08.2003 in IA No. 566 in WP(C) No.202/1995 and as per the guidelines issued by this Ministry vide letters No. 5-1/1998-FC (Pt. II) dated 18.09.2003, as well as letter No. 5-2/2006-FC dated 03.10.2006 in this regard.
4. **Additional amount of the NPV of the diverted forestland**, if any, becoming due after finalisation of the same by the hon'ble Supreme Court of India on receipt of the report from the Expert Committee, shall be charged by the State Government from the User Agency. The User Agency shall furnish an undertaking to this effect.





5. All the above funds received from the User Agency under the project shall be transferred to the CAMPA Fund (CAF) in Account No. 344901010070128 of the Union Bank of India, Sunder Nagar Branch, New Delhi 110 003.
6. **The entire reservoir created due to submergence shall be declared as Reserved Forests** under the India Forest Act, 1927. However, regulated fishing shall be allowed.
7. Dumping area for muck disposal should be properly stabilized and reclaimed and plantation should be done over such sites by the User Agency before the project is closed.
8. **The User Agency shall transfer the cost of Catchment Area Treatment Plan** (revised as on date incorporating the existing wage structure) to the State Forest Department. Catchment Area Treatment (CAT) Plan should be implemented at the project cost.
9. The project area shall be demarcated on ground at the project cost, using four feet high RCC Pillars, with each pillar inscribed with the serial number, forward and backward bearings and distance between two adjacent pillars.
10. While constructing approach roads, sufficient safety measures should be adopted to avoid rolling down of muck/debris along the slope and damage to forest area should be avoided.
11. **All conditions stipulated at the time of grant of Environmental Clearance shall be complied with by the User Agency.** As per the Environmental Clearance order during the lean season a minimum of 3 cumecs water shall be released downstream of the dam for the sustenance of aquatic life.
12. **The Reclamation Plan** including muck management plan, Restoration and Reclamation Plan, Green Belt Development Plan **shall be implemented at the cost of the User Agency.**

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13. **Any tree felling shall be done only when it is unavoidable and under strict supervision of the State Forest Department.**
 14. **Planting of native tree species shall be undertaken** on vacant land along the reservoirs and canals.
 15. **No tree felling in the area between FRL and FRL-4 m. levels shall** be carried out.
 16. **Water will be provided free of cost to the State Forest Department** for raising nurser6y/plantations in nearby areas.
 17. **No labour camps shall be set up inside the forest area.** The User Agency shall provide fuel wood preferably alternate fuel to the labourers and the staff working at the site.
 18. **No damage to the flora and fauna of the area shall be caused.** The forest land shall not be used for any purpose other than that specified in the proposal.
 19. **All efforts should be made by the User Agency for the protection of the environment and to avoid any damage to the Wild life found in the area.** Steps may be taken to minimize biotic pressure over adjoining/near by forests.
 20. **All the components of the Environment Management Plan (EMP) shall be implemented by the User Agency** in co-ordination with the different agencies of the State Government.
 21. **The Forest land thus diverted shall be non-transferable.** Whenever and whatever extent of forest land is not required by the User Agency, it shall be surrendered to the State Forest Department after proper rehabilitation, under intimation to this Ministry.
 22. **All other conditions that the CCF, North East Regional Officer, Shillong may impose from time to time for the protection and improvement of the flora**



and fauna in the forest area shall also be applicable.

The State Government shall ensure compliance of all the above conditions.

Yours faithfully,

Sd/-

(A.K. Joshi)

Assistant Inspector General of Forests"

(emphasis supplied)

20.8 These statutory clearances were also brought to the notice of the Hon'ble Supreme Court in an Interlocutory Application No.2163 of 2008 in Writ Petition (C) No.202 of 1995 (T. N. Godavarman Thirumalpad vs. Union of India) by way of an affidavit filed by the Ministry of Environment and Forests, Government of India. In the said affidavit, the Ministry of Environment and Forests, Government of India specifically mentioned that the recommendations and observations contained in the Carrying Capacity Studies and the project specific Environmental Impact Assessment (EIA) studies and Environment Management Plan (EMP) were considered by the Expert Appraisal Committee (EAC) for River Valley and Hydroelectric Projects constituted under the Environment Protection Act, 1986 and that the EAC, after satisfying themselves, recommended Environmental Clearance for the projects and subsequently Ministry had accorded Environmental



Clearance for the Teesta-VI Project on 21.09.2006 and for Teesta Stage-III on 04.08.2006 respectively.

20.9 The affidavit filed on behalf of the Ministry of Environment and Forests, Government of India before the Hon'ble Supreme Court in the Interlocutory Application No.2163 of 2008 in Writ Petition (C) No.202 of 1995, reads as hereunder:

" IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION
WRIT PETITION (C) NO. 202 OF 1995

IN THE MATTER OF: -

T.N. Godavarman Thirumalpad ...Petitioner

Versus

Union of India and Others ...Respondents

I.A. No. 2163 & 2167 IN IA No. 1413 REGARDING THE CONSTITUTION OF THE FOREST ADVISORY COMMITTEE (FAC).
&
DIVERSION OF 89.4266 HA OF FOREST LAND FOR CONSTRUCTION OF 500 MW TEESTA STAGE - VI HYDROELECTRIC PROJECT BY M/S LANCO ENERGY PRIVATE LIMITED IN SIKKIM.

AFFIDAVIT ON BEHALF OF
MINISTRY OF ENVIRONMENT AND FORESTS

I, C.D. Singh, aged about 44 years, S/o Shri R.D. Singh, residing at G-72, Type -V, Nivedita Kunj, R.K. Puram, Sector-10, New Delhi-110 022 do hereby solemnly affirm and state as under:

1. That, I am working as Assistant Inspector General of Forests (F.C. Division), Ministry of Environment and Forest (MoEF), Government of India, and as such am well conversant with the facts of the case from records maintained in the office. I have been authorized and directed to swear in this affidavit on behalf of the Ministry of Environment and Forests, Government of India.



2. That, the MoEF has filed its response by way of an affidavit dated 05.03.2008 on the observations of Fourth Report of CEC dated 15.11.2007 in relation to Teesta-VI Project before this Hon'ble Court. The MoEF in its affidavit has affirmed in Para 48(i) that the Carrying Capacity Study of the Teesta River was carried out by the Centre for Inter Disciplinary Studies for Hill and Mountain Environment (CISHME) to assess the impact of the envisaged development projects in Sikkim including six hydroelectric projects identified for development in the Teesta River basin.

3. That, the CEC filed its supplementary report dated 26.03.2008, wherein it further prayed that the forest clearance granted to Teesta-III HEP may be kept in abeyance and further no permission be granted to Teesta-VI project till MoEF after taking into consideration the Carrying Capacity Studies concludes that the implementation of these Projects is environmentally and ecologically compatible.

4. That, it is submitted that both these projects namely Teesta-III and Teesta-VI are being implemented by the State Government of Sikkim in Joint Sector on BOT basis. The Carrying Capacity Study by CISHME in association with six other reputed institutions was started in 2001 and completed in 2006 in four phases and relates to environmental aspects of the development projects including proposed hydroelectric projects in Teesta basin in Sikkim. The phase-I report was received in the Ministry during May 2003, Phase-II report during April, 2005. **As part of Phase-III, the draft final report along with the executive summary and recommendations was submitted to the Ministry of Environment & Forest by M/s CISHME in March 2006.** M/s CISHME as part of Phase-IV i.e. the final phase of the Project, has conducted workshops and seminars for the general public and the Govt. official to apprise them of the findings of the study and thereafter, MoEF has directed M/s CISHME to revise the summary and recommendations of the final report and clearly mention whether or not the dams would be constructed, above Chungthang area in Teesta Basin. **The revised Executive Summary and recommendations of the Carrying Capacity Studies of Teesta Basin was submitted by CISHME in the month of November, 2007, which states that whatever developmental activity is proposed in Teesta Basin, it should be undertaken in the areas below Chungthang. It was further recommended that if the dams are absolutely necessary the same may not be of heights above 80 m.**

5. That, when the proposal for Site Clearance for Teesta Projects Teesta-III, Teesta-IV and Teesta-VI came up, Ministry had already received the Draft Carrying Capacity Studies. The site clearance proposals were further deliberated by the Steering Committee on Carrying Capacity Studies, Sikkim in its 3rd meeting held on 9th May 2005. **After considering various relevant aspects, the Committee had decided to allow issue of Site Clearance for Survey & Investigation of Teesta-III, IV & VI. Thus in view of above, it is clear that the Expert Appraisal Committee (EAC) for River Valley and Hydroelectric Projects was fully aware about**





the developments of Carrying Capacity study while granting Site Clearance to Teesta-VI and Teesta-III and the same has been considered while granting Environmental Clearance to both Teesta-VI and Teesta-III Projects. Moreover, Teesta-VI and Teesta-III projects are both located in the area below Chungthang, in the districts of South Sikkim and North Sikkim respectively. The height of the dam structure of Teesta-VI HEP is only about 25 m and the height of the diversion structure of Teesta-III project is about 60 m only. There is no displacement of any person on account of execution of these projects. The recommendations and observations contained in the Carrying Capacity Studies and the project specific Environment Impact Assessment (EIA) studies and Environment Management Plan (EMP) were considered for River Valley and Hydroelectric Projects constituted under Environmental Protection Act (1986) comprising of 13 eminent Experts related to the field of Environment and Ecology, Earthquake, Engineering, Fisheries, Water Technology etc. constituted under Environment Protection Act (1986), while considering the proposal for grant of Environment Clearance for Teesta Stage-VI and Teesta Stage-III projects in Sikkim. The EAC after satisfying themselves recommended Environmental Clearance for both these projects and subsequently Ministry has accorded Environmental Clearance for the Teesta Stage-VI Project on 21.09.2006 and for Teesta Stage-III on 04.08.2006 respectively.

6. That, after the grant of the Environmental Clearance to Teesta Stage-VI and Teesta Stage-III, their Proposals for Forest Clearance were considered by the Forest Advisory Committee (FAC) and after detailed and thorough examination of the proposals forwarded by State Government along with Site inspection report from the Regional MOEF, Shillong, FAC has recommended the diversion of forest land, taking into account the Environmental clearance already recommended by the EAC to these projects, on 17th May 2007.

7. That, Teesta-VI is located at an altitude of only 340 m and is well below Chungthang in South Sikkim. The project involves construction of a barrage of about 25 m height with a small diurnal pondage, which is well within the ceiling of 80 m height recommended by CISHME in its carrying capacity study of Teesta Basin in Sikkim. The study has also noted that the area concerned is already under significantly changed land use and there will be no major transformation of any natural ecosystems with the implementation of the project in fact the study reports that the local villages mostly extended their support for the project and the inhabitants of surrounding areas welcomed the project expecting to get jobs and expand their business. Further the Environment Impact Assessment (EIA) Study for Teesta Stage-VI was conducted by the Department of Forests, Environment and Wild Life Management Plan (EMP) has been formulated for this project. The EIA report contained a comprehensive study on the various base line parameters like water, air, biological environment comprising of vegetation



details, floristic study, fauna, aquatic ecology etc. and the probable associated impacts and the mitigative measures relating to Project development and the same were comprehensively dealt in the EMP which interalia covers the various measures like Rehabilitation and Resettlement Plan, Restoration Plan for Quarry areas and Spoil tips, Public health and Solid waste management plan, Bio-Diversity Conservation Plan including Fishery Management, Soil Conservation and protection plan, Greenbelt Development Plan, Catchment Area Treatment Plan, Environmental Monitoring Scheme, and Landscape plan etc. In view of the above facts noted in the carrying capacity study about the Teesta VI Project, the Environmental Clearance for Teesta Stage-VI was accorded on 21.9.2006 after duly considering the Carrying Capacity Studies. This Ministry is of the view that the implementation of the Teesta VI project is environmentally safe and ecologically compatible.

8. That, Teesta-III project is located below Chungthang with the dam height 60 m which is well within the stipulated height below 80 m as per the recommendations of the Carrying Capacity Studies. It is further submitted that M/S WAPCOS (Government of India Undertaking concern) who were also involved in the Carrying Capacity studies of Teesta Basin and were full knowledge of observations of Carrying Capacity Studies, had prepared a detailed EIA/EMP report for the Teesta Stage-III after taking into account the detailed data. **The EIA report contained a detailed study on the various base line parameters like water, air, biological environment comprising of vegetation details, flora, fauna, fisheries, etc. and the probable associated risks and the mitigative measures relating to the Project activity and the same were comprehensively dealt in the EMP which interalia covers the various measures like Rehabilitation and Resettlement Plan, Local Area Development Programme, Muck Management Plan, Forest Protection Plan, Wildlife Conservation Plan, Bio-Diversity Conservation Plan, Reservoir Rim Treatment Plan, Disaster Management Plan, Dam Break Analysis, Fish Management Plan, Solid Waster Management Plan, Greenbelt Development Plan, Quarry stablilization & Restoration Plan, Public Health Delivery System and Catchment Area Treatment Plan, etc.** Sufficient mitigation measures have been proposed in consultation with the State Forest Department and covered as part of EMP to take care of environmental implications. It is submitted that this Ministry had received a copy of representations regarding various apprehensions including observations relating to Carrying Capacity Studies. **The Ministry had forwarded the same to Teesta III HEP asking them to submit their responses to the above observations.** Teesta III HEP submitted a detailed reply in response to the said representations and the same were duly considered by the EAC during the appraisal meeting held on 28-6-2006 & 19-7-2006. **It is further stated, all the Environmental Aspects including that of geological parameters of the project have been thoroughly examined and scrutinized by the various competent authorities i.e. State Level Environmental Impact**

Assessment Committee, Expert Committee for River Valley & Hydroelectric Projects of Ministry of Environment and Forests, etc. before granting clearance to the said project. As the Environmental Clearance was accorded on 4.8.2006 after duly considering the Carrying Capacity Studies, the Ministry is of the view that the implementation of the Teesta Stage-III project is environmentally safe and ecologically viable and compatible.

9. That an appeal was filed by Affected Citizens of Teesta, a NGO against the grant of the Environmental Clearance to Teesta Hydroelectric Project Stage-III under Section 11(1) of the National Environment Appellate Authority Act, 1997 numbered as Appeal No. 8 of 2006. The issue of Carrying Capacity Studies was raised in the said Appeal. The National Environment Appellate Authority (NEAA) in its order dated 5th July, 2007 clearly stated:

"That the EIA report has made a detailed examination of the geological conditions of the project area and related aspects. A perusal of EIA report and EMP reveals that EIA report throws evidence to proper assessment of the environmental impact of the project. The various Environment programme such as Muck Management Plan, Forest and Wildlife Conservation Plan, Fish Management Plan etc. prove the point of view of the Respondents that comprehensive analysis of the impact of the project on the local environment has been done in the EIA Report. Necessary attention has been paid to preservation of aquatic ecology of the river system by assuring minimum flow of water in the system. This Authority note that the Expert Committee on River Valley projects of the MoEF has examined the report on the Carrying Capacity Study on Teesta River System and recommended the project for approval of Respondent No. 1 (MoEF). All these analyses and precautionary programme confirms the comprehensive coverage of EIA Report and protective nature of EMP".

Thus the NEAA which is the statutory and expert authority, relating to the grant of Environmental Clearance had dismissed the challenge against the grant of Environment Clearance to Teesta-III HEP after comprehensively dealing with all the issues raised, including the issue of carrying capacity study raised therein. The construction of the Teesta-III Project is in full swing and irretrievable loss and damage would be caused to the Teesta-III Project if the development and construction of the Project is stopped. The Ministry while considering the proposal for Environmental Clearance, has noted that Teesta-III HEP is one of the best investigated projects (since 1974) in the State of Sikkim and all the apprehensions raised in the Carrying Capacity Studies were adequately covered and which after years of attempts is now being developed and constructed by the Company at an excellent pace which

is reflected as under (as per the progress report submitted by M/s Teesta Urja Limited, vide dated 02-04.08);

- More than Rs.900 Crore has been spent on the project as on date.
- The biggest financial closure in Joint Sector development of Hydro Power Project in the Country has been achieved, wherein Rural Electrification Corporation (REC) leading a Consortium of Eleven (11) Nationalised Banks had agreed to finance the debt of approximately to Rs.4,500 crores for development of the Project.
- The contractor has mobilized men & machinery at the project site and the Main Civil Works have been started.
- Labour camps have been established by the Contractor at Power House Site, Adit V and Diversion Tunnel and the same are under development at other sites.
- About Fifteen Hundred (1500) workers are working round the clock.
- Various important approach roads around 18 Km from the existing North Sikkim Highway and the bridges to Dam Site and Power House site etc. have been mostly completed.
- Majority of the Infrastructural works have been completed and Major Civil Works under progress.
- **A single day delay in the construction of the Teesta-III HE Project at current price would cause a loss of Rs.8 to 10 Crores a day.**

Similarly for Teesta-VI, delay in implementation of the project will cause loss to the nation of more than Rs.2 crores per day on account of delayed power generation from the project and cost over run due to delay in implementation of the project.

10. That, the Govt. of Sikkim has intimated to this Ministry that they had constituted a Multidisciplinary Committee with representatives from various disciplines of Forestry, Ecology, Wild Life, Agriculture, Social Justice, Disaster Management, WWF-Sikkim Branch, representatives from MOEF, Fisheries Department, etc. to oversee the effective implementation of the suggested safeguard measures proposed in the Environmental Management Plan as approved by this Ministry and also to suggest additional measures when ever required accordingly. Further, the project companies are obliged to comply with any other additional safeguard measures pronounced subsequently as deemed required by this Ministry to ensure effective implementation of the suggested safeguard measures in a time bound and satisfactory manner.

11. That, the country is already reeling under severe peak power deficit of around 13 %, which is a direct result of adverse hydro thermal ratio of 25:75 against the desired level of 40:60.



This position needs to be corrected through execution of more and more hydro power projects to generate environment friendly and peak power and reduce dependence on power generation based on fossil fuels which are contributing enormously towards atmospheric pollution and global warming.

12. That, in view of above, it may be noted that Ministry of Environment and Forests has considered all aspects related to Carrying Capacity Report before granting environmental clearance to both Teesta Stage VI HEP and Teesta Stage IIIHEP. Ministry once again recommends that permission for diversion of 89.4266 ha of forest land (67.4295 for surface use and 21.9971 ha for underground works) for construction of the Teesta VI HE Project may kindly be considered.

13. That, the Ministry recommends that the forest clearance accorded by this Hon'ble Court on 28.09.2007 and approved by the MOEF vide letter no. 8-142/2006-FC dated 12.10.2007 for Teesta Stage-III HEP may kindly be continued.

14. That, as regards to Teesta Stage-IV project referred by the CEC in its report is located in Darjeeling Dist. Of West Bengal (Teesta Low Dam Stage-IV), the same is not covered in the scope of Carrying Capacity Study, which was limited only to the Teesta Basin in Sikkim.

15. I state that what is stated above is true and correct.

Sd/-
DEPONENT

VERIFICATION


I, the above named deponent, do hereby verify that the contents of the Paras 1 to 15 of this Affidavit are true and correct to the best of my knowledge derived from the records maintained in the office and nothing material has been concealed there from.

Verified at New Delhi on this 24th day of April 2008

Sd/-
DEPONENT "

(emphasis supplied)

20.10 The affidavit filed by Ministry of Environment and Forests, Government of India dated 24.04.2008 is comprehensive and self-explaining. After perusal for the affidavit of the Ministry of Environment and Forests, Government of India,




the Hon'ble Supreme Court vide its order dated 25.04.2008 observed that the Ministry may examine and pass appropriate orders. The Supreme Court thus accepted the recommendations, subject to the clearance by the Ministry of Environment and Forests, Government of India. The Interlocutory Application was disposed of accordingly. **It is, therefore, evident that all the required statutory clearance were obtained and conditions imposed thereunder were duly complied with and neither the petitioners nor the State has any grievance against the respondent No.3 for any non-compliance of the requirement of terms and conditions of the clearances imposed by the competent authorities.**

21.1 (vii) **Incorporation and functioning of the respondent No.3 with respect to the implementation of the impugned project.**

21.2 The relevant materials brought to my notice by Mr. Jayanta Mitra, learned Senior Counsel for the respondent No.3 ensure that –

(i) incorporation of the respondent No.3 joint venture company, viz. a Special Purpose Vehicle, holding 74 % equity shares for their consortium partners and allotting 26 % of equity shares to the Government of Sikkim, of





course, with the approval of the Government of Sikkim, is fully in compliance with the power policy of the Government of Sikkim as well as the National Electricity Policy, 2005, which was formulated in compliance with Section 3 of the Electricity Act, 2003;

(ii) the respondent No.3 Company, a Special Purpose Vehicle, themselves has agreed to arrange the funds for the State Government towards their 26% equity shares;


(iii) all the statutory clearances with stringent conditions in respect of the Project have been granted;

(iv) all the stringent conditions imposed in the statutory clearance are duly complied with by the user agency i.e. the respondent No.3;

(v) the acquisition of the private land required for the Project has been accomplished and the compensation amount has been distributed to the land owners;

(vi) the permission for diversion of forest land required for the Project has been obtained and the





construction of the Civil Components of the Project are in full swing;

(vii) the site location for the impugned project is below Chungthang;


(viii) the height of the dam is restricted only upto 60' far below to 80';

(ix) the respondent No.3 has also initiated and implemented various social welfare activities in the Project area such as holding of various Medical Camps; Afforestation; provision of Ambulance facility; Construction of Community Centre has been commenced at Theng Village; Sponsoring of various cultural activities. Further the respondent No.3 has firmed up plans for improvement of education facilities, medical facilities, sanitation and water supply in the Project area villages;

(x) Teesta Industrial Training & Development Centre ("TITDC") has been started at Mangan to impart technical training to the local youth;

(xi) out of the 26 km. of the constructed roads required for the Project, to provide access to the various





work fronts and components, the construction of about 20 km. of the roads have been completed;


(xii) two bridges across River Teesta and River Lanchungchu of the span of about 320 ft. and 80 ft. respectively have been constructed;

(xiii) underground component of the Project such as diversion tunnel, access Adits to the Head Race Tunnel, Main Access Tunnel to the power house, Cable Tunnel works are under way and as on today in total more than 400 m. length of tunnelling works have been completed and the construction works at various sites are going on round the clock;

(xiv) the Engineering, Procurement and Construction (EPC) Contractors have mobilized huge quantity of heavy construction plant, equipment and machinery and materials at different work fronts. More than 1200 highly skilled, semi skilled and unskilled work force is actively engaged round the clock at various work sites;

(xv) labour camps have been established at work sites and other infrastructure like stores and workshops etc. have been constructed;





(xvi) M/s Energy Infratech has already completed the preparation of Value Engineering Report, Design Report. The detailed construction Drawings of Left Bank Diversion Tunnel, Adit Zero to Inlet Tunnel, Slope stabilization works at Diversion Tunnel and Inlet to HRT, all construction Adit to the Head Race Tunnel & Head Race Tunnel, Cable Tunnel, Main Access Tunnel to Power House and Open Excavation of Surge Shaft have been prepared and issued to the EPC Contractor;


(xvii) PTC India Ltd. has executed the share subscription agreement with the respondent No.3;

(xviii) the Govt. of Sikkim is in the final stages of approving the share subscription agreement vide which the Govt. of Sikkim would subscribe to the equity share capital of the respondent No.3;

(xix) the respondent No.3 is at advance stage of its negotiations with APGENCO, for participation;

(xx) the respondent No.3 achieved the financial closure of the Project, wherein Rural Electrification Corporation Ltd ("REC") leading the consortium of 11






nationalised Banks and Financial Institution sanctioned the Debt amounting to Rs.4560 crores for the Project and the common loan agreements have already been executed with the lenders by the respondent No.3; REC had vide its sanction letter dated 23.12.2006 mandated that the Engineering, Procurement and Construction Contract (EPC Contract) of the Project is to be awarded through the process of International Competitive Bidding route by the 3rd respondent. Accordingly, the respondent No.3 floated the tenders for EPC Contract of Teesta III HEP;

(xxi)Larsen & Toubro ("L&T") who has proposed to be the equity investor and EPC contractor in the Athena Consortium also presented its bid in response to such tender for EPC Contract. One of the conditions of such Tender was that the successful bidder had to invest in the equity share capital of the respondent No.3 ;

(xxii) however, in a transparent bidding process which process had been certified and rated by M/s ICRA Limited, a premier rating agency in the country which has been incorporated by various Banks and Financial Institutions, the EPC Contract was awarded to the consortium lead by Navyuga Engineering Company (NEC) and consisting of






SEW Constructions Ltd. – Abir Construction Private Limited (ABIR) – M/s Sabir Dam & Water Works Construction Company and M/s CKD Hydro Power Pvt. Ltd. The Electro-mechanical works have been awarded to a consortium led by M/s VATech Hydro;

(xxiii) the role of Karvy Group, ICICI Securities and IL&FS, who were not the investing partners in the Athena consortium, was to Syndicate the Debt and Equity for the Project. The Punjab National Bank("PNB") which is one of the Nationalised Bank in the Consortium of lenders led by M/s REC, as a term of sanctioning the debt mandated that it should be given the role to syndicate the debt for the Project and accordingly PNB was given the said role. As on date the paid up equity share capital of the respondent No.3 is Rs. 383.82 crores and the REC led consortium has already disbursed an amount of Rs.676.52 crores to respondent No.3 as debt. The respondent No.3 would avail further services of M/s Karvy, M/s ICICI Securities and IL&FS as and when required;

(xxiv) the role of M/s Halcrow & M/s Colenco, who were not the investing partners in the Athena consortium, was to provide engineering services for execution of the





Project. The respondent No.3 after detailed deliberation on various types of Dam Structure decided to have "Concrete Faced Rock Fill Dam" ("CFRD") instead of Concrete Gravity Dam ("CGD") for the Project. The services of M/s Energy Infratech Private Limited ("EIPL") a premier company providing consultancy services from concept to commissioning of the Power Projects were engaged to locate the companies who have expertise in construction of CFRD Dam. M/s Tecsalt of Canada and M/s Sogreah of France were narrowed down as experts for execution of CFRD Dam. M/s EIPL entered into Joint venture agreement with the said two Companies for providing Engineering Services for the Project. The expertise of M/s Halcrow and M/s Colenco would also be obtained as per the requirements of the Project, during the development of the detailed designs and execution of the Project; and

(xxv) the Technical parameters and the Project cost has been certified by the Central Electricity Authority, while granting the Techno-Economic concurrence to the Project, under Section 8 of the Electricity Act, 2003 and the respondent No.3 is bound by the terms of such concurrence.





21.3 I am, therefore, convinced that incorporation of respondent No.3, a Special Purpose Vehicle, and its functioning with reference to implementation of the impugned project is strictly in accordance with law and not arbitrary and the same is fair and transparent and also protects the interest of the State as well as the public.

22.1 (viii) **Whether the implementation of the project requires any interference of this Court by way of Judicial Review.**

22.2 It is the settled law that while exercising the power of judicial review under Article 226 of the Constitution of India, this Court is concerned only as to the decision making process, but not as to the decision taken by the State Government. Of course, while doing so, the Court should ensure that such process is transparent, fair and reasonable.

22.3 It is true the State's action in commercial and contractual transactions with private parties must be inconsonance with Article 14 and the same should not be influenced by extraneous and irrelevant consideration. Of course, even though public authorities have some discretion in contracts having commercial element, such discretion is not

absolute and must be governed by some norms and procedures in public interest and for public good as contended on behalf of the writ petitioners based on the decision of the Apex Court in ***Sterling Computers Ltd. vs. M/s M & N Publications Ltd. and others*** reported in **(1993) 1 SCC 445**. In the instant case, it is apparent on the face of the records, as discussed above, that all the earlier attempts of the Government of Sikkim for installation of Hydro Electric Power Projects by a joint venture could not succeed, in spite of their extensive efforts. After the enactment of the Electricity Act, 2003 and the formulation of the new National Electricity Policy, 2005, giving free hand to the State Government to work out their own modules, the State Government constituted a High Powered Hydro Power Committee, who studied the issue in depth and recommended the State Power Policy, which was approved by the Cabinet and then adopted by the Government of Sikkim by the Letter of Intent dated 26.02.2005. The above decision making process adopted by the State of Sikkim is transparent, fair and reasonable. Once this Court arrives at a conclusion that the power policy of the State is transparent, fair and reasonable, it may not be proper for this Court to replace its own judgment in respect of such policy of the State, more particularly in a complex matter of this nature, which involves highly technical




issues. Hence, it may not be proper for this Court, to interfere with such decision taken and the Agreement dated 28.07.2005 entered into pursuant to said Power Policy of the State of Sikkim dated 26.02.2005.

22.4 The above conclusion is also fortified with the decisions of the Apex Court, as referred to hereunder:

(i) In **Sterling Computers Limited and Ors. Vs. M & N Publications Limited and Ors** reported in **1993 (1) SCC 445**, the Apex Court held as follows: -

X X X X

12. At times it is said that public authorities must have the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution in many cases for years. That is why the Courts have impressed that even in contractual matters the public authority should not have unfettered discretion. **In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by Courts while dealing with public property. It is not possible for Courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi judicial authority while awarding contracts. Under some special circumstances a discretion has to be**



conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the Courts, such decisions are upheld on the principle laid down by Justice Holmes, that Courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive.

13. But in normal course some rules must exist to regulate the selection of persons for awarding contracts. In such matters always a defence cannot be entertained that contract has been awarded without observing the well settled norms and rules prescribed, on basis of the doctrine of "executive necessity". The norms and procedures prescribed by Government and indicated by Courts to be more strictly followed while awarding contracts which have along with a commercial element a public purpose as in the present case. The publication of directories by the MTNL is not just a commercial venture; the primary object is to provide service to the people.

X X X X

15. There is nothing paradoxical in imposing legal limits on such authorities by Courts even in contractual matters because the whole conception of unfettered discretion is inappropriate to a public authority, who is expected to exercise such powers only for public good.

X X X X

17. It is true that by way of judicial review the Court is not expected to act as a court of appeal while examining an administrative decision and to record a finding whether such decision could have been taken otherwise in the facts and circumstances of the case. In the book Administrative Law, Prof. Wade has said:

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding



authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which legislature is presumed to have intended. The decisions which are extravagant or capricious cannot be legitimate. **But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. "With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority."**

But in the same book Prof. Wade has also said:

"The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest.

There are many cases in which a public authority has been held to have acted from improper motives or upon irrelevant considerations, or to, have failed to take account of relevant considerations, so that its action is ultra vires and void."

18. **While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process". In this connection reference may be made to the case of Chief Constable of the North Wales Police v. Evans (1982) 3 All ER 141, where it was said that: (p.144a)**

"The purpose of judicial review" ..is to ensure that the individual receives fair

treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court."

By way of judicial review **the Court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State.** Courts have inherent limitations on the scope of any such enquiry. But at the same time as was said by the House of Lords in the 55 aforesaid case, *Chief Constable of the North Wales Police v. Evans* (supra), the Courts can certainly examine whether **"decision making process" was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.**

19. If the contract has been entered into without ignoring the procedure can be said to be basic in nature and after an objective consideration of different options available **taking into account the interest of the State and the public**, then Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract. But, once the procedure adopted by an authority for purpose of entering into a contract is held to be against the mandate of Article 14 of the Constitution, the Courts cannot ignore such action saying that the authorities concerned must have some latitude or liberty in contractual matters and any interference by Court amounts to encroachment on the exclusive right of the executive to take such decision.

(emphasis supplied)

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(ii) In **Tata Cellular Vs. Union of India** reported in **AIR 1996 SC 11**, the Apex Court further held as follows: -

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113. The principles deducible from the above are:

(1) **The modern trend points to judicial restraint in administrative action.**

(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

(emphasis supplied)

X X X X

(iii) In **Raunaq International Limited Vs. I.V.R.**

Construction Ltd. & Ors. reported in **AIR 1999 SC 393**,

the Apex Court also held as follows: -

X X X X





9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount importance are commercial considerations. These would be : (1) The price at which the other side is willing to do the work; (2) Whether the goods or services offered are of the requisite specifications; (3) Whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important; (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality; (5) past experience of the tenderer, and whether he has successfully completed similar work earlier; (6) time which will be taken to deliver the goods or services; and often (7) the ability of the tenderer to take follow up action, rectify defects or to give post contract services. Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest ? (1) Public money would be expended for the purposes of the contract; (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in re-doing the entire work - thus involving larger outlays or public money and delaying the availability of services, facilities or goods, e.g. A delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial

development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. **It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers.**

12. When a petition is filed as a public interest litigation challenging the award of a contract by the State or any public body to a particular tenderer, **the court must satisfy itself that party which has brought the litigation is litigating bonafide for public good. The public interest litigation should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition. The court can examine the previous record of public service rendered by the organisation bringing public interest litigation.** Even when a public interest litigation is entertained the court must be careful to weigh conflicting public interests before intervening. Intervention by the court may ultimately result in delay in the execution of the project. The obvious consequence of such delay is price escalation. If any re-tendering is prescribed, cost of the project can escalate substantially. What is more important, ultimately the public would have to pay a much higher price in the form of delay in the commissioning of the project and the consequent delay in the contemplated public service becoming available to the public. **If it is a power project which is thus delayed, the**

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public may lose substantially because of shortage in electric supply and the consequent obstruction in industrial development. If the project is for the construction of a road, or an irrigation canal, the delay in transportation facility becoming available or the delay in water supply for agriculture being available, can be a substantial set back to the country's economic development. **Where the decision has been taken bonafide and a choice has been exercised on legitimate considerations and not arbitrarily, there is no reason why the court should entertain a petition under Article 226.**

X X X X

22. In *Tata Cellular v. Union of India*,: AIR1996SC11, this Court again examined the scope of judicial review in the case of a tender awarded by a public authority for carrying out certain work. This Court acknowledged that the principles of judicial review can apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of that power of judicial review. The Court also observed that the right to choose cannot be considered as an arbitrary power. of course, if this power is exercised for any collateral purpose, the exercise of that power will be struck down. "Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters and the need to remedy any unfairness. Such an unfairness is set right by judicial review." After examining a number of authorities, the Court concluded (at page 687) as follows :-

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative, decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

(5) **The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative or quasi-administrative sphere.** However, the decision can be tested by the application of the "Wednesbury principle" of reasonableness and the decision should be free from arbitrariness, not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

23. **The same view has been reiterated in Asia Foundation and Construction Ltd. v. Trafalgar House Construction (I) Ltd. and Ors., : (1997)1SCC738**, the court observing that judicial review of contractual transactions by Government bodies is permissible to prevent arbitrariness, favouritism or use of power for collateral purposes. This Court added a further dimension to the undesirability of intervention by pointing out that where the project is a high cost project for which loans from the World Bank or other international bodies have been obtained after following the specifications and procedure of such a body, it would be detrimental to public interest to interfere. The same principles have been also reaffirmed in **New Horizons Limited and Anr. v. Union of India and Ors., : (1995)1SCC478** with this Court again emphasising the need to allow for certain flexibility in administrative decision-making, observing that **the decision can be challenged only on the Wednesbury principle of unreasonableness** i.e. unless the decision is so unreasonable that no sensible person would have arrived at such a decision, it should not be upset. In **Delhi Science Forum and Ors. v. Union of India and Anr., : [1996]2SCR767**, this Court once again observed that if a reasonable procedure has been followed, the decision should not be challenged except on the **Wednesbury principle of unreasonableness**.

24. Dealing with interim orders, this Court observed in **Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. : 1985ECR4(SC)**



that an interim order should not be granted without considering balance of convenience, the public interest involved and the financial impact of an interim order. Similarly, in *Ramniklal N. Bhutta and Anr. v. State of Maharashtra and Ors.*, : AIR1997SC1236 , the Court said that while granting a Stay the court should arrive at a proper balancing of competing interests and grant a Stay only when there is an overwhelming public interest in granting it, as against the public detriment which may be caused by granting a Stay. Therefore, in granting an Injunction or Stay order against the award of a contract by the Government or a Government agency, the court has to satisfy itself that the public interest in holding up the project far outweighs the public interest in carrying it out within a reasonable time. **The court must also take into account the cost involved in staying the project and whether the public would stand to benefit by incurring such cost.**

25. Therefore, when such a Stay order is obtained at the instance of a private party or even at the instance of a body litigating in public interest, any interim order which stops the project from proceeding further, must provide for the reimbursement of costs to the public in case ultimately the litigation started by such an individual or body fails. The public must be compensated both for the delay in implementation of the project and the cost escalation resulting from such delay. Unless an adequate provision is made for this in the interim order, the interim order may prove counter-productive.


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X

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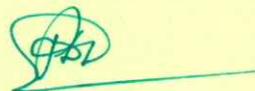
22.5 **Testing the Power Policy of the Government of Sikkim dated 26.02.2005, and the Agreement dated 18.07.2005 entered into between the Government of Sikkim and the respondent No.3, incorporation of the respondent No.3 and its functioning with reference to implementation of the impugned project, in the light of the**




ratios laid down by the Apex Court referred to above, I am satisfied that the same do not suffer from any infraction of decision making process or infirmity of well settled legal principles.

23.1 (ix) **Decision.**

23.2 From the above detailed discussion, there cannot be an iota of doubt that the Teesta Stage-III Hydro Electric Project, a mega project, is one of the few best Projects in the world, which has been investigated, surveyed and studied for decades. The impugned Teesta Stage-III Hydro Electric Project was found most beneficial not only for the State of Sikkim but also for the Nation. It could not be executed for various reasons including the constraints imposed by Government of India and its inflexible policy towards the Central Sector Projects, which did not meet the specific needs of the State of Sikkim, viz. free power share, transfer of project after the license period free of cost to the State Government, preference to the local employment, socio-economic welfare measures guaranteed to the people of the locality, etc. The Teesta Stage-III Hydro Electric Project thus had suffered nearly two decades delay with a loss of about one million units of power generation so far. Any further delay would






mean a loss of fourteen million units per day. More delay would also mean an enhanced cost of construction, delay in realisation of power benefits to the Nation and delay in realisation of free power revenue to the State of Sikkim, i.e. nearly 1.6 million units per day tantamounting to Rs.32,00,000/- per day, more delay in creation of employment and infrastructure in the State of Sikkim, more delay in completing the ownership of asset by Sikkim after license period, shattering of investor confidence which may cause delay in all above benefits from all the projects put together, etc. The impugned hydel power project is, therefore, the only maximum revenue earner for the State in the coming years and any delay will further constrain the progress of the State.

23.3 In fine, I am convinced that:

- (i) NHPC did not agree with the terms of the Government of Sikkim and therefore the contention of the petitioners that Government of Sikkim deliberately avoided NHPC is not correct;
- (ii) the Government of Sikkim, having experienced great delay and difficulty in developing the Hydro Electric Project in the State through competitive






bidding process or route, rightly decided to develop their own model of a joint venture company with the participation of the private developers as per the National Electricity Policy, 2005, which were formulated in compliance with Section 3 of the Electricity Act, 2003;

- (iii) these terms of the power policy of the Government of Sikkim, viz. the Letter of Intent dated 26.02.2005, are fully in consonance with the National Electricity Policy, 2005 dated 12.02.2005 and provides for a transparent, fair and reasonable method for identifying the IPP, which is apparently beneficial to the State of Sikkim;
- (iv) the decision of the State Government sounds reasonable. No reasonable person could have any grievance against the Power Policy of the Government of Sikkim or against the process of selection of respondent No. 3 for implementing the impugned project, as rightly contended on





behalf of the State of Sikkim, as the same were transparent, fair and reasonable;

- (v) the terms and conditions of the said Agreement dated 18.07.2005, which are neither irrational nor arbitrary nor unreasonable nor against any provisions of law nor opposed to public policy nor opposed to public interest. And they are reasonable and in consonance with the Electricity Act, 2003 and the National Electricity Policy, 2005 and also ensures the interest of the public as well as of the State;

- (vi) all the required statutory clearance were obtained and conditions imposed thereunder were duly complied with and neither the petitioners nor the State has any grievance against the respondent No.3 for any non-compliance of the terms and conditions of such statutory clearances imposed by the competent authorities.



(vii) incorporation of respondent No.3 , a Special Purpose Vehicle, and its functioning with reference to implementation of the impugned project is strictly in accordance with law, fair and transparent; and also protects the interest of the State as well as the public; and the same is neither arbitrary nor unreasonable; and

(viii) testing the Power Policy of the Government of Sikkim dated 26.02.2005 and the Agreement dated 18.07.2005 entered into with the respondent No.3 and incorporation of the respondent No.3 and its functioning with reference to implementation of the impugned project, in the light of the ratios laid down by the Apex Court referred to above, I am satisfied that the same do not suffer from any infraction of decision making process or infirmity of well settled legal principles.

24. Issue No. (iii) is answered in the negative.





25. The Writ Petition is, therefore, dismissed as devoid of merits and want of legal contentions with cost of Rs.50,000/- (Rupees fifty thousand) which shall be paid to the State exchequer by the petitioners jointly and severely.

(P.D. Dinakaran, CJ)

14 .10.2010

Index : Yes/~~No~~

Internet : Yes/~~No~~

pm/jk