

of 5 MW capacity at Kurtha, located in Chamba Distt. H.P.(hereinafter referred as 'the Project') has moved the petition for adjudication either by this Commission itself or by way of reference to an Arbitrator under section 86(1)(f), read with Section 158, of the Electricity Act, 2003(hereinafter referred as "the Act"), its claim for compensation on account of losses incurred due to non-readiness of Karian Sub-station 33/220kV to be developed by the Himachal Pradesh Power Transmission Corporation Ltd. (hereinafter referred as "the Respondent No.1") with effect from 30.05.2014 i.e. the Scheduled date of commissioning of the petitioner's project in terms of PERT Chart and Construction Schedule, which are alleged to be part and parcel of the Connection Agreement dated 12.03.2014, executed inter-se the parties, stating that due to inadequate power evacuation arrangement the petitioner has faced the loss of generation; and the Respondents i.e. the Himachal Pradesh Power Transmission Corporation Ltd. (Respondent No. 1) and the Himachal Pradesh State Electricity Board Ltd. (Respondent No. 2) are liable to pay an amount of Rs. 21,23,67,895/- on account of the generation loss for the period from 01.06.2014 to 30.04.2017 to the petitioner, being the financial loss suffered by the petitioner, alongwith the interest @ 18% from due date till its actual realization, and also the generation loss w.e.f. 01.05.2017, till the commissioning of 33/220 kV Sub-station at Karian with 18% interest.

2. Before resorting to the provisions of Section 86(1) (f) of the Electricity Act, 2003, read with Section 158, of the Act and regulations 9,12 and 53 of the HPERC (Conduct of Business) Regulations, 2005, the Commission is to satisfy itself whether the dispute has actually arisen between the parties; adjudication of the dispute falls within the jurisdiction of this Commission, the sufficient material is available on record to ascertain the value and nature of the issue/claim raised by the parties; and the availability of technical expertise required to analyse and decide the issues/claim raised before it.

3. After going through the response to the petition filed by the Respondents, and the petitioner's rejoinder to the response of the Respondents, the Commission vide its interim Order dated 25.11.2017 directed the petitioner to establish that the dispute has arisen in terms of the agreement executed by it with the Respondents and to build up specific issues and the claims for compensation, alongwith supporting documents. Accordingly in compliance to the said Interim Order, the petitioner vide MA No. 38 of 2018, has now revised the claim and has stated that the petitioner Company has

suffered a total loss amounting to Rs. 12,23,98,345/- with effect from 01.06.2014 to 30.09.2017 due to non-availability of evacuation facility to be provided by the Respondent No. 1 and due to severe load restrictions imposed by the Respondent No. 2 under temporary evacuation arrangement for Kurtha SHEP (5 MW) of the petitioner Company. As the petitioner is still continuously suffering the power generation loss to its Kurtha SHEP due to non-availability of physical connection point at Karian 33/220 kV Sub-station, the petitioner is entitled to the total claim as stated hereinbefore, alongwith generation loss w.e.f. 01.10.2017 onwards till the evacuation facility is provided by the Respondent No. 1, alongwith interest @ 18% from due date till its actual realization. The Respondent No. 1 has failed to provide evacuation facility to the petitioner Company from the scheduled date of commissioning of its project, and hence the petitioner Company is facing the huge financial loss continuously. On taking up the issue of loss with Respondent No. 1, as per Clause 8 of the Connection Agreement dated 12.03.2014, the Respondent No. 1 has rejected the claim of the petitioner, hence the dispute has arisen inter-se the parties in terms of the agreements executed by it with the Respondents.

4. Brief facts per averments made on behalf the petitioner are as under:-

- (a) The petitioner Company signed the Memorandum of Understanding (MOU) on dated 06.06.2007, with the Government of Himachal Pradesh for setting up Small Hydro Electric Project at Kurtha, located in District Chamba. Thereafter, the Respondent No. 2 i.e. HPSEB the competent authority, vide office order dated 21.05.2010 was pleased to accord Techno-Economic Clearance (TEC) to Kurtha Small Hydro Project 5 MW (2x2500 kW) allotted to the petitioner Company in Saredi and Kundi Nallahs, the tributaries of Sal Khad in Ravi Basin in District Chamba at an estimated cost of Rs. 3250.34 Lakh.
- (b) The Government of Himachal Pradesh executed an Implementation Agreement (IA) with the petitioner Company on 29.12.2011 for setting up 5 MW Kurtha Hydro Electric Project, located in District Chamba after having concluded that the project is Techno-Economic viable and Karian 33/220 kV. Sub-station was allocated as evacuation facility to the petitioner's Project. This was followed by a Supplementary Implementation Agreement (SIA), which was entered into between the parties on 16.10.2012 vide which both the parties have agreed to execute the said project, subject to the terms and conditions contained in the Implementation Agreement and further subject to the extent the same stand amended by the Supplementary Implementation Agreement.
- (c) On completion of all the requisite formalities, the Respondent No. 1 executed the Connection Agreement on 12.03.2014 with the petitioner Company subject to the terms and conditions contained in the

Connection Agreement. Clause –D of the Connection Agreement reads as under:-

“(D) The parties shall separately take up for implementation of the works on the mutually agreed terms and conditions. The scope of works, time schedule for completion of works, including the timelines for the various milestones to be reached for completion of works (PERT Chart) shall form on appendix to this agreement, and shall form the basis for evaluating if the works by the parties is being executed in time penalties for non completion of works in time by one party resulting in financial losses to the other party may be appropriately priced as mutual agreement for indemnification of each other against losses incurred in this regard, and form a part of this agreement similar for the regular O &M of the connection equipments owned by the applicant and located in the STUs premises/switchyard, the parties, shall separately take up the O&M agreement on mutually agreed terms and conditions.”

- (d) The petitioner Company vide letter dated 01.04.2014, in sequel to its earlier communication dated 18.01.2014, wished to enter into Power Purchase Agreement (PPA) with the Respondent No. 2 and requested to inform it with regard to the formalities required in order to execute Power Purchase Agreement at the earliest.
- (e) The petitioner Company vide letter dated 01.04.2014 also informed Respondent No. 1 with respect to the signing of Power Purchase Agreement with the Respondent No. 2 and further requested to provide the status of its inter-connection point at Karian 33/220 kV Sub-station.
- (f) The petitioner Company vide letter dated 10.04.2014 informed the Respondent No. 1, that Kurtha Small Hydro Electric Project is likely to be commissioned by approximately 25.05.2014 and requested the Respondent No. 1 to confirm the availability of all officers so that the power of 2x 2.5 MW Kurtha Small Hydro Electric Project could be evacuated to the terminal point of Karian Sub-station to be built by Respondent No. 1. Further vide letter dated 20.05.2014, the petitioner informed the Respondent No. 2 regarding deposit of testing fees amounting to Rs. 81,680/- for Kurtha Small Hydro Electric Project (SHEP) 5 MW and requested that information may be conveyed to the Metering and Protection Testing Wing for necessary action in this regard.
- (g) As per the Construction Schedule, which was also approved by HIMURJA, and PERT Chart which are part and parcel of the Connection Agreement dated 12.03.2014, the scheduled commissioning date of the petitioner project was 30.05.2014.
- (h) Due to non-readiness of Karian 33/220 kV Sub-station of the Respondent No. 1 and non-availability of inter connection facility, the petitioner could not commission its project with effect from the scheduled date of commissioning. The petitioner, in order to mitigate

and to overcome its losses, after informing the Respondent No.1, requested the Respondent No.2 to provide temporary evacuation arrangements from 33/220 kV Chamba Gharola line situated in near vicinity till the permanent evacuation facility is provided by the Respondent No. 1 from Karian Sub-station.

- (i) The petitioner Company made detailed representation dated 07.08.2014 to the Government of Himachal Pradesh for redressal of its grievances and the Government was requested to intervene in the matter, so that entry may be given through Gharola Feeder in Karian (33kV) Sub-station of the Respondent No.1 for evacuation of power and to ensure immediate Grid connectivity at Karian, located in District Chamba.
- (j) The petitioner Company vide letter dated 20.08.2014, requested Respondent No. 1 Corporation to grant permission to the petitioner to temporarily erect one small shed and install its VCB along with panels on temporary basis so that it is able to connect directly with Gharola Feeder of the Respondent No. 2 without connecting to the Karian 33 kV Sub-station, till the same is charged/commissioned.
- (k) On the requests and reminders of the petitioner Company, the Government advised the Respondent No. 1 vide letter dated 22.08.2014 for sorting out the issue of evacuation point for transmission line of Kurtha SHEP 5 MW in District Chamba. The Director HIMURJA vide letter dated 23.08.2014 also requested the Respondent No.1 to look into the matter of evacuation of power from the project of the petitioner Company.
- (l) The Respondent No. 2 vide letter dated 25.09.2014 informed the Respondent No. 1 that Kurtha SHEP (5MW) has been allowed to evacuate the power through 33 kV Chamba-Gharola line as an interim arrangement as 220/33 kV Sub-station at Karian, proposed to be built by the Respondent No. 1, has not been commissioned and its commissioning is not expected in near future. The Respondent No. 2 has also appreciated the petitioner Company with the remarks that IPP cannot be asked to defer the commercial operation date of the project because of non-performance of respondents and requested the Respondent No. 1, that un-necessary interference in the matter may be avoided unless and until Sub-station is linked with comprehensive transmission system and also advised to concentrate on the completion of its 33/220 kV Karian Sub-station so that evacuation of power of Chamba zone could be done in effective and economical manner.
- (m) The Respondent No. 2 executed an Interim Power Purchase Agreement in respect of Kurtha SHEP 5 MW with the petitioner Company on 11.12.2014 which was duly approved by this Commission, and thereafter Supplementary Power Purchase Agreement on dated 11.05.2015 subject to the terms and conditions contained in the said agreement.
- (n) The Kurtha SHEP (5MW) located in District Chamba has been synchronized with the Grid and after conducting commissioning test in

presence of independent engineers, the same has been successfully commissioned w.e.f. 30.12.2014. Thereafter, the petitioner Company entered into a Long Term Power Purchase Agreement with the Respondent No. 2 on 27.11.2015 subject to the terms and conditions contained in the agreement.

- (o) It has been provided as per the clause 2.2.46 of the Interim Power Purchase Agreement dated 11.12.2014 as well as Power Purchase Agreement dated 27.11.2015 as under:-

*“2.2.46 **Interconnection Facilities** means all the facilities which shall include, without limitation, switching equipment, protection, control and metering devices etc. for the incoming bay(s) for the Project Line(s), to be installed and maintained by the HPPTCL as proposed 33/220 kV Sub-station at Karian at the cost of the company to enable evacuation of electrical output from the Project in accordance with the Agreement.*

Since system for evacuation of power from 33/220 kV Karian Sub-station is not ready on 220 kV, as an Interim Agreement the power of the project shall be evacuated through 33 kV bus bar of 33/220 kV Karian Sub-station, on 33 kV Chamba Gharola Feeder. The evacuation of power shall be approximately 1 MW during June to August and 2 MW in September. However, preference shall be given for evacuation of power from the IPPs with permanent interfacing arrangement over the interim arrangement. Wheeling charges for transfer of power through 33 kV bus bar at Karian Sub-station shall have to be borne by the IPP”.

- (p) The petitioner Company made various requests and representations to the respondents as well as to the Govt. for resolving its disputes at the earliest in order to avoid further generation loss to the generator and vide letter dated 29.06.2016 again made a detailed representation to the Respondent No.1 and requested that the petitioner Company has suffered a huge loss on account of non-availability of evacuation point at Karian Sub-station to be built by the Respondent No.1 and due to severe load restrictions imposed by the Respondent No.2 through interim evacuation system, and claimed generation loss since 30.12.2014, the date of commercial operation of the project and further requested the Respondent No. 1 to expedite the commissioning of 33/220 kV Karian Sub-station so that generation losses of the petitioner Company are avoided in future.
- (q) The Respondent No. 2 vide letter dated 25.07.2016 intimated the Government of Himachal Pradesh that Kurtha SHEP 5 MW has been synchronized with the Grid and commissioning test conducted/witnessed in the presence of an independent Engineer and found in order. It was further intimated that Kurtha SHEP 5 MW be treated as commercially operated w.e.f. 30.12.2014 (AN). The petitioner Company sent another reminder vide letter dated 25.07.2016 to the Respondent No. 1 to the effect that due to non-availability of assigned evacuation by the Karian Sub-station of the Respondent No. 2

by interim evacuation system, the petitioner Company has suffered a huge loss and further requested to expedite the commissioning of 33/220 kV Karian Sub-station.

- (r) The Government of Himachal Pradesh vide letter dated 03.08.2016 intimated the Respondent No. 1 with regard to the grievances of the petitioner Company qua non-availability of assigned evacuation point and thereby causing huge financial loss on account of generation loss to the petitioner Company and directed the Respondent No. 1 to sort out the matter and take necessary action under intimation to the Government.
- (s) The Respondent No.1 vide letter dated 16.08.2016 intimated the Special Secretary (Power) to the Government of Himachal Pradesh to the effect that the transmission line from Karian to Rajera is under construction and its Sub-station will be commissioned by March, 2017. It was further stated that the IPP has not applied/signed an agreement for open access. On receipt of this letter the petitioner Company vide letter dated 27.08.2016 communicated to the Respondent No. 1 that the proposed 33/220 kV Karian Sub-station is not fully functional and the petitioner has signed long term PPA with the Respondent No. 2 and as such the agreement for open access is not applicable and the petitioner Company has already executed the Connection Agreement on 12.03.2014 with the Respondent No.1.
- (t) The petitioner Company vide letter dated 03.02.2017 made detailed representation to the Respondent No. 1 and claimed generation loss w.e.f. 30.12.2014 i.e. commercial operation date of the project till January, 2017 to the tune of Rs. 9,60,20,471/- and further requested to expedite the commissioning of its 33/220 kV Karian Sub-station located in Distt. Chamba, so that power generation loss may be avoided in future.
- (u) The petitioner Company has also taken up the issue of evacuation facility in the STU meetings and the Government has also advised the respondent Corporation to look into the matter and immediately to take action against the erring officers/officials and report compliance but the Respondent No.1 did nothing which fact is evident from the copies of relevant extracts of STU meetings annexed with the petition.\
- (v) The Respondent No.1 vide letter dated 21.02.2017 informed the petitioner Company that since generator has not availed open access and in absence of open access, a request for compensation cannot be considered.
- (w) Per clause 8 of the Connection Agreement dated 12.03.2014 arrived at between the petitioner Company and the Respondent No.1- Corporation, it has been specifically provided that all differences and/or dispute between the parties shall at first instance be settled through amicable settlement at the level of MD/CMD and further in the event of unresolved disputes or differences as covered under the statutory arbitration provided under the Act, 2003, the same shall be resolved accordingly.

- (x) The Respondent No.1 has failed to provide evacuation facility to the petitioner's project from the schedule date of commissioning of its project in terms of Connection Agreement. The Respondent Corporation has rejected the claim of the petitioner on 21.02.2017, therefore, dispute has arisen inter-se the parties in terms of the agreements executed by it with the respondents and hence the petitioner Company filed claim petition for compensation before this Commission.

5. In response to the petition, the Respondent No. 2 (HPSEBL) has filed the short reply stating that the relief claimed by the petitioner Company pertains to Respondent No.1, as it relates to commissioning of 33/220 kV Sub-station at Karian. Since the project of the petitioner had been completed and the transmission system provided in the IA for evacuation of the power generated or to be generated from the project was not ready, therefore the petitioner Company approached the Respondent No. 2 i.e. HPSEBL for making temporary arrangement for evacuation of power from its project. The request of the petitioner for interim evacuation arrangement was actively considered by the HPSEBL and in order to facilitate the evacuation of power, the HPSEBL agreed to transmit the same, through 33 kV, Chamba Ghorola line with certain conditions which ultimately formed part and parcel of the agreement dated 11.12.2014 and the same was approved by this Commission vide Order dated 05.12.2014. It is clearly mentioned, under Clauses 4.4 and 6.4.4 of the said agreement, that no deemed generation benefit is available to IPP for the period when power evacuation is on interim basis. Clauses 4.4 and 6.4.4 read as under.-

“Clause 4.4 (Interim arrangement for evacuation of Power)

In case power cannot be evacuated from the project at the interconnection point due to non commissioning of the Project Line, non availability of evacuation system beyond the interconnection point or any other technical constraints the parties may mutually agree to an interim arrangement, alongwith the terms and conditions thereof for evacuation of power from the project till such time the same can be evacuated under the regular arrangement envisaged in the Agreement. However, the Deemed Generation benefit under section 6.4 or any other provisions of the Agreement shall not be available to the Company for the period during which power is evacuated under such interim arrangement.

Deemed Generation (Clause 6.4)

Clause 6.4.4 The provisions of this Section 6.4 shall not be applicable in respect of the period in which power from the project is evacuated under an interim arrangement in accordance with Section 4.4.”

It is clear from the above clauses of the agreement executed by the petitioner that the petitioner will not be allowed any benefit of deemed generation, as such the claim made by the petitioner is not maintainable. The Respondent No.2 in the interest of

justice prays that the present petition being devoid of any merit *and it also does not* disclose any enforceable cause of action against the Respondent No.2 hence the same may be dismissed with costs.

6. The Respondent No. 1 has questioned the maintainability of this petition, stating that the petition moved by the petitioner is not maintainable and is liable to be dismissed for the reasons that-

- (a) the Respondent No. 1, is the statutory authority performing statutory functions. While it has been the endeavour of the Respondent No. 1 to build the transmission system in the State in terms of the statutory mandate, there cannot be any claim for compensation against it for any delay, particularly the deemed generation, without there being any agreement for indemnification;
- (b) there is no contract with the petitioner providing for any such indemnity for losses. The petitioner only has signed a Connection Agreement with the Respondent No. 1, which does not permit any transfer of power or open access. The said Agreement is only for the purposes of the petitioner connecting to the system of the Respondent No. 1, in its capacity as STU. Further the Connection Agreement specifically provides that the commercial aspects, including penalties for delay, indemnification etc., shall be separately agreed to. Therefore, there is no contractual claim at present that can be maintained by the petitioner based on the present agreement;
- (c) the right to inject electricity and the use of system would arise only after open access is obtained. The Connection Agreement does not deal with the open access at all and any other commercial terms and conditions with regard to access to the transmission, but only for the grant of connectivity to the generation station. The claim of the petitioner is directly hit by Regulation 8(6) of the HPERC (Grant of Connectivity, Long-term and Medium-term Intra State Open Access and Related Matters) Regulations, 2010 which provides that the grant of connectivity shall not entitle an applicant to interchange any power with the grid, unless it obtains long-term open access or medium term access or short-term open access. The basis of the claim of the petitioner is that because of delay in the transmission system, being established, the petitioner has been prevented from using the system to supply power. There was no open access applied for by the petitioner and, therefore, there was no right of the petitioner to use the system for any power flow. In the absence of any such right, the question of deemed generation for the power that the petitioner could not make flow on the system does not arise;
- (d) the Transmission Service Agreement (TSA) executed by the HPSEBL (Respondent No. 2) and the HPPTCL (Respondent No. 1) is only a inter-se HPPTCL and HPSEBL, and there is no contractual obligation

of the HPPTCL qua the petitioner. The transmission system in issue is yet to be included in the Transmission Service Agreement with HPSEBL and therefore, there is no commercial agreement with HPSEBL as yet; and

- (e) the petitioner itself has not complied with the terms of the Connection Agreement, the question of the petitioner claiming any right under the Connection Agreement does not arise. In terms of the connectivity granted to the petitioner, including the Connection Agreement, the petitioner was required to pay the charges for the construction of bays at the Sub-station. The petitioner was called upon to pay the said charges as far back as in December, 2014 and the petitioner deposited the same only on 01.05.2018.

7. With regard to the objections raised by the Respondent No.1, as set out in para 6 of this Order, the petitioner Company submits that.-

- (a) The Respondent No. 1 has not performed its contractual obligation to provide evacuation facility to the petitioner's Kurtha Project from its Karian Sub-station with effect from the scheduled date of commissioning i.e. 30.05.2014 in terms of PERT Chart which is a part and parcel of the Connection Agreement dated 12.03.2014 and in terms of the Construction Schedule approved by HIMURJA. The Respondent No.1 has failed to fulfill the said contractual obligation without there being any reason. The respondents are liable to indemnify the petitioner for the losses caused to the petitioner.
- (b) Under Clause D of the Connection Agreement dated 12.03.2014, the Respondent No.1 was required to complete the work and commission the Karian Sub-station in terms of PERT Chart, which forms an appendix to the said agreement. Non-completion of works and non-commissioning of Sub-station on the agreed date of performance by the Respondent No.1 has resulted in financial losses to the petitioner and petitioner is required to be appropriately compensated for the losses incurred in this regard.
- (c) The Kurtha project of the petitioner could be commissioned only on 30.12.2014 with Gharola Feeder of Respondent No. 2 with load restrictions under temporary arrangement after taking strenuous efforts made by the petitioner in this regard. The Respondent No.1 failed to establish the dedicated evacuation line in time and extended the time line of commissioning the Karian 33/220 kV Sub-station without any justifiable reason. It is also on record that the petitioner has made various requests and reminders to the Government to sort out the issue of evacuation facility to the petitioner's project and the Government has also advised the Respondent No. 1 to look into matter and immediately to take action against the erring officers/officials and report compliance. The petitioner was unable to inject its full power from its generating station and was forced to inject less power to

Gharola Feeder of the Respondent No. 2, therefore, the petitioner is entitled to claim compensation. The petitioner had signed interim PPA with the Respondent No.2 on 14.12.2014 and subsequently long term PPA with it. However, it is settled law that in case the financial loss is caused to either of the party, the quantum of compensation is required to be determined on the basis of actual loss suffered by the aggrieved party and the injured party is entitled to put it in the position in which it would have been put if the contract had been fulfilled in the manner as agreed.

- (d) The open access and transmission charges are to be borne by the Respondent No.2 since petitioner has already signed long term PPA with the Respondent No.2 and the petitioner has not sold its power outside the State. In the agreement with the Respondent No.1 there was no requirement relating to Open Access. The Respondent No.1 is unnecessarily trying to confuse the issue. It is a clear case of doing something by the Respondent No.1 on certain terms and within stipulated time period. For the purpose of present controversy, the petitioner has already signed long term PPA with the Respondent No.2 and has not sold its power to other than the HPSEBL. The issues regarding long term/medium term open access are being raised unnecessarily as the same would not be relevant for the purpose of determination of compensation to be paid by the Respondent No.1 to petitioner for violation of contractual obligation on its part.
- (e) The contention of the Respondent No.1, in ancillary proceedings, is contrary to reply filed in the main petition. It is submitted that Article 2.1 of the agreement as well as regulation 8(6) of the HPERC (Grant of Connectivity, Long-Term and Medium-Term Intra-State Open Access and Related Matters) Regulations, 2010 are not applicable in the present case as the petitioner has not sold the power outside the State. Further, there arises no question of interchange any power with the Grid as the system of the Respondent No.1 was not ready for flow of power w.e.f. the scheduled date of commissioning of the project i.e. 30.05.2014. Now the petitioner has already signed long term PPA with the Respondent No.2. In terms of letter dated 01.12.2014 of the Respondent No.1, the petitioner was required to deposit the bay charges before interfacing its project with the Sub-station of Respondent No.1 and the petitioner on dated 10.04.2018 has deposited the same i.e. Rs. 93,91,300/- through ICICI Bank DD No. 506946 dated 15.03.2018 before commissioning of the Sub-station of Respondent No.1 but despite this the Respondent No.1 has even tried to linger on the issue of evacuation facility and interconnected the petitioner's project with the Sub-station on 03.06.2018 even after one month of deposition of bay charges by the petitioner.

- (f) The Connection Agreement dated 12.03.2014 may not be read in isolation but is required to be read in consonance with other agreements executed with the petitioner and general law.
 - (g) The petitioner on various occasions has intimated the respondent right from the very beginning, that the LTA is not applicable to the case of the petitioner as it does not require electricity for its own use and has already signed the long term PPA with the Respondent No.2 and the same is an issue between the Respondent Nos. 1 and 2 and long term open access in this regard is required to be availed by the Respondent No.2 from the Respondent No.1 which fact is also substantiated by the respondents in its meeting held on 31.10.2017, therefore, the petitioner should not suffer for the faults committed by the respondents. However, the transmission service agreement was executed between the Respondents 1 and 2 on 10.02.2012 much prior to signing of Connection Agreement dated 12.03.2014 and capacity of 1060 MW was included in that agreement and the Respondent No. 2 is required to revise the capacity in TSA accordingly if the same is yet to be included after adding the capacity being injected by upcoming IPPs and now the same stands included by the Board by signing Supplementary Agreement with the Respondent No.1 in terms of TSA executed in the year 2012. However, this is an issue inter-se the Respondents 1 and 2 and the petitioner cannot be penalized for the faults committed by them.
8. The petitioner Company further adds that:-
- (a) On one hand, HIMURJA is insisting upon the IPPs to pay penalties for not developing the projects in time as in the present case also the Respondent No.2 has deducted rupees Nine Lacs from the petitioner as liquidated damages without there being any fault on its part for delayed commissioning of the Kurtha project in spite of the fact that the petitioner was ready to commission its project in terms of PERT Chart and construction schedule w.e.f. 30.05.2014 but the Karian Sub-station 33/22 kV of the Respondent No.1 was not ready to commission on the said date, and on the other hand the respondents are avoiding their responsibility to perform the contractual obligations as per the agreements executed inter-se the parties despite their faults.
 - (b) In pursuance to the assurances made by the respondents in various STU meetings, the petitioner went ahead and made the investment based on the said assurances given in STU meetings and contractual commitments made through Connection Agreement. Hence, the respondents cannot escape from their liabilities for breach and are liable to indemnify the losses caused to the petitioner for its no fault.
 - (c) For determining the quantum of compensation under the law respondents are jointly and severally liable to pay the amount to the petitioner as per the actual loss suffered by it. Hence, due to the fault

on the part of the respondents, the petitioner Company has suffered huge financial loss as assessed in petition amounting to Rs.12,23,98,345/- upto 30.09.2017 alongwith 18% interest per annum and also to pay the total future loss w.e.f. 01.10.2017 onwards till commissioning of the Karian 33/220 kV Sub-station with interest @ 18% till actual realization of the amount.

9. The petitioner has in support of its claim made out the terms of reference as under:-

- (i) Whether Karian 33/220kV substation was allotted as power evacuation facility to the petitioner's Kurtha SHEP (5.00MW)?
- (ii) If issue No. 1 is answered in affirmative, whether as per the Connection Agreement dated 12.03.2014 the Respondent No. 1 was duty bound to provide evacuation facility from its Karian 33/220 kV Sub-station to the petitioner's Kurtha SHEP (5MW) in terms of the Construction Schedule and PERT Chart from the scheduled date of Commissioning of the project i.e. 30.05.2014?
- (iii) Whether the Respondent No. 1 is responsible for causing delay in commissioning Karian 33/220 kV Sub-station and delay occurred/ is occurring only on account of the omissions and commissions on the part of the Respondent No. 1 and due to which dispute has arisen inter-se the parties?
- (iv) Whether the dispute inter-se the parties falls within the jurisdiction of this Commission?
- (v) If issue No. (ii) & (iii) is answered in affirmative, whether the petitioner has suffered loss?
- (vi) If issue No. (v) is proved in affirmative, whether the petitioner is entitled to compensation, if so, to what amount and by which of the respondents?

10. The copies of the MA No. 38 of 2018, alongwith the supporting documents filed by the petitioner stand already delivered to the Respondents, and an opportunity of being heard and making their written submissions has also been provided to the Respondents.

11. Shri Anand K. Ganeshan, Learned Advocate appearing for the Respondent No. 1, has reiterated and argued that the petition is not maintainable for the reasons, already referred to in para 6 of this Order. Regarding the effect of Connectivity Agreement, the said Learned Advocate, submits that the Hon'ble APTEL in its decision, rendered in Appeal No. 281 of 2016 and **Appeal No. 81 of 2017 NHPC Limited V/s Power Grid Corporation of India Ltd.** and others decided on 16.07.2018, lays down that the Connection Agreement is required only for the purposes of physical connectivity of the transmission line to the generation station and

the Hon'ble APTEL, rendered on 30th April, 2015 in Appeal No. 54 of 2014 the **Himachal Sorang Power Ltd. V/s the Central Electricity Regulatory Commission and others**, emphasizing that it is the general practice that a time margin is provided in the commissioning of the transmission system and generating units so as to enable completion of pre-commissioning tests of generating units prior to the final synchronization of the generating plants with the grid. Indemnification Agreements also incorporate the reciprocal obligation between the parties in case of delay in completion of their respective works. Part 'D' of the recital of the Connection Agreement executed in this case specifically makes reference to the execution of a separate agreement for implementation of the works on mutual terms and conditions.

The petitioner pursuant to sub-regulations (6)(7)(1) of the Central Electricity Authority (Technical Standards for Connectivity to Grid) Regulations, 2007, was required to execute both these Agreements i.e. the Connection Agreement (alongwith PERT Chart and Construction Schedule) and Indemnification Agreement as contemplated under Part 'D' of the recital of the Connection Agreement of 12th March, 2014. The scope of works, time schedule for completion of work, PERT Chart and Construction Schedule, which were to be prepared separately and were to form the part of the Connection Agreement as its Appendix, were never prepared.

The petitioner has failed to execute the complete Connection Agreement, as per Connectivity Regulations and has not obtained the Long-term Open Access or Mid-term Open Access or Short-term Open Access, as required under the Regulation 8(6) of HPERC (Grant of Connectivity, Long-term and Mid-term Intra-State Open Access & Related Matters) Regulations, 2010.

Shri Anand K. Ganeshan, Learned Advocate further argues that the Regulations framed under the Act, over rides the contracts and submits that the Constitution Bench of the **Hon'ble Supreme Court in PTC India Limited Vs. Central Electricity Regulatory Commission (2010) 4 SCC 603** has held that the Regulations framed by the Commission would override the existing Contracts:

"58A regulations under Section 178 is in the nature of a subordinate Legislation. Such subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have been across the board by an Order of the Central Commission under Section 79(1)(j).

92. *Summary of our Findings:*

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

Apart from this the said Learned Advocate also submits that it is settled law that no person can be benefited for his own wrongs. The petitioner itself has not complied with the terms of the Connection Agreement and further right to use of the transmission system does not arise for the reason that he has also failed to deposit the bay charges called for in Dec., 2014 and deposited the same only on 01.05.2018. In fact this amount was required to be deposited immediately on the receipt of the estimated cost of the interconnection facility to be provided, to enable the licensee to provide appropriate facilities consistent with the Grid Connectivity Standards laid down by the Authority.

13. Shri Sharwan Dogra, Learned Advocate appearing for the petitioner Company submits that due to non-readlines of Karian of Sub-station to be developed by the Respondent No. 1, the petitioner Company was unable to inject its full power from its generating station and was forced to inject less power to the Gharola Feeder of the Respondent No.2, resultantly the petitioner has suffered a huge financial loss, and as such he is entitled for compensation from the respondents. For determining the question of compensation under the law the respondents are jointly and severally liable to pay the amount to the petitioner as per the actual loss suffered by it. After the commencement of the Electricity Act, 2003, i.e. 10th June, 2003 all adjudication of disputes between licensees and generating Companies can only be done by the State Commission or the Arbitrator appointed by it. According to section 86(1)(f) of the Act, the State Commission has jurisdiction “to adjudicate upon disputes between licensees and generating companies and to refer any dispute for arbitration”. Present dispute between the petitioner Company and the Respondents is a dispute between a generating Company and licensees. Therefore, the present case falls with the jurisdiction of the State Commission under section 86(1)(f) of the Act.

14. In support of his above contention Shri Sharwan Dogra has cited the Apex Court decision rendered in **Gujarat Urja Vikas Nigam Ltd. Vs/ ESAR Power Ltd.**

AIR 2008 SC1921. Ratio decided by the Supreme Court that case will squarely apply to the present case. Hon'ble Supreme Court that case has held that-

“25. *It may be noted that Section 86(1)(f) of the Act, 2003 is a special provision for adjudication of disputes between the licensee and the generating companies. Such disputes can be adjudicated upon either by the State Commission or the person or persons to whom it is referred for arbitration. In our opinion the word “and” in Section 86(1)(f) between the words “generating companies” and “to refer any dispute for arbitration” means “or”. It is well settled that sometimes “and” can mean “or” and sometimes “or” can mean “and” (vide G.P. Singh’s Principle of Statutory Interpretation” Ninth Edition, 2004.*

26. *In our opinion in Section 86(1)(f) of the Electricity Act, 2003 the word “and” between the words “generating companies” and the words “refer any dispute” means “or”, otherwise it will lead to an anomalous situation because obviously the State Commission cannot both decide a dispute itself and also refer it to some Arbitrator. Hence, the word “and” in Section 86(1)(f) means “or”.*

“29 *****It is in the discretion of the State Commission whether the dispute should be decided itself or it should be referred to an Arbitrator. Some leeway has to be given to the legislature in such matters and there has to be judicial restraint in the matter of judicial review of constitutionality of a statute vide **Government of Andhra Pradesh and Ors. V/s Smt. P. Laxmi Devi JT 2008(2) 8 SC 639**. There are various reasons why the State Commission may not decide the dispute itself and may refer it for Arbitrator. Alternatively, the dispute may involve some highly technical point which even the State Commission may not have the expertise to decide, and such dispute in such a situation can be referred to an expert Arbitrator. There may be various other considerations for which the State Commission may refer the dispute to an Arbitrator instead of deciding it itself. Hence, there is no violation of Article 14 of the Constitution of India.”

15. It is apt to point out that during the hearing Shri Sharwan Dogra the Learned Counsel, appearing for the petitioner conceded that the role of the Respondent No. 2, i.e. the HPSEBL and also the State Govt., which is not a party in the present proceedings, have been very cooperative in facilitating the petitioner and that no claim lies against both of them.

16. With the background, as delineated in foregoing paragraphs, the first issue which arises for consideration and determination in this petition is about the jurisdiction of this Commission. After taking into consideration the facts and the circumstances of the case, the arguments advanced, and the written submissions made by the parties and the Apex Court decisions cited, we are satisfied that the prima facie dispute has arisen in terms of the agreements executed by the petitioner with

respondents. The Respondents have also admitted the jurisdiction of the Commission to decide the dispute. Hence the dispute so far as it emerges out of the agreement executed by the petitioner with respondents falls within the jurisdictions of this Commission. Keeping in view the nature of the claim, we decide to adjudicate the dispute ourselves rather than referring the same to an arbitrator.

17. After having decided the issue relating to the jurisdiction of the Commission, we now proceed further to frame following issues for our consideration that-

- (A) Whether the Respondent No.1 has defaulted in meeting its obligations under the Connection Agreement executed by it with the petitioner on 12.03.2014?
- (B) Whether the open access was a pre-requisite for the petitioner, for usage of the system of the Respondent No.1?
- (C) Whether the Respondent No. 1 is liable to pay any compensation to the petitioner, if so, to what extent?
- (D) Whether the Respondent No. 2 is liable to pay the compensation as claimed by the petitioner?

18. Now let us consider these issues one by one.

19. **Issue No. 'A' Whether the Respondent No.1 has defaulted in meeting its obligations under the Connection Agreement executed by it with the petitioner on 12.03.2014?**

We observe that the Connection Agreement signed by the petitioner with STU on 12.03.2014 inter-alia provides as under: -

- “(C) The parties shall enter into this connection agreement to record the terms and conditions upon which the parties will carry out their respective connection works, in addition to the estimated cost required to be carried out by the STU for works related to the interconnection in accordance with the connection agreement. In the case of a generating plant seeking connection to the Electrical system not owned by the STU, a tripartite connection agreement is signed between the STU, the Distribution licensee and the applicant, since the planning of the inter State transmission system, insulation coordination system studies etc. are the responsibility of the STU. The responsibility of the three parties would be defined accordingly in the tripartite agreement.
- (D) The parties shall separately take up implementation of the works on the mutually agreed terms and conditions. The scope of works, time schedule for completion of works, including the timelines for the various milestones to be reached for completion of work (PERT chart) shall form an appendix to this agreement, and shall form the basis for valuating if the works by the parties is being executed in time, penalties for non completion of works in time by one party resulting in financial losses to the other party may be appropriately priced, as mutual agreement of indemnification of losses incurred in this regard, and form a part of this agreement similar for the regular O&M of the

connection equipments owned by the applicant and located in the STUs premises/switchyard, the parties shall separately take up the O&M agreement on mutually agreed terms and conditions.”

“2.4 Agreement to pay Charges for construction of Bays:

The applicant will execute an agreement with STU for the erection of equipment of applicant or intra state transmission licensee/Distribution licensee in the substation or inter-State transmission licensee will execute an agreement with STU for construction of bays, if required. For this purpose the applicant shall pay charges to the STU on mutually agreed terms.”

20. A mere reading of the above provision shows that time lines and the terms and conditions for the implementation of the respective connection works, which were required for providing connectivity to the project, were to be mutually agreed separately. It was also agreed by the parties to the Connection Agreement of 12th March, 2014 that the scope of works, time schedule for completion of work, including the time lines for various mile stones to be reached for completion of work (PERT Chart), shall form an appendix to the said agreement. However, the mutual agreement on such time lines and other terms and conditions which were to be mutually agreed and an appendix which was to be added to the said agreement was not arrived at. As brought out by the Respondent No. 1, as per para 5 of this Order, the connectivity for physical connection, the PERT Chart referred to in the recital ‘D’ of the Connection Agreement reproduced in the preceding para of this Order, is entirely different from the Construction Schedule and PERT Chart referred to by the petitioner. The petitioner has otherwise also not established that construction schedule and PERT Chart being referred to by him forms a part of the Connection Agreement. However, even if it is established, the same would not obviate the need for mutual agreement in accordance with the provisions of the aforesaid recital ‘D’ of the Connection Agreement. The said Connection Agreement thus remained grossly incomplete to this extent. The issues which were to be mutually agreed as per the provisions of the said agreement were also left open ended. In absence of agreement between the parties to the Connection Agreement on the issues, which were to be decided mutually, and the finalization of PERT Chart, which was to form appendix to the said agreement, we decline to conclude that there was any default on the part of Respondent No.1.

21. In view of the above, we find that the Respondent No. 1 has not defaulted in meeting its obligations under the Connection Agreement executed by it with the petitioner on 12.03.2014.

Issue No. 'B'- Whether the open access was a pre-requisite for the petitioner, for usage of the system of the Respondent No.1?

22. The respondent No. 1 has pleaded that the petitioner's right to inject electricity and the use of system would arise only after open access is obtained. The Connection Agreement does not deal with the open access at all and any other commercial terms and conditions with regard to access to the transmission, but only for the grant of connectivity to the generation station and that the claim of the petitioner is directly hit by Regulation 8(6) of the HPERC (Grant of Connectivity, Long-term and Medium-term Intra State Open Access and Related Matters) Regulations, 2010 which provides that the grant of connectivity shall not entitle an applicant to interchange any power with the grid, unless it obtains long-term open access or medium term access or short-term open access. The basis of the claim of the petitioner is that because of delay in the transmission system, being established, the petitioner has been prevented from using the system to supply power. There was no open access applied for by the petitioner and, therefore, there was no right of the petitioner to use the system for any power flow. In the absence of any such right, the question of deemed generation for the power that the petitioner could not make flow on the system does not arise.

23. On the other hand, the petitioner has stated that the open access and transmission charges are to be borne by the Respondent No.2 since petitioner has already signed long term PPA with the Respondent No.2 and the petitioner has not sold its power outside the State. Under the agreement with the Respondent No.1 there was no requirement relating to Open Access.

24. The plea made by the Respondent No.1 is correct but the same will hold good only in cases when the applicant for the connectivity is to dispose of his power through open access. In this case since the petitioner signed PPAs with HPSEBL on 11.12.2014 and 27.11.2015 according to which the entire saleable power was to be purchased by the Respondent No. 2 i.e. the HPSEBL. The PPA duly defines the term interconnection point to mean the physical touch point where the Project Line(s) and the allied equipment forming a part of the Interconnection Facilities are connected to the existing/proposed 33/220 kV pooling sub-station of the HPPTCL at Karian.

25. It was, therefore, not obligatory for the petitioner to obtain open access for the power, which was to be purchased by the Respondent No. 2 i.e. the HPSEBL. As such, the plea taken by the Respondent No.1 about the condition of seeking open access by the petitioner will not hold good when considered in proper prospective.

Issue No. ‘C’ Whether the Respondent No. 1 is liable to pay any compensation to the petitioner, if so, to what extent?

26. The Petitioner entered into the Implementation Agreement with the State Government (which is not a party before us) for 5 MW Kurtha Hydro Electric Project on 29/12/2011 and after having applied for connectivity to the STU on 18.05.2013 (as per contention of the petitioner) the petitioner signed a Connection Agreement with the STU on 12th March, 2014. The first interim PPA with HPSEBL was signed on 11th December, 2014. This only shows that the important issues regarding evacuation and disposal of power were not assigned due priority in the initial stages.

27. As observed in para 20 of this Order, the Connection Agreement signed by the petitioner with Respondent No.1 remained open ended on certain important issues, which were to be mutually agreed after execution of the agreement. In the absence of mutual agreement between the parties to the Connection Agreement on the issues, which were to be decided mutually, it cannot be concluded that there was any default on the part of Respondent No.1.

28. We would further like to invite reference of Sub-Regulation (5) of Regulation 5 of the HPERC (Promotion of Generation from the Renewable Energy Sources and Terms and Conditions for Tariff Determination) Regulations, 2012 which inter-alia provides that the licensee shall provide interconnection facilities after receipt of the estimated cost of the said facilities. The relevant abstract is reproduced below-

“(5) The licensee shall, after receipt of the estimated cost of the interconnection facilities, provide appropriate facilities consistent with the grid connectivity standards laid down by the Authority or as specified in the relevant Code-

- (i) in case where such facilities are to be provided at an existing sub-station, within a period of 12 months or as may be agreed otherwise; and
- (ii) in case of the new sub-station, within such period as may be mutually agreed keeping in view the time frame in which such new sub-station is to be commissioned:

Provided that the renewable energy generator shall give prior intimation, at least 4 months before the expected date of commencement of operation of the project, to the licensee about his intention and readiness to inject power and also regarding the arrangements finalized by him for disposal of power beyond the interconnection point:

X X X X X X X X X”

29. The Respondent No.1 demanded the estimated cost of 33KV Bay vide letter No. HPPTCL/TSA/2014-15-5627-30 dated 01/12/2014. The same had not been paid by the petitioner till the filing of the petition inspite of the fact that as per the aforesaid letter the petitioner, was “requested to deposit the required cost of the 33KV bays on priority, so that further action could be taken accordingly.” However, the same has been stated to have been paid now on 15.03.2018 after filing of the present petition and after a gap of more than 3 years after raising the demand. In accordance with para 3 of the agreement of 12.03.2014 completion of the connection works was also one of the main conditions precedent for first charging of the equipment through the grid. The evacuation of power through the system of Respondent No.1 could have been possible on completion of connection works only. The petitioner was thus neither entitled, nor it was otherwise feasible, to the first synchronization of the project with the system of the petitioner. Since the petitioner did not deposit the estimated cost of the 33 kV bay required for such connection for a period of more than three years after the date on which demand was raised, it cannot have any claim against the other party to the agreement i.e. the Respondent No. 1. Obviously, even if any claim otherwise lies against the Respondent No. 1, the same would have accrued only from a date subsequent to the date on which estimated cost is deposited and that too after allowing sufficient time for completion of works as per aforesaid regulations.

30. The payment of the estimated cost of the interconnection facilities as well as the time lines for the implementation of the same were, obviously the main essence of the Connection Agreement and no agreement/action on any of the two essential ingredients had been arrived at. The penalties for non-completion of work in time by any party were to be priced based on the PERT Chart, which was to be mutually agreed and annexed as a part of the Connection Agreement, was also not arrived at.

31. In view of above, we observe that the petitioner not only failed to comply with the obligations cast on him under the agreement signed by him on 12th March, 2014 but also failed to follow the provisions of the HPERC Regulations as reproduced hereinbefore. The petitioner himself failed to pay the cost of 33 kV bay, which was essentially required for smooth evacuation of power. The petitioner has not established any default on the part of Respondent No. 1 under the agreement with him. Even if it is so established it can only lead to a conclusion that both the parties to the agreement have lagged behind. It is an established law that if both the parties fail to meet their obligation no party can claim against the other party.

32. The Respondent No. 1, is a statutory authority performing statutory functions and has to build the transmission system in the State in terms of statutory mandate. However, there cannot be any claim for compensation against it for any delay, particularly for the compensation for the loss of generation, without there being any agreement about the terms and conditions and the PERT Charts for all the works required for evacuation of power for indemnification.

33. In view of above, we find that the Respondent No. 1 is not liable to pay any compensation to the petitioner as claimed from him.

Issue No. 'D'- Whether the Respondent No. 2 is liable to pay the compensation as claimed by the petitioner?

34. So far as the Respondent No. 2 i.e. HPSEBL is concerned, the position is quiet clear. The petitioner had entered into interim PPA with the Petitioner on 11/12/2014 for sale of power from the Petitioner's Project which was followed by the PPA dated 27/11/2015. In both the agreements, the parties had agreed that under interim arrangement till the completion of Karian Sub-Station evacuation shall be feasible for about 1 MW power (January to August) and 2 MW in September. Both the parties had specifically agreed that the deemed generation benefit shall not be available to the Developer (Petitioner) for the power which is evacuated under such interim arrangement. In view of above, no claim lies against the Respondent No. 2. Moreover, the petitioner himself admitted during the course of hearing that no claim lies against HPSEBL.

Conclusion

35. In view of above findings, we conclude that the claim raised, in the petition, by the petitioner, on account of compensation for loss of generation, stated to have been suffered by the petitioner, is not sustainable. We shall however like to add here that this shall not in any way undermine the necessity of completion of the various ongoing transmission works by HPTCL/STU in a time bound and expeditious manner so that the incidents of loss of generation are avoided.

The petition is disposed of accordingly. No costs.

Sd/-
(BHANU PRATAP SINGH)
MEMBER

Sd/-
(S.K.B.S. NEGI)
CHAIRMAN