

**BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY
COMMISSION SHIMLA**

In the matter of:-

The HP State Electricity Board Ltd. thro' its,
Chief Engineer (Commercial)
Vidyut Bhawan, Shimla-171004
..... ..**Petitioner**

Versus

1. M/s Malana Power Company Ltd.
Bhilwara Towers, A-12, Sector-1,
Noida-201301
.....**Respondent No.1**
2. The Himachal Pradesh Power Transmission Corporation Ltd.,
Himfed Bhawan (Below Old MLA Quarters)
Panjari, Shimla-171005
.....**Respondent No.2**
3. The Himachal Pradesh, State Load Dispatch Centre (HPSLDC),
Totu, Shimla-171011
....**Respondent No.3**

Petition No. 16 of 2018

(Decided on **30th March, 2019**)

CORAM

**S.K.B.S NEGI
CHAIRMAN**

**BHANU PRATAP SINGH
MEMBER**

Counsels: -

for Petitioner:	Sh. Anand K. Ganeshan, Senior Advocate a/w Sh. Kamlesh Saklani (authorised Representative)
for Respondent No1 :	Ms Jyotsna Rewal Dua, Sr. Advocate a/w Ms Charu Bhatnagar Advocate Sh. Sumit Garg, Senior General Manager
for Respondent No.2.	Sh. I.P. Singh, Consultant (Legal) a/w Sh. R.K. Dhiman, Dy. G.M. (C&M)
for Respondent No.3:	Sh. Hem Raj Dhiman, Superintending Engineer (HPSLDC),

ORDER

(Last heard on 2nd March, 2019 and orders reserved)

This petition has been filed by the Himachal Pradesh State Electricity Board Ltd. (hereinafter referred as “the petitioner”), pursuant to the Order dated 12.03.2018, passed by the Hon’ble High Court of Himachal Pradesh in CWP No. 1078 of 2017- M/s Malana Power Company V/s Himachal Pradesh State Electricity Board Ltd. and others, which reads as under:-

“ Therefore, leaving all legal questions raised in this petition open to be decided at appropriate stage by appropriate Forums/Courts, the writ petition, is disposed of with a direction to either of the parties to approach the 2nd respondent for

adjudication of the claims in para 65(b) of the order, within two weeks. The 2nd respondent shall thereafter decide the matter within three months, of course, on rendering all co-operation by the parties on both sides and after-affording to them due opportunity of being heard.”

2. The petitioner through this petition seeks adjudication and directions in regard to the wheeling charges and transmission charges payable by the Respondent No.1 i.e. M/s Malana Power Company Limited (hereinafter referred as “the Respondent No.1” or “MPCL”) for use of the State network for the transmission and wheeling of electricity by the petitioner to supply power to third parties outside the State of Himachal Pradesh.

PETITIONER’S SUBMISSIONS

3. The petitioner submits that-
 - (a) The Respondent No. 1 i.e. M/s Malana Power Company Ltd., Bhilwara Towers, A:12, Sector-1, Noida- 201301 has established a 86 MW generation station at Jari in Distt. Kullu in the State of Himachal Pradesh. The generating station is connected through 132 kV line owned by the MPCL at interconnection point i.e. 132 kV Bajaura Sub-station of the petitioner. The MPCL, thereafter interconnection point, uses State network up to the Inter-State point for selling its saleable energy outside the State.
 - (b) Prior to 10.06.2010, when the Himachal Pradesh State Electricity Board Ltd. was acting as a consolidated utility for transmission and distribution, the entire network within the State was owned by the Electricity Board. The transmission licensee HPPTCL was vested with the functions of intra-State transmission with effect from 10.06.2010. The petitioner is vested with the functions of distribution and retail supply of electricity in the State.
 - (c) For the purpose of conveyance of electricity from the generating station to outside the State of Himachal Pradesh, the petitioner had initially entered into an Agreement dated 03.03.1999 with the Respondent No. 1 providing for the terms and conditions including the tariff for conveyance of electricity using the network within the State from interconnection point to inter-State point. The said Agreement dated 03.03.1999 was further amended on 24.08.2011, 22.02.2012, 20.03.2013 and 29.03.2014.
 - (d) The Central Electricity Regulatory Commission (hereinafter referred as “the Central Commission” or “CERC”) had framed and notified the CERC (Open Access in inter-State Transmission) Regulations, 2008 (hereinafter “Open Access Regulations”) i.e. from 25.01.2008, providing for the terms and conditions on which open access would be provided for conveyance of electricity from one State to another. The Open Access Regulations, inter-alia, provide as under-

“Transmission Charges

16(1) In case of bilateral transactions, for use of the inter-State transmission system, the transmission charges at the rate specified hereunder shall be payable by the applicant for the energy approved for transmission at the point(s) of injection:

<i>Type of Transmission</i>	<i>Transmission Charges (Total) (Rs/MWh)</i>
<i>(a) Bilateral, intra-regional</i>	<i>30</i>
<i>(b) Bilateral, between adjacent regions</i>	<i>60</i>

(c) *Bilateral, wheeling through one or more Intervening regions.*

90

(2) *In case of the collective transaction, for use of the inter-State transmission system, transmission charges at the rate of Rs. 30/MWh for energy approved for transmission for each point of injection and for each point of drawal shall be payable.*

(3) *The inter-State entities shall additionally pay transmission charges for use of the State network as determined by the respective State Commission:*

Provided that in case the State Commission has not determined the transmission charges, the same shall not be a ground for denial of open access and charges for use of respective State network shall be payable for the energy approved at the rate of Rs. 30/MWh:

Provided further that transmission charges for use of the State network shall be intimated to the Regional Load Despatch Centre concerned for display on its website:

Provided also that transmission charges shall not be revised with retrospective effect.

“Transmission Losses

23. (1) *The buyers and sellers of the electricity shall absorb apportioned energy losses in the transmission system as estimated by the Regional Load Despatch Centre and the State Load Despatch Centre concerned, and applied in accordance with the detailed procedure.*

(2) *The energy losses shall be accounted for by providing a differential between schedules at the points of supply, inter-utility transfer and drawal of electricity.*

(3) *The applicable transmission losses for the regional transmission system as well as for State network shall be declared in advance and shall not be revised retrospectively.”*

(e) Regulation 16 of the Open Access Regulations were amended on 20th May, 2009 as under-

“16. (1) In case of bilateral transactions, the transmission charges at the rate specified hereunder shall be payable by the short-term customer for the energy approved for transmission at the point or points of injection:

Type of Transaction	Transmission charge (Total)(Rs./MWh)
(a) <i>Bilateral, intra-regional</i>	80
(b) <i>Bilateral, between adjacent regions</i>	160
(c) <i>Bilateral, wheeling through one or more intervening regions</i>	240

(2) *In case of the collective transactions, transmission charges at the rate of Rs.100/MWh for energy approved for transmission separately for each point of injection and for each point of drawal, shall be payable.*

(3) *The intra-State entities shall pay the transmission charges for use of the State network as fixed by the respective State Commission in addition to the charges specified under clauses (1) and (2):*

Provided that in case the State Commission has not determined the transmission charges, the charges for use of respective

State network shall be payable at the rate of Rs.80/MWh for the electricity transmitted:

Provided further that non-fixation of the transmission charges by the State Commission for use of the State network shall not be a ground for refusal of open access:

Provided also that the transmission charges payable for use of the State network shall be conveyed to the Regional Load Despatch Centre concerned who shall display these rates on its web site:

Provided also that the transmission charges payable for use of the State network shall not be revised retrospectively.”

- (f) Even after the notification of the Open Access Regulations, the parties were initially of the view that the tariff to be charged from the Respondent No.1 would be in terms of the Agreement entered into between the parties. This view was however contrary to the law settled by the **Hon’ble Supreme Court in the case of PTC India Limited Vs. Central Electricity Regulatory Commission (2010) 4 SCC 603**, paras 66 and 79, wherein it was held that the Regulations would over-ride the contract between the parties. Further, it is a settled position of law that the tariff determined by the Regulatory Commission is statutory and is binding on all and cannot be amended or deviated from by the parties.[Ref: **Shree Sidhali Steels Ltd. Vs. State of Uttar Pradesh (2011) 3 SCC 193**, paras 61 and 62]
- (g) The Respondent No. 1 filed a petition being petition No. 449/MP/2014 before the Central Commission, inter-alia, challenging, in part, the contents and charges levied by the agreement dated 03.03.1999 and several further parimateria Agreement entered into between the petitioner and the Respondent No.1 with regard to the charges for the transmission of power of the Respondent No. 1 on the inter-State system, namely from the interconnection point at Bajaura sub-station which belongs to the petitioner till the 400 kV Sub-station of Power Grid Corporation at Nalagarh.
- (h) From the date of notification of the Open Access Regulations, i.e. from 25.01.2008, the Respondent No.1 cannot be charged UI charges in contradiction of the Open Access Regulations and further, handling charges cannot be charged. However, the Respondent No.1 only wanted selective application of the Open Access Regulations where it suited the Respondent No.1 and for the other aspects and charges as transmission charges and wheeling charges as well as losses, the Agreement to apply.
- (i) The petitioner filed its reply to the petition as well as a counter claim, claiming all the charges and losses in terms of the Open Access Regulations. The petitioner contended that since the Respondent No.1 had claimed the applicability of charges as per regulations, all charges had to be applied as per the regulations including the losses, wheeling charges, transmission charges etc.
- (j) The Central Commission decided petition No. 449/MP/2014 and the counter in petition No. 169/MP/2015 vide Order dated 10.03.2017, inter-alia, holding as under-

“64. In the light of the above discussion, the prayers of MPCL in Petition No. 449/MP/2014 are disposed of as under: -

(a) As regards the first prayer seeking a declaration that the Agreements dated 24.8.2011, 22.2.2012, 20.3.2013 and 29.3.2014 are void, it is directed that the provisions of the said agreements in so far as they are inconsistent with the Open Access Regulations, 2008 read with the UI Regulations, 2009 and DSM Regulations, 2014 shall be inoperative. HPSEBL is directed to work out the UI charges afresh in terms of the above mentioned regulations.

(b) MPCL has sought a direction to HPSEBL to refund the excess UI charges and handling charges alongwith interest at the rate of 18%. We direct that the difference between UI charges collected with effect from 01.04.2008 as per the letter dated 20.4.2009 and Agreements dated 24.8.2011, 22.2.2012, 20.3.2013, 29.3.2014 or any subsequent agreement and the UI/DSM charges calculated as per the Open Access Regulations, 2008 read with the U I Regulations, 2009/DSM regulations, 2014 shall be refunded or adjusted by HPSEBL in a period of three months from the date of issue of this order. However, the interest is not allowed.

(c) MPCL has sought a direction to HPSEBL to discontinue the collection of handling charges. It is directed that HPSEBL is not entitled for handling charges as it is getting the operating charges reimbursed through NRLDC and Power Exchanges. HPSEBL is directed to refund the handling charges collected from MPCL from 01.04.2008 till the issue of this order. MPCL shall be entitled for a simple interest of 9%.

(d) MPCL has sought a direction to HPSEBL and Himachal Pradesh Load Despatch Society to follow the regulations framed by this Commission while dealing with inter-State power. In the light of the directions given in (a) to (c) above, no further directions are required to be issued in this regard. Both MPCL and HPSEBL have sorted out the problem with regard to NoC for short term open access and therefore, no direction is required to be issued in this regard.

(e) MPCL has sought a direction to allow scheduling/metering of power of MPCL by NRLDC. This prayer has been made without any supporting pleadings. Therefore no direction is issued on this prayer.

65. The prayers of HPSEBL in Petition No.167/MP/2015 are disposed of as under:-

(a) HPSEBL had prayed that if the Open Access Regulations and UI Regulations of the Commission are to apply, the same would be applicable in entirety and for all aspects between the parties. We have already directed that the Open Access Regulations, 2008 shall apply in all aspects including the wheeling charges/losses and handling charges.

(b) There is dispute between the parties as to whether the transmission charges and losses determined by HPERC shall be applicable in case of the wheeling charges and losses payable by MPCL for using State network. Since the wheeling charges and losses pertaining to State network fall under the jurisdiction of HPERC, we direct the parties to approach the learned HPERC for suitable directions in this regard. Till the matter is decided by the HPERC, the default transmission charges and losses as per the Open Access Regulations, 2008 shall be payable. Accordingly, wheeling charges and losses shall be worked out by MPCL and HPSEBL.

(c) *HPSEBL has sought a direction to MPCL to pay the difference between the amounts already paid and to be paid in line with the charges and losses mentioned as per Annexure A & B to the affidavit dated 27.4.2015. It is directed that the difference between the transmission charges and losses paid by MPCL and the transmission charges and losses worked out based on the decision of HPERC shall be payable as arrears in three installments by MPCL to HPSEBL.*

66. *Petition No.449/MP/2014 and 167/MP/2015 are disposed of in terms of the above.”*

- (k) The Open Access Regulations, as quoted above provide that the charges and losses for the use of the State network would be as determined by the State Commission from time to time. For the State of Himachal Pradesh, this Commission has, from time to time, passed tariff orders determining the transmission and wheeling charges as well as losses. The transmission and wheeling charges for use of the State network are applicable as determined by this Commission since the year 2008.
- (l) As stated above, the Commission has determined and notified the wheeling charges and transmission charges for the use of State network w.e.f. 5th September, 2008. Therefore, before determination of transmission charges by the State Commission for use of intra-State system of HP, the Respondent No. 1 is liable to pay charges for transference of power through intra-State network @ Rs. 30 MWh as provided in the Central Commission's Regulations as default rate. Thereafter, the transmission charges for transference of power through intra-State network of HP shall be as notified by the Commission from time to time as detailed above.
- (m) Considering the law settled by the Hon'ble Supreme Court, the Central Commission vide order dated 10.03.2017 has held that all the charges and losses to be paid for by the Respondent No.1 need to be in terms of the Regulations. With regard to the charges and losses specified by this Commission to be applied, the Central Commission held that it was for this Commission to confirm whether the charges have been determined or not and adjudicate on the issue.
- (n) There is no dispute even by the Respondent No.1 that the Respondent No. 1 is using the State network of both the petitioner as well as the transmission licensee, i.e. HPPTCL. This is also specifically recorded in the order of the Central Commission.
- (o) That the Respondent No. 1 is using the State network and the only confirmation required is whether the charges are determined or not by the State Commission. The petitioner vide letter dated 28.03.2017 sought the clarification from the Commission on whether the charges are determined or not which are payable by the users of the network including the Respondent No.1 the said communication was replied to by the Commission on 03.04.2017, inter-alia, stating that the Commission has framed the regulations for determination of tariff in 2007 and that the Commission has from time to time determined the transmission/ wheeling

- charges and losses for usage of the State network. In case the Respondent No.1 is using the State network, the said charges are payable.
- (p) The Respondent No.1 has sought to contend that the above communication dated 03.04.2017 violates the principles of natural justice without hearing the Respondent No.1, the Commission has by its communication not determined any dispute or decided any question. The Commission had merely stated that the tariff orders were passed from time to time determining the charges which are payable by the users of the State network and in case the Respondent No.1 is also using the State network, the Respondent No.1 is liable to pay the charges so determined.
- (q) There are other generators, namely, Chanju (36MW), Baner Sangam (5MW), Sumez (14MW), Nanti selling energy outside the State. These generators are also paying the charges for use of the State network as determined by this Commission from time to time. There are also Consumers who are purchasing power from outside the State under Short Term Open Access, using the State network are paying the transmission and distribution charges and losses for the State network as determined by this Commission from time to time. There is no special dispensation which is available or can be made available to only the Respondent No.1.
- (r) There is no separate determination of the charges by the Commission on a case to case basis, but the tariff orders are passed as orders in rem, following the procedure under Sections 62 and 64 of the Electricity Act, 2003 and in terms of the Regulations, if any, framed under Section 61 of the Electricity Act, 2003. The charges so determined, whether transmission charges, wheeling charges or retail supply tariff are applicable in rem.
- (s) For the purpose of wheeling charges and transmission charges, the Commission has followed the postage stamp basis and any person using the State network is liable to pay the charges. It is irrelevant so far as the end use or supply of electricity is concerned, but what is relevant is only that the person is using the State network.
- (t) The Commission does not pass orders determining the charges for use of the State network for specific persons or category of persons. The charges are determined for the network and any person using the network is liable to pay the charges. The Commission has passed orders determining the transmission and wheeling charges for use of the State network applicable since the year 2008 w. e.f. 05.09.2008, which are as under:-

Table-1
TRANSMISSION CHARGES

Sr. No.	Period	Applicable CERC/HPERC Regulations	Applicable Rate (Paise/kWh)	
			STU System of HP	HPSEBL (DISCOM System)
1.	01.04.2008 to 25.09.2008	CERC Regulations dated 25.01.2008.	Rs.30/MWh i.e. 3 Paise/kWh	
2.	26.09.2008 to 25.11.2009	HPERC order dated 05.09.2008	Rs. 43621/MW/month i.e. 6.05 Paise/kWh	75 Paise/kWh

3.	26.11.2009 to 24.08.2010	HPERC order dated 25.11.2009	Rs.43358.92/MW/month i.e. 6.02 Paise/kWh	71 Paise/kWh
4.	25.08.2010 to 08.12.2011	HPERC order dated 19.08.2010	Rs.64967.43/MW/month i.e 9.02 Paise/kWh	100.73 Paise/kwh
5.	09.12.2011 to 26.06.2012	HPERC order dated 01.12.2011	2.12 Paise/kWh	38 Paise/kWh
6.	27.06.2012 to 31.03.2013	HPERC order dated 26.06.2012	2.15 Paise/kWh	47 Paise/kWh
7.	01.04.2013 to 31.03.2014	HPERC order dated 29.05.2013	2 Paise/kWh	44 Paise/kWh
8.	01.04.2014 to 31.03.2015	HPERC orders dated 10.06.2014 and 12.06.2014	2 Paise/kWh	46 Paise/kWh

Table-2

TRANSMISSION LOSSES

Sr. No.	Period	Applicable CERC/HPERC Regulations	Applicable Losses (%)	
			STU System of HP	HPSEBL (DISCOM System)
1.	01.04.2008 to 31.03.2009	HPERC order dated 30.05.2008	3.71%	12.50%
2.	01.04.2009 to 23.08.2009	HPERC order dated 30.05.2008	3.71%	11.72%
3.	24.08.2009 to 31.03.2010	HPERC order dated 24.08.2009	3.71%	9.43%
4.	01.04.2010 to 09.06.2010	HPERC order dated 24.08.2009	3.71%	9.12%
5.	10.06.2010 to 31.03.2011	HPERC order dated 10.06.2010	3.71%	9.12%
6.	01.04.2011 to 31.03.2012	HPERC order dated 19.07.2011	14%	
7.	01.04.2012 to 23.04.2012	HPERC order dated 19.07.2011	13.5%	
8.	24.04.2012 to 31.03.2013	HPERC order dated 24.04.2012	12.4%	
9.	01.04.2013 to 26.04.2013	HPERC order dated 24.04.2012	12.0%	
10.	27.04.2013 to 31.03.2014	HPERC order dated 27.04.2013	12%	
11.	01.04.2014 to 31.03.2018	HPERC orders dated 10.06.2014 and 12.06.2014	0.75%	4.00%

- (u) The petitioner has computed the charges to be paid by the Respondent No.1 for the use of the State network amounting to Rs. 63,94,69,198.00 strictly in terms of the tariff orders passed by the Commission from time to time. The petitioner has also given due adjustment of the charges which are payable to the Respondent No.1 in terms of the regulations and tariff orders amounting to Rs. 8,21,43,246.00 and thus the differential claim of the petitioner works out of Rs. 55,73,25,952.00 till February, 2017, which the petitioner is entitled to from the Respondent No.1. The petitioner till date has been raising bills to the Respondent No.1 in consonance with the relevant Regulations and Tariff Orders, which the Respondent No.1 is not complying.

- (v) the Respondent No.1 is only seeking to selectively apply the Regulations and the tariff orders, where it suits him and avoid those charges which do not suit him and for such charges rely on the Agreements. This is not permissible and is contrary to the law settled by the Hon'ble Supreme Court. This has also been specifically rejected by the Central Commission.
- (w) In terms of the decision the Central Commission, the petitioner is liable to pay the charges for use of the State network as determined from time to time, which are as per the tariff orders passed by the Commission from time to time.
- (x) The Hon'ble High Court vide Order dated 12.03.2018 has held that the issue is to be decided as per the order of the Central Commission by the Commission in a petition filed and after hearing the parties. In the circumstances and pursuant to the Order dated 10.03.2017 of the Central Commission and the Order dated 12.03.2018 of the Hon'ble High Court, the petitioner has preferred the present petition before this Commission for directions and decision.

BACK GROUND

4. It is pertinent to point out that-

- (a) The petitioner filed counter claim i.e. Petition No. 167/HP/2015 for directions of the Central Commission to recompute the wheeling charges and losses payable by the Respondent No. 1 in terms of the Tariff Orders/ARRs of the HPERC for the Consumers of the State Electricity Board (petitioner) as it was charging wheeling charges and losses as per agreement dated 03/03/1999.
- (b) The Respondent No. 1 filed reply to the petition No. 167/MP/2015 filed by the petitioner, wherein it stated that the HPERC has calculated only the charges on electricity consumed within the State and the wheeling charges and losses of any power going outside the State has not been considered by the HPERC. The Respondent No. 1 demonstrated from the Tariff Orders/ARR's the petitioner have calculated the charges only for the energy which has been consumed within the State by the Consumers of the petitioner and that no charges have been calculated in respect of the Embedded Generators, including petitioner, whose energy is going outside the State in the Tariff Orders and ARR's passed by the HPERC. The petitioner filed rejoinder followed by an affidavit on the directions of the CERC and submitted that line diagram of the HPSEBL (66kV and above) indicating usage of HP system for evacuation of the power of the Respondent No. 1.
- (c) The Central Commission heard both the parties together and passed the common Order dated 10/03/2017 and Review petition thereon was disposed of vide Order dated 18th September, 2017. The directions contained in para 65(b) of the Central Commission Order dated 10.03.2017 reads as under: -

“There is dispute between the parties as to whether the transmission charges and losses determined by HPERC shall be applicable in case of the wheeling charges and losses payable by MPCL for using State Network. Since the wheeling charges and losses pertaining to State Network fall under the jurisdiction of HPERC, we direct the parties to

approach the learned HPERC for suitable direction in this regard. Till the matter is decided by the HPERC, the default transmission charges and losses as per the Open Access Regulations, 2008 shall be payable. Accordingly, wheeling charges and losses shall be worked out by MPCL and HPSEBL.

- (d) The petitioner sought clarification in relation to the adjudication of the aforesaid claim before the State Commission and the State Commission issued the clarificatory letter dated 03.04.2017.
- (e) The petitioner approached the HPERC, seeking clarification and Executive Director (Tariff) vide its letter dated 03.04.2017 clarified that charges and losses approved by the HPERC shall be applicable to the Respondent No. 1 as well. On the basis of said clarification, the petitioner worked out demand of Rs. 55,73,25,952/- The Respondent No. 1 worked out the net amount of Rs. 16,45,18,905/- payable by the petitioner to it towards excess UL and handling charges alongwith interest after adjusting the wheeling charges at default rates.
- (f) The CWP No. 1078 of 2017 was filed before the Hon'ble High Court of HP praying for quashing the HPERC letter dated 03.04.2017 issued by the Executive Director (Tariff), HPERC to the Respondent No. 1 and also for quashing the Tariff Orders issued by the Chairman of the HPERC, which was relied upon by the petitioner while raising demand of wheeling charges on the ground that the said Tariff Orders were issued by the Chairman, HPERC, sitting singly which is in contravention of the Conduct of Business Regulations prescribing a quorum of two Members. The State Govt. has issued notification constituting the State Commission to be a Three Member Commission and the Orders of the State Commission had to be passed by majority Members and the Chairman sitting singly did not constitute that majority.
- (g) The Hon'ble High Court leaving all legal questions, raised in CWP, open to be decided at appropriate stage by the appropriate Forum/Courts, disposed of the CWP, with a direction to either of the parties to approach the State Commission for adjudication of the claims in para 65(b) of the Central Commission Order dated 10.03.2017, as reproduced in sub-para (j) of para 3 of this Order.
- (h) The Respondent No.1, filed SLP No. 9864 of 2018 before the Hon'ble Supreme Court, challenging the HP High Court Order dated 10.03.2017 and the Commission's letter dated 03.04.2017, and the Hon'ble Supreme Court vide its Order dated 18.09.2018 disposed of the SLP, by making it clear that the Order of the Single Member dated 03.04.2017 is non-est and the entire issue would be decided afresh by the State Commission, within time lines, as stipulated by the Hon'ble High Court.
- (i) The Hon'ble Supreme Court permitted the additional documents to be taken on record. In the aforesaid SLP No. 9864 of 2018 this Commission did not appear. The petitioner HPSEBL on 29.09.2018, informed the Commission about the aforesaid Order passed by the Hon'ble Supreme Court. Hence, the Commission revived action on the petitioners petition No. 16 of 2018 and issued the notice for hearing to the parties fixing the date hearing as 06.10.2018 in this case.

- (j) On 06.10.2018, the Respondent No.1, filed its response and requested to implead the Himachal Pradesh State Load Despatch Centre (HPSLDC) as necessary party, which was allowed and the case was listed on 27.10.2018.
- (k) As the Respondent No. 1, was seeking additional documents from the petitioner, the HPSLDC had not filed its response to the petition and the pleadings were not complete as yet, this Commission was not able to decide the case within the timelines stipulated by the Hon'ble High Court, which were to expire on 29.12.2018. In order to give justice, the parties had to be granted opportunity and thereafter parties were to be heard. All this exercise was to consume some more time. The Hon'ble Supreme Court, on the application of this Commission, has been pleased to extend the times for disposal of this petition as stipulated by the High Court upto the end of March, 2019.

RESPONSE OF RESPONDENT NO.1 (MPCL)

- 5. With the foregoing back ground the Respondent No. 1 states that -
 - 5.1 This Commission has to determine whether it has arrived at the Wheeling Charges of the Respondent No. 1 in its Tariff Orders/ARRs and not to work out the Wheeling Charges for the said period.
 - 5.2 The entire State network of the petitioner is not being used by the Respondent No. 1. The petitioner itself filed affidavit in the CERC wherein it submitted Single Line Network Diagram showing the evacuation route of the Respondent No. 1 power. Therefore, the respondent No. 1 has used the petitioner's network only to the extent submitted by the petitioner before the CERC.
 - 5.3 The said Regulations are applicable to the Respondent No.1 and the liability of the Respondent No. 1 for payment of Transmission Charges has to be in terms of the said Regulations. The evacuation route submitted by the petitioner in the CERC is being used majorly to carry the inter-State power and is the ISTS system as per the definition of ISTS in the Electricity Act, 2003.

The definition of ISTS in the Electricity Act, 2003 under section 2(36)(ii) is reproduced hereunder:

“Inter State Transmission System includes-

- (i) -----
- (ii) *the conveyance of electricity across the territory of an intervening State as well as the conveyance within the State which is incidental to such inter-State transmission of electricity.*
- (iii) -----

- 5.4 Further as the Respondent No. 1 is selling the power in inter-State after obtaining the Open Access in inter-State, it is an Inter-State Open Access Customer as per the definition given in Regulation 2(n-b) read with Regulation 1(2) of the CERC (Open Access in inter-State Transmission) Regulations, 2009 as amended from time to time. It is a noteworthy fact that the State Regulations and relevant procedures, by issue of NOCs as per the Central Regulations also exempt Inter-State Open Access Customers from the applicability of the Regulations which are specific to inter-State transmission for consumption of power within State only.

Therefore, charges calculated for the Consumers of the State cannot be made applicable to the Respondent/ similarly placed Generators.

- 5.5 The Respondent No. 1 does not contest that the Regulations would override the contracts between the parties wherever the contracts are in conflict with the Regulations. However, the tariff determined by the Regulatory Commission is statutory and binding on only those entities for whom the Tariff has been determined. Respondent No. 1 is not a “Consumer”, and Tariff Orders are not applicable to it. The HPERC, in the Tariff Orders, has in discharge of its functions under Section 86(1) of the Electricity Act,2003 and the Regulations issued by it, passed various Tariff Orders/ARRs for the petitioner and the State Transmission Utility (HPPTCL) approving the wheeling Charges and losses for the Consumers of the petitioner if they procure the energy from any other source to be consumed by them within the State.
- 5.6 The Commission has issued the Himachal Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, from time to time. The Regulations of Commission itself prescribe method for determination of charges for “Consumers” only and this Commission in line with the provisions of the Electricity Act,2003 and its own Regulations had determined the charges for the Consumers only. The Tariff Orders/ARR’s have considered only the energy input into the State for consumption in the State. The Respondent No. 1 has scrutinized each and every Tariff Order/ARR passed by this Commission relied upon by petitioner before the CERC and it is a matter of record that the Tariff Orders/ARR’s have been issued on the assumptions. This Commission while approving the tariff for the petitioner has grouped all the Consumers of the petitioner in categories while directing the applicability of the Open Access Wheeling Charges, losses and other charges in case of the Consumers for the energy consumed within the State only. The Commission has not prescribed any category for embedded generators (including petitioner itself) whose power is going outside the State.
- 5.7 From the perusal of the Tables of the MYT Order, it is clear that the Wheeling Charges collected by the petitioner as non-tariff income have been allocated to the retail supply business upto 10%. This implies that this allocation of charges to retail business is only for the charges collected from the categories of the Consumers of the petitioner which have been considered by the State Commission in its Order. As per the Order of the State Commission, the delivery point for the energy injected into system has to be within distribution system for intra-State consumption for the purpose of levy of wheeling charges calculated by the State Commission in the said Order. Therefore, these charges will be applicable only to those generators who supply the power to a category of the Consumers of the petitioner pursuant to the Intra-State Open Access. As such the Respondent No. 1 and similarly placed generators (Embedded Generators) whose drawl point is not within the distribution system have not at all been considered while working out the Wheeling Charges. In case of STU this Commission has worked out the charges by considering the energy contracts of petitioner only.
- 5.8 The petitioner fell in error in stating that Petition No. 449/MP/2014 filed by it before Central Commission challenged the contents and charges levied by

Agreement dated 03.03.1999. It is the Petitioner who challenged the agreement dated 03.03.1999 before the CERC.

- 5.9 The Respondent No. 1 has not contested that all charges have to be determined as per Regulations, it is the Respondent No. 1's contention that this Commission has not determined its Transmission charges and losses (as the power of the Petitioner is inter-State power) and therefore the CERC Open Access Regulations will apply to it. The HPERC has also confirmed before the Hon'ble High Court of Himachal Pradesh that it has not considered the generation capacity of the Respondent No.1, therefore, these charges cannot be applied.
- 5.10 This Commission has issued Tariff Orders from time to time for energy input into the State transmission system for intra-State consumption and it has not considered energy sale outside the State, either by the Petitioner or any embedded generator, including the Respondent No. 1. The power of the Respondent No. 1 is energy sold outside the State and is not for intra-State consumption and is therefore not considered in the Tariff Orders.
- 5.11 The entire State network of the Petitioner is not being used by the Respondent No. 1. The Petitioner itself filed Affidavit in the CERC wherein it submitted Single Line Network Diagram showing the evacuation route of the Respondent No.1's power. Therefore, the Respondent No. 1 has used the Petitioner's network only to the extent submitted by the Petitioner before the CERC. As per the CERC Open Access Regulations, 2008 as amended, the transmission charges of the Respondent No. 1's power has to be calculated for "use" of the State Network from the point of injection into the State Network at Bajaura to the point of delivery at CTU. The word "use" in the CERC Regulations means that only the network that has been "used" by the inter-State entities for transmission of power upto the ISTS is to be considered for calculation of the transmission charges by the State Commission. This means that an intra--State entity who is using the State network for transmission of Power into the ISTS has to pay the transmission charges to the State Network for use of the State Network. The Regulations also implies that the charges have to be paid to the extent of the use of the State network by the intra-State entity. The CERC Regulations are specific that the transmission charges are payable for the energy for transmission from the point of injection to the point of drawl. That the power is being injected at Bajaura s/s of the petitioner and the same is being delivered at inter-State point at Nalagarh. It is submitted that the data transmission devices have been installed by the Respondent No. 1 at Kango s/s of the Petitioner as per the directions of the Petitioner which itself proves that flow of power of the Respondent No. 1. It is also submitted that on various occasions due to any constraint in this line, the generation schedule of the Respondent No. 1 is also changed by the Petitioner by issuing the directions. The assets in use between the point of injection i.e. Bajaura and Interstate Point at Nalagarh are incidental to the inter-State transmission of electricity and are included in the ISTS as per the definition of inter-State transmission system as prescribed in the Electricity Act, 2003.
- 5.12 The letter dated 03.04.2017 issued by the Executive Director (Tariff) to the Petitioner has been declared non-est by the Hon'ble Supreme Court vide Order

dated 18.09.2018 and the same cannot be referred to or relied upon in any proceedings.

- 5.13 The statement of the Petitioner is that there are other generators transferring power outside the State using the Petitioner's network and making payments as per the Tariff Orders. This statement of the Petitioner is in total contradiction to its submission before the CERC in Para 12 that there is no generator other than the Respondent No. 1 in the State supplying electricity outside the State.
- 5.14 The Tariff Orders are applicable to the Consumers of the petitioner, (who either buy the power from the petitioner or procure the power and draw the same inside the State for consumption) but will not be applicable to persons who are not Consumers.
- 5.15 That this Commission has arrived the charges following the Postage Stamp Method but this methodology has been applied only for the Consumers and not for the embedded generators. It is not denied that the Respondent No. 1 is using the State network and the extent of use of State network has already been indentified and submitted by the Petitioner itself by Affidavit before CERC. The National Electricity Policy, 2005 categorically states that the Tariff framework has to be sensitive to distance, direction and related to quantum of power flow.

“Section 86 of the Electricity Act, 2003 states that 86(4)- In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published under Section 3.”

Therefore, the Transmission Charges and losses of the Respondent No. 1 had to be determined in terms of the distance, direction and quantum of flow as indentified and submitted by the Petitioner. This having not been done, the Tariff Orders are not applicable to the Respondent No.1 and the Respondent No. 1 is liable to pay all charges at default rate prescribed in the CERC Regulations. The Commission has to determine the charges or pass the orders for use of State network for different category of persons and it has done so by determining the charges for several different categories of Consumers which have been reproduced in the Tariff Orders. Some of these categories are

Domestic,

NDNCs,

Commercial,

Small and Medium Industrial power,

Large Power Supply,

Irrigation & Drinking Water Pumping,

Street Lighting

Bulk Supply

Temporary Connection

With a categoric statement that the Tariff has been determined only for the power consumed within the State

The sale outside the State has not been considered for computation of any Tariff Order passed by the State Commission, This means that not only the Respondent No. 1's Generating Station but the entire category of generation stations (including petitioner) selling the power outside the State using the Petitioner's network has not been determined. The table reproduced by the petitioner is the charges for the aforementioned Consumers and not for the category of embedded generators like the Respondent No. 1.

- 5.16 The Central Commission never ordered the Respondent No. 1 to pay charges in terms of the Tariff Orders.

“In fact CERC ordered that till the matter is decided by the HPERC, the default transmission charges and losses as per the Open Access Regulations, 2008 shall be payable. The Petitioner has repeatedly ignored the order of the CERC and in contempt of this order has issued several letters to the Respondent No. 1 to pay charges for the Tariff Orders passed by this Commission.”

RESPONSE OF RESPONDENT NO.2 (HPPTCL)

6. The HPPTCL i.e. the Respondent No. 2, in response to the petition submits-
- (a) that the tariff regulations approved by the Commission set up under the statute shall prevail, apply and over ride any bilateral agreement made by the parties;
 - (b) that all charges i.e. wheeling charges, transmission charges and transmission losses shall be applicable once these are determined and approved by the Commission and there cannot be any selective application on the basis of mutual agreement at the choice of the parties thereafter;
 - (c) that in the matter of applicability of tariff, the order(s) of the State Commission or the Central Commission shall invariably apply. The fixing of unscheduled interchange (UI) charges has to be as per Open Access Regulations by the Appropriate Commission;
 - (d) that the Commission's order fixing tariff under Open Access Regulations shall uniformly apply to all power producers using transmission network;
 - (e) that the Commission has jurisdiction to determine/ decide tariff for intra-State use of transmission network and the Respondent No. 1 is liable to pay all pending charges in accordance with order of this Commission.

REJOINDER TO THE RESPONSE OF THE RESPONDENT NO. 1 (MPCL)

7. The Petitioner has filed the rejoinder to the reply filed by the Respondent No. 1, stating-
- 7.1 that it is wrong and denied that the HPSLDC is a necessary party to the present proceedings or is otherwise liable to be impleaded as a Respondent in the present Petition. The subject matter of the present Petition is on the charges that the Petitioner is entitled to recover from the Respondent No. 1 for the use of the network of the Petitioner by the Respondent No. 1. There is no role whatsoever of the SLDC in the determination of charges or for the adjudication of the present

proceedings. The present Petition is by the Petitioner, who has the discretion to implead such parties as deemed necessary;

- 7.2 that the Respondent No. 1 has been paying the charges since the year, 2001. Further, it is wrong and denied that the charges and losses to be paid by the Respondent No. 1 for use of the network of the Petitioner has not been determined by the Commission or otherwise could not have been arrived at by the Commission. The respondent is completely misconstruing the issue of manner in which the wheeling charges and losses are determined and the energy input to be used for the said purpose. It is wrong and denied that the tariff orders of the Commission over the years determining the network are not applicable in the present case;
- 7.3 that it is wrong and denied that the tariff orders passed by the Commission are non-est as alleged to have been held by the Hon'ble Supreme Court. To the contrary, the specific challenge by the Respondent No. 1 before the Hon'ble Supreme Court was that the tariff orders of the Commission since the year, 2008 are non-est on account of the same being passed only by a Single Member of the Commission. Despite raising the specific ground before the Hon'ble Supreme Court, the said contention was not accepted by the Hon'ble Supreme Court and it is only the communication dated 03.04.2017 of the Commission that was set aside with the direction to the Commission to decide the matter after hearing the parties. In any event, the contention raised is misconceived. The Electricity Act does not provide for any minimum quorum, but leaves the same to be decided by means of delegated legislation in the form of Regulations. During the relevant time, there was only one Member of the Commission appointed and the other posts were lying vacant. Section 93 of the Electricity Act is specifically for the purposes of protecting any act or proceeding of the Commission from being invalidated on account of any vacancy or defect in the constitution of the Commission. The contention of the Respondent No.1 on the question of quorum, even if applicable would be squarely covered by section 93 of the Electricity Act, 2003 and therefore, there is no merit in the contentions sought to be raised. In any event, the contention was specifically raised before the Hon'ble Supreme Court and not accepted by the Hon'ble Supreme Court, therefore, the same cannot be raised once again;
- 7.4 that the counter claim was filed by the Petitioner before the Central Commission stating that all charges including wheeling charges and losses etc. have to be paid as per the Regulations. The Regulations of the Central Commission require the wheeling charges and losses to be paid as per the determination of the Appropriate State Commission, the Commission in the present case. It is wrong and denied that the tariff orders of the Commission are not applicable for the purposes of payment by the Respondent No. 1 to the petitioner. The Commission has passed the tariff orders to be applicable in rem to be payable by any person who uses the network of the Petitioner. There are no separate charges determined for each individual user, but the charges determined applicable for any person using the network of the Petitioner during the respective year when the tariff order applied. It is wrong and denied that the charges determined by the Commission are only payable by those Consumers who consume electricity within the State.

The Commission has determined the charges based on the total long term and medium term capacity using the network of the Petitioner, and such capacity users pay the entire revenue requirement for the network cost of the petitioner. The short term open access users, such as the Respondent No. 1 herein, who uses system of the petitioner are liable to pay the charges for use of the system as determined by the Commission, which charges are then accounted for as income of the petitioner to the benefit of the long term users. The charges determined by the Commission correspond to the cost of the network of the Petitioner and the Respondent No. 1 cannot avoid paying such charges on hyper technical and misplaced grounds as sought to be raised.

- 7.5 That the Respondent No. 1 is liable to pay the net charges of Rs. 55,73,25,952/- for the period w.e.f. 01.04.2008 to 31.03.2017 which were worked out by the Petitioner in terms of the tariff order of the Commission after making due adjustments of UI charges and Handling Charges as mandated by Hon'ble CERC in its order dated 10.03.2017 and also thereafter liable to pay the same charges on the tariff determined by the Commission. The Petitioner has to recover substantial amounts from the Respondent No.1 and the calculation sought to be made by the Respondent No. 1 are baseless. It is wrong and denied that there was any statement made by the Commission that the Commission has not calculated the transmission charges and losses of the Respondent No. 1. The Commission is required only to compute the network cost of the Petitioner to be payable by any user of the transmission and distribution system of the Petitioner. The Respondent No. 1 is only seeking to confuse the issue on the methodology for computation of the charges for the network of the Petitioner. It is wrong and denied that the tariff orders do not determine the charges payable for the use of the network by the Respondent No. 1.
- 7.6 That the Central Commission has not placed any restriction on the nature of the decision to be made by the Commission. The Commission is required to decide on the charges that the Respondent No. 1 is liable to pay for the use of the network within the State. It is wrong and denied that the petitioner has shown any single line network diagram to show the evacuation route which is being used by the Respondent No. 1 and that the Petitioner's network only to such a limited extent is being used by the Respondent No.1. On the contrary, the Affidavit filed by the Petitioner before the Central Commission specifically states that the Respondent No. 1 is injecting power at the 132 kV Sub-station at Bajaura in integrated mode after using the intra-State system up to the State periphery through various routes. Two such routes have been mentioned only as indicative on the nature. Further, the single line diagram sought to be relied on by the Respondent No. 1 itself specifically states that the above flow diagram mentions only one interstate point for illustrative purpose whereas in actual power flows through all the nodes in integrated mode using both the HPSEBL (DISCOM) and the HPPTCL(STU) systems. In the circumstances, it is baseless for the Respondent No. 1 to contend that only a small portion of the network is being put to use. The basic case of the Respondent No. 1. In the present proceedings are on the issue that only a small portion of the State network, namely, one line is being used by the Respondent No. 1, which itself is misconceived.

- 7.7 That there is no basis for the contentions sought to be raised by the Respondent No. 1, when the very regulations of the Central Commission as sought to be relied on by the Respondent No. 1 provided that for use of the network of the State, the Respondent No. 1 is required to pay the charges as determined by the Commission. It is wrong and denied that the charges have been determined by the Commission only for the Consumers in the State. The Commission has determined charges for the network of the State entity, which is being used by the Respondent No. 1. The tariff orders have been passed as Orders applicable in rem, for all users of the State network including the Respondent No. 1. This is also established by the fact that all similarly placed power plants which are connected to the network of the State and supplying power to outside the State of Himachal Pradesh are paying the charges as determined by the Commission in each of the tariff orders.
- 7.8 That it is wrong and denied that the tariff determined by the Commission is restricted only to specific entities. It is wrong and denied that the Respondent No. 1 is being treated as a consumer. The Commission has passed tariff orders determining various tariffs, which includes the retail supply tariff and also the wheeling charges and losses for use of the network. The retail supply tariff obviously does not apply to the Respondent No. 1 which is not a consumer on which the retail supply tariff applies. In case, the retail supply tariff does not even apply to Consumers who take supply through open access from outside the State such Consumers pay only the network charges to the extent of open access supply. However, the respondent No. 1 is a user of the State network and is, therefore, liable to pay the charges determined for use of the State network, namely the wheeling charges and losses. In Himachal Pradesh, the Petitioner was the only Long Term/Medium Term Customer. To meet up the power requirement of the State, the Petitioner has availability from its own Hydel Power Houses and is purchasing power through Long Term Power Purchase Agreements from various sources located within and also outside the State of Himachal Pradesh. In fact, more than 70% of the total power procured by the Petitioner comes through the CTU system and the Petitioner has obtained Long term Open Access for the same. During Summer/monsoon months, the hydro availability goes up and there is no need to draw the power from outside the State sources, which remains surplus and this surplus power is thus sold by the petitioner outside the State without drawing it into the petitioner's system. The Commission has, therefore, rightly considered only long term power getting transacted through the Petitioner's system to meet the requirement of the State and the surplus long term power which is not flowing through the Petitioner's system and is being sold by the Petitioner outside the State, has not been considered. Similarly, while calculating the charges for STU system, the Commission has considered the long term power drawn through STU system for meeting the requirement of the State. The Respondent No. 1 is selling the saleable energy of its 86 MW Malana HEP outside the State using intra-State system of HP through Short Term Open Access right from the commissioning of the Malana HEP in bilateral/collective transactions. The revenue received from short open Access transactions by short term customers including the Respondent No. 1 has been accounted for as income in arriving the net ARR of the Petitioner. This is the methodology followed by various other States where the short term

open Access users pay the charges as determined by the Appropriate Commission and the said charges are accounted for income of the licensee. Thus the accounting by the Commission is correct and the short term open access customers have also availed the benefit in the shape of lesser Open access charges. While previously, the charges were being paid as mutually agreed between the parties, it is now been settled by the decision of the Hon'ble Central Commission that the charges and losses will be as per regulations and not as agreed mutually. This decision of the Central Commission has been fully accepted by the Respondent No. 1 and it is not open to the Respondent No. 1 to now seek to indirectly challenge the said decision. It is wrong and denied that the wheeling charges are allocated to the retail supply business. The wheeling charges payable by the short term open access Consumers are treated as income to reduce the revenue requirements of the petitioner. The use of the network and the liability to pay wheeling charges was not dependent upon the destination for consumption of electricity on the nature of the consumer of electricity. The charges for use of the State network and any person using the State network by means of open access are liable to pay the charges as determined by the Commission. It is wrong and denied that the Commission determines charges for a particular use of the network. The Commission determines the charges for use of the State network and any person using the State network is liable to pay the charges. On the other hand, the tariff order as relied on Respondent No. 1 itself provides that the charges for short term open access to the provisions of the relevant open access regulations.

- 7.9 That the Respondent No. 1 had specifically challenged the levy of charges in terms of the agreement, stating that the charges are required to be levied only in terms of the regulations.
- 7.10 That the Commission had considered only the long term/medium term capacity in the computation as the total revenue requirements are being paid for by the long-term/medium term open access customers. The short term open access customers get open access on margins and the charges payable by the short term customers are treated as income to reduce the revenue requirement of the Petitioner. This is the methodology followed by the Commission and also by various regulatory Commissions across the country. This is only the methodology of determination of charges, which cannot be challenged at this stage. Further, this does not however mean that the short open access Consumers are not required to pay the charges for use of the network as determined by the Commission, as is sought to be contended. The network cost as determined by the Commission is binding and is liable to be paid in the form of charges and losses as determined by the Commission.
- 7.11 That the charges have been determined by the Commission for use of the State network and the same are liable to be paid by the Respondent No. 1.
- 7.12 That it is wrong and denied that the Respondent No. 1 is only using one particular line or a small portion of the network as is sought to be alleged. It is wrong and denied that the Regulations of the Central Commission requires charges only for a particular line to be paid or that he Respondent No. 1 is actually using only one particular line as is sought to be alleged.

- 7.13 That the Commission will decide the issue of the charges payable by the Respondent No. 1 with regard to the tariff order passed by the Commission over the years. The specific objections taken by the Respondent No. 1 that the tariff orders are non-est has not been accepted by the Hon'ble Supreme Court.
- 7.14 That at the time when the averments were made before the Hon'ble Central Commission, there were no other generators using the State network to supply of power outside the State. However, since May, 2016 other generators have begun supply electricity outside the State using short-term open access, namely;

Sl. No.	Name of Generator	Start date of short term open access sale
1	Baner Sangam	01/06/2016
2	Kanchanjunga	01/06/2016
3	Chanju HEP	24/02/2017
4	Surya Kanta HEP	23/05/2017
5	Sandhya HEP	24/03/2018
6	Kasang HEP	07/05/2018
7	Baragarh	30/05/2018

All of above other generators use the network of the State for supplying electricity outside the State and are paying the charges as determined by the Commission. Further there are also Consumers within the State who were procuring power from outside the State. Such Consumers are also paying the charges for the use of the State network as determined by the Commission from time to time in the tariff orders.

- 7.15 That the very nature of postage stamp method determination is that any person using the network is liable to pay the charges as determined. The post stamp tariff determination is always in rem and applies to any person using the line. The Respondent No. 1, has itself admitted that postage stamp method is used for payment of charges, the Respondent No. 1 cannot then seek to avoid paying the said charges in terms of the determination by the Commission. It is further stated that there is no question of determination of network cost for Consumers because the retail supply tariff covers the cost of electricity as well as the cost of the network. The very determination of network cost is for open access customers, which could be retail supply Consumers as also generators using the network of the State. The Respondent No. 1 cannot be permitted to indirectly challenge the tariff orders of the Commission on the use of the postage stamp method, as is sought to be done.
- 7.16 That the Commission has determined the retail supply tariff of the Consumers which is being enumerated by the Respondent No. 1. However the use of the network is on voltage level basis and based on the cost of the network. These charges for the network are liable to be paid by any person using the network, including the Respondent No. 1. This is also evident by the fact that all other open access customers including generators and Consumers who are using the network for open access are paying the charges as determined by the Commission. The Respondent No. 1 cannot claim or otherwise be entitled to any special treatment.

The computations made in the tariff orders cannot be challenged at this stage, when the tariff orders have attained finality.

- 7.17 That the Respondent No. 1 is liable to pay substantial charges to the Petitioner, which the Respondent No. 1 has not been paying. In fact the Respondent No. 1 has since February, 2017 not been paying any wheeling charge and UI charges, which evidence only the lack of bonafide of the Respondent No. 1.

RESPONDENT NO. 1 (MPCL)'s REBUTTAL TO THE PETITIONER'S REJOINDER

8. Respondent No. 1 has filed affidavit dated 28.11.2018 in rebuttal to the petitioner's rejoinder stating that fresh submissions made by the petitioner in its rejoinder are not accompanied with documents/ evidence and as such, has asked for some information and documents in relation to-
- (i) Revenue receipt from Short Open Access transmission by Short term customers including Respondent No. 1 which has been accounted for as income in arriving at the net ARR of the petitioner.
 - (ii) Transmission Service Agreement with all the generators, to ascertain the transmission charges and losses being charged by the Petitioner/ Utilities for the said generator and respective order of the Appropriate Commission on the basis of which the transmission charges and losses are being charged.
 - (iii) The load flow statement and reliability margin of this petitioner's system in respect of the power injection by Respondent No. 1 and the drawl schedule of the Petitioner/ State for all the months of each year in dispute.
 - (iv) The postage stamp methodology being used.

PETITIONER'S (HPSEBL)'s RESPONSE ON THE REBUTTAL OF THE RESPONDENT NO.1 (MPCL)

9. In response to the additional Affidavit dated 28.11.2018 filed by the Respondent No 1, purporting to seek various information from the petitioner, the petitioner submits-
- (a) that the affidavit filed by the Respondent No.1 is merely to divert the nature of the present proceedings and indirectly challenge the tariff orders passed by the Commission over the years, which is impermissible. The basic contention of the Respondent No.1 that the petitioner has made fresh submissions is misconceived. The petitioner has only, by way of the rejoinder, replied to the contentions raised by the respondent in the reply filed before the Commission and stated the contents of the tariff orders passed by the Commission;
 - (b) that the present proceedings are only to decide on the wheeling charges payable by the Respondent No.1, which stands determined by the Commission in the various tariff orders passed over the years. The present proceedings are not to challenge the manner in which the tariff orders passed, the relevant factors considered and the computations made by the Commission in the tariff orders;
 - (c) that the information sought for by the Respondent No. 1 in relation to the quantum of non-tariff income considered in the tariff orders, the Agreements

entered with the third parties etc. are irrelevant to the present proceedings before the Commission as the tariff orders are not under challenge. The petitioner had only stated the methodology followed by the Commission in the computation and determination of revenue requirements and tariff in the various tariff orders passed;

- (d) that methodology followed is evident by Table-115 i.e. Breakup of Wheeling Charges Recovery in FY-16 read with Table 116 i.e. Trued-up Non-Tariff Income for FY 16 and Table 76 i.e. HPSEBL Submission- Details of ARR proposed for FY 19, read with Table 169 Total Revenue Requirement for FY 19 including Past Adjustments of “Fourth Annual Performance Review Order for 3rd MYT Control Period (FY-15 –FY-19) and Determination of Tariff for FY19 and True-up- of FY 16 of 3rd MYT Control Period for the Himachal Pradesh State Electricity Board Limited (HPSEBL) which provides the breakup of the different categories of the charges including wheeling charges for usage of State Network and differential amount on account of previous arrears which stands approved by the Commission from time to time and accounted for arriving at net ARR. This is the methodology followed by the Commission in the tariff orders passed over the years, which was what was stated by the petitioner in the rejoinder filed. The respondent cannot now seek the underlying basis of the tariff orders passed by the Commission and thereby seek to challenge the determination made in these proceedings;
- (e) that for Short Term Open Access Customers, charges/losses thereof are governed by the regulations and the Detailed Procedure laid down thereunder. The tariff payable and actually paid by the generators using short term open access over the network of the State is as determined by the Commission and not by virtue of any agreement between the parties. The tariff determination is a statutory exercise and it is for this purpose that the Hon’ble CERC has also held that the agreement between the parties cannot apply to the extent that it provides for tariff, as the tariff as determined under the regulations and orders of the Regulatory Commission shall apply;
- (f) that the quantum of power purchased by the petitioner vis-à-vis the load flow studies, reliability margins, the drawl schedules etc are wholly irrelevant to the present proceedings. The present proceedings are not for determination of tariff for the petitioner’s retail supply and power purchase business, and in fact is not for the determination of tariff by way of a tariff order, but is only for the purpose of deciding whether the Commission has determined the wheeling charges in the tariff orders or not. The case of the petitioner is that the wheeling charges stand determined, which is being paid by all the users of the State network including generators, and the same is liable to be paid for by the Respondent No.1 also.;
- (g) that the rejoinder filed by the petitioner on the total power procurement is based on the tariff orders of the Commission, which is provided for in Table 144, namely, the monthly demand supply position read with Table 154, approved merit order in MYT Order;
- (h) that the load flow studies, reliability margin etc. are relevant to decide whether to grant short term open access. This is because short term open access is based on margins. In the present case, there is no dispute on the usage of the State network

by the Respondent No.1 and the question is only as to the charges payable for the use of the State network. This is also specifically held in the order dated 10.03.2017 of the Hon'ble CERC;

- (i) that the postage stamp method is only a methodology for determination and applicability of tariff, wherein a particular tariff is provided for the use of any part of the State network, and not on the basis of use of individual lines. The Commission has only determined a particular tariff for use of any part of the state network at the given voltage levels. There is no fresh determination or fresh methodology to be applied, but what has already been applied to all Consumers and users of the State network in the State of Himachal Pradesh;
 - (j) that the petitioner has not mentioned any fresh facts in the rejoinder filed before the Commission and the contents of the additional affidavit of the Respondent No.1 is only an attempt to divert the nature of the present proceedings and also indirectly challenge the tariff orders of the Commission passed over the years, which is impermissible at this stage. The Respondent No.1 has sought for documents which are wholly irrelevant and are evidently only for the purposes of dragging on the present petition endlessly.
10. The Respondent No.1, vehemently refuted the averments made by the petitioner, set out in the preceding para of this Order, stating that the information/documents sought by him, are relevant and very material for the disposal of the petition and despite the Standing Counsel for the petitioner undertook to supply information /documents asked for, the petitioner is not supplying the same.

Keeping in view the foregoing submissions made and arguments addressed, on the issue, by or on behalf of the respective parties, this Commission did not find any substance in the request of the Respondent No. 1, seeking additional documents from the petitioner at this stage, and the same was not acceded to by the Commission vide its Interim Order dated 22.02.2019.

HEARING

11. Sufficient opportunity has also been given to the parties to substantiate their averments made in their pleadings and we have heard their Counsels at length, on the preliminary objections raised as well as on the merits of the case. The Gist of the same is discussed hereunder.

PETITIONER'S ARGUMENTS

12. Elaborating the issues involved in this case Sh. Anand K. Ganeshan, the Learned Counsel for the petitioner has made following arguments/submissions for consideration on the issues raised by it.
- 12.1 The present petition is filed seeking adjudication and directions in regard to the wheeling charges and transmission charges payable by the Respondent, Malana Power Company Limited for use of the State network for the transmission and wheeling of to supply power to third parties outside the State of Himachal Pradesh.
- (a) The Respondent No.1 has established a 86 MW generating station at Jari in Distt. Kullu in the State of Himachal Pradesh. The generating station is

connected through 132 kV line would be by Malana Power Company Limited (MPCL) at interconnection point i.e. 132 kV Bajaura sub-station of the petitioner. MPCL thereafter interconnection point onwards uses State network up to the Interstate point for selling its saleable energy outside the State.

- (b) For the purpose of conveyance of electricity from the generating station to outside the State of Himachal Pradesh, the Respondent No. 1 had initially entered into an Agreement dated 03.03.1999 with the Electricity Board providing for the terms and conditions including the tariff for conveyance of electricity using the network within the State from Interconnection point to inter-State point. The said Agreement dated 03.03.1999 was further amended on 24.08.2011, 22.02.2012, 20.03.2013 and 29.03.2014.
- (c) The Central Commission had framed and notified the CERC (Open Access in inter-State Transmission) Regulations, 2008 (hereinafter referred as 'Open Access Regulations') i. e. from 25.01.2008, providing for the terms and conditions on which open access would be provided for conveyance of electricity from one State to another.
- (d) Even after the notification of the Open Access Regulations, the parties were initially of the view that the tariff to be charged from the Respondent would be in terms of the Agreement entered into between the parties. This view was however contrary to the law settled by the Hon'ble Supreme Court in the case of **PTC India Limited Vs. Central Electricity Regulatory Commission, (2010) 4 SCC 603, para 66 and 79** wherein it was held that the Regulations would over-ride the contract between the parties. Further, it is a settled position of law that the tariff determined by the Regulatory Commission is statutory and is binding on all and cannot be amended or deviated from by the parties. [Ref: **Sidhabali Steels Ltd. Vs. State of Uttar Pradesh (2011) 3 SCC 193, para 61 and 62**].

12.2 The Respondent filed a petition being Petition No. 449 /MP/2014 before the Central Commission, inter-alia, challenging, in part, the contents and charges levied by the Agreement dated 03.03.1999 and several further parimateria Agreement entered into between the petitioner and the Respondent with regard to the charges for the transmission of power of the Respondent on the intra-State system, namely from the interconnection point at Bajaura Sub-station which belongs to the petitioner till the 400 kV Sub-station of Power Grid Corporation at Nalagarh.

- (a) It was the case of the Respondent No.1 that from the date of notification of the Open Access Regulations, i.e. from 25.01.2008, the Respondent No.1 cannot be charged UI charges in contradiction of the Open Access Regulations and further, handling charges cannot be charged. However, the Respondent No. 1 only wanted selective application of the Open Access Regulations where it suited him and for the other aspects and charges such as transmission charges and wheeling charges as well as losses, the Agreements to apply. This is not permissible and is contrary to the law settled by the Hon'ble Supreme Court. This has also been specifically rejected by the Central Commission.

- (b) The petitioner filed its reply to the petition as well as a counter claim, claiming all the charges and losses in terms of the Open Access Regulations. The petitioner contended that since the Respondent No. 1 had claimed the applicability of charges as per the Regulations, all charges had to be applied as per the Regulations including the losses, wheeling charges, transmission charges etc.
- (c) The Central Commission decided petition No. 449/MP/2014 and the counter claim in petition No. 169/MP/2015 vide Order dated 10.03.2017. The Central Commission, inter-alia, held that since the Respondent No.1 was using the system of the petitioner and the STU, the petitioner was required to pay the charges as determined by this Commission for the same. Since the Respondent No.1 disputed the applicability of the tariff orders passed by the Commission, the Central Commission directed that the parties need to seek clarification/directions from the Commission. It was inter-alia, held as under:

“65. The prayers of HPSEBL in petition No. 167/MP/2015 are disposed as under:

- (a) HPSEBL had prayed that if the Open Access Regulations and UI Regulations of the Commission are to apply, the same would be applicable in entirety and for all aspects between the parties. We have already directed that the Open Access Regulations, 2008 shall apply in all aspects including the wheeling charges/losses and handling charges.*
- (b) There is dispute between the parties as to whether the transmission charges and losses determined by HPERC shall be applicable in case of the wheeling charges and losses payable by MPCL for using State network. Since the wheeling charges and losses pertaining to State network fall under the jurisdiction of HPERC, we direct the parties to approach the learned HPERC for suitable directions in this regard. Till the matter is decided by the HPERC, the default transmission charges and losses as per the Open Access Regulations, 2008 shall be payable. Accordingly, wheeling charges and losses shall be worked out by MPCL and HPSEBL.”*

- (d) The Open access Regulations provide that the charges and losses for the use of the State network would be as determined by the State Commission from time to time. For the State of Himachal Pradesh this Commission has from time to time passed tariff orders determining the transmission and wheeling charges as well as losses. The transmission and wheeling charges for use of the State network are applicable as determined by this Commission since the year 2008.
- (e) As stated above, the Commission has determined and notified the wheeling charges and transmission charges for the use of State network w.e.f. 5th September, 2008. Therefore, before determination of transmission charges by the State Commission for use of intra-State system of HP, the petitioner is liable to pay charges for transference of power through intra-State network @ Rs. 30/MWh as provided in the Central Commission’s Regulations at default rate. Thereafter, the transmission charges for transference of power through intra-State network of HP shall be as notified by the Commission from time to time as detailed above.

- (f) Considering the law settled by the Hon'ble Supreme Court, the Central Commission vide Order dated 10.03.2017 has held that all the charges and losses to be paid for by the Respondent No.1 need to be in terms of the Regulations. With regard to the charges and losses specified by the Commission to be applied, the Central Commission held that it was for this Commission to confirm whether the charges have been determined or not and adjudicate on the issue.
- (g) It is relevant to mention that there can be no dispute that the Respondent No.1 is using the State network of both the petitioner as well as the transmission licensee, HPPTCL. This is also specifically recorded in the Order of the Central Commission, inter-alia, as under:
- “58.....In the present case, MPCL is using the network of STU of Himachal Pradesh and HPSEBL (DISCOM). Therefore, the transmission charges/wheeling charges and losses determined by HPERC shall apply in the case of the MPCL for using the State network while selling its power by availing short term open access in accordance with the Open Access Regulations, 2008.”*
- (h) In view of the fact that the petitioner is using the State network and the only confirmation required is whether the charges are determined or not.

12.3 The Commission has passed tariff orders over the years, determining the charges for the use of the network in the State of Himachal Pradesh. The present proceedings are only to decide on the wheeling charges payable by the Respondent No.1, which stands determined by the Commission in the various tariff orders passed over the years. The present proceedings are not to challenge the manner in which the tariff orders passed, the relevant factors considered and the computations made by the Commission in the tariff orders.

12.4 The tariff orders are not passed qua a particular user of the network, but for the network as a whole. Any person who uses the network is required to pay the charges as determined by the Commission in the tariff orders. The Commission does not pass orders determining the charges for use of the State network for specific persons or category of persons. The charges are determined for the network and any person using the network is liable to pay the charges. The Commission has passed orders determining the transmission and wheeling charges for use of the State network applicable since the year 2008.

There is no separate determination of the charges by the Commission on a case to case basis, but the tariff orders are passed as orders in rem, following the procedure under Section 62 and 64 of the Electricity Act and in terms of the Regulations if any framed under Section 61 of the Electricity Act. The charges so determined, whether transmission charges, wheeling charges or retail supply tariff are applicable in rem.

12.5 For the purpose of wheeling charges and transmission charges, the Commission has followed the postage stamp basis and any person using the State network is liable to pay the charges. It is irrelevant as to the end use or supply of electricity, but what is relevant is only that the person is using the State network.

- 12.6 In terms of the decision of the Central Commission, the Petitioner is liable to pay the charges for use of the State network as determined from time to time, which are as per the tariff orders passed by the Commission from time to time.
- 12.7 The Respondent No. 1 in the present proceedings is seeking to indirectly challenge the tariff orders of the Commission passed from time to time. The Respondent No. 1 had filed a writ petition in the Hon'ble High Court of Himachal Pradesh in CWP No. 1078/2017, inter-alia, challenged the tariff orders of the Commission over the years and sought the same to be set aside. The said prayers were however not granted by the Hon'ble High Court in the decision dated 12/03/2018. The Hon'ble High Court only held that in terms of the directions of the Central Commission, either party could approach the Commission for the tariff to be payable by the Respondent No. 1.
- (a) Challenging the decision of the Hon'ble High Court dated 12/03/2018, the Respondent No. 1 had filed a Special Leave Petition being SLP No. 9864 of 2018 before the Hon'ble Supreme Court, wherein once again the specific prayer was sought for setting aside the tariff orders of the Commission. The said prayer was also rejected by the Hon'ble Supreme Court.
 - (b) The tariff orders have attained finality and have been implemented in the State of Himachal Pradesh. All other users of the transmission and distribution system have paid the tariff as determined by the Commission. The same principle applies to the Respondent No. 1 also, who cannot be placed differently and given a special treatment as compared to others. There is no exemption to the Respondent No. 1 from the applicability of the tariff orders.
 - (c) All users of the network of the State are required to pay and are paying the charges as determined by the Commission. This also includes all generators who are similarly situated and are supplying electricity outside the State of Himachal Pradesh by using the State network. In terms of the Regulations of the Central Commission, the charges for the State network are to be paid as determined by the Commission, which is as per the tariff orders passed by the Commission. The contention of the Respondent No. 1 that no separate charges are determined for it is misconceived. As submitted hereinabove, the Commission only determines the charges for the network, based on the network cost. Any person using the network is required to pay the network charges. The charges are not determined for each user separately. The tariff orders are passed in rem and is applicable to all users of the system. This is the system followed in all the States of the country. Even under the Regulations of the Central Commission, the tariff for a system is only determined and any person using the system is required to pay the charges as determined. The identity of the users does not impact the charges to be paid for the use of the system.
 - (d) Faced with this decision, the Respondent No. 1 has now sought to go behind the tariff determined by the Commission and challenge the very basis of the tariff orders. This is not only permissible, but an abuse of process of the court. The tariff orders have attained finality and are binding on the parties.

- 12.8 The tariff orders are binding on all including the licensee, generators and Consumers. It has in fact been settled by the Hon'ble Supreme Court that even under Article 32 of the Constitution, it is not permissible for the Hon'ble Supreme Court to vary the tariff. In this regard, the Hon'ble Supreme Court has in the case of **Shree Sidhali Steels Ltd Vs. State of Uttar Pradesh, (2011) 3 SCC 193**, inter-alia, held as under:

“61. It will not be out of place to mention that in view of Section 29 of the Electricity Regulatory Commissions Act, 1998, the licensee i.e. Respondent 2 has no authority to enforce any tariff other than the one approved by the Commission. In view of Section 24 of the U.P. Electricity Reforms Act, 1999 the licensee i.e. Respondent 2 lacks power/authority to modify the tariff determined by the Commission and in case of any violation, the licensee would be exposing itself to the punishment prescribed under Section 28 of the Act of 1999.

62. This Court in Assn. of Industrial Electricity Users v. State of A.P. [(2002) 3 SCC 711] as well as in W.B. Electricity Regulatory Commission v. CESC Ltd. [(2002) 8 SCC 715] , and in BSES Ltd. v. Tata Power Co. Ltd. [(2004) 1 SCC 195] , has held that the licensee has no power to amend and/or modify the tariff determined by the Regulatory Commission. Grant of reliefs claimed by the petitioners would amount to compelling them to act against the statute. Such a course is not permissible while exercising powers under Article 32 of the Constitution. Thus Respondent 2 Corporation cannot be directed to amend or modify the tariffs determined by the Commission nor the petitioners would be entitled to seek any direction against the licensee to amend or modify the tariff determined by the Commission.”

The above decision applies to the present case. The entire case of the Respondent No. 1 is for the tariff as determined by the Commission which has attained finality not to be applied to the Respondent No. 1 and to charge a different tariff, which is impermissible.

- 12.9 Sh. Anand K. Ganeshan, Learned Counsel for the petitioner concludes his arguments and prays that there is no merit in the contentions raised by the Respondent No. 1. The present petition is liable to be allowed. The Respondent No. 1 ought to be directed to pay the tariff in terms of the tariff orders passed by the State Commission over the years, together with interest for the delay in the payment of the tariff.

RESPONDENT NO.1 (MPCL)'s ARGUMENTS

13. Per contra, contrary to the submissions of the petitioner Sh. Sumit Garg, representing the Respondent No.1 i.e. M/s Malana Power Company Ltd. (MPCL), has argued as follows.
- 13.1 Wheeling charges are paid by the Respondent No. 1 and accepted by the petitioner from Respondent No.1 in accordance with the wheeling Agreement since, 2001. MPCL is an independent power producer (IPP) and as per the Implementation Agreement, after giving fixed percentage of free power to Govt. of HP, the entire remaining electricity has to be sold outside the State. No power of MPCL is consumed in the State of HP. The MPCL has been injecting its power at

interconnection point of HPSEBL at Bajaura and petitioner transfers the power to Interstate point. The Agreement further states that the transferable energy shall be deemed to have been to MPCL's account and debited to the petitioner's account. In terms of agreement dated 03.03.1999, Respondent was liable to pay petitioner wheeling charges at the rate specified in the Agreement the Respondent paid said charges, which were accepted by the petitioner without any objection.

The petitioner raised this issue in petition No. 167/MP/2015 before the CERC on hearing the arguments and after perusing the Tariff Orders passed by this Commission. CERC was unable to find/ascertain any wheeling charges or losses calculated in the orders for power going outside the State. Therefore, the matter was sent to this Commission to decide this dispute. Since the charges paid by the Respondent No.1 have been included in the Non-tariff income, the petitioner is claiming the wheeling charges determined by this Commission for the Consumers. The petitioner having accepted the wheeling charges in terms of the Agreement, there was no reason to seek determination of wheeling charges of the Respondent from this Commission. The wheeling charges for the power of the Respondent were never determined by this Commission.

- 13.2 Regulations of this Commission do not provide for determination of wheeling charges of power going outside the State (Interstate power). In his support Shri Sumit Garg has made reference to Clause (a) of subsection (1) of Section 86, read with the definition of "Consumer" given in section 2 (15) of the Electricity Act, 2003, and Regulation 16(1) of the CERC (Open Access in Interstate Transmission) Regulations, 2008; Regulations 8 (1) (a) and 15 of the HPERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007; and Regulation 6(1) of the HPERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2011. Sh. Garg asserts that the CERC has envisaged a scenario where the State Commission may not have determined the wheeling/transmission charges of interstate power, and therefore had made a provision in CERC (Open Access in Interstate Transmission) Regulations, 2008. It indicates that the State Regulations still did not have regulations for calculating wheeling charges for all Consumers. Since the distribution business is prescribed for the Consumers of the area of supply, the wheeling business and retail supply business are also for the Consumers of the area of supply. Respondent, as consumer, is paying the charges as determined by the Commission for use of the power supplied by the HPSEBL for its own consumption. The Respondent is not challenging the Orders of this Commission on the ground of calculation or methodology and its case is restricted to only one submission that is that tariff Orders passed by this Commission have not determined the wheeling/transmission charges of the power going outside the State which includes the Respondents power. The STU losses under these Regulations are also applicable to Consumers only. According to Sh. Garg the regulations issued by this Commission are for determination of wheeling only for Consumers (supply) and the said regulations are not applicable on any person who is not a consumer and for this reason are not applicable to Respondent.

- 13.3 Petitioner has not furnished data for determination of wheeling charges of power going outside the State in tariff petitions; wheeling charges paid by the Respondent are accounted for in the “Non-tariff income” by the petitioner. In its tariff petitions, the petitioner has submitted the summary of energy balance, wherein it has submitted power procurement from its own sources and interstate and banking to meet its sale requirement to Consumers. Only the energy consumed within the State has been considered. Excess power procured is either banked or is sold in interstate at State/DISCOM periphery. The power of the Respondent does not figure in the summary of energy balance. The inclusion of the income from Respondent in Non-tariff income is in line with the Regulations of this Commission which are applicable only to the Consumers and not to power sold outside the State like that of Respondent or similarly situated cases including petitioner itself. If the wheeling tariff for Consumers is applicable to Respondent, then the wheeling charges paid by the Respondent No.1 should not have been considered as non tariff income and should have been adjusted from the wheeling ARR.
- 13.4 Tariff Orders issued by the Commission have not determined the wheeling charges of power going outside the State. The Commission has proceeded to derive the wheeling tariff on the basis of some assumptions. The assumptions are-
- (a) *Only the energy input into the State Transmission System is required for intra-State consumption. Hence, the Commission has not considered energy sale outside the State for computation of wheeling charges.*
 - (b) *Category wise sales have been allocated to different voltages proportionately based on past information, except for categories where sales data at different voltages is available such as large industrial power, irrigation and drinking water, pumping and bulk supply.*

There are 8 to 11 categories at different voltage levels. Each category is a consumer. The charges are calculated by this Commission for each voltage level. The categories fall in one of the three voltage levels. The charges for each voltage level are applicable to all those categories which fall in the said voltage level in *rem.*

MPCL, not being a consumer does not fall into any of the specified categories. The Tariff Orders state that in the case of generators the charges will be applicable on the energy injected into the system. The charges determined by this Commission, wherever payable by generators are only for those generators whose energy is being consumed by the Consumers of the State as per the assumptions specified by the Commission for determination of wheeling charges in the Tariff Orders and is not applicable to those generators whose energy is being transacted in inter-State at State periphery.

In the petition, the petitioner, having submitted only categories of Consumers for approval of this Commission, shows that the petitioner had sought for fixation of Wheeling Charge only for Consumers.

There is a similar situation on the perusal of the Orders in case of the HPPTCL (STU). All the charges have been determined only for the energy consumption in the State.

13.5 It is a fact that Petitioner has been selling surplus energy in the inter-State which it is selling through either on collective or on bilateral transactions basis and the said energy has not been considered for determination of wheeling tariff.

The Petitioner in the rejoinder has stated that the said energy was rightly not considered for determination of tariff because the surplus power is sold outside the State without drawing it in the system of the Petitioner.

The submission is factually wrong and misleading and contrary to the Tariff Petitions filed by the Petitioner because on perusal of the several Tariff Orders and True up Orders passed by this Commission, it can be observed that the Commission itself has approved the Annual Summary of Energy Balance in the Tariff Orders which state the Banking sale as well as the inter-State sale is at the Discom/State periphery (intra-state system).

The State/HP/Discom periphery is part of the intra-State system, therefore no inter- state sale has taken place without use of the intra-State system by the petitioner. The petitioner is not a trader but a Discom, therefore it necessarily has to draw the power at its periphery for further operations. It is a fact that this calculation of energy balance at State/Discom periphery is available for every year of the Consumer's Tariff. This fact is also evident by accounting for the PGCIL losses on the entire transfer of energy at State Periphery, whether sold or banked in inter-State or consumed in the State. The use of intra-State system for interstate sale or banking is established from records and cannot be denied. This is also a fact that no energy in inter-State can be sold on short term basis without use of State Periphery.

If the wheeling charges in the tariff Orders are applicable to the entire energy wheeled on the distribution system of the petitioner, the petitioner itself will be required to adjust approximately Rs.200 Crores per annum in the wheeling ARR from the revenue earned by it from the inter-state transactions towards inter-State and banking. The petitioner will also have to adjust wheeling losses on the inter-State sale/ banking of energy at the rates approved by this Commission for Consumers in different years.

The energy generated by the Respondent is injected at Bajaura Sub-station. The petitioner has been consuming this energy within the vicinity of Bajaura Sub-station i.e. Kullu. Therefore the petitioner is not required to bring the power equivalent to energy injected by the Respondent for consumption. This means that the Petitioner has not incurred the losses which it would have incurred on transfer of energy from other sources to Bajaura. In fact the injection of energy by the Respondent at Bajaura(distribution Sub-station of Petitioner) eases out the petitioners system because this energy is consumed in the vicinity and the petitioner is not required to physically transmit its power for this area. This is a blessing for the petitioner, as with this energy injection it is able to save the energy losses on account of transmission. These facts have also not been taken into account while approving the ARRs.

In view of the assumption that all energy going outside the State is not considered for calculation of wheeling charges, same has not been analysed for

determination in wheeling charges applicable to the Consumers. The said schedules have not been supplied to the Respondent by the petitioner.

In such case Respondent would be forced to review the situation by switching over to evacuate its power by connecting to STU (HPPTCL) then its transmission/wheeling charges will be in the range of 2 Paise per kWh and losses in the range of 0.75%. In contrast to the wheeling charges for Consumers which the petitioner states are applicable to MPCL. Respondent can also evacuate its power through ADHPL dedicated transmission line whose charges are currently being determined by the CERC for the entire power being sold in the inter-State. The free power in such case can be drawn at CTU Nalagarh.

In the case the Respondent disconnects from the petitioner's system, then the petitioner can make its own arrangement for the supply of power requirement at Bajaura. These options will also be valid in terms of the Implementation Agreement. If the petitioner would have submitted the entire transferable capacity whether embedded or non-embedded in the State System before this Commission for the approval of the Capacity Charges, only then this Commission would have been in a position to arrive at the charges for the Respondent also. In the absence of entire transferable capacity whether embedded or non-embedded in the State System, the Commission has been determining the wheeling charges only for the categories of Consumers and not for any other category. The petitioner in its rejoinder furnished a list of about 7 generators who they claim are paying the wheeling charges as determined by this Commission.

It is a fact that one of the generators namely Kanchanjunga is not connected to the system of the Petitioner but connected to STU and the charges payable by it shall be entirely through a separate order. In case of Sandhya Hydro, Respondent has established before this Commission that the petitioner has not been charging at the rates applicable to the Consumers as per the approved Tariff Orders.

The approved wheeling charges for the Consumers can not be made applicable to generators who have been specifically exempted by the Tariff Assumptions. It is added that the Respondent cannot be put on the same platform as the other small hydro generators. The policies for the small generators are not applicable to MPCL. The small generators will not even have to pay wheeling charges in future as per the policies of the State Government. Also, if other generators whose power is going outside the State are wrongly paying the wheeling charges for Consumers, it does not mean that the Respondent can be forced to do so as the charges will be payable only if they have been determined by this Commission.

- 13.6 Almost all the State Commissions have issued the Multi-year Tariff Regulations for determination of tariff of generating companies, transmission licensees, SLDC and distribution licensees. These States have specifically provided for the entire capacity/contracted capacity for each category of users while calculating the charges and losses. The Regulations prescribe determination of charges for all users of the intra State system and are not restricted to the energy consumed in the State.

It is also a fact that almost all the Commissions have followed the similar principle to determine the Transmission Charges as well as the Wheeling Charges by issuing the similar Regulations. The State of Himachal Pradesh is an exception to this where the Commission has issued the specific Regulations and calculated the wheeling and transmission charges only by considering the energy inputs for the consumption in to the State meaning thereby, the Commission was to determine the wheeling charges for Consumers only and Capacity Charges applicable to all the Customers have not been determined.

- 13.7 Tariff Orders passed by Single Member Commission are nonest. The Conduct of Business Regulations, 2005 issued by the State Commission on 1.01.2005 were issued by One Member Commission as it stood at that point of time. It being a “Single Member Commission” did not prescribe any quorum. Vide Notification dated 26.12.2005, the Government of Himachal Pradesh superseded its earlier Notification dated 30.12.2000 and reconstituted the Himachal Pradesh Electricity Regulatory Commission as “ Three Members Commission” in place of “ Single Member Commission” w.e.f. 6.01.2006.

On 14.01.2008 the Single Member State Commission amended the Conduct of Business Regulations, 2005 and prescribed the quorum for proceedings before the State Commission to be “Two”. Despite notifying a “Three Member Commission” and later prescribing a quorum of “Two Members”, the quorum was not complete due to the non-appointment of the members. Therefore the State Commission did not have the requisite prescribed quorum to conduct proceedings in discharge of its functions prescribed in the Electricity Act, 2003.

This Hon’ble Supreme Court in the case of **PTC India vs. Central Electricity Regulatory Commission (AIR 2010 SC 1338)** has categorically stated that “Measures under Section 79(1) have to be in conformity with the regulations under Section 178” Therefore when the regulations issued by the State Commission under Section 178 of the Electricity Act , 2003 provided for a quorum of two members to conduct the proceedings, then the prescribed quorum has to be adhered to by the State Commission for discharge of its functions under Section 79 of the Act which includes passing the Tariff Orders/ ARR’s.

Even if it is assumed that the amendment of the State Commission (Conduct of Business) Regulations, 2005 in 2008 prescribing the quorum of “two” members for proceedings before the Commission was by a Single Member who had no jurisdiction to issue such amendment Notification, it is settled law once there is prescribed/ notified Commission, and no quorum is prescribed, then the majority of the Members of the Commission should discharge the functions of the Commission. Therefore there ought to have been a majority of members (at least two out of three) to carry out the functions of the Commission. Reliance in this regard is placed on the decision of this Hon’ble court in the case of **Ishwar Chandra vs. Satyanarain Sinha &Ors (AIR 1972 SC 1812)**.

- 13.8 Present Commission suffers from defect of non constitution even though quorum complete.
Section 82(4) of the Electricity Act, 2003, states that-

The State Commission shall consist of not more than three members including the Chairman.

Section 82(1) of the Electricity Act, 2003 states that –

Every State Government shall, within six months from the appointed date, by Notification, constitute for the purposes of this Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission.

The Government of Himachal Pradesh regularized the One Member Commission that was appointed under the Electricity Regulatory Commissions Act, 1998. Vide Notification dated 26.12.2005, the Government of Himachal Pradesh superseded its earlier Notification dated 30.12.2000 and reconstituted the Himachal Pradesh Electricity Regulatory Commission as “ Three Members Commission” in place of “ Single Member Commission” w.e.f. 6.01.2006.

The Three Member Commission was never constituted and till today three members have never been appointed.

Section 93 of the Electricity Act states that-----

Vacancies etc not to invalidate proceedings- No act or proceeding of the Appropriate Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Appropriate Commission.

Section 85 of the Electricity Act states that-

85 Constitution of Selection Committee to select members of State Commission –

(1) The State Government shall, within one month from the date of occurrence of any vacancy by reason of death, resignation or removal of the Chairperson or a member and six months before the superannuation or end of tenure of the Chairperson or member, make a reference to the selection committee, for filling up the vacancy.

Non constitution of the notified strength of the Commission is not vacancy and the proceedings/ orders of the Commission are not covered by Section 93.

PETITIONER’S (HPSEBL)’s REBUTTAL ON ARGUMENTS OF RESPONDENT NO.1 (MPCL)

14. In rebuttal, Sh. Anand K. Ganeshan, the Learned Counsel for the petitioner submits that-

- (a) It is wrong to say that the tariff to be charged from the Respondent No.1, would be in terms of the Agreement dated 03.03.1999 entered into between the parties. The Hon’ble Supreme Court in **PTC India Ltd. V/s Central Electricity Regulatory Commission (2010) 4 SCC 603**, para 66 and 79 has held that the Regulations would override the contract between the parties. Further in **Sidhabali Steels Ltd. V/s State of Uttar Pradesh (2011) 3 SCC 193** para 61 and 62, the Hon’ble Apex Court has made it clear that the tariff determined by the Regulatory Commission is statutory and is binding on all, and cannot be amended or deviated from by the parties. In light of this contention of the Respondent No. 1 has no merit.
- (b) The Respondent No.1 only wanted selective applicability of the Open Access Regulations where it suited the Respondent No.1 and the other

aspects and charges as well as losses, the Agreements are claimed to be applicable. This is not permissible and is contrary to the Law settled by the Hon'ble Apex Court. This has also been rejected by the Central Commission. The Central Commission, inter-alia, held that since the Respondent No. 1 was using the system of the petitioner and STU, the petitioner was required to pay the charges as determined by the Commission for the same. It was the State Commission alone to confirm whether the charges have been determined or not and adjudicate on the same issue.

- (c) This Commission has passed tariff orders over the years, determining the charges for the use of the State network, per regulations in force, and following the procedure under Sections 62 and 64 of the Act. The present proceedings are only to decide on the wheeling charges payable by the Respondent, which stands determined by the Commission in various tariff orders passed over the years. The Commission does not pass orders determining the charges for the use of the State network for specific persons or category of persons, or on case to case basis. The tariff orders have attained finality and are binding on all i.e. the licensee, the generators and Consumers and cannot be reopened. The present proceedings are not to challenge the manner in which tariff orders passed, the relevant factors considered and computations made by the Commission in the tariff orders.
- (d) The Respondent No. 1 is selling the saleable energy of its 86 MW, Malana HEP outside the State using intra-State System of the HPSEBL through Short Term Open Access right from the commissioning of the Malana HEP in bilateral /collective transactions. The revenue received from the Short-Term Open Access customers, including the Respondent No.1, has been accounted in arriving the net ARR of the petitioner. This is methodology followed by various other States where the Short Term Open Access users pay the charges as determined by the Appropriate Commission and the said charges are accounted for in the income of the licensee. This accounting is correct and the Short Term Open Access customers have also availed the benefit in the shape of lesser open access charges. It is settled by the decision of the Hon'ble Central Commission that the charges and losses will be as per Regulations and not as agreed mutually. It is not open to the Respondent No. 1 now to indirectly challenge the Central Commission decision, having been fully accepted by the Respondent No. 1.
- (e) It is wrong that the wheeling charges are allocated to the retail supply business. The wheeling charges payable by the Short Term Open Access Consumers are treated as income to reduce the revenue requirements of the petitioner. The use of the Network and liability to pay wheeling charges was not dependent upon the distribution for consumption of electricity on the nature of the Consumers of the electricity. The Commission determined the charges for the use of State Network and any person using the State Network is liable to pay the charges. The tariff orders, as relied on by the Respondent No. 1, itself provide that charges for Short Term Open Access are subject to the provisions of the relevant Open Access regulations.

- (f) The arguments addressed by the Respondent No. 1, in relation to Kanchanjunga and Sandhya HEPs, have no relevance as the developers of these projects are making payments on interim arrangements and final orders thereon are yet to be issued.

Sh. Anand K. Ganeshan Senior Advocate concludes that in view of above, the arguments addressed by the Respondent No. 1 have no merit.

COMMISSION'S ANALYSES

15. The CERC in its Order dated 10th March, 2017 has inter-alia held that “*the CERC Open Access Regulations, 2008 shall apply in all aspects including the wheeling charges/ losses and handling charges*” and also that “*the transmission charges and losses as determined by the State Commission shall be applicable for use of the State network in terms of Regulation 16(3) of the Open Access Regulations. Only where the concerned State Commission has not determined the transmission charges, then only the default transmission charges specified under proviso to clause (3) of the Open Access Regulations, 2008 shall be applicable.*”

In view of the above, the following issues arise for discussion for the decision by the Commission

- (1) Whether the tariff orders passed by the State Commission during the period onwards from 6th January, 2006, are invalid merely on the ground that the Tariff Orders were issued by the Single Member Commission?
 - (2) Whether the Commission has determined the transmission/ wheeling charges payable by the generation company for use of the State network in respect of the period for which petition has been made (i.e. 01.04.2008 onwards) and what shall be the charges payable in the instant case?
 - (3) Whether the Respondent No. 1 used the State network for conveyance of power up to the periphery of the inter-State network?
 - (4) Whether the energy losses for use of the State network have been determined by the State Commission and what shall be the losses applicable in the instant case?
 - (5) Whether the orders passed by the Commission are subject to review on account of various averments made by the Respondent No. 1 with regard to the principles and methodologies followed by the Commission, while determining the charges in its Orders?
16. We now proceed to discuss and decide the aforesaid issues as follows:-

Issue No.1: Whether the tariff orders passed by the State Commission during the period onwards from 6th January, 2006, are invalid merely on the ground that the Tariff Orders were issued by the Single Member Commission?

- 16.1 M/s Malana Power Company Ltd, has raised preliminary objection as to the constitution and the functioning of this Commission stating that-

“Therefore, the Single Member State Commission, was defunct and even after appointment of the Member is still a defunct Commission and orders, regulations etc. passed by the Commission are without jurisdiction and hence void.

Hon'ble Supreme Court, after hearing legal issues in the matter gave a finding that the Order dated 03.04.2017 signed singly is non-est. Therefore, application of an earlier or present Order/regulation signed issued singly

shall also, be non-est while deciding the issue of dispute of Wheeling Charges in case of the Respondent No.1”

- 16.2 The preliminary objection raises the jurisdictional issue. It is settled law that the issue of the jurisdiction, which goes to the root of the case, once it is brought to the notice of the Court has to be tried first. Hence, this Commission takes up this issue first.
- 16.3 The petitioner denies that the tariff orders passed by the Commission are non-est as alleged to have been held by the Hon’ble Supreme Court. To the contrary, the specific challenge by the Respondent No. 1 before the Hon’ble Supreme Court was that the tariff orders of the Commission since the year 2008 are non-est on account of the same being passed only by a single Member of the Commission. Despite raising the specific ground before the Hon’ble Supreme Court, the said contention was not accepted by the Hon’ble Supreme Court and it is only the communication dated 03/04/2017 of the Commission that was set aside with the direction to the Commission to decide the matter after hearing the parties. In any event, the contention raised is misconceived. The Electricity Act does not provide for any minimum quorum, but leaves the same to be decided by means of delegated legislation in the form of regulations. During the relevant time, there was only one member of the Commission appointed and the other posts were lying vacant. Section 93 of the Electricity Act is specifically for the purposes of protecting any act or proceedings of the Commission from being invalidated on account of any vacancy or defect in the constitution of the Commission. The contention of the Respondent No.1 on the question of quorum, even if applicable would be squarely covered by section 93 of the Electricity Act and, therefore, there is no merit in the contentions sought to be raised. In any event, the contention was specifically raised before the Hon’ble Supreme Court and not accepted by the Hon’ble Supreme Court, therefore, the same cannot be raised once again.
- 16.4 Before we deal with the rival contentions on this issue, it is necessary that the provisions of the Electricity Act, 2003 to keep in mind, which relates to the constitution of the State Commission, sections 82, 84, 85 and 89 of the said Act, so far as these are relevant, reads thus:-

“82. Constitution of State Commission:- (1) *Every State Government shall, within six months from the appointed date, by notification, constitute for the purposes of this Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission:*

Provided that the State Electricity Regulatory Commission, established by a State Government under section 17 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule, and functioning as such immediately before the appointed date shall be the State Commission for the purposes of this Act and the Chairperson, Members, Secretary, and officers and other employees thereof shall continue to hold office, on the same terms and conditions on which they were appointed under those Acts.

Provided further xxxxxxxxxxxxxxxxxxxxxxxxx

(2) *The State Commission shall be a body corporate by the name aforesaid having perpetual succession and a common seal, with power to acquire, hold*

and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.

(3) xxxxxxxxxxxxxxxxxxxxxxxxxxx

(4) The State Commission shall consist of not more than three Members, including the Chairperson.

(5) The Chairman and Member of the State Commission shall be appointed by the State Govt. on the recommendations of a Selection Committee referred to in section 85,

84. Qualifications for appointment of Chairperson and Members of State Commission.- (1) The Chairperson and the Members of the State Commission shall be persons of ability, integrity and standing who have adequate knowledge of, and have shown capacity in, dealing with problems relating to engineering, finance, commerce, economics, law or management.

(2) Notwithstanding anything contained in sub-section (1), the State Government may appoint any person as the Chairperson from amongst persons who is, or has been, a Judge of a High Court:

Provided that no appointment under this sub-section shall be made except after consultation with the Chief Justice of that High Court:

(3) The Chairperson or any other Member of the State Commission shall not hold any other office.

(4) The Chairperson shall be Chief Executive of the State Commission.

85. Constitution of Selection Committee to select Members of State Commission.- (1) The State Government shall, for the purposes of selecting the Members of the State Commission, constitute a Selection Committee consisting of-

(a) a person who has been a Judge of the High CourtChairperson;

(b) the Chief Secretary of the concerned State ...Member;

(c) the Chairperson of the Authority or the Chairperson of the Central CommissionMember:

Provided that nothing contained in this section shall apply to the appointment of a person as the Chairperson who is or has been a Judge of the High Court.

(2) The State Government shall, within one month from the date occurrence of any vacancy by reason of death, resignation or removal of the Chairperson or a Member and six months before the superannuation or end of tenure of the Chairperson or Member, make a reference to the Selection Committee for filing up of the vacancy.

(3) The Selection Committee shall finalise the selection of the Chairperson and Members within three months from the date on which the reference is made to it.

(4) The Selection Committee shall recommend a panel of two names for every vacancy referred to it.

(5) Before recommending any person for appointment as the Chairperson or other Member of the State Commission, the Selection Committee shall satisfy itself that such person does not have any financial or other interest which is

likely to affect prejudicially his functions as such Chairperson or Member, as the case may be .

(6) No appointment of Chairperson or other Member shall be invalid merely by reason of any vacancy in the Selection Committee.

89 Terms of office and Condition of service of Member.

xxx xxx xxx xxx

(3) Every Member shall, before entering upon his office, make and subscribe to an both of office and secrecy in such form and in such manner and before such authority as may be prescribed.

xxx xxx xxx xxx xxx

16.5 We must now proceed to Section 92 and 93 which relates to the proceedings of Appropriate Commission. It read thus:-

“Section 92. Proceedings of Appropriate Commission.-(1) The Appropriate Commission shall meet at the head office or any other place at such time as the Chairperson may direct, and shall observe such rules of procedure in regard to the transaction of business at its meetings(including the quorum at its meetings) as it may specify.

(2) The Chairperson, or if he is unable to attend a meeting of the Appropriate Commission, any other Member nominated by the Chairperson in this behalf and, in the absence of such nomination or where there is no Chairperson, any Member chosen by the Members present from amongst themselves, shall preside at the meeting.

(3) All questions which come up before the meeting of the Appropriate Commission shall be decided by a majority of votes, of the Member present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.

(4) Save as otherwise provided in Sub-section (3), every Member shall have one vote.

(5) All orders and decisions of the Appropriate Commission shall be authenticated by its Secretary or any other officer of the Commission duly authorised by the Chairperson in this behalf.

93. Vacancies, etc., not to invalidate proceedings.- No act or proceeding of authenticated by its Secretary shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Appropriate Commission.”

16.6 Section 92(1) makes it clear that the Appropriate Commission has to be observe such rules of procedure in regard to transaction of business at its meetings (including the quorum at its meetings) as it may specify. The word ‘specify’ must be read as specified in regulations because Section 2 ((62) of the said Act defines the word ‘specified’ to mean specified by regulations. It read thus:-

“Section 2. (Definitions):- In this Act, unless the context otherwise require,-

..... xxx xxx xxx xxx xxx

(46) “ notification “ means notification published in the Official Gazette and the expression “notify” shall be construed accordingly.

xxx xxx xxx xxx xxx

(62) “specified” means specified by regulations made by the Appropriate Commission or the Authority, as the case may be, under this Act.

xxx xxx xxx xxx xxx

It is now necessary to quote the other provisions of the HPERC (Conduct of Business) Regulations, 2005 (hereinafter referred as “CBRs or Conduct of Business Regulations”) which are of some relevance.

2. Definitions and Interpretation:

2.1 In these Regulations, unless the context otherwise require,-

- (a)
- (b)
- (c)
- (d)
- (e)
- (f)

(g) “proceedings” means and include proceedings of all nature that the Commission may decide to initiate or hold in the discharge of its functions under the Act but any preliminary meeting or any action taken by the Commission before such initiation shall not be a proceeding for the purpose of these regulations.

16.7 As in this State the Single Member State Commission constituted under the Electricity Regulatory Commissions Act, 1998, continued to function under 2003 Act and neither the said Act nor the original CBR provided for the constitution of Benches and the quorum for the proceedings and meetings of the Commission and State Government was contemplating to appoint Multimember State Commission and preparatory steps needed to taken to facilitate the functioning of the Multimember Commission as and when appointed Regulations 9A, 9-B, 9-C & 9-D, were inserted in the CBRs in January, 2008, which read as under-

“9-A. Distribution of Business amongst Benches and transfer of cases from one Bench to another.- (1) Where Benches are constituted, the Chairperson may, from time to time, by order, make provisions as to the distribution of the business of the Commission amongst the Benches and also provide for the matters which may be dealt with by each Bench.

(2) On the application of any of parties and after notice to the parties, and after hearing such of them as he may desire to be heard, or on his own motion without such notice, the Chairperson may transfer any case pending before one Bench, for disposal, to any other Bench.

9-B. Decision to be by majority.- If the Members of a Bench of the Commission consisting of two Members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairperson, who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other Members of the Commission and such point or points shall be decided according to the opinion of the majority of the Members of the Commission, who have heard the case including those who first heard it, but in such cases the Chairperson or the Member presiding over a bench shall not exercise a second or casting vote.

9-C. Quorum and sittings.- (1) The quorum for proceedings before the Commission shall be two:

Provided that where the Commission is "Two Member Commission" the single Member shall constitute the quorum:-

Provided further that in the case of a proceeding to review any decision taken by the Commission or its Bench or for consideration of any issue, which could not be decided on account of equality of votes, all the Members being personally present shall constitute the quorum for such meeting.

(2) The Chairperson or if he is unable to attend a meeting of the Commission, any other Member nominated by the Chairperson in this behalf and in the absence of such nomination or where there is no Chairperson, any Member chosen by the Members present among themselves, shall preside at the meeting.

(3) All questions which come up before any meeting of the full Commission shall be decided by a majority of votes of the Members present and in the event of an equality of votes, the Chairperson or the person presiding shall have the right to exercise a second or casting vote.

(4) Save as otherwise provided in sub-regulation (3) every Member shall have one vote.

9-D. Attendance by Members and voting.- *No Member shall exercise his vote on a decision, unless he is present during all the substantial hearings of the Commission on such matter."*

Regulation 73, reads as under:-

"73. Effect of non-compliance.- *The failure to comply with any requirement of these regulations shall not invalidate any proceeding merely by reasons of such failure unless the Commission is of the view that such failure has resulted in miscarriage of justice."*

16.8 Section 82 of the said Act talks about constitution of the State Commission by notification to be issued by the State Govt. It states that the State Commission shall consist of not more than three Members including the Chairperson. So the maximum strength of the State Commission is three Members. Section 92(1) of the said Act relates to the proceedings of the Appropriate Commission. It states that the State Commission shall observe such rules of procedure in regard to the transaction of business at its meetings (including the quorum at its meetings) as it may specify. The term 'specified' is defined in Section 2(62) of the said Act as "specified by the regulations made by the Appropriate Commission or the Authority as the case may be". Pertinently, Regulation 9-C of the Conduct of Business Regulations says that quorum for the proceedings before the State Commission shall be two. Regulation 2(1) defines 'proceedings' to mean and include proceedings of all nature that the Commission may hold in discharge of its functions under the said Act. Regulation 73 of the CBRs, protects the failure to meet the requirement of the regulations, unless such failure in the opinion of the Commission has resulted in miscarriage of justice.

16.9 Sub-section (5) of Sub-section 82 of the Act states that the Chairperson and Members thereof shall be appointed by the State Government on the recommendations of a Selection Committee referred to in Section 85, Section 84 prescribes the qualifications for appointment of Chairperson and Members of the State Commission. Section 85 relates to constitution of Selection Committee to

select Members of the State Commission. Elaborate procedure to be followed for appointment of Chairman and Members is laid down in these Sections. Sub-section (3) of Section 89 of the Act lays down that every Member shall, before entering upon his office make and subscribe to an oath of office and secrecy in such form and in such manner and before such authority as may be prescribed. The words “defect in the constitution of the Appropriate Commission” will have to be read in the above context. Challenge to the constitution of the Appropriate Commission can be raised inter alia on the ground that the Chairperson or any Member of the Appropriate Commission does not have the required qualifications or that the reference to the Selection Committee was not made or that the Selection Committee which selected them was not properly constituted or that the Chairperson or any Member has not been appointed or any Member has not, before entering upon the office, subscribed to an oath of office and secrecy. The word ‘vacancy’ used in Section 93 relates to the constitution of the Commission. Section 93 does not refer to quorum. Undoubtedly, if a Member retires, or dies or on some such ground is unavailable, some other Member or Members will have to decide the petition as the doctrine of necessity will then spring into action.

- 16.10 It is pertinent to note that per provisions of Section 85, read with Section 2 (46) of the Act, the State Commission can be constituted, by a notification, published in the Official Gazette. Per provisions of the Law of Evidence the judicial notice can be taken on production of the copy of the Official Gazette publishing the notification. It is settled Law that when a notification is required to be published, it will come into force on the date of its publication. The Respondent No.1, who assails the actions of the Commission, has not produced the copy of the Official Gazette in which the aforesaid State Govt. notification dated 19.12.2005, constituting the “Three Members” w.e.f. 06.01.2006, has been published. The notification, which remains unpublished and not acted upon, cannot be considered a valid notification and itself is non-est in the eye of Law.
- 16.11 In the present case though the State Govt. fixed the strength of the State Commission, as “Three Members” but did not proceed further to process and appoint two Members of the State Commission. This can at the most be taken as the defect in the constitution of the State Commission. So long as the Multi Member State Commission is not constituted, the requirement of the quorum does not arise. Even the failure to comply with requirement of the regulations, does not invalidate the proceedings under regulation 73 of the CBRs. Presently the State Commission is the “Two Member Commission” and the State Govt. has appointed a Member (in addition to the Chairperson) per provisions of sections 82, 84, 85 and 89 of the Electricity Act, 2003, and it is functioning and discharging its duties as such.
- 16.12 In this connection in **Jharkhand Justice Forum and Anr. V/s State of Jharkhand and Ors., MANU/JH/0785/2003**, High Court of Jharkhand the opined that the State Public Service Commission as a body is yet to be Constituted and as per provisions of the Constitution and regulations framed, the Constitution of the first Commission will be complete and effective only when the Chairman and the four members being initially appointed. It held that for the Commission to perform its duties properly, the other members contemplated have also to be appointed as

envisaged by the regulations. However, the Court took the view in public interest that whatever has been done thus far need not be nullified only on the ground that the State Public Service Commission was not fully constituted. Commission and Chairman and a Member who alone were appointed could not validly constitute the first Commission in the eyes of law.

- 16.13 The **Hon'ble Supreme Court in Gokaraju Rangaraju V/s State of Andhra Pradesh, 1981 SC 1473**, applied the de facto doctrine to uphold the judgment of a Sessions Judge whose appointment was subsequently declared invalid on the ground that it was in violation of Article 233 of the Constitution. Their lordship held that the de facto doctrine is now well established that the acts of officers de facto performed by them with the scope of their assumed official authority, in the interest of public or third persons and not in their own benefit, are generally as valid and binding as they were the acts of officers de jure.
- 16.14 In view of the above the tariff orders passed by the State Commission during the period onward 6th January, 2006 cannot be taken as invalid merely on the ground that the tariff orders were issued by the Single Member State Commission sitting singly. Hence the contention of the Respondent No.1, that the State Commission is defunct Commission, and Orders, regulations made by it are without jurisdiction, cannot be accepted. Moreover, section 93 of the Electricity Act, 2003 specifically stipulates that any proceedings/acts of the Commission shall not be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Commission. This issue is decided accordingly.

17. Issue No.2:- Whether the Commission has determined the transmission/ wheeling charges payable by the generation company for use of the State network in respect of the period for which petition has been made (i.e. 01.04.2008 onwards) and what shall be the charges payable in the instant case?

- 17.1 We find it necessary, in the first instance, to have a look on the organisational set-up in relation to transmission and distribution of power and tariffs for transmission and distribution functions. We observe that till June, 2010, the erstwhile HPSEB was a composite entity looking after entire EHV system and the entire function for the conveyance of power on EHT system was known as transmission function. Composite charges (known as transmission charges) were payable for the use of EHV system of the State network. In fact this situation continued till the expiry of MYT period in the said Regulations on 31.03.2011 as the Order dated 19.08.2010, which was issued on the basis of the Tariff Order for 2010-11, remained applicable up to 31.03.2011. The Commission's MYT Regulations for transmission and distribution, which came into force in 2007, provided for determination of separate charges for transmission and distribution functions under respective Regulations. However, no separate wheeling charges were payable for the use of EHV system during that period. In the post reorganization period, certain components of such EHV system were allowed to be retained by the petitioner. As such, the conveyance of power at EHV involves EHV system of the petitioner as well as the transmission system of the Respondent No. 2 i.e. HPPTCL.
- 17.2 The aforesaid MYT Regulations, 2007 were repealed in 2011 when the Commission's MYT Regulations, 2011 came into force. The MYT Regulations, 2011 are in force till present even though these have undergone certain

amendments from time to time. The MYT Regulations of 2011 define the term “wheeling” to mean as under:-

“wheeling” means the operation whereby the distribution system and associated facilities of a distribution licensee are used by another person for the conveyance of electricity on payment of charges to be determined under section 62.”

The above said definition clearly shows that the “wheeling” includes the use of distribution system for conveyance of electricity by any person for any purpose whatsoever, whether for making use within the State or export to other States and that too irrespective of the voltage at which the distribution system is to be used. Since certain EHV systems were allowed to be retained by the petitioner (the distribution licensee) the wheeling charges shall be payable to the distribution licensee even if only EHV component of the distribution network is used. As such, it is clear that in the prevalent post reorganization situation, a generator connected to the distribution system, even though at EHV, exporting power to outside the State shall also have to pay wheeling charges (for use of the distribution system) in addition to the charges for the use of intra-State transmission system of the Respondent No.2 i.e. HPPTCL. In case of the generators exporting power outside the State, even though energy is not physically drawn at the State periphery, energy accounting is done for scheduling etc. by adjusting losses upto State periphery.

- 17.3 In this background we now proceed further to decide the issue duly taking into account the submissions made by the parties.
- 17.4 The petitioner has contended that based on the findings of the CERC in their order dated 10th March, 2017, the charges as shown in Table-3 are payable by the Respondent No. 1 for the use of State Network. The petitioner have, in support of their claim, also referred to certain Orders of the Commission as listed in Table-3 below:-

Table -3
CHARGES CLAIMED AS PAYABLE

Sr. No.	Period	Applicable CERC/HPERC Regulations	Applicable Rate (Paisa/kWh)	
			STU System of HP	HPSEBL (DISCOM System)
1.	01.04.2008 to 25.09.2008	CERC Regulations dated 25.01.2008.	Rs.30/MWh i.e. 3 Paisa/kWh	
2.	26.09.2008 to 25.11.2009	HPERC order dated 05.09.2008	Rs. 43621/MW/month i.e. 6.05 Paisa/kWh	75 Paisa/kWh
3.	26.11.2009 to 24.08.2010	HPERC order dated 25.11.2009	Rs.43358.92/MW/month i.e. 6.02 Paisa/kWh	71 Paisa/kWh
4.	25.08.2010 to 08.12.2011	HPERC order dated 19.08.2010	Rs.64967.43/MW/month i.e. 9.02 Paisa/kWh	100.73 Paisa/kwh
5.	09.12.2011 to 26.06.2012	HPERC order dated 01.12.2011	2.12 Paisa/kWh	38 Paisa/kWh
6.	27.06.2012 to 31.03.2013	HPERC order dated 26.06.2012	2.15 Paisa/kWh	47 Paisa/kWh
7.	01.04.2013 to 31.03.2014	HPERC order dated 29.05.2013	2 Paisa/kWh	44 Paisa/kWh
8.	01.04.2014 to 31.03.2015	HPERC orders dated 10.06.2014 and 12.06.2014	2 Paisa/kWh	46 Paisa/kWh

- 17.5 In view of the provisions under the aforesaid MYT Regulations, the Commission has determined the Open Access Charges in its Tariff Orders from time to time. However, separate orders based on the relevant Tariff Orders were also issued in certain cases.
- 17.6 From the perusal of the Orders issued by the Commission from time to time from 5.09.2008 onwards as referred to by the petitioner, we find that the wheeling charges for the use of the EHV system of the petitioner as well as the transmission system of the HPPTCL have been determined from time to time. However there are certain time gaps for which such determination has not been made. The copies of these orders are already available in the public domain.
- 17.7 For the period from 01.04.2008 to 25.09.2008, the petitioner has claimed the CERC default charges and there is no dispute in relation to the said period.
- 17.8 The petitioner has based its claims for the charges in respect of the transmission system for the periods from 26.09.2008 to 25.11.2009, from 26.11.2009 to 24.08.2010 and 25.08.2010 to 08.12.2011 on the Commission's Orders dated 05.09.2008, 25.11.2009 and 19.08.2010 respectively (**refer serial No. 2 to 4 of Table-3**). We find that the Orders dated 05.09.2008, 25.11.2009 and 19.08.2010 were applicable only upto 31.03.2009, 31.03.2010 and 31.03.2011 respectively and were not extended beyond the close of respective financial years. As such, the rates as per these orders cannot be applied to the periods falling in subsequent financial years i.e. from 01.04.2009 to 25.11.2009, from 01.04.2010 to 24.08.2010 and from 01.04.2011 to 08.12.2011 respectively. No separate orders of the wheeling charges were issued in respect of these broken periods of 01.04.2009 to 25.11.2009, 01.04.2010 to 24.08.2010 and 01.04.2011 to 08.12.2011. Accordingly the charges as per the aforesaid Orders shall be applicable only in respect of the periods from 26.09.2008 to 31.03.2009, 26.11.2009 to 31.03.2010 and 25.08.2010 to 31.03.2011. For other periods upto 31.03.2011, the default charges as per the CERC Regulations shall be applicable.
- 17.9 As regards the Discom charges of 75 paise per kWh, 71 paise per kWh and 100.73 paise per kWh, as claimed by the petitioner, for the period from 26.09.2008 to 31.03.2011 are not applicable keeping in view the fact that till 31.03.2011, the erstwhile HPSEB was a composite entity and the entire EHV system was covered under its transmission function. The charges being claimed pertain to the use of the Distribution system of 33 kV and below and are not applicable in the instant case, where the power was injected at 132kV level.
- 17.10 In relation to the period from 01.04.2011 to 08.12.2011, it is observed that as also mentioned in para 17.6 of this Order, the Commission's Order dated 19.08.2010 referred to by the petitioner in respect of their claim in respect of the period from 01.04.2011 to 08.12.2011 was applicable up to 31.03.2011 only. In absence of any specific order for the period from 01.04.2011 to 08.12.2011, the default charges as per the CERC Regulations shall be applicable for this period. However for the period from 09.12.2011 to 31.3.2012 the charges as determined by the Commission in its Order dated 01.12.2011 i.e. 2.12 paise per kWh for the transmission system of the Respondent No. 2 i.e. HPPTCL and 38 paise per kWh for the EHV system of the petitioner shall be applicable.

- 17.11 As regards the charges for FY 2012-13, we observe that the order depicting such charges was issued on 26.06.2012 only. As such, the default charges as per the CERC Regulations shall be applicable for the period from 1.4.2012 to 26.6.2012. However, the charges claimed in the petition for the use of EHV component of the distribution system of the petitioner and the system of the Respondent No.2 i.e. HPPTCL, in respect of the year 2012-13 shall be applicable for the period from 27.06.2012 to 31.03.2013. For the financial year 2013-14 and onwards, the charges for the transmission system of the Respondent No.2 as well as for the EHV system of the petitioner have been determined by the Commission in the respective Orders as referred to by the petitioner and shall be applicable.
- 17.12 The charges in respect of the periods from 09.12.2011 to 31.03.2012 and from 27.06.2012 onwards have been determined by the Commission in accordance with the prevailing MYT Regulations for all the persons, including generators, availing open access in respective systems of the i.e. the EHV system of the distribution licensee and the transmission system of the Respondent No. 2 i.e. HPPTCL and are applicable irrespective of the factor whether the power is to be exported outside the State or otherwise.
- 17.13 In view of the above and after considering the submissions made by the parties, we conclude that in the instant case, the charges shall be applicable in case of the Respondent No. 1 at the following rates:-

Table- 4
CHARGES PAYABLE AS PER THE COMMISSION'S CONCLUSION

Sr. No.	Period	Applicable CERC/HPERC Regulations	Applicable Rate	
			Transmission System of the erstwhile HPSEB / HPPTCL	HPSEBL (DISCOM) EHV System
1.	01.04.2008 to 25.09.2008	CERC Regulations dated 25.01.2008.	Default charges as per CERC regulations shall be applicable.	
2.	26.09.2008 to 31.03.2009	HPERC orders dated 30.05.2008 and 05.09.2008	Rs. 43621/MW/ month	Not applicable
3.	01.04.2009 to 25.11.2009	CERC Regulations dated 25.01.2008.	Default charges as per CERC regulations shall be applicable.	
4.	26.11.2009 to 31.03.2010	HPERC orders dated 24.08.2009 and 25.11.2009	Rs.43358.92/MW/month	Not applicable
5.	01.04.2010 to 24.08.2010	CERC Regulations dated 25.01.2008.	Default charges as per CERC regulations shall be applicable.	
6.	25.08.2010 to 31.03.2011	HPERC orders dated 10.06.2010 and 19.08.2010	Rs. 64967.43/MW/ month	Not applicable
7.	01.04.2011 to 08.12.2011	CERC Regulations dated 25.01.2008.	Default charges as per CERC regulations shall be applicable.	
8.	09.12.2011 to 31.03.2012	HPERC orders dated 14.07.2011, 19.07.2011 and 01.12.2011	2.12 Paisa/kWh	38 Paisa/ kWh
9.	1.4.2012 to 26.06.2012	CERC Regulations dated 25.01.2008.	Default charges as per CERC regulations shall be applicable.	
10.	27.06.2012 to 31.03.2013	HPERC orders dated 14.07.2011, 24.04.2012 and 26.06.2012	2.15 Paisa/kWh	47 Paisa/kWh
11.	01.04.2013 to 31.03.2014	HPERC orders dated 14.07.2011, 27.04.2013 and 29.05.2013	2 Paisa/kWh	44 Paisa/kWh
12.	01.04.2014 to 31.03.2015	HPERC orders dated 10.06.2014 and 12.06.2014	2 Paisa/kWh	46 Paisa/kWh

For the sake of clarity, we would like to mention that such charges for the financial years 2015-16 to 2018-19 have also been determined under the respective Tariff Orders and the same shall also be applicable in the instant case.

18. Issue No. 3 Whether the Respondent No. 1 used the State network for conveyance of power up to the periphery of the inter-State network?

18.1 The Respondent No. 1 has argued that they are not using the State network and further that even if it is established that they are using the system, the extent of use is very nominal. In this connection, we find that the contention that they are not using the system is totally incorrect as the conveyance of power is impossible without using the network with which the project is interconnected. The use of the State network starts right from the interconnection point. In fact the CERC in their Order dated 10.03.2017 have already confirmed that the State network of Himachal Pradesh is used by the Respondent No. 1. So far as the extent of use i.e. length of line etc. is concerned, the same is not relevant in the instant case as the Commission has determined the rate of charges on postal stamp basis. The charges have been determined and as per the MYT Regulations are payable irrespective of the route for flow of the power. However, just for arguments sake it is pointed out that even if the flow of power through displacement were to be considered, the transmission charges incurred by the licensee in making the power available from other sources at the State periphery would have also come into picture.

18.2 The Respondent No. 1 has also claimed that the wheeling charges and transmission charges are not charged from certain other open access generators using the system. In this connection, they have also named some generators in support of their contention. On the other hand, the petitioner has confirmed that respective charges are being charged from the generators using the distribution system and/or the transmission system. In view of the said confirmation given by the petitioner, we do not find any necessity to pass any verdict on the matter. Moreover even if the contention of the Respondent No. 1 is accepted, it will not in any way dilute the right of the petitioner for recovery of charges from him.

19. Issue No.4 Whether the energy losses for use of the State network have been determined by the State Commission and what shall be the losses applicable in the instant case?

19.1 The CERC has, vide their order dated 10th March, 2017 concluded that their Open Access Regulations of 2008 shall prevail. It has also been held that *the transmission charges and losses as determined by the State Commission shall be applicable for use of the State network in terms of regulation 16(3) of the Open Access Regulations*. In the petition, the losses have been claimed at the rates tabulated in the following Table-5 based on the various Orders of the Commission:

Table – 5
ENERGY LOSSES CLAIMED BY THE PETITIONER

Sr. No.	Period	Applicable CERC/HPERC Regulations	Applicable Losses (%)	
			STU System of HP	HPSEBL (DISCOM System)
1.	01.04.2008 to 31.03.2009	HPERC order dated 30.05.2008	3.71%	12.50%
2.	01.04.2009 to 23.08.2009	HPERC order dated 30.05.2008	3.71%	11.72%

3.	24.08.2009 to 31.03.2010	HPERC order dated 24.08.2009	3.71%	9.43%
4.	01.04.2010 to 09.06.2010	HPERC order dated 24.08.2009	3.71%	9.12%
5.	10.06.2010 to 31.03.2011	HPERC order dated 10.06.2010	3.71%	9.12%
6.	01.04.2011 to 31.03.2012	HPERC order dated 19.07.2011	14%	
7.	01.04.2012 to 23.04.2012	HPERC order dated 19.07.2011	13.5%	
8.	24.04.2012 to 31.03.2013	HPERC order dated 24.04.2012	12.4%	
9.	01.04.2013 to 26.04.2013	HPERC order dated 24.04.2012	12.0%	
10.	27.04.2013 to 31.03.2014	HPERC order dated 27.04.2013	12%	
11.	01.04.2014 to 31.03.2018	HPERC orders dated 10.06.2014 and 12.06.2014	0.75%	4.00%

19.2 We find that the CERC Regulations, 2008 also provide for adjustment of losses in kind as per the following provisions:-

“23 Transmission losses

- (1) *The buyers and sellers of the electricity shall absorb apportioned energy losses in the transmission system as estimated by the Regional Load Despatch Centre and the State Load Despatch Centre concerned, and applied in accordance with the detailed procedure.*
- (2) *The energy losses shall be accounted for by providing a differential between schedules at the point of supply, inter-utility transfer and drawal of electricity.*
- (3) *The applicable transmission losses for the regional transmission system as well as for State network shall be declared in advance and shall not be revised retrospectively.”*

In the above background, we now proceed to examine the claims with regard to the rates at which losses are applicable for each period.

(i) for the period from 1.4.2008 to 31.03.2011-

We observe that as discussed in a preceding paragraph also, the erstwhile HPSEB, till its reorganization, was a composite entity looking after the entire system including the systems at all voltage levels. Accordingly, in the instant case, the losses determined by the Commission for the EHV system (then known as the transmission system) shall only be applicable. In fact, the losses so determined remained applicable upto 31.03.2011 even though the reorganization of the erstwhile HPSEB was ordered in June, 2010. In view of the above, the losses at the rate of 3.71%, as determined by this Commission, in relation to these periods, shall only be applicable and no distribution losses, as claimed by the petitioner shall be applicable.

(ii) for the period from 01.04.2011 to 31.03.2014-

The petitioner has claimed that in relation to these periods, the losses are recoverable at the rate varying from 12% to 14%. We observe that losses being claimed by the petitioner correspond to the composite T&D losses for the

entire State network at various voltages and no separate losses have been determined exclusively for the EHV network. Accordingly the claim of the petitioner in this regard is not accepted. As such, the losses in respect of these periods shall be applicable in accordance with the provisions of regulation 23 of the CERC Regulations, 2008 as applicable for respective periods which provide for adjustment of losses at the rates estimated by the SLDC.

(iii) for the period from 01.04.2014 to 31.03.2018-

We observe that the Commission has determined the energy losses for the transmission system of the HPPTCL (Respondent No.2) as well as for the EHV system of the petitioner as 0.75% and 4% respectively in accordance with MYT Tariff Order dated 10.06.2014 and subsequent annual Tariff Orders. As such, the rate of losses so determined shall be applicable. We will also like to mention here that such losses have been determined by the Commission for the current financial year i.e. FY 2018-19 at the same rate as applicable for FYs 2014-15 to 2017-18.

19.3 In view of the above and after considering the submissions made by the parties, we conclude that in the instant case, the losses shall be applicable in case of the Respondent No. 1 at the following rates:-

Table – 6

ENERGY LOSSES PAYABLE BY THE RESPONDENT NO. 1

Sr. No.	Period	Applicable CERC/ HPERC Regulations	Applicable Losses (%)	
			Transmissions System of the erstwhile HPSEB /HPPTCL	HPSEBL (DISCOM) EHV System
1.	01.04.2008 to 31.03.2009	HPERC order dated 30.05.2008	3.71%	
2.	01.04.2009 to 23.08.2009	HPERC order dated 30.05.2008	3.71%	
3.	24.08.2009 to 31.03.2010	HPERC order dated 24.08.2009	3.71%	
4.	01.04.2010 to 09.06.2010	HPERC order dated 24.08.2009	3.71%	
5.	10.06.2010 to 31.03.2011	HPERC order dated 10.06.2010	3.71%	
6.	01.04.2011 to 31.03.2012	HPERC order dated 19.07.2011	As estimated and adjusted by State Load Despatch Centre.	
7.	01.04.2012 to 23.04.2012	HPERC order dated 19.07.2011		
8.	24.04.2012 to 31.03.2013	HPERC order dated 24.04.2012		
9.	01.04.2013 to 26.04.2013	HPERC order dated 24.04.2012		
10.	27.04.2013 to 31.03.2014	HPERC order dated 27.04.2013		
11.	01.04.2014 to 31.03.2018	HPERC orders dated 10.06.2014 and 12.06.2014	0.75%	4.00%

20. **Issue No.5** Whether the orders passed by the Commission are subject to review on account of various averments made by the Respondent No. 1 with

regard to the principles and methodologies followed by the Commission, while determining the charges in its Orders?

20.1 The Respondent No. 1 has made various submissions relating to the principles and the methodologies followed by the Commission, while determining the various charges, in its Orders. It has also been argued by the Respondent No. 1 that since the generating capacity of their plant has not been taken into account, the charges so determined by the Commission are not applicable to him. In this connection we find that since the Respondent No. 1 has been availing Short Term Open Access only, the capacity was not required to be added for the purpose. However, while determining the charges, the financial receipts from various sources, including those in relation to the Respondent No.1, were considered and offset against the revenue requirements while determining the charges. The overall effect thus gets nullified. The charges determined by the Commission are payable by all the persons availing open access through distribution system of the petitioner and the transmission system of the Respondent No. 2 i.e. HPPTCL. In fact, such expenses incurred by the distribution licensee are also duly taken into account while determining the tariff for the retail Consumers. Moreover, the proceeds from the sale of surplus power outside the State are also duly accounted for while determining the revenue requirements of the concerned licensee.

We also observe that since the Respondent No.1 is availing Short Term Open Access and the CERC has also held that the CERC Open Access Regulations shall prevail, he has to be treated as Short Term Open Access user only. However, the Commission may not be averse to treating him a Long Term Open Access user if he applies and registers himself in that capacity with the SLDC/NRLDC and other agencies under relevant Statutes. He cannot be allowed to have different status for different purposes.

20.2 We also find that the Tariff Orders issued by the Commission have already attained finality and are not subject to review at this stage. The issues raised by the Respondent No. 1, therefore, do not merit any consideration at this stage as this will only tantamount to indirect challenge to the Tariff Orders, which have otherwise attained finality.

21 After having duly considered the various submissions made by the parties and having concluded the relevant issues as per the foregoing paragraphs of this Order, we now direct the parties to settle the accounts after accounting for the rates/charges mentioned in Table-4 and Table-6 given in this Order. The net amount payable as arrears by the Respondent No. 1 to the petitioner shall be paid, in addition to the current bills, in three equal monthly installments and the first installment shall fall due on 31st day from the date of issue of the bill by the petitioner. Any delay in payment by the Respondent No. 1 shall, without prejudice to any other right of any of the parties to this Lis, attract simple interest @ 9% per annum for the actual number of days by which payment is delayed.

No order as to costs.

--Sd/-

(Bhanu Pratap Singh)
Member

--Sd/-

(S.K.B.S. Negi)
Chairman