

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

Petition No: 46 of 2021
Date of Institution: 12.11.2021
Arguments Heard on: 26.02.2024
Decided on: 12.04.2024

CORAM

Devendra Kumar Sharma
CHAIRMAN

Yashwant Singh Chogal
MEMBER (Law)

Shashi Kant Joshi
MEMBER

In the matter of:-

M/s Everest Power Private Limited
Hall A, First Floor, Plot No. 143-144,
Uyog Vihar, Phase-IV, Gurugram-122015.

.....Petitioner

Versus

The Himachal Pradesh Power
Transmission Corporation Limited (HPPTCL)
Himfed Bhawan, Below Old MLA's Quarters,
Tutikandi (Panjiri), Shimla-05.

.....Respondent

Petition under Sections 86(1)(a), (f), (k) and 62(6) of the Electricity Act, 2003, for quashing the invoices dated 14.09.2021, 01.10.2021 and 08.11.2021 raised by the Respondent towards the transmission charges on account of wheeling of 100 MW power through the 220 kV D/C Charor – Banala Transmission Line.

Present:

Sh. Rajnish Manikatala, Ld. Sr. Advocate alongwith Sh. Hemant Singh and Sh. Vipul Sharda Ld. Advocates for the Petitioner.
Sh. Vikas Chauhan, Ld. Advocate for the Respondent.

ORDER

This Petition has been filed by M/s Everest Power Private Limited (hereinafter to be referred as Petitioner) for quashing invoices dated 14.09.2021, 01.10.2021 and 08.11.2021 raised by the Himachal Pradesh Power Transmission Corporation Limited (HPPTCL/Respondent for short) on account of the transmission charges for wheeling of power from its Malana Stage-II, Hydro Electric Project through 220 kV Double Circuit (D/C) Charor – Banala Transmission Line (Transmission Line for short).

FACTS OF CASE

2. The facts necessary for the determination of the present Petition are that the Petitioner owns and operates 100 MW Malana Stage-II Hydro Electric Plant situated at Village Chowki, Near Jarri, District Kullu, Himachal Pradesh (Malana II HEP for short), which has been commissioned on 12.07.2012 and wheeling the power through the 220 kV D/C Transmission Line w.e.f. December, 2019. The Transmission Line was commissioned on 01.10.2019 for evacuating 289 MW power from Small HEPs in Parvati Valley and the Malana-II HEP.

3. Prior to the energisation of the Transmission Line, the power from the Project was being evacuated through the Allain Duhangan Transmission Line (AD Hydro Line). Detail regarding the arrangement prior to evacuation of power through the Transmission Line, Power Purchase Agreements with PTC India Ltd. and Punjab State Power Corporation Ltd., is in respect of determination of Tariff of Malana-II HEP by Ld. PSERC and meetings of NRPC has been given in paras 12 to 19 qua which there is no dispute.

4. The Commission has approved the Capital Cost and determined the charges of the Transmission Line vide Order dated 12.08.2021 in Petition No. 97 of 2020. The recovery of the Transmission charges of the Transmission Line have been dealt in Paras 4.7.2, 4.8.4 and 4.8.5 of the Order that the recovery of transmission charges be not made till the nature of the Transmission Line is certified by the Northern Region Power Committee (NRPC) and in case it is certified that the Transmission Line is not part of Inter-state Transmission System (ISTS), the recovery would be carried out as per Clause 33 of the Himachal Pradesh Electricity Regulatory Commission, MYT Regulations, 2011 (HPERC MYT Regulations, 2011 for short).

5. According to the Petitioner, as per Section 62 (6) of the Electricity Act, 2003 (Act for short), a licensee is entitled to charge tariff as approved by the Appropriate Commission and cannot charge anything in excess of the approved amount and since the transmission tariff has not been approved for recovery by the Appropriate Commission, the charges sought to be recovered by the Respondent would be in excess as mandated by the Commission in Order dated 12.08.2021.

6. The HPPTCL issued NOC to the Petitioner vide letter dated 09.07.2019 (Annexure P-7), for availing open access in Inter-State Transmission System. According to the Petitioner, in the two meetings of Northern Region Power Committee held on 23.09.2019 and 24.09.2019 (Annexure P-8), the HPPTCL placed agenda for declaration of the Transmission Line as deemed ISTS without the data of four/two quarters and requested for certification from NRPC so as to file a Petition before Ld. CERC for determination of tariff. The HPPTCL was informed by the NRPC that a study is required for such certification but the study was not completed even after commissioning of the Transmission Line on 01.10.2019. The Respondent on the other hand filed Petition No. 97 of 2020 on

28.05.2020 before the Commission for approval of the capital cost and determination of tariff of the Transmission Line for the period from the date of Commissioning (COD) i.e. 01.10.2019 to FY 2023-24 under Sections, 62, 64 and 86 of the Act which has been decided on 12.08.2021 (Annexure P-9).

7. In said Petition, the contention of the Petitioner was that it does not agree to the entire recovery of the transmission charges from the Malana-II HEP and even if the Commission has jurisdiction to determine the tariff, including its recovery, the same can only be shared amongst all the beneficiaries of Intra-state Transmission System as observed by the Commission in Paras 4.8.4 and 4.8.5 of the Tariff Order dated 12.08.2021. The HPPTCL was also directed to follow up with the NRPC in an expeditious manner for establishing the nature of asset. As per the Petitioner, in view of the Order dated 12.08.2021, the transmission tariff can only be recovered in terms of mechanism of the Appropriate Commission, having the jurisdiction and, thus, the tariff for Transmission Line has not been approved for recovery from the Transmission system users including the Petitioner. Further, pursuant to Order dated 12.08.2021, NRPC vide letter dated

24.08.2021 (Annexure P-10) directed the HPPTCL to approach the Ld. CERC for getting the certification of the Transmission Line.

8. According to the Petitioner, the Respondent/HPPTCL in complete violation of the aforesaid order dated 12.08.2021, issued demand notices dated 14.09.2021, 01.10.2021 and 08.11.2021 demanding provisional transmission charges for entire capacity of the Transmission Line to the tune of Rs. 23,12,67,333/-, Rs. 24,10,89,999/- and Rs. 25,09,12,665/- for the period w.e.f. COD i.e. 01.10.2019 to August, 2021 and also for the months of September and October, 2021 (Annexure P-11).

9. In a meeting convened by the Respondent on 21.10.2021 to discuss various agendas in respect of the Transmission Line, the Respondent informed that NRPC has asked the Respondent to approach Ld. CERC for certification of the line and the HPPTCL will approach Ld. CERC by 15th November and till certification, the Transmission Line is to be treated as Intra-state asset and tariff is to be paid failing which the Respondent will regulate the transmission of power of Malana-II HEP. However, it was wrongly recorded in the minutes of meeting (Annexure P-12) that the Petitioner has agreed to pay the bills by 15th November, 2021. As per the Petitioner, the

submissions made by the Petitioner in the meeting were not incorporated in the minutes of meeting and thus, vide letter dated 27.10.2021 (Annexure P-13), the Petitioner pointed out that in case of high-capacity transmission lines, transmission charges are to be levied based upon the allotted capacity. Further, it has been recorded in Para 4.8.5 of the Order dated 12.08.2021 (Annexure P-9) that in case the Transmission Line is declared as Inter-state, the recovery will be under PoC mechanism and if not, the same will be as per Regulation 33 of HPERC MYT Regulations, 2011 which provides for sharing of transmission charges and losses amongst the Long Term and Medium-Term customers of Intra-state Transmission System (InSTS).

10. Thus, the issuance of the above invoices (Annexure P-11, Colly) constrained the Petitioner to approach the Commission by way of the present Petition for quashing of the same being without any authority of law, non-est and illegal and for the interim relief for stay of the invoices and taking any coercive action against the Petitioner including invocation of Regulation of power supply, till the pendency of the Petition. Upon such request, the Commission vide interim Order dated 17.11.2021 restrained the Respondent from stopping the

flow of power from the Malana-II HEP till the adjudication of dispute with certain additional observations. Pursuant to the observations made in the interim Order 17.11.2021, the parties convened the meetings on 23.11.2021 (Annexure P-14) and 15.12.2021. Further, the Commission vide Order dated on 27.11.2021 directed the Petitioner to pay 35% of the transmission charges in 3 installments of 10 days each, as an interim measure, till the adjudication of the dispute against which the Petitioner filed a Writ Petition before the Hon'ble High Court of Himachal Pradesh being CWP No. 7763 of 2021, alongwith an application (CMP No. 14648 of 2021) and the Hon'ble High Court was pleased to stay the Order dated 27.11.2021 passed by the Commission.

11. Meanwhile, the Respondent filed Petition No. 57/MP/2022 before the Ld. CERC, for declaring the Transmission Line as part of Inter-State Transmission System (ISTS), and consequently, seeking inclusion of the same under the PoC/ sharing mechanism under the CERC Sharing Regulations, 2020. However, the Ld. CERC vide Order dated 04.05.2023 has held that the Transmission Line cannot be considered as Inter-state Transmission Line and continues to be an Intra-state Transmission Line under the jurisdiction of the

Commission. It is averred that the Order of the Ld. CERC dated 04.05.2023 was primarily based upon the load flow data submitted by NRLDC.

12. The Petitioner was granted Long Term Open Access (LTA) by the Respondent on 30.12.2022 (Annexure P-15) for the quantum of 86 MW till 12.07.2024 and 80 MW from 13.07.2024 to 05.12.2044 and connection agreements dated 28.06.2019 and 30.05.2022 (Annexure P-16) were executed between the parties.

13. Aggrieved by the Order of Ld. CERC dated 04.05.2023, the Petitioner has preferred an appeal before the Hon'ble APTEL, being Appeal No. 628 of 2023 that the subject line is part of ISTS, being used for transmission of power directly outside the territory of the State of H.P which is said to be pending adjudication before the Hon'ble APTEL.

14. In the meanwhile, the Hon'ble High Court vide Order dated 31.05.2023 in C.W.P. No. 7763 of 2021 directed the Petitioner to approach the Hon'ble APTEL against the interim Order dated 27.11.2021, extending the interim protection granted by the Commission vide order dated 10.12.2021 till 31.07.2023.

15. The HPPTCL sought to invoke the Bank Guarantee vide letter dated 03.08.2023, as such, the Petitioner approached the Commission for urgent listing of the Petition and the Commission vide Order dated 04.08.2023 directed the Petitioner to deposit 35% of the transmission charges as accrued upto 31.07.2023 in respect of Transmission Line within a week and to submit the compliance. Meanwhile, the Respondent issued a disconnection notice dated 11.08.2023 (Annexure P-18) to the Petitioner.

16. The Petitioner, as directed by the Hon'ble Himachal Pradesh High Court vide Order dated 31.05.2023 and aggrieved of the Order dated 04.08.2023 filed an appeal against Order dated 27.11.2021, being DFR No. 473 of 2023, before the Hon'ble APTEL which has been disposed of vide Order dated 14.08.2023 (Annexure P-17).

17. It is averred that the Malana-II HEP sustained heavy loss during monsoon resulting in forced shut down on 09.07.2023 and resultantly, the transmission system from Malana-II HEP to the Respondent's 200 kV Charor system through which the energy generated from Malana-II was evacuated into the grid also got impacted with breakdown of 2 number of towers. It is averred that the Malana-II HEP has not been restored on the date of filing of Petition and may

take considerable time and even if the Plant is restored, the Power cannot be evacuated. However, the Respondent has been raising the bills/invoices till date.

18. As per the Petitioner, the Respondent is attempting to recover the entire ARR of its transmission asset (Transmission Line) from the Petitioner despite that the transmission charges for the Transmission Line have not been approved for recovery by the Appropriate Commission in terms of the Act, as the nature of the Transmission Line whether it is ISTS or InSTS is yet not ascertained. In case the Transmission Line is ISTS, the Ld. CERC will have the jurisdiction in the terms of the CERC Tariff Regulations, 2019 read with CERC sharing Regulations 2010 and 2020 and the issue in this regard is pending adjudication before the Hon'ble APTEL. Further, as per the Petitioner in case the Transmission Line is declared InSTS, the tariff of the Transmission Line is to be recovered in accordance with Regulation 33 of the HPERC MYT Regulations, 2011, which mandates that transmission charges are to be shared between all the Long term and Medium term customers of the InSTS on monthly basis based on the allotted transmission capacity or contracted capacity, as the case may be, which is 86 MW till 12.07.2024, and 80

MW from 13.07.2024 to 05.12.2044. Therefore, the invoices dated 14.09.2021, 01.10.2021 and 08.11.2021 are illegal, without any authority of law and non-est. Since the issue is pending adjudication before the Hon'ble APTEL in Appeal No. 628 of 2023, any amount charged by the Respondent will be treated as in excess of what has been determined/ approved by the Appropriate Commission. The Respondent has, therefore, violated the provisions of the Act which render the demand illegal and arbitrary. Not only this, the impugned invoices had been raised well before the Order of the Hon'ble CERC dated 04.05.2023, in Petition No. 57/MP/2022, as such the invoices were without any authority of law.

19. As per the Petitioner, the Commission in Order dated 12.08.2021 in Petition No. 97 of 2021 has rejected specific prayer for levy of the entire transmission charges of the Transmission Line in Para 4.8.5 of the order, thus, there was no occasion for the Respondent to have raised the impugned invoices which are based on the entire 289 MW capacity of the Transmission Line and being contrary to the tariff Order dated 12.08.2021, the same are liable to be quashed and similarly, the narration recorded in the interim Orders

dated 27.11.2021 and 04.08.2023, qua evacuation of 100 MW power through the Transmission Line also need to be corrected.

REPLY OF THE RESPONDENT

20. The Petition has been resisted by filing the reply raising preliminary submissions, inter alia, that the Petitioner has no cause of action to maintain the Petition which has been filed to avoid the liability accrued in favour of the Respondent and that the Commission vide order dated 12.08.2021 in Petition No. 97 of 2020 has approved the transmission charges for the Transmission Line owned and operated by the Respondent and that the Commission vide the above Order dated 12.08.2021 has neither stayed the recovery of transmission charges from the Petitioner nor has put the prior certification of Transmission Line by the NRPC, as a condition precedent, to raise the monthly transmission charges as being alleged by the Petitioner and that no objection to this effect was raised by the Petitioner during the pendency of Petition No. 97 of 2020 and that the Petitioner has come out with the false and frivolous grounds at this belated stage to avoid the liability.

21. Relying with regard to Para 4.8.5 of order dated 12.08.2021 in Petition No. 97/2020, it is averred that appropriate Petition before the

Ld. CERC being Petition No. 57/MP/2022 was filed by the Respondent and the Hon'ble CERC vide order dated 04.05.2023 (Annexure R/1) has held that the Transmission Line cannot be considered as Inter-state line and continues to be an Intra-state line under the jurisdiction of the Commission. The Petitioner has challenged the aforesaid order before the Hon'ble APTEL in Appeal No. 628 of 2023 which is pending adjudication and that the Hon'ble APTEL has not stayed the Order of the Ld. CERC in respect of the line which renders the present Petition non-maintainable.

22. As per the Respondent, the Transmission Line is exclusively being used by the Petitioner to evacuate the power from Malana-II HEP and in accordance with the agreement entered into between the Petitioner and the Respondent and the prevailing Regulations, the Petitioner is liable to bear the cost of the entire line till other Projects in the area begin evacuation of power from their respective projects through the Transmission Line. Further, the Petitioner had filed an appeal bearing DFR No. 473 of 2023 before the Hon'ble APTEL laying challenge to the two interlocutory orders dated 27.11.2021 and 04.08.2023 passed by the Commission in the present Petition,

which has been dismissed by the Hon'ble APTEL vide order dated 14.08.2023 making the observation as under:

“It is useful in this context, to refer to Clause 33 of the HPERC MYT transmission Regulations, 2003 which reads thus:-

33. Allocation of Transmission Service Charges and Losses

(1) The Annual Transmission Service Charges (ATSC) shall be shared between the long-and medium-term customers of the transmission system on monthly basis based on allotted transmission capacity or contracted capacity, as the case may.

A reading of Regulation 33 (1), as afore-extracted, indicates that the said provision would be attracted only when the transmission system is shared between long and medium-term customers. It is not in dispute that, in the present case, the Appellant is alone using the system for which transmission charges have been levied on them.”

23. Therefore, the Petitioner is liable to pay the entire transmission charges being the only user of the system for the period from COD to FY 2023-2024. Also that the Regulation 31 of the HPERC (Terms and Conditions for Determination of Transmission Tariff) Regulations, 2011 (HPERC MYT Regulations 2011) provides as under:-

“31. Transmission Tariff / Charges

(1) The transmission charges payable by the transmission customers of the transmission system shall be designed to

recover the aggregate revenue requirement computed as annual transmission charges by the Commission for each year of the control period.

(2) In addition to transmission charges, charges for reactive energy, as may be determined by the Commission in the MYT order, shall also be payable by all the transmission customers of the system.”

Thus, the Petitioner being the only transmission customer of the Line is liable to pay the entire transmission charges as computed by the Commission in Petition No. 97/2020.

24. Further, in terms of agreement for long term access dated 30.12.2022 (effective from 05.12.2019) (Annexure R/3) between the Respondent and the Petitioner, it has been provided under Clause (L) (2) (b) as under :-

“(L)(2)(b) Long term transmission customer shall share and pay the transmission charges of the transmission system detailed in annexure A-3 in accordance with the sharing mechanism detailed in Annexure-4. In case, in future, any other long-term transmission customer(s) is/are granted open access through the transmission system detailed at Annexure-3 (subject to technical feasibility), he/they would also share the applicable transmission charges.”

25. Therefore, the Petitioner being the only beneficiary of the transmission system has to pay the entire transmission charges till other long term transmission customer(s) enter the transmission system. Not only this, Clause 6 of agreement dated 28.06.2019 (Annexure R/4), executed by the parties provides as under:-

“that Everest Power hereby agrees to pay the applicable transmission charges and bear losses to HPPTCL System which is put to use for transmitting its Power generated at Malana-II Project”.

Therefore, the words “HPPTCL system which is put to use for transmitting its Power generated at Malana-II Project as stipulated in agreement dated 28.06.2019 make it amply clear that the Petitioner has agreed to bear the applicable transmission charges and can’t be allowed at this stage to dispute the payment.

26. Further, as per Regulation 4, the HPERC (Terms and Conditions for Determination of Transmission Tariff) Regulations, 2011,(HPERC MYT Regulations, 2011) the Respondent is within its right to claim the transmission charges from the Petitioner which has been reproduced as under:-

“4. (2) Tariff determined by the Commission and the directions given in the tariff order made by the Commission shall be quid pro quo and mutually inclusive. The tariff determined shall, within the period specified by it, be subject to the compliance of the directions to the satisfaction of the Commission and their non-compliance shall lead to such amendment, revocation, variation and alteration of the tariff, as may be ordered by the Commission.”

27. It is averred that the word ‘quid pro quo’ literally means one for another or ‘you charge the fee for service’ and the term mutually inclusive refers to the “events which allow to different events to occur simultaneously”. Hence, the contention of the Petitioner that the Respondent was required to abide by the directions of the Commission contained in Para 4.8.5 of the Order dated 12.08.2021 prior to levying of the charges is uncalled for.

28. Reference to 30th and 31st standing committee meeting of the NRPC held on 19.12.2011 and 02.01.2013, respectively has also been made in reply to the averments of the Petitioner but once the status of the Line has been declared as InSTS by the Ld. CERC, such reference has no bearing to the issue in the present Petition.

29. As per the Respondent, the representatives of the Petitioner had agreed to pay the outstanding transmission charges amounting to Rs. 23,12,67,333/- in a meeting held on 21.10.2021 by 15.11.2021 and to execute the connectivity agreement and the LTA, as per the MoM dated 21.10.2021 (Annexure P-12) and the payment has been disputed due to some ulterior motive. The Transmission Line is operational since December, 2019 and the power of the Petitioner's plant is getting evacuated and thus, the Respondent is within its right to recover the transmission charges from the Petitioner and the unnecessary withholding of transmission charges for the usage of the Transmission Line would result in severe shortage of funds to ensure smooth operation and maintenance of the transmission line.

30. On merits, the contents of the Petition have been denied reiterating the averments made by way of preliminary submissions. It is denied that the transmission charges bills can only be raised after declaration of the nature of the asset as ISTS or InSTS. Also averred that the Petitioner has wrongly interpreted the Order dated 12.08.2021 as the Commission has nowhere restrained the Respondent to charge the transmission charges and as on date, the nature of the Transmission system/Line has been declared by the

Hon'ble CERC as InSTS. It is also averred that the invoices/ bills are in line with the tariff order dated 12.08.2021 and LTA dated 30.12.2022. It is denied that the charges are to be as per the allotted capacity and that the Regulation 33 of the HPERC (Terms and Conditions for Determination of Transmission Tariff) Regulations, 2011,(HPERC MYT Regulations, 2011) provides as as under:

(i) The Annual Transmission Service Charge (ATSC) shall be shared between the long- and medium-term customers of the transmission system on monthly basis based on the allotted transmission capacity or contracted capacity, as the case may be”.

31. It is averred that the Respondent had planned and constructed the Transmission Line with an aggregate capacity of 289 MW to multiple beneficiaries of 41 Nos. Projects, as elaborated and described under Clause 3.4.1 to 3.4.8 of the Tariff order dated 12.08.2021 and till date, the Petitioner is the only beneficiary and connected to the Transmission Line and, therefore, the approved ARR is to be borne by the Petitioner till such time other beneficiaries are connected and consequent sharing takes place as per Regulation 33, as above. Similarly, the transmission charges as raised are not in violation of Section 62 (6) Electricity Act, 2003. Also that the

averments regarding agreement dated 25.07.2005, LTOA dated 14.07.2008, and Order dated 27.11.2023 passed by Ld. PSERC in Petition No. 54/2012 have no relevance qua the issue in the present Petition.

32. As per the Respondent, it had planned and constructed the Transmission Line with an anticipated capacity of 289 MW. However, the maximum Transmission capacity Surge Impedance Loading (SIL) of similar Transmission Line as declared by the Hon'ble CERC is 132 MW and under N-1 contingency condition, in accordance with the CERC (Sharing of Inter State Transmission Charges and Losses) Regulations, 2020 (Annexure R/6) and that the utilization of Petitioner to that extent shall be 75.76% (with 10 % overloading the utilization shall be 83.33%) and that therefore, the Respondent is well within its right to recover transmission charges from the Petitioner. It is denied that the minutes dated 21.10.2021 are arbitrary. Rather, the same were agreed upon and recorded in the presence of the parties and the Petitioner cannot deny its obligation and commitments.

REJOINDER

33. In rejoinder, the contents of the reply have been denied and those of the Petition have been reaffirmed.

SUBMISSIONS OF THE LD. COUNSEL FOR THE PARTIES

34. Sh. Rajnish Maniktala, Ld. Sr. Advocate has submitted that the Petitioner has signed LTA agreement with the Respondent on 30.12.2022 for transmitting 86 MW energy till 12.07.2024 and 80 MW energy w.e.f.13.07.2024 to 05.12.2044 through the Transmission Line and, therefore, the Respondent was required to levy the transmission charges in respect of aforesaid allotted/contracted capacity as per Regulation 33 of the HPERC MYT Regulations, 2011 but have issued invoices for the entire capacity of the Line i.e. 289 MW which are arbitrary and illegal. He has further submitted that as per Section 62 (6) of the Electricity Act, 2003, the HPPTCL is entitled to charge amount/tariff, as approved by the Appropriate Commission, and cannot charge anything in excess of the amount approved by the Appropriate Commission and the Commission in Petition No. 97 of 2020 decided on 12.08.2021 has restricted the liability of the Petitioner to the extent of allotted/contracted capacity and, thus, any

charges in excess of the same are illegal and the demand is barred by the principles of Res-judicata as the Commission's findings in Petition No. 97 of 2020 have attained finality. The Ld. Sr. Counsel has further submitted that the reliance by the Respondent on the observations of the Judgement/Order of the Hon'ble APTEL dated 14.08.2023 in DFR No 473 of 2023 to the effect that *"A reading of Regulation 33 (1), as afore-extracted, indicates that the said provision would be attracted only when the transmission system is shared between long and medium-term customers. It is not in dispute that, in the present case, the Appellant is alone using the system for which transmission charges have been levied on them"* is misplaced as the said observations by the Hon'ble APTEL have been made while upholding the Interim Order of the Commission dated 27.11.2021, which have no precedential value having not been made while adjudicating the merits of the case. In this regard, he has relied upon the law laid down by the Hon'ble Supreme Court in the cases (2009) 5 Supreme Court Cases 694, 2015 SCC Online Cal 7997, 2007 SCC Online Bom 634, 1997 SCC OnLine Cal 429, 2005 SCC OnLine Cal 377 and (2010) 5 Supreme Court Cases 388. He has further submitted that the reliance placed by the Respondent on the

judgement of Hon'ble APTEL dated 29.11.2014 in Appeal No. 128 and 163 of 2013 upholding the levy of entire transmission charges on Bhilangana Hydro has also no bearing to the facts and circumstances of the present case as in the said case, the 3rd proviso to Regulation 20 (1) (b) of the UERC (Terms and Conditions for Intra-state Open Access) Regulations, 2010, contained a specific provision mandating exclusive levy of transmission charges upon a generator but there is no such provision in the HPERC MYT Regulations, 2011 and Regulation 33 of HPERC MYT Regulations clearly restricts the liability to the extent of allotted/contracted capacity. Thus, the ratio in the Bhilangana case is not applicable to the present case. He has further submitted that the Ld. Uttarakhand Regulatory Commission vide Order dated 17.10.2023 in Petition No. 30 of 2023 has deleted the proviso providing for exclusive levy of transmission charges Regulation i.e. Regulation 20 (1) (b) of the UERC (Terms and Conditions for Intra-state Open Access) Regulations, 2015. According to him, the invoices dated 14.09.2021, 01.10.2021 and 08.11.2021 are arbitrary and illegal and liable to be quashed.

35. Sh. Vikas Chauhan Ld. Counsel for the Respondent has submitted that the Petitioner despite availing the system to its

exclusive use ever since the commissioning of the Transmission Line has deferred the liability on one pretext or the other and has raised new and fresh pleas every now and then to deny the due charges. According to him, the status of the Transmission Line has been declared by the Ld. CERC as Intra-state Transmission Line and the Petitioner is liable to pay the transmission charges for the entire capacity of the Transmission Line being the sole and exclusive user of the same and cannot avoid the liability merely on the ground that other Projects which were to be connected to the Transmission Line have not come up. He has also submitted that the Regulation 33 of HPERC MYT Regulations, 2011 would be attracted only when the transmission system is shared between the long and medium term customers and since the system has so far not been shared by any other customers, the Petitioner being the sole beneficiary is liable for the entire capacity i.e. 289 MW of the Line and the demand notices/invoices dated 14.09.2021, 01.10.2021 and 08.11.2021 are legal and valid. He has further submitted that the Hon'ble APTEL in Order dated 14.08.2023 in DFR No. 473 of 2023 has observed that the Petitioner is liable to pay the entire transmission charges being the only user of the system and, thus, the Petitioner cannot be

allowed to dispute that the invoices are not valid. He has also submitted that the Hon'ble APTEL in Appeal Nos. 128 and 163 of 2013 in the case, Bhilanagana Hydro Project Ltd. V/s Power Transmission Corporation of Uttarakhand Ltd. MANU/ET/0230/2014 has upheld the levy of the entire capacity of Line on the sole beneficiary of the system, as such, the Petition is liable to be dismissed.

36. We have gone through the submissions of the Ld. Counsel for the parties including the written submissions made by the Petitioner and have perused the entire case file with minute care.

37. The following points arise for determination in the present Petition:

1. Whether the Petitioner is not liable to pay the transmission charges for the entire capacity of 289 MW of the Transmission Line and the provisional invoices dated 14.09.2021, 01.10.2021, 08.11.2021 demanding the charges for the entire capacity of 289 MW of the Transmission Line from the Petitioner and subsequent bills qua transmission charges,

minutes of meeting held on 21.10.2021 and disconnection notice dated 11.08.2023 are illegal and null and void?

2. Final Order (Relief)

38 For the reasons to be recorded hereinafter in writing, our point wise findings are as under:-

Point No. 1: No

Final Order: Petition dismissed as per operative part of the order

REASONS FOR FINDINGS

39. **Point No. 1**

Before, we advert to the merits of the Petition, it is relevant to mention that the status of the Charor-Banala Transmission Line (Transmission Line) has been determined by the Ld. CERC as Intra-state Transmission Line vide Order dated 04.05.2023 in Petition No. 57/MP/2022. The Petitioner has preferred an appeal against the order of Ld. CERC dated 04.05.2023 before Hon'ble APTEL, bearing Appeal No. 628 of 2023, which is said to be pending. However, the Ld. Counsel for the parties have submitted that neither any order staying the order of Ld. CERC has been passed by the Hon'ble APTEL nor the proceedings in the present Petition have been stayed.

Therefore, presently, the status of the aforesaid Transmission Line is that of Intra-state transmission line.

40. The Petitioner has claimed that the Commission while approving the transmission charges of the Transmission Line had made the recovery of the charges subject to certification of nature of Transmission Line by the Northern Region Power Committee (NRPC) in Para 4.7.2, 4.8.4 and 4.8.5 of Order dated 12.08.2021 in Petition No. 97 of 2020 but without getting the requisite certificate, the impugned invoices have been raised which are illegal. The Transmission Line was commissioned on 01.10.2019 as evident from Order dated 12.08.2021 in Petition No. 97 of 2020 and the Petitioner started evacuating the Power w.e.f. December, 2019. The record suggests that the Respondent repeatedly approached the NRPC for requisite certification but the matter was deferred time and again. The Petitioner and Respondent have signed an agreement dated 28.06.2019 agreeing to pay the applicable transmission charges. The recovery of charges was necessary for the proper maintenance of Line and smooth evacuation of power and since there was delay in NRPC certification on one pretext or the other, the Respondent preferred to raise provisional bills pending certification of status of

Line as ISTS. On getting the requisite certificate, the Respondent has filed the Petition before Ld. CERC and the Ld. CERC has held that the Transmission Line is Intra-state Transmission Line. Only the provisional bills have been raised against the petitioner being the sole beneficiary of the line. Therefore, the contention of the Petitioner that there was stay on recovery of charges by the Commission has no substance.

41. Adverting to the merits to the Petition, the core issue which arises for the determination in the present matter is whether the Petitioner is liable to pay the transmission charges for the entire capacity of the Transmission Line i.e. 289 MW or is liable to pay the charges to the extent of 86 MW upto 12.07.2024 and 80 MW from 13.07.2024 to 05.12.2044, as claimed by the petitioner.

42. The Transmission Line has been constructed for transmitting 289 MW of power by the HPPTCL for various Projects in the area which has been commissioned on 01.10.2019 and till date, only the Malana-II HEP, having capacity of 100 MW, has been connected to the same and transmitting the power by utilizing the entire capacity of line line being the sole beneficiary.

43. On the request of the Petitioner to provide Long Term Access, NOC dated 09.07.2019 was issued by the Respondent and Long Term Access Agreement (LTA for short) has been signed by the Petitioner and the Respondent on 30.12.2022 for the long term open access. It is the case of the Petitioner that the Malana-II HEP (100 MW) shall transmit 86 MW upto 12.07.2024 and 80 MW w.e.f. 13.07.2024 to 05.12.2044 through the Transmission Line, as mentioned in Annexure-I of the LTA dated 30.12.2022 meaning thereby that the contracted/allotted capacity of Malana-II HEP is 86 MW upto 12.07.2024 and 80 MW w.e.f. 13.07.2024 to 05.12.2044.

44. The Petitioner has placed on record copy of Minutes of Meeting held on 21.10.2021 with the HPPTCL in which the issue of the bills/invoices was raised wherein the Respondent pointed that the allotted capacity is applicable only in case of multiple beneficiaries and since Malana-II is the only beneficiary as on date, entire approved ARR has to be paid by the beneficiary i.e. Malana-II HEP. The Petitioner responded to the minutes of meeting dated 21.10.2021 vide letter dated 27.10.2021 as under :

“The Capacity of Charor-Banala 220kV D/c was envisaged to evacuate 289 MW of power from different hydro projects which were to be developed in the vicinity

of Malana-II, otherwise the connectivity would have been retained on the lower voltage and at lower cost of dedicated Transmission Line for power evacuation of Malana-II (100 MW HEP) and that development of other Hydro projects in the vicinity for using the high capacity Transmission Line is not in the control of Malana-II developer, neither the implementation of high capacity Transmission Line was in control of Malana-II developer as it was a decision made by HPPTCL/CEA and when the development of such high capacity links are constructed, it is not justified to put all burden on the single entity. This approach will discourage the developer and the overall development of the vicinity due to higher tariff of transmission lines which will make the project(s) unviable.”

45. The Transmission Line was commissioned on 01.10.2019 and the power of the Petitioner's plant is getting evacuated with effect from December 2019 and thus, the Respondent is within its right to recover the transmission charges from the Petitioner and the unnecessary withholding of transmission charges for the usage of the Transmission Line would result in severe shortage of funds to ensure smooth operation and maintenance of the transmission line. Therefore nothing adverse was conveyed to the petitioner in the minutes of meeting dated 21.10.2021.
46. The Commission has framed the HPERC MYT Regulations, 2011 for regulating the Open Access Transmission and

allocation of transmission service charges. Regulation 33 (1) of the above Regulations provides for the allocation of transmission service charges and losses which reads as under:

“ Allocation of Transmission Service Charge and Losses

(1) The Annual Transmission Service Charge (ATSC) shall be shared between the long and medium term customers of the transmission system on monthly basis based on the allotted transmission capacity or contracted capacity, as the case may be.”

47. The Petitioner has also relied upon Para 4.8.5 of the Order dated 12.08.2021 in case no. 97 of 2020 passed by the Commission which is reproduced as under:

“4.8.5 The Petitioner is directed to take up the matter of recovery of the line under PoC mechanism with CERC in case the Charor-Banala line is declared as inter-state by NRPC. In case of denial of Inter-state status, the recovery of the approved ARR is required to be undertaken as per Clause 33 of HPERC MYT Transmission Regulations, 2011.”

48. The careful perusal of Regulation 33 (1) of the HPERC, MYT Regulations, 2011, shows that the Annual Transmission Services Charges shall be shared between the long term and medium term customers of the transmission system on monthly basis on the

allotted transmission capacity or contracted capacity, as the case may be. As the Transmission Line is exclusively being used by the Petitioner to evacuate the power from Malana-II HEP since December, 2019 and since the long term open access agreement dated 30.12.2022 has been executed between the Petitioner and the Respondent in accordance with the said Regulations, the Petitioner is liable to bear the cost of the entire approved ARR of the transmission line till other Projects in the area begin evacuation of power from their respective projects. Therefore, the allotted capacity of 86 MW upto 12.07.2024 and 80 MW w.e.f. 13.07.2024 upto 05.12.2044, as mentioned in the LTA agreement dated 30.12.2022 shall come into being when the other generators are connected to the system and till such time, it is the petitioner who has to bear the charges as per Regulation 33 (1) of the HPERC MYT Regulations, 2011. Hence, the entire Transmission charges of the Line as being claimed by the Respondent from the Petitioner are recoverable from the Petitioner as per Regulation 33 ibid. Moreover, the status of the Transmission Line has been declared by the Ld. CERC as Intra-state Transmission Line vide order dated 04.05.2023, the charges have to be recovered from the user i.e. Petitioner failing which it would not be possible for the

respondent to maintain and operate the system. Thus, the transmission charges as raised are not in violation of Section 62 (6) Electricity Act, 2003.

49. Sh. Vikas Chauhan, Ld. Counsel has contended that the Regulation 33 of the HPERC MYT Regulations, 2010 is quite clear and the since the Petitioner has been using the entire system and is the sole beneficiary, the entire transmission charges are required to be paid by the Petitioner. As observed above, the Regulation 33 of the HPERC MYT Regulations, 2011 would come in aid of the petitioner only in case when the transmission system is shared by other generators and since the entire system is being used by the petitioner for it's exclusive use, the ratio as laid down in the aforesaid law has no application to the facts and circumstances of the present case.

50. Sh. Vikas Chauhan, Ld. Counsel for the Respondent has vehemently contended that the Hon'ble APTEL in Order dated 14.08.2023 in DFR No. 473 of 2023 has made an observation that *“A reading of Regulation 33 (1), as afore-extracted, indicates that the said provision would be attracted only when the transmission system is shared between long and medium-term customers. It is not in*

dispute that, in the present case, the Appellant is alone using the system for which transmission charges have been levied on them. He has, therefore, submitted that in view of the said observations, the Petitioner is bound to pay the entire charges of the said line.

51. Sh. Maniktala, Ld. Sr. Counsel has submitted that the Commission had passed interim Order dated 27.11.2021 directing the Petitioner to pay transmission charges of 100 MW pending disposal of the Petition and the Hon'ble APTEL has kept the same in view and has made aforesaid observations in an appeal against the interlocutory orders and the observations made in an application for interlocutory order cannot be construed as a precedent being tentative in nature and have no bearing at the time of final disposal. He submits that the judgement dated 14.08.2023 of the Hon'ble APTEL in DFR No. 473 of 2023 is required to be read in its entirety and not in piecemeal in the light of its factual matrix involved and that any observations made in any interlocutory application has no precedential value. He has relied upon the law laid down in (2009) 5 Supreme Court Cases 694, 2015 SCC Online Cal 7997, 2007 SCC OnLine Bom 634, 1997 SCC OnLine Cal 429, 2005 SCC OnLine Cal 377, (2010) 5 Supreme Court Cases 388.

52. Since the observations have been made by the Hon'ble APTEL while hearing the appeal against the Order of the commission dated 27.11.2021, regarding applicability of Regulation 33 of HPERC MYT Regulation 2011 in order dated 14.08.2023 which have not been assailed by the petitioner, the same cannot be said to be without any basis.

53. Undisputedly, the capacity of the transmission line is 289 MW which is being used by the petitioner for its exclusive use and being the sole beneficiary of the system, the petitioner cannot absolve itself from the liability to pay the charges for the same.

54 In view of the above, the petitioner has miserably failed to establish on record that the petitioner is not liable to pay the transmission charges for the entire capacity of the transmission line i.e. 289 MW or that the petitioner is liable to pay the transmission charges for 86 MW upto 12.07.2024 and 80 MW from 13.07.2024 onwards from its project i.e. Malana-II HEP. Similarly, the petitioner has failed to establish on record that the provisional bills dated 14.08.2021, 01.10.2021 and 08.11.2021 demanding the transmission charges for the entire capacity of the transmission line i.e. 289 MW and subsequent bills and disconnection notice dated 11.08.2023 are

also illegal and null and void. The petitioner has also failed to establish on record that the minutes of meeting held on 21.10.2021 are also wrong and illegal. Point No. 1 is accordingly decided against the petitioner.

Final Order

In view of the aforesaid discussions and findings, the petition fails and is accordingly dismissed. The pending applications, if any, are also deemed to have been dismissed.

The file after needful be consigned to the records.

Announced
12.04.2024

(Shashi Kant Joshi)
Member

(Yashwant Singh Chogal)
Member (Law)

(Devendra Kumar Sharma)
Chairman