BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION SHIMLA

In the matter of:-

M/s Sandhya Hydro Power Projects Balargha Pvt. Ltd.
House No. 24, Behind HPSEB Bhuntar Sub-station,
Bhuntar, Kullu, HP-175125 **……..……Petitioner**

Versus

1. The HP State Load Despatch Centre
SLDC Complex, HP Load Despatch
Society, Totu, Shimla-171011 **……..Respondent No.1**
2. The HP State Electricity Board Ltd. thro' its,
Chief Engineer (Commercial)
Vidyut Bhawan, Shimla-171004 **…….Respondent No.2**
3. The HP Power Transmission Corporation Ltd.
Himfed Bhawan, New ISBT Road,
Panjari, Shimla-171005 **……..Respondent No.3**

Petition No. 62 of 2019

(Decided on **9th July, 2020)**

CORAM

S.K.B.S NEGI
CHAIRMAN

BHANU PRATAP SINGH
MEMBER

Counsels:-

for Petitioner:	Sh. Vinay Kuthiala, Sr. Advocate a/w Sh. Sakya Singla, Advocate Ms. Nameeta Singh, Advocate Sh. L.S. Mehta and Sh. D.S. Verma, Advocate
for Respondent No.1 :	Sh. Surinder Saklani, Standing Counsel
for Respondent No.2 :	Sh. Kamlesh Saklani (Authorised Representative)
for Respondent No.3 **:**	Sh. I.P. Singh, Legal Consultant

ORDER

(Last heard on 07.03.2020 and Orders reserved)

M/s Sandhya Hydro Power Projects, Balargha Pvt. Ltd., a Company registered under the Companies Act, 1956, having its registered office at Hotel Sandhya Palace, Shamshi, Kullu, HP-175125, through Mr. Domnic Peter, its Assistant Manager (Regulatory and Sales) R/o K-701 JMD, Sector-33, Gurgaon and Authorised

Representative (hereinafter referred as "the Petitioner") has filed the above captioned petition, under section 86 of the Electricity Act, 2003 (hereinafter referred as "the Act") read with regulations 16, 17 and 19 of the HPERC(Deviation Settlement Mechanism and Related Matters) Regulations, 2018 (hereinafter referred as the "DSM Regulations") and regulations 68, 70 and 71 of the HPERC (Conduct of Business) Regulations, 2005, for quashing the demand of **Rs. 1,21,28,112/-** out of **Rs. 2,14,18,511/-** towards Imbalance charges for the period from 24.03.2018 to 02.12.2018 raised by the Himachal Pradesh State Load Despatch Centre (hereinafter referred as "the Respondent No.1 or the HPSLDC") and also for seeking a declaration that the provisions of the DSM Regulations are not applicable to the Petitioner for any deviation from the Schedule for reasons which are neither attributable to nor are within the reasonable control of the Petitioner. This petition is also accompanied by an application for an interim stay of the demand for DSM Charges levied on the project of the Petitioner i.e. Balargha Small Hydro Power Project (9MW) set up on the river Parbati in Kullu Distt. (hereinafter referred to as "the Project").

2. This petition, along with the application for interim relief, was listed for admission on 15.06.2019, and this Commission directed the Respondents to file their response by the next hearing i.e. 29.06.2019 and in the meanwhile, not to take coercive steps against the Petitioner. Subsequently, the Commission vide its Order dated 29.06.2019 directed the Petitioner to pay 1/3 of the pending billed amount of U.I. Charges; and thereafter vide its Order 03.08.2019, directed the Petitioner to continue to pay DSM Charges regularly.

3. The facts of the case in brief, per submissions of the Petitioner, are as under:-

(a) The Petitioner has set up 9 MW +10% Continuous Over Load (COL) Hydro Power Project in P.O. Barshaini, Phati Manikaran, Kothi Kanawar, Tehsil and Distt. Kullu in the State of Himachal Pradesh with interconnection at its LILO Switchyard connected to the 33kV distribution network of the HPSEBL, i.e. the Respondent No.2 and permanent interconnection point at 33/132kV Sub-station Barshaini of the HP Power Transmission Corporation Ltd. (HPPTCL) i.e. the Respondent No.3, construction of which is delayed since October, 2013 and is currently re-scheduled to be commissioned by December, 2020. The Petitioner is operating the project as a captive plant and is supplying power to captive consumers in Delhi. The power from the project is scheduled for regional accounting through the Respondent No.1 i.e. the HPSLDC, which is an apex body in the State, to ensure integrated operation of the power system in the State and performs the functions as per section 32 of the Act.

(b) On 24.08.2012, the Petitioner made an application to the Himachal Pradesh Power Transmission Corporation Limited (HPPTCL), (STU) i.e. the Respondent No.3 for grant of connectivity for its power plant through the Intra-State transmission system.

(c) On 15.10.2012, 23rd STU Coordination Committee Meeting was conducted to approve the interim arrangement for the evacuation of power of the Petitioner's power plant through the transmission facilities maintained by the Respondent No.2.

(d) A meeting between the Petitioner and the Respondent No. 2 i.e the HPSEBL was held on 03.11.2012 for finalising the interim evacuation arrangement in respect of the project until the proposed 33/132 kV Sub-station Barshaini of the HPPTCL is commissioned.

(e) On 07.03.2013, the STU Coordination Committee in its 26th meeting directed the Respondent No.2 to enter into an arrangement with the Petitioner for the interim period till the permanent transmission facility is created and commissioned at Barshaini by the Respondent No.3.

(f) The Respondent No.3/HPPTCL granted Permanent Connectivity to the Petitioner on 25.03.2013 to its planned Sub-station at 33/132KV Barshaini. The relevant extracts from the Intimation for grant of connectivity document are as follows:

"1. Note: -

2… In case the connectivity is granted to the IaSTS of an intra-state transmission licensee/Distribution Licensee other than the STU, a tripartite agreement shall be signed between the applicant, the State Transmission Utility and such Intra-State transmission licensee/ Distribution Licensee, in line with the provisions of the Regulations.

4. Since, the regular arrangement for the evacuation of power shall not come up by the indicated commissioning date of the projects, power shall be evacuated through interim arrangements to be provided by HPSEBL and terms and conditions admissible in such cases shall be applicable."

(g) In the absence of an evacuation system proposed by the Respondent No. 3 i.e. the HPPTCL and any other effective alternative, the Petitioner on 03.04.2013 entered into an agreement with the Respondent No. 2 i.e. the HPSEBL for the evacuation of power from Balargha HEP 9 MW until the commissioning of proposed 33/132kV Sub-station Barshaini of the Respondent No. 3. Thereafter, the Petitioner entered into an Interim Connection and Transmission Agreement dated 10.07.2013 with Respondent No. 2. The relevant extracts from the said agreement are as follows:-

"WHEREAS with regards to the Balargha HEP (9MW) being set up by the Applicant in Phati Manikaran, Kullu, the decision was taken in the meeting held on 03.11.2012 between Company and the Applicant wherein the Applicant was advised to reconductor the existing 33 kV D/C Transmission Line with High Ampacity AL 59 conductors and interface the Balargha HEP to this 33 kV D/C transmission line through LILO system near Balargha HEP itself for the interim evacuation arrangement until the proposed 33/132 kV Sub-station of HPPTCL (STU) at Barshaini is commissioned as per minutes circulated vide CE (SO&P) letter No. HPSEBL/(CESO&P)/PH&T/BD-W-26(Balargha/2012-4640-43dated 03.11.2012

WHEREAS the Applicant has executed the works under the said interim arrangement of evacuation and transmission plan as per the MoM with HPSEBL and completed the entire work as per the requirement mentioned therein.

WHEREAS to evacuate power of the Balargha HEP on a commercial basis, the STU Coordination Committee in its 26th meeting held on 07.03.2013 directed the company to enter into a suitable agreement with the Developer of Balargha HEP to facilitate the evacuation of power from Balargha HEP through HPSEBL system during the interim period in line with the HPSEBL MoM dated 03.11.2012 which shall remain in force until permanent transmission facility is created and commissioned at Barshaini by HPPTCL (STU Viz 132 kV/ 33 kV SS and 132 kV evacuation line) and the Balargha HEP is connected to the said Barshaini Sub-station by 33 kV transmission lines.

WHEREAS the company agreed that the interim interconnection point (until permanent evacuation arrangement is available for the Balargha HEP) will be at 132/33 kV Sub-station, Malana and metering will also be done at Malana Sub-station at 132 kV end."

(h) The Petitioner had initially applied for Medium Term Open Access ("**MTOA**"). A meeting was convened on 06.06.2017 between the Petitioner, Respondent No.2/HPSEBL and Malana Power Company Ltd. ("**MPCL**") to set out the modalities regarding grant of Open Access. However, considering the current status of the interim evacuation system, the Petitioner was granted Short Term Open Access ("**STOA**") by the Respondent No.2 and entered into a STOA Agreement.

(i) The Petitioner entered into an Interim Power Transmission Service Agreement dated 06.12.2017 with the Respondent No. 2 i.e. the HPSEBL for wheeling of power into the Respondent No.2 System to LILO point at 33kV TOSS feeder through 33/132kV Sub-station at Malana to Bajaura (Associated Transmission System of Malana Power Company Limited) and beyond up to State periphery using State network, till commissioning of permanent interconnection point is completed by the Respondent No. 3. The relevant excerpt of the Agreement is as below:-

"*OUTAGES AND AVAILABILITY OF SYSTEM*

6.1 The parties will agree upon the scheduled outages Plan.

6.2 The connectivity granted to SHPPBPL is purely on an interim basis and as such, no deemed generation will be applicable for loss of generation to SHPPBPL for whatsoever reason(s)."

(j) In terms of the interim arrangement, the Petitioner carried out the task of strengthening of interim evacuation at its own cost: and

(i) created LILO on both circuits of 33kV D/C Line between Barshani and Malana-1 at Balargha HEP and reconductored AAAC conductor between Balargha and Malana-1 (Approximately 15 KM);

(ii) reconductored newly installed 2nd circuit ACSR DOG with AL 59 DOG equivalent high ampacity conductor without seeking pro-rata share of cost from other developer connected to this line;

(iii) arranged suitable temporary bypass for reconductoring by laying temporary lines and paid deemed generation charges to other Genco for generation loss as per provision of the signed PPAs with the Respondent No.2 during the period of reconductoring;

(iv) paid O&M expenses w.r.to LILO switchgear and augmentation cost including the departmental charges;

(v) converted a single circuit line of the Respondent No.2 to double circuit line and strengthened the existing system by adding transformers.

Even though it was an interim system the Petitioner spent more than Rs. 3 crores on meeting the above requirements. Because of the investment made by the Petitioner in improving the evacuation in power deficit State of Himachal Pradesh, the other generators have also started using the said infrastructure.

(k) The Petitioner's project achieved commercial operation on 22.01.2018. On 01.02.2018, evacuation of power from the Petitioner's power plant commenced.

(l) In absence of the Permanent Connectivity, the Petitioner has incurred-

(i) 100% of the wheeling charges (INR 0.65/kWh till June 30, 2019, and INR 0.27/kWh thereafter) and wheeling losses to the Respondent No. 2;

(ii) wheeling losses and wheeling charges to Malana Power Company Limited for use of their system to connect to the Respondent No.2 Sub-station at Bajaura;

(iii) DSM penalty due to failure of the 22 km long non-dedicated distribution line of the HPSEBL and the system of Malana Power Company connecting the 33KV TOSS feeder of the HPSEBL at one end and the 132KV Sub-station of the Respondent No.3 i.e. the HPPTCL at Bajaura at the other end;

(m) The Petitioner is facing difficulty in adhering to its scheduled generation from its project on a regular basis and is subjected to payment of Imbalance charges, and subsequently, DSM charges on account of such deviation. The deviation from schedule is primarily on account of-

(i) reasons attributable to the Petitioner in making its powerhouse available for dispatch;

(ii) failures/restrictions in the grid maintained by the Respondent No.2.

(n) The grid failure/outages are primarily due to the frequent tripping, shut-downs, load restriction imposed by the Respondent No.2. Other reasons include:-

(i) Breakdown of one or both of the 33kV Double Circuit Barshaini-Malana TOSS and JIRAH feeders owned and operated by the HPSEBL;

(ii) Load restriction imposed by the Respondent No.2 for dispatch less than rated load;
(iii) Non-availability of the line due to earth fault;
(iv) Non-availability of the line due to over current;
(v) Shutdowns taken by the Respondent No.2 for unscheduled/ scheduled maintenance of the said TOSS Feeder, JIRAH feeder, Malana Sub-station of the Respondent No.2;
(vi) Non-availability of the line at the Respondent No.2 Malana Sub-station;
(vii) Non-availability of the line at Bajaura 132 kV Sub-station;
(viii) Non-availability of the line at the Respondent No.2 Kangu 132 kV Sub-station;

(o) As a result of repeated deviations, between period 24.03.2018 to 02.12.2018, Respondent No. 2 imposed Imbalance charges amounting to Rs. 2,14,18,511/- based on the extent of deviation recorded for various entities. Out of such amount, the Petitioner has paid an amount of Rs.92,90,399/- being the amount payable due to deviation in generation attributable to the Petitioner. The balance amount of Rs.1,21,28,112/- was attributable to the failures/restrictions in the grid maintained by Respondent No. 2;

(p) During 28.06.2018 to 01.04.2019, the Petitioner sent various letters, apprising the Respondent No. 1 about the events leading to deviation from the approved schedule which was not attributable to the Petitioner and requested the Respondent No. 1 to condone the said deviations;

(q) The Commission framed the Himachal Pradesh Electricity Regulatory Commission (Deviation Settlement Mechanism and Related Matters) Regulations, 2018 applicable to the State Entities w.e.f. 03.12.2018. For the period after 03.12.2018, the Petitioner had been unable to dispute the bills as the backup calculations were not shared by the Respondent No.1 i.e. the HPSLDC with the Petitioner;

(r) DSM penalty of Rs 1,04,97,560/- has been imposed between 03.12.2018 to 19.05.2019 without providing any calculations related to the application frequency and the applicable rate for the desired time period. Between 14.01.2019 to 27.05.2019, the Petitioner paid the entire DSM amount. While paying the said DSM charges, the Petitioner addressed several letters to Respondent No. 1 and the Respondent No.2, disputing the DSM charges imposed for reasons beyond its control. On 27.04.2019, a joint meeting was held at Head Office of the Respondent No.2 for addressing the issue of grid failure/outages. Instead of resolving the issue, Respondent No. 2 advised the Petitioner to deploy its own manpower to maintain the line with the supervision of the Respondent No.2. Moreover, the Respondent No.2 advised the Petitioner to approach this Commission for regulatory intervention. Therefore, the Respondent No.2 has not decided the issues raised by the Petitioner;

(s) On 04.05.2019, the Respondent No. 2 i.e. the HPSEBL issued a demand letter asking for payment Rs 2,14,18,511/- along with the late payment surcharge towards Imbalance charges raised from time to time under various invoices. That out of total bill amount of Rs 2,14,18,511/-, only Rs.1,21,28,112/-

remained unpaid by the Petitioner on account of the same being attributable to the failures/ restrictions in the grid maintained by the Respondent No. 2.

4. With the background, as delineated in the preceding para, the Petitioner has moved this petition for quashing the demand of Rs. 1,21,28,112/- out of Rs. 2,14,18,511/- towards Imbalance charges for the period from 24.03.2018 to 02.12.2018 raised by the Respondent No. 1 i.e. the Himachal Pradesh State Load Despatch Centre and also for seeking a declaration that the provisions of the DSM Regulations are not applicable to the Petitioner for any deviation from the Schedule for reasons which are neither attributable to nor are within the reasonable control of the Petitioner.

The gist of Responses to the Petition

5. The Respondents have filed their response to the petition.

5.1 The Respondent No.1 i.e. the HPSLDC submits that petition is not maintainable-

(i) as the Petitioner has failed to pinpoint any illegality in the issuance of letter dated 04.05.2019;
(ii) by abuse of process of law, Respondent No. 1 is being unnecessarily dragged in litigation;
(iii) the Petitioner is confusing UI charges and DSM charges;
(iv) the Petitioner has concealed and is trying to mislead as the Respondent No.1 has already supplied calculations for each time block and the Petitioner has already entered into Interim Power Transmission Agreement with the HPSEBL, stipulating for non claiming deemed generation benefit;
(v) DSM payments cannot be waived off. Non-receipt of payment puts the Respondents under constraints to enforce recoveries. Pending liability is of Rs.21,75,805/- and the bills raised are in accordance with STOA Regulations/DSM Regulations. Moreover, Respondent No. 1 is paying the amount to the NRLDC to avoid the imposition of penalty @0.04% each day and cutting of feeders/lines of the whole State;
(vi) the Respondent No.3 i.e. the HPPTCL has granted consent in March, 2013 for connectivity of 9MW Balargha HEP:-
    (a) subject to the fulfillment of other requirements and connectivity was to be from the commissioning of lines;
    (b) subject to the signing of the Connection Agreement for physical interconnection to the system (Commercial agreement) ;
    (c) subject to the signing of the Long Term Access Agreement;

In the instant case, Transmission Service Agreement was signed by the Petitioner with the Respondent No.2 in December, 2017 for wheeling power at Bajaura Sub-station; and 33/132 kV GIA Sub-station at Barashaini is yet to be completed by December, 2020.

5.2 In response to the Petitioner, the Respondent No.2, i.e. the HPSEBL submits that-

(a) provisions for exercising the mandate of the prevalent regulations for raising the DSM bills fall within the ambit of the HPSLDC i.e. the Respondent No.1. Non-receipt of payment within due dates puts the Respondent No.2 under

constraints to exercise the relevant provisions (including late payment surcharge) which have been adhered to;

(b) the Respondent No.2 in due cognizance to section 86(1) (e) of the Act has allowed the connectivity at 33 kV State Grid as an alternate interim arrangement. The Petitioner has also misconceived the conception of levy of DSM charges which are to be imposed in line with the regulations.

5.3 In response to the petition, the Respondent No.3 i.e. the HPPTCL submits that-

(a) the Respondent No.3 granted consent/intimation for grant of connectivity for the evacuation of power of the project in March, 2013, subject to other requirements to be fulfilled. Connectivity was to be from the commissioning of the lines and sub-station(s) and signing of the Connection Agreement for enabling the Petitioner to seek physical interconnection to the system. The Long Term Access Agreement (Commercial Agreement) was also required to be signed with the Respondent No.3;

(b) Interim Power and Transmission Service Agreement was signed by the Petitioner with the Respondent No.2 in December, 2017 for wheeling power at Bajaura Sub-station;

(c) The 33/132 kV GIA Sub-station at Barshaini is yet to be completed by December, 2020.

6. The Respondent No.2 i.e. the HPSEBL has also filed the supplementary reply to the petition stating that-

(a) the petition as preferred is neither competent nor maintainable as the Petitioner has failed to pinpoint any illegality in the issuance of letter dated 04.05.2019;

(b) the petition is an abuse of process of law and Respondent No. 2 has been unnecessarily dragged in the litigation;

(c) the Petitioner being defaulter can't move this petition. The Respondent No. 2 raised bills for Imbalance charges in accordance with STOA Regulations, 2010, and as the Petitioner has not paid UI charges the HPSEBL deposited UI charges, with the NRLDC from its own pocket;

(d) the Tripartite Agreement (between the Petitioner, the Respondent No.2 and M/s Malana Power Ltd.) to wheel 9MW power injected in the HPSEBL's system at LILO point at 33kV Feeder System of MPCL to the HPSEBL (132 kV Sub-station Bajaura) and beyond the HP State periphery using State Network, stipulating that:-

(1) No deemed generation benefit will be availed.

(2) Connectively granted is purely on an interim basis.

(e) as per the agreement dated 06.12.2007, the Petitioner has been granted connectively on an interim basis and no deemed generation benefit/ generation loss is applicable. Further, the agreement is without any duress and undue influence. Thus, Petitioner is estopped by his own acts;

(f) the parties are strictly governed by the agreed terms/conditions;

(g) DSM penalty cannot be waived off;

(h) The Petitioner is misleading. If the agreement is read as a whole, the Petitioner is bound to pay UI Charges.

Rejoinder submissions by the Petitioner

7. The Petitioner has filed the rejoinders to the replies/response filed on behalf of the Respondents.

7.1 The rejoinder to the response of the HPSLDC's i.e. Respondent No.1 is as under:

(a) As the reply does not contain specific and/or implicit denial of averments in the application, hence the principle of non-traverse becomes applicable, which envisages that the response of the Respondent must deal specifically with each allegation of fact in petition/application and when the Respondent denies any such facts, he must not do so evasively but answer the part of the substance. If his denial of fact is not specific but evasive, the said fact shall be taken to be admitted;

(b) The statutory authority has been entrusted with the function to ensure planned and coordinated development of the Intra-State transmission system, as enunciated under Sections 32 (2) and 33 (1) of the Act. However, the SLDC has failed to discharge its statutory duty of supervising and controlling grid operations. The consequence arising out of such clarification cannot be passed on to the generator;

(c) Regulation 12 of the DSM Regulations, 2018 mandates the Respondent No.1 to furnish requisite details, in suitable formats, reflecting the accounts and payment details in a fair and transparent manner;

(d) In the present case various communications, sent to share calculations, are not replied to. Such calculations were only shared twice for the period from 06.05.2019 to 09.06.2019. As such the applicant/Petitioner had no choice but to make full payment under protest and duress;

(e) No one can take advantage of its own fault;

(f) Due to paucity of time, the Applicant is not able to put on record the analysis of the deviations hence the applicant craves leave of the Commission to submit the same later on;

7.2 The rejoinder to the response of the Respondent No.2 is as under:-

(a) as the reply does not contain specific and/ or implicit denial of averments in the petition, the principle of non-traverse is applicable;

(b) deviations occurred due to non-availability of feeders owned and operated by the Respondent No.2 as well as load restrictions imposed by the Respondent No.1;

(c) it is denied that on non-receipt of payment from the Petitioner within due dates puts the Respondent No.2 under constraint to exercise the relevant provisions which have been adhered to and the bills (including surcharge) out of Rs. 2,14,18,511/- the Petitioner has paid Rs. 92,90,399/- being the amount payable. The balance of Rs. 1,21,28,112/- has been withheld which is not on account of any deviations on the part of the Petitioner and is attributable to the grid failure/restrictions in the grid;

(d) in the absence of permanent interconnection point of 132 kV Sub-station the Petitioner had to connect its project to 33kV distribution lines of the Respondent No.2 who has miserably failed to monitor the performance of the said lines;

(e) the Respondent No.2 has failed to address the grievances, i.e. to say the Petitioner's project is capable of injecting the scheduled generation approved but is unable to inject the scheduled power in the grid for reasons beyond its control;

(f) the Petitioner is being penalized for no fault on its part. The Respondent No.2 is under obligation to operate and provide an efficient, reliable, coordinated and economical system of the electricity distribution system. Failure of the lines of the Respondent No.2 is beyond the control of the applicant. The imposition of 6% losses which are the consequence of the default of the Respondent No.2 cannot be passed on to the Petitioner;

(g) DSM as well as Imbalance charges are liable to be waived off to the extent of the amount arising out of reasons not attributable to it.

7.3 The Petitioner has also filed rejoinder to the supplementary reply of the Respondent No.2 stating that:-

(a) The supplementary reply is inconsistent with and/or contrary to the original stand in reply to the petition. It amounts to an abuse of the process of law;

(b) The Respondent No.2 copied verbalism the reply filed without any application of mind. It is a delaying tactic and is an attempt to obfuscate the issues raised. The Respondent No.2 sought leave to allow it to file a supplementary reply in order to bring on record the DSM data/calculations, as required by the Petitioner but the Respondent No.2 has not filed data and has filed reply raising new grounds/taking fresh defense;

(c) Application dated 24.08.2012 made to the Respondent No. 3/(STU) for connectivity of the plant to transit power from Balaragha through an intra-State transmission system. The Petitioner expected the commissioning of the project in October, 2013. Sub-station of the Respondent No.3 was not ready, hence there was no option with the Petitioner other than connecting Sub-station of the Respondent No.2 temporarily;

(d) STU Coordination Meeting held on 15.10.2012 to approve Interim arrangement through LILO on 33kV Barsaini Malana-I.D/C Line at Balaragha and augmentation of Circuit beyond Balaragha HEP by high capacity conductors, through the HPSEBL system 03.11.2012 meeting held between the Petitioner and the Respondent No.2 for finalization of Interim arrangements, and the Petitioner was to carry on augmentation work at its own cost the Petitioner created LILO and re-conducted AAAC conductor; installed new 2nd Circuit ACSR DOG with AL 59 DOG, and replaced existing poles with 13 meter swaged poles, spending Rs. 3,00,00,000/- (3 Crore) The STU in 26th Meeting held on 27.04.2013, directed the Respondent No. 2 to enter into a suitable agreement for the interim period and the Agreement was executed;

(e) The Respondent No.2 did not permit the Petitioner to seek a pro-rata share of costs with any other developers to be connected and imposed liability to allow non-discriminatory access to other developers.

(f) The Petitioner had to enter separate MoU with the Respondent No.2 and Brahamganga HEP for the user of Brahmaganga Corridor;

(g) Cost/liability of deemed generation payable to other generators was not of the Petitioner but was only of the Respondent No.2;

(h) The Petitioner operates and maintains the LILO switchgear at its own cost as directed by the Respondent No.2. Augmentation costs (including Rs. 15,21,909/- departmental charges) are borne by the Petitioner. The heavy monetary burden in converting a single circuit line of the Respondent No.2 to double circuit line is borne by the Petitioner;

(i) The Petitioner has facilitated the Respondent No.2 i.e. the HPSEBL in improving supply in the area, without incurring any investments by the Respondent No.2 and also decreased deemed generation charges payable by the Respondent No.2 to other generators connected to the system;

(j) The Petitioner is not even able to inject the scheduled generation due to the non-availability of the grid on the part of the Respondent No.2 rather the Petitioner was constrained to incur a penalty by way of UI charges and DSM charges for deviation, caused majorly due to non-availability of the Respondent No.2 system;

(k) The Objective of DSM regulations is to maintain grid discipline and grid security. Respondent No. 2 i.e. the HPSEBL has stepped into the shoes of the STU and as such is under statutory obligation to carry out the functions of the STU. The Respondent No.2 is unilaterally levying DSM penalties and has not performed its statutory duties/obligations and is not imposing these charges upon other generators who are supplying power to the Respondent No.2 for example PPA with M/s Prodigy Hydro Power (P) Ltd., discriminatory treatment between generating Companies, who are equally subjected to UI/DSM regulations (it is not protecting other generating companies selling power on the Inter-State basis who are deviating from the Schedule for the same grid conditions.) ;

(l) Liability can be fastened on a person who either fails to carry out the duty cast by the specific provisions of the Statute or is otherwise responsible for the act/omission done. In the present case, the grid was not available; deviations were triggered due to no fault of the Petitioner. The Petitioner has already placed on record the analysis of backup calculations of DSM Charges shared by the Respondent No.1 i.e. the HPSLDC, clearly demonstrating that the said major portion of Imbalance /DSM Charges are attributable to the non-availability of the grid maintained by the Respondent No.2, hence the penalty to the extent caused by the failure of Respondent No.2 should be borne by the Respondent No.2, for failure to carry out its statutory obligations.

7.4 In the rejoinder to preliminary submissions, made by the Respondent No.2, the Petitioner submits that:-

(a) Bald allegations put forth by the Respondent No.2 are baseless;

(b) There is no abuse of process, as the deviation has arisen due to the default of the Respondent No.2;

(c) Respondent No. 2 is misleading to the extent that the Petitioner is evading liability out of total Rs. 2,14,18,511/-. The Petitioner has paid 92,90,399/- and Rs. 1,21,28,112/- were withheld because deviations were for non-availability of the grid and the request for condonation of deviations was not even considered;

(d) It is denied that per terms of Tri-partite Agreement the Petitioner is not entitled to generation loss;

(e) It is denied that the deemed generation benefit is misplaced.

(f) The Petitioner is only requesting to the extent that the UI/DSM charges are attributable to grid outages of the Respondent No.2, and should be borne by the Respondent No.2;

(g) Unequal treatment is being given to the Petitioner;

(h) The reply is false, misconceived, moonshine and hence denied;

(i) The Petitioner has duly paid the Imbalance charges to the extent of deviation on the part of the Petitioner;

(j) The Respondent No.2 has acknowledged the outages on account of issues at 33/132kV Sub-station Malana at Jeri on different occasions;

(k) The Respondent No.1 has failed to give any response to the Petitioner's letters;

(l) The Petitioner has paid 1/3rd pending UI charges and all DSM charges raised since 03.12.2019, even though not attributable to the Petitioner;

(m) The project is generating power and is capable of injecting the scheduled generation approved, but is unable to inject power in the grid due to reasons not attributable to it;

(n) The parties are not strictly governed by the terms and conditions of the agreement if the agreement is dehors the provisions of the Act;

(o) Evasive replies, as the principle of non-traverse, is applicable, tantamount to deemed admission;

(p) The Respondent No.2 has miserably failed to monitor the performance of the transmission line and as such no liability can be saddled on the Petitioner, to that extent charges are liable to be waived off;

(q) The Commission has the power to relax any provisions causing hardship and injustice to any party;

(r) The preposition of law pertaining to force majeure is applicable if performance of the obligation is substantially affected; and reasons are beyond the control or could not be foreseen;

(s) The supplementary reply is copied contents of the original reply.

7.5 In sub-rejoinder to the rejoinder of the Petitioner to the supplementary reply of the Board, i.e. Respondent No.2, it is submitted that-

(a) The Petitioner has misconstrued the Power Transmission Agreement dated 06.12.2017 which is purely interim agreement to facilitate the Petitioner to sell its saleable energy on Short Term basis outside the State on STOA basis;

(b) An agreement was willfully executed, at his request, by the Petitioner in his own interest and he is bound by the contractual liabilities arising therefrom;

(c) The Petitioner incurred expenditure for augmentation of the system and is liable to pay wheeling charges;

(d) Permanent interconnection at Barashaini 22/132 kV Sub-station is to be built up by the Respondent No.3 and such the Respondent No. 2 is not responsible for the reason that it has made utmost efforts to maintain the system;

(e) The Petitioner is using the System and earning money from its buyers outside the State under STOA and the over drawl is subject to DSM Regulations. The other generators are selling power to the HPSEBL under LTPPA and their deemed generation claim is to be dealt with LTPPA;

(f) The bills are being raised as per DSM Regulations. Any deviation during real-time operation is to be regulated under DSM regulations;

(g) The Law cited by the Petitioner has no relevance and each case is required to be dealt on merits.

7.6 The Petitioner has filed the rejoinder to the reply of the Respondent No.3 i.e. the HPPTCL stating that-

(a) as the reply does not contain specific and/or implicit denial of averments made, in the petition and fundamental issues raised, in the petition, are not addressed, the principle of non-traverse is applicable;

(b) the Respondent No.3 has not commissioned the permanent interconnection point in time;

(c) denied that the Respondent No.3 directed the Petitioner to furnish additional details to sign the Connection Agreement and Long Term Access Agreement;

(d) the Petitioner had applied to Respondent No.3 for connection at Balaragha HEP;

(e) Respondent No. 3 i.e. the HPPTCL in the 26th Co-ordination Committee meeting, held on 07.03.2013, directed the Petitioner to enter into a suitable agreement with Respondent No.2 to facilitate the evacuation of power during the interim period. The Petitioner complied with each direction of the Respondent No.3;

(f) the Petitioner spent more than Rs. 2 crores on meeting requirement of interim evacuation agreement;

(g) the Respondent No.3 i.e. the HPPTCL has not denied the delay in developing the permanent interconnection point at 33/132 kV Sub-station Barshaini is creating hardship to the Petitioner and the Petitioner had to incur additional costs in terms of wheeling losses and wheeling charges payable to the Respondent No. 2 and MPCL due to failure of 22 km Long non-dedicated line of the Respondent No.2.

Queries raised by the Commission

8. The Commission, keeping in view the fact that there is the change in the prayer made in the original main petition and that now made in the rejoinder to the supplementary reply made by the Respondent No. 2 (i.e. MA No. 151 of 2019), observed that the data supplied by the Petitioner needs further validation by the Respondents, the Reconciliation statement is not endorsed/confirmed by the Respondents and the extent of relaxation required in the statutory provisions, is not clear and gave the following directions-

(a) the Petitioner to furnish: -

(i) segregation of outages for State Grid/HPSEBL Grid/Malana-I System;

(ii) Scheduled and unscheduled energy for outages period of the system;

(iii) communications exchanged with the SLDC for revision of schedule on a real-time basis during the outage period, and the response received thereon if any;

(iv) copies of applications/letters seeking concurrence from the SLDC in Format-II, prescribed under the procedure for STOA in intra-State Transmission and Distribution System;

(v) reconciliation statement of the Imbalance charges for the disputed period;

(vi) details of payments received from the buyers in respect of the time block for which Imbalance charge/DSM charges have been charged by the SLDC along with a copy of the agreement for such sale of power;

(vii) the extent of relaxation required in relation to the statutory provisions.

(b) the Respondents No.1 and No. 2 to validate/confirm the reconciliation statement/data furnished by the Petitioner vide MA No.151 of 2019 i.e. rejoinder to the supplementary reply made by the Respondent No.2;

(c) Respondents No. 1 and 2 to file their response to the rejoinder filed by the Petitioner.

Response to the Commission's queries

9. In response to the aforesaid directions, the Petitioner submits that-

(i) the Petitioner is selling its power under STOA to the consumers outside the State using Inter-State Transmission Corridor and is scheduling its power under the CERC OA Regulations, 2008 and the procedure laid down by the CTU i.e. "PGCIL", on First come First serve basis under STOA by booking transmission corridor for a month;

(ii) initially, it applied for Medium Term Open Access (MTOA). In a meeting held on 06.06.2017 with the HPSEBL and the Malana Power Company, the Petitioner was granted STOA instead of MTOA. Under MTOA the generator has the ability to revise the schedule in real-time from the 4^{th} time block, but under STOA the schedules get revised after the expiry of 2 days (48 hours) from receipt of the application for revision;

(iii) in cases of uninformed grid outages/failure, it is not possible to revise the schedule, as the revision becomes effective after 2 days (48 hours) from the receipt of the application. The written confirmation regarding the magnitude of grid outages is required from the HPSLDC on the request of the HPSEBL. Both have failed to perform their duty and as such charges cannot be saddled on the Petitioner for no fault. Some instances depicting the dereliction of duties by the Respondent No.1, i.e. HPSLDC and the Respondent No.2 i.e. the HPSEBL are: -

(a) On 24.09.2018 at 07:00 PM, the Petitioner could not evacuate power on account of grid outage/failure of the breakdown of 33 kV DC Line from Jari to Barshaini. The Respondent No.2 did not inform the Petitioner regarding this outage/failure. Subsequently, the Petitioner on 26.09.2018 at 12:54 PM, issued a letter requesting the Respondent No.2 to confirm and communicate the event of an outage to the Respondent No.1 i.e. the HPSLDC thereby enabling the RLDC to revise the

schedule of the Petitioner with immediate effect. The Petitioner on 26.09.2018 at 12:02 PM, also approached the RLDC for revision in the schedule by providing the photographs of the damaged 33kV Line but the request for revision was denied by the RLDC in the absence of confirmation by Respondent No.1. Pertinently, the schedule was revised at 04:00 PM only when the confirmation was finally received from Respondent No.1;

(b) On 04.02.2019, the Respondent No.2 i.e. the HPSEBL intimated the Petitioner regarding the occurrence of grid failure at Jari and subsequently the Petitioner at 10:41 PM, informed the Respondent No.1 the HPSLDC about the said outage along with the letter received from Respondent No. 2 and requested for revision of schedule till 04:00 PM, 05.02.2019. However, the Respondent No.1 failed to take immediate action and intimated the RLDC about the outages only on 05.02.2019 at 04:23 PM. Hence, the Petitioner couldn't revise the schedule due to delay on part of Respondent No.1, which resulted in saddling the Petitioner with DSM charges for reasons solely attributable to the Respondent No.2;

(c) On 08.02.2019 at 01:32 PM, the Respondent No.2 i.e. the HPSEBL intimated the Petitioner regarding the occurrence of grid outage at Jari. Subsequently, at 02:35 PM, the Petitioner informed the Respondent No.1 i.e. the HPSLDC about the said outage along with the letter received from the Respondent No.2 with a request to confirm and communicate the same to the NRLDC. This outage was confirmed by the Respondent No.1 to the NRLDC at 05:54 thereby revising the schedule from 06:30 PM;

(iv) the Petitioner was forced to shut down due to the non-availability of the evacuation system of the Respondent No. 2.There has been earning from the power scheduled, but the UI/DSM penalty, attributable to the Respondent No.2, makes the net revenue negligible. The non-revision of the schedule has caused hardship to the Petitioner;

(v) the Petitioner has supplied data regarding segregation of outages, scheduled and unscheduled energy and communications exchanged with the SLDC for revisions;

(vi) in relation to the data pertaining to payments received from the buyer, the Petitioner submits that the said data is not relevant for adjudication of the present dispute, as the net earnings are negligible- [A chart showing the revenue generated has been enclosed];

(vii) the Petitioner seeks relaxation in terms of regulations 16 and 19 of the HPERC (DSM and Related Matters) Regulations, 2018.

9.1 In response to the Commission direction, the Respondent No.1 i.e. the HPSLDC submits that-

(a) that before the commencement of DSM Regulations on 3rd December, 2018, the charges were charged in the name and style of UI/Imbalance Charges. The Respondent No.1 only raised the bills, whereas the amount was being deposited with the Respondent No.2 i.e. the HPSEBL. After 3rd December, when the DSM Regulations came into operation, the bills are

being raised by the Respondent No.1 and the same is further deposited with the "State Deviation Pool Account" maintained by the HPSLDC and which further deposits the same into the "NRLDC Pool Account" in view of the actual bills raised by the NRPC. Thus, the role of the HPSLDC, i.e. the Respondent No.1 is only to raise the bills and further to deposit as per provisions of the Regulations in force, (the same with the NRLDC). No revenue is being generated by the Respondent No.1;

(b) the request of the Petitioner for waiver of DSM/Imbalance Charges and to adjust the Imbalance /DSM Charges due to non-availability of evacuation system against the Wheeling Charges can by no stretch of imagination be allowed, for the reason that the power which is provided by the power producer is scheduled earlier and anyone can purchase the power from IEX/Bilateral exchange(s) and accordingly the power is being provided to the power purchasers and if the power producers have to reschedule, the regulations are required to be followed and the Petitioner cannot blame the respondents;

(c) in relation to validation/confirmation/reconciliation of the statements/data furnished by the Petitioner, the Respondent No.1 i.e. the HPSLDC submits that, whereas the Petitioner has to furnish the details of the payment received from the buyers that too in respect of time block for which Imbalance Charges/ DSM Charges have been charged by the Respondent No.1. The Petitioner has furnished the detail of the revenue generated between 24.03.2018 to 30.06.2019. Whereas there are 96 time blocks in a single day, the Petitioner has submitted only total revenue generated, which itself goes to show that the Petitioner is trying to conceal from this Commission. In the absence of any data submitted by the Petitioner, the reconciliation statement of data furnished by the Petitioner cannot be validated.

9.2 After hearing the parties, the Commission finds that neither the data furnished by the Petitioner has been validated/confirmed by the Respondents nor the reconciliation statement of Imbalance Charges for the disputed period, have been made available. Further, the Board is unable to explain the tripping/outages in the system during the disputed period.

Further Shri Surinder Saklani, the learned Advocate appearing for the HPSLDC i.e. Respondent No.1, and Sh. Kamlesh Saklani, appearing for the HPSEBL, i.e. Respondent No.2, undertook to make detailed written submissions validating/ confirming the data made available by the Petitioner and also furnishing the information explaining the tripping/outages in the system within two weeks and the Commission vide it's Interim Order dated 28.09.2019 gave liberty to the parties to file the written arguments the parties were given the liberty to file written arguments in support of their respective claims within three weeks.

9.3 Pursuant to the Commission's Order dated 28.09.2019 the Respondent No.1, i.e. the HPSLDC has only validated the schedule/injected energy and UI/DSM Charges for the period 24.03.2018 to 30.06.2019, stating that-

(i) the post communication exchanged for continued outages with the Respondent No.1, which have initially Zero scheduled energy, remains continued without any revision, and other communications exchanged pertain to the Respondent No.2;

(ii) the data for scheduling of STOA (Bilateral Transactions), as seeking concurrence for the Respondent No.1, and the data of energy scheduled, injected and UI/DSM for the period 24.03.2018 to 02.12.2018 and 03.12.2018 to 30.06.2019, is generally in order;

(iii) the undertakings for scheduling of power through STOA in IEX submitted by the Petitioner have not been (not found) enclosed by the Respondent No.1;

(iv) data pertaining to MTOA application and minutes of meeting dated 06.06.2017, details of outages, being up to the voltage of 33 kV details of energy schedule injected and UI Charges for the period 24.03.2018 to 02.12.2018, post communications exchanged for continued outages, payments of UI Charges for the period 24.03.2018 to 02.12.2018, these pertain to the HPSEBL, i.e. the Respondent No.2, and as such that can be validated by the Respondent No. 2 and the reconciliation/ status of Imbalance charges are the issues pertaining to the Respondent No.2;

(v) whereas the Commission asked for the details of payments received from the buyers in respect of the time block for which Imbalance Charges/DSM Charges have been charged by the SLDC, along with the copy of the agreement for such sale of power, the Petitioner has submitted the details in lumpsum, which cannot be validated/confirmed.

10. The Petitioner vide submissions made on 27.09.2019 has urged that any submissions and documents filed by the Respondents, at the belated stage, may not be taken on record, unless the Petitioner is granted to file its additional submissions validating the data made available by the Petitioner and the furnish the information, explaining tripping/outages in the system.

11. Since the parties have not exchanged their submissions *interesse*, the copies of the written submissions were directed to be sent to the parties and the Petitioner and Respondents were given final opportunity to make their final additional submissions if any.

Additional submissions

12. Written submissions filed by the learned Counsel, Sh. Neeti Niyaman, for the Petitioner, are as under: -

(a) that at the outset, the Petitioner, reiterates, adopts and maintains all and whatever has been stated in the petition and subsequent pleadings filed before this Commission and the same are a part of this additional submissions;

(b) that pursuant to the Commission Order dated 28.09.2019, the Respondent No.1, i.e. the HPSLDC had filed the Compliance Report dated 24.10.2019 (Compliance Report) validating/confirming the data furnished by the Petitioner vide MA NO. 159 of 2019, and has not denied the data furnished by the Petitioner, which demonstrates the defaults of the Respondent leading to such deviations. The Respondent No.2, i.e. the HPSEBL has failed to file a Compliance Report validating/confirming the data furnished by the Petitioner;

(c) that the Petitioner has made out a clear case in pleadings that a large extent of deviation or shortfall in a generation has occurred, at times, due to the default of the Respondents. Non-filing of a Compliance Report by the Respondent No.2, i.e. the HPSEBL also validates/confirms the data furnished on record by the Petitioner are not disputed. In the absence of denial of the contentions of the Petitioner, as supported by the data furnished in the MA No. 159 of 2019 which stands admitted, the Petitioner's case stands proved in the light of the principles of non-traverse. While affirming this principle, the Hon'ble Supreme Court in **Lohia Properties (P) Ltd. Tinsukia, Dibrugarh, Assam Vs. Atmaram Kumar,** reported as (**1993) 4 SCC** 6, has observed that-

> *"Rule 5 provides that every allegation of fact in the plaint, if not denied in the written statement shall be taken to be admitted by the defendant. What this rule says is, that any allegation of fact must either be denied specifically or by necessary implication or there should be at least a statement that the fact is not admitted. If the plea is not taken in that manner, then the allegation shall be taken to be admitted.*
>
> *xxxxxxxxxxxxxxxxxxxxxxx*
>
> *Non-traverse would constitute an implied admission"*

(d) that it is denied and disputed that the data furnished under Annexure- 2 cannot be validated/confirmed by Respondent No.1 i.e. the HPSLDC. The Petitioner had furnished the data pertaining to details of an outage impacting the Petitioner's power plant along with reasons attributable to such outages. The said data is accompanied with the Respondent No.2 i.e.the HPSEBL's record acknowledging these outages. The response submitted by the Respondent No.1, is elusive and does not meet the requirement of law. The data clearly demonstrates that deviations were caused on account of grid failure/disturbance on part of the Respondent No.2, and the Respondent No.2, has also acknowledged the outages on account of issues at the 33/132 kV Sub-station Malana in Jari for the different period. Despite the acknowledgment, the Respondent No.2, failed to take any appropriate action and as a result, the Petitioner is being saddled with the liability of Imbalance Charges and Deviation Charges (DSM Charges) on a weekly basis;

(e) that the statement made by the Respondent No.1, i.e. the HPSLDC that the data of energy scheduled, injected energy and Imbalance Charges/DSM for the period 24.03.2018 to 02.12.2018 and 03.12.2018 to 30.06.2019 is generally in order amounts to validation/confirmation by the Respondent No.1, Annexure-3 pertains to data of downward revision of power and unscheduled power on account of outages of 33/132 kV Sub-station Malana to Jari on different occasions between the aforesaid period. On account of the statement made by the Respondent No.1, and in the absence of denial, the data furnished on record vide Annexure-3 stands validated/confirmed under the principles of non-traverse;

(f) that in absence of denial, the data furnished under Annexure-4 contains communications exchanged between the Petitioner and the Respondent No.1, i.e. the HPSLDC and the Respondent No.2, i.e. HPSEBL regarding revision of schedule on a real-time basis, to demonstrate that the delay on part of the Respondent No.2, in intimating the Petitioner regarding the occurrence of grid failure ultimately resulted in the imposition of heavy Imbalance Charges and DSM Charges on the Petitioner, Further, it is denied that even after communication exchanged with the Respondent No.1, requesting revision of schedules, the same remained continued without any revision. It is reiterated that as per the provisions of the Himachal Pradesh Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations, 2008, in the event of grid outages/failure, the revision of schedule is only possible after obtaining the written confirmation from the Respondent No.2, regarding the magnitude of grid outages/failure and its restoration time. Further, the Respondent No.1, on receipt of the communication from the Respondent No.2, is required to intimate the Regional Load Dispatch Centre (RLDC) regarding the said outages /failure for revision of the schedules. However, in the present case, the data furnished under Annexure-4 evidently demonstrates that both the Respondent No.1, and the Respondent No.2, failed to perform its statutory duty resulting into the imposition of Imbalance Charges/DSM Charges on the Petitioner for no fault of its own;

(g) that response by the Respondent No.1, i.e. the HPSLDC amounts to validation/confirmation of data furnished under Annexure-5 pertaining to copies of application seeking concurrence from the Respondent No.1, in Format-II of the Procedure for Scheduling of Short Term Open Access (Bilateral Transaction) for sale of power through Bilateral Transaction through the use of Inter-State Transmission System. It is further submitted that the copies of undertaking (Format V of the Short Term Open Access (STOA) procedure) submitted by the Respondent No.1, pertains to undertaking furnished by the Petitioner for short term purchase/ sale of power under open access. It is submitted that the Respondent No.1, cannot take refuge of the undertaking given by the Petitioner regarding restriction of power injection under open access on account of regulatory measures/restrictions imposed by the Respondent No.2, i.e. the HPSEBL in the relevant system and on account of force majeure events including grid's failure beyond the control of the Respondent No.2. The Petitioner cannot be held liable for the defaults on account of the Respondent No.2. The Petitioner can only be penalised to the extent of under-injection on account of shortfall in generation due to issues relating to its generation station only. DSM is in the nature of a penalty for deviations from the schedule. In the instant case, a large extent of deviations has occurred due to load restriction imposed by the Respondent No.2, grid failure, shutdowns due to scheduled/ unscheduled maintenance by the Respondent No.2. Such a penal clause cannot be applied to the Petitioner who is ready and willing to comply but is stopped from doing so by the Respondent No.2. It is well settled that in legal jurisprudence, the liability can only be fastened on a person who either fails to carry out the duty cast by the

specific provisions of the statute or is otherwise responsible for the act/omission done. However, the law nowhere envisages imposing my penalty either directly or vicariously upon a person who is not connected with any such event or an act. The Hon'ble Supreme Court in ***Cellular Operators Association of India Vs. TRAI (2016) 7 SCC 703*** has held that the imposition of mandatory penalty on an entity on account of reasons not attributable to such entity is violative of Article 14, read with Article 19(1) (g) of the Constitution of India. It was further held that in case a person is affected by the breach of a standard of quality required under an Act or Regulation, then the person is required to be compensated for actual loss suffered as a result of the fault of the service provider;

(h) that the data of reconciliation statement of Imbalance Charges as per scheduled and injected energy for the period 24.03.2018 to 02.12.2018 stands validated/ confirmed by the Respondent No.1 i.e. the HPSLDC. With respect to the payment of Imbalance Charges, it is submitted that the Petitioner has paid a total sum of Rs. 13,333,104/- (Rupees One Crore Thirty Lakh, Thirty-Three Thousand One hundred Four Only) in respect of invoices for Imbalance Charges raised by the Respondent No.1, i.e. the HPSLDC for the period24.03.2018 to 02.12.2018 and the said payments were made to the Respondent No.2, i.e. the HPSEBL as instructed by the Respondent No.1;

(i) that the allegation of the Respondent No.1, i.e. the HPSLDC that the Petitioner has not supplied the details of payments received from the buyers in respect of each time block for which Imbalance charges/DSM charges have been charged by the Respondent No.1, is false and misconceived. The Petitioner has already mentioned on record that the Petitioner has furnished the details of gross revenue generated during the time blocks for the period between 24.03.2018 to 30.06.2019 along with the details of actual injection and total DSM penalty imposed during the said period on account of transmission constraints at page 269 of M.A. 159 of 2019. The Petitioner has also provided the extent of the loss incurred due to unscheduled power on account of transmission constraint and the net revenue figures pertaining to the said duration. All these details are based on the data provided by the Respondents. The Order dated 31.08.2019 does not direct the Petitioner to furnish the details pertaining to "each" time block and, thus, the Respondents cannot be allowed to add words to the Order to suit its motive to delay the adjudication of rightful claims of the Petitioner. That each day consists 96 time blocks and the payment information against each such blocks for a 15-month period spread across several files containing voluminous documents and does not add any pertinent information to the adjudication of the issue;

13. <u>Final Arguments of the Petitioner</u>

In support of the averments made in the Petition, rejoinders to the replies of the Respondents and the additional submissions made, Sh. Vinay Kuthiala, the Ld. Senior Counsel for the Petitioner argues: -

(i) that the Petitioner has invested approximately Rs. 3 crores in augmenting the interim evacuation system in its own interest for availing the STOA. Other generating companies in the same vicinity have also started using the said infrastructure for evacuation of power. The Petitioner has thus,

benefitted the Respondent No.2 i.e. the HPSEBL in improving supply in the area and reducing the incidents of line failures, without Respondent No.2 incurring any expenses/investment;

(ii) that the Petitioner had initially applied for Medium Term Open Access ("MTOA"). A meeting was convened on 06.06.2017 between the Petitioner, The Respondent No.2 i.e. the HPSEBL and Malana Power Company Ltd. ("MPCL") to set out the modalities regarding grant of Open Access. However, considering the current status of the interim evacuation system, the Petitioner was granted Short Term Open Access ("STOA") by the Respondent No.2. The Petitioner had no other option for evacuation and was thus compelled to enter into a STOA arrangement. The Transmission System is the only infrastructure through which, the Petitioner, as a generator, can evacuate power from its Project. However, due to the delay in the commissioning of permanent interconnection facility, the Petitioner had to perforce agree to the interim arrangement and has even invested in the development of the system of the Respondent No.2. The criteria for the grant to STOA is by utilizing surplus capacity/margins available in the transmission system It is for this reason that STOA is curtailed on priority in case of constraint in the system. Grant of STOA does not provide for system strengthening/augmentation. The Respondent No.2 entered into a detailed understanding of the augmentation of its evacuation system at the Petitioner's cost, to facilitate the Petitioner to evacuate power from its Project. However, the Petitioner has thereafter, being compelled to avail STOA despite having applied for MTOA;

(iii) that the Petitioner cannot be regarded as pure STOA customer since (i) it has invested and developed the evacuation system, which is in fact being used by other generators supplying power to the Respondent No.2; (ii) the Petitioner had to connect to the alternative evacuation system perforce due to non-availability of the permanent Transmission System; and (iii) the Petitioner had applied for MTOA, which was not granted in view of the current status of evacuation system in which, the Petitioner has invested significant amount;

(iv) that the Petitioner is sui generis because of its peculiar factual background and distinct nature from STOA as ordinarily granted under the Regulations. Therefore, it requires the adoption of different modalities to deal with the particular facts and circumstances of the case.

(a) **High Voltage/EHV lines of the HPSEBL, in this case, is part of the transmission system/State Grid:**

The Electricity Act, 2003 ("Act") under section 2 (32) defines **"grid"** as the high voltage backbone system of interconnected transmission lines, sub-stations and generating plants.

The Act under section 2 (72) defines "**transmission lines"** as all high-pressure cables and overhead lines (not being an essential part of the distribution system of a licensee) transmitting electricity from a generating station to another generating station or a substation, together with any step-up and step-down transformers, switch-gear and other works necessary to and used for the control of such cables or overhead lines, and such buildings or part thereof as may be required to accommodate such transformers, switch-gear and other works.

The Act further defines **"distributing main"** under section 2 (18) as the portion of any main with which a service line is, or is intended to be, immediately connected.

Under section 2(19) "distribution system" means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation or the consumers;

Similarly, section 2 (50) defines "power system" as all aspects of generation, transmission, distribution and supply of electricity and includes one or more the following, namely (a) generating stations; (b) transmission or main transmission lines; (c) sub-station; (d) tie-lines; (e) load dispatch activities; (f) mains or distribution mains; (g) electric supply-lines; (h) overhead lines; (i) service lines; (j) works.

Furthermore, the HPERC Regulations 2018 defines "State Grid" under Regulations 2 (1) (v) as the Intra-State Transmission System/network owned by the State Transmission Utility (STU)/transmission licensee(s) and/or the EHV/High Voltage Distribution System/ network owned by the distribution licensee(s) within the State.

The current interim evacuation system provided by the Respondent No.2 i.e. HPSEBL which is used for connecting the Petitioner's Project along with other generation Projects through LILO to Barshaini Sub-station forms part of the transmission system. It is not an essential part of the distribution system, which includes distribution mains and service lines and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers.

The present arrangement has been provided by the Respondent No.2 on augmentation of the evacuation system by the Petitioner, as an alternative to the permanent connectivity allowed on 25.03.2013, the Respondent No. 2 evacuation system has to function as part with a transmission line and fulfill the parameters specified for the functioning of transmission lines by the Commission.

Every transmission licensee is required to comply with the technical standards of operation and maintenance of transmission lines, in accordance with the Grid Standards. Therefore, the Respondent No.2 is required to adhere to these prescribed standards and to ensure the availability of the evacuation system.

(b) **Nature of obligation of the Respondent No.2/HPSEBL under the Himachal Pradesh Grid Code, 2010 vis-à-vis State Grid Planning.**

Clause 5.1.1 of the HPERC Grid Code, 2008 specifies that the primary objective of the integrated operation of the State Power Grid is to enhance the

overall operational economy and reliability of the entire electric power network spread over the geographical area of the State.

Clause 5.2.1 prescribes that the Participant Utilities shall co-operate with each other and adopt Good Utility Practices at all times for the satisfactory and beneficial operation of the State Power Grid.

Chapter 3 of the Grid Code stipulates Planning Code applied to STU, other licensees, State Sector Generating Stations ("SSGS"), connected to and/or using and/or involved in developing the Intra State Transmission System ("IaSTS"). It prescribes a perspective plan for the development of the electricity system and methodology for load forecasting for the evacuation of power from IaSTS for efficient scheduling and operation of the evacuation system.

Clause 3.4.5 states that in addition to the IaSTS, the STU shall plan from time to time, system strengthening schemes, need of which may arise to overcome the constraints in power transfer, and to improve the overall performance of the grid. The Intra-State transmission proposals including system-strengthening scheme identified on the basis of planning studies would be finalized by the STU based on the inputs received from various stakeholders i.e. generating companies and distribution licensees, the SLDC and any committee created for the transmission planning purposes by the Commission.

Chapter 4 prescribes the Connectivity Conditions Code which applies to the STU and all Users connected to and/or involved in developing the State Power Grid and includes Generating Companies/Transmission Licensee/ Distribution Licensee, which are engaged in generation/ transmission/ distribution of power through the State Power System. This chapter lays down mandatory procedures to be followed during the establishment and modification of the arrangements for connection to and /or use of the assets of IaSTS.

(v) that the contention that the Respondent No.2 i.e. the HPSEBL was not bound by the directions/recommendations of the Respondent No.3 i.e. the HPPTCL, which is the STU, is not tenable. The Respondent No. 2 as an integral part of the State Grid and having benefitted from the augmentation work carried out by the Petitioner to its system for evacuation of power, on the directions/ recommendations of the Respondent No. 3, cannot raise such an argument. The Respondent No.2 has to act in the interest of and as an integral part of the entire State Grid. In cannot abdicate its statutory duties or avoid consequences of non-compliance thereof, on the pretext that it has an interim arrangement with the Petitioner for the evacuation of power from the Petitioner's Project;

(vi). that the Respondent No.1 i.e. the HPSLDC and the Respondent No.2 i.e. the HPSEBL are unilaterally levying the DSM penalties (and earlier, the Imbalance charges) even for the circumstances where the Respondent No. 2 has not performed its part of statutory obligations i.e. ensuring that the line is available at the prescribed level (i.e. 97%) to evacuate power from the generating station. It is reiterated that the Petitioner has invested approximately 3 crores in augmenting that current evacuation system;

(vii). that the Respondent No.2 i.e. the HPSEBL is not imposing deviation charges upon the other generating companies who are supplying power to the Respondent No.2 i.e. the HPSEBL and in fact paying deemed generation charges to these generating companies, where their evacuation is affected by the failure of the Respondent No.2 system. This clearly shows that the Respondent No.2 is not declaring the deviations of these other generating stations that are attributable to the Respondent No.2;

(viii) that the Petitioner may not be entitled to deemed generation as an open access captive generator, it cannot be treated differently from other generators, insofar as deviations in generation caused by the Respondent No.2 i.e. the HPSEBL system failure. It is discriminatory and unfair for the Petitioner to be subjected to the DSM penalty for deviations that are not attributable to the Petitioner in any manner when other generators are not being imposed with such penalties. This is violative of Article 14, read with Article 19(1) (g) of the Constitution of India;

The **Hon'ble Supreme Court in the case of Jamshed Hormusj Wadia Vs. Board of Trustees, Port of Mumbai, and Ors. (2004) 3 SCC 214** held that the position is settled that the State and its authorities including instrumentalities of States have to be just, fair and reasonable in all their activities including those in the field of contracts. Even while giving effect to the interim arrangement for the evacuation of power, the Respondents cannot be heard or seen to violate Article 14 of the Constitution of India. The Hon'ble Supreme Court further observed that:-

> 17…… *Reference in this connection may also be made to Kumari Shrilekha Vidyarthi etc. etc. vs. State of U.P. and others – MANU/SC/504/1991: AIR1991 SC537,* ***wherein this Court held that while acting in the field of contractual rights the personality of the State does not undergo such a radical change as not to require regulation of its conduct by Article 14****. It is not as if the requirements of Article 14 and contractual obligations are alien concepts which cannot co-exist.* ***Our Constitution does not envisage or permit unfairness or unreasonableness in State action in any sphere of activities*** *contrary to the professed ideals in the Preamble. The exclusion of Article 14 in contractual matters is not permissible in our constitutional scheme.*
>
> *18* ***In our opinion, in the field of contracts, the State and its instrumentalities ought to so design their activities as would ensure fair competition and non-discrimination.*** *They can augment their resources, but the object should be to serve the public cause and to do public good by resorting to fair and reasonable methods." (emphasis supplied)*

(ix) **Power to Relax/Remove Difficulty:**

The HPERC (Deviation Settlement Mechanism and Related Matters) Regulations, 2018 ("HPERC DSM Regulations") provides for the imposition of DSM charges on the State entities in case of occurrence of any deviation in the schedule. However, the Regulation does not acknowledge the reasons attributable to said deviation and imposes strict liability on the State entity even in conditions where the said deviation has not occurred due to the fault of the generator.

The deviation/shortfall in the generation is attributable to the failure/outage in the grid maintained by the Respondent No.2 i.e. the HPSEBL which is beyond the control of the Petitioner. The Respondent No.2 has clearly failed to comply with the standards and parameters required to be maintained for State Grid, which has affected the Petitioner's ability to evacuate power that its Project was ready and capable to generate.

(x) that these regulations are to maintain grid discipline and grid security. The Petitioner cannot be made liable for any Imbalance in grid discipline/security that is not attributable to its action/omission. The Respondent No. 2 i.e. the HPSEBL is not imposing deviation charges upon the other generating companies who are supplying power to the Respondent No.2 and in fact paying deemed generation charges to these generating companies, where their evacuation is affected by the failure of the Respondent No.2 system

In cellular Operators Association of India and Ors. Vs. Telecom Regulatory Authority of India and Ors. (2016) 7 SCC 703, the Hon'ble Supreme Court, while dealing with a similar situation where the telecom service provider was subjected to penal charges for call drop without any fault on its part, held the levy of such panel charges to be arbitrary and unconstitutional. The relevant excerpts are reproduced hereunder: -

"63……. Secondly, no facts have been shown to us which would indicate that a particular area would be filled with call drops thanks to the fault on the part of the service providers in which consumers would be severely inconvenienced. The mere ipse dixit of the learned Attorney General, without any facts being pleaded to this effect, cannot possibly make an unconstitutional Regulation constitutional. We, therefore, hold that a strict penal liability laid down on the erroneous basis that the fault is entire with the service provider is manifestly arbitrary and unreasonable. Also, the payment of such penalty to a consumer who may himself be at fault, and which gives an unjustifiable windfall to such consumer, is also manifestly arbitrary and unreasonable.

65. In the present case, also, a mandatory penalty is payable by the service provider for call drops that may take place which is not due to its fault and may be due to the fault of the recipient of the penalty, which is violative of Article 14, read with Article 19(1) (g) of the Constitution of India." (emphasis supplied)

The HPERC DSM Regulations are being construed in a manner where the Petitioner is made liable for the penal charges in form of DSM charges without any fault on its part, then it will amount to a violation of Article 14 of the Constitution and the objective of the Act.

(xi) **The Hon'ble Supreme Court in Madeva Upendra Sinai and Ors. Vs. Union of India (UIO) and Ors. reported as AIR-1975 SC 797**, while dealing with the nature and purpose of a "removal of difficulty clause" has held that: -

"*39. To keep pace with the rapidly increasing responsibilities of a Welfare democratic State, the legislature has to turn out a plethora of hurried legislation, the volume of which is often matched with its complexity. Under conditions of extreme pressure, with heavy demands on the time of*

the legislature and the endurance and skill of the draftsman, it is well nigh impossible to foresee all the circumstances to deal with which a statute is enacted or to anticipate all the difficulties that might arise in its working due to peculiar local conditions or even local law. This is particularly true when Parliament undertakes legislation which gives a new dimension to socio-economic activities of the State or extends the existing Indian laws to new territories or areas freshly merged in the Union of India. In order to aviate the necessity of approaching the legislature for removal of every difficulty, howsoever trivial, encountered in the enforcement of a statute, by going through the time-consuming amendatory process, the legislature some-times thinks it expedient to invest the Executive with a very limited power to make minor adaptations peripheral adjustments in the statute, for making its implementation effective, without touching its substance. That is why the "removal of difficulty clause", once frowned upon and nicked-named as "Henry VIII Clause" in scornful commemoration of the absolutist ways in which that English King got the difficulties" in enforcing his autocratic will removed through the instrumentality of a servile Parliament, now finds acceptance as a practical necessity, in several Indian statutes of the post-independence era."

(xii) The Supreme Court in Arun Kumar and Ors. Vs. Union of India (UOI) and Ors. reported as (2007) 1SCC 732 while interpreting the doctrine of 'reading down" held that is well settled that if the provision of law is explicitly clear, language unambiguous and interpretation leaves no room for more than one construction, it has to be read as it is. In that case, the provision of law has to be tested on the touchstone of the relevant provisions of law or the Constitution and it is not open to a court to invoke the doctrine of "reading down" with a view to save the statute from declaring it ultra virus by carrying it to the point of perverting the purposes of the statute'. The Hon'ble Supreme Court further observed that: -

"*66. The question, therefore, is whether such a provision is ultra vires Article 14 of the Constitution. Though there is no direct decision of this Court on the point, some High Courts have considered the question. In BHEL Employees Association Vs. Union of India, the validity of amended Rule 3 was challenged. In that case, however, the Court was concerned with fringe benefits (Which stand altogether on a different footing). But the argument was that there was the excessive delegation of power by the Legislature to the Executive and the provision was, therefore, ultra-vires the parent Act as also violative of Article 14 of the Constitution."*

(xiii) **The Hon'ble Supreme Court in Gulfan and Ors. Vs. Sanat Kumar Ganguli reported as AIR 1965 SC 1839**, while dealing with the nature and objective of 'interpretation of statute' held that: -

"18 Normally, the words used in a statute have to be construed in their ordinary meaning; but in many cases, the judicial approach finds that the

simple device of adopting the ordinary meaning of words does not meet the ends or a fair and reasonable construction. Exclusive reliance on the bare dictionary meaning of words may not necessarily assist a proper construction of the statutory provision in which the words occur. Often enough, in interpreting a statutory provision, it becomes necessary to have regard to the subject-matter of the statute and the object which it is intended to achieve. That is why in deciding the true scope and effect of the relevant words in any statutory provision, the context in which the words occur, the object of the statute in which the provision is included, and the policy underlying the statute assume relevance and become material. As Halsbury has observed, the words "should be construed in the light of their context rather than what may be either strict etymological sense or their popular meaning apart from that context. This position is not disputed before us by either party."

(xiv) That a strict and literal application of the rule that the penalty would be levied on the generator for every occasion of deviation irrespective of its fault is arbitrary and *ultra-vires* the Constitution of India. In such a situation, the validity of the proviso can be protected through either of the following: -

(1) Reading down of the definition of 'deviation' to appropriately provide for consideration of whether the deviation can be attributed to the fault of the generator, thus, saving the proviso from the malaise of gross arbitrates;

(2) Passing appropriate orders relaxing the application of the deviation clause for such cases where the deviation is not attributable to the generator;

(3) Exercising the power to remove the difficulty, to appropriately incorporate necessary language/words to clarify that the consequences of deviation would not apply where the generator does not fault.

In view of the aforesaid facts and circumstances, the Petitioner is entitled to the following reliefs:

(a) A declaration that the Petitioner is not liable to pay the remaining Imbalance amount of Rs. 1,21,28,122/- (Rupees One Crore Twenty-One Lakh Twenty Eight Thousand One Hundred Twenty-Two Only) as levied through Demand Notice dated 04.05.2019;

(b) A declaration that the Petitioner is not liable to pay the DSM charges which are attributable to non-availability of the line of the Respondent No.2 i.e. the HPSEBL, thereby entitled to the refund the amount already paid as DSM as well as Imbalance charges on account of deviation attributable to the non-availability of line maintained by the Respondent No.2.

The Petitioner, therefore, requested the Commission, in terms of the power conferred under the Regulations 16 to 19, of the HPERC (Deviation Settlement Mechanism & Related Matters) Regulations, 2018, may consider the following solutions to address the present peculiar situations:-

(a) Waive the liability of payment of Imbalance /DSM charges due to non-availability of evacuation system by the generator, and absorb the financial impact of deviation as part of the Respondent No.2 i.e. the HPSEBL cost, as done for generators supplying power to the Respondent No.2;

b). in the alternative, allow the Petitioner to adjust the Imbalance /DSM charges due to non-availability of evacuation system against, wheeling charges paid by the Petitioner to the Respondent No. 2 i.e. the HPSEBL on a fiscal year basis effective from the date of commissioning of the Petitioner Projects.

14. <u>Arguments of the Respondent No. 1/HPSLDC:</u>

Per Contra, the Respondent No. 1/HPSLDC argues-

(a) that it is specifically denied that the Petitioner has made out a clear case that a large extent of deviation or shortfall in a generation has occurred due to default of the Respondents. The averment is bald and without any substance, as there is no fault/default so far as the Respondent No.1 is concerned, accordingly the petition deserves dismissal qua the Respondent No.1;

(b) that nowhere in the compliance report the Respondent No.1 i.e. the HPSLDC admitted any data furnished by the Petitioner. So far as non-filing of compliance report by the Respondent No.2 i.e. the HPSEBL is concerned the same cannot be construed as an admission on behalf of the Respondent No.1. It is vehemently denied that the case of the Petitioner is admitted by the principle of non-traverse, however, neither this principle is applicable in the present case nor the law cited is applicable in the case in hand. It is the well-settled proposition of law that facts will follow the law and law will not follow the facts;

(c) that, on the one hand, stand as taken by the Petitioner is that the Respondent No.2 i.e. the HPSEBL has not validated the data and on the other hand it is being submitted that the Respondent No.2 has acknowledged the same, as such the averments are self-contradictory. The averments as made by the Petitioner are w.r.to the Respondent No.2, as such the petition deserves dismissal qua the Respondent No.1. It is vehemently denied that statement made by the Respondent No.1 amounts to validation/confirmation. Since the case of the Petitioner pertains to Imbalance charges which were being charged by the Respondent No.2 before DSM regulation came in to force as such the Petition itself is not maintainable against the Respondent No.1 i.e. the HPSLDC, as the role of the Respondent No.1 starts after DSM regulations came in to force i.e. w.e.f. 03.12.2018, as such

keeping in view the undisputed facts w.r.to DSM regulations the petition, deserves dismissal qua the Respondent No.1;

(d) that the Respondent No.1 has not made any averments which will amount to validation/confirmation of data. Since the Petitioner has given an undertaking and the Petitioner is bound by the undertaking. So far as the law point mentioned by the Petitioner is concerned the same is not applicable in the case in hand;

(e) that even the relief which has been sought is from the Respondent No.2 and not from the Respondent No.1, as such the petition deserves to be dismissed qua the Respondent No.1;

(f) that the petition is not maintainable before this Commission as the Petitioner has failed to pinpoint any illegality or irregularity committed by the Respondent No.1 i.e. the HPSLDC in issuing letter dated 04.05.2019, on account of Imbalance charges for the period 24.03.2018 to 02.12.2018 amounting to Rs. 2,14,18,511/;

(g) that before the implementation of the HPERC Deviation Settlement Mechanism (DSM) Regulations, 2018 w.e.f. 03.12.2018, the Respondent No.1 i.e. the HPSLDC used to prepare and raise the bills of Imbalance Charges in accordance with Short Term Open Access Regulations, 2010 and Detailed procedure laid thereof, for any mismatch between scheduled and actual Energy injections at injection points for Intra State entities and the Respondent No.2 used to deposit the amount of Imbalance Charges (UI) with the Northern Regional Load Dispatch Centre (NRLDC) from its own pocket and thereafter the same was realized from the IPPs/ State entities and after DSM Regulations, 2018 the same is now being raised and deposited by the Respondent No.1 w.e.f. 03.12.2018, as such letter dated 04.05.2019 is issued to the Petitioner Company, as the Petitioner has not paid the Imbalance charges for the period 24.03.2018 to 02.12.2018;

(h) that the Petitioner is trying to confuse the matter by interlinking the Imbalance charges and the DSM charges whereas, as a matter of fact, that DSM charges are being charged w.e.f. 03.12.2018 and before that UI charges i.e. Imbalance charges are being charged;

(i) that the NRPC provide 10 days time to the Respondent No. 1 i.e. the HPSEBL to deposit DSM charges for the respective week and further a grace period of 2 days for depositing the same and in accordance with the stipulation as contained in the NRPC/CERC Regulations, the Respondent No.1 further requested the State Entities/ IPPs (OA Customers) in HP State to deposit the charges within a week time as per the HPERC Regulations and if there is any failure on the part of the Respondent No.1 in depositing the DSM Charges to the NRLDC the resultant action will be penalty @ 0.04% for each day of delay. As such the Respondent No.1 cannot even afford to delay in depositing the DSM charges to the NRLDC beyond stipulated period and the same analogy is applied to the other Open Access Customer/ State Entities;

(j) that in case there is any default in payment of DSM charges to the NRLDC in that eventuality apart from penalty, the NRLDC may cut the feeders/lines of the whole

state if the payment is not made to the NRLDC due to the default or role attributable even to a single State Entity/OA Customer;

(k) that the Respondent No.1 has issued a letter for the outstanding amount for the period 24.03.2018 to 02.12.2018 for Imbalance charges which are applicable as per the Short Term Open Access Regulations, 2010 and detailed procedure laid thereof. Copy of the STOA Regulations, 2010 and detailed procedure is already on record along with the reply which clearly suggests that the outstanding amount as per letter 04.05.2019 is being charged in accordance with above said regulations and procedure;

(l) that the Imbalance Charges for Unscheduled Interchange (UI) raised weekly bill from Open Access (OA) Customers by the Respondent No.1 i.e. the HPSLDC for the period 24.03.2018 to 02.12.2018 as per the Short Term Open Access (STOA) Regulations, 2010 and detailed procedure laid thereof. The Respondent No.2 i.e. the HPSEBL operated the payment collection thereof from the OA customers and further deposits with the NRLDC for the State of HP as a whole. After 03.12.2018, this Commission notified the Deviation Settlement Mechanism and related matters (DSM) Regulations, 2018, wherein the Respondent No.1 was given the responsibility to raise Deviation Settlement Charges and energy account thereof, collect the DSM charges into "State Deviation Pool Account" from the State Entities and further deposits with the NRLDC account within the stipulated time. It is further submitted that the Petitioner has tried to confuse the matter by interlinking the Imbalance charges and the DSM charges, whereas as a matter of fact that DSM charges are being charged w.e.f. 03.12.2018 and before that UI charges i.e. Imbalance charges are being charged. It was the Respondent No.2 which used to deposit the amount of Imbalance (UI) Charges with the Northern Regional Load Dispatch Centre (NRLDC) from its own pocket and thereafter the same was realized from the IPPs/ State entities. No payment of Imbalance (UI) charges for period 24.03.2018 to 02.12.2018 was received by the Respondent No.1 as the same was being operated by the Respondent No. 2 and further deposited with NRLDC, and in this way, the Respondent No.1 is not earning any revenue on the DSM Charges collected from the State Entities w.e.f. 03.12.2018. That in case there is any default in payment of DSM Charges to the NRLDC in that eventuality apart from penalty as mentioned in para supra the NRLDC may be forced to cut the feeders/lines of the whole State if the payment is not made to the NRLDC;

(m) that the Imbalance charges for Unscheduled Interchange (UI) raised from the Open Access (OA) Customers/Petitioner by the Respondent No.1 for the period 24.03.2018 to 02.12.2018 as per the Short Term Open Access (STOA) Regulations, 2010 and detailed procedure laid thereof. Respondent No. 2 operated the payment collection thereof and further deposited with the NRLDC for the State of HP as a whole;

(n) that as per the HPERC DSM Regulations, 2018 implemented w.e.f. 03.12.2018, the Replying Respondent prepared and raised the Deviation Settlement Charges for week wise Deviation Settlement Account (DSA) based on the OA customers/Petitioner's scheduled and Actual Energy injections (in case of the Petitioner as OA Generator/State Entity) and the Deviations or each time block thereof and worked out on the average frequency of that time block at the rates and provisions specified in DSM Regulations, 2018. Moreover, the Respondent No.1 had already supplied all calculations for each time block and the average frequency of that time block and the DSA rate with DSM Charges bill to each State Entity including the Petitioner, which can be checked from the e-mail of the Replying Respondent. Moreover, by hiding the facts of DSM calculations, the Petitioner cannot be relieved from the DSM charges incurred as per the over drawl (OD)/ under drawl (UD) from the injections scheduled incurred and as per the scheduled energy final data made available with the NRLDC and actual SEM data provided by the OA customer/Petitioner.

Further, the DSM payment with the NRLDC is time-bound after collecting the same from State Entities including the Petitioner into "State Deviation Pool Account". As already explained and submitted that the Respondent No.1 is not revenue earning/generating entity and any default in payment with the NRLDC will result into the penalty for the State of HP as a whole and the various provisions laid down in the HPERC/CERC Regulations shall be attracted in such eventuality;

(o) that the Imbalance Charges are strictly levied in accordance with the STOA Regulations, 2010 and detailed procedure thereof, copy of which is already on record. It is further submitted that apart from these written arguments, oral arguments and reply be also read as part and parcel of arguments;

(p) that the Respondent No.1 i.e. the HPSLDC has devised the format which can be seen from "Statement -A" already supplied and is part and parcel of the record submitted before this Commission. However, for details in 96-time block data, schedule energy, actual energy, over drawl, under drawl, frequency, DSA Rate, normal and additional deviation also stand supplied along with the respective bills. Moreover, as per the demand of the Petitioner the backup calculations w.e.f. 03.12.2018 onwards in Excel form have also been provided on 18.07.2019 which is also part and parcel of the record of this Commission. Further, the backup calculations in Excel form as well as in PDF/Excel form are continuously being sent to the Petitioner as well as all other State Entities till dates;

(q) that this Commission may go through the petition as well as voluminous record submitted by the Petitioner clearly goes to show that the main grievance of the Petitioner is prior DSM charges and the same has nothing to do so far as the Respondent no.1 is concerned, as the DSM charges are levied as per the directions of this Commission;

(r) that although the Respondent No.1 is not under any obligation to validate the /confirm the data, but in view of the directions passed by this Commission the data has been validated and the same is part and parcel of the record of this Commission as the same has been submitted by way of compliance report to order dated 28.09.2019;

(s) that the Respondent No.1 i.e. the HPSLDC will come in to picture w.e.f. 03.12.2018 and bare perusal of the petition and documents appended thereto clearly goes to suggest that the Petitioner is aggrieved for the period 24.03.2018 to 02.12.2018, as such the Respondent No.1 has been unnecessary dragged into this unwarranted litigation;

(t) that whatever letters or communication Petitioner have made with the Respondent No.1 was promptly replied and officials of the Petitioner were apprised regarding this aspect;

(u) that in view of admission of the Petitioner that the Respondent No.2 i.e. the HPSEBL has issued a letter dated 04.05.2019 in that eventuality the Respondent No.1 is not a necessary party to the list and accordingly the petition may be dismissed qua the Respondent No.1;

(v) that the Petitioner is making false averments that some amount has been paid qua Imbalance charges for the period 24.03.2018 to 02.12.2018 as no amount is deposited with the Respondent No.1 i.e. the HPSLDC and the Petitioner be put to strict proof regarding these false averments;

(w) that the Respondent No.1 i.e. the HPSLDC is not earning any revenue as whatever amount is being deposited by the IPPs (OA customers) the same is accordingly further deposited with the NRLDC and further the Respondent No.1 is functioning strictly in accordance with the regulations of this Commission;

(x) that the fact that all the direction issued by this Commission including validation of data has been complied with in the stipulated period and no false averments have been made that compliance has not been made;

(y) that the law cited by the Petitioner is not applicable in the case in hand;

(z) that even the relief which has been sought from the Respondent No.2 i.e. the HPSEBL and not from the Respondent No.1, i.e. the HPSLDC as such the petition deserves to be dismissed qua the Respondent No.1.

15. <u>Arguments on behalf of the Respondent No.2/HPSEBL)</u>

The Respondent No.2 i.e. the HPSEBL, has submitted the written arguments in support of and stated that:-

(i) the petition as preferred is neither competent nor maintainable in the present form in as much as the Petitioner has failed to pinpoint any illegality or irregularity committed by the Respondent No. 2 i.e. the HPSEBL in issuing letter dated 4.5.2019, on account of Imbalance charges

for the period 24.03.2018 to 2.12.2018 amounting to Rs. 2,14,18,511/- accordingly the petition as preferred is liable to be dismissed with a heavy cost;

(ii) the implementation of the HPERC Deviation Settlement Mechanism (DSM) Regulation 2018 i.e. 03.12.2018, the Respondent No. 1 i.e. the HPSLDC prepared and raised the bills of Imbalance Charges in accordance with the Short Term open Access Regulation 2010 & Detailed procedure laid thereof, for any mismatch between scheduled and actual energy drawl at drawl points and scheduled & actual Energy injections at injection points for Intra State entities. It was the Respondent No.2 i.e. the HPSEBL which used to deposit the amount of Imbalance Charges (UI) with the Northern Regional Load Dispatch Centre (NRLDC) from its own pocket and, thereafter, the same was realized from the IPPs/State entities in accordance with the regulations. Accordingly, the impugned letter dated 4.5.2019 was issued to the Petitioner Company, as the Petitioner has not paid the Imbalance charges for the period 24.3.2018 to 02.12.2018 in the legal and justified manner. Accordingly, the present petition is liable to be dismissed;

(iii) the Petitioner has entered into a tripartite agreement with the respondent and the Malana Power Corporation Ltd (MPCL) to wheel the energy of 9 MW SHPPBPL HEP injected into the HPSEBL system at LILO point at 33 kV TOSS Feeder system of Malana Power to the HPSEBL 132 KV Sub-Station Bajaura and beyond up to the HP State periphery using the State network without any undue influence. Clause 5.2 of the tripartite agreement is very much material wherein the bone of contention of the present dispute falls and it states as under:

> *"no deemed generation benefit will be available to SHPPBPL during this interim evacuation arrangement."*

Further clause 6 of the agreement ibid provides for outage and availability of the system and clause 6.2 reads as under: -

> *"6.2 the connectivity granted to SHPPBPL is purely on an interim basis and as such, no deemed generation will be applicable for loss of generation to SHPPBPL for whatsoever reasons."*

So, it is crystal clear from the terms of the agreement that the Petitioner was granted connectivity purely on the interim basis and is not entitled to the loss of generation for whatsoever reasons. It is specifically submitted that as per the agreement dated 06-12-2017, the Petitioner has been granted connectivity on the short term basis and as no deemed generation is applicable for loss of generation to the Petitioner for whatsoever reasons,

(iv) the permanent inter-connection point of the Petitioner HEP is Barshaini 33/132 KV Sub-Station of the Respondent No.3 i.e. the HPPTCL, which is admittedly delayed since October, 2013 and as submitted in the paras *supra*, the Respondent No 2 has provided only interim arrangement strictly in terms of the tripartite agreements dated 06-12-2017,

(v) the Petitioner is the only short term open access customer using the system of the Respondent No. 2 i.e. the HPSEBL for sale of its saleable energy generated by its station outside the State, hence, liable to comply with the DSM regulations as amended up to date whereas the other generators of the area are selling power to the HPSEBL under Long Term Power Purchase Agreements and the claim of deemed generation, if any, raised by these generators is being dealt with as per the provisions contained in these long term power purchase agreements (PPA);

(vi) the Petitioner is selling its power outside the State under Short Term Open Access and earning money from its buyers. Whenever there occurs any tripping, the Petitioner overdraws power from the schedule of the Respondent No.2/HPSEBL to meet its obligations and is liable to comply with the DSM Regulations strictly. However, it is submitted that all the DSM bills are being raised to the Petitioner as per prevalent regulations, being short term open access customer i.e. for the usage of State network for wheeling of power, the bills are being raised at the rates determined by the Commission, for over-drawl of power from the system of the Respondent No.2 for mitigating its obligation of sale of power outside the State,

(vii) the bills for wheeling charges are being raised to the Petitioner on the actual energy being wheeled by the Petitioner through State network for sale outside the State on the rates determined by the Commission whereas the DSM bills are being raised on the energy over-drawn by the Petitioner to mitigate its committed obligations of sale of its power outside the State under short term open access and any deviation thereof during real-time operations, whatsoever the reasons, shall be governed under prevalent DSM regulations/Short Term Open Access Regulations, hence every action of the Respondent No.2/HPSEBL is in consonance with the provisions of tripartite Agreement dated 06.12.2017 which is an undisputed interim measure, read with provisions of prevalent Regulations notified by the Himachal Pradesh Electricity Regulatory Commission and the Central Electricity Commission as applicable. It is relevant to state here that the law relied upon by the Petitioner has no bearing on the present case and it is the settled law of the land that every case has to be decided on its facts and circumstances,

(viii) the Commission vide its interim order dated 31-08-2019 had directed the Petitioner to supply the details of payments received from the buyers in respect time block for which Imbalance charge/DSM charges have been charged by the SLDC along with the copy of the agreement for such sale of power. However, despite the strict directions of this Commission, the Petitioner deliberately did not supply the details of payments received from the buyers in respect time block for which Imbalance charge/DSM charges have been charged by the SLDC along with the copy of the agreement for such sale of power which is a crystal clear attempt to mislead the Commission,

(ix) as per the procedure for the short term open access the under –injection (i.e. injection less than the schedule) for each time block of 15 minutes, as projected at the injection point, shall be paid for by the person who has

made under-injection and shall be recoverable by the person who is deemed to have supplied the energy to the grid in that time block as per the energy account of the State Load Dispatch Centre (SLDC). Hence, in the present case, the Petitioner was under shortfall to meet its schedule and the quantum of energy stands drawn from the grid of the Respondent No.2 i.e. the HPSEBL, so the impugned letter dated 04-05-2019 wherein demand on account of Imbalance charge for the period 24-03-2018 to 02-12-2018 amounting to Rs.2,14,18,511-/ is valid in the eyes of law and the Petitioner cannot by any stretch of imagination escape from the payment,

(x) keeping in view the facts and circumstances narrated hereinbefore, the demand on account of Imbalance charge for the period 24-03-2018 to 02-12-2018 amounting to Rs. 2,14,18,511-/ is just and valid in the eyes of law and the petition deserves to be dismissed in the interest of justice and fair play.

16. The Petitioner has made the Additional Submissions in addition to the Written Submissions of Respondent No.2 dated 21.10.2019 stating that: -

(a) the Petition and subsequent pleadings bring out a clear case on behalf of the Petitioner that deviation or shortfall in a generation has occurred due to the default of the Respondent No.2, i.e. the HPSEBL, which led to illegal and onerous consequences upon the Petitioner. However, despite the Respondent No.1 i.e the HPSLDC, being the nodal agency for Imbalance Charges/DSM Accounting, it did not consider the non-availability of the grid and has penalized the Petitioner for the reasons not attributable to the Petitioner;

(b) the current interim evacuation system was provided by the Respondent No.2 i.e. the HPSEBL, which is used for connecting the Petitioner's Project along with other generation Projects through LILO to Barshaini Sub-station forms part of the Transmission System. Considering the fact that the present arrangement has been provided by the Respondent No.2, on augmentation of the evacuation system by the Petitioner, as an alternative to the permanent connectivity allowed on 25.03.2013, the Respondent No.2/HPSEBL's evacuation system has to function at par with a transmission line and fulfill the parameters specified for the functioning of transmission lines by the Commission. Every transmission licensee is required to comply with the technical standards of operation and maintenance of transmission lines, in accordance with the Grid Standards. Thus, Respondent No.2, cannot avoid its obligation to comply with the specified norms and parameters on the ground that the agreement entered into by it with the Petitioner, is an interim arrangement, and that evacuation under STOA will be available to the Petitioner depending on the level of efficiency/outage of the said system;

(c) the Petitioner cannot be regarded as pure STOA customer since (i) it has invested and developed the evacuation system, which is in fact being used by other generators supplying power to the Respondent No.2, i.e. the HPSEBL; (ii) the Petitioner had to connect to the alternative evacuation system perforce due to non-availability of the permanent Transmission System (and is still not available despite being scheduled for completion by Oct 2013); and (iii) the Petitioner had applied for Medium Term Open Access ("**MTOA"**), which was not granted in view of the current status of evacuation system in which, the Petitioner has

invested significant amount. The present case of the Petitioner is *sui generis* because of its peculiar factual background and distinct nature from STOA as ordinarily granted under the Regulations. Therefore, it requires the adoption of different modalities to deal with the particular facts and circumstances of the case;

(d) It is pertinent to mention that the objective of the Himachal Pradesh Electricity Regulatory Commission (Deviation Settlement Mechanism and Related Matters) Regulations, 2018 ("**HPERC DSM Regulations"**) is to maintain grid discipline and grid security as envisaged under the CERC (Indian Electricity Grid Code) Regulations, 2010 and Himachal Pradesh Electricity Grid Code, 2008, through the commercial mechanism for Deviation Settlement for over-drawl and under-injection of electricity by the users of the grid. The objective of these regulations is to maintain grid discipline and grid security. The Petitioner cannot be made liable for any Imbalance in grid discipline/security that is not attributable to its action/omission;

(e) if the Commission directs the Petitioner to bring on record said documents, then the Petitioner will supply these voluminous documents for verification/ reconciliation by the Respondents;

(f) the HPERC DSM Regulations, 2018 provides for the imposition of DSM charges on the State entities in case of occurrence of any deviation in the schedule. However, the Regulation doesn't acknowledge the reasons attributable to said deviation and imposes a strict liability of the State entity even in conditions where the said deviation has occurred due to the non-availability of the evacuation line operated and maintained by the Respondent No.2/HPSEBL. The Petitioner can only be penalised to the extent of actual default of its own and the liability can be fastened on a person who either fails to carry out the duty cast by the specific provisions of the statute or is otherwise responsible for the act/omission done;

(g) the facts and circumstances of the present case, this e Commission, in terms of the power conferred under Regulations 16 to 19 of the Himachal Pradesh Electricity Regulatory Commission (Deviation Settlement Mechanism and Related Matters) Regulations, 2018, may consider the following solutions to address the present peculiar situations:

(i) Waive the liability of the Petitioner/Generator for payment of Imbalance / DSM charges due to non-availability of evacuation system by the Respondent No.2, and absorb the financial impact of deviation as part of the Respondent No.2 cost, as is already being done for generators supplying power to the Respondent No.2;

(ii) In the alternative, allow the Petitioner to adjust the Imbalance /DSM charges due to the non-availability of the evacuation system against wheeling charges paid by the Petitioner to the Respondent No.2, on a fiscal year basis effective from the date of commissioning of the Petitioner's Projects.

17. We have heard the Ld. Counsels appearing for the parties and have gone through their stand in the Petition, written submissions, rejoinders, sur-rejoinders, arguments put-forth during the hearing and after a thorough evaluation of the relevant material on record and found that the Petitioner initially moved the petition for quashing the demand of Rs.1,21,28,112/- (Rupees One Crore Twenty One Lakh Twenty Eight Thousand One Hundred Twelve only) out off Rs. 2,14,18,511/- (Rupees Two Crore Fourteen Lakh

Eighteen Thousand Five Hundred Eleven only) towards imbalancing Charges for the period from 24-03-2018 to 02-12-2018 raised by the Respondent No. 1 i.e., the HPSLDC and seeking a declaration that the provisions of the DSM Regulations are not applicable to the Petitioner for any deviations from the schedule for reasons which are neither attributable to nor are within the reasonable control of the Petitioner. Now the Petitioner has modified its prayer stating that –

The Commission, in terms of the power conferred under the Regulations 16 to 19 of the Himachal Pradesh Electricity Regulatory Commission (Deviation Settlement Mechanism and Related Matters) Regulations, 2018, may consider the following solutions to address the present peculiar situations: -

(a) Waive the liability of payment of Imbalance /DSM charges due to non-availability of evacuation system by the generator, and absorb the financial impact of deviation as part of the Respondent No.2 i.e. the HPSEBL cost, as done for generators supplying power to the Respondent No.2;

(b). in the alternative, allow the Petitioner to adjust the Imbalance /DSM charges due to non-availability of evacuation system against, wheeling charges paid by the Petitioner to the Respondent No. 2/HPSEBL on a fiscal year basis effective from the date of commissioning of the Petitioner Projects.

ISSUES FOR CONSIDERATION:-

18. The pleadings as aforesaid give rise to the following main issues for consideration:-

(I) Whether the Petitioner is liable to pay the Imbalance charges (for the period 24.03.2018 to 02.12.2018) and DSM charges (for the period 03.12.2018 to 30.06.2019) for such deviations in schedules for the injections under Short Term Open Access as are caused due to the constraints/ breakdowns in the system of the Distribution Licensee?

(II) Whether the Late Payment Surcharge/Interest is payable for the delayed payment of the Imbalance charges or the DSM charges, as the case may be?

(III) Whether the HPSEBL is liable to compensate the Petitioner for the Imbalance /DSM charges due to constraints/ breakdowns in the system of Distribution Licensee?

(IV) Whether there is discriminatory treatment in charging Imbalance / DSM charges to the Petitioner vis-à-vis other SHPs located in the area in which the Petitioner's plant is located?

(V) Whether the liability for payment of the Imbalance Charges/DSM charges can be waived off on a fiscal year basis w.e.f. COD of the project?

(VI) Whether the Petitioner can be allowed to adjust the Imbalance /DSM Charges due to non-availability of the system of the HPSEBL against the wheeling charges paid/ payable by the Petitioner to the Respondent No. 2 on fiscal year basis effective from the COD of the Project?

19. We now proceed to consider the submissions made by the Petitioner and the Respondents and at arrive at decisions on each of the issues as follows:-

19.1 Issue No.I

Whether the Petitioner is liable to pay the Imbalance charges (for the period 24.03.2018 to 02.12.2018) and DSM charges (for the period 03.12.2018 to 30.06.2019) for such deviations in schedules for the injections under Short Term Open Access as are caused due to the constraints/ breakdowns in the system of the Distribution Licensee?

The Petitioner has set up 9.00 MW Hydro Electric Project located in Himachal Pradesh and sells its saleable portion of energy to the captive consumers located in Delhi by availing the Short Term Open Access (STOA) using the Intra-State and Inter-State System. Apart from the distribution system of HPSEBL and the transmission system of HPPTCL, the Petitioner also uses the system of Malana Power Company Limited (MPCL) as per the tripartite agreement executed by it on 06.12.2017. The HPSLDC schedules the generation of the Petitioner's plant as well as for other customers availing open access through Intra-State distribution and transmission systems and also for the energy generation/withdrawals for the other State entities under its control. The schedule for the State as a whole is prepared and submitted by the SLDC to the NRLDC for necessary scheduling. In case of the deviation in the schedule so implemented by the NRLDC, the deviation charges as per the CERC regulations are levied, which are payable by the SLDC to the NRPC (Northern Region Power Committee) within a period of ten days. The HPSLDC, on its part, prepares the weekly energy accounts and determines the Imbalance charges/DSM charges for each State entity for the deviation in its schedule and also recovers the same from the concerned State entities liable to pay such charges.

These Imbalance/DSM charges basically facilitate the recovery from the State entity(ies) which deviate from the schedule (under injection in case of a generator), of such costs as are incurred by the other State entity(ies) which help in the system in the same time block on a real time basis in meeting the obligations of that entity corresponding to its approved schedule. The recovery so made is used for discharging liabilities towards the NRPC and also for compensating the State entity(ies) which helped the system on a real-time basis for each time block. This means that even in the case of non-generation at the Petitioner's plant, the scheduled energy was being made available to its consumers in Delhi, but the revenue from such consumers was being collected by the Petitioner for the corresponding to entire scheduled energy. As such, the Petitioner on whose behalf the energy was being made available to its consumers even in case of insufficient generation is liable to pay the Imbalance charges/DSM Charges. The Imbalance/DSM charges do not constitute a penalty and as such the pleadings/ruling given by the Petitioner in support of his claim about the conditionality with regard to levy of penalty are not relevant in this context of the issues which are before us for consideration.

The procedure for determining the Imbalance charges in different situations, including for situations involving non-availability of the system has been clearly incorporated in the detailed procedure under the Himachal Pradesh Electricity Regulatory Commission (Short Term Open Access) Regulations, 2010. Similarly, the rates of DSM charges have been specified in the Himachal Pradesh Electricity Regulatory Commission (Deviation Settlement Mechanism and Related Matters) Regulations, 2018 and the charges so determined are payable by the entities in all cases where the deviations (under injection in case of the generator) takes place. In case of the constraints/breakdowns of the system, such entity may, however, be entitled to request for the revision of its generation schedule as per the provisions of applicable regulations and in case such revision is approved by the competent authority the deviation for the subsequent time blocks may get revised accordingly. However, any compensation for loss of generation due to the constraints/ breakdowns in the system is neither the subject matter of this mechanism nor the payment of the Imbalance charges /DSM charges for the under injection can be withheld by taking a plea that such charges are not payable as under injections were caused due to the constraints/breakdowns in the Licensee's system. In this connection, we also observe that even though the Petitioner could not generate power, as scheduled, during certain time blocks, the revenue received by it from its consumers is of the same order or even marginally higher than the Imbalance/ DSM charges billed to it for such time block. The time block-wise detail of the revenue earned has however not been submitted by the Petitioner.

We also observe that even as per undertakings furnished by the Petitioner while applying for STOA, he has agreed that he will not be entitled to any claim in any shape on account of any other reason including the grid's failure beyond the control of the HPSEBL/HPPTCL. The extract of the provision is reproduced as under:

> *"The STOA customer shall not be entitled to claim compensation, in any shape, for any loss or damage whatsoever arising out of failure due to force majeure events such as fire, rebellion, mutiny, civil commotion, riot, strike, lockout, forces of nature, accident, the act of God and any other reason including grid's failure beyond the control of the HPSEBL/HPPTCL."*

Further, as per the procedure for Short Term Open Access and also as per the undertaking given by the STOA consumers, such customers have to abide by restoring / restrictions as may be imposed by the concerned Licensee on mixed feeders.

We also find that the Petitioner has, in his submissions, mixed up the roles of the various agencies under the Act and the Regulations. The levy of Imbalance charges and DSM charges under the respective regulations is a function of the HPSLDC. Even though the HPSEBL has, for certain periods, acted on behalf of the HPSLDC in billing the Imbalance charges, the same cannot be linked with the claim, if any, against the HPSEBL in its capacity as Discom. The Imbalance

charges and DSM charges have to be paid expeditiously and timely without linking with any other issues. In fact, even in the tripartite interim power transmission service agreement was signed by the Petitioner with the HPSEBL and the MPCL on 06.12.2017 and it has specifically been agreed that the HPSLDC/ NRLDC shall settle the UI/deviations directly with the MPCL and the SHPPBPL (Petitioner Company). This provision of the interim agreement also supports our contention as mentioned hereinbefore.

In view of the foregoing discussions, we are of the opinion that the Imbalance charges / DSM charges are payable as per the regulations by the State Entities, which deviate (under injection in case of a generator) from the schedule and charges so payable cannot be withheld by such entity even in cases where the schedule for injection of power could not be met by it due to the constraints/breakdowns in the system of the HPSEBL.

We, therefore, hold that the Imbalance charges / DSM charges are payable by the Petitioner even for the deviations are caused due to the constraints/breakdowns in the system of the HPSEBL and that the Petitioner cannot withhold the payments for the same with the plea that he is not liable to pay the Imbalance charges billed to him for the under injection which was caused due to the constraint in the said systems.

We also observe that the Petitioner has not established any specific discrepancies in the bills raised to him except that he has specifically referred to the three incidents in which, according to him, there were abnormal delays, according to the Petitioner on the part of the HPSEBL/ HPSLDC in taking action for revision of the schedule and which resulted in huge charges to him. These three events are discussed as under:-

i. during the period 24.09.2018 to 30.09.2018, a delay of 45 hours have been attributed to the HPSEBL. It has been mentioned that the HPSEBL confirmed the outage of 33kV line after a period of about 45 hours starting from the 19.00 Hours on 24.09.2018 i.e. from the time at which the line actually got damaged. We find that the claim made by the Petitioner is self-contradictory in view of the fact that the Petitioner itself has mentioned that it requested for such confirmation at 12.54 hours on 26.09.2018 and that the confirmation to the effect was received from the HPSEBL at 15.51hours of the same day. As such the delay of 45 hours cannot be attributed to the HPSEBL. However, otherwise, at the face of it, there seems to be some error in the total quantum of scheduled injection, as considered in the weekly bill for the period 24.09.2018 to 30.09.2018. This needs to be reconciled;

ii. for 04/05.02.2019 a delay of about 5 and 1/2 hours has been attributed by the Petitioner to the HPSEBL and about 17 and 1/2 hours towards the HPSLDC. Whereas no detail about the time at which the HPSEBL was to give such confirmation has been provided, the delay of about 17 and 1/2 hours attributed by the Petitioner to the HPSLDC needs to be looked into by the Managing Director**,**

the HPSLDC for necessary steps to avoid such delays. As regards the DSM charges billed to the Petitioner 's company for this period, we feel that same get offset by the revenue earned by it from its consumer for the same period in which no generation actually took place. As such there is hardly any loss to the Petitioner in this regard; and

iii. In relation to 07.02.2019, a delay of about 15 hours has been attributed to the HPSEBL for which no evidence/details about the time at which the HPSEBL was requested to give such confirmation have been provided. However, the delay of about 3 hours as attributed to the HPSLDC cannot be considered as abnormally high.

In view of the above, we decide that the Petitioner is liable to pay the Imbalance charges/DSM charges even for the time blocks in which he could not inject power as per the schedule due to the constraints /breakdowns in the system of the HPSEBL. The discrepancies, if any, with regard to the quantum of energy scheduled as per weekly bill (24.09.2018 to 30.09.2018) can however be taken up by the Petitioner with the HPSEBL/HPSLDC within 15 days from the date of issue of this Order. In case such discrepancies in the said weekly bill are taken up by the Petitioner, the same shall be decided by the HPSEBL/HPSLDC within 12 days.

19.2 Issue No. II

Whether the Late Payment Surcharge/Interest is payable for the delayed payment of the Imbalance charges or the DSM charges, as the case may be?

Timely payment of the various charges under the deviation settlement mechanism is of prime essence. In case of delay in payments, it can have an adverse impact on the real-time grid operations due to obvious reasons. The various regulations provide for levy of Interest / Late Payment Surcharge in case of delay in payment. In fact, as per the latest amendments in the DSM regulations which came into effect in July, 2019 the rate of Late Payment Surcharge in case of prolonged delay has been doubled.

The Interest / Surcharge as per the applicable regulations shall be at the rates applicable from time to time and the question of not charging of the same does not arise. As a matter of fact, the security mechanisms provided for in the relevant regulations should also be enforced by the HPSLDC according to which it is also entitled to exercise powers to curtail the schedule for the defaulting State entity in accordance with the procedure given in the amendment regulations i.e. The Himachal Pradesh Electricity Regulatory Commission (Deviation Settlement Mechanism and Related Matters) (First Amendment) Regulations, 2018.

In view of the above, the Petitioner cannot, by any stretch of the imagination, escape the payment of surcharge/interest on the outstanding dues at the rates applicable under the relevant regulations.

19.3 Issue No. III

Whether HPSEBL is liable to compensate the Petitioner for the Imbalance /DSM charges due to constraints/ breakdowns in the system of Distribution Licensee?

The Petitioner has pleaded that they are not asking for any deemed generation benefit but are requesting that they should not be penalised by way of levy of the Imbalance / DSM Charges on account of the deviations which were caused due to the constraints/breakdowns in the system of the Respondent No. 2, which were beyond the Petitioner's control. As discussed in para 19.1, of this order the Imbalance / DSM charges are charged to facilitate compensation to the entity which helped the system in meeting the scheduled commitment of an entity in case of his inability to inject power as per the schedule and to maintain grid discipline. These charges do not constitute a penalty and in fact, may not necessarily be payable to the Discom in all situations. In some cases, these charges may be payable to some other State entity(ies) which helped the system depending on the flows on a real-time basis. We feel that waiver of the Imbalance / DSM charges shall only amount to allowing deemed generation benefit which is otherwise not admissible in this case.

The loss of generation due to the constraints/breakdowns in the evacuation system is one of the risks associated with the implementation of a project and the same has to be taken into account by the generator while finalizing the agreements with the concerned stakeholders including the purchaser. The generator and the purchaser, being the main beneficiaries, are obviously the two major stockholders. In this case, the risks, if any, that can be allocated to the owner of the wheeling system shall necessarily have to be treated as per the terms and conditions of the Power Transmission Service Agreement (PTSA) for the interim period.

In this case, the power is being evacuated under an interim arrangement as per the tripartite agreement signed by the Petitioner Company with the HPSEBL on 06.12.2017. As per the said agreement, it has clearly been agreed by the Petitioner company that the connectivity granted to the SHPPBPL (Petitioner's Company) is purely on an interim basis and as such, no deemed generation will be applicable for loss of generation to the SHPPBPL for whatsoever reasons. Accordingly, there should not be any question of the HPSEBL making good for the loss in a generation or for compensating the Petitioner for the Imbalance / DSM charges payable by the Petitioner Company.

The Petitioner has also pleaded that the distribution licensee is under obligation to maintain the distribution system and should accordingly compensate for the loss of generation due to constraint in a system. In this connection, we observe that the distribution system is mainly designed for the supply of power to its consumers and any technical arrangements for wheeling of power through open access shall have to be dealt with under the site-specific mutual agreement between the parties.

The Petitioner has repeatedly argued that it has spent an amount of more than Rs. 3 crores for the interim arrangement. It is still being held liable to pay the penalty for the deviation in the schedule due to constraints in the evacuation system for no fault of him. In this connection, we observe that the stated amount has been spent by the Petitioner under a separate agreement executed by him with the HPSEBL and this is not an issue presently under consideration before us. We, however, feel that in the absence of augmentation of the system, evacuation of any power from the project would have been hardly possible. In this connection, we also observe that even the interim arrangement has facilitated the Petitioner to achieve an annual CUF which is higher than the CUF for 75% dependable year as per the TEC accorded for the project. This is so in spite of the fact that in some cases generation loss has taken place due to reasons attributed purely to the generator, as admitted by the Petitioner himself.

The Petitioner has also submitted that even though it intended to avail MTOA, but was allowed STOA only. He has also submitted that this has resulted in a loss to him. He has pleaded that he should not be treated as a Short Term Open Access Customer. We decline to accept the submission made by the Petitioner in this regard particularly when he has regularly applied for the Short Term Open Access to the concerned authorities. We otherwise also find that this is not the subject matter of this petition in which he has disputed the Imbalance charges and DSM charges levied on him for such deviation in the generation schedules under the Short Term Open Access availed by him, as are caused due to the constraints/breakdowns in the system.

The Petitioner has pleaded that 33 kV system of the HPSEBL through which power is being evacuated should be treated at par with the transmission line as such arrangements have been made as an alternative to the transmission line. In this connection, we observe that the said 33 kV system cannot be treated as transmission line particular keeping in view the fact that such arrangement was allowed only as an interim arrangement and the Petitioner has agreed that no deemed generation benefit will be applicable for loss of generation to them for whatsoever reasons. We feel that in case the Petitioner wanted to safeguard its risks against any such loss of generation due to outages in the system, it should have incorporated suitable provisions in the said PTSA itself which could have enabled it to claim such compensation. In fact, to the contrary, the Petitioner Company has specifically agreed that no deemed generation shall be applicable.

In view of the above discussions, we decide that the Respondent No. 2 is not liable to compensate the Petitioner Company for the Imbalance / DSM charges payable by the Petitioner Company for any shortfall in generation due to the constraints/breakdowns in the system of the HPSEBL. We would, however; also like to clarify here that even though the Respondent No. 2 is not held liable to compensate the Petitioner for the loss of a generation as it (Respondent no. 2) can not undermine the importance of the efficient operation of the system. In fact, the

outages in the system cause losses to Respondent No. 2 also in relation to the drawl of power from the other SHPs from which he is purchasing power. As such we further direct the HPSEBL to look into the reasons for frequent interruptions in their system and take necessary steps as may be considered feasible for system improvement.

19.4 Issue No. IV

Whether there is a discriminatory treatment in charging Imbalance / DSM charges to the Petitioner vis-à-vis other SHPs located in the area in which the Petitioner's plant is located?

The Petitioner has alleged that Respondent No.2, is not imposing the Imbalance /DSM Charges upon other generators, who are supplying power to the Respondent No. 2 (e.g. the PPA with M/S Prodigy Hydro Power (P) Limited). It has been alleged that there is the discriminatory treatment between generating companies, who are equally subject to Imbalance /DSM Regulations and thus Respondent No. 2, is not protecting other generators who are selling power on Inter-State basis and are deviating from the schedule for the same Grid conditions.

Per contra, the Respondent No. 2, has submitted that the Petitioner is using the system and earning money from its buyers outside the State under STOA and the over-drawl is subject to DSM regulations. The other generators are selling power to the Respondent No.2 under the Power Purchase Agreement. It has been mentioned that in their case since the Discom purchases power, the deemed generation claim is to be dealt with under executed PPA between the parties.

We observe that in case of the SHPs selling power to the Discom, the power, is sold at the interconnection point and the responsibility of drawl of power beyond the interconnection point vests with the Discom. The scheduling of generation in case of such plants is done as a part of the overall schedule of the Discom and as such, there is no need for separate plant-wise scheduling in such cases. The incidence of Imbalance or DSM charges in relation to such plants is absorbed by the HPSEBL in its capacity of being a purchaser of power from such plants. In the present case, the Petitioner is only a Short Term Open Access customer using the system of the Respondent No. 2 for wheeling of power for sale of its saleable energy generated, at its station to outside the State. Hence, it is liable to comply with the STOA and the DSM Regulations as amended from time to time. As such the contention that there is discriminatory treatment in levying of Imbalance/DSM charges is not based on facts.

We also observe that even in a case of SHPs who sell the power to the HPSEBL under the PPA but inject the power under the interim arrangement, no benefit of the deemed generation is given till the interconnection under the regular arrangement. Even otherwise, in the case of SHPs to whom the benefit of deemed generation is available under the PPA, such benefit is allowed only beyond certain limits.

In view of the above, we observe that the submissions made by the Petitioner in this regard, are not based on facts and do not merit any further consideration.

19.5 Issue No. V

Whether the liability for payment of the Imbalance Charges/DSM charges can be waived off on a fiscal year basis w.e.f. COD of the project?

The Petitioner has pleaded that the DSM as well as Imbalance charges are liable to be waived off to the extent of the amount arising out of the reasons not attributable to it.

We observe that the relevant regulations do not envisage any waiver of the dues which have accrued thereunder. The Discom as well as the HPSLDC has also empathetically contested the proposal given by the Petitioner. Moreover, just for argument sake even if the said suggestion were to be considered, the same would obviously start a chain reaction as every entity will have one or other constraint for deviating from the schedule. As such, this will not only upset the whole mechanism but can also have an adverse impact on the real-time operation of the grid. In fact, this may amount to penalising the State entity which might have not only maintained the grid discipline meticulously but might have also helped the system in mitigating the constraint.

In view of the above, we do not find any merit in their suggestion for a waiver of recovery of the dues.

19.6 Issue No. VI

Whether the Petitioner can be allowed to adjust the Imbalance /DSM Charges due to the non-availability of the system of the HPSEBL against the wheeling charges paid/ payable by the Petitioner to the Respondent No. 2 i.e. the HPSEBL on fiscal year basis effective from the COD of the Project?

As discussed in para 19.1 of this Order, the Imbalance / DSM charges are recovered to compensate the Entity which might have helped the system in the event of a shortfall in injection by another entity by way of providing electricity for meeting the commitments of such generators on real-time basis even in the situation of reduced generation by the generator. The wheeling charges recoverable by the Discom are legitimate charges under the regulations and cannot be denied to him. As such, the suggestion for adjustment of the dues against the wheeling charges does not merit consideration and we decline to accept the same.

20. Conclusions

In view of the foregoing discussions and perusal of the detailed submissions made by the parties; -

(i) we decline to accept the requests made by the Petitioner for quashing the demand of the Imbalance charges / DSM charges for the deviations caused due to the constraints in the system of the HPSEBL or for their waiver or adjustment thereof against the wheeling charges payable by it to the Discom;

(ii) we also decline to accept the plea made by the Petitioner that the HPERC DSM regulations are not applicable to him and hold that the various charges as per the said DSM regulations are payable by the Petitioner also;

(iii) we also direct the Petitioner to clear the outstanding dues on account of the Imbalance charges as well as the DSM charges, along with the interest/surcharge for Late Payment at the applicable rates, within 30 days of the issue of this order failing which the HPSLDC may take the necessary action as per the applicable provisions of the regulations;

(iv) in case of any discrepancies, on account of the total quantum of scheduled injection considered in the weekly bill (24.09.2018 to 30.09.2018) mentioned in para 19.1, the Petitioner shall be at liberty to take up the matter for necessary rectification of this bill with the HPSLDC and the HPSEBL, along with complete supporting details within 15 days from the date of issue of this order. In case of revision of said bill by the competent authority based on such submissions made by the Petitioner, the differential amount, if any, will be refunded/recovered along with surcharge/interest up to the date of refund/payment. In case such discrepancies in the said weekly bill are taken up by the Petitioner, the same shall be decided by the HPSEBL/HPSLDC within 12 days. The Petitioner shall however not be entitled to withhold any amount, or the Late Payment Surcharge/Interest thereon beyond the period of 30 days from the date of issue of this Order with the plea that it has taken up the matter with the HPSLDC/HPSEBL for rectification of certain discrepancies in the bills;

(v) we also observe that the function regarding the billing and recovery of the Imbalance charges / DSM charges actually pertains to the HPSLDC under the regulations. Accordingly, even if such function was discharged, on behalf of the HPSLDC, by the HPSEBL for a certain period, the matter regarding reconciliation/rectification of such bills and the recovery of such dues should actually be taken up by the HPSLDC. We, therefore, direct the HPSLDC to pursue the recovery of the outstanding dues as well as the interest for Late Payment with the Petitioner in accordance with the provisions of the regulations;

(vi) we also direct the Petitioner as well as the HPSEBL and the HPSLDC to take steps for improving the communication arrangements/ operating procedures to avoid delays related with real time operations/revisions etc.;

(vii) we further direct the HPSEBL to look into the reasons for frequent interruptions in their system and take necessary steps as may be considered feasible for system improvement; and

(viii) we also observe the need for the interim arrangements normally arises in case of non-implementation of the permanent evacuation system envisaged for the project. In this case, the evacuation under the permanent arrangement is to be done through the ongoing 33/132 kV at Barshaini which has been stated to be scheduled for commissioning for December, 2020. We direct the HPPTCL to ensure the timely commissioning of the said Sub-Station and the connecting lines within the scheduled date.

With the above observations and directions, the petition is disposed of and the Interim Order's dated 29.06.2017 staying the payment of 2/3rd of the billed amount of U.I**.** charges are vacated.

--Sd/-
(Bhanu Pratap Singh)
Member

--Sd/-
(S.K.B.S. Negi)
Chairman