

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

Petition No: 74 of 2023
Date of Institution: 21.07.2023
Arguments Heard on: 29.11.2023
Decided on: 10.01.2024

CORAM

Devendra Kumar Sharma
CHAIRMAN

Yashwant Singh Chogal
MEMBER (Law)

Shashi Kant Joshi
MEMBER

In the matter of:-

M/s IA Hydro Energy Pvt. Ltd., through
Sh. Jitender Kumar (Authorised Signatory),
D-17, Sector-1, Lane-1, New Shimla,
Shimla, HP-171009.

.....**Petitioner**

Versus

1. The HP State Electricity Board Limited through its,
Chief Engineer (Comm.),
Vidyut Bhawan, Shimla, HP-171004.
2. The HP State Load Dispatch Centre through its,
Chief Engineer (SLDC),
Totu, Shimla, HP-171005.

.....**Respondents**

**Petition under Section 86 (1) (f) of the Electricity Act, 2003 in the matter of
refund of excess wheeling charges.**

Present:

Sh. Raunak Jain, Ld. Counsel for the Petitioner.
Sh. Kamlesh Saklani, Authorised Representative for Respondent
No. 1.
Sh. Surinder Saklani, Ld. Counsel for Respondent No. 2.

ORDER

This Petition has been filed by M/s IA Hydro Energy Private Limited (the Petitioner for short) under Section 86 (1) (f) of the Electricity Act, 2003 (Act for short), for refund of excess wheeling charges.

2. The Petitioner owns and operates 36 MW (3x12 MW) Chanju-I Hydro Electric Project (Project for short) located on Chanju Nallah , a tributary of river Ravi, Distt. Chamba, H.P. (Project for short). In Order to evacuate the power from the Project, the Petitioner has erected 6 km long 132 kV, Double Circuit transmission line from the Project to LILO point of 132 kV, Kurthala-Bathri D/C transmission line of the Himachal Pradesh State Electricity Board Limited (Respondent No. 1/HPSEBL for short) at Nakrod. Further, the 132 kV single circuit Bathri-Jassure line is linked to the 132/220 kV Sub-station of STU at Jassure.

3. As per the Petitioner, the Commission determined single wheeling charges for 66 kV and above voltage levels i.e. same wheeling charges for all open access customers connected at 66 kV and above for FY 2020 (01.07.2019 to 31.05.2020) vide Order dated 29.06.2019 in Petition No. 28/2019 (hereinafter to be referred as MYT

Order). Aggrieved by the determination of a single wheeling charges for 66 kV and above voltage levels, the aforesaid Order was challenged by M/s Malana Power Company Limited (MPCL for short) in Appeal No. 104 of 2020 before the Hon'ble Appellate Tribunal for Electricity, New Delhi (APTEL for short) and the Hon'ble APTEL vide judgment dated 18.08.2022 (Annexure P-2), allowing the appeal has set aside the MYT Order dated 29.06.2019 to the extent of its applicability for MPCL in respect of wheeling charges and remitted the matter to the Commission for determination of wheeling charges voltage level wise and for a fresh determination of separate wheeling charge for voltage level 66 kV and above. Paras 21, 22, 31, 33, 40, 41 and 42 of the judgment dated 18.08.2022 of the Hon'ble APTEL have been reproduced in the Petition as under:-

"21. The Appellant submitted that the wheeling charges determined by the Impugned Order are still erroneous being contrary to the Regulations as well as other Orders issued by HPERC, the Regulations issued by State Commission prescribe for voltage wise determination of wheeling charges and losses and the Impugned Order has not determined the wheeling charges separately for voltage level of 66 kV and above, all voltage levels of 66 kV and above have been clubbed together and a single wheeling charge has been determined.

22. Therefore, by the captioned Appeal, the only issue emerging out is whether the State Commission is right in determining the common wheeling charge for voltage levels of 66kV and above and distribution losses clubbed for voltage level of 132kV and 220 kV. If the answer to above, is in affirmative, the Appeal stands devoid of merit.

31. *At this stage, we are adjudicating only on whether the State Commission is bound and shall determine the wheeling charges and losses voltage wise.*

33. *It is clear from the above that the State Commission shall determine the wheeling charges and losses on voltage wise basis, against the petition filed by the distribution licensee. The State Commission is bound by its own Regulations and therefore, shall determine the wheeling charges and the losses voltage wise, ensuring compliance from the distribution licensee for furnishing all relevant information and data.*

40. *Accordingly, the State Commission is bound to determine wheeling charges separately for each voltage level and in case of non-furnishing of information and data by the distribution licensee, should ensure compliance by the licensee, HPSEBL in the instant case.*

41. *For the foregoing reasons as stated above, the captioned Appeal No. 104 of 2020 is allowed, the Impugned Order dated 29.06.2019 ("Impugned Order") passed by Himachal Pradesh Electricity Regulatory Commission (hereinafter referred to as the "HPERC" or "State Commission") in Tariff Petition No.28 of 2019 for the Control Period 2019-20 to 2023-24 is hereby set aside to the extent of its applicability for the Appellant in respect of wheeling charges.*

42. *We remit the matter, involving the issue of determination of wheeling charges voltage wise, to the State Commission for a fresh decision for determining separate wheeling charges for voltage levels 66 kV and above."*

4. It is averred that in compliance of judgment dated 18.08.2022 of the Hon'ble APTEL, the Commission vide Order dated 28.11.2022 (Annexure P-3) has determined the wheeling charges for 66 kV, 132 kV and 220 kV voltage level separately. Paras 20 to 25 of the Order of the Commission have been reproduced in the Petition as under:

"20. Based upon the above, the wheeling charges for EHT category of the Consumers as determined by the Commission in tariff Order 29th June, 2019 are revised as under:-

Approved Wheeling Charges for EHT Open Access for FY20 (01-07-2019 to 31-05-2020)

S.No	Description	EHT (220 kV)	EHT (132 kV)	EHT (66 kV)
1	Total Wheeling ARR (Rs. Cr.)	1627.77		
2	Cost apportioned (Rs. Cr.)	92.92	186.85	78.34
3	Estimated Load (MW)	217	531	233
4	Estimated Energy (MUs)	1,086	2,629	1,168
5	Wheeling Charges for Long-term Open Access/ Medium term Open Access Customers (Rs. per MW per month)	27,386	87,024	1,18,410
6	Wheeling Charges for Short-term Open Access Customers (Paisa per unit)	6	21	28

21. The Commission is aware that as a consequence of adoption of the energy estimates based on the actual sales, the energy estimates for other voltage levels (33 kV and below) may also undergo marginal changes. However, since the difference may be only marginal and the matter presently under consideration of the Commission relates to determination of the wheeling charges for 66 kV, 132 kV and 220 kV levels, the rates of the wheeling charges for the voltages lower than 66 kV are not being revisited in this Order.

Approved Wheeling Charges for EHT Open Access for FY21 (01-06-2020 to 31-05-2021)

S. No.	Description	EHT (220 kV)	EHT (132 kV)	EHT (66 kV)
1	Total Wheeling ARR (Rs. Cr.)	1739.01		
2	Cost apportioned (Rs. Cr.)	87.08	199.88	78.04
3	Estimated Load (MW)	196	503	220
4	Estimated Energy (MUs)	980	2,483	1,103
5	Wheeling Charges for Long-term Open Access/ Medium term Open Access Customers (Rs. per MW per month)	26,446	91,830	1,23,640
6	Wheeling Charges for Short-term Open Access Customers (Paisa per unit)	6	22	29

22. The Hon'ble APTEL in its Order dated 18.08.2022 has set aside the Order dated 29.06.2019 of this Commission to the extent of its applicability

to the appellant i.e. Malana Power Company in respect of the wheeling charges. The Commission vide Tariff Order dated 29.06.2019 has determined the tariff for the period commencing from 1st July, 2019 till determination of the new tariff, which was determined vide Order dated 06.06.2020. This Commission has subsequently determined the wheeling charges of HPSEBL vide its Tariff Orders dated 31.05.2021 and 29.03.2022 as well for the respective years. But, these Orders of the Commission have not been challenged by the MPCL. The tariff Orders issued by the Commission after Tariff Order 29.06.2019 also did not have the voltage wise separate wheeling tariff for EHT open access of 66 kV and above. However, seeing the spirit of the above mentioned Order dated 18th August, 2022 of the Hon'ble APTEL and as natural corollary of aforesaid revision, the Commission suo-moto revises on above lines, the wheeling charges determined vide the Tariff Order issued after 29-06-2019 i.e. the Tariff Orders made effective from 01-06-2020, 01-06-2021 and 01-04-2022. The wheeling charges for the respective periods for the EHT categories shall be as under:-

Approved Wheeling Charges for EHT Open Access for FY22 (01-06-2021 to 31-03-2022)

S.No.	Description	EHT (220 kV)	EHT (132 kV)	EHT (66 kV)
1	Total Wheeling ARR (Rs. Cr.)	1834.97		
2	Cost apportioned (Rs. Cr.)	81.31	177.62	71.07
3	Estimated Load (MW)	212	565	251
4	Estimated Energy (MUs)	1,061	2,807	1,263
5	Wheeling Charges for Long-term Open Access/ Medium term Open Access Customers (Rs. per MW per month)	23,263	78,068	1,05,792
6	Wheeling Charges for Short-term Open Access Customers (Paisa per unit)	5	18	25

Approved Wheeling Charges for EHT Open Access for FY23

S.No.	Description	EHT (220 KV)	EHT (132 KV)	EHT (66 KV)
1	Total Wheeling ARR (Rs. Cr.)	1974.19		
2	Cost apportioned (Rs. Cr.)	82.22	179.66	74.12
3	Estimated Load (MW)	216	548	272
4	Estimated Energy (MUs)	1,082	2,722	1,364
5	Wheeling Charges for Long-term Open Access/ Medium term Open Access Customers (Rs. per MW per month)	22,875	76,741	1,04,426
6	Wheeling Charges for Short-term Open Access Customers (Paisa per unit)	5	18	25

23. The Commission also refers to Para 16.3.1 of the Tariff Order dated 29th March, 2022 which refers to the “wheeling charges for EHV category. Since the EHT category has now been further segregated to the three voltage levels (66 kV, 132 kV and 220 kV), the aforesaid words shall be substituted to read “wheeling charges for the 66 kV category”. However, in case, where a renewable energy project is connected directly to a Substation with higher voltage level (i.e. 132 kV and 220 kV), the wheeling charges for such higher voltage (132 kV or 220 kV) as the case may be, shall be applicable.

24. This Commission after receipt of the Order of the Hon’ble APTEL had inadvertently treated the Petition as Suo-Moto whereas the original number should have been continued/ mentioned. Hence, the Suo-Moto Petition No.54/2022 is deemed to be disposed off with this Order.

25. Let a copy of this Order be placed immediately before the Order dated 29.06.2019 in Petition No. 28 of 2019, as well as before, the aforesaid Orders dated 06-06-2020, 31-05-2021 and 29-03-2022 for ready reference.”

5. As per the Petitioner, the Himachal Pradesh State Load Dispatch Centre (HPSLDC/ Respondent No. 2 for short) vide letter dated 27.12.2022 (Annexure P-4) informed M/s India Energy Exchange Limited (electricity trading platform) regarding the decision of the Commission dated 28.11.2022 in Petition No. 28/2019 regarding the approved wheeling charges for short term open access customers for FY 2022-23.

6. As per the Petitioner, it invited the attention of the Respondent No. 2 vide letter dated 12.01.2023 (Annexure P-5) to the judgment dated 18.08.2022 in Appeal No. 104 of 2020 and the Order dated 28.11.2022 in Petition No. 28/2019 passed by the Commission regarding the approval of revised wheeling charges for the short term open access Customers for the period FY 2019-20 to FY2022-23 that consequent upon the Commission's Order dated 28.11.2022 revising the wheeling charges, the Petitioner has paid an excess amount of Rs. 2,14,67,593/- for the period from 01.07.2019 to 04.12.2022 which is required to be refunded to the Petitioner.

7. It is averred that the Respondent No. 2 HPSLDC, vide letter dated 03.03.2023 (Annexure P-6) forwarded letter dated 12.01.2023 of the Petitioner to the Executive Director (Tariff) of the HP Electricity

Regulatory Commission for clarification on the applicability of the Order dated 28.11.2022 passed by the Commission for all Intra-state Open Access Generators so that the Respondent No. 2/ HPSLDC may issue the wheeling energy bills accordingly. However, no favorable response was received from the Respondent No. 2 constraining it to send e-mails dated 27.03.2023 and 29.04.2023 (Annexure P-7 Colly), reminding the Respondent No. 2 to comply with the Order dated 28.11.2022 passed by the Commission and to refund the amount of Rs. 2,14,67,593/-. Still, no response was received constraining the Petitioner to file the present Petition.

8. As per, the Petitioner, the issues which arises for consideration are:

- (i) Whether the Commission vide its Order dated 28.11.2022 in Petition No. 29/2019 has revised the wheeling charges for EHT category of the Consumers for FY 2020 till FY 2023 from what was determined earlier by the Commission vide its tariff Orders dated 29.06.2019, 06.06.2020, 31.05.2021 and 29.03.2022?
- (ii) Whether the Petitioner is entitled to refund of Rs. 2,14,67,593/- for the period of 01.07.2019 to 04.12.2022

(being the excess wheeling charges paid) as a natural consequence to the Order dated 28.11.2022 in Petition No. 29/2019 passed by the Commission, with interest?

9. As per the Petitioner, the Hon'ble APTEL in Judgment dated 18.08.2022 has clearly held that the Commission is bound to issue wheeling charges separately for each voltage level and besides settling aside the Order dated 29.06.2019 to the extent of its applicability for MPCL in respect of the wheeling charges, the APTEL in Para 42 had also remitted the matter involving the issue of determination of wheeling charges voltage wise and for a fresh determination of separate wheeling charges for voltage levels 66 kV and above. Not only this, the Commission in Para 20 of Order dated 28.11.2022 itself specified that wheeling charges for EHT category of the Consumers, as determined earlier by the Commission vide tariff Order dated 29.06.2019, are 'revised' and has specified the approved wheeling charges for EHT Open Access customers for FY 2020 (01.07.2019 to 31.05.2020). Not only this, in Para 21 of the said Order, the Commission has accepted that the matter under consideration relates to determination of the wheeling charges of 66 kV, 132 kV and 220 kV levels. Further, in Para 22 of the Order dated

28.11.2022, the Commission, has specified the approved wheeling charges for EHT Open Access Customers including 132 kV voltage levels and, therefore, the wheeling charges could be levied by the Respondents only in accordance with the Order dated 28.11.2022 for 132 kV voltage levels.

10. It is further averred that the Commission in Para 25 of Order dated 28.11.2022 has ordered that the Order be placed immediately before the Order dated 29.06.2019 in Petition No. 28/2019 as well as before Orders dated 06.06.2020, 31.05.2021 and 29.03.2022 for ready reference which are generic tariff Orders and apply to all the stakeholders. Thus, seeing the spirit of judgment dated 18.08.2022 of the Hon'ble APTEL, and as a natural corollary of aforesaid revision by the Commission, the wheeling charges are required to be levied in terms of Order dated 28.11.2022 for FY 2019-20 to FY 2022-23.

11. It is also averred that the Respondents have recovered an excess amount of Rs. 2,14,67,593/- for the period from 01.07.2019 to 04.12.2022 towards wheeling charges which are required to be refunded. Further, the Petitioner is also entitled to be compensated for the deprivation of such money by way of interest and in this regard has relied upon the following judgments :-

- (i) North Delhi Power Ltd. vs. DERC, APL No. 153 of 2009,
- (ii) Tata Power Co. Ltd. vs. MERC, APL No. 173 of 2009,
- (iii) Reliance Infrastructure Ltd. vs. MERC, RP No. 13 of 2012,
- (iv) Tata Power Co. Ltd. vs. MERC, APL No. 104, 105 and 106 of 2012.

12. The Petition has been resisted and contested by the Respondents by filing separate replies.

13. The Respondent No. 1 in its reply has averred, inter-alia, that the Petition is neither competent nor maintainable and that the same is barred by time and that the Petitioner has not approached the Commission with clean hands and that the Petition is not sustainable as per the mandate of law in as much as that there is no provision in the Central Electricity Regulatory Commission (Open Access in Interstate Transmission) Regulations, 2008 (CERC Regulations, 2008 for short) as amended for the revision of the transmission charges on retrospective basis. Further after the Order dated 28.11.2022 in Petition No. 28 of 2019 passed by the Commission regarding approval of Aggregate Revenue Requirement (ARR) for the FY 20 and the Multi Year Tariff of the 4th MYT Order for control period (FY

20-24) under Sections 62, 64, 86 of the Electricity Act 2003, the replying respondent is recovering the wheeling charges, as per voltage wise as ordered by the Commission. However, in so far as the revised wheeling charges from the 01.07.2019 to 04.12.2022, as claimed by the Petitioner, are concerned, the same are not available retrospectively as per proviso 4 of Regulation 16 of the CERC Regulations, 2008. Reliance has been placed on the Judgment of the Hon'ble APTEL in Appeal No. 3 of 2014 titled as Shree Cement Limited versus Rajasthan Electricity Regulatory Commission and another decided on 1st July 2014, whereby the retrospective revision of transmission/wheeling charges has been declined. Paras 27 of the Judgment of Hon'ble APTEL has been reproduced in the reply as under:-

"27 summary of our findings:

27.1 the learned state commission has not committed any illegality while passing the impugned Order and holding that tariff Order cannot be reviewed or modified at this stage and Petition under section 86 (1) (f) of the Electricity Act, 2003 has no force and the state commission has rightly disallowed the adjustment of the extra transmission charges paid by the appellant-Petitioner to the Respondent No. 2 distribution licensee, pertaining to the inter-state sale of power through bilateral contracts and through collective transaction in power exchange from its CPP on short term open access basis. The learned state commission has rightly refused

to adjust the transmission charges for short term open access transactions from retrospective date, despite the fact that the said charges were provisional.

27.2 the CERC (Open Access in Inter-state Transmission) Regulations, 2008 amended in 2009, particularly, Regulation 16 (3), clearly envisage that short term access charges shall not be subject to retrospective adjustment and CERC Regulations do not envisage any such restriction in respect of long terms open access transaction. The short terms open access user also include power exchange users where transactions in the nature of stock exchange, which gets completed on a daily basis and cannot be subsequently opened.”

14. It is averred that the Petitioner is a short term open access Consumer and, therefore, the adjustment of the transmission charges cannot be done on retrospective basis.

15. On merits, the contents of the Petition have been denied that the Petitioner is entitled for the refund of the revised transmission/wheeling charges as per Order dated 28.11.2022 of the Commission in the case of MPCL and submitted that the Regulations governing the field do not provide for such revision. It is also averred that the Hon'ble APTEL has not passed any Order for the revision of transmission charges for the retrospective period as it essentially means the amendment of the tariff Order which has been passed by the Commission under Section 62 of the Electricity Act, 2003. However, after the Order dated 28.11.2022, the replying Respondent

is levying the transmission charges voltage wise and the amount as figured out in the Petition is wrong and incorrect. As per the replying Respondent, the Petition is meritless and may be dismissed.

16. The Respondent No. 2, in its separate reply has raised preliminary submissions, inter-alia, that the Petition is neither competent nor maintainable in as much as that the Petitioner has failed to pin point any illegality and that the judgment against which the Petitioner is seeking relief has been passed in a particular case that too on remand by the Hon'ble APTEL and that the Petitioner cannot seek the parity with the judgment for the reason that the Judgment is passed upon a direction of the higher authority, as such, the Petition is liable to be dismissed.

17. On merits, the Replying Respondent has denied that the Petition is within time and submitted that the same is beyond time and cannot be entertained without an application for condonation for delay.

18. It is also averred that the Hon'ble APTEL had passed the Judgment only qua the MPCL and that the present Petitioner had never laid challenge to the Order dated 29.06.2019 passed by the

Commission in Petition No. 28/2019, therefore, the Petitioner cannot seek parity with MPCL. It is also averred that the Petition is vague and vexatious as Petitioner is trying to make out a case on the strength of the order passed by the Commission on the direction of Hon'ble APTEL, in the case of MPCL and nothing can be granted to the Petitioner which is not expressly provided under the law.

19. Also averred that the revised wheeling charges cannot be made applicable to the Petitioner as the same were only in respect of MPCL upon the directions of Hon'ble APTEL and thus, the Petitioner is not entitled for the refund of Rs. 2,14,67,593/- for the period from 01.07.2019 to 04.12.2022, as a natural consequence to Order dated 28.11.2022 in Petition No. 28 of 2019, as claimed by the Petitioner. Also averred that the Judgment rendered by the Hon'ble APTEL on 18.08.2022 in Appeal No.104/2020 against the Order of the Commission dated 29.06.2019 in Petition No. 28 of 2019 was in personam and cannot be relied upon in other cases. Also that the Judgment of the Hon'ble APTEL cannot be read in piecemeal, as claimed by the Petitioner, and if the Judgment of the Hon'ble APTEL is read as a whole, the same is only with respect to MPCL and not for

others and accordingly, the claim as preferred by the Petitioner is not tenable.

20. In separate rejoinders, the Petitioner has denied the contents of replies and reiterated the averments made in the Petition.

Submissions of the Learned Counsel for the parties

21. We have heard Sh. Raunak Jain, Ld. Counsel for the Petitioner, Sh. Kamlesh Saklani, Authorised Representative for the Respondent No. 1 and Sh. Surinder Saklani, Ld. Counsel for the Respondent No. 2.

22. Sh. Raunak Jain, Ld. Counsel for the Petitioner has submitted that the Commission in compliance of the Judgment of the Hon'ble APTEL dated 18.08.2022 in Appeal No. 104 of 2020, while passing the consequential Order dated 28.11.2022 in Petition No. 28/2019, has determined the wheeling charges for all EHT category of Consumers for FY 2022-23 till FY 2023. According to him, the Petitioner being EHT Consumer connected at 132 kV voltage level is covered under the Judgment dated 18.08.2022 of Hon'ble APTEL and Order dated 28.11.2022 of the Commission and entitled for the refund of amount of Rs. 2,14,67,593/-, recovered in excess of the

approved wheeling charges for the period w.e.f. 01.07.2019 to 04.12.2022 alongwith carrying cost/ interest @ 1.25% per month w.e.f. the date of the recovery of the excess amount from the Petitioner. According to him, the Petition is within time having been filed on 21.07.2023 i.e. within a span of 3 years from 28.11.2022. He has further submitted that the transmission charges and wheeling charges are two separate charges, as the transmission charges are paid using transmission infrastructure whereas, the wheeling charges are paid to the distribution company for using distribution infrastructure. According to him, the CERC Regulations, 2008 have no application in the present case and that the Commission vide Order dated 28.11.2022 has revised the wheeling charges and, therefore, the charges could be levied by the Respondent only in accordance with Order dated 28.11.2022. He has also contended that consequent upon the revision of Wheeling charges, the Commission in Para 25 of the Order dated 28.11.2022 in Petition No. 28/2019, has ordered to place the said Order immediately before the MYT Order dated 29.06.2019 in Petition No. 28 of 2019 as well as Orders dated 06.06.2020, 31.05.2021 and 29.03.2022 (Petitions No. 05/2020, 11/2021 and 02/2022 respectively) and since, the wheeling charges

determined vide Order dated 28.11.2022 are effective w.e.f 01.06.2020, 01.06.2021 and 01.04.2022, the Petitioner is entitled for refund of the excess recovered amount of what is determined by the Commission. Sh. Jain has relied on the law laid down by the Hon'ble APTEL in Gujrat Urja Vikas Nigam Ltd. Vs. EMCO Limited & another decided on 20.11.2014 in Appeal No. 252/2013 that the Order in an application under Section 86 (1) (f) of the Electricity Act, 2003 is applicable to all the Project Developers.

23. Sh. Kamlesh Saklani, Authorised Representative for the Respondent No. 1, on the other hand, has submitted that neither the Petition is maintainable nor the same is within time and that the Petitioner has not approached the Commission with clean hands. According to him, the Petition is not sustainable as according to the Regulation 16 of the CERC Regulations, 2008, there is no provision of adjustment of transmission/wheeling charges retrospectively. Further, the Hon'ble APTEL has set aside the MYT Order dated 29.06.2019 only to the extent of its applicability to MPCL and since the MYT Order dated 29.06.2019 was not assailed by the Petitioner, the Petitioner is not entitled for the charges as claimed. He has relied upon the law laid down by the Hon'ble APTEL in Shree Cement

Limited versus Rajasthan Electricity Regulatory Commission and another (Appeal No. 03/2014 decided on 01.07.2014). As per Sh. Kamlesh Saklani, the Petitioner is not entitled for the refund of charges as claimed.

24. Sh. Surinder Saklani, Ld. Counsel for the Respondent No. 2 has also submitted that the Petition is not maintainable as the Judgment against which the Petitioner has sought relief has been passed in a particular case on remand by the Hon'ble APTEL and Petitioner cannot seek parity with the Judgment for the reason that the Judgment has been passed upon the direction of the Hon'ble APTEL in a specific case of MPCL and that too on Appeal. According to him, the Petition is not within time and cannot be entertained as the initial Order was passed on 29.06.2019 in Petition No. 28 of 2019 but the Petitioner never challenged the same and that the Hon'ble APTEL has allowed the appeal only to the extent of its applicability to MPCL and the Commission revised the charges accordingly, as directed, and, thus, the Petitioner cannot take advantage of the same, being a judgment in Personam. He has specifically submitted that Order dated 28.11.2022 with respect to MPCL cannot be construed as an uniform Order and in Order to seek the desired relief as claimed, the

Petitioner was required to challenge the Order dated 29.06.2019 before the Hon'ble APTEL, therefore, the Petitioner is not entitled for the refund as claimed.

POINTS FOR DETERMINATION

25. We have carefully gone through the submissions of the Petitioner and Respondents. We have also perused the record carefully. On the basis of submissions of the parties and the pleadings, the following points arise for determination in the present matter:-

Point No. 1

Whether the Petition is within time and maintainable?

Point No. 2

Whether the Petitioner is entitled for the refund of amount of Rs. 2,14,67,593 on the basis of Order dated 28.11.2022 passed in Petition No. 28/2019 as claimed?

Point No. 3 (Final Order)

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

Point No. 1: No

Point No. 2 : No

Point No. 3 : The Petition dismissed per operative part of the Order.

Reasons for findings

Point No. 1 and 2

27. Both the points being interlinked and interconnected are being taken up together for consideration.

28. Before advertng to the merits of the case, it is relevant to mention that the Petitioner is not selling the Power of its Project to the Distribution Licensee i.e. Respondent No. 1/HPSEBL for the utilization within the State of Himachal Pradesh. Rather, the Petitioner is selling the Power from its Project outside the State of Himachal Pradesh by utilizing the system/network of Distribution Licensee i.e. Respondent No. 1 as also the State Transmission utility. This Commission has framed the Himachal Pradesh Electricity Regulatory Commission (Grant of Connectivity Long Term and Medium Term Intra-state Open Access and Related Matters) Regulations, 2010 (hereinafter to be referred as HPERC, Long Term Open Access Regulations, 2010) and Himachal Pradesh Electricity Regulatory Commission (Short Term Open Access) Regulations, 2010 (hereinafter to be referred as HPERC, Short Term Open Access

Regulations, 2010) for transmission/ wheeling of electricity within the State. Petitioner has not signed any long term/ Medium term open access agreement with the Respondent No. 1. On the Contrary, the Petitioner is selling the Power of its Project outside the State in Short term power market by availing short term open Access by utilizing the system of Respondent No. 2, (Distribution Licensee) as also the network of STU for inter-state Power exchange transaction.

29. It is the case of the Petitioner that on the directions dated 18.08.2022 of the APTEL in Appeal No. 104 of 2020 whereby the MYT Order dated 29.06.2019 in Petition No. 28/2019 was set aside, the Commission has Suo-Moto revised the wheeling charges for short term open access customers for voltage levels 66 kV and above and the revised tariff is required to be charged from the Petitioner as the Commission has Ordered in Para 25 of the Order dated 28.11.2022 to place said Order immediately before Order dated 29.06.2019 in Petition No. 28/2019 as also the Orders dated 06.06.2020, 31.05.2021 and 29.03.2022 in Petitions No. 05/2020, 11/2021 and 02/2022 respectively for ready reference. According to the Petitioner, on the revision of charges by the Commission, the Petitioner

becomes ipso facto entitled for the revised charges and for the refund of Rs.2,14,67,593/- with interest @ 1.25% per month, paid in excess.

30. The entire thrust of the Petitioner, therefore, is that the Commission has Suo-Moto revised the wheeling charges for voltage levels 66 kV and above, and as a natural corollary of the same, the Petitioner becomes entitled for the revised tariff and refund of excess amount. This contention of the Petitioner is untenable as the Commission has not Suo-Moto revised the wheeling charges for open access customers and rather, revised the same, on the directions of Hon'ble APTEL vide Judgment dated 18.08.2022 in Appeal No. 104/2020, preferred by the MPCL against MYT Order dated 29.06.2019 in Petition No. 28/2019. In this regard, it is relevant to refer to Paras 41 and 42 of the Judgment dated 18.08.2022 of Hon'ble APTEL passed in Appeal No.104/2020, which are reproduced as under:-

"41. For the foregoing reasons as stated above, the captioned Appeal No. 104 of 2020 is allowed, the Impugned Order dated 29.06.2019 ("Impugned Order") passed by Himachal Pradesh Electricity Regulatory Commission (hereinafter referred to as the "HPERC" or "State Commission") in Tariff Petition No.28 of 2019 for the Control Period 2019-20 to 2023-24 is hereby set aside to the extent of its applicability for the Appellant in respect of wheeling charges.

42. We remit the matter, involving the issue of determination of wheeling charges voltage wise, to the State Commission for a fresh

decision for determining separate wheeling charges for voltage levels 66 kV and above.”

31. It is own case of the Petitioner that against determination of the single wheeling charges of voltage levels 66 kV and above, determined by the Commission vide MYT Order dated 29.06.2019 in Petition No. 28 of 2019, MPCL challenged the said Order in Appeal No. 104/2020 before the Hon'ble APTEL and the Hon'ble APTEL, allowing the appeal, has set aside the MYT Order dated 29.06.2019 to the extent of its applicability for the MPCL in respect of wheeling charges and remitted the matter back to the Commission for a fresh decision for determination of separate wheeling charges for voltage levels wise for 66 kV and above. The MYT Order dated 29.06.2019 of the Commission was not challenged by the Petitioner before the Hon'ble APTEL and accepting the order as correct, the charges were paid to the Respondents without any objection or protest. On the other hand, the MPCL, feeling aggrieved of the Order dated 29.06.2019 in Petition No. 28 of 2019, immediately challenged the Order qua its Project before the Hon'ble APTEL and the Hon'ble APTEL vide Judgment dated 18.08.2022 in Appeal No. 104 of 2020 was pleased to accept their appeal and remit the matter back to the

Commission for determination of separate wheeling charges to the extent of its applicability for the appellant i.e MPCL.

32. From the careful perusal of Judgment dated 18.08.2022 passed in Appeal No. 104/2020 by the Hon'ble APTEL, it is quite clear that the MYT Order dated 29.06.2019 in Petition No. 28 of 2019 had not been set aside as a whole and rather, the same was set aside only to the extent of its applicability to the MPCL, the Appellant, before Hon'ble APTEL. Though Sh. Raunak Jain, Ld. Counsel for the Petitioner submits that in Para 42 of the Judgment dated 18.08.2022 in Appeal No. 104/2020 passed by the Hon'ble APTEL, the matter involving determination of wheeling charges had been remitted back to the Commission for a fresh decision determining separate wheeling charges for voltage levels 66 kV and above and, therefore, the Petitioner is also entitled for the parity with that of MPCL but the submissions of Sh. Jain have no merits and are liable to be rejected for the reason that the Hon'ble APTEL in Para 41 of its Order had set aside the MYT Order dated 29.06.2019 in Petition No. 28 of 2019 of the Commission only to the extent of its applicability to the MPCL, and, thus, Para 42 of the Judgment of Hon'ble APTEL has to be read only in conjunction with Para 41, as mentioned above, and not in

isolation. Therefore, the Petitioner cannot claim any parity with the MPCL and on the basis of directions of the Hon'ble APTEL which were only to the extent of the MPCL. Hence, the Petitioner is not Ipso facto entitled for the revised wheeling charges as claimed.

33. As observed above, the Petitioner has not been able to show as to why the Petitioner was silent for such a long time and did not challenge the MYT Order dated 29.06.2019 before the Hon'ble APTEL. It is also none of the case of the Petitioner that it was not aware of the MYT Order dated 29.06.2019 passed by the Commission in Petition No. 28/2019. Had the Petitioner been aggrieved the MYT Order dated 29.06.2019, the Petitioner would have immediately challenged the same before Hon'ble APTEL. Thus, having not laid any challenge to the Order dated 29.06.2019 and no explanation having come forward from the Petitioner for not challenging the same, the Petitioner being fence sitter, cannot come forward at this belated stage after about a period of 4 years that it is entitled for the revised wheeling charges for voltage levels 66 kV and above, in respect of its project, in view the Judgment of the Hon'ble APTEL dated 18.08.2022 and Order of the Commission dated

28.11.2022 on appeal by the MPCL. The Petition, therefore, is hopelessly time barred.

34. Even the Petitioner cannot take any advantage of Para 22 of Order dated 28.11.2022 in Petition No. 28/2019 of placing the Order immediately before Order dated 29.06.2019 for the reasons that it was necessary to do so for the purpose of record so that, whenever, reference to MYT Order dated 29.06.2019 is made by the Commission or by the Hon'ble APTEL or any other authority, there is an information available that the MYT Order dated 29.06.2019 has been revised by the Commission as per the directions dated 18.08.2022 of the Hon'ble APTEL in appeal No. 104/2020 to the extent of its applicability to the MPCL. In this regard, it is relevant to refer to Para 22 of Order dated 28.11.2022 of the Commission, wherein the Commission has categorically observed that the Hon'ble APTEL has set aside the Order of 29.06.2019 passed by the Commission to the extent of its applicability to the MPCL in respect of the Wheeling charges. Therefore, the revised wheeling charges are applicable only to the extent of its applicability to the MPCL and the Petitioner can neither take any advantage of the Judgment of Hon'ble

APTEL nor claim any parity with the MPCL at this belated stage having not challenged the MYT Order dated 29.06.2019.

35. It is the case of the Petitioner that it is utilizing the system of Distribution Licensee i.e. Respondent No. 1 for transmission of electricity outside the State. In this regard, the Central Electricity Regulatory Commission has framed the CERC Regulations, 2008 in respect of open access in Inter-state transmission of the Power, as amended in 2009. The amended Regulation 16 whereof is reproduced as under:-

“16. Transmission Charges

- (1) *In case of bilateral and collective transactions, transmission charges for the energy approved at the regional periphery for transmission separately for each point of injection and for each point of drawal, shall be payable in accordance with the provisions of Central Electricity Regulatory Commission (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010 as amended from time to time.*
- (2) *The intra-State entities shall pay the transmission charges for use of the State network as fixed by the respective State Commission in addition to the charges specified under clause (1) of this regulation.*

Provided that where the State Commission has not determined the transmission charges for use of the state network in ₹./Mwh. The charges for use of respective State network shall be payable at the rate of ₹80/ MWh for the energy approved.

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

Provided also that the transmission charges payable for use of the State network shall be conveyed by State Load Despatch Centre to the concerned Regional Load Despatch Centre. These charges shall

be displayed by the concerned State Load Despatch Centre and Regional Load Despatch Centre on their web sites:

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

36. As observed above, the Petitioner is selling the power outside the State by using the short term access granted by the Respondent No. 1, Distribution Licensee for the use of its system. It is clear from the 4th proviso of Regulation 16, as mentioned above, that the transmission charges shall not be revised with retrospective effect. Since, the Petitioner is selling the Power outside the State on Short Term Open Access basis, the 4th Proviso of Regulation 16 of CERC Regulations, 2008 put and embargo for claiming the revised charges retrospectively. As observed above, the Petitioner is not a long term open access customer having not signed any such agreement with the Respondent No. 2. The MYT Order of the Commission in Petition No. 28 of 2019 has also not been assailed by the Petitioner, therefore, the 4th proviso of aforesaid Regulations 16 debars the Petitioner from claiming the charges retrospectively. Even, there is no provision in HPERC Short Term Open Access, Regulations, 2010 framed by this Commission for claiming the short term open access charges retrospectively.

37. Though much thrust has been laid by the Petitioner that transmission and wheeling charges are different as transmission charges pertain to the use of transmission infrastructure and wheeling charges are paid to the distribution company for using the distribution infrastructure and, therefore, the CERC Regulations, 2008 are not applicable to the Petitioner. The said contention is also not tenable for the reasons that though the transmission and wheeling charges are determined separately but the purpose of both wheeling and transmission of power is one and the same. The only difference is that the transmission charges are paid to the STU whereas the wheeling charges will go to distribution company/licensee. In the present case, it may be reiterated at the cost of repetition that the Petitioner is transmitting/wheeling the Power of its project outside the State by utilising the system of the Distribution Licensee i.e. Respondent No. 1/HPSEBL as also State transmission utility. Since, the purpose of both wheeling and transmission is the same i.e. transmission of power intra-state and inter-state, the submissions that wheeling and transmission are different are without any substance.

38. Significantly, the Hon'ble APTEL had the occasion to consider the applicability the CERC Regulations, 2008, as amended, in the

matter of Shree Cement Limited versus Rajasthan Electricity Regulatory Commission & Ors. Appeal No. 3 of 2014 decided on 01.07.2014 wherein it is held by the Hon'ble APTEL that the CERC Regulations 2008, as amended, clearly envisage that short term open access charges shall not be subjected to retrospective adjustment whereas there is no such restriction in the case of long term open access transmission charges. Para 27 of the aforesaid Judgment of the Hon'ble APTEL is being reproduced as under:-

“27.1 The learned State Commission has not committed any illegality while passing the impugned order and holding that tariff order cannot be reviewed or modified at this stage and petition under Section 86(1)(f) of the Electricity Act, 2003, has no force and the State Commission has rightly disallowed the adjustment of the extra transmission charges paid by the Appellant-petitioner to the Respondent No.2- distribution licensee, pertaining to the inter-state sale of power through bilateral contracts and through collective transactions in power exchange from its CPP on short term open access basis. The learned State Commission has rightly refused to adjust the transmission charges for short term open access transactions from retrospective date, despite the fact that the said charges were provisional.

27.2 The CERC (Open Access in Inter-State Transmission) Regulations, 2008, as amended in 2009, particularly, Regulation 16(3), clearly envisage that short term open excess charges shall not be subject to retrospective adjustment and CERC Regulations do not envisage any such restriction in respect of long term open access transactions. The short term open access users also include power exchange users where transaction is in the nature of stock exchange, which gets completed on a daily basis and cannot be subsequently opened.

27.3 The Respondent No.2/Distribution Licensee has rightly adjusted the transmission charges on 2.2.2012, paid for intra-state open access by

the Appellant. The Respondent No.2/Distribution Licensee has rightly not adjusted or refunded so called extra transmission charges for inter-state power exchange transactions.

27.4 The State Commission has rightly rejected or dismissed the Appellant's petition being Petition No. 329/2012, filed under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute and for direction to Respondent No.2/distribution licensee to pay excess amount charged.

27.5 The State Commission, vide its provisional order, dated 31.3.2011, had allowed the provisional tariff for FY 2011-12, in para 6, clearly mentioned that transmission tariff and SLDC charges shall be subject to adjustment when the same are finalized for FY 2011-12. The provisional tariff order had mentioned about the adjustment of transmission tariff and SLDC charges only and the provisional tariff order had not allowed adjustment in case of transmission charges for Short Term Open Access customers and transmission charges for power exchange transactions.

27.6 We observe that in Regulation 16(3) of the CERC (Open Access in Inter-State Transmission) Regulations, 2008 as amended in May, 2009, there is no proviso which specifies revision in case of finalization of tariff. Similarly, there is no exclusion in Regulation 16(3) thereof, which would permit revision in case of finalization of tariff. In view of absence of any such provision/exclusion, the Regulation 16(3) stops from revision with retrospective effect.

27.7 We further observe that the transmission charges in respect of State Network, used by the Appellant-petitioner, for interstate transmission of power under short term open access, cannot be revised after the determination of final tariff."

39. Since, the Hon'ble APTEL has clearly held that the Short Term Open Access Charges are not subject to retrospective revision and since the Petitioner has failed to challenge the MYT Order dated 29.06.2019 in Petition No. 28 of 2019 and the Hon'ble APTEL in Appeal No. 104/2020 vide Judgment dated 18.08.2022 has set aside

the MYT Order dated 29.06.2019, in Appeal, only to the extent of its applicability to MPCL, the law as laid by the Hon'ble APTEL in case of Shree Cement Ltd. V/s Rajasthan Electricity Regulatory Commission and another (Appeal No. 03 of 2014 decided on 01.07.2014) is clearly applicable to the facts of the present case. On the other hand, the law laid down by the Hon'ble APTEL in Gujrat Urja Vikas Nigam Ltd. Vs. EMCO Limited & another decided on 20.11.2014 in Appeal No. 252/2013, as relied upon by the Ld. Counsel for the Petitioner has no applicability to the facts of the present case.

40. Importantly, the Petitioner has filed the present Petition under Section 86 (1) (f) of the Electricity Act, 2003 for adjudication of dispute seeking direction to the respondents to comply with the Order dated 28.11.2022 in Petition No. 28/2019 and for refunding the excess amount of the wheeling charges. The Commission has determined the tariff in exercise of Powers under Section 62 of the Electricity Act, 2003. The Hon'ble APTEL had set aside the MYT Order dated 29.06.2019 only to the extent of its applicability to the MPCL. The initial MYT Order dated 29.06.2019 in Petition No. 28 of 2019 was never challenged by the Petitioner. Since, the MYT Order

dated 29.06.2019 in Petition No. 28/2019 had been passed in exercise of powers under Section 62 of the Electricity Act, 2003 and the CERC Regulations, 2008 do not provide for retrospective adjustment of short term open access charges, the Petition under Section 86 (1) (f) of the Electricity Act, 2003 is also not maintainable.

41. In view of the above, the Petitioner has not been able to substantiate that the Petition is within time or maintainable or that the Petitioner is entitled to for the refund of amount of Rs. 2,14,67,593 on the basis of Order dated 28.11.2022 passed in Petition No. 28/2019 as claimed. Both these issues are accordingly decided against the Petitioner.

Point No. 3: (Final Order)

42. In view of our above said discussion and findings, there are no merits in the Petition, which is accordingly dismissed. The miscellaneous applications, if any, are also disposed off.

The file after needful be consigned to records.

Announced
10.01.2024

-Sd- (Shashi Kant Joshi) Member	-Sd- (Yashwant Singh Chogal) Member (Law)	-Sd- (Devendra Kumar Sharma) Chairman
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