BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION SHIMLA

Petition No: **28 of 2025**
Date of Institution: 12.12.2024
Arguments Heard on: 01.07.2025
Decided on: **17.07.2025**

CORAM

Devendra Kumar Sharma
CHAIRMAN

Yashwant Singh Chogal
MEMBER (Law)

Shashi Kant Joshi
MEMBER

In the matter of:-

M/s Sandhya Hydo Power Projects Balargha Pvt Ltd,
H.No.24, Behind HPSEBL Bhunter,
Substation, Bhunter, Kullu HP-155125 **………Petitioner**

Versus

The HP State Electricity Board Limited,
Vidyut Bhawan,
Shimla, H.P.171004. ……….**Respondent No.1**

The HP State Load Dispatch Centre,
SLDC Complex,Totu Shimla-171011 ……….**Respondent No.2**

The HP Power Transmission Corporation Limited,
Himfed Bhawan, Below Old MLA's Quarters,
Tutikandi (Panjiri), Shimla, H.P.-171005. **……….Respondent No. 3**

Petition Under Sections 86(1)(c), 86(1)(e), 86(1)(f), 86(1)(i), read with Section 60 of Electricity Act, 2003 and Regulation 16 to 19 of the HPERC (Deviation Settlement Mechanism and Related Matters) Regulations, 2018 seeking setting aside of the Demand Notices for the period from 20.05.2019 to 30.06.2024 levying Deviation Settlement Mechanism charges on the Petitioner for

instances of deviation due to grid outage/failure not attributable to the Petitioner and for declaration that the provisions of HPERC (Deviation Settlement Mechanism and Related Matters) Regulations, 2018 and the DSM Charges thereunder are not applicable to the Petitioner.

Present:

Sh. Shakya Chaudhary and Ms. Asmita Narula, Ld. Counsel for the Petitioner.
Sh. Kamlesh Saklani, Authorized Representative for the Respondent No. 1.
Sh. Surinder Saklani, Ld. Counsel for the Respondent No.2.
Sh. Vikas Chauhan, Ld. Counsel for the Respondent No. 3.

ORDER

This Petition has been filed by M/s Sandhya Hydro Power Projects Balargha Pvt. Ltd. (the Petitioner for short) under Sections 86(1)(c), 86(1)(e), 86(1)(f), 86(1)(i), read with Section 60 of Electricity Act, 2003 (Act for short) and Regulation 16 to 19 of the HPERC (Deviation Settlement Mechanism and Related Matters) Regulations, 2018 (HPERC DSM Regulations for short) for setting aside the Demand Notices raised for the period w.e.f 20.05.2019 to 30.06.2024 levying Deviation Settlement Mechanism charges on the Petitioner for instances of deviation due to grid outage/failure not attributable to the Petitioner and that the provisions of HPERC (Deviation Settlement Mechanism and Related Matters) Regulations, 2018 and DSM charges thereunder are not applicable to the Petitioner.

FACTS

2. The case of the Petitioner is that a 5 MW project with 20% Continuous Over-Load (C.O.L.) was conceived to be setup at Barshaini, Tehsil and District Kullu, H.P. (Project for short) and an Implementation Agreement (IA) dated 16.12.2010 was signed with the Government of Himachal Pradesh (GoHP). The Techno Economic Clearance (TEC) was provided for the Project on 10.09.2010. The relevant clause thereof has been reproduced as under:-

> *"xiv) The IPP shall interface his project at the proposed 33/220 kV substation at Barsaini (to be constructed by HPPTCL) at 33 kV level for evacuation of power. The power shall have to be evacuated through joint evacuation arrangement to be planned by HPPTCL for that area. In case the proposed transmission system for the above area is not completed by the time of commissioning of the above project, the IPP shall have to provide alternative evacuation arrangement at his cost to the nearest substation of HBSEB Ltd. where further evacuation is feasible as per undertaking given by him"*

The IA and TEC are annexed at Annexure P-3 (COLLY).

3. Upon further investigation of the site, it was gathered that the capacity of the Project can be increased to 9 MW and accordingly, a revised TEC for 9 MW was sanctioned on 09.08.2012 but the evacuation system for the project remained the same i.e 33/132KV Sub-station of the HPPTCL planned at Barshaini by dedicated line (of

approximately 6 Km) from the Petitioner project to the HPPTCL Sub-station Barshaini. Accordingly, a revised IA for 9 MW Project plus 10% C.O.L. was executed on 07.11.2012. The revised TEC dated 09.08.2012 was also issued. The Copy of TEC dated 09.08.2012 and IA dated 07.11.2012 are annexed at Annexure-P4 (COLLY).

4. The 33/220 kV Sub-station at Barshaini (HPPTCL Sub-station for short) was scheduled to be commissioned by October 2023. However, pending Commissioning of the HPPTCL Sub-Station, the Petitioner was constrained to arrange interim connectivity/evacuation facility for the project through the distribution system of HPSEBL per decision taken in the 23rd meeting dated 15.10.2012 of STU Coordination Committee (Annexure-P5). In a meeting held on 03.11.2012 (Annexure-P-6) , between the Petitioner and the HPSEBL for finalizing the interim evacuation arrangement, the existing system of HPSEBL required strengthening at the cost to be borne by the Petitioner.

5. According to the Petitioner, due to non-commissioning of the Barshaini Sub-station in time, the Petitioner was constrained to incur heavy monetary burden of Rs. 3.00 Crores in converting single circuit line of the HPSEBL to double circuit line and strengthening the

existing evacuation infrastructure system by reconductoring and augmenting in order to effectively evacuate the power on interim basis which is also being utilized by the other generators. Due to the failure in timely commissioning of the HPPTCL Sub-station, the Petitioner was allowed short term open access (STOA) on the interim evacuation system against the request for medium term open access (MTOA).

6. The Respondent No. 3/ HPPTCL granted connectivity to the project to its 33/120 KV, Barshaini Sub-station on 25.03.2013 (Annexure-P-7) from the date of commissioning of the Barshaini Sub-station under Himachal Pradesh Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium Term Open Access in the Inter State Transmission and related matters) Regulations, 2010. Since, the permanent evacuation would not be ready by the Project's commissioning date, the Petitioner signed an agreement with the Respondent No.1/HPSEBL on 03.04.2013 for interim evacuation of power from the Project. Further, on 10.07.2013 the Petitioner also signed an Interim Connection and Transmission Agreement (ICTA) with the HPSEBL for power evacuation till the HPPTCL Sub-station is completed against which the Petitioner is

required to bear the operation & maintenance (O&M) cost for the transmission line and terminal way at Malana Sub-station as well as to pay transmission tariff and wheeling losses @ 6% and wheeling charges to the HPSEBL as determined by the Commission, from time to time, for the use of the distribution system of the Respondent No. 1. Copies of the Agreements dated 03.04.2013 and 10.07.2013 are annexed at Annexure P-8 (COLLY).

7. The Petitioner also signed Interim Power Transmission Service Agreement (IPTSA) on 06.12.2017 (Annexure-P10) with the HPSEBL for wheeling of power from its system to the LILO point at 33 kV TOSS feeder through 33 kV Sub-station at Malana to Bajaura (Associated transmission system of the MPCL) to the HPSEBL's 132 kV Sub-station at Bajaura and beyond upto the State periphery using the State network till the Permanent interconnection point/ HPPTCL Sub-station is completed by the HPPTCL.

8. According to the Petitioner, it was constrained to sign the IPTSA agreeing that it would not seek any deemed generation on account of outages, believing that the construction of the HPPTCLs, Sub-station would be completed within a reasonable time period. However, the Petitioner is not seeking the deemed generation for the

deviation of schedules caused due to grid failure but challenging the levy of DSM charges for such instances of deviation on account of non-availability of interim evacuation line to be maintained by the HPSEBL. Further, though the Petitioner may not be entitled to the deemed generation as an open access generator, yet the above clause cannot be used by the Respondents No. 1 and 2 to subject the Petitioner with the onerous consequences for deviation in generation caused due to the system failure of HPSEBL. Clauses 6.1 and 6.2 of IPTSA have been re-produced as under:-

> "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 interim basis and as such no deemed generation will be applicable for loss of generation to SHPPBPL for whatsoever reason(s)"

9. According to the Petitioner, the Project of the Petitioner achieved commercial operation on 22.01.2018 and supplying power under group captive mechanism through inter-state open access utilizing the interim evacuation system of the HPSEBL. The Petitioner has been providing its generation schedule to the Regional Load Despatch Centre (RLDC) through the Himachal Pradesh State Load Despatch Centre (the Respondent No.2/ HPSLDC for short). It is averred that the HPPTCL has failed to develop and implement the

Permanent evacuation system i.e. the HPPTCL Sub-station on one pretext or the other causing grave prejudice to the Petitioner and its conduct of indefinitely delaying the construction of the permanent evacuation infrastructure associated with the Petitioner's Project is in dereliction of its statutory duty casted upon it in terms of the Electricity Act, 2003 (Act for short) which is causing severe financial losses to the Petitioner.

10. Consequently, the project has been facing difficultly in adhering to its scheduled generation on several occasions on account of reasons not attributable to the Petitioner but owing to the failure/restriction in the grid maintained by the HPSEBL. As a result, the Petitioner's Project has been unable to inject power on several occasions despite being available and ready to generate power as per its schedule. The failure/restrictions in the grid are entirely beyond the Petitioner's control and are primarily due to the frequent tripping, shut-downs, load restrictions imposed by HPSEBL and outages of the electrical lines. The matter was also taken up with the HPSEBL in several occasions for improving the system but in vain. The detail of some of the instances alongwith acknowledgment/ confirmation from the HPSEBL is annexed as Annexure P-11 (COLLY).

11. It is claimed that the HPSLDC and HPSEBL are unilaterally and arbitrarily levying the DSM penalties, on the Petitioner, even for the circumstances where the HPSEBL has failed to perform its part of statutory obligation of making the line available at the prescribed level of 97% to evacuate power from the generation station. A reference has been made to the Central Electricity Regulatory Commission (Technical Standards for connectivity to the Grid) Regulation, 2007, which prescribe the grid connectivity standards for hydro generating units that the hydro generating units shall be capable of generating upto 110% of rated capacity on continuous basis. However, the unavailability of interim evacuation arrangement at the prescribed level clubbed with continuous instances of grid outages has not allowed the Petitioner to run its project at the full rated capacity at any point. As a result, the Petitioner has suffered great prejudice on account of the failure of the HPPTCL in not constructing the permanent evacuation system and failure on the part of the HPSEBL in maintaining the interim evacuation system. However, on account of the failure of the Respondents, the Petitioner has been continuously slapped with enormous penalties in the form of DSM charges under CERC (Deviation Settlement Mechanism and related matters)

Regulation, 2014 (CERC, DSM Regulations for short) but such instances of deviation were beyond the reasonable control of the Petitioner. Not only this, the Petitioner has been paying 100% wheeling charges even when the grid was not available at its standard level for effective conveyance of electricity as well as the DSM charges during such periods, thereby, imposing an additional financial burden on the Petitioner on the basis of CERC DSM Regulations and HPERC DSM Regulations as detailed under:-

Period	**Regulation**	**Amount (INR)**
20.03.2018 to 02.12.2018	CERC DSM Regulations 2014	1,21,28,112
03.12.2018 to 19.05.2019	HPERC DSM Regulations 2019	1,02,83,594
20.05.2019 to 30.06.2024	HPERC DSM Regulations 2019	8,19,29,665

12. As per the Petitioner, it informed the HPSEBL regarding the uncontrollable events which led to the Petitioner's deviation from the approved schedules and requested waiving of the DSM charges imposed on account of such incidents. Through, the HPSEBL acknowledged the outages on account of issues at the 33/132 kV Sub-station Malana at Jari for the different periods, yet the HPSEBL and the HPSLDC have been continuously imposing DSM charges for the deviation and the Respondent No. 1 has been justifying the same

even though the same are attributable to the system failure of the HPSEBL on the premise that the Petitioner is earning revenue by selling power to its captive users but whether or not the Petitioner has received the payment against the scheduled energy, the same cannot be a relevant consideration to apportion/attribute the impact of deviation in schedules, even where the same have been on account of the failure of the HPSEBL and, therefore, the Respondents cannot be allowed to take advantages of their own wrongs.

13. It is averred that several requests were made to the HPSEBL and the HPSLDC for resolving the matter but the HPSLDC advised the Petitioner to deploy its own manpower to maintain the line in supervision of the HPSEBL and the HPSEBL advised the Petitioner to approach the Commission for regulatory intervention. The copies of the letters addressed to the HPSEBL and the HPSLDC have been annexed as Annexure P-12 (COLLY).

14. In the circumstances, the Petitioner had approached the Commission by filing Petition No. 62 of 2019 for setting aside the DSM charges but the Hon'ble Commission vide order dated 09.07.2020 disposed off said Petition upholding the levy of imbalance/ DSM charges on the Petitioner. However, the

Commission in said order had noted the consistent failure/ fault of the HPSEBL's evacuation system and also noted the delay of implementation of HPPTCL Sub-station but no directions were issued against the Respondents.

15. Aggrieved by the final order dated 09.07.2020 in Petition No. 62 of 2019, the Petitioner has preferred an appeal, bearing Appeal No. 103 of 2020, before the Hon'ble Appellate Tribunal for Electricity (APTEL) and the Hon'ble APTEL has been pleased to direct the Respondents not to take any precipitative action in furtherance of order dated 09.07.2020. The interim orders dated 07.08.2022 and 24.02.2022 passed by Hon'ble Appellate Tribunal in Appeal No. 103 of 2020 have been annexed as Annexure P-13.

16. It is claimed that the Petitioner is being burdened with continuous DSM charges on account of the failure of the Respondent No. 1 in maintaining the interim evacuation system and failure of Respondent No. 3 for not providing the permanent evacuation system which cannot be considered akin to grid constraints and tantamount to failure on their part to fulfill their respective statutory obligations. Not only this, the Respondents cannot be allowed to take benefit of their defaults by levying DSM charges. Without prejudice, it is

submitted that any undertaking provided by the Petitioner for not claiming deemed generation or to not seek damages for instances of outages cannot be read to be operative in perpetuity. The Petitioner has made payment as per the table (Annexure P-14) as under:-

Sr.No.	Period	Amount (INR)
01	01.04.2019 to 31.03.2020	3,30,99,580
02	01.04.2020 to 31.03.2021	1,95,79,654
03	01.04.2021 to 31.03.2022	3,24,47,533
04	01.04.2022 to 31.03.2023	6,01,35,198
05	01.04.2023 to 31.04.2024	1,70,16,483
06	01.04.2024 to 30.06.2024	56,84,833

17. It is averred that due to continuous instances of grid outages, the Petitioner has suffered direct losses of generation and consequent loss of revenue. Further, the Petitioner had no choice but to restrict the generation from the Project due to grid failure or backing down instructions received from the HPSLDC from time to time. This has also resulted in damage to the equipment of the Project which is unable to run at its optimum level.

18. It is also averred that DSM Charges cannot be imposed legally on the Petitioner without any fault of it. The HPSEBL must bear the consequences of its failure to comply with Technical standards of operation and maintenance of the evacuation system in accordance with the grid standards and there should be accountability and liability

of the officers but the Respondents acting in an illegal and irrational manner dehoring the objective of the Act and the HPERC DSM Regulations which amounts to misfeasance in public office.

19. Also averred that the Petitioner cannot construct, replicate operate and maintain an evacuation system for its own use because of significant barriers such as (i) obtaining a license (ii) substantial cost/investment in developing the infrastructure (iii) longer gestation period in developing such infrastructure, and (iv) difficulty in replicating such infrastructure. In the circumstances, the interim evacuation pending implementation of permanent evacuation system was obtained. Thus, the HPSEBL was to play the role of an essential facility not only in wheeling the power but also promoting the renewable energy by evacuating the power from the project of Petitioner providing adequate evacuation facility. Reliance has been placed in *East India Petroleum Pvt. Ltd. (EIPL) v. South Asia LPG Company Pvt. Ltd. (SALPG), 2018 SCC OnLine CCI.* Further the essential facility as being provided by the HPSEBL cannot be denied for its own commercial benefit as held in HPCL-Mittal Pipelines Limited v. Gujarat Enery Transmission Corporation Limited and Ors., 2018 CompLR 215 (CCI).

20. The HPSEBL by denying the facility at its prescribed standards and by restricting the interim evacuation has abused its dominant and monopolistic position by continuously defying the technical standards. In this regard, Section 60 of the Act empowers the Commission to deal with the instances of abuse of dominance.

21. According to the Petitioner having made significant investment in augmenting the infrastructure of the HPSEBL and investment in the Project having acted on the premise /representation, the same is enforceable against the Respondents on the principles of promissory estoppel and legitimate expectation *(ref: Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P. & Ors., (1979) 2 SCC 409, paras 164-165 of GUVNL vs GERC & Ors, Appeal No. 279-2013 decision dated 22.08.2014.*

22. Further, the communications nowhere suggest that the interim evacuation facility is not feasible for operating and wheeling 9 MW hydro power and without prejudice, even if instances of the outages were considered while opting for evacuation facility in the hilly areas, the Petitioner could not have foreseen DSM charges to the tune of Rs. 1 Crore every six months which dehors the basic principles of law. The HPSEBL cannot backtrack from its promises of providing

adequate grid connectivity to the Project of the Petitioner and its liable to make good the losses on account of curtailment of grid due to regular instances of grid outages/failure, load restrictions and shut down etc. Further, the interim interconnection nowhere prescribes that the Petitioner will be liable to pay compensation even where the HPSEBL is at fault which have to be construed in the commercial sense to meet the business efficacy test and could be used as a promise to subject the Petitioner to wrongful loss. Reliance in this regard has been placed in *Satya Jain v. Anis Ahmed Reshdie, (2013) 8 SCC 131 and para 7 of Union of India v. D.N Revri & Co.,(1976) 4 SCC 147.*

23. According to the Petitioner, it had immediately approached the HPSEBL and HPSLDC for revision in schedules in cases where the outages were consistent for more than 2 days but Regulation 12 of HPERC short term open access Regulation 2010 do not provide for immediate revision and the revision can only be done after 2 days. Therefore, it was not possible for the Petitioner to revise the schedule on a real time basis or for faults/breakdown raging for less than that period. Thus, deviation caused on account thereof cannot be considered as a fault in maintaining its scheduled generation. Further,

the Petitioner cannot be regarded as pure STOA Customer as it had applied for MTOA which was denied to it. Thus, the Petitioner is *'sui generis'* because of its peculiar background and distinct nature of STOA and requires adoption of different modalities.

24. As per HPERC DSM Regulations, the onerous financial penalty, that a generator is subject to, for deviation from scheduled generation, is penal in effect and purport, as it is a charge imposed for no default on the part of generator but such penal clause cannot be applied to Petitioner who was ready and willing to comply but was stopped by the HPSEBL. The Petitioner can only be penalized to the extent of defaults attributed to it as held in ***Cellular Operators Association of India & Ors. v. Telecom Regulatory Authority of India, (2016) 7 SCC 703.***

25. Also even after 4 year of order dated 09.07.2020 in Petition No. 62 of 2019, the Respondents have failed to take remedial action. The instrumentalities of the State have to be just, fair and reasonable in all their activities, including those in the field of contracts as held in ***Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai and Ors., (2004) 3 SCC 214.***

26. Further, the HPPTCL also admitted the delay caused in the construction of permanent evacuation system. Thus, the Petitioner cannot be saddled with the liability on account of deviation or shortfall in schedules without fulfilling its statutory functions and duties as held ***in Oil and Netural Gas Corporation Ltd. (ONGC), Head Engineering Services v. Gujarat Electricity Regulatory Commission and Ors***.

27. Further, the imposition of DSM Charges on the Petitioner and not holding the HPSEBL liable for its default, is discriminatory qua the other hydro projects situated in the State and supplying power to the HPSEBL, when it is squarely recorded that the incidence of DSM charges for such generators are absorbed by the HPSEBL irrespective of the fact whether the deviation is attributable to the generator or not.

28. Also averred that the provisions of Regulations 16 to 18 of the HPERC DSM Regulations provide power to relax and the Commission may, at any time, vary, alter, modify or amend any provision of Regulation to remove difficulty to make such provisions consistent with the provisions of the Act. The Commission may, therefore, exercise its power for providing necessary relief. A reliance

has also been placed in ***Mahadeolal Kanodia v. The Administrator-General, AIR 1960 SC 936 & Sheikh Gulfan v. Sanat Kumar Ganguli, AIR 1965 SC 1839.***

29. Further, the Petitioner has been suffering irreparably daily due to arbitrary imposition of DSM penalty for the reasons not attributable to it and facing huge financial stress to the tune of Rs. 8 Crores at the hands of the Respondents which is likely to turn the Project unviable. Hence, the Petition.

REPLY OF THE RESPONDENTS

30. The Petition has been resisted by the Respondents No. 1, 2 and 3 by filing the separate replies.

REPLY OF RESPONDENT NO. 1

31. The Respondent 1/ HPSEBL in its reply has averred that the issues raised in the Petition are vague, wholly misconceived and the Petition is liable to be rejected. The Project is connected to 33kV distribution network of the HPSEBL, as a temporary arrangement, till the permanent interconnection point at 33/132kV Sub-station at Barshaini is constructed by the Respondent No. 3/ HPPTCL which was initially due to be commissioned by October, 2013. The Petitioner had made an application to the HPPTCL on 24.08.2012 for

the connectivity but keeping in view the fact that there would be delay in commissioning the permanent evacuation system, a decision was taken in the 23rd meeting of the STU Coordination Committee held 15.10.2012 that the HPSEBL shall provide interim connectivity to the Petitioner. Further in the 26th meeting of the STU Coordination Committee held on 07.03.2013, the HPSEBL was directed to enter into an arrangement with the Petitioner for the interim period till the permanent transmission facility is commissioned and accordingly, the Petitioner signed Interim evacuation agreement on 03.04.2013 with the HPSEBL followed by Interim Connection and Transmission Agreement (ICTA) **Annexure R-1** on 10.07.2013.

32. It is averred that the Petitioner had initially applied for a Medium-Term Open Access, but in a meeting held on 06.06.2017 between the Petitioner, HPSEBL and Malana Power Company Limited, the Petitioner was granted a Short-Term Open Access (SOTA).

33. On 06.12.2017, the Petitioner signed an Interim Power Transmission Service Agreement (IPSTA) with HPSEBL for wheeling the power from the Project to LILO point at 33 kV TOSS feeder through 33/132 kV Sub-station at Malana to Bajaura belonging to

Malana Power Company Limited to HPSEBL's 132 kV Sub-station Bajaura and beyond up to the State periphery using the state network, till creation of permanent interconnection point. The outages and availability of system was specifically dealt under Clauses 6.1 and 6.2 in the Agreement dated 06.12.2017 as under:-

> "6.1 The parties will agree upon the scheduled outages plan.
> 6.2 The Connectivity granted to SHPPBPL is purely on interim basis and as such, no deemed generation will be applicable for loss of generation to SHPPBPL for whatsoever reason(s)"

34. As per the HPSEBL, the above arrangement was only as a interim measure to facilitate the commercial operation of the project and not a legal obligation. The Project achieved the Commercial operation on 22.01.2018 and evacuation of power started from 01.02.2018.

35. It is averred that the charges for the deviation from the approved schedule and the actual generation were in terms of what is payable by the HPSEBL for the State as a whole and the share of the Petitioner out of the same is being worked out.

36. It is also averred that the Petitioner had paid Rs. 92,90,399/- for which the Petitioner had filed a Petition before Commission bearing Petition No. 62 of 2019 seeking direction that a sum of Rs. 1,21,28,112/- was not payable by it, as demanded vide letter dated

04.05.2019 but the Commission disposed off said Petition vide order dated 09.07.2020 that Petitioner is liable to pay the said sum of Rs. 1,21,28,112/-. The Petitioner has challenged the said order in DFR No. 271 of 2020 before the Hon'ble APTEL, which is pending.

37. The present challenge to DSM charges amounting to Rs. 8,19,29,665/- out of the total amount of Rs. 15,13,88,0005/- for the period from 20.05.2019 to 30.06.2024 is misconceived. The main grounds for the challenge that the deviation has occurred due to the load restriction instructions issued by the HPSEBL, grid failure and shut down are not tenable as the Commission has already dealt and adjudicated such issues in Petition No. 62 of 2019 pertaining to the DSM charges amounting to Rs. 1,21,28,112 out of Rs. 2,14,18,511/- for the period 24.03.2018 to 02.12.2018, raised by the HPSLDC. In the said Petition, a relief had also been sought qua the inapplicability of the provisions of the HPERC DSM Regulations that the reasons for deviation were neither attributable nor within the reasonable control of the Petitioner but said prayer was rejected by the Commission vide order dated 09.07.2020 (Annexure-R2).

38. As per the Respondent No. 1, the Petitioner has misconstrued the concept of levy of deviation charges which can be imposed as per

HPERC DSM Regulations based upon the Principle of deviation between the schedule and the actual generation. Further, as per Regulation 28(3) of the HPERC, Short Term Open Access Regulations, 2010, the bills for deviation charges are raised by HPSLDC which reads as under:-

> *"Any mismatch between the scheduled and the actual drawal at drawl points and scheduled and the actual injection at injection points for the intra-State entities shall be determined by the State Load Dispatch Centre and covered in the intra-State Availability Based Tariff (ABT)."*

39. It is averred that it is the HPSLDC, which schedules the generation for the projects 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 HPSLDC to the Northern Region Load Despatch Centre (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 by NRLDC which are payable by the HPSLDC within a period of ten days. The HPSLDC, on its part, prepares the weekly energy accounts and determines the deviation 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.

40. Also that the deviation charges facilitate the recovery from State entity(ies) which deviate from the approved schedule (under injection in case of Petitioner) of such costs are incurred by the other State entity(ies) which help the system in the same time block on real time basis in meeting the obligations of that entity corresponding to its approved schedule. This essentially means that even in the case of non-generation at the Appellant'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 corresponding to entire scheduled energy.

41. It is averred that the State Commission vide interim order dated 31.08.2019 (referring to earlier Petition No. 62 of 2019) had directed the Petitioner to supply details of payments received from the buyers in respective time blocks for which Imbalance Charges have been charged by the HPSLDC along with the copy of agreement for sale of power. However, the same was not provided for the reasons best known to the Petitioner to avoid any adverse inference.

42. As per the HPSEBL, there cannot be a situation that the Petitioner is paid consideration for the electricity based on the scheduled energy, but the difference between the schedule and the actual generation is not accounted towards the Petitioner in the form of deviation charges. Such a situation would only mean that the Petitioner procures electricity from the grid free of cost and supplies to its consumers for consideration.

43. Also averred that the HPSLDC prepare and raise the bills for the deviation charges including the disputed amount on the HPSEBL in accordance with the STOA Regulations, 2010 for any mismatch between the scheduled and actual energy injection at the injection point for Intra State Utilities. The HPSEBL had deposited the entire Imbalance/ deviation Charges for the State with the NRLDC from its own pocket and thereafter realized the same from IPPs/State Utilities in accordance with their share. A reference has also been made to Clause 4.3 of the IPSTA as under:-

> *"4.3 Each Party shall be responsible for paying their respective UI/ Deviation charges that are payble by such Party as determined by the Northern Regional Load Despatch Centre/ HPSLDC."*

44. It is denied that the deviation Charges are in the nature of penalty. The procedure for determining the deviation charges in

different situations including non-availability of system has clearly been incorporated in the procedure under HPERC STOA Regulations, 2010 and the charges so determined are payable by the entity(ies) where the deviation (under injection in case of the Petitioner) takes place which is in the nature a compensatory mechanism for the actual deviation from the implemented schedule.

45. According to HPSEBL, in the event of constraints/breakdowns of the system, the entity(ies) may request for the revision of generation schedule as per the provisions of applicable regulations and in case the revision is approved by the competent authority, the deviation for the subsequent time blocks may get revised but any compensation for the loss of generation due to the constraints/ breakdowns in the system is not within the ambit of STOA Regulations, 2010, nor the payment of the deviation charges for under injection can be withheld by taking a plea that the charges are not payable because under injections was due to constraints/ breakdowns in the system being maintainable by the Respondent. Further, even though there is a failure in generation, as scheduled during certain time blocks, the payment is still recovered and the revenue is marginally higher than the deviation charges.

46. It is further averred that the Petitioner is trying to make a case for deemed generation which is otherwise not applicable to the Petitioner and in case the contention of the Petitioner is accepted, the same would mean that the Petitioner is compensated for the electricity under-generated against the schedule, but the actual generation is less which is another form of deemed generation which is prohibited. Further, the Petitioner has clearly agreed under clauses 6.1 and 6.2 in IPSTA that the connectivity being temporary, no deemed generation will be applicable for the loss of generation to the Petitioner for whatsoever reasons. Further, the Petitioner is also liable to pay the late payment surcharge on the delayed payment of Imbalance Charges as per Regulation 30(2) of the STOA Regulations, 2010 at the rate of 0.04% for each day of default.

47. It is denied that the Petitioner is prejudiced in any manner as the Petitioner is using the system and earning money from its buyer outside the State under STOA and the over-drawl is subject to the HPERC DSM Regulations. The other generators are selling power to the HPSEBL under Power Purchase Agreement(s) (PPAs) and in such cases, the power is sold at the interconnection point and the responsibility of selling the power beyond the interconnection point is

of the HPSEBL. Further, the scheduling of generation in case of such plants is done as part of overall schedule of the answering and, as such, there is no need for separate plant-wise scheduling in such cases. The incidence of deviation charges in such cases is absorbed by the Respondent in its capacity as a purchaser of power from such plants.

REPLY OF RESPONDENT NO. 2

48. The HPSLDC in its separate reply has averred that the petition is neither competent not maintainable and that the Petitioner has concealed material facts.

49. On merits, it is averred that the HPSLDC has been raising DSM charges bill on weekly basis to all Intra-State Entities of HP State including the Petitioner strictly as per DSM Regulations, 2018, based on the power scheduled by the Petitioner in Bilateral and Collective mode and actual SEM Data made available /supplied by the Petitioner to the HPSLDC.

50. According to the HPSLDC, neither the HPSLDC has taken any advantage of the Petitioner nor has given any advisory to deploy its manpower to maintain the line with the supervision of the HPSEBL. It is averred that the DSM Regulation 2018 are applicable to all the

Intra-State Entities of HP State Including the Petitioner and has denied that any precipitative action has been taken or any instructions to back down/restrict the generation were issued or any lackadaisical approach has been adopted.

51. According to the HPSLDC, the DSM charges are applicable to all the Intra-State Entities availing Open Access for sale/purchase as per HPERC DSM Regulations, 2018 and no illegal DSM charges have been raised by HPSLDC. Also that the HPERC DSM Regulations, do not provide any provision for considering the deviations caused on account of faults/ breakdown.

52. It is averred that the Petitioner has been selling the power to Inter-State Entity and nodal agency for scheduling power in Inter-State Bilateral mode is NRLDC and request for any revision in Bilateral Schedule should have been submitted to NLRDC instead of HPSLDC. Hence, any claim for delayed revision in Scheduling at the end of HPSLDC, is not maintainable. Further, the HPSEBL bears the DSM Charges for the Hydro Project (in HP State) selling power to the HPSEBL under PPA's with HPSEBL. However, the Intra-State Open Access Entities selling power within/outside the HP State have to

bear the DSM Charges on their own in accordance with HPERC DSM Regulations.

REPLY OF RESPONDENT NO. 3

53. The Respondent No. 3 in its separate reply has stated that the Petition is not maintainable as no relief has been claimed against it and being not a necessary party, its name should be struck out. Further, the Petitioner was made aware at the time of grant of TEC (Annexure P-3) that in case of non completion of transmission system to be constructed by the HPPTCL by the time of commissioning of project, the Petitioner shall have to provide alternate evacuation arrangement at its cost, to the nearest sub-station of the HPSEBL and the Petitioner had given an undertaking to this effect. Therefore, the objection of the Petitioner for non-completion of permanent evacuation system, for no fault of the HPPTCL, is not tenable.

54. According to the HPPTCL, since the Permanent evacuation system i.e. 33/220 kV Sub-station at Barsaini of the HPPTCL was not in existence at the time of the revised TEC, an interim evacuation arrangement was allowed to be provided to the Project pursuant to the decision taken in the 23rd STU Coordination Committee Meeting.

55. Further, the grid connectivity to the Petitioner per its request dated 24.08.2012 was allowed on 25.03.2013 (Annexure P-7) but it was made clear to Petitioner that the connectivity shall be applicable from the commissioning of the system of the HPPTCL. The relevant portion of the connectivity dated 25.03.2013:-

> *"6. Details of Connectivity*
> *c) Date from which connectivity is granted: Connectivity shall be applicable from the date of commissioning of lines and sub stations indicated below against S. No. 6 (d).*
> *Note:*
> *4. Since, the regular arrangement for evacuation of power shall not come up by the indicated commissioning date of the project, power shall be evacuated through interim arrangements to be provided by HPSEBL and terms and conditions as admissible in such cases shall be applicable."*

56. According to the replying Respondent, steps were taken for the creation of Permanent evacuation system in time and 80% work of the Barshaini-Charor transmission line is complete whereas 75% of the Sub-station Barshaini is also complete. The Barshaini-Charor transmission line consist of a total of 143 towers (77 towers in forest areas and 66 towers in private land) passing through difficult hilly terrain and hard-to-access areas. Further, number of working days were restricted due to snowfall, winters, frequent flash floods, cloudbursts and other hindrances. Due to these obstructions and hindrances, the completion of the work could not be achieved within

the scheduled timeframe for the reasons beyond the control the HPPTCL.

57. Further, there has been delay on account of Land Acquisition, Covid-19 Pandemic, Litigations pertaining to ROW issues in the District Courts and High Courts, delay in tree cutting, delay on account of Shutdowns for Stringing Work, delay due to the overlaping with 33 kV D/C HPSEBL Line and Brahmganga IPP Transmission Line and other LT Lines and Limited Fronts and Team Availability by the firm. Further, time was consumed in the process of marking and felling of trees which was time consuming involving the joint site visit of Forest Department and Forest Corporation representative which started only in March, 2022 and completed in the month of October/ November, 2023

58. Regarding the execution status of the Barsaini Sub-Station. It is averred that the commissioning of Sub-station is expected by 31.12.2025. However, it has been stressed to the contractor to ensure commissioning of Sub-station by September 2025. As per the HPPTCL, every possible effort is being to execute and carry out the early commissioning of the permanent transmission system.

59. Detail on account of delay has also been given that there was delay in approval of drawings of Sub-station, Force majeure due landslide between 17.08.2019 to 30.08.2019, 08.07.2023 to 25.09.2023 and 12.09.2024 to 24.09.2024, (107 days), delay due to non-availability of dumping site between 22.10.2019 to 27.12.2019 and 12.03.2020 to 20.06.2020 (78 days), delay due to rainfall aggregating to 128 days, delay due to snowfall in the region aggregating to 257 days and delay due to addition in scope of work, etc. A detail of each of the delay has also been offered in the reply.

60. It is averred that the Petitioner vide letter dated 25.02.2020 had requested for allowing evacuation of power from the Project by LILO of one Circuit of 132 kV Barsaini-Charor D/C line under construction but the HPPTCL vide letter dated 13.05.2020 had intimated the Petitioner that the proposed LILO of one circuit of 132 kV Barsaini-Charor D/C line can be allowed at T-30 subject to terms and conditions. A revised Connection Agreement was also signed by the Petitioner with the Respondent No. 3 on 19.03.2021. Copies of letter dated 25.02.2020, 13.05.2020 and Connection Agreement dated 19.03.2021 are annexed as Annexure-R-3/A to C.

61. Also averred that the Petition is not maintainable as the Commission has already decided a similar issue earlier vide order dated 09.07.2020 in Petition No. 62 of 2019 which has been assailed by the Petitioner in the Appeal before the Hon’ble APTEL in Appeal No. 130 of 2020.

REJOINDERS

62. In separate rejoinders, the contents of the replies have been denied and those of the Petition have been reaffirmed.

ORAL SUBMISSIONS

63. We have heard Sh. Sakya Chaudhary Ld. Counsel for the Petitioner, Sh. Kamelsh Saklani, Authorised Representative for Respondent No. 1, Sh. Surinder Saklani, Ld. Counsel for the Respondent No. 1 and Sh. Vikas Chauhan, Ld Counsel for the Respondent No. 3 and have gone through the record carefully.

64. Sh. Sakya Chaudhary, Ld. Counsel for the Petitioner has submitted the very outset that while disposing of Petition No. 62 of 2019 vide order dated 09.07.2020, the Commission had directed Respondent 1 and 2 to take all the remedial steps for improving the communication arrangement /operating procedure to avoid delay related to the Real Time Operation and to look into the reasons for

frequent interruptions in the system and timely completion of permanent evacuation system and to take remedial steps for the system improvement but despite these specific directions in 2020 no steps have been taken by Respondents and rather, the Petitioner is being continuously subjected to the penalties in the form the DSM Charges for the sheer failure of the Respondents.

65. According to him, due to the inaction on the part of Respondents, the Petitioner despite being ready to generate and evacuate the power has not been able to do so. According to him, no mechanism has been worked out to allow the Petitioner to revise its generation schedule with the 4 time blocks as allowed to the MTOA and LTOA users.

66. He has further submitted that the contention of Respondents that the issues raised in the Petition stand decided in the earlier Petitioner is not tenable for the reasons that the Commission is not bound by the finding in the earlier proceeding and has to decide the present Petition as per facts of the present case and the applicable law and Principle of *res judicata* will not apply as there is a significant change in the circumstances inasmuch as (i) the Respondents No. 1 to 3 have failed to comply with the directions passed in Petition No.

62 of 2019 till date, (ii) the time period and cause of action is different; (iii) the Hon'ble APTEL has directed the Respondents not to take any precipitative action and (iv) the order dated 09.07.2020 in Petition No. 62 of 2019 has not attained the finality in view of the appeal pending against it. A Reliance in this regard has been placed in **Korin v. The India Cable Company Ltd. & Ors.** (1978) 1 SCC 98 and **Yasin Gulab Shikalkar v. Maruti Nagnath Aware & Ors**., W.P. (C) No. 7278/20222, Hon'ble High Court of Bombay.

67. According to him there are three erroneous assumptions/ factors were considered in earlier Petition which need to reconsidered i.e. *Firstly,* there was no non-generation and insufficient generation on the part of Petitioner, as the Petitioner could not generate and evacuate due to non-availability of evacuation system of Respondent No. 1; *Secondly*, the Petitioner was refused MOTA and granted STOA and under Regulation 12 of HPERC (Short Time Open Access) Regulation 2010 revision of schedule is allowed only after two days and, therefore, the Petitioner had no opportunity to revise its schedule on real-time basis within the next 4 time blocks; and, *thirdly* the Commission has proceeded on the basis that the Petitioner has received payments from its counterparty under PPA, and was

therefore, required to pay DSM charges to compensate the party who had supplied the power that was not generated by the Petitioner. According to him, the Petitioner was ready and willing to generate the power as per schedule, but could not inject due to the unavailability of the evacuation system of the Respondent No. 1 but there is not deviation on the part of Petitioner and the Revenue generated on the part of Petitioner with its counterparty and the payment received from it arise under contract law in terms of the Contract and the same cannot justify the illegal imposition of DSM charges. Also that the justification offered in the order dated 09.07.2020 to distinguish the judgment in ***Cellular Operators Association of India and Others v. Telecom Regulatory Authority of India*** is not correct. He has further submitted that the DSM Charges is a penalty that is applicable an on the *wrongdoing* of generatic entity but same cannot be applied to the Petitioner as there is no wrong doing on its part as despite its willingness, the Petitioner could not inject an account of non-availability of the system of Respondent No. 1. He has also submitted that the imposition of DSM of the Petitioner is not tenable as no defaults, whatsoever, have been committed by the Petitioner. According to him, the HPERC DSM Regulations have to be interpreted and applied in a manner that is legally sustainable, fair, transparent and reasonable and in case the Regulations are applied in an arbitrary and unreasonable manner irrespective of fact that there is no wrongdoing on the part of Petitioner, the same would result in great prejudice to the Petitioner. According to him, the Commission has the powers under Regulation 16 and 17 to remove difficulties, if any, for giving true effect to the cause. He has also relied upon Mahodeolal Kanodia v. The Administrator-General, 1960 SCC OnLine SC 47; Sheikh Gulfan v. Sanat Kumar Ganguli, AIR 1965 SC 1839; Jamshed Hormusj Wadia v. Board of Trustees, Port of Mumbai, and Ors., (2004) 3 SCC 214; N.T.P.C. Limited v. Madhya Pradesh State Electricity Board and Ors., Appeal No. 89/2006 and Madeva Upendra Sinai and Ors. v. Union of India and Ors., AIR 1975 SC 797.

68. Sh. Kamlesh Saklani, Authorised Representative for the Respondent No. 1 has submitted that the Commission has elaborately dealt the similar issues in earlier Petition No. 62 of 2019 decided on 09.07.2020 and, therefore, the Petition is not maintainable and liable to be dismissed. He has also submitted that the interim connectivity to the system of the HPSEBL was provided by the

HPSEBL with the condition that no deemed generation will be provided to the Petitioner for the loss of generation. Therefore, having deviated from the approved schedules, the DSM charges are liable to be paid and in case such charges are waived off, the Petitioner would indirectly claim deemed generation in the shape of revenue earned under the PPA for non-generation.

69. Sh. Surinder Saklani, Ld. Counsel for the Respondent No. 2 has submitted that the Petitioner has concealed the material facts and the Petition is liable to be dismissed. Further, the DSM charges bills are being raised on weekly basis to all the Intra-state entities as per HPERC DSM Regulations, 2018 including the Petitioner and no illegal bills have been raised.

70. Sh. Vikas Chauhan, Ld. Counsel for the Respondent No. 3 has also submitted that there is no inordinate delay in completion of the permanent evacuation system but on account of factors beyond the control of the Respondent No. 3 a genuine delay has occurred.

POINTS FOR DETERMINATION

71. We have gone through the submissions including the written submissions filed by the Petitioner and perused the record carefully.

On the basis of the pleadings and submissions, the following points arise for determination:-

<u>Point No. 1</u>: Whether the provisions of the Himachal Pradesh Electricity Regulatory Commission (Deviation Settlement Mechanism and Related Matters) Regulations, 2018 and the DSM Charges thereunder are not applicable to the Petitioner?

<u>Point No. 2</u>: Whether the Petitioner is not liable to pay the DSM Charges to the tune of Rs. 8,19,29,665/- on account of deviation in schedules for the period from 20.05.2019 to 30.06.2024 as alleged?

<u>Point No. 3</u>: **Final Order**

72. 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: (Final Order) The Petition dismissed per operative part of the Order.

<u>REASONS FOR FINDINGS</u>

<u>Point No. 1:</u>

73. The Petitioner has sought a declaration that the provisions of the HPERC (Deviation Settlement Mechanism) Regulations and DSM charges thereunder are not applicable to the Petitioner as the

deviation, if any, in the approved schedules submitted by the Petitioner, has occurred on account of inefficiency on the part of the Respondent No.1/ HPSEBL in not maintaining the grid, frequent trippings, shutdowns, load restrictions and outages of the electrical lines not within the control of the Petitioner, as despite willing to generate, the Petitioner could not generate.

74. The Commission has framed the Himachal Pradesh Electricity Regulatory Commission (Deviation Settlement Mechanism and Related Matters) Regulations 2018 which have come into force from 03.12.2018. The objective of these Regulations is to maintain grid discipline and grid security as envisaged, under the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 and Himachal Pradesh Electricity Grid Code, 2008 and amendments made from time to time, through the commercial mechanism for deviation settlement through drawls and injection of electricity by the users of the grid as contained in Regulation 3 of the above Regulations.

75. The HPERC DSM Regulations, 2018 are applicable to all the buyers and the sellers i.e. the State distribution licensee(s), State Sector Generating Stations and Open Access Customers connected

to the State Grid as contained in Regulation 4 of the above Regulations which reads as under:-

> *"4. Scope.- These regulations shall be applicable to the buyers and the sellers i.e. the State distribution licensee(s), State Sector Generating Stations and Open Access Customers connected to the State Grid: Explanation:- The sellers selling power to a person forming the State Entity, including the distribution licensee, on regular basis shall not be considered as separate State Entity in relation to such sale of power under regular arrangement and the availability of power from the such sources shall be accounted for by the State Entity purchasing such power for all intents and purposes. However, in case only a part of the total energy sales by a seller is being sold under regular arrangement and balance part is sold to any other person, not forming a State Entity of the State, such seller shall be considered as a separate State Entity in relation to sale of such balance portion. Accordingly the generating stations selling the entire saleable energy to the distribution licensee shall not be treated as the State Entities for the purpose of scheduling and dispatching."*

76. The Respondents No. 1 and 2 have clearly stated in their replies that being an open access customer, the schedules are being regularly drawn by the Petitioner and submitted to the HPSLDC. It is not disputed by the Petitioner that it is not submitting the schedules of generation. There is no explanation by the Petitioner as to under which Regulatory mechanism, the Petitioner is being governed for the drawl of schedules and consequent deviation therefrom, if any, if the HPERC DSM Regulations, 2018 are not applicable to it. The Petitioner is an open access customer as STOA has been granted to the Petitioner for conveying the power and is connected to the State

grid. Therefore, the aforesaid Regulations are squarely applicable to the Petitioner and is governed by the Deviation Settlement Mechanism and charges being worked out and levied thereunder. Point No. 1, is accordingly decided against the Petitioner.

Point No. 2

77. The Petitioner is aggrieved of the imposition of DSM Charges amounting to Rs. 8,19,29,665/- for the deviation in approved schedules of energy w.e.f. 20.05.2019 to 30.06.2024. The Project of the Petitioner achieved the commercial operation on 22.01.2018 and has been supplying the power since 01.02.2018 under the short term open access. On deviation of the approved schedules for the period in between 20.03.2018 to 02.12.2018, DSM charges amounting to Rs. 1,21,28,112/- were imposed upon the Petitioner. The Petitioner had assailed such imposition of DSM charges in Petition No. 62 of 2019 seeking the following reliefs:-

> *"(i) Declare that the imbalance charges of Rs. 1,21,28,112/- out of the total of Rs. 2.14.18.511/- imposed on the Petitioner's Project for the period from 24.03.2018 to 02.12.2018 for deviations not attributable to the Petitioner, as not payable by the Petitioner;*
> *(ii) Quash and/ or set aside letter dated 04.05.2019 for payment of imbalance charges and imbalance charge invoices for the period from 24.03.2018 to 02.12.2018 raised to the extent of Rs. 1,21,28,112/- being imbalance charges not attributable to the Petitioner;*
> *(iii) Direct the Respondent No. 1 to produce the details of computation of DSM charges for the Petitioner's Project w.e.f. 03.12.2018 including*

the time of deviation, the prevailing frequency and the applicable DSM rate;
(iv) Hold and declare that the provisions of the Himachal Pradesh Electricity Regulatory Commission (Deviation Settlement Mechanism and Related Matters) Regulations, 2018 and DSM charges thereunder shall not be applicable to the Petitioner's Project for such deviation that are neither attributable to the Petitioner nor within the reasonable control of the Petitioner;
(v) Pass such further or other order(s) or this Hon'ble Commission may deem fir in the facts and the circumstances of the case."

78. The Commission vide order dated 09.07.2020 disposed off said Petition upholding the imposition of DSM charges on the Petitioner. In order to adjudicate the said Petition, the Commission had framed the following issues for determination:-

(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?

79. The Commission after detailed discussion and analysis disposed off the Petition No. 62 of 2019 vide order dated 09.07.2020 with the following findings on the Issues No. I, III and IV as under:-

> **"*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.

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.

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."

80. The Commission, therefore, has comprehensively dealt with the concept of deviation in approved schedules of energy on account of non-generation/ under generation for any reasons including system

constraints. Thus, except the issue of time period of the DSM charges, raised in the present Petition, almost same pleas have been raised in the present Petition.

81. As per the principles for operationalising deviation settlement mechanism, as outlined under Clause (E) of Regulation 5 of the HPERC DSM Regulations, 2018 Deviation shall means:-

> *"For the purposes of Deviation settlement amongst State Entities, the SLDC shall work out the "Deviation Pool Accounts" comprising over-drawal/ under-drawal and over-injection/ under-injection for each State Entity corresponding to each Scheduling period in accordance with the principle that the deviation in a time-block for a Seller means its total actual injection minus its total scheduled generation and for a Buyer means its total actual drawal minus its total scheduled drawal."*

82. Undisputedly, the Petitioner sells its saleable portion of energy from its Project to the consumers located outside the State by availing the Short Term Open Access (STOA) using the Intra-State and Inter-State System. The HPSLDC schedules the generation of the Petitioner's plant as well as 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 HPSLDC to the NRLDC. In case of the deviation in the schedule(s), so submitted to the NRLDC, the deviation charges

as per the CERC Regulations are levied, which are payable by the HPSLDC to the NRPC (Northern Region Power Committee) within a period of 10 days. The HPSLDC, on its part, prepares the weekly energy accounts and determines the 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.

83. The DSM charges basically facilitate the recovery from the State entity(ies) which deviate from its approved schedules. The recovery so made is used for discharging liabilities towards the NRPC and also for compensating the State entity(ies) which supported 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, but the revenue from such consumers was being collected by the Petitioner for the corresponding scheduled energy. As such, the Petitioner on whose behalf the energy was being made available to its consumers, even in case of insufficient generation or non-generation against the approved schedules, is liable to pay the DSM Charges. Significantly, the Petitioner has not furnished the detail of the payment received from the buyers in respective time blocks of deviation. This detail was

material but has been withheld for the reasons best known to the Petitioner. **Though, the Petitioner has claimed that earning of revenue by selling power to its captive users is not a relevant consideration to apportion/ attribute the impact** but it is a peculiar situation where no power has been supplied by the Petitioner against the approved schedule and instead, the shortfall has been met by other grid connected entities. Therefore, the purchaser to whom the power was intended to be sold by the Petitioner, infact, received the power without the power being generated by the Petitioner on account of any reason. Thus, the revenue as received against the deviation of approved schedule was meant for the entity which supplied the deficient power in place of the Petitioner and accordingly, the deviation charges are imposed in order to compensate said entity.

84. In fact, the Petitioner has misconstrued the concept of levy of deviation charges. Undeniably, the Petitioner is a short term open access customer. The deviation charges can be imposed as per HPERC DSM Regulations based upon the Principle of deviation between the schedule and the actual generation.

85. The deviation charges as per the CERC Regulations are levied by NRLDC which are payable by the HPSLDC within a period of ten days. The HPSLDC, on its part, prepares the weekly energy accounts and determines the deviation 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. The non imposition of such charges would only mean that the Petitioner procures electricity from the grid free of cost and supplies to its consumers for consideration.

86. The Petitioner has tried to create a distinction between the DSM mechanism and system failure that for the failure of system, such charges cannot be imposed. However, any compensation for loss of generation due to the constraints/ breakdowns in the system is neither the subject matter of DSM mechanism nor the payment of the 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 as even though the Petitioner could not generate power, as scheduled, during certain time blocks, the revenue received by it from its consumers remains nearly the same or sometimes even marginally higher than

the DSM charges billed to it for such time blocks. The time block-wise detail of the revenue earned has, however, not been submitted by the Petitioner.

87. Significantly, even as per undertakings furnished by the Petitioner while applying for STOA, it was agreed that it 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."*

88. Though the Petitioner has tried to project that it is not asking for any deemed generation benefit yet the waiver of DSM charges would mean that the Petitioner is compensated for the electricity under-generated against the schedule which is another form of deemed generation as the Petitioner has clearly agreed under clauses 6.1 and 6.2 in IPSTA that the connectivity being temporary, no deemed generation will be applicable for the loss of generation to the Petitioner for whatsoever reasons. Therefore, waiver of the DSM

Charges would ultimately mean allowing of a deemed generation which is not permissible.

89. Though the Petitioner has also tried to project that DSM charges are in the shape of penalty but said contention is wrong as the DSM charges are charged to compensate 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 rather paid to other entity(ies) which helped the system depending on the flow on a real-time basis.

90. The Petitioner has also claimed that there is discriminatory treatment to the Petitioner vis-à-vis other generators in levying DSM charges but said contention is also wrong as the other generators are selling power to the HPSEBL under Power Purchase Agreement(s) (PPAs) and in such cases, the power is sold at the interconnection point and the responsibility of selling the power beyond the interconnection point is of the HPSEBL. Further, the scheduling of generation in case of such plants is done as part of overall schedule of the HPSEBL and, as such, there is no need for separate plant-wise scheduling in such cases. The incidence of deviation charges in such

cases is absorbed by the Respondent No. 1/ HPSEBL in its capacity as a purchaser of power from such plants.

91. Much stress has been laid that the Petitioner was ready to generate but could not generate on account of the inefficiency of Respondents No. 1 and 3 as neither the interim evacuation arrangement was working properly nor permanent evacuation system was ready. Further there were recurring shut down instructions, outages in the system, breakdowns and grid failures which have compelled the Petitioner to not comply with the approved schedules. It is relevant to mention here that 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. In the present case, the power is being evacuated under an interim arrangement as per the agreement signed by the Petitioner with the HPSEBL. As per the said agreement, it has clearly been agreed by the Petitioner that the connectivity granted to it is purely on an interim basis and as such, no deemed generation will be

applicable for loss of generation for whatsoever reasons. Accordingly, there should not be any question of the HPSEBL making good for the loss in generation or for compensating the Petitioner for the DSM charges legally payable by the Petitioner.

92. Therefore on account of aforesaid circumstances, the Petitioner cannot claim that he is not liable for the payment of DSM charges in deviation of the approved schedules. Thus, the case law relied upon by the Petitioner has no application to the facts and circumstances of the present case.

93. In view of the foregoing discussions, it can be concluded that the DSM charges are payable as per the HPERC DSM Regulations, 2018, as amended from time to time, by the State Entities, which deviate (under injection in case of a generator) from the schedules and charges so payable cannot be withheld by it and the Petitioner is liable to pay the DSM charges as raised for the period from 20.05.2019 to 20.06.2024. Point No. 2 is accordingly decided against the Petitioner and in favour of the Respondents.

<u>Final Order</u>

94. In view of the aforesaid discussions and findings, the Petition fails and is accordingly dismissed. The pending applications, if any,

are also deemed to have been disposed off.

The file after needful be consigned to the records.

<u>Announced</u>
17.07.2025

sd/-	sd/-	sd/-
(Shashi Kant Joshi)	**(Yashwant Singh Chogal**	**(Devendra Kumar Sharma)**
Member	**Member (Law)**	**Chairman**