

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

Petition No: 100 of 2024
Date of Institution: 04.05.2024
Arguments Heard on: 05.12.2025
Decided on: 31.12.2025

CORAM

Yashwant Singh Chogal
MEMBER (Law)-cum-CHAIRMAN

Shashi Kant Joshi
MEMBER

In the matter of:-

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

.....**Petitioner**

Versus

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

.....**Respondent No. 1**

The Directorate of Energy,
M.C. Parking Building, 2nd Floor,
Near Tutikandi Crossing, Shimla, H.P.-171005.

.....**Respondent No. 2**

Petition Under Sections 86(1)(a), (f), (k), and Section 62 (6) of Electricity Act, 2003 for declaring that the events occurring on 09.07.2023 and 24.07.2023 which persisted till 29.09.2023 were force majeure events as per Clause 9 of the Long Term Open Access Agreement dated 30.12.2022 and that the Himachal Pradesh Power Transmission Corporation Limited is liable to

refund the transmission charges collected forcibly from the Petitioner on account of occurrence of such force majeure events and that invoices dated 05.08.2023, 02.09.2023 and 03.10.2023 are liable to be quashed.

Present:-

Sh. Hemant Singh, Ms. Supriya Rastogi and Sh. Vipul Sharda, Ld. Counsel for the Petitioner.

Sh. Vikas Chauhan, Ld. Counsel for the Respondent No. 1.

Sh. Shanti Swaroop, Ld. Legal Consultant for the Respondent No. 2.

ORDER

This Petition has been filed by M/s Everest Power Private Limited (the Petitioner for short) under Sections 86(1)(a), (f) and (k) and Section 62 (6) of Electricity Act, 2003 (Act for short) for declaring that the events occurring on or after 09.07.2023 to 29.09.2023, as elaborated in the Petition were force majeure events as per Clause 9 of the Long Term Open Access Agreement (LTOA/ LTA for short) dated 30.12.2022 executed by the Petitioner with the Himachal Pradesh Power Transmission Corporation Limited (the Respondent No. 1/ HPPTCL for short) and that the Respondent No. 1 is liable to refund the amount collected by the Petitioner forcibly on account of transmission charges for transmission of 100 MW power through D/C

Charor Banala transmission line and for quashing the invoices dated 05.08.2023, 02.09.2023 and 03.10.2023 issued by the Respondent No. 1 for the period covered under the force majeure events.

2. The Petitioner owns and operates 100 MW Malana Stage-II Hydro Electric Plant situated at Village Chowki, near Jarri, District Kullu, Himachal Pradesh (Malana II HEP for short) which was commissioned on 12.07.2012 and the power thereof is being wheeled through 220 kV D/C Charor Banala Transmission line (Transmission Line for short) constructed by the Respondent No. 1/ HPPTCL w.e.f. 03.12.2019.

3. The Petitioner has signed the Long Term Open Access Agreement (LTOA) with the HPPTCL/ Respondent No. 1 on 30.12.2022 for the evacuation of power from the Project through the transmission line. The Petitioner has also signed a connection agreement with the HPPTCL on 30.05.2022. Both the agreements contain force majeure event clauses, being Clause No. 9, which are being reproduced as under:-

Connection Agreement dated 30.05.2022

"9. Force Majeure

Force Majeure herein is defined as any clause which is beyond the control of the STU or the applicant or Intra-State transmission licensee/ Distribution licensee as the case maybe, which could not be foreseen or with a reasonable amount of diligence could not have been foreseen and which substantially affects the performance of the agreement. Force Majeure events would include:

- *Natural phenomenon including but not limited to floods, droughts, earthquake and epidemics;*
- *....*
- *Neither of the parties shall be liable for delays in performing obligation on account of any force majeure causes as referred to and/or defined above."*

LTA Agreement dated 30.12.2022

"9. The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lockout, fire, flood, forces of nature, major accident, act of God, change of law and any other causes beyond the control of the defaulting party."

4. As per the Petitioner, the following force majeure events have occurred in the Malana II HEP:-

- (a) On account of the prevailing monsoon season resulting in heavy and devastating rains in the State of Himachal Pradesh, there was accumulation of heavy silt due to which, the Malana II HEP of the Petitioner was forced to shutdown on 09.07.2023;
- (b) As in the month of July 2023, the local weather condition in the State of Himachal Pradesh did not stabilize, with silt being accumulated near the intake system of the Petitioner's Project. In lieu thereto, the transmission system from Malana II HEP to the Respondent's 200kV Charor system, through which the energy generated from Malana II HEP was evacuated into the Grid, got impacted with breakdown of two nos. of towers being flooded. Hence, the power from Malana II

HEP could not be evacuated even if the plant was restored post stopping of the heavy rains.

- (c) Further, on 24.07.2023, there was a sudden cloud burst in the catchment area which resulted in flash flood in the rivers. As such, to enable passage of the sudden high flood discharge upstream the dam, radial gates of the Dam Gates in partial open condition were attempted to be fully opened. However, due to continuous high silt and debris, the said gates got jammed and consequently, the water level reached the Dam top and started overflowing through the Dam;
- (d) Considering the above events, Malana II HEP could not be restored till 29.09.2023 since even if the said plant was restored, the same would not have been able to evacuate power generated through the then damaged transmission system. In terms thereof, the Petitioner issued a Force Majeure notice to HPPTCL on 25.08.2023, detailing the above difficulties;
- (e) Thereafter, on 12.09.2023, the power supply scheduled to PSPCL was operated through machines after a long span of time. However, water had been drawn through the penstock nozzles of both units to decrease the water level in the reservoir, and attempts were made to fully open the dam gates with more hydraulic pressure. Accordingly, the gates were opened with high pressure;
- (f) However, the opening of the radial gates resulted in passing through of accumulated large debris, plant remains, wooden logs and accumulated silt, and to ensure safety of the plant turbines, machines were again stopped in the evening on 10.09.2023, and the same were in a standstill condition until complete flushing was done. In view thereof, it was noted that the process of entire cleaning and flushing would take another 9-10 days; and
- (g) As such, after the issue of flushing and cleaning was resolved, the plant was synchronized and energy was scheduled to PSPCL from 29.09.2023.

5. As per the Petitioner, Clause 9 of the LTOA agreement exempts the Petitioner from any liabilities including payment of

transmission charges on occurrence of force majeure events, therefore, the Respondent No. 1 is not competent to raise any bills/ invoices qua the transmission charges from the Petitioner from July, 2023 till the time the force majeure events subsisted.

6. The Petitioner has given details about the status of the Power Purchase Agreement (PPA) dated 25.07.2005 (Annexure P-1) signed with the Power Trading Corporation (PTC) for purchase of entire electricity, the Power Sale Agreement (PSA) dated 23.03.2006 (Annexure P-2) with erstwhile Punjab State Electricity Board (PSEB), now Punjab State Power Corporation Limited (PSPCL), LTOA dated 14.07.2008 (Annexure P-3) granted by the Power Grid Corporation of India Limited (PGCIL), agenda and minutes of meeting for the 30th and 31st meeting of the Standing Committee on Power System Planning of Northern Region held on 19.12.2011 and 02.01.2013 (Annexure P-4 and Annexure P-5) in respect of the construction of the transmission line, details of filing of Petition No. 54 of 2012 with the Punjab State Electricity Regulatory Commission (PSERC) and order dated 27.11.2013 passed therein, judgment passed by the Hon'ble Appellate Tribunal for Electricity (APTEL for short) on

12.11.2014 in Appeal No. 30 of 2014 and batch pertaining to the transmission charges and losses payable to AD Hydro Power for transmission of power from Malana-II HEP, shifting of Malana-II HEP from AD Hydro Power line to 220 kV Charor Banala D/C line constructed by the Respondent No. 1, implementation of order dated 04.12.2014 in Petition No. 54 of 2012 passed by the PSERC, reference to the orders passed by Hon'ble Supreme Court on 26.04.2017 and 12.07.2017 in Civil Appeal No. 1795 of 2013 and Review Petition No. 1365 of 2017 has also been made. However, it may be stated at the outset that the said details as given in paras, 10, 11, 12, 13, 14, 15, 16 and 17 has no bearing with the present controversy of suffering force majeure events, as described in the present Petition qua which the exemption from payment of the transmission charges has been sought.

7. As per the Petitioner, on 04.07.2023 (Annexure P-8), the Himachal Pradesh State Load Despatch Centre (HPSLDC for short) issued letter to the Respondent No. 1 that the transmission system availability factor calculation (TAFM) based on the 100% information was available for the transmission line for the month of April, 2023.

8. It is averred that the Respondent No. 2 vide letter dated 05.08.2023 (Annexure P-9) levied provisional transmission charges upon the Petitioner for the month of July, 2023 for an amount of Rs. 54,55,12,966/- which were inclusive of the outstanding amount in terms of the tariff order dated 12.08.2021 subject to adjustment in Petition No. 46 of 2021.

9. The Petitioner on 13.07.2023 intimated various authorities i.e. PSPCL and the Directorate of Energy (DoE for short), Government of Himachal Pradesh (GoHP) of the heavy rainfall and force shutdown of the Project/ Plant since 09.07.2023 which constitute as force majeure events. Further, the Petitioner also informed the higher authorities that it was pursuing the matter with the Respondent No. 1 and seeking to evacuate power from Malana-II HEP through alternate system (ERS) after having deliberate discussions with the stakeholders.

10. As per the Petitioner, there was a sudden cloudburst in the catchment area on 24.07.2023 which resulted in flash flood in the river and to enable the passage of sudden high flood discharge upstream the dam, the radial gates of the dam in partial open

condition were attempted to be fully opened but due to the continuous high silt and debris, the said gates got jammed and the water level reached the dam top and started overflowing through the dam. Copies of the photographs of the damaged transmission line tower, newspaper reports and order of the District Disaster Management Authority, Kullu dated 09.07.2023 have been annexed as Annexures P-11, P-12 and P-13 respectively.

11. Also, in continuation of earlier communication dated 13.07.2023, the Petitioner issued a further letter to the PSPCL on 26.07.2023 (Annexure P-14) informing about the events occurring in the State of H.P especially the events regarding sudden cloud burst.

12. In the circumstances, the Malana-II HEP could not be restored till 29.09.2023 and even if the Plant had been restored earlier, it would not have been able to evacuate its power due to damaged transmission system and that the restoration of transmission system took a considerable time.

13. In the meanwhile, the Respondent No. 1 issue a notice to the HPSLDC on 16.08.2023 (Annexure P-15) intimating the suspension of scheduling of energy generated from Malana-II HEP to the

Petitioner and based on said letter, the Petitioner issued letter to the PSPCL on 21.08.2023 (Annexure P-16) apprising of the situation in the State of H.P.

14. On 22.08.2023, the Commission passed an order in Petition No. 46 of 2021 directing the Petitioner to make payment of 35% of the transmission charges accrued upto July, 2023 with interest in three equal installments. However, the issue relating to the nature of subject transmission line and levy of transmission charges is sub-judice before the Hon'ble APTEL in Appeal No. 628 of 2023. Further, the abovesaid Petition No. 46 of 2021 is pending before this Commission. Copy of order dated 22.08.2023 passed by the Commission in Petition No. 46 of 2021 has been annexed as Annexure P-17.

15. According to the Petition, in view of the above force majeure events, the Petitioner issued notice to the Respondent No. 1 invoking Clause 9 of the agreements dated 30.05.2022 and 30.12.2022 on 25.08.2023 highlighting the above incidents.

16. It is averred that on 28.08.2023 (Annexure P-19), the Petitioner intimated the DoE, GoHP (Respondent No. 2) about the status of

Malana-II HEP from 26.08.2023 to 28.08.2023 and updated the ongoing activities to divert/ stop the water overflowing on the dam and to open the choked and jammed gates. The detail of the email dated 26.08.2023 has been reproduced in para 32 of the Petition.

17. On 02.09.2023 (Annexure P-20), the Respondent No. 1 issued letter to the Petitioner attaching invoices for the month of August, 2023 for the provisional transmission charges for an amount of Rs. 46,65,28,541/- inclusive of total outstanding amount in terms of Petition No. 46 of 2021. The Petitioner informed the Respondent No. 1 vide letter dated 05.09.2023 (Annexure P-21) that a sum of Rs. 3,33,33,333/- being balance amount has been remitted to the HPPTCL under protest as HPPTCL has computed the transmission charges till 31.07.2023, ignoring the force majeure events occurred in July, 2023.

18. According to the Petitioner, the erection of 2 ERS towers was undertaken and the entire transmission system was charged on 05.09.2023. The machines were synchronized with the grid on 06.09.2023 and the energy was scheduled to PSPCL from 08:00 hours. The PSPCL was informed of the above status on 06.09.2023

(Annexure P-22) that choking of the radial gates at the dam was the main concern which is yet to be addressed and once the water available at the dam was utilized for generation of power by the Malana-II HEP, the radial gates would be approached for repairing/rectification.

19. In the meanwhile, the Petitioner informed the PSPCL on 12.09.2023 (Annexure P-23) that since the power supply scheduled to the PSPCL was operated through machine after a long span of time, the water had been drawn through the penstock nozzles of both the machines to decrease the water level in the reservoir and the dam gates were opened with more hydraulic pressure which consequently resulted in accumulation of large debris, plant remains, wooden logs and silt and, therefore, in order to ensure safety of the plant turbines, the machines had to be stopped again on 10.09.2023 which remained at the standstill condition until complete flushing. A further letter dated 13.09.2023 (Annexure P-24) was also issued to the PSPCL reiterating the above status.

20. The HPPTCL responding to the force majeure notice dated 25.08.2023 vide letter dated 28.09.2023 (Annexure P-25) stated that

as per Clause 9 of the LTA agreement on 30.12.2022, the Petitioner was obligated to notify the HPPTCL of the force majeure conditions within 30 days of the occurrence and since the disruption had occurred on 09.07.2023 and notice was issued on 25.08.2023, the force majeure as raised was rejected.

21. It is claimed that after resolving the issue of flushing and cleaning, the Plant was synchronized and the power was scheduled to the PSPCL w.e.f. 29.09.2023 (Annexure P-26).

22. On 03.10.2023, the Respondent No. 1 issued another letter (Annexure P-27) raising an invoice for the payment of transmission charges for the month of September, 2023 amounting to Rs. 49,16,01,943/- including total outstanding amount in terms of Petition No. 46 of 2021. It is reiterated that the Petitioner had paid the requisite transmission charges in compliance of the order dated 22.08.2023 passed by the Commission in Petition No. 46 of 2021 which also included charges for the month of July, 2023. Further, the Petitioner also issued a fresh Bank Guarantee being BG No. 0076NDDG00014224 on 14.09.2023 in favour of the Respondent No. 1 in terms of LTA dated 30.12.2022. It is averred that the Respondent

No. 1 has levied Rs. 54,55,12,966/-, Rs. 49,65,28,541 and Rs. 49,16,01,943/- as transmission charges for the months of July to September, 2023 respectively.

23. Further averred that the Petition No. 46 of 2021 was disposed off by the Commission vide order dated 12.04.2024 directing the Petitioner to pay the entire transmission charges for use of transmission line of the Respondent No. 1 which has been assailed by the Petitioner before the Hon'ble APTEL in Appeal No. 196 of 2024.

24. It has been mentioned in the grounds of challenge by reiterating the averments made in the previous paras that the force majeure events were beyond the control of the Petitioner as Clause 9 of the LTA agreement clearly covers floods, force of nature, act of God amongst others as force majeure events and thus, no charges or compensation whatsoever can be levied on the Petitioner on account of force majeure events. Hence, the Petition.

REPLY OF THE RESPONDENTS

25. The Petition has been resisted by the Respondents No. 1 and 2 by filing the separate replies. The Respondent No. 2 was not initially

made a party to the Petition. Being a necessary party for the adjudication of the Petition, the Commission vide order dated 25.09.2024 arrayed the Directorate of Energy (DoE) as Respondent No. 2 to the Petition.

REPLY OF RESPONDENT NO. 1

26. The Respondent No. 1 in its reply has raised preliminary submissions that the Petitioner has no cause of action to maintain the Petition as the Petitioner has failed to prove the force majeure events by placing any cogent record/ evidence leading to force shutdown of Malana-II HEP between 09.07.2023 to 29.09.2023 and that the Petition has been filed to avoid the liability which has been accrued in favour of the Respondent No. 1.

27. Further, the Petitioner has failed to intimate the force majeure events, if any, within 30 days from its occurrence and has also failed to satisfy the Respondent No. 1 with respect to the existence of such events as required under the LTA dated 30.12.2022 as it was only on 25.08.2023 that the Petitioner intimated the Respondent No. 1 about the shutdown of Malana-II HEP w.e.f. 09.07.2023 referring to severe weather conditions resulting in severe rainfall, massive flooding and

landslides leading to accumulation of heavy silt. It was also informed that two towers of the Petitioners 132 kV transmission line also suffered breakdown and that the cloudburst which occurred on 24.07.2023 had resulted in jamming of the radial gates of the dam. However, the Petitioner has failed to satisfy such assertions by way of any cogent evidence.

28. According to the Respondent No. 1, efforts made by the Petitioner for the termination of force majeure events or mitigating its efforts were never intimated to the Replying Respondent. In the circumstances, the plea of suffering force majeure events was rejected vide letter dated 28.09.2023.

29. According to the Respondent No. 1, the Petitioner has failed to produce any report or certificate from any government authority with regard to the suffering of the force majeure events at Malana-II HEP leading to force shutdown between 09.07.2023 to 28.09.2023 asserting that such report/ certificate would have been germane to determine the claim of impossibility of performance of contract under a force majeure clause.

30. It is also averred that the prayer for refunding the amount collected by the Respondent No. 1 towards transmission charges during the alleged force majeure events between 09.07.2023 to 29.09.2023 is ill found as the Petitioner is in default of the payment of transmission charges for the usage of 220 kV D/C Charor Banala transmission line since 03.12.2019 and only a sum of Rs. 20,66,67,059/- has been paid and a sum of Rs. 51,51,09,487/- is still due to be recovered. Further, the prayer for quashing the invoices dated 05.08.2023 (Annexure P-9), dated 02.09.2023 (Annexure P-20) and dated 03.10.2023 (Annexure P-27) is not tenable as said invoices include provisional transmission charges for the months of July to September, 2023 and outstanding amount to be paid by the Petitioner in accordance with tariff order dated 12.08.2021 in respect of 220 kV D/C Charor Banala Transmission line and that the Petitioner by way of clever drafting intends to mislead the Commission to get a favorable order.

31. Further, the quashing of invoices would lead to denial of genuine demand for the period other than the Force Majeure. As per the Replying Respondent, the Commission has permitted the

recovery of entire transmission charges of the transmission line vide order dated 12.04.2024 in Petition No. 46 of 2021.

32. As per the HPPTCL, the Petitioner in terms of PPA executed with the PTC on 25.07.2005 (Annexure P-1) was under an obligation [Article 4.1 (x)] to obtain insurance coverage or certificate of insurance as per Schedule D which included “Business Interruption Insurance (upon Completion of Construction)”. Thus, the period under forced shutdown w.e.f. 09.07.2023 to 29.09.2023 as alleged due to force majeure events and the generation losses, if any, suffered by the Petitioner is duly covered under the above insurance.

33. According to the Respondent No. 1, the Malana-I HEP which is located in the same basin in the downstream of the Malana-II HEP has continued to operate normally during the said period and thus, the generation loss, if any, is on account of lack of adoption of prudent practice of Operation and Maintenance on the part of the Petitioner and the Replying Respondent had no control over the same.

34. On merits, the contents of the Petition have been denied reiterating the submissions made by way of preliminary submissions

averring that the transmission system of the Replying Respondent was in operation and was never damaged. It is denied that the Petitioner was unable to evacuate its power due to unprecedented rains/ floods or that the restoration of the transmission system took a considerable time. It is denied that the Petitioner is entitled to invoke Clause 9 (Force Majeure Clause) of the LTOA dated 30.12.2022 or that the bills/ invoices were not required to be raised from July, 2023 till the time the alleged force majeure events continued.

35. It is averred that the Force majeure Clause in the LTOA dated 30.12.2022 is to be given strict interpretation and that the Petitioner has failed to notify such events within 30 days of occurrence of the force majeure events and that the Petitioner except the self serving assertions has not been able to support the existence of such force majeure events by virtue of strong and cogent evidence or certificate from any Government Authority. Similarly, the Petitioner has failed to intimate the Respondent No. 1 qua the termination of force majeure events and the efforts made for restoration of power evacuation or smooth running of the Project after the forced shutdown of the Project.

36. As per the Replying Respondent, though Clause 9 of the LTA agreement exempts the parties from any losses or damages suffered on account of from force majeure events but in the present case, the Petitioner has sought relief from the payment of transmission charges which is beyond the scope of the LTA agreement, as the LTA agreement does not anywhere provide that the Petitioner is totally exempted from the payment of transmission charges for the alleged force majeure events.

37. Further averred that the transmission system by the Respondent No. 1 has been created for 289 MW power from multiple beneficiaries (41 Nos.) but till date only Malana-II HEP is connected and evacuating the power and is required to bear the ARR till other beneficiaries are connected to the system.

38. It has been denied for want of knowledge that huge silt had accumulated due to which Malana-II HEP was forced to shut down on 09.07.2023 and that the Petitioner has failed to place on record any evidence that the two towers were flooded. Not only this, the Petitioner on 13.07.2023 never requested for any support from the Replying Respondent for evacuation of power by alternate

arrangement and intimated only on 25.08.2023 of suffering of force majeure events.

39. Also averred that neither the Replying Respondent was informed of suffering of cloudburst event on 24.07.2023 nor such evidence has been placed on record and that the Annexures P-11 to P-13 are general in nature and it cannot be inferred from the same that it pertains to the force majeure events suffered by Malana-II HEP. Further the photographs (Annexure P-11) are undated and the news item (Annexure P-12) as well as order dated 09.07.2023 (Annexure P-13) have no relevance in the absence of cogent evidence.

40. According to the Respondent No. 1, notice dated 12.08.2023 to the HPSLDC for suspension of scheduling of energy was not in the wake of force majeure events as put forth by the Petitioner and rather, said notice was issued for non-compliance of order dated 04.08.2023 in Petition No. 46 of 2021. Also the communication dated 28.08.2023 (Annexure P-19) was never addressed to the Replying Respondent. It is denied that the Petitioner has made payment under protest on the pretext of suffering from force majeure events

pertaining to flooding and landslides in July, 2023. The issuance of letter dated 05.09.2023 has not been denied. However, the communications dated 06.09.2023, 12.09.2023 and 13.09.2023 (Annexures P-22 to P-24) respectively were never addressed to the Replying Respondent. It is denied that the Petitioner has paid the transmission charges for the month of July, 2023. As per the Replying Respondent, the Petitioner is liable to pay the transmission charges for the usage of the transmission line and has paid only a sum of Rs. 20,66,67,059/- and a sum of Rs. 51,51,09,487/- is still due and payable. Also that the transmission charges levied upon the Petitioner i.e. Rs. 94,81,479/- (Annexure P-9), Rs. 86,53,366/- (Annexure P-20) and Rs. 93,78,671/- (Annexure P-27) are for use of the transmission system for the months of July, August and September, 2023 respectively. The Replying Respondent has also denied the averments made in the grounds of challenge by reiterating the averments made in previous paras and has asserted that the Petitioner is not entitled for any exemption to pay the transmission charges for the period w.e.f. 09.07.2023 to 29.09.2023 as claimed.

REPLY OF RESPONDENT NO. 2

41. The Respondent No. 2 in its reply has averred that the Respondent No. 2 has been receiving free power from Malana-II HEP and has placed on record, the actual generation and free power schedule to the GoHP by Malana-II HEP w.e.f. 09.07.2023 till 20.09.2023 as supplied by the HPSLDC as Annexure R-X and that the Petition be decided on merits as per the LTA executed between the Petitioner and the Respondent No. 1/ HPPTCL.

REJOINDER

42. In separate rejoinders, the contents of the replies have been denied and those of the Petition have been reaffirmed. The Petitioner in its rejoinder to the Reply of the Respondent No. 1 has averred that the HPPTCL has miserably failed to reply to the sequence of events which occurred post 09.07.2023. A detail of sequence of events has also been appended to the rejoinder. Further that all the authorities were kept apprised of all the incidents and that the events were beyond the control of the Petitioner. Also that the Petitioner has placed on record sufficient evidence/ record to showcase the

occurrence. Further, vide Annexure P-11, the Petitioner had sought assistance from the Respondent No. 1 for evacuation of power from Malana-II HEP through an alternate system after detailed discussion with the stakeholders. Regarding delay in notifying the force majeure events, beyond 30 days, reference has been made to clause 2 (a), (b), (c), 6 (a) and 9 of the LTA that Clause 9 does not provide that notice is required to be issued within 30 days of the occurrence of the event and that even on 25.08.2023, the force majeure events were subsisting and affecting the operations of the Project. Thus, the Respondent No. 1 has misinterpreted the same. On the claim of harm or damage to Malana-I HEP located downstream of Malana-II HEP, it is averred that the comparison is ill founded.

SUBMISSIONS OF THE PARTIES

43. We have heard Sh. Hemant Singh, Ld. Counsel for the Petitioner, Sh. Vikas Chauhan, Ld. Counsel for the Respondent No. 1 and Sh. Shanti Swaroop, Ld. Legal Consultant for the Respondent No. 2.

44. Sh. Hemant Singh Ld Counsel for the Petitioner has submitted that the Malana-II HEP was affected by a series of force majeure

events in the month of July, 2023 especially on 09.07.2023 and 24.07.2023 on account of floods, cloudburst and landslides as a result of which there was accumulation of heavy slit leading to forced shut down of Malana HEP and break down of 2 numbers towers of the evacuation system which were flooded. According to him, due to a sudden cloudburst in catchment area of the project on 24.07.2023, there were flash floods in the Malana river with high slit and debris which impacted the discharge of water as the radial gates of the dam which were in partial open condition got jammed when attempted to be fully opened and water level reached the dam top and started overflowing through the dam. As per the Ld. Counsel, the dam authorities have made all possible efforts to mitigate the hardship and alert was also sounded to other sections and Projects downstream of the river through all possible ways so as to take all preventive steps of safety. According to him, the Project Authority has taken all possible measures to restore the 132 kV transmission line immediately but a significant time has been consumed due to inclement weather conditions which hampered the restoration work. He has further submitted that the force majeure events were beyond

the control of the Petitioner and could not be reasonably foreseen and falls within the ambit of Clause 9 of the LTA agreement dated 30.12.2022 and connection agreement dated 30.05.2022 which have affected the obligation under the agreement for the period till the force majeure events subsisted which absolves the Petitioner from payment of the transmission charges to the Respondent No. 1 for the period from 09.07.2023 to 26.09.2023. He has also submitted that during subsistence of the force majeure events, the Petitioner notified the existence of force majeure events to the Respondent No. 1 on 25.08.2023 but despite this, invoices for levying of the transmission charges have been repeatedly issued for the force majeure period which are not tenable as no transmission charges are liable to be paid for period under force majeure events. As per the Ld. Counsel of the Petitioner, the Clause 22-a of Regulation 3 (1) of the Himachal Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Transmission Tariff) Regulations, 2011, as inserted vide 2nd amendment dated 22.11.2018 does not provide for issuance of force majeure notice and that the Regulations framed by the Commission become part of the Regulatory framework and

override the existing clause of issuance of mandatory force majeure notice as per the LTA dated 30.12.2022 and the assertion of the Respondent in this regard is not correct. He has also submitted that the Petitioner has demonstrated the existence of force majeure events by producing sufficient documentary evidence in the shape of newspaper reports, photographs and letters etc. and the Petition is ought to be allowed. He has relied upon the law laid down by the Hon'ble Supreme Court in PTC v. CERC 2010(4)SCC 603, Rajasthan Housing Board vs New Pink City Nirman Sehkari Smiti Ltd. and another (2015) 7 SCC 601 and judgment of the Hon'ble APTEL in Appeal No. 169 of 2018 decided on 14.05.2024 in case titled M/s Himachal Sorang Power Pvt. Ltd. Vs CERC and others.

45. Sh. Vikas Chauhan, Ld. Counsel for the Respondent No. 1 has submitted that there is no denying the fact that a flash flood had occurred upstream of the Malana-II HEP on the fateful dates on 09.07.2023 and 24.07.2023 resulting in damage to the Project but said flash floods were not so severe to be construed as a force majeure events as the flash floods were controlled and could have easily been managed had adequate safety arrangements been

adopted while constructing the Project and dam. According to him, the cloudburst and flash floods are not a rare phenomenon and were expected to happen as the Project is situated in a geologically sensitive area and having regard to these known conditions, the Petitioner was expected to be ready for such eventualities in case of floods of high magnitude and that on the fateful dates, the flood was not even 1/4th of the design flood anticipated for the Project but still the Project sustaining damage clearly points out towards the negligence in preparedness of the Petitioner for meeting such eventualities. He has also submitted that the jamming of radial gates clearly points towards the improper maintenance of the system which negates the contention of the Petitioner. He has further submitted that the Petitioner has not been able to place on record any satisfactory evidence about the early restoration of the Project and since the system of the Respondent No. 1 was ready in all aspects, the case of the Petitioner does not fall under clause 9 of the LTA dated 30.12.2022 or connection agreement dated 30.05.2022 and therefore, the Petitioner is not absolved from performance of the contract and is liable pay the transmission and other charges and

invoices dated 05.08.2023, 02.09.2023 and 03.10.2023 have rightly been issued. He has also submitted that the delay in issuing the force majeure notice after a gap of almost 31 days clearly suggests that the event was accepted and treated as a normal foreseeable weather condition.

46. Sh. Shanti Swaroop, Ld. Legal Consultant for the Respondent No. 2 has submitted that the cloudburst incident had occurred 14 KM upstream to the Malana-II HEP which had led to immediate flooding of the Malana river and that the Malana-II HEP had limited time for restricting the flow having a small storage capacity and flood discharge was released accordingly.

47. We have carefully gone through the submissions and record including the written submissions filed by the parties. On the basis of pleadings, submissions and record, the following points arise for determination in the Petition:-

Point No. 1: Whether the flood events occurring in the month of July, 2023 i.e. on 09.07.2023 and 24.07.2023, upstream of the Malana-II HEP were beyond the control of the Petitioner and were force majeure events as per Clauses 9 of the Connection

Agreement dated 30.05.2022 and LTA Agreement dated 31.12.2022?

Point No. 2: If Point No. 1 is answered in affirmative, whether the Petitioner is exempted from the payment of transmission charges to the Respondent No. 1 for the period w.e.f. 09.07.2023 to 29.09.2023 and the invoices dated 05.08.2023, 02.09.2023 and 03.10.2023 are liable to be quashed?

Point No. 3: **Final Order**

Point No. 1: No.

Point No. 2: No.

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

REASONS FOR FINDINGS

Points No. 1 and 2:

48. Both these points being interconnected and interlinked are taken up together for disposal.

49. Before we advert to the merits of the case, it is relevant to refer that the occurrence of heavy rains and flash floods upstream the Malana-II HEP on the fateful dates and sustaining of damage to the various components of the Project on account thereof have not been disputed. Similarly, the exchange of correspondence, as mentioned in

the Petition, is also not in dispute. What is disputed by the Respondent No. 1 is that the alleged events were neither unforeseeable nor unpredictable nor beyond the control of the Petitioner and rather, the damage to the system of the Malana-II HEP has occurred due to the errors on the part of the Petitioner in maintenance and operation of the Project especially spillway gates, for which the Petitioner cannot seek exemption and escape the liability.

50. It is relevant to refer that the Petitioner in the present Petition has given details of the PPA dated 25.07.2025 with the Power Trading Corporation (PTC), Power Sale Agreement (PSA) dated 23.03.2006 with the Punjab State Power Corporation Limited (PSPCL), LTOA dated 14.07.2008 granted by the Power Grid Corporation of India Limited (PGCIL), agenda for the 30th and 31st meeting of the Standing Committee on Power System Planning of Northern Region dated 19.12.2011 and 02.01.2013 in respect of the construction of the transmission line, details of filing of Petition No. 54 of 2012 with the Punjab State Electricity Regulatory Commission (PSERC) and order dated 27.11.2013 passed therein and judgment

passed by the Hon'ble Appellate Tribunal for Electricity (APTEL for short) on 12.11.2014 in Appeal No. 30 of 2014 and batch, pertaining to the transmission charges and losses payable to AD Hydro Power for transmission of power from Malana-II HEP be made pass through and payable by the PSPCL, shifting of transmission of energy of Malana-II HEP from AD Hydro Power line to 220 kV Charor Banala D/C line constructed by the Respondent No. 1, implementation of order dated 04.12.2014 in Petition No. 54 of 2012 passed by the PSERC and reference to the orders passed by Hon'ble Supreme Court on 26.04.2017 and 12.07.2017 in Civil Appeal No. 1795 of 2013 and Review Petition No. 1365 of 2017. However, the aforesaid detail given in Paras 8 to 17 in the Petition have no bearing with the controversy in the present matter which pertains to the non-performance of contract on account of force majeure events.

51. Similarly, the Petitioner has also made reference to Petition No. 46 of 2021 pertaining to a dispute over quantum of transmission charges payable by the Petitioner to the Respondent No. 1. The Commission had disposed off said Petition vide order dated 12.04.2024, which had been assailed by the Petitioner before the

Hon'ble APTEL in Appeal No. 196 of 2024. However, the said appeal was decided by the Hon'ble APTEL vide order dated 27.08.2024 remanding the matter to the Commission for decision afresh. Therefore, the Commission re-entered said Petition No. 46 of 2021 in the register which has now been disposed off vide order dated 23.01.2025. The said order dated 23.01.2025 passed by the Commission has been assailed by the Petitioner before the Hon'ble APTEL in Appeal No. 51 of 2025 which is pending before the Hon'ble APTEL. As mentioned above, the controversy in said Petition No. 46 of 2021 pertained towards quantum of transmission charges to be levied and thus, the same too has no bearing with the present controversy, wherein the Petitioner has sought exemption from payment of the transmission charges on account of the force majeure events alleged to be prevailing on or after 09.07.2023 in the Malana-II HEP.

52. Undisputedly, the Petitioner has signed the connection agreement on 30.05.2022 and LTA on 30.12.2022 with the HPPTCL/ Respondent No. 1. Both the agreements contain force majeure event clauses, being Clause No. 9, which are being reproduced as under:-

Connection Agreement dated 30.05.2022

"9. Force Majeure

Force Majeure herein is defined as any clause which is beyond the control of the STU or the applicant or Intra-State transmission licensee/ Distribution licensee as the case maybe, which could not be foreseen or with a reasonable amount of diligence could not have been foreseen and which substantially affects the performance of the agreement. Force Majeure events would include:

- *Natural phenomenon including but not limited to floods, droughts, earthquake and epidemics;*
- *....*
- *Neither of the parties shall be liable for delays in performing obligation on account of any force majeure causes as referred to and/or defined above."*

LTA Agreement dated 30.12.2022

"9. The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lockout, fire, flood, forces of nature, major accident, act of God, change of law and any other causes beyond the control of the defaulting party."

53. It is evident from Clauses 9, as contained in both the agreements dated 30.05.2022 and 30.12.2022 that the force majeure event clause covers floods, force of nature and act of God, which are beyond the control of the contracting parties or which could not have been foreseen with a reasonable amount of diligence and substantially affects the performance of the agreement. On being established as such, the defaulting party shall not be liable for

performing any obligation on account of happening or existence of such force majeure events. In the circumstances, the Petitioner in order to seek recourse to the force majeure clause has to establish that the non-performance of the obligations under the LTA dated 30.12.2022 or connection agreement dated 30.05.2022 were beyond its reasonable control and that the events were foreseeable and could not have been prevented by the exercise of due diligence and also that the events were not attributable to the negligence, omission, or failure of the construction/ design. Conversely, the foreseeable natural events, if not adequately considered at the design stage or neglect in operation and maintenance, do not qualify as Force Majeure events.

54. In *Energy Watchdog v. Central Electricity Regulatory Commission & Ors.* (2017) 14 SCC 80, the Hon'ble Supreme Court has held that interpretation of force majeure should be construed narrowly and that it cannot be stretched to cover probable difficulty or loss cause to the entity obligated to perform the contract.

55. Therefore, the force majeure clause cannot be invoked merely on account of inconvenience, difficulty or commercial hardship and

only those events which render performance impossible and which squarely fall within the contractual definition can be accepted as Force Majeure. Hence, the Force Majeure clause is to be interpreted narrowly and mere hardship or adverse conditions do not amount to force majeure events. Similarly, the operational and managerial lapses, including failure in planning, design or operation, cannot be construed as force majeure events.

56. The Petitioner has claimed that the following force majeure events have occurred in Malana-II HEP on 09.07.2023 and 24.07.2023 and therefore, it was prevented from the performance of the obligation under the agreement dated 30.12.2022:-

- (a) On account of the prevailing monsoon season resulting in heavy and devastating rains in the State of Himachal Pradesh, there was accumulation of heavy silt due to which, the Malana II HEP of the Petitioner was forced to shutdown on 09.07.2023;
- (b) As in the month of July 2023, the local weather condition in the State of Himachal Pradesh did not stabilize, with silt being accumulated near the intake system of the Petitioner's Project. In lieu thereto, the transmission system from Malana II HEP to the Respondent's 200kV Charor system, through which the energy generated from Malana II HEP was evacuated into the Grid, got impacted with breakdown of two nos. of towers being flooded. Hence, the power from Malana II HEP could not be evacuated even if the plant was restored post stopping of the heavy rains.
- (c) Further, on 24.07.2023, there was a sudden cloud burst in the catchment area which resulted in flash flood in the rivers. As such, to

- enable passage of the sudden high flood discharge upstream the dam, radial gates of the Dam Gates in partial open condition were attempted to be fully opened. However, due to continuous high silt and debris, the said gates got jammed and consequently, the water level reached the Dam top and started overflowing through the Dam;
- (d) Considering the above events, Malana II HEP could not be restored till 29.09.2023 since even if the said plant was restored, the same would not have been able to evacuate power generated through the then damaged transmission system. In terms thereof, the Petitioner issued a Force Majeure notice to HPPTCL on 25.08.2023, detailing the above difficulties;
 - (e) Thereafter, on 12.09.2023, the power supply scheduled to PSPCL was operated through machines after a long span of time. However, water had been drawn through the penstock nozzles of both units to decrease the water level in the reservoir, and attempts were made to fully open the dam gates with more hydraulic pressure. Accordingly, the gates were opened with high pressure;
 - (f) However, the opening of the radial gates resulted in passing through of accumulated large debris, plant remains, wooden logs and accumulated silt, and to ensure safety of the plant turbines, machines were again stopped in the evening on 10.09.2023, and the same were in a standstill condition until complete flushing was done. In view thereof, it was noted that the process of entire cleaning and flushing would take another 9-10 days; and
 - (g) As such, after the issue of flushing and cleaning was resolved, the plant was synchronized and energy was scheduled to PSPCL from 29.09.2023.

57. Substantiating its case, the Petitioner has placed on record the LTOA dated 30.12.2022 (Annexure P-6), Connection Agreements dated 28.06.2019 and 30.05.2022 (Annexure P-7), copy of letter dated 04.07.2023 (Annexure P-8) issued by the HPSLDC in respect

of transmission system availability factor calculations, copies of photographs of the river, Project building and dam on the fateful dates (Annexure P-11), copies of the newspaper cuttings (Annexure P-12), copy of Office order dated 09.07.2023 passed by the District Disaster Management Authority, Kullu (Annexure P-13), intimation dated 26.07.2023 sent by the Petitioner to the authorities of the PSPCL (Annexure P-14), copy of letter dated 16.08.2023 issued by the HPPTCL to the HPSLDC for not scheduling the power of Malana-II HEP being defaulter of the LTOA dated 30.12.2022 w.e.f. 03:00 PM on 16.08.2023 (Annexure P-15), copy of letter dated 21.08.2023 issued by the Petitioner to the PSPCL regarding the current situation at Malana-II HEP regarding the force majeure events (Annexure P-16), copy of Force Majeure notice dated 25.08.2023 issued by the Petitioner to the HPPTCL intimating existence of the force majeure events (Annexure P-18), copies of e-mail dated 28.08.2023 to the DoE regarding the status of Malana-II HEP on 26.08.2023, 27.08.2023 and 28.08.2023 (Annexure P-19), copy of invoice dated 02.09.2023 issued by the HPPTCL (Annexure P-20), copy of letter dated 05.09.2023 issued by the Petitioner to the HPPTCL for

revocation of suspension of power under LTOA (Annexure P-21), copies of letter dated 06.09.2023, 12.09.2023 and 13.09.2023 issued by the Petitioner to the PSPCL regarding the current situation (Annexure P-22 to P-24), reply dated 28.09.2023 of the HPPTCL to the notice dated 25.08.2023 (Annexure P-25) and copy of letter dated 03.10.2023 issued by the HPPTCL to the Petitioner regarding payment of provisional transmission charges for September, 2023.

58. No technical/ expert report either internal or external carried out by some expert engineer or government authority about the magnitude of flood recorded, design flood, early warning system, status of spillway gates, status of sediments and boulders, spillway capacity etc. operation and maintenance of various components of the Projects has been produced by the Petitioner either with the Petition or afterwards to substantiate that all the components of the Project especially the dam gates were adequate and were being maintained carefully at regular intervals. Therefore, in the absence of any such cogent evidence, the Commission in order to examine the controversy in the matter in its proper context/ perspective, vide order dated 17.12.2024 directed the Respondent No. 2/ DoE to file a

comprehensive affidavit in the matter indicating the following details alongwith documents:-

1. Design Flood of dam and its return period.
2. Magnitude of flood recorded at the time of incident.
3. Status of the early warning system, whether installed upstream of dam. If yes, whether was the same functional at the time of incident?
4. Lead time for operation of gates from the site of early warning system.
5. Status of the spillway gates of dam at the time of incident with hoisting capacity of the gates.
6. Status of sediment and boulder deposition at the face of gates.
7. Status of Insurance of the project. Whether insurance covers the generation loss?
8. Spillway capacity of the dam.
9. Whether spillway had been augmented or is being augmented.
10. Reservoir level before the incidents.
11. Capacity of the reservoir.

59. In response to the directions issued by the Commission on 17.12.2024, the compliance affidavit dated 17.03.2025 was filed on 18.03.2025 by the Respondent No. 2/ DoE submitting the following in para 2 of the compliance affidavit:-

“2. There exists Safety & Authority Cell in the Directorate of Energy and the present affidavit is based upon record available in the Cell. The point wise compliance affidavit is as under:

i. Design Flood of Dam and Its Return Period:

*That the then HPSEB now HPSEBL has accorded Techno Economic Clearance Malana-II (2x50 MW), the copy of which is enclosed herewith as **Annexure-I** for kind perusal of this Hon'ble*

Commission. It is further submitted that the design flood in respect of Malana-II dam is of 650 Cumecs (**Annexure-I TEC of Malana-II HEP**). However, the dam has two radial spillway gates measuring **4.00m x 5.50m** to manage flood discharges.

ii. Magnitude of Flood Recorded at the Time of Incident:

The Directorate of Energy has constituted a Committee with the approval of the State Government vide No. HPDoE/CE(Energy)/Malana-II HEP/2024/3346-58 dated 12.08.2024 to inquire the various aspects of flood incidences, a committee with members having officers from DoE, District Administration and aspects in the field of design, hydrology and hydropower were made part of this committee for conducting an enquiry on the damages occurred to Malana-I Malana-II, Sumez and Parbati-III HEPs in recent cloud burst. The committee has submitted the Site Visit Report to the GoHP in respect of Malana-I, Malana-II, Parbati-III, Sumez and Beas Kund HEPs. The relevant extracts of the Site Visit Report in respect of Malana-II HEP is enclosed herewith as **Annexure-II** for kind perusal of this Hon'ble Court. The relevant points in **Annexure-II** are as under:-

- The relevant extracts of report **Annexure-II** states that on **August 1, 2024, at 2:56 AM**, a sudden increase in the water level from **2.90 meters to 3.55 meters** was recorded at the Automatic Water Level Recorder (AWLR) upstream of the Malana-II Dam.
- As per information provided by Malana-II, the flood discharge was **approximately 150 cumecs**, which is **40 cumecs higher** than the flood event of 2023. However, this relatively small increase in discharge led to heavy devastation downstream, which is in variance to the magnitude of the flood. IPP was asked to authenticate the statement based on factual evidence which so far has not been done at their end.

iii. Status of the Early Warning System, Whether Installed Upstream of Dam:

- As per relevant extracts of report **Annexure-II** the dam has an **Automatic Water Level Recorder (AWLR)** installed just upstream dam site to measure water levels.

- As per relevant extracts of report **Annexure-II**, the **Early Warning System (EWS)** is **not up to standard**, and no flood forecasting system has been installed.

iv. Lead Time for Operation of Gates from the Site of Early Warning System:

The AWS has been installed just at the upstream of Dam site of Malana-II HEP. However, the dam authorities noticed rising water levels at **2:56 AM**, and the gates were opened between **3:00 AM** and **6:00 AM**.

v. Status of the Spillway Gates of the Dam at the Time of Incident with Hoisting Capacity of the Gates:

- The spillway gates were opened to release discharge and lower the reservoir level.
- Stop log gates are available for maintenance.
- The hoisting system capacity is not explicitly mentioned in the report.

vi. Status of Sediment and Boulder Deposition at the Face of Gates:

As per relevant extracts of report **Annexure-II**, no sediments and boulders deposition at the face of the gates. However, as reported by the project developer of Malana-II HEP, **muddy water, logs, and other** trash were observed flowing into the reservoir, indicating possible sediment inflow from upstream.

vii. Status of Insurance of the Project. Whether Insurance Covers the Generation Loss:

No data available in the office of Directorate of Energy.

viii. Spillway Capacity of the Dam:

- The dam has **two radial spillway gates**, each measuring **4.00m x 5.50m**.
- The spillway discharge capacity of both gates is 650 cumecs.

ix. Whether Spillway Had Been Augmented or Is Being Augmented:

- The dam has **overtopped twice** in the past: once in **2013** and again in **2023**.
- Despite this, spillway augmentation been delayed, and ungated additional spillway construction has not yet been completed by the Project authority.

x. Reservoir Level before the Incidents:

- *As per relevant Extracts of report Annexure-II the water level in the reservoir was at EL 2538.70m before the flood.*
- *It rose to EL 2539.60m before release operation began.*

*xi. **Capacity of the Reservoir:***

- *Gross Storage Capacity : **0.386 million cubic meters (MCM)***
- *Live Storage Capacity :**0.2875 MCM***

60. It is the case of the Petitioner that on account of heavy and devastating rains on 09.07.2023, there was heavy silt accumulation in the dam and as a result thereof, the Malana-II HEP was forced to shut down and the transmission system from the Project line upto 220 kV Charor system got impacted with breakdown of 2 Nos. of towers being flooded. Further, on 24.07.2023 due to a cloudburst in the catchment area, there was high flood discharge upstream of the dam and the radial gates of the dam which were in partial open condition were attempted to be opened fully but due to continuous high silt and debris, the gates got jammed and water level reached over the dam and got spilled over the dam. Resultantly, the Malana-II HEP could not be restored till 29.09.2023. In the circumstances, force majeure notice dated 25.08.2023 was sent to the Respondent invoking clause 9 of the LTA dated 30.12.2022 seeking exemption from the payment of transmission charges on account of impossibility of non-performance of the contract during the period of force majeure.

61. A careful perusal of the compliance affidavit submitted by the DoE, shows that there exists a safety and authority cell in the DoE and the affidavit is based on the record available in the said cell. It is evident from the compliance affidavit that a committee was constituted by the DoE, Government of Himachal Pradesh (GoHP) on 12.08.2024 under the directions of the GoHP to enquire into the various aspects of flood magnitude in various Projects. The said committee on visiting the site of the Malana-II HEP has submitted its report to the DoE/ Respondent No. 2, which has been annexed as Annexure-II with the compliance affidavit dated 17.03.2025 of the DoE.

62. Though much detail about the flash floods incident occurred during the year 2023 has not been given as the committee had been constituted on 12.08.2024 yet it is mentioned in para 2 (ii) of the compliance affidavit dated 17.03.2025 that the flood discharge in the year 2024 was 150 cumecs which was 40 cumecs higher than the flash floods event of 2023, meaning thereby that the flash floods in the year 2023 were only of the magnitude of 110 cumecs, well within the design flood. This part of the affidavit has not been controverted

by the Petitioner that the magnitude of the floods in the year, 2023 was more than 110 Cumecs nor any evidence contrary to the same has been produced.

63. The Techno Economic Clearance (TEC) for the Project was issued by the HP State Electricity Board now HP State Electricity Board Limited. However, said TEC was not placed on record by the Petitioner. Rather, the TEC dated 15.01.2004 has been annexed by the DoE with the compliance affidavit as Annexure-I. It is evident from the TEC that the design flood in respect of the Malana-II HEP was considered as 650 Cumecs with catchment area of 158 sq. km. The TEC also shows that the dam has two radial spillway gates measuring 4.00m x 5.0m operated by hydraulic hoist to manage discharge of water. As evident from the compliance affidavit, the magnitude of flood recorded in the year 2023 was 40 cumecs lower than the flood of 150 Cumecs record in the year, 2024. It is highly strange that the gates could not handle even a flood of less than $1/4^{\text{th}}$ of the design flood capacity which points out towards serious flaws in the operation and maintenance of the dam and its gates.

64. The Petitioner has filed an affidavit in response to the compliance affidavit dated 17.03.2025 of the Respondent No. 2/ DoE that the DoE in the compliance affidavit dated 17.03.2025 has erroneously put forth details/ information regarding the force majeure events occurring in August, 2024 and that the details/ information provided by the Respondent No. 2/ DoE do not pertain to the issue of force majeure events occurred in the Malana-II HEP in the month of July, 2023 onwards. However, the factum of the design flood of Malana-II HEP as 650 Cumecs and existence of two radial spillway gates measuring 4.00m x 5.50 m has not been disputed. Further, the detail/ information in the compliance affidavit dated 17.03.2025 qua the early warning system being not upto the standard and non-existence of flood forecasting system as mentioned by the DoE has also been controverted being completely frivolous. Also submitted that the stop log gates are available for maintenance purposes and are kept aside on the dam body. It is also submitted in response to compliance affidavit dated 17.03.2025 that the Malana-II HEP dam has overtopped only two times since the commissioning on 12.07.2012 and as per objections of the DoE, health assessment of

the dam was carried out wherein the expert had suggested that the dam radial gates hoisting system capacity was required to be enhanced for smooth operation of the gates. Regarding the status of sediment and boulders deposition at the face of gates, it is submitted that the same were observed during the flash floods. On the status of insurance, it is submitted that the Project is insured which also covers the generation loss but the insurance would only cover the cost incurred in repairing the power station and does not take into consideration the force majeure events and the damage suffered on account thereof and that the controversy in the Petition does not relate to the recovery of generation loss. On the point of augmentation of spillway and delayed spillway augmentation, it is submitted that the Petitioner initiated concrete cutting work at the Project site in the month of August, 2023 but such work was stopped in the Month of November, 2023 due to extreme weather conditions but the work was in progress till the force majeure event occurring in August, 2024 (which form part of Petition No. 119 of 2024) and as on date, the restoration work is in progress but this aspect has been overlooked by the DoE.

65. As evident from the compliance affidavit dated 17.03.2025, the DoE had constituted a committee with the approval of the State Government vide order No. HPDoE/CE(Energy)/Malana-II HEP/2024/3346-58 dated 12.08.2024 to enquire into the various flood incidences in respect of Malana-I, Malana-II, Parabati-III, Sumez and Beas Kund HEP. The report of the committee in respect of the Malana-II HEP has been placed on record as Annexure-II with the compliance affidavit.

66. The committee while enquiring into the incident at Malana-II HEP has observed that the dam had overtopped twice, firstly on 14.08.2013 and secondly on 24.07.2023 but despite this, the work of construction of additional spillway has been delayed. The committee also observed that the information provided to the committee based on data/ record of reservoir/ gate operation and power house was not satisfactory as gaps were observed in the record leading to suspicion of fast opening of gates. The Committee also observed that inflow calculations provided after 07:00 AM lacked a proper basis and were misinterpreted and it was revealed by the dam authorities that the data provided was based on visual checking of the water level rather

than accurate calculations. It was also observed that despite repeated instructions since the last one year, CCTV has not been made functional and the SCADA system for the gate was also not in operation at the dam site. It was also observed that the early warning system as available was not compatible to the desired standards and that no flood forecasting, AWD system is provided and the levels of water were being measured at upstream site. It was further observed by the Committee that dam break analysis has been recently conducted but the marking of danger level was still pending but the results of the dam break analysis were not shared with the local administration. Further, the early warning system, voice broadcasting system is still to be installed.

67. It has not been disputed by the Petitioner that the committee had not conducted the enquiry or the Project authorities were not associated. In the circumstances, there is no reason for doubting the contents of report of the committee in Annexure-II of the compliance affidavit dated 17.03.2025 or the averments/ detail made by the Respondent No. 2 in the compliance affidavit dated 17.03.2025.

68. Though the Petitioner has come out with an assertion that the early warning system, Automatic Water Level Records (AWLR) installed upstream of Malana-II HEP dam site for measuring the water levels were functional but the committee has observed that the Early Warning System (EWS) was not compatible to the desired standard, no flood forecasting system/ AWD is provided and the water levels were being checked visually and data, as provided to the committee was based on visual checking of the dam, clearly suggesting that the AWLR and EWS were either not functional or were not compatible to the desired standards. Otherwise also, no satisfactory evidence about the functionality of the aforesaid system has come on record except the self serving assertions in the Petition which are not satisfactory to discharge the burden of proof about the query of the Commission about the lead time for operation of gates from the early warning system, more particularly when the committee has observed that the data as provided was based on visual checking of the water level rather than accurate calculations and gaps were observed in the report produced which indicates about suppression of vital detail.

69. Coming to the hoisting capacity of the gates, though it is not mentioned in report (Annexure-II) annexed with compliance affidavit but fact remains that the dam had overtopped in the year, 2013. Though, no detail thereof has been given in the Petition, yet the Petitioner in response to the compliance affidavit has mentioned that when the dam had been overtopped, the enhancement of hoisting capacity of the gates had been advised by the expert but no such corrective measure were taken which clearly indicates that the operation and maintenance of the dam and gates were neglected, as a result, silt kept on accumulating and water could not be discharged smoothly leading to further damage and uprooting of two evacuation towers.

70. In fact, the detailed report of the causes for overtopping the dam in the year, 2013 was required to be produced especially about the spillway gates/ radial gates and corrective measures taken in the year, 2013. The flash floods on the fateful dates in July, 2023 were even less than 1/4th of the design capacity but still the dam has overtopped which points out about serious lapses in maintenance of dam and gates or serious lapses in design and construction of dam.

71. On the presence of sediment and boulders deposition at the gates, evidently, the Project had become functional after 26.09.2023 but no report of any expert either internal or external has been produced about the magnitude of said objects and steps taken for removal of the same. In the absence thereof, an inference strongly arises that the maintenance was neglected and due to negligent handling of the dam and gates, deposition of sediments and boulders, if any, had occurred.

72. Regarding spillway capacity of the dam, it was observed by the committee that the discharge capacity of both the gates was 650 Cumecs which was compatible to the design flood of 650 Cumecs but evidently, recorded presence of flood on the fateful dates was less than 110 Cumecs meaning thereby that the flood on the date of incident was even less than $1/4^{\text{th}}$ of the anticipated volume of flood i.e. 650 Cumecs which could have easily been passed through the spillway gates. In fact, the dam gates play a significant role in the safety of dam and are required to be maintained properly at regular intervals. As observed above, no satisfactory evidence about the repairs and maintenance of the dam gates has been led. No record or

data of such maintenance has been placed on record. This clearly indicates that this aspect has been neglected, as a result, the gates could not cater to a small flood of 110 Cumecs, as against the design capacity of 650 Cumecs, and got jammed. It is also mentioned in the compliance affidavit dated 17.03.2025 that spillway augmentation as mentioned earlier was delayed and ungated additional spillway was not completed by the Project authorities which further points out towards the neglect in maintaining the dam and gates which appear to be the real cause of damage to the evacuation towers.

73. It is clearly evident from the TEC of the Project (Annexure-I to the compliance affidavit dated 17.03.2025) and report of the expert committee (Annexure-II) that the design flood was anticipated as 650 Cumecs. The Project is situated at Malana river in Himalayan region a geographical sensitive area having a huge catchment area of 158 sq. km. Hence, recurrence of floods was a foreseeable and anticipated environmental condition and, as such, the design flood was anticipated as 650 Cumecs. Not even a single documents has come on record that the flood was more than 110 Cumecs which is considered as normal river behaviour and was manageable.

Therefore, if the flood was within the established design flood capacity i.e. Probable Maximum Flood (PMF), it inherently suggests that the event was a foreseen risk for which the dam and gates were capable to handle. It is settled law that one who asserts, must prove and therefore, the Petitioner invoking the Force Majeure clause was required to demonstrate by leading sufficient cogent evidence that the event was neither foreseeable nor preventable and also that there was no fault or negligence on the maintenance of the dam and gates. Since, the Project has failed to withstand a flood of lesser magnitude than the design flood, the focus clearly shifts towards a potential negligence towards design, construction or operational failure of the dam and gates rather than unpreventable force majeure events as projected.

74. In fact, as observed above, the Petitioner has not been able to show as to whether the proper maintenance of the dam and gates was being carried out at regular intervals. Since, the flash floods were of the magnitude of 110 Cumecs, in a river having catchment area of 158 sq. km., hence, the alleged event was foreseeable and preventable and can't be said to be beyond the reasonable control of

the Petitioner. Further, the jamming of gates with a flood of about 110 Cumecs clearly suggests about inadequate maintenance of dam structure, spillways gates, operational errors i.e. not following correct emergency plan such as proper water release protocols which led to a reduced capacity to handle even a flood of 110 Cumecs,.

75. The Petitioner has also not been able to prove a direct causal link between an extraordinary event i.e. the alleged flash flood and its inability to perform. Once, the flood was within the design parameters, the cause of damage was not flash floods itself which was manageable and rather, the failure of the dam system to function as intended. As observed above, the flood upto 650 Cumecs was a predictable weather event based on the Project location and is considered a natural risk inherent to the Project responsibility. As mentioned above, the Petitioner has not produced any evidence except some photographs and newspaper reporting which are not enough to establish that the event was exceptional and had happened despite taking all reasonable precautions.

76. In an hydro dam accumulation of silt is a known, foreseeable and recurring phenomenon, particularly during monsoon season. Silt

management, including provision of desilting chambers, flushing arrangements and operational protocols, forms an integral part of project design and operation. Therefore, being an inherent project risk, the dam operators have a responsibility to anticipate and manage the sedimentation as part of routine operation and maintenance through appropriate engineering and operational measures. The Petitioners have not placed on record any technical evidence or certification from competent authorities to establish that the silt accumulation on 09.07.2023 was of an unprecedented or extraordinary nature, beyond design assumptions or was incapable of being mitigated by due diligence. Therefore, the events which are inherent to the nature of the project and arise during normal operation, even if causing temporary disruption, cannot be elevated as Force Majeure events.

77. Significantly, the dam had overtopped in the year, 2013 however, every effort has been made to suppress the same, Why such incident had occurred, what steps had been taken, neither any explanation has been offered nor any report to that effect have been produced. It is relevant to refer there that the Petitioner has

mentioned in response affidavit in response to the compliance affidavit that a health check up of the dam was done after the dam overtopped in the past and as per the objections of the DoE, health assessment of the dam was carried out where the expert had suggested that the dam radial gates hoisting capacity be enhanced. However, neither the observations of the DoE nor the said health assessment has been produced. Not learning any lesson from the previous event of 2013, which finds mention in the report of the DoE and response affidavit of the Petitioner to the compliance affidavit dated 17.03.2025 clearly suggest that there was flaw in the construction of the dam and operation and maintenance of gates of the dam which is the cause of erratic water discharge. The Petitioner was aware of the hydrology where the cloudbursts are not rare phenomenon meaning thereby that there was foreseeability of the risk of flash floods and occurring of such type of mishaps. Thus, the preventable measures were required to be taken which appear to be lacking.

78. In order to rule out the doubt that the spillway gates and other regular maintenance of dam and gates was being carried out

periodically, the Petitioner was required to produce the operation and maintenance record especially the steps taken after the 2013 incident but it appears the Petitioner has suppressed more and disclosed less and rather the details of past events find mention only in the report of the of the committee of the DoE which also found gaps between the data as produced and the statement offered.

79. Even the Petitioner has not led any evidence that the rainfall on the fateful dates were so unprecedented and could not have been anticipated. As observed above, the river has a catchment of about 158 sq. km. The magnitude of the flood was only 110 Cumecs. Thus, the rainfall was within the Probable Maximum Precipitation as according to the hydrology, the design flood was anticipated as 650 Cumecs and catchment area as 158 sq. km. The magnitude of floods was only 110 Cumecs. Thus, it cannot be reasonably believed that the utility poles were knocked over by a small gust of flood which clearly point out that there was failure on the part of the Petitioner in maintaining the operational gates and as a result, controlled water could not be discharged resulting in uprooting/ damage to the utility poles/ transmission system.

80. Significantly, the alleged incident had happened on 09.07.2023 and 24.07.2023. As per the Connection Agreement dated 30.05.2022 and LTA agreement dated 30.12.2022 the incident was required to be notified within 30 days from the incident but the incident infact has been notified on 25.08.2023 after a delay of almost 45 days from 09.07.2023 and 31 days after 24.07.2023. This clearly suggests that incident at once was not viewed as a force majeure event and was considered a normal incident, as such, the same was not notified in time to seek the exemption of the payment of the charges. Even the reliance by the Petitioner on Clause 22 (a) of Regulation 3 (1) of the Transmission Tariff Regulations, 2011, as amended, is misplaced as Clause 22 (a) simply defines the force majeure and thus, the notice which is mandatory under the agreements, the Petitioner was required to issue such notice in time.

81. Apparently, no evidence has also been produced of any major damage sustained by the Projects downstream the river and especially Malana-I HEP which is about 5 km downstream of Malana-II HEP. Though the Petitioner has claimed that it immediately communicated the incident to the Projects downstream the river by

hooters, alarms, telephones, whatsapp etc. but in the absence of any damage by flood to other Projects downstream also suggests that the incident was not of high magnitude, as claimed, and thus, the notice invoking Clauses 9 of the agreements has been made to escape the liability for its own wrongs.

82. In so far as the law laid down by the Hon'ble Supreme Court in PTC v. CERC 2010(4)SCC 603 and Rajasthan Housing Board vs New Pink City Nirman Sehkari Smiti Ltd. and another (2015) 7 SCC 601 and judgment of the Hon'ble APTEL in Appeal No. 169 of 2018 decided on 14.05.2024 in case titled M/s Himachal Sorang Power Pvt. Ltd. Vs CERC and others, which has been relied upon by the Petitioner has no application to the facts and circumstances of the present case.

83. In the circumstances, the Petitioner has not been able to substantiate that the flash floods happening on 09.07.2023 and 24.07.2023 were not reasonably foreseeable or that the incidents were beyond its control or that the incidents/ events fall within the ambit of force majeure events under Clauses 9 of the Connection Agreement dated 30.05.2022 and LTA agreement dated 30.12.2022

and on account thereof, the Petitioner has failed to perform its part of the contract or that the Petitioner is exempted from the payment of transmission charges to the Respondent No. 1 for the period w.e.f. 09.07.2023 to 29.09.2023. Similarly, the Petitioner has not been able to substantiate that the invoices dated 05.08.2023, 02.09.2023 and 03.10.2023 are illegal and liable to be quashed. Points No. 1 and 2 are accordingly decided against the Petitioner and in favour of the Respondent No. 1.

FINAL ORDER

84. 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.

85. Let a copy of the order be supplied to the parties forthwith.

The file after needful be consigned to the records.

Announced
31.12.2025

-Sd-

(Shashi Kant Joshi)
Member

-Sd-

(Yashwant Singh Chogal)
Member (Law)-cum-Chairman