

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

Petition No: 119 of 2024
Date of Institution: 20.09.2024
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
and after 01.08.2024 at Malana-II HEP are force majeure events as
per Clause 9 of the Long Term Open Access Agreement dated
30.12.2022 and that the transmission charges are not liable to be**

paid till the subsistence of force majeure events and the invoice dated 05.09.2024 is 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 after 01.08.2024 as elaborated in the Petition are force majeure events as per Clause 9 of the Long Term Open Access Agreement (LTOA) 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 transmission charges qua wheeling of 100 MW power through 220 kV D/C Charor Banala transmission line are not payable and the invoice dated 05.09.2024 issued by the Respondent No. 1 for the

period covered under the force majeure events is liable to be quashed.

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 to 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 w.e.f. 01.08.2024 :-

- a) On 01.08.2024, due to the prevailing monsoon season resulting in heavy and devastating rains in the State of Himachal Pradesh, a cloud burst occurred at 02:45 hours in the catchment areas, flash flood occurred at the Dam site of Malana-II HEP. This incident was immediately informed to the downstream hydro projects, local administration and District Disaster Management Authority ("DDMA").
- b) Further, safety alerts were also initiated via hooters and public addressing systems about the release of water from the Dam, and the Dam gates were gradually operated to release the flash flood.
- c) On the same day (01.08.2024), at 03:15 hours, the generating units at the powerhouse had to be safely shut down, and the intake gates were closed. In fact, it is stated that the employees residing in the accommodation above the office building at the powerhouse had to be promptly evacuated to secure locations.

- d) In light of the imminent risk posed by crossing the bridge near the MAT, which was subsequently washed away by the flood, the team inside the powerhouse was instructed to remain within the facility, specifically at the highest safe location available.
As such, the above incident also severely damaged some of the properties situated at the site.
- e) Accordingly, a preliminary inspection was carried out to gather information on the damages incurred due to the incident, wherein, the following was noted:
 - i. The Dam and its apparent components were observed safe, however, the approach road between the powerhouse and the Dam got damaged/ washed away in the flood;
 - ii. The approach bridge to the main access tunnel of the powerhouse was washed away in the flood, which led to non-accessibility and isolation of the powerhouse from the rest of the road;
 - iii. The entire 132 KV switchyard, its control room, and the 725 kV DG set got washed away in the flood;
 - iv. The connecting bridge to the tail race tunnel cum cable tunnel was also washed away in the flood;
 - v. The main administrative building and the office premises were also washed away in the flood;
 - vi. Three towers vis-à-vis tower nos. 01, 02 and 03 of the 132 KV D/C transmission lines also got washed away in the flood; and
 - vii. The intensity of the flood was so high that the flood water flowed back to the powerhouse via Tail Race Tunnel (TRT).

5. It is claimed that the above peculiar situation tantamount to events of force majeure as per Clause 9 of the LTOA agreement 30.12.2022 and Connection Agreement dated 30.05.2022 which exempt the Petitioner from any liabilities including liability of payment of transmission charges on occurrence of force majeure events which will continue till the Petitioner is in a position to generate the power.

Further, as a matter of fact, the Project cannot be restored to generate power until the effects of the force majeure events are prevailing.

6. As per the Petitioner, it promptly informed the HPPTCL vide letters dated 03.08.2024, 09.08.2024 and 16.08.2024 about the above incident.

7. 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 relevant to mention that the said details as given in paras, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 have no bearing with the present controversy of force majeure events, as described in the present Petition qua which the exemption from payment of the transmission charges has been sought.

8. According to the Petitioner, it is wheeling the power from Malana-II HEP through 220 kV D/C Charor-Banala transmission line belonging to the Respondent No. 1 from December, 2019 onwards

and a Long Term Open Access Agreement (LTOA/ LTA) was granted by the HPPTCL on 30.12.2022 (Annexure P-6) for a quantum of 86 MW till 12.07.2024 and 80 MW from 13.07.2024 to 05.12.2044 as per the connection agreements dated 28.06.2019 and 30.05.2022 (Annexure P-7).

9. In para 21 of the Petition, the details pertaining to the period from 09.07.2023 to 29.09.2023 has been mentioned which is subject matter of Petition No. 100 of 2024. It is mentioned that the Petitioner has also sought exemption from the payment of transmission charges for the period under force majeure events occurring from 09.07.2023 to 29.09.2023 but in August, 2023 and December, 2023 the Respondent No. 1 has unilaterally encashed the Bank Guarantee (BG) bearing BG No. 0076NDDG00015922 and BG No. 0076NDDG00014224 for the period w.e.f. 09.07.2023 to 29.09.2023.

10. In paras 22 to 28 of the Petition, the details of Petition No. 46 of 2021, filing of CWP No. 7763 of 2021 against order dated 27.11.2021 in Petition No. 46 of 2021 before the Hon'ble High Court, filing of Bank Guarantee, order dated 30.05.2023 passed by the Hon'ble High Court in CWP No. 7763 of 2021 directing the Petitioner to approach

the Hon'ble APTEL, the detail of order dated 04.08.2023 passed by the Commission in Petition No. 46 of 2021 and disposal of Petition No. 46 of 2021 vide order dated 12.04.2024 by the Commission has been given. According to the Petitioner, the Petitioner challenged the order dated 04.08.2023 passed by the Commission in Petition No. 46 of 2021 in Appeal No. 196 of 2021 before the Hon'ble APTEL. The detail of fresh order passed by the Commission in Petition No. 46 of 2021 has also been given but said controversy has no bearing with the controversy raised in the present Petition which is about treating the events occurring after 01.08.2024 in Malana-II HEP as force majeure events and exemption of transmission charges for said period.

11. According to the Petitioner, it assailed the order dated 12.04.2024 in Petition No. 46 of 2021 before the Hon'ble APTEL in appeal No. 196 of 2024 whereby vide final order dated 27.08.2024, the order of the Commission dated 12.04.2024 was set aside by the Hon'ble APTEL. The observations made by the Hon'ble APTEL have been reproduced in para 29. In paras 30 and 31, the detail of payment of transmission charges @ 35% and the pendency of

Appeal before the Hon'ble APTEL has been made which too has no bearing with the present controversy.

12. As per the Petitioner, immediately after the incident on 01.08.2024, the intimation was passed on to the downstream hydro projects, local administration and District Disaster Management Authority and safety alerts were also initiated via hooters and public addressing systems about the release of water from the Dam and the dam gates were gradually opened to release the flash floods. Copies of the newspaper articles evidencing the flash floods and copies of the photos of the Malana-II HEP before and after the flash floods occurring on 01.08.2024 have been annexed as Annexure P-16 and Annexure P-17 (Colly).

13. On 01.08.2024 at 03:15 hours, after the flash floods were noticed, the generating units at the powerhouse had to be safely shutdown and the intake gates were closed. The employees at the powerhouse were evacuated to secure locations. In the light of imminent risk posed by the bridge near the MAT which was washed away in the flood, the team inside the power house was instructed to remain at the highest safe location available. However, incident

ended up severely damaging some of the properties at site and preliminary inspection was carried out to gather information about the damages due to the incident which were noted by the Petitioner in the incident report dated 01.08.2024 as under:-

- a) The Dam and its apparent components were observed safe, however, the approach road between the powerhouse and the Dam got damaged/ washed away in the flood;
- b) The approach bridge to the main access tunnel of the powerhouse was washed away in the flood, which led to non-accessibility and Isolation of the powerhouse from the rest of the road;
- c) The entire 132 KV switchyard, its control room, and the 725 kV DG set got washed away in the flood;
- d) The connecting bridge to the tail race tunnel cum cable tunnel was also washed away in the flood.
- e) The main Admin building and the office premises were also washed away in the flood;
- f) Three towers vis-à-vis tower nos. 01, 02 and 03 of the 132 KV D/C transmission lines also got washed away in the flood; and
- g) The intensity of the flood was so high that the flood water flowed back to the powerhouse via TRT.

A copy of the Incident Report dated 01.08.2024 as prepared by the Petitioner is annexed as Annexure P-18.

14. It is averred that on 01.08.2024, it was gathered from the messages contained in the whatsapp group that a lot of other power plants in the area faced similar issues due to the flash floods on 01.08.2024 (Annexure P-19).

15. According to the Petitioner, in view of the above unforeseeable and uncontrollable circumstances, the Petitioner was constrained to issue a Force Majeure notice to the HPPTCL/ Respondent No. 1 on 03.08.2024 (Annexure P-20) invoking Clause 9 of the Connection Agreement dated 30.05.2022 and LTA agreement dated 30.12.2022.

16. It is averred that on 03.08.2024 (Annexure P-21), the Petitioner wrote to the Station House Officer (SHO), Police Station, Tehsil Kullu, Himachal Pradesh, informing about the incidents occurring on 01.08.2024, as under:-

- a) That, the power plant components such as the switchyard, road, bridge, DG set, Hydra machine, JCB machine and transmission line towers etc. were totally washed away in the flash floods;
- b) The Petitioner's office building, having all documentary records, IT assets, office furniture, store buildings and security check posts, staff accommodations were also washed out in the flash floods; and
- c) The exact total loss and damage of the plant components were yet to be ascertained until the plant became accessible. In these circumstances, it was informed that the power plant was under forced shutdown conditions.

The contents of the above letters were also forwarded by the Petitioner to the Deputy Commissioner and Superintendent of Police, Kullu, Himachal Pradesh vide letter dated 03.08.2024 (Annexure P-22).

17. It is further averred that due to the damage to the power Plant, the Petitioner also filed a First Information Report (FIR) with the Police Station, Distt. Kullu, Himachal Pradesh, on 05.08.2024 (Annexure P-23).

18. Simultaneously, the Petitioner vide letter dated 09.08.2024 (Annexure P-24) intimated the HPSLDC about the occurrence of the subsisting force majeure events, which has been reproduced as under:-

"We are writing to update you about a Force Majeure event that occurred at 100 MW Malana II HEP (Everest Power Pvt. Ltd.) It is well known to everyone with the evidence that many areas in Himachal Pradesh experienced devastating heavy rainfall and floods due to severe weather conditions. On account of the same, the 100 MW Malana II HEP (Everest Power Pvt. Ltd.) has to go under forced shutdown owing to the aforesaid force majeure event from 1st August 2024 onwards.

It is stated that with the onset of consequent heavy and devastating rainfall, massive flooding and landslides have resulted in the forced outage of EPPL's 100 MW Malana II HEP since 01.08.2024.

Therefore, the present notice is issued as a consequence of the above force majeure events and to inform your good office of the occurrence of the said force majeure events. For this, it is stated that EPPL is invoking Clause 9 of the captioned Agreement(s).

Further, as per the above provisions, it is emphasized that EPPL is exempted from being levied any claims, whatsoever, under the captioned Agreements. Accordingly, HPSLDC is hereby requested not to levy any charges, including open access or any other charges, upon EPPL till the subsistence of the effect of the aforementioned force majeure events, starting from 01.08.2024."

19. The Petitioner issued another communication to HPPTCL on 16.08.2024 (Annexure P-25), in addition to the Force Majeure Notice dated 03.08.2024 and submitted photographs of the DAM upstream condition and photographs of location of the main access tunnel connecting bridge, administration office building location and the switchyard location, which were all washed away in the flashfloods which occurred on 01.08.2024. The Petitioner also referred to Clause 9 of the LTA dated 30.12.2022 and Clause 9 of the Connection Agreement dated 30.05.2022 and reiterated that the Petitioner is exempted from any levy of charges, including open access or transmission charges amongst others, till the subsistence of the effect of the aforementioned force majeure events, starting from 01.08.2024. Copy of the letter dated 16.08.2024 was also sent to the HPSLDC.

20. However, on 31.08.2024 (Annexure P-26), in blatant disregard of the above issues raised by the Petitioner, the HPSLDC responded to the letter dated 09.08.2024, alleging that there is no provision for exemption of charges on account of force majeure events under the HPERC (Levy and collection of Fees and charges by State Load

Despatch Centre) Regulations, 2011 (SLDC Regulations, 2011 for short) and that the HPSLDC would continue to raise the monthly SLDC charges bill from August, 2024 onwards in accordance with Clause Nos. 29 (4) and 29 (5) of the aforesaid Regulations, in proportion to the contracted capacity.

21. Subsequently, on 05.09.2024, the HPPTCL issued a letter to the Petitioner, thereby attaching an invoice for the month of August, 2024 towards transmission charges for an amount of Rs. 52,24,11,367/-, which purportedly included the total outstanding amount in terms of the order dated 12.04.2024 passed in Petition No. 46 of 2021, without appreciating the fact that the said order has been set aside vide order dated 27.08.2024 by the Hon'ble APTEL. The said invoice was further raised for the period of subsisting force majeure events. The aforesaid bill/ invoice was based upon HPSLDC's letter dated 02.09.2024 (Annexure P-27), wherein, the SLDC charges were raised for the month of August, 2024.

22. It is further averred that the Petitioner vide letter dated 14.09.2024 (Annexure P-29) informed the HPPTCL that its claim for the transmission charges for the month of August, 2024 is wholly

untenable and contrary to the terms of the LTA, the Connection Agreement and in the teeth of the Order dated 27.08.2024 issued by the Hon'ble APTEL but the HPPTCL till date has not responded to the notice notifying the force majeure events by the Petitioner through its communications dated 03.08.2024 and 16.08.2024.

23. Thereafter, on the same date i.e., 14.09.2024 (Annexure P-30), the Petitioner responded to HPSLDC's letter dated 02.09.2024, inter alia requesting the HPSLDC to withdraw its claim for SLDC charges on account of the occurrence of force majeure events in terms of the express provisions of the LTA dated 30.12.2022 and the Connection Agreement dated 30.05.2022.

24. As per the Petitioner, it is settled law that in the event of occurrence of force majeure events, no transmission charges can be levied by the Transmission Licensee and has referred to the law laid down by the Hon'ble APTEL in Appeal No.169 of 2018 vide judgment dated 14.05.2024 titled M/s Himachal Sorang Power Pvt. Ltd. v. CERC & Ors., which has been upheld by the Hon'ble Supreme Court in Civil Appeal No. 8494 of 2024 vide order dated 27.08.2024.

25. The indulgence of the Commission has been sought for restraining the HPPTCL from raising any bills/ invoice qua the transmission charges upon the Petitioner from August, 2024 onwards till the time such force majeure events subsist and therefore, the bill/ invoice dated 05.09.2024 raised by the HPPTCL for Rs. 52,24,11,367/- is liable to be quashed without prejudice to its rights. It is averred that the demand notice raised vide invoice/ bill dated 05.09.2024 is also contrary to the order dated 27.08.2024 passed by the Hon'ble APTEL in Appeal No. 196 of 2024 as 100% transmission charges are not leviable and the invoice dated 05.09.2024 is liable to be set aside and the HPPTCL is required to be restrained from raising the bills till the time the force majeure events are prevailing.

26. It is also averred that the force majeure Clause 9 of the LTA dated 30.05.2022 covers floods, force of nature, act of God amongst others and since the force majeure events as mentioned above have led to the inability of the Petitioner to evacuate power from the Project, the event clearly falls within the ambit of the force majeure event as contemplated in the LTOA agreement dated 30.05.2022. It is also averred that till the time the transmission system of Petitioner

is ready to evacuate power after cessation of the force majeure events, no transmission charges are payable. Hence, the events as elaborated in the Petition amount to force majeure events within the purview of Clause 9 of the LTA agreement dated 30.12.2022 and Connection Agreement dated 30.05.2022 and be declared as such and the invoice dated 05.09.2024 is required to be quashed till the subsistence of force majeure events.

REPLY OF THE RESPONDENTS

27. 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

28. The Respondent No. 1 in its reply has raised preliminary submissions that the occurrence of force majeure events is yet to be established being necessary condition in the LTA dated 30.12.2022 and that the Petitioner has failed to justify the assertions of suffering

from any force majeure events by way of cogent evidence. Further, the termination/ cessation of the force majeure events or efforts made for mitigating the effects of the force majeure events were never intimated by the Petitioner to the Replying Respondent and, therefore, the suffering of force majeure events has been denied.

29. Also averred that the Petitioner has failed to place on record any certificate or report from any Government Authority/ Agency with respect to suffering of any force majeure events leading to force shutdown w.e.f. 01.08.2024 which was 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 quashing invoice dated 05.09.2024 is not maintainable as the invoice includes the transmission charges for the month of August, 2024 alongwith outstanding amount ending on July, 2024 to be paid by the Petitioner in terms of tariff order dated 12.08.2021 in respect to 220 kV D/C Charor-Banala transmission line and the Petitioner by way of clever drafting has tried to mislead the Commission to get a favorable order and the quashing of invoice might lead to denial of the genuine

demand made by the Replying Respondent towards the transmission charges from the Petitioner for the period other than claimed under the force majeure events.

31. It is further averred that in terms of the PPA executed with the PTC on 24.07.2005 (Annexure P-1), the Petitioner was under an obligation under [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 shut down as alleged w.e.f. 01.08.2024 till its subsistence due to force majeure events is duly covered under the above insurance and the generation loss, if any, suffered by the Petitioner is also duly covered.

32. It is also averred that as per the Clause 9 of the LTA dated 30.12.2022, the transmission/ drawl of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist but the Petitioner has not adhered to said part of the clause and has failed to intimate the cessation/ termination of the force majeure events which allegedly started on 01.08.2024. Also averred that the Petition is totally silent about the

tentative time of the cessation of the aforesaid force majeure events.

Thus, the Petition is premature.

33. On merits, the contents of the Petition have been denied. It is denied that the Petitioner is entitled to invoke Clause 9 (Force Majeure Clause) of the LTOA dated 30.12.2022 and seek indulgence of the Commission of not raising any bill/ invoice and that the force majeure clause is to be given strict interpretation and as a matter of fact, the Petitioner has failed to intimate the cessation thereof and effective steps being initiated to start the transmission/ drawl of power from its Project at the earliest. Further, the suffering of force majeure events w.e.f. 01.08.2024 is based upon the assertion of the Petitioner and is not supported by any cogent evidence report or certificate of any expert Government Authority/ Agency. The receipt of letters dated 03.08.2024, 09.08.2024 and 16.08.2024 has not been disputed but the contents thereof have been denied. It is averred that the Hon'ble APTEL in its order dated 27.08.2024 in Appeal No. 196 of 2024 has nowhere restrained the Respondent No. 1 from making complete demand towards the transmission charges. Further, the Petitioner has no cause of action.

34. Replying to the factual matrix, it is averred that the transmission system i.e. the 220 kV D/C Charor Banala transmission line is under the exclusive use by the Petitioner for evacuating the power from Malana-II HEP and thus, the approved ARR is required to be borne by the Petitioner till the other beneficiaries are connected to the system and consequent sharing shall take place.

35. According to the Respondent, the Petitioner was in default for payment towards the transmission charges in terms of order passed by the Commission during the pendency of Petition No. 46 of 2021, as such, the Respondent No. 1 encashed the Bank Guarantee. Also the Petitioner by quoting facts of different Petitions is trying to mislead the Commission.

36. It is denied that the Respondent No. 1 deliberately and in contravention of order of the Hon'ble APTEL has arbitrarily raised the demand on the Petitioner vide invoice dated 05.09.2024. Further, the pendency of the Appeal No. 628 of 2023 before the Hon'ble APTEL has no bearing with the present cause of action.

37. Further averred that there is nothing on record to substantiate the existence of force majeure events and damages suffered by the

Project. The Respondent No. 1, as per the connection agreement dated 30.05.2022, is responsible for maintenance of the transmission system beyond the interconnection point of the Project i.e. 220 kV Bus Bar of 220/132/33 kV Charor Sub-station of the HPPTCL, wherein no outage or unavailability of transmission system has happened during the aforesaid period and uninterrupted service has been provided for the Project. According to it, the Petitioner has filed the present Petition to avoid the liability which has accrued in favour of the Respondent No. 1.

REPLY OF RESPONDENT NO. 2

38. 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. 29.07.2024 till 06.10.2024 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

39. In separate rejoinders, the contents of the replies have been denied and those of the Petition have been reaffirmed. As per the Petitioner, it has placed on record sufficient evidence/ record to showcase the occurrence of force majeure events which are still persisting and false assertions have been made by the Respondent No. 1 in its reply. Further, sufficient efforts have been taken for mitigating the effects of the force majeure events.

SUBMISSIONS OF THE PARTIES

40. 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.

41. Sh. Hemant Singh Ld Counsel for the Petitioner has submitted that the Malana-II HEP was affected by a serious force majeure event on 01.08.2024 on account of cloudburst, flash floods and landslides as a result, the Project had to be forcibly shutdown. Further submitted that extensive damage was sustained by the Project in the flash floods as crossing bridge near the MAT, administration building,

entire 132 kV switchyard with DG set, connecting bridge to the tail race tunnel and three towers of the 132 kV D/C transmission line etc. were washed away and that the incident of cloudburst and flash floods was neither foreseeable nor preventable and is required to be considered as force majeure event. According to him, the Petitioner immediately passed on the information to the concerned authorities and the Projects downstream the Malana-II HEP by all possible means and promptly notified the Respondent No. 1/ HPPTCL of the existence of force majeure events as per Clause 9 of the LTA dated 30.12.2022. According to the Ld. Counsel, the Petitioner has established on record the existence of force majeure event by placing on record sufficient cogent and satisfactory evidence i.e. incident report, photographs of Malana-II HEP before and after the flash floods, newspaper reports, FIR made by the Malana-II HEP authorities, messages sent to various authorities and force majeure event notice etc. According to him, Clause 9 of the LTA dated 30.12.2022 and connection agreement dated 30.05.2022 provide that any event which is beyond the reasonable control of the parties shall be a force majeure event and, therefore, the Petitioner is absolved of

the liability from payment of the transmission and other charges till subsisting of the force majeure events and thus, the invoice dated 05.09.2025 is liable to be set aside. He has also submitted that since the force majeure incidents are continuing and the Project is not restored for generation, the PSPCL has terminated its agreement with the Petitioner. He has relied upon the law laid down by the Hon'ble APTEL in Appeal No. 169 of 2018 titled as M/s Himachal Sorang Pvt. Ltd. v. CERC & Ors. decided on 14.05.2024 which has been upheld by the Hon'ble Supreme Court vide order dated 27.08.2024 in Civil Appeal No. 8494 of 2024.

42. 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 dam on the fateful morning on 01.08.2024 resulting in loss to the various components of the Project but said flash floods were not so severe to be construed as a force majeure event as the flash floods were controlled and could have easily been managed had adequate safety arrangements been adopted for regulating the water discharge from the dam. According to him, the cloudburst and flash floods are not a rare phenomenon 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 but on the fateful date, the flood was about 1/4th of the design flood which was capable of being managed by timely discharge of water and it appears that the dam and gates were not being maintained properly, as a result, the water was not discharged properly and the Project sustained damage. He has also submitted that the Petitioner has not placed on record the steps taken by it for mitigating the alleged hardship and restoration of the evacuation system and since, the evacuation system of the Respondent No. 1 was ready in all respect, the Petitioner is not absolved of the liability under the garb of force majeure events and is liable to pay the transmission charges and the bill/ invoice has rightly been issued.

43. 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.

44. 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 events occurring on or after 01.08.2024 at Malana-II HEP were beyond the control of the Petitioner and were/ are force majeure events as per clauses 9 of the Connection Agreement dated 30.05.2020 and LTA Agreement dated 30.12.2022?

Point No. 2: If Point No. 1 is answered in affirmative whether the Petitioner is exempted from the payment of transmission charges for the period w.e.f. 01.08.2024 onwards and invoice dated 05.09.2024 is 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 Order.

REASONS FOR FINDINGS

Points No. 1 and 2:

45. Both these points being interconnected and interlinked are taken up together for adjudication.

46. Before we advert to the merits of the case, it is relevant to refer that the occurrence of cloudburst upstream the Malana-II HEP on the fateful morning, flash floods on account thereof and sustaining of damage to the various components of the Project has not been disputed by the Respondents. Similarly, the exchange of correspondence with various authorities, as mentioned in the Petition, is also not in dispute. What is disputed by the Respondent No. 1 is that the alleged event was not an unforeseeable and unpredictable event and do not amount to force majeure event beyond the control of the Petitioner and, therefore, the Petitioner cannot escape the liability under the LTA dated 30.12.2022 for no fault of the Respondent No. 1.

47. 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, 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 and commissioning of 220 kV D/C

Charor-Banala Transmission line and wheeling of power through said line. However, the aforesaid detail as given in Paras 10 to 19 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 occurring on 01.08.2024.

48. 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 and details about the Writ Petition pending in the Hon'ble High Court and Appeal before the Hon'ble APTEL. 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. Thereafter, 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 01.08.2024 at the Malana-II HEP.

49. Undisputedly, the Petitioner signed the connection agreement on 30.05.2022 and LTA on 30.12.2022 with the HPPTCL. Both the agreements contain force majeure event clauses, as Clause 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."

50. 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 so established, the defaulting party shall not be liable for performing any obligation on account of happening or existence of such force majeure events.

51. In the circumstances, the Petitioner in order to seek recourse to the force majeure clause has to establish that the non-performance of the obligation under the LTA dated 30.12.2022 or connection agreement dated 30.05.2022 was beyond its reasonable control and that the incident/ event was unforeseeable and could not have been

prevented by the exercise of due diligence and also that the events were not attributable to its negligence, omission, or failure of the construction/ design/ maintenance.

52. 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 clause should be construed narrowly. 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 events. Thus, the Force Majeure clause is to be interpreted strictly and 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.

53. The Petitioner has claimed that the following force majeure events have occurred in Malana-II HEP on 01.08.2024 which are continuing and on account thereof, it was prevented from the performing the obligations under the LTA dated 30.12.2022:-

- a) On 01.08.2024, due to the prevailing monsoon season resulting in heavy and devastating rains in the State of Himachal Pradesh, a cloud burst occurred at 02:45 hours in the catchment areas, flash flood occurred at the Dam site of Malana-II HEP. This incident was immediately informed to the downstream hydro projects, local administration and District Disaster Management Authority ("DDMA").
- b) Further, safety alerts were also initiated via hooters and public addressing systems about the release of water from the Dam, and the Dam gates were gradually operated to release the flash flood.
- c) On the same day (01.08.2024), at 03:15 hours, the generating units at the powerhouse had to be safely shut down, and the intake gates were closed. In fact, it is stated that the employees residing in the accommodation above the office building at the powerhouse had to be promptly evacuated to secure locations.
- d) In light of the imminent risk posed by crossing the bridge near the MAT, which was subsequently washed away by the flood, the team inside the powerhouse was instructed to remain within the facility, specifically at the highest safe location available.
As such, the above incident also severely damaged some of the properties situated at the site.
- e) Accordingly, a preliminary inspection was carried out to gather information on the damages incurred due to the incident, wherein, the following was noted:
 - i. The Dam and its apparent components were observed safe, however, the approach road between the powerhouse and the Dam got damaged/ washed away in the flood;
 - ii. The approach bridge to the main access tunnel of the powerhouse was washed away in the flood, which led to non-accessibility and isolation of the powerhouse from the rest of the road;
 - iii. The entire 132 KV switchyard, its control room, and the 725 kV DG set got washed away in the flood;
 - iv. The connecting bridge to the tail race tunnel cum cable tunnel was also washed away in the flood;
 - v. The main administrative building and the office premises were also washed away in the flood;

- vi. Three towers vis-à-vis tower nos. 01, 02 and 03 of the 132 KV D/C transmission lines also got washed away in the flood; and
- vii. The intensity of the flood was so high that the flood water flowed back to the powerhouse via Tail Race Tunnel (TRT).

54. 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 Bank Guarantee (BG) dated 15.12.2021 (Annexure P-8), copy of order dated 31.05.2023 (Annexure P-9), copy of the order of the Commission (Annexure P-10), copy of letter dated 03.08.2023 issued by HPPTCL to ICICI Bank (Annexure P-11), copy of fresh BG dated 14.09.2023 (Annexure P-12), copy of another BG dated 12.11.2023 (Annexure P-13), copy of final order dated 12.04.2024 in Petition No. 46 of 2021 (Annexure P-14), copy of order dated 27.08.2024 in Appeal No. 196 of 2024 passed by the Hon'ble APTEL (Annexure P-15), copies of the newspaper articles (Annexure P-16), copies of photographs before and after the incident (Annexure P-17 Colly), copy of incident report dated 01.08.2024 (Annexure P-18), copy of whatsapp messages dated 01.08.2024 with District Disaster Management Authority, Kullu (Annexure P-19) Copy of Force Majeure Notice dated 03.08.2024 issued to the HPPTCL (Annexure

P-20), copy of letter dated 03.08.2024 intimating the SHO, Police Station, Kullu (Annexure P-21), copy of letter dated 03.08.2024 issued to the Deputy Commissioner and Superintendent of Police, Kullu (Annexure P-22), copy of FIR dated 05.08.2024 (Annexure P-23), copy of letter dated 09.08.2024 issued by the Petitioner to the HPSLDC (Annexure P-24), copy of letter dated 16.08.2024 issued by the Petitioner to the HPPTCL (Annexure P-25), copy of letter dated 31.08.2024 issued by the HPSLDC (Annexure P-26), copy of letter dated 02.09.2024 issued by the HPSLDC regarding payment of SLDC charges (Annexure P-27), copy of letter dated 05.09.2024 issued by the HPPTCL (Annexure P-28), copy of letter dated 14.09.2024 issued by the Petitioner to the HPPTCL regarding payment of provisional transmission charges for August, 2024 (Annexure P-29) and copy of letter dated 12.09.2024 issued by the Petitioner to the HPSLDC regarding payment of monthly SLDC charges for August, 2024 (Annexure P-30).

55. No 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 and spillways 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.

56. In response to the directions issued by the Commission on 17.12.2024, the compliance affidavit dated 17.03.2025 has been 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”**

57. It has been claimed by the Petitioner that on account of heavy and devastating rains during monsoon season, a cloudburst occurred at 02:45 hours in the catchment area and, as a result thereof, flash floods occurred at the dam site of Malana-II HEP on 01.08.2024 which caused extensive damage to the Project and force majeure events are subsisting till date and accordingly, a force majeure notice dated 03.08.2024 was sent to the Respondent No. 1 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 but ignoring the same, bill for the period under force majeure has been issued.

58. A careful perusal of the compliance affidavit submitted by the DoE, shows that a committee had been constituted by the DoE, on

12.08.2024 under the directions of the Government of Himachal Pradesh (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 made part of the compliance affidavit as Annexure-II and the information mentioned in the compliance affidavit is based on the record maintained in Safety and Authority Cell in the DoE.

59. The TEC for the Project was issued by the HP State Electricity Board now HP State Electricity Board Limited on 15.10.2004. 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 dated 17.03.2025 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 dated 17.03.2025, the magnitude of flood on the fateful date was only 150

Cumecs. It is highly strange that the manageable flood created havoc, as projected and the dam and its gates could not handle even a flood of about $1/4^{\text{th}}$ of the design flood which is 650 Cumecs which points out towards serious flaw in the operation and maintenance of the dam and its gates.

60. The Petitioner has filed an affidavit in response to the compliance affidavit dated 17.03.2025 filed by the Respondent No. 2/ DoE wherein, the detail/ information about the design flood of 650 Cumecs and existence of two radial spillway gates measuring 4.00 m x 5.50 m to manage the flood discharge has not been disputed. Regarding magnitude of flood recorded at the time of incident, it is submitted that there was sudden increase in the water level on 01.08.2024 at 02:56 hours from 2.9 meters to 3.55 meters as recorded at the automatic water level recorder upstream of Malana-II HEP dam. Further, it was also observed that the muddy water alongwith logs and other trash were seen flowing into the reservoir indicating a flash flood and safety alerts were sounded through hooters, public address system, telephone, social media groups and it was gathered that a lot of other Projects in the area faced similar

issues. Further, the Petitioner gradually increased opening of dam radial gates taking care of downstream flooding and dam safety and a table indicating the detail of gate operation and water released has also been appended and that had the Petitioner not opened the dam gates, there were chances of dam overtopping in 10-15 minutes. Further, at about 06:00 hours, when water was continuing at 125 Cumecs, the gates were gradually opened fully but the flood intensity remained around 100 Cumecs on 01.08.2025 and thereafter, slowly decreased and that this information was supplied to the DoE on 02.08.2024 but the same has not been mentioned in the compliance affidavit. On the status of early warning system, it is submitted that as per the installed AWLR, it was observed at 02:56 hours on 01.08.2024 that water level at EWS increased from 2.9 meters to 3.55 meters. It is submitted that the assertion of the DoE in compliance affidavit dated 17.03.2025 that the EWS was not upto the standard is completely frivolous. On the issue of spillway gates at the dam at the time of incident with hoisting capacity of the gates, it has been submitted that the Malana-II HEP had overtopped twice since the commissioning on 12.07.2012 and health assessment of the dam

and its components was carried out as per the directions of the DoE and during said study, expert had suggested that the dam radial gates hoisting system capacity was required to be enhanced for smooth operation of the gates but in the present case, no instance of enhancement of hoisting system capacity arises on the part of the Petitioner as during the incident on 01.08.2024, both gates were opened and the flood discharge was passing through these gates. Regarding the status of sediment and boulders deposition at the face of gate, it is submitted that on 31.07.2024, the Petitioner had carried out reservoir flushing to remove the silt and debris from the reservoir but on the fateful date, muddy water, logs and other trash was recorded flowing into the reservoir. 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 the observation of the DoE that the spillway augmentation has been

delayed, 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 incident occurring in August, 2024 and as on date the restoration work is in progress but this aspect has been overlooked by the DoE in the compliance affidavit.

61. The response of the Petitioner to the compliance affidavit is self contradictory as on the one hand it is mentioned that the gates were gradually opened after observing the behaviour of flood/ water but on the other hand, it is mentioned that no instance of enhancement of hoisting system capacity arises on part of the Petitioner since during the incident of the floods on 01.08.2024 both the gates were opened and the flood discharge was passed through these gates only. Here it is relevant to mention that the committee in its report, which is to be discussed in subsequent paras has mentioned that there were gaps between the statements made by the Project authorities and the data provided, which clearly suggest vital information about the performance of the gates has been withheld.

62. It is evident from the report of the committee enquiring into the incident dated 01.08.2024 at Malana-II HEP which is part of the compliance affidavit dated 17.03.2025 as Annexure-II 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.

63. 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. It is thus evident that the things were being taken casually.

64. 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.

65. Even the rise in the water level of the dam on 01.08.2024 at 02:56 AM from 2.90 meters to 3.55 meters as recorded in the Automatic Water Level Recorder (AWLR) upstream of the dam is a normal predictable activity when there is elevation of water level in the river due to flood taking into consideration the design flood of 650 Cumecs.

66. Coming to the hoisting capacity of the gates, though it is not mentioned in report (Annexure-II) annexed with compliance affidavit dated 17.03.2025 but fact remains that the dam had overtopped twice in the year, 2013 and 2023. 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 till the happening of the incident on 01.08.2024 which clearly indicates that the operation and maintenance of the dam and gates were neglected, as a result, the water could not be discharged smoothly leading to further damage to the various components of the Project including the evacuation system.

67. In fact, the detailed report of the causes for overtopping the dam in the year, 2013 and 2023 was required to be produced especially about the spillway gates/ radial gates, hoisting capacity and corrective measures taken in the year, 2013 and 2023. The flash floods on the fateful date on 01.08.2024 were about 1/4th of the design flood capacity but still the dam gates were unable to pass on

the discharge of water which points out about lapses in maintenance of dam and gates or serious lapses in design and construction of dam. It is relevant to mention that no details whatsoever about the periodical maintenance of gates and dam has been produced which would have been relevant to infer that adequate precautions were being taken.

68. On the presence of sediment and boulders deposition at the gates, no such deposition was noted by the committee. Though, it has been mentioned that flushing of the dam had been carried out on 31.07.2024 but no record thereof has been produced. Had the gates been opened at the time as Projected, the alleged sediments and boulders would have easily crossed over through the spillway gates as in a flood, presence of sediments and boulders is not an unforeseen thing.

69. Coming to the 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 only 150 Cumecs which as per the Petitioner remained at about 100

cumecs throughout the day on 01.08.2024 meaning thereby that the flood on the date of incident was $1/4^{\text{th}}$ 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 the 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 and gates 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 150 Cumecs, as against the design flood of 650 Cumecs. It is also mentioned in the compliance affidavit dated 17.03.2025 by the DoE that spillway augmentation has been delayed and ungated additional spillway was not completed by the Project authorities despite dam overtopping twice which further points out towards the neglect in maintaining the dam and gates which appear to be the real cause of damage to the various components of the Project including the evacuation system and can't be considered as a force majeure event as claimed.

70. 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 150 Cumecs on the fateful date 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. 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. However, except the photographs, newspaper reports, incident report, FIR, whatsapp messages and various correspondence post incident, no other evidence has been produced. The photographs, incident report and

FIR simply points out towards the flood and damage but not about the operation and maintenance issues. 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.

71. 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 150 Cumecs, in a river having catchment area of 158 sq. km., the alleged event was foreseeable and preventable and can't be said to be beyond the reasonable control of the Petitioner.

72. 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, newspaper reports and correspondences exchanged with parties which are not enough to establish that the event was exceptional and had happened despite taking all reasonable precautions.

73. Significantly, the dam had overtopped twice in the year, 2013 and 2023. Why such incident had occurred, what steps had been taken, neither any explanation has been offered nor any reports to that effect have been produced. It is relevant to refer here that the Petitioner has mentioned in response affidavit in response to the compliance affidavit that a health assessment of the dam was done after the dam overtopped in the past as directed by the DoE and 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 report has been produced. Not learning any lesson from the previous events of 2013 and 2023 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. Significantly, 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. Here it is relevant to mention that the committee in its report Annexure-II to the compliance affidavit dated 17.03.2025 has concluded the following amongst others:-

“Both IPP must go for comprehensive hydrological study to have better understanding of the peak flow and retruned period under various climate conditions.

The Dam’s operations are critical and important as aspect which plays vital role. Though Malana-II is just a diversion dam having small storage for peaking but looking at the Malana river terrain/ regime, even the small storage is critical. The data provided by the Malana-II authorities are contradictory which needs further investigations for establishing the facts about regulated gate operations. Though the facts was that the Malana-II dam had very limited scope/ time as far as restricting/ holding the flow is concerned.

Further, the bursting of balancing of reservoir of Malana-I also escalated the flood in the Malana river and it lead to excessive damages downstream in Kothi and Baladhi village.

In spite of repeated directions of developing and maintaining an online river flow/ discharge monitoring site upstream in Malana Khad, both the dam authorities failed to do so, and the major event of Malana-II dam overtopping. Just a gauge site was installed upstream of Malana-II, which only informed about the increase of water level in the river, though this vital information received in the time has helped in present event. The information was gathered and disseminated immediately by dam authorities which could provided sufficient evacuation time for people downstream and fortunately we had no loss of life. But heaving

a flow/ discharge measuring site, would had provided some time to have effective gate operations.”

74. This also suggest that the approach of the Petitioner in managing the dam and flood was casual as a result of which the dam had overtopped twice.

75. 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 on the fateful day was only 150 Cumecs. Thus, the rainfall was within the Probable Maximum Precipitation as according to the hydrology, the design flood was anticipated as 650 Cumecs and in a catchment area as 158 sq. km.

76. 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.

77. It is claimed by the Petitioner that the force majeure events are still subsisting but no data/ record of the day to day activities being carried out to restore the generation and the repair of the damaged evacuation system has been produced.

78. In so far as the law laid down by 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.

79. In view of the above, the Petitioner has not been able to substantiate that the flash floods incident on 01.08.2024 was 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. 01.08.2024 onwards. Similarly, the Petitioner has not been able to substantiate that the invoice dated 05.09.2024, is 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

80. 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.

81. 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