

In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

Appeal No.170 of 2015
AND
Appeal No. 287 of 2016

Dated: 9th August, 2017

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I. J. Kapoor, Technical Member

In the matter of :-

Himalaya Power Producers Association (HPPA)
HIMURJA, SDA Complex
Block No. 8-A, Kasumpti
Shimla – 171 009

... Appellant

Versus

1. Power Transmission Corporation of Uttarakhand Ltd. (PTCUL)
Vidyut Bhawan, Near ISBT Crossing
Saharanpur Road, Majra
Dehradun – 248 002
Uttrakhand

...Respondent No.1

2. Uttrakhand Electricity Regulatory Commission (UERC)
Vidyut Niyamak Bhawan
Near ISBT, Majra
Dehradun – 248 171
Uttrakhand

...Respondent No. 2

Counsel for the Appellant(s): **Mr. Anand K. Ganesan**
Ms. Swapna Seshadri
Ms. Neha Garg
Mr. Sandeep Rajpurohit
Ms. Saloni Sacheti

Counsel for the Respondent(s): Mr. Sarul Jain
Mr. S.P. Arya
Ms. Geeta Malhotra
Mr. Kamal Kant for R-1

Mr. Buddy A. Ranganadhan
Mr. D.V. Raghu Vamsy
Mr. Hasan Murtaza
Mr. Raunak Jain for R-2

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The present Appeals are being filed under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the "**Act**") against the Order dated 11.04.2015 ("**Impugned Order 1**") passed by the Utrakhand Electricity Regulatory Commission (hereinafter referred to as the "**State Commission**") passed in Petition No. 48 of 2014 whereby the State Commission has trued up the financials of the Respondent No.1, Power Transmission Corporation of Uttarakhand Limited (hereinafter referred to as the "**Respondent No.1/PTCUL**") for the FY 2004-05 to FY 2013-14 and approved the Annual Revenue Requirement ("ARR") and determined the transmission tariff for the FY 2015-16 and against the Order dated 5.04.2016 ("**Impugned Order 2**") passed by the State Commission in Petition No. 33 of 2015 whereby the State Commission has trued up the financials of the Respondent No.1 for the FY 2014-15 and approved the ARR and determined the transmission tariff for the FY 2016-17 to FY 2018-19. The present Appeals are concerning about pooling of transmission assets exclusively used by the distribution licensee in the State of

Uttarakhand for the purpose of calculation of intra-State Open Access transmission charges.

2. The issues raised by the Appellant in both the Appeals and parties to the said Appeals are common. These Appeals were also heard together and hence, we are proceeding to decide on the present Appeals by this common judgement.
3. The Appellant, HPPA is an Association of Power Producers registered under the provisions of Himachal Pradesh (HP) Societies Registered Act, 2006. The Appellant represents the interest of hydro power generators supplying electricity to the distribution licensees, traders, consumers and others through open access.
4. The Respondent No.1, PTCUL is a company incorporated under the provisions of the Companies Act, 1956 and is a transmission licensee and the State Transmission Utility (STU) for the State of Uttarakhand and discharging functions in terms of the Act.
5. The Respondent No. 2, Uttarakhand Electricity Regulatory Commission is the Electricity Regulatory Commission for the State of Uttarakhand, exercising jurisdiction and discharging functions in terms of the Act.
6. Facts of the present Appeals:
 - a) The State Commission on 28.10.2010 notified the UERC (Terms and Conditions of Intra-State Open Access), Regulations, 2010 (hereinafter referred to as the “**Open Access**”

Regulations, 2010”) providing therein the terms and conditions for grant of open access including the charges thereof.

- b) On 29.11.2014, the Respondent No. 1 filed Petition No. 48 of 2014 for true up of FY 2004-05 to FY 2013-14 and approval of ARR & determination of transmission tariff for FY 2015-16 as per the UERC (Terms and Conditions for determination of Tariff) Regulations, 2011 (hereinafter referred to as the “**Tariff Regulations, 2011**”) for the control period FY 2013-14 to FY 2015-16. The State Commission further notified UERC (Terms and Conditions for Determination of Multi Year Tariff) Regulations, 2015 (hereinafter referred to as “Tariff Regulations, 2015”) for the second Control Period from FY 2016-17 to FY 2018-19 based on which the Respondent No. 1 filed Petition No. 33 of 2015.
- c) The State Commission on 31.1.2015 notified the UERC (Terms and Conditions of Intra-State Open Access), Regulations, 2015 (hereinafter referred to as the “**Open Access Regulations, 2015**”) providing therein the terms and conditions for grant of open access including the charges thereof.
- d) The Appellant on 13.3.2015 filed objections with the State Commission in the Petition No. 48 of 2014 stating that the system used exclusively by the distribution licensee should not be pooled and used for purpose of calculation of transmission charges payable by all the open access customers in the State as it is contrary to the provisions of the Open Access Regulations, 2010/2015.

- e) On 11.4.2015, the State Commission issued the Impugned Order 1 in Petition No. 48 of 2014 filed by the Respondent No.1 for true up of its financials for FY 2004-05 to FY 2013-14 and approval of the ARR and determination of transmission tariff for the FY 2015-16. Aggrieved by the said order the Appellant has filed the Appeal No. 170 of 2015 before this Tribunal.

- f) On 5.4.2016, the State Commission issued the Impugned Order 2 in Petition No. 33 of 2015 filed by the Respondent No.1 for true up of its financials for FY 2014-15 and approval of the ARR and determination of transmission tariff for the FY 2016-17 to 2018-19. Aggrieved by the said order the Appellant has filed the Appeal No. 287 of 2016 before this Tribunal.

7. Questions of Law

The Appellant has raised the following questions of law in the present Appeals:

- a) Whether the State Commission is justified in including those transmission networks, which are used exclusively by the distribution licensee for the calculation of the transmission charges for open access customers?

- b) Whether the State Commission has applied the second proviso to Regulation 21 of the Open Access Regulations, 2010 and the proviso to Regulation 20 of the Open Access Regulations, 2015?

- c) Whether the State Commission is justified in passing on the burden of the costs and expenses of lines used exclusively by the distribution licensee on to all the open access customers?
 - d) Whether the State Commission has maintained the principle of non-discriminatory open access in the manner of determination and sharing of transmission charges by the open access customers?
8. We have heard at length the learned counsel for the rival parties and considered carefully their written submissions, arguments put forth during the hearings etc. Gist of the same is discussed hereunder.
9. The learned counsel for the Appellant has made following arguments/submissions for our consideration on the issues raised by it:
- a) Open Access is one of the primary features and objectives of the Act. The State Regulatory Commissions are mandated to introduce open access in a phased manner so as to provide the freedom of choice to the consumers and also the generators. Under the provisions of the Act, the business of transmission is to be divested and distanced from purchase and sale of electricity and the mandate to the transmission licensee is to provide non-discriminatory open access. This is provided in Section 38 of the Act for Central Transmission Utility, Section 39 of the Act for State Transmission Utility and in Section 40 of the Act for transmitting utility. All users of the transmission system, irrespective of being

generators, distribution licensees, consumers etc. are to be treated in a non-discriminatory manner for open access and use of the transmission system. For the purpose, the State Commission had framed Open Access Regulations, 2010 providing therein the terms and conditions for grant of open access including the charges thereof.

- b) In terms of the Open Access Regulations, 2010 the charges for open access are to be shared by all the open access users in the State. The formula for determination and sharing of transmission charges is provided for in Regulation 21 of the Open Access Regulations, 2010. The second proviso to Regulation 21 provides that where the transmission system including dedicated transmission system is being used exclusively for an open access customer, the transmission charges for such system shall be borne entirely by such open access customer till such time the surplus capacity is allotted and used for by other persons. In terms of the same, it is incumbent upon the State Commission to identify all those transmission systems in the State which are used exclusively by a single open access customer and the charges for such lines is to be borne exclusively by such open access customers without in any manner the other open access customers in the State being affected or sharing such charges.
- c) For the FY 2015-16, Respondent No. 1 had on or about 29.11.2014 filed the petition for approval of the ARR and determination of transmission tariff. Pursuant to the said filing, in

accordance with Section 64 of the Act, the State Commission issued public notice inviting objections and representations from all the stakeholders. The Appellant filed its objections before the State Commission and also appeared in the proceedings before the State Commission. One of the primary objections taken by the Appellant during the proceedings was that in terms of the Open Access Regulations where the system is being used exclusively by the distribution licensee, the charges of such system cannot be pooled and used for the purposes of calculation of the transmission charges payable by all the open access customers in the State. This was specifically contrary to the Regulation 21 of the Open Access Regulations.

- d) In the meantime, the State Commission framed and notified the Intra-State Open Access Regulations, 2015 and in particular the proviso thereto is similar with the second proviso to Regulation 21 of the Open Access Regulations, 2010 with regard to transmission charges.

- e) Vide the Impugned Orders, the State Commission while approving the Annual Revenue Requirements and determining the transmission tariff of the Respondent No. 1, it has included and pooled all the transmission network in the State even those which are being used exclusively by the distribution licensee. The ARR and the transmission tariff has been worked out considering all of the transmission network of Respondent No.1 without any distinction of those lines which are used exclusively by the

distribution licensee and those lines which are being used by more than one open access customer. The same is contrary to the specific provisions of the Open Access Regulations. The transmission charges for transmission network exclusively used by/ augmented for the distribution licensee are to be worked out and approved separately by the State Commission and are to be borne entirely by the distribution licensee.

- f) The State Commission erred in not even entering into the aspect of identifying the lines and systems which are being used exclusively by the distribution licensee, which is an open access customer. Except in cases where open access has been allowed to third parties, all other transmission systems in the State are exclusively used by the distribution licensee and their corresponding charges are to be on the account of distribution licensee only till such time surplus capacity is utilised by other open access customers. As a consequence of the Impugned Orders, transmission charges for the lines and systems being used exclusively by the distribution licensee are being shared by the other open access customers.
- g) The issue raised by the Appellant which is confused by the Respondents as being of financial double counting and double recovery by the transmission licensee, as the only issue raised is that the transmission system being exclusively used by the distribution licensee has to be governed in the manner provided in the Regulations 2010/2015 and not by including the same in the pool for determination of open access charges. In terms of the Regulations, for any transmission system of the Transmission Licensee used exclusively by open access customer, the entire

transmission charges for such transmission system are to be paid by such open access customer. The cost of such transmission system shall not be pooled together in the Annual Revenue Requirements for calculation and payment of transmission charges, till the time the surplus capacity is allotted and used by the other open access customers.

- h) The open access customer defined in the regulations as reproduced below do not distinguish between generator, distribution licensee, trader or consumer with regard to open access.

“(19) “Open access customer (in short customer)” means a consumer, trader, distribution licensee or a generating station who has been granted open access under these regulations.”

- i) The State Commission failed to appreciate that when there is a specific provision in the regulations as to the manner in which transmission charges are to be calculated, determined and levied the same is binding and ought to have been followed. The State Commission also applied the said Regulation to other open access customer such as in the case of M/s Bhilangana Hydro Power Ltd. (M/s BHPL) Vs. PTCUL which has been upheld by this Tribunal vide judgement dated 29.11.2014 in Appeal Nos. 128, 129 and 163 of 2013 and it is not open to the State Commission to take a different view.
- j) The contention of the Respondent No. 1 that the charges recovered from open access customers are repaid to the

distribution licensee in the State i.e. Uttarakhand Power Corporation Ltd. (UPCL) and therefore there is no double recovery begs the question as to why the open access customers are being asked to pay without first excluding the transmission system being used exclusively by UPCL. The contention that there is no benefit given to UPCL is erroneous. The reply filed by the State Commission itself admits that the benefit is given to UPCL. Further, the argument that there was no objection raised with regard to the inclusion of the entire system for the determination of charges contrary to the Regulations. This issue was specifically raised by the Appellant as under:

“..... Further, such monthly transmission charges are not being recovered only for the components of the network being utilised by open access users, but for the entire PTCUL system. This is arbitrary and in violation of Regulation 21 of UERC (Terms and Conditions of Intra-State Open Access Regulations, 2010 and Hon’ble UERC should not allow this.”

The State Commission has not dealt with this issue in the Impugned Order.

- k) The contention of the State Commission firstly raised in oral arguments that the network is a meshed network and it is not clear that whether the Regulations are capable of being implemented at all is also misconceived. The Impugned Orders do not state this. In this regard the Appellant has quoted the judgement of Hon’ble Supreme Court in case of Mohinder Singh Gill Vs. Chief Election

Commissioner (1978) 1 SCC 405 regarding justification of order by filing affidavits and giving fresh reasons not forming part of the Order. Further, Regulations being delegated legislation is binding on all including the State Commission [Ref: PTC India Ltd. Vs. Central Electricity Regulatory Commission, (2010) 4 SCC 603]. Even assuming that the State Commission has power to implement or not to implement a particular Regulation, the same has to be applied uniformly to all persons. It cannot be that the State Commission will apply the Regulations for use of transmission system by the generators or customers but not for the use of transmission system by the distribution licensee. In this regard the Appellant has placed reliance on the judgement of Hon'ble Supreme Court in case of Narain Das & Ors. Vs. The Improvement Trust, Amritsar (1973) 2 SCC 265.

- l) The other contention of the State Commission is that the Regulation only deals with the system that is augmented, either by way of new construction or capacity addition. There is no difficulty on this. Even the State Commission has not applied the same for the systems that have been built or augmented for exclusive use of the distribution licensee. They have to be necessarily considered separately. The systems built exclusively for the distribution licensee will only be known to the State Commission or the Transmission Licensee and not to the third parties.

- m) The State Commission has erred in not dealing with the issue specifically raised by the Appellant and that the State Commission has recorded the submission of the Appellant but failed to give any

finding on the same. The Impugned Orders of the State Commission lack application of mind and does not deal with the specific aspect raised. Substantial burden has been placed on the open access customers on account of non-implementation of the Regulations in the correct manner.

10. The learned counsel for the Respondent No. 1 has made following arguments/submissions for our consideration on the issues raised in the present Appeals:

a) The Appellant is not an aggrieved person and hence cannot file the Appeal in accordance with the provisions of the Act. The present Appeals are not maintainable. The Appellant has hypothetically raised objections that there are dedicated transmission/ distribution network used by distribution licensee whereas there is no such concept of dedicated transmission/ distribution network as per the Act. The State Commission has passed the Impugned Orders after hearing all the concerned including the Appellant.

b) As per the provisions of the Tariff Regulations, 2011 the State Commission has approved the revised Annual Transmission Charges (ATC) for FY 2015-16 wherein the State Commission under "Other Income" as a part of Non-Tariff Income (NTI) has deducted the Short Term Open Access (STOA) charges paid to the Respondent No. 1.

c) The transmission charges levied on the open access customers

are strictly as per the Regulation 21 (b) of the Open Access Regulations, 2010 after due adjustments. The charges paid to the Respondent No. 1 by the STOA customers are reduced from the ARR and charges paid by the long/ medium term open access customers are refunded back to the distribution licensee in the State i.e. Uttarakhand Power Corporation Ltd. (UPCL) as per the regulations. There is no over recovery by the Respondent No. 1 as the open access charges are adjusted/ refunded from the entire transmission charges payable to it as approved by the State Commission.

- d) ATC are calculated considering UPCL as the sole beneficiary of the entire transmission network of the Respondent No.1 but UPCL is not utilising the total capacity of the network and the remaining power is allotted to other STOA/ Long Term Open Access (LTOA) customers. Therefore, the same transmission network is used by the open access customers and the Respondent No. 1 is charging transmission charges from them as per the provisions of the Open Access Regulations, 2010/2015. The charges paid by new beneficiary are also adjusted as per the Regulations.
- e) The only open access customer availing LTOA is M/s BHPL and transmission charges for the network used by it is determined separately and is not included / pooled up in transmission charges on the rest of transmission network of the Respondent No. 1. Accordingly, the charges of line being used exclusively are determined separately and are not included/ pooled up with the entire transmission network in the State.

11. The learned counsel for the State Commission has made following arguments/submissions for our consideration on the issues raised in the present Appeals:
- a) The Appellant has not raised the issue before the State Commission in the manner it has raised the same before this Tribunal. Even in the next tariff year the Appellant has not raised the issue properly before the State Commission but continued to maintain same suggestion/ objection as done in the previous year.
 - b) The contention of the Appellant is fallacious on three basic grounds viz. such contention is not borne by and is in fact in the teeth of the very Regulation being cited by the Appellant, such contention is technically, for want of more appropriate expression, unstatable and the contention as raised before the State Commission (essentially alleged “financial double-counting”) has been expressly dealt with by the State Commission in the Impugned Orders.
 - c) From the bare perusal of the Regulations, it is clear that it applies to the situation of ‘augmentation’ of the transmission system or construction of a ‘dedicated transmission system’ when such augmentation or dedicated system is constructed for or is being used by an open access customer. The said proviso cannot possibly apply to the entire transmission network as contended by the Appellant.

- d) The contention of the Appellant that the distribution licensee only uses some part of the transmission network is fanciful, imaginary and illusory.
- e) The Appellant either before the State Commission or before this Tribunal has not identified parts of transmission networks 'augmented' for or any 'dedicated transmission system' which has been 'constructed for' or 'exclusively used' either by the distribution licensee of the State or much less than any of the generators which the Appellant represents. This has not been done by the Appellant neither can do it for the obvious reason that there is no such system as contended by it.
- f) For the Appellant to try and apply the said proviso to the entire transmission network is therefore contrary to the express words of the proviso, not based on fact and would render the said proviso completely contrary to the main part of the Regulation itself.
- g) The flow of electricity which is based on laws of physics is indeterminate and unidentifiable, the question of isolating from within a state grid those lines which are used by any one open access user (whether a generator or distribution licensee) is a technically unstatable condition. The real power flow in the meshed network is in accordance with the following formula:

$$P = V_s * V_r * \sin \alpha / X$$

Where P= Power in MW, V_s = Sending end voltage,

V_r = receiving end voltage, X = line impedance between buses and α = phase angle between bus voltages.

That is, quantum of power flow in each circuit depends upon V_s , V_r , X i.e. impedance between buses/ nodes and phase angle which plays significant role in pushing flow of power in the network.

- h) There is no 'financial double counting' in open access users paying transmission charges for the simple reason that any monies received by the Transmission Licensee from open access users is treated as 'Non-Tariff Income' in regulatory books of the transmission licensee and is reduced from its revenue gap in its ARR. Accordingly, the transmission charges payable by the distribution licensee to the Transmission Licensee would be net of transmission charges payable by open access users to the transmission licensee.
- i) The State Commission has passed the Impugned Orders as per the provisions of the applicable regulations and the Act. The contention of the Appellant that the transmission charges for the system used by UPCL should not be included for determination of transmission charges payable by the open access customers is not tenable as the system in vogue in the State is the postage stamp method and Point of Connection (PoC) is yet to be introduced. Accordingly, the beneficiary has to pay transmission charges determined in accordance with relevant Regulations.
- j) The Open Access customers are not made to pay entire ATC of transmission network owned by Respondent No. 1. As per the

Open Access Regulations, 2010/2015, the transmission charges are actually recovered on pro-rata basis based on approved open access capacity allotted to such open access customers and also on basis of number of hours of such drawl per day by such customers. The Impugned Orders also ensures that the ATC recovered by the Respondent No. 1 does not exceed the approved ARR. UPCL is not the sole beneficiary of the transmission network, the same is also being used by the open access customers thereby sharing the ATC.

- k) As per the provisions of the Open Access Regulations, 2010/2015, the transmission charges of a dedicated transmission system used exclusively by an open access customer shall be borne entirely by it. When new or other open access customer starts using the said transmission system then the transmission charges for that system shall be shared on pro-rata basis amongst the open access users. The Appellant is misinterpreting the provisions by wrongly considering distribution licensee of the State as an open access customer. This contention of the Appellant is imaginary and misconceived.
- l) In case of M/s BHPL, the State Commission has applied the relevant provisions of the Open Access Regulations, 2010 as done in the present cases and decided the cases according to the relevant provisions of the prevalent regulations. The decision of the State Commission has been upheld by this Tribunal vide judgement dated 29.11.2014. M/s BHPL has filed an appeal with Hon'ble Supreme Court which is pending.

12. After having a careful examination of all the issues raised in the present Appeals and submissions made by the Appellant and the Respondents for our consideration, our observations are as follows:-

- a) The present Appeals pertains to the decision of the State Commission vide its Impugned Orders regarding calculation and levy of transmission charges payable by open access customers including the transmission networks which are being exclusively used by the distribution licensee in the State.
- b) On Question No. 7 a) i.e. Whether the State Commission is justified in including those transmission networks which are used exclusively by the distribution licensee for the calculation of the transmission charges for open access customers?, we observe as follows:
 - i. Both the Appeals of the Appellant are directed on one particular issue i.e. inclusion of the transmission networks being used exclusively by the distribution licensee for the purpose of calculation and levy of transmission charges on open access customers. This requires the interpretation of the relevant Regulations i.e. Open Access Regulations, 2010/2015 and the analysis of the Impugned Orders of the State Commission. Let us first analyse the provisions of the Open Access Regulations, 2010 and the Open Access Regulations, 2015.

The relevant extract from Open Access Regulations, 2010 is reproduced below:

“Chapter 5

Open Access Charges

21 Transmission Charges and Wheeling Charges:

(1) Transmission Charges

Open Access customer using transmission system shall pay the charges as stated hereunder:

(a) For use of inter-State transmission system – As specified by Central Commission from time to time.

(b) For use of intra-State transmission system – transmission charges payable to State Transmission Utility/ transmission licensee by an open access customer for usage of their system shall be determined as under:

Transmission Charges = $ATC/(PLS_T \times 365)$ (in Rs./MW-day)

Where,

ATC = Annual Transmission Charges determined by the Commission for the State transmission system for the previous year.

PLS_T = Peak Load served by the State transmission system in that year.

Provided that transmission charges shall be payable on basis of Contracted Capacity/ Scheduled Load or actual power flow whichever is higher. For Open Access

for a part of a day, the transmission charges shall be payable on pro-rata basis.

Provided further that where augmentation of transmission system including dedicated transmission system used for open access has been constructed for exclusive use or being used exclusively by an open access customer, the transmission charges for such dedicated system shall be worked out by transmission licensee for their respective systems and got approved by the Commission and shall be borne entirely by such open access customer till such time the surplus capacity is allotted and used for by other persons or purposes.”

The relevant extract from Open Access Regulations, 2015 is reproduced below:

“20 Transmission Charges and Wheeling Charges:

(1) Transmission Charges

Open Access customer using transmission system shall pay the charges as stated hereunder:

(a) For use of inter-State transmission system – As specified by the Central Commission from time to time.

(b) For use of intra-State transmission system – Transmission charges payable by an open access customer to STU for usage of its system shall be determined as under:

Transmission Charges = $ATC / (PLS_T \times 365)$ (in Rs./MW/day)

Where,

ATC = Annual Transmission Charges determined by the Commission for the State transmission system for the relevant year.

PLS_T = Peak Load served by the State transmission system in the previous year.

Provided that transmission charges shall be payable on basis of Approved Capacity.

Provided for Open Access for part of the day, the transmission charges shall be levied as under.

- (i) Upto 6 hours in a day: $\frac{1}{2}$ of transmission charges as determined in sub-regulation 1 (b) above.
- (ii) Above 6 hours in a day: equal to the transmission charges determined in sub-regulation 1 (b) above.

Provided further that where augmentation of transmission system including dedicated transmission system used for open access has been constructed for exclusive use of or being used exclusively by an open access customer, the transmission charges for such augmentation including dedicated system shall be worked out by STU for its system and got approved by the Commission and shall be borne entirely by such open access customer till such time the surplus capacity is allotted and used for by other open access customers, where after the cost of the

above system will be shared on pro- rata basis depending upon open access capacity allotted to them.”

From the above it can be seen that an open access customer who is using intra-State transmission system is liable to pay transmission charges to STU/ Transmission Licensee. The formula defined in the Open Access Regulations, 2010/2015 uses ATC which are the Annual Transmission Charges of the STU/ Transmission Licensee determined by the State Commission as per Tariff Regulations 2011/2015 for the State transmission system for the relevant/previous year. Thus, the transmission charges payable by an open access customer are calculated based on the transmission system of the State and do not distinguish it for any exclusive use of any transmission system by the distribution licensee. The payment of transmission charges by open access customer is pro-rata based on its contracted capacity/ scheduled load or actual power flow whichever is higher/ approved capacity as worked out based on the formula mentioned above.

The second proviso to the above Regulations' mentions that till such time the surplus capacity of the augmented transmission system including dedicated transmission system is allotted and used by other persons/purposes/open access customer, the transmission charges for such augmented transmission system including dedicated transmission system used exclusively by an open access customer shall be paid by such open access customer for whom the system is augmented/ dedicated

transmission line is made. For such cases, the transmission charges shall be worked out by STU/transmission licensee for their respective systems and got it approved by the State Commission. This proviso is applicable for the augmentation of transmission system including dedicated transmission system used for open access constructed for exclusive use of open access customer or being used exclusively by open access customer. The transmission charges for such system is to be paid by such open access customer. These charges are applicable to system over and above the State transmission system included in the main Regulation.

- ii. Now let us analyse the impugned findings of the State Commission in the Impugned Order 1. The relevant extracts are reproduced below:

“2.5 Annual Transmission Charges

2.5.1 Stakeholder’s Comment

Shri Dalip Dua, Vice President (Publications), Himalaya Power Producers Association submitted that although UPCL is the sole beneficiary of the entire intra-state transmission network, PTCUL is recovering monthly transmission charges for its entire network, from open access users also. This amounts to double recovery for the purposes of servicing the same asset, which is in violation of the Regulation 21 of the UERC (Terms and Conditions of Intra-State Open Access) Regulations, 2010 and, therefore, should not be allowed.

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2.5.2 Petitioner's Response

PTCUL submitted that recovery from open access consumers are being reflected under the non-tariff income and is being reduced in the ARR and no double recovery to that extent is being done by PTCUL. PTCUL submitted that the open access charges are being levied according to the Open Access Regulations notified by the Commission.

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2.5.3 Commission's View

The Commission has approved the Annual Transmission Charges for FY 2015-16 in accordance with the provisions of UERC (Terms and Conditions for Determination of Tariff) Regulations, 2011 as detailed under each item of Annual Transmission Charges.

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5.6 Recovery of Annual Transmission Charges

Having considered the submissions made by PTCUL, the response of the stakeholders in context of Petitioner's proposals for ARR and the relevant provisions of the Electricity Act, 2003 and Regulations of the Commission, the Commission hereby approves that:

- Power Transmission Corporation of Uttarakhand Ltd., the transmission licensee in the State will be entitled to recover Annual Transmission Charges for FY 2015-16 from its beneficiaries in accordance with the provisions of the Regulations.

▪ The payments, however, shall be subject to adjustment, in case any new beneficiary (including long/medium term open access customer) is using the Petitioner's system, by an amount equal to the charges payable by that beneficiary in accordance with the UERC (Terms & Conditions of Intra-State Open Access) Regulations, 2015. In that case, the charges recoverable from the new beneficiary (ies), including long/medium term open access customers, shall be refunded to UPCL in accordance with the said Regulations.

5.7 Transmission Charges payable by Open Access Customers

Uttarakhand Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2015 inter-alia specify transmission charges applicable on the customers seeking open access to intra-State transmission system.

In accordance with the methodology provided in the aforesaid Regulations, the rate of transmission charges payable by customers seeking open access to intra-State transmission system for FY 2015-16 (applicable upto 31st March, 2016) shall be:

Table 5.20: Transmission Charges approved for FY 2015-16

Description	Rs./MW/day
Transmission charges	4191.92

However, in case augmentation of transmission system including construction of dedicated transmission system is

required for giving long term open access then such long term customer shall, in addition to transmission charges as per Rate of Charge provided above, also bear the transmission charges for such augmentation works including dedicated system. These charges shall be determined by the Commission on Rs./MW/day basis after scrutiny of the annual revenue requirements for the said works including dedicated system based on the proposal of the STU/transmission licensee, on case to case basis. With regard to sharing of these transmission charges for the augmentation works including dedicated system, the Commission shall take a decision, taking into account the beneficiaries of the said works and its usage, at the time of scrutiny of PTCUL's ARR for the ensuing year for intra-State system. However, till such time the Commission issues tariff order for the ensuing year, the long term access customer for whom these augmentation works including dedicated system was carried shall be liable to pay these additional transmission charges.

The Annual Transmission Charges approved for FY 2015-16 will be applicable with effect from April 01, 2015.

The relevant extracts from the Impugned Order 2 are reproduced below:

*“2.5 Annual Transmission Charges
2.5.1 Stakeholder's Comment*

.....

Shri DalipDua, Vice President (Publications), Himalaya Power Producers Association submitted that although UPCL is the sole beneficiary of the entire intra-state transmission network, PTCUL is recovering monthly transmission charges for its entire network, from open access users also. This amounts to double recovery for the purposes of servicing the same asset, which is in violation of the Regulation 20 of the UERC (Terms and Conditions of Intra-State Open Access) Regulations, 2015 and, therefore, should not be allowed.

.....

2.5.2 Petitioner’s Response

PTCUL submitted that recovery from open access consumers are being reflected under the non-tariff income and is being reduced in the ARR and no double recovery to that extent is being done by PTCUL. PTCUL submitted that the open access charges are being levied according to the Open Access Regulations notified by the Commission.

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2.5.3 Commission’s View

The Commission has approved the Annual Transmission Charges for FY 2016-17 in accordance with the provisions of UERC (Terms and Conditions for Determination of Multi Year Tariff) Regulations, 2015 as detailed under each item of Annual Transmission Charges and the issues raised by the stakeholders have been addressed while approving the ARR for second Control Period as detailed in subsequent Chapters of this Order.

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5.5 Recovery of Annual Transmission Charges

Having considered the submissions made by PTCUL, the responses of the stakeholders in context of Petitioner's proposals for ARR and the relevant provisions of the Electricity Act, 2003 and Regulations of the Commission, the Commission hereby approves that:

□ Power Transmission Corporation of Uttarakhand Ltd., the transmission licensee in the State will be entitled to recover Annual Transmission Charges for FY 2016-17 from its beneficiaries in accordance with the provisions of the Regulations.

□ The payments, however, shall be subject to adjustment, in case any new beneficiary (including long/medium term open access customer) is using the Petitioner's system, by an amount equal to the charges payable by that beneficiary in accordance with the UERC (Terms & Conditions of Intra-State Open Access) Regulations, 2015. In that case, the charges recoverable from the new beneficiary (ies), including long/medium term open access customers, shall be refunded to UPCL in accordance with the said Regulations.

5.6 Transmission Charges payable by Open Access Customers

Uttarakhand Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2015 inter-alia specify transmission charges applicable on the customers seeking open access to intra-state transmission system. In this regard, Regulation 20(1)(b) specifies as under:

“(b) For use of intra-State transmission system—
Transmission charges payable by an open access customer to STU for usage of its system shall be determined as under:

$$\text{Transmission Charges} = \frac{\text{ATC}}{(\text{PLS}_T \times 365)} \text{ (Rs./MW/day)}$$

Where, ATC = Annual Transmission Charges determined by the Commission for the State transmission system for the relevant year;

PLS_T = Peak load served by the State transmission system in the previous year”

The ATC approved by the Commission for FY 2016-17 is Rs. 261.04 Crore as given in Table 5.25 above and the PLST during FY 2015-16 is 2034 MW. Hence, in accordance with the methodology provided in the aforesaid Regulations, the rate of transmission charges payable by the customers seeking open access to intra-State transmission system for FY 2016-17 (applicable upto 31st March, 2017) shall be:

Table 5.26: Rate of Transmission Charges for open access approved for FY 2016-17

Description	Rs./MW/day
Transmission Charges	3516.12

However, in case, augmentation of transmission system including construction of dedicated transmission system is required for giving long term open access then such long term customer shall, in addition to transmission charges as per the Rate of Charge provided above, also bear the transmission charges for such augmentation works including

dedicated system. These charges shall be determined by the Commission on Rs./MW/day basis after scrutiny of the annual revenue requirements for the said works including dedicated system based on the proposal of the STU/transmission licensee, on case to case basis. With regard to sharing of these transmission charges for the augmentation works including dedicated system, the Commission shall take a decision, taking into account the beneficiaries of the said works and its usage, at the time of scrutiny of PTCUL's ARR for the ensuing year for intra-State system. However, till such time the Commission issues tariff order for the ensuing year, the long term access customer for whom these augmentation works including dedicated system was carried shall be liable to pay these additional transmission charges. **The Petitioner is hereby directed that the transmission charges recovered from short term open access customers shall be shown separately as a separate head of income in the ARR/Tariff filings for subsequent years. Further, the Petitioner is also directed to refund the transmission charges collected from long term/medium term open access customers to UPCL and show this amount as a separate expense head in its ARR/Tariff filings from next year onwards rather than reducing it from its revenue.**

The Annual Transmission Charges approved for FY 2016-17 will be applicable with effect from April 01, 2016."

From the impugned findings as above it can be seen that the State Commission has decided the ATC of Respondent No. 1 for FY 2015-16 and FY 2016-17 based on Tariff Regulations, 2011 & Tariff Regulations, 2015 respectively and its recovery by the Respondent No. 1 after considering submissions made by the Respondent No. 1, stakeholders including the Appellant, provisions of the relevant Regulations and the Act. The open access transmission charges at the rate of 4191.92 Rs./MW/day for FY 2015-16 and at the rate of 3516.12 Rs./MW/day for FY 2016-17 payable by the open access customers are also calculated based on the provisions of Open Access Regulations, 2010/2015 after determination of ATC. An open access customer using the intra-State transmission system has to pay pro-rata transmission charges as per the methodology prescribed in the Open Access Regulations, 2010/2015 i.e. on the basis of its Contracted/Approved Open Access Capacity at the rate approved in the Impugned Orders and also on basis of number of hours of such drawl per day by such open access customers. Further, the medium/long term open access charges and STOA charges recovered from the open access customers are taken care by the State Commission in NTI of the Respondent No.1 by a way of reduction in ARR. Accordingly, the Respondent No. 1 is not recovering ATC more than what is approved by the State Commission.

Accordingly, the calculation of rate of open access transmission charges applicable to the open access customers have been carried out by the State Commission according to the applicable

Regulations based on ATC calculated for the State transmission system without any distinction of exclusive use of any transmission network by the distribution licensee as discussed above.

Hence, this issue is decided against the Appellant.

- c) On question No. 7 b) i.e. Whether the State Commission has applied the second proviso to Regulation 21 of the Open Access Regulations, 2010 and the proviso to Regulation 20 of the Open Access Regulations, 2015?, we observe as follows:
- i. Now on the question that whether the second proviso to the Open Access Regulations, 2010 and proviso to the Open Access Regulations, 2015 is applicable to the distribution licensee which is the main and only contention of the Appellant. According to the Appellant by applying the proviso to the said Regulations the transmission charges of the transmission network exclusively used by UPCL shall be calculated and levied separately on UPCL only and should not be pooled for calculation of transmission charges payable by the open access customers. As discussed at 12 b) i. above, the proviso to the said Regulations speaks about the payment of transmission charges by an open access customer for augmented transmission system including dedicated transmission line due to whom the augmentation of transmission system including dedicated transmission line is carried out or the same is used exclusively by an open access customer.

This is also confirmed from Regulation 14 (2) (a) of the Open Access Regulations, 2010 and 13 (2) (a) of the Open Access Regulations, 2015. The relevant extracts are reproduced below:

Extract from Open Access Regulations, 2010:

“14 Procedure for Long Term Access

(2) Without involving inter-State Transmission System

(a)

.....

Provided that in case augmentation of transmission system is required, the applicant shall also have to bear the transmission charges for the same as per 2nd proviso of sub-regulation (1) of Regulation 21 contained in Chapter 5 of these Regulations:”

Extract from Open Access Regulations, 2015:

“13 Procedure for Long Term Access

(2) Without involving inter-State Transmission System

(a)

.....

Provided that in case augmentation of transmission/distribution system is required, the applicant shall also have to bear the transmission charges/wheeling charges for the same as per 3rd proviso of sub-regulation (1) and 4th proviso of sub-regulation 2 of Regulation 20 contained in Chapter 5 of these Regulations:”

Thus two scenarios clearly emerge out of the said Regulations. First that all the open access customers are liable to pay transmission charges for the use of intra – State transmission system as determined by the State Commission and these transmission charges are calculated by the State Commission as per the Open Access Regulations based on approved ATC of the Respondent No. 1. As per the Regulations the State transmission network is considered as one entity and the open access transmission charges are payable by the open access customer on pro-rata basis according to its Contracted/Approved open access capacity.

Second that if augmentation of the existing transmission system including dedicated transmission line is necessitated for granting open access to a customer or such augmented transmission system including dedicated transmission line is being used exclusively by such customer, it is liable to pay the charges for the same including open access transmission charges as calculated for the State transmission system till such time it is shared by other open access customer(s). Thus, the proviso is related to the augmentation of the transmission system including dedicated transmission line. Hence, there is no requirement of applying the said proviso of the Open Access Regulations, 2010/2015 by the State Commission. The Appellant has also referred to this Tribunal's judgement dated 29.11.2014 in Appeal Nos. 128, 129 and 163 of 2013 in case of M/s BHPL Vs. PTCUL which is under challenge with Hon'ble Supreme Court and is yet to be decided.

From the perusal of the judgement, we find that the State Commission has used the proviso to the said Regulations for levying transmission charges for dedicated transmission line on the open access customer i.e. M/s BHPL till such time it is used by other open access customers as the same was exclusively used by it for evacuation of power from its power plant as the other open access customers who were supposed to use this line were not in position to utilise it. Thus, the issue in the said appeal is differentiated from the contention of the Appellant in the present Appeal. The State Commission in case of M/s BHPTL has acted according to its Regulations.

- ii. Further, the State Commission has submitted that the system in place in the State is the postage stamp method for collection of transmission charges and PoC is yet to be introduced. Accordingly, the beneficiary (ies) of the State transmission system has to pay transmission charges determined in accordance with relevant Regulations. The State network is inherently a meshed network and power flows in accordance with the laws of physics and hence any transmission network exclusively used by the distribution licensee has no meaning. We are in agreement to this contention of the State Commission though the same was not clearly expressed in the Impugned Orders as the issue was dealt according to the Regulations of the State Commission. The clarification now given by the State Commission is mere elaboration of its decision which was based on its Regulations. After perusal of the Impugned Orders as discussed above in previous paragraphs related to our observations, we find that the

State Commission has followed its Regulations while determining the ATC of the Respondent No. 1 and thereupon deciding the transmission charges payable by the open access customers. The Open Access Regulations, 2010/2015 were also notified by the State Commission after considering the views of all the stakeholders. The said Regulations were also not challenged. As the Impugned Orders have been passed by the State Commission according to its Regulations the judgement of Hon'ble Supreme Court in case of Mohinder Singh Gill Vs. Chief Election Commissioner (1978) 1 SCC 405 regarding justification of order by filing fresh affidavits and giving fresh reasons not forming part of the Order quoted by the Appellant is not applicable in the present Appeals. There is also no violation of the judgement of Hon'ble Supreme Court in case of PTC India Ltd. Vs. Central Electricity Regulatory Commission, (2010) 4 SCC 603 by the State Commission as its Impugned Orders were based on the Regulations framed by it. Based on our aforesaid discussions the reliance of the Appellant on the judgement of Hon'ble Supreme Court in case of Narain Das & Ors. Vs. The Improvement Trust, Amritsar (1973) 2 SCC 265 regarding application of same Regulation differently for distribution licensee and M/s BHPTL also does not survive. Accordingly, we are of the considered opinion that there is no infirmity in the decision of the State Commission for not applying second proviso to the Regulation 21 of Open Access Regulations, 2010 and proviso to the Regulation 20 of the Open Access Regulations, 2015.

Hence, this issue is also decided against the Appellant.

d) On Question No. 7 c) i.e. Whether the State Commission is justified in passing on the burden of the costs and expenses of lines used exclusively by the distribution licensee on to all the open access customers? and on Question No. 7 d) i.e. Whether the State Commission has maintained the principle of non-discriminatory open access in the manner of determination and sharing of transmission charges by the open access customers?, we observe as below:

- i. In view of our decisions at para 12 b) and 12 c) above, we are of the considered opinion that the issues raised by the Appellant in the above questions of law have no merit and are decided against it.

ORDER

We are of the considered opinion that the issues raised in the present Appeals have no merit as discussed above. The Appeals are hereby dismissed.

The Impugned Orders dated 11.4.2015 and 5.4.2016 passed by the State Commission are upheld.

No order as to costs.

Pronounced in the Open Court on this **9th day of August, 2017.**

(I.J. Kapoor)
Technical Member

(Mrs. Justice Ranjana P. Desai)
Chairperson

✓
REPORTABLE/NON-REPORTABLE

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