

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

Appeal No. 54 of 2014

Dated: 30th April, 2015

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Justice Surendra Kumar, Judicial Member

In the matter of:

Himachal Sorang Power Ltd.,
Ashirwad Building,
D-7, Lane-1,
New Shimla,
Shimla-171009.

... Appellant/Petitioner

versus

1. Central Electricity Regulatory Commission,
3rd and 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi-110001.

2. Power Grid Corporation of India Ltd.,
Registered Office Address:- B-9,
Outub Institutional Area,
Katwaria Sarai,
New Delhi-110016.

Corporate Office Address: Saudamini,
Plot No.2, Sector 29,
Near IFFCO Chowk,
Gurgaon (Haryana)-122001.

.... Respondents

Counsel for the Appellant(s) : Mr. Sitesh Mukherjee
Mr. Jafar Alam
Ms. Payal chandra

Counsel for the Respondent : Mr. K.S. Dhingra for R-1
Mr. Anand K. Ganesan for R-2

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The appellant/petitioner, namely, Himchal Sorang Power Ltd. has filed the instant Appeal under Section 111 of the Electricity Act, 2003 against the impugned order dated

31.01.2013 passed by the learned Central Electricity Regulatory Commission, in short ('Central Commission') in Petition No. 43/MP/2012 titled as Himachal Sorang Power Ltd. Vs. Powergrid Corporation of India Ltd. whereby the learned Central Commission has dismissed the petition of the appellant filed under Section 79 (1) (f) of the Electricity Act, 2003 regarding a dispute arising between the appellant, being a generating Company, and the respondent Power Grid Corporation of India Ltd., being a transmission licensee with the following observation:-

"25. The above discussion leads us to the conclusion that the petitioner sought postponement of commencement of open access till the commissioning of the Karcham-Wangtoo transmission line. The respondent has agreed to the request of the petitioner and has started billing from April 2012 as the Karcham-Wangtoo transmission line was commissioned with effect from 01.04.2012. The claim of the petitioner for further postponement of commencement of open access cannot be considered, as no force majeure event has been brought to our notice which took place after April 2012 which had the impact of delaying the project. The petitioner's project is being delayed on account of improper planning and execution of the works of the project and the respondent cannot be made to suffer for the failure on the part of the petitioner to execute the project in time. Therefore, no relief can be granted to the petitioner and the petitioner is liable to pay the transmission charges to the respondent from 01.04.2012.

26. The petition stands disposed of in the light of the above discussion."

2. The appellant is the power generating Company and the respondent no.1 is the Central Electricity Regulatory Commission which is empowered to discharge its functions under the various provisions of the Electricity Act, 2003. Respondent No.2 Power Grid Corporation of India Ltd. is a Central Transmission Utility (CTU) and is a transmission licensee.

3. The appellant filed a petition under Section 79 (1) (f) of the Electricity Act, 2003 before the Central Commission making the following prayers:-

"(i) Declare that the petitioner is entitled in the facts and circumstances of the case, to an extension of the date for commencement of open access under the BPTA;

(ii) Pass appropriate directions extending the date of commencement of long term open access from May, 2011 to September, 2012 under the BPTA;

(iii) Restrain the respondent from making any claims under the BPTA for transmission charges or in respect of extension of the date of commencement of open access under the BPTA prior to September, 2012;

(iv) Direct the respondent to withdraw the invoices dated 08.09.2011 and 03.01.2012;

(v) In the interim, grant a stay on the respondent from raising any invoices on the Petitioner for transmission charges or otherwise till September, 2012 or to take any steps

or coercive action to recover the transmission charges raised in its invoices dated 08.09.2011 and 03.01.2012; and

(vi) Pass such other orders that this Hon'ble Commission deems fit in the interest of justice."

4. By the impugned order, the learned Central Commission has, inter alia, come to the following findings and conclusions:-

- (a) The bill of Rs. 70 lacs raised by the Respondent No. 2 on 08/09/2011 for the period prior to 01.04.2012 has been cancelled by Respondent No. 2 on 03/01/2012. There is no grievance on this issue.
- (b) The Appellant has sought revisions from time to time in the date on which the open access would take effect. Firstly, revision was sought till January, 2012, then till May, 2012, then again to September, 2012, then again to December, 2012 and finally to May, 2013. The Appellant has not been consistent in its approach and has been continuously revising its prayers.
- (c) The Appellant has not complied with the provisions of the BPTA in issuing notice of Force Majeure to the Respondent No. 2 to amend the period of extension to September, 2012.
- (d) By communication dated 07/07/2011, the Appellant has stated that the open access is to commence from the date when the Karcham Wangtoo - Abdullapur line (KWA line) is ready and commissioned. This letter was not without prejudice to the rights of the Appellant. The line was commissioned on 01/04/2012 and the Appellant is liable to pay the transmission charges from such date.
- (e) There was no force majeure after April, 2012 which can be claimed by the Appellant. The last alleged force majeure was on 14/07/2010. Only one activity was carried out between 01/06/2012 and 15/08/2012. The Appellant has not acted prudently and has changed the design of the power plant by lowering the Head by only 0.75 meters after two years of the alleged geographical surprise.

- (f) The failure to estimate the time required for construction and repair activity is attributable to the Appellant and cannot be termed as force majeure. Even in the letter dated 07/07/2011, (which was claimed by the Appellant as a notice of Force Majeure under the BPTA) the Appellant has not mentioned about alleged geological surprises and the time required to recover from the same. The Appellant has agreed that the open access will be from the date of commissioning of the Karcham Wangtoo - Abdullapur line.
- (g) The extension only till 01/04/2012 was permitted, which was agreed by the Appellant. No force majeure took place after April, 2012. No relief can be granted to the Appellant.

5. Thus, by the impugned order, the learned Central Commission has dismissed the said petition filed by the appellant seeking extension of time 'on the basis of alleged force majeure events' from the date when the appellant is required to pay transmission/open access charges to the respondent no.2 (transmission licensee) for the long term open access which has been applied for and granted to the appellant.

6. The appellant has challenged the impugned order primarily on the ground that the appellant is required to pay the transmission charges /open access charges by application of the force majeure clause in the Bulk Power Transmission Agreement (BPTA) dated 21.10.2009 entered into between the appellant and the transmission licensee.

7. It may further be noted that the appellant challenged the aforesaid impugned order dated 31.01.2013, passed by the Central Commission by filing a Review Petition before the Central Commission which had also been dismissed by the Central Commission on 10.10.2013. Thus, the impugned order has been re-affirmed by the Central Commission in its Review Order dated 10.10.2013. The instant Appeal has been filed against the impugned order dated 31.01.2013 as mentioned above which is for consideration before us.

8. The appellant has in the instant Appeal mainly challenged the impugned order on the following two grounds:-

- (a) that the force majeure clause under Bulk Power Transmission Agreement (BPTA) is applicable in the present case and the date of applicability of transmission charges is to be extended till the time the appellant begins commercial operation and use of the open access.

- (b) that the respondent no.2/Power Grid by signing the connection agreement dated 06.03.2012 recognizing the connectivity from September, 2012 has accepted the extension of time for payment of transmission charges till September, 2012.

9. The relevant facts for deciding this Appeal are mentioned as under:-

9.01. that on 16.10.2003, the Bulk Supply Transmission Agreement (BPTA) was executed between the Powergrid Corporation of India Ltd. and Haryana Vidyut Prasaran Nigam Ltd. (HVPNL).

9.02. that on 23.09.2004 a Memorandum of Understanding was executed between Himachal Sorang Power Private Limited (HSPL) with Government of Himachal Pradesh (GoHP) regarding implementation of Sorang Hydro Electric Project (Sorang HEP/Project) with a generating capacity of 60 MW on the Sorang Nallah, tributary of Satluj river. The project commissioning was agreed to be as per the Techno Economic Clearance (TEC) that would be granted to the Detailed Project Report (DPR) of the Project.

9.03. that on 06.05.2005, the appellant issued a letter to Himachal Pradesh State Electricity Board (HPSEB) submitting DPR of Sorang Hydro Electric Project with capacity of 100 MW for its approval.

9.04. that on 28.01.2006, the Implementation Agreement was executed between GoPH and the appellant setting out the terms and conditions governing the implementation of the project. The Scheduled Commercial Operation Date of the project was 84 months from the date of execution of the Implementation Agreement, namely, 28.01.2013. Further, Implementation Agreement also provided for dis-incentives for delayed commercial operation of the project.

9.05. that on 09.06.2006, the Chief Engineer (P & M), HPSEB granted Techno Economic Clearance (TEC) to the Sorang Project with a capacity of 100 MW at an estimated cost of Rs. 586 crores at April, 2005 price level which provided that the Project shall be completed within 54 months after award of main civil works.

9.06. that on 08.02.2007, the Supplementary Implementation Agreement was executed between the GoHP and the appellant. Clause 5.42 of the Supplementary Implementation Agreement provides that the project has been allotted on the basis of tentative installed capacity as mentioned in the Notice Inviting proposal. However, in case the capacity of the project increases or decreases upon firming up of the potential as per TEC, the appellant would be required to sign fresh/revised MoU/Implementation Agreement.

9.07. that on 12.12.2007 the appellant submitted to the Powergrid /respondent no.2, an application for grant of Long Term Open Access (LTOA) for a period of 25 years, commissioning schedule for Unit-I was mentioned as December, 2009 and for Unit -II as March, 2010.

9.08. that on 02.06.08, the appellant requested Jaypee to provide connectivity through single circuit Loop In Loop Out (LILO) of 400 kV Baspa-Jhakri line of Jaypee for implementation of power evacuation scheme of the appellant.

9.09. that Jaypee vide its letter dated 23.06.2008 wrote to the appellant that Baspa Jhakri 400 kV double circuit line being a dedicated transmission line, the same cannot be used for LILO connection of the project.

9.10. that on 14.07.2008 the Powergrid wrote to the appellant stating that it would be granted Long Term Open Access (LTOA) subject to signing of the BPTA for payment of transmission charges and other conditions mentioned in intimation format given along with the grant states the date of commencement of open access as July, 2010. Powergrid while granting LTOA to the appellant accepted the injecting utility as single circuit LILO at Chaura (Baspa Jhakri) 400 KV line.

9.11. that on 23.09.2008, the appellant reiterated its request to Jaypee to provide connectivity through single circuit LILO of the 400 KV Baspa Jhakri line of Jaypee for implementation of power evacuation scheme of the appellant.

9.12. that on 05.10.2008, the appellant wrote to the Government of Himachal Pradesh to take up the matter with Jaypee to allow the appellant connectivity of its Baspa Jhakri line which was also in line with the suggestion of the Standing Committee.

9.13. that on 15.01.2009, a meeting was convened by the Central Electricity Authority (CEA) to review the evacuation arrangement from the Sorang Project of the appellant wherein the following stipulations were agreed upon:-

- (a) Jaypee would make best efforts for commissioning of 400 kV D/C quad line from Karcham-Wangtoo to Abdullapur facilitating power evacuation from Sorang Project. In the event of any delay, Jaypee had to ensure that the section of the line between the LILO section for Sorang to Karcham-Wangtoo and interconnection of the line with Karcham-Wangtoo and interconnection of the line with Karcham-Wangtoo S/Y should be made available matching with commissioning of generation at Sorang HEP i.e. by July 2010 so that the power from Sorang Project can be

evacuated through Sorang to Karcham Wangtoo and then via Baspa-Nathpa Jhakri line till commissioning of the Karcham Wangtoo Abdullapur line.

- (b) The appellant would construct the LILO portion from their switchyard to a suitable location near Karcham Wangtoo- Abdullapur line.
- (c) The sharing of transmission charges for evacuation of the appellant's power through Karcham-Wangtoo Abdullapur Line would be as per Regulations issued by the Central Commission from time to time.

9.14 that in the 27th Standing Committee Meeting of Northern Region on Transmission Planning dated 30.05.2009, it was agreed that appellant would be granted LTOA subject to certain stipulations.

9.15. that on 17.07.2009, the appellant was granted LTOA, for a period of 25 years, with the date of commencement of open access being November 2010. As per the permission for LTOA, the BPTA with Powergrid was to be signed within one month of issuance of the LTOA permission. This letter cancelled the communication issued vide letter dated 14.07.2008.

9.16. that on 21.10.2009, Bulk Power Transmission Agreement was executed between the Powergrid and the appellant for transmission of power from the project of the appellant for a period of 25 years from May 2011 or actual date of commercial operation of first unit of the project, whichever was earlier. Under the said agreement, a specific line, namely, LILO of one circuit of Karcham Wangtoo - Abdullapur 400 KV D/c (Quad) Line at Sorang was to be constructed and commissioned to provide long-term open access to the appellant.

9.17. that in July, 2010 the appellant claimed certain geological surprises at its project site, claimed due to weak strata in Head Race Tunnel (HRT) etc, strike by contractors/labourers, unprecedented rains etc.

9.18. that on 02.08.2010, the appellant citing the reasons for alleged force majeure requested for the date of commencement of open access to be revised from May 2011 to January, 2012.

9.19. that subsequently, by communication dated 28.02.2011, the appellant citing the very same reasons that were cited in the previous letter dated 02.08.2010 requested for further extension of time from January 2012 to May 2012. . Even though no further events took place after July 2010 which were claimed to be a new force majeure event.

9.20. that on 19.01.2011, in the meantime, the appellant had written to another company, namely, HP Power Transmission Corporation Limited seeking extension of time for open access as per the agreement with the respondent no. 2 to be extended till May 2012. The said letter was forwarded by HP Power Transmission Corporation Limited to the Northern Regional Power Committee/NRPC by communication dated 14.03.2011.

9.21. that on 07.04.2011 NRPC replied to the above communication dated 14.03.2011 stating that the matter for amendment of the commencement date under the BPTA between the appellant and the respondent no. 2 was not within its purview.

9.22. that in a meeting held on 01.06.2011 of the various constituents of NRPC it was decided by the constituents of the Northern region that no extension of time can be granted to the appellant. This was the consistent view taken by the constituents even in previous cases when the generator was claiming delay in commissioning of the power plant as a reason for non payment of open access charges.

9.23. that on 07.07.2011 pursuant to the above decision of the constituents of the NRPC, the appellant wrote to the respondent no. 2 stating that since the Karcham Wangtoo - Abdullapur line to be constructed by a transmission licensee, namely, M/s Jaypee Powergrid has not been commissioned, the date of commencement of open access of the appellant be considered from the date when the said line will be commissioned and be ready for evacuation of the power from the project of the appellant.

9.24. that on 31.01.2012, Powergrid-respondent no.2 wrote to M/s. Jaypee stating that power from the appellant's Project would be evacuated through LILO of one circuit of Karcham Wangtoo-Abdullapur Line and that in accordance with the Connectivity Regulations, a Connection Agreement needed to be signed by appellant for connectivity of ISTS. The data regarding connectivity has been submitted by the appellant and has been processed by respondent no. 2 as per approved procedure for signing of Connection Agreement. The details of the Connection Agreement to the Inter-State Transmission System (ISTS) was also submitted for Jaypee's observation. The date of commissioning as per the Connection Agreement was September 2012.

9.25. that on 06.03.2012 Connection Agreement was executed between the appellant and the Powergrid-respondent no. 2 with regard to technical aspects and physical connectivity of the transmission line with the generating station of the appellant.

9.26. that on 01.04.2012 Karcham Wangtoo- Abdullapur line was ready and commissioned. The transmission licensee was in the position to evacuate the power from

the generating station of the appellant and the capacity in the transmission system of Powergrid-respondent no.2 was reserved for the appellant to the extent of 100 MW. The transmission/open access charges were also payable by the appellant in terms of the Regulations of the Central Commission from the said date when the open access had commenced.

9.27. that on 02.04.2012, Jaypee informed NRPC that the LILO 400 KV DC Baspa - Jhakri Line and 400 KV DC KarchamWangtoo-Abdullapur Transmission line along with 2 associated bays at Abdullapur sub station and 2 X 80 MVAR Line reactors at Wangtoo sub station had been declared under commercial operation w.e.f. 01.06.2011 and 01.04.2012 respectively.

9.28. that the Powergrid-respondent no.2 on 27.04.2012 filed its reply in the said Petition No. 43/MP/2012 wherein it opposed the petition.

9.29. that since as per letter dated 02.04.2012 from Jaypee, the Karcham Wangtoo-Abdullapur Transmission Line was commissioned on 01.04.2012, therefore, transmission charges are payable by the appellant w.e.f. 01.04.2012, because the appellant in its letter dated 07.07.2011 had requested the Powergrid- respondent no. 2 to consider date of commencement of LTOA under the BPTA as the date when Karcham Wangtoo-Abdullapur Transmission Line is commissioned.

9.30. that, therefore, transmission charges are payable by the appellant w.e.f. 01.04.2012, because the appellant in its letter dated 07.07.2011 had requested the Powergrid- respondent no. 2 to consider the date of commencement of LTOA under the BPTA as the date when Karcham Wangtoo- Abdullapur Transmission Line is commissioned and accordingly the Powergrid-respondent no.2 withdrew its invoice dated 08.09.2011 through a negative bill raised vide invoice dated 03.01.2012.

9.31. that the appellant revised the claim for extension of time till December 2012 in the rejoinder filed by the Appellant before the Central Commission.

9.32. that in additional affidavit dated 17.12.2012 filed by the appellant before the Central Commission, the appellant once again sought the revision of the time period for extension of the open access start date to May 2013

9.33. that on 31.01.2013, the learned Central Commission passed the impugned order and dismissed the said petition of the appellant in which the appellant sought extension of date for open access under BPTA till September, 2012.

9.34. that on 18.03.2013 the appellant filed Review Petition before the Central Commission wherein the appellant prayed that the open access should only commence from March 2013. Further, the appellant raised a new plea i.e. since the Connection Agreement was signed only in September 2012, the open access could not begin prior to the said date.

9.35. that the Central Commission vide order dated 10.10.2013, dismissed the Review Petition filed by the appellant.

10. We have heard Mr. Sitesh Mukherjee assisted by Mr. Jafar Alam and Ms. Payal Chandra, the learned counsel for the appellant; Mr. K.S. Dhingra, learned counsel for the respondent no.1 and Mr. Anand K. Ganesan, learned counsel for the respondent no.2. We have perused the written submissions filed by the contesting parties and have cautiously gone through the impugned orders.

11. The following issues arise for our consideration in this Appeal:-

- (A) Whether the learned Central Commission failed to consider the impact of the force majeure events on the Project and to allow reasonable time taken by the appellant to mitigate the effect of the force majeure events and restore work on site?
- (B) Whether the learned Central Commission erred in holding that the appellant, a generating company, did not comply with the requirement of the BPTA in effectively invoking the force majeure clause to seek amendment of the BPTA for the commencement of open access?

12. Since these issues are inter-connected, we are considering and deciding them together. The learned counsel for the appellant has made the following submissions on these issues:-

12.01. that the respondent no.2 in a bid to unjustly enrich itself is levying transmission charges on the appellant even for the periods when the appellant's generating station was unable to utilize transmission line of the respondent no.2 due to force majeure events.

12.02. that the learned Central Commission has failed to consider the force majeure clause of the Bulk Power Transmission Agreement dated 21.10.2009 executed between the appellant and the respondent no.2 and further the obligations of the respondent no.2 to ready its transmission line.

12.03. that the impugned order is based on a mis-directed enquiry into superfluous questions such as whether Powergrid (respondent no.2) had adequate notice of the force majeure events and on far-fetched inferences such as that the appellant's letter dated 07.07.2011 amounted to the appellant conceding its rights under the force majeure clause.

12.04. that as per Clause 13 of the BPTA dealing with force majeure events, the appellant is not required to pay any transmission charges for the period the appellant remained unable to use the transmission line till 30.04.2013 due to the effects of force majeure events of the appellant's generating plant (Sorang Project). Clause 13 dealing with the force majeure provides as under:-

"13.0 FORCE MAJEURE

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 fire, rebellion, mutiny, civil commotion, riot, strike, lock out, force of nature, accident, act of God and any other reason beyond the control of the concerned party. But any party claiming the benefit of this Article shall satisfy the other party of the existence of such an event and give a written notice within a reasonable time to the other party to this effect. 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."

12.05. that Clause 13 of the BPTA must be read as per the settled law that force majeure includes any event over which the performing party has no control as was held in the cases of Dhanraj Gobindram Vs. Shamji Kalidas and Co. reported at AIR 1961 SC 1285 and in MMTC of India Ltd. Vs Interore Fertichem Resources SA reported at AIR 2012 Delhi 123.

12.06. that the commissioning of the appellant's power plant has been substantially delayed due to the following reasons which were beyond the control of the appellant, including:-

- a) Several geological surprises affecting major works of the power plant including penstock tunnel, cable tunnel, fire fighting tank and head race tunnel;

- b) Torrential rains damaging the approach roads to the site, and
- c) Strikes by construction workers and disputes with land owners.

All these reasons being beyond the control of the appellant are covered under Clause 13 of the BPTA.

12.07. that the respondent no.2 at no stage has disputed the occurrence of the said events nor has denied the delay in the commissioning of the said generating project. The appellant had filed a detailed expert report and other material before the learned Central Commission to substantiate the force majeure events.

12.08. that the learned Central Commission, in the impugned order, particularly, in paragraph no. 24 observed that the petitioner submitted a report and an addendum to the report prepared by Lahmeyer International Private Limited (Expert) and its affidavit dated 17.12.2012 to show that delay of 699 days took place due to geological surprises combined with inclement weather and the respondent-Power Grid did not file any reply to the said report in spite of the same having been served upon it.

12.09. that the learned Central Commission has wrongly held that no geological surprise was encountered by the appellant after 14.07.2010 and, therefore, the appellant cannot claim the benefit of the force majeure clause beyond this date. Such a narrow meaning cannot be given to the terms of the force majeure clause of the BPTA and as such the order of the Central Commission is contrary to the settled law on force majeure.

12.10. that as per the Expert Report dated 24.09.2012, a delay of 700 days took place due to geological surprises combined with inclement weather and the said aspect has not been properly considered by the learned Central Commission in the impugned order.

12.11. that the learned Central Commission erroneously confined its enquiry to determine whether any force majeure events had occurred after 01.04.2012, without appreciating and considering that the ambit of the force majeure clause in the BPTA extended till the effects of the force majeure events had ceased to operate. The learned Central Commission further failed to consider that the effects of the force majeure events, that had occurred before 01.04.2012, had not ceased to operate. In effect, the learned Central Commission held that time taken in overcoming a force majeure event is not included within the ambit of force majeure event.

12.12. that the learned Central Commission has wrongly rejected the conclusion recorded in the Expert Report without citing any reasons. The only reasoning given in the impugned order is that if the project developer failed to estimate impact of geographical surprise and taken necessary corrective action, it cannot be treated as force majeure. The said finding in the impugned order is without any evidence because opinion of an expert may not be binding on any Regulatory Commission or Court but the learned Central Commission should have recorded the reasons for disagreeing with the said Expert Report as was held in V. Rajamma Vs. A. Ram Reddy reported at 2011 (2) ALT 551, Bajaj Hindustan Ltd. Vs. Sir Shaadi Lal Enterprises Ltd. & Anr. reported in (2011) 1 SCC 640 and also in U.P. Public Services Commission Vs. Subhash Chandra Dixit & Ors. reported at (2003) 12 SCC 701 wherein the Hon'ble Apex Court held that judges' opinions or studies undertaken by experts can be disregarded only in exceptional circumstances based on justifiable grounds. No project can be designed in a manner that meets a time line in a precise and exact manner even after taking into consideration complex and unexpected geological surprises and certain geological surprises may come to light only during the implementation of the same. The intensity and impact of such geological surprises could not have been predicted or accounted for at the inception of the project.

12.13. that the events encountered by the appellant have led to a considerable delay in the construction and commissioning of its power plant and the same amount to force majeure events in terms of Clause 13 of the BPTA which requires that the time reasonably taken to overcome the effects of the force majeure events must also be included within its ambit. In these facts and circumstances the force majeure events must also be included within its limit. In these circumstances, the appellant cannot be held liable to pay transmission charges till 30 April 2013, when the effects of the force majeure events ceased to operate.

12.14. that the contention of the respondent-Powergrid that the force majeure clause does not apply to the generating station's ability to use the transmission line, as long-term access means the grant of a "right to use" the transmission line and not the "use" of the transmission line is misconceived because under Regulation 26 of the Open Access Regulations, the transmission charges are payable for the use of the transmission system and hence the appellant is not required to pay for the transmission system when it is unable to use it. The Open Access Regulations are not self-contained. They envisage the execution of a BPTA and it is the BPTA which ultimately governs the rights of the parties.

12.15. that Regulation 15 of the Open Access Regulations is reproduced as under:

“15. Execution of Long-term Access Agreement

The applicant shall sign an agreement for long-term access with the Central Transmission Utility in case long-term access is granted by the Central Transmission Utility, in accordance with the provision as may be made in the detailed procedure. While seeking long-term access to an inter-State transmission licensee, other than the Central Transmission Utility, the applicant shall sign a tripartite long-term access with the transmission utility and the inter-State transmission licensee. The long-term access agreement shall contain the date of commencement of long-term access, the point of injection of power into the grid and point of drawal from the grid and the details of dedicated transmission lines, if any, required. In case augmentation of transmission system is required, the long-term access agreement shall contain the time line for construction of the facilities of the applicant and the transmission licensee, the bank guarantee required to be given by the applicant and other details in accordance with the detailed procedure.”

12.16. that the model BPTA prescribed in the detailed procedure issued under the Open Access Regulations saves the provisions of the BPTA executed between Powergrid and the appellant including the force majeure events as per Clause 13 of the BPTA.

12.17. that the contention of the respondent no.2 that a transmission company who had built a transmission system for a generating station would be left with stranded capacity and suffer losses if the generating stations were excused from its liability to pay transmission charges for the period of force majeure is also misconceived because the transmission line in the instant case was not built for the appellant and the appellant is the beneficiary of surplus capacity in the Karcham-Wangtoo Abdullapur line (“KWA line”). Further, respondent no.2-Powergrid placed no evidence on record to show that it had suffered any loss on account of the appellant’s inability to use the transmission system. The respondent no.2-Powergrid has suffered no loss as the transmission capacity meant for the appellant has been licensed out to short-term and medium-term customers till the appellant is able to use the transmission capacity. Moreover, as per the CERC (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010, the transmission charges for the transmission system will be shared by the transmission service customers who use the transmission system (conversely, the appellant will bear the transmission charges for other transmission service customers as and when they are unable to use the transmission system).

12.18. that the appellant gave sufficient notice to the respondent no.2-Powergrid of the force majeure events. The finding in the impugned order to the effect that appellant did

not give notice of force majeure to the respondent no.2-Powergrid is contrary to record. The first force majeure event occurred on 14.07.2010 and the appellant duly informed respondent no. 2 about the delay in commissioning vide its letter dated 02.08.2010, i.e. within a fortnight of the force majeure event. Correspondences were exchanged between the appellant, respondent no.2 and Northern Regional Power Committee.

12.19. that the learned Central Commission has further failed to consider the letter dated 16.02.2011 sent by Himachal Pradesh Power Transmission Corporation Ltd. to the respondent no.2 -Powergrid recommending that evacuation of power from the appellant's power plant be considered from May 2012. The appellant again sent a letter to respondent no. 2 on 28.02.2011 seeking extension of commencement of open access from May 2012, categorically stating that the project has encountered several unanticipated geological surprises coupled with strikes and torrential rainfall.

12.20. that a bare reading of Clause 13 of the BPTA dealing with force majeure makes it evident that a claim for force majeure is not conditional upon the affected party by sending a notice to the non-affected party. The said provision does not say that in the event a force majeure notice is not sent, the force majeure clause is unenforceable. The term 'notice' in Clause 13 contemplates only that the non-affected party be informed of the fact that events beyond the control of the affected party had occurred. The appellant's aforesaid correspondence gave sufficient notice to respondent no.2-Powergrid that events beyond its control occurred and the same had prevented the appellant from utilizing transmission system as per the schedule indicated in the BPTA.

12.21. that the CERC's contention that the appellant's said letters did not use the term 'force majeure' and, therefore, did not qualify as a 'notice' of force majeure, is patently misconceived. The force majeure clause itself does not stipulate that the term 'force majeure' must be employed for a letter to qualify as a 'force majeure' notice. Further, Clause 15 of the BPTA, which governs the manner in which notice is required to be given by one party to the other, does not lay down any specific requirement for giving a notice in the event of a force majeure claim. It merely stipulates that a notice must be given in writing within a reasonable period of time. In law the word 'notice' denotes merely an intimation to the party concerned of a particular fact and includes a plaint filed in a suit as was held in the cases of Parasramka Commercial Co. Vs. Union of India reported at 1969 (2) SCC 694 and Commissioner of Sales Tax Vs. Subhash & Co reported at (2003) 3 SCC 454.

12.22. that further as per Section 3 of the Transfer of Property Act, 1882 “a person is said to have notice” of a fact when he actually knows that fact, or when, but for willful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.

12.23. that the learned Central Commission has wrongly concluded that appellant has given up its force majeure claim vide letter dated 07.07.2011. The said finding is perverse and contrary to the record. The said letter of the appellant does not specifically state that the appellant had given up its force majeure claim. The appellant’s request vide its letter dated 07.07.2011, for postponement of commencement of BPTA on the ground that the KWA line had not been commissioned, does not imply that the appellant had given up its force majeure claim. The said letter merely states that the date of commencement of open access may be considered from the date when KWA line will be commissioned and ready for evacuation of power.

12.24. that the appellant’s force majeure claim had to be examined independently of its claims arising from its letter dated 07.07.2011 as the appellant’s claim for force majeure is unrelated to and extends beyond the scope of its letter dated 07.07.2011. The learned Central Commission has, therefore, erred in concluding that the appellant was precluded from relying upon its claim for force majeure in light of the fact that the appellant specifically sought permission from respondent no. 2 to extend the date of commencement of open access from the date when the KWA line will be commissioned and ready for evacuation of power from the appellant’s power plant vide its letter dated 07.07.2011 which request of the appellant was accepted by the respondent no. 2.

12.25. that having completely ignored the force majeure events, the learned Central Commission has further erred in not analyzing the expert evidence on the delays which were consequential to the said force majeure events.

12.26. that though Jaypee had informed respondent no. 2 that the KWA line was ready as on 01.04.2012, it is pertinent that the KWA line was not ready to evacuate power from the appellant's power plant as on this date. In fact, the tension plates required on the cross arms of Tower No. 46 of the KWA line (which had provision for LILCO connection with the appellant's transmission line) were not ready even till 15.07.2013 as revealed in a joint inspection carried out by the appellant and Jaypee on the said date. This delay has occurred due to default on Jaypee's part and the appellant addressed a letter dated

17.08.2013 to respondent no. 2, bringing to light the fact of non-readiness of Tower No. 46.

12.27. that the appellant is not liable to pay open access charges since it could not connect to the transmission line due to incomplete LILO connection. The respondent no. 2 granted connectivity to the appellant's power plant vide a Connection Agreement dated 06.03.2012 between the appellant, respondent no. 2 and Jaypee Powergrid Ltd., a joint venture between respondent no.2 and a private company. By the Connection Agreement, the appellant was granted connectivity through a LILO connection to be established between the appellant's generating station and the KWA line, being built by Jaypee Powergrid.

12.28. that Jaypee Powergrid was to build the KWA Line and make it ready to evacuate power from the appellant's generating station i.e. ready for a LILO connection to be rigged onto it.

12.29. that in the alternative by Connection Agreement dated 06.03.2012, the respondent no.2 -Powergrid had agreed with the appellant that the date of commencement of open access would be September, 2012. The respondent no. 2 vide letter dated 14.02.2012, specifically accepted that the commissioning of the appellant's generating station stood extended to September 2012. In any event, open access is subject to the grant of connectivity as there can be no open access without connectivity, although there can be connectivity without open access. Regulation 3 of the Open Access Regulations provides that connectivity and open access must be applied for simultaneously or connectivity must be applied for before open access. Hence, BPTA is, by necessary implication, subject to the terms of the Connection Agreement executed, inter alia, between the appellant and respondent no. 2. By granting connectivity as of September, 2012 vide the Connection Agreement, the date of commencement of open access stipulated in the BPTA stood substituted/ varied/ waived.

Per contra, learned counsel for the respondent no.2-Powergrid has made the following submissions:-

13. that the alleged force majeure reasons had occurred only in July 2010 and there was no event or circumstance that had arisen after the said date which can be said to be a force majeure event or act of God.

13.01. that after the said event, the appellant had sought extension of the start date of open access from May, 2011 till January, 2012 vide communication dated 02.08.2010. Thereafter, on 28.02.2011, the appellant once again sought the revision of the date for start of open access till May 2012. The same was neither agreed to by the respondent no. 2 nor by the constituents in the Northern Region upon whom the liability would arise in case the appellant is not required to pay the open access charges.

13.02. that subsequent to 07.07.2011, the appellant voluntarily and in clear understanding of the position stated that the date for commencement of open access be considered from the date when the Karcham Wangtoo-Abdullapur line is ready and commissioned and this happened on 01.04.2012. Only from 01.04.2012 the open access has been granted to the appellant and the appellant is required to pay the charges for the same.

13.03. that the extension of time for open access was not granted on account of any force majeure conditions claimed by the appellant but because the transmission lines in question which is required for a grant of open access was commissioned only on 01.04.2013 till 31.03.2014, the capacity could not have been reserved for the appellant because the line in question which was constructed for grant of open access to the appellant was not completed and commissioned. Therefore, the open access charges have been billed from 01.04.2014 onwards. In the circumstances, the submission on behalf of the appellant that the claim for force majeure has been accepted by the respondent no. 2 for extension up to 31.03.2014 is not correct. In any event, the appellant has itself admitted the start of open access is from 01.04.2012, the date when the Karcham Wangtoo-Abdullapur line (KWA line) was ready as communicated vide communication dated 07.07.2011.

13.04. that the appellant in the said proceedings sought to wriggle out of the position taken by the appellant vide above communication dated 07.07.2011 on the ground that the communication dated 07.07.2011 was not a waiver of the claim of the appellant for force majeure.

13.05. that the communication dated 07.07.2011 of the appellant is not a plea or pleading of the appellant, but a piece of evidence. The evidence is on the understanding of the parties and the stand taken by the parties with regard to the rights and obligations of the parties to each other. The letter dated 07.07.2011 is a clear admission on the part of the appellant regarding the open access to commence from the date when the Karcham Wangtoo- Abdullapur line was ready which was commissioning on 01.04.2012.

13.06. that the admission of the appellant has an evidentiary value. The burden of proving that the admission made was wrong is on the party who has made the admission as was held by the Hon'ble Supreme Court in the case of United India Insurance Co. Ltd. Vs. Samir Chandra Chaudhary, reported at (2005) 5 SCC 784 observing that the admission is the best piece of evidence against the persons making admission. The apex Court in the case of Avadh Kishore Das Vs. Ram Gopal (1979) 4 SCC 790 : AIR 1979 SC 861 held that it is true that evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong, but they do raise an estoppel and shift the burden of proof placing it on the person making the admission or his representative-in-interest. The appellant has neither sought to explain the letter nor has the appellant sought to prove the letter or its contents to be wrong.

13.07. The question of raising an alternative plea does not permit a party to disregard the admission made by the party to set up a completely different case. The alternative plea of the appellant is disproved by the admission of the appellant itself. The Central Commission has correctly and legally relied on the said communication dated 07.07.2011 of the appellant to reject the case sought to be made out by the appellant.

13.08. that in this Appeal, the appellant has placed large material to claim that there was a force majeure. The appellant is seeking to rely on force majeure events as if it is arguing on why there was a delay in commissioning of the power plant to claim IDC & IEDC as part of its generation tariff. This is not the case. The force majeure being sought by the appellant cannot be a reason for non payment of open access charges under the BPTA.

14. Regarding the effect of Connectivity Agreement, learned counsel for the respondent no.2/transmission licensee has made the following submissions:

14.01. that the appellant has sought to rely on the Connectivity Agreement dated 06.03.2012 entered into between the appellant and the respondent no. 2 to contend that the parties have agreed for open access to be applicable only from September 2012 and not from April 2012. This contention on behalf of the appellant is misconceived.

14.02. that the Connection Agreement is required only for the purposes of physical connectivity of the transmission line to the generating station and to ensure technical compliance and other technical aspects of such physical connection. The Connectivity Agreement or the Connectivity Regulation has no relation with regard to open access.

14.03. that the connectivity is required under the provisions of the Central Electricity Authority (Technical Standards for Connectivity to the Grid) Regulations, 2007 and in particular Regulation 6(7)(1), which reads as under:

“6. General Connectivity Conditions-

(7) (1) Every connection of a requester system to the grid shall be covered by a connection agreement between the requester and

- (a) Appropriate Transmission Utility in case of connection to inter-State transmission system or intra State transmission system as the case may be;
- (b) Distribution licensee in case of inter-connection to distribution licensee’s in case of inter-connection to distribution licensee’s system; and
- (c) Transmission licensee and Appropriate Transmission Utility in case of inter-connection to a transmission licensee (tripartite agreement).

(2) The connection agreement shall contain general and specific technical conditions, applicable to that connection.”

14.04. that in the present case, the appellant applied for signing the Connection Agreement in terms of the above Connectivity Regulations only on 24.11.2011, much after the open access had been granted. This was only for the purposes of physically connecting the transmission line being constructed to the generating station of the appellant. The connectivity being in September 2012 as captured in the said agreement was because the generating station was getting delayed and it was not possible to physically connect the generating station to the transmission line. While approaching the respondent no. 2 to sign the Connection Agreement, the appellant represented that the plant would come by September 2012 and therefore, the said date got incorporated in the Connection Agreement.

14.05. that the Connection Agreement itself provides that the open access shall be governed under the provisions of the Open Access Regulations of the Central Commission. The Connection Agreement does not deal with open access granted or otherwise the charges payable for the open access.

14.06. that the reliance by the appellant on the Connection Agreement dated 06.03.2012 to contend that the open access cannot be taken as having commenced prior to September 2012 is misconceived. The right to use the system and the capacity being reserved was from April 2012 and the delay caused in the establishment of the generating station

cannot be a ground for avoiding the payment for the system capacity being reserved for the appellant by the transmission licensee/respondent no.2.

14.07. that the Open Access Regulations provide a methodology for applying and obtaining open access as well as relinquishment of open access in case the open access customer does not require the open access. There is a specified provision and procedure for relinquishment of long-term open access. In case the appellant did not wish the transmission capacity to be reserved in its favour, the appellant could have followed the procedure and relinquished its long-term open access. Upon the relinquishment, the transmission capacity would have been allocated to other persons who desire to have transmission capacity reserved. The appellant, however, chose to block the transmission capacity in the system / long term open access. If the capacity is blocked, the same needs to be paid for.

14.08. that when the appellant has chosen to maintain the transmission capacity reserved in the system, which capacity the appellant had a right to use from 01.04.2012, the appellant cannot deny its obligation to pay the charges for such transmission capacity. The transmission capacity has been reserved in favour of the appellant to the exclusion of all others.

14.09. that if the contention of the appellant is allowed, its effect would be that for a period from 01.04.2012 till the time when the open access ought to have commenced in the submission of the appellant, the capacity charges for the transmission capacity reserved in favour of the appellant would have to be borne by the other beneficiaries of the transmission system, which would be most unfair and have unjust consequences on the persons being burdened with the charges for the capacity which has been reserved in favour of the appellant.

15. The learned counsel for the respondent no.1/Central Commission, has replied to the submissions of the appellant in the following manner:-

15.01. that Central Commission's findings are based on the evidence of the Consultant's Report/Expert's Report and the addendum thereto which are summarized below:

(a) The last geographical surprise was encountered on 14.7.2010 causing collapse at chainage 891.50 m at crown of Head Race Tunnel (HRT) followed by cavity formation with sudden ingress of water with mud and squeezing ground.

(b) After the geological surprise of 14.7.2010, further work was started for excavation of HRT w.e.f 17.12.2010, after three months.

(c) Only one activity for vertical realignment of HRT was undertaken between 1.6.2012 to 25.8.2012.

(d) The above activity for vertical realignment of HRT in itself was not a geographical surprise but an activity to be performed after a geographical surprise, which had occurred on or before 14.7.2010.

(e) After almost two years of the geographical surprise encountered during construction of Head Race Tunnel on 14.7.2010, a decision to change design was implemented and that too of lowering of HRT by 0.75 m only.

(f) Failure to estimate the time in itself cannot be considered a forced majeure.

(g) It is the engineering and project execution abilities of the project developer to decide how much time it would require him to recover from geographical surprise and if necessary to implement either design changes or excavation methods.

(h) If the project developer has failed to estimate impact of geographical surprise and take necessary corrective action, it cannot be treated as force majeure.

(i) In its letter dated 7.7.2011 the appellant sought to align the commencement of open access with the commissioning of Karcham-Wangtoo transmission line, written after the geological surprise of 14.7.2010 there is no mention of it and the time required for recovery.

(j) When the appellant requested for open access with effect from the date of commissioning of Karcham-Wangtoo transmission line, it is presumed that the appellant had factored in the time required to recover from the geological surprises and complete the project by the time of the commissioning of Karcham-Wangtoo transmission line.

(k) Failure of the appellant to properly estimate the time and execute the work in a time bound manner cannot be construed as force majeure.

(l) Sorang HEP was delayed on account of improper planning and execution of the works by the appellant.

15.02. that the Central Commission as an expert body, further assisted by the professional staff having expertise in all major fields, is not bound by the report of the consultant appointed by a party before it. The Central Commission has the mandate and competence to arrive at its own independent opinion after discussing the whole material on record and analyzing the expert's report in detail.

15.03. that the appellant did not produce any evidence of strike by the labour of the contractor or its duration and also did not produce any evidence of excessive rains, though rains are the normal feature of the hilly area where Sorang Hydro Project is located and have to be taken care of at the planning stage.

15.04. that the finding of the Central Commission in the impugned order on the question of notice of force majeure by the appellant to the respondent no.2 is extracted below:

“22. The Force Majeure clause of the agreement between the respondent and HVPNL stands incorporated in the BPTA by virtue of clause 3.0 thereof and extracted above. However, in order to invoke the Force Majeure clause the party has to give notice to the other party of the existence of the Force Majeure event or events. It is to be seen whether the petitioner has given notice to the respondent of existence of the Force Majeure events seeking extension of date of commencement of inter-State open excess. The petitioner has not placed anything on record and has not even averred that it issued notice to the respondent for extension of date of commencement of open access up to September 2012. The petitioner has filed a copy of the letter dated 28.2.2011 (Annexure P5) wherein it requested the Director (Projects) of the respondent to consider its request to extend the BPTA date since due to unforeseen circumstances stated therein the commissioning of the Project was delayed by one year and the new commissioning schedule was May 2012. Even in its communication dated 28.2.2011 addressed to Chairman HPSEB, and the communication dated 18.4.2011 addressed to Chairman, NRPC (Annexure P4 and Annexure P 5 respectively), the petitioner sought amendment in the BPTA for commencement of open access in May 2012 instead of May 2011. The petitioner has not complied with the requirement of the BPTA of issuing notice to the respondent to seek amendment of the BPTA for commencement of open access to September 2012. Therefore, the dispute has not crystallized in terms of the BPTA before the petitioner approached the Commission by way of the present petition. Therefore, the petition is liable to be rejected on this ground.”

15.05. that in both the letters 02.08.2010 and 28.02.2011, the alleged force majeure events are not similarly worded and they did not give the specific details of the events. Therefore, these letters cannot be said to be the notices under the force majeure clause. The details of the alleged geological surprises, strike by labour, unprecedented rains were necessarily to be given in the notice for satisfaction of the respondent no.2 as the requirement of the force majeure clause is to “satisfy the other party of the existence of such an event”. Even if the plea of the appellant that these letters were the notices under the force majeure clause is accepted, in the letter dated 02.08.2010 the appellant sought

extension up to January 2012 and in the letter dated 28.02.2011, extension of time for commencement of long term access was sought up to May 2012. Both these letters do not disclose or even mention about the alleged force majeure. The appellant completely failed to satisfy the respondent no.2 of existence of such force majeure event.

15.06. that the appellant has argued that the Connection Agreement dated 06.03.2012 executed pursuant to Connectivity Regulations notified on 10.08.2009, superseded the BPTA and as such the respondent no.2 cannot claim transmission charges from a date prior to September 2012, the date of commissioning of Sorang Project accepted in the Connection Agreement. The said Connection Agreement was not placed on record by the appellant in the main petition nor did the appellant make any averment based on the Connection Agreement. The said Connection Agreement was filed by the appellant in the Review Petition. The learned Central Commission in the Review Order held that the purposes of the BPTA which governs commercial aspects of long term access and the Connection Agreement are different and on this aspect the Connection Agreement did not supersede the BPTA since the issue of sharing of the transmission charges is directly and exclusively governed by the BPTA. After considering all aspects including the impugned order, the learned Central Commission dismissed the Review Petition of the appellant and re-affirmed the impugned order.

15.07. that the contention of the appellant that the BPTA stands superseded by the execution of Connection Agreement is not legally sustainable. The Hon'ble Supreme Court in Lata Construction Vs. Dr. Rameshchandra Ramniklal Shah reported at AIR 2000 SC 380 held that the concept of substitution of an agreement can be applied only when one agreement completely replaces the other. The Hon'ble Supreme Court in the case of Gujarat Bottling Company Ltd Vs. Coca Cola Company reported at AIR 1995 SC 2372 held that after consideration of the principle of novation when the purposes of two agreements are different, the latter agreement cannot be said to have substituted the earlier. Since the Connection Agreement was executed to meet the statutory requirements under the

Connectivity Regulations of the Central Commission, the same cannot wipe out or substitute or supersede the BPTA. The BPTA was executed on 21.10.2009 when the Connectivity Regulations were already in force and yet the appellant under the BPTA agreed to share the transmission charges from May 2011. In the letters dated 02.08.2010 and 28.02.2011, the appellant did not place reliance on the Connectivity Agreement.

15.08. that this Appellate Tribunal in its judgment dated 18.05.2010 in Appeal No. 176 of 2009 in the case of Bangalore Electricity Supply Company Ltd Vs. Devengere Sugar Company Ltd. and another decided the issue of waiver holding that the waiver is a matter of intention and can be either express or implied. In order to hand over a waiver, there shall be some positive act on the part of the party which is supposed to have waived his right. Thus, the appellant is deemed to have waived its rights, if any, available under the Connectivity Agreement and cannot invoke the Connection Agreement to avoid its liability to share the transmission charges from 01.04.2012 decided in the main order.

15.09. that no cognizance can be taken of the allegations of default on the part of Jaypee Powergrid on commissioning of Karcham Wangtoo- Abdullapur transmission line since it was neither a party before the Central Commission nor is it before this Appellate Tribunal. Under the BPTA, the appellant was required to coordinate with Jaypee Powergrid Ltd. for construction of LILO. The appellant did not bring to the notice of the Central Commission the efforts made by it with Jaypee Powergrid to ensure early completion of LILO of Karcham Wangtoo - Abdullapur transmission line and the reasons for which these efforts did not materialize, requiring intervention of the respondent no.2 as the Central Transmission Utility.

15.10. that the material on record reveals that the appellant took up the matter with Jaypee Powergrid only on 02.05.2013, after dismissal of the main petition and filing of the review petition.

OUR DISCUSSION AND CONCLUSION:-

16. The appellant/petitioner, namely, Himchal Sorang Power Ltd., as mentioned above, filed the aforesaid petition under Section 79 (1) (f) of the Electricity Act, 2003 to declare that the appellant /petitioner is entitled to an extension of the date for commencement of the Open Access under the Bulk Power Transmission Agreement (BPTA) and further to extend the date of commencement of the Long Term Open Access from May 2011 to September, 2012 under the said BPTA and also to restrain the respondent no.2 Power Grid (Transmission Licensee) from making any claims under the BPTA for transmission charges in respect of extension of the date of commencement of open access prior to September, 2012.

17. This petition has been dismissed by the Central Commission by the impugned order dated 31.01.2013 concluding that the appellant sought postponement of commencement of open access till the commissioning of the Karcham-Wangtoo transmission line, the Power Grid had agreed to the appellant's request and started billing from April 2012 as the said transmission line was commissioned with effect from 01.04.2012. It has been concluded in the impugned order that the appellant's claim for further extension of commencement of the open access cannot be considered as force majeure event as no such event had been brought to the notice of the Central Commission, which took place prior to April 2012 which was having any kind of impact of delaying the project. The further finding of the Central Commission, in the impugned order, is that the appellant's project is being delayed on account of improper planning and execution of the works of the project and the Power Grid cannot be allowed to suffer for failure of the appellant to execute or commission the project in time. It has further been held in the impugned order that the appellant is liable to pay the transmission charges to the Power Grid/ respondent no.2 from 01.04.2012.

18. The learned Central Commission, in the impugned order, has further recorded that the appellant has been seeking revisions from time to time in the date on which the open access would take effect. Firstly, revision was sought till January, 2012, then till May, 2012, then again to September, 2012, then again to December, 2012 and finally to May,

2013. The Appellant has not complied with the provisions of the BPTA in issuing notice of force majeure to the Respondent No. 2 to amend the period of extension to September, 2012.

19. The main contention of the learned counsel for the appellant is that the force majeure clause under BPTA is applicable to the appellant's case, hence the date of applicability of the transmission charges should be extended till the time the appellant begins commercial operation of the power plant and use the open access. The further contention of the appellant is that the Power Grid by signing the Connection Agreement dated 06.03.2012 has since recognized the connectivity from September, 2012 should be deemed to have accepted the extension of time for payment of transmission charges till September, 2012.

20. The appellant has challenged the impugned order on the ground that the appellant is required to pay the transmission charges/open access charges by application of force majeure clause in the BPTA dated 21.10.2009 entered into between the appellant and the transmission licensee. After going through the material on record, the Commission dismissed the aforesaid petition of the appellant observing that by the communication dated 07.07.2011 which the appellant claims to be the notice of intimation of force majeure to the respondent no.2 simply states that the open access is to commence from the date Karcham Wangtoo-Abdullapur Line (KWA) is ready and commissioned. Since the transmission line was commissioned on 01.04.2012, the appellant is liable to pay the transmission charges from 01.04.2012. The learned Central Commission did not find any force majeure having taken place after April, 2012. The last alleged force majeure was on 14.07.2010. Only one activity was carried out between 01.06.2012 and 15.08.2012 and the Appellant had not acted prudently and changed the design of the power plant by lowering the Head by only 0.75 meters after two years of the alleged geographical surprise. Since in the letter dated 07.07.2011 sent by the appellant which the appellant is claiming to be the notice of force majeure under BPTA does not mention about any alleged geological surprises and the time required to recover from the same, the said notice cannot be said to be a sufficient notice of force majeure event.

21. Now, we are to decide whether the learned Central Commission failed to consider the impact of the force majeure event on the appellant's project and to allow reasonable time to mitigate the effects of the force majeure and restore work on site. We have quoted above the force majeure clause of the BPTA. The said clause 13 dealing with force majeure requires that the party claiming the benefit of the force majeure event shall

satisfy the other party of the existence of such an event and give a written notice within a reasonable time to the other party to this effect and transmission and 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.

22. As mentioned above, the appellant did not give the required notice under clause 13 regarding force majeure event fulfilling the requirements of the said clause, within a reasonable time and the appellant did not satisfy the respondent no.2-Power Grid about the existence of the alleged force majeure event. The notice/ communication dated 07.07.2011 sent by the appellant to the respondent no.2- Power Grid simply states that the open access is to commence from the date when Karcham Wangtoo-Abdullapur Line (KWA) is ready and commissioned. The said communication cannot be said to be a notice in sufficient compliance of the provisions of clause 13 dealing with force majeure provided under the BPTA. When there are specific provisions to be complied with for the applicability of force majeure events, the said requirements cannot be legally ignored or exempted on the strength of some case law. The Hon'ble Supreme Court in Dhanraj Gobindram's case (supra) observed that force majeure includes any event over which the performing party has no control. In the case in hand, no legal notice fulfilling the requirements of clause 13 had been given by the appellant to the respondent no.2 in order to get the benefit of such force majeure and it failed to satisfy the respondent no.2 about the existence of such force majeure event. If the grounds leading to the delay in commissioning of the appellant's power plant are to be considered, no material to substantiate the said grounds has been placed by the appellant on record either before the Central Commission or before this Appellate Tribunal. The only ground pressed during arguments in the Appeal by the appellant is regarding sufficient geological surprises affecting major works, for which no notice fulfilling the requirements provided under clause 13 of the BPTA had been given. The learned Central Commission, in the impugned order, has given detailed and cogent reasons for not agreeing to the report prepared by Lahmeyer International Private Limited (Expert). We have quoted the said reasons in para 15.1 of this judgment. We find no force in the appellant's contention that the learned Central Commission did not cite sufficient or material reasons for disagreeing with the expert's report. We are further unable to agree to the contention of the appellant that the learned Central Commission failed to consider that the effects of the force majeure events, that occurred before 01.04.2012, had not ceased to operate. We agree to the finding recorded by the Central Commission in the impugned order because clause 13 dealing with force majeure clearly provides that 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. The said clause does not provide that the effect of force majeure to continue till the appellant is restored to its original position if there was no force majeure. If the appellant fails to restore or recover from the alleged force majeure for unreasonably long time, it cannot be held entitled to any benefit on that score.

23. The main contention of the appellant on the issue of force majeure and its impact is that the learned Central Commission erroneously confined its enquiry to determine whether any force majeure events had occurred after 01.04.2012 without appreciating and considering that the ambit of force majeure in the BPTA extended till the effects of force majeure events had ceased to operate. It further failed to consider that the effects of force majeure events, that had occurred before 01.04.2012, had not ceased to operate. Thus, the learned Central Commission was bound to consider first the force majeure events and then to decide the date or time when the effects of such force majeure events had actually ceased to operate or had come to an end. Further, the thrust of the argument of the appellant on this issue is that the force majeure events encountered by the appellant have led to a considerable delay in the construction and commissioning of its power plant and the same amounted to force majeure under the BPTA. Clause 13 requires that the time reasonably taken to overcome the effects of the force majeure events must also be included within its ambit.

24. To the contrary, the contention of the respondent no.2-Power Grid, on the issue of force majeure is that the first force majeure event occurred on 14.07.2010. According to clause 13 dealing with force majeure under the BPTA, the party claiming the benefit of the force majeure event shall have to satisfy the other party (Power Grid in the instant case) of the existence of such force majeure event or shall give a written notice within reasonable time to the other party to this effect. In the instant matter, the appellant in both the letters dated 02.08.2010 and 28.02.2011, did not give the details of the existence of force majeure events. No attempt has been made by the appellant to satisfy the respondent no.2 about the existence of the force majeure events nor any written notice under the force majeure clause was ever given. Both these letters are said to be the notice of force majeure events by the appellant whereas in the letter dated 02.08.2010, the appellant sought extension upto January, 2012 and in the letter dated 28.02.2011 extension of time for commencement of long term open access upto May, 2012. Both these letters do not disclose or even mention about the force majeure event. In the letter dated 07.07.2011 sent by the appellant, the appellant only sought to align the

commencement of open access with the commissioning of Karcham-Wangtoo transmission line, written after the geological surprise of 14.07.2010 and there is no mention of any geological surprise and the time required for recovery in the said letter dated 07.07.2011.

25. After hearing submissions on the plea of force majeure of both the rival parties and going through the impugned order, we find that the learned Central Commission after perusing the report of the Consultant/Expert and the addendum thereto found that the last geographical surprise was encountered on 14.07.2010 causing collapse at chainage 891.50 m at crown of Head Race Tunnel (HRT) followed by cavity formation with sudden ingress of water with mud and squeezing ground. After the geological surprise on 14.07.2010, further work was started for excavation of HRT w.e.f 17.12.2010, after three months. Only one activity for vertical realignment of HRT was undertaken between 01.06.2012 to 25.08.2012. Finding of the Central Commission in the impugned order regarding geological surprise is that activity for vertical re-alignment of HRT in itself was not a geographical surprise but an activity to be performed after a geographical surprise, which had occurred on or before 14.7.2010 and after almost two years of the said geographical surprise encountered during construction of Head Race Tunnel on 14.07.2010, a decision to change design was taken and implemented for lowering of HRT by 0.75 mt only. The Central Commission, in the impugned order, further observed that failure to estimate the time in itself cannot be considered a force majeure. If the project developer has failed to estimate impact of geographical surprise and take necessary corrective action, the same cannot be treated as force majeure. The appellant by sending letter dated 07.07.2011 only sought to align the commencement of open access with the commissioning of Karcham-Wangtoo transmission line, without mentioning any geological surprise and any time required to overcome the effect of the said surprise.

26. We have carefully and deeply perused the aforementioned letters sent by the appellant only to find that there is no mention of the existence of the occurrence or existence of any geological surprise or force majeure event. Thus, we hold that no notice, informing occurrence or existence of any force majeure event as required by clause 13 of the BPTA entered into between the parties, had ever been given by the appellant to the respondent no.2 Power Grid by fulfilling the requirements of the provisions mentioned in clause 13. The appellant was bound to give a notice in writing within reasonable time to respondent no.2 informing it of the existence of force majeure event but such a notice had never been given. There is no compliance of the provisions of Clause 13 dealing with force majeure under the said BPTA entered into between the appellant and the

respondent no.2-Power Grid. We agree with the findings and reasonings recorded in the impugned order about the non-existence of force majeure event. Since there is no provision under Clause 13 of the BPTA providing for any benefit for extension of time to recover from the effect of the so called force majeure event, no benefit of the said submission of the appellant can be granted to it. The clause 13 simply provides that the transmission/drawal 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. It does not provide for any kind of relaxation or extension of time to be granted to a developer to overcome or recover from the effect of such force majeure event.

27. The next contention of the appellant is that since the respondent no.2 Power Grid has suffered no loss as the transmission capacity meant for the appellant has been licensed out to short-term and medium-term customers till the appellant is able to use the transmission capacity. Though Jaypee had informed respondent no. 2 that the said KWA line was ready as on 01.04.2012, but the said line was not ready to evacuate power from the appellant's power plant on 01.04.2012 because the tension plates required on the cross arms of Tower No. 46 of the said line were not ready till 15.07.2013, as revealed in a joint inspection carried out by the appellant and Jaypee on the said date. This delay has occurred due to default on Jaypee's part and the appellant addressed a letter dated 17.08.2013 to respondent no. 2, apprising the fact of non-readiness of Tower No. 46, hence the appellant is not liable to pay open access charges since it could not connect the transmission line due to incomplete LILO connection. The respondent no.2 granted connectivity to the appellant's power plant vide Connection Agreement dated 06.03.2012 between the appellant, respondent no.2 and Jaypee Power Grid Limited, (a joint venture between respondent no.2 and Jaypee Power Grid). By the Connection Agreement, the appellant was granted connectivity through a LILO connection to be established between the appellant's generating station and the KWA line, being built by Jaypee Powergrid.

28. The other contention of the appellant, in the alternative, is that by the Connection Agreement dated 06.03.2012, the respondent no.2- Power Grid had agreed with the appellant that the date of commencement of open access would be September, 2012. Since the respondent no. 2 vide letter dated 14.02.2012, specifically accepted that the commissioning of the appellant's generating station stood extended to September 2012. In any event, open access is subject to the grant of connectivity as there can be no open access without connectivity, although there can be connectivity without open

access. Further thrust on this contention is that since Regulation 3 of the Open Access Regulations provides that connectivity and open access must be applied for simultaneously or connectivity must be applied for before open access, BPTA is by necessary implication, subject to the terms of the Connection Agreement and by granting connectivity as on September, 2012 vide the Connection Agreement, the date of commencement of open access stipulated in the BPTA stood substituted/ varied/ waived.

29. To the contrary on the issue of Connection Agreement and open access, the learned counsel for the respondent contended that the extension of time which the appellant vide communication dated 02.08.2010 sought was for open access from May 2011 to January, 2012 and further by communication dated 28.02.2011 once again sought the extension of the date for start of open access till May 2012, the same was neither agreed to by the respondent no. 2 nor by the constituents in the Northern Region Power Committee (NRPC).

30. Subsequent to 07.07.2011, the appellant voluntarily and clearly understanding the position stated that the date for commencement of open access be considered from the date when the Karcham Wangtoo-Abdullapur line is ready and commissioned and this happened on 01.04.2012 and only from 01.04.2012 the open access has been granted to the appellant and the appellant is required to pay the transmission charges from 01.04.2012.

31. After going through the rival contentions on this issue of open access, we find from the correspondences and other material available on record that the appellant had requested the respondent no.2 that the date for commencement of open access should be considered from the date the said transmission line was ready and commissioned. Since the said line became ready and commissioned on 01.04.2012, only from 01.04.2012 the appellant had been granted open access. We further find that the extension of time for open access was never granted on account of any force majeure conditions claimed by the appellant but because the transmission line in question, which is required for a grant of open access, was commissioned only on 01.04.2013. Till 31.03.2014 the capacity could not have been reserved for the appellant because the line in question which was constructed for grant of open access to the appellant was not completed and commissioned. Therefore, the open access charges have been billed from 01.04.2014 onwards. In these circumstances, we do not find any force in the contention of the appellant that the claim for force majeure had been accepted by the respondent no. 2 for

extension of open access up to 31.03.2014. The appellant had itself admitted the start of open access from 01.04.2012, the date when the said Karcham Wangtoo-Abdullapur line (KWA line) was ready as communicated vide communication dated 07.07.2011 of the appellant. We further observe that the appellant had sought to rely on the Connectivity Agreement dated 06.03.2012 entered into between the appellant and the respondent no.2 just to contend that the parties have agreed for open access to be applicable only from September, 2012 and not from April, 2012. The Connection Agreement is required only for the purposes of physical connectivity of the transmission line to the generating station and to ensure technical compliance and other technical aspects of such physical connection. The Connectivity Agreement or the Connectivity Regulation has no relation with regard to open access. We have already quoted the relevant Regulation 6 dealing with General Connectivity Conditions of Central Electricity Authority (Technical Standards for Connectivity to the Grid, 2007) in clause 14.3 of this judgment. The appellant applied for signing the Connection Agreement according to the Connectivity Regulations only on 24.11.2011, much after the open access had been granted. The connectivity being in September 2012, as mentioned in the said Connectivity Agreement was only because the generating station was getting delayed and it was not possible to physically connect the generating station to the transmission line. While approaching the respondent no. 2 to sign the Connection Agreement, the appellant represented that the plant would come by September 2012 and, therefore, the said date was incorporated in the Connection Agreement.

32. On perusal of the Connection Agreement, we find that it provides that the open access shall be granted under the provisions of the Open Access Regulation of the Central Commission. The Connection Agreement does not deal with Open Access granted or otherwise the charges payable for the open access. In these circumstances, we are unable to accept the contention of the appellant that the open access cannot be taken as having commenced prior to September, 2012. Right to use the system and the capacity reserved for the appellant was from April, 2012 and the delay caused in the commissioning of the generating station cannot be a ground for avoiding the payment for the system capacity being reserved for the appellant by the transmission licensee-respondent no.2. The Open Access Regulations provide a methodology for applying and obtaining open access as well as relinquishment of open access in case the open access customer does not require the open access. That procedure has not been followed by the appellant in this matter. If the appellant actually did not require transmission capacity to be reserved in its favour, the appellant could have followed the procedure provided for relinquishment of long-term

open access. Upon the relinquishment, the transmission capacity would have been allocated to other persons who desire to have transmission capacity reserved. In the case before us, the appellant chose to block the transmission capacity in the system / long term open access. Since the said capacity has been blocked, the same needs to be paid for by the appellant. Thus, we further agree to the findings recorded by the Central Commission in the impugned order on Connectivity Agreement and BPTA while dealing with open access issue. We find no force in this contention of the appellant that the BPTA stands superseded by the execution of Connection Agreement. The Connection Agreement was executed to meet the statutory requirements under the Connectivity Regulation of the Central Commission, the same cannot wipe out or substitute or supersede the BPTA. The BPTA was executed between the parties on 21.10.2009 when the Connectivity Regulations were already in force and yet the appellant under the BPTA agreed to share the transmission charges from May, 2011. We are further unable to accept the contention of the appellant regarding the delay in commissioning of transmission line having been made by the Jaypee Power Grid because firstly the Jaypee Power Grid was neither a party before the Central Commission nor before this Appellate Tribunal and secondly the material on record reveals that the appellant took up the matter with Jaypee Power Grid only on 02.05.2013 after dismissal of the main petition and filing of the review petition.

33. We hold that the learned Central Commission has considered the factum of force majeure event in letter and spirit by going through the communications sent by the appellant to the respondent no.2-Power Grid and correctly found that during the period there was no force majeure event. The notice of force majeure as required by the provisions of clause 13 dealing with force majeure under BPTA cannot be said to be a correct and legal notice because in the said communication we do not find any mention of the occurrence or existence of any force majeure event and no effort was made by the appellant to satisfy the opposite party, namely, the respondent no.2. The Central Commission has not erred in holding that the appellant did not comply with the requirements of the BPTA in effectively invoking the force majeure clause to seek amendment of the BPTA for the commencement of the open access.

34. In view of the above discussion, both the issues are decided against the appellant and the appeal is liable to be dismissed.

ORDER

The instant Appeal is hereby dismissed and the impugned order dated 31.01.2013 passed by the learned Central Commission in Petition No. 43/MP/2012 is hereby re-affirmed. There shall be no order as to costs.

Pronounced in open Court on this 30th day of April, 2015.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

✓ REPORTABLE/NON-REPORTABLE

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