

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

**IA No. 12 of 2012 in
Appeal No.81 of 2011**

Dated: 25th January, 2012

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. P.S. Datta, Judicial Member**

In the matter of

Allain Duhangan Hydro Power Ltd ... Appellant (s)

Versus

Everest Power Private Limited & Ors ... Respondent (s)

**Counsel for the Appellant (s): Mr. Amit Kapur
Mr. Apoorva Misra
Mr. Nitin Kala**

**Counsel for the Respondent(s): Mr. M.G. Ramachandran &
Mr. Tarun Johri, Adv. for R-1.
Mr. S.B. Upadhyay, Sr. Adv.
Mr. S. Tanuwada
Mr. Pawan K. Singh
Er. Sanjay Dewan for R6 & R8
Mr. D.P. Sharda, Adv. for R-8**

ORDER

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

The appellant has filed IA No.12 of 2012 seeking directions of this Tribunal to the respondent no.1 to comply with the interim order dated 10.06.2011 passed by this Tribunal.

2. The brief facts of the case are as under:-

2.1 The appellant is a generating company which has set up Allain Duhangan Hydro Electric Project of 192 MW capacity along with 220 kV Allain Duhangan - Nalagarh transmission line for evacuation of power in the state of Himachal Pradesh. M/s. Everest Power Pvt. Ltd., the respondent no.1 herein, is also a generating company engaged in development of Malana-II

Hydro Electric Project of 100 MW capacity. The main appeal has been filed by the appellant against the order dated 01.06.2011 of the Central Electricity Regulatory Commission declaring 220 kV Allain Duhangan - Nalagarh transmission line of the appellant as inter-State transmission system and directing the appellant to provide connectivity to Malana-II Hydro Electric Project of the respondent no.1 on this transmission line.

2.2 IA 141 of 2011 filed by the appellant for grant of interim stay of the impugned order was disposed of by this Tribunal by its interim order dated 10.06.2011 giving the following directions :

“ i) The Appellant will allow connectivity in compliance with the applicable laws to Respondent no.1 on 220 KV Allain Duhangan – Nalagarh transmission line by loop in loop

out of one of the circuits at 220/132 KV Chhuar sub-station of Respondent no.1.

- ii) In the interim period, the transmission charges will be worked out on the capital cost of the transmission line as per the audited accounts of the Appellant on the basis of norms of Central Commission's Tariff Regulations, 2009 and will be shared by the Respondent no.1 in proportion to the rated capacity of the unit commissioned, on pro-rata basis.*

- iii) The first Respondent will share the transmission loss @ 4.75 % of the energy injected by Malana II Power Station at the tapping of 220 KV at Allain Duhangan – Nalagarh circuit at Chhuar Sub-Station of Respondent no.1.*

- iv) The Northern Region Load Despatch Centre will schedule and dispatch the power generation and prepare UI accounts and energy accounts for both Allain Duhangan Hydro Power Station of the Appellant and Malana- II Power Station of Respondent No.1 and will control the switching operations at 220/132 KV at Chhuar sub-station of the Respondent no.1.”*

2.3 Consequent upon to the order of this Tribunal, the appellant provided connectivity to Malana-II Hydro Electric Project of the respondent no.1. The appellant and the respondent no. 1 also entered into an Interim Power Transmission Agreement ('IPTA') on 09.08.2011.

2.4 On 03.08.2011 and 12.08.2011 respectively, the 1st and the 2nd unit each of 50 MW capacity of Malana-II were synchronized and commenced injection of power through 220 KV Allain Duhangan - Nalagarh transmission line of the appellant. Respondent no.1 made payments to the appellant for the months of August and September, 2011 according to the Interim Power Transmission Agreement but refused to make payment for the subsequent months.

2.5 On 03.12.2011, the respondent no. 1 approached the appellant intimating that due to some unexpected problems in the project structure they were unable to complete commissioning process and the process of commissioning of the project had to be stopped w.e.f. 02.10.2011 to carry out inspection of water conductor system and undertake required repairs and rectifications which could take around 4 to 5 months. The respondent no.1 also requested the appellant to waive of the payment of monthly transmission charges from October 2011 till generation is restored from Malana-II, after completion of repairs.

2.6 The appellant by its letter dated 09.12.2011, asked the respondent no.1 to make payment as according to them the transmission charges were payable even when the generating plant was closed for maintenance and repairs.

2.7 On 09.12.2011, the respondent no.1 again wrote to the appellant that as they were not generating and transmitting any power from the project, therefore, as per the terms and conditions of the IPTA they were not obligated to pay the transmission charges.

2.8 Aggrieved by non-payment of transmission charges by the respondent no.1, the appellant has filed IA No.12 of 2012 seeking the directions of the Tribunal to respondent no.1 to comply with the

agreement dated 09.08.2011 entered into by the parties following Tribunal's order dated 10.06.2011.

3. Ld. Counsel for the appellant submitted as under:-

3.1 The transmission charges are payable by the respondent no.1 for the capacity of the appellant's transmission line booked for its generating station irrespective of injection and sale of energy from the generating station. According to Central Commission's Tariff Regulations of 2009, the transmission charges are computed on the basis of fixed cost of the transmission system and its availability factor. The bills raised by the appellant on the respondent no.1 are according to

the directions and the Tribunal in its interim order and the Central Commission's Tariff Regulations.

3.2 According to the IPTA entered into between the respondent and the appellant, the transmission charges are payable from the date of synchronization of the units. Even otherwise, as per CEA's monthly report the 1st and 2nd units at Malana-II were commissioned on 06.08.2011 and 14.08.2011 respectively.

3.3 The respondent no.1 was very much part of the process of finalization of the agreement and cannot now turn back and say that it was forced by the appellant to enter into the agreement. The respondent no.1 on one hand is placing reliance

on the interim order and the agreement to have access to the transmission capacity of appellant's transmission system and on the other hand it is alleging that the agreement is not in compliance with the interim order. The respondent no.1 cannot be approbate and reprobate at the same time. Having obtained benefit out of the agreement, the respondent cannot be allowed to question its validity at this stage. In this connection, he relied on the following judgments.

- (i) *Shyam Telelink Limited Vs. Union Of India: reported as (2010) 10 SCC 165*
- (ii) *Karam Kapahi and Ors Vs. Lal Chand Public Charitable Trust: (2010) 4 SCC 753*
- (iii) *R.N. Gosain Vs. Yashpal Dhir: (1992) 4 SCC*

683

3.4 By not paying the transmission charges for having booked the capacity on the appellant's transmission system the respondent no.1 was seeking unjust enrichment. In this regard, reliance was placed upon the following judgments:

- (i) *K.T. Venkatgiri Vs State of Karnataka reported as (2003)9 SCC 1*
- (ii) *State of Maharashtra Vs Swanstone Multiplex Cinema Pvt Ltd. reported as (2009) 8 SCC 235*

3.5 Assuming without admitting that the respondent no.1 was forced by the appellant to enter into the agreement, the respondent no.1 could have approached the Tribunal. On the contrary, the respondent no.1 proceeded in terms of the agreement to connect Malana-II to the appellant transmission system and injected energy into the

system. Even after the shutdown of the power plant, the respondent no.1 continued to withdraw energy from the transmission system.

4. The Ld. Counsel for the respondent no.1 has made the following submissions:-

4.1 In terms of interim order of the Tribunal, the transmission charges are payable for the units which are transmitted after the commissioning of the generation project of the respondent no.1. There has been no commissioning of the generating units and there has been no sale of generating unit by the respondent no.1 to a third party which requires the conveyance of the electricity generated from the generating station to Nalagarh by use of the transmission line.

Accordingly, the purpose for which the transmission charges have been specified under the interim order dated 10.06.2011, and with specific reference to the commissioned generating stations, has not occurred and, therefore, no transmission charges are payable.

4.2 The synchronization of the units was for testing purpose and not for commercial operation. He relied on the definition of commercial operation given in the Government of India notification dated 30th March, 1992, the Standard Bidding Documents of Ministry of Power, Government of India and Central Electricity Regulatory Commission's Regulations. He emphasized that commissioning and the commercial operation are one and the same thing. During synchronization

and testing, the electricity was not sold to any third party but respondent no.1 was entitled to Unscheduled Interchange (UI) charges for the delivered energy.

4.3 Malana – II is expected to be commissioned only in June, 2012 and, therefore, there will no usage of transmission line till June, 2012 and the respondent no.1 is not required to pay the transmission charges till then.

5. We have carefully examined the submissions made by the Ld. Counsel for the parties and the documents submitted by them. The questions that would arise for our consideration are:

- i) What is the effective date from which transmission charges are payable by the respondent no.1 to the appellant in terms of the interim order dated 10.06.2011?

- ii) Whether the transmission charges are payable by the respondent no.1 to the appellant during the interim period after the effective date irrespective of the energy generated at its power station?

Since the above issues are interconnected we will be considering them together.

6. We notice that the Tribunal in the interim order dated 10.06.2011 had directed the appellant to allow connectivity to the respondent no.1. It was

also observed that in the interim period, the transmission charges would be worked out on the basis of capital cost of the transmission line as per the audited accounts of the appellant on the basis of the norms specified in Central Commission's Tariff Regulations, 2009 and will be shared by the respondent no.1 in proportion to the rated capacity of the unit commissioned.

7. According to the Central Commission's Tariff Regulations of 2009, the transmission charges are to be computed on the basis of fixed cost of transmission system and the transmission system availability factor. We notice that the appellant and the respondent no.1 entered into Interim Power Transmission Agreement ('IPTA') on 09.08.2011. According to the IPTA, the

respondent no.1 has to pay to the appellant the transmission charges on monthly basis from the date of synchronization of unit of the respondent no.1. The monthly transmission charges have also been worked out as Rs.22,776,058 per month for 100 MW capacity of the respondent no.1, as per the Central Commission's Regulations of 2009.

8. Admittedly, unit I & II at Malana-II were synchronized on 03.08.2011 and 12.08.2011 respectively and operated and wheeled energy on the transmission system of the appellant from 03.08.2011 to 01.10.2011. Accordingly, invoice was raised by the appellant on the respondent no.1 every month from August, 2011 onwards. Respondent no.1 also made payment for the

months of August and September, 2011 to the appellant according to the IPTA dated 09.08.2011.

9. On 03.12.2011, the respondent no.1 in its letter to the appellant for the first time informed about the unexpected problem in project structure requiring shutdown of the power plant for repairs w.e.f. 02.10.2011. The respondent no.1 also requested the appellant to waive off the payment of monthly transmission charges from October, 2011 till the generation is restored after completion of repairs. However, in its letter dated 09.12.2011 to the appellant, the respondent no.1 stated that the transmission charges were not payable during the outage of Malana-II according to the IPTA.

10. We have examined the terms and conditions of the IPTA dated 09.08.2011 and find that the liability of the respondent no.1 for payment of transmission charges commences from the date of synchronization of the first unit at Malana-II i.e. 03.08.2011. Even though we feel that the payment of transmission charges should be made by the respondent no.1 w.e.f. 03.08.2011 in terms of the IPTA, we have to decide the effective date in view of the issue raised by the respondent no.1 linking the payment to commissioning of the units in terms of the interim order.

11. The Ld. Counsel for respondent no.2 has argued that the units at Malana-II have not been commissioned and, therefore, no payment for transmission charges is due to the appellant till

the commissioning of the units at Malana-II as per the interim order of the Tribunal. According to him, the commissioning and commercial operation are synonym and he relied on the notification dated 30th March, 1992 of Government of India, Standard Bidding Documents and Generation Tariff Regulations of the Central Commission.

12. We find that the Government of India notification dated 30.03.1992 deals with only date of commercial operation (COD) and not commissioning. Further, according to the notification, the date of commercial operation in the case of hydro will be not exceeding 15 days from the date of synchronization. By this definition, the COD of Malana-II should have taken

place by the end of August, 2011. We also find that the Standard Bidding Document is dealing with thermal power station and not hydro power station. The Central Commission Regulations also define the date of commercial operation. Moreover, these documents relate to tariff for the generating station and not for the purpose of payment of transmission charges for access on the transmission system.

13. We have examined the office memorandum no.3/2/2007/P&P dated 3rd September, 2009 issued by the Ministry of Power which defines the commissioning of power projects. The commissioning for hydro project has been defined as under:-

- “I. trial run operation has started*
- II. The unit has achieved full rated capacity in case of purely run-of-river stations and run-of-river stations with pondage*
- III. the unit has achieved full rated capacity or the design capacity corresponding to prevailing reservoir level in case of storage power stations.”*

14. We have also examined monthly review of power sector report of Central Electricity Authority copy of was submitted by the Ld. Counsel for the appellant, which clearly indicates commissioning of Malana-II unit – I on 06.08.2011 and unit – II on 14.08.2011. The Central Electricity Authority is a statutory authority responsible for collecting and recording the data concerning the generation, transmission, etc., and to make public from time to time the information secured under the

Electricity Act and provide for publication of reports and investigations. Accordingly, we accept the date of commissioning for the units at Malana-II as recorded by the Central Electricity Authority in its publication, as effective date for the purpose of payment of transmission charges by the respondent no.1 to the appellant as per the interim order of the Tribunal dated 10.06.2011. Thus the effective date from which transmission charges are payable by the respondent no.1 to the appellant will be 06.08.2011 for 50 MW capacity and 14.08.2011 for 100 MW capacity, in terms of the interim order.

15. The transmission charges are fixed charges which are to be shared by the respondent no.1 in proportion to the capacity of the unit

commissioned on pro-rata basis, irrespective of energy generation at its power plant, as per the interim order. However, in terms of the interim order only transmission losses are to be borne by the respondent @ 4.75% of the actual energy injected by Malana-II to be adjusted in kind. Thus, actual energy generation on the basis of which adjustment of transmission loss is to be adjusted should not be mixed up with the transmission charges which are fixed on the basis of capacity of unit commissioned and not on the energy generation. Thus the second question is also decided in affirmative in favour of the appellant.

16. Ld. Counsel for respondent no.1 has also argued that they have not commenced sale of power from

Malana – II to third party and the energy generated during the months from August to October, 2011 has been treated as UI to be paid at UI rate only.

17. We have perused the documents relating to UI accounts prepared by Northern Regional Power Committee submitted by the Ld. Counsel for the appellant. According to the UI accounts, the UI charges payable to the respondent no.1 for injection of energy during the period August, 2011 to October, 2011 is about Rs.16.52 crores. Thus, respondent no.1 has made use of the transmission system of the appellant for evacuation of power from Malana-II and has also gained materially to the tune of Rs.16.5 crores on account of energy injected into the transmission

system of the appellant in the form of UI charges which are paid from the pool account of the Northern Regional Power Committee.

18. We also find that the respondent no.1 made full payment of monthly transmission charges for the months of August and September, 2011 in terms of the IPTA. Thus the respondent no.1 had correctly understood the terms and conditions of the IPTA and complied with the same for 2 months. On experiencing forced outage of the Malana-II power plant, at first the respondent no.1 sought waiver of transmission charges w.e.f. 02.10.2011 from the appellant. However, only on 09.12.2011 for the first time the respondent no.1 disputed the sums demanded by the appellant stating that since there was no injection of energy since 02.10.2011

onwards, the payment of any charges under the IPTA would not arise. Strangely now the Ld. Counsel for the respondent no.1 argued that the transmission charges would be payable only on achieving COD which is now expected sometimes in June, 2012. Thus the respondent no.1 has been changing its stand from time to time to avoid payment of transmission charges in terms of the interim order of the Tribunal and IPTA.

19. We feel that the respondent no.1 after having taken advantage of the interim order for getting connectivity through the appellant's system cannot be wriggle out from its responsibility to make payment for transmission charges in proportion to the capacity of its power plant, in

terms of the interim order of the Tribunal and the IPTA entered into with the appellant.

20. Accordingly we direct the respondent no.1 to make monthly payments on account of transmission charges to the appellant irrespective of actual energy injection from Malana-II for the interim period in terms of the interim order of the Tribunal dated 10.06.2011 as per the charge agreed in the IPTA dated 09.08.2011, from the effective date as decided in this order i.e. 06.08.2011 for 50 MW capacity and 14.08.2011 for 100 MW capacity. The payment due for the months of October, November and December, 2011 should be released by the respondent no.1 within two weeks of this order. The appellant is

also entitled to payment of surcharge for the delayed payments in terms of the IPTA.

21. Accordingly, IA 12 of 2012 is allowed without any cost.

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

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