IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 301 OF 2016 & IA No. 260 of 2024

Dated: 16.12.2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

IN THE MATTER OF:

M/s. Om Hydro Power Ltd.
Through its Authorized Signatory,
Shri Dinesh Kumar,
Village Bandla, PO Nachhir,
Tehsil Palampur, Dist. Kangra,
Himachal Pradesh, 176061

...Appellant

VERSUS

(1) **Himachal Pradesh Electricity Regulatory Commission**
Through its Secretary,
Keonthal Commercial Complex,
Khalini, Shimla-171002

(2) **Himachal Pradesh State Electricity Board Ltd.**
Through its Director,
Kumar House, Shimla-171004

…Respondents

Counsel for the Appellant(s) : Mr. Tarun Johri
Mr. Ankur Gupta
Mr. Ankit Saini
Mr. Buddy A. Ranganathan
Ms. Aditi Sharma
Mr. D. V. Raghuvamsy

Counsel for the Respondent(s) : Mr. Pradeep Misra

Mr. Manoj Kumar Sharma for R-1

Mrs. Swapna Seshadri
Mr. Anand K. Ganeshan
Mr. Ashwin Ramanathan
Ms. Ritu Apurva
Mr. Utkarsh Singh
Ms. Neha Garg
Ms. Parichita Choudhury for R-2

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. M/s Om Hydro Power Ltd. (in short "Appellant" or "OHPL") has filed the present Appeal challenging the order dated 28.04.2016 (in short "Impugned Order") in Petition No. 149 of 2013 passed by the Himachal Pradesh Electricity Regulatory Commission (in short "State Commission" or "HPERC").

Description of the Parties:

2. The Appellant, M/s. Om Hydro Power Ltd. is registered under the Companies Act and has set up a 15 MW hydroelectric project at Palampur Himachal Pradesh.

3. Respondent No.1 is the State Commission, inter-alia, the Appropriate Commission under the Electricity Act, 2003 (in short "Act") to determine the tariff for generation, supply, transmission, and wheeling of electricity, wholesale, bulk, or retail within the State.

4. Respondent No. 2, Himachal Pradesh State Electricity Board Ltd. (in short “HPSEBL”) is vested with generating and supplying power within the State.

Factual Matrix of the Case

5. The Appellant has signed a Memorandum of Understanding (hereinafter referred to as "MoU") with the Government of Himachal Pradesh (hereinafter referred to as "GoHP") on 28.08.1993 to carry out detailed investigations, conduct techno-economic studies, and submission of Detailed Project Report (hereinafter referred to as the "DPR") for the implementation of the Neogal Hydro Electric Project of 12MW capacity (which was subsequently revised to 15 MW) located at Kangra district of Himachal Pradesh.

6. On 04.07.1998, the 1st Implementation Agreement was signed between the GoHP and the Appellant, whereby the Appellant was granted the right to build, own, operate, and maintain at their cost the 15 MW Neogal Hydro Electric Project and sell power from the Project to the Respondent No. 2 for a period of 40 (forty) years from the Commercial Operation Date (COD) of the Project.

7. GOHP, on 25.10.1999, granted the Techno-Economic Clearance (hereinafter referred to as "TEC") for the Project of a capital cost of Rs. 61.74 crores based on the price level of March 1998.

8. Thereafter, the Implementation Agreements/ amendments were entered into between the GoHP and the Appellant for the implementation of the 15MW Neogal Hydro Electric Project on 08.10.2001, 04.04.2002, 03.01.2003, 27.01.2006, 30.05.2007 and 10.04.2014.

9. On 12.07.2006, Respondent No. 2 and the Appellant filed a joint petition, Petition No. 138/2006 before the State Commission for the approval of the Power Purchase Agreement (in short "PPA"), which was approved by HPERC on 12.07.2006, inter-alia, with the following direction: -

> *"(iii) Tariff and other terms and conditions of the PPA shall be subject to the provisions of the Commission's regulation on power procurement from renewable sources, as and when such regulations are framed."*

10. Pursuant to the order of the State Commission, the Appellant entered into a PPA with Respondent No. 2 on 27.10.2006 for the sale of the Electricity generated by the Project to the Appellant, however, the PPA, as executed, did not contain the aforesaid clause.

11. Further, the State Commission vide its notification dated 18.06.2007 notified the HPERC (Power Procurement from Renewal Sources and Co-generation by Distribution Licensee) Regulations 2007 (hereinafter referred to as the 18.06.2007 "HPERC Regulations 2007"), wherein Regulation 6(3) is reproduced as follows-

> *"While deciding the terms and conditions of tariff for energy from renewable sources and co-generation, the Commission shall, as far as possible, be guided by the principles and methodologies specified by the Central Commission, the National Electricity Policy, the Tariff Policy and the Tariff Regulations notified by the Central Commission."*

12. The financial closure of the Project was done in the year 2008, and M/s Infrastructure Development Finance Company Limited (hereinafter referred to as "IDFC") appraised the project cost at Rs.82.60 crore, which was to be funded on a Debt: Equity ratio of 75:25, based on which a term loan of Rs. 62 crore was sanctioned to the Appellant, the balance funding requirement of Rs. 20.60 crore for the capital cost of the Project was raised as equity by the Appellant.

13. Thereafter, as per the fourth supplementary agreement signed on 27.10.2006, the project's COD should be achieved within 42 months after the signing of the PPA, i.e., by 27.04.2010.

14. As the revised cost estimate of the Project as per March 2010 price level had substantially increased, the Directorate of Energy, GoHP accepted the revised estimated project cost of Rs. 12380.00 lacs and asked the Appellant to submit the complete cost of the Project to the GoHP/ Department of Energy for revised concurrence/TEC within three months from COD of the plant.

15. The Appellant, faced with a revised project cost estimate of Rs. 123.8 crore and unable to secure additional debt from IDFC, approached the State Commission and submitted Petition No. 48/2010 along with the interlocutory application (M. A. No 123/2010), seeking an interim tariff of Rs. 3.50 per kWh to facilitate obtaining additional loan for the Project's construction/implementation.

16. The State Commission, through its Order dated 27.10.2010, disposed of this petition and application, determining that-

> *"14. In the present case the project is in the construction stage, the exercise of the project specific tariff determination is not feasible.*

> ***Apart from this the completion of the project involves time and cost overruns.*** *The provisions in the Act and regulations contemplate either the project specific tariff determination under sec 62(1)(a) or under the renewable regulations or in the alternative, by the way of approval of PPA under section 86(1)(b) of the Act. There is no provision for a tariff for the sole purpose of carrying financial arrangements for raising bank loans. In view of the above discussion the Commission declines to grant tariff, as an interim measure applied for by the petitioner and directs that the observations made in this order should not prejudice any further decision to be taken on the original petition which shall be considered and dealt with on its own merits.* ***However in view of the costs indicated in the petition it is likely that the final tariff will be pegged at far higher levels than provided in the PPA and therefore for financial closure purposes the financial institutions may be more considerate in choosing to leverage this project."***

17. According to Article 3 of the Power Purchase Agreement (PPA), the construction period should not exceed 32 months from the date of financial closure, and since the financial closure occurred on 21.05.2008, this implies that commissioning should have been completed by 21.01.2011.

18. Additionally, the principal Loan Agreement with IDFC was modified due to the escalated project cost of Rs. 123.80 crore, IDFC granted an extra loan of Rs. 22.98 crore to the Appellant, thereby increasing the total loan amount to Rs. 84.98 crore.

19. However, the project was completed in May 2013 and achieved commercial operation on 06.05.2013, the power generated from the Project is being sold to Respondent No. 2.

20. Directorate of Energy, GoHP vide its letter No. DOE/CE/TEC-Neogal/2013-5433-34 dated 19.10.2013 approved the completion cost of the Project at Rs. 152.70 crore.

21. However, the actual Project cost as per the audited balance sheet of the Appellant, as certified by the statutory Auditors is Rs. 147.71 crores, as of 05.05.2013.

22. The Appellant filed a petition before the State Commission, bearing Petition No. 149/2013, requesting a determination of project-specific tariff for its 15 MW Plant and asserted a total project cost of Rs. 147.71 Crore.

23. The State Commission after noticing some discrepancies in the data furnished by the Appellant raised various queries and clarifications vide its Letter dated 03.12.2014, including information relating to reasons for deviation in capital costs, etc.

24. The State Commission passed the Impugned Order dated 28.04.2016 determining the capital cost and levelized tariff of the Project, inter-alia, disallowed costs of Rs. 47.48 crores from the capital cost of the Appellant's project and has determined the levelized tariff at Rs. 2.31/kWh considering the useful life of the Project for 40 years.

25. Aggrieved by the said Order, the Appellant filed the present Appeal.

Submissions of the Appellant

26. The Appellant submitted that the State Commission had determined the levelized tariff of the 15 MW Neogal Hydro Power Project, Himachal Pradesh, at Rs. 2.31/kWh, as against the claim of Rs. 4.52/kWh.

27. The Capital Cost has been determined at Rs 100.23 Cr. but the claim of the Appellant is Rs. 147.71 Cr which is as per the Audited Balance Sheet dated 26.11.2013, the balance claim is Rs. 47. 48 Cr.

28. The Appellant submits that the State Commission has disallowed Interest During Construction (IDC), as interest was allowed until 06.05.2012, whereas the actual COD is 06.05.2013, accordingly, the IDC on the outstanding loan of Rs. 11.05 Cr. has been disallowed.

29. The State Commission has allowed 39.5 months as Force Majeure under the PPA in favour of the Appellant.

30. Clause 2.24 of the fourth SIA dated 27.01.2006 provides that the SCOD of the Project shall be 42 months from the date of signing of the PPA i.e. 27.10.2006, therefore, the period of 42 months shall expire on 27.04.2010.

31. The commissioning date is 06.05.2013 with a delay of 37 months calculated from 27.04.2010, however, considering that the State Commission had declared 39.5 months as a Force Majeure period, the actual expiry of the time frame comes out to be 11.08.2013 whereas the actual COD was achieved before that on 06.05.2013.

32. Therefore, the State Commission has erred in disallowing the IDC charges for 12 months from 06.05.2012 till 06.05.2013.

33. Further, the construction of the Project was supposed to be completed by 31.07.2009 as per Article 3.2 of the PPA which reads as under

> ***"3.2 For the purpose of this Article the Construction period means a maximum period of 32 months from the date of Financial Closure. The construction schedule to this effect is as per Schedule-I of this Agreement. The Company shall also furnish the board, half yearly progress reports by 31st March and 30th September every year indicating achievement viz-a-viz the targets, spillages, if any, and the remedial actions intended to be taken."***

34. The Financial Closure (FC) was achieved on 21.05.2008, and further, the period of 32 months starting from 21.05.2008 ended on 21.01.2011 and including the period of 39.5 months as Force Majeure which was allowed by Respondent No.1, the date of expiry would come out to be 04.05.2014 which is beyond the actual date of commissioning i.e., 06.05.2013.

35. The Clause 2.24 of the 4th SIA dated 27.01.2006 has to be read as under since the PPA did not define the SCOD:

> ***"2.24 "Scheduled Commercial Operation Date" shall mean the date by which the Company shall achieve the Commercial Operation of all the units of the Project and the same shall be Forty Two (42) months from the date of signing of Power Purchase Agreement."***

36. Therefore, the SCOD of the Project shall be 42 months from the date of signing of the PPA and not as per the Schedule of Construction as annexed to the PPA.

37. It was submitted that the State Commission deducted Rs. 0.77 Cr. while calculating the deductions on account of Interest from idle cash by taking into consideration the actual commercial date as 06.05.2012 and not 06.05.2013, therefore, the total amount paid of Rs. 30.06 Cr towards IDC would qualify for the Capital Cost of the Project instead of Rs. 19.01 Cr.

38. The Appellant submitted that the Appellant had prayed for the depreciation in terms of the CERC Regulations, 2012 but the State Commission had adopted the HPERC Regulations, 2007 and had not applied the Advance Against Depreciation (AD) benefit to cater to loan repayment requirements.

39. Also, submitted that the State Commission mentioned in its order that the Appellant has received the Capital Subsidy from MNRE, even after, the Appellant has informed the State Commission that the same has not been received.

40. The State Commission had only allowed the Tax component i.e., actual MAT and the Corporate Tax, however, the State Commission while calculating the levelized tariff at Rs. 2.31/kWh omitted to count the tax component so approved which ultimately resulted in a reduction of the payable levelized tariff by the Respondent No. 2.

41. It is contended that the Directorate of Energy, GOHP vide dated 19.10.2010 sanctioned a capital cost of Rs. 152.70 Cr. State Commission, through an order dated 27.10.2010 in Petition No. 48 of 2010, noted that the costs outlined in the Petition could result in a tariff substantially exceeding that stipulated in the Power Purchase Agreement (PPA), however, State Commission neglected to factor this consideration into the Impugned Order.

42. Further, prayed that the tariff of Rs. 2.31/kWh is very less than the generic levelized tariff of Rs. 3.17/kWh (w/o AD benefit) and Rs. 2.89/kWh (with AD benefit) for control period w.e.f 18.12.2012 to 31.03.2017 fixed by the State Commission vide order dated 20.05.2013 for Hydro Power Projects above 5 MW to 25 MW under Regulation 14 of the Himachal Pradesh Electricity Regulatory Commission (Promotion of Generation from the Renewable Energy Sources and Terms and Condition for Tariff Determination) Regulation, 2012.

Submissions of State Commission

43. The State Commission contends that although the Appellant initially stated the cost of land as Rs. 6.17 crore in the petition, they later revised this figure to Rs. 5.74 crore in their response to the discrepancy note issued by the State Commission on 27.04.2015.

44. The project's Detailed Project Report (DPR) outlined the cost of Government land at Rs. 0.33 Lakh per hectare and Rs. 4 Lakh per hectare for private land, however, according to the Appellant's petition, the actual cost of land acquired deviated significantly from these figures, amounting to Rs. 9.12 Lakh per hectare for government land and Rs. 27.75 lakh per hectare for private land, the State Commission raised inquiries regarding the substantial

difference between the projected costs outlined in the DPR and the actual costs incurred for land acquisition for the project.

45. The State Commission has argued that the Appellant obtained the Private Land between 2002 and 2003, with payment to the HP State Forest Department for the Net Present Value (NPV) of forest land made in 2007, and acquisition of the transmission line right-of-way occurring in 2012 and 2013, hence, the primary reason for the significant increase in costs was due to the delayed acquisition of land for the transmission line from private parties.

46. Therefore, submitted that the excess land acquired by the Appellant from Government and private parties along with the cost of these acquisitions has been allowed to the extent of proofs of land agreements submitted by the Appellant.

47. It is submitted that vide reply dated 27.04.2007, to a discrepancy note issued by the State Commission, the Appellant has submitted proofs of a payment made for payments made to the Forest Department towards compensation for cutting of trees, while the Appellant had claimed a total cost of Rs. 10.82 lakh as this cost of tree compensation in its petition, the proofs submitted add up to Rs. 16.97 lakhs as follows-

A.) Payment proof of Rs. 11.04 lakh to Divisional Forest Officer Palampur for penalty of muck debris and cost of left out trees green standing coming in alignment of Neogal SHP.

B.) Payment proof of Rs. 28,541 to the H.P State Forest Department with no explanation for the payment or any supporting document.

C.) Payment proof of Rs. 5.64 Lakh to DFO Palampur towards the cost of trees.

48. To resolve this discrepancy, the State Commission requested the Appellant to re-submit the receipts of payments made to the Forest Department for tree compensation, in response to this note, on 15.09.2015, the Appellant provided cash receipts totalling Rs. 48,910/-, based on this, the State Commission decided to approve a cost of Rs. 48,910/- and Rs. 5.64 lahks as the tree compensation cost.

49. However, the cost of Rs. 11.04 lakh is being rejected as it pertains to a penalty imposed on the Appellant, and the cost of Rs. 28,541/- was rejected due to the absence of supporting documents.

50. The State Commission approved the total expenditure incurred towards the acquisition of land as shown in the table below:-

All values in Rs. Crore

S. No.	Head of Works	As per petition	As per contract/ agreement	As per payment references	Allowed by Commission
1.	Government Land	0.02	0.02	0.02	0.02
2.	Transmission Land	3.64	2.95	2.68	2.95
3.	Private Land	0.29	0.27	0.27	0.27
4.	Forest Land	1.70	1.70	1.70	1.70
5.	Compensation for tree cutting	0.10	-	0.06	0.06
	Total	5.74	4.95	4.67	5.01

51. It was submitted that the Appellant has claimed the cost of civil works at Rs. 69.02 Crores but the contractors have raised bills of Rs. 55.84 Crores. The amount allowed by the State Commission is as per the payment references of Rs. 44.78 Crores.

52. Similarly, the amount claimed under miscellaneous and communication/road work is on the higher side as compared to the bills produced by the Appellant and therefore the same were rejected.

53. Further, the State Commission has allowed the expenditure incurred on the transmission line only after a prudence check but it is ready to accommodate any other expense also under the head of the transmission line only if a valid proof of payment is submitted by the Appellant.

54. The State Commission submits that the Appellant has argued that the Respondent has wrongly disallowed Rs. 11.05 Crores claimed as interest during construction on the outstanding loan, it is contended that the scheduled Commercial Operation Date (COD) based on the Implementation Agreement (IA) was 27.04.2010, and as per the Power Purchase Agreement (PPA), it was 21.01.2011, the Respondent allowed a delay of 39.5 months due to force majeure events, extending the COD to 5.05.2014, however, the Appellant asserted that the dates specified in the IA or PPA merely set the maximum limit for project completion, and if completed earlier, the actual COD should be considered, the Appellant completed the project in May 2013, well within the maximum timeline, despite the claimed force majeure of 51 months, which would have pushed the maximum COD to July 2014, the Appellant finished the work by May 2013, 15 months before the maximum COD, thus, after adding the 39.5 months of time overrun to 27.04.2010, 15 months should be deducted to calculate the COD, resulting in a date of May 2012.

55. The Respondent further asserts that it is the contention of the Appellant that the interest from idle cash was deducted until the actual Commercial Operation Date (COD) of May 2013, not until the assumed COD of May 2012, they argued that the assumed COD of May 2012 is merely a financial penalty for delays, but it does not reflect the actual commissioning date, in reality, the project was commissioned in May 2013, and the Appellant benefited from interest on idle cash until that time, which should have been reinvested into the project, assuming a COD date of May 2012 implies that any delay costs incurred beyond that point would not be compensated to the Appellant.

56. However, any interest income resulting from the Appellant's inability to efficiently utilize funds should be deducted from the overall capital cost of the project.

57. It is submitted that the tax while determining the project-specific tariff, the Respondent has considered the actual and Corporate Tax Rates for the years 2013-14 and 2014-15 while assuming the current tax rates and MAT rates for the future balance period of the project, as follows-

	FY	Tax Rate	Type
For 1st Year	2013-14	20.01%	MAT
Foe 2nd- 10th Year	2014-15 to 2022-23	20.01%	MAT
From 11th year onwards	2023-24 onwards	32.45%	Corporate

58. Further, it is argued that if the Appellant identifies any discrepancies and brings them to the attention of the Respondent, those discrepancies will be taken into account during the truing-up process.

Submissions of Respondent No. 2

59. Respondent No. 2 submits that as per Schedule 1 of the PPA, the actual SCOD was July 2009 and the schedules of the PPA are an integral part of the same.

60. Further the Appellant has sought a time overrun of 51 months before the State Commission, however, the Appellant was supposed to give notice to Respondent No. 2 within 5 days of the occurrence of Force Majeure along with the evidentiary claims of the same and also to intimate the Respondent No. 2 within 24 hours of the termination of the Force Majeure event.

61. Respondent No. 2 further placed reliance upon *Talwandi Sabo Power Limited vs. PSPCL and Ors., 2016 SCC OnLine APTEL 64* and *Himachal Sorang Power Ltd. vs. CERC and Ors., Appeal No. 54 of 2014*, where it was held that when there are specific terms for providing notice and on whom it is to be served, the concept of substantial compliance of the contract by some mode other than that specified in the contract cannot be introduced, it was further held that non-issuance of a force majeure notice is fatal to the case of the party seeking to have the time overrun condoned.

62. That for a total period of 51 months overrun, the time period of 39 months has been allowed and one year has been disallowed by the State Commission and therefore, the Interest During Construction has been disallowed for one year only.

63. Also, the time overrun is inclusive of the construction schedule provided in the PPA and not exclusive to it so the shifting of SCOD date to 05.05.2014 is entirely misplaced.

64. Further, as per Article 12.5 of the PPA any force majeure event would not entitle any party to claim additional costs or expenses.

65. It is submitted that the Appellant in its petition before the State Commission has considered the amount of Rs. 6.20 Crores in the tariff computation as MNRE subsidy amount.

66. In a cost-plus tariff determination conducted by the State Commission, it cannot be justified that if the generator opts not to accept any available subsidy, or if the subsidy is unavailable due to the generator's actions, or if the generator fails to pursue its entitlement to the subsidy, the resulting costs should be borne by Respondent No. 2 and consumers in Himachal Pradesh.

67. In the case of *Him Urja Pvt Ltd v. Uttarakhand Electricity Regulatory Commission, Appeal No. 17 of 2017* dated May 9, 2019, this Tribunal addressing a similar issue has ruled that the failure to claim subsidy from the MNRE or its unavailability due to the actions of the generator does not justify transferring the cost to consumers.

68. Also submitted that the tariff petition produced by the Appellant along with the Written Submissions dated 05.03.2024 shows that the MNRE subsidy of Rs. 620 lakhs has already been included in the tariff computation.

69. Also, the responsibility to provide adequate evidence rests with the Petitioner, the Petitioner must support its claims with evidence, and it cannot

argue as a defence that certain documents were not submitted because they were not specifically requested by the State Commission.

70. Moreover, in the current case, the Appellant has acknowledged possessing the documents but failed to present them before the State Commission, attempting to introduce these documents during the appeal does not meet the criteria outlined in Order 41 Rule 27 of the Civil Procedure Code, 1908, which states that documents not in a party's possession at the time cannot be submitted during the appellate stage, therefore, solely on this basis, the documents cannot be admitted during the appeal, and consequently, no relief can be granted to the Appellant based on such documents.

71. Respondent No. 2 contends that the State Commission did indeed take into account the tax component concerning the levelised tariff, specifically, the benefit of a tax holiday regarding Income Tax, provided for a period of 10 years under Section 80 1A of the Income Tax Act, 1961, was considered, the Minimum Alternate Tax (MAT) at a rate of 20.01% (inclusive of surcharge and cess) for the fiscal years 2014-15 to 2022-23 was factored into the tariff. Subsequently, the income tax rate of 32.45% (inclusive of surcharge and cess) was also considered.

Analysis and Decision

72. We have heard in detail the learned counsels appearing on behalf of the Appellant and the Respondents.

73. Respondent no. 2 submitted that the arguments were advanced on behalf of the Appellant on two issues, namely, (a) force majeure and consequent claim for additional cost/IDC and (b) the MNRE subsidy not availed

by the Appellant. However, the Appellant in its Written Submissions dated 05.03.2024 had included all the grounds of the appeal, which were not even orally pressed during the hearing on 28.02.2024.

74. Further, it was argued that based on the hearing before the Tribunal, HPSEB had filed its written submissions dated 13.03.2024 limited to the two issues above. The fact of the Appellant seeking to enlarge the scope of its oral arguments by not limiting its written submissions to the grounds argued has also been taken note of by this Tribunal in the daily order dated 13.03.2024.

75. The order dated 13.03.2024 passed by this Tribunal is reproduced as under:

"ORDER

Heard Mr. Tarun Johri, Learned Counsel for the Appellant and Mr. Anand K. Ganesan, Learned Counsel for the 2nd Respondent regarding written submission filed. We make it clear that on the last date of hearing when the arguments were concluded the issues which were deliberated and argued are as follows :-

1. The Force Majeure Event
2. The Subsidy granted by MNRE

However, Mr. Johri, Learned Counsel for the Appellant pointed out that they argued one more issue regarding documents placed before the Commission but not considered.

Mr. Anand K. Ganesan, Learned Counsel for the 2nd Respondent, however, vehemently opposed the same that it has not been argued.

Further, Mr. Johri also pointed out that the amount in respect of MAT has been allowed but not considered as part of the final determination.

Mr. Anand K. Ganesan made a request that he may be allowed to submit his reply on the other issues as submitted by Mr. Johri regarding the additional document and the MAT. Reply, as requested, shall be filed within one week. Arguments concluded.

Judgement Reserved."

76. From the above, it is seen that the Appellant filed the Written Submissions on 05.03.2024 i.e. well before the final hearing on 13.03.2024 giving ample opportunity to Respondent No. 2 to counter the Written Submission on its merit. However, the Respondent restricted its defence only to two issues.

77. Considering that the arguments in the form of written submissions were placed before us before the hearing was concluded, it may not be justifiable to ignore such arguments, even if not argued orally as it is part of the hearing.

78. However, as argued by the Appellant we shall adjudicate the four issues where Respondent No. 2 was given the opportunity either during oral hearing or through written reply.

79. The Appellant, however, contended that it has raised the issue regarding documents placed before the Commission but not considered, additionally pointed out that the amount in respect of MAT has been allowed but not considered as part of the final determination.

80. The questions which need/ to be answered through this Appeal are the disallowances as follows:

a) Computation of Capital Cost of the Project
   i. Land Cost
   ii. Civil Works
   iii. Miscellaneous Expenses
   iv. Road Works
   v. Environment & Ecology for Compensatory Afforestation Tax
   vi. Transmission Line
b) Interest During Construction
c) Advance against Depreciation while determining the levelized tariff
d) MNRE Capital Subsidy
e) Tax Component
f) Determination of levelized tariff

81. Accordingly, we will consider only the items argued by the Appellant during the hearing, i.e.

1. *The Force Majeure Event,*
2. *The Subsidy granted by MNRE,*
3. *Issues where documents placed before the Commission but not considered, and*
4. *MAT*

82. The issue-wise analysis and decision is given below:

a) Computation of Capital Cost of the Project
(Documents furnished but not considered)

83. Capital cost comparison as per DPR, as per amended loan agreement, and as per Petition is as follows:

(All Fig in Cr)

Head of Works	As per DPR	As per Amended Loan Agreement	As per Petition
Land		18.02	6.17
Civil Works	29.91	54.53	69.02
Transmission line	1.13	3.98	8.04
E&M Works	29.31	23.10	23.68
Preoperative Expenses	1.37	11.47	8.47
Interest During Construction (IDC)		12.12	30.06
LADF			2.25
Contingencies		0.60	
Total	**61.74**	**123.82**	**147.71**

84. The State Commission vide letters dated 3.12.2014,18.12.2014, 13.02.2015, 29.05.2015, 6.07.2015, 19,08.2015, 31.10,2015 in petition no 149/2013 asked the petitioner to submit the detailed information/ reasons of variation in the cost of the project as per TEC and actual basis.

85. It is important to note that the State Government revised the sanctioned cost of the TEC to 152.70 Cr. vide letter dated 19.10.2010 as against the original cost of Rs. 61.74 crores, which was based on the price level of March 1998.

86. The Appellant in its reply had submitted the justification and papers as desired by the Commission best to the availability, however, the Commission comparing the completed cost as approved in TEC and completed audited costs submitted by the Petitioner, disallowed the escalated costs, the repeated queries by the Commission shows that cost approved in TEC at the price level of March 1998 and completed cost submitted by the Petitioner after auditing at price level 2013 should remain same or to be escalated as per the escalation rate considered by the Commission in its order dated 28.4.2016.

87. Therefore, the State Commission has erred in comparing the costs of the project based on the price level in 1998 with the price level in 2013 and then limiting the variation based on the escalation cost as decided by it instead of a prudent increase in cost for determination of capital cost under section 62 of the Act.

88. Undisputedly, the State Government, based on the prudent costs prevailing at the time of construction of the project, has revised the TEC cost as Rs. 152.70 crores as against the original TEC cost of Rs. 61.74 crores determined at the market prices of the year 1998.

89. It cannot be denied that during that period, there was a large increase in the cost of construction of such projects.

90. The State Commission through various orders asked the Appellant for submission of details of the Govt land acquisition, forest clearance, private land acquisition, payment deposited/paid to various agencies and land owners, procedure of appointment of contractors, sub-contractors, payment release details and other documents related to project construction/ approval, the Appellant through various letters submitted all the documents to the Commission.

91. Based on its understanding of the various time delays in the project as discussed under section 4.3 of this order, the Commission believes that the developer could have avoided certain costs, could have completed certain works at a lower cost, or could have procured certain equipment/materials at a lower cost, by executing those works or procuring those equipment/materials earlier than their actual execution or procurement.

92. Due to the absence of detailed data to identify such activities, which the developer could have executed at an earlier date, and due to the complications involved in performing such a thorough analysis, the Commission has adjusted such costs using the WPI index by adopting the following methodology to account for the increase in project cost due to time delays -

> *"4.12.1*
>
> ---
>
> a. *The Commission identified broad cost heads which could not have been executed at an earlier date or the cost of which would not have been impacted due to time delays. These cost heads include-·*
>
> *i. E&M: the contract for E&M was awarded in 2008 well*

before the scheduled commissioning of the project in April 2010 (42 months after signing of PPA as mentioned in 4th Supplementary Agreement). Also the cost of E&M contract was lower than the cost estimated in

1. Civil works- for D Chamber, Intake structure and protection wall - awarded to "Jai Santoshi Mata Constructions" earlier on 17th September 2009 and later to "MCC Power Projects" on 1st April 2010.

2. Excavation and concreting of Penslock Pedals anchor blocks - awarded to "Sanjeev Kumar Anand" earlier on 19th May 2009 and later to "MCC Power Projects" on 18th November 2009.

The Commission believes such civil works could have been planned in a better way by the developer to avoid certain costs.•

iii. Transmission Line: the civil works for erection of Transmission lines was done in the years 2011, 2012 and 2013 even though the scheduled COD date was in April 2010 (42 months after signing of PPA as mentioned in 4th Supplementary Agreement). The Commission believes these costs could have been reduced by implementing the project at an earlier date.

c. To account for the cost escalation of such activities, the Commission has adjusted 50% of their cost as per the WPI index for the period of time delay disallowance of 1 year from May 2013 to May 2012. The WPI index for the year 2012 was 164.92 while for the year 2013 was 175.35."

93. The State Commission vide order dated 28.4.2016 in petition no 149/2013 started the roving inquiry for finalization of capital cost which may not be correct, instead should have appointed a Designated Independent Agency (DIA)/institute/expert who has the expertise/ detailed knowledge about the construction of hydro-electric generating station, the severity of issues related to geographical surprises encountered during construction and resolution of the same, DIA / Expert on their vast experience shall be in better position to estimate the expenditure to be incurred.

94. The State Government, Directorate of Energy GOHP vide its letter dated 19.10.2013 acknowledges the completed cost as Rs. 152.70 crores which is based on finalized accounts of the project, as such, the State Commission should have taken the views of the State Government also.

95. The head-wise capital cost approved by the Commission in its order dated 28.4.2016 in Petition no 149/2013 is discussed in the following paragraphs:

96. The following heads were included in the determination of Capital Cost of the Project, namely-

i. **Land Cost**

(Documents furnished but not considered)

97. The Appellant vide its petition had claimed the cost of the land at Rs. 6.17 Cr., however, in its reply to the discrepancy note of the Commission on 27.4.2015, the Appellant had claimed a land cost of Rs 5.75 Cr. against which only an amount of Rs. 5 Cr. has been allowed by the State Commission, as under:

(All Fig in Cr.)

S. No.	Head of Works	As per petition	As per contract/ agreement	As per payment references	Allowed by Commission
1.	Government Land	0.02	0.02	0.02	0.02
2.	Transmission Land	3.64	2.95	2.68	2.95
3.	Private Land	0.29	0.27	0.27	0.27
4.	Forest Land	1.70	1.70	1.70	1.70
5.	Compensation for tree cutting	0.10	-	0.06	0.06
	Total	5.75	4.95	4.67	5.01

98. The cost of Government Land and Forest Land is not in dispute i.e. Rs. 0.02 Crore and 1.70 Crore respectively, the State Commission has allowed the same.

99. The cost of Transmission land as claimed in the petition was Rs. 3.64 Crore but payment references of Rs. 2.95 Crore were produced before the State Commission therefore, the Commission has only allowed Rs. 2.95 Crore towards the cost of Transmission Land.

100. The State Commission in its order stated that the land requirement for the Transmission line as per DPR was 19.1 Ha and the land acquired is 20.01 Ha, which is allowed by the State Commission based on the Petitioner's submissions that due to site requirement, additional land was acquired.

101. The State Commission also stated that as per DPR land cost was considered very low and actual expenditure is higher and the Petitioner failed to submit the documentary proof of the same, however, **it is noticed that the Appellant has submitted the entire details (chart) of Transmission Land payment of Rs. 3.64 Crore, as also placed at Annexure A13 of this Appeal Paper book** and the differential amount has been erroneously missed while calculating the same.

102. On page 325 of the Appeal Paper Book, the Appellant noted the following:

> *"Note: All the payment proof including all related documents already submitted to Commission and again submitted all details"*

103. **It is thus noted that all the documents were placed before the Commission, however, the Commission has failed to consider these documents.**

104. The Appeal before this Tribunal is a continuation of the original petition before the Commission, on facts and law both, in the light of the above the issue can be remanded on the grounds of non-consideration of facts placed before the Commission or can be decided by this Tribunal also.

105. The instant appeal has been pending before this Tribunal since 2016, therefore, we find it appropriate to resolve the issue on its merit based on facts placed before us.

106. The cost of Private Land as claimed was 0.29 Crore but only Rs. 0.27 Crore had been allowed by the State Commission, the Appellant submitted that

an amount of Rs. 0.02 Crore has been missed which is the stamp duty and registration charges, and the same are part of the Agreements with the private land owners, details of the same enclosed in the Appeal Paper book (Annexure A13).

107. The Appellant submitted that all such documents, detailing the agreements and costs paid (reference- Annexure A13), were submitted to the State Commission also.

108. It cannot be disputed that such expenditure has been made and related proof, except the proof related to stamp duty and registration charges, is placed before the Commission and also before us, the same is, thus, need to be allowed.

109. The cost of Compensation for tree cutting as claimed was 0.10 Crore but only Rs. 0.06 Crore had been allowed by the Commission. The differential amount is Rs. 0.04 Crore. The Appellant clarified that this discrepancy falls due to the inadvertent missing of the proofs submitted to the Commission.

110. **In view of the details submitted before us which are claimed to be placed before the Commission, we decide the issue in favour of the Appellant, and the differential cost for land for transmission and Private land (stamp duty and registration charges) is allowed, the State Commission is directed to allow such costs on the basis of the proofs submitted by the Appellant.**

ii. <u>Civil Works</u>

(All Fig in Cr)

Head of Works	As Per DPR	As per Petition	Remarks
Civil Works	29.91	69.02	Civil and Hydro Mechanical Works

111. The Appellant had claimed Rs. 69.02 Cr. against civil works, as per DPR amount allocated for civil works was Rs. 29.61 Cr., the State Commission vide letters dated 3.12.2014, etc. had asked the Appellant to submit the details of the civil works award, contract agreement, and payment disbursed to the agency, the Appellant in its replies submitted the desired documents to the Commission.

112. **The State Commission ignored the documentary evidence placed before it for the reasonable cost incurred by the Appellant and decided the issue based on unjustified and irrational methodology.**

113. The Appellant in reply to various discrepancy notes submitted the final cost of civil works as Rs. 55.84 Cr. as per the bills raised by the Contractors against the claimed cost of Rs 69.02 Cr.

114. The Appellant submitted that an amount of Rs. 11.06 Cr. has been disallowed by the Commission as against the total claim of Rs. 55.85 Crore as per the petition, the Commission had allowed the civil works of a cost of Rs. 44.78 Cr. against the payment proofs reconciled from the bank statements.

115. In the total claim of Rs 55.85 Cr., the major civil works were awarded amounting to Rs. 29.19 Cr. out of which Rs 25.57 Cr. of bills were raised by the various contractors, the Commission had allowed only Rs 19.63 Cr.

116. The State Commission in its order mentioned that a competitive bidding procedure was not adopted in finalizing the main EPC contractor which was awarded on 20.6.2007 and the Penalty was levied when the agency left the work in May 2009 stated Operational difficulty, further, the Commission in its order at para 4.12 states the following for not allowing the claimed cost:

> *" 4.12.1 Based on its understanding of the various time delays in the project as discussed under section 4.3 of this order, the Commission believes that the developer could have avoided certain costs or could have completed certain works at a lower cost or could have procured certain equipment/materials at a lower cost, by executing those works or procuring that equipment / material earlier than their actual execution or procurement. Due to the absence of detailed data to identify such activities; which could have been executed by the developer at an earlier date, and due to the complications involved in performing such a detailed analysis, the Commission has adjusted such costs using WPI index-------."*

117. Regulation 12 of the HPERC Generation Tariff Regulation, 2007 provides as under:

> *"12. Capital cost of the project:*
>
> *(1) Subject to prudence check by the Commission, the actual expenditure incurred on completion of the project shall form the basis for determination of tariff. The tariff shall be determined based on the admitted capital expenditure actually incurred up to the date of commercial operation of the generating station and shall include capitalised initial spares subject to a ceiling norm of 1.5 % of the original project cost as on the cut off date:*

Provided that where the power purchase agreement entered into between the generating company and the beneficiaries provides a ceiling of actual expenditure, the capital expenditure shall not exceed such ceiling for determination of tariff."

118. It is observed that the State Commission after comparing the civil cost as per the original DPR (based on market prices for March 1998) with the project cost based on the price level of 2013 as the project was completed in May 2013 (as per Commission May 2012), has failed in appreciating that there is always a huge gap in the approval and commissioning of hydro projects due to the approval of various clearances from Central / State Government, land acquisition, financing, these factors needs to be considered while approving the cost of the project, resulting into significant increase in the project cost.

119. It is pertinent to mention that Himachal Pradesh is a Hydro Generation rich state and the State Commission may be aware of the difficulties in working conditions, the occurrence of geological surprises during construction, the availability of few agencies, and other operational difficulties.

120. Accordingly, the State Commission must take a balanced view of how to complete the project within the schedule or to minimize delays, the Appellant to avoid such delays and start litigation with the Contractor, work continued with the already working agencies and wherever required renegotiate the cost.

121. The State Commission has allowed a time overrun of 39.5 months due to force majeure.

122. **The Appellant submitted that whatever documents were available were submitted to the Commission, due to this the claim had been revised from Rs. 69.02 Cr. to 55.85 Cr.**

123. The Commission must apply Prudence Check while allowing the capital cost / completed cost of the project, in case the State Commission is not agreeable to audited/actual expenditure on any item, it needs to validate that expenditure by comparing it with other similarly placed project or getting it vetted by experts.

124. We find it totally unacceptable and unjustified that by **questioning the time of award, the audited/actual expenditure can be rejected, the rejection should be made on rational and justified grounds.**

125. In the present case Commission had gone one step beyond not only deciding what activity to take up when by the Appellant even the cost of such activities was also decided using the WPI index.

126. As per section 86(1) (a) and 86(2) (ii)of the Electricity Act, 2003 following is defined

> "(1) The State Commission shall discharge the following functions, namely:--
>
> (a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:
>
> Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(2) The State Commission shall advise the State Government on all or any of the following matters, namely:--

(i) promotion of competition, efficiency and economy in activities of the electricity industry;

(ii) promotion of investment in electricity industry;"

127. The Regulatory Commission must maintain a balance between the Developer/ Generator and Beneficiaries and ensure that they are not deprived of their entitlement, whereas, the State Commission penalized the Appellant by disallowing capital cost of Rs. 11.06 Cr. on the presumption basis and recovery of actual and reasonable capital cost is restricted, even when documentary evidence was placed before the Commission.

128. The State Commission before determining the capital cost of the project should have considered the civil construction cost of any other project commissioned during the same period to get a fair idea.

129. **The Appellant also submitted the Auditor's certificate of the completed cost as of 6.5.2013, which the Commission also did not consider.**

130. The State Commission Order's para no. 4.12.1 shows that the decision is based more on presumption rather than a defensible prudence check, as seen from below-quoted extract:

"---- developer could have avoided certain costs or could have completed certain works at a lower cost or could have procured certain equipment/materials at a lower cost, by executing those

works or procuring that equipment / material earlier than their actual execution or procurement."

131. The State Commission has erred in guessing and presuming the timing of events and /or justification of the cost without having data or benchmark cost of any civil work/equipment, it is observed that the State Commission has not compared the costs with any other similarly placed project.

132. The statement of the State Commission that "***due to the complications involved in performing such a detailed analysis, the Commission has adjusted such costs using WPI index"*** needs to be rejected as the failure to carry out prudent analysis cannot be allowed to be a valid reason for the disallowance of the reasonable cost incurred by the Appellant, inter-alia supported by audited accounts, and therefore, the Appellant cannot be made to suffer for this failure to prudently determine Capital cost including civil cost without exploring the alternate legally tenable methodology.

133. It is also important to mention that considering the Project size of 15 MW which is covered under the Small Hydro project and for the project executed in the same time frame, benchmark costs or tariffs are available which are computed by various State Commissions based on large data set available.

134. At the first instance for regulatory accounting, the auditor statement is to be relied upon and only in case of discrepancy or valid reasons, a detailed analysis can be carried out, however, the role of prudence check is not to make **presumptive** conclusions.

135. There is an apparent inconsistency in the approach of the Commission, in place of the normal prevailing practice of regulatory prudence check based

on the Auditor certificate, the State Commission sought proof of each payment, and for minor works, the Commission accepted the payment proofs for approving the expenditure, however, for major works, the Commission has questioned the timing, methodology, and justification for each sub-item and rejected some of the actual costs even supported by payment receipts.

136. Also, the methodology adopted by the commission i.e. escalation of DPR cost as per WPI is not as per the relevant Regulations.

137. It is a settled principle that if the law provides a methodology to do a thing, it cannot be done in any other manner.

138. The State Commission is bound by its Tariff Regulations, none of the State Commission's Regulations provides for any other alternative to the prudent analysis, inter-alia, there is no alternative methodology mandates that the Commission can Suo motto compute the capital cost by escalating the DPR cost based on WPI.

139. Therefore, once no such methodology is mentioned in the Tariff Regulations, the State Commission has to carry out the prudence check per the Regulations and should not invent any new methodology to predict or arrive at cost based on its presumption including the sequence and timing of work orders.

140. It cannot be disputed that in general, the application of WPI in Regulated Tariff Mechanisms is limited to O&M charges only, its application to the estimation of capital cost or Civil work cost is erroneous as WPI consists of a basket of items while relevant escalation in case of projects concerning civil work is based on items like Steel, Cement and manpower costs, also

considering geographical surprises in case of Hydro Station, a simplistic formula of WPI escalation cannot be applied.

141. **Hence the methodology adopted by the Commission is arbitrary and not in accordance with its own Regulation, given this the State Commission should have looked into the Civil cost accordingly, and if required, should have sought the advice of experts/institutes like IIT Roorkee or consultant having experience in Civil engineering costs analysis, considering the scope of work, manpower and material cost.**

142. **In view of the above the deduction of Rs 11.06 Cr is found erroneous as the reasoning of the deduction is presumptive in nature and the methodology adopted by the Commission to arrive at the cost is not in accordance with the Regulations.**

143. **The issue is decided in favour of the Appellant, the cost of Rs. 11.06 Cr is allowed based on the documents placed before us as also placed before the State Commission.**

iii. Miscellaneous Expenses

144. The Appellant has claimed miscellaneous expenses of Rs. 0.22 Crore paid to various companies for consultancy services and charges, the proof of payments, ledger account summary, and bills of the consultants and surveyors towards miscellaneous expenses have been submitted with the Appeal paper-book, the State Commission has held that any amount based on ledger cannot be passed if supporting documents are not provided in respect of the same.

145. It cannot be argued that the State Commission can seek and verify the actual expenditure, however, it must take into consideration the Appellant was implementing a 15 MW project and may lack experience like other regulated entities and utilities, so there is a need to give an opportunity to submit documents.

146. However, the State Commission rejected the claim stating that the expenditure could not be allowed based on the ledger, however, the Commission could have directed the Appellant to specific documents as required in support of the ledger.

147. **The details are placed in Annexure 16 (Proof of payments, ledger account summary, bills of the consultants and surveyors towards `Misc. Expenses') of the Appeal Paper Book (page nos. 1672 to 1692), and the Appellant claimed that these were placed before the State Commission also.**

148. **Accordingly, we direct the State Commission to re-examine the issue, and in case the Appellant provides the relevant document, the cost should be allowed.**

iv. <u>Communication/ Road Works</u>

149. **The Appellant claimed an amount of Rs. 10.19 Cr. for the Road Work/ Communication expenses incurred by it, additionally, it is the submission of the Appellant that the break-up and details of the said expenses incurred by the Appellant were submitted to the State Commission, the ledger of road work and work order of traffic tunnel and bills of the contractors carrying out road construction were also**

submitted but the Commission in its Impugned Order had mentioned that the same were not part of the record and therefore the amount of Rs. 10.19 Crore was rejected.

150. The Appellant, on page 1693 of Annexure 17 of the Appeal Paper Book, recorded that:

> *"(1)The Commission has not considered this expenditure and hence the same is claimable. (2) The detail of sheet expenditure incurred under road communication placed in annexue 7 of our reply dated 20.01.2015 page no 235 and again commission asked a query on 02.04.2015 and we are submitted detail sheet of expenditure-under road and communication in our reply dated 27.04.2015 in which we are placed ledger of road work and work order of traffic tunnel and bills of road contractor Page no 670 to 766"*

151. **The Appellant submitted that the State Commission has failed to consider these documents, accordingly, we direct that the claim of Rs. 10.19 of the Appellant needs to be re-examined by the State Commission based on such documents.**

v. <u>Environment & Ecology for Compensatory Afforestation Tax</u>

152. The cost of Rs. 0.96 Crore has been disallowed by the Commission while calculating the Capital Cost of the Project. The Appellant submitted that all the details were submitted before the State Commission.

153. The Appellant on page 2855 of Annexure 18 of the Appeal Paper Book, recorded that:

> **"The Commission has not considered this expenditure and hence the same is claimable (The same amount shown by us in our Reply dated 20.01.2015 Annexure 7 page no 237.)"**

154. Any prudent expenditure made by the Appellant cannot be rejected, if enough proof is provided by the Appellant to satisfy such a claim is made.

155. **The State Commission is directed to verify and re-examine the claim based on documents submitted by the Appellant before it as part of the original petition.**

vi. <u>Transmission Line</u>

(All Fig in Cr)

Head of Works	As Per DPR	As per Petition	Remarks
Transmission Line	1.13	8.04	Land lease for right of way and erection cost of Transmission line

156. The Appellant had claimed Rs. 8.04 Cr for transmission line expense, however, in reply dated 18.9.2015 to the discrepancy note issued by the Commission, the Appellant the claim to a cost of Rs. 7.54 Cr for the transmission line and an establishment cost of Rs. 0.27 Cr, however, the Commission has allowed a claim of Rs 4.46 Cr only as against Rs. 7.54 Cr.

157. The Commission has allowed payment to HPSEB of Rs. 0.86 Cr for the cost of land at Dehan Sub Station and other charges while rejecting the claim of Rs 1.95 Cr to HPSEB for the cost of sharing for augmentation of 132/33 KV Dehan Substation because this payment could not be verified from the Appellant account.

158. The Commission agreed that for power evacuation land is required at the Dehan substation of HPSEB, however, the State Commission rejected the claim for the system to be augmented for evacuation of **power as payment proof is not available.**

159. It is pertinent to mention that for the evacuation of power of the Appellant's project, there is a need for the augmentation of the electrical system of the Dehan substation of HPSEB as per the CEA technical standards and such details of augmentation could have been verified from the HPSEB also, however, the State Commission without carrying out any prudent analysis and had rejected the claim of the Appellant.

160. The State Commission had rejected the claim of Rs. 0.37 Cr. for the electrical equipment which had been procured by the Appellant from various agencies for substation work, land lease amount of Rs. 0.26 Cr. allowed against Rs. 0.62 Cr. and had allowed cost of Transmission line work for Rs. 0.71 Cr. only as against the claim of 1.71 Cr which was awarded to M/s Devarya Engineering stating lack of payment proof from bank statement.

161. **The Appellant has alleged that it has submitted all the documents related to the payments to the respective parties and these are also submitted with the Appeal paper-book.**

162. The State Commission has allowed an amount of Rs. 4.46 Crores after perusal of the documents submitted by the Appellant of which break-up is as follows:

(All Fig in Cr)

S. No.	Head of Works	As per Petition	As per contract/agreement	As per payment references	Allowed by Commission
1.	Material	2.55	2.98	2.55	2.55
2a.	Payment of HPSEB	0.86	0.86	0.86	0.86
2b	Payment of Railways	0.02	0.02	0.02	0.02
2c	Payment to Devarya	1.36	1.36	0.71	0.71
2.	Sub Total – Transmission Line	2.24	2.24	1.59	1.59
3.	Network Augmentation	1.95	1.95	-	-
4.	Land lease rent	0.41	0.42	0.26	0.26
5.	Electrical Equipment	0.37	0.37	0.05	0.05
	Total	7.54	8.18	4.46	4.46

163. The State Commission has indulged itself in a roving investigation for each payment and seeking proof of payment against each item ignoring the agreements between parties and auditor certificate without stating a reason for not accepting such documents, as such it is not a prudence practice while finalizing the capital cost of the project.

164. **Given the documents placed before the Commission by the Appellant, the State Commission is hereby directed to re-examine the claim.**

b) Interest During Construction

165. The Appellant had signed an MOU with the State Government for the development of the project and various Implementation Agreements (in total 6 nos.) were also signed, as per clause 1c(iii) of 4th IA dated 27.01.2006, the construction of the project to be completed within 42 months from the signing of PPA (signed on 27.10.2006.

166. The project was commissioned on 6.5.2013, and as per the 4th Supplementary Implementation Agreement dated 27.01.2006, the Project was to be commissioned by 26.4.2011 i.e. within 42 months from the date of signing of the PPA i.e. 27.10.2006.

167. The Appellant in Petition no 48/2013 sought condonation of delay of 51 months out of 84 months of the construction period due to force majeure, Commission after a detailed analysis of the construction activities and reasons submitted by the Appellant allowed the delay of 39.5 months.

168. The State Commission classified the delay into the following categories:

i. Category A Factors attributable to generating Company cost escalation due to time delay of such factors are not passed on to tariff by the Commission

ii. Category B Factors beyond the control of the generating company, and cost escalation due to time delays of such factors are entirely passed on to tariff by the Commission.

iii. Situation not covered by (i) and (ii) (hereafter referred to as Factor C), this Tribunal has further opined in Petition no 54 of 2012 that the escalation is due to time delays of such factors are not partly passed on

to the tariff by the Commission, in such cases, the State Commission has allowed 50% of the time delay for such factors.

169. The relevant extract of the Impugned Order is quoted as under:

"4.3.7 The Commission finds it appropriate to be guided by the principles laid down by Hon'ble APTEL in its judgment in Appeal No. 72 of 2010 for prudence check to decide the responsibility for delay in execution of a generating project. In para 7.4 of the said judgement, Hon'ble APTEL has held that the delay in execution of a generating project could occur due to

(a) Factors entirely attributable to the generating company (thereafter referred to as "factor A"). Escalations due to time delays of such factors are not passed on to the tariff by the Commission.

(b) Factors beyond the control of generating company (thereafter referred to as "factor B"). Cost escalations due to time delays of such factors are entirely passed on to the tariff by the Commission.

(c) Situation not covered by (i) and (ii) above (thereafter referred to as "factor C"). Hon'ble APTEL has further opined Order in Petition No.54 of 2012. Escalations due to time delays of such factors are not partly passed on to the tariff by the Commission. In this case the Commission has allowed 50% of the time delay for such factors.

4.3.8 The Commission has taken note of the submissions made by the developer for time delays and considered events like road damage, rain and snow as factor C events and others as factor B

events. The Commission has however, while taking a reasonable view, avoided classification of any event as factor A.

170. Details of the delay claimed by the Petitioner therein and accepted by the State Commission, are mentioned in the table below:

	Force Majeure	Time Loss claimed by petitioner	Factor	Allowed time loss by Commission (months)	Remarks
2007	Road damage due to unprecedent ed rains	6	C	3	The developer has submitted an order by Magistrate to stop construction work in July 2007 due to heavy rains. Further, in its letter dated 30.12.2007 to HPSEB, the developer has claimed only 3 months of time delay.
2007	Disruption due to blockage by villagers	2	C	1	Several newspaper clippings indicate construction work was affected however developer has not submitted any proof for date of termination of force majeure event.
2008	Road	6	C	3	In its letter dated 21.12.2008 to
	damage due to unprecedent ed rain/snow				HPSEB, the developer has claimed only 3 months of repair time from Oct 2008 to Dec 2008. Based on experience of year 2007, the developer should have anyways planned to close construction work during rainy season from July 2008 to Sep 2008.
2009	Road damage due to unprecedent ed rain	4	C	2	In its letter dated 30.10.2009 to HPSEB, the developer has claimed only 1 month of repair time in Oct 2009. Based on experience of year 2007 and 2008, the developer should have anyways planned to close construction work during rainy season from July 2009 to Sep 2009.
2010	Damage to components due to cloud burst/flash flood	13	B	13	The developer has submitted work schedule for repair works and in its letter dated 30.12.2011 had asked HPSEB for time extension of upto 1 year from May 2011 to May 2012
2011 -12	Road damage due to unprecedent ed rain/snow	3	B	3	The developer in its letter dated 08.05.2012 had asked HPSEB for time extension of upto 3 months from May 2012 to Aug 2012. Documents for start and termination of event have been submitted.

2011 -12	Disruption of transmission line work by villagers	2	C	1	The developer in its letter dated 14.04.2012 has asked for loss of 39 labor days. Further proof for termination of force majeure event has not been submitted.
2012 -13	Intense Rain/Flash flood 2012	3	C	1.5	The developer has claimed delay from Sep 2012 to Dec 2012 on account of intense rain/flash flood. However the construction work should have finished till Aug 2012 as per the earlier submission of developer itself (after taking into account all earlier force majeure events)
2012 -13	Stoppage of joint line with dept. line work at Dehan substation.	8	B	8	The developer has submitted details of court case on the issue of RoW for transmission line and delay in commissioning due to the same.
2012 -13	Legal notice and litigation by Pvt land owners in TXN	4	B	4	
	Total	**51**		**39.5**	

171. The Appellant vide letter dated 30.12.11 requested HPSEB for an extension of 13 months (May 2011 to May 2012) due to “Damage to components due to cloud burst/flash flood”, the State Commission had allowed this delay under Category B which means the entire time delay allowed under this category shall be passed on to the tariff.

172. The Appellant vide letter dated 8.5.12 asked HPSEB for a time extension of 3 months from May 2012 to August 2012 under the head “road damage due to unprecedented rain/snow”, which is allowed by the Commission under category B means the entire time delay allowed under this category shall be passed on to the tariff by the Commission.

173. The Appellant claimed a two-month time extension vide letter dated 14.4.2012 due to the disruption of transmission line work by villagers, the State

Commission had allowed delay under category C for one month, which runs parallel to the time extension granted earlier.

174. The Appellant claimed a three-month extension from September 2012 to December 2012, under "intensive rain/ Flash flood 2012, the State Commission had allowed 1.5 months under Category C, this is in continuation to the time extension granted from May 2012 to August 2012, however, restricted to 1.5 months only under category C.

175. As such it cannot be denied that the Appellant has got the extension till mid-October 2012.

176. Further, the Appellant had claimed a time extension of 8 months and 4 months due to the stoppage of joint line with line work at the Dehan substation and legal notice and litigation by private land owners respectively, the Commission had allowed the claimed time extension under Category B means the entire time delay allowed under this category shall be passed on to the tariff.

177. However, the dates of such extensions are not provided in the Impugned Order.

178. However, the extensions are given during 2012-13, and total months granted are 12, as such the delay has to be condoned for the year 2012-13 i.e. upto 1st April 2013.

179. Accordingly, the final COD dates work out as follows:

a. As per implementation Agreement 27.1.2006 and PPA dated 27.10.2006, the completion schedule of 42 months shall be 26.4.2011.
b. Further time extension allowed by the Commission under Category B is 13 months (May 2011 to May 2012), 3 months (May 2012 to August 2012).
c. A 1.5-month extension under Category C was also allowed for the period starting from September 2012. i.e. up to mid-October, 2012.
d. Further, 8 months for FY 2012-13 and 4 months (specific dates were not mentioned in the Commission order) of time extensions were granted under Category B. As such, counting 8 months from mid-October 2012, the extension is granted beyond the actual COD.
e. As per the time extension allowed by the Commission in its order Commissioning date of the projects worked out beyond 6.5.2012 which is, wrongly, considered by the Commission to work out the IDC.

180. Respondent No. 2 submitted that as per Schedule-1 attached to the PPA, the SCOD of the Project was agreed upon by both parties to be July 2009. The Schedules of the PPA form an integral part of the PPA. Therefore, the contention that the PPA did not recognize the scheduled date of commissioning is factually incorrect.

181. The Commission in the Impugned Order has notes as under:

"3.3.3 Commission's view

> *As per the clause 2.24 of the 4th Supplementary Implementation Agreement the project was to be commissioned within 42 months from the date of signing of the PPA i.e. by 27th April, 2010.* ***The PPA does not specifically mention any scheduled COD, however it states under Article 3 that the construction period should be a maximum of 32 months from the date of financial closure.****"*

182. Further, Respondent No. 2 argued that the notice of force majeure is mandatory has also been reiterated in the case of Himachal Sorang Power Ltd v. CERC & Ors, Appeal No. 54 of 2014 dated 30.04.2015, para 22, 26 and 33. The Hon'ble Tribunal has already reiterated that where the PPA provides for a particular consequence of force majeure, the same is binding on the parties.

183. Also, submitted that although the time overrun of 39.5 months itself is incorrect, however, any further time overrun ought to certainly not be allowed, since the claim of the Appellant fails to meet the contractual requirement of notice of force majeure to the other party, however, accepted the decision of the Commission as it has not been challenged.

184. Accordingly, the argument of the Respondent is rejected.

185. The Commission in its order dated 28.4.2016 had allowed the delay by dates as requested by the Appellant to HPSEB, this represents that as per the time extension allowed by the Commission under Category B (the entire time delay allowed under this category shall be passed on to the tariff), the final commissioning date works out to be not before 06.05.2013, however, the Commission had considered the Commissioning date as 6.5.2012 for allowing IDC and other allowances, hence there is an error apparent in the decision of the Commission, the State Commission is bound to consider the IDC as per the COD achieved, as mentioned above.

186. Therefore, the State Commission is directed to re-determine the IDC subject to COD on 06.05.2013.

c) Advance against Depreciation while determining the levelized tariff

187. The Appellant states that the Commission has not applied the CERC norms and has relied upon the financial norms adopted in HPERC SHP Tariff Order 2007 and the HPERC 2007 Regulations.

188. The Appellant argued that the State Commission should adhere to the established norms in their entirety, rather than applying them partially, consequently, the Impugned Order is liable to be set aside, furthermore, the Commission must incorporate provisions for Advance against Depreciation in line with the specified norms applicable to the Appellant's case.

189. The Commission has stated that it has appropriately granted depreciation in line with its tariff order, since the loan requirement can be fulfilled through depreciation, the issue of providing advance against depreciation is deemed unnecessary.

190. Also, the issue of Advance against depreciation has been settled by this Tribunal, the Supreme Court, *has ruled that AAD is income received in advance and is not a reserve or appropriation of profits. AAD is an amount that needs to be adjusted in the future by reducing the normal depreciation that will be included in future years,* further, CERC has also noted that *the part of the tariff that arises due to the inclusion of AAD should be treated as revenue received in advance. This is because the advance will be adjusted against depreciation in later years.*

191. HPERC Tariff Regulations do not contain the provision of Advance against depreciation, **we find no infirmity in the decision of the Commission in this regard hence no relief is granted on this account.**

192. However, this issue is not covered as part of the arguments considered, also the decision is against the Appellant, as such the decision of the State Commission is upheld to this count.

d) MNRE Capital Subsidy

193. The Appellant had submitted that a subsidy amount of Rs. 6.20 Cr. is to be considered as per the MNRE policy for the State of Himachal Pradesh, further, stated that this amount of Rs. 6.20 Cr. has been received, therefore, the Commission has adjusted 90% of this subsidy amount as additional loan repayment during the first year of operation, for determination of tariff, balance 10% of the subsidy amount has been allowed by the Commission towards administrative spent while availing the loan or other incidental expenses.

194. It cannot be argued that availing of subsidy is the responsibility of the Appellant, however, based on the auditor certificate, it is evident that no subsidy is availed by the Appellant.

195. The Commission had considered that subsidy credited to the Appellant account, based on the submission of the Appellant, and the same had been adjusted in 90% of the subsidy amount in loan repayment, which had adversely impacted the cash flow of the Appellant, the relevant extract of the Impugned Order is as under:

> *"5.3.1 The Commission directed the Petitioner to furnish details of any kind of subsidy availed by the Petitioner.*

5.3.2 The Petitioner submitted that a subsidy amount of Rs. 6.20 crore is to be considered as per the MNRE policy for the State of Himachal Pradesh. Accordingly, this subsidy amount will have to be accounted on project specific basis.

5.3.3 ***As the petitioner has stated that this amount of Rs. 6.20 Crore has been received, therefore, the Commission has adjusted 90% of the subsidy amount as additional loan repayment during the first year of operation****, for the determination of tariff. 10% of the subsidy amount has been allowed by the commission towards administrative expenses spent while availing the loan or other incidental expenses."*

196. However, the Appellant submitted that it had nowhere mentioned in the Petition before the State Commission that the amount of Rs. 6.02 Cr. as Capital Subsidy has been received from MNRE.

197. Respondent No. 2 argued that the above contention of the Appellant stands negated in terms of its pleading before the State Commission. The Appellant in its petition before the State Commission had considered the subsidy amount of Rs. 6.20 crores in the tariff computation. This is provided in para 4.1 of the Petition read with Annexure Q to the petition.

198. Further argued that the Appellant was entitled to the subsidy amount from MNRE and had itself considered the same in the tariff computation. There is nothing on record to show whether the Appellant had claimed the same from MNRE, whether the same has been rejected by MNRE, whether the rejection (if any) is for reasons attributable to the Appellant etc. There is no basis for the claim now sought to be made that the subsidy amount is not to be considered.

199. From the above, it is clear that there is no evidence regarding:

a. whether the Appellant had claimed the same from MNRE,
b. whether the same has been rejected by MNRE, and
c. whether the rejection (if any) is for reasons attributable to the Appellant

200. The Commission has stated that the subsidy amount cannot be recovered from the state's consumers if the Appellant has not received it yet due to its own inefficiency.

201. However, from the Impugned Order or the submissions of the Respondents, we could not find any finding ascertaining the fact that the Appellant has not acted diligently.

202. The MNRE grants the subsidy after examining the facts of the case and can be disallowed for reasons that cannot be attributed to the Appellant.

203. The reliance on this Tribunal's judgment dated May 9, 2019, in ***Him Urja Pvt Ltd v. Uttarakhand Electricity Regulatory Commission, Appeal No. 17 of 2017***, wherein it has been held that the Appellant cannot be allowed to take benefit of its own fault of not receiving the MNRE subsidy and therefore the cost cannot be passed onto the consumers,

204. However, without justifying the fault on the part of the Appellant the same cannot be denied, in the instant case the State Commission has not recorded any finding based on which the Appellant is held responsible as such reliance on the aforesaid judgment is misplaced.

205. Hence, the State Commission is directed to re-examine the matter, and in case, the reasons for the non-grant of subsidy by MNRE are not

attributable to the Appellant, the Commission shall make corrections accordingly.

e) Tax Component

206. The Appellant has stated that the Commission while calculating the levelized tariff, erroneously omitted to count the tax component which it has approved in para 5.9.2 and 5.9.3 of the impugned order:

> "5.9.2 *The Commission while determining the project specific tariff has considered the actual MAT and Corporate Tax Rates for the years 2013-14 and 2014-15 while assuming the current Tax rates and MAT rates for the future balance period of the project, as follows*
>
> *XXXXXXXXX*
>
> *5.9.3 The generic levelised tariff determined in the order dated 18.12.2007 is subject to adjustment on account of variation in the tax rates. Accordingly, in case of any changes in these tax rates, the tariff under this order shall also be suitably adjusted as per the formulae given in the subsequent paragraphs."*

207. The Commission in its reply has stated that in case any discrepancy is found and pointed out by the Appellant to the Commission, it will be considered while truing up exercise by the Commission.

208. The Appellant at the time of Truing up may take up the issue with the Commission.

209. We agree with the decision of the Commission and the Appellant may take up the issue of tax and submit necessary documents of actual tax payment at the time of Truing up.

f) Determination of levelized tariff

210. The purpose of determination of capital cost etc. is to determine the levelized tariff of the generating project, it is therefore important that the levelized tariff impacted by the parameters decided above should be examined.

211. The Commission had worked out the levelized tariff for 40 years based on the approved capital cost, IDC, and financial parameters, which has been revised by this judgment as concluded in the foregoing paragraphs.

212. The Commission in its order considered ROE 14% post-Tax ROE, 11.71% interest on term loan, and an average tax rate of 29.35% for the 40 years period of the plant operation.

213. It is pertinent to mention that the State Commission has to follow the policy as per the 4th SIA ROE as 14% post-tax. The Appellant has prayed for an increase in the levelized tariff as the Directorate of Energy, GoHP vide its letter no. DOE/CE/TEC-Neogal/2013-5433-34 dated 19.10.2013 has approved the project completion cost at Rs. 152.70 Crores which is very close to the actual expenditure of Rs. 147.71 crores.

214. **The tariff is to be computed as per the State Commission's Tariff regulation and Capital cost approved by the Commission. As a consequence of the judgment in this Appeal, based on the revision of Capital cost approved by the Commission, the tariff would be revised. It,**

however, cannot be approved based on the completion cost approved by the Directorate of Energy, GoHP.

215. For the determination of a levelized tariff, it is important to note the design energy of the project.

216. The Appellant had claimed 71.86 MU of gross generation at 75% dependable year after considering water release at the rate of 15% of the dependable flows for respective periods which has been stated to have been done as per GoHP policy. As per notification no PC-F(2)-I/2005 issued by the Government of Himachal Pradesh on 9.9.2005, the quantum flow of water to be released and maintained should be a threshold value of not less than 15% of the minimum inflow observed in the lean season and not of the dependable flows during the respective period.

217. As per clause 6 of the 4th Supplementary Implementation agreement dated 27.1.2006, it was directed by the Government of Himachal Pradesh that for the first 12 years, royalty power should be 16% (15% free power +1% LADA as per 6th amendment of Implementation agreement dated 10.4.2014) and for the balance 28 years 21% (including 1% LADA)

218. The Commission had considered only 12% royalty power while working out the net saleable energy.

219. As per Section 86 (4) of the Electricity Act 2003,

> (4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.

220. It is pertinent to mention here that the Commission had to consider the directive issued by the State Government regarding royalty power, Local Area Development Authority (LADA). These orders/policies are binding on the developers, and accordingly, the same has to be allowed by the Commission in tariff orders. **Accordingly, Net Salable energy is to be worked out again by the Commission.**

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal No. 301 of 2016 has merit and is allowed to the extent as concluded in the foregoing paragraphs, the Impugned Order dated 28.04.2016 passed by the Himachal Pradesh Electricity Regulatory Commission in Petition No. 149 of 2013 is set aside.

The State Commission is directed to pass the consequential order within three months from the date of this judgment strictly in accordance with the observations and conclusions made herein.

The Captioned Appeal and IAs, if any are disposed of in above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 16TH DAY OF DECEMBER, 2024.

(Virender Bhatt)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member

pr/mkj