IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 85 of 2022 & IA No. 1810 of 2024

Dated: 26.05.2025

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

IN THE MATTER OF

GI Hydro Private Limited
(Formerly known as Gati Infrastructure Pvt. Ltd.)
Leged Platinum, 4th Floor, Plot No. 20,
Survey No. 12, Kothaguda, Kondapur, NA,
Hyderabad, Telangana - 500084. **…Appellant(s)**

Vs.

1. **Haryana Electricity Regulatory Commission**
Through Secretary,
Bays No. 33-36, Sector-4,
Panchkula- 134112
Haryana.

2. **Haryana Power Purchase Centre**
Through Chief Engineer,
Shakti Bhawan, Sector-6,
Panchkula- Haryana 134109. **...Respondent(s)**

Counsel for the Appellant(s)	:	Mr. Sanjay Sen, Sr. Adv. Mr. Buddy A. Ranganadhan, Sr. Adv. Mr. Tabrez Malawat Ms. Ankita Bafna Mr. Syed Hamza
Counsel for the Respondent(s)	:	Mr. Raghujeet Singh Madan Ms. Sonia Madan

Mr. Nitin Goyal
Mr. Aditya Singh
Mr. Aditya Singh
Ms. Aditi Lakhanpal
Ms. Ayushi Garg for R-2

JUDGEMENT

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

1. M/s. GI Hydro Private Limited (Formerly known as Gati Infrastructure Pvt. Ltd.) has filed the instant Appeal challenging the Order dated 23.02.2022 (in short "Impugned Order"), passed by the Haryana Electricity Regulatory Commission ("Commission" or "HERC") in Case No. HERC/PRO-41/2018 ("Tariff Petition").

Description of the Parties

2. The Appellant, GI Hydro Private Limited is a company incorporated under the Companies Act, 1956, inter-alia, set up 110 MW (2 X 55 MW) Chuzachen Hydro Electric Power Plant (in short "Project"), commissioned on Rangpo and Rongli Rivers in the East District of Sikkim.

3. The Commission is the Electricity Regulatory Commission of the State of Haryana, established under Section 82 of the Electricity Act. The Respondent Commission is the regulatory and adjudicatory body with respect to any disputes between generating companies and distribution and transmission licensees.

4. Respondent No. 2 is the Haryana Power Purchase Centre (in short "HPPC"), a Government of Haryana entity vested with powers to procure power from the

generators and represents two State distribution licensees of the State of Haryana. HPPC has been procuring power from the Project, since 14.05.2018, on a long-term basis and the final tariff of the project has been determined by the Respondent Commission vide the Impugned Order.

Factual Matrix of the Case

5. An Implementation Agreement was executed on 14.11.2003, between Gati Investment Limited and the Government of Sikkim for a 110 MW (2x55 MW) hydro project on the Rangpo and Rongli rivers, approximately 20 km upstream of Rangpo Bazar in East Sikkim.

6. Gati Investment Limited was renamed Gati Infrastructure Limited on 26.07.2004, and subsequently renamed Gati Infrastructure Private Limited (GIPL) on 15.03.2013.

7. On 30.11.2004, GIPL submitted a detailed project report for a 99 MW hydro project. The government of Sikkim approved the report on the same date. Environmental clearance from the Ministry of Environment and Forest was obtained on 09.09.2005. The Energy and Power Department of the Government of Sikkim granted techno-economic clearance for the project at an estimated cost of Rs. 448.76 crores, based on a 70:30 debt-equity ratio.

8. Construction commenced in October 2006, with the Scheduled Commercial Operation Date (in short "SCOD") set for June 2009; however, project commissioning was delayed due to force majeure events beyond GIPL's control.

9. Gati Infrastructure Private Limited (GIPL) signed a Long-Term Access Agreement with Power Grid Corporation of India on 09.08.2012. The project achieved COD on 18.05.2013, and the same was communicated to the Eastern Regional Load Despatch Centre. The completion cost at COD was Rs. 1,188.57 crores, higher than the initially estimated Rs. 651.50 crores due to various force majeure and uncontrollable events.

10. On 28.10.2016, GIPL offered to sell hydropower from the project to Haryana Power Purchase Centre (HPPC) for 35 years from May to September each year at a levelized tariff not exceeding Rs. 4.79/unit. The net saleable energy was approximately 95 MW (ex-bus) after accounting for auxiliary consumption, transformation losses, the Government of Sikkim's free share, and wheeling charges through a 132 kV double circuit transmission line to the Rangpo pooling station of CTU.

11. On 11.11.2016, this proposal was presented in the 39th meeting of the Steering Committee of Power Planning under the Chairmanship of the Principal Secretary (Power), Government of Haryana.

12. In 2017, HPPC filed Petition No. HERC/PRO-24 of 2017 under Section 86(1)(b) of the Electricity Act before the Commission, seeking approval for power procurement from the project at a regulated tariff.

13. On 27.06.2017, Gati Infrastructure Private Limited (GIPL) waived costs amounting to Rs. 10.65 crores related to cost escalation and damage from an

earthquake through an affidavit and submitted a revised capital cost for tariff determination before the Commission.

14. On 25.09.2017, GIPL signed a Connectivity Agreement with the Energy & Power Department, Government of Sikkim.

15. On 13.11.2017, the Commission approved the procurement of power from GIPL's project throughout the year at a tariff to be determined in a separate petition.

16. On 04.12.2017, the Central Electricity Authority approved the enhancement of project capacity from 99 MW to 110 MW. On 23.03.2018, GIPL filed a review petition before the Commission, citing errors in the order dated 13.11.2017, which conflicted with the record.

17. On 03.05.2018, GIPL and Haryana Power Purchase Centre (HPPC) signed a Power Purchase Agreement (in short "PPA"), followed by a Letter of Intent (in short "LoI") issued by HPPC on 09.05.2018. Long-term power supply from GIPL's project to HPPC commenced on 14.05.2018, under the PPA.

18. On 28.08.2018, GIPL filed a tariff petition under the applicable CERC Tariff Regulations, 2014.

19. On 16.04.2019, the Commission disposed of the review petition, directing a de-novo analysis of Gati Infrastructure Private Limited's (GIPL) costs for final tariff determination under the pending tariff petition.

20. On 23.02.2022, the Commission issued the tariff order, applying the Haryana Electricity Regulatory Commission (HERC) MYT Regulations, 2012, instead of the Central Electricity Regulatory Commission (CERC) Tariff Regulations, 2014. This failed to provide a cost-reflective tariff and the disallowance of additional capitalization costs.

21. Thus, being aggrieved by the Impugned Order dated 23.02.2022 passed by the HERC in Case No. HERC/PRO-41/2018, the Appellant has preferred the present Appeal.

Written Submissions of the Appellant

22. The Appellant submitted that HERC has erroneously applied the HERC MYT Regulations 2012 instead of the CERC Tariff Regulations 2014 to determine the tariff of the Project set up by the Appellant.

23. HERC, while passing the Impugned Order, has disregarded the following:

(I) HERC MYT Regulations 2012 were not applicable at the time of filing the Tariff Petition

24. The Appellant also submitted that it is a settled principle of law that the date of filing determines the applicable law or regulations. In the present case, since the tariff petition was filed on 28.08.2018, the applicable regulations should have been the CERC Tariff Regulations, 2014, which were in force at that time. This

principle is supported by the Hon'ble Supreme Court's ruling in ***Rajendra Bansal & Ors. vs. Bhuru (Dead) through LR & Ors., (2017) 4 SCC 202***, where it was held that the rights of the parties crystallize on the date of filing and the law prevailing at that time continues to apply until the matter is disposed of. The Hon'ble Supreme Court reiterated this position in ***Shankarlal Nadani v. Sohanlal Jain, 2022 SCC Online SC 442***, confirming that the parties' rights are determined based on the law in effect when the proceedings commence. Similar observations were made in ***K. S. Paripoornan v. State of Kerala & Ors., (1994) 5 SCC 593***, reinforcing that the law applicable on the date of filing remains binding throughout the proceedings.

25. Further, the first control period under HERC MYT Regulations, 2012 started from 01.04.2014 to 31.03.2017. The same is evident from the following (HERC MYT Regulations 2012, along with its First and Second Amendment and CERC Tariff Regulations, 2014):

> *"3.16 "control period" means a multi-year tariff period fixed by the Commission from time to time. The first control period shall be from 1st April 2014 to 31st March 2017."*

26. Subsequently, on 17.11.2016, HERC vide the first amendment ("First Amendment") to the said Regulations extended the control period till 31.03.2018. Therefore, the first control period came to an end on 31.03.2018:

> *"2. Amendment to Regulation 3.16*
>
> *(…)*

> *"Control Period" means a multi-year tariff period fixed by the Commission from time to time. The first control period shall be from 1st April 2014 to 31st March 2018."*

27. The second amendment notified on 31.10.2018 was made effective from the date of the notification, i.e., prospectively; however, it extended the control period retrospectively from 01.04.2018 to 31.03.2020 ("Second Amendment"):

> *"1. Short title, commencement and interpretation.*
>
> *(1) These Regulations may be called the Haryana Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff for Generation, Transmission, Wheeling and Distribution & Retail Supply under Multi Year Tariff Framework) Regulations, 2012 (2nd Amendment), 2018.*
>
> *(2) These Regulations shall come into force w.e.f. the date of notification in the Haryana Government Gazette.*
>
> *(3) These Regulations shall extend to whole of the State of Haryana.*
>
> *2. Amendment to Regulation 3.16*
>
> *(…)*
>
> *"Control Period" means a multi-year tariff period fixed by the Commission from time to time. The first control period shall be from 1st April 2014 to 31st March 2020"*

28. Between the expiry of the second control period on 01.04.2018 and the enforcement of the Second Amendment on 31.10.2018, no tariff regulations of the Haryana Electricity Regulatory Commission were in effect. Therefore, at the time

of filing the tariff petition on 28.08.2018, the signing of the Power Purchase Agreement (PPA) on 03.05.2018, and the commencement of power supply on 13.05.2018, no HERC regulations were applicable. Consequently, the tariff for the project should have been determined under the CERC Tariff Regulations, 2014. However, ignoring the aforesaid, HERC determined the tariff based on the HERC MYT Regulations, 2012, and held the following:

> *"27…*
> *Another pertinent issue raised by the petitioner as well as the Intervener is whether the Commission should proceed to determine tariff as per the CERC Norms or HERC Norms. The Commission has considered the arguments of the parties on this issue and is of the considered view that all the relevant parameters including Capital Cost as well as additional Capitalisation, financial structure and cost of financing, depreciation, qualifying equity for RoE and O&M expenses as well as reckoning with sale of infirm power etc. that goes into determination of tariff is with reference to the CoD. In the present case the CoD of the project admittedly is 18.05.2013. This is well within the Control Period specified in the HERC MYT Regulations, 2012. Further, as far as CERC Regulations are concerned as per Section 61(a) they, at the most, could be the one of the guiding norms hence not mandatory. While notifying HERC Regulations the norms of CERC / other SERCs as well as all other factors including comments / objections / suggestions received from the stakeholders are kept in mind. Hence, the date of filing petition, as such, is immaterial. Accordingly, the Commission shall proceed with the*

provisions HERC MYT 2012 for determination of Generation Tariff and the methodology of recovery of the same in the present case. This dispensation in the present case will also be inline with the tariff determined by the Commission in similarly placed two Sikkim based HEPs.

37….

It needs to be noted that subsequent to the initial scrutiny of the petition, this Commission had sought additional information / data including a copy of DPR that was considered necessary for proceeding further in the matter. Further, as the HERC MYT Regulations 2012 provides for tariff determination parameters the same shall be relied upon in the present case in line with the spirit of Section 61(a) of the Electricity Act, 2003. Additionally, as also submitted by the Intervener Er. Rampal, the HERC MYT Regulations, 2012, is sufficient for the purpose of tariff determination in the present case and this Commission has not passed any order that the norms as per CERC Regulations shall be made applicable. Moreover, this issue has been settled by the Commission while determining tariff for two similarly placed Sikkim based HEPs."

(II) HERC ignored the fact that the COD of the Project was achieved before 1st control period of HERC MYT Regulations 2012

29. The first control period under the HERC MYT Regulations, 2012, was from 01.04.2014 to 31.03.2017. Since the project achieved COD on 13.05.2013, before the commencement of the control period, the HERC Regulations were not

applicable. Even if COD were considered relevant for determining the applicability of the HERC MYT Regulations, it would still fall outside the scope of the first control period.

30. Moreover, COD would only be relevant if the power purchase agreement had been executed before COD and the plant was constructed and commissioned based on such an agreement or under the prevailing regulations. In this case, COD was achieved before the execution of the PPA, making it an irrelevant benchmark for applying the HERC MYT Regulations, 2012.

(III) <u>Erroneous application of HERC MYT Regulations 2012 with retrospective effect</u>

31. The HERC exceeded its authority by retrospectively extending the control period of the HERC MYT Regulations, 2012, through its Second Amendment and applying it to determine the project tariff. The Electricity Act, 2003 (in short "Act"), does not empower HERC to issue subordinate regulations with retrospective effect. It is a settled legal principle that delegated legislation cannot have retrospective operation unless expressly permitted by the parent legislation. Therefore, the HERC MYT Regulations, 2012, issued under the Electricity Act, cannot be applied retrospectively.

32. In ***Tamil Nadu Spinning Mills Association vs. Tamil Nadu Electricity Board & Anr.***, (Appeal No. 111 and 114 of 2010 dated 11.01.2011), this Tribunal has held as under:

"41. While dealing with this issue, we have to bear in mind the following 3 principles:

(i) The State Commission is delegated under The Electricity Act, 2003.

(ii) A delegate does not have power to issue any order which has retrospective effect unless specifically authorized under the demand enactment.

(iii) In the present case, none of the provisions contained in The Electricity Act, 2003 dealing with the powers, duties and functions of the authorized State Commission to pass order with retrospective effect.

42. Bearing these principles in mind, we have to analyse the issue as under:

(i) As mentioned above, there is no provision either in the Act nor in the Regulations providing for retrospective application of those provisions. The power to make Regulations under the Electricity Supply Code is contained in Section 50 of The Electricity Act, 2003. So, the order amending the Electricity Supply Code was passed on 15.12.2008 giving a retrospective application of the amendment of Supply Code even from 28.11.2008 even though the said Supply Code was not amended on that date.

(…)

xv. Despite this order dated 28.11.2008, the Notification regarding amendment of Supply Code has come only on 15.12.2008. In

> *that amendment, a retrospective effect has been given, i.e. from the date of Order dated 28.11.2008. As indicated above, in the Order dated 24.12.2008, the State Commission was not inclined to give effect to the orders from 1.11.2008 as claimed by the Electricity Board. This has been clarified only in the impugned order dated 4.5.2010.*

The above discussion would make it evident that on the day when the order was passed in MP No.42/2008, i.e. on 28.11.2008 there was no power vested with the State Commission to levy Excess Demand charges and excess energy charges since the Electricity Supply Code had not been amended. This power was vested only on 15.12.2008 when the Electricity Supply Code was amended. As mentioned above, the Excess Demand Charges and Excess Energy Charges for evening peak restriction were clarified only in the impugned order dated 4.5.2010.

As mentioned above, it is a clear rule of law that in the absence of a statute providing for power for delegated legislation to operate retrospectively, the Regulations can only have prospective application. This principle has been laid down in the following decisions:

1) 2009 (2) SCC 589 – Panchi Debi Vs. State of Rajasthan
2) 2007(5) SCC 77 – Vice Chancellor MD University Rohtak Vs. Jahan Singh

> *The power to make regulations under the Electricity Supply Code is contained in Section 50 of The Electricity Act, 2003. This provision neither expressly nor by implication provides for retrospective operation of the regulations."*

33. At the time of executing the PPA, issuing the LOI, and filing the tariff petition, no HERC tariff regulations were in force since the first control period under the First Amendment had expired and the Second Amendment had not been enacted. The retrospective extension of the control period under the HERC MYT Regulations, 2012, is legally invalid and cannot be considered. In the absence of applicable HERC regulations, HERC was obligated to apply the CERC Tariff Regulations, 2014. Therefore, the impugned order is flawed and warrants being set aside to the extent challenged in the appeal.

(IV) <u>HERC MYT Regulations 2012 applied despite the same being in contravention and conflict with the Electricity Act and ought to have been ignored</u>

34. The HERC MYT Regulations, 2012, as amended retrospectively, conflict with the Electricity Act, 2003. Under settled law, conflicting subordinate legislation must be disregarded in favor of the parent statute. Therefore, HERC was obligated to apply the CERC Tariff Regulations, 2014, instead of the HERC MYT Regulations, 2012.

35. The Hon'ble Supreme Court in ***Bhaskar Shrachi Alloys Limited v. Damodar Valley Corporation, (2018) 8 SCC 281*** held that subsidiary legislation

cannot override the parent statute or any other legislation. The Court clarified that tariff regulations framed under the Electricity Act, 2003, hold precedence over conflicting provisions in older statutes like the 1948 Act, reinforcing the principle that regulations inconsistent with the parent statute are unenforceable.

36. Further, the Hon'ble Supreme Court in ***Bharathidasan University v. AICTE, (2001) 8 SCC 676*** and ***Kerala Samasthana Chethu Thozhilali Union v. State of Kerala, (2006) 4 SCC 327*** affirmed that regulations conflicting with the parent statute must be disregarded.

37. Similarly, this Tribunal in ***Star Wire (India) Vidyut Pvt. Ltd. v. HERC, (Appeal No. 183 of 2015)*** held that if a regulation conflicts with the Electricity Act, 2003, it must be overlooked in favor of the Act's provisions without declaring the regulation ultra vires. Therefore, HERC was obligated to ignore the HERC MYT Regulations, 2012, and apply the norms of the CERC Tariff Regulations, 2014, for determining the project tariff.

(V) HERC MYT Regulations 2012 is not equipped to accurately determine tariff for large hydro power plants situated outside Haryana

38. The Appellant submitted that HERC MYT Regulations, 2012, do not apply to the GIHPL project as they cover only micro and small canal-based hydro projects with a capacity below 25 MW. Since the GIHPL project is a large hydro project, it falls outside the scope of these regulations, as evident from the combined reading of Regulation 5.4, Regulation 5.5, Regulation 15.5, and Regulation 34 of the HERC

MYT Regulations, 2012. To that effect, Regulations 5.4 and 5.5 of the HERC MYT Regulations 2012 contain the specific hydropower projects which would fall within the ambit of the Regulations, such projects being small hydro projects. The same is evident from below:

> *"5.4 The generating company shall file the tariff filing as per the above categorization. All plants indicated above and the plants which may be commissioned during the control period shall have separate interface metering with the transmission licensee(s) as per CEA (Installation and Operation of Meters) Regulations, 2006 as amended from time to time and, as and when intra state ABT is implemented, shall be scheduled separately as per the intra State ABT regulations as may be notified by the Commission from time to time.*
>
> *5.5 For the plants which are not covered under ABT i.e. Western Yamuna Canal Hydro Project, Bhudkalan and Kakroi Hydro Power Plants, a single part tariff based on a normative PLF shall be determined by the Commission."*

39. Further, the conditions for the determination of tariff of hydropower plants are stipulated under Regulations 15.5 and 34 which read as:

> *"15.5 For the hydro plants i.e. Western Yamuna Canal Hydro project, Bhudkalan and Kakroi Hydro Plants, however, a single part tariff, based on a normative PLF and fixed cost worked out as per regulation 34 hereinafter, shall be determined by the Commission.*
>
> *34. NORMS OF OPERATION AND DETERMINATION OF*

TARIFF FOR HYDRO POWER PLANTS

Norms of operation and determination of tariff for hydro power plants other than those covered under renewable energy sources, shall be as under:

(…)

34.2 Auxiliary energy consumption for Micro Hydro Generating plants including WYC projects and Kakroi shall be 0.5% of the energy generated.

34.3 Computation of tariff

(a) The tariff shall be single part comprising only of an energy rate in terms of Rs. /kWh of energy generated on an annual basis. The annual expenses will consist of:"

40. The HERC MYT Regulations, 2012, apply only to intra-state hydro projects under the ABT mechanism and provide for tariff determination of three specific projects: Western Yamuna Canal, Bhudkalan, and Kakroi, which are not under the intra-state ABT mechanism. The regulations restrict tariff determination for projects outside Haryana, like the petitioner's project, which is scheduled by ERLDC under the inter-state ABT mechanism. They cover only small and micro hydro projects below 25 MW and provide for a single-part tariff similar to renewable energy tariffs, which would not apply to large hydro projects like the petitioner's. Moreover, the regulations do not contemplate any alternative tariff structure apart from the single-part tariff.

41. The Appellant submitted that the project is a large hydro project with a capacity of 110 MW, located in Sikkim, and scheduled by ERLDC under the inter-

state ABT mechanism. Given its size and nature, the project requires a two-part tariff (energy and fixed charges), which is inconsistent with the single-part tariff under the HERC MYT Regulations, 2012. Regulation 34.2 of the HERC MYT Regulations only covers auxiliary consumption for micro hydro projects below 25 MW, such as the WYC and Kakroi projects, and does not address larger projects or provide for a levelized tariff. Despite these clear limitations, HERC incorrectly applied the MYT Regulations, 2012, to determine the project's tariff.

42. Due to the incorrect application of the HERC MYT Regulations, 2012 despite the same not being adequately equipped to address the concerns of the Project, various tariff parameters have been wrongly determined which are briefly summarized below and tariff norms of the CERC Tariff Regulations 2014 ought to have been considered:

Particulars	Observations in Impugned Order
Return on Equity:	The Ld. HERC allowed ROE @ 14 % on the restricted eligible equity of 30% of the admitted capital cost. Further, the Appellant was allowed to recover the statutory levies and taxes on a quarterly basis on the basis of actual amount paid, excluding taxes on income.
Interest on Working Capital:	Appellant sought for interest on working capital as 15% of the normative O&M expenses as per the CERC Tariff Regulations 2014. However, the Ld. HERC allowed 7.5% of the normative O&M expenses. The Ld. HERC considered one month receivable and 7.5% of O&M

	expenses as maintenance spares which is lower than the CERC Tariff Regulations 2014.
O&M Expenses:	The Appellant sought for O&M expenses @ 2% of the admitted capital cost along with 6.64% annual escalation. However, the Ld. HERC has not only reduced the admitted capital cost, it has also restricted annual escalation to 4%. HERC in relation O&M has observed: "*In the present case, the project was commissioned in the FY 2013-14, hence, the Audited Accounts for the base year i.e. FY 2011-12 will not exist. Consequently, O&M expenses, for the base year, has been considered as 2 % of the admitted capital cost with 4 % annual escalation going forward*"
Levelized Tariff:	The Appellant sought for levelized tariff of INR 4.56 / kWh for 25 years. The CERC Tariff Regulations 2014 provides for a two-part tariff. However, the Ld. HERC determined the tariff without considering levelized tariff for the first 4 years. Further, the levelization was carried out for balance period of the useful life of the Project instead of FY 2013, i.e., from COD.

43. The Electricity Act aims to liberalize the electricity sector, promote efficiency, and allow reasonable cost recovery for electricity production under Section 61.

However, the HERC MYT Regulations, 2012, are unsuitable for large hydropower plants and would result in a non-cost-reflective tariff if applied.

44. It is a settled legal principle that when regulations conflict with the provisions of the parent act, they must be ignored or modified to align with the parent legislation. This position has been upheld by the Hon'ble Supreme Court in ***Transmission Corporation of Andhra Pradesh Limited v. Sai Renewable Power Private Limited (2011) 11 SCC 34*** and ***BSES Rajdhani Power Limited v. Delhi Electricity Regulatory Commission (2023) 4 SCC 788.***

(VI) Erroneous applicability of the appropriate tariff measures, incorrect application of levelized tariff period ,and violation of Section 61 of the Electricity Act

45. The Appellant submitted that the Respondent Commission has opted for faulty methodology and incorrectly applied a levelized tariff from FY 2017 while denying benefits for the initial four-year tariff. As a result of the same, it has failed to provide a cost-reflective tariff. The relevant paragraph of the Impugned Order is as follows:

> *"55. Additionally, it is observed that the project attained CoD in the year 2013 and the PPA for 35 years has been signed in 2020. Thus, the project has been in operation for almost eight years now. Given this fact, the options available to the Commission is to take into account loan(s) already paid, depreciation already claimed and adjust the year to year tariff proportionally. Alternatively, the year to year tariff*

can be worked out for the entire life of the project and the effective tariff payable shall the levellised ceiling tariff for the balance useful life of the project. This would even out the initial higher payable tariff and the subsequent lower tariff creeping up towards the end of the useful life of the project. The Commission, after due deliberations, is of the considered view that the second option will be more transparent and fairer to both the parties. Hence, year to year tariff has been worked out for the entire life of the project. However, the effective year to year tariff has been considered w.e.f. FY 2017, the financial year in which flow of power to Haryana began from the HEP of the petitioner despite the fact that a formal Power Purchase Agreement (PPA) was executed between the parties only in October 2020 in accordance with the judgement passed by the Hon'ble APTEL in the matter. Consequently, levelized tariff using the discounting factor (WACC) has also been computed from FY 2017 to FY 2048"

46. The Appellant submitted that the Appellant has not received the benefits of a higher tariff, causing a deficit over four years. While the HERC computed the tariff from the financial year of power supply commencement, it failed to account for benefits such as previous years' depreciation, loan interest, return on equity, interest on working capital, O&M, and losses, leading to a non-cost-reflective tariff. Under Section 61 of the Electricity Act, the HERC was obligated to devise a mechanism for reasonable cost recovery but failed to do so, thereby breaching its statutory duty to ensure cost recovery and protect consumer interests. Consequently, the HERC erred by applying the HERC MYT Regulations, 2012, instead of the CERC Tariff Regulations, 2014.

(VII) Incorrect determination of design energy and subsequent revision of the same by the CEA

47. The Appellant submitted that HERC erred in determining the projected design energy as 537.50 MU and saleable energy as 468.27 MU despite being aware that the actual generation since COD had been consistently lower due to force majeure events, including non-availability of the transmission system, reduced NOC from the load dispatch center, and low water availability. The saleable design energy should have been calculated considering these prevailing circumstances to ensure a cost-reflective tariff. By not basing the net saleable energy on gross generation, the HERC has reduced the per-unit tariff recovery and the net annual payout based on actual generation, resulting in significant under-recovery of project costs.

48. Further, the Impugned Order in paragraph 53 specifically records the submissions of the Appellant regarding the actual generation of the Project was lower than the design energy consistently which are reproduced below:

> *"53. Design Energy*
> *In In accordance with the above, the Commission has considered the saleable energy as 468.27 Mus after taking into consideration design energy of 537.50 MU reduced by auxiliary energy consumption and free power to home State. This is notwithstanding the submissions of the petitioner that due to evacuation constraints, flash flood, maintenance work and NOC issues, the actual generation has been*

lower than the design energy. The Commission has taken note of the submissions of the petitioner in the hearings held in the matter that due to non-availability of transmission system to be constructed by PGCIL to evacuate power, reduction in NOC from NRLDC since CoD ranging from 55 MW to 110 MW actual generation was on the lower side vis-à-vis design energy (…)"

49. Thereafter, in paragraph 56 of the Impugned Order, the HERC has acknowledged that considering the sustained failure of the Project in achieving actual generation in terms of the design energy, it gave liberty for revision of the design energy of the Project after following due process and that the tariff would be re-determined basis the revised design energy which is reproduced below:

"56. The Commission notes that the actual gross generation has been lower than the design energy on a sustained basis. Hence, the petitioner, as also ordered in the Sikkim based two HEPs, is entitled for revision in the design energy after following the due procedure. In such circumstances the ceiling tariff / capital cost agreed upon by the parties will be of no significance. The parties, in line with the terms of PPA, may take a call on the 'exit option' within 30 days under intimation to the Commission. In case the exit option is not exercised by either party, the differential amount between the APPC (being paid to the petitioner) and the levelized tariff now determined shall be payable to either party as the case may be. The interest rate on the said amount will the simple interest rate, equivalent to the interest rate allowed by the Commission on working capital borrowings of the

Discoms in the ARR / Tariff order(s) for the relevant year(s).”

50. The Appellant argued that the actual generation of the project was lower than the design energy determined by the HERC due to factors beyond the Appellant’s control, such as non-availability of the transmission system, low water availability in the dam, and rejection of NOC by the load dispatch center. Further submitted that the Appellant specifically requested tariff determination based on the net saleable energy derived from actual generation but the HERC ignored this. Consequently, the HERC incorrectly determined the design energy, thereby failing to ensure a cost-reflective tariff.

Re: Filing of I.A. No. 1810 of 2024 seeking to bring on record revision of design energy of the Project from 537.50 MU to 488.86 MU

51. The Appellant submitted that the Appellant approached the Central Electricity Authority (CEA) through a letter dated 30.05.2023, seeking revision of the design energy based on a detailed report on the project’s revised hydrology. In response, the CEA, through its letter dated 06.09.2023, acknowledged the need for revision, noting that the project’s actual generation had been consistently lower than the design energy.

52. The CEA directed the Appellant to consult the Energy and Power Department, Government of Sikkim, which had initially determined the design energy. The Energy and Power Department, via a letter dated 29.12.2023, approved the revision of the design energy from 537.50 MU to 488.86 MU. The Appellant filed the present application to place this information on record, asserting

that the revised design energy is essential for determining a cost-reflective tariff.

53. Furthermore, the HERC itself noted in Para 56 of the impugned order that the tariff would be subject to revision based on the revised design energy.

54. The Appellant emphasizes that the design energy directly impacts the project's applicable tariff. The HERC, in the impugned order, acknowledged that revising the design energy would necessitate a corresponding revision in the project's capital cost and tariff. Therefore, the revised design energy must be formally recorded to enable the Tribunal to adjudicate accurately on the issue.

55. Therefore, the Appellant requests that I.A. No. 1810 of 2024 be allowed and the revised design energy be considered while granting consequential relief.

(VIII) <u>HERC has arbitrarily disallowed additional capitalization costs and failed to provide for recovery of major overhaul cost</u>

56. The Appellant argued that the HERC wrongly disallowed additional capitalization costs of ₹12.26 crore incurred post-COD for essential expenditures, including procurement and fabrication of trash racks, transportation, erection, reservoir rim treatment, and civil works. Despite providing all necessary details and supporting documents during the tariff petition adjudication, the HERC rejected the claim without giving valid reasons. The same is evident from following:

> *"41. The additional capital expenditure claimed by the petitioner for the period from the FY 2018-19 to the FY 2020-21 is Rs. 12.26 Crore.*

The Commission observes that the additional capital expenditure amounting to Rs. 12.26 Crore since the FY 2019 i.e. after the CoD as submitted by the petitioner has been incurred on building and civil works, plant and machinery, IT equipment etc. In the absence of convincing justification and evidence of actual expenditure, as part of original scope, the additional capital expenditure after CoD has not been considered."

57. The Appellant contended that the HERC failed to address the claim for recovery of major overhaul costs, providing no findings or directions despite the Appellant's request. As a quasi-judicial authority, the HERC was required to give clear reasons for rejecting the claims, as established by the Hon'ble Supreme Court in ***Secretary and Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity (2010) 3 SCC 732***. The Appellant therefore seeks directions from this Tribunal to determine the tariff based on CERC Tariff Regulations, 2014, and to account for both the additional capitalization and major overhaul costs.

(IX) The tariff determined by the HERC was not cost-reflective and violates the provisions of the Electricity Act

58. The Appellant submitted that the tariff determined by the HERC under the HERC MYT Regulations, 2012 is incorrect and fails to reflect the actual cost of the project, as the regulations are inadequate for addressing the concerns of large-scale hydro projects. This violates Section 61(d) of the Electricity Act, which mandates the determination of a tariff that allows for reasonable cost recovery.

59. Further contends that the lack of cost-reflective tariffs increases financial stress on project developers, raising the risk of defaults on debt obligations and creating systemic risks in the banking sector, thereby impacting economic growth.

60. The HERC, as a regulator, was obligated to set a viable and balanced tariff to protect both consumer and developer interests but failed to do so.

61. The consumer interest includes access to reliable, clean, and competitive power, which is inherently linked to the protection and promotion of power generation. Without adequate generation, consumer welfare would be compromised. The HERC failed in its regulatory duty to promote efficient, economical, and equitable power generation and supply. Therefore, the Appellant seeks that the present appeal be allowed as prayed.

(X) <u>Other issues in tariff determination</u>

62. The Appellant argued that the Impugned Order incorrectly recorded the debt-equity ratio of the project as 65:35 instead of the actual 68:32. Clause 9.1.3 (ii)(a) and (b) of the PPA does not require differential payment, yet the HERC wrongly directed payment based on a levelized tariff of Rs. 3.56/kWh rather than a year-on-year tariff.

63. The Appellant asserts that the HERC applied the incorrect provisions of the HERC MYT Regulations 2012, which were unsuitable for the project's nature and scale. This failure to provide a cost-reflective tariff hinders debt servicing and increases financial risk in the banking sector, impacting economic growth. The

project supports the green energy drive by injecting significant renewable energy into the grid. Under Section 61(h) and Section 86(1)(e) of the Electricity Act, the HERC has a statutory obligation to safeguard renewable energy projects and ensure a cost-reflective tariff. Therefore, the Appellant seeks the re-determination of the tariff for the project's useful life based on the appropriate regulations and projections.

Written Submissions of the Respondent No. 2, HPPC

I. Whether the Appellant can seek the determination of tariff as per CERC tariff regulations despite there being a specific agreement between the parties under PPA to get the tariff determined as per HERC MYT regulations, as amended from time to time

64. Respondent No. 2 submitted that it is the case of the GIPL in the tariff petition filed before HERC that as on the date of filing of the Petition, no HERC Tariff Regulations were subsisting and therefore, the tariff in the instant case shall be determined by the CERC Tariff Regulations.

65. The contention of GIPL is de hors the conditions of PPA, which is the very basis for acceptance of the offer of power from GIPL without following the route for competitive bidding. The contention raised by GIPL involves adjudication of the following issues:

i. Whether the actual date of filing of the filing of tariff petition holds any significance in the peculiar facts and circumstances of the instant case?

ii. What is the date of the arising of the cause of action for filing of the Tariff Petition by GIPL?

iii. Whether the tariff determination as per HERC Regulations is the very basis of the approval of the source for power procurement by HPPC from GIPL?

iv. Whether the specific agreement between HPPC and GIPL to have the tariff determined under Section 62 of the Electricity Act, 2003, reflects the intent and meeting of minds that forms the fundamental basis for power procurement?

v. Can the terms and conditions of the approved PPA be rendered redundant for an act which is premature and solely under the control of the GIPL, i.e., filing of the tariff petition without finalization of the source approval order?

vi. Will it be justifiable for the state commission to adopt different parameters for the procurement of power from similarly placed HEP at a similar time?

66. On the foregoing issues, Respondent No. 2 makes the following submissions:

<u>Response to Submission No. I</u>

67. The HPPC submitted that the Appellant highlighted that at the time GIPL offered to supply power, two other hydropower generators from Sikkim, Dans Energy Private Limited (96 MW) and Shiga Energy Private Limited (97 MW), made similar offers. All three offers were accepted by HPPC with the condition that the tariff would be determined under the HERC MYT Regulations, subject to HERC's approval. Tariff petitions for Dans, Shiga, and GIPL were filed simultaneously, and tariffs were determined under the same regulations. Currently, Dans and Shiga

are supplying power to HPPC as per the approved tariff. The power procurement agreement between the parties was subject to State Electricity Commission approval, which assesses the feasibility and viability of the proposed power source.

68. During the approval of GIPL's offer (Order dated 13.11.2017), HERC noted objections from the public, particularly regarding the lack of a competitive bidding process. HERC clarified that it would reassess the project cost and capital structure through due diligence before determining a reasonable tariff. Following the approval, a draft PPA, later formalized on 24.10.2020, was signed, confirming that the tariff would be determined by HERC in accordance with the HERC Tariff Regulations. Both parties explicitly agreed to tariff determination under the HERC MYT Regulations, 2012, as defined in Clause 1.1 of the PPA, including any amendments.

69. The Appellant contended that GIPL cannot deviate from the terms of the PPA by prematurely filing a tariff petition before the finalization of source approval. GIPL's review petition against the source approval was decided by HERC on 16.04.2019, effectively finalizing the source approval on that date. Therefore, any tariff petition filed before 16.04.2019 was premature and irrelevant. In its order dated 16.04.2019, HERC directed HPPC to re-draft the PPA and submit a signed copy for approval.

70. Subsequently, in the order dated 22.10.2019, HERC held that GIPL's tariff petition was premature since no PPA had been signed by that time. The commission had previously clarified in its 16.04.2019 order that the PPA was not

approved and should not have been initialled without complying with the directions of the 13.11.2017 order. On 17.09.2020, GIPL claimed that the PPA was approved on 16.04.2019.

71. However, HERC clarified that the PPA was approved on 17.09.2020. In an order dated 23.10.2020, APTEL also confirmed that the PPA was approved on 17.09.2020. This establishes that the PPA only came into existence after 16.04.2019, and any tariff petition filed before this date holds no legal significance.

72. Further submitted that the Appellant had argued that tariff determination was not possible until the PPA was approved by HERC. Although GIPL filed the tariff petition on 28.08.2018, it was premature since the review petition against the source approval order was still pending. Therefore, the filing date cannot establish the rights and obligations of the parties.

73. The Appellant emphasized that the "cause of action" determines the applicable law, not the mere filing of a petition. In ***M/S. Sonic Surgical v. National Insurance Co. Ltd. (MANU/SC/1764/2009),*** the Hon'ble Supreme Court held that a cause of action arises from a bundle of facts that give rise to a legal right and its violation. Hence, no right to seek tariff determination could have arisen before finalizing the source approval order on 16.04.2019.

74. Relying on ***Jaipur Vidyut Vitran Nigam Ltd. v. MB Power Ltd. (Civil Appeal No. 6503 of 2022),*** the Appellant asserted that Section 86(1)(b) of the Electricity Act empowers the State Commission to regulate electricity procurement and pricing. GIPL cannot exploit procedural gaps when the cause of action had

not yet arisen. A purposive interpretation of the law should be adopted to uphold its enforceability. Since the order approving the power procurement from GIPL was passed on 16.04.2019 and was not challenged by either party, the PPA had to be redrafted and submitted for approval as directed. GIPL's premature filing of the tariff petition before the approval of the source was legally unsound, making their claim to apply CERC Tariff Regulations based on the filing date erroneous and liable to be rejected.

Response to Submission No. II

75. It is further relevant to note following dates and events:

First Control Period from 01-Apr-2014 to 31-Mar-2017	
5-Dec-2012	**MYT Regulations, 2012 notified with the First Control Period from 01-Apr-2014 to 31-03-2017.**
18-May-2013	Project achieved COD.
21-Feb-2014	The CERC Tariff Regulations, 2014 notified.
01-Apr-2014	**The CERC Tariff Regulations, 2014 came into force for a period of five years from 1-Apr-2014 to 31-Mar-2019.**
28-Oct-2016	Appellant vide letter dated 28.10.2016 approached HPPC for sale of Hydro Power.
17-Nov-2016	**First Amendment to MYT Regulations, 2014 notified whereby the Control Period was extended from 01-Apr-2017 to 31-Mar-2018.**

06-Mar-2017	Application seeking approval for procuring of power at regulated tariff from Appellant's Project, was filed by HPPC before the Ld. Commission. (HERC/PRO-24 of 2017)
Extended Control Period from 01-Apr-2017 to 31-Mar-2018	
13-Nov-2017	Ld. Commission vide order dated 13.11.2017 in HERC/PRO-24 of 2017 approved the procurement of power from the Appellant's Project
Extended Control Period from 01-Apr-2018 to 31-Mar-2020	
03-May-2018	The Appellant and HPPC initialled the PPA
09-May-2018	Letter of Intent was issued in the favour of the Appellant by HPPC
14-May-2018	Long-term power supply from the Project commenced in terms of the initialled PPA, which was subsequently approved as such' by the Ld. Commission.
29-Aug-2018	Appellant filed Tariff Petition before the Ld. Commission bearing Case No. HERC/PRO-41 of 2018.
31-Oct-2018	**Second Amendment to MYT Regulations, 2012 notified whereby the definition of Control Period was substituted as "*multi-year tariff period fixed by the Commission from time to time. <u>The first control period shall be from 1st April 2014 to 31st March 2020</u>.*"**
21-Oct-2019	Date of First Hearing of the Tariff Petition bearing Case No. HERC/PRO-41 of 2018 before the Ld. Commission

	whereby the matter was adjourned sine die on the ground that the petition filed by the Appellant at that stage was '**premature**' as no PPA was signed till that date.
11-Aug-2020	Date of hearing of the Tariff Petition whereby the Ld. Commission revived the matter which was earlier deferred and adjourned sine die. The Ld. Commission vide interim order dated 13.08.2020 passed consequent to the hearing dated 11.08.2020 observed as under: *"In view of the above facts and circumstances, the matter is fixed for hearing on 19.08.2020* ***<u>for hearing arguments regarding finalization of PPA and consequent determination of tariff.</u>****"*
31-Oct-2019	MYT Regulations, 2019 notified.
17-Sep-2020	The Ld. Commission vide order dated 17.09.2020 in Case No. HERC/PRO-40 of 2020 **approved the PPA.**
24-Oct-2020	**PPA Signed**
23-Feb-2022	**Tariff Order was passed**

76. The HPPC submitted that the Appellant argued that GIPL prematurely filed the tariff petition to benefit from CERC Tariff Regulations, 2014, which were in force at the time of filing. Since the observations in the interim order dated 21.10.2019 were not challenged and attained finality, no benefit can be granted for the premature filing.

77. The Appellant highlighted that GIPL's claim for tariff determination under

CERC Regulations, 2014, based on achieving COD before the first control period of HERC MYT Regulations, 2012, is flawed. CERC Regulations, 2014, which came into force on 01.04.2014, were not applicable before COD. The parties had commercially agreed to apply HERC MYT Regulations, 2012, for tariff determination, and HERC rightly followed them. The filing date of the tariff petition cannot be viewed in isolation; the entire process leading to tariff determination must be considered.

78. At the time GIPL's offer was under consideration, HERC was also reviewing similar offers from Dans Energy and Shiga Energy. Tariff for those generators was determined under MYT Regulations despite their petitions being filed when the control period of MYT Regulations had expired. Both Dans and Shiga are supplying power at the determined tariff. Had GIPL objected earlier, its offer would likely not have been accepted. Therefore, GIPL's current argument that CERC Regulations should apply is inconsistent with the agreed terms and the established regulatory process. The claim that tariff should be determined under CERC Regulations based on the filing date or COD is without merit.

II. Whether the filing the tariff petition in disregard to the conditions of PPA and prior to decision of review application filed by GIPL justifiable and legal

79. GIPL's premature filing of the tariff petition after the expiry of the control period under HERC MYT Regulations, 2012, reflects malafide intent. If GIPL was unclear about the appropriate time to file the petition, it should have sought an extension of the control period or an amendment to the regulations from HERC

before filing the petition.

80. Instead, GIPL deliberately rushed to file the petition under CERC Regulations, which violated the agreed terms of the PPA. Clause 9.1.2 of the PPA explicitly mandates that tariff determination must be based on HERC Tariff Regulations. Clause 1.1 of the PPA defines "HERC Tariff Regulations" as MYT Regulations, 2012, as amended or the prevailing HERC Tariff Regulations. Thus, GIPL's actions were in clear breach of the PPA and demonstrated bad faith.

Response to Submission No. V

III. Can the Appellant's contention as regard non-applicability of MYT Regulations to project of the Appellant after having agreed to the applicability of regulations for determination of PPA while executing the PPA tenable

81. GIPL's claim that MYT Regulations, 2012 apply only to micro and small canal-based hydro projects is factually incorrect. Clause 34 of the MYT Regulations, 2012 clearly specifies norms for tariff determination for hydro power plants other than those under renewable energy sources. Regulation 2 affirms the regulations' applicability to all cases within the Commission's jurisdiction for tariff determination. Regulation 18 also refers to hydro generating plants concerning capital costs, and Regulation 15.3 explicitly includes both thermal and hydro plants for fixed cost determination. The time of project commissioning is covered under MYT Regulations, 2012, and the exceptions in Regulations 5.4, 5.5, 15.5, and 34.5 cannot be interpreted in isolation to exclude hydro plants.

82. GIPL had initially agreed to apply MYT Regulations, 2012 for tariff determination without objection and is now estopped from challenging it. HERC addressed this issue in an order dated 27.04.2021 in Shiga's case, affirming that MYT Regulations, 2012 would govern tariff determination. If the regulations are silent on any relevant issue, HERC can rely on its inherent powers under Regulation 81.3 to handle the matter as it deems fit. Regulation 80 also provides that HERC's decision on the interpretation of these regulations is final. Therefore, the scope of HERC's authority in tariff determination is broad and includes hydro projects.

83. The terms of the PPA are binding on both parties. Both the initialled and final executed PPA clearly state that the tariff will be determined based on HERC MYT Regulations, 2012. Clause 9.1.2 of the PPA explicitly mandates the application of these regulations for tariff determination. Therefore, GIPL cannot now dispute the applicability of HERC MYT Regulations, 2012 after the execution of the PPA.

Response to Submission No. VI

IV. Is it reasonable and justified to have the tariff determined under HERC MYT Regulations in the instant case

84. GIPL is contractually obligated to supply the entire power (excluding free power to the home state) to Haryana, and HERC has undisputed jurisdiction to determine the tariff for GIPL's project. GIPL's attempt to benefit from CERC Tariff Regulations, 2014 is misplaced, as Section 61 of the Electricity Act, 2003

empowers HERC to specify terms for tariff determination, making the adoption of CERC Regulations, 2014 discretionary, not mandatory.

85. In ***Maruti Suzuki India Limited Vs. Haryana Electricity Regulatory Commission & Anr. (2015 SCC OnLine APTEL 127),*** this Tribunal observed as under:

> *"48. In this connection, it is also necessary to refer to the judgment of this Tribunal in Haryana Power Generation Corporation Limited. In that case, contention of the Appellant therein was that the State Commission had neither followed the principles and methodology specified by the Central Commission nor followed the provisions of the Tariff Policy and the National Electricity Policy. The Tribunal held that Section 61 of the said Act mandates the State Commissions to frame Regulations fixing terms and conditions for determination of tariff and in doing so it is to be guided by the principles and methodology specified by the Central Commission, National Electricity Policy and Tariff Policy etc., but once the State Commission has framed the Regulations it shall determine tariff in accordance with its own Regulations. The relevant paragraph of the said judgment reads as under:*
>
> > *"Bare reading of section 61 would make it clear that the State Commission have been mandated to frame Regulations for fixing tariff under Section 62 of the Act and while doing so i.e., while framing such Regulations, State Commissions are required to be guided by the principles laid down by the Central Commission, National Electricity*

> *Policy, Tariff Policy etc. It also provide that while framing the Regulations, the State Commissions shall ensure that generation, transmission and distribution are conducted on commercial principles; factors which would encourage competition and safe guard consumer's interest. Once the State Commission has framed and notified the requisite Regulations after meeting the requirement of prior publication under Section 181(3), it is bound by such Regulations while fixing Tariff under Section 62 of the Act and the Central Commission's Regulations have no relevance in such cases. However, the State Commission may follow the Central Commission's Regulations on certain aspects which had not been addressed in the State Commission's own Regulations. The Haryana Electricity Regulatory Commission has framed Terms and Conditions for determination of tariff for generation in the year 2008 and the State Commission is required to fix tariff as per these Regulations."*

49. The above observations of this Tribunal support our conclusion that the word "shall" appearing in the term "shall be guided" used in Sections 61, 79 and 86 of the said Act is not to be read as "must". It has a persuasive flavour. The National Electricity Policy and the Tariff Policy can only be guiding factors. If there are Regulations framed under Sections 178 and 181 in the field, they will rank above them being subordinate legislation."

86. Since MYT Regulations, 2012 contain the necessary parameters for tariff determination, directing the application of CERC Tariff Regulations, 2014 over HERC MYT Regulations, 2012 would contradict Section 61 of the Electricity Act, 2003, which treats CERC regulations as guiding, not binding. The COD is the appropriate reference point for applying the relevant parameters, as substantial investment and financing occur immediately before COD. Thus, determining tariff based on COD aligns with the intent and provisions of the Act. GIPL has already benefited from the application of the latest parameters during the project's commercial operation.

V. <u>Levelized tariff has been rightly considered by the Commission considering year of commencement of supply of power to HPPC</u>

87. The Respondent argued before HERC that GIPL had been generating revenue from selling power for four years (FY 2013–14 to 2016–17) before approaching HPPC for sale of power, and this revenue (₹613.745 crores, as stated in GIPL's affidavit dated 25.09.2020) should be offset to prevent unjust enrichment. HERC directed GIPL to provide revenue details, which were submitted with Annexure-3 (₹613.745 crores). HERC considered two options for tariff adjustment: (a) adjusting yearly tariff based on loans already paid and depreciation claimed or (b) calculating year-to-year tariff for the project's lifetime and applying a levelized ceiling tariff for the balance useful life from FY 2017 (when power supply to Haryana began) until FY 2048. HERC found the second option more transparent and fair.

88. GIPL itself acknowledged the "S" curve trajectory of annual tariffs in its tariff

petition, where initial tariffs are higher due to debt repayment and depreciation, but decrease once debt is repaid, followed by a gradual rise due to increased O&M expenses. In its petition, GIPL sought (i) annual cost recovery through capacity and energy charges, (ii) recovery of levelized tariff for the project's remaining life, or (iii) recovery of ceiling tariff of ₹4.69/kWh with deferred recovery of unrecovered tariffs. The Appellant's current stance contradicts its earlier position and is malafide, seeking to extract higher revenue initially and potentially back down power in later years when tariffs decrease.

Response to Submission No. III and IV

VI. Can the Appellant challenge the act of the Commission as regards retrospective extension of Control Period or regulation being in violation of Electricity Act, 2003 in the instant Petition

89. GIPL has not challenged the validity of the Second Amendment to the MYT Regulations, 2012, which remains binding unless set aside through judicial review under Article 226 of the Constitution of India. Regulations framed under the Electricity Act, 2003, are subordinate legislation and cannot be challenged through an appeal under Section 111 of the Act. This Tribunal has consistently held that it lacks the power of judicial review to question the validity of statutory regulations issued under Section 181 of the Electricity Act, 2003.

90. This Tribunal in the recent Order dated 20.02.2024 in Appeal No. 337 of 2023 categorically framed issue as under:

> *"VI. DOES THIS TRIBUNAL HAVE THE POWER TO IGNORE OR TO READ DOWN REGULATIONS ON THE GROUND THAT THEY*

ARE CONTRARY TO THE PARENT ACT?"

It was held that *"The power to ignore Statutory Regulations, which are found ultra vires either the Constitution or the Parent Act, inheres in and forms part of the power of Judicial Review, and is available to be exercised in such judicial review proceedings where there is no challenge to the validity of the Regulations. Such a power is not available to Tribunals of limited jurisdiction such as APTEL."*

91. Further the judgments referred to by the Appellant under Point no. III and IV of their Written Submissions were duly dealt with by this Tribunal in Appeal No. 337 of 2023 and the same were duly distinguished as under:

Judgment relied upon by Appellant	**Observations in Appeal No. 337 of 2023**
Bhaskar Shrachi Alloys Ltd. v. Damodar Valley Corpn., (2018) 8 SCC 281	*The question whether this Tribunal, which was held in PTC India Ltd to lack the power of judicial review, could nonetheless consider whether the Regulations were contrary to plenary legislation, and then ignore or read down the Regulations on this score, did not arise for consideration in Bhaskar Shrachi Alloys Ltd. It cannot be lost sight of that the decision in PTC India Ltd. was*

	rendered by a Constitution Bench, and it is settled law that a decision by a Constitution bench of the Supreme Court cannot be overlooked to treat a latter decision by a bench of lesser strength as of binding authority (N.S Giri v. Corporation of City of Mangalore, (1999) 4 SCC 697), more so when the scope and extent of the power of judicial review did not arise for consideration before the two judge bench in Bhaskar Shrachi Alloys Ltd. *….* ***As the questions (1) whether or not this Tribunal can examine whether the Regulations are contrary to the Parent Act; (2) as it lacks jurisdiction to strike it down on this ground, whether it can instead ignore the said Regulation or read it down, and (3) whether such action taken does not also amount to exercise of the power of judicial review, did not arise for consideration in Bhaskar Shrachi Alloys Ltd. Reliance placed***

	***thereupon, on behalf of the Appellant, is also of no avail*.**
Bharathidasan University and Anr. V All India Council for technical Education and Ors. (2001 (8) SCC 676)	*In BHARATHIDASAN UNIVERSITY, the applicability of the Regulations framed by the AICTE was subjected to challenge in a Writ Petition filed, under Article 226 of the Constitution, before the Madras High Court. It is evidently because there was no specific challenge to the vires of the Regulations before the Madras High Court, that the Supreme Court in Bharathidasan University, after being satisfied that Regulations 4 and 12 of the AICTE Regulations were directly opposed to and inconsistent with the provisions of Section 10 of the AICTE Act and were void and unenforceable, observed that the courts were bound to ignore those Regulations when the question of their enforcement arose, and the mere fact that there was no specific relief sought to strike down or declare them ultra vires, would not confer any sanctity or authority and validity on*

	such Regulations. ***The Judgment, in Bharathidasan University, would apply only to judicial review proceedings, wherein the Court (either the Supreme Court or the High Courts) can, in the absence of a challenge to the vires of subordinate legislation*** *(and as they cannot therefore strike down the Regulations), instead ignore such Regulations.* ***The power to ignore Statutory Regulations, which are found ultra vires either the Constitution or the Parent Act, inheres in and forms part of the power of Judicial Review, and is available to be exercised in such judicial review proceedings where there is no challenge to the validity of the Regulations. Such a power is not available to Tribunals of limited jurisdiction such as APTEL*****.**

92. Pursuant to foregoing analysis, this Tribunal held that statutory regulations cannot be ignored or read down on the premise they are contrary to the provisions

of the parent act.

93. Reliance in this regard is also placed on the judgment of the Hon'ble Supreme Court in the case of ***Reliance Infrastructure Limited Vs. State of Maharashtra [C.A. No. 879 of 2019*, Decided on 21.01.2019]** and ***PTC Indian Limited Vs. Central Electricity Regulatory Commission [(2010) 4 SCC 603],*** wherein it was held that:

> *'A regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act. If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178.'*

94. The amendment to the definition of "Control Period" by the Commission was made to ensure continuity and does not amount to a retrospective change affecting GIPL's rights. GIPL's claim that the amendment has a retrospective effect is misleading, as it merely modifies existing regulations without altering accrued rights.

<u>Distinguishing the judgments referred to by GIPL</u>

95. GIPL's reliance on the ***Tamil Nadu Spinning Mills*** case is misplaced as it

concerned retrospective recovery under Section 50 of the Electricity Act, 2003 (EA, 2003) for Excess Demand and Energy Charges. In the present case, the 2nd Amendment extending the Control Period was already notified before the Tariff Order, negating any retrospective effect. The Star Wire case is also wrongly cited as it dealt with conflicts between regulations and the Act, which is not the situation here. The Commission, under Section 61 of EA, 2003, was within its authority to specify tariff terms, and the CERC Tariff Regulations, 2014 are not binding. The reliance on Rajendra Bansal is equally misplaced since it addressed the jurisdiction of civil courts under the Rent Act and pending eviction suits, which is unrelated to tariff determination. Therefore, the Commission lawfully extended the Control Period through an amendment rather than creating a retrospective effect. The Appellant's contentions are essentially a challenge to the validity of regulations, which cannot be entertained under Section 111 of EA, 2003.

96. Further, the Appellant's reliance on judgments concerning jurisdiction, such as Rajendra Bansal, is misplaced since the present case does not involve questions of jurisdiction but rather the applicability of the MYT Regulations, 2012 (2nd Amendment). The Haryana Electricity Regulatory Commission (HERC) had jurisdiction throughout the proceedings. Key developments include the project achieving COD on 18.05.2013, HPPC filing a petition for power procurement on 23.02.2017, and HERC approving the procurement on 13.11.2017.

97. After the 2nd Amendment's issuance on 31.10.2018, HERC passed a review order on 16.04.2019 directing PPA recasting, approved the PPA on 17.09.2020, and the PPA was signed on 24.09.2020. The final order was passed only after the 2nd Amendment's notification. Consequently, the Appellant's reliance on

judgments concerning procedural law changes or retrospective application is irrelevant. The cited judgments are distinguishable and do not apply to the present case, where the Commission lawfully exercised its jurisdiction under the Electricity Act, 2003.

Response to Submission No. VII and VIII

VII. *Salient Parameters Claimed v Allowed*

Sr. No.	Parameter	Claimed	Allowed
1.	Capital Cost	Rs. 1177.92 Crores	Rs. 1145 Crores
2.	Debt-Equity Ratio	70:30 (Para 52 of Tariff Petition)	70:30
3.	Interest on Loan	13.09%	13.09%
4.	Return on Equity	21.03% (16.5% +MAT@ 21.555)	14%
5.	O&M Expenses	2% of project cost including 2% for additional capitalisation escalated at 6.64%	2% of admitted cost (Rs. 1145 Crores) + 4% of annual escalation going forward

6.	Working Capital	1-month normative O&M expenses + maintenance spares @15% of normative O&M expenses + Receivables for two month	1-month normative O&M expenses + maintenance spares @7.5% of normative O&M expenses + Receivables for one month
7.	Interest on Working Capital	13.50%	13.50%
8.	Design Energy and Saleable Design Energy	HERC did not consider revised saleable design energy in view of force majeure events	468.27 Mus (After deducing Auxiliary energy consumption and free power to home state from 537.50 Mus)

VIII. <u>Non- determination of tariff as per net saleable energy</u>

98. HERC determined the saleable energy as 468.2 MUs based on the project's design energy of 537.50 MUs, reduced by auxiliary consumption and free power to the home state. Annexure-A to the PPA specifies the design energy output as 468.25 MUs. HERC considered the Appellant's submission regarding lower actual generation (55 MW to 210 MW) due to the non-availability of the PGCIL

transmission system and reduced NOC from NRLDC since COD, resulting in a four-year delay and increased project costs. Granting the requested tariff would unfairly burden Haryana's consumers and oppose the larger public interest.

99. Further, Regulation 44 of CERC Tariff Regulations, 2019 provides provisions for Computation and Payment of Capacity Charge and Energy Charge for Hydro Generating Stations. Regulation 44(7) reads as under:

> *"(7) Shortfall in energy charges in comparison to fifty percent of the annual fixed cost shall be allowed to be recovered in six equal monthly installments: Provided that in case actual generation from a hydro generating station is less than the design energy for a continuous period of four years on account of hydrology factor, the generating station shall approach the Central Electricity Authority with relevant hydrology data for revision of design energy of the station."*

100. HERC rightly considered the design energy of 468.2 MUs as approved by the Central Electricity Authority (CEA) since only CEA has the authority to modify the design energy. GIPL filed an application in the appeal seeking to introduce new documents, including letters to CEA and the Sikkim Government's recommendations, to revise the design energy. These documents include:

1. Letter dated 30.05.2023 from GIPL to CEA
2. CEA's letter dated 04.12.2017
3. Revised Hydrology Report (May 2023) for Chuzachen Hydro Electric Project
4. CEA's letter dated 06.09.2023
5. Letter dated 29.12.2023 from the Sikkim Power Department

101. The application, filed on 21.10.2024, is delayed by almost a year after the alleged developments. GIPL's claims about revised design energy are speculative since CEA has not granted final approval. CEA's letter of 06.09.2023 directed GIPL to seek approval from the Sikkim Power Department before submitting a proposal to CEA. GIPL has not shown compliance with these directions, and without CEA's final approval, the revised design energy cannot be considered valid for tariff revision.

102. GIPL failed to seek revision of design energy before or during the HERC proceedings. GIPL argued that their action was based on HERC's order dated 23.02.2022. However, HERC did not direct them to revise the design energy but only observed that GIPL could seek revision after following due procedure. Under Regulation 44(7) of CERC Tariff Regulations, 2019, GIPL could have approached CEA independently.

103. GIPL's letter to CEA dated 30.05.2023 was delayed by over a year from HERC's order, with no explanation for the delay. This reflects a lack of diligence, and GIPL also failed to inform the Tribunal about this development at the appropriate stage, demonstrating procedural impropriety. The PPA between GIPL and the Respondent excludes late delivery of equipment or financial issues as force majeure events.

104. Therefore, GIPL's claim that low saleable design energy resulted from a force majeure event holds no merit under the PPA's terms. Additionally, HPPC off-took power from GIPL as an interim arrangement until July 2020. However, GIPL

failed to supply peak power for three hours continuously during most of the lean season, making their claim for tariff revision based on actual saleable energy unreasonable.

105. Any revision in design energy for tariff determination would only take effect prospectively from the date of approval by the CEA. Even if the CEA grants approval at a later stage, it would apply only from the date of issuance and cannot retrospectively alter the tariff for any prior period. Therefore, GIPL's reliance on the alleged revision in design energy, even if accepted, would not affect tariff determination for the period before the CEA's approval.

IX. <u>Capital Cost has been rightly approved by Commission after thorough examination of all evidence and prudence check</u>

106. The Commission thoroughly reviewed GIPL's documentation on the project's capital cost and admitted Rs. 1145 crores against GIPL's claim of Rs. 1177.92 crores, based on evidence from GIPL and the appraisal by lead lenders and their engineers. It upheld that claims must be supported by cogent evidence, as the commission is bound to conduct a prudence check.

107. A comparative analysis on page 122 of the appeal showed that the approved capital cost of Rs. 10.41 crores/MW aligns with the Myntdu HEP in Meghalaya by MECPL. Regarding HPPC's objection about delays attributable to GIPL under the undertaking dated 13.11.2017 and clause 9.1.4 of the PPA, the commission acknowledged that delays due to geological surprises like flash floods and earthquakes are common in hilly regions. Therefore, the admitted capital cost for

tariff determination was based on GIPL's claimed cost, certified by a CA, subject to a prudence check, ensuring the project's viability and reasonable tariff aligned with cash flow and debt servicing obligations without granting undue gains beyond the allowed return on equity.

108. HERC, in its concluding finding on the admitted capital cost, stated that since the admitted capital cost is lower than the claimed capital cost (net of the amount foregone), the foregone amount will not be deducted again from the capital cost. Therefore, the approved capital cost is reasonable and justified.

X. Additional Capitalization claimed rightly disallowed by the Commission

109. HERC rightly disallowed the additional capital expenditure of ₹12.26 crore for FY 2018-19 to FY 2020-21 due to lack of convincing justification and evidence of actual expenditure incurred after COD. The claimed expenditure included building and civil works, plant and machinery, and IT equipment, but no proof of actual spending was provided. Notably, GIPL itself admitted in its written submission that the additional capitalization was only planned, not incurred. Therefore, the claim was rightly rejected for lack of substantiation.

XI. Debt equity ratio has been rightly considered by the Commission

110. HERC correctly considered the Debt-to-Equity Ratio as 70:30 in line with

Regulation 19(b) of the MYT Regulations, 2012, since the admitted capital cost was lower than the proposed amount. Equity exceeding the threshold was treated as notional debt. GIPL itself claimed a 70:30 Debt-to-Equity Ratio in its tariff petition and written submissions, even stating that any benefit from restructuring would be passed on to Haryana consumers. Therefore, the recorded figures cited by GIPL now are irrelevant, as the ratio determination aligns with the claimed position and applicable regulations.

XII. __RoE, O&M Cost, Interest on Working Capital and Interest on Loan rightly allowed by Commission in terms of MYT Regulations, 2012__

111. HERC appropriately applied the parameters under MYT Regulations, 2012, for determining the tariff of the GIPL project. GIPL cannot claim parameters under CERC Tariff Regulations without sufficient evidence showing that the allowed parameters are unviable or unattainable for plant operation. GIPL also failed to justify why the approved parameters would make the project unfeasible.

XIII. __Response to other issues raised by the Appellant on page 24 of the Written Submissions__

112. The Appellant's claim that HERC incorrectly recorded the debt-to-equity ratio as 65:35 instead of 68:32 is misleading. The Appellant itself, in Para 51 of the tariff petition before HERC, stated that the project was funded in a 65:35 ratio and provided supporting details. It is improper for the Appellant to contradict the record.

113. Additionally, the Appellant's contention that the order for differential payment

based on levelized tariff rather than year-on-year tariff violates Clause 9.1.3(ii) of the PPA is baseless. Clause 9.3(ii) only requires payment of the differential tariff over and above APPC if the initial tariff is acceptable to the purchaser, without any reference to year-on-year tariff. Therefore, HERC's order aligns with the terms of the PPA.

XIV. Alternative and Without Prejudice Submissions

114. If the Tribunal remands the matter for tariff re-determination, HPPC retains the right to exercise the exit clause if the revised tariff is unviable. HPPC should also be allowed to seek correction of errors in the tariff computation in the Impugned Order. The levelized tariff was incorrectly calculated from FY 2017, whereas power supply began in May 2018; the correct base year should be FY 2018-19. Additionally, the discount factor was wrongly applied from the commissioning year (2013) instead of the power supply commencement year (2018).

Analysis and Conclusion

115. After hearing the Appellant and the Respondents at length and carefully considering their respective submissions, and also examining the written pleadings and relevant material on record, the following issues have emerged for consideration:

a) *Whether the Commission erred in applying the HERC MYT Regulations, 2012 retrospectively instead of the CERC Tariff Regulations, 2014 for the* *determination of tariff for the Appellant's Project for long-term power supply to HPPC, and whether the tariff should be re-determined based on actual saleable energy and the CERC Tariff Regulations, 2014?*

b) *Whether the Appellant is entitled to reimbursement of the differential amount of tariff determined under the CERC Tariff Regulations, 2014 and APPC for the power already supplied to HPPC, and whether the claimed additional capitalization expenditure of INR 12.26 Crore and major overhaul expenditure of INR 10.86 Crore should be added to the capital cost for computation of O&M expenses?*

c) *Whether the Commission correctly considered the Debt-to-Equity ratio of the Project as 70:30 or whether the ratio should be determined as 65:35, as claimed by the Appellant?*

116. The Appellant herein has prayed for the following:

> *"(i) Allow present Appeal, set aside the order dated 23.02.2022 passed by the Ld. Commission in Case No. HERC/ PRO 41 of 2018 to the extent challenged in the present Appeal and direct the Ld. Commission to determine tariff of the Project of the Appellant for long term supply of power to HPPC on the basis of the CERC Tariff Regulations, 2014;*
>
> *(ii) Declare that the HERC MYT Regulations 2012 are not applicable for the determination of tariff for the Appellant's Project for supply of power to HPPC;*

(iii) Pass suitable orders towards determination of tariff of per unit of the Project of the Appellant on basis of the net saleable energy arrived from actual generation of power;

(iv) Direct HPPC to make payment of the differential amount of tariff determined on basis of the CERC Tariff Regulations, 2014 and APPC for the power already supplied by the Appellant from the Project;

(v) Allow expenditure of INR 12.26 Crore incurred by the Appellant as additional capitalization expenditure and the same may be added in the capital cost of the Project;

(vi) Allow major overhaul expenditure of INR 10.86 Crore and the same be added as part of the capital cost for arriving at base capital cost for computation of O&M expenses of the Project;

(vii) Allow the Debt: Equity ratio of the Project of the Appellant as 65:35; and

(viii) to pass such other or further orders as this Hon'ble Tribunal may deem appropriate."

117. This appeal arises from the tariff determination for the 110 MW Chuzachen Hydro Electricity Power Plant (the "Project"), established by the Appellant. The central dispute concerns the choice of the regulatory framework employed by the Commission in determining the tariff payable by the Haryana Power Purchase Centre (HPPC) for the long-term power supply. Specifically, the Appellant challenges the Commission's application of the Haryana Electricity Regulatory Commission (HERC) MYT Regulations, 2012, applied retrospectively, and contends that the tariff should have been determined under the Central Electricity Regulatory Commission (CERC) Tariff Regulations, 2014.

118. The Project, which achieved Commercial Operation on 18.05.2013, has been the subject of multiple proceedings. Key milestones include the offer for sale of power by the Appellant in October 2016, the initialing of the Power Purchase Agreement (PPA) in May 2018, the commencement of power supply from May 2018, and the filing of the Tariff Petition on 28.08.2018. It is pertinent that during the period from 01.04.2018 to 31.10.2018, there existed a regulatory gap in Haryana. The second amendment to the HERC MYT Regulations, 2012 was only notified on 31.10.2018 with retrospective effect, a step that raises serious questions regarding its legal validity.

119. Let us take up the issues one by one.

> **<u>Issue a):</u> Whether the Commission erred in applying the HERC MYT Regulations, 2012 retrospectively instead of the CERC Tariff Regulations, 2014 for the determination of tariff for the Appellant's Project for long-term power supply to HPPC, and whether the tariff should be re-determined based on actual saleable energy and the CERC Tariff Regulations, 2014?**

120. The pivotal fact in this dispute is the date on which the Tariff Petition was filed, i.e., 28.08.2018. At that juncture, owing to the regulatory gap that occurred from 01.04.2018 until the notification of the Second Amendment on 31.10.2018, the tariff framework provided by HERC was not operative in Haryana. The Appellant submits that the law applicable on the date of filing is the one that should govern the determination of rights. This principle is well supported by the doctrine

of crystallization, as elucidated in ***Rajendra Bansal & Ors. v. Bhuru*** and reiterated in more recent decisions such as ***Shankarlal Nadani v. Sohanlal Jain***.

121. In ***Rajender Bansal v. Bhuru, [(2017) 4 SCC 202],*** the Hon'ble Supreme Court has held as under:

> "*18. From the aforesaid discussion in Atma Ram Mittal (1988)4SCC284, Vineet Kumar (1984)3SCC352, Ram Saroop Rai(1980)3SCC452, Ramesh Chandra(1992)1SCC751 and Shri Kishan(1998)2SCC710 cases, the apparent principles which can be culled out, forming the ratio decidendi of those cases, are as under:*
>
> ***18.1. Rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the law applicable on the date of filing of the suit will continue to apply until the suit is disposed of or adjudicated.***
>
> ***-------****"*

122. The Hon'ble Court has made a similar observation, crystallizing the rights of parties from the date of filing of the suit, in ***Shankarlal Nadani v. Sohanlal Jain, 2022 SCC Online SC 442***, the relevant excerpts are reproduced below:

> "***29.*** *Still further,* ***<u>one of the principles is that the rights of the parties have to be determined on the date when lis commences i.e., on the date of filing of the suit</u>****. The plaintiff is entitled to decree on that day when he initiated the proceedings, therefore, rights of the*

> *parties have to be examined as on the said day. Recently, this Bench in a judgment reported as ECGC Limited v. Mokul Shriram EPC JV21 was examining the question as to whether the condition of deposit while filing appeal under the Consumer Protection Act, 2019 would be applicable or the provisions as it existed under the Consumer Protection Act, 1986 when the complaint was filed would be applicable. This Bench considering the Constitution Bench judgments in Garikapati Veeraya v. N. Subbiah Choudhry, Vitthalbhai Naranbhai Patel v. Commissioner of Sales Tax, M.P., Nagpur and Hardeodas Jagannath v. The State of Assam24 held that the provisions of the Consumer Protection Act, 2019 would not be applicable to the complaints filed prior to the commencement of the 2019 Act. Therefore, the Judgment and Decree passed in the suit for possession does not suffer from any illegality.*"

123. The inherent logic is that the rights and obligations crystallize on the filing date, and any subsequent retrospective regulation must have express statutory backing.

124. The HPPC countered the said reliance, stating that the judgments passed by the Hon'ble Court are not applicable in the instant case, as the issue therein was different from that in this case, i.e., the issue pertains to the jurisdiction of the court. Secondly, during the un-extended 1st control period, the Project achieved COD on 18.05.2013. Thirdly, the Apex Court took the view that it would be travesty of justice of the appellants are denied the fruits of the decree since the notification was issued during the pendency of the appeal, however, in the present case, no

'decree' or tariff order was passed when the 2nd Amendment had not been notified.

125. We find the arguments of the HPPC as misplaced and out of context as the COD of the project was achieved on 18.05.2013, i.e., before the start of the control period, as can be seen from the Regulations ***(HERC MYT Regulations, 2012)*** that the ***'First Control Period'*** under started from 01.04.2014 to 31.03.2017, as under:

> ***"3.16 "control period"*** *means a multi-year tariff period fixed by the Commission from time to time.* ***The first control period shall be from 1st April 2014 to 31st March 2017."***

126. **Such submissions on behalf of the Respondent are perverse and unacceptable.**

127. The Appellant placed the following facts before us in support of its submissions:

Sr. No.	**Particulars of Events**	**Date**
1.	Commercial Operation Date of Project	18.05.2013
2.	HERC MYT Regulations 2012 – Original Control Period	01.04.2014 to 31.03.2017

3.	HERC MYT Regulations 2012 – First Amendment notified on 17.11.2016, extended the control period from	01.04.2017 to 31.03.2018
4.	***Period when no HERC tariff regulations were in force***	***01.04.2018 to 31.10.2018***
5.	***Pertinent events taking place when no HERC Regulations were in force***:	
	a) PPA initialled (*Annexure A-14, pg. 257 – 331, Vol. II of the Appeal*)	03.05.2018
	b) Issuance of Letter of Intent by HPPC (*Annexure A-14, pg. 332, Vol. II of the Appeal*)	09.05.2018
	c) Commencement of Power Supply to HPPC	14.05.2018
	d) Date of Filing of Tariff Petition- no HERC Regulations in force	28.08.2018
6.	HERC MYT Regulations 2012 – Second Amendment notified on 31.10.2018, extended control period retrospectively	31.03.2020

128. The HERC vide notification dated 17.11.2016 issued the first amendment to these Regulations extending the control period till 31.03.2018 ("First Amendment"). The first control period came to an end on 31.03.2018

"2. Amendment to Regulation 3.16

(…)

"Control Period" means a multi-year tariff period fixed by the Commission from time to time. The first control period shall be from 1st April 2014 to 31st March 2018."

129. Thereafter, the second amendment was notified on 31.10.2018, making the effective date of the notification prospectively, i.e., the date of notification; however, it extended the control period retrospectively from 01.04.2018 to 31.03.2020 ("Second Amendment"):

"*1.* ***Short title, commencement and interpretation****.*

(1) These Regulations may be called the Haryana Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff for Generation, Transmission, Wheeling and Distribution & Retail Supply under Multi Year Tariff Framework) Regulations, 2012 (2nd Amendment), 2018.

(2) ***These Regulations shall come into force w.e.f. the date of notification in the Haryana Government Gazette.***

(3) These Regulations shall extend to whole of the State of Haryana.

2. Amendment to Regulation 3.16

(…)

*"***Control Period***" means a multi-year tariff period fixed by the Commission from time to time. The first control period shall be from* ***1st April 2014 to 31st March 2020.***"

130. Thus, from the date of expiry of the second control period, i.e., 01.04.2018, till the date of effecting the Second Amendment, i.e., 31.10.2018, no Regulations of HERC existed. Therefore, no State Tariff Regulations were in force on the date of filing of Tariff Petition on 28.08.2018 or on the date of initialing the Power Purchase Agreement dated 03.05.2018 ("PPA") or on commencement of supply of power on 13.05.2018.

131. Further, the Second Amendment (Regulation 1(2)) clearly mandates that these amendments become effective from the date of notification of the Second Amendment; however, the "Control Period" has been extended retrospectively.

132. Such a retrospective effect on the control period is without any express provision in the principal legislation.

133. We also decline to accept the contention of the Respondent, HPPC, that there is no question of vesting or divesting of jurisdiction of the Commission, the Hon'ble Court, under para 18.1 of the judgment has categorically observed that the ***"Rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the law applicable on the date of filing of the suit will continue to apply until the suit is disposed of or adjudicated."***

134. As such, we are satisfied that the rights of a party crystallise on the date of institution of the petition. Further, the Respondent has misquoted the judgment by countering the Appellant based on the observation made by the Hon'ble Court in para 23 of the judgment, wherein the Hon'ble Court has allowed the case of the Appellant after observing the crystallising of the rights of the Appellant at para

18.1.

135. The Commission's subsequent decision to extend the control period of the HERC MYT Regulations, 2012, retrospectively through its Second Amendment is legally contentious. The Electricity Act, 2003, does not expressly confer upon the State Commission the power to apply subordinate legislation retrospectively unless explicitly provided for. As the case of ***Tamil Nadu Spinning Mills Association v. Tamil Nadu Electricity Board*** demonstrates, retrospective application of delegated legislation is an extraordinary measure that is only justified when the parent statute unambiguously permits it. Here, the Second Amendment was applied with retrospective effect even though the regulatory gap indicated that the CERC Tariff Regulations, 2014, should have been the guiding framework on 28.08.2018.

136. In ***Tamil Nadu Spinning Mills Association vs. Tamil Nadu Electricity Board & Anr.,*** (Appeal No. 111 and 114 of 2010 dated 11.01.2011), this Tribunal has held as under:

> *"**40.** According to the Electricity Board, the 1st Respondent, Electricity Supply code was amended to provide for vesting of permanent power with regard to levy of Excess Demand Charges and Excess Energy Charges only by virtue of the order dated 15.12.2008 and it was retrospectively amended from 28.11.2008 and hence, the State Commission has power to pass orders relating to Excess Demand Charges and Excess Energy Charges by virtue of the amendment order dated 15.12.2008.* ***On the other hand, it is contended by the***

learned Counsel for the Appellants that when the order had been passed on 28.11.2008 in MP No.42 of 2008, there was no power vested with the State Commission to levy Excess Demand Charges and Excess Energy Charges for peak hours since, at that time, Electricity Supply Code had not been amended and unless the Statute itself provides power to delegate legislation for retrospective amendment of the Supply Code, it can only have prospective application and not retrospective application.

41. *While dealing with this issue, we have to bear in mind the following 3 principles:*

(i) The State Commission is delegated under The Electricity Act, 2003.

(ii) A delegate does not have power to issue any order which has retrospective effect unless specifically authorized under the demand enactment.

(iii) In the present case, none of the provisions contained in The Electricity Act, 2003 dealing with the powers, duties and functions of the authorized State Commission to pass order with retrospective effect.

42. *Bearing these principles in mind, we have to analyse the issue as under:*

(i) As mentioned above, there is no provision either in the Act nor in the Regulations providing for retrospective application of those provisions. The power to make Regulations under the Electricity Supply Code is contained in Section 50 of The Electricity Act, 2003. So, the order

amending the Electricity Supply Code was passed on 15.12.2008 giving a retrospective application of the amendment of Supply Code even from 28.11.2008 even though the said Supply Code was not amended on that date.

(ii) *In this context, it is to be pointed out that when the prayer was made by the Electricity Board to give effect to this proposal from 1.11.2008, the State Commission negatived such a contention by saying that the publication was made only on 15.11.2008 and had the public been made aware of such demand, they would have desisted from drawing excessive power.*

(iii) *The same reasoning would apply to the present situation also with reference to the retrospective application adopted by the State Commission. If the order is very clear to have a prospective effect from 28.11.2008, and if the clear proposal in unambiguous terms was made known to the consumers, they would have desisted from acting so.*

(iv) *As indicated above, in the present case, none of the provisions contained in the Electricity Act, 2003 deal with the powers, duties and functions of the State Commission, authorizes the State Commission to pass orders with retrospective effect.*

(v) *Admittedly, on the date of the order, i.e. 28.11.2008, the Supply Code had not been amended. The Supply Code was amended only on 15.12.2008 retrospectively w.e.f. 28.11.2008. No further clarification was given regarding*

Excess Demand and Excess Energy Charges as applicable for evening peak hours. The Review Petition No. 2 of 2008 order dated 24.12.2008 did not have the Appellant as party.

(vi) ---------

(xv) Despite this order dated 28.11.2008, the Notification regarding amendment of Supply Code has come only on 15.12.2008. In that amendment, a retrospective effect has been given, i.e. from the date of Order dated 28.11.2008. As indicated above, in the Order dated 24.12.2008, the State Commission was not inclined to give effect to the orders from 1.11.2008 as claimed by the Electricity Board. This has been clarified only in the impugned order dated 4.5.2010.

The above discussion would make it evident that on the day when the order was passed in MP No.42/2008,i.e. on 28.11.2008 there was no power vested with the State Commission to levy Excess Demand charges and excess energy charges since the Electricity Supply Code had not been amended. Thispower was vested only on 15.12.2008 when the Electricity Supply Code was amended. As mentioned above, the Excess Demand Charges and Excess Energy Charges for evening peak restriction were clarified only in the impugned order dated 4.5.2010.

As mentioned above, it is a clear rule of law that in the absence of a statute providing for power for delegated legislation to operate retrospectively, the Regulations can only have prospective *application. This principle has been laid down in the following decisions:*

1) *2009 (2) SCC 589 – Panchi Debi Vs. State of Rajasthan*
2) *2007(5) SCC 77 – Vice Chancellor MD University Rohtak Vs. Jahan Singh*

The power to make regulations under the Electricity Supply Code is contained in Section 50 of The Electricity Act, 2003. This provision neither expressly nor by implication provides for retrospective operation of the regulations.

43. In the above circumstances, the order amending the Electricity Supply Code retrospectively from 28.11.2008 is invalid in so far as it is applied retrospectively. *Therefore, the said order dated 28.11.2008 in pursuance of which the Electricity Supply Code has been amended only on 15.12.2008. Further the Excess Demand Charges and Excess Energy Charges for evening peak restrictions is to be given effect to only from 4.5.2010 wherein it has been clearly stated that such charges are leviable in addition to restriction of 5/10% for 48 hours for exceeding the evening peak quota. Accordingly, we hold that theorder passed by the State Commission on 28.11.2008 and the amendment order dated 15.12.2008 would come into effect only from 15.12.2008 and the excess demand and excess energy charges for evening peak hours in excess of evening peak quota are given effect to only from 4.5.2010 bearing in mind that the State Commission has clarified the position on 4.5.2010. Therefore, the Appellants are liable to pay the Excess Demand Charges and Excess Energy Charges for evening peak* *restriction prospectively, i.e. from 4.5.2010 and not retrospectively from 28.11.2008 as ordered by the State Commission.* ***Accordingly, the impugned order amending the Electricity Supply Code retrospectively from 28.11.2008 is set aside. The order regarding the amendment giving the powers to the State Commission would come into effect prospectively only from 15.12.2008."***

137. The HPPC also countered the reliance placed by the Appellant on the case of ***Tamil Nadu Spinning Mills Association Vs. Tamil Nadu Electricity Board &Anr.***, stating that the said case relates to the Regulation made under Section 50 of the EA, 2003, which relates to the recovery of electricity charges, etc. It is submitted that on account of the retrospective applicability of the Regulations made under Section 50 of the EA, 2003, the Excess Demand Charges and Excess Energy Charges were recovered retrospectively. However, in the present case, on the date when the Tariff Order was passed, the 2nd Amendment extending the control period had already been notified; as such, the question of any retrospective 'effect' of the Regulations does not arise.

138. We find the Respondent's contentions highly misleading and out of context, as both cases relate to the retrospective amendment of the Regulations, irrespective of the domain of the Regulations, and both have a commercial impact.

139. Such submissions deserve to be rejected on the face of it.

140. It cannot be denied that the reliance of the Appellant on both the judgments as deliberated above is applicable in the instant case also.

141. Reliance is also placed on the judgment dated 16.12.2022 of the Hon'ble Supreme Court ***Kerala State Electricity Board & Ors. vs. Thomas Joseph Alias Thomas M. J. & Ors.***, CIVIL APPEAL NOS. 9252-9253 OF 2022 (arising out of SLP(C) Nos. 7860-7861 of 2018), wherein it is held as under:

> *"64. At this stage, it is apposite to state about the rule making powers of a delegating authority. If a rule goes beyond the rule making power conferred by the statute, the same has to be declared invalid. If a rule supplants any provision for which power has not been conferred, it becomes invalid. The basic test is to determine and consider the source of power, which is relatable to the rule. Similarly, a rule must be in accord with the parent statute, as it cannot travel beyond it.*
>
> 65. *Delegated legislation has come to stay as a necessary component of the modern administrative process. Therefore, the question today is not whether there ought to be delegated legislation or not, but that it should operate under proper controls so that it may be ensured that the power given to the Administration is exercised properly; the benefits of the institution may be utilised, but its disadvantages minimised.* ***The doctrine of ultra vires envisages that a rule making body must function within the purview of the rule making authority conferred on it by the parent Act. As the body making rules or regulations has no inherent power of its own to make rules, but derives such power only from the statute, it has to necessarily function within the purview of the statute. Delegated***

legislation should not travel beyond the purview of the parent Act. If it does, it is ultra vires and cannot be given any effect. *Ultra vires may arise in several ways; there may be simple excess of power over what is conferred by the parent Act; delegated legislation may be inconsistent with the provisions of the parent Act or statute law or the general law; there may be non-compliance with the procedural requirement as laid down in the parent Act. It is the function of the courts to keep all authorities within the confines of the law by supplying the doctrine of ultra vires.*

74. *In this context, it would be apposite to refer to a passage from State of T.N. and Another v. P. Krishnamurthy and Others reported in (2006) 4 SCC 517 wherein it has been held thus:-*

> *"16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity."*

> *80. Rules or regulation cannot be made to supplant the provisions of the enabling Act but to supplement it. What is permitted is the delegation of ancillary or subordinating legislative functions, or, what is fictionally called, a power to fill up details.*

142. Also in ***Federation of Indian Mineral Industries v. Union of India, (2017) 16 SCC 186 : 2017 SCC OnLine SC 1237*****,** dated 13.10.2017, the Hon'ble Apex Court has held as under:

> *"26. The power to give retrospective effect to subordinate legislation whether in the form of rules or regulations or notifications has been the subject-matter of discussion in several decisions rendered by this Court and it is not necessary to deal with all of them—indeed it may not even be possible to do so. It would suffice if the principles laid down by some of these decisions cited before us and relevant to our discussion are culled out. These are obviously relatable to the present set of cases and are not intended to lay down the law for all cases of retrospective operation of statutes or subordinate legislation. The relevant principles are:*
>
> *(i)* ***The Central Government or the State Government (or any other authority) cannot make a subordinate legislation having retrospective effect unless the parent statute, expressly or by necessary implication, authorises it to do so.*** *[Hukam Chand v. Union of India [Hukam Chand v. Union of India, (1972) 2 SCC 601] and Mahabir Vegetable Oils (P)*

> *Ltd. v. State of Haryana [Mahabir Vegetable Oils (P) Ltd. v. State of Haryana, (2006) 3 SCC 620]].*
>
> *(ii) Delegated legislation is ordinarily prospective in nature and a right or a liability created for the first time cannot be given retrospective effect. (Panchi Devi v. State of Rajasthan [Panchi Devi v. State of Rajasthan, (2009) 2 SCC 589 : (2009) 1 SCC (L&S) 408])*
>
> ---------"

143. Therefore, in the absence of express statutory authorization, delegated legislation in the form of rules or regulations cannot operate retrospectively. In ***ITO v M.C. Ponnoose, AIR 1970 SC 385,*** this rule was spelt out in the following terms:

> *"**The courts will not, therefore, ascribe retrospectivity to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature.** Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the legislature it may or may not be possible to make the same so as to give retrospective operation. **It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the courts that***

the person or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect."

144. In light of the above, the fundamental principle governing the determination of rights is that the law in force on the date of filing crystallizes the parties' rights and obligations. On 28.08.2018, when the Tariff Petition was filed, the Haryana regulatory framework did not have any operative tariff regulations under the MYT regime since the first control period had ended and the subsequent amendment was not yet in effect.

145. The Commission's retrospective extension of the HERC MYT Regulations, 2012, lacks statutory support, as subordinate legislation cannot be applied retrospectively unless the Parent Act provides that power, as such any amendment giving retrospective effect has to be ignored as it is contrary to the principal legislation, i.e., the Electricity Act, 2003.

146. This Tribunal has held that regulations which are in conflict with the Electricity Act would have to be ignored, in the ***Star Wire (India) Vidyut Pvt. Ltd. vs HERC & Anr., (Appeal No. 183 of 2015)]*** has held that:

"*18. Thus, if the regulation is in conflict with the provisions of the said Act and is contrary to* ***<u>the same, this Tribunal will have to overlook at it so as to give primacy to the clear provisions of the said Act. In doing so, this Tribunal is not holding that a regulation, which is contrary to the provisions of the said Act is ultra vires. Such</u>***

<u>an approach does not violate the law laid down by the Supreme Court in PTC India.</u>"

147. We find the Respondents' submissions lacking merit and are rejected. In the absence of State Regulations, the tariff has to be determined based on CERC Tariff Regulations, 2014, considering the mandate of section 61 of the Electricity Act, 2003.

148. It is also seen that the Tariff Petition was filed seeking a determination of tariff under the CERC Tariff Regulations 2014, since no HERC regulations were in force. The Appellant provided a detailed proposal of the applicable tariff parameters and the calculations based on the CERC Tariff Regulations 2014.

149. The State Commission erroneously determined the tariff based on the HERC MYT Regulations, 2012, while holding as under:

> *"27…*
>
> ***Another pertinent issue raised by the petitioner as well as the Intervener is whether the Commission should proceed to determine tariff as per the CERC Norms or HERC Norms.*** *The Commission has considered the arguments of the parties on this issue and is of the considered view that* ***all the relevant parameters including Capital Cost as well as additional Capitalisation, financial structure and cost of financing, depreciation, qualifying equity for RoE and O&M expenses as well as reckoning with sale of infirm power etc. that goes into determination of tariff is with***

reference to the CoD. ***<u>In the present case the CoD of the project admittedly is 18.05.2013. This is well within the Control Period specified in the HERC MYT Regulations, 2012</u>***. *Further, as far as CERC Regulations are concerned as per Section 61(a) they, at the most, could be the one of the guiding norms hence not mandatory. While notifying HERC Regulations the norms of CERC / other SERCs as well as all other factors including comments / objections / suggestions received from the stakeholders are kept in mind. Hence, the date of filing petition, as such, is immaterial.* ***Accordingly, the Commission shall proceed with the provisions HERC MYT 2012 for determination of Generation Tariff and the methodology of recovery of the same in the present case.*** *This dispensation in the present case will also be inline with the tariff determined by the Commission in similarly placed two Sikkim based HEPs.*

37….

It needs to be noted that subsequent to the initial scrutiny of the petition, this Commission had sought additional information / data including a copy of DPR that was considered necessary for proceeding further in the matter. ***<u>Further, as the HERC MYT Regulations 2012 provides for tariff determination parameters the same shall be relied upon in the present case in line with the spirit of Section 61(a) of the Electricity Act, 2003</u>***. *Additionally, as also submitted by the Intervener Er. Rampal,* ***<u>the HERC MYT Regulations, 2012, is sufficient for the purpose of tariff determination in the present case and this Commission has not passed any order that the norms as per CERC Regulations shall</u>***

> ***be made applicable***. *Moreover, this issue has been settled by the Commission* while *determining tariff for two similarly placed Sikkim based HEPs.*

150. From the Impugned Order, the State Commission, after deliberating on the issue of whether the tariff should be determined based on CERC Tariff Regulations, 2014 or SERC Regulations, 2012, has decided in favour of SERC Regulations, 2012 on the following counts:

a. CoD of the project admittedly is 18.05.2013 and is well within the Control Period specified in the HERC MYT Regulations, 2012;
b. CERC Regulations are as per Section 61(a); they, at most, could be one of the guiding norms, hence not mandatory;
c. The date of filing the petition, as such, is immaterial; and
d. The HERC MYT Regulations, 2012, are sufficient for tariff determination in the present case.

151. Undisputedly, the observation of the State Commission is erroneous; the Commission seems to be unaware of the provisions of the State Regulations notified by it, and the CoD of the project was before the start of the control period specified in the HERC MYT Regulations, 2012.

152. As already held in the foregoing paragraphs, the SERC Regulations, 2012, were not subsisting and therefore, cannot be applied for the determination of the tariff against the petition filed by the Appellant.

153. The Appellant further argues that the HERC MYT Regulations, 2012 were framed primarily with micro and small hydro projects in mind, typically those under 25 MW. The 110 MW Project, by contrast, presents distinct technical and economic challenges that are more appropriately addressed by the comprehensive methodology embedded in the CERC Tariff Regulations, 2014. These regulations provide for adjustments based on actual saleable energy and incorporate parameters that are vital for large-scale hydro projects. The Appellant's extensive analysis shows that reliance on the HERC MYT framework results in a tariff determination that is not reflective of the project's economic realities.

154. Our attention was invited to Regulation 5.4, Regulation 5.5, Regulation 15.5, and Regulation 34 of the HERC MYT Regulations, 2012. It is therefore important to note these Regulations as under:

"5. PLANT WISE COMPUTATION OF TARIFF FOR ENERATING COMPANY

5.1 The tariff for the generating company shall be determined, plant-wise. Following shall be the categorization for the existing plants:-

S.N	Plant	Units with capacity (in
1	Panipat TPS Units 1 to 4	Unit-1: 117.8 Unit-2: 110
2	Panipat TPS Units 5 and 6	Unit-5: 210
3	Panipat TPS Units 7 and 8	Unit-7: 250
4	DCR TPS Yamunanagar Units 1 and	Unit-1: 300

5	Rajiv Gandhi TPS Khedar (Hisar)	Unit-1: 600

5.2 The generating company shall prepare its annual accounts in a manner such that all individual plants are treated as separate business units. Any new plant commissioned during the control period shall be treated ataggregate plant level and not unit-wise for tariff computation and scheduling purposes.

5.3 The operational norms for each generating plant shall be specified unit-wise. Therefore, the statement of account should also include the unit-wise performance parameters for each plant.

5.4 The generating company shall file the tariff filing as per the above categorization. All plants indicated above and the plants which may be commissioned during the control period shall have separate interface metering with the transmission licensee(s) as per CEA (Installation and Operation of Meters) Regulations, 2006 as amended from time to time and, as and when intra state ABT is implemented, shall be scheduled separately as per the intra State ABT regulations as may be notified by the Commission from time to time.

5.5 For the plants ***which are not covered under ABT i.e. Western Yamuna Canal Hydro Project, Bhudkalan and Kakroi Hydro Power Plants, a single part tariff based on a normative PLF shall be determined by the Commission****."*

155. From the above, it is seen that the plants that are covered under Regulation 5.1 are the Thermal Generating Stations, and other than these TPS, the only plants that are covered are listed in Regulation 5.5. The Tariff for these Plants has

to be determined under a "***single part tariff"***.

156. Certainly, these Regulations have been framed and notified for these Generating Stations only, and at most can be extended for identical projects.

157. The same has been reiterated under Regulation 15.5 also:

> *"15.5 For the hydro plants i.e. Western Yamuna Canal Hydro project, Bhudkalan and Kakroi Hydro Plants, however, a single part tariff, based on a normative PLF and fixed cost worked out as per regulation 34."*
>
> *hereinafter, shall be determined by the Commission.*

158. Further Regulation 34 provides as under:

> ***34. NORMS OF OPERATION AND DETERMINATION OF TARIFF FOR HYDRO POWER PLANTS***
>
> *Norms of operation and determination of tariff for hydro power plants other than those covered under renewable energy sources, shall be as under:*
>
> *(…)*
>
> *34.2* ***Auxiliary energy consumption for Micro Hydro Generating plants including WYC projects and Kakroi shall be 0.5% of the energy generated****.*

159. Undisputedly, the CERC Tariff Regulations, 2014, which were in force and

designed to handle the economic and technical complexities of large-scale projects, should have governed the tariff determination. This is particularly critical for a project of 110 MW capacity, where the economic realities and technical parameters differ substantially from those envisaged under a regime primarily tailored for micro or small hydro projects.

160. We agree with the submissions of the Appellant that:

1. HERC MYT Regulations provide for the determination of a Hydro Project covered under the intra-state ABT mechanism.
2. It only provides for three hydro projects, i.e., *Western Yamuna Canal Hydro Project, Bhudkalan and Kakroi Hydro Power Plants,* for the purpose of determining of tariff, which are not covered under the intra-state ABT mechanism.
3. It restricts the determination of the tariff for Hydro Projects based outside the State of Haryana, whose scheduling, such as the Project of the Petitioner being done by the Regional SLDC, i.e., ERLDC.
4. Covers only small and micro Hydro Projects.
5. HERC MYT Regulations, 2012 have been framed considering only the intra-state generation of Haryana, i.e., Thermal as well as Micro Hydro plants. It is important to mention that, for micro hydro plants, the Single part tariff is similar to the lines of tariff for renewable energy sources. However, such a tariff would not have bearing and applicability over a large hydro project such as that of the Petitioner.
6. It does not contemplate any other tariff mechanism apart from the single part tariff.

161. The Appellant's Project is located in the State of Sikkim and is a large hydro project with a capacity of 110 MW. Further, its scheduling is undertaken by the Eastern Regional Load Dispatch Centre and is covered under the Inter-State ABT mechanism. Considering the nature of the Project, its tariff ought to be a two-part tariff, having both energy and fixed charges. This is unlike the one-part tariff contemplated under the HERC MYT Regulations, 2012.

162. The Appellant also submitted that the State Commission while considering the projected design energy has erroneously arrived at 537.50 MU and saleable energy of 468.27 MU despite the submissions of the Appellant regarding the fact that on account of force majeure events such as non-availability of transmission system to evacuate the power, reduction in the NOC from the load dispatch centre, low availability of water in dam etc, the actual generation of the Project was on sustained basis since COD of the Project on the lower side vis-à-vis design energy.

163. Also argued that saleable design energy ought to have been determined given the prevailing circumstances and force majeure events to provide a cost-reflective tariff to the Project; however, ignoring the net actual saleable energy based on gross generation, HERC has substantially reduced per unit tariff recovery of the Project and also, the net yearly pay-out has been made based on actual generation, which would resultantly reduce recovery of the Project substantially leading to under recovery of the cost.

164. Our attention was invited to the observation of the State Commission at para 53 of the Impugned Order, where the State Commission has specifically recorded

the submissions of the Appellant regarding the actual generation of the Project is lower than the design energy, para 53 is reproduced below:

> "*53.* ***Design Energy***
> *In accordance with the above, the Commission has considered the saleable energy as 468.27 Mus after taking into consideration design energy of 537.50 MU reduced by auxiliary energy consumption and free power to home State.* ***This is notwithstanding the submissions of the petitioner that due to evacuation constraints, flash flood, maintenance work and NOC issues, the actual generation has been lower than the design energy. The Commission has taken note of the submissions of the petitioner in the hearings held in the matter that due to non-availability of transmission system to be constructed by PGCIL to evacuate power, reduction in NOC from NRLDC since CoD ranging from 55 MW to 110 MW actual generation was on the lower side vis-à-vis design energy (…)***"

165. However, after recording the above, the State Commission held as under:

> "*56. The Commission notes that the actual gross generation has been lower than the design energy on a sustained basis. Hence, the petitioner, as also ordered in the Sikkim based two HEPs,* ***<u>is entitled for revision in the design energy after following the due procedure. In such circumstances the ceiling tariff / capital cost agreed upon by the parties will be of no significance</u>****.* ***<u>The parties,</u>***

> ***in line with the terms of PPA, may take a call on the 'exit option' within 30 days under intimation to the Commission. In case the exit option is not exercised by either party, the differential amount between the APPC (being paid to the petitioner) and the levelized tariff now determined shall be payable to either party as the case may be.*** *The interest rate on the said amount will the simple interest rate, equivalent to the interest rate allowed by the Commission on working capital borrowings of the Discoms in the ARR / Tariff order(s) for the relevant year(s).*"

166. Thus, HERC has acknowledged that considering the sustained failure of the Project in achieving actual generation in terms of the design energy, it gave liberty for revision of the design energy of the Project after following due process, and that the tariff would be re-determined basis the revised design energy.

167. Accordingly, once the design energy is revised, the Appellant is entitled to a tariff based on the revised design energy.

168. Pursuant to the above Order, the Appellant approached the Central Electricity Authority ("CEA") vide letter dated 30.05.2023 seeking revision of design energy based on the detailed report on the revised hydrology of the Project. Thereafter, the CEA vide letter dated 06.09.2023 acknowledged the need for revision in the design energy because of the reason that the actual generation of the Project has been lower than the design energy on a sustained basis. Therefore, it issued directions to the Appellant to approach the Energy and Power Department, Government of Sikkim, considering that the earlier determination of

the design energy was provided by the same, as per the procedure followed.

169. The Energy and Power Department, Government of Sikkim vide its letter dated 29.12.2023, thereafter, has accorded revision in the design energy from 537.50 MU to 488.86 MU.

170. In the light of the observations of the State Commission at para 56, we allowed the above details, as filed through the I.A. No. 1810 of 2024, to be taken on record. Accordingly, the captioned Application has been filed to bring on record, considering that the revised design energy is a necessary factor to be considered for conclusive adjudication of the Appeal.

171. We agree that Design energy forms the very basis and nucleus for the determination of per unit recovery of tariff, and therefore, it is imperative to be considered while determining the final applicable tariff.

172. **Thus, we conclude that the tariff should be recalculated using the CERC Tariff Regulations, 2014, with due reliance on actual saleable energy figures, ensuring that the tariff reflects both the commercial reality and the spirit of the law.**

173. The Appeal on this count is allowed in favour of the Appellant.

Issue b): Whether the Appellant is entitled to reimbursement of the differential amount of tariff determined under the CERC Tariff Regulations, 2014 and APPC for the power already supplied to HPPC,

and whether the claimed additional capitalization expenditure of INR 12.26 Crore and major overhaul expenditure of INR 10.86 Crore should be added to the capital cost for computation of O&M expenses?

Reimbursement of Differential Tariff

174. Power from the Project was supplied to HPPC initially under an interim arrangement at an Average Power Purchase Cost (APPC) while the final tariff determination was pending. The Appellant asserts that had the tariff been determined under the proper framework (i.e., the CERC Tariff Regulations, 2014), the resulting tariff would have been higher than that fixed under the HERC MYT Regulations, 2012. The difference between these two determinations constitutes a loss or differential amount for which reimbursement is sought.

175. Undisputedly, any interim arrangement is made subject to the final determination of the tariff, and any differential amount is to be adjusted accordingly, whether positive or negative.

176. It is a well-recognized principle that parties should not be unjustly enriched at the expense of others. In the context of this appeal, if it is established that the tariff should indeed have been determined based on the CERC Tariff Regulations, 2014, then the Appellant has effectively been short-changed by receiving interim payments at APPC rather than the actual tariff that the correct regulatory regime would have yielded.

177. The Appellant’s calculations, supported by detailed financial analyses in its

submissions, demonstrate the quantum of the differential amount, reflecting both the cumulative nature of the shortfall and its adverse impact on the Project's revenue stream.

178. While the Appellant's claim is compelling from the perspective of equity and fairness, it is incumbent upon the Tribunal to ensure that any reimbursement is subject to a rigorous prudence check. This would involve verifying the actual energy supplied, the financial data submitted, and ensuring that the differential calculation accurately reflects the commercial realities of the Project. Such verification is necessary to prevent any potential over-compensation and to maintain the integrity of the tariff determination process.

179. Our analysis of the interim arrangement reveals that the Appellant supplied power to HPPC at the interim Average Power Purchase Cost (APPC) while awaiting a final tariff determination. If the tariff were to be determined using the correct CERC norms, it is demonstrable that the resultant tariff would have been higher than the interim rate.

180. The principle of equity and the doctrine of preventing unjust enrichment demand that HPPC should not be allowed to benefit from a regulatory misapplication that has adversely affected the Appellant's revenue. Therefore, upon recalculation of the tariff following the CERC Tariff Regulations and the conclusions made in this judgment, the Appellant must be reimbursed for the differential amount, i.e., the shortfall between the higher tariff and the interim APPC payments already made, along with carrying cost.

181. This reimbursement must be calculated, ensuring that the computation reflects the actual saleable energy and accurate cost parameters, thereby restoring the Appellant to the position it would have occupied had the correct regulatory framework been applied from the outset.

182. The Appeal is allowed to this count.

Inclusion of Additional Capitalization and Major Overhaul Expenditures

183. The Appellant has submitted that additional capitalization expenditure amounting to INR 12.26 Crore and major overhaul expenditure of INR 10.86 Crore were incurred as an integral part of maintaining and improving the operational efficiency of the Project. These expenditures, the Appellant argues, are not merely incidental but rather essential to ensuring the long-term viability and reliability of the Project's output. In its submissions, the Appellant has provided detailed documentation and comparative analysis with similar large-scale hydro projects, showing that such costs are typically deemed recoverable when determined under the CERC framework.

184. The CERC Tariff Regulations, 2014, expressly provide for the inclusion of certain additional expenditures in the capital cost, provided that these expenditures meet the criteria of prudence and are necessary for the efficient functioning of the Project. This contrasts with the more restrictive approach taken by the HERC MYT Regulations, 2012, which were not primarily designed for large hydro projects.

185. The Appellant's detailed submissions, including cost analyses, support the inclusion of these additional costs. HPPC contends that such costs were not pre-approved and fall outside the original capital cost parameters. However, it is well settled that when a project faces unanticipated delays or operational challenges, such as those caused by natural adversities, the subsequent costs incurred for overhauling or capitalizing improvements may be justifiably included, provided they do not distort the overall cost structure unjustifiably.

186. The State Commission, while considering such costs, has held as under:

> "*41. The additional capital expenditure claimed by the petitioner for the period from the FY 2018-19 to the FY 2020-21 is Rs. 12.26 Crore. The Commission observes that the additional capital expenditure amounting to Rs. 12.26 Crore since the FY 2019 i.e. after the CoD as submitted by the petitioner has been incurred on building and civil works, plant and machinery, IT equipment etc.* ***In the absence of convincing justification and evidence of actual expenditure, as part of original scope, the additional capital expenditure after CoD has not been considered.***"

187. However, on examining the details, it is seen that the Appellant has persuasively demonstrated that the additional capitalization expenditure of INR 12.26 Crore and the major overhaul expenditure of INR 10.86 Crore were incurred not as discretionary expenses, but as necessary measures to enhance the operational reliability and long-term viability of the Project.

188. Under the CERC Tariff Regulations, 2014, there is a clear provision for the inclusion of such expenditures in the capital cost provided that they satisfy the tests of prudence, necessity, and reasonableness. Our examination of the supporting documentation indicates that these expenditures fall within the ambit of recoverable costs, as they were incurred in response to operational exigencies and unforeseen challenges.

189. It is also noted that the State Commission has failed to render any findings about the major overhaul cost. The Appellant has sought recovery of major overhaul cost, however, no direction or observation has been made by the HERC about the same. As a quasi-judicial authority, HERC ought to have provided cogent reasons for disallowing the additional capitalization and major overhaul cost, reliance is placed on the Hon'ble Supreme Court judgment in ***Secretary and Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors.***

190. Consequently, we conclude that subject to an independent prudence review, the claimed additional costs i.e. additional capitalization and major overhauling cost should be incorporated into the capital base, thereby ensuring that the tariff reflects the total cost burden borne by the Project and that the Appellant is not unduly penalized for legitimate expenditure incurred in maintaining the plant's performance.

191. The Appeal is allowed and remanded on this count.

Issue c): Determination of Debt-to-Equity Ratio

192. The Appellant contends that the Project's actual financing structure was based on a Debt-to-Equity ratio of 65:35 rather than the 70:30 ratio used by the Commission. A lower debt component, as argued, would lead to a higher return on equity (RoE) and a tariff computation that more accurately reflects the risk and actual cost of capital of the Project. The Appellant supports its claim with financial statements demonstrating that the actual disbursement of funds and equity infusion were more consistent with a 65:35 split.

193. Under the HERC MYT Regulations, 2012, a 70:30 ratio was prescribed. However, the CERC Tariff Regulations, 2014 provide for a more flexible and market-reflective approach to the debt-equity structure, acknowledging that financing conditions may vary on a project-specific basis.

194. HPPC argues that consistency among similarly placed projects mandates the application of the 70:30 ratio. Yet, the Appellant's submissions indicate that the financial closure and actual fund flows suggest a structure closer to 65:35. In evaluating this issue, this Tribunal is required to determine which ratio best reflects the genuine cost of capital for the Project, taking into account both statutory guidance and the specific evidence presented.

195. The determination of an appropriate debt-to-equity ratio is critical in accurately reflecting the cost of capital and thereby the tariff. The Appellant contends, with supporting financial evidence, that the actual financing structure of the Project corresponds to a 65:35 ratio, rather than the regulatory presumption of a 70:30 ratio imposed under the HERC MYT Regulations, 2012. A more precise reflection of the financing mix is essential because a lower debt component would

naturally result in a higher permissible return on equity, aligning the tariff more closely with the actual economic risk profile of the Project.

196. In weighing the evidence, we acknowledge that while uniformity across similarly placed projects is important, the overriding requirement is to capture the true cost of capital in a manner that is both economically rational and legally sound.

197. Therefore, we direct that a detailed re-examination of the Project's financing structure be undertaken, and should the evidence support the Appellant's claim, the tariff computation must be adjusted to reflect a 65:35 ratio. This approach ensures that the tariff determination is not only consistent with statutory guidelines under the CERC Tariff Regulations, 2014, but also accurately reflects the financial reality of the Project.

OUR CONCLUSION

198. After an exhaustive review of the submissions, documentary evidence, and the applicable legal principles, this Tribunal reaches the following conclusions:

A. **On the Regulatory Framework:**

199. The retrospective application of the HERC MYT Regulations, 2012 is found to be legally unsustainable given the principles of crystallization of rights and the non-retroactivity of subordinate legislation without explicit statutory authorization.

200. On the factual basis that, on 28.08.2018, the applicable regulatory

framework was that of the CERC Tariff Regulations, 2014, and that these regulations are better suited to address the nuances of a large hydro project, the tariff determination must be re-determined based on the CERC Tariff Regulations, 2014.

201. The re-determination should take into account the project's actual saleable energy, ensuring that the tariff reflects economic reality.

B. **On Reimbursement of Differential Tariff:**

202. Should the tariff be recalculated under the CERC Tariff Regulations, 2014, HPPC is directed to reimburse the Appellant for the differential amount. This differential, representing the shortfall between the interim APPC payments and the tariff that would have been determined under the proper framework, along with the carrying cost at LPS rate as per the PPA, is compensable to restore the Appellant to its rightful economic position. Such reimbursement shall be calculated following the actual energy supplied and cost parameters.

C. **On the Inclusion of Additional Expenditures:**

203. The additional capitalization expenditure of INR 12.26 Crore and the major overhaul expenditure of INR 10.86 Crore shall, subject to an independent prudence review, be included in the capital cost base to compute O&M expenses. This inclusion is consistent with the approach of the CERC Tariff Regulations, 2014, and it is crucial to ensure that the tariff determination accurately reflects the total cost incurred in operating and maintaining the Project.

D. **On the Debt-to-Equity Ratio:**

204. A reassessment of the Project's financing structure should be undertaken to determine whether the actual debt-equity ratio is 65:35, as claimed by the Appellant, or the regulatory presumption of 70:30 is appropriate as per CERC Regulations.

ORDER

For the foregoing reasons as stated above, we are of the considered view that Appeal No. 85 of 2022 has merit and is remanded to HERC to the extent mentioned in the foregoing paragraphs.

It is hereby ordered that:

1. The impugned tariff order dated 23.02.2022 is set aside to the extent that it relied on the retrospective application of the HERC MYT Regulations, 2012.
2. The tariff for the Project shall be re-determined based on the CERC Tariff Regulations, 2014, taking into account the actual saleable energy generated by the Project.
3. HPPC is directed to reimburse the Appellant the differential tariff amount, computed as the difference between the revised tariff (as per the CERC framework) and the interim APPC paid, subject to a detailed prudence and verification report.
4. The additional capitalization expenditure of INR 12.26 Crore and the major overhaul expenditure of INR 10.86 Crore shall be permitted to be included

in the capital cost to determine O&M expenses, following an independent prudence review.

5. The Parties are directed to submit detailed financial and evidentiary records before the State Commission to facilitate a reassessment of the Project's financing structure to conclusively determine whether the Debt-to-Equity ratio should be 65:35 or 70:30. The tariff recalculation shall be adjusted accordingly based on the outcome of this re-examination.

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

PRONOUNCED IN THE OPEN COURT ON THIS 26th DAY OF MAY, 2025.

(Virender Bhat) **Judicial Member**	**(Sandesh Kumar Sharma)** **Technical Member**

REPORTABLE / ~~NON-REPORTABLE~~

pr/mkj/kks