APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 264 of 2019

APPEAL NO. 232 of 2019

APPEAL NO. 77 of 2020

Dated : 03rd November, 2020

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member (Electricity)

IN THE MATTER OF :

APPEAL NO. 264 of 2019

M/s. Bhilangana Hydro Power Limited,
Represented by
B – 37, IIIrd Floor, Sector 1,
Noida – 201301,
Gautam Budh Nagar (U.P.) **...APPELLANT**

Versus

1. Uttarakhand Electricity Regulatory Commission
Vidyut Niyamak Bhawan,
Near I.S.B.T, P.O- Majra,
Dehradun, Uttarakhand- 248171

2. Power Transmission Corporation of Uttarakhand Limited,
Represented by Shri Sanjaya Mittal, Director (Projects),
Vidyut Bhawan,
Near ISBT Crossing,
Saharanpur Road, Majra,
Dehradun-248002 **...RESPONDENTS**

Counsel on record for the Appellant(s) :	Ms. Shikha Ohri Mr. Matrugupta Mishra Mr. Shourya Malhotra For App1
Counsel on record for the Respondent(s) :	Mr. Buddy A. Ranganadhan Ms. Stuti Krishn For Res1 Mr. Sitesh Mukherjee Mr. Divyanshu Bhatt Mr. Syed Jafar Alam Mr. Abhishek Kumar Mr. Aryaman Saxena Mr. Arjun Agarwal For Res2

IN THE MATTER OF :

APPEAL NO. 232 of 2019

Power Transmission Corporation of Uttarakhand Limited,
Vidyut Bhawan, Near ISBT Crossing,
Saharanpur Road, Majra, Dehradun-248002 **…APPELLANT**

Versus

Uttarakhand Electricity Regulatory Commission,
"Vidyut Niyamak Bhawan",
Near I.S.B.T., P.O. Majra,
Dehradun (Uttarakhand)-248171

Bhilangana Hydro Power Limited,
B-37, 3rd Floor,
Sector 1, Noida – 201 301
Gautam Budh Nagar (U.P.) **…RESPONDENTS**

Counsel on record for the Appellant(s) : Mr. Sitesh Mukherjee
Mr. Deep Rao Palepu
Mr. Divyanshu Bhatt
Mr. Vishal Binod For App1

Counsel on record for the Respondent(s) : Mr. Buddy A. Ranganadhan
Mr. Raunak Jain
Ms. Stuti Krishn For Res1

Ms. Shikha Ohri
Mr. Matrugupta Mishra
Mr. Shourya Malhotra
Mr. Omar Waziri
Mr. Samyak Mishra For Res2

IN THE MATTER OF :

Appeal No. 77 of 2020

M/s. Bhilangana Hydro Power Limited,
Represented by Shri Pramod Kumar Arora
B – 37, IIIrd Floor, Sector 1,
Noida – 201301,
Gautam Budh Nagar (U.P.) **...APPELLANT**

Versus

3. Uttarakhand Electricity Regulatory Commission
Through its Secretary,
Vidyut Niyamak Bhawan,
Near I.S.B.T, P.O- Majra,
Dehradun, Uttarakhand- 248171

4. Power Transmission Corporation of Uttarakhand Limited,
Represented by Shri Sanjaya Mittal, Director (Projects),
Vidyut Bhawan,
Near ISBT Crossing,
Saharanpur Road, Majra,
Dehradun-248002 **...RESPONDENTS**

Counsel on record for the Appellant(s) : Ms. Shikha Ohri
Mr. Matrugupta Mishra
Mr. Pratiksha Chaturvedi
Mr. Shourya Malhotra
Mr. Samyak Mishra
Mr. Mohd Aman Sheikh
Mr. Omar Waziri For App1

Counsel on record for the Respondent(s) : For Res1

Mr. Shankh Sengupta
Mr. Abhishek Kumar
Ms. Harneet Kaur
Mr. Sahil Mendiratta
Mr. Arjun Agarwal
Mr. Karan Arora For Res2

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The present Appeals being cross appeals have been filed challenging the findings of Uttarakhand Electricity Regulatory Commission's (herein after referred as "**UERC**") in the Order dated 22.11.2018 disposing of Petition No. 45 of 2018 (herein after referred as "**Impugned Order**").

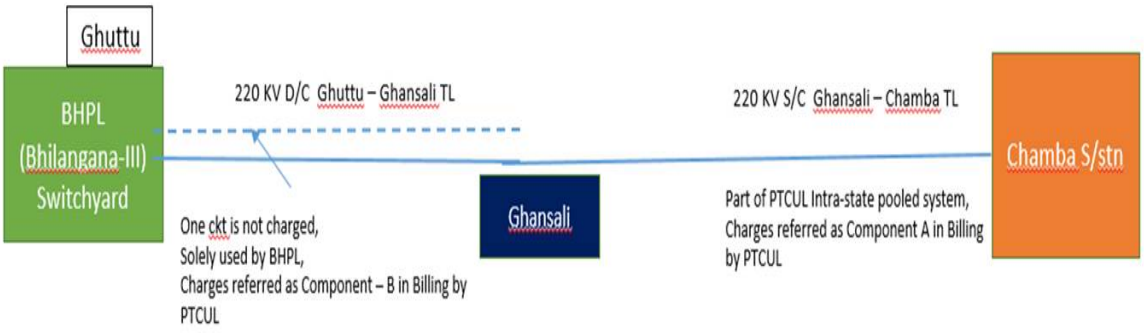
1.1 Bhilangana Hydro Power Limited (herein after referred as "**BHPL"**), the Appellant in Appeal No. 264 of 2019 has challenged the Impugned Order to the extent of findings rendered in para 26 of the Impugned Order. Power Transmission Company of Uttarakhand Limited (herein after referred as **"PTCUL"**), the Appellant in Appeal No. 232 of 2019 has challenged the Impugned Order to the extent of the findings on the payment of Late Payment Surcharge.

1.2 Additionally, BHPL has also filed Appeal No. 77 of 2020, challenging the order dated 02.12.2019 passed by UERC in Petition No. 17 of 2019, which is a consequential order to the above order dated 22.11.2018. As such, the findings on the issues involved in Appeal No. 264 of 2019, will have the same bearing on the issues involved in the aforesaid Appeal No. 77 of 2020.

2. **Brief Facts of the Case (s):**

The facts which led to the filing of the present Appeals are briefly narrated below:

2.1 BHPL set up a 24 MW small Hydroelectric Power project (hereinafter referred to as the "**Bhilangana-III**") and executed a Transmission Service Agreement dated 25.10.2008 (hereinafter referred to as the "**TSA"**) with PTCUL for evacuating power from the Bhilangana-III project. Power from Bhilangana III is being evacuated by a 220 kV S/C line from Power Project location at Ghuttu to Ghansali. A 220 kV sub-station at Ghansali was planned for existing/ proposed hydroelectric projects in the vicinity / valley. However, works for 220 kV Sub-station at Ghansali could not be taken up by PTCUL and line from Ghuttu was taken directly to Chamba 220 kV S/S as depicted in the diagram below:



2.2 Section between Ghansali and Chamba, part of Intra-state Transmission System, is referred to as Component A and Section between Ghuttu to Ghansali, is referred to as Component B in this judgment.

2.3 The said TSA dated 25.10.2008 between PTCUL and BHPL, *inter alia*, lays down the terms with regard to the payment of Late Payment Surcharge (LPS) to PTCUL, which shall be governed by the Regulations of the Appropriate Commission.

2.4 The Commission notified Open Access Regulations in Transmission and Distribution on 28.10.2010. There were no Open Access Regulations in the State of Uttarakhand before this date. The Commission also notified Tariff Regulation for RE Projects in the State of Uttarakhand on 06.07.2010. Thus, the TSA between the Appellant and Respondent was prior to notification of both the Regulations.

2.5 BHPL started evacuating power post commissioning of its Bhilangana III using the said line. PTCUL raised invoices for transmission of power at some arbitrary rate which was challenged before the Respondent Commission. Respondent Commission vide its Order dated 11.12.2012 set aside the invoices.

2.6 The Respondent Commission passed on order on 29.04.2013 wherein it imposed the entire cost of single circuit of the 220 kV Ghuttu - Ghansali line on BHPL and clarified that the 220 kV S/C Chamba-Ghansali line, 01 No. 220 kV bay at 220 kV S/s Chamba will be part of the overall intra-State transmission network.

2.7 The interim/provisional tariff for Component B was first determined by the Respondent Commission by an order dated 06.05.2013.

2.8 Being aggrieved by the aforesaid orders dated 29.04.2013 and 06.05.2013, BHPL filed Appeal Nos. 128 and 129 of 2013, respectively before this Tribunal. PTCUL also filed a cross-appeal being Appeal No. 163 of 2013 against the order dated 06.05.2013. This Tribunal vide a common order dated 29.11.2014, dismissed the aforesaid appeals. After dismissal of the appeals, BHPL paid the principal dues on 10.12.2014 and 08.01.2015 against the transmission charges for the period from 01.05.2012 till 30.11.2014.

2.9 Thereafter, BHPL filed civil appeals before the Hon'ble Supreme Court challenging the aforementioned order of this Tribunal. The Hon'ble Supreme Court by an order dated 10.05.2018 dismissed the appeal and granted leave to BHPL to approach the Ld. Central Commission to demonstrate that for any particular period the transmission was inter-state and on this being established, the Ld. Central Commission will be at liberty to modify the charges which will be treated as provisional till then. If no such application is filed within three months, the impugned order will be treated as final.

2.10 The State distribution licensee/Uttarakhand Power Corporation Ltd. ("**UPCL**") has been floating short term tenders for purchase of RE power. Bhilangana-III, a renewable energy generator in the State of Uttarakhand, participated in the said tenders through TATA Power Trading Company Ltd. ("**TPTCL**") and having qualified for the tenders started supplying power under the aforesaid arrangements w.e.f. 03.04.2015. This supply to UPCL through TPTCL was being made under various short term power purchase agreements till March 2020. However, with effect from 01.04.2020, BHPL is supplying power directly to UPCL under a LOI dated 16.03.2020.

2.11 PTCUL continued to raise invoices for transmission charges and late payment surcharge towards the Component-B. Against the said invoices, BHPL paid all transmission charges under a covering letter dated 08.06.2018. However, the basis of levy of LPS could not be settled amicably leading to Petition No. 45 of 2018.

2.12 Thereafter, BHPL filed a petition, being Petition No. 45 of 2018, before the Respondent Commission challenging the illegal and arbitrary demand for Late Payment Surcharge (LPS) raised by PTCUL towards recovery of transmission charges towards Component B, seeking, *inter alia,* the following prayers:

> *"i. Set aside and quash the demand for wrongly computed LPS in the monthly invoices dated 05.06.2018 and 04.07.2018 and the supplementary invoices dated 05.06.2018 and 02.07.2018 and hold the same as illegal and no effect can be given thereto;*
>
> *ii. Direct the Respondent not to claim LPS for the period, when the Petitioner was supplying power to UPCL (through Tata Power Trading Company Ltd.);*
>
> *iii. Direct the Respondent to claim LPS, if any only after the expiry of 30 days from the order passed by the Hon'ble Appellate Tribunal for Electricity on 29.11.2014 in Appeal No. 128 and 129 and 163/2013;*
>
> *iv. Direct the Respondent licensee to claim interest, if any, at simple interest @1.25% per month;*
>
> *v. Pass such other and further orders, as the Commission may deem fit and proper in the facts and circumstances of the present case."*

2.13 Notably all issues raised in Petition No. 45 of 2018 were limited only to "LPS" for transmission charges and there was no issue for transmission charges in the petition. All the invoices towards Component A were billed as NIL.

2.14 The Respondent Commission framed the following issues to be decided in Petition No. 45 of 2018:

> *"(i) Whether all invoices and consequential claim of LPS by the Respondent licensee for the period prior to the determination of Transmission Charges by the Commission vide its Orders dated 29.04.2013 and 06.05.2013 are legal and just.*
>
> *(ii) Whether the Interpretation of the word 'outstanding dues' for calculating LPS @ 1.25 % per month simple interest has been correctly done by the Respondent.*
>
> *(iii) Whether Petitioner is liable to pay Transmission Charges while supplying power to UPCL through a trader, i.e. TPTCL.*
>
> *(iv) Whether the claim of the Petitioner that the LPS, if any, is applicable only after the expiry of 30 days from the order passed by the Hon'ble Appellate Tribunal for Electricity on 29.11.2014 in Appeal No. 128 and 129 and 163/2013 is justified."*
>
> *(emphasis supplied)*

2.15 The Respondent Commission while deciding Issue-III in the impugned order, held as follows:

> *"26. With regard to the 3rd issue, the Commission would like to clarify that during the period when the Petitioner, a generator located in the State, is supplying power to the distribution license, i.e. UPCL through a trader, i.e. TPTCL, it is liable to pay all the charges including transmission charges and losses along with late payment surcharge, if any, to the Respondent licensee for use of its intra-state transmission system and the dedicated line i.e. 220 kV D/C Ghuttu-Ghansali line in accordance with the Open Access Regulations, 2015 as well as the (then prevalent) RE Regulations".*

2.16 BHPL filed a review petition, being Miscellaneous Application No. 102 of 2018, before the Respondent Commission seeking a review of the Impugned Order. However, the Respondent Commission by an order dated 24.01.2019 dismissed the review petition.

2.17 Thereafter, PTCUL raised an invoice on 11.03.2019 for an amount of Rs. 21,66,22,262.84/- for the first-time claiming transmission charges

and LPS towards Component A, that is for use of intra-State transmission network by BHPL for supply of power to UPCL.

2.18 BHPL has filed Appeal No. 264 of 2019 against the findings of Impugned Order.

2.19 As regards Appeal No. 232 of 2019, PTCUL has filed the same on account of the findings rendered by the UERC in following paras of the Impugned Order:

> *"Commission's view*
> *…*
> *24. The Commission would like to clarify the 1st issue in the light of the provisions of the Act. Section 62 of the Electricity Act, 2003 stipulates as under:*
>
> > *"Section 62 (Determination of tariff):- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –*
> > *(a) supply of electricity by a generating company to a distribution licensee: …*
> > *(b) transmission of electricity;*
> > *(c) wheeling of electricity;*
> > *(d) retail sale of electricity:"*
>
> From the perusal of Section 62 of the Act, it is unambiguous that the power to determine the tariff of the licensee/generating companies in any financial year lies with the Commission. Therefore, any bill raised at a tariff other than that determined by the Commission is illegal and ought to be struck down. The Commission, in its Order dated 11.12.2012, had taken a very categorical view in this regard and stated as under:
>
> > *"11. Based on the above, the Commission holds that the bills raised for transmission charges, for the transmission system from Bhilangana-III SHP to 220 kV S/s Chamba, by Respondents are not backed by proper authority.*

> *Consequently, their subsequent coercive actions of issue of notice for disconnection, placing embargo on scheduling of power etc. are not valid and deserve to be struck down ...*
>
> *12… The Petitioner shall furnish an undertaking to the Respondent that on determination of transmission charges, as aforesaid, by the Commission backlog of payment shall be cleared within 30 days of receipt of Order of the Commission to be issued by the Commission at a later date…"*

In the instant case, the Commission, for the first time, determined the transmission charges of the dedicated 220 kV D/C Ghuttu-Ghansali line for FY 11-12, FY 12-13 and for the first control period (FY 2013-14 to FY 2015-16) in its Order dated 06.05.2013. However, PTCUL without waiting for any approved interim/provisional/final tariff by the Commission arbitrarily raised invoices on the Petitioner which were illegal & lacked authority. The Commission has also held the same in its Order dated 11.12.2012. The submission of the Respondent that the Commission did not restrict it from raising any provisional bill is also baseless as the Commission in its Order dated 11.12.2012 had held that the bills raised were not backed by authority and, accordingly, restrained the Respondent from taking any coercive action on account of non-payment by the Petitioner. The Commission, accordingly, had also directed the generator to submit an undertaking in this regard that the entire backlog would be cleared within 30 days from the determination of transmission charges. Here in the instant matter, the Respondent company has construed the backlog as inclusive of LPS also, whereas the Commission is of the view, that LPS becomes due only when the legitimate bills remain unpaid. Any bills for transmission

charges raised not based on approved tariff will not be legal. Hence, in line of the Commission's Order dated 11.12.2012, PTCUL was legally allowed to raise bills consequent to 06.05.2013.

Therefore, all the invoices and consequential claims of LPS raised before 06.05.2013 by the Respondent licensee, i.e. PTCUL against the transmission charges of the dedicated line being solely used by the Petitioner, are arbitrary and illegal and deserve to be struck down.

…

25. With regard to the 2nd issue, it is to state that the Commission on the clarification sought by the Respondent had vide its letter dated 14.05.2015 clarified that:

> *" With regard to methodology for computation of late payment surcharge it is clarified that a simple interest @ 1.25% per month should be levied for the purpose of calculating late payment surcharge on the outstanding dues."*

Considering LPS in the outstanding principal amount and then again charging LPS@ 1.25% would tantamount to calculating it as compound interest and not otherwise. The Respondent licensee in this regard has taken refuge of the term outstanding dues whilst ignoring the term simple interest. The Respondent should have construed the intent of the letter dated 14.05.2015 harmoniously and not in isolation to its advantage, so as to remove any inconsistency.

Hence, from the clarification as above, it is amply clear that LPS for each month should be computed by levying a

simple interest @ 1.25% per month on the outstanding principal amount (excluding LPS) outstanding at the end of the previous month.

(Underline Supplied)

2.20 Another petition was filed by BHPL (Petition No. 17 of 2019). UERC vide an order dated 02.12.2019 dismissed Petition No. 17 of 2019, due to the pendency of the present appeal. Aggrieved by the Commission's Order dated 02.12.2019, BHPL has filed being Appeal No. 77 of 2020, before this Tribunal.

3. **Since, Appeal No 264 of 2019 and Appeal No. 232 of 2019 arise out of the same Impugned Order, therefore, we decide to adjudicate both appeals by this common judgment. Further, once the issues in the aforesaid appeals are decided, the same will have a consequential effect on Appeal No. 77 of 2020.**

4. We have heard arguments of the counsel for the Appellants and the Respondents in the batch of the Appeals at length over several hearings.

Appeal No. 264 of 2019

5. Mr. Basava Prabhu S. Patil, learned Senior Counsel appearing for the Appellant in Appeal No. 264 of 2019 has made the following oral submissions as also in the written submissions for our consideration:-

5.1 From the perusal of para 26 of the impugned order, the following needs to be considered:

a) The issue (3rd issue) was never raised by BHPL in its petition, and as such could not have been adjudicated. Hence, the first issue

in the appeal is whether a court of law can decide an issue which was completely alien with respect to the pleadings made in the petition. In the present case, when the entire issue in the petition of BHPL was limited to only LPS on transmission charges for "*Component B*", then there was no occasion for the Commission to have introduced by itself, and decided the issue pertaining to "transmission charges" for both "*Component A*" and "*Component B*";

b) Without prejudice, and on merits, it is stated that the aforesaid observation is a complete departure, and is completely contrary to the final orders dated 28.06.2018, 23.07.2018, 10.04.2019 and 10.04.2019 passed by the Respondent Commission itself. In all these orders, the issue involved supply of power by BHPL through the trader, TPTCL, to the distribution licensee/ UPCL.

5.2 As such, the learned senior counsel submitted that a court of law cannot decide an issue completely alien to the pleadings and the prayer made in the petition. In the present case, the entire issue raised by BHPL in the petition was limited to "LPS". There was no occasion for the Respondent Commission to introduce and decide the issue pertaining to "transmission charges" in the impugned order dated 22.11.2018. In this context, BHPL has relied upon the following judgments of the Hon'ble Supreme Court:

a) *Ram Sarup Gupta (dead) by LRs., vs. Bishun Narain Inter College*, reported in *AIR 1987 SC 1242;*

b) *Bachhaj Nahar Vs Nilima Mandal*, reported in *(2008) 17 SCC 491*

5.3 Furthermore, the impugned finding is a complete departure and is completely contrary to the final orders dated 28.06.2018, 23.07.2018,

10.04.2019 and 10.04.2019 passed by the Respondent Commission. In all these orders, the issue involved supply of power by Bhilangana through the trader, TPTCL to UPCL.

5.4 The Respondent Commission made a fundamental error by ignoring the fact that the transaction between the Appellant/ BHPL, Tata Power Trading and UPCL, were "back-to-back" transactions, which ultimately means that the power from the Appellant/ BHPL was meant for only and only the distribution licensee/ UPCL as the beneficiary. UPCL issues short-term bids for procurement of renewable power in order to meet its Renewable Purchase Obligations (RPO), which are specified under the UERC (Compliance of Renewable Purchase Obligation) Regulations, 2010. For every such bid, the Distribution Licensee (UPCL) files a petition before the Respondent Commission for approval. In this context, BHPL has cited the following orders of the Respondent Commission:

A. Order dated 28.06.2018 in the Application seeking prior approval of Uttarakhand Electricity Regulatory Commission on the Draft Power Purchase Agreement between Uttarakhand Power Corporation Limited and M/s Manikaran Power Limited, M/s Tata Power Trading Company Ltd. & M/s PTC India Ltd. for procuring Non-Solar RE Energy on short term basis for FY 2018-19.

The Respondent Commission while approving the draft power purchase agreement between UPCL and TPTCL for sale of electricity generated by Bhilangana-III, for FY 2018-19, held as follows:

> *"2.1.11. Further, the short term tender was floated by UPCL for supply of RE power at the State periphery and the generator from which power will be sourced by M/s TPTCL is located in the State*

> *of Uttarakhand at a dedicated 220 kV Bhilangana-III to Ghansali line, therefore, all the charges and losses till Ghansali will have to be borne by M/s TPTCL in accordance with the Open Access Regulations as well as RE Regulations, 2013. A 220 kV sub-station was proposed at Ghansali by PTCUL, however, due to its inefficiency the commissioning of the sub-station has got delayed and work on the same has not yet been started. Had the sub-station been erected, the power from M/s TPTCL would have been received at 220 kV substation at Ghansali and input energy would have been metered therein as the same would have been the delivery point as per the PPA. However, the trader cannot be penalized by asking it to bear the losses till 220 Chamba S/s, where the 220kV line from Bhilangana-III is interconnected. UPCL's submission in this regard is also in contradiction to the bid document. Hence, as proposed by M/s TPTCL and agreed upon by PTCUL, the Commission directs M/s TPTCL, PTCUL and UPCL to sit jointly and work out the methodology for computation of line losses considering the deemed delivery point at Ghansali and submit the report within 2 weeks of the date of Order".*

It is pertinent to mention herein that PTCUL participated in the aforesaid proceedings before the Respondent Commission and was all along aware that the liability for all transmission charges beyond Ghansali rested with UPCL.

B. In the order dated 23.07.2018, the Respondent Commission held as follows:

> *"2.1.9 Further, the short term tender was floated by UPCL for supply of RE power at the State periphery and the generator from which power will be sourced by M/s TPTCL is located in the State of Uttarakhand at a dedicated 220 kV Bhilangana-III to Ghansali line, therefore, all the charges and losses till Ghansali will have to be borne by M/s TPTCL in accordance with the Open Access Regulations as well as RE Regulations, 2013"*

C. Order dated 10.04.2019 passed in Petition No. 14/2019

The Respondent Commission by an order dated 10.04.2019, passed in Petition No. 14 of 2019, held as follows:

*"**(A) For the period 1stApril 2016 to 31 March 2017 i.e. FY 2016-17***

4.4 PPA is a legal document and it is incumbent upon the signing parties to honour the provisions of the PPA in letter and spirit. From the perusal of the above provisions of the aforesaid tenders and the related PPAs it is very clear that the HT bus of Bhilangana-III Hydro Power Project of Petitioner No. 1 is the inter-connection point with STU, as well as the delivery point and that the transmission charges of Ghuttu-Ghansali line shall be borne by UPCL.

……..

(B) For the period 1st April 2017 to 31st March 2018 i.e. FY 2017-18

4.7 From the perusal of the above provisions of the aforesaid tender invited by UPCL for purchase of non-solar renewable energy on short term basis for FY 2017-18 it is clear that State periphery has been designated as the delivery point. As per the tender document evaluation of bids shall be done at State Periphery. Clause 2 of the PPA very categorically state that all open access charges upto the delivery point i.e. Uttarakhand State Periphery shall be borne by TPTCL. Since PPA is a legal document and signed by both the parties i.e. UPCL and TPTCL, meaning thereby that all the provisions of the PPA are acceptable to both the parties, the Commission is of the view that all the Open Access charges up to the delivery point are payable by the bidder i.e. TPTCL.

…….

4.9 From the perusal of the above Orders of the Commission it is clear that Ghuttu-Ghansali line is a dedicated line which is being solely used by Petitioner No. 1 for the evacuation of power from its Bhilangana-III hydro project as of now. The transmission system consisting of proposed 220 kV GIS substation at Ghansali, 220 kV S/C Chamba – Ghansali line and 01 No. bay at 220 kV substation Chamba are system–strengthening works of the transmission licensee i.e. PTCUL and cost of these works shall be included in the overall ARR of Transmission Licensee therefore, the termination point of dedicated 220 kV Ghuttu-GhansaliGhansali shall be the deemed to be the State periphery/delivery point.

(A) For the period 1st April 2016 to 31st March 2017 i.e. FY 2016-17

UPCL has grossly violated the provisions of PPAs dated 01.10.2015 and 16.03.2016, therefore it is liable to pay the

transmission charges for Ghuttu-Ghansali line, provisionally determined by the Commission, to TPTCL after reconciling the same with transmission licensee i.e. PTCUL within 01(One) month of the issue of this Order along with late Payment Surcharge in accordance with Regulation 23 of RE Regulations, 2013 as PPA does not have the provision of LPS and the Regulations being subordinate legislation will prevail over the PPA as has also been held by the superior Appellate Authorities in numerous judgements.

(B) For the period 1st April 2017 to 31st March 2018 i.e. For FY 2017-18

No transmission charges for Ghuttu-Ghansali line are payable by UPCL to TPTCL in accordance with the provisions of the PPA dated 19.08.2017."

D. Order dated 10.04.2019 in Petition No. 08 of 2019

Application seeking prior approval of the Commission on the Draft Power Purchase Agreement between Uttarakhand Power Corporation Limited and M/s Tata Power Trading Company Ltd. for procuring Non-Solar RE Energy on short term basis for FY 2019-20.

The Respondent Commission while approving the draft power purchase agreement between UPCL and TATA Power Trading Company Ltd. for sale of electricity generated by Bhilangana-III, for FY 2019-20, held as follows:

"*2.1.15. The issue of availing open access by M/s TPTCL is immaterial in the instant case as M/s BHPL, the RE generator (source of power) is located within the State and has connectivity agreement with the PTCUL/STU for 220 kV Ghuttu-Ghansali Line for evacuation of power to be delivered to UPCL at State Periphery. Accordingly, as per the bid document and LoI, M/s TPTCL will be required to bear transmission charge of Ghuttu-Ghansali Line and ensure that energy is supplied at the State periphery. The State periphery in the instant case will be the deemed delivery point at Ghansali as approved by the Commission vide Order dated 28.06.2018 and all the charges beyond Ghansali will be borne by UPCL in accordance with the*

> *methodology adopted in the previous PPA. Hence, Clause 4(iii) of the draft PPA regarding booking of transmission corridor has no relevance as the generator from where the power is being sourced by the trader is within the State and is connected to a dedicated line and beyond the State periphery it will be UPCL's duty to evacuate power".*

Therefore, the Respondent Commission was itself of the considered view that the transmission charges for beyond "delivery point" (whether at Ghuttu, i.e. Component B or at Ghansali, i.e. Component A) are required to be borne by UPCL in the event TPTCL, as a trader, supplies power after procuring the same from Bhilangana. As such, para 26 of the impugned order, is a complete departure, and is *non-est* and illegal, wherein the liability of transmission charges was imposed upon TPTCL/ BHPL.

E. Order dated 03.08.2012

The Respondent Commission vide its order dated 03.08.2012, held that no transmission and wheeling charges are payable by renewable generators for sale of electricity to the distribution licensee or to local grid within the State.

> *15. Accordingly, the amendment of clause 2(e) (ii) of PPA dated 26.12.2011 vide supplementary agreement dated 27.02.2012 is unjustified and Respondent shall not claim transmission charges from the Petitioner beyond the interconnection point since the aforesaid PPA pertains to sale of power by the Petitioner to the Respondent, distribution licensee of the State, at APPC rates. Also clause ix of the LOI dated 29.02.2012 is erroneous and Respondent is directed to suitably amend the condition with respect to payment of transmission charges beyond the interconnection point of the Generator in its power purchase agreements with the Petitioner for the period starting from 18.11.2011 and upto 30.04.2012 when the Petitioner was selling power to UPCL.*
>
> *16. After going through the petition the Commission is of the view that the dispute between the Petitioner and the Respondent should not have arisen when RE Regulation 2010 very*

categorically specify that no transmission and wheeling charges are payable by renewable generators for sale of electricity to the distribution licensee or to local grid within the State. Moreover, the Commission had removed all the doubts experienced by UPCL and Renewable Generators/developers in interpreting, understanding and implementing certain provisions of the aforesaid regulations by issuing Removal of Difficulty Order dated 28.10.2010.

F. Order dated 29.04.2013 in Petition No. 11 of 2012 and Petition No. 20 of 2012

Apart from the aforesaid, even when power was being supplied outside the State by Bhilangana, the Respondent Commission by an order dated 29.04.2013 held that only the entire cost of single circuit of the 220 kV D/C Bhilangana-III/Ghuttu - Ghansali line (Component B) shall be borne by Bhilangana. The Respondent Commission clarified even at that stage that the 200 kV S/C Chamba-Ghansali line, 01 No. 220 kV bay at 220 kV S/s Chamba (Component A) will be part of the overall intra-State transmission network. The relevant extracts of the order dated 29.04.2013 are reproduced hereunder:

"16. Based on the above, the Commission is of the view that except for 220 kV D/C Bhilangana-III- Ghansali line other projects namely 220 kV GIS substation at Ghansali, 220 kV S/C Chamba -Ghansali line and 01 No. bay at 220 kV substation Chamba need be considered as system strengthening works of the transmission licensee and cost of these works, therefore will be included in the overall ARR of Transmission Licensee (Petitioner in the matter) to be recovered from distribution licensee of the State.

17. With regard to 220 kV D/C Bhilangana-III- Ghansali line, the Commission considers this as a transmission line which will be primarily used for evacuation of power from existing and proposed hydro generating stations in the area. The Commission has taken note of the fact that as of now while one circuit of this double circuit line is strung upto 220 kV S/s at Chamba and is being used for evacuation of power from the existing generating station namely Bhilangana-III (24 MW) the other circuit is strung uptoGhansali and is proposed to be connected to upcoming 220

kV S/s at Ghansali. It is apparent that only one circuit has been energised and put to use. Taking cognizance of the provisions of the Tariff regulations that any capital expenditure towards creation of an asset is deem fit for capitalization only if that asset is put to use, therefore, the Commission has decided to allow cost of servicing/ARR on only 50% of the capital cost incurred by the Petitioner towards the construction of the 220 kV D/C Bhilangana –III- Ghansali line which shall be recovered from the generator namely Bhilangana-III SHP, the only beneficiary as of now, subject to pro-rata recovery of this cost from other generators as and when they are commissioned and connected with this line. As far as the recovery of the balance capital cost of the line, disallowed as above, the Commission will take a view as and when the second circuit of the line is energised and put to use. Notwithstanding to what has been stated above, the Commission is also of the view that this line needs to be included by the Petitioner in the PoC mechanism for recovery of transmission charges as deemed ISTS system in accordance with CERC (Sharing of Inter-state Transmission charges & losses) Regulations, 2010, then the Petitioner shall accordingly recover the charges applicable thereof from the Generator. However, to obviate the financial difficulties being faced by the Petitioner due to non-servicing of the asset, a purely provisional determination is being made which will be subject to adjustment on determination of transmission charges for this line as deemed ISTS line by CERC."

The aforesaid view was also reiterated by the Respondent Commission in its order dated 06.05.2013, passed in Petition Nos. 05 and 08 of 2013, while determining the provisional Annual Revenue Requirement for the Associated Transmission System for Bhilangana III. The orders dated 29.04.2013 and 06.05.2013 have been upheld by the Hon'ble Supreme Court in Civil Appeal Nos. 2368-70/2015 by an order dated 10.05.2018 and have thus attained finality.

5.5 From all the above orders, it is clear that nowhere transmission charges beyond "delivery point" (whether at Ghuttu, i.e. Component B or at Ghansali, i.e. Component A) were held to be payable by either TPTCL or BHPL. Therefore, UERC was itself of the considered view that the

transmission charges, beyond delivery point are required to be borne by the distribution licensee/ UPCL in the event TPTCL, as a trader, supplies renewable power from the BHPL. As such, para 26 of the impugned order, is a complete departure, and is *non-est* and illegal, wherein the liability of transmission charges, was imposed upon TPTCL/ BHPL.

5.6 Further, from the aforesaid orders, it is apparent that as per the scheme of the bids floated by UPCL, transmission charges have to be borne by UPCL alone beyond the delivery point. In the bids floated by UPCL, the delivery point was either the inter-connection point between the generator and the transmission system, or the State transmission periphery. It is the case of the Appellant that whatever is the delivery point, no transmission charges can by imposed by PTCUL beyond such point.

5.7 As such, after passing the aforesaid orders, the Commission could not have inserted para 26 in the impugned order, whereby, without referring to any delivery point, directions were issued for making payment of transmission charges by the Appellant.

5.8 Further, BHPL submitted that the observations contained in Para 26 of the impugned order are extraneous to the issues involved in Petition No. 45 of 218 and therefore the entire paragraph and the interpretation of the UERC RE Regulations deserve to be set aside.

5.9 Without prejudice to the above stand taken, BHPL submitted that as per Regulation 38(1) of the UERC (Tariff and other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations, 2013 (herein the “UERC RE Regulations”) and Regulation 40 (1) of the UERC RE Regulations 2018,

no transmission charges can be levied upon a generator when power is being supplied to the distribution licensee in the State (UPCL).

5.10 The Commission, in para 26 of the impugned order, held that since power was being supplied by BHPL to a trader (Tata Power Trading), which thereafter supplied to the distribution licensee (UPCL), the aforesaid exemption from payment of transmission charges would not be available. In other words, the aforesaid exemption was held to be available only in the event power is being directly supplied to UPCL.

5.11 The UERC RE Regulations have been notified under Sections 61(h) and Section 86(1)(e) of the Electricity Act, 2003. These regulations specify tariff and other terms for supply of electricity from a renewable energy source to the distribution licensee in the State. Chapter 6 of the said regulations deals with miscellaneous issues such as transmission charges payable by RE generators availing open access, banking facility availed by captive generating plants, connectivity evacuation etc. Regulation 38 of UERC RE Regulations, under Chapter 6, deals with the issue of payment of transmission charges under three scenarios:

(i)	For open access for carrying electricity generated by RE based generating stations or Co-generating stations to the destination of use	RE based generating station/ consumer, shall pay the transmission and wheeling charges
(ii)	Sale of electricity to the distribution licensee or the local rural grid	No transmission and wheeling charges are payable
(iii)	Supply of electricity outside the State	Along with transmission/ wheeling charges under (i) above, transmission/wheeling charges for the dedicated network used only for evacuation of such power.

5.12 The Respondent Commission by its review order dated 24.01.2019 observed the following *qua* the applicability of the UERC RE Regulations and exemption provided thereunder, for Bhilangana:

> *"4.2.*
> *…*
> *Thus, from reading the above regulation it becomes clear that the Regulation obligates the RE generator and the consumers to pay Transmission Charges and Wheeling Charges for use of transmission system and distribution system. However, exception from payment of these charges is only allowed in cases where sale of electricity is made to the distribution licensee or to a local rural grid within the State. On hearing the submission made by the Petitioner it is clear that the Petitioner has attempted to draw an interpretation of the aforesaid Regulations for its own benefit.*
>
> *On simple interpretation of the above Regulations, it becomes clear that if any person, i.e. RE Generator in this case, sells electricity to a person other than a distribution licensee or a local rural grid, then he shall be liable to pay charges as specified in the Regulations. In contrary to this plain literal understanding, the contention of the Petitioner that his selling of power to a trader, which eventually is being purchased by UPCL, for the consumers of the State tantamount to his selling power to UPCL, is incorrect. Here it is important to emphasise the connotation of the word 'sale' mentioned in the 1st proviso to the aforesaid Regulations, which, here implies a sale made to a distribution licensee or to a local grid only through a legal Power Purchase Agreement (PPA) and not otherwise. In the instant case UPCL has a legal PPA with the electricity trader and not with the Petitioner. Therefore, the understanding as purported by the Petitioner is neither reasonable nor legal. It is only a matter of coincidence that the trader who bought power from the Petitioner further sold it to UPCL. Regulatory policies and law cannot be subject to such coincidences. Therefore, the whole premise on which the arguments challenging the validity of para 26 of the impugned Order is a mere figment.*
> *…*
> *4.4. In the present case, the Petitioner is disputing the interpretation of the aforesaid Regulations, framed by the Commission, after due public process and has stated that an error is committed by the Commission in the said Order by erroneously assuming that in order to avail the exemption, the generator has to directly sell the electricity to UPCL thereby committing misconception of law or fact. The Commission in the para 26 of the impugned Order has elaborated upon the interpretation of the 1st proviso to the aforesaid Regulations and the view of the Commission taken in the Order under Review is very much in line with the prevailing law. Considering the aforesaid principles on review by the Hon'ble Supreme Court the present petition does not stand firm with its arguments as the same fails to establish that an error*

exists on face of record. The Petitioner has come up with its own twisted & incorrect interpretation of aforesaid Regulations and is presenting it as an erroneous assumption or error committed by the Commission thereby, trying to open up arguments on the views which the Commission has already taken in the original matter. The Respondent has rightly pointed out that the Petitioner is putting up justifications against findings of the Commission and hence the same is more of an appeal in disguise rather than a review petition.

… "

5.13 PTCUL, in its reply has additionally contended that UERC RE Regulations, particularly Regulation 38, is only applicable to renewable energy generators who have received open access and have entered into a long-term power purchase agreement with the local Discom. According to BHPL, the same is wrong.

5.14 The UERC erroneously held that the exemption from payment of transmission charges, under the UERC RE Regulations, is applicable only in case of a direct sale to UPCL/direct PPA with UPCL but not when renewable energy is supplied to UPCL through a trader. The Respondent Commission lost sight of the fact that while approving the power purchase agreements between UPCL and TPTCL, it specifically approved the sale of power from Bhilangana and the delivery point was fixed as Bhilangana-III switchyard (for FY 2015-16 and FY 2016-17) and as Ghansali (for FY 2017-18, FY 2018-19 and FY 2019-20). Therefore, it was not a mere coincidence that TPTCL further sold the power to UPCL. Furthermore, all the aforesaid power purchase agreements clearly provided that the open access charges beyond the delivery point will be borne by UPCL. Therefore, even in terms of Regulations 38(1), no liability for transmission charges beyond Ghansali can be imposed upon BHPL.

5.15 The Respondent Commission also lost sight of the fact that it categorically observed in its order dated 10.04.2019 (Petition No. 8 of 2019) that no open access is required to be sought by BHPL/M/s TPTCL.

5.16 Apart from the aforesaid, the Commission made another fundamental error by ignoring the fact that the transaction between Bhilangana, TPTCL and UPCL, before 01.04.2020, was a back-to-back transaction, which ultimately means that the power from Bhilangana was meant for only and only UPCL as the beneficiary. UPCL issues short-term bids for procurement of power. For every such bid, Bhilangana issues a Letter of Intent (LOI) to TPTCL, thereby authorising the said trader to place its bid on behalf of Bhilangana. The bid placed by TPTCL clearly identifies the Bhilangana's project as the source of renewable power. The distribution licensee is procuring renewable power in order to meet its Renewable Purchase Obligations (RPO), which are specified under the UERC (Compliance of Renewable Purchase Obligation) Regulations, 2010, as evident from a reading of the aforesaid approval orders of the Commission.

5.17 Thereafter, upon succeeding in the bid, TPTCL executed a power purchase agreement (PPA) with UPCL, for the purpose of procurement of power from Bhilangana. The PPA mentions that power is being supplied by Bhilangana, while the LOIs issued by Bhilangana to TPTCL also mention that the same is for supply of power to UPCL. Even in the approval orders passed by the Respondent Commission approving the power purchase agreements dated 11.04.2015, 01.10.2015, 16.03.2016 and 19.08.2017, the Respondent Commission has specifically observed that the power being sold to UPCL will be sourced through the Bhilangana's generating station by TPTCL. The Respondent

Commission has lost sight of this important aspect while passing the Impugned Order. Hence, on account of the aforesaid "back-to-back" transactions entered by BHPL/ TPTCL with UPCL for period from 03.04.2015 to 31.03.2020, the benefit of exemption from paying transmission charges has to be extended to BHPL.

5.18 The phrase "sale of electricity" as reflected under Regulation 38(1) is not defined under the UERC RE Regulations nor under the Electricity Act, 2003.In the present case, there is a back to back arrangement, being a single transaction where energy is directly delivered to the distribution licensee by Bhilangana and the financial settlement is through TPTCL. Hence, the Commission is wrong to hold that power is being "conditionally" sold to the State. In this context, BHPL relied upon the judgment of this Tribunal PTC India Limited vs. UERC &Ors. (Appeal No. 88 of 2010).

5.19 Further, reliance is placed upon the judgment of this Tribunal in Appeal No. 15 of 2011, *Lanco Power Limited v. Haryana Electricity Regulatory Commission*, wherein it was held that the distribution licensee of the State of Haryana can maintain a petition against the generating company (Lanco) when power was supplied by the said generating company through a trader (PTC). In the said judgement, it was held that there was a "nexus" between the distribution licensee, generating company and the trader/ PTC. As such it was further held that Haryana Commission can adjudicate the dispute between the distribution licensee and the generating company.

5.20 Similarly, in the present case, the transaction between Bhilangana and UPCL, through a trader, is a "back-to-back" transaction and there is a nexus between Bhilangana and UPCL. Accordingly, the benefit of

exemption from payment of transmission charges (*Component A*) has to be granted to the Bhilangana when it supplies power to UPCL, through a trader (Tata Power Trading Co. Ltd.).

5.21 The Generation has been de-licensed under the provisions of the Electricity Act, 2003 (herein the "Act"). The Act envisages independence of the generators, in selling power to any entity or consumer at mutually decided consideration. To make this objective a reality the Act makes provision for open access whereby a generator, is entitled to non-discriminatory utilization of network of a distribution licensee and/or transmission licensee to supply power to another entity/ consumer. The Act also makes provision for granting license for electricity trading whereby such entities buy power only for re-sale and are entitled to an arbitrage. Therefore, if the UERC RE Regulations are interpreted in the manner where a Generator while selling power to a distribution licensee through a trading licensee, is going to be deprived of a benefit which the Generator is otherwise entitled to, for selling power to such distribution licensees, the synthesis on the basis of which the components of the Act are woven, would be distorted. It requires an express exclusion by a piece of legislation, otherwise by depriving a Generator from the exemption due to sale through a trading licensee, would amount to distorting the basic structure of Electricity Act, 2003. In view of the above, the reliance has been placed on judgment of the Hon'ble Supreme Court in TATA Power Co. Ltd. vs. Reliance Energy Ltd. & Ors. reported in (2009) 16 SCC 659.

5.22 It may be pertinent to mention herein that various other generators supplying power to UPCL through traders under same tender(s) with same terms and conditions are not being subjected to transmission

charges. Therefore, the UERC Regulations are being interpreted prejudicially against BHPL.

5.23 Furthermore, if the interpretation in the review order is correct then by that principle no obligated entity under Regulation 9 of the UERC RE Regulations can fulfil its RPO by procuring power from RE generators through trading licensees. If an obligated entity can procure power through a trading licensee towards achieving RPO as required under the Regulations, how can an interpretation be given whereby the exemption granted to a RE generator will be extinguished the moment there is sale of power through a trading licensee.

5.24 It has to be furthermore appreciated that, the demand raised by PTCUL for the use of intra-state network for supply of electricity from Generator situated in the State of Uttarakhand to UPCL is arbitrary and illegal as the supply of power on short term basis is governed by the Ministry of Power Guidelines as circulated and published through the Guideline of Ministry of Power 23/25/2011 R & R (Vol. III) dated 30.03.2016 (hereinafter referred to as the 'MoP Guidelines'). From a bare perusal of Clause 5.2, 5.3 and 5.4 of the MoP Guidelines it can be lucidly deduced that bidders have to quote tariff at the delivery point and it does not make any difference whether bid is made by the Generator or the Trader. The only rider is that in case of bid by the trader, trading margin are to be included at the rate quoted at delivery points. The relevant extracts of the guidelines are reproduced hereunder for convenience:

> *"5.2 The Bidder shall quote the single tariff at the Delivery Point upto three (3) decimals which shall include capacity charge, energy charge, trading margin (in case of Bidder being a Trader), applicable Point of Connection (POC) charges upto Delivery Point and all taxes, duties, cess etc. imposed by Central Govt. / State Govt. / Local bodies. Tariffs shall be designated in Indian Rupees only.*

> *5.3 For inter-State transmission of power, state/regional periphery of the Procurer to be taken as Delivery Point. For intra-state transmission of power,* ***inter-connection point of seller with STU/CTU to be taken as Delivery Point.***
>
> *5.4 For avoidance of doubt, Intra-State open access charges, transmission charges and losses along with POC injection charges and loss up to the POC interface are on Seller's account and* ***POC drawl charges and losses along with intra-state open access, transmission charges and losses are on Procurer's account.***

Therefore, all open access/ transmission charges beyond the delivery point are only to the account of the Procurer/UPCL.

5.25 Additionally, it is also contended that the impugned order is a non-speaking order, to the extent challenged in the present appeal and in excess of the prayer and the pleadings made before UERC. Petition No. 45 of 2018 pertained to the issue of late payment surcharge being claimed by PTCUL against the Component B, in the invoices. Component A was never an issue before the UERC. Bhilangana has come worse off by filing Petition No. 45 of 2019 before UERC.

6. **Mr. Sitesh Mukherjee, learned Counsel appearing for the Respondent No. 2/ PTCUL in Appeal No. 264 of 2019 has made the following oral submissions, as also in the written submissions for our consideration:-**

<u>BHPL is not entitled to be exempted from levy of transmission charges</u>

6.1 At the outset it is relevant to highlight that the BHPL did not before the UERC challenge the principal liability of payment of transmission charges wither for Component A of Component B. On the other hand, BHPL in its Petition before the UERC only challenged the levy of late payment surcharge. The same is amply clear from the prayers made by

BHPL before the UERC. The relevant extract of prayers made by BHPL in Petition No. 45 of 2018 is excerpted herein below:

> *"…a. set aside and quash the demand for wrongly computed LPS in the monthly invoices dated 05.06.2018 and 04.07.2018 and the supplementary invoices dated 05.06.2018 and 02.07.2018 and hold the same as illegal and no effect can be given thereto;*
>
> *b. direct the Respondent licensee not to claim LPS for the period when the Petitioner was supplying power to UPCL (through Tata Power Trading Company Ltd);*
>
> *c. direct the Respondent licensee to claim LPS, if any, only after the expiry of 30 days from the order passed by the Hon'ble Appellate Tribunal for Electricity on 29.11.2014 in Appeal No. 128,129 and 163/2013;*
>
> *d. direct the Respondent licensee to claim interest, if any, at simple interest @ 1.25% per month…"*

6.2 Furthermore, BHPL before the UERC in its Petition No. 45 of 2018 also took the specific ground that LPSC could not be levied since the entire chain of sale of power generated by BHPL is being done by TPTCL to UPCL. The relevant extract of Petition No. 45 of 2018 filed by BHPL before the UERC is excerpted herein below:

> *"It is pertinent to mention herein that while the appeal was pending before the Hon'ble Supreme Court, the Petitioner started supplying power to UPCL (through Tata Power Trading Company Limited) from 03.04.205 onwards. Therefore, no liability of payment of transmission charges or LPS thereto arises on the Petitioner for such period. However, the Respondent licensee continued to illegally and arbitrarily claim transmission charges."*

6.3 Although the Petition filed by BHPL before the UERC pertained to LPS but in light of specific prayers made and grounds taken by BHPL that LPS is not required to be paid even for Component A/ dedicated line, the UERC was called upon to frame the issue and decide the question in

terms of para 26 of the Impugned Order 1. The relevant extract of the Impugned Order 1 is excerpted herein below:

> *"…13. The Petitioner further contended that it started supplying power to UPCL through Tata Power Trading Company Ltd. (TPTCL) from 03.04.2015 onwards, consequently in compliance of the Commission's Order dated 03.08.2012 no Transmission Charges or LPS are payable by the Petitioner for sale of electricity to the Distribution Licensee, i.e. UPCL.*
> *…*
> *26. With regard to the 3rd issue, the Commission would like to clarify that during the period when the Petitioner, a generator located in the State, is supplying power to the distribution license, i.e. UPCL through a trader, i.e. TPTCL, it is liable to pay all the charges including transmission charges and losses along with late payment surcharge, if any, to the Respondent licensee for use of its intra-state transmission system and the dedicated line i.e. 220 kV D/C Ghuttu-Ghansali line in accordance with the Open Access Regulations, 2015 as well as the (then prevalent) RE Regulations…"*
>
> *(emphasis supplied)*

6.4 Moreover, BHPL taken specific grounds challenging the findings at para 26 of the Impugned Order 1. This is so because that issue of LPS and transmission charges for Component A was raked by it in the proceedings before the UERC. Now BHPL in the present appeal that taken a 360 degree turn to contend that the issue qua transmission charges where never raised by it before the Respondent Commission. It is submitted PTCUL in the aforesaid paragraphs has clearly demonstrated the LPS and transmission charges for Component A was an issue before the UERC and accordingly, the findings given is perfectly justified and is also in consonance with the applicable regulations and law. It is due to this reason that the UERC was called upon to frame the issue and basis the interpretation of regulations went ahead to hold that when the Appellant, a generator located in the State, is supplying power to the distribution license, i.e. UPCL through a trader, i.e. TPTCL, it is liable to pay all the charges including transmission charges and losses

along with late payment surcharge, if any, to the Respondent licensee for use of its intra-state transmission system and the dedicated line i.e. 220 kV D/C Ghuttu-Ghansali line in accordance with the Open Access Regulations, 2015 as well as the (then prevalent) RE Regulations.

6.5 However, at the time of final hearing before this Tribunal, BHPL has confined his grievance in respect of the finding at Para 26 to state that such finding was unnecessary as on facts the Appellant was not challenging the liability to pay transmission charges under Component B. In this context BHPL has further submitted that their grievance is limited to levy of transmission charges for Component A that followed the finding at para 26 of the Impugned Order. It is respectfully submitted that the UERC gave such a finding as the issue was raked up BHPL and therefore, now BHPL cannot take the stand that the issue qua the payment of transmission charges and LPS for Component A was a non-issue before the Respondent Commission.

6.6 The findings of the Respondent Commission at para 26 of the Impugned Order is justified and completely in line with the Open Access Regulations, 2015 as well as the (then prevalent) RE Regulations. PTCUL raised the Invoice for monthly transmission charges against Component – A in compliance with the Order dated 24.01.2019 issued by UERC in the matter of review filed by BHPL against the Order dated 22.11.2018 regarding late payment surcharge levied against monthly transmission charges. Accordingly, it is submitted that the demand for transmission charges were raised from 03.04.2015 till 29.02.2019 vide Invoice dated 11.03.2019 only after the clarification of regulation 36 of UERC RE Regulations, 2013 was provided by the UERC, therefore, the said Invoices cannot be classified as being time barred. Further, it is

submitted that PTCUL previously raised the bills for monthly transmission charges against Component - B only in its Invoices on the basis of the wrong and misleading facts presented by BHPL before the UERC as well as the transmission licensee, i.e. PTCUL and the distribution licensee, i.e. UPCL. Further, the misleading interpretation given by BHPL was also incorporated in clause 3 of PPAs executed between UPCL and TPTCL for purchase of electricity from BHPL's Project. It is respectfully submitted that the interpretation of Regulations of UERC RE Regulations, 2013 by BHPL was only to take financial advantage and place all the burden of transmission charges for the 220KV S/c Ghuttu-Ghansali line on UPCL thereby evading from the liability of payment of transmission charges. It is humbly submitted that PTCUL has raised the invoice towards transmission charges for Component – A in line with the UERC's finding on Law in its Orders dated 22.11.2018 and 24.01.2019.

6.7 Further, BHPL has sought to contend that the pleadings and the evidence placed by BHPL before the UERC vide petition No. 45 of 2018 was in relation to payment of transmission charges for the period of power to a trader i.e. TPTCL (trader) and not to local grid or DISCOM within the state of Uttarakhand, relating to Component - B only.

6.8 In this regard, even though the scope of the Petition No. 45 of 2018 was allegedly only with regard to late payment surcharge, the reason why the issue of transmission charges was raised as a question of Law by the UERC is on account of one of the grounds taken by BHPL in the said petition. The ground taken by BHPL was that it is not liable to pay any transmission charges to PTCUL since it is supplying power to a trader

and ultimately to UPCL. In this regard, the relevant extract of the Order dated 22.11.2018 issued by the UERC is excerpted herein below:

> *"13.The Petitioner further contended that it started supplying power to UPCL through Tata Power Trading Company Ltd. (TPTCL) from 03.04.2015 onwards, consequently in compliance of the Commission's Order dated 03.08.2012 no Transmission Charges or LPS are payable by the Petitioner for sale of electricity to the Distribution Licensee, i.e. UPCL."*

6.9 Accordingly, the question had to be framed and decided by the UERC as to whether there is a liability for payment of transmission charges in case the generator is selling power to a trader and not directly to the local grid or the distribution licensee within the state of Uttarakhand under legal PPA with the distribution licensee as per the condition specified in Regulation 7(1) of the UERC RE Regulations, 2013.

6.10 Further, the Invoices for monthly transmission charges against Component - A were raised by PTCUL in compliance with the Order dated 24.01.2019 issued by UERC in the Review Petition wherein the clarification of Regulation 36 of UERC RE Regulations, 2013 was provided. The said clarification pertains to payment of transmission charges by RE Generator in case the supply of Power is outside the state or within the state i.e. to UPCL but it does not demarcate between the two components of transmission charges and considers payment of transmission charges as a whole. Further, it is reiterated that the said clarification brought to light the representation of wrong and misleading facts by BHPL during execution of PPAs between UPCL and TPTCL which is unlawful. The misleading facts regarding payment of transmission charges when BHPL started supplying power to a trader, i.e. TPTCL and not to a local grid or the distribution licensee within the

state of Uttarakhand were put forth before the UERC in Petition No. 45 of 2018 as well, therefore the malafide intention of BHPL is evident.

6.11 In this regard, reference is apposite to the UERC's Order dated 24.01.2019. The relevant extract of the said order is excerpted herein below:

> *"……. In contrary to this plain literal understanding, the contention of the Petitioner that his selling of power to a trader, which eventually is being purchased by UPCL, for the consumers of the State tantamount to his selling power to UPCL, is incorrect. Here it is important to emphasize the connotation of the word 'sale' mentioned in the 01st proviso to the aforesaid Regulations, here implies a sale made to a distribution licensee or to a local grid only through a legal (PPA) and not otherwise. In the instant case UPCL has a legal PPA with the electricity trader and not with the Petitioner. Therefore, the understanding as purported by the Petitioner is neither reasonable nor legal. It is only a matter of coincidence that the trader who bought power from the Petitioner further sold it to UPCL. Regulatory policies and law cannot be subject to such coincidences…."*

6.12 The clarification provided by the UERC on Regulation 36 of UERC RE Regulations, 2010 is also applicable on UERC RE Regulations, 2013 and similarly UERC RE Regulations, 2018

6.13 BHPL by selling power to a trader is not following the regulated tariff rule, which is a sine qua non for sale to distribution licensee. As per the RE Regulations, a waiver from payment of transmission charges is only available when the RE Generator sells power at a regulated tariff to the distribution licensee under a long term PPA.

6.14 In order to understand the scope of the RE Regulations, reference is apposite to Regulation 2 of the extant regulations. The relevant extract of RE Regulations is excerpted herein below:

> "***2. Scope and extent of application***
>
> *(1) These regulations shall apply in all cases where*

supply of electricity is being made from Renewable Energy Based Generating Stations, commissioned after coming into effect of these Regulations, to the distribution licensees or local rural grids within the State of Uttarakhand:

(2) The existing projects, which are at present supplying power to third party shall have the option to switch over to supply to the distribution licensee subject to provisions of Regulation 7 of these Regulations or the local rural grid, at generic tariffs as was applicable at the time of commissioning of their project or seek determination of project specific tariff from the Commission. The option shall be for the balance life of the project and shall not be allowed to be changed once it is exercised."

Notably, according to Regulation 2(1), the RE Regulations are applicable only in a situation wherein the supply of power from the RE Generator is to a local distribution licensee or a local rural grid within the state of Uttarakhand. The term "supply" has been defined under the Act, to mean the sale of electricity to a licensee or consumer within the State of Uttarakhand. However, as per the abovementioned Regulation, supply herein is restricted in its scope to mean a sale to a distribution licensee or local grid within the State of Uttarakhand. Pertinently, BHPL is supplying power to a trader, i.e. TPTCL and not directly to the Distribution Licensee, i.e. UPCL.

Further, as BHPL is supplying power to a trader, it is covered under Regulation 2(2). BHPL is supplying power to a third party and not to distribution licensee or local grid within the State of Uttarakhand at a regulated tariff determined by the UERC. Therefore, the RE Regulations are not applicable in the instant case.

6.15 Further, reference is apposite to Regulation 7 of the RE Regulations, which provides as under:

"7. Sale of Power

(1) All RE Based Generating Stations and Co-generating

Stations shall be allowed to sell power, over and above the capacity required for their own use, to the distribution licensee provided that distribution licensee is willing to enter into a PPA or to local rural grids at the rates determined by the Commission or to any consumer/person within the State or outside the State at mutually agreed rates (provided that such consumer has been allowed Open Access under Open Access Regulations).

(2) The distribution licensee on an offer made by the said RE based Generating Stations and Co-generating Stations may enter into a power purchase agreement in conformity with these Regulations and relevant provisions of other Regulations and the Act. However, if the distribution licensee intends to purchase power from such generator it shall sign the PPA within two months of offer made by the generating company. Otherwise, if the distribution licensee is not willing to purchase power from such generator it shall intimate the same to the generating company within one month of offer made by it.

Provided that where a grid interactive roof top and small Solar PV plant, is installed in the Premises, by a third party who intends to sell net energy (i.e. after adjustment of entire consumption of owner of the premise) to the distribution licensee, a tripartite agreement will have to be entered into amongst the third Party, the Eligible Consumer and such Distribution Licensee.

(3) The distribution licensee shall make an application for approval of power purchase agreement entered into with the generating company in such form and manner as specified in these regulations and UERC (Conduct of Business) Regulations, 2014 as amended from time to time within one month of the date of signing the PPA."

A perusal of Regulation 7(1) indicates that the RE Generator has two options under the RE Regulations to supply power viz. 1) RE Generator may supply power to the distribution licensee or local grid within the State of Uttarakhand at a regulated tariff determined by the UERC or 2) RE Generator may sell power to any consumer/person at any rate that may be mutually agreed by the entities. Pertinently, in the instant case, BHPL has opted to supply power to a third party, i.e. TPTCL (Trader) at a mutually agreed rate.

Further, Regulation 7(2) and Regulation 7(3), contemplate a situation wherein an offer is made by the Renewable Energy based generating station to the distribution licensee and a situation wherein the PPA contemplated is by the distribution licensee with the RE Generator directly, respectively. Therefore, a sale by a trader is not covered within the ambit of the RE Regulations.

6.16 Further, reference is apposite to Regulation 8 of the RE Regulations, which prescribes as under:

> *"8. Open Access*
>
> *(1) Non-discriminatory Open access in State Transmission/Distribution System shall be allowed to all RE based Generating stations and Co-generating Stations for captive use and to those covered under Regulation 7(1), which shall be subject to the provisions of the Open Access Regulations.*
>
> *Provided that the 'open access' shall be allowed subject to the availability of surplus capacity in the State Transmission/Distribution System.*
>
> *(2) Such open access shall be subject to payment of transmission/wheeling charges and adjustment of average transmission/ distribution losses in kind as determined in accordance with the Regulation 40 of these Regulations.*
>
> *(3) If any question arises as to the availability of surplus capacity in the State transmission system or the State distribution system, the matter shall be adjudicated and decided by the Commission."*

A perusal of Regulation 8 indicates that generically the open access provided under the RE Regulations will be subject to payment of Transmission Charges/Wheeling Charges. Therefore, when RE Generators take open access, they are required to pay the Transmission Charges/Wheeling Charges.

6.17 Accordingly, the proviso to Regulation 40 which provides for an exemption to RE Generators from payment of transmission charges for sale to distribution licensee or local grid needs to be worked out in the context of the Regulations excerpted hereinabove, particularly, Regulation 8. Regulation 40 is excerpted hereinbelow for the ready reference:

> *"40. Transmission Charges, Wheeling Charges and Losses*
>
> *(1) Transmission Charges: For non-discriminatory 'open access' to the intra-State transmission system for carrying the electricity generated by the RE Based Generating Stations or Co-generating Stations to the destination of use, the RE generator or the consumer, as the case may be, shall have to pay the transmission charges and wheeling charges for use of intra-state transmission system and distribution system which shall be calculated based on the principles specified in UERC (Terms and Conditions of Intra State Open Access) Regulations, 2015 read with amendments from time to time:*
>
> *Provided that no Transmission and Wheeling Charges 'are payable for sale of electricity to distribution licensee or to local rural grid within the State;*
>
> *Provided further that where a generating company proposes to supply electricity outside the State, such generating company, in addition to transmission/ wheeling charges specified above, shall have to bear the transmission/ wheeling charges determined by the Commission on case to case basis for the dedicated lines and substation of the transmission/ distribution licensee used only for evacuation of such power;*
>
> *Provided further that where more than one generating company proposes to supply electricity outside the State over common dedicated transmission/ distribution system of transmission/ distribution licensee for evacuation of their power, such generating companies, ·in addition to transmission/wheeling charges specified above, shall have to bear the full transmission/wheeling charges determined by the Commission on case to case basis for such dedicated lines and substation of the transmission/ distribution licensee used only for evacuation of such power on pro-rata basis of installed capacity.*
>
> *(2) In addition to Transmission and Wheeling Charges,*

the losses in the intra-State Transmission/ Distribution System and dedicated lines and sub-stations, if applicable as above, shall be adjusted in kind based on the principles specified in UERC (Terms and Conditions of Intra-State Open Access) Regulations, 2015 read with amendments from time to time."

6.18 The way to read Regulation 8 with Regulation 40 would be that Regulation 8 is the default rule according to which RE Generators being open access customers are liable to pay transmission charges as per Regulation 20(1)(b) of the Open Access Regulations. Further, Regulation 40 provides for a specific exemption only to RE Generators who are directly selling power to a distribution licensee or local grid within the State of Uttarakhand under a valid PPA but not when the RE Generators are selling power to trader and not to the distribution licensee or local grid within the State of Uttarakhand.

6.19 Regulation 20(1)(b) of the Open Access Regulations is excerpted herein below:

"(b) For use of intra-state transmission system charges are payable by an open access customers to STU for usage of its system shall be determined as under:-

*Transmission charges =ATC/(PLTs*365)(Rs/MW/day) Where,*

ATC= Annual Transmission charges determined by the Commission for the state transmission system for the relevant year

PLST=Peak load served by the State transmission system in the previous year."

6.20 In this regard it is relevant to state that the BHPL does not qualify within the ambit of Regulation 40 proviso as it is applicable only to RE Generators who are directly selling power to a distribution licensee or local grid within the State of Uttarakhand under a valid PPA but not when the RE Generators are selling power to trader and not to the distribution licensee or local grid within the State of Uttarakhand. The Hon'ble

Supreme Court has held in the case of *Casio India Company Private Limited vs. State of Haryana [(2016) 6 SCC 209]* that the proviso should not be given a greater or more significant role in the interpretation of the main part of the notification, except as carving out an exception. Further, the Hon'ble Supreme Court has held that giving overdue and extended implied interpretation to the proviso in the notification will nullify and unreasonably restrict the general and plain words of the main notification. Such construction is not warranted. The relevant extract of the judgment is excerpted herein below:

> *"… 23. Read in this manner, we do not think that the proviso should be given a greater or more significant role in interpretation of the main part of the notification, except as carving out an exception. It means and implies that the requirement of the proviso should be satisfied i.e. manufacturing dealer should not have charged the tax. The proviso would not scuttle or negate the main provision by holding that the first transaction by the eligible manufacturing dealer in the course/by way of inter-State sale would be exempt but if the inter-State sale is made by trader/purchaser, the same would not be exempt. That will not be the correct understanding of the proviso. Giving overdue and extended implied interpretation to the proviso in the notification will nullify and unreasonably restrict the general and plain words of the main notification. Such construction is not warranted.*
>
> *24. Quite apart from the above, Rule 28-A(4)(c) supports the interpretation and does not counter it. The said rule exempts all intra- State sales including subsequent sales. The reason for enacting this clause is obvious. The intention is to exempt all subsequent stages in the State of Haryana and the eligible product can be sold a number of times, without payment of tax. Intra-State sales refer to sale between two parties within the State of Haryana. Inter-State transaction results in movement of goods from the State of Haryana to another State. Thus, sub-clause (ii) of sub-rule (2)(n) refers to inter-State trade or commerce and the Notification does not refer to subsequent sales as in case of Rule 28-A(4)(c). Whether or not tax should be paid on subsequent sales/purchase in the other State cannot be made the subject-matter of Rule 28-A or the Notification. Inter-State sale from the State of Haryana will be only once or not a repeated one. Therefore, there is no requirement of reference to subsequent sale. In this context, it is rightly submitted by the assessee that there is only one inter-State sale from the State of Haryana and the interpretation as suggested*

> *by the Revenue would tantamount to making the exempted goods chargeable to tax, and the said goods would cease to enjoy the competitive edge given to the manufacturer in the State of Haryana. It will be counter-productive."*

6.21 Accordingly, the proviso of Regulation 40 should be read in the manner as interpreted by the Hon'ble Supreme Court to mean simply that benefit under the Regulations re exemption of transmission charges are available only to a RE Generator who is selling power to a distribution licensee or local grid within the State of Uttarakhand on long term basis under a valid PPA approved by the UERC and not to the Appellant/BHPL which is selling power to TPTCL i.e. a trader and not to the distribution licensee/UPCL directly or local grid within the State of Uttarakhand . Accordingly, the finding of the UERC that BHPL is liable to pay all the charges including transmission charges and losses along with late payment surcharge to the Respondent licensee/PTCUL for use of its intra-state transmission system and the dedicated line i.e. 220 kV D/C Ghuttu-Ghansali line in accordance with the Open Access Regulations, 2015 as well as the (then prevalent) RE Regulations, is completely tenable and justified as per the applicable regulatory framework. It is a benefit that is provided in the RE Regulations to incentivise the RE Generators to sell the power within the State of Uttarakhand on a long-term basis. However, BHPL has instead entered into a PPA with TPTCL. The power generated by BHPL's Project is being sold to TPTCL on the basis of availability, demand, and commercial viability. It was being sold outside the State of Uttarakhand prior to 2015, and subsequently it is being sold within the State of Uttarakhand. The Agreement from the year 2007 between BHPL and TPTCL under which the BHPL will supply power to TPTCL is for 20 years. However, it cannot be disputed that the arrangement of power between TPTCL and UPCL is temporary, TPTCL

may have not qualified in the bidding or UPCL may not require RE for its compliances / RPO or the requirement may be variable. There may arise a scenario when TPTCL starts selling the power outside the State of Uttarakhand. Moreover, BHPL, who has neither any intention nor any control as to whom the power is being sold to and the fact that the power is being sold to UPCL is only a co-incidence, as has also been held by the UERC.

6.22 From a bare perusal of the RE Regulations it is evident that the interpretation being advanced by BHPL is not tenable in law, admittedly BHPL has no PPA with UPCL, further the power purchased by UPCL from TPTCL was through Bidding process. Pertinently, BHPL has an agreement with TPTCL since 2007 for the entire capacity of BHPL's Project and the responsibility to pay transmission charges as per the said PPA was of BHPL whereas UPCL has purchased power from TPTCL who was the successful bidder, to fulfil its RPO obligation. Moreover, it is humbly submitted that the invoice pertaining to component A or B is not relevant, it is wrong to suggest that even if invoices legally due, were not raised, will conform right upon BHPL to make illegal gains. The invoices could not be raised earlier due to misrepresentation of facts, but once it is found that the responsibility for the same as per law/regulations lies upon BHPL, BHPL cannot escape from its liability. The payment or non-payment by BHPL ought to depend upon the provisions of Law and not conduct of parties which admittedly was based upon misconception of facts and suppression of relevant facts.

6.23 BHPL has sought to contend that the invoice raised by PTCUL is barred by limitation. In this regard, it is reiterated and clarified that the Invoice

dated 11.03.2019, has been raised by PTCUL upon BHPL after clarification being provided by UERC vide its Order dated 24.01.2019. The UERC vide its Order dated 24.01.2019 has provided clarification regarding the scope and application of Regulation 36 of the UERC RE Regulations, 2010. Further, it is humbly submitted that since billing is a continuous process and any discrepancies brought to the notice of the parties at a later stage with respect to billing, more so, by way of clarification from the regulator, i.e. the UERC in the instant situation, is liable to be rectified as and when the same is brought to the knowledge of the parties. Even otherwise the amount due is a public money and no delay and latches, if any, can confer any unlawful benefit upon BHPL, and BHPL cannot be permitted to make unlawful gain and enrich itself by taking baseless plea of limitation .Accordingly, it is submitted that after the clarification being provided by the UERC, PTCUL raised the aforesaid invoice upon BHPL. Hence, the contention of BHPL that the invoice is barred by limitation is baseless and devoid of any merit whatsoever.

6.24 Without prejudice to the foregoing, it is humbly submitted that bifurcation of the transmission network of PTCUL (into the two Components: A & B) was done only for the purposes of ease of billing and nothing beyond that. The said bifurcation cannot in any way have an impact on the effect of RE Regulations. It is humbly submitted that irrespective of whether billing is done for Component A or B the impact and effect of the RE Regulations is the same. Therefore, it is imperative for this Tribunal to decide the question of Law viz. whether the RE Generators are liable for payment of transmission charges when they supply power to the local distribution company through a trader first and thereafter, according to the decision of this Tribunal the necessary consequences will follow viz.

whether the invoices raised by PTCUL towards Component A are tenable in Law or not.

6.25 Further, as per the finding on Law by the UERC, PTCUL is well within its right to recover transmission charges from BHPL, for the services which have escaped billing.

6.26 Further, BHPL has sought to rely on the Judgement of the Hon'ble Supreme Court in Bachhaj Nahar vs. Nilima Mandal & Anr. [(2008) 17 SCC 491] to contend that reliefs beyond what is claimed in the Petition cannot be granted. It is humbly submitted that BHPL's reliance on the aforesaid Judgment of the Hon'ble Supreme Court is highly misplaced and is only an attempt to digress this Tribunal from the real question i.e. whether there is a liability for payment of transmission charges in case the generator is selling power to a trader and not directly to the distribution licensee or local grid within the State of Uttarakhand. In this regard, it is reiterated that even though the scope of the Petition No. 45 of 2018 was allegedly only with regard to late payment surcharge levied against dues towards Component - B, the reason why the issue of transmission charges was raised as a question of Law by the UERC is on account of one of the grounds taken by BHPL itself in the said petition. The ground taken by BHPL was that it is not liable to pay any transmission charges to PTCUL since it is supplying power to the distribution licensee through a trader. Therefore, it is submitted that the question had to be framed and decided by the UERC as to whether there is a liability for payment of transmission charges in case the generator is selling power to a trader and not directly to the distribution licensee or local grid within the State of Uttarakhand.

6.27 Irrespective of the fact that either UPCL or TPTCL has taken responsibility for payment of transmission charges, it is humbly submitted that the primary responsibility for payment of transmission charges towards utilization of the transmission network of PTCUL is with the RE Generator, i.e. BHPL under both the regulations and the TSA. It is humbly submitted that BHPL is liable for payment of transmission charges under Law and the regulations are not subject to the PPAs entered between the parties. It is a settled position of law in terms of Hon'ble Supreme Court judgment in PTC India Limited vs. Central Electricity Regulatory Commission & Ors. [(2010) 4 SCC 603], that regulations will have an over-riding effect on PPA. Accordingly, it is submitted that in case of a conflict, the regulations of the UERC would override the PPAs entered into between the parties.

6.28 As per the TSA executed between BHPL& PTCUL and the relevant provisions of the Open Access Regulations, it is the statutory right of PTCUL to claim all the applicable transmission charges from BHPL. Further, PTCUL has been claiming the transmission charges as per the terms of abovesaid TSA and the arrangement of BHPL with any third party is not the concern of PTCUL. Even otherwise, the responsibility to pay transmission charges to PTCUL lies solely upon BHPL and if any other entity takes responsibility towards such charges then it is an issue between the parties to such an agreement, whatever be the arrangement between parties, ultimately PTCUL must duly receive the transmission charges.

6.29 The supply of electricity by a trader is not governed by RE Regulations but whenever the sale of electricity to a trader and not to local grid or the distribution licensee within the state of Uttarakhand, the same will be as

per the procedure defined in the relevant provisions of Open Access Regulations in accordance to which the transmission charges are payable in line with Regulation 20(1)(b), Chapter 8 of the said Regulations which stipulates that *"..(b) For use of intra-state transmission system charges are payable by an open access customers to STU for usage of its system shall be determined as under:-*

*Transmission charges =ATC/(PLTs*365)(Rs/MW/day) Where,*

ATC= Annual Transmission charges determined by the Commission for the state transmission system for the relevant year

PLST=Peak load served by the State transmission system in the previous year."

6.30 The contention of BHPL that the Invoice dated 11.03.2019 must be quashed being illegal and arbitrary is blatantly refuted as the said invoice comprises of the two components i.e. (i) Component – A which is computed as per Open Access Regulations for the existing network (ii) Component - B which is calculated on the basis of the tariff determined by the UERC for the network being solely used by it (220kV S/C Ghuttu-Ghansali Line).

6.31 The view taken by the UERC that the validity of the invoice dated 11.03.2019 can be determined only after the applicability of UERC RE Regulations is decided by this Tribunal in a pending Appeal, i.e. 264 of 2019, is legally sound and does not merit interference by this Tribunal. It is respectfully submitted that a subordinate court ought not to decide upon a question of Law that is pending adjudication before an Appellate Court. As per the settled principles of judicial propriety a lower court is bound by the decision of the higher court. Accordingly, it is submitted that it would have been against the principle of judicial propriety for the

UERC to decide upon a question of Law that is pending adjudication before this Tribunal. Therefore, it is imperative for this Tribunal to decide the question of Law viz. whether the RE Generators are liable for payment of transmission charges when they supply power to the local distribution company through a trader.

6.32 The RE Regulations are not applicable on an inter-state trader like TPTCL in this case. The RPO Regulation 9 clearly specifies that in line with the provisions of the Act, National Electricity Policy and the Tariff Policy, to promote development of renewable and non-conventional sources of energy, all the existing and future distribution licensees, captive users and Open Access Customers, herein after referred to as "obligated Entity", in the State shall be obliged to procure minimum percentage of their total electricity requirement for own consumption.

6.33 Further, although the above said RE Regulations came into effect in order to promote the Renewable Energy Sources, but the word 'trader' is not defined nor applicable in the said Regulations. 'Trader' is defined under Open Access Regulations which is stipulated as below: -

> *"Open Access Customer (in Short Customer)" means a consumer, trader, distribution Licensee or a generating company who has been granted Open Access under these Regulations.*
>
> *Therefore, as per the UERC Open Access Regulations, 2015 any Open Access Customer, trader, in this case is required to seek Open Access in line with the Chapter 4 i.e. Application Procedure and Approval for Open Access of the said Regulations from the transmission licensee in case of Medium Term Open Access and from SLDC in case of Short Term Open Access."*

6.34 Further, the kind attention of this Tribunal is drawn to Regulation 20 (1)(b), Chapter 8 of Open Access Regulations which prescribes for liability of payment of transmission charges:

> *"20(1)(b).. for use of intra-state transmission system transmission*

charges payable by an Open Access Customer to STU for usage of its system shall be determined as under:

*Transmission charges =ATC/(PLTs*365)(Rs/MW/day) Where,*

ATC=Annual Transmission Charges determinedby the Commission for the State transmission system for the relevant year

PLST = Peak load served by the State Transmission System in the previous year.

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

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

Upto 6 hours in a day: ½ of the transmission charges as determined in sub-regulation (1)(b) above
Above 6 hours in a day: equal to the transmission charges determined in sub-regulation (1)(b) above.

Provided further that where augmentation of transmission system including construction of dedicated transmission system used for Open Access has been done for exclusive use of or being used exclusively by an Open Access Customer, the transmission charges for such augmentation including dedicated system and got approved by the Commission and shall be borne entirely by such Open Access Customer till such time the surplus capacity is allotted and used for by other Open Access Customers, where after the cost of the above system will be shared on pro-rata basis depending upon Open Access capacity allotted to them."

6.35 Hence, it is absolutely clear that a trader is an Open Access Customer under the Open Access Regulations and is obliged to seek Open Access for usage of the transmission network of PTCUL and also liable to pay the transmission charges for Open Access under the said Regulations. Also, the sale of electricity to the distribution licensee by a trader is not governed by RE Regulations which provides that *"…. These Regulations shall apply in all cases where tariffs for supply of electricity from Renewable Energy Sources and Non-Fossil Fuel Based Co-Generating Stations to the distribution licensees or to local rural grids within the State*

of Uttarakhand are to be determined by the Commission under Section 62 of the Act……."

6.36 However, at the time of final hearing in the matter before this Tribunal, BHPL has confined his grievance in respect of the finding at Para 26 of Impugned Order to state that such finding was unnecessary as on facts BHPL was not challenging the liability to pay transmission charges under Component B. In this context BHPL has further submitted that their grievance is limited to levy of transmission charges that followed the finding at para 26 of the Impugned Order. It is submitted that finding at para 26 of Impugned Order is perfectly justified in terms of submissions made herein above. Further it would not come in the way of UERC examining the BHPL's challenge to the bills in respect of component A. This tribunal should decide the question of Law viz. whether the RE Generators are liable for payment of transmission charges when they supply power to the local distribution company through a trader first and thereafter, according to the decision of this Tribunal the necessary consequences will follow viz. whether the invoices raised by PTCUL towards Component A are tenable in Law or not.

6.37 In light of the submissions made herein above and in accordance with the Open Access Regulations, 2015 as well as the (then prevalent) RE Regulations it is amply clear that when BHPL, a generator located in the State, is supplying power to the distribution license, i.e. UPCL through a trader, i.e. TPTCL, it is liable to pay all the charges including transmission charges and losses along with late payment surcharge, if any, to the Respondent licensee for use of its intra- state transmission system and the dedicated line i.e. 220 kV D/C Ghuttu- Ghansali. Accordingly, all the invoices raised by PTCUL upon BHPL relating to

transmission charges for the Component A i.e for the 220 kV D/C Ghuttu-Ghansali is justified and in terms of the applicable regulations.

Appeal No. 232 of 2019

7. **Mr. Sitesh Mukherjee, learned counsel appearing for the Appellant/ PTCUL in Appeal No. 232 of 2019 made the following submissions:-**

LPS ought to be levied from the date of commissioning of the Line in issue

7.1 The UERC vide the Impugned Order has inter alia held that any bills for transmission charges raised not based on approved tariff will not be legal. Further, in terms of the Respondent Commission's Order dated 11.12.2012, PTCUL was legally allowed to raise bills only consequent to 06.05.2013. Accordingly, all the invoices and consequential claims of LPS raised before 06.05.2013 by PTCUL against the transmission charges of the dedicated the Line in issue being solely used by BHPL were held to be arbitrary and illegal and were struck down.

7.2 The transmission charges for the Line in issue were determined by the Respondent Commission vide its order dated 06.05.2013 in Petition No. 8 of 2013. The investment approval for the same was accorded by the Respondent Commission vide its order dated 29.04.2013. However, PTCUL raised invoices w.e.f. 04.11.2011 (i.e. the date when the said line achieved commercial operation) on the basis of the provisional ARR calculated by it which was filed before the Respondent Commission as part of its Petition dated 30.04.2012 filed before the Respondent Commission for determination of provisional ARR for FY 2011- 12 & FY 2012-13 for the associated transmission system of the Project.

7.3 While the Respondent Commission in the Impugned Order has inter alia held that PTCUL could have only raised invoices towards annual transmission charges once the same were determined by the Respondent Commission i.e. from 06.05.2013 onwards and not before it, PTCUL humbly submit that such stand and reasoning is against the settled principles of law, is fallacious and uninformed by commercial considerations.

7.4 Whenever a judicial order acknowledges the right of a party to recover any charges, the said right is acknowledged right from the first day when such charges ought to have been levied. The aforementioned holding by the Respondent Commission in the Impugned order is squarely against the settled principle of law that PTCUL is entitled to receive the cost of its asset from the day that it was put to use for the benefit of BHPL. It is submitted that such cost of asset would include the LPS, which is in the nature of interest due to delayed payment and is levied for the delay in recovery of the cost of the asset.

7.5 It is pertinent to note that the Respondent Commission vide its order dated 06.05.2013 determined the tariff for the Line in issue from 04.11.2011. It is submitted that the liability of BHPL to pay transmission charges is not in dispute, as it has been settled by this Tribunal as well as the Hon'ble Supreme Court of India. However, until the issue attained finality vide the Supreme Court order dated 10.05.2018, BHPL had barely made any payments to PTCUL against the invoices raised by it. It can also be observed from the facts delineated hereinabove, that after the Hon'ble Supreme Court granted a stay vide its interim order dated 12.10.2015 on the operation of Respondent Commission's orders dated 29.04.2013 and 06.05.2013, BHPL stopped making payments from

October 2015 onwards. Incomplete payments were made by BHPL after the passing of the aforementioned order dated 10.05.2018. This has resulted in gross delay in the recovery of the cost of the transmission line by PTCUL. It is submitted that the entire purpose of LPS is to ensure that if there is delay in recovery of the cost, the same is recovered along with the cost suffered because of the delay. However, the same has been denied to PTCUL by the Respondent Commission vide the Impugned Order, in complete disregard of the commercial impact of such a ruling on PTCUL and in complete ignorance of the principles of business efficacy.

7.6 The cost related to the Line in issue was incurred by PTCUL in construction of the said network much before the determination of tariff by the Respondent Commission and the facility for usage of the network was completed by BHPL much before the determination of the transmission charges payable by it. It is pertinent to mention that PTCUL avails loans from financial institutions for making investment and creating various assets and has to pay interest on loan. Hence, if the cost of servicing of asset is not recovered then PTCUL faces financial crisis for repayment of loan which is ultimately made from the internal accruals and profits in the form of Return on Equity (RoE). It is humbly submitted that the Respondent Commission itself in its order dated 11.12.2012 has taken cognizance of the fact that PTCUL is undergoing financial hardship due to non-servicing of its asset/investment.

7.7 The refusal by BHPL to pay the LPS on the transmission charges for the period prior to 06.05.2013, on the ground that prior to such date the charges were not determined for the Line in issue is completely

fallacious and goes against the very object and purpose of having a provision related to LPS in the TSA.

7.8 In fact, none of the orders of the Respondent Commission or this Tribunal or the Hon'ble Supreme Court disentitle PTCUL or take away PTCUL right to claim transmission charges from BHPL for the period 04.11.2011 to 06.05.2013 on the ground that the tariff was determined on 06.05.2013. In view thereof, it is submitted that the argument that PTCUL can recover transmission charges from 04.11.2011 but not the LPS on account of delay in payment of such transmission charges which were due since 04.11.2011 is completely unfounded and militates against the commercial considerations involved in the business.

7.9 PTCUL's obligation was to make available the transmission network to ensure that BHPL is enabled to evacuate and supply the power generated from the Project to its consumers. The said obligation of PTCUL to make available the transmission network was in exchange of payment against the transmission charges invoices raised by PTCUL. The power was supplied and consumed by the consumers of BHPL. Against such consumption, BHPL has already charged the tariff from its consumers. Therefore, there has been an unjust enrichment to BHPL. Accordingly, BHPL should be held liable to compensate and the Appellant is entitled to be compensated by way of levying LPS on BHPL for the delayed payments.

7.10 BHPL has also contended that the determination of transmission charges for the Line in issue was provisional and PTCUL ought to have approached the Ld. CERC for determination of transmission charges under the PoC mechanism and it has failed to do so. BHPL has further argued that in view of the same, all the claims of LPS towards

transmission charges determined on provisional basis are void. In this regard, it is the humble submission of PTCUL that it has taken all efforts possible to get the transmission charges for the Line in issue determined and details of such efforts have been delineated in the Rejoinder submitted by the Appellant and have not been reiterated here for the sake of brevity.

7.11 The Hon'ble Supreme Court in the matter of *Consolidated Coffee Ltd. versus Agricultural Income Tax Officer, Madikeri and Ors. AIR 2000 SC 3731* held that a late payment surcharge/interest is necessarily compensatory in nature. Once the principal amount has been adjudged to be due then late payment surcharge follows which has been wrongly denied by the Respondent Commission to the Appellant. In this regard following judgments of Hon'ble Supreme Court in *Indian Council for Enviro-Legal Action Vs Union of India* (2011) 8 SCC 161, would be relevant.

7.12 The Appellant is entitled under the contract, the law and the equity both to claim LPS from BHPL for delayed payment of transmission charges. It is further submitted that there are plethora of judgements or orders which uphold that the interest or an additional charge must be paid by the one who withholds money otherwise required to be paid. The Appellant relies on the following judgments:

a) In the matter of ***Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa and Ors. v. N. C. Budharaj (Deceased) by Lrs. And Ors.*** (2001) 2 SCC 721, wherein the Constitutional Bench opined as follows:

> *"21 that the basic proposition of law that a person deprived of the use of money to which he is legitimately*

> *entitled has a right to be compensated for the deprivation by whatever name it may be called, viz., interest, compensation or damages and this proposition is unmistakable and valid; the efficacy and binding nature of such law cannot be either diminished or whittled down."*

b) In the matter of ***Alok Shanker Pandey v. Union of India*** (2007) 3 SCC 545, wherein the Hon'ble Supreme Court of India was pleased to hold as under:

> *"7. It may be mentioned that there is misconception about interest. Interest is not a penalty or punishment at all, but it is the normal accretion on capital. For example, If A had to pay B a certain amount, say 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that*
> *A has kept the amount with himself and earned interest on it for this period. Hence equity demands that A should not only pay back the principal amount but also the interest thereon to B."*

7.13 Based on the settled principle of law that it was the right of PTCUL to recover the transmission charges/cost of the servicing the asset from the date of energization of its asset, that the Appellant had availed loan for this purpose. However, in the present case, PTCUL had to repay the same alongwith interest much before the determination of tariff by the Respondent Commission. If LPS is not allowed for this period, then at least the tariff that had been determined should have been allowed alongwith the carrying cost.

7.14 The issue of carrying cost is no longer res integra and has been decided by this Tribunal in its judgment dated 13.04.2018 in Appeal No. 210 of 2017 titled **Adani Power Ltd. vs. CERC & Ors.** wherein this Tribunal recognised the concept of restitution by placing the affected party to the same economic position and allowed carrying costs in respect of the

allowed change in law events. 41. The above decision of this Tribunal has been upheld by the Hon'ble Supreme Court in ***Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power Ltd.***, *(2019) 5 SCC 325*. Hon'ble Supreme Court allowed the carrying cost and reiterated the principle that in terms of contract, parties must be put to same economic position which they enjoyed prior to the change in law occurrence. In view of judgement of this Tribunal reproduced above on the issue related to the carrying cost, the Respondent Commission if had to disallow LPS for the period, then at least the tariff that had been determined should have been allowed alongwith the carrying cost.

7.15 The denial of LPS and further carrying cost by the Respondent Commission is illegal and arbitrary. It is settled principle of law that carrying cost is to be allowed based on the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow is arranged by the company from lenders and/or promoters and/or accruals has to be paid by way of carrying cost. This Tribunal in its judgment in the case of Tata Power Company Limited vs. Maharastra Electricity Regulatory Commission dated 27.10.2014 (Appeal No. 212 of 2013) has clearly affirmed the aforesaid principles vis-à-vis carrying cost.

<u>Delay in determination of tariff by the Respondent Commission cannot prejudice PTCUL</u>

7.16 The Respondent Commission while dealing with the Subject Petition lost sight of the fact that the only reason why there was delay in recovery of the annual transmission charges from BHPL was because of delay in determination of the tariff for the Line in issue by the Respondent

Commission itself. In this regard, it is necessary to recapitulate the relevant facts and events and the same are reiterated hereinbelow:

a. PTCUL filed a Petition dated 03.07.2009 for approval of capital investment for substation works, both new and for augmentation, and the associated line works. The Respondent Commission while according no objection to the Appellant for going ahead with their investment approval vide its order dated 24.11.2011, excluded four projects from the investment proposed by the Appellant. The said four projects are: (a) 200 kV S/C Chamba – Ghansali Line; (b) 01 No. 220 kV bay at 220 kV S/s Chamba; (c) 220 kV D/C Bhilangana-III – GhansaliLine; and (d) 220 kV S/s Ghansali ("**Associated Transmission System**" or "**ATS**").

b. PTCUL in its ARR and Tariff Petition for FY 2012-13 filed on 30.11.2011 had requested for approval of transmission charges for ATS and the Respondent Commission vide its letter dated 23.03.2012 directed the Petitioner therein as under:

> *"…Considering the request of licensee that completion of formalities/ procedures under PoC mechanism, may take a longer time, the Commission directs PTCUL to submit a proposal in the form of Petition for determination of provisional ARR/ transmission charges for these transmission assets in accordance with the Regulations of the Commission for recovery of the same from the beneficiary generator till transmission charges are decided by CERC under PoC mechanism."*

c. Thereafter PTCUL submitted a Petition vide letter no. 703/MD/PTCUL/UERC dated 30.04.2012 for determination of provisional ARR for the FY 2011-12 and FY 2012-13 for the ATS.

d. The Respondent Commission determined the ARR of the GG Line from 04.11.2011 vide its order dated 06.05.2013 in the MYT

Petition No. 8 of 2013.

7.17 In view of the foregoing, it is submitted that 'act of a court shall prejudice no man' i.e. ***actus curiae neminem gravabit*** is a settled principle of law. Accordingly, delay in raising invoices, which was not attributable to PTCUL, does not wipe out the liability of BHPL to pay LPS which is legitimately due to PTCUL.

7.18 To further elucidate, it is submitted that if on the day when the said line was put to commercial use PTCUL would have been able to levy the annual transmission charges along with the open access charges on BHPL, it would have allowed PTCUL timely recovery of the cost of its assets. However, due to non-determination of the annual transmission charges till 06.05.2013, PTCUL had to incur additional interest on working capital further to the operation and maintenance expenses. Once the transmission charges were in fact determined, PTCUL ought to be allowed to recover the interest for the delay in recovering the cost of the said line, in the form of LPS.

<u>That the invoices raised by the Appellant were in terms with the Orders of the Respondent Commission</u>

7.19 BHPL has contended that all invoices issued by PTCUL prior to the determination of tariff of the GG Line vide order dated 06.05.2013 by the Respondent Commission are null and void. In this regard, BHPL has placed reliance on the order of the Respondent Commission dated 11.12.2012 in Petition No. 20 of 2012. The Respondent Commission in the said order inter alia observed as under:

> *"….. the Commission holds that the bill raised for transmission charges, for the transmission system from Bhilangana-III SHP to 220kV S/s Chamba, by Respondents are not backed by proper*

authority. Consequently, their subsequent coercive actions of issue of notice for disconnection, placing embargo on scheduling of power etc. are not valid and deserve to be struck down.

On the other hand, the Commission also takes note of concern expressed by the Respondent that no payment for the cost towards servicing of the investment on this transmission system us creating financial hardship to them and that these charges need to be paid by the Petitioner as they are the sole user of these assets"

7.20 In context of the above, it is pertinent to refer Regulation 34 of the Uttarakhand Electricity Regulatory Commission (Terms & Conditions of Intra-State Open Access) Regulations, 2010 ("Open Access Regulations") which specifies the actions which a transmission licensee can take on default in payment by a generator, and the same is extracted as under:

"…… 34. Default in payment:

Non-payment of any charge or sum of money payable by the Open Access Customer under these Regulations shall be considered non- compliance of these Regulation. The STU or any other transmission licensee or a distribution licensee may discontinue Open Access after giving Customer an advance notice of fifteen days without prejudice to its right to recover such charges by suit. …"

7.21 A bare perusal of the above depicts that coercive action means disconnection from the grid or may mean encashment of a letter of credit on non-payment of dues by the generator. The order dated 11.12.2012 only directed PTCUL not to take any such coercive actions and nowhere did it direct PTCUL to not exercise its statutory and contractual rights, which includes the right to raise invoices for recovery of the transmission charges from BHPL.

7.22 As per Clause 5.3.1(a) of the TSA, PTCUL was required to submit an invoice to BHPL on the fifth day of every month demanding monthly transmission charges. It is submitted that PTCUL while submitting

invoices prior to the determination of the tariff by the Respondent Commission (i.e. prior to 06.05.2013) was fulfilling its contractual obligation under the TSA and to ensure that a financial obligation is established against BHPL for the services availed by it under the TSA. Clause 5.3.1(a) is excerpted below:

> *"Clause 5.3.1 (a) – Commencing with the month following the month in which the Scheduled COD occurs, PTCUL, shall submit to the Company by the fifth day of such succeeding month (or, if such day is not a Business Day, the immediately following Business Day) an Invoice in the Agreed Form (the "Monthly Transmission Charge Invoice") signed by the authorized signatory of PTCUL setting out the computation of the Monthly Transmission Charge payable by Company to PTCUL in respect of the immediately preceding month in accordance with the Agreement."*

7.23 PTCUL was duly fulfilling its statutory and contractual obligations by raising invoices for recovery of the transmission charges on the basis of the provisional tariff determined by the Respondent Commission. It is further submitted that if PTCUL had not raised the bills timely then the assessment of the same in future would have been very difficult. Consequently, neither BHPL could have been made liable to pay transmission charges for the period from 04.11.2011 onwards nor could the Appellant had claimed the applicable LPS.

<u>That the Appellant's methodology for calculating the LPS is correct</u>

7.24 On the issue of methodology to be followed for computation of LPS, the Respondent Commission in the Impugned order has held that considering LPS in the outstanding principal amount and then again charging LPS@ 1.25% would tantamount to calculating it as compound interest and not otherwise. The Respondent Commission has further observed that PTCUL while taking refuge of the term 'outstanding dues' has ignored the term 'simple interest' and the intent of the letter dated 14.05.2015 should have been construed harmoniously. Accordingly, it

was held that LPS for each month should be computed by levying a simple interest @ 1.25% per month on the outstanding principal amount (excluding LPS) outstanding at the end of the previous month.

7.25 At the very outset, reference may be made to Clause 5.4.2 of the TSA which provides that the applicable LPS/ rebate will be governed by the regulations of Appropriate Commission. Clause 5.4.2 of the TSA is excerpted below:

> *"5.4.2 – As per provision of this agreement, Company has to pay monthly transmission charges to PTCUL. Applicable late payment surcharge/rebate shall be governed by the regulations of Appropriate Commission in this regard."*

7.26 As per Regulation 33 of UERC (Terms and Conditions of Intra State Open Access) Regulations, 2015 ("UERC Regulations 2015"), in the event of non-payment of any bill for charges by an open-access customer, late payment surcharge at the rate of 1.25% per month will be applicable. The said Regulations is extracted below for ready reference:

> *"33. Late Payment Surcharge:*
>
> *In case the payment of any bill for charges payable under these regulations is delayed by an open access customer beyond the due date, without prejudice to any action under the Act or any other regulation thereunder, a late payment surcharge at the rate of 1.25% per month shall be levied."*

7.27 On 25.04.2015, PTCUL approached the Respondent Commission for seeking clarification with respect to calculation of LPS, which PTCUL was liable to recover from BHPL for delay in making payments towards transmission charges. The Respondent Commission, vide its communication dated 14.05.2015, clarified that the late payment surcharge must be levied on the 'outstanding dues'. The relevant portion from the communication dated 14.05.2015 has been excerpted below:

> "*With regard to methodology for computation of late payment*

> *surcharge it is clarified that a simple interest @ 1.25% per month should be levied for the purpose of calculating late payment surcharge on the outstanding dues.*"
>
> [Emphasis Supplied]

7.28 The UERC Regulations, 2015 do not specifically state the term 'simple interest'. It states that the LPS at the rate of 1.25% per month should be levied and the Respondent Commission vide its communication dated 14.05. 2015 clarified that a simple interest at the rate of 1.25% should be levied on the 'outstanding dues'.

7.29 The term 'outstanding dues' as used by the Respondent Commission in its clarification dated 14.05.2015 has a wide connotation and it includes all payments that are due but not paid, be it principal amount, interest or any other cost that needs to be paid.

7.30 The clarification by the Respondent Commission should be read in a harmonious manner and in the context in which it was issued. Accordingly, it is humbly submitted that the Respondent Commission in the Impugned Order while focusing upon the word 'simple interest' in the aforementioned clarification has completely lost sight of term 'outstanding dues'. It is submitted that even though simple interest needs to be levied, it needs to be levied on the total outstanding dues. In the instant case, outstanding dues will be a combination of principal bill amount and the unpaid LPS accrued till the date of payment.

7.31 Even the order of the Respondent Commission dated 11.12.2012 does not refer to the outstanding amounts as simply 'monthly payments' or 'monthly transmission charges' but rather uses the term 'backlog' for all the pending outstanding payments. Accordingly, it is submitted that the term 'backlog' will include both the bill amount and the LPS on such bill amount within its ambit.

7.32 It has been argued by BHPL that PTCUL ought not to be allowed to contend that it is applying a simple interest calculation and in the same breadth also contend that the term outstanding dues is only meant to be understood as outstanding principal amount inclusive of the applicable LPS accrued on it, for further calculation of LPS in order to ascertain the total LPS. In this regard, it is submitted that the interpretation of the clarification by BHPL is against the generally accepted financial principles and is a manner of taking advantage and evading the payment of LPS which was levied by PTCUL in terms of the provisions of the TSA and the Regulations, as discussed hereinabove.

7.33 It is a standard and widely accepted principle of accounting that whenever there is any principal amount on which interest has accrued, first the interest is adjusted from any payment received and thereafter the remaining amount is adjusted against the outstanding principal amount. It is a settled proposition of law that LPS in in the nature of interest. Further, the aforementioned principle of calculating the LPS is consistent with the primary intention behind the levy of LPS, which is to compensate for the delay and to create deterrence against delayed payment towards the invoices raised.

7.34 The methodology adopted by BHPL for computing delayed payment surcharge is that if there is any payment made towards outstanding amounts, then the same needs to be first adjusted against the principal amount and then against the interest accumulated on the same, if any. However, if such a principle were to be resorted to, then it would be in direct contradiction with the aforementioned principle of accounting and will defeat the objective behind the levy of LPS and would lead to an anomalous situation. For instance, assuming the outstanding amount to

be X and LPS accrued on it to be Y. In a situation where payment made against the outstanding dues is only X, then if BHPL's methodology was to be adopted, then the entire payment would be adjusted only against the principal amounts, leaving the LPS out. In such a case, amount Y will remain outstanding and in terms of BHPL's methodology no interest would accrue on it and even after passage of years together, the outstanding amount towards LPS corresponding to principal amount X, would remain Y. Therefore, there would be no deterrence for BHPL to not delay the payments and this would defeat the principal objective behind the levy of LPS.

7.35 The methodology adopted by BHPL for computing delayed payment surcharge is that if there is any payment made towards outstanding amounts, then the same needs to be first adjusted against the principal amount and then against the interest accumulated on the same, is against the industry practice. In this regard Ministry of Power (MoP) has on 08.10.2020 notified the Draft Electricity (Late Payment Surcharge) Rules, 2020 wherein, MoP has clearly held that all payments by a distribution licensee to a generating company or a trading licensee for power procured from it or by a user of a transmission system shall be first adjusted towards late payment surcharge and thereafter, towards monthly charges, starting from the longest overdue bill. The relevant extract of the aforesaid rules is excerpted herein below:

> *"5. All payments by a distribution licensee to a generating company or a trading licensee for power procured from it or by a user of a transmission system shall be first adjusted towards late payment surcharge and thereafter, towards monthly charges, starting from the longest overdue bill."*

7.36 In any case, the clarification cannot undo the financial principles of accounting nor can it be interpreted against the said principles.

7.37 It is the contention of BHPL that LPS clause does not intend to establish a recovery mechanism but simply incentivizes an early payment. In response to such suggestion, it is humbly submitted that the intent of retaining LPS clause in the Open Access Regulations was for it to act as a deterrent on the open access customer from any delay in payment. Further, it is submitted that BHPL is liable to bear the LPS at the pre-determined rate. Accordingly, it is submitted that in this regard the contention of BHPL is wholly irrelevant and cannot be accepted.

7.38 PTCUL has rightly interpreted and implemented the provisions of the TSA, relevant regulations and clarification provided by the Respondent Commission while issuing monthly invoices towards transmission charges.

7.39 It is submitted that the contention of BHPL that it is liable for LPS only after a period of 30 days after the judgment passed by this Tribunal on 29.11.2014 is misconceived and strongly refuted by PTCUL. It is important to clarify that the invoices of monthly transmission charges were raised w.e.f. 04.11.2011 (date of energization of the GG Line in issue) whose tariff was determined vide tariff order dated 06.05.2013 wherein the Respondent Commission has computed tariff of the said network from 04.11.2011 onwards. Therefore, the transmission charges ought to be recovered from the COD of the line alongwith the LPS applicable thereon. PTCUL cannot be penalized for the delay in determination of tariff by the Respondent Commission that also without the carrying cost. Further, the carrying cost could have been allowed by the Respondent Commission or can be compensated by allowing LPS from the date of COD of the GG Line.

7.40 Accordingly, the LPS levied was in accordance with the clarifications issued by UERC vide their Letter dated 14.05.2015 i.e. @ 1.25 % per month on the “outstanding dues” which clearly states that the LPS is computed on the outstanding dues against the monthly invoices. It is humbly submitted that the UERC, while focusing upon the word ‘simple interest’ in the said letter, has completely lost sight of the word ‘outstanding dues’. The UERC assumed that PTCUL is applying compound interest when in fact the invoice raised clearly show that the LPS is clearly applied on the outstanding dues as provided in the regulations and as also clarified by the UERC. It is pertinent to mention that the levy of LPS is not penal in nature and is imposed in order to recover the financial cost and is compensatory in nature.

7.41 Therefore, the finding of UERC in the Impugned Order that the bills can only be raised by PTCUL after the annual transmission charges have been determined by the UERC, it is squarely against the settled principle of law that PTCUL is entitled to receive the cost of its asset from the day that it was put to use for the benefit of BHPL. Such cost of the asset would include the LPS, which is in the nature of interest due to delayed payment and is levied for the delay in recovery of the cost of the asset.

7.42 Further, the LPS levied was in accordance with the clarifications issued by UERC vide their Letter dated 14.05.2015 i.e. @ 1.25 % per month on the “outstanding dues” which clearly states that the LPS is computed on the outstanding dues against the monthly invoices. It is humbly submitted that the UERC, while focusing upon the word ‘simple interest’ in the said letter, has completely lost sight of the word ‘outstanding dues’. The UERC assumed that the Appellant is applying compound interest when in fact the invoice raised clearly show that the LPS is clearly applied on the outstanding dues as provided in the regulations and as

also clarified by the UERC (as also indicated that the same is also recognized as industry wide practice by MoP).

7.43 In view of foregoing, this Tribunal may be pleased to allow the present appeal and set aside the erroneous finding of UERC wherein, it has held that that the LPS becomes due only when the legitimate bills remain unpaid and any invoices for transmission charges not based on approved tariff will not be legal. Accordingly, this Tribunal may set aside the directions of UERC wherein it has held that all the invoices and consequential claims of LPS for the period upto 06.05.2013 raised by PTCUL against BHPL for the transmission charges of the dedicated line being solely used by BHPL are arbitrary and illegal.

8. **Mr. Basava Prabhu S. Patil, learned Senior Counsel appearing for the Respondent No. 2/ BHPL in Appeal No. 232 of 2019 has made the following oral submissions, as also in the written submissions for our consideration:-**

8.1 During the hearing before this Tribunal on 29.09.2020, PTCUL urged that as UERC has denied its claim for LPS from 04.11.2011 (date of commissioning of the transmission asset) till 06.05.2013 (date of determination of transmission tariff), it may be granted the liberty to claim carrying cost for the said period before the Respondent Commission. It is most respectfully submitted that the issue of carrying cost was not raised by PTCUL before UERC in the tariff proceedings or Petition No. 45 of 2018. The same is a non-issue in the present adjudicatory proceedings. PTCUL's attempt to seek liberty in the present proceedings to raise the issue before UERC is entirely misplaced.

8.2 In terms of the provisions of the Electricity Act, 2003 (the "Act") the power to determine tariff for the licensees/generating companies in any financial year rests only with the Appropriate Commission and therefore,

any bill raised at a tariff other than that which has been determined by the Appropriate Commission is illegal and ought to be struck down. Therefore, all invoices raised prior to 06.05.2013 that is, the date of determination of transmission charges, are illegal and were correctly struck down by UERC by the impugned order as well as the order dated 11.12.2012.

8.3 The tariff is determined under Part VII of the Electricity Act, 2003, in terms of Sections 61, 62 and 63. Section 62(6) provides that:

> *"If a licensee or a generating company recovers a price or charge exceeding the **tariff determined under this section**, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.*
>
> *(Emphasis supplied)*

The aforesaid section clearly provides that any excess recovery over and above the "tariff determined" by the Appropriate Commission will have to be repaid with interest. Thus, the Act itself provides that there can be no levy of interest or delayed payment surcharge, in the absence of determination of tariff. In this context, reliance was placed on the judgment of the Hon'ble Supreme Court case of *NTPC Ltd. v. M.P. SEB*, reported in *(2011) 15 SCC 580.*

8.4 This Tribunal has also held in a plethora of judgments that under the provisions of the Electricity Act, 2003 ("Electricity Act"), a transmission licensee, while undertaking a licensed activity, is not authorized to levy or collect any charges without the prior approval of the Appropriate Commission. The business and/or activity of transmission is licensed in terms of the Electricity Act. Further, tariff determination is a function solely attributable to the Appropriate Electricity Regulatory Commission under Sections 61, 62 and 63 of the Electricity Act, 2003. Thus, any

transmission licensee such as a State Transmission Utility/STU, in the present case the Appellant has no authority to charge, claim and/or determine transmission charges or for that matter any other open access charges.

8.5 LPS is in the nature of an interest, i.e. a compensation for delayed or non-payment of legitimate dues payable to a party under an agreement. In order to successfully claim any such LPS (i.e. interest or compensation), the dues have to be 'legitimate'. The outstanding dues can only be deemed to be legitimate when the same is claimed on the basis of a legitimate and/or legal foundation and the bills raised under an agreement have a clear legal backing. As a natural corollary, there cannot be any 'outstanding dues' on which LPS would be payable, if the bill raised never had any legal and/or legitimate foundation. All bills raised for the period prior to the determination of tariff for the transmission asset are null and void.

8.6 The aforesaid position is settled and has time and again been clearly recognized by this tribunal in a number of judgments and also by the Respondent Commission in its interim order dated 11.12.2012. PTCUL did not challenge the order dated 11.12.2012. The mere fact that tariff for the line was determined by UERC w.e.f. 04.11.2011 does not mean that the tariff becomes payable w.e.f. 04.11.2011. Tariff becomes recoverable/ payable only once it is determined by the Appropriate Commission. This is in line with Section 62(6) of the Electricity Act, 2003. Even in the order dated 11.12.2012, UERC held that the charges shall be paid within 30 days of tariff determination, clearly demonstrating that no LPS was leviable for the period prior to determination. This order has attained finality.

8.7 Further, as per the provisions of the TSA, it is clearly demonstrated that a valid invoice for monthly transmission charges can only be raised for the transmission charges determined by the Appropriate Commission. In view thereof, the Respondent Commission has rightly held that LPS becomes due only on unpaid legitimate bills. Since, the bills raised by PTCUL during this period were invalid, BHPL was never under any obligation to pay and/or never had any liability to make any payment. The claim for LPS with effect from 04.11.2011 till the determination of transmission charges by the Respondent Commission by its order dated 06.05.2013, are null and void.

8.8 Notwithstanding the aforesaid, it is also pertinent to note that the claim for LPS for the period from 04.11.2011 to 08.06.2018, was raised by PTCUL by its monthly invoices dated 05.06.2018 and 04.07.2018 and supplementary invoices dated 05.06.2018 and 02.07.2018. This claim is clearly time barred.

8.9 PTCUL by way of the present appeal has also challenged the Impugned Order on the ground that the methodology for computation of LPS, as has been clarified by UERC, i.e. LPS for each month should be computed by levying a simple interest @ 1.25% per month on the outstanding principal amount (excluding the LPS) outstanding at the end of the previous month, is wrong. PTCUL has, *inter alia*, reasoned that the said methodology as clarified by UERC is erroneous as giving effect to the same would tantamount to a situation wherein, only the unpaid principal amounts of the previous period would amount to 'outstanding dues' by excluding the LPS that has accrued on the same. PTCUL has contended that it is a standard and accepted principle of accounting that whenever there is any principle amount on which interest has been

accrued, first the interest is adjusted from any payment received and thereafter the remaining amount is adjusted against the outstanding principal amount. Accordingly, as per PTCUL, the term "outstanding dues" should be interpreted to include the principal amount as well as LPS for the previous month. PTCUL by its monthly invoices dated 05.06.2018 and 04.07.2018 and supplementary invoices dated 05.06.2018 and 02.07.2018 has arbitrarily claimed LPS by applying the aforesaid rationale and applying interest @1.25% per month in a compounded manner for the period from 04.11.2011 to 08.06.2018.

8.10 The aforesaid contention loses sight of the fact that tariff determination, unlike commercial contracts, is function of the Appropriate Commission. Unlike commercial contracts where the liability to pay arises based on the consensus between the parties, tariff becomes payable once it is determined by the Appropriate Commission. PTCUL, is a licensed utility and is not entitled to recover any amount without the approval of the Respondent Commission. Therefore, tariff can only become outstanding/due/ payable once it is determined by the Appropriate Commission.

8.11 Furthermore, Section 59 of the Indian Contract Act, 1872 provides that:

> *"59. Application of payment where debt to be discharged is indicated.—*
>
> *Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly"*

8.12 In the present case, BHPL while paying the transmission charges to PTCUL under a covering letter dated 08.06.2018 categorically informed PTCUL that payments were being made against the principal amount. PTCUL proceeded to appropriate such payments without protest.

Today, it is not open to PTCUL to contend that the payment will be first applied to interest and to the principal amount. This position has been clarified by the Hon'ble Supreme Court in the case of *Leela Hotels Ltd. v. Housing & Urban Development Corpn. Ltd.*, (2012) 1 SCC 302.

8.13 Apart from the aforesaid, Clause 5.4.2 of the Transmission Service Agreement dated 28.05.2010 ("TSA"), that was executed between PTCUL and BHPL, provides that:

> *"5.4 Payment of Invoices:*
>
> *5.4.2 As per provision of this agreement Company has to pay monthly transmission charges to PTCUL. Applicable late payment surcharge/rebate shall be governed by the regulations of Appropriate Commission in this regard."*

8.14 As per the provisions of the UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations, 2013 and presently 2018 (hereinafter referred to as the "UERC RE Regulations") and the Uttarakhand Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2015 (hereinafter referred to as the "UERC Open Access Regulations"), *in case payment of any bill for charges payable is delayed beyond the due date, a late payment surcharge at the rate of 1.25% per month shall be levied*. It is pertinent to note that the charges under the said regulations become payable only upon determination by the Commission.

8.15 The Respondent Commission vide its letter dated 14.05.2015 clarified that LPS has to be computed @1.25% simple interest on the outstanding *dues*. The Respondent Commission vide the aforesaid letter dated 14.05.2015, clarified as follows:

> *"With regard to methodology for computation of late payment surcharge it is clarified that a simple interest @ of 1.25%per month*

should be levied for the purpose of calculating late payment surcharge on the outstanding dues."

8.16 The above clarification was issued in line with the aforesaid Regulations, specifying the methodology for the computation of the applicable LPS. It bears mention that PTCUL has never sought review of the said clarification issued by UERC or sought any clarification for the computation of levy by way of a formal petition or application.

8.17 Even though PTCUL has averred in its appeal that it is not compounding the rate of interest on the outstanding dues (i.e., it is applying simple interest computation on the unpaid dues inclusive of both the unpaid principal dues along with the applicable LPS accrued on the same), however, the methodology for computation of LPS as extended by PTCUL would essentially amount to computation of LPS on a compounded interest basis and in effect negate the Respondent Commission's clarification.

8.18 UERC, the impugned order, has clearly expressed its intent, idea and rationale *qua* the interpretation of the term "outstanding dues" in a computation involving a simple interest at a specified rate of interest. It has clearly observed that LPS is always *vis-à-vis* a particular month's bill (it is true in respect of any kind of monthly bill such as transmission charge bills, open access charge bills, monthly energy bills, etc). Thus, the LPS for each month has to be calculated separately against the outstanding principal amount, if any.

8.19 The late payment surcharge is in the nature of compensatory charge, it is not a penal charge, as is being proposed by PTCUL. This has been recognised by Hon'ble Supreme Court in its judgement dated

14.11.2000 in M/s Consolidated Coffee Ltd. Vs. The Agricultural Income-Tax Officer, Madikeri & Ors AIR 2000 SC 3731.

8.20 It is a well settled principle of law that LPS is to compensate the Transmission Licensee for the additional cost of raising funds, required to meet the shortfall in revenue inflow, caused as a result of such delay in payment of transmission charges. LPS becomes applicable only when there is delay in payment of Transmission Charges by Transmission System Users (TSUs) after the due date. As per the tariff regulations of most State Commissions, the normative working capital covers receivables by the licensees only up to 45 days. Therefore, LPS is levied to compensate the Transmission licensee for the interest cost that is incurred on the additional working requirement due to delay in payment beyond 45 days. Therefore, such compensation can only be on a month to month basis and not in a compounded manner as proposed by PTCUL.

8.21 UERC has rightly observed that any LPS that accrues at the end of each month if added to the outstanding principal for further computation of applicable LPS, i.e. if the LPS for each month is not separately calculated against the outstanding principal amount (excluding the LPS) at the end of each month, then it would tantamount to compounding of interest on the outstanding dues, and thus, it is most humbly that the term “outstanding dues” ought to be interpreted in the manner advanced by UERC in the context of a simple interest computation.

8.22 In the aforesaid regard, PTCUL ought not to be allowed to contend that it is applying a simple interest calculation and in the same breath, also contend that the term “outstanding dues” is only meant to be understood the outstanding principal amount inclusive of the applicable LPS accrued

on it, for further calculation of LPS in order to ascertain the total LPS. As per the clarification of the Respondent Commission, the LPS is to be calculated against a particular monthly bill at a specified simple interest rate, for the relevant period of delay, if any.

Further, if the method proposed by PTCUL, i.e. the interpretation of the term "outstanding dues" as extended by PTCUL is accepted, it would essentially mean that the "outstanding dues" keep increasing periodically, i.e. for a day, month, year (by including the LPS accrued on it up until that point in time), thereby completely frustrating the idea behind a simple interest computation.

8.23 Thus, in view of the foregoing, it is most humbly submitted that the reliefs sought by PTCUL to the extent that the LPS is payable with effect from 04.11.2011 is erroneous and is not countenanced in law. Thus, firstly, BHPL is not liable for payment of the LPS ranging between the period 04.11.2011 to 06.03.2015. Secondly, the PTCUL's methodology for computation of interest ought to be rejected in view of the present facts and circumstances.

9. We have heard learned counsel for the Appellants and learned counsel for the Respondents at considerable length of time and carefully considered their written submissions. We have also perused the findings given in the various judgments relied upon by both the parties. Based upon the same and relevant material placed before us, the following issues emerge in the Appeals for our consideration:-

<u>APPEAL No. 264 of 2019</u>

I. Whether the UERC was justified in deciding an issue which was completely alien with respect to the pleadings made in the petition?

II. Whether the provisions of Commission's RE Regulations, 2013 have been correctly applied in the present matter?

III. Whether it was mandatory for BHPL to avail Open Access in order to avail exemption from payment of transmission charges under Regulation 38 of Commission's RE Regulations?

IV. Whether sale of power to distribution licensee is different from the sale of power to same distribution licensee through a trader?

APPEAL No. 232 of 2019

V. Whether PTCUL is entitled for Late Payment Surcharge for the period between the commissioning of assets and determination of tariff by the Commission?

VI. Whether rate of LPS should be at simple interest or monthly compounding interest?

Our Analysis & Findings:-

10. Issue No. I:-

10.1 According to BHPL, a court of law cannot decide an issue completely alien to the pleadings and the prayer made in the petition. In the present case, the entire issue raised by BHPL in the petition was limited to "LPS". There was no occasion for the Respondent Commission to introduce and decide the issue pertaining to "transmission charges" in the impugned order dated 22.11.2018. Appellant has relied on the following judgments of the Hon'ble Supreme Court:

(a) *Ram Sarup Gupta (dead) by LRs., vs. Bishun Narain Inter College [AIR 1987 SC 1242]*

(b) *Bachhaj Nahar Vs Nilima Mandal, reported in (2008) 17 SCC 49*

10.2 It is settled law that the adjudicating bodies should not go beyond the prayer. The Hon'ble Supreme Court in Ram Sarup Gupta (dead)

by LRs., vs. Bishun Narain Inter College [AIR 1987 SC 1242] observed as under:

> *"It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise.*

10.3 Further, on the issue whether a court can decide an issue which has not been prayed for the Hon'ble Supreme Court in Bachhaj Nahar Vs Nilima Mandal, reported in (2008) 17 SCC 491, settled the aforementioned issue in the following words:

> *"10. The High Court, in this case, in its obvious zeal to cut delay and hardship that may ensue by relegating the plaintiffs to one more round of litigation, has rendered a judgment which violates several fundamental rules of civil procedure. The rules breached are:*
>
> *(i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject-matter of an issue, cannot be decided by the court.*
>
> *(ii) A court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.*
>
> *(iii) A factual issue cannot be raised or considered for the first time in a second appeal.*
>
> *11. The Civil Procedure Code is an elaborate codification of the principles of natural justice to be applied to civil litigation. The provisions are so elaborate that many a time, fulfilment of the procedural requirements of the Code may itself contribute to delay. But any anxiety to cut the delay or further litigation should not be a ground to flout the settled fundamental rules of civil procedure. Be that as it may. We will briefly set out the reasons for the aforesaid conclusions.*

12. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

13. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when the defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.

….

16. The observation of the High Court that when a plaintiff sets forth the facts and makes a prayer for a particular relief in the suit, he is merely suggesting what the relief should be, and that it is for the court, as a matter of law, to decide upon the relief that should be granted, is not sound. Such an observation may be appropriate with reference to a writ proceeding. It may even be appropriate in a civil suit while proposing to grant as relief, a lesser or smaller version of what is claimed. But the said observation is misconceived if it is meant to hold that a civil court may grant any relief it deems fit, ignoring the prayer. It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart,

> *in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel, acquiescence, non-joinder of causes of action or parties etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In a suit for recovery of Rs.one lakh, the court cannot grant a decree for Rs. Ten lakhs. In a suit for recovery possession of property `A', court cannot grant possession of property `B'. In a suit praying for permanent injunction, court grant a relief of declaration or possession. The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc.*
>
> *….*
>
> *23 [Ed.: Para 23 corrected vide Official Corrigendum No. F.3/Ed.B.J./89/2009 dated 17-7-2009.]. It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel, acquiescence, non-joinder of causes of action or parties, etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit…."*
>
> *(underline supplied)*

10.4 In the light of above findings of the Hon'ble Supreme Court, we answer this issue in negative i.e. the Respondent Commission ought not have decided an issue which was not there in the pleadings.

11. **Issue No. II:-**

11.1 According to PTCUL Respondent in Appeal No. 264 of 2019, provisions of Regulation 38 of Commission's RE Regulations 2013 would apply only to RE Generator who would be supplying power to UPCL on long term basis on the generic tariff determined by the Commission under these Regulations and has applied for open access from the Respondent according to Commission's Open Access Regulations in force at relevant times. In support of his claim PTCUL has quoted

Regulations 1, 7, 12 and 38 of Commission's RE Regulations. We do not intend to examine provisions in Regulations 1,7 and 12 of RE Regulations 2013. However, we will look into Regulation 38 of these Regulations which exempts a RE Generator if supplies power to distribution licensee. Regulation 38 is reproduced below:

> ***"38. Transmission Charges, Wheeling Charges and Losses***
>
> *(1) Transmission Charges: For non-discriminatory 'open access' to the intra-State transmission system for carrying the electricity generated by the RE Based Generating Stations or Cogenerating Stations to the destination of use, the RE generator or the consumer, as the case may be, shall have to pay the transmission charges and wheeling charges for use of intra-state transmission system and distribution system which shall be calculated based on the principles specified in [UERC (Terms and Conditions of Intra-State Open Access) Regulations, 2010].*
>
> *Provided that no Transmission and Wheeling Charges are payable for sale of electricity to distribution licensee or to local rural grid within the State.*
>
> *Provided further that where a generating company proposes to supply electricity outside the State, such generating company, in addition to transmission/ wheeling chares specified above, shall have to bear the transmission/ wheeling charges determined by the Commission on case to case basis for the dedicated lines and substation of the transmission/ distribution licensee used only for evacuation of such power.*

11.2 It is noted that the Commission's RE Regulations have been notified under Sections 61(h) and Section 86(1)(e) of the Electricity Act, 2003. These regulations specify tariff and other terms for supply of electricity from a renewable energy source to the distribution licensee in the State. Chapter 6 of the said Regulations deals with miscellaneous issues such as transmission charges payable by RE generators availing open access, banking facility availed by captive generating plants, connectivity evacuation etc. Regulation 38 of UERC RE Regulations, under Chapter 6, deals with the issue of payment of transmission charges under three scenarios:

(i)	For open access for carrying electricity generated by RE based generating stations or Co-generating stations to the destination of use	RE based generating station/ consumer, shall pay the transmission and wheeling charges
(ii)	Sale of electricity to the distribution licensee or the local rural grid	No transmission and wheeling charges are payable
(iii)	Supply of electricity outside the State	Along with transmission/ wheeling charges under (i) above, transmission/wheeling charges for the dedicated network used only for evacuation of such power.

11.3 Perusal of Regulation 38 of would reveal that the contention of the Respondent PTCUL that Regulation 38 of Commission's RE Regulations 2013 would apply only to RE Generator who would be supplying power to UPCL on long term basis on the generic tariff determined by the Commission is completely misplaced and is liable to be rejected for the reason that as per 2nd proviso to Regulation 38, a RE Generator who is supplying power outside the state is liable to pay the transmission charges. Certainly the tariff for such generators who are supplying power outside the State would not have been determined by the Commission. If the contention of the PTCUL is accepted then such generators would not be liable to pay any transmission charge as Regulation 38 would not be applicable to them as well. Similarly, RE Generators who are supplying power to their destination point within the State using assets of PTCUL would not covered under this Regulation 38 as their tariff would not be generic tariff determined by the Commission and accordingly would also not be liable to pay any transmission charges. If Regulation 38 is applicable to these two categories of RE Generators then it is applicable to the RE Generators

who is supplying power to UPCL whose tariff is determined under Section 63 of the Act i.e. under TBCB.

11.4 Let us examine the issue from another angle. Considering, for the sake of argument, that Regulation 38 is not applicable in the present case and BHPL is liable to pay transmission charges for component A as well and BHPL pays such an amount of say Rs 21 crore to PTCUL. Now, since the ARR of PTCUL for the relevant period has been fully met with, i.e. transmission charges for component A have already been recovered by PTCUL from UPCL. Therefore, PTCUL will have to refund the said amount to UPCL upfront. UPCL in turn would have to refund the amount to GENCO/TPTCL in accordance with the PPA signed between UPCL and TPTCL which provides that transmission charges beyond delivery point would be borne by UPCL. Thus, whole exercise would result in a naught.

11.5 In view of above discussions and analysis, we hold that Regulation 38 of Commission's RE Regulations 2013 would be applicable in the present matter.

12. **Issue No. III:-**

12.1 According to PTCUL, it was incumbent upon BHPL to seek open access for use of its transmission system to avail benefit under Regulation 38 of the Commission's RE Regulations. This contention of the Respondent is misconceived is also liable to be rejected.

12.2 BHPL in its submissions has stated that the Respondent Commission has categorically observed in its order dated 10.04.2019 (Petition No. 8 of 2019) that no open access is required to be sought by Bhilangana/M/s TPTCL.

12.3 There is rational in the above observations of the Commission that in the present set of facts no open access is required to be sought by BHPL or the Trading Licensee. It is well known fact that ownership of power changes after metering point. In distribution the licensee is responsible for system upto meter only. Beyond meter it is the responsibility of the consumer. Similarly, ownership of power changes from BHPL to UPCL after metering point. Up to metering point BHPL/TPTCL remains owner of the power supplied to UPCL, after metering point power belongs to UPCL. Ideally meter should have been provided at delivery point, however, in this case Meter has been provided at BHPL power station's busbar as a special case as it cannot be provided at delivery point i.e. at Ghansali. Accordingly, BHPL or TPTCL are not required to seek open access from PTCUL for use of its intra-state transmission system for the reason that they are not using it at all. It is the UPCL which is using intra-state transmission system for transmitting power purchased from BHPL to its load centers.

12.4 The question in this issue is answered accordingly.

13. **Issue No. IV:-**

13.1 According to BHPL there is a back to back arrangement, being a single transaction where energy is directly delivered to the distribution licensee by BHPL and the financial settlement is through TPTCL. Hence, the Commission is wrong to hold that power is being "conditionally" sold to the State. This Tribunal in the case of PTC India Limited vs. UERC & Ors. (Appeal No. 88 of 2010), clearly held as in para 27 of the judgment that Trader is only a facilitator for supply of electricity by a generator to a licensee or a consumer.

13.2 According to PTCUL the reliance placed by BHPL on the judgment of this Tribunal in Appeal No. 88 of 2010 to suggest that no distinction can be drawn between the power supplied by the trader and the one supplied directly by the generator. However, the said judgment only pertains to the issue of grant of open access and who should be entitled to seek such open access. While open access is acknowledged as a right in terms of the provisions of the Electricity Act, 2003, there is no reason for the same reasoning to be extended to the scenario of a special benefit or an exemption, which in the instant case is the exemption from paying transmission charges.

13.3 The question as to whether the supply of power to a trader tantamount to supply of power to a consumer came before this Tribunal in Appeal No. 88 of 2010. Whereas BHPL has placed its reliance on this judgments, PTCUL has stated that the facts and the question before this Tribunal in Appeal No. 88 of 2010 were entirely different.

13.4 We have examined the judgment of this Tribunal in Appeal No. 88 of 2010. Facts of that case as reported in the Judgment are reproduced below for better understanding:

> *5. The background of the cases is described below:-*
>
> *i) Govt. of Uttrakhand allotted hydro project sites to private generating companies in the year 2003 in pursuance of the State Government's policy on small hydro power. Subsequently, Implementation Agreement was signed between the hydro project developers and the State Government. The Implementation Agreement provided choice to the generating company for sale of power to UPCL, the distribution licensee of Uttrakhand, High Tension consumer within the State of Uttrakhand, local rural grids in Uttrakhand, rural power distribution entities and any consumer outside the State of Uttrakhand.*
>
> *ii) The hydro generating companies, Respondent No.2 herein in Appeal No. 88 of 2010 and Appellant in Appeal No. 93 of 2010, signed agreement with trading licensees for sale of entire power except the agreed percentage of free power as royalty to the State Government.*

iii) The trading licensee, Appellant in Appeal No. 88 of 2010, which has signed a Power Purchase Agreement with Swasti Power Engineering Ltd., Respondent-2 herein, signed back to back agreement with Punjab State Electricity Board for sale of entire power purchased from the hydro generating company.

iv) The hydro generating companies also signed wheeling agreement with Power Transmission Corporation of Uttrakhand, Respondent herein, for evacuation of power from the hydro project upto the sub-station of Central Transmission Utility for further transmission of electricity outside the State of Uttakhand.

v) On 14.5.2009, Uttrakhand Power Corporation Ltd., Respondent herein, filed a petition before the State Commission to allow open access for carrying electricity outside the State of Uttrakhand from Vanala Hydro Electric Project of Him Urja Pvt. Ltd., a generating company setting up a small hydro power project in the State of Uttrakhand.

vi) The State Commission passed an interim order dated 10.6.2009 stating that from the Implementation Agreement signed by the hydro power generating company with the State Government, it was clear that the sale outside the State was permissible only to a consumer and sought the status of the proposed buyer of electricity. Accordingly, Him Urja Pvt. Ltd. submitted its response to the State Commission contesting the interim order of the State Commission in the matter of open access. In the mean time UPCL filed another application that it was willing to withdraw its petition dated 14.5.2009 for seeking open access.

vii) The State Commission vide a letter dated 10.08.2009 sought the view of the State Government on the issue of permissibility of sale of electricity outside the State of Uttrakhand from the hydro projects as per the terms of the Implementation Agreement.

viii) The State Government vide letter dated 10.11.2009 intimated to the State Commission that there is severe shortage of electricity in the State and the hydro generating company had proposed to sell power to a Trading Company which did not fall in the category of consumer. Accordingly, the State Government informed that it would not be appropriate to consider the proposal of open access to the Hydro Project Developer.

ix) The State Commission passed the impugned order on 30.12.2009 denying open access to the hydro generating company in view of the clarification given by the State Government. The State Commission also directed that a copy of the order may be sent to all small hydro power developers in the State as the order had implication for similarly placed small hydro power developers.

x) The State Commission also denied open access to Swasti Power Engineering Ltd., Respondent herein, vide order dated 30.12.2009 on the basis of its order of the same date in the matter of granting open access to another hydro power generating company, namely, Him Urja Pvt. Ltd.

xi) Aggrieved by the order dated 30.12.2009 of the State Commission, the Appellants have filed these Appeals.

…

11. Based on the contentions of the parties the following questions would arise:-

i) Whether the Appeals are maintainable under Section 111 of the Electricity Act, 2003?

ii) ***Whether the hydro generating companies, appellant/respondent herein, have a legal right to sell electricity to a Trading Licensee even though the Implementation Agreement signed with the State Government permits sale outside the State only to any consumer?***

13.5 Perusal of the above portion of the judgment would reveal that one of issues before this Tribunal in Appeal No. 88 of 2010 was similar i.e. whether sale of power from RE Generator to a trader would tantamount to sale of power to a consumer. This Tribunal in para 27 of its judgment held as under:

"27. It is argued by the Respondents UPCL/State Government that the Implementation Agreement provides for sale outside the State to only a consumer and the State Commission has rightly held so. In our view, the State Commission has taken restrictive interpretation of clause 4.1 of the Implementation Agreement. ***Trader is only a facilitator for supply of electricity by a generator to a licensee or a consumer.*** *In this case the hydro power generating company has proposed to sell power to a Inter-state trading licensee which has back to back agreement for re-sale of power to a distribution licensee outside the State of Uttrakhand. The distribution licensee is going to pool the power procured from the trading licensee with power procured from other sources and supply the same to its consumers. Thus the power is ultimately going to be consumed by the consumers outside the State of Uttrakhand. This is in accordance with scheme of things and provisions of the Electricity Act, 2003."*

{Emphasis added}

13.6 Thus, the issue before Tribunal was not restricted to Open Access, as claimed by the PTCUL, but to define role of a trader in the transaction. This Tribunal held that Trader is only a facilitator for supply of electricity by a generator to a licensee. This judgment of Tribunal has not been

challenged before Hon'ble Supreme Court and has, thus, attained finality. Accordingly, the sale of power by BHPL to trader TPTCL which sells it to UPCL through back-to-back agreements would be same as sale of power by BHPL to UPCL and Regulation 38 of RE Regulations would apply in its entirety.

14. **Issue No. V:-**

14.1 PTCUL has submitted that although the Commission has determined tariff for Component B vide its Order dated 06.05.2013 with effect from 04.11.2011 i.e. from date of commissioning of the line, it was not permitted PTCUL to charge LPS for the intervening period 04.11. 2011 to 06.05.2011. This has resulted in acute hardship to PTCUL for none of its fault. PTCUL has relied on TSA provisions of dated 25.10.2008 between PTCUL and BHPL.

14.2 BHPL has supported the Commission's Order and has submitted that since tariff was first determined by the Respondent Commission on 06.05.2013, payment of transmission charges for use of Component B would become due from this date and there were no outstanding dues prior to this date as per law and no LPS becomes payable for any period prior to this date.

14.3 Let us examine the findings of the Commission in the Impugned Order. Findings of the Commission on the issue are quoted below:

Commission's view

…

24. The Commission would like to clarify the 1st issue in the light of the provisions of the Act. Section 62 of the Electricity Act, 2003 stipulates as under:

"Section 62 (Determination of tariff):- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –

(a) supply of electricity by a generating company to a distribution licensee: …

(b) transmission of electricity;

(c) wheeling of electricity;

(d) retail sale of electricity:"

From the perusal of Section 62 of the Act, it is unambiguous that the power to determine the tariff of the licensee/generating companies in any financial year lies with the Commission. Therefore, any bill raised at a tariff other than that determined by the Commission is illegal and ought to be struck down. The Commission had in its Order dated 11.12.2012 had taken a very categorical view in this regard and had stated:

> *"11. Based on the above, the Commission holds that the bills raised for transmission charges, for the transmission system from Bhilangana-III SHP to 220 kV S/s Chamba, by Respondents are not backed by proper authority. Consequently, their subsequent coercive actions of issue of notice for disconnection, placing embargo on scheduling of power etc. are not valid and deserve to be struck down ...*
>
> *12… The Petitioner shall furnish an undertaking to the Respondent that on determination of transmission charges, as aforesaid, by the Commission backlog of payment shall be cleared within 30 days of receipt of Order of the Commission to be issued by the Commission at a later date…"*

In the instant case, the Commission, for the first time, determined the transmission charges of the dedicated 220 kV D/C Ghuttu-Ghansali line for FY 11-12, FY 12-13 and for the first control period (FY 2013-14 to FY 2015-16) in its Order dated 06.05.2013. However, PTCUL without waiting for any approved interim/provisional/final tariff by the Commission arbitrarily raised invoices on the Petitioner which were illegal & lacked authority. The Commission has also held the same in its Order dated 11.12.2012. The submission of the Respondent that the Commission did not restrict it from raising any provisional bill is also baseless as the Commission in its Order dated 11.12.2012 had held that the bills raised were not backed by authority and, accordingly, restrained the Respondent from taking any coercive action on account of non-payment by the Petitioner. The Commission, accordingly, had also directed the generator to submit an undertaking in this regard that

the entire backlog would be cleared within 30 days from the determination of transmission charges. ***Here in the instant matter, the Respondent company has construed the backlog as inclusive of LPS also, whereas the Commission is of the view, that LPS becomes due only when the legitimate bills remain unpaid. Any bills for transmission charges raised not based on approved tariff will not be legal. Hence, in line of the Commission's Order dated 11.12.2012, PTCUL was legally allowed to raise bills consequent to 06.05.2013.***

Therefore, all the invoices and consequential claims of LPS raised before 06.05.2013 by the Respondent licensee, i.e. PTCUL against the transmission charges of the dedicated line being solely used by the Petitioner, are arbitrary and illegal and deserve to be struck down.

…

From the perusal of the above, it is evident that the similar issue with respect to the issuance of invoice for transmission charges prior to the date of determination of tariff, has already been considered and decided by UERC in its order dated 11.12.2012. Admittedly, the same was never challenged by PTCUL. Therefore, when the said issue has already been considered, and the finding to that effect has already been rendered, which remains unchallenged, and has not been overruled by a superior court, the same cannot be re-agitated again. As such, PTCUL could not have raised invoices and the consequent claim for LPS upon BHPL, for the period prior to 06.05.2013. We have examined the findings of the Commission, reproduced above, and find no infirmity with the same.

14.4 During the course of proceeding held on 29.09.2020, the learned counsel for PTCUL sought for liberty to claim carrying cost for the period from 04.11.2011 (date of commissioning of the transmission asset) till 06.05.2013 (date of determination of transmission tariff).

14.5 The learned senior counsel for BHPL submitted that the issue of carrying cost was not raised by PTCUL before UERC in the tariff proceedings or Petition No. 45 of 2018. The same is a non-issue in the present

adjudicatory proceedings. PTCUL's attempt to seek liberty in the present proceedings to raise the issue before the Respondent Commission is entirely misplaced.

14.6 From the perusal of the impugned order, it is clear that PTCUL never raised the issue of carrying cost before UERC. As such, we cannot pass any directions to that affect.

15. **Issue No. VI:-**

15.1 Commission's findings on the issue are quoted below:

> *"25. With regard to the 2nd issue, it is to state that the Commission on the clarification sought by the Respondent had vide its letter dated 14.05.2015 clarified that:*
>
> *" With regard to methodology for computation of late payment surcharge it is clarified that a simple interest @ 1.25% per month should be levied for the purpose of calculating late payment surcharge on the outstanding dues."*
>
> *Considering LPS in the outstanding principal amount and then again charging LPS@ 1.25% would tantamount to calculating it as compound interest and not otherwise. The Respondent licensee in this regard has taken refuge of the term outstanding dues whilst ignoring the term simple interest. The Respondent should have construed the intent of the letter dated 14.05.2015 harmoniously and not in isolation to its advantage, so as to remove any inconsistency.*
>
> *Hence, from the clarification as above, it is amply clear that LPS for each month should be computed by levying a simple interest @ 1.25% per month on the outstanding principal amount (excluding LPS) outstanding at the end of the previous month."*

15.2 For the purpose of deciding this issue, let us examine Regulation 33 of the UERC Open Access Regulations, 2015, which is provided hereinunder:

> *"**33. Late payment surcharge:***
>
> *In case the payment of any bill for charges payable under these regulations is delayed by an open access customer beyond the due date, without prejudice to any action under the Act or any other regulation thereunder, a late payment surcharge at the rate of 1.25% per month shall be levied."*

15.3 From the above Regulation, there is no infirmity as to whether the levy of simple interest on LPS would be inclusive of both the unpaid principal dues along with the applicable LPS accrued on the same. In this context, a clarificatory letter was issued on 14.05.2015, wherein it stated as follows:

> *"With regard to methodology for computation of late payment surcharge it is clarified that a simple interest @ of 1.25%per month should be levied for the purpose of calculating late payment surcharge on the outstanding dues."*

15.4 UERC in the impugned order has clarified the intent, idea and rationale *qua* the interpretation of the term "outstanding dues" in a computation involving a simple interest at a specified rate of interest. It has clearly observed that LPS is always *vis-à-vis* a particular month's bill. It is true in respect of any kind of monthly bill such as transmission charge bills, open access charge bills, monthly energy bills, etc.

15.5 It is noted that PTCUL had sought the clarification vide its letter referred in the Commission's Order (referred above) in regard to mode of LPS calculation. In case PTCUL was aggrieved by the above clarification it should have appealed against the same at that time. In the light of above discussions, we do not find any infirmity with the Commission's findings and confirm the same.

ORDER

For the foregoing reasons, as stated supra, we find merits in Appeal No. 264 of 2019, and the same is allowed. Accordingly, the issues involved in Appeal No. 77 of 2020, which are similar to the issues involved in Appeal No. 264 of 2019, stand allowed and the impugned order dated 02.12 2019 is set aside.

PTCUL is directed to withdraw its invoices raised upon BHPL, in lieu of the findings given under para 26 of the impugned order dated 22.11.2018, and the impugned order dated 02.12.2019.

As regards Appeal No. 232 of 2019, the issues raised therein are decided against PTCUL. The findings rendered by the State Commission to the extent challenged in the aforesaid Appeal No. 232 of 2019 are hereby upheld.

The Appeal Nos. 264 of 2019 and 77 of 2020 stand disposed of in above terms and Appeal No. 232 of 2019 stands dismissed.

No order as to costs.

Pronounced in the Virtual Court on this **day of 03rd November, 2020.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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