

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
(Appellate Jurisdiction)**

**Appeal No. 30 of 2023 &  
IA No. 81 of 2023**

**Dated: 17.03.2023**

**Present: Hon'ble Mr. Justice Ramesh Ranganadhan, Chairperson  
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

**IN THE MATTER OF:**

M/s Brua Hydrowatt Pvt. Ltd.  
Through its Sr. Vice President  
(Sh. Suresh Kumar Tiwari),  
Plot No.2 Industrial Area, Baddi,  
Distt. Solan-173205

---Appellant

**VERSUS**

1. Himachal Pradesh Electricity Regulatory Commission  
Through its Secretary,  
Vidyut Aayog Bhawan, Block No. 37,  
SDA Complex, Kasumpti, Shimla-171 009  
Himachal Pradesh ---Respondent No.1
2. The HP Power Transmission Corporation Ltd.  
(Represented by its Managing Director)  
Himfed Bhawan, Panjari, Near New ISBT,  
Shimla – 171004 ---Respondent No.2
3. The State of Himachal Pradesh  
Through Additional Chief Secretary (MPP & Power),  
Govt. of Himachal Pradesh, Shimla – 171002. ---Respondent No.3
4. M/s Darjeeling Power Pvt. Ltd.  
(Developer of Shaung 3MW SHEP) through its Director,  
214, Empire House, 3<sup>rd</sup> Floor, Dr. DN Road,  
Fort Mumbai – 400001, Maharashtra ---Respondent No.4

5. M/s Roura Non-Conventional Energy (P) Ltd.,  
(Developer of Roura-II, 24MW SHEP) through its Director,  
Plot No.226, Road No.78, Phase-III,  
Jubilee Hills, Hyderabad – 500033 ---Respondent No.5

Counsel for the Appellant(s) : Mr. Tarun Johri  
Mr. Ankur Gupta

Counsel for the Respondent(s) : Ms. Swapna Seshadri  
Mr. Amal Nair  
Ms. Kritika Khanna for R-2

Mr. Susheel Thakur for R-4

Mr. Vishwanathan Iyer  
Ms. Shimpy Sharma  
Mr. Arman Sharma  
Mr. Avdesh Bairwa  
Ms. Jyoti Mehra for R-5

## **J U D G M E N T**

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

1. The Appellant, M/s. Brua Hydrowatt Pvt. Ltd. has filed the present Appeal assailing the Order dated 27.12.2022 (herein after referred as "Impugned Order") passed by Himachal Pradesh Electricity Regulatory Commission (in short "HPERC" or the "State Commission") in Petition No. 35 of 2022 whereby the State Commission has fastened the additional liability for payment of Bay charges for 66kV Feeder Bay at 66kV Switching Station, Urni to be paid by Respondent No. 5 in addition to the charges required to be paid by him in proportion to its capacity only *inter alia* it to recover the same from Respondent No. 5 with interest after the commissioning of the project of Respondent No. 5.

2. The captioned Appeal has been considered for adjudication against the IA No. 81 of 2023 wherein the Appellant has made the following prayers:

- i. Allow the instant Application and thereby, stay the operation of Impugned Order dated 27.12.2022 passed in 35 of 2022 by Respondent No.1, till the final adjudication of the aforesaid Appeal;
- ii. Stay the operation of demand letters dated 14.03.2022, 30.05.2022 & 02.01.2023 issued by Respondent No.2, till the final adjudication of the aforesaid Appeal.
- iii. Direct the Respondent No.2 not to disconnect the Applicant's Project from the current Interim evacuation arrangement till the grant of connectivity to the Project to its transmission system i.e. 66Kv Feeder Bay at 66kv Switching Station at Urni, on payment of Applicant's proportionate share of Bay charges of Rs.85,71,361.75/-, subject to the final adjudication of the above Appeal.
- iv. Pass such other order as this Hon'ble Court may deem fit and proper in the facts and the circumstances of the case.

3. After hearing the matter in detail, it is observed that the relief as sought by the Appellant in the captioned IA 81/2023, if, allowed, then the relief as prayed in the main Appeal will become infructuous, rendering the Appeal also as infructuous, therefore, the IA 81/2023 is taken up for hearing alongwith the main Appeal.

**Parties**

4. The Appellant, formerly known as M/s Contransys Private Ltd., is a Company incorporated and registered under the Companies Act, 1956 and is a Generating Company in terms of Section 2(28) of the Electricity Act, 2003.

5. The Respondent No.1, HPERC has been vested with the powers and functions to adjudicate the matter in dispute under the provisions of the Electricity Act, 2003 (in short “the Act”).

6. The Respondent No.2, Himachal Pradesh Power Transmission Corporation Limited (in short “HPPTCL”) is the transmission licensee vested with the functions of the State Transmission Utility (in short “STU”) and has been entrusted with the execution of all networks, both transmission lines and sub-station of 66 KV and above voltage rating, formulation, up-gradation and execution of transmission master plan of Himachal Pradesh for strengthening of transmission network.

7. The Respondent No.3 is the State of Himachal Pradesh.

8. The Respondent No.4, M/s Darjeeling Power Pvt. Ltd. is also a Generating Company in terms of Section 2 (28) of the Act and has commissioned Shaung Hydro Electric Project having a capacity of 3 MW in the District Kinnaur, Himachal Pradesh.

9. The Respondent No.5, M/s Roura Non-Conventional Energy (P) Ltd., is also a Generating Companies in terms of Section 2 (28) of the Act and has proposed to commission the 24 MW Roura-II HEP after obtaining the Techno-

Economic Clearance (in short “TEC”) for the project in the year, 2009, however, the same is yet to be commissioned.

10. The main issue in dispute is whether the Appellant can be fastened with the liability of paying for the entire cost of Bay charges of 66kV Feeder Bay at 66kV Switching Station, Urni on the basis of an internal understanding amongst the three generators, without examination or consideration of the applicable Regulations and the agreement signed with the HPPTCL?

### **Factual Matrix**

11. The factual matrix of the case is noted in brief in the succeeding paragraphs.

12. The Government of Himachal Pradesh (in short “GoHP”), on 25.07.2006, entered into an Implementation Agreement (in short “IA”) with the Appellant for establishing the Brua HEP (5MW) in the District Kinnaur, Himachal Pradesh, wherein it is specified that the interconnection point as the physical touch point(s) for the projects shall be on 33kV single circuit transmission line and will be connected to the grid at nearby point (Karcham).

13. Subsequently, on 06.04.2009, Appellant and HPSEBL, the distribution licensee, executed a long-term Power Purchase Agreement (in short “PPA”) in respect of Brua HEP 5 MW, the capacity of 5 MW was revised to 9 MW, on 09.07.2018, on mutual agreement corresponding to the enhanced capacity of the Brua Hydro Electric Project to 9 MW (in short “BHEP”) and thus executed Supplementary PPA at a fixed tariff of Rs.2.93/- per unit (preferential tariff).

14. Thereafter, on 03.12.2010, the Appellant informed HPSEBL that the Project will be connected at Karcham sub-station in accordance with the terms of the PPA for which the Appellant is preparing for constructing the transmission line up to Karcham substation and subsequently, got it approved from HPSEBL.

15. However, HPPTCL, later on, convened a meeting on 05.05.2010 and resolved that Brua and Shaung Projects of the Appellant and Respondent No.4 respectively shall be connected at Urni at proposed 66 kV switching-yard in joint mode, which resulted in change of route of Appellant's transmission line, compelling the Appellant for requesting HPPTCL to confirm the interconnection point so that the Appellant can re-plan and revise the transmission route including to take steps for seeking approval from the forest department, as the construction of Project was is in full swing and it was scheduled to be commissioned by end of year, 2011.

16. For evacuation of power, the Appellant, on 04.07.2012, submitted an application for grant of connectivity to the proposed 66kV Switching Station at Urni through 66kV S/C line from BHEP to Urni in accordance with HPERC (Grant of Connectivity, Long Term Access and Medium Term Open Access in Intra State Transmission and related matters) Regulations, 2010.

17. Against the application for connectivity, HPPTCL vide letter dated 18.03.2013 & 23.04.2013 granted connectivity to the Project of the Appellant.

18. The Connection Agreement (in short "CA") was separately executed on 04.06.2014 by the Appellant with HPPTCL wherein the connection point was

specified as 66kV switching station at Urni, also the Clause (C) of the Connection Agreement provided that, in case of BHEP seeking connection to the electrical system not owned by the STU, Tripartite connection agreement would be signed between STU, distribution licensee and the Appellant, since, the planning of the intra-state transmission system, insulation, coordination, system studies etc. are the responsibility of the STU.

19. However, HPPTCL on 04.12.2015, informed that Urni switching station shall be effective only after commissioning of Urni-Wangtoo 66 kV line and 66/220/400 kV sub-station at Wangtoo, which shall take some more time for the commissioning of this line and sub-station, therefore, for the evacuation of power from the Project, interim arrangement has been envisaged by charging one of the 220 kV Kahshang Bhaba line circuit at 66 kV

20. On 31.12.2015, the Appellant informed the HPPTCL that HPSEBL has instructed the Appellant to construct a 66 kV feeder Bay (at their own cost) at existing 66/22 kV Nathpa sub-station of HPSEBL in District Kinnaur for interim evacuation arrangement of power to be generated from the Project till commissioning of 400/220/66 kV Wangtoo sub-station of HPPTCL, further, the construction work of 66 kV feeder Bay has also been completed and now they want to connect circuit-II of Kashang Bhaba 220 kV DC line at Tower No. 100; also the Project of the Appellant and Respondent No. 4 are ready for commissioning and will evacuate their power from the above interim arrangement once it got commissioned.

21. Thereafter, the Appellant signed an Interim Power Transmission Agreement ("IPTA") dated 23.01.2016 with Respondent No.2 wherein the

Appellant is required to pay rupees 0.14 to HPPTCL for providing interim arrangement for evacuation of power from the Project initially through HPSEBL 66kV Natpha sub-station and thereafter, HPPTCL 220kV GIS Bhoktoo sub-station.

22. However, the Appellant vide letter dated 21.12.2016 informed HPPTCL that due to capacity constraint on Nathpa Kotla line and Kotla sub-station, the Appellant is forced to curtail its generation by 1/3rd resulting into heavy generation loss.

23. Separately, on 27.12.2019, the Appellant and the other Generators (i.e. the Respondent nos. 4 and 5) executed an Internal Tripartite Agreement with regard to sharing of transmission charges including cost of Bay installed by HPPTCL at Urni, wherein, Clause 2 of agreement provided that the entire cost of common 66 kV terminal Bay including metering arrangements required to be in place for metering purpose etc. shall be shared by the IPP's in proportionate to their individual generating capacities.

24. The aforesaid Internal Tripartite Agreement, as noticed from the documents furnished, is in addition to the agreement signed on 27.06.2012 by the Appellant and other generators i.e. Respondent nos. 4 & 5, for sharing the cost of establishment, operation and maintenance of the joint evacuation system including interconnection facility at the interfacing point, however, the same was an independent agreement signed amongst the generators as submitted by the Appellant.



25. It is on 02.07.2021, a revised CA was signed between the Appellant and HPPTCL, thereafter, HPPTCL vide letter dated 17.09.2021 intimated that 66 kV D/C transmission line from Urni to Wangtoo is near completion and will be completed by the end of the month and power from the projects will be evacuated through Urni sub-station.

26. The Appellant on 25.09.2021 intimated the HPPTCL that the 9.80 KM dedicated transmission line of the Appellant and Respondent No.4 is ready to be connected to Urni GIS sub-station and requested to provide copy of draft O&M agreement.

27. In reply to the aforesaid request of the Appellant, HPPTCL vide email dated 29.09.2021 intimated the Appellant that in the instance of joint evacuation of power by 2 or more generators through a common Bay in its system, one of the generators is required to act as a lead generator.

28. On 24.01.2022, Appellant informed Respondent No.2 that its dedicated 66 kV line is ready to be connected to 66 kV GIS Urni sub-station, in response HPPTCL, on 14.03.2022, intimated the Appellant to deposit Bay cost for Bay No. 609 amounting to Rs. 3,42,85,447/-.

29. Accordingly, on 30.03.2022, Appellant requested the Respondent Nos. 4 & 5 to arrange and deposit their individual share of cost of Bay on or before 10.04.2022 so that the O&M agreement can be signed and their projects are connected to Urni substation.

30. In reply to the aforesaid request Respondent No. 4 vide letter dated 28.04.2022 confirmed that it is ready to deposit its proportionate share of Bay charges of Rs. 28,57,121/- to HPPTCL, however, vide letter dated 25.04.2022, Respondent No. 5 intimated that it will deposit its proportionate share of Bay cost alongwith interest at the time of commissioning of its Project, as submitted by the Appellant that the project commissioning by Respondent No. 5 is yet to be commenced.

31. Subsequently, on 30.05.2022, HPPTCL informed that, since the CA dated 02.07.2021 signed between Respondent No.2 and Appellant for evacuation of power in joint mode with Respondent No.4 & 5, therefore, the cost of the interconnection facility shall be deposited by the Appellant on behalf of all the three generators including the Appellant.

32. Being aggrieved by the decision of HPPTCL directing the Appellant to pay full Bay charges including the charges to be paid by Respondent nos. 4 & 5, the Appellant on 08.06.2022 filed the Petition No.35 of 2022 before the State Commission for adjudication of dispute qua demand of Bay charges raised by the HPPTCL vide letter dated 30.05.2022.

33. The State Commission vide its order dated 27.12.2022, dismissed the Petition No.35 of 2022 filed by the Appellant, and hence the captioned appeal.

### **Our Observations and Conclusion**

34. Before proceeding further, it is important to note the relevant clauses of various agreements signed by the parties herein.

35. The relevant clauses of the CA signed between the Appellant and the HPPTCL are reproduced as under:

***“Clause 2.4 Agreement to pay Charges for construction of Bays:  
The applicant will execute an agreement with STU for the erection of equipment of applicant or intra-state transmission licensee/Distribution Licensee in the substation premises of the STU for construction of Bays, if required. For this purpose, the applicant shall pay charges to the STU on mutually agreed terms.*”**

***2.5 Agreement to pay O&M Charges:***

*The applicant shall pay O&M charges to the STU on mutually agreed terms for the Bay equipment of applicant being operated & maintained by the STU in their substation. These O&M charges will be governed time to time as per the mutually agreed terms.”*

36. The relevant clause 2. of the Tripartite Agreement signed by the three generators including the Appellant provides as under:

*“2. That the entire cost of common 66 kV terminal Bay including metering arrangements required to be in place for metering purpose etc. shall be shared by the IPPs in proportionate to their individual generating capacities.”*

37. The extracts of the Supplementary Power Purchase Agreement dated 09.07.2018, germane to the present context are as under: -

**“2.2.43. “Interconnection Facilities” means all the facilities which shall include, without limitation, switching equipment, protection, control and metering devices etc. for the incoming Bay(s) for the Project Line(s), to be installed and maintained by HPPTCL at 66 KV sub-station at Umi, District Kinnaur at the cost of the Company, to enable evacuation of electrical output from the project in accordance with the agreement. The Power from this project shall be evacuated in joint mode with Shaung (3MW) by interfacing the project line from Shaung SLIP (3MW) with 66 KV transmission line from Brua (9MW) to 66 KV proposed substation of HPPTCL at 66KV level. **The cost of 66 KV transmission line from Barua SHP (9.00 MW) to 66 KV substation at Urni and terminal equipment shall be shared with the developer of Shaung SHP on proportionate basis (Annexure VIII)****

However, as an interim arrangement, till commissioning of 66 KV Urni Sub-Station and 400/220/66 KV Wangtoo Sub-Station of HPPTCL, the power shall be evacuated through 66/22 KV Sub -Station at Nathpa of HPSEBL in Distt. Kinnaur (Annexure-IX). **This being interim arrangement the IPP shall have to back down in the event of non-availability of power evacuation capacity of the system and no deemed generation benefit will be payable by HPSEBL during the interim evacuation period.**

**Explanation:** For the purpose of this clause, the expression “cost” shall include “other expenditure borne by the company like re-organisation of Bays at interconnecting sub-station and associated civil works alongwith related operation and maintenance cost.”

38. On being asked with reference to the provision i.e. **“For this purpose, the applicant shall pay charges to the STU on mutually agreed terms”**, as contained under clause 2.4 of the CA, the Appellant submitted that no agreement has been executed between the Appellant and HPPTCL in terms of Clause 2.4 of CA dated 02.07.2021 as quoted in the foregoing paragraph for payment of charges to HPPTCL on mutually agreed terms, as such, in the absence of such specific agreement in terms of Clause 2.4 & 2.5 no demand for payment of entire cost of Bay charges could have been imposed on the Appellant. Further, submitted that the reliance placed by the State Commission on the said clauses while dismissing the Petition filed by the Appellant is completely erroneous.

39. The State Commission has recorded its finding in Para 38 of the Impugned Order, as under:

*“38. Apparently, the Bay has been constructed for use of the Projects of the Petitioner and Respondents No. 3 and 4. It is clear from the aforesaid agreement dated 02.07.2021 (Annexure P-27) that the Petitioner, while acting as a lead partner of the consortium, has agreed to pay the cost of construction of Bay/ Bay charges, additional costs and O&M charges. As discussed above, all the three project developers have agreed to reimburse the Bay charges including O&M charges of the interconnection facilities being operated and maintained by the HPPTCL in the Sub-station as also all the cost towards modification/ alteration/ construction of Bays.”*

40. Therefore, the State Commission has held that the Appellant in the Agreement dated 02.07.2021, while acting as a lead partner of the consortium,

has agreed to pay the Bay charges, additional cost and O&M charges, which is completely beyond and contrary to the conditions of the CA dated 02.07.2021 as countered by the Appellant.

41. We are inclined to accept the contentions of the Appellant as there is no such condition in the Agreement dated 02.07.2021 as seen from clause 2.4 and clause 2.5 of the CA, whereby, the Appellant had agreed to pay the complete Bay charges and O&M charges, for and on behalf of the Respondent No.4 & 5 in addition to charges corresponding to its liability, further, as also seen that the said agreement is silent about the situation that if one of the generators failed to pay the Bay charges or do not commission its Project, then the said charges would be payable by the lead member.

42. Therefore, we are satisfied that the unilateral demand for payment of Bay charges raised by the HPPTCL upon the Appellant on behalf of other generators is contrary to the conditions of the Connection Agreement.

43. Relying upon the Tripartite Agreement signed amongst the generators of which HPPTCL is not a party, HPPTCL has argued that the Appellant was internally chosen to represent the project developers in their transactions with HPPTCL and also, to pay the entire Bay cost, further, as per the settled law, the intention of the contracting parties has to be drawn from the harmonious construction of the terms of the contract, and, from the harmonious construction of the Tripartite Agreement, it can be concluded that the Appellant, insofar as the evacuation of power from the 66 kV Bay at Urni is concerned, was representing the other two project developers.

44. It is important to note here that the Tripartite Agreement is independent of the contractual arrangement made between the Appellant and HPPTCL and HPPTCL cannot take shelter under the garb of an independent internal arrangement between the parties. The payment terms are to be drawn only from the provisions of the agreement(s) signed between the Appellant and the HPPTCL and therefore, any provision contained therein is independent of the CA, which has to be referred for payment of charges related disputes.

45. It was also argued by HPPTCL that the Tripartite Agreement provides for qualifying factors in the event of default by any of the project developers of being in material breach of the contract, further, in terms of the agreement, in the event of default, the defaulting entity would lose its right to evacuate power from the 66 kV Bay at Urni and the other two remaining parties would take over the right to use the Bay and therefore, once there is a material breach of contract the Appellant has all the rights of remedy under the law, however, separately it is liable to pay the complete Bay charges to HPPTCL as per the agreement signed as lead partner of the consortium of the generators.

46. We fail to understand the contention of the Respondent No. 2, as the Tripartite Agreement is neither a part of the contract between the Appellant and the Respondent No. 2 nor is referred as a condition in the event of default in payment of charges for the Bay by either of the generators, it is an internal agreement and Respondent No. 2 cannot use its provisions to its benefit without being party to it, further, the CA is silent on the payment of charges in case of such a default of one of the generators.

47. The Respondent No. 2, further, argued that the Appellant has executed the CA dated 02.07.2021 with HPPTCL on behalf the generators, it is to the fact that the Appellant signing the contract with HPPTCL obviously draws its strength from the internal tripartite agreement and therefore, becomes clear that it is the Appellant which, for the purposes of the evacuation facility, is the party contractually bound with HPPTCL, further, in terms of the Connection Agreement, it is the Appellant which had applied to HPPTCL to seek connection from the evacuation facility in a joint mode with Respondent No. 4 and 5. Relevant extract of the agreement in this regard is as under:

*"(A)The Applicant has applied to the STU for connection of the **Brua (9.00 MW) Small Hydro Electric Project** facility in joint mode with **Shaung (3.00MW) SHP** and **Roura-II (24.00MW) SHP** to the STU Transmission System and use of the STUs Transmission system to transmit electricity to and or from the Facility through the Intrastate Transmission system."*

48. The Respondent No. 2 invited our attention to clause 2. of the Connection Agreement stating that it clearly places the liability of paying the charges towards monthly transmission charges, modification/alternation to the evacuation facility, construction charges for the 66 kV Bay at Urni and O&M charges for using the evacuation facility on the Appellant, the relevant extract of the agreement is reproduced here under:

## **2. Agreement to Pay Charges and Costs**

### **2.1 Agreement to Monthly Transmission Tariff**



*The applicant declares that it shall pay the Monthly Tariff including HPSLDC charges, for use of Intra State Transmission system, as and when Long term access, Medium -term open access or short-term open access is availed by the applicant, in accordance with the relevant regulations of HPERC in this regard.*

**2.2 Agreement of additional costs**

*The applicant declares that it shall pay the cost towards modification/alterations to the Infrastructure of STU or Intra-State transmission licensee/Distribution Licensee other than the STU, as the casemay be, for accommodating the proposed connection as specified in the letter of STU furnishing connection details.*

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**2.4 Agreement to pay Charges for construction of Bays:**

*The applicant will execute an agreement with STU for the erection of equipment of applicant or intra-state transmission licensee/Distribution Licensee in the substation premises of the STU for construction of bays, if required. For this purpose the applicant shall pay charges to the STU on mutually agreed terms.*

**2.5 Agreement to pay O&M Charges:**

*The applicant shall pay O&M charges to the STU on mutually agreed terms for the bay equipment of applicant being operated & maintained by the STU in their substation. These O&M charges will be governed time to time as per the mutually agreed terms."*

49. However, the Respondent No. 2 could not explain the reason for not signing the agreement as mandated in the aforesaid clauses as clause 2.4 which provided that for **“For this purpose the applicant shall pay charges to the STU on mutually agreed terms”** i.e. payment of charges for construction of Bay shall be on mutually agreed terms, it cannot, thus, be on the basis of unilateral decision by Respondent No.2.

50. It was, further reiterated that the rights and obligations of the Appellant and HPPTCL are governed by the CA, thus, in terms of the CA it is the Appellant which is contractually bound to pay for the Bay cost amongst other charges and it needs no reiteration that a contract cannot confer rights or impose obligations upon any person who is not a party to the contract.

51. We agree with the above contention of the Respondent No. 2 as the payment for the construction/ allocation for use of the Bay shall be governed by the CA which clearly provides that it shall be on mutually agreed terms which have not been settled by the Appellant and the Respondent No. 2.

52. The Respondent No. 2 also submitted that in the present set of facts, it is only the Appellant which has entered into a CA with HPPTCL and as such HPPTCL cannot seek reimbursement of the Bay cost from Respondent No. 4 and 5 for the simple reason the said parties are not party to the CA, in other words, by expecting HPPTCL to claim the Bay cost from the other Respondents, the Appellant is in a way seeking to achieve something indirectly which is otherwise not allowed legally, if so is the contention of the Respondent No.2, it should have signed separate connection agreements

with the other two generators, or had incorporated exclusive terms and conditions for the payment by lead generator.

53. As argued above by the Respondent No. 2, we are not convinced to the fact that the failure of Respondent No. 2 in finalizing the mutually agreed terms of payment as per the Connection Agreement, and on the other side accepting the payment made by Respondent No. 4 directly in proportion to its liability, the Appellant can be fastened with the liability of making the charges for the Bay on behalf of Respondent No. 5.

54. The Appellant in its response pleaded that the State Commission after recording in Para 35 of Impugned Order, that Clause 2 of Tripartite Agreement dated 27.12.2019 provided that the entire cost of common 66kV terminal bay including metering arrangement required to be in place for metering purpose shall be shared in proportion to their individual generating capacities, erroneously held that the Appellant had agreed to pay the cost of construction of bay charges and O&M charges, whereas, no such condition existed in such agreement. Clause 2.0 of Tripartite Agreement reads as under: -

*“2. That the entire cost of common 66 kV terminal bay including metering arrangements required to be in place for metering purpose etc. shall be shared by the IPPs in proportionate to their individual generating capacities.”*

55. It was, further, put forth by the Appellant that the Impugned demand for payment of bay charges, is neither supported by terms and conditions contained in the Tripartite Agreement dated 27.12.2019 nor is governed by

Connection Agreement dated 02.07.2021, therefore, the liability of Appellant for payment of bay charges has to be restricted to the extent of its proportionate share of the installed capacity of its Project i.e. 9MW, additionally, the Order and demand letters are against provision of Clause 2.2.43 of Supplementary Power Purchase Agreement dated 09.07.2018 as quoted in the foregoing paragraphs, which clearly provided that **“The cost of 66 KV transmission line from Barua SHP (9.00 MW) to 66 KV substation at Urni and terminal equipment shall be shared with the developer of Shaung SHP on proportionate basis.”** i.e. the costs of 66kV transmission line from Barua SHP to 66kV sub-station at Urni and terminal equipment shall be shared with the developer of Shaung, on proportionate basis.

56. It was also brought before us that Respondent No.5 vide its letter dated 25.04.2022 confirmed to pay its share of costs of the Bay with applicable interest at the time of commissioning of the Project, thus, Respondent No.2 could not have demanded the entire cost of bay charges from the Appellant, in as much as, Respondent No.5 had never denied its liability to pay such charges to Respondent No.2, further, there is no Rule or Regulation etc. notified by the State Commission, which entitles an IPP to postpone its liability to pay its share of Bay charges on the ground of delay in commissioning of the Project, further, pleaded that appropriate penalty, as per the Regulations, ought to have been imposed upon Respondent No.5.

57. At this stage we are refraining from observing the conduct and liabilities of Respondent No. 5.

58. However, the decision of the State Commission having accepted the undertaking of Respondent No.4 to pay Rs.28,57,121/- as the proportionate charges for the Bay should be likewise made applicable to the Appellant and the State Commission ought not to have directed the Appellant to pay the share of Bay charges payable by Respondent No.5, admittedly, an amount of Rs.35,00,000/- being the proportionate share of Bay charges has already been paid by Respondent No.4 to HPPTCL vide letter dated 23.01.2023 in terms the observations made in Para 40 by the State Commission. The relevant extract of the Impugned Order is quoted as under:

*“Significantly, the Respondents No. 3 and 4 have not disputed the connection agreement dated 02.07.2021 (Annexure P-27) as also the internal agreement dated 27.12.2019 (Annexure P-24). The Respondents No. 3 and 4 have also not disputed their liability to pay charges as discussed above to the extent and in proportion to their capacity of the Projects. **Rather, the Respondent No. 3 has very categorically mentioned in its reply that the Respondent No. 3 is ready and willing to pay its share amounting to Rs. 28,57,121/-. Similarly, the Respondent No. 4, in its reply, has also stated that it is ready and willing to pay the charges but its Project is yet to be commissioned and for want of loan disbursal, the Respondent No. 4 is not in a position to bear its proportional charges of Bay and other charges.**”*

59. The Appellant submitted that it is ready to pay its proportionate share of Bay charges of Rs.85,71,361.75/- corresponding to the capacity of 9MW to

the Respondent No.2 for grant of connectivity of the Project to its transmission system i.e. 66kV Feeder Bay at 66kV Switching Station at Urni, Himachal Pradesh.

60. We find merit in the contention of the Appellant. The Appellant cannot be fastened with the liability on behalf of Respondent No. 5, the same as observed in the Impugned Order that the Respondent No. 5 is willing to pay with interest only after the commissioning of its project may be recovered under the law by the Respondent No. 2, HPPTCL.

61. The Respondent No. 2, additionally, submitted that presently an interim arrangement has been put in place for the evacuation of power from BHEP, the Appellant's project by connecting it to the Kashang - Bhabha D/C line and this Tribunal vide interim orders dated 19.01.2023 and 31.01.2023 has directed HPPTCL not to disconnect the Appellant from the temporary arrangement subject to the Appellant paying the interim charges, further requested that such directions are adversely affecting it financially and HPPTCL is failing in complying with its contractual liabilities to other generators in the State of Himachal Pradesh through the Kashang - Bhabha D/C Line, and will lead to multiplicity of proceedings.

62. Also added that the LTA with M/s Tidong Power is about to be operationalized from March 2023 and as such HPPTCL has to make the evacuation facility available for the same, further, 12 MW of capacity of the Appellant HPPTCL would be forced to fault on its obligation to evacuate power corresponding to much higher capacity.

63. As decided in the foregoing paragraph to adjudicate the Appeal itself, we refrain in taking any decision on the above submission of Respondent No. 2, additionally, once connected through the Urni sub-station, the interim arrangement for the Appellant will be no longer required.

64. The Respondent No. 2 also submitted that the Appellant being in a long-term contractual relationship with HPPTCL the Appellant can always pay full charges for the Bay cost subject to the outcome of the Appeal, more so, when the Respondent No. 5 has submitted all along that it is willing to pay its share of the Bay cost to the Appellant with interest, which can be recovered by the Appellant once the project of Respondent No. 5 is commissioned, also the Appellant has failed to make out its case prima facie, since contractually it is HPPTCL and the Appellant which are bound together. It is the case of the Appellant that it is unable to enforce its contract with Respondent No. 4 and 5 and hence has resorted to renege on its contract with HPPTCL.

65. If we agree with the contention of Respondent No. 2 that Respondent No. 5 is willing to pay its share on commissioning of its project and as such Appellant can recover the same after making the payment on behalf of Respondent No. 5 at this stage as HPPTCL has the liability of maintaining and operating the Transmission network of the State, the same can be made equally good for the Appellant also which has no such contractual liability and therefore, once the project of the Respondent No. 5 is commissioned, HPPTCL can recover the same with interest from the Respondent No. 5.

66. Further, the argument of the Respondent No. 2 that the complete Bay charges is to be paid by the Appellant who in turn can recover the same from the

other generators cannot be agreed to as it is the liability to be borne by the individual generator in proportion to their share as already paid by Respondent No. 4 corresponding to its share and the payment as already accepted by HPPTCL.

67. The submission of the Respondent No. 4 that it has already paid its share was placed on record and the Respondent No. 2 is directed to provide connectivity to its generating station at Urni sub-station for the evacuation of power.

68. The Respondent No. 2 is also directed to provide connectivity to BHEP of the Appellant as per the CA with immediate effect on payment of its share in proportion to its capacity i.e. 9 MW.

69. The Respondent no. 5 also argued against any relief to be granted to the Appellant *inter alia* inviting our attention to some other agreement dated August 14, 2015 signed between the Appellant and the Respondent no. 4 for joint evacuation of power and nominating an IPP for signing the Operation & Maintenance (O&M) Agreement with HPSEBL and for sharing the charges levied by the board/ Govt, wherein an arrangement was made such that the Appellant was been authorized by Respondent No. 4 to sign the O&M Agreement with HPSEBL and the entire charges levied by the HPSEBL were payable by the Appellant on account of operation & maintenance of 66 KV bay at Urni-Nathpa Sub-Stations and separately to be shared proportionately by the Appellant and the Respondent no. 4.



70. We find it totally irrelevant to deal or examine such agreement which is neither part of the present appeal nor relevant to the present dispute in hand.

71. The Respondent no. 5 reiterated that it was the agreement that all the three generators shall pool the power to be generated from their generating stations at the common 66kV terminal bay commissioned by Respondent No. 2, also agreeing that the entire cost of common 66kV terminal bay including metering arrangements required to be in place for metering purpose etc. shall be shared by them in proportionate to their individual generating capacities and that the Appellant, Respondent No. 4 and Respondent No. 5 will jointly nominate the Appellant to settle the claims, if any, of the deemed generation of the projects with the HPSEBL in line with the decision of HPERC in the Case No. 254/2006, M/s Sri Sai Krishna Hydro Energies Private Limited & Other versus Himachal Pradesh State Electricity Board, Shimla, further, the internal settlement of the deemed generation claims amongst the IPPs were to be made in proportion to the installed capacities of the respective IPPs.

72. The issue in hand has no bearing or relation to deemed generation, find such submission of the Respondent no. 5 as unnecessary and wholly unwarranted.

73. It was also submitted that cost of O&M charges of the inter connection facilities at the injection point of Respondent No. 2 were to be shared by the generators injecting power, in proportion to the installed capacity of their project, however, the installed capacity of the project of the Respondent no. 5, as of date, is nil and as per the Tripartite Agreement, the answering Respondent is not required to pay any share of the amount demanded by Respondent No. 2 from

Respondent No. 1, being the lead generator, however, with a harmonious & conjoint interpretation of the provisions of the Tripartite Agreement leads to the only conclusion that the impugned demand raised by Respondent No. 2 is to be borne by the Appellant in the first instance since many other IPPs are also paying 100 % bay costs where their own share is less than 50 %.

74. The whole issue has cropped up because of utter failure of Respondent No. 5 in commissioning its project, even to the extent, as submitted, has not started the commissioning till date, such an action requires stringent penalties, however, no provisions has been out in any of the contractual agreements signed by the generators.

75. We find it most inappropriate, the submission of Respondent No. 5 that the Appellant be levied with additional burden on its behalf due to its failure in commissioning its project, we direct the State Commission to ensure that necessary provisions be made so that such failures can be appropriately penalized in future.

76. Therefore, the Appellant cannot be levied with additional burden in the absence of any express provision available in the contractual agreements signed by the Appellant with Respondent no. 2, separately, the Bay charges with interest corresponding to Respondent No. 5 can be recovered by Respondent No. 2 from Respondent no. 5 after the commissioning of its generating project of 24 MW or through relevant remedy available under the law.

## **ORDER**

For the foregoing reasons as stated above, we are of the considered view that the present Appeal being Appeal No. 30 of 2023 filed by the generator i.e. M/s. Brua Hydrowatt Pvt. Ltd. has merit and is allowed.

The Impugned Order dated 27.12.2022 passed by the Himachal Pradesh Electricity Regulatory Commission in Petition No. 35 of 2022 is set aside to the extent as observed in the foregoing paragraphs.

The Respondent No. 2 is directed to, immediately, provide connectivity to the generating stations of the Appellant and Respondent no. 4, on payment of corresponding charges for the Bay in proportion to their capacities.

Needless to say, pending IA, if any, shall stand disposed of.

**PRONOUNCED IN THE OPEN COURT ON THIS 17<sup>th</sup> DAY OF MARCH, 2023.**

**(Sandesh Kumar Sharma)**  
**Technical Member**

**(Justice Ramesh Ranganadhan)**  
**Chairperson**

*pr/mkj*