

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No: 43/MP/2012

Coram :
Dr. Pramod Deo, Chairperson
Shri S. Jayaraman, Member
Shri V.S. Verma, Member
Shri M. Deena Dayalan, Member
Shri A.S.Bakshi, Member (EO)

Date of Hearing: 21.06.2012
Date of Order : 31.01.2013

In the matter of

Petition under Section 79 (1)(f) of the Electricity Act, 2003 regarding a dispute arising between the petitioner, being a generating company and the Respondent, being a transmission licensee

And in the matter of

Himachal Sorang Power Ltd.

Petitioner

Vs

Powergrid Corporation of India Ltd

Respondent

Present:

Shri Sitesh Mukherjee, Advocate, HSPL
Shri Sakya Singha Chaudhuri, Advocate, HSPL
Shri S.C. Mahajan, HSPL
Shri Prabhat Gujral, HSPL
Ms. Anusha Nagarajan, HSPL
Shri Avinash M. Pangi, PGCIL
Ms. Rashmi Pant Joshi, PGCIL

ORDER

In this petition, filed under clause (f) of sub-section (1) of Section 79 of the Electricity Act, 2003, the petitioner has made the following prayers, namely:

- “(i) Declare that the Petitioner is entitled in the facts and circumstances of the case, to an extension of the date for commencement of open access under the BPTA;*
- (ii) Pass appropriate directions extending the date of commencement of long term open access from May, 2011 to September, 2012 under the BPTA;*
- (iii) Restrain the Respondent from making any claims under the BPTA for transmission charges or in respect of extension of the date of commencement of open access under the BPTA prior to September, 2012*
- (iv) Direct the Respondent to withdraw the invoices dated 08.09.2011 and 03.01.2012;*
- (v) In the interim, grant a stay on the Respondent from raising any invoices on the Petitioner for transmission charges or otherwise till September, 2012 or to take any steps or coercive action to recover the transmission charges raised in its invoices dated 08.09.2011 and 03.01.2012; and*
- (vi) Pass such other orders that this Hon'ble Commission deems fit in the interest of justice.”*

Submission of the Petitioner

2. The petitioner, Himachal Sorang Power Private Limited signed a Memorandum of Understanding dated 23.9.2004 with the State Government of Himachal Pradesh for the implementation of a run-of-the-river hydro electric power project with a generation capacity of 100 MW (2X50 MW) on the Sorang Nallah tributary of Satluj river, in the Kinnaur District of Himachal Pradesh ("**Project**"). Subsequently, the Government of Himachal Pradesh and the petitioner entered into an Implementation Agreement dated 20.1.2006 ("**Implementation Agreement**") setting out the terms and conditions governing implementation of the Project. North Delhi Power Limited, Delhi is the sole identified beneficiary who is to be supplied 85 MW of power. The remaining 15 MW is proposed to be sold by the petitioner as merchant power. The power is to be evacuated through a LILO circuit constructed by

the petitioner at Sorang in one circuit of 400 kV D/C Karcham Wangtoo-Abdullapur transmission line, which joins with the transmission network of the respondent, Power Grid Corporation of India Ltd (PGCIL) at Abdullapur sub-station.

3. The petitioner was granted long-term open access by PGCIL for 25 years and for this purpose, a Bulk Power Transmission Agreement ("**BPTA**") was executed on 21.10.2009. As per the BPTA, the date of commencement of open access was May 2011, the expected date of commercial operation of the Project or the actual date of commercial operation of the first unit of the Project, whichever was earlier. The relevant part of the BPTA is extracted below:

"HSPPL shall bear the applicable transmission charges of NR corresponding to 100 MW from Sorang Hydro Electric Project from May 2011 or actual date of commercial operation of 1st unit, wherever is earlier, onwards.-----".

4. The petitioner has submitted that the Implementation Agreement with the State Government prescribed the milestones for the implementation of the project and the petitioner has throughout been prudent in achieving the construction and financial milestones and in getting the required approval in time as per the details given in the table below:

Sl. No	Particulars	Target as per Implementation Agreement	Achievement Date
1.	TEC	20.06.2007	09.06.2006
2.	Environmental Clearance	20.06.2007	07.09.2006
3.	Forest Clearance	20.06.2007	01.11.2006
4.	Fisheries Clearance	20.06.2007	16.05.2006
5.	Financial Closure	01.05.2007	11.06.2007

5. The petitioner has submitted that the Detailed Project Report (DPR) of the project prepared by the consultants M/s Design Group contemplated a construction period of 54 months with the scheduled date of commissioning as June, 2011 and accordingly, LTA was scheduled from May 2011. The petitioner has submitted that the petitioner has taken all necessary measures to implement the project in accordance with the schedule. However since the commencement of the execution of the project, the petitioner has been encountering geological surprises continuously coupled with adverse conditions in the form of torrential monsoons that affected the implementation of project. The petitioner has submitted that the excavation and construction activities were severely hampered by geological surprises and torrential rains in relation to penstock, cable tunnel, fire-fighting tank and head race tunnel. These factors have caused the petitioner to carry out substantial changes to the methodology and design for the implementation of the project which has resulted in considerable delay in completion of the project. The petitioner has explained the delay on completion of diverse activities as discussed hereunder.

(a) **Penstock:** The petitioner has stated that works in respect of the penstock were scheduled to be commenced in February 2009 and completed by February 2010. The petitioner has stated that the works were, however, rescheduled to be completed by July 2012, with a delay of 18 months because of the factors over which it did not have any control. The petitioner has explained that while carrying out surface excavation to lay penstock line it encountered excessive overburdening of soil cover at various places up to a depth of 7m - 8m, though DPR had considered a very thin overburden. The petitioner has argued that overburdening of soil cover

slowed down the progress of construction. Besides, the petitioner has stated, the region faced unprecedented torrential rains and heavy snowfall during 2009 and 2010, which caused damage to the works already executed at site and protracted further progress. The delay of about two months during November 2010 to January 2011 has been attributed to the interim stay ordered by the civil court on 3.11.2010 restraining the petitioner from constructing the road leading to the Project site, which order was subsequently vacated by the District Judge, Kinnaur by his judgment dated 10.1.2011 on appeal filed by the petitioner. The petitioner has submitted that on account of the problems faced by it during the excavation process for construction of penstock, it was compelled to change the construction design and methodology at certain places leading to further time over-run.

(b) **Cable Tunnel:** The petitioner has stated that while carrying out the excavation work for construction of the inclined RCC tunnel for laying of cables from the powerhouse to the gas-insulated switchyard, as planned, it encountered very loose/unstable strata though initially based on the DPR it expected good rock in the tunnel and suitable strata for RCC trench. In view of the difficulties confronted, the petitioner has claimed that it changed the alignment of the balance inclined tunnel by diverting it to horizontal tunnel and vertical shaft and installing steel truss in place of RCC trench. The petitioner has stated that the changed design increased the scope of work which was recommenced on 27.4.2011 with a delay 13 months. The petitioner has stated that construction of cable tunnel originally scheduled to be completed by March 2010 was expected to be completed by February 2012, with a delay of 23 months.

(c) **Fire-fighting Tank:** The petitioner has stated that construction of the fire-fighting tank also delayed the Project. The petitioner has explained that it started construction of the fire-fighting tank in November 2010 as an over-ground tank based on design parameters in the DPR and the understanding that the rocks in the area were hard to withstand the burden of the fire-fighting tank. However, it has been stated, after a substantial portion of the fire-fighting tank was constructed, in June 2011 the unexpected movement of rocks caused the tank to be buried which led to relocation of the fire-fighting tank and thereby resulting in the delay. The petitioner has stated that under the revised construction schedule the fire-fighting tank was expected to be completed by February 2012.

(d) **Head Race Tunnel:** The petitioner has stated that the work on construction of the Head Race Tunnel was scheduled to commence in February 2009 and was to be completed by March 2011. It has been stated that the work was delayed by 12 months and was rescheduled to be completed in February 2012 owing to the fact that during the course of excavation it discovered shear zone and opening up of cavities, resulting in slow progress in work and thereby causing the delay.

(e) **Other factors:** The petitioner has submitted that inhospitable weather conditions led to delay of about 3 months, by restricting movement of the men and construction material and slowing down of excavation work. The petitioner has further submitted that strikes by workmen, protests by villagers and obstructions by landowners were the additional causes for the delay in the construction.

6. The petitioner has submitted that realizing that despite its best efforts, the Project was unlikely to be commissioned as originally scheduled (May 2011), it wrote to the respondent and other concerned authorities informing them of the factors causing delay in the execution of the Project and requested the respondent for postponing the date of commencement of open access under the BPTA. The petitioner made a representation to the Chairman, Himachal Pradesh State Electricity Board on 19.1.2011 informing him about the prevailing circumstances with a request to take up the matter with the Respondent to allow an amendment to the BPTA and extend the date from May 2011 to May 2012. The petitioner also took up the matter with the respondent vide letter dated 28.2.2011 requesting to extend the date of open access to May 2012. The petitioner wrote a letter dated 18.4.2011 to the Chairman, Northern Regional Power Committee (NRPC) setting out the details of the impediments faced in execution of the Project to facilitate the members of NRPC to deliberate on the issue of extension of the date of commencement of open access, and to suitably advise the respondent. The petitioner has submitted that NRPC instead of taking up the matter with the respondent rejected the petitioner's request for extension at its 21st meeting held on 1st and 2nd June 2011.

7. The petitioner has submitted that pursuant to the meeting of NRPC dated 2.6.2011, the respondent has raised two invoices dated 8.9.2011 and 3.1.2012 on the petitioner for Rs. 70 lakhs each. The petitioner has submitted that these invoices have been raised for a period when the petitioner has not even utilized the transmission network of the respondent. The petitioner has submitted that the BPTA provides that the terms and conditions governing the contractual relations between

the petitioner and the respondent shall be the same as mentioned in the BPTA between the respondent and Haryana Vidyut Prasaran Nigam Limited dated 16.10.2003 which has been enclosed as the Annexure to the BPTA. The petitioner has submitted that Clause 13 of the BPTA dated 16.10.2003 provides for force majeure which relieves the parties from any liability arising out of failure comply with the terms of the agreement to the extent such failure is caused by events that include strikes, forces of nature, act of god and any other reasons beyond the control of the concerned party. The petitioner has submitted that strike by workmen, protest by villagers and obstructions by land owners, torrential rains, climatic conditions, mishaps during tunneling process and geological surprises time and again forced the petitioner either to stall or to slow down the construction. The petitioner has submitted that since the delays were caused by unpredictable and unforeseen circumstances which were beyond the control of the petitioner and which could not have been prevented despite all prudent steps taken by the petitioner, these events hampering the progress of the project fall within the definition of force majeure as defined in the BPTA.

8. The petitioner has submitted that the LTOA has been granted to the petitioner without any system strengthening and that no additional or new asset of the respondent would be strengthened for exclusive use of the petitioner's project. The petitioner has submitted that construction of the fresh LILO circuit pursuant to the LTOA is the sole responsibility of the petitioner. The petitioner has submitted that since the respondent has not incurred any cost in respect of the transmission system to be utilized by the petitioner and it is not a case where another suitable applicant

has been denied LTOA in order to give priority to the petitioner's project, no loss has been or shall be suffered by the respondent by virtue of extension of the date of commencement of the LTOA. The petitioner has submitted that the decision of the respondent to raise the transmission charges from July 2011 to September 2011 and not to defer the date of BPTA is contrary to the provisions of the BPTA and the established principles of contract law. The petitioner has submitted that it would be in the interest of justice to extend the date of commencement of BPTA to September 2012.

9. The petitioner has submitted that the present dispute is clearly contractual and relates to the BPTA entered between the petitioner and the respondent. Therefore, NRPC has no role to play in the decision making of the respondent vis-à-vis the extension of the date of the BPTA and it is not the appropriate forum to adjudicate on the contractual relations between the petitioner and the transmission licensee like the respondent. The petitioner has further submitted that Section 29 (4) of the Act assigns the role of an advisory and coordinating body to RPCs. Therefore, no powers have been granted to NRPC to sit in judgment over the contractual rights and obligations between the respondent and the petitioner. Despite its limited role under the Act, NRPC has advised the respondent not to extend the date of the BPTA in the meeting held on 2.6.2011. The petitioner has submitted that the respondent has acted on the basis of the decision of NRPC instead of examining the facts and circumstances under which the project was delayed.

10. The petitioner has prayed for a declaration that it is entitled to the extension of the date of commencement of open access under the BPTA and for appropriate directions for extension of the date of commencement of the long term access from May 2011 to September, 2012 under the BPTA, among other prayers.

Reply of PGCIL

11. The respondent in its reply has denied that the causes for delay in completion of the project were beyond the reasonable control of the petitioner. The respondent has urged that such eventualities are common in hydro projects and it is for the generator (the petitioner) to deal with the situations. The respondent has stated that the petitioner's claim for extension of time on the grounds of geological surprises, torrential rains, heavy snowfall, and labour unrest etc. are untenable.

12. The respondent has submitted that the petitioner had applied for long term open access in March 2009 for 100 MW from Sorang HEP in Himachal Pradesh. The application was discussed during the LTOA meeting held on 30.5.2009 and it was decided that Sorang HEP Power would be evacuated through LILO of one circuit of 400 kV D/C Karcham Wangtoo-Abdullapur line and the LILO would be constructed by the petitioner. LTOA was granted to the petitioner without any additional system strengthening by the intimation dated 17.7.2009. Subsequently, BPTA was signed by the petitioner and the respondent according to which the date of commencement of open access was May 2011 or actual date of commercial operation of the first unit, whichever is earlier. The respondent has further submitted that the petitioner vide its letter dated 2.8.2010 requested PGCIL to revise the date of commencement of open access from May 2011 to January 2012 because of the

anticipated delay in the commissioning schedule of the Project due to some unforeseen circumstances. Subsequently, by its letter dated 28.2.2011, the petitioner revised the schedule of commissioning to May 2012 and requested for extension of commencement of open access from May 2012. The respondent has submitted that since long term access is granted based on the decision taken by the beneficiaries of the concerned region, the request of the petitioner regarding extension of the date of commencement of open access was placed before the NRPC. The respondent has further submitted that the matter was discussed in the 19th meeting of the Technical Coordination Committee (TCC) and 21st meeting of NRPC held on 1st and 2nd June, 2011 respectively which did not recommend extension of the date of commencement of open access. The respondent has further submitted that subsequent to the decisions in NRPC, the petitioner by its letter dated 7.7.2011 sought revision of its request for extension of the commencement of open access from the date Karcham Wangtoo-Abdullapur transmission line is commissioned. The respondent has submitted that M/s JP Power Grid Limited in its letter dated 2.4.2012 has informed the NRPC that the Karcham Wangtoo-Abdullapur line has been commissioned in March 2012 and declared under commercial operation w.e.f. 1.4.2012. The respondent has submitted that the petitioner is entitled to avail open access w.e.f. 1.4.2012 i.e. the date of commercial operation of Karcham Wangtoo - Abdullapur transmission line.

13. The respondent has submitted that since the petitioner has requested for being levied the transmission charges from the date of completion of Karcham Wangtoo - Abdullapur line and since this line has been declared under commercial

operation w.e.f 1.4.2012, the petitioner is liable to pay the transmission charges w.e.f 1.4.2012. The respondent has further submitted that the invoices dated 8.9.2011 for the transmission charges for August, 2011 has already been withdrawn through a negative bill raised by the invoice dated 3.1.2012.

Rejoinder of the Petitioner

14. The petitioner in its rejoinder has reiterated the grounds taken in the petition. It has stated that it could not correctly anticipate the impact of *Force Majeure* events and therefore could not arrive at the firm date for commissioning of the Project and therefore revised the dates from time to time. The petitioner has objected to rejection of its request by NRPC on the ground that NRPC did not have any role in the matter since it was a commercial arrangement between the petitioner and the respondent. The petitioner has concluded its rejoinder with a prayer to “extend the date of commencement of long term open access under the BPTA up to December 2012.”

15. After hearing the learned counsel for the petitioner and the representative of the respondent during the hearing on 21.6.2012, we had directed the petitioner to explain the following:

(a) Whether any geological surprises have taken place after April, 2012?

(b) Whether the failure to estimate the time will be considered as force majeure?

16. The petitioner in its letter filed on 8.10.2012 has submitted that it engaged M/s Lahmeyer International (India) Pvt. Ltd. as independent engineer for analysis of the

force majeure events and its impact on the implementation of the project and placed on record the report of the M/s Lahmeyer International (India) Pvt. Ltd. The petitioner in its letter dated 17.11.2012 sought an opportunity of hearing to explain the details of the force majeure events and analysis of the independent engineers as submitted in Lahmeyer report. Subsequently, the petitioner vide its letter filed in the Commission on 17.12.2012 submitted an Addendum to the Report on Geological Surprises providing timeline for each of the components affected by the geological surprises alongwith the delay due to change in methodology and design. The petitioner has filed an additional affidavit dated 17.12.2012 explaining the reasons for the delay in commissioning of the project based on the report by Lahmeyer International (India) Pvt. Ltd. The petitioner has submitted that Lahmeyer International after analyzing the direct and indirect delay components of the force majeure events has calculated the delay of 699 days in commissioning of the project taking into account the period for which force majeure events occurred, time taken to recover from damages caused by the force majeure events and the time taken to change the methodology and designs and further execution of the additional works which had to be undertaken due to force majeure events. The petitioner has prayed that the effective date of commencement of long term access be extended upto 1.5.2013.

Analysis and Decision

17. We have considered the pleadings of the parties and other material on record. The main plank of argument of the petitioner is that due to various geological surprises affecting the construction of the generating station which are beyond the control of the petitioner, it could not complete the works of the generating station as

per the schedule and in accordance with the provisions of force majeure in the BPTA between the petitioner and respondent, it is not liable to pay the transmission charges till the commissioning of the generating station. The respondent has contested the contention of the petitioner and has submitted that such eventualities are common in the projects of such nature and suitable actions are required to be taken by the generators to deal with such situation. The respondent has submitted that the petitioner is not entitled to extension of date of commencement of open access beyond 1.4.2012.

18. Before going into merits of the petitioner's claim, we deem it necessary to consider the petitioner's objection to the decision taken by NRPC. According to the petitioner, the question of extension of date of commencement of open access is a bilateral issue between the petitioner and the respondent and it was not appropriate to involve NRPC in the decision making. The respondent has explained that the petitioner's request to allow long-term open access was placed before the beneficiaries in the Northern Region and the open access was agreed after discussion at NRPC forum. Therefore, the petitioner's request for extension of date was also placed before NRPC. There is merit in the explanation given by the respondent. The issue of sharing of the transmission charges by the beneficiaries in the Northern Region is intricately linked with the petitioner's request for extension of commencement of open access. If the petitioner is granted extension of the date of commencement of long term access without any liability to pay the proportionate transmission charges, then it will increase the liability of the beneficiaries of the Northern Region as the transmission line has been constructed and come into commercial operation. Therefore, we do not find any infirmity with the consultation of

NRPC on the issue of extension of the date of commencement of open access. That apart, the petitioner in its letter dated 19.1.2011 (Annexure P 4) addressed to Chairman, HPSEB requested him to take up the matter with the respondent, CEA and the constituents of Standing Committee of NRPC to allow amendment of the BPTA for commencement of open access to May 2012. Again, by its letter dated 18.4.2011, the petitioner requested the Chairman, NRPC that the matter be taken up in the next meeting of Standing Committee of NRPC to allow amendment of the BPTA. Thus the petitioner has itself accepted NRPC as a forum for decision making through agreement by the constituents of the region and only because its request was rejected by NRPC, the petitioner cannot turn around and raise objections to the decision at the NRPC forum. It is also noticed that after the decision by NRPC, the petitioner approached the respondent through its letter dated 7.7.2011 to revise the commencement of open access from the date Karcham – Wangtoo Abdullahpur line was commissioned to which the respondent agreed. Therefore, both petitioner and respondent by mutual consultation have decided the date of commencement of open access as 1.4.2012 i.e. the date of commercial operation of Karcham – Wangtoo Abdullahpur transmission line irrespective of the decision at the NRPC forum.

19. Another issue is regarding raising of two invoices by the respondent dated 8.9.2011 and 3.1.2012 on the petitioner for ₹ 70 lakh each on the ground that the petitioner had not utilized the transmission network of the respondent during that time. Accordingly, the petitioner has sought a direction on the respondent to withdraw these invoices. On perusal of these invoices it is seen that the respondent raised an invoice for ₹ 70 lakh on 8.9.2011 and subsequently another negative (-) invoice for ₹ 70 lakh on 3.1.2012. Thus the invoice dated 3.1.2012 cancelled the

earlier invoice of 8.9.2011. This position has been confirmed by the respondent in its reply. The petitioner has not made any payment towards the bill dated 8.9.2011. Accordingly, the transmission charges were not recovered by the respondent based on the invoices. Thus the petitioner's prayer in this regard is infructuous.

20. Next we consider the request of the petitioner for extension of the date of commencement of open access under the BPTA. It is noticed that as per the BPTA signed by the petitioner and the respondent, the date of commencement of open access was May 2011 or actual date of commercial operation of the first unit of the generating station of the petitioner, whichever was earlier. The petitioner vide its letter dated 2.8.2010 requested PGCIL to revise the date of commencement of open access from May 2011 to January 2012 because of the anticipated delay in the commissioning schedule of the Project due to some unforeseen circumstances. Subsequently, by its letter dated 28.2.2011, the petitioner further revised the schedule of commissioning to May 2012 and requested for extension of commencement of open access from May 2012. In the petition, the petitioner has sought revision of the date to September 2012 and subsequently, the petitioner has revised its prayer regarding the commencement of the open access to December 2012 in its rejoinder and to May 2013 in its additional affidavit dated 17.12.2012. Thus the petitioner is not consistent in its approach and has been revising its prayer commensurate with the delay in the commissioning of its generating station.

21. The petitioner has relied upon the force majeure clause in the BPTA in support of its prayer for extension of the date of commencement of open access. Clause 3.0 of the BPTA incorporates the terms and conditions of another agreement

dated 16.10.2003 signed between the respondent and HVPNL, which has been attached as Annexure A of the BPTA. The said clause 3.0 is reproduced hereunder:

“3.0 Copy of the Agreements dated 16.10.2003 entered with HVPNL of Northern Region attached at Annexure A shall form part and parcel of this Agreement and accordingly all terms and conditions of Agreements dt. 16.10.2003 shall mutatis mutandis apply to the Long term transmission customer. Any revision, replacement, modification and extension of Agreements dt. 16.10.2003 shall also apply to to the Long term transmission customer.”

Clause 13 of the agreement dated 16.10.2003 signed between the respondent and HVPNL and annexed as Annexure A of the BPTA contains the *Force Majeure* clause in the following terms:

“The Parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure events such as fire, rebellion, mutiny, civil commotion, riot, strike, lockout forces of nature, accident, act of God and any other reason beyond the control of concerned party. But any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and give written notice within a reasonable time to the other party to this effect. Transmission/drawl of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist. ”

22. The *Force Majeure* clause in the agreement between the respondent and HVPNL stands incorporated in the BPTA by virtue of clause 3.0 thereof and extracted above. In order to invoke the *Force Majeure* clause, the party needs to give notice to the other party of the existence of the *Force Majeure* event or events. It is to be seen whether the petitioner has given notice to the respondent of existence of the *Force Majeure* events seeking extension of date of commencement of inter-State open access. The petitioner has not placed anything on record and has

not even averred that it issued notice to the respondent for extension of date of commencement of open access up to September 2012. The petitioner has filed a copy of the letter dated 28.2.2011 (Annexure P5) wherein it requested the Director (Projects) of the respondent to consider its request to extend the BPTA date since due to unforeseen circumstances stated therein, the commissioning of the Project was delayed by one year and the new commissioning schedule was May 2012. Even in its communication dated 28.2.2011 addressed to Chairman HPSEB, and the communication dated 18.4.2011 addressed to Chairman, NRPC (Annexure P4 and Annexure P 5 respectively), the petitioner sought amendment in the BPTA for commencement of open access in May 2012 instead of May 2011. The petitioner has not complied with the requirement of the BPTA of issuing notice to the respondent to seek amendment of the BPTA for commencement of open access to September 2012. Therefore, the dispute has not crystallized in terms of the BPTA before the petitioner approached the Commission by way of the present petition. Therefore, the petition is liable to be rejected on this ground.

23. We notice that after the request of the petitioner was not agreed to by the beneficiaries of the Northern Region, the petitioner vide its letter dated 7.7.2011 sought a confirmation from the respondent that the date of commencement of open access would be the date when Karcham Wangtoo – Abdullapur transmission line was commissioned and ready for evacuation of the petitioner's power. The petitioner's said letter dated 7.7.2011 is reproduced hereunder:

"File No. HSPL/07/2011

Date: 07.07.2011

*The Executive Director (Commercial)
M/s. Power Grid Corporation of India Ltd.*

Saudamini, Plot No. 2
Sector 29, IFFCO Chowk
Gurgaon – 122001

Sub: BPTA Agreement with PGCIL - regarding

Ref: Minutes of 19th meeting of NRPC dated: 01.06.11 held at Parwanoo (HP)

Sir,

We had submitted our request for postponement of commencement of BPTA from May 2011 to May 2012 to NRPC. As per MoM dated 27.06.2011 our request has been considered and rejected. We have entered into BPTA with PGCIL on 21st Oct 2009. As per the Agreement, the date of commencement of open access is May 2011. Also as per the Agreement, evacuation of power from our project is by LILO with Karcham Wangtoo – Abdullapur 400 kV D/C (Quad) line of M/s. Jaypee Powergrid Limited.

But, till date, Karcham Wangtoo – Abdullapur line to be constructed by M/s. Jaypee Powergrid has not been commissioned and is not ready for evacuation of power. Hence our date of commencement of Open Access may please be considered from the date when this line will be commissioned and ready for evacuation of our power, which may please be confirmed.

Thanking you,

*Yours faithfully,
For Himachal Sorang Power Limited,
Authorised Signatory”*

From the above letter, it is seen that the petitioner sought to link the commencement of open access with the commissioning of Karcham Wangtoo – Abdullapur transmission line. The respondent in its reply has confirmed that it has agreed to the request of the petitioner. The petitioner in its rejoinder has stated that the letter was written without prejudice to its rights. We have already reproduced the petitioner's letter *in extenso*. We do not find that the letter was subject to any conditions. To us the letter appears to be unconditional. Karcham Wangtoo – Abdullapur transmission line was commissioned on 1.4.2012 and as such the

petitioner became liable for sharing of the transmission charges upon commissioning of this transmission line.

24. In response to our directions during the hearing on 21.6.2012 as to whether any geological surprises have taken place after April 2012, the petitioner submitted a report and an addendum to the report prepared by Lahmeyer International Private Limited and vide its affidavit dated 17.12.2012 has submitted that as per the said report, a delay of 699 days have taken place due to geological surprises combined with inclement weather which are beyond the control of the petitioner. The respondent has not filed any reply to the report though copy of the same has been served on it. We have considered the submission of the petitioner in its affidavit dated 17.12.2012 and the report and addendum to the report of M/s Lahameyer International Private Limited. It is noticed that Annexure – I of the report gives a list of geological surprises/occurrences in Sorang Hydro Electric Project. The last geographical surprise mentioned in the report is dated 14.7.2010 and no geographical surprise has taken place after April, 2012. It is seen from the report that the incident of geological surprise of a collapse at chainage 891.50m at crown of Head Race Tunnel (HRT) followed by cavity formation with sudden ingress of water with mud and squeezing ground were encountered on 14.7.2010. After the geological surprise on 14.7.2010, further work was started for excavation of HRT w.e.f 16.12.2010. In annexure 1 of the report, only one activity between 1.6.12 to 15.8.12 is mentioned for vertical realignment of HRT as under:

“The design of the HRT and methodology at the troubled location of cavity opening was changed and it had been declared to keep the vertical alignment of the HRT down by 0.75m, thus a length of 57.0m of the HRT had been excavated with chisel only. It started on as June, 2012 & the work was completed on 25th August 2012 thus a delay of 86 days occurred.”

The above was not a geographical surprise but an activity to be performed after a geographical surprise. It is not clear from the report as to why after almost two years of the geographical surprise during construction of Head Race tunnel on 14.7.2010, a decision to change design was implemented and that too of lowering of Head Race tunnel by 0.75 m only. On our further query as to whether the failure to estimate the time will be considered as force majeure, the consultant at para 8(xv) has explained as under:

"Failure to estimate the time in itself cannot be considered a forced majeure. One needs to examine the reason behind the estimated time going wrong. It is these reasons which may or may not be called a force majeure. In the present case, the reasons of estimated time line not holding has been primarily geological surprises combined with inclement weather condition etc. These are indeed beyond reasonable control of the project personnel and hence force majeure."

We are not in agreement with the above reasoning. Most of the hydro electrical projects are located in locations prone to geographical surprises and inclement weather conditions specifically in Monsoon period. Therefore, it is the engineering and project execution abilities of the project developer to decide how much time it would require him to recover from geographical surprise and if necessary to implement either design changes or excavation methods. If the project developer has failed to estimate impact of geographical surprise and taken necessary corrective action, it cannot be treated as Force majeure. It is noteworthy that the petitioner in its letter dated 7.7.2011 has sought to align the commencement of open access with the commissioning of Karcham-Wangtoo transmission line, after the geological surprises of 14.7.2010. In the said letter there is no mention about the geological surprises and the time required to recover from geological surprises. When the petitioner has requested for open access with effect from the date of

commissioning of Karcham-Wangtoo transmission line, it is presumed that the petitioner had factored in the time required to recover from the geological surprises and complete the project by the time of the commissioning of Karcham-Wangtoo transmission line. Failure of the petitioner to properly estimate the time and execute the work in a time bound manner cannot be construed as force majeure.

25. The above discussion leads us to the conclusion that the petitioner sought postponement of commencement of open access till the commissioning of the Karcham-Wangtoo transmission line. The respondent has agreed to the request of the petitioner and has started billing from April 2012 as the Karcham-Wangtoo transmission line was commissioned with effect from 1.4.2012. The claim of the petitioner for further postponement of commencement of open access cannot be considered, as no force majeure event has been brought to our notice which took place after April 2012 which had the impact of delaying the project. The petitioner's project is being delayed on account of improper planning and execution of the works of the project and the respondent cannot be made to suffer for the failure on the part of the petitioner to execute the project in time. Therefore, no relief can be granted to the petitioner and the petitioner is liable to pay the transmission charges to the respondent from 1.4.2012.

26. The petition stands disposed of in the light of the above discussion.

sd/-	sd/-	sd/-	sd/-	sd/-
(A. S. Bakshi)	(M. Deena Dayalan)	(V.S. Verma)	(S. Jayaraman)	(Dr. Pramod Deo)
Member	Member	Member	Member	Chairperson