

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A.K. Singhal, Member

Shri A. S. Bakshi, Member

Date of Order: 10th of March, 2017

Petition No. 449/MP/2014

In the matter of:

Petition under Section 79 (1) (f) read with Section 60 of the Electricity Act, 2003

And

In the matter of:

Malana Power Company Limited

Bhilwara Towers

A 12, Sector 1,

Noida – 201 301

....**Petitioner**

Vs

1. Himachal Pradesh State Electricity Board Limited
Kumar House, Vidyut Bhawan,
Shimla – 171 004

2. Himachal Pradesh Load Despatch Society
SLDC Complex,
Tutu, Shimla

.....**Respondents**

Petition No. 167/MP/2015

And

in the matter of

Counter-claim on behalf of Himachal Pradesh State Electricity Board

In the Matter of:

Himachal Pradesh State Electricity Board Limited

Kumar House, Vidyut Bhawan,

Shimla – 171 004

.....**Petitioner**

Vs

M/s Malana Power Company Limited

Bhilwara Towers

A 12, Sector 1,

NOIDA – 201 301

.....**Respondent**

Parties Present

Ms. Seema Jain, Advocate, MPCL
Shri Dushyant K. Mahant, Advocate, MPCL
Shri Sumit Garg, MPCL Ms. Kakoli Sengupta, MPCL
Shri Sanjay Kumar Jana, MPCL
Shri Anand K Ganesan, Advocate, HPSEBL
Ms. Swapna Seshadri, Advocate, HPSEBL
Shri Deepak Uppal, HPSEBL
Shri Joginder Singh, HPSEBL

ORDER

The Petitioner in Petition No 449/MP/2015 is Malana Power Company Ltd (MPCL), a generating company which has constructed a Run of the River with Pondage Hydroelectric Power Project with an installed capacity of 86 MW (2x23MW) on Malana Nallah, a glacier fed tributary of Parbati River in Kullu District of Himachal Pradesh. MPCL entered into an Implementation Agreement dated 13.3.1997 with the State Government of Himachal Pradesh. In terms of clause 14.1 of the Implementation Agreement, MPCL was to provide the State Government a fixed percentage of free power and the remaining power generated from the project was to be supplied outside the State of Himachal Pradesh. Clause 16.8 of the Implementation Agreement provided that a separate agreement would be signed by MPCL for use of the transmission system specifying various modalities for the generation, evacuation of power, maintenance of the project, wheeling charges to be levied by either party for use of transmission system of the other party to evacuate power, modalities for supply of free power, metering and other miscellaneous related technical issues. Consequently, MPCL signed an agreement dated 3.3.1999 with the erstwhile Himachal Pradesh State Electricity Board, the predecessor of HPSEB Limited (HPSEBL), outlining the modalities of all the issues contained in clause 16.8 of the Implementation Agreement. The Agreement dated 3.3.1999 has been referred to in this order as Wheeling Agreement.

2. As per the Wheeling Agreement, MPCL would transmit the entire energy generated at the project excluding auxiliary consumption and transmission losses through its own 132 kV double circuit transmission line upto the interconnection point (i.e. Bajaura sub-station of HPSEBL). HPSEBL would make arrangement for wheeling and/or transfer of transferable energy from the interconnection point to the inter-State point (i.e. 400 kV bus bar of 400 kV sub-station of PGCIL at Nalagarh). As per the Wheeling Agreement, Free Energy for each billing month from the project at the Interconnection Point shall be 15% of the deliverable energy for the first 12 years from the commercial operation date and 20% of the deliverable energy for the next 28 years. The remaining energy shall be equal to the difference of the injected energy and the free energy for the billing month. The transferable energy for the billing month would mean the energy quantum in kWh to be made available in a billing month in accordance with the Wheeling Agreement by HPSEBL to PGCIL on behalf of MPCL at the interstate point which shall be equal to 0.96 times the remaining energy for that billing month. The wheeling charges for transfer of the remaining energy from the inter-connection point to the interstate point shall be payable by MPCL to HPSEBL for the remaining energy at the following rates:

Period	Rate
A) For the first 12 years from Commercial Operation Date	
i) If Commercial Operation Date is achieved on or before 30 th September, 2002	6 paise per kWh
ii) If Commercial Operation Date is achieved on or after 1 st October, 2002 but on or before 30 th September 2003	8 paise per kWh
iii) If Commercial Operation Date is achieved on or after 1 st October, 2002 but on or before 30 th September 2003	10 paise per kWh or at the per kWh rate as shall be charged by POWERGRID for wheeling and/or transfer of Transferable Energy from the Interstate Point to the Delivery Point(s) from time to time, whichever is higher

B) After 12 years from Commercial Operation Date	10 paise per kWh or at the per kWh rate as shall be charged by POWERGRID for wheeling and/or transfer of Transferable Energy from the Interstate Point to the Delivery Point(s) from time to time, whichever is higher
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3. The erstwhile HPSEBL was unbundled under the Himachal Pradesh Power Sector Reforms Transfer Scheme (the transfer scheme) formulated under Section 131 of the Electricity Act, 2003 which was notified by the State Government under Notification No MPP-A (3)-1/2001-IV dated 10.6.2010. Under the transfer scheme, the functions of generation, distribution and trading of electricity were assigned to HPSEBL. The function of transmission of electricity within the State was vested in Himachal Pradesh Power Transmission Corporation (Pvt) Ltd (HPPTCL) which was also to perform the statutory functions of the State Transmission Utility. The transfer scheme further provided that the functions of SLDC would be performed by an entity directly under the State Government. Himachal Pradesh State Load Despatch Society (Respondent No 2) has been promoted by the State Government for performing the functions of SLDC. For the purpose of the present order, HPSEBL refers to the erstwhile Himachal Pradesh State Electricity Board also.

4. MPCL project namely Malana HEPP was commissioned on 5.7.2001. According to MPCL, since the commissioning of the Malana HEPP, MPCL has been supplying the State's share of free power to the Government of Himachal Pradesh. Further, on payment of wheeling charges and losses in accordance with the agreement dated 3.3.1999, MPCL has been selling the remaining power outside the State through bilateral and collective transactions by availing the Short-Term Open Access in accordance with the extant regulations of the Commission. MPCL has submitted that in accordance with the Central Electricity Regulatory Commission

(Open Access in Inter-State Transmission) Regulations, 2004 (the Open Access Regulations, 2004) notified on 30.1.2004, MPCL is treated as an embedded customer and the unscheduled open access charges for the inter-State transactions were being settled in accordance with the Regulation 21 of the said regulations. The Open Access Regulations, 2004 were repealed by the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations, 2008 (the Open Access Regulations, 2008) notified on 25.1.2008. MPCL has submitted that in terms of Regulation 2(h) of the Open Access Regulations, 2008, MPCL is an intra-State entity and the UI charges for intra-State entities are governed by Regulation 20 of the said regulations, particularly clause(5) thereof which provides that “unless specified otherwise by the concerned State Commission, UI rate for intra-State entity shall be 105% (for over-drawal and under-generation) and 95% (for under-drawal and over-generation) of UI rate at the periphery of the regional entity.” MPCL has submitted that Clause (6) of Regulation 20 of Open Access Regulations, 2008 was substituted on 20.5.2009 which provided that “no charges, other than those specified under these Regulations shall be payable by any person granted short term open access under these regulations.” MPCL has submitted that the Commission notified the Central Electricity Regulatory Commission (Unscheduled Interchange Charges and related matters Regulations, 2009 (UI Regulations) on 30.3.2009. In accordance with Regulation 4(ii), the UI Regulations are applicable to “sellers and buyers involved in transactions facilitated through short term open access or medium term open access or long term access in inter-State transmission of electricity”. According to MPCL, (i) the deviations from schedules in course of its transactions through short term open access to inter-State transmission should be regulated in terms of Regulation 20 of Open Access Regulations, 2008 and UI Regulations, and (ii) no

charges other than the charges stipulated in Open Access Regulations, 2008 should be levied on MPCL.

5. MPCL has submitted that the HPSEBL vide letter dated 20.4.2009 informed MPCL about its decision to adopt a new method for calculating UI charges for over-drawl and levy of handling charges with effect from 1.4.2008. The said letter is extracted as under:

“In this context, it is informed that subject matter was considered by WTMs of the Board in its 372nd meeting and following has been approved:

1. The applicable charges for any drawal of power in real time operation by M/s MPCL through its buyer(s) in excess of power scheduled/rescheduled, shall be paid for by M/s MPCL to HPSEBL at a rate which is highest applicable rate at which M/s MPCL is selling its power to its buyer(s) or UI rate(s) applicable for the said fifteen minutes time block(s) whichever is higher.

2. In case of underdrawal on account of difference in energy scheduled and energy actually generated by MPCL, HPSEBL shall make the payments to M/s MPCL as and when HPSEBL receives the amount for such under drawals from UI pool account of NRPC.

3. The energy bills raised for the period 04/2008 to 10/2008 raised on M/s MPCL may be revised on the aforesaid principle and all such transactions beyond 10/2008 shall also be governed by the same principles.

4. HPSEBL shall levy a handling charges @ 3 paise per unit.

5. The principle be applied uniformly to all IPPs.

Accordingly, you are requested to convey the consent of M/s MPCL and visit HPSEBL to reconcile the energy accounts from 01.04.08 to 31.03.09”.

According to MPCL, the revised rates of UI charges as per para 1 of the letter dated 20.4.2009 as quoted above is illegal as it is contrary to the provisions of the UI Regulations. MPCL is further stated to be aggrieved that the methodology adopted in case of over-drawls had not been made applicable to transactions of under-drawls. MPCL has submitted that levying of handling charges is illegal and unsustainable as Regulation 20(6) of Open Access Regulations, 2008 specifically prohibited State

Utilities from charging any charges other than those permitted under the Open Access Regulations.

6. MPCL has submitted that HPSEBL started issuing bills at UI rates and also demanded the handling charges from April 2008 onwards as per the letter dated 20.4.2009. MPCL has submitted that it had no option but to pay the UI charges at the rate approved by HPSEBL alongwith handling charges as MPCL was threatened with stoppage of scheduling of power from the Malana HEPP.

7. MPCL has submitted that it desired to sell some of its power through the Energy Exchange and therefore, approached HPSEBL for NoC as required under the regulations of the Commission for collective transactions. In reply, MPCL received draft agreement through e-mail dated 19.4.2011 from HPSEBL which incorporated the provisions of the letter dated 20.4.2009 and also proposed to continue with the handling charges. MPCL has stated that on receipt of the draft agreement, it replied to Respondent No 2 vide its letter dated 21.4.2011 that the treatment of power over-drawn and power under-drawn should be governed as per the UI Regulations. MPCL also protested against levy of handling charge. MPCL has submitted that in reply to the letter dated 21.4.2011, HPSEBL vide its letter dated 26.4.2011 informed that the terms and conditions incorporated in the draft agreement are the same as contained in the Agreement forwarded by Respondent No.1 to PTC India Limited for facilitating the sale of GoHP free and equity power and suggestions made by MPCL were not agreeable to HPSEBL. MPCL has submitted that on receipt of the letter dated 26.4.2011, MPCL in its letter dated 26.4.2011 conveyed its willingness to sign the draft agreement and requested HBSEB Limited to issue NOC with effect from 1.5.2011 while maintaining its view that the treatment

of overdrawal and underdrawal should be as per the CERC regulations. The agreement was signed by MPCL with HBSEB Limited on 24.8.2011.

8. MPCL has submitted that it was scheduling its power to Punjab on day-ahead basis, but foresaw congestion on its day-ahead booking of transmission corridor. Therefore, MPCL vide its letters dated 23.8.2011 separately addressed to Chief Engineer (System Operation) and Respondent No. 2, had requested them to give consent for open access on week-ahead schedule for the week 27.8.2011 to 2.9.2011. To discuss the matter, a meeting was held on 25.8.2011 with the officials of HPSEBL where at HPSEBL agreed to the request of MPCL for week-ahead scheduling, subject to payment at the maximum of the UI rate i.e. Rs. 17.96/per unit in case of any over-drawl of power by MPCL. At the meeting it was agreed that the highest rate of the UI charges would be applicable in case of week-ahead transactions only whereas the charges for day-ahead transactions would continue to be regulated in accordance with the terms and condition of agreement dated 24.8.2011. It was also decided that week-ahead scheduling agreement would be applicable only after making necessary amendments to the agreement signed on 24.8.2011. After the meeting, MPCL sent some letters to HPSEBL to persuade HPSEBL to agree to the UI rates specified by the Central Commission. However since its efforts did not meet with any success, the agreement dated 24.8.2011 was amended vide amendment dated 14.9.2011 in keeping with decisions arrived at the meeting held on 25.8.2011. MPCL has alleged that charging the UI at the highest of the applicable rate in all cases, irrespective of frequency, was unlawful and was an evidence of dominance and highhandedness of HPSEBL.

9. MPCL has submitted that the agreement dated 24.8.2011, as amended, was to expire on 31.3.2012 and therefore, at the insistence of HPSEBL, fresh agreement was signed on 22.2.2012 which was valid from 1.4.2012 to 31.3.2013. The fresh agreement contained the same terms and conditions as of the agreement dated 24.4.2011, as amended.

10. MPCL has submitted that HPSEBL vide letter dated 26.11.2012, directed MPCL to provisionally make the payment against the UI and handling charges amounting to Rs.5,27,42,905/- for the month of June 2012, failing which consent for open access for the month of December, 2012 would be declined. It has been stated that despite the fact that the matter was being pursued by MPCL, HPSEBL vide its letter dated 30.11.2012 conveyed its refusal for consent for sale of power for December, 2012. Consequently, Respondent No 2 vide its letter dated 30.11.2012 intimated that it was not in a position to grant concurrence for open access for December 2012 in view refusal by HPSEBL on account of default by MPCL in making payment of the outstanding dues.

11. According to MPCL, after several representations made by it to HPSEBL, Clause-1 of Annexure -1 of the Agreement dated 22.2.2012 was amended on 20.3.2013 retrospectively with effect from 1.4.2012. MPCL has alleged that even after the amendment, the scheme for recovery of the UI charges was not in line with the rates specified under the UI Regulations.

12. MPCL executed another agreement dated 29.3.2014 with HPSEBL, valid for the period 1.4.2014 to 31.3.2015 whereby the rate of charges for over-drawl was aligned with the Commission's Regulations in force except in case of under-drawls for which additional clause was inserted as under:

"In the eventuality of any loss to HPSEBL on account of overdrawal by MPCL when HPSEBL is under drawing power into the Grid, MPCL shall compensate, the loss on actual basis which otherwise would not have occurred to HPSEBL, as ascertained mutually."

MPCL has averred that the agreement for the year 2014-15 was still not aligned with the UI Regulations as in those regulations there was no provision for compensating loss on actual basis, nor was there any provision for payment of handling charges.

13. MPCL has submitted that it took up the matter with HPSEBL for refund of excess UI charges and handling charges since these charges were recovered without authority of law. Accordingly, MPCL has sought direction for refund of the excess payments made to HPSEBL. MPCL has furnished the details of calculations in support of its claim for refund at Annexure 46 and 47 of the petition.

14. In the above background, MPCL has filed the present petition seeking the following reliefs:

- “(1) Declare Agreements dated 24.08.2011, 22.02.2012, 20.03.2013 and 29.03.2014 and their amendments null and void.
- (2) Direct Respondent No. 1 to refund the amount of Rs 8,63,99,226/- being the excess UI charges recovered up to March 2014 and Rs.5,17,65,390/- up to July 2014 being the handling charges along with interest at the rate of 18% being illegally collected by Respondent No. 1.
- (3) Direct Respondent No. 1 to discontinue the levy and collection of illegal handling charges from MPCL.
- (4) Direct Respondent No. 1 and Respondent No. 2 to follow the Regulations framed by Central Commission in dealing with interstate power.
- (5) Allow the scheduling / metering of power of MPCL by the NRLDC.”

15. Notices were issued to the respondents. Reply to the petition has been filed by HPSEBL, the Respondent No 1. Respondent No 2, Himachal Pradesh State Load Despatch Society has not filed its reply.

16. HPSEBL vide affidavit dated 27.2.2015 has refuted the claims of MPCL and has submitted as under:

(a) MPCL entered into agreements voluntarily and without any demur and took substantial benefit thereunder, but is now seeking to challenge these agreements limited to the aspect of the UI charges and handling charges. According to HPSEBL, the Commission's regulations were not applicable since it involved intra-State transmission of electricity for which the charges could be mutually decided. HPSEBL has submitted that MPCL has enjoyed the benefit of very low wheeling charges of 6 paise/unit and wheeling losses @ 4% as a *quid pro quo* of the UI charges payable under the impugned agreements. HPSEBL has averred that MPCL had stopped paying all charges with effect from 1.4.2014 even though the present petition was filed on 1.11.2014. MPCL was charged for the wheeling losses in accordance with the principles contained in Articles 4.2, 4.8, 8.5, 9 and 11 of the agreement dated 3.3.1999. The subsequent agreements were entered into by mutual agreement of the parties as contemplated in Clause 1.9 of the agreement dated 3.3.1999.

(b) MPCL voluntarily entered into the agreement dated 3.3.1999, without protest or demur and the parties acted upon the agreement in good faith for several years on all aspects, including with regard to payment of wheeling charges, wheeling losses, UI charges and all other applicable charges as under:

Clause 10

*6 paise per KWh / 8 paise KWh - First 12 years of commercial operation;
10 paise per KWh -After 12 years of commercial operation*

CLAUSE 8.5

4% losses on wheeling of transferable energy through Intra-State system of Himachal Pradesh.

(c) The UI rates were mutually agreed between MPCL and the HPSEBL at every stage and MPCL did not challenge the same at any time after the notification of the Open Access Regulations, 2008 on 25.1.2008 by this Commission. Further, if it was the understanding of MPCL that the Open Access Regulations, 2008 and the UI Regulations were applicable, MPCL would not have continued to take the benefit of the extremely low wheeling charges and losses.

(d) Usually in the case of the use of intra-State transmission system, the generating companies become liable to pay SLDC Fees and Charges. However, since all the charges and losses were being settled between the parties on the mutually agreed terms, SLDC Fees and Charges were not being recovered from MPCL. HPSEBL has urged that handling charges were being recovered based on the mutual consent in order to compensate for SLDC Fees and Charges.

(e) HPSEBL was proceeding on the basis that the power flow of MPCL through its network is intra-State transmission system and HPSEBL can prescribe the charges for such transmission. Further, Agreement dated 3.3.1999 and all subsequent Agreements including the Agreement dated 24.8.2011, 22.2.2012 and 20.3.2013 were on the same basis. If the Commission comes to the conclusion that the Open Access Regulations, 2008 and the UI Regulations are to govern the relationship between the parties, they should apply in their entirety and all the

charges should be re-worked as per these regulations from the dates they came into effect and became applicable.

17. MPCL has, vide affidavits dated 17.3.2015 and 2.4.2015, submitted its rejoinder to the reply dated 27.2.2015 of HPSEBL as under:

(a) MPCL has denied for having voluntarily entered into the agreements with HPSEBL or having voluntarily made payments to HPSEBL. On the question of delay raised by HPSEBL, MPCL has submitted that it was constantly in correspondence with HPSEBL in respect of levy of the excess UI charges and the handling charges. MPCL has submitted that the agreement for fixation of wheeling charges was as per the milestone dates to be achieved by MPCL for commercial operation of the Malana HEPP.

(b) HPSEBL contention that Handling Charges are charges in lieu of SLDC charges is not true as MPCL is paying SLDC charges as per regulations in addition to Handling Charges.

(c) The rate for the UI charges for use of intra-State system have to be decided as per the Regulation 20(5) of the Open Access Regulations, 2008 if UI rates have not been notified by the State Commission. In the present case, it is a matter of record that no UI Regulations were issued by the State Commission.

(d) MPCL has been paying the SLDC Fees and Charges at the rates notified by the State Commission from time to time, in addition to handling charges levied by HPSEBL.

(e) MPCL has been paying wheeling charges and losses as per the Agreement dated 3.3.1999. The issue of wheeling charges and losses charged by HPSEBL are not in dispute in the present petition. The matter before this Commission is the claim of MPCL for refund of UI Charges recovered in excess from MPCL and the recovery of handling charges illegally by HPSEBL.

(f) The terms of Wheeling Charges have been prescribed by Agreement dated 3.3.1999 whereas the UI charges were decided and informed by the HPSEBL to MPCL vide letter dated 20.4.2009 and later on incorporated in the Agreement in dated 24.8.2011. The Agreement dated 24.8.2011 is not an amendment to the Wheeling Agreement dated 3.3.1999. Therefore the Wheeling Agreement dated 3.3.1999 and the Agreement dated 24.8.2011 are two separate Agreements and if HPSEBL has any grievance against the Agreement dated 3.3.1999, it should raise its grievance by way of a separate petition before this Commission and the same cannot be made part and parcel of the present proceedings.

(g) The issue of wheeling charges is already in discussion between MPCL and HPSEBL since December, 2012 as the wheeling charges were to be revised after the period of 12 years from COD i.e. in July, 2013. The discussions between MPCL and HPSEBL is still in progress and HPSEBL vide letter dated 11.3.2015 has informed that MPCL will pay charges in accordance with the CERC Open Access Regulations. The issue of wheeling charges being in consideration as on date, it is not appropriate to raise this

issue before this Commission till the time the matter is not concluded between the parties.

(h) HPSEBL's claim that the scheduling of power was not stopped is not true. HPSEBL refused the concurrence for bilateral transactions in the month of December,2012 but since MPCL had NOC valid for collective transaction, it was able to transmit its power.

(i) HPSEBL's contention regarding reworking of wheeling charges is not tenable in law as HPSEBL has to first put MPCL to notice by way of filing its claim and setting out its grievances. Only after MPCL gets an opportunity to meet the allegations, the matter can be taken up by this Commission.

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18. Learned counsel for HPSEBL, during the hearing submitted that if the Commission comes to a conclusion that only the Open Access Regulations and UI Regulations of the Commission were to apply, then the regulations should apply in their entirety and all charges should be reworked as per the regulations of the Commission from the dates applicable. Learned counsel for MPCL took an objection that HPSEBL cannot be allowed to raise the issue of the wheeling charges, wheeling losses etc. not being in accordance with the regulations of the Commission in the present petition and should file a separate petition. The Commission directed HPSEBL to file an independent petition with regard to its claims for wheeling charges and losses. However, HPSEBL filed a counter claim vide its affidavit dated 27.4.2015. In the said affidavit, HPSEBL has submitted that the claim of HPSEBL is consequent upon the decision of the Commission in the Petition No. 447/MP/2014 and if the Commission comes to the conclusion that the parties are to be governed

by the UI Regulations and Open Access Regulations of the Commission, the same must govern the relationship between the parties in entirety and must apply across the board. HPSEBL has submitted that MPCL cannot continue to enjoy the wheeling charges and wheeling losses as per the Agreements dated 3.3.1999, 24.8.2011, 22.2.2012 and 20.3.2013 and must pay the wheeling/transmission charges as per the provisions of Regulation 16(1) of the Open Access Regulations, 2008 as notified on 25.1.2008. As per the Open Access Regulations, 2008, an intra-State entity shall be liable to pay the transmission charges for use of the State network as fixed by the respective State Commission. Further, where the State Commission has not determined the transmission charges, the intra-State entity shall be liable to pay Rs.30/mWh for use of the State network which has been modified to Rs.80/MWh vide amendment to the Open Access Regulations, 2008 notified on 20.5.2009. HPSEBL has submitted that Himachal Pradesh Electricity Regulatory Commission has determined and notified the transmission charges for the transmission of power through the transmission system of HPSEBL (DISCOM) with effect from 15.9.2008. Accordingly, MPCL is liable to pay wheeling charges for transfer of power through the State network @ Rs. 30/MWh till 20.5.2009 and thereafter, the charges shall be as determined by HPERC from time to time. HPSEBL has submitted a compilation of charges payable for use of STU system of Himachal Pradesh and HPSEBL (DISCOM) system at Annexure A to the affidavit supported by the orders of the HPERC. As regards the transmission/wheeling losses, HPSEBL has submitted that transmission losses are regulated in terms of Regulation 23 of the Open Access Regulations, 2008 which provides that the buyers and sellers of electricity shall absorb the apportioned energy losses in the transmission system as estimated by the Regional Load Despatch Centre and State Load Despatch Centre concerned.

HPSEBL has submitted that HPERC has determined and notified losses for the intra-State transmission system of Himachal Pradesh from time to time which shall be applicable to MPCL. HPSEBL has placed on record a compilation of transmission losses through the intra-State transmission of STU and DISCOM of Himachal Pradesh at Annexure B to the affidavit. HPSEBL has made the following prayers:

- “i if this Commission decided that if the Open Access Regulations and UI Regulations of the Commission are to apply, the same would be applicable in entirety and for all aspects between the parties;
- ii direct the parties to re-compute all charges as per wheeling charges and wheeling losses as per Annexures A & B;
- iii direct MPCL to pay the difference between the amounts already paid and to be paid in line with the charges/ losses mentioned herein as per Annexures A & B;
- iv pass any such further order(s) as deemed fit and proper in the circumstances”

19. MPCL in its reply dated 19.5.2015 has submitted that HPSEBL has not complied with the directions of the Commission to file a proper application for counter-claim. MPCL has submitted that HPSEBL has not also paid the statutory and mandatory filing fee in order to sustain a valid counter claim for adjudication. MPCL has also submitted that since 2001, HPSEBL had not raised the dispute of wheeling charges through any communication to MPCL and the claim is being raised for the first time in the year 2015. Therefore, HPSEBL has waived, acquiesced and abandoned any right whatsoever to claim any alleged due qua the wheeling charges. MPCL has submitted that HPSEBL cannot raise any grievance which it deliberately and willfully chose not to raise since 2008 and therefore, the alleged dues are hopelessly time barred. MPCL has submitted that even if the procedural laws are not strictly applicable to the proceedings before the Commission, it cannot mean that by

any stretch of imagination that the Respondent can agitate enormous dues without even filing the filing fees and ride on the petition of MPCL.

20. On merit of the counter-claim, MPCL has submitted as under:

(a) The wheeling charges, transmission charges and losses as tabulated in the counter-claim of HPSEBL are not applicable to MPCL as MPCL is not required to take open access in the State and therefore MPCL is neither an Open Access Customer in distribution nor an open access customer in transmission nor MPCL sells any of its power to any entity including any of the customers/consumers of the Respondent or any of the licensees within the State of Himachal Pradesh.

(b) MPCL is not an open access customer as defined in Himachal Pradesh Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2005 or consumer as defined in the Electricity Act, 2003. MPCL is an intrastate entity whose entire generation after deducting free power/energy and state losses is being sold outside the State of Himachal Pradesh and in terms of the Open Access Regulations, 2008, MPCL is an inter-State customer.

(c) None of the orders issued by the State Commission have considered the wheeling of power from MPCL's power plant to the inter-State point or the case of any other similar generator selling power in the interstate for calculation of wheeling charges, transmission charges or losses. Further, the orders passed by the State Commission do not contain any directives for applicability of these orders in the case of wheeling of power of the generators

whose point of injection is interstate and power is delivered at the interstate point.

(d) The orders of the HPERC state that the charges calculated by it are for power sold within the State. Further, MYT orders do not take into consideration the provisions of the wheeling agreement between MPCL and HPSEBL. MPCL has submitted that as per its analysis of the MYT orders, the wheeling charges and losses are for sale of power within the State and therefore are not applicable in case of MPCL.

(e) As per Open Access Regulations, 2008, intra-State entity using inter-State network have to pay the transmission charges for use of the State network. Therefore, MPCL's liability has to be calculated for use of the State network from the point of injection into the State network at Bajaura to the point of delivery at CTU. The power from Malana HEP is injected at Bajaura sub-station of HPSEBL and the same is being delivered at CTU sub-station at Nalagarh via Bajaura-Kango line of HPSEBL. The assets in use between Bajaura and Nalagarh are incidental to inter-State transmission of electricity as per the definition of section 2(36)(ii) of the Electricity Act, 2003 and therefore, the modality of calculation of charges has to be in line with the inter-State transmission system. Therefore, this Commission has the power to determine the transmission charges for which HPSEBL is duty bound to furnish the details of such assets.

(f) The wheeling charges prescribed in the Wheeling Agreement are not arbitrary charges and the same have been arrived at by HPSEBL by considering the use of its network by MPCL and therefore the charges are

more or less comparable to the charges prescribed in the Open Access Regulations, 2008 and its subsequent amendment. The contention of HPSEBL that the wheeling charges were concessional is erroneous as the wheeling charges prescribed in the Wheeling Agreement which depended on the commercial date of operation are in consonance with the commercial principles followed in every industry.

(g) MPCL being an interstate customer selling the power in the interstate is not liable to pay the same charges payable by the intra-State open access customers. The State Commission has to determine the charges payable by MPCL for the use of the State network separately taking into account the use of assets, distance and quantum of flow as per CERC regulations.

21. During the hearing, learned counsel for MPCL submitted that MPCL has been paying UI charges in excess of the charges prescribed under Central Electricity Regulatory Commission (Unscheduled Interchange charges and related matters) Regulations, 2009 (UI Regulations) from 1.4.2008 till 31.3.2014. He further submitted that with effect from 1.4.2014, the charges are being settled as per the UI Regulations. The excess amount of UI charges paid from 1.4.2008 to 31.3.2014 calculated by MPCL should be refunded. With regard to contention of HPSEBL that levying of handling charges is in lieu of SLDC charges for inter-State sale of power, learned counsel for MPCL submitted that MPCL has been paying SLDC charges as well as handling charges. Learned counsel further submitted a portion of the transmission line i.e. Bajaura to ISTS network is incidental and therefore, it is to be treated as ISTS and its transmission charges should be calculated as per the Open Access Regulations of the Commission. Learned counsel submitted that the earlier

MYT orders of HPERC dealt with 'customer'. However, MYT order for the period 2014-15 dealt with 'consumer'. Since MPCL's generating station is not a consumer, the same has not been considered by HPERC. Learned counsel for HPSEBL submitted that as per the law settled by Hon`ble Supreme Court in *New Bihar Leaves Co. and others V State of Bihar*[(1981) 1SCC 537], a party cannot challenge one part of the agreement while still retaining the benefits of the other part. An agreement should be implemented by the party in totality. Learned counsel submitted that the transmission charges for transfer of power through intra-State system of HP for the period from 1.4.2008 to 25.9.2008 should be levied as per the Open Access Regulations of the Commission, since no separate charges have been specified by the State Commission. For the subsequent periods, the charges as per HPERC's MYT orders are applicable for use of the State network. As per MYT order for the period 2009-11, the transmission charges and wheeling charges are payable @ Rs. 43621/MW and 75 Paisa/unit respectively. Learned counsel further submitted that since MPCL's generating station is connected to the distribution system and the inter-connection point is STU, it is liable to pay charges as applicable. Learned counsel further submitted that the intra-State customer is required to pay additional charges for the use of State network as determined by the State Commission. The transmission charges and wheeling charges are determined for the complete system and it is not possible to calculate separately for each individual generator.

22. The Commission vide Record of Proceedings dated 18.6.2015 treated the counter-claim of HPSEBL as a separate petition as under:

"2. The Commission after hearing the parties decided that the affidavit filed by HPSEBL should be treated as petition and numbered accordingly."

Accordingly, the affidavit dated 27.4.2015 filed by HPSEBL has been numbered as Petition No. 167/MP/2015. HPSEBL has also paid the filing fees for miscellaneous petition. Therefore, the objection taken by MPCL that proper application accompanied by applicable fee has not been paid by HBSEB Limited has been cured.

23. MPCL's affidavit 10.6.205 has been treated as reply to Petition No.167/MP/2015. HPSEBL in its rejoinder dated 8.2.2015 has submitted that the entire issue before the Commission is whether the transaction is to be governed by the UI Regulations read with the Open Access Regulations, 2008 or on bilateral basis. HPSEBL has submitted that if the transactions are to be governed by the regulations of this Commission, all computations will automatically have to be done as per the Commission's directions. HPSEBL has submitted that the claims of the respondent will be consequent upon the decision of this Commission in respect of the claims raised in Petition No. 449/MP/2014 and since the claim of MPCL in Petition No. 449/MP/2014 is for refund from 2008 onwards, the counter-claim of HPSEBL would be applicable from the said date. As regards the quantification of the counter-claim, HPSEBL has submitted that no further computation necessary at this stage. HPSEBL has denied that it has waived or abandoned its right to claim wheeling charges/losses as per the regulations of the Commission. HPSEBL has relied on the judgement of the Appellate Tribunal dated 18.5.2010 in Appeal No.176 of 2009 in which the necessary ingredients of waiver have been discussed and has submitted that in the present case both MPCL and Respondent bonafide proceeded on the basis that this is a bilateral issue and is not governed by the regulations of the commission dealing with inter-State open access and therefore, there is no question of waiver. HPSEBL has submitted that if the argument of MPCL is accepted, it

stands to no reason as to why MPCL continued with the bilateral arrangement with HPSEBL even beyond 2008 and till 2014 when the present petition was filed. As regards the plea of MPCL regarding limitation in filing counter-claim, HPSEBL has relied on the judgement of the Hon'ble Supreme Court in Tamil Nadu Power Generation and Distribution Company Limited V. PPN Green Limited {(2014) 11 SCC 53} and the Full Bench judgement of the Appellate Tribunal dated 13.3.2015 in Appeal No.127 of 2013 and has submitted that in terms of the said judgement, Limitation Act of 1963 is not applicable to the proceedings before the Central or State Commission. As regards the transmission charges and losses submitted at Annexures A and B of the counter claim, HPSEBL has submitted that the rates are proper rates and are very much applicable to MPCL for the following reasons:

(a) In the light of the definition of "inter-State transmission system" and "intra-State transmission system" as per section 2(36) and (37) of the Electricity Act, 2003, MPCL's power is flowing to the ISTS through the network of the respondents and such usage is incidental to the flow of power from MPCL's plant outside the State on ISTS.

(b) "Intra-State entity" as defined in Open Access Regulations, 2008 and HERC (Short Term Open Access) Regulations, 2010 refers to an entity whose metering and energy accounting is done by SLDC or any other authorized State Utility. In the instant case, metering and energy accounting is done by HPSEBL.

(c) MPCL satisfies the condition of Open Access Customer as per the Open Access Regulations, 2008 and HERC (Short Term Open Access) Regulations, 2010.

(d) Open Access Regulations, 2008 and HERC (Short Term Open Access) Regulations, 2010 define “State network” as any network owned by the State Transmission Utility, distribution licensee or any other person granted license by the State Commission to construct, operate and maintain the transmission system. In Himachal Pradesh, the State network is owned by HPPTCL and HPSEBL and any entity using the State network is liable to pay the charges for usage of State network.

(e) MPCL injects its power at interconnection point i.e. 132 kV sub-station Bajoura and wheels it through EHV network owned by HPSEBL upto the periphery of DISCOM and thereafter transmits it by using STUs network to HP periphery. Thus, MPCL is using EHV system of HPSEBL and STU before injecting power into CTU system at inter-State point for sale outside the State.

(f) MPCL sells its power outside the State after wheeling through the intra-State System of both HPSEBL and STU bilaterally and at the platform of energy exchange under the short term open access and for any such transactions resorts to the consent/NOC of HPSEBL as applicable as per the procedures. The very practice of MPCL selling power under such arrangements after seeking the consent/NOC from the respondents clarifies that MPCL is an Open Access Customer.

24. HPSEBL has submitted that the issue arising on UI settlement comprises two components i.e. one is the computation of quantum of UI energy (overdrawal/underdrawal) which needs the sanctity of losses in the State network and the other is the rate for the UI energy. MPCL is misleading that the approach for

computation of charges should be as per the regulations and the losses computation as per the agreement between MPCL and HPSEBL. HPSEBL has contended that such a stand cannot be countenanced in law, and UI charges, losses and wheeling charges can either be as per the Commission's regulations or as per the bilateral agreements.

25. The Commission directed HPSEBL to submit the copies of the orders of HPERC considering the wheeling of power of MPCL and similarly placed generators into ISTS and whether the wheeling charges are doubly charged from MPCL. HPSEBL in its affidavit dated 26.8.2015 has submitted that the STU system comprises of transmission system connecting HPSEBL (DISCOM) periphery with HP State periphery and are restricted to certain specified EHV lines in the State of Himachal Pradesh and the distribution system of HPSEBL (DISCOM) consists of lines and associated equipment at various voltage levels of EHV, HV and LV connected with the generating station, HPPTCL (STU) system and consumers of HPSEBL. Further, MPCL is injecting power at 132 kV Sub Station Bajoura (injection point) of HPSEBL and selling power outside the State in an integrated mode after using intra-State system up to HP periphery i.e. DISCOM system as well as STU system through various routes. HPSEBL has submitted that MPCL has also admitted during the hearing for having used the system of HPSEBL and also HPPTC Limited for transfer of power outside the State of Himachal Pradesh. HPSEBL has submitted that there is no generator in the State of HP supplying electricity outside the State using the system of the State utilities, except MPCL. However, there are various consumers who procure electricity through inter-state open access and use the system of the State utilities. Such consumers are similarly situated as that of MPCL with regard to the use of the system of HPSEBL and the charges that are levied.

Both consumers and generators are open access customers. HPSEBL has submitted that the consumers of HPSEBL system are also purchasing power from outside the state through Short-Term Open Access and are paying charges for usage of STU system, DISCOM system and other charges as determined by the State Commission. As regards the allegation of double recovery, HPSEBL has submitted that wheeling charges for usage of the system of HPSEBL are accounted for in the non-tariff income of the utilities and HPERC is deducting the total revenue requirements of HPSEBL in the numerator by the non-tariff income including the wheeling charges, instead of adding the number of units to the denominator which proves that the entire wheeling charges are duly accounted for and it is incorrect to say that there is double recovery.

26. MPCL has, vide affidavit dated 18.4.2016, submitted that HPSEBL was charging wheeling charges as per the agreement dated 3.3.1999. However, after conclusion of the arguments in the present cases and in the absence of any directions/orders from this Commission, HPSEBL vide its letter dated 9.2.2016 demanded wheeling charges at rates contrary to the wheeling agreement and the charges varied from Rs. 0.2243 to Rs. 0.2368 per KWh for the period May, 2015 to December, 2015 amounting to Rs. 5,41,18,768/-. Though MPCL vide letter dated 25.2.2016 requested HPSEBL to revise the invoices at the rate of Rs.0.10 per KWh as per the wheeling agreement dated 3.3.1999 till further orders by this Commission, HPSEBL issued letter dated 22.3.2016 again charging wheeling charges at the rate of 0.2243/KWh for January and February, 2016.

Analysis and Decisions

27. We have heard the learned counsels for the parties at great length and have also perused the pleadings and documents available on record. In Petition No.449/MP/2014, MPCL has sought a direction against recovery of excess UI charges and Handling Charges collected by HPSEBL in contravention of the Open Access Regulations, 2008 and UI Regulations, 2009 of the Commission. HPSEBL has submitted that MPCL is now challenging the methodology for charging UI charges in the letter dated 20.4.2009 and subsequently in the Agreement dated 24.8.2011 after lapse of substantial time and after having acted upon the above agreements and taking other benefits by way of very low wheeling charges and wheeling losses. HPSEBL has filed a counter-claim for revision in wheeling charges and losses from the date of commercial operation of Malana HEP or at least from the date of coming into effect of Open Access Regulations, 2008 of this Commission on the ground that the Open Access Regulations, 2008 have to be applied in toto i.e. both in respect of deviation as well as wheeling charges and losses. According to HPSEBL, MPCL as an Open Access Customer for short term open access is required under the provisions of Open Access Regulations, 2008 to pay the wheeling charges and losses as determined by the State Commission for use of the State network before injecting power into ISTS or where the State Commission has not determined the charges, the payable rates shall be Rs.30/kWh till 20.9.2009 and thereafter @ Rs.80/kWh. In the present case, wheeling charges for use of the system of STU and DISCOM in Himachal Pradesh have been determined by the HPERC with effect from 5.9.2008 and according to HPSEBL, MPCL is required to pay the transmission charges @ Rs.30 from 25.1.2008 till 4.9.2008 and thereafter, at the rate determined by HPERC. The counter-claim of the HPSEBL has been treated as a Petition. MPCL has taken a preliminary objection that HPSEBL has waived,

acquiesced and abandoned any right whatsoever it had to claim any alleged due qua wheeling charges as it has not deliberately and willfully chosen not to raise the claim since 2008. There is also dispute between MPCL and HPSEBL with regard to the applicability of the transmission charges and losses determined by HPERC in case of MPCL for availing the State network in the course of availing short term open access and levying of handling charges.

28. In the light of rival submissions of the parties, the following issues arise for our consideration:

(a) Whether the claims of Malana Power Company Limited and counter claims of HPSEBL are time barred?

(b) Whether the Malana Power Company Limited and HPSEBL having acted upon the Agreements with regard to UI Charges, transmission/wheeling charges and losses have waived their rights for determination of the charges under the statutory regulations?

(c) To what extent the Open Access Regulations, 2008 and UI regulations, 2009 will override the Agreement dated 3.3.1999, letter dated 20.4.2009, and Agreements dated 24.8.2011, 22.2.2012, 20.3.2013 and 29.3.2014?

(d) Whether the transmission charges and losses determined by the HPERC is applicable for the purpose of computing wheeling charges and losses payable by MPCL for use of State network for availing short term open access to ISTS?

(e) Whether Handling Charges levied by HPSEBL from MPCL is tenable in law?

(f) Whether the refusal of HPSEBL to grant no objection to Malana Power Company Limited for availing short term open access to ISTS is tenable in law?

(g) Reliefs to be granted to MPCL?

Issue No.1: Whether the claims of Malana Power Company Limited and counter claims of HPSEBL are time barred?

29. MPCL executed Malana HEPP, a Run of the River Hydro-Electric Project, in the State of Himachal Pradesh pursuant to the Implementation Agreement dated 13.3.1997 entered into by MPCL with Government of Himachal Pradesh. Clause 16.8 of the said Implementation Agreement provided as under:

“16.8 Subject to provisions made in Clause 14.1, separate Agreement specifying various modalities for the generation, evacuation of power, maintenance of the Project, wheeling charges to be levied by either party for the use of the transmission system of the other party to evacuate power, modalities of supply of free power, metering and miscellaneous related technical issues, will be signed within three(3) months of this Agreement.”

Pursuant to the above, MPCL and HPSEBL entered into an Agreement dated 3.3.1999 which was to remain in force upto the period the Implementation Agreement would remain in force. This Agreement provided that HPSEBL would wheel and/or transfer the Remaining Energy (quantum of energy injected in kWhr minus free energy) from the inter-connection point to the inter-State point on payment of charges as per clause 10 and adjustment of transmission losses as per clauses 8.5 and 9 of the Agreement. Clause 1.9 of the Agreement dated 3.3.1999 provides as under:

“1.9 Any agreement, consent, approval, authorization, notice, communication, information or report required under or pursuant to this Agreement from or by any Party shall be valid and effectual only if it is in writing and under the hands of duly authorized representative of such Party in this behalf and not otherwise.”

30. In terms of the above provision, HPSEBL issued a letter dated 20.4.2009 laying down the principle for deviation accounting, revision of the energy bills from April 2008 till October 2008 on the basis of the said principle and levying of handling charges at the rate 3 paise/unit. MPCL appears to have agreed to the principle decided by HPSEBL and made the payment accordingly. There is no document on record which shows that MPCL had protested against the said provision or challenged the said letter before any forum. HPSEBL sent a draft agreement to MPCL on 19.4.2011 containing by and large the principles in the letter dated 20.4.2009. MPCL vide its letter dated 21.4.2011 raised the point that any mismatch of actual generation and scheduled energy from Malana HEP should be as per the Open Access Regulations, 2008. The suggestions of MPCL were not acceptable to HPSEBL and MPCL vide its letter dated 26.4.2011 while maintaining that treatment of overdrawal/underdrawal should be regulated as per the regulations of this Commission agreed to sign the agreement. The agreement was signed on 24.8.2011 and was valid till 31.3.2012. For the subsequent periods, HPSEBL and MPCL entered into agreements dated 22.2.2012, 20.3.2013 and 29.3.2014. MPCL has challenged the letter dated 20.4.2009, and agreements dated 24.8.2011, 22.2.2012, 20.3.2013 and 29.3.2014 in the present petition on the ground that they are in contravention of the Open Access Regulations, 2008 and UI Regulations, 2009 of this Commission.

31. HPSEBL in its reply dated 27.2.2014 has submitted that MPCL is challenging the methodology for UI charges in the letter dated 20.4.2009 and subsequently in the

Agreement dated 20.4.2011 after lapse of substantial time. However, HPSEBL has submitted that if the Commission decides that Open Access Regulations, 2008 and UI Regulations, 2009 were to apply, then the same should be made applicable in its entirety and not in part as is being sought by MPCL. In other words, HPSEBL is not vehemently opposing the petition of MPCL on the ground of limitation. On the other hand, the counter-claim of the HPSEBL made vide affidavit dated 27.4.2015 which has been treated as a petition has been opposed by Malana Power Company Limited as time barred on the ground that the issue of wheeling charges and losses have been raised by HPSEBL only in the year 2015.

32. The crux of the dispute in both petitions is whether the Open Access Regulations, 2008 and the UI Regulations, 2009 would be applicable for settlement of UI charges, transmission charges and losses in case of Malana Power Company Limited (MPCL) in supersession of the agreements between MPCL and HPSEBL. It is an admitted fact that though the grievance of the Malana Power Company Limited with regard to settlement of mismatch between actual generation and scheduled energy pertains to the period from 1.4.2008 onwards, it has approached the Commission only in November 2014. HPSEBL has raised its counter claim vide affidavit dated 27.4.2015 seeking application of the provisions of the Open Access Regulations with effect from 1.4.2008 with regard to wheeling charges and losses, in case it is decided that the said regulations would be applicable for settlement of UI charges.

33. It is a settled principle that law of limitation does not apply to cases of adjudication of disputes under the Electricity Act, 2003. The view finds support from the judgment of the Hon'ble Supreme Court dated 4.4.2014 in Civil Appeal No. 4126

of 2013 (T.N. Generation & Distribution Corpn. Limited Vs. PPN Power Gen. Co. Pvt. Ltd) extracted below:

“48. The next submission of Mr. Nariman is that the claim of the respondents would have been held to be time barred on reference to arbitration. We are not able to accept the aforesaid submission of Mr. Nariman. On the facts of this case, in our opinion, the principle of delay and latches would not apply, by virtue of the adjustment of payments being made on FIFO basis. The procedure adopted by the respondent, as observed by the State Commission as well as by the APTEL, would be covered under Sections 60 and 61 of the Contract Act. APTEL, upon a detailed consideration of the correspondence between the parties, has confirmed the findings of fact recorded by the State Commission that the appellant had been only making part payment of the invoices. During the course of the hearing, Mr. Salve has pointed out that the payment of entire invoices was to be made each time which was never adhered to by the appellant. Therefore, the respondents were constrained to adopt FIFO method. Learned senior counsel also pointed out that there was no complaint or objection ever raised by the appellant. The objection to the method adopted by the respondents on the method of FIFO, was only raised in the counter affidavit to the petition filed by the appellant before the State Commission. According to the learned senior counsel, the plea is an afterthought and has been rightly rejected by the State Commission as well as the APTEL. We also have no hesitation in rejecting the submission of Mr. Nariman on this issue. In any event, the Limitation Act is inapplicable to proceeding before the State Commission.”

34. As per the law enunciated by the Hon’ble Supreme Court, the Limitation Act of 1963 is not applicable in the proceedings before the Commission. The Commission under sub-section (1) of section 92 of the Electricity Act, 2003 has been empowered to observe such rules of procedure in regard to transaction of business at its meetings as it may specify. In exercise of the said power, the Commission has not specified any time limit for filing of the petition before it. Therefore, the claims of MPC Limited and counter-claims of HPSEBL are maintainable in the absence of any regulations with regard to limitation and accordingly, the objections with regard to maintainability of claims and counter-claims on the ground of limitation are over-ruled.

Issue No.2: Whether the Malana Power Company Limited and HPSEBL having acted upon the Agreements with regard to UI Charges, transmission/wheeling charges and losses have waived their rights for determination of the charges under the statutory regulations?

35. HPSEBL has submitted that in terms of the statement of facts and documents filed alongwith the petition as well as the reply, all parties proceeded on the mutuality of payment of charges including UI charges, wheeling charges, wheeling losses and handling charges in terms of the Agreements dated 3.3.1999, 24.8.2011, 22.2.2012 and 20.3.2013. HPSEBL has submitted that it proceeded on the bonafide basis that the regulations of the Commission were not applicable to the above transmission of power. However, HPSEBL has not taken the position that the mismatch settlement cannot be done in terms of the regulations of the Commission since MPCL has voluntarily agreed and signed all the agreements and acted upon it. On the other hand, HPSEBL has submitted that if the claims of MPCL are to be governed by the regulations of the Commission, the counter-claims of MPCL have to be considered as per the regulations of the Commission.

36. MPCL in its reply to the counter-claim of HPSEBL has submitted that since 2001 or at any point of time, HPSEBL has not raised any dispute with regard to wheeling charges through any communication to MPCL. It has been further submitted that it has been conclusively established on the basis of records that HPSEBL has waived, acquiesced and abandoned any right whatsoever it had to claim any due qua wheeling charges. MPCL has submitted that HPSEBL cannot agitate any grievance which it deliberately and willfully chose not to raise since 2008. HPSEBL in its reply has denied that it has waived or abandoned its right to claim wheeling charges/wheeling losses. Relying on the judgement of the Appellate Tribunal for Electricity dated 18.5.2010 in Appeal No.176 of 2009 with regard to

waiver, HPSEBL has submitted that there is no question of waiver in this case as both MPC Limited and HPSEBL bonafide proceeded on the basis that this is a bilateral issue and is not governed by the regulations of the Commission. HPSEBL has submitted that even MPCL continued with the bilateral arrangement with HPSEBL even beyond 2008 and till 2014 when it filed the petition and in the same logic, MPCL has also waived its right to be governed by the regulations of the Commission.

37. The dispute between MPC Limited and HPSEBL pertains to the period from 1.4.2008 onwards when the Open Access Regulations, 2008 came into force. Even though the said regulation provides for settlement of mismatch in respect of intra-State entity in the course of short term open access, transmission/wheeling charges and losses and operating charges, the parties continued to govern their relationship in terms of the agreements. While MPCL wants only the mismatch between the actual generation and scheduled energy to get settled in accordance with Open Access Regulations, 2008 and UI Regulations, 2009, HPSEBL is of the view that the regulations of the Commission should be made applicable for other aspects included in the agreement dated 3.3.1999 such as wheeling/transmission charges and losses.

38. The admitted facts of the case are that MPCL is selling its remaining power outside the State of Himachal Pradesh by availing short term open access to inter-State transmission. MPCL is granted short term open access in terms of Open Access Regulations, 2008 and scheduling of power from the inter-connection point of PGCIL at Nalagarh is taking place as per the said regulations. However, settlement of mismatch, payment of wheeling charges and losses etc. are being carried out in terms of the agreement between MPCL and HPSEBL. Therefore, the question arises

whether the parties through their mutual agreement can waive the requirement of compliance with the statutory regulations in the absence of provisions in the regulations permitting the parties to do so. In other words, whether the agreements dated 3.3.1999, 24.8.2011, 22.2.2012, 20.3.2013 and 29.3.2014, which provide for rates of the wheeling charges/wheeling losses and UI charges payable/recoverable by MPCL would override the Open Access Regulations. The Constitution Bench of the Hon'ble Supreme Court in the in PTC India Ltd Vs CERC (AIR 2010 SC 1338) held that the Commission's regulations override the existing as well as future contracts. The extracts from the judgment of the Hon'ble Supreme Court is reproduced below:

“(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations.”

The Open Access Regulations, 2008 and UI Regulations, 2009 have been notified by the Commission in exercise of powers under section 178 of the Electricity Act, 2003. These regulations govern the payment of wheeling charges, wheeling losses and the UI charges and other charges, and the provisions of the agreements dated 3.3.1999, 24.8.2011, 22.2.2012, 20.3.2013 and 29.3.2014 to the extent that they are contrary to and inconsistent with these regulations are unenforceable. Therefore, the Commission is of the view that the relationship between the MPC Limited and HPSEBL with regard to payment of transmission charges and losses, settlement of mismatch between the actual generation and scheduled energy, RLDC/SLDC Operating charges etc. shall be governed in terms of the Open Access Regulations read with the UI Regulations, as amended from time to time. In our view, in the light of the principle laid down by the Hon'ble Supreme Court that the

regulated entities are required to align their existing as well as future agreements, both MPC Limited and HPSEBL should have aligned their existing and future contracts with the provisions of the Open Access Regulations, 2008 and UI Regulations, 2009 and the parties cannot claim waiver on the ground of having acted on the basis of the agreements which are inconsistent with the statutory regulations.

Issue No.3: To what extent the Open Access Regulations, 2008 and UI Regulations, 2009 will override the Agreement dated 3.3.1999, letter dated 20.4.2009, and Agreements dated 24.8.2011, 22.2.2012, 20.3.2013 and 29.3.2014?

39. Having held that the provisions of the agreements dated 3.3.1999, 24.8.2011, 22.2.2012, 20.3.2013 and 29.3.2014 and the letter dated 20.4.2009 are inoperative to the extent they are inconsistent with the provisions of the Open Access Regulations, 2008 and UI Regulations, 2009, we next proceed to examine the provisions of these agreements and provisions of the above mentioned regulations.

40. The Implementation Agreement dated 30.3.1997 between Malana Power Company Limited (MPC Limited) and Himachal Pradesh State Electricity Board provides that the MPC Limited shall provide to the Himachal Pradesh or its agent, free of cost 15% of the deliverable energy for the first twelve years from the commercial operation date and 20% of the deliverable energy for the next 28 years at the interconnection point and the balance thereof (remaining energy) can be disposed of by the MPC Limited to any other consumer located outside Himachal Pradesh. The Agreement further provides that MPC Limited would transmit the entire energy (excluding auxiliary consumption and transformation losses) generated at the project through its own 132 kV double circuit transmission line upto the interconnection point. As per clause 16.8 of the said agreement, MPC Limited and HPSEBL have entered into the Agreement dated 3.3.1999. Interconnection point has

been defined in the Agreement dated 3.3.1999 as “the physical touch point where the company’s transmission lines and the interconnection facilities are connected to the 132 kV bus at Bajaura sub-station of HPSEBL.” Interconnection facilities have been defined as “all the facilities including, without limitation, the switching equipments, PLCC equipments, protection and metering devices etc. for two numbers incoming bays from the Company’s transmission line to be installed, operated and maintained by the Himachal Pradesh Board at its 132 kV bus at Bajaura sub-station at the cost of the Company to enable evacuation of the power from the project in accordance with this Agreement”. The Agreement dated 3.3.1999 provides that Himachal Pradesh Board shall make arrangements for wheeling and/or for transfer of transferable energy from the interconnection point to the inter-State point. “Inter-State point” has been defined as “the physical touch point at 400 kV bus bar of 400 kV sub-station of POWERGRID at Nalagarh where the transferable energy of the Company shall be made available to POWERGRID by Himachal Pradesh Board on behalf of the Company”. Thus, as per the arrangement between MPC Limited and HPSEBL, MPC Limited shall use the State network to deliver the remaining energy at the interstate point at Nalagarh which is a sub-station of POWERGRID.

41. As per the Clause 10 of the Agreement dated 3.3.1999, MPC Limited is liable to pay the transmission/wheeling charges for use of the State network as under:

Period	Rate
C) For the first 12 years from Commercial Operation Date	
iv) If Commercial Operation Date is achieved on or before 30 th September, 2002	6 paise per kWh
v) If Commercial Operation Date is achieved on or after 1 st	8 paise per kWh

	October, 2002 but on or before 30 th September 2003	
vi)	If Commercial Operation Date is achieved on or after 1 st October, 2002 but on or before 30 th September 2003	10 paise per kWh or at the per kWh rate as shall be charged by POWERGRID for wheeling and/or transfer of Transferable Energy from the Interstate Point to the Delivery Point(s) from time to time, whichever is higher
D)	After 12 years from Commercial Operation Date	10 paise per kWh or at the per kWh rate as shall be charged by POWERGRID for wheeling and/or transfer of Transferable Energy from the Interstate Point to the Delivery Point(s) from time to time, whichever is higher

42. As regards the accounting of losses, Clause 8.5 of the Agreement dated 3.3.1999 provides as under:

“8.5 Transferable Energy for the Billing Month shall mean the energy quantum in kWh to be made available in that Billing Month in accordance with this Agreement by the Himachal Pradesh Board to the POWERGRID on behalf of the Company at the Interstate Point. It shall be equal to 0.96 times the Remaining Energy for that Billing Month.”

Therefore, as per the above agreement, MPC Limited is required to pay 4% transmission losses for wheeling the power through the State network of Himachal Pradesh for delivery at the interstate point at Nalagarh.

43. HPSEBL has submitted that in terms of clause 1.9 of the Agreement dated 3.3.1999, MPC Limited and HPSEBL have agreed to certain arrangement with regard to UI and handling charges in the letter dated 20.4.2009, and agreements dated 24.8.2011, 22.2.2012, 20.3.2013 and 29.3.2014. Relevant provisions of the said letter/agreements have been extracted as under:

(A) Letter dated 20.4.2009

“2. In case of underdrawal on account of difference in energy scheduled and energy actually generated by MPCL, HPSEBL shall make the payments to M/s MPCL as and when HPSEBL receives the amount for such underdrawals from UI pool account of NRPC.

3. The energy bills raised for the period 04/2008 to 10/2008 raised on M/s MPCL may be revised on the aforesaid principle and all such transactions beyond 10/2008 shall also be governed by the same principles.
4. HPSEBL shall levy a handling charges @ 3 paise per unit.
5. The principle be applied uniformly to all IPPs.”

(B) Clause 1 of Annexure 1 to Agreement dated 24.8.2011:

“(a) MPCL will pay HPSEBL the wheeling charges, losses and any levies, taxes, duties, cess etc. for transference of Remaining Energy of Malana HEP from Interconnection Point to Interstate Point as per the terms & conditions contained in the aforesaid wheeling agreement dated 3.3.1999 between MPCL and HPSEBL.

(b) Applicable charges for any drawal of power in real time operations by MPCL through its buyer(s) and/or energy sold through Energy Exchange by MPCL in excess of power scheduled/rescheduled, as detailed in Clause 5 of the Main Agreement, for the period from 1st May, 2011 to 31st March, 2012 shall be paid for by MPCL to HPSEBL at a rate which is the highest applicable rate at which MPCL sells this power through Energy Exchange or at U.I. rate(s) applicable for said 15 minutes time block(s) period(s), whichever is higher.

(iii) Applicable charges for any drawal of power in real time operations by MPCL through its buyer(s) and/or energy sold through Energy Exchange by MPCL failing short of the power scheduled/rescheduled, as detailed in Clause No. 5 of the Main Agreement for the period from 1st May, 2011 to 31st March, 2012 shall be paid for by HPSEBL to MPCL at UI rate(s) applicable for said 15 minutes time block(s) period(s).

(iv) Tariff for handling charges will be 3 paise per KWh of energy sold at HP periphery by Malana HEP.

(C) Clause 1 of Annexure 1 to Agreement dated 22.2.2012

“(a) MPCL will pay HPSEBL the wheeling charges, losses and any levies, taxes, duties, cess etc. for transference of Remaining Energy of Malana HEP from Interconnection Point to Interstate Point as per the terms & conditions contained in the aforesaid wheeling agreement dated 3.3.1999 between MPCL and HPSEBL.

(b) Applicable charges for any drawal of power in real time operations by MPCL through its buyer(s) and/or energy sold through Energy Exchange by MPCL in excess of power scheduled/rescheduled, as detailed in Clause 5 of the Main Agreement, for the period from 1st April, 2012 to 31st March, 2013 shall be paid for by MPCL to HPSEBL following rates:

- (i) Overdrawal by MPCL in case of day ahead scheduling shall be paid for by MPCL to HPSEBL at a rate which is the highest applicable rate at which MPCL shall be selling power to its buyer(s) or rate at which MPCL

sells this power through Energy Exchange or at U.I. rate(s) applicable for said 15 minutes time block(s) period(s), whichever is higher.

(ii) For over-draws in case of month ahead/ week ahead/ mixed (month ahead + week ahead + day ahead + energy exchange) scheduling:

(I) Rate of overdraws upto 10% of the energy scheduled by MPCL to its buyer(s) or through Energy Exchange will be the highest applicable rate at which MPCL shall be selling power to its buyer(s) or rate at which MPCL sells this power through Energy Exchange or at UI rate(s) applicable for said 15 minutes time block(s)/ period(s), whichever is higher.

(II) In case the overdraws exceed 10% of the energy scheduled by MPCL to its buyer(s) or through Energy Exchange, the rate for first three hours will be the applicable rate at which MPCL shall be selling power to its buyer(s) or rate at which MPCL sells this power through Energy Exchange or at UI rate(s) applicable for said 15 minutes time block(s)/ period(s), whichever is higher. Thereafter, the rate for overdraws will be the highest UI rate which at present is Rs. 17.46 per unit.

(c) Applicable charges for any drawal of power in real time operations by MPCL through its buyer(s) and/or energy sold through Energy Exchange by MPCL failing short of the power scheduled/rescheduled as detailed in Clause No. 5 of the Main Agreement for the period from 1st April, 25012 to 31st March, 2013 shall be paid for by HPSEBL to MPCL at UI rate(s) applicable for said 15 minutes time block(s) period(s).

(d) Tariff for handling charges will be 3 paise per KWh of energy sold at HP periphery by Malana HEP.

(e) The rate of overdraws during any time block when Malana HEP generation is backed down by HPSLDC/ALDC will be the sale rate of MPCL to its buyers through Energy Exchange during that time block.

(D) Clause 1 of Annexure 1 to Agreement dated 20.3.2013

“(a) MPCL will pay HPSEBL the wheeling charges, losses and any levies, taxes, duties, cess etc. for transference of Remaining Energy of Malana HEP from Interconnection Point to Interstate Point as per the terms & conditions contained in the aforesaid wheeling agreement dated 3.3.1999 between MPCL and HPSEBL.

(b) Applicable charges for any drawal of power in real time operations by MPCL (Overdrawl by MPCL) through is buyer(s) and/or energy sold through Energy Exchange by MCPL in excess of power scheduled/rescheduled, as detailed in Clause 5 of the Main Agreement, for the period from 1st April, 2013 to 31st March, 2014 shall be paid for by MPCL to HPSEBL following rates:

(i) Overdrawal by MPCL in case of day ahead scheduling shall be paid for by MPCL to HPSEBL at a rate which is the highest applicable rate at which MPCL shall be selling power to its buyer(s) or rate at which MPCL sells this power through Energy Exchange or at U.I. rate(s) applicable for said 15 minutes time block(s) period(s), whichever is higher.

(ii) For over-drawls in case of month ahead/ week ahead/ mixed (month ahead + week ahead + day ahead + energy exchange) scheduling:

(I) Rate of overdrawls upto 10% of the energy scheduled by MPCL to its buyer(s) or through Energy Exchange will be the highest applicable rate at which MPCL shall be selling power to its buyer(s) or rate at which MPCL sells this power through Energy Exchange or at UI rate(s) applicable for said 15 minutes time block(s)/ period(s), whichever is higher.

(II) In case the overdrawls exceed 10% of the energy scheduled by MPCL to its buyer(s) or through Energy Exchange, the rate for first three hours will be the applicable rate at which MPCL shall be selling power to its buyer(s) or rate at which MPCL sells this power through Energy Exchange or at UI rate(s) applicable for said 15 minutes time block(s)/ period(s), whichever is higher. Thereafter, the rate for overdrawls will be Rs. 9.00 per unit or UI rate(s) applicable for said 15 minutes time block(s)/ period(s), whichever is higher.

(c) Applicable charges for any drawal of power in real time operations by MPCL (underdrawl by MPCL) through its buyer(s) and/or energy sold through Energy Exchange by MPCL failing short of the power scheduled/rescheduled as detailed in Clause No. 5 of the Main Agreement for the period from 1st April, 2013 to 31st March, 2014 shall be paid for by HPSEBL to MPCL at UI rate(s) applicable for said 15 minutes time block(s) period(s).

(d) Tariff for handling charges will be 3 paise per KWh of energy sold at HP periphery by Malana HEP.

(e) The rate of overdrawls during any time block when Malana HEP generation is backed down by HPSLDC/ALDC will be the sale rate of MPCL to its buyers through Energy Exchange during that time block.

(E) Clause 1 of Annexure 1 to Agreement dated 29.3.2014

“(a) MPCL will pay HPSEBL the wheeling charges, loses and any levies, Taxes, Duties, Cess etc. for transference of Remaining Energy of Malana HEP from Interconnection Point to Inter-State Point as per the terms and conditions contained in the aforesaid wheeling agreement dated 3.3.1999 between MPCL and HPSEBL.

(b) Applicable charges for any drawal of power in real time operations by MPCL (Overdrawal by MPCL) through the buyer(s) and/or energy sold through Energy Exchange by MPCL in excess of power scheduled/rescheduled, as detailed in Clause 2.5 of the Main Agreement, for the period from 1st April 2014 to 31st March 2015 shall be paid for by MPCL to HPSED Ltd at the rates of 105% of charge(s) for deviation (inclusive of additional deviation charges, if any) applicable for said 15 minutes time block(s) period(s) (in line with the CERC Regulations dated 6.1.2014 on "Deviation Settlement Mechanism and related matters" and Himachal Pradesh Electricity Regulatory Commission (Short Term Open Access) Regulations, 2010) as amended from time to time.

(c) Applicable charges for any drawal of power in real time operations by MPCL (underdrawal by MPCL) through the buyer(s) and/or energy sold through Energy Exchange by MPCL falling short of the power scheduled/rescheduled, as detailed in Clause 2 of the Main Agreement, for the period from 1st April 2014 to 31st March 2015 shall be paid for by HPSED Ltd to MPCL at the rates of 95% of charge(s) for deviation (inclusive of additional deviation charges, if any) applicable for said 15 minutes time block(s) period(s) (in line with the CERC Regulations dated 6.1.2014 on "Deviation Settlement Mechanism and related matters" and Himachal Pradesh Electricity Regulatory Commission (Short Term Open Access) Regulations, 2010) as amended from time to time. In the eventuality of any loss to HPSEBL on account of over drawal by MPCL when HPSEBL is under drawing power into the Grid, MPCL shall compensate the loss on actual basis which otherwise would not have occurred to HPSEBL, as ascertained mutually.

(d) Tariff for handling charges will be 3 paise per kWh of energy sold at HP unit periphery by Malana HEP."

44. Perusal of the above agreements show that wheeling charges, losses and other taxes and levies etc shall be payable as per the agreement dated 3.3.1999. The drawal of power by MPCL or its buyer at the interstate point (Nalagarh sub-station of POWERGRID) including sale of power through power exchange in excess of the corresponding power scheduled or re-scheduled by HPSEBL and/or NRLDC shall be paid by MPCL at the rate mentioned under clause 1(b) of the annexure to the agreements. Further, HPSEBL has imposed a handling charge of 3 paise/kWh.

45. The Open Access Regulations, 2008 and the UI Regulations, 2009 have been made in exercise of powers under section 178 of the Act. In accordance with clause

(2) of Regulation 1 of the Open Access Regulations, 2008, these regulations apply to the applications made for grant of open access for energy transfer schedules for use of the transmission lines or associated facilities with such lines on the “inter-State transmission system”. Similarly, the UI Regulations of 2009 and Deviation Settlement Regulations of 2014 provides that these regulations shall be applicable to sellers and buyers involved in the transactions facilitated through short term open access, medium term open access or long term access in inter-State transmission of electricity. The key for deciding the applicability of the Open Access Regulations and the UI Regulations is the interpretation of the expression “inter-State transmission system”. The expression “inter-State transmission system” has been defined under sub-section (36) of Section 2 of the Electricity Act as under:

“(i) any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State.

(ii) The conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;

(iii) The transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by a Central Transmission Utility.”

Sub-section (36) of Section 2 makes it clear that the transmission system used for conveyance of electricity by means of main transmission lines from the territory of one State to the territory of another State is the inter-State transmission system. It follows that the intra-State system used for conveyance of electricity outside the territory of the State of Himachal Pradesh in conjunction with inter-State transmission lines partakes the character of inter-State transmission system. Therefore, the Open Access Regulations govern all matters provided therein.

46. Regulation 16 of the Open Access Regulations, 2008 provides as under:

“Transmission Charges

16. (1) In case of bilateral transactions, for use of the inter-State transmission system, the transmission charges at the rate specified hereunder shall be payable by the applicant for the energy approved for transmission at the point(s) of injection:

Type of Transaction	Transmission charges(Total) (Rs./MWh)
(a) Bilateral, intra-regional	30
(b) Bilateral, between adjacent regions	60
(c) Bilateral, wheeling through one or more intervening regions	90

(2) In case of the collective transaction, for use of the inter-State transmission system, transmission charges at the rate of Rs.30/MWh for energy approved for transmission for each point of injection and for each point of drawal shall be payable.

(3) The intra-State entities shall additionally pay transmission charges for use of the State network as determined by the respective State Commission:

Provided that in case the State Commission has not determined the transmission charges, the same shall not be a ground for denial of open access and charges for use of respective State network shall be payable for the energy approved at the rate of Rs.30/MWh:

Provided further that transmission charges for use of the State network shall be intimated to the Regional Load Despatch Centre concerned for display on its web site:

Provided also that transmission charges shall not be revised with retrospective effect.”

The Commission vide amendment dated 20.5.2009 (to be applicable in cases of the open access applications received by nodal agency on or after 15.6.2009) amended the rates of charges mentioned in clauses (1) and (2) of Regulation 16 of the Open Access Regulations. Since the rates pertain to the charges for inter-State transmission system for bilateral transactions and collective transactions, the parties to the present petition do not have any dispute in that regard. However, first proviso to clause (3) was amended as under:

“Provided that in case the State Commission has not determined the transmission charges, the charges for use of respective State network shall be payable at the rate of Rs.80/MWh for the electricity transmitted:”

Thus as per the Open Access Regulations, 2008, the transmission charges for use of the State network shall be as determined by the State Commission. Wherever, the State Commission has not determined the transmission charges, transmission charges at the rate of Rs.30/MWh for energy approved shall be payable which has been revised to Rs.80/MW in respect of open access applications received on or after 15.6.2009.

47. As regards the transmission losses, Open Access Regulations, 2008 provides as under:

“Transmission losses

23. (1) The buyers and sellers of the electricity shall absorb apportioned energy losses in the transmission system as estimated by the Regional Load Despatch Centre and the State Load Despatch Centre concerned, and applied in accordance with the detailed procedure.

(2) The energy losses shall be accounted for by providing a differential between schedules at the points of supply, inter-utility transfer and drawal of electricity.

(3) The applicable transmission losses for the regional transmission system as well as for State network shall be declared in advance and shall not be revised retrospectively.”

48. As regards the UI charges, Open Access Regulations, 2008 provides as under:

“Unscheduled Inter-change (UI) Charges

20. (1) All transactions for State utilities and for intra-State entities scheduled by the nodal agency under these regulations, shall be accounted for and included in the respective day-ahead net interchange schedules of the concerned regional entity issued by the Regional Load Despatch Centre.

(2) Based on net metering on the periphery of each regional entity, composite UI accounts shall be issued for each regional entity on a weekly cycle and transaction-wise UI accounting, and UI accounting for intra-State entities shall not be carried out at the regional level.

(3) The State utility designated for the purpose of collection / disbursement of UI charges from / to intra-State entities shall be responsible for timely payment of the State's composite dues to the regional UI pool account.

(4) Any mismatch between the scheduled and the actual drawal at drawal points and scheduled and the actual injection at injection points for the intra-State entities shall be determined by the concerned State Load Despatch Centre and covered in the intra-State UI accounting scheme.

(5) Unless specified otherwise by the concerned State Commission, UI rate for intra-State entity shall be 105% (for over-drawals or under generation) and 95% (for under-drawals or over generation) of UI rate at the periphery of regional entity.

(6) In an interconnection (integrated A.C. grid), since MW deviations from schedule of an entity are met from the entire grid, and the local utility is not solely responsible for absorbing these deviations, restrictions regarding magnitude of deviations (except on account of over-stressing of concerned transmission or distribution system), and charges other than those applicable in accordance with these regulation (such as standby charges, grid support charges, parallel operation charges) shall not be imposed by the State Utilities on the customers of inter-State open access."

Clause (6) of Regulation 20 of the Open Access Regulations was amended vide amendment dated 25.1.2008 (applicable to open access applications received on or after 15.6.2009) as under:

"(6) No charges, other than those specified under these regulations shall be payable by any person granted short-term open access under these regulations."

49. As per Clause (4) of Regulation 20 of the Open Access Regulations, 2008, any mismatch between the scheduled drawal and the actual drawal at drawal points and scheduled and the actual injection at injection points for the intra-State entities is determined by the concerned State Load Despatch Centre and covered in the intra-State UI accounting. It is an admitted fact that there is no intra-State ABT in the State of Himachal Pradesh. Therefore, the rates for UI charges payable/receivable by the intra-State entities are regulated under clause (5) of Regulation 20 of the Open Access Regulations. The UI rate for an intra-State entity as specified in clause (5) is 105% (for over-drawals or under generation) and 95% (for under-drawals or

over generation) of the UI rate applicable at the periphery of regional entity, unless some other rates are specified by the concerned State Commission. The UI Charges are governed as per the Tariff Regulations for the period 2004-09 for the period from 1.4.2008 till 130.3.2009. The UI Charges were governed by the UI Regulations from 1.4.2009 till 16.2.2014 and thereafter, the deviation charges are to be governed by the Central Electricity Regulatory Commission (Deviation Settlement Mechanism and related matters) Regulations, 2014 (DSM Regulations).

50. From the above discussion, it follows that there are inconsistencies between the Open Access Regulations, 2008 and the Agreement dated 3.3.1999 between the MPC Limited and HPSEBL with regard to transmission/wheeling charges and transmission losses to be paid by an open access customer for use of State network and therefore, the provisions of Open Access Regulations, 2008 shall prevail. It is also the understanding of MPCL that Clause 10 of the Agreement dated 3.3.1999 would give way to the to the relevant provisions of the Open Access Regulations, 2008 in so far as the transmission charges are concerned. In this connection, HPSEBL has placed on record a letter dated 30.7.2014 written by MPCL to HPSEBL. Relevant extract of the letter is reproduced as under:

“The Electricity Act empowers the CERC or the relevant State Electricity Regulatory Commission, as the case may be, to frame regulations consistent with and for giving effect to the provisions of the Electricity Act. These regulations are in the nature of subordinate legislations. Therefore, it can be argued that the provision is of the Electricity Act and any regulations framed under the Electricity Act (such as the CERC Open Access Regulations) dealing with inter-State open access transaction will override an existing contract (such as the Wheeling Agreement) to the extent of any inconsistency between the two.

In view of the fact the CERC Open Access Regulations expressly provide the transmission and operation charges payable by an inter-State short term open access customer, Regulation 16 of the CERC Open Access Regulations will supersede Clause 10 of the Wheeling Agreement. Consequently, MPCL will

be liable to pay applicable charges in accordance with the CERC Open Access Regulations and not the charges specified in Clause 10 of the Wheeling Agreement.”

51. Further, there are inconsistencies between the Open Access Regulations and UI Regulations/DSM Regulations on the one hand and the Agreements between MPC Limited and HPSEBL on the other hand. As already held, the Open Access Regulations, 2008 and UI Regulations, 2009/DSM Regulations, 2014 shall override the provisions of the agreements between the parties to the extent of inconsistencies. It thus follows from the above that MPCL is liable to pay or recover the UI charges for deviation from the schedule in accordance with clause (5) of Regulation 20, including proviso thereunder, of the Open Access Regulations, 2008 read with the UI Regulations and DSM Regulations. We hold that with effect from the operation of the Open Access Regulations, 2008, the mismatch between the actual generation and scheduled energy shall be worked out afresh in terms of the Regulation 20(5) of the Open Access Regulations, 2008 read with the UI Regulations, 2008 and the DSM Regulations, 2014.

Issue No.4: Whether the transmission charges and losses determined by the learned HPERC are applicable for the purpose of computing wheeling charges and losses payable by MPCL for use of State network for availing short term open access to ISTS?

52. MPCL injects its power at interconnection point i.e. 132 kV sub-station Bajoura and wheels it through EHV network owned by HPSEBL upto the periphery of DISCOM and thereafter transmits power by using STU network to the HP periphery for injecting power into the CTU system at interstate point for sale outside the State. We have already held that the transmission charges and losses as determined by the State Commission shall be applicable for use of the State network in terms of Regulation 16(3) of the Open Access Regulations. Only where the concerned State

Commission has not determined the transmission charges, then only the default transmission charges specified under proviso to clause (3) of the Open Access Regulations, 2008 shall be applicable.

53. HPSEBL has submitted that HPERC has determined and notified the transmission charges for transmission of power through the State Transmission Utility and wheeling charges for transmission of power through the system of HPSEBL (DISCOM) with effect from 5.9.2008. HPSEBL has submitted that before determination of the transmission charges by HPERC for use of the intra-State system of Himachal Pradesh, MPCL is liable to pay charges for transfer of power through intra-State network @ Rs.30/MWh as per the Open Access Regulations, 2008 and thereafter, transmission charges for transfer of power through intra-State network shall be as notified by HPERC from time to time. HPSEBL has submitted the details of transmission charges for transfer of power through the intra-State system of Himachal Pradesh at Annexure A to the affidavit dated 27.4.2015. HPSEBL has submitted that HPERC has also determined and notified losses for intra-State system of Himachal Pradesh as per the details placed as Annexure B to the affidavit dated 27.4.2015 and MPCL is liable to bear the losses for transfer of power through the intra-State system of Himachal Pradesh as determined by HPERC from time to time.

54. MPCL has submitted that HPERC in its orders has determined the charges for open access customers in transmission and open access customers in distribution, and transmission and distribution losses for sale within the State i.e. intra-State Open Access Customers. MPCL has further submitted that it is not required to take open access in the State and therefore is neither an open access customer in

distribution nor an open access customer in transmission. Further, MPCL does not sell any of its power to any entity including any of the customers/consumers of HPSEBL or any of the licensees within the State of Himachal Pradesh. Therefore, the tariff orders issued by the HPERC for the intra-State customers/ consumers/ generators selling power within the State are not applicable in case of MPCL. According to MPCL, definition of “Open Access Customer” in HPERC (Terms and Conditions for Open Access) Regulations, 2005 read with the definition of “consumer” in the Electricity Act, 2003 shows that MPCL is not an intra-State Customer of Himachal Pradesh but an inter-State Customer in terms of the regulations of this Commission as MPCL after supplying the free power is required to dispose of the entire power outside the State i.e. in ISTS. MPCL has further submitted that since the Wheeling Agreement dated 3.3.1999 was being followed by both parties since 2001, energy sold by MPCL was not before HPERC for determination of wheeling charges, transmission charges and losses. MPCL has submitted that none of the orders issued by HPERC have considered the wheeling of power from Malana HEPP or the case of any other similar generator selling power to the interstate point or the case of any other similar generator selling power in the interstate for the calculation of wheeling charges, transmission charges or losses. MPCL has further submitted that the orders passed by HPERC do not contain any directives for the applicability of these orders in case of wheeling of power of the generators whose point of injection is interstate and power is delivered at the interstate point.

55. MPCL has submitted that after analysis of the transmission charges in the orders of HPERC, it emerged that while calculating the transmission charges, HPERC has considered only the contracted capacity which is its own generation plus

the PPAs and shares in various projects and MPCL's capacity has not been considered. Further while determining the transmission charges, HPERC has considered the parameters applicable to only the customers of HPSEBL. As regards the losses, MPCL has submitted that losses arrived at by HPERC has been apportioned according to the sale at the system and the power wheeled through the system and MPCL not having sold the energy generated by it to any intra-State customer is not covered by the losses calculated by HPERC. MPCL has also submitted that as per the HPERC orders, the distribution loss of the HPSEBL is for distribution of power to its consumers and since MPCL is not selling any power for distribution in the State of Himachal Pradesh, the distribution losses as approved by HPERC are not applicable in case of MPCL.

56. MPCL has submitted that HPERC in discharge of its functions of determining the tariff of Wheeling and Transmission Charge within the State under section 86 of the Electricity Act, 2003. MPCL has submitted that the Open Access Regulations, 2008 state that the transmission charges of inter-State entities using the interstate network have to pay the transmission charges for "use" of the intra-State network. Accordingly, the wheeling charges, transmission charges and losses for inter-State entities like MPCL needs to be determined by HPERC for use of the State network from the point of injection into the State network at Bajaura to the point of delivery at CTU.

57. HPSEBL has submitted that in so far as the applicability of orders of the State Commission are concerned, HPERC has determined the charges for usage of State network duly considering the revenue receivable for wheeling of power which includes wheeling charges receivable by HPSEBL from MPCL. HPSEBL has

submitted that this Commission is not the forum to challenge the various MYT orders passed by HPERC.

58. We have considered the submissions of the parties. MPCL is selling its remaining power (other other than free power) outside the State of Himachal Pradesh by availing short term open access. The transmission systems of STU and distribution system of HPSEBL are being used by MPCL for selling power outside the State for which MPCL obtains no objection certificate from the State entities as per the Open Access Regulations. Clause (2) of Regulation 16 of the Open Access Regulations, 2008 provides that the intra-State entities shall pay the transmission charges for use of the State network as fixed by the respective State network. State network has been defined as under:

“State Network means network owned by the State Transmission Utility, distribution licensee or any other person granted licence by the State Commission to construct, operate and maintain the transmission system.”

In the present case, MPCL is using the network of STU of Himachal Pradesh and HPSEBL (DISCOM). Therefore, the transmission charges/wheeling charges and losses determined by HPERC shall apply in the case of the MPCL for using the State network while selling its power by availing short term open access in accordance with the Open Access Regulations, 2008.

59. Both HPSEBL and MPCL have advanced extensive arguments in favour of and against the applicability of the MYT orders issued by HPERC since September 2008 for determination of transmission charges. While HPSEBL has submitted that the orders are applicable in case of MPCL, MPCL has taken the position that these orders are applicable to the consumers of HPSEBL who take supply of power by availing short term open access for their consumption whereas MPCL avails open

access in order to deliver its power at ISTS. HPSEBL in response to the query of the Commission has confirmed that there is no generator in the State of Himachal Pradesh supplying electricity outside the State using the system of State Utilities except MPCL. HPSEBL has treated MPCL in the same category as the consumers who procure electricity through inter-State open access and use the system of State Utilities. MPCL has vehemently opposed to be treated as a consumer and has sought separate determination of transmission charges for wheeling power for sale outside the State by using the system of State Utilities. Section 86 of the Electricity Act, 2003 deals with the functions of the State Commission. For the purpose of the present discussion, the following provisions have been extracted:

“Section 86. (Functions of State Commission): --- (1) The State Commission shall discharge the following functions, namely: -

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;”

The State Commission has been vested with the power to determine the tariff for generation, supply, transmission and wheeling of electricity within the State. Further, the State Commission has the power to adjudicate the disputes between the licensees and generating companies. Since HPSEBL is applying the transmission charges and losses determined by HPERC for use of the State network in the course of availing inter-State open access and MPCL is opposing the applicability of the said charges in its case, the parties may approach the HPERC for directions/clarification, as may be advised. This Commission cannot decide the issue

whether the transmission charges and losses decided by the HPERC shall be applicable in case of MPCL in the context of Regulation 16(3) of the Open Access Regulations, 2008.

Issue No.5: Whether Handling Charges levied by HPSEBL from MPCL is tenable in law?

60. In the letter dated 20.4.2009 and Agreements dated 24.8.2011, 22.2.2012 and 20.3.2013, it has been provided that MPCL will pay HPSEBL @ 3 paise per unit of energy sold at HP periphery as handling charges. MPCL has submitted that there is no basis for charging the handling charges by HPSEBL under the Electricity Act, 2003 and Rules and Regulations made thereunder. MPCL also took up the matter with HPSEBL vide its letter dated 14.5.2014 and is stated to have received no reply to the letter. HPSEBL in its affidavit dated 27.2.2014 has submitted that usually in case of the use of intra-State system, the generating companies become liable to pay SLDC charges. In the present case, since all the charges and losses etc. were being settled between the parties on the mutually agreed terms and conditions, SLDC Charges were being charged as per mutual acceptance. HPSEBL has submitted that MPCL had given due consent towards acceptance of handling charges. MPCL in its rejoinder has submitted that MPCL has been paying the SLDC charges at the rates notified by this Commission from time to time. In this connection, MPCL has also placed on record the copy of the Daily Obligation Summary Report generated by the Indian Energy Exchange which shows that an amount of Rs. 2000/ per day has been paid towards SLDC scheduling and Operating charges.

61. We have considered the submission of the parties. It is an admitted fact that all transactions for sale of power from Malana HEPP are through short term open

access to inter-State transmission of electricity. Clause (6) of Regulation 20 of the Open Access Regulations, 2008 provides that “no charges, other than those specified under these regulations shall be payable by any person granted short-term open access under these regulations”. Thus, there is complete prohibition to charge from the Open Access Customers any other charges than those specified in the Open Access Regulations, 2008. Regulation 17 of the Open Access Regulations, 2008 provides that operating charges of Rs. 2000 per day for bilateral transactions or for part of the day for each State Load Despatch Centre involved and Rs.2000 per day for collective transaction for the State Load Despatch Centre involved would be payable by the applicant for short term open access. The said rates have been revised to Rs.1000/per day vide amendment dated 15.6.2015 to the Open Access Regulations, 2008. The Operating Charges include the fee for scheduling, system operation and collection and disbursement of charges. Regulation 25 provides that in case of bilateral transactions, the operating charges payable by the persons allowed short term open access shall be collected and disbursed by the nodal agency. In case of collective transactions, the operating charges of State Load Despatch Centre shall be directly settled by the Power Exchanges with the respective SLDCs. On perusal of Annexure 3 to the MPCL affidavit dated 17.3.2015, it is noticed that MPCL is paying SLDC scheduling and operating charges of Rs. 2000 per day. The operating charges are reimbursed by NRLDC and Power Exchanges to HPSEBL as per the provisions of the Open Access Regulations, 2008 as discussed above.

62. In view of the above discussion, the Commission is of the view that handling charges collected by HPSEBL @ 3 paise per unit being contrary to the provisions of the Open Access Regulations, 2008 cannot be sustained. HPSEBL is directed to refund the said charges to MPCL within one month from the date of this order.

Issue No.6: Whether the refusal of HPSEBL to grant no objection to Malana Power Company Limited for availing short term open access to ISTS are tenable in law?

63. MPCL has submitted that Himachal Pradesh Load Despatch Society vide their letter dated 30.11.2012 had refused to grant consent for open access for December 2012 on the ground of non-payment by MPCL of the UI and handling charges amounting to ₹5,27,42,905/- by MPCL. HPSEBL has submitted that as per its record, due consent was given to MPCL for disposal of its entire power from the date of commissioning of the project and not even a single unit remained unscheduled till date irrespective of the correspondence mentioned by MPCL. HPSEBL has submitted that MPCL has been selling its power through bilateral as well as energy exchange platform without any constraint. MPCL in its rejoinder has not refuted the statement of HPSEBL. During the final hearing of the petition, the learned counsel for MPCL did not deal with this aspect of denial of NoC. In our view, both MPCL and HPSEBL have sorted out the problem with regard to issue of NoC. Therefore, no direction is required to be issued in this regard.

Reliefs to be granted to MPCL and HPSEBL

64. In the light of the above discussion, the prayers of MPCL in Petition No. 449/MP/2014 are disposed of as under:

(a) As regards the first prayer seeking a declaration that the Agreements dated 24.8.2011, 22.2.2012, 20.3.2013 and 29.3.2014 are void, it is directed that the provisions of the said agreements in so far as they are inconsistent with the Open Access Regulations, 2008 read with the UI Regulations, 2009 and DSM Regulations, 2014 shall be inoperative. HPSEBL is directed to work out the UI charges afresh in terms of the above mentioned regulations.

(b) MPCL has sought a direction to HPSEBL to refund the excess UI charges and handling charges alongwith interest at the rate of 18%. We direct that the difference between UI charges collected with effect from 1.4.2008 as per the letter dated 20.4.2009 and Agreements dated 24.8.2011, 22.2.2012, 20.3.2013, 29.3.2014 or any subsequent agreement and the UI/DSM charges calculated as per the Open Access Regulations, 2008 read with the UI Regulations, 2009/DSM regulations, 2014 shall be refunded or adjusted by HPSEBL in a period of three months from the date of issue of this order. However, the interest is not allowed.

(c) MPCL has sought a direction to HPSEBL to discontinue the collection of handling charges. It is directed that HPSEBL is not entitled for handling charges as it is getting the operating charges reimbursed through NRLDC and Power Exchanges. HPSEBL is directed to refund the handling charges collected from MPCL from 1.4.2008 till the issue of this order. MPCL shall be entitled for a simple interest of 9%.

(d) MPCL has sought a direction to HPSEBL and Himachal Pradesh Load Despatch Society to follow the regulations framed by this Commission while dealing with interstate power. In the light of the directions given in (a) to (c) above, no further directions are required to be issued in this regard. Both MPCL and HPSEBL have sorted out the problem with regard to NoC for short term open access and therefore, no direction is required to be issued in this regard.

(e) MPCL has sought a direction to allow scheduling/metering of power of MPCL by NRLDC. This prayer has been made without any supporting pleadings. Therefore, no direction is issued on this prayer.

65. The prayers of HPSEBL in Petition No.167/MP/2015 are disposed of as under:

(a) HPSEBL had prayed that if the Open Access Regulations and UI Regulations of the Commission are to apply, the same would be applicable in entirety and for all aspects between the parties. We have already directed that the Open Access Regulations, 2008 shall apply in all aspects including the wheeling charges/losses and handling charges.

(b) There is dispute between the parties as to whether the transmission charges and losses determined by HPERC shall be applicable in case of the wheeling charges and losses payable by MPCL for using State network. Since the wheeling charges and losses pertaining to State network fall under the jurisdiction of HPERC, we direct the parties to approach the learned HPERC for suitable directions in this regard. Till the matter is decided by the HPERC, the default transmission charges and losses as per the Open Access Regulations, 2008 shall be payable. Accordingly, wheeling charges and losses shall be worked out by MPCL and HPSEBL.

(c) HPSEBL has sought a direction to MPCL to pay the difference between the amounts already paid and to be paid in line with the charges and losses mentioned as per Annexure A & B to the affidavit dated 27.4.2015. It is directed that the difference between the transmission charges and losses paid

by MPCL and the transmission charges and losses worked out based on the decision of HPERC shall be payable as arrears in three installments by MPCL to HPSEBL.

66. Petition No. 449/MP/2014 and 167/MP/2015 are disposed of in terms of the above.

sd/-
(A. S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson