BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION
BAYS No. 33-36, SECTOR-4, PANCHKULA- 134112, HARYANA

CASE NO: HERC / PRO-69 of 2017

DATE OF HEARING	**:**	**28.04.2021**
DATE OF ORDER	**:**	**15.06.2021**

IN THE MATTER OF:

Petition under section 86(1)(f) of The Electricity Act, 2003 read with Regulation 23 of the Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 seeking payment of Rs. 76,61,606/-. towards the deemed generation as the grid down time considerably exceeded the considerable downtime/maintenance hours under Power Purchase Agreement dated 20th August, 2010 executed between the petitioner and respondent no. 1 on behalf of respondent no. 3 & 4; along with interest @ 18% p.a. and other damages.

Petitioner

M/s. Zamil Infra Pvt. Ltd.

Respondents

1. Haryana Power Purchase Centre (HPPC), Panchkula
2. Chief Engineer, HPPC, Panchkula
3. Dakshin Haryana Bijli Vitran Nigam Limited (DHBVN), Hisar
4. Uttar Haryana Bijli Vitran Nigam Limited (UHBVN), Panchkula

Present

On behalf of the Petitioner through Video Conferencing

1. Shri Vishal Garg Narwana, Advocate.

On behalf of the Respondents through Video Conferencing

1. Shri Shubham Arya, Advocate for HPPC

Quorum

Shri Pravindra Singh Chauhan, Member (In Chair)
Shri Naresh Sardana, Member

ORDER

Brief Background of the case

1. By way of the present petition, the petitioner has invoked the jurisdiction of the Commission under Section 86 (1)(f) of the Electricity Act, 2003 read with Regulation 23 of the Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2004, seeking payment of Rs. 76,61,606/- towards deemed generation as the grid down time exceeded 87.6 hours prescribed under Power Purchase Agreement dated 20th August, 2010.
2. That the case was earlier dismissed by the Commission, vide Order dated 16.01.2019, for lack of prosecution. The request of the Petitioner to recall the ibid Order and restore the case to its original number & stage was also rejected by the Commission, vide Order dated 25.04.2019.
3. That the Petitioner filed an Appeal before the Hon'ble Appellate Tribunal for Electricity, against the aforesaid Orders of the Commission (DFR No. 2185 of 2019). Hon'ble Appellate Tribunal for Electricity, vide its Order dated 06.03.2020, remanded the case to the Commission. The relevant part of the Order dated 06.03.2020 is reproduced below:-

   "We set aside the impugned order and restore the case of the Appellant for consideration and adjudication by the State Commission in accordance with law subject to cost of Rs. 25,000/- (Rupees twenty five thousand only) being paid by deposit in Chief Ministers' relief fund within two weeks hereof. The parties are directed to appear before the State Commission for further proceeding on 03.04.2020.

   The appeal and pending applications are disposed of in above terms".
4. Accordingly, the case has been restored to its original number and stage.
5. The Petitioner has submitted as under:-

a) That on 20.08.2010, a Power Purchase Agreement (herein after referred to as the PPA) was executed between the Petitioner and Respondent No. 1. The Respondent no. 1 was acting on behalf of Respondent no. 3 & 4. The PPA inter alia defines the roles and responsibilities of the petitioner and the respondents vis-a-vis the aforementioned Power Project.

b) That the above project of the petitioner company also received approval of Indian Renewable Energy Development Agency Limited (IREDA) vide letter dated 17th

September, 2010, to avail generation based incentive in accordance with the guidelines for Rooftop PV and small Solar Power Plants Connected scheme.

c) That as per the terms and conditions of the agreement, the respondent no. 1 shall purchase and accept all energy available at the delivery point from the petitioner on the rates/tariff settled by this Commission on different dates. The tariff for solar power generated from roof top PV and small solar power plants shall be Rs. 17.91 per kWh. The base rate shall be Rs. 5.50 per kWh (for financial year 2010-11) and the escalation of 3 % on base rate every year as indicated by IREDA in their guidelines issued on 12.08.2010 shall be subject to the approval of this Commission.

d) That as per the procedure laid down for the payment of the purchase of monthly energy by the respondent no. 1, the authorized representative of the respondent no. 3 & 4 and the authorized representatives of petitioner took the reading of meters supplying power to grid and for captive consumption of plant. On behalf of respondent no. 3 & 4, the respondent no. 1 is preparing and maintaining the monthly energy account depicting energy delivered and wheeled to respondent no. 1. The petitioner raised monthly bills on the respondent no. 1 for the energy sold at the delivery point at the tariff described in article 4 of the agreement. The respondent no. 1 used to submit the claims along-with the documentary evidence for the payment of electricity generated for the corresponding month to IREDA on monthly basis. The IREDA used to disburse the claimed amount to the respondent no. 1 as per article 5 of the agreement.

e) That after entering into the power purchase agreement between the petitioner and the respondent no. 1, the petitioner and other solar power developers found that there are certain discrepancies and anomalies in the power purchase agreement, which the Commission vide order dated 24.12.2010, clarified/ rectified.

f) That as per the ibid order dated 24.12.2010, any refusal beyond 87.6 hours in a year for dispatch of Solar PV Power Plant shall be treated as deemed generation and paid for at the tariff approved by the Commission.

g) That in the light of the order dated 24.12.2010, the petitioner company is suffering loss due to downing of the grid, which amounted to deemed generation. The petitioner company has sent the notices through speed post for the grid down time for claiming the revenue loss.

h) That after waiting for a considerable time, the petitioner send notice dated 27.02.2017 under article 14.1 of the power purchase agreement, for convening a meeting between

authorized representative of the petitioner company and authorized representative of respondent no. 1 to resolve the issue of payment of deemed generation to the petitioner company.

i) That the respondents did not reply to any of the ibid demand notices and no meeting was convened between the petitioner and respondent no. 1.

j) That the aforesaid notice under article 14.1 of the power purchase agreement was duly received by the respondents. Even after receiving the aforesaid notice, the respondents did not respond and no meeting was convened between the petitioner and the respondent no. 1.

k) That due to the arbitrary behavior of the respondents, the petitioner was left with no other option, but to approach this Commission under the Provisions of the Electricity Act, 2003 and the power purchase agreement.

l) That in view of the above, the present petition may be allowed and the respondents may be directed to pay Rs. 76,61,606/- towards deemed generation as the grid down time considerably exceeded the downtime/maintenance hours under Power Purchase Agreement dated 20th August, 2010 executed between the petitioner and respondent no. 1 on behalf of respondent no. 3 & 4 along with interest @ 18% per annum and Rs. 11,000/- as the cost of the legal proceedings.

Reply filed by HPPC (Respondent No. 1)

6. HPPC filed its detailed reply dated 28.09.2018, on the issues and relief sought by the Petitioner herein. HPPC has submitted as under:-

a) That the Petition, filed by Zamil Infra Private Limited- the Petitioner herein claiming deemed generation for the grid down time purported to be under the PPA dated 20.08.2010 is misconceived and is liable to be rejected. Further, the claim made by the Petitioner for interest at the rate of 18% per annum and cost of Rs 11,000 is also misconceived and is liable to be rejected. Without prejudice to the above, the substantial part of the claim made by the Petitioner is time barred and therefore not admissible even otherwise.

b) That in terms of the provisions of the PPA dated 20.08.2010, there cannot be any claim for deemed generation. The PPA provides for the sale and purchase of energy at the tariff determined by the Commission vide Orders dated 16.04.2010 and 18.07.2010 from the project of the Petitioner (Article 4.1.1). The price payable is for the solar power

actually generated and supplied by the Petitioner to the Respondent. The PPA does not talk about any deemed generation.

c) Further and in any event, the deemed generation cannot be claimed for the Force Majeure Event of the transmission system or the distribution system being not available at the relevant time to evacuate the power. Such non-availability of the system, in the facts and circumstances of the case is on account of Force Majeure Event as provided for in Article 17 of the PPA. Article 17 of the PPA reads as under:

"17. If any party hereto is wholly or partially prevented from performing any of its obligations under this Agreement by reason of or through lightning, earthquake, fire, floods, invasion, insurrection, rebellion, mutiny, tidal wave, civil unrest, riot, epidemics, explosion, the order of any court, judge or civil authority, change in state or national law, war, any act of God or the public enemy or any other similar cause beyond its exclusive control and not attributable to its neglect, then and in any such event, such party shall be excused from whatever performance is prevented by such event to the extent so prevented and such party shall not be liable for any damage, sanction or loss resulting there from.

17.2 Force Majeure Exclusions

Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:

a. Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts or consumables for the Power Project;
b. Delay in the performance of any contractor, sub-contractor or their agents;
c. Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;
d. Strikes at the facilities of the Affected Party;
e. Insufficiency of finances or funds or the agreement becoming onerous to perform; and
f. Non-performance caused by, or connected with, the Affected Party's:
i. Negligent or intentional acts, errors or omissions;
ii. Failure to comply with an Indian Law; or
iii. Breach of, or default under this Agreement.

17.3 The party invoking this clause shall satisfy the other party of the existence of such an event and give written notice within Seven (7) days to the other party and take all possible steps to revert to normal conditions. In case of failure to Intimate within specified period, the event shall not be treated as force majeure event.

17.4 To the extent not prevented by a Force Majeure Event pursuant to Article 11.3, the Affected Party shall continue to perform its obligations pursuant to this Agreement.

The Affected Party shall use its reasonable efforts to mitigate the effect of any Force Majeure Event as soon as practicable."

d) That in terms of the above provision, when the Respondent is wholly or partially prevented from performing any of its obligation under the PPA by reason of an event beyond its control and not attributable to it, the Respondent will be excused from the performance, so prevented, in accordance with Article 17.1 of the PPA (quoted above). Article 17.2 of the PPA deals with the Force Majeure exclusion and lists six events. None of the events listed in Article 17.2 as Force Majeure exclusion covers the non-availability of the distribution line/transmission line to evacuate the power from the Solar Power Project set up by the Petitioner.

e) It is submitted that non-availability of distribution system/transmission system on most of the occasions was on account of force majeure and was not on account of any neglect or default on the part of the Respondent No. 1 for reasons beyond the control. The force majeure includes the constraints faced in the upstream network also. There was no refusal of the Respondent No. 1 to evacuate the power when the system was available. There was no other entity using the evacuation line from the generating project upto the sub-station. Accordingly, whenever the line was available unaffected by force majeure, namely when the non-availability was not for reasons beyond the control of Respondent No. 1, the power from the project was being evacuated.

f) In the facts and circumstances of the case, the terms of the PPA entered into between the parties did not provide for any deemed generation.

g) By Order dated 24.12.2010, the Commission directed as under:

"On the issue of dispatch and continuity of service the Petitioner vehemently argued that in order to make the project bankable the maximum hours of refusal to off take power by the Discoms in a year should be restricted to 1% i.e. 87.6 hours. Arguing to the contrary the power utilities submitted that as per CERC Regulations the capacity utilization factor for the solar power plants is 19% and the Solar PV Project proponents seems to have ignored the facts that during night/bad light there cannot be any generation and thus, the request of the project developer is not appropriate. After careful consideration of rival contentions the Commission is of the considered view that any perceived frivolous backing down needs to be discouraged. Thus the utilities shall make all efforts to evacuate the available solar power and treat them as "must run" Station (a fact admitted by UHBVNL/HPPC Memo No.CH14/GM/RA/N/F-102/Vol.III dated 8.12.2010). Further, Article 12 of the PPA provides for the conditions under which solar generation may be backed down by the system operator i.e. on consideration of Grid security or safety of any equipment or personnel. In order to meet such contingencies the Commission

believes that provision for (at the most) 1% i.e. 87.6 hours of the maximum hours in a year i.e. 8760 hours of backing down should be sufficient to address the concerns of the power utilities. Hence, the Commission orders that Clause 8.12 & Clause 12.1 of the PPA shall be amended accordingly i.e. any refusal beyond 87.6 hours in a year shall be treated as deemed generation and paid for at the tariff approved by the Commission."

h) That in terms of the above, the Commission had dealt with a situation where there is a refusal on the part of the distribution licensee/transmission licensee to take the power from the power project beyond 87.6 hours in a year for the purpose of deemed generation. The above does not apply to a situation of Force Majeure Event falling within the scope of Article 17 of the PPA. The principle applicable to Force Majeure is that the performance of the contract would be beyond the control of the person and accordingly there cannot be any consideration that the person concerned has refused to allow injection of power beyond 87.6 hours.

i) That in terms of the Order dated 24.12.2010 dealing with the amendment of Article 8.12 and Article 12.1 of the PPA, relates to the Grid operation and Load Despatch etc. and the responsibility of the Respondent to operate and maintain the system. These again do not relate to Force Majeure situation. Article 12.1 of the PPA deals with the continuity of the service and the ability of the Respondent to require the Petitioner to temporarily curtail or interrupt the delivery of energy, when necessary, in the circumstances mentioned in sub-clauses 12.1.1 to 12.1.4.

j) That directions contained in the Order dated 24.12.2010 passed by the Commission of maintaining continuity of the services and seeking temporary curtailment or interruption of delivery of energy are related to the activities like Repair, Replacement, Removal of the Equipment dealt in Article 12.1.1 or similar activities dealt in Article 12.1.2 or Article 12.1.4 etc. It cannot, per se, be applied to a situation where there is a Force Majeure condition. For example, if there is a Force Majeure condition extending to more than 87.6 hours in a year, namely on account of Act of God, the line is not available for say 10 days i.e. 240 hours in a year, it is not possible for the Respondent to fulfil the obligation of maintaining the system throughout the year excluding 87.6 hours. Thus, force majeure event or event which is beyond the control of Respondent No. 1, preventing the performance, cannot be included in the permissible time of 87.6 hours, the said time allowed has to be for matters other than the force majeure. This is also the well settled principle as laid down by the Hon'ble Supreme Court in the context of Section 56 of the Indian Contract Act, 1872, namely, no person can be compelled to do

an impossible act. The Respondent No. 1 would crave reference to the decision of the Hon'ble Supreme Court in **Dhanrajamal Gobindram -v- Shamji Kalidas & Co., (1961) 3 SCR 1020 : AIR 1961 SC 1285,** wherein it was held as under:

> *"17. McCardie, J. in Lebeaupin v. Crispin [(1920) 2 KB 714] has given an account of what is meant by "force majeure", with reference to its history. The expression "force majeure" is not a mere French version of the Latin expression "vis major". It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in "force majeure". Judges have agreed that strikes, breakdown of machinery, which, though normally not included in "vis major" are included in "force majeure". An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to "force majeure", the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to "force majeure", and even if this be the meaning, it is obvious that the condition about "force majeure" in the agreement was not vague. The use of the word "usual" makes all the difference, and the meaning of the condition may be made certain by evidence about a force majeure clause, which was in contemplation of parties."*

Reference in this regard may also be made to the **SPIC SMO –v- Tamil Nadu Electricity Board, 2012 SCC OnLine Mad 2966 : (2013) 1 CTC 500 : (2013) 3 ICC 310**

> *"89a. With regard to the non-execution of the turnkey project within the stipulated date viz., 24.8.2000, this Court would like to place it on record that the circumstances narrated and accepted by the Defendant-Board under Exs. P9, P10 & P11 would definitely come under the definition of Force Majeure or vis major (Latin) 'superior force' also known as forca major (Catalan), fuerza mayor (Spanish), cas fortuit (French) or casus fortuitus (Latin) 'chance occurrence, unavoidable accident', is a common clause in contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, prevents one or both parties from fulfilling their obligations under the contract.*
>
> *89b. Of course, in practice, most force majeure clauses do not excuse a party's non-performance entirely, but only suspends it for the duration of the force majeure.*
>
> *89c.Force majeure is generally intended to include risks beyond the reasonable control of a party, incurred not as a product or result of the negligence or malfeasance of a party, which have a materially adverse effect on the ability of such party to perform its obligations, as where non-performance is caused by the usual and natural consequences of external forces or where the intervening circumstances are specifically contemplated.*
>
> *89e. As contemplated under Section 56 of the Indian Contract Act, 1872 promises and reciprocal promises under a contract come to an end*

when force majeure conditions occur. Force majeure, or Act of God, occurs when:

1. The cause is not created by the defaulting party's fault;

2. The cause must be inevitable and unforeseeable; and

3. The cause must make execution of the contract wholly impossible."

k) That a Force Majeure event excuses or suspend the performance during the relevant period on a day to-day basis and also for a further period which is reasonably required to overcome/cure the issues that arise after Force Majeure. In such an event, the total number of hours in a year i.e. 8760 hours should be reduced by the number of hours under Force Majeure and the limit of 87.6 hours specified in the Order dated 24.12.2010 need to be considered with reference to the above reduced number of hours i.e. excluding the period of Force Majeure. The amendment directed by this Commission to be carried out cannot be to the effect that the Force Majeure Event should also be considered in the permissible 87.6 hours. The order dated 24.12.2010 passed by this Commission stating "*Clause 8.12 and Clause 12.1 of the PPA shall be amended accordingly i.e. any refusal beyond 87.6 hours in a year…."* need to be considered in a contextual manner and not in a literal or pedantic manner as suggested by the Petitioner. The reference to Article 8.12 and Article 12.1 is qualified with the expression **"refusal"**, which necessarily implies that deemed generation to be considered is when there is a refusal in the part of the Respondent No. 1. The refusal is a part of voluntary action, namely, when the Respondent No. 1 is in a position to perform but refuses to perform. The Respondent No. 1 cannot be said to have refused to perform if the performance is affected by force majeure or for the reasons beyond the control of the Respondent No. 1.

l) That non-availability of the system has been affected on account of Force Majeure reason. The project is situated in the Tehsil Narnaul, District Mahendergarh which is affected by frequent thunder-storm and western disturbances as it is surrounded on the North by Bhiwani and Rewari Districts, on the East by Rewari District and Alwar District of Rajasthan, on the South by Alwar, Jaipur and Sikar Districts of Rajasthan and on the West by Sikar and Jhunjhunu Districts of Rajasthan. The Respondent is filing herewith the report dated 02.02.2018 forwarded by the Sub Divisional office of Dakshin Haryana Bijlee Vitaran Nigam Limited which, inter-alia, reads as under:

"Sub: Grid Issue with 1 MW Solar Power Plant of M/s Zamil at Village Panchnauta, Narnaul, Mohindergarh.

On the above subject cited matter, enclosed please find herewith the month wise, year wise details of feeder outage alongwith reason of feeder outage on the prescribed format for your kind consideration and necessary action please.

It is further added that in addition to the reason of the outage mention as per attached year wise annexure some additional reason are also being effected the grid connectivity given as under:

1. Due to hilly area poles cannot be erected in proper depth due to which during heavy wind storm poles broken and this area is so much effected to wind storm during May to Aug.

2. Line have been stand erected alongwith road and crusher zone is running in this area 24x7 Hrs., the dumper and trucks are moving on this road in large quantity, some time they strike the pole in night hours due to which supply got disturbed for long time duration.

3. Length of feeder feeding to solar plant is 14 KM at present feeding to 33 KV Dholera. At the time of commissioning of solar plant the feeder was proposed from 33 KV Nizampur and the length was only 5 KM. But due to change of feeding source on request of consumer the length of feeder increased to double extent.

4. Geographical conditions are also not favourable to electric line in this area. Being hilly area straight electric line cannot be erected and zig-zag lines are more prone to breakdown as compare to straight line.

submitted for your kind consideration please."

m) That at the time when the project was being implemented, the Petitioner was advised by Dakshin Haryana Bijli Vitran Nigam Limited (DHBVNL), vide letter dated 03.08.2010, regarding power evacuation facilities for the project as under:

"It is intimated that village Panchnota is situated 12 KM from existing 33 KV S/Stn. Dholera and there is Right of way for erection of 11 KV/33 KV line from proposed plant either by providing AB cable or ACSR which is technically feasible. Installed capacity of 33KV S/Stn. Dholera is 10 MVA 33/11 KV.

It is also informed that 33 KV S/Stn. Nizampur is also existing 8 KM from the proposed site of above plant and there is right way for erection of 33 KV/11 KV line either by AB or ACSR but railway crossing is involved in erection path. Rough site sketch of showing both the ROW i.e. 33 KV S/Stn. Dholera and 33 KV S/Stn. Nizampur is attached herewith.

This is for your information and necessary action please"

n) That the Petitioner was also advised of the difficulties which would be encountered in the use of Dholera Line. Despite the above, the Petitioner proceeded to opt for the Dholera Line vide letter dated 10.10.2011 on the ground that the Petitioner is required to Commission the project urgently in order to avail the benefit from the Government of India. The Petitioner, therefore, opted for the Dholera Line knowing fully well that the distance involved is about 16 KMs as against 8 KMs in Nizampur Line. Further, the Nizampur Line was connected to 220 KV Substation whereas the Dholera Line is connected to 132 KV System. Accordingly, the Petitioner cannot now complain of events affecting the longer line of Dholera and Force Majeure outages in the said line.

o) That without prejudice to the contention that the Petitioner is not entitled to claim any relief in regard to non-availability of evacuation system during the period of force majeure and further even in regard to any period where evacuation could not be given effect to the constraints in the upstream systems in the State, even assuming but not admitting that a claim for compensation is maintainable, the Petitioner cannot vaguely state an amount or the period and seek compensation/deemed generation. The Petitioner is required to plead clearly the time, duration when the Petitioner was affected by the actions of the Respondent resulting in non-generation, whether at the relevant time, the generation of electricity was possible, if so to what extent, dependent on the DNI/Irradiance available, whether the generation plant of the Petitioner was capable of generating without any constraint in the machines etc. There has to be a clear proof of the above aspects and burden of establishing the same is on the Petitioner. The pleadings filed by the Petitioner and the documents placed does not give the proof of the above aspects. The statements are only vague, un-substantiated claims made by the Petitioners.

p) That the Petitioner cannot claim deemed generation for non-generation of electricity during the time when there is a Force Majeure Event affecting the Respondent to evacuate power. In any event, the claim made by the Petitioner for the period more than 3 years from the date of the filing of the petition is time barred and cannot be considered in the present proceedings.

q) That in the facts and circumstances mentioned above, there is no merit in the Petition filed. The Petition filed is liable to be dismissed. The Respondent No. 1 has dealt with the specific issues raised by the Petitioner in the context of the applicable provisions of the PPA entered into between the parties and the principles laid down by the Hon'ble

Supreme Court. The Respondent No. 1 is not replying para-wise to the Petition and submits that the submissions made hereinabove adequately answers the allegations and contentions raised by the Petitioner. Save as mentioned hereinabove, each and every allegation contained in the Petition is specifically denied.

Proceedings in the Case

7. The case was first heard on 27.05.2020, consequent to the remand back order dated 06.03.2020 of the Hon'ble Appellate Tribunal for Electricity.

8. The case was next heard on 15.07.2020. The Commission, vide its Interim Order, considered the amendment application moved by the Petitioner herein in the Commission under Section 94 of the Electricity Act 2003 and Order 6 Rule 17 read with Section 151 of the CPC for amendment of the Petition and rejected the same. The relevant part of the Order of the Commission dated 15.07.2020, is reproduced hereunder:-

"Arguments were heard today on the issue whether amendment in the petition can be carried out at this stage almost three years after the filing of the petition. The main argument advanced by the petitioner was that some new facts had come to the notice of the authorized signatory who had been appointed by the petitioner on 06.06.2020. Per contra the Ld. Counsel, for Respondent, submitted that the original petition was also time barred and so was the amended petition. In support of the arguments, the Ld. Counsel for the Respondent cited catena of judgements of the Hon'ble Supreme Court on the issue i.e. factors to be taken into consideration while dealing with applications for amendments. The Commission observes that the reason given for amendment by the Petitioner i.e. the wrong calculation came to the knowledge of the petitioner when the new authorized signatory joined on 6.06.2020 is not bona-fide as the present case was preferred by the Petitioner in 2017 with the same purported wrong calculation. The amendment application has been preferred by the Petitioner after the Commission, on remand Order of the Hon'ble APTEL, scheduled the case for hearing on 15.07.2020. The Commission further observes that no new material facts have been placed on record by the Petitioner justifying the amendment application.

Considering the submission of both parties, the Commission is of the view that amendment in the petition is not permissible at this stage. Consequently, the application for amendment of the petition is rejected."

9. The case was finally heard through Video conferencing on 28.04.2021, as scheduled, in view of COVID-19 pandemic. The Commission granted liberty to the parties to file written submissions of their arguments within one week.

10. In response, the Petitioner filed its written submissions through email dated 30.04.2021, as under:-

a) The power purchase agreement is valid for 25 years and still subsisting. Every month the Petitioner sends timely notices of deemed generation, which are duly received by HPPC and this is an admitted position. Every month HPPC purchases electricity from the Petitioner and also receives the notice of the deemed generation. Consequently, HPPC on a month-to-month basis acknowledges the liability of deemed generation which is a continuous cause of action/liability. Therefore, the plea by HPPC that the claim for deemed generation is hit by limitation is untenable. With their logic the petitioner will have to regularly keep filing the petitions to the Commission every three year, 8 times during the 25 years tenure of PPA.

b) Time limitation clause also is misconstrued and deliberately misinterpreted by HPPC for not giving the right picture to the Commission. Deemed generation data can only be reconciled after the end of the year since 86.7 hrs exemption is not further defined on monthly basis. Hence 2012 data can be reconciled only in 2013 and 2013 data in 2014. Keeping in mind the post Facto reconciliation nature of the clause, even HPPC argument should have been time limitation for claim before 2013 rather than 2014 which they submitted to the Commission. This essentially means that Time limitation has to be considered three plus one year due to post facto reconciliation nature of the clause.

c) The conduct of the respondents is a continuously wrong. The petitioner kept making reasonable efforts to take the compensation against deemed generation from HPPC through constant official communication in these years. The fact of liability in the shape of deemed generation and in the light of order passed by this Commission on 24.12.2010 is acknowledged by the respondents by way of inter departmental notices on various dates and also admitted that this maintenance issue will fall within the ambit of deemed generation. The details of the conversation/letters are as below:

   i. Letter dated 11.08.2014 vide memo no. 30/Solar plant to Sh. Hanuman Dutt AGM/Op.S/Division, DHBVN, N/Chaudhary by XEN/Op Division DHBVN, Narnaul.

   ii. Letter dated 20.08.2014 vide memo no. 41/Solar plant to Sh. T.C. Kansal XEN/Op Division DHBVN, Narnaul by SE/Op. Circle, DHBVN Narnaul.

   iii. Letter dated 4.09.2014 vide memo no. 32/Solar plant to Sh. Hanuman Dutt SDO/Op.S/Division, DHBVN, N/Chaudhary by XEN/Op Division DHBVN, Narnaul.

iv. Letter dated 09.12.2014 vide memo no. 35/Solar plant to Sh. Hanuman Dutt SDO/Op.S/Division, DHBVN, N/Chaudhary by XEN/Op Division DHBVN, Narnaul.

v. Letter dated 19.03.2015 vide memo no. Ch-62/Solar P.P.V-II to XEN/Op Division, DHBVN, Narnaul by SE/Op Circle DHBVN, Narnaul.

vi. Letter dated 24.03.2015 vide memo no.Ch 216/SE/C/318/N/Vol-II to The Chief Engineer/Op, DHBVN, New Delhi by Se/Commercial, DHBVN, Hisar.

vii. Letter dated 01.04.2015 vide memo no. 65/Solar P.P.V-II to XEN/Op Division, DHBVN, Narnaul by SE/op Circle DHBVN, Narnaul.

Hence, the claim of the petitioner is well within time.

These inter departmental correspondence is an admitted fact, which can be verified from the respondents. These correspondences were also marked to the petitioner. The notarised copies of these departmental correspondences are already submitted in this Commission through separate application.

On 12.01.2021, the respondents were directed to intimate the number and duration of time the generator herein was backed down due to scheduled maintenance and instances where the power was backed down by HPPC in spite of the availability of the system. On 28.04.2021, the counsel for the respondent HPPC submitted that they do not have any such data. But HPPC concealed the aforesaid notices, which shows that the respondents are not coming before the Commission with clean hands.

FORCE MAJEURE EVENT

d) To invoke this exemption, the beneficiary has to follow the procedure mentioned in Clause 17 of PPA. This principle of force majeure does not apply to the facts and circumstances of the present case. The Respondents have not followed the requisite procedure for invoking force majeure, even assuming, that such a plea could be taken in the facts of the present case.

e) Even a bare perusal of the annexures attached with the present Petition as well as the reply of the Respondents makes it amply evident that there was no force majeure event. The grid down time and the reasons for the same are due to the deliberate inaction on part of the HPPC, which was within their exclusive control.

f) Further, Respondents' reliance on Clause 17.2 and their claim that *force majeure* exclusions do not include distribution lines/transmissions lines is wholly misconceived and without merit. Alleged regular breakdowns were well within the reasonable control of the Respondents and claiming alleged regular breakdowns as an excuse implies express knowledge on their part and the continuation of such issues proves a lack of effort (negligence and failure) to resolve such issues, by making necessary

infrastructure changes. Also, a bare perusal of Clause 17.2 shows that the present circumstances fall under multiple *force majeure* exclusions mentioned.

g) Respondents have admitted their inability to evacuate electricity for prolonged periods of time over multiple years. The Respondents have taken a frivolous and superficial plea of *force majeure* without substantiating their claim or following the requisite procedure and have further failed to elucidate the necessary steps taken to mitigate loss to the Petitioner, as required under the Power Purchase Agreement.

h) The inter-departmental notices which are annexed with the reply have no legal bearing, as both the parties are governed by the PPA and by the order passed by the Commission. Power purchase agreement is a bilateral contract. Therefore, the terms and conditions of PPA and orders passed by the Commission cannot be changed unilaterally. The documents annexed with the reply are not binding upon the parties to PPA especially the Petitioner.

i) The Report of the Sub-Divisional Officer has been prepared on 02.02.2018, which is conveniently after this Petition was decided to be heard (on merits) and is in furtherance of the stance taken by the Respondent.

j) This Report clearly is an afterthought to thwart the legitimate claim of the Petitioner herein. This report again admits and proves that for at least a decade, despite being aware of the same, no relevant policy changes (with respect to infrastructure, etc.) have been made to prevent issues as claimed to exist in the Reply filed by the Respondent.

REFUSAL OR FAILURE

k) HPPC cannot take this technical plea at this stage. As per the Power Purchase Agreement and Order dated 24.12.2010 passed by the Commission, it was the duty of HPPC to evacuate electricity and to maintain the electricity lines, poles, etc. The wilful default not to maintain the evacuation system is wilful neglect/ refusal/failure/ on the part of HPPC and the same cannot be held against the Petitioner herein. It will be considered as wilful neglect/ refusal/default, which falls in the category of failure. The HPPC is provided 87.6 hours in a year to maintain the electricity evacuation system and beyond that period no exemption can be granted to HPPC, in light of the present facts and circumstances herein.

l) Order dated 24.12.2010 was passed, which put a cap on the number of Exempted Hours (to 87.6 hours). The same was done, by the Commission, with the intention that "*any perceived frivolous backing down needs to be discouraged"*.

m) The term "refusal" has to be understood in context of this above intention of the Commission to introduce the above limit. Any attempt to achieve such a "frivolous backing down", by the HPPC, needs to be stopped and discouraged in order give true effect to the intention of the direction of the Commission.

n) HPPC cannot take advantage of its own wrong and default. Electricity is a perishable item. This kind of conduct and stand of HPPC will also prejudice the loan repayments of Petitioner.

o) The electricity which is supplied in north India is evacuated from the Bhakra Nangal Dam which is situated in mountains and hills. The electric line is installed on the poles on the mountains and the hills. The argument of HPPC is not tenable at all because if the hilly area is to be considered a valid excuse, then the evacuation from the Bhakra Nangal Dam, in its entirety, would be a big failure whereas, such is not the case. Further, there are numerous properly maintained and functioning power projects and power stations across India situated in mountains and hills.

p) Respondent had set-up two lines which should adhere to certain standards and it is not unreasonable for the Petitioner to assume that both were legitimately viable options. The Petitioner cannot be said to have committed any wrong in choosing between one of the two legitimate options, given by the Respondent. Whereas, the Respondent admits that the exercising the option, with the shorter distance and with a (supposedly better) 220 KV system, would still have taken longer and delayed the project, prejudicially affecting the interests of the Petitioner.

q) If the hilly terrain causes difficulty for the Respondents, then it should be considered prior to awarding the project to the Petitioner and necessary provisions should have been incorporated into the Power Purchase Agreement entered between the parties. On the contrary, Clause 17.2 indicates such issues would not be covered as force majeure.

r) If the poles are broken by being hit by dumpers and trucks then the HPPC should have lodged complaints and filed FIR and taken necessary action against the culprits. The HPPC cannot surreptitiously make the Petitioner to bear the burden of these alleged losses. The Petitioner has no contributory role in such incidents.

s) It is always the endeavour of the electricity department to install the electric lines and poles on the roadside because it is easy to maintain and easy to find faults in the line. Further adequate fortification must be done with respect to design, materials used, etc. to protect the lines, which is the responsibility of HPPC.

t) The Petitioner along with other power developers had filed a joint petition seeking the relief that the clause 8.12 and clause 12.1 of the power purchase agreement. The amended clause read as follows: -

*"**Clause 8.12 & Clause 12.1:** In reference to load dispatch and continuity of service the petitioner(s) have requested for insertion of, "Discoms shall have to allow and accept dispatch of Solar PV Power from the project proponent for 99% of the maximum hours in a year i.e., for 8672.4 hours out of 8760 hours in a year. Discom/State Load Dispatch Centre can refuse permission to project Proponent/Developer due to any technical reason for dispatch of Solar PV Power*

only up to 87.6 hours in a year. Any refusal beyond this limit of 87.6 hours in a year for dispatch of Solar PV Power shall have to be reimbursed to the Project Proponent at the rate of Rs. 17.91 / kWh since it will be treated as deemed generation"

u) In the light of this prayer, on 24.12.2010, the Commission had amended the aforesaid clauses by saying that any refusal beyond 87.6 hours in a year shall be treated as deemed generation and paid for at the tariff approved by the commission. The relevant para of the order reads as follows:

> *"On the issue of dispatch and continuity of service the petitioner vehemently argued that in order to make the project bankable the maximum hours of refusal to off take power by the Discoms in a year should be restricted to 1% i.e., 87.6 hours. Arguing to the contrary the power utilities submitted that as per CERC regulations the capacity utilization factor for the solar power plants is 19% and the Solar PV project proponents seems to have ignored the facts that during night/ bad light there cannot be any generation and thus, this request of the project developer is not appropriate. After careful consideration of rival contentions, the Commission is of the considered view that any perceived frivolous backing down needs to be discouraged. Thus, the utilities shall make all efforts to evacuate the available solar power and treat them as **'must run'** station (a fact admitted by UHBVNL/HPPC Memo No. Ch-14/GM/RA/N/F-102/Vol. III dated 8/12/2010). Further, Article 12 of the PPA provides for the conditions under which solar generation may be backed down by the system operator i.e., on consideration of grid security or safety of any equipment or personnel. **In order to meet such contingencies, the Commission believes that provision for (at the most) 1% i.e., 87.6 hours of the maximum hours in a year i.e.,8760 hours of backing down should be sufficient to address the concerns of the power utilities. Hence the Commission orders that Clause 8.12 & Clause 12.1 of the PPA shall be amended accordingly i.e., any refusal beyond 87.6 hours in a year shall be treated as deemed generation and paid for at the tariff approved by the Commission."***

v) The non-maintenance of the lines/grid timely is not a legitimate excuse to not evacuate the electricity from the solar plant of the Petitioner and in any case deny the claims of the Petitioner. The Commission has already provided 87 hours to HPPC to maintain the faulty electricity lines and grid.

w) The Petitioner is seeking the execution of order dated 24.12.2010 passed by the Commission. The acts/omissions attributable to the Respondents is contemptuous.

11. In response, HPPC has also filed its written submission dated 03.05.2021, reiterating the contents of their reply dated 28.09.2018. HPPC, has, additionally submitted as under:-

a) That the claim of the Petitioner is time barred. The claim made by the Petitioner for the period prior to 3 years from the date of the filing of the Petition i.e. 3 years before 18.09.2017 are time barred and cannot be considered in the present proceedings. In regard to the above following decisions of the Hon'ble Supreme Court are relevant:

i) The provisions of the Limitation Act, 1963, are applicable to proceedings under the Electricity Act 2003. In A.P. Power Co-ordination Committee -v- Lanco Kondapalli Power Ltd. (2016) 3 SCC 468, the Hon'ble Supreme Court has held as follows:

> *"28. Coming back to the issues relating to limitation, in view of law noticed above and for the reasons noted in M.P. Steel Corpn. [M.P. Steel Corpn. v. CCE, (2015) 7 SCC 58 : (2015) 3 SCC (Civ) 510] , we respectfully concur and hold that by itself the Limitation Act will not be applicable to the Commission under the Electricity Act, 2003 as the Commission is not a court stricto sensu. The further stand of the respondents that the Commission being a statutory tribunal, cannot act beyond the four walls of the Electricity Act also does not brook any exception. In PPN Power Generating Co. (P) Ltd. [T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd., (2014) 11 SCC 53] this Court examined the issue of limitation in a very summary manner and without referring to the relevant provisions of the Electricity Act, 2003, at the end of para 64 it was observed in a single sentence that the Limitation Act is inapplicable to proceeding before the State Commission. But in view of detailed discussion in M.P. Steel Corpn. [M.P. Steel Corpn. v. CCE, (2015) 7 SCC 58 : (2015) 3 SCC (Civ) 510] , we have held above that by itself the Limitation Act is inapplicable to proceeding or action brought before the State Commission. However, the Electricity Act, 2003 requires a further scrutiny to find out whether by virtue of Section 175 of the Electricity Act or otherwise it can be inferred that the provisions of the Limitation Act will govern or curtail the powers of the Commission in entertaining a claim under Section 86(1)(f) of the Electricity Act. Section 175 reads thus:*
>
> > *"175.Provisions of this Act to be in addition to and not in derogation of other laws.—The provisions of this Act are in addition to and not in derogation of any other law for the time being in force."*
>
> *A plain reading of this section leads to a conclusion that unless the provisions of the Electricity Act are in conflict with any other law when this Act will have overriding effect as per Section 174, the provisions of the Electricity Act will not adversely affect any other law for the time being in force. In other words, as stated in the section the provisions of the Electricity Act will be additional provisions without adversely affecting or subtracting anything from any other law which may be in force. Such provision cannot be stretched to infer adoption of the Limitation Act for the purpose of regulating the varied and*

numerous powers and functions of the authorities under the Electricity Act, 2003. In this context it is relevant to keep in view that the State Commission or the Central Commission have been entrusted with large number of diverse functions, many being administrative or regulatory and such powers do not invite the rigours of the Limitation Act. Only for controlling the quasi-judicial functions of the Commission under Section 86(1)(f), it will not be possible to accept the contention of the appellants that by Section 175 the Electricity Act, 2003 adopts the Limitation Act either explicitly or by necessary implication.

……..

*30. In such a situation it falls for consideration whether the principle of law enunciated in State of Kerala v. V.R. Kalliyanikutty [State of Kerala v. V.R. Kalliyanikutty, (1999) 3 SCC 657] and in New Delhi Municipal Committee v. Kalu Ram [New Delhi Municipal Committee v. Kalu Ram, (1976) 3 SCC 407] is attracted so as to bar entertainment of claims which are legally not recoverable in a suit or other legal proceeding on account of bar created by the Limitation Act. On behalf of the respondents those judgments were explained by pointing out that in the first case the peculiar words in the statute—"amount due" and in the second case "arrears of rent payable" fell for interpretation in the context of powers of the tribunal concerned and on account of the aforesaid particular words of the statute this Court held that the duty cast upon the authority to determine what is recoverable or payable implies a duty to determine such claims in accordance with law**. In our considered view a statutory authority like the Commission is also required to determine or decide a claim or dispute either by itself or by referring it to arbitration only in accordance with law and thus Sections 174 and 175 of the Electricity Act assume relevance. Since no separate limitation has been prescribed for exercise of power under Section 86(1)(f) nor this adjudicatory power of the Commission has been enlarged to entertain even the time-barred claims, there is no conflict between the provisions of the Electricity Act and the Limitation Act to attract the provisions of Section 174 of the Electricity Act. In such a situation, on account of the provisions in Section 175 of the Electricity Act or even otherwise, the power of adjudication and determination or even the power of deciding whether a case requires reference to arbitration must be exercised in a fair manner and in accordance with law. In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation.** *We have taken this view not only because it appears to be more just but also because unlike labour laws and the Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view.*

31. *We have taken the aforesaid view to avoid injustice as well as the possibility of discrimination. We have already extracted a part of para 11 of the judgment in State of Kerala v. V.R. Kalliyanikutty [State of Kerala v. V.R.*

Kalliyanikutty, (1999) 3 SCC 657] wherein the Court considered the matter also in the light of Article 14 of the Constitution. In that case the possibility of Article 14 being attracted against the statute was highlighted to justify a particular interpretation as already noted. It was also observed that it would be ironic if in the name of speedy recovery contemplated by the statute, a creditor is enabled to recover claims beyond the period of limitation. In this context, it would be fair to infer that the special adjudicatory role envisaged under Section 86(1)(f) also appears to be for speedy resolution so that a vital developmental factor — electricity and its supply is not adversely affected by delay in adjudication of even ordinary civil disputes by the civil court. Evidently, in the absence of any reason or justification the legislature did not contemplate to enable a creditor who has allowed the period of limitation to set in, to recover such delayed claims through the Commission. ***Hence we hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court. But in an appropriate case, a specified period may be excluded on account of the principle underlying the salutary provisions like Section 5 or Section 14 of the Limitation Act. We must hasten to add here that such limitation upon the Commission on account of this decision would be only in respect of its judicial power under clause (f) of sub-section (1) of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions which may be administrative or regulatory****."*

(Emphasis Supplied)

ii) Hon'ble Supreme Court in CLP India Private Limited -v- Gujarat Urja Vikas Nigam Limited (2020) 5 SCC 185 has held that mere sending of letters or exchange of letters do not extend the period of limitation as provided by law. Para 29 of the above judgment reads as under:

"29. The next question is whether GERC and Aptel fell into error in granting restricted refund calculable for the 3 year period prior to Gujarat Urja's application. *The concurred findings on this aspect, in the opinion of this Court, are reasonable. There is merit in CLP's submission that the earliest point in time, when the cause of action arose, was in May 1996, when Gujarat Urja rejected its contention that incentive was payable in terms of the PPA, notwithstanding the Notification of 6-11-1995. Despite this stated position, meetings continued to be held and, what is more, incentive amounts, were paid to CLP.* ***No doubt, no document conclusively stated that CLP's claim was accepted. We do not find any merit in the submission of Gujarat Urja that the issue was kept alive, due to a series of communications.*** *In this regard, Aptel's findings about inapplicability of Section 18 of the Limitation Act, are correct.* ***There was no admission on the part of CLP, at least of the kind, that extended the time for preferring an application for recovery of excess payments. It has been consistently ruled by this Court that repeated letters, or exchange of communications, do not extend the period of limitation, provided by law.*** *[S.S. Rathore v. State of M.P., (1989) 4 SCC 582 : 1990 SCC (L&S) 50; Union*

of India v. Har Dayal, (2010) 1 SCC 394; Schlumberger Asia Services Ltd. v. ONGC, (2013) 7 SCC 562 : (2013) 3 SCC (Civ) 630.]"

(emphasis supplied)

b) In the Petition filed, the Petitioner has claimed interest at the rate of 18% per annum and the cost of Rs 11,000. Whereas, the Petitioner is not entitled to interest or any amount whatsoever as the Petitioner has been negligent in pursuing its case before this Commission.

c) The following summary of dates would clearly show that the delay in disposal of the present Petition is entirely attributable to the Petitioner:-

Date	**Event**
02.12.2012-02.05.2017	Notices/Letters issued by the Petitioner to the Respondent No. 1.
18.09.2017	Petition No. 69 of 2017 filed by the Petitioner before the Commission.
19.12.2018	This Commission passed the following order in the above Petition: *2. The Petitioner M/s. Zamil Infra Pvt. Ltd. nor any of its authorized representative was present during the hearing.* *3. The Commission consider it appropriate to grant one more opportunity to the Petitioner to present his case and accordingly schedule the next hearing in the matter for 07.01.2019 at 11:30 A.M.*
07.01.2019	This Commission passed the order, inter-alia, stating as under: *The case was heard by the Commission on 07.01.2019, as scheduled.* *2. At the outset, the representative of the Petitioner, Shri Aman Mittal, Advocate, pleaded that due to sudden demise in the family of the Petitioner, the case may be adjourned to some other date. HPPC also expressed its consent on the adjournment sought by the Petitioner.* *3. Considering the request of Petitioner, the Commission adjourns the case.* *4. The case shall be next heard on 16.01.2019 at 11.30 AM.*
16.01.2019	This Commission passed the order, inter-alia, stating as under: *"2. The Commission observes that the Petitioners is neither attending the hearing nor filed any rejoinder etc. to the reply filed by the Respondents.* *3. The Respondent urged to dismiss the case, as the Petitioner has remained absent from hearing/sought adjournment for the fourth time.* *4. At the time when the court was about to adjourn for the day,*

the representative of the Petitioner, Shri Aman Mittal, Advocate, appeared and sought adjournment of the case. The Commission enquired from Shri Aman Mittal whether he can argue in the matter. However, he replied that he has appeared to seek adjournment only.

5. The Commission observe from perusal of the records that it transpires that the present petition instituted on 18.09.2017. Subsequently, the case was listed for hearing on 13.12.2018, 19.12.2018, 07.01.2019 and 16.01.2019. On every occasion, the petitioner sought adjournment or did not appear at all, thereby wasting precious time of the Commission. It appears that the petitioner is not interested in pursuing the matter. Accordingly, the petition is dismissed for want of prosecution. Before parting with this Order, the Commission directs that in case any petitioner and/or any respondent desires to seek adjournment, they shall inform the Commission in writing atleast 3 days prior to the date of hearing with justification/reason for seeking adjournment for consideration of the Commission.

In terms of the above, the present petition is disposed of."

25.04.2019 The order passed by this Commission in the Petition filed by the Petitioner for recalling the order dated 16.01.2019 and for restoring the above Petition. The order, inter-alia, reads as under:

"4. The Commission is not satisfied with the explanation being given by the Ld. Counsel regarding his absence in the hearing held on 16.01.2019. It is not acceptable that the counsel would not be aware of the marriage & the scheduled programmes much in advance. The same could have been duly informed to the Commission in the hearing held on 07.01.2019. It seems that the absence of the counsel was wilful and now the marriage of sister is being projected as an excuse for the absence. The same is thus not accepted by the Commission & the attempt is severely deprecated. In the considered view of the Commission marriages are planned well in advance and are not a sudden event and the Commission could have been informed about non-appearance well in advance instead of wasting precious time of the Commission and the opposite party.

5. In view of the above, the request of the Petitioner to restore the case to its original number & stage, is dismissed."

06.03.2020 Judgment and order passed by the Hon'ble Tribunal in an Appeal being Appeal No. 75 of 2020 filed by the Petitioner against the orders dated 16.01.2019 and 25.04.2019 passed by this Hon'ble Commission. The judgment, inter-alia, reads as under:

"…….In our opinion, since a proxy counsel was present before the Commission, it cannot be said that there was no appearance. In these circumstances, the case of the Appellant could not and should not have been dismissed "for want of prosecution". The Commission would have been within its power and jurisdiction to decide the case on merits, it having afforded the opportunity for hearing as was necessary in law. But then, having declined the request for adjournment, it was improper to dismiss the case for want of prosecution. In the impugned order dated 16.01.2019 there is no mention whatsoever of the facts of the case or the issues that arose between the parties, much less opinion of the Commission in that regard.

7. Though in view of the above, the impugned order must be set aside and the matter restored on the file of the Commission for further proceedings in accordance with law, such relief ought not to be granted unconditionally. ***After all, the Appellant has been neglectful in assisting the Commission for expeditious adjudication.***

8. We set aside the impugned order and restore the case of the Appellant for consideration and adjudication by the State Commission in accordance with law subject to cost of Rs. 25,000/- (Rupees twenty five thousand only) being paid by deposit in Chief Ministers' relief fund within two weeks hereof. The parties are directed to appear before the State Commission for further proceeding on 03.04.2020. 9. The appeal and pending applications are disposed of in above terms."

(emphasis supplied)

27.05.2020 In pursuance to the order dated 06.03.2020 passed by the Tribunal, this Hon'ble Commission passed the following order:

"The case was listed for hearing consequent to the remand back order dated 06.03.2020 of Hon'ble Appellate Tribunal for Electricity in Appeal No. DFR No. 2185 of 2019. The relevant part of the Order dated 06.03.2020 is reproduced as under:-

> *"We set aside the impugned order and restore the case of the Appellant for consideration and adjudication by the State Commission in accordance with law subject to cost of Rs. 25,000/- (Rupees twenty five thousand only) being paid by deposit in Chief Ministers' relief fund within two weeks hereof. The parties are directed to appear before the State Commission for further proceeding on 03.04.2020. The appeal and pending applications are disposed of in above terms".*

3. Shri Vishal Garg Narwana, Ld. Advocate for the Petitioner, informed the Commission that the cost of Rs. 25,000/- imposed by Hon'ble Appellate Tribunal for Electricity, was duly deposited

within time. The Commission directs the Petitioner to submit proof of deposit of the same, including date and account in which the same was credited, within 3 days from the date of this Order.
4. The Ld. Advocate for the Petitioner was unable to make submissions due to poor network connectivity at his end.
5. Accordingly, the case is adjourned. The next date of hearing shall be intimated separately."

15.07.2020 On an application filed by the Petitioner seeking amendment of the Petition, the Commission passed an order, inter-alia, reading as under:

Arguments were heard today on the issue whether amendment in the petition can be carried out at this stage almost three years after the filing of the petition. The main argument advanced by the petitioner was that some new facts had come to the notice of the authorized signatory who had been appointed by the petitioner on 06.06.2020. Per contra the Ld. Counsel, for Respondent, submitted that the original petition was also time barred and so was the amended petition. In support of the arguments, the Ld. Counsel for the Respondent cited catena of judgements of the Hon'ble Supreme Court on the issue i.e. factors to be taken into consideration while dealing with applications for amendments. The Commission observes that the reason given for amendment by the Petitioner i.e. the wrong calculation came to the knowledge of the petitioner when the new authorized signatory joined on 6.06.2020 is not bona-fide as the present case was preferred by the Petitioner in 2017 with the same purported wrong calculation. The amendment application has been preferred by the Petitioner after the Commission, on remand Order of the Hon'ble APTEL, scheduled the case for hearing on 15.07.2020. The Commission further observes that no new material facts have been placed on record by the Petitioner justifying the amendment application.

Considering the submission of both parties, the Commission is of the view that amendment in the petition is not permissible at this stage. Consequently, the application for amendment of the petition is rejected. The matter will be heard on merits on the next date of hearing i.e. 08.09.2020."

d) It is submitted that even as a matter of equity or restitution, the burden of interest for the delay by the Appellant cannot be on the consumers. The Generators should be required to act in a prompt manner, without delaying the filing of the Petition and pursuing the Petition. The Appellant has not acted in a prudent manner by filing the Petition only in

September 2017 and then seeking adjournments and/or not appearing before this Commission.

e) In the matters where there have been delays on part of the Petitioners in approaching the Hon'ble Courts or in providing the information, the Hon'ble Courts have held as under:

i) The Hon'ble Tribunal in Punjab State Power Corporation Limited -v- Punjab State Electricity Regulatory Commission dated 22.04.2015 in Appeal No. 174 of 2013 while considering the delay in providing complete documents, inter-alia, held as under:

> *"29. In the remand order, the State Commission after having scrutinized the necessary documents allowed a reduction of Rs. 3.48 crores from the net tariff income of the utilities for FY 2007-08 and Rs. 32.87 crores from non-tariff income for FY 2008-09 and decided that the effect of this order will be given in the tariff order of FY 2013-14. The Commission felt that carrying cost cannot be allowed for the entire period and has restricted it to a period of 9 months i.e. three months for FY 2012-13 and 6 months for FY 2013-14 since recovery of this amount will be available to the utility from the increased tariff determined for FY 2013-14, because of non production of evidentiary documents was on account of due to delay on the part of the Appellant. The State Commission has given detailed order explaining the delay in providing the documents by the Appellant. The Tribunal in its order dated 18.10.2012 has also observed that the Appellant had not produced the relevant documents for FY 2007-08 and 2008-09. Therefore, we feel thatthere is no infirmity in not allowing the carrying cost for the period of delay caused by the Appellant in supplying requisite information to the State Commission. We find no merit in the arguments of the Appellant that the carrying cost should be allowed due to change in procedure adopted by the State Commission. We feel that complete documents were not available for deciding the issue by either of the two procedures. Accordingly this issue is decided against the Appellant.*
>
> *30. Summary of our findings:*
>
> *….*
>
> *(iv) Interest on delayed recovery of interest on SPV loans:*
>
> *We find no merit in the arguments of the Appellant that the carrying cost should be allowed due to change in procedure adopted by the State Commission. We feel that complete documents were not made available before the Commission for deciding the issue by either of the two procedures. The carrying cost for the delay on the part of the Appellant cannot be passed on to the consumers. Accordingly, this issue is decided against the Appellant."*

ii) Kanwar Singh and Ors. -v- Union of India (UOI), 2005 (82) DRJ 397, 120 (2005) DLT 348

> *"12. In the present case, in spite of such delays and long lapse of time, a liberal view has been taken to allow such amendment to the claimants*

primarily on the ground that there is determination of the land value in other proceedings. In most of the matters, the claimants really wake up only when such determination takes place in other matters and it is on that basis that the amendment is sought. The claimants not having claimed the amount originally cannot, thus, claim to recover interest from the Government for this period of delay."

iii) Budh Ram -v- Union of India (UOI) and Ors. 2011 SCC online del 1192

18. In view of the above stated discussion, the Petitioners cannot be granted the interest for the period of which they had not approached the court for being substituted in place of Budh Ram as their LRs.

(Emphasis Supplied)

f) It is also a well settled principle of law that no party can take advantage of its own wrong. In this regard, the following decisions of the Hon'ble Supreme Court are relevant:

i) Kushweshwar Prasad Singh –v- State of Bihar (2007) 11 SCC 14

"14. In this connection, our attention has been invited by the learned Counsel for the appellant to a decision of this Court in Mrutunjay Pani and Anr. vs. Narmada Bala Sasmal and Anr. [1962 (1) SCR Pg. 290], wherein it was held by this Court that where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. This is based on the Latin maxim 'Commodum ex injuria sua nemo habere debet' (No party can take undue advantage of his own wrong).

15. In Union of India & Ors.v. Major General Madan Lal Yadav (Retd.), (1996) 4 SCC 127, the accused-army personnel himself was responsible for delay as he escaped from detention. Then he raised on objection against initiation of proceedings on the ground that such proceedings ought to have been initiated within six months under the Army Act, 1950. Referring to the above maxim, this Court held that the accused could not take undue advantage of his own wrong. Considering the relevant provisions of the Act, the Court held that presence of the accused was essential condition for the commencement of trial and when the accused did not make himself available, he could not be allowed to raise a contention that proceedings were time-barred. This Court referred to Broom's Legal Maxims (10th Edn.) P. 191 it is stated;

"….. it is a maxim of law, recognized and established, that no man shall take advantage of his own wrong; and this maxim which is based on elementary principles, is fully recognized in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure".

16.It is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it

differently, "a wrong doer ought not to be permitted to make a profit out of his own wrong"."

ii) In B. M. Malani -v- Commissioner of Income Tax and Anr. 2008 (10) SCC 617

"18.For the said purpose, another well-known principle, namely, a person cannot take advantage of his own wrong, may also have to be borne in mind. The said principle, it is conceded, has not been applied by the courts below in this case, but we may take note of few precedents operating in the field to highlight the aforementioned proposition of law. See Priyanka Overseas Pvt. Ltd. and Anr. vs. Union of India and Ors. [1991 Suppl. (1) SCC 102, para 39]; Union of India and Ors. vs. Major General Madan Lal Yadav (Retd.) [1996 (3) SCR 785]; Ashok Kapil vs. Sana Ullah (dead) and Ors. [1996 (6) SCC 342]; Sushil Kumar vs. Rakesh Kumar [AIR (2004) SC 230]; first sentence, Kushweshwar Prasad Singh vs. State of Bihar and Ors. SCC at pp 451-52, paras 13, 14 and 16".

12. HPPC has also filed rejoinder to the written submissions filed by the Petitioner, submitting as under:-

a) The Petitioner has filed the written submission before this Commission on 01.05.2021 wherein at Para 8 of the submissions, the Petitioner has relied on certain documents/communications to state that the claim of the Petitioner is within limitation and not time barred.

b) The documents relied on by the Petitioner have been filed in the Commission only on 01.05.2021 by way of an application; despite the matter having being pending for the last 4 years, including, an Appeal having being filed by the Petitioner before the Hon'ble Appellate Tribunal and therefore the Petitioner had several opportunities to place on record the documents.

c) At the outset, it is submitted that the application sought to be filed before this Commission has not been served on the Respondent No. 1.

d) That reliance cannot be placed on the document when the application has not been entertained by the Commission as it has been filed at a belated stage when the trial has been completed and the arguments on behalf of the parties were concluded before the Commission on 12.01.2021. The order dated 12.01.2021, inter-alia, reads as under:

"The Commission, after hearing both the parties at length, directs the Respondents to intimate the number and duration of time the generator herein was backed down due to scheduled maintenance and instances where the power was backed down by HPPC in spite of the availability of the system. The Petitioner is directed to substantiate the fact that the loss of generation claimed by it occurred due to refusal of the Respondents to off take the power. The requisite information may be provided within two weeks from the date of issue of this Order."

e) The above Petition was listed thereafter on 28.04.2021 for compliance of the above order dated 12.01.2021. At such a stage, the Application filed by the Petitioner for placing additional documents cannot be allowed.

f) Further, the alleged documents that have been sought to be produced before the Commission are stated be of the Year 2014 and 2015. It is submitted that the Petitioner has failed to show any sufficient cause as to why these documents were not placed before this Commission at the stage of filing of the Petition in 2017. The Petitioner chose not to file any rejoinder to the reply filed by the Respondent No. 1 specifically stating that the Petition filed by the Petitioner is time-barred.

g) It is submitted that inadvertence of the party or that the party did not realize the importance of a document does not constitute a 'sufficient cause'. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

h) In regard to the above, the reliance is placed on the following decisions:

i) Polyflor Limited -v- Sh. A.N.Goenka & Ors., Judgment dated 18.04.2016 passed in CS(OS) 504/2004, wherein the Hon'ble High Court of Delhi, inter-alia, held as under:

> *"2. The first set of documents sought to be produced are photocopies of annual report of the plaintiff, which includes the annual report of its predecessor, for the year 1997-99. The second set is the original duly audited annual report for the year ending 30.06.2001 and 30.06.2003. The third set of original annual reports are of the plaintiff company for the years ended on 30.06.2005, 2007, 2009, 2011 and 2013.*
>
> *3. The learned Joint Registrar in his order takes note of the fact that the original suit was filed in the year 2004; the documents sought to be produced were neither filed alongwith the plaint, nor at the stage of admission/denial of documents, nor even at the stage of framing of issues on 02.12.2013; PW-1 is under cross examination and had been substantially cross examined when the application was moved on 27.01.2016. The learned Joint Registrar has observed that vague and non convincing reasons have been given by the plaintiff for not filing the documents earlier, and unjustifiable reason has been given as to why, when the documents were in the domain and control of the plaintiff, the same were not filed at the appropriate stage, or even at the stage of framing of issues.*
>
> *4. So far as the documents pertaining to the years after 2004 are concerned, the Joint Registrar has also observed that they do not appear to be relevant, as they reflect the sales figures post the filing of the suit, whereas the claim of the plaintiff for damages upon rendition of accounts is limited to Rs.20 lacs, which would have to be substantiated on the basis of the claim of sales/goodwill for the period prior to the filing of the suit.*

……

12. Order VII Rule 14 (1) provides that: "Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint".

13. Sub-rule (2) of Order VII Rule 14 provides that: "Where any such documents not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is".

14. Thus, when the suit was filed, the plaintiff was obliged to produce all documents which it sought to rely upon in its power and possession. If, according to the plaintiff, the annual reports from 1997 to 2003-04 were not available with it, under Order VII Rule 14 (2), the plaintiff was obliged to state in whose possession and power the said documents, namely, the annual reports, were.

……..

16. Order VII Rule 14 (3) mandates that: "A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not without the leave of the Court, be received in evidence on his behalf at the hearing of the suit". Thus, as a matter of rule, the plaintiff is prohibited from leading in evidence a document which he ought to have produced when the plaint was presented. The exception to this rule is that, where the Court grants leave to the plaintiff, the document may be permitted to be led in evidence at the hearing of the suit.

17. Thus, the issue is, whether in the above noted facts and circumstances, the plaintiff is entitled to grant of such leave. In the present case, the plaintiff's witness PW-1 is under cross-examination and has already undergone a substantial portion of his cross-examination. To grant leave to, and permit the plaintiff to file and lead in evidence additional documents at this stage would mean that the defendants would be put to serious prejudice. The defendants have not had the occasion to deal with the said documents. Had the documents now sought to be produced, been produced at the relevant time, i.e. at the stage of filing of the suit, or at least at the time when the issues were framed, the defendants would have had the occasion to deal with the same by making appropriate pleadings and filing its own documents to counter the reliance placed by the plaintiff on the documents in question.

18. The progress of the suit cannot be interdicted on account of the blatantly casual approach of the plaintiff. The plaintiff has not given any justifiable and acceptable explanation for not filing the said documents at

the earlier stage of the proceedings. If the submissions of the plaintiff were to be accepted, it would mean that in every case, a party should be permitted to lead in evidence documents not earlier filed and relied upon at any stage of the proceedings."

ii) Shri Ramanand -v- Delhi Development Authority and Another, Judgment dated 11.08.2016 passed in CM(M) 374/2015 & CM No.7905/2015

"6. The settled legal position as per Order 7 Rule 14 is that the plaintiff has to present documents when the plaint is presented by him. Subsequently, the document cannot be presented without the leave of the court.

…….

8. Similarly in Haldiram (India) Pvt. Ltd. & Ors. vs. M/s.Haldiram Bhujiawala & Anr. (supra) this court in para 21 and 22 held as follows:-

> *"21. In any event, both under the old Order 7 Rule 18 sub-rule (1) and new Order 7 Rule 14 sub-rule (3) CPC a new document can certainly be produced on behalf of plaintiff at the final hearing of suit, but the same has to be done with leave of the Court. It is not that the plaintiff has a legal vested right to file a document at a belated stage i.e. at the final hearing of the suit. The said provision gives a discretionary power to the Court, which needless to say has to be exercised in a reasonable and legal manner. In fact, this power has to be exercised sparingly and for some overpowering reason and not as a matter of routine. If petitioners" interpretation of Sub Rule 3 is accepted, it would make it impossible for the trial court to conclude the hearing of any suit."*

9. The legal position is clear that only those documents can be permitted to be filed after the initial stage where the Court grants leave. I may come to the reasons given by the petitioner for the belated filing of the two applications to bring on record additional documents.

10. A perusal of the application of the petitioner under Order 7 Rule 14 CPC which was the first application filed shows that the only ground mentioned for filing this application is stated in para 6 as follows:-

> *"6.That certain documents, now intended to be filed, are result of subsequent events and supply of relevant information by the concerned authorities. Hence, the same were not in power and possession of the plaintiff at the relevant time, however, the same are very important documents and are necessary to assist this Hon'ble to arrive at a fair conclusion in deciding the real controversy involved between the parties, otherwise, serious prejudice would be caused to the plaintiff."*

11. Admittedly, the issues were framed way back on 28.11.2007. An additional legal issue has been framed on 7.11.2012. The evidence of the petitioner has already commenced. Now at this belated stage the petitioner has chosen to move the present applications in 2012. The only explanation given is that the documents intended to be filed are a result of "subsequent events and supply of relevant information by the concerned

authorities". Under the guise of this general excuse 88 additional documents are sought to be placed on record. The manner in which the documents are sought to be filed clearly show that the plea of the petitioner lacks merits. The belated filing of the documents would prejudice the respondent at this stage. No sufficient reasons are given by the petitioners.

j) In addition to the above, the issue of continuous wrong has been raised as an afterthought for the first time in the written submission filed by the Petitioner. In the Petition, at Para 15, the Petitioner had stated as under:

> *"……..The cause of action to approach the Hon'ble Commission arises in favour of the petitioner on each and every date on which the demand notice was send to the respondents and lastly the day when notice dated 27.02.2017 send to the respondents"*

k) Firstly, the present is also not a case of 'continuing wrong' as claimed by the Petitioner. In this regard, reliance is placed on Balakrishna Savalram Pujari Waghmare -v- Shree Dhyaneshwar Maharaj Sansthan, AIR 1959 SC 798 wherein the Hon'ble Supreme Court has discussed the ambit and scope of Section 23 of the Limitation Act, 1908, which is in pari-materia with Section 22 of the Limitation Act, 1963, upon which reliance has been placed by UPCL. The relevant extracts of the said judgment are as under:

> *"31. It is then contended by Mr Rege that the suits cannot be held to be barred under Article 120 because Section 23 of the Limitation Act applies; and since, in the words of the said section, the conduct of the trustees amounted to a continuing wrong, a fresh period of limitation began to run at every moment of time during which the said wrong continued. Does the conduct of the trustees amount to a continuing wrong under Section 23? That is the question which this contention raises for our decision. In other words, did the cause of action arise de die in diem as claimed by the appellants? In dealing with this argument it is necessary to bear in mind that Section 23 refers not to a continuing right but to a continuing wrong.* ***It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in regard to acts which can be properly characterised as continuing wrongs that Section 23 can be invoked.*** *Thus considered it is difficult to hold that the trustees' act in denying altogether the alleged rights of the Guravs as hereditary worshippers and in claiming and obtaining possession from them by their suit in 1922 was a continuing wrong. The decree obtained by the trustees in the said litigation had injured effectively and completely the appellants' rights though the damage caused by the said decree subsequently*

continued. Can it be said that, after the appellants were evicted from the temple in execution of the said decree, the continuance of their dispossession was due to a recurring act of tort committed by the trustees from moment to moment? As soon as the decree was passed and the appellants were dispossessed in execution proceedings, their rights had been completely injured, and though their dispossession continued, it cannot be said that the trustees were committing wrongful acts or acts of tort from moment to moment so as to give the appellants a cause of action de die in diem. We think there can be no doubt that where the wrongful act complained of amounts to ouster, the resulting injury to the right is complete at the date of the ouster and so there would be no scope for the application of 23 in such a case. That is the view which the High Court has taken and we see no reason to differ from it."

(emphasis supplied)

l) The principle of 'continuing wrong' was also discussed by the court in Khair Mohammad Khan –v- Jannat, AIR 1940 Lah 359, wherein the court had held as under:

In considering whether the particular act complained of constitutes a "continuing wrong" within meaning of section 23, for which the cause of action arises de die in diem, it is necessary to keep in mind the distinction between an "injury" and the "effects of that injury." Where the injury complained of is complete on a certain date, there is no "continuing wrong" even though the damage caused by that injury might continue. In such a case the cause of action to the person injured arises, once and for all, at the time when the injury is inflicted, and the fact that the effects of the injury are felt by the aggrieved person on subsequent occasions, intermittently or even continuously, does not make the injury a "continuing wrong" so as to give him a fresh cause of action on each such occasion*. If, however, the act is such that the injury itself is continuous, then there is a "continuing wrong" and the case is governed by section 23. As observed by Mookerjee, J. in Brojendra Kishore Roy v. Bharat Chandra Roy [(1915) 31 I.C. 242.] , the essence of a continuing wrong is that "the act complained of creates a continuing source of injury and is of such a nature as to render the door of it responsible for the continuance; in such fresh clause of action arises de die in diem. To put the matter in another way, where the wrongful act produces a state of affairs, every moment's continuance of which is a new tort, a fresh cause of action for the continuance lies." The question in each case, therefore, is whether the "injury," which is the basis of the grievance of the aggrieved party is itself "continuing," or whether the injury was complete when it was committed but the damage flowing from it has continued or is continuing. If the former, the case falls within the purview of section 23 of the Indian Limitation Act and the cause of action arises de die in diem: if the latter, the terminus a quo is the date on which the wrongful act was done. For an instance of a "continuing wrong," reference may be made to Rajrup Koer v. Abul Hossein [I.L.R. (1881) 6 Cal. 394 (P.C.).] where some forty or fifty years before the suit the plaintiff's ancestors, after making compensation to the defendants, had constructed a pain or artificial water course on the defendants' land to take water from a natural stream to the plaintiff's land. Some years before the suit the defendants, without authority, had obstructed the flow of water along the pain by making dams and cuts in the*

channel and thus drew off continuously, from day to day, water from the plaintiff's channel and diverted it to their own fields. In a suit by the plaintiff for a declaration of his sole right to the pain and an injunction directing the defendants to close the openings and restraining them from draining off the water in future, it was held by their Lordships of the Privy Council that the dams, cuts and other modes of obstructing or diverting the water from the watercourse were in the nature of a "continuing nuisance" as to which the cause of action was renewed de die in diem so long as the obstructions causing such interference were allowed to continue and the suit was held to fall within section 24 of the Indian Limitation Act IX of 1871 (which corresponded to section 23 of the present Act IX of 1908). Other instances of "continuing wrongs" are continued pollution of a stream [Hole v. Chord Union [(1894) L.R. 1 Ch. 293.]]; obstruction caused to immemorial egress of rain water from the plaintiff's house through a drain on the defendants land [Punja Kuvarji v. Rat Kuvar [I.L.R. (1882) 6 Bom. 20.]]; obstruction of discharge of surface water [Kaseswar Muherjee v. Annoda Prosad Patra [(1917) 41 I.C. 863.]]; obstruction of light and air through ancient windows [Shadwell v. Hutchisor [(1831) 2 B. and Ad. 97.] , Ponnu Nadar v. Kumaru Reddiar [I.L.R. (1936) 59 Mad. 75.] and Moti Ram v. Hans Raj [1936 A.I.R. (Lah.) 334.]]. In all such cases the "injury" is continuous and, therefore, limitation runs every moment of the time, during which the injury continues.

The present case, however, stands on an entirely different footing. Here, so far as the portion of the platform which was constructed in 1925 is concerned, the injury was completed at the time of the construction. *The act of the defendants by constructing the chabutra on the common land and thus appropriating it to their exclusive use, amounted to a complete dispossession and ouster of the plaintiffs and the other mohalladars.* ***It was not a "continuing" wrong, but a wrong which was completed at the time the construction was put up; it was not an "injury" which, to use the classical words of Blackstone "had been committed by continuation from one given day to another" (Book III, Ch. 12, P. 211). The cause of action to the aggrieved mohalladars arose once and for all at the date of the ouster. It does not arise afresh every day that the structure exists and to such a case the provisions of section 23 do not apply.*** *There is a large number of cases decided by the Chief Court and this Court in which this view has been taken, and with which I am in respectful agreement.*

(emphasis supplied)

m) Without prejudice to the above, even assuming that the nature of dispute is a continuous wrong, it is well settled even in the case of continuing wrong, the remedy has to be restricted to what falls within the limitation and not outside the limitation. In this regard the Hon'ble Supreme Court's judgment in State of M.P. –v- Yogendra Shrivastava, (2010) 12 SCC 538 is as under:

"18. We cannot agree. Where the issue relates to payment or fixation of salary or any allowance, the challenge is not barred by limitation or the doctrine of laches, as the denial of benefit occurs every month when the salary is paid,

thereby giving rise to a fresh cause of action, based on continuing wrong. Though the lesser payment may be a consequence of the error that was committed at the time of appointment, the claim for a higher allowance in accordance with the Rules (prospectively from the date of application) cannot be rejected merely because it arises from a wrong fixation made several years prior to the claim for correct payment. But in respect of grant of consequential relief of recovery of arrears for the past period, the principle relating to recurring and successive wrongs would apply. ***Therefore the consequential relief of payment of arrears will have to be restricted to a period of three years prior to the date of the original application.*** *(See M.R. Gupta v. Union of India [(1995) 5 SCC 628 : 1995 SCC (L&S) 1273 : (1995) 31 ATC 186] and Union of India v. Tarsem Singh [(2008) 8 SCC 648 : (2008) 2 SCC (L&S) 765] .)"*

(emphasis supplied)

Commission's Analysis and Order

13. The Commission heard the arguments of the parties at length as well as perused the written submissions placed on record by the parties. The following issues arise for consideration and decision of the Commission:-

a) Whether the recovery claim preferred by the Petitioner against the Respondents is time barred as per the Limitation Act, 1963?

b) Whether the loss of generation due to grid failure constitutes refusal to off-take power by the HPPC and is eligible for deemed generation?

a. Whether the recovery claim preferred by the Petitioner against the Respondents is time barred as per the Limitation Act, 1963?

The Petitioner has filed the present Petition on 18.09.2017, seeking payment of Rs. 76,61,606/-. towards the deemed generation as the grid down time exceeded the downtime/maintenance hours specified by the Commission since April, 2012. The Petitioner has been pursuing with the Respondent Nigam for payment of deemed generation on account of deemed generation charges for non-evacuation of power exceeding the threshold limit of 87.6 hours in a year allowed by the Commission vide its Order dated 24.12.2020, through correspondence/letters. The Petitioner has claimed that the cause of action to approach the Commission arises in favour of the Petitioner on each and every date on which the notice claiming deemed generation charges was send to the Respondent and including the notice dated 27.02.2017 send to the Respondents, as per Article 14.1 of the Power Purchase Agreement.

Before going into the merits of the case, the Commission observes that Article 113 of the Schedule of the Limitation Act, 1963, provides as under:-

j) PART X.—SUITS FOR WHICH THERE IS NO PRESCRIBED PERIOD

Article	*Description of suit*	*Period of limitation*	*Time from which period begins to run*
13	*Any suit for which no period of limitation is provided elsewhere in this Schedule.*	*Three years.*	*When the right to sue accrues*

In the considered view of the Commission, the judgement of Hon'ble Supreme Court in A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd., (2016) 3 SCC 468, is noteworthy in this context, wherein it has been held that *"30…….In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike labour laws and the Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view.*

*31…….**Hence we hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court.** But in an appropriate case, a specified period may be excluded on account of the principle underlying the salutary provisions like Section 5 or Section 14 of the Limitation Act. We must hasten to add here that such limitation upon the Commission on account of this decision would be only in respect of its judicial power under clause (f) of sub-section (1) of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions which may be administrative or regulatory."* (Emphasis supplied)

It is evident from the above judgement that the Limitation Act, 1963 is applicable in the instant case as well, which is three years from the date the right to sue accrues, as specified in Article 113 of the Schedule of the Limitation Act, 1963.

Having held as above, the next issue to be examined and settled by this Commission is the date when the right to sue accrued. In this regard, Petitioner has claimed that it has been continuously following up with the Respondent Nigam for payment of deemed generation charges through letters and hence cause of action to approach the Commission arises in favour of the Petitioner on each and every date on which the demand notice was sent to the Respondents including the day when notice dated 27.02.2017 was sent to the Respondents. Therefore, the claim cannot be termed as barred by law. Per-contra, the Respondent No. 1 i.e. HPPC argued vehemently that in any case the claim made by the Petitioner for the period more than 3 years from the date of filing of the petition, is time barred and cannot be considered in the present proceedings. It has been further argued by the Respondent Nigam / HPPC that the Petitioner is estopped from submitting documents / letters etc. after the hearing of the parties here concluded and the Commission sought certain information from the Parties vide Interim Order dated 12.01.2021, on a petition that has been pending adjudication before this Commission for the last four years solely attributable to the Petitioner itself. In support of this the Respondent cited catena of case laws already re-produced earlier in the present Order.

The Commission observes that the right of the Petitioner to sue occured on the happening of an event giving rise to the actionable claims. Regarding, the extension of such time line by filing representations through letters and meetings, we can gainfully extract from the judgement of the Hon'ble Supreme Court in State of Tripura and Ors. vs. Arabinda Chakraborty and Ors.: MANU/SC/0342/2014, wherein it has been held as under:-

"11. In our opinion, the suit was hopelessly barred by law of limitation. Simply by making a representation, when there is no statutory provision or there is no statutory appeal provided, the period of limitation would not get extended. The law does not permit extension of period of limitation by mere filing of a representation. A person may go on making representations for years and in such an event the period of limitation would not commence from the date on which the last representation is decided. …

..

14. It is a settled legal position that the period of limitation would commence from the date on which the cause of action takes place. Had there been any statute giving right

of appeal to the Respondent and if the Respondent had filed such a statutory appeal, the period of limitation would have commenced from the date when the statutory appeal was decided. In the instant case, there was no provision with regard to any statutory appeal. The Respondent kept on making representations one after another and all the representations had been rejected. Submission of the Respondent to the effect that the period of limitation would commence from the date on which his last representation was rejected cannot be accepted. If accepted, it would be nothing but travesty of the law of limitation. One can go on making representations for 25 years and in that event one cannot say that the period of limitation would commence when the last representation was decided. On this legal issue, we feel that the courts below committed an error by considering the date of rejection of the last representation as the date on which the cause of action had arisen. This could not have been done."

Further, Hon'ble Supreme Court in CLP India Private Limited vs Gujarat Urja Vikas Nigam Limited (2020) 5 SCC 185, held that mere sending of letters or exchange of letters do not extend the period of limitation. The relevant extract of the said judgement is reproduced hereunder:-

"26. The next question is whether GERC and Aptel fell into error in granting restricted refund calculable for the 3 year period prior to Gujarat Urja's application. The concurred findings on this aspect, in the opinion of this Court, are reasonable. There is merit in CLP's submission that the earliest point in time, when the cause of action arose, was in May 1996, when Gujarat Urja rejected its contention that incentive was payable in terms of the PPA, notwithstanding the Notification of 6-11-1995. Despite this stated position, meetings continued to be held and, what is more, incentive amounts, were paid to CLP. No doubt, no document conclusively stated that CLP's claim was accepted. We do not find any merit in the submission of Gujarat Urja that the issue was kept alive, due to a series of communications. In this regard, Aptel's findings about inapplicability of Section 18 of the Limitation Act, are correct. ***There was no admission on the part of CLP, at least of the kind, that extended the time for preferring an application for recovery of excess payments. It has been consistently ruled by this Court that repeated letters, or exchange of communications, do not extend the period of limitation, provided by law."*** (Emphasis supplied)

Thus, as per the above mentioned judgements rendered by Hon'ble Supreme Court, the internal communications starting from 11.08.2014 to 01.04.2015, cited by the Petitioner, cannot be perceived as extension in the period of limitation provided by law and admission on the part of the answering Nigam / HPPC, regarding the non-existing claim of the Petitioner for deemed generation. Since, there was no claim preferred by the Petitioner, the Respondents could not have acknowledged the same. Such internal communications, even if considered, only shows the apprehension as well as efforts of the officers concerned to control the break down and tripping of the evacuation line for proper and smooth evacuation of the electricity generated by the power plant of the Petitioner herein. Therefore, the right of the Petitioner to sue occurred on the happening of an event when the non-evacuation of power happened beyond 87.6 hours in a year, giving rise to the actionable claims.

The Commission has examined the submission of the Petitioner that limitation period is to be applied in respect of claims before 2013 rather than 2014, as the deemed generation data can only be reconciled after the end of the year and 2012, data can be reconciled only in 2013 and 2013 data in 2014. The Commission is of the considered view that right to sue accrues on the happening of an event giving rise to actionable claims and the time taken to prepare claim on account of happening of such an event cannot be included in the limitation period. Generation data and backing down data is available on daily basis and the Petitioner was in a position to lodge claim of deemed generation at soon as the cumulative backing down by DISCOMs/HPPC exceeds 86.7 Hours in a particular year. Thus, the contention of the Petitioner that generation data could be reconciled only after the end of the year, is devoid of merit. In this case, no claim was preferred by the Petitioner, even after the end of the year.

Additionally, the Commission has examined the numerous letters written by the Petitioner to Respondent No. 3 (DHBVN), starting from 02.02.2012 to 27.02.2017, which has been cited as demand notice by the Petitioner in the present Petition. The Commission observes that in all these letters, except for the letter dated 27.02.2017, the Petitioner has not shown any intention to claim deemed generation on account of grid failure. In each and every letter, the Petitioner has pointed out grid related problems, loss of generation due to non availability of grid and concluded the letter with the

request to improve the Grid Supply ASAP. One such letter dated 16.12.2013 is reproduced hereunder:-

"

To
Chief Engineer,
Dakshin Haryana Bijli Virtran Nigam,
PO Power House Rohtak Road, Punjab Bagh, New Delhi-35
Ph. No. 011-28312877, Fax No. 011-28312866

Subject:- Grid issue with 1MW Solar Power Plant at village – Panchnauta, Narnaul Distt – Mahendragarh under JNNSM Reg. No. 017-RPSSGP/IREDA/ HARYANA/2010

Dear sir,

This is in continuation of attached letter "Annex.-1" we like to bring the facts in to your kind notice that we are facing a lot of grid related problems like high/low grid & no availability of grid during power generation hour between 6.00 AM to 7.00 PM at 1 MW SPV Panchnuta plant connected with DHBVN substation at Dhulhera.
During 1st Nov'13 to 30th Nov'2013 total 26 Hrs and 22 mins power generation period was lost due to various grid related problems, Refer attached Annex.-2.
And total grid down time (day only) during 1st March-2012 till 30th Nov-2013 is mentioned below which is a huge loss.
……
We have already made the investment in the plant and due to the above mentioned grid issue; we are losing our precious revenue. And this is hampering our business plan and creating hurdle to achieve the Solar Power Generation targets.
We humbly requested to do needful for the improvement of Grid Supply ASAP."

The above mentioned letters of the Petitioner requesting the DISCOM to improve the Grid Supply ASAP can by no stretch of imagination be construed as demand notice. Probably the Petitioner was well aware of the fact that loss of generation on account of grid failure neither constitutes refusal to off-take power by the Respondent Nigam /

HPPC nor backing down and accordingly not eligible for deemed generation. It was only in its notice dated 27.02.2017, the Petitioner raised the issue of deemed generation, and even this was not a demand notice as it did not contain the amount of demand raised supported by corroborative evidences as required for claiming payments for deemed generation.

In view of the above discussions, the Commission observes that the Limitation Act, 1963 is squarely applicable in the instant case, which is three years from the date the right to sue accrues, as specified in Article 113 of the Schedule of the Limitation Act, 1963 and the right to sue accrues on the happening of an event giving rise to actionable claims. The present Petition was originally filed before the Commission on 18.09.2017. Accordingly, the Commission answers the issue framed in affirmative i.e. the recovery claim preferred by the Petitioner against the Respondents is time barred as per the Limitations Act, 1963, in respect of the claims preferred for the period prior to 18.09.2014.

b. Whether the loss of generation due to grid failure constitutes refusal to off take power by the HPPC and is eligible for deemed generation?

The Commission examined the issue at length, in respect of claims pertaining to the period after 18.09.2014, on merit by examining its Order dated 24.12.2010, wherein the direction was given to treat the refusal beyond 87.6 hours in a year as deemed generation. The relevant extract, which is part and parcel of the PPA, of the ibid Order is reproduced hereunder:-

"On the issue of dispatch and continuity of service the petitioner vehemently argued that in order to make the project bankable the maximum hours of refusal to off take power by the Discoms in a year should be restricted to 1% i.e. 87.6 hours. Arguing to the contrary the power utilities submitted that as per CERC regulations the capacity utilization factor for the solar power plants is 19% and the Solar PV project proponents seems to have ignored the facts that during night / bad light there cannot be any generation and thus, this request of the project developer is not appropriate. After careful consideration of rival contentions the Commission is of the considered view that <u>any perceived frivolous</u>

*backing down needs to be discouraged. Thus the utilities shall make all efforts to evacuate the available solar power and treat them as **'must run'** station (a fact admitted by UHBVNL/HPPC Memo No. Ch-14/GM/RA/N/F-102/Vol. III dated 8/12/2010). Further, Article 12 of the PPA provides for the conditions under which solar generation may be backed down by the system operator i.e. on consideration of grid security or safety of any equipment or personnel.* ***In order to meet such contingencies the Commission believes that provision for (at the most) 1% i.e. 87.6 hours of the maximum hours in a year i.e. 8760 hours of backing down should be sufficient to address the concerns of the power utilities. Hence the Commission orders that Clause 8.12 & Clause 12.1 of the PPA shall be amended accordingly i.e. any refusal beyond 87.6 hours in a year shall be treated as deemed generation and paid for at the tariff approved by the Commisison."***

The Commission observes that the focus at the time of passing of the ibid Order, for the Solar Power Projects set-up in Haryana under RPSSGP Scheme of the Central Government including that of the Petitioner, was to discourage any frivolous backing down and the Solar plants should be "must run" in true letter and spirit. The utilities should make all efforts to evacuate the available solar power. The provisions of 87.6 hours for refusal to schedule power was made in order to meet contingencies such as grid security/safety of equipment or personnel. The Commission in its ibid Order was concerned about the fact that solar power should not be subjected to "Merit Order Despatch" principle and it should not be backed down by DISCOMs in normal circumstances.

In this context, the Commission has taken note of the submissions of HPPC that the Petitioner was also advised of the difficulties which would be encountered in the use of Dholera Line, which is presently being used to evacuate power of the Petitioner and inspite of this the Petitioner proceeded to opt for the Dholera Line connected to 132 KV substation, being well aware of the fact, that the distance involved is about 16 KMs as against 8 KMs Nizampur evacuation Line connected to 220 KV substation. The geographical condition of the project has exposed it to frequent thunder-storm and western disturbances, causing frequent grid failures. The fact of grid failures has been admitted by the Petitioner also in its letters addressed to Respondent No. 3 (DHBVN), where in it has been invariably

mentioned that they are facing a lot of grid related problems like high/low grid & non-availability of grid. It strengthen the arguments of the HPPC that there was no refusal (backing down) from their end to schedule the power of the generator, rather the same was due to grid unavailability caused by facts & circumstances beyond their control. The Commission has considered the objection of the Petitioner that the report of the Sub-Divisional Officer, explaining the reasons of feeder outages, has been prepared on 02.02.2018 i.e. the date after filing of the present petition. In this regard, the Commission observes that DHBVNL had advised the Petitioner, vide its letter dated 03.08.2010 regarding technical feasibility of both the lines i.e. line connecting 33 KV S/Stn. Dholera at a distance of 12 KM from the village in which plant is installed and 33 KV S/Stn. Nizampur at a distance of 8 KM from the proposed plant site. Therefore, the letter dated 02.02.2018, explaining the reason for feeder outages, cannot be perceived as an afterthought.

The Commission, in its Interim Order dated 12.01.2021 had directed the Respondents to provide the details regarding the number and duration of time the generator herein was backed down due to scheduled maintenance and instances where the power was backed down by HPPC in spite of the availability of the grid / distribution system. The Petitioner was also directed to substantiate the fact that the loss of generation claimed by it occurred due to refusal of the Respondents to off-take power. In this regard, HPPC submitted that there was no occasion on which power was backed down in spite of availability of the distribution system. However, the Petitioner was not able to substantiate that loss of generation suffered by it due to refusal of the Respondents to off-take power duly supported by the details w.r.t. the time and duration when the Petitioner was affected by the action of HPPC resulting in non-generation; generation of electricity during this period dependent on the Direct Normal Irradiance (DNI) available; generation capability/availability of plant of the Petitioner during that time period etc.

The Commission agrees with the submission of the Petitioner that it is the responsibility of the DISCOMs to control the break down and frequent trippings. However, the reasons for grid issues being faced at the 33 KV Dholera mentioned by Sub Divisional Office of DHBVNL in its report dated 02.02.2018, are strong

wind storm during May to August and zig-zag lines instead of straight lines due to geographical conditions etc.

The Commission has taken note of the submissions of the Respondent that non-availability of the system has been affected on account of Force Majeure reasons which is beyond the reasonable control of the answering Nigam. The project is situated in the Tehsil Narnaul, District Mahendergarh which is affected by frequent thunder-storm and western disturbances as it is surrounded on the North by Bhiwani and Rewari Districts, on the East by Rewari District and Alwar District of Rajasthan, on the South by Alwar, Jaipur and Sikar Districts of Rajasthan and on the West by Sikar and Jhunjhunu Districts of Rajasthan. Force Majeure Event have been provided in Article 17 of the PPA dated 20.08.2010, which reads as under:-

"17. If any party hereto is wholly or partially prevented from performing any of its obligations under this Agreement by reason of or through lightning, earthquake, fire, floods, invasion, insurrection, rebellion, mutiny, tidal wave, civil unrest, riot, epidemics, explosion, the order of any court, judge or civil authority, change in state or national law, war, any act of God or the public enemy or any other similar cause beyond its exclusive control and not attributable to its neglect, then and in any such event, such party shall be excused from whatever performance is prevented by such event to the extent so prevented and such party shall not be liable for any damage, sanction or loss resulting there from.

17.2 Force Majeure Exclusions

Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:

a. Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts or consumables for the Power Project;
b. Delay in the performance of any contractor, sub-contractor or their agents;
c. Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;
d. Strikes at the facilities of the Affected Party;
e. Insufficiency of finances or funds or the agreement becoming onerous to perform; and
f. Non-performance caused by, or connected with, the Affected Party's:
i. Negligent or intentional acts, errors or omissions;
ii. Failure to comply with an Indian Law; or
iii. Breach of, or default under this Agreement.

17.3 The party invoking this clause shall satisfy the other party of the existence of such an event and give written notice within Seven (7) days to the other party and take all possible steps to revert to normal conditions. In case of failure to Intimate within specified period, the event shall not be treated as force majeure event.

17.4 To the extent not prevented by a Force Majeure Event pursuant to Article 11.3, the Affected Party shall continue to perform its obligations pursuant to this Agreement. The Affected Party shall use its reasonable efforts to mitigate the effect of any Force Majeure Event as soon as practicable."

Thus, the 'force majeure event' specified in the PPA includes 'act of god' or 'any other similar cause beyond its exclusive control'. It has been further provided that in any such event, such party shall be excused from whatever performance is prevented by such event to the extent so prevented and such party shall not be liable for any damage, sanction or loss resulting there from. The outages on account of geographical conditions & heavy wind storms squarely falls under the 'force majeure events', not under the reasonable control of the Respondents. Such events does not falls under the 'force majeure exclusions' mentioned under Article 17.2 of the PPA. The Order dated 24.12.2010 of the Commission directing that "…….*any refusal beyond 87.6 hours in a year shall be treated as deemed generation and paid for at the tariff approved by the Commission.*", is not applicable on loss of generation due to grid failure or any force majeure event.

The Commission in its Order dated 24.10.2010 directed that DISCOMs shall not refuse to take power from such generators, keeping in mind the fact that Solar Power needs to be encouraged despite its high cost of generation. Further, a margin of 1% i.e. 87.6 hours was allowed to be backed down in order to address the concerns of Grid security or safety of any equipment or personnel. The Order has addressed the issue of deliberate action on the part of DISCOMs, not to schedule costly solar power. However, the reasons beyond the control of DISCOMs e.g. grid failure etc. were not envisaged as 'refusal' of DISCOMs to off-take power.

In view of the above, the Commission answers the issue framed in negative i.e. the loss of generation due to grid failure does not constitutes refusal to off-take power by the DISCOMs / deliberate backing down eligible for payment of deemed generation charges.

Conclusion:-

Having answered the above issues, the Commission is of the considered view that the recovery claim for deemed generation preferred by the Petitioner on account of grid failure does not constitute deemed generation caused by deliberate backing down by HPPC/DISCOM and accordingly the relief sought by the Petitioner is devoid of merit even for the period during which the dispensation of the Limitation Act, 1963 is not applicable i.e. after 18.09.2014.

14. In terms of the above Order, the present petition is disposed of.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 15.06.2021.

Date: 15.06.2021	(Naresh Sardana)	(Pravindra Singh Chauhan)
Place: Panchkula	Member	Member