

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO. 281 OF 2016**

**and**

**APPEAL NO. 81 of 2017**

**Dated : 16<sup>th</sup> July, 2018**

**PRESENT : HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER  
HON'BLE MR. S.D. DUBEY. TECHNICAL MEMBER**

**IN THE MATTER OF:**

NHPC Limited  
N.H.P.C Office Complex  
Sector 33, Faridabad, (Haryana)-121003.

**... APPELLANT**

**VERSUS**

1. Power Grid Corporation of India Limited,  
"Saudamani", Plot No.2,  
Sector-29, Gurgaon -122 001.
2. NTPC Limited,  
NTPC Bhawan  
Core 7, Scope Complex, Institutional Area  
Lodhi Road, New Delhi-110003.
3. Parbati Koldam Transmission Company Limited,  
Building No. 10 B, 12th Floor,  
DLF Cibre City, Shankar Chauk,  
Haryana – 122001.
4. Central Electricity Regulatory Commission,  
(a statutory body incorporated under the Electricity Act, 2003),  
3<sup>rd</sup> & 4<sup>th</sup> floors, Chanderlok Building,  
36, Janpath, New Delhi

- Counsel for the Appellant(s)** : Mr. Sachin Datta, Sr. Adv.  
Mr. Rajiv Shankar Dvivedi  
Mr. A.K. Sarkar
- Counsel for the Respondent(s)** : Mr. M.G. Ramachandran  
Ms. Ranjitha Ramachandran  
Ms. Poorva Saigal  
Mr. Shubham Arya for R-1
- Ms. Suparna Srivastava  
Mr. Tushar Mathur for R-2
- Mr. Amit Kapur  
Ms. Aparajita Upadhyay for R-3
- Mr. Sethu Ramalingam for R-4

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

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

**APPEAL NO. 281 OF 2016**

1. The Appeal No.281 of 2016 has been filed under Section 111(2) of the Electricity Act, 2003 against the impugned Order dated 21.7.2016, passed by the Central Electricity Regulatory Commission (**CERC**) in Petition No. 91/TT/2012, (hereinafter referred to as the “**impugned order**”), whereby the CERC totally ignored the case put by the appellant about indemnity clause in the agreement and further committed the error that the sharing of the transmission charges has not to be on the basis of the transmission charges paid by other generator, but on the basis of what is intended to be paid by other generator.

- 1.1 CERC (respondent No. 4) had issued tariff order for period 2009-2014 for Asset I and Asset III of transmission assets of PGCIL submitted through petition NO. 91/TT/2012. Thereafter PGCIL (respondent No.01) had raised bill amounting to Rs.74.78 Crs as bilateral arrear (idling charge) for pre-commissioning period of Parbati-III project of NHPC. The claim was based on CERC order pertaining to assets for which tariff was allowed vide CERC order dtd. 26.05.2015.
- 1.2 NHPC (appellant) refused the claim of PGCIL based on provisions of mutually signed indemnification agreement. NHPC had submitted review petition no. 25/RP/2015 in petition no. 91/TT/2012 for review of para -23 of CERC order dtd. 26.05.2015.
- 1.3 CERC had issued review order and recall order dtd. 26.05.2015 in petition no. 91/TT/2012 for review the provision of para-23. As per CERC direction order dtd. 29.12.2015, PGCIL provided necessary documents to NHPC in petition no. 91/TT/2012.
- 1.4 NHPC had submitted its reply in petition no. 91/TT/2012. Further NHPC had also submitted supplementary reply in petition no. 91/TT/2012.
- 1.5 CERC had issued order in petition no. 91/TT/2012(Impugned order), vide which CERC reviewed para-23 of order dtd. 26.05.2015.
- 1.6 Hence, the Appellant has preferred this appeal.

**APPEAL NO. 81 of 2017**

2. The Appeal No.81 of 2017 has been filed under Section 111(2) of the Electricity Act, 2003 against impugned order dated 07.09.2016, passed by the Central Electricity Regulatory Commission (**CERC**) in Review Petition No. 19/RP/2015 in Petition No. 91/TT/2012, (hereinafter referred to as the “impugned order”), whereby the CERC totally ignored the case put by the appellant about indemnity clause in the agreement and proper commissioning of full transmission system. The CERC further committed the error by taking two distinct approaches for allowing COD of same Transmission Assets of the same transmission system. and arbitrarily allowed tariff for Asset-II from 01.09.2013, which was denied in its earlier order. The CERC directed that the NHPC would be liable to pay charges from 01.09.2013 till 23.04.2014.
- 2.1 CERC (respondent No. 4) had issued tariff order for period 2009-2014 for Asset I and Asset III of transmission assets of PGCIL submitted through petition NO. 91/TT/2012. Thereafter PGCIL (respondent No.01) had raised bill amounting to Rs.74.78 Crs as bilateral arrear (idling charge) for pre-commissioning period of Parbati-III project (NHPC). The claim was based on CERC order pertaining to assets for which tariff was allowed vide CERC order dtd. 26.05.2015.
- 2.2 NHPC (Appellant) refused the claim of PGCIL based on provisions of mutually signed indemnification agreement. NHPC had submitted review

petition no. 25/RP/2015 in petition no. 91/TT/2012 for review of para -23 of CERC order dtd. 26.05.2015.

2.3 CERC had issued review order and recall order dtd. 26.05.2015 in petition no. 91/TT/2012 for review the provision of para-23. As per CERC direction order dtd. 29.12.2015, PGCIL provided necessary documents to NHPC in petition no. 91/TT/2012.

2.4 NHPC had submitted its reply in petition no. 91/TT/2012. Further NHPC had also submitted supplementary reply in petition no. 91/TT/2012.

2.5 CERC had issued order in petition no. 91/TT/2012(Impugned order), vide which CERC reviewed para-23 of order dtd. 26.05.2015.

2.6 Hence this appeal has been filed against the aforesaid impugned order.

### **3. Brief Facts of the Case in Appeal No.281 of 2016:-**

3.1 NHPC Limited (appellant), hereinafter called 'NHPC', is a Government of India Company within the meaning of the Companies Act, 1956. Further, it is a 'Generating Company' as defined under Section 2(28) of the Electricity Act, 2003. The appellant is having power stations/projects at different regions and places in the country. Parbati Hydro Electric Project, Stage-III, hereinafter called "Parbati-III", is one of them located in the state of Himachal Pradesh.

3.2 NHPC and PGCIL had signed Indemnification Agreement on 22.07.2005 to protect mutual interest. Pursuant to the above indemnity agreement, the development of Associated Transmission System (ATS) of Parbati-III was

under scope of Power Grid Corporation of India Limited (PGCIL). Part of this ATS was given to Parbati Koldam Transmission Company Limited (**PKTCL**) for execution on 15.09.2008.

- 3.3 The units of Parbati-III are under commercial operation since 24.03.2014. Prior to commissioning of units of Parbati-III, PGCIL (respondent no.1) had submitted Petition No. 91/TT/2012 for determination of transmission tariff for combined asset of transmission system associated with Parbati-III HEP of NHPC. NHPC was not impleaded as a respondent.
- 3.4 The Assets covered for tariff by PGCIL under above petition no. 91/TT/2012 were as under:-
- (a) Asset-I :- 400kV D/C Parbati-Amritsar T/L along with associated bays at both ends.
  - (b) Asset-II:- LILO of 2<sup>nd</sup>Ckt of Parbati-II-Koldam associated bays and LILO of Parbati-III.
  - (c) Assets:-III:- 400kV 80MVAR Bus Reactor at Parbati Pooling station along with associated bays.
- 3.5 Against submitted petition by PGCIL, CERC vide tariff order dtd. 26.05.2015 had considered Asset-I & Asset-III only for tariff with effect from 01.08.2013. CERC at para-23 of the order dtd. 26.05.2015, had allowed recovery of transmission charge from NHPC for pre-commissioning period of Parbati-III Project. Based on CERC order dtd. 26.05.2015, PGCIL had raised bill (Bilateral arrear bill) amounting to Rs.74.78 Crs to NHPC.

3.6 NHPC had objected to the claim of PGCIL and requested for withdrawal of bill on following grounds:-

- (a) Non-consideration of provisions of Indemnification agreement mutually signed between PGCIL and NHPC.
- (b) Commissioning of whole system was not with effected from 01.08.2013 as claimed by PGCIL.
- (c) NHPC was not made party in original petition resulted addition of para-23 in CERC order dtd. 26.05.2015.

3.7 The availability of 400KV transmission line with sufficient lead time is essentially required for commissioning of hydro power station. Keeping in view of this requirement, a gap of 10 months was envisaged between commissioning date of ATS and generating station in Indemnification agreement.

- i. In case of delay in commissioning of ATS / Power station, the indemnification liability is for the amount of IDC limited to six month from Zero date.
- ii. In case of Force majeure clause no party is liable for any claim.

3.8 The commissioning of transmission line and hydro power station were delayed due to reasons beyond the control of both parties. Based on assessment of progress of work, NHPC had requested PGCIL to make the transmission line available by June'2013, which could not be achieved by PGCIL.NHPC was all set to commission the Power Station in the month of

June, 2013. The units were spun in May / June , 2013 but PGCIL did not make any communication with NHPC for connecting the ATS System with Power Station and their intention to do so by 01.08.2013.

3.9 The PGCIL claim is based on request from NHPC to commission the transmission line in the month of June 2013 as requested by Director (Project), NHPC vide its letter dated 12.06.2013. In this respect, the NHPC begs to mention that NHPC was all set to commission the Power Station in the month of June, 2013. The first unit was spun in May, 2013 but PGCIL did not make any communication with NHPC for connecting the ATS System with Power Station. The transmission line was back-charged but it remained under shut down from 06.09.2013 to 22.10.2013 on request of NHPC for making connections / testing etc.

3.10 Only part system of ATS was available for evacuation of power from Parbati-III Power station. The AFC cannot be granted till commissioning of full system. It was evident from submissions of the PGCIL that only a part of work covered under Assets-II was complete (Parbati-III – Banala) and part work was not complete on the COD of Parbati-III power station. The second evacuation ckt of Parbati-III was made operational from 3<sup>rd</sup> Nov, 2015. Therefore, the complete scope under ATS has been completed w.e.f. 3.11.2015.



- 3.11 The PGCIL had wrongly submitted that the Asset 1 was commissioned with effect from 01.08.2013. No such certificate from concerned RLDC had been filed by the PGCIL in the tariff petition. In the absence of such a certificate, the date of commencement of COD, as claimed by the PGCIL, could not have been accepted to be true and correct.
- 3.12 Even apart from that, if the document submitted by the PGCIL itself is looked i.e. in support of its claim for COD (Form-2), it is quite evident that the column of *communication system* had been left blank. Meaning thereby on the date of purported COD, the communication system was not in place. The communication system is one of the most crucial and essential requirement for regular services of the transmission system. In the absence of the same, the transmission system cannot be said to have become fully operational.
- 3.13 Moreover, if it is agreed that the Asset-I and III has been properly commissioned on 01.08.2013, it is of no use for Parbati-III Power station without commissioning of Asset-II along with proper communication system in place. Therefore, recovery of transmission tariff from Parbati-III for half commissioned system (Asset-I & Asset-III) is again not justified.
- 3.14 Without commissioning of Asset-II along with communication system, the full ATS which is intended to evacuate power of Parbat-III Power station along with other power station / sub-station in that region, cannot be

considered completed for regular service under Regulation 3(12) of Tariff Regulation'2009. The claim of the PGCIL that Asset-I and Asset-III was kept on regular service from 01.08.2013 is not correct.

- 3.15 CERC tariff order dated 26.05.2015 is for recovery of AFC for Assets I & III prior to commissioning of Parbati-III power station from NHPC. It may be seen from schematic diagram provided by PGCIL that these are the common assets to be used for evacuation of power of several hydro stations / pooling stations (Parbat-II, Sainj, Koldam, etc) in that region including Parbati-III of NHPC. Therefore, total recovery of AFC w.e.f date of charging of transmission line upto commissioning of Parbati-III units only from NHPC/ Parbati-III Power station was not justified.
- 3.16 The appellant preferred a review petition to review para-23 of the order of CERC dated 26.05.2015. The review petition was taken up for hearing and the CERC vide order dated 29.12.2015, allowed the review petition. Consequent to the order dated 29.12.2015, the main petition was heard on 28.01.2016. NHPC filed its further reply vide affidavits dated 12.02.2016 and 22.02.2016. The matter was heard on 08.03.2016, whereby after hearing the matter, the judgement was reserved and finally the order was passed vide impugned order dated 21.07.2016.

3.17 CERC vide order dtd. 21.07.2016 has modified the para-23 as under:-

*"23. In view of the requirement of NHPC as conveyed by its letter dated 12.6.2013, the petitioner has commissioned the asset with effect from 1.8.2013. Unit # 1 and 2 of Parbati HEP-III of NHPC were commissioned on 24.3.2014. Since the transmission assets were commissioned with effect from 1.8.2013 at the request and behest of NHPC, we are of the view that the transmission charges from 1.8.2013 to 23.3.2014 shall be borne by NHPC in terms of Regulation 8(6) of Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010 as amended from time to time. The CTU is directed to examine whether these transmission assets were used by other generators during the period in question, and if so, the transmission charges paid by them shall be utilised to reduce the liability of NHPC."*

4. **FACTS IN ISSUE**

- a. Whether or not CERC has failed to consider the applicability of the indemnification agreement which was signed before notification of POC regulation.
- b. Whether or not the CERC committed an error in holding merely that, "if the transmission assets were used by any other generator during the period, then the transmission charges paid by them should be utilised for reducing the liability of NHPC", whereas they ought to have held that the transmission charges intended to be paid by any other generator should be utilised for reducing the liability of NHPC?

## **5. QUESTIONS OF LAW**

The Appellant has raised following questions of law for consideration in their Appeal:-

- 5.1 Whether or not the CERC has failed to consider the applicability of the indemnification agreement which was signed before notification of POC regulation?
- 5.2 Whether or not the CERC has committed an error in ignoring the indemnification agreement between the parties?
- 5.3 Whether or not the CERC committed an error in holding merely that, “if the transmission assets were used by any other generator during the period, then the transmission charges paid by them should be utilised for reducing the liability of NHPC”, whereas they ought to have held that the transmission charges intended to be paid by any other generator should be utilised for reducing the liability of NHPC?
- 5.4 Whether or not, having admitted the presence of other generator, who are either using or likely to use the transmission assets, without a proper apportionment, it will result into a new hardship for the appellant and unexpected windfall for those other generator?
- 5.5 Whether non-filing of reply by NTPC and PKTCL in itself is sufficient to disapprove the name of the applicant?

- 5.6 Whether or not it was incumbent upon the Respondent No. 1 to come clean on the aspect as to how many other generating station are likely to use the transmission assets and requests for the apportionment among same?
- 5.7 Whether or not the CERC has failed in its duty in not correctly ascertaining the aforesaid aspect and is committed a gross illegality by adjusting only the charges paid by other generator without taking into consideration the intended use by the other generators?
- 5.8 Whether or not the CERC has committed an error of fact in holding that there is no document on record which shows that NHPC had insisted on commissioning of assets for the evacuation of power from Parbati III HEP?
- 5.9 Whether or not the CERC has committed error in ignoring the fact that as per the agreement between the parties, there has to be a gap of 10 month and for such period, it cannot be deemed to be a delay and NHPC cannot be fastened with the liability to bear the cost?
- 5.10 Whether or not the CERC has committed an error in ignoring the fact that the applicant is a public sector undertaking and such imposition of entire cost upon the appellant without proper apportionment will make the cost of the electricity of the appellant unduly high and that of the other generator's unduly low resulting in wrongful loss for the applicant?

**6. Brief Facts of the Case in Appeal No. 81 of 2017:-**

- 6.1 NHPC Limited (appellant), hereinafter called 'NHPC', is a Government of India Company within the meaning of the Companies Act, 1956. Further, it is a 'Generating Company' as defined under Section 2(28) of the Electricity Act, 2003. The appellant is having power stations/projects at different regions and places in the country. Parbati Hydro Electric Project, Stage-III, hereinafter called "Parbati-III", is one of them located in the state of Himachal Pradesh.
- 6.2 NHPC and PGCIL had signed Indemnification Agreement on 22.07.2005 to protect mutual interest. The true copy of the indemnity agreement dated 22.7.2005 is part of the Annexure A/2. Pursuant to the above indemnity agreement, the development of Associated Transmission System (ATS) of Parbati-III was under scope of Power Grid Corporation of India Limited (PGCIL). Part of this ATS was given to PKTCL for execution on 15.09.2008.
- 6.3 The units of Parbati-III are under commercial operation since 24.03.2014. Prior to commissioning of units of Parbati-III, PGCIL (respondent no.1) had submitted Petition No. 91/TT/2012 for determination of transmission tariff for combined asset of transmission system associated with Parbati-III HEP of NHPC. NHPC was not impleaded as a respondent.

6.4 The Assets covered for tariff by PGCIL under above petition no. 91/TT/2012 were as under:-

- (d) Asset-I :- 400kV D/C Parbati-Amritsar T/L along with associated bays at both ends.
- (e) Asset-II:- LILO of 2<sup>nd</sup>Ckt of Parbati-II-Koldam associated bays and LILO of Parbati-III.
- (f) Assets:-III:- 400kV 80MVAR Bus Reactor at Parbati Pooling station along with associated bays.

6.5 Against submitted petition by PGCIL, CERC vide tariff order dtd. 26.05.2015 had considered Asset-I & Asset-III only for tariff with effect from 01.08.2013. CERC at para-23 of the order dtd. 26.05.2015, had allowed recovery of transmission charge from NHPC for pre-commissioning period of Parbati-III Project. Based on CERC order dtd. 26.05.2015, PGCIL had raised bill (Bilateral arrear bill) amounting to Rs.74.78 Crs to NHPC.

6.6 NHPC had objected to the claim of PGCIL and requested for withdrawal of bill on following grounds:-

- (d) Non-consideration of provisions of Indemnification agreement mutually signed between PGCIL and NHPC.
- (e) Commissioning of whole system was not with effected from 01.08.2013 as claimed by PGCIL.
- (f) NHPC was not made party in original petition resulted addition of para-23 in CERC order dtd. 26.05.2015.

6.7 The availability of 400KV transmission line with sufficient lead time is essentially required for commissioning of hydro power station. Keeping in view of this requirement a gap of 10 months was envisaged between commissioning date of ATS and generating station in Indemnification agreement.

iii. In case of delay in commissioning of ATS / Power station, the indemnification liability is for the amount of IDC limited to six month from Zero date.

iv. In case of Force majeure clause no party is liable for any claim.

6.8 The commissioning of transmission line and hydro power station were delayed due to reasons beyond control of both parties. Based on assessment of progress of work, NHPC had requested PGCIL to make the transmission line available by June, 2013, which could not be achieved by PGCIL. NHPC was all set to commission the Power Station in the month of June, 2013. The units were spun in May / June but PGCIL did not make any communication with NHPC for connecting the ATS System with Power Station and their intention to do so by 01.08.2013.

6.9 The PGCIL claim is based on request from NHPC to commission the transmission line in the month of June 2013 as requested by Director (Project), NHPC vide its letter dated 12.06.2013. In this respect, the NHPC begs to mention that NHPC was all set to commission the Power Station in the month of June, 2013. The first unit was spun in May, 2013 but PGCIL



did not make any communication with NHPC for connecting the ATS System with Power Station. The transmission line was back-charged but it remained under shut down from 06.09.2013 to 22.10.2013 on request of NHPC for making connections / testing etc.

- 6.10 Only part system of ATS was available for evacuation of power from Parbati-III Power station. The AFC cannot be granted till commissioning of full system. It was evident from submissions of the PGCIL that only a part of work covered under Assets-II was complete (Parbati-III – Banala) and part work was not complete on the COD of Parbati-III power station. The second evacuation ckt of Parbati-III was made operational from 3<sup>rd</sup> Nov, 2015. Therefore, the complete scope under ATS has been completed w.e.f .03.11.2015.
- 6.11 The PGCIL had wrongly submitted that the Asset 1 was commissioned with effect from 01.08.2013. It is pertinent to mention here that no such certificate from concerned RLDC had been filed by the PGCIL in the tariff petition. In the absence of such a certificate, the date of commencement of COD, as claimed by the PGCIL, could not have been accepted to be true and correct.
- 6.12 Even apart from that, if the document submitted by the PGCIL itself is looked i.e. in support of its claim for COD (Form-2), it is quite evident that the column of *communication system* had been left blank.

Meaning thereby on the date of purported COD, the communication system was not in place. The communication system is one of the most crucial and essential requirement for regular services of the transmission system. In the absence of the same, the transmission system cannot be said to have become fully operational.

- 6.13 Moreover, if it is agreed that the Asset-I and III has been properly commissioned on 01.08.2013, it is of no use for Parbati-III Power station without commissioning of Asset-II along with proper communication system in place. Therefore, recovery of transmission tariff from Parbati-III for half commissioned system (Asset-I & Asset-III) is again not justified.
- 6.14 Without commissioning of Asset-II along with communication system, the full ATS which is intended to evacuate power of Parbat-III Power station along with other power station / sub-station in that region, cannot be considered completed for regular service under Regulation 3(12) of Tariff Regulation'2009. The claim of the appellant that Asset-I and Asset-III was kept on regular service from 01.08.2013 is not correct.
- 6.15 CERC tariff order dated 26.05.2015 is for recovery of AFC for Assets I & III prior to commissioning of Parbati-III power station from NHPC. It may be seen from schematic diagram provided by PGCIL that these are the common assets to be used for evacuation of power of several hydro station /

pooling stations (Parbat-II, Sainj, Koldam, etc) in that region including Parbati-III of NHPC. Therefore, total recovery of AFC w.e.f date of charging of transmission line upto commissioning of Parbati-III units only from NHPC/ Parbati-III Power station was not justified.

6.16 The appellant preferred a review petition to review para-23 of the order of CERC dated 26.05.2015. The review petition was taken up for hearing and the CERC vide order dated 29.12.2015, allowed the review petition. Consequent to the order dated 29.12.2015, the main petition was heard on 28.01.2016. NHPC filed its further reply vide affidavits dated 12.02.2016 and 22.02.2016. The matter was heard on 08.03.2016, whereby after hearing the matter, the judgement was reserved and finally the order was passed vide impugned order dated 21.07.2016.

6.17 CERC vide order dtd. 21.07.2016 has modified the para-23 as under:-

*"23. In view of the requirement of NHPC as conveyed by its letter dated 12.6.2013, the petitioner has commissioned the asset with effect from 1.8.2013. Unit # 1 and 2 of Parbati HEP-III of NHPC were commissioned on 24.3.2014. Since the transmission assets were commissioned with effect from 1.8.2013 at the request and behest of NHPC, we are of the view that the transmission charges from 1.8.2013 to 23.3.2014 shall be borne by NHPC in terms of Regulation 8(6) of Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010 as amended*

*from time to time. The CTU is directed to examine whether these transmission assets were used by other generators during the period in question, and if so, the transmission charges paid by them shall be utilised to reduce the liability of NHPC."*

6.18 Thereafter the Appellant filed an appeal against the order dated. 21.07.2016 passed by the CERC in 91/TT/2012. In order dated 21.07.2016 (Para 15), CERC has directed PGCIL to submit a report whether the transmission assets were used by any other generator during the period, if so the transmission charges paid by them should be utilized for reducing the liability of NHPC.

6.19 PGCIL vide its letter dated 31.08.2016 has indicated that no other generator has used the above assets during the said period. Therefore, as per CERC order dtd. 21.07.2016, the liability of payment of transmission charges of the above assets for period 01.08.2013 to 23.03.2014 lies with NHPC. Here, it is worth mentioning that the whole transmission asset has been created for multiple generating stations/sub-stations (viz NHPC, NTPC, Govt. of Himachal Pradesh and for linking Nalagrah Grid). The imposition of total AFC on NHPC only because NHPC Parbati-III Power station was first commissioned, is not justified. PGCIL needs to certify that during the said period, no power to / from Nalagarh grid substation was flowing. The Nalagarh sub-station was already a commissioned sub-station.

6.20 The Review Petition No. 19/RP/ 2015 was taken up by the CERC and vide its order dated 07.09.2016, it allowed tariff for Asset-II also which was earlier denied due to its incompleteness. In this order, CERC has directed that tariff for Asset-II is also to be paid by NHPC for the intermittent period (01.09.2013 to 23.03.2014). Though, CERC has not yet determined the annual fix charges for full / part of Asset-II, it has ordered its payment by NHPC. This order is also not based on factual position on availability/commissioning of transmission segment between Parbati-III pooling point (Banala) and availability of second circuit for evacuation of power from Parbati-III to Banala sub-station which also includes a part of Asset-II. The second circuit was commissioned in November, 2015. It is worth mentioning that Asset-II covers LILO point at Parbati-III PS and pooling sub-station at Banala.

6.21 NHPC reiterated that commissioning of transmission assets was not in order. The transmission line was only back-charged without commissioning of metering and communication system and without any flow of power. NHPC has already highlighted these issues through document submitted by PGCIL and NHPC letter. Both the documents clearly establish that the PLCC system at Parbati-III end and Banala end which is part of Asset-II was not commissioned on 01.09.2013.

6.22 CERC vide order dtd. 07.09.2016 has given two types of treatment for allowing AFC of Assets-II. Part assets of Asset-II (c-d-e-f), which is

connected to NHPC power station, has been declared under commercial operation with further installation of metering system and recovery has been directed from NHPC.

6.23 PGCIL submitted petition No. 411/TT/2014 in CERC for grant of tariff for rest two no. Of LILO (Loop in & Loop out) connected with transmission system of Parbati-III Power Station and Banala Sub-station by aforesaid petition, COD of above both LILO from 01.04.2014.

6.24 CERC issued tariff order by order dated 30.07.2016. in which Para-14, CERC considered COD of Loop in system with effect from 03.11.2015 and Loop out from 10.10.2014 i.e. commissioning date of respective connected line of PKTCL. CERC has considered provisions of Implementation agreement signed between PGCIL and PKTCL for payment of IDC & IEDC by PKTCL to PGCIL for prior period of COD i.e. from 30.06.2014 to respective date COD of each LILO.

6.25 Whereas in appellant case, the Hon'ble CERC has not considered provisions of Indemnification agreement signed between PGCIL and the appellant (NHPC) in respect to payment of idle charges for prior period of COD of Parbati-III Power station. The Hon'ble CERC directed to payment of full AFC instead of applicable IDC & IEDC. On the other hand, the part of Asset-II (b-c & f-g), which is connected to PKTCL system, is not declared under commercial operation with the remarks that the same will be declared under

commercial operation with commissioning of PKTCL system. Different treatment by CERC for the same transmission asset for NHPC and for PKTCL is not logical as well as legal and is bad in the eyes of law.

**7. FACTS IN ISSUE :-**

- a. Whether or not CERC has failed to consider the applicability of the indemnification agreement which was signed before notification of POC regulation.
- b. Whether or not the CERC committed an error by taking two distinct approaches for allowing COD of same Transmission assets?
- c. Whether or not the CERC committed an error in allowing the tariff for Assets-II from 01.09.2013, which was denied in earlier order and the CERC directed the NHPC should be liable to pay charges from 01.09. 2013 till 23.04.2014.

**8. QUESTIONS OF LAW**

The Appellant has raised following questions of law for consideration in their Appeal:-

- 8.1 Whether or not the CERC has failed to consider the applicability of the indemnification agreement which was signed before notification of POC regulation?
- 8.2 Whether or not the CERC has committed an error in ignoring the indemnification agreement between the parties?

- 8.3 Whether continuous transmission line can be broken in two entities for grant of AFC, though part asset is not useful for evacuation of power from Power station?
- 8.4 Whether or not the CERC committed an error by taking two distinct approaches for allowing COD of same Transmission Assets?
- 8.5 Whether or not the CERC committed an error that allowing the tariff for Asset-II from 01.09.2013, which was denied in earlier order and the CERC directed that the NHPC should liable to pay charges from 01/09/2013 till 23.04.2014?
- 8.6 Whether or not the CERC has committed error by taking two distinct approaches for allowing recovery of transmission charge/ idle charge for same transmission Assets?
- 8.7 Whether or not the CERC has committed error in ignoring the fact that as per the agreement between the parties, there has to be a gap of 10 month and for such period, it cannot be deemed to be a delay and NHPC cannot be fastened with the liability to bear the cost?
- 8.8 Whether or not the CERC has committed an error in ignoring the fact that the applicant is a public sector undertaking and such imposition of entire cost upon the appellant without proper apportionment will make the cost of the electricity of the appellant unduly high and that of the other generator's unduly low resulting in wrongful loss for the applicant?



**9. The submissions of learned senior counsel, Mr. Sachin Datta and Mr. Rajiv Shankar Dvivedi, appearing for the Appellant in the Appeals No.281 of 2016 and 81 of 2017 are given below:-**

9.1 The first order passed by the CERC on Tariff Petition filed by Power Grid Corporation of India (Petition No. 91/TT/2012) is dated 26.05.2015. Since the said order was passed without hearing the NHPC Ltd., a review petition was filed by the NHPC Ltd. which was allowed vide order dated 29.12.2015. Thereafter, the CERC issued order dated 21.07.2016 in respect of Tariff Petition No. 91/TT/2012 filed by Power Grid Corporation of India. After the issuance of the said order, the original order dated 26.05.2015 stood merged with the order dated 21.07.2016. As such, the order dated 26.05.2015 does not survive in law and therefore, it was wholly illegal for the CERC to have issued order dated 07.09.2016 (the impugned order in Appeal No. 81/2017) purportedly once again reviewing the order dated 26.05.2015.

9.2 Moreover, what has been held in the order dated 7.9.2016 has a bearing on the issues involved and considered in the order dated 21.7.2016. Therefore, such disjointed consideration was wholly unwarranted and has resulted not only in a procedural impropriety but also substantial miscarriage of justice. It is evident that CERC has grossly erred in procedure followed by it and as such the impugned order and entire proceedings deserves to be set aside on this ground alone.

**NO FINDING AS TO WHICH PORTION OF ASSET-II QUALIFIES AS A DISTINCT ELEMENT” IN THE STATUTORY SENSE SO AS TO BE ENTITLED TO TARIFF EVEN WITHOUT COD OF THE ENTIRE ASSET**

9.3 While passing order dated 26.05.2015, the Commission had taken a view that tariff could not be granted in respect of Asset II since a portion of the LILO Circuit of Asset II was not being utilized as the Koldam Switchyard was not commissioned. Finding to this effect is contained in paragraph 6 of the order dated 26.5.2015, reproduced hereunder:

*“6. A portion of the LILO circuits of Asset-II is not utilized as the Koldam switchyard has not been commissioned and the part of LILO cannot be put to trial operation without the line getting connected at the other end as per the APTEL order dated 2.7.2012 in Appeal No. 123 of 2011. Further, the petitioner has neither prayed for declaration of date of commercial operation under Regulation 3 (12) (C) of the 2009 Tariff Regulations nor disclosed the information that the portion of LILO are not in use. Punjab State Power Corporation Limited (PSPGL), Respondent No.6, has also raised this issue in their submission. Since the Koldam Switchyard has not been commissioned, we are not inclined to grant tariff for Asset-II in this petition. The petitioner is at liberty to file the tariff of this asset when complete LILO is put into regular service after test charge and trial operation.”*

As long as the aforesaid finding remained, there was no occasion to consider the Banala Amritsar Transmission Line, or any other portion of Asset II, to be an “element” of the transmission system in respect of which tariff could be granted. In this regard Regulation 3 (12) (C) of the CERC (Terms & Conditions of the Tariff) Regulations 2009 provides as under:

*“(c) in relation to the transmission system, the date declared by the transmission licensee from 0000 hour of which an element*

*of the transmission system is in regular service after successful charging and trial operation:*

*Provided that the date shall be the first day of calendar month and transmission charge for the element shall be payable and its availability shall be accounted for, from that date:*

*Provided further that in case an element of the transmission system is ready for regular service but is prevented from providing such service for reasons not attributable to the transmission licensee, its suppliers or contractors, the Commission may approve the date of commercial operation prior to the element coming into regular service.”*

There is no discussion in the impugned order as to how and which portion of which asset qualifies as an “element” in the statutory sense, so as to be entitled to tariff even without COD of the entire asset, as per the scope of work, is admittedly not declared.

9.4 It is notable that the aforementioned paragraph 6 of the order dated 26.5.2015 was reviewed after order dated 21.07.2016 (impugned order in Appeal No. 281 / 2016 before this Tribunal) had been passed. This again was a procedural as also a substantive irregularity in as much as what constitutes an “element” of the transmission system in respect of which the tariff could be granted, had to be considered in an integrated and collective manner instead of in an haphazard and disjointed manner as done by the Central Commission.

9.5 For any part of the transmission system to be considered an element of the transmission system, it is laid down in the relevant regulation (reproduced

above) that the said element must be ready for regular service. Admittedly, Asset-I & III could not be possible to have been put to regular service for evacuation of power from Parbati III Generating Station in the absence of c-d-e-f portion of Asset – II. Thus the date of commercial operation for Asset – I cannot possibly be different from the date of commercial operation for c-d-e-f portion of Asset-II. Yet, in the impugned order in Appeal No. 281/2016, the Central Commission has determined 01.08.2013 to be the date of COD of Asset I and III whereas in the impugned order in Appeal No. 81/2017 the Central Commission has determined 01.09.2013 to be the date of commercial operation of the c-d-e-f portion of Asset-II. This is a glaring inconsistency which demonstrates utter non-application of mind by the Central Commission. It is submitted that the error has resulted because of disjointed consideration of the matter, as already stated hereinabove.

9.6 The impugned orders have been passed by the CERC on the assumptions that NHPC has used the transmission line of the Respondent No.1 for drawal of start up power. This assumption is totally incorrect. In fact, no start up power was required by NHPC at all. Yet, in paragraph 11 of the impugned order dated 21.7.2016 in the finding has been given that *“since the transmission line was to be put into use during this period by the Generating Station, NHPC would be liable to pay the transmission charges from the*

*date of commissioning of the transmission assets till the date of commissioning of the Generating Station”.* This finding is also erroneous.

Transmission lines were not used for start up power by NHPC. In hydro projects, power from 400 kV is not required for construction purpose. In fact 400 kV line is required for integration with generating stations for testing and commissioning and power flow. The transmission line can be said under commercial operation only with generation of power (power flow) and hence, as a matter of practice, the COD of transmission line and generating station are supposed to be same. This practice can be verified in case of any other hydro power project.

After testing and commissioning of first unit, the first synchronization (connection with grid) was done on 19.02.2014. The volume of infirm power generated during synchronisation is certified by NRPC and the same appears only when power station is synchronized with grid and shows the injected power during testing. There is no drawal of power during or before testing.

## **INDEMNIFICATION AGREEMENT NOT CONSIDERED**

9.7 The indemnification agreement between NHPC and Power Grid Corporation of India Ltd, has not been considered at all by the CERC. No finding has been rendered on the following provisions of the Indemnification Agreement:

**“2. Indemnification:**

- a) *In the event of delay in commissioning of generating units vis a vis ATS the defaulting party shall pay the Interest During Construction (IDC) including foreign Exchange Rate Variation (FERC) and Govt. Guarantee fee if any for generating units and ATS calculated as lower of the two up to a period of six months from the zero date. However, the defaulting party shall pay the indemnification claim only in case of revenue loss or part thereof suffered by the other party due to delay in commissioning by the defaulting party.*
- b) *Either party who was ready to commission and have notified the other party, shall obtain a certificate from Statutory Auditors at the end of financial year certifying the amount of IDC from zero date to actual date of commissioning or six months IDC whichever is less.*

**4. Limitation of payment.**

*No claim other than IDC including FERV and Govt. Guarantee fee if any referred to above i.e. any indirect loss due to delay in commissioning Generating Unit/ ATS shall be payable by either party to other party.”*

9.8 The Central Commission has taken note of the pleas raised by NHPC but not dealt with them at all. The contention of NHPC regarding scope and purport of indemnification agreement has been noted in the impugned order itself but no finding has been rendered in respect of substantive portion of the indemnification agreement.

9.9 In paragraph 11 of the impugned order the indemnification has been considered only for the purpose of one of the aspects viz. the gap of 10 months envisaged in the indemnification agreement between

commissioning of the transmission system and commissioning of the power project. However, other substantive provisions of the indemnification agreement have not been considered at all.

**FAILURE TO ADJUDICATE PLEAS REGARDING COMMUNICATION SYSTEM NOT IN PLACE**

9.10 The impugned order completely errs in failing to notice that the plea regarding commissioning on 1.8.2013/ 1.9.2013 is completely falsified by the fact that the communication system in respect of the transmission asset was not in place on 1.8.2013/ 1.9.2013. In fact, the Tariff Petition filed by the Respondent No.1 did not even fill up the relevant Form-2 in respect of communication system and which was left blank. No particular, whatsoever, were given in the Tariff Petition with regard to communication system although a bare averment was made that communication system was an intrinsic part of the transmission system and the same was commissioned along with Asset –I and Asset-III. The relevant letters of NHPC which clearly establish that the communication system was not in place, were annexed with the Review Petition of 25 / RP / 2016 and a letter dated 7.10.2013 on the part of the NHPC to DGM, Power Grid Corporation Ltd, which states as under:

*“Please refer our earlier letter NH/PP-III/E&M/T-09/13/3065-66 dated 24.09.2013 through which PGCIL was requested to commission PLCC line between Parbati III and*

*Banala substation as generation of Parbati HE Project stage-III is likely to commence from 20<sup>th</sup> October onwards.*

*It is once again requested to take up the matter with M/s BPL for early commissioning of PLCC system. Moreover, jumpering works at dead end lower of Parbati stage-III may also be completed immediately.”*

The aforesaid material which was placed on record before the Central Commission, has not been considered at all in the impugned order.

- 9.11 The fact that communication system was not in place as on 1.08.2013 or 1.09.2013 is established beyond the pale of doubt in view of joint minutes of meeting dated 12.10.2013, duly signed by representative of PGICL, NHPC and the concerned agencies involved in setting up and testing of the communications system. The said document has been recently located / retrieved by NHPC from the concerned project records and conclusively clinches the issue. There is thus a very serious infirmity in the impugned orders in both appeal nos. 281/2016 and 81/2017 inasmuch as tariff has been granted even prior to the date on which the communication system was commissioned. It is regrettable that relevant facts in this regard were not fully placed on record by PGCIL neither before the CERC nor before this Tribunal. It also explains the complete silence of PGCIL in respect of the contentions of NHPC flowing from unrebutted letter dated 07.10.2013 referred to hereinabove.

**IMPUGNED ORDERS ARE INCONSISTENT WITH THE VIEWS TAKEN BY CERC IN IDENTICAL PETITION IN RESPECT OF ASSETS FORMING PART OF THE SAME TRANSMISSION SYSTEM**



9.12 The impugned orders of both the appeals are completely inconsistent with what has been held by CERC itself in Review Petition No. 156/TT/2015 order dated 29.12.2016, filed by Parbati Koldam Transmission Company Ltd. (PKTCL) seeking tariff in respect of Section a-f (portion starting from Parbati II HEP to LILO Point of Parbati (Banala) Pooling Station) and a-b (portion starting from Parbati II HEP to LILO point Parbati III HEP).

9.13 The said assets were put into use only on 3.11.2015. Although the date of commissioning of commercial operation claimed by the petitioner in the said petition was 30.06.2015, the finding rendered by the CERC are as under:

***“Para 24. It is observed that Ckt-I and CKT-II of Parbati – III Koldam line were originally envisaged to be commissioned with the 400 KV bays in Parbati-II switchyard of NHPC. On account of delay in commissioning of 400 KV bays in Parbati-II switchyard of NHPC, the Ckt-I and Ckt.-II of Parbati-III Koldam line were put into use only on 3.11.2015 through an alternate arrangement. Since the delay is attributable to the non-commissioning of 400 kV bays by NHPC, we are of the view that the IDC and IEDC from 30.6.2015 for instant assets till 2.11.2015 shall be borne by NHPC. With effect from 3.11.2015, the transmission charges for the instant assets shall be serviced in accordance with Sharing Regulations. The IDC and IEDC born by NHPC shall not be capitalized by NHPC in its book of accounts for the purpose of claiming tariff for its generation from Parbati HEPs as well as for transmission services by the petitioner.”***

9.14 It is evident from the above that CERC thought it fit that NHPC bear only the charges on account of IDC and IEDC during the period 30.06.2015 – 2.11.2015. Thus, there is a remarkable inconsistency in the approach of the CERC from case to case. A Review Petition in respect of the said Petition

No. 156/TT/ 2015 is already pending before the CERC. As such, the entire issue is still at large before the Commission and it would be in the fitness of things if the impugned orders are set aside and the entire matter is remanded back to the CERC for a complete and comprehensive adjudication.

9.15 Impugned orders are also inconsistent with the view taken by the CERC in Petition No. 411/TT/ 2014 in respect of segment b-c, f-g. In the said case, an agreement between PGCIL and PKTCL (joint venture of PGCIL & Reliance Power), which is synonymous with the Indemnification Agreement in the present case, has been taken into cognizance (refer CERC order dated 30.07.2016 in petition no. 411/TT/2014) and on that basis CERC ordered only payment of IDC & IEDC component by PKTCL to PGCIL. The copy of this order is already annexed with Appeal No.81/ 2017. The line segment b-c and f-g is the part of full scheme as per investment approval as well as mutual agreement signed between NHPC & PGCIL.

**ORDER PASSED IN APPEAL NO. 281/2016 IS INCONSISTENT WITH ORDER PASSED IN APPEAL 81/2017**

9.16 The position as of 21.07.2016 was that a portion of Asset-II could not qualify as an “element” for the purpose of grant of tariff. This is because of the finding rendered at Para 6 in this regard in order dated 26.5.2015. By necessary implication the Amritsar / Balana line could not also have been considered as an element because it was not possible to use the said line in

the absence of a portion of Asset II being available for evacuation of power from Parbati III. The necessary test for recognising a portion of an asset as an “element” is that it must be ready for regular service. The view that was prevalent on 21.07.2016 (prior to review order dated 7.9.2016) was that the c-d-e-f portion of Asset-II was not eligible for tariff. The position in this regard was reviewed by the commission only on 07.09.2016. However, even prior thereto, the impugned Order dated 21.07.2016 grants tariff in respect of the Amritsar / Balana line and that too with effect from 01.08.2013, whereas, the tariff for c-d-e-f portion was granted only w.e.f. 01.09.2013. This is akin to putting the cart before the horse and shows utter non-application of mind warranting reconsideration of the matter. It is pertinent to note that even in oral arguments, none of the parties have even attempted to justify the finding regarding COD w.e.f. 1.8.2013 as held in the impugned order dated 21.7.2016 in Appeal 281/2016.

**NO BASIS OR RATIONALE FOR THE FINDING TO FASTEN ENTIRE LIABILITY OF TRANSMISSION CHARGES ON NHPC**

9.17 The impugned order in Appeal No. 281/2016 records the contention of NHPC in paragraph 14 to the effect that *“there are common assets used for evacuation of power from other hydro stations / pooling stations such as Parbati II, Sainj, Koldam etc in the region apart from Parbati III of NHPC. Therefore, the cost has to be suitably apportioned between all the generation stations.”*

The above submission has already been accepted by CERC in para 14 of its order dated 30.07.2016 in petition no. 411/TT/2014. But, totally ignoring its own finding, in the instant case, the CERC has fastened the entire liability upon NHPC alone, which is not only contrary to fact but also against the settled practice. Never before has the NHPC been fastened with this kind of liability for idle period, whereas admittedly, in all generating stations, the transmission system is always completed before the generating station.

For the purpose of deciding this issue, the relevant regulations namely Regulation 8 (6) of Central Electricity Regulatory Commission (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010 were required to be interpreted. However, there is no analysis / consideration / interpretation of this Regulation.

9.18 The impugned order also records that :-

***“the Petitioner has made NHPC, NTPC and PKTCL as parties to the Petition and has served copies of the pleadings on them. However, NTPC and PKTCL have neither filed any reply nor participated in the proceedings. Therefore, there is no material on record which substantiates the Claim of NHPC that Asset I and III have been used by NTPC and PKTCL or any other generator during the period 1.8.2013 to 23.3.2014.”***

It is thus evident that the CERC has proceeded on assumptions in the absence of NTPC and PKTCL participating in the proceedings. The impugned order does not cite or interpret any Regulation on the basis of which liability has been fastened solely on NHPC alone.

9.19 The very fact that elaborate submissions have been made by NTPC and PKTCL before this Tribunal on this aspect of the matter, after having failed to participate in the proceedings before the CERC, is itself demonstrative that the matter is required to be considered in the first instance by the CERC.

**10. The submissions of the learned counsel, Mr. M.G. Ramachandran, appearing for Respondent No.1- Power Grid Corporation of India Limited in Appeal Nos. 281 of 2016 & 81 of 2017 are as follows:-**

10.1 By the two impugned Orders, the Central Commission has held that –

- (a) all the three transmission assets/elements were declared under commercial operation by Powergrid on 01.08.2013 (Asset I and III) and 01.09.2013 (Asset II);
- (b) NHPC is liable to pay the transmission charges to Powergrid in terms of the Tariff Regulations, 2009 read with the Sharing of Inter-State Transmission Charges Regulations, 2010 with effect from 01.08.2013/01.09.2013 to 24.03.2014 i.e. till commissioning of NHPC's Generating Station {Parbati-III};
- (c) The transmission charges effective from 24.03.2014 shall be payable by the long term beneficiaries of power from NHPC; and
- (d) NHPC's generating station {Parbati-III} were declared under commercial operation on 24.03.2014.

**Grievance of NHPC in the two appeals:**

10.2 NHPC should not be held liable to pay the transmission charges for the period from 01.08.2013/01.09.2013 to 24.03.2014. The said period was prior to the date of commercial operation of the generating units of NHPC. In terms of the indemnification agreement entered into between NHPC and Powergrid, the transmission lines were to be available to NHPC 10 months prior to the commercial operation of the generating units. The generating units have been declared under commercial operation on 24.03.2014, the 10 months prior period for Powergrid to provide transmission facilities was June 2013 and, therefore, there is no requirement to pay any charges by NHPC. In any event, the liability of NHPC is restricted to pay the IDC and IEDC for the period consistent with the decision taken by the Central Commission in other cases.

10.3 It has also been alleged by NHPC that the communication system of Powergrid was not ready as on 01.08.2013/01.09.2013 and, therefore, the transmission system could not be said to be ready in all respects on the said date. Further, it has been urged that the entire transmission system envisaged in the region to be undertaken by Powergrid was not done as on 01.08.2013/01.09.2013.

10.4 In the diagram filed by NHPC along with the written submissions dated 12.12.2017 at Page 9, the assets have been designated as under:

- (a) Asset No. 1 which is the transmission line from Amritsar to Parbati Pooling Station (Banala) indicated in the Map as Point A to Point Z;
- (b) Asset No. 2 which is the transmission line from Parbati Pooling Station (Banala) to the Interconnection Point, namely, F to E indicated in the Map and LILO Line from D to C indicated in the Map;
- (c) Asset No. 3 at Parbati Pooling Station (Banala) marked as F in the Map; and
- (d) Asset No. 4 transmission line F-G i.e. from Parbati Pooling Station (Banala) to the line to Switchyard of Koldam Generating Station of NTPC and B-C i.e. from Parbati III generating station of NHPC to the line upto Parbati II generating station of NHPC.

10.5 In the impugned order the Central Commission has however proceeded to describe the assets differently, namely, as under:

- a. Asset-I: 400 kV D/C 400 kV D/C Parbati- Amritsar T/L along with associated bays at both ends;
- b. Asset-II: LILO of 2nd Ckt of Parbati-II-Koldam T/L at Pooling Station along with associated bays and LILO at Parbati-III;
- c. Asset-III: 400 kV 80 MVAR Bus Reactor at Parbati Pooling Station along with associated bays; and
- d. Asset-IV: LILO Line of Parbati II KoldamCkt-I at Parbati Pooling Station.

10.6 In the impugned Order, the Central Commission has accepted that all the three assets (excluding Asset IV - Parbati Pooling Station – Koldam Line) was validly declared under commercial operation as on 01.08.2013 and 01.09.2013

10.7 The Central Commission has accepted the date of the commercial operation of the transmission assets/elements to be as on 01.08.2013 and 01.09.2013. NHPC itself had sought shut down of the transmission lines from 06.09.2013 to 22.10.2013.

10.8 The Tariff Regulations, 2009 recognize the declaration of commercial operation of an element of a transmission system and not of transmission system as a whole. Regulation 3(12)(c) defines the Commercial Operation Date as under:

*“3(12)(c) in relation to the transmission system, the date declared by the transmission licensee from 0000 hour of which an element of the transmission system is in regular service after successful charging and trial operation:”*

10.9 Regulation 4 and 5 also recognizes that the tariff may be determined for a transmission line or a sub-station:

*“4. Tariff determination. (1) Tariff in respect of a generating station may be determined for the whole of the generating station or a stage or unit or block of the generating station, and tariff for the transmission system may be determined for the whole of the transmission system or the transmission line or sub-station.*

*5. Application for determination of tariff. (1) The generating company or the transmission licensee, as the case may be, may make an application for determination of tariff in accordance with Central Electricity Regulatory Commission (Procedure for making of*



*application for determination of tariff, publication of the application and other related matters) Regulations, 2004, as amended from time to time or any statutory re-enactment thereof, in respect of the units of the generating station or the transmission lines or sub-stations of the transmission system, completed or projected to be completed within six months from the date of application.*

10.10 NHPC itself sought for the connectivity to the switchyard of Parbati-III so as to enable power flow from Parbati-III Switchyard vide letter dated 12.06.2013. In pursuance of the above letter dated 12.06.2013, the Assets were completed in all respects and the COD has been declared of all the assets as on 01.08.2013 and 01.09.2013. The transmission assets were available to Parbati-III Generating Station to get the Start-up Power, Commissioning Power for pre-commissioning activities, undertake performance test, injection of infirm power etc. to enable declaration of the COD of Parbati III Generating Station on 24.03.2014.

10.11 In terms of the above Regulations forming part of the Sharing Regulations, the transmission charges is payable by NHPC as a Generating Company when the transmission lines have been declared under commercial operation till such time when the generating units are commissioned and declared under commercial operation resulting in power flow to the procurers/beneficiaries. Thus, for the period between the declaration of commercial operation of the transmission line (in the present case

01.08.2013/01.09.2013) till the declaration of the commercial operation of the generating units (which is 24.03.2014), the transmission charges payable by the generator (NHPC) and thereafter, by the Procurers/beneficiaries of power from Parbati III.

**Re: NHPC Contention No. 1–The Order dated 07.09.2016 ceased to be valid**

10.12 The contention of NHPC is that after the Order dated 21.7.2016 was passed by the Central Commission in Petition No. 91/TT/2012, the earlier Order dated 26.5.2015 passed by the Central Commission in the said petition was no longer valid. Accordingly, the Order dated 07.09.2016 passed by the Central Commission allowing the review Petition of the Powergrid and decision taken to consider the transmission assets of the line between Parbati III to Parbati Pooling Station under commercial operation effective 01.09.2013 were not valid. According to NHPC, the Order dated 26.05.2015 stood merged in the Order dated 21.07.2016.

10.13 The objections raised by NHPC is hyper-technical and devoid of any merit. The review petition being Review Petition No. 19/RP/2015 was filed by Powergrid in July 2015 prior to the Review Petition No 25/RP/2015 was filed by NHPC. The Review Petition filed by Powergrid was in regard to the commercial operation of the asset between Parbati Pooling Station and Parbati III generating station laid down by Powergrid. The Review Petition

filed by NHPC was not on the aspect of commercial operation of the line but on the aspect of the liability of NHPC to pay transmission charges, Thus the two issues are separate.

10.14 NHPC was a party in both the review petitions. NHPC was duly heard even in the review petition filed by Powergrid. The hearing in the Review Petition No. 19/RP/2015 filed by Powergrid was completed on 27.10.2015. The Order dated 21.7.2016 was passed after the conclusion of the hearing in the review petition filed by Powergrid. Accordingly, there was no occasion for Powergrid to seek review of the Order dated 21.07.2016. The Central Commission has rightly decided the two review petitions. There is no error in the procedure adopted by the Central Commission. In any event, the said objections are hyper-technical in nature.

10.15 In terms of the provisions of Section 79(3) and 178 of the Electricity Act, 2003, the Central Commission has been empowered to adopt a procedure as it considers appropriate so long the Central Commission maintains transparency. As mentioned above, the Central Commission had given due hearing to NHPC also, in the review petition filed by Powergrid. There is no question of any violation of principles of natural justice.

10.16 There is no issue of merger of the Order dated 26.05.2015 with the Order dated 07.09.2016 in a manner that the review petition filed by Powergrid for consideration of the Asset II for COD ought to have been dismissed. As

stated above, Powergrid's review petition was filed prior to the review petition filed by NHPC. The two review petitions were on distinct matters. In its review petition (25/RP/2015), NHPC had not dealt with the COD of Asset II. In the circumstances the objections raised by NHPC are hyper-technical;

10.17 Further, the issue of merger of the Order dated 26.05.2015 with the Order dated 21.07.2016 has been raised by NHPC only during the arguments before this Tribunal. There is no plea or ground taken at any stage prior to the above. There is no ground specified in the Memorandum of Appeal. The plea now sought to be urged for the first time is an afterthought and is only to raise procedural issues to avoid the implication of the Orders passed by the Central Commission. While, there is no objection to raising questions of law based on the existing facts, there has to be a ground raised in the appeal. In the absence of the ground, such a plea cannot be raised. The plea raised is not the one of the nature of challenge to the jurisdiction or limitation, which goes to the root of the matter. The plea raised in the present case is only a purported error of procedure adopted by the Central Commission.

10.18 In this regard, Powergrid relies on the the decision of the Hon'ble Supreme Court in Messrs. Trojan & Company v. RM. N. N. Nagappa Chettiar 1953 SCR789:

*22..... It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint the court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case. The allegations on which the plaintiff claimed relief in respect of these shares are clear and emphatic. There was no suggestion made in the plaint or even when its amendment was sought at one stage that the plaintiff in the alternative was entitled to this amount on the ground of failure of consideration. That being so, we see no valid grounds for entertaining the plaintiff's claim as based on failure of consideration on the case pleaded by him.*

**Re – Contention No. 2 – Transmission lines under Asset II were not complete in the absence of communication system:**

10.19 The contention raised by the Appellant is based on the two pleas, namely, (i) Form 2 filed along with the tariff petition by Powergrid does not contain any details of the communication system in the concern column; (ii) NHPC had written letters dated 08.08.2013 & 07.10.2013 which were not replied to by Powergrid.

10.20 Powergrid states that Form-2 filed by NHPC in the Appeal Paperbook is not the form which was filed along with the petition by Powergrid at the time of the filing of the original tariff petition. The said form was filed at a later stage along with an affidavit dated 23.03.2015 in response to the queries raised by the Central Commission. As the affidavit was filed in March 2015,

after coming into force of the Tariff Regulations, 2014 with effect from 1.4.2014, the forms have been taken from the Tariff Regulations, 2014 even though the assets relate to Tariff Regulations 2009.

10.21 The entire petition No. 91 of 2012 filed by Powergrid before the Central Commission vide Compilation of Documents dated 14.12.2017 and Form-2 attached to the said affidavit is as per the Tariff Regulations, 2009.

10.22 In the Tariff Regulations 2009, there is no separate commercial operation for communication system but only for elements of transmission system which were recognized as transmission lines or sub-stations as submitted hereinabove. However, there was a provision for commercial operation date for communication system (Regulation 4(4)) separate from the elements of Transmission System (Regulation 4(3)) In Tariff Regulations 2014:

*“4 (4) Date of commercial operation in relation to a communication system or element thereof shall mean the date declared by the transmission licensee from 0000 hour of which a communication system or element is put into service after completion of site acceptance test including transfer of voice and data to respective control center as certified by the respective Regional Load Dispatch Centre.”*

10.23 This was the reason why Tariff filing forms attached to Tariff Regulations 2014 separately provided for communication system. However, since the Transmission Assets in issue were commissioned under Tariff Regulations

2009, Powergrid could not have shown the communication system as independent element, which was provided for the first time only under Tariff Regulations 2014. Though inadvertently, Powergrid submitted the form attached to Tariff Regulations 2014 in March 2015, the communication system could not have been shown separately as the Petition was to be considered as per Tariff Regulations 2009. Since communication system were not separately identified as an Asset, the same were part of sub-station or line as the case may be. This is also clear from the expenditure incurred by Power Grid which shows expenditure incurred prior to COD inclusive of PLCC.

10.24 In any event the reference to Form 5B at Sl No. 6.5 PLCC, with the original petition as well as Form 11 filed in 2015 (clearly shows that the communication system was specified in regard to the capital cost incurred by Powergrid within the Sub-station. The entire capital cost have been incurred and capitalised prior to Date of Commercial Operation (DOC or COD). The claim in the financial year 2013-14 was in regard to the retention money which was withheld from the contractor and was subsequently paid in accordance with the usual contractual arrangements.

10.25 The PLCC System was, therefore, installed prior to the commissioning of the transmission assets on 01.08.2013/01.09.2013.

10.26 NHPC has selectively produced the form-2 from a subsequent filing without the forms filed in the original filing. Since there was no separate column in the form prescribed along with the Tariff Regulations, 2009, the capital cost of the communication system etc were included as a part of the transmission line/substation itself which were specified in the two columns provided for in the Form-2. The details of the communication system expenditure has been given in the other forms. The Central Commission has also accepted the above in Impugned Order as this was the consistent practice at that time.

10.27 There is no requirement of any certification by any agency for commercial operation of any element of transmission system within the control period of Tariff Regulations 2009. The requirement of certificate came for the first time only under Tariff Regulations 2014 as per the definition of ‘Trial Operation’:

*“5(2) Trial operation in relation to a transmission system or an element thereof shall mean successful charging of the transmission system or an element thereof for 24 hours at continuous flow of power, and communication signal from sending end to receiving end and with requisite metering system, telemetry and protection system in service enclosing certificate to that effect from concerned Regional Load Dispatch Centre.”*

10.28 Further, the communication system in issue is installed in the Switchyard in Parbati III Station which is owned, operated and maintained by NHPC.



There is no reason for NHPC to have not known the date on which the communication system is provided. However, NHPC has not referred to any date when the communication system was provided either before the Central Commission or before this Tribunal.

10.29 As regards the letters written by NHPC is concerned, these are subsequent to the declaration of commercial operation of the transmission system for Asset II. By the said time, NHPC was entitled to draw power through the transmission assets for its activities. NHPC being aware that its generating stations were getting delayed has sought to blame Power Grid to avoid payment of transmission charges. This is also demonstrated by the fact that NHPC is unable to state the date on which the communication system was provided.

10.30 In the NRPC Meeting held on 12 and 13<sup>th</sup> September, 2013 when NHPC had stated that one unit of Parbati III was expected to be commissioned in September 2013, no issue of communication system was raised at that stage. If the communication system was not there as alleged by NHPC and it is an essential part of the transmission assets as required by NHPC, then NHPC could not have expected to commission the generating station in September if the communication system had not been provided.

**Re: Contention No. 3 – All the transmission system in the area should have been ready including Parbati-II to Koldam and Parbati Pooling Station to Koldam:**

10.31 As submitted hereinabove, the Tariff Regulations 2009 recognize the Commercial Operation Date as well as tariff is for element of transmission system i.e. transmission line or sub-station and not for the transmission system as a whole (Regulation 3(12)(c), Regulation 4 and 5 of Tariff Regulations 2009 quoted above). Thus, the contention of NHPC that the transmission assets can be considered for commercial operation only when the entire transmission system is ready is contrary to the provisions of the Tariff Regulations 2009 as well as consistent decisions of the Central Commission.

10.32 Further the transmission system required for evacuation of power from Parbati III generating station was the transmission line from Parbati III to Parbati Pooling Station (identified as c-d-e-f), Parbati Pooling Station and the transmission line from Parbati Pooling Station to Amritsar. The line B-C and F-G were not related to Parbati III which is clear from the fact that the power was in fact evacuated from Parbati III generating station from 24.03.2014 even though the line B-C and F-G were not commissioned. If the contention of NHPC is accepted, then it would mean that the above transmission assets were capable of being used and were in fact commercially used even before the declared Commercial Operation of the Assets. This would be absurd.

10.33 NHPC has for the first time in rejoinder argument raised the issue that the Assets do not qualify as elements of Transmission System and has relied on the definition of Elements of Transmission System under Tariff Regulations 2014. As submitted hereinabove, the Assets I to III were commissioned with the control period of Tariff Regulations 2009 and not within the control period of Tariff Regulations 2014. Therefore, the definitions and conditions of Tariff Regulations 2014 cannot be applied to Assets I to III. The reliance on Tariff Regulations 2014 by NHPC is therefore incorrect.

10.34 In any event, the Asset I to III are separately identifiable. The Central Commission has identified the line/station as an element and has allowed the commissioning. The transmission line identified as c-d-e-f is capable of conveyance of power between NHPC Parbati III generating station and Parbati Pooling Point and therefore it is a transmission element. The line between Point C to B to B to A was with reference to Parbati-II Generating Station. This did not in any manner affect the power flow from Parbati III to Parbati Pooling station. Similarly line between Point F to G and G onwards did not in any manner affect the power flow from Parbati III to Parbati Pooling Station. If the contention of NHPC is accepted that the line c-d-e-f is not an element and cannot be considered to be commissioned and the commercial operation for Asset II is to be considered as November 2015 even though the Asset was capable of being used from 01.09.2013 and was

actually being used by NHPC itself from 24.03.2014, then this would mean that the power is being injected by NHPC and being transmitted to its beneficiaries through Asset II, prior to the commercial operation of the Asset II which is absurd and nonsensical.

10.35 Without prejudice to the above and even assuming but not admitting that the transmission line c-d-e-f is not an element of transmission system as per Tariff Regulations 2014, it is submitted that the same is to be considered for commercial operation by exercise of 'Power to relax' under the Regulations.

10.36 If the power is not exercised, there would be an absurd situation where even though the asset is capable of carrying power and even as per the case of NHPC, it was used from February 2014 by NHPC and from March 2014, the NHPC injected the power into the line for transmission of power to beneficiaries, the line would be held to be commissioned only on 03.11.2015. Therefore the line was commercially used even before its actual commercial operation date – which is untenable. The commercial operation date is the date when the line was capable of being used which was 01.09.2013 for Asset II.

10.37 There is no contradiction in the declaration of COD of transmission line between Amritsar-Parbati Pooling Station (Banala) and Parbati Pooling Station (Banala) -Parbati III and COD of F-G and B-C. The declaration of COD is not based on actual flow of power. The Central Commission has

decided the commercial operation date based on when the transmission asset is ready for commercial use i.e. the transmission asset is capable of conveying power. If the contention of NHPC is accepted that the commercial operation date is only from actual flow of power, then the Regulation 8(6) of Sharing Regulations 2010 would be rendered otiose. Regulation 8(6) envisages transmission charges to be paid by generating stations until commissioning of generating station. It is trite that until commissioning of generating stations, there cannot be any actual flow of power. If the commercial operation of the transmission asset is only from actual flow of power i.e. from commissioning of the generating stations, then there is no question of payment of transmission charges by the generating station. The contention of NHPC is thus contrary to both Regulation 3(12)(c) of Tariff Regulation 2009 as well as Regulation 8(6) of Sharing Regulation.

10.38 In the case of B-C and F-G, the commercial operation is not based on actual flow of power but when the line was connected on the other side i.e. at B and at G. This has been held by Central Commission in Impugned Order dated 07.09.2016 at Para 14 at Pages 36-37 of Appeal Paperbook in Appeal No. 81 of 2017.

**Re: Contention No. 4 – NHPC is not liable to pay transmission charges as per the Indemnification Agreement between Powergrid and NHPC**

10.39 Powergrid has completed and commissioned the transmission assets and Powergrid is entitled to transmission charges for such transmission assets from such commercial operation date. Powergrid is a transmission licensee under Electricity Act, 2003 and is entitled to recovery of its costs. The question in the present case is whose liability it is to pay the transmission charges.

10.40 The transmission system was developed for NHPC and NHPC sought for the connectivity to the switchyard of Parbati-III so as to enable power flow from Parbati-III Switchyard letter dated 12.06.2013. In pursuance of the above letter dated 12.06.2013, the Assets were completed in all respects and the COD has been declared of all the assets as on 01.08.2013 and 01.09.2013. NHPC in its letter had stated that it was ready for commissioning in June 2013 but in fact did not commission until March 2014 despite the line being available.

10.41 The transmission assets were available to Parbati-III Generating Station to get the Start-up Power, Commissioning Power for pre-commissioning activities, undertake performance test, injection of infirm power etc. to enable declaration of the COD of Parbati III Generating Station on 24.03.2014.

10.42 NHPC itself admits that it needs the transmission assets for pre-commissioning activities and that it needs the transmission line for 10

months prior to commissioning. Further NHPC itself has stated in its Letter dated 12.06.2013 that it requires the 400 KV line and supply of 400 KV power for various activities. Thus, NHPC's stand that it does not need the 400 KV transmission line for start up power is contrary to its own letter. The need for transmission line by NHPC has also been recognized by the Central Commission in the Impugned Order at Para 11.10.43. Accordingly, when NHPC admits that it requires the transmission assets and had requested for them to be commissioned at the earliest, it is not feasible for NHPC to then contend that it would not pay the transmission charges for the said transmission assets. There is no provision in the Agreement that the transmission facilities to NHPC would be provided free of cost. Indeed, there cannot be any such provision.

10.44 The requirement of NHPC to pay transmission charges for the transmission assets is further clarified by Regulation 8(6) of the Sharing Regulation, 2010:

*“(6) For Long Term Transmission Customers availing power supply from inter-State generating stations, the charges attributable to such generation for long term supply shall be calculated directly at drawal nodes as per methodology given in the Annexure-I. Such mechanism shall be effective only after commercial operation of the generator. Till then it shall be the responsibility of the generator to pay transmission charges.”*

Thus, NHPC is liable for payment of transmission charges until 24.03.2014.

10.45 The liability on the generator provided for in Regulation 8 (6) of the Sharing Regulations, 2010 have to be implemented notwithstanding anything contained to the contrary in any contract between Powergrid and NHPC. Regulation 14 clearly states that the existing contract shall stand re-aligned to the Regulation and the Transmission Service Agreement envisaged under Regulation 14:

*“14.All existing users of the ISTS and the Transmission Licensees shall ensure that their existing contracts are realigned to these regulations within a period of 60 days from the date of notification of the Transmission Service Agreement insofar as the elements related to the determination of Point of Connection transmission charges, allocation of losses, billing and collection, provision of information and any other matter that requires amendment or realignment consequent to these Regulations.”*

10.46 The Constitution Bench of the Hon’ble Supreme Court in PTC India Limited v. Central Electricity Regulatory Commission (2010) 4 SCC 603 has held that the Regulations framed by the Central Commission would override the existing contracts:

*“58.....A regulation under Section 178 is in the nature of a subordinate Legislation. Such subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an Order of the Central Commission under Section 79(1)(j).*



*92. Summary of our Findings:*

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

10.47 Therefore, it is not open to NHPC to rely on the Indemnification Agreement to contend contrary to the Sharing Regulations 2010.

10.48 The reliance on indemnity clause is in any event not relevant to the present issue. The Indemnity Agreement relates to construction period and does not apply after commissioning of the transmission assets. The indemnity clause relates to Interest During Construction and Incidental Expenditure during Construction to be paid in case of delays. Both these elements relate to period prior to commissioning of the respective project i.e. in case the commissioning of the transmission assets of Powergrid is delayed due to the delay by NHPC, NHPC would be liable to indemnify Powergrid. However, this would not arise in the present case, where the transmission asset has been commissioned. Once the transmission asset is commissioned, the transmission licensee is entitled to payment of transmission charges. This transmission charges has been held to be payable by the associated generating station until the commissioning of the generating station and thereafter by the beneficiaries of the generating station.

10.49 The contention of NHPC that the Central Commission has taken a contrary stand in the subsequent decisions in Petition No. 411/TT/2014 and 156/TT/2015 is erroneous. At the outset, it is submitted that both the Petitions relate to Tariff Regulations 2014 and not Tariff Regulations 2009. Further the facts in the said decisions were completely different. In the said cases, the transmission assets could not be commissioned due to delays by the generating station or another transmission licensee. In the case of Powergrid transmission asset (B-C in the map) in Petition No. 411/TT/2014, the asset was not commissioned until the commissioning of the connecting transmission lines by PKTCL i.e. at B point. Since the line was not connected at B, it could not be held to be commissioned. Similarly, for PKTCL in Petition No. 156/TT/2015, the bays at Parbati II Pot head yard of NHPC was not ready. However, in the present case, the transmission line being C-D-E-F was connected on both ends i.e. C at the NHPC switchyard and F at Parbati Pooling Station. This has not been disputed by NHPC. Thus, all transmission assets in issue in the present case have been commissioned on 01.08.2013/01.09.2013, in contrast to the case in Petition No. 411/TT/2014 and 156/TT/2015 wherein the assets were not commissioned.

10.50 The liability for payment is different in case the assets are commissioned and if they are not commissioned. There is nothing contrary in the decisions of the Central Commission. There is no question of payment of transmission

charges until the transmission asset is commissioned and Regulation 8(6) of the Sharing Regulations 2010 therefore have no application in the said cases. In such circumstances, the Central Commission considered the indemnity agreement providing for payment of interest during construction and incidental expenditure during construction. Once the transmission asset is commissioned, there is no question of payment of interest during construction or incidental expenditure during construction which by their very definition relate to pre-commissioning period.

10.51 The contention of NHPC that since the Central Commission is considering the issues in Petition No. 411/TT/2014 and 156/TT/2015 in review, the present matter should be remanded back is frivolous. If the said contention is accepted, then the Appellate Court would remand the decision of the lower court, every time any party cites such decision as precedent in any other proceeding before the lower court. This is not acceptable. The Central Commission has passed the impugned orders and the same cannot be re-considered by Central Commission merely because in a subsequent case, parties are relying on the impugned order.

**Re: Contention No. 5 – The Transmission system is not exclusively for NHPC’s Parbati III generating station and the transmission charges should be shared by other generators in the area**

10.52 The transmission assets in question are part of the associated transmission system for Parbati III generating stations and were not developed for any

other generating station. Merely because there are other generating stations in the area does not mean that the transmission system was developed for the said stations. It is specifically denied that Parbati II, Sainj HEP or Koldam Station were evacuating power through the said system. The evacuation of Koldam generating station is downstream through Nalagarh.

10.53 The fact that the transmission system in issue is associated with Parbati III generating station is clear from the following:

- e. Administrative Approval dated 31.07.2006 granted by Ministry of Power to Powergrid for ‘implementation of Transmission System associated with Parbati-III HEP’ and providing for scope of work ;
- f. Letter by Powergrid dated 09.08.2009 intimating the grant of sanction for implementation of ‘Transmission System associated with Parbati-III HEP’ ;
- g. The Petition was filed by Powergrid for Associated Transmission System associated with Parbati III HEP;
- h. Letter dated 18.07.2013 by Powergrid informing NHPC of the commissioning of 400 KV transmission system associated with Parbati III HEP;
- i. Indemnification Agreement dated 22.07.2005 recognize that the associated transmission system (ATS) was for Parbati III generating station Even in the Appeal, NHPC has accepted that the scope of

Powergrid was to develop the associated transmission system of Parbati III;

10.54 NHPC itself in its Letter dated 12.06.2013 refers to the transmission assets as ‘Associated Transmission lines for Parbati-III Project, Dist. Kullu, H.P’ and sought for completion of the same for commissioning of its project. It is therefore not open to NHPC to now claim that the transmission system was not associated with only Parbati III HEP.

10.55 The Central Commission has recognized that the transmission assets were intended for evacuation from Parbati III generating station at Para 14 at Page 41-42. However, the Central Commission had rightly held that in case any other generating station used the transmission line, the transmission charges should be paid by them. However, Powergrid has clarified that the transmission system has not been used by any other generating station. Further NHPC has also failed to demonstrate that the transmission system was either used or intended to be used by any other generating station. NHPC has made allegations that scope of work covers other generation projects without any proof or evidence. Further NHPC has not offered any explanation for various documents on record which demonstrate the transmission system was associated with Parbati III.

**11. The submissions of the learned counsel, Mr. Amit Kapur , appearing for Respondent No. 3 - Parbati Koldam Transmission Company Limited(PKTCL) in Appeal Nos. 281 of 2016 and 81 of 2017 are as follows :-**

11.1 The PKTCL is a joint venture company of PGCIL and Reliance Infrastructure Limited (“*R-Infra*”) with an equity participation of 26% and 74% respectively. PKTCL has entered into an Implementation Agreement with Central Transmission Utility (“*CTU*”) i.e. PGCIL on 23.11.2007, for competition of the following transmission lines and is governed by the provisions set out in the Implementation Agreement:-

- (a) 400 kV D/C Koldam Ludhiana Transmission Line
- (b) 2 X 400 kV S/C Parbati Koldam Transmission Lines along with D/C portion.

In the present Appeal, the portion of PKTCL’s elements under discussion is one of the two single circuit lines emanating from Parbati-II HEP to Koldam switchyard via LILO point of Banala Pooling Station (which has also been termed as Circuit-II).

***Re. Original order dated 26.05.2015 in (PGCIL’s Tariff Petition no. 91/TT/2012) merged with order dated 29.12.2015 (NHPC’s review petition 25/RP/2015), and its implications.***

11.2 Review Petitions were filed by PGCIL (19/RP/2015, dated 28.07.2015 with NHPC as Respondent no. 18) and NHPC (25/RP/2015, dated 12.11.2015

with PGCIL as Respondent No. 1). Both review petitions were pending and heard contemporaneously (PGCIL's Review Petition was last heard on 21.12.2015 while NHPC's Review Petition was last heard on 10.12.2015). CERC chose to issue specific orders on each review petition specific to that petition only. Even if the doctrine of merger be applied, as on 29.12.2015/21.07.2016 (Order disposing 25/RP/2015) as also on 07.09.2016 (Order disposing 19/RP/2015) the order in place was the CERC Order dated 26.05.2015 as modified to the extent of para 23 only. Rest of the Order dated 26.05.2015 remained intact in the eyes of law and in so far as the latter order deals with issues other than para 23 there is no infirmity other than a mere procedural technicality. NHPC appear to be clutching at straws in the wind.

***Re: Liability to pay transmission charges accrue only upon commissioning of the generating station ( i.e. date of COD of Parbati-III). Transmission charges are only payable once the entire Asset-II along with the associated transmission lines is commissioned. The evacuation lines 'b-a-ending at LILO of Parbati Polling station' and portion 'g-h' was not available on the date of commissioning of Parbati-III.***

- 11.3 The present case relates to a portion 'c-d-e-f' of Asset-II which was completed on 01.09.2013. The Central Commission by way of the Impugned Order has declared the COD of the said portion of Asset-II as 01.09.2013. The said portion of Asset-II could not be put to use from 01.09.2013 to 23.03.2014, due to non-readiness of NHPC's Parbati-III HEP.

11.4 The definition of COD as per Regulation 3(12)(c) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 is set out below:-

*“(c) in relation to the transmission system, the date declared by the transmission licensee from 0000 hour of which an element of the transmission system is in regular service after successful charging and trial operation.*

*Provided that the date shall be the first day of a calendar month and transmission charge for the element shall be payable and its availability shall be accounted for, from that date:*

*Provided further that in case an element of the transmission system is ready for regular service but is prevented from providing such service for reasons not attributable to the transmission licensee, its suppliers or contractors, the Commission may approve the date of commercial operation prior to the element coming into regular service.”*

11.5 As per the above, COD was correctly declared by the Central Commission for that portion of asset which was expedited at the behest of NHPC and was capable of being put to use. Portion ‘c-d-e-f’ of Asset-II was completed at both ends once the bay at NHPC’s end was ready on 28.08.2013. Accordingly COD of the said asset was declared as 01.09.2013. Parbati-III HEP of NHPC achieved COD only on 24.03.2014, and accordingly, the transmission charges for delay from the COD of this element i.e. 01.09.2013 till COD of NHPC’s Parbati-III HEP i.e. 24.03.2014 was directed to be



borne by NHPC in accordance with Regulation 8(6) of the CERC (Sharing of Inter State Transmission Charges and Losses) regulations, 2010 as reproduced herein below:-

8. *Determination of specific transmission charges applicable for a Designated ISTS Customer-*

(6) *For Long Term customers availing supplies from inter-state generating stations, the charges payable by such generators for such Long Term supply shall be billed directly to the respective Long Term customers based on their share of capacity in such generating stations. Such mechanism shall be effective only after “commercial operation” of the generator. **Till then, it shall be the responsibility of generator to pay these charges.***

11.6 NHPC has contended that only a part of Asset-II was completed by PGCIL at the time of COD of Parbati-III HEP and Circuit-II of Asset-II was not available until 03.11.2015. In this context it is submitted that as per the Implementation Agreement dated 23.11.2007 executed between PKTCL and PGCIL, Circuit-II of Asset-II, being constructed by PKTCL was never envisaged to be used for evacuation of Power from Parbati-III HEP. As per the Transmission license granted by the Ld. Central Commission, PKTCL was only required to construct two (2) Single Circuit lines from Parbati-II HEP to Koldam and one (1) Double Circuit Line from Koldam to Ludhiana.

11.7 It was only in the 26<sup>th</sup> Standing Committee on Power System Planning of Northern Region (“*Standing Committee*”) meeting held on 13.10.2008 that a section of Parbati-II to Koldam Transmission Line, Circuit-II (starting from LILO point of Parbati-III HEP to LILO point of Banala Pooling Station) was required for the evacuation of power from Parbati-III HEP at the behest of NHPC. Accordingly, the Implementation Agreement was amended and as per the Amended No. 2 (para 4.0) to Implementation Agreement issued by PGCIL, PKTCL was required to construct this small section of Parbati-II to Koldam Transmission Line (Circuit-II) from LILO point of Parbati-III HEP to LILO point of Banala Pooling Station matching with the commissioning of Parbati-III HEP.

11.8 Further, during the Long Term Access meeting held along with the 32<sup>nd</sup> Standing Committee on Power System Planning meeting on 31.08.2013, it was suggested that section of Parbati – Koldam Transmission Lines (both Circuit-I and Circuit-II) starting from Parbati-II to LILO point of Banala Pooling Station (Circuit-I) and from Parbati-II to LILO point of Parbati-III HEP (Circuit-II) can be used for evacuation of Power from Sainj HEP as well as an N-1 condition in case the section being used for evacuation of power from Parbati-III HEP is not available. However, in the said meeting it was also decided that Circuit-II was required only by December’ 2014, i.e. matching with the commissioning of Sainj HEP. Therefore, there was no

requirement of Circuit-II for Parbati-III HEP until 31.08.2013 (date of the said meetings), and Circuit-II was required to be completed by December'2014 matching with the commissioning of Sainj HEP.

11.9 NHPC was well aware of the commissioning schedule of PKTCL's Transmission line, as the same was discussed in the 32<sup>nd</sup> Standing Committee meeting. However, NHPC failed to complete its bays for connection of PKTCL's Transmission line. In addition to this, NHPC tried to evade its responsibility of commissioning its bays altogether, by writing a letter dated 18.08.2015 to CTU, wherein NHPC informed that even though the Transmission Line from Parbati-III HEP to Parbati Pooling point via Parbati-II had been commissioned, the same shall not come into operation until September' 2018 due to the non-readiness of NHPC's Parbati-II HEP which was already substantially delayed from its original commissioning schedule. The said letter was written by NHPC after PKTCL's Transmission Line was ready and available for commissioning, in an attempt to hide its failure to complete the associated bays, and also because NHPC did not require the balance section of the Transmission Line.

11.10 The delay in commissioning of PKTCL's Transmission Line is squarely attributable to NHPC, NHPC failed to make ready the bays in its Switchyard which were to be used for connecting PKTCL's Transmission Line. It is submitted that the same has also been unequivocally held by the Central

Commission in its order dated 29.12.2016 passed in Petition No. 156/TT/2015, holding that PKTCL was not able to put into use its Transmission Line due to delay on part NHPC. Relevant paras of the order dated 29.12.2016 are extracted herein below:-

*“24. It is observed that Ckt.-I and Ckt.-II of Parbati-III-Koldam line were originally envisaged to be commissioned with the 400 kV bays in Parbati-II switchyard of NHPC. On account of delay in commissioning of 400 kV bays in Parbati-II switchyard of NHPC, the Ckt.-I and Ckt.-II of Parbati-III-Koldam line were put into use only on 3.11.2015 through an alternate arrangement. Since the delay is attributable to the non-commissioning of 400 kV bays by NHPC, we are of the view that the IDC and IEDC from 30.6.2015 for instant assets till 2.11.2015 shall be borne by NHPC...” [Para 24 @ pg. 14-15 of Order dated 29.12.2016 passed in Petition No. 156/TT/2015]*

11.11 In the Impugned Order the Central Commission has clearly held that portion ‘c-d-e-f’ of Asset-II was required for evacuation from Parbati-III HEP and the same was completed on the request of NHPC on 01.09.2013. PKTCL had provided the section required for evacuation of Parbati-III HEP (i.e. portion ‘d-e’) matching the commissioning of section ‘c-d-e-f’ of Asset II. Therefore, there was no delay on part of PKTCL in completion of its section.

***Re: Alleged differential treatment for part assets of Asste-II (c-d-e-f), which is connected to NHPC’s Parbati-III power station, being declared under commercial operation while rest of Asset-II (‘b-c’ and ‘f-g’) connected to***

*PKTCL system is not being so declared. Further PKTCL's liability being confined to payment of IDC and IEDC only.*

11.12 NHPC is trying to mislead this Tribunal by raising issues which are not a part of the present Appeal. It is submitted that the Central Commission by way of its order dated 30.07.2016 passed in Petition No. 411/TT/2014 had directed PKTCL to pay IDC and IEDC to PGCIL for the period from 30.06.2014 till the COD of LILO.

11.13 The Central Commission had considered the provisions of the Implementation Agreement executed between PKTCL and PGCIL, which provided that PKTCL's transmission line was to be commissioned by 30.06.2014. However, NHPC had specifically requested PGCIL for commissioning of Asset-II by June 2013 by its letter dated 12.06.2013. Therefore it was only at the insistence of NHPC that PGCIL made all efforts and commissioned Asset-II by 01.09.2013.

11.14 PKTCL is a transmission licensee and not a beneficiary. The liability to pay charges for both are different. As such the question of parity does not arise at all in the present case. PKTCL has already filed a Review Petition No. 52/RP/2016 before the Ld. Central Commission seeking review of the Order dated 30.07.2016 regarding liability of PKTCL to bear any charges including IDC and IEDC for delay in achieving COD by PGCIL. The said Review Petition was reserved for judgment on 11.11.2016.

*Re: The declaration of commercial operation of lines c-d-e-f not being proper since they have only been back charged with no communication system and not being in regular use.*

11.15 The above issue is between NHPC and PGCIL. PKTCL's role in respect of Asset-II is limited to construction of portion d-e which was duly commissioned on 01.09.2013 (i.e. before the COD of Parbati-III) as declared in Petition no. 297/TT/2013.

12. **We have heard at length the learned senior counsel appearing for the Appellant and the learned counsel appearing for the Respondents and we have gone through carefully the written submissions and also considered the relevant material on record. The following principle issues emerge in Appeal Nos. 281 of 2016 and Appeal No.81 of 2017 for our consideration:-**

**Issue No.1:** The applicability of indemnification agreement signed between the NHPC and Powergrid;

**Issue No.2** Declaration / consideration of COD for various assets / elements without putting the associated communication system in place;

**Issue No.3:** Adoption of different approaches in similar cases for allowing recovery of transmission charges / Idle charges;

**Issue No.4:** Sharing of transmission charges by other generators in the area for using the common transmission system.

**The issues raised by the Appellants in both the Appeals are similar in nature. Hence, we will decide these two appeals by this common judgment.**

**Our findings & Analysis :**

**12.1 Issue No.1 :**

The Appellant / NHPC has alleged that the indemnification agreement signed by them with Powergrid has not been considered at all by the Central Commission and no finding has been rendered on the distinct provisions of the indemnification agreement. In this regard, the Central Commission has taken note of the pleas raised by NHPC but not dealt with them at all in the impugned order NHPC has contended that under Para 11 of the impugned order, only one aspect i.e. the gap of 10 months envisaged in the indemnification agreement between commissioning of the transmission system and commissioning of the power project has been considered by the Central Commission. NHPC has further submitted that they should not be held liable to pay the transmission charges for the period from 01/09/2013 to 23.04.2014 as the said period was prior to the date of commercial operation of the generating units of Parbati-III HE Project. Their argument is primarily based on the provisions of the indemnification agreement which envisaged that transmission lines were to be available to NHPC 10 months prior to the commercial operation of the generating units. The generating units were declared under commercial operation on 23.04.2014 and the ten months prior period for Powergrid to provide transmission facilities was accordingly June, 2013. Therefore, there is no requirement to pay any

charges by NHPC. In any event the liability of the NHPC is restricted to pay the IDC/IEDC for the period consistent with the decision taken by the Central Commission in other similar cases.

12.2 *Per contra*, the Respondent No.1 –Powergrid have submitted that the reference transmission system was developed for NHPC so as to enable power flow from Parbati-III switchyard and in pursuance of the NHPC letter dated 12.06.2013, the assets were completed in all respects with the declaration of COD as 01.08.2013 /01.09.2013. In fact, vide above letter, NHPC had stated that it was ready for commissioning in June, 2013 but actually, could not commission the generating units until March, 2014 despite the lines being available. Powergrid has further contended that as per request of NHPC vide their letter mentioned above, the transmission assets were commissioned as per their desired schedule and it may not be feasible for NHPC to contend that they would not pay the transmission charges for the said transmission assets. There is no provision in the agreement that transmission facility to NHPC would be provided free of cost and actually there cannot be any such provision. The requirement of NHPC to pay transmission charges for the transmission assets is further clarified by CERC Regulation 8 (6) of the Sharing Regulation, 2010 which is reproduced below:-



*“(6) For Long Term Transmission Customers availing power supply from inter-State generating stations, the charges attributable to such generation for long term supply shall be calculated directly at drawal nodes as per methodology given in the Annexure-I. Such mechanism shall be effective only after commercial operation of the generator. Till then it shall be the responsibility of the generator to pay transmission charges.”*

12.3 Powergrid has further submitted that the liability on the generator provided in above Regulation has to be implemented notwithstanding anything contained to the contrary in any contract between Powergrid and NHPC. In fact, Regulation 14 clearly states that the existing contract shall stand re-aligned to the Regulation and the Transmission Service Agreement (TSA) envisaged under Regulation 14. Powergrid has further cited the judgment of the Hon’ble Supreme Court in PTC India Ltd. Vs. CERC (2010) 4 SCC 603 which held that the Regulations framed by the Central Commission would override the existing contracts. It is argued by Powergrid that the indemnity clause is, in any event, not relevant to the present case as the same relates to construction period and does not apply after commissioning of the transmission assets. The IDC and IEDC payable in case of delays relate to the period prior to commissioning of the respective project but the same would not arise in the present case where the transmission assets have already been commissioned. Powergrid has also stated that there is nothing contrary in the decisions of the Central Commission and there is no question

of paying the transmission charges until the transmission asset is commissioned.

**Our Findings:-**

12.4 It is a general practice that a time margin is provided in the commissioning of transmission system and generating units so as to enable completion of pre-commissioning tests of generating units prior to the final synchronisation of the generating plants with the grid. In the present case too, as per the Indemnification Agreement, a gap of ten months was envisaged between the commissioning of the transmission system and the generating units of Parbati-III HE Project. Indemnification Agreement further incorporates the reciprocal obligations between the parties (NHPC & Powergrid) in case of delay in completion of their respective assets i.e. transmission system of Powergrid and generating units of NHPC. We have considered the contentions of the learned counsel appearing for the Appellant and the Respondents and find that the Central Commission has considered only a limited provision of the Indemnification Agreement namely the gap in commissioning of transmission system and generating units (10 months) but has not analysed the same in their impugned order, as being generally done by the Central Commission in similar cases. It is accordingly necessary to take full cognisance of the indemnification agreement and its applicability in the present case in the interest of justice and equity.

13. **Issue No.2 :-**

13.1 The Appellant (NHPC) has alleged that the impugned order completely errs in failing to notice their plea regarding commissioning on 1.8.2013 / 1.9.2013 which is completely falsified by the fact that the communication system in respect of said transmission assets was not in place on that date. In fact, the Tariff Petition filed by the Respondent No.1 (Power Grid) did not even fill up the relevant Form-2 in respect of the communication system and was left blank. No particulars, whatsoever, was given by Power Grid in the Tariff Petition relating to the communication system although a bare averment was made that communication system was an intrinsic part of the transmission system and the same was commissioned along with Asset –I to Asset-III. NHPC has further submitted that their letters which clearly establish that the communication system was not in place, were annexed with the Review Petition of 25 / RP / 2016 but the Central Commission has not considered the same in the impugned order. The learned counsel appearing for the Appellant, NHPC, has further contended that the joint minutes of meeting dated 12.10.2013, duly signed by representative of PGICL, NHPC and the concerned agencies involved in setting up and testing of the communication system clearly established beyond doubt that the communication system was not in place on 1.8.2013 / 1.9.2013. NHPC has alleged that there is a serious infirmity in the impugned orders in both

appeal nos. 281/2016 and 81/2017 inasmuch as tariff has been granted even prior to the date on which the communication system was commissioned. The relevant facts in this regard were not fully placed on record by PGCIL neither before the Central Commission nor before this Tribunal.

13.2 *Per contra*, the learned counsel appearing for Respondent (Powergrid) has submitted that in the Tariff Regulations 2009, there is no separate commercial operation date for communication system but only for elements of transmission system which were recognized as transmission lines or sub-stations. However, there was a provision for commercial operation date for communication system (Regulation 4(4)) separate from the elements of Transmission System (Regulation 4(3)) in the Tariff Regulations, 2014. Since the Transmission Assets in issue were commissioned under Tariff Regulations 2009, Powergrid could not have shown the communication system as independent element, which was provided for the first time only under Tariff Regulations 2014. Since communication system were not separately identified as an Asset, the same were part of sub-station or transmission line as the case may be. Powergrid further submitted that this is also clear from the expenditure incurred by Power Grid which shows expenditure incurred prior to COD inclusive of PLCC. The Central Commission has also accepted the above in the impugned order as this was the consistent practice at that time.

13.3 The learned counsel appearing for the Respondent (PGCIL) has further been contended that there is no requirement of any certification by any agency for commercial operation of any element of transmission system within the control period of Tariff Regulations 2009. It has been introduced only under Tariff Regulations 2014. Powergrid has also pointed out that in the NRPC Meeting held on 12 and 13<sup>th</sup> September, 2013 when NHPC had stated that one unit of Parbati III was expected to be commissioned in September 2013, no issue of communication system was raised at that stage. Powergrid has also argued that if the communication system was not there as alleged by NHPC and it is an essential part of the transmission assets as required by NHPC, then NHPC could not have expected to commission the generating station in September, 2013 without the installation of the communication system.

13.4 The Respondent No.3 (PKTCL) has submitted that the above issue is between NHPC and Powergrid and their role in respect of Asset-II is limited to construct the portion 'd-e' which was duly commissioned on 01.09.2013 (i.e. before COD of Parbati-III project) as declared in Petition No.297/TT/2013.

**Our Findings:-**

13.5 The claim of the Appellant, NHPC that the communication system associated with the reference transmission lines was not commissioned as on

1.8.2013/1.9.2013 is primarily based on the contents of their letters addressed to Powergrid for expediting the completion of communication system and also, the joint minutes of meeting dated 12.10.2013 between the representative of PGCIL, NHPC, SIEMENS, Banala & BPL Telecom for expediting the completion of communication system. NHPC has reiterated that during October, 2013, all the associated parties have reviewed the progress of work and identified various balance works for completion of the communication system. Then, the claim of Powergrid to have completed communication system along with Assets I-III on 1.8.2013/1.9.2013 does not appear to be logical and factual. It is relevant to note that as per Regulation, 2009, there was no specific requirement for declaration of COD of communication system separately. However, it is an established fact that the communication system being the intrinsic part of transmission system has to be put in place before COD of the transmission assets. Therefore, as per the documents placed on record by the rival parties, the matter needs to be re-examined afresh for arriving at the actual COD of transmission assets taking into consideration the actual date of completion of associated communication system.

14. **Issue No.3 :-**

14.1 The Appellant, NHPC has alleged that the impugned orders of both the appeals are completely inconsistent with what has been held by CERC itself

in Review Petition No. 156/TT/2015 order dated 29.12.2016, filed by Parbati Koldam Transmission Co. Ltd. (PKTCL) seeking tariff in respect of Section a-f and a-b . NHPC has further submitted that as per above order, the findings of CERC under Para 24 reads as follows:-

***“Para 24. It is observed that Ckt-I and CKT-II of Parbati – III Koldam line were originally envisaged to be commissioned with the 400 KV bays in Parbati-II switchyard of NHPC. On account of delay in commissioning of 400 KV bays in Parbati-II switchyard of NHPC, the Ckt-I and Ckt.-II of Parbati-III Koldam line were put into use only on 3.11.2015 through an alternate arrangement. Since the delay is attributable to the non-commissioning of 400 kV bays by NHPC, we are of the view that the IDC and IEDC from 30.6.2015 for instant assets till 2.11.2015 shall be borne by NHPC. With effect from 3.11.2015, the transmission charges for the instant assets shall be serviced in accordance with Sharing Regulations. The IDC and IEDC born by NHPC shall not be capitalized by NHPC in its book of accounts for the purpose of claiming tariff for its generation from Parbati HEPs as well as for transmission services by the petitioner.”***

It is evident from the above that the liability of NHPC is to bear only the charges on account of IDC and IEDC during the period 30.06.2015 – 2.11.2015. Thus, there is a distinguished inconsistency in the approach of the CERC from case to case. It is further brought out by NHPC that a Review Petition in respect of the said Petition No. 156/TT/ 2015 is already pending before the CERC and as such, the entire issue is still at large before the Commission for a complete / comprehensive adjudication and needs reconsideration.

14.2 *Per contra*, the Respondent No.1 (Powergrid) has contended that the contention of NHPC regarding the contrary stand by Central Commission in subsequent decisions in Petition No.411/TT/2014 and 156/TT/2015 is erroneous and illogical. Both the above petitions relate to Tariff Regulations 2014 and not Tariff Regulations 2009. Besides, the facts in the said petitions were completely different. Powergrid has further submitted that in the said cases, the transmission assets could not be commissioned due to delays by the generating station or another transmission licensee. However, in the present case, the transmission line being C-D-E-F was connected on both ends i.e. C at the NHPC switchyard and F at Parbati Pooling Station. Thus, all transmission assets in issue in the present case have been commissioned on 01.08.2013/01.09.2013, in contrast to the case in Petition No. 411/TT/2014 and 156/TT/2015 wherein the assets were not commissioned.

14.3 Powergrid has further brought out that there is nothing contrary in the decisions of the Central Commission and there is no question of payment of transmission charges until the transmission asset is commissioned. Once the transmission asset is commissioned, there is no question of payment of IDC or IEDC which by their very definition relate to pre-commissioning period.



**Our Findings :-**

14.4 We have gone through the rival contentions of the learned counsel appearing for both the parties carefully on this issue and find that the findings of the Central Commission in the present case and in the subsequent cases have a large variance. NHPC alleges for the differential treatment in their case while comparing with the subsequent cases of PKTCL and PGCIL. On the other hand, the Respondents have submitted that the facts in the present case and those subsequent cases of PKTCL are quite different and there is no contrast in the decision taken by the Central Commission. It is, however, relevant to opine that the findings and decisions of the Central Commission have to be consistent and uniform based on principle of natural justice and equity in all the cases as far as liability for delay in commissioning of the respective assets of the parties is concerned. It is further noted that a review petition in respect of the said petition No.156/TT/2015 is pending before the CERC and the entire issue, as such, needs comprehensive adjudication.

15. **Issue No.4 :-**

15.1 The learned counsel appearing for the Appellant has contended that there are common assets used for evacuation of power from other Hydro stations / pooling stations such as Parbati –II, Sainj, Koldam etc. in the region apart

from Parbati-III Project of NHPC. Therefore, the cost has to be suitably apportioned between all the generating stations. NHPC has further submitted that the Central Commission has recorded their contention in the impugned order dated 30.07.2016 in Petition No. 411/TT/2014 but has totally ignored its own findings and has fastened the entire liability upon NHPC alone which is not only contrary to the fact but also against the settled practice. The Appellant event proceeds further in pointing out that never before has the NHPC been fastened with this kind of liability for idle period whereas admittedly, in all generating stations, the transmission system is generally completed before the generating units. NHPC has alleged that the Central Commission has proceeded merely on presumptions in the absence of NTPC and PKTCL participating in the proceeding and the impugned order does not cite any regulation on the basis of which liability has been fastened solely on NHPC alone. This is also evident from the impugned order which records as under:-

*“the Petitioner has made NHPC, NTPC and PKTCL as parties to the Petition and has served copies of the pleadings on them. However, NTPC and PKTCL have neither filed any reply nor participated in the proceedings. Therefore, there is no material on record which substantiates the Claim of NHPC that Asset I and III have been used by NTPC and PKTCL or any other generator during the period 1.8.2013 to 23.3.2014.”*

15.2 *Per contra*, the learned counsel appearing for the Respondent No.1 (Powergrid) has submitted that the transmission asset in question are part of

the associated transmission system for Parbati-III Project and were not developed for any other generating station. Merely because there are other generating stations in the area does not mean that the transmission system was developed for the said stations namely Parbati-II, Sainj, Kodlam etc.. Powergrid has specifically denied that the above stations were evacuating power through the said transmission system developed for Parbati-III Hydro Project. The evacuation of power from Koldam generating station is downstream through Nalagarh. Powergrid has further contended that NHPC has failed to demonstrate with proper proof or evidence that the transmission system was either used or intended to be used by any other generating station.

**Our findings:-**

15.3 We have noted and gone through the rival contentions of the learned counsel appearing for the Appellant and Respondents. It is a matter of general practice that transmission system in an area or valley is planned and implemented in an integrated manner considering the development of present and future projects so as to effect economy of scale and right of way (row) etc. The transmission charges payable by each generating project are decided accordingly considering the extent of use of the common facilities. In the instant case, the transmission assets in question have been developed exclusively for Parbati-III Hydro Project of NHPC and other Hydro Projects

namely Parbati-II, Sainj, Koldam etc. have their own evacuation system and admittedly not the transmission assets of Parbati-III HE Project. Powergrid has categorically submitted the above contentions, before the Central Commission during its proceedings which has also been recorded by CERC in the impugned order. We, thus, find no legal infirmity or error in the impugned order of the Central Commission to this account.

16. **Summary of findings :-**

After thorough evaluation of the oral and documentary evidence available in the file and taking into consideration the submission of learned counsel appearing for both the parties, we are of the considered opinion that the issues raised in the present appeals need to be apprised afresh considering the facts arising out of various issues discussed hereinabove and also taking into consideration the additional submissions by the Appellant in support of their contentions regarding COD of various assets and payment of transmission charges. Hence, the Appeals filed by the Appellant succeed in part and the impugned order passed by the Central Commission is liable to be vitiated in the interest of justice and equity.

**ORDER**

For the forgoing reasons, as stated above, we are of the considered view that the issues raised in the present appeals being Appeal No. 281 of 2016 and 81

of 2017 have merits. The Appeals filed by the Appellant are allowed. The impugned order passed by Central Electricity Regulatory Commission dated 21.07.2016 in Petition No. 91/TT/2012 and the order dated 07.09.2016 in Review Petition No.19/RP/2015 are hereby set aside.

The matter stands remitted back to the Central Commission with the direction for fresh consideration in accordance with law after affording reasonable opportunity to both the parties and dispose off as expeditiously as possible at any rate within a period of six months from the date of appearance of the parties.

The Appellants and Respondents are directed to appear personally or through their counsel on 16.08.2018 before the Central Commission without further notice to collect necessary date of hearing.

No order as to costs.

Pronounced in the Open Court on this 16<sup>th</sup> day of July, 2018.

**(S.D. Dubey)**  
**Technical Member**

**(Justice N.K. Patil)**  
**Judicial Member**

**REPORTABLE / ~~NON-REPORTABLE~~**

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