

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)**

APPEAL NO. 332 of 2016 &

IA Nos.706 of 2017 & 699 of 2017

Dated: 18th January, 2019

**PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

IN THE MATTER OF:

Nuclear Power Corporation of India Limited

.....Appellant

VERSUS

1. Central Electricity Regulatory Commission

2. RAVP Transmission Company Limited

3. Power Grid Corporation of India Ltd.

..... Respondent(s)

4. U.P. Power Corporation Ltd.

5. AD Hydro Power Ltd.

6. Haryana Power Purchase Centre

7. Punjab State Power Corporation Ltd. (PSPCL)

8. Himachal Sorang Private Ltd.

9. Adani Power Limited

10. Jaipur Vidhyut Nigam Limited

11. Ajmer Vidyut Vitran Nigam Limited

12. Jodhpur Vidyut Vitran Nigam Limited

13. Lanco Anpara Power Limited

14. Lanco Green Power Private Limited

15. Power Development Department

16. North Central Railway

17. Jaiprakash Power Ventures Limited

18. BSES Yamuna Power Limited

19. BSES Rajdhani Power Limited

20. Tata Power Delhi Distribution Limited

21. New Delhi Municipal Corporation

22. UTC Chandigarh

23. PTC (Budhil), PTC Limited

24. PTC (Everest), PTC Limited

25. Uttaranchal Power Corporation Ltd.

26. Himachal Pradesh State Electricity Board

27. Power Grid Corporation of India Ltd.

28. Power Grid Corporation of India Ltd.

.....Proforma Respondent(s)

Counsel for the Appellant(s) : Mr. Ramji Srinivasan, Sr.Adv
Ms. Kritika Shukla
Ms. Syloha Mohapatra
Mr. Bhaskar Pandit
Mr. Sandeep Sarwate (Rep.)

Counsel for the Respondent(s) : Mr. Sethu Ramalingam for R-1

Mr. Sanjay Sen, Sr. Adv.

Mr. Deep Rao

Mr. Divyanshu Bhatt

Mr. Arjun Agarwal

Mr. Apoorva Misra for R-2

Ms. Sakie Jakaria for R-3

Mr. Pradeep Misra

Mr. Suraj Singh for R-4

J U D G M E N T

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

1. The present Appeal has been filed by Nuclear Power Corporation Ltd. (hereinafter referred to as the "Appellant") under Section 111 of the Electricity Act, 2003 challenging the Order dated 20.9.2017 ("Impugned Order") passed by the Central Electricity Regulatory Commission (hereinafter referred to as the 'Central Commission') in Petition

No.43/MP/2016 whereby Central Commission has held the Appellant to be liable to bear the transmission charges of the transmission assets commissioned by the Respondent No. 2 from Scheduled Commercial Operation Date (SCOD) till commissioning of the downstream system.

- 1.1** The Appellant, NPCIL is a public limited company incorporated under the provisions of the Companies Act, 1956 which was established with the objective of operating atomic power plants and implementing atomic power projects for generation of electricity in pursuance of schemes and programmes of the Government of India under the Atomic Energy Act, 1962.
- 1.2** The Respondent No.1, i.e. CERC is the Central Commission constituted under Section 76 of the Electricity Act, 2003 (“the Act”) and exercising jurisdiction and discharging functions in terms of the Act.
- 1.3** The Respondent No. 2, RTCL is a Company incorporated under the provisions of Companies Act, 1956. It was incorporated as a special purpose vehicle under the Companies Act, 1956 by PFC Consulting Ltd. (“**PFCCL**”) as part of a Tariff Based Competitive Bidding (“**TBCB**”) process for implementing the RAPP-Shujalpur 400 kV D/C Twin Moose

ACSR transmission line project on a build, own, operate and maintain basis.

1.4 The Respondent No. 3, PGCIL is a transmission licensee and also discharging functions of the Central Transmission Utility (CTU) under the Act.

2. Facts of the Case:-

2.1 The Central Commission on 11.6.2010 notified the CERC (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010 (hereinafter referred as 'Sharing Regulations').

2.2 Consequent to TBCB process, Sterlite Grid Limited ("**SGL**") participated in the said competitive bidding process conducted by PFCCL and emerged as the successful bidder. PFCCL issued a letter of intent to SGL on 17.09.2013. In accordance with the bidding documents, SGL acquired 100% of the shareholding in the Petitioner Company by executing a Share Purchase Agreement with PFCCL and the Petitioner Company on 12.03.2014. The scope of work includes the implementing the RAPP-Shujalpur 400 kV D/C Twin Moose ACSR transmission line project on a build, own, operate and maintain basis.

- 2.3** The Central Commission on 21.2.2014 issued the CERC (Terms and Conditions for determination of Tariff) Regulations, 2014 (hereinafter referred as 'Tariff Regulations, 2014') applicable for the period from 1.4.2014 to 31.3.2019.
- 2.4** The Petitioner had entered into TSA 2013 with the LTTCs on 24.07.2013. Under the TSA 2013, the SCOD is February, 2016 (or any date that the parties thereto might otherwise agree to).
- 2.5** The Central Commission granted Transmission License to the Respondent No. 2 on 31.07.2014 and adopted the tariff discovered under TBCB under Section 63 of the Act vide order dated 23.07.2014.
- 2.6** On 15.07.2015, Order entitled "Policy for Incentivizing Early Commissioning of Transmission Projects" was issued by the Ministry of Power (MoP) with the objective of incentivizing early commissioning of transmission projects. The MoP Order provides that transmission projects including projects under implementation pursuant to a TBCB, would be entitled to transmission charges from the actual date of their commissioning where it was prior to the SCOD.
- 2.7** Under the TSA 2013, the SCOD is February, 2016 (or any date that the parties thereto might otherwise agree to). Respondent No.2 addressed

letters dated 20.07.2015 to PGCIL and NPCIL stating that the Project would be ready for charging by 15.11.2015 and accordingly, requested PGCIL and NPCIL to make the interconnecting elements ready in all respects for charging and making the Project operational. The Respondent No.2 also sent the said letters dated 20.07.2015 to the Central Electricity Regulatory Commission, the CTU, the CEA, the Western Regional Load Despatch Centre and the Northern Regional Load Despatch Centre.

- 2.8** Respondent No. 2 addressed letter dated 30.07.2015 to all the LTTCs including the Lead LTTC, namely, U. P. Power Corporation Limited stating that in light of the MoP Order, Respondent No. 2 intended to commission its transmission element before February, 2016 (the SCOD named in the TSA 2013) so as to avail of its entitlement under the MoP Order to receive transmission charges from the date of actual COD which would be prior to February, 2016. The LTTCs did not object to the Respondent No.2's said proposal to advance the date of SCOD of the Project to before February, 2016. Accordingly, the Respondent No.2 proceeded to hasten construction activity on the Project as the LTTCs had agreed to the Respondent No.2 's said proposal as per the provision for SCOD in the TSA 2013, to change the SCOD of the Project to the actual COD, if the actual COD was prior to February, 2016.

2.9 The Project was ready to be commissioned well in advance of the SCOD of February, 2016. On 18.12.2015 itself, the Respondent No. 2 intimated all the concerned stakeholders that it had declared deemed COD as of 26.12.2015 and would be entitled to the incentive under the MoP Order with effect from 26.12.2015. The Respondent No.2 also submitted the details of its Yearly Transmission Charges (“**YTC**”) for the period from October, 2015 to December, 2015 vide its letter dated 25.09.2015 to the Power System Operation Corporation Limited (“**POSOCO**”). Further, the Respondent No. 2 also submitted details of its YTC for the period from January, 2016 to March, 2016 vide its letter to POSOCO dated 13.11.2015. Pursuant to declaring the COD of the Project, the Respondent No. 2 entered into TSA 2015 and RSA. Since, the Respondent No. 2 was not paid transmission charges for the period starting from the date of its COD, that is, 26.12.2015 as per the terms of the TSA 2013, TSA 2015 and the RSA, Respondent No. 2 approached the Central Commission and filed Petition No. 43/MP/2016.

2.10 CERC vide order dated 21.9.2016 in the aforesaid petition held that the Appellant is liable to pay RTCL, transmission charges in respect of the RAPP-Shujalpur 400 kV D/C Twin Moose ACSR transmission line project from the SCOD i.e. 1.3.2016 upto the commissioning of bays to be constructed by the Appellant i.e. 11.11.2016 as the appellant was

solely responsible for the delay in commissioning of the bays.

3. Facts in Issue:-

- 3.1** Whether Respondent No.1 has passed the order in complete violation of the principles of natural justice?
- 3.2** Whether Respondent No.1, in facts and circumstances of the matter, erred in holding the Appellant liable to pay transmission charges by way of impugned order dated 21.09.2016?
- 3.3** Whether Respondent No.1, in facts and circumstances of the matter, failed to appreciate that there was no contractual agreement whatsoever on part of the Appellant to commission RAPP end bays for termination of RAPP-Shujalpur 400 kV transmission line by February 2016 neither were any financial obligations agreed upon between the parties which involves the Appellant?
- 3.4** Whether Respondent No.1, in facts and circumstances of the matter, was in error by failing to appreciate that no relief was claimed against the Appellant by Respondent No.2?
- 3.5** Whether Respondent No.1, in facts and circumstances of the matter, erred in holding that in the absence of a contractual agreement, the payment liability should fall on the entity on whose account an element is not put to use?
- 3.6** Whether Respondent No.1, in facts and circumstances of the matter,

failed to appreciate that the Appellant had de-linked the commissioning of RAPP end bays for termination of RAPP-Shujalpur 400 kV transmission line from the schedule of RAPP 7 & 8 and infact preponed the commissioning of the same.

- 3.7** Whether Respondent No.1, in facts and circumstances of the matter, failed to appreciate that the alleged delay in the commissioning of RAPP end bays for termination of RAPP-Shujalpur 400 kV transmission line wad due to factors beyond the control of Appellant?

4. Questions of Law:-

The following questions of law arise in the present appeal:-

- 4.1** Whether a direction can be given in an order which traverses beyond the pleadings and relief sought?
- 4.2** Whether in the absence of an Implementation Agreement or any other form of contractual agreement, the liability to pay transmission charges can be imposed on the entity on whose account an element is not put to use?
- 4.3** Whether liability can be imposed on a party without adjudication on the merits of the matter?

5. The learned senior counsel, Mr. Ramji Srinivasan, appearing for the Appellant has made following arguments/submissions for our consideration:

- 5.1** In March 2016, Respondent No. 2 (RTCL) filed a petition before Respondent No. 1 (namely, the Central Electricity Regulatory

Commission, also referred to as "CERC") seeking payment of monthly transmission charges for the period starting from 26.12 2015 under the agreements and order dated 15.7.2015 issued by the Ministry of Power titled "Policy for incentivizing Early Commissioning of Transmission Projects} on the ground that once the project has achieved the COD, the Respondent No. 2 incurs a number of financial liabilities which would be met by the transmission charges which Respondent No. 2 is allegedly entitled to. It is pertinent to note at this stage that no relief whatsoever was claimed against the Appellant in the petition before Respondent No. 1 and neither was any allegation or averment made with respect to the Appellant.

- 5.2** CERC vide impugned order dated 21.09.2016 allowed the petition partly in favour of Respondent No. 2, holding that the Commercial Operation Date (COD) as 1.3.2016 (i.e. the SCOD of the project) and not 26.12.2015 as claimed by Respondent No 2 .It was further held that Respondent No. 2 is entitled to transmission charges from 1.3.2016 till RAPP end bays for termination of RAPP-Shujalpur 400 kV transmission line are ready, holding the Appellant liable to pay the same. Appellant, being aggrieved and dissatisfied filed the present Appeal impugning the order dated September 21st, 2016 passed by the Respondent No. 1 in Petition No. 43/MP/2016.

5.3 CERC has failed to appreciate that neither allegation nor any relief was sought against the Appellant by Respondent No. 2 in its petition. It has been clearly held in various cases by the Hon'ble Supreme Court that the object and purpose of the pleadings and determination of issues is to ensure that the litigants come to trial with all issues clearly defined and in order to prevent the cases being expanded and shifted during trial. On this issue, Appellant has relied on following judgments: Kalyan Singh Chouhan v C.P. Joshi (AIR 2011 SC 1127), Baccha Nahar v Nilima Mandal &Ors. (AIR 2009 SC 1103) , J.K. Iron & Steel Co.Ltd. Kanpur vs. The Iron and Steel Mazdoor Union and Gujarat Urja Vikas Nigam Limited v Gujarat Electricity Regulatory Commission &Ors. (2018 ELR (APTEL) 599) wherein it was held that it is settled legal proposition that as a rule relief not founded on the pleadings should not be granted and when there is no prayer for a particular relief and no pleadings to support such a relief and when defendant has no opportunity to resist or oppose such a relief if the court considers and grants such a relief, it will lead to miscarriage of justice.

5.4 There was no contractual agreement between Appellant and Respondent No. 2 or 3 with respect to date of commissioning, whereby the Appellant had agreed that it would commission RAPP end bays for termination of RAPP Shujalpur 400 kV transmission line by February

2016. In the absence of any contractual agreement/commitment, the Appellant cannot be held responsible for non-completion of the project by such date. On this issue, reliance has been placed on M.C. Chacko v The State Bank of Travancore, Trivandrum [197011 SCR 658] Welldone Estate Projects Pvt. Ltd. vs. Today Homes and Infrastructure Pvt. Ltd. 178 (2011) DLT 118.

5.5 CERC failed to appreciate that merely because Respondent No. 2 in TSA 2013 executed with the LTTCs, stipulated that the SCOD was February 2016, the same would not bind the Appellant herein, especially when the Appellant is not a party to such an agreement. It is respectfully submitted that the Appellant had in good faith stated that complete effort would be made in order to commission the project by February 2016, however, in the event of non-completion of the same by such date would not make the Appellant liable for payment of transmission charges.

5.6 CERC failed to appreciate that the Appellant had in fact made all endeavours to commission the entire project by February 2016. In fact the construction of the 400 kV switchyard bays and erection of the bus bars and equipment in the 400 kV bays was even completed by the

month of February 2016 (the agreed date) and the construction of the reactor would be completed by next month. The balance work was commissioning of line reactors and telemetry. Telemetry was to be commissioned by respondent No.3 on deposit work basis..

- 5.7** CERC has erred in interpreting the CERC Sharing Regulations, 2010. It is submitted that Regulation 8 of the CERC Sharing Regulations, 2010 stipulates that 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. As per the said regulation, such mechanism shall be effective only after "commercial operation" of the generator and till then it is the responsibility of the generator to pay these charges. Though under this Regulation, prior to the commercial operation of the plant, the upcoming generator is required to pay the transmission charges, however, this is applicable when the generator draws commissioning power under DSM for which it makes a specific request to the concerned Regional Load Dispatch centre, in whose jurisdiction the generator is located. So far as RAPP 7&8 is concerned, no such request has been made to RLDC for drawing commissioning power and thus, in these circumstances, Appellant cannot be held liable to pay transmission charges.

- 5.8** CERC also failed to appreciate and analyse as to whether the line reactors on the Shujalpur end which was within the scope of Respondent No. 3 was ready for commissioning in February 2016 or not. Respondent No. 1 has accepted a mere assertion made on part of Respondent No. 3 that the bays were commissioned by 4.2.2016 and 28.2.2016. Assuming but not accepting that there has been a delay on part in commissioning the generator, the same was due to unavoidable reason which cannot be attributed to the Appellant. There are several contributing factors beyond the control of the Appellant which are involved in commissioning of the line reactors and telemetry.
- 5.9** The facts of the present Petition being similar to the dispute in Appeal No. 390/2017, namely Punjab State Power Corporation Limited v Patran Transmission Company Limited &Ors., the judgment dated 27.3.2018 of this Tribunal in the said appeal squarely covers the facts in issue and therefore is applicable to the present dispute. The judgment clearly lays down that in the absence of a contractual relationship, a party cannot be held liable to pay the transmission charges, regardless of the delay caused by the party. The Tribunal further held that a meeting between the parties cannot be construed to imply a contractual relationship. The Tribunal has therefore categorically decided the present issue in dispute

and has imposed liability on the State Transmission Utility (STU), who is contractually obligated to ensure the implementation of the project. Therefore, the impugned order of CERC has been passed in violation of the principles of natural justice and is contrary to the basic contractual principles and the CERC Sharing Regulations, 2010.

6. The learned counsel, Mr. Sethu Ramalingam, appearing for the Respondent No.1, CERC has made following arguments/submissions for our consideration:

6.1 Only grievance espoused in this Appeal is the fastening on the Appellant, the liability for payment of the transmission charges for the delay in commissioning of part of the transmission system which was to be developed by the Appellant. The rationale behind the Commission's decision in the impugned order came up for consideration by this Tribunal in the Appeal No. 390 of 2017. In that Appeal this Tribunal was concerned with the decision of the Central Commission in its order dated 4.1. 2017 in Petition No. 155/MP/2016, involving identical facts as in the present case.

6.2 It has been explicitly stated in the Tribunal's Judgment dated 27.3.2018 in Appeal No. 390 of 2017 that while deciding the issue in Commission's order dated 4.1. 2017 in Petition No. 155/MP/2016 impugned in the above proceedings, the Commission relied on its order dated 21.9.2016

in Petition No. 43/MP/2016 wherein the Commission had laid down the principles for such cases that the liability to pay transmission charges fall on the entity on whose account the transmission system could not be put to use.

6.3 While deciding the issue in Appeal No. 390/2017, the Tribunal had taken into consideration the following submissions of the Central Commission:

- i. The scope of Sharing Regulations as stated in Clause 3 arise when the Transmission System is used by the Designated ISTS Customers (DICs). The present case is related to the period from the SCOD until the Transmission System is used by the DICs. Accordingly, the Sharing Regulations are not applicable for the said period.

- ii. This Tribunal in its judgement dated 2.7.2012 in Appeal No. 123 of 2011 and Hon'ble Supreme Court in the judgement dated 3.3.2016 in Civil Appeal No. 9302 of 2012 in case of PGCIL Vs. PSPCL and Ors. dealt with similar case regarding second proviso to the Regulation 3 (12) of the CERC Tariff Regulations, 2009. This Tribunal has held that COD of the transmission asset in question cannot be declared in absence of sub-station including the switchgear and protection at Barh end and the transmission asset is not ready for use. Accordingly, this Tribunal has held that PSPCL which was one of the

beneficiaries cannot be fastened with liabilities for the transmission charges. The said judgement of this Tribunal was upheld by the Hon'ble Supreme Court in the above mentioned Civil Appeal.

- iii. In view of the above judgements the law is well settled that until transmission asset is put into service the beneficiaries are not liable to pay the transmission charges of the said assets. The settled law is also equally applicable to the ISTS constructed under TBCB route which are ready for being put into use and the upstream/downstream system are not ready. The Central Commission has decided this issue in its Order dated 21.9.2016 in Petition No. 43/MP/2016 (RAPP Transmission Company Ltd. Vs. PGCIL &Ors.) wherein it has laid principle for payment of transmission charges by the licensee due to whom the transmission asset cannot be made operational/ put to use due to non-readiness of upstream/downstream terminal bays. This Order of the Central Commission is under challenge before this Tribunal.
- iv. The Appellant has not questioned the entitlement of receiving transmission charges by the Respondent No. 2. As per settled law and provisions of the Sharing Regulations, DICs are not liable to pay transmission charges until the Transmission System is made

operational. It was the responsibility of the Appellant to make ready the downstream system and hence in light of the Order dated 21.9.2016 of the Central Commission the Appellant is liable to pay transmission charges until the Transmission System is put to use.

- v. The statutory basis for the decision by the Central Commission to assign liability on the Appellant for payment of transmission charges is the law laid down by the Hon'ble Supreme Court vide judgement dated 15.3.2010 in SLP (C) No. 22080/2005 in case of PTC India Ltd. v. CERC (2010) 4 SCC 603. In this judgement, it has been held that promulgation of a regulation is not a prerequisite for exercise of the regulatory power by the Central Commission under Section 79 (1) of the Act. It has been held that CERC is the decision-making Authority and such decision making/ taking steps or measures under Section 79 (1) by the Central Commission is not dependent upon making of regulations under Section 178 of the Act. Accordingly, in absence of specific provisions in the Sharing Regulations to deal with the situation under question the Central Commission through exercise of its regulatory power has prescribed a principle for sharing of transmission charges of the Transmission System of the Respondent No. 2 in the Impugned Order. The said power of the Central Commission is traceable to the power under Section 79 (1)

(c) and (d) of the Act which vests power in the Central Commission to “regulate inter-state transmission of electricity” and “to determine the tariff of inter-state transmission systems” respectively.

6.4 As the Tribunal vide its Judgment dated 27.3.2018 in Appeal No. 390 of 2017 dismissed the Appeal, the present appeal also deserves to be dismissed being devoid of merit.

7. The learned senior counsel, Mr. Sanjay Sen, appearing for the Respondent No.2 has made following arguments/submissions for our consideration:

7.1 CERC vide order dated 21.9.2016 in Petition No. 43/MP/2016 filed by Respondent No. 2 herein, held that the Appellant is liable to pay RTCL, transmission charges in respect of the RAPP-Shujalpur 400 kV D/C Twin Moose ACSR transmission line project from the SCOD i.e. 1.3.2016 (not from the COD i.e. 26.12.2015) upto the commissioning of bays to be constructed by the appellant i.e. 11.11.2016 as the appellant was solely responsible for the delay in commissioning the bays. At present, Respondent No. 2 is suffering grave prejudice as no transmission charges have been paid for the aforesaid period and now amount to approximately Rs. 28 crores i.e. 10% of the entire project cost.

7.2 Under the extant regulatory framework established by the Commission, there are only two routes through which Respondent No.2 can receive transmission charges: (i) from the Appellant due to its admitted default in commissioning the transmission elements under its scope of work; or (ii) through the Point of Connection Charging Method ("**PoC Method**") in accordance with the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010 ("**Sharing Regulations**").

7.3 Pertinently, it was observed by this Tribunal in its judgment dated 27.03.2018 in Appeal No. 390 of 2017, titled *Punjab State Power Corporation Limited vs. Patran Transmission Company Limited & Ors* ("**Patran Judgment**") that there was no contractual arrangement between the party commissioning its transmission element on time, i.e. Patran Transmission Company Limited, and the defaulting party, i.e. Punjab State Transmission Company Limited ("**PSTCL**"). This Tribunal held that the only contractual arrangement existed between Patran Transmission Company Limited and its LTTCs, including with Punjab State Power Corporation Limited ("**PSPCL**"). PSPCL, as an LTTC had undertaken the obligation under the TSA to arrange the Interconnection Facilities for the Project. Accordingly, this Tribunal held PSPCL liable to pay transmission charges, instead of PSTCL. Similarly, in the facts of

the instant Appeal, there is no inter se contractual arrangement between the answering Respondent and the defaulting party, i.e. the Appellant. However, similar to the factual situation in the case of the Patran Judgment, the answering Respondent had entered into the TSA dated 24.07.2013 with the various LTTCs, who were the beneficiaries of the Project established by it.

7.4 The contractual arrangement, i.e. the TSA dated 24.07.2013, entered into between the answering Respondent and the various LTTCs, allocates the legal responsibility for arranging the Interconnection Facilities on the LTTCs. Thus, the LTTCs must be held responsible for delays by the Appellant in commissioning the Interconnection Facilities i.e. the bays and switchyard being established by NPCIL necessary for the regular flow of electricity through the Project. Accordingly, any risk associated with the implementation of the Interconnection Facilities, including the delay in their implementation, has been contractually allocated to the LTTCs. Thus, for the period of delay in implementation of the said bays, the TSA envisages the transmission charges liability to be borne by the LTTCs and paid to the answering Respondent.

7.5 Pertinently, the answering Respondent had, vide its Petition No. 43/MP/2016, prayed for the transmission charges to be recovered from

the beneficiaries under the PoC Method. In this regard, the prayers of answering Respondent in Petition No. 43/MP/2016 have been quoted by Respondent No.2:

“(a) Direct the CTU to disburse payment of transmission charges to the RAPPTCL for the period starting from 26.12.2015 under the Transmission Services Agreement dated 24.07.2013 and the Revenue Sharing Agreement dated 23.12.2015 read with Transmission Services Agreement dated 24.07.2013 and Order dated 15.07.2015 issued by the Ministry of Power entitled "Policy for Incentivizing Early Commissioning of Transmission Projects.”

7.6 This principle has been enunciated by this Tribunal in the Patran Judgment as well. While there was no inter se arrangement between Patran Transmission Company Limited and PSTCL (the State Transmission Utility), the contractual agreement existed between Patran Transmission Company Limited and PSPCL (the Punjab Distribution Company), an LTTC. Accordingly, the Patran Judgment held PSPCL liable to bear the transmission charges for the period of delay. Reliance has been placed on the following observations in the Patran Judgment:

“(vi) However, it is felt that the Central Commission in the Impugned Order has abruptly concluded the payment liability on the Appellant just by referring to its earlier orders and not establishing the linkage with the present case explicitly. This Tribunal would like to make it clear the same.

(vii) It is clear that the liability to pay transmission charges by the Appellant to the Respondent No. 1 from SCOD till downstream system is commissioned does not arise from the Regulations of the Central Commission. The most relevant decision of the Central Commission matching to the circumstances of the present case is its order dated 21.9.2016 in Petition No. 43/MP/2016 where the principles were laid down clearly that the entity due to which system developed through TBCB route cannot be put to use is liable to pay the transmission charges from SCOD till commissioning of the upstream/ downstream system/terminal bays. The Transmission System in question has also been developed through TBCB route. In the present case as per the principles laid down by the Central Commission it appears that PSTCL is the defaulting party and should have been made liable to pay the said transmission charges. However, we find that there is no contractual relation between the Respondent No. 1 and PSTCL. The contractual relation between the Appellant and the Respondent No. 1 is the TSA, which lays down the rights and obligations of the parties. The Article 4.2 of the TSA deals with the obligations of the LTTCs in implementation of the project. The Article 4.2 of the TSA deals with the obligations of the LTTCs in implementation of the project. The relevant portion is reproduced below:

*“4.2 Long Term Transmission Customers’ obligations in implementation of the Project: 4.2.1 Subject to the terms and conditions of this Agreement, Long Term Transmission Customers’, at their own cost and expense, undertake to be **responsible**:
b. for arranging and making available the Interconnection facilities to enable the TSP to connect the Project;”*

The LTTCs, including the Appellant at their own cost and expense were required to provide interconnection facilities to the Respondent No. 1 so that the Transmission System could be connected by SCOD and made operational.

(viii) It is clear that it was only the Appellant amongst all the LTTCs who was responsible to arrange the downstream system for connection to Transmission System by SCOD so that it could be put to use. This is irrespective of any relation between the Appellant and PSTCL. Accordingly, as per the principles laid down by the Central Commission vide its Order dated 21.9.2016 which

are judicial in nature the defaulting entity in the present case is the Appellant.

...

(xi) In view of the foregoing discussions, we are of the considered opinion that there is no infirmity in the decision of the Central Commission by holding that the Appellant is liable to pay transmission charges from SCOD of the Transmission Asset until commissioning of the downstream system.”

7.7 In view of the Patran judgment and the provisions of the TSA dated 24.07.2013, it is clear that the LTTCs of the Project shall be liable to pay the transmission charges to the answering Respondent for the period from 01.03.2016 to 11.11.2016 under the PoC Method.

7.8 Without prejudice and in the alternative, it is a settled principle of law that the defaulting party, whose delay was responsible for a transmission element not being utilized or put to regular use, should bear the liability of transmission charges until the date when the said transmission element can be put to regular use and utilized by the beneficiaries of a transmission element to transmit power. In the instant case the defaulting party was the Appellant who was delayed in constructing the bays at its end, thereby obstructing the answering

Respondent's Project from being put to regular use until 11.11.2016. Therefore, it is the Appellant who is required to pay the transmission charges to the answering Respondent for the period from 01.03.2016 to 11.11.2016, as has been held by the Ld. Commission vide the Impugned Order.

7.9 In the absence of a specific contractual relationship between the Appellant and the answering Respondent is wholly irrelevant in the present circumstances, as the Commission in exercise of its wide powers to regulate inter-state transmission of electricity under section 79(1)(c) of the Electricity Act, 2003 has directed the Appellant to pay the answering Respondent transmission charges as it is solely responsible for the delay in commissioning the requisite bays at the Rajasthan Atomic Power Project (“**RAPP**”) end. Further, the relief granted by the Commission was consequential and appurtenant to the reliefs sought in Petition No. 43/MP/2016. It is settled law that a court is empowered to grant consequential reliefs in order to meet the ends of equity and justice in a matter.

7.10 Furthermore, the Commission's directions to the Appellant were passed in exercise of its wide power to 'regulate' the inter-state transmission of electricity vested in it vide Section 79(1)(c) of the Electricity Act, 2003.

The Appellant has been directed to bear the liability to pay the answering Respondent transmission charges for the period from the SCOD of the Project i.e. 01.03.2016 up to the commissioning of the bays to be constructed by the Appellant i.e. 11.11.2016. The Commission's reasoning for the same, is that there would have been no delay in the actual flow of power through to the Project but for the Appellant's default in constructing bays at the RAPP end in a timely manner. The logic underpinning the Commission's judicial principle to hold the defaulting party liable is that beneficiaries or LTTCs of a transmission system ought not to be held liable to pay transmission charges when they cannot even get the benefit of a transmission system. The aforesaid direction to the Appellant is well within the Commission's power to regulate inter-state transmission of electricity under Section 79(1)(c) of the Act and the Appellant is bound by the same.

7.11 This principle has been specifically affirmed by this Tribunal and formed the basis for its findings in the Patran Judgment. Vide the Patran Judgment, this Tribunal specifically affirmed the principle enunciated in the Impugned Order in a context where there exists no contractual agreement between the party who has commissioned its transmission element (in this case, the answering Respondent) and the defaulting

party who is responsible for the delay (in this case, the Appellant). In the Patran Judgment, this Tribunal agreed with the Commission's judicial principle of holding that the defaulting party must be held liable for transmission charges. The Patran Judgment holds that where statutory regulations are silent on a certain aspect, then the Commission can utilize its regulatory powers under Section 79(1) of the Electricity Act, 2003 ("**Act**") to mould a suitable remedy for a party who has been wrongfully prejudiced for no fault of its own.

7.12 Reliance has been placed on the judgments passed by the Hon'ble Supreme Court of India in *PTC India limited vs. Central Electricity Regulatory Commission and Ors.* [(2010) 4 SCC 603], which enunciates the contours of regulatory powers of the Commission under section 79(1) of the Act and in *Central Power Distribution Company Limited vs. Central Electricity Regulatory Commission &Ors.* [(2007) 8 SCC 197] wherein it has been held it is a well settled principle that the power to regulate includes the power to enforce.

7.13 In the instant case, it is undisputed that answering Respondent must recover its transmission charges at any cost as it is not responsible for any breach or fault whatsoever. The answering Respondent cannot be made to suffer for no fault of its own. The only question that remains is

whether the transmission charges are to be paid by a defaulting party or the PoC Pool – even though the PoC Pool cannot get the benefit of transmission services. The Commission exercised its regulatory powers to devise a mechanism for the enforcement of the answering Respondent's right to recover the transmission charges from the Appellant, who is responsible for the delay in the Project being put to regular use, in the absence of an *inter se* contractual agreement between the two parties, which has been upheld by this Tribunal vide the Patran Judgment. In view of the circumstances and the principle of law settled by the Patran Judgment, it is clear that the Appellant has rightly been held to be liable to bear the transmission charges as it is the Appellant who was responsible for the delay in commissioning the bays at its end thereby preventing the answering Respondent's Project from being put to regular use.

7.14 In view of the provisions of Sharing Regulations; the law laid down by the Hon'ble Supreme Court; the previous orders of this Tribunal, the answering Respondent prays that this Tribunal directs the LTTCs to pay transmission charges to the answering Respondent for the period from 01.03.2016 to 11.11.2016 through the PoC Pool and issue consequent directions to the CTU. Without prejudice and in the alternative, Respondent No.2 has also prayed that this Tribunal be

pleased to hold that the answering Respondent is entitled to recover its transmission charges for the said period from the Appellant.

8. Learned counsel, Mr. Pradeep Misra, appearing for Respondent No.4/UPPCL has made following submissions for our consideration:

8.1 Beneficiaries are not liable to pay transmission charges unless and until benefit of the said transmission system is available to them. In this regard, reliance was placed on the judgment dated 3.3.2016 of the Hon'ble Supreme Court in Civil Appeal No. 9193 and 9302 of 2012 (Barh-Balia judgment) wherein it was held that beneficiaries cannot be made liable to pay for the delay as the energy supply line had not started on said date.

8.2 Long-Term Transmission Customers are liable to pay transmission charges only when transmission system is being put to use. In the Patran case, CERC has held PSPCL liable to pay the transmission charges as the downstream assets were owned by it. In the present case also, Appellant is the owner of bay and switchyard and thus CERC has rightly held that Appellant is liable to pay transmission charges.

- 8.3** The project was taken up for strengthening of WR-NR Corridor. It was decided in the meeting of Standing Committee on Power System Planning that RAPP-Shujalpur 400 kV D/C line will be constructed on bidding process mode and bay at RAPP and Switchyard will be constructed by Appellant. The decision taken in the Standing Committee is binding on the Appellant and once it has delayed the project it is not available to Appellant to say that it will not pay the transmission charges.
- 8.4** Respondent no.3, PGCIL being CTU was under the obligation to see that there should be co-ordination between appellant and Respondent No.2. The assets to be commissioned by both appellant and second Respondent should come at the same time so that benefit of this transmission system will be available to beneficiaries. Respondent No. 3 has also failed in discharging the statutory duties for which the beneficiaries cannot be penalized. Therefore, the appeal is liable to be dismissed.
- 9.** **We have heard learned Counsel appearing for the Appellant and the learned Counsel appearing for the Respondents at consideration length of time and considered the written submissions carefully and evaluated the entire relevant material available on record. The following only one issue emerges out of the Appeal for our consideration:**

“Whether the Central Commission is right in holding the Appellant liable to pay transmission charges on account of an element not

put to use in absence of in Implementation Agreement or any form of Contractual Agreement”?

10. Our Findings & Analysis:-

10.1 In this Tribunal's Judgment dated 27.03.2018 in Appeal No. 390 of 2017, titled *Punjab State Power Corporation Limited vs. Patran Transmission Company Limited & Ors* (“**Patran Judgment**”), there was no contractual arrangement between the party commissioning its transmission element on time, i.e. Patran Transmission Company Limited, and the defaulting party, i.e. Punjab State Transmission Company Limited (“**PSTCL**”). This Tribunal held that the only contractual arrangement existed between Patran Transmission Company Limited and its LTTCs, including with Punjab State Power Corporation Limited (“**PSPCL**”). The relevant excerpts of the Patran Judgment have already been reproduced at Para 7.6 above by the second Respondent for ready reference.

10.2 PSPCL, as an LTTC had undertaken the obligation under the TSA with Patran to arrange the Interconnection Facilities for Patran's Project. Accordingly, this Tribunal held PSPCL liable to pay transmission charges, instead of PSTCL. Similarly, in the facts of the instant Appeal, there is no inter se contractual arrangement between the Respondent No.2 and the defaulting party, i.e. the Appellant. However, similar to the

factual situation in the case of the Patran Judgment, the RespondentNo.2 had entered into the TSA dated 24.07.2013 with the various LTTCs, who were the beneficiaries of the Project being established by it.

10.3 We further observe that these type of major issues ought to have been covered under Regulations by the Central Commission to plug the gaps, which would avoid litigations. The importance of the same was considered by the Central Commission at one point of time in its order dated 5.8.2015 and directed its staff for appropriate amendments in the Tariff Regulations, 2014. Till date no such modifications have been carried out by it in the Regulations. It is however, observed that there are many regulatory/ judicial orders of the Central Commission to deal with the situations like in the present case.

10.4 The Hon'ble Supreme Court in the judgement dated 3.3.2016 in Civil Appeal No. 9302 of 2012 in case of PGCIL Vs. PSPCL and Ors. has held that the LTTCs are liable to pay the transmission charges only when the transmission system is made operational put to use. The Central Commission has also relied on the said judgement while formulating principles of payment of transmission charges by the entities before the transmission system/ asset is made operational/ put to use.

10.4 The Central Commission has submitted that the statutory basis for the decision by the Central Commission to assign liability on the Appellant for payment of transmission charges is based on the Hon'ble Supreme Court's judgement dated 15.3.2010 in SLP (C) No. 22080/2005 in case of PTC India Ltd. v. CERC (2010) 4 SCC 603. After perusal of the said judgement we find that it has been held that the Central Commission is the decision-making Authority under Section 79 (1) of the Act and such decision making or taking steps/ measures under the said Section of the Act is not dependent upon making of regulations under Section 178 of the Act. It is further held in the judgement that if any regulations are framed by the Central Commission under Section 178 of the Act then the decision of the Central Commission has to be in accordance with the said regulations.

10.5 Accordingly, in absence of specific provisions in the Sharing Regulations/ Tariff Regulations, 2014 to deal with the situation under question the Central Commission through exercise of its regulatory powers has prescribed a principle for sharing of transmission charges of the Transmission System of the Respondent No. 2 in the Impugned Order. Thus, it is observed that by way of exercising its regulatory power by a way of judicial order (s) the Central Commission has laid

down the principles of payment of transmission charges in such an eventuality. However, it is felt that the Central Commission in the Impugned Order has abruptly concluded the payment liability on the Appellant just by referring to its earlier orders and not establishing the linkage with the present case explicitly. This Tribunal would like to clarify the same.

10.6 It is clear that the liability to pay transmission charges by the Appellant to the Respondent No. 2 from SCOD till downstream system is commissioned does not arise from the Regulations of the Central Commission. Our most relevant decision matching to the circumstances of the present case is our judgment dated 27.3.2018 in Appeal No. 390 of 2017(Patran judgment) where the principles were laid down clearly that the entity due to which system developed through TBCB route cannot be put to use is liable to pay the transmission charges from SCOD till commissioning of the upstream/ downstream system/terminal bays. The Transmission System in question has also been developed through TBCB route. In the present case as per the principles laid down by the Central Commission it emerges that NPCIL is the defaulting party and should have been made liable to pay the said transmission charges. However, we find that there is no contractual relation between the Respondent No. 2 and NPCIL.

10.7 From the decision of the Standing Committee on Power System Planning (a statutory committee), it is clear that it was only the Appellant who was responsible to arrange the downstream system for connection to Transmission System by SCOD so that it could be put to use. This is irrespective of any relation between the Appellant and Respondent No.2. Accordingly, as per the principles laid down by the Central Commission vide its Order dated 21.9.2016 which are judicial in nature the defaulting entity in the present case is the Appellant.

10.8 In view of the foregoing discussions, we are of the considered opinion that there is no infirmity in the decision of the Central Commission by holding that the Appellant is liable to pay transmission charges from SCOD of the Transmission Asset until commissioning of the downstream system alongwith applicable charges as per TSA which was already raised by CTU.

Summary of Our Findings:-

10.9 It is now in dispute that the Respondent No.2 had commissioned the transmission lines on 26.12.2015 (COD considered by the Commission as 01.03.2016) and the downstream element under the scope of the Appellant could be commissioned only on 11.11.2016. Subsequent to

the commissioning of its lines in totality, the second Respondent is entitled to receive transmission charges from 01.03.2016 either from the Appellant due to its admitted default or through the POC charges from the LTTCS/beneficiaries. The Hon'ble Supreme Court in its judgment dated 03.03.2016 (Barh-Balia judgment) has held that the beneficiaries cannot be made liable to pay for the delay in any transmission element which in turn, prevents the entire system to be put to use. Hence, the second Respondent cannot be paid under POC mechanism and alternatively, the transmission charges had to be paid by the defaulting party i.e. the Appellant.

10.10In the facts and circumstances of the instant case, the Central Commission has based its decision to assign liability on the Appellant for payment of transmission charges keeping in view the aforesaid judgment of the Apex court and also, the judgment of the Supreme Court dated 15.03.2016 in PTC India Ltd. Vs. CERC case in which it was, inter-alia held that the Central Commission is empowered to exercise its regulatory powers under Section 79(1) of the Act, even without any specific regulations. Accordingly, we hold that the decision of the Central Commission is just and right and the impugned order has

been passed by it judiciously in accordance with law and does not call for any interference of this Tribunal.

10.11 It is pertinent to note that Respondent No. 2 had served Regulation of Power Supply Notice on the Appellant and during the hearing on 6.12.2018, Respondent No. 2 was directed not to take any coercive steps until further orders. Therefore, it is now made clear that if the appellant fails to make the payment to Respondent No. 2 within 30 days from the date of the judgment, Respondent No.2 shall be entitled to take coercive action against the Appellant in accordance with the Regulation of Power Supply Regulations, 2010.

ORDER

For foregoing reasons as stated supra, we are of the considered view that the issues raised in the instant appeal are devoid of merits. Hence, the appeal is dismissed as devoid of merits.

The Impugned Order dated 21.9.2016 passed by the Central Commission is upheld.

In view of the disposal of the Appeal, the relief sought in the IA No. 706 of 2016 & IA No. 699 of 2017 do not survive for consideration and stand disposed of.

No order as to costs.

Pronounced in the Open Court on this 18th day of January, 2019.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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