

**In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)**

**Appeal No 390 of 2017 and
IA Nos. 566 of 2017, 725 & 1063 of 2017**

Dated: 27th March, 2018

**Present: Hon'ble Mr. I.J. Kapoor, Technical Member
Hon'ble Mr. N K Patil, Judicial Member**

In the matter of :-

**Punjab State Power Corporation Limited (PSPCL)
Shed No T-1-A, Thermal Design,
Near 22 No. Phatak,
Patiala, Punjab**

... Appellant

Versus

- 1. Patran Transmission Company Limited (PTCL)
Room No, 409, 4th Floor Skipper Corner
88 Nehru Place,
New Delhi-110019** **...Respondent No 1**
- 2. Central Electricity Regulatory Commission (CERC)
3rd & 4th Floor, Chanderlok Building
36, Janpath, New Delhi- 110001** **...Respondent No 2**
- 3. Haryana Power Purchase Centre
Shakti Bhawan, Energy Exchange
Room No. 446, Top Floor,
Sector-6, Panchkula-134109
Haryana** **...Respondent No 3**
- 4. Himachal Sorang Power Private Limited
D-7, Sector-1, Lane-1, 2nd Floor
New Shimla, Shimla-171009
Himachal Pradesh** **...Respondent No 4**

5. **Adani Power Limited**
3th Floor, Achalraj
Opposite Mayors Bungalow
Law garden, Ahmedabad-380006 ...Respondent No 5
6. **Jaipur Vidyut Vitran Nigam Limited**
Vidyut Bhawan,
Janpath, Jaipur-302005 Rajasthan ...Respondent No 6
7. **Ajmer Vidyut Vitran Nigam Limited**
Old Power House, Hathi Bhata
Jaipur Road,
Ajmer, Rajasthan ...Respondent No 7
8. **Jodhpur Vidyut Vitran Nigam Ltd**
400 kV, GSS Building,
Ajmer Road, Heerapur,
Jodhpur, Rajasthan ...Respondent No 8
9. **Lanco Anpara Power Limited**
Plot No 397, Udyog Vihar
Phase-3, Gurgaon-122016
Haryana ...Respondent No 9
10. **Lanco Green Power Private Ltd**
Plot No. 397, Udyog Vihar Phase- 3,
Gurgaon-122016, Haryana ...Respondent No 10
11. **Power Development Department**
Govt. of Jammu & Kashmir
SLDC Building, 1st Floor
Gladani Power House Narwal,
Jammu, Jammu & Kashmir ...Respondent No 11
12. **North Central Railway**
DRM Office, Nawab Yusuf Road
Allahabad, Uttar Pradesh ...Respondent No 12
13. **AD Hydro Power Limited**
Bhilwara Towers,
A-12, Sector-1
Noida-201301, Uttar Pradesh ...Respondent No 13

14. **Jaiprakash Power Ventures Limited**
A Block, Sector-128,
Noida-201304, Uttar Pradesh ...Respondent No 14
15. **BSES Yamuna Power Limited**
2nd Floor, B Block
Shakti Kiran Building (Near Karkardooma Court)
New Delhi ...Respondent No 15
16. **BSES Rajdhani Power Limited**
BSES Bhawan, 2nd Floor B Block,
Behind Nehru Place Bus Terminal
Nehru Place New Delhi-110019 ...Respondent No 16
17. **Tata Power Delhi Distribution Limited**
33 kV sub-station Building, Hudson Lane,
Kingsway Camp, New Delhi-110019 ...Respondent No 17
18. **New Delhi Municipal Corporation**
Palika Kendra, Sansad Marg
New Delhi-110 001 ...Respondent No 18
19. **Union Territory of Chandigarh**
Div-11, Opposite Transport Nagar
Industrial Phase-1
Chandigarh ...Respondent No 19
20. **Power Grid Corporation of India Limited (PGCIL)**
B-9, Qutab Institutional Area Katwaria Sarai,
New Delhi-110016 ...Respondent No 20
21. **Uttar Pradesh Power Corporation Limited**
14th Floor, Shakti Bhawan Ext Building,
14, Ashok Marg
Lucknow Uttar Pradesh ...Respondent No 21
22. **PTC India Limited**
2 nd Floor, NBCC Tower
15, Bhikaji Cama Place
New Delhi-110066 ...Respondent No 22
23. **Uttaranchal Power Corporation Limited**
Urja Bhawan, Kanwali Road

- Near Balli Wala Chowk
Dehradun, Uttarakhand ...Respondent No 23
24. Himachal Pradesh State Electricity Board (HPSEB)
Vidyut Bhawan, Kumar House
Building No. 11,
Shimla, Himachal Pradesh ...Respondent No 24
25. PFC Consulting Ltd
First Floor, "Urjanidhi",
1, Barakhamba Lane,
Connaught Place,
New Delhi-110 001 ...Respondent No 25
26. Power System Operation Corporation Ltd. (POSOCO)
B-9, Qutab Institutional Area,
Katwaria Sarai, New Delhi-110016 ...Respondent No 26
27. Central Electricity Authority (CEA)
Sewa Bhawan, Sector-1, R K Puram
New Delhi- 110016 ...Respondent No 27
28. Punjab State Transmission Corporation Ltd. (PSTCL)
Office of Financial Adviser (Commercial &
Regulatory Cell)
3rd Floor, Opp Kali Mata Mandir,
Shakti Sadan
Patiala, Punjab- 147001 ...Respondent No 28

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Mr. A K Dubey

Ms. Ranjitha Ramachandran

Ms. Anushree Bardhan

Ms. Poorva Saigal

Mr. Polkit Agarwal for R-28

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal is being filed by Punjab State Power Corporation Ltd. (hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 challenging the Order dated 4.1.2017 (“**Impugned Order**”) passed by the Central Electricity Regulatory Commission (hereinafter referred to as the '**Central Commission**') in Petition No.155/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. 1 from Scheduled Commercial Operation Date (SCOD) till commissioning of the downstream system.

2. The Appellant, PSPCL is a Company incorporated under the provisions of the Companies Act, 1956. It is a distribution licensee in the State of Punjab. It is also one of the beneficiaries of the transmission system established by the Respondent No. 1.
3. The Respondent No. 1, PTCL is a Company incorporated under the provisions of Companies Act, 1956. It was incorporated as a Special Purpose Vehicle (SPV) by M/s PFC Consulting Ltd., Respondent No. 25 for Tariff Based Competitive Bidding (TBCB) process to select successful bidder for establishing transmission system for the 400 kV Patran Sub Station.
4. The Respondent No.2, 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.
5. The Respondent Nos. 3 to 24 are the beneficiaries of the transmission system established by the Respondent No. 1, who have executed Transmission Service Agreement (TSA) with the Respondent No. 1. The Respondent No. 20, PGCIL is also discharging functions of the Central Transmission Utility (CTU) under the Act.
6. The Respondent No. 26, POSOCO is the nodal agency for computation of Point of Connection (PoC) charges including for the new transmission elements that are added to ISTS.
7. The Respondent No. 27 is the Central Electricity Authority and the Respondent No. 28 is PSTCL, the State Transmission Utility (STU)

for Punjab which was executing downstream system connecting to the transmission system executed by the Respondent No. 1.

8. Facts of the present Appeal:

- a) 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**').
- b) Consequent to TBCB process, the transmission system for 400 kV Patran Sub-Station was awarded to M/s Techno Electric and Engineering Ltd. Letter of Intent (Lol) was issued to it on 17.9.2013 by the Respondent No. 25, the Bid Process Co-ordinator (BPC). On 13.11.2013 the successful bidder i.e. M/s Techno Electric and Engineering Ltd. took over 100% shareholding in the SPV i.e. Respondent No. 1. The scope of work includes the following which is hereinafter collectively termed as the Transmission System:
 - (i) Creation of 2x500 MVA, 400/220 kV sub-station at Patran
 - (ii) LILO of both circuits of Patiala-Kaithal 400 kV D/C at Patran(Triple Snow Bird Conductor),
 - (iii) 400 kV bays
 - (iv) 220 k V bays and
 - (v) Space for spare bays.
- c) 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.

- d) Transmission Service Agreement (TSA) was signed on 12.5.2014 (Effective Date) between the Respondent No. 1 and the Long Term Transmission Customers (LTTCs) of the Transmission System. The Transmission System was required to be commissioned in 30 months i.e. by 11.11.2016 being SCOD.
- e) The Central Commission granted Transmission License to the Respondent No. 1 on 14.7.2014 and adopted the tariff discovered under TBCB under Section 63 of the Act vide order dated 5.8.2014.
- f) The Respondent No. 1 completed the Transmission System in June, 2016 and approached the Respondent No. 26, POSOCO to include the transmission charges of the Transmission System in the Point of Connection (PoC) Mechanism. However, the downstream system which was to be executed by PSTCL was not completed. POSOCO vide letter dated 19.7.2016 informed the Respondent No. 1 that the inclusion of transmission charges of the Transmission System is subject to the outcome of the Petition No. 74/MP/2016 pending before the Central Commission on the issue of SCOD or actual power flow on completion of the downstream system by the Appellant. Aggrieved by the said letter, the Respondent No. 1 approached the Central Commission and filed Petition No. 155/MP/2016 on 1.8.2016.
- g) PSTCL through an affidavit dated 11.11.2016 before the Central Commission in Petition No. 155/MP/2016 stated that the

downstream system was expected to be commissioned by 31.12.2016.

- h) On 4.1.2017, the Central Commission issued the Impugned Order and has held that the Respondent No. 1 is not entitled to any transmission charges prior to SCOD and the Appellant shall be liable to bear the transmission charges from SCOD/ actual commissioning whichever is later till commissioning of downstream system post which the Transmission System will be included in PoC.
- i) The SCOD of the Transmission System is 11.11.2016 and the downstream system was commissioned on 19.5.2017. The Appellant has been made liable to pay transmission charges for the period from 11.11.2016 to 18.5.2017.
- j) Aggrieved by the Impugned Order on the decision of the Central Commission regarding bearing of the transmission charges from SCOD/ actual commissioning whichever is later till commissioning of downstream system, the Appellant preferred the present Appeal before this Tribunal.

9. QUESTIONS OF LAW

The Appellant has raised the following questions of law in the present Appeal:

(a) Whether a recovery can be sought to be made from the Appellant which is neither authorised in law nor in contract?

(b) Whether the Central Commission while passing the

transmission tariff orders can ignore the provisions of Sharing Regulations, 2010 which provide for pooling of transmission tariff of all transmission licensees and recovery through the PoC Pool?

(c) Whether the earlier Orders of the Central Commission can apply to the Appellant when the said Orders were passed in other matters and where the Appellant was neither heard nor at fault?

(d) Whether, having prescribed a manner of recovery of transmission charges in the Sharing Regulations, the Central Commission can proceed to distract from the same in individual cases and for the benefit of certain private parties?

10. The learned senior counsel for the Appellant has made following arguments/submissions for our consideration:

- a) The Central Commission while arriving at the decision to hold the Appellant liable to pay transmission charges from SCOD till commissioning of downstream system has erred by merely relying on its earlier orders and assuming that the Appellant is the owner of the downstream asset. The downstream system neither belongs to the Appellant nor being implemented by it. The error in the decision of the Central Commission might have occurred due to similarity in the names of PSPCL and PSTCL.
- b) The Impugned Order is beyond the pleadings and prayers of the Respondent No. 1 and is in violation to the principles of natural

justice. The prayer of the Respondent No. 1 was for payment of transmission charges under PoC mechanism only. It is a well settled principle that a court cannot travel beyond the pleadings of the parties. On this issue the Appellant has relied on the judgement of Hon'ble Supreme Court in case of Union of India v EID Parry (India) Lt. (2000) 2 SCC 223 and in case of V K Majotra v Union of India (2003) 8 SCC 40.

- c) The Impugned Order is contrary to the provisions of the TSA. There is no provision in TSA for payment of transmission charges by the Appellant from SCOD till commissioning of the downstream system. As per TSA all the signatories i.e. LTTCs have to bear the transmission charges.

- d) The Central Commission also failed to appreciate that the Tariff Regulations, 2014 and Sharing Regulations do not envisage recovery of transmission charges till the downstream system is ready and hence the Impugned Order is contrary to the provisions of the Regulations. Once the transmission asset is declared under commercial operation, the transmission charges are to be shared/recovered as per Sharing Regulations. The transmission charges of different licensees are recovered through one pool and there cannot be sub-pools within one pool. The Sharing Regulations make no distinction for the Appellant to bear transmission charges from SCOD of the Transmission System to the commissioning of the downstream system. Once the transmission system is declared under commercial operation, its recovery automatically gets shared as per Sharing Regulations.

Also, in the present case there is no application of Regulation of Power Supply in terms of Central Commission's Regulations on the same.

- e) The Central Commission ignored that there is no relationship between the Appellant and the Respondent No. 1 either statutory or contractual to ask the Appellant alone to pay the transmission charges for the Transmission System of the Respondent No. 1. There is no such methodology as per the Statutory Regulations. Even the judgement of Hon'ble Supreme Court in case of PTC India Ltd. vs. CERC (2010) 4 SCC 603 has held the primacy of the Statutory Regulations which was ignored by the Central Commission. Further, the Hon'ble Supreme Court in the judgement in case of Gujarat Urja Vikas Nigam Ltd. V. Essar Power Ltd. (2008) 4 SCC 755 has reiterated that where a statute provides for thing to be done in a particular manner, then it has to be done in that manner and in no other manner.
- f) The Central Commission has also erred in relying on the order dated 5.8.2015 in Petition No. 11/SM/2014 wherein there were certain general directions for CTU and STU in case of mismatch between transmission systems of the CTU & STU. PSTCL had also filed affidavit dated 11.11.2016 before the Central Commission intimating the estimated date of commissioning of the downstream system. The Appellant is a distribution licensee and the said order relied by the Central Commission STU of Punjab i.e. PSTCL is liable for execution of the downstream system and Appellant could not be made liable to pay the said transmission charges.

- g) The Central Commission also erred in relying on the order dated 19.4.2016 in Petition No. 100/TT/2014 wherein RRVPNL delayed the system and there was detailed correspondence between the parties. In the present case there is no correspondence between the Appellant and the Respondent No. 1. However, there is correspondence between Respondent No. 1 and PSTCL. Accordingly, the Appellant cannot be made liable to pay the transmission charges for the said period. The orders of the Central Commission in Petition Nos. 32/RP/2016 & 29/RP/2016 has held that the other State entities liable to pay the transmission charges and the Appellant was only one of the parties and it would be improper ground to contend that the Appellant should not be challenging the Impugned Order by way of the present Appeal.
- h) The reliance of the Respondent No. 1 to claim the transmission charges is erroneous as the payment of transmission charges have arisen on account of invoice raised by PGCIL to the Appellant after the Impugned Order. TSA does not relate to the liability of bearing transmission charges from SCOD to commissioning of the downstream system. Payment of 25% of the total amount by the Appellant to the Respondent No. 1 was made under protest and was due to threat of the Respondent No. 1 vide its Notice dated 6.7.2017. Thereafter, the Appellant protested and raised objections to any liability to make payments. The Appellant has also submitted the bank guarantee to the Respondent No. 1 and has acted in a bonafide manner.

- i) In Petition No. 31/RP/2016 the Central Commission has acknowledged that the default was on part of PSTCL and not the Appellant. Accordingly, the Appellant cannot be made liable to pay the transmission charges. The reliance of the Respondent No. 1 on the judgement of Hon'ble Supreme Court in Civil Appeal No. 9193 of 2012 is misplaced as the facts of that case are different from the present case and was related to CERC Tariff Regulations, 2009 and fault on the part of the generator. On the other hand, the said decision goes against the Respondent No. 1 as the basic principle is that the beneficiaries cannot be held liable to pay the transmission charges and the Appellant is also one of the beneficiaries of the Transmission System executed by the Respondent No. 1. Further, it has been held that only Interest During Construction (IDC) and Incidental Expenses During Construction (IEDC) are payable till the time the upstream/downstream are commissioned.
- j) On the issue of maintainability of the Appeal, the Appellant has relied on various judgements of the Hon'ble Supreme Court viz. Uttar Pradesh Power Corporation Ltd. V. NTPC (2009) 6 SCC 235, Catholic Syrian Bank Ltd. V. CIT (2012) 3 SCC 784, Begam Suraiya Rashid v. State of M.P. (2006) 3 SCC 305 and State of Gujarat v. Manoharsinhji Prdumansinji Jadeja (2013) 2 SCC 300.
- k) The Central Commission cannot do away with the Sharing Regulations and introduce new methods of recovery of transmission charges to benefit private parties like Respondent No.1.

11. The learned senior counsel for the Respondent No. 1 has made following arguments / submissions on the issues raised in the present Appeal for our consideration:

a) The Central Commission has adopted the principle for payment of transmission charges by the Appellant based on its earlier decisions. The entity which is accountable for delay in commissioning of the downstream system is liable to pay the transmission charges in case the transmission system is not put to use by SCOD.

b) The Appeal is liable to be dismissed on the account of suppression of facts by the Appellant. The Appellant has not produced all facts before this Tribunal. The Appellant has not raised any objection in terms of TSA to the bills dated 22.3.2017 raised by the CTU on behalf of the Appellant as per the Impugned Order. The Appellant has also ignored various reminders and subsequent three invoices dated 7.4.2017, 8.5.2017 & 7.6.2017 raised by CTU. In terms of Article 10.9.1 of the TSA these invoices have attained finality as no objection was raised by the Appellant within 30 days from the invoice. To exercise its rights under the law the Respondent No. 1 also issued Regulation Notice dated 6.7.2017 for commencement of regulation of power of the Appellant under CERC (Regulation of Power Supply), Regulations, 2010. Subsequently, the Appellant agreed to pay 25% of the total amount payable and agreed to discuss a schedule for balance payments. The total amount payable by the Appellant as per the Impugned Order is Rs. 11,36,33,365 and out of which amount of Rs. 8,52,25,024 is still pending.

- c) On non-payment of balance dues, the Respondent No. 1 again issued Regulation Notice on 23.8.2017. The Appellant approached the Hon'ble High Court of Punjab and Haryana by filing CWP No. 19349 of 2017. The Hon'ble High Court vide order dated 11.9.2017 directed the Appellant to furnish bank guarantee in favour of the Respondent No. 1 to the tune of Rs. 10 Cr. Presently the bank guarantee is valid till 20.6.2018. Accordingly, it is clear that the Appellant has not approached this Tribunal with clean hands and is seeking to circumvent due process of law.
- d) The Appellant has also not raised any objections of its liability during the proceedings before the Central Commission and even after the Impugned Order until Regulation Notice was issued by the Respondent No.1. This is evident from the Record of Proceedings (ROPs) of the Central Commission where it was asked about the commissioning of the downstream system. PSTCL being implementing agency of the Appellant filed affidavit before the Central Commission and stated that the downstream system would be commissioned by 31.12.2016. Accordingly, the Appellant is not allowed to approbate and reprobate by taking a contrary stand.
- e) The Appellant is bound by the terms and conditions of the TSA. There is no contractual relation between the Respondent No. 1 and PSTCL. According to the TSA it was the duty of the Appellant to make ready the downstream system. The Respondent No. 1 is not concerned about the sharing of responsibilities between the Appellant and the PSTCL. The Appellant at para 7 (G) of the

Appeal has used word 'also' and stated that PSTCL is also responsible for construction of downstream system connecting to the Transmission System. However, as per TSA, the Appellant is solely responsible for construction of the downstream system by any means/ agency may it be PSTCL. Further as per Article 10.1 of the TSA, the Respondent No. 1 is entitled to receive transmission charges from SCOD of the Transmission System until the expiry of the TSA.

- f) The liability to pay the said transmission charges by the Appellant is a settled regulatory framework in terms of similar cases where the Appellant was also a party. The Appellant has not challenged any of these orders and has accepted them. To mention them are Central Commission's Order dated 26.8.2016 in Petition No. 31/RP/2016 wherein liability of payment of transmission charges have been imposed on the Appellant. The other orders where the Appellant was a party as Respondent are the order dated 24.11.2016 in Petition No. 29/RP/2016 (PGCIL Vs. RRVPNL &Ors.) and order dated 27.1.2017 in Petition No. 32/RP/2016 (PGCIL Vs. RRVPNL &Ors.). Hon'ble Supreme Court vide judgement dated 3.3.2016 in Civil Appeal No. 9193 of 2012 considered similar facts and decided that all the beneficiaries cannot be made liable to pay transmission charges till transmission system is put to use. Further, based on the observations of the Central Commission in its Order dated 13.12.2011 in Petition No. 154/MP/2011 in case of PGCIL vs. Spectrum Power Generation Ltd. it has been noted in recital (H) of the TSA that as and when the scheme becomes implementable, the transmission charges will be pooled. In the present case too the other beneficiaries cannot

be made liable to pay till the transmission line is made operational. This Tribunal is bound by the order of the Hon'ble Supreme Court for such type of situations where transmission line is not operational for no fault of the transmission licensee. The Appellant has not raised the issue of decision regarding payment of transmission charges but has only disputed its own liability regarding the same. The only issue before this Tribunal is that whether the burden can be imposed on other beneficiaries as well. The Apex Court has already held that all the beneficiaries cannot be made liable. The Appeal need to be dismissed for non-disclosure of this order of the Apex Court and also for raising contrary plea in related cases.

- g) As per Article 4.2.1 of the TSA, the LTTCs are responsible for arranging and making available the interconnection facilities to enable the Transmission Service Provider here the Respondent No. 1 to connect the project. There is no contract between PSTCL and the Respondent No. 1. The Appellant was required to ensure that PSTCL constructs and completes the interconnecting downstream assets in time and in tandem with the Transmission System.
- h) The reliance of the Appellant that there was a direct correspondence between the Respondent No. 1 and PSTCL regarding execution of downstream system and hence the Appellant is not liable to bear the said transmission charges for the said period is misplaced. PSTCL and Respondent No. 1 were attending the meetings called by CEA which is the nodal agency looking after implementation of various transmission systems in

the country including that of the Respondent No.1. It is the offshoot of such meetings and also meetings at the level of Northern Region Power Committee the correspondences were exchanged between the Respondent No. 1 and PSTCL. The Appellant cannot run away from its responsibility as per the TSA for arranging the downstream system in time.

- i) The reliance of the Appellant on the Sharing Regulations is misplaced as all the LTTCs started making payments under PoC Mechanism once the downstream system was commissioned and connected to the Transmission System thereby putting it into use. On the other hand, the Central Commission has held the Appellant liable to pay transmission charges for the period from SCOD till the commissioning of the downstream system on account of its failure to execute and commission the downstream system. The Sharing Regulations do not provide that all the LTTCs are to be made liable on account of default of one of the LTTCs.

- j) TSA provides for sharing the transmission charges and not in nature of contract setting out joint and several liability on the parties. The same was also clarified in the judgement of Hon'ble Supreme Court in case of PGCIL Vs. the Appellant. The Central Commission has rightly balanced the interest of the beneficiaries and the licensee. When the Sharing Regulations and Tariff Regulations, 2014 do not cover a particular situation the Central Commission has inherent powers to devise methodology which removes difficulties in such situations.

12. The learned counsel for the Respondent No. 28, i.e. PSTCL has made following arguments / submissions on the issues raised in the present Appeal for our consideration:

- a) The Commissioning schedule of the Transmission System was never intimated to PSTCL from Respondent No. 1, PGCIL, CEA or any other agency inspite of repeated reminders regarding progress of work and co-ordination of bays to finalise downstream 220 kV route plans. The downstream system was to be commissioned by PSTCL and the scope of work include Loop in Loop Out (LILO) of 200 kV Patran to Kakrala and 200 kV Patran to Rajla at 400 kV Patran with ACSR Zebra conductor of multi-circuit towers (line length 5.898 kms). The Planning was done on 15.7.2015 and work order was placed on 22.1.2016 with completion time schedule of 10 months i.e. by 21.11.2016.

- b) The above transmission lines were passing through the forest area and PSTCL has applied for diversion of 0.091 hectare of forest land on 14.3.2016. The forest department sought information vide various letters and the information related to PSTCL was given timely. The in-principle forest clearance was obtained only on 1.5.2017 from Ministry of Environment and Forest. The remaining works were completed on 16.5.2017 and the line was energised on 16.5.2017. The grant of forest clearance was mainly due to serious views taken by National Green Tribunal (NGT) vide order dated 19.5.2016 in the matter of Dr. Amandeep Agarwal vs. State of Punjab regarding other activities in Punjab related to diversion of forest land and till the passing of the order dated 28.10.2016 by the Hon'ble Supreme Court in Civil Appeal No. 33942 of 2016

(State of Punjab Vs. Dr. Amandeep Agarwal &Ors.) setting aside the order of the NGT. In the above circumstances PSTCL moved in a prudent manner in carrying out the downstream system works and the delay was due to reasons beyond its control.

13. The learned counsel for the Respondent No. 24, HPSEB Ltd. has made arguments / submissions supporting the view of the Appellant that there is no other mechanism provided in Sharing Regulations for sharing and recovery of the transmission charges. The principle adopted by the Central Commission in the present case is erroneous and contrary to the Sharing Regulations. The Central Commission has also not examined the force majeure reasons of delay in executing the downstream lines.
14. The learned counsel for the Central Commission has made following arguments / submissions on the issues raised in the present Appeal for our consideration:
 - a) 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.
 - b) 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 Appeal.

- c) 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.
- d) The Appellant has not questioned the entitlement of receiving transmission charges by the Respondent No. 1. 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.

- e) 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. 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. 1 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.

15. After having a careful examination of principle submissions of the rival parties on various issues raised in the instant Appeal, our observations are as follows:-

a) The present case pertains to the decision of the Central Commission making the Appellant liable to pay the transmission charges to the Respondent No. 1 for the period from SCOD i.e. 11.11.2016 till the commissioning of the downstream assets by PSTCL in May, 2017.

b) On Question No. 9 (a) i.e. Whether a recovery can be sought to be made from the Appellant which is neither authorised in law nor in contract?, we decide as follows:

(i) To decide on this question raised by the Appellant, let us first analyse the findings of the Central Commission in the Impugned Order. The relevant portion of the Impugned Order is reproduced below:

“16. The next question arises that who shall bear the transmission charges of the elements from the date of SCOD till the commissioning of downstream stream asset by PSPCL. The issue regarding payment of transmission charges from the date of SCOD was deliberated in Petition No. 43/MP/2016 and the Commission vide order dated 21.9.2016 laid down the principles for such cases and observed as under:

“24. A related issue arises as to how recovery of transmission charges of transmission licensee shall be made when the transmission system under TBCB is ready as on its scheduled COD as per the provisions of the TSA but cannot be made operational or put to use due to non-availability/ delay in upstream/ downstream system. In our view, ISTS licensee executing the project under TBCB should enter into Implementation Agreement with CTU, STU, inter-State transmission licensee, or the concerned LTTC, as the case may be, who are responsible for executing the upstream/ downstream transmission system and clearly provide the liability for payment of transmission charges in case of the transmission line or upstream/downstream transmission assets. In the absence of Implementation Agreement, the payment liability should fall on the entity on whose account an element is not put to use. For example, if the transmission line is ready but terminal bays belonging to other licensees are not ready, the owners of upstream and downstream terminal bays shall be liable to pay the charges to the owner of transmission line in the ratio of 50:50 till the bays are commissioned. In case one end bays are commissioned, the owner of other end bays shall be liable to pay the entire transmission charges of the transmission line till its bays are commissioned. The above principle shall be followed by CTU in all cases of similar nature in future.”

As per the decision quoted above, if the downstream system of the elements in present case is not commissioned by the schedule date of commercial operation, the owner of the downstream system shall be liable to pay the transmission charges of the transmission system till the downstream system is commissioned. However, the Commission, vide order dated 19.4.2016 in Petition No. 100/TT/2014, observed as under:

"8.The petitioner has prayed for approval of COD under Regulation 4(3)(ii) of 2014 Tariff Regulations. Petitioner has submitted that the downstream system which is the associated 220 kV feeder connections was to be implemented by the RVPNL. The petitioner has made several correspondences to the RVPNL for making the associated 220 kV feeder connections available; however the downstream system was not implemented at the time of filing of this petition. The petitioner, vide its affidavit dated 9.3.2015, has submitted that out of the 6 nos. 220 kV feeders to be implemented by the RVPNL, two feeders have been commissioned.

9. Clause 3 (ii) of Regulation 4 of the 2014 Tariff Regulations provides as under:-

“in case a transmission system or an element thereof is prevented from regular service for reasons not attributable to the transmission

licensee or its supplier or its contractors but is on account of the delay in commissioning of the concerned generating station or in commissioning of the upstream or downstream transmission system, the transmission licensee shall approach the Commission through an appropriate application for approval of the date of commercial operation of such transmission system or an element thereof.”

10. Further, the Commission in its order dated 5.8.2015 in Petition No. 11/SM/2014 in the matter of Non-compliance of Sections 38 and 39 of the Electricity Act, 2003 has stated that:-

“....20. Keeping in view the mismatch between commissioning of transmission system by an ISTS licensee and upstream/downstream system of STU, we are of the view that ISTS transmission licensees and STUs should also sign such Implementation Agreement for development of ISTS and downstream system in coordinated way to avoid any mismatch. We direct staff of the Commission to examine this aspect and propose necessary changes required in the 2014 Tariff Regulations to enable an ISTS licensees and STUs to enter into Implementation Agreement.

21. *Since, the process of amendment would take time, we direct STUs to expedite downstream system in a time bound manner so that the transmission system already commissioned is put to use. PGCIL is at liberty to approach the Commission for invoking Regulation 3(12) (c) of the 2009 Tariff Regulations or Regulation 4(3) (ii) of 2014 Tariff Regulations, as the case may be, for COD of the completed assets. Concerned STU, who had requested for provision of downstream line bays in the various meetings of Standing Committee/RPC, shall bear the transmission charges till completion of downstream system.*”

11. *PSPCL submitted that the DOCO certificate given in the petition does not certify that the associated 220kV bays have been charged/commissioned. Hence, as per the certification given in the DOCO certificate, the 220kV bays are not certified to be commissioned. In absence of 220kV line bays, this entire substation/project becomes idle since the purpose of this new substation is to supply 220kV lines in Kotputli area.*

12. *The petitioner has already completed its work covered under their scope of work but the concerned STU has not completed their scope of work i.e. the implementation of associated 220 kV feeder*

connections. The petitioner in this matter has made regular correspondence which is evident from the copy of letters submitted to the RVPNL. Petitioner vide affidavit dated 1.2.2016 has submitted the status of 220KV feeders of Kotputli Sub-station. It is evident from the submission that commissioning of 220 KV feeders have been delayed.

13. In view of the above we are approving the COD of the Asset A & B (i) as 1.4.2014 and Asset B (ii) as 10.9.2014 under the Regulation 4 (3(ii)) of the 2014 Tariff Regulations. However, as regards the recovery of the transmission charges is concerned, the transmission charges is to be recovered from the concerned State Discoms in accordance with the transmission service agreements as set forth in forthcoming paragraph of this order.

14. Annual Fixed charges for 2014-19 tariff period are being determined in the succeeding paragraphs. "

In the light of the above, PSPCL shall be liable to bear transmission charges from SCOD/actual commissioning whichever is later till commissioning of downstream system post which the assets shall be considered under POC.

While deciding the issue in the Impugned Order the Central Commission has 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 like the present case in

hand. According to the laid principle, the transmission licensee implementing transmission system through TBCB route shall enter into an Implementation Agreement (IA) with the entity responsible for the implementation of the upstream/downstream system clearly stating the liability to pay transmission charges in case of delay. The Central Commission further elaborated that in the case if there is no IA, the liability to pay transmission charges fall on the entity on whose account the transmission system could not be put to use.

The Central Commission in the Impugned Order has also referred to its previous order dated 19.4.2016 in Petition No. 100/TT/2014 and order dated 5.8.2015 in Petition No. 11/SM/2014. In the said orders, the Central Commission while acknowledging the gaps in the Tariff Regulations, 2014, directed its staff to examine the aspect of signing of IA between the Inter State Transmission Licensees (ISTS) & STUs and propose necessary changes required in the Tariff Regulations, 2014 to enable ISTS and STUs to enter into Implementation Agreement. The Central Commission also observed that the concerned STU, who had requested for provision of downstream line bays in the various meetings of Standing Committee/RPC, shall bear the transmission charges till completion of downstream system and goes on deciding that the concerned State (Rajasthan) Discoms have to bear transmission charges till the commissioning of the downstream system based on the TSAs signed by them.

The Central Commission then goes on deciding that the Appellant is liable to pay transmission charges to the Respondent No. 1 from SCOD of the Transmission System until downstream system is commissioned.

- (ii) It is clear from the decision of the Central Commission that there is no provision either in the Sharing Regulations or in the Tariff Regulations, 2014 to cover an eventuality of payment to a transmission licensee, the transmission charges by the concerned party when its transmission system is ready/commissioned but the upstream/ downstream system is not ready due to which the transmission system cannot be put to use.
- (iii) Now let us examine the relevant portion of the Sharing Regulations. The same is reproduced below:

“2 (1)

(l) Designated ISTS Customer or DIC means the user of any segment(s) or element(s) of the ISTS and shall include generator, State Transmission Utility, State Electricity Board or load serving entity including Bulk Consumer and any other entity or person directly connected to the ISTS and shall further include any intra-State entity who has obtained Medium Term Open Access or Long Term Access to ISTS.

Provided that where the ISTS charges were being billed to the distribution companies or any designated agency in the State for purchasing power before implementation of these regulations, the distribution companies or the designated

agency, as the case may be, shall be treated as Designated ISTS Customer in that State for the purpose of preparation of Regional Transmission Account (RTA) by Regional Power Committees and for the purpose of billing and collection by the CTU: Provided further that after implementation of these regulations, the States may designate any agency as Designated ISTS Customer for the above purpose.

.....

.....

CHAPTER 2: SCOPE OF THE REGULATIONS

3. Yearly Transmission Charges, revenue requirement on account of foreign exchange rate variation, changes in interest rates etc. as approved by the Commission and Losses shall be shared amongst the following categories of Designated ISTS Customers who use the ISTS:-

(a) Generating Stations (i) which are regional entities as defined in the Indian Electricity Grid Code (IEGC) or (ii) are having LTA or MTOA to ISTS and are connected either to STU or ISTS or both;

(b) State Electricity Boards/State Transmission Utilities connected with ISTS or designated agency in the State (on behalf of distribution companies, generators and other bulk customers connected to the transmission system owned by the SEB/STU/ intra-State transmission licensee);

(c) Any bulk consumer directly connected with the ISTS, and

(d) Any designated entity representing a physically connected entity as per clauses (a), (b) and (c) above.”

Further, the Chapter 3 and 4 of the Sharing Regulations titled “PRINCIPLES AND MECHANISM FOR SHARING OF ISTS CHARGES AND LOSSES” and “PROCESSES FOR SHARING OF TRANSMISSION CHARGES AND LOSSES” deals with the principles, mechanism and methodology for sharing of transmission charges and losses. Perusal of the same makes it clear that PoC mechanism is based on the usage of the transmission systems.

The Sharing Regulations provide sharing of transmission charges by the Designated ISTS Customers who use the ISTS. Accordingly, it is clear that all the LTTCs are liable to pay transmission charges only when the Transmission System is being used or put to use.

(iv) In the present case, the Transmission System could not be put to use as the downstream system was not ready by SCOD. The Central Commission relying on its earlier orders in similar situations has held that the Appellant is responsible to pay the transmission charges to the Respondent No. 1 until the downstream system is commissioned.

(v) 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 stated 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.

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 power has prescribed a principle for sharing of transmission charges of the Transmission System of the Respondent No. 1 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.

(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.

(ix) The Appellant has also argued that there was communication between PSTCL and the Respondent No.1 regarding implementation of the downstream system and hence it was not responsible for the execution of the downstream system. The Appellant by taking strength from communications exchanged between the petitioner and the STU in the Order of the Central Commission in case of RVPNL has argued that in that case the STU was held responsible for the delay in execution of downstream bays but the Appellant ignored the fact that the Rajasthan Discoms were made liable to pay the transmission charges by the Central Commission in that case. In the present case it is observed that the communication of Respondent No. 1 with PSTCL was technical in nature arising out of various

meetings taken by CEA/ Regional Power Committee and not a contractual one. It was the Appellant who was bound contractually for arranging and making available the downstream system. Accordingly, these contentions of the Appellant are misplaced.

- (x) The Respondent No. 1 has brought on record the orders of the Central Commission in similar cases where the Appellant was a party and the Appellant has not challenged the same. The Appellant has contested that some of these orders cannot be made applicable to it, as they were not directly related to the Appellant. To mention them are Central Commission's Order dated 26.8.2016 in Petition No. 31/RP/2016 wherein liability of payment of transmission charges of the transmission system of PGCIL have been imposed on the Appellant. Based on the submissions of the parties it appears that this order has also not been challenged by the Appellant thus attaining finality of the principle of payment of transmission charges by the Appellant from SCOD until commissioning of the downstream system. The other similar orders where the Appellant was a party as Respondent are the order dated 24.11.2016 in Petition No. 29/RP/2016 (PGCIL Vs. RRVPNL &Ors.) and order dated 27.1.2017 in Petition No. 32/RP/2016 (PGCIL Vs. RRVPNL &Ors.). Although vide these orders the Appellant is not held to pay the transmission charges from SCOD until commissioning of the downstream system but these orders have enumerated the principles followed by the Central Commission.

- (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.
- (xii) Accordingly, this issue is decided against the Appellant.
- c) However, we 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 also observed that there are many regulatory/judicial orders of the Central Commission to deal with the situations like in the present case.
- d) 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.

e) On Question No. 9 (b) i.e. Whether the Central Commission while passing the transmission tariff orders can ignore the provisions of Sharing Regulations, 2010 which provide for pooling of transmission tariff of all transmission licensees and recovery through the PoC Pool? and on Question No. 9 (d) i.e. Whether, having prescribed a manner of recovery of transmission charges in the Sharing Regulations, the Central Commission can proceed to distract from the same in individual cases and for the benefit of certain private parties?, we decide as follows:

(i) As discussed at S. No. 15 b) above while deciding Question No. 9 (a) it is clear that the provisions of the Sharing Regulations (applicability of PoC on the DICs) are not applicable to the situation when the Transmission Asset is not in use. Accordingly, the question of applicability of sharing regulation for the period from SCOD until commissioning of downstream system does not arise.

(ii) From the discussions at S. No. 15 b) above it is clear that the Central Commission has decided the principle to deal with the situation by a way of regulatory powers available to it under Section 79 (1) of the Act as has been held by Hon'ble Supreme Court's judgement PTC case in absence of specific regulations. It is also seen that the same principle has been applied by the Central Commission in case of PGCIL in some other orders. It can't be presumed by the Appellant that the Central Commission has proceeded for benefit of the private parties.

(iii) Hence, this issue is also decided against the Appellant.

f) On Question No. 9 (c) i.e. Whether the earlier Orders of the Central Commission can apply to the Appellant when the said Orders were passed in other matters and where the Appellant was neither heard nor at fault?, we decide as follows:

(i) The earlier orders of the Central Commission as discussed at S. No. 15 b) has laid down the principles for dealing the situation as in the present case and are judicial orders. The applicability of those orders depends upon the circumstance of the case and the applicability on the Appellant has been discussed at S.No. 15 b) above.

(ii) Hence this issue is also decided accordingly.

ORDER

Having regard to the facts and circumstances of the case as stated above, we are of the considered view that the issues raised in the instant appeal have no merit. The appeal is hereby dismissed devoid of merits.

The Impugned Order dated 4.1.2017 passed by the Central Commission is hereby upheld and IA No. 566 of 2017, IA No. 725 & IA No. 1063 of 2017 stand disposed of as such.

No order as to costs.

Pronounced in the Open Court on this **27th day of March, 2018.**

(N K Patil)
Judicial Member

(I.J. Kapoor)
Technical Member

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