

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

Appeal No. 99 of 2015

Dated: 01st December, 2015

**Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. I. J. KAPOOR, TECHNICAL MEMBER**

In the Matter of:

Power Grid Corporation of India Ltd.

Saudamini, Plot No.2,
Sector 29, Gurgaon – 122 001

... Appellant/Petitioner

Versus

- 1. Central Electricity Regulatory Commission**
3rd and 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi – 110 001.
- 2. Rajasthan Rajya Vidyut Prasaran Nigam Ltd.**
Vidyut Bhawan, Jyoti Nagar, Janpath,
Jaipur – 302 005.
- 3. Ajmer Vidyut Vitran Nigam Ltd.**
400 kV GSS Building, (Ground Floor)
Ajmer Road, Heerapura,
Jaipur – 302 005.
- 4. Jaipur Vidyut Vitran Nigam Ltd.**
400 kV GSS Building (Ground Floor)
Ajmer Road, Heerapur,
Jaipur – 302 005.
- 5. Jodhpur Vidyut Vitran Nigam Ltd.**
400 kV GSS Building (Ground Floor),
Ajmer Road, Heerapur,
Jaipur – 302 005.
- 6. Himachal Pradesh State Electricity Board Ltd.**
Vidyut Bhawan, Kumar House Complex Building II,
Shimla – 171 004.
- 7. Punjab State Power Corporation Ltd.**
The Mall,
Patiala – 147 001.

- 8. Haryana Power Purchase Centre**
Shakti Bhawan, Sector 6,
Panchkula (Haryana) – 134 109.
- 9. Power Development Department**
Govt. of jammu & Kashmir,
Mini Secretariat, Jammu – 180 006.
- 10. Uttar Pradesh Power Corporation Ltd.**
Shakti Bhawan, 14, Ashok Marg,
Lucknow – 226 001.
- 11. Delhi Transco Ltd.**
Shakti Sadan, Kotla Road,
New Delhi – 110 002.
- 12. BSES Yamuna Power Ltd.**
Shakti Kiran Building,
Karkardooma,
Delhi – 110 092.
- 13. BSES Rajdhani Power Ltd.**
BSES Bhawan, Building No. 20, Nehru Place,
New Delhi – 110 019.
- 14. Tata Power Distribution Company Limited**
(Formerly North Delhi Power Limited)
Power Trading & Load Dispatch Group
Cennet Building, Grid Building, Near PP Jewelers,
Pitam Pura, New Delhi – 110 034
- 15. Chandigarh Administration**
Sector 9, Chandigarh – 160 022.
- 16. Uttarakhand Power Corporation Ltd.**
Urja Bhawan, Kanwali Road,
Dehradun – 248 001.
- 17. North Central Railway**
Regional Head Quarter,
Civil Lines, Allahabad – 211 001.
- 18. New Delhi Municipal Council**
Palika Kendra, Sansad Marg,
New Delhi – 110 002.

... Respondent(s)

Counsel for the Appellant(s) : Mr. M. G. Ramachandran and
Ms. Ranjitha Ramachandran

Counsel for the Respondent(s) : Mr. Pradeep Mishra, Mr. Suraj Singh,
Mr. R.B. Sharma

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

This is an appeal under Section 111 of Electricity Act, 2003 filed by Power Grid Corporation of India Ltd. (hereinafter referred to as the '**appellant**') against the order dated 09.01.2015 passed by the Central Electricity Regulatory Commission (in short '**Central Commission**') in Petition No. 80/TT/2012 regarding approval of transmission charges of 50% series compensation (the transmission asset) at Meerut (Extension) on Tehri Pooling Point (Koteshwar) Meerut 765 kV 2* Single Circuit Lines (charged at 400 kV) under Transmission System associated with Koteshwar HEP for tariff block 2009-14 period from date of commercial operation (01.02.2012-31.03.2014) whereby the learned Central Commission has rejected the time overrun of 40 months and disallowed the claim for Interest During Construction (IDC) and Incidental Expenditure During Construction (IEDC) of Rs.5.53 Crores for such period of delay.

- 2) According to the appellant/petitioner, the delay in commissioning of the transmission asset was due to the unique design of the 765 kV Fixed Series Compensation (FSC) installation at Meerut which was first of its kind and the 765 kV Bypass switch exclusively used for such installation was not commonly available. In view of the technical complexity and the limited competent and experienced manufacturers, the appellant faced difficulties in successful conclusion of the bidding process for issuing the Letter of Award as well as for finalization of the technical specifications and engineering parameters. These factors were beyond the control of the appellant and the learned Central Commission ought to have condoned the delay of 40 months and allowed the costs of IDC and IEDC.
- 3) The appellant, Power Grid Corporation of India Ltd., is a Government Company within the meaning of Companies Act, 1956 and is engaged in the transmission

of electricity and other functions provided under the Electricity Act, 2003. The appellant discharges the functions of the Central Transmission Utility (CTU) under Section 38 of the Electricity Act, 2003.

- 4) The respondent No.1 is the Central Electricity Regulatory Commission which is empowered to discharge various functions including determination of tariff under the provisions of the Electricity Act 2003. The learned Central Commission had notified the Central Electricity Regulatory Commission (Terms and Conditions for determination of Tariff) Regulations 2009 (hereinafter referred to as the '**Tariff Regulations 2009**') applicable from 01.04.2009 to 31.03.2014. The remaining respondents, Respondent Nos. 2 to 18 are distribution licensees in various States of the country.
- 5) The relevant facts for the purpose of deciding this appeal are as under:
- (i) That on 24.03.2004, the 16th Standing Committee meeting on Transmission System Planning in Northern Region approved, *inter alia*, the transmission assets which are detailed as under:

Transmission Lines:

- (a) Koteshwar – Tehri Pooling Point (Koteshwar) 400 kV D/C line
(b) LILO of Tehri-Meeru 765 kV lines (charged at 400 kV level) at Tehri Pooling Point (Koteshwar) (Loop in with 400 kV D/C Triple Snowbird line & Loop out with 765 kV S/C lines)

Sub-station

- (a) Sub-station 400 kV Tehri pooling Point (Koteshwar) Gas Insulated Substation (GIS)-New
(b) 50% series compensation at existing Sub-station of POWERGRID at Meerut (Extension) on Tehri Pooling Point (Koteshwar)-Meerut 765 kV 2* S/C lines (charged at 400 kV level)
- (ii) That on 01.06.2005, the Board of Directors of the appellant approved the Investment for the **Koteshwar Transmission System** at an estimated

cost of Rs.26034 lakh including Interest During Construction of Rs.1334 Lakh based on the 4th quarter 2004 price level.

- (iii) That on 11.09.2006 Global Competitive Bids were invited by the appellant for the 765 kV installation at Meerut. However, the bidding process was annulled as two out of three bidders did not have the technical qualifications.
- (iv) That on 27.09.2007 the bids were again invited after incorporation of revised qualifying requirements.
- (v) That on 14.12.2007 the bids were opened. However, the bidding process was again annulled as the bidders had deviated from the design in the bidding documents.
- (vi) That on 25.07.2008, the appellant reviewed the technical specifications and after necessary modifications, re-invited the bids. The bids were opened.
- (vii) That on 17.06.2009 the Letter of Award was issued to the successful bidder i.e. M/s SIEMENS.
- (viii) That as per the Investment Approval (IA) the above transmission assets were scheduled to be commissioned within 27 months from the date of letter of award for Gas Insulated Substation (GIS) package i.e. 27 months from 17.06.2006. Accordingly, the scheduled completion date was 01.10.2008. Transmission assets were commissioned on 01.02.2012.
- (ix) That on 25.02.2012, the appellant filed petition, being Petition No.80/TT/2012 before the Central Commission for determination of transmission tariff for the Transmission Assets on the basis of capital expenditure incurred or to be incurred up to the anticipated date of commercial operation and estimated additional capital expenditure

projected to be incurred from the anticipated date of commercial operation i.e. on 01.01.2012 till 31.03.2014.

- (x) That on 03.07.2014, the appellant vide Affidavit submitted the actual date of commercial operation of transmission assets i.e. 01.02.2012.
- (xi) That during the proceedings in Petition No. 80 of 2012, the Central Commission from time to time sought for various information, detail justification, clarifications etc. from the appellant regarding the delay, which details were provided by the appellant to the Central Commission vide Affidavits dated 07.01.2013 and 10.12.2014. Thus the appellant submitted the requisite details regarding the delay in commissioning of Transmission Asset.
- (xii) That the appellant stated before the Central Commission that 765 kV Fixed Series Compensation (FSC) to be installed at Meerut end on Tehri Pooling Point (Koteshwar)-Meerut 765 kV 2* to single circuit line is the first 765 kV level installation in the country and there are very few such 765 kV level installation worldwide. Due to the specific design, 765 kV Bypass Switch exclusively used for 765 kV FSC installation is very rare and not commonly available. During global competitive bidding in 2006 very few vendors like SIEMENS, NOKIA & ABB were understood to have the technology and capability of FSC at level 765 kV. Accordingly, with this backdrop and in line with the procurement policy and procedure in vogue, for transparency fairness and competitiveness in process, Global Competitive Bids for the subject package were invited in September, 2006. However, two out of three firms fell short of meeting the qualification criteria stipulated in the Bidding Documents and therefore the bidding process was annulled.
- (xiii) That bid had to be invited thrice after they failed twice only because of the uniqueness of the works to be carried out. This was due to the fact that it was the first 765 kV FSC installation in the country.**

There were constraints in the availability of experienced manufacturers worldwide which forced the bidding process to be delayed by about 34 months with respect to the investment approval date.

(xiv) That the period of execution of the project of 27 months was indicated to begin along with the award of Tehri Pooling Station GIS. This was mainly due to the reason that both the projects were required at the same time and as per Feasibility Report, both were expected to be awarded simultaneously. However, in actuality, though the contract for Tehri Pooling Point (GIS) substation got awarded on 17.06.2006, the contract for 765 kV FSC could not be awarded due to the aforesaid reasons which involved a delay of nearly 3 years. Further the project also got delayed during the execution stage since the by-pass switch was not meeting the technical requirements stipulated by the appellant.

(xv) That the finer aspects of design of FSC which was being done for the first time could not be known in completeness at the stage of selecting a bidder. After the contracting stage is completed, the detailed engineering is normally done to determine the final parameter of the equipment based on which the type test is carried out. This being a unique project, on account of technical complexities involved and the fact that it was the first 765 kV level installation in the country, it required a detailed set of calculation based on which the series of type – test were carried out at CERDA, France and completed in January 2012 and accordingly the FSC was commissioned in February 2012. Thus the FSC was commissioned with a delay of 40 months from the date of scheduled commissioning. This delay in procurement and subsequent execution of this work was entirely beyond the control of the appellant.

- (xvi) That after hearing the parties and considering the material on record the learned Central Commission vide Impugned Order dated 09.01.2005 has disposed of the said Petition No. 80/TT/2012.
- 6) We have heard Mr. M. G. Ramachandran, assisted by Ms. Ranjitha Ramachandran, learned counsel for the appellant, Mr. Pradeep Misra, Mr. Suraj Singh and Mr. R.B. Sharma, learned counsel for the respondents. We have also gone through the written submissions submitted by the parties and also gone through the material on record including the Impugned Order passed by the Central Commission.
- 7) The only following issue arises for our consideration in this appeal:
Whether the Central Commission is legally justified in rejecting the claim of time over run of the appellant in respect of transmission asset and in holding that the said delay of 40 months was caused by the inefficiency of the appellant?
- 8) The following submissions have been made by the appellant on this issue:
- (i) That the Investment Approval provided for a common Schedule Date for all the Assets being 27 months from the Letter of Award for Gas Insulated Substation Package. The period of 27 months is less than the time scheduled under Tariff Regulations 2009 for completion of transmission schemes for 765 kV transmission lines and sub-stations. Thus it is incorrect to say that any time cushion was granted to the appellant in view of the time taken from the date of Letter of Award as opposed to the date of Investment Approval.
- (ii) That the scheduled date for the transmission system was computed based on the Letter of Award of the Gas Insulated Substation package on the expectation that the letter of Award for both the Gas Insulated Substation and the 765 kV FSC installation would be awarded simultaneously. Further 765 kV FSC installation was connected to the

construction of the Loop In Loop Out (LILO) of Tehri Meerut line at Tehri Pooling Point and the sub-station of the Tehri Pooling point. Thus the installation was to be constructed in accordance with the implementation schedule of the LILO and the sub-station. **The Commissioning of FSC installation would not serve any purpose if the LILO and sub-station were not ready and not commissioned. Both projects were required at the same time and as per the feasibility report both were expected to be awarded simultaneously. Therefore, scheduled date of commissioning of FSC installation was connected to the letter of award of the gas insulated sub-station package.**

- (iii) That the selection of the manufacturer for the 765 kV installation and the 765 kV bypass switch was under the global bidding process in line with the procurement policy and procedure in vogue, for transparency, fairness and competitiveness in process. The competitive bidding process had to be conducted three times for issuance of letter of award to the successful bidder. This was because of the uniqueness of the work to be carried out being the first 765 kV FSC installation in the country and even globally, there were very few such installations. The appellant had no previous experience of such installation and could not have known all the finer aspects of the design and the technical specifications prior to the procurement process. Further there were also constraints in the availability of the experienced manufacturers worldwide which forced the bidding process to be delayed by about 34 months with respect to the investment approval date.
- (iv) That the first bid was undertaken in 2006. There were few vendors like SIEMENS, NOKIA and ABB which were understood to be having technology and capability of FSC at level of 765 kV. Only three firms participated in the bid and two out of three firms fell short of meeting the qualification criteria. Since only one firm was technically qualified, the bidding process was annulled. This was beyond the control of the

appellant as the bidding process could not be held with only one qualified bidder.

- (v) That another bidding process was conducted in 2007. The qualification requirements were revised and the bids were invited. The bids were opened on 14.12.2007. Since some bidders deviated on the design of the Metal Oxide Varistor (MOV) for high order of contingency stipulated in the bidding documents, the bidding process on second time had to be annulled.
- (vi) That in view of the technical complexity involved and the lack of experience, it was considered prudent to review the technical specifications by suitably adjusting the contingency levels which *inter alia* had no impact on the performance of the appellant. The necessary modifications were carried out before the bids were re-invited. In May, 2008 fresh bids were invited on global basis for the third time and were opened on 25.07.2008. The letter of award was issued to the successful bidder M/s SIEMENS on 17.06.2009 on turnkey contract basis for 765 kV FSC installation.
- (vii) That since the letter of award was made three years after the letter of award to the Tehri Pooling Station, the implementation schedule of the appellant for the FSC installation should be considered from the date of letter of award for the FSC installation and not the letter of award for Tehri Pooling Station.**
- (viii) That the delay in issuance of letter of award was not attributable to the appellant. The circumstances have to be considered in a proper and pragmatic manner. Since the project was being undertaken for the first time by the appellant having no prior experience, the installation of any system for the first time would involve challenges which are not possible to foresee and plan. Therefore, the time schedule expected may not be accurate and there may be delays in actual implementation of the new

system. The appellant had finalized the technical specifications to the best of its ability. This has to be considered while considering the time over run for a new project.

- (ix) That this stand that the appellant should have held the pre-bid conference is erroneous, because the appellant cannot hold a pre-bid conference with potential bidders for discussions on qualifying criteria and technical specifications in the bidding documents. It cannot be expected that the potential bidders would disclose their designs and technical specifications at the pre-bid conferences when other potential bidders are present.
- (x) That the appellant had finalized the technical specifications to the best of its ability, the appellant cannot be faulted that the technical specifications had to be revised, particularly when the project was technically complex and rare.
- (xi) **That after the contract for the 765 kV FSC installation was awarded, the project was delayed in the execution stage by six months.** Since the FSC installation was technically complex, detailed calculations were required to be done for finalization of the final parameters. The finer aspects of the design of FSC could not be known at the time of selecting the bidder and it is only after the contracting stage that detailed engineering is normally done to determine the parameter of the equipment based on which type test is carried out. The FSC installation required detailed set of calculations based on which the series of type test were carried out at CERDA, France which was completed in January 2012 and commissioned in February, 2012.
- (xii) That the bypass switch supplied by the manufacturer did not meet the technical requirements stipulated by the appellant and the same was beyond the control of the appellant. The delay due to any default or failure on part of the contractor/supplier is to be compensated by

liquidated damages to be recovered from the contractor/supplier to the extent of the contract and to be adjudicated under the adjudication process provided in the contract. Such adjudication can be done only after completion of the contract. The details of liquidated damages recoverable were not available with the appellant at the time of filing the tariff petition. The appellant had undertaken to file the liquidated damages after closing of the contract. Thus any liquidated damages recovered by the appellant from the contractor/supplier would be adjusted at such time. However, at present, the appellant has not recovered the liquidated damages. The delay in the project is to be condoned and the appellant should be allowed to recover IDC and IEDC at this stage. Any amount received as liquidated damages after adjudication would be adjusted subsequently.

(xiii) That in the present case, the learned Central Commission has committed an error by not considering the relevant material available on record or otherwise drawing an inference on the basis of mere assumption and presumption without any analysis of the documents available on record. Thus the Central Commission should be directed to allow the IDC and IEDC for Rs.5.53 crores and re-determine the approval capital cost.

9) **Per contra**, the following submissions have been made on behalf of the respondents on this issue:

(i) That the learned Central Commission has legally and correctly disallowed the time over run of 40 months of the date of scheduled commissioning in the commissioning of the transmission system, consequently disallowing the IDC and IEDC for the time over run for Rs.5.53 crores in the tariff determination.

(ii) That the scheduled completion period of the project in this case was decided by the appellant himself as is evident from the investment approval dated 01.06.2005 which clearly stipulates that the project is

scheduled for completion within 27 months. Normally, the scheduled completion period of the project, commences from the date of investment approval but in this case the scheduled commissioning period commenced from the date of letter of award for Gas Insulated Substation package which in the opinion of the appellant, constituted the critical items or works for the purpose of determining the scheduled completion period. In spite of the cushion availed by the appellant, in the form of scheduled completion period of the project from the date of letter of award for GIS package, the work could not be completed by the appellant within the specified period of 27 months. **The completion of this work had taken 40 months extra which clearly indicates lack of coordination and supervision by the appellant and its employees.**

- (iii) That the learned Central Commission after examining the issue in detail and in its proper perspective, has come to the conclusion that the delay in commercial operation of the transmission asset is on account of inefficiency of the appellant/petitioner or the failure of the vendor/supplier to supply the equipment of the agreed technical specifications and the same cannot be condoned. The Central Commission has rightly and clearly stated that there is no justification, whatsoever, to burden the consumers with additional costs for the failure of the vendor/supplier to supply the proper equipment.
- (iv) That there are no specific regulations to deal with the issue related to the time over run cost. This Appellate Tribunal vide its judgment dated 27.04.2011 in Appeal No. 72 of 2010 in the matter of *MSPGCL Vs MERC & Ors.* had laid down the principle for prudence check of time over run and cost over run of high projects.
- (v) That the appellant was reluctant to furnish information before the Central Commission to substantiate its claims and many times the Central Commission had to direct the appellant to furnish the information. Even, at times, incorrect and incomplete information had

been furnished by the appellant. The strategy adopted and used by the appellant to conceal the material facts from the Central Commission and the respondent beneficiaries is self defeating.

- (vi) That the contention of the appellant that the scheduled commissioning of the asset in question being 27 months from the date of letter of award (LOA) means that letter of award for both Tehri pooling Station GIS and 765 kV FSC installation would be awarded around the same time, as misleading and misconceived. The alleged technical complexities involving in this asset were neither brought to the notice of the “Standing Committee on Transmission Planning in Northern Region” nor to the Board of Directors while granting investment approval. The appellant had not properly prepared the technical specifications before undertaking the bidding process. If the appellant was of the view that the project was unique, a pre-bid conference would have been held to finalize the specifications and assess the availability of vendors which is a general practice for such project. **However, in this case, pre-bid conference was done when huge delay had already occurred. A part of the delay was also caused by the vendor as the vendor could not supply the bypass switch in accordance with prescribed specifications under the contract and thus liable for damages. Thus, the delay on this issue was entirely within the control of the appellant.** The appellant must desist from blaming the Central Commission for his own omission and commission because it is a case of clear impudence on the part of the appellant.

10) **Our consideration and conclusion on the issue relating to time over run of 40 months:**

- (a) We have cited above the detailed facts of the matter and rival contentions of the parties hence repetition of the same is not necessary here. To arrive at our own independent conclusion and to test the legality and validity of the Impugned Order, we deem it proper to quote the relevant part of the Impugned Order, which is produced as under:

“Time over-run

11. *Against the scheduled date of commercial operation of 1.10.2008, the transmission asset has been declared under commercial operation on 1.2.2012, with delay of 40 months. During technical validation, the Commission under letter dated 6.7.2012 sought the following information from the petitioner:-*

- (a) Justification along with documentary evidence for condoning the delay which was stated to be on account of delay in supply of the equipment by the supplier.*
- (b) Details of liquidated damages leviable on contractor in accordance with provisions of contract, along with documentary evidence.*

12. *The petitioner vide affidavit dated 7.1.2013 has submitted as under:*

“Reply to point-(a)

It is submitted that 765 kV FSC to be installed at Meerut end on Tehri Pooling Point (Koteshwar) – Meerut 765 kV 2 S/C Line, is first 765 kV Level installation in the country and there are very few such 765 kV Level installation worldwide. Due to specific design, 765 kV Bypass Switch exclusively used for 765 kV FSC installation is very rare and not commonly available. During global competitive bidding in 2006, hardly few vendors like SIEMENS, NOKIAN & ABB were understood to have the technology and capability of 765 kV FSC. Accordingly, with this backdrop and in line with the procurement policy and procedure in vogue, for transparency, fairness and competitiveness in process, Global Competitive Bids for the subject package were invited in September, 2006. As two out of three firms were falling short of meeting the qualification criteria stipulated in the Bidding Documents, the bidding process was annulled.*

The bids under re-bidding were invited on 27/09/2007 after incorporation of revised Qualifying Requirements (QR) in the Bidding Documents and were opened on 14/12/2007. Again the bidding process against the said invitation was annulled due to deviation taken by the bidders on design of the MOV for high order of contingency stipulated in the Bidding Documents.

In view of the technical complexity involved and the fact that POWERGRID had no previous experience with 765 kV FSC and also the experience across the global for such supply was rare, it was

considered prudent to review the technical specification by suitably adjusting the contingency level which inter-alia had no impact on performance requirement of petitioner, bids were re-invited after necessary modifications.

Subsequently, fresh bids were invited in May, 2008 on global basis and were opened on 25.07.2008. Finally LOA was issued to the successful bidder i.e. M/S SIEMENS on 17.06.2009 on turnkey contract basis for 765 kV FSC installation at Meerut. It is therefore to be clarified that the Bids had to be invited three times (after they failed twice) only because of the uniqueness of work to be carried out. It is to be emphasized that this being the first 765 kV FSC installation in the country and constraints in availability of experienced manufacturers worldwide, forced the bidding process to be delayed by about 34 months w.r.t investment approval date.

As far as the time - line of execution of these works are concerned, it is to be clarified that the period of its execution of 27 months was indicated to begin along with the date of award of Tehri Pooling Station (GIS). This was mainly due to the reason that both these were required at the same time and as per FR, were expected to be awarded simultaneously. Though the Tehri Pooling Point (GIS) substation got awarded, the FSC could not be awarded due to the reasons stated above which involved a delay of about 3 years. The project also got delayed during execution stage since the by - pass switch was not meeting the technical requirements stipulated by the petitioner.

It needs to be mentioned that at the stage of selecting a bidder during a procurement process, the finer aspects of design of FSC were not known in completeness. After the contracting stage is completed, the detailed engineering is normally done to determine the final parameter of the equipment based on which the type test is carried out. This being a unique project, required a detailed set of calculation based on which the series of type-test was carried out at CERDA, France and completed in Jan 2012 and accordingly the FSC was commissioned in Feb 2012.

It may be appreciated from above that the delay in procurement and subsequent execution of this work was entirely beyond the control of the petitioner. This may therefore be condoned.”

13. The petitioner has not submitted the details of Liquidated Damages (LD) recovered or recoverable, though in the affidavit dated 7.1.2013 it was stated that the details of LD levied on contractor would be submitted separately after closing of contract.

14. The chronology of activities culled out from the petitioner's affidavit dated 7.1.2013 is summarized as under:-

Srl. No.	Date of Activity	Activity	Remarks
1	1.6.2005	Grant of Investment Approval	
2	11.9..2006	Global competitive bidding	2 out of 3 firms did not meet qualification Criteria-Bid process annulled
3	27.9.2007	Re-bidding (Global)	After revised qualifying requirement
4	14.12.2007	Bids opened	Deviation by bidders on design of MOV For higher order of contingency stipulated in bid. Bid process annulled
5	12.5.2008	Re-bidding (Global)	After revising technical specifications by suitably adjusting contingency level
6	25.7.2008	Bids opened	
7	1.10.2008	Scheduled Commissioning	27 months from LOA
8	17.6.2009	Letter of Award issued	34 months (from starting of bidding process September, 2006 to LoA)
9	1.2.2012	Date of commercial operation	Delay of 40 months

15. From the details furnished by the petitioner it is seen that the petitioner had revised qualifying requirements twice. This makes it obvious that the petitioner had not properly prepared the technical specifications before undertaking the bidding process. In case of uniqueness of the project, a pre-bid conference is generally held to finalize the specifications and assess the availability of vendors. Non-finalization of complete specifications before bidding shows imprudence on the part of petitioner in proceeding with calling bids, which caused the inordinate delay of 34 months.

16. The petitioner has admitted that this being a unique project required a detailed set of calculations. The petitioner has failed to furnish any information to show that it took timely action for carrying out the detailed calculations. The petitioner has further submitted that a series of type tests were carried out at CERDA, France, which were completed in January, 2012. However, the details of the activities undertaken and time taken for each activity have not been provided.

17. The petitioner has further stated that during execution stage the project was delayed since bypass switch was not meeting the technical requirement stipulated by it. Thus, according to the petitioner, a part of the delay was caused because of the fault of the vendor. It was the responsibility of the vendor to supply equipment in accordance with prescribed specification under the contract. As the vendor had failed to supply the equipment as per the agreed specifications, the petitioner can recover damages from the vendor/supplier in accordance with the terms of the contract. There can be no justification, whatsoever, to saddle the consumers with additional costs for the failure of the vendor/supplier to supply the proper equipment.

18. Accordingly, in the light of above discussion, the delay of 40 months is not condoned.

IDC and IEDC

19. As held above, delay in commercial operation of the transmission asset is on account of inefficiency of the petitioner or the failure of the vendor/supplier to supply the equipment of the agreed technical specifications. The inefficiency cost on part of the petitioner or the supplier cannot be passed to the consumers. Therefore, IDC and IEDC for the period of delay of 40 months are not being allowed. The amounts on account of IDC and IEDC disallowed are being deducted from capital cost as given overleaf.”

- (b) This Appellate Tribunal vide its judgment dated 27.04.2011 in Appeal No. 72 of 2011 in case of MSPGCL Vs. MERC & Ors. while considering principle for prudence check of time over run and cost overrun of a project held as under:

“7.4 The delay in execution of a generating project could occur due to following reasons:

- i) Due to factors entirely attributable to the generating company, e.g., imprudence in selecting the contractors/suppliers and in executing contractual agreements including terms and conditions of the contracts, delay in award of contracts, delay in providing inputs like making land available to the contractors, delay in payments to contractors/suppliers as per the terms of contract, mismanagement of finances, slackness in project management like improper co-ordination between the various contractors, etc.*
- ii) Due to factors beyond the control of the generating company e.g. delay caused due to force majeure like natural calamity or any other reasons which clearly establish, beyond any doubt, that there has been no imprudence on the part of the generating company in executing the project.*

iii) Situation not covered by (i) & (ii) above.

In our opinion in the first case the entire cost due to time over run has to be borne by the generating company. However, the Liquidated damages (LDs) and insurance proceeds on account of delay, if any, receivable by the generating company could be retained by the generating company. In the second case the generating company could be given benefit of the additional cost incurred due to time over-run. However, the consumers should get full benefit of the LDs recovered from the contractors/suppliers of the generating company and the insurance proceeds, if any, to reduce the capital cost. In the third case the additional cost due to time overrun including the LDs and insurance proceeds could be shared between the generating company and the consumer. It would also be prudent to consider the delay with respect to some benchmarks rather than depending on the provisions of the contract between the generating company and its contractors/suppliers. If the time schedule is taken as per the terms of the contract, this may result in imprudent time schedule not in accordance with good industry practices.

7.5 In our opinion, the above principles will be in consonance with the provisions of Section 61(d) of the Act, safeguarding the consumers interest and at the same time, ensuring recovery of cost of electricity in a reasonable manner.”

- (c) We find that the Board of Directors of appellant approved the Investment Approval for the said transmission assets on 01.06.2005. We also find that the first bidding process was annulled by the appellant itself as the two out of three bidders did not have technical qualifications and it was not proper to proceed with the bidding process with only one technically qualified bidder. The second time bids were again invited after a gap of one year, after incorporating the revised qualifying requirements, which bids were opened on 14.12.2007 and the second bidding process was again annulled on the ground that the bidders had deviated from the design in bidding documents. After more than seven months of the opening of the second bids, the appellant again reviewed the technical specifications and after necessary modifications, the bids were third time re-invited and the bids were opened and ultimately on 17.06.2009 the letter of award was issued to the successful bidder, namely M/s.Siemens. Thus these facts clearly indicate that four years were taken by the appellant in selecting successful bidder from the date of the Investment

Approval by the Board of Directors of the appellant. We may take note of the fact that the scheduled completion period of the project in this case was decided by the appellant itself, as is evident from the Investment Approval dated 01.06.2005, which clearly stipulates that the project was scheduled for completion within 27 months from the date of Letter of Award for Gas Insulated Substation. Thus it is evident from the record that as per the Investment Approval, the said transmission assets were scheduled to be commissioned within 27 months from the date of Letter of Award for Gas Insulated Substation and accordingly scheduled completion date of the transmission assets was 01.10.2008 (i.e. 27 months from 17.06.2006). Admittedly, the transmission assets in this case were commissioned only on 01.02.2012.

- (d) The contention of the appellant that bids had to be invited thrice, after they failed twice, only because of the uniqueness of the nature of the transmission works to be carried out and this was due to the fact that it was the first 765 kV Fixed Series Compensation installation in the country and there were constraints in the availability of the experienced manufacturers worldwide which forced the bid process to be delayed by about 34 months with respect to the Investment Approval date. Further contention of the appellant is that the period of execution of the project of 27 months was indicated to begin along with award of Tehri Pooling Point Gas Insulated Substation and this was mainly due to the reason that both projects were required at the same time and as per Investment Approval both were expected to be awarded simultaneously. However, in actuality, though the contract for Tehri Pooling Point Substation GIS got awarded on 17.06.2006, the contract for 765 kV FSC installation could not be awarded due to the thrice bidding process which involved a delay of nearly three years. Further, the project also got delayed during the execution stage since the bypass switch was not meeting the technical requirement stipulated by the appellant. Further contention of the appellant is that the nature of the transmission work being a unique project, on account of technical complexities involved and the said work being first 765 kV installation in the country, it required a detailed set of calculation based on

which the series of type test were carried out at CERDA, France which completed in January 2012 and accordingly, the FSC was commissioned in February, 2012. A justification is being argued by the appellant for this delay of 40 months from the date of scheduled commissioning stating the aforesaid grounds/reasons, which we are unable to accept after considering the facts and circumstances and the factors connected there with. All these reasons were entirely within the control of the appellant and the appellant was well aware of the uniqueness/complexity and the nature of 765 kV installations in the country. If the reasonable and prudent precautions and care had been taken by the appellant/petitioner the said situation would not have arisen.

- (e) We are totally unable to accept or countenance the said contentions of the appellant because there was a clear stipulation in the Investment Approval that the said assets were to be commissioned within 27 months from the date of Letter of Award for Gas Insulated Substation package. The Letter of Award for Gas Insulated Substation package was made on 17.06.2006 and accordingly, the scheduled completion date was 01.10.2008. There is no indication at all to the effect that the period of execution of the project of 27 months would begin along with award of Tehri Pooling Point GIS. If the appellant expected that both projects were expected to be awarded simultaneously, it was a mistake on the part of the appellant. In the present case, the contract for Tehri Pooling Point GIS was awarded on 17.06.2006 whereas the contract for 765 kV installation was awarded after nearly three years, there remained no question to contemplate that both the projects would be awarded simultaneously. It appears from the record that there was no proper and careful planning about the said transmission project which resulted in the said project having been commissioned with a delay of 40 months. We conclude from the facts and circumstances in the matter in hand, that the said delay of 40 months was absolutely within the control of the appellant and by the exercise of due and reasonable prudence, the said transmission system could have been commissioned within the stipulated time but because of the slackness and improper coordination the said delay had occurred. Hence, we conclude that the delay in issuance of letter of award was completely attributable to the

appellant/petitioner because had the appellant finalized the technical specifications to the best of its ability at an appropriate time, the said extraordinary unexplained delay could not have occurred. We are of the firm view that in such situation the appellant should have held the pre-bid conference and we are unable to accept the contention of the appellant that such pre-bid conference with potential bidders for discussion of qualifying criteria and technical specifications in the bidding documents could not be held.

- (f) We agree to the finding of the Central Commission as recorded in the Impugned Order that the delay in commercial operation of the transmission asset is on account of inefficiency of the appellant/petitioner or the failure of the vendor/supplier to supply the equipment of the agreed technical specifications and the same could not be condoned. We further approve the finding of the Central Commission that there is no justification, whatsoever, to burden the consumers with additional costs for the failure of the vendor/supplier to supply the proper equipment. We are unable to approve or countenance this contention of the appellant that the scheduled commissioning of the asset in question being 27 months from the date of letter of award means that the letter of award for both Tehri Pooling Point GIS and 765 kV FSC installation would be awarded around the same time. The said technical complexities involved in this asset, as is emerging from the material on record, were neither brought to the notice of Standing Committee meeting on Transmission System planning in Northern Region nor to the Board of Directors of the appellant while granting Investment Approval. It appears from the record that the appellant had not properly prepared the technical specifications before undertaking the bidding process. If the appellant was of the view that the project was unique, a pre-bid conference could have been held to finalize the specifications and assess the availability of vendors which is a general practice for such projects. However, in this case, pre-bid conference was done by the appellant when huge delay had already occurred. A part of the delay was also caused by the vendor as the vendor could not supply the bypass switch in accordance with the prescribed specifications under the contract and is liable for the damages. Thus the whole delay in the

commissioning of the transmission asset was entirely within the control of the appellant and the same is fully attributable to the appellant/ petitioner itself.

- (g) The appellant may recover the liquidated damages from the contractor/ supplier to the extent of the contract for any such default or failure of the contractor/supplier. We are unable to accept this contention of the appellant that the appellant should be allowed to recover IDC and IEDC at this stage and any amount receivable as liquidated damages after adjudication from the contractor/ supplier would be adjusted subsequently. There is no question of any kind of adjustment in this matter if there is really any delay due to default or failure on the part of the contractor/supplier in supply of the said equipment. The appellant can always recover the liquidated damages from the said contractor/supplier.
- (h) This Appellate Tribunal, in its judgment dated 27.04.2011 in Appeal No. 72 of 2011 in the matter of *MSPGCL Vs. MERC & Ors.*, while considering the principle for prudence check of time over run and cost overrun of a project has already settled a principle of law and clearly held that any delay in execution of any project if caused due to the factors entirely attributable to any generating company or utility i.e. imprudence in selecting the contractor/supplier and delay in payment, mis-management of finance, slackness in project management like improper coordination, the entire cost due to time over run has to be borne by the company or the utility and the liquidated damages and insurance proceeds on account of such delay, if any, receivable by the company or a utility could be retained by the said company or the utility.
- (i) In view of the above discussion, we do not find any merit in the contentions of the appellant/petitioner. There is no material on record to deviate from the findings recorded by the Central Commission in the Impugned Order and we approve the same. The said issue is decided against the appellant. We observe that the Central Commission is legally justified in rejecting the claim of time over run of 40 months in respect of the said transmission assets. The appeal is worthy of dismissal.

ORDER

The instant appeal, Appeal No. 99 of 2015, is hereby dismissed and the Impugned order dated 09.01.2015, passed by the Central Commission in Petition No. 80/TT/2012 is hereby upheld.

No costs.

Pronounced in the open court on this **01st December, 2015.**

(I. J. Kapoor)
Technical Member

(Justice Surendra Kumar)
Judicial Member



REPORTABLE / ~~NON-REPORTABLE~~