

In the Appellate Tribunal for Electricity at New Delhi
(Appellate Jurisdiction)

Appeal No. 107 of 2014

Dated: 26th February, 2015.

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member

IN THE MATTER OF:

Power Grid Corporation of India Limited,
Having its Registered Office at:
B-9, Qutab Institutional Area,
Katwaria Sarai,
New Delhi-110016,
Corporate Office at:
"Saudamani", Plot No.2,
Sector-29, Gurgaon-122 001 (Haryana).

...Appellant /Petitioner

Versus

1. Central Electricity Regulatory Commission,
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi-1100011.
2. Uttar Pradesh Power Corporation Ltd.,
Shakti Bhawan, 14, Ashok Marg,
Lucknow-225 001(U.P.).
3. Rajasthan Rajya Vidyut Prasaran Nigam Ltd.,
Vidyut Bhawan, Vidyut Marg,
Jaipur-302 005.
(Rajasthan)
4. Ajmer Vidyut Vitran Nigam Ltd.,
400 kV GSS Building (Ground Floor),
Ajmer Road, Heerapura,

Jaipur, (Rajasthan)-302024.

5. Jaipur Vidyut Vitran Nigam Ltd.,
400 kV GSS Building (Ground Floor),
Ajmer Road, Heerapura,
Jaipur, (Rajasthan)-302024.
6. Jodhpur Vidyut Vitran Nigam Ltd.,
400 kV GSS Building (Ground Floor),
Ajmer Road, Heerapura,
Jaipur, (Rajasthan)-302024.
7. Himachal Pradesh State Electricity Board,
Vidyut Bhawan,
Kumar House Complex Building-II,
Shimla-171 004. (Himachal Pradesh).
8. Punjab State Electricity Board,
The Mall, Patiala-147 001. (Punjab).
9. Haryana Power Purchase Centre,
Shakti Bhawan, Sector-6,
Panchkula (Haryana)-134109.
10. Power Development Department,
Government of Jammu and Kashmir,
Mini Secretariat, (Jammu)-180001.
11. Delhi Transco Ltd.,
Shakti Sadan, Kotla Road,
New Delhi-110 002.
12. BSES Yamuna Power Ltd.,
Shakti Kiran Building, Karkardooma,
Delhi-110 002.
13. BSES Rajdhani Power Ltd.,

BSES Bhawan, Nehru Place,
New Delhi-110019.

14. North Delhi Power Ltd.,
Power Trading & Load Dispatch Group,
Cennet Building,
Adjacent to 66/11kV Pitampura-3,
Grid Building, Near PP Jewellers,
Pitampura, New Delhi-110 034.
15. Chandigarh Administration,
Sector-9, Chandigarh-160009.
16. Uttarakhand Power Corporation Ltd.,
Urja Bhawan, Kanwali Road,
Dehradun. (Uttarakhand).
17. North Central Railway,
Allahabad. (U.P.)
18. New Delhi Municipal Council,
Palika Kendra, Sansad Marg,
New Delhi-110 002.

... Respondents

Counsel for the appellant(s) : Ms. Suparna Srivastava &
Ms. Nishtha Sikroria

Counsel for the respondent(s) : Mr. Rajiv Srivastava for Respdt. No.-
2.
Mr. Pradeep Misra & Mr. Manoj
Kumar Sharma for Respdt. No. 3-5.
Mr. R.B. Sharma for Respdt. No.13

J U D G M E N T

PER JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The instant Appeal has been filed under Section 111 of the Electricity Act, 2003 against the order dated 04.02.2014 (hereinafter referred to as the 'impugned order') passed by the learned Central Electricity Regulatory Commission (hereinafter referred to as the 'Central Commission') in Petition No. 96/TT/2012 titled as Power Grid Corporation of India Ltd. Vs. Uttar Pradesh Power Corporation Ltd. & Ors. whereby the learned Central Commission (respondent no.1 herein) has determined the transmission tariff for Pole-II of +/- 500kV, 2500 MW Balia-Bhiwadi HVDC Bipole associated with Barh Generation Project (3x660 MW) (hereinafter referred to as the 'transmission asset') in Northern Region from the date of commercial operation 01.07.2012 to 31.03.2014 based on the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009, (hereinafter referred to as the '2009 Tariff Regulations').

2. The appellant/petitioner is aggrieved to the extent that the Central Commission has erroneously declined to condone the entire time overrun in delayed commissioning of the transmission project particularly when the appellant/petitioner had placed sufficient material on record to establish that the said delay was beyond the control of the appellant. Consequently, the Central Commission has deducted the Interest During Construction (IDC) and Incidental Expenses During Construction (IEDC) from out of the capital cost allowed for the transmission asset, leaving no recourse for recovery of the same.

2.1. that in this manner, out of the total delay of 33 months in commissioning the subject asset, the learned Central Commission has declined to condone the delay of 12 months for the reasons stated in the impugned order. Consequently, the appellant/ petitioner has been denied IDC of Rs.1.89 crores and IEDC of Rs.14.73 crores, aggregating to Rs.16.30 crores from out of the capital cost approved for the assets.

3. The learned Central Commission has, in the impugned order, held as under:-

"25. We have considered the submissions of the petitioner and our response is as under:-

(a) As regards the delay of the generation project, we are aware that there is delay in commissioning of Barh Generation Project. Similar issue has already been dealt with in Petition No. 315/TT/2010 (Pole-I of Balia-Bhiwadi) wherein delay of 11 months due to delay in commissioning of generating unit of NTPC Barh Generation project and delay in getting Excise Duty Exemption Certificate (EDEC) had been condoned. Although the petitioner has not clearly mentioned the period, we condone the period of 11 months out of total delay (32 months) as being attributable to delay in commissioning of the Generation project.

(b) As regards the delay of 15 months in award of project attributed to DGFT Guidelines, it transpires from the master network diagram that the time envisaged from investment decision (12.12.2005) to issue of Letter of Award (30.6.2006) was around 7 months. But on 17.3.2006, DGFT issued a notification, containing changed guidelines. Therefore, the Bid documents were again forwarded by the petitioner to World Bank after incorporating the necessary amendments. On receipt of 'No Objection' from the World Bank, the documents were issued to bidders. The Second Stage Bids were opened in January, 2007. Subsequently, the contract(s) for the subject package were placed in March, 2007. Therefore, the total delay occurred in award of project is 15 months (December, 2005 to March, 2007). However, from the Master Diagram it is evident that the time envisaged for evaluation of bid and award of contract was 7 months. Therefore, the delay attributable to DGFT guidelines is 8 months (15 months -7 months) and we condone the same.

(c) As regards the delay adduced to transfer of technology and related fact that the supplier viz. BHEL could not supply converter transformers in time (July, 2008 to March, 2009), it is seen that its supply started in October, 2011 to March, 2012 involving delay of 38 months. It is noted that Pole-II was commissioned on 01.07.2012. While we do appreciate and welcome indigenous capacity building in HVDC manufacturing targeted to be achieved by joint venture of Siemens and BHEL to be a laudable initiative, we do not find any justification for passing on the burden of delay on this score to the beneficiaries. We leave this issue of delay to be sorted out between the Petitioner and BHEL.

(d) As regards the delay attributed to transportation problem, we notice that the transportation problem arose consequent to change in supplier at Balia end from M/s Siemens to BHEL. The first converter transformer was ready to despatch from BHEL Bhopal on October, 2011. Due to bridge collapse in Bhopal, MP, Govt. restricted movement of heavy equipments for two months from October, 2011. We condone the delay of 2 months attributed to transportation constraint.

26. Based on the above, we condone the delay of 21 months as per the following details:-

Total Delay Condoned - 21 Months:

- (a) Delay in Commissioning of NTPC Barh Generation project: 11 months
- (b) Delay in Award of the project due to DGFT Guidelines: 8 months
- (c) Delay in Tech. Transfer & manufacturing of Converter Transformer by BHEL: Nil
- (d) Delay in Transportation of Converter Transformer from BHEL Bhopal: 2 months

27. Accordingly, the following deduction is made from the capital cost towards IEDC and IDC on account of the delay of 12 months:-

(Rs. In Lakh)			
As per Management Certificate dated 20.11.2012	IEDC	IDC	TOTAL
IEDC/IDC upto 31.03.2012 (75 months)	779.69	4980.30	5759.99
IEDC/IDC for the period 01.04.2012 to 30.6.2012 (3 months)	96.15	876.07	972.22
Total IDC and IEDC Claimed for the total period of Completion (78 Months)	875.84	5856.37	6732.21
Detail of IEDC/IDC Disallowed for 12 months			
Pro Rata IEDC/IDC Disallowed (9 months)	93.56	597.64	691.20
IEDC/IDC for the period 01.04.2012 to 30.6.2012 (3 months)	96.15	876.07	972.22
Total Disallowed (12 months)	93.56	597.64	1663.42

4. that the appellant is a Government of India Company incorporated under the Companies Act, 1956 and is a Central Transmission Utility. The Central Government has declared the appellant as the Central Transmission Utility (CTU) authorized to exercise powers under Section 38 of the Electricity Act, 2003 and further is deemed to be a transmission licensee under Section 14 of the Electricity Act, 2003 and is

required, inter alia, to build, maintain and operate an efficient, coordinated and economic inter-State transmission system (ISTS) for smooth flow of electricity from generating stations to the load centers. The tariff for the said transmission system is determined by the Central Commission in accordance with the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2009 issued vide Notification dated 19.01.2009 and to remain in force for a period of 5 years w.e.f. 01.04.2009 unless reviewed earlier or extended by the Central Commission.

5. that respondent no.1 is the Central Electricity Regulatory Commission set up under Section 76 of the Electricity Act 2003 to exercise the powers and discharge the functions assigned to it including the regulations under Electricity Act, 2003. The respondent nos. 2 to 18 are the beneficiaries in the Northern Region who receive power supply from various generating stations by means of the lines built, maintained and operated by the appellant as the CTU.

6. The relevant facts for the purpose of deciding this Appeal are as under:-

6.1. that the appellant had set up the transmission system associated with Barh Generation Project (3x660MW) situated in the Northern Region being implemented by NTPC. The commissioning of the said system was to strengthen the transmission corridor between eastern part of Northern Region to Western part of Northern Region and was to facilitate transfer of additional power over East-West corridor in Northern Region. Further, many generation projects in the Eastern Region were to be commissioned during 2010. For Northern Region which had been facing acute shortages of power and required large import of power from Eastern to the Northern Region, the HVDC bi-pole link under the aforesaid transmission system was to provide additional corridor and bring power directly at the load centers of Northern Region.

6.2. that on 12.12.2005 the administrative approval and sanction for the transmission system associated with Barh Generation Project was accorded by the Government of India, Ministry of Power at an estimated cost of Rs. 3779.46 crores

including IDC of Rs.179.41 crores (based on 2nd quarter 2005 price level). The Project was to be funded through the World Bank loan.

6.3. that on 23.01.2012 the Revised Cost Estimate (RCE) for the scheme was accorded by the Board of Directors of the appellant vide letter dated 23.01.2012 at an estimated cost of Rs.4289.59 crores including IDC of Rs.413.26 crores (based on 1st quarter, 2011 price level). The scope of work comprised in the proposed scheme included the Bhilai - Bhiwadi 2500 MW, +/- 500kV HVDC bipole line.

6.4. that on 12.03.2012, the appellant/petitioner filed a petition being no.96/TT/2012 before the Central Commission for determination of transmission tariff for Pole-II of +/- 500kVm 2500 MW Balia-Bhiwadi bi-pole associated with the Barh Generation Project from the anticipated Date of Commercial Operation (DOC), namely, 01.07.2012 to 31.03.2012. The said petition was based on actual expenditure incurred upto 31.03.2011 and projected expenditure to be incurred from 01.04.2011 to 31.03.2014 with a stated delay of 33 months in commissioning as per the investment approval. The appellant submitted the revised management certificate dated 20.11.2012 on actual Date of Commercial Operation (DOC), namely, 01.07.2012.

6.5. that the said delay of 33 months in commissioning of the transmission asset had occurred due to :-

- (i) delay in commissioning of units at the NTPC Barh Project,
- (ii) delay in technology transfer and manufacturing of converter transformer
- (iii) delay in transportation of converter transformer from BHEL Bhopal due to bridge collapse in Madhya Pradesh, and
- (iv) delay in award of the project due to DGFT guidelines,

The delay on all the above counts was stated to be beyond the control of the appellant.

6.6. According to the appellant/petitioner, the learned Central Commission should have condoned the entire delay of 33 months in commissioning of the transmission assets and by not doing so it has committed error of law. Following details showing item-wise reasons of delay have been given on behalf of the appellant:

Schedule Date	Actual Date	Delay	Delay Claimed	Remarks
December, 2005 (Original Schedule)	March, 2007	Delay in Award of the Project due to DGFT Guidelines	15 Months	8 Months Delay Condoned
February, 2008 (Original Schedule)	October, 2011	Delay in Technology Transfer and Manufacture of Converter Transformer	38 Months	Delay Not Condoned
December, 2011 (Revised Schedule due to delay in Technology Transfer)	June, 2012	Delay in Transportation	7 Months	2 Months Delay Condoned
October 2009 (Original Schedule)	July, 2012	Delay in commissioning of Balia-Bhiwadi line, Pole I and Pole II	11 Months	11 Months Delay Condoned (Delay Condoned due to Delay in Generation Project)

Because the said delay was beyond the control of the appellant/petitioner and was not attributable to it, hence the learned Central Commission has wrongly declined to condone the entire time overrun in delayed commissioning of the transmission project .

6.7. According to the appellant since the impugned tariff order dated 04.02.2014 passed by the learned Central Commission suffers from error of law in declining to

condone the delay of 12 months in commissioning of the project and consequently disallowed IDC and IEDC as part of the approved capital cost and further denying the appellant of its legitimate tariff entitlements, the impugned order is liable to be set aside to that extent.

6.8. that during the course of proceedings in the above tariff petition, the appellant/petitioner filed affidavits dated 20.03.2013 and 13.09.2013 giving details regarding delay in commissioning of the transmission assets in pursuance of the queries raised by the Central Commission.

6.9. that the Central Commission, vide, impugned order dated 04.02.2014, has approved the transmission tariff for the transmission assets and has allowed the transmission charges for being recovered from the beneficiaries. The learned Central Commission, according to the appellant, has wrongly concluded that there is no cost overrun as had been contended by some of the beneficiaries. Despite there being categorical submissions placed on record by the appellant/petitioner regarding time overrun that the delay in executing and commissioning the project had been on accounts which were beyond the control of the appellant, the Central Commission did not condone the entire delay of 33 months, as claimed in the petition, but it only condoned the delay of 21 months as against the delay of 33 months. Further the approval for additional initial spares has also been declined by the learned Central Commission on the ground that proper justification and details were not made available, inspite of the fact, that the appellant had specifically pleaded the provisions of power to relax under which the Central Commission could allow initial spares of Rs.11.48 crores.

7. We have heard Ms. Suparna Srivastava, assisted by Ms. Nishta Sikroria, learned counsel for the appellant and Mr. Rajiv Shrivastava, learned counsel appearing for the respondent no.2, Mr. Pradeep Misra, assisted by Mr. Manoj Kumar Sharma, learned counsel appearing for the respondent nos. 3-5 and Mr. R.B. Sharma, learned counsel appearing for the respondent no.13. We have also gone through the written

submissions filed by the contending parties and also the material on record including the impugned order.

8. The only issue arising for our consideration in the present Appeal is whether the learned Central Commission has rightly and correctly declined to condone the delay of 12 months out of the total delay of 33 months in commissioning of the said transmission asset of the appellant and consequently in denying IDC of Rs. 1.89 crores and IEDC of Rs.14.73 crores, aggregating to Rs.16.30 crores from out of the capital cost approved for the assets?

9. The following submissions have been made on behalf of the appellant on this issue.

9.1. that the learned Central Commission has erroneously declined to condone the entire time over-run in delayed commissioning of the transmission project even when the appellant had placed details on record pleading that the said delay has been for the reasons beyond the control of the appellant.

9.2. that consequently, the Central Commission has deducted the Interest During Construction (IDC) and Incidental Expenses During Construction (IEDC) from out of the capital cost allowed for the transmission asset, leaving no recourse for recovery of the same to the appellant.

9.3. that the appellant filed the impugned Petition being No.96/TT/2012 before the Central Commission seeking determination of the transmission tariff for Pole-II of +/- 500kV, 2500 MW Balia-Bhiwadi HVDC bi-pole associated with the Barh Generation Project from the Date of Commercial Operation (DOC), namely, 01.07.2012 to 31.03.2014.

9.4. that the said petition was based on expenditure incurred upto 31.03.2011 and projected expenditure to be incurred from 01.04.2011 to 31.03.2014 with a delay of 33 months in the commissioning of the transmission asset, as per the investment approval.

9.5. that in the said petition it was submitted that the said delay had incurred due to :-

- (i) delay in commissioning of units at the NTPC Barh Project,
- (ii) delay in technology transfer and manufacturing of converter transformer
- (iii) delay in transportation of converter transformer from BHEL Bhopal due to bridge collapse in Madhya Pradesh, and
- (iv) delay in award of the project due to Director General, Foreign Trade (DGFT) guidelines.

10. The learned counsel for the appellant regarding delay in commissioning of NTPC Generation Project has made the following submissions:-

10.1. that due to delay in commissioning of units at NTPC- Barh project, the subject transmission assets could not be commissioned in time as there were frequent shift of schedule of generation project because of which the appellant/petitioner had to slow down the work on the transmission project.

10.2. that however, in view of the contractual constraints, it was not feasible to delay the work to the extent to match the schedule of generation project. The work of the subject transmission asset was, therefore, completed and the asset was declared under commercial operation on 01.07.2012.

10.3. that the appellant in its affidavit dated 21.03.2013, submitted before the Central Commission, stated that the Ministry of Power vide its letter dated 12.12.2005, communicated that the schedule of completion will be 45 months from the date of investment approval, matching with best effort commissioning schedule of three generation units of Barh Project being implemented by NTPC.

10.4. that the schedule of generation project at the stage of its approval and preparation of feasibility report, as per NTPC letter dated 11.08.2003, was as under:-

"1st Unit - June, 2008, 2nd Unit - March, 2009 & 3rd Unit - December 2009. The matching unit could not be commissioned in time and the schedule of units at Barh as per QPR meeting of NTPC held on 27.10.2010 was as follows:

Unit	1 st (#4)	2 nd (#1)	3 rd (#5)	4 th (#2)	5 th (#3)
Schedule	Q3 (2012-13)	Q1 (2013-14)	Q2 (2013-14)	Q3 (2013-14)	Q1 (2014-15)

10.5. that the construction of generating station at Barh was delayed, the proposal regarding commissioning of Balia-Bhiwadi HVDC Bipole was discussed in the NRPC meeting held on 23 & 24th December, 2009. The commissioning of other generation projects in 2010, in ER like Kahalgaon-II (unit-3) & Farakka-III of NTPC, Mejia Ext. & DVC generation project and availability of additional transmission corridor, it was decided to go ahead with commissioning of these links. But in view of contractual constraint, it was also not feasible to delay the work to such an extent to match the revised schedule of generation units.

10.6. that the transmission project which was scheduled to commission in October, 2009 as per the investment approval, was ultimately commissioned on 01.07.2012 with a delay of 33 months.

11. Regarding delay in technical transfer and manufacturing of converter transformer, the learned counsel for the appellant has made the following contentions:-

11.1. that the +/- 500 kV, 2500 MW Balia-Bhiwadi HVDC subject project was awarded to the consortium of M/s Siemens AG Germany, M/s BHEL India and M/s Siemens Ltd. India with a provision that manufacturing facilities would be built by BHEL and a total number of eight 500 kV converter transformers would be supplied by BHEL with technology collaboration/transfer from Siemens. This award was made

because none of the Indian manufacturers were having such HVDC technologies or manufacturing facilities in India.

11.2. that with the award of contract to the aforesaid consortium, best opportunities became available to Indian manufacturers/suppliers resulting in development of indigenous HVDC technology in India.

11.3 that since the said technology was the highest rating converter transformer for India as well as for BHEL and since the design and technology of Siemens was entirely different, it necessitated design and manufacturing of an entirely new transformer unit with completely new technology than that which was being used by BHEL in the normal course of their manufacturing. To meet the project schedule, new facility for converter transformer manufacturing was to be made ready by February, 2008 by BHEL and the transportation of the same was planned during July, 2008 to March, 2009. However, there was a delay in technology transfer and manufacturing of converter transformer by BHEL.

11.4. that the appellant/petitioner pursued BHEL rigorously and put its best efforts to expedite the manufacturing of transformers. The appellant/petitioner had adduced various reasons in the said affidavit such as constraints during excavation of hard rocky earth bed beneath the ground soil, high underground water level and its accumulation causing hurdles in execution of civil work, non-availability of Indian vendors for designing of special oil spray system, necessitating its separate procurement by BHEL becoming ready in May 2010.

11.5. that the issue with BHEL was taken up by the Government of India, Ministry of Commerce vide letter dated 28.08.2008. The BHEL responded vide letter dated 09.11.2012 outlining the issues faced by it during various stages of erection and commissioning beyond the control of BHEL.

11.6. that the original schedule of transformer supply from BHEL, Bhopal was July, 2008 to March, 2009 whereas it was supplied from October, 2011 to March, 2012 involving a delay of around 38 months.

12. Regarding delay in transportation of equipment, the appellant's submissions are as under:-

12.1. that due to hilly terrain in the Vindhya range having sharp turns & other constraints in road transportation from BHEL, Bhopal to Balia, it was planned to transport converter transformers through sea-route and inland water-ways. Accordingly, the converter transformers were to be transported at Kandla port, however, due to bridge collapse in Madhya Pradesh, the movement of all heavy transports were held up for a period of two months by the Government of Madhya Pradesh. Besides, as per the Road Transport Corporation in Madhya Pradesh, all the bridges having span of more than 06 metres had to be by-passed, resulting in further delay in transportation. Thereafter, the consignment was transported from Kandla Port to Kolkata Port via sea route. Further, due to insufficient/low water level in Ganga River, the consignment from Kolkata to Balia through inland water-ways took additional around three months to reach at Balia. A delay of about 3 months was thus caused in transportation of equipment to its destination.

13. Regarding delay in award of project, the following submissions have been made on behalf of the appellant:-

13.1. that the delay in award of the subject project was explained in detail in additional affidavit dated 20.03.2013 by the appellant placed before the Central Commission. The said details were not properly considered and appreciated by the Central Commission while passing the impugned order.

13.2. that the delay in award of contract was for the reason that the subject project was envisaged to be funded by the World Bank under its loan scheme adopting two-

stage bidding procedure. Accordingly, the draft bidding document was finalized as per Standard Bidding Document and the approval of the World Bank was obtained. The First Stage bids were opened in December, 2005 and the Evaluation Report was sent to the World Bank for concurrence. The Second Stage Bid was now to be opened for which the concurrence of the World Bank had been taken. In the meantime, vide Notification dated 17.03.2006, the Director General of Foreign Trade (DGFT) in the Government of India extended deemed export benefits for supply and installation of goods and equipment to projects financed by multilateral and bilateral agencies/funds under DDP based bid evaluation.

13.3. that under DDP, the bidders were to have incentive to increase the domestic goods contents in their bid which in turn could lead to development of indigenous technology. Accordingly, the World Bank was requested to adopt the evaluation criteria on DDP basis, namely, comparison of CIF price plus custom duty plus octroi/entry tax, if applicable, with ex-works price without taxes and duties. Finally, the World Bank conveyed that the bids should be compared on the basis of CIP with deemed export benefit and domestic preferences with certain limits/guidelines incorporating the necessary amendments, the bid documents were again forwarded to the World Bank and on receipt of no-objection from the World Bank, the documents were issued to the bidders. Accordingly, the Second Stage bids were opened in January, 2007 and subsequently, the contracts for subject package were placed in March, 2007 with a delay of 15 months.

14. that the learned Central Commission, out of the total delay of 33 months in commissioning the subject asset, has declined to condone the delay of 12 months for the reasons recorded in the impugned order. Consequently, the appellant/ petitioner was denied IDC and IEDC aggregating to Rs.16.30 crores from out of the capital cost approved for the assets. The learned Central Commission failed to appreciate the reasons of delay disclosed by the appellant/petitioner whereas the said reasons were beyond the control of the appellant and the entire delay caused was liable to be condoned.

15. that the learned Central Commission has appreciated and welcomed the indigenous capacity building in HVDC manufacturing targeted to be achieved by the joint venture of Siemens and BHEL to be a 'laudable initiative', yet has failed to appreciate that this indigenous capacity building is ultimately to result in benefit to all beneficiaries of not only the subject transmission assets but also of transmission assets to be built up by the appellant from time to time. The initial constraints being encountered while developing indigenous technology ought to have been taken into account by the learned Central Commission and the resultant delay ought to have been condoned.

16. **Per contra**, the following submissions have been made on behalf of the respondent nos. 3 to 5 & 13:-

16.1. that in the said petition being Petition No. 96/TT/2012 filed before the Central Commission relating to delay in commissioning of the transmission asset, the appellant has made vague submissions.

16.2. that the learned Central Commission directed the appellant/petitioner to submit the following informations/clarifications on affidavit vide letter dated 22.06.2012 and 15.05.2012:-

- "A) Vide letter dated 22.06.2012
- i) Actual date of commercial operation of the assets covered in the petition.
 - ii) Detailed justification along with documentary evidence for delay of 32 months in commissioning of the asset (the specific delay period due to each of reasons mentioned in the petition is to be submitted);
 - iii) The activity wise detail showing the schedule and actual time for each activity and duration as well as reasons for delay in each activity along with supporting documents;
 - iv) In the light of the fact that the delay in supply and transportation of converter transformer is a bilateral issue between supplier and petitioner and the financial impact should not be passed on to the

beneficiaries, the details of the LD clauses in the LOA and the amount of recovery made on this account is to be submitted;

- v) Revised auditor certificate in case of procurement of additional spares along with justification for the same and also list of spares already procured and proposed to be procured;
- vi) The details of the indemnification agreement and other penal provisions like liquidation damage clauses etc. in the agreements with the other parties.

B) Vide letter dated 15.05.2012.

vii) The revised CA Certificate/Management certificate indicating expenditure as on 01.07.2012 and projected additional capital expenditure thereafter along with revised Forms- 1, 6, 9 and Form 13.

viii) Against which assets the additional initial spares of Rs. 31.98 lakh (approx.) are to be procured in addition to the already capitalized spares of Rs. 4837.03 lacs, as mentioned in Para 8 of the petition."

16.3. that the appellant submitted some information on affidavit wherein reasons of delay have not been mentioned.

16.4. Regarding liquidated damages, the appellant submitted that the same will be adjusted in the capital cost at the time of closing of contract which is yet to take place. However, till date no information is placed about the liquidated damages.

16.5. the learned Central Commission, in the impugned order, has condoned the delay of 11 months out of the total 33 months delay on the ground of delay in commissioning of Barh Generation Project. The Central Commission further condoned the delay 8 months attributable to Director General of Foreign Trade guidelines (DGFT).

16.6. that in the impugned order, the delay regarding supply of technology and converter transformers was not condoned as it was relating to a commercial contract. The delay of two months in transportation was further condoned. Thus, out of total

33 months delay, 21 months delay has been condoned. Regarding the initial spares, the Central Commission has held that the appellant has failed to give the justification for additional spares giving liberty to the appellant/petitioner to submit actual expenditure on initial spares at the time of true up with full justification. Thus, the period for which delay was not condoned, IDC and IEDC has been disallowed.

16.7. that against the aforesaid disallowance of IDC and IEDC, the instant appeal has been filed by the appellant.

16.8. that the appellant has not furnished sufficient reasons to show that the delay caused was beyond the control of the appellant. The respondents, on the one hand, could not get the benefit of the project due to delay and on the other hand penalize with IDC and IEDC for no fault on their behalf.

16.9. that Section 61(d) of the Electricity Act, 2003 provides as under:-

“61. Tariff Regulations- The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

(d) Safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner.”

16.10. that the aim and spirit of the Electricity Act, 2003 is that the tariff should be cheapest at the hands of the consumers. In case, the appellant's contention is accepted the tariff will be higher at the hands of consumers of different States which is against the aim and spirit of the Electricity Act, 2003.

16.11. that this Appellate Tribunal in its judgment dated 12.01.2012 in Appeal No. 65 of 2011 in the matter of Power Grid Corporation of India Ltd. Vs. CERC & Ors. declined to interfere with the order passed by the Central Commission in not condoning the delay in commissioning the asset on the ground that the appellant had not made the adequate measures for compensation of the delay caused by NTPC. This Appellate Tribunal relied upon Section 61(d) of the Electricity Act, 2003 and

confirmed the order passed by the Central Commission on the ground that award of IDC and IEDC would amount to higher tariff, which will be prejudicial to the interest of consumers.

16.12. that the said project was to be completed within the time schedule of 45 months progressively commencing from the date of investment approval (12th December, 2005). The time schedule is normally decided by the Ministry of Power after considering the relevant inputs from the appellant. Further, the time schedule was to match with the commissioning schedule of three generating units of Barh Power Project and accordingly the project was to be completed latest by 12th September, 2009 and commissioned on 1st, October, 2009. The Board of Directors of the appellant further revised the completion schedule from October, 2009 to March, 2012 through a revised cost estimates dated 23.01.2012 in its meeting held on December 27, 2011. Finally, the commissioning was achieved on 01.07.2012 resulting into a time over run of 33 months.

16.13. that according to the appellant, the delay of 15 months in award of project has been attributed to DGFT guidelines. The impugned order of learned Central Commission has duly considered the 15 months delay as contended by the appellant and allowed 8 months time over run leaving no grievance on this account for the appellant.

16.14. that the entire pleadings of the appellant show that there was problem in the adaptation of technology which is a phase that takes place after the technology has been adopted and put to use in production activities. If this is the case, then it is clearly an imprudence on the part of the appellant in the selection of the contractor/supplier and covered by the judgment dated 27.04.2011 in Appeal No. 72 of 2010 (MSPGCL Vs MERC & others) wherein this Appellate Tribunal has laid down the principles for prudence check of time over run and cost over run of a project 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, received 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."

16.15. that the most surprising aspect in this Appeal is that the appellant is pleading the case of the contractor/supplier even though the contractor/supplier is not a party to the Appeal. The learned Central Commission, in the impugned order, has left this issue of delay on this ground to be sorted out between the appellant and the BHEL.

16.16. that the learned Central Commission, in the impugned order, has rightly disallowed the alleged claim of time overrun in technology transfer and manufacturing of converter transformer by BHEL.

16.17. that the appellant has alleged delay of 7 months to transport converter transformers on the ground of bridge collapse in Madhya Pradesh and consequently restricting the movement of heavy consignment like converter transformer for a period of 2 months is a specialized function and the same is given to those agencies which are well equipped and have an expertise in this area of operation. The learned Central Commission, however, condoned the delay for the duration of 2 months during which movement of heavy transport was restricted causing no grievance to the appellant on this account.

17. OUR CONCLUSION

The only grievance of the appellant/petitioner by the impugned order is to the extent that the Central Commission has erroneously declined to condone the entire time over run of 33 months in delayed commissioning of the transmission project particularly when the appellant/petitioner had placed sufficient material on record in the shape of affidavit to establish that the said delay was beyond the control of the appellant. Further, the grievance of the appellant is that the Central Commission has wrongly disallowed time overrun of balance 12 months period and has wrongly deducted the Interest During Construction (IDC) and Incidental Expenditure During Construction (IEDC) for the disallowed period of 12 months time over run from out of

the capital cost allowed for the transmission asset leaving no recourse for recovery of the same to the appellant.

17.1. We have reproduced the relevant part of the impugned order dated 04.02.2014 in Para no.3 of this judgment. Now, we test the findings recorded by the learned Central Commission in the impugned order. Regarding delay of generation project, the Central Commission has observed that there is a delay in commissioning of Barh Generation Project. Since similar issue had already been dealt with in Petition No. 315/TT/2010 (Pole-I of Balia-Bhiwadi) wherein delay of 11 months due to delay in commissioning of generating unit of NTPC Barh Generation Project and delay in getting Excise Duty Exemption Certificate (EDEC) had been condoned by the Central Commission. On the same analogy, the Central Commission has condoned the period of 11 months out of total delay as being attributable to delay in commissioning of the generation project further observing that the petitioner has not clearly mentioned the period of delay.

17.2. Regarding delay of 15 months in award of project attributed to DGFT guidelines, after considering various factors and reasons cited by the appellant/petitioner, the Central Commission has condoned the delay of 8 months out of claimed delay of 15 months finding the same attributable to DGFT guidelines.

17.3. The learned Central Commission did not find any justification in condoning the delay of 38 months against the delay in transfer of technology and related facts that the supplier viz. BHEL could not supply converter transformer in time (July 2008 to March, 2009). The supply of converter transformer started in October, 2011 to March, 2012 involving delay of 38 months. The Pole-II was commissioned on 01.07.2012. The Central Commission did not find any justification for passing on the burden of delay, on the ground of delay in transfer of technology, to the beneficiaries. While passing the impugned order, the learned Central Commission has clearly observed 'we leave this issue of delay to be sorted out between the Petitioner and the supplier BHEL'.

Thus, the Central Commission has left this issue to be sorted out between the appellant/petitioner and the supplier BHEL.

17.4. The learned Central Commission, in the impugned order, has condoned the delay of two months attributed to transportation constraints. Thus, the Central Commission has allowed total delay of 21 months in the commissioning of the project.

17.5. In Para no. 26 of the impugned order, the learned Central Commission has detailed the item-wise delay and further in mentioning deductions in para no. 27 of the impugned order to be made from the capital cost, towards IDC and IEDC on account of the remaining delay of 12 months. According to the appellant, the transmission project which was scheduled to be commissioned in October, 2009 was ultimately commissioned on 01.07.2012 with a delay of 33 months. The details regarding delay in the said commissioning were mentioned in the petition filed before the Central Commission and the learned Central Commission, after dealing with the reasons or causes of the said delay, has condoned the delay of 21 months out of total delay of 33 months as claimed by the appellant and declined to condone the delay of remaining 12 months and accordingly passed the impugned order. The period of delay, properly explained and substantiated with material, has been condoned by the learned Central Commission holding that the same was not attributable to the appellant. For the remaining period of delay of 12 months, the appellant did not give satisfactory reasons and other material to support the said delay and the reasons therefor. In the affidavit filed by the appellant before the Central Commission, sufficient reasons of the said delay had not been mentioned.

17.6. Regarding liquidated damages, the appellant has submitted that the same will be adjusted in the capital cost at the time of closing the contract, which is yet to take place. However, till date no information has been placed by the appellant about the liquidated damages. Thus, the Central Commission has given an option to the appellant to adjust the liquidated damages in the capital cost at the time of closing of

the contract. The appellant, for the reasons best known to it, has not placed any information about the liquidated damages.

17.7. We may further observe that regarding the initial spares, the learned Central Commission has, in the impugned order, held that the appellant had failed to give the justification for additional spares and has given liberty to the appellant/petitioner to submit actual expenditure on initial spares at the time of truing up with full justification.

17.8 After going through the rival submissions and the impugned order, we find that the appellant has not furnished sufficient reasons to show that the delay of balance 12 months in the commissioning of the said project was beyond the control of the appellant.

The aim and spirit of the Electricity Act, 2003 particularly, Section 61 (d) of the Electricity Act, 2003 is that the tariff should be cheapest at the hands of the consumers. We find force in this contention of the respondents that if the balance delay of 11 months is condoned and the corresponding IDC and IEDC for the 12 months period are allowed, the tariff will be higher at the hands of the consumers of different states which would be against the aim and spirit of the Electricity Act, 2003. We are fortified in this view by the judgment dated 12.01.2012 of this Appellate Tribunal in Appeal No. 65 of 2011 in the matter of Power Grid Corporation of India Ltd. Vs. CERC & Ors. where this Tribunal while relying on Section 61 (d) of the Electricity Act, 2003 confirmed the order passed by the Central Commission on the ground that award of IDC and IEDC would amount to higher tariff which will be prejudicial to the interest of the consumers.

17.9. We see that the entire pleadings and submissions of the appellant before us show that there was a problem in the adaptation of technology which is a phase that takes place after the technology has been adopted and put to use in production activities. Then there comes an imprudence on the part of the appellant in the

selection of the contractor/supplier and the same is covered by the judgment dated 27.04.2011 in Appeal No. 72 of 2010 (MSPGCL Vs MERC & others) wherein this Appellate Tribunal had laid down the principles for prudence check of time over run and cost over run of a project which we have narrated in upper part of this judgment.

17.10. We further note that in this Appeal, the appellant is pleading the case of contractor or supplier even though the contractor or supplier is not a party to the Appeal. The Central Commission, in the impugned order, has left this issue of delay to be sorted out between the appellant and the BHEL. We find that the learned Central Commission, in the impugned order, has rightly disallowed the delay due to technology transfer and manufacturing of converter transformer by BHEL.

18. In view of the above discussion, we do not find any perversity or illegality in the reasonings recorded in the impugned order. We approve the same findings. The issue is accordingly decided against the appellant/petitioner. This Appeal merits dismissal.

Summary of Findings:

19. The learned Central Commission has rightly, justly and legally declined to condone the delay of 12 months out of the total delay of 33 months in commissioning of the said transmission asset of the appellant and consequently has rightly denied the IDC of Rs. 1.89 crores and IEDC of Rs.14.73 crores, aggregating to Rs.16.30 crores from out of the capital cost approved for the assets. We may further note that on the issue regarding the liquidated damages, according to the appellant, the same will be adjusted in the capital cost at the time of closing the contract which is yet to take place. However, till date the appellant has placed no information about the liquidated damages. We may further observe that the learned Central Commission has, in the impugned order, given liberty to the appellant/petitioner to submit actual expenditure on initial spares at the time of truing up with full justification.

20. Consequently, the instant Appeal fails and is hereby dismissed. The impugned order dated 04.02.2014 passed by the learned Central Commission is hereby confirmed. No order as to costs.

Pronounced in open Court on this 26th day of February, 2015.

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

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