

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 167 OF 2013

Dated: 5th March, 2014

**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 Ltd
Saudamini, Plot No. 2,
Sector 29, Gurgaon – 122001 Haryana

.... Appellant-
Petitioner

VERSUS

1. Central Electricity Regulatory Commission
3rd and 4th Floor, Chanderlok Building
36, Janpath, New Delhi – 110001
2. Karnataka Power Transmission Corporation Limited
Represented by its Chairman,
Kaveri Bhavan, Bangalore – 560 009
3. Transmission Corporation of Andhra Pradesh Limited
Represented by its Chairman,
Vidyut Soudha, Hyderabad – 500 082
4. KeralaState Electricity Board
Represented by its Chairman, Vaidyuthi Bhavanam,
Pattom, Thiruvananthapuram – 695 004
5. Tamil Nadu Electricity Board
Represented by its Chairman
NPKRR Maaligai, 800, Anna Salai,
Chennai – 600 002
6. Electricity Department, Government of Goa,
Represented by Chief Engineer (Electrical),
Vidyut Bhawan, Panaji, Goa – 403 001
7. Electricity Department, Government of Pondicherry,
Represented by Superintending Engineer -I,
Pondicherry – 605 001
8. Eastern Power Distribution Company of Andhra Pradesh Limited
Represented by its Managing Director,
APEPDCL, P&T Colony, Seethmmadhara,
Vishakhapatnam-530 013, Andhra Pradesh

9. Southern Power Distribution Company of Andhra Pradesh Limited
Represented by its Managing Director,
Srinivasa Kalyana Mandapam Backside,
Tiruchanoor Road, Kesavayana Gunta,
Tirupati – 517 501, Andhra Pradesh
10. Central Power Distribution Company of Andhra Pradesh Limited
Represented by its Managing Director,
Corporate Office, Mint Compound,
Hyderabad – 500 063, Andhra Pradesh
11. Northern Power Distribution Company of Andhra Pradesh Limited
Represented by its Managing Director,
Opp. NIT Petrol Pump, Chaitanyapuri, Kazipet,
Warangal – 506 004, Andhra Pradesh
12. Bangalore Electricity Supply Company Limited
Represented by its Managing Director,
Corporate Office, K.R. Circle, Bangalore – 560 001
13. Gulbarga Electricity Supply Company Limited
Represented by its Managing Director,
Station Main Road, Gulbarga-585 102,Karnataka
14. Hubli Electricity Supply Company Limited
Represented by its Managing Director,
Navanagar, PB Road,
Hubli- 580 025, Karnataka
15. MESCOM Corporate Office,
Represented by its Managing Director,
Paradigm Plaza, AB Shetty Circle,
Mangalore – 575 001
16. Chamundeswari Electricity Supply Corporation Limited
Represented by its Managing Director,
927, L J Avenue, Ground floor,
New Kantharaj Urs Road, Saraswatipuram,
Mysore – 570 009
17. Neyveli Lignite Corporation Ltd.
Represented by its Chairman and Managing Director,
Corporate Office
Neyveli, Tamil Nadu- 607801

.... Respondents

Counsel for the Appellant(s)	...	Mr. M.G. Ramachandran Ms. Swagatika Sahoo Ms. Anushree Badhan Ms. Poorva Saigal
Counsel for the Respondent(s)	...	Mr. S. Vallinayagam for R-7 Ms. Swapna Seshadri for R-12 to R-16

JUDGMENT

PER HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. This is an Appeal preferred under Section 111 of the Electricity Act, 2003 against the Order dated 9.05.2013 passed by the Central Electricity Regulatory Commission (hereinafter called the '**Central Commission**') in Review Petition No. 7/RP/2012 filed in Petition No. 136 of 2010 wherein the Central Commission has partly allowed the review petition filed by the Appellant and reviewed the Order dated 11.01.2012 on the aspect of Interest During Construction (IDC) and Incidental Expenses During Construction ((IEDC) to be capitalized from 1.02.2009 to 31.07.2009 in respect of LILO of Ramagundam- Khammam T/L at Warangal Sub-Station (Asset 1) and 2X315 MVA Auto Transformer & 400/220 kV Bays Equipment at Warangal Sub-station (Asset 2). However the Central Commission has rejected the claim of the Appellant in the review petition on the aspect of IDC and IEDC to be capitalized from 1.02.2009 to 31.08.2009 in respect of Combined assets of LILO of Ramagundam-Khammam 400kV S/C T/L at Warangal and Neyveli-Pugalur-Madurai 400kV D/C T/L (Asset 3) and 2X315 MVA, 400/220 kV Auto Transformer alongwith associated Bays at Pugalur Sub-Station (Asset 4) on the ground that the Appellant had knowledge of the reasons for delay in commissioning of Assets 3 & 4 at the time of filing the original petition and had failed to furnish those details at that point of time and further that the Indemnification Agreement is a bilateral issue between the Appellant and Neyveli Lignite Corporation (hereinafter referred to as "**NLC**") and the issue of compensation should be settled between the parties in terms of the said Agreement.

2. The relevant facts for deciding this Appeal are as follows:

- (I) that the Appellant herein, Power Grid Corporation of India Ltd (hereinafter referred as the Powergrid), is a Government Company within the meaning of Companies Act, 1956 with the object of undertaking Inter State Transmission of Electricity in India. The Appellant discharges the functions of the Central Transmission Utility (**CTU**) and is engaged in the transmission of electricity and other functions provided under the Electricity Act, 2003 (hereinafter referred as the '**Electricity Act**'). The Appellant being CTU is also a deemed Transmission Licensee under Section 14 of the Electricity Act.

- (II) that the Appellant discharges the above functions under the regulatory control of the Central Electricity Regulatory Commission, Respondent No.1 (hereinafter referred to as the Central Commission).
- (III) that for the period from 1.4.2009 to 31.3.2014, the Central Commission framed the Central Commission Tariff Regulations, 2009 (hereinafter referred to as the “**Tariff Regulations, 2009**”) inter-alia, providing for the norms and parameters applicable for determination of tariff for the transmission licensee.
- (IV) that the Appellant filed Petition No. 136 of 2010 before the Central Commission seeking the transmission tariff for the aforesaid four Assets/elements of Transmission System associated with NLC-II Expansion Project in Southern Region for the tariff period 1.4.2009 to 31.3.2014 , in accordance with the Tariff Regulations, 2009.

2.1 that the learned Central Commission vide order dated 11.1.2012 in Petition No. 136 of 2010 (main order) while determining the tariff for the transmission system of the Appellant, had disallowed the Interest During Construction and Incidental Expenditure During Construction in Capital Cost in respect of Asset 1 & 2 and Asset 3 & 4 as claimed by the Appellant. Assets 1 to 4 were part of transmission project under Transmission System associated with Neyveli Lignite Corporation-II Expansion Project in Southern Region. IDC and IEDC required to be computed to determine the capital cost of the project and return on investment to be passed through in the transmission tariff. The Appellant filed Review Petition No. 7 of 2012 before the Central Commission for review of the order dated 11.01.2012 on the issue of the total time over run in case of Asset 1 and 2 and Asset 3 and 4 and denial of NLC to pay the losses on account of disallowance of IDC and IEDC as directed by the Central Commission.

2.2 that the Central Commission vide Review order dated 09.05.2013 has partly allowed the review petition on the above issue. The Central Commission has allowed the IDC and IEDC in respect of Asset 1 and 2 and has rejected the claim with regard to Asset 3 & 4 holding that the Indemnification Agreement is a bilateral issue between the Appellant and Respondent and the issue of compensation should be settled between the parties and the Central Commission, accordingly, disposed of this issue with such directions.

2.3 that the following issues arose before the Central Commission for consideration:

- (a) The total time over-run in case of Assets 1 & 2 and Assets 3 & 4 is 19 months and 20 months respectively and not 20 months and 21 months as held in the impugned order;
- (b) IDC and IEDC was not allowed for 6 and 7 months for Assets 1 & 2 and Assets 3 & 4 respectively and this delay of 6 & 7 months is not attributable to PGCIL and hence IDC and IEDC should be allowed; and
- (c) NLC has declined to pay the loss on account of disallowance of IDC and IEDC as IDC & IEDC is payable only from 1.8.2009/1.9.2009 and not from 28.2.2009, as the original zero date has been shifted to 1.8.2009/1.9.2009.

2.4 that on the first issue of time over-run, the Central Commission noted that the investment approval for the project was granted on 11.01.2005 and the time schedule was 35 months from the date of investment approval. The date of scheduled commissioning of the assets worked out to 11.12.2007. Assets 1 & 2 were commissioned on 1.8.2009 and Assets 3 & 4 were commissioned on 1.9.2009 and thus there was a delay of 19 months and 20 months in commissioning Assets 1 & 2 and Assets 3 & 4 respectively and not 20 and 21 months as held in the main impugned order. The Central Commission treated it an error apparent on the face of record and corrected the inadvertent error by the review order.

2.5 that the Central Commission while considering the second issue of disallowance of IDC and IEDC for 6 & 7 months in case of Assets 1 & 2 and Assets 3 & 4 respectively, held that admittedly, all the four assets were scheduled to be commissioned in January, 2008. However, the assets were commissioned only on 1.8.2009 and 1.9.2009. The delay from January, 2008 to February, 2009 was condoned as the Powergrid had rescheduled the commissioning of the transmission lines to February, 2009 to match with the revised commissioning schedule of NLC which was also discussed and agreed upon by the beneficiaries in the SRPC meetings. The delays beyond February, 2009 i.e. 6 months in the case of Asset 1 and 2 and 7 months in the case of Asset 3 and 4 were not condoned and accordingly IDC and IEDC were not allowed for the said period by the Central Commission. It was brought to the notice of the Central Commission that

the Powergrid had submitted in the original petition (Petition No. 136/2010) that APTRANSCO in the 9th and 10th SRPC meetings informed that Warangal Sub-station along with LILO of Ramagundam – Khammam line would be ready by July, 2009 and accordingly Assets 1 & 2 were commissioned on 1.8.2009. The Central Commission found that this aspect was overlooked while passing the main order dated 11.1.2012. The Central Commission was of the view in the impugned review order that since PGCIL/Powergrid had delayed the commissioning of Assets 1 & 2 to match the APTRANSCO downstream assets, the delay cannot be attributed to Powergrid. Accordingly, IDC and IEDC for the period from 1.2.2009 to 31.7.2009 were allowed to be capitalized by the Central Commission while correcting the main order.

2.6 that for our purpose, impugned order dated 9.5.2013 particularly, para 18, 19 & 20 are relevant, which are reproduced below:

“18. As regards Assets 3 & 4, IDC & IEDC was not allowed from 1.2.2009 to 31.8.2009. PGCIL has submitted, in Petition No. 136/2010, that commissioning of Assets 3 & 4 was discussed and agreed in the 9th SRPC meeting held on 6.3.2009 and accordingly the assets were commissioned on 1.9.2009. PGCIL has also filed a copy of the minutes of the 9th SRPC meeting. It is observed that though the document shows that the Committee agreed for commissioning of the said assets, it does not state when the assets are to be commissioned. During the hearing of the instant Review Petition on 22.11.2012, PGCIL has submitted that commissioning of Assets 3 & 4 was delayed due to litigation and due to the work related to increasing the height of the towers as per the directions of the Hon’ble Supreme Court. These reasons for delay were not submitted by PGCIL in the original petition. Moreover, these were not even mentioned in the instant review petition. This contention of delay due to litigation has been raised only during the hearing of the review petition. PGCIL was in the knowledge of the reasons for delay in commissioning of Assets 3 & 4 at the time of filing the original petition and it has failed to furnish those details at that point of time. It appears that PGCIL was not diligent in pursuing the matter. We are of the view that PGCIL cannot be allowed to bring in new facts in the instant Review Petition. As such PGCIL’s prayer to allow IDC and IEDC and its capitalization in the case of Assets 3 & 4 is rejected.

19. PGCIL has submitted that NLC is not paying the compensation in terms of the indemnification Agreement as directed by the Commission in the impugned order. It is clarified that IDC and IEDC was disallowed on account of time over-run attributable to PGCIL. Since PGCIL had an indemnification Agreement with NLC, PGCIL was granted liberty to claim the loss from NLC in terms of the Indemnification Agreement. NLC’s refusal to pay the compensation cannot be a ground for allowing the IDC/IEDC to PGCIL.

Indemnification Agreement is a bilateral issue between PGCIL and NLC and the issue of compensation should be settled between the parties in terms of the said Agreement. We do not consider it necessary to pass any order or directions in this regard. The third issue is disposed of accordingly.

20. *The instant Review Petition is partly allowed and consequential orders to this effect shall be issued separately.”*

3. The learned counsel for the Appellant has made the following submissions:
- (a) that the Respondent no.5 has raised the preliminary objections with regard to the maintainability of the present Appeal on the ground that the Appeal has been filed against the Review Order dated 9.5.2013 wherein the Central Commission has partly allowed the Review Petition and, therefore, as per judgment dated 2.12.2013 in Appeal No. 88 of 2013, NTPC v/s Central Electricity Regulatory Commission, this Tribunal has held that the doctrine of merger is not applicable in respect of the issues rejected by the Central Commission and the Appeal in respect of the rejected issued against the Review Order is not maintainable.
 - (b) that during the hearing of the instant Review Petition No. 7 of 2012 on 22.11.2012, the Appellant/Powergrid for the first time submitted that the commissioning of Assets 3 & 4 was delayed due to litigation and due to the work related to increasing the height of the towers as per the directions of the Hon'ble Supreme Court dated 8.5.2009 in SLP(C) No. 24713 of 2008 titled, MD, M/s Ramakrishna Poultry Pvt Ltd vs R. Chellappan & Ors. The Hon'ble Supreme Court in its judgment and order dated 8.5.2009, in which the Appellant was also a respondent, while setting-aside the order of the Division bench of the Madras High Court directed the Appellant/Powergrid to increase the clearance from 52 meters to 56 meters so that the clearance between the lowest point of the sag of the cable and the top most portion of the poultry shed is not less than 40 ft. These reasons, for delay, were not admittedly submitted by the Appellant in the original petition and these were not even mentioned in the instant Review Petition.
 - (c) that the Appellant, vide rejoinder dated 13.9.2012 to the reply of TNEB in the Review Petition, before the Central Commission for the

first time raised point of direction of the Hon'ble Supreme Court and the delay caused thereby.

- (d) that the transmission line passed over Survey no. 249/1 to 249/11 and 242 of Nanniyur Village where as poultry farm was established in the year 2004. One of the land owners filed a writ petition before the Madras High Court to change the route alignment which was decided on 18.1.2007 directing the District Magistrate to consider all objections and decide the matter.
- (e) that the District Magistrate, accordingly, after hearing all parties in exercise of powers under Section 7(3) of the Indian Telegraph Act, 1886 passed an Order dated 30.4.2007 directing Powergrid to realign the lines in a manner that the line would not directly pass over the said Survey land. It was at that stage that one R. Chillappan filed a Writ Petition being No. 10259 of 2007 before the Hon'ble Madras High Court challenging the District Magistrate's order dated 30.4.2007. Madras High Court vide order dated 7.8.2008 allowed the Writ petition holding that the District Magistrate has no powers to order realignment of any transmission line and then the matter reached the Hon'ble Apex Court through the aforesaid SLP which was decided as aforesaid by the judgment dated 8.5.2009 of the Hon'ble Apex Court.
- (f) that after taking us to the aforesaid litigation, the learned counsel for the Appellant tried to explain the delay caused in the commissioning of Assets 3 & 4 which point the Appellant did not raise during the hearing of the original petition and even in the review petition and also during the hearing of the Review Petition. The Appellant remained throughout silent regarding litigation and the order of the Hon'ble Supreme Court, the reasons best known to the Appellant. It is surprising that even the review petition does not have any mention or whisper of the judgment of the Hon'ble Supreme Court dated 8.5.2009 in which the Appellant was respondent and certain directions were given to the Appellant by the Hon'ble Supreme Court. Even then the judgment of the Hon'ble Supreme Court was not thought proper to be brought to the notice of the Central Commission while deciding the original petition and also in the

instant review petition. Without seeking any amendment in the review petition, the Appellant/Powergrid tried to explain the same by filing a rejoinder affidavit on 13.9.2012 and that too while submitting reply to the TNEB's contention in the review petition. No commission can dream of any fact or document which remains well to the knowledge or possession of an Appellant or either party to the litigation particularly, when the necessary party develops a habit to conceal the important fact and that too the judgment of the Hon'ble Supreme Court, for years, which cannot be appreciated at all.

- (g) that the Regulation 7(a) of the Tariff Regulations, 2009 provides that the Capital Cost of the project shall include expenditure incurred or projected to be incurred upto the date of commercial operation. Hence IDC and IEDC from the date of capitalization upto the date of commercial operation has been included in the capital cost for Assets 3 and 4.
- (h) that with regard to the issue regarding compensation to be paid by NLC to the Appellant, the Central Commission vide order dated 11.01.2012 has given the liberty to the Appellant to claim the loss on account of disallowance of IDC and IEDC from NLC in accordance with the Indemnification Agreement.
- (i) that the Central Commission proceeded on the basis of Zero date being February 2009. Though the Central commission referred to the modification in the Indemnification Agreement, the effect of such modification and resultant zero date was not considered by the Central Commission. By virtue of the modification, the zero date is 01.08.2009(Asset 1 and 2) and 01.09.2009 (Asset 3 and 4).
- (j) that as per the main order of the Central Commission dated 11.01.2012, the Appellant raised a bill for collection of the disallowed amount from NLC which refused to pay the disallowed amount of IDC and IEDC vide letter dated 17.2.2012 stating that the PGCIL is not entitled to recover the disallowed IDC from NLC since the amount deducted by the Central Commission as IDC and IEDC is for the time delay incurred from February, 2009 up to the commissioning date of the associated transmission system namely; 1.8.2009/1.9.2009 whereas NLC as a defaulting party is required to pay IDC only if

there is any revenue loss suffered by the PGCIL after the revised zero date viz. 1.8.2009/1.9.2009.

- (k) that the Central Commission has taken an inconsistent approach in the Impugned order while itself allowing Appellant to claim the loss on account of disallowance of IDC and IEDC from NLC in accordance with the Indemnification Agreement by its main order dated 11.01.2012 and then in the Review order held that indemnification Agreement is a bilateral issue between the Appellant and NLC and the issue of Compensation should be settled between the parties in terms of the said agreement.

4. Per contra, Mr. S. Vallinayagam, the learned counsel for the Respondent No.5 has made the following submissions:

- (a) that the learned counsel for the Respondent No.5, during the hearing of the main Petition as well as Review Petition had objected the intention of the Appellant/Powergrid to claim cost over-run from beneficiaries and took the stand that when the beneficiaries are not responsible for the delay in commissioning of the power house or the transmission line, the beneficiaries should not be burdened with higher transmission charges. The Appellant should bear the additional cost due to time over-run.
- (b) that the Central Commission in the impugned order dated 9.5.2013 in Review Petition No. 7/2012 held that the documents submitted by the Powergrid pertaining to 9th SRPC meeting held on 6.3.2009 do not state, when assets 3 & 4 are to be commissioned. It is only during the pendency of Review Petition, the Appellant submitted that the delay is due to litigation. The learned Central Commission's finding in the impugned order, that the Appellant was aware of the reasons for the delay in commissioning of assets 3 & 4 and it appears that the Appellant was not diligent in pursuing the matter, is based on the material available on record and the same is legal and correct.

- (c) that the Appellant has furnished reasons for delay in commissioning of assets 3 & 4 only after the issue of order by the Central Commission in Petition No. 136/2010 which clearly shows that the Appellant supplements false and fabricated facts to somehow get a favourable order. Though, the petitioner was not diligent in pursuing the matter as held by the Central Commission, even though the commission has entertained the Review petition in respect of assets 1 & 2 and the Appellant is unjustified in submitting new facts after issue of orders by the Central Commission.
- (d) that the Appellant had earlier signed an Indemnity Agreement with NLC with zero date as February, 2009 and subsequently, a modification to the Indemnification Agreement was signed with NLC specifying as under:-

“that in case of delay, the actual date of the commissioning of generating unit or associated transmission system which ever is commissioned earlier after the original date shall be considered as the revised zero date.”

In these circumstances, the Appellant should approach NLC in this regard for rectification of the zero date in the Indemnification Agreement. Since, NLC is not agreeable to the condition of change of ‘Zero date’, the Appellant is now trying to charge the same from the beneficiaries, which is not the mandate of the Electricity Act, 2003.

- (e) that the Respondent No.5 in the Review Petition No. 7/2012 repeatedly stated that the modified Indemnity Agreement was signed on 26.12.2007 after a gap of 3 years from the date of original Indemnity Agreement namely; 29.12.2004. Also in the absence of zero date in the Indemnity Agreement dated 29.12.2004, the schedule commissioning date of Associated Transmission System would be January 2008 and hence the IDC & IEDC after the period of January 2008 due to the delay in commissioning of Associated Transmission System needs to be collected from NLC. Since the issue is a bilateral one between NLC and PGCIL, the beneficiaries having no role to play, the same should be settled between the parties to the Indemnity Agreement. It is wrong to shift the burden

on the beneficiaries, who are not party to the agreement between NLC and PGCIL.

- (f) that the Appellant has not brought on record any valid reason for substantiating its claim regarding delay in the completion of assets 3 & 4.
- (g) that the Appellant states that its Billing advice dated 14.2.2012 for collection of the disallowed amount from NLC was negated by NLC stating that “the original due date of January 2008 for commissioning of the associated transmission system was rescheduled as February, 2009” and hence, PGCIL is not entitled to recover the disallowed IDC for the time delay incurred from February, 2009 upto the commissioning date of the associated transmission system namely; 1.8.2009 for assets 1 & 2 and 1.9.2009 for assets 3 & 4. The Central Commission granted the Appellant the relief against NLC in the main Petition. If NLC was aggrieved against the order, it should have filed an Appeal before this Tribunal or review before the Central Commission. If the NLC failed to comply with the findings without challenging the order of Central Commission in the main petition No. 136/2010, the Appellant should have filed an application to get the order executed or the petition under Section 142 of the Electricity Act, 2003. In any event, the appellant cannot claim the amount from the beneficiaries.
- (h) that only in the rejoinder to the Reply filed by Respondent No.5 in Review Petition No. 7/2012, the appellant stated for the first time that the Assets 3 & 4 could not be commissioned during February, 2009 due to several technical reasons.
- (i) that any interference with the main order dated 11.1.2012 in Petition No. 136 of 2010 will only result in unjust enrichment to the Appellant at the cost of consumers at large. The Appeal is liable to be dismissed being devoid of any merit.

5. On perusal of the impugned order and evidence on record and hearing of submission of the rival parties, the following points arise for our consideration:

Point-1: Whether the present appeal is maintainable, on the ground that the appeal has been filed against the review order dated 9.5.2013 wherein the Central Commission has partly allowed the Review Petition, as per the judgment dated 2.12.2013 in Appeal No. 88 of 2013 in NTPC v/s CERC passed by this Tribunal?

Point-2: Whether the Central Commission has rightly rejected the claim of the Appellant in Review Petition No. 7 of 2012 filed in Petition No. 136/ 2010 on the aspect of IDC and IEDC to be capitalized from 1.9.2009 to 31.8.2009 in respect of assets 3 & 4 of the Appellant on the ground that the Appellant had knowledge of the reasons for delay in commissioning of assets 3 & 4 at the time of filing of original application and failed to furnish the relevant details at that point of time?

Point-3: Whether the Central Commission has rightly held in the Review Order dated 9.5.2013 in Review Petition No. 7 of 2012 that the Indemnification Agreement is a bilateral issue between the Appellant and Neyveli Lignite Corporation Ltd (NCL) and the issue of compensation should be settled between the parties in terms of the said agreement?

6. Point-wise considerations are as follows:

(A) Point-1:

(a) The Appellant Petitioner filed Petition No.136 of 2010 before the Central Commission seeking determination of transmission tariff for the assets/elements 1, 2, 3 & 4 of the transmission system associated with NLC for the tariff period of 1.4.2009 to 31.3.2014 in accordance with the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2009. The learned Central Commission vide order dated 11.1.2012 decided the Petition No. 136/2010 filed for determination of transmission tariff for the subject transmission assets (assets 1 to 4) for the period 1.4.2009 to 31.3.2014 in accordance with the Central Commission Tariff Regulations, 2009. The Central Commission had disallowed the Interest during Construction (IDC) and Incidental Expenses during Construction (IEDC) in the capital cost in respect of assets 1, 2, 3 & 4 claimed by the Appellant by the main order dated 11.1.2012.

- (b) The Assets 1 to 4 were parts of the transmission system associated with NLC-II Project and the issue involved was IDC and IEDC of the Assets 1 to 4 dealing with determination of transmission charges of the Appellant Petitioner. In the main order, the transmission charges of Asset 1 (for Aug. 2009), Asset 2 (2009-14), Combined Asset 1 & 3 (from Sep. 2009 to 21.03.2014) and Asset 4 (2009-14) were determined.
- (c) The Appellant filed Review Petition 7 of 2012 before the Central Commission seeking review of the order dated 11.1.2012 on the issue of total time over run in case of Assets 1 to 4 and denial of NLC to pay the loss on account of disallowance of IDC and IEDC as directed by the Central Commission in the main order dated 11.1.2012.
- (d) The learned Central Commission allowed the Review Petition in respect of Assets 1 & 2 of the Appellant Petitioner vide order dated 9.5.2013 observing that APTRANSCO in the 9th and 10th SRPC meetings informed that Assets 1 & 2 were commissioned on 1.8.2009 and this material aspect was overlooked while passing the main order. Since the IDC and IEDC with respect to the Assets 1 & 2 for the period 1.2.2009 to 31.7.2009 were allowed to be capitalized in the Review Order as the PGCIL/Appellant had delayed the commissioning of Assets 1 & 2 to match the APTRANSCO downstream assets.
- (e) IDC and IEDC as regards Assets 3 & 4 of the Appellant Petitioner were not allowed from 1.2.2009 to 31.8.2009 in the review order as PGCIL/Appellant in the original petition had submitted that commissioning of Assets 3 & 4 was discussed and agreed in 9th SRPC meeting held on 6.3.2009 and the Assets 3 & 4 were commissioned on 1.9.2009. The documentary evidence since did not make it clear on which date Assets 3 & 4 were to be commissioned. The main reason for rejecting IDC & IEDC regarding Assets 3 & 4 of the Appellant as emerges from the impugned Review Order is that the Appellant in the hearing of the instant review petition submitted that the commissioning of Assets 3 & 4 was delayed due to litigation and due to the work related to increasing the height of the towers as per

the directions of the Hon'ble Supreme Court. This very important and material fact or ground resulting in delay in the commissioning of Assets 3 & 4 was never taken in the original petition and also not mentioned in the content of the instant review petition. In the impugned review order, the Central Commission clearly observed that the Appellant was not diligent in pursuing the matter. The learned Central Commission vide impugned Review Order dated 9.5.2013, accordingly, rejected the Appellant Petitioner's prayer to allow IDC and IEDC and its capitalization in respect of Assets 3 & 4.

- (f) The instant Appeal has been filed by the Appellant Petitioner, against the impugned order dated 9.5.2013 passed by the Central Commission in the Review Petition No. 7 of 2012 filed in Petition No. 136/2010, before this Tribunal on the issue of disallowance of interest during construction and incidental expense during construction. The main dispute between the contesting parties is that since out of four Assets of the Appellant Petitioner, IDC and IEDC has been allowed as regards Assets 1 & 2 and IDC and IEDC has been disallowed as regards Assets 3 & 4 respectively in the impugned Review Order dated 9.5.2013, review order as regards Asset 1 & 2 has merged with the main order dated 11.1.2012 in Petition No. 136 of 2010. Since the claim or request of the Appellant Petitioner for IDC and IEDC regarding Assets 3 and 4 has been disallowed in the impugned Review Order dated 9.5.2013, the same cannot be said to be merged with the main order dated 11.1.2012 in Petition No. 136 of 2010, in view of the judgment dated 2.12.2012 passed by this Tribunal in Appeal No. 88 of 2013 in NTPC vs CERC of this Tribunal and also in judgment dated 8.1.2014 in Appeal No. 9 of 2013 Jamshedpur Utilities and Services Company Ltd v/s Jharkhand Electricity Regulatory Commission of this Tribunal.
- (g) This Tribunal vide judgment dated 2.12.2013 in Appeal No. 88 of 2013 in the case of NTPC Limited v/s Central Electricity Regulatory Commission, in para 31 held as follows:

"If the Review Petition raises several distinct issues and the some of them are rejected, the Doctrine of Merger in so far as the issues which were rejected in the Review Order will not have any application. When this principle is applied to the present

case, then we are constrained to hold that the present Appeal as against the Review order in respect of these issues is not maintainable in view of the fact that these issues have already been decided in the main order itself. Thus, we uphold the objection regarding the Maintainability of the Appeal.”

- (h) The same view has been reiterated by this Tribunal in Appeal No. 9 of 2013 in its judgment dated 8.1.2014. This Tribunal has clearly held that if the several distinct issues are raised in a Review Petition and out of those issues some are rejected, the Doctrine of Merger will not be applicable with regard to the issues rejected but the issues which are allowed in the Review Order will be merged with the main order.
- (i) Mr. M.G. Ramachandran, the learned counsel for the Appellant has vehemently argued that the Central Commission vide Review Order dated 9.5.2013 has partly allowed the Review Petition on the issue of IDC and IEDC regarding Assets 1 & 2 and has rejected the claim of IDC and IEDC with regard to the Assets 3 & 4. All the four Assets, Asset 1, 2, 3 & 4 form the part of the same issue namely; determination of transmission tariff of the Appellant.
- (j) According to the learned counsel for the Appellant Petitioner, in the present case, the Central Commission has partly allowed the claims of IDC and IEDC regarding Assets 1 & 2 and partly disallowed the same regarding Assets 3 & 4 under the same issue. Therefore, all the claims raised by the Appellant in the review petition have been merged in the main Order. The contention of the learned counsel for the Respondent No.5 that IDC and IEDC in respect of Assets 1 & 2 has been allowed and, therefore, the merger of the main order is only with respect to Assets 1 & 2 and not with respect to Assets 3 & 4, is not correct because the issue of disallowance of IDC and IEDC is a single issue which was raised in the Review Petition in respect of four Assets of the transmission system of the Appellant Petitioner. This aspect cannot be considered as four issues as contented by the Respondent No.5. The learned counsel for the Appellant has vehemently argued that the Assets may be several but the issue is same namely; disallowance of IDC and IEDC and just on the ground that the issue was allowed in respect of some of the Assets, the issue cannot be split into two issues. After making elaborate submissions

on the point of maintainability of the present Appeal filed against the impugned Review Order, the learned counsel for the Appellant has submitted that the present Appeal filed against the Review Order is competent and maintainable and the same cannot be rejected merely on the fact of the so called different issues or technicalities.

- (k) According to the learned counsel for the Appellant, the issue of IDC and IEDC with regard to all the 4 Assets of the Appellant is same, but the claims for the Appellant are different and this in itself is sufficient to justify the view that instant Appeal against the Review Order is maintainable.
- (l) As per the judgment of Lily Thomas v. Union of India, AIR 2000 SC 1650 (1652) – “Review,” means the act of looking, offer something again with a view to correction or improvement.
- (m) In Sushil v. State, AIR 1975 SC 1185, it had been held by the Hon’ble Supreme Court that the decree that is subsequently passed on review of a decree, whether it modifies, reverses or confirms the original decree, is a new decree superseding the original one.
- (n) In Harbans v. Thakoor, 9 C 209; Bhaniram v. Ambika, 31 CWN 1035; Gangaraju v. Venkata, AIR 1942 Mad. 235, it had been held that when a review is granted on a particular ground, court has a discretion to rehear the whole case if it thinks necessary.
- (o) Further, in Inderjit v. Sahu, AIR 1964 All. 359, it was held that the power of the court is not restricted to the particular ground on which the review is granted. The court has jurisdiction to rehear the entire case of it. Failure to give reasons (though the Court should give them) would not amount to error in procedure justifying interference in revision.
- (p) The Hon’ble Supreme Court in P.M.A. Metropolitan v. Moran Mar Marthoma, AIR 1995 SC 2001 (2033) observed that when a review petition is entertained and notice is issued by a court it is open to it to restrict the scope of hearing but once the petition is heard and the court is satisfied that the order under review was erroneous at the face of it then it is not precluded from allowing the petition setting aside the findings which were earlier not permitted to be reopened.

(q) **Section 120 of the Electricity Act, 2003 dealing with procedure and powers of Appellate Tribunal laid down as follows:**

“120. Procedure and powers of Appellate Tribunal.—(1) *The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal shall have powers to regulate its own procedure.*

(2) *The Appellate Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:--*

(a) *summoning and enforcing the attendance of any person and examining him on oath;*

(b) *requiring the discovery and production of documents;*

(c) *receiving evidence on affidavits;*

(d) *subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;*

(e) *issuing commissions for the examination of witnesses or documents;*

(f) *reviewing its decisions;*

(g) *dismissing a representation of default or deciding it ex parte;*

(h) *setting aside any order of dismissal or any representation for default or any order passed by it ex parte;*

(i) *any other matter which may be prescribed by the Central Government.*

(3) *An order made by the Appellate Tribunal under this Act shall be executable by the Appellate Tribunal as a decree of civil court and, for this purpose, the Appellate Tribunal shall have all the powers of a civil court.*

(4) *Notwithstanding anything contained in sub-section (3), the Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.*

(5) *All proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860) and the Appellate Tribunal shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974)”*

(r) Order XLVII, Rule 7 of The Code of Civil Procedure, 1908 provides as under:

“7. Order of rejection not appealable. Objections to order granting application –(1) *An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to at once by an appeal*

from the order granting the application or in an appeal from the decree or order finally passed or made in the suit.”

The aforesaid sub-section (1) of Section 7, nowhere makes any distinction about the partial allowing of the review application. Only words rejection or grant of the review application find place therein. There is no mention dealing with any situation like part allowing of the review application.

- (s) **The Hon’ble Supreme Court in DSR Steel (Private) Limited v/s State of Rajasthan and others reported in (2012) 6 Supreme Court Cases 782 while dealing with the doctrine of merger has recently observed as follows:**

“25. Different situations may arise in relation to review petitions filed before a court of tribunal.

25.1 One of the situations could be where the review application is allowed, the decree or order passed by the court or tribunal is vacated and the appeal/proceedings in which the same is made are reheard and a fresh decree or order passed in the same. It is manifest that in such a situation the subsequent decree alone is appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the court hearing the review petition.

25.2 The second situation that one can conceive of is where a court or tribunal makes an order in a review petition in which the review petition is allowed and the decree/order under review is reversed or modified. Such an order shall then be a composite order whereby the court not only vacates the earlier decree or order but simultaneously with such vacation of the earlier decree or order passes another decree or order or modifies the one made earlier. The decree so vacated, reversed or modified is then the decree that is effective for the purposes of a further appeal, if any, maintainable under law.

25.3 The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review petition. The decree in such a case suffers neither any reversal nor an alteration or modification. It is an order by which the review petition is dismissed thereby affirming the decree or order. In such a contingency there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition. Time taken by a party in diligently pursuing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or

condonation would not imply that there is a merger of the original decree and the order dismissing the review petition.

- (t) In the impugned Review Order dated 9.5.2013, the instant review petition has been partly allowed and, subsequently orders to this effect were directed to be issued by the Central Commission. The Review Petition has accordingly been disposed of. It is quite evident from the impugned review order that IDC and IEDC with regard to the Assets 1 & 2 were allowed for the reasons mentioned therein and the same with regard to the Assets 3 & 4 were disallowed for the mentioned reasons. The Appellant Petitioner claimed IDC and IEDC with respect to all the four Assets 1, 2, 3 & 4 which were disallowed in the main order. In the review order, IDC & IEDC for Assets 1 & 2 were allowed and Assets 3 & 4 were disallowed. On the basis of the review order, consequential order has been issued by the Central Commission which would further result in redetermination of tariff because tariff is determined on the basis of many components/Assets. Moreover, the transmission charges for combined Assets 1 and 3 have been determined in the main order for the period 1.9.2009 to 31.3.2014. The allowance of IDC and IEDC in respect of Asset 1 in the review order will result in modification of transmission charges for combined Asset 1 & 3 determined in the main order.
- (u) Thus, by the review order, the learned Central Commission has partly set aside the main order and accordingly allowed the review application after rehearing the parties during the review petition. The main order has consequentially been reversed/modified. Thus, the learned Central Commission has made an order in review petition by which the review petition has been allowed and the decree/order under review has been reversed or modified. Such an order then becomes a composite order whereby the Central Commission has not only vacated the earlier decree or order but simultaneous with such vacation of the earlier decree or order has passed another decree/order by modifying the one made earlier. Thus, the original decree or order of the Central Commission has been reversed or modified by the subsequent review order or decree

and the review order or decree is effective for the purpose of further appeal.

After considering the controversy before us on the point of maintainability of the instant Appeal, and going through the different aspects of the matter and different rulings and legal position, we find ourselves in agreement with the pleas taken by the learned Counsel for the Appellant Petitioner. In our view, the instant appeal against the review order is fully competent and legally maintainable and this point namely; Point-1 is decided in favour of the Appellant Petitioner.

- (v) The findings of this Tribunal in Appeal No. 88 of 2013 will not be applicable in the present case as in the present case the issue dealt with in the review petition was IDC and IEDC in respect of Asset 1 to 4, which was allowed partially by allowing IDC and IEDC in respect of Asset 1 & 2. Further, in the main order, the transmission charges for combined Asset 1 & 3 were determined. The review allowing IDC and IEDC in respect of Asset 1 will modify the transmission charges for combined Asset 1 & 3.

(B) Point-2 and 3:

- (a) Since point no. 2 and 3 are interconnected, we think it proper to take them up together. The admitted position as is evident from the submissions of the rival parties and also from the material available on record, it is amply clear that the judgment and order dated 8.5.2009 passed by the Hon'ble Supreme Court in SLP (C) No. 24713 of 2008 in which the present Appellant Petitioner was also a respondent and by which the present Appellant/Powergrid was directed to increase the clearance from 52 meters to 56 meters so that the clearance between the lowest point of the sag of the cable and the top most portion of the poultry shed is not less than 40 ft, which was not brought to the notice/knowledge of the Central Commission during the hearing of the main Petition No. 136/2010 decided on 11.1.2012. Not only this, the direction of the Hon'ble Supreme Court was not mentioned even in the body of the review petition. Thus, the ground causing any delay due to increase in the

height of the cable as directed by the Hon'ble Supreme Court was not pleaded or mentioned in the instant review petition, due to which the commissioning of Assets 3 & 4 of the Appellant Petitioner was allegedly got delayed. Even no amendment in the review petition was sought by the Appellant Petitioner during the pendency of the review petition and lastly an attempt was made to introduce the ground of delay on the basis of the directions of the Hon'ble Supreme Court dated 8.5.2009 through a rejoinder affidavit dated 13.9.1992 which was filed in reply to the TNEB in the Review Petition. Thus, it is a clear case in which even the order of the Apex Court was knowingly and deliberately kept beyond the knowledge of the Central Commission throughout, the reasons best known to the Appellant Petitioner.

- (b) This is not a case that the said judgment of the Hon'ble Supreme Court dated 8.5.2009 was not in the knowledge or notice of the Appellant particularly when the Appellant was respondent before the Hon'ble Apex Court. This argument cannot be accepted or countenanced that the order of the Hon'ble Supreme Court is a newly discovered document, which even after the exercise of due diligence was not within the knowledge or could not be produced by the Appellant Petitioner at the time when the original order was passed or review order was made.
- (c) The Hon'ble Supreme Court in *Union of India v Paul Manickam*, AIR 2003 SC 4622 (4629) held that the court would not entertain a review petition with an entirely new substratum of issues or where there is suppression of facts.
- (d) In *Mohan Lal Bagla v. Board of Revenue, U.P.*, AIR 2005 AII 308, it has been held that Re-hearing of the case is not permissible in the disguise of review. The power of review is exercisable only where the circumstances are strictly covered by the statutory exceptions contemplated under Order 47 Rule 1 C.P.C.
- (e) Further, in *Bdya Devi v. I.T. Commr., Allahabad*, AIR 2004 Cal 63 (67) (DB), it has further been held that in review, the court cannot

enter into a process of taking evidence to establish same thing which is not on record in order to create records for the purpose.

In view of the above discussions, we do not find any merit in the submissions made by the learned Counsel for the Appellant. Both these points namely; Point-2 & 3, are decided against the Appellant as the findings recorded by the learned Central Commission in the review order did not reflect any infirmity, illegality or inconsistency. There is no sufficient cause or any error on record to assail the said findings of the Central Commission in the impugned Review Order.

7. In view of the above discussions, Point-1 regarding maintainability of the Appeal against the review order is decided in favour of the Appellant Petitioner. Point-2 & 3, as discussed above, are decided against the Appellant Petitioner as the impugned Review Order does not suffer from any perversity, infirmity or illegality. The Appeal is accordingly disposed of. No order as to costs.

Pronounced in open Court on this 5th day of March, 2014.

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

√ **REPORTABLE/NON-REPORTABLE**

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