

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 257 of 2013

Dated: 12th September, 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 (s)

Versus

**1. Central Electricity Regulatory Commission,
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi-110 001.**

**2. Maharashtra State Electricity Distribution Company Ltd.,
5th Floor. Prakashgad,
Plot No. 9, Anant Kanekar Marg,
Bandra (East),
Mumbai-400 051**

...Respondent(s)

Counsel for the Appellant(s): Mr. M.G. Ramachandran,
Ms. Swagatika Sahoo,
Ms. Poorva Saigal

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

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

The present Appeal has been filed by Power Grid Corporation of India Ltd. (hereinafter referred to as

“Power Grid”) against the order dated 1.8.2013 passed by the Central Electricity Regulatory Commission (“Central Commission”) wherein the Central Commission has disallowed the Interest During Construction (“IDC”) and Incidental Expenditure During Construction (“IEDC”) while determining the transmission tariff in respect of Inter Connecting Transformer (ICT) III of 400/220 kV Pune Sub-station alongwith associated bays and ICT III at Wardha sub-station alongwith associated bays, etc., under the Western Region System Strengthening VI Scheme for the tariff period 2009-14.

2. The Central Electricity Regulatory Commission (“State Commission”) and Maharashtra State Electricity Distribution Co. Ltd. are Respondent nos. 1 and 2 respectively.

3. The facts of the case are as under:

3.1 On 25.02.2008, the Board of Directors of the Power Grid approved an investment for works under Western Region System Strengthening VI Scheme which included ICT III at 400/220 kV Pune sub-station and ICT III at Wardha sub-station. As per the investment approval, the commissioning schedule of the system was 33 months from the date of investment approval. Accordingly, the Scheduled Commercial Operation Date was 1.12.2010. However, the transmission assets were not ready for commercial operation as on the scheduled date as envisaged for reasons which according to Power Grid were beyond their control.

3.2 Power Grid had experienced a number of failures of transformers due to external faults at various sub-

stations and therefore, decided to establish and validate the design with respect to the short circuit withstand capability of the transformers in order to enhance system reliability and availability.

3.3 Accordingly, it was decided to validate the design of 315 KVA Autotransformer for short circuit conditions once for each manufacturer including M/s. AREVA who was given award for supply and erection of 315 KVA Autotransformers at Pune sub-station and Wardha sub-station. The test facilities for Short Circuit Test were not available in India and Power Grid had to depend on the testing facilities abroad which took a lot of time till the test bed became available. Finally, the short circuit testing was done in KEEMA, Netherland after a lot of efforts.

3.4 One of the ICT under transformer package which included the transformer for 400 kV Pune and 400 kV Wardha awarded to M/s. AREVA failed in short circuit test and this required detailed investigation of failure after transporting the same back to India and suitable modifications and re-testing at KEEMA resulting in further delay. Accordingly, there was a time overrun in commissioning of ICTs at Pune and Wadha.

3.5 Power Grid filed a Petition before the Central Commission for determination of transmission tariff for the transmission assets commissioned under the Western Region System Strengthening VI Scheme for tariff period 2009-14. Power Grid prayed that the time overrun of 11 months in commissioning of ICT III at Pune and 13 months in commissioning of ICT-III at Wardha were beyond their control and accordingly the IDC and IEDC for the period beyond the scheduled

commissioning of the ICTs should be allowed in determining the transmission tariff.

3.6 The Central Commission concluded that there was delay of 8 months in conducting Short Circuit Test and held that the delay cannot be entirely attributed to Power Grid as it was beyond the control of Power Grid or its suppliers as they had to depend on the third party to perform the test. Further the Central Commission decided that Power Grid and the beneficiaries shall share the IDC and IEDC for the period of 8 months delay equally in case of both Pune ICT-III and Wardha ICT-III. The Central Commission also held that the impact of balance period of time overrun i.e. 3 months in case of Pune ICT-III and 5 months in case of Wardha ICT-III shall be borne by Power Grid.

3.7 Aggrieved by the findings of the Central Commission, Power Grid has filed this Appeal.

3.8 According to Power Grid, there is clear finding that they had not committed any imprudence in selecting the contractor/supplier and the delay cannot be entirely attributed to them as delay was due to non-availability of test bed for short circuit test, which was beyond the control of Power Grid and its supplier. Despite the above finding, the Central Commission has wrongly decided that the cost due to time overrun on account of delay in getting the test bed for Short Circuit Test should be shared by Power Grid and the beneficiaries in equal proportion. After the findings, clearly recording that the delay was beyond the control of Power Grid and the supplier, there is no basis for holding that the cost of time overrun on this account

should be shared by Power Grid with beneficiary. The reason for the delay is nothing but force majeure. Any thing which is beyond the control of the party is force majeure or impossibility of performance under Section 56 of Indian Contract Act, 1872. In so far as the balance delay of 3 months in case of ICT-III Pune and 5 months delay in case of ICT-III Wardha, rejected on the ground of design deficiency, the same issue is pending in Review Petition No. 4 of 2014 filed in Appeal No. 165 of 2012.

4. On the above issues, we have heard Mr. M.G. Ramachandran, learned counsel for Power Grid, the Appellant and Mr. M.S. Ramalingam, learned counsel for the Central Commission.

5. After carefully examining the contentions of the parties, the following questions would arise for our consideration:

- (i) Whether the Central Commission has erred in directing sharing of the IDC and IEDC incurred due to delay of 8 months in getting short circuit done due to non-availability of test bed between Power Grid and the beneficiaries equally after clearly holding that the delay in getting the Short Circuit Test done was beyond the control of Power Grid or its supplier?
- (ii) Whether the Central Commission has erred in deciding the impact of balance period of time overrun i.e. 3 months in case of ICT-III at Pune and 5 months in case of ICT-III

at Wardha due to failure of transformer in Short Circuit Test shall be borne by Power Grid?

6. Both the above issues are inter-connected and are being dealt with together.

7. Mr. M.G. Ramachandran, learned counsel for Power Grid argued that the reason recorded in the impugned order clearly leads to only possible conclusion that the Appellant was not responsible for the delay of 8 months in getting the short circuit test done and the delay was beyond the control of Appellant and its supplier. The reason for the delay was nothing but force majeure. He referred to AIR 1954 SC 44 in the matter of Satyabrata Ghose vs. Mugneeram Bangur and Co. & Anr. wherein the concept of force majeure or impossibility of

performance has been dealt with and analysed by the Hon'ble Supreme Court. He further submitted that as far as the balanced delay due to failure of transformer is concerned, the same is covered by the Judgment of this Tribunal in Appeal No. 165 of 2012. However, Power Grid has filed a Review Petition against the findings of this Tribunal in Appeal No. 165 of 2012.

8. Mr. M.S. Ramalingam, learned counsel for the Central Commission made submissions supporting the findings of the Central Commission. He also relied on the Tribunal's judgment dated 28th November, 2013 in Appeal No. 165 of 2012.

9. Let us examine the findings of the Central Commission in the impugned order dated 01.08.2013.

“17. The Appellate Tribunal for Electricity in its judgment dated 27.4.2011 in Appeal No. 72/2010 (MSPGCL Vs. MERC & Ors.) has laid down the

following principles for prudence check of time over-run related cost:

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.

18. In the light of the above principles, the issue of time over-run due to delay in obtaining the test bed and failure of the transformer in the SCT has been considered. As regards the delay in conducting the SCT, it has been observed that AREVA while requesting KEMA, Netherlands for early testing of the transformer, vide its e-mail dated 2.11.2009 has informed that the transformer was expected to reach KEMA by 15.3.2010. The SCT was conducted only on 27.11.2010 and thus there was a delay of 8 months in conducting the SCT. AREVA, who has been awarded the contract for supply of ICTs by the petitioner, is one of the major manufacturers of the energy equipments in the world. The case of the petitioner does not fall under the first category as the petitioner cannot be said to be imprudent in selecting AREVA to execute the project. The delay cannot be entirely attributed

to the petitioner as the delay in getting the SCT done due to non-availability of test bed was beyond the control of the petitioner or its suppliers as they had to depend on the third party to perform the test. The petitioner case also does not fall under the second category as the delay cannot be attributed to any force majeure event. In our view, the instant situation falls under the third category of cases laid down by APTEL in the above said judgment. We are of the considered view that the burden of cost over-run due to delay in conducting the SCT should be shared by the petitioner and the beneficiaries in equal proportion. We direct that the petitioner and the beneficiaries shall share the IDC and IEDC for the period of 8 months delay in case of both Pune ICT-III and Wardha ICT-III. The transformer failed the Short Circuit Test conducted on 27.11.2010 due to design deficiency. The type test was covered in the delivery schedule and the supplier is responsible for delay in delivery. We are of the view that the cost of time over-run due to failure of the transformer in SCT cannot be passed on to the beneficiaries except for the period during

which the type test bed was not available. Accordingly, we direct that 8 months period for which test bed was not available shall be shared by the petitioner and beneficiaries and the impact of balance period of time over-run i.e. 3 months in case of Pune ICT-III and 5 months in case of Wardha ICT-III shall be borne by the petitioner”.

10. Thus, the Central Commission has relied on the Judgment dated 27.4.2011 of this Tribunal in Appeal no. 72 of 2010 wherein the Tribunal had laid down the principles for prudence check of time overrun related cost. Even though the Central Commission held that the delay in getting the test bed for Short Circuit Test was beyond the control of Power Grid and its supplier, M/s. AREVA, the Central Commission decided that the delay of 8 months due to delay in getting the test bed would fall under category-III of the principles for prudence check laid down by this Tribunal and

accordingly the impact of cost due to time overrun has to be shared equally by the Appellant and the beneficiary. The Central Commission has also decided that the impact of balance period of time overrun i.e. 3 months in case of Pune ICT-III and 5 months in case of Wardha ICT-III due to failure of the transformer in Short Circuit Test cannot be passed on to the beneficiaries and has to be borne by Power Grid.

11. We find that in the Tribunal's Judgment in Appeal no. 72 of 2010, the second condition for prudence check is due to factors beyond the control of the 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 company in executing the project. In the present case, the Central Commission has held that the period of 8 months

delay in conducting the Short Circuit Test due to non-availability of test bed was beyond the control of Power Grid or its supplier. However, the Central Commission still decided that the impact of delay in conducting the Short Circuit Test should be shared equally by Power Grid and the beneficiaries. In our opinion, the present situation of non-availability of test bed for Short Circuit Test will fall under the second Category as it has been established beyond any doubt, that there was no imprudence on the part of the generating company or its supplier in executing the project and the delay of 8 months was due to factors beyond the control of Power Grid or its supplier. It is not necessary that the factors beyond the control of the generating or transmission company are only due to force majeure like natural calamity. The example given under the second category in the judgment of the Tribunal relied by the Central Commission is not exhaustive. If it is clearly

established, beyond any doubt, that the delay in execution of the project is due to factors beyond the control of the company and there is no imprudence on the part of the company in executing the project, then the delay would be covered under the second category i.e. due to factors beyond the control of the company.

12. The Central Commission has clearly held that there was no imprudence on the part of Power Grid in selecting AREVA to execute the project and delay due to non-availability of test bed was beyond the control of Power Grid or its supplier as they had to depend on the third party outside the country to perform the test as the testing facilities were not available in the country. We feel that the impact on cost due to time overrun of 8 months as a result of delay in getting the Short Circuit Test done due to non-availability of test bed should be

allowed in the transmission tariff to Power Grid i.e. IDC and IEDC for 8 months should be allowed to Power Grid.

13. As far as delay due to failure of the ICTs is concerned, the same is covered by the judgment dated 28.11.2013 of this Tribunal in Appeal no. 165 of 2012 in the matter of Power Grid Corporation of India Ltd. vs. Central Electricity Regulatory Commission & Anr. wherein this Tribunal did not allow the delay caused due to failure of the transformer to be passed on to beneficiaries. The Tribunal held that the beneficiaries should not be saddled with any additional cost due to failure of transformer during short circuit test.

14. The Appellant had filed a Review Petition against this finding of this Tribunal in Appeal No. 165 of 2012 which has also been rejected by this Tribunal by order dated 30th June, 2014. Accordingly, this issue is decided against Power Grid.

15. Summary of our findings

- (i) The delay of 8 months in conducting Short Circuit Test due to non-availability of test bed was beyond the control of Power Grid or its supplier. The Central Commission has also given clear finding that this delay was beyond the control of Power Grid and its supplier as they had to depend on other Organization outside India as the Short Circuit Testing facilities were not available in the country. Accordingly, IDC and IEDC for delay of 8 months in getting the Short Circuit Test due to non-availability of test bed should be allowed to Power Grid.**

(ii) The balance delay in commissioning of the ICTs due to failure of the transformer during testing cannot be allowed to be passed on to the beneficiary and has to be borne by Power Grid. We have relied on the finding of this Tribunal in Appeal no. 165 of 2012 in this regard.

16. In view of above, the Appeal is allowed in part as indicated above. The Central Commission is directed to pass the consequential order as per the above findings at the earliest. No order as to cost.

17. Pronounced in the open court on this **12th day of September, 2014.**

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

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REPORTABLE/NON-REPORTABLE

Vs