

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

Appeal No. 87 of 2012

Dated : 3rd December, 2013

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

In the matter of:

Uttar Pradesh Power Corporation Ltd.
(Formerly Uttar Pradesh State Electricity Board)
Shakti Bhawan, 14, Ashok Marg,
Lucknow – 226 001

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Appellant

Versus

1. Central Electricity Regulatory Commission
4th Floor, Chandralok Building, 36, Janpath,
New Delhi – 110 001

2. Power Grid Corporation of India Ltd.
B-9, Qutub Institutional Area,
Katwaria Sarai, New Delhi – 110 016

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Respondents

Counsel for the Appellant(s) : Mr. Pradeep Misra
Mr. Manoj Kr. Sharma
Mr. Shashank Pandit

Counsel for the Respondent(s) : Mr. M.G. Ramachandran
Ms. Swagatika Sahoo
Mr. Manu Seshadri for R-1

APPEAL UNDER SECTION 111 OF THE ELECTRICITY ACT, 2003.

JUDGMENT

HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. This appeal, has been filed by **Uttar Pradesh Power Corporation Ltd. (Appellant)** against the Order dated 25.10.2011 passed by the Central Electricity Regulatory Commission, New Delhi in Petition No. 21 & 22 of 2011, under Section 111 of the Electricity Act, 2003, whereby the Respondent No. 1 - Central Electricity Regulatory Commission (hereinafter called the 'Central Commission') allowed Petition No. 21 of 2011 and held that the **Respondent No.2/Petitioner - Power Grid Corporation of India Ltd. (hereinafter described as 'Power Grid')**, can recover the licence fee from the beneficiaries. The Central Commission in Petition No. 22 of 2011, for the period from 01.04.2009 onwards, has directed the staff of the commission to take necessary action for suitable amendments to Central Electricity Regulatory Commission (Terms & Conditions of Tariff Regulations), 2009 (in short 2009 Regulations), to provide for reimbursement of licence Fee. The Central Commission, in the impugned order, was of the view that Regulation 42 to the 2009 Regulations needs to be suitably amended to provide for reimbursement of licence Fee during 2009-2014. Regarding reimbursement of licence Fee for the period 2008-2009, it allowed reimbursement of the licence Fee by the beneficiaries by exercising Central Commission's power to remove difficulties under Regulation 12 of Central Electricity Regulatory Commission (Terms & Conditions of Tariff Regulations) 2004 (in short 2004 Regulations).

The instant case raises a substantial question of law as to whether licence fee which is a fee payable for special privilege could be pass through to the beneficiaries. Though the

beneficiaries have nothing to do with that privilege of the licensee.

2. The facts of the case giving rise to this Appeal are as follows:-
 - A. That the Appellant is successor in interest of the then U.P. State Electricity Board and used to purchase electricity from different central owned generating stations for the purpose of distribution of the same in U.P. through various distribution companies which are subsidiaries of the Appellant.
 - B. That Respondent No.1 is Central Electricity Regulatory Commission (hereinafter referred to as Central Commission) established under Section 3 of Electricity Regulatory Commission's Act, 1998 and deemed to be a Central Commission under Section 76(2) of Electricity Act, 2003 for the purpose of Electricity Act, 2003. The functions of the Central Commission are defined under Section 79 of Electricity Act, 2003.
 - C. That Respondent No.2 is a central transmission utility engaged in the business of providing transmission facilities to the various distribution companies for transmission of power purchased by them from different generating companies.
 - D. That Respondent No.2 was incorporated in the year 1992 after carving out the transmission assets of National Thermal Power Corporation Ltd.
 - E. That since then Respondent No.2 has been engaged in the business of transmission of electricity.

- F. That on enforcement of the Electricity Act 2003, on 10.06.2003, Respondent No.2 had become a deemed licensee but after one year it had to take a licence for transmission of electricity. That Respondent No.2 has taken a licence and has been doing business of transmission of electricity.
- G. That in the year 2008 CERC has framed CERC (Payment of Fee) Regulations, 2008 by which licence Fee has been imposed on Respondent No.2 w.e.f. the financial year 2008-09.
- H. That as the Respondent No.2 was required to pay licence fee of Rs.0.05% of the average transmission charges recovered by it, it has filed a Petition No. 21 of 2011 before CERC (Central Commission), praying therein that under the CERC (Terms and Conditions of Tariff) Regulations, 2004 which were applicable from 2004-2009, Respondent No.2 was not required to pay such licence Fee. Since now it has to pay a licence Fee, hence by exercising the power under Regulation 13 to relax, Respondent No.2 be permitted to recover the said amount of licence Fee from the Appellant and other beneficiaries.
- I. That similarly another Petition No.22 of 2011 was filed by the Respondent No.2 that the licence Fee paid for the year 2009-10 and 2010-11 be permitted to be recovered from the beneficiaries.
- J. That Appellant filed objections in the said Petitions stating therein that licence is a privilege to anyone and the Fee for

acquiring such privilege cannot be termed as expenses so that it can pass to the consumers.

3. The learned Central Commission, without considering the contention and provisions of law, allowed the Petition No. 21 of 2011 filed by the Respondent No.2 and held that the Respondent No. 2 can recover the licence Fee from the beneficiaries. Regarding Petition No. 22 of 2011, the Central Commission Feeling need for amendment to Regulation 42 provided for reimbursement of licence Fee during 2009-2014 directing the Commission's staff to take necessary action for suitable amendment to 2009 Regulations. The impugned order of the Central Commission makes it abundantly clear that there was no provision for reimbursement of the licence Fee in 2009 Regulations providing for any kind of reimbursement of the licence Fee. The Commission therefore found it appropriate to pass on the incident of the licence Fee on the consumers through the distribution companies. Resultantly, the Power Grid was directed to be reimbursed of the licence Fee paid by it, by the beneficiaries for the period 2008-09.

4. In the nutshell, Power Grid Corporation through Petition No. 21 & 22 of 2011 prayed for billing and reimbursement of the licence Fee from consumers and beneficiaries (who were Respondents before the Central Commission) for the period from 17.10.2008 till 31st March 2009 in relaxation of the provisions of Regulation 56 (IV) of Regulations 2004 and for the period 2009-10 and 2010-11 in relaxation of Regulation 19(g) of Central Regulations 2009. The Commission by impugned order has allowed reimbursement of the licence Fee for the period 2008-09 by

invoking its power to remove difficulties under Regulation 12 of Central Regulations 2004 as claimed in Petition No. 21 of 2011. In respect of licence Fee for the period 2009-2010 and 2010-2011 claimed in Petition No. 22 of 2011, the Commission has directed its staff for taking necessary action for amendment to Central Regulations 2009.

5. Power Grid submitted before the learned Central Commission that the Commission had notified the Central Electricity Regulatory Commission (Payment of Fee) Regulations 2008 (hereinafter described as payment of Fee regulations) dated 17.10.2008 which was amended on 12.05.2009. Thus, Regulation 4(1) of the Payment of Fee Regulations was amended which provides as under : -

"4(1). The Transmission Licensee for inter-state transmission, including a person deemed to be a transmission Licensee referred to under any of the provisos to Section 14 of the Electricity Act, 2003, shall pay licence fee at the rate of 0.05% per annum of the annual transmission charges applicable for that year rounded off to the nearest one hundred rupees.

Provided that the licence fee for the year 2008-09 shall be paid within 30 days of commencement of these regulations.

(2) The transmission Licensee granted a licence for the inter-state transmission of electricity shall pay licence fee at the rate of Rs.Two lakh (Rs.2,00,000/-) per annum from the date of grant of licence and up to the date preceding the date of commercial operation of the inter-state transmission system or an element thereof"

6. The Power Grid submitted before the learned Central Commission that since licence fee is required to be paid annually by 30th April of each year, the Petitioner/Power Grid has paid the licence fee for the financial year 2008-09 (in part), 2009-10 and 2010-11 under protest. The gist made by Power Grid, Petitioner, before the Central Commission was that the Commission had notified the 2004 Regulations for determination of tariff based on the capital cost of the transmission projects for the period from 1.4.2004 to 31.3.2009. Regulation 56(iv) of 2004 Regulations provides for O&M expenses per circuit km and per day which had been arrived at based on the actual O&M expenses during the years 1998-99, 1999-2000, 2000-01, 2001-02 and 2002-03 of the various projects of the petitioner. Similarly, the Commission had notified the 2009 Regulations for determination of tariff based on the capital cost of the transmission projects for the period 1.4.2009 to 31.3.2014.

7. Since the licence fee has been a new component of cost to the transmission licence under O&M stage of the project and has become incidental to the Petitioner/Central Transmission Utility (CTU) only from 2008-09. Since no such cost component was incidental during 1998-99 to 2003-04 and during 2003-04 to 2007-08, the normative O&M rates in the 2004 regulations and 2009 regulations respectively have not captured the costs associated with the licence fee. Licence fee has become a new and additional cost component incident since 2008-09 on the Power Grid and shall be incurred during the life of the project and the same should be categorized as an expense under O&M expenditure. One more submission raised by the Power Grid before the Central Commission was that as per para 7.1.6 of the

Tariff Policy notified by the Central Government on 6.1.2006, the tariff of the transmission systems shall be determined in future on the basis of competitive bidding and in that event, transmission licensee while bidding for the project may be in a position to include all the cost towards transmission system including licence fee. However, in case of the projects for which tariff is to be decided under the provisions of 2004 regulations and 2009 regulations which do not specifically capture the cost associated with the licence fee, there is a requirement to categorize licence fee as an expense under O&M and allow reimbursement to the transmission licensees.

8. The Power Grid accordingly filed the Petitions under Regulations 12 & 13 of 2004 Regulations and Regulation 44 of 2009 Regulations for relaxation of the relevant provisions pertaining to O&M expenses and to allow billing and reimbursement of the licence fee from the beneficiaries.

9. The gist of objections of the beneficiaries who were Respondents before the Central Commission was as follows :-

a) That the Power Grid's request for relaxation of regulations 19(g) of 2009 regulations is solely guided by commercial considerations with the aim to get the expenses on account of licence fee which is otherwise not allowed under 2009 Regulations. Moreover, relaxation of Regulation 19(g) of 2009 Regulations would disturb the delicate balance between safeguarding the consumer's interest and ensuring recovery of the cost of electricity in a reasonable manner which is an important consideration while framing the regulations.

- b) that O&M expenses have been awarded on normative basis and there will always be savings in any one or more heads and when such savings are not passed on to the beneficiaries, making claims for any additional expenditure incurred, it is not equitable. Moreover, licence fee is an expenditure incurred by the petitioner to be in business of transmission and hence, the expenditure has to be met only from the profits of the company. Therefore, it was requested that the Commission may consider not to burden the beneficiaries and ultimately the end consumers by allowing billing and reimbursement of licence fee which is not contemplated in the 2004 and 2009 regulations.
- c) that The licence fee has been levied on the beneficiaries with effect from 2008-09. It is the onus of the licensee to pay the licence fee and it will be totally irrational, illegal and unjustified to pass on the burden of licence fee on the consumers. UPPCL has further submitted that licensing is conferment of right to do an authorized activity in a specific area and therefore, the fee charged for conferment of the said right should be borne by the person who is conferred with the right of licence i.e. the licensee.
- d) that without having a valid licence, the petitioner cannot undertake the transmission business and therefore, it is obligatory on the part of the petitioner to bear the cost of licence fee from its own profits. It has been further submitted that in the past, recovery on O&M expenses cost by the petitioner has exceeded the actual O&M expenses incurred. Since there was no provision for truing up in the last tariff

period, the additional revenue recovered by the petitioner was retained by it. If the Commission considers to allow recovery of licence fee from the beneficiaries, the same can be adjusted at the end of the tariff period during the truing up exercise.

- e) That since the petitioner is already claiming O&M expenses on normative basis for its projects, claiming such expenses again in the form of licence fee means double burden on the consumers for the same head of expenses.

10. After hearing the contentions of the learned counsel for the parties and going through the material on record, the learned Central Commission did not agree with the contentions of the beneficiaries that licence fee is in the nature of eligibility fee to carry on the business of transmission and accordingly, the licensees should bear the licence fee from their own profits.

11. The learned Central Commission reminding of its powers and functions vested with it to regulate interstate transmission, to specify the grid code having regard to grid standards etc. had specified various regulations to discharge its statutory functions and to achieve the purposes of the Act. The Commission is implementing these regulations in order to regulate interstate transmission of electricity, to ensure non-discriminatory open access, to promote competition and protect consumer interests. These activities are aimed at benefiting the distribution companies and the end consumers. Thus, the electricity sector and the ultimate beneficiaries, the consumers, are benefited by the regulatory functions of the Commission with regard to inter-state transmission of electricity.

12. Thus the learned Central Commission considered it appropriate to pass on the burden of the licence fee to the consumers through the distribution companies by the impugned order. The learned Central Commission did not accept the suggestion of the beneficiary companies and consumers that the licence fee should be borne by the petitioner/Power Grid from the savings under O&M expenses giving following observations in Para 16 of the impugned order :-

“We are of the view that since licence fee has not been considered while fixing the norms for O&M expenses, it would not be appropriate to ask the petitioner to bear the expenditure from O&M expenses. The petitioner has placed on record the copies of the regulations issued by some of the State Commissions which deal with the issue of bearing the cost of licence fee. We notice that the State Commissions have allowed the reimbursement of licence fee of intra-state transmission licensees as part of the ARR of the distribution companies. That being the case, the licence fee paid by the petitioner should be allowed as a pass through in tariff”.

13. While concluding the impugned judgement, the learned Central Commission passed the impugned order which is reproduced below :-

“17. The Petitioner has sought relaxation of the relevant provisions of 2004 and 2009 regulations pertaining to O&M expenses in order to allow the licence fee as a pass through. We are not inclined to relax the O&M norms to allow reimbursement of licence on actual basis. The Commission has provided for a separate provision for reimbursement of

application fee and publication expenses in Regulation 42 of 2009 regulations. We are of the view that Regulation 42 needs to be suitably amended to provide for reimbursement of licence fee during 2009-14. As regards reimbursement of licence fee for the period 2008-09, we allow reimbursement of the licence fee by the beneficiaries by exercising our power to remove difficulties under Regulation 12 of 2004 Regulations.'

18. We direct the staff of the Commission to take necessary action for suitable amendment to 2009 regulations to provide for reimbursement of licence fee."

19. In this matter, 2004 regulations came into force w.e.f. 1st April, 2004 and remained in force till 31st March, 2009 with a provision that this Regulation 2004 shall come into force on 1st April 2004 unless reviewed earlier or extended by the commission, shall remain in force for a period of five years. 2004 Regulations were to be applied in all the cases where tariff was to be determined by the Commission based on capital cost. In 2004 Regulations, there were two regulations, namely 12 & 13 which are necessary for our discussion and conclusion in this matter which are reproduced below :-

"12. Power to remove Difficulties : If any difficulty arises in giving effect to these regulations, the Commission, may, of its own motion or otherwise, by an order and after giving a reasonable opportunity to those likely to be affected by such order, make such provisions, not inconsistent with these regulations, as may appear to be necessary for removing the difficulty.

13. Power to Relax : The Commission, for reasons to be recorded in writing, may vary any of the provisions of these regulations on its own motion or on an application made before it by an interested person”.

20. CERC framed CERC (payment of fee) Regulations 2008 on 17.10.2008 for the first time providing in Regulation 4 that the transmission licensee for interstate transmission including a person deemed to be a transmission licensee referred to in the first, second, third, fourth and fifth proviso to Section 14 of the Electricity Act 2003, for such purpose shall pay licence fee @ 0.05% p.a. of the annual transmission charges applicable for that year. Thus, by 2008, payment of fee regulations, a provision was incorporated requiring the transmission licensee for interstate transmission to pay licence fee at the rate mentioned therein, also prescribing time limit for such payment.

21. CERC, thereafter framed CERC 2009 Regulations on 19.01.2009 which came into force on 1st April, 2009 and they were to be in operation for a period of five years. 2009 Regulations thus, came into force on 1st April 2009 and unless reviewed earlier or extended by the Commission shall remain in force for a period of five years, from its date of commencement. It was clearly pointed out in 2009 Regulations that where a project or a part thereof has been declared under commercial operation before the date of commencement of 2009 regulations and whose tariff has not been finally determined by the Commission till that date, the tariff in respect of such projects or such part thereof for the period ending 31st March, 2009, shall be determined in accordance with 2004 regulations.

22. A careful scrutiny and perusal of 2009 regulations makes it abundantly clear that no provision for payment of licence fee by the interstate transmission company was made in 2009 regulations.

23. Respondent No.2, Power Grid filed the aforesaid petition No. 21 and 22 of 2011 each on 10.2.2011 before the learned Central Commission for allowing the billing and reimbursement of licence fee for the year 2008-09, 2009-10 and 2010-11 and the Central Commission passed the order on both the petitions, while exercising powers under regulation 12 of Regulations 2004. It directed for reimbursement of licence fee for the subsequent financial years (2009-14), and directed the staff to take necessary action for suitable amendment to Regulations 2009 to provide for reimbursement of licence fee under regulation 42 of 2009 Regulations. Thus, the aforesaid petitions 21 & 22 of 2011 were decided by the learned Central Commission by the impugned order dated 25.10.2011 and Appeal in this Tribunal was filed on 23.01.2012 challenging the impugned order.

24. CERC/Central Commission amended 2009 Regulations on 31.12.2012 whereby Regulation 42 has been amended inserting a new regulation 42 A. Thus, the CERC amended 2009 Regulations by CERC (Terms & Conditions of tariff) (3rd amendment) Regulations 2012 on 31.12.2012 and then a new regulation 42 A to 2009 Regulations was introduced which provides for reimbursement of fee, charges and expenses of the earlier licence fee and paid by transmission licensee in terms of CERC (payment of fee regulation 2008).

25. Thus, the main controversy in the case in hand is that till 31st December, 2012, 2009 regulations of CERC were amended by the

learned CERC, there was no provision providing for reimbursement of licence fee paid by the interstate transmission licensee and CERC (3rd amendment) 2012 was introduced with retrospective effect from 01.04.2009 by the Central Commission by inserting a new regulation 42 A to 2009 Regulations. Thus, the said provision providing for reimbursement of licence fee was brought into effect with retrospective effect after a lapse of more than 2 ½ years.

26. Now we deal with the submissions and counter submissions raised by the learned counsel for the rival parties during hearing of this appeal.

27. The following submissions on behalf of the Appellant, U.P. Power Corporation Ltd. have been raised :-

- a) The Licence fee is charged for a privilege to do the business in transmission of electricity and without payment of the said fee any utility is not empowered to do such business, hence it has to be borne by the licensee out of its profits and its burden cannot be fastened on the beneficiaries/consumers.
- b) The licence fee cannot be charged after the tariff period is over as per the decision of Hon'ble Supreme Court in UPPCL Vs. NTPC & Ors. 2009 ELR Page 13. The tariff of one tariff period cannot be adjusted in next tariff period.
- c) The power under Removal of Difficulties order is a limited power to remove the difficulties in implementation of the Regulations and not to insert anything which has not been provided under the Regulations. The commission was not justified/right in allowing the reimbursement of licence fee by exercising its

power to remove difficulties under Regulation 12 of the Tariff Regulation 2004.

- d) That the grant of additional benefit under regulation 12 of 2004 Tariff Regulations to the transmission licensees would amount to disturb the equilibrium set through the tariff regulations.
- e) The Regulations being subordinate legislation cannot be applied from retrospective effect. Hence the amendment to 2009 Regulations made vide notification dated 31.12.2012 has no application in the present case. The Central Commission was not justified in issuing directions to its staff for amendment of tariff regulations 2009.
- f) Elaborating the submissions made during hearing by the learned counsel of the Appellant, it has been vehemently argued that the learned Central Commission, in the impugned order, did not agree to exercise its power to relax the provisions of regulation 56 (iv) namely Operation and Maintenance Expenses of Tariff Regulations 2004 as requested by the Power Grid, Respondent No.2. Regulation 12 of the Tariff Regulations, 2004 is neither applicable nor the procedure contemplated in the regulation has been applied in the instant case. The powers to remove difficulties as provided under Regulation 12 of 2004 regulations can be exercised only if any difficulty arises in giving effect to 2004 Regulations. In the instant case, there was no difficulty in giving effect to 2004 Regulations. The learned Central Commission has wrongly exercised its power under Regulation 12 to remove difficulties. The learned Commission clearly refused to exercise the power to relax. Hence exercise of power by the Commission under regulation 12 of 2004

regulations is clearly an abuse of process of law and the Commission has committed gross error of law in passing the impugned order. Even the Power Grid, while evaluating the aforesaid petition did not show any difficulty in giving effect to any of the regulation of Regulations 2004. The Commission by allowing reimbursement of the licence fee from the beneficiaries by exercising its power to remove difficulties under Regulation 12 of Tariff Regulations 2004 has committed gross illegality.

- g) The learned counsel for the Appellant throwing light on the submissions relating to grant of special benefits has meekly submitted that exercise of power to remove difficulties by the Commission ultimately has resulted in an additional benefit to Respondent, Power Grid for which no provision existed in 2004 Regulations.
- h) Regarding direction to the staff of the Central Commission, the learned counsel for the Appellant has submitted that the Commission has already finalized its views based mainly on the input from Respondent No.2. The procedure so adopted for amendment of regulations is not in accordance with the procedure to be adopted for amendment of the Tariff Regulations 2009 as contained in the Electricity Act, 2003.
- i) The most important submission on behalf of the Appellant is regarding adjustment of tariff of one period in the next tariff period. The same cannot be done. By doing so, the learned Commission has travelled beyond its powers.

j) The Commission is empowered to frame regulations and specify terms and conditions for determination of tariff under Section 61 of the Electricity Act, 2003. While framing these regulations, commission is guided by certain guidelines mentioned under the said Section. Safeguarding of consumer's interest and yet at the same time, recovery of the cost of electricity in a reasonable manner is an important guideline under Section 61(d) of the Electricity Act, 2003. Although the electricity consumer and the generating companies have divergent interests, the Commission is required to take care that these divergent interests are balanced while framing the terms and conditions for determination of tariff. Once the terms and conditions for determination of tariff have been framed by the Commission, any attempt to seek further benefit over and above the regulatory provisions disturbs the delicate balance which the Commission has been trying to maintain through the Tariff Regulations, 2004. The grant of benefit to the Respondent-Power Grid on account of their alleged claim would disturb the equilibrium and the same would only result in unreasonable benefit to the Respondent- Power Grid. Thus, the grant of benefit over and above the Tariff Regulations, 2004 is unreasonable.

28. Before discussing and considering the submissions raised on behalf of the rival parties in this appeal, it is also pertinent to mention the counter submissions or reply made by the learned counsel for the respondents, which are mentioned below :-

i) that the Central Commission is fully competent and entitled to allow the licensees including deemed transmission licensees to

recover such licence fee from the beneficiaries, namely, as a pass through in the tariff payable by the beneficiaries to the licensees. Section 79 (1) (d) of the Electricity Act 2003 authorizes the Central Commission to determine tariff for the interstate transmission of electricity.

The Power Grid which is the Central Transmission Utility is entitled to recover the licence fee paid by it to the central commission and the impugned order was correctly and legally passed which requires no interference at this stage by this Tribunal. The licence fee imposed upon the transmission licensee is regulatory in nature as it is well settled that no quid pro quo need to be established for such licence fee imposed. This view had taken in *Coal Committee v State of Maharashtra* (2005) 2 SCC 345 at Page 354, *State of Bihar v Shri Ayurved Bhawan* (2005) 2 SCC 762 at Page 782, *State of Himachal Pradesh v Shivalik Agro Poly Products* (2004) 8 SCC 556 at Page 563.

ii) That the O & M Expenses under the head Administrative and General Expenses would include all Overhead Expenses such as fee, charges etc which are compulsorily payable by the licensee. The cash outflow on account of such fee etc is nothing but expense or cost to the licensee and is to be allowed in a capital cost based tariff. Based on the above principles of capital cost based tariff (as opposed to the tariff based competitive bidding process), the licence fee which are compulsorily payable by Power Grid is a part of the O & M Expenses to be allowed.

iii) That the O & M Expenses for the period 2004-09 determined based on the previous year's O & M Expenses as well as O & M Expenses for the period 2009-14 determined again based on the

previous year's actual O & M Expenses and incorporated under the head O & M Expenses in the respective Tariff regulations, 2004 and Tariff Regulations, 2009 did not cover the licence fee payable by Power Grid to the Central Commission. This was for the reason that at the relevant time when the base year's O & M expenses were considered the licence fee was not payable by Power Grid. Accordingly, the normative O & M Expenses specified in the Tariff Regulations, 2004 as well as in the Tariff Regulations, 2009 do not include the cash outflow on account of the payment of licence fee.

iv) that due to the changed circumstances, the Power Grid by way of filing the aforesaid Petition No. 21 & 22 of 2011 sought for the exercise of powers by the Central Commission under Regulation 12 and 13 of the Tariff Regulations, 2004 and Regulation 44 of the Tariff Regulations, 2009 respectively for relaxation of the Tariff Regulations dealing with O & M expenses.

v) By the impugned order, the learned Central Commission has exercised such powers to relax and allow licence fee to be recovered by Power Grid as O & M Expenses in addition to the normative O & M Expenses specified in the Tariff Regulations.

The Appellant's submission that Central Commission has no power to relax to allow such O & M Expenses, as pass through by Power Grid to the beneficiaries is misconceived and against the principle of natural injustice.

vi) that Section 79 (1) (g) authorizes the Central Commission to levy fee. The Central Commission can, therefore, levy licence fee. It is not necessary for the Central Commission to frame Regulations for levying fee or otherwise specifying as to how fee levied can be

a part of the tariff. Even in the absence of any Regulation, the Central Commission can direct licence fee to be reimbursed by the beneficiaries.

vii) that it is well settled that the regulatory powers i.e. power to relax itself enables the Regulator to do all things necessary for such regulations including levy of fee etc. The same view has been taken in Deepak Theatre -v- State of Punjab, 1992 (Supp) (1) SCC 684 at Page 687; State of UP -v- Maharaja Dharmander Prasad Singh (1989) 2 SCC 505 at Page 523; Hotel & Restaurant Association -v- Star India (P) Ltd (2006) 13 SCC 753 at page 772; K. Ramanathan -v- State of Tamil Nadu (1985) 2 SCC 116 Page 130 para 18; and JK Industries Limited -v- Union of India (2007) 13 SCC 673.

viii) that other State Commissions have also allowed reimbursement of licence fee of intra state transmission licensees and adopting the same formula, the Central commission vide impugned judgement directed reimbursement of licence fee paid by the transmission licensee as a pass through. In this regard, regulations of several state commissions have also been referred to, which need not be repeated here.

ix) It has been submitted by the Respondents that power to relax and power to remove difficulties are incorporated in the Tariff Regulations, 2004 and 2009 precisely to deal with the circumstances that arise as in the present case. The object of incorporating such provision is because at the time of passing Regulations (Law), it may not be possible to foresee all the events and situations which may arise in its working. In order to deal with

such situation, the Central Commission has retained the powers to remove any difficulty and power to relax.

The Tariff Regulations, 2004 and Tariff Regulations, 2009 were notified based on the circumstances existed at the time of passing of the Regulations and in the case of O & M Expenses for the period 2004-09 it was determined based on the previous year's O & M Expenses as well as O & M Expenses for the period 2009-14 determined based on previous year's actual O & M expenses. The O & M expenses in respect of the Tariff Regulations 2004 and 2009 did not cover the licence fee payable by Power Grid to the Central Commission. Therefore the cash out flow in the head of licence fee is not included in the O & M expenses under Regulations 2004 and 2009.

x) that the important aspect is that the normative parameters are set with reference to a specific tariff element and based on the position prevalent at the time of the normative determination. The subsequent developments may change the basis on which the norms had been fixed with reference to a particular tariff element. If such subsequent developments are not on account of any imprudence or failure or default on the part of the utility, or otherwise attributable to the Utility the normative parameters need to be revised to adjust for the impact of the subsequent developments.

xi) that there is no illegality or irregularity in the Order of the Central Commission by allowing the Respondent No.2 the reimbursement of the Licence fee for the period 2008-09. The imposition of Licence Fee is a subsequent development and that was not included in either the O & M expenses or any other

normative parameters fixed in the Tariff Regulations 2004 or Tariff Regulations, 2009.

xii) "At times, a statute may contain a "removal of difficulty" clause. The need for such a clause arises because at the time of passing a new law, it may not be possible to foresee all the difficulties which might arise in its working. In order to obviate the need to go to the legislature to pass a law to remove any difficulty howsoever trivial, the executive is given power to remove any such difficulty by making an order. At times, 'removal of difficulty' clause may empower the government to amend the parent Act or any other Act with a view to bring the parent Act into full operation. Its widest extension is to empower the delegate, "if any, difficulty arises in bringing the Act into operation to remove the difficulty by order." This kind of clause has acquired the nickname of Henry VIII clause, as personifying "executive autocracy".

Considering the Henry VIII clause, the learned counsel for the Respondent has justified the exercise the power to remove difficulty and the power to relax by the learned Central Commission in the impugned order.

The learned counsel for the Respondent justifying the impugned order has submitted that both, power to remove difficulties and power to relax supplement each other to deal with a situation which may arise from time to time. The power to relax was to be exercised in the facts and circumstances of the case which the learned Central Commission, through slip or by inadvertence refused to exercise but preferred to exercise the power to remove difficulties in the implementation of the Regulations. The intention of the learned Central Commission

while passing the impugned order was quite candid and bonafide to exercise the power to relax and not the power to remove difficulty. But on this ground alone, the impugned order cannot be said to be vitiated or suffering from any error of law. The object of passing the impugned order is to be seen and not the bonafide slip. Similarly, by mentioning wrong or improper provision of law or procedure, the impugned order cannot be said to be defective in law because both the powers, viz. the power to remove difficulties and power to relax, supplement each other and authorizes the learned Central Commission to meet the eventuality which came before it in subsequent or challenged circumstances or predicaments. Furthermore, the nature of jurisdiction exercised by the learned Central Commission is regulatory in nature which carries with it the power in the interest of justice.

That in compliance of the impugned order, the Central Commission has amended the Tariff Regulations 2009 and added a new Regulation namely 42 A to 2009 Regulations for reimbursement of licence fee etc. by issuing notifications dated 31.12.12 which would cover the subsequent part of the impugned order relating to reimbursement of licence fee which has been paid by the Transmission licensee/Power Grid to the Central Commission.

xiii) It is well settled that the Appellant cannot challenge the validity of the above Regulation in an appeal under section 111 of the Electricity Act, 2003. In this regard the Hon'ble Supreme Court in PTC India Limited v Central Electricity Regulatory Commission, AIR 2010 SC 1338 has held as under:

"92.(v) If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Tribunal shall lie on the validity of a regulation made under Section 178."

In view of the above it is not open to the Appellant to contend that the applicability of the Regulations providing for Fee and Charges as a pass through in the tariff by reimbursement by the beneficiaries including the Appellant can be given effect only from 31.12.2012 and not from 1.4.2009. The Appellant cannot challenge the validity of the above Regulation in the present proceedings.

In terms of the Regulations, there cannot be any issue on the reimbursement to be done for Fee and Charges payable from 1.4.2009 onwards.

After going through the submissions raised by the learned counsel for the rival parties and after going through the lengthy written submissions of both the parties, the following issues arise for our consideration :-

1. Whether the licence fee is charged for a privilege to do the business in transmission of electricity and without payment of the said fee, any utility is not empowered to do such business.
2. Whether such licence fee has to be borne or paid by the licensee out of its profits and its burden cannot be fastened on the beneficiaries/consumers.
3. Whether the power to remove difficulties provided under Regulation 12 of Tariff Regulations 2004 is limited to the

extent to remove difficulties in the implementation of the Regulations.

4. Whether the Power to Remove difficulties under Regulation 12 and Power to Relax provided under Regulation 13 of 2004 Regulations supplement each other to deal with a situation which may arise subsequently.
5. Whether the Regulations being subordinate legislation cannot be applied with retrospective effect and the validity/illegality of such Regulations can be decided by this Tribunal.
6. Whether the licence fee can be charged after the tariff period is over.
7. Whether the adjustment of tariff of one period can be made in the next tariff period.

Regarding Issue No.1&2, we are of the opinion that licence fee has been paid by the transmission licensee as required by the Central Commission Regulations for payment of fees, 2008 and after the amendment to the 2008 Regulations on 17.10.2008, the licence fee is to be paid by the transmission licensee annually as per the formula given in the said Regulations.

The transmission licensee was not paying any license fee prior to the said amendment, hence it is entitled to reimbursement of the said licence fee which has been paid by it and the same can be directed to be pass through to the beneficiaries. Licence fee cannot be allowed to be paid by the transmission licensee out of its profits in the changed circumstances. The licence fee paid by Power Grid as per the Central Commission's Regulations was not

captured in the normative O & M expenses specified in the 2004 Tariff Regulations and 2009 Tariff Regulations. The normative O & M expenses for the period 2004-09 were decided by the Central Commission on the basis of the actual O & M expenses for the period 1998-03 when no licence fee was payable by Power Grid. Similarly, the normative O & M expenses for the period 2009-14 in the 2009 Tariff Regulations were decided on the basis of the actual O & M expenses for the period 2003-08 when the licence fee was not payable by the Power Grid. It is true that licence is a privilege for a particular trade or business and without licence nobody can do any business or trade. We agree with the findings of the Central Commission that the Commission has to implement its Regulations in order to regulate the inter-State transmission of electricity to ensure non-discriminatory open access, to promote competition and protect consumer interests and these activities are aimed at benefiting the distribution licensees and the end consumers. If licence fee is paid for a business or trade annually in accordance with any formula, the licence fee paid by the licensee is liable to be reimbursed as pass through in tariff by the beneficiary. Thus, the Issue No. 1&2 are decided against the Appellant and in favour of the Respondents.

Regarding Issue No. 3&4, our view is that the Central Commission under bonafide and candid exercise of judicial discretion inadvertently passed the impugned order and directed reimbursement of the licence fee under exercise of its power to remove difficulties. The mere quoting of the wrong provision cannot vitiate any bonafide and legitimate order of any quasi judicial authority like the Central Commission. It has been clearly pointed out and rightly admitted by the learned counsel for the

Central Commission that the Commission purportedly passed the impugned order while exercising power to relax, though both powers viz Power to relax and Power to remove difficulties are supplemental to each other. These issues are also decided against the Appellant and in favour of the Respondents.

Regarding Issue No.5, we are of the view that since the Central Regulations or any state Regulations, are covered under the category of delegated legislations, this Tribunal has no jurisdiction to entertain or decide the validity of such regulations and said regulations cannot be challenged before this Tribunal under its Appellate jurisdiction in view of the Hon'ble Supreme Court Judgement in PTC India Ltd. Vs. CERC AIR 2010 Supreme Court 1338 which laid down that this Tribunal can interpret the regulations but cannot enter into the validity of any of the regulations. Thus this Tribunal is not competent enough to decide the issue whether the learned Central Commission was justified in passing the impugned order recommending its staff to undertake the process of amendment in CERC Regulations 2009 for the purpose of reimbursement of licence fee of the transmission licensee. In the impugned order the Central Commission has only decided that the Regulation 42 of the 2009 Regulations needs to be suitably amended to provide for reimbursement of licence fee during 2009-14 and directed the staff of the Commission to take necessary action for suitable amendment to 2009 Regulations to provide for reimbursement of licence fee. The 2009 Tariff Regulations were amended subsequently by notification dated 31.12.2012 after inviting suggestions and objections from the stake holders. Thus, we cannot decide the controversy as to whether central regulations can be amended with retrospective effect.

Thus, this issue is also decided against the Appellant and in favour of the Respondents.

Regarding Issue No. 6 & 7, both sides have laid emphasis during arguments.

The learned counsel for the Appellant has referred to U.P. Power Corporation Ltd. Vs. National Thermal Power Corpn. Ltd. and Ors 2009 ELR (SC) 0013) arguing that in the reported case the controversy was whether the amount required to be paid by the Respondent Corporation towards revision of pay scales of its employees with retrospective effect from 1st January, 1997 could be subject matter of revision in the tariff for the next tariff years. Hon'ble Supreme Court while deciding this controversy held that the Central Commission has the exclusive jurisdiction to frame not only the tariff but also any amendment, alternation and additions in regard thereto. For the purpose of making tariff the actual costs required for payment to the employees being a part of the operation and maintenance cost which are to be paid by way of extra amount could fall for determination by the central commission. Such an application should ordinarily be filed within the period during which the tariff order was in force. Since in the reported case, the corporation respondent did not place the required details and datas during the required period before the central commission, the claim was disallowed by the central commission. The Appeal against that order was filed before this Tribunal. This Tribunal directed the additional cost to be absorbed in new tariff. The view expressed by this Tribunal was not approved by the Hon'ble Supreme Court. Hon'ble Supreme Court observed

in para 48 that it is difficult to agree with the opinion of the Tribunal that increase in the salary with retrospective effect could have been a subject matter for determination of tariff in another period and the learned Tribunal was not justified to issue directions to the Central Commission as the Central Commission should not have been asked to revisit the tariff after five years. After studying the aforesaid judgement of the Hon'ble Supreme Court, we find that in the reported case, Central Commission was asked to revisit the tariff after five years, but in the case in hand, the issue of levy of licence fee on the transmission licensee was decided by the Central Commission in the end of the tariff period viz financial year 2008-09 and also end of the control period 2004-09. The learned central commission, accordingly allowed the reimbursement of the licence fee paid by the transmission licensee/Respondent No.2 for the tariff period 2008-09 (partly) in the next control period i.e. 2009-14. Thus, the facts of the reported case are quite different from the facts of the case in hand before us. The said case law is of no help to the Appellant as it does not apply.

Thus, the Issue No. 6 & 7 are also decided against the Appellant and in favour of the Respondents.

In the result the Central Commission's impugned order is hereby affirmed as there is no illegality or perversity in the impugned order.

In view of the above, the Appeal is dismissed being devoid of merits. No order as to costs.

Pronounced in the open Court on this day of **3rd December, 2013.**

(Justice Surendra Kumar)

Judicial Member

(Rakesh Nath)

Technical Member

Dated : 3rd December, 2013

REPORTABLE/NON-REPORTABLE

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