

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

**Dated: 24, September, 2013**

**Present: MR. JUSTICE KARPAGA VINAYAGAM, CHAIRPERSON**  
**MR. V J TALWAR, TECHNICAL MEMBER,**

**Appeal No. 58 of 2012**

**IN THE MATTER OF:**

Power Grid Corporation of India Ltd  
Saudamini, Plot No. 2,  
Sector 29, Gurgaon – 122001  
Haryana

.....Appellant

VERSUS

1. Central Electricity Regulatory Commission  
3<sup>rd</sup> and 4<sup>th</sup> Floor, Chanderlok Building  
36, Janpath, New Delhi – 110001
2. Madhya Pradesh Power Trading Company Limited  
Represented by its Managing Director,  
Shakti Bhawan, Rampur,  
Jabalpur – 482 008
3. Maharashtra State Electricity Distribution Company Limited  
Represented by its Chief Engineer (Power Purchase Cell),  
5<sup>th</sup> floor, Prakashgad,  
Plot No. 9, Anant Kanekar Marg,  
Bandra (East), Mumbai – 400 051
4. Gujarat Urja Vikas Nigam Limited  
Represented by its Chairman,  
Sardar Patel Vidyut Bhawan,  
Race Course, Vadodara – 390 007  
Gujarat

5. Electricity Department, Government of Goa,  
Represented by its Chief Engineer (Electrical),  
Vidyut Bhawan, Near Mandvi Hotel,  
Panaji, Goa – 403 001
6. Electricity Department, Administration of Daman & Diu,  
Represented by its Secretary (Finance),  
Power House Building, 2<sup>nd</sup> floor,  
Daman – 396 210
7. Electricity Department, Administration of Dadra & Nagar Haveli  
Represented by its Secretary (Power),  
U.T. Silvassa – 396 230
8. Chhattisgarh State Electricity Board  
Represented by its Chairman,  
P.O. Sunder Nagar, Dangania,  
Raipur, Chhattisgarh – 492 013
9. Madhya Pradesh Audyogik Kendra Vikas Nigam (Indore) Limited  
Represented by its Managing Director,  
3/54, Press Complex, Agra-Mumbai Road,  
Indore – 452 008

.....Respondents

Counsel for the Appellant : Mr M G Ramachandran

Counsel for the Respondent : Nil

**Per Mr. V J Talwar, Technical Member**

1. The Appellant, Power Grid Corporation of India Ltd, is a Government Company within the meaning of Companies Act, 1956 and is undertaking interstate transmission of electricity in India as a Transmission Licensee. The Appellant also discharges the functions of the Central Transmission Utility as provided under the Electricity Act, 2003.

2. The Central Electricity Regulatory Commission (hereinafter referred to as the “**Central Commission**”) is the 1<sup>st</sup> Respondent. The Appellant is a transmission licensee of the Central Commission and accordingly the tariff for the services rendered by the Appellant is determined by the Central Commission.
3. Other Respondents are the Distribution Licensees, Transmission Licensees and other beneficiaries of the transmission system of the Appellant in the Western Region.
4. The present Appeal filed by the Appellant against the Impugned Order dated 9.11.2011 passed by the Central Commission in Petition No. 335 of 2010 rejecting the Interest During Construction (IDC) and Incidental Expenses During Construction (IEDC) for the period from April, 2009 to January, 2011 in the transmission tariff of the Appellant for (i) 400/220 kV ICT-I at Wardha Sub-station with associated bays and, (ii) combined assets of 400/220 kV ICT-I & ICT – II at Wardha Sub-station with associated bays under the SIPAT-II Supplementary Transmission System in Western Region for tariff block 2009-14 period.
5. The relevant facts of the case are given below:
  - i). The Appellant, Power Grid Corporation of India Ltd, is a Government of India Undertaking incorporated under the Companies Act, 1956. The Appellant undertakes the activities of laying down, operating and maintaining Inter-state Transmission system for providing transmission services and also discharges the functions of the Central Transmission Utility under the Electricity Act, 2003.

- ii). The tariff of the Appellant for the transmission system of the Appellant is determined by the Central Commission under Section 79 (1)(d) of the Electricity Act, 2003.
- iii). The Appellant has undertaken the implementation of the Sipat II Supplementary Transmission System in the Western Region. The Ministry of Power, Government of India accorded the approval to the Project on 24.06.2005 at an estimated cost of Rs. 813.67 crores including interest during construction of Rs. 35.04 crores. The Board of Directors of the Appellant, vide memorandum dated 3.9.2010, accorded the revised cost estimate to the Project at an estimated cost of Rs. 982.24 crores, including interest during construction of Rs. 73.57 crores..
- iv). The scope of work covered under the Project was as follows:  
Transmission Lines:  
(a) Seoni (Appellant)-Wardha(Appellant) 765 kV S/C line (initially to be operated at 400 kV) (275 kms)  
(b) Wardha (Appellant)-Akola (MSEB) 400 kV D/C line (184 kms)  
(c) Akola (MSEB)-Aurangabad (MSEB) 400 kV D/C line (265 kms)  
  
Substations:  
(a) 400 kV Wardha substation (NEW) with a provision to upgrade it at 765 kV  
(b) 400 kV Seoni substation (Extension)  
(c) 400 kV Akola (MSEB) substation (Extension)  
(d) 400 kV Aurangabad (MSEB) substation (Extension)
- v). The Project was scheduled to be commissioned within a period of 36 months from the date of investment approval. The scheduled date of completion was June 2008. The commissioning of the project got delayed. The details of the

commissioning of the various elements of the Project are as under:

S. No	Asset	Scheduled commissioning date	Date of commercial operation	Delay in commissioning
1	765 kV S/C Seoni-Wardha transmission line with associated bays 400 kV D/C Wardha Akola transmission line with associated bays	June 2008	01.04.2009	9 months
2	ICT-I at 400/220 kV substation at Wardha with associated bays	June 2008	01.04.2009	9 months
3	400 kV D/C Akola-Aurangabad Transmission line at Akola and Aurangabad and 400 kV Bus reactor at Wardha substation	June 2008	01.12.2009	17 months
4	ICT-II 400/220 kV at Wardha substation with associated bays	June 2008	01.02.2011	32 months

- vi). The Appellant filed a Petition No. 182 of 2010 before the Central Commission for approval of the transmission tariff for assets 1, 2 and 3 above, setting out the reasons for the delay in the commissioning of the said assets along with supporting documents.
- vii). The Central Commission vide order dated 15.3.2011 in Petition No. 182 of 2010 approved the transmission tariff for the assets at serial numbers 1, 2 and 3 above as well as condoned the delay in the commissioning of the said assets.

- viii). The second Interconnecting Transformer (ICT-II) at Wardha was to be made ready for commissioning in March, 2009 along with the Wardha substation and Akola line. All the works on this ICT-II were completed in February, 2009 and the pre-commissioning tests were carried out in March, 2009.
  - ix). During the pre-commissioning tests on the said ICT-II it was found that the "Tan-Delta Value" of the tertiary winding was very high and violating the acceptable limits. The manufacturer initially tried to repair the ICT-II at the site but recommended subsequently that the ICT-II be taken back to the factory for further repairs. The manufacturer took time in repairing the ICT-II. The ICT-II after repair was received at the Wardha sub-station on 14.09.2010 and was declared under commercial operation on 1.2.2011. There was, therefore, a delay of 23 months in the commissioning of the ICT - II from March, 2009 till January, 2011.
  - x). The Appellant on 10.12.2010 filed a petition, being Petition No. 335 of 2010, before the Central Commission for the approval of the final transmission tariff from the anticipated date of commercial operation of the above element of the system i.e. 1.12.2010 to 31.03.2014.
  - xi). On 9.11.2011, the Central Commission passed the impugned Order disallowing the IDC and IEDC for delay of 23 months. Aggrieved by the Order dated 9.11.2011, the Appellant has filed the present.
6. Assailing the Impugned Order the learned Counsel for the Appellant made the following submissions:

- a) Perusal of the impugned Order would show that the Central Commission had rejected the claim for time overrun of 23 month only by stating that the failure during the pre-commissioning test was a bilateral issue between the Appellant and BHEL, the Supplier. There is no other reason given in the impugned Order. The Central Commission has not analyzed or dealt with the justification given by the Appellant for the failure.
- b) The Central Commission has also not taken into account the salient aspects of the case specifically pleaded, namely, that the downstream transmission system to be made available for evacuation of power by the Maharashtra State Transmission Company was not ready. In view of this fact, there was no prejudice whatsoever caused to the beneficiaries/consumers on account of any delay in the commissioning of ICT-II. The Central Commission ought to have considered this aspect, dealt with it and then decided the matter on merits.
- c) As regards the decision of the Central Commission to disallow the time overrun on grounds that the pre-commissioning test was a bilateral issue between the Appellant and the Supplier, the following aspects are relevant:
- I). BHEL, a Government of India Undertaking is the Supplier of equipment. BHEL takes the responsibility of supplying and agrees to pay liquidated damages in case there is any failure or default on its part. Like in all other contracts, it is a customary practice in all such contracts, liquidated damages is always limited and it is about 5% of the project cost at the maximum;

- II). It is not possible for the Appellant to call upon the Supplier of equipment to agree to compensate for the delay or default to the full extent of the loss that may be caused to the Appellant on account of the delay on the part of the Supplier. In other words, the entire risk of delay or default on the part of the Supplier cannot be asked to be compensated. In such an event, no manufacturer/supplier will agree to enter into a contract with the Appellant and agree to supply the equipment. The bilateral issue between the Appellant and BHEL is, therefore, restricted to the quantum of liquidated damages which the Appellant can recover from BHEL. It is not open ended. The entire time overrun of 23 months cannot be required to be compensated by BHEL under the Supply Contract.
- III). The assumption that ICT-2 failed during the pre-commissioning test can be a bilateral issue between BHEL and the Appellant only to the extent of getting the transformer repaired by BHEL at no extra cost or additional expenditure to the Appellant. BHEL is required to undertake necessary repairs under the warranty clause agreed in the Suppliers' Contract. BHEL, in addition can be called upon to pay liquidated damages to a specified extent i.e. 5% agreed to in the contract. BHEL cannot be asked to pay anything extra. Accordingly, the bilateral issue between the Appellant and BHEL for the failure of the transformer during the pre-commissioning test is restricted and limited and not open ended as sought to be construed by the Central Commission.

- d) In the present case, the error that was found in the Transformer during the pre-commissioning test was not for reasons attributable to the Appellant. The said defect, upon not being able to be rectified at site was required to be taken to the facility of BHEL for repairs. The repairing and commissioning schedule was also decided keeping in view the requirement of the transmission system. The downlink transmission system of MSETCL not being ready at the relevant time, the ICT - II was also not capable of being used. In the circumstances, the delayed commissioning of the ICT - II has not caused any prejudice in the availability of the transmission system.
- e) This Tribunal in the case of Maharashtra State Power Generation Company Limited v. Maharashtra Electricity Regulatory Commission & Others, dated 18.01.2013 in Appeal No. 57 of 2012 has laid down the principle of risk allocation on account of delay in commissioning of the project developed by the Appellant on cost plus tariff under Section 62 of the Act. This decision applies to the present case. The Central Commission is required to go into the aspects whether the delay in the commissioning is attributable to the Appellant based on any default on the part of the Appellant. It is not correct on the part of the Central Commission to merely state that since it is an issue between the Appellant and the supplier, the same cannot be part of the tariff.
- f) The Central Commission has failed to appreciate the principles of tariff determination under Section 62 of the Electricity Act, namely that all reasonable costs and expenses in the establishment of the transmission system needs to be allowed and an expenditure can be disallowed only if the same is imprudent and is for reasons

attributable to the Appellant. The tariff of the Appellant is regulated and the Appellant does not have the freedom to command the tariff based on market forces and take all risks and benefits attached thereon.

g) In a 'cost plus' based tariff determination process under Section 62 of the Electricity Act wherein only the reasonable costs and expenses are allowed, all risks attached to the project cannot be passed on to the regulated entity and only such costs and expenses which are on account of default on the part of the Appellant can be disallowed.

7. None appeared on behalf of the Respondents.
8. Upon hearing the learned Counsel for the Appellant and after going through the records made available to us the only question that may arise for our consideration is:

“Whether the Central Commission was right in rejecting the claim of the appellant for Interest During Construction (IDC) and Incidental Expenditure During Construction (IEDC) from March 2009 to Jan 2011.”

9. According to the Central Commission, The delay in commissioning of the ICT II was due to its failure during the pre-commissioning test was a bilateral issue between the Appellant and the supplier of the equipment. The consumers cannot be made to pay for the IDC and IEDC which has accrued on account of the non-commissioning of the assets due to defective ICT. The relevant portion of the impugned order is as under:

***“TIME OVER-RUN***

15. As per the investment approval for the system by the Ministry of Power on 24.6.2005 the system was scheduled to be commissioned within 36 months i.e. by June, 2008. The petitioner has submitted that ICT-II 400/220 kV at Wardha Sub-station along with associated bays was commissioned on 1.2.2011 after a delay of 31 months. That ICT-2 was ready for commissioning by March 2009 along with Wardha sub-station and Akola Line. Accordingly, all works had been completed by February 2009 and pre-commissioning test carried out before charging of elements of Grid.

16. The petitioner has submitted that during the pre-commissioning test in March 2009, it was found that "Tan-Delta Value" of tertiary winding was very high and violating its acceptable limit. That M/s BHEL initially tried to repair the ICT at site but eventually it had to be taken back to factory for further repairs. The repair of ICT took more time at BHEL works, who scheduled the same considering the time lines for readiness of the downstream transmission system of Maharashtra and new on-going works for other transmission projects. The repaired ICT was delivered by BHEL on 14.9.2010. The ICT was commissioned on 1.2.2011. The petitioner has also submitted that the first ICT commissioned at Wardha is loaded below 50% with LILO of 220 kV Wardha- Badnera.

17. The petitioner has submitted, vide affidavit dated 18.5.2011, that two nos. of 220 kV Transmission Lines along with one 400/220 kV ICT for each transmission line were placed for the Wardha sub-station as per the standard norms. Even though ICT I was put under commercial operation on 1.4.2009, first set of two nos. of 220 kV lines were connected by MSETCL at Wardha substation only on 20.1.2010. ICT II was put under commercial operation on 1.2.2011 and the balance two nos. of 220 kV Lines are yet to be provided by MSETCL. It has also submitted that in the absence of downstream system, the loading of ICT is 50-80 MW only. That even though there was delay in

commissioning of ICT II due to problem during pre-commissioning stage, there was no constraint in power evacuation to the downstream system at Wardha sub-station. The delay is attributable to MSETCL as it is not able to draw power even after commissioning of ICT II at Wardha. The petitioner has further submitted that levy of liquidated damages as per the provisions of the contract with BHEL for delay in delivery of ICT is under process and same shall be adjusted in the project cost in due course.

18. The delay in commissioning of the ICT II due to failure during the pre-commissioning test was a bilateral issue between the petitioner and the supplier. The consumers cannot be made to pay for the IDC and IEDC which has accrued on account of the non-commissioning of the assets due to defective ICT. The IDC and IEDC, for the delayed period of 23 months on account of repair of ICT by BHEL, are disallowed.

19. Details of IDC and IEDC disallowed are as under:-

Rs(` in lakh)

<b>Detail of IDC and IEDC as per CA Certificate dated 2.8.2010</b>		
	<b>IEDC</b>	<b>IDC</b>
Up to 31.3.2010	60.10	159.59
From 1.4.2010 to DOCO	21.26	50.08
<b>Total IDC and IEDC Claimed</b>	<b>81.36</b>	<b>209.67</b>
<b>Detail of IDC and IEDC disallowed for 23 months</b>		
From March 2009 to March 2010 (for 13 months)	<b>13.71</b>	<b>36.40</b>
From April 2010 to Jan 2011 (for 10 months)	<b>21.26</b>	<b>50.08</b>
<b>Total Disallowed IDC and IEDC (for 23 months)</b>	<b>34.97</b>	<b>86.48</b>

10. Thus, the only reason for delay in commissioning of the ICT –II was its failure on ‘Tan-delta’ test carried out during on-site pre-commissioning tests and long delay in rectifying the fault.
11. In pursuance to Rule 65(2) of Indian Electricity Rules 1956 every EHT equipment is required to undergo certain on-site routine tests

before commissioning as per practice code of Bureau of Indian Standards. Tan-delta test is one of the routine tests done on transformers to determine the dielectric strength of insulation. Tan-delta test is also performed on EHT transformers periodically, generally every year, during the service to meet the requirements of Rule 65(4) of Indian Electricity Rules 1956. In case any transformer fails on Tan-delta test during the service, the utility takes remedial measures, such as cleaning or replacement of bushing, oil filtration etc., and the transformer is put back into service within few days. In this case, the manufacturer of transformer could not rectify the defect on site and had to take back the transformer to its works. At works the core of the transformer was removed from the tank to rectify the defect. This fact has clearly established that the transformer had manufacturing defect.

- 12.** During the pendency of the present Appeal, this Tribunal had occasioned to adjudicate upon another case with similar facts in the matter of Power Grid Corporation of India (also Appellant in present case) Vs Central Electricity Regulatory Commission in Appeal No 180 of 2010. In this case, certain defects were noticed on the ICT before its commissioning and the ICT was sent back to works of the manufacturer for repairs. Accordingly, there was delay in the commissioning of the ICT. The Central Commission did not allow IDC and IEDC for the delay. This Tribunal in its judgment dated 12.5.2012 upheld the Central Commission's order. The relevant portion of the judgment dated 12.5.2012 in Appeal No. 180 of 2012 is reproduced below:

*“12 The Central Commission has not unjustifiably held that the damages in the form of IDC and IEDC should not be passed on to the beneficiaries. The manufacturer of ICT and its transportation is essentially a matter between the appellant and its vendor. This is a matter contractual between them alone. A number of factors, namely, whether in the construction of the ICT at the manufacturer’s end there were defects or not, whether adequate precautionary measures were taken for transportation of the machine or not, whether the ICT was sent back with utmost dispatch or not, whether there was any delay in effecting repairs or not, whether there was any agreement between the appellant and the manufacturer or not, what were the terms and conditions, if any, so agreed to between the manufacturer and the appellant, in this regard are all unknown and in the circumstances it cannot be said in a broad sweep that the delay cannot be attributed to appellant and/or the manufacturer. Rightly the Commission has said in the impugned order that it is a bilateral issue between the manufacturer and the appellant. Responsibility is upon both to ensure that the machine is transported and journeyed safely and it cannot be said that the parties must not take into account the condition of road for transportation. It is not a case of breakdown, while working without any human fault, of machinery all on a sudden over which the party could not have any prior control. In the circumstances, it cannot be said that the order complained of is devoid of reasonable analysis of the factual situation and the Commission committed any illegality.”*

13. The ratio laid down in Appeal No. 180 of 2010 by this Tribunal would squarely apply to the present case.
14. The reliance of the learned Counsel for the appellant on this Tribunal’s judgment dated 18.01.2013 in Appeal No. 57 of 2012 is misplaced. The ratio of the judgment dated 18.01.2013 cannot be

applied to the present case as the facts of Appeal No. 57 of 2012 were entirely different from the present case. In that Appeal the issue before this Tribunal was direction of the State Commission to incorporate a 'back to back penalty clause' in the PPA between the Generating Company and EPC contractor as in the case of PPA under section 63 of the Act.

15. The contention of the Appellant relating to non-availability of down-stream network is misplaced and is liable to be rejected. According to Appellant's own submissions, some of the 220 kV system of MSETCL emanating from Wardha 400 kV substation was available and power stepped down through ICT – I was being evacuated through the available network. Further, the commissioning of ICT – II was fixed independent of availability of down-stream network and in case the ICT-II got commissioned in March 2009 as per schedule, the Appellant would have claimed tariff from the beneficiaries irrespective of availability of 220 kV lines of MSETCL.
16. The Central Commission has rightly held in the Impugned Order that the delay in commissioning of the ICT II due to failure during the pre-commissioning test was a bilateral issue between the petitioner and the supplier. The consumers cannot be made to pay for the IDC and IEDC which has accrued on account of the non-commissioning of the assets due to defective ICT.
17. As per preamble and Section 61 (d) of the Act, the Commission has to safeguard the consumer's interest so that the tariff, transmission tariff as well as the retail tariff for distribution of electricity has to be determined in such a way that the electricity is supplied to the consumers on the reasonable rates. If the claim of

Rs.121.45 Lakhs made by the Appellant is added in the Capital Cost, additional burden will have to be borne by the consumers. Therefore, the Central Commission is right in rejecting the said claim of the Appellant towards the IDC and IEDC for the period March 2009 to Jan, 2011

**18. Summary of findings:**

- (i) Tan-delta test is one of the mandatory routine tests done on transformers to determine the dielectric strength of insulation and is also performed on the transformers periodically. In case any transformer fails on Tan-delta test during the service, the utility takes remedial measures and the transformer is put back into service within few days. In this case, the manufacturer of transformer could not rectify the defect on site and had to take back the transformer to its works. This fact has clearly established that the transformer had manufacturing defect. Section 61 (d) of the Act mandates the Commission has to safeguard the consumer's interest so that the tariff for distribution of electricity is determined in such a way that the electricity is supplied to the consumers on the reasonable rates. If the claim of additional IDC and IEDC of Rs.121.45 Lakhs made by the Appellant on account of delay in commissioning of defective transformer is added to the Capital Cost, additional burden will have to be borne by the consumers. Therefore, the Central Commission is**

**right in rejecting the said claim of the Appellant towards the IDC and IEDC for the period March 2009 to Jan, 2011.**

19. In view of our above findings, we find that there is no merit in this Appeal. Consequently, the Appeal is dismissed. No order as to costs.

**(V J Talwar)**  
**Technical Member**

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

Dated: 24, September, 2013

REPORTABLE/~~NOT REPORTABLE~~