

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY,
AT NEW DELHI
(APPELLATE JURISDICTION)**

APPEAL NO. 98 OF 2015

Dated: 25th April, 2016

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member**

In the matter of:

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

Versus

**Central Electricity Regulatory)
Commission, 3rd and 4th Floor,)
Chanderlok Building, 36, Janpath,)
New Delhi-110001)Respondent No.1**

**West Bengal State Electricity)
Distribution Company Ltd. Vidyut)
Bhawan, Bidhan Nagar, Block DJ,)
Sector II, Salt Lake City,)
Calcutta-700091)Respondent No.2**

**Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Mr. Shubham Arya
Ms. Anushree Bardhan**

Counsel for the Respondent(s) : Mr. K.S. Dhingra for R-1

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

The present Appeal has been filed under Section 111 of the Electricity Act, 2003 by M/s. Power Grid Corporation of India Ltd. having its corporate office at Gurgaon, Haryana (hereinafter referred to as the “**Appellant**”) against the Impugned Order dated 06.01.2015 passed by the Central Electricity Regulatory Commission (hereinafter referred to as the “**Central Commission**”) in Petition No. 206/TT/2012 whereby the Central Commission has approved the transmission tariff for (I) Asset I : 160 MVA Transformer (1st) and associated bays at Malda Sub-station (II) Asset II : 160 MVA Transformer (2nd) and associated bays at Malda Sub-station (III) Asset-III : 01 No. 400 KV bay at Malda sub-station, (IV) Asset IV : 160 MVA Transformer and associated bays at 220 /132 KV Birpara Sub-station; and (V) Asset V : 160 MVA Transformer and associated bays at 220/132 KV Siliguri Sub-station under Eastern Region Strengthening Scheme IV (ERSS-IV) in Eastern Region from

anticipated Date of Commercial Operation 01.12.2012 to 31.03.2014 for tariff block 2009-14.

In the Impugned Order dated 06.01.2015, the Central Commission has disallowed the transformers being replaced to be added as spare transformers and de-capitalised the said assets and has also disallowed the Interest During Construction (IDC) and the Incidental Expenses During Construction (IEDC) for Asset III to the tune of Rs.11.04 lakhs and also disallowed Rs. 19.38 lakhs as capital cost in excess of apportioned cost.

2. The Appellant herein i.e. Power Grid Corporation of India Ltd (PGCIL) is a Government Company within the meaning of Companies Act, 1956 and is undertaking Inter-State transmission of electricity in India and is engaged in the transmission of the Electricity and other functions provided under the Electricity Act, 2003 under the regulatory control of the Central Commission.

One of the Transmission schemes being executed by the Appellant is the Transmission Scheme under Eastern Region Strengthening Scheme-IV (ERSS-IV) in the Eastern Region.

3. The Central Electricity Regulatory Commission is the Respondent No.1 in the present Appeal and exercises powers and discharging functions under the provisions of the Electricity Act, 2003.
4. West Bengal State Electricity Distribution Company Ltd. is Respondent No.2 in the present Appeal and is entrusted with the distribution of electricity in the State of West Bengal.

5. **Facts of the Appeal:**

A. The Appellant was entrusted with the implementation of Transmission System associated with Eastern Region Strengthening Scheme-IV (ERSS IV) in Eastern Region. It was a regional project of Eastern Region for which the Eastern Region constituents were beneficiaries of the Appellant. The scope of work covered under the ERSS IV Scheme includes:

- (i) Replacement of 2x50 MVA, 220/132 KV transformer by 2x160 MVA 220/132 KV transformer with associated bays at 400/200/132 KV Malda Sub-station (Asset I and Asset II);
- (ii) Installation of additional bay/breaker against 400 KV Malda-Farakka-I feeder at Malda Sub-station (Asset III);

- (iii) Replacement of 1x50 MVA, 220/132 KV transformer by 1x160 MVA 220/132 KV transformer with associated bays at 220/132 KV Birpara Sub-station (Asset IV);
- (iv) Additional 160 MVA, 220/132 KV transformer with associated bays at 220/132 KV Siliguri station (Asset V);
- (v) 125MVAR bus reactor alongwith associated bays at Ranchi 400/220 KV Sub-station;
- (vi) 125 MVAR bus reactor alongwith associated bays at Patna 400/220 KV Sub-station.

The present scope of work was entrusted to the Appellant with the agreement of the Eastern Region Constituents as recorded in the 14th Eastern Region Power Committee held on 11.06.2010

- B. On 29.08.2012, the Appellant filed Petition No. 206/TT/2012 before the Central Commission for approval of transmission tariff for Asset I to V on the basis of capital expenditure incurred or to be incurred up to the anticipated date of commercial operation and estimated capital expenditure projected to be incurred from the anticipated date of commercial operation till 31.03.2014. The Appellant provided a Revised Anticipated

Date of Commercial Operation for all Assets as 01.12.2012 (i.e. prior to the scheduled completion date of 01.05.2013).

- C. As per the Investment Approval, the above Assets were scheduled to be commissioned within 21 months from the date of investment approval i.e. the scheduled completion date was 01.05.2013.
- D. The present Appeal concerns Asset I to Asset V in Eastern Region.
- E. The Central Commission has notified the Central Electricity Regulatory Commission (Terms & Conditions for determination of Tariff) Regulation, 2009 (hereinafter referred to as the “**Tariff Regulations, 2009**”) applicable for the period from 01.04.2009 to 31.03.2014.
- F. On 07.07.2011, the Board of Directors of Appellant approved the Investment for the ERSS-IV at an estimated cost of Rs.6036 lakhs based on April 2011 price level.
- G. The Assets being Asset I, asset II, Asset IV and Asset V were commissioned on 01.03.2013, 01.02.2013, 01.02.2013 and 01.01.2013 respectively i.e. within the scheduled date of

commercial operation of 01.05.2013. However, the Asset III was not delayed and was commissioned on 01.11.2013.

- H. In the Standing Committee meeting on Power System Planning headed by the Central Electricity Authority (CEA) held on 20.09.2010, the requirement for spare transformers/reactor to meet the needs of the member states in the eastern region was considered. In addition to the reactors and inter-connected transformers already agreed to by the Eastern Region constituents at the Eastern Regional Power Committee Forum, the constituents further agreed to the provision of 1x50 MVA 22/132 KV transformer at Birpara Sub-station (being replaced by asset III) and 2x50 MVA 22/132 KV transformer at Malda Sub-station (being replaced by Asset I and II) which would be included in the list of spares as part of Central Transmission system of the Eastern Region until it is requisitioned by any beneficiary, after which it would form part of the State Transmission System of that beneficiary. The requirement of spare transformers was further confirmed in the 16th meeting of Eastern Regional Power Committee held on 17th and 18th December, 2010. As per the Appellant, the Central

Commission in its Impugned Order dated 06.01.2015 has erred in holding that three 50 MVA transformers (which had been replaced by three 160 MVA transformers under the ERSS-IV) were no longer assets in use and therefore these three 50 MVA transformers de-capitalised from the date of replacement, as were not considered as spare transformers.

(I) The Central Commission further while delaying the IDC and IEDC has disallowed the claim of Appellant amounting to Rs.11.04 lakhs on account of time overrun without considering that the IDC and IEDC being disallowed was part of the excess capital cost which had already been disallowed which is resulted in double reduction by way of disallowance of IDC and IEDC and in addition of additional capital expenditure in excess of apportioned cost.

J. Aggrieved by the central Commission's Impugned Order dated 06.01.2015, the Appellant has filed the present Appeal.

6. For deciding this Appeal, the following issues needs to be examined carefully:

A. Whether in the facts and circumstances of the case, the Central Commission erred in not considering the claim of the Appellant

for keeping the three 1x50 MVA transformers replaced by 1x160 MVA transformers in the ERSS IV as spare transformers?

- B. Whether in the facts and circumstances of the case, the Central Commission was right in holding that the transformers were 'assets not in use' and therefore were to be de-capitalised?
- C. Whether in facts and circumstances of the case, the Central Commission is right in rejecting the claim of the Appellant for time overrun in respect of Asset III and disallowing the associated IDC and IEDC costs?
- D. Whether the Central Commission erred in disallowing the excess capital cost of Rs.19.38 lakhs when the capital cost had already been reduced by Rs.11.04 lakhs due to disallowance of Interest During Construction and Incidental Expenditure During Expenditure for time overrun?
7. We have heard at length Mr. M.G. Ramachandran and Ms. Ranjitha Ramachandran, Learned Counsel for the Appellant and Mr. K.S. Dhingra, Learned Counsel for the Central Commission and considered the Written Submissions and the arguments put forth by the rival parties and the significant issues emerged for our consideration are as under.

8. The Learned Counsel for the Appellant has made the following submissions for our consideration:
- (a) The Central Commission has erred in holding that the three 50 MVA transformers (which had been replaced by three 160 MVA transformers under the ERSS-IV) were no longer assets in use and therefore were to be de-capitalised from the date of replacement. It is submitted that the above transformers were not being replaced due to any defect in the transformers or any default of or otherwise any reason whatsoever attributable to the Appellant. They were replaced due to the exigencies of the circumstances which required transformers with higher MVA and the fact that the replaced transformers are still useable by the Appellant as spare transformer ready for use in Eastern Region for the benefit of beneficiaries at large.
 - (b) The Central Commission has failed to appreciate that the Appellant maintains an extensive transmission network and provision for such spare transformers ready for use is both prudent and essential to ensure continuous and stable functioning of the transmission system.

- (c) When a functional transformer is sought to be replaced due to requirement of a transformer with higher MVA and not due to any technical defect in the replaced transformer, such transformer can still be useful to the Appellant and the Appellant's beneficiaries as a spare transformer ready for use. Therefore, the Appellant sought to utilize the replaced transformer instead of discarding the same which has been disallowed by the Central Commission.
- (d) The Central Commission has erred in holding that since the Assets (transformers) had completed the useful life of 25 years, they cannot be considered as spares and ought to be de-capitalised. There are many assets which are 'in use' even after the completion of 25 years and it cannot be said they all should be de-capitalised simply because their initial generally estimated 'useful life' has been completed. It has been submitted that the replaced transformers are still functional and can be used in case of exigencies or emergencies wherein transformers may be needed for any constituent of the Eastern Region and in such circumstances, the Appellant has acted prudently in keeping the said transformers as spares for

meeting future emergencies and the Central Commission should have appreciated this act of the Appellant rather than adopting the narrow and pedantic view of the useful life of the asset in de-capitalising these assets which are still functional and useful.

- (e) The Central Commission has failed to consider that the need of the spares agreed/adopted in 14th ERPC cannot be ignored and in case of non allowance of the replaced transformers and discontinuation of tariff through de-capitalisation, the spare inventory as agreed and approved by the ERPC needs to be procured as new transformers, which will have a larger tariff impact on the constituents.
- (f) The Central Commission has erred in completely ignoring the decision of the Standing Committee on Power System Planning as well as Eastern Regional Power Committee and concluding that the replaced transformers from Malda and Birpara sub-station cannot be considered as spares and were to be de-capitalised. When the two Committees had agreed on the need of the spare transformers ready for use, the Central

Commission ought to have allowed the same as the asset in use.

- (g) The Central Commission has failed to consider that the transformers in question being replaced were to be considered as spares ready for use as had been agreed in Standing Committee on Power System Planning headed by the Central Electricity Authority held on 20.09.2010. The Standing Committee agreed on the requirement of spares of Inter-Connected Transformers and Reactors to meet the needs of the member States in the Eastern Region and specifically considered and approved the transformers for Malda sub-station and Birpara sub-station which were to be replaced for being used as spares by the Appellant/member States for the Eastern Region.
- (h) The Central Commission has failed to consider that the Eastern Region beneficiaries have specifically agreed to include the said transformers in the list of spares which would be part of Central Transmission System of the Eastern Region until it is requisitioned by any beneficiary, after which it would form part of the STS of that beneficiary. The beneficiaries, therefore,

agreed on the requirement of the spare transformers and further agreed to share the costs of such spares and there cannot be any issue in allowing the claim of the Appellant.

- (i) The Central Commission has erred in condoning the delay of six months in commissioning of Asset III which was caused for reasons not attributable to the Appellant as it relates to working in a charged switchyard. The Central Commission has failed to appreciate the fact that the delay was not attributable to the Appellant and was caused despite the best efforts of the Appellant to minimize the delay and therefore the Appellant is entitled to claim IDC and IEDC for these six months.
- (j) The Central Commission has failed to appreciate the precarious nature of work which has carried out under the ERSS IV, which involved dismantling of equipment as well as augmentation works to be carried out in the existing system i.e. working on a charged switchyard. Therefore the work had to be carried out with great caution to ensure that no disturbance or damage is caused to the equipment or system. In such circumstances, the progress was slower than anticipated or foreseen by the Appellant.

- (k) The Central Commission has proceeded on the wrong basis that the Appellant ought to have been aware of the requirement of carrying out such type of works in the existing charged sub-station. It is submitted that the extent of difficulties and additional works involved could not have been anticipated. The Appellant had scheduled 20 days time for dismantling of existing equipment, foundation etc. as per the schedule of activities based on mechanical excavation. However, the progress was slower than anticipated and the entire process took six months. This was due to the nature of the site, wherein requisitioned work had to be carried out with great care and precaution. The Appellant had to carry out manual excavation as the foundation and dismantling was close to charged equipment and mechanical excavation could have caused damage to the equipment or disturbance to the system. Once the foundation and dismantling work was completed, the Appellant declared commissioning within 15 days without any further delay.

- (l) The Central Commission has not taken proper and pragmatic view of the circumstances affecting the construction of the Asset III, particularly, from the point of view of such system being constructed on a charged switchyard and requiring great care and precaution which affected the progress. The Appellant cannot be penalized for undertaking work cautiously and required to ensure that no disturbance is caused to the system in operation.
- (m) The Central Commission has erred in considering the date of 17.12.2012 as the scheduled completion date for Asset III. As per the Investment Approval, the scheduled date of commercial operation was 01.05.2013 and, therefore, the Central Commission ought to have considered the delay only as per such date. The Appellant had commenced work with regard to dismantling and foundation prior to the scheduled date of commercial operation and had the Appellant not incurred the unforeseen difficulties as well as carrying out initial work, such work would have been completed in 20 days as anticipated in schedule of activities i.e. much before the scheduled date of

commercial operation resulting in commissioning Asset III well in time.

- (n) ERSS IV was a strengthening scheme for the Eastern Region and involved very cautious approach on the part of the Appellant so as to ensure that the work be carried out with great care and complete safety without any damage to the existing equipment and no disturbance was caused to the running system. Due to the above, the pace of work was slow. Therefore, though the dismantling of existing equipment, foundation and such activities was to be completed in only 20 days time as per the schedule of activities, the same actually took six months. In particular, the following hurdles were faced by the Appellant during the construction process:

- (i) Six number of high bus post insulator foundation were falling in the existing cable trench route for LT cable. As mechanical excavation could damage the existing cables, the excavation was carried out manually which took a lot of time. Therefore, the foundation took nearly one month to complete i.e. 15.03.2013 to 15.04.2013.

- (ii) New cable trench passes through an area which contains the power cable for lighting, colony supply and office supply. Once again, the excavation was done manually as the mechanical excavation could damage the existing cable. This took a lot of time and the foundation took nearly one month i.e. 15.04.2013 to 15.05.2013.
- (iii) No new panel had been considered for the 400 KV system in this package and the old panel had been modified for new equipment. Control room of Malda Substation is at ground floor and there is no cable alley. New cables from the field side had been routed through the old cable trench to commissioning of Asset III. This was due to the nature of construction of the assets work were carried out in electrically charged system with full precaution and safety and without disturbance of other charged equipment. Thus the additional works were not made as the feasibility (FR stage).
- (o) The Central Commission has failed to consider that the capital cost claimed by the Appellant was inclusive of the IDC and

IEDC. Therefore, the excess capital cost of Rs. 19.38 lakhs (as held by the Central Commission) was inclusive of the IDC & IEDC incurred by the Appellant due to the delay of six months in commissioning of Asset III. When the Central Commission disallowed the amount of Rs. 11.04 lakhs as IDC and IEDC for the six months of delay, the balance capital cost claimed by the Appellant was only Rs.8.34 lakhs in excess of the approved apportioned cost. Therefore, the Central Commission ought to have only disallowed a further amount of Rs.8.34 lakhs as being capital cost in excess of approved apportioned cost instead of disallowing the entire Rs. 19.38 lakhs (resulting in a total deduction of Rs. 30.42 lakhs from the capital cost of Asset III). By way of the Impugned Order, the capital cost approved by the Central Commission at Rs. 302.11 lakhs is lower than the apportioned cost of Rs. 313.15 lakhs.

9. The Learned Counsel for the Central Commission made the following submissions/argument for reconsideration:-
 - (i) The Board of Directors of the Appellant Company accorded investment approval for implementation of the Eastern Region Strengthening Scheme IV (ERSS IV) vide Memo dated

13.07.2011 at a total cost of Rs. 6036 lakh, including IDC of Rs. 245 lakh.

- (ii) ERSS IV, inter-alia, comprises the following assets, namely:
- (a) Asset I: 160 MVA Transformer (1st) and associated bays at Malda Sub-station,
 - (b) Asset II: 160 MVA Transformer (2nd) and associated bays at Malda Sub-station,
 - (c) Asset III: 1 no. 400 KV bay at Malda Sub-station,
 - (d) Asset IV: 160 MVA Transformer and associated bays at 220/132 KV Birpara Sub-station,
 - (e) Asset V: 160 MVA Transformer and associated bays at 220/132 KV Siliguri Sub-station.

In accordance with the Investment Approval, the above assets were scheduled to be commissioned within 21 months from the date of investment approval i.e. 1.5.2013.

- (iii) The above assets were declared under commercial operation w.e.f. the date shown against each asset hereunder:

- (a) Asset I 1.03.2013
- (b) Asset II 1.02.2013
- (c) Asset III 1.11.2013

(d) Asset IV 1.02.2013

(e) Asset V 1.01.2013

(iv) **De-capitalisation of three 50 MVA Transformers:**

As regards the de-capitalisation of three 50 MVA transformers, the following have been submitted:-

- (a) In the process of implementation of ERSS IV, the Appellant replaced three 50 MVA transformers, two at Malda Sub-station and one at Birpara Sub-station with 160 MVA transformers. However, in the Tariff Petition submitted by the Appellant, it claimed tariff by retaining the value of the replaced 50 MVA transformers in the capital cost.
- (b) The Appellant's claim was examined on the touchstone of proviso to Clause (1) of Regulation 7 of the 2009 Tariff Regulations of the Central Commission, which legislates that the assets not in use are to be taken out of the capital cost of the project.
- (c) Proviso to Clause (1) of Regulation 7 of the 2009 Tariff Regulations has been added in keeping with the fundamental thought of protection of consumers' interest

in view of clause (d) of Section 61 of the Electricity Act,
extracted below:

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

*.....
(d) safeguarding of consumers’ interest and at the same time, recovery of the cost of electricity in a reasonable manner;
.....”*

- (d) 50 MVA transformers which were replaced by 160 MVA transformers are not in use at Malda and Birpara Sub-stations. Accordingly, while examining the tariff for 160 MVA transformers, the Central Commission proposed to de-capitalise the replaced 50 MVA transformers, in accordance with proviso to Clause (1) of Regulation 7 of the 2009 Tariff Regulations of Central Commission.
- (e) Therefore, the Central Commission directed the Appellant to submit the date from which the replaced 50 MVA transformers were in use and whether tariff was approved by the Central Commission for these transformers in the past.

- (f) The Appellant vide its affidavit dated 24.07.2013 submitted that the replaced 50 MVA transformers at Birpara sub-station and Malda Sub-station had been in use since 1.10.1987 and 1.10.1986 respectively and that the tariff for these transformers was claimed under Chukha Transmission System.
- (g) From the information furnished by the Appellant, it was known that the transformers had completed their prescribed useful life of 25 years.
- (h) The appellant stated that the replaced transformers were to be added to the inventory of spare transformers as agreed to by the constituents of Eastern Region at 16th ERPC meeting of 18.12.2010.
- (i) During hearing on 22.04.2014, the Central Commission directed the Appellant to submit the details of gross block corresponding to the assets proposed to be de-capitalized (the replaced transformers) and the cumulative depreciation recovered in respect thereof.
- (j) In response to the directions as above, the Appellant in its affidavit dated 20.06.2014, submitted as under:-

“With regard to de-capitalisation i.e. replacement of ICTs at Malda and Birpara S/s, it is submitted that the replaced ICTs at these substations have been kept as spares as discussed in the 16th ERPC & TCC, the relevant minutes of which were also submitted in the subject petition (page 19 to 22 enclosed herewith as Encl-1). Therefore, there is no need for de-capitalisation of the ICTs which had been replaced at Malda & Birpara S/s by the Assets I, II & IV of the subject petition.”

- (k) Since the Appellant did not submit the details of gross block and accumulated depreciation of the replaced transformers, the fresh direction was issued on 1.10.2014 in order to give another opportunity to the Appellant for this purpose.
- (l) Still, the Appellant did not furnish the information required by the Central Commission.
- (m) The Central Commission has consistently followed the policy of de-capitalisation of the assets not in use in view of the 2009 Tariff Regulations. There is no provision of statutory regulations in support of the Appellant’s claims to permit retention of the replaced assets, not in use, in the capital cost of the new asset. The Appellant in support of its claim has asserted that in the meeting of the

Standing Committee on Power Planning of CEA held on 20.09.2010 and the Eastern Regional Power Committee (ERPC) 16th meeting held on 18.12.2010, the constituents of Eastern Region had agreed that the replaced transformers should not be disposed of, but be taken as inventory in the shape of spare transformers.

- (n) At the meeting of the Standing Committee on Power Planning, it was decided that the replaced transformers would be “in the list of spares” and not as “spare transformers” as seen from the following extracts of the minutes of the meeting filed by the Appellant:

“In addition to the provision of above spares, 1x50 MVA 220/132 KV Transformer at Birpara S/S to be replaced by 1x160 MVA and 2x50 MVA 220/132 KV Transformers at Malda S/S to be replaced by 2x160 MVA units would be also in the list of spares for its utilization.”

- (o) In the current regime of tariff determination, it is an established tenet that, but for the initial spares, the spares are not included in the capital cost for the purpose of computation of tariff.

(p) In the meeting of ERPC relied by the Appellant, it was inter-alia, noted that the replaced transformers were to be released from Malda and Birpara Sub-station of Powergrid as observed from the following extracts:

“The issue was first discussed in 56th OCC meeting (23.11.2010), where no consensus could be reached and it was decided to take it up in next OCC meeting, wherein OCC (08.12.2010) recommended following:

a. Number and ratings of spare transformer for States requirement would be:

.....

v) 220/132 KV, 3x50 MVA (these are to be released from Malda and Birpara Sub-station of Powergrid)

.....

Deliberation in TCC meeting

During deliberation, Powergrid agreed to install these spare transformers at their Sub-stations with Eastern Region. TCC recommended:

1. Following number and rating of spare transformer is recommended for approval:

.....

v) 220/132 KV, 3x50 MVA (these are to be released from Malda and Birpara Sub-station of Powergrid)

- (q) The above recommendation of TCC was approved by ERPC in its 16th meeting held on 18th December, 2010.
- (r) Therefore, the decision of ERPC was to release 50 MVA transformers from Malda and Birpara Sub-stations.
- (s) Once the transformers are released or ejected or eliminated from Malda and Birpara Sub-stations, their cost cannot be retained in the capital cost of these Sub-stations considered for tariff.
- (t) Presuming for sake of argument that the decision at the meetings of the Standing Committee on Power Planning and ERPC are to be construed as permitting retention of capital cost of the replaced transformers for tariff, these decisions are de hors the proviso to Clause (1) of Regulation 7 of the 2009 Tariff Regulations.
- (u) Presuming further that the above decisions constitute agreement between the Appellant and the beneficiaries, such agreement is void in the face of proviso to Clause (1) of Regulation 7 of the 2009 Tariff Regulations, when seen in the light of decision of the Constitution Bench of the Hon'ble Supreme Court in the PTC India Ltd. Vs.

CERC (AIR 2010 SC 1338) wherein it was held that the Commission's Regulations override the existing as well future contracts, as may be noticed from the following extracts from the judgment:

“(ii) A Regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations.”

- (v) This Tribunal in its judgment dated 8.05.2014 in Appeal No. 173/2013 (NTPC Ltd. V/s. CERC &Ors.) had disallowed capitalization of spare transformer at Talcher Super Power Thermal Station. The conclusion of this Tribunal in this regard is extracted below:

“27. SUMMARY OF FINDINGS (i) The learned Central Commission has not committed any illegality or perversity in disallowing the additional capital expenditure on purchase of generator transformer during tariff period 2009-14 on the ground that new generator transformer will only be used as a spare.”

- (w) Subsequently, this Tribunal in its judgment dated 1.05.2015 in Appeal No. 97/203 (NTPC V/s. CERC & Anr.) disallowed capitalization of spare/additional

transformer. The relevant extract from the judgment are reproduced below:

“(d) We find that additional capital expenditure on account of Spare Generator Transformer is not permissible under the Tariff Regulations 2009. The example of Rihand Super Thermal Power Station where additional capitalization on account of Spare Generator Transformer was allowed will not be applicable in the present case as in case of Rihand additional capitalization was allowed under the Tariff Regulations 2004 wherein such capital expenditure was permissible. Therefore, we do not find any infirmity in the finding of the Central Commission.

- (x) It follows from the above judgments of this Tribunal that the Appellant cannot be allowed to retain the replaced transformers as spare transformers for tariff.
- (y) In view of the decisions at the meetings of the Standing Committee on Power Planning and the ERPC, the following averment has been made in the Memo of Appeal:

“H. The requirement for spare transformers/reactor to meet the needs of the member states in the Eastern Region was considered in the Standing Committee on Power System Planning headed by Central Electricity Authority held on 20.09.2010, in addition to the reactors and inter-connected transformers already agreed to by the Eastern Region constituents at the Eastern Regional Power Committee Forum, the constituents further agreed to the provision of 1x50

MVA 22/132 KV transformer at Birpara Sub-station (being replaced by Asset III) and 2x50 MVA 22/132 KV transformer at Malda Sub-station (being replaced by Assets I and II) would also be in the list of spares which would be part of Central Transmission System of the Eastern Region until any one is requisitioned by any beneficiary, after which it would form part of the State Transmission System of that beneficiary.....”

It is clear from the above that the replaced transformers are proposed to be kept as spare transformer as part of the Central Transmission System only as an interim measure and are to become part of the intra-State Transmission System after they are requisitioned by any State beneficiary.

- (z) The transformers are not connected to the inter-State Transmission System for any purpose and are kept idle. Therefore, the replaced 50 MVA transformers do not render any service and accordingly their cost cannot be considered towards the capital cost for the purpose of tariff, since otherwise it will adversely affect the consumers' interest.

- (aa) Learned Counsel for the Central Commission further stated that currently, West Bengal State Distribution Company Ltd. (Respondent No.2) is the only beneficiary and is to pay the tariff determined under the Impugned Order. In case, the replaced 50 MVA transformers are retained for tariff, Respondent No.2 will bear tariff for these transformers. When the replaced 50 MVA transformers are transferred to other State of Eastern Region, say, the State of Bihar, it is not fair to charge tariff from Respondent No.2 for the intervening period.
- (bb) As regards the applicability of two judgments of this Tribunal as cited by the Appellant in support of its claim, it is submitted that the above two judgments are not in context of additional capitalization of generating stations and are not applicable in the present case. The decision of this Tribunal in the above two judgments that spare assets cannot be considered in the capital cost for determination of tariff, as in principle equally applicable in the present case.

(cc) It is further stated that vide judgment dated 1.05.2015 by this Tribunal, it is concluded unless there is a specific provision in the regulations permitting capitalization of cost of spare assets, such assets cannot be included in the capital base and the relevant portion is extracted below:-

“(d) We find that additional capital expenditure on account of Spare Generator Transformer is not permissible under the Tariff Regulations 2009.”

(dd) In support of its claim for retention of the cost of the replaced 50 MVA transformers, the Appellant has relied upon sub-clause (v) of Clause (2) of Regulation 9 of the 2009 Tariff Regulations, extracted as under:-

“9. Additional Capitalisation.

(1).....

(2) The capital expenditure incurred or projected to be incurred on the following counts after the cut-off date may, in its discretion, be admitted by the Commission, subject to prudence check.

.....

(v) In case of transmission system any additional expenditure on items such as relays, control and instrumentation, computer system power line carrier

communication, DC batteries, replacement of switchyard equipment due to increase of fault level, emergency restoration system, insulators clearing infrastructure, replacement of damaged equipment not covered by insurance and any other expenditure which has become necessary for successful and efficient operation of transmission system.”

It can be seen from the above that Regulation 9 provides for additional capitalization of expenditure incurred after date of commercial operation and does not concern treatment of replaced assets. In the instant case, the expenditure of 50 MVA transformers was incurred during the initial years which have no relationship with the cut-off date of the new 160 MVA transformers. This Regulation permits capitalization of expenditure which is necessary for successful and efficient operation of transmission system. In the present case, 50 MVA transformers have been kept as spare transformers and are not used for operation of the inter-State Transmission System as these are not connected to the system of the Intra-State Transmission System and this will be used as part of the Intra-State Transmission on being requisitioned by any State beneficiary in the Eastern Region and till that time

they do not render any service. In support of this, proviso to Clause (1) of Regulation 7 of the 2009 Tariff Regulations is extracted below:

“7. Capital Cost. (1) Capital cost for a project shall include:

.....
Provided that the assets forming part of the project, but not in use shall be taken out of the capital cost.”

- (ee) The Appellant has argued that when the transformers are used as spare transformers, it cannot be said that they are not in use and, therefore, its claim for retention of capital cost of the replaced 50 MVA transformers with the consent of the beneficiaries does not violate the Regulations of the Central Commission because the Regulation provide for de-capitalisation of assets not in use.
- (ff) As per the Central Commission these transformers cannot be considered in the capital base since they are not in use.
- (v) **Disallowance of IDC and IEDC of Rs. 11.04 lakh in respect of Asset III**

- (a) Asset III was declared under commercial operation on 01.11.2013 with a delay of 6 months from the scheduled commission of 01.05.2013 and this delay on account of reasons mentioned by the Appellant for carrying out construction on a charged switchyard necessitating great care and safety.
- (b) However, It can be seen that around the delay of 1½ years caused in commencement of the subject work itself.
- (c) As regards that the work was to be carried out on a charged switchyard, this fact was known to the Appellant at a planning stage itself.
- (d) The time schedule of commission of assets was decided by the Appellant after carrying out the studies and grounds as per the feasibility stage. In support of this argument, the Learned Counsel for the Central Commission quoted this Tribunal judgment dated 27.04.2011 in Appeal No. 72/2010 (Maharashtra State Power Generation Corporation Ltd. Vs. Maharashtra Electricity Regulatory Commission & Ors.) while considering principle for prudence check of time overrun,

which laid down the following guidelines for condoning the delay:

“7.4 the delay in execution of a generating project could occur due to following reasons:

- i) Due to factors entirely attributable to the generating company, e.g., imprudence in selecting the contractors/suppliers and in executing contractual agreements including terms and conditions of the contracts, delay in award of contracts, delay in providing inputs like making land available to the contractors, delay in payments to contractors/suppliers as per the terms of contract, mismanagement of finances, slackness in project management like improper co-ordination between the various contractors, etc.***
- ii) Due to factors beyond the control of the generating company e.g. delay caused due to force majeure like natural calamity or any other reasons which clearly establish, beyond any doubt, that there has been no imprudence on the part of the generating company in executing the project.***
- iii) Situation not covered by (i) & (ii) above.***

In our opinion in the first case the entire cost due to time overrun has to be borne by the generating company. However, the Liquidated Damages (LDs) and insurance proceeds on account of delay, if any, receivable 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 overrun. However, the consumers should get full benefit of the LDs recovered from the contractors/suppliers of the generating company and the insurance proceeds, if any, to reduce the capital cost. In the third case the additional cost due to time overrun including the LDs and insurance proceeds could be shared between the generating company and the consumer. It would also be prudent to consider the delay with respect to some benchmarks rather than depending on the provisions of the contract between the generating company and its contractors/suppliers. If the time schedule is taken as per the terms of the contract, this may result in imprudent time schedule not in accordance with good industry practices.

7.5 In our opinion, the above principles will be in consonance with the provisions of Section 61(d) of the Act, safeguarding the consumers interest and at the same time, ensuring recovery of cost of electricity in a reasonable manner.”

- (e) There is no dispute about the fact that approved capital cost includes IDC and IEDC but in absence of any working calculation in support of the claim it is difficult to ascertain that the entire amount of IDC and IEDC of

Rs.11.04 lakhs was included in the excess capital cost of Rs.19.38.

- (f) As regards the Appellant's contention that there is double reduction in capital cost on account of adjustment of IDC and IEDC, IDC & IEDC are adjustable against the capital cost to be considered in tariff and not against the expenditure which is otherwise inadmissible and the consumer is not to service such expenditure in any case. Restriction of capital cost to the apportioned approved capital cost and adjustment of IDC and IEDC for delayed period are independent acts without any correlation between the two.
- (g) As regards the Appellant's argument of considering 17.12.2012 as the scheduled completion date of Asset III, the Central Commission stated that 17.12.2012 was considered as the date of completion of supply and erection and not as the scheduled commercial date of operation. In the Impugned Order, the Central Commission has taken 01.05.2013 as the scheduled date of commercial operation with 01.11.2013 as the actual

date of commercial operation and hence, therefore, adjusted IDC and IEDC for the delay of 6 months accordingly.

(vi) **Disallowance of Excess Capital Cost of Rs. 19.38 lakhs of Asset III**

- (a) The Learned Counsel for the Central Commission stated that anticipated completion capital cost as on 31.03.2014 as indicated by the Appellant was Rs.332.53 lakhs, thereby there was excess of Rs.19.38 lakhs over the apportioned approved capital cost of Asset III as Rs.313.15 lakhs. For the purpose of tariff computation, the Central Commission considered the apportioned approved capital cost of Rs. 313.15 lakhs and this practice has been followed by it in all cases where anticipated completion cost exceeded the apportioned approved cost.
- (b) The Central Commission also accepts the cost approved by the Board of Appellant. As such, the Appellant could have approached its own Board for approval of the

Revised Estimate Cost and the same could have been submitted before the Central Commission.

- (c) In light of the above, the decision of the Central Commission in this regard cannot be faulted.

For all the issues raised by the Appellant in the Present Appeal, have been stated to be lacking merit by the Learned Counsel of the Central Commission and seeking their dismissal by this Tribunal.

10. After having careful examination of all the submissions/arguments made by the rival parties before us, our observations are detailed out in the following paragraphs.
11. On the first issue raised by the Appellant regarding non-consideration by Central Commission of its claim for keeping three 1x50 MVA transformers replaced by three 1x160 MVA transformers as spare transformers and the related issue regarding findings of the Central Commission that the replaced transformers were 'assets not in use' and need to be de-capitalized, we would like to analyse both the issues jointly.
12. The Appellant has contested that the above transformers were not replaced due to any defect in the said transformers or any default of

or otherwise any reason whatsoever attributable to the Appellant. The replaced transformers are still usable as spare transformers ready for use in the Eastern Region. Therefore, the Appellant sought the utilization of replaced transformers instead of discarding the same, which has been disallowed by the Central Commission.

13. It was known that three 1x50 MVA transformers had completed their prescribed useful life of 25 years. These replaced transformers were to be added to the inventory of spare transformers as agreed to by the constituents of Eastern Region at 16th ERPC meeting of 18.12.2010.
14. Further, it has been brought to our notice that replaced transformers are proposed to be kept as spare transformers as part of the Central Transmission System only as interim measure and are to become part of the Intra-State Transmission System after they are requisitioned by any beneficiary State.
15. We have observed that the Central Commission in its Regulations prevailing at that point of time has allowed only the initial spares as part of capital cost for the purpose of tariff determination.
16. Proviso to Clause (1) of Regulation 7 of the 2009 Tariff Regulations of the Central Commission is extracted below:-

“7. Capital Cost. (i) Capital cost for a projects shall include:
.....
.....

Provided that the assets forming part of the project but not in use shall be taken out of the capital cost.”

Hence Clause(1) of Regulation 7 of the 2009 Tariff Regulations of the Central Commission legislates that the assets which are not in use, are to be taken out of the capital cost of the project.

17. It is to be noted that all the three Assets i.e. three of 1x50 MVA transformers have completed their useful life of 25 years and their capital costs were included by the Central Commission for tariff determination upto 31.03.2014 vide its Order dated 06.08.2013 in Petition No. 331/2010. Cost of new assets i.e. 3x160 MVA transformers replacing 3x50 MVA transformers has been allowed to be capitalized and as such, the replaced assets have to be de-capitalised by reducing the net value of replaced assets from the capital cost of new assets.

18. The Appellant has argued that when the transformers are used as spare transformers, it cannot be said that they are not in use and therefore, its claim for retention of capital cost of the replaced 3x50 MVA transformers with the consent of the beneficiaries does not

violate the Regulations of the Central Commission as these replaced assets are to be considered as 'asset in use'.

This submission of the Appellant does not have any merit in light of the fact that these 3x50 MVA transformers stand replaced and till the time they are requisitioned by any beneficiary State, they would remain as spare transformers and hence, it could be treated as spare transformers but 'asset not in use'.

This Tribunal in its earlier judgment dated 08.05.2014 in Appeal No. 173/2013 (NTPC Ltd. Vs. Central Electricity Regulatory Commission & Ors.) and judgment dated 01.05.2015 in Appeal No. 97/2013 (NTPC Ltd. Vs. Central Electricity Regulatory Commission & Ors.) disallowed capitalization of spare/additional transformers. In judgment dated 01.05.2015, this Tribunal observed that unless there is a specific provision in the Regulations permitting capitalization of the cost of spare assets, such assets cannot be included in the capital base.

19. Since there is no provision in the statutory Regulations of the Central Commission in support of the Appellant's claim to permit retention of replaced assets not in use, in the capital cost of the new assets, we are of the considered view that the Appellant's claim in this regard is

untenable. We are in agreement with the findings of the Central Commission in this regard in its Impugned Order dated 06.01.2015. As such, both these issues are decided against the Appellant.

20. On the next issue of the Appellant for the time overrun in respect of Asset III and disallowance of the associated IDC and IEDC costs by the Central Commission, Appellant has submitted that the work under ERSS IV Scheme involved dismantling of existing equipment as well as augmentation works to be carried out in the existing system and as such, the pace of work was slow and the extent of difficulties and additional works involved could not have been anticipated by the Appellant. It should not be denied its claim of associated IDC and IEDC for undertaking such works cautiously without causing any disturbance to the system. We have observed that the construction work to be carried out on a charged switchyard was known to the Appellant at the planning stage itself. It could have been planned accordingly by the Appellant.

21. We have also noted that the Appellant's own admission that completion of the subject work took 6 months against the time of 20 days anticipated by the Appellant which makes it difficult for us to

consider condonation of delay of 6 months for such works which could be carried out in 20 days time.

22. We have further noted that there has been no documentary evidence furnished by the Appellant in support of its plea for condoning the delay of 6 months, barring the reasons such as work was to be carried out on a charged switchyard needing utmost care and safety etc. Even in light of this judgment dated 27.04.2011 of this Tribunal laying down the guidelines for condoning the delay, we do not find any merit in this claim of the Appellant which is the result of delayed commencement and it could have been better planned.

23. Accordingly, we have concluded that the delay is attributable to the Appellant and the entire cost due to time overrun is to be borne by the Appellant. As such, IDC and IEDC for delayed period of commercial operation of Asset III would not be admissible to the Appellant.

24. As regards the last issue regarding disallowance of excess capital cost of Rs.19.38 lakhs when the capital cost has already been

reduced by Rs.11.04 lakhs due to disallowance IDC and IEDC for time overrun, we are of the considered opinion that there is no dispute about the fact that the approved capital cost include IDC and IEDC. However, the issue is whether the whole amount of IDC and IEDC of Rs. 11.04 lakhs has been included in the excess capital cost of Rs. 19.38 lakhs which was disallowed. We have noted the observation of the Central Commission in its Impugned Order that no working calculations in support of this claim were provided by the Appellant. As such, the Central Commission in absence of any substantiated details supported by proper calculations by the Appellant has not considered it worthy for acceptance.

25. As regards the Appellant's contention of double adjustment in capital cost on account of adjustment of IDC and IEDC as the IDC and IEDC should be adjustable against the capital cost to be considered in tariff and not against the expenditure which is otherwise inadmissible, we tend to agree with the argument put forth by the Learned Counsel for the State Commission stating therein that the excess of anticipated cost over the apportioned approved cost is inadmissible in tariff and the IDC and IEDC for the period of delay are also inadmissible and

therefore, one inadmissible cost cannot be adjusted against another inadmissible cost but two have to be added to arrive at the total inadmissible expenditure for further computing the admissible capital cost for the purpose of tariff. Hence, the methodology suggested on behalf of Appellant for the adjustment of the excess capital cost only and not IDC and IEDC for the period of delay is not acceptable. Hence, this issue is also decided against the Appellant.

ORDER

In light of the above, the present Appeal is hereby dismissed and the Impugned Order dated 06.01.2015 of the Central Commission is hereby reaffirmed. No order as to costs.

Pronounced in the open court on this **25th day of April, 2016.**

(I.J. Kapoor)
Technical Member

√
REPORTABLE/NON-REPORTABLE
dk

(Justice Ranjana P. Desai)
Chairperson