

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

Appeal No 178 of 2015

Dated: 20th November, 2017

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 (PGCIL)
Saudamini, Plot No. 2,
Sector-29, Gurgaon
Haryana- 122001

... Appellant

Versus

- 1. Central Electricity Regulatory Commission (CERC)**
3rd & 4th Floor, Chanderlok Building
36, Janpath, New Delhi- 110001 **...Respondent No 1**
- 2. Madhya Pradesh Power Trading Co. Ltd. (MPPTCL)**
Shakti Bhawan, Rampur,
Jabalpur –482008 **...Respondent No 2**
- 3. Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL)**
Prakashgad, 4th Floor
Andheri (E), Mumbai- 400052 **...Respondent No 3**
- 4. Gujarat Urja Vikas Nigam Ltd. (GUVNL)**
Sardar Patel Vidyut Bhawan
Race Course Road, Vadodara- 390007 **...Respondent No 4**
- 5. Electricity Department, Govt. of Goa**
Vidyut Bhawan, Near Mandvi Hotel
Panaji- 403001, GOA **...Respondent No 5**
- 6. Electricity Department,**
Administration of Daman & Diu
Daman- 396210 **...Respondent No 6**

7. **Electricity Department,
Administration of Dadra Nagar Haveli
UT, Silvassa- 396230** ...Respondent No 7
8. **Chhattisgarh State Electricity Board
PO Sunder Nagar, Dangania
Raipur- 492013, Chhattisgarh** ...Respondent No 8
9. **Madhya Pradesh Audyogic Kendra Vikas
Nigam (Indore) Ltd.
3/54 Pre ss Complex
Agra- Mumbai Road
Indore- 452008** ...Respondent No 9

Counsel for the Appellant(s): Mr. Sitesh Mukherjee
Mr. Deep Rao
Mr. Rahul Bajaj
Ms. Pragya Vatts
Mr. Gautam Chawla
Ms. AkanshaTyagi

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

Mr. G L Pandey
Mr. Sarthak L
Mr. Rishabh Donnel Singh for R-2

JUDGMENT

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

1. The present Appeal is being filed by Power Grid Corporation of India Ltd. (herein after referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) challenging the Order dated 12.05.2015 (“**Impugned**”

Order") passed by the Central Electricity Regulatory Commission (hereinafter referred to as the '**Central Commission**') in Petition No.53/TT/2013, in the matter regarding disallowance of condonation of delay of seven months in commissioning of 400 kV D/C Raipur – Wardha Transmission Line (TL) along with Fixed Series Compensation (FSC) at Wardha ("hereinafter referred to as the "**Asset**") and consequential disallowance of Interest During Construction (IDC) and Incidental Expenses During Construction (IEDC) amounting to Rs. 4.6613 Cr.

2. The Appellant, Power Grid Corporation of India Ltd. is the Govt. Company within the meaning of Companies Act, 1956 and also functions as the Central Transmission Utility (CTU) under Section 38 to the Act. The tariff of the Appellant is determined by the Central Commission.
3. The Respondent No.1 i.e. Central Electricity Regulatory Commission (CERC) is the Central Commission constituted under Section 76 of the Electricity Act, 2003 and exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.
4. The Respondents No. 2 to 9 are the beneficiaries of the Asset.
5. **Facts of the present Appeal:**
 - a) The Central Commission has notified the CERC (Terms and Conditions for determination of Tariff) Regulations, 2009(hereinafter referred as '**Tariff Regulations, 2009**') applicable for the period from 1.4.2009 to 31.3.2014.

- b) Ministry of Power (MoP), Govt. of India (GoI), accorded Investment Approval (IA) for execution of Western Region System Strengthening Scheme –II (WRSS-II) on 24.7.2006. The scope of work covered under the scheme broadly include the following:

Set-A: For absorbing import in Eastern and Central part of WR Transmission Lines (To be implemented by PGCIL)

- i. Seoni (PGCIL) – Wardha (PGCIL) 765 kV 2nd S/C (initially to be operated at 400 kV)
- ii. Wardha (PGCIL) – Parli (PGCIL) 400 kV D/C (Quad)
- iii. Raipur (PGCIL) – Wardha (PGCIL) 400 kV D/C Line
- iv. Bhadravati (PGCIL) – Parli (PGCIL) 400 kV D/C
- v. Parli (MSEB) – Parli (PGCIL) 400 kV D/C

Sub-stations (To be implemented by PGCIL)

- i. Seoni 400 /220 kV Substation (PGCIL) Extension
- ii. Parli 400 kV (New) Switching Station (PGCIL)
- iii. Parli 400/220 kV Substation (MSEB) (Extension)
- iv. Bhadravati 400 kV Substation (PGCIL) Extension
- v. Wardha 400/220 kV Substation (PGCIL) Extension along with 25% Fixed Series Compensation (FSC)
- vi. Raipur 400/220 kV Substation (PGCIL) Extension.

The present Appeal is limited only to 400 kV D/C Raipur – Wardha Transmission Line along with FSC at Wardha.

- c) According to the IA the Asset was scheduled to be commissioned within 48 months from the date of IA i.e. by 1.8.2010. The actual

date of commissioning of the Asset is 1.1.2013 with a delay of 29 months.

- d) On 3.1.2013, the Appellant filed tariff petition No. 53/TT/2013 before the Central Commission for determination of tariff of the Asset. The Appellant in the tariff petition and subsequent affidavits filed before the Central Commission provided details stating reasons for delay in commissioning of the Asset.
- e) Out of claim of delay of 29 months by the Appellant in commissioning of the Asset, the Central Commission has condoned the delay of 22 months vide its Impugned Order. The break-up of the same is a below:

Reason for delay	Total Delay	Delay Condoned
Signing of loan agreement with World Bank (24.7.2006 to 28.03.2008)	20 Months	Yes
Award of Contract (28.3.2008 to 25.5.2008)	2 Months	Yes
Pending Railway and Forest Clearance (June 2012 to December 2012)	7 Months	No

- f) As a result the Central Commission has disallowed IDC & IEDC for a period of 7 months in the commissioning of the Asset. The disallowed IDC amount is Rs. 2.7428 Cr. and disallowed IEDC

amount is Rs. 1.9185 Cr. Total amount disallowed is Rs. 4.6613 Cr.

6. Aggrieved by the Impugned Order passed by the Central Commission, the Appellant has preferred the present Appeal on grounds that the Central Commission has failed to examine the documents and information placed on record by the Appellant before it and has denied to condone the said delay of 7 months.

7. **QUESTIONS OF LAW**

The Appellant has raised the following questions of law in the present Appeal:

- a. Whether the Central Commission has incorrectly disallowed IDC and IEDC for delay in commissioning of Asset due to the factors beyond the control of the Appellant?
 - b. Whether the findings of the Central Commission on the demeanor of the Appellant in obtaining the clearance from Railway and Forest Department is incorrect?
8. The learned counsel for the Appellant has made following arguments/submissions for our consideration:
 - a) The Appellant's main grievance in the Impugned Order is that the Central Commission failed to grant the Appellant adequate opportunity to furnish the relevant explanations and documents deemed necessary by the Central Commission for adjudication of the Appellant's claims.

- b) The reasons given by the Central Commission for rejection of condonation of delay of 7 months are devoid of merit. The Appellant approached the Railway/Forest authorities as soon as reasonably practicable. The Central Commission was supposed to have done prudence check by seeking specific information from the Appellant.
- c) The Central Commission erred in holding that the Appellant should have not waited for carrying out works at the non-affected areas. The Appellant diligently pursued construction activities on all portions of land unaffected by forestland or railway land. This is evident from that the Appellant commissioned the Asset within one month of receiving final forest clearance in Maharashtra and within one week of receiving railway clearance. The findings of the Central Commission in this regard is misplaced.
- d) The Appellant in the petition before the Central Commission explained the reasons for the 7 month delay in obtaining Forest and Railway clearance. The same was done in the petition and the relevant portion from the petition is reproduced below:

“5) Reasons for Delay the commissioning of line is delayed due to the following reasons:

(a) Delay in getting Railway Clearances: The line was passing through the Railway land and required permission of Railway Board for erection of towers on Railway land. Accordingly, the proposal was submitted by the Petitioner to Sr. DE SECR on 06.08.2009 {sic

06.05.2009). After lot of persuasion, the provisional approval for erection of 400 kV D/C line was accorded on 24.12.2012 by Railways and with the tremendous efforts line work was completed by the petitioner by 31.12.2012.

(b) *Delay in getting forest clearance in Chhattisgarh and Maharashtra:*

Forest clearance in Chhattisgarh:

On completion of detailed survey, the application for forest clearance for Chhattisgarh portion was submitted for total area of 15.37 Hectare (in line length of 3.34 km). The first stage approval was accorded on 31.5.2010 (approximately after 15 months from the date of application) by RMOEF, Bhopal stipulating various conditions mandating deposit of the requisite amounts including undertakings for compliance of guidelines. Accordingly payments were deposited by Petitioner and on complying with all the terms & conditions and on submission of undertakings as stipulated in stage- 1 approval, the 2nd stage and final approval was issued on 09.03.2011 (approximately after 28 months from the date of application and after eight months from the scheduled date of completion) by RMOEF, Bhopal. On second stage approval, the cost of tree cutting deposited and approval was given in May 2011.

Forest clearance in Maharashtra:

On completion of detailed survey, the application for forest clearance for Maharashtra portion was submitted for total area of 100.9 Hectare (in line length of 21.94 kms). The proposal involved 80.90 Hectare in forest division of Gondia and 20.0 Hectare under area of Forest Development Corporation of Maharashtra (FDCM)

.....
Accordingly the 1st stage was issued on 30.4.2012 Bhopal stipulating various conditions

.....
On complying with all the terms & conditions and on submission of undertakings as stipulated in stage-1 approval, the approval was obtained on 17.9.2012 for second and final stage.

Since the line was passing through the protected area/eco-sensitive zone and the proposed land being within the 10 kms. of boundary of protected reserve, Tree felling permission had also to be taken from Hon'ble High Court Maharashtra.

After permission of Hon'ble Court. Petitioner started construction activities in forest area and completed the work and successfully charges the line on 31.12.2012 and declared under commercial operation from 01.01.2013.

From the above it is evident that in spite of Petitioner's efforts for obtaining forest clearances in time, the entire process of forest clearances was 'completed in

November 2012 which is beyond the control of Petitioner. Therefore, Ld. Commission may kindly condone the delay in commissioning of the asset.”

- e) The Central Commission has erred in holding that the Appellant has failed to substantiate the reasons for the delay in submitting applications for forest and railway clearance with appropriate evidence. In this regard the Appellant has submitted the following:

Delay in grant of Forest Clearances

i. Delay of Forest Clearance in Chhattisgarh

The Central Commission in various orders has recognized that the grant of forest clearance in accordance with the Forest Conservation Rules, 2003, should typically not take a period of more than 300 days or 10 months. The relevant observations of the Central Commission, in PGCIL Vs. Madhya Pradesh Power Management Company and Ors. in Petition No. 218/TT/2016 vide Order dated 18.09.2017 has held as below:

“34. ...As per MoEF notification dated 3.2.2004, the State Governments are required to process the applications and forward the same to the MoEF alongwith their recommendations in 210 days. Further, MoEF has to process cases to obtain sanction of central government and issue of in-principle approval/rejection in 90 days. Thus, as per MoEF Notification dated 3.2.2004, the time specified for forest approval is 300 days (210+90 days) or 10 months. In the instant case, it took 54 months and 23 days for obtaining the final clearance of forest department, which is much higher than the specified 10 months. It is observed that the

Petitioner has pursued its proposal with various authorities diligently. Therefore, we are of the view that the delay on account forest approval is beyond the control of the Petitioner and shall not be attributable to the Petitioner.

If the above findings of the Central Commission that 300 days/ 10 months being the typical timeline within which forest clearances ought to be granted, are applied to the Appellant's case it is found that the Asset would have been commissioned as per the schedule provided in the IA. The application for the grant of forest clearance in Chhattisgarh was filed on 29.8.2008. As per the Central Commission's estimate of 10 months, the Appellant should have been granted in-principle forest clearance approximately by 29.06.2009. This would have been well before the Scheduled Commercial Operation Date (SCOD) of 01.08.2010. The Appellant's proposal was delayed and forest clearance was granted to the Appellant only on 09.03.2011. Accordingly, the grant of forest clearance in Chhattisgarh was delayed by a period of nearly 21 months.

ii. Delay of Forest Clearance in Maharashtra

The application for the grant of forest clearance in Maharashtra for Gondia was filed on 20.8.2007 before the DCF, Gondia's office seeking permission for tree enumeration and survey of forest area. As per the Central Commission's timelines in the order mentioned above, forest clearance should have been granted by 20.6.2008. However, the forest clearance was granted only on 17.09.2012 i.e. after a delay of almost 51 months. The forest clearance process in

Maharashtra was completed only when the Hon'ble Bombay High Court granted its clearance for the felling of trees on 30.11.2012 i.e. a further delay of 2 and a half months. The total delay for forests clearances in Maharashtra was approximately 53.5 months.

- f) The Central Commission has erred in not condoning the delay attributable to the forest authorities and the time taken to obtain the Hon'ble Bombay High Court's approval, which was completely beyond the control of the Appellant. Even if it is assumed that the delay in the grant of forest clearance in Chhattisgarh of 21 months will get subsumed within the 22 month period already condoned by the Central Commission, the delay of 53.5 months in Maharashtra is significantly in excess of the 22 month period.
- g) The Central Commission has contended that the Appellant has failed to submit the application for the grant of Railway clearance in time after IA. On this issue, the Appellant has submitted that the application for the grant of Railway clearance was submitted only after site inspection/study was complete. The proposal to lease out railway land for construction/erection of the towers had to be made in compliance with Railways Board Regulation for Power Line Crossing, 1987. The said regulations contemplate the conditions and manner in which such proposals for approvals/consents from Ministry of Railways can be submitted. Only when such studies were complete and the appropriate site as per the statutory requirement was defined, due applications were made. The Appellant diligently carried out the necessary survey and applied for the Railway clearance.

The Appellant further submitted that if the appropriate authorities had adhered to the time period that is normally required for the grant of Railway clearance i.e. between 5 to 8 months, the same would have been granted before the SCOD and enabled the Appellant to commission the Transmission Asset by the SCOD.

In this regard, the Appellant has relied on the Central Commission's Order dated 19.05.2014 in PGCILVs. Madhya Pradesh Power Trading Company and Ors., in Petition No. 284 of 2010, wherein the Central Commission has observed as below:

“As per the details given above, Railway clearance was given in 5 to 8 months in earlier cases. In the instant case, the petitioner has applied for Railway clearance on 19.1.2009 and deposited the required money in June, 2010 and the Railways gave clearance on 8.9.2010, almost after 20 months of application for clearance. The time taken by Railways for giving the clearance in the instant case is unusually longer than the time taken in other cases. Thus, there is justification for condoning the delay. We accordingly condone the delay of three months. Accordingly, 11 months time over-run is condoned and the remaining 4 months time over-run occurred due to theft of towers is not condoned.”

The Appellant was granted railway clearance only on 24.12.2012 i.e. after a delay of almost 3 years after the expiry of the period within which railway clearances are to be typically granted. The timelines related to delay in Railway clearance is as below:

Date of filing application	Date on which clearance should have been granted	Date of actual grant of clearance	Delay in months
06.05.2009	06.03.2010	24.12.2012	33

- h) On the contention of the Central Commission that the Appellant should have constructed other components of the Asset which were not dependent on the grant of Railway/Forest clearance, the Appellant has submitted that it was granted Railway clearance only on 24.12.2012 and the Asset was commissioned on 01.01.2013 i.e. within 1 week of receiving the Railway Clearance. It would have been impossible for the Appellant to commission the Asset within a period of one week from the grant of Railway clearance if it had not diligently built other components of the Asset concurrently. Similarly, regarding forest clearance, on 30.11.2012, the Bombay High Court granted its approval for tree felling for the construction of the Asset. The fact that the project was commissioned after a month of the grant of the same, i.e. on 01.01.2013, evidences the fact that other components of the Asset were being built while the application for the grant of forest clearance was pending. In view of this, it is erroneous for the Central Commission to conclude that the Appellant was not constructing other components of the Asset simultaneously while the application for the grant of railway clearance/forest clearance was still pending. The Appellant undertook the following works in the non-affected areas at the time when Railway/Forest clearances were pending in the affected areas.

Foundation: 924 nos. completed, balance 65 nos. Tower Erection: 917 nos. completed, balance 72 nos. Stringing: 323.484 kms. completed, balance 47 kms.

- i) The Central Commission has erred in concluding that the Appellant has failed to furnish the requisite evidence regarding application made to Forest Development Corporation of Maharashtra when asked for vide letter dated 18.2.2013 of the Central Commission. Vide the said letter the Appellant was only directed to furnish the date on which the application for the grant of forest clearance was submitted to the Forest Development Corporation of Maharashtra. Accordingly the Appellant submitted the following vide its affidavit dated 18.9.2013:

“With regard to query IX: It is submitted that the Date of application for forest clearance by Forest Development Corporation of Maharashtra is 17.10.2007.”

Since the Appellant was not asked to furnish the application but only share the date of filing the same, it duly complied with this request.

- j) The Central Commission has erred in rejecting the relief sought by the Appellant out rightly without providing with an opportunity to place the necessary information on the record. This Tribunal may consider remanding this matter back to the Central Commission for its determination as regards the condonation of delay for seven months keeping in view of the approach outlined by this Tribunal vide Judgment dated 15.03.2017 in Appeal No. 127 of 2015 in case of PGCILVs. Central Electricity Regulatory Commission and Ors. The relevant extract of the said judgment is quoted below:

“We are of the considered opinion that the Appellant must be given a chance to tender document in support of its claim for condonation of delay in respect of Assets IV and V. We are, therefore, remanding the matter to the Central Commission to enable the Appellant to place complete facts and supporting documents for condonation of delay for Assets IV and V and pass appropriate order after its prudent check.”

9. The learned counsel for the Central Commission has made following arguments / submissions on the issues raised in the present Appeal for our consideration:
- a) The Appellant in the tariff petition before the Central Commission has sought condonation of delay of 29 months, out of which the Central Commission has condoned delay of 22 months (20 months for approval of World Bank Loan and subsequent 2 months for placing award). The reasons for condonation of delay for balance 7 months (claimed on account of delay in obtaining clearance from Railways and Forest Department) submitted by the Appellant in the tariff petition were vague and not very specific. The Appellant failed to give specific details of the activities undertaken by it prior to making applications for obtaining permission of Railway Authorities and Forest Clearance.
 - b) The Appellant in the tariff petition failed to furnish the reasons for 3 years delay from IA date in taking up the matter with Railway Authorities on 6.5.2009, dates of submission of application for FC regarding transmission line for Chhattisgarh and Maharashtra portions and documentary evidence in support of the said reasons

of delay. The Central Commission vide letter dated 18.2.2013 asked for the following information, among other, from the Appellant:

“vi) Justification along with the documentary evidence for delay of about 36 months for submission of application for Railway/Forest clearance.”

- c) The Appellant vide its reply dated 18.9.2013 filed before the Central Commission in the said petition on the issue of delay as sought by the Central Commission merely reiterated the reasons for delay already given in the tariff petition without crucial details. Further, after conclusion of the hearing on the said tariff petition on 25.2.2014, the Appellant vide suo-motu affidavit dated 17.5.2014 explained that despite its efforts the delay occurred in signing of the loan agreement with the World Bank. The loan agreement was signed on 28.3.2008 i.e. after a delay of 20 months from the date of IA. These details were not furnished by the Appellant in the main tariff petition. The Appellant on 23.5.2008 issued Letter of Award (LoA) to the contractor within 2 months of signing of the loan agreement. The Central Commission after prudence check condoned the delay of 22 months (20 months for delay in signing of the loan agreement and 2 months in placing LoA) against the total delay of 29 months.
- d) The delay of balance 7 months ought to be justified by the Appellant on account of permission from Railway Authorities and Forest Clearances. The Central Commission has not condoned this delay as the Appellant failed to furnish necessary or sufficient details in support of the plea for condonation of delay. The Central Commission has recorded the reasons in writing for non-

condonation of such delay in detail in the Impugned Order. Accordingly, the IDC and IEDC for the 7 months delay that was not condoned by the Central Commission has been deducted from the capital cost.

- e) The Appellant in the present Appeal has also not explained the basic reasons because of which the Central Commission has not condoned the delay of 7 months. In the present Appeal the Appellant has only described theoretically and in general terms the steps required to be taken before Railway/ Forest authorities for obtaining clearances without detailing the steps actually taken by it. Further, the Appellant before the Central Commission did not give such explanation. The Appellant also failed to bring on record the Regulations of the Railway Board on which reliance has been placed by it.
- f) The Appellant also failed to provide the dates regarding completion of site inspection/study, finalisation of adjacent spans after which the Appellant approached Railway authorities, conduct of detailed surveys to finalise exact tower location and finalisation of actual route of the transmission line. The Appellant has also not produced the evidence in support of the preliminary activities undertaken before approaching the authorities in Railways and Forest departments.
- g) The burden of proof is on the Appellant that it took all timely actions for obtaining necessary approvals/sanctions. As per the principles of law of evidence, the burden of proof is on the party which desires the court to believe the existence of any particular

fact. In this regard, the Central Commission has relied on Sections 101 to 103 of the Evidence Act. The Appellant has failed to discharge such burden. As a corollary, the Appellant has delayed timely action in initial stages which had cascading effect on all subsequent activities. Accordingly, the Appellant has defaulted in taking appropriate measures for timely commissioning of the transmission line.

- h) This Tribunal vide judgement dated 27.4.2011 in Appeal No. 72 of 2010 in case of Maharashtra State Power Generation Corporation Ltd. Vs. Maharashtra Electricity Regulatory Commission &Ors. has held that the consequences of time overrun on account of factors attributable to the generating company are to be borne by it. This principle also applies in cases of delay in commercial operation of the transmission assets by the transmission licensee. Accordingly, the delay of 7 months is attributable to the Appellant and is not condonable and consequently the Appellant is not entitled to IDC and IEDC for the said period of delay.
- i) The reliance of the Appellant on this Tribunal's judgement dated 15.03.2017 in Appeal No. 127 of 2015 is misplaced as in the present case the Appellant was specifically directed by the Central Commission to produce documents in support of the initial delay and it failed to avail such opportunity. The Appellant in memorandum of appeal also did not consider appropriate to bring any reason why it could not produce supporting documents before the Central Commission.

- j) The reliance of the Appellant on the other orders of the Central Commission regarding specific time for granting forest clearance is misplaced as the Appellant itself has applied for the said clearance with a delay of more than 2 years whereas the time of about 10 months in granting clearance in other orders is taken from the date of submission of the proposal for forest clearance. Regarding application for grant of forest clearance in Chhattisgarh and Maharashtra, the Appellant has not made any such averment in the tariff petition before the Central Commission.
- k) The reliance of the Appellant on the Central Commission's order dated 19.05.2014 wherein 11 months delay was condoned is misplaced as the said delay was condoned based on peculiar facts. The said order is not an authority for condonation of delay in taking up the proposal with railway authorities. In present case there was initial delay of about 3 years in taking up the proposal with railway authorities. The initial delay of 22 months condoned by Central Commission was concurrent with initial delay of about 3 years by the Appellant in taking up the matter with railway authorities.
10. After having a careful examination of all the issues brought before us on the issues raised in the present Appeal and submissions made by the Respondents and Appellant for our consideration, our observations are as follows: -
- a) The present case pertains to decision of the Central Commission on disallowance of condonation of delay of seven months in commissioning of the Asset due to delay in permission from

Railways and Forest Clearance and consequential reduction of capital cost by a way of disallowance of related IDC and IEDC.

- b) Since both the questions of law raised by the Appellant are related to non-condonation of delay of 7 months by the Central Commission, we are taking both the questions together. On Question No. 7 (a) i.e. Whether the Central Commission has incorrectly disallowed IDC and IEDC for delay in commissioning of Asset due to factors beyond the control of the Appellant? and on Question No. 7 (b) i.e. Whether the findings of the Central Commission on the demeanor of the Appellant in obtaining the clearance from Railway and Forest Department is incorrect?, we decide as follows:
- c) In order to analyse the questions of law raised by the Appellant, there is need to analyse the related provisions of the Tariff Regulations, 2009, Appellant's submissions before the Central Commission related to its tariff petition for the Asset, response of the Appellant to the queries raised by the Central Commission and decision of the Central Commission in the Impugned Order.
- d) Let us first analyse the related provisions of the Tariff Regulations, 2009. The relevant extract from Regulation on 7 of the said Regulations is reproduced below:

“Capital Cost

.....
.....

(2) The capital cost admitted by the Commission after prudence check shall form the basis for determination of tariff:

Provided that in case of the thermal generating station and the transmission system, prudence check of capital cost may be carried out based on the benchmark norms to be specified by the Commission from time to time:

Provided further that in cases where benchmark norms have not been specified, prudence check may include scrutiny of the reasonableness of the capital expenditure, financing plan, interest during construction, use of efficient technology, cost over-run and time over-run, and such other matters as may be considered appropriate by the Commission for determination of tariff:

.....
.....

From the above it can be seen that the above provision of Tariff Regulations, 2009 provides for admission of capital cost for determination of tariff, by the Central Commission after prudence check, which also includes prudence check on cost over - run and time over - run.

- e) Now let us analyse the queries raised by the Central Commission vide its letter dated 18.2.2013 and response submitted by the Appellant regarding time overrun of 7 months due to delay in Railway/ Forest Clearance. The Central Commission has raised the following queries related to delay in Railway/ Forest Clearance. The relevant portion of the said letter is reproduced below:

“.....

vi) Justification along with the documentary evidence for delay of about 36 months for submission of application for Railway/Forest clearance.

.....

ix) Date of application for forest clearance by Forest Development Corporation of Maharashtra.”

From the above it can be seen that the Central Commission wanted to know along with documentary evidence justification for delay of about 36 from the IA date for submission of application by the Appellant for Railway/ Forest Clearance and specifically also the date on which the Appellant has made application for forest clearance by Forest Development Corporation of Maharashtra (FDCM).

By above queries for carrying out prudence check, the Central Commission wanted to ascertain whether there is any slackness on the part of the Appellant for getting the Railway/ Forest clearances in time.

- f) In response to the above queries, the Appellant has made the following submissions. The relevant extract of the submissions made by the Appellant is reproduced below:

“With regard to query VI: It is submitted that the reasons for delay are:

(a) Delay in getting Railway Clearances:

The line was passing through the Railway land and required permission of Railway Board for erection of towers on

Railway land. The proposal was to be concurred by Railway Board before approval of Executive Director, Land & Amenities and Ministry of Railway. Accordingly, the proposal was submitted by the Petitioner to Sr. DE, SECR, Raipur on 06.05.2009. After, a lot of persuasion, the provisional approval for erection of 400 kV D/C line was accorded on 24.12.2012 by Railways and with the tremendous efforts line work was completed by the petitioner by 31.12.2012.

(b) Delay in getting forest clearance in Chhattisgarh and Maharashtra:

The Transmission line was passing through the forest and wildlife corridor which requires approval from MOEF along with clearances from National Tiger Conservation Authority (NTCA) & other Govt. authorities. As a process, on finalisation of route of Transmission line, an Environmental Assessment is being carried out with Forest officials that certify that the final route selected involves the barest minimum use of forests. Subsequently forest proposal is submitted for approval of concerned Authorities at State & Central level based on type and area of forest involved.

Forest clearance in Chhattisgarh:

On completion of detailed survey, the application for forest clearance, for Chhattisgarh portion was submitted for total area of 15.37 Hectare (in line length of 3.34 km). The first stage approval was accorded on 31.5.2010 (approximately after 15 months from the date of application) by RMOEF, Bhopal stimulating various conditions mandating deposit of

the requisite amounts including undertakings for compliance of guidelines. Accordingly payments were deposited by Petitioner and on complying with all the terms & conditions and on submission of undertakings as stipulated in stage- 1 approval, the 2nd stage and final approval was issued on 09.03.2011 (approximately after 28 months from the date of application and after eight months from the scheduled date of completion) by RMOEF, Bhopal. On second stage approval, the cost of tree cutting deposited and approval was given in May 2011 for tree cutting.

Forest clearance in Maharashtra:

On completion of detailed survey, the application for forest clearance, for Maharashtra portion was submitted for total area of 100.9 Hectare (in line length of 21.94 kms). The proposal involved 80.90 Hectare in forest division of Gondia and 20.0 Hectare under area of Forest Development Corporation of Maharashtra (FDCM).

.....

Accordingly the 1st stage was issued on 30.4.2012 Bhopal stipulating various conditions

.....

On complying with all the terms & conditions and on submission of undertakings as stipulated in stage-1 approval, the approval was obtained on 17.9.2012 for second and final stage.

Since the line was passing through the protected area/eco-sensitive zone and the proposed land being within the 10 kms of boundary of protected reserve, Tree felling permission had also to be taken from Hon'ble High Court Maharashtra as per the directives of the Court.

.....

After permission of Hon'ble Court, Petitioner started construction activities in forest area and completed the work and successfully charges the line on 31.12.2012 and declared under commercial operation from 01.01.2013.

From the above it is evident that in spite of Petitioner's efforts for obtaining forest clearances in time, the entire process of forest clearances was completed in November '2012 which is beyond the control of Petitioner. Therefore, Hon'ble Commission may kindly condone the delay in commissioning of the asset."

.....

.....

With regard to query IX: It is submitted that the Date of application for forest clearance by Forest Development Corporation of Maharashtra is 17.10.2007."

From the above it is clear that the Appellant has not addressed to the query of the Central Commission regarding reasons for delay of about 36 months in submission of application for Railway/ Forest Clearance and has focussed on the issue how the delay in obtaining the said clearances have happened.

- g) Now let us analyse the Impugned findings of the Central Commission. The relevant portion from the Impugned Order is reproduced below:

“15. We have considered the submissions of the petitioner and the respondent. The petitioner has initially submitted in the petition that the proposal for railway clearance was submitted on 6.8.2009 whereas in its subsequent affidavit dated 19.9.2013, the petitioner has submitted that the proposal for railway clearance was submitted on 6.5.2009. It has not submitted reasons for filing the application for Railway clearance after 34 months of IA. Instead, the petitioner has attributed the time over-run for the delay in getting railway and forest clearance. The petitioner has also not provided any documentary evidence to show that it made the application for forest clearance to Maharashtra forest authorities on 17.10.2007. However, from the chronology of the events, it is evident that the petitioner has submitted complete set of documents to the forest authorities on 30.11.2009 and got Stage-I clearance on 30.4.2012 and Stage-II clearance from MoEF, New Delhi on 17.9.2012 for Maharashtra portion. It is also observed that the petitioner started correspondence with the State government of Chhattisgarh for forest clearance on 29.8.2008. Stage-I approval was received on 31.5.2010 and Stage-II approval was received from MoEF, New Delhi on 9.3.2011.

16. While the petitioner is seeking condonation of delay, citing uncontrollable factors, analysis shows that the petitioner was not prudent in the activities which were under its domain. Timely submission of application for clearance from Forest and Railway Authorities are activities which were under the control of the petitioner, and as stated above, the petitioner, even after being asked to submit reason for approaching Railway/forest authorities so late for these clearances, has not submitted the same and instead, reiterated the reasons for delay in clearance. Many of the activities in transmission projects are performed concurrently. While the work cannot be done in the areas requiring forest and railway clearance, execution of work can be continued in the areas not requiring any clearance. The petitioner has not given detailed break-up of activities in the areas not requiring any clearance and how the forest and railway clearance was critical activities. Sequencing and time line of various activities can only enable assessment of admissibility of time over-run.

17. As regards forest and railway clearances, they are meant for few locations only and the petitioner could have undertaken other works simultaneously. Out of the total line length of 370.565 km, the forest clearance was required only for line length of 3.34 km and 21.94 km in Chhattisgarh and Maharashtra respectively. There was no hindrance in taking up the work in the remaining portion of line length of 370.565 km and completing the same. The petitioner has not given documents to show that the delay in getting the

aforementioned clearances obstructed the work in such a manner as to cause delay in the completion of work envisaged in the scope of works in the instant petition. The petitioner has not further explained the reason for approaching the authorities for forest and railway clearance so late. As such we are not inclined to agree with the petitioner's contention that the time over-run is attributable to the delay in getting forest and railway clearance."

From the above it is clear that the Central Commission while denying time overrun on account of delay in getting Railway/ Forest clearances has held that the Appellant has not placed on record the reasons for delay/ documentary evidence in making application before appropriate authorities.

The Appellant has failed to explain the delay of about 36 months in specific terms with documentary evidence for making application before Railway/ Forest authorities before the Central Commission. Even on query vide letter dated 18.2.2013 from the Central Commission the Appellant vide its affidavit dated 18.9.2013 simply re-iterated that there was delay in getting clearances from the Railway/ Forest authorities and made the same submissions as it did in the petition.

- h) Based on the discussions as above, the submissions made by the Appellant, the Central Commission's query to Railway/ Forest clearance we conclude as below:

- i. Railway Clearances (Final clearances granted by Railway authorities on 24.12.2012):

From the perusal of the Impugned Order, it is clear that the Central Commission has taken 34 months from 6.5.2009 (actual date) and not from 6.8.2009 while seeking explanation for not submitting reasons for filing the application for Railway clearance after 34 months of IA date i.e. 24.7.2006. We observe that the Appellant has not explained the delay of said 34 months in making the application before Railway authorities as sought by the Central Commission. The Appellant rather submitted that there was delay in grant of clearance by Railways. Accordingly, the Appellant has lost the opportunity for explanation of specific reasons (if any) beyond its control before the Central Commission for carrying out prudence check.

- ii. Forest Clearance in State of Chhattisgarh (Final approval for tree cutting accorded in May 2011):

The Appellant has made application for registration of land diversion proposal with Chhattisgarh Government on 29.8.2008. The Central Commission has observed that the Appellant has not submitted any evidence on record and explanation for delay of more than two years in submitting application for registration after the investment approval dated 24.7.2006. Accordingly, the Appellant has lost the opportunity for explanation of specific reasons (if any)

beyond its control before the Central Commission for carrying out prudence check.

- iii. Forest Clearance in State of Maharashtra (Approval for tree felling by Bombay High Court on 30.11.2012):

The Appellant has submitted that preliminary application to DCF, Gondia for permission for tree enumeration and survey of forest area measuring 80.9 hectares was submitted on 20.8.2007. The Central Commission has held that the Appellant has not submitted any evidence in support of submission of its application for forest clearance before the authorities on 17.10.2007. The Central Commission before this Tribunal has submitted that the Appellant has not made any specific explanation for delay of more than one year in submitting preliminary application after the IA which is correct. However, there is no such observation by the Central Commission regarding this in the Impugned Order. The Central Commission in the Impugned Order has held that the Appellant has submitted the complete set of documents to the forest authorities only on 30.11.2009 for obtaining forest clearance. As per the Central Commission this could have been done on 2.3.2009 when the Appellant submitted proposal to DCF, Gondia for forest clearance. Thus the Central Commission has carried out prudence check for the delay on this aspect also. The Appellant has lost the opportunity for explanation of specific reasons (if any) beyond its control before the Central Commission for not giving reasons for delay in submission of application

before Forest authorities for the purpose of carrying out prudence check.

- i) The Appellant has also submitted that regarding Railway Clearance there is specific requirement to follow the 1987 Regulations of the Railways. The Central Commission has contested that no such submissions were made by the Appellant before it. This amounts to bringing additional facts before us which were not available before the Central Commission while deciding the petition.

- j) Further, the Appellant has also submitted some other orders in Petition Nos. 218/TT/2016 & 284 of 2010 of the Central Commission wherein the Central Commission has recognised minimum time required for getting Forest/ Railway Clearances. In the present case the Forest/ Railway clearances were not available to the Appellant in the said timeframe as indicated by the Central Commission in other orders. However, the ground for not condoning the delay of 7 months was related to non-explanation and not producing any evidence for initial delay/ making delayed application before the concerned authorities. Hence, the reliance of the Appellant on the other orders of the Central Commission do not survive.

- k) The Appellant has also referred to this Tribunal's judgement dated 15.03.2017 in Appeal no. 127 of 2015, PGCIL Vs. Central Electricity Regulatory Commission and Ors. regarding providing an opportunity to place the necessary information on the record before the Central Commission. On this issue we observe that the

present case and the case in Appeal No. 127 of 2015 are different. In the present case the Central Commission vide its letter dated 18.2.2013 has clearly asked the Appellant to provide justification along with the documentary evidence for delay of about 36 months for submission of application for Railway/Forest clearance which it failed.

- l) From the above discussions, it emerges that the activity on the critical path was Railway crossing. Railway clearance was granted to the Appellant on 24.12.2012. Forest clearance/ permission for felling of trees in the State of Maharashtra was granted to the Appellant on 30.11.2012. The Appellant has submitted that based on delay of 53.5 months on account of permission of felling of trees in the State of Maharashtra the said delay of 7 months needs to be condoned. We observe that though the Appellant has made its first communication with forest authorities in the State of Maharashtra in August, 2007 but the activity on critical path was Railway crossing clearance for which it has applied at a very later stage in May, 2009 and has also failed to submit the reasoning/ supporting documents for prudence check as called for by the Central Commission vide letter dated 18.2.2013. Accordingly, this contention of the Appellant is also not sustainable.
- m) In view of the foregoing discussions, we are of the considered opinion that it is the responsibility of the Appellant to provide all the relevant details available with it as sought by the Central Commission during the hearing of the tariff petition before the Central Commission. The Appellant has failed to do the same before the Central Commission rather it focussed only on how the

delays were caused by the Railway/ Forest authorities in granting the clearances. Had the Appellant acted in time for making various applications to get the clearances further delay of 7 months would have been avoided. Accordingly, we are of the considered opinion that the Central Commission has rightly held that the said time over-run of 7 months is attributable to the Appellant and not due to delay in getting forest and railway clearance.

n) Accordingly, the issues raised by the Appellant are decided against it.

ORDER

We are of the considered opinion that the issues raised in the present Appeal have no merit as discussed above.

The Impugned Order dated 12.5.2015 passed by the Central Commission is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **20th day of November, 2017.**

(I. J. Kapoor)
Technical Member

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(Mrs. Justice Ranjana P. Desai)
Chairperson

REPORTABLE/NON-REPORTABLE

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