APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 151 of 2015& IA No.250 of 2015, 55 of 2017 & 538 of 2015

Dated : 04th October, 2018

PRESENT: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF :

Bharatiya Nabhikiya Vidyut Nigam Limited,
(BHAVINI), Registered Office : 51,
Montieth Road, Egmore,
Chennai - 600 008. .....Appellant

VERSUS

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

2. Karnataka Power Transmission Corporation Limited,
(KPTCL), Kaveri Bhavan,
Bangalore-560 009

3. Transmission Corporation of Andhra Pradesh Limited,
(APTRANSCO), Vidyut Soudha,
Hyderabad-500 082

4. Kerala State Electricity Board (KSEB),
Vaidyuthi Bhavanam, Pattom,
Thiruvananthapuram-695 004

5. Tamil Nadu Generation and
Distribution Corporation Limited,
(Formerly Tamil Nadu Electricity Board-TNEB),
NPKRR Maaligai, 800, Anna Salai,
Chennai-600 002

6. Electricity Department,
Govt. of Goa, Vidyuti Bhawan,
Panaji, Goa-403 001

7. Electricity Department,
Govt. of Pondicherry,
Pondicherry-605 001

8. Eastern Power Distribution Company
of Andhra Pradesh Limited (APEPDCL),
Seethmmadhara, Vishakhapatnam,
Andhra Pradesh -530016.

9. Southern Power Distribution Company
of Andhra Pradesh Limited, (APSPDCL),
Srinivasasa Kalyana Mandapam Backside,
Tiruchanoor Road, Kesavayana Gunta,
Tirupati-517 501, Chittoor District, Andhra Pradesh

10. Central Power Distribution Company
of Andhra Pradesh Limited (APCPDCL),
Corporate Office, Mint Compound,
Hyderabad-500 063, Andhra Pradesh

11. Northern Power Distribution Company
of Andhra Pradesh Limited, (APNPDCL),
Opposite NIT Petrol Pump,
Chaitanyapuri, Kazipet,
Warangal-506 004, Andhra Pradesh

12. Bangalore Electricity Supply Co. Limited, (BESCOM),
Corporate Office, K.R. circle,
Bangalore-560 001, Karnataka

13. Gulbarga Electricity Supply Co. Limited, (GESCOM),
Station Main Road, Gulbarga-585 1052,
Karnataka-585102.

14. Hubli Electricity Supply Co. Limited (HESCOM),
Navanagar, PB Road, Hubli-580 025,
Karnataka-580025.

15. Mangalore Electricity Supply Co. Limited (MESCOM)
MESCOM Corporate Office,
Paradigm Plaza, AB Shetty Circle,
Mangalore-575 5001, Karnataka

16. Chamundeswari Electricity Supply Corporation Limited,
(CESC), # 927, L J Avenue, Ground Floor,
New Kantharaj Urs Road, Saraswatipuram,
Mysore-570 009, Karnataka ….Respondents

Counsel for the Appellant(s) **:** Mr. Sumit Goel
Ms. Tanya Chaudhury
Mr. Manu Bajaj
Ms. Aishwarya Dash
Ms. Sonal Gupta

Counsel for the Respondent(s) **:** Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Mr. Shubham Arya for R-1

Mr. Vallinayagam
Ms. Aamali for R-5

Mr. K.S. Dhingra for R-17

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The Appellant assailing the correctness of the impugned order dated 29.04.2015 passed in Petition No. 105/TT/2012 on the file of Central Electricity Regulatory Commission (hereinafter called the '**Central Commission**') filed this Appeal wherein the Central Commission has decided the transmission tariff of transmission assets established by the Respondent No.1 (Powergrid).

2. Brief Facts of the Case :-

2.1 The Appellant i.e Bhartiya Nabhikiya Vidyut Nigam Ltd. (hereinafter "BHAVINI" or "the Appellant") is a Company registered under the Companies Act, 1956 within the meaning of Companies Act, 1956, wholly controlled by Government of India, established in 2003 in Chennai. It is responsible for the construction, commissioning and operation of the Fast Breeder Reactors (FBRs) envisaged as part of the country's three stage nuclear power programme.

2.2 BHAVINI is under administrative control of Department of Atomic Energy (DAE). Once the first breeder reactor, called Prototype Fast Breeder Reactor (PFBR) goes into commercial power generation, BHAVINI will be the second power utility in India after Nuclear Power

Corporation of India (NPCIL), to use nuclear fuel sources to generate power.

2.3 The Respondent No.1, Power Grid Corporation of India (Power Grid) is a Government Company within the meaning of Companies Act, 1956. In exercise of powers under sub-section (1) of Section 38(1) of the Electricity Act, 2003, the Government of India has declared the Respondent No.1 as Central Transmission Utility (CTU). The Respondent No.1 being CTU is deemed to be a transmission licensee under Section 14 of the Electricity Act, 2003.

2.4 The Ministry of Power, Government of India has made a tentative allocation, vide its letter, dated 09.06.2003 for the distribution of the power of the Unit of the Appellant. However, no final decision has been taken thereof by the Government of India as to how the power to be generated by the unit in question is to be shared.

2.5 On 22.09.2005, the Standing Committee on Power System Planning in its 21st meeting, finalised the following transmission system for PFBR Evacuation system:

(i) Step-up voltage of 230 kV.

(ii) Transmission lines :-

(a) KPFBR-Kancheepuram 230 kV D/C Line

(b) KPFBR-Arani 230 kV D/C Line

(c) KPFBR-Sirucheri230 kV D/C Line

(d) KPFBR-MAPS 230 kV S/C (with one spare phase-cable link)

(iii) Requirement of 6 nos. 230 kV line bays at KPFBR for construction of three nos. 230 kV D/C lines to Kancheepuram, Arani and Sirucheri sub-stations of TNEB. Bay(s) for KPFBR-MAPS link by cable would be an additional requirement.

2.6 On 09.09.2008, the Appellant i.e. BHAVINI entered into an Indemnification Agreement with Power Grid Corporation of India Ltd. (POWERGID) to match the commissioning schedule of the generating units vis-a-vis the associated transmission of POWERGRID. The Schedule agreed for the purpose of Indemnification was signed between the POWERGRID and BHAVINI on 23.01.2009. As per the schedule, the Commissioning schedule of Power Project (Generating Unit) and Commissioning schedule of the Associated Transmission System (ATS) was November, 2011. The zero date for the purpose of Indemnification was 01.12.2011. As per the Agreement dated 23.01.2009, the Appellant (BHAVINI) had requested for advancement of the commissioning of one of the three lines on best efforts basis to May, 2011 to meet its pre-commissioning power requirement.

2.7 The transmission system was scheduled to be commissioned within 24 months from the date of investment approval (17.03.2010) i.e. by 16.03.2012 / 01.04.2012. The PGCIL scope of work covered under "Transmission System associated with Kalpakkam PFBR (500 MW)"in Southern Region is as follows:-

Transmission lines :-

(a) KPFBR-Kancheepuram 230 kV D/C Line

(b) KPFBR-Arani 230 kV D/C Line

(c) KPFBR-Sirucheri230 kV D/C Line

(Including Associated Bays) i.e.:

Extension of existing 230 KV TNEB sub stations at Kanchipuram, Arani and Sirucheri sub stations.

2.8 On 05.082011 Transmission Service Agreement was entered into between Appellant and Respondent No.1 to govern the inter-state transmission services including sharing of transmission charges and losses amongst the Designated ISTS Customers (DICs) and disbursing the transmission charges collected by Central Transmission Utility (CTU) to respective ISTS constituent.

2.9 On 15.09.2011, the Respondent No.1 filed a Petition seeking approval of the transmission tariff for (a) Kalpakkam PFBR-Sirucheri 230 kV D/C Line; (b) Kalpakkam PFBR-Arani 230 kV D/C Line; (c) Kalpakkam

PFBR-Kanchipuram 230 kV D/C Line under Transmission System associated with Kalpakkam PFBR (500 MW) in Southern Region, for tariff block 2009-14 based on the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009. The Respondent No.1 claimed transmission tariff for the instant assets from the anticipated date of commercial operation (DOCO).

2.10 The Respondent No.1 issued a notification, dated 30.11.2011 being SR-II : Comm l: 2011-2012:250. The notification reads as follows:

"It is hereby notified that the Kalpakkam-Sirucheri 230 KV D/C Transmission Line along with associated Bays & Equipment under Kalpakkam-PFBR Associated Transmissions system has been successfully commissioned. The above asset will be under commercial operation w.e.f. 01.12.2011.

The transmission charges for the above asset are payable from 01.12.2011 as being approved by CERC and the same will be communicated separately."

Also, the Respondent No.1 issued a notification, dated 29.03.2012 being SR-II: Comml: 2011-2012 :400. The notification reads as follows:-

"It is hereby notified that the Kalpakkam-Sirucheri 230 KV D/C Transmission Line along with associated Bays & Equipment under Kalpakkam-PFBR Associated Transmissions system has been successfully commissioned. The above asset will be under commercial operation w.e.f. 01.04.2012.

The transmission charges for the above asset are payable from 01.04.2012 as being approved by CERC and the same will be communicated separately."

2.11 On 29.03.2012, the Central Electricity Regulatory Commission (CERC) in exercise of its power fixed the provisional tariff. The CERC on

11.07.2012 modified its provisional tariff fixation order dated 29.03.2012. The relevant excerpts are reproduced hereunder for ready reference:

> *"The following sentence be added at the end of Para 6 of the order dated 29.03.2012 : The transmission charges of Kalpakkam PFBR-Sirucheri, D/C 230 kV Line from the date of commercial operation till the scheduled date of completion shall be borne by Bharatiya Nahikiya Vidyut Nigam Limited (BHAVINI) in accordance with the Annexure-I to the Indemnification Agreement, dated 9.9.2008 between BHAVINI and Power Grid Corporation India Limited." 2. The order dated 29.03.2012 remains unaltered in all other aspects:"*

2.12 Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) i.e. the Respondent No.5 herein filed its reply vide Affidavit dated 24.11.2011. The Respondent No.1 i.e. Power Grid Corporation of India Ltd. filed rejoinders to the reply filed by TANGEDCO, vide Affidavit, dated 21.08.2012. The lines of Asset-I and Asset-II i.e., Kalpakkam PFBR-Sirucheri and Kalpakkam PFBR – Arani 230 kV lines were commissioned on 1.12.2011 & 1.4.2012 respectively.

2.13 The Respondent No.1-POWERGRID issued a notification dated 24.09.2012 notifying that the Kalpakkam – Kancheepuram 230 KV D/c Transmission Line along with associated Bays & Equipment under Kalpakkam-PFBR Associated Transmission System has been successfully charged on 31.08.2012 and will be under commercial operation w.e.f. 01.09.2012 and the transmission charges are payable from 01.09.2012. However, associated bay at Kancheepuram end was

not ready whereby Appellant could not be in a position to evacuate its power through PFBR-Kancheepuam ATS.

2.14 Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) i.e. the Respondent No.5 herein filed another reply vide Affidavit dated 07.12.2012.

2.15 On 27.12.2012, the Appellant and the Respondent NO.1 entered into an agreement, where under it was agreed that :

"Kalpakkam-Sirucheri 230 KV D?C line is commissioned on 01.12.2011. BHAVINI shall bear and pay the full transmission charges as determined by CERC, for Kalpakkam-Sirucheri 230 KV D/C line from the Date of Commercial Operation of the line till this line becomes part of Regional Scheme. Thereafter, the transmission charges shall be shared by the beneficiaries, as per CERC Regulation (as issued from time to time)".

2.16 On 03.01 2013, the Appellant received a message from Superintending Engineer/LD&GO Tamil Nadu Transmission Corporation Ltd. (TANTRANSCO), requesting BHAVINI to close the 230 kV Kalpakkam PFBR-Sirucheri & 230 KV Kalpakkam PFBR-Arani lines to keep them in service to utilize them as part of network.

2.17 After getting necessary clearance from SRLDC, Bangalore both the lines i.e. the 230 kV Kalpakkam PFBR-Sirucheri & 230 kV Kalpakkam PFBR-Arani lines were taken in service on 07.01.2013. Ever since, these lines have been in constant service and are under the control of SRLDC/SRPC.

2.18 Since the lines of Asset-I and Asset-II are part of the Regional Scheme i.e. Southern Grid since 07.01.2013, any outage of these lines is to be discussed and approved in the Operation Coordination Committee (OCC) of the Southern Region Power Committee (SRPC). Unless it is approved in SRPC-OCC, the outage cannot be availed.

2.19 The Appellant had used Asset-I and Asset-II for its commissioning power for a total 58.68 hours since 07.01.2013 whereas the constituents of SRPC are said to have used the lines in question fully for grid power system management.

2.20 Though Asset-I and Asset-II had become part of the Regional Scheme since 07.01.2013, they were used for grid power system management on earlier instances also. An example for this is taking these Assets on line on 16.09.212 when 230 KV Kalivandapatti-Sirucheri line outage was availed. On the request of PGCIL & TANTRANSCO, the Appellant took Asset-I and Asset-II in service to restore the power supply to Sirucheri. The above instances indicate that the Asset-I and Asset-II are being used by TANTRANSCO and the Regional System since their very commissioning.

2.21 The CERC directed the Respondent No.1 to confirm the status of commissioning of Assets. The Respondent NO.1 in reply, vide Affidavit dated 13.08.2013 had submitted the details of the actual DOCO. The

details of scheduled and actual DOCO in respect of assets covered under the instant petition are as follows:-

Sl.No.	Description	Scheduled DOCO	Actual DOCO
1.	Kalpakkam PFBR-Sirucheri 230 kV D/C Line (Asset-I)	1.4.2012	1.12.2011*
2.	Kalpakkam PFBR-Arani 230 kV D/C Line (Asset-II)	1.4.2012	1.4.2012
3.	Kalpakkam PFBR-Kanchipuram 230 kV D/C Line (Asset-III)	1.4.2012	1.9.2012

*The Appellant, however, had requested for pre-ponement of Asset-I to May, 2011 vide letter dated 22.1.2009.

2.22 On 25.11.2013, the Appellant, filed a Review Petition seeking inter-alia the following reliefs:

"1. Review CERC order dated 29.03.2012 read with its order dated 11.07.2012 and order refund of Rs.1,43,22,477/- paid by BHAVINI to PGCIL, pursuant to the said order.

2. Order PGCIL to pay interest, at the rate as Commission may deem fit, from the date of payment of Rs.1,43,22,477/- to PGCIL by BHAVINI till the date of repayment by PGCIL."

2.23 The CERC vide its Record of Proceedings for the hearing dated 26.11.2013 directed the Appellant and the Respondent No.1 to submit copy of all the correspondences exchanged between them with regard to payment of transmission charges. The Appellant (BHAVINI) filed its submissions on 26.11.2013 and 31.12.2013. The Appellant raised issue

of payment of transmission charges of Kalpakkam PFBR-Sirucheri D/C 230 kV line. On 15.01.2014, the Respondent No.1 vide its affidavit in compliance with the Record of Proceedings dated 26.11.2013, stating that the total cost for all 3 Elements is Rs.12984.05 lacs.

2.24 The Central Commission directed the Respondent No.1 vide letter, dated 10.07.2014 to furnish the following information:

(1) How COD of Kalpakkam PFBR-Sirucheri 230 kV D/C line could be declared, when the plant has not been commissioned and the transmission line for evacuation of power from BHAVINI Station is not in regular use?

(2) How the assets included in the instant petition are being used?

(3) The petitioner has not commissioned the 230 kV Kalpakkam-Sirucheri D/C line as requested by BHAVINI in May, 2011. Why the transmission charges of this line is recovered from BHAVINI from the date of commercial operation (1.12.2011) to the scheduled date of completion (1.4.2012), since Indemnification Agreement provides for payment of IDC only?

2.25 The Respondent No.1 vide its Affidavit, dated 26.09.2014 submitted that as per the Investment Approval, the scheduled date of completion of the instant asset is 01.04.2012 and Asset-I was commissioned on 1.12.2011.

2.26 The CERC vide Record of Proceedings for the hearing dated 20.10.2014 directed the Respondent No.1 to furnish the following details by 11.11.2014:

"a) RPC and Standing Committee Approval-copy of minutes of the meetings;

b) Copy of BPTA signed with beneficiaries;

c) Whether the assets included in the instant petition have been included in POC charges, and if included, since when;

d) The provisions under which COD for the transmission line has been declared; and

e) How the assets included in the instant petition are being used?

2.27 The Commission had also directed the Petitioner to submit the status of the generating project and its expected unit wise date of commercial operation by 11.11.2014. The Respondent No.1 vide its Affidavit dated 13.11.2014 replied the queries of the CERC.

2.28 By way of Order, dated 29.04.2015, the CERC has directed BHAVINI to bear the transmission charges of Assets-I and II from the date of commercial operation to the commercial operation of its first unit of

generating station in line with Regulation 8(6) of Sharing Regulations. The operative part of the Order reads as follows:-

"We would like to review our directions in order dated 11.07.2012 in the light of Regulation 8(6) of the Sharing Regulations. Accordingly, as stated in para 17, BHAVINI shall bear the transmission charges of Assets-I and II from the date of commercial operation to the commercial operation of its first unit of generating station in line with Regulation 8(6) of Sharing Regulations. Thereafter, the assets shall be pooled in PoC as regional scheme. Our order dated 11.07.2012 stands revised accordingly."

2.29 Being aggrieved by the impugned order passed by the Central Commission, the Appellant herein felt necessitated to present this Appeal for our consideration.

3. QUESTIONS OF LAW:-

The Appellant has raised the following questions of law in the present appeal for our consideration:-

3.1 Whether in the absence of the approval of the Date of Commercial Operation (DOCO) under the second proviso of Regulation 3 (12)(c) of the 2009 Tariff Regulations, the very filing of the petition under Regulation 86 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 and Tariff Regulations, 2009 for the approval of the transmission tariff was maintainable?

3.2 Whether the DOCO can be determined by the CERC – that too, retrospectively from a date unilaterally declared by the Respondent No.1 as the DOCO – in a petition filed for the approval of the transmission tariff under Regulation 86 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 read with Tariff Regulations, 2009?

3.3 Whether the date of commercial operation (DOCO) can be determined in a manner which is contrary to the clear and unambiguous mandate of Regulation 3(12)(c) of Tariff Regulations, 2009?

3.4 Whether the CERC was justified in accepting that the date of commercial operation of Asset-I and II had been approved as 1.12.2011 and 1.4.2012 respectively merely because the CEA had given permission to energize since the lines were connected at both ends i.e. Kalpakkam end and Sirucheri/Arani and after it had categorically noticed that the Respondent No.1 i.e. Power Grid Corporation of India had unilaterally declared the commercial operation without the prior approval of the Commission?

3.5 Whether the second proviso to Regulation 3(12)(c) of the 2009 Tariff Regulations is mandatory in nature and any action taken contrary to the manner prescribed in the said regulation would be invalid and liable to be set aside?

4. <u>The Learned Counsel, Ms. Aishwarya Dash, appearing for the Appellant has filed the written submissions as follows</u>:-

4.1 On 09.09.2008, the Appellant i.e. BHAVINI entered into an Indemnification Agreement with Power Grid Corporation of India Ltd. (POWERGRID) to match the commissioning schedule of the generating units vis-a-vis the associated transmission system of POWERGRID, and on 23.01.2009 the Schedule agreed for the purpose of Indemnification (Annexure – I to the Indemnification Agreement) was signed between the POWERGRID and BHAVINI. As per the schedule, the Commissioning schedule of Power Project (Generating Unit) and Commissioning schedule of the Associated Transmissions System (ATS) was November, 2011. The Zero date for the purpose of indemnification was 01.12.2011. As per the Annexure, dated 23.01.2009 of the Indemnification Agreement, the Appellant (BHAVINI) had requested for advancement of the commissioning of one of the three lines on best efforts basis to May, 2011 to meet its pre-commissioning evacuation requirement of Kalpakkam.

4.2 On 15.09.2011, the Respondent No. 1 filed a Petition seeking approval of the transmission tariff for (a) Kalpakkam PFBR-Sirucheri 230 kV D/C Line;

(b) Kalpakkam PFBR-Arani 230 kV D/C Line; (c) Kalpakkam PFBR-Kanchipuram 230 kV D/C Line under Transmission System associated with Kalpakkam PFBR (500 MW) in Southern Region, for tariff block 2009-14 based on the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009. It is pertinent to mention that the Respondent No. 1 claimed transmission tariff for the instant assets from the anticipated date of commercial operation (DOCO).

4.3 The Respondent No. 1 unilaterally issued a notification, dated 30.11.2011 being SR-II: Comml: 2011-2012:250 notifying "*that the Kalpakkam-Sirucheri 230 KV D/C Transmission Line along with associated Bays & Equipment under Kalpakkam-PFBR Associated Transmission system has been successfully commissioned. The above asset will be under commercial operation w.e.f. 01.12.2011.*"

4.4 The Respondent No.1 filed a petition for the determination of transmission tariff from the anticipated date of commercial operation till 31.03.2014 under Regulation 86 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999. The provisional tariff was fixed vide order dated 29.03.2012. When the Kalapakkam-Sirucheri line allegedly became ready for commissioning, PGCIL knew very well that the Kalapakkam PFBR was not ready. Instead of approaching the CERC under the second proviso of Regulation 3(12)(c)

of the CERC (Terms and Conditions of tariff) Regulations, 2009 for determination of the Date of Commercial Operation ('DOCO'), they unilaterally declared the DOCO as 01.12.2011.

4.5 On 29.03.2012, the Respondent No. 1 again in violation of the second proviso to the said Regulation 3(12)(c) issued a notification claiming that the Kalpakkam-Arani 230 KV D/C Transmission Line along with associated bays and equipment under Kalpakkam-PFBR Associated Transmission system had been successfully commissioned; that the above asset would be under commercial operation w.e.f. 01.04.2012 and that the transmission charges for the above asset were payable from 01-04-2012 as being approved by CERC and the same would be communicated separately.

4.6 On 29.03.2012, the Central Electricity Regulatory Commission (CERC) in exercise of its power fixed the provisional tariff. The relevant excerpts are reproduced hereunder for ready reference:

> *"6. With effect from 1.7.2011, the provisional tariff allowed in this order shall be applicable from the date of commercial operation of the transmission system and the billing, collection and disbursement of the transmission charges shall be governed by Provisional orders/PGCIL/SR Page 7 the provisions of Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010.*
>
> *7. The provisional transmission charges allowed in this order shall be subject to adjustment as per Regulation 5 (4) of the 2009 regulations."*

4.7 The CERC on 11.07.2012 modified its provisional tariff fixation order dated 29.03.2012. The relevant excerpts are reproduced hereunder for ready reference:

> *"The following sentence be added at the end of Para 6 of the order dated 29.3.2012: "The transmission charges of Kalpakkam PFBR – Sirucheri, D/C 230 kV Line from the date of commercial operation till the scheduled date of completion shall be borne by Bharatiya Nabhikiya Vidyut Nigam Limited (BHAVINI) in accordance with the Annexure-I to the Indemnification Agreement, dated 9.9.2008 between BHAVINI and Power Grid Corporation India Limited." 2. The order dated 29.3.2012 remains unaltered in all other aspects".*

4.8 The Annexure VI to the aforementioned order dated 29.03.2012 provided for the provisional tariff from the anticipated DOCO for **Asset I** Kalpakkam PFBR-Sirucheri, 230 kV D/C line : **1.11.2011.**

> **Combined Asset I, II, III** (a) Kalpakkam PFBR-Sirucheri, 30 kV D/C line; (b) Kalpakkam-Arani, 230 kV D/C line; and Kalpakkam PFBR-Kanchipuram, 230 kV D/C line: **1.3.2012**

4.9 Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) i.e. the Respondent No. 5 herein filed its reply vide Affidavit, dated 24.11.2011, contesting *inter-alia* the claim of Powergrid-Respondent No. 1 to the additional RoE of 0.5%. The Respondent No. 1 filed rejoinder to the reply filed by TANGEDCO, vide Affidavit dated 21.08.2012, wherein while seeking to justify its claim to the additional RoE of 0.5%, Powergrid stated *inter alia* that *"The Investment Approval is on 17.03.2010, hence the commissioning schedule comes to 16.03.2012 (DOCO as 01.04.2012 against which Kalpakkam PFBR-Sirucheri, D/C*

230 kV Line has been declared under commercial operation on 01.12.2011 and the other two lines namely Kalpakkam PFBR- Arani 230 Kv D/C Lines and Kalpakkam PFBR-Kanchipuram 230 Kv D/C lines are under advance stage of commissioning…"

4.10 The statement that the line Kalpakkam PFBR- Arani was under the advance stage of commissioning questions the correctness of the very notification dated 29.03.2012 wherein the Power grid claimed that the Kalpakkam PFBR- Arani Associated Transmission System had been successfully commissioned and that the said asset(line) would be under commercial operation w.e.f. 01.04.2012.

4.11 Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) i.e. the Respondent No. 5 herein filed another reply vide Affidavit, dated 07.12.2012.

4.12 On 27.12.2012, the Appellant and the Respondent No. 1 entered into an agreement , where under it was agreed that:

> *"Kalpakkam-Sirucheri 230KV D/C line is commissioned on 01.12.2011.*
>
> *BHAVINI shall bear and pay the full transmission charges as determined by CERC, for Kalpakkam-Sirucheri 230KV D/C line from the Date of Commercial Operation of the line till this line becomes part of Regional Scheme. Thereafter, the transmission charges shall be shared by the beneficiaries, as per CERC Regulation (as issued from time to time)."*

4.13 The claim made by the Power grid that the actual DOCO of Kalpakkam-Arani line was 01.04.2012 was contrary to their rejoinder affidavit dated 21.08.2012. As far as the Kalpakkam-Kancheepuram line is concerned, although Power Grid by notification dated 24.09.2012 claimed that the said ATS (asset) was under commercial operation w.e.f. 01.09.2012, the CERC by the order impugned in the present appeal has rejected the same. Further, the said claim was given up by PGCIL as demonstrated vide the Minutes of the 19th and 20th Meeting of the Technical Coordination of the Southern Regional Power Committee held at Hyderabad on 27.09.2012 and 28.09.2012. **The said minutes read as under:**

> *"27.1.4. Energisation of 230 kV D/C Kalpakkam-Kancheepuram Transmission Lines under Kalpakkam PFBR Scheme*
>
> *27.1.4.1 In the Meeting, Dircetor (O), TRATRANSCO said that CoD was to be declared in consultation with the States as well as after SRPC approval, as decided in the previous SRPC meeting."*
>
> *"29.1.4. Energisation of 230 kV D/C Kalpakkam-Kancheepuram Transmission Lines under Kalpakkam PFBR Scheme*
> *In the TCC Meeting held the previous day, TCC had recommended that the CoD could be agreed.*
> *The Committee approved the above."*

4.14 It is relevant to point out that after the 19th and 20th Meeting of the Technical Coordination of the Southern Regional Power Committee held at Hyderabad on 27.09.2012 and 28.09.2012, Power-grid has not produced anything on record to show that any other DOCO was fixed by

Power-grid in consultation with the states as well as after the approval of SRPC.

4.15 On 25.11.2013, the Appellant, filed a Review Petition seeking inter-alia the following reliefs:

> *"1. Review CERC order dated 29.03.2012 read with its order dated 11.07.2012 and order refund of Rs. 1,43,22,477/- paid by BHAVINI to PGCIL pursuant to the said order.*
>
> *2. Order PGCIL to pay interest, at the rate as Commission may deem fit, from the date of payment of Rs. 1,43,22,477/- to PGCIL by BHAVINI till the date of repayment by PGCIL."*

4.16 The Appellant (BHAVINI) filed its submissions on 26.11.2013 and 31.12.2013. The Appellant raised issue of payment of transmission charges of Kalpakkam PFBR-Sirucheri D/C 230 kV line.

4.17 The State Commission directed the Respondent No. 1, vide letter, dated 10.07.2014 to furnish the additional information in response to which the Respondent No. 1 *vide* its Affidavit dated 26.09.2014 submitted that as per the Investment Approval the scheduled date of completion of the instant assets is 01.04.2012 and Asset-1 was commissioned on 1.12.2011.

4.18 The following issues were *inter-alia* raised by the parties:

(a) The Petitioner has not fulfilled the conditions for declaration of DOCO including prior approval of the Commission as prescribed in Regulation 3(12)(c) of the 2009 Tariff Regulations.

(b) The petitioner may be directed to submit the dates of test charging, trial operation and regular use of the subject lines before finalising the DOCO for the subject lines. The date of commercialization of the subject lines shall be finalised in par with the date of commercialisation of the Kalpakkam PFBR unit so that the beneficiaries are not burdened with transmission tariff of idly charged lines.

4.19 By way of the Impugned Order dated 29.04.2015, the CERC has determined the transmission tariff with respect to Asset I and Asset II i.e. Kalpakkam-Sirucheri and Kalpakkam-Arani lines. As far as Asset III i.e. Kalpakkam-Kancheepuram is concerned the CERC has declined to fix the tariff.

4.20 Submission I: <u>DOCO was not declared in terms of the requirements and mandate of Regulation 3(12)(c) of the 2009 Tariff Regulations</u>

a) The Commission after noticing that as per Regulation 3(12)(c) of the 2009 Tariff Regulations, the Respondent No. 1 i.e. Power Grid Corporation of India Ltd. should have approached the Commission for approval of the date of commercial operation in case it was prevented from providing such service for reasons not attributable to it and that the Respondent No. 1 had declared the commercial operation without the prior approval of the Commission;

nonetheless erred in thereafter holding that the commercial operation of Assets-I and II had been approved as 1.12.2011 and 1.4.2012 respectively merely because the CEA had given permission to energise since the lines were connected at both ends *i.e.* Kalpakkam end and Sirucheri/Arani. This is not the requirement of the regulations. Regulation 3(12)(c) of the 2009 Tariff Regulations reads as follows:

"Date of commercial operation" or 'COD' means:
(c) in relation to the transmission system, the date declared by the transmission licensee from 0000 hour of which an element of the transmission system is in regular service after successful charging and trial operation;

Provided that the date shall be the first day of a calendar month and transmission charge for the element shall be payable and its availability shall be accounted for, from that date:

Provided further that in case an element of the transmission system is ready for regular service but is prevented from providing such service for reasons not attributable to the transmission licensee, its suppliers or contractors, the Commission may approve the date of commercial operation prior to the element coming into regular service."

b) The second proviso to Regulation 3(12)(c) of the 2009 Tariff Regulations envisages a situation wherein an element of the transmission system is ready for regular service but is prevented from providing such service for reasons not attributable to the transmission licensee, its suppliers or contractors, in such a situation the Commission may approve the date of commercial

operation. It is submitted that in the present case, if the element of transmission system to be constructed by the Respondent No. 1 was ready, however, Respondent No. 1 was not able to provide such service, due to reasons not attributable to it, then the Respondent No. 1 ought to have approached the State Commission for the determination of the date of Commercial Operation under the second proviso to Regulation 3(12)(c).

c) The approval of the Commission is a mandatory requirement for the declaration of Date of Commercial Operation (DOCO) as the Commission has to satisfy itself of three conditions before approving the DOCO as per the decision this Hon'ble Tribunal (Appeal No. 123 of 2011), which has been affirmed by the Hon'ble Supreme Court in ***Power Grid Corporation of India vs. Punjab State Power Corporation Limited and Ors***., (2016) 4 SCC 797.

d) The above decision of the Hon'ble Supreme Court has been relied upon by this Hon'ble Tribunal in the case of ***Power Grid Corporation of India Limited vs. CERC & Ors.,*** Appeal No. 198 of 2015 decided on 18.01.2018 (para 13(i)), wherein this Hon'ble Tribunal held that the second proviso to regulation 3(12)(c) was not applicable as the asset was not ready for regular use.

e) In view of the findings of the Hon'ble Supreme Court, there is a duty cast upon the Commission to ensure that the above-cited 3 conditions are met before the DOCO is declared by it. However, in the present case, the Respondent No. 1 has unilaterally declared the DOCO, without approaching the Commission as mandated by the Regulations.

f) It is settled law that if the manner of doing a particular act is prescribed under any statute, such act must be done in that manner prescribed under the statute, but not otherwise **(Ref: *Ram Phal Kundu vs. Kamal Sharma*, *(2004) 2 SCC 759 para 12***). This Tribunal has also held in ***Essar Power Ltd. vs. Uttar Pradesh Electricity Regulatory Commission,*** reported as 2012 ELR (APTEL) 182 at para 118 that the Commission is required to act consistent with the provisions of the Electricity Act, 2003 and when the Act/ regulations vest power in the authority to be exercised in a particular manner then the said authority has to exercise it only in that manner provided in the statute and not otherwise. This decision has been further relied upon by this Hon'ble Tribunal in the case of **Wardha Power Co. Ltd. vs. Maharashtra Electricity Regulatory Commission** reported as 2015 ELR (APTEL) 779 (para 42).

g) The second proviso to Regulation 3(12)(c) of the 2009 Tariff Regulations is mandatory in nature and any action taken contrary to the manner prescribed in the said regulation would be invalid and liable to be set aside. In a case where the Commission is satisfied that the said three conditions are fulfilled, then it has to declare the DOCO; and in case where it is not satisfied as to the fulfillment of the said three conditions, then it must decline to declare the DOCO. Such satisfaction has to be arrived at independent of the energisation certificate issued by the CEA. The duty to ascertain as to whether the three conditions are fulfilled or not for the declaration of DOCO is a statutory duty, and hence, cannot be abdicated or delegated.

h) The above definition has been introduced after in contrast to the position as under the Central Electricity Regulatory Commission (Terms and Condition of Tariff) Regulations, 2004 under which 'Date of Commercial Operation' for the purpose of Inter-State transmission was defined under Regulation 49 (ix) as under:

"(ix) 'Date of Commercial Operation' or 'COD' means the date of charging the project or part thereof to its rated voltage level or seven days after the date on which it is declared ready for charging by the transmission licensee, but is not able to be charged for the reasons not attributable to the transmission licensee, its suppliers or contractors.

Provided that the date of commercial operation shall not be a date prior to the scheduled date of commercial operation mentioned in the implementation agreement or the transmission service agreement or the investment approval, as the case may be, unless mutually agreed by all the parties."

i) The Respondent No. 1 could have notified a date of commercial operation under the 2004 Regulations in case the project is not being charged for reasons not attributable to the Respondent No. 1. However, this position has been altered by the 2009 Regulations, which categorically provide that in case the transmission service is not being provided for reasons not attributable to the transmission licensee, then Respondent does not have the freedom of unilaterally fixing a date of commercial operation. On the other hand, this power has been expressly provided to the Ld. Commission. Further, the Commission may or may not approve the date of commercial operation. Thus, as per Regulation 3(12)(c) of the 2009 Tariff Regulations, the Respondent No. 1 should have approached the Commission for approval of the date of commercial operation. The Respondent acted on the contrary and unilaterally fixed its own date of commercial operation, without approaching the Ld. Commission for approval of the date of commercial operation and thereby went against the scheme of the CERC Regulations.

(j) The State Commission is bound to follow the regulations framed by it in exercise of its power under Section 178 of the Electricity Act, 2003. **(*PTC India Ltd. vs. Central Electricity Regulatory Commission,*** reported as (2010) 4 SCC 603) (para 49, 53-54)).

(k) The power to be exercised by the Commission is after ensuring that the conditions as stipulated by the Hon'ble Supreme Court are met. Thus, the objective behind the prescription of the mandatory provision of the second proviso of Regulation 3(12)(c) of the 2009 regulations is in the public interest, i.e. the consumers interest.

(l) Admittedly, the DOCO was not declared in terms of the requirements and mandate of Regulation 3(12)(c) of the 2009 Tariff Regulations.

Submission II: Regulation 8(6) does not have any application in the facts of the instant case

(i) The CERC relied upon Regulation 8(6) of the CERC (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010 to conclude that the Appellant would have to bear the transmission charges of Assets-I and II from the date of commercial operation to the commercial operation of its first unit of generating station in line with Regulation 8(6) of Sharing Regulations.

(ii) The CERC failed to appreciate that Sharing Regulations, 2010 did not have any application in the facts of the instant case in as much as the Respondent No. 1 had not fulfilled the conditions for declaration of DOCO including prior approval of the Commission as prescribed in Regulation 3(12)(c) of the 2009 Regulations, which was a mandatory requirement and a pre-requisite for the fixation of tariff. Any reference to or reliance upon Regulation 8(6) without determination of DOCO in terms of Regulation 3(12)(c) is contrary to the scheme of the Electricity Act, 2003 and the various Regulations framed there under. Further, the CERC failed to appreciate that as on date, the Unit of the Appellant cannot be considered to be an *inter-state generating station* as the subject lines and the unit itself does not service other States. As such, on these facts, Regulation 8(6) would have no application. The CERC thus committed grave error in law.

(iii) The expression "*inter-state generating station*" is defined to mean *"a Central/other generating station in which two or more states have shares and whose scheduling is to be coordinated by the Regional Load Dispatch Centre"*. As of today, no decision has been taken by the Government of India as to how the power to be generated by the unit in question is to be shared. Hence, the

conclusion arrived at by the CERC relying on Regulation 8(6) is entirely without basis and is thus erroneous.

(iv) None of the Respondents had relied upon the Regulation 8(6) either in their pleadings or in their submissions during the hearing before the CERC. The reliance on the said Regulation by the CERC in the impugned order has come as a huge surprise to the Appellant. If the CERC had given notice to the Appellant about its intention to rely on the said Regulation and had sought the Appellant's response to the same, the Appellant would have had an opportunity to point out the non-applicability of the said Regulation to the Appellant's unit in question. In any event, the Appellant would have moved an appropriate application under Regulation 20 for exemption from the rigour of the Regulation 8(6) setting out therein the reasons which lead to the non-commissioning and the delay in commencement of the commercial operation of the unit in question.

4.27 Submission III: <u>Finding as to usage of the instant lines is contrary to the factual position</u>

a) In the alternate and without prejudice to the aforementioned submission, the CERC erred in not considering that Asset – I and II were being used by the Respondent No. 5 i.e. TANGEDCO for the major part of the capacity of the same. In view of the same, the

Respondent No. 5 and other entities that use the subject transmission lines ought to have been directed to bear the transmission to the extent of their use.

b) The lines of Asset – I and Asset – II are in use and are part of the Southern Grid. The same is being used by the Respondent No. 5 i.e. TANGEDCO for drawl of power. The Transmission Lines installed by Respondent No. 1 for the Appellant are being utilized by Respondent No. 5 for transferring power flow from Arani to Sirucheri through the switchyard of the Appellant since Jan, 2013 till date. Due to the fact that the pre-ponement of the date for commissioning of Asset-I could not become a reality, the Appellant had to make an alternate arrangement for drawl of commissioning power from Madras Atomic Power Station.

c) The submission of the Respondent No. 1 in paragraph 12 of the impugned order, dated 29.04.2015 i.e. that the instant assets are being used for drawl of power by the Appellant i.e. BHAVINI herein for commissioning activities is contrary to the prevailing position.

d) In as much as the Respondent No. 1 could not advance the commissioning of the Kalpakkam PFBR-Sirucheri, D/C 230 KV transmission line, the Appellant had to make alternate

arrangements on its own and sourced the power from Madras Atomic Power Station (MAPS), Kalpakkam to meet its urgent need for the PFBR commissioning power. Further, the Appellant did not use Kalpakkam PFBR – Sirucheri, D/C 230 KV Line commissioned by the Respondent No. 1 during the period 01.12.2011 to 31.03.2012 at all.

e) Respondent No. 5 i.e. TANGEDCO has been using the subject lines for drawl of power, in terms of law and equity, the Respondent No. 5 should be directed to bear the consequent transmission charges for usage of the same. In the alternate, the Respondent No. 5 should in the very least be directed to share the transmission charges in proportion to actual usage of the subject lines by the Respondent No. 5 and the Appellant herein.

4.28 Submission IV: <u>The subject lines form part of a transmission scheme/project and would thus have to be clubbed for the purpose of tariff determination for tariff block 2009-14.</u>

(i) Admittedly, the date of commercial operation of Asset-III has not been approved. In such circumstances, the CERC erroneously came to the conclusion that only Asset-III was to be excluded for the purposes of collection of transmission charges.

(ii) That the CERC erred in declaring separate DOCOs for Asset I and II. The CERC failed to appreciate that the Agreement for Indemnification dated 09.09.2008 clearly stipulates as follows:

"*2. Indemnification*

a) In the event of delay in commissioning of generating units or Associated transmission Systems (ATS), as the case may be, the defaulting party shall indemnify the other party for such delays. In case the actual commissioning of Generating Unit(s) and ATS occurs beyond the mutually agreed Zero date, the actual date of commissioning of Generating units(s) or ATS, whichever is commissioned earlier shall be considered as the Zero date for the purpose of this agreement. The amount of interest during construction (IDC) including FERV and Govt. Guarantee fees if any, for the period of delay ("Indemnification Period") up to a maximum period of one year from the zero date, would be calculated by both the parties to this agreement and the lower of the two shall be the 'indemnification amount' required to be paid by the defaulting party to the other party."

A mere perusal of the above clause demonstrates that the project is not to be dissected for the purposes of commissioning or declaration of DOCO. Neither was the project envisaged to function in such a dissected manner, where its associated transmission systems were to function independently. This is abundantly clear from, the indemnification clause itself which makes reference to *Associated Transmission Systems (ATS).*

(iii) Further, Annexure 1 to the Indemnification Agreement dated 09.09.2008 entered into between the Appellant and the Respondent No. 1 provided as under **:**

"2. Commissioning Schedule of Associated Transmission System (ATS) –November, 2011

- *Kalpakkam-Sirucheri 230 kV D/C Line*
- *Kalpakkam-Kanchipuram 230 kV D/C Line*
- *Kalpakkam-Arani 230 kV D/C Line*
  (including associated bays)"

Admittedly, the Kalpakkam-Kanchipuram Line and the associated bays have not been commissioned and as such the ATS as a whole has not been commissioned.

(iv) The CERC vide para (a) and (b) (i), (ii) and (iii) of letter Ref. No. C-7/189(204)/2009-CERC, dated 23.10.2009 had decided the procedure for combining of assets for the purpose of Tariff determination for 2009-14 period as follows:-

"(a) Assets forming part of a transmission scheme/project would be clubbed for the purpose of tariff determination for tariff block 2009-14. Assets from two different projects would not be clubbed for the purpose of tariff determination.

(b) For the transmission scheme/projects completed fully and under commercial operation up to 31.03.2009:

(i) Elements of a transmission project commissioned within 2 years from the actual DOCO of first element will be combined and treated as stage I of that project. If any element of that project is commissioned after two years the same would be considered as part of next stage of that transmission project. Thus, the total transmission project commissioning will be divided in stages based on the date of commissioning of the individual assets. Maximum period of each stage will be two years.

(ii) The actual DOCO of last element of a stage of transmission scheme/project would be treated as the notional DOCO of combined assets of a particular stage of transmission scheme/project.

(iii) Cut off date in such cases will be reckoned from the notional DOCO of combined assets (stage wise)"

(v) In line with the above procedure, the Respondent No. 1 Power Grid in its Petition filed before the CERC on 15.09.2011 had clubbed the subject lines for the purpose of determination of transmission charges and had accordingly determined the notional DOCO to be 01.03.2012. The relevant portion of paragraph 8.2 of the Petition reads as follows:

"In line with the above procedure, (a) Kalpakkam PFBR-Sirucheri, 230 kV D/C Line anticipated DOCO 01.11.2011 (b) Kalpakkam PFBR-Arani 230 kV D/C Line anticipated DOCO 01.03.2012 (c) Kalpakkam PFBR-Kanchipuram 230 kV D/C Line anticipated 01.03.2012 in Southern Region have been clubbed for the purpose of determination of transmission charges and accordingly ***notional DOCO*** *shall be considered as anticipated DOCO – 01.03.2012."*

(vi) To evacuate the power generated by the Unit of the Appellant, all three assets have necessarily to be commissioned and be functional as the unit of the Appellant is a 'Base Load Station' which requires all three assets as a pre-requisite for power evacuation. As a matter of fact, the Atomic Energy Regulatory Board (AERB) would not permit the Appellant to generate power unless all three assets along with the associated sub-stations are installed by the Respondent No. 1/ Respondent No. 5 and are functional. It is a matter of fact that Asset-III is not functional since terminal bay at Kanchipuram is yet to be made ready by Respondent No. 1/Respondent No. 5. Further, the indemnification agreement dated 09.09.2008 between

the Appellant and Respondent No. 1 indicated a single date of commissioning as a whole.

(vii) Therefore, without prejudice to the above submissions, it is submitted that the CERC erred in approving the commercial operation of Asset-I as 01.12.2011 in paragraph 17 of the Impugned Order, when the Respondent had determined the DOCO as 01.03.2012 after having clubbed *(a) Kalpakkam PFBR-Sirucheri, 230 kV D/C Line anticipated DOCO 01.11.2011 (b) Kalpakkam PFBR-Arani 230 kV D/C Line anticipated DOCO 01.03.2012 (c) Kalpakkam PFBR-Kanchipuram 230 kV D/C Line anticipated DOCO 01.03.2012*

4.29 Submission V: Recourse to the power to relax provisions under Regulation 20 of the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010.

(a) Under Regulation 20 of the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010, the CERC has been empowered to relax any of the provisions of the regulations either on its own motion or on an application made before it by an interested person for reasons to be recorded in writing.

(b) The non-commissioning of the unit of the Appellant, was a result of several unforeseen circumstances such as the Fukushima (Japan) Nuclear Power Plant incident, which required the Appellant to undertake and implement several additional safeguards as recommended by the task force of the Atomic Energy Regulatory Board (AERB).

(c) Thus, in view of the aforesaid unforeseen reasons, the Appellant reserves its right to approach the CERC to invoke its power under Regulation 20 to relax the provisions of Regulation 8(6) and exempt the Appellant from the rigour of Regulation 8(6) in public interest.

4.30 Submission VI: <u>The Appellant had agreed to pay transmission charges if and only if the advancement of commissioning of transmission line between Kalpakkam PFBR – Sirucheri, D/C 230 kV Line took place before the Zero date, i.e. 01.12.2011.</u>

(i) The CERC failed to appreciate that Annexure – 1 to the Indemnification Agreement, dated 09.09.2008 between the Appellant and the Respondent No. 1 clearly stated that *"for the purpose of indemnification, the <u>Zero date would be 1.12.2011"</u> and with a note that, "<u>To advance the commissioning</u> of one of the above line to meet the pre-commissioning evacuation requirement of Kalpakkam Project, the best effort schedule would be May,*

*2011. The total transmission charges for **advancement of one of the above line** would be payable by BHAVINI from the date of its commissioning till it become regional scheme."*

(ii) The Agreement thus very clearly confirms that the Appellant had agreed to pay the transmission charges if and only if the advancement of commissioning of transmission line between Kalpakkam PFBR – Sirucheri, D/C 230 kV Line took place before the Zero date i.e. 1.12.2011.

(iii) The Respondent No. 1 did not advance the commissioning of the Kalpakkam PFBR – Sirucheri, D/C 230 KV transmission line as requested by the Appellant to May, 2011. Instead, the Respondent No. 1 declared the Associated Transmission System Kalpakkam PFBR – Sirucheri, D/C 230 KV Line under commercial operation w.e.f. 1.12.2011 i.e. on zero date stated in the indemnification agreement dated 9.9.2008. The same is an admitted position and has been confirmed by the Respondent No. 1 vide notification, dated 30.11.2011.

(iv) In view of the fact that the Respondent No. 1 could not advance the commissioning of the Kalpakkam PFBR-Sirucheri, D/C 230 KV transmission line, the Appellant had to make alternate arrangements on its own and sourced the power from Madras

Atomic Power Station (MAPS), Kalpakkam to meet its urgent need for the PFBR commissioning power. Further, the Appellant did not use Kalpakkam PFBR – Sirucheri, D/C 230 KV Line commissioned by the Respondent No. 1 from 01.12.2011.

(v) In view of the foregoing submissions the Appellant humbly prays that this Tribunal may be pleased to allow the instant appeal and set aside the Impugned Order dated 29.04.2015.

5. <u>Mr. M.G. Ramachandran, the learned Counsel appearing for the Respondent No.1 has filed the written submissions as under:-</u>

5.1 By the Impugned Order, the Central Commission has held that:

a. The commercial operation date (COD) of Asset I and Asset II is 01.12.2011 and 01.04.2012 respectively;

b. The Appellant is liable to pay the transmission charges to Powergrid with effect from the above COD of the transmission Assets I and, IIuntil the commissioning of the Appellant's generating unitand thereafter the charges would be considered as part of the Point of Connection (PoC) charges under Central Electricity Regulatory Commission (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010(hereinafter referred to as '**Sharing Regulations 2010**').

c. The Asset III cannot be declared under commercial operation as the conditions under Regulation 3(12)(c) are not satisfied.

5.2 The Appellant has challenged the decision of the Central Commission being (a) and (b) above in the present Appeal. Powergrid has challenged the issue (c) by way of Appeal No. 168 of 2015. The present submissions are related to Assets I and II only.

Grievances of the Appellant in the present Appeal

5.3 A. There was no prior approval of the commercial operation date of the Asset I and II.

B. The Appellant cannot be held liable to pay the transmission charges for the transmission assets until the commissioning of it'sgenerating unit.

However, the Appellant has not challenged the fact that the Assets I and II are complete in all respects. The Appellant has also not challenged the computation of the transmission charges.

Relevant Regulations

5.4 The Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 - (a) Regulation 3 (12) (c) defining the date of commercial operation or COD, (b) Regulation 4 dealing with the determination of tariff for each line or the substation, (c) Regulation 7

dealing with the capital cost; (d) Regulation 9 dealing with the additional capitalisation; (e) Tariff filing forms prescribed in the annexures to be followed by the transmission licensees and other Utilities.

B. Central Electricity Regulatory Commission (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010 - Regulations 8 and 14.

Re: Approval of Date of Commercial Operation (COD)

5.5 The Central Commission has after due consideration of all documents and information furnished by Powergrid has held the COD of Asset I and II as 01.12.2011 and 01.04.2012 respectively. The Central Commission has considered the issue in respect of Regulation 3(12)(c) of the Tariff Regulations 2009 and duly approved the date of commercial operation date.

5.6 As mentioned above the Appellant has not challenged or otherwise disputed the fact that the Powergrid had completed all works related to Asset I and II by the respective commercial operation dates or the clear finding of the Central Commission that there is no fault of Powergrid due to which the Assets I and II could not be put regular use. The Appellant acknowledges that the Asset I and II were commissioned on 01.12.2011 and 01.04.2012 respectively. The date of commercial operation was also agreed to by all constituents of the Southern Region during the 19th

Meeting of TCC and 20th Meeting of Southern Region Power Committee (SRPC) held at Hyderabad on 27th and 28th September 2012.

5.7 During the proceedings before the Central Commission, the issue was raised by some of the Respondents that Powergrid had not fulfilled the conditions for declaration of date of commercial operation as prescribed in Regulation 3(12)(c) of the Tariff Regulations, 2009.

5.8 Powergrid was directed by the Central Commission to furnish the information as to the commercial operation date. In this regard, information was duly submitted by Powergrid. The Asset I and Asset II were complete in all respects and no further work was to be undertaken by Powergrid. The lines could not be put to regular use for reasons not attributable to Powergrid but rather because the generating station of the Appellant was not ready. Neither of these two facts has been challenged by the Appellant.

5.11 In the above context and on receipt of the information submitted by Powergrid, the Central Commission after noting the provisions of the Regulation 3(12)(c) and observing that the lines (Asset I and II) were connected at both ends and the Central Electricity Authority had issued Energisation Certificates on that basis. Since the line was complete is all respects, the Central Commission approved the commercial operation date for Asset I and Asset II as 01.12.2011 and 01.04.2012, respectively.

5.12 The Powergrid duly satisfied the requirements of the second proviso to Regulation 3(12)(c) of the Tariff Regulations, 2009 for declaration of commercial operation namely, *when the element of the transmission system is ready for regular use but is prevented from providing such service for reasons not attributable to the transmission licensee, its suppliers or contractors.* The Central Commission has already observed in this regard that the lines were connected at both ends and energized. The fact that they could not be put to regular use is not attributable to Powergrid but because the generating unit of the Appellant was not commissioned. In view of the Regulation 3(12)(c), the date of commercial operation can be declared from the date of completion of all works, namely, the date when the line was energized being connected on both sides. In the above circumstances, the Central Commission was right in approving the date of commercial operation as on 01.12.2011 and 01.04.2012 for Asset I and Asset II respectively. There can be no requirement of regular service when the proviso is intended for an element which is not in regular service. If the line was in regular service, then there would be no need to resort to the proviso.

5.13 The Appellant has in the appeal only raised the objection that no prior approval of the Central Commission was sought as required under the second proviso to Regulation 3(12)(c) of Tariff Regulations 2009. It is submitted that there is no requirement of any 'prior' approval of the

Central Commission for filing of the Petition for determination of Transmission Tariff. The requirement under Regulation 3(12)(c) is for approval and not prior approval and the same can approved in the process of determination of tariff. .The Hon'ble Supreme Court in Ashok Kumar Das and Ors. vs. University of Burdwan and Ors. (2010) 3 SCC 616has considered the difference between approval and prior approval and held that approval means that the approval can be granted subsequently:

5.14 There is no requirement of any prior approval and the fact that the Central Commission considered the issue subsequently and granted approval is consistent with the Tariff Regulations 2009. In fact in the case of COD, the approval has to be retrospective because the approval cannot be granted unless the asset is ready and complete in all respect and has been commissioned.

5.15 There is no specific methodology provided in the Regulations for seeking approval of COD nor is any timeline provided. The Regulation only requires the approval of the Central Commission for the date of commercial operation in case such date is prior to the element coming into regular service and this issue only arises during the tariff determination process. The Central Commission has granted the approval in the Impugned Tariff Order and as such, there is no violation of the Tariff Regulations 2009.

5.16 As a consistent practice, the Tariff Petitions are filed in advance based on anticipated date of commercial operation. In the present case, the Petition was filed by Powergrid on 15.09.2011 (i.e. prior to actual COD) and therefore there could not have been any prior approval for the COD for filing of the Tariff Petition.

5.17 It was not even known whether there would be any requirement of approval at all. During the pendency of the proceedings, the transmission assets were commissioned and the Central Commission was informed of the actual dates of COD. When the Central Commission was examining the issue, it was noted that the COD would be in accordance with the Proviso to Section 3(12)(c) and therefore the Central Commission considered the issue and approved the COD after considering all the facts and information.

5.18 The purpose of Second Proviso to Regulation 3(12)(c) is for Central Commission to determine if the Asset are ready in all respects and not to create hurdles in the tariff determination process. It cannot be disputed that the Assets in question were ready in all respects and that the Central Commission has considered the same before granting approval to the date of commercial operation.

5.19 The observation that Powergrid should have approached the Central Commission for approval of the date of commercial operation only relates to the requirement of Powergrid seeking approval of Central

Commission. Powergrid had not specifically sought approval under second proviso of Regulation 3(12)(c); however, this does not mean that the Central Commission did not have the power to examine whether the approval is to be granted in terms of the second proviso of Regulation 3(12)(c). It is a well settled principle that even in absence of a specific reference to the Regulation, the relief can be granted so long as the power does exist in the authority.

5.20 In the present case, the issue of approval of commercial operation date had arisen in the proceedings before the Central Commission and the Central Commission after examining the provisions of the Regulation 3(12)(c) and observing that the Assets had been connected at both ends, approved the commercial operation date. Powergrid cannot be denied transmission tariff for the transmission lines/Assets which have been completed even assuming that there is any error or irregularity in procedure. The errors in procedure do not affect the substantial rights of a party.

5.21 It is well settled principle that the procedural issues cannot be allowed to override justice as held in following judgements:

Kailash v. Nanhku (2005) 4 SCC 480

28. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the

opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The observations made by Krishna Iyer, J. in Sushil Kumar Sen v. State of Bihar [(1975) 1 SCC 774] are pertinent: (SCC p. 777, paras 5-6)

> *"The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer.*
>
> *The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. … Justice is the goal of jurisprudence — processual, as much as substantive."*

Sangram Singh v. Election Tribunal AIR 1955 SC 425

"*16. Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it."*

Bajaj Tempo Ltd. v. Commissioner of C. Ex. and Customs 1999 (63) ECC 268

"**13.***The substantive benefit cannot be denied mainly on the ground of procedural deficiency. The important concern is the fact of payment of appropriate duty on the goods in question, which is evidenced by the documents with which the goods have been received. As already discussed above, this can be checked by the Jurisdictional Central Excise Officers of the appellant."*

State of Punjab v. ShamlalMurari (1976) 1 SCC 719

> ***"8.*** *This omission or default is only a breach which can be characterised as an irregularity to be corrected by condonation on application by the party fulfilling the condition within a time allowed by the court. We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, tho' procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After all, courts are to do justice, not to wreck this end product on technicalities. Viewed in this perspective, even what is regarded as mandatory traditionally may, perhaps, have to be moderated into wholesome directions to be complied with in time or in extended time."*

5.22 In any event, the Central Commission has also inherent powers to relax the procedural requirements in the interests of justice. Regulation 44 of the Tariff Regulations 2009 state as under:

> *"44. Power to Relax. The Commission, for reasons to be recorded in writing, may relax any of the provisions of these regulations on its own motion or on an application made before it by an interested person."*

5.23 In the present case, all parties had the opportunity to be heard on the issue of Regulation 3(12)(c) and therefore there is no prejudice caused to any party due to Powergrid not seeking a specific approval. There is no requirement of prior approval in the Tariff Regulations; the Tariff Regulations, 2009 only requires the approval of the Central Commission, which is granted at the time of determination of the tariff. Thus there has

been no adverse implication of the Central Commission having considered the date of Commissioning while passing the Impugned order.

5.24 That there is no inconsistency in the Impugned Order. The Central Commission has approved the commercial operation date of Asset I and Asset II on the basis that the requirements of Second Proviso to Regulation 3(12)(c) have been satisfied and not on the basis that Powergrid has declared the commercial operation date. In the same order, Central Commission has held that Asset III has not satisfied the requirements (the same has been challenged by Powergrid in other Appeal). Thus, the Central Commission has wisely considered the issue and passed the Impugned Order.

5.25 The Appellant is raising hyper technical objections to deny the transmission licensee its legitimate dues. As per the Appellant, even though the transmission Assets I and II are otherwise ready and capable of being used, they should not be declared under COD because of an alleged procedural or hyper technical issues.

Re: The contention of the Appellant that the date of commercial operation can be determined only once the entire transmission system is commissioned.

5.26 The Appellant has raised the issue that the entire transmission system associated with Kalapakkam PFBR is to be declared under commercial operation together and each asset cannot be declared under commercial operation separately. This issue has been raised for the first time in

Appeal. The said issue was not raised before the Central Commission even though the Appellant was aware that Powergrid had submitted separate date of commercial operation for each Asset.

5.27 It is well settled principle that new issues cannot be raised for the first time in appeal:

State of Maharashtra V. Hindustan Construction Company Limited (2010) 4 SCC 518

"*36. As notice above, in the application for setting aside the award, the appellant set up only five grounds viz. waiver, acquiescence, delay, laches and res judicata. The grounds sought to be added in the memorandum of arbitration appeal by way of amendment are absolutely new grounds for which there is no foundation in the application for setting aside the award. Obviously, such new grounds containing new material/facts could not have been introduced for the first time in an appeal when admittedly these grounds were not originally raised in the arbitration petition for setting aside the award. Moreover, no prayer was made by the appellant for amendment in the petition under Section 34 before the court concerned or at the appellate stage.*"

M.P. Shreevastava vs. Mrs. Veena (24.08.1966 - SC) : AIR 1967 SC 1193

"4. It was never argued on behalf of the appellant in the court of first instance and High Court that attempts proved on have been made by the respondent to resume conjugal relations could not in law amount to satisfaction of the decree, and we do not think we would be justified at this stage in allowing that question to be raised for the first time in this court.

Karpagathachi and Ors. vs. Nagarathinathachi (10.03.1965 - SC) : AIR 1965 SC 1752

> "*7…. In the High Court, the appellants raised the contention for the first time that the two partition lists were required to be registered. The point could not be decided without further investigation into questions of fact, and in the circumstances, the High Court rightly ruled that this new contention could not be raised for the first time in appeal. We think that the appellants ought not to be allowed to raise this contention.*"

Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers Private Limited (2008) 14 SCC 208

> "*24. Learned counsel for the respondent submitted that other points are available to be raised. Since no other point was urged before the High Court, we find no reason to examine if any other point was available. The appeal is allowed without any orders as to costs.*"

Steel Authority of India Limited v. Gupta Brother Steel Tubes Limited (2009) 10 SCC 63

> *"32. We are not persuaded by the aforenoted submission of the learned Senior Counsel for the appellant for more than one reason. For one, the aforesaid argument was not at all canvassed before the High Court. A perusal of the judgment of the High Court would show that only two contentions were raised there, namely (i) that the arbitrator committed error of jurisdiction when he entered a time-barred claim; and (ii) that the arbitrator awarded damages to the claimant under Categories A, AA and C by exercising his power beyond Clause 7.2 of the agreement. We are afraid that the appellant cannot be permitted to raise a contention before this Court in an appeal by special leave which was not raised before the High Court. This contention is not even indirectly or remotely connected with the plea of limitation that was canvassed before the High Court.*"

5.28 Without prejudice to the above, it is submitted that the Tariff Regulations 2009 defines the date of commercial operation with respect to an element of the transmission system:

*"3(12) '**date of commercial operation**' **or 'COD'** means*

……..…..

(c) in relation to the transmission system, the date declared by the transmission licensee from 0000 hour of which an element of the transmission system is in regular service after successful charging and trial operation:

…….

Provided further that in case an element of the transmission system is ready for regular service but is prevented from providing such service for reasons not attributable to the transmission licensee, its suppliers or contractors, the Commission may approve the date of commercial operation prior to the element coming into regular service."

5.29 Further the Tariff Regulations 2009 provides the tariff determination for the transmission line or sub-station:

"4. Tariff determination.*(1) Tariff in respect of a generating station may be determined for the whole of the generating station or a stage or unit or block of the generating station, and tariff for the transmission system may be determined for the whole of the transmission system or the transmission line or sub-station.*

5. Application for determination of tariff*. (1) The generating company or the transmission licensee, as the case may be, may make an application for determination of tariff in accordance with Central Electricity Regulatory Commission (Procedure for making of application for determination of tariff, publication of the application and other related matters) Regulations, 2004, as amended from time to time or any statutory re-enactment thereof, in respect of the units of the generating station or the transmission lines or sub-stations of the transmission system, completed or projected to be completed within six months from the date of application.*"

5.30 The Appellant has in the Appeal referred to the Procedure which provides that Assets forming part of a transmission scheme/project would be

clubbed for tariff determination. This is to clarify that the Assets from two different projects would not be clubbed. The clubbing of Assets for determination of transmission charges does not mean that the transmission charges cannot be determined individually for each asset/element which are ready and COD has been declared/approved. The clubbing of assets does not take away the substantive right of transmission charges for transmission assets already commissioned. There is no condition that the tariff would not be determined unless all Assets forming part of the transmission scheme or project are commissioned and clubbed together. Such a condition would be contrary to the Tariff Regulations 2009 and cannot be sustained.

5.31 In fact the Procedure as relied on by the Appellant also provides as under:

> *"(b) For the transmission scheme/projects completed fully and under commercial operation up to 31.03.2009:*
>
> > *(i) Elements of a transmission project commissioned within 2 years from the actual DOCO of first element will be combined and treated as stage 1 of that project. If any element of the project is commissioned after two years the same would be considered as part of the next stage of that transmission project. Thus, the total transmission project commissioning will be divided in stages based on the date of commissioning of individual assets. Maximum period of each stage will be two years.*"

Thus, the Procedure recognizes that each element or individual asset of the transmission project may be commissioned separately. This is clearly contrary to the submission of the Appellant that there cannot be any commissioning of each individual asset/element.

5.32 It is also relevant to note that even in the case of a generating station with a number of generating units, the Tariff determination commences with the commercial operation of the first unit for the first unit even pending the completion and declaration of commercial operation of other units.

5.33 Further the Transmission Agreement dated 05.08.2011 duly executed by the Appellant also recognizes the declaration of date of commercial operation for each element i.e. each transmission line/Asset:

> *"Element" means each Transmission Line or each circuit of the Transmission Lines (where there are more than one circuit) or each bay of Sub-station or switching station or HVDC terminal or inverter station including ICTs, Reactors, SVC, FSC etc forming part of the ISTS, which is owned, operated and maintained by the concerned ISTS Licensee;*
>
> …….
>
> *4.3 New ISTS Schemes*
>
> *4.3.1 New ISTS Schemes shall be as identified in consultation with the stakeholders, by CEA and CTU.*
>
> *4.3.2 Any element that may be added to the ISTS detailed in Article 4.1.1 and declared for commercial operation by the concerned ISTS Licensee will be intimated to the DICs by the ISTS Licensee or the CTU, as and when these are declared under commercial operation. Such addition shall form a part of Schedule – II of this Agreement and shall be governed by the terms and conditions as contained herein.*
>
> *4.3.3 CTU shall notify all the ISTS Licensees and the DICs, as and when such element, as mentioned in Article 4.3.2 comes into operation.*

5.34 The element is defined as each transmission line in Transmission Agreement and therefore each Asset being a transmission line, is also an

element. The Agreement recognizes that any element can be declared for Commercial Operation.

5.35 In the present case, the Asset I, II and III are transmission lines and separately identified (Standing Committee on Power System Planning in Southern Region, in which the evacuation system was agreed to). The Investment Approval dated 17.03.2010 also recognizes each Asset separately. Thus each transmission line is an element in the transmission system and each element, such as Asset I or Asset II can be declared under commercial operation separately.

5.36 The contention of the Appellant that the transmission assets can be considered for commercial operation only when the entire transmission system is ready is contrary to the provisions of the Tariff Regulations 2009, the Transmission Agreement as well as consistent decisions of the Central Commission. Powergrid having completed the work in respect of an element of the transmission system is entitled to the tariff related to such element.

5.37 If the contention of the Appellant is accepted, then the transmission asset being Asset I and II, though capable of being used would not be considered as commissioned. In fact the Appellant itself has contended to have used the Asset I and Asset II for its commissioning power besides alleging that others such as TANGENDCO have also used the line. Therefore, the contention of the Appellant is that though the

Transmission Assets are being used, the Assets should not be declared under commercial operation. This is absurd and cannot be acceptable.

5.38 The Appellant has sought to allege that the entire system is required to be commissioned together is without any basis. There is no such recognition in any of the Agreements or otherwise that only if the entire system is ready, then only the same would be considered as commissioned. The reference to the Indemnification Agreement is misplaced. The Agreement dated 05.08.2011 between the parties recognizes the commissioning of each element. Further in terms of the said Agreement, the Appellant itself had sought for early commissioning of one line and has actually used the said transmission line. Therefore, it is not open for the Appellant to argue that all lines together were required as a pre-requisite. In any event, the Tariff Regulation 2009 recognizes the commissioning of the individual element of a transmission system.

5.39 The Appellant has merely quoted isolated portions of Design Criteria without annexing the Manual. The planning and designing of transmission project has been done to withstand the outage. However, the requirement of Asset III to withstand the outage is neither correct nor relevant at this stage, particularly when the generating unit of the Appellant has not been commissioned. The determination of date of commercial operation is as per completion of work for an element of transmission system as per the Tariff Regulations, 2009 and the same has

been approved by the Central Commission. In any event, all three lines of the Powergrid are ready and complete and therefore there is no default on part of Powergrid in this regard.

Re: Payment of Transmission Tariff by Appellant until the commissioning of its generating unit

5.40 Powergrid has completed and commissioned the transmission assets and Powergrid is entitled to transmission charges for such transmission assets from such commercial operation date. Powergrid is a transmission licensee under Electricity Act, 2003 and is entitled to recovery of its costs. Powergrid has performed all activities required to set up, charge and commission the transmission lines/Assets and the transmission lines/Assets have been ready and available. The transmission assets have been declared under commercial operation. Powergrid cannot be denied the tariff merely because the generating unit has not yet been commissioned. The transmission charges are to be determined from the date of commercial operation and they are payable from such date in accordance with Tariff Regulations, 2009 and Sharing Regulations, 2010, either by the beneficiaries or the generator. The question in the present case is whose liability it is to pay the transmission charges.

5.41 The Assets were developed and established for the Appellant and were commissioned at the request of the Appellant. The fact is that the

transmission assets were meant for evacuation of power from the generating station of the Appellant.

5.42 In the present case, the Appellant has executed the Agreement dated 05.08.2011 with Powergrid as the Designated ISTS Customer in accordance with the Sharing Regulations 2010 (as admitted by the Appellant in the Appeal). Thus, the Appellant is the customer and therefore the Appellant would be liable to pay the transmission charges. The Central Commission has held that the transmission charges in respect of the transmission lines in question (Asset I and Asset II) would be payable by the Appellant. The Appellant cannot claim that it is not liable to transmission charges even though the transmission system is ready and commissioned.

5.43 The requirement of the Appellant as a generator to pay the transmission charges for the transmission assets is clarified by Regulation 8(6) of the Sharing Regulation, 2010:

> "*(6) For Long Term Transmission Customers availing power supply from inter-State generating stations, the charges attributable to such generation for long term supply shall be calculated directly at drawal nodes as per methodology given in the Annexure-I. Such mechanism shall be effective only after commercial operation of the generator. Till then it shall be the responsibility of the generator to pay transmission charges.*"

Thus, the Appellant is liable for payment of transmission charges until the commercial operation of its generating station.

5.44 The said Regulations also recognize that the existing contract shall stand re-aligned to the Regulation and the Transmission Service Agreement envisaged under Regulation 14:

> *"14. All existing users of the ISTS and the Transmission Licensees shall ensure that their existing contracts are realigned to these regulations within a period of 60 days from the date of notification of the Transmission Service Agreement insofar as the elements related to the determination of Point of Connection transmission charges, allocation of losses, billing and collection, provision of information and any other matter that requires amendment or realignment consequent to these Regulations*."

5.45 Thus, even assuming but not admitting that there is anything contrary contained in any contract between Powergrid and the Appellant, the liability of the Appellant as per Regulation 8(6) would be implemented.

5.46 The Constitution Bench of the Hon'ble Supreme Court in PTC India Limited v. Central Electricity Regulatory Commission (2010) 4 SCC 603 has held that the Regulations framed by the Central Commission would override the existing contracts:

> *"58……A regulation under Section 178 is in the nature of a subordinate Legislation. Such subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an Order of the Central Commission under Section 79(1)(j).*
>
> *92. Summary of our Findings:*
> *……*
> *(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."

5.47 Therefore, it is not open to the Appellant to rely on any Agreement to contend contrary to the Sharing Regulations 2010. In the present case however, the Agreement between the parties itself recognizes the liability of the Appellant to pay the transmission charges.

5.48 The Appellant is seeking to rely on the Indemnity Clause in the Agreement dated 09.09.2008 which is not relevant to the present issue. As submitted herein above, the Agreement cannot contradict the Regulations and were required to be aligned with the Sharing Regulations 2010.

5.49 On the other hand, the Indemnification Agreement dated 09.09.2008 recognizes that the Appellant had sought to advance the commissioning to meet the pre-commissioning power requirement on best effort schedule and the Appellant agreed to pay the total transmission charges for the transmission line from the date of its commissioning till it becomes regional scheme. Thus, the Appellant had itself agreed to pay the transmission charges.

5.50 Further, the Appellant had vide Agreement dated 27.12.2012 acknowledged that Powergrid had commissioned the transmission line prior to commissioning of the generation unit and agreed to pay the full transmission charges as determined by the Central Commission from the

date of commercial operation of the line until the line becomes part of the regional scheme. Thus, even as per the Indemnification Agreement the Appellant is liable to pay the transmission charges until the line becomes part of the regional scheme. The contention of the Appellant that it is liable to pay transmission charges only in case of advancement of the transmission line is therefore incorrect by May, 2011.

5.51 The above Agreement is binding on the Appellant and it is not open to the Appellant to contend otherwise. Thus, both as per the Sharing Regulations 2010 as well as the Agreements entered into between the Appellant and Powergrid, the Appellant is liable to pay the transmission charges until the commissioning of the generating station of the Appellant.

5.52 Even otherwise, the fact that the line of Powergrid is not being used is because of the non readiness of the Appellant's generating station means that the Appellant is liable to pay the transmission charges until the generating station is ready. The above principle has already been held by the Tribunal in Punjab State Power Corporation Limited v. Patran Transmission Company Limited dated 27.03.2018 in Appeal No. 390 of 2017

> *15….*
>
> *(viii) It is clear that it was only the Appellant amongst all the LTTCs who was responsible to arrange the downstream system for connection to Transmission System by SCOD so that it could be put*

> *to use. This is irrespective of any relation between the Appellant and PSTCL. Accordingly, as per the principles laid down by the Central Commission vide its Order dated 21.9.2016 which are judicial in nature the defaulting entity in the present case is the Appellant.*
>
> …..
>
> *(xi) In view of the foregoing discussions, we are of the considered opinion that there is no infirmity in the decision of the Central Commission by holding that the Appellant is liable to pay transmission charges from SCOD of the Transmission Asset until commissioning of the downstream system."*

In the said case, even though the issue of liability was not covered by the Regulations, the Tribunal had held that PSPCL to be in default for lack of downstream system and therefore held PSPCL liable to pay the transmission charges till commissioning of the downstream system. The Tribunal has upheld the principle laid down by Central Commission that the transmission charges are payable by a person in default. This is because a transmission licensee cannot be denied transmission charges when it has completed the transmission asset but the same could not be used due to the default of some other person. In the present case, the Sharing Regulations (Regulation 8(6)) itself provides for liability of the generator to pay for the transmission charges until commissioning of the generating station. Further the Appellant had also agreed to pay the transmission charges until it becomes part of the regional scheme.

Re: Power to relax for avoiding payment of legitimate dues

5.53 There cannot be any relaxation or exemption from payment of transmission charges by the Appellant. Once the transmission assets have been commissioned, transmission charges are recoverable with respect to such Assets. Powergrid cannot be denied transmission charges because the Appellant want an exemption or relaxation. The legitimate dues of a transmission licensee cannot be denied in such a manner. This would result in serious cash flow issues and affect the transmission service in the country. Further once the Appellant has agreed to pay the transmission charges in the Agreements if cannot avoid the same by seeking any relaxation or exemption.

Re: Contentions on delay of the generating project of the Appellant.

5.54 The relief for force majeure, if applicable, may be available to the Appellant against the beneficiaries or any other entity procuring power from the Appellant; however, the same is not relevant for the liability to pay transmission charges to Powergrid. The transmission Assets have been completed and commissioned by Powergrid and Powergrid is entitled to transmission charges on the same. Powergrid cannot be denied transmission charges because the generating units of the Appellant could not be commissioned.

5.55 The Sharing Regulations 2010 as well as Transmission Agreement dated 05.08.2011 do not recognize any such exception from payment of

transmission charges. The Regulations and the later Agreement have superseded the Indemnification Agreement dated 09.09.2008. In fact the Appellant in Agreement dated 27.12.2012 has agreed to pay the transmission charges until commissioning of its generating units. The Appellant, having specifically agreed to the same, cannot at this belated stage seek to evade the liability.

5.56 The actual use of the transmission asset is not relevant as the same is not attributable to Powergrid but because the generating unit of the Appellant was not ready. The Tariff Regulations 2009 specifically recognize the commissioning of the transmission lines without being in regular use. The Appellant had not submitted the schedule of commissioning before the Central Commission despite a specific direction which was noted in the Impugned Order .

5.57 The Appellant has now belatedly sought to contend that the transmission line was delayed beyond May 2011 and it had to make alternate arrangements. This is incorrect. At the outset, it is submitted the Powergrid had agreed for a best effort schedule of May 2011 and had not made any commitment. In fact the time schedule for Powergrid to complete the line was 01.04.2012 as recognized by the Central Commission in the Impugned Order. It was at the request of the Appellant that Powergrid advanced the commissioning of the line to 1.12.2011.

5.58 In any event, the Appellant's power project was not commissioned whereas the first transmission line of Powergrid was ready as on 01.12.2011. It cannot be contended that the generating units of the Appellant would have required start-up power during May 2011 to December 2011, when such units have not been commissioned in 2012 or even in 2015 when the Appeal was filed by the Appellant. In fact the unit is not commissioned as on date. Therefore, the contention that the Appellant had made alternate arrangements for drawl of commissioning power cannot be correct. In any case, once the transmission line is commissioned, the Appellant is required to pay the transmission charges until the generating station is commissioned and thereafter the transmission charges are to be paid by beneficiaries of the Appellant's generating station.

5.59 In this regard, this Tribunal in Gujarat Energy Transmission Corporation Limited v. Gujarat Electricity Regulatory Commission and Another in Appeal No. 6 of 2015 dated13.10.2015 has recognized that the transmission charges are payable irrespective of the actual use of the transmission and the same has also been upheld by the Hon'ble Supreme Court on 23.02.2018 in Civil Appeal No. 14062 of 2015.

5.60 The Powergrid as a transmission licensee has invested substantial amounts and completed the transmission lines. Powergrid cannot be

denied the transmission charges on any ground of generating station not being ready.

Re: The contention of the Appellant that it is not an inter-state generating station

5.61 The Appellant has sought to contend that it is not an inter-state generating station and therefore Regulation 8(6) of Sharing Regulations would have no application. This is completely erroneous. The Appellant is connected to the inter-state transmission system and further intends to supply power to more than one state. An interstate generating station is defined under the Indian Electricity Grid Code, 2010 as

> "*a Central generating station or other generating station, in which two or more states have shares*".

A central generating station is defined as:

> "*the generating station owned by the companies owned or controlled by the Central Government*"

5.62 Admittedly, the Appellant is owned and controlled by the Government of India and therefore is a Central Generating Station and consequently an Inter-State Generating Station. This is also consistent with the Electricity Act, 2003 wherein the Central Generating Stations as well as generating stations selling power to two states are under the jurisdiction of the Central Commission. There is no requirement for two states to have a

share in the central generating station. This would be incongruous to Section 79:

> *"Section 79. (Functions of Central Commission): --- (1) The Central Commission shall discharge the following functions, namely:-*
> *(a) to regulate the tariff of generating companies owned or controlled by the Central Government;*
> *(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause(a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;*

5.63 In any event, the Appellant is the open access customer as the Appellant has executed the Transmission Service Agreement with Powergrid. Therefore, even otherwise, as the open access customer, it is the Appellant who has to bear the transmission charges. This was also agreed by the Appellant. Further even otherwise, the line cannot be put to regular service due to the Appellant's generating station, therefore the Appellant is required to pay the transmission charges. This principle has been consistently held by the Central Commission and has also been held by the Tribunal in Punjab State Power Corporation Limited v. Patran Transmission Company Limited dated 27.03.2018 in Appeal No. 390 of 2017. The issues raised by the Appellant with regard to the same are covered against the Appellant by the above judgment.

5.64 The power project of the Appellant is not yet ready and therefore no final allocation of share in the capacity has yet been made. The Appellant cannot take advantage of its own wrong by claiming that it is not an inter-state generating station because no final allocation has been made. In fact, since no beneficiaries of the Appellant's power project have been finally identified, any transmission charges associated with the evacuation of power from the generating station is to be paid by the Appellant. It cannot be that Powergrid despite having commissioned the transmission lines, would be unable to recover the transmission charges.

Re: Use of the transmission line by TANTRANSCO

5.65 The contention of the Appellant that the line has been used by Tamil Nadu Transmission Corporation Ltd (TANTRANSCO) has been raised for the first time in the Appeal. The above contention was not raised before the Central Commission. It is well settled principle of law that a new ground cannot be taken up for the first time in the Appeal (Supra).

5.66 In any case, the said contention of the Appellant that TANTRANSCO has used the line proves that the transmission lines were capable of use and commissioned. The Appellant cannot challenge the approval of the commercial operation date of Asset I and II and at the same time contend that the Asset I and Asset II were used by TANTRANSCO. It is obvious

that the Assets cannot be used unless they are ready for use and are declared under commercial operation.

5.67 In the event, it is held that the Asset I and II have been put to regular use by TANTRANSCO or any other person, the transmission charges for such Assets would be shared by such entities or would be part of the POC charges and collected under the Sharing Regulations 2010. Powergrid is required to be paid the transmission charges.

6. <u>Mr. S. Vallinayagam, the Learned Counsel appearing for the Respondent No.5 has filed written submissions as follows:-</u>

6.1 The present appeal seeks to set aside the order dated 29.04.2015 passed by the CERC in the tariff petition No. 105/TT/2012 filed by Respondent-1 for approval of transmission tariff for the transmission system (Assets I, II & III) associated with the power evacuation system for Kalpakkam PFBR (500MW) for the tariff block 2009-14.

6.2 Asset I, II and III were executed by the first respondent, exclusively for evacuation of power from the Appellant Company. M/s PGCIL, being the Central Transmission Utility (CTU) has been entrusted with execution of the above transmission scheme.

6.3 The present dispute alleging liability to make payment in respect of the transmission lines meant for evacuating power from the Appellant generating station has arisen due to the non-commissioning of the generating station by the appellant within the stipulated time frame. The

appellant generator is responsible for non-commissioning. Had the generating plant of the Appellant commissioned in time, the transmission licensee would have collected the transmission charges from the procurers of electricity from the Appellant generator.

6.4 It is evident from the second proviso of the Regulation 12(2) of Tariff Regulations that since the Appellant has failed to commission the generation project so as to bring the radially connected transmission system into beneficial use, they are held responsible for payment of transmission charges from the date of deemed COD of the transmission line approved by Hon'ble Commission.

6.5 The Central Electricity Regulatory Commission (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010 provides for the above said eventuality. The relevant regulation is extracted hereunder:

"8. Determination of specific transmission charges applicable for a Designated ISTS Customer.

(6) For Long Term customers availing supplies from inter-state generating stations, the charges payable by such generators for such Long Term supply shall be billed directly to the respective Long Term customers based on their share of capacity in such generating stations. Such mechanism shall be effective only after "commercial operation" of the generator. Till then, it shall be the responsibility of generator to pay these charges."

In the record of proceedings dated 20/10/2014 the central commission records as under:

"4. The Commission observed that as per regulation 8(6) of Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010, the generator was required to

bear the transmission charges of the transmission asset to the commissioning of its generation project."

The Central Commission directed the appellant generator to pay the transmission charges in compliance with the Sharing Regulations. The relevant portion of the regulation is extracted hereunder:

"Such mechanism shall be effective only after "commercial operation" of the generator. <u>Till then, it shall be the responsibility of generator to pay these charges</u>."

It is an admitted fact that the generator has not declared its commercial operation date. In the circumstances the responsibility to pay the charges lies on the generator.

6.6 The other important factor for the dispute is failure on the part of the transmission licensee in not coordinating with the generating station's commissioning. Had the transmission licensee planned its investment approval and commissioning of the evacuation lines matching with the commissioning of generating station by the Appellant, the present situation could have been avoided. The transmission licensee did not comply with the mandate of section 38 (2) of the Act 2003.

6.7 The transmission licensee is wrong to contend that, since it has laid down the transmission line, it is entitled to tariff. The provisions of the Act 2003 and the regulations made there under are to be given their purposive interpretation. Section 61 (b) of the Act, 2003 specifically states that 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 – (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles.

6.8 It is an admitted fact that the line connecting the appellant generator and the substation of the 5th respondent was used only for the purpose of drawal of commissioning power by the generator. This fact has not been denied by the generator. The transmission licensee also concurs the same by way of affidavit dated nil of November 2014. It is evident from the above facts that the line is not being used for the intended purpose of supply of power by the generator.

Another important fact to be taken into consideration is the statement on the part of the Appellant generator that no final decision has been taken thereof by the government of India as to how the power to be generated by the unit in question is to be shared. There is no PPA between Respondent No. 5 and the Appellant generator.

6.9 The Appellant and the Respondents in the present appeal operate on commercial principles as per the mandate of Act, 2003. There is no contractual commitment by the beneficiaries to either the generator or the transmission licensee in relation to the payment of transmission charges. On the other hand there are agreements to indemnify each other between the generator and the transmission licensee. It is for this reason Section

38 (2) mandates co-ordination between the generator and transmission licensee; and regulation 8 (6) of the Sharing Regulations cast the obligation on the generator to pay the transmission charges up to the date of COD of the generator. This is a statutory requirement.

The above facts are material for consideration in adjudicating the issues. The purpose for which the evacuation line was laid could not be achieved because of the failure on the part of the appellant to commission its generating unit till date. The issue of early commissioning of the transmission assets was also at the request of the generator. The beneficiaries have no role to play in the understanding and co-ordination between the generator and the transmission licensee.

6.10 The Appellant was well aware of the commissioning date and its technical requirements. It was wrong on the part of the Appellant to seek advancement of the commissioning of the evacuation lines by requesting PGCIL, to lay down the evacuation lines for the purpose of drawing commissioning power. Power for commissioning a generating plant as well as start-up is required to be arranged from the transmission licensee of the particular State within the territory of which, the generating plant is being commissioned on payment of the tariff for such commissioning and start-up power and other charges as fixed by the State Regulatory Commission. The Appellant herein drew power from Madras Atomic

Power Station for its commissioning and start-up requirements. Ideally, the Appellant should have sought open access from the State Transmission Licensee to get power from Madras Atomic Power Station up to the date of completion of its commissioning activities.

6.11 The Appellant herein did not file its reply before CERC to the petition filed by PGCIL seeking tariff in respect of the evacuation lines constructed by PGCIL for evacuating power to be generated by the Appellant generating station.

6.12 The Appellant herein did not file any document before CERC to show that the "instant line has become part of the regional asset since 01/04/2012 and is being used by the constituents of southern region".

6.13 In the record of proceedings dated 20/10/2014 the Central Commission records as under:

"4. The Commission observed that as per regulation 8(6) of Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010, the generator was required to bear the transmission charges of the transmission asset to the commissioning of its generation project.
In response, the representative of the petitioner as well as BHAVINI submitted that the instant line has become part of the regional asset since 01/04/2012 and it is being used by other constituents of southern region"

After noting the above contention of the Appellant and PGCIL, the Central Commission directed the PGCIL to submit the following information on an affidavit:

a)..

b)..

c)..

d)..

e) how the assets included in the instant petition are being used?

In response to the above ROP, PGCIL vide its affidavit dated 13th November 2014 stated as under:

"Reply:
With regard to above query it is submitted that 230 KV BHAVINI – Sirucheri D/c line and 230 KV BHAVINI – Arani D/c line are being utilised for drawing commissioning power for BHAVINI PFBR apart from transmission of power from Sirucheri to Arani and vice versa. Regarding the commissioning of 230 KV BHAVINI – Kancheepuram D/c line, the same was discussed and agreed by all the constituents of Southern Region during 19th meeting of TCC and 20th meeting of SRPC held at Hyderabad on 27th/28th of September 2012"

The Appellant herein neither pleaded before CERC nor did it file any affidavit or document to substantiate it's contention that the instant line has become part of the regional asset since 01/04/2012. On the contrary, the affidavit filed by PGCIL does not state that the assets have become part of the regional asset. Since the Appellant did not object to the affidavit filed by PGCIL, the contention of the Appellant that the assets have become part of the regional asset since 01/04/2012 and it is being used by other constituents of southern region is not proved.

6.14 The Appellant for the first time in the appeal before this Appellate Tribunal brought on record exhibit O, exhibit P, exhibit Q, exhibit R, exhibit S and exhibit T to contend that Asset I and Asset II had become

part of the regional scheme since 07/01/2013. These documents were not filed before the Central Commission.

The Appellant further improves its contention that Asset I and Asset II are being used by TANTRANSCO and the regional system since the very commissioning. There was no such averment, contention or statement by the Appellant before CERC.

6.15 The Appellant did not file any application seeking permission of this Appellate Tribunal to bring on record new documents which were not part of the records before CERC. In the absence of any such application, the Appellant cannot rely on the new documents in the Appeal and any relief claimed by the Appellant on the basis of these new documents cannot be granted.

6.16 Without prejudice to the above contention it is stated that the documents filed by the Appellant in the Appeal do not prove that the assets have become part of the regional scheme since 07/01/2013 as contended in the Appeal which is an improvement of the earlier statement recorded in the CERC Record of Proceedings wherein the Appellant contended that the line had become part of regional asset since 01/04/2012.

6.17 The evacuation lines were commissioned by PGCIL for the purpose of evacuating power from the generating stations of the appellant. In the absence of the generating station being commissioned, the lines cannot be

used for the intended purpose of evacuating power from the generating station of the appellant.

6.18 The CERC vide ROP dated 10/07/2014 sought the following information on affidavit:

"1. How COD of Kalpakkam PFBR-Sirucheri 230 KV D/C line could be declared, when the plant has not been commissioned and the transmission line for evacuation of power from BHAVIVI station is not in regular use?
2. How the assets included in the instant petition are being used?"

PGCIL wide its affidavit dated nil of September 2014 stated that:

"With regard to above query, it is submitted that as per annexure one dated 23/01/2009 of the Indemnification Agreement dated 09/09/2008 BHAVINI has requested the advancement of the commissioning of one of the 3 lines on best efforts by May 2011 to meet pre-commissioning evacuation requirement of Kalpakkam. To meet such requirement of commissioning of one of the 3 lines was advanced and subsequently Kalpakkam-Sirucheri 239 KV D/C line could be declared under commercial operation in 01/12/2011.
It may be further submitted that as per the letter received from BHAVINI dated 22/01/2009, BHAVINI has requested, even though we require transmission line by November 2011, that there could be possibility of requirement of one line between Sirucheri and our substation by May 2011. We will inform you at appropriate time the exact requirement. In case required, transmission charges for the advancement of Kalpakkam – Sirucheri line, would be payable by BHAVINI from the date of its commissioning as per procedures. The same has already been submitted wide reply to ROP dated 16/01/2014. Copy of Indemnification Agreement dated 09/09/2008 Annexure I and BHAVINI letter is enclosed as Encl 1. Wide agreement dated 27/12/2012, BHAVINI has agreed to the DOCO of 01/12/2011 and also to pay transmission charges with effect from 01/12/2011."

In reply to the 2nd question as to how the assets included in the instant petition are being used, PGCIL stated that the assets included in the instant petition are being used by BHAVINI for commissioning activities.

6.19 The Annexures exhibit O – T do not establish the fact that the two assets have become part of the regional asset and are being used by constituents of southern region. The two assets were kept in tied up condition only to prevent theft of lines. This fact has been held by CERC in the impugned order -- ***"It is observed that BHAVINI switchyard is connected to Arani and Sirucheri and it will cause power to flow from Sirucheri to Arani and vice versa in view of the nature of electrical system."*** *Further CERC held that:* ***"it is however observed that CEA gave permission to energise since lines were connected at both ends that is Kalpakkam end and Siruseri / Arani end."***

The Commission further held that: ***"these assets were planned for evacuation of power from BHAVINI. In the absence of commissioning of BHAVINI, these assets could not be put to regular use for supply of power to the constituents of Southern Region."***

6.20 The fact of the matter is that the COD of the subject assets were approved by the Commission subject to the fact that the switch yard of BHAVINI is connected to Siruseri and Arani substations facilitating power flow from Siruseri to Arani SS and vice versa. If the power flow between these

two substations was not established, then the Commission would not have approved the COD. Declaration of COD of the transmission line does not mean the line is put to the intended purpose of evacuation of power from the appellant generating station. There cannot be evacuation because the share of power is yet to be allocated by Government of India and the generator has not declared its COD.

6.21 The Connectivity regulations relating to LTOA specifically state that the generator entering into LTOA will be responsible for paying the transmission charges in respect of the allocated capacity till the target beneficiaries is identified and executes PPA with the identified beneficiary. The Appellant states that allocation of power from the generator is yet to be made by Govt. of India. In absence of allocation and consequent PPA, the Connectivity Regulations also mandate payment of transmission charges by the Appellant generator.

6.22 The Appellant's claim of the asset being used by TANTRANSCO is wrong and misleading. There is no requirement for TANTRANSCO to use these radial lines which are exclusively built for evacuation of power from BHAVINI. Since PGCIL is in need of the lines to be in charged condition for substantiating the essential conditions for COD as well as to safeguard the assets, these lines are kept connected at both ends of the sub-stations of 5th Respondent. It does not mean that the lines have

become part of the regional scheme or used by TANTRANSCO. In fact, these additional lines form a circuitous route and cause additional transmission losses. The incidence taking support of the ideally charged radial lines for restoration of supply at Siruseri SS for restoration of Kalivanthapattu – Siruseri line during outage was a temporary measure to rectify the faulty line of TANTRANSCO. This incident cannot be construed to say that the line has become part of regional asset. A dedicated evacuation line can only be used for evacuation of power from the identified generator and not in any other manner.

6.23 The TANTRANSCO is ready to keep the line switches open at both Siruseri and Arani SS so as to prove that these lines are not of any beneficial use to TANTRANSCO, provided PGCIL is willing to accept the risk of theft of conductors.

6.24 Further, the Appellant has miserably failed multiple times to honour its commitment to commission the generation project. It is a total failure on the part of the Appellant and the Appellant has **caused huge financial loss to the public exchequer** by keeping on postponing the commissioning date. The appellant is not even ready to disclose or defend the reasons for the inordinate delay in commissioning the project. The distribution utilities are forced to procure high cost power due to the failure of the Appellant to commission the project as per the schedule.

This respondent requests the APTEL to direct the Appellant to compensate the distribution utilities for the loss on account of non-commissioning of the project from the date of SCOD to till date.

6.25 It is accordingly summed up:

- ✓ The Appellant's statement that the subject assets are part of regional assets before CERC and the new plea before this Appellate Tribunal that it is used by TANTRANSCO is wrong and denied.
- ✓ The power flow between Siruseri- Arani Substations is established because of commissioning of BHAVINI- Siruseri and BHAVINI - Arani 230 kV D/c lines and declaration of commercial operation by PGCIL as established in the findings of the Commission's order and are not brought to beneficial use or intended purpose.
- ✓ TANTANSCO is ready to keep these circuits out of service which do not serve any purpose to TANTRANSCO/ TANGEDCO.
- ✓ The Appellant miserably failed to commission the generation project and bring these lines under intended beneficial use and caused the loss to public exchequer.
- ✓ The Appellant is responsible to pay the transmission charges for the instant assets from COD to date of commercial operation of the generation projects as mandated under Regulations.

6.26 In view of the above submissions the Appeal as filed by the Appellant herein deserves to be dismissed as devoid of merit.

7. Mr. K.S. Dhingra, the Learned Counsel appearing for the Respondent No.17 has filed the following written submissions:-

7.1 On 15.9.2011, Power Grid filed the tariff petition before the Central Commission for approval of transmission tariff in respect of the following transmission lines along with associated bays with effect from the anticipated dates of commercial operation shown against each:

(a) Transmission Line –I 1.12.2011

(b) Transmission Line -II 1.3.2012(Revised to 1.4.2012)

(c) Transmission Line -III 1.3.2012(Revised to 1.9.2012)

7.2 Power Grid by its notifications dated 30.11.2011 and 29.3.2012 notified all concerned, including the Appellant, that Transmission Line - I would be put under commercial operation on 1.12.2011 and Transmission Line – II on 1.4.2012. Power Grid further notified that the transmission charges would be payable from these dates.

7.3 The final tariff in respect of Transmission Line – I and Transmission Line – II, **(collectively, the transmission lines)**, was determined by the Central Commission by the impugned order considering the dates of commercial operation notified by Power Grid. In the impugned order, the Central Commission did not determine the transmission charges for Transmission Line – III and Power Grid has filed the connected Appeal No 168/2015.

7.4 The Atomic Power Plant was not commissioned by the dates of commercial operation of the transmission lines considered in the impugned order and, therefore, the transmission lines could not be included in the regional scheme.

7.5 Since the transmission lines were commissioned for evacuation of power from the Atomic Power Plant owned by the Appellant and the Atomic Power Plant was not ready for commissioning, the Central Commission in the impugned order directed that the transmission charges would be borne by the Appellant in terms of Regulation 8 (6) of the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010.

7.6 In terms of the direction, from the dates of commercial operation of the transmission lines to the date on which the transmission lines are included in the regional scheme viz the date of commercial operation of the Atomic Power Plant, the transmission charges would be borne by the appellant, as provided in Regulation 8(6) of the Sharing Regulations and on commercial operation of the Atomic Power Plant, the transmission lines would be pooled with the regional scheme in which case the transmission charges would be borne by the regional entities.

7.7 The Appellant, in the proceedings before the Central Commission, did not raise any objection to the dates of commercial operation of the

transmission lines notified by Power Grid vide notifications dated 30.11.2011 and 29.3.2012 despite the fact that it was fully aware that the Atomic Power Plant would not be ready for commissioning on the dates notified by Power Grid.

7.8 The Appellant did not file its reply before the Central Commission. It, however, filed an Application dated 25.11.2013 for review of interim directions for payment of provisional tariff and the written submissions dated 31.12.2013**.** In the filings, the Appellant did not raise any objection to the dates of commercial operation claimed by Power Grid.

7.9 At the hearing on 20.10.2014 the Appellant was directed by the Central Commission to submit the expected date of commercial operation of the Atomic Power Plant. The Appellant did not comply with the direction and the Central Commission in the impugned order deprecated the appellant's attitude:

"15. No further response has been received from BHAVINI. BHAVINI should have filed the status of generating units and their anticipated date of commissioning within the time stipulated by the Commission. Non-filing of this information by BHAVINI is not appreciated by us."

7.10 Thus, the issues have been raised by the Appellant for the first time in the present Appeal clearly as an afterthought.

7.11 Ideally, Power Grid ought to have sought prior approval of the Central Commission before declaring the date of commercial operation and an

observation to that effect has been made in Para 17 of the impugned order. It is noted that in the present case, Power Grid declared the commercial operation of the transmission lines during pendency of the tariff petition filed on 15.9.2011 and sought approval of tariff on the basis of dates declared by it.

7.12 The plain reading of the second proviso to sub-clause (c) of clause (12) of Regulation 3 of the 2009 Tariff Regulations does not suggest that the Central Commission is prevented from approving the date of commercial operation simultaneously with the approval of tariff.

7.13 The Central Commission is not divested of the discretion to approve the date of commercial operation claimed in the tariff petition or any other date considered appropriate depending upon the applicable facts while approving the tariff under the second proviso to sub-clause (c) of clause (12) of Regulation 3 ibid.

7.14 The Central Commission is vested with power and function to determine tariff of the inter-State transmission system under clause (d) of subsection (1) of Section 79 of the Electricity Act. The determination of date of commercial operation of a newly commissioned transmission asset by the Central Commission is incidental to its statutory power and function of determination of tariff under the Electricity Act.

7.15 As held by the Hon'ble Supreme Court in **KhargramPanchayatSmitiVs State of West Bengal [(1987) 3 SCC 82],** power to do any act includes the power to make incidental or consequential orders to make exercise of such power effective.

7.16 In the light of above law, approval of dates of commercial operation of the transmission lines in the process of determination of transmission tariff by the Central Commission cannot be faulted.

7.17 In the case in hand, the Central Commission, in the first instance, examined Power Grid's claim for date of commercial operation of the transmission lines based on facts available before it by virtue of power under the second proviso to sub-clause (c) of clause (12) of Regulation 3 of the Tariff Regulations. The Central Commission first approved the dates claimed by Power Grid and thereafter proceeded to determine the transmission charges on the basis the dates so approved.

7.18 The relevant part of the observations of the Central Commission are as under:

"17. …… It is observed that BHAVINI switchyard is connected to Arani and Sirucheri and it will cause power to flow from Sirucheri to Arani and vice-versa in view of the nature of electrical system. Energisation certificates dated 30.11.2011 and 20.3.2012 were issued by CEA. It is however observed that CEA gave permission to energise since the lines were connected at both ends i.e. Kalpakkam end and Sirucheri/Arani end. Hence, the date of commercial operation of Assets-I and II have been approved as 1.12.2011 and 1.4.2012 respectively."

7.19 Under second proviso to sub-clause (c) of clause (12) of Regulation 3 the Central Commission is empowered to approve the date of commercial operation before the date on which the element of the transmission system is put to regular use.

7.20 In the instant case, because of non-commissioning of the Atomic Power Plant the transmission lines were not in regular use on the dates of commercial operation approved by the Central Commission. Thus the Central Commission acted strictly in accordance with the second proviso to sub-clause (c) of clause (12) of Regulation 3 of the Tariff Regulations.

7.21 Without determining the date of commercial operation of a transmission asset, its tariff cannot be determined. Thus, determination of date of commercial operation is *sine qua non* for determination of tariff. Acceptance of contention of the appellant would be clog on exercise of the statutory power of determination of tariff by the Central Commission.

Re: Retrospective Approval of Date of Commercial Operation

7.22 There is no force in the Appellant's allegation that the Central Commission retrospectively approved the dates of commercial operation of the transmission lines. The tariff petition was filed by Power Grid on 15.9.2011 based on the anticipated dates of commercial operation as required under clause (1) of Regulation 5 of the 2009 Tariff Regulations.

7.23 The Appellant was, therefore, aware of the likely dates of payment of the transmission charges. The acceptance of the dates projected in the tariff petition cannot be said to be the retrospective approval of the dates of commercial operation.

7.24 It has been the established industry practice for decades that the tariff of a generating station and a transmission asset is determined retrospectively and since, as already submitted, determination of date of commercial operation is essential for the determination of tariff, their simultaneous determination cannot be said to be retrospective. cannot be said to be retrospective.

Re: DOCO for Transmission System as a Whole

7.25 The Appellant has submitted that there has to be one date of commercial operation of the entire transmission system and till that date it cannot be made liable for payment of the transmission charges for the transmission lines. The plea is that the tariff needs to be determined for the transmission system as a whole and not in piecemeal. In terms of clause (1) of Regulation 4 of the 2009 Tariff Regulations, the tariff for the transmission system can be determined for the whole of the transmission system or the transmission line or substation.

7.26 Therefore, the plea of the appellant lacks merit.

Re: Application of Regulation 8 (6) of Sharing Regulations

7.27 Clause (6) of Regulation 8 of the Sharing Regulations, which is the basis for deciding the liability of the appellant to pay the transmission charges is extracted below:

> *"(6) For Long Term customers availing supplies from inter-state generating stations, the charges payable by such generators for such Long Term supply shall be billed directly to the respective Long Term customers based on their share of capacity in such generating stations. Such mechanism shall be effective only after "commercial operation" of the generator. Till then, it shall be the responsibility of generator to pay these charges."*

7.28 Clause (6) of Regulation 8 of the Sharing Regulations which provides that the generator is to bear the transmission charges till commercial operation of the generating station has been enacted to cater to the situation arising in the case on hand. The appellant has contended that it is not an inter-State generating station and therefore, it cannot be fastened with liability to pay the transmission charges under clause (6) of Regulation 8 of the Sharing Regulations.

7.29 The "inter-State Generating Station" has been defined as under:

> *"a Central/other generating station in which two or more states have shares and whose scheduling is to be coordinated by the Regional Load Despatch Centre."*

7.30 The tentative allocation of power generated at the Atomic Power Plant as per Ministry of Power's letter No 3/2/2003-DVC dated 9.6.2003. By virtue of the scheme of generation and sale of electricity in more than one State, as discernible from the allocation made by Ministry of Power, the

Atomic Power Plant is an inter-State generating station. In any case, the direction to the Appellant to bear the transmission charges of the transmission lines have nothing to do with its status as inter-State generating station or otherwise.

7.31 The direction given by the Central Commission, is consequential to exercise of its power and functions of determination of tariff for inter-State transmission system under clause (d) of subsection (1) of Section 79 of the Electricity Act. Without a direction for sharing of the transmission charges, the power of determination of tariff would become redundant.

7.32 The Appellant had entered into the Transmission Service Agreement dated 8.8.2011 with Power Grid whereby it was agreed that the methodology for calculation of PoC charges (the transmission charges) would be in accordance with the Sharing Regulations.

7.33 Accordingly, the contention of the appellant that the Sharing Regulations do not apply to it is without merit.

Re: Usage of Transmission Lines by TANGEDCO

7.34 The Appellant has alleged that the Central Commission has not considered the usage of the transmission lines by TANGEDCO (Respondent No 5). It has stated that the transmission lines are being used by TANGEDCO for drawal of power since 7.1.2013. The appellant has urged that the

transmission charges should be borne by TANGEDCO or alternatively, TANGEDCO be made to proportionately share the transmission charges for usage of the transmission lines by it.

7.35 Power Grid in its affidavit dated 13.11.2014 inter alia stated as under:

"….. it is submitted that 230 kV BHAVINI – Sirucheri D/C line and 230 kV BHAVINI – Arani D/C line are being utilized for drawing commissioning power for BHAVINI PFBR apart from transmission of power from Sirucheri to Avani and vice versa."

7.36 The appellant did not dispute the correctness of the submission of Power Grid. Based on this, the Central Commission in the impugned order noted the submission of Power Grid as under:

"12. …….. The petitioner has further submitted that the instant assets were being used for drawl of power by BHAVINI for commissioning activities."

7.37 The Appellant did not produce any data of usage of the transmission line by TANGEDCO before the Central Commission. The copies of the documents at Exhibits 'O' to Exhibit 'T' were also not produced. Therefore, the Central Commission did not have the opportunity to examine the issue and record its findings on the issue of usage of the transmission lines by TANGEDCO in the impugned order.

7.38 The Appellant has not given any reasons why the documents annexed to the Memo of Appeal could not be produced in the proceedings before the Central Commission.

Re: Appellant's Liability to Pay Transmission Charges for Advancement of Commissioning before Zero Date

7.39 The Appellant executed the indemnification agreement dated 9.9.2008 with Power Grid, in terms of which the commissioning schedules of the Atomic Power Plant (Nov, 2011) and the transmission system (Dec, 2011) were to match.

7.40 The agreed Zero date of 1.12.2011 coincided with the commissioning of the Atomic Power Plant scheduled for commercial operation in November 2011, when supply of power to the beneficiaries would have commenced and the transmission system would have become the part of the regional scheme.

7.41 By virtue of the Appellant's Note, the commissioning of one of the three transmission lines could be advanced to May 2011 to meet the requirement of evacuation of infirm power from the Atomic Power Plant, in which case the transmission charges were payable by the Appellant till such time the transmission line became part of the regional scheme on commissioning of the Atomic Power Plant.

7.42 Based on the above, it has been urged by the Appellant that it is liable to pay the transmission charges for the period prior to the agreed Zero date of 1.12.2011 on advancing the commissioning of one line. It has alleged that since the commissioning of Transmission Line – I was not advanced to May 2011the appellant made alternative arrangement for supply of

power. Therefore, it has no liability to pay the transmission charges for the transmission lines.

7.43 Power Grid with its affidavit dated 15.1.2014 filed a copy of the Appellant's letter dated 22.1.2009 which read as under:

" even though we require transmission lines by November, 2011, there could be possibility of requirement of one line between Sirucheri and our Sub Station by May 2011. We will inform you at appropriate time the exact requirement.……"

7.44 The Appellant has not filed any evidence that it approached Power Grid intimating its requirement of one line in May 2011, though it has alleged that commissioning of one transmission line was not advanced and it made alternative arrangement.

7.45 The argument of the Appellant overlooks the subsequent agreement dated 27.12.2012 executed with Power Grid during pendency of the tariff petition. The relevant extracts of the agreement dated 27.12.2012 are as under:

"……

AND WHEREAS in terms of Indemnification Agreement POWERGRID has commissioned the Kalpakkam - Sirucheri 230 kV D/C line ahead of commissioning of Kalpakkam PFBR Generation.

AND WHEREAS POWERGRID has filed tariff petition with CERC, for determination and payment of transmission charges for Kalpakkam-Sirucheri 230 kV D/C line, stating that transmission charges for Kalpakkam-Sirucheri 230 kV D/C line shall be payable by BHAVINI from the date of commissioning of the line till it becomes regional scheme.

NOW, THEREFORE, in consideration of the premises, mutual agreements, covenants and conditions set forth in this AGREEMENT, it is hereby agreed by and between the parties as follows:
Kalpakkam-Sirucheri 230 kV D/C line is commissioned by POWERGRID on 1.12.2011.

BHAVINI shall bear and pay the full transmission charges as determined by CERC, for Kalpakkam-Sirucheri 230 kV D/C line from the Date of Commercial Operation of the line till this line becomes part of the Regional Scheme. Thereafter, the transmission charges shall be shared by the beneficiaries, as per CERC Regulation (as issued from time to time).

BHAVINI shall open irrevocable revolving LC equivalent to 105% of the estimated monthly bills in favor of POWERGRID."(p 156/Appeal Paper Book)

7.46 The above facts clearly establish that the appellant accepted its liability to pay the transmission charges from 1.12.2011 till such time Transmission Line - I became part of the regional scheme. In the circumstances, challenge to the directions for sharing of the transmission charges in respect of Transmission Line - I is *sans* any basis.

7.47 As regards Transmission Line - II, it was scheduled to be declared commercially operative on 1.4.2012 to match with the commissioning of the Atomic Power Plant. The Appellant has not placed on record any evidence to the effect that the commissioning schedule of the Atomic Power Plant was revised or that Power Grid was at any stage apprised of the delay in the commissioning. The Appellant did not respond to the direction of the Central Commission to submit the expected date of commercial operation. On the contrary, Power Grid in the tariff petition

stated that at the meeting of the Southern Regional Power Committee held on 30.4.2011 the appellant confirmed commissioning of the Atomic Power Plant by March 2012**.** Therefore, the scheduled date of commercial operation of 1.4.2012 had to be adhered to by Power Grid.

7.48 However, the Appellant did not adhere to the commissioning schedule of the Atomic Power Plant. In the circumstances, it would have been inequitable to saddle the beneficiaries with the liability to pay the transmission charges**.** At the same time, the investment made by Power Grid had to be serviced. Therefore, the Appellant was required to bear the transmission charges till such time the transmission lines became part of the regional scheme on commissioning of the Atomic Power Plant because the transmission lines were planned for evacuation of power from the Atomic Power Plant, commissioning of which was delayed by the appellant.

7.49 On the basis of the principle of Novation, enshrined in Section 62 of the Contract Act, extracted as under, the Appellant cannot refute its liability to pay the transmission charges till such time the transmission lines are included in the regional scheme:

"62. Effect of novation, rescission, and alteration of contract

If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

7.50 Since Transmission Line – I was not commissioned during May 2011 Power Grid neither claimed nor has been authorized the transmission charges from May 2011 but has been allowed to claim the transmission charges only from the actual dates of commercial operation of the transmission lines because of non-commissioning of the Atomic Power Plant.

Re: Relaxation

7.51 The appellant by relying upon Regulation 20 of the Sharing Regulations, extracted below, reserves its right to approach the Central Commission for relaxation of Regulation 8 (6) thereof:

*"20. **Power to Relax.***

(1) The Commission may, for reasons to be recorded in writing, relax any of the provisions of these regulations on its own motion or on an application made before it by an interested person."

7.56 The Appellant did not seek any relaxation in the proceedings before the Central Commission in the first instance. Therefore, the stage for seeking relaxation of any of the provisions of the Sharing Regulations has exhausted. Further, it is a well-accepted norm of interpretation that the word 'may' is normally directory and not mandatory. The use of words 'may relax' in Regulation 20 suggests that this is an enabling provision conferring capacity, power, authority or discretion on the Central Commission. The exercise of the power under Regulation 20 cannot be claimed by the Appellant as a matter of right. 'Power to Relax' is an

extraordinary power which can be invoked only under extraordinary circumstances. The deviation from the specified norms by invoking 'Power to Relax' amounts to concession which cannot be claimed as a matter of right as held by the Hon'ble Supreme Court in **K V. Rajalakshmiah Vs State of Mysore (AIR 1967 SC 993)**.

7.57 In the instant case, absolving the appellant of the liability to pay the transmission charges will prove prejudicial to public interest since in that case the consumers would be burdened with extra tariff without their fault or any corresponding benefit to them.

8. **We have heard learned Counsel appearing for the Appellant and the learned Counsel appearing for the Respondents at consideration length of time and we have gone through the written submissions carefully and evaluated the entire relevant material available on record. The following main issues emerge out of Appeal for our consideration:**

Issue No.1: a) Whether the Central Commission has rightly accepted the COD of Asset I & Asset II as per the provisions of Regulation 3(12(c)?

b) Whether the COD can be determined only when the entire transmission system is commissioned?

Issue No.2: a) Whether the Appellant is liable to pay the transmission charges w.e.f. the COD of transmission assets I & III until the commissioning of its generating unit?

b) Whether the transmission charges reliable to be shared by proposed beneficiaries?

Issue No.3: Whether the Central Commission is just and right in non-relaxing the provisions under Regulation 20 of its sharing Regulations 2010 for payment of transmission charges?.

Our findings and analysis :-

Issue No.1 :-

8.1 The learned counsel for the Appellant submitted that Respondent No.1, Powergrid should have approached the Central Commission for approval of the COD of Asset I & II under the Regulation 3(12(c) of the Tariff Regulations, 2009. He, further contended that the approval of the Central Commission is a mandatory requirement for declaration of COD as the Commission had to satisfy itself of the three conditions laid down by this Tribunal in Appeal No.123 of 2011 which has also been confirmed by the judgment dated 3.3.2016 by the Hon'ble Supreme Court. The learned counsel further contended that as per the settled principle of law if the manner of doing a particular act is prescribed under any statute such act must be done in that manner but not otherwise. To substantiate his

contentions, he placed reliance on the judgment of the apex court in ***Ram Phal Kundu vs. Kamal Sharma,*** *(2004) 2 SCC 759.* Further, this Tribunal has also held in ***Essar Power Ltd. vs. Uttar Pradesh Electricity Regulatory Commission,*** reported as 2012 ELR (APTEL) 182 at para 118 that the Commission is required to act consistent with the provisions of the Electricity Act, 2003 and its Regulations. The power to declare/accept the COD has been especially provided to the Central Commission which may or may not approve the COD after applying its prudence on the facts and circumstances of the case. The counsel for the Appellant further contended that as per decision of the Hon'ble Supreme Court in ***PTC India Ltd. vs. Central Electricity Regulatory Commission,*** reported as (2010) 4 SCC 603, the Central Commission is bound to follow the Regulations framed by it in exercise of its power under Section 178 of the Electricity Act, 2003. Further, the learned counsel also emphasised that the entire transmission system needs to be declared under commercial operation in a single go rather than opposing the COD elementwise.

8.2 ***Per contra,*** the learned counsel appearing for Respondent NO.1, Powergrid contended that the Central Commission, after due consideration of all documents and information furnished by Powergrid, has accepted the COD of Asset I and II as 01.12.2011 and 01.04.2012

respectively. He was quick to point out that, as per the Regulation 3(12)(c), the COD can be very well declared from the date of completion of all works i.e. the date when the line was energised being connected on both ends as in the present case. Additionally, there can be no requirement of regular service when the proviso is intended for an element which is not in regular service and if the line was in regular service, there will be no need to resort to this proviso. On the contentions of the Appellant in the Appeal, that no prior approval of the Central Commission was sought for by the Respondent, the learned counsel vehemently submitted that as per the Regulation, there is no requirement of any 'prior' approval of the Central Commission for filing of the Petition for determination of Transmission Tariff. The requirement under Regulation 3(12)(c) is for 'approval' and not 'prior approval' as the same can be approved in the process of determination of tariff. .The Hon'ble Supreme Court in ***Ashok Kumar Das and Ors. vs. University of Burdwan and Ors. (2010) 3 SCC 616*** has considered the difference between 'approval' and 'prior approval' and held as approval means that the approval can be granted subsequently.

8.3 The learned counsel further contended that, there is no specific methodology provided in the Regulations for seeking approval of COD nor is any timeline provided. The Regulation only requires the approval of the Central Commission which has been granted in the Impugned

Tariff Order and hence there is no violation of the Tariff Regulations 2009. The learned counsel placed his reliance on following judgments of the Hon'ble Supreme Court which have settled the principle that the procedural issues cannot be allowed to override justice:-

(a) ***Kailash V. Nanhku (2005) 4 SCC 480***
(b) ***Sangram Singh v. Election Tribunal AIR 1955 SC 425***
(c) ***Bajaj Tempo Ltd. vs. Commissioner of C.Ex.and Customs 1999 (63) ECC 268***
(d) ***State of Punjab v. Shamla Murari (1976) 1 SCC 719***

8.4 The learned counsel appearing for the Respondent No.1 further vehemently pointed out that, the Appellant for the first time has raised the issue of declaring COD of the entire system associated with Kalpakkam-PFBR in one go. He submitted that the said issue was never raised before the Central Commission even though the Appellant was fully aware of the submissions of Powergrid regarding separate COD for each Asset. It is well settled principle of law that new issues cannot be raised for the first time in Appeal and to substantiate his contentions, he placed reliance on judgments of **Hon'ble Supreme Court namely-** ***State of Maharashtra V. Hindustan Construction Company Limited (2010) 4 SCC 518, Karpagathachi and Ors. vs. Nagarathinathachi (10.03.1965 - SC) : AIR 1965 SC 1752, Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers Private Limited (2008) 14 SCC 208, Steel Authority of India Limited v. Gupta Brother Steel Tubes Limited (2009) 10 SCC 63.***

8.5 The learned counsel further submitted that the Transmission Agreement dated 05.08.2011 duly executed by the Appellant also recognizes the declaration of date of commercial operation for each element i.e. each transmission line/Asset.

8.6 The learned counsel appearing for Respondent No.5 submitted that Asset I, II and III were executed by the first Respondent, exclusively for evacuation of power from Kalpakkam-PFBR generating unit of the Appellant and the present dispute regarding approval /prior approval of COD by the Central Commission has arisen out due to the fact that Asset I & II have been commissioned but the generating station of the Appellant has not yet been completed. He further pointed out that the other important factor for the issue is failure on the part of the Respondent No.1 in not coordinating with the generating station's schedule resulting into utter mismatch between generation and transmission. The Respondent No.1 should have performed with the mandate of section 38 (2) of the Act 2003. He further contended that Appellant was well aware of the COD of his generating unit and it was wrong on his part to seek advancement of the commissioning of evacuation lines for the purpose of drawing, testing and commissioning power.

8.7 The learned counsel for the Central Commission submitted that the Appellant, in the proceedings before the Central Commission, did not

raise any objection to the dates of commercial operation of the transmission lines notified by the Respondent No.1 vide notifications dated 30.11.2011 and 29.3.2012. He further contended that the plain reading of the second proviso to sub-clause (c) of clause 3(12) of the 2009 Tariff Regulations does not suggest that the Central Commission is prevented from approving the date of commercial operation simultaneously along with the approval of tariff. In this regard, he placed reliance on the judgment of Hon'ble Supreme Court in **Khargram Panchayat Smiti Vs State of West Bengal [(1987) 3 SCC 82].** He was quick to point out that for the approval of COD of the Assets in the process of determination of transmission tariff, the Central Commission cannot be faulted. The relevant extract of the impugned order in this regard is as under :-

"17. …….. It is observed that BHAVINI switchyard is connected to Arani and Sirucheri and it will cause power to flow from Sirucheri to Arani and vice-versa in view of the nature of electrical system. Energisation certificates dated 30.11.2011 and 20.3.2012 were issued by CEA. It is however observed that CEA gave permission to energise since the lines were connected at both ends i.e. Kalpakkam end and Sirucheri/Arani end. Hence, the date of commercial operation of Assets-I and II have been approved as 1.12.2011 and 1.4.2012 respectively."

Our findings & analysis:-

8.8 We have gone through the submissions of the learned counsel for the Appellant and the learned counsel for the Respondents and also considered the rulings in various judgments of the Apex court and this Tribunal. The main contention / objection of the Appellant counsel is

that, no prior approval of the Central Commission was obtained before declaring the COD of various assets. The learned counsel for the Appellant contended that it is mandatory under Regulation 3(12(c) of the Tariff Regulations, 2009 to take prior approval on the COD before moving the application for determination of transmission tariff. On the other hand, the counsel for Respondent No.1 submitted that after analysing and applying prudence check on the information and material submitted by it, the Central Commission accepted / approved the COD of various assets strictly adhering to its tariff regulations. It has become a principle of law after the judgments of Hon'ble Supreme Court in various cases that the approval means that the approval can be granted subsequently. We have taken note from the contentions of the learned counsel appearing for the Appellant as well as Respondents that there is no dispute as far as completion of all the works under the scope of works for assets is concerned and it is only the procedure for approval of the COD which is under question.

8.9 After careful consideration of the well settled principles of law laid down by the apex court and this Tribunal in various judgments that procedural issues cannot be allowed to override justice. In the present case wherein the Respondent No.1 has completed all associated works of the reference assets as per the time schedule agreed to by the parties and it has a

legitimate claim to receive requisite charges as approved by the Central Commission. We find that the Central Commission while adhering to its Regulations, has adopted judicious approach and considered all the material placed before it prudently while passing the impugned order giving cogent reasoning. Besides, as per its Regulations, the State Commission can approve COD of the entire system as whole or elementwise as the case may be depending upon the circumstances therein. Therefore, we do not find any substance in the contentions of the Appellant Counsel that, COD has to be approved for all the lines/system as a whole in one go and not its elementwise. Accordingly, we do not find any legal infirmity or ambiguity in the impugned order passed by the Central Commission as far as approval of COD of different assets namely Asset I & II are concerned.

Issue No. 2:-

8.10 The learned counsel appearing for the Appellant submitted that the Appellant cannot be held liable to pay the transmission charges for the transmission assets until the commissioning of its generating unit. He further contended that the Appellant has neither challenged the fact that the Assets I & II are completed in all respects nor there is any error in computation of the transmission charges. The learned counsel further submitted that the Assets I & II are being used by Respondent No.5 i.e.

TANGEDCO for the major part of the capacity of the same and accordingly the Respondent No.5 and other entities using the subject transmission lines should have been made liable to bear the transmission charges to the extent of their use. The counsel further submitted that the lines of Assets - I & II have become part of Southern Grid since January, 2013 onwards. The learned counsel submitted that the pre-ponement of COD for Asset-I could not become a reality and the Appellant had to make an alternate arrangement for drawl of commissioning power from Madras Atomic Power Station. The Counsel for the Appellant was quick to submit that the Respondent No.5 has been using the subject lines for drawl of power and in terms of laws and equity, it should be directed to at least share the transmission charges in proportion of their actual use, if not made to bear full charges.

8.11 ***Per contra,*** the learned counsel for the Respondent No.1 contended that, as held by the Central Commission in the impugned order, the Appellant is liable to pay the transmission charges from the COD of Asset-I & II until the commissioning of Appellant's Generating Station and thereafter, the transmission charges would be considered as part of POC charges under CERC Sharing Regulations, 2010. The learned counsel further submitted that the Assets were developed for the Appellant and were commissioned as per their schedule. In fact, the transmission charges are

to be determined from the COD and they are payable from such date in accordance with Tariff Regulations, 2009 and Sharing Regulations, 2010 either by the beneficiaries or the generator. He pointed out that the real question in the present case is that who is to pay the transmission charges. He further contended that in the present case, the Appellant has executed the Transmission Service Agreement dated 05.08.2011 with Powergrid as DIC, in accordance with the Sharing Regulations, 2010. Thus, the Appellant is the DIC of the ISTS and liable to pay the transmission charges, as held by the Central Commission. The Appellant cannot now claim that it is not liable to pay the transmission charges even though the transmission system is ready and commissioned. The learned counsel further attracted the provisions of Regulation 8(6) of the Sharing Regulations, 2010 which is reproduced below:-

"*(6) For Long Term Transmission Customers availing power supply from inter-State generating stations, the charges attributable to such generation for long term supply shall be calculated directly at drawal nodes as per methodology given in the Annexure-I. Such mechanism shall be effective only after commercial operation of the generator. Till then it shall be the responsibility of the generator to pay transmission charges.*"

8.12 The learned counsel further submitted that, as per the CERC Regulations, it is well settled that the existing contracts shall stand realigned to the regulations and TSA envisaged under Regulation, 2014. Thus, in case of any contradiction, arising out of any contract between Powergrid and the

Appellant, the liability of the Appellant as per Regulation 8(6) would be implemented. The learned counsel also placed reliance on the judgment of the Hon'ble Supreme Court in *PTC India Ltd. vs. CERC 2010 (4) SCC 603* to substantiate his argument that Regulations framed by Central Commission would override the existing contracts. It is further submitted by the learned counsel for the Appellant that vide Agreement dated 27.12.2012, the Appellant had duly acknowledged that Powergrid had commissioned the transmission lines prior to the commissioning of generating unit and also agreed to pay the full transmission charges as determined by the Central Commission from the COD of the line until the same become part of the regional scheme. It is, thus, significant to note that even as per the said Indemnification Agreement, the Appellant is liable to pay the transmission charges till the line becomes part of the regional scheme. Therefore, the learned counsel appearing for the first Respondent submitted that, the Central Commission after due consideration of the oral document and evidence available in the file has rightly justified denying the relief sought by the Appellant. Hence, on this ground also, the Appeal filed by the Appellant is liable to be dismissed.

8.13 The learned counsel appearing for Respondent No.5 submitted that the present dispute regarding liability to make payment in respect of the

transmission lines meant for evacuating power from the Appellant' generating station has arisen due to the non-commissioning of the generating station by the Appellant within the stipulated time frame. The Appellant generator only is responsible for non-commissioning of the generating units. Had the generating plant of the Appellant commissioned in time, the transmission licensee would have collected the transmission charges from the procurers of electricity from the Appellant generator. He further contended that the Central Commission has rightly decided this issue that as the transmission system has been established for evacuation of power from the generating unit of the Appellant, it is liable to bear the transmission charges. He further pointed out that the issue of early COD of transmission assets was also at the request of the Appellant and the beneficiaries have no role to play in the Agreement between the generator and the transmission licensee. Further, the Appellant was well aware of the COD of its generating unit and it was wrong on their part to seek advancement of the commissioning of the evacuation line.

8.14 The learned counsel for the Respondent Commission submitted that since the transmission lines were commissioned for evacuation of power from the Atomic Power Plant owned by the appellant and the Atomic Power Plant was not ready for commissioning, the Central Commission in the impugned order directed that the transmission charges would be borne by

the appellant in terms of Regulation 8 (6) of the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010. He further contended that the Powergrid in its affidavit dated 13.11.2014 has, *inter alia*, stated that the said lines are being utilized for drawing commissioning power for BHAVINI-PFBR. As Appellant did not dispute the correctness of the Powergrid submissions and based on this, the Central Commission held that the instant assets were being used for drawl of power by BHAVINI for commissioning activities. Further, the Appellant could not produce any data which can establish the use of the instant transmission lines by TANGEDCO before the Central Commission. The Exhibits, now submitted by the Appellant were never produced before the Central Commission and accordingly it did not have the opportunity to examine the same. The learned counsel appearing for the Respondent Commission submitted that the impugned order passed by the Central Commission is well founded and well reasoned. Therefore, interference of this Tribunal does not call for.

Our Findings & analysis:-

8.15 We have considered the submissions of the learned counsel for the Appellant and the learned counsel for the Respondent and also perused on the materials placed on record before us. It is not in dispute that the

transmission lines especially Asset I & II have been completed in all respects by Powergrid and lines are connected at both ends after successful charging. The real question has arisen that who should bear the transmission charges for the transmission lines once their COD and tariff has been fixed by the Central Commission. Generally, the transmission charges would have to be borne by either the generating company or the beneficiaries who are allottees of the generated power from a particular generating project. The main issue in the instant case has resulted due to non-commissioning of the Kalpakkam – PFBR Generating Stating even after the lapse of more than six years from its scheduled COD. While transmission lines are ready for use but there is no generation for evacuation.

8.16 After thorough evaluation of the records placed before us, it is relevant to note that the transmission lines constructed by Respondent No.1-Powergrid were envisaged solely for evacuation of 500 MW power from the generating station of the Appellant. As per the Indemnification Agreement executed between BHAVINI and Powergrid, it was a clear commitment that pending declaration of the transmission assets as part of regional transmission network, the transmission charges up to the commissioning of generating unit shall be borne by BHAVINI, the Appellant herein. Now, after commissioning of Assets –I & II, the Appellant is making peripheral submissions such as Powergrid could not

advance the commissioning of transmission lines by May, 2011 and the other beneficiaries such as Respondent No.5 is also using the said assets for exchange of power in their territory and hence, either they should bear the entire transmission charges or at least share the charges in proportion of usage to be decided by the Central Commission. After thorough evaluation of the relevant records available on the file regarding this issue placed before us, we opine that as per the relevant regulations of the CERC as well as Indemnification Agreement signed by the Appellant with Respondent No.1 dated 27.12.2012, the transmission charges are liable to be borne by the Appellant up to the commissioning of their generating unit. In view of the facts and circumstances of the case that, the generating unit is not yet commissioned and the reference transmission system could not become part of regional network and also, no documentary evidence available to prove the usage of these lines by Respondent No.5/other entities, the Appellant is legally bound to bear the charges as decided by the State Commission. Accordingly, We do not find any error and irregularity in the impugned order passed by the Central Commission in this regard. Therefore, interference of this tribunal does not call for.

Issue No. 3:

8.17 The learned counsel for the Appellant submitted that the non-commissioning of generating unit was a result of several unforeseen circumstances such as Fukushima (Japan) Nuclear Power Plant disaster which required the Appellant to undertake and implement several additional safeguards as recommended by the task force of the Atomic Energy Regulatory Board (AERB). Keeping this in view, the Central Commission ought to have relaxed provisions under Regulation 20 and allowed non-recovery of transmission charges up to the commissioning of the generating unit. The learned counsel was quick to point out that the Indemnification Agreement dated 09.09.2008 clearly confirms the contention of the Appellant to pay the transmission charges if and only if the commissioning of the same is advanced to May 2011, whereas the earliest commissioning could be achieved by the Respondent No. 1 on 01.12.2011. He further contended that pending commissioning of KPFBR-Sirucheri 230 kV D/C transmission lines, the Appellant had to make alternate arrangements on its own and sourced the power from Madras Atomic Power Station to meet its urgent need for commissioning power. The learned counsel vehemently submitted that the Central Commission has failed to consider the case made out by the Appellant.

8.18 **Per Contra,** the learned counsel for Respondent No.1 submitted that the Central Commission has rightly not provided any relaxation or exemption from payment of transmission charges by the Appellant as once the transmission assets stand commissioned, the transmission charges are due to be recovered with respect to such asset. He further contended that the Powergrid could not be denied the transmission charges legitimate transmission charges on account of the Appellant requesting for an exemption or relaxation. If the Transmission Licensee is denied the transmission charges in such a manner by relaxing the Regulations, the same would result into serious cash flow problems and in turn, affect the transmission service in the country. The learned counsel appearing for the Respondent No.1 submitted that impugned order passed by the Central Commission is sound and the Appellant counsel has failed to make out any legal infirmity committed by the Central Commission. Therefore, he submitted that the impugned order passed by the Central Commission is as per the relevant regulations. Therefore, interference of this Tribunal does not call for.

8.19 The learned counsel for Respondent No.5 contended that the Appellant has miserably failed to commission its generating unit and in turn, made the Respondent No.1 as well as beneficiaries of electricity generation from Kalpakaam to get deprived of benefits from the project. He further

submitted that in the process of excessive delay in the commissioning of 500 MW generating unit, the Appellant has caused huge financial loss to the public exchequer by keeping on postponing the commissioning date. The beneficiaries who have been allotted power from the generating unit are forced to procure high cost power from the alternate sources and the Appellant is liable to compensate the Distribution Utilities for the loss on account of non-commissioning of the project from the date of scheduled COD to till date. Learned counsel appearing for the Respondent No.5 submitted that the appeal filed by the Appellant is liable to be dismissed with cost.

8.20 The learned counsel for the Central Commission contended that the Appellant did not seek any relaxation in the proceedings before the Central Commission in the first instance. Therefore, the stage for seeking relaxation in any of the provisions of the Regulations has exhausted. He further submitted that a plain reading of Regulation 20 implies that "may relax" is a enabling provision conferring capacity, power authority or discretion of the Central Commission. The same cannot be claimed as a matter of right as power to relax is an extraordinary power which can be evoked only under exceptional circumstances of the case.

8.21 To substantiate his submissions, the learned counsel placed reliance on the judgment of Hon'ble Supreme Court in K V. Rajalakshmiah Vs State

of Mysore (AIR 1967 SC 993) which has held that the deviation from the specified norms by invoking power to relax amounts to concession which cannot be claimed as matter of right. He further brought out that in the instant case, absolving the Appellant of the liability to pay the transmission charges will prove prejudice to the public interest as the consumers would be burdened with extra tariff without none of their fault or any corresponding benefit to them. Hence, Appeal filed by the Appellant is liable to be dismissed.

Our findings & analysis:

8.22 We have thoroughly analysed the contentions of the Appellant and the Respondents and also perused the rulings of the judgement cited by the learned counsel. Admittedly, the Appellant could not commission its generating unit even after lapse of more than 6 years from the scheduled date of commissioning and also intends to avail the benefit of relaxation under CERC Regulations 20 of getting absolved of paying the transmission charges. On the other hand, the Respondents vehemently contended that the request of the Appellant for availing exemption or relaxation in paying the legitimate transmission charges is not at all justified. The learned counsel for the Respondents further submitted that the Appellant has not only deprived the Transmission Licensees to recover its transmission charges but also made the

beneficiaries/Distribution licensees to suffer for want of power from its generating unit. As such the Appellant does not have any legitimate right to seek a relaxation from the Central Commission under any of the relevant Regulations for not paying the transmission charges. In view of the foregoing facts and circumstances of the case in hand, we are of the considered opinion that the Central Commission has rightly justified in not acceding to the request of the Appellant for granting a relaxation under Regulation 20. We, accordingly, hold that findings of the Central Commission in this regard rightly justified and are also in line with the decisions of the Apex Court cited supra.

Summary of our findings:

9. After thorough evaluation of the oral and documentary evidence available in the file and taking into consideration the submission of learned counsel appearing for both the parties, we are of the considered view that, the Central Commission after thorough evaluation the entire relevant material on records by assigning valid and cogent reasons, has passed the well considered order. Therefore, we hold that the issues raised in the present appeal are devoid of merits. Accordingly, the impugned order passed by the Central Commission deserves to be upheld.

ORDER

For the forgoing reasons, as stated above, we are of the considered view that the issues raised in the present appeal being Appeal No. 151 of 2015 are answered against the Appellant.

Hence the Appeal filed by the Appellant is dismissed.

The impugned order passed by Central Electricity Regulatory Commission dated 29.04.2015 in Petition No. 105/TT/2012 is hereby upheld.

In view of the above, the prayer sought in the IA Nos. 250 of 2015, 55 of 2017 and 538 of 2017 in Appeal No. 151 of 2015 do not survive for consideration and hence stand disposed of as having become infructuous.

No order as to costs.

Pronounced in the Open Court on this **04th day of October, 2018.**

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~

Pr