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

APPEAL NO. 175 of 2015 &
IA NO. 647 OF 2017

Dated: 12th July, 2018

Present: Hon'ble Mr. I.J. Kapoor, Technical Member
Hon'ble Mr. N. K. Patil, Judicial Member

In the matter of:

Pragati Power Corporation Ltd. (PPCL)
Himadri Rajghat Power House Complex,
New Delhi - 110002 **…. Appellant**

Versus

1. **Central Electricity Regulatory Commission (CERC)**
3rd& 4th Floor, Chanderlok Building,
35, Janpath, New Delhi- 110001 **…. Respondent No.1**

2. **BSES Yamuna Power Limited (BYPL)**
Shakti Kiran Vihar
Karkardooma **…. Respondent No.2**
New Delhi – 110 092

3. **New Delhi Municipal Council (NDMC)**
Palika Kendra, Sansad Marg
New Delhi – 110 001 **…. Respondent No.3**

4. **North Delhi Power Ltd. (NDPL)**
Grid Substation, Hudson Road
Kingsway Camp, Delhi – 110 009 **…. Respondent No.4**

5. **BSES Rajdhani Power Limited (BRPL)**
BSES Bhawan, Nehru Place
Nehru Place
New Delhi – 110 019 **…. Respondent No.5**

6. Punjab State Power Corporation Ltd. (PSPCL)
PSEB Head Office
The Mall, Patiala – 147 001 …. Respondent No.6

7. Haryana Power Purchase Centre (HPPC)
Shakti Bhawan, Sector – IV
Panchkula, Haryana – 134 109 …. Respondent No.7

8. Garrison Engineer
Military Engineering Services (MES)
GopiNath Market, Delhi Cantt – 110 010 …. Respondent No.8

Counsel for the Appellant(s) : Ms. Swapna Seshadri
Mr. Anand K. Ganesan
Mr. Ashwin Ramanathan
Ms. Rhea Luthra
Ms. Neha Garg

Counsel for the Respondent(s) : Mr. Manish Srivastava
Mr. Aditya Gupta
Mr. Mehak Bakshi
Mr. Prachi Johri for R-4

Mr. R.B. Sharma for R-5

JUDGMENT

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

1. The present Appeal is being aggrieved filed by Pragati Power Corporation Ltd. (hereinafter referred to as the **"Appellant"**) under Section 111 of the Electricity Act, 2003 ("**Act**") against the order dated 26.5.2015**("Impugned Order")** passed by Central Electricity Regulatory Commission (hereinafter referred to as the **"Central**

Commission") in Petition No. 257 of 2010 wherein the Central Commission has determined the tariff of Pragati-III Combined Cycle Power Plant (1371.20 MW) of the Appellant for the period from date of commercial operation of GT-I of Block-I upto 31.3.2014.The Central Commission vide the Impugned Order has disallowed time overrun and corresponding Interest During Construction (IDC), Incidental Expenses During Construction (IEDC)& Foreign Exchange Rate Variations (FERV), non-consideration of IDC on normative debt: equity ratio, claim of additional water charges and municipal tax payable by the Appellant.

2. The Appellant i.e. PPCL is a generating Company having meaning under Section 2 (28) of the Act.

3. The Respondent No.1 i.e. Central Electricity Regulatory Commission (CERC) is the Central Commission constituted under Section 76 of the Act and exercising jurisdiction and discharging functions in terms of the Act.

4. The Respondents No. 2 to 5 and 8 are the Distribution Licensees in the State of Delhi and Respondent Nos. 6 & 7 are procurer of power on behalf of Distribution Licensees in the States of Punjab and Haryana respectively. The Respondents are the beneficiaries of the electricity being generated at the Pragati-III Combined Cycle Power Plant (1371.20 MW) of the Appellant.

5. **Brief facts of the case are as follows:**

a) The Central Commission notified the CERC (Terms and Conditions of Tariff) Regulations, 2009 ("**Tariff Regulations 2009**") providing for the norms and parameters for determination of tariff of generating companies supplying power to more than one State for the period 2009-14.

b) The Appellant has executed Pragati-III Combined Cycle Power Plant (1371.20 MW) ("**Pragati-III**") primarily with the objective of commissioning the same by Common Wealth Games (CWG) scheduled to be held in Delhi in October 2010. In the Investment Approvals of the Board of Directors of the Appellant no specific Scheduled Commercial Operation Date (SCOD) of the Block-I & II has been indicated except mentioning that the project was to be developed in view of CWG in 2010. As per the EPC contract, Block-I & Block-II were to be commissioned within 28 months and 32 months from the date of award of main plant package i.e. 30.4.2008. Accordingly, the petitioner has considered the SCOD of Block-I as 31.7.2010 and Block-II as 30.11.2010.The break up of capacity, SCOD and actual Commercial Operation Date (COD) of Pragati-III is summarised in the table below. There has been delay in the COD of the Pragati-III.

The relevant SCOD/COD and delay of the Pragati-III are as below:-

	Unit	**Capacity (MW)**	**SCOD**	**Actual COD**	**Delay in Months**
Block-I	GT-I	216	31.3.2010	27.12.2011	21
	GT-II	216	31.5.2010	16.07.2012	26
	ST-I with HRSG-I	342.8	31.7.2010	01.04.2012	
	ST-I with HRSG-I & II	253.60	31.7.2010	14.12.2012	28.5

	Total (Block-I)	**685.60**			
Block-II	GT-III	216	31.7.2010	28.10.2013	39
	GT-IV	216	30.9.2010	27.02.2014	41
	ST- II	253.60	30.11.2010	27.03.2014	40
	Total (Block-II)	**685.60**			
	Grand Total	1371.20			

c) COD of Block-I comprising of two Gas Turbines (GTs) and one Steam Turbine (ST) was completed on 14.12.2012 and COD of Block-II comprising of another set of two GTs and one ST was completed on 27.03.2014.

d) On 15.9.2010, the Appellant filed Petition No. 257 of 2010 for determination of tariff of Pragati-III from Commercial Operation Date (COD) of GT-I of Block-I till 31.3.2014.

e) The Central Commission vide order dated 25.5.2012 approved the provisional tariff of Pragati-III calculated at 95% of the capital cost claimed by the Appellant.

f) During the course of proceedings in the tariff petition before the Central Commission, the Appellant filed additional data and information related to time overrun in implementation of Pragati-III, which include communications, exchanged with M/s BHEL (EPC Contractor for Pragati-III).

g) The Central Commission vide Impugned Order dated 26.5.2015, decided Petition No. 257 of 2010 and determined the tariff applicable to the Pragati-III of the Appellant.

h) The Central Commission vide Impugned Order has not allowed any IDC and IEDC with respect to disallowed time overrun citing that the delay was due to the coordination issue between the Appellant and the BHEL. The Central Commission has also

disallowed Foreign Exchange Rate Variation (FERV), non-consideration of IDC on normative debt: equity ratio, water charges and municipal tax payable by the Appellant.

i) Aggrieved by the findings of the Central Commission in the Impugned Order, the Appellant has preferred the present Appeal before this Tribunal.

6. Questions of Law:

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

a) Whether the interpretation of the Central Commission is correct that the delay which has occurred in setting up Pragati-III is covered by situation (i) as referred in the judgement dated 27.4.2011 passed by this Tribunal in the matter of MSPGCL v. MERC &Ors.?

b) Whether the Central Commission having categorically found that there was no imprudence on part of the Appellant in selecting BHEL as the contractor which is specifically mentioned in situation (i) of the judgement dated 27.4.2011 can then further go on to blame the Appellant and not give any IDC or IEDC whatsoever to the Appellant?

c) Whether the Central Commission in computing the interest on loan has acted in violation of Regulation 12 of the Tariff Regulations 2009 which provides for normative debt: equity ratio of 70:30?

d) Whether the FERV liability as a consequence of not condoning the time overrun can be fastened on the Appellant when the Appellant has done all in its power to pursue with BHEL to put up the plant on time?

e) Whether the Central Commission has indeed considered the special water charges and taxes being paid by the Pragati-III which is set up in a municipal area while framing the Operation & Maintenance expenses in terms of Regulation 19 (c) of the Tariff Regulations 2009, when there are barely any such generating stations in the entire country and only the Appellant is required to use treated water and pay additional municipal taxes due to the location of the Pragati-III?

7. We have heard the learned counsel appearing for the Appellant and the Respondents at considerable length of time and also carefully gone through the written submissions and submissions put forth during the hearings. Gist of the same is discussed hereunder.

8. The learned counsel Shri Anand K. Ganesan appearing for the Appellant submitted the following submissions for our consideration on the issues raised in the instant Appeal as follows:-

a) The Central Commission has erred in disallowing time overrun and IDC& IEDC beyond SCOD of Pragati-III by vaguely attributing the same to the Appellant. The findings of the Central Commission on this issue are self-contradictory, as at several

places in the Impugned Order it has noted that BHEL failed to mobilize the resources to complete and commission the Pragati-III in time and on the other hand it has not taken cognisance of the record of about 200 letters/correspondences (including that of Govt. of NCT of Delhi, Govt. of Gujarat, BHEL & NTPC) submitted by the Appellant showing that it was pressing very hard with BHEL to complete Pragati-III project within the specified time limits. According to the Appellant the matter is covered under situation (ii) of the judgment dated 27.4.2011 of this Tribunal in respect of Maharashtra State Power Generating Company Ltd. (MSPGCL) v. MERC &Ors. ("**MSPGCL Judgement**") and not under situation (i).

b) Pragati-III was conceived to supply power during CWG to be held during October 2010 in Delhi. BHEL has prioritised the completion of projects, which it was having on hand at that point of time by keeping in mind that the requirement of power during CWG would have to be met with this capacity.

c) The Central Commission has not gone into the issues/ not given any reasons/ not examined the evidence on record placed by the Appellant on the issue of time overrun. In the Impugned Order there is no reference to the evidences placed by the Appellant before the Central Commission and hence the matter may be remanded to the Central Commission to pass a reasoned order.

d) In the MSPGCL Judgement, this Tribunal has held that the contract was prudently awarded to BHEL and the delay was due to BHEL which was beyond the control of the generating

company. This Tribunal in the said judgement has also found that there was contributory delay from the generating company and applied the situation (iii) of the said judgement according to which 50% of IDC & IEDC was allowed to the generator. In the present case, the Central Commission has also concluded that the award of EPC Contract to BHEL was prudent and has also held that the delay was caused by BHEL. The only finding against the Appellant in the Impugned Order is that the Appellant failed to persuade BHEL to complete the project in time. Accordingly, the Central Commission has erroneously applied the decision of the said judgement of this Tribunal under situation (i).

e) In response to the Record of Proceedings (ROP) for the hearing dated 11.11.2014 before the Central Commission, the Appellant filed affidavit dated 5.12.2014 and submitted all the relevant correspondences which explain delay in the commissioning of Pragati-III. The Appellant has also provided the activity wise details through PERT/Bar chart describing the time overrun. However, the Central Commission has not gone into the details of the same while deciding the petition.

f) The Central Commission has appreciated the Appellant for commissioning Pragati-III at a reasonable cost of Rs. 4355.19 Cr. as against the estimated project cost of Rs. 5195.81 Cr. and even below the cost of contemporary projects like UNOSUGEN &OTPC if compared on per MW basis. Despite lower cost of the Pragati-III, the Central Commission has allowed the capital cost of Rs. 3794.07 Cr. only by disallowing IDC, IEDC, FERV etc. The capital cost claimed by the Appellant is very less even if full

IDC & IEDC is included. The issue of allowance/ disallowance of IDC & IEDC is consequential to the allowance/ disallowance of time overrun.

g) The Central Commission has erred in not allowing the servicing of loan on normative debt: equity ratio of 70:30 at least up to SCOD of individual GT(s)/Block(s) in accordance with Tariff Regulations 2009. The Appellant has invested higher equity at the beginning of the project to ensure that the project does not get delayed further due to late drawal of debt. The Tariff Regulations 2009 provide normative debt: equity ratio of 70:30 and when equity exceeds 30% then the excess equity beyond 30% is treated as normative loan. However, the Central Commission erroneously proceeded on basis of actual equity and not on normative debt: equity ratio. This Tribunal in the MSPGCL Judgement has dealt this issue and the decision of the Central Commission is against the principle laid by this Tribunal in the said judgement.

h) The Appellant has presented its own calculation of IDC based on capital cost claimed by it and has demanded the IDC of Rs. 299.73 Cr. up to SCOD of the Pragati-III. While doing so the Appellant has relied on Regulation 12 & 16 of the Tariff Regulations 2009 and some normative figures of interest rate.

i) The issue of FERV is also consequential to the issue of time overrun and the same is automatically adjusted based on the decision on time overrun.

j) The Appellant is also subjected to unique charges in the form of sewage treatment to Delhi Jal Board (DJB) and municipal taxes due to its location in NCT of Delhi. No other gas based station in country is subjected to such charges. The O&M norms in Tariff Regulations 2009 of the Central Commission are based on normal water charges which are generally applicable to all generating stations and does not include such unique charges. The Central Commission ought to have allowed these charges in line with it has allowed additional O&M expenses for advance class GTs.

9. The learned counsel Mr. Manish Srivastava appearing for the Respondent No. 4 submitted the following submissions for our consideration on the issues raised in the instant Appeal are as follows:-

a) The Appellant has not disclosed complete facts before this Tribunal. The time overrun was due to slackness in project management and improper coordination between the BHEL and sub-contractors and not due to reasons beyond the control of the Appellant. The Appellant has also not taken the holistic view of the Impugned Order wherein it has been clarified that though the delay may be attributed to BHEL the final responsibility lies with the Appellant to ensure completion of the project as per contractual terms.

b) The Appellant's claim of IDC is flawed as the question of normative debt: equity comes into picture only when it has become liable to payback loan. Interest on loan cannot be

claimed unless the loan is availed and repayment is made for the same. IDC cannot be used to make a means of additional income.

c) FERV attributable to delay in commissioning cannot be allowed to the benefit of the Appellant. FERV is directly related to the allowance/ disallowance of time overrun.

d) Additional water charges and municipal taxes cannot be considered as change in law event and the Central Commission has rightly disallowed the same. In case of NTPC also the Central Commission has disallowed additional claim of water charges and the same has been upheld by this Tribunal vide order dated 3.6.2010. The Central Commission vide statement of reasons to Tariff Regulations 2009 has clarified that expenses incurred with regard to water charges and municipal taxes cannot be made pass through.

10. The learned counsel Mr. R B Sharma appearing for the Respondent No. 5 submitted the following submissions for our consideration on the issues raised in the instant Appeal are as follows:-

a) The Tariff Regulation 2009 does not cover the issue of time overrun and hence this Tribunal in the MSPGCL Judgement has set out the principles to deal with such situations. The Appellant in the present case has put all blame on BHEL for delay which was not the party before the Central Commission and nor a party before this Tribunal. The Appellant is trying to transfer the burden of delay to the beneficiaries of the Pragati-III

whereas the issue is between the Appellant and BHEL. This Tribunal vide judgement dated 26.2.2015 in Appeal No. 107 of 2014 in case of PGCIL v. CERC &Ors. has dealt such issue and in light of the said judgement the Impugned Order is wholly justified. As regards the issue of communication between the Appellant and BHEL is concerned, the similar case has been decided by this Tribunal in judgement dated 28.11.2013 in Appeal No. 165 of 2012.

b) The Appellant's contention regarding dichotomy in the findings of the Central Commission is misconceived. The principles in the MSPGCL Judgement are illustrative in nature and not conclusive. The Pragati-III was to be commissioned during CWG and it was the Appellant who was responsible to get the works completed through the contractual agreement and hence the ultimate responsibility rests with the Appellant. The Central Commission has applied the principles laid down by this Tribunal in the MSPGCL Judgement many times and has been upheld by this Tribunal.

c) Though the Central Commission has held that there is no imprudence in selection of BHEL as an EPC Contractor but the execution of contract is vital between the parties and it depends on case-to-case basis. The contention of the Appellant that it cannot do more than pressing upon BHEL to complete the work in time, if accepted, will mean that no project can be completed in the prescribed timelines.

d) The Appellant has cited casual reasons for the delay as reasons beyond the control of the Appellant. These include

delays in civil works due to non-availability of material/ mobilisation of resources, delay in transportation of GTs, non-availability of critical material etc. These are general problems faced by any project during execution stage and in the present case was the responsibility of BHEL as it was a turnkey project. The Central Commission is justified in not allowing the time overrun to the Appellant and consequently IDC & IEDC. The Central Commission has devoted ten pages in the Impugned Order to decide the issue of time overrun and hence the Appellant's contention that the Central Commission has not gone into the details submitted by it is misplaced. The Appellant has also not submitted complete set of documents specifically PERT chart asked by the Central Commission. It is important to provide all the relevant documents by the Appellant to the Central Commission and the Central Commission has right to demand relevant documents to decide the case.

e) The issue of reasonableness of the cost raised by the Appellant is misconceived as the Central Commission has determined the cost as on SCOD by disallowing the time overrun and consequential costs. Further, the cost of the project would increase in the form of additional capitalisation, initial spares, undischarged liabilities etc.

f) On the issue of disallowance of servicing of loan on normative basis, it may be noted that the Central Commission allows the servicing of loan on normative basis only after COD through tariff. Before COD, the Appellant is allowed IDC on actual basis as capital cost of the project is determined on the expenditure incurred including IDC and financing charges. The concept of

normative parameters arise only during tariff determination after the unit has been declared under commercial operation. The contention of the Appellant on this issue is misleading.

g) The issue of FERV is incidental to the issue of time overrun and automatically gets adjusted. The issue of additional water charges and municipal tax payable by the Appellant is misconceived as the same is already covered under normative O&M expenses as per the Tariff Regulations 2009. Further, the Appellant is solely responsible for locating the Pragati-III in the NCT of Delhi. Accordingly, the claim of the Appellant is not reasonable. The disallowance of water charges is also covered vide judgement dated 4.5.2016 of this Tribunal in Appeal No. 148 of 2015.

11. We have heard the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondents at considerable length of time on various issues raised in the present Appeal for our considerations are as follows: -

a) The main issues raised by the Appellant are disallowance of time overrun beyond the SCOD & consequential disallowance of IDC/ IEDC/ FERV, IDC not considered based on normative debt: equity ratio and disallowance of additional water charges & municipal taxes over and above the normative O&M expenses.

b) First, let us take the questions of law related to the time overrun. On Question No. 6. a) i.e. Whether the interpretation of the Central Commission is correct that the delay which has occurred

in setting up Pragati-III is covered by situation (i) as referred in the MSPGCL Judgement? and on Question No. 6. b) i.e. Whether the Central Commission having categorically found that there was no imprudence on part of the Appellant in selecting BHEL as the contractor which is specifically mentioned in situation (i) of the MSPGCL Judgement can then further go on to blame the Appellant and not give any IDC or IEDC whatsoever to the Appellant?, we observe as below:

i. To answer these questions, we need to analyse the MSPGCL Judgement, Impugned Order, Tariff Regulations 2009 and other relevant material placed on record before this Tribunal. Let us first examine the findings of this Tribunal in the MSPGCL Judgement. The relevant extract of the same is reproduced below:

"*7.3. The Tariff Regulations of the State Commission do not specify any benchmark norms for prudence check of the capital cost. The Central Commission Tariff Regulations, 2009 for prudence check of capital cost provide for the following:*

> *"(2) The capital cost admitted by the Commission after prudence check shall form the basis for determination of tariff:*
>
> *Provided that in case of the thermal generating station and the transmission system, prudence check of capital cost may be carried out based on the benchmark norms to be specified by the Commission from time to time:*

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

The Central Commission has also not laid down any benchmark norms for prudence check, but its Regulations only indicate the area of prudence check including cost overrun and time overrun. The State Commission has not examined the reasons for delay in commissioning of the project and attributed the entire time overrun related cost with respect to the contractual schedule agreed with BHEL to the Appellant. In our view, this is not prudence check. In the absence of specific regulations, we will now find answer to the question raised by us relating prudence check of time overrun related costs.

7.4. The delay in execution of a generating project could occur due to following reasons:

i) due to factors entirely attributable to the generating company, e.g., imprudence in selecting the contractors/suppliers and in executing contractual agreements including terms and conditions of the contracts, delay in award of contracts, delay in

providing inputs like making land available to the contractors, delay in payments to contractors/suppliers as per the terms of contract, mismanagement of finances, slackness in project management like improper co-ordination between the various contractors, etc.

ii) due to factors beyond the control of the generating company e.g. delay caused due to force majeure like natural calamity or any other reasons which clearly establish, beyond any doubt, that there has been no imprudence on the part of the generating company in executing the project.

iii) situation not covered by (i) & (ii) above.

In our opinion in the first case the entire cost due to time over run has to be borne by the generating company. However, the Liquidated Damages (LDs) and insurance proceeds on account of delay, if any, received by the generating company could be retained by the generating company. In the second case the generating company could be given benefit of the additional cost incurred due to time over-run. However, the consumers should get full benefit of the LDs recovered from the contractors/suppliers of the generating company and the insurance proceeds, if any, to reduce the capital cost. In the third case the additional cost due to time overrun including the LDs and insurance proceeds could be shared between the generating company and the

consumer. It would also be prudent to consider the delay with respect to some benchmarks rather than depending on the provisions of the contract between the generating company and its contractors/suppliers. If the time schedule is taken as per the terms of the contract, this may result in imprudent time schedule not in accordance with good industry practices.

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

From the above it can be seen that this Tribunal in absence of specific regulations/ benchmark norms for prudence check in respect of time overrun & cost overrun has laid down the above principles for apportionment of costs due to time overrun in different situations like factors entirely attributable to the generating company, factors beyond the control of the generating company and other factors.

ii. Let us now analyse the impugned findings of the Central Commission on the issue of time overrun. The relevant extract from the Impugned Order is reproduced below:

"19. In line with the observations of the Tribunal as above and considering the submissions of the parties, the issue of time overrun in the completion of the

project (GTs / STs / Blocks) has been examined as under:

BLOCK- I [GT-I]

20. From the reasons narrated by the petitioner in para 15 above, there is a total delay of 21 months in the commissioning of GT-I. The petitioner has submitted that the delay of 6 months was due to problem in the transportation of GTs (GT I & II) from Mundra Port to site. The petitioner has also submitted that these GTs were imported from USA and were dispatched in flange to flange assembled conditions and permission for carrying such heavy equipments by road through the State of Gujarat was delayed. It appears from the submission of the petitioner that there has been lack of due diligence on the part of the EPC contractor while submitting the bid. The EPC contractor was expected to carry out the route survey for the timely supply of equipments / materials before submitting his bid for the project and agreeing to the time line specified. As per prudent utility practices under the bid specification, the bidder is required to familiarize himself with regard to the site conditions, the accessibility to site and the method of transportation of items etc. The EPC contractor having failed to do the above, it becomes onerous on the part of the petitioner to enforce these conditions strictly to ensure the supply of these items specially considering the fact that the project was to be commissioned before the Common Wealth Games to be held in New Delhi in October, 2010. In our view, the

petitioner cannot escape its responsibility on account of the delay in transportation of the GTs by road by the EPC contractor. In this background, we hold that the delay of 6 months in the transportation of assembled GTs is attributable to the petitioner.

21. There has been a delay of 7 months in piling work, fault in casting of foundation of GT/GTG due to non-availability of hydraulic rigs, delay in submission of civil drawings, inadequate supply of man-power by the sub-contractor and delay in deployment of skilled/unskilled workers by the sub-contractor of M/s BHEL. There is also a delay of 7 months in commissioning of compressed air system, DM plant etc and delay of one month in commissioning of GT-I from oil flushing to synchronization and trial run. The delay of 7 months in piling work etc., in our view is attributable to the unprofessional approach and the lack of planning and execution of the contractual responsibilities on the part of M/s BHEL. Further, the delay of 7 months in the commissioning of compressed air system and DM plant etc., is attributable to the slackness in project management resulting in the lack of co-ordination between the various sub-contractors and the improper planning and execution of the works by the EPC contractor & its sub-contractors and not on account of any reasons which were beyond the control of the petitioner and the EPC contractor/sub-contractors. The delay of one month in the commissioning of GT-I from oil flushing to synchronization and trial run is

consequential upon the delays as aforesaid and the petitioner cannot escape the responsibility contending that the factors leading to the delay were beyond its control. Accordingly, we hold that the delay of 15 months (7+7+1) as stated above is attributable to the petitioner.

22. Though we do not find any imprudence in the selection of M/s BHEL as the EPC contractor, the conduct of the parties during execution of the contract had resulted in the delay in the execution of the project within the timeline specified under the contract. The project having been envisaged to commence operation during the Commonwealth games in October, 2010, it was incumbent on the part of all the parties to complete the project within the stipulated time. From the various correspondences exchanged between the petitioner and M/s BHEL, it is evident that there has been a general reluctance and apathy on the part of M/s BHEL in the execution of the contract as per the specified timeline. M/s BHEL had failed to mobilize the resources as per the requirement of the work schedule and there has been slackness on the part of BHEL in project management and to adhere to the specified timeline for the project. The petitioner also failed to persuade M/s BHEL to strictly adhere to the time schedule for completion of the works. These factors considered in totality, lead us to the conclusion that the delay is attributable to the petitioner and is therefore covered by the principle [(situation (i)] laid down in the

judgment of the Tribunal dated 27.4.2011 in Appeal No. 72/2010. Accordingly, the entire cost due to total time overrun of 21 months as above in the commissioning of GT-I is required to be borne by the petitioner. However, the Liquidated Damages and Insurance proceeds on account of the delay if any, received could be retained by the petitioner.

BLOCK-I [GT-II]

23. From the reasons for the delay submitted by the petitioner its is observed that there is a time overrun of 25½ months in the commissioning of GT-II, which includes the delay of 21 months for GT-I for reasons such as the delay in transportation of GTs from Mundra Port to the site, delay on part of EPC contractor and lack of co-ordination etc. We had in above paragraph held that the total delay of 21 months in the commissioning of GT-I is required to be borne by the petitioner for the reasons stated therein. In addition to this, the delay of 4 ½ months in the commissioning of GT-II is on account of the erection problem in fuel gas pre-heating system, generator excitation and hydrogen gas analyser. This erection problem, in our view cannot be considered to be beyond the control of the contractor and there is no reason to burden the beneficiaries on this count. In line with our observations above in respect of GT-I, the delay on part of EPC contractor in respect of the COD of GT-II is also attributable to the petitioner and is therefore covered by the principle [(situation (i)] laid down in the

judgment of the Tribunal dated 27.4.2011 in Appeal No. 72/2010. Accordingly, the entire costs due to total time overrun of 25 ½ months in the commissioning of GT-II is required to be borne by the petitioner. However, the Liquidated Damages and Insurance proceeds on account of the delay if any, received could be retained by the petitioner.

Steam Turbine along with Heat Recovery Steam Generator (HRSG)-I &II (Block-I)

24. From the reasons submitted by the petitioner for delay it is observed that the overall time overrun of 28½ months in the commissioning of Steam Turbine Generator includes the delay of 25½ months in the commissioning of GT-I & II for the reasons mentioned in paragraph 23 above. In addition to this, there is a delay of 3 months due to (i) delay in assigning the job work to civil design consultants, submission of civil drawings & execution of work by BHEL vendor (ii) Steam turbine erection and delay in readiness of balance of plant like cooling tower, clarifier, CW pump house fore-bay etc. and failure of thrust pads of steam turbine at a load of 65 MW and (iii) delay due to labour strike in M/s Vasavi, a sub-contractor of BHEL. From the various correspondences exchanged between the petitioner and M/s BHEL, it is evident that there has been general reluctance and apathy on the part of M/s BHEL in the execution of the contract as per the specified timeline. M/s BHEL had failed to mobilize the

resources as per the requirement of the work schedule and there has been slackness on the part of BHEL in project management and to adhere to the specified timeline for the project. The petitioner also failed to persuade M/s BHEL to strictly adhere to the time schedule for completion of the works. These factors in totality, lead us to the conclusion that the delay is attributable to the petitioner and is therefore covered by the principle [(situation (i)] laid down in the judgment of the Tribunal dated 27.4.2011 in Appeal No. 72/2010. Accordingly, the entire time overrun of 28½ months in the commissioning of Block-I is required to be borne by the petitioner. However, the Liquidated Damages and Insurance proceeds on account of the delay if any, received could be retained by the petitioner.

Block-II

25. The petitioner, as stated in para 15 above, has furnished the reasons for the delay of 40 months in the commissioning of Block-II (GT-III+GT-IV+STG-II) of the generating station. The various reasons for the delay as furnished by the petitioner are similar to the reasons furnished by the petitioner in respect of the delay in commissioning of Block-I. This includes the delay in assigning of job work to civil design consultants and actual execution of work by vendor of BHEL at site, delay in commissioning of GT-III due to non readiness of civil structure, poor mobilization of erection agency to undertake erection work of GT-III, road clearance,

non-readiness of GT-IV foundation, poor mobilization of work force and material by erection agency, delay in initial casting of STG-II, non availability of Diverter Damper and delay in commissioning activities like alkali boil out and steam blowing etc. In our view, the reasons submitted by the petitioner as above is attributable to the slackness in project management resulting in the lack of co-ordination between the various sub-contractors and the improper planning and execution of the works by the EPC contractor & its sub-contractors and not on account of any reasons which were beyond the control of the petitioner and the EPC contractor/sub-contractors. In our view there has been failure on the part of the EPC contractor to mobilize resources as per requirement of work schedules. Accordingly, we are of the considered view that the failure on the part of M/s BHEL in executing the work as per contractual agreements and the slackness on the part of the petitioner in project management has contributed to the delay for which the respondents cannot be burdened. Accordingly, we hold that the petitioner is responsible for the delay of 40 months in case of Block-II of the generating station and is therefore covered by the principle [(situation (i)] laid down in the judgment of the Tribunal dated 27.4.2011 in Appeal No. 72/2010. However, the Liquidated Damages and Insurance proceeds on account of the delay if any, received could be retained by the petitioner.

From the above it emerges that the Central Commission while holding that there is no imprudence in selection of EPC Contractor and dealing the issue of time overrun has held that the delay in commissioning of Prargati-III was attributable to the Appellant as the delays were mainly due to lack of due diligence, improper planning& execution, slackness in project management, co-ordination issues between BHEL and its sub-contractors, availability of material, mobilisation of resources etc. by the EPC Contractor. The Central Commission has also observed that the reasons of delay cannot be said to be beyond the control of the EPC Contractor and the Appellant has failed to enforce the terms of the contract with the EPC Contractor and hence in accordance with the MSPGCL Judgement the entire cost due to time overrun is to be borne by the Appellant as per situation (i).

iii. The learned counsel appearing for the Appellant has contended that the Central Commission has not gone into the details of the correspondences between the Appellant and BHEL and other correspondences/ documents produced during the proceedings before the Central Commission. We have carefully perused the correspondences/ documents placed by the Appellant before the Central Commission, which are also reproduced before this Tribunal in the instant Appeal. We hold that the Central Commission while analysing the time-overrun issue has deliberated the various reasons for delays until COD of GT(s)/ Block(s) in detail. It is observed that the Appellant in the said correspondences and documents placed by it

before the Central Commission /this Tribunal has enumerated the said reasons dealt by the Central Commission. Further, we also observe that the Central Commission in the Impugned Order has recorded as below:

> *"**Time overrun***
> *15. It could be observed from the table under para 13 above that there is substantial time overrun in commissioning of the different GTs in Open Cycle mode and Combined cycle mode including the project as a whole. The petitioner was directed vide ROP dated 11.11.2014 to furnish the reasons for the delay in the commissioning of the Unit/Blocks and in response, the petitioner has furnished the reasons for time overrun, broadly, as under:*
> *……."*

In view of the above, this contention of the Appellant is not sustainable.

iv. We further hold that the reasons for delay in commissioning of Pragati-III are generally related to slackness in project management, deployment of lesser resources, lack of planning/due diligence for transportation of GTs, unavailability of equipment in time etc. These are all contractual issues between the Appellant and the EPC Contractor and between EPC Contractor and its Sub-Contractors. These type of issues are covered in situation

(i) of the MSPGCL Judgement. We also observe that the contracts have provisions to deal with such type of situations and the Appellant can levy Liquidated Damages (LDs). In the instant case. We have not come across even a single issue, which is beyond the control of the EPC Contractor/ Appellant leading to delay in the commissioning of the Pragati-III. The Appellant has failed to impress upon the EPC Contractor to construct the project in scheduled time. Accordingly, the Appellant is not eligible for grant of time overrun and corresponding increase in IDC/IEDC. However, in terms of the MSPGCL Judgement, the Appellant is eligible to retain the insurance proceeds on account of delay, if any and LD amount recovered from the EPC Contractor.

v. The counsel for the Appellant has also contended that the Central Commission has held that there is no imprudence in the decision of the Appellant in selecting BHEL as the EPC Contractor and hence in terms of the MSPGCL Judgement the reasons for delay shall not fall in the situation (i). While contending so, the Appellant has relied on the following findings of this Tribunal in the said judgement. The relevant extract is reproduced below:

> *"7.7. Admittedly, there is no dispute regarding capital cost incurred by the Appellant. We have noticed that the State Commission has not gone into the reasons for delay in commissioning of the project and has proceeded with attributing the entire delay and cost of such delay on the Appellant, except allowing the*

Appellant to retain the Liquidated Damages. The State Commission has also not considered the reasons for delay as submitted by the Appellant in its petition.

7.8. Let us now examine the matter in light of the principles laid down by us in para 7.4 above. It has been indicated by the Appellant that against the Notice Inviting Tender for the main plant only one bid was received, viz. from BHEL. Thus there was no alternative available to the Appellant in so far as placement of order for main plant is concerned presumably due to lack of competition in manufacturing of main plant equipment at that point of time. The agreement with the BHEL provided for a reasonable time schedule for completion of the project as also a reasonable clause for Liquidity damages. Thus there seems to be no imprudence on the part of the Appellant in selecting the main equipment supplier, which happens to be a major state owned equipment manufacturing company and in the terms & conditions of the agreement.

7.9. We have gone through the documents in the form of letters from the Appellant to BHEL indicating the delay in supply and other shortcomings on the part of BHEL and claiming there has been no delay on account of providing inputs by the Appellant to BHEL. On the other hand, there is a letter from BHEL to the Appellant, though accepting some delays on its part, also alleging delay on the part of the Appellant in

providing inputs with reference to contractual schedule. However, the Appellant in its reply to BHEL has indicated that even after handing over the inputs, BHEL could not immediately commence the work and took more time in completing the activities. Besides main plant equipment, there is no mention about commissioning of the Balance of Plants which are also major components of the plant. We have also noticed inordinate delay in stabilization of the unit after commissioning.

7.10. It is also argued by the Appellant that BHEL being the only major supplier of the equipment in the country at that time could not cope up with the targetted schedules due to heavy orders. Delays were experienced not only at Parli Unit 6 but also at other projects. In our opinion, this appears to be the case of sudden spurt in execution of the Power Projects in the country and consequential increase in demand of equipments and the gestation period required by the industry in enhancing the manufacturing capacity.

7.11. Considering all these facts and documents submitted before this Tribunal, though it is evident that there was delay on the part of BHEL in supply and commissioning of the main plant, it is not established beyond doubt that the entire delay was due to the reasons beyond the control of the Appellant.

7.12. In view of above, we feel that this case falls under category (iii) described in para 7.4.……."

From the above it can be seen that this Tribunal has held that the State Commission (MERC) has not analysed the reasons for delay. This Tribunal has analysed the reasons for delay in light of the principles set by it. This Tribunal has held that there is no imprudence in selecting BHEL as equipment supplier as BHEL being a major equipment manufacturing state owned company. This Tribunal has analysed that due to heavy orders at that point of time BHEL could not cope up with the targeted schedules. This Tribunal further held that there was delay on the part of BHEL in supply and commissioning of the main plant and it was not established beyond reasonable doubt that the entire delay was due to the reasons beyond the control of the Appellant. Accordingly, this Tribunal decided that the case falls under situation (iii) of the laid down principles in MSPGCL Judgement.

vi. We further hold that, there is a basic difference between the instant case and the case relied upon by the Appellant. The present case is of Gas Turbine Based power station and the relied case is that of coal-based power station. In present case the two GTs were imported from USA and in relied case major equipment were indigenously manufactured by BHEL. In the MSPGCL Judgement, this Tribunal has held that the delay was due to sudden spurt in orders for execution of the Power Projects in the country and consequential increase in demand of equipment and the gestation period required by the industry in enhancing the manufacturing capacity. The instant case and the relied

case happened in different timelines. The other reasons for delay also differ in the instant case. Hence, the two cases cannot be compared and hence the reliance placed by counsel for the Appellant on the said judgement is not applicable to the facts and circumstances of this case.

vii. In the present case, the Central Commission also held that there is no imprudence in selecting BHEL as an EPC Contractor as it was expected from a major state owned manufacturing company of repute like BHEL to carry out the works expeditiously with proper project management techniques. However, it does not mean that prudent selection of a company to execute the project is enough and the Appellant can be excused of situation (i) of the MSPGCL Judgement. Selection of the contractor and execution of the project are two different things. The Respondent No. 4 has submitted that prudence in selection of BHEL as EPC Contractor reflects the capabilities of BHEL yet the conduct of parties in executing the contractual agreement is vital which depends on case-to-case basis. We tend to agree with this contention of the Respondent No. 4. Further, we also observe that the scenarios mentioned under situation (i) of the MSPGCL Judgement are indicative only and not exhaustive.

viii. Hence, in view of our discussions as above, we are of the considered opinion that the issues raised by the Appellant are decided against it.

c) Now we let us take the question of law related to second issue regarding normative debt: equity ratio for the purpose of IDC until SCOD. On Question No. 6. c) i.e. Whether the Central Commission in computing the interest on loan has acted in violation of Regulation 12 of the Tariff Regulations 2009 which provides for normative debt : equity ratio of 70:30?, we consider as below:

i. To address this issue let us first analyse the provisions of the Tariff Regulations 2009 relied upon by the Appellant. The relevant extract is reproduced below:

> *"12. **Debt-Equity Ratio**. (1) For a project declared under commercial operation on or after1.4.2009, if the equity actually deployed is more than 30% of the capital cost, equity in excess of 30% shall be treated as normative loan:*
>
> *Provided that where equity actually deployed is less than 30% of the capital cost, the actual equity shall be considered for determination of tariff:"*

From the above it can be seen that for projects where COD is on or after 1.4.2009 if equity deployed is more than 30% of the capital cost then the equity in excess of 30% shall be treated as normative loan andwhere equity actually deployed is less than 30% of the capital cost, the actual equity shall be considered for determination of tariff.

> *"16. Interest on loan capital. (1) The loans arrived at in the manner indicated in regulation 12 shall be considered as gross normative loan for calculation of interest on loan."*

From the above it can be seen that the Interest on Loan (IOL) component of the fixed charges is calculated based on the loans arrived in accordance with Regulation 12 of the Tariff Regulations, 2009.

ii. We note that the above provisions of the determination of tariff on normative basis comes into picture from the COD of the unit/ station for year on year tariff purpose. In the present case, the Appellant has applied this principle of normative debt: equity ratio during the construction period. The Respondent Nos. 4 & 5 are relating the issue from the COD of GT(s)/ Block (s) of Pragati-III, which in our view seems to be correct. We are proceeding to analyse the issue in light of the said contention of the parties.

iii. Now let us examine the findings of the Central Commission in the Impugned Order. The relevant extract is reproduced below:

*"**Interest During Construction***

36. The petitioner has submitted that the tariff filing forms filed earlier have been revised considering IDC on actuals, on payment basis, as on the dates of COD of the individual blocks. The petitioner has also submitted that it had earlier signed a loan agreement with PFC for 70% of the project cost and the loan drawl schedule was to commence from the fourth quarter of financial year 2009-10. It has also submitted that due to the delay in

supplies and services, the overall project has been delayed and accordingly the loan drawl schedule was revised on several occasions. The petitioner has further stated that during the intervening period the petitioner had utilized its own Reserves & Surplus for the release of initial advance to the EPC contractor, payment of running bills for supply and services for a considerable period and that the payment has been totally on equity expenditure. Accordingly, it has submitted that no IDC is payable for the said period. The petitioner has therefore requested the Commission to allow IDC as per actuals, without deduction of the LD retained by the petitioner, since the issue of LD has not been settled between petitioner and M/s. BHEL. Therefore, while finalizing the book of accounts, the LD amount has been shown as retained amount in book of accounts though deducted from the EPC contractor and the same has not been adjusted while working out final amount for IDC and Capital cost.

37. The petitioner has raised debt from Power Finance Corporation (PFC) and PFC vide letter dated 9.4.2009 has sanctioned debt amounting to `3637.00 crore. The petitioner has also availed loan amounting to `500.00 crore from the Govt. of NCT of Delhi. The details regarding the debt raised by the petitioner is as follows:

		Amount (₹ in lakh)
I	**PFC Loan**	
	Loan disbursement started from 5.2.2010	
	Loan drawn up to 31.3.2014	191558.00
	Loan amount drawn till COD of station (27.3.2014)	191558.00
	Repayment instalment (starting from 15.4.2013– Quarterly)	3420.68
II	**GoNCTD Loan**	
	Loan disbursement started from 30.11.2011	
	Loan drawn up to 31.3.2014	50000.00
	Loan amount drawn till COD of station (27.3.2014)	50000.00
	Repayment instalment (starting from 29.11.2012 –Yearly)	1333.33
III	**Total Interest During Construction claimed**	**43478.00**

38. As stated, the total time overrun involved in the commissioning of the project has not been allowed and accordingly the cost overrun due to time overrun has not been allowed. Therefore, IDC has not been allowed for the time over run period of 21 months, 26 months, 28½ months, 39 months, 41 months, 40 months in the commissioning of GT-I, GT-II, Block-I, GT-III, GT-IV and Block-II respectively. Despite directions of the Commission, the petitioner has not furnished the detailed calculations for unit-wise allocation of the total IDC. Therefore, the interest amount of `4941 lakh worked up to 30.11.2010 (scheduled COD of the generating station) has been apportioned between capital and revenue, based on the same proportion as considered by the petitioner vide affidavit dated 5.12.2014.The petitioner is however directed to furnish the detailed calculations for unit-wise allocation of the total IDC at the time of revision of tariff based on truing-up exercise in terms of Regulation 6(1) of the 2009 Tariff Regulations.

39. On the basis of the above, out of total interest of `4941 lakh, an amount of `2709.40 lakh has been

treated as IDC and the same has been allocated to the various units based on the total IDC vis-a vis the unit-wise IDC claimed by the petitioner. Accordingly, the unit-wise IDC has been worked out and allowed as under:

(Rs. Lakh)

	GT-I	STG-I & HRSG-I	GT-II	ST/HRS G-I & II	GT-III	GT-IV	STG-II/ Project	**Total**
IDC	403.90	258.26	327.81	124.19	464.14	405.45	725.65	**2709.40**

From the above it can be seen that the Central Commission has held that the Appellant in the tariff filing prescribed forms has considered IDC on actuals, on payment basis, as on the dates of COD of the GT(s)/Blocks(s). The Central Commission has further held that the Appellant initially had made payments to the EPC Contractor from the equity as loan drawdown was rescheduled due to delay in the project and hence submitted that no IDC is payable to it for the said period. No IDC has been allowed for the time overrun period. The Appellant has not furnished the detailed calculations for unit-wise allocation of the total IDC. In absence of the same the Central Commission has worked out IDC as Rs. 49.41 Cr. until SCOD and apportioned it between capital and revenue based on proportion submitted on the affidavit dated 5.12.2014 by the Appellant. The Central Commission has also directed the Appellant to furnish the detailed calculations for unit-wise allocation of the total IDC at the time of revision of tariff based on truing-up exercise in terms of Regulation 6(1) of the Tariff Regulations 2009. Thereafter the Central Commission has proceeded to

calculate IDC, which according to the Central Commission works out to Rs. 27.09 Cr.

iv. We observe that the Regulation 12 and 16 of the Tariff Regulations 2009 relied by the Appellant provides for consideration of equity invested beyond 30% as normative debt from COD for the purpose of tariff determination. The Appellant has contended to apply the same principle during the construction period also, which in our opinion is flawed. However, from the submissions of the Appellant it is clear that the Appellant has been deploying only equity since 2008-09 before first drawal of loan on 5.2.2010. However, it is observed that the Central Commission has taken actual interest on loan on payment basis during construction for the purpose of capitalisation as on COD of GT(s)/ Block(s) based on the claim of the Appellant vide revised forms submitted by it on affidavit dated 5.12.2014. Further, in absence of details of IDC apportionment as on COD of GT(s)/ Block (s) which are not provided by the Appellant the Central Commission has arrived at the figure of Rs. 27.09 Cr. as allowable IDC, which in any case would be adjusted as and when the Appellant provides the details as directed by the Central Commission during truing up exercise.

v. The Appellant has relied on the MSPGCL Judgement of this Tribunal on this issue. The relevant extract from the judgement of this Tribunal is reproduced below:

"8.5. As regards IDC, the Appellant has submitted that the loan amount has reduced due to lower approved capital cost, on the other hand the State Commission has considered a normative pattern for draw-downs of loans and upfront infusion of certain part of the overall equity funding instead of actual pattern for working out the normative IDC.……

……

8.6. The State Commission has computed the IDC considering the original schedule and original phasing of expenditure. Regarding drawdown of loans and equity infusion the State Commission in the impugned order has recorded as under:

> *"79. As per the prudent industry practice, any project is funded in the following pattern:*
>
> *• Certain proportion of Upfront Equity (30% or 50%)*
>
> *• Similar proportion of Upfront Debt*
>
> *• Debt and Equity in proportion to Debt:Equity Ratio*

In case the project is initially funded with debt and equity is infused at later stage to repay the debt, the IDC component will increase as compared to proportionate debt and equity funding".

We agree with the State Commission that the infusion of debt & equity has to be more or less on paripassu basis as per normative debt equity ratio. However, the increase in IDC due to time over run has to be allowed only according to the principles laid down in para 7.4

above. Accordingly, the State Commission is directed to re-determine the IDC for the actual period of commissioning of the project and then work out the excess IDC for the period of time over run on a pro-rata basis and limit the disallowance to 50% of the same on account of excess IDC. This question is answered accordingly."

From the above it can be seen that this Tribunal has agreed to the decision of the MERC that the infusion of the debt and equity during project construction has to be on parripassu basis as per the normative debt: equity ratio.

We observe that the said case was related to infusion of debt prior to infusion of equity and infusing equity at a later stage to repay the debt. This has resulted in higher IDC if compared with IDC worked out based on normative debt: equity ratio and accordingly MERC had considered IDC based on original phasing of the expenditure. The instant case is different from that of the MSPGCL Judgement on this issue as the Central Commission has allowed the IDC based on the claim of the Appellant.

vi. In view of the above and facts and circumstances of the case we are of the considered opinion that there is no legal infirmity in the decision of the Central Commission on this issue.

vii. Accordingly, this issue is decided against the Appellant.

d) Now we move on the third issue related to FERV. On Question No. 6. d) i.e. Whether the FERV liability as a consequence of not condoning the time overrun can be fastened on the Appellant when the Appellant has done all in its power to pursue with BHEL to put up the plant on time?, we considered as follows:

i. At para 11. b) above, we have already decided the issue of time overrun against the Appellant. It is observed that the issue of FERV is directly linked to the time-overrun issue. The same has also been contended by the Appellant and the Respondent Nos. 4 & 5. Accordingly, in view of our disallowing the time overrun to Pragati-III, FERV is also not admissible to the Appellant for the period beyond SCOD as claimed by the Appellant.

ii. Accordingly, this issue is also answered against the Appellant.

e) Now we have reached to the final issue raised by the Appellant regarding additional claim on account of water charges and municipal tax. On Question No. 6. e) i.e. Whether the Central Commission has indeed considered the special water charges and taxes being paid by the Pragati-III which is set up in a municipal area while framing the Operation & Maintenance expenses in terms of Regulation 19 (c) of the Tariff Regulations 2009, when there are barely any such generating stations in the entire country and only the Appellant is required to use treated water and pay additional municipal taxes due to the location of the Pragati-III?, we observe as below:

i. The Appellant has contended that in view of its location in NCT of Delhi, it has to use sewage treated water for which it is paying additional charges to DJB as compared to normal water charges and also liable to pay municipal tax. The Appellant has argued that O & M norms framed by the Central Commission do not include such charges and hence the same may be allowed to it additionally.

ii. The Respondent Nos. 4 & 5 have submitted that once O&M charges are allowed on normative basis no additional charges can be allowed. On the issue the counsel for the Respondents have relied on the judgement dated 4.5.2016 of this Tribunal in Appeal No. 148 of 2015 in case of NTPC Ltd. v. UPPCL &Ors. Wherein the claim of NTPC regarding additional water charges on account of increase in water charges has been rejected.

iii. Let us first examine the findings of the Central Commission on this issue. The relevant extract from the Impugned Order is reproduced below:

> *"65. In addition to the above, the petitioner vide affidavit dated 13.10.2014 has submitted that water requirement of Bawana project is being met from Rithala Sewage treatment plant of Delhi Jal Board (DJB). The petitioner has submitted that Sewage treated water is available as raw water for its further processing to meet out cooling water, DM water, fire water and service water requirement. This according to*

the petitioner has resulted in avoidance of the dependency on the fresh water from sources such as Yamuna river and is environment friendly. However, the petitioner has submitted that the cost of using such type of water for the plant is very high as compared to similar power plants like Ratnagiri and SUGEN Power Plants of similar design and type. Accordingly, the petitioner has prayed for allowing additional O&M expenses payable to DJB for Sewage treated water charges. The petitioner has included the expenditure incurred towards payment to DJB in the total O & M charges and is in addition to the O&M expense norms allowed under the 2009 Tariff Regulations. The petitioner has further prayed that the annual charges payable to DJB as additional O&M cost over and above the normative rates may be approved.

66. Based on the above, the petitioner has claimed an amount of `4812.00 lakh……. The petitioner has also entered into an agreement with DJB to meet water requirement of the plant from Rithala Sewage Treatment Plant and the actual bill paid to the DJB has been included in the claim for O&M expenses as summarized hereunder:

……

67. The respondent, BRPL vide affidavit dated 30.10.2014 has submitted that the O&M expenses for the generating station may be allowed strictly in accordance with the O&M expense norms provided under Regulation19 of the 2009 Tariff Regulations. It

has also submitted that the Commission may not allow the estimated additional O&M expenses by exercising its Power to relax under Regulation 44 of the 2009 Tariff Regulations, as the tariff is a complete package and its reasonability has to be examined in totality.

68. The respondent, TPDDL while pointing out that Regulation 19(c) of the 2009 Tariff Regulations specifies the norms for the O&M expenses for GTs/Combined Cycle generating stations, has submitted that the request of the petitioner for allowing higher O&M expenses on account of water charges payable to DJB and property tax payable to Municipal Council of Delhi is not justified as the O&M expenses for the period 2009-14 have been arrived at on normative basis by factoring in the water charges. It has also submitted that the petitioner enjoys the liberty to manage its expenses on O&M as admissible on normative basis and therefore, the additional O&M charges in the form of water charges and property tax cannot be permitted to be recovered from the beneficiaries.

69. We have examined the submissions of the parties. The normative O&M expenses specified by the Commission under Regulation 19(c) of the 2009 Tariff Regulations provides for O&M expenses for small gas turbines and other than small gas turbines and not for "advanced class gas turbines" for combined cycle gas turbine generating stations, which are subjected to

much higher thermal stress and blade temperatures when compared to "E class machines". The GTs in the generating station are "advanced class 9…….. …….. Accordingly, we are inclined to consider the prayer of the petitioner by invoking the provisions of Regulations 44 of the 2009 Tariff Regulations, only in respect of LTSA/LTMA.…… ……However, the water charges demanded additionally by the petitioner are not being allowed as the same forms part of the normative O&M expenses during the tariff period 2009-14.……..."

From the above it can be seen that the Central Commission while allowing additional O&M expenses under power to relax on account of LTSA/LTMA has not allowed additional water charges payable by the Appellant to DJB as the same forms the part of normative O&M expenses during the tariff period 2009-14.

iv. Now let us examine the provisions of Tariff Regulations 2009 in respect of O&M expenses. The relevant extract is reproduced below:

*"3. (28) **'operation and maintenance expenses' or 'O&M expenses**' means the expenditure incurred on operation and maintenance of the project, or part thereof, and*

includes the expenditure on manpower, repairs, spares, consumables, insurance and overheads;

19. ***Operation and Maintenance Expenses.*** *Normative operation and maintenance expenses shall be as follows, namely:*

……

(c) Open Cycle Gas Turbine/Combined Cycle generating stations:

"

(Rs. in lakh/MW)

Year	Gas Turbine/ Combined Cycle generating stations other than small gas turbine power generating stations	Small gas turbine power generating stations	Agartala GPS
(1)	(2)	(3)	(4)
2009-10	14.80	22.90	31.75
2010-11	15.65	24.21	33.57
2011-12	16.54	25.59	35.49
2012-13	17.49	27.06	37.52
2013-14	18.49	28.61	39.66

From the above it can be seen that the Central Commission has fixed normative O&M expenses, which include various expenses during O&M of the plants and include" water charges.

v. Now let us consider the findings of this Tribunal in Appeal No. 148 of 2015 in case of NTPC Ltd. v. UPPCL &Ors. The relevant extract is reproduced below:

"7. The following issues arise for our consideration in the instant Appeal.

(i) Whether the Central Commission is justified in disallowing the additional expenditure incurred by NTPC on account of the substantial increase in water charges?

13.5 The Central Commission arrived the Normative O&M expenses for the Tariff period 2009-14 as a package considering all the elements/components of operation and maintenance expenses such as employees cost, repair & maintenance cost of generating stations including water charges. Hence, the increase in cost of one element cannot be considered in isolation as the normative O&M cost is arrived duly considering all the factors. Further, while framing the Tariff Regulations, the Central/State Commissions considers the stakeholders/public opinion and as per National Tariff Policy etc., the Regulations are framed. Further, the Commission has considered an escalation factor of 5.72% as per WPI & CPI index published by Govt. of India.

13.6 According to Tariff Policy, the O&M expenses are controllable factor and hence, the Appellant/Petitioner has to take suitable measures to control the O&M expenditures and the Act provides reward for efficiency in performance. Further, the O&M expenditure as per

Tariff Regulations, 2009, is norm based and not at actual, hence, any additional expenses in one component cannot be allowed and whole spectrum of cost should be looked into while considering the comparison of actual cost and the recovery based on norms.

……..

13.9 Further, the Central Commission duly followed their Tariff Regulations, 2009 while determining the Tariff by considering the Normative O&M expenses of the Appellant Generating Stations duly taking the stakeholders/public view at the time of approval of the Tariff Regulations.

……..

13.11 In our opinion after going through the above submissions, we do not find any infirmity in the decision of the Central Commission regarding disallowance of increase in water charges for the period 2009-14 as the increase in water charges is one of the component of the normative O&M charges in the tariff Regulations, 2009 and further the O&M charges in the Tariff Regulations, 2009 is one package under which water charges is one of the components and hence the increase in one component cannot be considered under Regulation, 44 of the tariff Regulations, i.e. "Power to Relax". However, the Appellant is allowed by the Central Commission for the Tariff period 2014-19 by excluding the water charges from the Normative O&M charges. Thus, this issue is

decided against the Appellant. Thus, we feel that the impact of water charges cannot be considered for the tariff period 2009-14. However, the Commission considered the effect of water charges separately by excluding the water charges from the Normative O&M expenses.

13.12 Thus, we do not find any infirmity in the decision of the Central Commission in the Impugned Order dated 10.04.2015. Accordingly, the Appeal is dismissed."

From the above it can be seen that this Tribunal after analysing the issue in detail and considering relevant various aspects of normative O&M charges, disallowed the increase in expenses on account of water charges under power to relax. This Tribunal has also observed that the Central Commission has removed water charges from normative O&M expenses and allowed water expenses separately for the period 2014-19 vide theTariff Regulations 2014.

vi. We observe that this Tribunal in its judgement in Appeal No. 148 of 2015 as above has taken a view that O&M charges in the Tariff Regulations 2009 is one package under which water charges is one of the components and hence the increase in one component cannot be considered under power to relax. Further, this Tribunal after analysing the issue of increase in water charges in detail and considering various aspects of normative O&M charges, tariff policy,

consultation process during finalising of the Tariff Regulations 2009 etc. disallowed the increase in expenses on account of water charges. It is also observed from the Impugned Order that the Appellant has claimed the amount of actual bill paid to the DJB in the claim for additional O&M expenses. This means claiming of water charges twice, as the water charges are already included in the normative O&M expenses. Further, the additional claim for water charges in absolute terms is very less as compared to the normative O&M expenses allowed by the Central Commission. This Tribunal has also observed that the Central Commission has already removed water charges from normative O&M expenses and allowed water expenses separately for the period 2014-19 in Tariff Regulations 2014.Accordingly, in view of the provisions of the Tariff Regulations 2009 and decision of this Tribunal in Appeal No. 148 of 2015, we are of the considered opinion that there is no merit in the contention of the Appellant for allowing additional water charges payable by it to DJB.

vii. It is also observed that there is no finding of the Central Commission on the issue of municipal tax in the Impugned Order. However, for the reasons similar to disallowance of additional water charges, the said claim of the Appellant regarding municipal taxes is also not allowed.

viii. In view of our discussions as above, the issues raised in the present Appeal are answered against the Appellant.

ORDER

After careful evaluation of the oral, documentary and other relevant materials available on the file and for the foregoing reasons as stated supra, we are of the considered opinion that the issues raised in the instant Appeal have no merit.

The Central Commission after thorough evaluation of the relevant material on record and also considering the submissions of the counsel who represented the parties has rightly justified the findings answering the issues against the Appellant just and reasonable. We do not find any perversity in the Impugned Order. Therefore, interference of this Tribunal does not call for.

Hence, the Appeal is hereby dismissed devoid of merits and the Impugned Order dated 26.5.2015 passed by the Central Commission is hereby upheld.

Accordingly, IA No. 647 of 2017 stands disposed of as having become infructuous.

No order as to costs.

Pronounced in the Open Court on this **12th day of July, 2018.**

(Justice N. K. Patil)
Judicial Member

(I.J. Kapoor)
Technical Member

√

REPORTABLE/NON-REPORTABLE

mk