

Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No. 201 of 2011

Dated: 3rd October, 2012

**Present: Hon'ble Mr. Justice P. S. Datta, Judicial Member
Hon'ble Mr. V.J. Talwar, Technical Member**

In the matter of:

Tamil Nadu Generation and Distribution Corporation Limited,
Rep. by its Chief Engineer/Planning & Resource Centre,
No. 144, Anna Sahai, Chennai- 600002. Appellant(s)

Versus

1. Power Grid Corporation of India Limited
Represented by its Chairman and Managing Director
Corporate Office,
Sudamini, Plot No. 2, Sector-29, Gurgaon- 122001
Haryana
2. Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001
3. Karnataka Power Transmission Corporation Ltd.
Kaveri Bhavan, Bangalore- 560001
Represented by its Chairman

4. Kerala State Electricity Board(KSEB)
Vaidyuthi Bhavanam
Pattom,
Thiruvananthapuram- 695004
Represented by its Chairman
5. Electricity Department
Govt. of Pondicherry
Pondicherry- 05001
Represented by its Chief Secretary ...Respondent(s)

Counsel for the Appellant : Mr. S. Vallinayagam

Counsel for the Respondent: Mr. M. G. Ramachandran
Ms. Swapna Seshadri for R- 1

JUDGMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. The appellant Tamil Nadu Generation and Distribution Corporation Limited , a distribution licensee for the purpose of this appeal in the State of Tamil Nadu has preferred this appeal being aggrieved with the order dated 4th May,2011 passed by the second respondent, the Central Electricity Regulatory Commission upon the petition of the first respondent Power Grid Corporation of India Limited , being the Petition No. 307 of 2010, whereby the Central Commission allowed transmission tariff from 01.04.2009, which according to the

appellant, is the deemed date of commercial operation in respect of the evacuation line laid down by the respondent no. 1 for evacuation of electricity from the nuclear power plant yet to be commissioned by the Nuclear Power Corporation of India Ltd .

2. The Government of India proposed to set up a 2000 MW Nuclear Power plant at Kundankulam in Tamil Nadu. The project was envisaged as a fast track project scheduled to be operational by the end of 2007 by the Nuclear Power Corporation of India Limited, but till date the project has not yet been operational and no electricity has been generated from the nuclear plant. The evacuation scheme was to be put to effect by the Powergrid Corporation of India Limited as per the schedule as follows:-

- a) 400 KV D/C (Quad Conductor) Kundankulam – Tirunelveli Line 1 & SS at Tirunelveli by LILO of both ckts of Madurai- Trivendrum 400 KV line 26 months (May 2007).
- b) 400 KV D/C (Quad Conductor) Kundankulam – Tirunelveli Line II & 400KV D/C Tirunelveli – Udmalpet line (December 2007).
- c) Balance & Tirunelveli - Muvattupuzha- North Trichur 400 KV line (42 months, Nov.'08).

An agreement was reached in 138th meeting of the Southern Regional Electricity Board (SREB) held on 30.08.2005 at Chennai after elaborate discussion on the subject and the scheme was approved as envisaged. An indemnification agreement was executed by the Powergrid & NPCIL on 13.12.2004 to the effect that in the event of delay occurring due to the either of the parties the one party would compensate the other to the extent of Interest During Construction (IDC) including FERV and Govt. Guarantee fee, if any, for the delay up to a maximum period of one year. As the commissioning of the LILO of Madurai- Trivendram line at Tirunelveli and the sub-station at Tirunelveli was not likely to be commissioned as per the schedule, the appellant requested the first respondent to commission the 400/200 KV Tirunveli sub-station as per the schedule, i.e.,26 months from administrative approval (May,2007). The first respondent allegedly contended that they did not want their investment on this line to get stranded and they did not want to forgo any revenue out of it till the generating units are commissioned. The first respondent then filed a petition, being petition no. 81 of 2010 seeking approval of the date of commercial operation from 1.4.2009 in terms of the regulation 3 (12(c)) of the CERC (Terms and Conditions of) Tariff Regulations, 2009 before the CERC as the commissioning of the

Kundankulam APS was delayed and no definite date could be found for the same by NPCIL. In the said petition the first respondent stated that the lines were part of the nuclear power station associated transmission system and because there were problems in respect of the execution of the nuclear power station, delay in laying down lines by the first respondent beyond the agreed completion schedule under the contract is expected to lead to contractual issues including financial liabilities on account of loan from ADB. It was also the case of the respondent that due to delay there would be increase in cost of the project and therefore the respondent was constrained to complete its transmission project. Before commissioning of the power project the first respondent applied for declaration of the date of commercial operation under regulation 3(12)(c) of the CERC (Terms and Conditions of Tariff) Regulations, 2009 knowing fully well that the lines were not going to be of any beneficial use in as much as the units were not likely to be synchronized with the Southern Region grid. According to the appellant, the Power Grid should have taken recourse to precautionary measure to make good the loss, if any, allegedly suffered by them consequent upon change in the scheduled date of commercial operation of the two units at Kundankulam. As the lines were laid down exclusively for evacuation of power from the nuclear power plant the appellant suggested for

impleadment of the NPCIL before the CERC and the indemnity bond executed between NPCIL and the Power grid Corporation of India should be given effect to and acted upon so as to recover the loss incurred by the first respondent because of the delay on the part of the NPCIL in Commissioning of the project, but overruling the objection of the appellant the second respondent, the CERC by the order dated 24.09.2010, allegedly without assigning any reason approved the date of commercial operation of the assets with effect from 1.4.2009 in terms of the second proviso to regulation 3(12) of the Tariff Regulations,2009.

3. Then the first respondent filed a petition seeking approval of transmission charges before the CERC which upon the said petition, being the Petition no.307 of 2010, passed an order dated 04.05.2011 allowing transmission tariff from the deemed date of commercial operation, namely, 1.4.2009 in respect of the evacuation line laid down by the respondent no 1 for evacuating electricity from the nuclear power plant yet to be commissioned then.

4. It is this order dated 4th. May, 2011 that is the subject matter of the present appeal by the Tamil Nadu Generation and Distribution Company Limited on the following amongst other grounds,

a) The first respondent ought to have either completed the project as per the schedule without waiting for the nuclear power plant or should have waited for synchronization of the units in the plant.

b) The indemnification agreement entered into between the first respondent and the NPCIL should have been invoked and acted upon to compensate for the damages allegedly suffered by the former.

c) The contention of the first respondent that zero date /zero hour for reckoning the commissioning schedule of the associated transmission lines has not been defined, and as such it could not give effect to the indemnification agreement is a frivolous ground, and this is a matter between the NPCIL and the first respondent and the beneficiaries of the SR have no role to play in fixing the zero date.

d) The admission on the part of the first respondent that they failed to define the zero date which resulted in rendering the indemnification agreement null and void is solely a lapse /omission/mistake on the part of the first respondent for which the beneficiaries could not be held responsible.

e) The beneficiaries could not be held responsible for the delay in the commissioning of the project. The delay on the part of the first respondent in completing the works covered by the administrative approval has resulted in 213% increase in IDC from Rs.71.41crore to Rs.223.42crore. This amount cannot be added now to the capital cost of the project making the beneficiaries liable to pay in as much as the commercial operation date was deemed to have been declared from 1.4.2009 much before the commercial operation date of the generating units.

f) The above increase was solely due to the delay in execution of the project by the first respondent or taking their own decision to delay the same to synchronize with the commercial operation date of the generating units.

g) The beneficiaries should not be asked to pay the transmission charges until the commissioning the generating units and the assets of the first respondent are put to regular service for evacuating the power generated from the generator.

h) The transmission scheme is limited to the units 1 and 2 of Kundankulam APS and declaring the deemed commercial operation date from 1.4.2009 is not justified and contrary to the stand taken by the

first respondent earlier when they were asked to commission the assets as per the schedule indicated in the administrative approval.

i) As per regulation 7(2) of the Regulations, 2009 the capital costs in respect of the disputed asset should be limited to the original sanctioned cost for the purpose of tariff. The escalation in costs due to delay, not attributable to the appellant, cannot be capitalized and claimed as against the appellant in the form of the transmission charges.

J) In the absence of an asset being put into regular service, the costs incurred in establishing such asset cannot be capitalized and consequently transmission tariff cannot be awarded.

k) The Southern Region constituents have paid UI charges or purchased energy at huge cost from October, 2007 onwards when the first unit was targeted for commissioning as this date was not kept up by NPCIL, and the delay has not only resulted in greater mismatch between supply and demand but also resulted in the wrath of the CERC many a times and fines imposed on the TNEB.

l) The NPCIL is liable for the delay in commissioning the nuclear plant. It is due to this that the first respondent is said to have delayed its project.

m) Cost of asset not put to use cannot be added to the capital cost of the project for computation of the tariff.

n) Cost incurred in indemnification should not be added to the cost of the project to be approved for the nuclear power plant and should be deducted.

5. The appellant on 3.4.2012 filed an affidavit containing certain additional grounds which are summarized as follows:-

a) The appellant is not a party to the agreement between Nuclear Power Corporation of India Ltd. and the first respondent. The existence of an indemnity bond and the inability of the first respondent to get the zero date fixed do not entitle the first respondent to claim transmission charges in respect of an asset which is not in regular use. The first respondent cannot take advantage of its own wrong.

b) It is a well known fact that delay in commissioning the nuclear plant is attributable to the delay in receiving necessary equipments from Russia, time taken by the Government of Russia in taking up the matter with different authorities and other factors which the Central Commission itself had taken note of.

c) The Central Commission failed to take into account certain relevant factors, namely i) who is responsible for the delay in bringing the transmission system into regular service? ii) Whether the party responsible for the above delay has any liability to discharge for the delay on its part? iii) when there is an indemnity bond executed by the party responsible for the delay, what should be the consequence of the same ?iv)what would be the consequence to the tariff to be determined in the event of letting off the Nuclear Power Corporation of India Ltd. from discharging its liability?

d) It was the duty of the Central Commission as a Regulator to direct the Nuclear Power Corporation of India Ltd. to declare the zero date so that the financial liability incurred by the first respondent is borne by the Nuclear Power Corporation of India Ltd.

e) As a Regulator it was the duty of the Central Commission to ensure that no undue financial burden was cast on the beneficiaries which is a pass through in the tariff.

f) A beneficiary cannot be held liable to pay transmission tariff in respect of a transmission system not under regular use.

g) A beneficiary has no role in the delay caused in the transmission of electricity through the system

h) The declaration of the date of commercial operation does not entitle the transmission licensee to demand tariff from the beneficiaries on the facts and in the circumstances of the case.

i) Interest During Construction/IEDC charges accrued due to the delay in commissioning of the station by the Nuclear Power Corporation of India Ltd. cannot be passed on to the beneficiaries.

J) The Commission erred in grossing up the rate of return based on the tax rate of the relevant Finance Acts .

k) The Commission erred in granting the claim for reimbursement of service tax because transmission of power has been exempt from payment of service tax.

6. The Power Grid Corporation of India Limited has filed a counter affidavit and one additional counter affidavit challenging the additional grounds urged by the appellant and in the main counter affidavit it has been contended as follows:

a) that the plea of the appellant is contrary to the second proviso to the regulation 3(12) of the Tariff Regulations,2009, that the existence of an indemnity bond between the respondent no 1 and the developer of the

Power Plant does not prevent the respondent no 1 from declaring the transmission line under commercial operation,

b) that the delay had already resulted in the increase in the interest during construction and the respondent no 1 acted prudently to avoid further increase in the interest during construction and that, had the respondent no 1 not declared the transmission line under commercial operation, the appellant and the other beneficiaries of the transmission line would have become liable to pay much more higher interest during construction and other charges,

c) that the utilisation of the line and the system for conveyance of power is entirely between the appellant and other beneficiaries of the one part and the Nuclear Power Corporation of India Ltd. of the other part,

d) that the first respondent has no responsibility to provide power to the appellant,

e) that the appellant and the Nuclear Power Corporation of India Ltd. have between them a separate agreement and the first respondent is not a party to that agreement,

f) that the first respondent had performed all the activities required to set up , charge and commission the transmission lines and the transmission lines have been ready and available to the beneficiaries , as such the

respondent no 1 cannot be held responsible for non-utilisation of the transmission line and the system by the beneficiaries.

g) that regarding the indemnification agreement dated 13.12.2004 the first respondent had commercially negotiated and concluded agreement with the appellant, and the Commission has considered the said agreement and the terms and conditions contained in the said agreement while passing the earlier order dated 24.9.2010.

h) The Commission has taken into consideration the difficulty faced by the respondent no 1 in getting the developer of the power project to agree to a zero date as identified under the agreement, and the said issue was already settled by the Central Commission in the order dated 24.9.2010. The appellant cannot urge the same issue already decided.

i) that the regulations 5 and 7 of the Tariff Regulations, 2009 clearly show that where the lines are ready to provide regular service to the beneficiaries but is unable to do so for reasons not attributable to the licensee the Central Commission is empowered to approve the date of commercial operation even prior to such regular service and determine the transmission tariff from such date.

J) that If the appellant's interpretation of the regulation 7 is accepted it would render the provisions of the second proviso to the regulation 3(12)

and the regulation 5 redundant as the very purpose of allowing the date of commercial operation before the line being put to regular use and service would be negated.

k)that The arrangement between the respondent no 1 and the beneficiaries requires the beneficiaries to pay the transmission tariff applicable from the date of commercial operation of the line irrespective of any flow of power through such lines. Thus, as the line was ready and available for regular service as far as the first respondent is concerned, the appellant and other beneficiaries are required to pay the transmission tariff as determined by the Central Commission from the date of the commercial operation.

l) The indemnification agreement does not become effective for various reasons not attributable to the first respondent and the reasons include the fact that the Nuclear Power Corporation of India Ltd. did not agree on the Zero date.

J) The scope of the appeal cannot be expanded in the manner as sought to be done by the appellant because the Tribunal is only required to consider the appropriateness of the order impugned.

k) The Transmission Line was completed by the first respondent within the time frame contemplated, hence the first respondent is entitled to the

transmission tariff in terms of the regulation 2(12) of the Tariff Regulations, 2009.

7. On the pleadings as aforesaid, the following points would arise for consideration in the present appeal:

a) Whether the Central Commission was justified in approving the transmission tariff in the impugned order?

b) Whether the contention of the appellant that the Central Commission was not justified in approving tariff payable by the appellant in the absence of the power plant not being as yet commissioned by the Nuclear Power Corporation of India as alleged in the memorandum of appeal is acceptable in the present appeal?

8. Both the points call for an integrated approach. By way of prolegomena it needs to be recorded that before the impugned order was passed on 4.5.2011 on the petition, being petition no. 307 of 2011, filed by the Respondent No. 1 praying for determination of transmission tariff for Kundankulam- Tiruenveli 400KV(QUAD) D/C Line -1 & 2 with associated bays and equipments the said Respondent No. 1 had earlier filed a petition, being petition No. 81 of 2010, before the Commission

wherein the present appellant which was before unbundling known as Tamil Nadu Electricity Board was the respondent, praying for declaration of Commercial operation in terms of regulation-3 (12(c)) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2009 read with regulations 24 of Central Electricity Regulatory Commission (Conduct of Business) Regulations 1999. The Central Commission upon hearing both the parties passed an order on 24.9.2010 declaring 1.4.2009 as the date of commercial operation of the transmission lines and allowed the respondent No. 1 of this appeal to file petition for determination and approval of transmission charges with effect from that date. The said petition No. 81 of 2010 was hotly opposed by the present appellant's predecessor entity but no appeal was preferred against the Central Commission's order dated 24.9.2010 and the said appealable order, since not appealed against, attained finality. As apprehended by the appellant, the respondent No. 1 of this appeal then filed a petition, being No. 307 of 2011, praying for determination of transmission tariff and then came out, upon hearing both the parties, the impugned order now under challenge before us.

9. In the conspectus of this scenario the appellant during the pendency of the appeal filed an interlocutory application praying for

addition of Nuclear Power Corporation of India Ltd. as party to this instant appeal on the purported ground that declaration of commercial operation without the Nuclear Power Corporation of India Ltd. having failed to commission the generation and subsequent determination of tariff by the Central Commission was not in accordance with the law. Significantly, in the petition 81 of 2010 wherein prayer was made by the respondent No. 1 of this appeal for declaration of Commercial operation the Nuclear Power Corporation of India Ltd. was not a party though prayer was made by the present appellant or for that matter by Tamil Nadu Electricity Board for making the Nuclear Power Corporation of India Ltd. as party in that petition on the ground that the indemnity bond be given effect to. However, this interlocutory application no. 141 of 2012 was dismissed on contest by this Tribunal on 10.5.2012 and a few words from the said order may not be out of context.

“Regardless of the question whether the argument has merit or not it can be said that it is misplaced in the present context. We are not deciding in this Appeal as to whether there should be a declaration of date of commercial operation or what should have been the date of declaration of commercial operation. That is not the issue here. Before us in this Appeal, we are to confine ourselves to the question as to whether the order of the Commission determining and approving the transmission charges payable to the Respondent No.1 Power Grid Corporation of India Ltd. is legally justified or not. Our search is not directed in this appeal to the questions as to how, why and under what circumstances there has been delay in commissioning the assets or who is responsible for such delay. The matter of the fact is that the order dated 24.9.2010 passed by the Commission in Petition No.81 of 2010 declaring the date of commercial operation which was an appealable

order under Section 111 of Electricity Act, 2003 has not been challenged and the said Order has attained finality. It was that proceeding where the question should have been properly ventilated and it was there where perhaps the question of impleadment of the party might have been addressed to. In the present Appeal no relief could be claimed against the Nuclear Power Corporation of India Ltd. Inviting the questions as to whether the beneficiary could be made liable to pay transmission tariff in respect of a system not yet under regular service and whether declaration of date of commercial operation would amount to transmission licensees' eligibility to demand tariff from the beneficiaries would in fact amount to inviting the widening and extending the scope and ambit of the Appeal which is not permissible.”

Importantly, this order was also not challenged before the Superior Court. It is in this background that we are proceeding to the deliberations of this appeal.

10. We have heard Mr.S.Vallinayagam, learned counsel for the appellant and Mr. M.G.Ramachandran, learned counsel for the first respondent. None appeared for the Central Commission and other respondents. In the present appeal it is of no use in recording the oral submissions of the learned counsel for the contending parties since both the learned advocates argued in the same lines and in the same identical words with no further addition or subtraction as have been averred by them in their respective pleadings.

11. In the order impugned the Commission has referred to its earlier order dated 24.9.2010 and then proceeded to the discussion on the components of the transmission tariff such as capital cost, additional capital expenditure, debt equity ratio, return on equity, interest on loans, depreciation, operation and maintenance expenses, interest on working capital and then fixed the transmission charges. The appellant before the Commission raised objection to a) the prayer of the first respondent for grossing up the rate of return based on the tax rate of the relevant Finance Act by linking the same with the proposed amendment of the regulation by the Commission, b) claim for reimbursement of service tax on the ground that the transmission of power has been exempted from payment of service tax, c) revision of norms for O&M expenditure due to impact of wage revision, d) reimbursement of license fee which is not covered under the regulations. These objections were taken note of by the Commission in the impugned order and the findings of the Commission on these points do not appear to be the major grounds in the instant appeal. However, be it recorded here that the first three points have not been conclusively decided against the appellant, and the point on the capital cost as urged in the instant appeal is found to have been decided in terms of the Regulations, 2009 and the interpretation of regulation 7(2) as made by the learned advocate for the appellant to the

effect that only the cost which was originally sanctioned should be reckoned as capital cost appears to be not in consonance with the regulations 7 of the Tariff Regulations ,2009, if read in its entirety. So far as the fees etc. payable are concerned, the Commission has relied upon its own earlier order dated 11.1.2010 and we do not find any irregularity in the order complained of.

12. Notably, before the Commission it was once again ventilated that declaration of commercial date as 1.4.2009 and determination of transmission tariff from that date was not beyond reproach in as much as imposition of transmission tariff consequent upon declaration of commercial operation was at the peril of the appellant because of negligence on the part of the Nuclear Power Corporation of India Ltd. in not commissioning the project as per the schedule, as such it should have been most appropriate on the part of the respondent No. 1 of this appeal either to stick to the schedule or it should have waited for synchronization of the units in the plant. The same arguments have been repeated before this Tribunal. We cannot but be in agreement with the Commission that since the order dated 24.9.2010 passed in Petition No. 81 of 2010 remained unchallenged the issue operated as *res judicata*. It is unavoidable to quote the regulation 3 (12 (c) of the Central

Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009:

“(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.”

In the present appeal we must not be called upon to consider whether the second proviso to regulations 3(12)(c) should have been invoked by the Commission in the present situation because this aspect of the matter cannot be put to challenge. Declaration of commercial operation, it cannot be disputed, would under the law entitle the transmission licensee to claim for transmission tariff as against the beneficiaries of the transmission line, no matter whether there was failure on the part of the

generator to transmit electrical energy, and the dispute, if any, has to be resolved between the appellant and the Nuclear Power Corporation of India Ltd. We answer the point accordingly, as raised by the learned counsel for the appellant.

13. Much has been talked about non-invocation of the indemnification agreement entered into by and between the first respondent and the Nuclear Power Corporation of India Ltd. in order to have the first respondent compensated for the damages. This is again not relevant for the purpose of the present appeal. However, the indemnification agreement could not be put to use, as argued by the learned counsel for the first respondent, because of the zero date not being defined or agreed upon and, secondly, the regulations quoted above do not suggest or speak of the necessity of synchronization of the units in the plant with commercial operation of the evacuation line. Moreover, the indemnification agreement cannot wither away the provisions of the Regulations at extant, which we are concerned with, and a party, if found eligible to a right under the law, cannot be deprived of such right available as against another party on the ground that a contractual remedy which is in the instant case inchoate in nature was available to that party as against a third party particularly when the contents of the

contract have no co-nexus with the regulations 3(12),5,and 7 of the Tariff Regulations,2009. Again, the resolution of the 138th.meeting of the Southern Regional Electricity Board on 30.8.2005 does not appear to be of any assistance to the appellant. The matter of the fact is that when rightly or wrongly the Commission declared the Commercial operation date on the prayer of the first respondent the latter became entitled to apply for determination of transmission tariff payable by the distribution licensee. It will not be out of context to read regulations 5 and 7 of the Tariff Regulations 2009 to meet the objections of the learned counsel for the appellant that declaration of commercial operation date does not automatically entitle a transmission licensee to demand tariff.

*“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.*

*(2) The generating company or the transmission licensee, as the case may be, shall make an application as per **Appendix I** to these regulations, for determination of tariff based on capital expenditure incurred duly certified by the auditors or projected to be incurred up to the date of commercial operation and additional capital expenditure incurred duly certified by the auditors or projected to be incurred during the tariff period of the generating station or the transmission system:*

Provided that in case of an existing project, the application shall be based on admitted capital cost including any additional capitalization already admitted up to 31.3.2009 and estimated additional capital expenditure for the respective years of the tariff period 2009-14:

Provided further that application shall contain details of underlying assumptions for projected capital cost and additional capital expenditure, where applicable.

(3) In case of the existing projects, the generating company or the transmission licensee, as the case may be, shall continue to provisionally bill the beneficiaries or the long-term customers with the tariff approved by the Commission and applicable as on 31.3.2009 for the period starting from 1.4.2009 till approval of tariff by the Commission in accordance these regulations:

Provided that where the tariff provisionally billed exceeds or falls short of the final tariff approved by the Commission under these regulations, the generating company or the transmission licensee, as the case may be, shall refund to or recover from the beneficiaries or the transmission customers, as the case may be, within six months along with simple interest at the rate equal to short-term Prime Lending Rate of State Bank of India on the 1st April of the concerned/respective year.

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

(a) the expenditure incurred or projected to be incurred, including interest during construction and financing charges, any gain or loss on account of foreign exchange risk variation during construction on the loan - (i) being equal to 70% of the funds deployed, in the event of the actual equity in excess of 30% of the funds deployed, by treating the excess equity as normative loan, or (ii) being equal to the actual amount of loan in the event of the actual equity less than 30% of the funds deployed, - up to the date of commercial operation of the project, as admitted by the Commission, after prudence check;

(b) capitalised initial spares subject to the ceiling rates specified in regulation 8; and

(c) additional capital expenditure determined under regulation 9:

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

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

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

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

Provided also that the Commission may issue guidelines for vetting of capital cost of hydro-electric projects by independent agency or expert and in that event the capital cost as vetted by such agency or expert may be considered by the Commission while determining the tariff for the hydro generating station:

Provided also that the Commission may issue guidelines for scrutiny and approval of commissioning schedule of the hydro-electric projects of a developer, not being a State controlled or owned company as envisaged in the tariff policy as amended vide Government of India Resolution No 23/2/2005-R&R (Vol.IV) dated 31st March 2008:

Provided also that in case the site of a hydro generating station is awarded to a developer (not being a State controlled or owned company), by a State Government by following a two stage transparent process of bidding, any expenditure incurred or committed to be incurred by the project developer for getting the project site allotted shall not be included in the capital cost:

Provided also that the capital cost in case of such hydro generating station shall include:

(a) cost of approved rehabilitation and resettlement (R&R) plan of the project in conformity with National R&R Policy and R&R package as approved; and

(b) cost of the developer's 10% contribution towards Rajiv Gandhi Grameen Vidyutikaran Yojana (RGGVY) project in the affected area:

Provided also that where the power purchase agreement entered into between the generating company and the beneficiaries or the implementation agreement and the transmission service agreement entered into between the transmission licensee and the long-term transmission customer, as the case may be, provide for ceiling of actual expenditure, the capital expenditure admitted by the Commission shall take into consideration such ceiling for determination of tariff:

Provided also that in case of the existing projects, the capital cost admitted by the Commission prior to 1.4.2009 and the additional capital expenditure projected to be incurred for the respective year of the tariff period 2009-14, as may be admitted by the Commission, shall form the basis for determination of tariff."

These two regulations read with the regulation 3(12) of the Tariff Regulations, 2009 would clearly and unmistakably show that the Central Commission has power to approve the date of commercial operation after the project is ready for such operation and determine the transmission tariff upon such declaration of commercial operation according to the Tariff Regulations. Definition of the date of commercial operation in the Bulk Power Transmission Agreement between Power

Grid Corporation of India and Tamil Nadu Electricity Board on 4.3.2006 does not help the appellant.

14. The argument of the learned counsel for the appellant that the beneficiaries of the Southern Region have no role to play in fixing the zero date or that the first respondent and the Nuclear Power Corporation of India Ltd. were responsible for not defining the zero date and that non-fixation of zero date must not result in causing hardship to the appellant leads us nowhere particularly when this is not an issue so far as the merit of the impugned order is concerned. Again, it is no body's case that the beneficiaries were responsible for the delay in commissioning the project. Therefore, the argument of the learned counsel for the appellant that the beneficiaries should not be asked to pay the transmission charges cannot be accepted because transmission charges have been determined in terms of the CERC Tariff Regulations, 2009 only after declaration of commercial operation which was effected in terms of the Regulation quoted above. Therefore, in this appeal it is misnomer to put the questions as to who was responsible for the delay in bringing the transmission system into regular service and what would be the consequences in the event of the Tariff being determined in the absence of commissioning of the power plant. The argument of the

learned counsel for the appellant that even though there has been declaration of commercial operation transmission tariff cannot be charged by the first respondent is difficult to accept because acceptance of such argument will militate against the regulation 3(12) of the Tariff Regulations,2009.

15. The argument of the learned counsel for the appellant that a beneficiary cannot be held liable to pay transmission tariff when the system has not been under regular use because of non commissioning of the power plant is perhaps not supported by the law and the further argument that the declaration of the date of the commercial operation does not invariably entitle the transmission licensee to demand Tariff or that the commission was not justified in determining the Tariff is in circumstances unacceptable in view of the regulations of the Tariff Regulations,2009 as we read earlier. On the contrary, the argument of the learned counsel for the first respondent that the delay has already resulted in the increase in the interest during construction and that the first respondent exhibited its prudence by praying for declaration of commercial operation and for consequential determination of transmission tariff so as to avoid further increase in the interest during construction to the prejudice of the beneficiaries can hardly be brushed

aside being illogical and illegal. Any amount of much more progressive delay will definitely invite payment of much higher interest during construction and other charges by the beneficiaries.

16. It has been rightly argued by the learned advocate for the first respondent that the first respondent has no legal obligations, no concern regarding supply of electrical energy to the appellant. As the indemnification agreement is not the subject matter of the present appeal, so also is the case in respect of an agreement said to have been executed between the appellant and the Nuclear Power Corporation of India Ltd.

17. The reliance placed by the appellant on the clauses of the Bulk Power Transmission Agreement does not come to the aid of the appellant because fixing the date of commercial operation amounts to the operation on commercial basis. The word '*commercial operation*' loses its significance if it is argued that declaration of a date of commercial operation is legally distinct from and with no co-relation whatsoever with the fixation of tariff payable by a distribution licensee. The proviso to sub-regulation (2) of the regulation 1 of the Tariff

Regulations,2009 makes it indubitably clear that tariff in respect of a project shall be determined by the relevant Tariff Regulations.

18. The provisions of the Bulk Power Transmission Agreement cannot under any circumstances be given precedence and supersession over the Tariff Regulations, 2009. Moreover, the said agreement undisputedly, as rightly argued by the learned counsel for the first respondent, has in Article 8.1.stipulated that the transmission tariff and terms and conditions of tariff shall be in accordance with the Central Electricity Regulatory Commission Regulations. The matter of the fact is that it could not be the case of the appellant that delay in commissioning the project is attributable to the first respondent. The argument for the learned counsel for the appellant that the loss incurred by the transmission service provider can be charged from the appellant beneficiary when delay in commissioning the project was on the part of the generator is misplaced in view of what we have said above. Clauses 7.1, 7.2 and 10.1 of the Bulk Power Transmission Agreement between the appellant and the first respondent centre round the aspects of billing, monthly energy accounting and payments of the bill. These clauses do not definitely override the Tariff Regulations 2009 and these clauses

have to be read in the totality of the context of the agreement itself and cannot be conjoined with the Tariff Regulations.

19. At the last leg of his argument the learned counsel for the appellant relies upon the decision in *Union Of India vs. Fili Tiago De Gama (1990) 1 SCC 277* in support of his argument that the agreement between the appellant and the first respondent has to be interpreted in the light of the principle of statutory interpretation of contract where discovery of intention is of paramount consideration. The learned advocate has further referred to the decision in *Anwar Hasan Khan Vs. Mohd. Safi & Ors. (2001) 8 SCC 540*. These decisions do not come to the rescue of the appellant in view of the fact that it is also a fundamental principle that interpretation of contract must not be in derogation to the letter and spirit of statute. In fact, the decisions are out of context in view of the Commission having relied upon the provisions of the Regulations in determining the transmission tariff.

20. In the result, the appeal does not appear to stand, and while winding up our discussion, we must make it clear at the risk of repetition that whatever we have said in the preceding paragraphs cannot be

construed to be of any reflection on the legality of the order dated 24.09.2010 as the said order has not been challenged and we have proceeded from the consequences of that order and ending with the merit of the impugned order itself in this appeal.

21. Accordingly, the appeal is dismissed without cost.

(V.J. Talwar)
Technical Member

(P.S.Datta)
Judicial Member

REPORTABLE/NON-REPORTABLE

Pratibha