

Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No. 160 of 2011

Dated 10th May, 2012

Coram : Hon'ble Mr. Justice P.S. Datta, Judicial Member

Hon'ble Mr. V.J.Talwar, Technical Member

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

.... Appellant(s)

Vs.

1. Central Electricity Regulatory Commission
3rd and 4th Floor, Chanderlok Building,
36, Janpath, New Delhi – 110001.
2. Rajasthan Rajya Vidyut Prasaran Nigam Ltd.
Vidyut Bhawan, Vidyut Marg,
Jaipur-302 005.
3. Ajmer Vidyut Vitran Nigam Ltd.,
Old Power House,
Hathi Bhata, Jaipur Road,
Ajmer – 305 001,
Rajasthan
4. Jaipur Vidyut Vitran Nigam Ltd.,
Vidyut Bhwan, Janapath,
Jaipur – 302005,
Rajasthan

5. Jodhpur Vidyut Vitran Nigam Ltd.,
New Power House, Industrial Area,
Jodhpur – 342003,
Rajasthan
6. Himachal Pradesh State Electricity Board,
Vidyut Bhawan, Kumar House Complex Building II,
Shimla – 171004
7. Punjab State Electricity Board,
The Mall, Patiala – 147 001.
8. Haryana Power Purchase Centre,
Shakti Bhawan, Sector – 6,
Panchkula (Haryana) 134 109.
9. Power Development Department,
Government of Jammu & Kashmir,
Mini Secretariat, Jammu – 180006.
10. Uttar Pradesh Power Corporation Ltd.,
Shakti Bhawan, 14, Ashok Marg,
Lucknow – 226001.
11. Delhi Transco Ltd.
Shakti Sadan, Kotla Road,
New Delhi – 110019
12. BSES Yamuna Power Ltd.,
BSES Bhawan, Nehru Place,
New Delhi – 110019.
13. BSES Rajdhani Power Ltd.,
BSES Bhawan, Nehru Place,
New Delhi – 110019.
14. North Delhi Power Ltd.
Power Trading & Load Dispatch Group
Cennet Building, Pitampura,
New Delhi – 110034.
15. Chandigarh Administration,
Sector 9, Chandigarh – 160022.

16. Uttarakhand Power Corporation Ltd,
Urja Bhawan, Kanwali Road,
Dehradun – 248 001.

17. North Central Railway
Regional Headquarters,
Civil Lines, Allahabad – 211 001.

18. New Delhi Municipal Council,
Palika Kendra, Sansad Marg,
New Delhi – 110002.

.....Respondent(s)

Counsel for the Appellant (s) : Mr. M.G. Ramachandran
Mr. Anand K. Ganesan

Counsel for the Respondent (s) : Mr. Pradeep Misra &
Mr. Suraj Singh for R-10
Mr. R.B. Sharma for R-13
Mr. Manu Seshadri for R-1

JUDGEMENT

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

1. Power Grid Corporation of India Limited, a Central Transmission Utility within the meaning of section 38 of the Electricity Act, 2003 implemented the transmission system associated with SEWA II Hydro Electric Plant of NHPC Limited. One of the Assets, called Asset II which is the subject matter of the present appeal is the “ **Second Circuit of**

132 kV D/C Sewa II – Hiranagar line along with associated bays at Hiranagar sub-station.” On 18.7.2005 the Board of Directors of the appellant approved an investment of Rs.98.47crore including Interest During Construction of Rs.4.73 crore based on 4th quarter 2004 price levels. The appellant negotiated and entered into an indemnity agreement with NHPC dated 22.7.2005 containing the terms and conditions mutually agreed to between the appellant and NHPC. The agreement provided for matching the commissioning schedule of the generating station and the associated transmission system. Also, the agreement provided for indemnification by the defaulting party in case of delay in the commissioning. The clause is ***“In the event of delay in commissioning of generating units vis a vis ATS the defaulting party shall pay the Interest During Construction (IDC) including the Foreign Exchange Rate Variation (FERV) and Govt. Guarantee fee if any for generating units and ATS calculated as lower of the two, up to a period of six months from the zero date. However, the defaulting party shall pay the indemnification claim only in case of revenue loss or part thereof suffered by the other party due to delay in commissioning by the defaulting party.”*** The zero date for operation of the indemnification clause was agreed to be 1.6.2008 , and as per the Investment Approval the transmission system was to be commissioned within 27 months of the date of the Letter of Award for

Tower Package. The date of award of the Tower Package was 7.2.2006 and accordingly the scheduled commercial date was May, 2008. But , neither the generation project of NHPC nor the Associated Transmission system of the appellant was ready for commercial operation as on the schedule time of May, 2008 as envisaged on account of three reasons, namely a) delay in work due to agitation during the period from June,2008 to August,2008, b) there was delay in forest clearance by the Government of Jammu & Kashmir and the approval for forest clearance for 4.7 kilometres of line length having been received in November, 2008 only, c) dispute over Right of Way in Kathua section , d) non- completion of the generating station of SEWA II Hydro Electric Project being executed by NHPC. Though the circuit was ready by 31.3.2009 it could not be declared under commercial operation due to non-availability of SEWA-II generation. The SEWA II generation has been commissioned by NHPC on 30.6.2010 following which the line was ready and was declared under commercial operation with effect from 1.7.2010. Since the indemnity was only for six months from the zero date and both the generation project and transmission project were delayed for more than six months the indemnification clause was not applicable in the circumstance.

2. On 4.12.2010 the appellant filed a petition , being petition no 325 of 2010 for approval of transmission tariff for the concerned lines. The Central Commission while passing the impugned order on 10.8.2011 held that the delay in the commissioning the transmission system from May,2008 to 31.3.2009 was justified and accordingly allowed the Interest During Construction for the said period for Asset II (as also for Asset I which was related to "one circuit of 132 kV D/C SEWA II – Hiranagar line along with associated bays at Hiranagar sub-station and one circuit of 132 kV D/C SEWA II Mahanpur line along with associated bays at Mahanpur ") But the Commission turned down the prayer of the appellant for INTEREST DURING CONSTRUCTION and IEDC for the period from 1.4.2009 to 30.6.2010. Hence the appeal.

3. According to the appellant, the Commission erred in not appreciating the following:-

(a) Though the transmission lines were ready for commissioning on 31.3.2009 the same could not be commissioned as the Power Department of the Government of Jammu & Kashmir did not allow such commissioning till 5.8.2009.(b) The Asset II could not be commissioned independent of Asset I.(c)The Asset II could not be commissioned as the SEWA II Hydro Electric Project was not ready for commissioning .

The Asset II was commissioned on 1.7.2010 along with the commissioning of the SEWA II Hydro Electric Project. (d) In the circumstance, the appellant was not in a position to avail itself of the indemnification clause .(e)The indemnification provision in the agreement with the NHPC could not be unilateral and could be only based on negotiation and mutual agreement wherein both the parties build up limitation of liability terms to protect themselves against unlimited liabilities. (f) there was delay in forest clearance.(g) there was dispute as to the right of way.

4. There are 18 respondents including the Central Electricity Regulatory Commission, the respondent no 1 who is represented by Mr.Manu Seshadri, the learned Advocate and who in course of his submission supported the reasoning of the Central Commission made in the impugned order. The other respondents include four distribution companies of the State of Rajasthan, Punjab State Electricity Board,, Himachal Power Purchase Centre, Power Development Department of the Government of Jammu &Kashmir, Uttar Pradesh Power Corporation Limited, Delhi Transco Ltd., BSES Yamuna Power Ltd., BSES Rajdhani Power Ltd, North Delhi Power Ltd., Chandigarh Administration, Uttarakhand Power Corporation Ltd., North Central Railway, and New

Delhi Municipal Council. Of these respondents the Uttar Pradesh Power Corporation Limited, the respondent no 13, and the BSES Rajdhani Power Ltd, the respondent no 10 have filed their counters which require mentioning. Mr. R.B Sharma, learned Advocate appeared for the BSES Rajdhani Power Ltd and Mr.Pradeep Mishra along with Mr.Suraj Singh, learned Advocates appeared for the respondent no 13, the Uttar Pradesh Power Corporation Ltd and they made their respective submissions strictly in line with their written responses. As said earlier, the Central Commission made oral submission in justification of the order complained of. Other respondents did not contest.

5. The BSES Rajdhani Power Limited, the respondent no 13 in its verified reply contends that the appellant is not entitled to the IDC due to the fault of the appellant itself and the Commission was justified in rejecting the claim of the appellant in this regard. The appellant has delayed completion of the project in question and the time over-run in the completion was unreasonable and reasonably found unreasonable by the Commission. The time over run of fifteen months from April, 2009 to June, 2010 was not considered justified by the Commission . Evacuation of power from SEWA II generation was to be facilitated and coordinated by the appellant and the agreement executed by the

appellant was found lacking as the appellant did not build in the commissioning of the generating station. Fault attributable to the appellant cannot be passed on to the beneficiaries.

6. The respondent no 10, the Uttar Pradesh Power Corporation Limited contends in its written submission that the CERC has taken the view rightly that in case the appellant has not secured its commercial interest in the agreement entered into with NHPC the amount cannot be include in the capital cost. Because of the delay on the part of the appellant the beneficiaries cannot be burdened by addition in the capital cost which will lead to higher determination of tariff and consumer in general would suffer.

7. The point for consideration is whether the Central Commission was right in rejecting the claim of the appellant for Interest During Construction and Incidental Expenditure During Construction from 1.4.2009 to 30.6.2010.

8. It is pertinent to note that in respect of the Asset I which we have noted above the appellant filed a petition, being Petition no. 73 of 2010

claiming therein IDC and IEDC for the period from 1.4.2009 to 31.8.2009. The Commission while passing the order on 15.2.2011 rejected the IDC and IEDC for the said period against which the appellant preferred an appeal, being appeal no 65 of 2011 on exactly the same grounds as have been advanced in the present appeal. In the memorandum of the present appeal it has been categorically mentioned that the grounds agitated herein were already raised in the appeal no 65 of 2011 that related to the order dated 15.2.2011 passed by the Commission in relation to the Asset I. It is the case of the appellant that the Asset II could not be commissioned independent of the Asset I and the reasons for delay in commissioning the Asset II are the very reasons applicable to the Asset I. The matter of the fact is that when this appeal was filed before the Tribunal on 7.10.2011 the appeal no 65 of 2011 had been pending which is why pendency of the said appeal could be mentioned in memorandum of appeal of this appeal wherein also mention has been made about the Asset I and , importantly during the pendency of this appeal the appeal no 65 of 2011 has been disposed of by this Tribunal on 12.01.2012 (Coram: Hon'ble Chairperson and Hon'ble Mr.V.J.Talwar) and a copy of the judgement of that appeal has been filed by the respondents . This has been argued by the learned counsel for the appellant that duration of the period in the appeal no 65 of 2011 is not exactly the same period and in the instant appeal the time

over run is little longer and the reasons for delay in commissioning the Asset II are various but one of the reasons is the delay in commissioning the Asset I. Accordingly, it is argued that this appeal should be considered in a different perspective and it must not be forgotten that the appellant was in no way responsible for the delay in commissioning the Asset II.

9. It is now pertinent to see the reasoning assigned by the Commission in order to examine whether the reasons for dismissal of the prayer in respect of the Asset I are equally applicable to the instant appeal in relation to the Asset II. The Central Commission observes:-

“10. As per the Investment Approval , the transmission assets are required to be completed within 27 months from the date of award of tower package. Reckoning from the date of award of tower package, i.e., 7.2.2006, the transmission assets were to be commissioned by May, 2008. However, Asset 1 and 2 were commissioned on 1.9.2009 and 1.7.2010 respectively, which has resulted in a time over-run of 16 months and 26 months. The Commission in its order dated 15.2.2011 in Petition no.73/2010 had condoned the time over-run in respect of Asset 1 and had observed as under:-

We have examined the submission of the petitioner and objection of the respondents with regard to time over run. On perusal of documents submitted by the petition, it is noted that the delay of 11 months from May 2008 to March 2009 was on account of agitation ROW problem and forest clearance which appear to be justified for the detailed reasons given by the petitioner. Moreover, it is noticed that the petitioner in its letter dated 6.8.2009 informed the Northern Regional Power Committee and the beneficiaries that the

transmission lines were test checked on 31.3.2009 but could not be charged due to delay in completion of SEWA-II Hydro Electric Project. It was also mentioned by the petitioner that on request of Jammu and Kashmir, the transmission lines were charged on 5.8.2009 and was declared under commercial operation w.e.f.1.9.2009. Therefore, we find that the delay of five months is not justified as the petitioner has not built in the sufficient safeguard in the Implementation Agreement to take care of the delay in the commissioning of the generating station. Accordingly, IEDC and IDC have not been allowed from 1.4.2009 till 31.8.2009 which amount to Rs177.32lakh, Rs11.78lakh and Rs0.41lakh in respect of the transmission line, sub-station and PLCC respectively.

11. Accordingly, time over-run of 11 months was condoned in respect of Asset 1. The same logic holds good for Asset 2 for the period from May, 2008 to March, 2009 and accordingly, the time over run of 11 months in respect of Asset 2 is condoned. The petitioner is responsible for the delay in commissioning of Asset 2 from April,2009 to June,2010. The petitioner has submitted that though both the lines were ready for commissioning by 31.3.2009, they could only be charged with the commissioning of SEWA II Generation of NHPC with effect from 30.6.2010. The petitioner has further clarified that as per the Implementation Agreement between NHPC and the petitioner , in case of the default the defaulting party would be required to pay IDC up to a period of six months from the zero date which was fixed on 1.6.2008. During the hearing on 7.6.2011, the representative of the petitioner submitted that this zero date slipped by both the parties. The petitioner has approached the NHPC for revising the zero date but no response has been received. We are of the view that the petitioner has not built in requisite safeguard in its Implementation Agreement to address the delay on account of the slippage in commissioning of the generation project and the beneficiaries cannot be made to pay for the failure of the petitioner to put in place a robust commercial arrangement to take care of the time over-run. Accordingly, IDC and IEDC charges of Rs56.50lakh, Rs12.06lakh and R. 0.09lakh pertaining to Transmission Line, Sub-station and PLCC respectively are not allowed.^o

10. While dismissing the appeal no 65 of 2011 this Tribunal held as follows:-

“5. In the light of the above rival contentions, the following question may arise for consideration:

“Whether the Central Commission is right in rejecting the claim of the Appellant towards the Interest During Construction and Incidental Expenditure During Construction for the period from 1.4.2009 to 1.9.2009 ?

6. According to the Appellant, the indemnity clause contained in the indemnification agreement provides for the indemnification to be applicable from the zero date for a period of 06 months and as such, it would become elapsed after a period of 06 months; since the transmission project is delayed for more than 06 months from the zero date, no indemnity can be claimed by the Appellant under the indemnification clause and that therefore, the Central Commission having accepted that the delay was due to circumstances beyond the control of the Appellant, the Central Commission ought to have allowed for the subsequent period as well.

7. The Learned Counsel for the Appellant would also contend that since the Central Commission has accepted the entire period till 1.3.2010 to be on account of Force Majeure affecting the Hydro Power Corporation, there cannot be any question of indemnity applicable and therefore, the Central Commission ought to have allowed indemnity in respect of the period being 1.4.2009 to 1.9.2009.

8. We have carefully considered the submissions made by both the parties.

9. It is the case of the Appellant that though the transmission lines were ready on 1.4.2009, it could not be commercially operative as the Generating Station was not made ready by the Hydro Power Corporation. However, the Central Commission has taken a view that in case the Appellant has not included its commercial interest in the Agreement entered into with the Hydro Power Corporation, the said amount cannot be included in the capital cost.

10. According to the Central Commission, the delay in the commissioning of the transmission system from May, 2008 to 31.3.2009

was justified and as such the Appellant would be entitled to the benefit for the said period but the Appellant cannot claim for the further period i.e. from 1.4.2009 to 31.8.2009 since the Appellant had not built any sufficient safeguards as referred to in the agreement to take care of the delay in commissioning of the Generating Station. The relevant portion of the impugned order is as under:

****** (We omit this portion as has been reproduced earlier)*

11. As mentioned above, it is the case of the Appellant that due to the event beyond the control of the Appellant under the Force Majeure circumstances, the delay cannot be attributed to any fault of the Appellant as the delay for the earlier period was allowed by the Central Commission on the ground of the existence of the sufficient justification provided by the Appellant for the delay and the Commission ought to have rejected for the subsequent period.

12. It is noticed that the agreement dated 22.7.2005 between the Appellant and the Hydro Power Corporation is to secure coordinated completion of the transmission lines as well as the Generating Stations so that the entire system becomes operative simultaneously.

13. As per clause 1(a) of the Agreement, the zero date from which the indemnification agreement shall be applicable was to be worked out for each generating units and the Associated Transmission System. This has to be mutually agreed in the quarterly meeting between the parties within 03 months of the investment approval which will form an integral part of the Agreement. The said date was agreed upon as 1.6.2008. However, as provided in the above schedule, the period shall be regularly reviewed in the Quarterly Meeting between the parties. Therefore, the contention of the Appellant that indemnity clause got elapsed has no basis.

14. That apart, clause 2 (a) of the Agreement which relates to the indemnification by the defaulting party to the either party provides that the same will be calculated only up to a period of 06 months from the zero date. This clause has to be interpreted along with the clause 1 (a) under which the zero date can be altered. If the contention of the Appellant that the indemnity period of six months from zero date had elapsed as both projects got delayed is accepted, then the very purpose of indemnifying agreement would be lost. Due to geological uncertainties, the commissioning of hydro-electric projects gets delayed. Therefore the Appellant should have been cautious and should have

taken care to specify zero date from the date either of the project was ready for commissioning instead of firm date.

15. The perusal of the entire Agreement would show that the object of the Agreement is that the Appellant as well as the Hydro Power Corporation will arrange its works so that the lines as well as the Generating Stations are completed simultaneously and within the time frame. The Agreement has also provided that in case of any default by any party, it will compensate to either party in respect of Interest During Construction for a period of 06 months from the zero date which could be reviewed by the parties periodically as mentioned earlier. In view of this clause providing for the periodical review, the contention of the Appellant that indemnification Clause had lapsed and hence they are entitled to add amount of Rs.189.51 lakhs in the capital cost is misplaced.

16. The first unit of the Sewa-II generating Station of the Hydro Power Corporation was commissioned on 29.6.2010. So from that period the benefit of the transmission system became available to the Appellants. However, the Appellant has filed the tariff petition even prior to the said commissioning date and the Central Commission has allowed the tariff to the Appellant for its transmission system by taking the date of commercial operation as 1.9.2009. Therefore, the Appellant cannot claim addition of Rs.189.51 lakhs in the capital cost especially when the Power Corporation is liable to pay the transmission tariff to the Appellant without any benefit as the power generated from SEWA-II Generating Station of Hydro Power Corporation was not available.

17. The Appellant had relied upon the order dated 6.9.2010 passed by the Central Commission in the Petition No.57 of 2010 filed by the Power Corporation for determination of tariff for SEWA Hydro Electric Project Stage-II from 01.03.2010 to 31.03.2014. The impugned order in this case has been passed on 15.2.2011, but the Appellant has relied upon the order passed on 6.9.2010, in the Petition which has been filed by the Hydro Power Corporation for determination of tariff for its project and as such this has no relevance for the purpose of the present case. In that case, the Central Commission allowed escalation in the capital cost of the Hydro Project upto 1.3.2010 which has nothing to do with the indemnity clause in the agreement of the Appellant and the Hydro Power Corporation in question.

18. As per the preamble of the Act and the Section 61 (d) of the Act, the Commission has to safeguard the consumer's interest so that all the tariff, transmission tariff as well as the retail tariff for distribution of

electricity has to be so determined that the electricity is supplied to the consumers on the cheapest rates. If the claim of Rs.189.51 lakhs made by the Appellant is added in the capital cost of the transmission system on the date of the commercial operation i.e. on 1.9.2009, the beneficiary utilities have to pay the annual charges on the said amount for all the times to come. This additional charge would be passed through in ARR of beneficiaries approved by the Appropriate Commission which in turn add to the burden of the consumers. As such there is no merit in the claim made by the Appellant.”

11. It is plain that the reasons for dismissal of the appeal no 65 of 2011 are equally applicable to the instant appeal and it is difficult to distinguish the factuality in the earlier appeal from those of the present appeal. We find no reason as to why the appellant could be entitled to a period of nine months as claimed by the appellant. In the written note of argument, it has been submitted that the Appellant is entitled to IDC and IEDC for a period of nine months i.e. 15 months minus 6 months covered by the indemnity. We fail to follow the rationale of the argument. The Tribunal in Appeal No.65 of 2011 extensively quoted Paragraph 18 of the Order dated. 15.2.2011, which we also have quoted because in the Impugned Order, the Commission also quoted the said paragraph recorded in order dated 15.2.2011 and held that there is no merit in the Appeal. The Assets were required to be completed within 27 months from the date of award of tower package which was 7.2.2006. Asset I was commissioned on 1.9.2009 and the Asset II was commissioned on 1.7.2010. The Commission justified the delay for a

period of five months that ended on 31.3.2009 and disallowed interest during construction and incidental expenses during construction from 1.4.2009 to 31.8.2009 in case of Asset I as the said Asset I was commissioned by the Appellant on 1.9.2009. It was one of the grounds in the memorandum of this appeal that because of delay in commissioning of the Asset-I there occurred delay in commissioning the Asset II. It is the case of the Appellant that both the circuits were ready for commissioning on 31.3.2009. This Tribunal did not find any fault with the Commission's reasoning whereby delay of five months was reckoned from 1.4.2009 to 31.8.2009 as the Appellant did not have in-built sufficient safeguard in the implementation agreement. When this is so, we fail to understand how delay of nine months as claimed could be condoned. According to the Commission, 31.3.2009, is the cut off date as till that date no fault could be attributed to the Appellant. Interest during construction and incidental expenses during construction from 1.4.2009 to 31.8.2009 was not allowed. Similarly, the same in respect of Asset II from 1.4.2009 till the date of commissioning on the same logic cannot be allowed. The Commission clearly held, rightly too that the same logic holds good for the Asset II for the period from May, 2008 to March, 2009 and the Appellant was responsible for the delay in commissioning Asset II from April, 2009 to June, 2010. Accordingly, we hold that in line with the reasoning of the Commission which was upheld

by this Tribunal in Appeal No.65 of 2011, this Appeal is also not maintainable.

12. Thus, the Appeal is dismissed without cost.

(V.J. Talwar)

Technical Member

(P.S. Datta)

Judicial Member

Reportable/Not-reportable

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