

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

Appeal No. 105 of 2014

Dated: 3<sup>rd</sup> December, 2014

Present: Hon'ble Mr. Rakesh Nath, Technical Member  
Hon'ble Justice Surendra Kumar, Judicial Member

In the matter of:

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

..... Appellant/Petitioner

Versus

1. Central Electricity Regulatory Commission,  
3<sup>rd</sup> & 4<sup>th</sup> Floor, Chanderlok Building,  
36, Janpath, New Delhi-110 001.

2. Chief Engineer,  
Haryana Power Purchase Center,  
Shakti Bhawan, Sector-6,  
Panchkula (Haryana) 134109.

..... Respondents

Counsel for the Appellant(s) : Mr. Anand K. Ganesan  
Ms. Swapna Seshadri

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

JUDGMENT

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. This is an appeal under Section 111 of the Electricity Act, 2003 against the order dated 09.05.2013 (hereinafter referred to as the 'impugned order'), passed by the Central Electricity Regulatory Commission (hereinafter referred to as the 'Central Commission'), in Petition No. 147/TT/2011 in the matter of Power Grid Corporation of India Limited Vs. Haryana Power Purchase Centre, Panchkula, filed by the appellant Power Grid Corporation of India Limited (in short, 'PGCIL')

whereby the learned Central Commission has disallowed the Interest During Construction (IDC) and the Incidental Expenses During Construction (IDEC) for a period of 30 months of delay in commissioning of 315 MVA, 400 kV/220 kV transformers at GIS sub station at Gurgaon (ICT-II), the transmission asset of the appellant on the basis that the appellant had not made any efforts to get the same commissioned along with associated bays tested at KEMA, Netherlands facility. Thus, the appellant has filed the present appeal against the impugned order whereby the Central Commission has not condoned the delay of 30 months in commissioning of 315 MVA, 400/220 kV transformer at GIS sub station at Gurgaon (ICT-II) and as a consequence, the Central Commission has not allowed capitalization of IDC and IE DC for the period of delay.

2. The main grievance of the appellant against the impugned order is that the Central Commission has not considered the additional affidavit dated 25.04.2013 filed by the appellant in the original proceedings on the ground of the same having been filed after about five months of finally hearing the arguments in the matter and reserving the same for judgment/order.

3. The appellant, PGCIL, is a Government Company within the meaning of Companies Act, 1956 and is an undertaking Inter-State Transmission of Electricity in India and also discharges the functions of the Central Transmission Utility (CTU) as provided under the Electricity Act, 2003. Respondent No.1 is the Central Electricity Regulatory Commission vested with statutory functions and duties as provided under the Electricity Act, 2003. Respondent No.2 is the Power Purchase Centre for Haryana.

4. The relevant facts giving rise to the instant appeal are stated as under:-

4.1. that the Central Commission has notified the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (hereinafter referred to as the 'Tariff Regulations, 2009') and the said Tariff Regulations came

in force on 01.04.2009 and shall remain in force for a period of five years, namely, till 31.03.2014.

4.2. that one of the projects being undertaken by the appellant was the combined elements of 315 MVA, 400 kV/220 kV, ICT-I (Date of Commercial Operation 01.07.2010) & 315 MVA, 400 kV/220 kV, ICT-II (projected date of commercial operation 01.10.2011) at GIS sub station at Gurgaon (New) along with associated bays under Transmission System associated with Northern Region System Strengthening Scheme-VI.

4.3 that the Board of Directors of the appellant, vide memo dated 22.01.2007, accorded administrative approval and expenditure sanction to the Transmission System associated with Northern Region System Strengthening Scheme-VI at the total cost of Rs. 18695 lakh, including Interest During Construction (IDC) of Rs. 1236 lac. The revised cost estimate of Rs. 26587 lakh including, IDC of Rs. 1953 lakh was subsequently approved, vide memo dated 16.08.2011, as per the revised cost estimate submitted by the appellant/petitioner.

4.4. that the scope of the work project was as under:-

Loop In-Loop Out (LILO) of Ballabgarh-Bhiwadi 400 kV S/C line at Gurgaon-27 Km and 2 X 315 MVA, 400/200 kV transformers at GIS sub station at Gurgaon (new).

4.5 that in accordance with memo dated 22.01.2007, the transmission system was to be commissioned within 30 months from the date of issuance of first letter of award. First letter of award was issued on 22.1.2007, the date of administrative approval. Thus, the transmission system was scheduled to be commissioned by 01.08.2009.

4.6. that out of two 315 MVA 400/220 kV transformers, first transformer (ICT-I) along with LILO of S/C line at Gurgaon was put under commercial operation on 01.07.2010 with a delay of 11 months. The tariff was approved by the Central Commission's order dated 30.08.2012 in Petition No. 343 of 2010 wherein

delay of 11 months was condoned. As per the tariff order dated 30.08.2012, the main reason of delay was forest clearance which was received on 26.03.2010. The assets were commissioned within three months from the date of forest clearance. The Central Commission while considering the reason of delay of forest clearance took the view that the delay was beyond the control of the appellant/petitioner and allowed the time over run out of the total cost variation of about Rs. 5500 lakh, major cost variation of Rs. 3400 lakh was due to addition of 7 km multi ckt. portion of transmission line and about Rs. 700 lakh was due to increase in cost of sub station equipments and transformer. Considering the said reasons, the cost of time over run was found to be justified by the State Commission and the increase in the cost was allowed in its earlier tariff order dated 30.08.2012.

4.7. that on 20.06.2011 the appellant/petitioner filed Petition No. 147/TT/2011 (impugned petition) for approval of tariff for ICT-II with the projected date of commercial operation as 01.10.2011 entailing delay of 26 months.

4.8. that in the impugned petition being Petition No. 147/TT/2011, the appellant explained the reasons for time over run as under:-

*“that 315 MVA 400/220 kV Auto Transformers are in use in various sub-stations of POWERGRID. Over a period it was noticed that these are subjected to various types of faults during operation including short circuit resulting into failure of transformer.*

*M/s BHEL, who is a sub-contractor under M/s L&T, is the supplier of ICT-II at Gurgaon. As per the contractual conditions of POWERGRID, the manufacturer has to subject the transformer for its design validation for clearance of Short Circuit Tests.*

*Since BHEL make 315 MVA ICT was not subjected to Short Circuit test so far, the ICT being supplied by BHEL under this proposal was identified for Short Circuit Test. It is important to mention that the Short Circuit test on Autotransformers of these ratings are being validated for the first time in India, whereas the test facilities for short circuit test is not available in India as on date. Thus the petitioner has to depend on the testing facilities abroad. This took considerable time in getting the time*

*schedule/test bed availability at KEMA, Netherland and then physical movement to test lab and back.*

*During the short circuit testing in KEMA, Netherland, in unforeseen circumstances the transformer has failed, though pertaining to such experienced and reputed manufacturer like BHEL and resulted in delay in commissioning of the transformer.*

*These tests have been specified and conducted in the interest of Power System as a whole to enhance the system reliability and availability. The outcome of test failure is beyond the control of POWERGRID and delay in commissioning of ICT-II was beyond the control of petitioner and may be condoned."*

4.9. that the Central Commission looking to the reasons given for delay in the impugned petition in view of the vagueness, the Central Commission's Secretariat vide communication dated 19.07.2011 asked the appellant to furnish the following specific details :-

- (i) The date on which the transformer was supplied by BHEL,
- (ii) When the appellant decided to subject the transformer to short circuit tests,
- (iii) Efforts made by the appellant or the equipment supplier in getting time schedule/test bed availability at KEMA which is stated to have taken "considerable time", and
- (iv) Details of the efforts made towards physical movement of the transformer to test lab.

4.10. During pendency of the petition before the Central Commission, ICT-II was put under commercial operation on 1.2.2012, with a delay of 30 months.

4.11. that the appellant in its affidavit dated 14.2.2012 submitted the reasons for the delay which were mere repetition of the reasons already given in the impugned petition despite the fact that there was a further delay of 4 months from the projected date of commissioning. The appellant further stated that details of

amount of liquidated damages, if any, shall be submitted after closing of contract with the supplier and as per the usual practice and, therefore, IDC and IEDC ought to be allowed as claimed in the impugned petition.

4.12. that after hearing on the matter, the order on tariff was reserved by the Central Commission on 27.11.2012. However, after hearing but before disposal of the impugned petition, the appellant filed a further affidavit dated 25.04.2013 explaining the reasons for the time over run and delay in achieving commercial operation of the ICT-II and to place the documentary evidence on record.

4.13. that the Central Commission vide impugned order dated 09.05.2013 determined the transmission tariff for ICT-II and did not condone the delay of 30 months which had occurred in its commissioning and disallowed the Interest During Construction (IDC) and Incidental Expenses During Construction (IEDC) for a period of 30 months of delay, without considering the contents of appellant's affidavits dated 14.02.2012 and 25.04.2013. Thus, in the impugned order, the Central Commission has declined to condone the delay of 30 months in the commissioning of ICT-II. The Central Commission, has accordingly disallowed IDC of Rs. 320.64 lakh and IEDC of Rs. 81.71 lakh for the delay period of 30 months and reduced the capital cost to the extent IDC and IEDC disallowed. The Central Commission considered the capital cost of Rs. 5052.26 lakh on the date of commercial operation against the apportioned approved cost of Rs. 5212.28 lakh.

4.14. that Since the Central Commission had not considered the additional affidavit dated 25.04.2013 filed by the appellant in the impugned petition, the appellant moved a petition for review of the impugned order dated 09.05.2013 before the Central Commission and filed the Review Petition being Review Petition No. 8 of 2013, which has been dismissed, vide review order dated 14.11.2013 of the Central Commission.

5. We have heard Mr. Anand K. Ganesan & Ms. Swapna Seshadri, learned counsel for the appellant and Mr. K.S. Dhingra, learned counsel appearing for the

respondent no.1/Central Commission. We have also gone through the material on record as well as the respective written submissions filed by the rival parties.

6. The following issues are involved in the present appeal which are as under:

- (1) Whether the non - availability of test beds at KEMA Netherlands which is a third party on which M/s BHEL, is dependent is not an event beyond the control of the appellant for the purpose of commissioning ICT - II ?
- (2) Whether the affidavit dated 25.4.2013 was not available on the record of the Central Commission and if so, can the Central Commission take the position that it may not be considered merely because it was filed after the conclusion of the hearing ?

7. **Disposal of Issue No.1**

This issue relates to the non-availability of the test beds at KEMA resulting in delay of the commissioning of ICT-II. On this issue, the following submissions have been made on behalf of the appellant.

7.1. that the Central Commission has wrongly disallowed the Interest During Construction (IDC) and the Incidental Expenses during Construction (IEDC) for the period of delay of 30 months in commissioning of the transmission assets, ICT-II, on the ground that the appellant had not made any efforts to get the same, namely, ICT-II at GIS sub station at Gurgaon along with associated bays tested at KEMA facility.

7.2. that the appellant has to conduct various kinds of tests on the ICTs/ transformers which are being installed by the appellant in its various transmission assets in the country. The type testing of ICT / transformer is of two types (a) Mandatory Type Testing (ii) Special Test (Optional).

7.3. that in terms of the Standards of International Electro-technical Commission, the mandatory tests are carried out to ascertain the reliable

functioning of the transformer/ICT. Further, in the International Electro-technical Commission - 60076 - 5 and also in IS:2026, Part I, several more stringent tests are carried out such as the dynamic short-circuit withstand test in order to improve the reliability of the equipment.

7.4. that as a Central Transmission Utility (CTU) and with the experience regarding functioning of transformers/ICT, the appellant continuously insists on the equipment supplier to carry out stringent tests to test the capability of the transformers/ICT as a matter of course.

7.5. that the appellant had faced the issue of failure of several transformers/ICTs due to external short circuit in many of the sub stations. Therefore, the appellant, by experience had built up requirements of reliability and availability of the equipment in its contract with the equipment supplier.

7.6. that the appellant included the short circuit withstand test to be one of the type tests to be passed by its transformers/ICTs and this was done to provide continuity of service and also reduce interruption of service in the overall interest of the consumer.

7.7. that the Central Electricity Authority (CEA) has notified the CEA (Technical Standards for Construction of Electrical Plant and Electrical Lines) Regulations, 2010 on 20.8.2010 and in the said regulations, the short-circuit withstand test has been prescribed to be conducted on the transformer/ICT as under-

*"(vi) short circuit withstand test shall be conducted on one of each type and rating of transformers to validate the design and quality unless such test has been conducted within last 5 years on transformers of same design. In case there was a change in design before 5 years, the new transformer design shall be validated by carrying out short-circuit withstand test."*

7.8. that for conducting the tests, there is a limited availability of test beds globally and, therefore, the tests get delayed due to the long waiting period and the requirement of physically moving a big equipment like a transformer/ICT to the place of the test-bed and back. In the case in hand, where a 400 KV transformer/ICT testing was to be done, the KEMA test bed in the Netherlands was the only place in the world where the short-circuit withstand test on such a 400 KV transformers/ICT could be conducted.

7.9. that in the present case, the appellant has functioned under the following timelines -

- i. that the contract for the 400/220 KV, 315 MVA transformers was awarded by the appellant to Ms/ BHEL on 29.6.2007;
- ii. that in India, the short-circuit withstand test is conducted only for transformer/ICT up to 220 KV whereas in the present case, the transformer/ICT was of 400 KV rating;
- iii. that the facility/test bed for conducting the short-circuit withstand test on 400 KV transformers/ICT are available only at very few locations such as CESI, Italy and KEMA, Netherlands;
- iv. that CESI, Italy indicated that the test facility would not be available to conduct the test of a transformer/ICT exceeding the weight of 150 tonnes due to transport limitations;
- v. that the only option was to get the test conducted at KEMA, Netherlands which has a very large clientele across the world and has a long waiting period for carrying out such tests;
- vi. that even at KEMA, several of the transformers / ICTs of the appellant were scheduled to be tested between 2008-10 and the availability of test-beds lots were closely monitored and planned while keeping track of the availability of such beds;

- vii. that the appellant was in constant touch with the equipment supplier - M/s BHEL which was persisting with KEMA to conduct the test for ICT - II, Gurgaon;
  - viii. that the test for ICT- II, Gurgaon was carried out by KEMA on 20.10.2010 and the preliminary report was forwarded to the appellant vide BHEL's letter dated 4.11.2010;
  - ix. that thereafter, the transformer was shipped to the manufacturers works for further testing. However, the final report showed that the ICT-II had failed the short-circuit withstand test;
  - x. that under the circumstances when the ICT -II had failed the short-circuit withstand test, the appellant discussed the matter urgently and a decision was taken in March 2011 to get another short-circuit type tested ICT / transformer from M/s CGL;
  - xi. that usually, the equipment suppliers take the period of at least 18 months to deliver transformer/ICT. However, due to constant effort on the part of the appellant, the appellant could receive a new ICT - II in January 2012 (within 10 months);
  - xii. that all other activities and constructions had been completed and by deploying additional manpower, the appellant could achieve the commercial operation of the ICT - II effective on 01.02.2012.
- 7.10. that the learned Central Commission has proceeded on a simplistic basis that the appellant has to deal with the equipment suppliers. The fact is that the appellant insists on the equipment suppliers for timely completion of all works under the contract. However, in certain contracts, the equipment supplier is dependent on third parties for certain vital activities such as conducting of short-circuit withstand test, which would only be done at KEMA, Netherlands in the present case.

7.11. that the Central Commission has erred in holding that this is purely a contractual issue between the appellant and its equipment supplier without appreciating the peculiar facts of the present case, wherein the reasons for the delay were even beyond the control of the equipment supplier due to the limited availability of test-beds at KEMA, Netherlands.

7.12. that this Appellate Tribunal in its judgment dated 12.9.2014 in Appeal No. 257 of 2013 in the case of Power Grid Corporation of India Ltd v. CERC & Ors. has, while considering the issue of sharing of IDC and IEDC incurred, due to delay of eight months in getting short circuit done due to non-availability of test bed between Power Grid and the beneficiaries equally on agreeing to the finding of the Central Commission holding that the delay in getting the short circuit test done was beyond the control of Power Grid or its supplier, held that:-

“12.....We feel that the impact on cost due to time overrun of 8 months as a result of delay in getting the Short Circuit Test done due to non-availability of test bed should be allowed in the transmission tariff to Power Grid i.e. IDC and IEDC for 8 months should be allowed to Power Grid.”

7.13. that the approach of the Central Commission in the impugned order is in deviation of the principles laid down by this Appellate Tribunal in its judgment dated 02.07.2012 in Appeal No. 123 of 2011 in the case of PSPCL v Powergrid Corporation of India Ltd. & Ors., wherein this Tribunal held that when the important issue regarding COD was raised by the appellant through affidavits dated 04.03.2011, 15.03.2011 and 07.04.2011 before the Central Commission, between date of hearing on 25.01.2011 and the date of the impugned order on 29.04.2011, the Central Commission ought to have re-heard the matter by giving further opportunity to both the parties before deciding the issue.

7.14. that the Central Commission had earlier in its order dated 30.8.2012 in Petition No. 343 of 2010 had condoned the delay of 11 months with respect

to ICT - I of the very same transmission system due to non-availability of requisite land and forest clearance issues.

7.15. that at least the delay of 11 months which had occurred due to non-availability of the requisite land and forest clearance issues ought to have been condoned at the very least.

8. **Per contra**, the following submissions have been made on behalf of the respondent/Central Commission:-

8.1. that as per the afore-stated affidavit dated 25.04.2013, filed by the appellant five months after concluding the arguments and reserving the judgment/order, BHEL requested KEMA for conducting type test vide **letter dated 18.5.2010** and test was conducted on **20.10.2010**. The request of BHEL was fulfilled by conducting type test within five months by KEMA.

8.2. that even if the affidavit is taken into account, there is an unexplained delay between December 2008, the scheduled date of supply of ICT-II, to May 2010, the date of request by BHEL to KEMA for conducting type test.

8.3. that according to the appellant, **delay in commissioning was on account of non-availability of test bed at KEMA, Netherlands and appellant sought condonation of delay on the ground of reasons beyond its control. The averment of the appellant does not controvert the finding of the Central Commission recorded in the impugned order that the delay was on account of defective design of the transformer. Neither in law nor in equity the consumer can be burdened with additional cost on account of the appellant's claim for capitalization of IDC and IEDC for the period of delay of 30 months.**

8.4. that there is no law conferring a right on the appellant to claim IDC and IEDC in every case of delay and the issue is to be decided based on the

facts of each case. The beneficiary was neither involved in the selection of the design nor the equipment supplier nor with the testing process and thus does not owe any responsibility for the delay in testing.

8.5. that the supplier is responsible for supply of transformer with defective design and, therefore, either the supplier should bear the consequences or the appellant but certainly the consumer cannot be made to suffer.

8.6. that this Appellate Tribunal in its judgment dated 12.01.2012 in Appeal No. 65 of 2011 filed by the appellant which too involved condonation of delay and non-capitalization of IDC and IEDC for the period of delay upheld the Central Commission's order on the ground that the decision was in consumers' interest because as per the preamble of the Electricity Act, 2003 and 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 claim made by the appellant is added in the capital cost of the transmission system on the date of the commercial operation, 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 the ARR of beneficiaries which in turn would further add to the burden of the consumers.

8.7. that the appellant, while seeking condonation of delay on analogy of delay condoned for ICT-I, has urged that a part of the delay was on account of delay in handing over of clear and vacant possession of land at Gurgaon and the delay of 11 months in commissioning of ICT-I has been condoned by the Central Commission while approving tariff and on that basis the appellant has wrongly claimed condonation of delay of 11 months in commissioning of ICT-II.

8.8. that the appellant in the first instance in the petition/ affidavit did not seek condonation of delay of 11 months on account of delay in

handing over the vacant possession of land. The appellant, in the Review Petition, first time placed reliance on the fact of condonation of delay of 11 months in the case of ICT-I and LILO of 400 kV S/C line at Gurgaon. The Commission has recorded a finding in the impugned order that the appellant has not been able to establish any correlation between the delay in handing over the vacant possession of land and the delay in commissioning. In the case of ICT-II, the only factor responsible for the delay in commissioning, as recorded by the Central Commission, is the delay in delivery of the transformer. Accordingly, the view taken by the Central Commission on the reasons while approving tariff for ICT-I on the basis of facts applicable in that case cannot be extended to ICT-II.

8.9. that as per the Review Order dated 14.11.2013, **clear possession of land was handed over to the appellant on 9.1.2009** after removing 66 kV transmission line. However, the **delivery of the transformer (ICT-II) was received by the appellant in January 2012** for which the award was placed on L&T much earlier on 29.6.2007, for scheduled supply by December 2008.

8.10. that in case of ICT-I design was not found to be defective, but in the case of ICT-II, the design was found to be defective in the impugned order.

8.11. that the main ground of the appellant in the appeal is that the **short circuit tests were optional and not mandatory** and the appellant on its own decided to subject the transformer to short circuit testing. The said transformer on testing was found to be defective and failed the quality tests, causing delay in commissioning. The question of reputation of the equipment supplier, BHEL or L&T in the present case, raised by the appellant is also irrelevant to condone the delay and allow IDC and IEDC for the period of delay.

8.12. that finding of the Central Commission recorded in the impugned order that the defective design transformer was the factor responsible for

the delay in commissioning of ICT-II has not been challenged in the present appeal by the appellant.

8.13. that the appellant has contended that after the transformer failed to meet short circuit test conducted on 20.10.2010, it was replaced by the equipment supplier in January 2012, and the replacement, apparently after changing the design of the failed transformer, was given after 15 months from the date of the test.

8.14. that under the similar circumstances, the Central Commission had not condoned the delay in commissioning of ICT at Raipur in Western Region in its order dated 28.5.2012 in Petition No 136/2011 in the case of Power Grid Corporation of India Ltd Vs Chhattisgarh State Electricity Board. The appeal filed against the order dated 28.5.2012 before this Appellate Tribunal being No. 165/2013 has been dismissed by this Tribunal vide its judgment dated 28.11.2013, upholding the order of the Central Commission observing as under:

*"41. Summary of our findings:*

*Short Circuit Withstand Test may destroy the equipment altogether. Thus, it has been made Optional Type Test. It is performed on the transformer with the consent of both the supplier and the buyer. Both, the routine as well as the type tests are meant for ensuring the quality of the transformer. If any transformer fails of any of the type tests, the quality of such transformer becomes doubtful. The fact, as per the Appellant's own admission, that when the transformers failed on Short Circuit Withstand Test, the Appellant got Messrs Areva to re-design the transformer and supply the redesigned transformer would establish that the design of failed transformer was defective."*

8.15. that this is a matter of double whammy for beneficiary. On account of delay, the beneficiary was not only deprived of the timely service but is also sought to be forced to bear additional burden for the period of delay. Allowing IDC and IEDC for the period of delay of 30 months in the commissioning of transformer/ICT-II would prove to be double whammy for the beneficiary.

8.16. that this Appellate Tribunal in its very recent judgment dated 12.9.2014 in Appeal No 257/2013 in the case of PGCIL Vs CERC and another, as argued by the appellant, has followed the judgment dated 28.11.2013 of this Appellate Tribunal in Appeal No. 165 of 2013 and has held that where the transformer is found to be defective, delay cannot be condoned, while observing as under:

**"15. Summary of our findings**

(i) .....

*(ii) The balance delay in commissioning of the ICTs due to failure of the transformer during testing cannot be allowed to be passed on to the beneficiary and has to be borne by Power Grid. We have relied on the finding of this Tribunal in Appeal no. 165 of 2012 in this regard."*

8.17. that the judgment dated 2.7.2012 in Appeal No 123 of 2011 cited by the appellant has no application to the case in hand due to the following reasons:

- (i) that there was a clear finding by the Commission that the design of the transformer was defective which caused the delay.
- (ii) that the appellant was given opportunity to explain the delay to the specific details but it did not furnish details in its affidavit dated 14.02.2012 filed in response to the communication from the Commission.
- (iii) that the documents which the appellant relied upon in the affidavit dated 25.4.2013 were already available in its possession but it did not furnish any explanation for not submitting the documents in the affidavit dated 14.2.2012.
- (iv) that In Appeal No 123 of 2011, the issue was regarding achieving of the date of commercial operation when this Appellate Tribunal independently found that the conditions of achieving COD were not fulfilled and this Tribunal observed that the objections of the appellant filed after hearing but before issuance of order ought to have been considered.

9. Before we proceed to decide this issue, we deem it proper to produce the relevant part of the impugned order dated 09.05.2013 which is as under:-

*"Time over-run*

13. *As per investment approval, the project is to be commissioned within 30 months from the date of issue of first letter of award. The date of first letter of award is 22.1.2007 and accordingly, the schedule of completion works out to 1.8.2009. As against this, the asset has been put under commercial operation on 1.2.2012. Thus there is delay of 30 months in the commissioning of the Asset.*

14. *The petitioner vide affidavit dated 14.2.2012 has submitted reasons for delay in commissioning the asset. The petitioner has submitted that 315 MVA, 400/220 kV auto-transformers are used in various sub-stations. Over a period it was noticed that these are subjected to various types of faults during operation including short circuit resulting in failure of these transformers. In order to increase reliability and minimize failures on account of these faults, the petitioner has started Short Circuit Test on Transformers to further strengthen the Short Circuit Capability of the Transformer. As per the contractual conditions of the petitioner, the manufacturer has to subject such transformers for their design validation for clearance of short circuit tests. Since BHEL make 315 MVA was not subjected to short circuit test, the ICT supplied by BHEL under this proposal was identified for short circuit test. The short circuit testing facilities are not available in India, and are only available at KEMA, Netherlands. Thus, the petitioner had to depend on the testing facilities abroad. This took considerable time in getting schedule/ test bed availability at KEMA, Netherlands and then physical movement to and from test lab took further time.*

15. *The petitioner has further submitted that during the short circuit testing in KEMA, Netherlands, in unforeseen circumstances, the transformer failed causing delay in commissioning of the transformer. To meet requirement of the transformer at Gurgaon, a new transformer of another make which had already qualified the short circuit test was diverted to Gurgaon sub-station. The petitioner has requested that the delay in commissioning of ICT-II was beyond the control of the petitioner and may be condoned. It has further submitted that the details of amount of Liquidated Damages, if any, shall be submitted and the amount recovered on account of Liquidated Damages is credited against the cost of the Project. PSPCL in its affidavit dated 14.12.2012 has submitted that IDC for the period of delay should not be allowed.*

16. *We observe that the delay is due to short circuit testing at KEMA, Netherlands and the failure of transformer during testing. Since the award of contract, it was clear that short circuit testing had to be done by the supplier. The petitioner has not submitted any document to show that it*

*was pressing the supplier for timely delivery of equipment. There is also no evidence that the petitioner had made effort to get it tested at KEMA facility on time. The petitioner has not produced any documentary evidence to show that the delay was due to delay in testing. Thus, we are of the view that the time over-run cannot be attributed to delay in conducting the tests. The failure of transformer due to design deficiency is entirely the responsibility of supplier. This burden cannot be passed to the respondent. Hence delay of 30 months due to failure of transformer is not being condoned. Accordingly, IDC and IEDC for the period of time over-run is disallowed. Details of disallowed IDC and IEDC are as follows:-*

(₹ in lakh)

Details of IDC and IEDC as per Auditor's Certificate dated 2.7.2012		
	IEDC	IDC
Total IDC and IEDC Claimed up to 31.3.2011	187.29	401.62
Expenditure from 1.4.2011 to 31.1.2012 (DOCO: 1.2.2012)	6.79	159.99
<b>Total IEDC and IDC claimed</b>	<b>194.08</b>	<b>561.61</b>
Details of IEDC & IDC Disallowed for 30 months		
From August 2010 to March 2011 (for 20 months)*	74.92	160.65
From 1.4.2011 to 31.1.2012 (for 10 months)**	6.79	159.99
<b>Total Disallowed IEDC and IDC (for 30 months)</b>	<b>81.71</b>	<b>320.64</b>

\*IEDC and IDC for balance disallowed period (20 months) has been calculated on pro-rata basis from the IEDC and IDC claimed up to 31.3.2011.

\*\*IEDC and IDC for 10 months has been considered from April 2011 to January 2012 as per Management certificate dated 2.7.2012.

*17. Disallowed IEDC and IDC have been proportionately deducted from the cost of elements as on date of commercial operation (excluding Land). The capital cost amounting to Rs. 5052.26 lakh (excluding disallowed IEDC and IDC) has been considered for the purpose of determination of transmission tariff."*

10. The contention of the appellant, that non-availability of test beds at KEMA, Netherlands, which is a third party on which M/s. BHEL is dependant, was an event beyond the control of the appellant for the purpose of commissioning of ICT-II is not really the dispute between the parties before us. This issue has been raised at the instance of the appellant just to cover up the lapses of the appellant. According to the appellant, since the appellant had faced the issue of failure of several transformers/ICTs due to external short circuit in many sub-stations, the appellant included the short circuit withstand test to be one of the type tests to be passed by its transformers/ICTs and the same was done to provide continuity of service and reduce interruption of service in the overall interest of the consumer.

The BHEL requested KEMA, Netherlands for conducting short circuit withstand test vide letter dated 18.05.2010 and the test was conducted within five months on 20.10.10 at KEMA, Netherlands. Thus, the request of the BHEL for conducting short circuit test on ICT-II was fulfilled by KEMA within five months of the said request. We have deeply considered the contents of the affidavit dated 25.04.2013, though filed by the appellant after a gap of five months of conclusion of the arguments and reserving the judgment/order by the Central Commission, but still there is an unexplained delay between December, 2008, the scheduled date of supply of ICT-II to May, 2010, the date of request by BHEL to KEMA for conducting the said test.

11. According to the appellant/petitioner, the delay in commissioning of ICT-II was on account of non-availability of test bed at KEMA, Netherlands and the appellant had sought condonation of delay of 30 months alleging the reasons beyond its control. The appellant does not controvert the finding of the Central Commission recorded in the impugned order that the delay was on account of defective design of the transformer/ICT-II. Thus, there is no challenge to the Commission's finding in the impugned order that delay was on account of defective design of the transformer in the instant appeal. Therefore, neither in law nor in equity, the consumer can be burdened with additional cost on account of appellant's claim for capitalization of IDC and IEDC for the period of delay of 30 months. Further, the beneficiary was neither involved in the selection of the design of the transformer nor equipment supplier was involved with the testing process and hence the beneficiary or the consumer do not owe any responsibility for the delay in conducting the short circuit withstand test on transformer/ICT-II. In these circumstances, since the design of the ICT-II was defective as observed by the Central Commission in the impugned order, the supplier is responsible for supply of transformer with defective design and, therefore, either the appellant or the supplier should bear the consequences of the late commissioning of ICT-II but certainly the consumer cannot be made to suffer for the delay of 30 months in commissioning of ICT-II. The impugned order appears to us to be in the interest of consumer because under Section 60 (d) of the Electricity Act, 2003, the Commission has to safeguard the consumers' interest so that all the

tariff/transmission tariff as well as retail tariff for distribution of electricity has to be so determined that the electricity is supplied to the consumers on the cheapest rate. If the claim made by the appellant is added in the capital cost of the appellant, the beneficiary utilities have to pay the enhanced charges and that would in turn further add to the burden of the consumers.

12. We are further unable to accept this contention of the appellant that since the delay of 11 months in commissioning of ICT-I has been condoned by the Central Commission on account of delay in handing over the possession of land and forest clearance, the delay of 11 months in commissioning of ICT-II should also be condoned on the same basis. The facts and circumstances leading to delay in the commissioning of ICT-I and ICT-II are quite distinguishable because in the case of ICT-II, the only factor responsible for the delay in commissioning, as recorded by the Central Commission, is the delay in delivery of the transformer/ICT-II. In the case of ICT-I, the design was found to be defective whereas in the case of ICT-II, the design was not found to be defective as is evident from the impugned order. Further, the delivery of transformer/ICT-II was received by the appellant in January, 2012 for which the award was placed on L & T much earlier on 29.06.2007 for scheduled supply by December, 2008. On these grounds, we do not find any illegality or perversity in the impugned order regarding condonation of delay in ICT-I & ICT-II, the facts and circumstances being quite dis-similar.

13. The main ground of the appellant in the appeal is that short circuit tests were optional and were not mandatory but the appellant on its own decided to subject the transformer/ICT to short circuit testing and the said transformer/ICT-II on testing was found to be defective and failed the quality test causing delay of 30 months in its commissioning. Thus, the said test was optional and was not mandatory and if the said transformer/ICT-II was defective in design, the appellant is itself responsible for the said delay of 30 months in commissioning of transformer/ICT-II and it is not open to the appellant to blame others. On consideration of the above factors, we agree to the finding recorded by the Central Commission in the impugned order that the defective design of the transformer was the factor responsible for the delay in commissioning of ICT-II. All

these factors have been pleaded by the appellant saying that after the transformer failed to meet short circuit test conducted on 20.10.10, it was replaced by the equipment supplier in January, 2012 and the replacement, apparently after changing the design of failed transformer was given after 15 months from the date of test. All these things further go to show imprudence on the part of the appellant indicating that the appellant has failed to make any efforts towards prompt or quick commissioning of ICT-II/transformer. We do not find any force in any of the submissions of the appellant/petitioner made on this issue. In upholding the impugned order of the Central Commission, we find support from our judgment dated 28.11.2013 in Appeal No. 165 of 2013 in the case of Power Grid Corporation of India Ltd Vs. Chhattisgarh State Electricity Board whereby we upheld the Commission's order and dismissed the said appeal on the identical facts relating to the failure of short circuit withstand test upon transformer/ICT when the said test was optional test and the design of failed transformer was found defective. In upholding the impugned order, we are further fortified with this Appellate Tribunal's view vide judgment dated 12.09.2014 in Appeal No. 257 of 2013 in the case of Power Grid Corporation of India Ltd. Vs. CERC and Anr., wherein we have recently observed that the balance delay in commissioning of the ICTs due to failure of the transformer during testing cannot be allowed to be passed on to the beneficiary and has to be borne by the Power Grid.

14. Our judgment dated 2.7.2012, in Appeal No. 123 of 2011 cited by the appellant has no application to the instant appeal due to the reasons that in the instant case, there is a clear finding of the Central Commission in the impugned order that the design of the transformer was defective and the same had caused the delay.

15. In view of the above discussion, all the contentions raised by the appellant on this issue are without merits and the issue no.1 is decided against the appellant.

16. **DISPOSAL OF ISSUE NO.2.**

Issue no.2 relates to the non-consideration of the affidavit dated 25.04.2013 filed by the appellant after five months of conclusion of the arguments and fixing the matter for judgment/order. On this issue, the following submissions have been made on behalf of the appellant:

16.1. that the Central Commission did not consider the Additional Affidavit dated 25.4.2013 filed by the appellant and when the appellant moved a petition for review of the order dated 09.05.2013 before the Central Commission, the Central Commission has committed illegality by dismissing the review petition vide review order dated 14.11.2013.

17. **Per contra**, the following submissions have been made on behalf of the respondent/Commission:-

17.1. that the said affidavit was filed by the appellant by way of evidence five months after the conclusion of the hearing on the petition and reserving the matter for order.

17.2. that there is no law which permits a party to produce or file evidence if the case has been reserved for order without leave of the court. The appellant did not seek leave of the Central Commission for placing the affidavit on record annexing the said document. The appellant should have approached the Commission seeking leave by moving a proper application along with affidavit and then only the Commission after considering the contents would have decided the matter.

17.3. that It is trite law that evidence can be produced only in support of the averments made in the pleadings and the evidence de hors the pleadings has no worth and cannot be considered.

17.4. that In the instant case, the appellant did not make any averment in the petition that it had made any efforts to get delivery of the transformer or its installation expedited and in the absence of any averments in the petition, the affidavit dated 25.4.2013, had to be kept out of consideration.

17.5. that the appellant did not explain and has not explained till last as to why it could not produce or file the said evidence on record in support of time over-run along with the petition for approval of tariff or in the earlier affidavit dated 14.02.2012 filed in response to the letter dated 19.7.2011 sent by the Secretariat of the Commission. After considering the said facts, the Central Commission has also dismissed the Review Petition vide review order dated 14.11.2013.

18. Before we proceed to decide this issue no. 2 relating to non-consideration of the affidavit dated 25.04.2013 filed by the appellant, we deem it appropriate to consider the contents of the said affidavit and its implications. The contents of this affidavit dated 25.04.2013 are, in short, as under:-

18.1. DELAY DUE TO TYPE TEST:- that the appellant/petitioner has also suffered the delay due to long waiting period for carrying out type tests at KEMA. The Powergrid had faced a number of failures of transformers due to external short-circuits at various sub-stations.

18.2. As per Section 38 of the Electricity Act, 2003, Powergrid being a CTU undertakes the inter-state transmission of electricity through inter-state transmission system. Considering the requirement of reliability and availability of the system, a review was taken by Management and it was brought out that in order to establish the quality and to validate the design with respect to short circuit withstand capability of these transformers, additional test, namely, dynamic short circuit test should be conducted. In parallel, it was also learnt that NTPC in its technical specification had already included the short circuit withstand test for its transformer. Upon such reviews and practices followed by other high performing utility in India, Powergrid also included short circuit withstand test as the type test of its transformer. This was done with two fold benefits, one by giving continuity of service of power supply to its consumers and second, by ensuring that the transformer failures are reduced thereby

arresting the interruption of service. Both of them go a long way in giving enhanced service to the beneficiaries. The benefits finally get passed on to the consumers in this manner. Due to limited availability of test beds globally, the tests get delayed sometimes due to obvious reasons of waiting period and physical shifting/movements of the transformers. However, it may be considered prudent to conduct short circuit test.

18.3. that CEA had also taken a call on bringing out Regulations regarding standards on transmission lines and electric plants to be followed by all Indian utilities. CEA notified the (Technical Standards for Construction of Electrical Plants and Electric Lines), Regulations, 2010 on 20.08.2010.

18.4. that the contract for the said transformers at Gurgaon was awarded on 29.06.2007. Short circuit test in India is conducted only upto 220 kV and facilities for conducting such type of test for 400 kV ICTs are available outside India only like Italy and KEMA in Netherlands.

18.5. that a number of transformers of Powergrid were scheduled to be tested at KEMA test lab during the years 2008-10 and availability of test bed slots were closely monitored. Accordingly, BHEL requested KEMA for conducting type test vide their communication dated 18.05.2010 which test for ICT-II Gurgaon transformer was carried out on 20.10.2010 at KEMA. The preliminary report and BHEL letter dated 04.11.2010 was sent to appellant Powergrid. The transformer was then shipped to the manufacturers works for further testing. After receipt of the final report of the test after bringing back the transformer to BHEL works from KEMA, Netherlands, it was understood that the transformer had failed the test. Under the circumstances, when the transformer had failed the short circuit (SC) type test and appreciating the urgent need of commissioning of the ICT, Powergrid acted swiftly to arrest any further delay and a decision was taken in March, 2011 for getting a SC type tested transformer from M/s. CGL. The transformer was finally received in January, 2012 and put under commercial operation w.e.f. 01.02.2012.

19. A close perusal of the said affidavit makes it abundantly clear that an attempt by the appellant has been made to explain the delay in the commissioning of ICT-II and the contentions mentioned in the affidavit have been argued at length apart from mentioning them in the written submissions by the learned counsel for the appellant which we have already quoted above in this judgment.

20. We have given our thoughtful consideration and appreciation to the grounds of delay mentioned in the affidavit. However, these factors have properly been considered in the review order passed by the Central Commission relating to the contents of affidavit, creating circumstances resulting in the delay of commissioning of the transformer/ICT-II.

21. Order 41 Rule 27 of the CPC clearly prescribes the circumstances under which additional evidence can be filed by any party to the Appeal in the Appellate Court and for that purpose a proper application has to be moved with the affidavit seeking leave of the Appellate Court and the same is taken into consideration as evidence after obtaining the leave of the Appellate Court and not otherwise. In the impugned petition, no such grounds as tried to be taken in the Review Petition were taken. The learned Central Commission before passing the impugned order, through a communication asked the appellant/petitioner to furnish some details but the appellant in an obviating manner filed affidavit dated 14.02.2012 skipping the clear replies to the queries made by the Central Commission vide its communication. Further, in the affidavit dated 14.02.2012 of the appellant, no such facts or circumstances were taken for the reasons best known to the appellant/petitioner. The said affidavit dated 25.04.2013 was filed after a period of about five months from the date of conclusion of the arguments and fixing/reserving the matter for judgment/order which petition was decided by the impugned order dated 09.05.2013. If the appellant/petitioner had not taken any due care in going through the pleadings of the petition and other circumstances/grounds and the same could not be

done during the hearing of the petition and the appellant/petitioner had waited for about five months and then filed its affidavit on 25.04.2013 for the reasons best known to it, and that too, without explaining the circumstances under which the said delay of five months in filing the affidavit had occurred. The appellant/petitioner simply had filed the affidavit dated 25.04.2013 before the Central Commission without making any application seeking any kind of leave of Commission as required under Order 41 Rule 27 CPC. Thus, if no consideration of the contents of the affidavit dated 25.04.2013 had been given by the Central Commission, we have considered the contents thereof and we are of the firm opinion that nothing new has been brought to the notice of this Appellate Tribunal to justify the delay occurred in the commissioning of ICT-II/Transformer. The issue no. 2 is accordingly decided against the appellant.

22. Since both the issues have been decided against the appellant, the appeal merits dismissal.

23. **SUMMARY OF FINDINGS:-**

23.1. The BHEL requested KEMA, Netherlands for conducting short circuit withstand test on transformer/ICT-II vide letter dated 18.05.2010 and the said test was conducted by KEMA on its test bed on 20.10.2010. Thus, the request of BHEL was fulfilled by conducting the said test within five months at the test bed at KEMA. Hence, it cannot be said that there was non-availability of test beds at KEMA, Netherlands for long period. The said test at test beds at KEMA, Netherlands on transformer/ICT-II took only five months and the said delay of 30 months in commissioning of the ICT-II cannot be said to be an event beyond the control of the appellant/petitioner for the purpose of commissioning of ICT-II. Since the said test on ICT-II was optional and was not mandatory and the decision of the said test on ICT-II was taken by the appellant/petitioner particularly when the ICT-II was found to be defective in design and due to said defective design, there was delay of 30 months in commissioning of ICT-II, the appellant/petitioner is itself responsible for the said delay. The Central Commission has, in the impugned order, rightly disallowed the Interest During Construction (IDC) and Incidental

Expenses During Construction (IEDC) for a period of 30 months delay in the commissioning of ICT-II, the transmission asset of the appellant. Consequently, the Central Commission has rightly disallowed capitalization of IDC and IEDC for the said delay of 30 months.

23.2. The Central Commission has not committed any illegality in ignoring the affidavit dated 25.04.2013 filed by the appellant in its impugned order dated 09.05.2013 particularly when the said affidavit was filed after five months of the conclusion of the arguments of the parties and reserving the judgment/order in the matter. In the instant appeal we have considered the contents of the affidavit and we find that nothing new has been brought forth to justify the delay of 30 months that had occurred in the commissioning of ICT-II/transformer. After giving due consideration to the contents of the affidavit dated 25.04.2013 of the appellant, we do not find any sufficient ground that would explain extraordinary delay of 30 months in the said commissioning of ICT-II. We further make it clear that in the cases like the present one, when the Commission after hearing arguments of the parties and fixing the matter for judgment/order and any party to the proceedings wants to file any documentary evidence/any affidavit, the said affidavit/documentary evidence should be accompanied with the application seeking leave of the Commission for filing the said documentary evidence and then only the State Commission may consider the said affidavit or document.

24. Consequently, the appeal is hereby dismissed. The impugned order passed by the Central Commission is hereby affirmed. No order as to costs.

**Pronounced in open Court on this 3<sup>rd</sup> day of December, 2014.**

**(Justice Surendra Kumar)**  
**Judicial Member**

**(Rakesh Nath)**  
**Technical Member**

**rkt**

