IN THE APPELLATE TRIBUNAL FOR ELECTRICITY

(Appellate Jurisdiction)

APPEAL NO. 272 OF 2018 & IA No.1034 of 2025

&

APPEAL NO. 24 OF 2021 & IA No.1159 of 2019

Dated: 11th December, 2025

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mrs. Seema Gupta, Technical Member (Electricity)

APPEAL NO. 272 OF 2018 & IA No.1034 of 2025

IN THE MATTER OF:

Bhopal Dhule Transmission Company Limited,
F-1. "The Mira Corporate Suites",
1 & 2 Ishwar Nagar, Mathura Road,
New Delhi-110065. … Appellant

Versus

1. Central Electricity Regulatory Commission,
   Through its Secretary,
   3rd& 4th Floor, Chanderlok Building,
   Janpath, New Delhi-110001.

2. Power Grid Corporation of India Limited,
   Through its Chairman and Managing Director,
   having its registered office at:
   B-9, Qutub Institutional Area,
   Katwaria Sarai, New Delhi-110016.
   and Corporate office at: "Saudamini", Plot No.2,
   Sector-29, Gurgaon -122001.

3. Madhya Pradesh Power Management Company Limited,

Through Managing Director,
Shakti Bhawan, Rampur
Jabalpur-482 008.

4. Maharashtra State Electricity Distribution Co.Ltd.,
Through Chairman and Managing Director,
Prakashgad, 4th Floor, Andheri (East)
Mumbai- 400 052.

5. Gujarat Urja Vikas Nigam Limited,
Through Managing Director,
Sardar Patel Vidyut Bhawan,
Race Course

6. Electricity Department, Government of Goa,
Through Chief Electrical Engineer,
Vidhyut Bhawan, Panaji,
Near Mandvi Hotel, Goa-403 001.

7. Electricity Department,
Through Secretary (Power),
Administration of Daman & Diu,
Daman-396 210.
(Also at)
Exceutive Engineer,
Vidhyut Bhavan, near 66/11 kv Kachigam sub-station,
Somnath – Kachigam road, Kachigam,
Daman-396210.

8. Electricity Department,
Through Secretary (Power),
Administration of Dadra Nagar Haveli,
U.T., Silvassa-396 230.

9. Chhattisgarh State Electricity Board,
Through Managing Director,
P.O. Sundar Nagar, Dangania, Raipur,
Chhattisgarh-492 013
(Now known as)
Chhattisgarh State Power Distribution Company Limited,
Vidyut Seva Bhavan, P.O. Sundar Nagar,
Dangania, Raipur, Chhattisgarh-492 013.

10. Madhya Pradesh Audyogik Kendra,
Through its Managing Director,
Vikas Nigam (Indore) Ltd.,
3/54, Press Complex, Agra-Bombay Road,
Inodre-452 008.

11. Central Transmission Utility of India Limited,
Through its Chairman-cum-Managing Director,
"Saudamini", Plot No.2,
Sector-29, Near IFFCO Chowk,
Gurgaon,
Haryana -122001.. … Respondents

Counsel for the Appellant(s) : Mr. Syed Jafar Alam
Mr. Deep Rao Palepu
Mr. Harneet Kaur
Mr. Arjun Agarwal

Counsel for the Respondent(s) : Mr. Dhananjay Baijal for Res.1

Ms. Suparna Srivastava for Res.2

Mr. Alok Shankar
Mr. Kumarjeet Ray for Res.11

APPEAL NO. 24 OF 2021 & IA No.1159 of 2019

IN THE MATTER OF:

Power Grid Corporation of India Limited,
Through its Chairman and Managing Director,
having its registered office at:
B-9, Qutub Institutional Area,
Katwaria Sarai, New Delhi-110016.
and Corporate office at: "Saudamini", Plot No.2,
Sector-29, Gurgaon -122001. … Appellant

Versus

1. Central Electricity Regulatory Commission,
Through its Secretary,
3rd& 4th Floor, Chanderlok Building,
Janpath, New Delhi-110001.

2. Bhopal Dhule Transmission Company Ltd.,
Through its Director,
F-1, "The Mira Corporate Suites", 1 & 2 Ishwar Nagar,
Mathura Road, New Delhi-110065.

3. Chhattisgarh State Power Trading Company Limited,
Through its Director,
2nd Floor, "Vidyut Sewa Bhawan",
Danganiya, Raipur, Chhattisgarh-492013.

4. Sterlite Energy Limited,
Through its Director,
1st Floor, City Mart Complex,
Baramuda, Bhubaneswar, Odisha-751023.

5. GMR Kamalanga Energy Limited,
Through its Director,
10th Floor, C&D Block,
IBC Knowledge Park, Opposite Fire Station,
Bannerughatta Road, Bangalore, Karnataka-560076.

6. Navbharat Power Private Limited,
Through its Director,
Malaxmi House, 82583/3, Road No.2,
Banjara Hills, Hyderabad-500034.

7. Monnet Power Company Limited,
Through its Director,
Monnet House, 11 Masjid Moth,
Greater Kailash Part-II, New Delhi-110048.

8. Jindal India Thermal Power Limited,
Through its Director,
B-1, Local Shopping Complex,
Vasant Kunj, New Delhi-110070.

9. Lanco Babandh Power Private Limited,
Through its Director,
Plot No.397, Udyog Vihar V,
Gurgaon, Haryana-122016.

10. Ind Barath Energy (Utkal) Limited,
Through its Director,
Plot No.30 A, Road No.1, Film Nagar, Jubilee Hills,
Hyderabad, Andhra Pradesh-500033.

11. MB Power (Madhya Pradesh) Limited,
Through its Director,
235, Okhla Industrial Area, Phase-III,
New Delhi-110020.

12. RKM Powergen Limited,
Through its Director,
147, Gitanjali Avanti Vihar, Sector-1,
Raipur, Chhattisgarh -492004.

13. Athena Chhattisgarh Power Limited,
Through its Director,
7-1-24 B Block, 5th Floor, Roxana Towers, Greenlands,
Begumpet, Hyderabad, Andhra Pradesh-500016.

14. Jindal Power Limited,
Through its Director,
2nd Floor, DCM Building, Plot No.94, Sector 32,
Gurgaon, Haryana-122001.

15. SKS Power Generation (Chhattisgarh) Limited,
Through its Director,
501 B, Elegant Business Park,
Andheri, Kurla Road, J.B. Nagar, Andheri (East),
Mumbai, Mahrashtra-400059.

16. Korba West Power Company Limited,
Through its Director,
6th and 7th Floor, Vatika City Point,
M.G. Road, Gurgaon, Haryana-122002.

17. DB Power Limited,
Through its Director,
813, Phase V, Udyog Vihar,
Gurgaon, Haryana-122016.

18. Visa Power Limited,
Through its Director,
No.9, HLL Building, Shakespeare Sarani, Kolkata,
West Bengal-700071.

19. KSK Mahanadi Power Company Limited,
Through its Director,
82/293/82/A/431/A, Road No.22,
Jubilee Hills, Hyderabad,
Andhra Pradesh-500033.

20. Bharat Aluminum Company Limited,
Through its Director,
C/o Administrative Building,
Balco Nagar, Korba, Chhattisgarh-495684.

21. Vandana Vidyut Limited,
Through its Director,
Vandana Bhawan, MG Road,
Raipur, Chhatisgarh-492001.

22. Lanco Amarkantak Power Limited,
Through its Director,
Plot No.397, Udyog Vihar, Phase-3,
Gurgaon, Haryana-122016.

23. Chhattisgarh Steel & Power Limited,
Through its Director,
142, Saheed Smarak Complex,
G.E. Road, Raipur, Chhatisgarh-492001.

24. GMR Chhattisgarh Energy Pvt. Limited
Through its Director,
10th Floor, Tower D,IBC Knowledge Park,
4/1 Bannerghatta Road, Near Dairy Circle,
Bangalore, Karnataka-560029.

25. Central Transmission Utility of India Limited,
Through its Chief General Manager,
Floors No.5-10, Tower 1, Plot No.16,
IRCON International Tower, Institutional Area,
Sector 32, Gurugram, Haryana – 122001.

Counsel for the Appellant(s) : Ms. Suparna Srivastava

Counsel for the Respondent(s) : Mr. Dhananjay Baijal for Res.1

Mr. Syed Jafar Alam
Mr. Deep Rao Palepu
Mr. Harneet Kaur
Mr. Arjun Agarwal for Res.2

Mr. Alok Shankar
Mr. Kumarjeet Rao for Res.25

JUDGEMENT

PER HON'BLE MRS. SEEMA GUPTA, TECHNICAL MEMBER (ELECTRICITY)

Appeal no. 272 of 2018 has been filed by M/s Bhopal Dhule Transmission Company Limited, challenging the order dated 20.09.2017 in Petition No. 227/TT/2014 **(**hereinafter referred as **"Impugned Order 1"**) passed by the Central Electricity Regulatory Commission. The CERC dismissed the Review Petition No.46/RP/2017 filed by the Appellant-BPTCL against the order in Petition no.227/TT/2014 vide its Order dated 23.07.2018.

Appeal no. 24 of 2021 has been filed by M/s Power Grid Corporation of India Limited, challenging the order dated 25.06.2018 in Petition No. 216/MP/2018 **(**hereinafter referred as **"Impugned Order 2"**) passed by the Central Electricity Regulatory Commission.

The issues involved in both the appeals are connected and accordingly being disposed of with this common judgement. For the sake of convenience, the description of the parties is given hereunder as per appeal No.272 of 2018.

Description of Parties (Appeal No.272 of 2018)

The Appellant, M/s Bhopal Dhule Transmission Company Limited **(**hereinafter referred as **"Appellant-BDTCL"**), is engaged in the business of developing, operating and maintaining a competitive bid out inter-State transmission project on a build, own, operate and maintain basis.

Respondent No.1 is Central Electricity Regulatory Commission (hereinafter referred as **"Central Commission/CERC"**)

Respondent No.2 is Power Grid Corporation of India Ltd. (PGCIL), which is inter-State transmission licensee under section 2 (73) of the Electricity Act, that owns, develops and operates transmission elements across the country. PGCIL also discharged the functions of the Central Transmission Utility ("CTU") in terms of Section 2(10) and 38 of the Act and the nodal agency in terms of Regulations 2(q) and 4 of the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State transmission and related matters) Regulations, 2009 ("Connectivity Regulations"). Power Grid Corporation of India Ltd is the Appellant in Appeal No 24 of 2021(hereinafter referred as **"Appellant-PGCIL"**). Respondent No.3 to 10 are distribution licensees, electricity departments of power procurement companies of States, who procure transmission services from PGCIL mainly in the Western Region and are Long Term Transmission Customers who executed a Transmission Services Agreement dated 7.12.2010 with the Appellant-BPTCL.

Factual matrix of the Case: (Appeal No.272 of 2018)

As per the applicable Guidelines for implementing transmission projects under the TBCB route, the Government of India appointed M/s. PFC Consulting Ltd. as the Bid Process Coordinator (BPC). The BPC incorporated BDTCL as a Special Purpose Vehicle (SPV) for implementing the following transmission elements on build, own, operate and maintain basis :

(a) Transmission Lines:

(i) Jabalpur-Bhopal 765 kV S/C Transmission line (JB Line);[1]

(ii) Bhopal-Indore 765 kV S/C Transmission line (BI Line);[2]

(iii) Bhopal-Bhopal 400 kV D/C Transmission Line (BB Line);

(iv) Aurangabad-Dhule 765 kV S/C Transmission Line (AD Line) ;[3]

(v) Dhule-Vadodara 765 kV S/C Transmission Line (DV Line) [4] and

(vi) Dhule-Dhule 400 kV D/C Transmission Line (DD Line).

(b) Substations:

(i) 765/400 kV 2x1500 MVA substation at Bhopal

(ii) 765/400 kV 2x1500 MVA substation at Dhule

(The above transmission lines and substations together are referred as Project)

Note :1. The line to be terminated in Jabalpur 765/400 kV Substation of Appellant – PGCIL

2. The line to be terminated in Indore 765/400 kV substation of Appellant- PGCIL

3. The line to be terminated in Aurangabad 765/400 kV substation of Appellant- PGCIL

4. The line to be terminated in Vadodra 765/400 kV substation of Appellant- PGCIL

On 07.12.2010, Respondent Nos.3 to 10 (distribution licensees, electricity departments or power procurement companies of States), the Long-Term Transmission Customers executed a Transmission Services Agreement (“TSA)

with the SPV. On 31.01.2011, PFC Consulting Ltd. issued a Letter of Intent to Sterlite Grid Limited ("SGL") after it emerged as the successful bidder in the competitive bidding process for implementation of the Project. With the signing of a Share Purchase Agreement with PFFCL on 31.03.2011, SGL acquired 100 % shareholding in the SPV, and the date of scheduled COD for the Project was worked out as 31.03.2014 as per schedule 3 of the TSA.

Meanwhile PGCIL filed Petition No 227/TT/2014 before CERC for determination transmission tariff of the transmission assets (Asset I : 765 kV line bays along with switchable line reactor at Jabalpur 765/400 kV substation, Asset II : 765 kV line bays along with switchable line reactor at Indore 765/400 kV substation and Asset III :765 kV line bays at Aurangabad 765/400 kV substation) for 2014-19 tariff block as per CERC (Terms and Condition of Tariff) Regulations 2014 **("Tariff Regulation 2014")**. Thereafter, on 09.10.2014, CERC vide its Record of Proceeding in Petition No.227/TT/2014, directed the Appellant-BDTCL to file information limited to the commissioning of the Project. Appellant-BDTCL vide its affidavit dated 11.11.2014 submitted the anticipated dates of commissioning of its downstream lines corresponding to Asset –I as 15.03.2015, Asset II as 15.11.2014 and Asset III as 20.11.2014. On 20.09.2017, CERC passed the order in Petition No 227/TT/2014 **("Impugned Order 1")**, in which COD of Asset I , Asset II and Asset III of PGCIL was approved as 20.10.2014, 5.10.2014 and 29.05.2014 and due to non-availability of downstream network due to which these assets could not be put into regular operation, directed that the transmission charges of the these Transmission Assets of Appellant – PGCIL from their respective commercial operation dates to be borne by Appellant-BDTCL till the commissioning of the Appellant-BDTCL transmission elements. On 07.11.2017, the Appellant-BDTCL filed Review Petition No.46/RP/2017 for modification of CERC's Order dated 20.09.2017 in Petition No.227/TT/2014, which was dismissed by CERC vide its Order dated 23.07.2018.

In the meantime, on 15.10.2016, the Appellant-BDTCL filed Petition No.216/MP/2016 seeking compensatory and declaratory relief under the TSA on account of Change in Law and Force Majeure events which adversely impacted the implementation of the Project.

In terms of the Impugned Order 1 (dated 20.09.2017), Appellant -PGCIL on 13.10.2017 raised bilateral bills of about Rs.6,00,24,116/- on Appellant –BDTCL and on 16.02.2018, Appellant - PGCIL wrote to the Appellant-BDTCL reiterating its demand for the aforementioned transmission charges. They informed that Appellant – BDTCL shall be liable to pay a late payment surcharge to PGCIL at the rate of 1.5% per month on delayed payment beyond 60 days. In response to the said communication, on 26.02.2018 Appellant-BDTCL informed PGCIL about the pendency of the Review Petition before the CERC and requested PGCIL to wait before taking any action as the matter was *sub judice.*

Thereafter, on 25.06.2018, CERC passed its Order in Petition No.216/MP/2016 holding that the Appellant – BDTCL was not responsible for the delay in commissioning of its Project by approving of the Change in Law and Force Majeure claims of the Appellant, and extending the scheduled commercial operation date of the Project to the respective actual commercial operation dates of different transmission elements.

Aggrieved by Impugned Order 1 (dated 20.09.2017) read along with review order dated 23.07.2018, Appellant –BDTCL filed Appeal No 272 of 2018 before this Tribunal contending that CERC has wrongly imposed liability of payment of transmission charges of referred assets of PGCIL on the BDTCL due to delay in commissioning of BDTCL corresponding Assets, while CERC itself vide its Order dated 25.06.2018 in Petition No 216/MP/2016 extended the scheduled

commissioning date of BDTCL project to actual commercial operation date on account of *Force Majeure*.

Factual matrix of the Case: (Appeal No.24 of 2021)

In the present Appeal, Appellant-PGCIL has impugned the Order dated 25.6.2018 (Impugned Order 2) passed by CERC in Petition No.216/MP/2016 filed by Appellant –BDTCL, in which CERC has granted reliefs to BDTCL under the Transmission Service Agreement (TSA) dated 7.12.2010 on account of *Force Majeure* and change in law events claimed by BDTCL to have adversely affected the implementation of the their transmission elements under the Project awarded to it under the tariff based-competitive bidding (TBCB) route. Due to delay in finalization of coordinates of the gantry at the Vadodara GIS sub-station as also the commissioning of the Vadodara sub-station by PGCIL, liability of payment transmission charges for the Dhule-Vadodara 765 kV S/C transmission line of BDTCL from 9.2.2015 (i.e. its deemed commissioning date) to 13.6.2015 (i.e. when the line has actually been put into use was affixed on Appellant –PGCIL.

The CERC in its Order dated 25.5.2016 passed in Petition No.66/TT/2015 for determination of transmission tariff for 765 kV line bay and 3x80 MVAR line reactor at 765 kV Vadodara GIS being implemented by PGCIL, under regulated tariff mechanism (RTM) for Dhule-Vadodara 765 kV S/c transmission line (IPTC) for the 2014-19 tariff period, has noted that delay in implementation of the Vadodara GIS sub-station is mainly due to the delay in land allotment and non-readiness of associated transmission lines by BDTCL and has held the same to be beyond the control of the Appellant-PGCIL and had condoned the said delay (14 months and 14 days) in Petition No.66/TT/2015.

Aggrieved by the Impugned Order 2 (dated 30.06.2018), Appellant –PGCIL has filed Appeal No 24 of 2021, contending that CERC has wrongly imposed liability of payment of transmission charges of Dhule-Vadodara 765 kV S/c line of BDTCL on PGCIL due to delay in commissioning of corresponding Assets being implemented by PGCIL, firstly PGCIL is not a party to the TSA dated 7.2.2010 signed by BDTCL and CERC itself Order dated 25.05.2016 in Petition No 66/TT/2015 condoned the delay in implementation of referred transmission elements by PGCIL on account of *Force Majeure*.

ISSUE INVOLVED IN BOTH THE APPEALS

The issue involved in both the Appeals is the imposition of bilateral transmission charges liability upon an inter-State transmission licensee for the mismatch of its under-implementation transmission assets within its scope with the inter-connected and ready for commissioning/ deemed commissioned transmission assets of another transmission license. The transmission assets in question are part of the transmission system strengthening scheme in the Western Region evolved for evacuation of power from the generating stations in the Western Region, part of which is implemented by Appellant-BDTCL and part by Appellant – PGCIL and the commissioning of these assets (i.e. the lines and their pooling sub-stations) is inter-linked and were required to be synchronized for enabling power flow through them.

Out of the said assets

1. The bays at 765/400 kV pooling sub-stations at Jabalpur, Indore and Aurangabad (alongwith line bays and reactors) implemented and commissioned by PGCIL on 20.10.2014, 5.10.2014 and 29.5.2014

respectively. The associated 765 kV transmission lines (i.e. Jabalpur-Bhopal, Bhopal-Indore and Aurangabad-Dhule) implemented by BDTCL were commissioned on 9.6.2015, 9.10.2014 and 5.12.2014 respectively, due to which the said bays at the respective pooling sub-stations could not be put to use in regular service from 20.10.2014 to 9.6.2015 for bays at Jabalpur pooling station, from 5.10.2014 to 9.10.2014 for bays at Indore sub-station and from 29.5.2014 to 5.12.2014 for bays at Aurangabad sub-station (the mismatch period) and liability of its transmission system for the mismatch period has been affixed on Appellant - BDTCL vide **Impugned Order 1 dated 20.09.2017** in Petition No. 227/TT/2014, which is impugned in the Appeal 272 of 2018.

2. The Dhule-Vadodara 765 kV S/c transmission line *[the DV line]* implemented by BDTCL, has been declared deemed commercially operational w.e.f. 9.2.2015. However, the inter-connected 765 kV bay at 765/400 kV pooling sub-station at Vadodara (along with line bays and reactors) implemented by PGCIL, was commissioned on 13.6.2015, due to which *DV line* could not be put to use in regular service for the period from 9.2.2015 to 13.6.2015 (the mismatch period) and liability of its transmission system for the mismatch period has been affixed on Appellant-PGCIL vide **Impugned Order 2 dated 25.06.2018** in Petition No. 216/MP/2018, which is impugned in the Appeal 24 of 2021

DISCUSSION AND ANALYSIS

Elaborate submissions have been put forth by Ms. Suparna Srivastava, learned counsel appearing on behalf of Appellant – PGCIL, Mr. Deep Rao Palepu, learned Counsel appearing on behalf of Appellant – BDTCL, Mr. Dhananjay

Baijal, learned Counsel appearing on behalf of Central Commission and Mr. Alok Shankar, learned Counsel appearing on behalf of Central Transmission Utility (CTUIL). Both PGCIL and BDTCL in their Appeal have pleaded non-compliance of the principles of natural justice by CERC, by not giving an opportunity of being heard while imposing the mismatch liability on them while passing the respective Impugned Orders, however during the course of hearing of the Appeals, learned counsel on behalf of BDTCL and PGCIL submitted that the said plea is not being pressed and accordingly same is not deliberated in this judgement. The submissions put forth on behalf of parties in both the Appeals are dealt in following Paragraphs

IS IMPUGNED ORDER 1 IN VIOLATION OF "TARIFF REGULATION 2014" AND DOES IT CONTRADICT THIS TRIBUNAL'S BINDING PRECEDENTS?

SUBMISSIONS URGED ON BEHALF OF APELLANT – BDTCL

It is submitted that the Impugned Order 1 (dated 20.09.2017), which affixed liability of payment of transmission charges for PGCIL assets for the mismatch period upon Appellant - BDTCL on account of delay in commissioning of its associated downstream transmission lines, violates the CERC (Terms and Conditions of Tariff) Regulation 2014 **("Tariff Regulations 2014")** on account of the following:

i) CERC cannot resort to regulatory powers under Section 79 of the Act to deviate from any regulations framed under Section 178 of the Act **[("*PTC India Ltd. v. CERC"*, (2010) 4 SCC 603].** Regulations 8(5) and 8(7) read with Regulation 12(2) of the "Tariff Regulations 2014" prescribe a mechanism for Section 62 projects (which includes PGCIL's assets) to pass through any cost implications on account of *FM* events to the beneficiaries/ DICs. Considering the inclusive definition of *FM* under

Regulation 3(25) of the Tariff Regulations 2014, the delay caused to PGCIL due to *FM* events impacting the interconnecting BDTCL's project, squarely qualifies as an *FM* event for PGCIL under the "Tariff Regulations 2014". CERC ought to have considered and enforced the aforesaid recovery mechanism under the "Tariff Regulations 2014" to ensure PGCIL is not out of pocket despite timely completing its project.

ii) For the PGCIL's failure to invoke its remedies to claim *FM* relief in respect of BDTCL's uncontrollable delay before the CERC during its tariff proceedings, BDTCL cannot be made liable to pay transmission charges.

iii) The CERC's imposition of bilateral mismatch liability on BDTCL in exercise of its regulatory power defeats the objective of the contractual protections under BDTCL's TSA from penal consequences in case of FM events (APTEL Judgement dated 14.09.2020 "***NRSS XXXI (B) Transmission Ltd. vs. CERC & Ors"; 2020 SCC OnLine APTEL 72.*** ("**NRSS Judgement**")). Such exercise of regulatory power is contrary to the law settled by the Supreme Court that the CERC cannot go beyond the terms of a contract, or 're-write' the terms of a contract, to add any additional liability or create a new 'quasi-contractual relationship' while exercising its adjudicatory/ regulatory power (**Supreme Court's Judgement dated 06.04.2023 in "*Haryana Power Purchase Centre v. Sasan Power Ltd. & Ors.*"; 2023 SCC Online 577) ("HPPC Judgement"); Judgement of APTEL dated 15.09.2022 "*Punjab State Transmission Corporation Limited vs. CERC & Ors*.; 2022 SCC OnLine APTEL 78 ("PSTCL Judgement")).**

It is further submitted that the Impugned Order 1 dated 20.09.2017 contradicts this Tribunal's binding Precedent, as in "**NRSS Judgement**", *Supra*, it has been held that once the SCOD of a transmission project has been extended to its

ACOD on account of FM events, there is no 'delay' in commissioning that can be attributed to the developing entity. The entire concept of *Force Majeure* (*FM)* relief – granted by the appropriate commission in terms of the provisions of the TSA (for Section 63 projects) is based on the fact that such events were squarely out of the control of the transmission licensee, and it cannot be held liable for any penal consequences arising out of such period that the *FM* event persisted. In para. 8.21 of the "NRSS Judgement", this Tribunal has held that to impose liability of IDC and IEDC on a transmission licensee for the period, when it was impacted by *FM* events, runs contrary to the objective of the *FM* clause in the TSA. It is also unambiguously noted that when *FM* relief is available under the TSA, the CERC ought not to have penalized the *FM* affected entity by imposing a liability outside the provisions of the contract, more so when there is no provision in the **"Sharing Regulations 2010"** in this regard.

By the **"NRSS Judgment"** *(Supra),* this Tribunal in exercise of its powers under Section 111 of the Act has categorically set aside the CERC's regulatory decision to impose mismatch liability on an entity that has suffered *FM,* the CERC cannot again resort to its generic regulatory powers to reiterate the same outcome that was set aside. The question that who must bear such transmission charge liability to the interconnected licensee, who completed their system on time, was left for the CERC to determine in remand proceedings. It is submitted that after the "NRSS Judgment", in the context of *FM*, it was only open to the CERC to impose liability on the Point of Connection ("**PoC**") Pool and not on the entity who suffered *FM* event(s). The instant cases are squarely covered by the "NRSS judgment".

SUBMISSIONS URGED ON BEHALF OF CERC

Regarding the contention of BDTCL that in the treatment of charges related to

Interest During Construction (IDC) and Incidental Expenses during Construction (IEDC) for projects under RTM (by PGCIL), the bilateral liability affixed on BDTCL gets covered, it is submitted that IDC/IEDC costs differ fundamentally from transmission charges, accruing only pre-declaration of Commercial Operation under specific Tariff Regulations. These charges cannot substitute for transmission charges, which only accrue upon actual declaration of commercial operation date (COD) or approval of COD. An analogy being drawn by BDTCL that the payment of said charges from the ISTS pool on capitalization would in any way undermine the basis of the Regulations as one being based only on utilization is incorrect. The Capital cost of any project including the IDC and IEDC costs are recovered by way of tariff when the said project has declared COD. The Tariff Regulations, 2014 under specific *force majeure* conditions allow a delayed transmission project to further claim IDC and IEDC for delayed period from the generating station and transmission charges in case COD has been approved under regulation 4(3) by CERC. In the instant case, transmission charges under regulation 4(3) has already been approved by CERC. For the mismatch period, the liability should be borne by BTDCL and not be passed on to innocent beneficiaries under any circumstance. Further, since the facts of the present case relates specifically to transmission charges, the issue of IDC/IEDC has no bearing.

SUBMISSIONS URGED ON BEHALF OF APPELLANT - PGCIL

Learned Counsel submitted that the Tariff for the said transmission assets (Asset I, Asset II, Asset III) of PGCIL, is determined in accordance with the provisions of then applicable Tariff Regulations, 2014 wherein, “Date of Commercial Operation” (COD) is the date from which the servicing of the transmission assets

is to begin and in case the transmission system or an element thereof is prevented from being put to regular service on account of a delay of commissioning of the upstream or downstream (inter-connected) transmission system, then, as per 2nd proviso to Regulation 4(3), the transmission licensee can approach the CERC for approval of COD of such transmission system or an element thereof; upon such COD approval, PGCIL is entitled to receive transmission charges for its commissioned assets. The proviso does not stipulate the manner in which such charges are to be received and leaves the same to the regulatory discretion of the CERC. By exercising its regulatory powers from time to time, the CERC has put in place the principles for servicing the transmission asset stranded on account of such mismatch. This exercise of regulatory powers, in the absence of regulations, has been approved in **"PTC India Ltd. Vs. CERC" [(2010) 4 SCC 603]** and reiterated by this Hon'ble Tribunal in Judgment dated 27.3.2018 **"Punjab State Power Corporation Ltd. Vs. Patran Transmission Co. Ltd"; 2018 SCC OnLine APTEL 66**. (**"Patran Judgement"**)

CONSIDERATION AND OUR VIEW

The main contention advanced by learned Counsel on behalf of BDTCL is that in view of provisions available in "Tariff Regulations 2014" to pass through of cost implications on account of *Force Majeure (FM)* events to the beneficiaries, delay caused to PGCIL in commissioning of its elements due to *FM* events impacting the BDTCL's interconnecting elements gets covered in *FM* events of "Tariff Regulation 2014" and CERC cannot resort to Regulatory Power under Section 79 of Electricity Act 2003. *Per Contra*, learned Counsel on behalf of CERC has contended that "Tariff Regulation 2014" only under specific *Force Majeure* conditions allow a delayed transmission project to claim IDC and IEDC for the delayed period and it accrues pre-declaration of Commercial Operation. Let us

examine the relevant portion of the "Tariff Regulation 2014" which is reproduced below:

"Regulation 8(5)
The Commission shall carry out truing up of tariff of transmission licensee based on the performance of following Uncontrollable parameters:

(i) Force Majeure;
(ii) Change in Law

Regulation 8(7)

"The financial gains and losses by a generating company or the transmission licensee, as the case may be, on account of uncontrollable parameters shall be passed on to beneficiaries of the generating company or to the long term transmission customers / DICs of transmission system, as the case may be.

Regulation 12 (2)

"The "uncontrollable factors" shall include but shall not be limited to the following:

(i) Force Majeure events; and
(ii) Change in Law"

Provided that no additional impact of time overrun or cost over-run shall be allowed on account of non-commissioning of the generating station or associated transmission system by SCOD, as the same should be recovered through Implementation Agreement between the generating company and the transmission licensee:

Provided further that if the generating station is not commissioned on the SCOD of the associated transmission system, the generating company shall bear the IDC or transmission charges if the transmission system is declared under commercial operation by the Commission in accordance with second proviso of Clause 3 of Regulation 4 of these regulations till the generating station is commissioned:

Provided also that if the transmission system is not commissioned on SCOD of the generating station, the transmission licensee shall arrange the evacuation from the generating station at its own arrangement and cost till the associated transmission system is commissioned."

From the perusal of above provision, it is observed that as per Regulation 8(5) and 8(7), Commission shall true up the transmission tariff of transmission licensee considering *Force Majeure* and any loss and gain on this account can be passed on to the beneficiaries. Under Regulation 12 (2), the uncontrolled factors shall include *Force Majeure* and Change in Law. Proviso to the Regulation 12 (2) specify that under mismatch conditions between generation and Transmission project i.e. whether transmission system comes first or the generation project comes first, in both the events additional cost on account of mismatch is not to be capitalized meaning thereby it cannot be passed on to the beneficiaries/DICs. In the case, when transmission system cannot be commissioned due of delay in generation project, generating company shall bear the additional IDC and IEDC of transmission project till generation project is commissioned and in case of delay of transmission project, Transmission licensee shall make arrangement at its cost for evacuation of power. It is also noted that the" Tariff Regulation 2014" does not specify the provisions when there is mismatch in commissioning of two transmission elements of two different Transmission Licensees, presumably such a situation was not envisaged at that time. Can then the consequences of mismatch between transmission elements of two different Transmission Licensees, as in the present case, be included under *Force Majeure* and considered as 'uncontrollable factors" and IDC and IEDC be claimed while determining tariff under Section 62 of Electricity Act 2003, as being contended by BDTCL. The definition of *Force Majeure* as per Regulation 3(25) of "Tariff Regulation 2014" is reproduced below:

> *" **'Force Majeure'** for the purpose of these regulations means the event or circumstance or combination of events or circumstances including those stated below which partly or fully prevents the generating company or transmission licensee to complete the project within the time specified in the Investment Approval, and only if such events or circumstances are not within the control the generating company or transmission licensee and could not have been avoided, had the generating company or transmission licensee taken reasonable care or complied with prudent utility practices:*
>
> *a) Act of God including lightning, drought, fire and explosion, earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, geological surprises, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred years; or*
> *(b) Any act of war, invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or*
> *(c) Industry wide strikes and labour disturbances having a nationwide impact in India;"*

From a perusal of the definition of *Force Majeure,* it is seen that for the events which are held to be beyond the control of licensee which partly or fully prevent the licensee to complete the project within the stipulated time line, additional cost of such delay can be claimed under *Force Majeure*. The Cost escalation impacting Contract Price, IDC and IEDC on account of uncontrollable factors, which includes Force Majeure events as per Regulation 12 (2), is allowed after prudence check under the proviso to Regulation 11(A) of Tariff Regulation 2014. Therefore, in case, Transmission licensee is not able to complete the project within the time line specified (Scheduled Commercial Operation Date - SCOD) for the uncontrollable factors, it is entitled to recover additional cost by way of IDC and IEDC etc. Thus, additional IDC and IEDC allowed to a licensee under *Force Majeure* is prior to declaring commercial operation date, which is not the present case.

Furthermore, our attention has been drawn to Regulation 4(3) of "Tariff Regulation 2014", relevant portion is reproduced below,

> *(3) "Date of commercial operation in relation to a transmission system shall mean the date declared by the transmission licensee from 0000 hour of which an element of the transmission system is in regular service after successful trial operation for transmitting electricity and communication signal from sending end to receiving end:*
>
> *Provided that:*
>
> *(i) where the transmission line or substation is dedicated for evacuation of power from a particular generating station, the generating company and transmission licensee shall endeavour to commission the generating station and the transmission system simultaneously as far as practicable and shall ensure the same through appropriate Implementation Agreement in accordance with Regulation 12(2) of these Regulations :*
>
> *(ii) in case a transmission system or an element thereof is prevented from regular service for reasons not attributable to the transmission licensee or its supplier or its contractors but is on account of the delay in commissioning of the concerned generating station or in commissioning of the upstream or downstream transmission system, the transmission licensee shall approach the Commission through an appropriate application for approval of the date of commercial operation of such transmission system or an element thereof".*

CERC, in the Impugned Order 1 (dated 20.09.2017 under Petition No 227/TT/2014), has approved the COD of PGCIL Asset I as 20.10.2014; Asset II as 05.10.2014 and Asset III as 29.05.2014, under above referred Regulation 4(3), in the absence of readiness of interconnecting transmission element of BDTCL. It is clear that the above regulation can be invoked when the transmission element has been completed, but it is prevented from regular

services for reasons not attributable to the transmission licensee, meaning thereby that proviso (ii) would come into play subsequent to completion of the project (including after accounting delay on account of Force Majeure). Accepting the contention advanced on behalf of BDTCL , that consequential impact to PGCIL due to delay in commissioning of interconnecting elements of BDTCL on account of *Force Majeure*, are covered under *Force majeure* of PGCIL under definition of *Force Majeure* in Tariff Regulation 2014, would mean that in case of mismatch between two transmission Licensee as in present case, the transmission licensee, whose tariff is determined under Section 62 (like PGCIL), is disentitled to invoke proviso ii of Regulation 4 (3), and the delay has to be necessarily compensated by way of IDC and IEDC; accepting such an interpretation, advanced by BDTCL, would render proviso ii of Regulation 4(3) otiose. In view of above deliberation, we do not find merit in the submissions of Appellant – BDTCL that Impugned Order 1 (dated 20.09.2017) is passed in contravention of Tariff Regulation 2014.

Placing reliance on the **Supreme Court Judgement dated 06.04.2023 in *Haryana Power Purchase Centre v. Sasan Power Ltd. & Ors.*, 2023 SCC Online 577 ("HPPC Judgement"); APTEL Judgement "*Punjab State Transmission Corporation Limited vs. CERC & Ors*. 2022 SCC On Line APTEL 78 ("PSTCL Judgement"),** it has been contended on behalf of Appellant – BDTCL that CERC cannot create a new 'quasi-contractual relationship' while exercising its adjudicatory/ regulatory power in exercise of its regulatory power.

In the **"HPPC Judgement"** *(Supra),* issue involved was with respect to Haryana Power Purchase Centre (HPPC)-the Appellant, nodal agency for power procurement in Haryana and Sasan Power Ltd., a generating company operating a large Ultra Mega Power Project (UMPP) - Respondent. A Power Purchase Agreement (PPA) was executed between HPPC and Sasan Power Ltd.

for long-term supply of electricity. The PPA contained a **"**Change in Law" clause, which allowed tariff adjustment, if unforeseen legal changes imposed additional costs. Sasan Power claimed certain changes like increase in cost of water intake channel due to change in feasibility report annexed with the Bid and actual site condition and imposition of Custom Duty on mining equipment under Change in Law clause and sought restitution. CERC declined the additional cost of water Intake channel under change in Law citing that it was the responsibility of Sasan Power to verify the location of water intake channel and reflect actual cost in the bid. With regard to custom duty also, CERC denied the change in Law Claim as custom duty on mining equipment was available in the schedule.

In the Appeal preferred by Sasan Power, this Tribunal concurred with the view of CERC with regard to change in water Intake channel not covered under the 'Change in Law' as per PPA, however remanded the matter to CERC to have a fresh look as issue involved substantial additional expenditure arising out of erroneous report of Consultant attached with Bid document. Upon remand, Commission considered the matter and ordered for additional payment in regard to water intake channel.

HPPC approached Supreme Court against the finding of this Tribunal contending that, even after rightly holding that increase in cost of Water intake channel is not covered under "Change in Law" claim as per PPA, it remanded the matter to Commission for fresh look. In this Context, the Supreme Court, in paragraph 96 (upon which reliance has been placed by BDTCL), held that the Commission under its adjudicatory powers cannot disregard the terms of the Contract between the parties. Referred Paragraph is reproduced below:

> *96. "While it may be open as indicated therein for a regulation to extricate a party from its contractual obligations, in the course of its adjudicatory power it may not be open to the Commission by using the*

nomenclature regulation to usurp this power to disregard the terms of the contract".

In the present case, it is an admitted fact that there is no contractual relationship between PGCIL & BDTCL, and the extant regulation do not govern consequences of mismatch in commissioning of transmission assets of two transmission licensees, and CERC has used its regulatory power under Section 79 of Electricity Act 2003 to assign liability of payment of transmission charges upon BDTCL, which has delayed the use of PGCIL transmission element and has not over written any contract between BDTCL & PGCIL. Therefore, the referred judgement is of no avail to BDTCL.

In **"PSTCL Judgement"** *(Supra)***,** the issue involved was between Punjab State Transmission Corporation Limited (PSTC), a transmission licensee engaged in the business of intra- state Transmission system and PGCIL, (then CTU) engaged in the business of inter-State Transmission System. PGCIL had taken up implementation of 220 kV inter-State bays at Jallandhar substation, for utilization by PSPCL. The CERC vide its order dated 21.11.2019 determined the transmission tariff of referred assets with COD as 31.03.2019 and held that till commissioning of downstream network by PSPCL, tariff for these assets shall be payable by PSTCL. Aggrieved thereby, PSTCL approached this Tribunal contenting that no requirement of such asset has been communicated by it, and accordingly there being no contractual liability or occasion for PSTCL to be treated as entity in default, the liability of payment of transmission charges by PSTCL is in violation of law. This Tribunal after pursuing the minutes of standing committee and Regional Power committee, which led to the approval of scheme including the subject asset and various other judgments noted that there was no agreement reached between the parties for development of subject assets and held as under:

> *"27. From the chronology of events, it is clear that PGCIL went ahead with the development of the work assuming that there was a requirement of the asset for purposes of the appellant. This assumption, without confirmation by the STU, was unfounded. In these circumstances, it cannot be said that there was an agreement reached between the parties (PGCIL on one hand and PTCL on the other) for development of the subject asset. In this view, as indeed in absence of any contract binding the parties to the dispute herein, the liability towards transmission charges cannot be fastened on the STU (PSTCL), not the least on the ground that it had been remiss in development of the downstream system".*

In the present case, BDTCL has not even contended that they were unaware that the bays, being implemented by PGCIL, was for termination of their lines or that no requirement had been agreed by them, as the concerned transmission lines in the Project awarded to them under competitive bidding was to be terminated in the substation/bays implemented by PGCIL. In view of the facts of present case, ratio of **"PSTCL Judgement"** is of no avail to BDTCL.

Learned Counsel on behalf of BDTCL has also contended that bilateral liability for the mismatch imposed on it defeats the objective of contractual protection under BDTCL's TSA from penal consequences in case of *FM* events and it is contravention of binding precedence of this Tribunal in **"NRSS Judgement"** *Supra.*

The referred Transmission Service Agreement (TSA) has been signed between Long Term Transmission Customers (LTTCs) and BDTCL – TSP on 07.12.2010, and in terms of the bidding condition, upon emerging as successful bidder SGL acquired 100 % shareholding in the company BDTCL on 31.03.2011, which became the effective date and the scheduled commercial operation date of various elements of the Project as 31.03.2014 in terms of Schedule 3 of TSA. In terms of TSA, TSP is to provide Contract Performance Guarantee to LTTCs. Under the TSA, TSP is obligated to complete its project within SCOD, and LTTCs are liable to pay Transmission Charges for various elements. In terms of Article

6.4 of the TSA, in case TSP fails to achieve COD of any element within its SCOD, the TSP is liable to pay liquidated damages in terms of this clause. However, TSA under Article 11 also provides for the *Force majeure* affecting the obligation of TSP and LTTCs. Article 11.3 is reproduced hereunder:

> ***"11.3 Force Majeure:***
>
> *A 'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:*
>
> ***(a) Natural Force Majeure Events:***
>
> *act of God, including, but not limited to drought, fire and explosion (to the extent originating from a source external to the Site), earthquake. volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years,*
>
> ***(b) Non-Natural Force Majeure Events:***
>
> *i. Direct Non-Natural Force Majeure Events*
>
> - *Nationalization or compulsory acquisition by any Indian Governmental Instrumentality of any material assets or rights of the TSP; or*
> - *the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consents, Clearances and Permits required by the TSP to perform their obligations under the RFP Project Documents or any unlawful, unreasonable or discriminatory refusal to grant any other Consents, Clearances and Permits required for the development/ operation of the Project, provided that a Competent Court of Law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down; or*
> - *any other unlawful, unreasonable or discriminatory action on the part of an Indian Governmental Instrumentality which is directed against the Project,*

provided that a Competent Court of Law declares the action to be unlawful, unreasonable and discriminatory and strikes the same down.
ii. Indirect Non - Natural Force Majeure Events

- *act of war (whether declared or undeclared), Invasion, armed conflict or act of foreign enemy, blockage, embargo, revolution, riot, insurrection, terrorist or military action; or*
- *radio active contamination or ionizing radiation originating form a source in India or resulting from any other Indirect Non Natural Force Majeure Event mentioned above, excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Site by the Affected Party or those employed or engaged by the Affected Party; or*
- *industry wide strikes and labour disturbances, having a nationwide impact in India".*

Article 11.7 provides for the Relief available under Force Majeure, as reproduced hereunder:

"11.7 Available Relief for a Force Majeure Event

Subject to this Article 11

(a) no Party shall be in breach of its obligations pursuant to this Agreement except to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event,

(b) every Party shall be entitled to claim relief for a Force Majeure Event affecting its performance in relation to its obligations under this Agreement.

(c) For the avoidance of doubt, it is clarified that the computation of Availability of the Element(s) under outage due to Force Majeure Event, as per Article 11.3 affecting the TSP shall be as per Appendix IV to the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2009 as on seven (7) days prior to the Bid Deadline. For the event(s) for which the Element(s) is/are deemed to be available as per Appendix IV to the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2009, then only the Non Escalable Transmission Charges, as applicable to such Element(s) in the relevant

Contract Year, shall be paid by the Long Term Transmission Customers as per Schedule 5, for the duration of such event(s).

(d) For so long as the TSP is claiming relief due to any Force Majeure Event under this Agreement, the Lead Long Term Transmission Customer may, from time to time on one (1) day notice, inspect the Project and the TSP shall provide the Lead Long Term Transmission Customer's personnel with access to the Project to carry out such inspections, subject to the Lead Long Term Transmission Customer's personnel complying with all reasonable safety precautions and standards".

On perusal of various provisions of TSA, it is evident that TSP can claim relief/ or have contractual protection, in case it is unable to perform its obligation on account of *Force Majeure* by way of extension of its SCOD, deemed availability etc. However, our attention has not been drawn to any provisions of *Force Majeure* events, both Natural or Non-Natural, which provides protection to the TSP from bilateral mismatch liability in case of non-commissioning of the other Transmission Licensee's elements, on account of delay in commissioning of BDTCL transmission elements under the TSA. The *Force Majeure* clause provides a relief under the contract between the parties, and cannot be claimed against parties with whom there is no such contractual relationship. Thus, in our view, TSA does not provide contractual protection to TSP-BDTCL from the bilateral mismatch liability, if any, affixed on it, in case the other transmission licensee's assets are not put to use due to delay in implementation of BDTCL interconnecting asset, more so as PGCIL is not a party to the TSA entered into between TSP – BDTCL and the beneficiaries.

Before taking note of the facts and the law declared by this Tribunal in the judgements relied on behalf of the parties to these proceedings, it is useful to take note of the judgements of the Supreme Court and this Tribunal relating to mismatch, during the period when there were no provision in the statutory regulations.

1). In **Power Grid Corpn. of India Ltd. v. Punjab State Power Corpn. Ltd., (2016) 4 SCC 797,** the Supreme Court, while agreeing with this Tribunal that COD of the transmission lines could be achieved only on fulfilment of the following three conditions: (*i*) the line has been charged successfully, (*ii*) its trial operation has been successfully carried out, and (*iii*) it is in regular service, referred to the definition of "transmission lines" in Section 2(72) of the Electricity Act, and observed that it was clear from the said definition that switchgear and other works were part of the transmission lines; Regulation 3(12) of the 2009 Regulations could not be interpreted against the spirit of the definition of "transmission lines" given in the statute; it was not in dispute that the switchgear at the Barh end of the Barh-Balia line, for protection and metering, were to be installed by NTPC, and the same was not done by it when the transmission line was completed by the appellant; as such the appellant might have suffered due to the delay on the part of NTPC in completing the transmission lines for some period; but beneficiaries, including Respondent 1, could not be made liable to pay for this delay w.e.f. 1-7-2010 as the energy supply line had not started on the said date.

2. The Appeal, in **Punjab State Power Corporation Limited v. Patran Transmission Company Limited, 2018 SCC OnLine APTEL 66 ("Patran Judgement")** , was filed by the Punjab State Power Corporation Ltd challenging the Order passed by the CERC in Petition No. 155/MP/2016 dated 4.1.2017 whereby the Appellant was held liable to bear the transmission charges of the transmission assets commissioned by Respondent No. 1 from Scheduled Commercial Operation Date (SCOD) till commissioning of the downstream system. On the question, whether recovery could be sought to be made, from the Appellant, which was neither authorized in law nor in contract, this Tribunal, in "**Patran Judgement" *(Supra)***, analyzed the findings of the CERC in the impugned order; in the said order, the CERC had relied on its earlier order in

Petition No. 43/MP/2016 dated 21.9.2016 wherein, on the issue as to how recovery of transmission charges of the transmission licensee shall be made when the transmission system under TBCB is ready as on its scheduled COD as per the provisions of the TSA but cannot be made operational or put to use due to non-availability/delay in upstream/downstream system, it was held that ISTS licensees, executing the project under TBCB, should enter into an Implementation Agreement with the CTU, STU, inter-State transmission licensee, or the concerned LTTC, as the case may be, who are responsible for executing the upstream/downstream transmission system, and clearly provide liability for payment of transmission charges in case of the transmission line or upstream/downstream transmission assets; in the absence of the Implementation Agreement, the payment liability should fall on the entity on whose account an element is not put to use; for example, if the transmission line is ready but the terminal bays belonging to other licensee are not ready, the owners of upstream and downstream terminal bays shall be liable to pay the charges to the owner of transmission line in the ratio of 50:50 till the bays are commissioned; in case one end bays are commissioned, the owner of other end bays shall be liable to pay the entire transmission charges of the transmission line till its bays are commissioned; the above principle shall be followed by CTU in all cases of similar nature in future; as per the decision quoted above, if the downstream system of the elements in the present case is not commissioned by the scheduled date of commercial operation, the owner of the downstream system shall be liable to pay the transmission charges of the transmission system till the downstream system is commissioned.

This Tribunal further observed that the CERC, in the impugned order, had also referred to its previous order in Petition No. 100/TT/2014 dated 19.4.2016 and its order in Petition No. 11/SM/2014 dated 5.8.2015; in the said

orders, the Central Commission, while acknowledging the gaps in the Tariff Regulations, 2014, had directed its staff to examine the aspect of signing of IA between the Inter State Transmission Licensees (ISTS) & STUs, and had proposed necessary changes required in the Tariff Regulations, 2014 to enable ISTS and STUs to enter into Implementation Agreement; the Central Commission had also observed that the concerned STU, which had requested for provision of downstream line bays in the various meetings of Standing Committee/RPC, shall bear the transmission charges till completion of the downstream system and goes on deciding that the concerned State (Rajasthan) Discoms have to bear transmission charges till the commissioning of the downstream system based on the TSAs signed by them; and the Appellant was liable to pay transmission charges to Respondent No. 1 from SCOD of the Transmission System until the downstream system was commissioned.

This Tribunal, thereafter, observed that there was no provision either in the Sharing Regulations or in the Tariff Regulations, 2014 to cover an eventuality of payment to a transmission licensee, the transmission charges by the concerned party when its transmission system is ready/commissioned but the upstream/downstream system is not ready due to which the transmission system cannot be put to use; the Sharing Regulations provided for sharing of transmission charges by the Designated ISTS Customers who use the ISTS; all the LTTCs are liable to pay transmission charges only when the Transmission System is being used or put to use; in the present case, the Transmission System could not be put to use as the downstream system was not ready by SCOD; the Central Commission, relying on its earlier orders in similar situations, had held that the Appellant was responsible to pay transmission charges to Respondent No. 1 until the downstream system is commissioned.

This Tribunal further noted the submission of the Central Commission, that the statutory basis for the decision by the Central Commission to assign liability on the Appellant for payment of transmission charges, was the Supreme Court's judgement in **PTC India Ltd. v. CERC (2010) 4 SCC 603;** accordingly, in the absence of specific provisions in the Sharing Regulations/ Tariff Regulations, 2014 to deal with the situation, the Central Commission, through exercise of its regulatory power, had prescribed a principle for sharing of transmission charges of the Transmission System of Respondent No. 1 in the Impugned Order; and, by way of exercising its regulatory power, by a way of judicial order (s), the Central Commission had laid down the principles of payment of transmission charges in such an eventuality.

While holding that the Central Commission, in the Impugned Order, had abruptly concluded the payment liability on the Appellant just by referring to its earlier orders and not establishing the linkage with the present case explicitly, this Tribunal further observed that the liability to pay transmission charges, by the Appellant to Respondent No. 1 from SCOD till the downstream system was commissioned, did not arise from the Regulations of the Central Commission; as per the principles laid down in the decision of the Central Commission, in its order in Petition No. 43/MP/2016 dated 21.9.2016, it appeared that PSTCL was the defaulting party and should have been made liable to pay the said transmission charges; however, there was no contractual relationship between Respondent No. 1 and PSTCL; the contractual relationship between the Appellant and Respondent No. 1 was the TSA, which laid down the rights and obligations of the parties; Article 4.2 of the TSA dealt with the obligations of the LTTCs in implementation of the project; it was only the Appellant, amongst all the LTTCs, who was responsible to arrange the downstream

system for connection to Transmission System by SCOD so that it could be put to use; this was irrespective of any relation between the Appellant and PSTCL; and accordingly, as per the principles laid down by the Central Commission, vide its Order dated 21.9.2016 which are judicial in nature, the defaulting entity in the present case was the Appellant; in the present case, the communication of Respondent No. 1 with PSTCL was technical in nature arising out of various meetings taken by CEA/ Regional Power Committee, and not a contractual one; it was the Appellant who was bound contractually for arranging and making available the downstream system; the Respondent No. 1 had brought on record the orders of the Central Commission in similar cases where the Appellant was a party and the Appellant had not challenged the same; and they were of the considered opinion that there was no infirmity in the decision of the Central Commission by holding that the Appellant was liable to pay transmission charges from SCOD of the Transmission Asset until commissioning of the downstream system.

This Tribunal then observed that these type of major issues ought to have been covered under Regulations by the Central Commission to plug the gaps, which would avoid litigation; the importance of the same was considered by the Central Commission at one point of time in its order dated 5.8.2015, and its staff was directed to undertake the exercise for appropriate amendments in the Tariff Regulations, 2014; till date no such modifications had been carried out by it in the Regulations; there were many regulatory/ judicial orders of the Central Commission to deal with situations like in the present case; the Supreme Court, in its judgement **in PGCIL Vs. PSPCL and Ors.** (Judgement in Civil Appeal No. 9302 of 2012 dated 3.3.2016), had held that the LTTCs were liable to pay transmission charges only when the transmission system was made operational/ put to use.

On the questions, whether the Central Commission while passing the transmission tariff orders could ignore the provisions of Sharing Regulations, 2010 which provide for pooling of transmission tariff of all transmission licensees and recovery through the PoC Pool, and whether, having prescribed a manner of recovery of transmission charges in the Sharing Regulations, the Central Commission could proceed to distract from the same in individual cases and for the benefit of certain private parties, this Tribunal observed that the provisions of the Sharing Regulations (applicability of PoC on the DICs) were not applicable to the situation when the Transmission Asset was not in use; accordingly, the question of applicability of sharing regulations for the period from SCOD until commissioning of downstream system did not arise; the Central Commission had decided the principle to deal with the situation by a way of regulatory powers available to it under Section 79 (1) of the Electricity Act, in the absence of specific regulations; the same principle was applied by the Central Commission in case of PGCIL in some other orders; and it could not be presumed by the Appellant that the Central Commission had proceeded for the benefit of private parties. This issue was also decided against the Appellant.

On the question, whether the earlier Orders of the Central Commission would apply to the Appellant when the said Orders were passed in other matters and where the Appellant was neither heard nor at fault?, this Tribunal held that the earlier orders of the Central Commission had laid down the principles for dealing with the situation as in the present case and were judicial orders; the applicability of those orders depended upon the circumstance of the case and the applicability on the Appellant had

been discussed earlier in the order. Hence this issue was also decided accordingly.

3. The Appeal, in **Nuclear Power Corporation of India v. CERC 2019 SCC Online Aptel 83,** was filed by Nuclear Power Corporation Ltd challenging the Order passed by the CERC in Petition No. 43/MP/2016 dated 20.9.2017 whereby Central Commission held the Appellant to be liable to bear the transmission charges of the transmission assets commissioned by Respondent No. 2 from Scheduled Commercial Operation Date (SCOD) till commissioning of the downstream system. The 2nd Respondent- RTCL, in the said Appeal, was incorporated as a special purpose vehicle under the Companies Act, 1956 by PFC Consulting Ltd. ("**PFCCL**") as part of a Tariff Based Competitive Bidding ("**TBCB**") process for implementing the RAPP-Shujalpur 400 kV D/C Twin Moose ACSR transmission line project on a build, own, operate and maintain basis. Under the TSA 2013, the SCOD was February, 2016 (or any date that the parties thereto might otherwise agree to). Respondent No. 2 addressed letters dated 20.07.2015 to PGCIL and NPCIL stating that the Project would be ready for charging by 15.11.2015, and accordingly requested PGCIL and NPCIL to make the inter-connecting elements ready in all respects for charging and making the Project operational. Respondent No. 2 also sent the said letter dated 20.07.2015 to the Central Electricity Regulatory Commission, the CTU, the CEA, the Western Regional Load Despatch Centre and the Northern Regional Load Despatch Centre. Respondent No. 2 also addressed letter dated 30.07.2015 to all the LTTCs including the Lead LTTC namely, U.P. Power Corporation Limited, stating that, in light of the MoP Order, Respondent No. 2 intended to commission its transmission element before February, 2016 (the SCOD named in the TSA 2013) so as to avail of its entitlement under the MoP Order to receive transmission

charges from the date of actual COD which would be prior to February, 2016. The LTTCs did not object to Respondent No. 2's proposal to advance the date of SCOD of the Project to before February, 2016. Accordingly, Respondent No. 2 proceeded to hasten construction activity on the Project as the LTTCs had agreed to Respondent No. 2 's proposal as per the provision for SCOD in the TSA 2013, to change the SCOD of the Project to the actual COD, if the actual COD was prior to February, 2016. The Project was ready to be commissioned well in advance of the SCOD of February, 2016. On 18.12.2015, Respondent No. 2 intimated all the concerned stakeholders that it had declared deemed COD as of 26.12.2015 and would be entitled to the incentive under the MoP Order with effect from 26.12.2015. Respondent No. 2 also submitted details of its Yearly Transmission Charges ("**YTC**") for the period from October, 2015 to December, 2015 vide its letter dated 25.09.2015 to the Power System Operation Corporation Limited ("**POSOCO**"). Further, Respondent No. 2 also submitted details of its YTC for the period from January, 2016 to March, 2016 vide its letter dated 13.11.2015 to POSOCO. Pursuant to declaring the COD of the Project, Respondent No. 2 entered into TSA 2015 and RSA. Since Respondent No. 2 was not paid transmission charges for the period starting from the date of its COD, that is 26.12.2015 as per the terms of the TSA 2013, TSA 2015 and the RSA, Respondent No. 2 approached the Central Commission and filed Petition No. 43/MP/2016.

The CERC, vide order in Petition No. 43/MP/2016 dated 21.9.2016, held that the Appellant was liable to pay RTCL, transmission charges in respect of the RAPP-Shujalpur 400 kV D/C Twin Moose ACSR transmission line project from the SCOD i.e. 1.3.2016 up to the commissioning of bays to be constructed by the Appellant i.e. 11.11.2016 as the appellant was solely responsible for the delay in commissioning of the bays.

On the question whether the Central Commission was right in holding the Appellant liable to pay transmission charges on account of an element not put to use, in the absence of an Implementation Agreement or any form of Contractual Agreement, this Tribunal observed that, in its earlier judgement, in **Punjab State Power Corporation Limited v. Patran Transmission Company Limited ("Patran Judgment"),** (Judgement in Appeal No. 390 of 2017 dated 27.03.2018), there was no contractual arrangement between the party commissioning its transmission element on time, i.e. Patran Transmission Company Limited, and the defaulting party, i.e. Punjab State Transmission Company Limited ("**PSTCL**"); this Tribunal had held that the only contractual arrangement which existed was between Patran Transmission Company Limited and its LTTCs, including with Punjab State Power Corporation Limited ("**PSPCL**"); PSPCL, as an LTTC, had undertaken the obligation under the TSA with Patran to arrange the Inter-connection Facilities for Patran's Project; accordingly, this Tribunal had held PSPCL liable to pay transmission charges, instead of PSTCL; similarly, in the facts of the instant Appeal, there was no inter-se contractual arrangement between Respondent No. 2 and the defaulting party, i.e. the Appellant; however, similar to the factual situation in the case of Patran Judgment, Respondent No. 2 had entered into the TSA dated 24.07.2013 with various LTTCs, who were the beneficiaries of the Project being established by it; these type of major issues ought to have been covered under Regulations by the Central Commission to plug the gaps, which would avoid litigations; the importance of the same was considered by the Central Commission at one point of time in its order dated 5.8.2015, and its staff was directed to undertake appropriate amendments in the Tariff Regulations, 2014; till date no such modifications had been carried out by it in the Regulations; there were many regulatory/judicial orders of the Central Commission to deal with the situations like in the present case; the Supreme Court, in **PGCIL v. PSPCL** (Judgement in

Civil Appeal No. 9302 of 2012 dated 3.3.2016), had held that the LTTCs were liable to pay the transmission charges only when the transmission system was made operational and was put to use; the Central Commission had also relied on the said judgement while formulating principles of payment of transmission charges by the entities before the transmission system/asset was made operational/put to use; in the absence of specific provisions in the Sharing Regulations/Tariff Regulations, 2014 to deal with the situation under question the Central Commission, through exercise of its regulatory powers, had prescribed the principle for sharing of transmission charges of the Transmission System of Respondent No. 2 in the Impugned Order; by way of exercising its regulatory power by a way of judicial order(s), the Central Commission had laid down the principles of payment of transmission charges in such an eventuality; the liability to pay transmission charges by the Appellant to Respondent No. 2 from SCOD till downstream system is commissioned does not arise from the Regulations of the Central Commission; in the present case, as per the principles laid down by the Central Commission, it emerged that NPCIL was the defaulting party and should have been made liable to pay the said transmission charges; however, there was no contractual relationship between Respondent No. 2 and NPCIL; from the decision of the Standing Committee on Power System Planning (a statutory committee), it was clear that it was only the Appellant who was responsible to arrange the downstream system for connection to the Transmission System by SCOD so that it could be put to use; this was irrespective of any relation between the Appellant and Respondent No. 2; accordingly, as per the principles laid down by the Central Commission vide its Order dated 21.9.2016 which were judicial in nature, the defaulting entity in the present case was the Appellant; there was no infirmity in the decision of the Central Commission in holding the Appellant liable to pay transmission charges from

SCOD of the Transmission Asset until commissioning of the downstream system along with applicable charges as per TSA which was already raised by CTU.

This Tribunal summarized its findings holding that it was not in dispute that Respondent No. 2 had commissioned the transmission lines on 26.12.2015 (COD considered by the Commission as 01.03.2016), and the downstream element under the scope of the Appellant could be commissioned only on 11.11.2016; subsequent to the commissioning of its lines in totality, the second Respondent was entitled to receive transmission charges from 01.03.2016 either from the Appellant due to its admitted default or through the POC charges from the LTTCs/beneficiaries; the Supreme Court, in its judgment dated 03.03.2016 (**Barh-Balia judgment**), had held that the beneficiaries cannot be made liable to pay for the delay in any transmission element which, in turn, prevented the entire system to be put to use; hence, the second Respondent cannot be paid under POC mechanism and, alternatively, the transmission charges had to be paid by the defaulting party i.e. the Appellant; in the facts and circumstances of the instant case, the Central Commission had based its decision to assign liability on the Appellant for payment of transmission charges keeping in view the aforesaid judgment of the Apex court, and also the judgment of the Supreme Court dated 15.03.2016 in **PTC India Ltd. v. CERC** in which it was, inter-alia, held that the Central Commission was empowered to exercise its regulatory powers under Section 79(1) of the Electricity Act, even without any specific regulations; the decision of the Central Commission was just and right; and the impugned order had been passed by it judiciously in accordance with law, and did not call for interference.

4. The Appeal, in **NRSS XXXI (B) Transmission Ltd. v. Central Electricity Regulatory Commission, 2020 SCC OnLine APTEL 72,** (reliance placed by BDTCL) was filed against the order passed by the CERC, in Petition

No. 60/TT/2017 dated 30.11.2017, whereby the Central Commission directed the Appellant to bear the liability of Interest During Construction (**IDC**) and Incidental Expenses During Construction (**IEDC**) of the transmission assets of Respondent No. 2 from their respective dates of commercial operation till the commissioning of Appellant's transmission system.

With regards the merits of the case, this Tribunal observed that its most relevant decision matching to the circumstances of the present case was the judgment in **Punjab State Power Corporation Limited v. Patran Transmission Company Limited** (Appeal No. 390 of 2017 dated 27.3.2018) ("**Patran Judgment**") where this Tribunal had acknowledged that the Central Commission, by way of exercising its regulatory power by way of a judicial order, had laid down the principles of payment of transmission charges in case there is mis-match in commissioning of transmission systems in Petition No. 43/MP/2016; thereafter, this Tribunal also adjudicated Appeal No. 332 of 2016 (RAPP Judgement) preferred against the order dated 21.9.2016 in Petition No. 43/MP/2016; and, vide judgment dated 18.1.2019, the Tribunal decided Appeal No. 332 of 2016 following the principles laid down in the Patran judgment.

This Tribunal, in **NRSS XXXI (B) Transmission Ltd.**, then summarized the principles laid down for such cases by the Commission upheld by this Tribunal in the context of mis-match in commissioning of transmission systems by different licensees as: (i) The LTTCs/beneficiaries are liable to pay transmission charges only when the Transmission System is being used or put to use; (ii) Subsequently, the Central Commission laid down the principle that the transmission licensee implementing transmission system through TBCB route shall enter into an Implementation Agreement (IA) with the entity responsible for the implementation of the upstream/downstream system clearly stating the liability to pay

transmission charges in case of delay. In the case if there is no IA, the liability to pay transmission charges fall on the entity on whose account the transmission system could not be put to use; (iii) In the absence of specific provisions in the Sharing Regulations/Tariff Regulations, 2014, the Central Commission through exercise of its regulatory powers, by way of a judicial order, has prescribed the aforesaid principle for sharing of transmission charges of the Transmission System; (iv) The statutory basis for the decision by the Central Commission to assign liability for payment of transmission charges in such matters is based on the Hon'ble Supreme Court's judgment dated 15.3.2010 in SLP (C) No. 22080/2005 in case of *PTC India Ltd.* v. *CERC*, (2010) 4 SCC 603, wherein, the Apex Court has held that decision-making Authority of the Commission under Section 79(1) of the Act is not dependent upon making of regulations under Section 178 of the Act. It is further held in the judgment of Hon'ble Supreme Court that, if any regulations are framed by the Central Commission under Section 178 of the Act then, the decision of the Central Commission has to be in accordance with the said regulations.

This Tribunal, in **NRSS XXXI (B) Transmission Ltd,** observed that, after deliberating the above settled principles in Patran Judgment, this Tribunal entered into the provisions of the TSA and held that the Appellant, Punjab State Power Corporation Ltd. (PSPCL), was the defaulting entity in the matter as it was only PSPCL, amongst all the LTTCs, who was responsible to arrange the downstream system as per Article 4.2 of the TSA for connection to Transmission System by SCOD so that it could be put to use; in the RAPP judgment, the Appellant Nuclear Power Corporation of India Limited (NPCIL) did not have any contractual relationship with the transmission licensee RAVP Transmission Company Limited (RTCL); however, the Tribunal relied on the decision of the Standing Committee on Power System Planning (a statutory committee) to hold NPCIL as the defaulting entity as it was only NPCIL who was responsible to

arrange the downstream system for connection to Transmission System by SCOD so that it could be put to use; in both the above judgements, since the Commission had abruptly concluded the payment liability on the parties by referring to its earlier order and did not establish the linkage with the case in hand, this Tribunal went ahead and established the linkage considering the upstream and downstream licensee did not have a contractual arrangement in place; and, in the impugned order as well, the Commission had again abruptly concluded the payment liability on the Appellant just by referring to its earlier orders and not establishing the linkage with the present case explicitly.

This Tribunal, in **NRSS XXXI (B) Transmission Ltd**, thereafter observed that, in the present case as per the general principles laid down by the Central Commission, it emerged that the Appellant was the defaulting party; however, a new aspect had been brought up for adjudication in the present Appeal; the bays of PGCIL could not be put into regular service without the commissioning of associated transmission line of the Appellant; therefore, the Commission decided that the COD of bays constructed by PGCIL shall be considered from the date of COD of associated line; subsequently, the Commission, vide order dated 29.3.2019 in Petition No. 195/MP/2017, granted relief to the Appellant by allowing delay in grant of forest clearance as an event of force majeure and allowed extension of COD of Appellant transmission system i.e. Kurukshetra - Malerkotla and Malerkotla - Kurukshetra Transmission Lines till the actual CODs i.e. 18.01.2017 and 27.03.2017; thus the question before them was whether liability of IDC and IEDC of the assets of Respondent No. 2 could be imposed on the Appellant when the Commission had condoned the delay in commissioning of its transmission assets on account of force majeure event, and had allowed extension of COD of its transmission system within the terms of the TSA dated 02.01.2014.

This Tribunal, in **NRSS XXXI (B) Transmission Ltd,** further observed that, admittedly, the Appellant implemented the project under TBCB route as per the TSA dated 02.01.2014; the Appellant was entitled to extension of commercial operation date under Article 11 of the TSA (force majeure), if the project implementation was affected due to force majeure event (s); once the Commission allowed extension of COD of the transmission elements/system under the terms of the TSA, it revoked all the tacit or explicit agreements made by the parties or system planning authorities regarding scheduled commercial operation dates of transmission elements; the Scheduled Commercial Operation date is accordingly shifted to actual COD; thus, the decision of the Commission to impose liability of IDC and IEDC of PGCIL bays on the Appellant for delay in commissioning of the transmission system was completely contradictory to the relief granted to the Appellant under the provisions of force majeure of the contract by way of extension of COD; the law in relation to force majeure has been explained by the Supreme Court in **Dhanrajamal Gobindram v. Shamji Kalidas and Co** that where reference is made to “force majeure”, the intention is to save the performing party from the consequences of anything over which he has no control; imposing liability of IDC and IEDC on the Appellant defeats the objective of introducing the provision of force majeure in the TSA i.e. to save the Appellant form the consequences of anything over which it has no control; when relief is available under the force majeure provisions of the contract, the Commission ought not to have penalised the Appellant for the same act outside the contract, particularly, when there is no such provision in the sharing regulations which the Appellant could have made itself aware of before bidding for the project; in the earlier judgments of this Tribunal (**Patran and RAPP**), it had been observed that this type of major issue ought to have been covered under Regulations by the Central Commission to plug the gaps, which would avoid litigations; however, the Commission did not amend its Regulations; it seemed

that the decisions in similar matters are being taken through judicial orders only; and there exists inconsistencies in the decisions of the Commission.

This Tribunal, in **NRSS XXXI (B) Transmission Ltd,** further held that, in the context of the present case, the question was what if the line of the Appellant i.e. NTL was ready and Respondent No. 2 could not complete its bays; the cost of bays being implemented by Respondent No. 2 must be a fraction of the cost of the transmission system implemented by the Appellant; in such cases, the licensee whose assets have been delayed may end up paying transmission charges more than its project cost; clearly, the levy of transmission charges of the Appellant on the Respondent No. 2 would not have been justified when there is no contract between the parties; the Commission in the impugned order and order dated 29.03.2019 had decided that, even if the COD of the transmission licensee has been extended on account of Force Majeure event, the licensee has to pay transmission charges for upstream/downstream assets for the period of delay; therefore, the bidder has to mandatorily consider this scenario while submitting the bid; there was no rationale as to how a transmission licensee could submit a reasonable bid when it was not aware of the liability pertaining to anticipated duration of such delay and the cost of the upstream/down-stream assets before submitting the bid; the same was equally applicable for the delay on achievement of COD on account of force majeure events by the projects implemented/being implemented through Regulated Tariff Mechanism (RTM); and infrastructure projects, involving huge investments, must not be part to such regulatory uncertainties that too, without remedy.

This Tribunal, in **NRSS XXXI (B) Transmission Ltd,** also observed that the Commission did not issue the directions for sharing of transmission charges in such cases as per the Sharing Regulations framed under Section 178 of the Act but by exercising regulatory power under Section 79 of the Act; therefore, such transmission charges in the absence of a contract, are more in the nature

of ‘damages’ for delay in commissioning of assets and cannot be qualified as sharing of transmission charges; however, breach of contract is a pre-condition to claim ‘damages’ under Section 73 and Section 74 of the Indian Contract Act, 1872; in this context, it is undisputed that there exists no contract between the licensees implementing the interlinked transmission systems in such cases; therefore, it is not prudent on the part of the Commission to impose such liability on the transmission licensees without entering into a contract/IA; and further, the transmission system, being a meshed network it cannot be the first time that the commission was dealing with the issue of mismatch in commissioning of transmission system in Petition No. 43/MP/2016 which culminated into principles being issued vide order dated 21.09.2016.

In the light of the above, this Tribunal felt that it would be just and proper for the Commission to take a fresh view in this regard considering all the aspects. The Commission was further directed to develop a mechanism in line with the observations made by this Tribunal in the forgoing paragraph after due stakeholder consultation; the Regulations framed/principles adopted by the Commission while undertaking its functions must be reasonable, consistent and in accordance with prevailing laws. This Tribunal concluded holding that the Impugned Order suffered from infirmity and arbitrariness and hence, liable to be set aside.

In this judgement”, this Tribunal neither recorded a specific finding nor did it give any directions with regard to who shall bear the liability of IDC and IEDC and remanded the matter to State Commission for a fresh look and also to develop mechanism after due stakeholder consultation.

5. In **T.N. Transmission Corpn. Ltd. v. CERC, 2024 SCC OnLine APTEL 129,** the Appellant-Tamil Nadu Transmission Corporation Limited was a

State Transmission Utility. The 1st Respondent was the Central Electricity Regulatory Commission. The 2nd respondent was the Power Grid Corporation of India Ltd., the inter-State transmission service provider. The 3rd Respondents was the generator-Bharatiya Nabhikiya Vidyut Nigam Limited connected to the evacuation line built by the 2nd Respondent. The Appeal related to true-up of tariff relating to 230 kV D/C Kalpakkam PFBR-Kanchipuram transmission line and 2 Nos. 230 kV Bays at Kanchipuram Sub-Station of Appellant under the transmission system associated with Kalpakkam PFBR (500 MW) Project.

The 2nd Respondent filed Tariff Petition 148/TT/2019 before the CERC for declaration of COD of 230 kV Kalpakkam - PFBR (Asset III) as 01.04.2014 under the 2014 Tariff Regulations and approval of its Transmission Tariff for Tariff block 2014-2019. The CERC, vide its order in Petition No 148/TT/2019 dated 04.03.2021, held that: (a) neither TANTRANSCO had completed the associated transmission bays under its scope nor BHAVINI had commissioned the generation project up to 01.04.2014; (b) COD of Asset-III was approved as 01.04.2014 under proviso (ii) of Regulation 4(3) of the 2014 Tariff Regulations; (c) as BHAVINI and TANTRANSCO were not ready on 01.04.2014, the transmission charges of the instant asset should be shared by BHAVINI and TANTRANSCO; therefore, the transmission charges from COD of the instant asset i.e., 01.04.2014 should be shared by TANTRANSCO and BHAVINI in equal proportion; after the commissioning of generation by BHAVINI or transmission system by TANTRANSCO, when the instant asset is put to regular use, the transmission charges of the instant asset shall be included in the POC computation.

Subsequently, the 2nd Respondent filed Petition No. 19/TT/2022 on 21.08.2021 for approval under Regulation 86 of the CERC (Conduct of Business) Regulations 1999 and the CERC (Terms and Conditions of Tariff) Regulations 2014 seeking true-up of the transmission tariff for 2014-2019 along with tariff for

the period 2019-2024 for the Kalpakkam PFBR transmission system (Asset I, II, &III). The CERC vide its order in Petition 19/TT/2022 dated 05.12.2022, approved True up of Annual Fixed Charges for the 2014-2019 period and Annual fixed Charges for the 2019-2024 Period for Kalpakkam PFBR transmission System (Asset I, II & III). With regard to sharing of Transmission charges of combined Asset I & II, the CERC held that it shall be borne by the 3rd Respondent BHAVINI from the date of commercial operation of the transmission Asset till COD of the first unit generating station as already held in the earlier orders of the CERC in Petition No 105/TT/2012 dated 29.04.2015 and in Petition No an/TT/2018 dated 29.01.2019, and as upheld by the judgment of this Tribunal in Appeal No 151 of 2015 dated 04.10.2018. With regard to sharing of transmission charges for Asset III, the CERC, in its order dated 05.12.2022, reaffirmed its earlier direction in order dated 04.03.2021 and reiterated that the same shall be shared by TANTRANSCO and the 3rd Respondent-BHAVANI in equal proportion. Aggrieved by the said order of the Central Commission passed in 19/TT/2022 dated 05.12.2022, the Appellant preferred the Appeal to this Tribunal.

It is in this context that this Tribunal held that the second proviso to Regulation 12 of the 2014 Tariff Regulations provided for a mismatch situation between the generator and the associated transmission system, and in case of delay of the generation project from the SCOD, then it is liable to pay for IDC or Transmission Charges if the transmission system is declared under commercial operation; however, the 2014 Tariff Regulations did not deal with a situation if, along with the generator, downstream or upstream system is delayed or only downstream system is delayed; accepting the contention of the Appellant that the second proviso to Regulation 12(2) as well as the Sharing Regulations 2010 mandated that only the generator was liable to pay till its COD, would mean that there was no obligation on the entity providing downstream/upstream system even if it was delayed, and they can default in their obligation without any liability

whatsoever, which was not correct; the referred Regulation of the 2014 Tariff Regulations also did not deal with a situation that, in case both the generation and the associated dedicated transmission system were commissioned but the downstream/upstream system was not commissioned, in such a case also the transmission system cannot be put to regular use, and whose liability would it be to pay for the Transmission charges for the transmission asset; in this situation neither the generator nor the beneficiaries were at fault to be mulcted with the liability of payment of transmission charges of associated transmission system, whose COD had been approved; though such a situation had not emerged in present lis, but it could be inferred that the liability for payment of 100% transmission charges in such a situation would rest with the defaulting entity that failed to provide the downstream system, thereby preventing the regular use of the transmission system; thus, they were not in agreement with the submission of the Appellant that the liability to pay 50% of the Transmission charges of Asset III on Appellant from 01.04.2014 till 28.02.2019 was contrary to the 2014 Tariff Regulations and 2010 Sharing Regulations, and that only the generator should be liable to pay 100 % of the transmission charges of Asset III.

6. In **POWERGRID v. M.P. Power Transmission Co. Ltd., (2025) 8 SCC 705,** the Supreme Court observed that Section 79 of the Electricity Act, 2003 enumerates the functions of the CERC which includes the dual functions of regulation and adjudication; Section 178 empowers CERC to enact regulations by notification thereby delegating to the body, the power of legislating statutory regulations; the aforesaid two provisions indicate that CERC functions as both the decision-making and regulation-making authority under Sections 79 and 178, respectively; while the authority exercising both these functions is one and the same, the functions by themselves are separate and distinct; the functions under Section 79 are administrative or adjudicatory whereas those under Section 178 are legislative; while the powers under Section 79 are to be exercised in

conformity with the statutory regulations under Section 178 wherever such regulations are applicable, there is no bar on the exercise of powers under Section 79 in a situation where a regulation under Section 178 has not been enacted in respect of a particular subject-matter; a Regulation under Section 178 is of general application to the entirety of a particular subject-matter as opposed to regulation on a case-to-case basis which may be done by the CERC under Section 79; making of a Regulation under Section 178 has the effect of interfering with and overriding existing contractual relationships between the regulated entities; orders under Section 79 should be confined to the existing statutory regulations and do not have the effect of altering the terms of contract between the specific parties before CERC; in **Energy Watchdog v. CERC, (2017) 14 SCC 80**, the Supreme Court held that Section 79(1) is the repository of the regulatory powers of CERC and such powers must be exercised in consonance with the guidelines or regulations under Section 178, however, if there are no such guidelines or regulations in place, it cannot be said that the hands of CERC are tied when it encounters a regulatory lacuna.

The Supreme Court, thereafter, observed that, in the case on hand, the CERC vide its orders dated 21-1-2020 in **POWERGRID v. M.P. Power Management Co. Ltd., 2020 SCC OnLine CERC 154,** and 27-1-2020 in **POWERGRID v. M.P. Power Management Co. Ltd., 2020 SCC OnLine CERC 147**, respectively, imposed the liability of payment of compensation for delay on to Respondent 1; it was the case of Respondent 1 that by doing so, CERC did not act in conformity with the 2014 Tariff Regulations which do not provide for payment of transmission charges by a party to whom the delay is attributable; the said argument does not hold any water; the Supreme Court's dictum in **PTC India Ltd. v. CERC, (2010) 4 SCC 603** and **Energy Watchdog v. CERC, (2017) 14 SCC 80**, respectively, settles the law in this regard and the absence of a regulation under Section 178 does not preclude CERC from exercising its powers

under Section 79(1) to make specific regulations or pass orders between the parties before it; the appellant in its petition before CERC had submitted that the delay was due to the delay in commissioning of the associated transmission lines which were in scope of Respondent 1 herein; it is in consequence to this prayer that CERC, though did not condone the delay, yet granted the liberty to the appellant to claim compensation from Respondent 1; Section 79 of the 2003 Act envisages dual function of regulation and adjudication to be performed by CERC; the expressions "*to regulate*", "*to determine*" and "*to adjudicate*" are used for different purposes in the list of matters enumerated under Section 79(1) and cannot be incorporated within the umbrella term of "adjudication"; in the case on hand, there is no contractual clause between the parties for establishing the risks of delay in commissioning of a transmission asset; there is also no uniform settled position as regards the liability of transmission charges payable before a particular transmission element is put in operation, in the form of regulations under Section 178; these circumstances, considered together with the prohibition on imposing liability of delayed payments on beneficiaries, leave a regulatory gap; this lacuna was recognised by APTEL in **Nuclear Power Corpn. of India Ltd. v. CERC, 2019 SCC OnLine APTEL 83** wherein the correctness of CERC's order was questioned; CERC, therein, had imposed the liability of transmission charges on the defaulting party on account of a transmission element not having been put to use by it, in the absence of a contractual arrangement between the parties; it was held that, in the absence of any specific provisions dealing with the situation in the 2014 Tariff Regulations or any other concurrent regulations under Section 178, CERC had prescribed a principle that the party to which the delay is attributable would be responsible for payment of the transmission charges for the period of delay not condoned.

After extracting the relevant portion of the order in **Nuclear Power Corpn. of India Ltd. v. CERC, 2019 SCC OnLine APTEL 83**, the Supreme

Court noted the averment of Respondent 1 that CERC could not conflate its powers of regulation with its adjudicatory functions and a regulation could not be brought into force by way of a judicial order, and observed that, in the light of the Supreme Court's dictum in **Airports Economic Regulatory Authority of India v. Delhi International Airport Ltd., (2024) 15 SCC 345**, it could not be said that there is a blanket ban on CERC to exercise its regulatory functions by way of orders under Section 79(1); even though the orders under Section 79 may not always be limpid as regards the matters where CERC is exercising its regulatory functions yet this cannot be the reason to conclude that CERC passes all orders in its capacity as an adjudicator; the nomenclature "*judicial order(s)*" as used in **Nuclear Power Corpn. of India Ltd. v. CERC, 2019 SCC OnLine APTEL 83,** does not change the nature of a specific order that CERC gives in its capacity as a regulator and the courts must understand the true import of an order to determine the nature thereof; though CERC's orders dated 21-and 27-1-2020, respectively, were for determination of tariff, yet the order granting liberty to the aggrieved appellant to claim compensation from the defaulting party was a consequence of a regulatory lacuna in the 2014 Tariff Regulations and therefore, was an instance of regulation of tariff between the parties; and CERC is empowered to order for imposition of transmission charges on the party to whom delay is attributable.

In **NRSS XXXI (B) Transmission Ltd. v. Central Electricity Regulatory Commission, 2020 SCC OnLine APTEL 72,** this Tribunal did not, nor could it have, overruled the earlier co-ordinate bench judgement of this Tribunal in **NTCL: (2019) SCC OnLine APTEL 83** or in **Punjab State Power Corporation Limited v. Patran Transmission Company Limited, 2018 SCC OnLine APTEL 66**. This Tribunal distinguished the aforesaid judgments, in **NTCL (2019) SCC OnLine APTEL 83** and **Patran Transmission Company Limited, 2018 SCC OnLine APTEL 66** on the ground that, in **NRSS XXXI (B)**

Transmission Limited: 2020 SCC OnLine APTEL 72, the Commission had held that the inability of the Appellant to commission its transmission system on time was because of force majeure events; since the Commission had itself allowed extension of COD under the terms of TSA, no liability could be fastened on the Appellant; and since these aspects which were not covered by the Regulations, the party which had delayed commissioning of its transmission system could not be mulcted with the liability to pay transmission charges to the utility which had commissioned its transmission asset on time. What this Tribunal failed to notice is that a force majeure event is in terms of what is prescribed in the TSA executed between the parties which are required to establish the transmission system and its contracting beneficiaries. The Transmission Supply Agreement provides for the consequences of failure to commission the transmission asset within time, including payment of liquidated damages and termination of the TSA. The effect of a force majeure event, and the consequences of the Commission recording a finding that force majeure events disabled the transmission utility from commissioning their transmission assets on time, is being dealt with later in this judgement.

Suffice it make it clear that we have not expressed any opinion on the observations of this Tribunal, in **NRSS XXXI (B) Transmission Ltd,** that, in some cases, the cost of transmission asset being implemented by the transmission utility which has delayed commissioning thereof, may well be a fraction of the cost of the transmission system implemented by the other transmission utility which has already commissioned its transmission asset and is entitled for transmission charges; and, in such cases, the licensee whose assets have been delayed may well end up paying transmission charges more than its project cost itself. What should happen in such a situation may necessitate a closer look, which exercise we have refrained from undertaking in these proceedings, as no such question arises for consideration in these appeals.

-In view of above deliberations, the issue is decided against the Appellant - BDTCL

DO SHARING REGULATION 2010 GOVERN BILATERAL MISMATCH CASES?

SUBMISSIONS URGED ON BEHALF OF APPELLANT - BDTCL

Learned Counsel on behalf of Appellant - BDTCL placing reliance on this Tribunal Judgement dated 09.05.2022 ***"Himachal Pradesh State Electricity Board vs. NRSS XXXI (A) Transmission Limited & Ors.; 2022 SCC OnLine APTEL 47*** ("**Himachal Judgement**"), submitted that in this judgement, this Tribunal has held that imposition of bilateral mismatch liability by CERC is in ignorance with the provisions of the Sharing Regulations 2010 – which clearly provide a mechanism of recovery of transmission charges from the PoC Pool in cases of bilateral mismatch. Learned Counsel for the BDTCL further submitted that in case this Tribunal decides that mismatch liability must be imposed on delayed entity despite being impacted by *Force Majeure* events, this Tribunal may put in place a mechanism, whereby the PoC Pool is an intermediary in the recovery transaction to ensure cash flows are not disrupted; i.e. the PoC Pool pays the said charges to the out-of-pocket impacted transmission licensee and then recovers the same from the 'delayed' entity.

SUBMISSIONS URGED ON BEHALF OF CERC

Learned Counsel on behalf of CERC submitted that the Central Electricity Regulatory Commission (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010 ("**Sharing Regulation 2010**") do not provide mechanisms for addressing mismatches or stranded lines and such an argument put forth on behalf of BDTCL is untenable, and has been consistently rejected by this Tribunal. This Tribunal in "***Patran Transmission Company Limited* vs. *Punjab State Power Corporation Ltd. & Ors.*, 2018 SCC OnLine APTEL 66**

("Patran Judgement"), **"*Nuclear Power Corporation of India Ltd.* V *CERC,* 2019 SCC OnLine APTEL 83 ("Nuclear Power Judgement"), *NRSS XXXI (B) Transmission Ltd* v *CERC,* 2020 SCC OnLine APTEL 72 ['NRSS XXXI'] and *Tamil Nadu Transmission Corporation Ltd.* vs. *CERC & Ors.* Appeal No. 140/2024, dated 11.12.2024 ['TAN TRANSCO'],** has held that the Sharing Regulations do not address mismatches or non-utilization, necessitating the Commission's intervention through regulatory powers. Indeed, on first principles, Regulations 7(1)(o) r/w Appendix I of the Regulations stipulates clearly that charges depend entirely on utilization. Hence, absence of utilization necessitates the Commission's regulatory intervention.

SUBMISSIONS URGED ON BEHALF OF PGCIL

Learned Counsel submitted that the Sharing Regulations, 2010 prevalent at the time of COD of instant assets, govern the sharing of ISTS transmission charges and losses for both the RTM and TBCB licensee once the mismatch period is over; transmission charges are then paid from the common "PoC pool". In the said Regulations, there is no provision laying down the mechanism for sharing of transmission charges in the event of commissioning mismatch of inter-linked transmission assets. As such, by exercising its regulatory powers from time to time, the CERC has put in place the principles for servicing the transmission asset stranded on account of such mismatch. This exercise of regulatory powers in the absence of regulations has been approved in **"PTC India Ltd. Vs. CERC" [(2010) 4 SCC 603]** and reiterated by this Tribunal in **"*Punjab State Power Corporation Ltd. & Ors.,* 2018 SCC OnLine APTEL 66 ("Patran Judgement")**,**.**

CONSIDERATION AND OUR VIEW

Appellant- BDTCL has contended that Impugned Orders are in contravention of Sharing Regulation 2010, per contra, it has been contended on behalf of CERC that Impugned Orders are as per the binding precedent of this Tribunal's judgement and sharing regulation 2010 do not govern mismatch/ stranding cases.

The *Point of Connection (PoC) mechanism* under the CERC Sharing Regulations, 2010 established **a framework** for sharing inter-State transmission charges and losses. Chapter 2 of the Sharing Regulation 2010 defines the scope of the Regulation, as reproduced below:

> ***"CHAPTER 2: SCOPE OF THE REGULATIONS***
>
> *3. Yearly Transmission Charges, revenue requirement on account of foreign exchange rate variation, changes in interest rates etc. as approved by the Commission and Losses shall be shared amongst the following categories of Designated ISTS Customers who **use** the ISTS: -*
>
> *[(a) Generating Stations (i) which are regional entities as defined in the Indian Electricity Grid Code (IEGC) or (ii) are having LTA or MTOA to ISTS and are connected either to STU or ISTS or both;*
>
> *(b) State Electricity Boards/State Transmission Utilities connected with ISTS or designated agency in the State (on behalf of distribution companies, generators and other bulk customers connected to the transmission system owned by the SEB/STU/intra-State transmission licensee);*
> *(c) Any bulk consumer directly connected with the ISTS, and*
> *(d) Any designated entity representing a physically connected entity as per clauses (a), (b) and (c) above."*

Chapter 3 provides for **"PRINCIPLES AND MECHANISM FOR SHARING OF ISTS CHARGES AND LOSSES"** and Chapter 4 titled **"PROCESSES FOR**

SHARING OF TRANSMISSION CHARGES AND LOSSES" deals with the principles, mechanism and methodology for sharing of transmission charges and losses. It is understood from the basic philosophy of POC based transmission pricing, described in Annexure –I of Sharing Regulation 2010, that it allocates costs based on distance, direction, and quantum of electricity flow, ensuring fairness, efficiency, and non-discrimination across all grid participants. Objective of the sharing Regulation, 2010 was to move away from the earlier *postage stamp method* (equal sharing regardless of usage) and create a national transmission tariff framework that reflects actual usage of the grid. Transmission charges are linked to how much and in which direction power flows through the grid; Longer transmission paths attract higher charges, discouraging inefficient sourcing; transmission charges vary depending on whether power flows from surplus to deficit regions. To determine the sharing of transmission charges, load flow based methodology is used. Thus, the very premise/ foundation of POC mechanism under Sharing Regulation 2010, is to determine sharing of charges on utilisation of transmission network by Designated inter-State Customers.

Regulation 8 of Sharing Regulation 2010 deals with the "Determination of specific transmission charges applicable for a Designated ISTS Customer (DIC), in which sub – regulation 5 deals with the consequences of delay of a generating station or unit from the date the Long-Term Access granted to it has become effective. Our attention has not been drawn to any specific regulation which deals with the consequences of delay in commissioning of the transmission element on account of the other Transmission Licensee.

The relevant paragraphs of **"Himachal Judgement",** *(supra),* reliance on which has been placed by the BDTCL are reproduced below :

"34. From, the above, it is clear that the decision of the CERC upheld by the Tribunal was based on the condition that the Central Commission under its Regulatory powers has laid down a principle as the relevant regulation does not have any provision for recovery of transmission charges, once the ISTS system is put to use. However, the LTTCs, the beneficiaries have indicated that the TSA and the relevant Regulations have necessary provisions and there is no difficulty in implementing the provisions contained therein. Further, this Tribunal has observed that:

"15. After having a careful examination of principle submissions of the rival parties on various issues raised in the instant Appeal, our observations are as follows:—

a) The present case pertains to the decision of the Central Commission making the Appellant liable to pay the transmission charges to the Respondent No. 1 for the period from SCOD i.e. 11.11.2016 till the commissioning of the downstream assets by PSTCL in May, 2017.

b) On Question No. 9 (a) i.e. Whether a recovery can be sought to be made from the Appellant which is neither authorised in law nor in contract?, we decide as follows:

(v) The Central Commission has submitted that the statutory basis for the decision by the Central Commission to assign liability on the Appellant for payment of transmission charges is based on the Hon'ble Supreme Court's judgment dated 15.3.2010 in SLP (C) No. 22080/2005 in case of PTC India Ltd. v. CERC, (2010) 4 SCC 603. After perusal of the said judgment we find that it has been held that the Central Commission is the decision-making Authority under Section 79(1) of the Act and such decision making or taking steps/measures under the said Section of the Act is not dependent upon making of regulations under Section 178 of the Act. It is further stated in the judgment that if any regulations are framed by the Central Commission under Section 178 of the Act then the decision of the Central Commission has to be in accordance with the said regulations.

Accordingly, in absence of specific provisions in the Sharing Regulations/Tariff Regulations, 2014 to deal with the situation under question the Central Commission through exercise of its regulatory power has prescribed a principle for sharing of transmission charges of the Transmission System of the Respondent No. 1 in the Impugned Order.

Thus, it is observed that by way of exercising its regulatory power by a way of judicial order(s) the Central Commission has laid down the principles of payment of transmission charges in such an eventuality.

c) However, we observe that these type of major issues ought to have been covered under Regulations by the Central Commission to plug the gaps, which would avoid litigations. The importance of the same was considered by the Central Commission at one point of time in its order dated 5.8.2015 and directed its staff for appropriate amendments in the Tariff Regulations, 2014. Till date no such modifications have been carried out by it in the Regulations. It is also observed that there are many regulatory/judicial orders of the Central Commission to deal with the situations like in the present case."

35. We are of the opinion that the said judgment is not relevant here as there is no difficulty in implementing the CERC Sharing Regulations to the extent of recovery of charges as also agreed by the beneficiaries including the Respondent no. 1. As per the Hon'ble Supreme Court's judgment dated 15.3.2010 as quoted above, that if any regulations are framed by the Central Commission under Section 178 of the Act then the decision of the Central Commission has to be in accordance with the said regulations.

36. Therefore, the regulatory powers can be used only if no express provision is available in implementing the contract. It is seen that the Central Commission has decided that no such provision exists even when it is pointed out by all the parties that there are enough provisions existing for the implementation of the contract and the recovery of the charges."

In **Himachal Pradesh State Electricity Board vs. NRSS XXXI (A) Transmission Limited: (2022) SCC OnLine APTEL 47**, this Tribunal again did not, nor could it have, overruled its earlier decision in **NTCL: (2019) SCC OnLine APTEL 83** or in **Punjab State Power Corporation Limited v. Patran Transmission Company Limited, 2018 SCC OnLine APTEL 66**. This Tribunal, however, held (in Para 36 of the said judgement) that regulatory powers could be used only if no expressed provision is available in implementing the contract; the Central Commission had decided that no such provision existed

even when it was pointed out by all the parties that there were enough provisions existing for the implementation of the contract and recovery of charges.

As noted earlier in this judgement, the Transmission Supply Agreement is between the defaulting party and its LTTCs/ beneficiaries. The other transmission utility, which had commissioned its transmission asset on time, is not a party to the said Agreement. In fact, there exists no contractual relationship between both these transmission utilities. This Tribunal in **Himachal Pradesh State Electricity Board**, even without considering this aspect and without examining the relevant provisions in the Regulations or in the Transmission Supply Agreement has, by merely holding that all the parties had agreed that provisions existed for implementation of the Regulations/Contract, set aside the judgement of the Commission.

The judgment of this Tribunal, in **Himachal Pradesh State Electricity Board**, is neither preceded by any reason nor is reference made therein to any particular provision of the Regulations or in the Agreement between the parties. The said judgement does not amount to a declaration of law or authority of a general nature constituting a binding precedent. The opinion expressed in the said judgment is without a reference to, much less on an analysis of the statutory or contractual provisions, and is a mere ipsi-dixit of this Tribunal. A decision is binding not because of its conclusions, but in regard to its ratio and the principles laid down therein. Any declaration or conclusion, arrived at without being preceded by any reason, cannot be deemed to be the declaration of law or authority of a general nature binding as a precedent. A decision rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority' is not a binding precedent. (**Lancaster Motor Company (London) Ltd. v. Bremith Ltd; (1941) 2 All ER 11)** Precedents sub-silentio and without argument are of no moment'. A decision, which is neither

founded on reasons nor it proceeds on a consideration of an issue, cannot be deemed to be a law declared to have a binding effect. That which escapes in the judgment without any occasion is not the ratio decidendi. A decision is binding not because of its conclusions but in regard to its ratio, and the principles laid down therein'. Any declaration or conclusion without being preceded by any reason cannot be deemed to be the declaration of law or authority of a general nature binding as a precedent. (**Jaisri Sahu v. Rajdewan Dubey; AIR 1962 SC 83; Municipal Corporation of Delhi v. Gurnam Kaur (1989) 1 SC 101; B. Shama Rao v. Union Territory of Pondicherry AIR 1967 SC 1480; State of Uttar Pradesh v. Synthetics and Chemicals Ltd. (1991) 4 SCC 139).** A mere direction of the Court without considering the legal position is not a precedent. (**Vishnu Dutt Sharma v. Manju Sharma (2009) 6 SCC 379).** The view, if any, expressed without analyzing the statutory provision cannot be treated as a binding precedent. (**N. Bhargavan Pillai v. State of Kerela (2004) 13 SCC 379)**. Uniformity and consistency are undoubtedly the core of judicial discipline. But that which escapes in the judgment without any occasion is not the ratio decidendi. (**Synthetics and Chemicals Ltd. (1991) 4 SCC 139; Gurnam Kaur (1989) 1 SC 101**).

Restraint in dissenting or overruling is for the sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law. (**Synthetics and Chemicals Ltd. (1991) 4 SCC 139**; **B. Shama Raov. Union Territory of Pondicherry AIR 1967 SC 1480; Rachakonda Nagaiah v. Govt. of A.P., 2012 SCC OnLine AP 447; Mandava Rama Krishna v. State of A.P., 2014 SCC OnLine AP 294).** Further, when the Court proceeds on the basis of a concession then the decision cannot have a binding precedent inasmuch as it cannot be held to be a declaration of law. (**Kulwant Kaur v. Gurdial Singh Mann: (2001) 4 SCC 262).** The very fact that this Tribunal proceeded on the concession of Counsel on all sides that there exists such a regulation or a

contractual provision, without examining whether there is in fact any such provision, would dilute its binding effect as a precedent in other cases. Reliance placed on behalf of the Appellant, on **Himachal Pradesh State Electricity Board vs. NRSS XXXI (A) Transmission Limited,** is therefore of no avail.

This Tribunal, in its various judgements have held that Sharing Regulation 2010 do not address the mismatch issue as referred below:

a)Judgement dated 14.09.2020 in ***NRSS XXXI (B) Transmission Ltd. vs. CERC & Ors.*** **2020 SCC OnLine APTEL 72** ("**NRSS Judgement**"), specifically notes at para 8.21 that Appellant could not have been aware of its liability *" particularly when there is no such provision in the sharing Regulation which the Appellant could have made itself aware of before bidding the project"* .

b)Judgement dated 11.12.2024 **"Tamil Nadu Transmission Corporation Ltd. vs. CERC & Ors; 2024 SCC OnLine APTEL 129 ("TAN TRANSCO Judgement")**, under Para 39 notes that "There is no stipulation in the sharing regulation that when a transmission element's COD is approved and is eligible to receive its transmission charges, but is not put to use due to combined default of Generator and other transmission licensee, who shall bear the transmission charges as beneficiaries/long term customers can be made liable to pay only after commercial operation of generator"

c) Judgement dated 27.03.2018 in "***Patran Transmission Company Limited*** **vs.** ***Punjab State Power Corporation Ltd. & Ors.,*** **2018 SCC OnLine APTEL 66 ("Patran Judgement")** ; In this judgement, issue of affixing the liability for payment of transmission charges of a transmission line in the absence of it being put to use due to delay in generation project is deliberated. This Tribunal after analyzing the scope of Sharing Regulation 2010, acknowledges that

"Accordingly, in absence of specific provisions in the Sharing Regulations/Tariff Regulations, 2014 to deal with the situation under question the Central commission through exercise of its regulatory power has prescribed a principle for sharing of transmission charges of the Transmission System of the Respondent No. 1 in the Impugned Order ".

In view of above deliberation, we do not find merit in the submissions of Appellant – BDTCL that Sharing Regulations 2010 has provision to deal with bilateral mismatch as in the present case.

Thus as held in above preceding paragraphs the "Tariff Regulation 2014" and "Sharing Regulation 2010' do not have provisions/consequences when there is mismatch in commissioning of transmission elements of two transmission licensee, however it is observed from Regulation 12 (2), of Tariff Regulation 2014, that when there is mismatch between generation and transmission licensee, the consequential relief granted to either party is not passed on to the beneficiaries by way of enhanced tariff but the defaulting party is to compensate. In the absence of provisions for mismatch between the commissioning of transmission elements of two transmission licensee under the relevant Regulation, drawing parallel with the provision available in Tariff Regulation 2014 with regard to generation and transmission mismatch, there is no error committed by CERC in mulcting the liability of payment of transmission charges on the defaulting transmission licensee utilizing its regulatory power under Section 79 (1) of the Electricity Act 2003. Exercise of regulatory power, in the absence of Statutory Regulations governing the field, has been approved by the Supreme Court in **"PTC India Ltd Vs CERC" (2010) 4 SCC 603).** Paragraph 56 of the said Judgement is reproduced below:

> ***"56.*** *Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulations under Section 178".*

CAN THE LIABILITY OF PAYMENT OF TRANSMISSION CHARGES BY BDTCL / PGCIL IMPOSED AS PER IMPUGNED ORDERS BE AFFIXED ON POC POOL I.E. THE BENEFICIARIES AND THE LTTCs under TSA

SUBMISSIONS URGED ON BEHALF OF BDTCL

It is submitted that CTUIL routinely enters into a model transmission services agreement ("**Model TSA**") approved by the CERC vide Order dated 29.04.2011 with all the beneficiaries of the ISTS system, who are liable to pay transmission charges for its use. In terms of the Model TSA, both BDTCL and PGCIL have privity of contract with the PoC Pool in their individual capacities as inter-State transmission licensees. However, it is only PGCIL, which is empowered by the regulatory framework to pass through the financial impact of *FM* events to the PoC Pool –in accordance with the Tariff Regulations 2014. Therefore, any liability towards payment of transmission charges/ IDC and IEDC to PGCIL, can only be fastened on the PoC Pool and no other entity. Further, in response to CSPTCL's query regarding sharing of transmission charges of each element of BDTCL's project between the LTTCs, CERC in the Order dated 28.10.2011 in Petition No. 108 of 2011/ (BDTCL's tariff adoption order) has clarified that sharing of transmission charges shall be governed by the Sharing Regulations 2010. Pertinently, the Sharing Regulations 2010 do not provide for imposition of transmission charges on an inter-connecting licensee, and only provide for

recovery of transmission charges from the PoC Pool. Learned Counsel further submitted that Supreme Court judgement dated 03.03.2016 in **"Power Grid Corporation of India Limited vs Punjab State Power Corporation Limited & Ors"; (2016) 4 SCC 797** ("***Barh-Balia Judgement")*** is inapplicable to the facts and issues in the present Appeals on account of :

a) The scope of the "*Barh-Balia Judgement*" was limited to determining the date of COD of PGCIL's Barh-Balia transmission line by analyzing when each element of the said line was energized and it does not consider the question of bilateral mismatch liability between transmission licensees at all – let alone in cases where bilateral mismatch has occurred on account of *FM* events, as in the present Appeals. The sole issue considered by this Tribunal in its Judgement dated 02.07.2012 in Appeal No. 123/2011, **"*Punjab State Power Corporation Limited Vs PGCIL and Ors*.,** which was disposed of vide the "Barh-Balia Judgement", is excerpted below for reference:

"7. We have heard the Ld. Counsel for the Appellant and the Respondent no.1 on the above issue and carefully considered their rival contentions. In the light of their submissions, ***the only issue that is to be decided by us is as under****:-*

"Whether on idle charging of a new transmission line connecting a sub-station of a transmission licensee to a generating station of a generating company from one end when the switchgear and metering and protection system at the generating station end is not made ready by the generating company, could it be declared as having achieved the COD for recovery of transmission charges from the beneficiaries?""

b) The *"Barh - Balia Judgement*" does not consider bilateral mismatch liability in the context of Section 63 (TBCB transmission projects) projects, which are contractually governed by the provisions of the TSA executed between

the transmission licensee and its LTTCs, and not by any tariff regulations. The *"Barh-Balia Judgement"* cannot be read to override all contractual protections granted to BDTCL under its TSA.

c) The "*Barh -Balia Judgement*" does not examine the imposition of bilateral mismatch liability in case the interconnecting entity is 'delayed' due to *FM* events. It would be inapposite to rely on the "*Barh - Balia Judgement*" to resolve the present case of mismatch where two inter-connected transmission licensees, for both Section 62 and Section 63 projects, are admittedly impacted by FM events.

d) The analysis in the judgement is confined to an interpretation of Regulation 3(12)(c) of the CERC (Terms and Conditions of Tariff) Regulations, 2009 ("**Tariff Regulations 2009**") and cannot be read to apply to future tariff control periods. In both the present Appeals, PGCIL's interconnecting transmission assets are governed by the "Tariff Regulations 2014" applicable for the 2014-19 control period.

e) The Judgement at para. 10 observes that if the switchgear of a transmission line is not installed, the said line cannot be termed as 'completed' in terms of the spirit of the definition of "transmission lines" under Section 2(72) of the Act - even if such switchgear was not in the scope of the transmission licensee developing the transmission line. If the said obiter observation is applied in a blanket fashion to all transmission mismatch cases where there is no actual power flow despite the transmission asset being ready in all other respects, it would amount to setting aside the very concept of Deemed COD in the entire transmission sector notwithstanding whether a project is governed by Section 62 or Section 63 of the Act. It is humbly submitted that such an interpretation cannot prevail, and if adopted, would in effect set at naught all deemed commercial operations claimed by PGCIL from the

advent of the Electricity Act, 2003.

SUBMISSION URGED ON BEHALF OF PGCIL

Learned Counsel reiterated that the Tariff for the transmission assets of PGCIL, is determined in accordance with the provisions of then applicable Tariff Regulations, 2014, and in case the transmission system or an element thereof is prevented from being put to regular service on account of a delay of commissioning of the upstream or downstream (inter-connected) transmission system, then, as per 2nd proviso to Regulation4(3), the transmission licensee can approach the CERC for approval of COD of such transmission system or an element thereof and upon such COD approval, PGCIL is entitled to receive transmission charges for its commissioned assets. Whereas, for a TBCB (Tariff Based Competitive Bidding) licensee such as BDTCL, the tariff discovered under the competitive bidding process is adopted by the CERC under Section 63 of Electricity Act 2003. The TBCB licensee enters into a Transmission Service Agreement (TSA) with its LTTCs who agree to use the system on payment of transmission charges. Unlike an RTM licensee, the TBCB licensee does not require regulatory approval from the CERC for declaring COD of its transmission system in the event of any mismatch or otherwise; its COD or deemed COD is a contractual milestone which is achieved in the manner prescribed in the TSA; which shows that such COD (or deemed COD) is achieved 72 hours following the connection of the Element with the Interconnection Facilities or 7 days after the date on which it is declared by the TSP to be ready for charging but is not able to be charged for reasons not attributed to the TSP. Once any Element of the system is declared to have achieved deemed COD, it is eligible for payment of monthly transmission charges applicable for such element. Accordingly, mismatch

charges for a TBCB licensee are paid to it by its LTTCs under contractual binding provisions as per Article 6.2.2 of the TSA. As per Article 4.2 of TSA, the LTTCs, at their own cost and expense, are required to provide inter-connection facilities to the TBCB licensee so that the transmission system may be connected and made operational. There is a provision in TSA for payment of liquidated damages by the TSP for delay in achieving COD of the project however, in the event that an Element or the system cannot be commissioned by its scheduled COD on account of any *Force Majeure*, extension in scheduled COD on a day-to-day basis is provided for a maximum period of 180 days; an extended SCOD relieves the TSP from liability to pay any liquidated damages to its LTTCs. However, this issue of *Force Majeure* is between the TSP and its LTTCs and, in the absence of contractual privity, has no relation with the stranding of PGCIL assets caused due to any commissioning mismatch.

It is submitted that CERC has failed to consider the provisions of Article 6.2.2 of the TSA and has wrongly imposed the mismatch liability on PGCIL, which liability is in fact to be contractually discharged by its LTTCs. In terms of the CERC tariff adoption Order dated 28.10.2011 provisions of the Sharing Regulations became applicable for payment of transmission charges under the TSA. However, since the Sharing Regulations come into force only when the transmission asset is put into regular service, therefore, for the period prior to regular service of BDTCL assets on 13.6.2015, it is the provisions under the TSA (Article 6.2.2) that govern the payment of mismatch charges being affixed on PGCIL vide Impugned Order 2 dated 25.06.2018. Referring to the Patran Judgement, learned counsel submitted that Liability at times has been imposed on LTTC-PSPCL (distribution utility of Punjab) and not the downstream inert-linked Licensee PSTCL (the transmission utility in Punjab), who has been held liable to pay mismatch charges.

While in case of Impugned Order 1 for RTM (Regulated Tariff Mechanism) Licensee i.e. PGCIL, liability has been rightly affixed on Appellant – BDTCL in terms of the Tariff Regulation read with various orders of CERC governing the issue of mismatch and servicing of the commissioned transmission assets.

With regard to applicability of Supreme Court's **" Barh-Balia Judgement"** , (*Supra),* it is submitted that Supreme Court while observing *in para 10* that for commissioning of a transmission line, switchgear and other works which are part of the said line must also be completed, held that the beneficiaries cannot be made liable to pay for the transmission tariff before transmission line was operational; same is not applicable in the present case as the referred judgement is in the context of mismatch between a generating station and a transmission line (and not two inter-linked transmission licensees) for which provision exists in the Sharing Regulations. Further there was no consideration of the deemed COD provision in cases of mismatch and its impact on transmission charges payment. The liability in the judgement is considered from the point of view of a beneficiary i.e. a Designated ISTS Customer under the Sharing Regulations, who pays the PoC charges and not from the point of view of an LTTC who, as a signatory to the TSA, is a user of the TBCB transmission asset and agrees to pay mismatch charges under Article 6.2.2; The "*Barh-Balia Judgement*" has been passed considering Regulation 3(12) of Tariff Regulations, 2009 and not Regulation 4(3) of Tariff Regulations, 2014, wherein the provision regarding COD approval for an RTM licensee is different. Further the judgement has not dealt with the issue of *Force Majeure* faced by the transmission licensees (and condoned by the CERC) which leads to a situation of mismatch with the transmission assets of an inter-connected transmission licensee.

SUBMISSION URGED ON BEHALF OF CERC

With regard to Impugned Order 2 dated 25.06.2018, in which liability has been affixed on PGCIL for payment of transmission charges of BDTCL for the mismatch period; PGCIL's reliance on Clause 6.2.2 of BDTCL's TSA, asserting that Long-Term Transmission Customers (LTTCs) become liable in cases of regulatory lacunae, is misplaced. The Supreme Court in **"*PTC India Ltd.* vs. *CERC"* (2010) 4 SCC 603** has conclusively ruled that regulations supersede contractual terms. The implementation of the Sharing Regulations has rendered corresponding TSA clauses regarding sharing of transmission charges redundant and inoperative. The Sharing Regulations 2010 read with "*Barh-Balia* Judgement" *(Supra)* leads to the conclusion that transmission charges for the unutilized asset cannot be levied on beneficiaries/LTTCs. PGCIL's reading of the "***Patran* judgment***" (supra)* is also not correct. In *Patran Judgement,* the Tribunal supported the Commission's principle as laid down in *Nuclear Power,* emphasizing that only a defaulting entity is liable for charges related to delayed or stranded assets. Crucially, in *Patran Judgement,* relying on *Barh-Balia Judgement,* this Tribunal underscored that beneficiaries and LTTCs cannot be held liable without demonstrated responsibility or default. The Tribunal in *Patran* identified a special clause within the TSA applicable to Patran Transmission that explicitly imposed interconnection responsibilities on particular LTTC, thus delineating clear liability based on factual circumstances. In fact *Patran Judgement* did not impose liability on all LTTC's that would have been covered by the clause of the TSA, but only on the defaulting LTTC. The Tribunal's decision in *Patran* neither introduced nor supported any broader doctrine assigning liability to LTTCs without fault.

SUBMISSION URGED ON BEHALF OF CTUIL

Learned Counsel submitted that plain reading of the provisions of sharing Regulation, makes it clear that only such portion of ISTS, which is commercial operation, shall be administered (Billing Collection and Disbursement), in terms of the provisions of sharing Regulation. In the instant appeals; due to certain force majeure events the relevant elements of the ISTS network being developed by PGCIL and BDTCL could not achieve commissioning due to the other elements not being ready. Therefore, billing, collection and disbursement cannot happen in terms of the provisions of the Sharing Regulations, 2020.

With regard to the contention of BDTCL/PGCIL that they are absolved of their liability of payment of each other charges, since the delay in their respective interconnection elements is on account of Force Majeure, it is submitted that consequences of *Force Majeure* is no longer res-integra and the law in relation to force majeure as laid down by courts and followed by this Tribunal that an event of force majeure has pre-defined consequences. For a project under the tariff based competitive bidding basis, the relief of force majeure is clearly identified in the contract which in the instant appeal would be the Transmission Services Agreement ("TSA"). A force majeure event in the TSA will not extinguish liability that arises otherwise than in terms of the TSA including *but not limited to payment of transmission charges under any other contracts and/or Regulations.*

It is settled law that the relief claimed qua an event of force majeure in a contract such as a TSA must flow from and be strictly in terms of the contract itself. A party cannot be allowed to claim reliefs beyond what is envisaged in the contract which incorporates the provisions relating to force majeure. This is because if a party is allowed to do so, then it will frustrate the sanctity of the contract between the parties that has been held to be paramount. One of the parties would have to

then relieve the other party to the contract over and beyond what it had initially envisaged to do. This strikes at the root of the concept of sanctity of contract.

Supreme Court in **"Energy Watchdog v. CERC", ((2017) 14 SCC 80)** has laid down the law governing force majeure clauses in India, and it has been held that the relief flowing from such force majeure clauses must be one that is an express or at the least implied clause in a contract . It is submitted that relief of force majeure is a contractual right which must flow from the contract itself. The relief obtained from such occurrence of event of force majeure as well as the very question of an occurrence of event falling under the purview of force majeure must be examined in terms of the contract entered into between the parties. The Petitioner cannot use force majeure relief to claim exemption from paying transmission charges which are payable in terms of Sharing Regulations".

Supreme Court in "***Power Grid Corporation of India Limited v. Punjab State Power Corporation Limited & Ors.'; ((2016) 4 SCC 797),*** has held that the beneficiaries cannot be made liable towards the payment of charges prior to the actual utilization/commissioning of the transmission assets.

This Tribunal in its Judgement **"Fatehgarh Bhadla Transmission Co. Ltd. v. CERC"; ((2023) SCC OnLine APTEL 16)** had specifically considered the issue that in the event of *Force Majeure*, whether the liability of transmission charges for the mismatch period be imposed on the consumers, and it has been held in the judgement that no liability for payment of transmission charges can be fastened upon the beneficiaries/consumers of the transmission system till they start receiving power through the commissioned inter-connected transmission assets. It was also held in the judgement that where more than one inter-State transmission licensee is involved, and the transmission system of one is delayed and the DICs do not receive power through the inter-connected transmission assets, fastening liability of payment of transmission charges on the DICs when

they have not received any benefit would be wholly unjustified. It has been held that force majeure is a relief under contract while sharing of transmission charges is a statutory duty. A force majeure relief under a contract cannot be said to subsume all liabilities of a party including statutory liabilities. This Tribunal in the aforesaid judgement also observed that transmission planning involves a complex network of assets being developed by RTM Licensee and TBCB licensee terminating at each other ends. In such cases, upon occurrence of a mismatch the delaying licensee would be liable to compensate the licensee whose assets are not being put to 'regular service' because of non-availability of interconnection facilities.

CONSIDERATION AND OUR VIEW

Learned Counsel on behalf of PGCIL, referring to article 6.2.2 of TSA has contended that liability of Transmission charges for the mismatch period (liability affixed on PGCIL under Impugned Order 2) should be affixed on LTTCs under TSA. The relevant Article 6.22 is reproduced below :

> *"Article 6.2.2*
>
> *Once any Element of the Project has been declared to have achieved deemed COD as per Article 6.2.1 above, such Element of the Project shall be deemed to have Availability equal to the Target Availability till the actual charging of the Element and to this extent, shall be eligible for payment of the Monthly Transmission Charges applicable for such Element."*

It is an admitted fact that TSA between LTTCs and BDTCL has been signed prior to Sharing Regulation 2010, wherein LTTCs have agreed for payment of transmission charges for various elements of the BDTCL project. Our attention has been drawn to the fact that, the CERC, in its order dated 28.10.2011 in

Petition No 108 of 2011/ BDTCL's tariff adoption order, has clarified that sharing of transmission charges shall be governed by the sharing Regulation 2010. Though TSA was signed by LTTCs assuming responsibility of payment of transmission charges upon declaration of COD / Deemed COD, however, once the Sharing Regulations have been made effective from 01.07.2011, corresponding TSA clauses regarding sharing of transmission charges becomes inoperative and stands superseded by the provisions of Regulations, as held by Supreme Court in **"PTC India Ltd. v. Central Electricity Regulatory Commission", (2010) 4 SCC 603** that sub-ordinate legislation can override existing contracts and existing contracts have to be got aligned with the extant Regulations. Relevant Paragraph of the judgement reproduced below :

> ***"58.*** *One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case-to-case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognised, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate legislation. Such subordinate legislation can even override the existing contracts including power purchase agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an order of the Central Commission under Section 79(1)(j)"*
>
> .

Thus, contractual liability of LTTCs, to pay for the transmission charges for BDTCL project as per TSA gets over written by the provisions of sharing Regulation. As the issue involved in the present case pertains to sharing of transmission charges for *DV* line of BDTCL upon declaration of its COD, and as

the liability of the LTTCs to pay yearly transmission charges under the Sharing Regulations 2010 is only on their using the transmission lines, we do not find merit in the submissions of PGCIL, that it is the LTTCs, who are liable to pay for the transmission charges due to mismatch, for the period prior when said line is put to use, or that it becomes part of PoC Pool.

Learned Counsels for both BDTCL and PGCIL have contended that the ratio decided in Supreme Court "Barh-Balia Judgement" is not applicable as the referred judgement has not dealt with the mismatch between two transmission entities, the effect of Force Majeure resulting in mismatch between commissioning.

In the referred "**Barh-Balia Judgement"** *(supra)* judgement, declaration of Commercial Operation of PGCIL line and affixing the liability of payment of transmission charges on the beneficiary in the absence of Commissioning of corresponding generation unit of NTPC has been decided. Though the Judgement has not specifically dealt with the issue whether, generation project of NTPC was delayed on account of Force Majeure Issue, but it unequivocally lays down the principle that beneficiaries including the Respondent (PSPCL) cannot be made liable to pay for this delay as energy has not started on the said line. Relevant Paragraph of the order quoted below:

> *"10. We have considered the rival submissions. Sub-section (72) of Section 2 of the Electricity Act, 2003 defines the words "transmission lines", which reads as under:*
>
> *"2. (72) "transmission lines" means all high pressure cables and overhead lines (not being an essential part of the distribution system of a licensee) transmitting electricity from a generating station to another generating station or a substation, together with any step-up and step-down transformers, switchgear and other works necessary to and used for the control of such cables or overhead lines, and such buildings or part thereof*

as may be required to accommodate such transformers, switchgear and other works;"

From the above definition, it is clear that switchgear and other works are part of transmission lines. In our opinion, Regulation 3(12) of the 2009 Regulations cannot be interpreted against the spirit of the definition of "transmission lines" given in the statute. It is evident from the record that it is not a disputed fact that switchgear at Barh end of Barh-Balia line for protection and metering were to be installed by NTPC and the same was not done by it when transmission line was completed by the appellant. As such the appellant might have suffered due to delay on the part of NTPC in completing the transmission lines for some period. But beneficiaries, including Respondent 1, cannot be made liable to pay for this delay w.e.f. 1-7-2010 as the energy supply line had not started on the said date."

The appeals were dismissed without prejudice to the right of PGCIL to claim relief, if any available to it under Law against NTPC, relevant paragraph is reproduced below :

"12 Since we are in agreement with the Tribunal that in the present case, b Respondent 1 and the beneficiaries could not have been made liable to pay the tariff before transmission line was operational, we find no infirmity in the impugned order. Therefore, the appeals are liable to be dismissed. Accordingly, both the appeals are dismissed without prejudice to the right of the appellant, if any, available to it under law, against NTPC. There shall be no order as to costs"

Thus, the "Barh-Balia Judgement" lays down the principle that beneficiaries cannot be made liable to pay for the transmission line if the said asset is not put to use; without prejudice to the right of affecting party i.e PGCIL against the defaulting party i.e NTPC, as available under law. This principle squarely cover the issue in present Appeals with regard to affixing the liability of payment of transmission charges on the defaulting party, till such asset (s) is put to use.

In "Patran Judgement (*supra*), reliance on which has been placed by PGCIL, this Tribunal upheld the principle laid down by the Commission that only a defaulting

entity is liable to pay for the charges related to delayed or stranded assets, and that beneficiaries and LTTCs cannot be held liable for mismatch liability in accordance with “Barh-Balia Judgement”. The *Patran Judgement* did not impose liability on the LTTC's covered by the clause of the TSA, but only on the defaulting LTTC, who was held responsible for providing interconnection facility as per TSA. Significantly, in the present case, both PGCIL and BDTCL are ISTS licensees without any LTTC assigned specific responsibility or liability for ensuring performance. This Tribunal's decision in *Patran* neither introduced nor supported any broader doctrine assigning liability to LTTCs without fault. The *Patran* judgment distinctly and explicitly approved the Central Commission's finding in Nuclear Power Judgement.

As noted hereinabove, both in **NTCL: (2019) SCC OnLine APTEL 83** and in **Punjab State Power Corporation Limited v. Patran Transmission Company Limited, 2018 SCC OnLine APTEL 66,** this Tribunal has affirmed the order passed by the Commission upholding the principles (*i*) LTTCs/ beneficiaries are liable to pay transmission charges only when the transmission system was being used or put to use; (*ii*) the liability to pay transmission charges fell on the LTTC on whose account the transmission system could not be put to use; and (*iii*) in the absence of a specific provision in the Sharing Regulation/ Tariff Regulation, the Commission could exercise its regulatory powers to assign liability for payment of transmission charges on the entity which had delayed in commissioning its transmission asset.

As noted hereinabove, the regulatory orders passed by the CERC both in **NTCL: (2019) SCC OnLine APTEL 83** and in **Punjab State Power Corporation Limited v. Patran Transmission Company Limited, 2018 SCC OnLine APTEL 66** would require the same principles to be applied in the present case also. Since a regulatory order passed by the Commission was already in force

by the time the present cases were heard by the Commission, passing of a similar regulatory order in the present case would not amount to giving such exercise of regulatory power with retrospective effect, for there were regulatory orders in existence prior to the impugned order came to be passed by the Commission.

In **Fatehgarh Bhadla Transmission Co. Ltd. v. CERC, 2023 SCC OnLine APTEL 16.** It was contended, on behalf of the Appellant therein, that, as per the TSA, the Appellant was liable only to pay liquidated damages on account of any delay in constructing its transmission project; and no further charges can be levied upon the Appellant, over and above what was recorded in the TSA. The submission, urged on behalf of the Respondent, was that the Transmission Service Agreement (TSA) entered into by the Appellant with the Generator also captured, under Article 6.2 that if the Appellant is unable to declare its COD due to reasons not attributable to it, it will have a deemed COD from the date it is ready and will be entitled to claim tariff from the said date; specifically, the Appellant has declared a deemed COD with effect from 31.07.2021, and its transmission charges, for the period from 31.07.2021 till completion of COD of the Generator, were being billed by the CTUIL to the Generating Company; and, while the Appellant has no difficulty in receiving its transmission charges from the entity which caused the mismatch qua its assets, it does not wish to honour the bills of the Respondent for charges for the period of mismatch caused by the Appellant.

After referring to Articles 4.4, 4.4.1, 4.4.2, 4.4.3, 6, 6.1.1, 6.2.1, 6.2.2, 6.3, 6.4, 6.4.1, 6.4.2, 6.4.3, 6.4.4, 11, 11.2.1, 11.2.3, 11.3, 11.4, 11.5, 11.6,11.7, 12.1, 12.1.2, 12.2, 12.2.1, 12.2.3, 12.2.4, 12.3, 12.3.1, 12.3.2, 12.3.3, 12.4, 13, 13.1, 13.2, 13.3, 13.4, 13.5 and Schedule 3 of the TSA, this Tribunal then observed that Section 73 of the Indian Contract Act relates to compensation for

loss or damage caused by breach of contract, and Section 74 relates to compensation for breach of contract where penalty is stipulated for; as there exists no contract as between the Appellant and PGCIL, neither Section 73 nor 74 of the Indian Contract Act are applicable to the present case; Article 6.4.1 of the Transmission Service Agreement required the appellant, in case they failed to achieve COD, to pay the Long Term Transmission Customers, (with whom the Transmission Service Agreement was entered into), a sum equivalent to 3.33% of Monthly Transmission Charges applicable for the Element of the Project for each day of delay up to sixty (60) days of delay, and beyond that time limit, at the rate of five percent (5%) of the Monthly Transmission Charges applicable to such Element/Project, as liquidated damages for such delay and not as penalty; payment of liquidated damages under the TSA is without prejudice to the Long Term Transmission Customers' rights thereunder, which includes the right of termination; the appellant's liability under the TSA, to pay liquidated damages, is only towards the Long Term Transmission Customers; and there was no contractual relationship between two transmission licensees governing situations where the delay by one resulted in the other suffering losses for no fault of theirs.

On the contention, urged on behalf of the Appellant, that the transmission charges of the Respondent-PGCIL should be mandatorily paid by the general body of open access customers of the meshed inter-state system (as per Sections 38(2)(d) and 40(c)), who had been granted open access, and the 'defaulter pays' principle is not applicable when it comes to imposition of transmission charges, as the same is governed by the Parent Statute, this Tribunal observed that the transmission assets of PGCIL received tariff on a cost-plus basis, and for the mismatch period they were held entitled to recover yearly transmission charges from the appellant; The contention that the 'defaulter pays' principle is not applicable when it comes to imposition of transmission charges is not tenable; Section 38(2)(d)(ii) and Section 40(c)(ii) respectively, stipulated that

it shall be the function of the Central Transmission Utility and the duty of the Transmission Licensee to provide non-discriminatory open access to its transmission system for use by any consumer as and when such open access is provided by the State Commission under sub-section (2) of Section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission; neither Section 38(2)(d)(ii) nor Section 40(c)(ii) of the Act made the DICs liable for the delay on the part of one of the transmission licensees in commissioning their transmission asset; Yearly Transmission Charges, as approved by the CERC, were required to be shared and paid by all designated customers of ISTS (DICs), including the generating stations; the methodology prescribed, for a pooled system of sharing of transmission charges to be paid by ISTS users, is known as the Point of Connection (PoC) mechanism; the CTU is required to collect these charges from the DICs in proportion to their monthly charges, and to place them in a pool known as the PoC pool; from the said PoC Pool, the CTU is required to disburse the monthly transmission charges, to various transmission licensees owning the transmission assets, in terms of their approved transmission tariff; non-payment of transmission charges results in a deficit in the shared pool which, in turn, results in under-servicing of the transmission assets comprised in the ISTS; no liability, for payment of transmission charges, can be fastened upon the beneficiaries/consumers of the transmission system till they start receiving power through the commissioned inter-connected transmission assets; where more than one inter-State transmission licensee is involved, and the transmission system of one is delayed, the DICs do not receive power through the inter-connected transmission assets; and fastening liability of payment of transmission charges on them, when they have not received any benefit therefrom, would be wholly unjustified.

This Tribunal further observed that, on the Appellant's own showing, the TSA was entered into with the Generator; the Appellant's claim of force majeure events resulting in delay in commissioning the project was in terms of clause 11, and their claim of a change in law was in terms of clause 12, thereof; and any relief they were entitled to in terms of the TSA could only be against the other party to the said Agreement ie the Generator, and not PGCIL which was neither a party to the TSA nor to the petition filed before the CERC by the appellant.

It is true that, in **Fatehgarh Bhadla Transmission Co. Ltd. v. CERC, 2023 SCC OnLine APTEL 16,** the 2019 and the 2020 Regulations, in effect, made the defaulter liable for the delay in commissioning their transmission asset, and the applicable Regulations enabled the CERC to deny IDC and IEDC in cases where it was satisfied that the delay in commissioning the transmission asset, by a transmission licensee was not justified. It cannot, however, be lost sight of that this Tribunal also examined the question whether the force-majeure clauses of the TSA would apply even to cases involving another transmission licensee which was not a party to the said Agreement, and held that it did not.

In this context, this Tribunal had observed that, on the Appellant's own showing the TSA (in that case) was entered into with the generators; the Appellant's claim of force majeure events resulting in delay in commissioning the project was in terms of Clause 11 of the TSA; any relief they were entitled to in terms of the TSA could only be against the other parties to the said Agreement ie the generator, and not the transmission utility which had commissioned its transmission asset on time, since the latter was neither a party to the TSA nor to the petition filed before the CERC by the Appellant relying on the force majeure events.

It is relevant to note that the finding of the Commission regarding force majeure events is in a dispute between the defaulting transmission utility and its LTTCs. The other transmission utility (which had commissioned its transmission asset) on time would, ordinarily, not even be a party to such proceedings and would have no say in the finding of the Commission that delay in commissioning of the transmission asset is on account of force majeure events. Even otherwise, a finding by the Commission, that the delay in commissioning of the transmission asset was on account of force majeure events, would only disable the LTTCs (which had entered into the TSA with the transmission utility) from acting in terms of the TSA to either impose liquidated damages or terminate the contract, since the transmission utility has been found by the Commission to have failed to commission the transmission asset on time only because of force majeure events, or in other words for events beyond its control.

The liability under the TSA is distinct from the liability to pay transmission charges to the transmission utility which had commissioned its transmission asset on time, since the latter transmission utility does not have a contractual relationship with the former. Having commissioned its transmission asset on time, and as its inability to recover transmission charges is solely on account of the failure of the other transmission utility to commission its transmission asset as scheduled, the former cannot be denied payment of transmission charges from its COD for no fault on its part. Likewise, the LTTCs (parties to the TSA) cannot be fastened with such a liability since no power flowed in the transmission line because of failure of the party with whom they had entered into the TSA to commission its transmission asset on time. As held by this Tribunal, in **Fatehgarh Bhadla Transmission Co. Ltd. v. CERC, 2023 SCC OnLine APTEL 16,** imposing such transmission charges on the pool would also be inappropriate for the very same reason that the general pool would then be called upon to pay transmission charges though no power flowed in the

transmission line on account of the delay on the part of the transmission utility in commissioning its transmission asset on time. The liability can only be fastened on the defaulting transmission utility and none else.

Furthermore, Supreme Court in **"Energy Watchdog v CERC (2017)" 14 SCC 80** has laid down the law governing Force majeure and held that relief of Force Majeure is a contractual right which must flow from the Contract. The relief obtained from occurrence of *force Majeure* events falling under the Force Majeure need to be examined in terms of the Contract entered between the parties. In our view BDTCL cannot use Force Majeure relief to claim exemption from paying transmission charges, so imposed on them by the CERC for non-utilisation of other transmission Licensee's assets, under Section 79 of Electricity Act, 2003.

In view of above deliberations, it is impermissible to affix liability of payment of transmission charges on the beneficiaries/LTTCs, for the period before the transmission elements are put to use. We, therefore, do not find any infirmity in the Impugned Order 1 & Impugned Order 2, of CERC affixing bilateral liability on BDTCL and PGCIL respectively for the mismatch period and not on the Beneficiary / LTTCs.

Learned Counsel on behalf of BDTCL has submitted that, even if bilateral mismatch liability is upheld by this Tribunal, the same should be paid from the *POC* Pool. As already deliberated above, a transmission element becomes a part of the *POC pool*, provided it is put to use. In the absence of its use i.e. no power flows across the particular element, and accordingly its usage under the load flow exercise cannot be determined so as to work out the sharing of its charges. In the absence of a transmission line becoming part of the *POC* pool, our attention has not been drawn towards any provision in the Sharing Regulating 2010,

according to which such bilateral liability can be serviced. Furthermore, accepting the contention advanced by BDTCL, that bilateral liability should be serviced from the POC pool, irrespective of payment by the defaulting party, would mean that some portion of the charges received from the beneficiaries, against the use of transmission elements in the POC Pool, should be passed on to BDTCL depriving the other transmission licensee to receive their legitimate share to that extent (which is passed on to the BDTCL) from the pool for no fault of theirs, which is not permissible under the extant Regulation. It is impermissible for this Tribunal to go beyond the Extant Regulations.

The law declared by the Supreme Court, in **Power Grid Corpn. of India Ltd. v. Punjab State Power Corpn. Ltd., (2016) 4 SCC 797,** is that the beneficiaries under the TSA could not be made liable to pay for the delay on the part of the transmission utility, with whom they had entered into the TSA, as the energy supply line had not started on the said date. In other words, they could not be mulcted with liability as no power flowed to them from the transmission line.

In **POWERGRID v. M.P. Power Transmission Co. Ltd., (2025) 8 SCC 705,** the Supreme Court observed that there was no contractual clause between the parties for establishing the risks of delay in commissioning of a transmission asset; there was also no Regulation fixing liability of transmission charges payable before a particular transmission element is put in operation; these circumstances, considered together with the prohibition on imposing liability of delayed payments on beneficiaries, left a regulatory gap; this lacuna was recognised by APTEL in **Nuclear Power Corpn. of India Ltd. v. CERC, 2019 SCC OnLine APTEL 83** wherein the correctness of CERC's order was questioned; CERC, therein, had imposed the liability of transmission charges on the defaulting party on account of a transmission element not having been put to

use by it, in the absence of a contractual arrangement between the parties; in the absence of any specific provisions dealing with the situation in the 2014 Tariff Regulations or any other concurrent regulations under Section 178, CERC had prescribed a principle that the party to which the delay is attributable would be responsible for payment of the transmission charges for the period of delay; and CERC is empowered to order for imposition of transmission charges on the party to whom delay is attributable.

In view of Article 141 of the Constitution, all courts/tribunals in India are bound to follow the decisions of the Supreme Court. Judicial discipline requires, and decorum known to law warrants, that the directions of the Supreme Court should be taken as binding and followed. In the hierarchical system of courts which exists, it is necessary for each lower tier to accept loyally the decisions of the higher tier. The judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted. **(Cassell & Co. v. Broome : [1972] 1 ALL ER 801 (HL); SMT. KAUSHALYA DEVI BOGRA (SMT) v. THE LAND ACQUISITION OFFICER, 1984 2 SCC 324).** When the Supreme Court decides a principle it would be the duty of the subordinate Court (or for that matter a statutory tribunal) to follow the said decision. A judgment of the High Court (or Tribunal) which refuses to follow the decision and directions of the Supreme Court is a nullity. **(Narinder Singh v. Surjit Singh, (1984) 2 SCC 402); Kausalya Devi Bogra v. Land Acquisition Officer, (1984) 2 SCC 324; Municipal Corporation of Guntur, Guntur v. B. Syamala Kumari, 2006 SCC OnLine AP 838; Somprakash v. State of Uttarakhand, 2019 SCC OnLine Utt 648; Director of Settlements, A.P. v. M.R. Apparao, (2002) 4 SCC 638).**

The law declared by the Supreme Court, in **Power Grid Corpn. of India Ltd. v. Punjab State Power Corpn. Ltd., (2016) 4 SCC 797** and

POWERGRID v. M.P. Power Transmission Co. Ltd., (2025) 8 SCC 705, is binding on this Tribunal. Consequently, the impugned orders passed by the CERC, fastening liability to pay transmission charges on the transmission utility which delayed commissioning of its transmission asset, cannot be faulted, as it is in terms of the law laid down by the Supreme Court in the afore-said judgements.

The submission urged on behalf of BDTCL/PGCIL , if accepted, would require liability to be fastened on the pool or the LTTCs for no fault of theirs and though they derived no benefit as no power flowed through the transmission asset of PGCIL/BDTCL as commissioning of the respective transmission asset of BDTCL/PGCIL got delayed. It is not in dispute that the party which commissioned the Transmission Asset is entitled for YTC from that date. What is in issue is only as to who shall bear the liability. Fastening the YTC, payable as a result of delayed commission of the Transmission Asset by the other party, on either the poor of the LTTCs is wholly unjustified for the above-said reasons. The contention put forth on behalf of BDTCL/PGCIL is therefore, rejected.

COMMISSIONING DATE OF BHOPAL – DHULE TRANSMISSION LINE OF BDTCL

SUBMISSIONS URGED ON BEHALF OF PGCIL

Learned Counsel on behalf of PGCIL has disputed the levy of liability of bilateral transmission charges of Rs 13.24 crore contending the deemed COD date of DV line of DBDTCL as 09.02.2015, in view of following :

- Land for Vadodara sub-station, where the DV line is to terminate, was handed over after much delay to PGCIL on 13.8.2013 and immediately thereafter the GPS gantry co-ordinates were informed to BDTCL on

11.9.2013. In a Meeting held on 27.12.2013, it was discussed that in case of non-availability of Vadodara sub-station matching with commissioning of the DV line, the line may be charged at 400 kV by-passing Vadodara sub-station and utilizing Vadodara-Pirana 400 kV line. Accordingly, an interim arrangement was offered to BDTCL for terminating the DV line by by-passing Vadodara sub-station and utilizing Vadodara-Pirana 400 kV line, as also informed to the CEA on 14.1.2015 and approved by PGCIL on 6.4.2015

- On 2.2.2015, BDTCL approached the CEA for its approval for charging the DV line and a conditional anti-theft charging certificate was issued on the same day i.e. 02.02.2015, however other certifications such as RLDC, no-load trial run certificate were left to be obtained before the DV line can declare its deemed COD;
- BDTCL has declared the deemed COD of the DV line on 9.2.2015, without commissioning of the pre-required element namely, the Dhule sub-station as per Schedule 3 of the TSA. This fact has been recorded in CERC Order dated 25.5.2016, as per BDTCL Affidavit dated 31.3.2015 in Petition No.66/TT/2015 (filed by PGCIL for approval of COD for Vadodara sub-station) that the DV line and the Dhule sub-station have been commissioned on 2.2.2015 and 28.2.2015 respectively, based on the Electrical Inspector approval for energization. The anti-theft charging instructions to WRLDC for idle charging of the DV line are also issued on 9.3.2015 without which the deemed COD of the DV line cannot be achieved. That being so, the question of Dhule sub-station already being commissioned on 9.2.2015 does not arise.
- CERC in its Order dated 26.11.2015 passed in Petition No.122/MP/2015 notes the date of successful trial run of the DV line as 13.6.2015 and BDTCL is entitled for transmission charges from the date each element is

put into regular service without linking to the pre-requisites prescribed in Schedule 3 of the TSA. BDTCL therefore cannot claim for servicing of DV line from its deemed COD;

SUBMISSIONS URGED ON BEHALF OF BDTCL

It has been submitted on behalf of BDTCL (reply dated 01.09.2022), that BDTCL has validly declared the deemed COD of the DV line in terms of the TSA and same has attained finality. CERC in its order dated 26.11.2015 in Petition No 122/MP/2015, wherein PGCIL is Respondent No 2 , has found that BDTCL has validly declared and achieved COD of each and every element of its project and this order has attained finality, in the absence of challenge. Furthermore, at the time of declaration of deemed COD of DV line by BDTCL, neither the CEA nor any long term Transmission Customers have raised any objection and even the limitation period of 3 years for any challenge to the declaration of deemed COD of the DV line as 09.02.2015 has already run out. This contention put forth on behalf of PGCIL needs to be summarily dismissed.

CONSIDERATION AND OUR VIEW

PGCIL has disputed the Deemed COD date of DV line as 09.02.2015, contending i) that Dhule substation by BDTCL itself was commissioned on 28.02.2015 as noted in the CERC order dated 25.05.2016 (in petition no 66/TT/2016) based on affidavit dated 31.03.2015 submitted by BDTCL ii) charging instruction for DV line for antitheft charging were approved on 09.03.2015 by WRLDC iii) date of successful trial run of the DV line has been recorded as 13.6.2015 in CERC order dated 26.11.2015. Per Contra, learned counsel on behalf of BDTCL has contended the issue of deemed Cod of DV line as 09.02.2015 has attained finality.

The effect of Force Majeure affecting completion of Vadodra Substation on the liability of PGCIL has already been deliberated in above paragraph. With regard to deemed COD issue of DV line, this Tribunal in its order dated 26.03.2025, while disposing IA No 413 of 2025 in the present Appeal No. 24 of 2021, for taking on record the additional documents like minutes of various meetings of operation and coordination committee meetings of western Region with regard to dispute of deemed COD of DV line, has deliberated this issue in detail and it has been held that it is unjustified to challenge the validity of certificate issued by the CEA dated 02.02.2015, in the absence of any such plea being taken by PGCIL either before the CERC or in the appeal before this Tribunal. Furthermore, during the hearing of referred IA as well the present Appeal with regard to approvals, other than CEA certificate, required to be obtained by BDTCL before declaring deemed COD as being contended, our attention has not been drawn to any statutory regulations in this Regard. Relevant paragraph from the Order of Tribunal dated 26.03.2025 in IA No 413 of 2025 (Appeal 24 of 2021) is reproduced below:

> *"The basis for the submission of BDTCL, that the deemed COD was 09.02.2015, is the certificate of the Central Electricity Authority (CEA) dated 02.02.2015, wherein the CEA certified that, on inspection of the 765 kV S/C Dhule-Vadodara transmission line which was carried on 19/20.01.2015, non-compliance of certain provisions, stipulated under the Regulations, was conveyed to BDTCL, and compliance of the same had been received by them, except construction of the 400 kV bays at Dhule Sub-Station of MSETCL; BDTCL had also since intimated that the work of connecting 765 bays at 765 Vadodara sub-station by PGCIL was yet to be completed, and had also mentioned that the theft issues were there in the said transmission line, and had therefore sought permission for anti-theft charging of the said line.*
>
> *By the afore-said letter, CEA informed BDTCL to avoid theft issues; approval of anti-theft charging of the said line was accorded subject to consistent compliance of the relevant provisions of "CEA Measures relating*

to "Safety and Electricity Supply Regulations, 2010" by BDTCL; and, after completion of connecting 765 kV bays, the remaining observations on the inspection report shall be complied and approved, and energization of the said line shall be obtained from their office.

Accepting the contention now urged for the first time by PGCIL, based on the documents now sought to be placed on record, would cast a cloud on the validity of the certificate issued by the CEA dated 02.02.2015, which, in the absence of any such plea being taken by PGCIL either before the CERC or in the appeal before this tribunal, would be wholly unjustified.

Mrs. Suparna Srivastava, learned counsel for PGCIL, would, however, contend that, besides certification by the CEA, other approvals are also required to be obtained by BDTCL, and it is in the context of the other approvals that the contents of the minutes of the various meetings (copies of which are enclosed along with IA) assume relevance. When we asked the learned counsel to show us the statutory regulations or regulatory orders, if any, passed by the CERC obligating BDTCL to obtain other approvals, Learned Counsel, would submit that such requirements have been stipulated by the CERC in various orders issued by it periodically and, if given an opportunity, she would place those orders also on record. We are loathe to grant the learned counsel, at this belated stage when hearing of the appeal is nearing completion, further time to place on record orders of the CERC, if any, since that would result in virtually re-opening the entire matter and in hearing the appeal all over again. On the basis of the documents, now sought to be relied upon, PGCIL seeks to make out a completely new case, which was never urged at any stage prior to the filing of the present IA.

Thus, we have already considered this issue in our earlier order dated 26.03.2025, we see no reason to delve on this all over again and accordingly. the contention of PGCIL in this regard is rejected.

CONCLUSION

In view of above deliberations, we do not find any error in the Impugned Orders passed by CERC, necessitating our interference and accordingly Impugned Order dated 20.09.2017 and Impugned Order dated 25.06.2018 are upheld.

The Captioned Appeals and pending IAs, if any, are dismissed.

PRONOUNCED IN THE OPEN COURT ON THIS 11th DAY OF DECEMBER, 2025.

(Seema Gupta)	**(Justice Ramesh Ranganathan)**
Technical Member (Electricity)	**Chairperson**

REPORTABLE / ~~NON-REPORTABLE~~
