

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)**

APPEAL NO. 17 OF 2019

Dated : 14th September, 2020

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member (Electricity)**

IN THE MATTER OF :

NRSS XXXI (B) Transmission Ltd.

6th Floor, Plot No. 19, Film City,

Sector 16-A, Noida, Uttar Pradesh -201301

...Appellant

Versus

- 1. Central Electricity Regulatory Commission (CERC)
Through its Secretary
3rd & 4th Floor, Chanderlok Building,
35, Janpath, New Delhi- 110001**
- 2. Power Grid Corporation of India Ltd.,
Through its Dy. General Manager (Commercial)
Saudamini, Plot No.2, Sector 29, Near IFFCO Chowk,
Gurgaon (Haryana) – 122001**
- 3. Rajasthan Urja Vikas Nigam Limited
Through its Managing Director
Vidyut Bhawan, Janpath, Jyoti Nagar,
Jaipur – 302 005**
- 4. Punjab State Power Corporation Ltd.
Through its Chief Engineer
Thermal Shed TI A, Near 22 Phatak, Patiala – 147 001**

- 5. Haryana Power Purchase Centre**
Through its Chief Engineer
2nd Floor, Shakti Bhawan, Sector – 6
Panchkula (Haryana) 134 109
- 6. U. P. Power Corporation Ltd.**
Through its Executive Engineer (Power Purchase Agreement),
14th Floor, Shakti Bhawan Extension,
14- Ashok Marg, Lucknow
Uttar Pradesh – 226001
- 7. TATA Power Delhi Distribution Ltd,**
Through its HOG (PMG),
33 kV Substation Building, Hudson Lines,
Kingsway Camp, New Delhi – 110009
- 8. Jaipur Vidyut Vitran Nigam Ltd.**
Through its Superintendent Engineer (RPCC)
400 kV GSS Building
Ajmer Road, Heerapura, Jaipur,
Rajasthan.
- 9. Ajmer Vidyut Vitran Nigam Ltd.**
Through its Superintendent Engineer (RPCC)
400 kV GSS Building
Ajmer Road, Heerapura, Jaipur
Rajasthan.
- 10. Jodhpur Vidyut Vitran Nigam Ltd.**
Through its Superintendent Engineer (RPCC)
400 kV GSS Building

**Ajmer Road, Heerapura, Jaipur
Rajasthan.**

- 11. Power Development Deptt. Govt. of J&K
Through its Chief Engineer (Commercial & Survey Wing)
SLDC Building, 220 kV Grid Station Premises, Gladni,
Narwal – Bala, Jammu – 180 006**

- 12. Delhi Transco Ltd
Through its Chairman
Shakti Sadan, Kotla Road (Near ITO),
New Delhi – 110 002**

- 13. North Central Railways
Through its Chief Electrical Engineer,
Head Quarter's Office, Subedarganj,
Allahabad – 211 003**

- 14. BSES Yamuna Power Ltd.
Through its Ch. Manager (Power Management)
2nd Floor, Shakti Kiran Building,
Karkardooma, New Delhi – 110 092**

- 15. BSES Rajdhani Power Ltd.
Through its Asst. Vice President (Power Management Group),
BSES Bhawan, Nehru Place,
New Delhi – 110 019**

- 16. New Delhi Municipal Council
Through its Chief Engineer (E-II)
Palika Kendra, Parliament Street,
New Delhi – 110001**

17. **Uttarakhand Power Corporation Ltd.**
Through its Chairman,
Victoria Cross Vijeyta Gabar Singh Bhawan
Kanwali Road, Balliwala Chowk,
Dehradun – 248001, Uttarakhand
18. **Electricity Wing of Engineering Dept.,**
Union Territory of Chandigarh
Through its Superintendent Engineer,
Electricity OP Circle, 5th Floor,
New Deluxe Building, Sector – 9
Chandigarh – 160009
19. **Himachal Pradesh State Electricity Board Ltd.**
Through its Chief Engineer (SO&P)
HPSEB Ltd., Vidyut Bhawan,
Shimla – 171 004

....Respondents

- Counsel for the Appellant (s) : Mr. M. G. Ramachandran, Sr. Adv.
Ms. Petal Chandhok
Ms. Ritwika Nanda
Mr. Amal Nair
Ms. Smridhi Sharma
Mr. Shubham Arya
Mr. Pranav Tomar
Ms. Ritwika Nanda
Ms. Sanya Panjwani
Mr. Aditya Rathore
- Counsel for the Respondent(s) : Mr. Suparna Srivastava
Ms. Sanjana Dua
Ms. Nehul Sharma for R-2
- Mr. Rajiv Srivastava
Ms. Garima Srivastava
Ms. Gargi Srivastava

Ms. Marshita Sinha
Ms. Harshita Sinha for R-6

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The present appeal has been filed by the Appellant being aggrieved by the order dated 30.11.2017 passed by the Central Electricity Regulatory Commission (hereinafter being referred to as the “**Central Commission/Commission**”) in Petition No 60/TT/2017, whereby the Central Commission has 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.
 - 1.1 The Appellant, NRSS XXXI (B) Transmission Limited (**NTL**), is a Company incorporated under the provisions of Companies Act as a special purpose vehicle (SPV) by REC Transmission Project Company Ltd. (**RECTPCL**) as part of Tariff Based Competitive Bidding (“**TBCB**”) process for implementation of “Northern Region System Strengthening Scheme XXXI (B)” transmission scheme.
 - 1.2 The Respondent No.1, i.e. CERC is the Central Commission constituted under Section 76 of the Electricity Act, 2003 (“the Act”) and exercising jurisdiction and discharging functions in terms of the Act.
 - 1.3 The Respondent No 2, Power Grid Corporation of India Ltd (**PGCIL**), was entrusted with implementation of 400 kV bays for lines being constructed by the Appellant under Northern Region System Strengthening Scheme XXXI (B). The assets being constructed by Respondent No 2 were
Asset-I: 2 No. Line Bays at Amritsar 400/220KV Sub-station and
Asset-II: 4 No. 220 KV Line Bays at Malerkotla GIS 400/220KV Sub-station.

2. FACTS OF THE CASE:-

- 2.1 The Appellant was incorporated as an SPV for the development of 400 kV D/C Kurukshetra - Malerkotla and 400 kV D/C Malerkotla - Amritsar Transmission Lines on BOOM (Build Own Operate and Maintain) Basis under the Transmission Scheme “Northern Region System Strengthening Scheme XXXI (B)”.
- 2.2 The Transmission Scheme was approved to augment the power supply to West Punjab by connecting Amritsar Sub-station with HVDC Station at Kurukshetra, thus enabling it to get supply from pit head Generating Stations in Chhattisgarh through Champa – Kuruskshetra HVDC bi-pole.
- 2.3 The REC Transmission Project Company Ltd. (hereinafter referred to as the “**RECTPCL**”) was selected as the Bid Process Coordinator (hereinafter referred to as the “**BPC**”) for the purpose of selection of bidder as Transmission Service Provider.
- 2.4 As per the Survey Report issued by RECTPCL, there were no forest areas in the route of Transmission Lines. The bid of the Appellant was based on the disclosure made by RECTPCL in the Survey Report. Presence of forests entails major additional expenses and longer duration for completion of project. None of these factors were taken into consideration by the Appellant at the time of submission of the bid which was premised on the representation that no forest land was involved.
- 2.5 While executing the project, the Appellant found that there was forest land involved in the project which required forest clearance to be obtained. In addition to the requirement of forest clearance, there was a change in the gantry coordinates of the terminating point at Kurukshetra Sub-station and Malerkotla Sub-station.
- 2.6 As per NLDC Report dated 21st Apr 2017 on “Operational Feedback on Transmission Constraints: April 2017”, the transmission scheme NRSS

XXXI (B) being implemented by NTL was required in matching timeframe of 800 kV HVDC Champa – Kurukshetra being developed by the PGCIL.

The Pole I with rated capacity of 1500 MW of the 800 kV HVDC Champa – Kurukshetra Line was declared under commercial operation w.e.f 24th Mar 2017. However, out of 3000 MW HVDC transmission capacity targeted to be commissioned by March 2017, only 1500 MW was commissioned at that time.

- 2.7 The Ministry of Power, Government of India vide its Notification No. 15/1/2013-Trans, dated 20th May 2013 appointed RECTPCL to be the BPC for the purpose of selection of bidder as Transmission Service Provider (hereinafter referred to as the “**TSP**”) to establish transmission system on BOOM basis for “Northern Region System Strengthening Scheme – XXXI (B)” through tariff based competitive bidding (hereinafter referred to as the “**TBCB**”) process.
- 2.8 Subsequently an SPV was created in the name of “NRSS XXXI (B) Transmission Limited” (NTL) i.e. the Appellant herein, for the implementation of this transmission scheme.
- 2.9 RECTPCL initiated a competitive bidding process for selecting a successful bidder to build, own, operate and maintain the Project and to provide transmission service to Long Term Transmission Customers (hereinafter referred to as the “**LTTCs**”).
- 2.10 On 15.10.2014, the MoP granted approval to the Appellant u/s 164 of Electricity Act 2003.
- 2.11 During the construction phase, the Appellant encountered a number of hindrances which were unforeseen and uncontrollable events and were beyond the control of the Appellant. That due to the said unforeseen and unavoidable events, the Appellant could not complete the Project on the Scheduled Date i.e. 11.09.2016. As per the granted transmission license dated 25.08.2014, the Project completion period was 28 months from its

Effective Date. The Commercial Operation Date (COD) of 400 kV D/C Kurukshetra–Malerkotla Transmission Line was declared on 18.01.2017 with a delay of 128 days. The Deemed Commercial Operation Date of 400 kV D/C Malerkotla–Amritsar Transmission Line was declared on 27.03.2017 with a delay of 196 days.

2.12 On 09.12.2016 PGCIL filed a petition before the Hon'ble CERC wherein PGCIL has incorrectly and without going into the reasons for the delay, which PGCIL was indeed very well privy to, casted aspersions on the Appellant with respect to the delay. Relevant extract from the Petition bearing no. 60/TT/2017 is copied below”

“It is to be mentioned that the delay is mainly due to matching the bays with the upcoming TBCB line. As is evident from the above that the delay was beyond the control of POWERGRID.”

2.13 The issue of delay in commissioning of the transmission line by the Appellant was pending by way of a separate petition being Petition No. 195/MP/2017 in which, there were detailed force majeure reasons outlined explaining the time and cost overrun.

214 On 30.11.2017 the CERC in the petition bearing no. 60/TT/2017 passed the Impugned Order, inter alia, holding the Appellant liable for payment of IDC and IEDC as under:

S. No	Name of the Asset	Period of liability for IDC and IEDC
1.	Asset – I : 2 Nos. 400/220 kV Line Bays at PGCIL Amritsar Sub-Station	01.10.2016 to COD of the asset (i.e., 03.04.2017)
2.	Asset – II (a) : 2 No. 400 kV Line Bays at PGCIL Malerkotla Sub Station	05.11.2016 to COD of the asset (i.e., 03.04.2017)
3.	Asset – II (b) : 2 No. 400 kV Line Bays at PGCIL Malerkotla Sub Station	05.11.2016 to COD of the asset (i.e., 18.01.2017)

2.15 By way of the Impugned Order, the Appellant was mulcted with IDC and IEDC costs without adjudicating and giving any finding on the reasons given by the Appellant for the said delay. Aggrieved by the Impugned Order

dated 30.11.2017 passed by the CERC on the above aspect, the Appellant has preferred the present Appeal.

- 2.16 A Review Petition 7/RP/2018 was filed before the CERC by the Appellant in the instant matter seeking review of the Impugned Order dated 30.11.2017. The CERC passed its judgement in the Review Petition on 20.06.2018 wherein it rejected the petition at the admission stage holding that it is devoid of any merit.

3. **QUESTIONS OF LAW**

The Appellant has raised following questions of Law :

- 3.1 Whether on account of not being a beneficiary of the scheme, the Appellant ought not to have been added as a party in the petition bearing no. 60/TT/2017?
- 3.2 Whether, in the facts and circumstances in the case, the CERC is right in placing the liability of payment of IDC and IDEC on the Appellant?
- 3.3 Whether, the CERC has erred in not deciding the petition bearing no. 195/MP/2017 as filed by the Appellant prior to passing an order in the Petition bearing no. 60/TT/2018?
- 3.4 Whether, the CERC has erred in not giving its detailed findings in the Impugned Order *qua* the submissions made by the Appellant regarding delays?

4. **Ms. Petal Chandok, Learned Counsel for Appellant has filed the Written Submissions for our consideration as under:-**

- 4.1 The Petition being 60/TT/2017 was filed by Powergrid for determination of Transmission Tariff for Asset-I: 2 No. Line Bays at Amritsar 400/220KV Sub-station and Asset-II: 4 No. 220 KV Line Bays at Malerkotla GIS 400/220KV Sub-station under 'Northern Region System Strengthening Scheme-XXXIB'.

4.2 In the impugned Order, the Central Commission has held that the Appellant herein shall be liable for the payment of Interest during Construction (**IDC**) and Incidental Expenses during Construction (**IEDC**). The relevant extracts of the impugned order dated 30.11.2017 are as under:

“28. The date of commercial operation (COD) considered for the instant assets are as follows:

Assets	COD Claimed	COD Allowed
Asset I: 2 No. Line bays at Amritsar 400/200 kV Sub-station	1.12.2016	3.4.2017
Asset II(a): 2 No. 400 kV Line bays at Malerkotla GIS 400/200 kV Sub-station	1.12.2016	3.4.2017
Asset II(b): 2 No. 400 kV Line bays at Malerkotla GIS 400/200 kV Sub-station	1.12.2016	18.1.2017

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31. *The petitioner also submitted that the delay is mainly due to matching the bays with the upcoming TBCB line.*
32. *NTL vide affidavit dated 9.5.2017 has submitted the following:*
- (a) *The transmission scheme NRSS XXXI(B) is for augmenting power supply to Amritsar through HVDC station at Kurukshetra (which will get power from pit head generating stations of Chhattisgarh.)*
 - (b) *Both the transmission lines under the scope of NTL have achieved commercial operation. On account of the following reasons falling within the meaning of Article 11 of the TSA the project has been delayed and the same is as follows:*
 - (i) *Delay in receipt of gantry coordinated at PGCIL Kurukshetra and Malerkotla Substation*
 - (ii) *Change in Tower Extension at Location No.71/0 of 400 kV D/C Kurukshetra Malerkotla line during the final stages of the implementation/construction of the transmission project.*
 - (iii) *Requirement of Multi circuit towers for transmission line termination at Malerkotla Sub-station end*
 - (iv) *Severe Right of Way issues*
 - (v) *Force Majeure Events like conflict between Sikh community on management of Gurudwara, conflict and communal tension in Malerkotla, Farmer agitation in Punjab, Desecration of Shri Guru Granth Sahib, Jat agitation for caste based reservation in Haryana, Desecration of Quran, Adverse climatic conditions in Punjab and Haryana.*
 - (vi) *Delay in transfer of SPV.*
 - (vii) *Delay in grant of Forest Clearance*
 - (viii) *Withholding of tree cutting in the state of Punjab due to NGT order dated 19.5.2016 in case no OA 161 and 162 of 2016 and demonetization.*

.....
Analysis and decision:

37. As per the Investment Approval dated 2.6.2015, the instant assets were scheduled to be commissioned within 16 months i.e. by 1.10.2016 against which the instant assets were ready to be put under commercial operation on 1.12.2016. However, the instant asset was put to use only after COD of associated line. The petitioner has submitted that it has made various communications with NTL through letters dated 30.9.2016, 19.10.2016, 27.10.2016 and 22.11.2016 for commissioning of the TBCB line. The petitioner has stated that the time over run is on account of the delay of the associated lines by the Respondent, NTL. We have observed that petitioner has submitted CEA certificate dated 26.9.2016 for Asset-I which proves that it was ready before 1.10.2016 but in case of Asset –II, the petitioner obtained CEA Certificate dated 4.11.2016. Therefore, there is no documentary evidence in the petition to support that Asset-II was ready before 4.11.2016. Hence, we are not inclined to allow time overrun of 1.10.2016 to 4.11.2016 for Asset-II. Accordingly, the IDC and IEDC shall be billed as under:

Assets	Date	Liabe party
Asset – I:	1.10.2016- date of COD of the asset	To be borne by NTL
Asset-II (a and b)	1.10.2016-4.11.2018	Not to be Capitalized
Asset-II (a and b)	5.11.2016- date of COD of the asset	To be borne by NTL

4.3 The Appellant had specifically raised the issue of delay in the commissioning of the Appellant's assets being due to force majeure events as described above. In this regard, in Para 23 of the Impugned order, the Central Commission has held as under:

“23. The petitioner has submitted that the 2 nos. of 400 kV line bays at Amritsar end and 4 nos. of 400 kV line bays at Malerkotla end were ready but were not put into use because of the non-commissioning of the associated transmission line being constructed by NRSS XXXI (B) Transmission Limited (NTL). The NTL has contended that the TBCB line has been delayed due to receipt of gantry coordination at PGCIL Kurukshetra and Malerkotla Sub-stations, change in tower extension, requirement of multi circuit towers, demonetization and delay in grant of forest clearance. We have considered the submissions of the respondent. The issues raised by the respondent (NTL) regarding time delay in commissioning shall be dealt in separate petition filed by NTL in Petition No. 195/MP/2017.”

4.4 Subsequent to the filing of the above appeal by the Appellant, the Petition No. 195/MP/2017 filed by the Appellant has been decided by the Central Commission vide Order dated 29.03.2019. In the said Order dated

29.03.2019 passed in Petition No. 195/MP/2017, the Central Commission has concluded that the delay on the part of the Appellant in commissioning the associated assets of the Appellant was due to Force Majeure events, beyond the control of the Appellant. The relevant extracts from the Order dated 29.03.2019 is as under:

“94. In the present case, as per RFP and the Survey Report issued by RECTCPL, there were no forest areas in the route of transmission lines. The Petitioner encountered forest areas in the districts of Haryana and Punjab, which is contrary to stipulation of RFP documents that there was no forest in the route. The Petitioner was unable to start the construction of the transmission line in respective forest stretches. The unforeseen requirement of obtaining forest clearance and delay in issuance of forest clearance, resulted in delays in implementation of the transmission project. Forest clearance is a mandatory requirement for laying the transmission lines in the forest area. The Petitioner took up the matter with the authorities for forest clearance. Therefore, the time taken for grant of forest clearance was beyond the reasonable control of the Petitioner and has affected the project implementation and thereby prevented the Petitioner from performing its obligations under the TSA.

95. In our view, the Petitioner was prevented from discharging its obligations under the TSA on account of unexpected requirement and delay in grant of forest clearance which was not there in the RFP documents and as such delay beyond one year in grant of forest clearance is covered under Force Majeure. Accordingly, the SCOD shall stand extended till the actual CODs of Kurukshetra – Malerkotla and Malerkotla – Kurukshetra Transmission Lines which are 18.1.2017 and 27.3.2017 respectively. However, we would like to make it clear that the extension of COD of the instant assets does not entail any financial benefit in the form of IDC and IEDC to the Petitioner.”

4.5 In the above Order dated 29.03.2019, the Central Commission has, however, not allowed the Appellant to capitalize the claim made by Powergrid against the Appellant in terms of the Order dated 30.11.2017 passed in Petition No. 60/TT/2017.

4.6 IMPLICATION OF THE ABOVE ORDERS AND EVENTS IS SUMMARISED AS UNDER:

- (a) The Appellant should not be held liable for delay as the delay is admittedly on account of force majeure reasons;
- (b) The Appellant cannot therefore be penalized to incur any additional cost by way of IDC/IEDC to be paid to Powergrid as decided in the impugned order, as force majeure suspends any such liability;

(c) The issue whether the Appellant was affected by the force majeure events or not was pending in Petition No. 195/MP/2017 at the time when the impugned order dated 30.11.2017 was passed in 60/TT/2017;

(d) Subsequent to the above, in the order dated 29.03.2019 passed in Petition No. 195/MP/2017, the Central Commission has decided the force majeure event in favour of the Appellant.

4.7 In the facts and circumstances mentioned above, the Appellant submits that the IDC/IEDC should not be held as payable by the Appellant to Powergrid. It cannot be that on the one hand, the Central Commission has found in the favour of the Appellant that the delay in achieving the commercial operation date of Appellant's asset was due to force majeure events in Petition No. 195/MP/2017 and on the other hand, in the present impugned order, penalise the Appellant (by payment of IDC and IEDC to Powergrid) for delay in commissioning of its assets. Further, Powergrid should be directed to recover such IDC/IEDC from the beneficiaries of the users of the transmission system of the Appellant/Powergrid along with interest, if any, in accordance with the Central Commission (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010.

4.8 In regard to the above, the Central Commission, in the order dated 27.05.2016 passed in the matter of Powergrid Corporation of India Limited –v- Madhya Pradesh Power Management Company Ltd. and Ors. (Petition no. 261/TT/2015) has held as under:

“7. The petitioner has sought approval of COD for Asset 1& 2 in accordance with Regulation 4 (3) (ii) of the Tariff Regulations 2014. The petitioner has submitted that due to non readiness of corresponding transmission line viz. 765 kV S/C Jabalpur- Bina and 765 kV D/C Dharamjaygarh-Jabalpur transmission line, the petitioner is not able to provide services for the reasons not attributable to itself, its suppliers, or contractors, but on account of the delay in commissioning of associated transmission line by Jabalpur Transmission Company Ltd. (JTCL). The petitioner has submitted that the case qualifies for consideration of the Commission for approval of date of commercial operation prior to the element of coming into regular service.

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18. *We have considered the submissions of the petitioner. The petitioner has submitted minutes of meeting of progress report by CEA on 24.9.2013 in which*

representatives of JTCL has informed about progress of the project. JTCL submitted that the project has been delayed due to delay in forest clearances. The petitioner has also submitted letter to M/s Sterlite Grid Ltd. dated 4.7.2014 with regard to readiness of transmission lines for the execution of 765 kV bays at Jabalpur & Bina. Further, the petitioner has also submitted record notes of the coordination meeting held with M/s Sterlite on 1.9.2014 with regard to expected COD of Transmission line, Sterlite has submitted that 765 kV S/C Jabalpur-Bina line and 765 kV D/C Jabalpur-Dharmjaygarh would be completed by 15.12.2015 and 31.3.2015. The petitioner has submitted Sterlite's letter to petitioner regarding status and commissioning intimation for the 765 kV D/C Jabalpur-Bina Transmission line of JTCL.

19. It is evident that the bays and reactors already commissioned/being commissioned by the petitioner was targeted according to the schedule of Order in Petition No. 261/TT/2015 Page 14 readiness of the corresponding transmission lines of downstream system of JTCL. The petitioner has worked to match with the associated lines of JTCL. Hence, delay of 187 days, 226 days, 531 days and 532 days with regard to Asset 1, 2, 3 & 4 respectively has been condoned, as the delay reasons are not attributable to the petitioner.

.....
Sharing of Transmission Charges

53. The transmission charges for the instant assets shall be borne by Long Term Transmission Customer (LTTC) of the Transmission Service Agreement (TSA) executed by Jabalpur Transmission Company Ltd. (JTCL) under Tariff Based Competitive Bidding line, till the commissioning of the transmission lines. Once the associated system is commissioned, the billing, collection and disbursement of the transmission charges approved shall be governed by the provisions of Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010, as amended from time to time as provided in Regulation 43 of the 2014 Tariff Regulations.”

- 4.9 The above decision taken by the Central Commission is squarely applicable to the facts of the present case. The Central Commission is not entitled to take a different view. In this regard, this Tribunal vide judgment dated 16.07.2018 passed in Appeal No. 281 of 2016- NHPC Limited –v- Powergrid Corporation of India Limited, has held as under:

“14.4 We have gone through the rival contentions of the learned counsel appearing for both the parties carefully on this issue and find that the findings of the Central Commission in the present case and in the subsequent cases have a large variance. NHPC alleges for the differential treatment in their case while comparing with the subsequent cases of PKTCL and PGCIL. On the other hand, the Respondents have submitted that the facts in the present case and those subsequent cases of PKTCL are quite different and there is no contrast in the decision taken by the Central Commission. It is, however, relevant to opine that the findings and decisions of the Central Commission have to be consistent and uniform based on principle of natural justice and equity in all the cases as far as liability for delay in commissioning of the respective assets of the parties is concerned. It is further noted that a review petition in

respect of the said petition No.156/TT/2015 is pending before the CERC and the entire issue, as such, needs comprehensive adjudication.”

- 4.10 Therefore, the Central Commission, while passing the impugned order, directing the payment of IDC and IEDC by the Appellant to Powergrid after taking note of the issue of the delay on the part of the Appellant being due to force majeure would be decided in Petition No. 195/TT/2017 then pending, ought to have passed the consequential directions that if the force majeure event issue is eventually decided in favour of the Appellant, the Appellant would be entitled to the appropriate monetary adjustments to offset the above liability held against the Appellant. It is submitted that it is in the above context that the Appellant had specifically urged that the two (2) petitions being Petition 60/TT/2017 and Petition No. 195/MP/2017 should be heard together.
- 4.11 Powergrid had established another transmission system which is to be interconnected with the transmission system being established by the Appellant. Powergrid's system achieved commercial operation as decided in the impugned order on 03.4.2017 (Asset I and IIA) and 18.1.2017 (Asset IIB). The Appellant's 400 kV D/C Kurukshetra- Malerkotla Transmission Line achieved COD on 18.01.2017.
- 4.12 The delay in the Appellant achieving the COD till 18.01.2017 has since been held by the Central Commission to be on account of Force Majeure reason i.e. beyond the control of the Appellant and, therefore, to be condoned in the order dated 29.3.2019 in the Petition No. 195 of 2017 passed by the Central Commission.
- 4.13 The issue to be considered is whether the Appellant should still be held liable to pay IDC and IEDC to Powergrid in regard to the above mis-match in the achievement of the COD of Powergrid System on 3.4.2017/18.01.2017 and the Appellant's System on 18.01.2017 when the

delay in the Appellant's System has been held by the Central Commission to be due to Force Majeure reason i.e. beyond the control of the Appellant.

4.14 The Power Sale Agreement (**PSA**) dated 2.1.2014 entered into by the Appellant with the beneficiaries deals with the available relief for Force Majeure in Article 11.7 as under:

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 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 Escalabel 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 Customers 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.*

4.15 In terms of the above the Appellant cannot be held to be in breach of any obligation to the extent delayed in its performance due to Force Majeure reason and the Appellant is entitled to claim relief in performance of such obligation due to Force Majeure event. There are no Regulations notified by the Central Commission which creates any such obligation on the part of the Appellant. There is no provision in the TSA which provides for any such obligation. On the other hand, the TSA, as mentioned above, clearly provides for a relief to the Appellant for any such obligation.

- 4.16 Powergrid has otherwise no agreement or contract or privity of any nature with the Appellant in any instrument or document to claim any such relief of IDC/IEDC against the Appellant. There is, therefore, no law or contractual provision providing for any such liability on the Appellant. The basic aspect is that the delay cannot be said to be on account of the Appellant if the Appellant was prevented on account of Force Majeure reason. The delay has to be excused. If the delay is excused and condoned, there cannot be any claim against the Appellant.
- 4.17 In the circumstances after the Order dated 29.3.2019 passed by the Central Commission in Petition No. 195/MP/2017 there cannot be any valid claim for IDC/IEDC by Powergrid from the Appellant. It is not that Powergrid is remediless. Powergrid having duly established its system on 03.04.2017/18.01.2017, Powergrid should be allowed the tariff to be recovered or IDC/IEDC to be added in regard to its tariff to be recovered from the beneficiaries of the Powergrid System. Powergrid should, therefore, to be held entitled to claim relief under the POC Mechanism for the amount due to it for the period from the date of the COD of Powergrid System.
- 4.18 The impugned order to the extent it holds that the Appellant shall pay IDC/IEDC to Powergrid is, therefore, liable to be set aside.

5. Ms. Suparna Srivastava, Learned Counsel for the Respondent No. 2 i.e. Power Grid Corporation of India Ltd. has filed the written note/reply for our consideration as under:-

- 5.1 The Appellant has challenged the Order dated 30.11.2017 passed by the Respondent No.1 Commission in Petition No.60/TT/2017 whereby, while determining the transmission tariff for the transmission assets of Respondent No.2, the Commission has directed that the IDC and IEDC of

the said transmission assets from their respective dates of commercial operation (COD) till the commissioning of the Appellant's transmission elements should be borne by the Appellant. The Appellant is aggrieved that the said liability has wrongly been imposed upon it inasmuch as,

- (i) all the elements of the project have been successfully commissioned by the Appellant in tandem with the upstream system 800 kV HVDC Champa-Kurukshetra bipole and power transmission beyond Kurukshetra HVDC terminal has not been constrained even for a single day;
- (ii) the delay in commissioning of the transmission project has been beyond the control of the Appellant and the issue of such delay has been pending adjudication before the Commission in Petition No.195/MP/2017 where detailed force majeure reasons explaining the time and cost overrun have been given. Despite the prayer made by the Appellant to hear Petition No.195/MP/2017 and Petition No.60/TT/2017 together so that a fair and comprehensive view of the matter can be taken, the same has been rejected and the Appellant has been mulcted with the IDC and IEDC costs without adjudicating and giving any finding on the reasons given by the Appellant for the said delay.

Contending as such, the Appellant has prayed for setting aside of the impugned Order dated 30.11.2017 passed by the Respondent No.1 Commission, thereby setting aside the liability on the Appellant for paying IDC and IEDC.

- 5.2 The transmission scheme in the name of "Northern Region System Strengthening Scheme XXXI (B)" [hereinafter referred to as "NRSS-XXXI (B)"] had been conceived for providing an additional transmission corridor to Amritsar for meeting load growth demands in the area by connecting the existing Amritsar sub-station with HVDC station at Kurukshetra for enabling

power supply from pit-head generating stations in Chhattisgarh through Champa-Kurukshetra HVDC bi-pole. The scheme was approved in the 31st Standing Committee Meeting for Power System Planning of Northern Region held on 2.1.2013 as under:

“c) Additional Corridor to Amritsar

CEA stated that 400/220 kV Amritsar substation is having 2x315 MVA transformation capacity and considering the load growth in Amritsar area, augmentation of transformation capacity by 1x500 MVA is under implementation. At present Amritsar S/s is being fed by a 400kV S/c line from Jullandhar and is also going to be connected with Parbati Pooling station by a 400kV D/c line. In addition, as part of PSTCL system, 400kV Makhu- Amritsar D/c line is being constructed for providing connectivity of STU grid with ISTS grid.

POWERGRID stated that although, Amritsar S/s is planned to be connected to Parbati Pooling station and Makhu (PSTCL substation) however the power supply to Amritsar area would be mainly through Jullandhar 400kV substation as during winters the generation of hydro projects would reduce to very low levels as well as in case of low generation at Talwandi Saboo TPS, Makhu S/s may also draw power from Amritsar. It is therefore necessary that power supply arrangement to Amritsar S/s is augmented. It was further stated, HVDC station at Kurukshetra is being established for supply of power from pit head generating stations of Chhattisgarh. Accordingly, for augmenting power supply to Amritsar S/s, following transmission works were proposed to be implemented through Tariff Based Competitive Bidding as System strengthening scheme of NR:

- 400kV Kurukshetra- Malerkotla D/c line
- 400kV Malerkotla- Amritsar D/c line

RVPNL enquired about the availability of space at Amritsar substation. POWERGRID informed that space is available and if required they would implement 400kV GIS bays for extension in Amritsar station.

Members agreed to the above proposal.”

The approved NRSS-XXXI (B) transmission scheme thus comprised of the following two elements for implementation through the tariff-based competitive bidding (TBCB) route:

- (i) 400 kV Kurukshetra-Malerkotla D/c line; and
- (ii) 400 kV Malerkotla-Amritsar D/c line.

5.3 The NRSS-XXXI (B) transmission scheme was to be implemented as a system strengthening scheme in the Northern Region. It is clear from Minutes of 31st Standing Committee Meeting for Power System Planning of Northern Region held on 2.1.2013 that the scheme was primarily for augmenting power supply to Amritsar sub-station. Further, a firm schedule

(28 months) was given for completion of the scheme in RFP document. The SPV was transferred on 12.5.2014. Accordingly, the scheme was to be completed by 10.9.2016. Neither the Central Electricity Authority nor the Central Transmission Utility, which are the main planning agencies directed the Appellant to delay the transmission line so as to match with Champa – Kurukshetra HVDC system. It was the sole decision of the Appellant to delay the lines without any consultation with the planning agencies. Notwithstanding this position, the Appellant has repeatedly and wrongly contended out of context that all the elements of the NRSS-XXXI (B) transmission scheme have been successfully completed in tandem with the upstream 800 kV HVDC Champa-Kurukshetra bi-pole and that power transmission beyond Kurukshetra HVDC terminal has not been constrained for even a single day. As the project had been awarded to the Appellant under the TBCB route, it was required to complete the same as per the assigned timelines i.e. by 10.9.2016.

- 5.4 While the aforesaid lines under NRSS-XXXI (B) transmission scheme were to be implemented under the TBCB route, the corresponding sub-station extension works by providing 400 kV line bays were to be carried out by Respondent No.2 as under:

Substations:

- (a) Kurukshetra HVDC Sub-Station (GIS) (Powergrid) (Extension)
400kV- Line Bays; 2 Nos.
- (b) Malerkotla(GIS) 400/220 kV (Powergrid) Sub-Station (Extension)
400kV- Line Bays: 4 Nos.
- (c) Amritsar 400/200 kV (Powergrid) Sub-station (Extension)
400kV- Line Bays: 2 Nos.

The Investment Approval (IA) and expenditure sanction for implementing the same was accorded by the Board of Directors of Respondent No.2 on 2.6.2015 at an estimated cost of Rs.118.18 crores which included IDC of

Rs.4.68 crores (based on February, 2015 price level). As per the IA, the scheduled completion of bays was 16 months from the date of the IA i.e. 1.10.2016 against which the bays at Amritsar and Malerkotla were commissioned with a delay of two months for the reasons not attributable to it as more particularly described herein below, even when the Energization Certificate from the Central Electricity Authority had been duly obtained.

5.5 Vide Notification dated 20.5.2013, the Government of India, Ministry of Power, notified REC Transmission Projects Company Ltd. as the Bid Process Coordinator (BPC) for the purpose of selection of bidder as Transmission Service Provider (TSP) to implement the NRSS-XXXI (B) transmission scheme. Vide letter dated 6.6.2013, the BPC requested Respondent No.2 to provide information relating to the transmission scheme for preparation of the project-related Request for Proposal (RfP) document, which was duly provided by Respondent No.2 vide letter dated 20.6.2013 alongwith a schematic map of the scheme. Further, the coordinates for the sub-stations under the scheme were also provided to the BPC vide emails dated 1.8.2013 and 5.9.2013 as under:

Amritsar: Lat- 31°32'27.1068" & Long- 74°53'34.983"

Malerkotla: Lat- 30°33'16" & Long- 75°52'27"

Kurukshetra: Lat- 29°54'25.44" & Long- 76°59'32.28"

5.6 For a transmission scheme under TBCB route, the identified BPC approaches Respondent No.2 for various inputs including coordinates for sub-stations associated with the scheme for inclusion in the RfP document. Upon receipt of such request, the coordinates are provided to BPC in consultation with the Engineering Department/Site with the disclaimer that the said coordinates are only tentative coordinates within the sub-station boundary wall for locating the respective sub-station site and are not to be treated as the final line termination coordinates. Further, the BPC while

publishing the RfP documents and Survey Report mentions the disclaimer about the coordinates and data mentioned in the RFP documents.

- 5.7 Further, the BPC has incorporated the disclaimers in the RfP document issued to the bidders as part of the bidding process. Relevant paragraphs from the RfP document are extracted as below:

“1.5 The BPC has initiated development of the Project and shall be responsible for the tasks in this regard as specified hereunder:

6... Provide to the Bidders a Survey Report for the Project at least forty five (45) days prior to the Bid Deadline. The Survey Report will contain information regarding the transmission line, i.e. voltage level, line configuration (i.e., S/C or D/C), indicative route alignment, conductor type conductor configuration and type of terrain likely to be encountered.

Provided that neither the BPC, its authorized representative, any of the Long Term Transmission Customer(s), nor their directors, employees or advisors/consultants make any representation or warranty, express or implied, or accept any responsibility or liability, whatsoever, in respect of any statements or omissions made in the Survey Report, or the accuracy, completeness or reliability of information contained therein, and shall incur no liability under any law, statute, rules or regulations as to the accuracy, reliability or completeness of such Survey Report, even if any loss or damage is caused to the Bidders by any act or omission on their part.

2.14.2.4 The BPC has carried out a survey of the Transmission Lines associated with the Project and shall provide each Bidder with its Survey Report of the Project. Bidders in their own interest should carry out required surveys and field investigation for submission of their Bid.

2.14.2.5 Failure to investigate the route of the Transmission Lines associated with the Project and to examine, inspect site or subsurface conditions fully shall not be grounds for a Bidder to alter its Bid after the Bid Deadline nor shall it relieve a Bidder from any responsibility for appropriately eliminating the difficulty or costs of successfully completing the Project.”

Thus, the participating bidders were aware that the coordinates for sub-stations are only tentative and that the selected bidder is required to coordinate with the concerned agency for exact position of termination of transmission line.

- 5.8 The Special Purpose Vehicle (SPV) in the name of NRSS XXXI (B) Transmission Ltd. (the Appellant herein) was incorporated for implementing the aforesaid scheme, which signed a Transmission Service Agreement dated 2.1.2014 with the long-term transmission customers (LTTCS) of the lines comprised in the scheme. The BPC initiated the bidding process by

issuing a Request for Qualification (RfQ) on 31.7.2013 for selection of a TSP to implement the scheme on build, own, operate and maintain basis. The qualified bidder under RfQ were then issued the RfP on 9.12.2013 including the Survey Report. One Essel Infra Projects Ltd. emerged as the successful bidder which subscribed to 100% shareholding in the Appellant company. Thereafter, the Appellant was granted transmission licence vide Order dated 25.8.2014 passed by the Respondent No.1 Commission in Petition No.90/TL/2014 and the tariff discovered in the bidding process was also adopted vide Order dated 7.8.2014 passed by the Commission in Petition No.89/TT/2014. The Appellant was required to implement the scheme and complete the same within 28 months of the grant of licence and on its scheduled date i.e. 10.9.2016.

- 5.9 Vide letter dated 14.5.2014, the Appellant requested Respondent No.2 for information regarding termination of lines at the sub-stations. In response thereto, Respondent No.2, vide letter dated 4.7.2014, informed the Appellant as under:

*“In regard to above, the GA and SLD showing the bays allotted at Malerkotla and Amritsar substations are attached.
Further the Electrical layout plan of Kurukshetra HVDC converter station showing the termination gantry (double level gantry at 15 m and 25 m) location for 400 kV D/c Kurukshetra – Malerkotla transmission line, which is required to be terminated at above converter stations at higher level gantry (i.e. 25 m approx.) is enclosed. It may also be noted that the North coordinates of the double level gantry (15 m and 25 m approx.) may vary by few meters during detailed engineering.”*

Thus, Respondent No.2 duly provided the necessary information to the Appellant regarding the bays for termination of lines of each of the sub-stations. Even at that time, Respondent No.2 categorically stated that there could be a variation in coordinates by few meters during detailed engineering. Thereafter, after a gap of more than a year, the Appellant, vide letter dated 27.8.2015, sought confirmation of coordinates from Respondent No.2 for carrying out works on the sections near the sub-

stations. In the said letter, the Appellant acknowledged that it had received the GA and SLD of bays at all the three sub-stations on 4.7.2014 itself. It is submitted that vide letter dated 10.10.2015, Respondent No.2 provided to the Appellant alongwith drawings, the coordinates of the sub-station centre gantries for LILO of Kurukshetra-Amritsar line. The co-ordinates of gantry for Malerkotla line to be terminated at Kurukshetra were also made available to the officials of the Appellant during their visit to Kurukshetra site vide email dated 12.3.2016. The said coordinates could vary by a few meters, which had a negligible impact on the finalization of dead end tower. In this manner, the gantry coordinates for the sub-stations were duly provided to the Appellant as and when requested for and there was no delay in confirmation of the same as was subsequently alleged by the Appellant.

- 5.10 The Appellant wrongly presumed that multi-circuit towers were required for termination of the 400kV D/c Amritsar-Malerkotla line and Kurukshetra-Malerkotla line. Despite being informed via the aforesaid communication dated 4.7.2014 that the said lines were to be terminated on double level gantry, the Appellant proceeded to install multi-circuit towers as per its own convenience for a task which could have been accomplished by using two nos. D/c towers as had already been done by the Appellant at Kurukshetra end. The Appellant was never required to install multi-circuit tower as there was no such requirement. Further, it was observed from the location of the dead end tower of the 400 kV D/c Malerkotla-Amritsar line that the said line was to run almost parallel in the Amritsar gantry and was to block termination of future transmission lines in future bays of the 400/220 kV Amritsar sub-station. It is submitted that it was the primary responsibility of transmission line executing agency that the line terminating at the sub-station did not block the future corridor of the existing sub-station and route alignment near substation was shared with respective site-in-charge of the

sub-station. However, the Appellant did not take the same into consideration and accordingly, vide letter dated 5.2.2016, Respondent No.2 advised the Appellant to realign the route of its 400kV Malerkotla-Amritsar line without blocking the future line corridor so that termination of any future line did not get blocked in future gantry of 400/220 kV Amritsar sub-station. Respondent No.2 also requested the Central Electricity Authority, vide letter dated 17.2.2016, to convene a meeting to address the issue of blockage of future expansion of Amritsar sub-station by the Malerkotla-Amritsar line. The said meeting was convened on 7.3.2016 (which was not attended by the Appellant) wherein it was decided that the Appellant would provide the requisite inputs so that optimal route for termination of the 400 kV D/c Malerkotla-Amritsar line at Amritsar could be finalized in consultation with Respondent No.2. Accordingly, vide letter dated 29.3.2016, Respondent No.2 advised the Appellant to realign the route of the said line without blocking the future line corridor and submit the revised route as also the dead end position so that sub-station equipment foundation for the line bays could be finalized and executed accordingly.

5.11 Vide its letter 14.4.2016, the Appellant informed Respondent No.2 that the route alignment in issue had already been published on 10.6.2014 as per Section 164 of the Electricity Act, 2003 and no objection to the same had been raised by Respondent No.2 at that time. In response thereto, Respondent No.2 vide its letter dated 28.4.2016 informed the Appellant as under:

“As per practice, in the publication made in Newspapers only name of villages are indicated and no route alignment with angle towers is shown. Since tower spotting and route alignment is not depicted in publication, question of objection from POWERGRID does not arise.

It is also logical that before going for construction, Transmission line route near Substation end should be shared with utility/POWERGRID, so that any issues regarding route can be addressed there and then. The dead end location was also provided, when POWERGRID asked for it, via email dated 29/01/2016. As soon as, details were received by POWERGRID, concern for future blockage was raised to all concerned.

Since, in Meeting with CEA it has been decided that NRSS-XXXI (B) shall provide requisite inputs to NRTS-II, POWERGRID so that optimal route for the termination of 400kV D/C Malerkotla Amritsar TL at Amritsar Substation can be finalized in consultation with POWERGRID. Accordingly, NRSS-XXXI (B) is once against requested to re-align the subject TL and submit the revised route.”

Vide another letter dated 27.4.2016, Respondent No.2 informed the Appellant that since the Appellant had intimated that the dead end tower location would not change, Respondent No.2 was going ahead with finalization of layout of terminal equipment at 400/220 kV Amritsar sub-station and in case during re-routing/re-alignment of the line, dead end tower location was required to be shifted, then the consequential rectification/re-work cost of the bay equipment was to be on the Appellant’s account.

5.12 A meeting was convened with the Central Electricity Authority on 27.5.2016 for resolving issue pertaining to termination of lines at substations of Respondent No.2 wherein the Appellant represented as under:

“3. M/s. NTL representative made a brief presentation showing the historical events, the status of construction as on date and the present route(s) of their line near the Amritsar, Malerkotla and Kurukshetra Substations. He informed that both 400 kV lines i.e. Kurukshetra – Malerkotla and Malerkotla – Amritsar are expected to complete by their scheduled COD i.e. September, 2016. The progress of transmission project was as under:

Progress till 27 May 2016

Name	Length (ckm)	Total Locations (nos.)	Found. Completed [Gangs]	Towers completed [Gangs]	Stringing payment done [Gangs]
Kurukshetra – Malerkotla 400 kV D/C line	267	375	351 [08]	295 [08]	121 [04]
Amritsar – Malerkotla 400 kV D/C line	299	412	379 [08]	337 [05]	120 [03]

It was further deliberated in the Meeting as under:

“6.He further stated that as the project is scheduled to be commissioned in Sept, 2016, it would not be possible to grant approval u/s 164 on a revised route. Further, there is no planned line for termination at Amritsar substation at present and in future if any line is proposed, appropriate care would be taken in the RFP for termination of line at Amritsar substation.

7. Regarding route of Kurukshetra- Malerkotla 400kV transmission line near Malerkotla substation of PGCIL, PGCIL representative intimated that provision has been kept for 5 line bays of 400kV to emanate from Malerkotla substation and expressed his concern on blocking of their termination at the substation. M/s NTL representative informed that the transmission line (tower no. 70/0 to 72/0) is passing more than 100 metres away from the boundary of Malerkotla substation and it has already been designed with +25m extension height for 70/0, normal DD tower for 71/0 and +18 m extension height for 72/0. PGCIL representative requested to extend the height of 71/0 to +25m so that the future transmission lines may not get any obstruction while terminating them at Malerkotla substation. M/s NTL representative responded that any change near Malerkotla substation is difficult as people are already agitating against routes of these lines and line is being erected with the help of local authorities . As there was no change in route approved u/s 164, PGCIL insisted for providing +25m extension at Location no. 71/0 to facilitate smooth under crossing of future lines, M/s NTL did not agree for the same as foundation for the DD tower had already been casted. With the intervention of CEA both the parties agreed for +9m height extension of Tower no. 71/0.”

Thus, with the intervention of the Central Electricity Authority, the Appellant was required to raise the height of only one tower No. 71/0 by +9 meters, which could be done within 10-15 days. In any case, the issue of re-routing/re-alignment had occurred for reasons not attributable to Respondent No.2 and as such, Respondent No.2 could not be held responsible for any delay on that account.

5.13 The Appellant was required to commission the transmission lines on or before 10.9.2016. However, the 400 kV D/c Kurukshetra-Malerkotla line was declared commercially operational on 18.1.2017 with a delay of 128 days and the 400 kV D/c Malerkotla-Amritsar line was declared commercially operational on 27.3.2017 with a delay of 196 days. This was so even when the Appellant vide letter dated 1.10.2016 also confirmed to Respondent No.2 that 400kV D/C Kurukshetra-Malerkotla transmission line

would be ready for charging and inter-connection with the grid system on 30.11.2016. As set out hereinabove, no part of the said delay could be attributed to Respondent No.2 at any stage of project implementation. Respondent No.2 also requested the Appellant to confirm the status of line termination and intimated the readiness of the bays vide letters dated 30.9.2016, 19.10.2016, 27.10.2016, 10.11.2016, 21.11.2016 and 22.11.2016, so that the scheme could be commissioned and power flow therefrom could take place. In that also, the Appellant raised untenable issue of wrong switching operation at Malerkotla end which had prevented the charging of Malerkotla-Amritsar line on 11.1.2017. However, the fault had occurred due to failure of one of the equipment; however, inspite of that, the line had been charged on 15.1.2017 i.e. after a gap of 4 days, which was negligible.

- 5.14 After commissioning of the transmission lines as aforesaid, the Appellant filed Petition No.195/MP/2017 before the Respondent No.1 Commission seeking compensatory and declaratory reliefs under the TSA on account of certain force majeure and change in law events which it claimed had occurred during the implementation of the scheme, adversely affecting the implementation of the scheme and preventing it from completing the scheme on time. Amongst others, the Appellant alleged delays on part of Respondent No.2 and citing other force majeure/change in law events, the Appellant submitted that not only the delay was liable to be condoned, but the Appellant was also required to be compensated to offset the additional cost incurred on account of unforeseen and uncontrollable events that had occurred subsequent to the submission of bid and award of the project. The Appellant accordingly prayed for extension of the Scheduled Date of Commercial Operation for the project to the actual Date of Commercial Operation of respective elements and also sought an increase in transmission charges to offset the cost of Rs.51.93 crores it claimed to

have incurred on account of additional IDC. It is submitted that none of the delays as pleaded by the Appellant qua Respondent No.2 could be attributable to it for reasons set out above and accordingly, Respondent No.2 filed its Reply in Petition No.195/MP/2017 denying the same. The said Petition is presently pending adjudication before the Respondent No.1 Commission.

5.15 In the meantime, Respondent No.2 also filed a Petition before the Respondent No.1 Commission [being Petition No.60/TT/2017] for approval of transmission tariff for the following assets for the tariff block 2014-19 under the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 [hereinafter, the “2014 Regulations”]:

- (i) Asset I: 2 No. line bays at Amritsar 400/220 kV sub-station
- (ii) Asset II: 4 No. 400kV line bays at Malerkotla GIS 400/220 kV sub-station

For the 2 GIS bays at Kurukshetra sub-station, Respondent No. 2 has filed a separate Petition No.61/TT/2018 for determination of tariff under the same project i.e. NRSS-XXXI-B. For approval of COD of each of the aforesaid assets under Petition No. 60/TT/2017, Respondent No. 2 submitted as under:

“Assets covered in present petition are as follows:

Sl No.	Assets	Scheduled DOCO as per IA	Anticipated DOCO	Delay in Months
1	Asset-I: 2 No. Line bays at Amritsar 400/220kV Substation	01.10.2016	01.12.2016	2 months
2.	Asset-II: 4 No. 220kV Line bays at Malerkotla GIS 400/220kV Substation	01.10.2016	01.12.2016	2 months

Justification of delay:

The 400kV bays at Amritsar Sis and 400kV GIS bays at Malerkotla S/s are being constructed by POWERGRID for connection of 400kV D/C Amritsar-Malerkotla TBCB line and 400kV D/C Kurukshetra-Malerkotla TBCB line being implemented by ESSELGROUP, As per the CEA reports as on 31.10.2016, these line is

scheduled to be commissioned in DEC' 2016 and NOV; 2016 respectively. Further NRSS XXXI(B)Transmission limited by its letter dtd. 01.10.2016 also confirmed that 400kV D/C Kurukshetra-Malerkotla T/L will be commissioned by 30thNov 2016. Correspondence has been made regarding status of line and readiness of our bays to NRSS-XXXI (B)Transmission limited vide letter dtd. 30,09,2016, 19.10.2016, 27.10.2016, 10.11,2016, 21.11.2016 and 22.11.2016, Further matching with the scheduled provided by NRSS-XXXI(B) Transmission limited (Essel Group), bays at POWERGRID end is anticipated to be commissioned by 01.12.2016. Relevant letter is attached hereto as Encl. – 5, page no 52 to 63.

It is to be mentioned the delay is mainly due to matching the bays with the upcoming TBCB line, As is evident from above that the delay was beyond the control of POWERGRID. Based on the above unforeseen delay reasons it is prayed to the Hon'ble Commission to condone the delay in completion of subject assets on merit of the same being out of the control of Petitioner in line with CERC Regulations' 2014 12(2)(i) "uncontrollable factors."

Respondent No.2 thus submitted that though its transmission assets were ready, they were not being put into service on account of delay in commissioning of the transmission lines of the Appellant. The Respondent No.1 Commission after hearing the Appellant in Petition No.60/TT/2017 and No.195/MP/2017 gave its findings and imposed the liability of IDC and IEDC on the Appellant.

5.16 The Appellant raised objections as regards its impleadment therein and submitted that since the Petition related to the tariff determination of Respondent No.2, there was neither any scope nor an independent analysis of the reasons behind the delay occasioned in implementation of the transmission scheme within the scope of work of the Appellant. The Appellant further submitted that the commercial operation of the transmission lines was delayed due to various force majeure and change in law events including delays occasioned on account of Respondent No.2. In Rejoinder thereto, Respondent No.2 reiterated as under:

"It is submitted that schedule commissioning as per Investment approval for asset under-present petition was 01.10.2016 and Schedule commissioning of the TBCB line was 11.09.2016. However TBCB line was getting delayed and NTL through its letter dtd. 01.10.2016 confirmed that 400kV D/C Kurukshetra-Malerkotla T/L will be commissioned by 30.11,2016. As the commissioning of TBCB line was further getting delayed, due to contractual obligation asset under present petition was declared DOCO on 01.12.2016. It is evident that lines were

*not ready and bays were ready to be charged hence it is submitted that the date of commercial operation for the **Asset-I & Asset-II** shall be determined in accordance with the provisions of Regulation 14.”*

5.17 The tariff for the transmission assets of Respondent No.2 is determined under Section 62 read with Section 64 of the Electricity Act, 2003 (hereinafter, the “2003 Act”), unlike that in the case of the Appellant where the discovered tariff under the TBCB is adopted by the Regulatory Commission under Section 63 of the Act. The regulatory regime governing the tariff determination for Respondent No.2 is laid down in the Central Electricity Regulatory Commission (Terms and conditions of Tariff) Regulations, 2014 (hereinafter the “2014 Tariff Regulations”) where, the “*Date of Commercial Operation*” or “*COD*” (i.e. the date from which the servicing of the transmission assets is to begin) is defined in Regulation as under:

“(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.”

Thus, a transmission system or an element thereof can be declared commercially operational when it is put in regular service after successful trial operation for transmitting electricity and communication signal from sending end to receiving end. However, if the same is prevented from

being put to service on account of the delay in commissioning of the concerned generating station or in commissioning of the upstream or downstream transmission system (the inter-connected system), then the transmission licensee may approach the Respondent No.1 Commission for approval of COD of such transmission system or an element thereof. Respondent No.2 submits that it was in accordance with these provisions in the 2014 Tariff Regulations that it filed the above Tariff Petition before the Respondent No.1 Commission and claimed approval of COD of the transmission assets implemented by it.

5.18 Under proviso (ii) of clause (3) of Regulation 4 of the 2014 Tariff Regulations, Respondent No.1 Commission may approve the COD of a transmission system implemented under Section 62 route in the event there is any mismatch in commissioning of the inter-linked upstream/downstream transmission system. Accordingly, while approving transmission tariffs for Respondent No.2, the Commission has from time to time on various occasions of mismatch, passed Orders approving the CODs of transmission assets under the said proviso (ii) of clause (3) of Regulation 4. Respondent No.2 craves leave to place the relevant Orders of the Commission in this regard at the time of hearing in the above Appeal. The consistent position adopted by the Commission is that in the event of a mismatch in commissioning of the inter-linked transmission systems, the transmission licensee (or its long-term customers) whose assets are not yet ready and because of which the already commissioned assets of the other transmission licensee have not been put in regular service, is liable to pay the transmission charges till commissioning of the inter-linked downstream/upstream transmission system. It follows that whenever a tariff determination is sought by invoking the provisions of Regulation 4(3)(ii) of the 2014 Tariff Regulations, it may result in imposition of a liability on the licensee implementing the inter-connecting transmission system and as

such, it is just, fair and necessary in compliance of the principals of natural justice that the said licensee is also made a party therein and is duly heard. In fact, a perusal of the impugned Order shows that the Respondent No.1 Commission has afforded that opportunity of being heard to the Appellant before adjudicating on the Tariff Petition of Respondent No.2:

“19. The Commission, vide its order dated 12.6.2017 in the instant petition, has directed as under:

We have considered the submissions of the Petitioner. The Petitioner has prayed for approval of COD of the instant bays at Amritsar and Malerkotla as 1.12.2016 under proviso (ii) of Regulation 4(3) of the 2014 Tariff Regulations. We would like to hear Essel Group before approving the COD of the instant assets as 1.12.2016, as prayed by the Petitioner.....”

That being so, the Appellant’s contention before the Commission as regards its impleadment in the tariff proceedings of Respondent No.2 was completely misplaced.

5.19 The Appellant has executed a TSA with its LTTCs for procurement of transmission services. Vide the said TSA, the LTTCs have agreed to use the available transmission capacity of the system and pay to the Appellant the transmission charges as determined in accordance with the terms of the TSA. The COD for the transmission system is governed by the Article 6.2 of the TSA as under:

“Commercial Operation

6.2.1 An Element of the Project shall be declared to have achieved COD seventy two (72) hours following the connection of the Element with the Interconnection Facilities or seven (7) days after the date on which it is declared by the TPS to be ready for charging but is not able to be charged for reasons not attributable to the TPS or seven (7) days after the date of deferment, if any, pursuant to Article 6.1.2.

.....

6.2.2 Once any Element of the Project have been declared to have achieved 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 Monthly Transmission Charges applicable for such Element.”

Thus, unlike in the case of Respondent No.2 who is a statutory licensee, the Appellant as a TBCB licensee is not required to approach the Respondent No.1 Commission for approval of COD of its system in the event of mismatch with the inter-linked system and is also not required to await any tariff approval from the Commission for servicing of its transmission assets.

5.20 In other words,

- (i) in the case of Respondent No.2 (the statutory licensee), the issue of mismatch for declaration of COD and servicing of commissioned assets is governed by the 2014 Tariff Regulations read with the Orders of the Respondent No.1 Commission;
- (ii) in the case of the Appellant(the TBCB licensee), the TSA together with its deeming provision regarding COD ensures that the transmission system is commissioned and duly serviced even when the inter-linked transmission system is yet to be commissioned.

5.21 Vide the impugned Order dated 30.11.2017 and based on the materials placed on record before it in the tariff proceedings, the Respondent No.1 Commission approved the COD for the transmission assets of Respondent No.2 by applying the provisions of proviso (ii) of clause (3) of Regulation 4 of the 2014 Tariff Regulations.

5.22 In consonance of the aforesaid Order, the Respondent No.1 Commission approved the COD of the instant Assets in the following manner:

“26. As per RLDC Certificate dated 17.4.2017 for 400kV Amritsar (PG)-Malerkotla (PG)- I along with associated bays and 400kV Amritsar(PG)-Malerkotla (PG)-II along with associated bays trial run completed on 31.3.2017 and 2.4.2017 respectively for Ckt I and II. Accordingly, we have considered the COD of the Asset I i.e. both bays at Amritsar end as 3.4.2017. For the sake of ease in computation, we are considering COD on later date keeping in view of the fact that only one day difference does not have much significance.

27. As per RLDC Certificate dated 3.2.2017 for 400Kv Kurukshetra(PG)-Malerkotla (PG)-I along with associated bays and 400kV Kurukshetra(PG)-Malerkotla (PG)- II along with associated bays completed trial operation on 16.1.2017 and 17.1.2017 respectively for Ckt-I and II. Accordingly, COD of Asset-II has been considered on 18.1.2017. We are considering COD on later date for ease of computation considering that only one day difference shall not

have much significance. Accordingly, the COD of the Asset-II is segregated into two assets i.e. Asset-II (a) and Asset-II (b) as 3.4.2017 and 18.1.2017 matching COD with associated lines respectively.

28. The date of commercial operation (COD) considered for the instant assets are as follows:

Assets	COD claimed	COD Allowed
Asset I: 2 No. line bays at Amritsar 400/220 Kv sub-station	1.12.2016	3.4.2017
Asset II(a): 2 No. 400kV Line Bays at Malerkotla GIS 400/220 kV Sub- station	1.12.2016	3.4.2017
Asset II(b): 2 No. 400kV line bays at Malerkotla GIS 400/220 kV Sub-station	1.12.2016	18.1.2017

The aforesaid approval of COD was in accordance with the provisions of the Tariff Regulations, the decision of this Hon'ble Tribunal and upon consideration of the factual implementation details placed on record and as such, could not be faulted with.

5.23 While addressing the issue of mismatch in commissioning of transmission system by an ISTS licensee and upstream/ downstream system in line with its earlier decisions and analyzing the evidence made available on record by the Appellant and the Respondent No.2, the Commission held as under:

“37. As per the Investment Approval dated 2.6.2015, the instant assets were scheduled to be commissioned within 16 months i.e. by 1.10.2016 against which the instant assets were ready to be put under commercial operation on 1.12.2016. However, the instant asset was put to use only after COD of associated line. The petitioner has submitted that it has made various communications with NTL through letters dated 30.9.2016, 19.10.2016, 27.10.2016 and 22.11.2016 for commissioning of the TBCB line. The petitioner has stated that the time over run is on account of the delay of the associated lines by the Respondent NTL. We have observed that petitioner has submitted CEA certificate dated 26.9.2016 for Asset-I which proves it was ready before 1.10.2016 but in case of Asset-II, the petitioner obtained CEA certificate dated 4.11.2016. Therefore, there is no documentary evidence in the petition to support that Asset-II was ready before 4.11.2016. Hence, we are not inclined to allow time overrun of 1.10.2016 to 4.11.2016 for Asset-II. Accordingly, the IDC and IEDC shall be billed as under:

Asset	Date	Liable party
Asset-I	1.10.2016- date of COD of the asset	To be borne by NTL
Asset-II (a and b)	1.10.2016- 4.11.2016	Not to be capitalized
Asset-II (a and b)	5.11.2016- date of COD of the asset	To be borne by NTL

Thus, the liability to pay IDC and IEDC for the period Respondent No.2 could not commission its assets on account of delay in implementation of the lines by the Appellant, was rightly imposed on the Appellant in accordance with the principles laid down by the Respondent No.1 Commission and upheld by this Hon'ble Tribunal as more particularly set out above and as such, did not suffer from any infirmity as wrongly alleged by the Appellant or at all.

5.24 After the passing of the above Order, the Appellant preferred Review Petition No.7/RP/2018 before the Respondent No.1 Commission which was disposed off at the admission stage itself vide Order dated 20.6.2018.

5.25 In the facts and circumstances set out above, there is no infirmity in the impugned Order of the Respondent No.1 Commission so as to warrant any interference from this Tribunal. The liability to pay IDC and IEDC for the period of mismatch has rightly been fixed on the Appellant and which the Appellant is liable to pay forthwith to Respondent No.2. The present Appeal thus being devoid of any merits, the same is liable to be dismissed by this Tribunal.

6. Mr. Rajiv Srivastava, Learned Counsel for the Respondent No. 6 i.e. Uttar Pradesh Power Corporation Ltd. has filed the Written Submissions for our consideration as under:-

6.1 The Appellant by way of the appeal under reply has challenged the Order dated 30.11.2017 passed by the Respondent No.1 Commission in Petition No.60/TT/2017 vide which, while determining the transmission tariff for the transmission assets of Respondent No.2, the Respondent Commission has directed that the IDC and IEDC of the said transmission assets from their

respective dates of commercial operation (COD) till the commissioning of the Appellant's transmission elements should be borne by the Appellant.

- 6.2 The transmission scheme "Northern Region System Strengthening Scheme XXXI (B)" (NRSS-XXXI (B)) had been conceived for providing an additional transmission corridor to Amritsar for meeting load growth demands in the area by connecting the existing Amritsar sub-station with HVDC station at Kurukshetra for enabling power supply from pit-head generating stations in Chhattisgarh through Champa-Kurukshetra HVDC bi-pole. The scheme was discussed and agreed to in the 31st Standing Committee Meeting for Power System Planning of Northern Region held on 2.1.2013. It was also approved during the 34th Standing Committee meeting held on 25.08.2014 and 33rd NRPC meeting held on 11.11.2014.
- 6.3 For implementing the aforesaid scheme, a Special Purpose Vehicle (SPV) in the name of NRSS XXXI (B) Transmission Ltd. (NTL), Appellant herein, was incorporated, which signed a Transmission Service Agreement dated 2.1.2014 with the long-term transmission customers (LTTCs) of the lines comprised in the scheme. The BPC initiated the bidding process by issuing a Request for Qualification (RfQ) on 31.7.2013 for selection of a TSP to implement the scheme on build, own, operate and maintain basis. The qualified bidder under RfQ were then issued the RfP on 9.12.2013 including the Survey Report. One Essel Infra Projects Ltd. emerged as the successful bidder which subscribed to 100% shareholding in the Appellant company. Thereafter, the Appellant was granted transmission license vide Order dated 25.8.2014 passed by the Respondent No.1 Commission in Petition No.90/TL/2014 and the tariff discovered in the bidding process was also adopted vide Order dated 7.8.2014 passed by the Commission in Petition No.89/TT/2014. The Appellant was required to implement the scheme and complete the same within 28 months of the grant of licence and on its scheduled date i.e. 10.9.2016.

- 6.4 Power Grid Corporation of India, Respondent No.2 herein, was entrusted with the implementation of transmission system associated with provision of 400kV bays for lines under NRSS XXXI (Part-B) scheme and filed petition No.60/TT/2017 for approval of the transmission tariff in respect of the Asset-I: 2 No. Line bays at Amritsar 400/200 kV sub-station and Asset-II: 4 No. 220 kV Line bays at Malerkotla GIS 400/220 kV sub-station in accordance with CERC (Terms and Conditions of Tariff) Regulations, 2014.
- 6.5 PGCIL, Respondent No.2 herein, claimed the COD of the Asset-I and II as 1.12.2016 under the second proviso of Regulation 4(3) of 2014 Tariff Regulations. The associated transmission system under the scope of NTL and the scheduled commissioning of the associated transmission system was 11.09.2016; however the same was not commissioned on 11.09.2016. Respondent No.2 clearly submitted that the 2 nos. of 400 kV line bays at Amritsar end and 4 nos. of 400 kV line bays at Malerkotla end were ready but were not put into use because of the non-commissioning of the associated transmission line being constructed by NTL. Therefore, Respondent No.2 prayed for approval of COD under second proviso to Regulation 4(3) of 2014 Tariff Regulations.
- 6.6 Considering the above stated facts, the Central Commission vide impugned order dated 30.11.2017 rightly directed IDC and IEDC of the said transmission assets from their respective dates of commercial operation (COD) till the commissioning of the Appellant's transmission elements to be borne by the Appellant.
- 6.7 The direction issued by the Central Commission vide the impugned order dated 30.11.2017 is in line with the consistent view taken by the Commission on this issue and the same has been illustrated in Para 25 of the order dated 30.11.2017 wherein it has been stated:

25. "...We have taken similar view in Petition No.209/TT/2017 at para 18 and relevant extract is as under:

18....As such the instant assets could be put into commercial operation only after 21.04.2017. Accordingly, the COD of the instant asset is approved as

21.04.2017. However, it is observed the instant bays of the petitioner at Muzaffarpur Sub-station were ready in all aspects by 31.08.2016 but were not put into use because of the non-commissioning of the associated transmission line by DMTCL. Accordingly, we are of the view that IDC and IEDC for the period from 31.08.2016 to 21.04.2017 shall be borne by DMTCL.”

6.8 While addressing the issue of mismatch in commissioning of transmission system by an ISTS licensee and upstream/ downstream system in line with its earlier decisions and analyzing the evidence made available on record by the Appellant and the Respondent No.2, the Commission held as under:

“37. As per the Investment Approval dated 2.6.2015, the instant assets were scheduled to be commissioned within 16 months i.e. by 1.10.2016 against which the instant assets were ready to be put under commercial operation on 1.12.2016. However, the instant asset was put to use only after COD of associated line. The petitioner has submitted that it has made various communications with NTL through letters dated 30.9.2016, 19.10.2016, 27.10.2016 and 22.11.2016 for commissioning of the TBCB line. The petitioner has stated that the time over run is on account of the delay of the associated lines by the Respondent NTL. We have observed that petitioner has submitted CEA certificate dated 26.9.2016 for Asset-I which proves it was ready before 1.10.2016 but in case of Asset-II, the petitioner obtained CEA certificate dated 4.11.2016. Therefore, there is no documentary evidence in the petition to support that Asset-II was ready before 4.11.2016. Hence, we are not inclined to allow time overrun of 1.10.2016 to 4.11.2016 for Asset-II. Accordingly, the IDC and IEDC shall be billed as under:

Asset	Date	Liabile party
Asset-I	1.10.2016- date of COD of the asset	To be borne by NTL
Asset-II (a and b)	1.10.2016- 4.11.2016	Not to be capitalized
Asset-II (a and b)	5.11.2016- date of COD of the asset	To be borne by NTL

Thus, the liability to pay IDC and IEDC for the period Respondent No.2 could not commission its assets on account of delay in implementation of the lines by the Appellant, was rightly imposed on the Appellant in accordance with the principles laid down by the Respondent No.1 Commission and upheld by this Hon’ble Tribunal as more particularly set out above and as such, did not suffer from any infirmity as wrongly alleged by the Appellant or at all.

6.9 The contention of the Appellant herein that the Ld. Commission failed to appreciate that the Appellant had filed a separate petition, Petition No.195/MP/2017, before the Commission stating reasons for the delay caused at its end is without merit since the Ld. Commission has clearly adverted to the same in Para 23 of the impugned order dated 30.11.2017 and held that, *“The issues raised by the respondent (NTL) regarding time delay in commissioning shall be dealt in separate petition filed by NTL in Petition No.195/MP/2017.”*

In fact the Commission, while disposing of the review petition 7/RP/2018 filed by the Appellant herein, clearly held that the scope of Petition No.195/MP/2017 seeking extension of SCOD on account of force majeure events and IDC for the period of time over-run was completely different from the scope of Petition No.60/TT/2017 filed by Respondent No.2 seeking determination of tariff of the bays. In any case, the issues pertaining to the reasons for the delay caused in the commissioning of the assets by the Appellant shall be dealt with separately by the Ld. Commission and therefore, no prejudice shall be caused to the Appellant in account of delinking the Petition No.195/MP/2017 and Petition No. 60/TT/2017.

6.10 Moreover, unlike in the case of Respondent No.2 who is a statutory licensee, the Appellant as a TBCB licensee is not required to approach the Respondent No.1 Commission for approval of COD of its system in the event of mismatch with the inter-linked system and is also not required to await any tariff approval from the Commission for servicing of its transmission assets. The Appellant has executed a TSA with its LTTCs for procurement of transmission services. Vide the said TSA, the LTTCs have agreed to use the available transmission capacity of the system and pay to the Appellant the transmission charges as determined in accordance with the terms of the TSA.

6.11 Therefore, in view of what has been stated in the foregoing paras of the present written submissions, the appeal under reply is devoid of any merit and is liable to be dismissed by this Hon'ble Tribunal. Impugned Order dated 30.11.2017 passed by the Ld. Commission in Petition No. 60/TT/2017 is just, proper and legal and hence does not call for any interference by this Hon'ble Tribunal.

7. We have heard learned counsel appearing for the Appellant and learned counsel for the Respondents at considerable length of time and we have gone through carefully their written submissions/arguments and also taken note of the relevant material available on records during the proceedings. On the basis of the pleadings and submissions available, the following issue emerges in the instant Appeal for our consideration: -

- **Whether in the facts and circumstances of the case, the Central Commission is justified in passing the Impugned Order holding the Appellant liable for payment of IDC & IEDC pertaining to Assets of Second Respondent ?**

8. Our Consideration and Findings :

8.1 The learned counsel for the Appellant submitted that while the Central Commission has held that the delay in achieving commercial operation date of Appellant's asset was due to force majeure events in Petition No. 195/MP/2017, it has been penalised with liability of IDC and IEDC of the asset of Respondent No 2 for delay in commissioning of its assets as per the impugned order. It is the contention of Appellant that pursuant to the decision of the Commission of absolving it from the liability of delay in

commissioning of assets, the IDC/IEDC of the assets of Respondent No 2 should not be billed to the Appellant. As the issue of delay has been settled after the adjudication of Petition 195/MP/2017 by the Commission in order dated 29.03.2019, therefore, we do not find merit in going into the specifics of delay in commissioning of the assets. The relevant extract of the Commission's order is as under :

"94. In the present case, as per RFP and the Survey Report issued by RECTCPL, there were no forest areas in the route of transmission lines. The Petitioner encountered forest areas in the districts of Haryana and Punjab, which is contrary to stipulation of RFP documents that there was no forest in the route. The Petitioner was unable to start the construction of the transmission line in respective forest stretches. The unforeseen requirement of obtaining forest clearance and delay in issuance of forest clearance, resulted in delays in implementation of the transmission project. Forest clearance is a mandatory requirement for laying the transmission lines in the forest area. The Petitioner took up the matter with the authorities for forest clearance. Therefore, the time taken for grant of forest clearance was beyond the reasonable control of the Petitioner and has affected the project implementation and thereby prevented the Petitioner from performing its obligations under the TSA.

95. In our view, the Petitioner was prevented from discharging its obligations under the TSA on account of unexpected requirement and delay in grant of forest clearance which was not there in the RFP documents and as such delay beyond one year in grant of forest clearance is covered under Force Majeure. Accordingly, the SCOD shall stand extended till the actual CODs of Kurukshetra – Malerkotla and Malerkotla – Kurukshetra Transmission Lines which are 18.1.2017 and 27.3.2017 respectively. However, we would like to make it clear that the extension of COD of the instant assets does not entail any financial benefit in the form of IDC and IEDC to the Petitioner."

- 8.2 The counsel for the Appellant further submitted that the Respondent No 2 should be directed to recover IDC/IEDC of its assets from the beneficiaries of the transmission system of the Appellant/Respondent No 2 along with interest, if any, in accordance with the Central Commission (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010. In this regard, the Appellant has relied on the order dated 27.05.2016 of the Commission in the matter of Powergrid Corporation of India Limited vs Madhya Pradesh Power Management Company Ltd. and Ors. (Petition no. 261/TT/2015) vide which the Commission allowed billing of transmission charges for the assets of Powergrid to LTTCs of Jabalpur Transmission

Company Ltd. (JTCL) till the commissioning of the transmission lines being constructed under Tariff Based Competitive Bidding by JTCL.

8.3 Learned counsel contended that the decision of the Commission in Petition No 261/TT/2015 is squarely applicable to the facts of the present case. Reliance has been placed on the judgment dated 16.07.2018 of this Tribunal in Appeal No. 281 of 2016- NHPC Limited vs Powergrid Corporation of India Limited to contend that Commission cannot take a different view in the present case.

8.4 **Per Contra**, learned counsel, appearing for Respondent No 2 has made the main submissions as under :

- (i) The tariff for transmission assets of PGCIL is determined under Section 62 read with Section 64 of the Electricity Act, 2003 (**Act**), whereas the tariff of the Appellant's assets was discovered through Tariff Based Competitive Bidding (TBCB) route under Section 63 of the Act.
- (ii) As provided in Regulation 4 of the Central Electricity Regulatory Commission (Terms and conditions of Tariff) Regulations, 2014, a transmission system or an element thereof can be declared commercially operational when it is put in regular service after successful trial operation for transmitting electricity and communication signal from sending end to receiving end. However, it is so provided in the proviso (ii) of Regulation 4(3) that if the transmission system is prevented from being put to service on account of the delay in commissioning of the concerned generating station or in commissioning of the upstream or downstream transmission system, then the transmission licensee may approach the Commission for approval of COD of such transmission system or an element thereof.

- (iii) The Respondent No.2 had approached the Commission in accordance with these provisions in the 2014 Tariff Regulations for approval of COD of the transmission assets implemented by it.
- (iv) While approving transmission tariffs for PGCIL's transmission systems, the Commission has, from time to time, on various occasions of mismatch, passed Orders approving the CODs of transmission assets under the said proviso (ii) of Regulation 4 (3).
- (v) The consistent position adopted by the Commission is that, in the event of a mismatch in commissioning of the inter-linked transmission systems, the transmission licensee (or its long-term customers) whose assets are not yet ready, and because of which the already commissioned assets of the other transmission licensee have not been put in regular service, is liable to pay the transmission charges till commissioning of the inter-linked downstream/ upstream transmission system.
- (vi) Whenever a tariff determination is sought by invoking the provisions of Regulation 4(3)(ii) of the 2014 Tariff Regulations, it may result in imposition of a liability on the licensee implementing the inter-connecting transmission system and as such, it is just, fair and necessary in compliance of the principals of natural justice that the said licensee is also made a party therein and is duly heard. Therefore, the Appellant's contention as regards its impleadment in the tariff proceedings of Respondent No.2 is completely misplaced.
- (vii) Unlike PGCIL, in terms of Article 6.2 of the TSA, the Appellant as a TBCB licensee is not required to approach the Commission for approval of COD of its system in the event of mismatch with the inter-linked system and is also not required to await any tariff approval from the Commission for servicing of its transmission assets. The TSA together with its provision of deemed COD ensures

that the transmission system is commissioned and duly serviced even when the inter-linked transmission system is yet to be commissioned.

- (viii) The regulatory mechanism, reiterated time and again in the orders of the Commission, ensures that the transmission licensees implementing their respective transmission assets through different routes of cost-plus and TBCB are not discriminated in so far as commissioning of assets and their servicing is concerned. In both situations, the relevant consideration is “mismatch” so long as a licensee is itself not responsible for it.
- (ix) Whatever factors which may lead to delay (admissible or otherwise) on part of the other licensee, are a matter between that licensee and its beneficiaries/LTTCs in the context of use of the transmission system and payment of transmission charges under the TSA and have no bearing with the servicing of inter-linked assets in cases of their mismatch. The principle followed is that if the commissioned assets of a licensee are not being put in regular service for reasons not attributable to it, then it is either the mismatching licensee or its beneficiaries/LTTCs who is liable to pay service the transmission assets for the period of mismatch.
- (x) The Appellant has failed to appreciate the regulatory scheme of tariff determination and has, therefore, wrongly sought to link its own tariff determination process with tariff determination of PGCIL to wrongly contend that the aspect of delay pleaded therein has a material bearing on the tariff determination for PGCIL.
- (xi) The Commission approved COD for the transmission assets of PGCIL by applying the provisions of proviso (ii) of clause (3) of Regulation 4 of the 2014 Tariff Regulations and by relying on its own order in Petition No 209/TT/2017. The approval of COD was in

accordance with decision of this Tribunal and could not be faulted with.

- (xii) The liability to pay IDC and IEDC for the period PGCIL could not commission its assets on account of delay in implementation of the lines by the Appellant, was rightly imposed on the Appellant in accordance with the principles laid down by the Commission and upheld by this Tribunal. The decision of the Commission, as such, did not suffer from any infirmity as wrongly alleged by the Appellant or at all.
- (xiii) Further, after the passing of the impugned order, the Appellant preferred Review Petition No.7/RP/2018 before the Commission which was disposed of at the admission stage itself vide order dated 20.6.2018. Finding no error apparent on the face of record and following the consistent view as laid down in Petition No.233/TT/2016, where the bays under the scope of PGCIL were not put into use due to delay in COD of the upstream or downstream assets, the Commission reiterated that IDC and IEDC for the period of delay was to be borne by the party executing the upstream or downstream assets.

8.5 Further, Learned Counsel appearing for Respondent No 6 Uttar Pradesh Power Corporation Limited (UPPCL) submitted mainly as under :

- (i) The Commission vide impugned order dated 30.11.2017 has rightly directed that IDC and IEDC of the transmission assets of PGCIL from their respective dates of commercial operation till the commissioning of the Appellant's transmission elements shall be borne by the Appellant.
- (ii) The direction issued by the Commission is in line with the consistent view taken by the Commission on this issue and upheld by this Tribunal. The same has been illustrated in Para 25 of the impugned

order wherein the Commission relied on similar view taken in Petition No 209/TT/2017.

- (iii) While disposing of the review petition 7/RP/2018 filed by the Appellant, the Commission clearly held that the scope of Petition No 195/MP/2017 seeking extension of SCOD on account of force majeure events and IDC for the period of time over run was completely different from the scope of Petition No 60/TT/2017 filed by PGCIL seeking determination of tariff of the bays.

Our Findings:

- 8.6 We have heard learned counsel appearing for the Appellant and the learned counsels appearing for the Respondents and carefully gone through their written submissions. In fact, the Respondent No 2 filed Petition No 60/TT/2017 before the Commission for determination of tariff for 400 kV bays being constructed by it for lines of the Appellant under Northern Region System Strengthening Scheme XXXI (B) as per Central Electricity Regulatory Commission (Terms and conditions of Tariff) Regulations, 2014.
- 8.7 It is a matter of fact that the assets/bays of Respondent No 2 could not be put to use on account of delay in implementation of the transmission lines being constructed by the Appellant. Therefore, it would be apt to quote Regulation 4 (3) (ii) of the Tariff Regulations in accordance with which, Respondent No 2 sought approval of COD of the transmission assets implemented by it.

“(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.”

8.8 It is relevant to note that by relying on its own Order in Petition No 209/TT/2017, the Commission decided COD of the bays of PGCIL as per Regulation 4 (3) (ii) of the Tariff Regulations, 2014 in the impugned order and directed that the IDC and IEDC of the assets of Respondents No 2 from their respective dates of commercial operation till the commissioning of Appellant's transmission system shall be billed to the Appellant. It was held by the Commission that as the bays could not be put into regular service without the commissioning of associated transmission line, COD of the Asset I and Asset II i.e. the bays of PGCIL shall be considered from date of COD of associated line being implemented by the Appellant. The relevant extract of 209/TT/2017 as quoted in the impugned order is as under

“24. The Petitioner has claimed the COD of the Asset I and II as 1.12.2016 under Regulation 4(3)(ii) of the 2014 Tariff Regulations.

25. The Asset I and II are mainly bays of Amritsar and Malerkotla. These bays could not be put into regular service without the commissioning of associated transmission line. We are of the view that COD of the Asset I and Asset II shall be considered from date of COD of associated line. We have taken similar view in Petition No. 209/TT/2017 at Para 18 and relevant extract is as under:

“18. As per findings of the APTEL, which was upheld by the Hon'ble Supreme Court, an element of transmission system can be declared as having attained commercial operation only if it has been charged successfully, after successful trial operation and is in regular service. In the instant case, bays were ready, but the successful trial operation and charging could not be carried out without the commissioning of the associated Muzaffarpur (PG)- Darbhanga (TBCB) 400kV D/c (Triple Snowbird) line. As the bays could not have been charged for trial operation without the transmission line, we are not inclined to approve the date of commercial operation of instant asset as 31.8.2016, as claimed by the Petitioner. We are of the view that the instant transmission assets

could be charged and trial operation could be successfully carried out only on commissioning of the associated transmission line, which is stated to have been commissioned on 21.4.2017. As such, the instant assets could be put into commercial operation only after 21.4.2017. Accordingly, the COD of the instant asset is approved as 21.4.2017. However, it is observed the instant bays of the petitioner at Muzaffarpur Sub-station were ready in all aspects by 31.8.2016 but were not put into use because of the non-commissioning of the associated transmission line by DMTCL. Accordingly, we are of the view that IDC and IEDC for the period from 31.8.2016 to 21.4.2017 shall be borne by DMTCL.”

- 8.9 It is the submission of the Respondents that the consistent position adopted by the Commission and upheld by this Tribunal is that, in the event of a mismatch in commissioning of the inter-linked transmission systems, the transmission licensee (or its long-term customers) whose assets are not yet ready, and because of which the already commissioned assets of the other transmission licensee have not been put in regular service, is liable to pay the transmission charges till commissioning of the inter-linked downstream/ upstream transmission system.
- 8.10 We find merit in the submission of Respondent No 2 that whenever a tariff determination is sought by invoking the provisions of Regulation 4(3)(ii) of the 2014 Tariff Regulations, it may result in imposition of a liability on the licensee implementing the inter-connecting transmission system. Therefore, as per the principles stated by the Hon'ble Supreme Court in *Udit Narain Singh Malpaharia v. Addl. Member, Board of Revenue, Bihar*, [AIR 1963 SC 786], the licensee implementing the inter-connecting transmission system becomes a 'necessary party' without whom no order can be made effectively. It becomes essential that such licensees/parties are duly heard before any liability, including IDC and IEDC of the transmission system being stranded, is imposed by the Commission. Accordingly, the contention of Appellant that it should not have been impleaded as a Respondent in Petition 60/TT/2017 filed by PGCIL is incorrect.

8.11 With regards to merits of the case, Tribunal's most relevant decision matching to the circumstances of the present case is the judgment dated 27.3.2018 in Appeal No. 390 of 2017 titled *Punjab State Power Corporation Limited vs. Patran Transmission Company Limited & Ors* ("**Patran Judgment**") where this Tribunal acknowledged that the Central Commission, by way of exercising its regulatory power by way of a judicial order, has 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 and decided in Para 15 as under

- (i) *"While deciding the issue in the Impugned Order the Central Commission has relied on its order dated 21.9.2016 in Petition No. 43/MP/2016 wherein the Commission had laid down the principles for such cases like the present case in hand. According to the laid principle, 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. The Central Commission further elaborated that 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. The Central Commission in the Impugned Order has also referred to its previous order dated 19.4.2016 in Petition No. 100/TT/2014 and order dated 5.8.2015 in Petition No. 11/SM/2014. In the said orders, the Central Commission while acknowledging the gaps in the Tariff Regulations, 2014, directed its staff to examine the aspect of signing of IA between the Inter State Transmission Licensees (ISTS) & STUs and propose necessary changes required in the Tariff Regulations, 2014 to enable ISTS and STUs to enter into Implementation Agreement. The Central Commission also observed that the concerned STU, who had requested for provision of downstream line bays in the various meetings of Standing Committee/RPC, shall bear the transmission charges till completion of 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. The Central Commission then goes on deciding that the Appellant is liable to pay transmission charges to the Respondent No. 1 from SCOD of the Transmission System until downstream system is commissioned.*
- (ii) *It is clear from the decision of the Central Commission that there is 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.*
- (iii) *Now let us examine the relevant portion of the Sharing Regulations. The same is reproduced below:*
XXXX

The Sharing Regulations provide sharing of transmission charges by the Designated ISTS Customers who use the ISTS. Accordingly, it is clear that all the LTTCs are liable to pay transmission charges only when the Transmission System is being used or put to use.

- (iv) 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 has held that the Appellant is responsible to pay the transmission charges to the Respondent No. 1 until the downstream system is commissioned.
- (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 judgement 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 judgement 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 judgement 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.

- (vi) However, it is felt that the Central Commission in the Impugned Order has 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 would like to make it clear the same.
- (vii) It is clear that the liability to pay transmission charges by the Appellant to the Respondent No. 1 from SCOD till downstream system is commissioned does not arise from the Regulations of the Central Commission. The most relevant decision of the Central Commission matching to the circumstances of the present case is its order dated 21.9.2016 in Petition No. 43/MP/2016 where the principles were laid down clearly that the entity due to which system developed through TBCB route cannot be put to use is liable to pay the transmission charges from SCOD till commissioning of the upstream/ downstream system/terminal bays. The Transmission System in question has also been developed through TBCB route. In the present case as per the principles laid down by the Central Commission it appears that PSTCL is the defaulting party and should have been made liable to pay the said transmission charges. However, we find that there is no contractual relation between the Respondent No. 1 and PSTCL. The contractual relation between the Appellant and the Respondent No. 1 is the TSA, which lays down the rights and obligations of the parties. The Article 4.2 of the TSA deals with the obligations of the LTTCs in implementation of the project. The Article 4.2 of the TSA deals with the obligations of the LTTCs in implementation of the project. The relevant portion is reproduced below:

“4.2 Long Term Transmission Customers’ obligations in implementation of the Project:

4.2.1 Subject to the terms and conditions of this Agreement, Long Term Transmission Customers’, at their own cost and expense, undertake to be responsible:

.....

b. for arranging and making available the Interconnection facilities to enable the TSP to connect the Project;”

The LTTCs, including the Appellant at their own cost and expense were required to provide interconnection facilities to the Respondent No. 1 so that the Transmission System could be connected by SCOD and made operational.

- (viii) It is clear that 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 is irrespective of any relation between the Appellant and PSTCL. 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 is the Appellant.*
- (ix) The Appellant has also argued that there was communication between PSTCL and the Respondent No.1 regarding implementation of the downstream system and hence it was not responsible for the execution of the downstream system. The Appellant by taking strength from communications exchanged between the petitioner and the STU in the Order of the Central Commission in case of RVPNL has argued that in that case the STU was held responsible for the delay in execution of downstream bays but the Appellant ignored the fact that the Rajasthan Discoms were made liable to pay the transmission charges by the Central Commission in that case. In the present case it is observed that 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. Accordingly, these contentions of the Appellant are misplaced.*
- (x) The Respondent No. 1 has brought on record the orders of the Central Commission in similar cases where the Appellant was a party and the Appellant has not challenged the same. The Appellant has contested that some of these orders cannot be made applicable to it, as they were not directly related to the Appellant. To mention them are Central Commission’s Order dated 26.8.2016 in Petition No. 31/RP/2016 wherein liability of payment of transmission charges of the transmission system of PGCIL have been imposed on the Appellant. Based on the submissions of the parties it appears that this order has also not been challenged by the Appellant thus attaining finality of the principle of payment of transmission charges by the Appellant from SCOD until commissioning of the downstream system. The other similar orders where the Appellant was a party as Respondent are the order dated 24.11.2016 in Petition No. 29/RP/2016 (PGCIL Vs. RRVPNL &Ors.) and order dated 27.1.2017 in Petition No. 32/RP/2016 (PGCIL Vs. RRVPNL &Ors.). Although vide these orders the Appellant is not held to pay the transmission charges from SCOD until commissioning of the downstream system but these orders have enumerated the principles followed by the Central Commission.*
- (xi) In view of the foregoing discussions, we are of the considered opinion that there is no infirmity in the decision of the Central Commission by holding that the*

Appellant is liable to pay transmission charges from SCOD of the Transmission Asset until commissioning of the downstream system.

8.12 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. Vide judgement dated 18.1.2019, the Tribunal decided Appeal No 332 of 2016 following the principles laid down in Patran judgement as under

- “10.5 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 powers has prescribed a principle for sharing of transmission charges of the Transmission System of the Respondent No. 2 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. However, it is felt that the Central Commission in the Impugned Order has 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 would like to clarify the same.*
- 10.6 It is clear that the liability to pay transmission charges by the Appellant to the Respondent No. 2 from SCOD till downstream system is commissioned does not arise from the Regulations of the Central Commission. Our most relevant decision matching to the circumstances of the present case is our judgment dated 27.3.2018 in Appeal No. 390 of 2017(Patran judgment) where the principles were laid down clearly that the entity due to which system developed through TBCB route cannot be put to use is liable to pay the transmission charges from SCOD till commissioning of the upstream/ downstream system/terminal bays. The Transmission System in question has also been developed through TBCB route. In the present case as per the principles laid down by the Central Commission it emerges that NPCIL is the defaulting party and should have been made liable to pay the said transmission charges. However, we find that there is no contractual relation between the Respondent No. 2 and NPCIL.*
- 10.7 From the decision of the Standing Committee on Power System Planning (a statutory committee), it is clear that it was only the Appellant who was responsible to arrange the downstream system for connection to Transmission System by SCOD so that it could be put to use. This is 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 are judicial in nature the defaulting entity in the present case is the Appellant.*
- 10.8 In view of the foregoing discussions, we are of the considered opinion that there is no infirmity in the decision of the Central Commission by holding that the Appellant is liable to pay transmission charges from SCOD of the Transmission Asset until commissioning of the downstream system alongwith applicable charges as per TSA which was already raised by CTU.”*

8.13 At this stage, it would be appropriate to summarise 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.

- (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 judgement 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 judgement 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.

- 8.14 After deliberating the above settled principles in Patran Judgement, 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.
- 8.15 In RAPP judgement, 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.
- 8.16 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. In the impugned order as well, the Commission has 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.
- 8.17 In the present case as per the general principles laid down by the Central Commission it emerges that the Appellant is the defaulting party. However, a new aspect has been brought before us 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 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.

- 8.18 Thus, the question before us is whether liability of IDC and IEDC of the assets of Respondent No 2 can be imposed on the Appellant when the Commission has condoned the delay in commissioning of its transmission assets on account of force majeure event and allowed extension of COD of its transmission system within the terms of the TSA dated 02.01.2014.
- 8.19 Admittedly, the Appellant implemented the project under TBCB route as per the TSA dated 02.01.2014. The Appellant is entitled to extension of commercial operation date under Article 11 of the TSA (force majeure), if the project implementation is affected due to force majeure event (s). We are of the opinion that once the Commission allows extension of COD of the transmission elements/system under the terms of the TSA, it revokes 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 is completely contradictory to relief granted to the Appellant under the provisions of force majeure of the contract by way of extension of COD.

8.20 The law in relation to force majeure has been explained by the Hon'ble Supreme Court in M/s. Dhanrajamal Gobindram v. M/s. Shamji Kalidas and Co. As under:

"...An analysis of rulings on the subject into which it is not necessary in this case to go, shows 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. This is the widest meaning that can be given to "force majeure", and even if this be the meaning, it is obvious that the condition about "force majeure" in the agreement was not vague."

8.21 It would thus appear that 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 from the consequences of anything over which it has no control. When the 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.

8.22 In the earlier judgements 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 and it seems that the decisions in similar matters are being taken through judicial orders only. We also note that there exists inconsistencies in the decisions of the Commission. As has been brought to our notice, deviating from its own principles, the Commission has directed to recover the transmission charges from the beneficiaries of the licensee who had delayed the transmission systems vide its order dated 27.05.2016 in Petition No 261/TT/2015. Further, in a discretionary manner, the Commission has selectively levied either transmission charges or IDC/IEDC on case to case basis. From the present case, it has also come

to light that the Commission has not addressed specific aspects of this issue while setting up the principles for such cases.

- 8.23 In the context of the present case, the question that also comes to our mind is that 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.
- 8.24 The Commission in the impugned order and order dated 29.03.2019 has 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. We fail to understand rationale behind this as to how a transmission licensee can submit a reasonable bid when it is 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 is 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). The infrastructure projects involving huge investments must not be part to such regulatory uncertainties that too, without remedy.
- 8.25 Admittedly, the Commission does 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 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 part of the Commission to impose such liability on the transmission licensees without entering into a contract/IA. Further, it is relevant to note that transmission system, being a meshed network it can not 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.

8.26 In light of the above, we feel that it would be just and proper for the commission to take a fresh view in this regard considering all the aspects. The Commission is further directed to develop a mechanism in line with the observations made by this Tribunal in the forgoing paragraph after due stakeholder consultation. We opine that the Regulations framed/principles adopted by the Commission while undertaking its functions must be reasonable, consistent and in accordance with prevailing laws. In the context of issue in hand, it would be apposite for the Commission to follow the principle settled by the Hon'ble Supreme Court of India in State of Kerala & ors. vs. Unni & anr. [(2007) 2 SCC 365], while developing the mechanism as under:

"When a subordinate legislation imposes conditions upon a licensee regulating the manner in which the trade is to be carried out, the same must be based on reasonable criteria. A person must have means to prevent commission of a crime by himself or by his employees. He must know where he stands. He must know to what extent or under what circumstances he is entitled to sell liquor. The statute in that sense must be definite and not vague. Where a statute is vague, the same is liable to be struck down."

8.27 While dealing with such complex issues, the Commission must aspire to bring objectivity to the whole process of legislation and adjudication. These principles are set by the Hon'ble Supreme Court of India in Global Energy Ltd. V. Central Electricity Regulatory Commission, (2009) 15 SCC 570 at 589 as under

“43. The law sometimes can be written in such subjective manner that it affects efficiency and transparent function of the government. If the statute provides for point-less discretion to agency, it is in essence demolishing the accountability strand within the administrative process as the agency is not under obligation from an objective norm, which can enforce account ability in decision-making process. All law making, be it in the context of delegated legislation or primary legislation, have to conform to the fundamental tenets of transparency and openness on one hand and responsiveness and accountability on the other. These are fundamental tenets flowing from Due Process requirement under Article 21, Equal Protection clause embodied in Article 14 and Fundamental Freedoms clause ingrained under Article 19. A modern deliberative democracy cannot function without these attributes.”

8.28 In view of the discussions and analysis set out in above paras, we are of the opinion that the Impugned Order suffers from infirmity and arbitrariness and hence, liable to be set aside.

ORDER

For foregoing reasons as stated supra, we are of the considered view that the issues raised in the instant appeal have merit. Hence, the appeal is allowed.

The Impugned Order dated 30.11.2017 passed by the Central Commission is set aside to the limited extent, as prayed by the Appellant.

No order as to costs.

Pronounced in the Virtual Court on this **14th day of September, 2020.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / NON-REPORTABLE

mkj