

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APL-55/2020

Dated: 22nd April, 2021

**Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member**

In the matter of:

**Power Grid Corporation of India Limited
"Saudamini", Plot No.2,
Sector-29, Gurgaon -122 001**

... Appellant(s)

Versus

**1. Central Electricity Regulatory Commission
Through its Secretary,
3rd and 4th Floor, Chanderlok
Building 36, Janpath,
New Delhi – 110001**

... Respondent No.1

**2. Tamil Nadu Generation and Distribution
Corporation Ltd.(TANGEDCO)
Through its Chairman & MD,
NPKRR Maaligai, 800, Anna Salai,
Chennai - 600 002**

... Respondent No.2

**3. Karnataka Power Transmission Corporation
Limited
Through its Managing Director,
(KPTCL), Kaveri Bhawan, K.G. Road,
Bangalore – 560009**

... Respondent No.3

**4. Transmission Corporation of Andhra
Pradesh Limited, (APTRANSCO),
Through its Chairman & Managing Director
Vidyut Soudha, Gundala, Eluru Rd,
Vijayawada, Andhra Pradesh – 520004**

... Respondent No.4

5. **Kerala State Electricity Board (KSEB)
Through its Chairman & Managing Director
Vaidyuthi Bhavanam, Pattom
Thiruvananthapuram - 695 004** ... Respondent No.5
6. **Tamilnadu Electricity Board (TNEB)
Through its Chairman & MD
NPKRR Maaligai, 800, Anna Salai,
Chennai-600002** ... Respondent No.6
7. **Electricity Department, Government of Goa
Through its Chief Electrical Engineer
Vidyuti Bhawan, 3rd Floor, Panaji,
Goa-403001** ... Respondent No.7
8. **Electricity Department, Government of
Pondicherry, Through its Secretary,
Pondicherry -605001** ... Respondent No.8
9. **Eastern Power Distribution Company of
Andhra Pradesh Ltd. (APEPDCL)
Through its Chairman & Managing
Director
P&T Colony, Seethmmadhara,
Vishakhapatnam, Andhra Pradesh- 530013** ... Respondent No.9
10. **Southern Power Distribution Company of
Andhra Pradesh Limited, (APSPDCL),
Through its Chairman & Managing
Director
Srinivasapuram, Tiruchanoor Road,
Tirupati - 517 503, Andhra Pradesh** ... Respondent No.10
11. **Central Power Distribution Company of
Andhra Pradesh Limited (APCPDCL),
Through its Chairman & Managing
Director
Corporate Office, Mint Compound,
Hyderabad - 500 063, Andhra Pradesh** ... Respondent No.11

12. **Northern Power Distribution Company of Andhra Pradesh Limited, (APNPDCL), Through its Chairman & Managing Director
H. No. 1-1-478, 503 & 504
Opp. NIT Petrol Pump,
Chaitanyapuri, Kazipet,
Warangal - 506 004, Telangana, India** ... Respondent No.12
13. **Bangalore Electricity Supply Company Ltd.
Through its Chairman,
(BESCOM), Corporate Office, KR. Circle,
Bangalore - 560001, Karnataka** ... Respondent No.13
14. **Gulbarga Electricity Supply Company Ltd, (GESCOM),
Through its Managing Director,
Station Main Road,
Kalaburagi - 585101, Karnataka** ... Respondent No.14
15. **Hubli Electricity Supply Company Ltd. (HESCOM),
Through its Managing Director
PB Road, Navanagar, Hubballi- 580 025** ... Respondent No.15
16. **Mangalore Electricity Limited,(MESCOM)
Through its Managing Director
Corporate Office, Paradigm Plaza, AB
Shetty Circle, Mangalore – 575001
Karnataka** ... Respondent No.16
17. **Chamundeswari Electricity Supply Corporation Ltd. Through its Managing Director,
(CESC), # 927,L J Avenue,
Ground Floor, New Kantharaj Urs
Road,Saraswatipuram, Mysore - 570009** ... Respondent No.17

**18. Transmission Corporation of Telangana
Limited
Through it Chairman and Managing Director
Vidhyut Sudha, Khairatabad,
Hyderabad,500082**

... Respondent No.18

**Counsel for the Appellant (s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Ritu Apurva
Mr. Aditya Hridaya Dubey**

Counsel for the Respondent (s) : Ms. Bhabna Das for R-3

JUDGMENT (ORAL)

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. This matter has been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.
2. The present Appeal under Section 111 (1) of the Electricity Act, 2003 was filed against the Order dated 8.11.2019 passed by the Central Electricity Regulatory Commission (hereinafter called "the Central Commission") in Petition No. 361/TT/2018 challenging the restriction of the claim of *Incidental Expenses During Construction* ("IEDC") made by the Appellant to 5% of the hard cost, even while the time overrun in execution of the assets has been condoned in entirety. It is the contention of the appellant that the Central Commission has fallen in error by ignoring that the Tariff Regulations, 2014 do not provide for restricting the IEDC to a fraction of the hard

cost by any provision, the Commission having framed the Tariff Regulations, 2014 being bound to determine the tariff in terms thereof and not otherwise.

3. The impugned order was passed in the proceedings arising out of Petition No. 361/TT/2018 filed by the appellant, Power Grid Corporation of India Ltd., seeking approval of transmission tariff for Asset-1: LILO of 400 kV S/C Neelmangla-Hoody Transmission Line at new 400/220 kV GIS Substation at Yelahanka with 1X63 MVAR 420 kV Bus Reactor along with associated bays and equipment and Asset-2: 2X500 MVA, 400/220 kV ICT"s along with associated bays and equipment at 400/220 kV Yelahanka Substation (hereinafter referred as "the transmission asset") under "System Strengthening XII in Southern Region" for 2014-19 tariff period as per Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (hereinafter referred to as "the 2014 Tariff Regulations").
4. The Investment Approval and expenditure sanction for the transmission system of the appellant was accorded on 26.02.2010 by the Board of Directors of the Appellant vide Memorandum No.C/CP/SR-XII dated 26.02.2010 at an estimated cost of Rs. 23234 lakh including an IDC of Rs. 1847 lakh, based on price level of 3rd Quarter of 2009. It is stated that the administrative approval and expenditure sanction of Revised Cost Estimate (RCE) for the transmission project was accorded on 21.02.2018 by the Board of Directors vide Memorandum No. C/CP/SRSS-

XII/PA1718-11-OG-RC007 dated 21.02.2018 at an estimated cost of Rs. 34077 lakh including an IDC of Rs. 9816 lakh based on price level of April 2017. The apportioned approved cost as per Investment Approval and as per RCE along with the Auditor certificates dated 21.02.2019 were submitted claiming capital cost incurred as on COD as well as additional capitalization projected to be incurred during 2018-19. There was bifurcation of Asset-2 into Asset-2A and Asset-2B effected in May 2019 by the appellant, followed by submission of the Revised Tariff forms and Management Certificates dated 17.5.2019 in respect of Asset-2A and Asset-2B. The subject Assets attained *Commercial Operation Date* (COD) on 1.04.2018. The Petition No. 361/TT/2018 seeking approval of transmission tariff for Asset-1 and Asset-2, mentioned earlier, was filed on 30.08.2018. The Central Commission, by the Impugned Order dated 08.11.2019, condoned the delay of 2106 days in commissioning of the assets and while allowing certain benefits consequent thereto restricted the claim of IEDC to 10.75% of the hard cost. The sole issue raised by the appellant concerns such restriction of IEDC.

5. It is the contention of the appellant that the Central Commission has failed to appreciate that during the preparation of the DPR of the project, IEDC is estimated to be 10.75% of specific cost considering that project shall be completed within timeline originally envisaged. However, when assets/projects got delayed due to *force majeure* condition, the IEDC also increased for reasons beyond the control of the appellant. It is submitted that if the

Central Commission condones the delay in commissioning the asset, then IEDC incurred in such cases should automatically be allowed.

6. The appellants case is that the Central Commission has ignored that the instant case falls under the provision of Regulation 11 (b)(2) of the Tariff Regulations, 2014 since the increase in IEDC is due to delay in completion of the project by 2016 days for Asset-I, Asset-2A and Asset- 2B. It is urged that since the entire time over-run has been condoned, the proportionate increase in IEDC accrued due to such delay must be allowed, there being no justification for it being restricted to 10.75% of Hard Cost as indicated in Abstract Cost Estimate of the investment approval, the provision of Regulations 11 of the Tariff Regulations, 2014 being clear and unambiguous, the only scrutiny left to be carried out being a prudence check to confirm that the expenditure claimed to have been incurred is legitimate expense.

7. The impugned decision of the Commission on the issue of IEDC is set out in the order under challenge as under:

“40. The Petitioner has claimed IEDC for the instant assets and submitted Auditor/Management Certificate in support of the same. The claimed IEDC is beyond the percentage of hard cost of 10.75% as indicated in the FR abstract cost estimate and, therefore, the same has been restricted to 10.75% of the hard cost, subject to true up....”

8. Apart from other errors, we must observe here, the impugned order, as quoted above, also comes across as an impermissible injudicious approach to adjudicatory process. A plain reading shows it is totally devoid of any reasoning and cannot be sustained.

9. The relevant Regulation on the subject reads thus:

"11. Interest during construction (IDC) Incidental Expenditure during Construction (IEDC)

(A) Interest during Construction (IDC): ...

*(B) Incidental Expenditure during Construction (IEDC): (1)
...*

(2) In case of additional costs on account of IEDC due to delay in achieving the SCOD, the generating company or the transmission licensee as the case may be, shall be required to furnish detailed justification with supporting documents for such delay including the details of incidental expenditure during the period of delay and liquidated damages recovered or recoverable corresponding to the delay:

Provided that if the delay is not attributable to the generating company or the transmission licensee, as the case may be, and is due to uncontrollable factors as specified in regulation 12, IEDC may be allowed after due prudence check:

Provided further that where the delay is attributable to an agency or contractor or supplier engaged by the generating company or the transmission licensee, the liquidated damages recovered from such agency or contractor or supplier shall be taken into account for computation of capital cost."

10. The Appellant challenges the denial of full effect of IEDC and its restriction to 10.75% of the hard cost placing reliance on previous decisions of this Tribunal; first the judgment rendered on 02.12.2019 in Appeal Nos. 95 and 140 of 2018 titled *Power Grid Corporation of India Limited Vs. Central Electricity Regulatory Commission* and, second, the order dated 09.03.2021 in Appeal No. 63 of 2020 titled *Power Grid Corporation of India Limited Vs. Central Electricity Regulatory Commission*. In the decision dated 02.12.2019, this Tribunal had held thus:

“7.16 In light of the above, we are of the considered opinion that Central Commission has not considered the IEDC for the reference assets correctly in line with provisions of its own regulations which cannot be sustained in the eyes of law. In catena of judgments of Hon’ble Supreme Court and this Tribunal, it has been held that the Regulations framed by the Commissions are binding for all stakeholders including the Commission itself. The Regulations framed under the Act, in no way, mandate the Central Commission to restrict the IEDC to 5% of the original estimated hard cost.

7.17 Accordingly, we hold that IEDC should be computed only on actual basis after due prudence check based on the data submitted by the Appellant in accordance with the Tariff Regulations.

ORDER

For the forgoing reasons, we are of the considered view that issues raised in the present appeals being Appeal Nos. 95 of 2018 & 140 of 2018 have merits and hence appeals are allowed.

The impugned orders dated 29.07.2016 in Petition No. 46/TT/2014 and order dated 05.10.2017 in Petition No. 02/RP/2017 passed by Central Electricity Regulatory Commission are hereby set aside to the extent challenged in the Appeal. The matter is remitted back to the Central Electricity Regulatory Commission with a direction to allow IEDC in accordance with the Tariff Regulations. No order as to costs.”

11. The above decision dated 2.12.2019 was followed and it was held by order dated 09.03.2021 as under:

“10. We are of the opinion that the observations made by the Central Commission wherein they have limited the payment of IEDC to 5% is not in accordance with the Regulations, is wrong and bad in law. However, since the entire delay period has not been condoned, therefore, there is a case where in the Central Commission can adjudicate on the proportional payment corresponding to the part delay condoned out of the total delay.

11. Having regard to the facts and circumstances of the case as stated above, Appeal filed by the Appellant is allowed. The Impugned Order dated 20.11.2019 passed by the Central Electricity Regulatory Commission 337/TT/2018 is hereby set aside. We direct the Central Commission to consider the matter afresh in light of observations and bearing in mind the principles laid down in the judgment dated 02.12.2019 passed by this Tribunal in Appeal Nos. 95 of 2018 & 140 of 2018 and pass fresh consequential order in accordance with law. The Appellant may approach the Central Commission at the time of truing up for implementation of this order. ...”

12. The prime argument of the appellant is that the entire time over-run having been condoned there was no justification whatsoever for the

benefit of IEDC to be so restricted. It is the submission that the IDC and IEDC are required to be determined under the relevant Tariff Regulations, 2014 based on the prudence check, it being contingent on the decision taken on the aspect of time over-run.

13. The learned counsel for the respondent Karnataka Power Transmission Corporation Limited (“KPTCL”), resisting the appeal, has argued that the previous decisions referred to above are not applicable since they related to the Tariff Regulations of 2009. This submission is not wholly correct as is demonstrated by the appellant with reference to the observations in the judgment dated 02.12.2019 expressly quoting Regulation 11 (b) (2) of Tariff Regulations, 2014.

14. The learned counsel for the third Respondent argued that the previous decision rendered on 09.03.2021 is *ex parte*. This, to our mind, does not make any difference in as much as the decision nonetheless was on the merits of the issues that were raised.

15. Be that as it may, the prime ground of contest before us by KPTCL is that the delay which had occurred in the present case was on account of Right of Way (“ROW”) issues that may not have been treated as factors which were beyond the control of the developer. It is submitted that such issues cannot be treated as *force majeure* event within the meaning of Regulation 12, which reads as under:

*“12. Controllable and Uncontrollable factors:
The following shall be considered as controllable and uncontrollable factors leading to cost escalation impacting Contract Prices, IDC and IEDC of the project:*

(1) The “controllable factors” shall include but shall not be limited to the following:

(a) Variations in capital expenditure on account of time and/or cost over-runs on account of land acquisition issues;

(b) Efficiency in the implementation of the project not involving approved change in scope of such project, change in statutory levies or force majeure events;
and

(c) Delay in execution of the project on account of contractor, supplier or agency of the generating company or transmission licensee.

(2) The “uncontrollable factors” shall include but shall not be limited to the following:

(i) Force Majeure events; and

(ii) Change in law.

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

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

Provided also that if the transmission system is not commissioned on SCOD of the generating station, the transmission licensee shall arrange the evacuation from

the generating station at its own arrangement and cost till the associated transmission system is commissioned."

16. The expression "*force majeure*" is defined by Regulation 3 (25) of Tariff Regulations, 2014 covering "*event or circumstance or combination of events or circumstances*" which prevent "*the generating company or transmission licensee to complete the project within the time specified*", they including "*Act of God*" or "*Any act of war, invasion, armed conflict*" or "*Industry wide strikes and labour disturbances*".

17. We agree with the submissions of the learned counsel for the appellant that the definition of the expression *force majeure* as set out in the Regulation is inclusive and cannot be restricted or limited the illustrations which are indicated therein. Similarly, the proviso contained in Regulation 11, as quoted above, also provides expansive definition wherein such events as have been the cause of the delay in the present case are duly covered. At any rate, the decision of the Commission condoning the delay in entirety has not even been challenged or questioned by any party, the finding on that issue having been become final and binding.

18. It was finally argued by the learned counsel for KPTCL that the Review Petition preferred by the party she represents, it being Review Petition No. 5/RP/2020, is pending consideration before the Central Commission. At the same time, we note that the issue raised in the Review Petition concerns the liability to pay transmission

charges levied on the said party. The issue in the Review petition being entirely distinct, the pendency of such petition cannot come in the way of this appeal being entertained on the above-mentioned issue.

19. For the above-mentioned reasons, we find no substance in the grounds of contest pleaded by the respondent to the appeal. We follow the previous decisions of this tribunal rendered on 02.12.2019 and 09.03.2021 in Appeal Nos. 95 and 140 of 2018 and Appeal No. 63 of 2020 respectively. There being no such limitation in the Regulation to the grant of entire benefit of IEDC, the period of delay in entirety having been condoned, the restriction to 10.75 % was wholly unjustified and improper. The impugned order to that extent is, thus, set aside. The Central Commission is directed to pass consequential fresh order on this subject within a period of four weeks hereof subject, of course, to prudence check.

20. The Appeal is disposed of in above terms. No order as to costs.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERENCE ON THIS 22nd APRIL, 2021**

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

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REPORTABLE/NON-REPORTABLE
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