IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO.118 OF 2006

Dated: 04th January 2022

Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

NORTH EASTERN ELECTRIC POWER CORPORATION LIMITED
Brookland Compound
Lower New Colony
Shillong – 793 003 ….. Appellant(s)

VERSUS

1. **POWER GRID CORPORATION OF INDIA LIMITED**
B-9, Qutab Institutional Area
Katwaria Sarai
New Delhi-110 016

2. **ASSAM STATE ELECTRICITY BOARD**
Bijulee Bhawan, Paltanbazar,
Guwahati 781 001
Assam

3. **MEGHALAYA STATE ELECTRICITY BOARD**
Meter Factory Area, Short Round Road,
Shillong – 793 001

4. **DEPARTMENT OF POWER**
Government of Arunachal Pradesh
Itanagar – 791 111

5. **ELECTRICITY DEPARTMENT**
Government of Manipur
Imphal– 795 001

6. **ELECTRICITY DEPARTMENT**
Government of Mizoram
Aizawl – 796 001

7. DEPARTMENT OF POWER
Government of Nagaland
Kohima – 797 001

8. DEPARTMENT OF POWER
Government of Tripura
Agartala – 799 001

9. NORTH EASTERN REGIONAL POWER COMMITTEE
Shillong – 793 003

10. NORTH EASTERN REGIONAL DESPATCH CENTRE
Shillong – 793 006

11. CENTRAL ELECTRICITY REGULATORY COMMISSION
[*Through Its Secretary]*
6th Floor, Core-3, SCOPE Complex
Lodhi Road
New Delhi ….. Respondents

Counsel for the Appellant (s)	:	Ms. Shikha Ohri Mr. Samyak Mishra
Counsel for the Respondent (s)	:	Mr. M.G. Ramachandran, Sr. Adv Mr. Shubham Arya Ms. PoorvaSaigal Ms. Shikha Sood for R-1

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

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 appeal at hand was filed by *North Eastern Electric Power Corporation Limited* (hereinafter referred to as *'the Appellant'* or *'NEEPCO'* or *'Generator'*) assailing the Order dated 07.04.2006 passed in Review Petition no. 189 of 2004 by the *Central Electricity Regulatory Commission* (hereinafter referred to as '*CERC'* or '*Central Commission')*, taking

exception primarily to it having singled out the appellant making it liable to pay transmission charges to the first respondent *Power Grid Corporation of India Limited* (hereinafter referred to as *'PGCIL'*) on the energy injected as *Unscheduled interchange* ("*UI*", for short) for the period beginning 01.11.2003. The dispute relates to the period from 01.11.2003 to 31.03.2017, described by PGCIL as arising out of regime enforced in the peculiar facts and circumstances of the *North Eastern Region* ("*NER*") of the country.

3. Concededly, the subject is governed by *Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001* for the period 01.11.2003 to 31.03.2004 and the *Central Electricity Regulatory Commission (Terms and Conditions) of Tariff) Regulations, 2004* for the period from 01.04.2004 (hereinafter referred to as '*Tariff Regulations 2001' and 'Tariff Regulations 2004'* respectively).

4. The appellant is a central sector generating company, owning, operating and maintaining various *Inter State Generating Stations* ("*ISGS*") including Assam Gas Based Power Station (291 MW), Agartala Gas Turbine Power Station (84 MW), Kopili Power Station (200 MW), Khandong Power Station (50 MW), Kopili Stage II Power Station (25 MW), Ranganadi Power Station (405 MW) and Doyang Power Station (75 MW), through which it generates and sells electricity to Respondent Nos. 2 to 8. The

Appellant, at the time of filing the appeal had about 51.80% (presently 44.5%) of the total capacity connected to the North Eastern Regional Grid.

5. The tariff for sale of electricity from the Appellant to Respondent Nos. 2 to 8 is determined as per the applicable *CERC (Terms and Conditions of Tariff) Regulations*, at ex-bus of the power stations. The transmission of power beyond ex-bus of the Power Stations is under the jurisdiction of the Central Transmission Utility (CTU) or the State Transmission Utility (STU) and the transmission tariff payable is determined by the Appropriate Commission as per the applicable tariff regulations. Such transmission tariff is payable to the CTU or the STU, as the case may be, by the beneficiaries receiving the energy and the ISGS have no role in the said transaction. Unless an ISGS sold power to a consumer under a bilateral agreement, there was no liability for payment of transmission charges. It is pertinent to mention here that the Appellant has had no bilateral agreement with any consumer, for sale of power, during the post ABT period from 01.11.2013 till date.

6. It is not in dispute that the transmission tariff in the NER was being charged based on the *Uniform Common Pooled Transmission Tariff* ("*UCPTT*"), operational in NER since 1992. The UCPTT rate of 35 paise/kwh was effective from 01.04.1998 till 31.03.2007. The UCPTT rate was derived by adding annual transmission charges for all Central Sector

transmission lines and sub-stations and for identified State-owned transmission lines, and dividing the sum by expected annual generation at all central generating stations in the region. Under the UCPTT mechanism, the transmission charges were calculated on the basis of actual drawal by the concerned beneficiaries who are availing the transmission system. The transmission charge was then apportioned among Respondent No. 1/PGCIL and the State Utilities, whose assets form part of common pooled transmission assets.

7. PGCIL had filed a petition, being Petition No. 40/2000 and subsequently a review petition, being Review Petition No. 110/2000 (against an interim order dated 22.09.2000), before the Central Commission seeking fixation of transmission tariff for the assets built in the NER based on Ministry of Power ('MOP') notification dated 16.12.1997. The same was opposed by the beneficiaries in the NER on the ground that the tariff of 90 paise/ kwh, claimed by PGCIL, was very high and that they were already paying tariff of 35 paise/ kwh, based on the agreement arrived at the NEREB Forum.

8. The aforementioned petitions culminated into an order dated 01.01.2002, wherein the Central Commission directed that tariff of 35 paise/ kwh would be continued till 31.03.2004 or till such time the power

generation matching the transmission capacity is available, whichever is earlier. The relevant parts of the Order may be quoted as under:

> *"12. The transmission schemes in respect of which tariff approval has been sought were approved by the Central Government to match with the future generation of power by NEEPCO. It is on record that except Kathalguri Gas plant, no other generating plant connected with these transmission schemes had been put to commercial operation by 1.2.2000, the date from which tariff has been claimed by the petitioner. There is thus an excess of transmission capacity and the respondents are not deriving any benefit out of such excess capacity. Under these circumstances, the respondents cannot be made liable to pay the transmission charges for the excess capacity. In fact from the petition itself, we find that PIB, while approving the revised cost estimates for Kathalguri transmission system, advised the petitioner to enter into a back-to-back commercial agreement with the generating utility and seek grant/compensation in case of delay or non-commissioning of the unit as per schedule. It becomes evident that even PIB did not intend the respondents to be burdened with extra'. tariff because of non-availability of generation commensurate with the transmission capacity. Therefore, tariff of these transmission schemes cannot be fixed under the notification dated 16.12.1997.*
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> *13. In the light of the foregoing, we direct that the respondents shall be liable to pay the transmission charge @ 35 paise/kWh of the power transmitted in the region. This tariff shall be applicable from 1.2.2000 to a period up to 31 March 2004 or till such time the power generation matching the transmission capacity is available, whichever is earlier. However, we wish to advise the Central Government to finalize an appropriate relief package for the NE Region. If the Central Government finalizes relief package, then the difference between the actual tariff and the tariff of 35 paise/kWh, which we have ordered, shall be provided from the relief package to the Petitioner. If this does not happen, the Petitioner would have to bear the difference."*
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> (Emphasis Supplied)

9. Concededly, the Availability Based Tariff (ABT) was introduced in NER w.e.f. 01.11.2003. Subsequently, by Order dated 06.09.2004, CERC determined the tariff in Petition no. 13 of 2004 for the period beginning 01.11.2003 (hereinafter "*Post ABT period*"). The relevant part of the Order dated 06.09.2004 may be quoted as under:

> *"10. The above suggestion of the petitioner has been examined by the Commission. Prima-facie, this new concept would not be in line with the concept of UCPTT, wherein the beneficiaries pay the regional transmission charge in proportion to energy actually received. If the generation at Central stations falls short of design energy, and beneficiaries have to pay the transmission charge @ 35 paise/kWh on design energy, the actual transmission charges per kWh of energy received would exceed 35 paise. We are therefore not inclined to accept the petitioner's suggestion.*
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> *11. However, it is recognized that after introduction of ABT in NER w.e.f 01.11.2003, the pattern of operation of the Central stations has considerably changed. The beneficiaries are now scheduling their full entitlements in these stations. The beneficiaries having a lower demand are letting the surplus to be exported, through bilateral trading or as UI. A question therefore arises as to how the regional transmission charges should be paid. The following example would illustrate the issue.*
>
> *12. Suppose a beneficiary schedules a drawal of X units from Central station during a month (as per its entitlement in Central station energy availability). Suppose the beneficiary actually draws only Y units during the month, and its under drawal (X - Y) gets exported from NER as UI. In the earlier UCPTT scheme (Pre-ABT), the beneficiary had to pay 35 paise/kWh on Y units, the only recognizable figure since X had little relevance. Now, with structured scheduling process in place, it could be said that the beneficiary is using the regional transmission system first for drawing X units and then for exporting (X – Y) units; so he should pay transmission charges corresponding to (2X – Y) units. This would not be fair. Nor would it be equitable*

to charge only for Y units. It is therefore directed that with effect from 01.11.2003, and till the date UCPTT concept continues, regional transmission charges in NER shall be paid by the under-drawing beneficiaries according to their respective scheduled energy drawal (X) from Central generating stations.

13. The over-drawing beneficiaries, and those importing power from outside NER under an agreement (that is, where Y exceeds X) shall pay the regional transmission charges according to their actual energy drawal (Y). Both X and Y shall be in terms of ex-power plant energy quantum. Further, in case a central generating station injects energy into the NER grid in excess of that scheduled by NER beneficiaries (that is, summation of X), either on account of a bilateral or as UI, the central generating station shall pay the UCPTT rate on such excess energy."

10. Thus, by the above dispensation, by Order dated 06.09.2004, CERC directed that while fixing the transmission charge of the NER, if a central generating station injects energy into the NER grid in excess of the scheduled energy, either on account of bilateral or as UI, the central generation station shall pay UPCTT rate on such excess energy injected into the grid.

11. The appellant felt aggrieved and filed Review Petition no. 02 of 2005 but the same was rejected by Order dated 07.04.2006. The relevant part of the said order reads thus:

"11. In our opinion, sharing of transmission charges based on actual energy drawal is not a fair proposition. The transmission system in the NER, and in other regions as well, is primarily created for conveyance of electricity corresponding to the installed capacity in the region and to facilitate delivery of entitlement (allocation in MW) of each beneficiary from central sector generating stations. Ideally,

the owner of the transmission system, the first respondent in the present case, deserves to be compensated for the investment made, irrespective of the energy flows. This is precisely the manner in which transmission charges are shared by the beneficiaries in other regions. However, this requires determination of total transmission charges, that is, total transmission charges payable to the first respondent based on the investment made. In contrast, in case of the NER, total transmission charges payable to the first respondent have not been determined for the reasons mentioned hereinabove. Instead, in the NER, transmission charge liability of the individual beneficiary is determined first and these liabilities are then added to arrive at the total amount receivable. This special dispensation for the NER was made in view of the excess transmission capacity available in the region. Prior to implementation of ABT, actual usage by individual beneficiary was judged by the energy drawn by that beneficiary. The continuance of this system is unfair to the first respondent, if actual drawal of a beneficiary is less than its scheduled drawal, because the transmission system has to be kept in readiness by the first respondent to deliver the scheduled energy. Therefore, the scheduled drawal from the central sector generating stations appears to be much better criterion for arriving at the usage by individual beneficiaries. The scheduled drawal was not thought of as measure of actual usage prior to ABT, because in the absence of any commercial implications, the schedules were of not much significance at that time. The scheduled drawal will also have better correlation (as compared to actual drawal) with entitlement, which as already explained, should be the ideal basis for sharing of the transmission charges. However, if actual drawal is more than the scheduled drawal, it is logical to apply the transmission charges based on actual drawal because the transmission system maintained and operated by the first respondent was able to support and was used for such drawal, even though it exceeded the scheduled drawal. Therefore, we have come to the conclusion that the directions contained in our order dated 6.9.2004 to the effect that beneficiaries shall pay transmission charges based on scheduled drawal from CGS or actual drawal, whichever is higher, is just and fair.

12. The order dated 6.9.2004 also stipulated that the central sector generating stations will have to pay the transmission charges on energy injected in excess of the generation scheduled by the beneficiaries in the NER. This was stipulated to mainly take care of bilateral sale by the central sector generating stations to the entities outside the NER. In such cases, the total schedule to the central sector generating stations (say A Mus) will be more than the schedule given by the NER beneficiaries (say B Mus) and the difference (A-B) MUs will be energy scheduled for drawal by an entity outside the NER. If the central sector generating station is able to generate C MUs, which is in excess of A, as per the order dated 6.9.2004, it will have to pay transmission charges for energy quantum of (C-B) MUs and UI charges for (C-A) MUs. There should be no doubt that additional transmission charges for use of the NER system for export of energy outside the region, whether under a bilateral sale or as UI, should be payable. The order dated 6.9.2004 ensures that these charges are paid by the central sector generating stations generating in excess of the schedule for NER beneficiaries. Needless to say, the central sector generating stations can always factor these charges into the rate charged from the entity importing the power generated. Even NEEPCO has admitted that transmission charges on the central sector generating stations are justified, if excess injection is on account of bilateral sale. There is no reason why their injection as UI should not attract a similar transmission charge. We are conscious of the fact that if generation level maintained by the central sector generating stations is above the total generation scheduled, application of transmission charges on the central sector generating stations brings down effective UI rate by 35 paise /kWh (UCPTT Rate). However, in our opinion, lower effective UI rate does not indicate unfair treatment to the central sector generating stations in the NER, because their overgeneration increases transmission losses in ER and over-loading of ER-WR link, and therefore should not be unduly encouraged. Based on the above analysis, we have come to the conclusion that our direction in the order dated 6.9.2004 on the issue of applying transmission charges to the central sector generating stations does not call for any review.

13. On the issue of "double charging", we have already come to the conclusion that application of transmission charges as per directions contained in order dated 6.9.2004 is not unfair to any individual beneficiary or the central sector generating stations in the NER. It is also a fact that the first respondent is not getting revenues commensurate with the investment and, therefore, the perception that the directions contained in order dated 6.9.2004 are leading to over-recovery by the first respondent is misplaced."

12. It is the above Order dated 07.04.2006 which was assailed by the appeal at hand, the contentions of the appellant being that it is contrary to the Tariff Regulations 2001 and Tariff Regulations 2004, also being discriminatory in nature, the appellant having been treated differently in relation to the UI norms prevalent at the time in other parts of the country.

13. The appeal at hand was decided by this tribunal, by judgment Dated 11.03.2008, the relevant part whereof may be quoted as under:

"14. It is true that the methodology adopted for recovery of transmission charges in the NER is different from other regions of the country but the basic concept of recovery of the aggregate transmission charges remains the same. The Tariff Regulations and the Open Access Regulations provide that the long term customers would be contributing for the annual transmission charges, as reduced by the adjustable charges recovered from the short-term transmission charges. Hence, we are of the opinion that NEEPCO not being a long term transmission customer would not be required to contribute towards the annual transmission charges applicable to a long-term customer.

….

20. In our opinion, application of transmission charges based on energy supplied in kWh terms instead of based on the capacity allocated in MW terms is not an adequate reason to recover transmission tariff on ISGS injecting power through the mechanism of UI. Admittedly, UI mechanism was introduced to bring in grid discipline and it

prescribed penalty/incentive on under/over drawl than the schedule depending upon the prevailing grid frequency. The mechanism provides that over drawl of energy when the grid frequency is less than 50.5 Hz, would attract penalty in the form of UI rate, which increase with every 0.02 Hz drop in the grid frequency. The UI rate has been modified from time to time to send necessary signals to the stakeholders. Recently, the Commission has upwardly revised the UI rates to encourage grid discipline. The UI mechanism in a way considers 50.5 Hz as the ideal grid frequency calling for no penalty or incentive at this level. Therefore, nothing should be done to disturb this basic premise: By introducing levy of transmission charges of 35 paise per kWh on energy injected as part of the UI mechanism, the Commission has effectively taken away the incentive for the generators to inject much needed power into the grid when the frequency starts dropping from 50.5 Hz. Here we agree with the contention of the Appellant that the threshold frequency at which it is commercially viable for a generator to inject UI energy would be lowered by around 0.12 Hz (if rate of 8 paise per unit for every 0.02 Hz drop upto 49.80 Hz is taken into consideration). This does not augur well for grid discipline.

21. Similarly, recovery of transmission charges based on energy supplied in kWh terms instead of based on the capacity allocated in MW terms is not an adequate reason to distinguish between ISGS in NER from other regions of the country. The right approach would be to levy transmission charges on the beneficiaries as is applicable in other parts of the country.

….

26. We feel that the real issue is the excess investment made by the Respondent in the NER. We agree with the observations of the Commission in this regard in its order of 1 January 2002, which we have referred to earlier, that there is thus an excess of transmission capacity and the respondents are not deriving any benefit out of such excess capacity. Under these circumstances, the respondents cannot be made liable to pay the transmission charges for the excess capacity. It becomes evident that even PIB did not intend the respondents to, be burdened with extra tariff

because of non-availability of generation commensurate with the transmission capacity.

27. We are of the firm opinion that something which is not straightaway justified cannot be made justifiable in a circuitous way. The Commission had rightly concluded that the beneficiaries cannot be made liable to pay for the excess investment made by PGCIL. Therefore, the plea that the first respondent is not getting revenue commensurate with the investments is of no relevance.

28. The Commission has ordered for payment of transmission charges by central generating station injecting excess energy into the NER grid in excess of that scheduled by NER beneficiaries (that is, summation of X), either on account of a bilateral or as UI, the central generating stations shall pay the UCPTT rate. This in our opinion amounts to double charging as the entity drawing such power from the grid is also required to pay transmission charges.

29. We therefore, allow the Appeal as above and set aside the order dated 07 Apr. 06 and allow the review petition No. 2 of 2005 thereby reviewing the order dated 06 Sept. 2004 in Petition No. 13 of 2004 and grant the exemption to the appellant from paying any regional transmission charges on energy injecting into the grid as UI in excess of the schedule."

(Emphasis Supplied)

14. The conclusion reached by this tribunal, by the afore-quoted judgment dated 11.03.2008, was primarily that a generation company injecting energy to the NER grid, in excess of that scheduled by beneficiaries either on account of a bilateral contract or as UI, cannot be called upon to pay transmission charges that also amounting to double recovery of such charges.

15. The first respondent (PGCIL) challenged the above said judgment dated 11.03.2008 of this tribunal, before Hon'ble Supreme Court by Civil Appeal no. 4733 of 2008. The said Civil Appeal was allowed by Hon'ble Supreme Court, by Order dated 30.01.2020, setting aside the judgment dated 11.03.2008 and remanding the matter back to this tribunal for a fresh decision, the relevant part of the said order of Hon'ble Supreme Court being as under:

> *"4. We have perused the order passed by the Central Commission as well as by the Appellate Tribunal. Various reasons have been given by the Central Commission for arriving at different conclusions in the order. The reasons, inter alia, given in paragraphs 11, 12 and 13 have not been specifically adverted to by the Appellate Tribunal. While deciding the appeal the Appellate Tribunal was required to consider the reasons given by the Commission. In the facts and circumstances of the case, we deem it appropriate to set aside the order of the Appellate Tribunal and remit the case to it to consider the case afresh after hearing the parties and decide the appeal, in accordance with law, duly considering the reason given in the order passed by the Central Commission.*
>
> *5. The appeal is allowed to the aforesaid extent."*

16. We have heard the learned counsel on all sides at length. We have been taken through the record.

17. Before coming in grips with the issues raised, it is necessary to take note of certain provisions of the applicable Tariff Regulations which read as under:

"(iii) 'Allotted Transmission Capacity' means the power transfer in MW *between the specified point(s)* of *injection and point(s)* of *drawal allowed to* a *long-term customer on the inter-state transmission system under the normal circumstances and the expression "allotment* of *transmission capacity" shall be construed accordingly;*

Allotted Transmission Capacity to a *long-term transmission customer shall be sum* of *the generating capacities allocated* to *the long term transmission customer from the ISGS and the contracted power, if any;*

…

(vii) 'Contracted Power' means the power in MW *which the transmission licensee has agreed to carry or which the transmission licensee is required to carry as per firm allocation from ISGS outside the region or the long term agreement between the importing and exporting utility;*

…

(xii) 'Inter-State Generating Station' or 'ISGS' has the meaning as assigned in the Indian Electricity Grid Code approved/notified by the Commission;

(xiii) 'Long-Term Transmission Customer' means a *person availing or intending to avail access to the inter-state transmission system for* a *period* of *twenty five years or more;*

(xviii) 'Short- Term Transmission Customer' means a *transmission customer other than the long-term transmission customer"*

18. The first respondent defends the impugned order arguing that the capital cost, the operation and maintenance expenses including a reasonable return is serviced through tariff to be paid by the users of the transmission system of the Power Grid as per the Tariff Regulations and Tariff Orders decided by the Central Commission in terms of Sections 61, 62, 64 and 79 of the Electricity Act, 2003 effective 10.06.2003. It is submitted that the determination of transmission charges during the relevant period from 01.11.2003 was under the *Availability Based Tariff*

(ABT) methodology decided by the Central Commission and, in terms thereof, the entire revenue requirements of the grid ought to be apportioned amongst the users based on the Capacity of power in terms of MW contracted/ allocated for use in the transmission system irrespective of the actual quantum of electricity conveyed from time to time being less or even nil. The argument essentially is that the transmission service users must pay for the capacity and it is for the user to use to the extent they desire, up to the contracted capacity.

19. The CERC has been pressing in these proceedings its view that in terms of Tariff Regulations 2001 and 2004, the annual transmission charges (independent of usage) should be shared by beneficiaries in ratio of power allocated from inter-State Generating Stations. It was argued that in the methodology of capacity-based recovery of the transmission charges, PGCIL would recover the revenue requirements fully, irrespective of the extent of the actual use or drawl of electricity by the users.

20. It is submitted that another incident of ABT is the UI mechanism to deal with injection in deviation from scheduling of electricity. Such injection could be by way over injection by generating company at times of grid frequency being low and the generating company earns UI charges. Where the ABT mechanism and Capacity based recovery of transmission charges are implemented, no further amount is required to be paid to the PGCIL as the transmission service provider and the UI charges earned is allowed to

be appropriated by the generating company. It is argued that while the above methodology of capacity-based recovery was duly implemented in all other regions of the country, an exception was made for NER having regard to the peculiar problems not related to PGCIL which had implemented the transmission systems as had been planned though the corresponding generation capacity to be established by others had not materialized.

21. It is the submission of the respondents that the capacity-based recovery of transmission charges based on allocated MW capacity under the ABT was not enforced in NER and instead a reduced recovery based on actual use of system at a reduced rate of Rs 0.35 per unit (KWh) was implemented by Order dated 01.02.2002 for justifiable reasons. The argument is that the principles applied in other regions cannot be applied to NER, having regard, *inter alia*, to substantially less recovery for the Transmission Service Providers - only 35 paise per kWh as against about 90 paise per kWh for full recovery. It is argued that the Central Commission has addressed the issue equitably by providing for transmission charges to be paid also for all injections of electricity including UI injection etc., it being not possible for PGCIL to avoid losses if the ABT methodology of capacity charges based on MW capacity had been adopted.

22. The respondent have argued that a power station generating more units than what has been scheduled by the beneficiaries necessarily avails

access to the transmission system for injecting the same into the grid so as to earn the UI Charges. It is submitted that the appellant generator would not have been able to earn UI Charges during the relevant period without availing access to the transmission system of PGCIL and since it (the appellant) had so availed the services, it must be required to pay for the same at the prescribed rate of 35 paise per unit. It is contended that it is inequitable that PGCIL was first not allowed to recover the full transmission charges as admissible under the ABT mechanism where the generating company/drawing entity would have paid substantially higher amount and at the same time also denied the equitable consideration of payment of charges at 35 paise for unscheduled injection etc. The argument is that by such unscheduled injection the generating company earns substantial revenue and, consequently, there is no reason why it should not be required to meet some part of the transmission charges in as much as such unscheduled injection is also conveyed through the transmission system and must be counted towards the units for which transmission charges are payable.

23. It is the submission of the first respondent (PGCIL) that there is no double payment of transmission charges. According to it, in case of scheduled energy, the transmission charges are availed only by the beneficiary purchasers who receive the delivery as ex-bus bar of the generating station. But if the generation company injects energy as UI, it

being not a contracted energy, the same can be construed to be delivered to the drawee utilities at their respective boundaries and for such purposes the transmission system PGCIL is utilized. It is the contention of the first respondent that, from such perspective, the generator does use the transmission system and, therefore, seek and take access for conveyance of electricity and consequently must pay for the same. Though, there is no bilateral arrangement with any purchaser nor with the transmission company, the transmission system is accessed to inject electricity into the grid in pooled manner to enable any person who may wish to take power from the grid, UI not being a bilateral arrangement. On this basis, PGCIL argues that under UI where two persons seek and avail access to the system independent of each other, each of them must be obliged to pay the applicable charges.

24. The sum and substance of the argument in defense of the impugned order is that a different approach has been adopted by CERC for NER. The submission is that, having been provided with substantial reduction in the recovery of transmission charges, it is just and equitable that such generating companies as derive additional revenue from UI charges, over and above the determined revenue requirement, be asked to pay levy imposed for injection under UI such that the reduction in transmission charges for NER is partly mitigated.

25. We are not impressed with the line of arguments of the respondents. There is no dispute as to the fact that the levy imposed by the impugned order is not covered by any regulatory mandate or contractual obligation. The Central Commission is a creature of statute and bound by the provisions of the Electricity Act, 2003 and the Regulations framed thereunder. We have already noted the relevant provisions of the Tariff Regulations earlier. The allotted transmission capacity is the sum of generating capacity allocated to the long-term customer from ISGI and the contracted power. The Tariff Regulations envisage two entities *viz*. long-term transmission customer on one hand and ISGI on the other. Clearly, ISGS cannot also be at the same time a long-term transmission customer. Under the Tariff Regulations, it is the long-term customer which contributes for the annual transmission charges, as reduced by adjustable charges recovered from short-term transmission charges. Since the appellant (ISGS) is not a long-term transmission customer, the liability to pay transmission charges cannot be recovered from it, the impugned decision being contrary to the letter and spirit of the relevant Tariff Regulations.

26. It has been pointed out by the appellant that CERC, by its Order dated 04.01.2000 on UI mechanism and charges, had rejected the idea of prescribing support frequency limits for different reasons. Observations in the said order of CERC, to the extent relevant read thus:

> *"5.9.9 We also considered the possibility of prescribing separate frequency limits for different regions. This may involve deviating from statutory frequency limits. This would also involve discriminating between regions. By maintaining the uniform frequency range, capacity additions could be expedited and demand side management would be given more importance. Besides, inter regional flow could be facilitated. Hence we are not inclined to prescribe differential frequency limit."*

27. The impugned order is contrary to the principle followed by CERC in afore-quoted decision declining to treat UI limits in a discriminatory manner for imposing uniform UI rates so as to encourage inter-regional flow of electricity.

28. Indisputably, in the wake of revision of the transmission tariff of PGCIL, it did not charge any transmission charges for UI injections after 01.04.2007. In this view of the matter, the recovery of transmission charges from the appellant on UI injections for the period preceding thereto is questionable.

29. It is pointed out that CERC, by its Order dated 16.01.2008 in the matter of determination of transmission tariff for transmission system associated with Kopili Hydroelectric Stage-I extension project (2x50 MW) in North Eastern Region for the period from 1.4.2004 to 31.3.2009, held as under:

> *"8. Energy availability from the central generating stations in the region has gradually gone up in the recent years. On the other hand, the annual transmission charges, had they been calculated following the principles laid down in the*

Commission's tariff regulations, would have been coming down with repayment of loans over the years. A stage has thus come where continuation of the UCPTT may no longer be beneficial to the States in the region. The UCPTT scheme has already continued much beyond the date contemplated by the Commission for its termination in the order dated 1.1.2002. We are, therefore, keen that the tariff for the transmission assets in the region be regulated under the 2004 regulations, without further delay. Since this change-over has to be effected from the beginning of a financial year, it has been decided that with effect from 1.4.2007, the transmission charges for all the transmission assets in the region are to be determined under the 2004 regulations, as indicated by the Commission in its order dated 27.4.2007 while approving the provisional transmission charges for the petitioner's transmission assets in the region.

…

CAPITAL COST

9. As per clause (1) of Regulation 52 of the 2004 regulations, subject to prudence check, the actual expenditure incurred on completion of the project shall form the basis for determination of final tariff. The final tariff shall be determined based on the admitted capital expenditure actually incurred up to the date of commercial operation of the transmission system and shall include capitalized initial spares subject to a ceiling norm as 1.5% of original project cost. The regulation is applicable in case of the transmission system declared under commercial operation on or after 1.4.2004. As regards the project commissioned prior to 1.4.2004, clause (2) of Regulation 52 of the 2004 regulations provides that in case of the existing projects, the project cost admitted by the Commission prior to that date, shall form the basis for determination of tariff.

10. The petitioner has considered the capital expenditure of Rs. 1898.23 lakh after accounting for additional capitalization of Rs. 63.80 lakh on works for the period from 1.2.2000 to 31.3.2004 and Rs. 29.03 lakh on account of FERV for the same period over the capital expenditure of Rs.1805.40 lakh as on the date of commercial operation.

11. As has been noted above, tariff for the transmission system during 2001-04 was not determined by the Commission under the terms and conditions specified by it

and the UCPTT rate was allowed to continue. Therefore, the capital base for computation of tariff is to be traced from the date of commercial operation."

(Emphasis Supplied)

30. The impugned levy, therefore, cannot be descried as a transmission charge and assumption that the transmission cost of first respondent remains under-recovered is rendered incorrect.

31. Admittedly, transmission costs are paid by beneficiaries in the region who have a transmission services agreement with PGCIL. In the present case, the beneficiaries are paying transmission charges under orders of the Central Commission. Even for the UI injections, PGCIL gets paid by the beneficiaries who are overdrawing for the additional/overdrawn power. This is because the beneficiaries make payment for transmission charges on actual drawal basis. Hence, PGCIL is correspondingly compensated for the usage of its assets. Therefore, upon enforcement, the impugned order is bound to result in a double recovery.

32. The UI mechanism was a distinctive feature of the ABT scheme introduced to bring about grid discipline in the system. By the impugned order, the injection of UI energy is discouraged and the UI mechanism is used in a circuitous manner for payment of transmission charges, which are otherwise not payable by the Appellant.

33. As a result of the impugned order the net UI charge receivable by a central generating station in NER on account of generation beyond schedule (which helps the grid under low frequency conditions) stood reduced by 35paise/kwh. Therefore, the threshold frequency (frequency below which it is commercially viable for a generator to inject UI energy) is lowered by 0.12Hz, as the addition to the rate of energy charge (transmission charge @ 35paise/kwh also comes into picture for determination of threshold frequency).

34. We reiterate the view taken earlier by judgment dated 11.03.2008 that the appellant not being a long-term transmission customer cannot be required under the extant regulations to contribute towards annual transmission charges applicable to long-term customers. We also endorse that the levy of transmission charges on the appellant against electricity injected as part of UI mechanism has the effect of taking back, *albeit* partially, the incentive given to the generators to inject power into the grid particularly at the time when the frequency falls below the threshold levels, this having the possibility of being counter-productive in the matter of grid discipline.

35. We agree with the appellant that the attempt by the impugned order is to do indirectly what cannot be done directly. This is an approach which

is wholly impermissible *[Delhi Admn. V. Gurdip Singh Uban, (2000) 7 SCC 296]*.

36. The Commission has concluded, and correctly so, that the excess investment made by PGCIL cannot be a burden passed on to the beneficiaries so long as they do not derive any benefit from such excess capacity. The difficulties faced by PGCIL in generating revenue commensurate with its investments cannot, however, be a justification for the appellant to be called upon to bear the burden.

37. We are not impressed with the reasons set out particularly in paras 11, 12 & 13 of the Order dated 07.04.2006 of the respondent Commission. Though a different methodology was applied for transmission charges from NER, the basic concept of such recovery remains the same whereunder it is the liability of the beneficiaries, this being the mandate of the Tariff Regulations. Since the Tariff Regulations have the force of law, it is not open for the regulatory authority to deviate from the letter and spirit of such regulatory framework.

38. As observed earlier, under the applicable regulations, transmission tariff is payable to PGCIL (or the State Transmission Utilities) only by the beneficiaries receiving electricity. Unless they engage in selling power to a consumer under bilateral agreements, which is not the case here, the central generating stations have no connection whatsoever with the

transmission tariff. The impugned levy leads to disincentivizing the generators from injecting power into the grid to maintain stability, in sharp contrast to the objective of UI mechanism which was introduced to bring in grid discipline prescribing penalties or incentives for deviation in the nature of under- or over-drawal of electricity as against scheduled energy. The injection of power by the central generation stations cannot be equated, or treated at par, with the bilateral obligations towards injection of power under the UI mechanism. Since the beneficiaries must pay transmission charges to PGCIL for over-drawal of power even in case of UI injections, it is clearly a case of double recovery which is neither just nor fair.

39. For the foregoing reasons, we allow the appeal and set aside the impugned order, thereby holding the appellant entitled to exemption from paying any uniform common pool transmission charges on electricity injected into the grid as UI in excess of the schedule.

40. The appeal is disposed of in above terms.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 04th DAY OF JANUARY, 2022.

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson

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