

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Review Petition No 8/RP/2013
In
Petition No 147/TT/2013**

Coram

**Shri V.S. Verma, Member
Shri M. Deena Dayalan, Member**

**Date of Hearing: 13.08.2013
Date of Order: 14.11.2013**

In the matter of

Review of order dated 9.5.2013 in Petition No. 147/TT/2011 in the matter of approval of transmission tariff for Combined Elements of 315 MVA 400 kV/220 kV ICT-I and ICT-II at GIS Sub-station at Gurgaon (New) along with associated bays under Transmission System associated with NRSS-VI.

And in the matter of

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

.....**Petitioner**

VERSUS

Haryana Power Purchase Centre
Shakti Bhawan, Sector-6 Panchkula (Haryana) 134 109

.....**Respondent**

Representatives of the Petitioner

:Shri S.S Raju, PGCIL
Shri M.M. Mondal, PGCIL
Shri Prashant Sharma, PGCIL
Ms. Sangeeta Edwards, PGCIL
Shri D. Nikhandia, PGCIL

Counsel for the Respondents

: None

ORDER

The Commission by order dated 9.5.2013 in Petition No 147/TT/2011 approved transmission charges for 315 MVA 400 kV/220 kV ICT-II along with associated bays at



GIS sub-station at Gurgaon (New), ICT-II being one of the assets sanctioned as part of the transmission system associated with Northern Region System Strengthening Scheme VI (the transmission system), for the period 1.2.2012, the date of commercial operation, to 31.3.2014 under the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009. Consequent to the said order dated 9.5.2013, the petitioner has filed the present petition wherein it has made the following prayers, namely:

- i) Condone the delay in commissioning of ICT-II at Gurgaon (DOCO 01.02.2012) as the reasons for delay are not within the control of the petitioner or its supplier;
- ii) Kindly take affidavit dated 25.04.2013 containing justification for delay with documentary evidence on record;
- iii) Pass such other relief as Honorable Commission deems fit and appropriate under the circumstances of the case and in the interest of justice.”

2. The administrative approval and expenditure sanction for the transmission system was accorded by the Board of Directors of the petitioner company on 22.1.2007 at a total cost of ₹18695 lakh. The scope of work included LILO of Ballabgarh-Bhiwadi 400 kV S/C transmission line at Gurgaon and 2 X 315 MVA 400/220 kV transformers at 400/220 kV GIS sub-station at Gurgaon (New).

3. As per investment approval, the transmission system was to be commissioned within 30 months from the date of issue of first letter of award, which was 22.1.2007 and accordingly, the scheduled date of commissioning of the transmission system works out to 22.7.2009. One transformer (ICT-I) was put under commercial operation on 1.7.2010 and its tariff for the period up to 31.3.2014 was approved by the Commission in the order dated 30.8.2012 in Petition No 343/ 2010.



4. The second transformer (ICT-II) was put under commercial operation on 1.2.2012, with a delay of 30 months. The petitioner filed the petition (Petition No 147/TT/2011) for approval of tariff for ICT-II from 1.10.2011, the projected date of commercial operation, to 31.3.2014. The petitioner explained the time overrun in the following words:

“There is delay of 26 months in the commissioning of the asset. The reasons for the time over-run are as below:

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

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

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

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

It is submitted that these tests have been specified and conducted in the interest of Power System as a whole to enhance the system reliability and availability. The outcome of test failure is beyond the control of POWERGRID and hence it is humbly prayed that delay in commissioning of ICT-II was beyond the control of petitioner and may be condoned.”

5. Secretariat of the Commission under letter dated 19.7.2011 directed the petitioner to furnish certain information, which included the reason and justification for condoning the delay and non-adjustment of Liquidated Damages (LD) amount, with advance copy to

the respondent. In response, the petitioner by its affidavit dated 14.2.2012 clarified the position as given hereunder:

- “d. Reason and justification for condoning the delay and not adjusting the LD amount with IDC & IEDC

Reply to Para 2(d) above: It is submitted that as already explained in para-8 of the petition that during the short circuit testing in KEMA, Netherland, in unforeseen circumstances the transformer has failed, though pertaining to such experienced and reputed manufacturer like BHEL and resulted in delay in commissioning of the transformer. It is submitted that these tests have been specified and conducted in the interest of Power System as a whole to enhance the system reliability and availability. The outcome of test failure is beyond the control of POWERGRID and hence it is humbly prayed that delay in commissioning of ICT-II was beyond the control of the petitioner and may be condoned. Further it is submitted that the detail of amount of LD if any shall be submitted after closing of contract with the supplier. As per practice amount recovered on account of LD is credited against the cost of the Project. Therefore, IDC and IEDC may be allowed as claimed in the petition.”

6. It is seen that the clarification furnished by the petitioner was generally the replica of the time over-run explained in the petition. The petition was heard on 27.11.2012 and reserved for order on tariff. On consideration of the material available on record, including the reasons for delay in commissioning of ICT-II explained by the petitioner in the affidavit dated 14.2.2012, the Commission in the order dated 9.5.2013 declined to condone the delay. The Commission was of the opinion that the delay was caused on account of design deficiency of the transformer which was attributable to the supplier/manufacturer. The Commission further noted that there was no evidence to show that the petitioner made any effort with the supplier for timely delivery of equipment or to get the transformer tested at KEMA facility on time or even that the delay in commissioning was due to delay in testing. Therefore, the Commission held, the burden on account of delay of the supplier could not be passed on the respondent. Accordingly, the

Commission disallowed IDC of ₹320.64 lakh and IEDC of ₹81.71 lakh for the delay of 30 months and reduced the capital cost to the extent IDC and IEDC disallowed. The Commission considered the reduced capital cost of ₹5052.26 lakh on the date of commercial operation against the apportioned approved cost of ₹5212.28 lakh. The relevant paras of the Commission's order are extracted hereunder:

"Time over-run"

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

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

16. We observe that the delay is due to short circuit testing at KEMA, Netherlands and the failure of transformer during testing. Since the award of contract, it was clear that short circuit testing had to be done by the supplier. The petitioner has not submitted any document to show that it was pressing the supplier for timely delivery of equipment. There is also no evidence that the petitioner had made effort to get it tested at KEMA facility on time. The petitioner has not produced any documentary evidence to show that the delay was due to delay in testing. Thus, we are of the view that the time over-run cannot be attributed to delay in conducting the tests. The failure of transformer due to design deficiency is entirely

the responsibility of supplier. This burden cannot be passed to the respondent. Hence delay of 30 months due to failure of transformer is not being condoned. Accordingly, IDC and IEDC for the period of time over-run is disallowed. Details of disallowed IDC and IEDC are as follows:-

(₹ in lakh)

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

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

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

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

7. The petitioner is aggrieved on account of reduction of capital cost consequent to adjustment of IDC and IEDC for the actual period of delay which is 30 months and has filed the present review petition.

8. The petitioner has stated it had filed the affidavit dated 25.4.2013, with relevant documentary evidence, explaining the reasons for the delay. However, the said affidavit has not been taken into account while passing the order dated 9.5.2013. The petitioner has presently summarized the submissions made in the said affidavit dated 25.4.2013 with regard to delay in short circuit testing as under:-



"I) Though the contracting agency is contractually liable and responsible for timely completion of all the works under the scope of the contract. However, it may be appreciated that under the subject contract the contracting agency is dependent on third party for some of the vital activities. Here, the supplier could not conduct the SC type test due to non-availability of test beds at KEMA which has resulted delay in delivery of equipments.

II) It is submitted that short circuit test was specified to improve the quality of the transformer, thereby improving reliability of services. However, the test facilities are owned by an external agency. In case of 400 kV class transformers, there is only one laboratory which can conduct Short Circuit test. Unavailability of test beds in the lab cannot be made a liability on the Petitioner or/and its supplier."

9. The petitioner has further stated that there has been delay by HVPNL in handing over the clear possession of land for construction of 400/220 kV sub-station where two transformers, ICT-I and ICT-II are installed. The petitioner has pointed out that the Commission has already condoned delay of 11 months in the commercial operation of ICT-I by order dated 30.8.2012 in Petition No 343/2010, on the ground of delayed possession of land and for the same reason 11 months delay in commercial operation of ICT-II deserves to be condoned as the two transformers (ICT-I and ICT-II) are installed at the same sub-station. The petitioner has stated that this aspect has been duly explained in the affidavit dated 25.4.2013.

10. We have heard the representative of the petitioner on the question of maintainability of the review petition. He has reiterated the submissions made in the review petition. The representative of the petitioner has stated that the delay in commissioning of ICT-II was due to non-availability of test bed at KEMA, Netherlands for testing and delays in acquisition of land for the sub-station at Gurgaon. It has been pointed out that the delay of 11 months in acquisition of land for the Gurgaon sub-station was condoned in the case of ICT-I, whereas the delay has not been condoned in the

present case though ICT-II is also erected at Gurgaon sub-station. The representative of the petitioner has submitted that the delay condoned in case of ICT-I is *ipso facto* applicable for ICT-II as well. The representative of the petitioner has further submitted that additional information filed vide affidavit dated 25.4.2013, giving justification for delay was not considered by the Commission.

11. We have bestowed our thoughtful consideration to the submissions made on behalf of the petitioner.

12. The power of the Commission to review its order under clause (f) of sub-section (1) of Section 94 of the Electricity Act is analogous to the power of a Civil Court under Section 114 read with Order 47, Rule 1 of the Code of Civil Procedure. The Commission can review its order on any of the grounds enumerated in Order 47, Rule 1, but not otherwise. The grounds for review of order available to the aggrieved person laid down under order 47, Rules 1 are as under:

- (a) The discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or
- (b) On account of some mistake or error apparent on the face of the record, or
- (c) For any other sufficient reason.

13. In the light of the above principles, we shall now consider whether the order dated 9.5.2013 falls within any of the above grounds. It is not the case of the petitioner that it has discovered new and important matter or evidence which, after the exercise of due



diligence was not within its knowledge or could not be produced by it at the time when the order dated 9.5.2013 was made.

14. It is to be examined whether there is any mistake or error apparent on the face of record.

15. The Commission did not condone the delay in commercial operation of ICT-II on two counts, namely, supply of faulty transformer by the supplier/manufacturer and inability of the petitioner to place on record any evidence to show that it made any effort with the supplier for timely supply or to get expedited the testing of transformer at KEMA. Even though the petitioner now contends that delay is not attributable to it or its supplier, such a contention is clearly contrary to the averment made in the petition and the affidavit dated 14.2.2012. In para 8 of the petition the petitioner unequivocally stated that *“(d)uring the short circuit testing in KEMA, Netherland, in unforeseen circumstances the transformer has failed, though pertaining to such experienced and reputed manufacturer like BHEL and resulted in delay in commissioning of the transformer.”* Similar statement was made in the affidavit dated 14.2.2012 filed by the petitioner. The petitioner expressly admitted of the failure of the transformer supplied by BHEL, who, as stated by the petitioner, is an *“experienced and reputed manufacturer”*. The supplier/manufacturer cannot be absolved of its responsibility to supply any equipment in proper working order. Therefore, there can be no error in the Commission’s observation that *“(t)he failure of transformer due to design deficiency is entirely the responsibility of supplier.”*

16. The other ground on which the Commission declined to condone the delay was the failure of the petitioner to produce any evidence that it took any steps for timely

delivery of transformer by BHEL or short circuit testing at KEMA. Neither in the main petition nor even in the affidavit dated 14.2.2012 the petitioner spelt out the steps taken by it in that direction. The petitioner sought to explain the time overrun in most general terms. In the present review petition the petitioner has admitted that “*the contracting agency is contractually liable and responsible for timely completion of all the works under the scope of the contract.*” Yet, in the proceedings in Petition No 147/TT/2011 till the conclusion of the hearing the petitioner failed to bring to the Commission’s notice any material to satisfy the Commission that it took up the matter with the supplier/manufacturer, BHEL, to ensure timely installation of the transformer. We may point out that the petitioner was under an obligation to do so. Similarly, the petitioner did not bring to the notice of the Commission any particular effort made to get short circuit testing expedited. Therefore, the finding of the Commission on the aspect the petitioner’s failure to highlight its efforts cannot be faulted as the basis of such finding is the absence of any details in petition and the affidavit filed by the petitioner itself.

17. The petitioner has stated that the delay in delivery of ICT-II cannot be attributed to the supplier as the delay was on account of non-availability of testing bed at KEMA, Netherlands. Based on this, the petitioner has sought restoration of capital cost reduced after adjustment of IDC and IEDC for the period of delay. The petitioner’s claim is contrary to the findings recorded in the order dated 9.5.2013 and also elaborated above. The acceptance of the respondent’s contention would make the respondent liable to pay tariff based the capital cost originally claimed by the petitioner. It appears unfair and inequitable since the respondent shall be forced to bear the consequences of the delay

without any fault on its part. The respondent was neither the supplier/manufacturer of the equipment nor was it associated with the procurement or testing of the transformer.

18. The petitioner has stated that a part of the delay is on account of delay in handing over of clear and vacant possession of land by HVPNL. The petitioner has further pointed out that the delay of 11 months in commissioning of ICT-I was condoned by the Commission while approving tariff for that asset and on that basis the petitioner has claimed condonation of delay of 11 months in commissioning of ICT-II. It is noted that no averments to that effect were made by the petitioner in the petition or the affidavit dated 14.2.2012 filed in response to the Commission Secretariat's letter dated 19.7.2011. Even otherwise, considering the facts of the case, this cannot be a ground for review. It is the petitioner's own case that clear possession of land was handed over by HVPNL on 9.1.2009 after removing 66 kV transmission line. However, delivery of the transformer (ICT-II) was received by the petitioner in January 2012 for which the award was placed on L&T much earlier on 29.6.2007, for supply by December 2008. Therefore, the petitioner has not been able to establish any correlation between the delay in handing over the vacant possession of land and the delay in commissioning of ICT-II. In the case of ICT-II, the only factor responsible for the delay in commissioning is the delay in delivery of the transformer. Therefore, the view taken while approving tariff for ICT-I on the basis of facts applicable in that case cannot be extended in the case of ICT-II. Had the petitioner been given the clear possession of land at Gurgaon in time, still then ICT-II could not have been commissioned earlier because of unavailability of ICT-II on ground.

19. The petitioner's principal grievance is that its affidavit dated 25.4.2013 has not been considered by the Commission. The affidavit was filed by the petitioner by way of



evidence five months after conclusion of the hearing on the petition. There is no law which permits a party to produce or file evidence after arguments in the case have been concluded and case is reserved for order without leave of the court. The petitioner did not seek leave of the Commission for placing the affidavit on record. In case the petitioner had approached for leave of the Commission by making a proper application, the matter would have been decided after hearing the respondent. Under these circumstances, reliance by the Commission on the affidavit would have resulted in violation of the rules of natural justice and caused miscarriage of justice. It is trite law that evidence can be produced only in support of the averments made in the pleadings. The evidence *de hors* the pleadings has no worth and cannot be considered. In the instant case, the petitioner did not make any averment in the petition that it made any efforts to get delivery of the transformer or its installation expedited. In the absence of any averments in the petition, the affidavit dated 25.4.2013 had to be kept out of consideration. There is yet another aspect which must be expressly brought out. The petitioner did not explain and has not explained even now as to why it could not produce on record the evidence in support of time over-run along with the petition for approval of tariff or the affidavit filed in response to the letter dated 19.7.2011 sent by the Secretariat of the Commission and why it became necessary to file the affidavit dated 25.4.2013. In the light of this discussion, the grievance of the petitioner arising out of non-consideration of affidavit dated 25.4.2013 is unfounded and without any valid basis.

20. The above discussion leads us to conclude that there is no error, much less the error apparent on the face of record in the order dated 9.5.2013.



21. In view of the above, we do not find any error in the order dated 9.5.2013. Accordingly, the review petition is not maintainable and is hereby dismissed at the admission stage itself.

sd/-

(M. DEENA DAYALAN)
MEMBER

sd/-

(V. S. VERMA)
MEMBER

