

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Review Petition No. 15/RP/2014

In Petition No.184/TT/2011

Coram:

**Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S Bakshi, Member**

Date of Hearing : 01.09.2014

Date of Order : 26.12.2014

In the matter of:

Review Petition under Section 94(1) (f) of the Electricity Act, 2003 read with Regulation 17 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, seeking review of order dated 22.4.2014 in Petition No. 184/TT/2011

And in the matter of:

NTPC Ltd.
NTPC Bhawan
Core 7, Scope Complex
7, Institutional Area, Lodhi Road
New Delhi- 110003

.....Petitioner

vs

1. Power Grid Corporation of India Limited,
"Saudamini", Plot No.2,
Sector-29, Gurgaon -122 001.
2. Assam State Electricity Board
Bijulee Bhawan, Paltan Bazar,
Guwahati -782001.
3. Meghalaya Energy Corporation Ltd,
Short Round Road
Shillong 793001.



4. Government of Arunachal Pradesh,
Itanagar
5. Power and Electricity Department ,
Government of Mizoram
Aizawal.
6. Electricity Department,
Government of Manipur, Keishampat,
Imphal
7. Department Of Power,
Government of Nagaland,
Kohima.
8. Tripura State Electricity Corporation Limited,
Bidyut Bhawan, North Banamalipur,
Agartala-700001.
9. ONGC Tripura Power Corporation Limited,
6th Floor, A wing, IFCI Towers,
New Delhi -110019.

.....**Respondents**

For petitioner : Shri M.G Ramachandran, Advocate, NTPC
Shri Atish Basu Roy, NTPC

For respondents : Ms. Suparna Srivastava, Advocate, PGCIL
Shri Swapnil Verma, PGCIL
Shri P. Saraswat, PGCIL
Shri S.L Venkatesh, PGCIL
Shri Mohd. Mohsain, PGCIL
Shri Rakesh Prasad, PGCIL
Shri S.S Raju, PGCIL
Ms. Sangeeta Edwards, PGCIL

ORDER

This is a review petition filed by NTPC Limited (NTPC) seeking review of the order dated 22.4.2014 in Petition No.184/TT/2011, wherein the transmission tariff of



ATS of Pallatana Gas Based Power Project and the Bongaigaon Thermal Power Station in the North Eastern Region for the tariff block 2009-14 was allowed. The Review Petitioner is aggrieved by the directions to pay the transmission charges after the commissioning of ATS of Pallatana GPS.

Brief facts of the case

2. Power Grid Corporation of India Ltd. (PGCIL) had filed Petition No.184/TT/2011 seeking transmission tariff for the ATS of Pallatana Gas Based Power Project and the Bongaigaon Thermal Power Station in the North Eastern Region for the tariff block 2009-14. The petition covered following six assets- (i) 400 kV D/C Bongaigaon TPS- Bongaigaon transmission line along with associated bays (Asset-I); (ii) 132 kV D/C Silchar-Badarpur transmission line along with associated bays (Asset-II); (iii) 132 kV D/C Silchar-Sirkona transmission line along with associated bays (Asset-III); (iv) 200 MVA, 400/132 kV ICT at Silchar Sub-station along with associated bays (Asset-IV); (v) 50 MVAR switchable line reactors for 400 kV D/C Silchar-Palatana at Silchar Sub-station along with associated bays (Asset-V) and 63 MVAR bus reactor at Silchar Sub-station along with associated bays (Asset-VI). Asset-I is associated with Bongaigaon TPS which is being developed by the Review Petitioner and assets II to VI are associated with Pallatana GBPP. As per the Investment Approval dated 26.2.2010, the said assets were scheduled to be commissioned within 34 months from the date of Investment Approval (IA). Accordingly, the assets were to be commissioned on 1.1.2013. PGCIL rescheduled the commissioning of Asset-I to 1.12.2011 as the asset was required for evacuation of power for Unit-I of Bongaigaon TPS which was agreed upon in the



Quarterly Director-Level Coordination Meeting between the Review Petitioner and PGCIL held on 11.1.2011.

3. PGCIL, vide affidavit dated 7.8.2013 submitted that as per the decision taken in the 10th NERPC meeting, Unit-I of Bongaigaon TPS was scheduled to be commissioned in August, 2011 and the date of commissioning was subsequently revised to June, 2012/October, 2012 in the 12th NERPC meeting and further to September 2013 in the 13th NERPC meeting. PGCIL submitted that the commissioning of Bongaigaon TPS was not certain and was undergoing frequent revisions. Even though the transmission asset was ready for intended use, it was unable to provide intended services because of non-readiness of Bongaigaon TPS. PGCIL, therefore, sought approval of the Commission regarding the date of commercial operation of the transmission system under Regulation 3(12)(c) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff), Regulations, 2009 (hereinafter referred as "2009 Tariff Regulations"). The Review Petitioner was a party to the said petition and was issued notice. The representative of the Review Petitioner was also present during the hearing as noticed from the attendance sheet for hearing dated 1.9.2014. The Commission after taking into consideration all relevant facts came to the conclusion that even though the transmission asset was ready for use but could not be put into use as the commissioning of corresponding generation was getting delayed, which could not be attributed to PGCIL, and accordingly, the Commission approved the date of commercial operation of the transmission asset as 1.1.2013.



4. In the impugned order, the Commission had taken note of the fact that the Review Petitioner entered into a generic Indemnification Agreement (IA) with PGCIL on 15.3.2002 according to which the Review Petitioner agreed to pay full IDC in respect of the associated transmission line for a maximum period of six months from the scheduled date of commissioning in the event of delay in commissioning of the generation project. The IA further provided that the zero date from which the indemnification mechanism would be applicable would be worked out for each of the project and mutually agreed in the Quarterly Director-Level Coordination Meeting between the Review Petitioner and PGCIL and such an agreement would become part of the IA. PGCIL submitted during the hearing of the main petition that no such agreement had been entered into in the instant case of Bongaigaon TPS. The representative of NTPC though present did not contest the submissions of PGCIL. After taking note of the submissions of PGCIL which was not contested by NTPC, the Commission decided that no such agreement existed between the parties deciding the zero date. The Commission further noted that even after declaration of the commercial operation of the Asset I with effect from 1.1.2013, the generating station is still not ready. As per the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010 (2010 Sharing Regulations), the DICs are required to enter into Transmission Service Agreement (TSA) with PGCIL for payment of transmission charges. In the absence of the TSA, the MTSA shall be the default transmission agreement. As no agreement was entered into between the Review Petitioner and PGCIL regarding the transmission charges after the transmission asset is put into commercial operation, it was held in the impugned order as under:-



"51. As per para 2.1.3 of the Model Transmission Agreement approved by the Commission, ISGS who is not a signatory to a BPTA or TSA too shall enter into this agreement and bind itself to the terms of the agreement. Therefore, NTPC is governed by the Model Transmission Agreement. Accordingly, it is directed that NTPC shall bear the transmission charges for Asset I from 1.1.2013 till commissioning of Bongaigaon TPS in line with clause (6) of Regulation 8 of the Sharing Regulations. The petitioners shall bill the transmission charges for Asset I on NTPC....."

5. The Review Petitioner has sought review of the above directions in the Review Petition. The Review Petitioner has submitted as under:-

(a) The Review Petitioner entered into an IA with PGCIL on 15.3.2002. The IA provides for working out the zero date in the Quarterly Director Level Coordination Meetings mutually between the parties and the said agreement would form part of the IA. The IA further provides for an indemnity for a limited period of six months from the zero date in case one of the parties to the agreement is ready for commercial operation on the zero date and the other party is not ready with its project on the zero date;

(b) In the Coordination Committee Meeting held on 12.10.2011, the following was discussed:-

"8. BONGAIGAON (3X250 MW):

- a) NTPC stated that 1X250 MW unit is expected to be commissioned on 1 July 2012;
- b) POWERGRID Informed that Bongaigaon TPS-Bongaigaon 400 kV D\C line is expected to be ready by December, 2011
- c) POWERGRID indicated that for the purpose of Indemnification, agreed Zero date shall be 01.07.2012. However, if NTPC require preponment of ATS to meet start up power requirement POWERGRID may make efforts for the same in which case NTPC shall bear the transmission charges from the date of commercial operations of ATS till the commissioning of the 1st Generating unit and sign BPTA for the same."

Therefore, the zero date for the purpose of indemnification is 1.7.2012.



- (c) The MTSA is applicable only when an IA has not been entered into between the parties. In the instant case, an IA has been entered into between the Review Petitioner and PGCIL and a zero date has also been agreed upon and hence, the MTSA is not applicable.
- (d) Since, the Commission has allowed recovery of transmission charges from the Review Petitioner on the premise that there was no IA between the Review Petitioner and PGCIL even though there was an agreement between the parties with 1.7.2012 as the zero date, it is an error apparent on the face of the record requiring review;
- (e) The Review Petitioner is governed by the provisions of the IA entered into with PGCIL and its financial exposure is limited to provisions of the IA and, therefore, it cannot be made liable under the MTSA;
- (f) The Review Petitioner has submitted that it has not been given an opportunity to present its objections which amounts to violation of the principles of natural justice.

6. PGCIL in its reply, filed vide affidavit dated 26.6.2014 has submitted that the statement made by PGCIL regarding the zero date was recorded in the minutes of the Working Level Coordination Meeting held on 12.10.2011 between PGCIL and NTPC



and no consent/confirmation of the Review Petitioner with respect to the zero date had been recorded in the said minutes. Usually, after preliminary discussions at working level, the zero date is finalized at Director level meeting and a separate sheet is signed which becomes the part of the IA. In the instant case, no such separate sheet indicating the zero date had been signed by the Review Petitioner and PGCIL. As no zero date has been mutually agreed upon by the Review Petitioner and PGCIL, the MTSA is applicable as provided under Regulation 13(5) of the 2010 Sharing Regulations. Accordingly, the Review Petitioner is required to bear the transmission charges for Asset I till the commissioning of its generation unit as provided under Clause (6) of Regulation 8 of the 2010 Sharing Regulations. PGCIL has further submitted that there is no mistake or error apparent on the face of record and the instant review petition is an appeal in disguise and it should be accordingly dismissed.

7. The Review Petitioner in its rejoinder, dated 7.7.2014, has submitted that PGCIL has wrongly stated that there is no agreement between them regarding the zero date. The zero date has been settled as 1.7.2012 in the Working Level Coordination Meeting and it has been recorded in the Minutes of the Meeting and the same was forwarded to PGCIL vide letter dated 24.11.2011. PGCIL had received the said Minutes and did not dispute the contents of the Minutes including the aspect of zero date. The Review Petitioner has further submitted that the IA clearly envisages that the zero date would be mutually decided in the Quarterly Director Level Coordination Meeting and the IA does not provide or stipulate any other form of arriving at the zero date. The Review Petitioner has also submitted that it is a well settled principle of contract law that the



agreement can be entered into many ways and it is not necessary that the agreement should be in a particular form unless the parties specifically provide for as laid down in J.K. Jain vs Delhi Development Authority (1995) 6 SSC 571, Deep Chandra vs Ruknuddaula Shamsheer Jang Nawab Mohammad Sajjad Ali Khan and Ors. AIR 1951 A1193, Kollipara Sriramulu vs Aswathnarayana and Ors. AIR 1968 SC1028 and Sri Satya Prakash Goel vs Ram Krishan Mission and Ors. AIR 1991 All343. It cannot be said that the zero date has not been agreed upon by the Review Petitioner. The Review Petitioner and PGCIL are governed by the IA and not by the MTSA. Further, as per Recital D of the MTSA, the development of ISTS scheme under construction would be governed in accordance with the IA.

8. During the hearing on 1.9.2014, the Review Petitioner reiterated the submissions made in the petition and the rejoinder. Learned counsel for PGCIL admitted that a generic IA was entered into between the Review Petitioner and PGCIL, according to which a zero date has to be agreed upon mutually by them and it should be followed up with the signing of an Annexure which would become part of the IA. In the instant case, Annexure has not been signed and hence MTSA is applicable. Learned counsel further submitted that a meeting was held on 9.3.2012 as a follow-up meeting to 12.10.2011 and the IA was sent to NTPC for signing and no progress has been made in this matter.

9. Based on the submissions of the Review Petitioner and PGCIL, the following three issues are framed:-

(a) Whether the Review Petitioner was not given sufficient opportunity to put



forward its case?

(b) Whether a zero date has been agreed upon between the Review petitioner and PGCIL?

(c) Whether there is any error apparent in the impugned order?

10. As regards the first issue of sufficient opportunity to the Review Petitioner, it is noted that Review Petitioner was one of the respondents in Petition No.184/TT/2011 and accordingly, notice regarding the date of hearing was issued to the Review Petitioner on 2.8.2013. No reply was filed by the Review Petitioner. PGCIL filed an affidavit dated 6.8.2013 seeking approval of date of commercial operation under Regulation 3(12)(c) of the 2009 Tariff Regulations and this fact was recorded in the Record of Proceedings dated 13.8.2013 a copy of which was also issued to the Review Petitioner on 21.8.2013. Further, though one of its representatives was present during the final hearing of Petition No.184/TT/2011 on 22.2.2014, no submission was made with respect to the date of commercial operation. The Review Petitioner neither filed any reply to the main petition even though it was a respondent in that matter nor did it file any response to the PGCIL's prayer for approval of date of commercial operation even though the Review Petitioner was put under notice. Hence, it is incorrect on the part of the Review Petitioner to say that it has not been given sufficient opportunity to present its case. Accordingly, the first issue is decided against the Review Petitioner.

11. The second issue is whether there is an IA between the Review Petitioner and



PGCIL with regard to the zero date. During the hearing of the main petition, PGCIL submitted that zero date for the purpose of IA has not been signed. This statement has not been denied by the representatives of NTPC. The commission has recorded the finding with regard to the IA and the zero date in para 47 and 48 of the impugned order, which is extracted as under:-

“47. Bongaigaon TPS of NTPC has not yet been commissioned and petitioner has been prevented from putting 400 kV Bongaigaon TPS-Bongaigaon transmission D/C transmission line (Asset I), declared under commercial operation on 1.1.2013 into regular service. Under such a situation, the question of bearing the transmission charges of Asset I arises. As per Indemnification Agreement (IA) dated 15.3.2002 executed between NTPC and the petitioner, NTPC has specifically agreed to pay full IDC in respect of the associated transmission line for a maximum period of 6 months from the scheduled date of the commissioning in the event of delay in commissioning of a generation project. IA further provides that, the schedule of commissioning of NTPC generating units along with the Associated Transmission System of the petitioner (the zero date from which the indemnification mechanism shall be applicable) shall be worked out for each project and mutually agreed in the Quarterly Director-level coordination meeting between the two entities within 3 months of investment approval and such an agreement will form an integral part of IA. It has also been provided that the above schedule for the power project and the ATS shall be regularly reviewed in the Quarterly Director level coordination meeting.

48. The petitioner has informed that Zero Date of Indemnification Agreement between the petitioner and Bongaigaon TPS has not been signed. However on perusal of the minutes of the 10th TCC of NERPC meeting, it was revealed that Asset I was anticipated to be commissioned on 1.1.2012 to match with the commissioning of first unit of Bongaigaon TPS as NTPC in the meeting held on 11.1.2011 stated that their first unit of Bongaigaon TPS would be coming in December, 2011. In any case, Asset I has been commissioned as per original schedule.”

12. In the review petition, the Review Petitioner is seeking review of the above decision on the ground that zero date has been decided in the minutes of the meeting held on 12.10.2011. PGCIL is denying that zero date was revised vide the minutes of the Working Level Coordination Meeting held on 12.10.2011 and submits that the issue was still open since NTPC has not signed the Annexure to the IA as is evident from the record note of discussion of the Working Level Coordination Meeting held on 9.3.2012.



13. We have considered the submissions of the parties. We find that both the Review Petitioner and PGCIL are in agreement about the existence of a generic IA signed on 15.3.2002. Clause 1 of the IA provides for the schedule of commissioning as under:-

"1. SCHEDULE OF COMMISSIONING

"The Schedule of Commissioning of NTPC Generating Units along with the Associated Transmission System of Powergrid (the zero date from which the indemnification mechanism shall be applicable) shall be worked out for each project and mutually agreed in the Quarterly Director level co-ordination meeting between Powergrid and NTPC within 3 months of investment approval which will form an integral part of this Agreement. The above schedule for the project and the ATS shall be regularly reviewed in the Quarterly Director level coordination meeting between NTPC and POWERGRID.

The Associated Transmission System will be used by Powergrid to evacuate power from concerned NTPC power stations as a first right. However, in the event of sufficient capacity being available after meeting reserve margins, other power could also be transmitted, subject to the condition that this would not result in any constraints in evacuating power generated by NTPC at its above power stations and shall be done in consultation with NTPC."

14. Clause 2 of the IA provides for Indemnification as under:-

"2. INDEMNIFICATION

"(a) It is specifically agreed that NTPC would pay full Interest During Construction (IDC) in respect of Powergrid's Associated Transmission System for a maximum period of 6 months from the scheduled date of commissioning in the event of delay in commissioning of generation project.

(b) Powergrid would pay 35% of Interest During Construction (IDC) in respect of NTPC's generating units for a maximum period of 6 months from the scheduled date of commissioning in the event of delay in commissioning of the Associated Transmission System.

(c) A coordination committee consisting of 2 (two) officials of NTPC and 2 (two) officials of Powergrid shall be constituted within 2 weeks of signing of this Agreement, which shall regularly monitor the progress on a quarterly basis.

(d) Either party who was ready to commission and have notified the other party, shall obtain a certificate from Statutory Auditors at the end of financial year certifying the



amount of IDC from zero date to actual date of commissioning or 6 months IDC, whichever is less.

(e) Indemnification payment by any party would arise only in case of revenue loss suffered by the other party.”

15. According to the above clause, the Review Petitioner and PGCIL are required to mutually work out the Schedule of Commissioning (zero date) in the Quarterly Director Level Co-ordination Meeting within three months of investment approval of each project. However, there is no record to show that the zero date was decided by the Review Petitioner and PGCIL within three months of the investment approval of Asset I. Further, in the Working Level Coordination Meeting held on 12.10.2011 between the Review Petitioner and PGCIL, it was decided that the zero date shall be 1.7.2012. The minutes of the said meeting are as under:-

"8. BONGAIGAON (3X250 MW)

a) NTPC stated that 1X250 MW unit is expected to be commissioned on 1 July 2012.

b) POWERGRID Informed that Bongaigaon TPS-Bongaigaon 400 kV D\C line is expected to be ready by December, 2011.

c) POWERGRID indicated that for the purpose of Indemnification, agreed Zero date shall be 01.07.2012. However, if NTPC require preponment of ATS to meet start up power requirement POWERGRID may make efforts for the same in which case NTPC shall bear the transmission charges from the date of commercial operations of ATS till the commissioning of the 1st Generating unit and sign BPTA for the same."

16. Subsequently, in the working level coordination meeting between NTPC and PGCIL on 9.3.2012, the status of the IA for Bongaigaon ATS was shown as under:-

Sr. No.	Issue	Status	Deliberation of meeting dated 9.3.2012
1.	Indemnification Agreement for Bongaigaon ATS	Indemnification Agreement has been sent to NTPC for signing	As per Investment Approval, transmission system is scheduled by December, 2012. Powergrid requested NTPC for zero date as June, 2012. Powergrid shall send the annexure for zero date for signing by NTPC.



17. Both Review Petitioner and PGCIL have argued vehemently for and against the existence of agreement between the parties regarding zero date. The Review Petitioner has relied on certain judgments of the High Court and Hon'ble Supreme Court and has contended that an agreement can be entered into in many ways and it is not necessary that the agreement should be in a particular form unless the parties specifically provide for it. On perusal of the IA, it appears that the requirement is for both the parties to agree with the zero date within three months of Investment Approval, which shall form an integral part of the agreement. Further, the above schedule for the generation project and ATS shall be regularly reviewed in the Quarterly Director Level Coordination Meeting. As per the minutes of the meeting dated 12.10.2011, PGCIL indicated that for the purpose of IA, agreed date shall be 1.7.2012. Consequent to that meeting, PGCIL is stated to have sent the Annexure to the IA to NTPC for signing. This is evident from Sr. No. 6 of the record note of discussion of the Working Level Coordination Meeting between NTPC and PGCIL held on 9.3.2012. From the minutes of the meeting dated 9.3.2012, it appears that there is a requirement for signing of Annexure to the IA for the purpose of zero date and the said Annexure having not been signed by the Review Petitioner, zero date in respect of Bongaigaon ATS has remained at the stage of deliberation only.

18. The third issue is whether there is any error apparent on the face of the impugned order in the light of the discussion made herein above. The main ground for seeking the review is that the MTSA which is a default agreement and bind a DIC to pay the transmission charges can be operationalized only when there is no separate



agreement between the transmission licensee and the generating company. According to NTPC, since there is an IA between PGCIL and NTPC, the MTSA shall not be applicable. As per para 2.1.3 of the MTSA, inter-State generating station which is not signatory to a BPTA or TSA shall enter into the agreement and bind it to the terms of the agreement. Regulation 13(5) provides that the MTSA shall be default Transmission Agreement and shall mandatorily apply to all DICs. From the above provision, it emerges that NTPC which is a DIC is required to enter into BPTA or TSA with PGCIL, failing which, it shall be governed by the provisions of the MTSA. In the instant case, no TSA has been entered into between NTPC and PGCIL and, therefore, NTPC is governed by the MTSA. NTPC is trying to interpret the IA as a BPTA/TSA. In our view, such an interpretation is incorrect as BPTA/TSA and the IA are totally different from each other. While the IA operates between the generating company and the transmission licensee prior to the commercial operation of either of the generating station or transmission system, the TSA operates after the commissioning of the transmission system.

19. Since the generating station of the Review Petitioner did not come into operation even after six months from the expected date of commissioning as 1.7.2012, the Commission in exercise of its power under Regulation 3(12)(c) of the 2009 Tariff Regulations, allowed PGCIL to declare the commercial operation as on 1.1.2013. Under the circumstance, the question that arose for consideration before the Commission is who will bear the transmission charges even after the commissioning of the transmission system with effect from 1.1.2013 when the unit of the generating



station has not been commissioned. In this context, the Commission allowed the relief to PGCIL in terms of Regulation 8(6) of the 2010 Sharing Regulations, which provides as under:-

"For Long Term customers availing supplies from inter-state generating stations, the charges payable by such generators for such Long Term supply shall be billed directly to the respective Long Term customers based on their share of capacity in such generating stations. Such mechanism shall be effective only after "commercial operation" of the generator. Till then, it shall be the responsibility of generator to pay these charges."

20. As per the above provision, from the date of commercial operation of the transmission system till the commercial operation of the generating station or unit thereof, the generating company shall pay the transmission charges and only after the commercial operation of the generating station, the transmission charges shall be billed to the long term customers based on their share in the generating station. Accordingly, the Review Petitioner was directed to pay the charges of the Asset I till the commercial operation of the generating station after which it would be the liability of the beneficiaries of the generating station to pay the transmission charges.

21. In view of the above discussions, we find that the zero date in terms of the IA was not decided by the Review Petitioner and the PGCIL and it was in the stage of deliberation only. As a result, the Commission did not award any liability to the Review Petitioner prior to the date of commercial operation of the transmission asset. After the commissioning of the transmission asset, the IA has no relevance and the liability for payment of transmission charges of the Review Petitioner arises out of the provision of the Regulation 8(6) of the 2010 Sharing Regulations and the MTSA which binds the Review Petitioner in terms of provision of Regulation 13(5) of the 2010 Sharing



Regulations. Therefore, we find neither any error nor any sufficient reason to review the impugned order.

22. The Review Petition is disposed of in terms of the above.

sd/-
(A. S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson

