

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 180/MP/2016

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A. K. Singhal, Member

Shri A S Bakshi, Member

Dr. M.K. Iyer, Member

Dated: 13th of September 2017

In the matter of

Petition under Section 79 (1) (c), (d) & (f) of the Electricity Act, 2003 read alongwith Regulation 55 of the Tariff Regulations, 2014 and Regulation 111 (Inherent Powers), Regulation 115 (Power to Remove Difficulties) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999

And in the matter of

Petition seeking directions from the Central Electricity Regulatory Commission against NTPC Limited to bear/pay IEDC charges for the associated transmission system with Barh Generation in lieu of the order dated 3.3.2016 of the Hon'ble Supreme Court of India and the Indemnification Agreement dated 15.3.2002 signed between the parties.

And in the matter of

Power Grid Corporation of India Limited
Saudamini, Plot No. 2
Sector-29, Gurgaon-122001

....Petitioner

Vs

NTPC Limited
Core 7, 7th Floor, Scope Complex
Lodhi Road, Institutional Area
Lodhi Colony
New Delhi-110003

....Respondent

Parties Present:

- 1) Shri Sanjay Sen, Senior Advocate, PGCIL
- 2) Shri Ruth Elwin, Advocate, PGCIL
- 3) Shri Sakie Jakharia, PGCIL



- 4) Ms. Manju Gupta, PGCIL
- 5) Shri Aryaman Saxena, PGCIL
- 6) Shri S.K. Venkatesh, PGCIL
- 7) Shri M.K. Mandal, PGCIL
- 8) Shri S.S. Raju, PGCIL
- 9) Shri Rakesh Prasad, PGCIL
- 10) Shri Avinash Pavgi, PGCIL
- 11) Shri M.G. Ramachandran, Advocate, NTPC
- 12) Shri Anushree Bardhan, Advocate, NTPC
- 13) Shri Poorva Saigal, Advocate, NTPC
- 14) Shri Shankar Saran, NTPC
- 15) Shri Nishant Gupta, NTPC
- 16) Shri Umesh Ambati, NTPC

ORDER

The Petitioner Power Grid Corporation of India Limited (PGCIL) has filed the present petition for adjudication of the dispute between the Petitioner and NTPC with regard to the payment of Incidental Expenditure During Construction (IEDC) for the period of delay in commercial operation of the Barh-Balia Transmission Line on account of the delay in commercial operation of Barh STPS of NTPC.

2. The brief facts of the case are that the Petitioner executed the Barh-Balia Transmission Line for evacuation of power from Barh STPS of NTPC. The Petitioner filed Petition No. 267 of 2010 for determination of tariff for the said transmission line with the anticipated COD as 1.7.2010. The Commission vide order dated 29.4.2011 approved the transmission charges of the said transmission line by taking into consideration the COD as 1.7.2010. Punjab State Power Corporation Limited (PSPCL) which is one of the beneficiaries of the said transmission line filed Appeal No. 123 of 2011 before Appellate Tribunal for Electricity (Appellate Tribunal) challenging the Commission's order dated 29.4.2011 in Petition No. 267 of 2010. The Appellate Tribunal vide its judgment dated 2.7.2012 held that the conditions of the 2009 Tariff



Regulations for declaration of COD are not met in case of the transmission line of the Petitioner and accordingly, set aside the Commission's order. The Petitioner filed Civil Appeal Nos. 9193 of 2013 and 9302 of 2012 before the Hon'ble Supreme Court. After considering the submission of the parties, Hon'ble Supreme Court dismissed the appeals and held that PSPCL would not be liable to pay the tariff before the transmission line was operational.

3. In the meanwhile, the Petitioner had filed another petition namely, 227/TT/2013 for determination of tariff of the said transmission system. The Commission heard both the petitions and determined the tariff of the transmission system vide order dated 30.6.2015 after deciding on the COD as 30.6.2015 and disallowed the IDC/IEDC for six months and directed its recovery from NTPC in terms of the Indemnification Agreement. Pursuant to the bills raised by the Petitioner, NTPC paid the IDC for six months and refused to pay the IEDC on the ground that the said charges are outside the scope of the Indemnification Agreement. In the above background, the Petitioner has filed the present petition seeking a direction to NTPC to pay the disallowed IEDC amount of ₹1.91 crore to the Petitioner with interest for delay.

4. The Petitioner has submitted that in para 11 of the judgement, Hon'ble Supreme Court has recorded that the delay in operationalizing the Barh-Balia transmission line is directly attributable to failure of NTPC in completing its scope of work in terms of contractual agreement between the parties. The Petitioner has further submitted that the Hon'ble Supreme Court has recorded a finding that the Petitioner might have suffered financial losses as a result of delay on the part of NTPC. The Petitioner has

submitted that in para 13 of the judgement, Hon'ble Supreme Court did not prejudice the right of the Petitioner to seek remedies against NTPC, if available under law. According to the Petitioner, Hon'ble Supreme Court has not limited the losses to any quantifiable head such as IDC or IEDC and therefore, losses pertaining to IEDC for the period of delay upto a maximum period of six months is liable to be claimed by either party directly responsible for such delay.

5. The Petitioner has submitted that clause 2 of the Indemnification Agreement dated 15.3.2002 specifies the extent of liability of both parties in the event of any delays. Further, Clause 2(e) expressly provides for indemnification payment in the event of revenue losses by the other party. Clause 4 of the Indemnification Agreement provides that "no claim other than IDC amount referred to above i.e. any indirect loss due to delay in commissioning generating units/ associated transmission system shall be payable by either party to the other party." The Petitioner has submitted that clause 4 only bars either party from claiming indirect losses attributable to delay, and not direct losses in the form of IEDC as in the present case.

6. The Petitioner has submitted that under Regulation 55 of the Tariff Regulation 2015, the Commission has been vested with the power to remedy a situation where it has become difficult to give effect to the provisions otherwise. The Petitioner has further submitted that the Commission has also been empowered under Regulation 111(inherent power) and Regulation 115 (Power to remove difficulty) of the Conduct of Business Regulations to issue suitable orders and directions in this regard.

7. NTPC has contested the claims of the Petitioner for the reasons as stated below:



- (a) The Petitioner's claim for IEDC for the Associated Transmission System (ATS) of NTPC Barh station under Regulation 55 of the Tariff Regulations, 2014 is not sustainable and is liable to be rejected as the Tariff Regulations, 2014 are not applicable in the present case as the Barh-Balia 400 kv double circuit line were put under commercial operation during the tariff period 2009-14 for which the Tariff Regulations, 2014 are applicable.
- (b) Similar claims for IEDC arising out of the same Indemnification Agreement dated 15.3.2002 entered into between the NTPC and PGCIL was considered by the Commission in its order dated 14.11.2013 in Review Petition No. 12 of 2013 read with order dated 9.5.2013 in Petition Nos. 2/TT/2011 and 57/TT/2011 wherein PGCIL's prayer's for allowing IEDC was rejected. Therefore, similar claim of PGCIL in the present petition is liable to be rejected.
- (c) The Petitioner is wrongly relying and misconstruing the decision of Hon'ble Supreme Court in judgment dated 3.3.2016 in Civil Appeal No. 9193 of 2012 (PGCIL Vs. Punjab State Power Corporation Limited and Others) to contend that the NTPC is liable to compensate the Petitioner without restricting the same to the IDC provided under the Indemnification Agreement. NTPC was not a party to the said proceedings and the Hon'ble Supreme Court was not deciding on the rights and obligations of PGCIL and NTPC in the said proceedings. Hon'ble Supreme Court in the said judgement had only stated that the decision in the Civil Appeal rejecting the claims of PGCIL is without prejudice to the rights of the Petitioner, if any, available to it under law against the NTPC. Accordingly, the

decision of the Hon'ble Supreme Court in Civil Appeal No. 9193 of 2012 cannot be interpreted to mean that Respondent, NTPC has become liable to pay the IEDC to the Petitioner.

(d) The interpretation of Indemnification Agreement by the Commission in the order dated 14.11.2013 in Review Petition No. 12 of 2013, Petition Nos. 2 of 2011, 57 of 2011 and Appeal against the main order dated 9.5.2013 having been dismissed by the Appellate Tribunal, the specific contractual arrangements between the Respondent and Petitioner is that no IEDC is payable by the Respondent to the Petitioner. Therefore, there is no question of any difficulty or its removal under Regulation 55 of the Tariff Regulations, 2014 as well as exercise of inherent powers under Regulation 111 or power to remove the difficulties under Regulation 115 of the CERC (Conduct of Business) Regulations, 1999.

(e) In order dated 30.6.2015 in Petition No.267/2010 and 227/TT/2013, the Commission has restricted the capital cost to the apportioned approved cost of Rs.73594 lakh as against a claim of Rs.76811.80 lakh. Therefore, the reduction in capital cost is not on account of IDC or IEDC. Hence there cannot be any claim of financial loss to the Petitioner as claimed in the petition.

8. The Petitioner has refuted the allegations and averments of NTPC and has made the following submissions:

- (a) While agreeing with NTPC that the tariff of the transmission system was determined under the Tariff Regulations, 2009, the Petitioner has submitted that its reliance on Regulation 55 of the Tariff Regulations, 2014 must be read with the provisions of the Conduct of Business Regulations. Further, the Petitioner is not seeking any remedy which is specifically provided under the Tariff Regulations but is seeking a general remedy which pertains to a specific component (IEDC) of the transmission system for which tariff is already determined alongwith the directions against NTPC for payment of IEDC.
- (b) The Commission is required to issue directions to the Respondent pursuant to the orders of the Hon'ble Supreme Court in Civil Appeal No. 9193 of 2012 as well as for enforcement of direction of this Commission made in Petition Nos. 267/2010 and 227/TT/2013 vide order dated 30.6.2015, wherein the Commission while re-determining the transmission tariff from the revised COD had categorically observed that Respondent, NTPC should bear IDC and IEDC for a period of six months.
- (c) The order dated 9.5.2013 in Petition Nos. 2/TT/2011 and 57/TT/2011 is stated to be prior to the order dated 30.6.2015 of the Commission in Petition Nos. 267/2010 and 227/TT/2013. In the latter order, the Commission had categorically directed the Respondent to pay both IDC and IEDC. Moreover, the observation made by the Commission in the order dated 9.5.2013 is to the effect that the Petitioner should have safeguarded its commercial interest in the matter of IDC and IEDC by means of an Indemnification Agreement and as

such the said order was made without due deliberation on the Notification of Government of India, Ministry of Power based on which the Indemnification Agreement was entered into between the Petitioner and NTPC.

(d) As regards the submission of NTPC that reduction of capital cost in order dated 30.6.2015 in Petition Nos. 267 of 2010 and 277/TT/2013 was not on account of IDC and IEDC but on account of limiting the admitted capital cost to apportioned capital cost, the Petitioner has submitted that in para 34 of the said order, the Commission has allowed capitalization of IDC and IEDC for a period of 8 months and reduction of capital cost has no role in determination of IDC and IEDC.

9. During the hearing of the petition, learned senior counsel for the petitioner submitted that in order dated 30.6.2015 in Petitions No. 267/2010 and 227/TT/2013, the Commission while re-determining the transmission tariff from the revised COD of the petitioner had categorically observed that NTPC should bear IDC and IEDC for a period of six months. Pursuant to the said order dated 30.6.2015, the Petitioner raised bills to NTPC towards the outstanding/un-capitalized IDC/IEDC. However, NTPC paid only IDC amount for a period of six months and refused to pay the IEDC and claimed that the same is not covered under the scope of Indemnification Agreement. Learned senior counsel for the petitioner further submitted that if the amount of IEDC for the said period is not permitted to be recovered from NTPC, the corresponding amount should not be reduced from the capital cost of the assts. Learned senior counsel for the Petitioner requested to clarify the direction given in para 34 of the order dated 30.6.2016 with

regard to the capitalisation of IDC and IEDC to which learned counsel for NTPC had no objection.

Analysis and Decision

10. The main issue for consideration is whether as per the directions of the Commission in order dated 30.6.2016 in Petitions No. 267/2010 and 227/TT/2013 as also the subsequent judgement of the Hon'ble Supreme Court dated 3.3.2016 in Civil Appeal No. 9193 of 2012 (PGCIL Vs. Punjab State Power Corporation Limited and Others), the Petitioner is entitled for recovery of IEDC for a period of six months from NTPC or not.

11. We intend to first recapitulate the circumstances leading to the issue of the order dated 30.6.2016 in Petitions No. 267/2010 and 227/TT/2013 and the subsequent developments leading to filing of the present petition in order to appreciate the dispute between the parties in its correct perspective. NTPC was constructing a Super Thermal Power Station at Barh in the State of Bihar. For evacuation of power from Stage-I of Barh STPS comprising 3 units of 660 MW each, associated transmission system comprising sub-stations, transmission lines etc. including 400 kV Barh-Balia double circuit line was constructed by the Petitioner. The construction of Balia Sub-station and the transmission line was under the scope of Petitioner and the construction of Barh Sub-station and the switchgear of the line at Barh end was under the scope of NTPC. Commissioning of Barh STPS Stage-I of NTPC was delayed for some reasons. However, the Petitioner completed the 400 kV Barh-Balia double circuit line and charged the line from Balia end on 30.6.2010 and claimed transmission tariff for the

period 1.4.2009 to 31.3.2014 in Petition No. 267/2010 considering the date of commercial operation as 1.7.2010. The transmission tariff for the said asset was granted vide order dated 29.4.2011.

12. PSPCL filed an Appeal No.123/2011 before the Appellate Tribunal against the Commission's order dated 29.4.2011 on the issue of date of commercial operation of the transmission asset. PSPCL submitted before Appellate Tribunal that the instant line was idle charged and not loaded from both ends as on 1.7.2010. The Appellate Tribunal vide judgement dated 2.7.2012 in Appeal No. 123/2011 set aside the Commission's order dated 29.4.2011 and remanded the matter back to the Commission for re-determination of the date of commercial operation of the instant asset with the following observations:

"7. We have heard the Ld. Counsel for the Appellant and the Respondent no.1 on the above issue and carefully considered their rival contentions. In the light of their submissions, the only issue that is to be decided by us is as under:-

"Whether on idle charging of a new transmission line connecting a sub-station of a transmission licensee to a generating station of a generating company from one end when the switchgear and metering and protection system at the generating station end is not made ready by the generating company, could it be declared as having achieved the COD for recovery of transmission charges from the beneficiaries?"

"8.6 According to the Appellant, the works at the Barh end were completed by NTPC only in August, 2011 and the first circuit of Barh-Balia line was loaded on 02.08.2011 while the second circuit was loaded on 19.08.2011." "10. A transmission system may comprise of one or more transmission lines and sub-station, inter-connecting transformer, etc. According to above definition an element of the transmission system which includes a transmission line, could be declared as attained COD if the following conditions are met.

- i) The line has been charged successfully,
- ii) Its trial operation has been successfully carried out, and
- iii) It is in regular service.

11. Thus, Barh-Balia line in order to achieve COD should have been charged successfully, its trial operation should have been completed and it should have been in regular service. While the line was idle charged only from Balia end on 30.06.2010, its



charging from Barh end, its trial operation and regular service was not possible as the switchgear at Barh end of the line was not ready. Admittedly, the switchgear, protection system and metering arrangement of the transmission line at Barh end were not ready on 01.07.2010 and reported to have been completed only in August, 2011. Thus, all the conditions laid down in the Tariff Regulations for attaining COD had not been complied with.

12. Ld. Counsel for the Respondent no.1 has argued that the second proviso to Regulation 3 (12) (c) of the Tariff Regulations stipulates that in case an element of the transmission system is ready for regular service but is prevented from providing such service for reasons not attributable to the transmission licensee, the Commission may approve COD prior to the element coming into service.

13. In our opinion this proviso is not applicable in this case as Barh-Balia line was not ready for regular service due to non-installation of the switchgear at Barh end. Merely because the components of the transmission line in the scope of POWERGRID (R-1) were ready, the line could not be considered as completed and ready for use till the switchgear and protection and metering arrangements, etc; at the Barh end of the line were completed. Both ends of the switchgear protection and metering systems along with the overhead line are components of the transmission line. If for the sake of convenience of construction and operation and maintenance, the scope of work of the components of transmission line at the generating station end has been entrusted to the generating company, the transmission line could not be considered as completed unless all the components of the transmission are ready for use. The second proviso to the definition of COD, in our opinion, will be applicable if the transmission line is ready in all respect for regular use but is prevented for use due to some reasons beyond the control of transmission licensee, e.g. high voltage in the system.”

“16. We notice that the Appellant had filed three affidavits on 04.03.2011, 15.03.2011 and 07.04.2011 before the Central Commission, between date of hearing on 25.01.2011 and the date of the impugned order on 29.04.2011. It is noticed that these affidavits were not considered by the Central Commission. This is evident from the recording in paragraph 6 of the impugned order which is reproduced below:

“6. No comments or suggestions have been received from the general public in response to the public notice published by the petitioner on 19/21.9.2010 as required under Section 64 of the Electricity Act, 2003 (the Act) read with Regulation 3 (6) of the Central Electricity Regulatory Commission (Procedure for making of application for determination of tariff, publication of the application and other related matters) Regulations, 2004. No reply has been filed by the respondents.”

17. In our opinion when an important issue regarding COD of the line was raised by the Appellant much before passing the impugned order in the matter, the Central Commission ought to have re-heard the matter by giving further opportunity to both the parties before deciding the issue.

18. We also notice from the petition filed by the Respondent no.1 before the Central Commission that the important fact of declaration of COD of Barh-Balia line without installation of the switchgear at Barh end was not indicated. This fact has also not been discussed anywhere in the impugned order. Thus, it appears that the Central Commission has decided the transmission tariff of Barh-Balia line w.e.f. 01.07.2010

without ascertaining that the line was ready for use after successful completion of trial operation.

19. In view of above, the question framed by us is answered in negative and in favour of the Appellant. Accordingly, we set aside the impugned order and remand the matter to the Central Commission to re-determine the COD and tariff of 400 kV Barh-Balia double circuit line after hearing all concerned within 3 months of the date of this judgment.”

13. The petitioner filed a Review Petition No. 09/2012 before Appellate Tribunal seeking review of the judgement in Appeal No. 123 of 2011. Appellate Tribunal vide judgement dated 8.11.2012 dismissed the Review Petition of the petitioner. Thereafter, the Petitioner filed Civil Appeals No.9302 of 2012 and 9193 of 2012 before the Hon'ble Supreme Court against the Appellate Tribunal's judgement. The Hon'ble Supreme Court in its order dated 15.3.2013 stayed the proceedings before the Commission during the pendency of the appeal. In the meanwhile, RCE for the Barh-Balia Transmission System was approved by the Petitioner's Board and the Petitioner filed Petition No.227/2013 seeking final tariff for Barh-Balia Transmission System. The Petitioner further filed an application before the Hon'ble Supreme Court seeking modification of the order dated 15.3.2013. The Hon'ble Supreme Court vide order dated 8.10.2013 directed the Commission to proceed with the determination of transmission tariff of the instant assets. The Commission thereafter took up the matter for consideration of the date of Commercial operation of the transmission system in the light of the observations of the Appellate Tribunal. The Commission also directed NTPC to be impleaded as a party to the petition and in compliance thereof, NTPC also filed reply with regard to the commercial operation. After considering all aspects, the Commission vide order dated 30.6.2015 decided the issue as under:

“34. Accordingly, the petitioner completed its portion of the work on 1.7.2010. However, the transmission line could not be put into use on account of the non-readiness of the switchyard of NTPC at Barh end and non-commissioning of the generation assets by NTPC. The petitioner has not submitted documents to substantiate its claim of regular co-ordination done with NTPC with regard to implementation of associated bays matching with the line. The petitioner is advised, in future to co-ordinate implementation of associated bays at both the ends on regular basis to ensure bays are ready and matching with commissioning of line. As per the Indemnification Agreement entered into by the petitioner with NTPC, the Zero Date was 1.10.2009 and if one party is ready with its assets and the other party is not ready, the party which is not ready with its assets will indemnify the other party for a period of six months. Though zero date has not been reset by the parties, it will be reckoned from the date when one party is ready for commercial operation of the asset. Accordingly, we are of the view that NTPC should bear the IDC and IEDC for a period of six months from 1.7.2010 i.e. from 1.7.2010 to 31.12.2010. The balance period of this time over-run is condoned and IDC & IEDC for this period shall be capitalised.”

14. Thereafter, PGCIL took up the matter with NTPC vide its letter dated 18.12.2015 for payment of IDC and IEDC for a period of six months from 1.7.2010 to 31.12.2010 in terms of the order of the Commission dated 30.6.2015. NTPC vide its letter dated 29.12.2015 replied that in terms of the clauses 2(a) and 4 of the Indemnification Agreement dated 15.3.2012 between PGCIL and NTPC, it is liable to pay the IDC for a period of six months only provided all requirements of the IA are met and PGCIL furnishes an undertaking that it has suffered losses due to delay in commissioning of bays at Barh generation project. PGCIL vide its letter dated 22.1.2016 reiterated its demand for IDC and IEDC for a period of six months in terms of the order of the Commission and further clarified that non-capitalisation of IDC and IEDC in tariff in itself is sufficient proof of revenue loss.

15. Hon'ble Supreme Court delivered the judgement dated 3.3.2016 in Civil Appeal No. 9193 of 2012 filed by PGCIL against the judgement of the Appellate Tribunal. Relevant observations of the Hon'ble Supreme Court are extracted as under:

“7. The language in the above definition is clear and unambiguous. We agree with the Tribunal that COD of transmission lines can be achieved only on fulfilment of following three conditions:-

- (i) The line has been charged successfully,
- (ii) Its trial operation has been successfully carried out, and
- (iii) It is in regular service.

8. It is contended on behalf of the appellant that what has been misinterpreted by the Tribunal is the second Proviso of clause (12) of Regulation 3 which provides that where transmission system is ready for regulatory services but prevented from providing the service for reasons not attributable to the transmission licensee, the commission has the power to approve the date of commercial operation prior to element coming into regular service. It is not disputed in the present case that Barh Sub-station was being constructed by NTPC, and Power Grid cannot be made to suffer as nothing was attributable to it.

9. On the other hand, on behalf of respondent No. 1 it is argued that the transmission line cannot be said to have been completed unless switchgear and other connected works are also completed, as provided in the definition of “transmission lines”.

10. We have considered the rival submissions. Subsection (72) of Section 2 of Electricity Act, 2003 defines the word “transmission lines”, which reads as under: -

“2(72) “transmission lines” means all high pressure cables and overhead lines (not being an essential part of the distribution system of a licensee) transmitting electricity from a generating station to another generating station or a sub-station, together with any step-up and step-down transformers, switch-gear and other works necessary to and used for the control of such cables or overhead lines, and such buildings or part thereof as may be required to accommodate such transformers, switch-gear and other works.”

11. From the above definition, it is clear that switchgear and other works are part of transmission lines. In our opinion, Regulation 3 (12) of the Regulations, 2009 cannot be interpreted against the spirit of the definition of “transmission lines” given in the statute. It is evident from record that it is not a disputed fact that switchgear at Barh end of Barh-Balia line for protection and metering were to be installed by NTPC and the same was not done by it when transmission line was completed by the appellant. As such the appellant might have suffered due to delay on the part of NTPC in completing the transmission lines for some period. But beneficiaries, including respondent No. 1, cannot be made liable to pay for this delay w.e.f. 01.07.2010 as the energy supply line had not started on said date.

12. We are apprised at the bar that meanwhile during the pendency of these appeals, in compliance of the interim order, after hearing all the concerned parties, C.E.R.C. has decided the matter on 30-06-2015, and transmission line has been now declared successfully charged w.e.f. 01-09-2011 and the commercial operation has started on said date. However, the order dated 30-06-2015 passed by CERC is stated to be operative subject to decision of this Court in the present appeals, due to the interim order passed by this court.



13. Since we are in agreement with the Tribunal that in the present case, respondent No. 1 and the beneficiaries could not have been made liable to pay the tariff before transmission line was operational, we find no infirmity in the impugned order. Therefore, the appeals are liable to be dismissed. Accordingly, both the appeals are dismissed without prejudice to the right of the appellant, if any, available to it under law, against NTPC. There shall be no order as to costs.”

16. NTPC has paid the IDC for a period of 6 months and claim for IEDC for the corresponding period amounting to Rs.1.91 crore has been declined by NTPC. In this context, the Petitioner has filed the present petition seeking a direction to NTPC to liquidate the outstanding amount of IEDC. The Petitioner has relied upon the directions of the Commission in order dated 30.6.2015 and judgement of the Hon'ble Supreme Court dated 3.3.2016 as quoted above in support of its claims for IEDC.

17. A preliminary objection has been taken by NTPC that the Petitioner cannot invoke the Power to Remove Difficulty of the Commission under Regulation 55 of the Tariff Regulations, 2014 as the tariff of the transmission system under consideration has been determined with COD as 1.9.2011 in terms of the Tariff Regulations, 2009. We are in agreement with NTPC. Tariff Regulations, 2014 are applicable with effect from 1.4.2014 and cannot be made retrospectively applicable to the present case where the disputed period for IEDC is from 1.7.2010 to 31.12.2010. Therefore, we are of the view that no relief can be granted in exercise of power under Regulation 55 of Tariff Regulations, 2014. The Petitioner has further invoked the power of the Commission under Regulation 111 regarding inherent power and Regulation 115 regarding power to remove difficulty under Conduct of Business Regulations for grant of relief. We are of the view that in the present case, the dispute has arisen between the parties with regard to the interpretation of the directions of the Commission in the order dated 30.6.2015 regarding payment of IEDC which shall be decided on merit keeping in view all relevant

facts and material documents. There is no requirement either to invoke the inherent power or the power to remove difficulty under the Conduct of Business Regulations to grant relief to the Petitioner.

18. The main objection of NTPC is that in terms of the Indemnification Agreement between the Petitioner and NTPC, NTPC is liable to pay IDC for a period of six months only and not IEDC on account of delay in COD of Barh STPS. The Petitioner has submitted that the Petitioner and NTPC have entered into Indemnification Agreement pursuant to the guidelines issued by Ministry of Power vide letter dated 29.2.2000 to provide for an indemnification arrangement between the Petitioner and NTPC for mismatches between transmission and generation project. The Petitioner has further submitted that in terms of the Indemnification Agreement dated 15.3.2002, NTPC would pay full IDC in respect of PGCIL's ATS for a maximum period of six months from the scheduled date of commissioning in the event of delay in commissioning of the generation project and PGCIL would pay 35% of IDC in respect of NTPC's generation units for a maximum period of six months from the scheduled date of commissioning in the event of delay in commissioning of the ATS. The Petitioner has further submitted that as per Clause 4 of the Indemnification Agreement, no claim other than IDC amount referred to above, i.e. any indirect loss due to delay in commissioning generating units/ATS shall be payable by either party to the other party. The Petitioner has submitted that the limitation on payment in terms of clause 4 of the IA is with regard to any indirect loss due to delay in commissioning and does not restrict the payment of IEDC which is a direct loss to the Petitioner.



19. We have considered the submissions of the Petitioner and NTPC. The Indemnification Agreement provides that the schedule of commissioning of NTPC generating units alongwith the associated transmission systems of PGCIL which shall be the zero date from which indemnification mechanism shall be applicable shall be worked out for each project and mutually agreed in the Quarterly Director level coordination meeting between PGCIL and NTPC. The said schedule shall be regularly reviewed in the Quarterly Director level coordination meeting between PGCIL and NTPC. Further, Clauses 2(a) and (b) and 4 of the Indemnification Agreement provide 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 six months from the scheduled date of commissioning in the event of delay in commissioning of the generation project.

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

4. LIMITATION OF PAYMENT

No claim other than IDC amount referred to above, i.e. any indirect loss due to delay in commissioning Generating Units/Associated Transmission System shall be payable by either party to the other party.”

Thus NTPC is liable to pay the full IDC to PGCIL from the scheduled date of commissioning for a period of six months. The IA further states that no indirect loss due to delay in commissioning of generating units or ATS shall be payable by the either party to the other party. In para 34 of the order dated 30.3.2015, the Commission has taken note of the provisions of the Indemnification Agreement (IA) and has observed that as per the IA, the zero date was 1.10.2009. However, the said zero date has not been reset by the parties. The Commission has decided that in the absence of reset

zero date, it will be reckoned from the date when one party is ready for commercial operation of the asset and accordingly, 1.7.2010 when the Petitioner was ready for commercial operation but could not do so in the absence of the readiness of the generating unit of NTPC was considered as revised zero date and NTPC was directed to bear the IDC and IEDC for a period of six months from 1.7.2010 to 31.12.2010. Even though the IA confined the liability to payment of IDC only, the Commission directed for payment of both IDC and IEDC. This was a conscious decision by the Commission as PGCIL despite being ready to declare COD was prevented from doing so on account of non-readiness of the unit of Barh STPS of NTPC. NTPC has neither filed any review against the said order nor filed any appeal. Therefore, the said order has attained finality and is binding on NTPC. Accordingly, NTPC is liable to pay the IEDC for the period of six months from 1.7.2010 to 31.12.2010 as per the decision in order dated 30.6.2015.

20. The next objection of NTPC is that the Commission in order dated 14.11.2013 in Review Petition No.12 of 2013 in Petition No.2/TT/2011 and 57/TT/2011 has decided that in terms of the IA, only IDC for six months is admissible for the period of delay and the decision in the present case is contrary to the decision in the review petition which has been upheld by the Appellate Tribunal in its judgement dated 25.2.2015 in Appeal No.118 of 2014. According to NTPC, the Indemnification Agreement as interpreted in order dated 14.11.2013 and the appeal against it having been dismissed by the Appellate Tribunal, the specific contractual arrangement between PGCIL and NTPC is that no IEDC is payable. The Petitioner has submitted that the order dated 9.5.2013 in Petition No.2/TT/2011 and 57/TT/2011 was prior to the order dated 30.6.2015 in



Petitions No. 267/2010 and 227/TT/2013 and in the latter order, the Commission has categorically directed NTPC to pay both IDC and IEDC.

21. We have considered the submissions of NTPC and the Petitioner. In order dated 9.5.2013 in 2/TT/2011 and 57/TT/2011, the Commission was considering the tariff of Koldam-Nalagarh 400 kV D/C (Quad) transmission line alongwith the bays at Nalagarh sub-station and bays at Ludhiana associated with Koldam HEP. On account of delay in COD of Koldam HEP, the Commission approved the commercial operation of Asset I and Asset II of the transmission system as 1.4.2010 and 1.4.2011 and condoned the time over-run except for the period covered under the Implementation Agreement and directed the Petitioner to recover the IDC and IEDC from NTPC who was executing Koldam HEP. Since NTPC refused to pay IEDC as it was not covered under the Indemnification Agreement, the Petitioner filed Review Petition No.12/RP/2013 with a prayer “to allow partial review of the order dated 9.5.2013 and allow restricted IEDC of 6 months as the reasons for delay are not within the control of the petitioner and the agreement with NTPC does not cover the IEDC”. The Commission after consideration of parties rejected the prayer of the Petitioner vide order dated 14.11.2013 and observed as under:

“9.....We are of the view that it is the responsibility of the Petitioner to safeguard its interest in the matter of IDC and IEDC in the IA. The Review Petitioner has failed to protect its interest and cannot be allowed to now shift the responsibility of his own omission to the beneficiaries. The Review Petitioner has only indemnified itself against IDC and not against IEDC. The risk arising out of IEDC was assumed by the Review Petitioner and the same cannot now be shifted to the beneficiaries. Accordingly, the Review Petitioner’s prayer to allow six month’s IEDC, disallowed in the impugned order, is rejected.”

The Appellate Tribunal in its judgement dated 25.2.2015 in Appeal No.118 of 2014 upheld the above decision of the Commission. It is pertinent to mention here that when the Petitioner filed a review petition seeking capitalization of IEDC on account of it being not covered under the IA, the Commission rejected the review and observed that since the Petitioner did not safeguard its interest in the IA by not including IEDC, it has assumed the risk and the same cannot be passed on to the beneficiaries. Since the order in the review merges and modifies the order in the main petition, the directions given in order dated 9.5.2013 in 2/TT/2011 and 57/TT/2011 stood modified to that extent. In other words, by virtue of the order in the Review Petition, the Petitioner became liable to bear the IEDC. The present petition has not been filed for review of the directions in order dated 30.3.2015 in Petition No.267/2010 and 227/TT/2013. On the other hand, a direction has been sought in the present petition to NTPC to pay the disallowed IEDC. Therefore, the present case is distinguishable from the earlier case for primarily two reasons. Firstly, there is no determination unlike in the review petition in the earlier case that the Petitioner shall be liable to bear the IEDC having not secured the same through the IA. Secondly, the Commission cannot review its decision in order dated 30.3.2015 in the present petition as no prayer has been made to that effect. The Commission cannot review the said order suo motu as it does not involve any clerical or arithmetical mistake. In fact, the Commission in the order dated 30.3.2015 has consciously directed NTPC to pay the IDC and IEDC for a period of six months. Thirdly, the said order having not been challenged has attained finality and is binding on both the Petitioner and NTPC. In the light of the above discussion, we reject the submission



of the NTPC that in view of the decision in order dated 14.11.2013 in Review Petition No.12 of 2013, NTPC would not be liable to pay IEDC in the present case.

22. The Petitioner has relied upon the judgement of the Hon'ble Supreme Court dated 3.3.2016 in Civil Appeal No. 9193 of 2012 and has submitted that the appeal of the Petitioner has been dismissed without any prejudice to the rights of the Petitioner, if any, available under law against NTPC. The Petitioner has submitted that as per clause 4 of the Indemnification Agreement, the Petitioner is debarred from claiming indirect losses attributable to the delay and not direct losses in the form of IEDC and therefore, as per the directions of the Hon'ble Supreme Court, losses for the period of delay upto six months is liable to be claimed by the Petitioner from NTPC. NTPC has submitted that the decision of the Hon'ble Supreme Court cannot be interpreted to mean that NTPC has become liable to pay the IEDC to the Petitioner. NTPC has submitted that claim of the Petitioner for IEDC has to be in accordance with law. Since the IEDC claim stands rejected in order dated 14.11.2013 in Review Petition No. 12 of 2013 on the specific ground that the IA between the Petitioner and NTPC covers only IDC and not IEDC.

23. We have considered the submissions of the parties. Hon'ble Supreme Court in para 12 of the judgement dated 3.3.2016 has taken note of the order dated 30.3.2015 of the Commission determining the date of commercial operation of the transmission line with effect from 1.9.2011 after the same was successfully charged on that date. While affirming the judgement of the Appellate Tribunal, Hon'ble Supreme Court has dismissed the appeals without prejudice to the right of the Petitioner if any available

under the law against NTPC. After taking into account the provisions of the IA between the Petitioner and NTPC, the Commission has already determined the liability of NTPC to pay IDC and IEDC to the Petitioner. For the reasons recorded in para 21 of this order, we are not in agreement with NTPC that the claim of the Petitioner for IEDC should be rejected in the light of the decision in order dated 14.11.2013 in Review Petition No. 12 of 2013.

24. In view of the above discussion, we allow the prayer of the Petitioner and direct NTPC to pay the IEDC of ₹1.91 crore with interest at the rate of 9% from the date of payment of IDC till the date of actual payment of IEDC within a period of one month from the date of issue of this order.

25. Petition No. 180/MP/2016 is disposed of in terms of the above.

sd/-
(Dr. M.K. Iyer)
Member

sd/-
(A.S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson