

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 60/TT/2017**

**Coram:**

**Shri P.K. Pujari, Chairperson  
Shri Arun Goyal, Member  
Shri P.K. Singh, Member**

**Date of Order: 26.04.2022**

**In the matter of:**

Approval under Regulation 86 of Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 and Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 for determination of transmission tariff from COD to 31.3.2019 for **Asset-I:** 2 No. Line bays at Amritsar 400/220 kV Sub-station and **Asset-II:** 4 No. 220 kV Line bays at Malerkotla GIS 400/220 kV Sub-station under "Northern Region System Strengthening Scheme- XXXI-B" (Received by way of remand).

**And in the matter of:**

Power Grid Corporation of India Limited,  
"SAUDAMINI", Plot No-2, Sector-29,  
Gurgaon - 122001 (Haryana).

**....Petitioner**

**Vs.**

1. Rajasthan Rajya Vidyut Prasaran Nigam Limited,  
Vidyut Bhawan, Vidyut Marg,  
Jaipur-302 005.
2. Ajmer Vidyut Vitran Nigam Limited,  
400 kV GSS Building (Ground Floor),  
Ajmer Road, Heerapura,  
Jaipur.
3. Jaipur Vidyut Vitran Nigam Limited,  
400 kV GSS Building (Ground Floor),  
Ajmer Road, Heerapura,  
Jaipur.
4. Jodhpur Vidyut Vitran Nigam Limited,  
400 kV GSS Building (Ground Floor),  
Ajmer Road, Heerapura,  
Jaipur.



5. Himachal Pradesh State Electricity Board,  
Vidyut Bhawan,  
Kumar House Complex Building II,  
Shimla-171 004.
6. Punjab State Electricity Board,  
The Mall,  
Patiala-147 001
7. Haryana Power Purchase Centre,  
Shakti Bhawan, Sector-6,  
Panchkula (Haryana)-134 109.
8. Power Development Department,  
Government of Jammu & Kashmir  
Mini Secretariat,  
Jammu,
9. Uttar Pradesh Power Corporation Limited,  
Shakti Bhawan, 14, Ashok Marg,  
Lucknow-226 001.
10. Delhi Transco Limited,  
Shakti Sadan, Kotla Road,  
New Delhi-110 002.
11. BSES Yamuna Power Limited,  
BSES Bhawan, Nehru Place,  
New Delhi.
12. BSES Rajdhani Power Limited,  
BSES Bhawan, Nehru Place,  
New Delhi.
13. North Delhi Power Limited,  
(Power Trading & Load Dispatch Group)  
Cennet Building,  
Adjacent to 66/11 kV Pitampura-3, Grid Building, Near PP Jewellers  
Pitampura, New Delhi-110034
14. Chandigarh Administration,  
Sector -9,  
Chandigarh.
15. Uttarakhand Power Corporation Limited,  
Urja Bhawan, Kanwali Road,  
Dehradun.
16. North Central Railway,  
Allahabad.



17. New Delhi Municipal Council,  
Palika Kendra, Sansad Marg,  
New Delhi-110002.
18. NRSS XXXI(B) Transmission Limited,  
A-26/3, Mohan Cooperative Estate, Saidabad,  
New Delhi-110044.

... Respondents

**For Petitioner:** Ms. Suprana Srivastava, Advocate, PGCIL  
Shri Tushar Mathur, Advocate PGCIL  
Ms. Soumya Singh, Advocate, PGCIL  
Shri S.S. Raju, PGCIL  
Shri D.K. Biswal, PGCIL  
Shri Ved Prakash Rustogi, PGCIL  
Shri A.K. Verma, PGCIL

**For Respondents:** Shri Vijayanand Semletty, NTL

### **ORDER**

Power Grid Corporation of India Limited (PGCIL) had filed this Petition for determination of transmission tariff under the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (hereinafter referred to as “the 2014 Tariff Regulations”) from COD to 31.3.2019 for Asset-I: 2 Number Line bays at Amritsar 400/220 kV Sub-station and Asset-II: 4 Number 220 kV Line bays at Malerkotla GIS 400/220 kV Sub-station (hereinafter collectively referred to as “the transmission assets”) under “Northern Region System Strengthening Scheme-XXXI-B” (hereinafter referred to as “the transmission scheme”).

2. The Commission vide order dated 30.11.2017 in this Petition held that the Petitioner was not able to put Asset-I and Asset-II into use because of delay in COD of the Kurukshetra-Malerkotla Transmission Line (in short, “the KM Line”) and Malerkotla-Amritsar Transmission Line (in short, “the MA Line”) executed by NRSS XXXI(B) Transmission Limited (NTL) under the TBCB (tariff based competitive bidding) route. Therefore, the Commission decided that NTL would bear IDC (interest during construction) and IEDC (incidental expenses during construction) for the period from



1.10.2016 to the approved COD of Asset-I (3.4.2017); from 5.11.2016 to the approved COD of Asset-II(a) (3.4.2017); and from 5.11.2016 to the approved COD of Asset-II(b) (18.1.2017). It may be noted that the Asset-II was split into two assets i.e. Asset-II(a) and Asset-II(b) consisting for two bays each based on their COD and the Commission vide its order dated 30.11.2017 in Petition No. 60/TT/2017 approved COD of the transmission assets [Asset-I, Asset-II (a) and Asset-II (b)] matching with COD of the transmission lines of NTL.

3. The said order dated 30.11.2017 was challenged by NTL before the Appellate Tribunal for Electricity (in short, "the APTEL") in Appeal No. 17 of 2019. The APTEL vide its judgement dated 14.9.2020 in the said Appeal No. 17 of 2019 partially set aside the Commission's order dated 30.11.2017 in Petition No. 60/TT/2017 and directed the Commission to take a fresh view in the matter on the issue of liability for the period of mismatch between the date when the transmission assets of PGCIL were ready for use and COD of the associated transmission lines of NTL after considering the observations of the APTEL. Accordingly, the matter was taken up for fresh consideration by the Commission.

### **Background**

4. The brief background of the case leading to the judgement of APTEL is as under:

a) The Investment Approval (IA) and expenditure sanction for the transmission scheme was accorded by the Board of Directors of the Petitioner vide Memorandum no. C/CP/NRSS-31 (Part-B) in NR for NRSS-XXXI (Part-B) dated 2.6.2015 at an estimated cost of Rs.11818 lakh including an IDC of Rs.468 lakh (based on February 2015 price level).

b) The scope of work covered under the transmission scheme is as follows:

#### **Sub-station**

(i) Amritsar 400/200 kV (Powergrid) Sub-station (Extension)

400 kV Line Bays: 2 numbers (Asset-I)



(ii) Malerkotla (GIS) 400/220 kV (Powergrid) Sub-station (Extension)]

400 kV Line Bays: 4 numbers (Asset-II)

(iii) Kurukshetra HVDC Sub-station (GIS) (Powergrid) (Extension)

400 kV Line Bays: 2 numbers (Asset-III)

c) The tariff for Asset-I and Asset-II was determined by the Commission vide order dated 30.11.2017 in the instant petition i.e. Petition No.60/TT/2017. The tariff for Asset-III for the period from its COD (i.e. 1.12.2016) to 31.3.2019 was determined by the Commission vide order dated 7.1.2020 in Petition No.61/TT/2018. Subsequently, the Petitioner filed Petition No.11/TT/2021 for truing up tariff of the complete scope of the work covered under the transmission scheme for the 2014-19 period and for determination of tariff for the 2019-24 tariff period. After hearing the parties, order has been reserved by the Commission in Petition No. 11/TT/2021.

d) Though the scheduled date of commercial operation (SCOD) of the transmission assets was 1.10.2016, the Petitioner in the instant petition sought approval of date of commercial operation (COD) of the transmission assets as 1.12.2016 under proviso (ii) of Regulation 4(3) of the 2014 Tariff Regulations on the ground that though it was ready to put the transmission assets into regular service, it was prevented from doing so due to the delay in COD of the associated transmission lines by NTL. The Commission did not approve COD of the transmission assets under proviso (ii) of Regulation 4(3) of the 2014 Tariff Regulations with effect from 1.12.2016 as claimed by the Petitioner. However, the Commission vide its order dated 30.11.2017 in Petition No. 60/TT/2017 approved COD of the transmission assets as follows matching with COD of the transmission lines of NTL:

<b>Assets</b>	<b>COD Claimed</b>	<b>COD Approved</b>
Asset I: 2 Number Line bays at Amritsar 400/220 kV Sub-station	1.12.2016	3.4.2017
Asset II(a): 2 Number 400 kV Line bays at Malerkotla GIS 400/220 kV Sub-station	1.12.2016	3.4.2017
Asset II(b): 2 Number 400 kV Line bays at Malerkotla GIS 400/220 kV Sub-station	1.12.2016	18.1.2017

e) The Commission in the said order dated 30.11.2017 in Petition No. 60/TT/2017 with regard to time over-run held as follows:



“37. As per the Investment Approval dated 2.6.2015, the instant assets were scheduled to be commissioned within 16 months i.e. by 1.10.2016 against which the instant assets were ready to be put under commercial operation on 1.12.2016. However, the instant asset was put to use only after COD of associated line. The petitioner has submitted that it has made various communications with NTL through letters dated 30.9.2016, 19.10.2016, 27.10.2016 and 22.11.2016 for commissioning of the TBCB line. The petitioner has stated that the time over run is on account of the delay of the associated lines by the Respondent, NTL. We have observed that petitioner has submitted CEA certificate dated 26.9.2016 for Asset-I which proves that it was ready before 1.10.2016 but in case of Asset-II, the petitioner obtained CEA Certificate dated 4.11.2016. Therefore, there is no documentary evidence in the petition to support that Asset-II was ready before 4.11.2016. Hence, we are not inclined to allow time overrun of 1.10.2016 to 4.11.2016 for Asset-II. Accordingly, the IDC and IEDC shall be billed as under:

<b>Assets</b>	<b>Date</b>	<b>Liabe party</b>
Asset-I:	1.10.2016 - date of COD of the asset	To be borne by NTL
Asset-II (a) & (b)	1.10.2016 - 4.11.2016	Not to be Capitalized
Asset-II (a) & ( b)	5.11.2016- date of COD of the asset	To be borne by NTL

f) NTL filed Review Petition No. 7/RP/2018 seeking review of order dated 30.11.2017 in Petition No. 60/TT/2017 which was dismissed by the Commission vide order dated 20.6.2018 holding that there was no error apparent in the order sought to be reviewed. NTL also filed Petition No.195/MP/2017 before the Commission seeking extension of the scheduled COD and increase in transmission charges due to unforeseen and uncontrollable events, i.e. *force majeure* with regard to the KM Line and the MA Line.

g) The Commission vide order dated 29.3.2019 in Petition No.195/MP/2017 held that the delay on part of NTL in commissioning the associated transmission lines was due to *force majeure* events and allowed extension of their SCOD.

5. NTL, aggrieved with the order dated 30.11.2017 of the Commission in Petition No. 60/TT/2017 for imposing liability of IDC and IEDC for the transmission assets, filed Appeal No. 17 of 2019 before APTEL. Appeal No. 17 of 2019 was disposed of by the APTEL vide order dated 14.9.2020 directing the Commission to take a fresh view with regard to all the aspects observed in the said judgement.

6. The matter was taken up for hearing afresh in the light of the observations of the APTEL. The Petitioner vide affidavit dated 3.3.2021 has submitted as follows:



a) The APTEL has held that NTL cannot be made liable to pay IDC and IEDC to the Petitioner, which had been incurred on account of delay caused by NTL in commissioning of the transmission assets.

b) The Petitioner has adopted the consistent position that IDC and IEDC have accrued due to delay in completion of the associated transmission lines by NTL. However, in view of the reasoning adduced by the APTEL, it is necessary to issue directions with respect to recovery of IDC and IEDC incurred by the Petitioner in order to prevent undue burden on other DICs of the transmission system developed by the Petitioner.

c) APTEL in order dated 14.9.2020 concluded that NTL was the defaulting party. However, in view of the relief granted by the Commission to NTL in Petition No.195/MP/2017, the decision to impose the liability of IDC and IEDC for the period of mismatch was contradictory to the relief granted to NTL by way of extension of COD.

d) In the light of the observations of APTEL, the Commission may frame regulations or principles which are reasonable and consistent with the prevailing laws in the context of mismatch of commissioning of transmission systems.

7. The matter was heard on 31.8.2021. The learned counsel for the Petitioner referred to the directions of APTEL and submitted that the Commission may issue appropriate directions for recovery of the IDC and IEDC due to PGCIL for the period of mismatch. The representative of NTL relied on its reply filed in the original petition and submitted that NTL is not liable to pay the IDC and IEDC to the Petitioner.

### **Analysis and Decision**

8. We have considered the submissions of the Petitioner and NTL and perused the judgement of the APTEL dated 14.9.2020 in Appeal No. 17 of 2019. The APTEL has made following observations and issued directions as quoted hereunder:

#### **“Our Findings:**

8.6 *We have heard learned counsel appearing for the Appellant and the learned counsels appearing for the Respondents and carefully gone through their written submissions. In fact, the Respondent No 2 filed Petition No 60/TT/2017 before*





the Commission for determination of tariff for 400 kV bays being constructed by it for lines of the Appellant under Northern Region System Strengthening Scheme XXXI (B) as per Central Electricity Regulatory Commission (Terms and conditions of Tariff) Regulations, 2014.

- 8.7 It is a matter of fact that the assets/bays of Respondent No 2 could not be put to use on account of delay in implementation of the transmission lines being constructed by the Appellant. Therefore, it would be apt to quote Regulation 4 (3) (ii) of the Tariff Regulations in accordance with which, Respondent No 2 sought approval of COD of the transmission assets implemented by it.
- “(3) Date of commercial operation in relation to a transmission system shall mean the date declared by the transmission licensee from 0000 hour of which an element of the transmission system is in regular service after successful trial operation for transmitting electricity and communication signal from sending end to receiving end:

Provided that:

(i) where the transmission line or substation is dedicated for evacuation of power from a particular generating station, the generating company and transmission licensee shall endeavour to commission the generating station and the transmission system simultaneously as far as practicable and shall ensure the same through appropriate Implementation Agreement in accordance with Regulation 12(2) of these Regulations:

(ii) in case a transmission system or an element thereof is prevented from regular service for reasons not attributable to the transmission licensee or its supplier or its contractors but is on account of the delay in commissioning of the concerned generating station or in commissioning of the upstream or downstream transmission system, the transmission licensee shall approach the Commission through an appropriate application for approval of the date of commercial operation of such transmission system or an element thereof.”

- 8.8 It is relevant to note that by relying on its own Order in Petition No 209/TT/2017, the Commission decided COD of the bays of PGCIL as per Regulation 4 (3) (ii) of the Tariff Regulations, 2014 in the impugned order and directed that the IDC and IEDC of the assets of Respondents No 2 from their respective dates of commercial operation till the commissioning of Appellant's transmission system shall be billed to the Appellant. It was held by the Commission that as the bays could not be put into regular service without the commissioning of associated transmission line, COD of the Asset I and Asset II i.e. the bays of PGCIL shall be considered from date of COD of associated line being implemented by the Appellant. The relevant extract of 209/TT/2017 as quoted in the impugned order is as under:

“24. The Petitioner has claimed the COD of the Asset I and II as 1.12.2016 under Regulation 4(3)(ii) of the 2014 Tariff Regulations.

25. The Asset I and II are mainly bays of Amritsar and Malerkotla. These bays could not be put into regular service without the commissioning of associated transmission line. We are of the view that COD of the Asset I and Asset II shall be considered from date of COD of associated line. We have taken similar view in Petition No. 209/TT/2017 at Para 18 and relevant extract is as under:

“18. As per findings of the APTEL, which was upheld by the Hon'ble Supreme Court, an element of transmission system can be declared as





*having attained commercial operation only if it has been charged successfully, after successful trial operation and is in regular service. In the instant case, bays were ready, but the successful trial operation and charging could not be carried out without the commissioning of the associated Muzaffarpur (PG)- Darbhanga (TBCB) 400kV D/c (Triple Snowbird) line. As the bays could not have been charged for trial operation without the transmission line, we are not inclined to approve the date of commercial operation of instant asset as 31.8.2016, as claimed by the Petitioner. We are of the view that the instant transmission assets could be charged and trial operation could be successfully carried out only on commissioning of the associated transmission line, which is stated to have been commissioned on 21.4.2017. As such, the instant assets could be put into commercial operation only after 21.4.2017. Accordingly, the COD of the instant asset is approved as 21.4.2017. However, it is observed the instant bays of the petitioner at Muzaffarpur Sub-station were ready in all aspects by 31.8.2016 but were not put into use because of the non-commissioning of the associated transmission line by DMTCL. Accordingly, we are of the view that IDC and IEDC for the period from 31.8.2016 to 21.4.2017 shall be borne by DMTCL.”*

- 8.9 *It is the submission of the Respondents that the consistent position adopted by the Commission and upheld by this Tribunal is that, in the event of a mismatch in commissioning of the inter-linked transmission systems, the transmission licensee (or its long-term customers) whose assets are not yet ready, and because of which the already commissioned assets of the other transmission licensee have not been put in regular service, is liable to pay the transmission charges till commissioning of the inter-linked downstream/ upstream transmission system.*
- 8.10 *We find merit in the submission of Respondent No 2 that whenever a tariff determination is sought by invoking the provisions of Regulation 4(3)(ii) of the 2014 Tariff Regulations, it may result in imposition of a liability on the licensee implementing the inter-connecting transmission system. Therefore, as per the principles stated by the Hon'ble Supreme Court in Udit Narain Singh Malpaharia v. Addl. Member, Board of Revenue, Bihar, [AIR 1963 SC 786], the licensee implementing the inter-connecting transmission system becomes a 'necessary party' without whom no order can be made effectively. It becomes essential that such licensees/parties are duly heard before any liability, including IDC and IEDC of the transmission system being stranded, is imposed by the Commission. Accordingly, the contention of Appellant that it should not have been impleaded as a Respondent in Petition 60/TT/2017 filed by PGCIL is incorrect.*
- 8.11 *With regards to merits of the case, Tribunal's most relevant decision matching to the circumstances of the present case is the judgment dated 27.3.2018 in Appeal No. 390 of 2017 titled Punjab State Power Corporation Limited vs. Patran Transmission Company Limited & Ors ("Patran Judgment") where this Tribunal acknowledged that the Central Commission, by way of exercising its regulatory power by way of a judicial order, has laid down the principles of payment of transmission charges in case there is mis-match in commissioning of transmission systems in Petition No 43/MP/2016 and decided in Para 15 as under*
- (j) *"While deciding the issue in the Impugned Order the Central Commission has relied on its order dated 21.9.2016 in Petition No. 43/MP/2016 wherein the Commission had laid down the principles for such cases like the present case in hand. According to the laid principle, the transmission licensee implementing transmission system through TBCB route shall enter into an*



*Implementation Agreement (IA) with the entity responsible for the implementation of the upstream/downstream system clearly stating the liability to pay transmission charges in case of delay. The Central Commission further elaborated that in the case if there is no IA, the liability to pay transmission charges fall on the entity on whose account the transmission system could not be put to use.*

*The Central Commission in the Impugned Order has also referred to its previous order dated 19.4.2016 in Petition No. 100/TT/2014 and order dated 5.8.2015 in Petition No. 11/SM/2014. In the said orders, the Central Commission while acknowledging the gaps in the Tariff Regulations, 2014, directed its staff to examine the aspect of signing of IA between the Inter State Transmission Licensees (ISTS) & STUs and propose necessary changes required in the Tariff Regulations, 2014 to enable ISTS and STUs to enter into Implementation Agreement. The Central Commission also observed that the concerned STU, who had requested for provision of downstream line bays in the various meetings of Standing Committee/RPC, shall bear the transmission charges till completion of downstream system and goes on deciding that the concerned State (Rajasthan) Discoms have to bear transmission charges till the commissioning of the downstream system based on the TSAs signed by them.*

*The Central Commission then goes on deciding that the Appellant is liable to pay transmission charges to the Respondent No. 1 from SCOD of the Transmission System until downstream system is commissioned.*

- (ii) It is clear from the decision of the Central Commission that there is no provision either in the Sharing Regulations or in the Tariff Regulations, 2014 to cover an eventuality of payment to a transmission licensee, the transmission charges by the concerned party when its transmission system is ready/commissioned but the upstream/ downstream system is not ready due to which the transmission system cannot be put to use.*
- (iii) Now let us examine the relevant portion of the Sharing Regulations. The same is reproduced below:  
XXXX*

*The Sharing Regulations provide sharing of transmission charges by the Designated ISTS Customers who use the ISTS. Accordingly, it is clear that all the LTTCs are liable to pay transmission charges only when the Transmission System is being used or put to use.*

- (iv) In the present case, the Transmission System could not be put to use as the downstream system was not ready by SCOD. The Central Commission relying on its earlier orders in similar situations has held that the Appellant is responsible to pay the transmission charges to the Respondent No. 1 until the downstream system is commissioned.*
- (v) The Central Commission has submitted that the statutory basis for the decision by the Central Commission to assign liability on the Appellant for payment of transmission charges is based on the Hon'ble Supreme Court's judgement dated 15.3.2010 in SLP (C) No. 22080/2005 in case of PTC India Ltd. v. CERC (2010) 4 SCC 603. After perusal of the said judgement we find that it has been held that the Central Commission is the decision-making Authority under Section 79 (1) of the Act and such decision making or taking steps/ measures under the said Section of the Act is not dependent upon*



making of regulations under Section 178 of the Act. It is further stated in the judgement that if any regulations are framed by the Central Commission under Section 178 of the Act then the decision of the Central Commission has to be in accordance with the said regulations.

Accordingly, in absence of specific provisions in the Sharing Regulations/ Tariff Regulations, 2014 to deal with the situation under question the Central Commission through exercise of its regulatory power has prescribed a principle for sharing of transmission charges of the Transmission System of the Respondent No. 1 in the Impugned Order. Thus, it is observed that by way of exercising its regulatory power by a way of judicial order (s) the Central Commission has laid down the principles of payment of transmission charges in such an eventuality.

(vi) However, it is felt that the Central Commission in the Impugned Order has abruptly concluded the payment liability on the Appellant just by referring to its earlier orders and not establishing the linkage with the present case explicitly. This Tribunal would like to make it clear the same.

(vii) It is clear that the liability to pay transmission charges by the Appellant to the Respondent No. 1 from SCOD till downstream system is commissioned does not arise from the Regulations of the Central Commission. The most relevant decision of the Central Commission matching to the circumstances of the present case is its order dated 21.9.2016 in Petition No. 43/MP/2016 where the principles were laid down clearly that the entity due to which system developed through TBCB route cannot be put to use is liable to pay the transmission charges from SCOD till commissioning of the upstream/downstream system/terminal bays. The Transmission System in question has also been developed through TBCB route. In the present case as per the principles laid down by the Central Commission it appears that PSTCL is the defaulting party and should have been made liable to pay the said transmission charges. However, we find that there is no contractual relation between the Respondent No. 1 and PSTCL. The contractual relation between the Appellant and the Respondent No. 1 is the TSA, which lays down the rights and obligations of the parties. The Article 4.2 of the TSA deals with the obligations of the LTTCs in implementation of the project. The Article 4.2 of the TSA deals with the obligations of the LTTCs in implementation of the project. The relevant portion is reproduced below:

“4.2 Long Term Transmission Customers’ obligations in implementation of the Project:

4.2.1 Subject to the terms and conditions of this Agreement, Long Term Transmission Customers’, at their own cost and expense, undertake to be responsible:

.....

b. for arranging and making available the Interconnection facilities to enable the TSP to connect the Project;”

The LTTCs, including the Appellant at their own cost and expense were required to provide interconnection facilities to the Respondent No. 1 so that the Transmission System could be connected by SCOD and made operational.

(viii) It is clear that it was only the Appellant amongst all the LTTCs who was responsible to arrange the downstream system for connection to Transmission System by SCOD so that it could be put to use. This is irrespective of any relation between the Appellant and PSTCL. Accordingly,



as per the principles laid down by the Central Commission vide its Order dated 21.9.2016 which are judicial in nature the defaulting entity in the present case is the Appellant.

(ix) The Appellant has also argued that there was communication between PSTCL and the Respondent No.1 regarding implementation of the downstream system and hence it was not responsible for the execution of the downstream system. The Appellant by taking strength from communications exchanged between the petitioner and the STU in the Order of the Central Commission in case of RVPNL has argued that in that case the STU was held responsible for the delay in execution of downstream bays but the Appellant ignored the fact that the Rajasthan Discoms were made liable to pay the transmission charges by the Central Commission in that case. In the present case it is observed that the communication of Respondent No. 1 with PSTCL was technical in nature arising out of various meetings taken by CEA/ Regional Power Committee and not a contractual one. It was the Appellant who was bound contractually for arranging and making available the downstream system. Accordingly, these contentions of the Appellant are misplaced.

(x) The Respondent No. 1 has brought on record the orders of the Central Commission in similar cases where the Appellant was a party and the Appellant has not challenged the same. The Appellant has contested that some of these orders cannot be made applicable to it, as they were not directly related to the Appellant. To mention them are Central Commission's Order dated 26.8.2016 in Petition No. 31/RP/2016 wherein liability of payment of transmission charges of the transmission system of PGCIL have been imposed on the Appellant. Based on the submissions of the parties it appears that this order has also not been challenged by the Appellant thus attaining finality of the principle of payment of transmission charges by the Appellant from SCOD until commissioning of the downstream system. The other similar orders where the Appellant was a party as Respondent are the order dated 24.11.2016 in Petition No. 29/RP/2016 (PGCIL Vs. RRVPNL &Ors.) and order dated 27.1.2017 in Petition No. 32/RP/2016 (PGCIL Vs. RRVPNL &Ors.). Although vide these orders the Appellant is not held to pay the transmission charges from SCOD until commissioning of the downstream system but these orders have enumerated the principles followed by the Central Commission.

(xi) In view of the foregoing discussions, we are of the considered opinion that there is no infirmity in the decision of the Central Commission by holding that the Appellant is liable to pay transmission charges from SCOD of the Transmission Asset until commissioning of the downstream system.

8.12 Thereafter, this Tribunal also adjudicated Appeal No 332 of 2016 (RAPP Judgement) preferred against the order dated 21.9.2016 in Petition No. 43/MP/2016. Vide judgement dated 18.1.2019, the Tribunal decided Appeal No 332 of 2016 following the principles laid down in Patran judgement as under

“10.5 Accordingly, in absence of specific provisions in the Sharing Regulations/ Tariff Regulations, 2014 to deal with the situation under question the Central Commission through exercise of its regulatory powers has prescribed a principle for sharing of transmission charges of the Transmission System of the Respondent No. 2 in the Impugned Order. Thus, it is observed that by way of exercising its regulatory power by a way of judicial order (s) the Central Commission has laid down the principles of





payment of transmission charges in such an eventuality. However, it is felt that the Central Commission in the Impugned Order has abruptly concluded the payment liability on the Appellant just by referring to its earlier orders and not establishing the linkage with the present case explicitly. This Tribunal would like to clarify the same.

- 10.6 It is clear that the liability to pay transmission charges by the Appellant to the Respondent No. 2 from SCOD till downstream system is commissioned does not arise from the Regulations of the Central Commission. Our most relevant decision matching to the circumstances of the present case is our judgment dated 27.3.2018 in Appeal No. 390 of 2017 (Patran judgment) where the principles were laid down clearly that the entity due to which system developed through TBCB route cannot be put to use is liable to pay the transmission charges from SCOD till commissioning of the upstream/downstream system/terminal bays. The Transmission System in question has also been developed through TBCB route. In the present case as per the principles laid down by the Central Commission it emerges that NPCIL is the defaulting party and should have been made liable to pay the said transmission charges. However, we find that there is no contractual relation between the Respondent No. 2 and NPCIL.
- 10.7 From the decision of the Standing Committee on Power System Planning (a statutory committee), it is clear that it was only the Appellant who was responsible to arrange the downstream system for connection to Transmission System by SCOD so that it could be put to use. This is irrespective of any relation between the Appellant and Respondent No.2. Accordingly, as per the principles laid down by the Central Commission vide its Order dated 21.9.2016 which are judicial in nature the defaulting entity in the present case is the Appellant.
- 10.8 In view of the foregoing discussions, we are of the considered opinion that there is no infirmity in the decision of the Central Commission by holding that the Appellant is liable to pay transmission charges from SCOD of the Transmission Asset until commissioning of the downstream system along with applicable charges as per TSA which was already raised by CTU.”
- 8.13 At this stage, it would be appropriate to summarise the principles laid down for such cases by the Commission upheld by this Tribunal in the context of mismatch in commissioning of transmission systems by different licensees.
- (i) The LTTCs/beneficiaries are liable to pay transmission charges only when the Transmission System is being used or put to use.
  - (ii) Subsequently, the Central Commission laid down the principle that the transmission licensee implementing transmission system through TBCB route shall enter into an Implementation Agreement (IA) with the entity responsible for the implementation of the upstream/downstream system clearly stating the liability to pay transmission charges in case of delay. In the case if there is no IA, the liability to pay transmission charges fall on the entity on whose account the transmission system could not be put to use.
  - (iii) In the absence of specific provisions in the Sharing Regulations/ Tariff Regulations, 2014, the Central Commission through exercise of its regulatory powers, by way of a judicial order, has prescribed the aforesaid principle for sharing of transmission charges of the Transmission System.



- (iv) *The statutory basis for the decision by the Central Commission to assign liability for payment of transmission charges in such matters is based on the Hon'ble Supreme Court's judgement dated 15.3.2010 in SLP (C) No. 22080/2005 in case of PTC India Ltd. v. CERC (2010) 4 SCC 603, wherein, the Apex Court has held that decision-making Authority of the Commission under Section 79 (1) of the Act is not dependent upon making of regulations under Section 178 of the Act. It is further held in the judgement of Hon'ble Supreme Court that, if any regulations are framed by the Central Commission under Section 178 of the Act then, the decision of the Central Commission has to be in accordance with the said regulations.*
- 8.14 *After deliberating the above settled principles in Patran Judgement, this Tribunal entered into the provisions of the TSA and held that the Appellant, Punjab State Power Corporation Ltd (PSPCL), was the defaulting entity in the matter as it was only PSPCL, amongst all the LTTCs, who was responsible to arrange the downstream system as per Article 4.2 of the TSA for connection to Transmission System by SCOD so that it could be put to use.*
- 8.15 *In RAPP judgement, the Appellant Nuclear Power Corporation of India Limited (NPCIL) did not have any contractual relationship with the transmission licensee RAVP Transmission Company Limited (RTCL). However, the Tribunal relied on the decision of the Standing Committee on Power System Planning (a statutory committee) to hold NPCIL as the defaulting entity as it was only NPCIL who was responsible to arrange the downstream system for connection to Transmission System by SCOD so that it could be put to use.*
- 8.16 *In both the above judgements, since the Commission had abruptly concluded the payment liability on the parties by referring to its earlier order and did not establish the linkage with the case in hand, this Tribunal went ahead and established the linkage considering the upstream and downstream licensee did not have a contractual arrangement in place. In the impugned order as well, the Commission has again abruptly concluded the payment liability on the Appellant just by referring to its earlier orders and not establishing the linkage with the present case explicitly.*
- 8.17 *In the present case as per the general principles laid down by the Central Commission it emerges that the Appellant is the defaulting party. However, a new aspect has been brought before us for adjudication in the present Appeal. The bays of PGCIL could not be put into regular service without the commissioning of associated transmission line of the Appellant. Therefore, the Commission decided that the COD of bays constructed by PGCIL shall be considered from date of COD of associated line. Subsequently, the Commission vide order dated 29.3.2019 in Petition No 195/MP/2017 granted relief to the Appellant by allowing delay in grant of forest clearance as an event of force majeure and allowed extension of COD of Appellant transmission system i.e. Kurukshetra–Malerkotla and Malerkotla–Kurukshetra Transmission Lines till the actual CODs i.e. 18.01.2017 and 27.03.2017.*
- 8.18 *Thus, the question before us is whether liability of IDC and IEDC of the assets of Respondent No 2 can be imposed on the Appellant when the Commission has condoned the delay in commissioning of its transmission assets on account of force majeure event and allowed extension of COD of its transmission system within the terms of the TSA dated 02.01.2014.*
- 8.19 *Admittedly, the Appellant implemented the project under TBCB route as per the TSA dated 02.01.2014. The Appellant is entitled to extension of commercial*



operation date under Article 11 of the TSA (force majeure), if the project implementation is affected due to force majeure event (s). We are of the opinion that once the Commission allows extension of COD of the transmission elements/system under the terms of the TSA, it revokes all the tacit or explicit agreements made by the parties or system planning authorities regarding scheduled commercial operation dates of transmission elements. The Scheduled Commercial Operation date is accordingly shifted to actual COD. Thus, the decision of the Commission to impose liability of IDC and IEDC of PGCIL bays on the Appellant for delay in commissioning of the transmission system is completely contradictory to relief granted to the Appellant under the provisions of force majeure of the contract by way of extension of COD

8.20 The law in relation to force majeure has been explained by the Hon'ble Supreme Court in *M/s. Dhanrajamal Gobindram v. M/s. Shamji Kalidas and Co.* As under:

“...An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to “force majeure”, the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to “force majeure”, and even if this be the meaning, it is obvious that the condition about “force majeure” in the agreement was not vague.

8.21 It would thus appear that imposing liability of IDC and IEDC on the Appellant defeats the objective of introducing the provision of force majeure in the TSA i.e. to save the Appellant from the consequences of anything over which it has no control. When the relief is available under the force majeure provisions of the contract, the Commission ought not to have penalised the Appellant for the same act outside the contract, particularly, when there is no such provision in the sharing regulations which the Appellant could have made itself aware of before bidding for the project.

8.22 In the earlier judgements of this Tribunal (*Patran* and *RAPP*), it had been observed that this type of major issue ought to have been covered under Regulations by the Central Commission to plug the gaps, which would avoid litigations. However, the Commission did not amend its Regulations and it seems that the decisions in similar matters are being taken through judicial orders only. We also note that there exist inconsistencies in the decisions of the Commission. As has been brought to our notice, deviating from its own principles, the Commission has directed to recover the transmission charges from the beneficiaries of the licensee who had delayed the transmission systems vide its order dated 27.05.2016 in *Petition No 261/TT/2015*. Further, in a discretionary manner, the Commission has selectively levied either transmission charges or IDC/IEDC on case to case basis. From the present case, it has also come to light that the Commission has not addressed specific aspects of this issue while setting up the principles for such cases.

8.23 In the context of the present case, the question that also comes to our mind is that what if the line of the Appellant i.e. NTL was ready and Respondent No 2 could not complete its bays. The cost of bays being implemented by Respondent No 2 must be a fraction of the cost of the transmission system implemented by the Appellant. In such cases, the licensee whose assets have been delayed may end up paying transmission charges more than its project cost. Clearly, the levy of transmission charges of the Appellant on the Respondent No 2 would not have been justified when there is no contract between the parties.

8.24 The Commission in the impugned order and order dated 29.3.2019 has decided that even if the COD of the transmission licensee has been extended on account of Force Majeure event, the licensee has to pay transmission charges for





upstream/downstream assets for the period of delay. Therefore, the bidder has to mandatorily consider this scenario while submitting the bid. We fail to understand rationale behind this as to how a transmission licensee can submit a reasonable bid when it is not aware of the liability pertaining to anticipated duration of such delay and the cost of the upstream/down-stream assets before submitting the bid. The same is equally applicable for the delay on achievement of COD on account of force majeure events by the projects implemented/being implemented through Regulated Tariff Mechanism (RTM). The infrastructure projects involving huge investments must not be part to such regulatory uncertainties that too, without remedy.

8.25 Admittedly, the Commission does not issue the directions for sharing of transmission charges in such cases as per the Sharing Regulations framed under Section 178 of the Act but by exercising regulatory power under Section 79 of the Act. Therefore, such transmission charges in absence of a contract, are more in the nature of 'damages' for delay in commissioning of assets and cannot be qualified as sharing of transmission charges. However, breach of contract is a pre-condition to claim 'damages' under Section 73 and Section 74 of the Indian Contract Act, 1872. In this context, it is undisputed that there exists no contract between the licensees implementing the interlinked transmission systems in such cases. Therefore, it is not prudent on part of the Commission to impose such liability on the transmission licensees without entering into a contract/IA. Further, it is relevant to note that transmission system, being a meshed network it cannot be the first time that the commission was dealing with the issue of mismatch in commissioning of transmission system in Petition No. 43/MP/2016 which culminated into principles being issued vide order dated 21.9.2016.

8.26 In light of the above, we feel that it would be just and proper for the commission to take a fresh view in this regard considering all the aspects. The Commission is further directed to develop a mechanism in line with the observations made by this Tribunal in the forgoing paragraph after due stakeholder consultation. We opine that the Regulations framed/principles adopted by the Commission while undertaking its functions must be reasonable, consistent and in accordance with prevailing laws. In the context of issue in hand, it would be apposite for the Commission to follow the principle settled by the Hon'ble Supreme Court of India in State of Kerala & ors. vs. Unni & anr. [(2007) 2 SCC 365], while developing the mechanism as under:

"When a subordinate legislation imposes conditions upon a licensee regulating the manner in which the trade is to be carried out, the same must be based on reasonable criteria. A person must have means to prevent commission of a crime by himself or by his employees. He must know where he stands. He must know to what extent or under what circumstances he is entitled to sell liquor. The statute in that sense must be definite and not vague. Where a statute is vague, the same is liable to be struck down."

8.27 While dealing with such complex issues, the Commission must aspire to bring objectivity to the whole process of legislation and adjudication. These principles are set by the Hon'ble Supreme Court of India in Global Energy Ltd. V. Central Electricity Regulatory Commission, (2009) 15 SCC 570 at 589 as under

"43. The law sometimes can be written in such subjective manner that it affects efficiency and transparent function of the government. If the statute provides for point-less discretion to agency, it is in essence demolishing the accountability strand within the administrative process as the agency is not under obligation from an objective norm, which can enforce accountability in



*decision-making process. All law making, be it in the context of delegated legislation or primary legislation, have to conform to the fundamental tenets of transparency and openness on one hand and responsiveness and accountability on the other. These are fundamental tenets flowing from Due Process requirement under Article 21, Equal Protection clause embodied in Article 14 and Fundamental Freedoms clause ingrained under Article 19. A modern deliberative democracy cannot function without these attributes.”*

8.28 *In view of the discussions and analysis set out in above paras, we are of the opinion that the Impugned Order suffers from infirmity and arbitrariness and hence, liable to be set aside.”*

9. The observations of APTEL as quoted above are summarised as under:

(a) The APTEL has observed that the Commission in its order dated 21.9.2016 in Petition No.43/MP/2016 in the matter of RAPP Transmission Company Limited Vs Power Grid Corporation of India Limited & Others (in short, “the RAPP Case”) and order dated 4.1.2017 in Petition No. 155/MP/2016 in the matter of Patran Transmission Company Limited Vs. Haryana Power Purchase Centre and Others (in short, “the Patran Case”) has laid down the principle that the LTTCs/ beneficiaries are liable to pay the transmission charges only when transmission system is being used or put to use (*paragraph 8.13(i) of the APTEL Order dated 14.9.2020 in Appeal No. 17 of 2019*).

(b) The APTEL has observed that the commission further laid down the principle that a transmission licensee implementing transmission system through TBCB route shall enter into an Implementation Agreement with the entity responsible for implementation of upstream/ downstream system clearly stating the liability to pay transmission charges in case of delay (*paragraph 8.13(ii) of the of the APTEL Order dated 14.9.2020 in Appeal No. 17 of 2019*).

(c) The Commission, in the absence of specific provisions in the Tariff Regulations/ Sharing Regulations, has prescribed the said principle by way of judicial orders through exercise of regulatory powers based on the Hon'ble Supreme Court judgement dated 15.3.2010 in the matter of PTC India Limited Vs CERC [(2010) 4 SCC 603] (in short, “the PTC Judgement”). The APTEL in its judgement dated 27.3.2018 in Appeal No.390 of 2017 (Patran Case) and judgement dated 18.1.2019 in Appeal No. 332 of 2016 (RAPP Case) has upheld the principles enunciated by the Commission in the RAPP Case (*paragraph 8.13(iii) of the of the APTEL Order dated 14.9.2020 in Appeal No. 17 of 2019*).



(d) The APTEL, in these judgements, further proceeded to establish the link between the defaulting entity and the licensee whose assets could not be put to use on account of such entity (*paragraph 8.14, paragraph 8.15 and paragraph 8.16 of the APTEL Order dated 14.9.2020 in Appeal No. 17 of 2019*).

(e) The APTEL has observed that this type of major issues ought to be covered under the Regulations by the Commission to plug the gaps which would avoid litigations (*paragraph 8.22 of the APTEL Order dated 14.9.2020 in Appeal No. 17 of 2019*).

(f) Though the APTEL has recognised NTL as the defaulting party on whose account the Petitioner could not commission the transmission assets, the APTEL has observed that the Commission in its order dated 29.3.2019 in Petition No.195/MP/2017 granted relief to the Petitioner by allowing delay in grant of forest clearance as an event of force majeure under Article 11 of the Transmission Service Agreement and allowed extension of SCOD till the actual COD of the associated transmission lines. The APTEL has further observed that the decision of the Commission to impose liability of IDC and IEDC of the transmission assets for the period of delay is contradictory to the relief granted to NTL under the provisions of force majeure by way of extension of SCOD (*paragraph 8.19 of the APTEL Order dated 14.9.2020 in Appeal No. 17 of 2019*).

(g) The APTEL has observed that in case the associated transmission lines of NTL were ready and the transmission assets of the Petitioner were not ready, in that case PGCIL would have ended up by paying transmission charges more than its project cost which would not have been justified in the absence of contract between the parties (*paragraph 8.23 of the APTEL Order dated 14.9.2020 in Appeal No. 17 of 2019*).

(h) The APTEL has observed that infrastructure projects involving huge investments must not be subject to regulatory uncertainty without any remedy as the transmission licensee implementing transmission systems under TBCB route cannot anticipate the scenario arising out of the delay and factor the same in the bid. Similarly, the projects implemented through regulated tariff mechanism cannot factor the charges which it would be required to pay in the event of delay on



achievement of COD on account of force majeure events (*paragraph 8.24 of the APTEL Order dated 14.9.2020 in Appeal No. 17 of 2019*).

(i) The APTEL has observed that the Commission has not issued the directions for sharing of transmission charges as per the Sharing Regulations specified under Section 178 of the Act but by exercising regulatory powers under Section 79 of the Act. APTEL has further observed that the transmission charges in the absence of a contract are more in the nature of damages for delay in commissioning of the assets and cannot be qualified as sharing of transmission charges. Breach of contract is a pre-condition to claim damages under Section 73 and Section 74 of the Indian Contract Act, 1872. Since there exists no contract between the licensees implementing the interlinked transmission system in such cases, it is not prudent on the part of the Commission to impose such liabilities on the transmission licensees without entering into a contract/ Implementation Agreement (*paragraph 8.25 of the APTEL Order dated 14.9.2020 in Appeal No. 17 of 2019*).

10. The APTEL in the above said Order dated 14.9.2020 in Appeal No. 17 of 2019 has referred to Commission's Order dated 27.5.2016 in Petition No.261/TT/2015 regarding treatment of sharing of charges. A Review Petition No. 35/RP/2018 has been filed for review of the said Order dated 27.5.2016 in Petition No.261/TT/2015. The Commission vide Order dated 28.1.2020 has admitted the Review Petition No. 35/RP/2018 and has accordingly directed to reopen Petition No.261/TT/2015 to decide the issue of sharing of the transmission charges of the assets of PGCIL. Thus, the said matter is at present under consideration of the Commission.

11. The APTEL has directed the Commission to take a fresh view in the matter considering all aspects and develop a mechanism in line with the observations made by the APTEL. The APTEL has observed that the Regulations framed/ principles adopted by the Commission while undertaking its functions must be reasonable, consistent and in accordance with prevailing laws (*paragraph 8.25 and paragraph 8.27 of the APTEL Order dated 14.9.2020 in Appeal No. 17 of 2019*).



12. Accordingly, the observations of the APTEL as summarised in paragraph 9 above have been considered while dealing with the issues in the present petition in subsequent paragraphs.

**Observation (a)**

13. The APTEL has observed that the principle that the LTTCs/ beneficiaries are liable to pay the transmission charges only when the transmission system is being used or put to use is based on the judicial decisions of the APTEL and Hon'ble Supreme Court. The APTEL in its judgement dated 2.7.2012 in Appeal No. 123 of 2011 (Punjab State Power Corporation Limited Vs. Power Grid Corporation of India Limited & Others) had the occasion to interpret Regulation 3(12)(c) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (in short, "the 2009 Tariff Regulations") relating to the definition of date of commercial operation of transmission system in the context of COD of 400 kV Barh-Balia transmission line of PGCIL. Regulation 3(12)(c) of the 2009 Tariff Regulations provides as under:

*"(12) date of commercial operation or COD means*

*(a).....*

*(b).....*

*(c) In relation to the transmission system, the date declared by the transmission licensee from 0000 hour of which an element of transmission system is in regular service after successful charging and trial operation.*

*Provided that the date shall be the first day of a calendar month and transmission charge for the element shall be payable and its availability shall be accounted for, from that date;*

*Provided further 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, its suppliers or contractors, the Commission may approve the date of Page No.16 of 24 Appeal No. 123 of 2011 commercial operation prior to the element coming into regular service."*

14. In the said case, 400 kV Barh-Balia transmission line was under the scope of PGCIL (the Petitioner herein) while switchgear and sub-station at Barh end were within the scope of Barh STPS (super thermal power station) of NTPC. The commercial operation of Barh STPS was delayed. However, Barh-Balia transmission line was



completed in June 2010, idle charged on 30.6.2010 and was declared under commercial operation with effect from 1.7.2010. The Commission determined the tariff of Barh-Balia transmission line vide its order dated 29.4.2011 in Petition No. 267/2010.

15. Aggrieved by the said order, Punjab State Power Corporation Limited filed Appeal No.123 of 2011 before APTEL and the issue was decided by APTEL vide order dated 2.7.2012 as under:

*"20. Summary of our findings:*

*According to Tariff Regulations, the COD of a transmission line shall be achieved when 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.*

*The above conditions in the case of 400 kV Barh-Balia line were not fulfilled on 01.07.2010, the date on which COD was declared by the Respondent no.1. Merely charging of the line from one end without the switchgear, protection and metering arrangements being ready at the other end, even if not in the scope of works of the transmission license, would not entitle the line for declaration of commercial operation.*

*21. In view of the above, the Appeal is allowed, the impugned order is set aside and matter is remanded back to the Central Commission for re-determining 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. No order as to costs."*

16. APTEL's afore-mentioned judgement dated 2.7.2012 in Appeal No. 123 of 2011 has been upheld by the Hon'ble Supreme Court vide judgment dated 3.3.2016 in Civil Appeal No. 9193 and Civil Appeal No. 9302 of 2012. The relevant portion of Hon'ble Supreme Court judgment dated 3.3.2016 is as follows:

*"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 "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".*

17. In the light of the judgements of the APTEL and Hon'ble Supreme Court as quoted above, the legal principle that emerges is that a transmission line can be operational only when the sub-station and bays at both ends of the transmission line are operational. In other words, a transmission line cannot be said to be operational if sub-station and bays at one (or both) ends are not operational and in that case, the beneficiaries cannot be made liable to pay transmission charges of such transmission line. Hon'ble Supreme Court has also clarified that its decision is without prejudice to the right of PGCIL, if any, available to it under law against NTPC. Therefore, as per the principle decided in the judgement of the Hon'ble Supreme Court, where the transmission licensee has completed implementation of its transmission system within its scope of work but it cannot put it to use on account of delay on part of the other transmission licensee or generating company (defaulting party), in that case the transmission licensee shall have the right against the defaulting party as available under law. The APTEL in its judgement dated 14.9.2020 in Appeal No. 17 of 2019 in the instant case has endorsed the above principle.

#### **Observation (b)**

18. The APTEL has made observation with regard to the principle laid down by the Commission to deal with mismatch in the date of commercial operation involving TBCB licensees.

19. Clause (3) of Regulation 4 of the 2014 Tariff Regulations defines the date of commercial operation of transmission system as under:





*“(3) Date of commercial operation in relation to a transmission system shall mean the date declared by the transmission licensee from 0000 hour of which an element of the transmission system is in regular service after successful trial operation for transmitting electricity and communication signal from sending end to receiving end:*

*Provided that:*

*(i) where the transmission line or substation is dedicated for evacuation of power from a particular generating station, the generating company and transmission licensee shall endeavour to commission the generating station and the transmission system simultaneously as far as practicable and shall ensure the same through appropriate Implementation Agreement in accordance with Regulation 12(2) of these Regulations:*  
*(ii) in case a transmission system or an element thereof is prevented from regular service for reasons not attributable to the transmission licensee or its supplier or its contractors but is on account of the delay in commissioning of the concerned generating station or in commissioning of the upstream or downstream transmission system, the transmission licensee shall approach the Commission through an appropriate application for approval of the date of commercial operation of such transmission system or an element thereof.”*

20. As per the above definition, a transmission system or an element thereof can be declared under commercial operation when it is put in regular service after successful trial operation for transmitting electricity and upon availability of communication signal from sending end to receiving end. If the transmission system is prevented from being put to service on account of the delay in commissioning of the concerned generating station or in commissioning of upstream or downstream transmission system, then the transmission licensee has the option to approach the Commission for approval of COD of such transmission system or an element thereof. PGCIL, the Petitioner herein, has approached the Commission in several cases for approval of date of commercial operation of its transmission assets including the present case under second proviso to Regulation 4(3) of the 2014 Tariff Regulations. Where the Commission has approved the date of commercial operation under the said proviso, the entity whether generating station or transmission licensee on whose account the transmission asset is prevented from regular use has been levied with the transmission charges till the defaulting entity has declared its generating station or transmission system, as the case may be, under commercial operation and the transmission asset is put to regular use. A few of such illustrative cases are the Commission’s Order dated 12.4.2019 in Petition No. 233/TT/2018; Order dated



14.2.2019 in Petition No. 59/TT2018; Order dated 9.10.2018 in Petition No. 56/TT/2017; Order dated 29.7.2016 in Petition No. 201/TT/2015; Order dated 19.7.2016 in Petition No. 403/TT/2014; Order dated 29.4.2016 in Petition No. 99/TT/2014; Order dated 29.4.2016 in Petition No. 100/TT/2014; and Order dated 29.4.2016 in Petition No. 110/TT/2014. In cases where the Commission has not approved the date of commercial operation under second proviso to Regulation 4(3) of the 2014 Tariff Regulations and deferred the date of commercial operation for matching it with the commercial operation of the other concerned entity, the Commission has imposed the liability of IDC and IEDC on the said other entity for the period of delay. A few of such illustrative cases are the Commission's Order dated 5.10.2017 in Petition No. 203/TT/2016; Order dated 15.5.2018 in Petition No. 108/TT/2016; Order dated 22.2.2018 in Petition No. 13/TT/2017; Order dated 15.12.2017 in Petition No. 141/TT/2017; and Order dated 30.11.2017 in Petition No. 55/TT/2017. In the present case, the Commission vide order dated 30.11.2017 decided that COD of Asset-I and Asset-II shall be considered from COD of the transmission lines being implemented by NTL and imposed liability of IDC and IEDC on NTL.

21. Article 6.2.1 and Article 6.2.2 of the Transmission Service Agreement (TSA) deal with the commercial operation of transmission systems executed through TBCB route as under:

*“6.2.1 An Element of the Project shall be declared to have achieved COD seventy two (72) hours following the connection of the Element with the interconnection Facilities or seven (7) days after the date on which it is declared by the TSP to be ready for charging but is not able to be charged for reasons not attributable to the TSP or seven (7) days after the date of deferment, if any, pursuant to Article 6.1.2.*

*Provided that an Element shall be declared to have achieved COD only after all the Elements(s), if any, which are pre-required to have achieved COD as defined in Schedule 3 of this Agreement, have been declared to have achieved their respective COD.*

*6.2.2 Once any Element of the Project has been declared to have achieved deemed COD as per Article 6.2.1 above, such Element of the Project shall be deemed to have Availability equal to the Target Availability till the actual charging of the Element and to this extent, shall be eligible for payment of the Monthly Transmission Charges applicable for such Element.”*



22. As per the above provisions, an element of a transmission project shall be declared to have achieved COD 72 hours following the connection of the element with the interconnection facilities or 7 days after the date on which it is declared by TSP (transmission service provider) to be ready for charging but is not able to be charged for reasons not attributable to TSP. Further, as per Article 6.1.1 of TSA, date of interconnection shall not be prior to SCOD unless it is agreed by LTTCs. As per Article 6.2.2 of TSA, once an element of the transmission system is declared to have achieved COD in accordance with Article 6.2.1 of TSA, such element shall be deemed to have achieved the availability equal to the Target Availability and to that extent shall be eligible for monthly transmission charges.

23. Bearing of monthly transmission charges, where an element of transmission system that has been executed through TBCB route and has declared COD under Article 6.2.1 of TSA on account of the non-availability of connected transmission system for charging is also an issue for consideration. Sharing of transmission charges, whether implemented through Tariff Based Competitive Bidding (TBCB) route or under Regulated Tariff Mechanism (RTM), was governed by the Central Electricity Regulatory Commission (Sharing of inter-State Transmission Charges and Losses) Regulations, 2010 (in short, "the Sharing Regulations, 2010") which remained in force till 31.10.2020. However, the Sharing Regulations, 2010 did not contain any specific provision with regard to sharing of transmission charges in case of mismatch in COD of transmission system of a transmission licensee with COD of a generating station or upstream/ downstream transmission asset of another transmission licensee.

24. In the RAPP Case in Petition No. 43/MP/2016 (RAPP Transmission Company Limited Vs Power Grid Corporation of India Limited & Others), the RAPP-Shujalpur transmission line being developed by RAPP Transmission Company Limited under TBCB



route was ready for commercial operation but the associated bays within the scope of Nuclear Power Corporation of India Limited (NPCIL) were not ready. In the light of the afore-mentioned provisions of Article 6.2.1 of TSA, the Commission vide order dated 21.9.2016 decided COD of the RAAP-Shujalpur transmission line as 1.3.2016. As regards the sharing of transmission charges from 1.3.2016 till COD of bays under the scope of NPCIL, the Commission held as under:

*“23. The next question is who shall bear the transmission charges of RAPP-Shujalpur Transmission Line from the date of SCOD till the associated bays at NPCIL end is commissioned. In the present case, it was decided in the 31st meeting of Standing Committee held on 2.1.2013 that commissioning of RAPP 7 & 8 generation would be delinked from the commissioning of the bays at RAPP end and the bays would be commissioned matching with the SCOD of RAPP-Shujalpur transmission line. Development of the bays at RAPP end was entrusted to NPCIL. Therefore, it was the responsibility of NPCIL to develop the bays by February, 2016. Non-commissioning of the bays by NPCIL has rendered the RAPP-Shujalpur transmission line unutilized which was developed as the interconnection line between Northern and Western Regions. Therefore, the petitioner is entitled for the transmission charges from SCOD of the transmission line i.e. 1.3.2016 till bays to be developed by NPCIL are ready and the asset covered under the present petition is put into actual use. NPCIL would be liable to pay the transmission charges from 1.3.2016 till the bays are commissioned. After the commission of the bays being implemented by NPCIL, the transmission line will be used for North-West inter-connection and would be included in PoC calculation and the transmission charges shall be payable as per the provisions of the Sharing Regulations. As per Regulation 11 of the Sharing Regulations, CTU is responsible for raising the bills, collection and disbursement of transmission charges to ISTS transmission licensee. Accordingly, CTU is directed to raise the bills on NPCIL from 1.3.2016. However, NPCIL shall directly pay to the petitioner under intimation to CTU in order to avoid double deduction of TDS. If NPCIL fails to pay the charges within a period of one month from the date of issue of this order, it shall be liable to pay the late payment surcharge in terms of Article 10.8.1 of the TSA.”*

25. The Commission vide order dated 21.9.2016 in Petition No. 43/MP/2016 also laid down the following principle to deal with future cases involving transmission systems developed under TBCB route as under:

*“24. A related issue arises as to how recovery of transmission charges of transmission licensee shall be made when the transmission system under TBCB is ready as on its scheduled COD as per the provisions of the TSA but cannot be made operational or put to use due to non-availability/ delay in upstream/ downstream system. In our view, ISTS licensee executing the project under TBCB should enter into Implementation Agreement with CTU, STU, inter-State transmission licensee, or the concerned LTTC, as the case may be, who are responsible for executing the upstream/ downstream transmission system and clearly provide the liability for payment of transmission charges in case of the transmission line or upstream/downstream transmission assets. In the absence of Implementation Agreement, the payment liability should fall on the entity on whose account an element is not put to use. For example, if the transmission line is ready but terminal bays belonging to other licensees are not ready, the owners of upstream and downstream terminal bays shall be liable to pay the charges to the owner of transmission*



*line in the ratio of 50:50 till the bays are commissioned. In case one end bays are commissioned, the owner of other end bays shall be liable to pay the entire transmission charges of the transmission line till its bays are commissioned. The above principle shall be followed by CTU in all cases of similar nature in future.”*

26. The above principle was followed in the Patran Case in Petition No. 155/MP/2016 (Patran Transmission Company Limited Vs. Haryana Power Purchase Centre and Others) while dealing with the mismatch of the transmission lines executed by Patran Transmission Company Limited and the sub-station being implemented by Punjab State Transmission Company Limited. The Commission in its order dated 4.1.2017 in Petition No. 155/MP/2016 decided that the transmission charges of the transmission system of Patran Transmission Company Limited from the date of its SCOD or actual COD, whichever is later, till COD of the downstream system shall be payable by PSPCL. The order dated 4.1.2017 in Petition No.155/MP/2016 was challenged by PSPCL before APTEL in Appeal No.390 of 2007 (the Patran Case). During the course of the hearing, APTEL desired to know the basis of the principle laid down in the RAPP Case. It was apprised to APTEL that the Commission had laid down the said principle in exercise of its regulatory power under Section 79 of the Act in the light of the judgement of the Hon'ble Supreme Court in the PTC matter i.e. PTC India Limited Vs CERC [(2010) 4 SCC 603] which states that specifying regulation under Section 178 is not a pre-requisite to take any measure by the Commission in exercise of powers under Section 79(1) of the Act. The relevant extract of the said judgement is as under:

*“55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation.*



*56. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulations under Section 178.”*

27. APTEL in its judgement dated 27.3.2018 in Appeal No.390 of 2017 (the Patran Case) and judgement dated 18.1.2019 in Appeal No. 332 of 2016 (the RAPP Case) has upheld the principles enunciated by the Commission. In these appeals, the APTEL also proceeded to establish the contractual linkage between the transmission licensees executing the upstream and downstream transmission system by referring to the provisions of TSA in case of Patran Transmission Company Limited and the minutes of the meeting of the Standing Committee in case of RAPP Transmission Company Limited.

#### **Observation (c)**

28. The APTEL has observed that the Commission should have covered major issues relating to mismatch of COD of transmission systems executed by different licensees through regulations.

29. Transmission systems are either being executed under Regulated Tariff Mechanism (RTM) or through TBCB route. Commercial operation of the transmission systems under Regulated Tariff Mechanism (RTM) was governed by the provisions of Tariff Regulations till 28.4.2016 and with effect from 29.4.2016 it came to be governed by provisions of the Grid Code. The provisions in the 2014 Tariff Regulations with regard to transmission system have been extracted in paragraph 19 above. Regulation 6(3A)(4) and Regulation 6(3A)(5) of the Grid Code deal with commercial operation of transmission system as under:

*“4. Date of commercial operation in relation to an inter-State Transmission System or an element thereof shall mean the date declared by the transmission licensee from 0000 hour of which an element of the transmission system is in regular service after successful trial*





operation for transmitting electricity and communication signal from the sending end to the receiving end:

*Provided that:*

*(i) In case of inter-State Transmission System executed through Tariff Based Competitive Bidding, the transmission licensee shall declare COD of the ISTS in accordance with the provisions of the Transmission Service Agreement.*

*(ii) Where the transmission line or substation is dedicated for evacuation of power from a particular generating station and the dedicated transmission line is being implemented other than through tariff based competitive bidding, the concerned generating company and transmission licensee shall endeavour to commission the generating station and the transmission system simultaneously as far as practicable and shall ensure the same through appropriate Implementation Agreement in accordance with relevant provisions of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 or any subsequent amendment or re-enactment thereof. In case the transmission line or sub-station dedicated to a generator is being implemented through tariff based competitive bidding, then matching of commissioning of the transmission line/sub-station and generating station shall be monitored by Central Electricity Authority.*

*(iii) Where the transmission system executed by a transmission licensee is required to be connected to the transmission system executed by any other transmission licensee and both transmission systems are executed in a manner other than through tariff based competitive bidding, the transmission licensee shall endeavour to match the commissioning of its transmission system with the transmission system of the other licensee as far as practicable and shall ensure the same through an appropriate Implementation Agreement. Where either of the transmission systems or both are implemented through tariff based competitive bidding, the progress of implementation of the transmission systems in a matching time schedule shall be monitored by the Central Electricity Authority.*

*(iv) In case a transmission system or an element thereof is prevented from regular service on or before the Scheduled COD for reasons not attributable to the transmission licensee or its supplier or its contractors but is on account of the delay in commissioning of the concerned generating station or in commissioning of the upstream or downstream transmission system of other transmission licensee, the transmission licensee shall approach the Commission through an appropriate application for approval of the date of commercial operation of such transmission system or an element thereof.*

*(v) An element shall be declared to have achieved COD only after all the elements which are pre-required to achieve COD as per the Transmission Services Agreement are commissioned. In case any element is required to be commissioned prior to the commissioning of pre-required element, the same can be done if CEA confirms that such commissioning is in the interest of the power system.*

*(vi) The transmission licensee shall submit a certificate from the CMD/CEO/MD of the Company that the transmission line, sub-station and communication system conform to the relevant Grid Standard and Grid Code, and are capable of operation to their full capacity. Note: Transmission Licensee referred to in this Sub-Regulation shall include "Deemed Transmission Licensee" as per the provision of the Act.*

*5. Trial run and Trial operation in relation to a transmission system or an element thereof shall mean successful charging of the transmission system or an element thereof for 24 hours at continuous flow of power, and communication signal from the sending end to the receiving end and with requisite metering system, telemetry and protection system in service enclosing certificate to that effect from concerned Regional Load Dispatch Centre."*





30. Regulation 5 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 (in short, “the 2019 Tariff Regulations”) provides for date of commercial operation as under:

*“5. Date of Commercial Operation: (1) The date of commercial operation of a generating station or unit thereof or a transmission system or element thereof and associated communication system shall be determined in accordance with the provisions of the Grid Code.*

*(2) In case the transmission system or element thereof executed by a transmission licensee is ready for commercial operation but the interconnected generating station or the transmission system of other transmission licensee as per the agreed project implementation schedule is not ready for commercial operation, the transmission licensee may file petition before the Commission for approval of the date of commercial operation of such transmission system or element thereof.”*

31. Regulation 6 of the 2019 Tariff Regulations provides for the treatment of mismatch of the dates of commercial operation as under:

*“6. Treatment of mismatch in date of commercial operation: (1) In case of mismatch of the date of commercial operation of the generating station and the transmission system, the liability for the transmission charges shall be determined as under:*

*(a) Where the generating station has not achieved the commercial operation as on the date of commercial operation of the associated transmission system (which is not before the SCOD of the generating station) and the Commission has approved the date of commercial operation of such transmission system in terms of clause (2) of the Regulation 5 of these regulations, the generating company shall be liable to pay the transmission charges of the associated transmission system in accordance with clause (5) of Regulation 14 of these regulations to the transmission licensee till the generating station or unit thereof achieves commercial operation:*

*(b) Where the associated transmission system has not achieved the commercial operation as on the date of commercial operation of the concerned generating station or unit thereof (which is not before the SCOD of the transmission system), the transmission licensee shall make alternate arrangement for the evacuation from the generating station at its own cost, failing which, the transmission licensee shall be liable to pay the transmission charges to the generating company as determined by the Commission, in accordance with clause (5) of Regulation 14 of these regulations, till the transmission system achieves the commercial operation.*

*(2) In case of mismatch of the date of commercial operation of the transmission system and the transmission system of other transmission licensee, the liability for the transmission charges shall be determined as under:*

*(a) Where an interconnected transmission system of other transmission licensee has not achieved the commercial operation as on the date of commercial operation of the transmission system (which is not before the SCOD of the interconnected transmission system) and the Commission has approved the date of commercial operation of such transmission system in terms of clause (2) of Regulation 5 of these regulations, the other transmission licensee shall be liable to pay the transmission charges of the transmission system in accordance with clause (5) of Regulation 14 of*



*these regulations to the transmission licensee till the interconnected transmission system achieves commercial operation:*

*(b) Where the transmission system has not achieved the commercial operation as on the date of commercial operation of the interconnected transmission system of other transmission licensee (which is not before the SCOD of the transmission system), the transmission licensee shall be liable to pay the transmission charges of such interconnected transmission system to the other transmission licensee or as may be determined by the Commission, in accordance with clause (5) of Regulation 14 of these regulations, till the transmission system achieves the commercial operation.”*

32. The 2019 Tariff Regulations came into effect on 1.4.2019 and contains detailed provisions with regard to liability for mismatch of the date of commercial operation between generating station and transmission system or between two transmission licensees of a connected transmission system. Subsequently, the Sharing Regulations, 2010 was repealed and the Central Electricity Regulatory Commission (Inter-State Transmission Charges and Losses) Regulations, 2020 (in short, “the Sharing Regulations, 2020”) came into force with effect from 1.11.2020. Clause 12 of Regulation 13 of the Sharing Regulations, 2020 deals with the liability of the generating station or transmission system in case of delay in commercial operation as under:

*“(12) In case of a transmission system where COD has been approved in terms of proviso (ii) of Clause (3) of Regulation 4 of the Tariff Regulations, 2014 or Clause (2) of Regulation 5 of the Tariff Regulations, 2019 or where deemed COD has been declared in terms of Transmission Service Agreement under Tariff based Competitive Bidding, the Yearly Transmission Charges for the transmission system shall be:*

*(a) paid by the inter-State transmission licensee whose transmission system is delayed till its transmission system achieves COD, or*

*(b) paid by the generating company whose generating station or unit(s) thereof is delayed, till the generating station or unit thereof, achieves COD, or*

*(c) shared in the manner as decided by the Commission on case to case basis, where more than one inter-State transmission licensee is involved or both transmission system and generating station are delayed.”*

33. Since the Sharing Regulations, 2020 deals with the mismatch in respect of the generating station or transmission system executed through both Regulated Tariff Mechanism as well as TBCB route, Regulation 6 of the 2019 Tariff Regulations has been repealed. Thus, mismatch in COD of transmission system of a transmission licensee and a transmission system of another licensee or a generating station is now covered under provisions of the Sharing Regulations, 2020. Also, Regulation 13(12)(c) of the Sharing



Regulations, 2020 has provided for case-to-case decision of the Commission for complex cases. It is pertinent to mention that the Sharing Regulations, 2020 has been specified under Section 178 of the Act after due stakeholders' consultations.

#### **Observation (d)**

34. The APTEL has observed that since the Commission vide its order dated 29.3.2019 in Petition No.195/MP/2017 has treated the delay in obtaining forest clearance by NTL as an event of force majeure and postponed SCOD to actual COD of the associated transmission lines, imposition of liability of IDC and IEDC of the transmission assets for the period of delay on NTL contradicts the relief granted for force majeure.

35. TSA between NTL and the Long Term Transmission Customers (LTTCs) of NTL governs the relationship between them and it provides for inter-se rights, duties, liabilities and responsibilities of NTL and LTTCs. Article 11.3 of TSA defines "force majeure" as any event or circumstance or combination of events or circumstances that wholly or partly prevents or unavoidably delays the affected party in the performance of its obligations under TSA if and only if such events or circumstances are not within the reasonable control of the affected party or could not have been avoided if the affected party had taken reasonable care or complied with prudent utility practices. Article 11.7 of TSA provides for relief for force majeure event, which is as follows:

#### ***"11.7 Available Relief for a Force Majeure Event***

*Subject to this Article 11*

*(a) no Party shall be in breach of its obligations pursuant to this Agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;*

*(b) every Party shall be entitled to claim relief for a Force Majeure Event affecting its performance in relation to its obligations under this Agreement.*

*(c) For the avoidance of doubt, it is clarified that the computation of Availability of the Element(s) under outage due to Force Majeure Event, as per Article 11.3 affecting the TSP shall be as per Appendix IV to the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2009, as on seven (7) days prior to the*



*Bid Deadline. For the event(s) for which the Element(s) is/are deemed to be available as per Appendix IV to the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2009, then only the Non Escalable Transmission Charges, as applicable to such Element(s) in the relevant Contract Year, shall be paid by the Long Term Transmission Customers as per Schedule 5, for the duration of such event(s).*

*(d) For so long as the TSP is claiming relief due to any Force Majeure Event under this Agreement, the Lead Long Term Transmission Customer may, from time to time on one (1) day notice, inspect the Project and the TSP shall provide the Lead Long Term Transmission Customer's personnel with access to the Project to carry out such inspections, subject to the Lead Long Term Transmission Customer's personnel complying with all reasonable safety precautions and standards."*

36. Article 11.7(b) of TSA provides that every party shall be entitled to claim relief for a force majeure event affecting its performance in relation to its obligations under the Agreement. Article 4.3(a) of TSA provides that TSP (in this case, NTL is TSP) shall take all necessary steps to commence work on the Project (in this case, the Project is the associated transmission lines) from the effective date of the Agreement and shall achieve Scheduled COD of the Project in accordance with Schedule 3 of TSA. Article 4.4.2 of TSA provides as under:

*"In the event that an Element or the Project cannot be commissioned by its Scheduled COD on account of any Force Majeure Event as per Article 11, the Scheduled COD shall be extended, by a 'day for day' basis, for a maximum period of one hundred and eighty (180) days. In case the Force Majeure Event continues even after the maximum period of one hundred and eighty (180) days, the TSP or the Majority Long Term Transmission Customers may choose to terminate the Agreement as per the provisions of Article 13.5."*

37. Failure to achieve COD by Scheduled COD will make NTL liable for payment of liquidated damages in terms of Article 6.4 of TSA as under:

*"6.4.1 If the TSP fails to achieve COD of any Element of the Project or the Project, by the Element's I Project's Scheduled COD as extended under Articles 4.4.1 and 4.4.2, then the TSP shall pay to the Long Term Transmission Customer(s), as communicated by the Lead Long Term Transmission Customer, in proportion to their Allocated Project Capacity as on the date seven (7) days prior to the Bid Deadline, a sum equivalent to 3.33% of Monthly Transmission Charges applicable for the Element of the Project [in case where no Elements have been defined, to be on the Project as a whole] I Project, for each day of delay up to sixty (60) days of delay and beyond that time limit, at the rate of five percent (5%) of the Monthly Transmission Charges applicable to such Element I Project, as liquidated damages for such delay and not as penalty, without prejudice to Long Term Transmission Customers' any rights under the Agreement.*

*6.4.2 The TSP's maximum liability under this Article 6.4 shall be limited to the amount of liquidated damages calculated in accordance with Article 6.4.1 for and up to six (6) months of delay for the Element or the Project.*



*Provided that in case of failure of the TSP to achieve COD of the Element of the Project even after the expiry of six (6) months from its Scheduled COD, the provisions of Article 13 shall apply.”*

38. NTL was prevented from discharging its obligations under TSA on account of unexpected requirement and delay in grant of forest clearance. The Commission vide order dated 29.3.2019 in Petition No.195/MP/2017 considered such delay on account of force majeure and held as under:

*“95. In our view, the Petitioner was prevented from discharging its obligations under the TSA on account of unexpected requirement and delay in grant of forest clearance which was not there in the RFP documents and as such delay beyond one year in grant of forest clearance is covered under Force Majeure. Accordingly, the SCOD shall stand extended till the actual CODs of Kurukshetra–Malerkotla and Malerkotla–Kurukshetra Transmission Lines which are 18.1.2017 and 27.3.2017 respectively. However, we would like to make it clear that the extension of COD of the instant assets does not entail any financial benefit in the form of IDC and IEDC to the Petitioner.”*

39. As a consequence of the delay in obtaining forest clearance being declared as an event of force majeure, SCOD of the associated transmission lines of NTL were extended to the actual COD and NTL was spared from paying the liquidated damages. The Petition No. 195/MP/2017 was filed by NTL for reliefs under TSA that included extension of SCOD on account of force majeure events. The Commission, based upon submission of the parties therein, extended SCOD of the associated transmission lines in terms of provisions of Article 11 of TSA. It cannot be a case of NTL that once SCOD of the associated transmission lines is extended, it is exonerated from all other liabilities whatsoever arising under applicable regulations or orders of the Commission or Orders of the Hon'ble Supreme Court. In other words, extension of SCOD of the associated transmission lines of NTL by the Commission, being only in respect of TSA, protects NTL from liabilities under TSA and, in no way, protects it from payment such as IDC and IEDC of the transmission assets of the Petitioner PGCIL arising due to matching of the COD. It is pertinent to note that irrespective of extension of SCOD of the associated transmission lines by the Commission, NTL is required to continue to discharge other liabilities viz. related to financial institutions, implications of taxation such as GST and various



obligations including contractual obligations. There is no provision in TSA to relieve NTL from any other obligation on account of force majeure including the liability for IDC and IEDC of the bays of PGCIL on account of delay in COD of the transmission lines of NTL. TSA is an agreement signed between NTL and LTTCs and operates within the contours of what has been agreed to in that agreement. Rights and obligations of any other entity, such as PGCIL, unconnected with the TSA cannot be affected by operations of the said agreement. Therefore, extension of SCOD of the transmission lines of NTL because of condonation of delay as per provisions of TSA cannot affect the rights of PGCIL.

**Observation (e)**

40. The APTEL has observed that in a reverse case i.e. when the associated transmission lines of NTL were ready but the transmission assets of PGCIL were not ready, PGCIL would have been made to pay the transmission charges more than the project cost which would not have been justified. In this connection, it is pertinent to mention that in the RAPP Case and the Patran Case, transmission lines executed by the respective transmission licensees under TBCB achieved deemed COD in terms of Article 6.2.1 of the TSA but could not be connected as the bays being executed by NPCIL and PSTCL respectively were not ready. The Commission imposed the liability of transmission charges on NPCIL and PSPCL for the duration of delay in commercial operation of the bays. APTEL in its judgement dated 27.3.2018 in Appeal No.390 of 2017 (the Patran case) and judgement dated 18.1.2019 in Appeal No. 332 of 2016 (the RAPP Case) has upheld the decision of the Commission. Thus, it is not the project cost but failure to commission the project resulting in assets not being put to use which determines the liability for payment of charges to the other party.

**Observation (f)**





41. The APTEL has observed that infrastructure projects involving huge investments must not be subject to regulatory uncertainty without any remedy, as the transmission licensee implementing transmission projects under TBCB route cannot anticipate the scenario arising out of the delay and factor them in the bid. Similarly, the projects implemented through regulatory tariff mechanism cannot factor in the charges which it would be required to pay.

42. In infrastructure projects, risks of increased project costs need to be either factored in the project cost by the entity implementing the project or are required to be compensated by the party which contributes towards such increase in the project cost. In the context of implementation of inter-State transmission system (ISTS) projects, following scenarios (though not exhaustive) may broadly emerge:

(a) The inter-State transmission system being implemented by an inter-State transmission licensee through Regulated Tariff Mechanism (RTM) is connected to a generating station at one end and a transmission system being implemented by another inter-State transmission licensee either under Regulated Tariff Mechanism route or TBCB route or has an intra-State transmission system at the other end;

(b) The inter-State transmission system being implemented by an inter-State transmission licensee through TBCB route is connected to a generating station at one end and a transmission system being implemented by another inter-State transmission licensee either under Regulated Tariff Mechanism route or TBCB route or has an intra-State transmission system at the other end;

(c) The inter-State transmission system being implemented by an inter-State transmission licensee through Regulated Tariff Mechanism is connected to transmission systems being implemented by inter-State transmission licensees under TBCB route at both ends;

(d) The inter-State transmission system being implemented by an inter-State transmission licensee through TBCB route or RTM route is connected to transmission system being implemented by a transmission licensee under





Regulated Tariff Mechanism at one end and by another transmission licensee under the TBCB route or there is intra-State transmission system at either end;

(e) The inter-State transmission system being implemented by an inter-State transmission licensee through TBCB route is connected to transmission system being implemented by inter-State transmission licensees under Regulated Tariff Mechanism at both ends; and

(f) There is a combination of generating station(s) or inter-State transmission system(s) (under TBCB route or under RTM route) or intra-State transmission system at either end.

43. In the above scenarios, there could be delay in achieving COD on the part of the generating station or the inter-State transmission licensee or the intra-State transmission system. However, delay in achieving COD on the part of any entity would impact the other entities which are ready for COD but are prevented from commissioning or putting the assets to regular use because of the delay, whether it is the inter-State connected transmission system (whether implemented under Regulatory Tariff Mechanism route or TBCB route), the intra-State transmission system or the generating station.

44. Where COD of an inter-State transmission system is approved by the Commission and there is delay in COD of the connected generating station or the transmission system, the Commission has laid down a mechanism through Clause (12) of Regulation 13 of the Sharing Regulations, 2020. Where the generating station has achieved COD but the connected or associated transmission system has been delayed, the Commission has specified a mechanism in Clause (8) and Clause (12) of Regulation 13 of the Sharing Regulations, 2020. These mechanisms, notified after due stakeholders' consultation, are as under:

*“(8) In case a generating station or unit(s) thereof has achieved COD and the Associated Transmission System is delayed, the concerned inter-State transmission licensee(s) shall make alternate arrangement at its own cost for despatch of power of the generating station or unit(s) thereof in consultation with the Central Transmission Utility: Provided that till such alternate arrangement is made, the inter-State transmission licensee(s) shall pay to*



*the generating station, the Yearly Transmission Charge corresponding to the quantum of Long Term Access for the period for which the transmission system has got delayed.*

*(12) In case of a transmission system where COD has been approved in terms of proviso (ii) of Clause (3) of Regulation 4 of the Tariff Regulations, 2014 or Clause (2) of Regulation 5 of the Tariff Regulations, 2019 or where deemed COD has been declared in terms of Transmission Service Agreement under Tariff based Competitive Bidding, the Yearly Transmission Charges for the transmission system shall be:*

- (a) paid by the inter-State transmission licensee whose transmission system is delayed till its transmission system achieves COD, or*
- (b) paid by the generating company whose generating station or unit(s) thereof is delayed, till the generating station or unit thereof, achieves COD, or*
- (c) shared in the manner as decided by the Commission on case to case basis, where more than one inter-State transmission licensee is involved or both transmission system and generating station are delayed.”*

45. The provisions in the Sharing Regulations, 2020 as quoted above provide the regulatory certainty in case of mismatch on account of delay in COD of the connected transmission systems and generating station.

#### **Observation (g)**

46. The APTEL has observed that the Commission did not decide the issue of mismatch on basis of the Sharing Regulations but did so by exercising regulatory powers under Section 79(1) of the Act and, therefore, recovery of IDC and IEDC from NTL, in the absence of contract between NTL and the Petitioner, is in the nature of damages and, therefore, cannot be qualified as sharing of transmission charges.

47. As quoted in earlier part of this order, the Commission has specified the mechanism for sharing of transmission charges under Clauses (8) and (12) of Regulation 13 of the Sharing Regulations, 2020. It has been laid down by the Hon'ble Supreme Court in the PTC Judgement that specifying regulations under Section 178 of the Act is not a pre-condition for exercising power by the Commission under Section 79(1) of the Act. In terms of the said judgement, such exercise of power by the Commission is subject to a caveat that if any regulations have been specified, then the provisions of the said regulations shall be complied with while exercising the power under Section 79(1) of the Act. To drive home the above principle, Hon'ble Supreme Court has cited two examples.



First, Hon'ble Supreme Court has observed that the Commission has been empowered under Section 79(1)(g) of the Act to levy fees for the purposes of the Act. Hon'ble Supreme Court has observed that an order imposing regulatory fees can be issued in the absence of regulations under Section 178. However, if there are regulations regarding fees, then the order under Section 79(1) levying the fees has to be in consonance of the regulation. Second, Hon'ble Supreme Court has referred to power of the Commission to specify the regulations under Section 178 of the Act in the light of the principles and methodologies under Section 61 of the Act. The Hon'ble Supreme Court has observed "*it is open to the Commission to specify the terms and conditions of tariff under Section 61 of the Act without specifying the regulations under Section 178 of the Act*". In other words, it is not mandatory for the Commission to specify everything through regulations but the Commission may regulate certain aspects through exercise of regulatory powers under Section 79(1) of the Act.

48. Extending the applicability of the above principles laid down by the Hon'ble Supreme Court in the present case, the Commission has been vested with the power under Section 79(1)(c) to regulate inter-State transmission of electricity and under Section 79(1)(d) of the Act to determine the tariff of inter-State transmission of electricity. There was no provision in the 2009 Tariff Regulations or the 2014 Tariff Regulations or the Sharing Regulations, 2010 for sharing of transmission charges in case of mismatch in COD of the inter-connected transmission system and generating stations or two inter-connected transmission system. To address the situation, the Commission had laid down a principle for sharing of transmission charges in such cases in the RAPP case. Subsequently, with due deference to the observations of the APTEL in 27.3.2018 in Appeal No.390 of 2017 (the Patran case) and judgement dated 18.1.2019 in Appeal No. 332 of 2016 (the RAPP Case), the Commission specified the principle of mismatch in Regulation 6 of the 2019 Tariff Regulations (quoted in paragraph 31 of this order).



However, the provisions of the 2019 Tariff Regulations are applicable to projects executed under Regulated Tariff Mechanism (RTM) route only. In order to specify the principle which would be applicable to projects implemented under both Regulated Tariff Mechanism (RTM) route as well as TBCB route, the Commission has specified Clause (8) and Clause (12) of Regulation 13 of the Sharing Regulations, 2020 (quoted in paragraph 44 of this order) to deal with various scenarios of mismatch. Keeping in view the complexities involved in such matter, Regulation 13(12)(c) of the Sharing Regulations, 2020 provides that transmission charges shall be “*shared in the manner as decided by the Commission on case to case basis, where more than one inter-State transmission licensee is involved or both transmission system and generating station are delayed*”. It may be noted that in the instant case, more than one inter-State transmission licensees are involved.

49. In paragraph 8.25 of the judgement dated 14.9.2020 in Appeal No. 17 of 2019, the APTEL has observed that since the Commission has decided issue of sharing of transmission charges by exercising regulatory power under Section 79(1) of the Act, and not as per the Sharing Regulations, 2020, such transmission charges in the absence of contract, are in the nature of damages for delay in commissioning of the assets and cannot be qualified as sharing of transmission charges. However, it may be appropriate here to observe that the APTEL has itself upheld the principle in the Patran case and the RAPP case. In fact, in the RAPP case though there was no contract between the parties, the APTEL proceeded to establish the link on the basis of minutes of the meeting of the Standing Committee.

50. The present case was also discussed in the 31<sup>st</sup> Standing Committee meeting of the Northern Region held on 2.1.2013 and the minutes of the meeting dated 4.2.2013 provide as under:



*“Additional Corridor to Amritsar*

*CEA stated that 400/220 kV Amritsar substation is having 2x315 MVA transformation capacity and considering the load growth in Amritsar area, augmentation of transformation capacity by 1x500 MVA is under implementation. At present Amritsar S/s is being fed by a 400 kV S/c line from Jullandhar and is also going to be connected with Parbati Pooling station by a 400 kV D/c line. In addition, as part of PSTCL system, 400 kV Makhu–Amritsar D/c line is being constructed for providing connectivity of STU grid with ISTS grid.*

*POWERGRID stated that although, Amritsar S/s is planned to be connected to Parbati Pooling station and Makhu (PSTCL substation), however the power supply to Amritsar area would be mainly through Jullandhar 400kV substation as during winter, the generation of hydro projects would reduce to very low levels as well as in case of low generation at Talwandi Saboo TPS, Makhu S/s may also draw power from Amritsar. It is therefore necessary that power supply arrangement to Amritsar S/s is augmented. It was further stated that HVDC station at Kurukshetra is being established for supply of power from pit head generating stations of Chattisgarh. Accordingly, for augmenting power supply to Amritsar S/s, following transmission works were proposed to be implemented through Tariff Based Competitive Bidding as System strengthening scheme of NR:*

- 400 kV Kurukshetra–Malerkotla D/c line*
- 400 kV Malerkotla–Amritsar D/c line*

*RVPNL enquired about the availability of space at Amritsar substation. POWERGRID informed that space is available and if required they would implement 400kV GIS bays for extension in Amritsar station.*

***Members agreed to the above proposal.”***

51. The matter was also discussed in the 34<sup>th</sup> Standing Committee meeting of the Northern Region held on 8.8.2014 and the minutes of the meeting dated 25.8.2014 noted the scope of PGCIL as under:

*“Item–4: Extension of 400 kV Malerkotla under NRSS-XXXI (Part-B)*

*Director (SP&PA), CEA informed that Kurukshetra–Malerkotla–Amritsar 400 kV line was planned as a part of system strengthening (NRSS-XXXI (B)) in the 31st Meeting of the Standing Committee on Power System Planning of Northern Region. The line is being implemented under tariff based competitive bidding and associated 400 kV bays are to be implemented by POWERGRID. The Letter of Interest (LoI) for the line under tariff based competitive bidding has already been issued. CTU, POWERGRID while taking up the implementation of the 400 kV bays at Malerkotla, has observed that adequate space is not available for accommodating 4 nos. of AIS bays at Malerkotla switchyard and for accommodating the same, outdoor GIS bays shall have to be provided. Accordingly, they have proposed to implement 4 nos. of GIS bays at Malerkotla, required for the subject transmission scheme.*

*The Committee agreed with the proposal of extension of 4 nos of bays as GIS at Malerkotla.”*





52. Further the transmission system was finalised as to be implemented under TBCB in the 31<sup>st</sup> Empowered Committee meeting held on 18.2.2013, the minutes of which dated 25.2.2013 noted as under:

*“14.0 Name of the Scheme: ‘Northern Region System Strengthening Scheme, NRSS – XXXI (Part – B)’ 14.1 This scheme was approved in the 31st meeting of the Standing Committee on Power System Planning of Northern Region held on 02.01.2013 with the following scope.*

**Scope:**

<b>Transmission Scheme</b>	<b>Estimated Line Length (km)/MVA</b>	<b>Estimate Cost (Rs. Crore)</b>
<i>Kurukshetra - Malerkotla 400 kV D/c line</i>	<i>125 km</i>	<i>150</i>
<i>Malerkotla - Amritsar 400 kV D/c line</i>	<i>180 km</i>	<i>220</i>
<i>Estimate Cost Rs. crore</i>		<i>370</i>

**Note**

- CTU to provide 2 no. of 400 kV bays each at Amritsar and Kurukshetra S/Ss
- CTU to provide 4 no. of 400 kV bays at the Malerkotla S/s 14.2. The EC recommended the scheme for implementation through TBCB.

Xxx

14.2 *The EC recommended the scheme for implementation through TBCB.”*

53. The above quoted minutes of the Standing Committee Meetings and Empowered Committee Meeting on the basis of which transmission lines to NTL were awarded, clearly establishes the interdependence of transmission lines of NTL and associated bays of Powergrid. Because the transmission lines under the scope of NTL were not ready, Asset-I and Asset-II of Powergrid could not be made operational and the beneficiaries could not derive any benefit from them. APTEL, in RAPP Case, had upheld Commission’s Order establishing the link between transmission line and associated bays on the basis of minutes of the meeting of the Standing Committee.

54. The Commission has been empowered under Section 79(1)(d) read with Section 62(1)(b) of the Act to determine the tariff for inter-State transmission of electricity under Regulated Tariff Mechanism route and under Section 79(1)(d) read with Section 63 of the Act to adopt the tariff under TBCB route. Thus, there is a statutory relationship between



the transmission licensees and the beneficiaries/ LTTCs in so far as determination of tariff and its sharing is concerned. Therefore, keeping in view the statutory relationship and conclusions drawn at Paragraph 53 of this Order, the Commission is well within its power to apportion the liability for delay in achieving the COD. This is particularly so, because the inter-State transmission systems are developed through coordinated transmission planning and implemented through Regulated Tariff Mechanism route or TBCB route. Tariff is determined or adopted by the Commission and the progress of the inter-connected transmission systems are coordinated and monitored through Joint Coordination Meeting of CTU or Standing Committee Meetings of CEA. In any case, treatment of mismatch in CODs of the generating station and connected transmission system and COD of two connected transmission systems have been en-capsuled in Clause (8) and Clause (12) of the Sharing Regulations, 2020. Therefore, the cases relating to mismatch of CODs shall be decided in accordance with the said principles.

**Decision in remand Petition No. 60/TT/2017 in the light of observations and directions of the APTEL**

55. The main prayer of NTL in the Appeal No. 17 of 2019 before the APTEL was that the Commission has not placed the liability of payment of IDC and IEDC on NTL correctly since the period of delay on the part of NTL to achieve COD has been condoned by the Commission holding it as an event of force majeure in Petition No.195/MP/2017. APTEL, allowing the appeal vide order dated 14.9.2020 set aside the order of the Commission dated 30.11.2017 in Petition No. 60/TT/2017 to the limited extent as prayed by NTL. Therefore, in the light of observations of the APTEL, the limited consideration in the remand is whether imposition of IDC and IEDC of the transmission assets of PGCIL for the period of delay on NTL is justified or not, particularly when the delay in achieving COD by NTL has been condoned by the Commission.



56. In the 31<sup>st</sup> Standing Committee Meeting for Power System Planning of Northern Region held on 2.1.2013, NRSS-XXXI(B) transmission scheme was approved for augmenting power supply to Amritsar sub-station. It was further decided that the transmission scheme would comprise of the KM Line and the MA Line and would be implemented through the tariff-based competitive bidding (TBCB) route. SCOD of the KM Line and the MA Line was 10.6.2016 i.e. within a period of 28 months from the date of transfer of SPV-12.5.2014.

57. The corresponding bays at Malerkotla and Amritsar for the associated transmission lines under NRSS XXXI(B) Transmission Scheme were to be implemented by the Petitioner, PGCIL as under:

- (a) 2 Numbers of 400 kV line bays at Amritsar 400/200 kV (Powergrid) Sub-station (Extension) - (Asset I);
- (b) 4 Numbers of 400 kV Line Bays at Malerkotla(GIS) 400/220 kV (Powergrid) Sub-Station (Extension) - (Asset II);
- (c) 2 Numbers of 400 kV Line Bays at Kurukshetra HVDC Sub-Station (GIS) (Powergrid) (Extension) - (Asset III).

58. The Investment Approval (IA) and expenditure sanction for implementing the bays was accorded by the Board of Directors of PGCIL on 2.6.2015 with scheduled completion date as 16 months from the date of I.A. i.e. 1.10.2016.

59. The Petitioner filed Petition No.60/TT/2017 for approval of COD of Asset-I and Asset-II as 1.12.2016 under proviso (ii) to Regulation 4(3) of the 2014 Tariff Regulations. The Petitioner vide affidavit dated 8.5.2017 submitted the charging details of associated transmission lines developed by NTL under the TBCB route as follows:



Sr. No.	Name of the Asset	Charging date	RLDC Letter
1	400 kV Malerkotla-Amritsar TBCB Line	Ckt-I: 30.03.2017 Ckt-II: 01.04.2017	17.04.2017
2	400 kV Kurukshetra-Malerkotla TBCB Line	Ckt-I: 15.01.2017 Ckt-II: 16.01.2017	03.02.2017

60. The Petitioner claimed that it was ready to declare COD of its bays but was prevented from doing so on account of the non-readiness of the associated transmission lines of NTL. The associated transmission lines under scope of NTL were scheduled to be put into commercial operation on 10.9.2016. However, they were delayed and were put into commercial operation in January/ April 2017. The Petitioner contended that it was prevented from putting the transmission assets into commercial operation due to the delay in completion of the associated transmission lines under the scope of NTL and therefore has sought approval of the bays at Amritsar and Malerkotla under proviso (ii) of Clause 3 of Regulation 4 of the 2014 Tariff Regulations. The said proviso (quoted at paragraph 13 of this order) provides for approval of the date of the commercial operation of the transmission system or transmission element which has been prevented from being put to regular service for reasons not attributable to the implementing entity.

61. In the light of the principle propounded by Hon'ble Supreme Court vide judgment dated 3.3.2016 in Civil Appeal No. 9193 and Civil Appeal No. 9302 of 2012 (judgements extracted in paragraph 16 of this order), the Commission did not approve the COD of Asset-I and Asset-II under proviso (ii) to Regulation 4(3) of the 2014 Tariff Regulations. Rather the Commission approved COD of Asset-I and Asset-II matching with the associated transmission lines of NTL as under:

*“26. As per RLDC Certificate dated 17.4.2017 for 400 kV Amritsar(PG)-Malerkotla(PG)-I along with associated bays and 400 kV Amritsar(PG)-Malerkotla(PG)-II along with associated bays trial run completed on 31.3.2017 and 2.4.2017 respectively for Ckt I and II. Accordingly, we have considered the COD of the Asset I i.e. both bays at Amritsar end as 3.4.2017. For the sake of ease in computation, we are considering COD on later date keeping in view of the fact that only one day difference does not have much significance.*



27. As per RLDC Certificate dated 3.2.2017 for 400 kV Kurukshetra(PG)-Malerkotla(PG)-I along with associated bays and 400 kV Kurukshetra(PG)-Malerkotla(PG)-II along with associated bays completed trial operation on 16.1.2017 and 17.1.2017 respectively for Ckt-I and II. Accordingly, COD of Asset II has been considered on 18.1.2017. We are considering COD on later date for ease of computation considering that only one day difference shall not have much significance. Accordingly, the COD of Asset-II is segregated into two assets i.e. Asset-II (a) and Asset-II (b) as 3.4.2017 and 18.1.2017 matching COD with associated lines respectively.

28. The date of commercial operation (COD) considered for the instant assets are as follows:

<b>Assets</b>	<b>COD Claimed</b>	<b>COD Approved</b>
Asset I: 2 No. Line bays at Amritsar 400/220 kV Sub-station	1.12.2016	3.04.2017
Asset II(a): 2 No. 400 kV Line bays at Malerkotla GIS 400/220 kV Sub-station	1.12.2016	3.4.2017
Asset II(b): 2 No. 400 kV Line bays at Malerkotla GIS 400/220 kV Sub-station	1.12.2016	18.1.2017

62. The Commission then decided the sharing of IDC and IEDC for the period of mismatch by NTL as under:

“37. As per the Investment Approval dated 2.6.2015, the instant assets were scheduled to be commissioned within 16 months i.e. by 1.10.2016 against which the instant assets were ready to be put under commercial operation on 1.12.2016. However, the instant asset was put to use only after COD of associated line. The petitioner has submitted that it has made various communications with NTL through letters dated 30.9.2016, 19.10.2016, 27.10.2016 and 22.11.2016 for commissioning of the TBCB line. The petitioner has stated that the time over run is on account of the delay of the associated lines by the Respondent, NTL. We have observed that petitioner has submitted CEA certificate dated 26.9.2016 for Asset-I which proves that it was ready before 1.10.2016 but in case of Asset-II, the petitioner obtained CEA Certificate dated 4.11.2016. Therefore, there is no documentary evidence in the petition to support that Asset-II was ready before 4.11.2016. Hence, we are not inclined to allow time overrun of 1.10.2016 to 4.11.2016 for Asset-II. Accordingly, the IDC and IEDC shall be billed as under:

<b>Assets</b>	<b>Date</b>	<b>Liabile party</b>
Asset – I	1.10.2016- date of COD of the asset	To be borne by NTL
Asset-II (a) & (b)	1.10.2016-4.11.2016	Not to be Capitalized
Asset-II (a) & ( b)	5.11.2016- date of COD of the asset	To be borne by NTL

63. NTL filed Petition No.195/MP/2017 in which NTL sought condonation of delay in COD of its transmission lines on account of it being affected by force majeure in terms of the TSA. The Commission vide order dated 29.3.2019 in Petition No.195/MP/2017 observed that NTL was prevented from discharging its obligations under the TSA on account of unexpected requirement and delay in grant of forest clearance which is a force





majeure event and extended the scheduled COD. The relevant portion of the order dated 29.3.2019 is extracted hereunder:

*“94. In the present case, as per RFP and the Survey Report issued by RECTCPL, there were no forest areas in the route of transmission lines. The Petitioner encountered forest areas in the districts of Haryana and Punjab, which is contrary to stipulation of RFP documents that there was no forest in the route. The Petitioner was unable to start the construction of the transmission line in respective forest stretches. The unforeseen requirement of obtaining forest clearance and delay in issuance of forest clearance, resulted in delays in implementation of the transmission project. Forest clearance is a mandatory requirement for laying the transmission lines in the forest area. The Petitioner took up the matter with the authorities for forest clearance. Therefore, the time taken for grant of forest clearance was beyond the reasonable control of the Petitioner and has affected the project implementation and thereby prevented the Petitioner from performing its obligations under the TSA.*

*95. In our view, the Petitioner was prevented from discharging its obligations under the TSA on account of unexpected requirement and delay in grant of forest clearance which was not there in the RFP documents and as such delay beyond one year in grant of forest clearance is covered under Force Majeure. Accordingly, the SCOD shall stand extended till the actual CODs of Kurukshetra – Malerkotla and Malerkotla – Kurukshetra Transmission Lines which are 18.1.2017 and 27.3.2017 respectively. However, we would like to make it clear that the extension of COD of the instant assets does not entail any financial benefit in the form of IDC and IEDC to the Petitioner.”*

64. NTL filed the Appeal No. 17 of 2019 before APTEL challenging the liability of IDC and IEDC imposed on it for the bays of PGCIL on the ground that the SCOD has been extended till the actual CODs. APTEL in paragraph 8.21 of the judgement dated 14.9.2020 in Appeal No. 17 of 2019 has observed that imposing liability of IDC and IEDC of the transmission assets of PGCIL due to mismatch on NTL defeats the objective of introducing provision of force majeure in TSA i.e. to save NTL from the consequence of anything over which it has no control. This specific observation of APTEL has been dealt with in paragraph 34 to paragraph 39 of this order.

65. NTL has contended that if IDC and IEDC of the transmission assets of PGCIL due to mismatch are imposed upon NTL, it would not be placed in the same economic position as if such force majeure event had not occurred. This argument of NTL is not supported by any provision of TSA and therefore, is flawed. The relief due to NTL under



provisions of force majeure are under Article 11 of TSA. Article 11.7(b) of TSA provides for relief for force majeure event, which is as under:

***“11.7 Available Relief for a Force Majeure Event***

*xxx*

*(b) every Party shall be entitled to claim relief for a Force Majeure Event affecting its performance in relation to its obligations under this Agreement.*

*xxx”*

Article 4.4.2 of TSA provides as under:

*“In the event that an Element or the Project cannot be commissioned by its Scheduled COD on account of any Force Majeure Event as per Article 11, the Scheduled COD shall be extended, by a 'day for day' basis, for a maximum period of one hundred and eighty (180) days. In case the Force Majeure Event continues even after the maximum period of one hundred and eighty (180) days, the TSP or the Majority Long Term Transmission Customers may choose to terminate the Agreement as per the provisions of Article 13.5.”*

Thus, only relief due to NTL under provisions of force majeure under the TSA is extension of SCOD. Accordingly, NTL has already been given extension of SCOD.

66. Extension of SCOD on account of the delay in completion of the project due to force majeure saves NTL from the payment of liquidated damages to the beneficiaries but does not relieve NTL from the liability to pay IDC and IEDC to PGCIL as the transmission assets of the Petitioner could not be put to use on account of NTL. This is in line with the view taken in the case of transmission lines of Bhopal Dhule Transmission Company Limited, where the transmission lines were delayed and associated bays of Powergrid were ready and Commission had condoned the delay of Bhopal-Dhule transmission Company Limited under Force Majeure. The Commission vide Order dated 20.9.2017 in Petition No. 227/TT/2014 observed as under:

*“It is observed that due to non-availability of downstream assets the instant assets have not been put to regular use. Accordingly, we are of the view that the transmission charges of Assets-1, 2 and 3 from the COD till the commissioning of downstream network will be borne by Bhopal Dhule Transmission Company Limited. After that the billing, collection and disbursement of the transmission charges approved shall be governed by the provisions of Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010, as amended from time to time as provided in Regulation 43 of the 2014 Tariff Regulations.*



The Commission had condoned the delay of Bhopal-Dhule transmission Company Limited under Force Majeure vide Order dated 25.6.2018 in Petition No. 216/MP/2016 as under:

*“75. Though Article 4.4.2 provides for extension of SCOD upto a maximum period of six months, after considering the circumstances for delay in grant of forest clearance, Section 164 authorization and allotment of land for Bhopal Sub-station and the efforts made by the Petitioner to mitigate the force majeure events, we allow extension of SCOD from 31.3.2014 till the dates of actual COD of the different elements of the project.”*

67. Hence, the principle has been followed consistently that even if under Force majeure, delay is condoned or SCOD is extended by the Commission, the liability of upstream/downstream system remains on such delayed transmission licensee.

68. Further, there is clear fallacy in NTL’s contentions. Suppose, for the sake of argument, it is assumed that NTL is not liable to pay IDC and IEDC. Then the question arises as to who will bear such charges due to Powergrid. This liability of IDC and IEDC cannot be capitalised as the transmission assets have not been put to use and the beneficiaries have not reaped any benefits. At the same time, PGCIL cannot be denied IDC and IEDC as it has done its part and made the transmission assets ready for use and, therefore, cannot be made to suffer on account of delay on the part of NTL. The IDC and IEDC payable by NTL to PGCIL cannot be passed on and loaded on the LTTCs/beneficiaries as there is no provision in TSA under which such recoveries can be made. In fact, the Commission in its order dated 21.9.2016 in the RAPP Case and order dated 4.1.2017 in the Patran Case has laid down the principle that the LTTCs/beneficiaries are liable to pay transmission charges only when transmission system is being used or put to use. The APTEL in its judgement dated 27.3.2018 in Appeal No.390 of 2017 (the Patran Case) and judgement dated 18.1.2019 in Appeal No. 332 of 2016 (the RAPP Case) has upheld the same principles enunciated by the Commission. These



principles flow from the principles enunciated by the Hon'ble Supreme Court vide judgment dated 3.3.2016 in Civil Appeal No. 9193 and Civil Appeal No. 9302 of 2012, wherein the Hon'ble Supreme Court observed as under:

*"11. Xxx 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. Xxx

*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. Xxx"*

69. In the meanwhile, the Commission after due stakeholders' consultation has laid down analogous principle in clause (a) of sub-regulation (12) of Regulation 13 of the Sharing Regulations, 2020 which is extracted as under:

*"(12) In case of a transmission system where COD has been approved in terms of proviso (ii) of Clause (3) of Regulation 4 of the Tariff Regulations, 2014 or Clause (2) of Regulation 5 of the Tariff Regulations, 2019 or where deemed COD has been declared in terms of Transmission Service Agreement under Tariff based Competitive Bidding, the Yearly Transmission Charges for the transmission system shall be:  
(a) paid by the inter-State transmission licensee whose transmission system is delayed till its transmission system achieves COD, or"*

70. Thus, the only fair solution is to fasten the liability of IDC and IEDC due to mismatch on NTL as delay has been caused by NTL. It shall be in line with the observations and decision of APTEL and the principle enunciated by the Commission (which has been duly upheld by APTEL) and the provisions in the Sharing Regulations, 2020.

71. As the line bays of PGCIL at Malerkotla and Amritsar and the associated transmission lines of NTL are inter-linked and dependant on each other, the Petitioner is entitled to recover IDC and IEDC from NTL for the period of mismatch. Accordingly, we modify the paragraph 37 of the order dated 30.11.2017 as follows:



“37. As per the Investment Approval dated 2.6.2015, the instant assets were scheduled to be commissioned within 16 months i.e. by 1.10.2016 against which the instant assets were ready to be put under commercial operation on 1.12.2016. The Commission in its order dated 30.11.2017 decided that the commercial operation of the instant assets would be done matching with the COD of the transmission lines of NTL. The petitioner has submitted that it has made various communications with NTL through letters dated 30.9.2016, 19.10.2016, 27.10.2016 and 22.11.2016 for commissioning of the TBCB line. Since NTL did not commission its transmission lines as per its SCOD but with delay, the COD of the transmission assets of the Petitioner could only be achieved after the COD of transmission lines of NTL. The petitioner has stated that the time over run is on account of the delay of the associated lines by the Respondent, NTL. We have observed that petitioner has submitted CEA certificate dated 26.9.2016 for Asset-I which proves that it was ready before 1.10.2016 but in case of Asset-II, the petitioner obtained CEA Certificate dated 4.11.2016. Therefore, there is no documentary evidence in the petition to support that Asset-II was ready before 4.11.2016. Thus, Asset-I and Asset-II were ready on 1.10.2016 and 5.11.2016 respectively. However, they could not be made operational and put to use from the said dates as the transmission lines of NTL were not ready. Time over-run in respect of the assets are as under:

<b>Assets</b>	<b>Time Over-run</b>	<b>Party Responsible for Time Over-run</b>
Asset-I	01.10.2016 till the date of COD of the asset	NTL
Asset-II(a) & II(b)	01.10.2016 to 04.11.2016	PGCIL
Asset-II(a) & II(b)	05.11.2016 till the date of COD of the asset	NTL

In respect of Asset-II(a) and Asset-II(b), for the period from 01.10.2016 to 04.11.2016, the delay being on account of the Petitioner, IDC and IEDC for the said period shall not be capitalised. In respect of Asset-I and Asset-II(a) & Asset-II(b), for the period 05.11.2016 till the date of COD of the assets of NTL, NTL is responsible for delay in achieving the COD of the transmission assets of the Petitioner. The IDC and IEDC for the said period cannot be capitalised since as per the Hon'ble Supreme Court's judgement dated 3.3.2016 in the case of Barh-Balia, beneficiaries of the Petitioner could not be made liable to pay the tariff before transmission asset is made operational. Further, the IDC and IEDC payable by NTL to PGCIL cannot be passed on and loaded on the LTTCs/beneficiaries as there is no such provision in TSA. It is NTL which remains liable to bear the liability vis-à-vis other transmission licensee (PGCIL) on account of causing delay in achieving the COD by the other transmission license (PGCIL) and the only relief NTL is entitled to is extension of the SCOD and waiving of the liquidated damages due to force majeure. Accordingly, we are of the view that the beneficiaries of neither PGCIL nor NTL can be held liable for the transmission charges for Asset-I and Asset-II as the assets have not been made operational and the beneficiaries have not derived any benefit from them. Further, Asset-I and Asset-II could not be made operational because the transmission lines under the scope of NTL were not ready. From the minutes of the Standing Committee Meeting and Empowered Committee meeting, on the basis of which transmission lines to NTL were awarded, clearly indicate that the associated bays of PGCIL would not serve any purpose without the associated transmission lines of NTL. Under the TSA, NTL is required to achieve the COD as per the timeline specified in the TSA. Failure to achieve the COD in time by NTL has resulted in the transmission assets of PGCIL not being put to use. In the light of the judgements of the Appellate Tribunal in the PATRAN Case and the RAAP Case, we are of the considered view that liability for IDC and IEDC for Asset-I (From 01.10.2016 till the date of COD of the asset) and for Asset-II(a) & II(b) (From 05.11.2016 till the date of COD of the asset) shall be borne by NTL as per table above.”





72. This order disposes of the Petition No.60/TT/2017 in terms of the above discussions and findings.

sd/-  
**(P.K. Singh)**  
Member

sd/-  
**(Arun Goyal)**  
Member

sd/-  
**(P.K. Pujari)**  
Chairperson

