

Ref. EPTA/CERC/2023/266**17th April 2023**

To,

Shri Harpreet Singh Pruthi
Secretary
Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi – 110001

Subject: Comments on the Draft Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) (Second Amendment) Regulations, 2023

Dear Sir,

1. We applaud the endeavors of the Hon'ble Central Electricity Regulatory Commission (**Hon'ble Commission**) to strengthen investor sentiment in favor of the transmission sector. Since the introduction of tariff based competitive bidding (**TBCB**), around 92 transmission projects have been awarded through bidding, and the participation and interest of the private players has seen growing momentum. We are happy that the Hon'ble Commission is heavily invested and focused on minimizing regulatory gaps and ensuring a level playing field for all.
2. The Draft Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) (Second Amendment) Regulations, 2023 (**Draft Regulations**) issued on 17.03.2023 is another example of the proactive approach being adopted by the Hon'ble Commission to address pressing issues impacting the transmission sector. It is a welcome step in the right direction.
3. In response to the public notice dated 17.03.2023 issued by the Hon'ble Commission, we are writing to submit our comments and suggestions on the Draft Regulations. These comments take into account the experience of the past 8 years in contending with the issue of mismatch in commissioning faced by transmission licensees.
4. All terms used herein are as defined in the CERC (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2020 (**Sharing Regulations 2020**), the Draft Regulations and the two Standard Transmission Service Agreements (**TSA**) issued by the Ministry of Power (**MoP**) in 2008 and 2021, respectively.
5. The Explanatory Memorandum dated 24.03.2023 issued by the Hon'ble Commission states that the objective of the Draft Regulations is to primarily address issues of mismatch in commissioning between ISTS and/or InSTS leading to non-commencement of power flow in the ISTS, including under force majeure conditions.

6. We welcome that the Draft Regulations have dispensed with the concept of bilateral liability in certain cases for interconnected transmission licensees and have evolved a mechanism that stipulates the recovery of tariff from Regional Transmission Deviation Account, the charges collected under T-GNA & the Deviation and Ancillary Service Pool Account as indicated in Regulation 13(12)(c) (collectively, the **Fund**).
7. An inherent feature of the experience of the Indian transmission grid shows that almost every project involving multiple licensees or generating companies faces a mismatch in commissioning. Notwithstanding careful planning, the nature of linear infrastructure projects, being built by several developers to interconnect with generating projects and load centers, is such that mismatch cannot be always avoided. This is due to a number of factors. The gestation period of generation projects, particularly renewable energy (**RE**) projects, is usually much less than the gestation period of the associated transmission system. Further, transmission projects face severe Right of Way issues, delays in forest clearances apart from other permits from multifarious statutory authorities. Furthermore, a transmission system is planned for a group of generation projects and delay by one generator out of the group is always possible.
8. In our view, in cases of delay, including under force majeure, transmission charges should be paid from the PoC pool or the Fund until the actual commissioning of the non-defaulting licensee. This burden on the DICs ought to be considered as an in-built cost of creating a reliable national grid. Indeed, the Draft Regulations take the first step towards transferring the costs of mismatch to the Fund so that no one entity is forced to bear the liability in this regard. The liability transferred to the PoC pool/the Fund by doing so will be small. The aggregate annual liability to an extent of Rs. 150-200 crores is adjudicated as attributable to cases of mismatch for the entire ISTS where the delay is due to force majeure events. This comes close to only 0.5% of the Rs. 42,000 crores available with the PoC pool. Similarly, as per the data published by POSOCO on bilateral billing, even if the PoC Pool pays full bilateral transmission charges, the impact will not be more than 2.5% of the sum available with the PoC pool for payment of all transmission charges.
9. Our critical concern is under-recovery and delayed recovery of tariff by a transmission licensee who has completed its scope of work and is ready on time. A licensee who has commissioned its transmission elements in time ought to be compensated immediately—without being penalised by way of any denial or deferred payment. In other words, a mismatch in commissioning due to delays by a downstream or upstream interconnecting transmission licensee cannot be allowed to affect the cash flow of a licensee who has completed its work in a timely fashion. Prompt recovery of transmission tariff from the PoC pool/Fund to the non-defaulting entity with effect from its deemed COD can effectively avoid under-recovery of tariff as well as any cash flow issues.

10. In view of the facts and circumstances stated above, it is suggested that for all cases where there is a delay in commissioning by a transmission licensee, the non-defaulting inter-connecting licensee ought to be permitted to recover 100% transmission charges from the PoC pool/Fund with effect from its deemed COD until the date of its actual commissioning.
11. In line with the aforementioned, our specific comments on the Draft Regulations, each followed by our proposed solutions are stated below:

A. Under-recovery of transmission charges and consequential cash flow issues:

- i. Regulation 13(12) of the Draft Regulations deals with the recovery of YTC with effect from the deemed COD of an ISTS system. As per Regulation 13(12)(a) and Regulation 13(12)(b) of the Draft Regulations, an ISTS licensee will be entitled to receive only 20% of the YTC for its ISTS system for a period of 6 months from its deemed COD or till the commencement of actual power flow, whichever is earlier. This would mean an upfront under-recovery of 80% of the licensee's tariff for a period of up to 6 months. Such licensee is entitled to 100% YTC only from 7th month onwards, in case the actual power flow does not commence before that.
- ii. Regulation 13(12)(d) and Regulation 13(2)(e), which deal with cases of mismatch between two inter-connecting transmission systems, contemplate payment of 20% YTC by the delaying ISTS licensee to the impacted ISTS licensee which has achieved deemed COD. Such liability is levied whether or not the delay is caused by a force majeure or other uncontrollable event. Here, the 20% YTC is to be calculated based on the YTC of either the ISTS system of the delaying entity or the impacted entity, whichever is lower. Thus, the liability of the delaying licensee is capped.
- iii. It may kindly be noted that as per the provisions of the TSA, particularly Clauses 6.2 and 10.5, a TBCB transmission licensee is entitled to receive payment of monthly transmission charges from the date of its commissioning, which could either be actual or deemed. In contrast to the clear contractual entitlement to 100% transmission charges from deemed COD, the draft regulations envisage payment of only 20% of the YTC for up to 6 months. Such a change would amount to overriding existing statutory contracts on the basis of which investments have been made by transmission system developers.
- iv. The proposed regulations will effectively penalise non-defaulting transmission licensees for implementing their projects in time and this will have a direct bearing on investor sentiment and potential investment in the sector. Indeed, such a provision may disincentivise transmission licensees from implementing their projects on time. The feedback from transmission licensees is that even with a recovery of 60% of the YTC for the first 6 months, a transmission licensee is bound to be out of pocket and unable to service its debt obligations. Post commissioning,

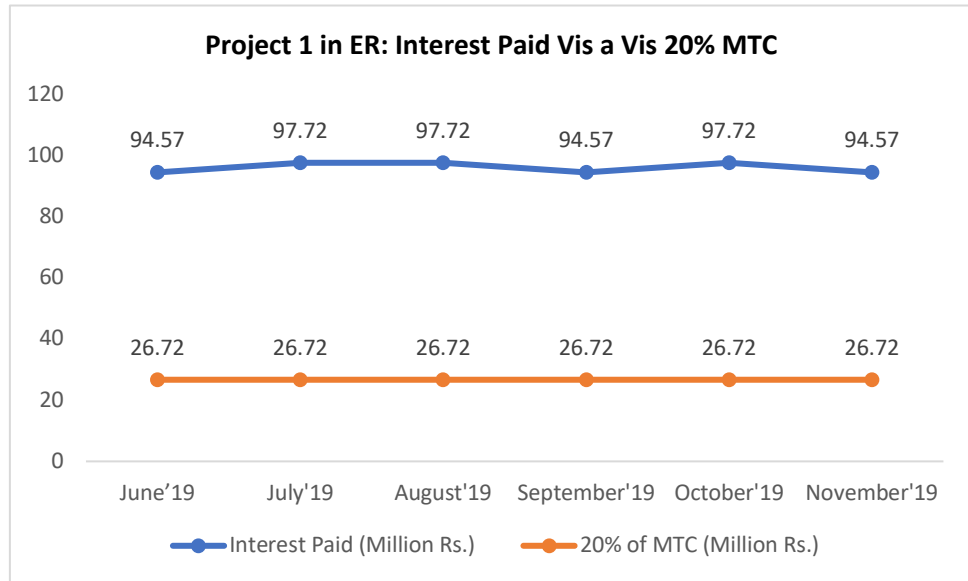
a licensee needs immediate cash flows inter alia for debt service obligations, operation & maintenance of the project and maintaining requisite insurances. It is submitted that any deviation in this regard is bound to cause financial stress immediately after commissioning of the project.

- v. Reference may be made to the following table and graph where the actual interest paid post commissioning of certain projects has been plotted and compared with recovery of 20% YTC (as proposed by the draft regulations) and 70% YTC. It is apparent that the 20% YTC recovery is insufficient to even pay the interest component on debt, let alone other expenditure required to be incurred by a transmission licensee post commissioning.

All Figures are in INR Million

Sample Project	Month of Commissioning	Monthly Interest (INR Million)		MTC (Total)	20% of MTC (INR)	70% of MTC (INR)
Project 1 in ER	June'19	94.57		133.58	26.72	93.51
Project 2 in WR	March'21	104.94		156.49	31.3	109.54
Project 3 in NER	February'21	179.54		328.2	65.64	229.74
Project 4 in NR	March'20	63.62	1435.22	24.162		84.57
Project 5 in WR	January'23	118.59	2094.97	35.19		123.18

Interest Cost Curve vis a vis 20% MTC for first 6 Month:



- vi. As per Para 1.11 of the Explanatory Memorandum to the Draft Regulations, the Hon'ble Commission intends to ensure that the transmission licensee whose transmission system is ready is not denied tariff for a long period of time leading to financial uncertainties. However, by denying payment of full transmission charges to the transmission licensees for the first six months from the deemed COD, the subject regulations are in fact pushing the non-defaulting entity into financial stress. Hence, apart from being inconsistent with the provisions of the TSA, the said prescription is also contrary to the well-placed intention of the Hon'ble Commission.

Proposed Solution

- i. The non-defaulting transmission licensees ought to be paid 100% YTC from the PoC Pool or the Fund with effect from their deemed COD. As submitted above, requiring such payment will have a negligible impact on the PoC pool/the Fund.

B. Mismatch in commissioning due to force majeure events

- i. While setting out the liability of the delaying ISTS licensee to pay part YTC to the impacted ISTS licensee, Regulation 13(12)(d) and Regulation 13(12)(e) of the Draft Regulations expressly state that the delaying ISTS licensee will be liable to pay such charges for any reason including reasons attributable to force majeure events.
- ii. Any imposition of liability to pay transmission charges on the delaying entity where the delay is in fact attributable to events accepted as force majeure events by the competent authority is extremely unfair and penal in nature. The grant of force majeure relief necessarily means that the competent authority has applied itself to the factual matrix of a particular licensee and accepted that uncontrollable events

delayed the timely commissioning of the licensee, and that the licensee cannot be blamed for such delay.

- iii. In cases where a transmission licensee is impacted by force majeure events, and the SCOD has been extended by the competent authority, the Hon'ble Appellate Tribunal for Electricity (APTEL) has unambiguously held in its Judgment dated 14.09.2020 in Appeal No. 17 of 2019 (**NRSS Judgement**) that no bilateral liability can be imposed on such a delaying transmission licensee. This principle was reiterated by the APTEL in its Judgment dated 03.12.2021 in Appeal Nos. 129 of 2020 and 276 of 2021. In fact, in the NRSS Judgement, after holding that no liability can be imposed on the entity impacted by force majeure, the APTEL directed the Hon'ble Commission to frame regulations to accordingly address such situations of mismatch and determine the mechanism for payment of transmission charges.
- iv. As per Para 1.11 of the Explanatory Memorandum, while formulating the Draft Regulations, the Hon'ble Commission's stated intention is to ensure that the penalties imposed on the delaying entities are equitable. However, the prescription under Regulation 13(12)(d) and Regulation 13(12)(e) for the delaying entity to pay transmission charges even when it is impacted by force majeure events cannot be said to be equitable. It is submitted that the subject regulations deviate from one of the primary objectives of the Hon'ble Commission and ought to be reconsidered. The imposition of such liability is also contrary to the directions dated 15.01.2021 issued by the MoP (**MoP Directions**) under Section 107 of the Electricity Act, 2003, as also referred to in the Explanatory Memorandum.
- v. It is pertinent to note that there is no legal embargo on recovery of transmission charges from the beneficiaries before the transmission line is operational. In fact, the Hon'ble Commission has itself proposed recovery from the Fund under Regulations 13(12)(a) and (b) of the Draft Regulations. Such recovery is not in any manner contrary to the Supreme Court judgment in *Power Grid Corporation of India Limited vs. Punjab State Power Corporation Limited*, (2016) 4 SCC 797 (**PGCIL Judgement**) referred to in the Explanatory Memorandum. The PGCIL Judgment was a purely judicial exercise, whereas in framing the Draft Regulations, the Hon'ble Commission is exercising its quasi-legislative and regulatory powers *inter alia* under Section 178 read with Section 79(1)(c) of the Electricity Act, 2003. Therefore, this Hon'ble Commission has wide discretion to frame appropriate regulations that will operate prospectively without being influenced by any judicial precedents.

Proposed Solution

- i. In line with the aforementioned judgements passed by APTEL and the MoP Directions, no transmission licensee impacted by force majeure events ought to be made liable to pay transmission charges to the non-defaulting entity. Instead, the

transmission charges ought to be recovered from the PoC Pool/ the Fund so that a party who has already suffered a force majeure is not penalised further.

- ii. As stated earlier, the non-defaulting entity impacted by mismatch may be paid transmission charges from the PoC pool/the fund, considering the negligible impact that it is bound to have on the pool.
- iii. Payment from the PoC pool immediately from the deemed COD shall also ensure that there is no impact on the cash flow of the licensee who is ready on time.
- iv. Even in cases where there is no force majeure relief, it may be appreciated that a TBCB transmission licensee is bound to pay liquidated damages for a period of up to 6 months if it does not commission its asset in time. The levy of a penalty for mismatch delays would exacerbate the overall financial burden on a transmission licensee that is already stressed. Thus, the primary source of all transmission charges ought to be the PoC pool or the Fund, as the case may be.

C. Treatment of cases of mismatch where a generating company is the delayed entity

- i. The Draft Regulations do not provide for payment of any transmission charges to the non-defaulting transmission licensee from the deemed COD where the generating station is delayed.

Proposed Solution

- i. The Draft Regulations ought to provide for payment of full transmission charges from the PoC Pool/ Fund to the impacted transmission licensee starting from the deemed COD of its element/project notwithstanding the delays by a generating company.
- ii. Where delays by the generating station are not attributable to any uncontrollable event, the generating station ought to be made liable for payment of full transmission charges from the deemed COD of transmission element/project till its actual commissioning. However, such liability should be paid by the PoC Pool at the first instance instead of being paid bilaterally. This will ensure that there is no under-recovery or delayed recovery by the non-defaulting transmission licensee. The PoC Pool can eventually be compensated by the concerned generating company. The circumstance to be avoided is where a transmission licensee has completed its scope of work in time and is still not compensated in a timely fashion. It may also be noted that in cases where transmission system strengthening schemes are implemented for the benefit of multiple generators and one of the generators is delayed, such delay does not stop the transmission licensee from recovering transmission charges from its deemed COD. In the present case as well, the transmission licensee should not wait to recover the transmission charges legitimately due to it from its deemed COD.

12. It is humbly requested that the Hon'ble Commission may kindly consider the suggestions stated above while finalising the amendment regulations in the interest of unhindered growth of the transmission sector.

Thanking you,

Yours sincerely,



Indu Shekhar Chaturvedi, IAS (Retd.)
Director General

Copy to:

Secretary, Ministry of Power, Government of India