

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 65 of 2011

Dated: 12th January, 2012

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. V J Talwar, Technical Member,

In The Matter Of

Power Grid Corporation of India Ltd
Saudamini, Plot No.2,
Sector 29, Gurgaon-122 001

... Appellant(s)

Versus

- 1. Central Electricity Regulatory Commission**
3rd and 4th Floor, Chanderlok Building
36, Janpath, New Delhi-110001
- 2. Rajasthan Rajya Vidyut Prasaran Nigam Ltd**
Vidyut Bhawan, Vidyut Marg,
Jaipur-302 005
- 3. Ajmer Vidyut Vitran Nigam Ltd**
Old Power House, Hathi Bhata,
Jaipur Road,
Ajmer-305 001, Rajasthan
- 4. Jaipur Vidyut Vitran Nigam Ltd**
Vidyut Bhawan, Janpath,
Jaipur-302 005
- 5. Jodhpur Vidyut Vitran Nigam Ltd**
New Power House, Industrial Area,
Jodhpur-342 003

- 6. Himachal Pradesh State Electricity Board,
Vidyut Bhawan,
Kumar House Complex Building II,
Shimla-171 004**
- 7. Punjab State Electricity Board
The Mall, Patiala-147 001**
- 8. Haryana Power Purchase Centre,
Shakti Bhawan, Sector 6,
Panchkula (Haryana)**
- 9. Power Development Department
Government of Jammu & Kashmir,
Mini Secretariat,
Jammu -180 006**
- 10. Uttar Pradesh Power Corporation Ltd.,
Shakti Bhawan,
14, Ashoka Marg,
Lucknow-226 001**
- 11. Delhi Transco Ltd
Shakti Sadan, Kotla Road,
New Delhi-110002**
- 12. BSES Yamuna Power Ltd
Shakti Kiran Building,
Karkardooma,
Delhi-110 092**
- 13. BSES Rajdhani Power Ltd
BSES Bhawan, Nehru Place,
New Delhi-110019**
- 14. North Delhi Power Ltd
Power Trading & Load Dispatch Group
Cennet Building, Pitampura,
New Delhi-110034**

15. **Chandigarh Administration**
Sector 9, Chandigarh-160 022

16. **Uttarakhand Power Corporation Ltd**
Urja Bhawan, Kanwali Road,
Dehradun-248 001

17. **North Central Railway**
Regional Headquarters,
Civil Lines,
Allahabad-211 001

18. **New Delhi Municipal Council,**
Palika Kendra, Sansad Marg,
New Delhi-110 002

....Respondent(s)

Counsel for Appellant(s): Mr. M.G. Ramachandran
Ms. Swapna Seshadri
Mr. Anand K. Ganesan
Ms. Ranjitha
Ms Sneha Venkataramani

Counsel for Respondent(s): Mr. Pradeep Misra for R-10
Mr. Suraj Singh
Mr. Daleep Kr. Dhayani
Mr. Manoj Kumar Sharma

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. Power Grid Corporation of India, the Appellant has filed this Appeal as against the order dated 15.2.2011 passed by the Central Electricity Regulatory Commission determining the transmission tariff for transmission system associated with Sewa-II Hydro Electric Project viz., SEWA-II- Hiranagar and SEWA-II - Maharapur 132 kV transmission lines.

2. The short facts of the case are as follows:
- (a) The Appellant namely Power Grid Corporation of India Limited is a Government Company. It discharges the functions of the Central Transmission Utility under Section 38 of the Electricity Act 2003. It also performs the function of an inter-state transmission licensee under Section 39 of the Act. The Central Electricity Regulatory Commission (Central Commission) is the 1st Respondent. Respondent No.2 to 16 and Respondent No. 18 are transmission and distribution licensees for various beneficiaries States of Northern Region. Respondent No.17 is Railways also a beneficiary of transmission system set up by the Appellant.
 - (b) The Appellant entered into an agreement with the National Hydro-Electric Power Corporation (Hydro Power Corporation) dated 22.7.2005 containing the terms and conditions mutually agreed to between the Appellant and the Hydro Power Corporation. This agreement provided for matching of the commissioning schedule of the Generating Station to be setup by the Hydro power Corporation and the Associated Transmission System being setup by the Appellant. It also provides for indemnification for the defaulting party in case of delay in the commissioning. The zero date for operation of indemnification clause was agreed to as 1.6.2008.

- (c) As per the Investment Approval, the transmission system was to be commissioned within 27 months of the date of the Letter of Award for Tower Package. The date of award of Tower Package was 7.2.2006. Accordingly, the Commercial Operation date for the transmission system was May, 2008.
- (d) However, neither the Generation Project of the Hydro Electric Power Corporation nor the Associated Transmission System of the Appellant were ready for commercial operation as on the schedule time of May, 2008. The Associated Transmission System of the Appellant could not be commissioned in May, 2008 for various reasons which are said to be beyond the control of the Appellant and was ready for commissioning on 31.3.2009 but could not put on commercial operation due to non-commissioning of the Generating Station of Hydro Power Corporation. Ultimately, on 5.8.2009, on the request from the Power Development Department, Government of Jammu & Kashmir, the lines were commissioned. Thereafter, the above lines were declared under commercial operation on 1.9.2009.
- (e) On 9.3.2010, the Appellant filed a petition before the Central Commission for approval of the transmission tariff for the two concerned lines.
- (f) On 11.11.2010, the Uttar Pradesh Power Corporation Ltd (UPPCL) (R-10) filed an objection to the Petition filed by

the Appellant. On the basis of the objections various details were sought for from the Appellant by the Central Commission. The same were furnished and clarified on 22.12.2010. In the meantime on 29.6.2010, the first unit of the Generating Station by the Hydro Power Corporation was commissioned. Thereupon, the complete transmission system in respect of both the lines were commissioned immediately on 1.7.2010.

- (g) After hearing both the parties, the Central Commission (R-1) passed the impugned order dated 15.2.2011 determining the transmission tariff. In the said order, the Central Commission allowed the Interest During Construction and Incidental Expenditure During Construction from the period from May, 2008 to 31.3.2009 holding that the delay in the commissioning of the transmission system during the said period was justified. However, the Central Commission rejected the Appellant's claim for Interest During Construction and Incidental Expenditure During Construction totalling Rs.189.51 lakhs for the period 1.4.2009 to 1.9.2009 on the ground that the Appellant had not built in the sufficient safeguard as referred to in the indemnification agreement to take care of the delay in the commissioning of the Generating Station.
- (h) Aggrieved over by the said rejection of the Interest During Construction and Incidental Expenditure During

Construction for the said period amounting to Rs.189.51 lakhs, the Appellant has filed this Appeal.

3. The Learned Counsel for the Appellant has raised the following grounds assailing the impugned order:
 - (a) The Agreement entered into between both the parties provides for indemnification in the event of delay by either party. However, as per the agreement, the indemnification will be applicable only for the delay for a period of 06 months from the zero date for commissioning of the generating system and the Associated Transmission System. Due to the events beyond their control, both the Appellant and the Hydro Power Corporation were unable to commission the respective transmission system and generation station within the said period of six months and as a result the indemnity clause had elapsed. Since the delay cannot be attributed to the fault of the Appellant, the delay during the said 06 months period was allowed by the Central Commission on the ground of existence of sufficient justification. However, the Central Commission wrongly disallowed the delay for the subsequent period namely from 1.4.2009 to 1.9.2009 nearly for 05 months on the ground that the Appellant has not built any sufficient safeguards in the agreement to cover the delay caused by the Hydro Power Corporation.
 - (b) The Central Commission has failed to appreciate that in any commercial agreement, no party will agree to take up

unlimited liability for an indefinite period of time. It was not possible for the Appellant to have insisted and made the Hydro Power Corporation to agree to an unlimited period of indemnification. There is no provision either in the Act or under the Regulation whereby the transmission utilities are mandated to incorporate full and absolute indemnity clauses in respect of the generating companies. In the absence of any such statutory provisions it is open to the parties to mutually negotiate and agree to the extent of indemnification possible and mutually agreeable and not beyond thereof.

- (c) The Central Commission has disallowed the claim of the Appellant not on account of any default in carrying its work but on the ground that the commercial term of indemnity contained agreement with Hydro Power Corporation did not cover the period of delay. This reasoning is wrong. Hence the impugned order is liable to be set aside.

4. Per Contra, the Learned Counsel appearing for the UPPCL (R-10) submits the following:

- (a) The Agreement dated 22.7.2005 between the Appellant and the Hydro Power Corporation is to secure the timely completion of lines as well as the Generating Station so that the entire transmission system becomes operative on the same date. As per the agreement, the zero date was fixed as on 1.6.2008. It further provided that the above schedule for the generating units and the Associated

Transmission System shall be regularly reviewed in the quarterly meeting between the Appellant and the Power Corporation. In view of the above, the contention of the Appellant that indemnification clause had elapsed is not correct.

- (b) Even according to the Appellant, the transmission lines were constructed and became ready on 1.4.2009. Hence, the question of payment of Interest During Construction for the period does not arise. Though the Appellant can claim the amount from the Hydro Power Corporation that this loss was caused to it due to delay in commissioning of the Generating Station by the Hydro Power Corporation, it cannot claim that it shall be added in the capital cost so as to enhance the transmission tariff payable by the beneficiaries. Therefore, the impugned order is perfectly justified.

5. In the light of the above rival contentions, the following question may arise for consideration:

“Whether the Central Commission is right in rejecting the claim of the Appellant towards the Interest During Construction and Incidental Expenditure During Construction for the period from 1.4.2009 to 1.9.2009 ?

6. According to the Appellant, the indemnity clause contained in the indemnification agreement provides for the indemnification to be applicable from the zero date for a period of 06 months

and as such, it would become elapsed after a period of 06 months; since the transmission project is delayed for more than 06 months from the zero date, no indemnity can be claimed by the Appellant under the indemnification clause and that therefore, the Central Commission having accepted that the delay was due to circumstances beyond the control of the Appellant, the Central Commission ought to have allowed for the subsequent period as well.

7. The Learned Counsel for the Appellant would also contend that since the Central Commission has accepted the entire period till 1.3.2010 to be on account of Force Majeure affecting the Hydro Power Corporation, there cannot be any question of indemnity applicable and therefore, the Central Commission ought to have allowed indemnity in respect of the period being 1.4.2009 to 1.9.2009.
8. We have carefully considered the submissions made by both the parties.
9. It is the case of the Appellant that though the transmission lines were ready on 1.4.2009, it could not be commercially operative as the Generating Station was not made ready by the Hydro Power Corporation. However, the Central Commission has taken a view that in case the Appellant has not included its commercial interest in the Agreement entered into with the Hydro Power Corporation, the said amount cannot be included in the capital cost.

10. According to the Central Commission, the delay in the commissioning of the transmission system from May, 2008 to 31.3.2009 was justified and as such the Appellant would be entitled to the benefit for the said period but the Appellant cannot claim for the further period i.e. from 1.4.2009 to 31.8.2009 since the Appellant had not built any sufficient safeguards as referred to in the agreement to take care of the delay in commissioning of the Generating Station. The relevant portion of the impugned order is as under:

“18. We have examined the submission of the Petitioner and objection of the Respondents with regard to time over run. On perusal of documents submitted by the Petitioner, it is noted that the delay of 11 months from May, 2008 to March, 2009 was on account of agitation, ROW problem and forest clearance which appear to be justified for the detailed reasons given by the Petitioner. Moreover, it is noticed that the Petitioner in its letter dated 6.8.2009 informed the Northern Regional Power Committee and the beneficiaries that the transmission lines were test checked on 31.3.2009 but could not be charged due to delay in completion of SEWA-II Hydro Electric Project. It was also mentioned by the Petitioner that on request of Jammu and Kashmir, the transmission lines were charged on 5.8.2009 and was declared under commercial operation w.e.f. 1.9.2009. Therefore, we find that the delay of five months is not justified as the Petitioner has not built in the sufficient safeguard in the implementation Agreement to take care of the delay in the commissioning of the Generating Station. Accordingly, IEDC and IDC have not been allowed from 1.4.2009 till 31.8.2009 which amount to Rs.177.32 lakh, Rs.11.78 lakh and Rs.0.41 lakh in respect of transmission line, sub-station and PLCC respectively”.

11. As mentioned above, it is the case of the Appellant that due to the event beyond the control of the Appellant under the Force

Majeure circumstances, the delay cannot be attributed to any fault of the Appellant as the delay for the earlier period was allowed by the Central Commission on the ground of the existence of the sufficient justification provided by the Appellant for the delay and the Commission ought to have rejected for the subsequent period.

12. It is noticed that the agreement dated 22.7.2005 between the Appellant and the Hydro Power Corporation is to secure coordinated completion of the transmission lines as well as the Generating Stations so that the entire system becomes operative simultaneously.
13. As per clause 1(a) of the Agreement, the zero date from which the indemnification agreement shall be applicable was to be worked out for each generating units and the Associated Transmission System. This has to be mutually agreed in the quarterly meeting between the parities within 03 months of the investment approval which will form an integral part of the Agreement. The said date was agreed upon as 1.6.2008. However, as provided in the above schedule, the period shall be regularly reviewed in the Quarterly Meeting between the parties. Therefore, the contention of the Appellant that indemnity clause got elapsed has no basis.
14. That apart, clause 2 (a) of the Agreement which relates to the indemnification by the defaulting party to the either party provides that the same will be calculated only up to a period of 06 months from the zero date. This clause has to be interpreted

along with the clause 1 (a) under which the zero date can be altered. If the contention of the Appellant that the indemnity period of six months from zero date had elapsed as both projects got delayed is accepted, then the very purpose of indemnifying agreement would be lost. Due to geological uncertainties, the commissioning of hydro-electric projects gets delayed. Therefore the Appellant should have been cautious and should have taken care to specify zero date from the date either of the project was ready for commissioning instead of firm date.

15. The perusal of the entire Agreement would show that the object of the Agreement is that the Appellant as well as the Hydro Power Corporation will arrange its works so that the lines as well as the Generating Stations are completed simultaneously and within the time frame. The Agreement has also provided that in case of any default by any party, it will compensate to either party in respect of Interest During Construction for a period of 06 months from the zero date which could be reviewed by the parties periodically as mentioned earlier. In view of this clause providing for the periodical review, the contention of the Appellant that indemnification Clause had lapsed and hence they are entitled to add amount of Rs.189.51 lakhs in the capital cost is misplaced.
16. The first unit of the Sewa-II generating Station of the Hydro Power Corporation was commissioned on 29.6.2010. So from that period the benefit of the transmission system became

available to the Appellants. However, the Appellant has filed the tariff petition even prior to the said commissioning date and the Central Commission has allowed the tariff to the Appellant for its transmission system by taking the date of commercial operation as 1.9.2009. Therefore, the Appellant cannot claim addition of Rs.189.51 lakhs in the capital cost especially when the Power Corporation is liable to pay the transmission tariff to the Appellant without any benefit as the power generated from SEWA-II Generating Station of Hydro Power Corporation was not available.

17. The Appellant had relied upon the order dated 6.9.2010 passed by the Central Commission in the Petition No.57 of 2010 filed by the Power Corporation for determination of tariff for SEWA Hydro Electric Project Stage-II from 01.03.2010 to 31.03.2014. The impugned order in this case has been passed on 15.2.2011, but the Appellant has relied upon the order passed on 6.9.2010, in the Petition which has been filed by the Hydro Power Corporation for determination of tariff for its project and as such this has no relevance for the purpose of the present case. In that case, the Central Commission allowed escalation in the capital cost of the Hydro Project upto 1.3.2010 which has nothing to do with the indemnity clause in the agreement of the Appellant and the Hydro Power Corporation in question.
18. As per the preamble of the Act and the Section 61 (d) of the Act, the Commission has to safeguard the consumer's interest so that all the tariff, transmission tariff as well as the retail tariff

for distribution of electricity has to be so determined that the electricity is supplied to the consumers on the cheapest rates. If the claim of Rs.189.51 lakhs made by the Appellant is added in the capital cost of the transmission system on the date of the commercial operation i.e. on 1.9.2009, the beneficiary utilities have to pay the annual charges on the said amount for all the times to come. This additional charges would be passed through in ARR of beneficiaries approved by the Appropriate Commission which in turn add to the burden of the consumers. As such there is no merit in the claim made by the Appellant.

19. Summary of Our Findings

(a) As per Clause 2 (a) of the Agreement, the indemnification by the defaulting party will be calculated only upto a period of 06 months from the zero date. This Clause has to be interpreted along with Clause 1 (a) under which the zero date can be altered. The said date was agreed upon as 1.6.2008. However, the period shall be regularly reviewed in the Quarterly Meeting between the parties. Therefore, the contention of the Appellant that indemnification Clause got elapsed has no basis.

(b) As per preamble and Section 61 (d) of the Act, the Commission has to safeguard the consumer's interest so that all the tariff, transmission tariff as well as the retail tariff for distribution of electricity has to be so determined in such a way that the electricity is

supplied to the consumers on the cheapest rates. If the claim of Rs.189.51 Lakhs made by the Appellant is added in the Capital Cost, Additional burden will have to be borne by the consumers. Therefore, the Central Commission is right in rejecting the said claim of the Appellant towards the Interest During Construction and Incidental Expenditure During Construction for the period 1.4.2009 to 1.9.2009.

20. In view of our above findings, we conclude that there is no merit in this Appeal as we do not find any infirmity in the impugned order. Consequently, the Appeal is liable to be dismissed.
21. Accordingly, the Appeal is dismissed as being devoid of merits. However, there is no order as to cost.

**(V J Talwar)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

Dated: 12th January, 2012

REPORTABLE/NON-REPORTABLE