

**Appellate Tribunal for Electricity, New Delhi  
(Appellate Jurisdiction)**

**Appeal No. 198 of 2015**

**and**

**Appeal No. 06 of 2016**

**Dated: 18<sup>th</sup> January, 2018**

**Present: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER  
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

**Appeal No. 198 of 2015**

**In the Matter of:**

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

**...Appellant**

**Versus**

1. Central Electricity Regulatory Commission  
3<sup>rd</sup> and 4<sup>th</sup> Floor, Chanderlok Building  
36, Janpath, New Delhi – 110 001
2. Rajasthan Rajya Vidyut Prasaran Nigam Limited  
Vidyut Bhawan, Vidyut Marg  
Jaipur – 302 005
3. Ajmer Vidyut Vitran Nigam Limited  
400 kV GSS Building (Ground Floor), Ajmer Road  
Heerapura, Jaipur-302024
4. Jaipur Vidyut Vitran Nigam Limited  
400 kV GSS (Ground Floor), Ajmer Road  
Heerapura Jaipur - 302024
5. Jodhpur Vidyut Vitran Nigam Limited  
400 kV GSS (Ground Floor), Ajmer Road  
Heerapura Jaipur – 302024

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) – 134 109
9. Power Development Department  
Govt. Of Jammu and Kashmir  
Mini Secretariat, Jammu – 180001
10. Uttar Pradesh Power Corporation Limited  
(Formerly Uttar Pradesh State Electricity Board)  
Shakti Bhawan, 14, Ashok Marg  
Lucknow – 226 001
11. Delhi Transco Limited  
Shakti Sadan, Kotla Road  
New Delhi – 110 002
12. BSES Yamuna Power Limited  
Shakti Kiran Building, Karkardooma  
Delhi – 110 092
13. BSES Rajdhani Power Limited  
BSES Bhawan  
Nehru Place  
New Delhi – 110 019
14. North Delhi Power Limited  
Power Trading & Load Dispatch Group  
Cennet Building, Adjacent to 66/11kV  
Pitampura-3  
Grid Building, Near PP Jewellers – 110 034
15. Chandigarh Administration  
Sector 9, Chandigarh – 160009
16. Uttrakhand Power Corporation Limited  
Urja Bhawan, Kanwali Road  
Dehradun – 248 001

17. North Central Railway  
Allahabad – 211011
18. New Delhi Municipal Council  
Palika Kendra, Sansad Marg  
New Delhi – 110 002
19. Sterlite Industries (I) Limited  
SIPCOT Industrial Complex  
Madurai Bypass Road  
TV Puram P.O.  
Tuticorin-628 002, Tamil Nadu

**... Respondent(s)**

Counsel for the Appellant(s) :	Ms. Swapna Seshadri Mr. Anand K. Ganesan Ms. Neha Garg Ms. Rhea Luthra Mr. Sandeep Rajpurohit Mr. Ashwin Ramanathan
Counsel for the Respondent(s) :	Mr. M.S. Ramalingam Mr. Sethu Ramalingam for R-1  Mr. Bipin Gupta Mr. Paramhans Mr. Sunil Bansal for R-3 to R-5  Mr. Vishnu S. Pillai Mr. S.K. chaturvedi Mr. Malay Dwivedi for R-11  Mr. R.B. Sharma for R-13  Mr. Sriharsha Peechara Ms. Vidhi Jain for R-18

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Civil Lines  
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18. New Delhi Municipal Council  
Palika Kendra, Sansad Marg  
New Delhi – 110 002
19. Sterlite Industries (I) Limited  
SIPCOT Industrial Complex  
Madurai Bypass Road  
TV Puram P.O.  
Tuticorin-628 002, Tamil Nadu

**... Respondent(s)**

Counsel for the Appellant(s) : Mr. Sitesh Mukherjee  
Mr. Deep Rao  
Ms. Pragya Vatts  
Mr. Gautam Chawla  
Ms. Akansha Tyagi

Counsel for the Respondent(s) :

Mr. M.S. Ramalingam  
Mr. Sethu Ramalingam for R-1

Mr. Pradeep Misra  
Mr. Manoj Kr. Sharma  
Mr. Shashank Pandit for R-3 to R-5

Mr. Vishnu S. Pillai  
Mr. S.K. Chaturvedi for R-11

Mr. R.B. Sharma for R-13

Mr. Sriharsha Peechara  
Ms. Vidhi Jain for R-18

## **J U D G M E N T**

**PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER**

### **Appeal No. 198 of 2015**

1. The present Appeal has been filed under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) against the Order dated 22.06.2015 passed by the Central Electricity Regulatory Commission (hereinafter called the ‘**Central Commission**’) in Petition No. 42/TT/2013 whereby the Central Commission has refused to determine the transmission tariff of 2 nos. 400 kV line bays along with 2 nos. 80 MVAR switchable line reactors at 400 kV Siliguri Sub-station (DOCO 01.04.2013) and 2 nos. 400 kV line bays at Bongaigaon Sub-station (DOCO: 1.6.2013) under Transmission Schemes for enabling import of NER/ER surplus power by NR in Eastern Region for tariff period 2009-14 under the provisions of the Central Electricity Regulatory Commission (Terms and Commissions of Tariff) Regulations, 2009. CERC has allowed the tariff under the control period of 2014-19 considering the commercial operation of these assets after commissioning of transmission line in November, 2014.

## Appeal No. 06 of 2016

2. This appeal has been filed under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) against the judgment and order dated 30.06.2015 passed by the Central Electricity Regulatory Commission (hereinafter called the ‘**Central Commission**’) in Petition No. 99/TT/2013. The main contention of Appellant is that they have declared that the actual date of commercial operation of Asset-1 (a) of 400 kV Line Bays at Biharshariff S/s for the 400 kV D/C Purnea-Biharshariff T/L is 01.04.2013, for Asset-1(b) of 1x80 MVAR Switchable Line Reactor at 400 kV Biharshariff S/s is 01.05.2013 and for Asset-2 of 400 kV Line Bays at Purnea S/s for the 400 kV D/C Purnea-Biharshariff T/L is 01.04.2013. However, CERC has held that as Purnea-Biharshariff Transmission Line was commissioned on 13.09.2013, hence date of commercial operation of the above transmission assets could be only 13.09.2013 and the Appellant will be entitled for tariff of these assets w.e.f. 01.10.2013.
  
3. The Appellant – Power Grid Corporation of India Limited is a Government Company within the meaning of the Companies Act, 1956 and is an inter-state transmission licensee. The Appellant implements transmission projects at the inter-state level. The Appellant has also been designated by the Government of India to act as the Central Transmission Utility.
  
4. The Respondent No. 1 is the Central Electricity Regulatory Commission, which is the Regulatory and regulates inter-state

transmission under Section 79 (1) (c) and (d) of the Electricity Act, 2003.

5. The Respondents No. 2 to 19 are the beneficiaries of the inter-state transmission system set up and being operated by the Appellant. The Respondents No. 2 to 19 pay for the transmission tariff of the ISTS set up by the Appellant.

6. **Facts of the Case**

a) The Appellant herein, Power Grid Corporation of India Ltd. is a Government Company within the meaning of Companies Act, 1956 and is undertaking Inter State Transmission of Electricity in India. The Appellant also discharges the functions of the Central Transmission Utility as provided under the Electricity Act, 2003.

b) The Appellant Discharges the above functions under the regulatory control of the Central Commission. The Tariff for the services rendered by the Appellant is also determined by the Central Commission.

c) The Central Commission has notified the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (hereinafter referred to as the “**Tariff Regulations, 2009**”). The Tariff Regulations, 2009 have come into force on 01.04.2009 and shall remain in force for a period of 5 years i.e. till 31.03.2014.

d) The transmission system(s) being executed in part by the Appellant is the Transmission Schemes for enabling import of NER/ER surplus power by NR in Eastern Region. The scope of the work to be executed by the Appellant consists of the following :

**Siliguri-Bongaigaon Transmission System (covered under Appeal No. 198 of 2015)**

i) Asset-1: 2 nos. 400 kV line bays along with 2 nos. 80 MVAR switchable line reactors at 400 kV Siliguri Sub-station; and

ii) Asset-2: 2 nos. 400 kV line bays at Bongaigaon Sub-station.



**Purnea-Biharshariff Transmission System (covered under Appeal No. 06 of 2016)**

- iii) At Biharshariff (PG) 400 kV Sub-station 2 nos. 400 kV line bays- Asset 1(a), each with 80 MVAR switchable line reactors – Asset 1(b) (required for Purnea-Biharshariff 400 kV Quad D/C line.
- iv) At Purnea (PG) 400 kV Sub-station 2 nos. 400 kV line bays, without reactors ( required for Purnea-Biharshariff 400 kV Quad D/C line – Asset-2.
- e) The investment approval for the above works was obtained by the Appellant from its Board of Directors vide Memorandum No. C/CP/Import of NER/ER surplus power by NR dated 19.09.2011 at an estimated cost of Rs. 8042 lakh, including IDC of Rs. 317 lakh (based on 2<sup>nd</sup> Quarter, 2011 price level).
- f) The transmission project under the scope of the Appellant was scheduled to be commissioned within 18 months from the date of the approval and accordingly the scheduled commissioning of the project works out to 18.03.2013. As against the above in Siliguri-Bongaigaon transmission system, Asset 1 was commissioned on 01.04.2013 and Asset 2 on 01.06.2013 with some marginal delays. Similarly, in Purnea-Biharshariff transmission system, asset 1(a), 1(b) & 2 got completed on 01.04.2013, 01.05.2013 & 01.04.2013, respectively.
- g) The Appellant while completed the above transmission assets, there was a delay in the commissioning of the associated 400 kV D/C transmission lines, which was being executed by M/s Sterlite Industries Limited under Tariff-based competitive bidding.
- h) The Tariff Regulations, 2009 in Regulation 3(12) (c), Second proviso provides as under:

*3. (12) “Date of commercial operation” or “COD” means (c) in relation to the transmission system, the date declared by the transmission licensee from 0000 hour of which an element of the 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 commercial operation prior to the element coming into regular service.”***

- i) In terms of the above, the Appellant filed Petition No. 42/TT/2013 on 17.01.2013 and Petition No. 99/TT/2013 on 22.04.2013 before the Central Commission praying for determination of tariff of Assets 1 & 2 (Siliguri-Bongaigaon) and Assets 1(a), 1(b) & 2 (Purnea-Biharshariff) and also apply the second proviso to Regulation 3 (12) (c) and declare the Assets as commercially operational.
- j) Two of the Respondents, Punjab State Power Corporation Limited (Respondent No. 7) and Uttar Pradesh Power Corporation Limited (Respondent No. 10) filed replies before the Central Commission contending that as per this Tribunal's Judgment dated 02.07.2012 in Appeal No. 123 of 2011, the commercial operation of the assets cannot be declared till the time the Bongaigaon-Siliguri and Purnea-Biharshariff transmission line is ready.
- k) The Central Commission has passed the Orders dated 22.06.2015 & 30.06.2015 accepting the above submission and applying the Judgment dated 02.07.2012 of this Tribunal. The Central Commission, has inter-alia held as under:

***“12. 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 Bongaigaon-Siliguri Transmission Line, which is stated to have been commissioned in November, 2014. Accordingly, the date of commercial operation of the***

***transmission assets could be only during the 2014-19 tariff period. However, the petitioner has claimed tariff for the transmission assets as per the 2009 Tariff Regulations. As such, the petitioner is directed to file a fresh petition claiming tariff for the transmission assets as per the 2014 Tariff Regulations within 30 days of issue of this order.”***

l) Aggrieved with these orders of the Commission, the Appellant has filed these petitions before this Tribunal.

**7. The following are the submissions made by the Learned Counsel of Appellant, Power Grid Corporation of India Limited, in Appeal No. 198 of 2015:**

a) The Central Commission has erroneously applied the Judgment dated 02.07.2012 of this Hon'ble Tribunal (which is in a different context) ('Barh-Balia Judgment') while dismissing the tariff petition of the Appellant. The Barh-Balia Judgment has been confirmed by the Hon'ble Supreme Court vide the Order dated 03.03.2016 reported as (2016) 4 SCC 797.

b) In the Barh Balia Judgment, this Hon'ble Tribunal dealt with the commercial operation of a transmission line parts of which were being constructed by National Thermal Power Corporation (NTPC), a generating company. However, in the present case, Asset 1 are 2 X 400kV bays and 2 nos. 80 MVAR switchable line reactors at Siliguri and Asset-2 are 02 nos. 400kV bays at Bongaigaon. In this case, the bays and reactors were connected to the existing sub-station and were ready for operation. At Siliguri S/S, line bays along with switchable line reactors had been commissioned with effect from (w.e.f.) 01.04.2013 & 01.06.2013 which have been useful in maintaining desired voltage level and improving Voltage Profile at Siliguri S/S. There was no further work left to be completed under the scope of the Appellant.

c) The Barh Balia Judgment has to be read in the context of the issue framed by the Hon'ble Tribunal in the said appeal, namely –

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

- d) The Hon’ble Tribunal gave three points / markers for the applicability of the proviso to Regulation 3 (12) (c) of the Tariff Regulations, 2009. The same are as under-

*“10. A transmission system may comprise of one or more transmission lines and sub-station, inter-connecting transformer, etc. According to above definition an element of the transmission system which includes a transmission line, could be declared as attained COD if the following conditions are met.*

- i) It has been charged successfully,*
- ii) its trial operation has been successfully carried out, and*
- iii) it is in regular service.*

*11. Thus, Barh-Balia line in order to achieve COD should have been charged successfully, its trial operation should have been completed and it should have been in regular service. While the line was idle charged only from Balia end on 30.06.2010, its charging from Barh end, its trial operation and regular service was not possible as the switchgear at Barh end of the line was not ready. Admittedly, the switchgear, protection system and metering arrangement of the transmission line at Barh end were not ready on 01.07.2010 and reported to have been completed only in August, 2011. Thus, all the conditions laid down in the Tariff Regulations for attaining COD had not been complied with.*

.....  
*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.”***

- e) The above tests have now been confirmed by the Hon'ble Supreme Court. However, while the present petition for the subject transmission assets was pending before the Central Commission, the Barh Balia Judgment had been stayed by the Hon'ble Supreme Court and the Appellant was still taking the position that as per Regulation 3 (12) (c) second proviso, the DOCO can be declared.
- f) The three aspects laid down by this Hon'ble Tribunal in the Barh Balia Judgment for declaring an asset under commercial operation for claiming the benefit of Regulation 3 (12) (c) second proviso have all been completed in the present case.
- g) With regard to the first condition of the line being successfully charged, in the present case, the Appellant is executing 400kV bays and line reactors in the existing substations, associated with the 400kV Siliguri-Bongaigaon line. The bays and reactors are declared under commercial operation after successful testing & charging.
- h) With regard to the second condition of trial operation, testing etc., the Appellant has placed the Rejoinder, the testing and pre commissioning report of the equipment jointly signed by the representative of the Appellant as well as the Executing Agency. These include the pre-commissioning and commissioning tests of the assets and the daily log book showing the charging of subject transmission assets covered in

the present case. The Reports are as per the format which was approved on 01.04.2011 but have been signed on 30.03.2013. Also, the installation of circuit breakers as on 10.03.2013 placed the Rejoinder and the various tests have been conducted in March to May of 2013.

- i) With regard to the third condition of the assets being in regular service, the Appellant has filed of the Rejoinder the relevant extracts from the 25th Technical Coordination Committee (TCC) and 25th Eastern Regional Power Committee (ERPC) Minutes of Meeting held on 20.09.013 and 21.09.2013 wherein it has clearly been recorded that the 2 nos. 400kV bays along with 80 MVAR switchable line reactor at Siliguri Substation have been declared under commercial operation
- j) The bays along with the reactors at Siliguri substation are being used and the Assets have been taken into account for calculation of system availability which has also been certified by ERPC.
- k) In the present case, it can be seen that the Appellant has fulfilled all the conditions specified by this Hon'ble Tribunal in the Barh-Balia Judgment in relation to the applicability of Regulation 3(12) (c) of Tariff Regulations, 2009. This is not the case that the Appellant has simply idle charged a transmission line from one end like Barh-Balia. The matter can be remanded back to the Central Commission for consideration of these documents.
- l) It is submitted that the bays and reactors have to be charged simultaneously since the reactor is being used as a bus reactor at Siliguri to control the problem of high voltage at the Siliguri substation (even in the absence of the commissioning of the line) as per the directive issued by POSOCO dated 20.11.2012. Vide the said directive, POSOCO directed the Appellant to use all the line reactors as bus reactor to control the over voltage problem in the Grid. This is not an

internal correspondence as argued by the Respondents and are binding on the Appellant in terms of Section 29 of the Electricity Act, 2003 ('Act').

- m) The proviso to Regulation 3(12)(c) of Tariff Regulations, 2009 is fully complied with and the assets are being used. Therefore, the Appellant is entitled to receive tariff with effect from respective DOCOs.

8. **Response of the Appellant to the aspects raised by the Respondents:**

**RE: The Appellant has failed to discharge its functions of coordination as per Section 38 of the Act.**

- a) The Respondents have stated that the Appellant is also a Central Transmission Utility (CTU) and as per Section 38 of the Act, and the Appellant has failed to discharge the duties of coordination between itself and Sterlite Limited which was building a line under Tariff Based Competitive Bidding (TBCB).
- b) It is submitted that the Appellant is a transmission licensee as per Section 14 & 40 of the Act. Under Section 38 of the Act, the Central Government has the option of notifying any Government Company as a CTU. As at present, the Appellant has been designated as a CTU.
- c) As regards the commissioning of the transmission asset, it is submitted that the same was made commercially operational on account of the need of controlling voltage at Siliguri substation & Bongaigaon substation. It is submitted that any transmission licensee (including the Appellant) implements the transmission systems by incurring high costs and the recovery of the same, if delayed beyond reasonable time would incur heavy liabilities. Thus, deferring COD of transmission assets beyond a certain reasonable time impedes the cash flow against such

investments. The Central Commission has opined the same in several cases of mismatches. Further, even a transmission licensee, implementing TBCB line is allowed to declare its transmission system as deemed commercially operational even if the connecting transmission system or generation is delayed.

- d) Therefore, withholding the declaration of COD of transmission assets of the Appellant on account of delays in commissioning of TBCB line, where the system implemented by the Appellant was commercially operational would be against the Regulations, precedence and spirit of the Act.
- e) Further, with regard to coordination of implementation of transmission assets, it is stated that, in light of the fact that Sterlite was assigned its scope of work pursuant to a TBCB exercise, the responsibility of coordinating the commission of the project lay with the Central Electricity Authority ('CEA'). As per Section 73(f) of the Act, the CEA is tasked with the responsibility of ensuring the timely completion of projects. The aforesaid provision reads as follows –

***“73. Functions and duties of Authority.- The Authority shall perform such functions and duties as the Central Government may prescribe or direct, and in particular to—***

***f) Promote and assist in the timely completion of schemes and projects for improving and augmenting the electricity system.”***

- f) Further, for the purpose of coordination of inter-state transmission system executed through tariff based competitive bidding it is the responsibility of the CEA to coordinate and monitor the project. The relevant provisions of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2016 is quoted as below –



5 (4) (ii) "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".

g) Further, the Government of India Vide its Gazette Notification dated 02.05.2012 had issued guidelines for encouraging competition in development of Transmission Projects wherein it is stated that

***"26. To ensure the timely completion of the transmission projects by the successful bidder, the Central Electricity Authority shall monitor the progress of the execution of the project as per the conditions of the license issued by the Central Electricity Regulatory Commission".***

h) Pursuant to this mandate, CEA held a meeting on 07.06.2012 to monitor Sterlite's progress. The Appellant participated actively in this

meeting. At the said meeting, Sterlite gave an express commitment to complete its scope of work by February, 2013. The Appellant did not have any reason to doubt Sterlite's said commitment and went ahead with its construction activities in right earnest. Therefore, the Appellant fulfilled its duty to coordinate with Sterlite. However, the Appellant could not have delayed its assets beyond a reasonable time especially when the Investment Approval required the Appellant to commission its assets within 18 months.

**RE: The assets are of no use to the Respondents and therefore need not be paid for**

- i) The Respondents have contended even if the subject transmission assets have been commissioned on 01.04.2013 / 01.06.2013, connecting to other lines and controlling the grid voltage, they are not getting benefit from the same and therefore, they should not be directed to pay.
- j) It is submitted that the issue is whether the assets have achieved DOCO on 01.04.2013 / 01.06.2016. If so, the Appellant is not concerned with who would pay for the same. If the Central Commission comes to the conclusion that beneficiaries of some other region are drawing benefit, such beneficiaries will be directed to pay. However, the Central Commission can consider this aspect also on remand.
- k) The system for recovery of transmission charges prevalent is the Point of Connection (POC) mechanism by which charges of all transmission licensees are pooled and recovered through the POC pool. Therefore, it can be ascertained as to whom is deriving benefit from these assets and such beneficiaries will automatically pay for it in terms of the POC Regulations.

**RE: The view taken by the Central Commission is in consumer interest and as per Section 61 (d) of the Act.**

- l) It has been submitted that the view taken by the Central Commission is in consumer interest. This is not correct and only an argument of convenience.
  
- m) The Central Commission has shifted the DOCO of the subject transmission assets from 01.04.2013 / 01.06.2013 to November, 2014. When the Appellant goes for tariff determination, the Interest during Construction ('IDC') & Incidental Expenses during Construction ('IEDC') for the period from April / June 2013 to November 2014 will get added and capitalized in the tariff of the Appellant which will be recovered from the beneficiaries for further period of 35 years.
  
- n) Therefore, the Appellant will actually recover a higher tariff including all elements such as Return on Equity, Interest on loan & depreciation on a higher capital cost. By postponing the recovery, the Central Commission has not acted as per Section 61 (d) of the Act.
  
- o) It has been held by the Hon'ble Supreme Court in Uttar Pradesh Power Corporation Limited v NTPC Limited & Ors. (2009) 6 SCC 235 that future consumers must not be directed to pay for past dues and the National Tariff Policy, 2016 also states that costs should be recovered as soon as they are incurred as under –

***“h) Multi Year Tariff***

.....

***4) Uncontrollable costs should be recovered speedily to ensure that future consumers are not burdened with past costs. Uncontrollable costs would include (but not limited to) fuel costs, costs on account of inflation, taxes and cess, variations in power purchase unit costs including on account of adverse natural events.”***

- p) Therefore, the better and consumer friendly approach would be to ensure recovery of costs as soon as they are incurred rather than postpone the recovery.

**RE: Other Miscellaneous Contentions**

- q) It was argued that the Appellant had filed a tariff petition before the Central Commission and not a petition for declaration of DOCO. Under Regulation 4 & 5 of the Tariff Regulations, 2009, the Appellant can file only a tariff petition and seek the DOCO either in the regular manner – Regulation 3 (12) (c) or under the second proviso thereof. The Appellant has followed the Tariff Regulations, 2009.
- r) The Respondents also contended that the Appellant has not achieved the commercial operation of assets in accordance with the Tariff Regulations, 2009. It is submitted that the Appellant completed its scope of work and declared the commercial operation of assets in accordance with the Tariff Regulations, 2009.
- s) It is submitted that the Appellant has nothing to do with the transmission line being executed by the third party (i.e. M/s Sterlite) through competitive bidding route. In given circumstances, the Appellant should not be penalized for the non-completion of work which is not within the scope of the Appellant.
- 9) **Per Contra, The following are the submission made by Learned Counsel of the Respondent No. 1 (CERC) in Appeal No. 6 of 2016:**
- a) The Central Electricity Regulatory Commission has been impleaded as Respondent No. 1 in the present proceedings wherein the appellant has impugned the Order dated 30.06.2015 in Petition No. 99/TT/2013 relating to the determination of date of commissioning of Asset-1a & b:

400 kV Line Bays at Biharsharif Sub-station along with 80 MVAR Switchable Line Reactors for the 400 kV D/C Purnea-Biharsharif transmission line and Asset-2: 400 kV Line Bays at Purnea Sub-station for the 400 kV D/C Purnea-Biharsharif transmission line under Transmission Schemes (in Eastern Region) for enabling import of NER/ER surplus power by NR for tariff block 2009-14.

- b) The Appellant, through the present Appeal has assailed the interpretation by the Central Commission, of Regulation 3 (12) (c) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009. Through this written submission, it is proposed to place on record certain facts and the reasoning behind the impugned order with a view to assisting the Hon'ble Appellate Tribunal in the adjudication of the issues in the Appeal.
- c) The relevant provision of the above Regulation is extracted hereunder for ease of reference

*“3. (12) ‘Date of commercial operation’ or ‘COD’ means*

*xxxxxx*

*(c) in relation to the transmission system, the date declared by the transmission licensee from 0000 hour of which an element of the 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 commercial operation prior to the element coming into regular service.”*

- d) The Appellant’s case is that the delay in commissioning of the Sterlite line is beyond the control of the Appellant and therefore this delay cannot be cited against the Appellant. This contention is based on the Second Proviso extracted above. In this connection, it is submitted that the Central Commission has interpreted clause 3(12) (c) in accordance with the basic principle for interpretation viz. *the statute must be read as a whole in its context*. Per contra, the Appellant seems to interpret the second proviso to Regulation 3(c) in isolation and out of context.
- e) The Central Commission has held that the second proviso can be brought into play only when all the three conditions mentioned in Regulation 3(12) (c) are satisfied viz. successful charging, trial operation and regular use - in that order. Even a cursory reading of the provision reveals that charging and trial operation are sine qua non for the regular use of the system. As being *‘ready for regular use’* is a condition precedent for the application of the second proviso of Regulation 3(12) (c), the same cannot have any application in cases where charging and trial operation have not taken place.
- f) The Appellant had also contended that the assets in question were put to *some use* even before the commissioning date fixed by the Central Commission. This submission also is not tenable, because this amounts to replacing the phrase “regular use” in the Regulation with “some use” which is against the basic principles for interpretation of statutes.

- g) The applicability of the principle laid down by the Hon'ble Tribunal in its judgment dated 2.7.2012 in Appeal No. 123/2011, the Central Commission craves leave to refer to the following extract from the above judgment:

*10. A transmission system may comprise of one or more transmission lines and sub-station, inter-connecting transformer, etc. According to above definition an element of the transmission system which includes a transmission line, could be declared as attained COD if the following conditions are met.*

- i) It has been charged successfully,*
- ii) its trial operation has been successfully carried out, and*
- iii) it is in regular service.*

- h) The bare reading of the above ruling of the Hon'ble Tribunal leaves no doubt that the impugned order is based on a binding precedent and conforms to the principle of judicial discipline.
- i) The Commission's interpretation of Regulation 3(12) (c) in the impugned order balances the interests of various stake-holders in the system and is in conformity with mandate assigned to the Central Commission in Section 61 of the Electricity Act extracted hereunder for ease of reference:

***61. The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-***

***(g) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;***

- j) The interpretation is in conformity with the rule of purposive interpretation also.

The impugned order, inter alia states as under:

*“14. ....The transmission line executed by Sterlite Ltd. was commissioned on 13.9.2013. This is also confirmed from CEA's Executive Summary report for the month of September, 2013 available at CEA website. As the Bays and Line Reactors could not have been charged for trial operation and cannot be considered ready for regular service without the availability of the transmission line. The bays and line reactors cannot be declared as commercial on the dates as claimed by the petitioner. Accordingly, the date of commercial operation of Asset 1(a), Asset 1(b) and Asset-2 cannot be approved as 1.4.2013, 1.5.2013 and 1.4.2013 respectively as claimed by the petitioner. “*

- k) The Appellant has not presented any submission to controvert the finding of the Commission that *“the Bays and Line Reactors could not have been charged for trial operation and cannot be considered ready for regular service without the availability of the transmission line”*. Consequently, there is no justification for modifying the date of commercial operation as concluded by the Central Commission.

10. **The following are the written submissions made by Learned Counsel of the Respondent No. 13, in Appeal Nos. 198 of 2015 and 06 of 2016:**

- a) This Appeal is fully covered by the judgment dated 2<sup>nd</sup> July, 2012 in Appeal No. 123 of 2011 of the Hon'ble Tribunal as the facts and circumstances of this Appeal is same as in Appeal 123 of 2011. In Appeal No. 123 of 2011 one element of the transmission system (Transmission line) was ready but the other element (bays) was not ready as these elements were entrusted for execution to two different agencies. In this Appeal also one element of the transmission system (Bays and reactors) was ready but the other element (transmission line) was not ready. In this case also, these elements were entrusted for execution to two different agencies. Hon'ble Tribunal in its order dated 11<sup>th</sup> December, 2015 in IA No. 336 of 2015 in this Appeal while



disallowing the stay on the impugned order has also opined that the present case is clearly covered by the judgment dated 2.7.2012 in Punjab State Power Corporation Limited v. Power Grid Corporation of India Limited in Appeal No. 123 of 2011.

b) The Appellant in his affidavit dated 12<sup>th</sup> February, 2014 submitted before the Commission that the Asset-1 and Asset-2 are ready for intended use but the POWERGRID is unable to provide intended service from the same because of non-readiness of transmission line (Not attributable to POWERGRID). Thus, according to the Appellant, the subject assets qualify consideration by the Commission under 2<sup>nd</sup> proviso to Regulation 3(12) (c) of Tariff Regulations, 2009. This contention of Appellant was rejected by the Commission as the same was not in accordance with the judgment dated 2<sup>nd</sup> July, 2012 in Appeal No. 123 wherein this Hon'ble Tribunal interpreted Regulation 3(12) (c) of Tariff Regulations, 2009 and also the applicability of the 2<sup>nd</sup> proviso. As per this judgment the 2<sup>nd</sup> proviso to the definition of COD is applicable if the transmission line (asset) is ready in all respects for regular use but is prevented for use due to some reasons beyond the control of transmission licensee, e.g. high voltage in system, etc. The relevant portion of the affidavit dated 12<sup>th</sup> February, 2014 is quoted below;

***“The asset 02 nos. 400 kV line bays along with 2 nos. 80 MVAR switchable line reactors at 400 kV Siliguri S/S and 2 nos. 400 kV line bays at Bongaigaon S/s has been made ready for its intended use but due to delay in commissioning of the Siliguri-Bongaigaon 400 kV transmission line, the POWERGRID is not able to provide transmission service for reasons not attributable to itself, its suppliers or contractors. The case accordingly qualifies for consideration of the Commission for approval of the date of commercial operation prior to the element coming into regular service.”***

It may, therefore be noted that the affidavit 12<sup>th</sup> February, 2014 of the Appellant before the Commission contradicts the assertion of the Appellant during the hearing on 16.11.2017 that the line reactor is used as a bus reactor. Hon'ble Tribunal while disallowing the stay of the impugned order has also opined that the Appellant have raised certain new issues like use of reactor as bus reactor at Siliguri for which there is no indication in the impugned order that these points were raised nor is it contended that these points were raised and not dealt with the Central Commission. Raising a fresh issue is not permissible in Appeal. Moreover the asset in question is a line reactor and not a bus reactor.

- c) The Appellant had also not questioned the applicability of the judgment dated 2<sup>nd</sup> July, 2012 in Appeal No. 123 of 2011 before the Commission. The Appellant, however, mentioned that an Appeal on this issue is pending before the Hon'ble Supreme Court. The Appeal filed by the Appellant has since been dismissed by the Hon'ble Supreme Court vide its judgment dated March 3, 2016 wherein the Supreme Court had clearly stated that the switchgear and other works are part of transmission lines and the Regulation 3(12) of the Tariff Regulations, 2009 cannot be interpreted against the spirit of the definition of 'transmission lines given in the statute. Para 10 and 11 of the Supreme Court judgment dated March 03, 2016 is important for further reinforcement of the judgment dated 2<sup>nd</sup> July, 2012 in Appeal No. 123 by the Hon'ble Tribunal.
- d) The opinion expressed by the Hon'ble Tribunal in its order dated 11<sup>th</sup> December, 2015 in IA No. 336 of 2015 in this Appeal while disallowing the stay on the impugned order has dealt on facts and other issues. Para 6 to 14 of the said order are important as the same also forms the basis of decision to reject the stay of the impugned order of the Commission.

- e) The Appellant while granting the 'Investment Approval' for the project had clearly stipulated that the subject assets are required for the Bongaigaon-Siliguri 400 kV (Quad) D/C transmission line and to be matched with its completion. Thus, it is evident that the subject assets can be in regular service only when the 400 kV transmission line is ready. Hon'ble Tribunal while disallowing the stay of the impugned order has also opined that subject assets are required for the Bongaigaon-Siliguri 400 kV (Quad) D/C transmission line and to be matched with it. Moreover, even technically the light load conditions of the 400 kV transmission line is the main source of generation of the high voltage and accordingly the provisioning of the switchable line reactor in the Investment approval. When the Bongaigaon-Siliguri 400 kV (Quad) D/C transmission line has not been commissioned then how all of the sudden high voltage cropped up at Siliguri S/S? Thus, the contention of the Appellant is without any basis even technically.
- f) The contention of the appellant that the judgment dated 2<sup>nd</sup> July, 2012 in Appeal No. 123 of 2011 of the Hon'ble Tribunal is applicable in regard to a transmission line connecting to a generating station is completely misconceived. The Appellant is not able to provide any distinguishing features in support of his contention.
- g) The Electricity Act, 2003 envisages large numbers of players to operate in this sector. To coordinate the efforts of various players, the Act also envisages coordination agencies namely the State Transmission Utility (STU) at State level and the Central Transmission Utility' (CTU) for the inter-state. The statutory functions of the STU and CTU have been defined under the Electricity Act, 2003. The Appellant under Section 38(1) has been notified as the CTU by the Central Government. The statutory role of the Appellant as 'Central Transmission Utility' (CTU) is

contained in Section 38(2) of the Electricity Act, 2003. In its capacity as CTU, the Appellant is required to discharge all functions of planning and coordination relating to inter-State transmission system with as many as eight agencies as contained in the Electricity Act, 2003. The Appellant in its capacity as CTU is required to plan and coordinate the function related to the construction of the transmission system to match their completion with the objects set in the Investment approval. The non-performance of statutory functions of planning and coordination vested in Appellant can create mess resulting into mismatch of various components of the transmission system. The mere fact that the Appellant is speaking of the mess without owning the statutory responsibility shows that the Appellant is also having a vested interest in this mess as a transmission licensee. This mess ultimately results into inefficiency which cannot be allowed to pass on to the Discoms through tariff. Thus, the Respondent-beneficiaries (Discoms) cannot be made to pay for the lapses in the performance of the statutory responsibilities of planning and co-ordination on the part of the Appellant. The pains of inefficiencies cannot be allowed to pass on to the beneficiaries and through beneficiaries to the electricity consumer through tariff. It is the submission of Respondent-BRPL that the Hon'ble Tribunal may not allow the cost of inefficiency to be passed on in the tariff.

**11. The following are the written submissions made by Learned Counsel of the Respondent Nos. 3, 4 & 5 in Appeal No. 06 of 2016:**

- a) The tariff is paid by the beneficiaries for supply of electricity or transmission of electricity. The word transmit has been defined in Section 2(74) as follows:

**“2(74) “transmit” means conveyance of electricity by means of transmission lines and the expression “transmission” shall be construed accordingly;”**

The project which was discussed and agreed to between the parties was Purnea-Biharshariff Transmission Line with bays at both end and 80 MVAR Switchable Line Reactors at Biharshariff. The beneficiaries will get the benefit out of the said line for import of surplus energy from eastern region to north region. In case the power is not transmitted to the said line no benefit of project is available to the beneficiaries and they are not liable to pay any tariff.

- b) The line diagram at Page 8 of Affidavit dated 07.02.2016 filed by Appellant will demonstrate that unless and until the Purnea-Biharshariff line is constructed no benefit of the assets installed by the Appellant will pass through to the beneficiaries. Hence, they are not liable to pay any tariff and CERC was right in holding that from commissioning of Purnea-Biharshariff line the Appellant will be entitled for tariff w.e.f. 01.10.2013.
- c) As per Section 61 the tariff should be cheapest at the consumer end and it is the responsibility of the regulator i.e. CERC to see that consumers should not be overburdened with the tariff. In the present case without any benefit to the consumers of Rajasthan, Appellant wants to levy the tariff when no service is being provided to the consumers.
- d) There is no provision either in the Electricity Act, 2003 or CERC (Terms and Conditions of Tariff) Regulation, 2014 which provides that tariff of any single asset can be granted. Thus CERC was fully justified in granting the tariff from the date of commissioning of line i.e. w.e.f. 01.10.2013.
- e) In the similar circumstances when transmission line was ready but switchyard on one end was not constructed, this Hon'ble Tribunal has held that the CoD of transmission line has not been achieved.

**(Judgment dated 02.07.2012 in Appeal No. 123 of 2011).** The said judgment has been relied upon by CERC.

- f) The said judgment of this Hon'ble Tribunal has also been approved by Hon'ble Supreme Court in Civil Appeal No. 9193 of 2012 filed by Appellant vide judgment dated 03.03.2016 when the said appeal was dismissed. It is relevant to point out here that the Civil Appeal No. 9193 of 2012 before Hon'ble Supreme Court also relates to the same control period i.e. 2009-2014 as that of in present appeal and the same Regulations of 2014 are applicable.
- g) The Hon'ble Supreme Court in U.P.P.C.L. Vs. NTPC and Ors. reported in 2009 (6) SCC 235 in Para 63 held as follows:

*“63. Furthermore, the direction of the Tribunal that the additional costs may be absorbed in the new tariff, in our opinion, was not correct. Some persons who are consumers during the tariff year in question may not continue to be the consumers of the appellant. Some new consumers might have come in. There is no reason as to why they should bear the brunt. Such quick-fix attitude, in our opinion, is not contemplated as framing of forthcoming tariff was put subject to fresh Regulations and not the old Regulations”.*

Thus, if the tariff is granted to the Appellant from the said date of CoD of the Assets i.e. 01.04.2013 and 01.05.2013, it will have difficulties as per the aforesaid observations of Hon'ble Supreme Court.

- h) As stated herein above Appellant is Central Transmission Utility as declared by Government of India under Section 38(1) of Electricity Act, 2003 and the Appellant has admitted this fact in Para No. 1 of its Petition No. 99/TT/2013. Thus, as per provisions of Section 38(2) it has to discharge all functions of planning and coordination relating to interstate transmission system. The Appellant is to coordinate with Ms.

Sterlite which was constructing Purnea-Biharshariff line. However, nothing has been placed before the Commission that it has made any coordination with M/s. Sterlite. The relevant Para 16 of the impugned order reads as follows:

***“16. As per Section 38(2) of Electricity Act, 2003, the Petitioner as a CTU has to discharge all functions of planning and co-ordination relating to inter-state transmission system with State Transmission Utilities, Central Government, State Governments, Generating Companies, Regional Power Authority, licensees to ensure development of an efficient, co-ordinated and economical system of inter-State transmission lines for smooth flow of electricity from generating stations to the load centres. In the instant case, the Petitioner has not submitted any documentary evidence in regard to co-ordination with M/s. Sterlite. We therefore direct the CTU to properly co-ordinate development of ISTS, so as to ensure commission of transmission line and bays are commissioned in a matching time-frame, to ensure that the assets are put into regular service as soon as they are commissioned”.***

12. We have heard at length the learned counsel for the rival parties and considered carefully their written submissions, arguments putforth during the hearings etc. The following questions of law arise in the present appeal(s):

- a) **Whether the Central Commission has ignored provision of Regulations 3 (12) (c) second proviso of the Tariff Regulations 2009?**
- b) **Whether the principle laid down by the Tribunal in the Judgment dated 02.07.2012 in Appeal No. 123 of 2011 is applicable to the facts of the case?**
- c) **Whether it can be said that the Assets 1 & 2 cannot be tested and put on trial run without the respective associated transmission line?**

***The issues raised by the Appellant in both the Appeals are common. Hence, we will decide on the present appeals by this common judgment.***

13. **Our Findings and Conclusion on the above issues**

Keeping in view the details appended with the appeals, arguments and written submissions, etc. of learned counsel, our findings and analysis thereof on specific issues are as below:

i) **Applicability of Regulation 3(12) (c), Second Proviso**

Regarding applicability of provision 3(12) (c), it is indicated that the second proviso can be brought out into play only when all the three conditions mentioned in the referred provision are specified viz. successful charging, trial operation and regular use. The reading of the provision clearly reveals that the charging and trial operation is pre-requisite for the regular use of the system. As being ready for the regular use, is a condition precedent for the application of the second proviso of Regulation 3(12) (c), the same cannot have any application in cases of where charging and trial operation have not taken place. The assets in question were put to some use even before the commissioning date fixed by the Central Commission. This submission is not tenable because this will amount to replacing the “intended/regular use” in the Regulation with “some use” which is against the basic principles for interpretation of statutes. It is noted that the line reactors were envisaged for specific use for the transmission lines and were not to be used as bus reactors which is cited by the appellant to justify to have put them in use moderating the high voltage arising at the reference sub-station. Hence, the Central Commission has rightly held that provision of Regulation 3 (12) ( c) - Second Proviso does not apply to the present case.

ii) **Applicability of Tribunal’s Judgment dated 02.07.2012 in the Appeal No. 123 of 2011:**

The appellant has argued that the judgment dated 2<sup>nd</sup> July, 2012, in Appeal No. 123 of 2011 of this Tribunal is not applicable in the present



case. It is further mentioned that an appeal filed by the appellant on this issue before the Hon'ble Supreme Court has since been dismissed by the Hon'ble Supreme Court vide its judgment dated March, 3, 2016 wherein the Hon'ble Supreme Court has clearly stated that the switchgear and other works are part of the transmission lines and the Regulation 3(12) (c), of the Tariff Regulations, 2009 cannot be interpreted against the spirit of the definition of transmission lines given in the statute. The judgment of the Hon'ble Supreme Court is very important for further enforcement of the judgment dated 2<sup>nd</sup> July, 2012 in Appeal No. 123 of 2011 by this Tribunal. It is further emphasized that the present case is identical in nature with Barh Balia case. In these two cases, some elements of the transmission system were ready and associated other elements were not ready resulting into non-completeness of the system preventing charging and regular use. In Barh Balia case, the transmission line was ready (Power Grid) and switchyard/switchgear (NTPC) were not ready. In this case, switchyard/switchgear (Power Grid) is ready whereas transmission line (M/s Sterlite Limited) was not ready. As such the findings of this Tribunal in judgment dated 02.07.2012 in Judgment dated 02.07.2012 in Appeal No. 123 of 2011 is fully applicable.

iii) **Trial run of Asset-1 & Asset-2 (Sub-station Bays & Line Reactors)**

It has been highlighted by the appellant that their scope of work in Asset-1 & Asset-2 was completed and got tested as required under pre-commissioning. In this connection, it is noted that the 400 kv Purnea Biharshariff transmission line executed by M/s Sterlite Limited was commissioned on 13.09.2013 as brought out by CEA in its Executive Summary Report for the month of September 2013. Similarly, Siliguri-Bongaigaon transmission line was commissioned in November, 2014. The Bays and Line Reactors could not have been charged for trial operation and cannot be considered ready for regular service without

the availability of the transmission line for which the line reactors were envisaged for. The Bays and Line Reactors, therefore, cannot be declared in commercial use on the dates as claimed by the appellant pending readiness of the associated 400 kv D/C transmission lines which got commissioned only on 13.09.2013/November, 2014.

In the light of the above, it may be concluded that some parts of the transmission system viz. bays and line reactors cannot be considered as commissioned and claimed to be put in commercial operation without commissioning of the associated transmission line(s). The completeness / intended use of the transmission system should be viewed in its entirety.

**ORDER**

We are of the considered opinion that the issues raised in both the appeals are devoid of merit. The impugned orders dated 22.06.2015 & 30.06.2015 passed by the Central Electricity Regulatory Commission are hereby confirmed. Both the appeals being Appeal Nos. 198 of 2015 and 06 of 2016 are dismissed. No order as to costs.

Pronounced in the open Court on this **18th day of January, 2018.**

**(S.D. Dubey)**  
**Technical Member**

**(Justice N.K. Patil)**  
**Judicial Member**

**Dated 18<sup>th</sup> January 2018.**