

In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

Appeal No.85 of 2016

Dated: 1st May, 2018

Present: Hon'ble Mr. I. J. Kapoor, Technical Member
Hon'ble Mr. N.K. Patil, Judicial Member

In the matter of :-

Power Grid Corporation of India Ltd. (PGCIL)
“Soudamini”, Plot No. 2, Sector 29
Gurgaon -122001

... Appellant

Versus

- 1. Central Electricity Regulatory
Commission
3rd and 4th Floor, Chanderlok Building
36, Janpath, New Delhi – 110001** **Respondent No.1**
- 2. Rajasthan Rajya Vidyut Prasaran Nigam Ltd.
Vidyut Bhawan, Vidyut Marg,
Jaipur- 302 005** **...Respondent No.2**
- 3. Ajmer Vidyut Vitran Nigam Ltd
400 KV GSS Building, Ajmer Road, Heerapura,
Jaipur - 302024** **...Respondent No.3**
- 4. Jaipur Vidyut Vitran Nigam Ltd
400 KV GSS Building, Ajmer Road,
Heerapura, Jaipur - 302024** **...Respondent No.4**
- 5. Jodhpur Vidyut Vitran Nigam Ltd
400 KV GSS Building, Ajmer Road,
Heerapura, Jaipur - 302024** **...Respondent No.5**
- 6. Himachal Pradesh State Electricity
Board, Vidyut Bhawan,**

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- | | | |
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| | Shimla – 171 004 (H.P) | ...Respondent No.6 |
| 7. | Punjab State Electricity Board,
The Mall, Patiala-147 001 | ...Respondent No.7 |
| 8. | Haryana Power Purchase Centre,
IInd Floor, Shakti Bhawan,
Sector-6, Panchkula – 134 109 | ...Respondent No.8 |
| 9. | Power Development Department
Janipura Grid Station,
Jammu (Tawi) - 180 007 | ...Respondent No.9 |
| 10. | Uttar Pradesh Power Corporation Ltd.
10th Floor, Shakti Bhawan Extn.
14, Ashok Marg, Lucknow - 226 001 | ...Respondent No.10 |
| 11. | Delhi Transco Ltd. (DTL)
Shakti Sadan, Kotla Road (near ITO).
New Delhi – 110002 | ...Respondent No.11 |
| 12. | BSES Yamuna Power Ltd. (BRPL)
Shakti Kiran Building, Karkardooma,
Delhi-110092 | ...Respondent No.12 |
| 13. | BSES Rajdhani Power Ltd. (BYPL)
BSES Bhawan, Nehru Place,
NEW DELHI – 110019 | ...Respondent No.13 |
| 14. | North Delhi Power Ltd.
Power Trading & Load Dispatch Group,
Cennet Building, Adjacent to 66/11Kv
Pitampura-3, Grid Building, Near PP Jewellers,
Pitampura, New Delhi-110034 | ...Respondent No.14 |
| 15. | Chandigarh Administration
Sector -9, Chandigarh – 160009 | ...Respondent No.15 |
| 16. | Uttarakhand Power Corporation Ltd.
Urja Bhawan, Kanwali Road,
Dehradun – 248001 | ...Respondent No.16 |

17. Northern Central Railway
Allahabad – 211011 ...Respondent No.17

18. New Delhi Municipal Council
Palika Kendra, Sansad Marg,
NEW DELHI-110002 ...Respondent No.18

Counsel for the Appellant(s): Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Parichita Chowdhury
Ms. Neha Garg
Ms. Rhea Luthra
Mr. Ashwin Ramanathan
Ms. Aditi Mohapatra
Mr. Sandeep Rajpurohit

Counsel for the Respondent(s): Mr. Sethu Ramalingam
Mr. S. Vallinayagam for R-1

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

Mr. R.B. Sharma for R-13

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal is being filed by Power Grid Corporation of India Ltd. (hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) against the order dated 21.12.2015 (“**Review Order**”) passed by Central Electricity Regulatory Commission (hereinafter referred to as the “**Central Commission**”) in Review Petition No. 21/RP/2015 merged with the Order dated 13.08.2015 (“**Main Order**”) in Petition No. 300/TT/2013 whereby the Central

Commission has determined the Transmission Tariff of the System Strengthening scheme in Northern Region for Sasan & Mundra UMPPs (hereinafter referred to as “**Transmission System**”) for 2009-14 period. Vide the said orders the Central Commission has disallowed certain time overrun in commissioning of the Transmission System.

2. The Appellant, Power Grid Corporation of India Ltd. is the Government Company within the meaning of the Companies Act, 1956 and also carry out functions as the Central Transmission Utility (CTU) under Section 38 to the Act.
3. The Respondent No.1 i.e. Central Electricity Regulatory Commission (CERC) is the Central Commission constituted under Section 76 of the Electricity Act, 2003 and exercising jurisdiction and discharging functions in terms of the Act.
4. The Respondents No. 2 to 18 are the beneficiaries of the Transmission System except Respondent No. 11 (DTL), which is no longer a beneficiary in terms of the GNCTD order as claimed by DTL.
5. **Brief facts of the case are as follows:-**
 - a) The Appellant has executed the Transmission System for which tariff for the period 2009-14 was determined by the Central Commission based on the CERC (Terms and Conditions of Tariff), Regulations, 2009 (hereinafter referred to as ‘**Tariff Regulations**,

2009’). This Transmission System comprises of **Asset- A** (400 kV D/C Agra- Sikar Transmission Line) and **Asset- B** (2 nos. 400 kV line bays for 400 kVD/C Agra-Sikar line including 2 nos. 50 MVAR Line Reactors).

- b) The Transmission System was required to be re-routed as the original route was passing through the Sariska Tiger Reserve. As per the Ministry of Environment and Forest (MOEF) circular dated 4.5.2001, States were not required to submit any proposal for diversion of forest land in National Park and Sanctuaries under the Forest Conservation Act, 1980. Further, the Hon’ble Supreme Court vide judgement dated 28.3.2008 directed that the use of forest land falling in National Parks/ Wild life sanctuaries will be permissible only in totally unavoidable circumstances. The same was reaffirmed by the MOEF circular dated 5.2.2009.
- c) The walkover/ preliminary survey for the route of Agra – Sikar transmission line was carried out in December 2008.
- d) The Board of the Appellant accorded Investment Approval (IA) for the Transmission System on 10.12.2009 and according to the IA the Transmission System was to be commissioned within 32 months from the date of IA i.e. by 01.09.2012. Asset- A was commissioned on 01.01.2014 and Asset- B was commissioned on 01.8.2013 (under Bus Reactor operation mode at 400/ 220 kV Sikar Sub- Station) with a delay of 16 months and 11 months respectively.

- e) On 29.10.2013, the Appellant filed Petition No. 300/TT/2013 before the Central Commission for determination of tariff of the Transmission System. During the course of hearings before the Central Commission, the Appellant filed the Affidavits dated 11.12.2013, 09.4.2014, 30.6.2014, 14.10.2014, 31.3.2015 & 29.06.2015 wherein the Appellant had placed extensive data on the aspect of time overrun and the detailed correspondence exchanged between the Appellant and NHAI/Indian Railways and all other necessary details. The Central Commission vide Main Order dated 13.08.2015 decided the Petition No. 300/TT/2013. The Central Commission has disallowed time overrun of 12 months for Asset- A and 11 months for Asset- B because of delay in obtaining No Objection Certificate (NOC) by the Appellant from National Highway Authority of India (NHAI) and Railways. Further, the Central Commission approved Date of Commercial Operation (DOCO) of Assets- A & B as 1.1.2014.
- f) Against the Main Order, the Appellant has filed Review Petition No. 21/RP/2015 before the Central Commission seeking review of the Main Order. The Central Commission partly allowed the claims of the Appellant to the extent of allowing DOCO of Asset- B as 1.8.2013 vide the Review Order dated 21.12.2015 and disallowed time overrun for Assets –A & B on account of delay in obtaining NOC from NHAI and Railways.
- g) Aggrieved by the Review Order, which also modified the Main Order the Appellant has preferred the present Appeal before this

Tribunal. The Review Order and Main Order are collectively referred to as the Impugned Order.

6. The instant Appeal is presented by the Appellant for consideration of the following questions of law:-

- a) Whether, as the first authority deciding the issues related to tariff determination, the Central Commission is not bound to properly consider the documents and evidence produced by the Appellant with regard to the delay and justification for the same in the execution of the subject Transmission System?
- b) Whether, the Central Commission, in review proceedings, can refuse to review its order when important facts have skipped the notice of the court?
- c) Whether the Appellant is in any way responsible for the time overrun in the present case when the Appellant has indeed acted in a bonafide and prudent manner in dealing with the authorities?
- d) Whether, the Appellant could have applied for clearances/NOC at the time of or immediately after the Investment Approval without freezing the actual positions of the towers across the National Highway and Railway Crossing?

7. We have heard learned counsel for the Appellant and the Respondents at considerable length of time and we have carefully perused their respective written submissions, arguments put forth during the hearings. Gist of the same is discussed hereunder.

8. The submissions on issues raised for our consideration in the instant appeal by the learned counsel for the Appellant are as follows:-

a) The Central Commission failed to appreciate that the entire delay of 16 months in the commissioning of the Asset A was beyond the control of the Appellant and has erred in condoning delay of only 4 months out of total delay of 16 months. The Central Commission in the Main Order erred in holding that the Appellant has applied for the NOC from NHAI and Railways much after the IA and therefore, any delay in receiving permissions from these authorities is to the account of the Appellant.

b) The Appellant had submitted the route alignment for the Transmission System to Dy. Conservator of Forest (DCF), Sariska, Distt. Alwar vide letter dated 24.2.2009. Thereafter in consultation with the forest officials, the forest area of 4.7656 Ha. was identified and a forest proposal was submitted on 4.11.2009 and accordingly IA for the Transmission System accorded on 10.12.2009. Based on the walkover survey, the contract was placed in March 2010 and subsequently final/ check survey was carried out.

c) During final/check survey in early 2011, the forest officials of Sariska Sanctuary informed that the route envisaged (passing through revenue land) by the Appellant is in the process of being notified as a buffer zone of Sariska Tiger Reserve. The same was later notified vide Notification dated 9.7.2012. This necessitated immediate rerouting of line to avoid additional cost as well as

indefinite delay in obtaining approval from National Board for Wildlife (NBWL) and Hon'ble Supreme Court. Accordingly, the Appellant surveyed three alternative routes encountering 'NO' forest /Sanctuary Area in association with forest officials. In July 2011, the shortest line route was finalized. Despite the change in the route, the construction activities in the re-routed portion were completed well within scheduled DOCO.

- d) The Central Commission erred in proceeding on the mechanical basis that there is delay on the part of the Appellant in applying for NOC from the NHAI and the Railways without appreciating that the Appellant cannot simply apply for NOC immediately after the IA.

- e) The Central Commission has failed to appreciate that along with the proposal for NOC to the concerned authorities, the Appellant is required to submit various crossing details like distance from National Highway centre point/boundary of National Highway to Tower Location at both end, Span of Crossing, Sag details, TOPO sheet etc. to identify the actual position of the Towers. NOC clearance is given by the concerned authorities after checking of any proposed permanent structure, bus/truck bay lane etc. in future along the Route. These details for the proposals for NOC for overhead crossing of National Highways and Railway are known only after final/check survey is complete in all respect and after fixing the tower positions. Accordingly, it was impossible for the Appellant to apply for clearances/NOC at the time of Investment Approval without freezing the actual positions of the towers.

- f) The proposal to lease out railway land for construction/erection of the towers was required to be made in compliance with Railways Board Regulations for Power Line Crossing, 1987. These Regulations contemplate the conditions and manner in which such sites need to propose for approvals/consents from Ministry of Railway. Due applications can be made only when such studies were complete and appropriate site as per the requirement was identified. The Central Commission has failed to appreciate that railway lines must be crossed with higher capacity tower and any deviation in this is not permitted. Railway Line crossing proposal is preferred to be submitted only after the adjacent spans are almost finalized to avoid any changes due to Right of Way issues at the last moment. Otherwise, any change in these proposals after submission shall necessitate fresh proposal.
- g) The Central Commission has not dealt with the affidavit dated 30.6.2014 submitted by the Appellant in the original tariff petition and in the review petition. In general, the timeframe for giving the clearances for crossing by NHAI and Railways is 5 to 8 months from the date of submission of the application. The Appellant had applied for the clearances/NOC from National Highway and Railway crossing between April 2011 to October 2011 (except for Single Broad gauge Agra Bateshwar Track & Alwar-Mathura Broad Gauge) well ahead of the scheduled DOCO i.e. September 2012. However, the NOC in most of the cases was granted after a period of more than 16 months.

h) In case of Railway Crossing the Appellant submitted Proposal for NOC after final/check survey at various railway crossing points. Details of correspondence between the Appellant and concerned Railway authorities are as below:

S.N.	Railway crossing	Date of proposal to issue NOC	Date of issue of NOC	Remarks
1	Railway crossing at Sikar-Luharu Line (NWR)	18/07/2011	06/12/2012	Delay of 17 months
2	Railway crossing at Sikar-Jerthi Line (NWR)	11/04/2011	06/12/2012	Delay of 20 months
3	Single Broad Gauge-Agra Bateshwar track	04/09/2012	03/01/2013	Delay of 4 months
4	Agra-Bayan electrified single track	28/10/2011	25/04/2013	Delay of 18 months
5	AgraForte-Bharatpurayana electrified single track	14/09/2011	11/02/2013	Delay of 17 months
6	Delhi-Bombay western Railway electrified track	28/10/2011	25/06/2012	Delay of 8 months
7	Alwar-Mathura Broad gauge	10/09/2012	18/09/2013	Delay of 12 months

Railways have taken 4 months to 20 months in granting NOC which normally takes 5 to 8 months' time. Railway Authorities took extra 12 months in granting NOC for Railway crossing.

- i) Major delay was due to delay in getting NOC for NH-8 crossing as all the NOCs for NH-3, NH-11 and all Railway crossings have been received before NOC for NH-8. NOC of NH-8 received on 3.10.2013 despite being submission of proposal of NOC well before scheduled DOCO. Further the delay of around 3 months after getting the clearance for NH-8 crossing was due to severe ROW issue arose at various locations. Details for the ROW submitted vide affidavit dated 30.6.2014.
- j) The Central Commission has generalized its reasoning that the Appellant delayed in applying for permission even to NHAI. The details of NOC clearance in case of NHAI for NH 8 is as below:

S.N.	Particulars	Date	Remarks
1	Proposal submitted to Project Manager NHAI	01/06/2011	Proposal submitted before 15 months of Scheduled DOCO i.e. September 2012.
2	Letter submitted to Project Director NHAI	18/07/2011	Appellant sought clearance for NOC
3	Report submitted by consultant of NHAI to Project Director , NHAI	24/08/2011	In this letter Consultant recommended to issue NOC in favour of the Appellant.

S.N.	Particulars	Date	Remarks
4	Letter from NHA I to POWERGRID	01/09/2011	For submission of Undertakings and agreement.
5	Letter from POWERGRID to NHA I along with requisite papers as mentioned at point 4 above.	12/09/2011	Notarized undertaking and Agreement submitted.
6	Letter submitted by consultant of NHA I to Project Director , NHA I	03/11/2011	Consultant of NHA I gave clearance that Appellant has submitted all the relevant documents for issuance of NOC.
7	Letter from POWERGRID to NHA I	10/12/2011	Reminder for Issue of NOC
8	Letter from POWERGRID to NHA I	22/06/2012	Reminder for Issue of NOC
9	Letter from POWERGRID to NHA I	13/11/2012	Reminder for Issue of NOC
10	Letter from POWERGRID to NHA I	27/05/2013	Reminder for Issue of NOC
11	Issue of NOC by NHA I for NH-8 crossing	03/10/2013	NOC issued by the National Highway Authority

Even after submission of the proposal for NOC well ahead of Scheduled DOCO, NHAI issued NOC after 27 months. Considering normal practice of granting NOC within 5 to 8 months, NHAI took extra 19 months in granting NOC. Further, the Appellant completed the work at this area just after getting the NOC.

The Appellant had submitted the proposal to NHAI to issue NOC for NH-11 (Agra- Jaipur Highway) on 10.1.2012 and NOC was received on 7.8.2012 after a period of around 7 months.

Further, the Appellant sought the NOC for overhead crossing of Transmission line on NH-03 (Agra-Gwalior Highway) on 12.9.2012 and got NOC on 15.5.2013 after a period of around 8 months.

- k) The Central Commission also failed to appreciate that the delay in Asset- B was primarily due to delay in Asset- A, which was beyond the control of the Appellant. The delay in commissioning of Asset-B is only consequential upon the delay which occurred in commissioning of Asset-A and was a natural corollary of the decision to be taken by the Central Commission with regard to the issue in respect of Asset- A.

- l) The Central Commission has failed to appreciate that there was no lack of prudence/ planning/ implementation of the Transmission System by the Appellant and the time over run in the Assets – A & B were primarily due to nonavailability of statutory clearances from NHAI and Railways.

- m) The reliance of the Respondent No. 13 on the judgement of this Tribunal dated 2.12.2013 in Appeal No. 88 of 2013 in case of 1NTPC Ltd. Vs. CERC &Ors. on the issue of maintainability is misplaced as the same has been clarified by this Tribunal in several judgements that the same would not be applicable to the tariff matters. The judgements relied upon by the Appellant are judgement dated 5.3.2014 in Appeal No. 167 of 2013 in case of PGCIL vs. CERC &Ors. and judgement dated 7.3.2014 in Appeal No. 30 of 2013 in case of NHDC Ltd. Vs. CERC &Ors. The Central Commission in the Review Order while allowing review on aspect of DOCO of Asset- B has modified the Main Order. Therefore the two orders have merged and the Appeal is maintainable only against the merged order.
- n) The Transmission System got delayed due to reasons beyond the control of the Appellant and it cannot be contended that the Appellant has been imprudent or inefficient. The Respondent No. 13 has simply quoted about delay in filing application to obtain NOC from NHAI and Railways but has not dealt with the reasons cited by the Appellant. The Respondent No. 13 has made vague allegations for not providing exact information to the Central Commission in form of PERT chart. The Appellant has satisfactorily explained the reasons of delay and it does not make difference that whether any PERT chart has been filed or not. The objections of the Respondent No. 13 lack merit and need to be disregarded.

9. The submissions of the learned counsel appearing for the Respondent No. 11(DTL) on issues raised for our consideration in the instant Appeal are as follows:-
- a) After issuance of directions of GNCTD vide letter dated 28.6.2006, the Respondent No. 11 since 1.4.2007 has been discharging the functions of Intra State Transmission of electricity in NCT of Delhi. The responsibility of bulk purchase of power and wheeling from Inter State level has been taken over by the Discoms in NCT of Delhi. The Appellant has erroneously impleaded the Respondent No. 11 contrary to the functions assigned to it by GNCTD.
 - b) The Respondent No. 11 is neither the beneficiary nor liable in any manner as the subject petition does not pertain to it.
10. The submissions of the learned counsel appearing for the Respondent No. 13 (BRPL) on issues raised for our consideration in the instant Appeal are as follows:-
- a) The Appeal filed by the Appellant is not maintainable as the Appeal has been filed against the Review Order along with the Main Order. The Review Petition was filed on the aspects related to DOCO of Asset- B, time overrun of Assets A & B. In Review Order the Central Commission has allowed the prayer of the Appellant related to DOCO of Asset- B and disallowed the other prayers against which the Appeal is filed before this Tribunal.

- b) Appeal against the order rejecting the Review Petition is not maintainable as per the Order 47 Rule 7 of the Civil Procedure Code and the Appeal would be only maintainable against the Main Order. This issue has been decided by this Tribunal vide judgement dated 2.12.2013 in Appeal No. 88 of 2013 in case of NTPC Ltd. Vs. CERC &Ors. Doctrine of merger in such cases is not applicable and hence the Appeal is not maintainable.
- c) Time overrun of 16 months has resulted in inadequacy of transmission network, which resulted in higher transmission line loss, which was ultimately borne by the beneficiaries due to failure of the Appellant in completing the Transmission System in scheduled time. The Central Commission has allowed delay of 4 months out of 16 months for the Asset- A as the Appellant failed to provide evidence of delay for balance period.
- d) The contention of the Appellant justifying its inability in applying for NOC to NHAI and Railways much after the IA is inconsequential as the Central Commission has condoned the delay of 4 months for Asset- A where it was justified. The Appellant has applied for NOC after a huge gap of 2 years 7 months from the date of IA which proves lack of prudence/ planning/ implementation of the Transmission Line by the Appellant. For NH 3 the Appellant had applied for NOC even after the scheduled completion date. Even the NOC dated 3.10.2013 granted for NH 8 was conditional which shows lack of documentation in application filed by the Appellant and it would be inappropriate to hold NHAI accountable for the delay in granting NOC. The Appellant has also

applied for NOC with the Railways in some case even after the scheduled completion date of the Transmission Line.

- e) In response to Record of Proceedings (ROP) dated 16.9.2014 on detailed query from the Central Commission regarding clearances from NHAI & Railways, the Appellant vide affidavit dated 14.10.2014 has tried to avoid in providing exact information as sought by the Central Commission. It is difficult to believe that the requisite information was not available with the Appellant as PERT/CPM is a widely used managerial technique in project construction management. The details required by the Central Commission was to ascertain the linkages of various activities to ascertain exact time overrun but the Appellant has not provided the crucial information in totality.
- f) The Appellant also failed to justify the contention that only after the final/ check survey and finalisation of tower locations for crossing NH/Railway line it was possible for it to approach for NOC. For proving the same it was required that the Appellant should have submitted the PERT/CPM chart or L2 network which was not done. The contention of the Appellant for providing data is also meaningless as the data / information provided in the Appeal was merely design data.
- g) In the Main Order, the Central Commission has stated that the Reactor at Sikar sub-station should have been commissioned after taking into consideration the voltage problem earlier after taking the approval of NRPC. Thus, the time overrun of 11 months in respect to Asset- B cannot be condoned.

11. After careful consideration of the submissions made by the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondents and after perusal of the written submissions on various issues raised in the present Appeal, our considerations and conclusions are as follows:-

a) The Core issue raised by the Appellant in the present Appeal is related to disallowance of complete time overrun by the Central Commission for Asset- A and Asset- B of the Transmission System as claimed by the Appellant.

b) The Respondent No. 13 has also raised the issue of maintainability of the Appeal. Before going into the merits of the Appeal this issue needs to be addressed. On this issue the Respondent No. 13 has relied on the judgement dated 2.12.2013 in Appeal No. 88 of 2013 of this Tribunal. The relevant extract from the said judgement is reproduced below:

“31. Summary of Our Findings

If the Review Petition raises several distinct issues and the some of them are rejected, the Doctrine of Merger in so far as the issues which were rejected in the Review Order will not have any application. When this principle is applied to the present case, then we are constrained to hold that the present Appeal as against the Review order in respect of these issues is not maintainable in view of the fact that these issues have already been decided in the main order itself.

Thus, we uphold the objection regarding the Maintainability of the Appeal.”

This Tribunal has held that the Doctrine of Merger will not be applicable to the distinct issues that were rejected in the review order and the appeal against such issues is not maintainable as the issues were decided in the main order.

- c) The Appellant while defending the maintainability of the Appeal has also relied on some of the judgements of this Tribunal viz judgement dated 5.3.2014 in Appeal No. 167 of 2013 in case of PGCIL vs. CERC &Ors. and judgement dated 7.3.2014 in Appeal No. 30 of 2013 in case of NHDC Ltd. Vs. CERC &Ors.
- d) Now let us analyse the findings of this Tribunal in the said judgements. The relevant extract from the judgement dated 5.3.2014 in Appeal No. 167 of 2013 in case of PGCIL vs. CERC & Ors. is reproduced herein below:

“(u) Thus, by the review order, the learned Central Commission has partly set aside the main order and accordingly allowed the review application after rehearing the parties during the review petition. The main order has consequentially been reversed/modified. Thus, the learned Central Commission has made an order in review petition by which the review petition has been allowed and the decree/order under review has been reversed or modified. Such an order then becomes a composite order whereby the Central Commission has not only vacated the earlier decree

or order but simultaneous with such vacation of the earlier decree or order has passed another decree/order by modifying the one made earlier. Thus, the original decree or order of the Central Commission has been reversed or modified by the subsequent review order or decree and the review order or decree is effective for the purpose of further appeal.

..... In our view, the instant appeal against the review order is fully competent and legally maintainable and this point namely; Point-1 is decided in favour of the Appellant Petitioner.

(v) The findings of this Tribunal in Appeal No. 88 of 2013 will not be applicable in the present case as in the present case the issue dealt with in the review petition was IDC and IEDC in respect of Asset 1 to 4, which was allowed partially by allowing IDC and IEDC in respect of Asset 1 & 2. Further, in the main order, the transmission charges for combined Asset 1 & 3 were determined. The review allowing IDC and IEDC in respect of Asset 1 will modify the transmission charges for combined Asset 1 & 3.”

The relevant extract from the judgement dated 7.3.2014 in Appeal No. 30 of 2013 in case of NHDC vs. CERC &Ors. is reproduced below:

“22. The facts of present case are totally different from the facts of the Appeal No.88 of 2013. In Appeal No.88 of 2013

the issues which were rejected in review against which the Appeal was filed, were not modified as a result of review allowed in other issues. In the present case in the suo-motu Review Order dated 14.3.2012, the Central Commission corrected the inadvertent clerical and arithmetical errors resulting in modification in various components of tariff including interest on loan and the Annual Fixed Charges of the project. The Central Commission in the Impugned Review Order dated 5.9.2012 again changed the computation of Maintenance Spares for Working Capital for FY 2008-09 and re-determined the Annual Fixed Charges for FY 2008-09 and directed the Appellant to claim the difference in the tariff determined by Order dated 16.1.2012 and the tariff determined by the Review Order dated 5.9.2012. The interest on loan and Annual Fixed charges for FY 2008-09 have also been modified in the Review order dated 5.9.2012 with respect to the Main order dated 16.1.2012. Thus, in the present case, the Doctrine of Merger will be applicable and main order dated 16.1.2012 and suo-motu Review order dated 14.3.2012 will merge with the Review order dated 5.9.2012. Therefore, the Appellant has correctly challenged the Review Order dated 5.9.2012 in respect of the issue of interest on loan in this Appeal. Hence, the Appeal filed against the Review order is maintainable in this case.

The above two judgements of this Tribunal reveal that in case the main order is modified based on the review order then the said

orders get merged and Doctrine of Merger will apply to them and the appeal against such order/orders is maintainable.

- e) After perusal of the Review Order dated 21.12.2015 in Petition No. 21/RP/2015 we observe that the Central Commission has allowed review on one aspect i.e. DOCO of Asset- B (DOCO allowed as 1.8.2013 instead of 1.1.2014 in the Main Order) as requested by the Appellant thereby modifying the Main Order dated 13.8.2015 in Petition No. 300/TT/2013. The relevant extract from Review Order is reproduced below:

“10. (a) The impugned order is modified to the extent that COD of Asset B shall be considered as 1.8.2013 instead of 1.1.2014 since the petitioner has submitted technical justification for using line reactors as bus reactors in terms of liberty granted to it. IDC has been calculated by taking the COD of Asset B as 1.8.2013 and the Review Petitioner shall submit the capital cost of Asset B as on 1.8.2013 at the time of truing up.”

Accordingly, the Doctrine of Merger will apply to the present case and as such, the Appeal is maintainable.

- f) The Appellant has raised questions of law which are related to the central issue of disallowance of complete time overrun by the Central Commission as requested by the Appellant for the Assets- A & B. Accordingly we are analysing the main issue i.e. Whether the Central Commission has rightly disallowed the time overrun in commissioning of the Assets- A & B by the Appellant?

- g) For answering the question, we first consider the findings of the Central Commission in the Main Order. The relevant extract of the same is reproduced below:

“22. We have considered the submissions made by the petitioner and the respondents. The MoEF circulars dated 4.5.2001 and 5.2.2009 and the Hon’ble Supreme Court’s judgement dated 28.3.2008, advising use of forest land in National Parks and Wild life areas only in totally unavoidable circumstances, were in existence much prior to the Investment Approval of the instant project dated 10.12.2009. The petitioner should have been aware at the time of planning the project that the instant line passes through the Sariska Tiger Sanctuary and should have taken cognizance of the judgement of the Hon’ble Supreme Court and the circulars issued by MoEF. The petitioner has failed to take into cognizance of the circulars issued by MoEF and the judgement of the Supreme Court at the planning stage and when confronted with the problem at the execution stage, the petitioner rerouted the transmission line to avoid the Tiger Sanctuary. The failure on the part of the petitioner to be prudent at the time of planning, necessitated rerouting of the line at the time of implementation, leading to time over-run. We are of the view that the petitioner with a vast experience in constructing transmission systems has failed to be prudent at the time of planning the instant lines and is solely responsible for the time over-run.”

23. It is further observed that the petitioner has not explained why there was a huge gap between the date of investment approval and the date of applying for NoC from NHAI and Railways. Once it is known that the transmission will cross the highways and railways, the petitioner should have made efforts from the beginning that necessary approval are in place and the project is executed in time. The petitioner applied for the NOC on 18.7.2011, 10.1.2012 and 12.9.2012 for NH-8, NH11 and NH-3 respectively. Similarly, in case of Railways, the petitioner has applied for NOC only during 2011 and 2012 i.e. starting from April 2011 to September 2012.....

..... However, the application was also made by the petitioner, after a gap of 2 years and 7 months from the date of Investment approval. Thus, in view of such inordinate delay in applying for clearances, the petitioner in the said order was also advised by the Commission to initiate action for obtaining Railway and Forest clearances in all future cases immediately after the Investment Approval is issued. However, the petitioner has failed to do so in the instant case and there is delay in applying for railway clearances by 16 to 33 months. Moreover, out of seven clearances, in two instances of Single Broad Gauge Agra-Bateshwar track and Alwar-Mathura Broad Gauge, the petitioner has applied for clearance on 4.9.2012 and 10.9.2012 respectively, after the scheduled date of commercial operation i.e. 1.9.2012 and no reasons for delay in applying for clearances have been submitted by the

petitioner. As such, we are not inclined to condone the delay on account of delays in getting the NOC from NHAI and the Railway authorities.

24. The petitioner has further submitted that RoW constraints in the form of obstruction by the villagers from September, 2013 to December, 2013 led to time over-run. The petitioner has also submitted the correspondence made to pursue the case with the District Collector, Superintendent of Police and the ADM in this regard. We are of the view that there was RoW constraints and that the petitioner made all possible efforts to get the matter settled. Hence, we are inclined to condone the time over-run of 4 months out of 16 months of time over-run in the case of Asset-A.....”

The Central Commission has held that the Appellant was not prudent at the time of planning of the Transmission System in view of the circulars of MOEF and decision of Hon'ble Supreme Court. The Appellant also failed to justify the long delay in applying for clearances from NHAI and Railways after the IA. Further, the Central Commission has allowed delay of 4 months on account of Right of Way constraints for the Asset A as the Appellant has taken all the possible steps to get the matter settled.

- h) Now let us consider the findings of the Central Commission in the Review Order. The relevant extract of the same is reproduced below:

“9..... In this connection, the petitioner has submitted that the details of reasons for delay due to national

highways and railway crossing were submitted vide affidavit dated 30.6.2014 (Annexure I) which has not been considered. The petitioner has also submitted the letters dated 1.6.2011 and 10.1.2011 addressed to NHAI, Jaipur (Annexure-J and K) and letter dated 12.9.2012 addressed to Project- Director, Gwalior (Annexure L) in support of contention that the review petitioner has been monitoring with NHAI for approval. We have perused the affidavit dated 30.6.2014 and Annexures J, K and L. All these documents have been taken into consideration in para 23 of the impugned order. Therefore the review of the impugned order sought by the Review Petitioner on account of non-consideration of the affidavit dated 30.6.2014 and Annexures J, K and L cannot be sustained. The petitioner has also placed on record letters dated 24.2.2009 and 4.11.2009 addressed to Dy. Conservator of Forest Department, Sariska District, Alwar and Conservator of Forests, Jaipur respectively. The letter dated 24.2.2009 seeks the status of forest land from the Dy. Conservator of Forests as per the route alignment of 400 kV D/C Agra-Sikar line. Through the letter dated 4.11.2009, the petitioner has submitted the proposal for forest clearance for an area of 4.7656 hectares of forest land which is covered under the corridor of 400 kV Agra-Sikar line.

.....
 10. In view of the above discussion, issues raised in the review petition are decided as under:

(a).....

(b) The review sought in respect of time overrun is rejected as some of the documents produced in review (affidavit dated 30.6.2014 and Annexure J, K and L) have been considered in the impugned order and other documents (letters dated 24.2.2009 and 4.11.2009) were in possession of the Review Petitioner at the time of issue of impugned order but were not produced in the main petition and are not relevant for deciding the issue of time overrun.”

The Central Commission while dealing with the contention of the Appellant that the Central Commission has not considered its affidavit dated 30.6.2014 in the main order has held that the Central Commission has considered the said affidavit of the Appellant at para 23 of the Main Order. The Central Commission has also discussed the additional letters which were placed on record before it for the first time in Review Petition and has held that the said letters were also not relevant to decide the issue of time overrun and has rejected the review on the issue of time overrun due to delay in obtaining NOC from NHAI and Railways.

- i) At this juncture it becomes important for us to consider the para 23 of the Main Order wherein the Central Commission has dealt the affidavit dated 30.6.2014 of the Appellant as the Appellant has also pressed upon the same issue before this Tribunal. The relevant extract from the Main Order is already reproduced above. We have gone through the contents of the affidavit dated 30.6.2014 filed by the Appellant before the Central Commission and the Main Order. We observe that the Central Commission has taken cognisance of

the submissions made by the Appellant in the said affidavit while issuing the Main Order. This is also evident from the fact that the Central Commission has allowed time overrun of 4 months due to ROW issues which was detailed out by the Appellant in the affidavit dated 30.6.2014.

- j) We have also gone through the letters dated 24.2.2009 and 4.11.2009 which were not submitted by the Appellant with the main petition. We find that the observations made by the Central Commission on the said letters in the Review Order are in order.
- k) After careful perusal of the Petition No. 300/TT/2013 filed by the Appellant before the Central Commission we came across the following para at page no. 10-11 of the said Petition:

“It is to mentioned that the walkover/ preliminary survey was done in December 2008. During walkover survey it was anticipated that the line will pass through Sariska Tiger Sanctuary. The contract was placed in 2010, during this period, numbers of houses, huts, tubewell, new HT lines and new LT sub stations were constructed. After placement of award, survey was again conducted and it was found that line cannot pass through Sariska Tiger Sanctuary, resulting in diversion of line and increase in line Highway and Railway crossings.”

From the above it is clear that the Appellant was aware since beginning that the line was anticipated to pass through Sariska Tiger Sanctuary and not the revenue land as submitted in the

instant Appeal. Perusal of the said petition and submissions made by the Appellant before the Central Commission reveals that there is no mention of the revenue land for the envisaged route of the Agra Sikar line.

- l) We also observe that the Appellant has contended that the reason for re-routing of the Transmission System was due to change in the route envisaged (which passing through revenue land) by the Appellant as the said route was in the process of being notified as a buffer zone of Sariska Tiger Reserve. The Appellant claims that it came to know about the same during final/check survey in early 2011 from the forest officials of Sariska Sanctuary. The Appellant has not placed any communication/particular date of having the knowledge of the same. The final/ check survey was almost more than a year from the date of IA and almost one year from placement of contract for the Transmission system. The submissions made by the Appellant in the instant Appeal are in deviation to what was presented before the Central Commission. From this it is confirmed that the conclusion drawn by the Central Commission regarding the Appellant being not prudent enough at the planning stage as the Appellant failed to take into cognizance of the circulars issued by MoEF and the judgement of the Hon'ble Supreme Court which were issued well before the IA date. Had the Appellant vigilant the same could have been taken care at the planning stage itself and rerouting of the line at the time of implementation which has led to time overrun would have been avoided. This has further compounded the problem in getting NOC

from NHAI and Railways for crossings of the Transmission System at various National Highways and Railway lines.

m) The Appellant has applied for NOC to NHAI starting from July 2011 to September 2012. In case of Railways, the Appellant has applied for NOC starting from April 2011 to September 2012. From the submissions of the Appellant it is clear that it has followed up with NHAI for issuance of NOC for the most crucial NH-8 crossing vide letters dated 10.12.2011, 22.6.2012, 13.11.2012 and 27.5.2013. From this, it is clear that the Appellant has been writing reminders in a customary manner at an interval of about every 6 months for issuance of NOC from NHAI. The Appellant has also not put on record any authenticated and credible document or any other means of following up like meeting with higher authorities etc. for obtaining clearances from NHAI. This lacks sense of urgency on the part of the Appellant for obtaining the clearances for the reasons best known to the Appellant. The Appellant has also not taken seriously the advisory of the Central Commission order dated 19.5.2014 in Petition No. 284/2010 wherein the Central Commission has advised the Appellant to initiate action for obtaining Railway and Forest clearances in all future cases immediately after the Investment Approval is issued.

n) The Regulations under which tariff has been determined by the Central Commission are the Tariff Regulations, 2009. While admitting the capital cost the Central Commission is required to carry out the prudence check in terms of Regulation 7 of the said regulations. The relevant extract is reproduced below:

“7. Capital Cost. (1) Capital cost for a project shall include:

.....

(2) The capital cost admitted by the Commission after prudence check shall form the basis for determination of tariff:

Provided that in case of the thermal generating station and the transmission system, prudence check of capital cost may be carried out based on the benchmark norms to be specified by the Commission from time to time:

Provided further that in cases where benchmark norms have not been specified, prudence check may include scrutiny of the reasonableness of the capital expenditure, financing plan, interest during construction, use of efficient technology, cost over-run and time over-run, and such other matters as may be considered appropriate by the Commission for determination of tariff.”

The Central Commission is required to carry out prudence check while allowing any time overrun and cost overrun.

- o) After considering all the relevant aspects of the Appeal, material placed on record and in view of our discussions as above, we are of the considered opinion that the Central Commission has rightly carried out prudence check while considering the submissions made by the Appellant and we do not see any legal infirmity in the order of the Central Commission in disallowing time overrun of 12 months for Asset-A and 11 months for Asset-B of the Transmission System.

p) We do not find any error or material irregularity in the Impugned Order passed by the Central Commission in the main Order and also in the Review Order. The Central Commission after careful evaluation of the oral, documentary and other relevant materials on record has rightly justified recording the findings in answering the issues against the Appellant. Therefore, interference of this Tribunal does not call for. Hence, on this ground also the Appeal filed by the Appellant is liable to be dismissed.

q) Accordingly, the issues raised by the Appellant are decided against the Appellant.

ORDER

Having regard to the legal and factual aspects of the matter as stated above, we are of the considered opinion that issues raised in the present Appeal are devoid of merit and hence, the Appeal No. 85 of 2016 is dismissed.

The Impugned Order dated 21.12.2015 (“**Review Order**”) passed by Central Electricity Regulatory Commission (in Review Petition No. 21/RP/2015 merged with the Order dated 13.08.2015 (“**Main Order**”) in Petition No. 300/TT/2013, is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **1st day of May, 2018.**

(Justice N. K. Patil)
Judicial Member

√

REPORTABLE/NON-REPORTABLE

mk

(I.J. Kapoor)
Technical Member