

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

APPEAL NO. 231 OF 2017

Dated: 3rd October, 2019

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. Ravindra Kumar Verma, Judicial Member

In the matter of:

Powerlinks Transmission Limited
10th Floor, DLF Tower A
District Centre Jasola,
New Delhi – 110025

...Appellant(s)

Versus

- 1. Central Electricity Regulatory Commission**
3rd and 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001.
...Respondent No.1
- 2. Power Grid Corporation of India Ltd.**
'Saudamini', Plot No.-2, Sector- 29,
Gurgaon, Haryana – 122 001
...Respondent No.2
- 3. West Bengal State Electricity Distribution**
Company Ltd.
Bidyut Bhawan, Bidhan Nagar,
Block DJ, Sector-II, Salt Lake,
Kolkata – 700091
...Respondent No.3
- 4. Damodar Valley Corporation,**
DVC Tower, Maniktala, Civil Centre,
VIP Road,
Kolkata – 700054
...Respondent No.4
- 5. Bihar State Electricity Board,**
Vidyut Bhawan, Bailey Road,
Patna – 800001
...Respondent No.5
- 6. Grid Corporation of India Ltd.**

Vidyut Bhawan, Janpath,
Bhubaneswar – 751007

...Respondent No.6

7. Power Department
Govt. of Sikkim, Gangtok – 737101

...Respondent No.7

8. Jharkhand State Electricity Board
In front of Main Secretariat,
Doranda, Ranchi – 834002

...Respondent No.

Counsel for the Appellant(s) : Mr. Amit Kapur
Mr. Yashaswi Kant

Counsel for the Respondent(s) :

JUDGMENT

PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

1. Prayer of the Appellant.

- (a) Set aside the Impugned Findings in the Impugned Order dated 20.04.2017 passed by the Ld. Central Commission in Petition No. 514/TT/2014;
- (b) Direct the Ld. Central Commission to allow the Normative IDC on the Normative Loan considered for funding the Additional Capitalization proposed for FY 2014-19; and
- (c) Pass such further and other appropriate orders deemed necessary in the facts and circumstances of the present case.

2. Questions of Law:

- A. Whether the Ld. Central Commission has contravened Regulation 9(2), 9(3), 19(1) and 19(5) of the Tariff Regulations 2014 (and corresponding Regulations of Tariff Regulations 2009 for 2013-14 true-up) by not allowing Normative IDC on Normative Loan?
- B. Whether the Ld. Central Commission erred by not adhering to the financial principle set out in the para 13.13 of the SOR dated 24.04.2014?
- C. Whether Normative IDC can be only provided on Normative Loan in case of initial funding of the Project before Commercial Operation Date ("COD") and not in case of Additional Capitalization even if the nature of investment in both case remains the same i.e. through internal resources?

3. Brief facts of the Case

- 3.1 The present Appeal has been filed by Powerlinks Transmission Ltd. (hereinafter referred to as the "PTL/Appellant") under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the "Act") against the Order dated 20.04.2017 ("Impugned Order") passed by the Central Electricity Regulatory Commission (hereinafter referred

to as the “Central Commission/CERC”) in Petition No. 514/TT/2014.

- 3.2 Powerlinks Transmission Ltd. , the Appellant herein is primarily engaged in the business of transmission of electricity.
- 3.4 The Respondent No.1 is the Central Electricity Regulatory Commission discharging function under the Electricity Act, 2003.
- 3.5 The Respondent No. 2, Power Grid Corporation of India Ltd is the Central Transmission Utility which owns and manages the inter-state transmission system across India.
- 3.6 Respondent No. 3 to Respondent No. 8 as detailed in the Memo of parties are proforma Respondents.
- 3.7 The Central Commission granted license to the Appellant on 13.11.2003 to transmit electricity as a Transmission Licensee and for that purpose to construct, maintain and operate the Inter-state Transmission System associated with the Tala Hydro Electric Project (“HEP”) East-North Inter Connector and Northern Region Transmission System. The Appellant is a Transmission Licensee within the meaning of Section 2(73) of the Electricity Act and is entrusted with the implementation of the scheme for Transmission System associated with the following:-

- (a) Siliguri-Purnea 400 KV D/C (Quad. Conductor) Transmission Line;
- (b) Purnea-Muzaffarpur (New) 400 KV D/C (Quad. Conductor) Transmission Line;
- (c) Muzaffarpur (New)-Gorakhpur (New) 400 KV D/C (Quad. Conductor) Transmission Line;
- (d) 220 KV D/C line from Muzaffarpur 400/220 KV new S/S to Muzaffarpur 220 KV S/S (BSEB) Transmission Line;
- (e) Gorakhpur (New)-Lucknow (New) 400 KV D/C Transmission Line; and
- (f) Bareilly-Mandola 400 KV D/C Transmission Line.

3.8 The Appellant filed Petition No. 288 of 2009 before the Central Commission seeking determination of Transmission Tariff for the period FY 2009-14 including the proposal for Additional Capitalization for the transmission assets associated with the Tala Hydro Electric Project. The proposed Additional Capitalization for FY 2009-14 included only the services and the equipment cost.

3.9 On 17.03.2011, the Central Commission passed the Order determining the Transmission Tariff for the above assets for the period FY 2009-14 including the approval on Additional Capitalization after prudent scrutiny of the same.

- 3.10. On 28.01.2014, the Appellant filed Petition No. 19/TT/2014 seeking Truing-up of Transmission Tariff for the period FY 2009-13 along with the actual Additional Capitalization. Further, since such Additional Capitalization had been funded through internal accruals, the Appellant had therefore proposed for capitalization of Normative IDC on Normative Loan considered at 70% of total funding of Additional Capital Expenditure Schemes.
- 3.11 On 21.02.2014, the Central Commission promulgated the Tariff Regulations 2014 wherein Regulations 9(2), 9(3), 19(1) and 19(5) read together specifically provide for consideration of equity in excess of 30% as Normative Loan even for expenditure on Additional Capitalization and that such Normative Loan is entitled for Normative IDC.
- 3.12 On 24.04.2014, the Central Commission issued the SOR to Tariff Regulations 2014 wherein the clarification regarding the financial principle guiding the applicability of Normative IDC on Normative Loan has been elaborated in Para 13.13.
- 3.13 Pending the disposal of the above Petition, on 27.11.2014, the Appellant filed Petition No. 514/TT/2014 for Truing-up for the period FY 2013-14, based on the provisions of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 for FY 2009-14, and Tariff determination for the

period FY 2014-19, based on the provisions of Tariff Regulations 2014.

3.14 In the aforesaid Petition No. 514/TT/2014, the Appellant proposed for Additional Capitalization for the period FY 2014-19 along with the estimated Normative IDC on Normative Loan required for funding of the proposed Additional Capitalization based on the estimated timelines based on Tariff Regulations 2014 backed by the principle highlighted in the SOR dated 24.04.2014 and prudent financial principles.

3.15 On 20.09.2016, the Central Commission issued the Record of Proceedings ("RoP") and raised certain queries pertaining to the computation of Normative IDC during FY 2013-14 and Auditor's Certificates for additional capitalization incurred/projected to be incurred during FY 2013-14 and FY 2014-19 showing segregated value of Normative IDC and original expenditure of the asset.

3.16 In compliance with the directions in the RoP, the Appellant submitted its response on 18.10.2016 before the Central Commission, wherein the Appellant submitted the Additional Capitalization for FY 2013-14 and proposed Additional Capitalization for FY 2014-19 including Normative IDC. The Audited Certificates supporting the actual expenditure however included only the cash expenditure.

3.17 On 20.04.2017, the Central Commission passed the Impugned Order wherein the Additional Capitalization has been approved only to the extent of actual/projected cash expenditure without considering the Normative IDC proposed for FY 2013-14 and FY 2014-19 contravening the provisions of Tariff Regulations 2009 and Tariff Regulations 2014 read with the SOR dated 24.04.2014.

4. Submissions of the Appellant

4.1 Powerlinks Transmission Limited, a Transmission Licensee filed Petition No. 514/TT/2014 before the Central Electricity Regulatory Commission seeking the following prayer:-

- (a) Truing-up for the period FY 2013-14, based on the provisions of CERC (Terms and Conditions of Tariff) Regulations, 2009 ("Tariff Regulations 2009") for FY 2009-14.
- (b) Tariff determination for the period FY 2014-19, based on the provisions of CERC (Terms and Conditions of Tariff) Regulations, 2014 ("Tariff Regulations 2014").

4.2. The Appellant had filed Petition No. 514/TT/2014 and, inter-alia, sought Additional Capitalization under various schemes during the period FY 2014-15 to FY 2018-19. Pending the adjudication of Petition No. 19/TT/2014 before the Central Commission, the Appellant had proposed such cost of Additional Capital Schemes

inclusive of Normative IDC.

4.3. The Central Commission by way of the Impugned Order has disallowed Normative Interest during Construction ("Normative IDC") claimed by the Appellant on the equity in excess of 30%. This equity investment was envisaged for the purpose of funding Additional Capitalization for FY 2014-15 to FY 2018-19. Relevant extract from the Impugned Order is:-

"47. The petitioner, vide affidavit dated 20.10.2016, has submitted that the additional capitalization projected to be incurred during the tariff period 2014-19 shall be funded through its internal accruals. It may be noted that the 2014 Tariff Regulations do not specifically provide for normative IDC in respect of additional capitalization, as the petitioner has not deployed any actual loan for additional capital expenditure. Hence, total Normative IDC of ₹48.31 lakh for insulator replacement, tower collapse and IR camera is not allowed."

4.4. The Appellant has challenged this disallowance since this treatment violates:-

(a) Regulations 9 and 19 of the Tariff Regulations 2014; read with

- (b) Paragraph 13.13 of the accompanying Statement of Reasons dated 24.04.2014 ("SOR") to the Tariff Regulations 2014

4.5. The said provisions essentially mandate that:-

- (a) Capital Cost/ Additional Capitalization being a part of the Capital Cost of the existing project should be funded in the Normative Debt-Equity ratio of 70:30.
- (b) If the developer deploys equity in excess of 30% for funding of such additional capital expenditure, such excess equity capital shall be treated as Normative Loan which shall therefore be entitled for Normative IDC. This is evident from a combined reading of Regulations 19(1), 19(5), 9(2) and 9(3) of Tariff Regulations 2014.
- (c) In the SOR to the Tariff Regulations 2014, Central Commission had specifically explained that equity in excess of 30% shall be treated as Notional Loan for the purpose of tariff and the notional loan shall also be entitled for interest during construction.

4.6. This Appeal was admitted on 08.08.2017, notice to the Respondents issued returnable on 14.09.2017, permitting dasti service. The Respondents have been served as far back as on 01.09.2017. Upon same, the Appellant filed an affidavit of service on 01.09.2017. The matter was listed on various occasions for hearing

since 26.09.2017. Since no one appeared on behalf of the Respondents, this Tribunal granted one more opportunity and adjourned the matter to 30.10.2017. None of the Respondents appeared or filed a Reply to the Appeal. Since, nobody entered appearance for the Respondents, the pleadings were to be treated as complete and the Appeal has been posted for hearing.

Re.: Tariff Regulations 2014 and Normative IDC on additional capitalisation

4.7 The grounds on which the Central Commission has disallowed Normative IDC are wrong in view of the following:-

- (a) The Appellant had envisaged to fund the proposed Additional Capitalization through its internal accruals and did not intend to seek any project specific loan. This fact was placed before the Central Commission through the Affidavit dated 20.10.2016. Accordingly, such investment would be funded through 100% equity.
- (b) Regulation 19(1) of the Tariff Regulations 2014 prescribe a normative debt-equity ratio at 70:30, hence the equity is capped at 30%.
- (c) In the event that the equity actually deployed is more than 30% of the capital cost, equity in excess of 30% is to be treated as

normative loan in terms of Regulation 19(1).

- (d) Regulation 19(5) of Tariff Regulations 2014 stipulate the treatment of funding Additional Capital Expenditure incurred after 01.04.2014 as approved by the Central Commission in the same manner as is done for a new project on its CoD after 01.04.2014, i.e., with 70:30 debt-equity ratio, in the manner specified under Regulation 19(1).
- (e) Regulation 9 (2) of the Tariff Regulations 2014 state that equity in excess of 30% of the funds deployed is to be treated as Normative Loan and the same shall be a part of the Project Cost.
- (f) Regulation 19(1) specifies funding pattern of the Project Cost for new projects, Regulation 9(2) specifies that IDC, including Normative IDC, shall be a part of the Project Cost. Thus, Regulation 9(2) is embedded in and linked to Regulation 19(1).
- (g) For new projects with CoD on or after 01.04.2014, IDC on normative loan is allowed to be capitalized in Project Cost in terms of Regulation 19(1) read with Regulation 9(2). Since Regulation 19(5) specifically provides that Additional Capital Expenditure (i.e. the Expenditure incurred in the period prior to the date when Asset is put to use or during its construction period) is to be funded as per Regulation 19(1), Regulation 9(2)

also gets attracted. Therefore, Normative IDC is permitted under the Tariff Regulations 2014.

Re.: Actual Deployment of Loan for admissibility of Normative IDC

4.8 The Central Commission has held that there is no specific provision for approval of Normative IDC for additional capitalization. To the contrary, the principle providing for the Normative IDC does not bar the Central Commission from providing Normative IDC on equity capital treated as Normative Loan and utilized for the purpose of funding projects for Additional Capitalization. Whether such capital is received before the COD of the Project or after the commissioning of the Project through Additional Capitalization, the treatment of equity capital in excess of 30% as Normative Loan remains the same.

4.9 The Central Commission has disallowed the Normative IDC on the ground that there is no actual loan deployment. In the event, if there was actual loan deployment, the IDC would have been allowed as per the extant Regulation. Since the Tariff Regulations 2014 is applicable to new projects, where Normative IDC is allowed to be capitalized, it cannot be considered to be limiting itself only to IDC for actual loan deployment. The Regulation 11A (Interest during Construction) refers to the infusion of debt fund, which as per Regulation 19(1) read with Regulation 19(5) can be

actual or normative debt. The Regulations allowing IDC to be part of Capital Cost does not restrict the same to actual debt availed by the transmission licensee. Either ways once the capital has been invested prudently and verified, it has to be duly reflected in the Balance Sheet and the regulatory account of the licensee with appropriate return/treatment.

4.10 In the SOR, the Central Commission has, in consideration of the above provisions, stated that investment made by the Generating Company or the Transmission Licensee in the form of equity in excess of 30% should be treated as Normative Loan for the purpose of determination of tariff. Further, such investment made by the developer has a cost to be served and therefore such equity capital treated as Normative Loan would be entitled for Normative IDC.

4.11 The above submissions, with regard to the use of internal source of finance in place of debt for funding the working capital (additional capitalisation in the instant case) also carries a cost, are supported by findings in:-

- (a) Tribunal's Judgment dated 28.05.2009 in Appeal No. 111 of 2008 in Reliance Infrastructure Ltd. v. MERC & Ors., reported as 2009 ELR (APTEL) 0560 [Para 6 & 7].

(b) Tribunal's Judgment dated 15.07.2009 in Appeal No. 137 of 2008, 138 of 2008 and 139 of 2008 in Tata Power Company Ltd. v. MERC, reported as 2009 ELR (APTEL) 0622 [Paras 15-20].

(c) Tribunal's Judgment dated 15.02.2011 in Appeal No. 173 of 2009 in Tata Power Company Ltd. v. MERC, reported as 2011 ELR (APTEL) 0336 [Para 23 & 24].

4.12 Regulation 9(3) of the Tariff Regulations 2014 stipulates that the Capital Cost of the existing Project shall include expenditure on account of any Additional Capitalization as allowed by the Central Commission. Therefore, the Capital Cost of an existing Project shall include the initial Project Cost (including Normative IDC on Normative Loan, if any) and the additional capitalization and de-capitalization as approved by the Central Commission for the respective years of the period FY 2014-19. For the reasons given in the preceding paragraphs, Additional Capitalization funding as per Regulation 19(5) includes the Normative IDC as per Regulation 19(1) and 9(2).

4.13. Thus, a combined reading of the said Regulations 19(1), 19(5), 9(2) and 9(3) of the Tariff Regulations 2014 along with the SOR dated 24.04.2014 provides that the additional capitalization being a part of the Capital Cost of the existing Project should be funded in

the Normative Debt-Equity ratio of 70:30. If the developer deploys equity in excess of 30% for funding of such additional capital expenditure, such excess equity capital shall be treated as Normative Loan which shall therefore be entitled for Normative IDC.

4.14 Further, Regulation 11A(1) of the Tariff Regulations 2014 stipulates that IDC shall be computed from the date of infusion of the funds and upto the Scheduled Commercial Operation Date ("SCOD") of the Project. Regulation 11 specifically deals with IDC to be considered in the Project Cost (which includes Additional Capital Expenditure) and does not limit IDC only to new projects and hence, would be equally applicable to IDC on Additional Capital Expenditure.

4.15 Aggrieved by the Impugned Order dated 20.04.2017, the Appellant has presented the instant Appeal.

5. The appeal was admitted as far as back on August 8th, 2017. Respondents have been served as far back as on September 9th, 2017. In spite of offering number of opportunities, the Respondents neither appeared nor represented. Since, nobody entered appearance for the respondents, we have heard the submissions and arguments of the Appellant and on the basis of

material/records available on the file reserved the judgment and accordingly, the judgment is being delivered ex parte.

8. Findings in this case are as under:-

- i) The short question here is whether the decision of the Central Commission not to allow the IDC in respect of additional capitalisation, funded by the Appellant through its internal accruals, as the Appellant has not deployed any actual loan for additional capital expenditure is correct.
- ii) As per Regulation 19(1) of the CERC Regulations, 2014, For a project declared under commercial operation on or after 1.4.2014, the debt-equity ratio would be considered as 70:30 as on COD. If the equity actually deployed is more than 30% of the capital cost, equity in excess of 30% shall be treated as normative loan.
- iii) As per Regulation 19(5) of the CERC Regulations, 2014, any expenditure incurred or project to be incurred on or after 01.04.2014 as may be admitted by the Central Commission as an additional capital expenditure for determination of tariff, and renovation and modernisation expenditure for life extension shall be serviced in the manner specified in clause (1) of this Regulation.
- iv) Regulation 11 (a) of the CERC Regulations, 2014 interest during construction shall be computed corresponding to the loan from the

date of infusion of debt fund and after taking into account the prudent phasing of fund upto SCOD.

- v) Para 13.13 of the Statement of Reasons dated 24.04.2014 issued by the Central Commission provides as under:-

“13.13 On the issue of allowing IDC for the equity infusion above the desired level, the Commission would like to refer to the Tariff Policy issued by the Government of India, which states that all the new power projects would be financed in the debt equity ratio of 70:30 and the investors are free to infuse equity more than the 30% level with a condition that equity infusion above the threshold limit of 30% would be considered as normative loan. The Commission is of the view that any investment deployed either in the form of equity or debt has a cost to be serviced. The investments made in the form of equity are risk capital carrying higher rate of return and have perpetual flow of return up to the end of the life of the plant. However, the loan capital does not enjoy the aforesaid perpetual and higher rate of return. As the equity in excess of 30% of capital cost has been considered as notional loan for the purpose of tariff, the Commission is of the view that the equity capital equivalent to notional loan shall also be entitled for interest during construction.”

- vi) The Appellant have also submitted that with regard to the use of internal sources for finance, in place of debt for funding the working capital (additional capitalisation in the instant case), also carries a cost, are supported by the findings in:

- (a) Tribunal's Judgment dated 28.05.2009 in Appeal No. 111 of 2008 in *Reliance Infrastructure Ltd. v. MERC & Ors.*, reported as 2009 ELR (APTEL) 0560 [Para 6 & 7].
- (b) Tribunal's Judgment dated 15.07.2009 in Appeal No. 137 of 2008, 138 of 2008 and 139 of 2008 in *Tata Power Company*

Ltd. v. MERC, reported as 2009 ELR (APTEL) 0622 [*Paras 15-20*].

- (c) Tribunal's Judgment dated 15.02.2011 in Appeal No. 173 of 2009 in *Tata Power Company Ltd. v. MERC*, reported as 2011 ELR (APTEL) 0336 [*Para 23 & 24*].

vii) In this case the Central Commission allowed the additional capitalisation funded by the Appellant through its internal accruals but did not allow the normative IDC on this additional capitalisation. The only reason given by the Central Commission is that the Tariff Regulations do not specifically provide for normative IDC in respect of additional capitalisation as the Petitioner has not deployed any actual loan for additional capital expenditure.

viii) As it is, the Central Commission have ignored, the various provisions of the Tariff Regulations, 2014, the Central Commission's views given at 13.13 of the Statement of Reasons dated 24.04.2014 and also the various judgments of this Tribunal referred by the Appellant on the issue of admissibility of interest during construction in respect of additional capitalisation funded through internal accruals.

ix) The Central Commission should have taken into consideration the aspect that whatever be the types of funds it is never free of cost. There is always a cost of funding. The argument that no actual loan for additional capital expenditure was taken and therefore it is not admissible for any normative IDC is wrong. It is the commercial decision of the Appellant whether to borrow the money from the market for the purpose of additional capitalisation or use its internal accruals. In either case, the capitalisation deserves to be given the

Interest During Construction. For the simple reasons that if the internal accruals were not to be used as additional capital than it would have been invested in the market in any interest earning instrument. Additional capitalisation is therefore entitled to be compensated in terms of normative IDC. The Central Commission should have considered this aspect that no funds are free funds.

- x) The Impugned Order is not in line with the Central Commission's views expressed in the Statement of Reasons notified by it and is also not in line with the various provisions of the Tariff Regulations, 2014 which provides that this additional capitalisation funded through the internal accruals of the Appellant to be treated as normative loan. As such we do not agree with the decision of the Central Commission.

ORDER

Having regard to the facts and circumstances of the case as stated above, Appeal filed by the Appellant is hereby allowed.

The Impugned Order dated 20.04.2017 passed by the first Respondent/the Central Commission is hereby set aside.

The matter stands remitted back to the first Respondent/the Central Commission with the direction to pass the order in the light of the observations made in the preceding paragraphs above in accordance with law as expeditiously as possible within a period of three months after receiving the copy of this judgement.

The Appellant and the Respondents are hereby directed to appear before the 1st Respondent/the Central Commission personally or through their counsel on 03.10.2019 without further notice.

No order as to costs.

Pronounced in the Open Court on this **3rd day of October,**
2019.

(Ravindra Kumar Verma)
Technical Member

✓

(Justice Manjula Chellur)
Chairperson

REPORTABLE/NON-REPORTABLE

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