

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APPEAL NOS. 95 of 2018 & 140 OF 2018

Dated: 02nd December, 2019

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member**

APPEAL NOS. 95 of 2018 & 140 OF 2018

In the matter of:

Power Grid Corporation of India Limited
Through its Managing Director
"Saudamini", Plot No. 2,
Sector -29, Gurgaon – 122 001

... Appellant

VERSUS

1. Central Electricity Regulatory Commission
Through its Secretary
4th Floor, Chanderlok Building,
26, Janpath, New Delhi -110001
2. Madhya Pradesh Power Management Company Ltd.
Through its Managing Director
Shakti Bhawan, Rampur,
Jabalpur – 482 008
3. Maharashtra State Electricity Distribution Company Ltd.
Through its Managing Director
Prakashgad, 4th Floor,
Andheri (East), Mumbai – 400 052

4. Gujarat Urja Vikas Nigam Ltd.
Sardar Patel Vidyut Bhawan,
Race Course Road,
Vadodara – 390 007
5. Electricity Department, Government of Goa
Vidyut Bhawan, Panaji,
Near Mandvi Hotel, Goa- 403 001
6. Electricity Department
Administration of Daman and Diu,
Daman-396 210.
7. Electricity Department
Administration of Dadar Nagar Haveli,
Through its Executive Engineer,
U.T., Silvassa – 396 230
8. Chhattisgarh State Electricity Board
Through its Chairman/Managing Director
P.O. Sunder Nagar, Dangania,
Raipur, Chhattisgarh – 492 013
9. Madhya Pradesh Audyogik Kendra
Through its Managing Director
Vikas Nigam (Indore) Ltd.,
3/54, Press Complex, Agra-Bombay Road,
Indore – 452 008

...Respondents

Counsel for the Appellant : Mr. M.G. Ramachandran, Sr.Adv.
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Parichita Chowdhury
Ms. Adhishree Chakraborty
Mr. Ashwin Ramanathan

Counsel for the Respondent(s) : Mr. Saurabh Mishra
Ms. Anuja Pethia for R-2

J U D G M E N T

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

1. The Appellant herein questioning the legality, validity and correctness of the various Impugned Orders dated 29.07.2016 in Petition Nos. 46/TT/2014 (Appeal No. 95 of 2018) and thereafter the review order dated 5.10.2017 in Review Petition No. 02/RP/2017 (Appeal No.140 of 2018) passed by the Central Electricity Regulatory Commission (hereinafter “**Central Commission**”), has filed the instant Appeals.
- 1.1 The Appeal No.95 of 2018 relates to approval of transmission tariff for Asset I: LILO point (at Dharmajaygarh near Korba WR SS) and the Review Petition No. 02/RP/2017 was filed seeking review of the Order dated 29.7.2016 passed by the Central Commission in Petition No. 46/TT/2014 with regard to approval of transmission tariff for Asset I: LILO point (at Dharmajaygarh near Korba WR SS) – Ranchi portion of 765 kV S/C Ranchi – WR pooling station line along with bays at Ranchi 765 kV Sub-station; Asset II: 765 kV 3x80 MVAR Bus Reactor I along with bays at Ranchi 765 kV Sub-station; Asset III: 765 kV 3x80 MVAR Bus Reactor I along with bays at Ranchi 765 kV Sub-station; Asset IV: 400 kV 125 MVAR Bus Reactor I along with bays at Ranchi 765 kV Sub-station and Asset V: 400 kV 125 MVAR Bus Reactor II along with

bays at Ranchi 765 kV Sub-station (hereinafter “**transmission project**”) under Common Scheme for 765 kV Pooling stations and Network for Northern Region(NR), Import by Northern Region from Eastern Region(ER) and from North Eastern Region(NER)/Southern Region(SR)/Western Region(WR) via Eastern Region(ER) and Common Scheme for network for Western Region(WR) and Import by Western Region from Eastern Region and from North Eastern Region/Southern Region/Western Region via Eastern Region in Western Region for tariff block 2009-15 period in terms of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (hereinafter “**Tariff Regulations, 2009**”).

- 1.2** The Appellant is aggrieved by the aforesaid Impugned Orders to the extent of restricting the IEDC and has preferred the present appeals.

2. Brief Facts of the Case(s):-

- 2.1** The Appellant herein, Power Grid Corporation of India Ltd. is a Government Company within the meaning of the 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.

- 2.2** The Appellant discharges the 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.
- 2.3** The Respondents are DISCOMs/beneficiaries of ISTS in Western Region.
- 2.4** The Central Commission has framed the CERC (Terms and Conditions of Tariff) Regulations, 2009 to deal with the fixation for the tariff period 2009-14.
- 2.5** The assets in question are as under –
- (i) Asset I: LILO point (at Dharmajaygarh near Korba WR SS) – Ranchi portion of 765 kV S/C Ranchi – WR pooling station line along with bays at Ranchi 765 kV Sub-station;
 - (ii) Asset II: 765 kV 3x80 MVAR Bus Reactor I along with bays at Ranchi 765 kV Sub-station;
 - (iii) Asset III: 765 kV 3x80 MVAR Bus Reactor II along with bays at Ranchi 765 kV Sub-station;
 - (iv) Asset IV: 400 kV 125 MVAR Bus Reactor I along with bays at Ranchi 765 kV Sub-station and Asset;
 - (v) 400 kV 125 MVAR Bus Reactor II along with bays at Ranchi 765 kV Sub-station .

The above assets are being implemented by the Appellant under the *‘Common Scheme for 765 kV Pooling stations and Network for Northern Region(NR), Import by Northern Region from Eastern Region(ER) and from North Eastern Region(NER)/Southern*

Region(SR)/Western Region(WR) via Eastern Region(ER) and Common Scheme for network for Western Region(WR) and Import by Western Region from Eastern Region and from North Eastern Region/Southern Region/Western Region via Eastern Region in Western Region'

- 2.6** The Appellant obtained the Investment Approval (IA) for the transmission project from its Board of Directors in its 212th meeting at an estimated cost of Rs. 707533 lakh, including Interest During Construction (hereinafter “**IDC**”) of Rs. 1360 lakh.
- 2.7** The transmission project was implemented by the Appellant in a phased manner. While some of the assets achieved commercial operation in the Tariff Period 2009-14, the other assets achieved commercial operation in 2014-19.
- 2.8** The Appellant filed Petition No. 46/TT/2014 for determination of tariff for the following three assets commissioned on 01.02.2014 –
- (i) 765 kV – 3 X 80 MVAR Bus Reactor II along with bays at Ranchi 765 kV sub-station;
 - (ii) 400 kV 125 MVAR Bus Reactor I along with the bays at Ranchi 765 kV sub-station;
 - (iii) 400 kV 125 MVAR Bus Reactor II along with the bays at Ranchi 765 kV sub-station;

2.9 During the course of the matter, the Board of the Appellant approved the Revised Cost Estimates (RCE) of the transmission project on 11.03.2016 at the 376th Meeting of the Board of Directors held on 09.03.2016.

2.10 The Appellant also filed Additional Affidavits dated 07.03.2014, 31.05.2014, 30.06.2014, 31.03.2016, 01.04.2014, 04.04.2016 & 17.06.2016 before the Central Commission during the course of the pendency of the matter.

2.11 The Central Commission has by impugned order dated 29.07.2016 decided Petition No. 46/TT/2014. The Central Commission has condoned the time over-run of 17 months and allowed capitalization of Interest During Construction (**IDC**) and Incidental Expenses During Construction (**IEDC**) in the matter. However, the IEDC allowed by the Central Commission has been limited to 5% of the 'Hard Cost' indicated by the appellant in the abstract cost estimate i.e. Rs. 5666.60 lakh as against 5 % of the Revised Cost estimate. Thus, there has been a disallowance of Rs. 260.31 lakh of IEDC.

2.12 The Central Commission, has, inter-alia held as under –

“22. The petitioner has claimed Incidental Expenditure during Construction (IEDC) of Rs. 543.64 lakh. Further, petitioner vide affidavit dated 16.6.2016 has submitted that IEDC discharged up to COD is Rs. 543.64 lakh. The percentage on Hard Cost as indicated in the Abstract Cost Estimate has been considered as

the allowable limit to the IEDC. In the current petition, 5% of the Hard Cost (i.e. Rs. 283.33 lakh) is the maximum limit for allowing IEDC. The IEDC claim of Rs. 543.64 lakh exceeds the abstract cost estimate, i.e. 5% of the hard cost, as on COD. Hence, Rs. 260.31 lakh (i.e. Rs. 543.64 – Rs. 283.33 lakh) has been disallowed from the capital cost as on COD.”

2.13 The Central Commission in the Order dated 29.07.2016, while determining the transmission tariff for the transmission project did not give any reasoning for calculation of IEDC at 5% of the hard cost based on the Abstract Cost Estimate and non-consideration of Revised Cost Estimate. As such under the provision of the tariff regulations 2009, the IEDC is admissible on the actual expenditure incurred by the appellant after a prudence check. But there is no such provision of restricting the same to the hard cost of the initial estimates prepared by the Appellant at the time of investment approval.

2.14 The Central Commission has vide the Order dated 05.10.2017 decided Petition No. 02/RP/2017. The Central commission dismissed the review petition by stating that the original IA indicates that IEDC has to be calculated as 5% of the Hard Cost estimates towards maintenance during construction, engineering and Administration cost and losses of stock. The Central Commission inter-alia, held as under:

“14. In the instant case, the original Investment approval indicates 5% of “Hard Cost” towards the maintenance during construction, Engineering and Administration cost and losses of stock. The same was considered as the basis for allowing the

IEDC on actual „Hard Cost“ in the impugned order. Thus, there is no apparent error in the impugned order as contended by PGCIL.”

2.15 Though there was no reasoning given in the Main Order dated 29.07.2016, the Central Commission has justified the view taken by it with detailed reasons in the Review Order dated 05.10.2017. Ordinarily, no appeal lies against the rejection of review petition as per Order 47, Rule 7 of the Code of Civil Procedure, 1908. However, this is a case where the entire justification for the view taken in the Main Order has been given in the Review Order dated 05.10.2017. The Appellant is filing an appeal against the Main Order dated 29.07.2016. However, during the course of the matter, the findings in the Review Order dated 05.10.2017 will be relied on. Therefore, the Appellant is also challenging the Order dated 05.10.2017.

3. Questions of Law :-

The Appellant has raised following questions of law in these Appeals for our consideration:-

- (a) Whether the Central Commission having framed the Tariff Regulations, 2009 which contain no provision for restricting IEDC to 5% of the hard cost does not stand bound by the provisions thereof?

(b) Whether the rationale of the Judgment dated 28.11.2013 in Appeal No. 165 of 2012 of this Hon'ble Tribunal is at all applicable to the aspect of determination of initial spares when the said judgment has been rendered in a completely different context? (arising in the context of the findings rendered in the Review Order dated 05.10.2017 in 2/RP/2017) ?

4. **Smt. Swapna Seshadri, learned counsel appearing for the Appellant has filed the written submissions for our consideration as under:-**

4.1 Appeal No. 95 of 2018 is against the Order dated 29.07.2016 (hereinafter, "**Impugned Order**") passed by the Central Electricity Regulatory Commission (hereinafter, "**Central Commission**") in Petition No. 46/TT/2014.

4.2 Petition No. 46/TT/2014 was filed by the Appellant – Power Grid Corporation of India Limited seeking determination of transmission tariff of Assets (05 nos.) under Common Scheme for 765kV Pooling Stations and Network in Western Region for tariff block 2009-14 period.

4.3 In the Order dated 29.07.2016, the Central Commission has allowed the Tariff element Incidental Expenses During Construction (**IEDC**) limited to 5% of the Abstract Cost Estimate, whereas the applicable

Tariff Regulations namely Regulation 11 of Tariff Regulations, 2014 provides as under –

“11. Interest during construction (IDC), Incidental Expenditure during Construction (IEDC)

(A) Interest during Construction (IDC):

(1) 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 funds upto SCOD.

(2) In case of additional costs on account of IDC due to delay in achieving the SCOD, the generating company or the transmission licensee as the case may be, shall be required to furnish detailed justifications with supporting documents for such delay including prudent phasing of funds:

Provided that if the delay is not attributable to the generating company or the transmission licensee as the case may be, and is due to uncontrollable factors as specified in Regulation 12 of these regulations, IDC may be allowed after due prudence check:

Provided further that only IDC on actual loan may be allowed beyond the SCOD to the extent, the delay is found beyond the control of generating company or the transmission licensee, as the case may be, after due prudence and taking into account prudent phasing of funds.

(B) Incidental Expenditure during Construction (IEDC):

(1) Incidental expenditure during construction shall be computed from the zero date and after taking into account pre-operative expenses upto SCOD:

Provided that any revenue earned during construction period up to SCOD on account of interest on deposits or advances, or any other receipts may be taken into account for reduction in incidental expenditure during construction.

(2) In case of additional costs on account of IEDC due to delay in achieving the SCOD, the generating company or the transmission licensee as the case may be, shall be required to furnish detailed justification with supporting documents for such delay including the details of incidental expenditure during the period of delay and liquidated damages recovered or recoverable corresponding to the delay:

Provided that if the delay is not attributable to the generating company or the transmission licensee, as the case may be, and is due to uncontrollable factors as specified in regulation 12, IEDC may be allowed after due prudence check:

Provided further that where the delay is attributable to an agency or contractor or supplier engaged by the generating company or the transmission licensee, the liquidated damages recovered from such agency or contractor or supplier shall be taken into account for computation of capital cost.”

4.4 The only finding of the Central Commission in the Main Order is as under –

“22. The petitioner has claimed Incidental Expenditure during Construction (IEDC) of Rs. 543.64 lakh. Further, petitioner vide affidavit dated 16.6.2016 has submitted that IEDC discharged up to COD is Rs. 543.64 lakh. The percentage on Hard Cost as indicated in the Abstract Cost Estimate has been considered as the allowable limit to the IEDC. In the current petition, 5% of the Hard Cost (i.e. Rs. 283.33 lakh) is the maximum limit for allowing IEDC. The IEDC claim of Rs. 543.64 lakh exceeds the abstract cost estimate, i.e. 5% of the hard cost, as on COD. Hence, Rs. 260.31 lakh (i.e. Rs. 543.64 – Rs. 283.33 lakh) has been disallowed from the capital cost as on COD.”

4.5 Since the above was a bald finding without reasoning and as per the provisions of the CERC (Terms and Conditions of Tariff) Regulations,

2009 (**Tariff Regulations, 2009**), the IEDC is admissible on the actual expenditure incurred by the Appellant after a prudence check, the Appellant filed a petition seeking review being 2/RP/2017 before the Central Commission.

4.6 Vide Order dated 05.10.2017, the Central Commission has dismissed the Review Petition 2/RP/2017, giving certain reasoning (**Pages 25 – 27 of Appeal No. 140 of 2018**). Though the review petition has been rejected and ordinarily an appeal against the rejection of the review petition is not maintainable as the judgement purporting to contain reasoning is only in the Order Dated 05.10.2017 the Appellant has filed appeal being Appeal No 140 of 2018.

4.7 The entire discussion on the issue is only in the Review Order dated 05.10.2017 and the contentions of the Appellant have been dealt with as under –

CONTENTION OF APPELLANT	COMMISSION'S VIEW
The 2009 Tariff Regulations do not provide for restricting the IEDC on percentage terms of the Hard Cost.	The Commission has been restricting the capital cost of the individual assets to the approved apportioned cost given in the Investment Approval or the Revised Cost Estimates as a part of prudence check, though the 2009 Tariff Regulations do not provide for the same.
Prayer for considering the entire "contingencies" as	The provision of "contingencies" provided for in the project are not against any specific head of expenditure but are for

part of IEDC	expenditure which may occur in the project as a whole.
IEDC booking varies as per the size and scope of the elements in the project	It is pertinent to mention that the 5% limit is not fixed by the Commission. The same is decided by the Appellant itself in accordance with the nature of the project.
The Appellant was not given opportunity to explain the variation between the actual IEDC incurred and FR estimated IEDC	It is observed that after filing Petition No. 46/TT/2014, the Appellant made additional submissions vide affidavits on its own or on the directions of the Commission on 2.6.2014, 2.7.2014, 31.3.2016, 4.4.2016 and 16.6.2016, but the Appellant chose not to make submission regarding the variation in the IEDC.

4.8 Though there was no reasoning given in the main order dated 29.07.2016, the Central Commission has justified the view taken by it with detailed reasons in the review order dated 05.10.2017. Ordinarily, no appeal lies against the rejection of review petition as per Order 47, Rule 7 of the Code of Civil Procedure, 1908.

4.9 However, this is a case where the entire justification for the view taken in the main order dated 29.07.2016 has been given in the review order. The Appellant therefore filed Appeal No. 140 of 2018 against the Review Order dated 05.10.2017. Otherwise, in the course of arguing Appeal No. 95 of 2018 against the main order dated 29.07.2016, the findings in the review order would have been relied on. Therefore, the Appellant has challenged both Orders.

4.10 The Order dated 29.07.2016 passed by the Central Commission is liable to be set aside on the ground that the Central Commission has not decided the matter as per the Applicable Regulations without considering the reasoning purported to be given in the Review Order Dated 05.10.2017. Without prejudice to the above the review order dated 29.07.2016 may be considered as the judgement giving reasons and challenge to the same as in Appeal 140 of 2018 may be considered.

4.11 Another two important factual aspects relevant are:

- (a)** that the Common Scheme of which 3 Assets are relevant for the present appeal consists of 39 elements and the Revised Cost Estimate of the entire Common Scheme is Rs 6570.54 crores;
- (b)** that there has been time overrun of 17 months which was beyond the control of the Appellant and the same has been duly condoned and allowed to be considered by the Central Commission.

4.12 The Central Commission has condoned the entire time overrun of 17 months in the matter and held as under – **(Appeal No. 95 of 2018)**

“19. The Hon'ble Appellate Tribunal for Electricity in its judgment dated 27.4.2011 in Appeal No.72/2010 has laid down the principle to be followed to determine the liability for time over-run in three scenarios as under:-

- (a) Due to factors entirely attributable to the project developer;*
- (b) Due to the factors beyond the control of project developer;*
and
- (c) Not covered under (a) and (b).*

In the first scenario, the additional cost due to time over-run would be entirely borne by the project developer and the LD amount, if any, would be retained by them. In the second scenario, the additional cost due to time over-run shall be capitalized, however, the benefit of LD and the insurance proceeds, if any, to be reduced from the capital cost. In the last scenario, the additional cost due to time over-run including LD and insurance proceeds should be shared between the project developer and the beneficiaries.

20. We are of the view that the delay in getting possession of sub-station land and law & order problem is beyond the control of the petitioner and it is condoned. The instant case, falls under the second scenario enunciated by Hon'ble Appellate Tribunal for Electricity. Accordingly, the IDC and IEDC during the period is capitalized."

4.13 The Appellant is also filing certain relevant documents in a material paperbook and craves leave to refer to the same during the course of hearing.

4.14 The following issues arise for decision in the matter –

- i. Whether the IEDC can at all be restricted to 5% of the hard cost, when the Tariff Regulations, 2009 contain no such provision for restricting IEDC to 5% of the hard cost and provides for such determination based on actual expenses to be allowed subject to prudence check? This is particularly when the Central Commission considers the reasons for time overrun and decides

to condone the same. In such situation the IDC and IEDC prudently incurred need to be allowed as a natural consequence without placing any such artificial limitation based on hard cost incurred.

- ii. Whether even if the IEDC is to be related to hard cost should it be with reference to 5% of the Abstract Cost Estimate as done by the Central Commission or should it be related to finally approved hard cost actually incurred and further considering the entire Common Scheme instead of applying asset wise?
- iii. Whether the provisions of IEDC and contingencies made at the time of Abstract Cost Estimate and thereafter being combined under the head 'IEDC including contingencies' in the Revised Cost Estimates has any effect on the matter?

4.15 The Appellant had claimed Incidental Expenditure during Construction (IEDC) of Rs. **543.64 lakh**. Further, the Appellant vide affidavit dated 16.6.2016 has submitted that IEDC discharged up to COD is Rs. 543.64 lakh.

4.16 In the present case, the IEDC incurred by the Appellant was within 5% of the total project cost approved in the Abstract Cost Estimate/RCEs considering the entire Common Scheme, but individually, there was a variation within the hard cost of the individual assets.

4.17 The relationship between IEDC & hard cost is firstly not there. In any event IEDC gets incurred commonly for various elements . If the elements of the project are large, the amount of IEDC booked as a percentage of the Abstract Cost Estimate/RCE is low but if the elements of the project are small (as in the present case), the amount of IEDC booked as a percentage of the Abstract Cost Estimate/RCE is higher. Restricting the capital cost of individual assets forming part of the Common Scheme to the approved apportioned cost given in the Abstract Cost Estimate/RCE has nothing to do with the treatment of IEDC.

4.18 The Central Commission has proceeded on an erroneous basis that in the course of Petition No. 46/TT/2015, the Central Commission gave an opportunity to the Appellant to explain as to why the IEDC was more than 5% of the hard cost. The Central Commission and its staff had raised several other queries which the Appellant responded to the same by filing appropriate affidavits. However, this aspect on IEDC was never raised and therefore, the Appellant could not clarify it in the main petition.

4.19 Restricting the capital cost of individual assets to the approved apportioned cost given in the Abstract Cost Estimate/RCE has nothing to do with the treatment of IEDC. The Central Commission ought to

have allowed IEDC as incurred considering the overall project cost and not the asset-wise cost.

4.20 At the time of investment approval, when the Abstract Cost Estimate is approved, IEDC is tentatively assumed at 5% of specific costs and thereafter a 3% contingency is kept for any other unforeseeable costs which may arise in project implementation. Therefore, the total is 8%. However, when Revised Cost Estimates are approved, there is only one head of 'IEDC including contingencies'. This is because, when RCEs are approved, the project stands implemented and the costs are known. Therefore, without prejudice to the contention that hard costs should not be considered, even if hard cost was to be seen then, at least 8 % should be applied instead of 5 %.

4.21 The provisions of Regulations 11 of the Tariff Regulations, 2014 is clear and there is no ambiguity. The Central Commission has to consider the actual IEDC, apply the prudence check, decide any quantum to be disallowed being incurred imprudently and subject to the above allow the actual expenditure as a legitimate expense. The revision are otherwise no other limitation placed. The Central Commission cannot introduce limitation such as those related to hard cost incurred.

4.22 The Central Commission itself in the Statement of Reasons to the Tariff Regulations, 2014, has explained the rationale behind

Regulation 11, to mean that if some additional cost is borne by a transmission licensee under the head of IDC and IEDC due to delay in achieving COD, a transmission licensee shall be required to furnish detailed justification with supporting documents for such delay and if the reasons for such delay are found to be uncontrollable after prudence check of the Central Commission, such additional IEDC accrued due to delays would be capitalized. Thus, the IDC and IEDC is not only limited up to scheduled COD but also actual IDC and IEDC beyond SCOD and up to actual COD may be allowed subject to prudence check. The relevant part of SOR to Tariff Regulations, 2014 is extracted below –

“13.12 The Commission would like to clarify that as per the provisions of the Regulations, in case of additional costs on account of IDC and IEDC due to delay in achieving COD, the generating company or transmission licensee shall be required to furnish detailed justification with supporting documents and the Commission will take an appropriate view after due prudence check. The Commission is of the view that it may not be practical to limit the IDC and IEDC only till SCOD as suggested by some of the beneficiaries and it shall be appropriate to carry out the prudence check for assessing the reasons for delay in achieving COD.”

Thus, the IDC and IEDC is not only limited up to scheduled COD but actual IDC and IEDC beyond SCOD and up to actual COD may be allowed subject to prudence check.”

4.23 Since the instant case falls under the provision of Regulation 11(b)(2) of the Tariff Regulations, 2014 and the Central Commission having

accepted that the time overrun is beyond the control of the Appellant, the increase in IEDC due to delay in completion of the project by 17 months ought to be considered. The Central Commission while condoning entire time over-run cannot disallow the proportionate increase in IEDC accrued due to such delay.

4.24 The Central Commission has not implemented that the test provided by it under the Tariff Regulations 2014 read with the Statement of Reasons (Clause 13.12) for allowing additional IEDC from the projected IEDC is also accounting for the condonation of time delay on account of such uncontrollable factors. If the Appellant has satisfied that test, there can be no ground for restricting the capitalization of IEDC.

4.25 Having condoned and duly allowed the time overrun, the IDC and IEDC for the 17 months delay should have been the natural consequence to be allowed to the Appellant.

4.26 The Central Commission has also ignored the fact that while Investment Approval is taken, IEDC is assumed as it is not known how much the actual amount that may have to be incurred. The general thumb rule is that in projects having estimated cost of more than Rs. 500 crores, 5% is assumed as IEDC and in projects having estimated

cost of less than Rs. 500 crores, IEDC upto 10.75% is considered in the Investment Approvals.

4.27 IEDC is assumed considering the scope, completion schedule and cost of the projects. However, the hard cost would vary depending on the actual execution of the project. This is because the relationship between IEDC and Hard Cost is not linear. If the elements of the project are large, the amount of IEDC booked as a percentage of the Abstract Cost Estimate/ Revised Cost Estimate is low, but if the elements of the project are small, the amount of IEDC booked as a percentage of the Abstract Cost Estimate/ Revised Cost Estimate is higher.

4.28 Therefore, the estimates on the IEDC at the time of Investment Approval are based on different parameters which does not consider IEDC on account of delay in completion of the project. The IEDC kept in the Abstract Cost Estimate has an underlying assumption that the said project will be put into commercial operation in the projected timeframe. Hence, when a transmission project is delayed, the actual IEDC overshoots its projections. Therefore, the Appellant submitted a revised cost estimate duly approved by the Board of the Appellant, stipulating the actual expenditure which has been overlooked by the Central Commission.

4.29 The Central Commission has held against the Appellant on the count that as per the Revised Cost Estimates, the IEDC for the entire transmission scheme is Rs. 139.59 crores which is only 2.44% of the hard cost, namely Rs. 5712.40 crores and the Appellant has claimed the IEDC @ 10.89% in respect of the present assets. This finding of the Central Commission is perverse. The entire transmission scheme includes the following assets –

“Transmission Lines

- a. Maithon-Gaya 400 kV Quad D/C Line along with multi-circuit portion in Common forest stretch.*
- b. Gaya-Sasaram 765 kV S/C Line.*
- c. Gaya-Balia 765 kV S/C Line.*
- d. Balia-Lucknow 765 kV S/C Line.*
- e. Ranchi-WR Pooling Station 765 kV S/C Line.*
- f. Lucknow 765/400 kV new substation-Lucknow 400/220 kV existing substation 400 kV Quad D/C Line*

Sub-stations

- a. Augmentation of Maithon 400/220 kV Sub-station*
 - (i) 2 nos. of 400 kV line bays (for determining Maithon-Gaya D/C line)*
 - (ii) 2 nos. of 400 kV line bays (for determining Mejia-Maithon D/C line)*
- b. New 765/400 kV Sub-station at Gaya*
 - (i) 3x1500 MVA, 765/400 kV Transformer alongwith associated bays*
 - (ii) 2 nos. of 765 kV line bays (for Gaya-Sasaram/Fatehpur & Gaya-Balia 765 kV lines)*
 - (iii) 4 nos. of 400 kV line bays (for Maithon-Gaya line & Kodarma-Gaya line)*
- c. New 765/400 kV Sub-station at Sasaram*

- (i) 1x1500MVA, 765/400 kV Transformer alongwith associated bays*
- (ii) 2 nos. of 400 kV bays (for Biharshariff-Sasaram 400 kV quad D/C line)*

d. Augmentation of Biharshariff 400/220 kV sub-station

- (i) 2 nos. of 400 kV bays (for Biharshariff-Sasaram 400 kV quad D/C line)*

e. New 765/400 kV Sub-station at Fatehpur

- (i) 2x1500MVA, 765/400 kV Transformer alongwith associated bays*
- (ii) 2 nos. of 765 kV line bays (for Sasaram-Fatehpur & Fatehpur-Agra 765 kV lines)*
- (iii) 4 nos. of 400 kV line bays (for LIL O of Allahabad-Mainpuri 400 kV D/C line)*

f. Augmentation of 400 kV Agra Sub-station to 765 kV

- (i) 2x1500MVA, 765/400 kV Transformer alongwith associated bays*
- (ii) 1 no. of 765 kV line bays (for Fatehpur-Agra 765 kV line)*

g. Augmentation of 400 kV Balia Sub-station to 765 kV

- (i) 2x1500MVA, 765/400 kV Transformer alongwith associated bays*
- (ii) 2 nos. of 765 kV line bays (for Gaya-Balia & Balia-Lucknow 765 kV lines)*

h. New 765/400 kV Sub-station at Lucknow

- (i) 2x1500MVA, 765/400 kV Transformer along with associated bays*
- (ii) 1 no. of 765 kV line bays (for Balia-Lucknow 765 kV lines)*
- (iii) 2 nos. of 400 kV bays (for Lucknow 765/400 kV new Sub-station – Lucknow 400/220 kV existing Sub-station 400 kV quad D/C line)*

i. Augmentation of existing Lucknow 400/220 kV sub-station

- (i) 2 nos. of 400kV bays (for Lucknow 765/400 kV new Sub-station – Lucknow 400/220 kV existing Sub-station 400kV quad D/C line)*

j. New 2x1500 MVA, 765/400 kV Sub-station at Ranchi

- (i) 1 no. of 765 kV line bays (for Ranchi-WR Pooling 765kV S/C line)*
- (ii) 4 nos. of 400 kV line bays (for Ranchi 400 kV new sub-station-)*

Ranchi 400/220 kV existing sub-station 400 kV quad 2xD/C line)

k. Augmentation of Ranchi 400/220 kV Sub-Station

(i) 6 nos. of 400 kV bays(4 nos. for Ranchi 765/400 kV new Sub-station-

Ranchi 400/220 kV existing Sub-station 400 kV quad 2xD/C line and 2 nos. for Raghunathpur TPS-Ranchi line)

l. 765/400 kV WR Pooling sub-station

(i) 1 no. of 765 kV line bays (for Ranchi –WR Pooling 765 kV S/C line)

m. Augmentation of Patna 400/220 kV sub-station

(i) 4 nos. of 400 kV line bays (for LILO of Barh- Balia 400 kV Quad line)

4.30 As against the above, the present matter i.e. Petition 46/TT/2016 was only pertaining to the following assets –

- (iv) 765 kV – 3 X 80 MVAR Bus Reactor II along with bays at Ranchi 765 kV sub-station;*
- (v) 400 kV 125 MVAR Bus Reactor I along with the bays at Ranchi 765 kV sub-station;*
- (vi) 400 kV 125 MVAR Bus Reactor II along with the bays at Ranchi 765 kV sub-station;*

4.31 The fact that the complete IEDC incurred by the Appellant for the project despite the time overrun was only 2.44% of the hard cost as on COD shows that the Appellant makes full efforts to control the IEDC even when there is a delay in project execution. However, among the individual elements of the transmission scheme, there may be a variation in the IEDC which may be beyond 5% and should be allowed

since the time overrun is being condoned.

4.32 In fact, for the entire scheme, the total actual IEDC incurred by the Appellant is Rs. 139.59 crores. Even if the Central Commission had allowed the IEDC at 10.89% for the current assets, the IEDC would not have exceeded total IEDC of Rs. 139.59 crores. While in the other assets of the transmission scheme where the actual IEDC was much lower than 5%, the actuals have been taken by the Central Commission but for the present assets, where the IEDC has exceeded 5%, the excess has been disallowed. This is unfair especially when the total IEDC is only 2.44% of the hard cost (as on COD) of the entire scheme.

4.33 It is also incorrect on the part of the Central Commission to hold that in earlier cases, the Central Commission was limiting the IEDC as per the cost assumed in the Abstract Cost Estimates / Revised Cost Estimates. This was not being followed by the Central Commission prior to the Impugned Order.

4.34 The finding that the Appellant chose not to explain the difference in the actual IEDC as compared to the IEDC assumed in the Abstract Cost Estimates is also perverse and without any basis. During the course of the matter, even though substantial queries were raised in the ROPs,

no explanation was called for by the Central Commission for the variation in IEDC.

4.35 In all tariff matters, the Appellant gives detailed explanations of the time overrun and cost overrun. Once prudence check is applied on these two aspects, the IDC and IEDC are automatically capitalised. It is for the first time that the Central Commission restricted the IEDC to 5% of the hard cost and therefore, there was no occasion for the Appellant to explain this aspect until called for by the Central Commission.

4.36 The only other point is the reliance placed by the Central Commission on the Judgment dated 28.11.2013 in Appeal No. 165 of 2012 of this Hon'ble Tribunal. This decision has no application in the facts of present case. In the said case, the Appellant had not submitted the RCEs duly approved by its Board of Directors and was still insisting on getting the tariff at the revised costs which was rejected by this Hon'ble Tribunal. In fact, in the said Judgment, this Hon'ble Tribunal has not even dealt with element wise IEDC determination and it is not clear as to which portion of the Judgment is being relied on by the Central Commission.

4.37 The Central Commission has misconstrued the Judgment dated

28.11.2013 in Appeal No. 165 of 2012 of this Hon'ble Tribunal. This Hon'ble Tribunal had not rendered any finding on the issue of IEDC and in fact had only recorded the submissions of the Central Commission that if the Appellant would approach the Central Commission with appropriate documentary evidence, the same would be considered by the Central Commission. This, by no stretch of imagination is an implied approval of the Hon'ble Tribunal to the Central Commission to deviate from its own Regulations by breaking up the IEDC and restricting it to 5 % of the hard cost.

4.38 The Impugned Order is being followed by the Central Commission in all other matters which is causing a huge loss to the Appellant. It is humbly prayed that this Hon'ble Tribunal settle the principle in the present appeals which can be followed in future cases as well.

5. Shri Saurabh Mishra, learned counsel appearing for the Respondent No.2 has filed the written submissions in the counter affidavit for our consideration as under:-

5.1 The Appellant herein had filed Petition No.46/TT/2014 before the Central Electricity Regulatory Commission. By impugned order dated 29.7.2016, the Commission was pleased to finally dispose of the said Petition No.46/TT/2014 by allowing Incidental Expenses during Construction ("IEDC"). However, the same was limited to 5% of the

hard cost i.e., 5666.60 lakhs as against 5% of the Revised Cost estimate / original investment proposal. Thus, the Commission disallowed IEDC to the extent of 260.31 lakhs. The said order 29.7.2016 has been challenged in the present appeal under Section 111(1) of the Act.

5.2 The answering Respondent respectfully submits that the present appeal is devoid of any merit and entails dismissal. The Commission has rightly limited IEDC to 5% of the hard cost i.e., 5666.60 lakhs as against 5% of the Revised Cost estimate / original investment proposal, as claimed by Appellant.

5.3 It is submitted that against the impugned order, the Appellant had preferred Review Petition No.02/RP/2017 under Section 94 of the Act and Order 47 Rule 1 of the Code of Civil Procedure, 1908 (“**CPC**”) claiming error apparent on the fact of the record and limited to the issue of IEDC. By order dated 5.10.2017, the Commission was pleased to dismiss Review Petition NO. 02/RP/2017 holding that there was no error apparent on the face of the record.

5.4 The Commission in its order dated 5.10.2017 held that the Commission had been restricting the capital cost of the individual assets to the approved apportioned cost given by the Appellant. This

view has been upheld by the Tribunal in its judgment dated 28.11.2013 in Appeal No.165 of 2012. On similar lines, the Commission restricts the IEDC also to the percentage of hard cost submitted by Appellant in the Abstract Cost Estimate of Investment Proposal as part of prudence check.

5.5 With regard to 3% contingency not being considered, the Commission rightly held that provision of contingencies are not against any specific head but are expenditure which may occur in the project as a whole. The Commission also noted that the 5% limit was not fixed by the Commission but determined by the Appellant considering the nature of the project. Hence, the Review Petition of the Appellant was found to be sans any substance and rightly dismissed.

5.6 The answering Respondent respectfully submits that the findings and reasoning given by the Commission in the impugned order is in accordance with law and does not deserve any interference from this Tribunal.

6. We have heard learned counsel appearing for the Appellant, learned counsel for the Respondent No.2 at considerable length of time and we have gone through carefully their written submissions/arguments and also taken note of the relevant material available on records during the proceedings. On the basis of the pleadings and submissions available, the following principal issue emerges in the instant Appeals for our consideration:-

- Whether the IEDC can be restricted to 5% of the hard cost when the Tariff Regulations 2009 envisage no such provision for restricting the IEDC ?

OUR FINDINGS AND ANALYSIS: -

7. Learned counsel for the Appellant submitted that the common scheme of which 3 Assets are relevant for the present Appeals consists of 39 elements and the Revised Cost Estimate of the entire Common Scheme is Rs.6570.54 crores. Learned counsel further submitted that there has been a time overrun of 17 months which was beyond the control of the Appellant and the same has been duly condoned by the Central Commission. Learned counsel for the Appellant contended that the IEDC claim was for Rs. 543..64 lakhs which was within 5% of the total project cost approved in the abstract cost / revised cost estimate considering the entire common scheme but individually there was a variation within the hard cost of the individual assets.

7.1 Learned counsel for the Appellant vehemently submitted that firstly there is no relation between the hard cost and IEDC, however, in any case, IEDC gets incurred commonly for various elements. If the elements of project are large, the amount of IEDC booked as percentage of the abstract cost estimate / revised cost estimate is low

but if the elements of the project are small (as in the present case), the amount of IEDC booked as a percentage of the Abstract Cost Estimate/Revised Cost Estimate is higher. In fact, the Central Commission has proceeded on an erroneous basis without giving an opportunity to the Appellant to explain as to why the IEDC was more than 5% of the hard cost in the referred assets. The Central Commission and its staff had raised several other queries which the Appellant responded by filing appropriate affidavits but this aspect on IEDC was never raised and therefore, the Appellant could not clarify it in the main petition.

7.2 Learned counsel was quick to submit that at the time of investment approval when the Abstract Cost Estimate is approved, IEDC is tentatively assumed at 5% of specific costs and thereafter a 3% contingency is also kept for any other unforeseeable costs which may arise in project implementation. However, when Revised Cost Estimates is approved, there is only one head of 'IEDC including contingencies' due to the fact that when RCEs are approved, the project stands implemented and all individual costs are known. Learned counsel cited the reference of Regulations 11 of the Tariff Regulations, 2014 as per which the Central Commission has to consider the actual IEDC, apply the prudence check, decide any

quantum to be disallowed being incurred imprudently and subject to the above allow the actual expenditure as a legitimate expense. Learned counsel highlighted that the Central Commission itself in the Statement of Reasons to the Tariff Regulations, 2014, has explained the rationale behind Regulation 11 as under :-

“13.12 The Commission would like to clarify that as per the provisions of the Regulations, in case of additional costs on account of IDC and IEDC due to delay in achieving COD, the generating company or transmission licensee shall be required to furnish detailed justification with supporting documents and the Commission will take an appropriate view after due prudence check. The Commission is of the view that it may not be practical to limit the IDC and IEDC only till SCOD as suggested by some of the beneficiaries and it shall be appropriate to carry out the prudence check for assessing the reasons for delay in achieving COD.”

Thus, the IDC and IEDC is not only limited up to scheduled COD but actual IDC and IEDC beyond SCOD and up to actual COD may be allowed subject to prudence check.”

- 7.3** Learned counsel contended that since the instant case falls under the provision of Regulation 11(b)(2) of the Tariff Regulations, 2014 and the Central Commission having accepted that the time overrun is beyond the control of the Appellant, the increase in IEDC due to delay in completion of the project by 17 months ought to be considered. Learned counsel alleged that the Central Commission has ignored the basic fact that while investment Approval is taken, IEDC is simply assumed as a matter of general thumb rule. For instance, the

projects having estimated cost of more than Rs. 500 crores, 5% is assumed as IEDC and in projects having estimated cost of less than Rs. 500 crores, IEDC upto 10.75% is considered in the Investment Approvals. Additionally, the IEDC kept in the abstract cost estimate has an underlying assumption that the said project will be put into commercial operation in the projected timeframe. Therefore, the Appellant submitted a revised cost estimate duly approved by the Board of the Appellant, stipulating the actual expenditure which has been overlooked by the Central Commission.

7.4 Learned counsel pointed out that the observations of the Central Commission that IEDC for the entire transmission scheme works out to only 2.44% of the hard cost but the Appellant has claimed IEDC at 10.89% in respect of present assets. In fact, the complete IEDC incurred by the Appellant for the project despite the time overrun was only 2.44% of the hard cost as on COD squarely indicates that the Appellant makes full efforts to control IEDC even after delay in project execution. However, among the individual elements of the transmission scheme, there may be a variation in the IEDC which may be beyond 5% but the overall percentage may be quite less as in the present case. In other words, even if the Central Commission had allowed the IEDC for instant assets at 10.89%, the overall IEDC would

not have exceeded the total IEDC of the project beyond the prescribed percentage.

7.5 Leaned counsel further pointed out that it is entirely incorrect on the part of the Central Commission to hold that in earlier cases, it was limiting the IEDC as per the cost assumed in the abstract cost estimates / revised cost estimates. The only other point is the reliance placed by the Central Commission on the judgment of this Tribunal dated 28.11.2013 in Appeal No.165 of 2012. In fact, this judgment has no application in the facts of the present case and nowhere in this judgment, this Tribunal has even dealt with elementwise IEDC. As such, it is not clear as to which portion of the judgment is being relied on by the Central Commission. Summing up his arguments, learned counsel for the Appellant reiterated that the impugned order is being followed by the Central Commission in all other matters which is causing a huge loss to the Appellant and requested this Tribunal to settle the principle in the present appeals for further reference and follow up.

7.6 ***Per contra***, learned counsel appearing for Respondent No.2 submitted that the present appeals are devoid of any merit and entail dismissal. By making a general routine submission, learned counsel contended that the Central Commission has rightly limited IEDC to 5% of the

hard cost. Learned counsel for Respondent No.2 further submitted that the Review Petition No.02/RP/2017 preferred by the Appellant under Section 94 of the Act and Order 47 Rule 1 of the Code of Civil Procedure, 1908 (“**CPC**”) claiming error apparent on the face of the record was rightly dismissed by the Central Commission. Further, the findings of the Central Commission is based on the judgment of this Tribunal dated 28.11.2013 in Appeal No.165 of 2012. Regarding provision of 3% contingency not being considered, learned counsel for Respondent No.2 submitted that the Central Commission has rightly held that provision of contingencies are not against any specific head but are expenditure which may occur in the project as a whole. Further, the Commission also noted that the 5% limit was not fixed by the Commission but determined by the Appellant itself considering the nature of the project. Learned counsel for the answering Respondent summed up his submissions reiterating the fact that the findings and reasoning given by the Commission in the impugned order is in accordance with law and does not deserve any interference of this Tribunal.

Our Findings:-

7.7 Having regard to the submissions made by the learned counsel for the Appellant and learned counsel for the answering Respondent, we note

that IEDC is admissible on the actual expenditure incurred by the Appellant after a prudence check as per the provisions of the Tariff Regulations and there is no such provision of restricting the same to the hard cost of the initial estimates prepared at the time of investment approval. It is a general practice that at the time of preparation of detailed project report for the Project, provision for IEDC is kept as a percentage of specific cost for the purpose of estimation whereas in actual IEDC of the project depends upon multiple variables having no demonstrable correlation with hard cost of the project.

- 7.8** Administrative and general expenses as well as manpower and other resources required in a project varies drastically depending upon Project specific conditions such as size of the project, terrain, project location, Right of Way (RoW) Constraints (including urbanization, river/highway/railway line crossings, crossing of other transmission lines, forest area) etc..
- 7.9** Generally resources are deployed considering complete project as single unit and there is no clear demarcation as to divide cost of these resources among constituent transmission elements of the project. For the purpose of filing petition, these combined expenses towards IEDC are apportioned among individual transmission elements. Due to the accounting practices, IEDC is generally booked progressively as and

when the assets are commissioned. Thus as such in reality element wise IEDC is just an indicative figure while a project wise IEDC is an actual figure.

7.10 The IEDC kept in the Abstract Cost Estimate has an underlying assumption that the said project will be put into commercial operation in the projected timeframe. Hence, when a transmission project is delayed, the actual IEDC would definitely increase. Thus, in case delay is not attributable to the developer, CERC while condoning the delay should also allow capitalization of increase in IEDC after prudence check.

7.11 If the elements of the projects are large, the amount of IEDC booked as a percentage of the Abstract Cost Estimate / Revised Cost Estimate is low, but if the elements of the project are small the amount of IEDC booked as a percentage of the Abstract Cost Estimate / Revised Cost Estimate is higher. Thus the relationship between IEDC and Hard Cost is not linear.

7.12 When the Abstract Cost Estimate is approved, apart from IEDC a contingency is kept for any other unforeseeable cost which may arise in project implementation. The IEDC cost as well as the contingency cost can increase depending upon several contingencies. There is

only one head of 'IEDC including contingencies' under the Revised Cost Estimates. This is because, when Revised Cost Estimates are approved, the project stands implemented and the costs are known. Therefore, without prejudice to the contention that hard costs should not be considered, even if hard cost is to be seen then, at least 'IEDC' including contingencies' should be applied.

7.13 In view of the above, we are of the opinion that while carrying out the restriction of the IEDC, CERC is considering hard cost as on COD and not on actual detailed hard cost. This is considered to be against CERC's own philosophy that the project cost is up to the cut of date and they are looking at investment approval / revised cost estimate wherein the IEDC percentage is on total hard cost. As rightly submitted by the learned counsel for the Appellant that actual IEDC of the project / element has no correlation with hard cost of the project and practice of taking a percentage of hard cost of IEDC is just a rough / approximate estimation for the purpose of providing cost input for approval purposes. As such, restricting the actual IEDC, based on this percentage is neither in terms of Tariff Regulations nor technically correct.

7.14 We also perused the findings of this Tribunal in the judgment dated 28.11.2013 in Appeal No.165 of 2012 relied upon by the

Commission/answering Respondent and it is noticed that the said judgment has no application in the present case as the referred judgment does not anywhere dealt with the matter of IEDC etc..

7.15 A similar matter relating to initial spares provision / apportionment came up before this Tribunal in Appeal No.74 of 2017 and decided on 14.09.2019 wherein this Tribunal decided as under:-

“For the forgoing reasons, we are of the considered opinion that issues raised in the present appeal being Appeal No . 74 of 2017 have merits and hence appeal is allowed.

The impugned order dated 21.04.2016 passed by Central Electricity Regulatory Commission in Petition No. 53/TT/2015 2018 is hereby set aside to the extent challenged in the Appeal.

The matter is remitted back to the Central Electricity Regulatory Commission with a direction to allow initial spares as a percentage of total project cost in accordance with the tariff regulations.

No order as to costs”.

7.16 In light of the above, we are of the considered opinion that Central Commission has not considered the IEDC for the reference assets correctly in line with provisions of its own regulations which cannot be sustained in the eyes of law. In catena of judgments of Hon’ble Supreme Court and this Tribunal, it has been held that the Regulations framed by the Commissions are binding for all stakeholders including the Commission itself. The Regulations framed under the Act, in no

way, mandate the Central Commission to restrict the IEDC to 5% of the original estimated hard cost.

7.17 Accordingly, we hold that IEDC should be computed only on actual basis after due prudence check based on the data submitted by the Appellant in accordance with the Tariff Regulations.

ORDER

For the forgoing reasons, we are of the considered view that issues raised in the present appeals being Appeal Nos. 95 of 2018 & 140 of 2018 have merits and hence appeals are allowed.

The impugned orders dated 29.07.2016 in Petition No. 46/TT/2014 and order dated 05.10.2017 in Petition No. 02/RP/2017 passed by Central Electricity Regulatory Commission are hereby set aside to the extent challenged in the Appeal. The matter is remitted back to the Central Electricity Regulatory Commission with a direction to allow IEDC in accordance with the Tariff Regulations.

No order as to costs.

Pronounced in the Open Court on this 02nd day of December,
2019.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~