

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 197/MP/2022

Coram:

**Shri Jishnu Barua, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P.K Singh, Member**

Date of Order: 06.12.2023

In the matter of:

Petition under Section 79(1)(c) and (d) of the Electricity Act, 2003 read with the applicable provisions of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 read with the applicable provisions of Conduct of Business Regulations, 1999 seeking recovery of IDC & IEDC for the 2 nos. 400 kV line bays at Muzaffarpur Sub-station of the Petitioner for termination of Muzaffarpur (PG)-Darbhanga (TBCB) 400 kV D/C (Triple snowbird) line implemented by DMTCL for the period 31.8.2016 to 21.4.2017.

And in the matter of:

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

..... Petitioner

Vs.

1. Darbhanga-Motihari Transmission Company Limited,
Essel Infraprojects Limited,
6th Floor, Plot No. 19, Film City, Sector-16A
Gautam Buddha Nagar, Noida,
Uttar Pradesh-201301.
2. Bihar State Power (Holding) Company Limited,
Transmission Vidyut Bhawan,
4th Floor, Bailey Road,
Patna, Bihar-800021.
3. Bihar State Power (Holding) Company Limited,
(Formerly Bihar State Electricity Board-BSEB),
Vidyut Bhawan, Bailey Road,
Patna-800 001.



4. West Bengal State Electricity Distribution Company Limited,
Bidyut Bhawan, Bidhan Nagar, Block DJ, Sector-II,
Salt Lake City, Kolkata-700091.
5. Grid Corporation of Orissa Limited,
Janpath, Bhubaneswar-751007.
6. Power Department,
Government of Sikkim,
Gangtok-737101.
7. Damodar Valley Corporation,
DVC Tower, Maniktala, Civic Centre,
VIP Road, Kolkata-700054.
8. Jharkhand Bijli Vitran Corporation Limited,
(formerly known as Jharkhand State Electricity Board)
Engineering Building, HEC
Dhurva, Ranchi-834002.
9. Maithan Power Limited,
MA-5, Gogna, PO-Maithan DAM,
District: Dhanbad , Jharkhand- 828207.Respondent(s)

For Petitioner : Ms. Swapna Seshadri, Advocate, PGCIL
Ms. Ritu Apurva, Advocate, PGCIL

For Respondents : Ms. Anushka Nagrajan, Advocate, DMTCL
Ms. Akansha Bhola, Advocate, CTUIL
Shri Siddhart Sharma, Advocate, CTUIL
Shri Akshayvat Kislay, Advocate, CTUIL

ORDER

The instant petition has been filed by Power Grid Corporation of India Limited (PGCIL) under Section 79(1)(c) and (d) of the Electricity Act, 2003 (“2003 Act”) read with the applicable provisions of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (“the 2014 Tariff Regulations”) read with the applicable provisions of Conduct of Business Regulations, 1999 seeking recovery of IDC and IEDC for the 2 numbers 400 kV line bays at Muzaffarpur Sub-station of the



Petitioner for termination of Muzaffarpur (PG)-Darbhanga (TBCB) 400 kV D/C (Triple snowbird) line implemented by DMTCL for the period 31.8.2016 to 21.4.2017.

2. The Petitioner has made the following prayers:

“In facts and circumstances, the Petitioner most respectfully prays that this Hon’ble Commission may be pleased to:

a. Decide the mode for recovery of charges for the Petitioner’s asset for the period 31/08/2016 to 21/04/2017 and grant consequential tariff in any of the modes suggested in the petition;

b. Grant interest on the above amount from the date the Petitioner refunded the same till the date of recovery in terms of the Order passed in the present petition;

c. Allow the petitioner to claim filing fee of the petition from beneficiaries.

d. Pass any such further order(s) as deemed fit and proper;

Background of the case

3. Brief facts of the matter as submitted by the Petitioner are as follows:

(a) The Petitioner filed Petition No. 209/TT/2016 for the determination of transmission tariff for 2 numbers 400 kV line bays at Muzaffarpur Sub-station for termination of Muzaffarpur (PG)-Darbhanga (TBCB) 400 kV D/C (Triple snowbird) line under Eastern Region Strengthening Scheme VI (ERSS VI) in Eastern Region for 2014-19 tariff period from COD to 31.3.2019.

(b) The Commission vide order dated 1.9.2017 held that Darbhanga-Motihari Transmission Company Limited (DMTCL), Respondent No.1 is liable to bear the IDC and IEDC for the period from 31.8.2016 to 21.4.2017 as the Petitioner could not use the line bays due to delay in commissioning of the associated transmission line under the scope of DMTCL. The relevant portion of the order dated 1.9.2017 is as follows:

“However, it is observed that the instant bays of the Petitioner at Muzaffarpur Sub-station were ready in all aspects by 31.8.2016 but were not put into use



because of the non- commissioning of the associated transmission line by DMTCL. Accordingly, we are of the view that the IDC and IDEC for the period from 31.8.2016 to 21.4.2017 shall be borne by DMTCL.”

(c) Accordingly, Petitioner raised a bill on DMTCL to pay ₹55.34 lakh without any interest or demure.

(d) DMTCL filed Petition No. 238/MP/2017 seeking an extension of the scheduled COD and increase in transmission charges due to unforeseen and uncontrollable events post-award of the ERSS-VI Transmission Scheme implemented by DMTCL under the Tariff Based Competitive Bidding (TBCB) route.

(e) Though there was no specific prayer, one of the contentions of DMTCL in Petition No. 238/MP/2017 was to recover the IDC and IDEC amount paid by it to PGCIL from the LTTC as per its TSA, as the additional expenditure due to delay of its transmission project was on account of “*force majeure*”.

(f) The Commission vide order dated 29.3.2019 in Petition No. 238/MP/2017 held that DMTCL was prevented from discharging its obligations under the TSA on account of “*force majeure*” and therefore extended the SCOD till the actual COD. The relevant extract of the order dated 29.3.2019 is as follows:

“65. In our view, the Petitioner was prevented from discharging its obligations under the TSA on account of unexpected requirement and delay in grant of forest clearance which was not there in the RFP documents and as such delay beyond one year in grant of forest clearance is covered under Force Majeure. Accordingly, the SCOD shall stand extended till the actual CODs of Darbhanga and Motihari transmission elements which are 31.3.2017 and 10.8.2017 respectively. However, we would like to make it clear that the extension of COD of the instant assets would not entail any financial benefit in the form of IDC and IEDC to the Petitioner.

(g) As regards the DMTCL’s claim of IDC and IEDC paid to the Petitioner in terms of the Commission’s order dated 1.9.2017 in Petition No. 209/TT/2016,



the Commission in an order dated 29.3.2019 in Petition No. 238/MP/2017 observed as follows:

“80. PGCIL had filed Petition No. 209/TT/2016 for “Determination of transmission tariff from actual COD to 31.3.2019 in respect of 02 no. 400 kV line bays at Muzaffarpur Sub-station for termination of Muzaffarpur (PG)-Darbhanga (TBCB) 400 kV D/C (Triple Snowbird) Line under “Eastern Region System Strengthening Scheme VI (ERSS-VI)” in Eastern Region.” The Commission, while disposing of Petition No. 209/TT/2016 vide order dated 1.9.2017, held that the Petitioner in the present petition 238/MP/2017 is responsible for the delay in COD of the said transmission assets of PGCIL and held that the Petitioner shall bear the IDC and IEDC for the period 31.8.2016 till 21.4.2017. The Petitioner has submitted that on 26.9.2017, PGCIL issued a Debit Note upon the Petitioner claiming an amount of ₹5534000 as IDC and IEDC for the period 31.8.2016 till 21.4.2017, which was duly paid by the Petitioner to PGCIL. The Petitioner has claimed the said amount of ₹5534000 paid to PGCIL pursuant to the aforesaid order as an additional financial implication on it. The Petitioner has submitted that the said amount of ₹5534000 be considered as an additional expenditure due to delay of the transmission project because to unforeseen Force Majeure events.

81. We have carefully considered the submission of the Petitioner. In the facts and circumstances of the present case, we do not find any rationale to approve the amount of ₹5534000/- paid to PGCIL pursuant to the Commission’s order dated 1.9.2017 in Petition No. 209/TT/2016 as additional expenditure.”

(h) Aggrieved by the order dated 29.3.2019 in Petition No. 238/MP/2017, DMTCL filed an Appeal No. 276 of 2021 before the APTEL on several grounds including the liability of IDC and IEDC to be borne by DMTCL.

(i) The APTEL, vide its judgement dated 3.12.2021 in Appeal No. 276 of 2021 directed the Petitioner to return the amounts paid by DMTCL to the Petitioner and also remitted the matter to the Commission for passing a reasoned order pursuant to the other directions. The relevant extract of the APTEL’s judgment dated 3.12.2021 is as follows:

“Issue No. 4-While extending the SCOD and holding that the delay was not on account of DMTCL, CERC has erroneously disallowed recovery of amounts paid by DMTCL to PGCIL along with interest pursuant to its order dated 01.09.2017 passed in Petition No. 209/TT/2016. DMTCL was held liable to pay these amounts on account of delay in COD of the Project.

Issue No.4:- We decide in favour of the Appeal and the amounts paid by DMTCL to PGCIL along with interest pursuant to order dated 01.09.2017 passed in Petition No. 209/TT/2016 be returned to DMTCL.”



(j) Subsequently, DMTCL filed Interlocutory Application (IA) No. 2099 of 2021 before the APTEL seeking clarification of the judgment dated 3.12.2021. The APTEL vide its order dated 21.1.2022 observed that DMTCL is entitled to be fully compensated for IDC and IEDC for the period from SCOD to actual COD on account of change in law and “*force majeure*” events and also to receive compensation on account of change in gantry coordinates and increase in number of power lines crossing and the consequential carrying cost. The relevant extracts from the order dated 21.1.2022 in I.A is as follows:

“The Appellants have moved these applications seeking clarification. Having heard the learned counsel for the parties, we are clear in our minds that the Judgment dated 03.12.2021 leaves no scope for doubt that the Appellants have been held entitled to be fully compensated for IDC and IEDC incurred on account of Change in Law and Force Majeure Events and also to receive compensation on account of change in Gantry Coordinates and increase in number of power lines crossing. It is inherent in the findings returned and the directions given that while passing a consequential order in terms of the remit, the Commission will be obliged to grant the reliefs in above nature and also to consider the consequential carrying cost.”

(k) Pursuant to directions of the APTEL in the judgment dated 3.12.2021, Petition No. 238/MP/2017 was reopened and heard. In the said proceedings, DMTCL submitted that it does not dispute the entitlement of the Petitioner to recover such amounts as it would have to refund to DMTCL as per APTEL’s judgment. DMTCL further submitted that the Petitioner should not be out of pocket when such amount is returned to DMTCL and the Petitioner ought to be allowed to recover the amount from PoC Pool when such amount is returned by it.

(l) In the remand proceedings, the counsel for the Petitioner also requested to grant liberty to approach APTEL in this regard by filing for an appropriate clarification.



(m) Accordingly, Petitioner filed an IA No. 245 of 2022 before the APTEL on 17.2.2022 seeking clarification of the judgement dated 3.12.2021 with respect to the manner of return of money to DMTCL. APTEL rejected the IA vide order dated 1.4.2022.

(n) The Commission vide order dated 13.5.2022 in the remand proceedings after taking into account the APTEL's judgment dated 3.12.2021 in Appeal No. 276 of 2021 and the subsequent clarificatory orders dated 21.1.2022 and 1.4.2022 passed in IA No. 2099 of 2021 (filed by DMTCL) and 245 of 2022 (filed by PGCIL), observed as follows:

“12. As regards Issue No. 4, we notice that PGCIL approached APTEL by filing IA No. 245 of 2022 in Appeal No. 276 of 2021 seeking clarification with regard to the direction in paragraph 20.1 and decision on Issue No. 4 in its judgment dated 3.12.2021 in Appeal No. 276 of 2021 and Appeal No. 129 of 2020. APTEL in its judgment dated 1.4.2022 has disposed of the said application as follows:

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.....

13. In the light of the finding of APTEL in the judgment dated 3.12.2021 in Appeal No. 276 of 2021 and the order dated 1.4.2022 in IA No. 245 of 2022, PGCIL is directed to comply with the decision of the APTEL, without prejudice to its right to pursue any remedy available under law.”

(o) In compliance with the Commission's order dated 13.5.2022 in Petition No. 238/MP/2017, Petitioner has refunded the amount of ₹55.34 lakh to DMTCL on 14.6.2022. However, the Petitioner is not able to recover the IDC and IEDC for the period from 31.8.2016 to 21.4.2017 as allowed by this Commission in its order dated 1.9.2019 in Petition No. 209/TT/2016 despite the finding of the Commission that the Petitioner's asset was ready by 31.8.2016.



(p) As a result, the Petitioner has filed the instant petition for appropriate orders for recovery of its IDC and IEDC for the period from 31.8.2016 to 21.4.2017.

Grounds

4. The detailed grounds made by the Petitioner in support of its prayer are as follows:

- a) The Petitioner has implemented the line bays as per the scheduled timelines, and line bays were ready for commercial operation on 31.8.2016. All relevant documents showing the readiness of the line bays, such as RLDC certificates and CEA certificates were also submitted before the Commission during the proceeding in Petition No.209/TT/2016. The said line bays could not be put to intended commercial use due to the unavailability of the associated line under the scope of DMTCL. Therefore, the Petitioner's case was clearly covered for approval of deemed COD under proviso (ii) of Regulation 4(3) of the 2014 Tariff Regulations.
- b) The Commission, in an order dated 1.9.2017 in Petition No. 209/TT/2016, has taken note of the readiness of Petitioner's line bays on 31.8.2016. However, the Commission shifted the COD of the Petitioner's line bays matching with the commissioning date of the associated transmission line i.e. 22.4.2017 and directed DMTCL to pay the IDC and IEDC of the Petitioner's line bays for the period from 31.8.2016 (date when Petitioner's line bays were ready) to 21.4.2017 to remedy the situation. This order has not been challenged and has been accepted by all parties including



DMTCL. Therefore, the entitlement of the Petitioner to recover its IDC and IEDC for the period from 31.8.2016 to 21.4.2017 has reached finality.

- c) The Petitioner is being deprived of its legitimate claim of IDC and IEDC for the period from 31.8.2016 to 21.4.2017. The non-recovery of the IDC and IEDC is causing financial loss to Petitioner, and it is contrary to the statutory/ regulatory framework and various orders of the Commission, APTEL and Hon'ble Supreme Court.
- d) As a plenary authority regulating the affairs of the Petitioner, only the Commission can pass orders to remedy the situation. Even the clarificatory order dated 1.4.2022 passed by APTEL is indicative of the fact that the Petitioner should not be put out of pocket.
- e) The plenary power of the Commission under Section 79(1)(c) and Section 79(1)(d) of the 2003 Act, is to regulate inter-State transmission of electricity and to determine the tariff for inter-State transmission of electricity. The 2014 Tariff Regulations and the 2010 Sharing Regulations provide for the manner of determination as well as recovery of transmission tariff. IDC and IEDC is also a component of transmission tariff, and this Commission is the only authority to decide on recovery of the same.
- f) Although the Petitioner has been directed to return the IDC and IEDC by the APTEL to DMTCL, the same would not mean that the Petitioner is not entitled to these charges for no reasons attributable to the Petitioner.
- g) In the clarification order dated 1.4.2022 in I. A No 245 of 2022, APTEL has specifically recognized that if the Petitioner is entitled in law to claim any



relief pursuant to the directions issued in the wake of the said conclusion, nothing said in the judgment passed by APTEL inhibits it from pursuing such remedy in accordance with the law.

- h) The Commission may either approve the COD under the second proviso to Regulation 4(3) of the 2014 Tariff Regulations as prayed originally by the Petitioner or allow to capitalize the said IDC and IEDC for the period from 31.8.2016 to 21.4.2017; or allow to recover the IDC and IEDC for the period from 31.8.2016 to 21.4.2017 from the common pool.
- i) The Petitioner has no other alternate remedy since there is no substantial question of law which can be agitated by the Petitioner by filing a second Appeal under Section 125 of the 2003 Act against the judgment dated 3.12.2021 of the APTEL, especially in view of the second clarificatory order dated 1.4.2022 given by the APTEL and the order of the Commission dated 13.5.2022 in the remanded back matter.

5. The matter was admitted on 7.2.2023 and the notice was issued to the Respondents to file their reply and the Petitioner to file its rejoinder, if any, thereafter. The Commission directed the Petitioner to implead CTUIL as a party in the matter. Accordingly, the Petitioner impleaded CTUIL. DMTCL, vide affidavit dated 27.2.2023 has filed its reply. However, no reply has been filed by CTUIL.

Reply of DMTCL

6. DMTCL vide affidavit dated 27.2.2023 has filed its reply and has made the following submissions:



- (a) The issues vis-à-vis payment of IDC and IEDC between the Petitioner and the DMTCL are settled and cannot be reagitated or re-opened, the relief against DMTCL is barred by res judicata and estoppel. Hence, the Petitioner cannot claim recovery of IDC and IEDC in an indirect manner.
- (b) APTEL, vide its judgment dated 3.12.2021 in Appeal No. 276 of 2021 and clarification order dated 21.2.2021 and 1.4.2022 in I. A No. 2099 of 2021 and 245 of 2022 and Commission vide its order dated 13.5.2022 in remand Petition No. 238/MP/2017 has already settled issues between Petitioner and the DMCTL regarding the payment of IDC and IEDC for the period between 31.8.2016 and 21.4.2017 and the same has attained finality.
- (c) The Commission's directions in the order dated 1.9.2017 in Petition No. 209/TT/2016 cannot be relied upon by the Petitioner to indirectly impute DMCTL for the liability to bear the said IDC and IEDC. Particularly so, considering that the Petitioner had taken the same plea during the course of the hearing dated 8.2.2022 in remand proceedings of Petition No. 238/MP/2017 before the Commission.
- (d) The Commission in its order dated 1.9.2017 in Petition No. 209/TT/2016 observed that the delay in commissioning the Petitioner's assets was due to reasons beyond the Petitioner's control and made Respondent No. 1 liable to pay IDC and IEDC during the period of delay as the transmission assets under the scope of DMTCL was not ready. In Petition No. 209/TT/2016, the Commission had not examined the reasons for the non-readiness of the DMTCL's transmission assets.



- (e) The Commission, vide its order dated 29.3.2019 in Petition No. 238/MP/2017 filed by DMTCL, held that the delay in commissioning of the assets under the scope of DMTCL was beyond the control of DMTCL and was due to '*force majeure*'.
- (f) Having held that the delay was not attributable to DMCTL on a detailed consideration of the facts, the very basis on which the liability to pay IDC and IEDC during the period of delay was foisted upon the DMCTL has ceased to exist. This has subsequently been confirmed by the APTEL in its orders enumerated above directing reimbursement of the sum paid by the DMCTL as IDC and IEDC to the Petitioner for the delay period.
- (g) DMCTL is neither a necessary nor a proper party to the present petition and has been improperly arrayed as a Respondent. As such, no relief can be claimed by the Petitioner against DMTCL.
- (h) The Petitioner's only grievance in the instant petition is that it is out of pocket after reimbursing the sum paid by the IDC and IEDC by DMCTL. However, the Petitioner has not given the basis of any right to claim any relief against DMCTL. Also, no right to relief can exist against DMCTL in view of the conclusive judgments/ orders of the Hon'ble APTEL and this Commission.
- (i) The Petitioner is in effect, seeking a revision in its tariff. DMCTL is not a beneficiary of the transmission project ERSS-VI and is not liable to pay tariff for the use of the line. DMTCL is merely an SPV incorporated for the implementation of certain transmission assets on the associated line. As such, there is no regulatory basis for making DMTCL liable to bear any part of the tariff of the Petitioner.



(j) APTEL, vide its order dated 1.4.2022 in IA No. 245 of 2022, did not confer any right upon the Petitioner to indirectly recover any part of such charges from DMTCL. In fact, APTEL specifically in its judgment dated 3.12.2021, directed reimbursement of the amount paid by DMCTL towards IDC and IEDC during the delay period, did not require to be clarified. Therefore, any remedy that can be pursued by the Petitioner to recover such amount from tariff or otherwise can only lie against such persons who are liable to bear the transmission charges.

7. The matter was listed again on 16.3.2023 and the learned counsel for the Petitioner reiterated its submissions made in the instant petition and submitted that the IDC and IEDC amount of ₹53.34 lakh has been returned to DMTCL and the unpaid carrying cost will be paid after calculating the interest. The learned counsel for the DMTCL also reiterated its submissions made in its reply and further submitted that the Petitioner has returned ₹55.34 lakh but has not paid the carrying cost. The learned counsel appearing for CTUIL submitted that recovery of IDC and IDEC by the Petitioner from the PoC pool will cause an additional burden on the beneficiaries, and prayer of the Petitioner may not be allowed. He further sought time to file its reply in the matter. However, as stated earlier in this order, CTUIL did not file any reply in the matter.

8. After hearing the parties, the Commission reserved the order in the matter.

Analysis and Conclusion

9. We have heard the submissions of the parties and have perused the material on record. The Petitioner has filed the instant petition under Section 79(1)(c) and (d) of



the Act read with the applicable provisions of Tariff Regulations, 2014 seeking recovery of IDC and IEDC for the period from 31.8.2016 (when the 400 kV line bays at Muzaffarpur Sub-station were made ready by the Petitioner) till 21.4.2017 (when the connecting 400 kV Darbhanga-Motihari line was made ready and put into commercial operation by the Respondent No. 1, DMTCL).

10. The Petitioner filed Petition No.209/TT/2016 for the determination of the tariff of the 400 kV line bays at Muzaffarpur Sub-station. The Petitioner sought a tariff from 31.8.2016 under the second proviso to Regulation 4(3) of the 2014 Tariff Regulations. However, the Commission vide order dated 1.9.2017 in Petition No. 209/TT/2016 held that 400kV line bays at Muzaffarpur Sub-station could be put into service only after commercial operation of the associated Muzaffarpur (PG)-Darbhanga (TBCB) 400 kV D/C (Triple Snowbird) line on 21.4.2017 and accordingly, approved the commercial operation of 400 kV line bays at Muzaffarpur Sub-station with effect from 21.4.2017. The Commission further directed that since the bays of the Petitioner at Muzaffarpur Sub-station were ready in all aspects by 31.8.2016 but could not be put into use because of the non-commissioning of the associated transmission line by DMTCL, DMTCL would be liable to bear the IDC and IEDC of the two-line bays at Muzaffarpur Sub-station for the period 31.8.2016 to 21.4.2017. DMTCL, in compliance with the said order, paid an amount of ₹55.34 lakh towards IDC and IEDC to the Petitioner.

11. DMTCL filed Petition No. 238/MP/2017 seeking an extension of SCOD and an increase in transmission charges due to unforeseen and uncontrollable events post-award of the ERSS-VI Transmission Scheme implemented by DMTCL under the Tariff Based Competitive Bidding (TBCB) route and for refund of ₹55.34 lakh towards IDC



and IEDC paid to the Petitioner. The Commission vide order dated 29.3.2019 in Petition No. 238/MP/2017 extended the SCOD of the Muzaffarpur (PG)-Darbhanga (TBCB) 400 kV D/C (Triple Snowbird) line till its actual COD holding that the delay was beyond the control of DMTCL but disallowed the financial benefits from the original SCOD till actual COD in the form of IDC and IEDC apart from disallowance of certain other claims. The Commission also disallowed the prayer of DMTCL for a refund of ₹55.34 lakh towards IDC and IEDC paid to the Petitioner.

12. Aggrieved by the order dated 29.3.2019 in Petition No. 238/MP/2017, DMTCL filed Appeal No. 276 of 2021 before APTEL in which one of the grounds of challenge was that since delay in COD of the Muzaffarpur (PG)-Darbhanga (TBCB) 400 kV D/C (Triple Snowbird) line has been held to be a Force Majeure and a Change in Law event, DMTCL cannot be held liable for payment of IDC and IEDC to the Petitioner. APTEL, vide common judgement dated 3.12.2021 in Appeal No.129 of 2020 (filed by NRSS XXXI) and in Appeal No.276 of 2021 (filed by DMTCL) referring to its earlier judgement in Appeal No.17 of 2019 directed the Petitioner to refund the IDC and IEDC to DMTCL. The relevant portions of APTEL's judgment dated 3.12.2021 is as follows:

"20.0 The issue raised at sub para (b) above is similar to issue raised in Appeal No. 17 of 2019: NRSS XXXI (B) Transmission Company Limited vs. CERC & Ors. The relevant paras of the Judgement in the said Appeal is as follows:

"8.21 It would thus appear that imposing liability of IDC and IEDC on the Appellant defeats the objective of introducing the provision of force majeure in the TSA i.e., to save the Appellant from the consequences of anything over which it has no control. When the relief is available under the force majeure provisions of the contract, the Commission ought not to have penalized the Appellant for the same act outside the contract, particularly, when there is no such provision in the sharing regulations which the Appellant could have made itself aware of before bidding for the project."



20.1 Therefore, we agree with the submissions made by the Appellant seeking relief for the recovery of amounts paid by DMTCL to PGCIL along with interest pursuant to its order dated 01.09.2017 passed in Petition No. 209/TT/2016. DMTCL was held liable to pay these amounts on account of delay in COD of the Project.”

“Issue No.4:- We decide in favour of the Appeal and the amounts paid by DMTCL to PGCIL along with interest pursuant to order dated 01.09.2017 passed in Petition No. 209/TT/2016 be returned to DMTCL.”

13. The Petitioner filed Interlocutory Application No. 245 of 2022 in Appeal No. 276 of 2021 seeking clarification of the judgment dated 3.12.2021. APTEL vide its order dated 1.4.2022 disposed of the I.A No. 245 of 2022 as under:

*“Having heard the learned senior counsel for the Applicant/PGCIL and the learned counsel for the non-applicant/Appellant-Darbhanga Motihari Transmission Company Limited, we see no occasion for clarification or ambiguity in the observations or directions in the judgment passed on 03.12.2021, particularly in the context of Para 20.1 and the decision on Issue no.4. **If the applicant/PGCIL is entitled in law to claim any relief pursuant to the directions issued in the wake of the said conclusion, nothing said in the judgment passed by this Tribunal inhibits it from pursuit of such remedy in accordance with law. With these observations, we dispose of both the applications.**”*

14. The Commission, vide order dated 13.5.2022 in the remand proceedings of Petition No. 238/MP/2017 after taking into account the APTEL’s judgment dated 3.12.2021 in Appeal No. 276 of 2021 and the subsequent clarificatory orders dated 21.01.2022 and 1.4.2022 passed in IA No. 2099 of 2021 (filed by DMTCL) and IA No. 245 of 2022 (filed by the Petitioner), observed as follows:

“
.....

13. In the light of the finding of APTEL in the judgment dated 3.12.2021 in Appeal No. 276 of 2021 and the order dated 1.4.2022 in IA No. 245 of 2022, PGCIL is directed to comply with the decision of the APTEL, without prejudice to its right to pursue any remedy available under law.”

15. The Petitioner has refunded the amount of ₹55.34 lakh to DMTCL on 14.6.2022 in accordance with the above directions of the Commission. In the present petition, the Petitioner has submitted that even though IDC and IEDC for the period from 31.8.2016 to 21.4.2017 was allowed by the Commission in its order dated 1.9.2019 in



Petition No. 209/TT/2016, the same is not being serviced by any party despite the finding of the Commission that the Petitioner's asset was ready by 31.8.2016. The Petitioner in para 42 of the petition has suggested the following three options for consideration to correctly decide the matter:

- (a) Approval of the COD of 400 kV line bays at Muzaffarpur Sub-station under second proviso to Regulation 4(3) of the Tariff Regulations, 2014 as has been prayed originally by the Petitioner; or
- (b) Capitalization of the IDC and IEDC for the period from 31.8.2016 to 21.4.2017; or
- (c) Recovery of the IDC and IEDC for the period from 31.8.2016 to 21.4.2017 from the POC pool.

16. The Petitioner has prayed for a decision with regard to the mode of recovery in one of the manners suggested above along with interest from the date of refund till the date of recovery in terms of the order to be passed in the present petition.

17. As regards the first suggestion of the Petitioner, it is noted that the Commission vide its order dated 1.9.2017 in Petition No. 209/TT/2016 after taking into consideration the facts of the matter and the submission of the Petitioner categorically rejected the said prayer for approval of the COD of 400 kV line bays at Muzaffarpur Sub-station under the second proviso to Regulation 4(3) of the 2014 Tariff Regulations. The said finding has not been reversed by APTEL in the appeals and interlocutory applications filed before it and is therefore still in operation. The suggestion of the Petitioner to revisit the said decision amounts to seeking a review of the decision of the Commission which is not maintainable under Order 47 Rule 1 after filing of the appeal. Accordingly, this suggestion is rejected.



18. The second suggestion is to capitalise the IDC and IEDC and the third suggestion is to reimburse the IDC and IEDC from the PoC pool. It is noted that the Commission had issued directions in its order dated 29.3.2019 in Petition No. 238/MP/2017 for recovery of IDC and IEDC from DMTCL as it was held responsible for the delay in commercial operation of the 400kV line bays at Muzaffarpur Sub-station of the Petitioner. However, APTEL ruled that IDC and IEDC cannot be recovered from DMTCL as it was affected by force majeure which was approved by the Commission. With regard to the rights of the Petitioner to recover the IDC and IEDC for the concerned period, APTEL in its order dated 1.4.2022 in IA No.245/2022 observed as under:

“..... If the applicant/PGCIL is entitled in law to claim any relief pursuant to the directions issued in the wake of the said conclusion, nothing said in the judgment passed by this Tribunal inhibits it from pursuit of such remedy in accordance with law. With these observations, we dispose of both the applications.”

19. The Commission in its order dated its order dated 29.3.2019 in Petition No. 238/MP/2017 has recorded a finding that 400kV line bays at Muzaffarpur Sub-station of the Petitioner were ready for commercial operation as on 31.8.2016 but could not be put into use because of the non-commissioning of the associated transmission line by DMTCL and therefore, DMTCL would be liable to bear the IDC and IEDC of the two-line bays at Muzaffarpur Sub-station for the period 31.8.2016 to 21.4.2017. APTEL, in its judgement dated judgment dated 3.12.2021, in Appeal No.276 of 2021 has only held that DMTCL is not liable to pay the IDC and IEDC for the said period on account of being affected by force majeure. Therefore, the finding of the Commission that the Petitioner is entitled to IDC and IEDC for the period 31.8.2016 to 21.4.2017 has not been interfered with. In other words, a right for recovery of IDC and IEDC has already accrued in favour of the Petitioner. The only question that remains to be



decided is who shall pay the IDC and IEDC after it was held by APTEL that DMTCL cannot be held liable. In this context, the third suggestion of the Petitioner that payment should be made from the PoC pool is not legally tenable for the simple reason that any payment from the PoC pool is after the CoD of the asset and this liability pertains to the period prior to the CoD. Therefore, we are left with the second option i.e. capitalisation of the IDC and IEDC for the said period. The first proviso to Regulation 11(A) of Tariff Regulations, 2014 provides as under:

“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:”

20. Similarly, first proviso to Regulation 11(B) of Tariff Regulations, 2014 provides as under:

“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:”

21. Regulation 12 of Tariff Regulations, 2014 provides that “uncontrollable factors” shall include force majeure events and changes in law. Force majeure has been defined in clause (25) of Regulation 3 of Tariff Regulations, 2014 as under:

“(25) ‘Force Majeure’ for the purpose of these regulations means the event or circumstance or combination of events or circumstances including those stated below which partly or fully prevents the generating company or transmission licensee to complete the project within the time specified in the Investment Approval, and only if such events or circumstances are not within the control the generating company or transmission licensee and could not have been avoided, had the generating company or transmission licensee taken reasonable care or complied with prudent utility practices:

a) Act of God including lightning, drought, fire and explosion, earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, geological surprises, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred years; or

(b) Any act of war, invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or



(c) Industry wide strikes and labour disturbances having a nationwide impact in India;”

22. The definition of force majeure is inclusive in nature and is not confined to sub-clauses (a), (b) and (c) of the said clause. Any event or circumstance, including those mentioned in sub-clauses (a), (b) and (c), which partly or fully prevents the generating company or transmission licensee, from completing the project within the time specified in the Investment Approval shall be considered as force majeure.

23. In the present case, execution of the Muzaffarpur (PG)-Darbhanga (TBCB) 400 kV D/C (Triple Snowbird) line was within the scope of DMTCL and since DMTCL was affected by force majeure, the Petitioner could not have achieved its CoD before the CoD of the connecting line. Further, the Commission rejected the request of the Petitioner to declare CoD under proviso to Regulation 4(3) of the Tariff Regulations, 2014. Therefore, the delay in achieving CoD of 400 kV line bays at Muzaffarpur Sub-station was beyond the control of the Petitioner. Since APTEL set aside the Commission’s decision to recover the IDC and IEDC from DMTCL, the only option available under law is to capitalise the IDC and IEDC in terms of provisos to Regulation 11(A) and 11(B) to Tariff Regulations, 2014. Accordingly, we decide that ₹55.34 lakh towards IDC and IEDC shall be capitalised for the purpose of determination of tariff 400 kV line bays at Muzaffarpur Sub-station. It is, however, clarified that we have allowed capitalisation of IDC and IEDC of the 400 kV line bays at Muzaffarpur Sub-station for the period 31.8.2016 to 21.4.2017 in the peculiar nature of the facts in the present case where the entity responsible for the delay was held to be not liable by APTEL to pay on account of being affected by force majeure. The decision in this case would not be considered as a precedent in other cases of allocation of liability for the delay in commercial operation of any transmission asset, whether pending before the



Commission or to be filed in future, and such cases will be decided on their own merit in accordance with law.

24. Consequential revision in tariff of 400 kV line bays at Muzaffarpur Sub-station shall be issued separately.

25. In view of the above discussions and findings, Petition No. 197/MP/2022 is disposed of.

sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member

sd/-
(Jishnu Barua)
Chairperson

