

13. Accordingly, Respondent No. 1 and the beneficiaries of the Kala Amb Transmission System signed the Transmission Services Agreement dated 02/01/2014 (hereinafter called the **TSA**).

14. As already mentioned above, the Kala Amb Transmission System was proposed to be built for the strengthening of the Northern Region Power System Grid, as was duly agreed by the beneficiaries including sharing of the transmission charges under POC mechanism. It was stated that the said Transmission System is not dedicated to the use of the State of Himachal Pradesh, but is part of the Northern Regional System Strengthening scheme as agreed to by all the constituents.

15. The said Transmission System not only provided 40% compensation on the Karcham Wangtoo – Kala Amb line for strengthening the Karcham Wangtoo – Abdullapur 400 KV D/c line, reduction in oscillations and for the purpose creation of LILO on both the 400 KV circuits of the Karcham Wangtoo – Abdullapur 400 KV line D/c line but also provided infrastructure for further down-stream system to be created by the Himachal Pradesh utility at 220 kV level. The latter part i.e. downstream network is not part of the ISTS system or the said Kala Amb Transmission System. The request of the State Utility to establish a 400/220/132KV substation was not acceded to and it was decided only to build the 400/220 KV substation as a part of the northern regional system strengthening scheme, accordingly, no matching time line was specified as per the agreement entered upon.

16. The Appellant made certain submission regarding the reasons for delay in the commissioning of the downstream system, however, at this stage we are restraining ourselves only to the issues related to the prayer made by the Appellant.

17. The only issue which emerges out of the Appeal is whether the Central Commission has rightly levied the transmission charges to the tune of 84.5% of the total transmission charges to be recovered by the Transmission Service Provider (TSA) for the said Kala Amb Transmission System (Element 1, Element 2 and Element 3) from the Appellant.

18. Before proceeding further, it is important to note the relevant provisions of the law, the agreements signed and the decisions of the beneficiaries in this regard.

19. Section 63 of the Electricity Act, 2003 (the Act) is the relevant section under which the bids were invited and the contract was awarded to Respondent no. 1. The section is reproduced herewith:

“Section 63. Determination of tariff by bidding process: Notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.”

20. Therefore, in terms of Section 63 of the Act, the Central Commission is required to adopt the tariff, on being satisfied that transparent process of bidding in accordance with the guidelines issued by the Ministry of Power, Government of India under Section 63 of the Act, has been followed in determination of such tariff.

21. As per the bidding guidelines the Respondent no. 1 entered into an agreement called as Transmission Service Agreement (TSA) with the beneficiaries including the Appellant, and the transmission charges for the said Transmission System shall be in accordance with the signed TSA, the rights and

obligations are frozen in the TSA in entirety, any deviation from the said TSA shall be bad in law.

22. Therefore, once the transmission tariff is adopted by CERC, the levying of the transmission charges shall be as per the statutory guidelines issued by Government of India under section 63 and the TSA signed between the Respondent no. 1 i.e. TSP and the beneficiaries i.e. the long term transmission customers (LTTCs).

23. The TSA signed by the parties provides, through the note appended, that:

“While the bidding is being done on the basis of existing Standard Bidding Documents (SBDs), and the list of LTTC is being provided as per the format of the existing SBDFs. It is clarified that the transmission charges will be shared and recovered as per the applicable CERC regulation which is at present the Point of Connection mechanism of sharing. As per the present CERC regulation the charges will be recovered by the Central Transmission Utility from the DICs and disbursed to the TSPs as per the Revenue Share Agreement.”

24. There is no dispute regarding methodology of determining and sharing the transmission charges for an ISTS Transmission System. Undoubtedly, it is the Point of Charge (PoC) mechanism as specified in the CERC Regulations on Sharing of Inter-State Transmission Charges. There cannot be any other mechanism except the one specified in the relevant Regulations and the TSA.

25. Article 10 of the TSA provides that LTTCs shall pay to the TSP, the monthly charges from the COD of the transmission system till the expiry of the Agreement or the termination of the TSA.:

“10.1 Subject to provisions of this Article 10, the Long Term Transmission Customers shall pay to the TSP, in Indian Rupees, on

monthly basis, the Monthly Transmission Charges from the date on which an Element(s) has achieved COD until the Expiry Date of this Agreement, unless terminated earlier, in line with the provisions of Schedule 5 of this Agreement.”

26. It is, thus, clear that all the LTTCs shall pay the monthly transmission charges as per the methodology specified under PoC mechanism. There is no provision under the TSA where only single entity can be levied upon with 100% transmission charges for certain elements.

27. The matter was also deliberated amongst the beneficiaries including PGCIL during the 37th meeting of the Technical Coordination Sub-Committee (TCC) & 40th meeting of the Northern Regional Power Committee (NRPC), wherein it was agreed and resolved that:

“C.16 Review on exemption on levy of Transmission Charges for PGCIL assets when downstream system due to legitimate constraints could not be developed on or before COD

TCC Deliberation

C.16.1 Representative of HPSEBL requested the Committee to consider exemption on levy of transmission charges on DISCOM and include the same in PoC till the commissioning of downstream system for following systems:

- *2 No. 220kV bays at 400/220 kV Sub -Station Hamirpur:

 - o *2 No. bays out of 4 No. bays of the said substation are still not being used by HPSEBL.**
- *6 No. bays of 400/220 kV Sub Station Kala Amb.

 - o *Due to forest clearance and land acquisition related issues HPSEBL could not develop downstream system for usage of 6 No. bays of said substation of PGCIL.**

C.16.2 He further stated that on account of several constraints it was not possible to commission the downstream network exactly matching with the commissioning of ISTS system. It was also highlighted that the

commissioning of ISTS system benefit the regional power system in form of improved reliability. He suggested that the tariff of the ISTS system should be included in PoC charges instead of charging the same from a single utility.

C.16.3 The views of HPSEBL were supported by other members including POWERGRID.

C.16.4 In view of consensus in the matter, TCC agreed that the opinion of the members may be forwarded by Member Secretary, NRPC to CERC for consideration

NRPC Deliberation

C.16.5 Committee concurred with the TCC deliberations.”

28. From the above, the beneficiaries including PGCIL agreed to the request of the Appellant for sharing of the transmission charges under PoC mechanism for the complete Kala Amb Transmission system.

29. The CERC Regulations on Sharing of Transmission Charges clearly spelt out the mechanism to be followed for determination of share of each beneficiary i.e. LTTC, presently under PoC mechanism. There is no mention of downstream or upstream network matching condition under which specific LTTC can be penalized.

30. Contrary to above, CERC has, in contravention to the prevailing laws, the provisions of the TSA and its own notified Regulation, passed the impugned order. The relevant extracts of the impugned order are reproduced below:

*“2. PGCIL accomplished all the milestones required in terms of the Request for Proposal (RfP) and Letter of Intent (LOI) and acquired the NRSS XXXI (A) Transmission Limited (hereinafter referred to as ‘NRSSTL’) as its fully owned subsidiary. ----- **The Commission in its order dated 22.8.2014 in Petition No. 93/TT/2014 has adopted the tariff of the transmission system and in order dated 8.7.2014 in***

Petition No. 94/TL/2014 has granted licence to NRSSTL for inter-State transmission of electricity.

*3. NRSSTL declared commercial operation of its transmission system on 12.7.2017 in terms of the provisions of 6.1.2 of the TSA. The issue regarding inclusion of the subject transmission line in PoC was raised by NRSSTL in the third Validation Committee meeting held on 29.8.2017. **In the Validation Committee it was decided that the subject transmission line shall not be considered under PoC due to non-availability of the downstream network and the same shall be governed as per the Commission`s order dated 4.1.2017 in Petition No. 155/MP/2016. Accordingly, NRSSTL is raising the invoices for the entire transmission system on the Petitioner.***

5. The Petitioner has submitted that the decision to make the Petitioner liable for payment of transmission charges till the COD of the downstream system is not legally tenable due to the following reasons:

*----- (g) **There is no provision in the TSA which provides that the transmission system is dependent on the downstream transmission assets. The downstream transmission assets are also not a part of the project.***

31. From the above, it is clear that:

- i) the decision of the validation committee resulted into the impugned order whereas there is no condition laid down under the TSA that the decision of the validation committee shall be a binding/ condition for determination of tariff; and
- ii) the petitioner (respondent no.1) has supported that the downstream network, to be developed by the Appellant, is not part of the ISTS system.

32. Further, in its reply dated 10.5.2018, the Respondent no1. submitted as under:

“-----

(b) PoC charges must be borne by the pool of DICs as a whole from COD onwards. As per the Request for Proposal (RfP), the transmission charges are required to be shared and recovered for payment in terms of the Sharing Regulations. From the pre-bidding stage itself, it was understood by all concerned including NRSSTL that the recovery mechanism under the TSA would be through the Sharing Regulations, and not through any bilateral billing on a particular beneficiary.

(c) The scheme is a system strengthening scheme and transmission charges shall be paid by all the beneficiaries and the same was agreed by the LTTCS, CEA and CTU in the 40th NRPC meeting held on 28.10.2017.”

33. The submissions of the Appellant in the present Appeal were supported by the Respondent during the proceedings before the CERC. The Central Commission, further, observed that:

17. Recently, the Commission in its order dated 31.5.2018 in Petition No. 99/MP/2017 has held as follows: —

“20. The Commission has taken a consistent view that the entity who is responsible for the asset not being put to use shall be liable to pay the transmission charges from the date of deemed CoD till the asset is put to use. The issue regarding payment of transmission charges from the date of SCOD was deliberated in Petition No. 43/MP/2016 and the Commission vide order dated 21.9.2016 laid down the principles for such cases and observed as under: —

“24. A related issue arises as to how recovery of transmission charges of transmission licensee shall be made when the transmission system under TBCB is ready as on its scheduled COD as per the provisions of the TSA but cannot be made operational or put to use due to non-availability/ delay in upstream/ downstream system. In our view, ISTS licensee executing the project under TBCB should enter into Implementation Agreement with CTU, STU, inter-State transmission licensee, or the concerned LTTC, as the case may be, who are responsible for executing the upstream/

downstream transmission system and clearly provide the liability for payment of transmission charges in case of the transmission line or upstream/downstream transmission assets. In the absence of Implementation Agreement, the payment liability should fall on the entity on whose account an element is not put to use. For example, if the transmission line is ready but terminal bays belonging to other licensees are not ready, the owners of upstream and downstream terminal bays shall be liable to pay the charges to the owner of transmission line in the ratio of 50:50 till the bays are commissioned. In case one end bays are commissioned, the owner of other end bays shall be liable to pay the entire transmission charges of the transmission line till its bays are commissioned. The above principle shall be followed by CTU in all cases of similar nature in future.”

The above decision of the Commission has been upheld by the Appellate Tribunal in its judgement dated 27.3.2018 in Appeal No 390 of 2017 and IA Nos. 566 of 2017, 725 & 1063 of 2017 (Punjab State Power Corporation Limited Vs Patran Transmission Company Limited & Others). The following observations of the Appellate Tribunal are relevant:

—(vii).....The most relevant decision of the Central Commission matching to the circumstances of the present case is its order dated 21.9.2016 in Petition No. 43/MP/2016 where the principles were laid down clearly that the entity due to which system developed through TBCB route cannot be put to use is liable to pay the transmission charges from SCOD till commissioning of the upstream/ downstream system/terminal bays. The Transmission System in question has also been developed through TBCB route. In the present case as per the principles laid down by the Central Commission it appears that PSTCL is the defaulting party and should have been made liable to pay the said transmission charges. However, we find that there is no contractual relation between the Respondent No. 1 and PSTCL. The contractual relation between the Appellant and the Respondent No. 1 is the TSA, which lays down the rights and obligations of the parties. The Article 4.2 of the TSA deals with the obligations of the LTTCs in implementation of the project. The relevant portion is reproduced below:

“4.2 Long Term Transmission Customers’ obligations in implementation of the Project:

4.2.1 Subject to the terms and conditions of this Agreement, Long Term Transmission Customers', at their own cost and expense, undertake to be responsible b. for arranging and making available the Interconnection facilities to enable the TSP to connect the Project;"

The LTTCs, including the Appellant at their own cost and expense were required to provide interconnection facilities to the Respondent No. 1 so that the Transmission System could be connected by SCOD and made operational."

21. In the said case, Patran Transmission Company Limited was implementing the transmission line through TBCB route which achieved CoD as per the SCOD whereas the downstream transmission system being developed by Punjab State Power Corporation Limited (PSPCL) could not be commissioned matching with the TBCB line. The Appellate Tribunal held that the LTTCs including PSPCL were responsible for providing inter-connection facility and PSPCL amongst all the LTTCs was responsible to arrange the downstream system for connection to Transmission System by SCOD so that it could be put to use. Accordingly, PSPCL was held liable for payment of transmission charges from the SCOD till the commissioning of the downstream transmission system."

In the above cases, the Commission has held that when the transmission asset is not being put to use on account of the default of the entity establishing the downstream transmission line, the defaulting entity should pay the transmission charges till the completion of the downstream system. The said decision has been upheld by Appellate Tribunal for Electricity."

34. From, the above, it is clear that the decision of the CERC upheld by the Tribunal was based on the condition that the Central Commission under its Regulatory powers has laid down a principle as the relevant regulation does not have any provision for recovery of transmission charges, once the ISTS system is put to use. However, the LTTCs, the beneficiaries have indicated that the TSA and the relevant Regulations have necessary provisions and there is no difficulty in implementing the provisions contained therein. Further, this Tribunal has observed that:

“15. After having a careful examination of principle submissions of the rival parties on various issues raised in the instant Appeal, our observations are as follows:-

a) The present case pertains to the decision of the Central Commission making the Appellant liable to pay the transmission charges to the Respondent No. 1 for the period from SCOD i.e. 11.11.2016 till the commissioning of the downstream assets by PSTCL in May, 2017.

b) On Question No. 9 (a) i.e. Whether a recovery can be sought to be made from the Appellant which is neither authorised in law nor in contract?, we decide as follows:

(v) The Central Commission has submitted that the statutory basis for the decision by the Central Commission to assign liability on the Appellant for payment of transmission charges is based on the Hon'ble Supreme Court's judgement dated 15.3.2010 in SLP (C) No. 22080/2005 in case of PTC India Ltd. v. CERC (2010) 4 SCC 603. After perusal of the said judgement we find that it has been held that the Central Commission is the decision-making Authority under Section 79 (1) of the Act and such decision making or taking steps/ measures under the said Section of the Act is not dependent upon making of regulations under Section 178 of the Act. It is further stated in the judgement that if any regulations are framed by the Central Commission under Section 178 of the Act then the decision of the Central Commission has to be in accordance with the said regulations.

Accordingly, in absence of specific provisions in the Sharing Regulations/ Tariff Regulations, 2014 to deal with the situation under question the Central Commission through exercise of its regulatory power has prescribed a principle for sharing of transmission charges of the Transmission System of the Respondent No. 1 in the Impugned Order. Thus, it is observed that by way of exercising its regulatory power by a way of judicial order (s) the Central Commission has laid down the principles of payment of transmission charges in such an eventuality

c) However, we observe that these type of major issues ought to have been covered under Regulations by the Central Commission to plug the gaps, which would avoid litigations. The importance of the same was considered by the Central Commission at one point of time in its order dated 5.8.2015 and directed its staff for appropriate amendments in the Tariff Regulations, 2014. Till date no such modifications have been carried out by it in the Regulations. It is also observed that there are many regulatory/ judicial orders of the Central Commission to deal with the situations like in the present case.”

35. We are of the opinion that the said judgment is not relevant here as there is no difficulty in implementing the CERC Sharing Regulations to the extent of recovery of charges as also agreed by the beneficiaries including the Respondent no. 1. As per the Hon’ble Supreme Court’s judgement dated 15.3.2010 as quoted above, that if any regulations are framed by the Central Commission under Section 178 of the Act then the decision of the Central Commission has to be in accordance with the said regulations.

36. Therefore, the regulatory powers can be used only if no express provision is available in implementing the contract. It is seen that the Central Commission has decided that no such provision exists even when it is pointed out by all the parties that there are enough provisions existing for the implementation of the contract and the recovery of the charges.

37. Further vide the said order, this Tribunal has held that these types of major issues ought to have been covered under Regulations by the Central Commission to plug the gaps, which would avoid litigations. However, till date no such modifications have been carried out by it in the Regulations, even after considering this in its order dated 5.8.2015 and directing its staff for appropriate amendments in the Tariff Regulations, 2014.

38. We find that the Central Commission continued with the practice of deciding contrary to its own regulations, which is irrational and unjustified. We again direct that the Central Commission should approach the Central Government, if decides, in favor of such an approach, for amending the relevant Bidding Guidelines issued under section 63 of the Act.

39. CERC in the impugned order has shown concern that NRPC has not discussed on technical usage as to whether the scheme in its present form i.e. without availability of downstream can serve its intended usage in the grid and further how the scheme shall improve its reliability in the absence of downstream system.

40. We fail to understand the comments of CERC as it has miserably failed to understand the functions of the TCC and NRPC, the two committees decide and resolve the issues only after examining the technical and commercial implications. Such comments are totally uncalled for and unjust on the part of CERC, a statutory body.

41. We are of the firm opinion that the decision of the TCC, duly vetted and approved by the NRPC is not a subject matter of challenge before the Central Commission, the decision of the NRPC is taken only after detailed deliberations amongst the members on technical and commercial merit.

42. Further, the transmission charges for the subject ISTS system should be recovered under the express provisions of the TSA read with CERC Sharing Regulations.

ORDER

For foregoing reasons as stated supra, we are of the considered view that the appeal has merit. The appeal is allowed and the impugned order dated

18/09/2018 passed by the Central Commission in Petition No. 104/MP/2018 is set aside.

The Central Commission is directed to pass a fresh and reasonable order expeditiously, but not later than three months from the date of this judgment.

No order as to costs.

Pronounced in the Virtual Court on this 9th Day of May, 2022.

**(Sandesh Kumar Sharma)
Technical Member**

**(Justice R. K. Gauba)
Officiating Chairperson**

REPORTABLE / ~~NON-REPORTABLE~~

pr/mkj