

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 238/MP/2017

Coram:

**Shri P.K Pujari, Chairperson
Dr. M.K. Iyer, Member**

Date of Order: 29.03.2019

In the matter of

Petition under Sections 61, 63 and 79 of the Electricity Act, 2003 seeking extension of the scheduled COD and increase in transmission charges due to unforeseen and uncontrollable events post award of ERSS-VI Transmission Scheme implemented by Darbhanga-Motihari Transmission Co. Ltd. under Tariff Based Competitive Bidding guidelines.

And In the matter of

Darbhanga-Motihari Transmission Company Limited
Essel Infraprojects Limited, 06th Floor,
Plot No. 19, Film City, Sec- 16 A,
Gautam Buddha Nagar, Noida, U.P.-201301

...Petitioner

Vs

1. Bihar State Power Transmission Co. Ltd.
Transmission Vidyut Bhawan, 04th Floor,
Bailey Road, Patna, Bihar (800021)
2. Bihar State Power Holding Company Limited,
Vidyut Bhawan, Bailey Road,
Patna, Bihar (800021)
3. West Bengal State Electricity Distribution Company Ltd.
Vidyut Bhawan, Kolkata-91
4. Power Grid Corporation of India Limited.
HVDC Pusauli, Saudamini,
Plot No. 02, Sector-29,
Near IFFCO Chowk, Gurgaon (Haryana) - 122 001
5. Grid Corporation of Orissa Ltd.
Janpath, Bhubaneswar-751022
6. Power Department,
Government of Sikkim,
Gangtok- 737101



7. Damodar Valley Corporation Ltd.
DVC Towers, VIP Road,
Kolkata- 700054
8. Jharkhand State Electricity Board
Engineering Building, HEC,
Dhurwa, Ranchi - 834004
9. Maithan Power Ltd.
MA-5, Gogna,
PO- Maithan DAM,
Distt.:Dhanbad, Jharkhand-828207.
10. PFC Consulting Ltd.
01, Barakhamba Lane, Connaught Place,
New Delhi-110001.

...**Respondents**

For Petitioner : Shri M.G Ramchandran, Advocate, DMTCL
Shri Shubham Arya, Advocate, DMTCL
Shri Amal Nair, Advocate, DMTCL
Shri Neraj Kumar, DMTCL

For Respondents : Shri R B Sharma, Advocate, BSPTCL and BSP(H)CL
Shri Shashwat Kumar, Advocate, PFCCL
Shri Dinesh P., Advocate, PFCCL
Shri, Shantanu Singh, Advocate, PFCCL
Shri Amit Rawat, PFCCL
Shri Laxmikant, PGCIL
Ms. Jyoti Prasad, PGCIL

ORDER

The Petitioner, Darbanga-Motihari Transmission Company Limited (DMTCL) herein is a wholly owned subsidiary of Essel Infraprojects Limited (EIL). EIL was selected as a successful bidder based on tariff based competitive bidding conducted by PFC Consulting Limited (PFCCL) under Sections 61, 63 and 79 of the Electricity Act, 2003, (hereinafter referred to as “the Act”) to establish the transmission system given below, on build, own, operate and maintain basis for “Eastern Region System Strengthening Scheme-VI” (hereinafter referred to as “project”) and to provide



transmission service to long term transmission customers of the project. The said transmission system includes following elements:-

- a. Establishment of 2x500 MVA, 400/220kV sub-station at Darbhanga along with Muzaffarpur-Darbhanga 400 kV D/C line with triple snowbird conductor (hereinafter referred to as “Asset-I”).
- b. 2x500 MVA, 400/220 kV sub-station at Motihari along with LILO of Barh-Gorakhpur 400 kV D/C quad line at Motihari (hereinafter referred to as “Asset-II”).

Brief background

2. The Ministry of Power, Government of India vide its Notification no. S.O. 2390(E), dated 8.10.2012 appointed PFCCCL as the Bid Process Coordinator (BPC) for the purpose of selecting a successful bidder as Transmission Service Provider (TSP) in order to establish the transmission system for “Eastern Region System Strengthening Scheme-VI” through tariff based competitive bidding.

3. A SPV was created in the name of DMTCL for the implementation of this transmission scheme. PFCCCL issued the Request for Qualification on 8.2.2013 and Request for Proposal (RFP) on 27.5.2013 to the bidders who had qualified under RFQ. On 6.8.2013, a Transmission Service Agreement (TSA) was entered into between the Petitioner and Long Term Transmission Customers (LTTCs) who are the beneficiaries under the said Agreement. EIL accomplished all milestones required in terms of the Request for Proposal and on 17.10.2013, EIL was declared as the successful bidder being the lowest bidder and Letter of Intent was issued by BPC for the execution of the transmission project. On 10.12.2013, a Tripartite Share Purchase Agreement was entered into between PFCCCL, DMTCL and EIL and the entire shareholding of DMTCL was transferred in favour of EIL thereby making the

Petitioner, a 100% subsidiary of EIL. Accordingly, Effective Date for the said Project was fixed as 10.12.2013.

4. The Petitioner was granted Transmission License for 25 years vide order dated 30.5.2014 in Petition No. No.324/TT/2013 and the transmission charges were adopted vide order dated 20.5.2014 in Petition No.323/TT/2013.

5. After the approval of CEA on 29.3.2017 to energize Asset-I, i.e. 400 kV D/C Muzaffarpur-Darbhanga Line and 400/220 kV Darbhanga GIS Sub-station, the deemed COD of the Darbhanga Element was declared w.e.f. 31.3.2017. However, the downstream element of BSPTCL was not ready for charging on 31.3.2017. BSPTCL has put the 220 kV S/C Darbhanga (TBCB)-Samastipur Transmission Line into commercial operation on 16.4.2017 and the power started flowing to BSPTCL system w.e.f. 16.4.2017. The Asset-II, i.e. the 220 kV D/C Darbhanga (TBCB)-Motipur Transmission Line was charged on 18.4.2017. The balance 220 kV Transmission Lines of BSPTCL (Darbhanga (TBCB)-Supaul/Loki Transmission Line and Darbhanga (TBCB)-Darbhanga Transmission Line) were under construction. On 3.4.2017, the Petitioner sent a letter intimating the LTTCs, CEA, BSPTCL and CTU for interconnection of the Motihari Element with the Grid. After the approval of CEA dated 28.7.2017 to energize 400/132 kV Motihari GIS Sub-station and readiness of BSPTCL 132 kV downstream system, the power started flowing to BSPTCL system w.e.f. 4.8.2017 through 132 kV D/C Motihari (TBCB)-Motihari and 132 kV D/C Motihari (TBCB)-Bettiah Transmission Lines. The Petitioner has submitted that though there was time over-run in case of the assets under its scope, the Petitioner has successfully put the instant assets into commercial operation before the downstream system of BSPTCL was ready and power flow to downstream system was not constrained even for a single day.



6. The Petitioner has sought adjustment of tariff on account of the events of Change in Law and Force Majeure events affecting the project during the operating period in order to restore the Petitioner to the same economic position as if the events have not occurred in terms of Article 12 and 11 of the TSA.

7. The petitioner has prayed for the following relief in the petition:-

- a. Allow increase in transmission charges of the transmission project on account of (i) Change in law (ii) Force Majeure events and to offset the cost of ₹21.75 crore incurred on account of the additional IDC and unforeseen and uncontrollable events;
- b. Extend the scheduled COD of the instant assets upto actual COD to enable the petitioner to take benefit of the tariff which it could not earn due to delay in implementation of the project as per the TSA and allow additional costs and waive any liquidated damages or any other consequences thereof under the TSA.

8. On the request of the learned senior counsel for the Petitioner, the Commission directed the Petitioner to file revised memo of parties impleading Power Finance Consulting Ltd. (PFCL), the Bid Process Co-ordinator (BPC), as a party to the petition. Accordingly, the Petitioner has filed revised memo of parties vide affidavit dated 21.5.2018, impleading PFCL as Respondent No. 10.

Submissions by the Petitioner

9. The Petitioner has sought compensation on account of the following Change in Law events which have impacted the cost of the project:-

- (a) Unexpected requirement and delay in obtaining forest clearance:-

The petitioner submitted that as per the RFP and the Survey Report issued



by PFCCL, there were no forest areas in the route of transmission lines. Accordingly, major expenses involved in obtaining the forest clearances were not taken into account at the time of submission of the bid. However, the Petitioner encountered forest areas in the Muzaffarpur, Darbhanga and Samastipur Districts in execution of Muzaffarpur-Darbhangha transmission line, whereas RFP documents categorically specified that there was no forest in the route. Similarly, while executing Asset-II, the Petitioner encountered forest at Motihari, Siwan and Gopalganj Districts, whereas the RFP documents specified that there is no forest in the route of LILO of both circuits of 400 kV D/C Barh-Gorakhpur transmission line. The Petitioner was unable to start the construction of the transmission line in respective forest stretches. The unforeseen requirement of obtaining forest clearance and delay in issuance of forest clearance, resulted in delays in implementation of the transmission project. The Petitioner reported the forest approval issue in case of Muzaffarpur-Darbhangha transmission line to Project Management Group (PMG) on 21.11.2016 and diligently kept updating LTTCs and the CEA on the issue, through its monthly progress reports and various communications. It came to the knowledge of the Petitioner after conducting the detailed survey of the route that the information given in the RFP regarding forest was incorrect. This necessitated applying for permissions with the Forest Departments of different Districts in State of Bihar and the process of obtaining NOC from the Department of Forest is a lengthy, expensive and time taking process. The Petitioner has put his grievance in the monthly reports and taken appropriate steps towards seeking of the clearance from the Forest Department. Stage I approval was granted on 1.4.2016 and 9.1.2017 for



Muzaffarpur- Darbhanga Line and for LILO of Barh-Gorakhpur Line respectively. The Stage II approval for the LILO of Barh-Gorakhpur Line was not granted still the Petitioner was able to complete the project. The Petitioner has submitted that the timeline for grant of Stage I permission is approximately 10 months as per the notification dated 14.3.2014 issued by Ministry of Environment & Forest, however, the Stage I permission for 400 kV Muzaffarpur-Darbhanga line was granted by the respective Forest Departments after lapse of about 19 months from date of the application and for LILO of Barh-Gorakhpur Line after lapse of about 28 months from date of the application. The tree cutting permission in case of the 400 kV Muzaffarpur–Darbhanga Line was received on 23.11.2016 further delaying the work. The petitioner incurred an additional cost of ₹1.25 crore towards applicable fees paid to Forest Department as an additional cost which increased the project cost and equivalent impact of project IDC.

- (b) The rate of Excise Duty increased from 12.36% to 12.5% with effect from 1.3.2015, thereby resulting in additional financial burden.
- (c) The rate of service tax increased from 12% to 14% (including cess) with effect from 1.6.2015 resulting in additional financial burden.
- (d) Swachh Bharat Cess was imposed with effect from 15.11.2015 at the rate of 0.5% on the value of taxable services resulting in additional financial burden.
- (e) Krishi Kalyan Cess with effect from 1.6.2016 levied on all taxable services at the rate of 0.5%, thereby resulting in additional financial burden.

- (f) As per Gazette Notification dated 20.1.2016 issued by the Government of Bihar, the entry tax on 'Electrical goods and transmission line material' was increased from 8% to 12%, due to which the Petitioner had to pay an additional amount on account of increased Entry Tax of ₹14.07 crore.

The Petitioner has submitted that the above said applicable taxes and duties has increased the project cost approximately ₹17 crore. The petitioner has also submitted the Auditor certificate certifying the additional cost because of increased taxes and duties.

10. The Petitioner has further submitted that the instant project was affected by the following Force Majeure events leading to increase in the cost and has prayed for compensation.

a. **Guidelines issued by MOP for payment of compensation towards damages about Right of Way (RoW) for transmission lines:-**

The Ministry of Power, Government of India issued the "Guidelines for payment of compensation towards damages in regard to Right of Way for transmission lines" on 15.10.2015. As per the Guidelines, in addition to the compensation towards normal crop and tree damages, compensation @ 85% of Land Value as determined by District Magistrate or any other authorities based on Circle rate/Guideline Value/Stamp act rates for tower base area (between four legs) impacted due to installation of tower/ Pylon Structure. Besides this, compensation towards diminution of land value in the RoW corridor due to laying of transmission line as decided by the State as per categorization/type of land in different places of States, subject to maximum of 15% of land value as determined based on circle rate/ Guideline Value/ Stamp act rates. The Petitioner has submitted that after the issuance of said

Guidelines, farmers started demanding the enhanced compensation in line with above guidelines, which lead to increase in RoW issues, which led to time over-run, and cost of RoW compensation. The petitioner intimated CEA and LTTCs about the said issue through monthly progress reports and various correspondence letters.

b. Demonetisation:-

The Petitioner submitted that demonetization of High Denomination Bank Notes of ₹500/- and ₹1000/- adversely affected the execution of the transmission project as the construction labour is paid daily wages in hard cash. However, due to the restricted cash withdrawal limits imposed by the Government of India, there was delay in payment of wages to the labourers. The Petitioner informed the LTTCs of the above developments through various letters. Consequently, the progress of the project was severely affected, which is an event beyond the contemplation of the Petitioner and could not have been anticipated or factored in during the issuance of the RFP and submission of the bid.

c. Prohibition of sand mining in Bihar due to NGT order dated 19.1.2016:-

The petitioner has submitted that Eastern Region Bench of National Green Tribunal (NGT) issued an order dated 19.1.2016 prohibiting mining, distribution and transportation of minor minerals including sand till issuance of environmental clearance of such activities. Due to prohibition on sand mining from 9.2.2016, the sand stocks got depleted from the market, leading to crisis in the construction sector in Bihar as sand is a critical component of any construction process. However, the said order was revoked on 3.3.2016 in the State of Bihar and the permission to restart the sand mining was granted again. This affected the project of the Petitioner as the stock of sand at

Petitioner transmission line and sub-station sites were reduced to nil due to which the petitioner's civil work was completely stopped for 20 days effectively from 15.2.2016 to 5.3.2016 resulting in the completion of project beyond scheduled date.

c. Flooding of Gandak River:-

The petitioner submitted that the LILO of both Ckts. of Barh-Gorakhpur 400 kV D/C Transmission Lines at Motihari crossing is approximately 9 km of Gandak river bed, which is approx. 23% of the total transmission line length. This stretch of 9 km remained heavily flooded from 28.5.2015 to 14.11.2015 due to unprecedented rains or other unforeseeable natural causes. This was caused by the earthquake in Nepal and Indo-Nepal border on 24.5.2015 resulting into landslide at Ramche village in Myagdi district due to which Kali Gandaki River was blocked causing increase in water level of Gandak River by 10 meters. Due to the unexpected rising of water level in the Gandak River, all the creeks were overflowing even before the actual season of monsoon in Bihar, which caused the blockade of approach road to the project locations and the Petitioner's work could not be taken up at approximately 50 affected locations. This resulted in delay of 90 days in completion of the project and could not be anticipated at the time of the RFP and submission of bid and as such, is a Force Majeure event beyond the control of DMTCL.

d. Change in Gantry Coordinates and connection arrangement at PGCIL Muzaffarpur Sub-station for 400 kV D/C Muzaffarpur-Darbhanga Transmission Line:-

There was a change in the Gantry Coordinates at PGCIL Muzaffarpur Substation end. As per the RFP dated 27.5.2013, the specification provided was Longitude: N 26° 03' 57.8815; Latitude: E 85° 22' 6.5475. However, it



was actually Longitude: N 26° 03' 55.21; Latitude: E 85° 22' 2.25. The petitioner has submitted that this difference between actual and RFP specifications resulted in requirement of two additional EHV power line crossings as well increase in length of line by 1.5 km. The Petitioner had to prepare and submit power line crossing proposals and to provide underpass gantries for power line crossings, which required approval. If there was no such difference between the actual and RFP specifications, then there would have not been any requirement to seek the further permissions. This was beyond the contemplation of the petitioner, and the same affected the project completion schedule. Though the RFP contained a disclaimer regarding the information provided, the entire risk of the said information cannot be passed onto the Project Developer or the Petitioner. A prospective bidder has a time frame of a mere 2-3 months within which it is not possible to analyse the entire area of the transmission project. The change in connection arrangement at Muzaffarpur end has resulted in delay in completion of Transmission Line by approximately by 6 months from 3.9.2015 to 11.3.2016 on account of approval of crossing proposals, design, engineering, manufacturing and supply of Gantries on standalone basis with an additional cost of approx. ₹3.15 crore in addition to corresponding cost of IEDC and IDC. These facts were brought to the notice of the LTTC's and CEA through various letters.

e. Increase in Power Line Crossings:-

The petitioner submitted that as per RFP 2 nos. of EHV power lines were required to be crossed for final selected route of 400 kV D/C Muzaffarpur-Darbhangga Transmission Line. However, during the execution, besides 2 underpass crossings, the number of EHV power line crossings increased by



another 5 no. of crossings. Similarly, 8 nos. of EHV power lines were projected in case of LILO of Barh-Gorakhpur 400 kV D/C line at Motihari. However, during execution, the number of EHV power line crossings was increased by another 6 crossings. Thus, for each additional power line crossing, the Petitioner was required to redo the detailed survey, prepare, submit and get the approval of crossing proposals from concerned licensees. This led to time over-run of approximately by 2 months and the petitioner was compelled to incur an additional cost of approximately ₹1.84 crore in addition to corresponding IDC of this duration.

f. Manhandling of TBEA officials at Darbhanga site:-

On 25.12.2016, some villagers near Darbhanga Sub-station stopped the vehicle of TBEA (a Chinese sub-contractor) and manhandled their senior officials posted at Darbhanga GIS. As a result, the Chinese sub-contractor and the other civil work executing agencies stopped the work. The petitioner vide its letter dated 26.12.2016, requested District Magistrate (Darbhanga) to resolve the issue and to provide protection to the officials of Petitioner, TBEA and other sub-contractors. After getting the Police protection, construction work resumed at the site effectively from 31.12.2016. Due to above reason, the work was completely stopped at site from 25.12.2016 to 30.12.2016 resulting in delay in implementation of the transmission project.

g. Delay in railway crossing work in Darbhanga line due to public agitation:-

The petitioner has submitted that for crossing on Turki- Ramdayalupur railway section by 400 kV D/C Muzaffarpur-Darbhanga Transmission Line, Eastern Central Railway (Sonapur) approved blockage on 19.2.2017 and 20.2.2017.



Anticipating local resistance, the Petitioner requested SDO (West), Muzaffarpur through its letter dated 16.2.2017 for administrative support. Police protection was provided by SDM vide its letter dated 17.2.2017 to execute the scheduled railway crossing work on 19.2.2017 and 20.2.2017. On 18.2.2017, some local villagers started agitation by beating up labourers, when they were mobilizing the resources at railway crossing locations to start the preparation for crossing works. The local villagers continued with their protest and did not allow the Petitioner to execute railway crossing work. Hence, the railway crossing work could not be completed on 19.2.2017 and 20.2.2017 and the work was resumed on 18.3.2017 and completed on 23.3.2017, resulting in delay in implementation of the transmission project. The petitioner has submitted that the direct cost impact was negligible, however there was financial impact on the project in the form of IDC during such period.

h. Ground improvement at Motihari Sub-station land due to Geo-technical surprise:-

During geo-technical investigations at Motihari Sub-station land, it showed that the strata are prone to liquefaction with consequences of bearing failure, lateral spreading and settlement. This required some ground improvement measures before starting any construction work. The Petitioner after consulting some experts came to a conclusion that ground improvement was required to be done before the start of foundation work. Hence, in line with good engineering practice and for safety of sub-station foundations, the Petitioner took up the ground improvement task before laying the foundation for the Sub-station. This resulted in stoppage of construction work at site from 6.4.2015 to 21.2.2016 and an additional expenditure of approx. ₹7.32 crore in addition to the IDC for this duration.

i. Flooding of Motihari Sub-station:-

There was sudden increase in water level of Gandak River and a canal passing near the sub-station which led to flooding of Motihari Sub-station land on 26.8.2015. As a result, the sub-station area was not approachable from 26.8.2015 to 13.9.2015 even after raising the sub-station land level up to FGL in consultation with the Petitioner's Engineering Consultant. Further, in order to avoid the flooding of Sub-station in future, the FGL of the sub-station was further increased by 800 mm thus resulting in additional expenditure of ₹0.64 crore.

j. Kidnapping of project staff of Motihari Transmission Line consequent to a "theft case":-

The Motihari Line store room in Gopalganj District was affected by frequent cases of theft. On 1.1.2016, the incident of theft occurred in the store maintained by JSL, the thief, who was a local villager was arrested by the Police on 3.1.2016. Consequent to theft of the store on 3.1.2016 and arrest of the thief from the village, the villagers took the storekeeper and beat him badly. Due to above incident, the site staff of contractor left the site and the work was stopped from 3.1.2016 to 15.1.2016.

k. Delay in supply of hardware material to Motihari line due to Chennai floods:-

The unprecedented heavy rains from 1.12.2015 to 6.12.2015, caused flooding of the Chennai city and consequently TAG factory, which was supplying hardware fittings. Due to flooding of TAG factory, assembly lines and raw/packaging material was also damaged. It took one month for TAG to resume its production work. Due to this the supply of hardware fittings and

accessories to the Motihari transmission line was delayed by TAG by approximately 30 days.

I. Delay in railway line crossing approvals for Motihari Transmission Line:-

The LILO of Ckts of Barh-Gorakhpur line at Motihari crosses at mile stone no. 89/13, 89/14 and 89/15, 89/16 between Ratansarai and Manjagarh railway stations. The Petitioner sought crossing approval from Railway Authorities and there was unexpected delay in grant of approval for crossing by Railway Authorities and the delay in approval was also informed to Project Monitoring Group, Government of India and only on its intervention, the approval for railway crossings was granted. The approximate time period for approval of Railway crossing is 12 months and the crossing approvals should have been received by 21.9.2016, however, the approval was received on 16.2.2017 after a delay of approximately 140 days. This delay in granting approval has resulted in the time over-run. Though the direct cost impact is negligible, there is a financial impact in the form of IDC.

m. Assembly Elections in State Bihar:-

The Election Department, Government of Bihar on 9.9.2015 notified the Assembly Elections during October and November 2015. Due to this, the movement of vehicles carrying the materials and manpower to the Petitioner's project site was restricted by the locals. This resulted in time over-run of approximately 2 months.

n. Additional implication of IDC and IEDC pursuant to Commission's order dated 1.9.2017 in Petition No. 209/TT/2016:-

The Commission while determining the transmission tariff for 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)” held that the IDC and IEDC for the period 31.8.2016 to 21.4.2017 shall be borne by the DMTCL vide order dated 1.9.2017 in Petition No. 209/TT/2016. Consequently, on 26.9.2017, PGCIL issued a Debit Note upon the Petitioner claiming an amount of ₹55,34,000/- as IDC and IEDC for the period 31.8.2016 to 21.4.2017. Thus, the claim of ₹55,34,000/- as IDC and IEDC for the period 31.8.2016 till 21.4.2017 pursuant to order dated 1.9.2017 is an additional financial implication on the Petitioner and the same has to be considered as an additional cost for increase in the tariff of the project.

11. The petitioner has submitted that the scheduled COD of Asset-I and II was 9.6.2016 and 9.8.2016 respectively. The Petitioner could not complete the instant assets in time due to the hindrances which were beyond its control and Asset-I and II were put into commercial operation on 31.3.2017 and 10.8.2017 after a time over-run of 295 days and 366 days respectively. There was an increase in the overall cost of the Project, due to loss of revenue due to time over-run and an additional cost of ₹69.60 crore due to the said delay on account of additional IDC and ₹31.76 crore on account of additional expenditure on forest clearance, change in law and change in scope, design and law. The petitioner has submitted that if it is compelled to operate the project as per the Bid Out tariff without taking into consideration the unforeseen and uncontrollable events, the return on the equity made will be impacted. If the transmission charges for the project are not revised to include the escalation of the cost of the project, it would be commercially unviable for the petitioner to perform its obligation under the TSA. The present case squarely falls within the ambit of Force Majeure and Change in Law. The LTTCs have been duly notified of the unforeseen

and uncontrollable events, as provided in Clause 3.4 of the TSA and no LTTC has raised their concern on these events/factors and no solution has been arrived at till date.

12. The Petitioner has submitted that as per the TSA, any event or circumstances that prevent the Petitioner from performing its obligations under the TSA, which is beyond the reasonable control of the Petitioner is a Force Majeure event. Because of such Force Majeure events, the rights and obligations of the parties are suspended and the Petitioner is entitled to claim relief on account of such Force Majeure events following the procedure prescribed under the TSA. The Petitioner has lost ₹142.90 crore and ₹30.60 crore of its revenue for the first year and second year respectively. As such, there has been an increase in the total cost of the project which necessitates ₹21.75 crore increase in the levelized transmission charges as per Clause 12.2.1 of the TSA and extend the scheduled COD to actual COD of the Project. The assumptions made by the Petitioner's holding company at the time of the bid with regard to the capital expenditure were based on the information provided in the RFP Documents and the laws and regulations applicable as on seven days prior to the Bid Deadline. The levelized transmission charges quoted by the Petitioner's holding company and approved by the Commission vide order dated 20.5.2014 was ₹117.369 million and it is a reasonable and not an aggressive price.

13. The Petitioner has submitted that unlike other infrastructure sector or power generation projects, the returns on the transmission projects are dependent entirely on the Project cost through the transmission tariff as the scalable part of the tariff is miniscule and only covers the O&M expenses. If the cost of the project increases or there is time over-run, the transmission service provider suffers not only because of cost over-run but also due to loss of revenue. Referring to the orders dated 2.4.2013,

15.4.2013, 21.2.2014, 24.8.2016, 28.4.2016 and 2.3.2017 in Petition Nos. 155/MP/2012, 159/MP/2012, 155/MP/2012, 32/MP/2014, 409/TT/2014 and 310/MP/2015 respectively, has submitted that the Commission has recognized the importance of adequate returns for investors in ensuring reliable supply of electricity. The petitioner also relied on APTEL judgment dated 2.12.2013 in Appeal No. 132 of 2012 titled Junagadh Power Projects Private Ltd. V. Gujarat Urja Vikas Nigam Limited and Ors., wherein it was held that:-

“28. In view of provisions of the Electricity Act, 2003, National Electricity Plan, Tariff Policy and the citations given above, we have come to the conclusion that the State Commission has powers to revise the tariff in a concluded PPA keeping in view the change in the circumstances of the case which are uncontrollable and revision in tariff is required to meet the objective of the Electricity Act.

[....]

29.

[F] The present case where PPA has been entered into for a long period of 20 years has to be differentiable from a contract where goods are supplied against a contract. One time supply of goods against a contract at less than a reasonable profit or on loss cannot be compared with a long term PPA for supply of power by a generating company where power has to be supplied for a 20 years period as the latter would involve sustaining operation of the generating plant for the entire period of the PPA.”

14. The Petitioner further referring to the orders dated 9.5.2013 in Petition No.150/TT/2011, 2.1.2013 in Petition No.94/TT/2011, 30.8.2012 in Petition No.343/2010, 31.7.2013 in Petition No. 162/2011, 25.5.2016 in Petition No.256/TT/2015, 16.10.2015 in Petition No.73/MP/2014, 28.4.2016 in Petition No. 409/TT/2014, 24.8.2016 in Petition No. 32/MP/2014 and 2.3.2017 and 8.5.2017 in Petition No.310/MP/2015 has submitted that the Commission has condoned the time over-run in implementation of the Project on account of unforeseen and uncontrollable events, Force Majeure events, geo-technical surprises, RoW issues and also compensated the transmission licensees with increase in tariff. The Petitioner has also relied upon on the judgments of Hon'ble Supreme Court like Satyabrata Ghose v Mugnee Ram Bangur and Co. AIR 1954 SC 44, Smt. Sushila

Devi and Anr. v Hari Singh (1971) 2 SCC 288, G. Patel v Gulam Abbas Mulla Alli Bhai (1977) 3 SCC 179 to highlight the principle of commercial impracticality to perform a contract.

15. The Petitioner has further submitted that though the Commission has adopted the tariff under Section 63 of the Act, the power to determine transmission charges with respect to the transmission project being established by the petitioner or revision of transmission charges lies within the power of the Commission under Section 62 read with Section 79 of the Act. The Petitioner has submitted that the Commission has to regulate tariff of the inter-State transmission of electricity, adjudicate upon disputes involving transmission licensees with regard to the matters under the Act. The Petitioner is a transmission licensee engaged in inter-State transmission of electricity and therefore, there is no legal bar for adjudication of dispute by the Commission only because the Commission has adopted the tariff under Section 63 of the Act. The power to determine additional transmission charges with respect to the transmission system being established by the petitioner for the additional scope of work and corresponding revision of transmission charges lies within the power of the Commission under Sections 62 and 79 of the Act. The Commission is empowered to take into consideration the impact of the increase in the cost of the Project by the unforeseen and uncontrollable events and increase the tariff in such a manner that this increase in cost is absorbed in the transmission charges.

Submissions by the Respondents and rejoinder of the Petitioner

16. The instant petition was admitted on 22.2.2018 and notices were issued to all LTTCs, the Central Transmission Utility, Central Electricity Authority and the Bid Process Coordinator of the project. Reply to the petition has been filed by the PFC Consulting Limited (PFCCL), Respondent No.10, vide affidavit dated 22.6.2018 and



the Petitioner has filed its rejoinder vide affidavit dated 13.7.2018. Bihar State Power Transmission Company Limited (BSPTCL), Respondent No.1, and Bihar State Power (Holding) Company Limited (BSP(H)CL), Respondent No.2 filed a common reply vide affidavit dated 27.8.2018. The petitioner has filed its rejoinder to the said reply vide affidavit dated 4.9.2018. PFC, Respondent No.10 has filed its reply vide affidavit dated 22.6.2018 and the Petitioner has filed its rejoinder to the said reply vide affidavit dated 13.7.2018.

17. BSPTCL and BSP(H)CL have submitted that the relief under the Change in Law and Force Majeure events can be claimed only in accordance with Article 12 and 11 of the TSA. As per the TSA, the Petitioner is required to notifying the Change in Law and Force Majeure events, if it is affected by such events and wishes to claim any relief for the same. The respondents have submitted that no such notice was ever served on the LTTCs of such events and as such no relief can be claimed by the Petitioner. Moreover, the service of the 'Notice' is pre-condition for claiming any relief under Change in Law events. The respondents have further submitted that the Petitioner did not exhaust other remedies available to it under Article 16 of the TSA before approaching the Commission, which provides for either party to raise any claim, dispute or difference of whatsoever nature arising under or in connection with this agreement whether during the execution of the project or after the completion. As per Article 16.2 of the TSA, an attempt for amicable settlement is required to be made and Article 16.2.1 provides the process for arriving at the amicable settlement and if the parties fail to resolve the dispute amicably within thirty days then the same may be referred to the Commission in accordance with Article 16.3 of the TSA. The respondents have submitted that the Petitioner has not followed the procedure specified in Article 16 of the TSA before approaching the Commission and hence the petition is not maintainable and is liable to be dismissed.

18. In response, the Petitioner has submitted that as provided in Clause 3.4 of the TSA, the petitioner has periodically and categorically intimated all the LTTCs on the difficulties and hurdles faced by it as well as the progress of the project through its monthly progress reports and various communications. The Petitioner has made all endeavors and had completed the Project matching with the timeframe of the downstream transmission system developed by BSPTCL. The Petitioner was routinely apprising the respondents about the progress of the project and sending separate notices to the respondents regarding the issues faced either due to Change in Law or Force Majeure events. The Petitioner was constrained to approach this Commission after exhausting all its remedies. The Petitioner has submitted that inspite of the various hurdles, it completed the assets under its scope before BSPTCL was ready with the assets 400/220 kV Darbhanga GIS Sub-Station and 400/132 kV Motihari GIS Sub-Station under the scope of BSPTCL. Thus, the time over-run in case of the assets under its scope did not affect the power flow to downstream system of BSPTCL even for a single day.

19. PFC has submitted that it was appointed by the Ministry of Power as the BPC vide Notification No. S.O. 2390(E) dated 8.10.2012 and it has carried out all obligations and duties as the BPC in accordance with the Tariff Based Competitive Bidding Guidelines for Transmission Service ("Competitive Bidding Guidelines"). Its role was restricted to the acquisition of the SPV created for the purposes of setting up of the project and execution of the Transmission Services Agreement. Impleading PFC in this Petition is erroneous and does not help the Petitioner. PFC has submitted that it is the responsibility of successful bidder for obtaining forest clearance for the forest stretches as provided in the Preliminary Survey Report and also for any forest area encountered during detailed survey. The Preliminary Survey

Report is only indicative and preliminary in nature and it was the responsibility of the bidder to ascertain the transmission route. As per Article 5.1.4 of the TSA, the final selection of the site including its geo-technical investigation is the responsibility of the Petitioner and PFC cannot be held liable for the same. PFC has denied that the Preliminary Survey Report for ERSS-VI was incorrect and led to time over-run in the execution of the ERSS-VI. The Clause 1.5(a) of the RFP Document clearly stipulates that the Survey Report so issued is preliminary in nature and that no representation or warranty, express or implied, or acceptance of any responsibility or liability in respect of statements made in the Survey Report is given by the BPC. Further, as per Clause 2.14.2, the Petitioner in its own interest should carry out required survey and field investigation before submission of bid as per Clause 2.14.2.5 failure to investigate the route of the transmission lines associated with the project shall not relieve the Petitioner from any responsibility for appropriately eliminating the difficulty or cost of successfully completing the project. The Preliminary Survey Report clearly stated the address and coordinates of the sub-station is provided by the CTU and such coordinates were only to facilitate the bidder and should not be treated as point of termination or emanation of the transmission line. PFC has submitted that it was the sole responsibility of the Petitioner to undertake appropriate survey and field investigations and having failed to do so, the Petitioner cannot seek time and cost relief.

20. In response, the Petitioner in its rejoinder to the reply filed by PFC has submitted that as per the Survey Report issued by PFC, there were no forest areas in the route of transmission lines. Therefore, the Petitioner could not take into account the expenses involved in obtaining forest clearances at the time of submission of the bid. Further, there was a change in the Gantry Coordinates of the Muzaffarpur Sub-station leading to requirement of two additional EHV power line



crossings as well as increase in length of the line. The Petitioner has submitted that PFC has given incorrect information in the Survey Report and hence PFC cannot absolve itself from fulfilling its duties in diligent manner. The petitioner cannot be reasonably expected to conduct a detailed survey and expected to gauge all the external factors along the route line within a short period. The Petitioner can take into account minor deviations while calculating expenses. However, the forest cover on the route of the transmission line cannot be considered as a minor deviation. The Petitioner has further submitted that the Commission in order dated 8.5.2013 in Petition No. 162/ MP/2011 has observed “that BPC was under obligation to furnish correct information in the bid documents and with the disclaimer clause BPC cannot absolve from its responsibility.” The Petitioner has submitted that any change in the coordinates leads to a change in the transmission line route and affects the scope of work. Referring to the order of the Commission dated 28.4.2016 in Petition No. 321/MP/2014, the Petitioner has submitted that time over-run due to delay in obtaining forest clearance is a Force Majeure event.

21. During the hearing on 18.10.2018, the learned counsel for the Petitioner reiterated their submissions made in the Petition. None appeared on behalf of respondents. PFCCL submitted that since it is a Bid Process Coordinator (BPC), no reliefs have been claimed against PFCCL. After hearing the parties, the Commission reserved the order on 18.10.2018. BSPTCL and BSP(H)CL have filed a combined Written Submissions in the matter on 24.10.2018, wherein they reiterated the submissions made in their reply. In response, the petitioner vide affidavit dated 2.11.2018 has reiterated the submissions given in its rejoinder and has further submitted that the petition filed by the Petitioner is not for arbitration of any dispute and the provisions of Article 16.2 dealing with the process of amicable settlement relates to any claim, dispute or difference between the parties. This does not apply to

the process provided under Articles 11 and 12 pertaining to Force Majeure and Change in Law respectively. Neither Article 11 nor Article 12 of the TSA envisage that in case the long term beneficiaries do not agree to the claim, procedure provided under Article 16.2 or 16.3 will apply. In any event, Article 16.3 relates to Dispute Resolution by the Commission. The issue of amicable settlement does not arise when the Petitioner is seeking relief for Force Majeure or Change in Law.

Analysis and Decision

22. We have heard and considered the submissions of the Petitioner, Bid Process Coordinator, PFCCL and Respondent Nos. 1 and 2 and have perused the record. On the basis of the submissions made by the parties, the following issues are framed:-

Issue (a) Whether the Petitioner has duly complied with the provisions of the TSA before approaching the Commission?

Issue (b) Whether the following claims of the Petitioner are covered under the 'Change in Law' provisions of the TSA?

- i. Unforeseen requirement of forest clearance and expenditure incurred on account of obtaining forest clearance;
- ii. Increase in taxes and duties;
- iii. Change in guidelines issued by MoP of compensation towards damages in regard to Right of Way (RoW) for transmission lines;
- iv. Demonetisation.

Issue (c) Whether the following claims of the Petitioner qualify to be covered under Force Majeure provisions of the TSA?

- i. Delay in obtaining forest clearance
- ii. Delay due to other events
 - Prohibition on sand mining
 - Flooding of Gandak River
 - Flooding at Motihari Sub-station

- Ground improvement at Motihari Sub-station land due to geo-technical surprise.
- Kidnapping of project staff in Motihari transmission line consequent to a “Theft”
- Delayed hardware material supply in Motihari line due to Chennai flood
- Delay in approval of Railway line crossing for Motihari Transmission line
- Manhandling with TBEA Officials at Darbhanga sub-station site
- Delay in railway crossing work in Darbhanga line due to public agitations
- Delay due to severe right of way (RoW) issues in transmission line

Issue (d) Whether the Petitioner is entitled for any relief on account of change in the scope of Request for Proposal relating to design, order and execution?

- i. Change in gantry coordinates and connection arrangement at PGCIL Muzaffarpur substation for 400 kV D/C Muzaffarpur-Darbhangha Transmission line.
- ii. Increase in number of power line crossings and High density of trees in 400 kV Muzaffarpur-Darbhangha Transmission line

Issue (e) Whether the Petitioner’s case for delay due to assembly elections in Bihar State is covered under the Force Majeure or Change in law provisions of the TSA?

Issue (f) Whether the Petitioner is entitled to any relief of IDC and IEDC pursuant to the Commission’s order dated 1.9.2017 in Petition No.209/TT/2016 on account of delay in ERSS-VI transmission scheme due to Force Majeure events

Issue (g) To what relief the Petitioner is entitled to in the light of answers to the above issues?

23. Now, we analyse the case of the Petitioner on the above issues.

Issue (a) Whether the Petitioner has duly complied with the provisions of the TSA before approaching the Commission?

24. The Petitioner has claimed reliefs of Force Majeure covered under Article 11 and Change in Law under Article 12 of the TSA. The relevant portions of Article 11 and 12 of the TSA are extracted hereunder:-

“Article 11 of the TSA provides for Force Majeure as under:

“11.2 Affected Party

“11.2.3 Any event of Force Majeure shall be deemed to be an event of Force Majeure affecting the TSP only if the Force Majeure event affects and results in late delivery of machinery and equipment for the project or construction, completion, commissioning of the project by the Scheduled COD and/or operation thereafter.

11.3 Force Majeure

A ‘Force Majeure’ means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an affected party in the performance of its obligation under the said agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly of the affected party and could not have been avoided if the affected party had taken reasonable care or complied with prudent utility practices:.

Article 12 of the TSA provides for Change in Law as under:-

12. Change in Law

12.1 Change in Law

12.1.1 Change in Law means the occurrence of any of the following after the date, which is seven days prior to the bid deadline resulting into any additional recurring/non-recurring expenditure by the TSP or any income to the TSP:

- The enactment coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India of any law, including rules and regulations framed pursuant to such law;
- A change in the interpretation or application of any law by any Indian Government instrumentality having legal power to interpret such law, or any competent court of law.”

25. Article 11.5 of the TSA provides for notification of Force Majeure events as under:-.

“11.5 Notification of Force Majeure Event

11.5.1 The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one (1) day after such reinstatement.



Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party shall give the other Party regular reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure.

11.5.2 The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations.”

26. A perusal of aforesaid Article 11.5.1 of the TSA, makes it clear that an affected party is mandatorily required to give notice to the other party of any event of Force Majeure as soon as reasonably practicable, but not later than seven days after the date on which the party knew or should have reasonably known of the commencement of the event of Force Majeure. It further provides that such notice of any event of Force Majeure shall be a pre-condition to the affected party's entitlement to claim relief under the TSA.

27. Article 12.3.1 of the TSA, provides that an affected party is required to give notice to the other party about the occurrence of Change in Law. Relevant excerpt of Article 12.3.1 of the TSA is as under:-

“**12.3.1** If the TSP is affected by a Change in Law in accordance with Article 12.1 and wishes to claim relief for such Change in Law under this Article 12, it shall give notice to Lead Long Term Transmission Customer of such Change in Law as soon as reasonably practicable after becoming aware of the same.”

28. It is observed that the Petitioner issued appropriate intimation to the LTTCs under Articles 11 and 12 of TSA qua the Force Majeure and Change in Law events respectively as soon as it became aware of Force Majeure and Change in Law events. The Petitioner has furnished the details of those events in the petition and the gist of these events is as under:-

Intimation of Change in Law events:

Srl. No.	Change in Law event	Details of LTTC Intimation
1	Unexpected requirement and delay in obtaining forest clearance.	Annexure P19
2	Increase in taxes and duties.	Annexure P21
3	Change in guidelines issued by MoP of compensation towards damages in regard to Right of Way (RoW) for transmission lines.	Annexure P23
4	Demonetization	Annexure P24

Intimation of Force Majeure Events:

Srl. No.	Force Majeure event	Details of LTTC to whom intimations given
1	Prohibition on sand mining	Annexure P26
2	Flooding of Gandak River	Annexure P27
3	Flooding of Motihari substation	Annexure P29
4	Ground improvement at Motihari Substation land due to geo-technical surprise	Annexure P31
5	Kidnapping of project staff in Motihari transmission line consequent to a "theft"	Annexure P32
6	Delayed hardware material supply in Motihari line due to Chennai flood	Annexure P33
7	Delay in Railway line crossing approvals for Motihari Transmission line	Annexure P35
8	Manhandling with TBEA Officials at Darbhanga substation site	Annexure P36
9	Delay in railway crossing work in Darbhanga line due to Public agitations	Annexure P37
10	Delay due to severe right of way (RoW) issues in transmission line	Annexure P39

29. Record reflects that the Petitioner also intimated the LTTCs about the occurrence and impact of above Force Majeure and Change in Law events through its monthly progress reports which is Annexure P15 of the petition. CEA in its minutes of the meetings regarding the review of the progress of the instant transmission projects also made mention of the aforesaid issues.

30. As regards the change in design, order, execution and work scope from RFP, the Petitioner gave due intimations to the LTTCs which are available on record and they are as under:-

Srl. No.	Description	Details of intimations given to LTTCs
1	Change in gantry coordinates and connection arrangement at PGCIL Muzaffarpur Sub-station for 400 kV D/C Muzaffarpur – Darbhanga Transmission line.	Annexure P42
2	Increase in No. of power line crossings.	Annexure P43
3	High density of trees in 400 kV Muzaffarpur-Darbhangha Transmission Line.	Annexure P44

31. The Petitioner has also placed on record documents regarding Assembly Elections in Bihar State and notice was given by the Petitioner to the LTTCs. No material is available or placed on record by the respondents to controvert that any of the LTTCs responded or reverted back to the Petitioner on the issue of notices sent qua Force Majeure and Change in Law. Correspondences exchanged with CEA and placed on record reflect that the Petitioner appraised CEA about the critical issues faced by it.

32. Documentary evidence placed on record by the Petitioner shows that the Petitioner before approaching the Commission had given prior intimations to the LTTCs for occurrences of Change in Law, Force Majeure and change in scope of work in terms of provisions of TSA. This issue is accordingly answered in favour of the Petitioner and against the respondents.

Issue (b) Whether the following claims of the Petitioner are covered under the ‘Change in Law’ provisions of the TSA?

- i. Unforeseen requirement of forest clearance and expenditure incurred on account of obtaining forest clearance;
- ii. Increase in taxes and duties;
- iii. Change in guidelines issued by MoP for compensation towards damages in regard to Right of Way (RoW) for transmission lines;
- iv. Demonetisation

33. Change in Law is defined under Article 12 of the TSA, which is reproduced hereunder:-

“12.1 Change in Law

12.1.1 Change in Law means the occurrence of any of the following after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/ non-recurring expenditure by the TSP or any income to TSP :

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits;
- any change in the licensing regulations of the Appropriate Commission, under which the Transmission License for the Project was granted if made applicable by such Appropriate Commission to the TSP;
- any change in the Acquisition Price; or
- any change in tax or introduction of any tax made applicable for providing Transmission Service by the TSP as per the terms of this Agreement.

12.1.2 Notwithstanding anything contained in this Agreement, Change in Law shall not cover any change:

- a. on account of regulatory measures by the Appropriate Commission including calculation of Availability; and
- b. In any tax applied on the income or profits of the TSP.”

(i) Unforeseen requirement of forest clearance and expenditure incurred on account of obtaining forest clearance

34. The case of the Petitioner is that it encountered forest areas in Muzaffarpur, Darbhanga and Samastipur Districts for 400 kV D/C Muzaffarpur-Darbhanga Transmission Line. According to the Petitioner, RFP documents in its Survey Report

in Page No. 45 Srl. No. 3 indicates Comparison Statement of three alternative routes which specifically mentions that there was no forest in the route of above 400 kV D/C Transmission Lines. It is also the case of the Petitioner that it encountered the forest area in Motihari, Siwan and Gopalganj Districts for 400 kV D/C Transmission LILO Line whereas RFP documents in its Survey Report in Page 45, Srl. No. 3 of Table showing Comparison Statement of three alternative routes categorically mentioned that there is no forest in the route of LILO of both circuits of 400 kV D/C Barh-Gorakhpur transmission line at Motihari. No document is placed on record by the respondents to controvert the contentions of the Petitioner that there was unexpected requirement of forest clearance and the expenditure incurred on account of approval of forest clearance was unjustified. PFCCL, who happens to be the Bid Process Coordinator in the instant case, has contended that it carried out all its obligations and duties in accordance with the Competitive Bidding Guidelines and its role was confined to the acquisition of SPV created for the purposes of setting up of the project and execution of the Transmission Services Agreement. It is further contended that in terms of Article 5.1.4 of the TSA, the final selection of the site including its geo-technical investigation is the responsibility of the Petitioner and PFCCL cannot be held liable for the same. Referring to Clause 2.14.2 of the RFP, PFCCL contended that it was for the Petitioner to carry out the required survey and field investigation before submission of its bid in terms of Clause 2.14.2.5 of the RFP and failure to investigate the route of the transmission lines associated with the project shall not absolve the Petitioner from any responsibility for appropriately eliminating the difficulty or cost of successfully completing the project. The Preliminary Survey Report clearly stated the address and coordinates of the sub-station as provided by the CTU and such coordinates were only meant to facilitate



the bidder and should not be treated as point of termination or emanation of the transmission line.

35. We have analysed the submissions of the parties on this issue. We feel it appropriate to make a reference here of the Commission's order dated 8.5.2013 in Petition No. 162/MP/2011 in the matter of East North Interconnection Company Limited Vs. Punjab State Transmission Corporation Limited and Ors., wherein the Commission observed that it was the obligation of the Bid Process Coordinator to prepare a reliable and accurate survey report. The relevant extract of the *ibid* order is as under:-

“...BPC was under obligation to furnish correct information in the bid documents and the disclaimer relied upon by the BPC cannot absolve it of its basic responsibility. We do not approve of the manner in which the process was handled by the Bid Process Coordinator in this matter and direct that for the projects in future, the Bid Process Coordinator should ensure that the scope of work indicated in the bid documents is accurate so that the bidders get correct information for deciding their bids before submission.”

36. On scrutiny of the record, we find that there was categorical denial in the RFP document prepared by PFCCL regarding the involvement of any forest area in the transmission line route and same was indicated as “Nil” forest area in the RFP document and survey report. In other words, as per RFP, there was no forest clearance requirement involved initially at the time of bidding. However, the requirement of forest clearance cropped up for the first time after award of the project work to the Petitioner. CEA in its minutes of the meetings regarding the review of the progress of the instant transmission projects also made mention of the forest issue.

37. After careful consideration of the material on record, we find that the contentions of the petitioner qualify the test laid down under Article 12 “Change in Law” of TSA, particularly under “imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier”. The Petitioner

has placed on record the intimations sent by it to LTTCs as well as monthly progress reports which testify the fact that before approaching the Commission it exhausted the procedural requirements of sending Notifications to the LTTCs as contemplated under the TSA.

38. It would be apt here to make a reference of the Commission's earlier order dated 24.8.2016 in Petition No. 32/MP/2014 in the matter of East North Interconnection Company Limited vs. Jodhpur Vidyut Vitran Nigam Limited and Ors.

The relevant extract is reproduced hereunder:-

“.....The petitioner after award of the project discovered that Bangaigaon-Siliguri Transmission Line would traverse through reserved forest, contrary to the categorical and express clarification issued by the Bid Process Coordinator at the time of bidding that no forest in the route of the transmission line was involved. This aspect has been extensively examined in our orders dated 8.5.2013 and 31.7.2013 and the Commission came to the conclusion that the requirement of obtaining the forest clearance which arose after the award of the project was covered under Change in Law within the meaning of Article 12 of the TSA. The Commission had also observed that the petitioner was entitled for additional time required for forest clearance and reimbursement of expenditure incurred by the petitioner on forest clearance.....”

39. In view of the above discussion, we hold that the need to obtain forest clearance which was not in the knowledge of the Petitioner before the award of the project and discovered later was a “Change in Law” event as defined in Article 12 of the TSA. To obtain forest clearance of the forest area which was not required earlier, the Petitioner submitted the forest proposals to Forest Departments. The details of the same are summarised below:-

Srl. No.	Name of Element	Forest Area (Ha.)	Date of forest proposal submitted	Stage I Approval	Stage II Approval
1	400 kV D/C Muzaffarpur-Darbhangha Transmission Line	0.9016	10.09.2014	01.04.2016	22.07.2016
2	LILO of both circuits of 400 kV D/C Barh-Gorakhpur Transmission line at Motihari	0.791	10.09.2014	09.01.2017	05.06.2018 (after filing of instant petition)

40. The Petitioner has submitted that it incurred significant expenditure relating to NPV cost, compensatory afforestation cost, dwarf tree cost and cost of tree falling etc. to the forest authorities and also furnished the details of demand notes issued by forest authorities and subsequent payments made by it against them as per summary given below:-

400 kV D/C Muzaffarpur-Darbhanga Transmission Line

Srl. No.	Description	Total Cost (in ₹)
1	NPV Cost	564402
2	Compensatory Afforestation Cost	2668524
3	Dwarf Tree Cost	2499886
	Total	5732812

Srl. No.	Details of Demands raised by Forest Department	Forest Department Demand Letters
1	Demand for Compensatory Afforestation Charges for Darbhanga forest division.	2119, dated 17.10.2015
2	Demand for NPV.	FC-234, dated 1.4.2016
3	Demand for Compensatory Afforestation for Muzaffarpur Forest Division.	FC-401, dated 7.6.2016
4	Demand for dwarf tree cost for Tirhut, Mithila and Samastipur Forest Division.	FC-402, dated 7.6.2016

LILO of Barh - Gorakhpur Line at Motihari

Srl. No.	Description	Total Cost (in ₹)
1	NPV Cost	495166
2	Compensatory Afforestation Cost	1816660
3	Dwarf Tree Cost	4087469
4	Tree cutting/felling charges	400246
	Total	6799541

Srl. No.	Details of forest demand	Forest Department Demand Letter
1	Demand for NPV and Compensatory Afforestation Charges	FC-20, dated 16.1.2017
2	Demand received for tree felling charges for Motihari Forest division	212, dated 19.1.2017
3	Demand for NPV, revised CA charges	214, dated 21.2.2017



Srl. No.	Details of forest demand	Forest Department Demand Letter
4	Demand for tree felling charges for Gopalganj forest division.	215, dated 22.2.2017
5	Demand for dwarf tree plantation for Gopalganj and Motihari forest division.	941, dated 12.9.2017

41. The Petitioner vide its rejoinder dated 13.7.2018 furnished the proof of payment of ₹4087469 made by it on account of demand raised by the Forest Department towards forest approval of LILO of both circuits of 400 kV D/C Barh-Gorakhpur Transmission Line at Motihari against Demand Note No. FC-941, dated 12.9.2017 for ₹4087469.

42. The Commission in its order dated 24.8.2016 in Petition No. 32/MP/2014, in the matter of East North Interconnection Company Limited Vs. Jodhpur Vidyut Vitran Nigam Limited and Ors., observed as under:-

“

- (a) The petitioner is entitled to all legitimate expenditure incurred for obtaining forest clearance including the expenditure on compensatory afforestation. The petitioner shall be required to submit the documentary proof of the expenditure made in getting the diversion of forest land for laying the transmission lines.”

43. Keeping in mind the above submissions of the Petitioner duly corroborated by documentary evidence, we are of the view that the amount paid by the Petitioner to the forest authorities is unexpected requirement of forest clearance and all expenditures incurred by the Petitioner on account of securing forest clearance is covered under “Change in Law”. Accordingly, the amount paid by the Petitioner to the forest authorities for obtaining diversion of forest land and any other legitimate expenditure incurred in connection with forest clearance shall be reimbursable on account of Change in Law.

(ii) Increase in Taxes and Duties

44. The Petitioner has submitted that there was increase in taxes, duties and levies post the bid submission date and subsequent to the award of the project due to which additional financial burden was incurred by it. The details of the same are as under:-

- The rate of Excise Duty increased from 12.36% to 12.5% with effect from 1.3.2015.
- The rate of Service Tax increased from 12% to 14% (including cess) with effect from 1.6.2015.
- Swachh Bharat Cess with effect from 15.11.2015 at the rate of 0.5% on the value of taxable services.
- Krishi Kalyan Cess with effect from 1.6.2016 levied on all taxable services at the rate of 0.5%.
- As per Gazette Notification dated 20.1.2016 issued by the Government of Bihar, the entry tax on 'Electrical goods and Transmission Line material' was increased from 8% to 12%.

45. In terms of Article 12.1.1 of the TSA, the Change in Law events should have occurred after the date which is seven days prior to the Bid Deadline resulting into any additional recurring/non-recurring any expenditure by the TSP or any income to the TSP. The Bid Deadline has been defined as "the last date and time for submission of the Bid in response to the RFP". Hence, in terms of TSA, bid deadline was 9.9.2013. Therefore, cut-off date for considering the claims under change in law is 1.9.2013. In the background of this principle, we proceed to deal with the Petitioner's claims related to change in several taxes and duties under Change in Law under Article 12 of TSA.

46. The Petitioner has furnished the Gazette Notification of Bihar State Government, dated 20.1.2016 indicating increase in Entry Tax on "Electrical goods and Transmission Line material" and Circular No. 194/04/2016-ST, dated 26.5.2016



issued by Ministry of Finance, Department of Revenue notifying Krishi Kalyan Cess w.e.f. 1.6.2016. The Petitioner also intimated the beneficiaries about the said change in taxes, duties and levies through its monthly progress reports as well as through letters separately. The changes in service tax, excise duty, imposition of Swachh Bharat Cess and Krishi Kalyan Cess fall within the definition of Change in Law event as they constitute “the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal in India, of any law, including rules and regulations framed pursuant to such Law” and are, therefore, a Change in Law, which came into effect subsequent to cut-off dates and are admissible.

47. The Petitioner has furnished the certificate from the Chartered Accountant certifying the additional amount paid by it due to change in various taxes and duties.

The details of the same are as follows:-

Srl. No.	Description	Amount (in ₹)
1	Bihar State Entry tax on 'Electrical goods and Transmission Line material' (increased from 8% to 12%) (Annexure P-20 Page No. 1224 of the Petition)	140688937
2	Excess excise duty from March, 2015 to April, 2017 due to increase in Excise Duty from 12.36% to 12.50 %) (Annexure P-20 Page No. 1327 of the petition)	372348
3.	Excise duty from 26.12.2014 to 30.8.2017 due to increase in Excise Duty from 12.36% to 12.5% for hardware fittings and accessories (Annexure P-20, Page No. 1327A of the petition).	148755
4.	Excise duty increase from 12.36% to 12.50% for the period 7.7.2014 to 30.6.2017 due to increase in taxes towards design and tower package. (Annexure P-20, Page No. 1327B of the petition).	356590
5.	Service tax increased from 12.36% to 15%	2003200

48. The Transmission Project has been built by the Petitioner for the purposes of providing “Transmission Service” to various LTTCs with whom it has entered into TSA. The Petitioner cannot provide the transmission service without establishing the transmission project which in turn requires payment of statutory taxes and duties on

the material, equipment and services during the construction period. The Commission in its earlier orders dated 1.2.2017, 8.5.2017, 3.4.2018 and 26.6.2018 in Petition Nos. 8/MP/2014, 310/MP/2015, 110/MP/2016 and 216/MP/2016 respectively has considered the increase in Excise Duty as Change in Law events. Appellate Tribunal for Electricity in Appeal No. 161 of 2015 vide judgment dated 19.4.2017 held that change in rates of Excise Duty and Service Tax are Change in Law events. The Petitioner incurred additional expenditures on account of change in taxes and duties, which is admissible and allowed to be considered under Article 12.2.1 of TSA for granting relief under Change in Law events.

(iii) Change in guidelines issued by MoP for compensation towards damages in regard to Right of Way (RoW) for transmission lines

49. The Petitioner has submitted that Ministry of Power, Government of India, vide Notification No. 3/7/2015-Trans. dated 15.10.2015, issued the “Guidelines for payment of compensation towards damages in regard to Right of Way for transmission lines” according to which in addition to provide compensation towards normal crop and tree damages, the compensation @85% of land value for tower base area and a maximum of 15% of land value of transmission line right of way corridor was to be determined based on circle rate/guideline value/Stamp Act rates in order to compensate the land owners. According to the Petitioner, after issuance of said Guidelines, the farmers started demanding the enhanced compensation, which led to increase in Right of Way (RoW) issues and also the cost of RoW compensation. In order to execute the project, the Petitioner had to resolve the issues of Right of Way by paying high compensation to the agitating farmers. The progress of the project was also hampered due to increased number of RoW issues.

50. We have considered the claim of the Petitioner. We understand that the Petitioner had followed the process laid down under Section 164 of the Electricity

Act, 2003 (“the Act”) for securing the right of way for building foundations and erecting towers. It is observed that the document quoted by the Petitioner is not a Notification as claimed by the Petitioner. It is general guidelines issued by the Ministry of Power, Government of India for determining the compensation to be paid to the land owners. This letter of Ministry of Power cannot be considered as “Change in Law” as claimed by the Petitioner.

51. As regards the additional expenditure incurred by the Petitioner on account of right of way, we make it clear that the case at hand is a competitive bidding project and we are of the view that the Petitioner has quoted all-inclusive transmission charges and the Petitioner was also expected to factor all unforeseen and contingent expenditure on account of right of way settlement in the quoted transmission charges while submitting the bid. Therefore, the additional expenditure incurred by Petitioner to settle the issues of RoW with land owners does not constitute a Change in Law event and any claim under this is not admissible.

(iv) Demonetisation

52. The Government of India on 8.11.2016 demonetized High Denomination Bank Notes of ₹500/- and ₹1,000/-. The execution of the transmission project was severely affected under the restricted cash withdrawal limits imposed by the Government of India, which was an event beyond the contemplation of the Petitioner, and could not have been even anticipated or factored in during the issuance of the RFP and submission of the bid. The Petitioner also informed the LTTCs through letters enclosing various RBI circulars related to allowed bank withdrawal limit.

53. The Petitioner has contended that the Government of India cancelled the legal tender character of high denomination bank notes of ₹500 and ₹1000 issued by RBI



effectively from 8.11.2016 and also restricted the daily cash withdrawal limits from Banks and ATM's. This situation continued till 1.1.2017 and thereafter Reserve Bank of India increased cash withdrawal limits from Banks and ATMs'. The project execution work remained severely affected during the period as daily wage payment to labour was affected due to restricted cash withdrawal limits by banks, which subsequently reduced the presence of labourers/manpower at project site.

54. We are of the view that the event of 'Demonetization' does not fall within the definition of 'Change in Law' event as it does not constitute any enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any law, including rules and regulations framed pursuant to such Law" and was temporary in nature and therefore cannot be considered an event of Change in Law as per Article 12 of TSA. Hence, the claim of the petitioner on account of event of demonetization is rejected.

Issue (c): Whether the following claims of the Petitioner qualify to be covered under Force Majeure provisions of the TSA?

- i. Delay in obtaining forest clearance
- ii. Delay due to other events
 - Prohibition on sand mining
 - Flooding of Gandak River
 - Flooding at Motihari Sub-station
 - Ground improvement at Motihari Sub-station land due to geo-technical surprise.
 - Kidnapping of project staff in Motihari transmission line consequent to a "Theft"
 - Delayed hardware material supply in Motihari line due to Chennai flood
 - Delay in approval of Railway line crossing for Motihari Transmission line
 - Manhandling with TBEA Officials at Darbhanga sub-station site

- Delay in railway crossing work in Darbhanga line due to public agitations
- Delay due to severe right of way (RoW) issues in transmission line

55. The Articles 11.3 and 11.4 of the TSA defines Force Majeure and the same is as under:-

“.....

11.3 Force Majeure

A ‘Force Majeure’ means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

(a) Natural Force Majeure Events:

act of God, including, but not limited to drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years,

(b) Non-Natural Force Majeure Events :

i. Direct Non–Natural Force Majeure Events

- Nationalization or compulsory acquisition by any Indian Governmental Instrumentality of any material assets or rights of the TSP; or
- the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consents, Clearances and Permits required by the TSP to perform their obligations under the RFP Project Documents or any unlawful, unreasonable or discriminatory refusal to grant any other Consents, Clearances and Permits required for the development/ operation of the Project, provided that a Competent Court of Law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down; or
- any other unlawful, unreasonable or discriminatory action on the part of an Indian Governmental Instrumentality which is directed against the Project, provided that a Competent Court of Law declares the action to be

unlawful, unreasonable and discriminatory and strikes the same down.

ii. Indirect Non - Natural Force Majeure Events

- act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or
- radio active contamination or ionising radiation originating from a source in India or resulting from any other Indirect Non Natural Force Majeure Event mentioned above, excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Site by the Affected Party or those employed or engaged by the Affected Party; or
- industry wide strikes and labour disturbances, having a nationwide impact in India.

11.4 Force Majeure Exclusions

11.4.1 Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:

- (a) Unavailability, late delivery, or changes in cost of the machinery, equipment, materials, spare parts etc. for the Project;
- (b) Delay in the performance of any Contractors or their agents;
- (c) Non-performance resulting from normal wear and tear typically experienced in transmission materials and equipment;
- (d) Strikes or labour disturbance at the facilities of the Affected Party;
- (e) Insufficiency of finances or funds or the Agreement becoming onerous to perform; and
- (f) Non-performance caused by, or connected with, the Affected Party's:
 - i. negligent or intentional acts, errors or omissions;
 - ii. failure to comply with an Indian Law; or
 - iii. breach of, or default under this Agreement or any Project Documents......”



(i) Delay in obtaining forest clearance

56. Section 2 of the Forest (Conservation) Act, 1980, provides that forest land can be diverted for non-forest purposes with the approval of the Central Government on the proposal of the Forest Advisory Committee and after furnishing of compliance report by the State Government with regard to the conditions for such compliance. Under Rule 6 of the Forest (Conservation) Rules, 2003, every user agency which wants to use forest land for non-forest purposes shall make a proposal to the Nodal Officer designated for the purpose by the State Government, complete in all respects. The State Government after being satisfied that the proposal requires prior approval under Section 2 of the Forest Conservation Act will send the proposal to the Central Government. The Central Government after receipt of the proposal shall send the same to the Forest Advisory Committee for its advice thereon. The Forest Advisory Committee after considering the proposal may advise the Central Government on the proposal and may suggest any conditions or restriction for use of any forest land for non-forest purposes which in its opinion would minimize the adverse environmental impact. The Central Government after considering the advice of the Committee and after making such enquiry as may be considered appropriate may grant approval to the proposal with or without conditions or reject the proposal. As per the Forest (Conservation) Amendment Rules, 2004 notified on 3.2.2004, a time period of 210 days after submission of the proposal for forest clearance has been envisaged for recommendations of the State Government and a time period of 90 days has been envisaged for approval by the Forest Advisory Committee under Central Government.

57. We have noted that the requirement of forest clearance in the case at hand occurred after award of the project. Bid Process Coordinator in RFP denied the involvement of forest on the route of the 400 kV D/C Muzaffarpur-Darbhanga

Transmission Line and LILO of Barh-Gorakhpur 400 kV D/C line at Motihari, the time required for forest clearance was not factored within the timeline prescribed in the TSA for completion of the transmission line. Therefore, forest clearance was an additional requirement that was to be performed by the Petitioner. The Petitioner was required to obtain forest clearance for the diversion of forest land in Muzaffarpur, Darbhanga and Samastipur Districts for 400 kV D/C Muzaffarpur-Darbhangha Transmission Line and in Motihari, Siwan and Gopalganj Districts for 400 kV D/C Transmission LILO Line in the State of Bihar. The time spent in obtaining the forest clearance in the present case can be said to be beyond the control of the Petitioner except where the Petitioner has taken unreasonable time for performance of its obligation in the process of forest clearance.

58. In respect of the forest clearance for the diversion of forest land in Muzaffarpur, Darbhanga and Samastipur Districts for 400 kV D/C Muzaffarpur-Darbhangha Transmission Line, the Petitioner made application on 10.9.2014 to the Nodal Officer, Forest Department, Patna. The transmission license was granted on 30.5.2014 and approval of route under Section 164 of the Electricity Act, 2003 ("the Act") was granted on 4.9.2014 to the Petitioner by MoP, Government of India. The Petitioner made the applications both for the Darbhanga and Motihari lines within a reasonable time. The proposal was forwarded to the DFOs of Tirhut, Mithila and Samastipur by Deputy Conservator of Forest on 25.9.2014. The demand for compensatory afforestation charges for Darbhanga Forest Division was provided on 17.10.2015 by Forest Department, which was deposited on 14.1.2016 by the Petitioner. The FRA certificates for forest land diversion under Samastipur, Muzaffarpur and Darbhanga forest division were issued by District Administration on 4.12.2015, 28.12.2015 and 30.12.2015 respectively. The in-principle Stage-I approval was granted to the Petitioner on 1.4.2016. Accordingly, the Petitioner



deposited the NPV Charges to Forest Department on 16.4.2016 as indicated in Stage-I approval. Forest Department raised the demand for compensatory afforestation for Muzaffarpur Division and dwarf tree cost for Tirhut, Mithila and Samastipur Forest Division on 7.6.2016, which was deposited by the Petitioner to Forest Department on 14.6.2016. The Petitioner submitted the compliance report to the Forest Department against the compliances raised in Stage-I forest approval dated 1.4.2016. Accordingly, the Stage-II forest approval was granted to Petitioner on 22.7.2016. The Forest Department issued intimation on 17.8.2016 to the Petitioner for forest land diversion subsequent to issuance of Stage-II forest approval. However, the tree felling permission was granted on 23.11.2016 to the Petitioner by Forest Department.

59. As regards the forest clearance for the diversion of forest land in Motihari, Siwan and Gopalganj Districts for 400 kV D/C Transmission LILO line, the Petitioner made application on 10.9.2014 to the Nodal Officer, Forest Department, Patna. Thereafter, the proposal was forwarded to the DFO Motihari and Gopalganj on 25.9.2014 for being processed. After completion of joint site visit with forest officers, the Petitioner submitted the joint site inspection report to DFO Motihari, Siwan and Gopalganj on 25.11.2014. However, the FRA certificates for land diversion under Gopalganj and Motihari forest divisions were issued by District Administration on 31.12.2015 and 15.6.2016 respectively. The in-principle Stage-I forest approval was granted on 9.1.2017. The demand for NPV, CA and tree falling charges for Motihari Forest Division were issued by Forest Department on 16.1.2017 and 19.1.2017 respectively, which was deposited by the Petitioner on 27.1.2017. The demand for NPV, CA and tree falling charges for Gopalganj Forest Division were issued by Forest Department on 21.2.2017, which was deposited by Petitioner on 27.2.2017. Further, the demand for dwarf tree cost for Gopalganj and Motihari Forest Division



was issued by Forest Department on 12.9.2017, which was deposited by Petitioner on 17.11.2017. The Stage-II forest approval had not been granted still the Petitioner was able to complete the Project. The Petitioner made every possible effort to expedite its forest proposals and reported the Forest approval issue of Motihari element to Project Management Group (PMG) of Government of India on 21.11.2016 in order to expedite the same.

60. It is observed that the Petitioner received the forest approvals as per details given below:-

Srl. No.	Transmission Line	Date of making application for forest clearance	In-principle approval for forest clearance	Time taken for forest clearance
1	400 kV D/C Muzaffarpur – Darbhanga line	10.9.2014	1.4.2016	19 month
2	LILO Of Barh-Gorakhpur 400 kV D/C line at Motihari	10.9.2014	9.1.2017	28 month

61. On receipt of approval as discussed hereinabove, the Petitioner had declared the COD of the 400 kV D/C Muzaffarpur-Darbhangha line and 2X500 MVA 400/220 kV Darbhanga GIS Sub-station on 31.3.2017 and LILO of both circuits of 400 kV D/C Barh-Gorakhpur Transmission Line at Motihari GIS and 2X200 MVA 400/132 kV Motihari GIS Sub-station on 10.8.2017. As per the Transmission Service Agreement, the Scheduled Commercial Operation Date (SCOD) is 30 months for Darbhanga Transmission Element and 32 months for Motihari Transmission Element from the effective date. The term effective date has been defined under Article 2.1 of the TSA which is later of three dates, namely, date of execution and delivery of the TSA by the parties, the date of acquiring of DMTCL by the successful bidder and date of providing Contract Performance Guarantee by the successful bidder. The TSA was pre-signed between DMTCL and LTTCs on 6.8.2013 and by way of a Tripartite Share Purchase Agreement between PFCCL, DMTCL and Essel Infraprojects Ltd.,

the entire shareholding of DMTCL was transferred on 10.12.2013 in favour of the Essel Infraprojects Ltd. Therefore, the effective date is 10.12.2013 and accordingly the Darbhanga Transmission Element and Motihari Transmission Element were scheduled to achieve COD by 9.6.2016 and 9.8.2016 respectively. As against the SCOD, the actual COD of the lines are as under:-

Srl. No.	Transmission Line	SCOD	Actual COD	Delay
1	400 kV D/C Muzaffarpur – Darbhanga line	9.6.2016	31.3.2017	10 month
2	LILO Of Barh-Gorakhpur 400 kV D/C line at Motihari	9.8.2016	10.8.2017	12 month

62. TSA defines the term “Force Majeure” as under:

“11.3 Force Majeure

A “Force Majeure” means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices.”

63. Thus, Force Majeure means any event or circumstance or combination of events and circumstances which wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under the TSA. An Affected Party has been defined in the TSA as “any of the Long Term Transmission Customers or the TSP whose performance has been affected by an event of Force Majeure”.

64. In the present case, as per RFP and the Survey Report issued by PFCCL, there were no forest areas in the route of transmission lines. The Petitioner encountered forest areas in the Muzaffarpur, Darbhanga and Samastipur Districts in execution of Muzaffarpur-Darbhanga transmission line contrary to stipulation of RFP documents that there was no forest in the route. Similarly, while executing Asset-II, the Petitioner encountered forest at Motihari, Siwan and Gopalganj Districts,

whereas the RFP documents specified that there is no forest in the route of LILO of both circuits of 400 kV D/C Barh-Gorakhpur transmission line. The Petitioner was unable to start the construction of the transmission line in respective forest stretches. The unforeseen requirement of obtaining forest clearance and delay in issuance of forest clearance, resulted in delays in implementation of the transmission project. Forest clearance is a mandatory requirement for laying the transmission lines in the forest area. The Petitioner took up the matter with the authorities for forest clearance. Therefore, the time taken for grant of forest clearance was beyond the reasonable control of the Petitioner and has affected the project implementation and thereby prevented the Petitioner from performing its obligations under the TSA.

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.

(ii) Delay due to other events

66. As we have concluded in the preceding paragraph that SCODs of 400 kV D/C Muzaffarpur-Darbhanga line and LILO of Barh-Gorakhpur 400 kV D/C line at Motihari have been extended till their actual COD, we deem it appropriate to refrain from making any observations on merits regarding the events, namely, (i) Prohibition on sand mining in Bihar due to NGT order, (ii) Flooding of Gandhak River and flooding

of Motihari Sub-station land, (iii) Ground improvement at Motihari Sub-station land due to geo-technical surprise, (iv) Petitioner's work affected due to (a) kidnapping of project staff in Motihari Transmission Line consequent to a "Theft", (b) Manhandling with TBEA officials at Darbhanga Sub-station site, (c) Delay in Railway Crossing work at Darbhanga line due to public agitations, (iv) Delay in hardware material supply at Motihari line due to Chennai flood (v) Delay in Railway line crossing approvals for Motihari Transmission Line, (vi) Delay due to severe right of way (RoW) issues in transmission line and (vii) Delay due to assembly elections in Bihar State to be falling under Force Majeure as their period is subsumed in the aforementioned extended COD.

67. The Petitioner has claimed additional expenditure of ₹64 lakh and ₹7.32 crore due to raising the level of sub-station land at Motihari level upto FGL + 800 mm in line with the recommendation of Petitioner's Engineering Consultant and towards ground improvement at Motihari Sub-station land due to geo-technical surprise. We are of the considered view that the said events cannot be considered as Force Majeure events as provided under Article 11.7 of the TSA. Accordingly, the Petitioner's claim is rejected.

Issue (d): Whether the Petitioner is entitled to any relief on account:-

- i Change in gantry coordinates and connection arrangement at PGCIL Muzaffarpur Sub-station for 400 kV D/C Muzaffarpur-Darbhangha Transmission Line.
- ii Increase in number of power line crossings and high density of trees in 400 kV Muzaffarpur- Darbhanga Transmission Line

(i) Change in gantry coordinates and connection arrangement at PGCIL Muzaffarpur Sub-station for 400 kV D/C Muzaffarpur–Darbhanga Transmission line and increase in number of power line crossings.

68. The Petitioner vide letter dated 25.3.2014 requested PGCIL to provide gantry coordinates of PGCIL Muzaffarpur Sub-station and PGCIL provided the same vide



its e-mail dated 21.4.2014. The Petitioner has submitted that there was a change in the gantry coordinates given by PGCIL at Muzaffarpur Sub-station end from the coordinates given by BPC in RFP dated 27.5.2013. The same are given hereunder:-

RFP Specification: Longitude: N 26° 03' 57.8815;

Latitude: E 85° 22' 6.5475

And

Actual coordinates: Longitude: N 26° 03' 55.21;

Latitude: E 85° 22' 2.25

69. The Petitioner has submitted that the above difference between actual and RFP specifications resulted in the requirement of two additional EHV power line crossings as well increase in 1.5 km route length of 400 kV D/C Muzaffarpur-Darbhanga Transmission Line. The Petitioner has submitted the plotted routes of 400 kV D/C Muzaffarpur-Darbhanga Transmission line on Toposheet, indicating the difference in route length, as per route provided by BPC and route adopted in actual as per the requirement of change in gantry coordinates. Due to the change in the coordinates, the Petitioner had to prepare and submit power line crossings. Seeking approval for the said 02 nos. of increased EHV Power Lines crossings was the result of change in gantry coordinates. The Petitioner has submitted that if there were no such difference between the actual and RFP specifications, then there would not have been any requirement to seek any further permission. Due to the increase in crossing of 02 Nos. of 400 kV D/C Transmission Lines, the Petitioner had to seek approvals for these increased power line crossings, design and procure the underpass gantries as per the following timeline:-

Sl. No.	Activity	Date
1	Letter to PGCIL to provide the Gantry Co-ordinates at Muzaffarpur Sub-station	25.3.2014
2	PGCIL provided gantry Co-ordinates (by email)	21.4.2014
3	Crossing of Powerlinks 400 kV D/C Purnea – Muzaffarpur Transmission Line	



Sl. No.	Activity	Date
3.1	Submission of power line crossing proposal	3.9.2015
3.2	Approval of crossing proposal	2.11.2015
4	Crossing of PGCIL 400 kV D/C Muzaffarpur - Bihar Sharif Transmission Line	
4.1	Submission of power line crossing proposal	3.9.2015
4.2	Approval of crossing proposal	11.3.2016
5	Gantry Design for undercrossing of PGCIL and Powerlinks Transmission Lines in one span	
5.1	Stub drawing of Gantry	4.12.2015
5.2	Structural, foundation design and BoM of Gantry	16.12.2015
6	Supply of Stubs and Gantry material	
6.1	Supply of Gantry Stubs at Site	4.12.2015
6.2	Supply of Gantry material at Site	19.2.2016

70. The change in Connection Arrangement at PGCIL Muzaffarpur Sub-station end required additional time of 6 months (from 3.9.2015 to 11.3.2016) for completion of transmission on account of seeking approval of 2 nos. of increased EHV power line crossings, design, engineering and procurement of gantries. The Petitioner has submitted that it incurred the additional cost of ₹3.15 crore due to increase in 1.5 km. route length of 400 kV D/C Muzaffarpur-Darbhanga Transmission Line in addition to corresponding cost of IDC and IEDC.

71. We have considered the submissions of the Petitioner. As per the submissions of the Petitioner, change in the gantry coordinates delayed the COD by 6 months and additional cost of ₹3.15 crore due to increase in 1.5 km. route length of 400 kV D/C Muzaffarpur-Darbhanga Transmission Line. The additional time of 6 months claimed by the Petitioner has already been taken care by the extension of the scheduled COD to actual COD.

72. As regards the other contention of additional cost of ₹3.15 crore due to increase in the route length by 1.5 km, we do not find any document or auditor's certificate espousing the said additional cost on account of increase in line length of 400 kV D/C Muzaffarpur-Darbhanga Transmission Line. In the absence of any document on record, we are unable to examine the claim of the Petitioner. Hence,

the claim of the Petitioner for additional cost of ₹3.15 crore due to increase in 1.5 km. route length of 400 kV D/C Muzaffarpur-Darbhanga Transmission Line is rejected in the absence of any supporting documents.

(ii) Work affected due to increase in number of power line crossings in both Darbhanga and Motihari Line and due to high tree density in 400 kV Muzaffarpur- Darbhanga Transmission Line

73. The Petitioner has submitted that only 02 nos. of EHV power lines in Darbhanga Line and 08 nos. of EHV power lines in Motihari line were required to be crossed as per final selected route provided in BPC survey report. However, during the project execution work, the no. of EHV power line crossings increased by another 5 nos. in Darbhanga Line and by 06 nos. in Motihari Line. For each additional power line crossing, the Petitioner had to redo the detailed survey, prepare, submit and get the approval of crossing proposals from concerned Licensees, which required additional time against the contemplated in RFP inputs. The Petitioner has submitted that it had to incur an additional cost of approximately ₹1.84 crore for implementing the additional power line crossings against the number of crossings given in RFP for both–Darbhanga and Motihari Transmission Line.

74. The Petitioner has submitted that the density of trees was shown as “Low” in the RFP Document under the final route summary of 400 kV D/C Muzaffarpur-Darbhanga Line. However, during execution of 400 kV D/C Muzaffarpur-Darbhanga Transmission Line, the Petitioner came across approximately 11000 (eleven thousand) trees of fruit gardens other than bamboo and banana owned by private parties, which was far more than the tree quantum anticipated at the time of bid submission. Due to above high density of trees, a lot of public resistance was faced by Petitioner during execution of transmission lines and work was carried out under

police protection at some places which affected the progress of the Petitioner's project.

75. We are of the view that though there is a change in the number of power line crossings vis-à-vis information provided by BPC in RFP document. However, as per Article 5.1 of TSA, the Petitioner was liable at its own cost and expense, for designing, constructing, erecting, completing and commissioning of transmission elements. It was also responsible for obtaining all consents, clearances and permits required for the development and construction of transmission project. It is noticed that the Petitioner obtained the entire power line crossing proposal in order to discharge its obligations under TSA and to complete the transmission line construction. Accordingly, this does not constitute any Force Majeure event and claim of the Petitioner on this account is disallowed.

76. As regards the high density of tree in Darbhanga Line vis-à-vis 'Low Density' as indicated by BPC in RFP document, we are of the view that the Petitioner should have factored in all unforeseen events including contingencies of right of way issues at the time of its bid submission. The failure to do so on the part of the Petitioner cannot be a valid reason for seeking compensation. Moreover, we are of the view that the right of way does not fall under event of Force Majeure. Hence, the Petitioner's claim for increase in cost on account of increased number of right of way issues due to high density of trees is not admissible. Accordingly, increase in cost on account of right of way issues in high tree density area of Darbhanga line is not allowed. The Petitioner's claim of time over-run has already been taken care by extending the scheduled COD.

Issue (e) Whether the Petitioner's case for delay due to assembly elections in Bihar State is covered under the Force Majeure or Change in law provisions of the TSA?

77. The Petitioner has submitted that Model Code of Conduct issued by the Election Commission came into effect w.e.f. 9.9.2015 in respect of General Assembly Elections of Bihar Legislative Assembly in the months of October and November, 2015 according to which elections were to be conducted in five phases. Due to the applicability of this Model Code of Conduct, the movement of vehicles carrying the materials and manpower to the Petitioner's project site was restricted by the administration, which affected the execution of the project work for two months, which resulted in delay of the completion of instant elements. In this regard, the Petitioner has also submitted the Press Release dated 9.9.2015.

78. Learned counsel for the Petitioner contended that Article 11.3 of the TSA makes it clear that the Force Majeure means any event or circumstance or combination of events and circumstances which wholly or partly prevent or unavoidably delays an Affected Party in the performance of its obligations under the TSA. The Petitioner has submitted that due to applicability of Election Commission's Model Code of Conduct for elections in phased manner in Bihar, the execution of the transmission project was affected on account of restricted mobilisation of material and manpower at the sites.

79. We have considered the submissions of the petitioner. We do not find any rational justification in the contentions of the Petitioner that project of the Petitioner was affected and the assembly elections restricted the mobilization of material and manpower. In our view, the assembly elections and its impact on the project are not covered under Article 11 of the TSA. Accordingly, the claim of the Petitioner that its work remained affected for two months from 12.10.2015 to 11.12.2015 cannot be considered to be allowed under Article 11 of the TSA. However, the Petitioner's

claim of time over-run has already been taken care by extending the scheduled COD.

Issue (f) Whether the Petitioner is entitled to any relief of IDC and IEDC pursuant to the Commission's order dated 1.9.2017 in Petition No.209/TT/2016 on account of delay in ERSS-VI transmission scheme due to Force Majeure events

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.

Issue (g) What relief the Petitioner is entitled to in the light of answers to the above issues?

82. The Petitioner has submitted that on account of events of Force Majeure and unexpected requirement of forest clearance, there was delay as a result of which there was time over-run of 295 days in case of Darbhanga line and 366 days in case of Motihari Line. The Petitioner has submitted that it incurred IDC during the period beyond SCOD till the respective dates of commercial operation of the Darbhanga and Motihari Transmission Lines. We have already extended the scheduled COD of the Darbhanga and Motihari Transmission Lines upto the actual CODs without the benefit of consequential IDC and IEDC. Accordingly, the Petitioner's prayer for grant of IDC for the period beyond the scheduled COD and the IEDC for the said period is rejected. However, the Petitioner is allowed to recover the amount paid by the Petitioner to the forest authorities for obtaining the forest clearance and other legitimate expenditure made for obtaining the forest clearance, service tax, excise duty, Swachh Bharat Cess and Krishi Kalyan Cess from the LTTCs. The Petitioner is directed to submit the documentary evidence in support of the amount paid to the forest departments for obtaining the forest clearance and payment of taxes alongwith the Auditor Certificate to the LTTCs while claiming the relief under Change in Law.

Summary of Decisions

83. The summary of our decisions with regard to Petitioner's claim is as under:

S. No.	Change in law	Allowed /Disallowed
1	Unexpected requirement of obtaining forest clearance and expenditure incurred on account of obtaining forest clearance.	Allowed
2	Increase in taxes and duties.	Allowed
3	Change in guidelines issued by MoP for compensation towards damages in regard to Right of Way (RoW) for transmission lines.	Disallowed
4	Demonetization	Disallowed
5	Delay in obtaining forest clearance under Force Majeure and extension of SCOD	Allowed

S. No.	Change in law	Allowed /Disallowed
6.	Extension of SCOD due to (i) Prohibition on sand mining in Bihar due to NGT order, (ii) Flooding of Gandhak River and flooding of Motihari Sub-station land, (iii) Ground improvement at Motihari Sub-station land due to geo-technical surprise, (iv) Work affected because of (a) kidnapping of project staff in Motihari Transmission Line consequent to a "Theft", (b) Manhandling with TBEA officials at Darbhanga Sub-station site, (c) Delay in Railway Crossing work at Darbhanga line due to public agitations, (iv) Delay in hardware material supply at Mothihari line due to Chennai flood (v) Delay in Railway line crossing approvals for Motihari Transmission Line, (vi) Delay due to severe right of way (RoW) issues in transmission line and (vii) Delay due to assembly elections in Bihar State to be falling under Force Majeure as their period is subsumed in the aforementioned extended COD.	Not considered on merits as the additional time claimed is subsumed in extended SCOD.
7	Change in gantry coordinates and connection agreement at PGCIL Muzaffarpur Sub-station for 400 kV D/C Muzaffarpur-Darbhangha Transmission Line, increase in number of power line crossings and high density of trees in 400 kV Muzaffarpur-Darbhangha Transmission Line.	The Additional time claimed is subsumed in extended SCOD.
8.	Work affected due to increase in number of power line crossings in both Darbhanga and Motihari Line and due to high tree density in 400 kV Muzaffarpur-Darbhangha Transmission Line.	Disallowed
9.	IDC and IEDC beyond scheduled COD till actual COD.	Disallowed
10.	Additional expenditure in terms of Commission's order dated 1.9.2017 in Petition No. 209/TT/2016.	Disallowed

84. In terms of above, the Petition No. 238/MP/2017 is disposed of.

sd/-
(Dr. M.K. Iyer)
Member

sd/-
(P.K. Pujari)
Chairperson

