

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 248/MP/2016  
with IA No. 64/2016**

**Coram:**

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

**Date of Order: 24<sup>th</sup> January, 2019**

**In the matter of**

Petition to set aside the demand letter dated 5.12.2016 issued by Bangalore Electricity Supply Company Ltd and for a declaration that Kudgi Transmission Limited is entitled for day to day extension of Scheduled COD for Elements 2 and 3 due to non-availability of interconnection facilities and for delay in handing over land notified by KIADB.

**And**

**In the matter of**

Kudgi Transmission Limited  
TCTC Building, First Floor, PB No979,  
Mount Poonamalle Road, Manapakkam  
Chennai - 600 089

.....Petitioner

**Vs**

1. Bangalore Electricity Supply Company Ltd.  
K.R. Circle Bangalore-560 001
2. Chamundeshwari Electricity Supply Corporation Ltd.  
No. 927, L.J. Avenue New Kantharaj Urs Road  
Saraswathipuram Mysore-570 009
3. Hubli Electricity Supply Company Ltd.  
Navanagar, Hubli-587117
4. Mangalore Electricity Supply Company Ltd.  
Paradigm Plaza A.B. Shetty Circle, Mangalore-575 001
5. Gulbarga Electricity Supply Company Ltd.  
Station Road Gulbarga-585 101
6. Power Company of Karnataka Ltd.  
Cauvery Bhavan, K.G. Road  
Bangalore-560 001
7. Kerala State Electricity Board Ltd.  
Vydyuthi Bhavanam, Pattom, Thiruvananthapuram, Kerala-695 004



8. Tamil Nadu Generation and Distribution Corporation Ltd.

10<sup>th</sup> Floor, NPKRR Maaligai, 144,  
Anna Salai, Chennai-600 002

9. Southern Power Distribution Company of Andhra Pradesh Ltd.

D. No. : 19-13-65/A, Srinivasapuram,  
Tiruchanoor Road, Tirupati-517 503

10. Eastern Power Distribution Company of Andhra Pradesh Ltd.

P&T Colony, Seethammadhara,  
Vishakhapatnam-530 013

11. Southern Power Distribution Company of Telangana Ltd.

6-1-50, Mint Compound, Hyderabad- 500 063

12. Northern Power Distribution Company of Telangana Ltd.

H. No.: 2-5-31/2, Corporate Office,  
VidyutBhavan, Nakkalgutta,  
Hanamkonda, Warangal-506 001

.....Respondents

**Parties present:**

Shri Alok Shankar, Advocate, KTL

**ORDER**

**Background**

The Petitioner, Kudgi Transmission Limited (“KTL”) is a company incorporated under the provisions of Companies Act, 1956 as a wholly owned subsidiary of REC Transmission Projects Company Limited (RECTPCL), with the objective to establish the transmission system for evacuation of power from Kudgi Thermal Power Station (3 x 800 MW in Phase-I) ('Kudgi TPS') of NTPC on Build, Own, Operate and Maintain (BOOM) basis and to act as the Transmission Service Provider (TSP) after being acquired by the successful bidder. RECTCPL was notified by the Ministry of Power, GOI vide notification dated 8.10.2012 as the Bid Process Coordinator (BPC) for the purpose of selection of bidder as TSP to establish the project on BOOM basis through tariff based competitive bidding process.

2. The Respondents are Long Term Transmission Customers (LTTCs) of the Petitioner who had entered into Transmission Service Agreement (TSA) with the



Petitioner on 14.5.2013. The Respondent No.1, BESCOM has been appointed and authorized to represent all the LTTCs for discharging the rights and obligations of the LTTCs as Lead LTTC, as per Article 18.1.1 of the TSA. Power Grid Corporation of India Limited (PGCIL) in its capacity as CTU and also in its capacity as a transmission licensee is developing the Narendra sub-station. The list of the long term transmission customers with their respective allocations in the transmission capacity developed by the Petitioner is as under:

S. No	Name of LTTCs	% Allocated Project Capacity
1	<b>ANDHRA PRADESH &amp; TELANGANA</b>	
a.	Northern Power Distribution Company of Telangana	3.26% (66.35 MW)
b.	Eastern Power Distribution Company of Andhra Pradesh Limited	3.25% (66.06 MW)
c.	Southern Power Distribution Company of Telangana	4.58% (93.11 MW)
d.	Central Power Distribution Company of Andhra Pradesh Limited	9.47% (192.58 MW)
<b>KARNATAKA</b>		
2	Power Company of Karnataka Limited ("PCKL") (PCKL has signed TSA on behalf of following Discoms)	
a.	Bangalore Electricity Supply Company Limited	29.19% (593.57 MW)
b.	Gulbarga Electricity Supply Company Limited	7.80% (158.62 MW)
c.	Hubli Electricity Supply Company Limited	10.69% (217.48 MW)
d.	Mangalore Electricity Supply Company Limited	4.90% (99.65 MW)
e.	Chamundeshwari Electricity Supply Company Limited	6.24% (126.92 MW)
<b>KERALA</b>		
3	Kerala State Electricity Board	5.86% (119.18 MW)
<b>TAMIL NADU</b>		
4	Tamil Nadu Generation and Distribution Company Limited	14.76% (300.10 MW)

3. Pursuant to the bifurcation of the then State of Andhra Pradesh into new States of Andhra Pradesh and Telangana, the share identified for the utilities in

the then State of Andhra Pradesh got divided between the distribution licensees in the new State of Telangana and the new State of Andhra Pradesh.

4. In accordance with the tariff based competitive bidding guidelines for Transmission Service notified by the Ministry of Power, GOI on 17.4.2006 under Section 63 of the Electricity Act, 2003, M/s L&T Infrastructure Development Projects Limited (“L&TIDPL”) was selected as a successful bidder with the lowest levellised transmission charges. Accordingly, Letter of Intent (LOI) was issued by the BPC on 31.7.2013 to L&T IDPL to establish the transmission system required for evacuation of power from Kudgi TPS of NTPC Limited. The project involves the development of the following transmission elements:

Sl. No	Scope of Work	Completion Target
1	(Kudgi TPS-Narendra (New) 400kV 2 x D/C quad Lines	18 months from effective date
2	Narendra (New) - Madhugiri 765 kV D/C Line	28 months from effective date
3	Madhugiri - Bidadi 400 kV D/C (quad) Line	28 months from effective date

5. In accordance with the competitive bidding guidelines, the BPC started preliminary works on the project. The BPC incorporated the Petitioner herein as Special Purpose Vehicle (SPV) for the project and initiated steps for obtaining initial consents. Thereafter in terms of the bid documents, L&T IDPL acquired 100% equity holding in the Petitioner Company on 30.8.2013 after execution of the Share Purchase Agreement and started implementing the project.

6. The Commission by order dated 7.1.2014 in Petition No. 191/TL/2013 had granted Transmission License to the Petitioner. Thereafter, the Commission approved and adopted the levellised transmission charges for the project by its order dated 8.1.2014 in Petition No. 190/TT/2013. The financial closure of the Project was achieved on 24.2.2014. Notice to Proceed was issued by the Petitioner

on 28.1.2014 and Engineering Procurement and Construction (EPC) Contract was entered into between the Petitioner and L&T IDPL on 21.2.2014.

7. The Ministry of Power, GOI on 22.5.2014 granted approval under Section 164 of the Electricity Act, 2003 conferring the powers of Telegraph Authority on the Petitioner for placing of electric lines or electrical plant for transmission of electricity. After adoption of tariff and approval of MOP under Section 164 of the 2003 Act, the Petitioner had started implementing the project in full steam.

#### **Submissions of the Petitioner**

8. In the above background, the Petitioner in this Petition has submitted the following:

(i) All ‘conditions subsequent’ under the TSA were satisfied by the Petitioner within the time frame stipulated under the TSA. The construction works on the site commenced immediately after the NTP was issued by the Petitioner. The Petitioner over-came serious law & order and ‘Right of Way’ issues and completed the construction of the Element 1 on 27.3.2015. All the long term transmission customers and other concerned agencies (Central Electrical Authority, NTPC & CTU) were informed of the completion of Element 1 of the Project.

(ii) The Project is proposed to be developed as evacuation facility for Kudgi TPS. Accordingly, the following interconnection facilities had to be developed prior to the commissioning of the Element 1 of the transmission project:

Sl No.	Name of the Agency	Interconnection facility
1	Kudgi TPS of NTPC	400 kV Bays allotted to KTL for connecting Element 1
2	PGCIL	Narendra (New) 765/400kV Pooling station - Respective Bays allotted to KTL for connecting Element 1
3	PGCIL	1 no. Multi Circuit Tower for terminating 2 circuits (second 400kV D/C line) of Element 1

(iii) The scheduled commercial operation date for Element 1 was 28.2.2015. However, the Petitioner had completed the entire scope of work for Element 1 on 27.3.2015. The LTTCs, the Central Electrical Authority (CEA), NTPC & CTU have not disputed this fact of the completion of Element 1 by 27.3.2015. However, due to non-availability of inter connection facility



required to be developed by NTPC and PGCIL, the Element 1 could not be tested and charged.

(iv) The Petitioner had submitted an application to the Electrical Inspectorate, CEA on 27.1.2015 for conducting inspection of the line. However, CEA expressed its inability to inspect the line as the charging facility was not available at both the ends. Thus, despite the completion of the line in March'2015, the Petitioner could not declare the COD of Element 1.

(v) The Petitioner thereafter approached this Commission as the delay in commissioning of the Element1 was for reasons beyond the control of the Petitioner and for the CEA to inspect the transmission line and allow the Petitioner to declare 'deemed commissioning' in terms of Article 6.2 of the TSA.

(vi) While the Petition was pending, the progress of transmission line associated with the Kudgi generating station was reviewed by CEA on 24.4.2015. CEA directed NTPC and PGCIL to ensure completion of 400 kV Bays at Narendra sub-station and Kudgi switchyard by June, 2015 so that KTL could charge their Kudgi - Narendra (New) 400 kV 2 x D/C line by June, 2015. Both NTPC and PGCIL failed to comply with the said directions issued by CEA.

(vii) Thereafter, the CEA in its meeting on 10.7.2015 again reviewed the progress of the generating station and the transmission lines associated thereto. Accordingly, CEA advised NTPC and PGCIL to complete the 400 kV bays and Narendra (New) - Narendra 400 kV Transmission Line by July, 2015 and August, 2015 respectively and also advised the Chief Engineer (EI), CEA to inspect the Kudgi STPS - Narendra (New) 400 kV 2xD/C Lines of the Petitioner at the earliest.

(viii) Pursuant to the directions of the CEA, the Element 1 was inspected and declared ready for charging on 28.7.2015. As per Article 6.2 of the TSA, an element is deemed to be complete 7 days after the Transmission Service Provider (the Petitioner herein) declares the facility is ready for charging. Thus, in terms of the TSA, the Petitioner declared the line to be under commercial operation from 4.8.2015. The commercial operation date was notified to all the Long Term Transmission Customers vide letter dated 6.8.2015.

(ix) In this background and context, it is clear that the Petitioner had completed all the works in relation to the Element 1 and was ready and would have achieved COD in April, 2015, as all items under its scope of work was completed by 27.3.2015.The inspection for declaration that the lines are ready for charging was delayed only due to inter-connection facility at both the ends of the line being unavailable. In view of this, the COD of Element 1 could be declared in 4.8.2015. The delay in declaration of COD of the Element 1 had a



cascading impact on the construction activities of other elements of the system also.

(x) Notwithstanding the impact on the construction schedule of Element 2 and Element 3, the Petitioner had fully completed these elements of the Project. The other elements of the Project i.e. Element 2 and Element 3 were required to be completed by 31.12.2015 (i.e 10 months after the original completion date of Element 1). However, the COD of Element 2 was declared on 19.9.2016 and Element 3 on 27.7.2016. The certificate for energization for Element 3 and Element 2 was received from CEA on 4.7.2016 and 10.9.2016 respectively.

(xi) In addition to the cascading impact that the delay in COD of Element 1 and non-payment of tariff for Element 1 had on the construction of Elements 2 and 3, the following were the reasons not attributable to the Petitioner and beyond the reasonable control of the Petitioner forcing the delay in the declaration of COD of Elements 2 and 3 :

- (i) Non-availability of Interconnection facility for Elements 2 and 3;
- (ii) Right of Way issues at various villages comprised in Ballari, Bijapur, Chitradurga, Koppal, Tumkur and Ramanagara Districts;
- (iii) Law and order issues at Bijapur, Ballari, Tumkur and Ramanagara Districts; and
- (iv) Delay in obtaining the Right of Way from the landowners for the lands claimed by Karnataka Industrial Areas Development Board (KIADB) as notified land for acquisition.

(xii) As regards inter-connection facility, the Petitioner vide letter dated 16.11.2015 had informed BESCOM (the Respondent No.1) about the non-availability of interconnection facilities required for the completion of Elements 2 and 3. Due to non-availability of interconnection facilities, inspection by CEA was delayed which had impacted the COD of the Project. The decision for charging 765 kV line on 400 kV lead to indecisiveness on which bay the lines were to be terminated which has resulted in inordinate delay. The interconnection facility for second element was made available only on 6.9.2016 and third element in August, 2016 and therefore, there was uncontrollable delay of about 9 months in declaration of COD. Clearly, the delay is due to the fault of the LTTC and by no standard can be attributable to the Petitioner. As per Article 4.2 of the TSA, making available inter-connection facility is the sole responsibility of the LTTCs.

(xiii) In addition to the above, due to law and order situation, certain parcels of private land in Tumkur and Ramanagra have remained inaccessible. Despite the District Collector notifying the rate payable as compensation, the local leaders did not allow access to the site. The Petitioner has been ready and willing to pay the compensation as determined by the District Collector.



However, the demand for compensation was akin to the market rate for sale and purchase of land in the area.

(xiv) The Petitioner had sought all possible assistance in relation to the issue and even sought police protection for the personnel and machinery of the Petitioner and its contractors. Correspondence in relation to issues in Tumkur and Ramanagara between the Petitioner and BESCOM has been furnished by the Petitioner.

(xv) The Petitioner further informed BESCOM that as soon as KIADB refused to grant permission for the original route, the Petitioner vide letter dated 26.5.2015 had submitted an application for approval of the revised alignment and permission to undertake works thereon. The Petitioner vide letter dated 24.11.2015 had informed BESCOM about the refusal of KIADB to grant approval for the original alignment of Element 2. The route plans had to be revised as per instructions of KIADB. Despite making all efforts in relation to such land, KIADB failed to grant approval for the same.

(xvi) The Petitioner vide its letter dated 21.12.2015 appraised the Lead LTTC, i.e. BESCOM about the problems being faced by the Petitioner in the completion of Elements 2 and 3 as a result of non-availability of KIADB land and further requested for extension of the Scheduled COD on day to day basis, in terms of Article 6.1.2 of the TSA. BESCOM vide letter dated 8.12.2015 addressed to KIADB had requested KIADB to resolve/sort out the Right of Way (ROW) issues on the Government land to enable the Petitioner to complete its scope of work in accordance with the TSA.

(xvii) It is evident that BESCOM had acknowledged that the completion of work was stalled only due to non-availability of land which had been notified by KIADB. However, BESCOM through its letter dated 30.1.2016 instead of agreeing to a revised COD, directed the Petitioner to approach this Commission and CEA for appropriate relief.

(xviii) CEA has at all times been kept informed about the difficulties faced by the Petitioner in relation to the project. CEA vide its letter dated 20.10.2015 requested KIADB to resolve/sort out the right of way issues in relation to construction of Elements 2 and 3 of the Project.

(xix) Ultimately, it is failure on the part of BESCOM, the lead LTTC, which had failed to extend the Scheduled COD without reasons or justification despite being aware that the Petitioner was not at fault. Despite the Petitioner having been granted approval under Section 164 of the Electricity Act, 2003, where it can enter upon land for the placing of electric lines or electrical plant for the transmission of electricity, but in terms of Section 10 of the Indian Telegraph Act, 1885, such power cannot be exercised qua land vested in the local authorities.



(xx) Therefore, the approval of the local authority which is vested with the powers for control and management of land is essential in the event the land vests in such local authority. In view of this, the Petitioner was unable to complete the portion of the Elements 2 and 3 which required access to land notified by KIADB.

(xi) The non-availability of interconnection facility, denial of approval for undertaking works on land notified by KIADB land and law and order issues in Tumkur and Ramanagra had a direct impact on the works in relation to Elements 2 and 3 of the Project. These reasons are beyond the control of the Petitioner. Accordingly, the Petitioner vide letter dated 21.12.2015 approached BESCOM and requested that Scheduled COD dates for Elements 2 and 3 be revised in the light of the hardship faced by the Petitioner.

(xii) In terms of Articles 4.4.2 and 4.4.3 read with Article 11 of the TSA, the Petitioner is entitled to a day for day extension in the event the Petitioner was prevented by an event of force majeure in performing its obligation to commission the elements by their respective commercial operation dates.

(xiii) The definition of force majeure is an inclusive definition and includes any event or combination of events which wholly or partially prevents or unavoidably delays the performance of obligations of an affected party in the TSA. Any event which is not covered within the exclusion of force majeure event identified under Article 11.4 and prevents or unavoidably delays the performance of a party in carrying out its obligation would be an event of force majeure. The reasons for which the works in relation to Elements 2 and 3 could not be completed were for factors beyond the control of the Petitioner which could not have been avoided by the Petitioner even after exercise of due care and compliance with prudent utility practices.

(xiv) The force majeure provision of the TSA incorporates principles of equity as no person should be penalized for failure to comply with the contractual obligations if they have taken all reasonable efforts to complete the works but are prevented by unforeseen reasons beyond their reasonable control. Judgment of the Hon'ble Supreme Court in Dhanrajamal Gobindram v Shamji Kalidas & Co (1961) 3 SCR 1020: AIR 1961 SC 1285 has been referred to.

(xv) The efforts made by the Petitioner in relation to complete entire works is not just undisputed but is established by the timely completion of the Element 1 of the Project. The occurrence of an event of force majeure and provisions of TSA mandating revision of the Scheduled COD are admitted and hence the Petitioner is entitled for day to day extension of SCOD. BESCOM vide letter dated 30.1.2016 did not dispute any of the contention of the Petitioner but instead of agreeing to a revision of the SCOD, directed the Petitioner to approach this Commission for appropriate relief.



(xxvi) Despite being fully aware of the events that caused the delay in construction of Elements 2 and 3 of the project, BESCOM vide letter dted 5.12.2016 claimed Liquidated Damages (LD) for delay in the completion of the project. In the said letter, BESCOM has alleged that there is a delay of 244 days in declaring COD of the project and therefore, the Petitioner has to pay LD to all the LTTCs in proportion as per TSA within 10 days failing which action will be initiated as per TSA i.e invoking Bank Guarantee. The said communication is illegal, unwarranted and abuse of dominant position of the Respondents and is without any basis with an attempt to unjustly enrich itself at the cost of the Petitioner.

(xxvii) The said communication of BESCOM is bad since it has inherent contradictions. While the first para of the said letter states that the construction of Elements 2 and 3 are still not complete, BESCOM computes that there has been a delay of 244 days in completion of construction of the project. Compensation for breach of contract can be awarded to the innocent party only in the event such party actually suffers a loss. Damages cannot be recovered to unjustly enrich from an alleged breach of a contract. Though BESCOM has admitted that the construction could not be completed due to ROW issues and yet it goes on to levy LD.

(xxviii) The said communication has been issued in a routine manner without taking into account the various correspondences from the Petitioner which remains undisputed. The Petitioner after great difficulty implemented the project and declared COD of each of the elements before the generating station for which the evacuation line has been commissioned. The project which was originally intended to evacuation line for the generating station was utilized to supply start up power to NTPC because of failure of BESCOM to complete the line which was to be developed by it. As a result of the delay in COD of the first unit, the implementation schedule of other two Elements was affected. Despite all hardships, the project was completed and vide letter dated 22.9.2016 all LTTCs including BESCOM were informed about the commissioning of the line.

(xxix) More than two months after the COD of the entire project, BESCOM had raised frivolous demand without giving details as (i) how the delay was calculated (ii) whether the demand has been taken by all LTTCs together in a meeting or by BESCOM acting alone in its capacity as Lead LTTC and (iii) whether the decision was taken after considering all the letters of the Petitioner. There is no explanation as to why the letter had not been marked to all LTTCs.

(xxx) Sections 73 and 74 of the Indian Contract Act, 1872 deal with the issue of compensation for breach of contract. Even assuming that the Petitioner has failed to complete the construction of the project as per scheduled COD, even then compensation can be claimed only if the LTTCs suffer any loss. Compensation cannot be claimed as a matter of routine and

cannot be a means to enrich a party to a contract. The Hon'ble Supreme Court in its judgment in Kailash Nath Associates v DDA (2015) 4 SCC 136 has discussed the law in relation to damages and laid down the law on compensation for breach of contract.

(xxxi) The right to claim LD for delay in completion of the project cannot be seen in isolation. The TSA has to be read as a whole. The entitlement of LDs in the event of delay in completion can be invoked only if the LTTCs have complied with their obligations under the TSA. The primacy reason for the delay was the non-availability of the inter-connection facility which is the sole responsibility of the Respondents. In addition to Article 4.2.1, the obligations of the LTTCs have been incorporated in various other provisions of the TSA (Article 5.1.3).

(xxxii) The impugned communication has been issued in haste without complying with the provisions of the TSA and is illegal and liable to be set aside and in the interim it cannot be given effect to and the respondents must be restrained from giving effect to the same. As per Article 6.5.2 of the TSA, the Petitioner is entitled to return of the Bank Guarantee within three months of the COD of the project. DOCO of Element 2 was achieved on 19.9.2016 and therefore the BGs should have been released on or before 19.12.2016. No prejudice will be caused to the Respondents upon release of the BGs.

9. Based on the above submissions, the Petitioner has sought for declaratory reliefs under the TSA dated 14.5.2013 on account of Force Majeure events affecting the commissioning of the Project. The Petitioner has made the following prayers:

- (a) *Admit the present petition;*
- (b) *declare that the Petitioner could not have commissioned the Project without the inter-connection facilities being made available by the LTTCs;*
- (c) *set aside the letter dated 5.12.2016 issued by BESCOM;*
- (d) *declare that the Petitioner is entitled to a day to day extension for each day's delay in non-availability of land notified by KIADB for the second element: and*
- (e) *direct return of the original bank guarantees furnished by the Petitioner.*
- (f) *pass such other and further orders/ directions as the Hon'ble Commission may deem appropriate in the facts and circumstances of the case.*

10. The Petitioner has also filed Interlocutory Application (IA No. 64/2016) praying for an ex-parte stay of operation of the communication of the BESCOM dated 5.12.2016 in terms of its submissions in the Petition.

11. The Petition was admitted on 29.12.2016 and notices in the Petition and IA were served on the Respondents. Thereafter, the matter was heard on 3.1.2017 and the Commission after hearing the parties, directed the Petitioner to place on record all the five letters referred to by BESCOM in its letter dated 5.12.2016. As regards the prayer of the Petitioner in the IA 64/2016, the Commission vide ROP dated 3.1.2017 directed the Petitioner to submit a BG of Rs 4.3 crore in favour of BESCOM (or the amount as may be calculated as LD by BESCOM for the delay) for a period of six months. The Commission also directed BESCOM not to encash the BG without permission of the Commission. Subject to this, the Commission directed BESCOM not to take any coercive action against the Petitioner in terms of its letter dated 5.12.2016. The IA was disposed of accordingly.

12. In compliance with the above directions of the Commission, the Petitioner vide affidavit dated 8.2.2017 has placed on record the letters referred to by BESCOM in its letter dated 5.12.2016. The Commission vide Record of Proceedings of the hearing dated 9.2.2017 directed the Petitioner to furnish documentary evidence in support of the reasons for the delay in the COD of Elements 2 and 3, as relied upon by the Petitioner. Reply in the matter has been filed by the Respondents, BESCOM and KSEBL and the Petitioner has filed its rejoinder to the same.

#### **Submissions of Respondents**

##### **BESCOM**

13. The Respondent No.1, BESCOM (the Lead LTTC) vide reply affidavit dated 21.4.2017 has objected to the submissions of the Petitioner mainly as under:

(a) Article 4.1 of the TSA deals with TSP's obligations in development of the project. As per Article 4.1 (c), the TSP shall at its own cost and expense observe, comply with, perform, undertake and be responsible for entering into a Connection Agreement with the CTU/STU (as applicable) in accordance with the Grid Code. Connection Agreement as per the TSA shall mean the agreement between the CTU/STU and the TSP, setting out the terms relating to the connection of the Project to the inter-connection facilities and use of the Inter-State Transmission System as per the provisions of the IEGC/State Grid Code, as the case may be. Therefore, it was the responsibility and obligation of the Petitioner to enter into Connection Agreement and undertake the work of connection of the Project to the inter-connection facilities.

(b) As per Regulation 2.5.3 of the IEGC Regulations, 2010, in case of Inter-State Transmission System, Central Transmission Utility shall be the nodal agency for Connectivity, long-term access and medium-term open access.

(b) The Respondent was in no way responsible for the commissioning of the project or inter-connection facilities and no liability can be foisted on it for payment of transmission charges for any failure of any other party under the TSA. Since the Petitioner had failed to achieve the commissioning as on SCOD, the Petitioner is liable to make good the losses suffered by the BESCOM and other LTTCs on account of its failure.

(c) In the matter of signing of connection agreements by all generators the Commission in its order dated 21.8.2012 in Petition No.169/SM/2012 had clarified that the Connection Agreement is a statutory requirement and has to be signed by all generators without any exception. It has also been directed in the said order that all generating companies whose generating stations were commissioned after 1.1.2010 to sign the connection agreements by 30.9.2012.

(d) Para E of Format Con-6 of draft Connection Agreement in detailed procedure connected with CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in Inter-State Transmission and Related Matters) Regulations, 2009 states that parties shall separately take up modalities for implementation of the works on mutually agreed terms and conditions. Thus, Format Con6 provides that agreement has to be entered into between Central Transmission Utility (CTU), Applicant Company and the inter-State Transmission Licensee. In the present case, NTPC, Kudgi is seeking connection as applicant to the inter-State Transmission system. The responsibilities of the three parties would be defined in the tripartite agreement. As provided in Para (E) of the agreement, penalties for non-completion of works in time by one party resulting in financial losses to the other party may be appropriately priced, as per mutual agreement, for indemnification of each other against losses incurred in this regard, and form part of this agreement. A perusal of the Tripartite Agreement makes it clear that there is no role of any LTTC in establishment of interconnection facilities required for commissioning of the project. The Respondents should not suffer financial implications on account of

failure of the Petitioner or others. The Respondent must be compensated for any delay in supply of electricity as per the terms of the TSA.

(e) PCKL had addressed a letter to CEA on 21.4.2016 (a) requesting the CTU and TSP to enter into connection Agreement, (b) applicable transmission charges shall not be levied on the beneficiaries; and (c) to conduct joint meeting with all LTTCs, NTPC, PGCIL, PCKL and the Petitioner.

(f) The certificate of energization for Elements 2 and 3 from CEA was not furnished to the LTTCs. Therefore, the submission of the Petitioner for deemed COD cannot be accepted. In Appeal No. 123/2011 (PSPCL V PGCIL) the Tribunal had held that the COD of the transmission line shall be achieved when the conditions namely (a) line has been charged successfully (b) the trial operation has been successfully carried out and (c) it is in regular service, are met.

(g) Article 4.2 of the TSA provides for LTTC obligations in implementation of the project. Article 4.2.1 (b) provides for arranging and making available the interconnection facilities to enable the TSP to connect the project. Accordingly, as per request of the Petitioner, BESCOM had written letter to PGCIL on 8.12.2015 and to the CEA on 3.5.2016 and 1.6.2016 requesting them to make arrangements to provide interconnection facilities to Element 2 and 3 respectively.

(h) The Commission vide its order dated 27.6.2016 in Petition No. 236/MP/2015 held that NTPC and PGCIL are liable to pay transmission charges for Element 1. As per Article 5.1.3 of the TSA, the TSP shall be responsible for obtaining all consents, clearances and permits. The role of LTTCs is only to assist and support the TSP in obtaining the same. Therefore, it was the responsibility of the Petitioner to clear issues pertaining to ROW. In so far as the role of LTTCs is concerned, BESCOM vide letter dated 8.12.2015 requested the CEO, KIADB to sort out ROW issues so that the transmission line could be completed well in time. As regards the non-availability of inter-connection facilities, BESCOM had written to PGCIL to provide interconnection facility and the delay on such account cannot be attributed to the Respondent/LTTC.

(i) As per Connection Agreement as detailed in procedures of CTU under Regulation 27 (1) of CERC (Grant of Connectivity, Long Term Access and Medium-Term Open Access in Inter-State Transmission and Related Matters) Regulations, 2009, the concerned parties (i.e CTU, Applicant and Inter-state Transmission Licensee) shall separately take up modalities for implementation of the works on mutually agreed terms and conditions. The scope of works, time schedule for completion of works including the time lines for the various milestones to be reached for completion of works (PERT chart) shall form an appendix to Connection agreement and shall form the basis for evaluating if the works by the parties is being executed in time. Penalties for non-completion of works in time by one party resulting in financial losses to the other party may

be appropriately priced as per mutual agreement for indemnification of each other against losses incurred in this regard, and form a part of this agreement.

(j) The submissions of the Petitioner as regards law and order problems are self-serving. The Petitioner has not substantiated or corroborated its statements with any supporting documents. The statement that correspondence between BESCOM and the Petitioner is produced as Annexure-J is false. The letters produced are not addressed to Respondent. It was the responsibility and obligation of the Petitioner to ensure that the work progressed in a smooth manner which the Petitioner failed to do.

(k) On receipt of letter of the Petitioner, the Respondent issued letter dated 8.12.2015 to KIADB requesting them to sort out ROW issues with a view to complete the transmission line in time. Citing the reason of ROW issues, the Petitioner sought for extension of time which was rejected by the Respondent stating that he should approach this Commission to seek appropriate reliefs. If the delay was caused due to reasons beyond the control of the Petitioner, then, in such an event, the Petitioner should have invoked the appropriate clause of the agreement which it has not done.

(l) The contention of ‘force majeure’ raised by the Petitioner cannot be accepted. Article 11.3 of the TSA lists out the events which are to be treated as force majeure events. A perusal of the same indicates that ROW issues do not constitute force majeure event under the terms of the TSA. Further, Article 11.5 of the TSA provides that 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 7 days after the date on which such party knew or should reasonably have known of the commencement of the event of force majeure. In this case, the Petitioner has not given the Respondent, notice of any force majeure event till date, much less within 7 days as stipulated. Such notice, as per the TSA, shall be a pre-condition to the affected party's entitlement to claim relief under the TSA. The terms of invocation of force majeure clause are to be complied with strictly, which the Petitioner has failed to do. In view of the same, the Respondent requested the Petitioner to approach this Commission for appropriate relief.

(m) As the Petitioner had failed to achieve commissioning of the project within the time stipulated, the Respondent issued letter dated 5.12.2016 claiming LD. The action of the Respondent is in accordance with the terms of the TSA entered into with the Petitioner. In order to decide COD, the Petitioner had to submit necessary approval letters from CEA which the Petitioner had failed to do. The submissions of Petitioner that the delay in declaration of COD of Element 1 affected the COD of the other two elements are not acceptable. The Petitioner was supposed to complete the project as per Schedule 3 of the TSA and the Petitioner was aware of the completion schedule of the project at the time of signing the TSA. The contention of the Petitioner that the project,

which was originally intended for the purpose of evacuation for the generating station was utilized to supply start up power to NTPC because of failure of BESCOM to complete the line, is untenable since the Respondent is a distribution licensee. It was envisaged by NTPC that KPTCL, which is the transmission licensee in the State of Karnataka should provide startup power. As this was delayed, the Petitioner agreed to provide startup power from Element 1 of the project. This is borne out from the MoM dated 29.5.2015 (meeting held on 24.4.2015) to review the progress of construction of transmission schemes wherein, the representative of the Petitioner suggested that due to delay in construction of 220kV line by KPTCL, their 400kV line Kudgi-Narendra (new) may be utilized for drawl of startup power.

(n) The Respondent has in accordance with Article 6.4 of the TSA, addressed letters to the Petitioner levying LD for delay in achieving COD of the project. As per Schedule 8 of the TSA, it is the right and obligation of the lead LTTC to communicate with the TSP on imposition of LD and as per Article 6.4 of the TSA, levy of LD has been communicated to the Petitioner. The letters written by the Petitioner do not supersede the terms of the contract and therefore the contention regarding various letters of the Petitioner is liable to be rejected.

(o) The averment that the LTTC can claim damages only if it has suffered a loss is untenable. The LTTCs and in turn its consumers have suffered immense loss due to the failure of the Petitioner to achieve COD of the project within the stipulated time as per the terms of TSA. If the transmission line was commissioned as per Schedule 3 of the TSA, the beneficiaries would have had the option of availability of the corridor for purchase of power from the Western Region, where the power is surplus. Due to the failure of the Petitioner to achieve COD as per the terms of the TSA, the beneficiaries have lost this opportunity. Thus, the action of the Respondent is strictly in accordance with the terms of the contract and provisions of law.

(p) As per Article 5.1.2 of the TSA, the TSP shall not be relieved from any of its obligations under the agreement or be entitled to any extension of time by reason of the unsuitability of the site or transmission line route(s) for whatever reasons. The TSP shall also not be entitled to any financial compensation in this regard. It is the responsibility of the TSP to obtain all consents, clearances and permits and the role of LTTCs is only to assist the TSP by providing letters of recommendation, which has been done by the Respondent.

(q) The Petitioner is entitled to return of BG only if it achieves COD within the timeframe stipulated in the contract. In this case, there is considerable delay by the Petitioner in achieving COD, which has caused substantial loss to the LTTCs, which the Respondent is entitled to recover. Moreover, to decide COD, the Petitioner had to submit necessary approval letters from CEA and as per directions of this Commission.

Accordingly, the Respondent, BESCOM has submitted that the relief sought for by the Petitioner is not in accordance with the terms of the TSA entered into with the LTTCs or the orders of the Commission or the law laid down by the Supreme Court and therefore, the Petition is liable to be dismissed.

#### **KSEBL**

14. The Respondent No.7, Kerala State Electricity Board Limited (KSEBL) vide its reply affidavit dated 28.1.2017 has mainly submitted the following:

(a) Any delay in commissioning new transmission lines and generating stations will adversely affect the power procurement plan of the beneficiaries which they plan in accordance with the scheduled commissioning dates of the projects. So it is the responsibility of the developer of the project to complete the project within the scheduled COD. Hence the developer of the project is liable to pay liquidated damages to the beneficiaries of the project for delay in achieving the scheduled COD as specified in the TSA entered into between the developer and beneficiaries.

(b) As per Article 6.4.1 of the TSA signed between the Petitioner and the LTTCs, the Petitioner is liable to pay liquidated damages to long term customers for not achieving the scheduled COD. Further, Article 6.5.1 of the TSA provides that if the TSP fails to achieve COD of any of the elements on their respective scheduled COD specified in this Agreement, subject to conditions mentioned in Article 4.4, the LTTCs shall have the right to encash the Contract Performance Guarantee (CPG) and appropriate in their favour as LD, an amount specified in Article 6.4.1, without prejudice to the other rights of the LTTCs under this Agreement. The Petitioner is liable to provide LD to all LTTCs in proportion to their respective allocation for the delay in commissioning of the project.

(c) It is not the sole responsibility of the LTTCs to make available the interconnection facilities. The Petitioner has failed to comply with the obligations of the TSP as per Article 4.1(e) & (g) of the TSA to enable the LTTCs to monitor and co-ordinate the development of the project matching with the interconnection facilities.

(d) The Petitioner has not provided progress reports on a monthly basis to the LTTCs. Further occurrence of events such as refusal of KIADB to approve route of Element 2 through their land, law and order issues etc., were not brought to the notice of the LTTCs in time. This shows the failure on the part of the Petitioner in performing its obligations as prescribed in the TSA.

(e) The allegation of the Petitioner that the delay in making available the interconnection facilities (made available to it only on 6.9.2016) resulted in the

uncontrollable delay of 9 months is not true. It is clear from the Petitioner's letter dated 27.5.2016 addressed to the Chief Secretary, Government of Karnataka that 10% of the works of the transmission system was still pending at KIADB area and some other locations due to compensation issues etc. Thus, the Petitioner could not have commissioned the project earlier even if the interconnection facilities were made available and hence the allegation of the Petitioner is baseless.

(f) As per Petitioner's letter dated 24.11.2015 addressed to BESCOM, the Petitioner had submitted the first proposal to KIADB authorities on 26.5.2015 which was rejected on 1.6.2015 citing reasons that the proposed route is passing through the plots already allotted by KIADB. Based on this revised proposal was submitted by the petitioner on 27.7.2015 to KIADB.

(g) The lead LTTC, BESCOM was informed of the matter only on 24.11.2015, i.e 6 months after the rejection of the proposal by KIADB. The Petitioner had sought the intervention of BESCOM to advise KIADB to grant approval at the earliest for commencement of construction work. The Petitioner's submission that BESCOM intervened in the matter to resolve the issues show that the lead LTTC had acted immediately when informed about the matter. Hence, it is clear that the laxity on the part of the Petitioner in timely intimating the LTTCs about the issues affected the progress of the project resulted in the undue delay in completing the works. Similarly the law and order problems were also not informed to the LTTCs in time. The Commission may not consider the request of the Petitioner to consider the reasons for delay as 'Force Majeure' as the Petitioner has failed to comply with the obligations under the TSA.

(h) Force majeure means any event or circumstances 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. In the present case, the delay in commissioning the line within the scheduled COD could have been avoided if the Petitioner had taken reasonable efforts to bring to the notice of the LTTCs the occurrence of such events in time and provided on timely basis relevant information with regard to the progress of the Project. Hence, the reason for delay of more than 8 months was not uncontrollable and hence cannot be considered as Force Majeure.

(i) The Petitioner has not issued notice to the LTTCs as provided under Article 11.5 of TSA. The notification of the Force Majeure event is a pre-condition to the affected party's entitlement to claim relief under TSA. Relief to the Petitioner under Force Majeure is subject to the condition as prescribed in Article 11.5.1 of the TSA. Hence, the primary requirement of issue of notice under this clause has not been complied with in the present case and the Petitioner is not entitled to claim any relief under the Force Majeure Clause of the TSA.

(j) Further, as per Article 11.6 of the TSA, the affected party is expected to use its reasonable efforts to mitigate the effect of such Force Majeure event. Hence, the Petitioner was expected to use its reasonable efforts to follow up with the LTTCs enabling them to intervene to assist the Petitioner to resolve the issues affecting the progress of the project. The Petitioner has failed to perform its obligations in the instant case.

(k) It can be concluded that the delay occurred due to negligence or omissions on the part of the Petitioner in bringing to the notice of the LTTCs of the occurrence of the events as prescribed in the TSA and hence cannot be considered as Force Majeure events. The Petitioner is liable to pay LD to the LTTCs for the delay.

Accordingly, KSEBL has prayed that the Petition may be dismissed and the LTTCs of the project including KSEBL, may be allowed to claim LD from the Petitioner in proportion to their respective allocations.

#### **Rejoinder of Petitioner**

15. The Petitioner vide its rejoinder affidavit dated 2.1.2018 has mainly reiterated its submissions made in the Petition. It has however submitted that entering into connection agreement is not relevant for adjudication of the issues in the present Petition. Moreover, there is no privity of contract between the Petitioner and PGCIL in connection with making available the inter-connection facilities and merely because the third party was required to develop the facility cannot be a ground for absolving the Respondents of their liability under the TSA. Referring to the judgment of the Hon'ble Supreme Court in Badat vs East India Trading Co (AIR 1964 SC 538), the Petitioner has submitted that specific pleadings have to be given specific reply and bald denial of pleadings amounts to admission. The Petitioner has reiterated that force majeure under the TSA is an inclusive definition including all such events and circumstances and merely because any head is not mentioned expressly as an example of force majeure event, cannot be interpreted to mean that ROW issue cannot be a force majeure event. As regards notice to the other party with regard to the Force Majeure event in terms of

Article 11.5 of the TSA, the Petitioner has clarified that it could not send letter within 7 days as the same was not reasonably practical, but wrote to the Respondent, BESCOM as soon as it was in a position to do so. With regards to breach of contract and claim for damages, the Petitioner has referred to Sections 73 and 74 of the Indian Contract Act and the various judgments of the Hon'ble Supreme Court and submitted that LD would not be payable till the time actual loss is proved by the party claiming breach of contract. Even if actual loss is impossible of being proved, then also loss must be established and proof of actual quantification may be dispensed with. Accordingly, the Petitioner has contended that the Respondents have failed to demonstrate any prejudice caused to them as a result of the delay and hence the Petition may be allowed and the BGs may be immediately released and the LTTCs may be directed to bear the costs of maintaining the BGs after the date of their expiry in terms of the TSA.

16. Thereafter, the matter was heard on 3.5.2018 and the Commission vide ROP of the directed the listing of this Petition along with Petition No. 210/MP/2017 filed by the Petitioner (for revision of the quoted transmission tariff payable to it in terms of the Transmission Services Agreement (TSA) for various events occurring after the Bid due date). Subsequently, this Petition was heard on 25.7.2018 and the Commission after directing the parties to file their written submissions, reserved its order in the Petition. In terms of the above directions, BESCOM vide affidavit dated 10.8.2018 and the Petitioner by affidavit dated 23.8.2018 have filed their written submissions.

#### **Written submissions of BESCOM**

17. BESCOM in its written submissions dated 10.8.2018 has mainly reiterated the submissions made in its reply. It has however submitted that the Petitioner has failed to execute the Connection Agreement as per Article 4.1(c) of the TSA and in

terms of the CERC Connectivity Regulations, 2009 and the detailed procedure thereof. It has pointed out that in terms of Articles 4.1(a) and 5.1.3 of the TSA, it was the responsibility of the Petitioner to carry out the survey and finalize the route and pay compensation to land owners and clear the issues pertaining to ROW. The Respondent has further submitted that the Petitioner for the first time had sought approval of KIADB to put up line and towers with regard to Element 2 in KIADB's land in Tumkur District, Karnataka. After KIADB vide letter dated 1.6.2015 proposed alternate route, the Petitioner had submitted revised route plan with KIADB on 27.7.2015, 9.9.2015 and 5.11.2015. Thereafter, KIADB directed the Petitioner to stop erecting towers and drawing lines on its land as the Petitioner had not paid compensation towards use of the land. Thus, the delay has been caused due to the Petitioner not adhering to the directions of KIADB and due to frequent changes in the alignment suggested by the Petitioner. The entire problem is due to the Petitioner not conducting survey and not approaching KIADB in good time. The Respondent has submitted that the Petitioner is entitled to extension of scheduled COD in cases of default by the Respondent and force majeure events and since the delay is attributable to the Petitioner, the Petitioner is not entitled for extension of SCOD. The Respondent while stating that no reliance can be made on the letters enclosed by the Petitioner in Annexure-J with regard to law & order problems in Tumkur etc., as the same is unauthenticated, it has submitted that even if these letters are relied upon, it would reveal that the Petitioner had approached the authorities after the SCOD. Referring to the judgment of the Hon'ble Supreme Court in Construction and Design Services V DDA (2015 14 SCC 263), the Respondent has submitted that in cases of public utility projects, it is presumed that delay in execution of project has resulted in loss. The Respondent being a public limited company, the Petitioner having executed the project

belatedly, is liable to pay LD as per provisions of the TSA. Accordingly, the Respondent has prayed that the Petition may be dismissed.

**Written submissions of Petitioner**

18. The Petitioner in its written submissions dated 23.8.2018 has reiterated its submissions made in the Petition and in its rejoinder. It has however clarified that in accordance with Article 6 of the TSA, the TSP is required to give advance notice of not less than 60 days of the date on which it proposes to connect any element with the interconnection facilities and hence it is obvious that such facility must be ready and made available to the TSP much earlier to enable to plan its construction activities. In terms of Article 6.1.2 of the TSA, any extension of date of connection due to any reason including failure to arrange for interconnection facilities leads to day to day deferment of SCOD. As regards law & order situation, the Petitioner has stated that the High Court of Karnataka, Dharwad Bench and the District Munsif Court had issued ex-parte interim injunction orders against the Petitioner based on petitions filed by landowners and as a result, the Petitioner was refrained from carrying out any work at respective sites. The Petitioner has further stated that the delay in grant of permission by KIADB, an instrumentality of the State, is for reasons beyond the control of the Petitioner and this constitutes a ‘force majeure’ event. The Petitioner has stated that there was no power flow even when the lines were ready and under commercial operation and hence there is no question of any loss suffered by the LTTCs. Accordingly, the Petitioner has prayed that the Petition may be allowed and the reliefs prayed for may be granted.

19. Since order in the Petition could not be passed prior to one Member of the Commission who heard the matter demitting office, the Petition was listed for hearing on 23.10.2018. During the hearing, the learned counsels for the Petitioner

and the Respondents submitted that since the Commission has already heard the matter and issued detailed ROP, no further arguments were required and order may be passed based on the submissions of the parties and the documents available on record. Accordingly, the Commission reserved its order in the Petition.

### **Analysis and Decision**

20. Based on the submissions of the parties and the documents available on record, the following issues emerge for consideration:

- A. **Issue No.1:** Whether the provisions of the TSA dated 14.5.2013 with regard to notice has been complied with?
- B. **Issue No.2:** Whether the claims of the Petitioner under Force Majeure events are admissible?
- C. **Issue No.3:** What reliefs should be granted to the Petitioner in the light of the answer to the above issues?

#### **Issue No.1: Whether the provisions of the TSA dated 14.5.2013 with regard to notice has been complied with?**

21. The Petitioner has claimed relief under Article 11(Force Majeure) of the TSA. Article 11.5.1 of the TSA provides 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.”*

22. Under Article 11.5.1 of the TSA, an 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 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 shall be a pre-condition to the affected party's entitlement to claim relief under the TSA.

23. The Petitioner vide its letter dated 16.11.2015 had informed BESCOM i.e the Lead LTT and all other LTTCs about the non-availability of the interconnection facilities required for completion of the Project to be made ready by PGCIL. Thereafter, the Petitioner, by letter dated 24.11.2015 intimated BESCOM and all other LTTCs about the refusal of KIADB to grant approval for the original alignment of Element 2 and to advise KIADB authorities to issue approval for commencement of construction. Further, the Petitioner by letter dated 21.12.2015 referred to the above said letters and intimated the BESCOM and other LTTCs about the problems faced by the petitioner in completion of Elements 2 and 3 as a result of non-availability of KIADB land and requested to extend the SCOD of Elements 2 and 3 on 'day to day' basis in terms of Article 6.1.2 of the TSA due to non-availability of inter-connection facilities to match the SCOD of these elements and to extend the SCOD of Element 2 by 180 days due to force majeure condition due to delay in approval by KIADB for Element 2 passing through KIADB land as per Article 4.4.2 of the TSA. In response, BESCOM vide separate letters dated 8.12.2015 had requested PGCIL to provide interconnection facilities for Elements 2 & 3 and had also requested the CEO, KIADB to sort out the Right of Way issues, so that the Petitioner can achieve COD of both the elements as per schedule. Subsequently, BESCOM vide letter dated 30.1.2016 requested the Petitioner to (i) approach the Central Commission for approval of force majeure condition and for extension of

COD and (ii) to approach the CEA for conduct of a joint meeting of the Petitioner with NTPC, PGCIL and all LTTCs to discuss the Project status, Right of Way issues and extension of the SCOD. Thereafter, BESCOM vide its letter dated 5.12.2016 had requested the Petitioner to pay LD to all the LTTCs in proportion to their share as per TSA considering a delay of 244 days from the scheduled COD of Elements 2 and 3 of 31.12.2015. Based on the above, the Petitioner has approached the Commission by filing the present Petition with the prayers as aforesaid. In our view, the Petitioner has complied with the requirement of prior notice to the LTTCs regarding the occurrence of the force majeure events leading to the delay in completion of the elements 2 and 3, before approaching this Commission through this Petition.

**Issue No.2: Whether the claims of the Petitioner under Force Majeure events are admissible?**

24. The provisions of the TSA dated 14.5.2013 with regard to ‘Force Majeure’ are extracted hereunder:

**“11. FORCE MAJEURE**

**11.1 Definitions**

**11.1.1** *The following terms shall have the meanings given hereunder.*

**11.2 Affected Party**

**11.2.1** *An Affected Party means any of the Long Term Transmission Customers or the TSP whose performance has been affected by an event of Force Majeure.*

**11.2.2** *An event of Force Majeure affecting the CTU/STU, or any agent of the Long Term Transmission Customers, which has affected the Interconnection Facilities, shall be deemed to be an event of Force Majeure affecting the Long Term Transmission Customers.*

**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 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 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*
- *radioactive 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.

#### **11.6 Duty to perform and duty to mitigate**

*To the extent not prevented by a Force Majeure Event, the Affected Party shall continue to perform its obligations as provided in this Agreement. The Affected Party shall use its reasonable efforts to mitigate the effect of any event of Force Majeure as soon as practicable.*

#### **11.7 Available Relief for a Force Majeure Event Subject to this Article 11**

*(a) No Party shall be in breach of its obligations pursuant to this Agreement except to the extent TSA for Selection of Transmission Service Provider for that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;*

*(b) Every Party shall be entitled to claim relief for a Force Majeure Event affecting its performance in relation to its obligations under this Agreement.*

*(c) For the avoidance of doubt, it is clarified that the computation of Availability of the Element(s) under outage due to Force Majeure Event, as per Article 11.3 affecting the TSP shall be as per Central Electricity Regulatory Commission (Terms & Conditions for Determination of Tariff) Regulations 2009 and related amendments from time to time, as applicable seven (7) days prior to the Bid Deadline. For the event(s) for which the Element(s) is/are deemed to be available as per Central Electricity Regulatory Commission (Terms and Conditions) Regulations for Order.*

*(d) For so long as the TSP is claiming relief due to any Force Majeure Event under this Agreement, the Lead Long Term Transmission Customer may, from time to time on one (1) day notice, inspect the Project and the TSP shall provide the Lead Long Term Transmission Customer's personnel with access to the Project to carry out such inspections, subject to the Lead Long Term Transmission Customer's personnel complying with all reasonable safety precautions and standards."*

25. "Force Majeure" has been defined as any event or circumstance or combination of events and circumstances that wholly or partly prevents or unavoidably delays an affected party in the performance of its obligations under the TSA, 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. Force Majeure also includes Natural Force Majeure under Force Majeure Exclusions unless they are results of force majeure events. Further, the definition of force majeure provides that the affected party is

entitled to the protection of force majeure to the extent the events or circumstances are not within the reasonable control of the affected party.

In the light of the provisions of force majeure, the claims of the Petitioner have been examined. The Petitioner has submitted that the construction of Elements 2 and 3 were delayed for the following reasons which according to it, were beyond its control:

- (A) *Non-availability of Interconnection facility for Elements 2 and 3;*
- (B) *Right of Way issues at various villages comprised in Bellari Bijapur, Chitradurga, Koppak, Tumkur and Ramanagara District;*
- (C) *Law and Order issues at Bijapur, Ballari, Tumkur and Ramanagara Districts.*
- (D) *Delay in obtaining Right of Way from the landowners for lands claimed by KIADB as notified land for acquisition*

**A. Non-availability of Interconnection facilities for Elements 2 and 3**

26. The Petitioner has submitted that Elements 2 and 3 were required to be completed by 31.12.2015 (about 10 months after the original completion date of Element 1). The Petitioner has also submitted that in addition to the delay in declaration of COD and non-payment of tariff for Element 1 and the impact it had on the construction schedule of Elements 2 and 3, the non-availability of Interconnection facilities for Element 2 and 3 had forced the delay in declaration of COD of the Elements 2 and 3 and hence not attributable to the Petitioner. The Petitioner has further submitted that it had informed BESCOM, the Lead LTTC vide letter dated 16.11.2015 about the non-availability of interconnection facilities being made available by PGCIL which was required for completion of Elements 2 and 3. It has stated that due to non-availability of interconnection facilities, inspection by CEA was delayed and the decision for charging 765 kV line on 400 kV led to indecisiveness as to the bay on which the lines were to be terminated and these impacted the COD of the elements. The Petitioner has also stated that as per provisions of Article 4.2 of the TSA, making interconnection facility is the sole

responsibility of the LTTCs and hence the delay due to default of LTTC cannot be attributable to the Petitioner. The Petitioner has further stated that the interconnection facilities were made available only on 6.9.2016 and therefore there was an uncontrollable delay of 9 months in the declaration of COD the elements.

27. The Respondent, BESCOM has submitted that in terms of Article 4.1(c) of the TSA, it was the responsibility and obligation of the Petitioner to enter into connection agreement and undertake the work of connection of the Project to the inter-connection facilities. The Respondent has also submitted that it was in no way responsible for commissioning the Project or interconnection facilities and no liability can be foisted on it for payment of transmission charges for any failure of any other party under the TSA. It has further submitted that as per request of the Petitioner, the Respondent has written letter to PGCIL on 8.12.2015 and to CEA on 3.5.2016 & 1.6.2016 requesting them to make arrangements to provide interconnection facilities to Element 2 and 3. Since the Petitioner has failed to achieve commissioning as on SCOD, the Petitioner is liable to make good the losses suffered by the Respondent and other LTTCs on account of its failure.

28. The Respondent, KSEBL submitted that it is not the sole responsibility of LTTCs to make available the interconnection facilities. It has also submitted that the Petitioner has failed to comply with the obligations of the TSP as per Article 4.1(e) & (g) of the TSA to enable the LTTCs to monitor and co-ordinate the development of the Project matching with the interconnection facilities. The Respondent has submitted that 10% of the works of the transmission system was still pending at KIADB area and some other locations due to compensation issues and hence the Petitioner could not have commissioned the Project earlier even if the interconnection facilities were made available.



29. We have considered the submissions of the Petitioner and the Respondents.

The Project was proposed to be developed as evacuation facility for NTPCs Kudgi TPS (3 x 800 MW Phase-I) and involves the development of the following transmission elements:

Sl No	Elements	Scope of work	Construction period
1	Element -1	2 Nos 400 kV Double Circuit Transmission Line-Kudgi TPS to Narendra (New)	18 months from the effective date
2	Element -2	765 kV D/C TL Narendra (New) to Madhugiri	28 months from the effective date
3	Element -3	400 kV D/C TL Madhugiri to Bidadi	28 months from the effective date

30. The details of the inter-connection facilities required to be developed prior to the commissioning of the elements of the transmission Project are as under:

Sl No	Name of the Agency	Interconnection facility
1	NTPC Kudgi Power Plant (3 x 800MW)	400 kV Bays allotted to KTL for connecting Element 1
2	Power Grid Corporation of India Limited ("PGCIL")	Narendra (New) 765/400 kV Pooling station-Respective bays allotted to KTL for connecting Element 1
3	PGCIL	1 no. Multi Circuit Tower for terminating 2 circuits (second 400 kV D/C line) of Element 1

Elements	Name of the Agency	Interconnection facility
Element-2	PGCIL	Narendra (New) 765/400 kV Pooling Station-Respective bays allotted to KTL for connecting Element 2
Element-2		Madhugiri 765/400 kV Pooling Station-Respective bays allotted to KTL for connecting Element 2
Element-3	PGCIL	Madhugiri 765/400 kV Pooling Station-Respective bays allotted to KTL for connecting Element 3
Element-3		Bidadi 400 kV Pooling Station-Respective bays allotted to KTL for connecting Element 3

31. Article 2 of the TSA defines the Effective Date as under:

**“2.1 Effective Date**

*This agreement shall be effective from later of the dates of the following events:*

- (a) *The agreement is executed and delivered by the Parties; and*
- (b) *The selected Bidder has acquired for the Acquisition Price one hundred percent (100%) of the equity shareholding of REC Transmission Projects Company Ltd. in Kudgi Transmission Limited along with all its related assets and liabilities as per the provisions of the Share Purchase Agreement and*
- (c) *The Selected Bidder on behalf of the TSP has provided the Contract Performance Guarantee, as per terms of Article 3.1 of this agreement.*

32. As per the said provisions, the TSA would be effective from the date of execution of TSA, successful bidder acquired the TSP as its fully owned subsidiary and successful bidder provided Contract Performance Guarantee whichever is later. It is noted that the TSA was entered into between the parties on 14.5.2013. LTIDPL acquired KTL as its fully owned subsidiary on 30.8.2013. Therefore, the effective date for implementation of the project is 30.8.2013.

33. Scheduled COD has been defined as under:

*“Scheduled COD” in relation to an Element(s) shall mean the date(s) as mentioned in Schedule 3 as against such Element(s) and in relation to the Project, shall mean the date as mentioned in Schedule 3 as against such Project, subject to the provisions of Article 4.4 of this Agreement, or such date as may be mutually agreed among the Parties.”*

34. Scheduled COD has been given in Schedule 3 of the TSA with overall SCOD as 28 months from the effective date. As per schedule 3 of the TSA, the first element of the project was contemplated to be completed within a period of 18 months and other two elements (Elements 2 and 3) were contemplated to be completed within a period of 28 months. Therefore, the Scheduled COD of the project was 28.2.2015 and 31.12.2015. The Petitioner completed the entire scope of work for the first element on 27.3.2015 and due to non-availability of inter-connection facility required to be developed by NTPC and PGCIL, it could not test and charge the same. However, based on CEA letter dated 28.7.2015, the Petitioner had

declared deemed COD of Element 1 from 4.8.2015 in terms of the provisions of the Article 6.2.2 of the TSA i.e., 7 days after the energisation of the transmission lines. Accordingly, the Commission by order dated 27.6.2016 in Petition No. 236/MP/2015 approved the deemed COD of Element 1 as 4.8.2015. Though the Petitioner in this Petition has submitted that the delay in declaration of COD of Element 1 had impacted the delay in declaration of COD of Elements 2 and 3, no justification has been furnished by the Petitioner in support of the same.

35. Article 4.1 and 4.2 of the TSA provides as under:

**“Article 4 Development of the Project**

**4.1 TSP’s obligations in development of the project:**

*Subject to the terms and conditions of this Agreement, the TSP at its own cost and expense shall observe, comply with perform, undertake and be responsible:*

*a. for procuring and maintain in full force and effect all Consents, Clearances and permits, required in accordance with Law for development of the Project:*

*b. for financing, constructing, owning and commissioning each of the Element of the Project for the scope of work set out in Schedule 2 of this Agreement in accordance with:*

*i. the Grid Code, the grid connectivity standards applicable to the Transmission Line and the sub-station as per the Central Electricity Authority (Technical for Connectivity to the Grid) Regulations, 2007, Central Electricity Authority (Technical Standards for Constructions for Construction of Electrical Plants and Electric Lines) Regulations, 2010, Central Electricity Authority (Grid Standards) Regulations, 2010 and as amended from time to time and following Regulations as and when notified by CEA:*

- Central Electricity Authority (Safety requirements for construction, operation and maintenance of electrical plants and electric lines) Regulations, 2008*

- Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations, 2007*

*ii. Prudent Utility Practices and the Law:*

xxxxxx

*c. for entering into a Connection Agreement with the CTU/STU (as applicable) in accordance with the Grid Code.*

xxxxxx

*e. to co-ordinate and liaise with concerned agencies and provide on a timely basis relevant information with regard to the specifications of the project that may be required for interconnecting the project with the Interconnection Facilities;*



xxxxxx

g. to provide to the Long Term Transmission Customers with a copy to CEA, on a monthly basis, progress reports with regard to the Project and the execution (in accordance with Agreed Form) to enable the Long Term Transmission Customers/CEA to monitor and co-ordinate the development of the Project matching with the Interconnection Facilities.

h. to comply with all its obligations undertaken in its Agreement.

**4.2 Long Term Transmission Customers' obligations in implementation of the Project:**

4.2.1 Subject to the terms and conditions of this Agreement, Long Term Transmission Customers, at their own cost and expense, undertake to be responsible:

a. for assisting and supporting the TSP in obtaining the Consents, Clearances and Permits required for the Project and in obtaining any applicable concessions for the Project, by providing letters of recommendation to the concerned Indian Governmental Instrumentality, as may be requested by the TSP from time to time;

b. for arranging and making available the Interconnection Facilities to enable the TSP to connect the Project;

c. for complying with all their obligations under this Agreement, and

xxxx

36. Article 4.1 of the TSA deals with TSPs obligations in the development of the Project. In terms of the Article 4.1(c), the TSP, at its own cost and expense, observe, perform, comply with, perform, undertake and be responsible for entering into Connection Agreement with the CTU/STU (as applicable), in accordance with the Grid Code. Article 4.2 of the TSA provides for the LTTCs obligations in implementation of the Project, which includes the arranging and making available the interconnection facilities to enable the TSP to connect to the Project. The Petitioner has stated that though the SCOD of Elements 2 and 3 were 31.12.2015, the interconnection facilities required for Elements 2 and 3 were made available by PGCIL only on 6.9.2016 and 28.7.2016 respectively. Article 6.1.2 of TSA dealing with connection with the inter-connection facilities provides as under:

*“6.1.2 The RLDC/SLDC (as the case may be) or the CTU/STU (as the case may be) of the Lead Long Term Transmission Customer may, for reasonable cause, including failure to arrange for interconnection Facilities as per Article 4.2 defer the connection for up to fifteen (15) days from the date notified by the TSP*

*pursuant to Article 6.1.1 if it notifies to the TSP in writing, before the date of connection, of the reason for the deferral and when the connection is to be rescheduled. However, no such deferment on one or more occasions would be more than an aggregate period of 30 days. Further, the Scheduled COD would be extended as required, for all such deferments on day for day basis.*

*6.1.3 Subject to Articles 6.1.1 and 6.1.2, any Element of Project may be connected with the Interconnection Facilities when:*

*(a) it has been completed in accordance with this Agreement and the Connection Agreement;*

*(b) it meets the Grid Code, Central Electricity Authority (Technical Standards for Connectivity to the Grid) Regulations, 2007 and all other Indian legal requirements and*

*(c) The TSP has obtained the approval in writing of the Electrical Inspector certifying that the Element is ready from the point of view of safety of supply and can be connected with the Interconnection Facilities.”*

37. Further, Article 6.2.1 of the TSA provides as under:

*“6.2.1 An Element of the Project shall be declared to have achieved COD seventy two (72) hours following the connection of the Element with the Interconnection Facilities or seven (7) days after the date on which it is declared by the TSP to be ready for charging but is not able to be charged for reasons not attributable to the TSP or seven (7) days after the date of deferment, if any, pursuant to Article 6.1.2.*

*Provided that an Element shall be declared to have achieved COD only after all the Element(s), if any, which are pre-required to have achieved COD as defined in Schedule 3 of this Agreement, have been declared to have achieved their respective COD.*

*6.2.2 Once any Element of the Project has been declared to have achieved deemed COD as per Article 6.2.1 above, such Element of the Project shall be deemed to have Availability equal to the Target Availability till the actual charging of the Element and to this extent, shall be eligible for payment of the Monthly Transmission Charges applicable for such Element.”*

38. As per the above said provisions, an element of the project shall be declared to have achieved COD 72 hours following the connection of the element with the interconnection facilities or 7 days after the date on which it is declared by the TSP to be ready for charging, but is not able to be charged for reasons not attributable to the TSP. Once the element is declared to have achieved the deemed CoD in terms of Article 6.2.1 of the TSA, such element shall be deemed to be availability equal to target availability till the actual charging of the element and is entitled to payment of monthly transmission charges applicable to such element. In the present case, the Petitioner in terms of Article 6.1.2 had

intimated BESCOM vide letter dated 21.12.2015 about the non-availability of interconnection facilities required for completion of Elements 2 and 3 and the delay in approval by KIADB for commencement of construction activity of Element 2 in KIADB area and accordingly sought the extension of SCOD (from 31.12.2015) of the said Elements by BESCOM and other LTTCs. However, neither the CTU nor the LTTCs took any action for deferment of SCOD on account of non-availability of inter-connection facility. Thus, the Petitioner was not in a position to declare the COD of Elements 2 and 3 within the SCOD i.e 31.12.2015 as the construction works were not completed. In our view, even in the absence of any inter-connection facilities, the Petitioner could have declared deemed COD of elements 2 and 3 in accordance with Article 6.2.1 of the TSA, in case these elements were ready and available for charging by 31.12.2015. Having not done so, the Petitioner cannot plead that the delay in completion of the project is on account of the non-availability of inter-connection facilities by PGCIL. In this background, we hold that the non-availability of inter-connection facilities cannot be considered as a ‘force majeure event’ as claimed by the Petitioner. The prayer of the Petitioner on this ground is therefore rejected.

39. It is however noticed that the Petitioner vide letter dated 5.7.2016 informed all the LTTCs that construction work of Element 3 (400 kV D/C TL Madhugiri to Bidadi) had been completed and the said line was ready for charging. The Petitioner also informed that since CEA had approved the energisation of the said line on 4.7.2016, it shall declare deemed COD of Element 3, seven days after the date of the said notice, in the absence of the inter-connection facilities, in accordance with Article 6.2.1 of the TSA. The relevant portion of the letter dated 5.7.2016 is extracted hereunder:

To,  
The Managing Director  
BESCOM, KR Circle, Bangalore  
Karnataka State

Dear Sir,

*Sub: Kudgi Transmission Limited- Notice on the readiness of 400 kV Double Circuit (Quad) Madhugiri-Bidadi Transmission line for Charging-reg.*

*Ref1: Our letter no. KTL-LTTC:2016-17:012 dated 10.5.2016*

*Ref2: Approval for energization from CEA (Ref no. CAE/4/EI/INSP/2015/dated: 4.7.2016)*

xxxxxxxxxxxxxx

*We would like to inform you that the construction works for the 400 kV Double Circuit (Quad) Madhugiri-Bidadi Transmission line are completed however since the inter-connection facilities at Bidadi sub-station is not made ready by PGCIL till date, the subject line cannot be charged and any delay in this regard shall not be attributable to KTL.*

*Further, we are glad to inform that the Electrical Inspectorate, Central Electricity Authority (CEA) has inspected the 400 kV Double Circuit (Quad) Madhugiri-Bidadi Transmission line and certified the completion of works under the scope of Kudgi Transmission Limited (KTL). Electrical Inspectorate, CEA has not issued the 'Approval for Energization'. Approval copy from CEA is attached for your reference.*

xxxxxxxxxxxxxx

*In view of the above clauses your support is solicited in advising PGCIL for providing the inter-connection facilities for Element 3 of the Kudgi project (400 kV Double Circuit (Quad) Madhugiri-Bidadi Transmission line) at the earliest falling which KTL shall be entitled to declare deemed COD 7 (seven) days for Element 3 of Kudgi project from the date of this notice.*

*Thanking you*

*Yours faithfully  
For Kudgi Transmission Limited*

*(P G Suresh Kumar)  
Director”*

40. Similarly, the Petitioner vide letter dated 12.9.2016 informed all the LTTCs that the construction works of Element 2 (765 kV D/C Narendra (new) to Madhugiri) had been completed and the said line was ready for charging. The Petitioner also informed that since CEA had approved the energisation of the said line on 10.9.2016, it shall declare deemed COD of Element 3, seven days after the date of the said notice, in the absence of the inter-connection facilities, in accordance with Article 6.2.1 of the TSA. The relevant portion of the letter dated 12.9.2016 is extracted hereunder:

“To,  
The Managing Director  
BESCOM, KR Circle, Bangalore  
Karnataka State

Dear Sir,

*Sub: Kudgi Transmission Limited- Notice on the readiness of 765 kV Double Circuit (Hex) Narendra (New) - Madhugiri Transmission line for Charging-reg.*

*Ref2: Approval for energization from CEA (Ref no. CAE/3/EI/INSP/2016/dated: 10.9.2016)*

xxxxx

*We would like to inform you that the construction works for the 765 kV Double Circuit (Hex) Narendra (New) - Madhugiri Transmission line are completed in all respect and is ready for energization.*

*Further, we are glad to inform that the Electrical Inspectorate, Central Electricity Authority (CEA) has inspected the 765 kV Double Circuit (Hex) Madhugiri-Bidadi Transmission line and certified the completion of works under the scope of Kudgi Transmission Limited (KTL). Electrical Inspectorate, CEA has not issued the ‘Approval for Energization’. Approval copy from CEA is attached for your reference.*

xxxxxxxxxxxx

*We once again request you to make the charging facilities available at the earliest. In view of the above clauses, in the absence of the interconnection facilities for energization Element 2 of the Kudgi Project (765 kV Double Circuit (Hex) Narendra (New) - Madhugiri Transmission line) shall be entitled to declared to achieve deemed COD 7 (seven) days after the date of this notice.*

*Thanking you*

*Yours faithfully  
For Kudgi Transmission Limited*

*(P G Suresh Kumar)  
Director”*

41. Thereafter, the Petitioner declared the deemed COD of Element 2 on 19.9.2016 and Element 3 on 13.7.2016 after completion of mandatory seven days period in terms of Article 6.2.1 of the TSA and vide letters dated 19.9.2016 and 27.7.2016 informed all the LTTCs about deemed COD of Elements 2 and 3 respectively. In our view, the Petitioner has complied with the provisions of the TSA while declaring the deemed CoD of Elements 2 and 3 as above. Accordingly, in terms of the TSA, the Petitioner is entitled for payment of monthly transmission charges with the deemed availability equivalent to target availability, till the element is actually charged and put to use.

## **B & C. Law and Order & Right of Way (ROW) issues**

42. In addition to the above, the force majeure events relied upon by the Petitioner in clause B & C of para 8 (xi) above viz., Law & Order and ROW issues at various villages of Bellari, Bijapur, Chitradurga,,Koppak Tumkur and Ramanagara District as justification for the delay in declaration of COD of Elements 2 and 3 are examined together in the subsequent paragraphs.

43. The Petitioner has submitted that certain parcels of private land in the districts of Tumkur and Ramanagara have remained inaccessible due to law and order situation. It has submitted that despite the District Collector notifying the rates payable as compensation, the local leaders did not allow access to the site. The Petitioner has submitted that it was ready and willing to pay the compensation as determined by the District Collector. However, the demand for compensation was akin to the market rate for sale and purchase of land in the area. The Petitioner has stated that it sought all possible assistance in relation to the issue and even sought Police protection for the Personnel and Machinery of the Petitioner and its contractors. The Petitioner has further submitted that it had been keeping the LTTCs informed of on the ground situation and law and order issues faced by it and the contractors at site and in many districts and villages and had to request police intervention in various locations including but not limited to Bijapur district, Bellary district, Hagari Bommanahalli Taluk, Tumkur district and Ramanagara district. The Petitioner has submitted that it was unable to move forward in accordance with the timelines for SCOD as the time taken for Right of Way either by legal process/police intervention or by negotiation has been time consuming. The Petitioner has further stated that the Hon'ble High Court of Karnataka, Dharwad Bench and the District Munsiff Court, Hagari Bommanahalli had issued ex-parte interim injunction orders against the Petitioner based on petitions

filed by landowners, as a result of which the Petitioner was unable to complete the works within the SCOD of the project i.e 31.12.2015. Accordingly, the Petitioner has submitted that the orders of the Court and the works being kept in abeyance clearly evidences that the force majeure situations had made it impossible for the Petitioner to complete the project within the time lines. The Petitioner has furnished copies of orders of the Court and the correspondences addressed to various authorities requesting police protection and support from local authorities in compliance with the directions of the Commission.

44. The Respondent, KSEBL has submitted that the laxity on the part of the Petitioner in timely intimating the LTTCs about the issues, affected the progress of the project resulted in the undue delay in completing the works. It has also submitted that the Petitioner has not informed the law and order problems and also not furnished the progress reports on a monthly basis to the LTTCs. Hence, KSEBL has prayed that the Commission may not consider the request of the Petitioner to consider the reasons for delay as 'Force Majeure' as the Petitioner has failed to comply with the obligations under the TSA. The Respondent No.1, BESCOM has submitted that the Petitioner has not substantiated or corroborated its submissions with any supporting documents. It has also stated that the submission of the Petitioner that the correspondence between Petitioner and BESCOM is produced at Annexure J is false as the letters are not authenticated. The Respondent has also stated that it was the responsibility and obligation of the Petitioner to ensure that the works progressed in a smooth manner which the Petitioner has failed to do. The Respondent has stated that the Petitioner was supposed to complete the project as per Schedule 3 of the TSA and the Petitioner was aware of the completion schedule of the project at the time of signing the TSA. The Respondent has contended that no reliance can be placed on the

documents relating to law and order problems in Bijapur, Bellari, Tumkur and Ramnagar districts in Annexure-J of the Petition as same is unauthenticated. Even if it is considered that the Petitioner had approached concerned authorities for sake of argument, it may be noted that the Petitioner has approached said authorities only after the SCOD. This according to the Respondent proves that the Petitioner has not been diligent in executing the project. The Respondent has added that it was the responsibility of the Petitioner to carry out the survey and finalize the route and pay compensation to land owners and clear the issues pertaining to Right of Way. Accordingly, the Respondent has submitted that it is not entitled for extension of SCOD on account of the failure on the part of the Petitioner in performing his obligations as prescribed in the TSA.

45. The submissions of the parties and the documents furnished on record have been considered. While the Petitioner has submitted that the Law & Order issues along with ROW issues in various villages had caused stoppage of construction activities thereby causing delay in the completion of the Elements 2 and 3 within the SCOD of 31.12.2015, the Respondent BESCOM has argued that the Petitioner had approached the authorities only after the SCOD of the elements and hence not entitled for condonation of delay. In this background, the question for consideration is whether the Law & Order and ROW issues had impacted the construction prior to the SCOD of the elements of the Petitioner and the steps taken by the Petitioner to mitigate the same.

46. As stated, the SCOD of Element 1 (2 x 400 kV Kudgi-Narendra (new) transmission line) of the Petitioner was 28.2.2015 and Elements 2 and 3 were 31.12.2015. As against this, the Petitioner had declared deemed COD of Element 1 on 4.8.2015, Element 2 on 19.9.2016 and Element 3 on 27.7.2016. The Petitioner was granted approval by the Ministry of Power, GOI, under Section 164 of the

Electricity Act, 2003 for the placing of electric lines for the transmission of electricity and accordingly the Petitioner had commenced construction activities of Element 1 during the month of June, 2014. From the Petitioner's letter dated 21.8.2014 addressed to the District Collector, Bijapur, it is noticed that the Petitioner had sought the intervention of the said authority to resolve the crop compensation issue for different type of towers, as the land owners did not agree with the crop compensation offered by the Petitioner and stopped the construction activities of Element 1 by the Petitioner. Thereafter, by letter dated 30.10.2014, the Petitioner while seeking intervention of the District Collector, Bijapur for taking up the construction activities of Element 1 without interruption by landowners, had informed the authority that entire amount of compensation as proposed is deposited with the Revenue department. Subsequently, the scope of work of Element 1 was completed on 27.3.2015 and the deemed COD of the said element was declared by the Petitioner on 4.8.2015 due to non availability of interconnection facility required to be developed by PGCIL.

47. As regards Elements 2 and 3, the submission of BESCOM that the Petitioner had approached the authorities only after the SCOD of the said elements (31.12.2105) is contrary to records and is not acceptable. Except for bald denials, the Respondent has not refuted/objection to the contents of the Petitioners' letter to the authorities seeking intervention on law & order issues and has also not adduced any evidence or justification to show that law & order issues had not affected the performance of these elements of the Petitioner under the TSA. It is noticed from Petitioner's letter dated 9.6.2015 addressed to the District Collector, Ramnagara that some of the land owners, after receipt of the mutually agreed crop/tree compensation, had obstructed and stopped the entire construction activities of the 400 kV Madhugiri-Bidadi line passing through Ramnagara district,

with demands for higher compensation. The Petitioner while pointing out that the entire construction activities had come to a grinding halt since May, 2015 due to resistance from land owners, had sought the intervention of the District Collector to provide necessary security to the personnel working on the said line and to permit the construction work, without interruption from land owners. The relevant portion of the said letter is extracted hereunder:

*"As you are aware, some part of 400kV Madhugiri-Bidadi line is passing through Ramnagara District and upon payment of crop/tree compensation which was arrived on mutual consensus basis, substantial progress is achieved in this section of the line.*

*However, after receipt of agreed compensation, the landowners in Ramnagara district have stopped entire construction activities with demands for higher compensation. This issue was brought to your notice on 5<sup>th</sup> May, 15.*

*Further, on 12<sup>th</sup> May, 15, the matter was discussed in detail in your good office in Ramnagara and following compensation was suggested by us for the tower locations falling in Ramnagara district. However, keeping proximity of Bidadi to Bangalore in view, two separate compensations were suggested.*

Xxxx

*In addition to this, any compensation towards the damage of crop/tree shall be paid as per the assessment report of Horticulture/ Agriculture/ Forest/ revenue deptts, wherever applicable.*

*We would bring to your kind notice that, commissioning of the subject transmission project is scheduled in the month of Dec'15. Due to severe resistance from the land owners, entire construction activity came to a grinding halt since May, 15, which has adverse impact on project progress thereby affecting overall commissioning schedule of the project..."*

48. Further, the Petitioner vide letter dated 3.8.2015 had sought the intervention of the District Magistrate, Tumkur District to provide necessary security for the personnel of the Petitioner working on Tower No.24/4 of 400 kV Madhugiri-Bidadi line, as one local villager, Shri Chennbasaiah resident of Village T.G.Palya, Honnidike, Tumkur, was threatening to commit suicide and was insisting for shifting of the said line passing over his land, despite compensation being paid in terms of the Deputy Commissioner's order dated 8.7.2014. The relevant portion of the said letter is extracted hereunder:

*"Further in Tumkur District, the Hon'ble District Magistrate, Tumkur exercising the rights under Section 16 of the Indian Telegraph Act, 1885, vide Letter No. MAG(1)CR250/2014-15 dated 8.7.2014) has issued orders for the compensation to be*

*paid in the Tumkur district towards the construction of transmission line. Accordingly Kudgi Transmission Ltd is paying the compensation as per the above referred DC order.*

*Tower No 24/4 of 400 kV Madhugiri -Bidadi line is falling in the hands of Mr Puttaranhaiah, resident of Village T.G.Palya, Honnudike and Mrs Shobha resident of village T.G.Palya, Honnudike. Accordingly, we have paid the foundation / erection amount to land owners and they accorded their consent for commencement of foundation work but one local villager Mr Chennbasaiah Sy No 34/2 resident of Village T.G.Palya, Honnudike, Tumkur is trying to threaten our project team and insisting to shift the line which will pass over his land and stating that if we will not do so, he will commit suicide or hand himself*

*Moreover , we have completed foundation and erection on both proceeding and succeeding towers, so shifting or rerouting of line is not at all possible and same is already to Mr Chennbasaiah even though he threatening to commit suicide. This issue is already brought into the notice of SI, Hebbur & CI, Kayathsandra .*

*Under the above facts and circumstances, keeping the stringent project timelines , we solicit your cooperation in completing the construction work on location No 24/4 in Village T.G.Palya, Honnudike, Tumkur ( Taluk & Dist) also request you to please instruct concerned authorities for providing necessary security to our personnel working on the above transmission line or to pass any other orders deemed fit under the given circumstances”*

49. Similarly, the Petitioner vide letter dated 12.8.2015 had sought the intervention of the Superintendent of Police, Tumkur District to provide security to the personnel of the Petitioner involved in stringing activity, against some landowners obstructing the construction of the transmission line in Village Gaudahalli, Hobli-Bellavi, Tehsil & District Tumkur. The relevant portion of the said letter is extracted hereunder:

*“We have completed the Foundation and erection activity in village Gaudahalli after making payments as per the order of the Honble District Magistrate, Tumkur and during stringing activity, some land owners are obstructing the construction work of the said transmission line. In addition to this we have paid compensation for trees also, which will affect the stringing work of said line and joint inspection of same as carried out in preens of concern farmers along with Horticulture/ Forest officials and Revenue officials respite the fact after receipt of compensation for trees they are not allowing to fell all the trees and stopped the stringing activity with demands for higher compensation”*

50. Subsequently, the Petitioner by letter dated 2.9.2015 addressed to the District Collector, Bellary and letter dated 5.9.2015 addressed to the Sub-Inspector of Police, Hagari Bommanahalli, brought to the notice of the authorities that some of the miscreants/landowners of Hagari Bommanahalli village, namely Ningappa Bydag, Ambasa G Singri and Amruth Kapadia, were obstructing and stopping the

construction activity in 765 kV D/C Narendra (new)-Madhugiri transmission line, leading to damage to equipments and personnel/tampering with the construction equipment's. The Petitioner had accordingly sought the help of the local authorities to permit the construction work without any interruption from the landowners. The relevant portion of the letter dated 2.9.2015 is extracted hereunder:

*“Further we would like to bring to your notice that despite of making payments towards agreed compensation to the landowner and seeking his permission for commencement of work in his land, a group of miscreants other than landowner are obstructing the construction activity in Hagari Bommanahalli Village. Details of the person stopping the works is mentioned below:*

Xxx

*They are stopping the work at site and even tampering with the construction equipment leading to nuisance at site. This may lead to severe damages to the Equipment and Personnel handling/tampering with the construction equipment.*

*It is needless to mention that such nuisance leads to idling of huge manpower and severely affecting the project progress in achieving completion schedules...”*

51. It is further observed that landowner Shri Ningappa Badagi had filed Writ Petition No.10966/2015 on 23.9.2015 before the Hon'ble High Court of Karnataka, Dharwad Bench to restrain the Petitioner from installing the high tension wire, towers and transformers near his land bearing Survey Nos 423/18 and 423/19 situated at Chitrapalli village in Hagari Bommanahalli taluk. By order dated 23.9.2015, the Hon'ble Court passed the following interim order:

*“The petitioner and the respondent No.3 should appear to Deputy Commissioner Ballari in 1.10.2015 at 2.30 p.m and the Deputy Commissioner Ballari should hear both of them and dispose of representation dt 2.9.2015 filed by the petitioner before the Deputy Commissioner Ballari”*

52. In terms of the above order, the Deputy Commissioner & District Magistrate, Ballari by order dated 17.10.2015 restrained Shri Ningappa Bidagi (the Petitioner therein) from interfering with the work of the Petitioner (the Petitioner herein) in the installation of high tension wire, towers and transformers in or near the said land of the Petitioner. The Petitioner was also accorded permission to carry out the work as per approved alignment after taking necessary permission and

payments to landowners. The relevant portion of the said order dated 17.10.2015 is extracted hereunder:

“No. REV.MAG.86.2015-16

DATED: 17-10-2015

*In exercise of the powers vested in me u/sec 16 of the Indian Telegraph Act 1885, the petitioner is hereby restrained from interfering with the work of the respondents in installing the high tension wire, power grid towers and transformers, in or near the lands bearing Sy No.423/18 and Sy No.423/19 situated at Chitrapalli village in Hagaribommanhalli taluk. The permission is hereby is also accorded to the Kudgi Transmission Ltd to carry out the work as per approved alignment after taking all necessary permission and payments to landowners as stipulated under the Act.”*

53. The Petitioner vide letter dated 28.10.2015 informed the District Collector, Tumkur that some of the landowners (Manjunath, Harish & Syed Dastabair) were not allowing the construction activity in their land despite making compensation payment as per order dated 8.7.2014 of the District Collector and had sought security for its personnel to take up the construction activity. The relevant portion of the letter dated 28.10.2015 is extracted hereunder:

*“We would like to inform you that based on order dated 08.07.2014 issued from your good office on the compensation for construction of transmission line we have completed substantial amount of work in Tumkur District*

*Further, we would like to bring to your notice that despite of making payment towards compensation (as per DC order) some of the landowners are not allowing to take up the construction activity in their land. Details are mentioned below:*

Xxxx

*They are demanding unreasonable compensation and not allowing us to work.*

*It is needless to mention that such nuisance leads to idling of huge manpower and severely affecting the project progress in achieving completion schedules...”*

54. Thereafter, the Petitioner by letter dated 23.11.2015 informed the Deputy Commissioner & District Magistrate, Ballari District that Shri Ningappa Badagi had refused to accept the compensation offered by the Petitioner in terms of the said Order dated 17.10.2015 and continued to obstruct the construction work in the 765 kV D/C Narendra (new)-Madhugiri transmission line. Accordingly, the Petitioner sought permission to take up the construction work in the said section and for providing security to its personnel working in the said transmission line, without

interruption from landowners. The relevant portion of the said letter is extracted hereunder:

*"We would like to mention here that Mr. Ninjappa has refused to accept the payment of compensation offered by KTL and has further continued to restrain us from proceeding with the project work. We would like to submit here that the actions of Mr. Ninjappa are in violation of the above order passed by you and has a major impediment in our project."*

55. Meanwhile, during the pendency of the above matters, the Petitioner by letter dated 18.9.2015 to the District Collector, Koppal and letter dated 5.10.2015 to the Chief Secretary, Govt. of Karnataka, brought to their notice the challenges faced by the Petitioner in obtaining the Right to Use (ROU) for location of towers falling in the land of Shri Megharaj s/o Giriyappa Raju (Survey No 54/8, 51/5, 56/12) Badegal village, Koppal District. The Petitioner accordingly requested these authorities to provide suitable security for its personnel working on the said transmission line (765 kV D/C, Narendra (new)-Madhugiri line) and for providing support to arrive at the compensation towards crop damages to landowners as per IS 5613 (Part 3/sec 2), section 10 of the Indian Telegraph Act, 1885 and Section 164 of the Electricity Act, 2003. The relevant portion of the said letter dated 5.10.2015 is extracted hereunder:

*"....We have received final approval from Railway as well as National Highway Authorities and based on the approvals the location for the tower is finalized. The towers are falling in the land of Mr Megharaj s/o Giriyappa Raju (Survey no 54/8, 51/5, 56/12), Badegal Village, Koppal District*

*We have explained him on the importance of project and also requested him to allow us work in the above mentioned survey numbers. He is being adamant and not allowing us to start the work. We also explained that the locations are approved by the government authorities hence there is no possibility of shifting the locations. We also highlighted that under section 164 of Electricity Act we have permission to enter any private property for the construction of towers..."*

56. It is pertinent to mention that the landowner Shri Megharaj filed Writ Petition No. 112112/2015 before the Hon'ble High Court of Karnataka, Dharwad Bench for direction on the Petitioner herein, to obtain consent from the Deputy Commissioner and the National Highway Authorities before laying the HT lines. The

said Writ Petition was disposed of by the Hon'ble Court on 23.11.2015 with direction to the Deputy Commissioner & District Magistrate, Koppal to pass appropriate orders after hearing the parties. Accordingly, the Deputy Commissioner & District Magistrate, Koppal after hearing the Petitioner and Shri Megharaj on 30.11.2015 in exercise of his powers under section 16 of the Indian Telegraph Act, 1885, restrained Shri Megharaj from interfering with the work of the Petitioner herein in the installation of HT lines, towers and transformers within the lands of the respondent situated in Dadegal village Taluk, district Koppal, vide Proceedings No. REV/ MAG/ 55/ 2015-16 C.No 19816 dated 9.12.2015. The relevant portion of the Order dated 9.12.2015 is extracted under:

*"In exercise of the powers vested U/s 16 of the Indian Telegraph Act 1885, the respondent is hereby restrained from interfering with the work of the petitioner in installing the HT lines, power grid towers and transformers, within the lands of the respondent Sy No. 54/8, 51/5, 56/12 situated at Dadegal village Taluk/District, Koppal."*

57. It is pertinent to mention that even after 31.12.2015 (the SCOD of Elements 2 and 3), the construction work of the Petitioner continued to be affected by Law & Order & ROW issues. This is evident from the Suit (O.S. No.12/2016) filed by one Shri Ambasa Singri before the Civil Judge, Hagari Bommanahalli seeking temporary injunction against the Petitioner herein from installing Tower and laying electrical lines by the Petitioner near or over the schedule property. The Civil Judge by his order dated 4.1.2016 granted temporary injunction restraining the Petitioner herein from installing the electricity tower and laying electrical lines over the property of the landowner. The relevant portion of the order dated 4.1.2016 is extracted hereunder:

*"Defendant company represented by its Managing Director and all persons claiming through it are hereby restrained by way of temporary injunction from installing electricity tower No. 28/E/4 and 29/O and from drawing electricity lines near and over the suit schedule property till the next date of hearing.."*

58. Thereafter, the Civil Judge, after hearing the parties, by order dated 2.2.2016 rejected the above said suit filed by Shri Ambasa Singri with costs. The Petitioner thereafter, vide letter dated 8.3.2016 brought to the notice of the District Collector, Chitradurga District the various challenges faced by the Petitioner in the said district on account of stoppage of construction activities by the landowners demanding unreasonable compensation. Further, the Petitioner by letter dated 5.5.2016 requested the Sub-Inspector of Police, Bellavi, Tumkur Taluk to provide security of its personnel working in Mudigire Village, Bellavi Hobli, Tumkur Taluk & District wherein work was stopped due to unreasonable demand for compensation of Rs 30 lakh by a landowner Jayamma (survey no 162, House no 168), despite payment of compensation in terms of Orders dated 8.7.2014 and 6.2.2015 of the District Collector, Tumkur Taluk. The Petitioner also sent letter dated 27.5.2016 to the Chief Secretary, Govt. of Karnataka requesting his intervention to resolve amongst other, the Law & Order issues in Tumkur and Ramamagara Districts and also sought police protection from landowners who were stopping the construction work. The relevant portion of the said letter dated 27.5.2016 is extracted as under:-

*Sub: Kudgi Transmission Line—Implementation of Transmission system associated with NTPC Kudgi (3x800 MW) in Phase I-reg.*

*The following are the specific points for which we request your kind intervention:*

1. KIADB:- xxxxx.

Law and Order Issues

a. *Tumkur - In KoraHubli and BellaviHubli, Kempanahalli, Kolalkunde, Nilahal, Girianalli, Vasanthanarasapura, Gaudahalli, Mudagere villages, we are being stopped by the land owners in several locations inspite of producing gazette, DC order, KIADB notification and caveat.*

*We approached SP Tumkur, Mr Karthik Reddy who in turn instructed the inspector of the limit. However, with presence of 1 or 2 police personnel, they are unable to convince the mob. We are outnumbered and forced to move away from the site locations.*

b. *Ramanagara - In Ramanagara under BidadiHubli, we have specific issue in Ganekal village, due to serious political intervention and because of this we are unable to work in the other areas of BidadiHubli, Berehalli, Avergere, Ballikuppe, Vajarahalli, Keteganahalli, Lingagaudanadoodi, hoblibidadi, under Ramanagara*

*District in several of the locations for the same reasons mentioned above, we are stopped by the present land owners. In the absence of police protection, it is not possible for us to carry out the project work.*

*The project is now delayed by over 6 months although we completed over 90% of the project ahead of schedule.”*

59. Again on 28.5.2016, the Petitioner requested the Inspector General of Police, Bangalore Central to deploy adequate force for self- protection, plant & material of the Petitioner to enable commencement of construction work and to complete the project before 25<sup>th</sup> June, 2016. The relevant portion of the said letter is extracted as under:

***“Sub: Police Protection- Kudgi Transmission Line - Implementation of Transmission system associated with NTPC Kudgi (3\*800 MW) in Phase I- reg***

*We are to make this 491 KM line in readiness much before the commencement of power generation from NTPC Kudgi plant. However, we are now struggling at some places in Tumkur and Ramanagara sites due to Law and Order problem.*

*a. Tumkuru- In KoraHubli and BellaviHubli, Kempanahalli, Kolalkunde, Nilahal, Giriyanalli, Vasanthanarasapura, Gaudahalli, Mudagere villages, we are being stopped by the land owners in several locations inspite of producing gazette, DC order, KIADB notification and caveat. Our men and material are hence vulnerable. Without understanding the land owners are demanding unreasonable amounts. Sir this is a Government of India Project. As per Law & DC order we are setting compensation.*

*We approached SP Tumkur, Mr. Karthik Reddy who in turn instructed the inspector of the limit. However, with presence of 1 or 2 police personnel, they are unable to convince the mob. We are outnumbered and forced to move away from the site locations.*

*b. Ramanagara - Ganekal village, Berehalli, Avargere, Ballikupe, Vajarahalli, Keteganahalli, Lingagaudandoodi, Hoblibidadi.*

*We specifically need the following Police strength.*

1. Inspector - 1 no.
2. Sub- Inspector- 2 nos
3. Constables - 30 nos

*Sir, we request you to deploy the above force for our self - protection, plant & material above all to enable us to commence the work & complete it before 25<sup>th</sup> June, 2016.”*

60. Similarly, letter was also addressed to the Circle Inspector of Police, Ramanagara, Ramanagara District on 13.6.2016 by the Petitioner informing him the challenges faced by the Petitioner in the completion of balance works in various villages in Bidadi Hobli, Taluk & District Ramangara.

61. From the sequence of events narrated above, it is evident that the works of Elements 2 and 3 of the Petitioner were affected even after the SCOD (31.12.2015). It is noted that there has been continuous obstruction/resistance from the landowners in various locations/villages including Bijapur, Bellary district, Hagari Bommanahali Taluk, Tumkur and Ramanagara district which resulted in the stoppage of construction activities in these locations. Despite the Petitioner obtaining approvals of the Railways and National Highway Authorities to enter the private premises for the construction work of the Project and also making compensation payment in terms of the orders of the Deputy Commissioner, it was unable to proceed with the construction work of the transmission lines due to serious law & order and ROW issues. The Petitioner in our view, had taken reasonable efforts to mitigate the delay by seeking help and cooperation of the District authorities to permit the construction work and police protection for its personnel working in these lines. In addition to this, the ex-parte orders of injunction by Court, the hearings before the District authorities (Deputy Commissioner & District Magistrate) for compensation payments to landowners and obtaining clearances for ROW had also contributed to the delay in the completion of the work beyond the SCOD of Elements 2 and 3. These events which resulted in delay in completion of the construction work of Elements 2 and 3 are events of force majeure which have affected the execution of the Project within the SCOD. Therefore, the Petitioner is entitled for relief under force majeure.

**D. Delay in obtaining ROW from the landowners for lands claimed by KIADB as notified land for acquisition**

62. The Petitioner has submitted that as soon as KIADB refused to grant permission for the original route, the Petitioner vide letter dated 26.5.2015 submitted an application for approval of the revised alignment and permission to

undertake works thereon. The Petitioner has further submitted that CEA vide its letter dated 20.10.2015 had requested KIADB to resolve/sort out the right of way issues in relation to construction of Elements 2 and 3 of the Project. The Petitioner has submitted that vide letter dated 24.11.2015 it had informed BESCOM about the refusal of KIADB to grant approval for the original alignment of Element 2. According to the Petitioner, the route plans had to be revised as per instructions of KIADB and despite making all efforts in relation to such land, KIADB had failed to grant approval for the same. In response, the BESCOM vide letter dated 8.12.2015 had requested KIADB to resolve/sort out the ROW issues on the Government land to enable the Petitioner to complete its scope of work in accordance with the TSA. The Petitioner has pointed out that it had by letter dated 21.12.2015 appraised BESCOM about the problems being faced by the Petitioner in the completion of Elements 2 and 3 as a result of non-availability of KIADB land and further requested BESCOM for extension of the Scheduled COD on day to day basis, in terms of Article 6.1.2 of the TSA. However, BESCOM, instead of agreeing to a revised COD, by letter dated 30.1.2016 had directed the Petitioner to approach this Commission and CEA for appropriate relief. The Petitioner has submitted that having been granted approval under Section 164 of the Electricity Act, 2003, the Petitioner can enter upon land for the placing of electric lines or electrical plant for the transmission of electricity, but in terms of Section 10 of the Indian Telegraph Act, 1885, such power cannot be exercised qua land vested in the local authorities. Accordingly, the Petitioner has submitted that it was unable to complete the portion of Elements 2 and 3 which required access to land notified by KIADB. In this background, the Petitioner has submitted that the delay in grant of permission by KIADB is entirely for reasons beyond its control and thus constitutes an event of force majeure, which entitles it for a day to day extension of SCOD for completion of obligations.



63. Per contra, the Respondent BESCOM has submitted that in response to the request of the Petitioner vide its application dated 26.5.2015, KIADB vide its letter dated 1.6.2015 had directed the Petitioner to propose an alternate route as the route proposed by the Petitioner was already allotted. The Respondent has stated that the Petitioner had on 27.7.2015 and 9.9.2015 submitted revised route plan with KIADB and sought approval to commence work. Thereafter on 5.11.2015, the Petitioner had sought the approval of its revised plan from KIADB. However, KIADB on 30.11.2015 directed the Petitioner to stop erecting towers and drawing lines on its land, since the Petitioner had not paid compensation towards the use of land. The Respondent has further submitted that the delay caused is due to the Petitioner not adhering to the directions of KIADB and due to frequent changes suggested by the Petitioner. It has stated that the problem is due to Petitioner not conducting survey and not approaching KIADB in good time. The Respondent has submitted that the Petitioner started seeking approvals only when it was nearing the SCOD and has thus not been diligent and delayed the implementation of the Project due to its own omissions. The Respondent has added that the role of LTTCs is only to assist and support the TSP in obtaining necessary approvals and had accordingly by letter dated 8.12.2016 requested the CEO, KIADB to sort out the ROW issues so that the transmission lines could be completed well within time. The Respondent has also stated that in terms of Article 5.1.2 of the TSA, the Petitioner shall not be relieved of its obligations or be entitled to extension of time for reason of unsuitability of site or transmission line route for whatever reason. Accordingly, the Respondent has submitted that the ROW issues do not constitute a force majeure event and the Petitioner is not entitled for extension of SCOD. The Respondent, KSEBL has submitted that the LTTCs were informed of the delay of approval by KIADB only on 24.11.2015 by the Petitioner and hence there

has been laxity on the part of the Petitioner in timely intimating the LTTCs about the issues which affected the progress of the project which resulted in the undue delay in completion of the works.

64. The submissions of the parties have been considered. In terms of Article 5.1.3 read with Article 4.1(a) of the TSA, it is the responsibility of the Petitioner to obtain all consents, clearances and permits relating to ROW for developing the project. As per Article 5.1.4(b),(c) & (d), the Petitioner has to carry out the final selection of the site including geo-technical investigation and survey in order to determine the final route of the transmission line and the Petitioner on its own cost has to seek access to the places where the Project is executed by paying necessary compensation. While the Petitioner has contended that the delay in grant of permission by KIADB to put up the line and towers with regard to Element 2 in KIADBs land in Tumkur District is a force majeure event, the Respondent, BESCOM has argued that the Petitioner had belatedly sought the approval from the concerned authorities and has not been diligent and delayed the implementation of the Project on its own.

65. In the present case, the Petitioner after a detailed survey of 765 kV D/C Narendra (New)-Madhugiri line had observed that this line was passing through KIADB plot situated in Bajanahalli, Thippedasarahalli, Yeladadalu & Nagenahali Village, Tumkur District and by letter to the Development Officer, KIADB, dated 26.5.2015 had sought approval of the route alignment with tower spotting data, at the locations mentioned in the tower schedule. In response, KIADB by letter dated 1.6.2015 informed the Petitioner that the proposed route passing through Vasanthanarasapura, Phase-1, 2 & 3 had already been allotted and accordingly requested the Petitioner to propose an alternate route without affecting the plots

for consideration by KIADB. The relevant portion of the said letter is extracted hereunder:

*"Adverting to the above, Adverting to the above, the proposed route alignment along with tire tower spotting data, passing through Vasanthanarasapura, Phase-1, 2 & 3, is not viable for consideration, because the proposed route passing through the plots has already been allotted by KIADB.*

*Hence, you are hereby requested to propose an alternate route without affecting the allotted plots for consideration by KIADB."*

66. Again, the Petitioner by letters dated 27.7.2015 and 9.9.2015 submitted revised proposal as advised by KIADB and sought approval of KIADB for the said route for commencement of work. Since the Petitioner had informed the CEA of the delay in approval by KIADB, the CEA vide its letter dated 20.10.2015 requested KIADB to resolve/sort out the right of way issues in relation to construction of Element 2 and 3 of the Project. Subsequently, the Petitioner vide letter dated 5.11.2015 sought approval of KIADB for the line passing through KIADB plots at the location mentioned in the tower schedule. Due to delay by KIADB to grant approval, the Petitioner vide letter dated 24.11.2015 informed BESCOM about the refusal of KIADB to grant approval for the original alignment of Element 2. In response, BESCOM vide letter dated 8.12.2015 requested KIADB to resolve/ sort out the ROW issues on the Government land to enable the Petitioner to complete its scope of work in accordance with the TSA. Thereafter, the Petitioner vide its letter dated 21.12.2015 had informed BESCOM of the delay in approval of KIADB land and had requested for extension of COD for 180 days due to the said force majeure event.

The contents of the said letter are extracted as under:

***"Sub:-Kudgi Transmission Limited- Implementation of Transmission System associated with NTPC Kudgi (3 x 800 MW in Phase I) - Request for Time extension for Element 2 & Element 3 - reg.***

*Further vide our letter referred above (Ref 2), we had informed that Element 2 (765 kV D/C Narendra(New)-Madhugiri is passing through KIADB land. We had submitted our first proposal on 26th May 2015 and till date we have not received approval for commencement of construction activity in KIADB area.*

*In view of above KIADB issue, we would like to bring the following clauses to your notice:*

- As per Transmission Service Agreement clause no 11.3 (b) (i) 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
- As per Transmission Service Agreement clause No 4.4.2, In the event that an Element or the Project cannot be commissioned by its Scheduled COD on account of any Force Majeure Event as per Article 11, the scheduled COD shall be extended, by a 'day for day' basis, for a maximum period of one hundred and eighty (180) days.

Vide letter no KIADB/DO/TMK/685/2015-16 dated 01.06.2015 (Copy attached), KIADB has refused to grant the approval and suggested to adopt alternative route. However approval on the alternative route is still awaited from KIADB. The refusal to grant approval by KIADB has restricted TSP (Kudgi Transmission Limited) to perform their obligation. We also brought this matter to the notice of Central Electricity Authority (CEA) and vide letter no CEA/PS/PSPM/1135(A)/2015/1308-10 dated 20.10.2015 CEA has immediately directed KIADB to issue the approval at the earliest (copy attached).

*As the TSP is not responsible for this delay and its force majeure condition, we request you to extend the scheduled COD of Element 2 by one hundred and eighty (180) days.*

*Further, due to criticality associated with the subject matter, kindly revert at the earliest within a period of one week hereof and provide us a convenient time slot to discuss on further course of action.”*

67. Subsequently, BESCOM instead of considering the grant of extension of time, by letter dated 30.1.2016 directed the Petitioner to approach the Central Commission and the CEA for appropriate relief. It is therefore evident that BESCOM though had the knowledge that the work of the Petitioner has been delayed due to the non-availability of approval by KIADB, had not granted extension of COD to the Petitioner in terms of the TSA. In the written submissions of BESCOM, it has been contended by BESCOM that the Petitioner was directed by KIADB on 30.11.2016 to stop erecting the towers and drawing lines on its land, as the Petitioner had not paid compensation towards the use of land. This submission is however not supported by any documentary evidence. The documents available on record do not also support the said contention of BESCOM. Even otherwise, this submission of BESCOM cannot be considered as the Petitioner after completing its scope of work

of Elements 2 and 3 and based on the certificate of energisation by CEA on 10.9.2016 and 4.7.2016 had declared deemed COD of the Elements 2 and 3 on 19.9.2016 and 27.7.2016 respectively due to non-availability of the required interconnection facilities.

68. It is observed that the Petitioner vide its letter dated 27.5.2016 to the Chief Secretary, Govt. of Karnataka, brought to his notice the issues faced relating to KIADB lands and had sought his intervention to resolve the same. The relevant portion of the said letter dated 27.5.2016 is extracted as under:-

*Sub: Kudgi Transmission Line—Implementation of Transmission system associated with NTPC Kudgi (3x 800 MW) in Phase I-reg.*

*The following are the specific points for which we request your kind intervention:*

**1.KIADB:-** 10 of our tower locations are coming in Phase 4 and 6 of KIADB acquisition in Vasanthanarasapura Industrial Area. We met Mr. Pankaj Pandey, CEO & EM of KIADB who has assured us a solution, within a week. As the matter has been pending for over 6 months, we request your help also in the matter.

Xxxxx

69. Thereafter, in a meeting of the Chief Engineer (PSPM), CEA on 17.6.2016 (MOM dated 21.6.2016), the Petitioner had submitted the progress of construction work of Elements 2 and 3 as under:

**Transmission system associated with Kudgi STPS (3x800 MW)**

The representative of NTPC informed that they are almost ready and 1<sup>st</sup> 800 MW Unit at Kudgi STPP would be synchronized by end of June 2016 and requested for readiness of associated transmission system. M/s KTL(L&T) representative informed that element-1 i.e Kudgi -Narendra (new) 400 kV 2xD/C line has been completed on 3/2015 and expressed his concern on the availability / readiness of 400 kV bays at Narendra (New) S/S, Madhugiri and Bidadi substation for Element 2 and element 3 respectively. M/s KTL (L&T) representative submitted progress of Element-1, 2 &3 as under;

**Element-I: Kudgi STPS - Narendra (new) 400 kV 2 x D/C line - completed**

**Element-2**

**Narendra (new) - Madhugiri 765 kV D/C line (initially operated at 400 kV).**

Length	379.48 ckm
Location	867 nos
Foundation Completed	852 nos
Tower Erected	850 nos
Stringing completed	367.68 ckm

**Element-3**

### **Madhugiri - Bidadi 400 kV D/C line**

Length	93 ckm
Location	256 nos
Foundation Completed	256 nos
Tower Erected	256 nos
Stringing completed	87.67 ckm

M/s KTL representative informed that element -3 and element -2 would be completed by end of June, 16 and July, 16 respectively, if bays are made ready at Narendra (new), Madhugiri and Bidadi s/s by PGCIL.

M/s KTL (L&T) representative highlighted the stalemate in obtaining approval for Right of Use for construction of towers in 10 locations in Element 2. These 10 tower locations are falling inside M/s KIADB notified land. It was highlighted that matter is pending with KIADB for the past 13 months due to indecisiveness on the part of KIADB, It was informed that KIADB concluded Right of Use for KPTCL 400 KV line corridor inside their premises recently and for this Rs. 5.6 Cr has been levied as charges to KPTCL by KIADB for 70 tower locations. M/s KTL (L&T) representative informed that KIADB is demanding Rs. 50 Lacs per acre for their lines in KIADB area. In addition, land owners have to be paid compensation as land acquisition is substantially at pre acquisition stage at 7 locs and at the final stages in 3 locs out of 10. M/s KTL (L&T) representative submitted a copy of letter from KIADB (letter No. KIADB/DO/TMK/2042/2015-16 dtd 20.02.2016) vide which approval for implementation of Transmission line tower in KIADB industrial area phase III, IV & VI earlier accorded. The approval was issued by Development Officer KIADB. However, M/s KTL (L&T) informed Chief Engineer (PSPM) that successive heads of KIADB orally stopped M/s KTL (L&T) not to proceed. Chief Engineer (PSPM) assured M/s KTL (L&T) that he will appropriately take up the matter with CEO (KIADB) to resolve if there is any issue for M/s KTL(L&T) taking up the erection of the towers for transmission lines passing along the corridor.

M/s KTL (L&T) representative expressed their concern on Element 2 which is getting connected at 400 KV bays of Narendra and Madhugiri S/S at initial stage and later line shall be connected at 765 KV bay. The representative of M/s KTL (L&T) wanted clarification and confirmation on who will bear the cost incurred due to this temporary arrangement. Chief Engineer (PSPM) advised M/s KTL (L&T) representative to take up matter with CERC as per the conditions stipulated in respective Transmission Service Agreement (TSA).

M/s KTL(L&T) representative requested for anti-theft charging of their transmission lines and CE (PSPM) advised him to take up this issue with CE (EI), CEA.”

70. It is clear from the above that the work on erection of towers in 10 locations which fall within the KIADB area had suffered on account of the delay in approvals by the KIADB. Though BESCOM was a participant in the meeting dated 17.6.2016, it had not raised any objections to the submissions of the Petitioner that approvals for 10 tower locations in KIADB areas were pending for more than 13 months and that the work had been stopped by KIADB by oral instructions. Even otherwise, it is noticed that BESCOM had earlier requested KIADB to resolve/sort out the ROW

issues on the Government land to enable the Petitioner to complete its scope of work in accordance with the TSA. Further, when the Petitioner requested BESCOM to extend the SCOD on account of the delay in approvals by KIADB, BESCOM had advised the Petitioner to approach the CEA and the CERC for necessary reliefs. Therefore, BESCOM cannot now contend that the delay is only on account of the Petitioner not being diligent in its survey and had approached the KIADB belatedly. As the Petitioner had submitted the proposals on 26.5.2015, 27.7.2015 and 9.9.2015 for approval, as advised by KIADB, it was obligatory on the part of KIADB to either approve the proposals submitted by the Petitioner or to reject the same with reasons, instead of delaying the approvals and apparently giving oral instructions to the Petitioner not to proceed with the work in KIADB areas. In our view, the delay in approvals by KIADB for the construction work of towers within the KIADB areas had caused considerable delay in the completion of the project. The delay in approvals by KIADB cannot, in our view, be said to be attributable to the Petitioner.

71. KSEBL has contended that 10% of the works of the transmission system was still pending at KIADB areas and some other locations due to compensation issues and hence, the Petitioner could not have commissioned the project earlier even if the interconnection facilities were made available. It is observed that out of the 15 foundations and 17 towers in respect of Element 2 which was pending completion as on June, 2016, erection of towers in 10 locations fall within the KIADB areas. The delay in completion of erection work/foundation as regards Elements 2 and 3 due to law & order and ROW issues in other areas has already been examined at length in paragraph 45 above and the same is not reiterated here for sake of brevity. In our considered view, withholding of permission by a local authority (KIADB) has resulted in delay in the construction work of these elements and the same is beyond the control of the Petitioner. We therefore hold

that the delay in approval of route alignment by KIADB for erection of towers within the KIADB areas coupled with law & order and ROW issues is a force majeure event, which has contributed to the delay in the completion of the work of Elements 2 and 3 of the Petitioner.

72. Based on the above discussions, we hold that the (i) non-availability of the required inter-connection facilities by PGCIL (ii) Law & Order issues in various villages, including the districts of Tumkur, Ramanagara and Bellary etc., and (iii) denial of approval by KIADB for undertaking works on lands notified by KIADB are ‘force majeure’ events falling within the scope and definition of force majeure under Article 11.3 of the TSA. These force majeure events, in our view have affected the execution of the Project within the SCOD. Therefore, the Petitioner is entitled for relief under force majeure. Article 11.7 of the TSA provides for relief for force majeure events, which is extracted as under:-

***“11.7 Available Relief for a Force Majeure Event***

***Subject to this Article 11***

- (a) no Party shall be in breach of its obligations pursuant to this Agreement except to the extent TSA for Selection of Transmission Service Provider for that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;*
- (b) every Party shall be entitled to claim relief for a Force Majeure Event affecting its performance in relation to its obligations under this Agreement.”*

73. Further, Article 4.4 provides for extension of time as under:

***“4.4. Extension of time***

*4.4.2 In the event that an Element or the Project cannot be commissioned by its scheduled COD on account of any Force Majeure Event as per Article 11, the Scheduled COD shall be extended, by a “day for day” basis, for a maximum period of one hundred and eighty (180) days. In case the Force Majeure Event continues even after the maximum period of one hundred and eighty (180) days, the TSP or the Majority Long Term Transmission Customers may choose to terminate the Agreement as per the provisions of Article 13.5.”*

74. Though Article 4.4.2 provides for extension of SCOD upto a maximum period of six months, after considering the circumstances for delay due to non-availability of inter-connection facilities by PGCIL (ii) Law & Order issues in various villages, including the districts of Tumkur, Ramanagara and Bellary etc., and (iii) denial of

approval by KIADB for undertaking works on lands notified by KIADB and the efforts made by the Petitioner to mitigate the force majeure events, we allow the extension of SCOD from 31.12.2015 till the dates of actual COD of the Elements 2 and 3 of the project.

**Issue No.3: What reliefs should be granted to the Petitioner in the light of the answer to the above issues?**

75. The Petitioner has submitted that BESCOM despite being fully aware of the events that has caused the delay in the construction of Elements 2 and 3 of the Project, has issued letter dated 5.12.2016 (posted on 16.12.2016) to the Petitioner (received on 22.12.2016) claiming Liquidated Damages (LD) for the delay in completion of the Project. The Petitioner has submitted that BESCOM in the said letter has alleged that since there was a delay of 244 days in the declaration of COD of the Elements, the Petitioner has to pay LD to all the LTTCs in proportion, as per Schedule-1 of the TSA within 10 days, failing which the action would be initiated as per TSA i.e. invocation of Performance Guarantee. According to the Petitioner, the said letter of BESCOM dated 5.12.2016 is illegal, unwarranted, abuse of dominant position of the Respondents and is without any basis. The Petitioner has stated that the said letter is an attempt of BESCOM to unjustly enrich itself at the cost of the Petitioner. The Petitioner has also pointed out that the letter of BESCOM has inherent contradictions for the following reasons:

- (i) While the first paragraph of the letter states that the construction of Element 2 and 3 are still not complete, the later para computes a delay of 244 days in completion of the construction of the Project.
- (ii) It is settled law that the compensation for breach of contract can be awarded to the innocent party only in the event such party actually suffering a loss. Damages cannot be recovered to unjustly enrich from an alleged breach of a contract.

76. In addition, the Petitioner has submitted that more than two months after being communicated about the commercial operation of the entire project,

BESCOM has raised a frivolous demand without giving any details as to how the delay was calculated. It has also submitted that the right to claim liquidated damages for delay in completion of the Project cannot be seen in isolation and TSA has to be read as a whole. The Petitioner has further stated that the entitlement of LDs in the event of delay in completion can be invoked only if the LTTC have complied with their obligations under the TSA. It has pointed out that the primary reason for delay was the non-availability of inter-connection facility which is the sole responsibility of the Respondents. The Petitioner has further submitted that as per Article 6.5.2 of the TSA, the Petitioner is entitled to return of the Bank Guarantee (BG) within 3 months of the commercial operation of the Project and since the COD of Element 2 was achieved on 19.9.2016, the BG should have been released on or before 19.12.2016. Accordingly, the Petitioner has prayed to set aside the letter dated 5.12.2016 of BESCOM and for return of the BGs furnished by the Petitioner.

77. The Respondent, BESCOM has submitted that since the Petitioner had not achieved COD within the timeframe stipulated under the TSA, it is required to pay LD as per Article 6.4 of the TSA. The Respondent has further submitted that being a public company, it is entitled LD for belated execution of the Project by the Petitioner. BESCOM has added that the Petitioner is entitled to return of BG only if it has achieved COD within the timeframe stipulated in the TSA. The Respondent, BESCOM has stated that the relief sought for by the Petitioner is not in accordance with the terms of the TSA entered into with the LTTCs, or the orders of this Commission or the law laid down by the Supreme Court and hence the Petition is liable to be dismissed. KSEBL has submitted that due to the delay in execution of the Project, the Petitioner is liable to pay LD to the LTTCs for the delay in proportion to their respective allocations as per Article 6.4.1 of the TSA. KSEBL has

also stated that in terms of Article 6.5.1 of the TSA, if the TSP fails to achieve COD of any of the elements on their respective scheduled COD specified in this Agreement, subject to conditions mentioned in Article 4.4, the LTTCs shall have the right to encash the Contract Performance Guarantee (CPG) and appropriate in their favour as LD an amount specified in Article 6.4.1, without prejudice to the other rights of the LTTCs under this Agreement. The Petitioner has clarified that the LTTCs cannot take advantage of their failure to provide the interconnection facility etc., in terms of the TSA and impose LD and encash the CPG by alleging breach of contract on the part of the Petitioner.

78. We have considered the submissions of Petitioner and Respondents. Articles 6.4 and 6.5 of TSA provides as under:

***“6.4 Liquidated Damages for Delay in achieving COD of Project:***

*6.4.1 If the TSP fails to achieve COD of any Element of the Project or the Project, by the Element's / Project's Scheduled COD as extended under Articles 4.4.1 and 4.4.2, then the TSP shall pay to the Long Term Transmission Customer(s), as communicated by the Lead Long Term Transmission Customer, in proportion to their Allocated Project Capacity as on the date seven (7) days prior to the Bid Deadline, a sum equivalent to 3.33% of Monthly Transmission Charges applicable for the Element of the Project [in case where no Elements have been defined, to be on the Project as a whole] / Project, for each day of delay up to sixty (60) days of delay and beyond that time limit, at the rate of five percent (5%) of the Monthly Transmission Charges applicable to such Element / Project, as liquidated damages for such delay and not as penalty, without prejudice to Long Term Transmission Customers' any rights under the Agreement.*

***6.5 Return of Contract Performance Guarantee***

*6.5.1 If the TSP fails to achieve COD of any of the Elements on their respective Scheduled COD specified in this Agreement, subject to conditions mentioned in Article 4.4, the Long Term Transmission Customers shall have the right to encash the Contract Performance Guarantee and appropriate in their favour as liquidated damages an amount specified in Article 6.4.1, without prejudice to the other rights of the Long Term Transmission Customers under this Agreement.*

*6.5.2 The Contract Performance Guarantee as submitted by TSP in accordance with Article 3.1.1 shall be released by the Long Term Transmission Customers within three (3) months from the COD of the Project. In the event of delay in achieving Scheduled COD of any of the Elements by the TSP (otherwise than due to reasons as mentioned in Article 3.1.1 or Article 11) and consequent part invocation of the Contract Performance Guarantee by the Long Term Transmission Customers, the Long Term Transmission Customers shall release the Contract Performance Guarantee if any, remaining unadjusted, after the satisfactory completion by the TSP of all the requirements regarding achieving the Scheduled COD of the remaining Elements of the Project. It is clarified that the Long Term*

*Transmission Customers shall also return/release the Contract Performance Guarantee in the event of (i) applicability of Article 3.3.2 to the extent the Contract Performance Guarantee is valid for an amount in excess of Rupees forty one crore forty lacs (Rs. 41.4 Cr) or (ii) termination of this Agreement by any Party as mentioned under Article 3.3.4 of this Agreement.*

*6.5.3 The release of the Contract Performance Guarantee shall be without prejudice to other rights of the Long Term Transmission Customers under this Agreement.*

79. In terms of Article 6.5.1 of the TSA, if the TSP fails to achieve COD of any of the elements on their respective scheduled COD specified in this Agreement, subject to conditions mentioned in Article 4.4, the LTTCs shall have the right to encash the Contract Performance Guarantee (CPG) and appropriate in their favour as LD an amount specified in Article 6.4.1, without prejudice to the other rights of the LTTCs under this Agreement. However, the petitioner has relied on Article 6.5.2 of the TSA and contended that the CPG submitted by in accordance with Article 3.1.1 shall be released by the LTTCs within three (3) months from the COD of the Project.

80. As stated, the SCOD of Elements 2 and 3 was 31.12.2015 and the actual COD of the Elements 2 and 3 are 19.9.2016 and 27.7.2016 respectively. The Respondent, BESCOM vide letter dated 5.12.2016 had requested the Petitioner to pay LD to all the LTTCs since there was a delay of 244 days and the project could not be completed within the SCOD of 31.12.2015 as per TSA. The contents of the said letter are extracted hereunder:

“Sir,

*Sub: Execution of Transmission System required for evacuation of Power from Kudgi TPS by M/s. L&T IDPL -reg delay in achieving COD*

- Ref: 1. L&T Letter No.: KTL: LTTC: 2016-17: 012 dated: 10.5.2016  
2. CEA minutes of the meeting No. CEA/ PS/ PSPM/ 7/ 72016/ 962-973 dated:22/23.6.2016  
3. L&T Letter No.: KTL: LTTC: 2016-17: 015 dated: 05-07-2016  
4. L&T Letter No.: KTL: LTTC: 2016-17: 016dated: 27.7.20.16  
5. PCKL vide letter PCKL/A3/AI/26/2005-06/2270-75 dated: 25.7.2016.*

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*Inviting reference to the above subject, according to Schedule-3 of TSA, Element-2 and Element-3 was supposed to be completed by 31.12.2015. Due to Right of way issues these elements are not yet completed.*

*M/s. KTL representative in the meeting held on 17.6.2016 informed that Element-3 and Element-2 would be completed by end of June 16 and July-16 respectively.*

*Further, as per Article 6.4.1 of TSA provides that, if the Transmission Service Provider (TSP) fails to achieve COD of any Element of the Project,*

**6.4.1** *Then the TSP shall pay to the Long Term Transmission Customers(s), as communicated by the Lead Long Term Transmission customer in proportion to their Allocated Project Capacity on the date seven (7) days prior to the Bid Deadline, a sum equivalent to 3.33% of Monthly Transmission Charges applicable for the Element of the Project [in case where no Elements have been defined, to be on the project as a whole]/project, for each day of delay up to sixty (60) days of delay and beyond that time limit, at the rate of five percent (5%) of the Monthly damages for such delay and not as penalty, without prejudice to Long Term Transmission Customers' any rights under the Agreement.*

**6.4.2** *The TSP's maximum liability under this Article 6.4 shall be limited to the amount of liquidated damages calculated in accordance with Article 6.4.1 for and up to six (6) months of delay for the Element or the Project. Provided that in case of failure of the TSP to achieve COD of the Element of the Project even after the expiry of six (6) months from its scheduled COD, the provisions of Article 13 shall apply.*

**6.4.4** *If the TSP fails to pay the amount of liquidated damages within the said period of ten (10) days, the Long Term Transmission Customers shall be entitled to recover the said amount of the liquidated damages by invoking the contract Performance Guarantee. If the then existing Contract Performance Guarantee is for an amount which is less than the amount of the liquidated damages payable by the TSP to the Long Term Transmission Customers under this Article 6.3, the TSP shall be liable to forth with pay the balance amount.*

*As per schedule-8 of TSA, it is the right and obligation of Lead Long Term Transmission Customer to communicate with the TSP on imposition of liquidated damages.*

*As per TSA signed on 14.5.2013, the transmission line has to be commissioned before 31.12.2015. There is considerable delay of 244 days.*

*Therefore, you are requested to pay LD to all the LTTCs in proportion to their share as per Schedule-1 of TSA within 10 days failing which the action as per provision of TSA will be initiated.*

*Yours faithfully,*

*General Manager (Elec)  
PP, BESCOM*

81. We have in this order decided that the (i) non-availability of the required inter-connection facilities by PGCIL (ii) Law & Order issues in various villages, including the districts of Tumkur, Ramanagara and Bellary etc., and (iii) denial of approval by KIADB for undertaking works on lands notified by KIADB are force majeure events which caused delay in the execution and completion of Elements 2 and 3 by the Petitioner. Also, in the light of the force majeure events affecting the performance of the obligations, we have held in para 75 above that the Petitioner

is entitled for revision in the SCOD of Elements 2 and 3 from 31.12.2015 till the dates of actual COD of these elements, in terms of Article 4.4.2 of the TSA. In this background, the demand made by BESCOM vide letter dated 5.1.2016 requesting the Petitioner to pay the LD amount to all the LTTCs in proportion to their share as per Schedule-1 of TSA due to delay in completion of the Project, is not sustainable in law. Accordingly, the letter of BESCOM dated 5.12.2016 is set-aside. Consequent upon this, the LTTCs are directed to return the Contract Performance Guarantee submitted by the Petitioner, within 15 days from the date of this order.

82. We had vide ROP of the hearing of this Petition on 3.1.2017, disposed of IA 64/2016 by directing the Petitioner to submit a BG of Rs 4.3 crore in favour of BESCOM (or the amount as may be calculated as LD by BESCOM for the delay) for a period of six months and the same was directed not to be encashed by BESCOM, without seeking permission of the Commission. The said BG has not been encashed by BESCOM. Accordingly, the BG submitted by the Petitioner in terms of our directions shall also be returned by BESCOM to the Petitioner, within 15 days from the date of this order.

83. Petition No. 248/MP/2016 is disposed of in terms of above.

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

Sd/-  
(P.K.Pujari)  
Chairperson