

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 237/MP/2021
Alongwith I.A. No.31/IA/2022**

Coram:

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

Date of Order: 31.12.2023

In the matter of:

Petition under Sections 63 and 79 of the Electricity Act, 2003 read with the statutory framework governing inter-State Transmission Systems, and Articles 11 and 12 of the Transmission Service Agreement dated 14.3.2016 executed between Khargone Transmission Limited and its Long-Term Transmission Customers for inter-alia claiming compensation due to Change in Law and seeking extension in the scheduled commercial operation date of the relevant elements of the Project on account of *force majeure*.

And in the matter of:

Khargone Transmission Limited,
Block F-1, The Mira Corporate Suites 1& 2,
Ishwar Nagar, Okhla Crossing,
Mathura Road, New Delhi 110065.

...Petitioner

Versus

1. Madhya Pradesh Power Management Company Limited,
Block No. 11, Ground Floor, Shakti Bhawan,
Vidyut Nagar, Rampur, Jabalpur,
Madhya Pradesh-482008.
2. Chhattisgarh State Power Distribution Company Limited,
P.O. Sunder Nagar, Dangania,
Raipur, Chhattisgarh-492013.
3. Gujarat Urja Vikas Nigam Limited,
Vidyut Bhawan, Race Course,
Vadodara, Gujarat-390007.
4. Maharashtra State Electricity Distribution Company Limited,
Prakashgad, 4th Floor, Bandra (East),
Mumbai-400051.



5. Electricity Department,
Government of Goa,
Vidyut Bhawan, Panaji,
Goa-605001.
6. DNH Power Distribution Corporation Limited,
Administration of Dadar Nagar Haveli,
66 kV, Amla Road, Silvassa-396230.
7. Electricity Department, Daman and Diu,
Administration of Daman and Diu,
Plot No. 35, OI DC Complex,
Near Fire Station, Somnath,
Daman-396210.
8. REC Transmission Projects Company Limited,
Core-4, Scope Complex,
7, Lodhi Road, New Delhi-110003, India.
9. Power Grid Corporation of India Limited,
Saudamini, Plot No.2,
Sector -29, Near IFFCO Chowk,
Gurgaon (Haryana)-122001.
10. NTPC Limited,
NTPC Bhawan, Core-7 Scope Complex,
7, Instead Area, Lodi Road,
New Delhi-11003.

...Respondents

For Petitioner: Shri Sanjay Sen, Senior Advocate, KTL
Ms. Mandakini Ghosh, Advocate, KTL
Shri Saahil Kaul, Advocate, KTL
Shri Neha Dabral, Advocate, KTL
Shri Deep Rao Palepu, Advocate, KTL
Shri Aryaman Saxena, KTL

For Respondents: Shri G. Umaphy, Senior Advocate, MSEDCL
Ms. Swapna Seheshdari, Advocate, PGCIL
Shri Anup Jain, Advocate, MSEDCL
Shri Akash Goel, Advocate, MSEDCL
Shri Ravi Sharma, Advocate, MPPMCL/ MPPTCL
Shri Ventakesh, Advocate, NTPC
Shri Ashutosh Srivastava, Advocate, NTPC
Shri Shivam Kumar, Advocate, NTPC
Shri Prashant Kumar, PGCIL
Shri V.C. Shekar, PGCIL



ORDER

The instant petition has been filed by Khargone Transmission Limited (KTL), under Sections 63 and 79 of the Electricity Act, 2003 ("2003 Act") read with Articles 11 and 12 of the Transmission Service Agreement (TSA) dated 14.3.2016 executed between KTL and its Long-Term Transmission Customers (LTTC) claiming compensation due to "Change in Law" and seeking extension in the scheduled commercial operation date (SCOD) of the relevant elements of the Project, i.e. "Transmission System Strengthening in WR associated with Khargone TPP (1320 MW)" on account of *force majeure*.

2. The Petitioner has made the following prayers:

"In view of the above submissions and in the interest of justice, it is most respectfully prayed that this Hon'ble Commission may be pleased to:

- (a) Admit and allow the present Petition;*
- (b) Hold and declare that the Petitioner was impacted by the Force Majeure events described in the Petition and is therefore entitled to relief in accordance with Article 11 of the TSA;*
- (c) condone the delays in the Project's implementation caused due to the aforesaid Force Majeure Events and appropriately extend the SCOD for concerned elements to the date of their actual commissioning;*
- (d) direct that the Petitioner ought not be made liable in any manner for the delays caused in Project's implementation due to the aforesaid Force Majeure Events;*
- (e) direct that no Liquidated Damages may be imposed on the Petitioner for the delays caused in Project's implementation due to the aforesaid Force Majeure Events under the TSA or otherwise*
- (f) hold and declare that the Petitioner was impacted by the Change in Law events described in the Petition and is therefore entitled to relief in accordance with Article 12 of the TSA;*
- (g) direct that the Petitioner is entitled to recover Interest During Construction incurred in respect of the periods of delay that were caused due to the unforeseen and uncontrollable events as described in the Petition;*
- (h) grant an appropriate increase of 12.24% of the Non-Escalable Transmission Charges in accordance with Article 12.2.1 of the TSA;*
- (i) grant the Petitioner compensatory restitution to the same economic position as had existed prior to the occurrence of the Change in Law events described in this Petition with effect from the date of commissioning of the Project as sought in this Petition, so as to offset the adverse impact of the aforesaid Change in Law events;*



- (j) *exercise regulatory powers to grant appropriate relief to the Petitioner in the facts of this case, including by way of condoning any inadvertent delay by the Petitioner, if any; and*
- (k) *Pass any other order as this Hon'ble Commission may deem fit in the facts and circumstances of the present case."*

Submissions of Petitioner

3. Petitioner has mainly submitted as follows:

- (a) The Petitioner is a wholly owned subsidiary of REC Transmission Projects Company Limited (RECTPCL), set up to establish the "Transmission System Strengthening in WR associated with Khargone TPP (1320 MW)" on build, own, operate and maintain basis and to act as the Transmission Service Provider after being acquired by the successful bidder.
- (b) In the bid process conducted by RECTPCL, Sterlite Grid 4 Limited participated and emerged as a successful bidder and consequently, Letter of Intent (LoI) was issued by RECTPCL to Sterlite Grid 4 Limited on 26.5.2016. Thereafter, Sterlite Grid 4 Limited took over the Petitioner by securing 100% equity in the Company.
- (c) The Petitioner is developing and implementing an inter-State transmission project on build, own, operate and maintain basis. The said project is being established for strengthening of the transmission system in the Western Region associated with the 2x660 Khargone Thermal Power Plant ("NTPC Khargone TPP") developed by NTPC Limited ("NTPC").
- (d) The transmission system strengthening in WR associated with Khargone TPP (1320 MW) was approved in the 38th Standing Committee on Power System Planning of Western Region on 17.7.2015. The transmission system under the scope of the Petitioner was planned to strengthen the existing Indore-Vadodara-Dhule 765 kV S/C corridor and for evacuation of power from the proposed NTPC's generation of Khargone TPP of 2X660 MW.
- (e) The scope of the project involves development and construction of the following transmission lines and sub-stations:

(I) Transmission Lines



- (i) LILO of one circuit of Khandwa-Rajgarh 400 kV D/C Transmission Line at Khargone TPP (“**LILLO**”);
 - (ii) Khargone TPP Switchyard-Khandwa Pool 400 kV D/C (Quad) Transmission Line (“**KK Line**”);
 - (iii) Khandwa Pool-Indore 765 kV D/C Transmission Line (“**KI Line**”); and
 - (iv) Khandwa Pool-Dhule 765 kV D/C Transmission Line (“**KD Line**”) (collectively referred to as “**Transmission Lines**”).
- (II) Establishment of 765/400 kV, 2x1500 MVA Pooling Station at Khandwa (“**Khandwa Sub-station**”).
- (III) 2 numbers of 765 kV line bays and 7x80 MVAR switchable line reactors (1 unit as spare) along with 800 Ω NGR and its auxiliaries for Khandwa Pool-Dhule 765 kV D/C at Dhule 765/400 kV sub-station of Bhopal Dhule Transmission Company Limited (“**Other Elements**”).

(Transmission Lines, Khandwa Sub-station and Other Elements are collectively referred to as the “Project”).

- (f) The Commission vide order dated 11.11.2016 in Petition No. 156/AT/2016 adopted the transmission charges for the Project developed by KTL. Subsequently, the Petitioner was also granted a transmission licence by the Commission vide order dated 17.11.2016 in Petition No. 157/TL/2016.
- (g) TSA dated 14.3.2016 was executed between the Petitioner and its LTTCs. Under the TSA, Madhya Pradesh Power Management, (MPPMCL), Respondent No.1 has been appointed as the lead LTTC to represent all the LTTCs for discharging the rights and obligations specified therein.
- (h) As per Schedule 2 of the TSA, the Petitioner was provided 37 months to achieve the overall SCOD of the transmission project and commission the KD line, KK line and KI line along with the Khandwa Sub-station. The effective date of the TSA is 22.8.2016 and, accordingly, the SCOD considering 37 months from the effective date is 21.9.2019.
- (i) The Petitioner has claimed that it has suffered several uncontrollable impediments and challenges in implementing the Project and that these challenges have arisen on account of occurrence of the following *force majeure* and “Change in Law” events which delayed the commissioning of the relevant elements of the Project beyond the SCOD.

I. **Force majeure events**



- Unexpected requirement to divert the KD Line to avoid intersection with the proposed Jamphal Dam;
- Delay due to unanticipated imposition of the H+6 criteria for laying of Transmission Lines by Madhya Pradesh Power Transmission Company Limited (“MPPTCL”);
- Delay in the acquisition of land and the subsequent construction of the Khandwa Sub-station due to agitations by local villagers;
- Delay in receiving the highway crossing approvals for erection of the KI Line over National Highway-3 from the National Highways Authority of India (“NHAI”); and
- Delay due to the outbreak and spread of the Covid-19 pandemic.

II. “Change in Law” events

- Additional expenditure due to diversion of the approved route of the KD line pursuant to the directions of the CEA;
 - Additional expenditure incurred on the construction of a concrete protection wall in terms of the directions of the Committee constituted by the Ministry of Power (MoP), Government of India;
 - Additional expenditure incurred in complying with the H+6 criteria imposed by MPPTCL for erection of the KI Line;
 - Additional expenditure incurred in construction of the KK Line along the diverted route as directed by NTPC;
 - Additional expenditure on account of enhancement of land compensation by the Governments of Madhya Pradesh and Maharashtra.
- (j) The Petitioner had to incur additional expenditure on account of “Change in Law” events during the implementation of the Project and is, therefore, entitled to reliefs under the TSA. Under Article 12 of the TSA, an event constitutes a “Change in Law” if it occurs after the date which is 7 days prior to the bid deadline, i.e. in the instant case, the bid was submitted on



16.5.2016. Accordingly, the cut-off date for determination of “Change in Law” is 9.5.2016.

(k) The details of time over-run in case of the elements under the Project are as follows:

Sr. No.	Name of Element	SCOD	Actual COD	Delay
1.	LILO	February, 2018	1.3.2018	On SCOD
2.	KK Line	July, 2019	19.3.2020	7 months 18 days
3.	KI Line	July, 2019	19.3.2020	7 months 18 days
4.	KD Line	July, 2019	13.12.2021	27 months 12 days
5.	Khandwa Sub-station	July, 2019	19.3.2020	7 months 18 days

(l) The Petitioner had earlier filed Petition No. 308/MP/2019 inter-alia claiming in-principle approval of the *force majeure* and “Change in Law” events impacting the Project. While claiming the above reliefs, the Petitioner had sought liberty to approach the Commission for quantification of its claims upon COD of the relevant elements. The Commission vide order dated 20.7.2020, had observed that it would not be appropriate to take a view on the claimed *force majeure* and “Change in Law” issues and neither would it be possible to grant any kind of declaratory in-principle reliefs till the Project is completed. The relevant portion of the order dated 20.7.2020 is as follows:

*“21. In terms of our order dated 21.10.2019 in the afore-mentioned IA, we have allowed a few elements of the Project to be put into commercial operation delinking them from rest of the elements in terms of recommendation of CEA and requirement of the generator (NTPC). **However, any decision on time overrun and relief on account of force majeure/ change in law events can only be taken for the Project as a whole.** The Petitioner has itself stated that it is unable to quantify the impact of such force majeure and change in law events since the Project is yet to be completed. **Therefore, we are of the view that since the complete project has not been implemented by the Petitioner till date, it would not be appropriate to take a view on the claimed force majeure and change in law issues at this stage and neither would it be possible to grant any kind of declaratory in-principle reliefs.**”*



(m) Accordingly, the Petitioner has filed the petition after COD of the elements of its Projects.

(n) The Petitioner has submitted that the approval under Section 164 of the 2003 Act was granted to the KD line, KK line and KI line by the CEA vide order dated 3.7.2017. The original envisaged length of the KD line, KK line and KI line as per the approval granted under Section 164 of the 2003 Act is as follows:

Srl. No.	Transmission line	Length of the line (in km) as per the Section 164 approval
1.	KD line	189.457
2.	KK line	25
3.	KI line	90

(o) The Petitioner has claimed the following relief due to the impact of the *force majeure* and “Change in Law” events on the various elements of the Project, including the loss of working time and the actual extension in SCOD sought:

Force Majeure			
Claim	Elements	Loss of Working Time	Extension in SCOD sought
Unexpected requirement to divert the KD Line to avoid intersection with the proposed Jamphal Dam.	KD Line	33 months	18 months
Delay due to unanticipated imposition of the H+6 criteria for laying of transmission lines by MPPTCL.	KD Line	9 months	9 months
	KI Line	9 months	8 months
	KK Line	24 months	9 months
Delay in receiving highway crossing approvals from NHAI.	KI Line	32 months	8 months
Delay in acquisition of land and subsequent construction of the Khandwa Sub-station due to agitations by locals.	Khandwa Sub-station	17 months	9 months
Delay due to outbreak of the Covid-19 pandemic	KD Line	8 months	27 months (cumulatively)

“Change in Law”	
Claim	Amount (₹)
Additional expenditure incurred in diverting the KD Line to avoid intersection with the Jamphal Dam.	60,00,00,000*
Additional expenditure incurred in construction of the concrete wall protection pursuant to directions of the MoP.	16,00,00,000*
Additional expenditure on account of enhancement of RoW compensation by the Governments of Maharashtra	34,02,02,064



and Madhya Pradesh.	
Additional expenditure incurred in complying with the H+6 criteria imposed by MPPTCL for construction of the KI Line.	4,92,00,000
Additional expenditure incurred in diverting the KK Line to avoid intersection with NTPC's railway tracks.	1,30,00,000

**The above amount includes expenditure estimated to be incurred on the specified "Change in Law" events.*

Claim	Amount (₹)
Interest During Construction	174,00,00,000

4. The Petitioner has submitted the actual length of each of the lines of the Petitioner as implemented vis-à-vis length of line as per BPC routes as follows:

Table 1: Length of Transmission Lines			
Sr. No.	Transmission Element	Line Length as per the BPC Route (in km)	Actual Length of the Implemented Line (in km)
1.	KD Line	Route 1: 221.17 Route 2: 226.06 Route 3: 235.36	Original-189.457 Diverted-191.438
2.	KK Line	Route 1: 86.95 Route 2: 92.8 Route 3: 99.58	25
3.	KI Line	Route 1: 153.5 Route 2: 159.3 Route 3: 153.8	90
4.	LILO	Route 1: 7.17 Route 2: 8 Route 3: 8.15	6.8

5. On a query of the Commission "Whether route followed was as per BPC along with legible copy of map separately for each line of the Petitioner, depicting the three alternate routes as per BPC survey superimposing the route as followed by the Petitioner in respect of all lines", the Petitioner has submitted that while it has endeavoured to construct all three Transmission Lines along the routes indicated in the route survey report of the BPC, there is a variation between the routes indicated by the BPC and the routes adopted by the Petitioner for the three Transmission Lines. The Petitioner has submitted that the aforesaid variation has occurred primarily due to certain uncontrollable, unavoidable and unforeseen *force majeure* events that prevented the Petitioner from constructing the Khandwa Sub-station at



the original location indicated in the BPC report. With the change in the location of the Khandwa Sub-station (under the scope of the Petitioner) that the Petitioner was compelled to make, the routes of the three lines were also constrained to be changed as one end of all the three Transmission Lines terminates at the Khandwa Sub-station. As per the RfP read with the clarifications issued thereunder, the Petitioner had the liberty to establish the Khandwa Sub-station at any location within the Khandwa District, the Petitioner began the process for acquisition of land for construction of the Khandwa Sub-station immediately upon the issuance of the Lol, but due to the delay in acquisition of land due to severe agitations by farmers and other residents in the village, construction of the Khandwa Sub-station took place at an alternate location within the district of Khandwa.

6. Considering the submissions on record, the following issues arise for our consideration:

Issue No. 1 Whether the Petitioner has complied with the provisions of the TSA before approaching the Commission for claiming relief under *force majeure* and “Change in Law”?

Issue No. 2: Whether the various claims of the Petitioner are covered under *force majeure* and “Change in Law” in terms of the TSA?

Issue No. 3: What reliefs, if any, should be granted to the Petitioner in the light of the answers to the above issues?

7. The above issues have been dealt with in succeeding paragraphs.

Issue No. 1 Whether the Petitioner has complied with the provisions of the TSA before approaching the Commission for claiming relief under *force majeure* and “Change in Law”?

8. The Petitioner has claimed time and cost over-run reliefs on account of the *force majeure* and “Change in Law” events as per the provisions Article 11 (*force majeure*) and Article 12 (“Change in Law”) of the TSA. Article 11.5 and 12 of the TSA provides as follows:

“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.”

“ ..

“12 CHANGE IN LAW

12.1 Change in Law

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

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

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

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

12.2 Relief for Change in Law



12.2.1 During Construction Period:

During the Construction Period, the impact of increase/decrease in the cost of the Project in the Transmission Charges shall be governed by the formula given below:

- *For every cumulative increase/decrease of each Rupees Seven Crore Forty Two Lakh Only (Rs. 7.42 Crore) in the cost of the Project up to the Scheduled COD of the Project, the increase/decrease in Non-Escalable Transmission Charges shall be an amount equal to zero point three one three percent (0.313%) of the Non-Escalable Transmission Charges.*

12.2.2 During the Operation Period:

During the Operation Period, the compensation for any increase/decrease in revenues shall be determined and effective from such date, as decided by the Appropriate Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law.

Provided that the above mentioned compensation shall be payable only if the increase/decrease in revenues or cost to the TSP is in excess of an amount equivalent to one percent (1%) of Transmission Charges in aggregate for a Contract Year.

12.2.3 *For any claims made under Articles 12.2.1 and 12.2.2 above, the TSP shall provide to the Long Term Transmission Customers and the Appropriate Commission documentary proof of such increase/decrease in cost of the Project/revenue for establishing the impact of such Change in Law.*

12.2.4 *The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Articles 12.2.1 and 12.2.2, and the date from which such compensation shall become effective, shall be final and binding on both the Parties subject to rights of appeal provided under applicable Law.*

12.3 Notification of Change in Law Event

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

12.3.2 *The TSP shall also be obliged to serve a notice to Lead Long Term Transmission Customer even when it is beneficially affected by a Change in Law.*

12.3.3 *Any notice served pursuant to Articles 12.3.1 and 12.3.2 shall provide, amongst other things, precise details of the Change in Law and its effect on the TSP.*

12.4 Payment on account of Change in Law



12.4.1 *The payment for Change in Law shall be through Supplementary Bill as mentioned in Article 10.10. However, in case of any change in Monthly Transmission Charges by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the TSP after such change in Transmission Charges shall appropriately reflect the changed Monthly Transmission Charges.”*

As per above, an affected party shall give notice to the other party of any event of force majeure. Further, if the TSP is affected by a “Change in Law” in accordance with Article 12.1 and wishes to claim relief for such “Change in Law”, it shall give notice to the lead LTTC as soon as reasonably practicable after being aware of the same. It further provides that any notice served pursuant to Article 12.3.1 and Article 12.3.2 of the TSA shall provide amongst other things, precise details of “Change in Law” and its effect on the TSP.

9. The Petitioner has claimed some of the events under both the “Change in Law” as well as the *force majeure* events leading to delay in implementation of the Project as well as increase in the expenditure to the Petitioner during the implementation. The Petitioner has placed on record the notices issued to the LTTCs intimating the occurrence as well as the cessation of the *force majeure* events and “Change in Law” events.

10. The Petitioner has submitted the date of serving notice to LTTCs for claimed *force majeure* events and Change in Law events as follows:

Sr. No.	Particulars of the <i>force majeure</i> event	Date of serving notice to LTTCs
1.	Unexpected requirement to divert the KD Line to avoid intersection with the proposed Jamphal Dam;	5.2.2019
2.	Delay due to unanticipated imposition of the H+6 criteria	9.1.2019
3.	Delay in the acquisition of land and the subsequent construction of the Khandwa Substation due to agitations by local villagers	19.7.2019
4.	Delay in obtaining highway crossing approvals from the NHAI	9.1.2019
5.	Outbreak of COVID-19 Pandemic causing delay in construction of KD Line	9.3.2020 for first wave, 27.4.2021 and 30.7.2021 for the second wave.



Sr. No.	Particulars of the “Change in Law” event	Date of serving notice to LTTCs
1.	Additional expenditure due to diversion of the approved route of the KD Line pursuant to the directions of the Central Electricity Authority	29.7.2019
2.	Additional expenditure incurred on the construction of a concrete protection wall in terms of the directions of the Committee constituted by the Ministry of Power, Government of India	20.8.2021
3.	Additional expenditure incurred in complying with the H+6 criteria imposed by MPPTCL	9.1.2019
4.	Issuance of fresh notifications specifying the RoW compensation by the Governments of Madhya Pradesh and Maharashtra	15.5.2018
5.	Additional expenditure incurred in diversion of route of the KK Line to avoid interception with NTPC’s Railway Track	9.1.2019

We have considered the submissions of the Petitioner and note that considering the nature of force majeure and “Change in Law” events claimed, the Petitioner has largely complied with the requirements of prior notice under the TSA for the force majeure and “Change in Law” events to the extent noted above.

Issue No. 2: Whether the various claims of the Petitioner are covered under *force majeure* and “Change in Law” in terms of the TSA?

11. The submissions of the Petitioner, the reply of the Respondents and analysis and decision on each of the *force majeure* and “Change in Law” events are discussed in subsequent paragraphs event wise.

(I) Force majeure event: Unexpected requirement to divert the KD Line to avoid inter-section with the proposed Jamphal Dam

Submissions of the Petitioner

(a) The Petitioner has submitted that the construction of the KD Line was delayed due to the unexpected requirement of diverting the said line from its approved route. The requirement was necessitated as the approved route of the KD Line intersected with the proposed site for the Jamphal-Kanoli-Sulwade Lift Irrigation Project (Jamphal Dam) to be established in Maharashtra. Accordingly, the concerned authorities in Maharashtra namely, the Minor Irrigation Division of Dhule (MIDD), Divisional Forest Officer, Dhule and the District Collector, Dhule (“DC



Dhule”), refused to grant the requisite “No objection certificate” (“NoC”) to the Petitioner for construction of the KD Line along the approved route.

(b) As a result, the Petitioner was required to divert the route of the KD Line to avoid intersection with the proposed site for the Jamphal Dam. The Petitioner was unable to carry out any construction activity in the vicinity of the Jamphal Dam between 16.7.2018 and 19.4.2021 due to non-grant of the necessary approvals by the concerned State authorities. Thus, the said delay constitutes a *force majeure* event in terms of Article 11 of the TSA, entitling the Petitioner for the extension in SCOD for the above period.

(c) The Petitioner has submitted that the approved route of the KD line was fixed after detailed consideration of all aspects of the route by technical experts. RECTPCL had provided a bid survey report to the Petitioner that *inter alia* specifically mentioned details of reserved forests, transmission lines, rivers, etc. which were present along the identified routes for the KD line. However, the said report did not mention the presence of any notified site for construction of a dam.

(d) The Petitioner was granted Section 164 of the 2003 Act approval for the route by the Central Electricity Authority (CEA) and the Petitioner had published public notices in the leading newspapers specifying the route (mentioning the details of all villages, tehsils and districts involved) through which the KD Line was to traverse. However, the Petitioner did not receive objections from any entity against the above mentioned route proposed for the KD Line. The District Collector of Dhule had itself issued a certificate required under the Forest Dweller (Recognition of Forest Rights) Act, 2006 for construction of the KD Line along the aforesaid route. Thus, at the stage of obtaining the clearance from the DC Dhule, no indication was provided to the Petitioner that the proposed route in respect of which clearance is given would cover the submergence area of the Jamphal Dam.

(e) The Petitioner at the bidding stage was neither intimated nor could it have known about the possibility of the proposed site for the Jamphal Dam intersecting with the approved route of the KD Line. As a result, the Petitioner was prevented from carrying activities on the route and even tried to resolve the issue with the authorities of State of Maharashtra and CEA.

(f) Based on CEA directions dated 29.7.2019, the Petitioner was required to divert the route of the KD Line to avoid any potential intersection with the site for



the Jamphal Dam. The Petitioner was also required to obtain the requisite approvals from the Sulwade Jamphal Irrigation Division for construction of the KD Line along the diverted route which resulted in loss of time i.e. from 16.7.2018 until 19.4.2021, when the requisite approvals for the diverted route were finally made available to the Petitioner.

(g) The details of the various efforts made by the Petitioner in expediting the aforesaid approvals during the period 19.7.2018 and 19.4.2021 is as follows:

Date	Event
16.7.2018	The Tehsildar, Dhule issued a letter directing the Petitioner to stop construction activities relating to the KD line as the approved route for the line intersected with the proposed site of the Jamphal Dam. The letter further stated that construction activities on the said land were illegal as the Petitioner had not taken the required permission from the office of the Tehsildar for commencing construction activities therein.
19.7.2018	KTL responded to the letter of the DC, Dhule dated 16.7.2018 stating that KTL had obtained all the requisite statutory approvals, being approvals under Sections 68 and 164 of the Electricity Act, 2003 for the same route. The Petitioner further informed that intimation regarding the Project had also been submitted to the office of the District Collector, Dhule vide letter dated 14.7.2017.
31.7.2018	The Petitioner also wrote to the office of the District Collector Dhule (DC Dhule), inter alia apprising it about the specific details of the project. Further, the Petitioner stated that it had obtained all the requisite approvals from the concerned authorities.
13.11.2018 and 7.12.2018	Having received no response, KTL issued a letter to the CEA requesting for support. The CEA thereafter issued a letter requesting DC Dhule for support to complete the Project in a timely manner.
9.1.2019	The Minor Irrigation Division of Dhule (MIDD) issued a show cause notice to KTL asking it to stop construction work on the KD Line with immediate effect
5.2.2019	The Petitioner issued notice dated 5.2.2019 to all LTTCs informing them about the FM event. While the first letter to stop work was issued in July 2018, the work continued till the above show cause notice by MIDD. Anticipating delays in completing the Project by the SCOD of July, 2019 due to complete stoppage of work in January 2019, KTL issued the FM notice in February 2019
March, 2019-July, 2019	The Petitioner liaised with various authorities including the CEA, DC Dhule and the Government of Maharashtra seeking an expeditious resolution of the deadlock. KTL also responded to the show cause notices issued by MIDD and Tehsildar Dhule. Meanwhile, the CEA in a meeting dated 18.3.2019 involving officials of CEA, KTL and Government of Maharashtra (GoM) including DC Dhule, was apprised of the issues in the development of the KD Line. It was thus agreed that the KD Line would be required to be diverted.
29.7.2019	The CEA after meetings and consultations with KTL and other stakeholders, issued a letter dated 29.7.2019 where inter alia KTL was to consider diverting the KD line in consultation with the officers of the MIDD and initiate the necessary action for getting the requisite permits and clearances from the concerned regulatory authorities at the earliest to avoid any further delay
March, 2020- February, 2021	The Petitioner in subsequent months liaised with various authorities including the CEA, MIDD etc., to obtain the necessary approvals to construct the KD line along the diverted route identified and selected by it. KTL also took the necessary steps to obtain the requisite no objection certificate from the Sulwade Jamphal Irrigation Division. The Sulwade Division directed the manner in which the diversion was to be made and also required KTL to construct a protection wall for its sub-station and towers.



Date	Event
	The CEA in a meeting dated 5.11.2020 sought further support in grant of NOC from the requisite authorities for the revised diverted route, while also recording that no such NOC was originally required to be obtained by Petitioner. Notably, the CEA also clarified that Petitioner was not at fault and construction was not unauthorized. In view thereof, a request to expedite clearance in the interest of the project was made. During this period, KTL also addressed a letter dated 21.1.2021 to the MoP seeking expeditious grant of NOC to KTL and further issued a letter dated 23.12.2020 to the Water Resource Department, Maharashtra seeking its support.
23.2.2021	The Sulwade Jamphal Irrigation Division issued the required no objection certificate to KTL for construction of the KD Line along the diverted route. <u>This was a fresh NoC not required to be obtained by KTL at the time of bidding and therefore a completely new consent.</u> The NoC was granted on the condition that 8 specific towers of the KD Line would be constructed at a distance of at least 200 meters from the toe end of submergence side of the proposed protection bund.
19.4.2021	A subsequent approval was granted on 19.4.2021 to carry out tree cutting and resume work at the project site on and from the said date.

(h) The Petitioner after obtaining all the requisite statutory approvals under Section 68 and 164 of the 2003 Act received a show cause notice on 9.1.2019 from MIDD for stopping all the construction activities on the KD line. After receiving the show cause notice, the Petitioner vide notice dated 5.2.2019 informed the LTTC's about the anticipated delay in completion of the KD line by July, 2019. Thereafter, the Petitioner approached various authorities like CEA, DC Dhule, Government of Maharashtra for expeditious resolution of the issue. The Petitioner has also stated that in the CEA meeting dated 18.3.2019, it was agreed that the KD line would be required to be diverted. Accordingly, the Petitioner initiated the necessary action with the MIDD for getting the requisite permits clearances for the concerned authority for the revised diverted route. On 23.2.2021, the Sulwade Jamphal Irrigation Division issued the required 'no objection' certificate to the Petitioner for construction of KD line along with the diverted route on 23.4.2021 and on 19.4.2021 the Petitioner was granted approval to carry out tree cutting and work was resumed. The Petitioner opted for a route which would not intersect with the Jamphal Dam.

(i) The Petitioner had already obtained the forest clearance on 9.2.2018 for diversion of 119.689 ha of forest land for construction of KD line along the originally approved route in Maharashtra. However, due to the above rerouting of the KD Line, the Petitioner had to obtain a fresh approval under Section 164 of the 2003 Act for the alternate route of 8 kilometers from the CEA. The said approval was obtained on 1.4.2021 after approximately 13 months from the date of application



(applied on 2.3.2020). Further, the alternate route for the KD line comprises 3.2 kilometers of forest land (21.466 ha) for which the Petitioner had to obtain forest clearance from the MoEFCC. The Petitioner obtained Stage-I forest clearance on 15.3.2021 after close to 20 months from the date of application (applied on 30.7.2019). The Petitioner had all the above approvals in place for the KD line when it was directed to divert the route of the said line. Obtaining these approvals afresh resulted in loss of considerable working time for the Petitioner.

(j) The said delay led to a loss of working time of around 33 months from 16.7.2018 until 19.4.2021 and constitutes a *force majeure* event under Article 11 of the TSA. The Petitioner has submitted that the total loss of working time on this account was 33 months, as the Petitioner was able to expedite the construction activities, an extension in the SCOD has been sought of the line for only 27 months.

Reply of MPPMCL and MSEDCL

12. MPPMCL and MSEDCL have made similar submissions and as such they are taken together. The gist of the submissions made by the Respondents is as follows:

(a) The Sulwade Jamphal Kanoli Irrigation Lift Scheme (Scheme) was started much before the Project cut-off date of 4.4.2016. The Scheme was approved in the year 2001 its contract was awarded in the year 2007. In terms of bid documents, the Petitioner was required to do the route and technical survey before bidding for the project.

(b) The Petitioner had access to full details in public domain and same should have been factored in by the Petitioner in its technical and financial Bid. In terms of Bidding Guidelines, all the bidders including the Petitioner were required to conduct route survey with other formalities. As per the provision 2.14.2.5. of RFP, the investigation of the route and survey of the transmission lines associated with the Project and to examine, inspect site or subsurface conditions was fully the responsibility of the Petitioner. As the scheme was approved in the year 2001 and Scheme was awarded to the contractor in year 2007 which is much prior to the bid cut-off date, the Petitioner's claim for delay of the transmission Project for about 33 months due to *force majeure* events is devoid of merits.



(c) The copy of the report of Central Water Commission (CWC) dated January, 2014 showing List of New Projects under Appraisal in CWC as on 1.1.2014 also showed the existence of the Scheme from May, 2012. The construction work was started in April, 1999 and the mechanical works started in 2004. The Scheme was cleared by the Planning Commission in December, 2007 for ₹290.88 crore at 2006-07 price level after acceptance of the project by TAC in its 90th meeting held in September, 2007.

(d) Perusal of the reply of Water Resources, River Development and Ganga Rejuvenation in Lok Sabha dated 1.1.2016 shows that Scheme was started in 2001 and the Scheme was awarded in the year 2007. Thus, the Petitioner has failed to take reasonable care and was negligent during the execution of the transmission project. If the Petitioner had made sincere attempts, the Petitioner would have easily found the gazette notification regarding Scheme which became the law of land. The act of the Petitioner falls under the exceptions defined for *force majeure* events in Clause 11 of the TSA Agreement dated 14.3.2016.

(e) Placing reliance on APTEL's judgment dated 20.11.2019 in Appeal No. 121 of 2015, Sasan Power Limited vs. CERC & Ors. submitted that it was the Petitioner's responsibility to verify the route of the KD Line before its approval. All the relevant details of Jamphal Dam were in public domain and same could have been factored in by the Petitioner in its technical and financial Bid.

(f) The approval under Section 164 of the 2003 Act, public notice and issuance of certificate under the Forest Dweller (Recognition of Forest Rights) Act, 2006 for construction of the KD Line by the District Collector, Dhule cannot be a sole ground to grant exemption on the ground of gross negligence on the part of the Petitioner.

Rejoinder to the reply of MMPCL and MSEDCL

13. The Petitioner has made the similar submissions in its rejoinder to the reply of MPPMCL and MSEDCL and, hence, dealt together. The clarifications given by the Petitioner are as follows:

(a) It is of no consequence that Jamphal Dam was planned in advance of the cut-off date under the TSA. Even if the Petitioner generally had knowledge about the plan to implement the Jamphal Dam at some unspecified location, it had no way of knowing what the exact location or area of the Jamphal Dam would be, or such location would intersect with the route of the KD Line.



(b) The BPC while preparing a survey report conducted a detailed survey and was unable to discover the Jamphal Dam because the same was not in existence. The Petitioner in furtherance of the detailed survey of the BPC, conducted two independent additional surveys (before and after the bid), published gazette notifications, newspaper publications required for obtaining Section 164 of the 2003 Act approval and yet the Dam authorities and local bodies gave no information to the Petitioner. Therefore, to hold the Petitioner responsible for knowing the existence of a Dam site beforehand, even before the Central or State water authorities, state administrative and forest departments would finalized the proposal is unreasonable and un contemplated under the bid documents of the TSA.

(c) Even the RECTPL, BPC had no knowledge of the precise location of the Jamphal Dam, and did not inform the prospective bidders of the possibility of the Jamphal Dam intersecting with the KD Line.

(d) The Alternate Route No. 2 of the BPC's Report also clearly fell within the catchment area of the Jamphal Dam. Thus, there was no way for the Petitioner or the BPC to know of the precise location of the Jamphal Dam. Hence, the contention of MPPMCL and MSEDCL that Jamphal Dam had pre-existing nature is wholly irrelevant.

(e) The approved route of the KD Line traverses the Khargone and Khandwa districts of Madhya Pradesh to the Dhule district of Maharashtra. The approved route of the KD Line was fixed after detailed consideration of all aspects of the routes by technical experts. RECTPCL had provided a bid survey report to the Petitioner that inter alia specifically mentioned details of reserved forests, transmission lines, rivers, etc. which were present along the identified routes for the KD Line. However, the said report did not mention the presence of any notified site for construction of a dam.

(f) No objection was received by the Petitioner from any entity against the public notice issued under Section 164 of the 2003 Act. Further, a certificate was granted by the District Collector of Dhule for construction of KD line along the very same route. Even at that stage of obtaining certificate, no indication was provided to the Petitioner that the proposed route in respect of which the said clearances were being obtained would cover the submergence area of the Jamphal Dam.



(g) By letter dated 16.7.2018, the Tehsildar, Shindkheda directed the Petitioner to immediately stop all construction activities relating to the KD Line falling within the submergence area of the Jamphal Dam. Till 16.7.2018, the Petitioner was never informed or had any opportunity to discover the precise coordinates of the aforesaid demarcation of the Jamphal Dam submergence area.

(h) The reliance placed by MPPMCL on the report of CWC dated January, 2014 is misplaced as the said report, categorizes projects into Category 'A' and 'B'. The projects specified under 'Category A' were under various stages of appraisal whereas the projects under Category B were already accepted by the Advisory Committee and investment approvals for the same were awaited. Therefore, the said scheme was categorized under Category 'A' in the attached report, and the approval for the project in 2014 was not accorded.

(i) In fact, in the 128th meeting of the Central Advisory Committee held on 10.3.2016, it is clearly recorded that the project was kept in abeyance since 2012 and the proposal resurfaced in the 128th meeting, which was approved in the 129th meeting but till December, 2020 awaited for the approval of the NITI Ayog / Planning Commission for budget allocation.

(j) The submission of MPPMCL that the scheme was approved by the Planning Commission in 2004 is also incorrect. The Petitioner has submitted that MPPMCL has submitted a document for a different project titled as 'Sulwade Barrage Medium Irrigation Project'. This project is not Sulwade Jamphal Kanoli LIS but an entirely different project that does not intersect with the Petitioner's project at all. From the 128th and 129th meeting of the Central Advisory Committee (CAC) of Central Water Commission, it showed that the Salwade Jamphal Kanoli LIS was accorded the approval in July/ August 2016.

(k) The reliance placed on response of Water Resource, River Development and Ganga Rejuvenation submitted in the Lok Sabha is also misplaced as the said document shows that the Sulwade Jamphal Kanoli LIS mentioned under Annexure – I titled as "*List of 68 MMI and ERM Projects (out of 148 project proposals received) considered and accepted by the advisory committee of MOWR, RD&GR during the current plan period (2012-13 to as on date)*". Thus, the Jamphal Dam project was clearly kept in abeyance and did not even receive investment approval in 2012. A perusal of the minutes of the 128th and 129th meeting of CAC of the



Central Water Commission shows conclusively that there was no finality of location or co-ordinates or timelines of the Jamphal Dam till January, 2019 at the very earliest.

(l) The Petitioner has also annexed images obtained from Google Earth for the period from 2013 up to 2021 to demonstrate that there was no construction on ground at least as late as 2017 i.e., long after the date of bid submission and completion of route survey by the BPC as well as the Petitioner. The BPC routes shared with the prospective bidders along with the RfS did not mention or demarcate the existence of a Dam or a submergence area.

(m) None of the authorities at the Central or State level were aware of the existence or the precise coordinates of the Jamphal Dam at the time of grant of various consents and approvals to the Petitioner for the Transmission Lines, including the Section 164 of the 2003 Act Approval granted by the CEA and clearance granted by District Collector, Dhule.

(n) The Petitioner was not negligent in carrying out its obligations under the TSA and took due care to ensure there is no unwarranted impediments in construction of transmission lines.

(o) The reliance placed by MPPMCL on reports being in public domain mentioning the existence of the Jamphal Dam is misplaced as these reports mention the conceptualization of the Jamphal Dam but does not provide the specific coordinates where the Jamphal Dam including its submergence area was to come up.

(p) The finalization of the plan to implement the Jamphal Dam was in a state of flux from 2006 with no finality being achieved till as late as February 2019, which is 3 years after the cut-off date under the TSA.

(q) The reliance placed by MSEDCL on the APTEL's judgment dated 20.11.2018 in Appeal No. 121 of 2015 titled *Sasan Power Limited v CERC & Ors.* is misplaced. The judgment states that grossly erroneous reports cannot be justified by taking shelter under the disclaimer in bid documents. The Petitioner did carry out the required due diligence before proceeding to implement the Project. The BPC cannot be absolved of the responsibility for not providing any inkling about the existence of a notified site for a Dam in the survey reports.



(r) Despite the above constraints, the Petitioner had completed close to 95% of the KD line by the originally envisaged SCOD which clearly demonstrates that the Petitioner was not negligent and carried out the development of the KD line.

(s) From the perusal of CEA ("Monthly Progress Reports") as on 31.7.2019, it shows that out of the total 486 towers to be constructed for the KD Line, the Petitioner had completed foundation work for 483 towers and erection of 480 towers was completed.

(t) In the CEA and the MoP meetings which were held inter alia to discuss the issues in implementation of the KD line in the Jamphal Dam area, no fault of the Petitioner was found in the construction of the KD line. In the CEA and MoP minutes of the meetings dated 18.3.2019, 29.7.2019, 5.11.2020, 10.2.2021 and 12.2.2021 it is clearly showed that the delay in construction of the KD line due to intersection with the Jamphal Dam was unexpected, unforeseen and uncontrollable.

(u) Not only the intersection of the KD line with the Jamphal Dam was unexpected, unforeseen and uncontrollable, but the proposal for construction of Jamphal Dam was itself approved much after the approval of the Project of the Petitioner, bid submission date and acquisition of the SPV by L1 bidder. Moreover, the earlier proposal moved for the construction of the Jamphal Dam in the years 2006 and 2012 were both returned for various reasons, and thereafter it was only in March, 2016 that the State government reconsidered its earlier proposal and submitted for fresh approval of the Central Water Committee in the 128th meeting of the Advisory Committee, as evident from the minutes of the meeting dated 10.3.2016 of the 128th meeting of Advisory Committee of Central Water Commission:

(v) The contention of MSEDCL and MPPMCL that the delay caused due to intersection of the KD line with the Jamphal Dam is covered within the *force majeure* exclusions mentioned in Article 14.4.1 of the TSA is misplaced. The delay due to the unexpected restrictions imposed by the Tehsildar Dhule and the MIDD on the construction of the KD line amounts to a *force majeure* event under Article 11 as well as a "Change in Law" under Article 12 of the TSA as the Petitioner was required to obtain fresh consents and clearances from concerned authorities that were not otherwise required as on the cut-off date. The Petitioner is, therefore,



entitled to appropriate relief for the time and cost over-run caused due to the above *force majeure* and “Change in Law” events in terms of Articles 11 and 12 of the TSA.

14. The Petitioner vide affidavit dated 6.9.2022 has submitted that based on the directions of various Indian Government Instrumentalities like DC Dhule, MIDD, Tapi Irrigation Division Corporation (TIDC) as well as the CEA, the Petitioner was compelled to reroute 6.5 km of the KD Line. The rerouted line required construction of 18 additional towers over a distance of 6.5 km. Of these, 9 locations fell within forest area for which the Petitioner obtained separate approvals. However, 9 locations that were diverted were made to pass through the narrow catchment area of the Jamphal Dam based on directions of the Indian Government Instrumentalities. The 9 towers along the narrow catchment area were constructed assuming the Full Reservoir Level (“FRL”) of the Jamphal Dam as 258 mtrs. and Top Bund Level (“TBL”) as 259.10 mtrs. The Petitioner deployed an engineering solution which has been implemented for the first time in the Indian transmission sector to optimize the diversion and prevent future threats to the operation of the KD Line. As a mitigation measure, the Petitioner constructed chimney foundations to raise the height of the towers at the locations of the approved diverted route falling in the narrow catchment area of the Jamphal Dam to ensure that the electrical towers including their base do not submerge in water when the narrow catchment area is filled with water.

Analysis and Decision

15. We have considered the submissions of the Petitioner and Respondents with respect to delay in execution of KD line. The Petitioner has contended that delay in execution of KD Line was due to the directions issued to it to divert the KD line to avoid intersection with the proposed Jamphal Dam as a result of which the Petitioner was required to take approvals from the concerned State Authorities and forest department. The Petitioner has contended that owing to this, it could not carry out any construction activity from 16.7.2018 to 19.4.2021. The Petitioner has contended that this is an event of *force majeure* in terms of Article 11 of the TSA which entitles the Petitioner for extension of the scheduled COD of KD line.



16. As against this, MPPMCL and MSEDCL have contended that the Petitioner was negligent during the execution of the Project and the act of the Petitioner falls under the *force majeure* exclusions as provided in the TSA. Clause 11.3 and Clause 11.4 of the TSA defines *force majeure* as follows:

“11.3 Force Majeure

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

(a) Natural Force Majeure Events:

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

(b) Non-Natural Force Majeure Events:

i. Direct Non–Natural Force Majeure Events:

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

ii. Indirect Non - Natural Force Majeure Events

- *act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or*



- *radio-active contamination or ionizing 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.”*

17. We have considered the above submissions of the Petitioner, MPPMCL and MSEDCL and have also gone through the record carefully. The main issue which needs to be analysed is “whether the intersection of proposed route of the Petitioner for KD line with Jamphal Dam is a *force majeure* event”.

18. We have perused the show cause notice issued by Tahsildar Dhule dated 16.7.2018 in this regard, which is as follows:



तहसील कार्यालय, शिंदखेडा

दुरध्वनी क्र.02566-222226

ई-मेल- tahsilk@gmail.com

क्रमांक/गावठाणा/कावि/ २१०/२०१८

दि. १६/०७/२०१८

नोटीस

प्रति,

प्रोजेक्ट मॅनेजर

खरगोन ट्रान्समिशन लि. (म.प.)

विषय:- मॉजे सॉडले ता.शिंदखेडा या शिबरातील आपले टॉवर उभारणीचे व पाया उभारणीचे सुरू असलेले काम तात्काळ बंद करणे बाबत.

संदर्भ:- दि.१६/०७/२०१८ रोजी मा. ना. श्री. सुभाषजी भामरे केंद्रीय सरसण राज्य,मंत्री, भारत सरकार व मा.जिल्हाधिकारी सो.धुळे यांचे अध्यक्षते खाली झालेल्या बैठकीतील सूचना

महाराष्ट्र प्रकल्पबाधित व्यक्तीचे पुनर्वसन अधिनियम-१९९९ चे कलम ११ (१) ची अधिसूचना दि.२ एप्रिल २००९ रोजी शासन राजपत्रात प्रसिध्द करण्यात आलेली आहे उक्त अधिनियमाचे कलम १२ नुसार राजपत्रात प्रसिध्द झालेल्या गावाच्या लाभदायक तसेच बुडीत क्षेत्रात कोणत्याही कृषी जमिनीची मा.जिल्हाधिकारी सो.धुळे यांची लेखी परवानगी असल्याशिवाय जमिनीचे हस्तांतरण (देंणगीच्या,पड्याच्या अथवा अन्य रूपाने) हस्तांतरीत करता येणार नाही. सदर निर्बंध हे आज देखील लागू असून आपण मा.जिल्हाधिकारी यांची कोणतीही लेखी परवानगी घेतलेली नसल्याची निदर्शनास येते.

तरी मा.जिल्हाधिकारी सो. धुळे यांनी दि.१६/०७/२०१८ रोजी आपल्या समक्ष झालेल्या बैठकीत दिलेल्या सूचनेनुसार मॉजे सॉडले येथील सुलवाडे-जामफल-कनोली उपसासिध्द योजना ता.शिंदखेडा या बुडीत क्षेत्रातील ट्रान्समिशन टॉवर उभारण्याचे काम तात्काळ बंद करावे. आपला खूलासा ४ दिवसांच्या आत सादर करावा.

Signature
16.7.18
(सुदाम महाजन)
14/10
तहसीलदार शिंदखेडा

प्रत:- मा.जिल्हाधिकारी सो.धुळे यांना माहितीसाठी सविनय सादर.

प्रत:- मा.उपजिल्हाधिकारी (पुनर्वसन) धुळे यांना माहितीसाठी सविनय सादर.

प्रत:- बं.पा.तलाठी सॉडले ता.शिंदखेडा यास संबंधितांना मुदतित बजावून केलेल्या कार्यवाहीचा

19. As per above, Tehsildar, Shindkheda issued a notice to the Petitioner directing immediate stoppage of works associated with KD line intersecting with Sulwade-Jamphal irrigation scheme Dam site. The subject of the notice dated 16.7.2018



states that “tower erection and foundation work in progress on agricultural land at Sondale village, Shindkheda Tehsil should be stopped immediately”. The said notice has referred to the meeting held on 16.7.2018 under the Chairmanship of Shri Subhashji Bhamre, Union Minister of State for Defence, Government of India and District Officer Dhule, which has been annexed with the notice dated 16.7.2018. In the said meeting dated 16.7.2018, officers of the Petitioner agreed to stop the work immediately and divert the line. The main contention behind immediate stoppage of works is that the Petitioner was found constructing towers in the agricultural land of Shindkheda which has been notified under Article 11(1) of the Maharashtra Project Affected Persons’ Rehabilitation Act, 1999 vide Notification dated 2.4.2009. As per the Article 12 of the said Act, transfer of agricultural land, cannot be done without the written permission of the District Collector, Dhule. The Petitioner vide its FM notice to LTTCs has also indicated as follows:

“As per the Minor Irrigation Division, Dhule (MIDD), the route for construction of the said transmission line falls under the submergence and dam seat area of Jamphal dam i.e. the proposed route of the Jamfal-Kanoli-Sulwade Lift Irrigation Project which is in the possession of Minor Irrigation Division since 2002 and restrictions were laid on the land under Sub-section (1) of Section 12 of the Maharashtra Project Affected Persons Rehabilitation Act 1999. MIDD is also of the view that KTL had illegally and unlawfully constructed number of 765KV D/c transmission towers in the submergence and dam seat area of Jamphal dam at Village Sondale and Songir without taking permission from MIDD. Further, the Divisional Forest Collector, Dhule vide their letters dated 31.7.2018 and 19.10.2018 respectively had instructed KTL to stop the construction work of towers and remove them from submergence and dam seat area of proposed Jamphal dam despite the fact that prior approval of the Govt. of India under Sub-section (1) of Section 68 of the Electricity Act, 2003 was issued to KTL by Central Electricity Authority (CEA) on 2.2.2016 for construction of transmission lines covered under said project.”

20. On perusal of notice dated 16.7.2018 of Tehsildar, Shindkheda it can be concluded that Gazette notification reserving the rights of land on which the Petitioner was carrying out construction was issued way back in 2002, whereas project cut-off date in instant case is 9.5.2016.

21. The Petitioner was again given show cause notice by Minor Irrigation Division, Dhule on 9.1.2019 which is as follows:





**Minor Irrigation Division, Dhule.
Sinchan Bhawan, Sakri Road,
Dhule - 424 001.**

wrd.maharashtra.gov.in Telephone No :- 02562 - 276124
Email :- middhule@gmail.com FAX No. :- 02562 - 276663
No./MID/PB-1/ 5 /2019 Date :- 3 / 1 / 2019

By RPAD

Show Cause Notice

To,
Shri. S. S. Shirur
Project Head,
Khargone Transmission Ltd, Dhule.

Subject: Construction of 765 Kv D/C transmission towers in the submergence and dam seat area of proposed Jamphal dam at village Sondale and Songir...

- References:**
1. Minutes of meeting held under chairmanship of Hon'ble MoS Defence Subhash Bhamare dated 16.07.2018
 2. DFO Dhule Letter No. B/Kaksh-14/1852/2019 Dated 31.07.2018
 3. Collector Dhule Letter No. Kaksh-4/Rehabilitation/kavi-490/2018 Dated 19.10.2018
 4. EE MID Dhule Letter No. MID/PB/2850/2050 Dated 28.11.2018

It has come to the attention of the Minor Irrigation Division Dhule that, in spite of giving frequent oral and writing instructions to your project authorities, site engineers and contractor etc. to stop the construction of 765 Kv D/C transmission towers and remove it from the submergence and dam seat area of proposed Jamphal dam, it is observed that you have continued the work in full swing.

This office has already brought to your kind attention that, entire land falls under the submergence and dam seat area of Jamphal dam has been notified under subsection (1) of section (11) of Maharashtra Project Affected Persons Rehabilitation act-1999. So, restrictions are laid on this land under subsection (1) of section (12) of same act after the publication of official gazette on date 02.04.2009. Likewise, entire forest land falls under the submergence and dam seat area of Jamphal dam has in possession of Minor Irrigation Division Dhule.

Though, your company has constructed number of 765 Kv D/C transmission towers in the submergence and dam seat area of Jamphal dam at village Sondale and Songir without taking prior permission from Rehabilitation Division of Collector office Dhule



or from Minor Irrigation Dhule. So, all the towers constructed by your company within above mentioned area are illegal and unlawful.


As per reference no.1, Hon'ble District Collector, Dhule has also pointed out this issue and declared subject sited work as illegal activity. In addition to that, Divisional Forest Officer, Dhule (as per reference no.2) has also informed you to stop the construction work at the forest land which is already handover to Minor Irrigation Dhule.

As per reference no.3, Hon'ble District Collector, Dhule has addressed to this department to, instruct your company to stop the construction work of towers immediately and remove it from submergence and dam seat area of proposed Jamphal dam, accordingly Minor Irrigation Division Dhule has informed you the same vide letter given in reference no. 4. But till this date there is no action initiated from your side for removing the towers.

Looking towards your approach, this office is giving final intimation to you to, remove all the towers from submergence and dam seat area of proposed Jamphal dam before January 31, 2019. Please notify this office when the restoration has been completed so that our staff may schedule a follow-up site inspection.

Failure to comply with this request or any further unauthorized activity on the site will result in severe criminal and administrative action against you in person as well as against your organisation. We anticipate and would appreciate your full cooperation in this matter.

Attachments: As per above


(S. C. Ahire)
Executive Engineer,
Minor Irrigation Division,
Dhule.

22. As per above, MIDD again stated that entire land under submergence and Dam seat area of Jamphal Dam has been notified under Maharashtra Project Affected Persons' Rehabilitation Act, 1999 vide gazette Notification dated 2.4.2009. The notice also stated that all towers of the Petitioner in said area are illegal and unlawful since it has not taken permission of Collector Office, Dhule or Minor Irrigation Department, Dhule.

23. We have perused reply given by the Petitioner dated 19.7.2018 and various other letters in response to said notice dated 16.7.2018. In the said reply, the Petitioner has referred to approval given under Section 164 and Section 68 of the 2003 Act, transmission license granted to the Petitioner. The Petitioner has submitted that District Collector of Dhule had itself issued a certificate required under the Forest Dweller (Recognition of Forest Rights) Act, 2006 for construction of the



KD line along the aforesaid route and, therefore, the Petitioner at the bidding stage was neither intimated nor could it have known about the possibility of the proposed site for the Jamphal Dam intersecting with the approved route of the KD line.

24. We have perused the certificate issued by the District Collector of Dhule under the Forest Dweller (Recognition of Forest Rights) Act, 2006 whereby DC, Dhule has recognized 119.689 hectares of forest land to be diverted in favour of the Petitioner. We observe that the show cause notice by Tehsildar, Shindkheda was issued to the Petitioner for restriction laid on agricultural land. We are of the view that on the proposed route of the Petitioner there may be some forest land and some agricultural land. The Petitioner has not been able to produce anything on record to show that it obtained approval of DC, Dhule with regard to agricultural land in the submergence and Dam seat area. Approval of forest land does not affect the approval required to be obtained by the Petitioner for agricultural land in terms of Maharashtra Project Affected Persons' Rehabilitation Act, 1999.

25. CEA held a meeting on 18.3.2019 on the issue of construction of Khandwa-Dhule transmission line where District Collector, Dhule also participated. During the meeting District Collector, Dhule stated as follows:

“District Collector of Dhule informed that the entire land falls under the submergences and dam seat area of Jamphal dam which has been notified under subsection (1) of Section (11) of Maharashtra Project Affected Persons Rehabilitation Act, 1999. Therefore, restrictions have been laid on this land under subsection (1) of Section (12) of same Act and notwithstanding anything contained in any law for the time being in force and require permission for any further transformation and development in the notified land. Several meetings were held earlier with M/s. KTL in last one year regarding the Dam issue. KTL was advised to submit relevant documents against various queries raised by the concerned departments and to divert the transmission route so as to avoid the dam area. He also suggested that line can be routed through narrow catchment area of Dam (which is around 1.12 Km) and forest approval for the diverted route is to be taken accordingly. He mentioned that one of the tower location which is coming near the boundary wall of Dam, needs to be shifted. “

26. The meeting at CEA concluded as follows:

“After detail deliberations, keeping in view the National importance of both the generation and transmission projects, following was agreed in the meeting.

- a) Rerouting of transmission line would be required to avoid towers in the submergence area of dam and to start construction activity of dam.*
- b) M/s KTL would submit response to all raised by District Administrative authority and Irrigation department of Government of Maharashtra immediate.*



- c) *An undertaking would be submitted by M/s. KTL stating that “Khandwa Pool-Dhule 765 kV D/C transmission line would be diverted from the proposed route, as and when required, to avoid submergence area of dam linked to Jamfal-Kanoli-Sulwade Lift Irrigation project. The diversion would be as per regulatory framework of CERC”*
- d) *District Administrative Authority. Govt. of Maharashtra would submit their response about the acceptance of above undertaking within three weeks from the date of issue of this minutes considering the importance of both projects and benefits to state/UTs. During above period no construction activity will be taken up by M/s. KTL in submergence area of dam.*
- e) *M/s KTL would carry out survey for rerouting of transmission line and submit Forest Clearance Division Proposal (FDP) to MoEF&CC at appropriate time to avoid constraint in evacuation of power from NTPC’s Khargone TPP.”*

27. We have perused the report of the Committee formed by the MoP to review the pending issues relating to the construction of the KD line chaired by CEA, Chairperson and comprising of officers of MSETCL, PGCIL and Water Resources department, Government of Maharashtra. The said Committee held a meeting on 12.2.2021 wherein following has been recorded:

“ED, TIDC, Jalgaon stated the facts of the case by highlighting the inception of the Sulwade Jamphal Kanoli lift Irrigation Scheme in Dhule District, Maharashtra in the year 2000. He mentioned that the land acquisition for the dam started in 2010 and about Rs. 500 Crs. has already been spent on the project so far. He further stated that their main concerns are with regard to the potential hazard of the reservoir water for the existing Dhule Substation which is adjacent to reservoir. He informed that in order to protect the village along the reservoir area, from the ingress of water, a bund wall would be built by them. Since the substation is very close to the reservoir and with the filling of the reservoir up to its full capacity, water in reservoir may ingress into the substation or there could be seepage of water into the switchyard, there is a need to take adequate electrical safety measures for the portion of towers failing in the reservoir area and for the safety of the substation. Accordingly, he suggested that M/s. BDTCL/KTL authorities should take precautionary measures in form of building concrete wall for protecting their S/S from any possibility of water Ingression/seepage. From TIDC side it won't be possible to bear/share any expenditure towards creating protective wall for the S/S as they are already bearing lot of expenditure in form of building bund wall.”

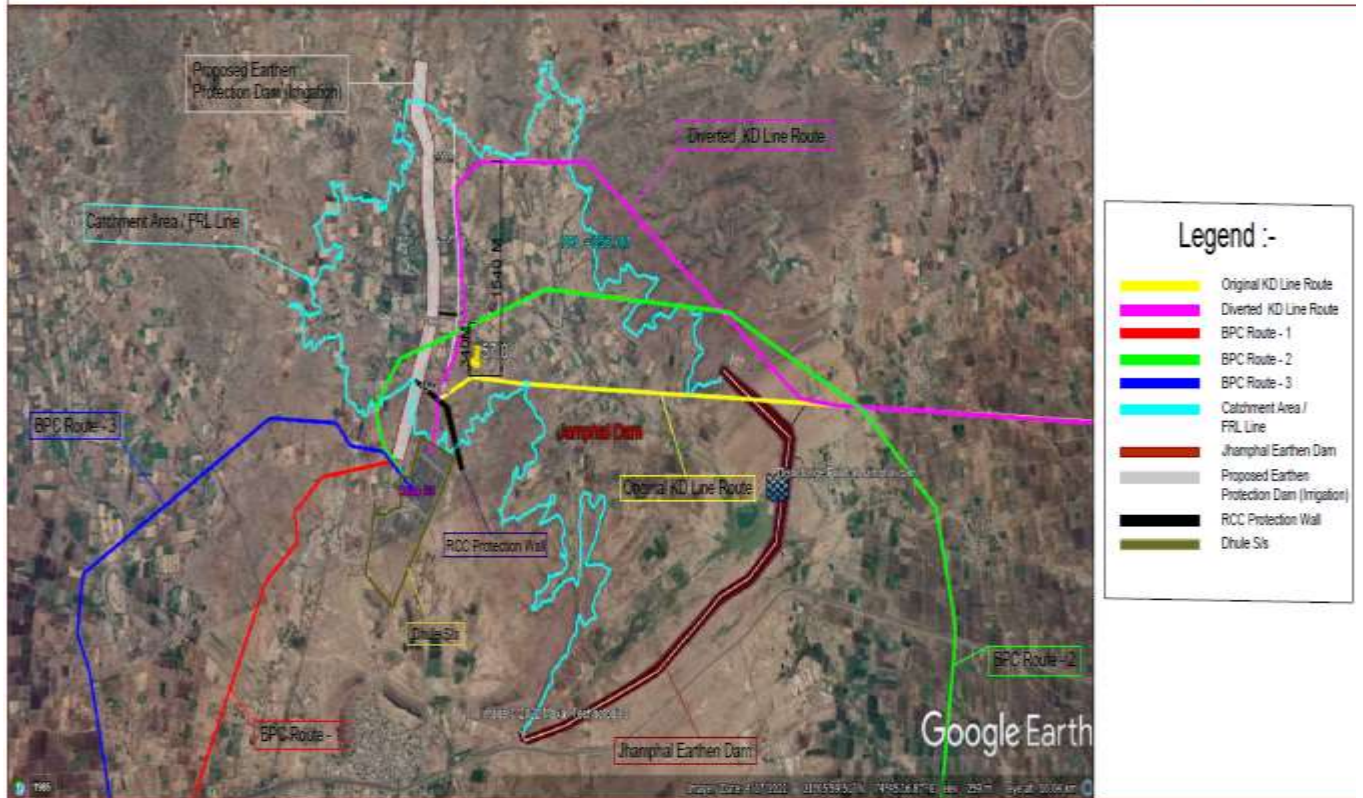
28. As per above TIDC, Government of Maharashtra stated that inception of the Jamphal Lift Irrigation Scheme was in the year 2000 and land acquisition for Dam started in the year 2010.

29. The Petitioner has submitted that BPC did not indicate the presence of Jamphal Dam in its Survey Report. In this regard, we observe that the petitioner didn't adopt any of the three routes suggested by BPC , rather they have chosen a new route which has comparatively smaller length. The length of Route-1, Route-2 and Route-3 as provided by the BPC are 221.17 km, 226.06 km and 235.36 km, respectively,



while length of route adopted by the Petitioner was 189.5 km with diverted length as 191.4 km. The Petitioner has submitted three routes suggested by the BPC and the route envisaged by the Petitioner and actually adopted by it, as follows:

765 KV D/C (HEXA) KHANDWA - DHULE LINE : DAM ORIGINAL ROUTE , DIVERSION ROUTE & BPC ROUTE 1, 2, & 3



30. From the above map, it can be seen that out of the three routes suggested by BPC, only BPC Route-2 (fluorescent green in map) goes through submergence area of the Dam but does not foul with the Dam seat area, whereas the Petitioner’s proposed shorter route (yellow colour in map) fouls with the Dam seat area (shown in brown colour in map). The diverted route (pink colour in map) of the Petitioner as implemented is also seen to be lying in submergence area but the diverted route does not foul with the Dam seat area.

31. It would be appropriate here to discuss the provisions of the Request for Qualification (RfQ) and Request for Proposal (RfP) of the Project. Clause 1.5 of the RfQ enumerates tasks to be carried out by the BPC and the same are as follows:

“1.5 The BPC has initiated development of the Project and shall be responsible for the tasks in this regard as specified here under:

- (a) Provide to the bidders a Survey Report for the project at least forty five days prior to the bid deadline. The Survey Report will contain information regarding*



the transmission line, i.e. voltage level, line configuration (i.e. S/C or D/C), indicative route alignment, conductor type, conductor configuration and type of terrain likely to be encountered.

Provided that neither the BPC, its authorized representative, any of the LTTCs, nor their directors, employees or advisors/consultants make any representation or warranty, express or implied, or accept any responsibility or liability, whatsoever, in respect of any statements or omissions made in the Survey Report, or the accuracy, completeness or reliability of information contained therein, and shall incur no liability under any law, statute, rules or regulations as to the accuracy, reliability or completeness of such Survey Report, even if any loss or damage is caused to the Bidders by any act or omission on their part.”

32. Clause 2.14.2 of the RfP provides that the bidders shall inform themselves fully about the following:

“2.14.2.1 *The Bidders shall make independent enquiry and satisfy themselves with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on his Bid. Once the Bidders have submitted their Bids, the Bidders shall be deemed to have inspected and examined the site conditions (including but not limited to its surroundings, its geological condition and the adequacy of transport facilities to the site), the laws and regulations in force in India, the transportation facilities available in India, the grid conditions, the adequacy and conditions of roads, bridges, railway sidings, ports, etc. for unloading and/or transporting heavy pieces of material and has based its design, equipment size and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the transmission of power. Accordingly, each Bidder acknowledges that, on being selected as Successful Bidder and on acquisition of one hundred percent (100%) of the equity shares of the East-North Interconnection Company Ltd., the TSP shall not be relieved from any of its obligations under the RfP Project Documents nor shall the TSP be entitled to any extension in Scheduled COD mentioned in this RfP or financial compensation for any reason whatsoever.*

“2.14.2.3 *Bidders may visit the route of the Transmission Lines associated with the Project and the surrounding areas and obtain / verify all information which they deem fit and necessary for the preparation of their Bid.*

2.14.2.4 *The BPC has carried out a survey of the Transmission Lines associated with the Project and shall provide each Bidder with its Survey Report of the Project. Bidders in their own interest should carry out required surveys and field investigation for submission of their Bid.*

2.14.2.5 *Failure to investigate the route of the Transmission Lines associated with the Project and to examine, inspect site or subsurface conditions fully shall not be grounds for a Bidder to alter its Bid after the Bid Deadline nor shall it relieve a Bidder from any responsibility for appropriately eliminating the difficulty or costs of successfully completing the Project.*

2.14.2.6 *The Selected Bidder shall obtain all necessary Consents, Clearances and Permits as required. The Bidders shall familiarize itself with the procedures and time frame required to obtain such Consents, Clearances and Permits.”*



33. As per clause 2.14.2 of the RfP, as quoted above, the Petitioner had to carry out its own survey before submission of the bid, and that failure to investigate the route shall not be grounds for a Bidder to alter its Bid after the Bid Deadline or shall it relieve a Bidder from any responsibility for appropriately eliminating the difficulty or costs of successfully completing the Project.

34. The Petitioner has referred to 128th meeting of the Central Advisory Committee held on 10.3.2016, stating that the project was kept in abeyance since 2012 and the proposal resurfaced in the 128th meeting, which was approved in the 129th meeting but till December, 2020 awaited for the approval of the NITI Ayog / Planning Commission for budget allocation. We have perused the said meetings of Central Advisory Committee. The minutes of the Meeting dated 10.3.2016 for the 128th Meeting held on 29.2.2016 provides as follows:



(iii) **Project Proposals considered by the Advisory Committee**

A. Irrigation and Multi-purpose Projects

1. Sulwade Jamphal Kanoli Lift Irrigation Scheme, Maharashtra (New Major, Estimated Cost Rs. 2374.46 Cr. @PL 2014-15)

CE (PAO), CWC and Member Secretary informed the Committee that proposal envisages construction of an intake structure on river Tapi upstream of existing Sulwade barrage in Dhule district to lift Tapi water in monsoon seasons to one existing tank Jamphal and construction of three new tanks as well as to nine existing minor tanks. The project contemplates to provide irrigation facilities annually to an area of 52,720 ha in drought prone and backward area. It is planned to pump water through a 41 km long pressurized pipe instead of open canal to Jamphal tank and redistribute this water further to other tanks.

The project was considered twice by Advisory Committee in 85th Meeting held on 22-02-2006 and 115th meeting held on 24-07-2012, and it was deferred during 85th meeting with remark that this project may be considered along with other projects of Maharashtra in Tapi basin in the next TAC meeting, and during 115th meeting remark was that the cost per hectare is on higher side and there is significant increase in cost of the project over a period of 5 years since considered in the last meeting i.e. in March, 2006. It was decided that before considering the project proposal for acceptance, the cost aspect and reasons for large increase in project cost would be examined by CWC in consultation with project authorities.

The State Government has now submitted the updated DPR along with updated cost estimate at Price Level 2014-15, without change in scope of work. The same has been examined in CWC and the cost has been finalized for Rs.2374.46 Cr @ P.L.2014-15. The increase in cost is due to price escalation, and implementation of new land acquisition Act as per LARR 2013. As per direction of Committee, State Govt. submitted detailed design of all major components to CWC approved by State CDO(MERI), Maharashtra for techno-economic appraisal which have been examined and approved by CWC.

Member Secretary also informed the Committee that lifting of water is being done upstream of existing Sulwade barrage which was commissioned in year 2010 which is not a part of this scheme, hence provisions of e-flows and longitudinal/latitudinal connectivity are not applicable to this scheme.

35. As per above, it can be observed that the said Jamphal Dam scheme was under discussion since 2006. The Petitioner has also referred to Google Earth images stating that it does not depict any development on the ground at least till 2020-21. We observe that once a scheme has been identified by the Government authorities, it may take some time to implement after finalisation of cost aspects etc. This cannot be argued by the Petitioner that in absence of physical roadblock it was entitled to plan its transmission line fouling with Dam seat area or submergence area without the required approvals. The RFP specifically provides that "*the Selected*



Bidder shall obtain all necessary Consents, Clearances and Permits as required. The Bidders shall familiarize itself with the procedures and time frame required to obtain such Consents, Clearances and Permits". It was the sole responsibility of the Petitioner to make itself aware of the consents and approvals required on proposed route and nobody else's responsibility to inform it about the same.

36. We observe that the Petitioner identified and surveyed a route of its own in respect of the KD line . On going through the show cause notices issued to the Petitioner and various minutes of the meeting in this regard as quoted above, it can be concluded that the submergence and Dam seat area of Jamphal Dam was under restricted area vide Gazette Notification dated 2.4.2009 which required permission of Collector Office. The Petitioner has not been able to produce the said permission of DC, Dhule while its work was stopped. We are of the view that if the restrictions were laid on land as early as 2009 much prior to bid deadline of May, 2016, the Petitioner should have taken care of the same when it finalised its route for the KD line and obtained required approvals. We further observe that the Petitioner has not opted for any of the suggested BPC routes but rather chose a new shorter route passing through Dam seat area . Therefore, we are of the view that failure of the Petitioner to carry out proper survey and obtain approvals cannot be considered as event of *force majeure*.

(II) Force majeure event: Delay due to the unanticipated imposition of the H+6 criteria for laying of transmission lines by MPPTCL

37. The Petitioner has contended that unanticipated imposition of H+6 criteria for laying the transmission lines by MPPTCL is a *force majeure* event leading to time over-run and additional expenditure to comply with the same. The submissions made by the Petitioner in this regard are as follows:

(i) The approved route of the transmission lines intersects with the existing transmission network of MPPTCL at certain locations. Accordingly, the Petitioner was required to ensure that its lines complied with the statutorily prescribed clearances at places where the Petitioner's transmission lines were crossing MPPTCL's transmission network.

(ii) The Petitioner vide letters dated 27.1.2017, 28.1.2017 and 16.2.2017 submitted its line crossing proposals for MPPTCL's approval. MPPTCL vide letter



dated 8.6.2017 refused to approve the Petitioner's line crossing proposals stating that the 'falling distance criteria for H+6' had not been fulfilled by the Petitioner at 18 crossings in relation to the KI line and the KD line. A similar condition was also subsequently imposed by MPPTCL on the KK line.

(iii) As per the CEA (Measures relating to safety and electric supply) Regulations 2010 ("2010 CEA Safety Regulations"), the Petitioner was required to maintain a clearance of at least 7.94 meters between its lines and those of MPPTCL at all locations where the two lines were intersecting.

(iv) The H+6 criteria imposed by MPPTCL required the Petitioner to maintain an additional distance of 6 meters, over and above the statutory requirement of 7.94 meters, between certain locations of the transmission lines and MPPTCL's transmission network.

(v) The H+6 criteria imposed by MPPTCL does not find mention in any legal requirement governing the construction of transmission lines, and was purportedly imposed by MPPTCL to ensure the safety of its existing lines and towers.

(vi) The Petitioner could not have contemplated at the time of submitting bid or thereafter that it would be required to comply with such additional safety requirements. It was also not foreseeable that MPPTCL could unreasonably delay the grant of the requisite no objection for construction of the above lines.

(vii) The Petitioner had to construct higher tower extensions at all places including KK line where such modifications were feasible and requested MPPTCL vide its letter dated 29.6.2017 and 21.9.2018 to reconsider its proposals.

(viii) Upon the Petitioner's request, MPPTCL granted conditional approvals stating that the Petitioner would give priority to restoration of MPPTCL's line over its own line in case of any line break-down, at all points where the H+6 criteria was not maintained. The line crossing approvals dated 16.10.2017, 20.11.2017, 29.11.2017, 26.12.2017, 26.2.2018, 31.10.2018 and 1.2.2019 issued by MPPTCL to the Petitioner are filed.

(ix) Based on the timelines as provided for grant of Section 164 of the 2003 Act authorization, the Petitioner anticipated that it would obtain the requisite approval from MPPTCL within a period of 2 months from the time of application. The said proposals were approved by MPPTCL belatedly and in phases with the last such approval for the KD lines and KI lines issued only on 26.12.2017 (i.e. 11 months



from the date of application). Thus, the grant of approvals was unreasonably delayed for a period of 9 months for the KD and KI Lines, i.e., at least from April, 2017 until December, 2017. Similarly, there was delay in the getting the line crossing approval for the KK line (i.e crossing proposal was first submitted on 28.1.2017 and re-submitted on 21.9.2018 and approval was granted by MPPTCL only on 1.2.2019. Thus, there was unreasonable delay in getting line crossing approval for KK line for a period of 22 months i.e. April, 2017 until February, 2019.

(x) The above delay of 9 months in grant of NOC for the KD and KI lines as well as 22 months in grant of NOC for the KK line was beyond the Petitioner's control which prevented the Petitioner from performing its obligations under the TSA and resulted in a delay in the commissioning of the three transmission lines. Accordingly, said delay, therefore, constitutes *force majeure* under Article 11 of the TSA entitling the Petitioner to an extension in the SCOD of the KD and KI lines by 9 months and KK line by 22 months. The Petitioner has submitted that due to its proactive efforts, the impact of loss of 22 months in construction of KK line has been significantly reduced and, accordingly, the total extension of SCOD claimed for the KK line is only 9 months from July, 2019 until 19.3.2020.

Reply of MPPMCL and MSEDCL

38. Identical contentions have been made by the MPPMCL and MSEDCL and, hence, they are taken together. The gist of the submissions made by the Respondents are as follows:

(i) MPPMCL has contended that the Petitioner has claimed the imposition of H+6 criteria for laying of transmission lines by MPPTCL as a *force majeure* event. However, the Petitioner has failed to implead MPPTCL as a party in the instant petition. Passing of any order on imposition of the H+6 criteria for laying of transmission lines by MPPTCL, will directly impact the MPPTCL and as such MPPTCL is necessary party without whose presence no effective order can be passed and enforced.

(ii) The requirement of H+6 distance criteria and angle crossing of 90 degree for crossing of various 400/220/132 kV lines of MPPTCL was existing much prior to cut-off date of the Petitioner's Project. It shows that there was negligence on the part of Petitioner.



(iii) Referring to MPPTCL's note, MPPMCL has submitted that collapse of tower during the construction phase shows negligence on the part of the Petitioner and the Petitioner was not in compliance with the applicable law on intersection of transmission lines of two licensees.

(iv) MPPTCL's Intra-State Transmission line was in existence much prior to the cut-off date of the Petitioner's Project. Therefore, the Petitioner's claim under *force majeure* events due to imposition of H+6 criteria for laying of Transmission Lines by MPPTCL, lacks merits and, hence, the delay claims of the Petitioner on account of KD line by 9 months, KI line by 9 months and KK line by 24 months, are liable to be rejected with costs. The said delay in execution of the lines could have been avoided if the Petitioner had taken reasonable care at the time of finalisation of the route and applied for DD/H+6 power line crossing with MPPTCL in the beginning.

(v) MSEDCL has submitted that it is the responsibility of the bidder to ascertain the transmission route and to undertake appropriate survey and field investigations. As per the TSA, the final selection of the site is the responsibility of the Petitioner and LTTCs cannot be held liable for the same. Therefore, failure to investigate the route of the transmission lines associated with the project will not relieve the Petitioner from any responsibility of successfully completing the Project.

Rejoinder to the reply of MSEDCL and MPPMCL

39. The Petitioner has made similar submissions on the issue of imposition of H+6 criteria in its rejoinder to the reply of MPPMCL and MSEDCL and written submissions and the same are dealt together. The gist of the submissions made by the Petitioner is as follows:

- (a) As regards the non-joinder of MPPTCL, the reliefs claimed in the present petition are as per Articles 11 and 12 of the TSA. MPPTCL is not a party to the TSA and no reliefs are claimed against MPPTCL. Thus, MPPTCL is not a proper or necessary party to the present proceedings and no case for non-joinder can be made out.
- (b) It is not a case where the Petitioner was not aware of MPPTCL's transmission network on the approved route of the transmission lines. The unexpected and arbitrary condition of complying with the H+6 criteria imposed by MPPTCL could not have been reasonably contemplated by the Petitioner at the pre-bid stage. The H+6 criteria does not find mention in any legal requirement governing the



construction/crossing of transmission lines, and was purportedly imposed by MPPTCL to ensure the safety of its existing lines and towers.

- (c) As regards the contention that the Petitioner was negligent in failing to maintain an angle crossing of 90 degrees with MPPTCL's network, the Petitioner has submitted that delay in construction of KD line, KI line and KK line was not due to deficiency on maintaining the requisite angles with MPPTCL's transmission network. The delay as caused was due to requirement to comply with H+6 criteria. The Petitioner made its best efforts to maintain the requisite angles and comply with the additional requirement of H+6 imposed by MPPTCL at all locations where technically feasible. Thus, no negligence can be attributed to KTL.
- (d) The mention of the collapse of the Petitioner's towers during the construction phase in the note referred by MPPMCL is irrelevant. The collapse of the towers was not related to the condition of H+6 criteria imposed by MPPTCL. During the construction of the KD line, 5 towers namely 3/0, 4/0, 5/0, 6/0 and 7/0 collapsed while 4 other towers were partially damaged due to heavy rains and thunderstorms on 16.4.2019. Three of the towers-3/0, 6/0 and 7/0 were crossing with MPPTCL's lines while the remaining were crossing with PGCIL's network. The collapse cited by MPPTCL in its note occurred in April, 2009, after the construction of the lines complying with the H+6 criteria.
- (e) In all the towers that collapsed, KTL had complied with the statutory norms including the additional H+6 criteria for the three towers crossing with MPPTCL's network.
- (f) As per Regulation 69 of the 2010 CEA Regulations, the Petitioner was only required to maintain a clearance of at least 7.94 meters between its lines and those of MPPTCL at all locations where the two lines were intersecting. Therefore, the imposition of H+6 criteria imposed by MPPTCL was unexpected and contrary to the regulatory norms governing construction and crossing of transmission lines.
- (g) The Petitioner was not required to apply for requisite approvals from MPPTCL as part of its initial route survey itself. It is only after getting approval under the , Government of India under Section 164 of the 2003 Act for construction of overhead transmission lines, the developer is required to take the requisite consents and clearances from local authorities within whose premises the said lines are supposed to cross, as one of the conditions for the grant of such approval.



- (h) The Petitioner obtained the Section 164 of the 2003 Act approval only on 3.7.2017 and was legally required to apply to MPPTCL only thereafter. However, the Petitioner adopted a pro-active approach and has engaged with MPPTCL for the requisite NoC well in time in January. Therefore, the actions of the Petitioner cannot be considered negligent as contended by MSEDCL and MPPMCL.
- (i) The delay caused due to complying with the H+6 criteria imposed by MPPTCL is a *force majeure* event under Article 11 as well as a “Change in Law” event under Article 12. The requirement to comply with the H+6 criteria amounts to imposition of a consent that was not required earlier at the cut-off date and is covered under “Change in Law” under the TSA. The Petitioner is, therefore, entitled to all consequential reliefs arising out of delays occasioned due to the above *force majeure* and “Change in Law” event in terms of Articles 11 and 12 of the TSA.

Analysis and Decision

40. We have considered the submissions of the Petitioner and Respondents and have perused the documents available on record. The Petitioner has contended that MPPTCL’s requirement for the Petitioner to maintain an additional distance of 6 meters, over and above the statutory requirement of 7.94 meters, where the Petitioner’s transmission lines intersect the MPPTCL’s network is a *force majeure* event. The Petitioner has contended that such a condition imposed by MPPTCL could not have been contemplated by the Petitioner at the time of submitting bid and was a condition which was required to be complied over and above the 2010 CEA Safety Regulations. MPPMCL has submitted that the said H+6 criteria was imposed by MPPTCL and MPPTCL should have been made a party to the present proceedings and passing of any order in this regard will directly impact MPPTCL. Therefore, MPPTCL is a necessary party and without whom no effective order can be passed and enforced.

41. Per contra, the Petitioner has opposed impleadment of MPPTCL on the ground that the claims made in the petition are as per the TSA and MPPTCL is not a party to the TSA nor any reliefs are claimed against MPPTCL. Therefore, MPPTCL is neither a proper nor a necessary party to the present proceedings.



42. We have considered the submissions of Petitioner and Respondents. We are of the view that the Petitioner was required to cross the existing transmission lines of MPPTCL. As per Article 5.1.1 of the TSA, the Petitioner is responsible for designing, constructing, erecting, completing and commissioning each element of the Project by the scheduled COD, at its own cost and expense. Further, in accordance with Article 5.1.3 of the TSA, the Petitioner is responsible to obtain all consents, clearances and permits including approval for crossings in order to carry out its obligations under the TSA in general and Article 5.1. 1 in particular. It is the responsibility of the Petitioner under the TSA to obtain consents/clearances by fulfilling the desired criteria. We are of the view that as per TSA it was the responsibility of the Petitioner to obtain all necessary consents including the consent of crossing MPPTCL lines and factor the cost as TSA clearly mentions that the Petitioner is responsible for designing, constructing, erecting, completing and commissioning each element of the Project by the scheduled COD, at its own cost and expense. Accordingly such event of H+6 criteria does not qualify as a force majeure event under the TSA.

43. We are also not inclined to go into the requirement of MPPTCL to allow crossing of another transmission line which is as per requirements of MPPTCL and accordingly, we do not find any need for MPPTCL to have been made a party to the proceedings adjudicate upon this issue.

(III) Force majeure event: Delay in the acquisition of land and construction of the Khandwa Sub-station due to agitations by locals

44. The Petitioner has made the following submissions with regard to delay in acquisition of land and construction of Khandwa Sub-station due to agitations by locals:

- (a) The Khandwa Sub-station had to be constructed on 89 acres of land lying in the Mortakka Mafi Village, Khandwa District in the State of Madhya Pradesh. However, the construction of Khandwa Sub-station was affected on two counts, namely (i) delay in the acquisition of land for construction of the Khandwa Sub-station due to agitations in 2017-18; and (ii) delay due to



stoppage of construction work relating to the Sub-station duringbetween February, 2019 to August, 2019 due to agitations by the locals.

- (b) The Petitioner lost 11 months due to delays in acquisition of land for Khandwa Sub-station and a further 6 months in construction of the said sub-station due to agitations by the locals. The said delay constitutes a *force majeure* event under Article 11 of the TSA.
- (c) The work pertaining to the Khandwa Sub-station was obstructed yet again in the month of February, 2019 due to severe agitations by local villagers. The agitating villagers made undue and unreasonable demands from the Petitioner in order to permit the Petitioner to commence construction activities at the site. In order to resolve the issue, the Petitioner took assistance of the State Authorities and police protection at the site so that it could carry out the construction of the Khandwa Sub-station. After various rounds of negotiation with the agitating villagers, the work at the site of Khandwa Sub-station could be resumed only by August, 2019. The aforesaid facts have also been recorded by the CEA in the minutes of the meeting dated 29.7.2019 and 5.8.2019 as well as the monthly progress reports of transmission projects awarded through TBCB route, issued from time to time.
- (d) The construction of Khandwa Sub-station was stopped between February, 2019 and July, 2019. The said delay of 6 months was unavoidable and prevented the Petitioner from performing its obligations under the TSA. As such, the total loss of working time caused in issues with respect to land acquisition and subsequent agitations during construction was around 17 months. However, the Petitioner through its pro-active approach, was able to mitigate the impact of the above and was able to commission the Khandwa Sub-station by 7.3.2020. As such, the Petitioner is entitled to an extension in the SCOD of the Khandwa Sub-station for a period of 9 months i.e. from July, 2019 to 7.3.2020 in terms of Article 11 of the TSA.

Reply of MSEDCL and MPPMCL

45. MPPMCL and MSEDCL has made similar contentions in their reply and hence they are taken together. The gist of the submissions made by the Respondents are as follows:



- (a) The Petitioner has approached the State Authorities in relation to delay in construction of the Khandwa Sub-station only in January, 2019 while the TSA was signed in 2016. Therefore, the Petitioner has failed to explain the reason for delay in approaching the Authorities from April, 2016 to January, 2019 (i.e. 33 months). Since the Petitioner has failed to explain the substantial delay of 33 months in the instant petition, the same is nothing but a negligent and lethargic attitude of the Petitioner towards completion of the transmission project. Therefore, the negligent and lethargic act of the Petitioner in completion of the Project falls under Article 11.4 of the TSA agreement explaining the exclusion from *force majeure* events.
- (b) The Petitioner has failed to provide documentary evidence showing from which date process for acquisition of land for Khandwa Sub-station had been initiated by the Petitioner and it is very essential for adjudicating the present case.

Rejoinder to the reply of MPPMCL and MSDECL

46. The Petitioner has made similar submissions on the issue of delay in the acquisition of land and construction of the Khandwa Sub-station due to agitation by locals in response to the reply of MPMPMCL and MSEDCL and the same are in its response to the reply of MPPMCL and MSDECL similar submission which are as follows :.

- (a) AsThe Petitioner has submitted that as per the RfP and subsequent amendments dated 29.4.2016 and 10.5.2016, a week prior to the bid submission date of 16.5.2016, the BPC clarified that the bidders had the liberty to establish Khandwa Sub-station at any location within the Khandwa District.
- (b) The BPC report prepared initially at the time of issuance of the RfS indicated that Khandwa Sub-station could be set up in the Khandwa Tehsil. However, after independent survey conducted before the submission of the bid, by various bid participants, it was found that land within the tehsil was inadequate and there were several ROoW issues, the BPC a week before the bid submission date revised the criteria and provided that the bidders may choose the location for setting up the Khandwa Sub-station anywhere within the Khandwa District. Accordingly, KTL submitted its bid considering the location of the Khandwa Sub-station in the Punasa Ttehsil, within the district of Khandwa.
- (c) The bid prepared and submitted by the Petitioner was after considering the location of the Sub-station in Punasa Tehsil, as opposed to the Khandwa tehsil and location



originally specified by the BPC (and later amended). Therefore, at the time of bid itself, the Petitioner had factored the total line length as per its actual line length existing on ground today. The same can be corroborated from the fact that CEA while considering the original location specified by the BPC (in Khandwa Tehsil) had estimated a total cost of ₹2370 crore as opposed to changed location, the Petitioner was identified as L1 bidder at the cost of ₹1591 crore.

- (d) Therefore, the Petitioner at no instance factored in the cost corresponding to the line lengths provided by the BPC but considering the location of the sub-station in Punasa Tehsil, which is part of Khandwa District. This decision of the Petitioner to select a location in Punasa District is in total compliance of the RfP document and the TSA of the Petitioner.
- (e) Thereafter, the Petitioner began the process of land acquisition for construction of the Khandwa Sub-station immediately on the issuance of LOoI and aligned its line routes after finalization of the location of Khandwa Sub-station. However, there was delay in land acquisition due to severe agitations by the farmers and other local residents in the village and which led to acquiring of land only in September, 2017.
- (f) The Petitioner tried to independently negotiate with the farmers and land-owners and while the negotiations were ongoing, the Petitioner in the interest of time, decided to re-design the Khandwa Sub-station on an alternate piece of land measuring 70-85 acres which was to be made available to it. However, even the alternate piece of land was not free from encumbrances. As a result, the Petitioner was able to acquire only 65 acres of the aforesaid land by 13.9.2017 and commenced the construction of the Khandwa Sub-station on such acquired land. The balance land of 11.51 acres required for potential future expansion activities was eventually acquired by 24.11.2018.
- (g) The Petitioner took adequate mitigation measures and approached the relevant authorities for support to avoid the delay in commissioning of the Project. However, the issues of agitation on such land continued intermittently till late 2019.
- (h) The various correspondence exchanged by the Petitioner at the time of land acquisition seeking support of the local authorities are as follows under:

Sr. No.	Date	Steps taken to resolve the issues in relation to the Khandwa Sub-station
1.	20.12.2016	KTL issued a letter to the SDM Punasa, requesting for intervention and support for acquiring land identified for the Khandwa Sub-station.
2.	16.3.2017	KTL wrote another letter to the SDM Punasa informing that while it was



		making all possible efforts to acquire land for the Sub-station, the process was facing severe resistance by the villagers in the area.
3.	8.6.2017	KTL wrote to SDM Punasa yet again apprising the SDM of the agitations carried out by the locals. KTL further informed that its officers were threatened of dire consequences if they continued approaching the land-owners for acquisition of land parcels.
4.	11.8.2017	KTL wrote to SDM Punasa apprising it of the agitations by locals. KTL further highlighted the importance of the Project indicating that the same was to be set up to evacuate power from NTPC's Khargone TPS and delay would inter alia impact the consumers of Madhya Pradesh.

- (i) After taking assistance and support of State authorities and police protection, a settlement was approved after several rounds of negotiations.
- (j) Despite seeking support from the administrative authorities and re-locating the location of the sub-station land within the Punasa Tehsil, the Petitioner continuously suffered severe agitations throughout the duration of its works pertaining to the Khandwa Sub-station. Due to continued agitations, the Petitioner anticipated a breach of SCOD of the Khandwa Sub-station and accordingly issued a notice of *force majeure* dated 15.5.2019 to all LTTCs.
- (k) The said agitations continued till 2019 and at least upto August, 2019, which severely impacted the construction of the Khandwa Sub-station. Again, in the month of January, 2019 due to severe agitations by local villagers all construction activities were brought to standstill. After taking assistance from the local authorities to resolve the issues of the land-owners, the Petitioner was able to reach a settlement with the agitating villagers after several rounds of negotiations involving members of the village panchayat, relevant officers of the State authorities as well as the Petitioner.
- (l) The various steps taken by the Petitioner to resolve the issues in relation to the Khandwa Sub-station are as follows:

Sr. No.	Date	Steps taken to resolve the issues in relation to the Khandwa Sub-station
1.	21.1.2019 and 3.4.2019	KTL executed agreements with local villagers to resume construction work after complying with demands of such locals
2.	10.4.2019	KTL further issued a letter to Office of Under Sectional Magistrate – revenue (“ USM ”) explaining the delays caused due to locals.
3.	11.4.2019	The USM, Khandwa issued a letter to Nayab Tehsildar and SHO asking them to prevent locals from obstructing the Project.



4.	1.5.2019	Further, KTL issued a letter to the Superintendent of Police for protection dated 01.05.2019.
5.	5.6.2019	KTL also addressed letter to Chief Secretary Govt. of Madhya Pradesh asking for support.
6.	6.6.2019 and 20.6.2019	KTL issued a letter to DC Khandwa dated 6 June, 2019 and CM Madhya Pradesh dated 20 June, 2019 requesting for support and an early resolution of the deadlock with locals.
7.	8.7.2019	KTL also issued a letter to the Nayab Tehsildar requesting for necessary support in resolution of issues with the locals.

- (m) The work at the site of the Khandwa Sub-station was resumed only by end of August, 2019 and the said fact was also recorded in the CEA minutes of meeting and monthly progress reports.
- (n) The Petitioner is seeking an extension in the SCOD of the Khandwa Sub-station for a period of only 7 months and 18 days for which the Petitioner has duly and consistently issued *force majeure* notices and kept all stakeholders apprised at least since May, 2018 until August, 2019, which is evident from the various documents annexed in the petition by the Petitioner and the Monthly Progress Reports for the period up to August, 2019. The said *force majeure* notice, CEA minutes and monthly progress reports clearly shows that the issues in implementation of the Khandwa Sub-station were regularly notified by the Petitioner.
- (o) The issues in acquisition of land and subsequent construction of the Khandwa Sub-station arose even prior to acquisition of the SPV by KTL in 2016 and continued sporadically throughout the development phase of the Khandwa Sub-station up to at least August, 2019. Thereafter, there were further obstructions that KTL faced during the construction phase.
- (p) The said delay is covered under *force majeure*, entitling extension in the SCOD. Despite the above challenges, the Petitioner was able to mitigate the impact of above *force majeure* event and commission the Khandwa Sub-station by 7.3.2020. Hence, the Petitioner is entitled for an extension of SCOD for at least 8 months on this basis.

47. In response to the Commission's query regarding the distance between the Khandwa Sub-station envisaged in the BPC survey report and the Khandwa Sub-



station as implemented by the Petitioner, the Petitioner has submitted that the distance between the Khandwa Sub-station envisaged in the BPC survey report and the Khandwa Sub-station as implemented by the Petitioner is approximately 66 km. As per the RfP read with the clarifications issued thereunder, the Petitioner had the liberty to establish the Khandwa Sub-station at any location within the Khandwa district which has been complied with. The Commission has assumed that the Petitioner had prepared its bid considering the line lengths and locations provided by the BPC. Whereas, the Petitioner had prepared its bid on the basis of the clarification issued by the BPC one week before the bid submission date, whereby, the criteria for selecting the location for setting up the Khandwa Sub-station was revised to anywhere within the 'Khandwa District' from anywhere in 'Khandwa Tehsil'. Accordingly, the Petitioner submitted its bid considering the location of the Khandwa Sub-station in the Punasa Tehsil, within the district of Khandwa. The bid prepared and submitted by the Petitioner was after considering the location of the sub-station in Punasa Tehsil, and location originally specified by the BPC (and later amended). Therefore, at the time of bid itself, the Petitioner had factored the total line length as per its actual line length existing on ground today.

Analysis and Decision

48. We have considered the submissions of the Petitioner, MPPMCL and MSEDCL. The Petitioner has submitted that Khandwa Sub-station had to be constructed in the Khandwa District in the State of Madhya Pradesh. The construction of Khandwa Sub-station was affected on two grounds (i) delay in the acquisition of land for construction of Khandwa Sub-station due to agitations in 2017-18 and (ii) delay due to stoppage of construction work relating to the sub-station between February, 2019 and August, 2019 due to agitations by the locals. As a result, the Petitioner lost 11 months due to delay in acquisition of land for Khandwa Sub-station and a further 6 months in construction of the Khandwa Sub-station due to agitations by the locals. The said delay constitutes a *force majeure* event under Article 11 of the TSA. Petitioner in the main Petition had submitted that agitations happened in February 2019, whereas in written submissions submitted that it started in January 2019.



49. The Petitioner has submitted that as per the BPC report prepared initially, it was indicated thatat Khandwa Sub-station could be set in the Khandwa Tehsil. Subsequently, a clarification was issued by BPC one week before the bid submission date, whereby the criteria for selecting the location for setting up of Khandwa Sub-station was revised to anywhere within the 'Khandwa District' from anywhere in 'Khandwa Tehsil'. Accordingly, the Petitioner submitted that the bid was prepared and submitted after considering the location of the sub-station in Punasa Tehsil. The Petitioner has categorically submitted that the Petitioner did not factor in the cost corresponding to the line length provided by the BPC but considering the location of the sub-station in Punasa Tehsil. The Petitioner has further submitted that the said decision of the Petitioner is in compliancecomplies of with the RfP and TSA of the Petitioner. Thereafter, the Petitioner began the process of land acquisition for construction of the Khandwa Sub-station immediately on the issuance of LoOI and aligned its line routes after finalization of the location of the Khandwa Sub-station. However, there was delay in land acquisition due to severe agitations by the farmers and other local residents in the village and which led to acquiring of land only in September, 2017. The Petitioner has submitted that while the negotiations were going on, the Petitioner in the interest of time decided to re-design the Khandwa Sub-station on an alternate piece of land measuring 70-85 acres which was to be made available to it. However, even the alternate piece of land was not free from encumbrances. As a result, the Petitioner was able to acquire only 65 acres of the aforesaid land by 13.9.2017 and thereafter the construction of Khandwa Sub-station commenced. The balance land of 11.51 acres required for potential future expansion activities was eventually acquired by 24.11.2018. However, the issues of agitation on such land continued intermittently till late 2019. It is observed that the Petitioner has submitted the following chronology of correspondence exchanged at the time of land acquisition seeking support of the local authorities:

Sr. No.	Date	Steps taken to resolve the issues in relation to the Khandwa Sub-station
1.	20.12.2016	KTL issued a letter to the SDM Punasa, requesting for intervention and support for acquiring land identified for the Khandwa Sub-station.
2.	16.3.2017	KTL wrote another letter to the SDM Punasa informing that while it was making all possible efforts to acquire land for the Sub-station, the process was facing severe resistance by the villagers in the area.
3.	8.6.2017	KTL wrote to SDM Punasa yet again apprising the SDM of the



		agitations carried out by the locals. KTL further informed that its officers were threatened of dire consequences if they continued approaching the land-owners for acquisition of land parcels.
4.	11.8.2017	KTL wrote to SDM Punasa apprising it of the agitations by locals. KTL further highlighted the importance of the Project indicating that the same was to be set up to evacuate power from NTPC's Khargone TPS and delay would inter alia impact the consumers of Madhya Pradesh.

On the other hand, the Respondents, MPPMCL and MSEDCL have submitted that the Petitioner has failed to provide documentary evidence showing from which date process for acquisition of land for Khandawa Sub-station had been initiated by the Petitioner and the same is very essential for adjudicating the present case.

50. We have examined the documentary evidence in support of the delay in acquiring the land for the Khandwa Sub-station. We agree with the contention of the Respondents that the Petitioner has failed to provide the documentary evidence showing from which date the process for acquisition of land for Khandwa Sub-station has been initiated by the Petitioner. We also note that as per the provisions of Article 3.1.3 and Article 5.1.4 of the TSA, it is the responsibility of the Petitioner to undertake final site selection, design and engineering works including acquisition of land. Moreover, we also note that the Petitioner commenced site identification activities upon issuance of LOI in May 2016, and commenced construction activities by September 2017 which is a reasonable time to assume for completing land acquisition procedures under the Land Acquisition Act 2013. Therefore, the Petitioner is not entitled for the force majeure relief for the delay from 20.12.2016 to 11.8.2017 (i.e 236 days).

51. As regards the delay in construction of Khandwa Sub-station, the Petitioner has submitted that subsequent to the acquiring of land and despite taking assistance from the additional authorities, the Petitioner continued to face severe agitations during the entire duration of its work pertaining to Khandwa Sub-station from January 2019/February 2019. We observe that Petitioner has submitted that it acquired the land by 24.11.2018. The Petitioner has submitted that it took steps to mitigate the issues with the local villagers.



52. We observe that though Petitioner has submitted that it was affected by agitation by local villagers after acquisition of land in January 2019/February 2019, however there is no documentary evidence to support if the construction of substation was affected due to local agitation in January or February 2019. Petitioner has submitted "Monthly progress Report of Transmission Projects awarded through Tariff Based Competitive Bidding (TBCB) Route" as on 28.02.2019 which notes as follows:

"Establishment of 2x1500MVA, 765/400kV, pooling station at Khandwa

Land Acquired: 100%

Civil work completed: 69%

Equipment supplied: 95%

Equipment erection: 19%

Scheduled COD:Jul'19

Anticipated COD:Jul'19

Constraints where Project Authority requires intervention:

1. Agitation from farmers for land acquisition"

From above, it is noted that agitation was for land acquisition, whereas Petitioner has submitted that it faced agitation after land acquisition. Due to contradicting statements/proofs, it cannot be concluded if the entire required land was acquired before 28.2.2019.

53. Petitioner has submitted that on 10.4.2019, the Petitioner approached the Under Sectional Magistrate (USM)-Revenue, Khandwa explaining the delays caused due to locals, and USM- Khandwa directed SHO on 11.4.2019 to provide assistance to the Petitioner for completion of the Project. Relevant portions of the letters dated 10.4.2019 written by the Petitioner to the Under Sectional Officer (Revenue Department) are extracted as under:

"1. Humbly submit that, since last several days pressure is being made for construction of society building by Chairman Mishrilal Birla and by Secretary – Kanhaya Lal of Shri Rewa Gurjer Samaj Manglik Bhawan Trust and by all officers of Executive Committee and by the members of the Committee. Threats have been given to employees and labourers to compel meeting their unreasonable demands made by the officers of the Trust Committee with the assistance of villagers of village – Moretakka and villagers of adjoining villages who collectively have used force to stop the construction works on the site and labourers were taken into wrongful confinement by the said villagers further roads and routes route leading to the project site were completely blocked. Taking the laborers into wrongful confinements the villagers There is



environment of terror and with several persons have been displaced due to which the speed of work is badly affected. The list of officers and members of Shri Rewa Gurjer Samaj Manglik Bhawan Trust is annexed for easy reference.

2. In village Moreghadi and Monetakka Mafi in 765/400kV power substation of the KTL for electricity supply with the cooperations of M.P.W.R.E.D.C. the construction work of 33kV is under progress. But under pressure of Shri Rewa Gurjer Samaj Manglik Bhawan Trust and for personal benefit some villagers have been obstructing the construction work of KTL. In context of 33kV line as per rule of government, there is no provision of compensation, despite it, demand is being made of huge amount. On asking by Junior Engineer of electricity department for getting construction with the help of police, farmers are threatening that they will bring women in frontline of demonstration for stopping the construction work in the plant. Being afraid, the contractor is taking leaving the project site incomplete. This line is extremely essential for testing, charging and installation of different apparatus and machines established in 765/400kV substation which is to be completed by the end of month of April in any circumstances. The list of farmers and villagers stopping the construction work is annexed for easy reference.

3. In village – Moritakka Mafi the construction work of Tower no – 20/0 of 400kV electricity transmission line is being hampered by farmer Mishri Lal S/o – Shobharam in context of construction of this tower notice was given to Mishri Lal, but he denied to receive it so again by regd. Post notice was served upon Mishri Lal. Thereafter also Mishri Lal is not allowing the construction work. Two three times the team of construction gang, labourers, machines and employees have returned due to continuous threatening.”

54. The Petitioner vide its letter dated 11.4.2019 requested to the Tehsildar, for necessary administrative support in convincing the villagers and resolving the issue. Relevant portions of the said letter are reproduced as under:

“In the context of aforesaid subject through referred letter, by the project head for strengthening of west grid in village – Moretakka the work of substation of 765 kV and 400kV transmission line work of 765 kV and 400kV by Khargone Transmission Limited is in progress. By villagers of village – Moretakka and villagers of adjoining villages and by members of Shri Rewa Gurjer Society obstacles are being created in construction work. By project head a request is made for making cooperation.

From application and documents presented by applicant, it is clear that, the project is undertaking of government of India and the work of governmental work in which for the construction by the concerned institution formally permission is obtained. It is undertaking of government of India. In construction work of governmental project for stopping of work by public and by making demand of amount is unauthorised way the work of project is being hammered.



With the application presented by project head, the copy of letter is annexed. Submit the report after verification of application. If in construction of said project by any person of KTL any kind of issue is being raised, then make sure taking action for resolving obstruction in governmental work.”

As per above, the first documentary support for contention of Petitioner that it was affected by agitation is letter dated 10.4.2019. Petitioner has submitted a letter dated 6.3.2018 written to District letter which was received in District Collector office on 6.3.2019. The same letter has been submitted as letter dated 28.3.2019 also . These letters have contradictory dates and hence cannot be considered as valid documents.

55. Petitioner has also submitted that on 1.5.2019, the Petitioner requested the Superintendent of Police for police protection and on 5.6.2019, 6.6.2019 and 20.6.2019, the Petitioner requested Chief Secretary, Chief Minister, Government of Madhya Pradesh and DC Khandwa for their support in resolving the issue with the locals. Thereafter, the Petitioner also requested the Nayab Tehsildar for its assistance in settling the issues with locals. The Petitioner wrote to USM, Khandwa explaining issues with Khandwa Sub-station and associated lines and elements. As stated by the Petitioner, the work at the site of Khandwa Sub-station could be resumed only by end of August, 2019.

56. A detailed perusal of the evidence submitted by the Petitioner establishes that the work of the Khandva substation was impacted between 10.4.2019 till 3.8.2019 .In our view, , the petitioner 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 to complete the substation works. Since the construction works were brought to standstill, we find merit in the submission of the Petitioner that the law and order situation caused loss of working time and Petitioner was unable to undertake construction activities for despite having all resources and capabilities, but only due to severe law and order problems caused by locals and land owners. These events which resulted in delay in completion of the construction work of Khandwa Substation 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. The Petitioner has claimed 7 months delay on



account of Force Majeure and for the aforesaid reasons the delay caused between 10.4.2019 till 3.8.2019 is condoned as a force majeure event.

(IV) Force majeure event: Delay in receiving highway crossing approvals from NHAI for construction of the KI line

57. The Petitioner has made the following submissions in support of its contention that the delay in receiving highway crossing approvals from NHAI led to delay in completion of the KI line:

(a) Approved route for the KI Line crosses the National Highway-3 connecting Agra and Mumbai between 583 and 584, near Kshipra village. Accordingly, to construct the KI Line over the aforesaid intersection with the highway, the Petitioner was required to obtain the necessary approvals from NHAI. However, the construction of the KI Line was inordinately delayed due to NHAI's refusal to grant the necessary approvals for construction of the KI Line over the intersection with the highway.

(b) The Petitioner submitted its highway crossing proposals to NHAI on 6.3.2017 and expected to obtain the said approvals within a reasonable period of 2 months. However, the said approvals were finally received by the Petitioner on 10.1.2020. Thus, grant of the said approvals by the NHAI was unreasonably and unavoidably delayed for no fault of the Petitioner for a period of 32 months i.e. from May, 2017 until January, 2020. The above delay of 32 months in grant of highway crossing approvals by the NHAI constitutes a *force majeure* event under the TSA entitling the Petitioner to appropriate extension in the SCOD of KI Line.

(c) As per the regulatory norms, the Petitioner was required to maintain a minimum ground clearance of 18.88 meters at the point of intersection of KI Line with NH-3. Accordingly, the Petitioner had designed the height and laid foundation of KI line as per the regulatory norms. Thus, the Petitioner did not anticipate any delay in obtaining the required approvals from the NHAI. However, NHAI vide letters dated 6.1.2018 and 6.8.2018, demanded that the Petitioner maintain a minimum vertical distance of 25.27 meters at the point of intersection of KI Line with NH-3.



(d) NHAI also imposed additional condition of submission of an additional bank guarantee of ₹2 crore as security for any expenditure required to be incurred in future to modify the KI Line in the event the Petitioner chose not to modify the configuration of KI Line at present.

(e) The requirement to maintain a vertical distance of 25.27 meters imposed by NHAI is significantly higher than the statutory requirement of 18.88 meters. The Petitioner having already designed the foundation of towers as per existing regulatory norms and further having constructed towers on both sides of NH-3 could not have significantly altered the structure of the relevant towers of KI Line without additional time and cost implications.

(f) The Petitioner lost significant amount of time in liaising with the CEA as well as the various departments of NHAI for getting the NOC expeditiously issued. The approval was given in around 34 months after NHAI agreed to relax the requirement to submit additional bank guarantee of ₹2 crore to ₹5 lakh with an undertaking that it would carry out the required modifications in configuration of KI Line in the event of vertical development of the national highway.

(g) The NHAI's refusal to grant the necessary NOC within reasonable timelines was unanticipated and beyond the Petitioner's control. The said delay in grant of NOC prevented the Petitioner from performing its obligations under the TSA and further led to a loss in working time of 32 months in construction of the KI Line i.e. from May, 2017 until January, 2020.

(h) The Petitioner has also annexed the relevant correspondences by KTL and mitigation measures undertaken by it to ensure timely completion of KI line.

(i) Though the Petitioner lost around 32 months on this ground, it was able to commission KI Line by 26.2.2020 i.e. with a delay beyond the SCOD of only 8 months. Accordingly, the Petitioner has prayed that the above delay of 8 months beyond the SCOD of KI Line be condoned in terms of Article 11 of the TSA.

Reply of MPPMCL and MSEDCL



58. The submissions made by MPPMCL and MSEDCL are identical in nature and, hence, are taken together. The following are the submissions made by MPPMCL and MSEDCL:

(a) The submission of the Petitioner that due to non-receipt of highway crossing approvals from NHAI for construction of KI Line, the Petitioner's project got delayed by 32 months is incorrect.

(b) In fact, the delay in construction of KI line was due to faults of the Petitioner. The scheduled time to execute the KI line was 37 months from the date of execution of TSA i.e. April, 2016. The Petitioner approached NHAI for issuance of NOC on 6.3.2017, after a delay of one year from the effective date under the TSA. As against the SCOD of July, 2019, KI line achieved actual COD on 19.3.2020. Thus, there was a delay of 8 months in construction of KI line. The Petitioner approached NHAI first time after one year from the effective date i.e. on 6.3.2017, and further that the Petitioner was negligent in not following up the matter with NHAI and followed up the matter after passing of 5 months i.e. 21.8.2017.

(c) Thus, the Petitioner has failed to explain the reasons for delay in approaching or following up the matter with NHAI. The Petitioner has also failed to follow up the matter from 7.3.2017 to July, 2017 (five months) with NHAI with regard to delay in approval of road crossing.

(d) Similarly, there was no follow up from 7.8.2018 to 12.11.2018 (three months) with regard to road crossing. Rather, NHAI vide letter dated 6.8.2018, made it explicitly clear that the Petitioner did not conduct any route survey of transmission project properly and it even did not ensure due diligence of power line crossing which was a must requirement for the Petitioner. The delay of 32 months on account construction of KI Line is an incorrect story based on misleading facts and shows negligence on the part of the Petitioner and as such the same be disallowed with heavy cost.

Rejoinder to the reply of MPPMCL and MSEDCL

59. The Petitioner has made similar submissions in response to the reply of MPPMCL and MSEDCL on the issue of delay in receiving highway crossing approvals from the NHAI which are as follows:



- (a) The Petitioner commenced pre-development activities including award of tenders to its contractors for various works and applying for the necessary consents and approvals from the MoP, including the approval under Section 164 of the 2003 Act. Therefore, there has not been any intentional delay by the Petitioner since the execution of TSA in April, 2016.
- (b) The Petitioner approached NHAI for approval in March, 2017 and was granted approval on 10.1.2020 i.e. after a lapse of close to 3 years.
- (c) From the perusal of Monthly Progress Reports issued by the CEA, it is shown that the Petitioner made consistent progress in the development of KI Line after execution of TSA and upto SCOD. From the Monthly Progress Report of July, 2019, it is also shown that the Petitioner had already completed the foundation and erection of all 243 towers of the said line and stringing was completed for 179.4 ckm out of a total of 180.08 ckm. The remaining portion of KI Line was held up due to delay in issuance of the requisite approvals by the NHAI. Thus, the Petitioner has diligently carried out the development of KI Line while liaising with NHAI to obtain the requisite highway crossing approval.
- (d) From the perusal of the monthly progress report, it is evident that the Petitioner diligently carried out the development of KI Line while liaising with NHAI to obtain the requisite highway crossing approval. It is evident from the Monthly Progress Reports that had NHAI not delayed the grant of the requisite highway crossing approvals, the Petitioner would have executed KI Line by SCOD of July, 2019.
- (e) The Petitioner has consistently reported the status of all highway crossing approvals including the issues with approval at NH-3 as early as in January, 2018. In subsequent monthly progress report issued by CEA in January, 2018, the Petitioner had continuously indicated that approval of NH-3 is pending for which intervention of the concerned authorities was sought.
- (f) It is incorrect to say that the Petitioner was negligent in not following up the matter with NHAI for requisite approval. As per the guidelines dated 22.11.2016, issued by the Ministry of Road, Transport and Highways, the minimum timeline provided for processing of applications for such approvals is



two months. Thus, the Petitioner could not immediately follow up the matter with NHAI for at least 2 months after making the application.

Analysis and Decision

60. We have considered the submissions of the Petitioner and the Respondents. The Petitioner has submitted that construction of KI Line was inordinately delayed due to NHAI's refusal to grant the necessary approvals for construction of KI Line over the intersection with highway. It is observed that Petitioner had initiated the process of taking approval from NHAI in 2017. However, NHAI granted approval/NOC only on 10.1.2020. The Petitioner vide its letter dated 6.3.2017 requested NHAI to process the crossing proposal of NH-3, Agra-Mumbai, Near Village Kshipra (in between the km stone, 583 and 584 Ch. -583 km+520m from Agra), for 765 kV D/C Hexa Khandwa-Indore Transmission Line approval and grant NOC for crossing approval. The relevant letter dated 6.3.3017, is extracted as follows:



**Sterlite
Power**

Khargone Transmission Limited
Site office-Plot.No-256, Ward No-15, Solar II Colony,
Bharwad Dist. - Khargone (M.P.) - 451111, INDIA

962
Phone: 07260-233722
www.sterlitepower.com

D/C ANNEXURE P-38

Date: 06 / 03 / 2017
TSS-WR/KTL/KI/NHAI/2016-17/17

To
Project Director,
PIU National Highway Authority of India
15, Sampat Hill, Opp. Sahara City,
Indore- Dewas Bypass
Bicholi Mardana, Indore, (MP)-452016

Sub: Submission of over head power line crossing proposal of NH-3, Agra - Mumbai, Near Village Kshipra (In between KM stone, 583 & 584, Ch.- 583 km+520m from Agra), for 765 kV D/C Hexa Khandwa - Indore Transmission line Reg.- NOC.

Ref. no: LOI No: RECTPCL/P-24/Khargone /2016-17/98 Dt. 26 May 2015 to M/s Sterlite Grid 4 Limited for the Establishment of Transmission system for "Transmission System Strengthening in WR associated with Khargone TPP (1320 MW)".

At the outset we would like to take this opportunity to inform you that Khargone Transmission Limited (A wholly owned subsidiary of Sterlite Power Grid Ventures Limited) are entrusted upon the construction of 765 kV & 400 kV Transmission lines under Western Region System Strengthening Scheme-II associated with Khargone TPP (1320 MW) as per the above said reference.

The above said line is in between Khandwa pooling/substation (KTL) and Indore pooling/substation (Power Grid) passing through Indore, Khargone & Khandwa district of Madhya Pradesh.

In the above route we are crossing through NH- 03 (Over head) in between Agra - Mumbai, between the K.M 583 and 584 Ch.- 583 KM + 520 M (from Agra) near Kshipra village with the adequate electrical clearance. Tower schedule is attached for your ready reference. We request you to issue NOC for the above said crossing for our records & commencement of Erection activities.

Necessary clearance has been maintained as per the guideline of the Indian Electricity Rules.

We request you to please process our proposal and accord your kind approval for proceeding the works.

Looking forward for your kind support.

NHAI, PIU, INDORE
LETTER RECEIVED

DATE: 06/03/2017



Registered Office: F-1, The Mira Corporate Suites, 1 & 2, Ishwar Nagar, Mathura Road, New Delhi - 110 065, INDIA. CIN: U40200DL2015GOI236783

61. Pursuant to the aforesaid letter, the Petitioner consistently followed up its aforesaid application for grant of approval/NOC for enabling it to timely complete the



Project. The Petitioner vide its letters dated 21.8.2017, 13.9.2017, 7.11.2017 had written to NHAI requesting for approval of the crossing proposal. Thereafter, on 6.1.2018, NHAI addressed letter to the Petitioner stating that though the Petitioner is meeting guidelines for erection of the transmission lines, however, the proposal needs to be modified and height of the proposed transmission towers will have to be increased to accommodate the vertical development of highway in the near future. Accordingly, NHAI returned the proposal submitted by the Petitioner and directed the Petitioner to submit a revised proposal. The said letter dated 6.1.2018 is extracted as follows:





ANNEXURE P-40
भारतीय राष्ट्रीय राजमार्ग प्राधिकरण
National Highways Authority of India
(राष्ट्रिय परिवहन और राजमार्ग मंत्रालय)
(Ministry of Road Transport and Highways)
परियोजना कार्यान्वयन इकाई,
Project Implementation Unit,
14, सम्पत हिल्स, सहारा सिटी के सामने, इन्दौर-देवास बायपास,
14, Sampat Hills, Opp. Sahara City, Indore-Dewas Bypass,
बिचौली मर्दाना, इन्दौर (म.प्र.) 452016
Bicholi Mardana, Indore (M.P.) 452 016



969
दूरभाष/ Phone : 0731-4975994
फैक्स/ Fax : 0731-
e-mail : indore@nhai.org
nhaindore@gmail.com

NHA/PIU/IND/NH-3/RO/2017/ 109

Dated 06.01.2018

To,

Sterlite Power,
Khargone Transmission Limited,
Site Office:- Plot no. 206, B Sector, Silicon City Rau,
Mhow- Pithampur Road Indore M.P. 452012

Sub.: Submission of overhead crossing proposal of NH-3, Agra Bombay, near Khispra village (In between KM stone, 583 and 584, CH 584+520mts from Agra) for 785 KV D/C Hexa Khandwa Indore Transmission Line under Khargone Transmission limited.

Ref.: (i) RO, Bhopal letter no. NHA/RO-MP/IND/OFC/Km 583 &584+52 mts/ 2017/ 30116 dated 03.01.2018
(ii) Your letter no. WR/KTL/KI/NHA/2016-17/18 dated 20.04.2017

Sir,

With reference to the above cited letter under ref. (i) dated 03.01.2018 it is mentioned that the proposal has been examined by RO, Bhopal and submit the points are as under:-

- (i) The proposed section of Indore-Dewas the requisite material to decide the desire height of sag of conductor in view of the future vertical development of highway.
- (ii) The Proposal needs to be modified for the vertical clearance of sag as per future requirement. Thought it is meeting the guidelines as on date but having into the future and the section is susceptible to vertical development in near future, therefore height needs to be increase.
- (iii) Please submit the key map with main feature, cross sections as per our NH cross section showing median width, showing available/proposed sag over median and other material which is needful to decide the future requirements as these towers will remain for next 100-150 years and then height/clearance increasing requirements all later stage by road authority will unnecessary charge with heavy amount.
- (iv) Please also ensure that no hindrance will be raised in future development of existing road.

मुख्यालय : जी-5 व 6, सेक्टर 10, द्वारका, नई दिल्ली - 110 075
Head Office : G-5 & 6, Sector 10, Dwarka, New Delhi - 110 075

62. It is observed that the Petitioner, in response to NHA's letter , wrote a letter to NHA on 27.1.2018, clarifying that vertical clearance of conductor is 21.5 meters and



minimum clearance required is 18.8 meters. Further, there is a flexibility for any future vertical development of Highway. The Petitioner also agreed that if in future there is any vertical development of highway, then the modifications will be accepted by the Petitioner and will be included in the Agreement during acceptance of crossing approval. Thereafter, on 18.9.2018, NHAI wrote a letter to Ministry of Road Transport and Highways (MoRTH) stating clearly that the Petitioner was required to keep the vertical clearance of at least 25.77 meters as Indore-Dewas is highly busy corridor. NHAI further proposed to give a bank guarantee of ₹5 lakh and a security of ₹2 crore to ensure that if in future there is any vertical shifting of highway, the same will be taken by the Petitioner at its own cost. Thereafter, on 12.10.2018, the MoRTH published a notice inviting public comments against the construction of the KI line on NH-3. On 13.11.2018, NHAI wrote a letter to the Petitioner stating explicitly that the Petitioner is required to keep the vertical clearance of at least 25.7 meters as Indore-Dewas section is highly busy corridor and requires vertical development in the near future. The Petitioner was further directed to submit an unconditional bank guarantee of ₹5 lakh and a security of ₹2 crore in favour of NHAI. The Petitioner also approached CEA through its letter dated 5.2.2019, wherein CEA was requested to intervene in the matter and expedite the issuance of NOC. The Petitioner further undertook to shift the transmission lines in the near future in case there was requirement for development of highway. The Petitioner in the said letter also requested to allow it to maintain vertical clearance of 21.5 meters without any additional bank guarantee of ₹2 crore since neither such development is approved nor notified by the Government. The Petitioner also wrote similar letters dated 12.2.2019 and 21.2.2019 to NHAI requesting to expedite the issuance of NOC by the NHAI and waive off its additional bank guarantee of ₹2 crore. The Petitioner also referred to the CEA minutes of meeting dated 29.7.2019 and 5.8.2019 wherein it was observed that power from both the units of the NTPC Khargone TPP can be evacuated through the Khargone TPP-Khandwa Pool-Indore corridor. To ensure the aforesaid power evacuation, the Petitioner was required to complete the following elements to match with the commissioning of Unit No. 2 of NTPC Khargone TPP, being (i) Khargone TPP Switchyard-Khandwa Pool 400 kV D/C (Quad) line along with 2 numbers 400 kV bays at Khandwa Pool; (ii) 2x1500 MVA, 765/ 400 kV ICTs along with associated bays at Khandwa Pooling Station; (iii) 240 MVA, 765 kV and



125 MVA, 400 kV bus reactors along with associated bays at Khandwa Pooling Station; and (iv) Khandwa Pool-Indore 765 kV D/C line along with 2 numbers of 765 kV bays at Khandwa Pool. The Petitioner also wrote a letter dated 15.9.2019, to follow up the matter with NHAI requesting to intervene in the matter as the transmission project is linked with evacuation of power from NTPC Khargone TPP (1320 MW). The Petitioner vide its letter dated 15.10.2019 again sought CEA assistance to get the early approval from NHAI. On 19.9.2019 and 30.9.2019, the Petitioner wrote letters to NHAI apprising about the fact that the Petitioner has completed all the foundation and erection work at the site and only the balance crossing activity is left for which NOC is required from NHAI. The Petitioner further stated in the letter that SCOD of the Project, which was 31.7.2019, has already lapsed and requested NHAI to intervene in the matter at the earliest. On 21.10.2019, NHAI granted NOC for overhead crossing proposal for 765 kV D/C Hexa Khandwa Indore Transmission Line of the Petitioner in between 583 and 584 on condition that the Petitioner will provide bank Guarantee of ₹5 lakh and an undertaking from CEA that shifting of tower and raising of conductor will not attract any financial implication on NHAI and the Petitioner will shift the same within 3 months at its own cost or will provide the complete expenditure to NHAI for shifting of this line at that particular time. The relevant extract of the letter dated 21.10.2019 is as follows:



ANNEXURE P-45

1025



भारतीय राष्ट्रीय राजमार्ग प्राधिकरण
(सड़क परिवहन और राजमार्ग मंत्रालय, भारत सरकार)
NATIONAL HIGHWAYS AUTHORITY OF INDIA
[Ministry of Road Transport and Highways, Govt. of India]



भारतमाला
एकीकृत नए नए भारत
BHARATMALA
ROAD TO PROSPERITY

क्षेत्रीय कार्यालय \ REGIONAL OFFICE
ई-2/167, अरेण कॉलोनी, हबीबगंज रेलवे स्टेशन के पास, भोपाल (म.प्र) 462 016
E-2/167, Arera Colony, Near Habibganj Railway Station, Bhopal (M.P.)-462 016
दूरभाष/Phone : 0755-2426638, फैक्स/Fax : 0755-2426698, ई-मेल/E-mail : robhopal@nha.org
NHA/RO-MP/IND/583-584/EHT Line/2019/ 36500 Date: 21.10.2019

To
The Project Director,
National Highways Authority of India,
Project Implementation Unit,
Indore (MP)

Sub: Submission of overhead crossing proposal of NH-3, Agra Bombay near Khspra vilage (in between KM stone, 583 and 584, CH 584+520 mts from Agra) for 765 KV D/C,Hexa Khandwa Indore Transmission Line under Khargone Transmission limited – NOC - Reg.

Ref: 1. M/s. Khargone Transmission Ltd. letter no. TSS/WR/KTL/KI/NHA/2019-20/47 dated 10.10.2019.
2. Central Electricity Authority letter no. CEA-PS-13-22(13)/1/2018-PSPM Division dated 19.07.2019.
3. This office letter no. NHA/RO-MP/IND/583-584/EHT Line/2018/32432 dated 18.09.2018.
4. Your letter no. NHA/PIU/IND/NH-03/CFC/2018/2200 dated 25.06.2018.
5. Your letter no. NHA/PIU/IND/NH-03/CFC/2018/2789 dated 13.08.2018.

Sir,
Please refer to above mentioned letter at ref. (1) vide which M/s. Khargone Transmission Ltd. has stated that the above mentioned crossing does not affect the Ujjain-Dewas project of NHA Ujjain and the crossing of the Khandwa Indore Transmission line is now lies 3.5 kms ahead (towards Indore) of the shifted starting Ch. of Dewas link project,connecting NH-3 near Kshipra bridge to Dewas-Ujjain road. The gazette notification of 19.08.2019 shows that the alignment of Indore-Dewas-Ujjain road is now not affecting due to this transmission line and accordingly you have recommended the proposal vide your letter dated 13.06.2018.

2. Also CE, Central Electricity Authority (CEA) vide their letter dated 19.07.2019 has mentioned in para-9 that "additional capital expenditure required for modification and time frame for execution may be decided by CERC". Therefore an undertaking may be obtained from CEA that, in case of modification required in future on this crossing of HT line.

3. The NOC for overhead crossing proposal for 765 KV D/C Hexa Khandwa Indore Transmission Line for M/s Khargone Transmission Limited (KTL) in between Km 583 & 584 is being accorded with the condition that M/s Khargone Transmission Limited will provide Performance Guarantee of Rs. 5.0 Lacs in form of BG and an undertaking from Central Electricity Authority that any shifting of tower and raising of conductor in future will not attracts any financial implication on NHA and KTL will shift the same within 3 months at their own cost or will provide the complete expenditure to NHA for shifting of this line at that particular time.

This issues with the approval of Regional Officer.

Yours faithfully,

(R.K. Gupta)
DGM (Tech.)

Copy to:
M/s. Khargone Transmission Ltd., House No. 208, B-Sector, Silicon City, Rau, Indore (M.P.)-452012.

प्रधान कार्यालय : जी 5 ब्लॉक 6, सेक्टर 10, नया दिल्ली-110 075 दूरभाष : 91-11-2507 4100/2507 4200 वेबसाइट : http://www.nha.org
Corporate Office : G-5 & 6, Sector-10, New Delhi-110 075 Phone : 91-11-2507 4100/2507 4200 Website : http://www.nha.org

Scanned by CamScanner

63. It is observed that the Petitioner has also furnished a bank guarantee of ₹5 lakh as requested by NHA on 6.1.2020. On 10.1.2020, NHA addressed a letter to the



Petitioner granting NOC for crossing proposal of NH-3, Agra-Mumbai, Near Village Kshipra (in between K.M. stone, 583 and 584 Ch. -583 km + 520 m from Agra), for 765 kV D/C Hexa Khandwa-Indore transmission line. The relevant extract of the letter dated 10.1.2020 is as follows:



NHAI/PIU/IND/NH-3/EHT Line/2020/ 74 Dated 10.01.2020

To,
M/s Sterlite Power Khargone Transmission Ltd.
House No. 208, B-Sector, Silicon City Rau,
Indore (MP)

Sub.: Submission of overhead crossing proposal of NH-3 Agra Bombay near Kshipra village (in between km stone 583 and 584, Ch. 584+520 mts from Agra) for 765 kv D/C Hwxa Khandwa Indore Transmission line under Khargone Transmission Limited – Reg.

Ref.: (i) NHAI, RO-Bhopal letter no. NHAI/RO-MP/IND/583-584/EHT Line/2019/37473 dtd 28.12.2019
(ii) Your letter no. 17 dtd 06.03.2017

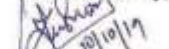
Sir,
Please refer your above cited letter under ref. (ii), vide which you have submitted overhead crossing proposal of NH-3 Agra Bombay near Kshipra village (in between km stone 583 and 584, Ch. 584+520 mts from Agra) for 765 kv D/C Hwxa Khandwa Indore Transmission line under Khargone Transmission Limited.

In this regard, please refer NHAI, RO-Bhopal letter dated 28.12.2019 under ref.(i), which is self explanatory.

You are hereby informed to proceed further in accordance with RO Bhopal letter dated 28.12.2019.

This is being issued with the approval of Project Director.

Yours sincerely,


(Neha Kushwah)
By. Manager (T)

For Project Director,
Project Implementation Unit, Indore

Encl :- As above

Copy for information to :

- IE, M/s Lion Engineering consultant Pvt. Ltd. Indore.
- M/s. Indore-Dewas Tollways Ltd, Mangliya Indore.

मुख्यालय : जी-5 व 6, सेक्टर 10, द्वारका, नई दिल्ली - 110 075
Head Office : G-5 & 6, Sector 10, Dwarka, New Delhi - 110 075



64. From the perusal of record, we notice that the Petitioner has claimed that delay in receiving the highway crossing approvals for erection of KI line over NH-3 from NHAI is covered under *force majeure*. The Petitioner has submitted that time of around 32 months was lost on this ground and it was able to execute KI line by 26.2.2020 i.e. with delay beyond SCOD of only 8 months. Accordingly, the Petitioner has prayed that the above delay of 8 months beyond SCOD of KI line is liable to be condoned in terms of Article 11 of the TSA.

65. On perusal of Article 11 of the TSA, we note that *force majeure* means any event or circumstance or combination of events and circumstances which wholly or partly prevents or unavoidably delays an affected party in the performance of its obligations under the TSA. An affected party has been defined in the TSA as any of the Long Term Transmission Customers or the TSP whose performance has been affected by an event of *force majeure*.

66. Coming to the facts of the present case, we feel that execution of KI transmission line was affected on account of delay in receiving highway crossing approval from NHAI. The documents on record establish that the Petitioner submitted detailed proposal on 6.3.2017 for obtaining the required clearance/NOC from NHAI. However, NHAI vide its letter dated 6.8.2018, communicated that there remains heavy traffic in Indore-Dewas section, therefore, this section may require vertical development in the near future. Thus, the Petitioner was advised to maintain vertical distance of at least 25.27 meters at the crossing. NHAI vide letter dated 13.11.2018, also requested the Petitioner to maintain vertical distance at least of 25.27 meters at the crossing or to submit unconditional bank guarantee of ₹2 crore in order that the modifications if need be in future, the transmission line can be accommodated in vertical development of highway.

67. We have also perused the CEA Regulations/IS which provides for vertical clearance of minimum 18.58 meters that needs to be maintained for NH crossing of 765 kV line and the clearance proposed by the Petitioner in the instant case is 21.50 meters which is in excess of the statutory requirement. Thus, the Petitioner has already meeting the statutory requirement and imposition of 25.27 meters height by



NHAI for maintaining vertical distance for future development of highway was an unexpected event which was beyond the control of the Petitioner. As per the TSA, KI line was scheduled to be completed and executed by July, 2019. NOC from NHAI to construct KI line across NH-3 was given only on 10.1.2020 and KI line was executed only on 26.2.2020. From the perusal of various correspondences exchanged between the Petitioner, NHAI and CEA, we are of the view that the Petitioner made all efforts to expedite the grant of approval by NHAI and reported the crossing approval issue to CEA as well.

68. In view of above discussions, we are of the view that the Petitioner could not proceed with implementation of the Project on account of delay caused by crossing approval. On examination of the case, we find that delay in achieving COD was not attributable to the Petitioner but it was due to delay in obtaining crossing approval. We, therefore, allow extension of SCOD of 7 months and 18 days beyond SCOD for KI line i.e. from August, 2019 upto 19.3.2020.

(V) Force majeure event: Delay in the completion of the KD line due to the outbreak of the Covid-19 pandemic.

69. The Petitioner has made the following submissions:

(a) The outbreak of the first wave of the Covid-19 pandemic and the lockdown imposed to contain it led to a loss of working time of approximately 6 months in the construction of the KD line.

(b) On 27.7.2020, the MoP vide its circular acknowledged that the owing to the outbreak of Covid-19 pandemic, there was disruption in the supply chain and manpower and accordingly, to off-set the said difficulties/ *force majeure* event, the MoP decided to grant a standard extension to all the transmission projects under implementation as on the date of 25.3.2020. The construction and commissioning of the KD line was severely impacted and development activities came to stand still. The outbreak of the first wave of the Covid-19 pandemic and the lockdown imposed to contain it led to a loss of working time of approximately 6 months in the construction of the KD line.

(c) Thereafter, by another Office Memorandum dated 12.6.2021, the MoP has granted another blanket extension of 3 months to all transmission projects under implementation that have their SCOD on or after 1.4.2021.



(d) The implementation of the KD Line was impacted again due to the resurgence of Covid-19 pandemic in India around March, 2021. It restricted the availability and movement of manpower and machinery. There was also a complete shut down in the supply of construction material and equipment etc. for the Project.

(e) The restrictions imposed by the government due to the outbreak of Covid-19 pandemic were beyond the Petitioner's reasonable control and led to the substantial loss of working time and, therefore, the same constitutes a *force majeure* event under Article 11.3 of the TSA. The Petitioner duly intimated the LTTCs of the occurrence of the aforesaid *force majeure* event vide its notices dated 9.3.2020, 27.4.2021 and 30.7.2021.

(f) Accordingly, the Petitioner stands entitled to an extension of SCOD beyond 1.4.2021 and is, therefore, covered within the scope of the aforesaid office memorandum dated 12.6.2021. The Petitioner submitted that it is entitled to a condonation of delay for at least a period of 8 months on account of the disruption caused due to the Covid-19 pandemic.

Reply of MPPMCL and MSEDCL

70. The submissions made by MPPMCL and MSEDCL similar in nature and hence are taken up together. The following are the submissions made by MPPMCL and MSEDCL:

(a) The Covid-19 pandemic started in 24.3.2020 whereas the SCOD of the Project was July, 2019 much before the starting date of Covid-19 pandemic. As the SCOD of the KD line was prior to the outbreak of Covid-19 pandemic, the Petitioner is not entitled for any relief due to outbreak of Covid-19 pandemic. Since the KD line has already been delayed on account of negligence and omission on part of the Petitioner, delay due to Covid-19 cannot be allowed as the Petitioner failed to explain the earlier delay in the Project.

(b) Reliance has been placed on the Commission's order dated 20.1.2020 in Petition No. 594/MP/2020 (GMRWEL Vs. DNHPCL) wherein the Commission held that lockdown due to outbreak of Covid-19 cannot be considered as a *force majeure* events hindering performance of obligations



under the PPA, which was also referred to by the Commission in order dated 27.6.2022 in Petition No. 187/MP/2021.

Rejoinder to the reply of MPPMCL and MSEDCL

71. The Petitioner has made similar submissions on the issue of outbreak of Covid-19 Pandemic in response to the reply of MPPMCL and MSEDCL and the same are dealt together:

(a) The construction of KD line was delayed initially due to the unexpected requirement to divert the said line due to intersection with the Jamphal Dam. As per the CEA Minutes of Meeting dated 29.7.2019, it was decided that KTL would complete the KD line by May, 2020. The Petitioner made best efforts to commission the KD line by May, 2020 by publishing the Section 164 of the 2003 Act approval for the diverted route on 27.1.2019 in the gazette and applied to CEA on 2.3.2020.

(b) However, the outbreak of Covid-19 and consequent nationwide lockdown and restrictions on movement of men and machinery by way States further affected the timelines for grant of approvals and delayed the construction of KD line. CEA granted Section 164 approval for the diverted route on 1.4.2021. Therefore, the Petitioner could not commence the construction activities on the line until April, 2021.

(c) The tree cutting Permission /Forest clearance for the diverted portion of the line was also received on 19.4.2021. The Petitioner resumed the construction activities of the line on 21.4.2021. However, the second wave of Covid-19 hit the nation hard and again the Governments of Maharashtra and Madhya Pradesh announced curfews and lockdown which impacted the construction activities due to restrictions in movement and slowdown of supply of materials.

(d) The delay due to restriction in movement of men and machinery imposed of materials imposed by Government of Maharashtra and Madhya Pradesh were duly communicated by the Petitioner in the Monthly Progress Reports submitted to the CEA between April, 2021 upto November, 2021. The KD line was subsequently was put into commercial operation in December, 2021.



(e) As such, the Petitioner could not complete the KD line prior to the outbreak Covid-19. The Petitioner is entitled to an extension in the SCOD of the KD line for atleast 8 months on account of the outbreak of Covid-19.

Analysis and Decision

72. We have considered the submissions of the Petitioner and the Respondents. The SCOD of the KD line was July, 2019 and actual COD of the KD line was on 13.12.2021. The Petitioner has contended that the construction of KD line was initially delayed due to unexpected requirement to divert the said line due to intersection with the Jamphal Dam and the said issue after being examined by us has already been rejected. Accordingly, the delay of 2.2 years in execution of the KD line has already been disallowed and, hence, there is no such extension in SCOD of the KD line.

73. The Petitioner has contended that MoP vide letters dated 27.7.2020 and 12.6.2021 had extended the COD of the transmission projects by 5 months and 3 months respectively. The Respondents have contended that SCOD of the KD line was prior to the outbreak of Covid-19 pandemic and the Petitioner is, accordingly, not entitled to any relief due to outbreak of Covid-19 pandemic.

74. We have perused the MOP O.M. referred to by the Petitioner. It is observed that the O.M. dated 27.7.2020 is not applicable to the projects whose SCOD was prior to 25.3.2020 and O.M. dated 12.6.2021 is applicable to transmission projects under implementation that have their SCOD on or after 1.4.2021. The relevant portions of the MoP's O.M. are extracted as follows:

*"No. 3/1/2020-Trans
Government of India
Ministry of Power
Shram Shakti Bhawan, Rafi Marg,
New Delhi- 110001,*

Dated: 27th July, 2020

To

1. Chairperson, Central Electricity Authority, New Delhi.
2. COO, CTU-Plg, POWERGRID, Gurugram

Sub: Extension to TSP/ Transmission Licensees for completion of under construction inter-state transmission projects

I am directed to state that transmission utilities have pointed out that construction activities at various transmission project sites have been severely affected by the



nationwide lockdown measures announced since 25th March, 2020 to contain outbreak of COVID-19 and have requested for extension of Scheduled Commercial Operation Date (SCOD) to mitigate the issues of disruption in supply chains and man power, caused due to outbreak of COVID-19 pandemic.

2. It has been, therefore, decided that;

i. All inter-state transmission projects, which were under construction as on date of lock-down i.e. 25th March 2020, shall get an extension of five months in respect of SCOD

*ii. **This order shall not apply to those projects, whose SCOD date was prior to 25th March 2020,***

iii. Start date of Long Term Access granted to a generator by CTU based on completion of a transmission line, whose SCOD is extended by 5 months due to COVID-19 as mentioned above at point (i), shall also be extended by 5 months.

3. This issues with the approval of Competent Authority.”

OM dated 12.6.2021

“Sub: Extension to TSP/Transmission Licensees for completion of under construction inter-State transmission projects – reg.

Sir,

I am directed to state that transmission utilities have approached this Ministry stating that construction activity at various transmission projects sites have been severely affected by the current second wave of COVID-19 pandemic and various measures taken by State/UT Governments to contain the pandemic; such as night curfew, imposition of section 144, weekend lockdown and complete lockdown. In this regard they have requested for extension of Scheduled Commercial Operation Date (SCOD) for the undergoing Transmission projects to mitigate the issues of disruption in supply chains and manpower, caused due to COVID-19 pandemic.

2. The matter has been examined in the Ministry and it has been noted that unlike last year complete lock-down in the entire country, this time different States/UTs have ordered lock-down in their State/UTs as per their own assessments. Therefore, after due consideration, it has been decided that;

- i. **All inter-state transmission projects, which are under construction with SCOD coming after 01 April 2021 shall get an extension of three (3) months in respect of their SCOD;***
- ii. The commencement date of Long Term Access (LTA) to a generator by CTU based on completion of a transmission line, whose SCOD is extended by three (3) months due to COVID-19 as mentioned above at point(i), shall also be extended by three (3) months.”*

75. In the instant case, the SCOD of KD line was 21.9.2019. As the SCOD of the KD line was prior to 25.3.2020, the MoP's OM dated 27.7.2020 is not applicable. Further, as the SCOD of the KD line is not after 1.4.2021, the OM dated 12.6.2021 is also not applicable to KD line. Therefore, the Petitioner is not eligible for any relief of extension of SCOD under the MoP's OMs. Accordingly, the submissions of the Petitioner on this count are rejected.



(I) “Change in Law” events : Additional expenditure incurred towards (i) diversion of KD Line, construction of towers and consequent IDC for the period of delay, (ii) construction of a concrete protection wall in terms of the directions of the committed constituted by the MoP, Government of India

76. The Petitioner has submitted that Petitioner has incurred additional expenditure on account of diversion of KD line, construction of towers and consequent IDC for the period of delay. The Petitioner has submitted that the CEA is an Indian Governmental Instrumentality and its orders have the force of Law in the meaning contemplated under the TSA and that the CEA’s letter dated 29.7.2019 which requires the Petitioner to divert the route of the KD line amounts to “Change in Law” under Article 12 of the TSA. Further, the Petitioner has incurred additional expenditure of ₹18 crore on account of construction of a concrete protection wall in terms of the directions of Committee constituted by the MoP, Government of India as compensation under the “Change in Law”.

77. Regarding additional expenditure incurred on account of construction of boundary wall of KD line, the Petitioner submitted that MoP vide order No. 2/7/2017-Trans dated 10.2.2021 constituted a committee in order to review the pending issues in relation to construction of KD line by the Petitioner. The said Committee in its minutes of meeting dated 12.2.2021 ordered the Petitioner to construct a concrete wall for the protection of the Dhule Sub-station and towers of the KD line which lie in the vicinity of the reservoir envisaged for Jamphal Dam. The Committee granted liberty to the Petitioner to approach the Commission in relation to recovery of the additional cost of such construction. The Petitioner has incurred an additional expenditure of ₹18,45,57,602/- in the construction of concrete protection wall pursuant to the aforesaid orders of the Committee constituted by the MoP. The Petitioner has also submitted the Auditor certificate certifying the said additional expenditure. The Petitioner has furnished order of the Committee constituted by the MoP and informed the same to be a Government instrumentality under the TSA and its directions have the force of law. Hence, the MoP’s order as well as Minutes of the meeting dated 10.2.2021 is a “Change in Law” event under the TSA.



78. On the other hand, the Respondents MPPMCL and MSEDCL have opposed the claim of the Petitioner under the “Change in Law” event due to diversion of KD line. The Respondents have submitted that the scheme for Jamphal Dam was in public domain before the cut-off date, therefore, it was expected from the Petitioner to know the surrounding areas of the Dhule Sub-station. According to the Respondents, the additional expenditure incurred on the construction of concrete wall along the boundary of the Dhule Sub-station comes under the design part and not under “Change in Law” events.

79. In response, the Petitioner has submitted that in the absence of any information on precise co-ordinates, the Petitioner could not have contemplated the requirement to divert the route of the KD line at the time of bid submission. As regards the expenditure incurred on the construction of the protection wall along the boundary of the Dhule Sub-station, the said wall was required to be constructed by the Petitioner pursuant to the directions issued by the Committee constituted by the MoP vide order No. 2/7/2017-Trans dated 10.2.2021 to review the pending issues in relation to construction of the KD line. The MoP and any Committee formed under its aegis, are Indian Governmental Instrumentalities within the meaning of the TSA and its directions have the force of law. Accordingly, the Petitioner is bound by law to follow the orders of the Committee constituted by the MoP.

Analysis and Decision

80. We have considered the above submissions and counter-submissions of the Petitioner, the Respondents, MSEDCL and MPPMCL and have gone through the record.

81. The submissions of the Petitioner with reference to diversion KD line have already been discussed in detail in the earlier part of this order while dealing with the said events under *force majeure*. Since it has been held that diversion of KD line was not an event of *force majeure*, because as per TSA it was the responsibility of the petitioner to identify the route after detailed survey, taking necessary consents and approval, designing and construction at its cost, and as such the issue does not qualify as a “Change in Law” event. Further, we observe that the Petitioner was



required to divert the route since the Petitioner's route was falling under the submergences and Dam seat area of Jamphal Dam and such land was notified under sub-section 1 of Section 11 of Maharashtra Project Affected Persons Rehabilitation Act, 1999, where restrictions were laid on this land under sub-section 1 of Section 12 of same Act. In the absence of required approvals under the said Act, the Petitioner was given show cause notice and the Petitioner was required to divert the route and obtain required approvals. CEA has conducted meetings to expedite the process of discussion and resolution and the Petitioner cannot argue that it was because of CEA's direction that it was required to divert the line. All the approvals which the Petitioner was required to take existed prior to bid deadline and hence there is no "Change in Law" on this account.

82. We shall now discuss the additional expenditure incurred towards construction of a concrete wall along the boundary Dhule Sub-station. The issue before us now is confined to whether the order of the MoP dated 10.2.2021, whereby a Committee was constituted to review the pending issues in relation to construction of the KD Line which directed the Petitioner to construct a protection wall along the Dhule Sub-station and based on that, the Petitioner incurred additional expenditure of ₹18,45,57,602/- need to be considered as a mandate to the Petitioner by a Government Instrumentality and is liable to be treated as an event covered under "Change in Law"?

83. The Minutes of the meeting dated 12.2.2021 of the Committee set up by the MoP is extracted as follows:

"Minutes of the Meeting of Committee Constituted by Ministry of Power to resolve issue raised by Irrigation Dept., Govt. of Maharashtra for grant of No Objection Certificate to KTL on 12.02.2021 at 1030 hrs through VC

List of participants is enclosed at Annexure I.

1. *Chairperson, CEA and Member (Power System) I/C, welcomed all the participants and requested Chief Engineer (PSPA-I) to take up the agenda.*
2. *Chief Engineer (PSPA-I), CEA welcomed all the participants and stated that Secretary (Power) on 10.02 2021 had taken a meeting to review the pending issues relating to the stalling of work on 765 kV Khandwa Pool - Dhule Transmission line being constructed by KTL. He also highlighted the urgent need of this line for the evacuation of NTPC's Khargone (1320 MW) power to MP & Maharashtra States with*



reliability. He stated that due to the stalling of construction, this project is now being reviewed by PMO during the upcoming meeting of Pragati on 24th Feb 2021, and therefore this Committee has been constituted by Ministry of Power to address and resolve the issue raised by Irrigation Dept., Govt of Maharashtra for grant of No Objection Certificate so that the work on the line can be resumed immediately.

Summary of discussion held during the meeting is as under: -

1. ED, TIDC, Jalgaon stated the facts of the case by highlighting the inception of the Sulwade Jamphal Kanoli Lift Irrigation Scheme in Dhule District, Maharashtra in the year 2000. He mentioned that the land acquisition for the dam started in 2010 and about Rs. 500 Crs. has already been spent on the project so far. He further stated that their main concerns are with regard to the potential hazard of the reservoir water for the existing Dhule Substation which is adjacent to reservoir. He informed that in order to protect the village along the reservoir area, from the ingress of water, a bund wall would be built by them. Since the substation is very close to the reservoir and with the filling of the reservoir up to its full capacity, water in reservoir may ingress into the substation or there could be seepage of water into the switchyard, there is a need to take adequate electrical safety measures for the portion of towers falling in the reservoir area and for the safety of the substation. Accordingly, he suggested that M/s BDTCL/KTL authorities should take precautionary measures in form of building concrete wall for protecting their S/S from any possibility of water ingress/seepage. From TIDC side it won't be possible to bear/share any expenditure towards creating protective wall for the S/S as they are already bearing lot of expenditure in form of building bund wall for protecting the nearby village from water ingress. ED, TIDC further mentioned that WRD is not objecting to construction of the Towers by KTL but are only concerned about the appropriate technical safety measures taken by the developer so that there is no restriction in the storage water level in the reservoir as compared to the design level. He accordingly suggested for construction of concrete wall on the boundary of existing Dhule 765kV S/s by Bhopal Dhule Transmission Company Limited (BDTCL)/KTL, such other protective arrangement for electrical installations in Substation/Towers by seeking expert advice and an undertaking from KTL towards that.
2. M/s KTL Representatives provided the background and need for this project, emphasizing that all other elements of the KTL project have been commissioned except for the 765 kV Khandwa -Dhule line, where out of 191 kms, only 6.5 km balance construction is remaining for completion. It was highlighted that KTL has done the rerouting of the line as directed by CEA to avoid the dam site and the line meets all the safety criteria set by TIDC. They understand the concern of WRD and are not principally opposing the construction of the Dam. However, considering the fact that they have already invested huge amount of money for the construction of the line and due to the stalling of the construction activities for the last two years on the Khandwa -Dhule line they are not able to realise the tariff and has incurred huge losses. They assured for giving an undertaking for bearing the cost of diversion and the concrete wall being proposed by WRD, provided the committee recommends the cost recovery mechanism through CERC. However, he stated that since there is an urgent need to complete the balance work pertaining to the Khandwa -Dhule line which is already delayed, for which, TIDC/ WRD need to provide NOC at the earliest.
3. Principal Secretary Energy, Govt, of Maharashtra indicated that there is no reservation from the Energy Department of the State as such for the KTL work. He would coordinate with Additional Chief Secretary (WRD), Govt, of Maharashtra to get



this matter resolved at the earliest.

4. *Principal Secretary (Energy), Govt, of Maharashtra made the following suggestions:*
 - a. *WRD to come out with the FRL levels.*
 - b. *CEA can recommend a height of the foundation above the FRL level for appropriate safety of the transmission towers.*
 - c. *Both transmission developers viz M/s KTL and M/s BDTCL should jointly take this responsibility to build the protection/ concrete wall.*
 - d. *Since both the transmission projects have been awarded under the TBCB Guidelines of Central Govt., there may be difficulty regarding recovery of additional cost of the work. As such, an appropriate recommendation needs to be provided by the committee for CERC to consider cost recovery of the same.*
5. *Director Projects MSETCL seconded the proposal of Principal Secretary Energy Maharashtra and stated that concrete wall need to be created to take care of water ingress problem, However, for any other subsequent problem like seepage/corrosion in the earthing, M/s BDTCL need to take remedial measures.*
6. *PGCIL Representative, Shri B. Anantha Sarma concurred with the suggestions of the Principal Secretary (Energy), Govt, of Maharashtra.*
7. *CEA Chairperson also agreed with the proposal of Principal Secretary (Energy), Govt, of Maharashtra and stated that in the light of M/s KTL agreeing for giving an undertaking to TIDC for construction of the concrete wall as desired by them, TIDC should also reciprocate by immediately issuing an NoC for starting the construction of the transmission line. He further stated that the safety aspect of the transmission lines including transmission tower is taken care by the Electrical Safety Inspector before giving charging approval for the line.*

After detailed deliberations, the Committee decided as under:

- ❖ *WRD to come out with the FRL levels for the DAM so that appropriate protection can be taken into account by M/s. KTL at the time of construction of concrete wall, as well as the transmission towers adjoining the Dam site as decided by the Committee.*
- ❖ *M/s. KTL to provide an undertaking for taking up the protective measures/construction of concrete wall for existing Dhule S/s immediately.*
- ❖ *NOC to be issued by WRD, Government of Maharashtra to M/s. KTL and M/s. BDTCL within 24 hrs of the undertaking received from M/s. KTL.*
- ❖ *M/s. KTL may approach Central Electricity Regulatory Commission with regard to commercial aspects pertaining to recovery of the additional cost for construction of the concrete wall.*
- ❖ *The operators shall not object for construction of Dam line, Bund line and any other components pertaining to Jamphal Dam including Rehabilitation Works, if any.”*

84. We observe that based on the decisions in the above said meeting, the Petitioner gave the following undertaking:



KHARGONE TRANSMISSION LIMITED

UNDERTAKING

Dear Sir,

This undertaking is in compliance with the directions issued by the committee being constituted by Ministry of Power under the chairmanship of Member (Power Systems), Central Electricity Authority on 12-02-2021 regarding construction of Khandwa Pool – Dhule 765 KV D/C Transmission line being executed by M/s Khargone Transmission Limited (KTL).

M/s KTL hereby undertakes and certifies that all the 8 towers (i.e. from 56/28 to 58/0) which are under dam submergence area are designed in compliance with revised TBL of 259.10M and FRL of 256M and are at a distance of 200 M from the proposed bund wall near Sondale village.

Further, M/s KTL undertakes that they will construct the concrete protection wall to protect the transmission towers and substation area and all the safety measures will be maintained as per the CEA Safety standards.

85. TIDC issued NOC based on abovesaid undertaking given by the Petitioner.



No Objection Certificate

This is to certify that TIDC hereby issues No Objection to Khargone Transmission Ltd (KTL) and Bhopal Dhule Transmission Company Ltd (BDTCL) on receipt of the Undertaking and subject to the following conditions:

1. KTL will construct the 8 towers which are under dam submergence area with TBL of 259.10M and FRL of 256M.
2. KTL will construct the concrete protection wall to protect the transmission towers and substation pertaining to BDTCL and KTL. All the safety measures as directed by CEA will be taken in account by KTL.
3. All support to be extended to M/s KTL regarding construction of the concrete wall.

86. We have perused the above report and minutes of meeting dated 12.2.2021 and the undertaking by the Petitioner for protective measures/construction of concrete wall for existing Dhule Sub-station. It was also decided in the said meeting that KTL may approach the Commission with regard to commercial aspects pertaining to recovery of the additional cost for construction of the concrete wall. We observe that Dhule Sub-station is owned by Bhopal-Dhule Transmission Company Limited and the boundary wall is meant for protection of Dhule Sub-station which is owned by BDTCL. We observe that as such the NOC by TIDC for construction of transmission line by the Petitioner was made subject to the undertaking to be given by the Petitioner to construct concrete wall which is otherwise not related to the Petitioner's project. Since the concrete wall was required to protect an existing sub-station of another transmission licensee, the condition of consent by TIDC amounts to "Change in Law" event under Clause 12.1.1. (fourth bullet- *a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits*).

87. Accordingly, the expenditure towards construction of concrete wall to protect Dhule Sub-station of BDTCL is allowed.



(III) “Change in Law” events: Additional expenditure incurred in complying with H+6 criteria imposed by MPPTCL

88. The Petitioner has submitted that the approved route of the transmission lines of the Petitioner intersects with existing transmission network of MPPTCL at certain locations. Therefore, it was required to ensure that its lines followed the statutorily prescribed clearances at places where the Petitioner’s transmission lines were crossing MPPTCL’s transmission network. Accordingly, the Petitioner had submitted its line crossing proposals for MPPTCL’s approval in January, 2017.

89. The Petitioner has submitted that at the time of submission of bid, only the cost of construction of the transmission lines was required to be factored. The Petitioner could not have contemplated the imposition of the additional requirement of complying with the H+6 criteria to obtain the necessary approval from MPPTCL. MPPTCL’s letter dated 8.6.2017 required the Petitioner to maintain an additional distance of 6 meters, over and above the statutory requirement of 7.94 meters, between certain locations of KI and KD lines with MPPTCL’s own lines amounts to an event of “Change in Law” as contemplated under Article 12 of the TSA.

90. Resultantly, on account of MPPTCL’s direction, the Petitioner was required to incur additional expenditure on the construction of higher tower extensions at around 25 line crossings which cumulatively impacted around 50 towers of the Petitioner’s three transmission lines. The Petitioner has incurred additional expenditure of ₹4.92 crore and claimed the same as an event of “Change in Law” under Article 12 of the TSA.

Reply of MSEDCL and MPPMCL

91. Both MPPMCL and MSEDCL have negated the claim of the Petitioner as “Change in Law” event and termed it as negligence on the part of the Petitioner. The objections of MSEDCL and MPPMCL on this aspect of the matter have already been dealt in detail while this event was claimed by the Petitioner an event of *force majeure*, we are, therefore, not reiterating the same here once again.



Analysis and Decision

92. For the reasons mentioned by us in detail in the earlier part of this order while dealing with this issue as an event of *force majeure*, no finding is required to be given for this event under “Change in Law”. Accordingly, we reject contentions of the Petitioner that on account of MPPTCL’s direction, the Petitioner was required to incur an additional expenditure on the construction of higher tower extensions of ₹4.92 crore and the same is required to be allowed as an event of “Change in Law” under Article 12 of the TSA. This issue is, accordingly, decided against the Petitioner and in favour of the Respondents.

(IV) “Change in Law” events : Additional expenditure incurred in diversion of route of the KK line to avoid intersection with NTPC’s railway track.

93. The Petitioner has made the following submissions with respect to the issue of diversion of route of KK line to avoid intersection with NTPC’s railway track:

- (a) Route of KK line intersected with the proposed route for NTPC’s railway line. Accordingly, the Petitioner was required to divert the route of KK line to avoid any interception with the railway lines of NTPC.
- (b) The Petitioner vide letters dated 29.11.2018 and 5.12.2018 requested NTPC to provide coordinates of the proposed route for its railway track and to check for interception of the aforesaid route with its railway line. The Petitioner also submitted coordinates of the route for KK line. NTPC vide its letter dated 15.12.2018 shared a report wherein it was stated that approved route for KK line was intercepting NTPC’s railway track at four places and passing its boundary at multiple locations.
- (c) The construction of KK line on alternate route resulted in an increase in the configuration of the existing transmission towers by 450 metric tonnes and increase in the route length by 350 meters. The above requirement to divert the route of KK line imposed by NTPC vide letter dated 15.12.2018 was a pre-condition for grant of NTPC’s approval to the Petitioner to construct the KK line along the NTPC’s railway track.
- (d) The aforesaid diversion of KK line has resulted in the Petitioner incurring additional expenditure of ₹1.3 crore after the cut-off date. The said



requirement, therefore, constitutes a “Change in Law” event and the Petitioner is entitled to relief in terms of Article 12.2. The Petitioner at the relevant time had duly notified NTPC of additional expenditure incurred by it on account of the diversion of KK line.

Reply of MSEDCL and MPPMCL

94. MPPMCL and MSEDCL have submitted that the Investment Approval for Khargone STPS Project was approved by NTPC Board in its 417th meeting held on 25.2.2015. The cut-off date of the Petitioner’s Transmission Project is 4.4.2016. Therefore, the Petitioner must have known the facts regarding intersection with NTPC’s railway track vis-a-vis NTPC’s Khargone STPS project as their transmission system was designed to evacuate power from NTPC’s Khargone STPS plant. As per clause 11.3 and 11.4 of the TSA, the benefit of *force majeure* events cannot be given to the party who has failed to take reasonable control or care during the project or has acted negligently. Placing reliance on clauses 2.14.2.3, 2.14.2.5 of the RfP, MSEDCL has submitted that the claim of the Petitioner does not fall under the ambit of “Change in Law”, as being outside the scope of “law” under the PPA. The additional cost of ₹1.3 crore incurred in diversion of route of the KK line to avoid intersection with NTPC’s railway track is not admissible under “Change in Law” as the railway siding was being developed by Khargone TPP as on the cut-off date and if the Petitioner was more diligent in its survey of the route, the Petitioner could have avoided the intersection of the KK line with the NTPC’s railway siding.

Reply of NTPC

95. NTPC has made the following submissions on this issue:

(a) NTPC is not a party to the TSA executed between the Petitioner and the LTTCs. Therefore, there is no privity of contract between the Petitioner and NTPC. The relief sought by the Petitioner in the instant petition has to be examined in the light of Article 4.4.2 read with Article 11 of the TSA, to which NTPC is not a party. Therefore, any liabilities arising out of the claims made by the Petitioner must concern the contracting parties and the same cannot be loaded upon NTPC.



(b) NTPC has filed Petition No. 402/GT/2019 for determination of tariff for Khargone TPP and the same is pending adjudication before the Commission. The Petitioner in the said petition qua the issue of *force majeure* has made similar submissions and NTPC has made detailed submissions with respect to the conduct of the Petitioner in delaying the commissioning of Khargone TPP. The delay in commissioning of the two units of the Khargone TPS was attributable to the Petitioner and occurred, inter alia, due to the non-availability of transmission infrastructure for evacuation of power from the Khargone TPS, which has been implemented by KTL.

(c) The diversion of route of KK line is not a “Change in Law” event within four corners of TSA. The Petitioner has submitted its bid for the Project on 16.5.2016 while the zero date for Khargone TPP was 31.3.2015. Thus, the Petitioner was well aware about the details of railway siding being developed by Khargone TPP and the same could have been avoided by the Petitioner by conducting survey in terms of provisions RfP. Further, Clause 2.14.2.5 of RfP makes it crystal clear that any failure to investigate the route and examine and inspect the site or sub-surface conditions shall not relieve the bidder from incurring additional costs of successfully completing the Projects.

(d) The Petitioner enquired about any interception of its KK line with railway siding of Khargone TPP only on 5.12.2018, i.e. almost 30 months after signing of TSA which reflects laxity on part of the Petitioner.

(e) The Petitioner had claimed *force majeure* on account of delay in diversion of KK line in Petition No. 308/MP/2019 and the same was also objected by NTPC. In the instant petition, the Petitioner has not claimed the said diversion in the route as *force majeure* event as the Petitioner has realised that it has due control over the issue and NTPC had no role in the delay caused, if any, in the diversion of KK line.

(f) The said event claimed by the Petitioner cannot be regarded as “Change in Law” event in term of provisions of the TSA. As per Clause 2.1.4.2 of the RfP provided that the bidders were prior to making the bids were required to satisfy and familiarise themselves in respect to all the required information, inputs, conditions and circumstances and factors that may affect them in any manner for making bid. Further, the RfP provides that after acquisition of KTL,



the TSP shall not be relived from any of its obligations under the RfP. Clause 2.1.4.2.3 allowed the bidder to visit the route of Transmission Lines associated with the Project and surrounding areas and obtain/verify all the information which is necessary for preparation of bids.

(g) The submission of the Petitioner that NTPC vide letter dated 15.12.2018, imposed the requirement to divert the route of KK line and it was a pre-condition for grant of NTPC's approval to the Petitioner to construct the KK line along NTPC's railway track is incorrect. From the perusal of the letter dated 15.12.2018, it reflects that NTPC only provided the relevant information with respect to the query sought by the Petitioner vide letter dated 5.12.2018 to check for any interception of KK line with NTPC's railway siding.

(h) The Petitioner has failed to conduct due diligence and investigate regarding the route of the said transmission system to avoid delay or cost over-run on account of such factor. Therefore, such an event cannot be regarded as a "Change in Law".

(i) NTPC was not at fault for the alleged additional expenditure incurred by the Petitioner in diversion of route of KK line to avoid interception with NTPC's railway track. Thus, NTPC cannot be held liable to bear such extra financial burden and the same needs to be borne by the LTTCs of the said transmission system as per provisions of the TSA.

Rejoinder to the reply of MPPMCL, MSEDCL and NTPC

96. The Petitioner has made similar submissions to the reply filed by the MPPMCL, MSEDCL and NTPC. The gist of the submissions is as follows:

(a) The Petitioner has submitted that Khargone TPS was conceptualized in February, 2015 with zero date of 31.3.2015. The Petitioner had no way of knowing the precise coordinates of NTPC's railway track as early as in April, 2016 when the Petitioner submitted its bid for the Project. As the precise route of NTPC's railway track was not available at the time of bid submission, the Petitioner could not have anticipated any intersection of the approved route of KK Line with NTPC's railway track. Further, no objection was received by the Petitioner during the process of obtaining the approval under Section 164 of the 2003 Act. The said route was approved by all the Authorities after due scrutiny on 5.7.2017. Therefore, the Petitioner was diligent and there was no



negligence on its part. The requirement to divert the above route of KK line imposed by NTPC i.e. an Indian Government Instrumentality, vide letter dated 15.12.2018 was a pre-condition for grant of NTPC's approval to the Petitioner to construct the KK line along NTPC's railway track. The aforesaid diversion of KK line resulted in incurring additional expenditure of ₹1.3 crore after the cut-off date and, therefore, constitutes a "Change in Law" event under Article 12.1.1 of the TSA.

- (b) As regards the NTPC's contention that delay in Khargone TPS is attributable to the Petitioner, the Petitioner has submitted that the Petitioner's Project has been impacted by *force majeure* events, the same has not in any manner prevented NTPC's Khargone TPS from evacuating power from its generating station from the COD of its two units for any reasons attributable to KTL.
- (c) In compliance with its obligations as provided under Regulation 13(8) of the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2020 ('the 2020 Sharing Regulations') read with Regulation 6(b) of the 2019 Tariff Regulations and Article 5.8 of the TSA, the Petitioner made alternate arrangements for evacuation of power from NTPC's Khargone TPS in advance of the CODs of the two units of Khargone TPS. The actual COD for the two units was delayed due to delay by Madhya Pradesh Pollution Control Board in granting 'Consent to Operate' for the said units and the same has been stated by NTPC in Petition No. 402/GT/2019. Further, the Petitioner has kept NTPC, CEA and all other stakeholders apprised of the difficulties being faced in the implementation of the Project and accordingly the Petitioner made an alternate arrangement for evacuation of power from NTPC's Khargone TPS. Therefore, non-availability of the Petitioner's transmission elements due to *force majeure* events has not affected the evacuation of power from NTPC's Khargone TPS. Accordingly, no liability can be imposed on the Petitioner for the delay in achieving COD by NTPC for the two units of the Khargone TPS on account of *force majeure* event since alternate arrangements were made by the Petitioner in advance of NTPC's COD.
- (d) As regards the NTPC's contention that it is not a party to the TSA and hence no liability for *force majeure* ought to be imposed on it, the Petitioner has



submitted the execution of the transmission assets was impacted due to occurrence of *force majeure* events which are the subject matter of the instant petition. The said events could not have been foreseen by the Petitioner. Moreover, delay in execution of Khargone TPS is not attributable to the Petitioner, even otherwise the period of alleged mismatch between the execution of NTPC's Khargone TPS and the transmission lines of the Petitioner is squarely covered by the *force majeure* events.

- (e) The principles laid down by the APTEL in Appeal No. 17 of 2019 dated 14.9.2020, *NRSS XXXI (B) Transmission Ltd. v. Central Electricity Regulatory Commission & Ors* are relevant and be considered in the instant case. As per the NRSS judgment, no liability can be imposed on a delaying entity if the appropriate Commission has condoned the delay in execution of the transmission assets and extended the SCOD on account of legitimate *force majeure* events.
- (f) The Petitioner has a bona fide case for seeking extension in the SCOD of the various transmission assets. Accordingly, no liability ought to be fastened upon the Petitioner in the present proceedings until its petition for claiming extension of SCOD of its Project is adjudicated upon by the Commission. Any cost over-run on account of the delay caused by *force majeure* events suffered by the Petitioner ought to be socialized among the various stakeholders including the Petitioner's LTTCs to ensure no one entity is unreasonably burdened due to the impact of uncontrollable events.

Analysis and Decision

97. We have considered the submissions of the Petitioner and Respondents. The Petitioner has contended that through letters dated 29.11.2018 and 5.12.2018 it had requested NTPC to provide coordinates of the proposed route for its railway track and to check for interception of the aforesaid route with its railway line. Thereafter, NTPC vide its letter dated 15.12.2018 shared a report wherein it was mentioned that the approved route for KK line was intercepting NTPC's railway track at four places and passing its boundary at multiple locations. As a result, the Petitioner had to take an alternative route which resulted in configuration of existing transmission towers by 450 metric tonnes and increase in the route length by 350 meters. The Petitioner has



contended that diversion of KK line resulted in the Petitioner incurring additional expenditure of ₹1.3 crore after the cut-off date. The Petitioner has submitted that requirement to divert route of the KK line imposed by NTPC vide letter dated 15.12.2018 was a pre-condition for grant of NTPC's approval to the Petitioner to construct the KK line along NTPC's railway track. This requirement constitutes "Change in Law" event and the Petitioner is entitled to a relief in terms of Article 12.2 of the TSA.

98. As against this, MPPMCL and MSEDCL have contended that Investment Approval for Khargone STPS Project was approved by NTPC's Board in its meeting held on 25.2.2015. The cut-off date of the Petitioner's Transmission Project is 4.4.2016. The Petitioner must have known about the intersection of KK line with NTPC's railway tracks. Further, Respondents by placing reliance on clause 11.3 and 11.4 of the TSA, submitted that benefit of *force majeure* events cannot be given to the party who has failed to take reasonable control or care during the project or has acted negligently. Further, by placing reliance on clauses 2.14.2.3, 2.14.2.5 of the RfP, MSEDCL has submitted that claim of the Petitioner does not fall within the ambit of "Change in Law", as being outside the scope of "law" under the TSA. The additional cost of ₹1.3 crore incurred in diversion of route of KK line to avoid intersection with NTPC's railway track is not admissible under "Change in Law" as the same has been incurred prior to the cut-off date.

99. NTPC has also raised similar contentions and has submitted that diversion of route of KK line is not a "Change in Law" event within four corners of TSA. The Petitioner has submitted its bid for the Project on 16.5.2016 while the zero date for the Khargone TPP was 31.3.2015. Thus, the Petitioner was well aware about the details of railway siding being developed by Khargone TPP and the same could have been avoided by the Petitioner by conducting survey in terms of provisions RfP. The Petitioner came to know about the interception of its KK line with the railway siding of Khargone TPP only on 15.12.2018 almost 30 months after signing of TSP which shows that the Petitioner was negligence on its part. The claim of the Petitioner cannot be regarded as "Change in Law" in terms of the TSA. NTPC by placing reliance on clauses 2.1.4.2 and 2.1.4.2.3 of the RfP submitted that bidder prior to



making of bid is required to satisfy and familiarise themselves in respect to all the required information, inputs, conditions and circumstances and factors that may affect them in any manner for making bid. NTPC denied that its letter dated 15.12.2018 imposed the requirement to divert the route of KK line and was a pre-condition for grant of NTPC's approval to the Petitioner to construct KK line along NTPC's railway track. NTPC on the request of the Petitioner merely provided the information with respect to any interception of KK line with NTPC's railway siding. As the Petitioner has failed to conduct prior enquiry and investigate the route of the transmission system, the same cannot be regarded as "Change in Law".

100. We have considered the submissions of the Petitioner and Respondents MPPMCL, MSEDCL and NTPC. The Petitioner is claiming that diversion of KK line to avoid interception with the NTPC's railway siding is an event of "Change in Law" under Article 12.2 of the TSA. We, therefore, think it appropriate to reproduce Article 12 of the TSA and the same is as follows:

“12 CHANGE IN LAW

12.1 Definitions

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

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits;*

- any change in the licensing regulations of the Appropriate Commission, under which the Transmission License for the Project was granted if made applicable by such Appropriate Commission to the TSP;*

- any change in the Acquisition Price; or*

- any change in tax or introduction of any tax made applicable for providing Transmission Service by the TSP as per the terms of this Agreement.*



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

a. on account of regulatory measures by the Appropriate Commission including calculation of Availability; and

b. in any tax applied on the income or profits of the TSP.”

101. The question which arises for our consideration now is whether the diversion of KK line to avoid interception with NTPC railway's line as communicated vide letter dated 15.12.2018 by NTPC falls within the ambit of "Change in Law" as per the provision of TSA as quoted above.

102. We observe that Bid deadline in terms of Bidding documents for the Project was 16.5.2016. Therefore, the cut-off date in terms of TSA which is seven days prior to bid deadline shall be 9.5.2016. The Petitioner has submitted that after the submission of the bid and upon survey of the approved route for KK line, the Petitioner was informed that the route for KK line intersected with the proposed route for NTPC's railway line. Thereafter, on 29.11.2018, the Petitioner requested NTPC to provide for the coordinates of the route for KK line and NTPC vide its letter dated 15.12.2018 informed the Petitioner by sharing a report that the approved route for KK line was intercepting with NTPC's railway lines at multiple places.

103. A perusal of Clause 2.14.2 of the RfP reveals that though BPC has carried out survey of the transmission lines, bidders are required to carry out survey and field investigation with regard to the routes of transmission lines for the purpose of submission of the bids. As pointed out by the Respondents, as per clause 2.14.2.1 of the RfP, the bidders were required to make independent enquiry and satisfy themselves with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on the bid and once the bidders have submitted their bids, the bidders shall be deemed to have inspected and examined the site conditions. Further, the bidders, in their own interest, were also required to carry out the required surveys and field investigations, visit the route of the transmission lines associated with Project and the surrounding areas and obtain and verify all the information which they deem fit and necessary for preparation of their bid and failure to investigate the route of transmission lines associated with



Project and to examine, inspect site or subsurface conditions fully shall not be a ground for a bidder to alter its bid nor it shall relieve a bidder from any responsibility for appropriately eliminating the difficulty or costs of successfully completing the Project.

104. In the present case, the Petitioner submitted its bid in year 2016 and the Investment Approval for the Khargone TPS was already approved on 25.2.2015. Therefore, the Petitioner was required to be diligent while conducting the survey of the transmission route and should have acted more diligently in knowing about the proposed railway siding related to Khargone TPS. As stated above in this order, while dealing with the issue of KD line intersecting the Jamphal Line, as per the RfP, the Petitioner is required to carry out its own survey before submission of the bid, and that failure to investigate the route shall not be grounds for a Bidder to alter its Bid after the Bid Deadline and it shall not relieve the Bidder from any responsibility for appropriately eliminating the difficulty or costs of successfully completing the Project. This aspect was made clear even prior to bidding that it had to carry out its own survey before submission of the Bid and that failure to investigate the route shall not be a ground for a Bidder to alter its Bid. Therefore, the contention of the Petitioner that Khargone TPS was conceptualized in the year 2015 and the Petitioner could not have discovered the precise coordinates of NTPC's railway track in 2016 does not have any merits. Had the Petitioner put in more strenuous efforts and acted diligently, it could have discovered the NTPC's railway lines are intersecting with KK line. In the present context, we think it proper to refer to Article 5 of the TSA which provides as follows:

“Article: 5

5. Construction of the Project

5.1 TSP's Construction Responsibilities:

5.1.1 The TSP, at its own cost and expense, shall be responsible for designing, constructing, erecting, completing and commissioning each Element of the Project by the Scheduled COD in accordance with the Central Electricity Authority (Technical Standards for Connectivity to the Grid) Regulations, 2007, Central Electricity Authority (Technical Standards for Construction of Electrical Plants and Electric Lines) Regulations, 2010 Central Electricity (Grid Standards) Regulations, 2010, Central Electricity Authority (Safety requirements for construction, operation and maintenance of electrical plants and electric lines) Regulations, 2011 and Central Electricity Authority (Measure relating to Safety and Electricity Supply) Regulations, 2010, Prudent Utility Practices and other applicable Laws.



5.1.2 *The TSP acknowledges and agrees that it shall not be relieved from any of its obligations under this 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 further acknowledges and agrees that it shall not be entitled to any financial compensation in this regard.”*

5.1.3 *The TSP shall be responsible for obtaining all Consents, Clearances, and Permits relating but not limited to road/rail/river/canal/power line/crossings, Power and Telecom Coordination Committee (PTCC), defence, civil aviation, right of way/way-leaves and environmental & forest clearances from relevant authorities required for developing, financing, constructing, maintaining/renewing all such Consents, Clearances and Permits in order to carry out its obligations under this Agreement in general and Article 5.1.1 in particular and shall furnish to the Lead Long Term Transmission Customer promptly with copy/ies of each Consents, Clearances and Permits, which it obtains. The Long Term Transmission Customers shall assist and support 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 reasonably required from time to time.*

5.1.4 *The TSP shall be responsible for:*

- (a) Acquisition of land for location specific substations, switching stations or HVDC terminal or inverter stations;*
- (b) Final selection of site including its geo technical investigation;*
- (c) Survey and geo- technical investigation of line route in order to determine the final route of the Transmission Lines;*
- (d) Seeking access to the site and other places where the project is being executed, at its own costs, including payment of any crop compensation or any other compensation as may be required.”*

105. From the perusal of above provision of TSA, we are of the view that the Petitioner cannot claim ignorance of its own responsibilities under the TSA and claim relief for diversion of the route of KK line to avoid interception with NTPC's railway track as an event of "Change in Law". From the record placed before us, we are of the view that had the Petitioner conducted a proper survey and approached the Petitioner on opportune time, it would have known about railway siding and could have taken timely remedial measures.

106. From the record, we find that the Petitioner approached NTPC on 29.11.2018 regarding interception of KK line with NTPC's railway siding when it was nearing the SCOD. Further, 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 reasons.



107. The actual length of each of the Petitioner's lines as implemented vis-à-vis length of line as per BPC routes are as follows:

Table 1: Length of Transmission Lines			
Sr. No.	Transmission Element	Line Length as per the BPC Route (in km)	Actual Length of the Implemented Line (in km)
1.	KD Line	Route 1: 221.17 Route 2: 226.06 Route 3: 235.36	Original-189.457 Diverted-191.438
2.	KK Line	Route 1: 86.95 Route 2: 92.8 Route 3: 99.58	25
3.	KI Line	Route 1: 153.5 Route 2: 159.3 Route 3: 153.8	90
4.	LILO	Route 1: 7.17 Route 2: 8 Route 3: 8.15	6.8

108. On perusal of the above table, with respect to KK line, it appears that BPC gave three route options to the Petitioner for the implementation of KK line. The Petitioner had an option to choose any one of the three suggested routes. Finally, the Petitioner opted to take Route-1 of the BPC whose original line length was 86.95 km, however the actual length of the implemented line was only 25 km. It is observed that the Petitioner, while finalising the transmission route, is under an obligation to enquire and satisfy itself about the factors affecting the bid and the price had to be fixed taking various circumstances into account as stated in the RfP. The finalization of the transmission route, its survey and geo-technical investigation, etc. were in the domain of the Petitioner, and it was incumbent upon it to avoid such an eventuality. Further, the submission of the Petitioner that no objection was received by it during the process of approval under section 164 of the 2003 Act in the facts and circumstances of the present case do not have any merit. The alleged letter of NTPC dated 15.12.2018 to deviate/ change the route of KK line does not fall within the ambit of "Change in Law" in terms of Article 12.1.1 of the TSA. The same also cannot be said to be a change/ imposition of a requirement for obtaining consent/ permit/ clearance not required earlier for constructing the transmission line. The Petitioner is solely responsible for the route in light of the aforesaid provisions of the TSA and RfP. In the present case, there was no mandate of any Indian Governmental Instrumentality requiring the Petitioner to necessarily alter/deviate the



route of KK line. The route of KK line, where the line length was reduced substantially compare to original route recommended by BPC, was selected by the Petitioner , as such the petitioner was supposed to factor all the subsequent modifications/changes thereof required while finalising the route in terms of the above-mentioned provisions under TSA , which consequently, neither relieves the licensee from its obligation under the TSA nor entitles it to an extension of time or any financial compensation on account of the reason of unsuitability of site or the transmission line route. Resultantly, no compensation can be allowed to the Petitioner on the aforesaid count. Accordingly, this issue is decided against the Petitioner and in favour of the Respondents with the observation that in the facts and circumstances of the case, no case is made out for additional expenditure on account of “Change in Law” event.

(V) “Change in Law” events: Increase in compensation payment towards Right of Way (RoW) due to notifications issued by the Governments of Madhya Pradesh and Maharashtra

109. The Petitioner has made the following submissions in support of its claim towards the compensation paid as per the notifications of Government of Madhya Pradesh and Maharashtra.

- (a) As on the cut-off date, in the State of Maharashtra, compensation for tower base was categorized into four categories while there was no provision for land compensation along the corridor of transmission line. Similarly, in the State of Madhya Pradesh, there was no provision of land compensation for tower base and corridor of transmission line as on cut-off date.
- (b) The Government of Madhya Pradesh through its circular dated 11.5.2017 specified compensation payable by the Petitioner and other transmission licensees for tower base at 85% of market value of land and the compensation for the transmission line corridor at 15% of the market value of land. Similarly, Government of Maharashtra through circular dated 31.5.2017 specified that the compensation payable by the Petitioner and other transmission licensees for tower base at 200% of the market value of



land and compensation for the transmission line corridor at 15% of the market value of land.

- (c) Thus, the Governments of Madhya Pradesh and Maharashtra are 'Indian Governmental Instrumentalities' within the meaning of the TSA and the notifications issued by them qualify as enactment of 'Law' under the TSA. 'Notifications' and 'Orders' are expressly recognised as 'Law' under the TSA and the Petitioner was bound by law to comply with the aforesaid Notifications to develop the Project.
- (d) The said notifications have resulted in an increase in the RoW compensation which the Petitioner was required to pay to landowners whose land was impacted due to the construction of overhead transmission lines in Madhya Pradesh and Maharashtra.
- (e) The aforesaid Notifications amount to the *enactment of a Law* and constitute "Change in Law" under Article 12.1.1 of the TSA, entitling the Petitioner to compensation for such additional expenditure in terms of Article 12.2 of the TSA. The Commission vide order dated 25.1.2021 in Petition No. 265/MP/2020 has already held the same notifications to be "Change in Law" events under the TSA. The Petitioner has notified the LTTC's.
- (f) As a result of the aforesaid "Change in Law" event, Petitioner has incurred an additional expenditure of ₹35,73,67,373/-, which is also supported by a certificate dated 27.6.2022 from the Auditor. Further, the Petitioner expects to incur an additional expenditure of ₹2,61,88,069/- towards RoW compensation.

Reply of MPPMCL and MSEDCL

110. The following are the submissions made by MPPMCL and MSEDCL on the issue of compensation:

- (a) The claim of the Petitioner under "Change in Law" events towards compensation payment towards RoW due to notifications issued by the governments of Madhya Pradesh and Maharashtra is pre-mature as the Petitioner has failed to provide list of lands and its owners whom the increased compensation was paid, Collector's order regarding increase in compensation, order of court's affirming the increase in compensation and



explanation regarding completion of transmission lines before 11.5.2017 in Madhya Pradesh and 31.5.2017 in Maharashtra. The additional expenditure on account of enhancement of land compensation has been claimed under both i.e. *force majeure* events and “Change in Law” events which are not possible and impermissible in law.

Rejoinder to the reply of MPPMCL and MSEDCL

111. The Petitioner has submitted that at the time of filing the instant petition, the Petitioner was in the process of collating the details of the additional land compensation paid on account of issuance of the circulars by State of Madhya Pradesh and Maharashtra. Accordingly, the Petitioner had provided approximate figures of the additional impact due to the said “Change in Law” event in its petition. However, now the Petitioner has collated the required information in relation to the said “Change in Law” claim. As per the CA certificate dated 27.6.2022, Petitioner has incurred an additional expenditure of ₹35,73,67,373/- on issuance of the circulars. Further, the Petitioner expects an additional amount of ₹2,61,88,069/- towards land compensation. The Petitioner has submitted that a tabular representation setting out the methodology for computation of land compensation, details of landowners, amounts paid, date of payment along with other relevant details has also been annexed in the instant petition.

Analysis and Decision

112. The Petitioner has submitted that as on the cut-off date i.e. 9.5.2016, the prevailing rate of compensation towards RoW damages in the State of Maharashtra was in accordance with the Government Notification dated 1.11.2010 and in the State of Madhya Pradesh there was no provision of land compensation for tower base and corridor of transmission line as on cut-off date.

113. We have considered the submissions made by the Petitioner and MPPMCL. As on cut-off date i.e. 9.5.2016, Government Order No. Sankirn/0210/P.K.29/Urja-4 dated 1.11.2010 of Energy and Labour Department, Government of Maharashtra was in force in Maharashtra which specified, inter-alia, that compensation to be given by transmission service provider to the land owners was (i) 25% for Non-Irrigated Agricultural Land (ii) 50% for Irrigated Agricultural Land (iii) 60% for Fruit Orchard



Land and (iv) 65% for Non-Agricultural Land. In the state of Madhya Pradesh, there was no provision of land compensation for tower base and corridor of transmission line as on cut-off date.

114. The MoP, Government of India, vide its letter dated 15.10.2015 issued Guidelines for payment of compensation towards damages in regard to RoW for transmission lines. In the said Guidelines, the MoP, *inter alia*, also requested all the States/UTs to take suitable decision regarding adoption of the Guidelines for determining the compensation for land considering that the acquisition of land is a 'State' subject under the Indian Constitution.

115. However, on 31.5.2017, the Industry, Energy and Labour Department, GOM vide Resolution Letter No. 2016/P.No.520/Energy/4 modified its earlier notification for the purpose of aligning the compensation rates towards RoW damages for transmission lines, with the "Guidelines for Payment of Compensation towards damages in regard to the RoW for transmission lines" issued by the MoP vide Notification No. 3/7/2015-Trans dated 15.10.2015 ("MoP Guidelines"). By way circular dated 31.5.2017, GoM increased the compensation to be provided by the TSP to the land owners as follows:

Notification dated 1.11.2010 (as on cut-off date)			GoM Notification dated 31.5.20217 (after the cut-off date)	
Land Category	Land Type	Land Compensation	Compensation for Tower Base Area (between four legs) impacted severely due to installation of tower structure	200% Ready Reckoner Rate
(A)	Non-Irrigated Agricultural Land	25%	Compensation towards diminution of land value in width of RoW.	15% of Ready Recokner Value
(B)	Irrigated Agricultural Land	50%		
(C)	Irrigated Agricultural Land	60%		
(D)	Non-Agricultural Land	65%		



Similarly, Government of Madhya Pradesh through its Circular No. R/3283/2016/7/2A dated 11.5.2017, specified compensation payable by the Petitioner and other transmission licensees for tower base at 85% of market value of land and the compensation for the transmission line corridor at 15% of the market value of land.

Particulars	Compensation (As on cut-off date)	Compensation (after the cut-off date)
Compensation amount for the land used for the installation of the High Tension transmission lines of 66 kV and above	None	85% of market value of land - tower base 15% of market value of land - transmission line

116. The Commission had considered that the Notification dated 31.5.2017 vide order dated 29.1.2021 in Petition No 264/MP/2020 and allowed it as a “Change in Law” event. The relevant portion of the said order dated 29.1.2021 is extracted as follows:

“56. In the present case, the Petitioner has, apart from guidelines of MoP dated 15.10.2015, also relied upon the Policy issued by the Government of Maharashtra after the cut-off date which provides for rate of land compensation to the land owners for transmission tower base and for RoW corridor under the transmission line. According to the Petitioner, the Policy issued by the ‘Indian Governmental Instrumentality’ qualifies as ‘Law’ under the TSA and that this Policy has been implemented by the revenue authorities of Government of Maharashtra for raising demand for compensation on the Petitioner requiring the Petitioner to make payment as per the same. It would be apt to quote the translated version of above Policy issued by the Government of Maharashtra submitted by the Petitioner:

“Policy to be adopted for payment of compensation for the land laying/coming under the transmission lines and increase in the rate of compensation for the land covered by the towers to be erected/constructed for the installation of the High-Tension transmission lines of 66 kv or more

State of Maharashtra

*Industry, Power & Labour Department
Govt. Order No.: Dhoran-2016/Pra.Kra.520/Urja-4
Ministry, Mumbai – 400 032.
Date: 31 May, 2017*

- Reference: 1) Govt. Order No.: Sankirna 0210/Pra.Kra.29/Urja-4 Dt.01/1/2010
2) Central Govt. Letter No. 3/7/2015-Prareshan, Dt. 15/10/2015.
3) Govt. Letter, Industry, Power & Labour Deptt. Kra. Sankirna2015/pr.kra.398/Urja-4 Dt. 25/08/2015.
4) Mahapareshan Co. letter no. mrvipakam/sanka/13279 Dt. 16/12/2016*



Preface: Under section 164 of India Electricity Act 2003 as well as u/s 10(D) of Telegraph Act 1885 and also as per Maharashtra Govt. Order No.06/CR 312/4, dt. 24/08/2006, the High Power Transmission Company has the powers for lying of transmission lines and erection of towers for the same. Moreover, while exercising this powers there are provisions also for payment of compensation to those to whom damages have been caused due to lying of transmission lines an erection of towers.

There are number of government and private transmission companies and license holders who are engaged in the business of lying of transmission lines of 66 kv or more which are entrusted with the job of looking after the transmission and repairs and Renovation etc.

While during practical work of installation of transmission lines and renovation of existing lines there is a protest by the farmers and landowners for the compensation from whose lands these transmission lines are passing. At present in accordance with the state order dt. 1/11/2010 and decision therein the compensation for the land covered under the towers is given to the farmers and landowners. However, there is a consistent demand by the farmers and landowners to the state government for increase in the compensation as well as compensation for that land also which is coming under the installation line. Therefore this demand by the farmers and landowners was under consideration by the state government. In this respect after taking into consideration the guidelines issued by the state government as per Ref. no.2 above and also as per the direction given in the meeting of Hon. Chief Minister and the minister (Power) the High Transmission Company had submitted the proposal to the state government as per Ref. no.4 above then after at the meeting held with the Chief Minister on 16/5/2017 and as per the decision taken thereat, for taking a policy decision, a note was produced on 22/5/2017 in the cabinet meeting and as per the decision arrive there at the policy is decided as hereunder as per the decision of the state government while Ref. no. 1 above.

The Decision of the State Government:

Maharashtra State Transmission Company and all other license holders companies are hereby permitted to pay compensation for the land taken for installation of towers for transmission lines (without acquiring the said land).

- 1. The compensation of the area covered under the High Tension tower should be given in accordance with the State Ready Reckoner prevalent/ in force in the said area as implemented /decided by the state level committee from time to time which should be double the valuation of the Ready Reckoner.*
- 2. The compensation for the land area below the very heavy tension line (wire corridor) will be paid 15% of the Ready Reckoner fixed by the State government which is prevalent in the said area from time to time.*
- 3. The compensation for the damages to the crops, fruits and other trees if any shall be paid in accordance with the policy prevalent at that time.*
- 4. This compensation policy shall be applicable to the Maharashtra Rajya Vidhyut Transmission Company – MARYA, Power Grid Corporation of India Limited, other government and private transmission license holders who are erecting transmission line of 66 kv and of more capacity such as High Tension HVC /DC transmission lines also.*



5. This compensation policy shall be applicable to all the area of the Maharashtra state except Bruhan Mumbai Mahanagar Palika and its suburban area. So far as the compensation for the land of the city area upon which High Tension Transmission lines are to be laid is concerned the Central government vide its letter dt. 11/8/2016 has constituted a committee at the central level. After receipt of the necessary guidelines from the said committee the policy for Bruhan Mumbai Mahanagar Palika and its suburban area will be made applicable.
6. In the city area where it is not possible to construct traditional towers thereat if technically possible, monopole tower, narrow base tower, Bahu path tower, special tower.

2. Date of implementation:

This new policy is applicable and implemented from the date of decision taken by the state.

3. Implementation Committee at district level:

3.1 The district collector shall constitute a committee in accordance with the government letter no. sankirna-2015/pr.a.kra.398/Urja-4, dt.25/08/2015 for deciding the compensation of the land which is covered under the high tension tower and the land below the transmission line

Sr.No.	Officer	Designation
1.	Dy. Division Officer (District Officer	President
2.	Dy. Supdt. Land Revenue	Member
3.	Town/Dist. Agriculture officer	Member
4.	The Representative of the concerned transmission license holder company (high transmission, power grid, Maharashtra Eastern grid power trans. Co. E.) The Representative of the concerned transmission license holder company (high transmission, power grid, Maharashtra Eastern grid power trans. Co. E.)	Member

3.2 The said committee shall, within its division shall conduct the admeasurement of the land covered by the tower and also of the land coming below the transmission line and decide the valuation thereof and decide the amount of compensation.

3.3 If the compensation decided by the committee is not agreeable to the concerned land owner, he shall be entitled to lodge an appeal to the district collector. If the district collector is satisfied that the appeal is reasonable, he shall ask/order the committee for revaluation. In this matter all the powers shall vest in the collector.

4. Procedure for implementation of Policy.

....

6. Procedure for payment of compensation:

6.1 Procedure for compensation of the land lying below the tower and the transmission lines: The compensation for the land covered under the tower



shall be paid in two instalments. The first instalment shall be paid after laying foundation (plinth) and is laid, the third instalment compensation should be paid of the land below the wires only after physical and actual installation of such line.

- 6.2 The compensation only for the land below the transmission wires: The land from which only the transmission wire has passed, the compensation for land below such wires will be paid only after physical and actual installation for this purpose the procedure is specified in the annexure herewith.*
- 6.3 Compensation for Crops/Fruits & Trees : Over and above the compensation, the damages caused to the crops/ fruits and trees and other trees whatever during the laying foundation (plinth) of the tower, construction and transmission line installation, shall be paid in two instalments.*
- 7. In case of transfer/ change of ownership of the land the new owner shall not be entitled to any compensation whatsoever.*
- 8. State government, local self-government, local authority, municipality, municipal corporation, MMRDA, State sponsored public projects, national highway authority, public park, amusement centre, mithagare, special economic zones, main/small ports, rivers& beaches, sports centre, granted and non-granted institutions, etc. are not entitled to be any compensation for the land covered by the tower and land under the transmission lines. Only under exceptional circumstances the concerned transmission company shall be able to take the decision. In the same way the compensation for the land under the central government or under the railway authority should be paid in accordance with the rules and procedures of the concerned ministry.*
- 9. In case of enhancement in the capacity of the existing transmission lines or renovation thereof, the compensation should be paid only after the land below the tower and for additional land occupied below the transmission line.*
- 10. For settlement and solution of any problems in implementation of this decision or if any clarification arises, a committee under the chairmanship of chief secretary (power) should be constituted for settlement of the same. The rep. of Transmission Company and Power Grid Co. of India should be included in the said committee. The chief engineer, state transmission (project) shall be the chief secretary and member of the committee.*
- 11. This order of the state government is issued after consultation and concurrence of the town planning department, revenue, forest and finance department and in response to the concerned given by the finance department vide its ref. no.122/2017 dt.19/4/2017 and is hereby issued. This decision of the Maharashtra government's is available on the www.maharashtra.gov.in and its code is 201706011123568510. This order is generated through digital signature.*

Under name and order of the Governor of Maharashtra.

.....”



117. Similarly, the translated version of the order issued by the Government of Madhya Pradesh is as follows:

**“Govt. of Madhya Pradesh
Ministry of Revenue Department**

Ministry of Revenue Department Sr. No: R/3283/2016/7/2A Date: 11.5.2017

To,
All Collectors, Madhya Pradesh

Subject: *About determination of compensation amount payable to private landlords because of setting up transmission lines by the POWERGRID in the state.*

Ministry of Power, Govt. of India vide letter ref 3/7/2015- Trans. dated 15.10.2015 has issued the guidelines regarding determination of compensation payment for utilisation of land proposed under Right of way in laying of transmission lines.

2. Hence, in consideration of the Ministry of Power, Govt of India letter dated 15.10.2015 and in the interest of public, following guidelines are being issued for the payment of compensation amount for the land used for the installation of the High Tension transmission lines of 66 kV and above:

1) *In addition to the compensation for the damage caused by the entry on the land, 85% of the existing market rates of the land used for the establishment of the tower will be paid to Land owner.*

(2) *15% of the existing market rates will be paid for the area of land situated under the transmission line between the width of the outer wires of both the sides of transmission lines tower. For this purpose, the width between the two outer wires will be considered as follows:*

Srl. No	Transmission Capacity	Width Between both outer conductor (in Meters)
1	66 kV	18 meters
2	110 kV	22 meters
3	132 kV	27 meters
4	220 kV	35 meters
5	400 kV	46 meters
6	400 kV	46 meters
7	+/- 500 kV HVDC	52 meters
8	765 kV S/C (in Delta configuration)	64 meters
9	765 kV D/C	67 meters
10	+/- 800 kV HVDC	69 meters
11	1200 kV	89 meters

2. *The amount to be given above will only be compensation amount. The land will remain registered in the name of the former land owner as before.*

3. *Even if otherwise provided in any rule, compensation for agricultural land will be payable on the basis of prevailing market rates of agricultural land and similarly*



compensation for non- agricultural land will be payable on the basis of prevailing market rates of non-agricultural land.

4. This circular is applicable only to Power transmission lines. Under this, compensation is to be paid to Power transmission line. Under this Power distribution is not included....”

118. From perusal of the quoted Government orders dated 31.5.2017 and 11.5.2017 issued by Government of Maharashtra and State of Madhya Pradesh respectively, we note that these are directions of the State Government which are binding on the State Authorities for determination of compensation for transmission lines.

119. We think it appropriate here to refer to the definition of ‘Government Instrumentality’ as defined in the TSA which is follows:

“Indian Governmental Instrumentality’ shall mean Government of India, Government of any State in India or any ministry, department, board, authority, agency, corporation, commission under direct or indirect control of the Government of India or any State Government or both, any political sub-division of any of them including any court or Appropriate Commission or tribunal or judicial or quasi-judicial body in India but excluding TSP and Long Term Transmission Customers;”

120. The term ‘Law’ as has been defined in the TSA is as follows:

“Law’ or ‘Laws’ in relation to this Agreement, shall mean all laws including electricity laws in force in India and any statute, ordinance, rule, regulation, notification, order or code, or any interpretation of any of them by an Indian Governmental Instrumentality having force of law and shall include all rules, regulations, decisions and orders of the Appropriate Commission;”

121. The Commission vide orders dated 27.3.2023 in Petition No. 533/MP/2020, 29.1.2021 in Petition No. 264/MP/2020, 28.10.2021 in Petition No. 610/MP/2020 and 16.6.2021 in Petition No. 453/MP/2019 observed that the Petitioner is entitled to increase in transmission charges on account of additional expenditure incurred towards payment of land compensation in terms of the above orders of the Governments of Maharashtra and Government of Madhya Pradesh.

122. The ‘Law’ under TSA includes any statute, ordinance, rule, regulation, notification, order or code or any interpretation of any of them by an Indian Governmental Instrumentality having force of law. Therefore, the circular dated 11.5.2017 and 31.5.2017 issued by Government of Madhya Pradesh and Maharashtra qualifies as ‘Law’ under the TSA and its introduction/ implementation



being after the cut-off date in the present case, is a “Change in Law” event in terms of Article 12.1.1 of the TSA.

123. As stated above, there was no official order providing land compensation for tower base and corridor of transmission line as on cut-off date in Madhya Pradesh. However, in case of Maharashtra the order 11.11.2010 of the Energy and Labour Department, Government of Maharashtra was in force as on the cut-off date i.e. 9.5.2016 in this regard. Accordingly, in case of Madhya Pradesh, the Petitioner shall be entitled for the difference in the land compensation envisaged by the Petitioner at the time of conceptualising the Project and the compensation provided for in the order dated 11.5.2017. In the case of Maharashtra, the Petitioner shall be entitled for the difference in the land compensation provided for in the Government orders dated 1.11.2010 and 31.5.2017.

Other Issues

124. PGCIL, vide affidavit dated 7.6.2022, has filed its reply in the matter. The gist of the submissions made by PGCIL are as follows:

- (a) The Commission on the request of the learned counsel for the PGCIL in the proceedings dated 17.5.2022 directed the Petitioner to implead PGCIL as a party and, accordingly, the Petitioner vide affidavit dated 23.5.2022 impleaded PGCIL as a party.
- (b) Though the Petitioner had not claimed any specific relief against it in the instant petition, the KI Line being developed by the Petitioner will connect to bays being developed by PGCIL and there is an issue of mismatch.
- (c) PGCIL has also filed Petition No. 694/TT/2020 seeking approval of COD under proviso to Regulation 5(2) of the 2019 Tariff Regulations and tariff determination for assets developed by PGCIL under the scheme “POWERGRID works associated with Transmission System Strengthening in Western Region associated with Khargone Thermal Power Station” in the Western Region. Some of the assets covered under above petition are associated with *KI Line* being implemented by Petitioner under TBCB.



- (d) During the course of hearing dated 17.5.2022, PGCIL requested the Commission to hear the instant petition along with Petition No. 694/TT/2020 filed by PGCIL to have holistic view on execution timelines of the elements.
- (e) The two elements of PGCIL, namely, (i) 2 numbers 765 kV line bays at 765/400 kV Indore Sub-station and (ii) 240 MVAR, 765 kV Switchable Line Reactor along with 700 Ohms NGR at 765/400 kV Indore Sub-station achieved its COD on 1.8.2019. However, the Petitioner's KI line was completed on 19.3.2020 and, hence, there is mismatch which needs to be appropriately dealt with by the Commission.
- (f) In Petition No. 694/TT/2020, PGCIL has also impleaded the Petitioner and the Petitioner in its reply filed in Petition No. 694/TT/2020 has also prayed that no liability ought to be imposed on it until the instant petition is heard and disposed of by the Commission.
- (g) The substantive right of PGCIL to claim COD under Regulation 5(2) of the 2019 Tariff Regulations cannot be taken away. The implication of the Petitioner being allowed on account of *force majeure* events in the present petition will have to be considered along with recovery mechanism of tariff of associated PGCIL assets in Petition No. 694/TT/2020.
- (h) Placed reliance on the Commission's order dated 26.4.2022 in Petition No. 60/TT/2017, wherein the Commission has held that if the assets are interlinked, the TBCB licensee is still liable for the period of mismatch and same has to be paid by it even though the SCOD of TBCB Licensee was extended due to *force majeure* events.
- (i) PGCIL has submitted that the Commission may approve the COD of its assets under Regulation 5(2) of the 2019 Tariff Regulations as it has complied with all requirements as provided in 2019 Tariff Regulations and PGCIL is entitled to receive transmission tariff from readiness of its assets i.e. 1.8.2019. The Commission while taking up both the matters together, may decide on how to deal with the recovery of tariff of PGCIL's assets.

Analysis and Decision

125. We have considered the submissions of PGCIL in the present petition with reference to KI line developed by the Petitioner. PGCIL has filed Petition No. 694/TT/2020 for determination of transmission tariff of 2 numbers 765 kV line bays at



765/400 kV Indore Sub-station of PGCIL (for Khandwa PS(TBCB)-Indore 765 kV D/C line) & 240 MVAR, 765 kV Switchable Line Reactors along with 700 Ohms NGR at 765/400 kV Indore Sub-station end of each ckt of Khandwa Pool-Indore 765 kV D/C line (line being implemented under TBCB) under “POWERGRID Works associated with Transmission system Strengthening in WR associated with Khargone TPS” in Western Region from COD to 31.3.2024 under the 2019 Tariff Regulations. PGCIL has submitted that the said line bays and the switchable line reactor at Indore, associated with the KI Line of the Petitioner, were ready on 1.8.2019. However, PGCIL could not put them into commercial operation as the associated transmission line under the scope of the Petitioner was put into commercial operation only 19.3.2020 and hence sought approval of its transmission assets at Indore Sub-station under Regulation 5(2) of the 2019 Tariff Regulations. The issue of mismatch in the COD of the transmission assets of PGCIL in Indore Sub-station and COD of the KI line of the Petitioner has already been settled by the Commission in order dated 4.7.2023 in Petition No. 694/TT/2020 filed by PGCIL. Therefore, there is no need for us to go into this issue in this petition. The relevant portion of the order dated 4.7.2023 is extracted hereunder:.

“79. Further, the entity responsible for execution of the downstream or upstream transmission licensee or a generating station, irrespective of the fact that it is affected by force majeure events, has to bear the transmission charges for the period of mismatch from the transmission asset to the COD of transmission asset/ scheme under its scope. In the instant case, the associated transmission line was ready on 19.3.2020. Therefore, we are of the view that the transmission charges of the transmission asset should be borne by KTL from COD of the transmission asset, i.e. from 1.8.2019 upto 18.3.2020 and thereafter the transmission charges of the 765 kV line bays shall be recovered as per the provisions of the 2020 Sharing Regulations as provided in Regulation 57 of the 2019 Tariff Regulations.”

Liquidated Damages

126. The Petitioner has prayed that no Liquidated Damages (LD) may be imposed on the Petitioner for the delays caused in implementation of the Project due to the *force majeure* events under the TSA or otherwise. The Petitioner has made the following submissions with respect to the issue of LD:

- (a) The present Project is established with the objective of evacuation of power from NTPC’s Khargone TPS. The entire transmission system under the TSA is developed with the objective of evacuation of power from NTPC’s Khargone



TPS from SCOD of its two units. Therefore, the SCOD of the transmission system coincided with SCOD of the two units of NTPC's Khargone TPS.

- (b) There has been no legal injury or actual loss to any party including NTPC, due to uncontrollable delay in the execution of the various elements of the Petitioner's Project. The KK and KD lines were planned for the system strengthening of existing corridor as well as for evacuation from NTPC. At the stage of planning, KK line along with KD line or KI line were sufficient for evacuation of power from NTPC.
- (c) The Petitioner made alternate arrangements for evacuation of power from NTPC's Khargone TPS in line with the COD of both units of NTPC. Despite that, as admitted by NTPC in its response, the COD has been delayed due to delay in grant of Consent to Operate (CTO) by the MPPCB.
- (d) In relation to Unit 1 of NTPC's Khargone TPS, during the meeting dated 5.8.2019, it was expressly agreed by NTPC, CEA and the Petitioner that existing LILO was sufficient for power evacuation from Unit 1 of NTPC's Khargone TPS even under N-1 contingency condition. Accordingly, it was decided that the same would be used for power evacuation during the trial run and subsequent commercial operation of Unit 1 since the other elements were impacted by *force majeure* events. The LILO under the Petitioner's scope was ready as early as on 1.3.2018. However, NTPC completed the trial operation of Unit 1 only on 29.9.2019 despite having agreed in the aforesaid meeting dated 5.8.2019 to synchronize Unit 1 using the LILO. Moreover, since the commissioning of Unit 1 of NTPC, power evacuation had undertaken through the alternate arrangement. Therefore, there is no legal, contractual or punitive injury caused to NTPC or the LTTCs of the Petitioner. Unit-I trial run was completed on 29.9.2019 and CTO was awaited and the said fact was stated by NTPC in its letter dated 21.11.2019.
- (e) In relation to Unit 2 of the Khargone TPS, the Petitioner has submitted that remaining transmission elements of KTL i.e. Khandwa Sub-station, KK and KI lines required for evacuation of power from Unit 2 had achieved commercial operation on and from 19.3.2020. However, NTPC was able to declare the COD of Unit-2 only by 4.4.2020 due to delay in obtaining CTO from the



MPPCB, which was admittedly received only on 1.4.2020 as per the averments in the made in generation tariff petition.

- (f) NTPC is required to obtain relevant approvals and consents including the CTO before they can evacuate power from Khargone TPS. Therefore, it is submitted that delay in achieving COD for Unit-2 was admittedly caused due to delay in obtaining the CTO from the MPPCB and not due to any purported delay on part of KTL.
- (g) The Petitioner has submitted that there are no pre-estimates of losses in the instant case. As per Section 73 and Section 74 of the Indian Contract Act, 1872 a party can claim LD when it is able to show a genuine pre-estimate of their losses. MPPMCL has raised a claim of ₹128.5 crore upon the Petitioner by way of their letter dated 4.5.2022 and has filed a detailed reply to the IA of the Petitioner along with its reply and written submissions in the instant petition. However, nowhere, MPPMCL has given any genuine estimation of their losses. Without any supporting documents, MPPMCL cannot demand any LD.
- (h) The Petitioner does not stand in violation of the terms and conditions of the TSA which could warrant imposition of LD under the strict interpretation of the TSA, and MPPMCL has not been able to place on record any genuine pre-estimation of their loss.
- (i) MPPMCL along with other LTTCs have enjoyed the power supplied for NTPC's generating unit from the day NTPC was ready for supply after complying with the terms and conditions under the PPA.
- (j) As regards the KD line is concerned, the Petitioner has submitted that the same was delinked from the rest of the Project elements by the Commission vide order dated 21.10.2019 in Petition No. 308/MP/2019. The additional uncontrollable delay in KD line in no manner impacted evacuation of power from NTPC's Khargone TPS or transmission of such power to LTTCs or otherwise.
- (k) Even if the extension in SCOD as sought in the petition is disallowed, it will still not be liable to pay any LD on account of absence of any loss or legal injury.



- (l) None of the LTTCs have suffered any loss due to the uncontrollable delay in the Project. In fact, none of the LTTCs have never even alleged any loss or damage on account of the purported delay in the SCOD of the Project in any of their oral or written averments or even otherwise. In such a case, award of damages when there is no actual loss or even a legal injury would result in a windfall gain for the LTTCs which is not the intent of Section 74 of the Indian Contract Act, 1872 as well as the provisions of the TSA.

127. On the other hand, MPPMCL vide letter dated 4.5.2022, has raised claim towards LD amounting to approximately ₹128.59 crore for the delay in the execution of the various elements of its Project. The Petitioner has also filed I.A No. 31/2022 for restraining MPPMCL and other LTTC's from taking any coercive steps against the Petitioner under the TSA including the invocation encashment of the Contract Performance Guarantee of ₹48.70 crore submitted under the TSA.

I.A. No.31/IA/2022

128. The Commission vide RoP dated 9.5.2022 had initially disposed of the I.A No. 31/IA/2022 filed by the Petitioner restraining MPPMCL and other LTTC's from taking coercive action against the Petitioner including invocation and encashment of the Contract Performance BG of ₹48.70 crore submitted under the TSA. However, after receiving objection by MPPMCL vide letter dated 11.5.2022 and after hearing the learned counsel for MPPMCL at length on hearing 17.5.2022 against the disposal of I.A without granting an opportunity to the Respondent, the Commission permitted MPPMCL to file its reply in the I.A No.31/IA/2022. The Commission further directed MPPMCL not to take any coercive action against the Petitioner till further orders in the said I.A. Accordingly, MPPMCL vide affidavit dated 25.5.2022 has filed its reply in the said I.A. and the Petitioner vide affidavit dated 17.6.2022 has filed its rejoinder to the I.A. reply.

Reply of MPPMCL in I.A No. 31/IA/2022

129. MPPMCL has made the following submissions in its reply to the I.A. No. 31/IA/2022:

- (a) MPPMCL has submitted that NTPC in its Petition No. 402/GT/2019 filed by NTPC for the determination of tariff for its Khargone STPS has submitted



that its project got delayed by 230 days due to non-availability of down-stream transmission system owned by the Petitioner. As per the 2020 Sharing Regulations, if upstream system is being delayed on account of the non-availability of down-stream system, the downstream system shall be liable to bear all the losses and damages caused to the upstream system. Therefore, in case such delay is condoned, the burden in the form of cost over-runs will ultimately pass on to the beneficiaries like MPPMCL. Further, in terms of Regulation 8 of the 2020 Sharing Regulations, NTPC would be gaining yearly transmission charges from transmission licence due to delay on part of KTL as transmission licence. The Petitioner is also a party in Petition No. 402/GT/2019 to determine the liability of the KTL. In view of the non-performance of contractual liability on part of the Petitioner, MPPMCL was right in sending letter for invocation of BG.

- (b) Clause 6.4 of the TSA provides a formula for computing the pre-estimate of loss to be paid as LD in the event the transmission licensee fails to achieve commercial operation of any of the elements of the Project within the stipulated period. Accordingly, the demand letter dated 4.5.2022 for payment of LD has been issued as per the provisions of the TSA. As the instant case involves non-performance of TSA by the Petitioner and MPPMCL has given detailed estimation of loss occurred to the beneficiaries due to non-performance of the TSA, Respondent is within its rights to invoke the Performance BG of ₹ 48.70 crore given by Petitioner in terms of provisions of TSA.

130. The Petitioner, vide affidavit dated 17.6.2022, has filed its rejoinder to the reply filed by MPPMCL. The gist of the submissions made are as follows:

- (a) As regard to MPPMCL's contention that the *Khargone TPS got delayed by 230 days* due to non-availability of the Petitioner's Project, the Petitioner has submitted that the Petitioner has made an alternate arrangement for evacuation of power from such generating station in terms of Regulation 13(8) of the 2020 Sharing Regulations and Regulation 6(b) of the 2019 Tariff Regulations. The Petitioner has kept NTPC, CEA and all other stakeholders apprised of the issues being faced in the implementation of the Project and endeavoured to make alternate arrangements for evacuation of power from NTPC's Khargone TPS in



advance of its commissioning timelines. The LILO under the scope of the Petitioner was ready on 1.3.2018 and was sufficient for power evacuation from Unit 1 of NTPC's Khargone TPS even under n-1 contingency condition and the same was agreed by NTPC, CEA and the Petitioner. However, NTPC has itself completed the trial operation of Unit-1 only on 29.9.2019 and achieved COD on 1.2.2020. The Unit-2 of the Khargone TPS achieved its COD on 19.3.2020. However, NTPC was able to declare the COD of Unit 2 only by 4.4.2020 due to delay in obtaining Consent to Operate from the Madhya Pradesh Pollution Control Board (MPPCB), which was received only on 1.4.2020. Therefore, the delay in achieving commercial operation date for the two units was for reasons not attributable to the Petitioner and instead was due to the delay in receiving the consent to operate from the MPPCB. Accordingly, no liability can be fastened upon the Petitioner in the present proceedings until its petition for claiming extension of SCOD of the Project is adjudicated upon by the Commission. Any cost over-run on account of the delay caused by *force majeure* events suffered by the Petitioner ought to be socialized among the various stakeholders including the Petitioner's LTTCs so as to ensure no one entity is unreasonably burdened due to the impact of uncontrollable events.

- (b) As regard to MPPMCL's right to claim LD under Article 6.4 of the TSA, the Petitioner has submitted that MPPMCL was being continuously apprised about the various *force majeure* and "Change in Law" events affecting the Project from 15.5.2018 onwards. However, until 4.5.2022 (i.e., after a delay of 4 years) MPPMCL has not raised any claim for damages against the Petitioner under Article 6.4 of the TSA. Therefore, having not raised any issue of LD till 3.5.2022, it is not open for MPPMCL to raise such belated claims at this stage especially when the matter is pending adjudication before the Commission. MPPMCL was also a party in the Petition No. 308/MP/2019, where the Petitioner had raised *force majeure* and "Change in Law" claims at the construction stage of the Project and MPPMCL had also filed a reply dated 19.10.2019 in the said petition. Even at that stage, no claim for LD were raised by MPPMCL despite active knowledge of the *force majeure* claims of the Petitioner. Therefore, MPPMCL's letter dated 4.5.2022 appears to be an afterthought. Under Article 11.7 of the



TSA, the Petitioner is not liable for any breach of the TSA or LD, where delays are due to *force majeure* events.

- (c) As regards MPPMCL's contentions on law on encashment of BG to recover LD, the Petitioner has submitted that as per Article 6.4 of the TSA, the LD is not a genuine estimate of loss that would be suffered by parties due to a purported breach or delay in the COD. Further, MPPMCL has not showed any occurrence of any loss due to the Petitioner. The invocation of the Contract Performance BG would be patently illegal and unjust and disproportionate punishment upon the Petitioner. The Petitioner would suffer irretrievable injustice by any such invocation as its financial standing and credit rating would be irreparably damaged. MPPMCL will not be entitled to any LD once the Petitioner's claims in the instant Petition are allowed.

131. We have considered the submissions of the Petitioner and MPPMCL. In the instant case, SCOD of KK line, KI line, Khandwa Sub-station and KD line was July, 2019 and actual COD of KK line, KI line, Khandwa Sub-station and KD line was 19.3.2020, 19.3.2020, 19.3.2020 and 13.1.2021 respectively.

132. The Petitioner's contentions, in short, is that the time over-run in case of its transmission lines did not affect the evacuation of power from Khargone TPS and no injury or loss is caused to the beneficiaries because of the time over-run. Therefore, the Petitioner is not liable to pay any LD to the beneficiaries of its transmission systems. Per contra, MPPMCL has contended that it is entitled for LD in the event of delay in COD of the transmission lines under Article 6.4 of the TSA and as per Article 6.5 of the TSA it is also entitled to encash the Performance BG against the LD payable by the Petitioner. The Articles 6.4 and 6.5 of TSA provides as follows:

"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."

133. As per 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 BG 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.

134. The Commission in a similar case, vide order dated 16.9.2022 in Petition No.62/MP/2020 held as follows:

"25. We have considered the rival contention of the parties. In Kailash Nath judgement, Hon'ble Supreme Court has interpreted the scope of Section 74 of the Indian Contract Act, 1876 which is extracted as under:

"74. Compensation for breach of contract where penalty stipulated for.—When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other



stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”

26. Thus, as per Section 74, the party complaining of the breach of contract is entitled to receive the compensation whether or not the actual damage or loss is proved to have been caused. After referring to a number of judgements such as in *Fateh Chand Vs Balkishan Dass* [(1964) 1 SCR 515], *Maula Bux Vs Union of India* [(1970) 1 SCR 1405], *Shri Hanuman Cotton Mills Vs. Tata Aircraft Limited* [(1969) 3 SCC 522] and *ONGC Ltd Vs Saw Pipes Ltd* [(2003) 5 SCC 705], Hon'ble Supreme Court in *Kailash Nath Case* has observed the following:

“68. From the aforesaid discussions, it can be held that:

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.”

It is evident from para 68(3) of the Kailash Nath Judgement that in every case of breach of contract, the person aggrieved by the breach is not required to prove the actual loss or damage suffered by him before he can claim a decree. Further, para 68(4) of the judgement states that in some contracts, it would be impossible for the court to assess the compensation arising from the breach and if the compensation claimed is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation. In the present case, since there is delay on the part of the Petitioner in achieving the COD of the project by the date of revised COD and commencement of supply of electricity to NTPC, this has resulted in breach of the terms and conditions of the PPA. In terms of Section 74 of the Indian Contract Act and the principles laid down in para 68(3) and (4) of Kailash Nath judgement, NTPC is not required to prove the loss or damage suffered on account of delay in commencement of supply of electricity by the Petitioner for claiming the compensation. Since the parties have agreed to pre-estimated compensation in the PPA to be paid in the event of delay in achieving COD and commencement of supply which the Commission considers as reasonable, NTPC is entitled to encash the PBG in terms of Article 4.6 of the PPA on account of breach of the provisions of the PPA by the Petitioner.



27. In the light of the above discussion and clear-cut provision of the Article 4.6.1 of the PPA, we do not find any infirmity in the action of NTPC to encash the BG for breach of the provisions of the PPA by the Petitioner. Consequently, the Petitioner is not entitled for refund of the encashed PBG. The Issue No. 3 is accordingly decided against the Petitioner.”

135. As per above it was held that in every case of breach of contract, the person aggrieved by the breach is not required to prove the actual loss or damage suffered by him before he can claim a decree, and in light of clear-cut provision of PPA, no infirmity in the action of encashing the BG for breach of the provisions of the PPA was found. In view of the discussions in preceding paragraphs, the Liquidated Damages shall be applicable as per the provisions of TSA keeping in view the subject to the allowance of delay in the instant Order due to grant in crossing approval by NHA1 for the KI line and delay in construction of Khandwa substation.

Interest During Construction (IDC) on account of time over-run and cost over-run due to “Change in Law” and force majeure claims

136. The Petitioner has submitted that delay in execution of the project has resulted in an increase in the IDC during the extended construction period and it amounts to ₹174 crore. The Petitioner has submitted that it is entitled to IDC to offset the adverse financial impact of all unforeseeable events encountered in the development of the Project, which occurred for reasons not attributable to KTL and led to loss of working time. The IDC incurred by the Petitioner for each of the transmission elements is as follows:

(₹ in lakh)

Sr. No.	Period	Element-wise break up of IDC						
		LILO of one ckt of Khandwa-Rajgarh 400 KV D/C line at Khargone TPP (LII.O Line)	Khandwa Pool-Indore 765 KV D/C line (KI Line)	Khargone TPP Switchyard - Khandwa pool 400 KV D/C (Quad) line (KK Line)	765/400 KV, 2* 1500 MVA pooling station at Khandwa (Khandwa SS)	Khandwa Pool-Dhule 765 KV D/C Line (KD Line)	2 numbers of 765 KV Line Bays and 7*80 MVAR switchable line reactors (Dhule Bay)	Total
1	August, 2019- March, 2020	-	14,42,59,513	3,20,14,272	17,18,21,084	31,23,73,552	5,01,91,941	71,06,60,362



2	April, 2020- March, 2021	-	-	-	-	54,74,65,111	8,79,66,271	63,54,31,382
3	April, 2021- December, 2021	-	-	-	-	41,68,28,168	2,55,45,442	44,23,73,610
	Net total Borrowing capitalised in books	-	14,42,59,513	3,20,14,272	17,18,21,084	1,27,66,66,831	16,37,03,653	1,78,84,65,353

137. The Petitioner has submitted that delay in commissioning of the Project especially the KD line occurred inter alia due to the refusal of the concerned authorities to permit KTL to construct the KD line along the approved route. The Khandwa Sub-station was delayed due to delay in acquisition of the land for constructing the proposed Khandwa Sub-station and continued law and order problems created by the landowners. The KI line and KK line were delayed due to delay in grant of consent by NHA and MPPTCL's requirement to comply with the H+6 criteria. The additional time consumed in overcoming the aforesaid events are covered under *force majeure* and "Change in Law" under the TSA.

138. The Petitioner has submitted that such additional IDC is an additional expenditure as it is an outflow from KTL to its lenders. Such IDC has been certified by the Petitioner's Chartered Accountant which has not been disputed by any of the Respondents. The said delay and the resultant expenditure are a direct consequence of "Change in Law" and *force majeure* events under the TSA and, accordingly, the Petitioner is entitled to IDC. The Petitioner has further submitted that it is a settled law that once the developer is granted relief on account of *force majeure* and "Change in Law" that have adversely affected the project, such developer is entitled for IDC and corresponding carrying costs for the said period. Even projects awarded under Section 63 of the 2003 Act are entitled to IDC once the claims for *force majeure* and "Change in Law" have been allowed. The Petitioner in support of its contention has relied upon the judgment of the APTEL dated 20.10.2020 in Appeal No. 208 of 2019 in the case of Bhopal Dhule Transmission Company vs Central Electricity Regulatory Commission and Ors.



139. MPPMCL on the other hand has submitted that the claim of IDC for the projects awarded under section 63 of the 2003 Act is not permissible under law.

140. We have considered the submissions of the Petitioner and MPPMCL. We have perused the provisions of TSA with respect to *force majeure* and Change in Law. As per TSA, compensation is provided for a Change in Law event, whereas for *force majeure* event there is no compensation except for relief in the form of extension of SCOD and hence levying of liquidated damages. In the instant case, two events have been allowed under Change in Law which are construction of concrete wall and compensation for land due to Government Orders. We observe that Petitioner has not claimed any delay on account of both the events allowed under Change in Law. Accordingly, the Petitioner's prayer for grant of IDC, is rejected.

Issue No. 3: What reliefs, if any, should be granted to the Petitioner in the light of the answers to the above issues?

Carrying cost

141. The Petitioner has also prayed for the carrying cost on compounded basis till the date the Petitioner is compensated for such additional expenditure. The Petitioner has placed reliance on Hon'ble Supreme Court in Judgment dated 24.8.2022 in Civil Appeal No. 7129 of 2021 titled *Uttar Haryana Bijli Vitran Nigam Limited v. Adani Power (Mundhra) Limited & Anr.* wherein it has held that once a party is entitled to carrying cost under the relevant agreement, the same is to be granted from the date when such additional expenditure on account of the relevant "Change in Law" event is incurred till the time the affected party receives compensation. The Petitioner has submitted that is settled law that compensation under "Change in Law" is based on the principle of restitution of the party to the same financial position which as per settled principle of law includes carrying cost from the date of impact. Therefore, as a relief for the occurrence of "Change in Law" event, the Petitioner is entitled to claim carrying cost, specifically in view of the principle of restitution inbuilt/envisaged in Article 12 of the TSA and the general law applicable to the grant of carrying cost/interest.



142. We have considered the submissions of the Petitioner. In the instant case, the TSA between the Petitioner and the beneficiaries does not provide for the principle of restitution. However, vide order dated 11.3.2023 in Petition No. 333/MP/2019, the carrying cost has been considered by the Commission in light of APTEL and Hon'ble Supreme Court Orders. The relevant extract of order dated 11.3.2023 in Petition No. 333/MP/2019 is quoted below:

“

118. We have considered the submissions made by the Petitioner. The issue of entitlement of carrying cost in terms of the provisions of the TSA had been considered by the Commission vide its order dated 16.6.2021 in Petition No. 453/MP/2019, wherein the Commission disallowed carrying cost in absence of the restitutionary principle in the TSA. However, the said order was challenged by the licensee before the APTEL in Appeal No. 238 of 2021 wherein the APTEL vide its order dated 27.9.2019 remitted the said issue back to the Commission for re-examination/fresh visit in view of the law declared by the Hon'ble Supreme Court and by the APTEL on the subject matter including vide judgment dated 15.9.2022 in Appeal No. 256 of 2019 & batch in the case of Parampujya Solar Energy Private Ltd. v. CERC and Ors. ('Parampujya Case').

119. The Commission in Petition No. 453/MP/2019 had examined the matter after hearing the parties. The Commission vide its order dated 15.2.2023 allowed the carrying cost subject to outcome of the decision of the Hon'ble Supreme Court in Civil Appeal No. 8880 of 2022 in the case of Telangana Northern Power Distribution Company Ltd. & Anr. V. Parampujya Solar Energy Pvt. Ltd. & Ors. Relevant portion of the said order dated 15.2.2023 is extracted as under:

“31. We have considered the submissions made by the Petitioner and Respondents with regard to carrying cost. The Commission had denied carrying cost in the impugned order relying on judgement dated 13.4.2018 in Appeal No. 210 of 2017 in Adani Power Limited v. Central Electricity Regulatory Commission and Ors, wherein it was held that since Gujarat Bid-01 PPA had no provision for restoration to the same economic position, the decision of allowing carrying cost will not be applicable. However, the APTEL has differentiated its earlier judgment dated 13.4.2018 in the matter of Adani Power Limited v. CERC & Ors. (Appeal No. 210 of 2017) in the case of Parampujya judgment to allow carrying cost in the following manner:

“51. The PPAs contain identical terms on the subject of “Relief for Change in Law” in the following form:

“12.2.1 The aggrieved Party shall be required to approach the Central Commission for seeking approval of Change in Law.

12.2.2 The decisions of the Central Commission to acknowledge a Change in Law and the date from which it will become effective, provide relief for the same, shall be final and governing on both parties.”

[Emphasis supplied]

71. Restitution is a principle of equity which is generally invoked by the adjudicatory authorities – Courts and Tribunals – to render substantial justice and, in this context, we may quote the following observations of Supreme Court in judgment reported as South Eastern Coalfields Ltd v. State of Madhya Pradesh & Ors. (2003) 8 SCC 648:



.....
72. As ruled in above mentioned case, absence of prohibition in law or contract against award of interest to recompense for delay in payment is also significant. As already quoted earlier, in the case of Uttar Haryana Bijli Vitran Nigam Ltd(supra), the Supreme Court has upheld the view that in terms of restitutionary principle, the affected party is to be given the benefit of restitution "as understood in civil law.

73. The claim arising out of change in law provisions, across all kinds of PPAs under bidding route, is essentially a claim for compensation, the objective being to relieve the affected party of the impact of change in law on its revenues or cost or by way of additional expenditure. The word "compensation" simply means anything given to make things equal in value, anything given as an equivalent, to make amends for loss or damage.

74. As has been pointed out, carrying cost, wherever allowed, has been granted generally at the rate of interest prescribed for Late Payment Surcharge ("LPS") in as much as, it also relates to amount paid towards deferred payments. Hon'ble Supreme Court in a recent decision rendered on 24.08.2022 in Uttar Haryana Bijli Vitran Nigam Ltd. &Anr. v. Adani Power (Mundra) Ltd. &Anr. 2022 SCC OnLine SC 1068, has observed that since the funds arranged by the developer are based on interest rate framework followed by scheduled commercial banks, the affected developer ought to be compensated in the same way.

75. The cardinal rule of interpretation is that words have to be read and understood in ordinary, natural and grammatical meaning. [S. Ganapathraj Surana v. State of T.N. 1993 Supp (2) SCC 565]. The crucial words are "provide relief". The word relief is defined by Black's Law Dictionary as under:

"Deliverance from oppression, wrong, or injustice. In this sense it is used as a general designation of the assistance, redress, or benefit which a complainant seeks at the hands of a court, particularly in equity. It may be thus used of such remedies as specific performance, or the reformation or rescission of a contract."

76. The meaning of the expression "relief", explained in P Ramanatha Aiyar's Advanced Law Lexicon is similar:

"Relief:

(a) Deliverance from some hardship, burden or grievance; legal redress or remedy; the lightening or removal of any burden.

(b) Aid or assistance given to those in need, especially, financial aid provided by the state.

(c) The redress or benefit, especially equitable in nature (such as an injunction or specific performance), that a party asks of a Court.—Also termed remedy. (Black, 7th Edn., 1999)

(d) Legal remedy for wrongs.

(e) "Relief" means the remedy which a Court of Justice may afford in relation to some actual or apprehended wrong or injury. [5 A. 345 (FB)]

(f) The word "relief" necessarily implies the pre-existence of a wrong. An action is not given to one who is not injured, 'actio non datur non dammi ficato'. [33 Bom. 509 : 11 Bom LR 85 : 5 MLT 301 : 2 IC 701]"

77. *****

78. The use of the word "relief" in the context of adjudicatory process, simply means the remedy which the adjudicatory forum may afford "in regard to some actual or apprehended



wrong or injury” or something which a party may claim as of right, or making the affected party “feel like easing out of ... hardship”. [Sarsuti v. Kunj Behari Lal, 1883 SCC On Line All 85; Santhamma v. Kerala State 2019 SCC On Line Ker 1265; Commissioner of Income-Tax v. R.B. Jodhamal Kuthiala, 1963 SCC On Line Punj 403; Dipti Aggarwal v. Ashish Chandra, 2017 SCC OnLine Cal 8835; Mewar Sugar Mills Ltd. v. Chairman Central Board of Direct Taxes and Ors. (09.10.1998 - DELHC)]. In Kavita Trehen v. Balsara Hygiene Products Ltd AIR (1995) SC 441, it was held by the Supreme court that jurisdiction to make restitution is inherent in every court and can be exercised whenever justice of the case demands.

79. While construing the contract, purposive interpretation of its terms is requisite [Nabha Power Limited vs. Punjab State Power Corporation Limited & Anr. (2018) 11 SCC 508]. This principle must be borne in mind while comprehending the scope and width of expression “provide relief” used in Article 12.2.2 in the PPA. For this, the statutory framework, as indeed the contractual clauses, will have to be kept in consideration.

80. The Central Commission is the sector regulator vested with wide powers to act in furtherance of the objectives enshrined in the Electricity Act, 2003. Section 61 of the said enactment guides its functions expecting the authorities established by this legislation to follow “commercial principles”, act so as to ensure optimum returns on the investments, promote generation from renewable sources of energy and, most importantly, strike a balance between consumers’ interest and recovery of cost of electricity in a reasonable manner.....

81. It is in this light that Hon’ble Supreme Court in the case of Energy Watchdog (supra) ruled, albeit in the context of Section 63, that the Regulatory Commission must exercise its functions in accordance with law and guidelines and in situations where no such guidelines exist, it may avail of its “general regulatory powers” under Section 79(1)(b).

82. We have already noted that the PPAs which were subject matter of decisions in the case of Adani Power Ltd (supra) and GMR Warora Ltd (supra) contained change in law clauses structured differently from the shape in which they occur in the present PPAs, the words “provide relief” not having been used in the former. The judgment dated 13.04.2018 of this tribunal in Adani Power Ltd.(supra) did not even consider the question as to whether the principle of time value of money would apply in examining the impact of change in law once change in law had been approved. The said decision for present purpose is, thus, sub silentio. When the judgment in the said case was carried in appeal to the Hon’ble Supreme Court leading to decision reported as Uttar Haryana Bijli Vitran Nigam Ltd (UHBVNL) (supra), the challenge was not in relation to what had been denied by this tribunal as the first appellate forum and, therefore, it is not correct to say that the issue stands settled by the said judgment. We are, at the same time, conscious of the fact that while upholding the relief to the extent granted in the case of Adani Power Ltd (supra), the Supreme Court by judgment reported as UHBVNL (supra) had observed that it would be fallacious to say that the claim of restitution was being put forward “on some general principle of equity”, the amount of carrying cost in that case being “relatable to Article 13 of the PPA” (the change in law clause).

83. In the present cases, the claim for compensation of SPPDs is primarily founded not on principles of equity but on the contractual clause stating that the affected party is entitled to approach the Commission which shall “provide relief” in relation to the impact of the change in law event if it has resulted in “any additional recurring /non-recurring expenditure”. The purpose of the change in law clause in the PPAs is to relieve the SPPDs of the additional burden. Since the impact of the new tax (GST or Safeguard Duty on Imports, as the case may be) would come from the date of enforcement of the new laws, the relief intended to be afforded under the contracts cannot be complete unless the said burden is allowed to be given a pass through from the date of imposition of the levy. Unlike the PPA in UHBVNL (supra) wherein the phraseology of change-in-law provision was exhaustive, the words “provide relief” in present PPAs are open ended, not qualified in any manner so as to be given a restrictive meaning in order to treat the date of adjudication of the claim by the regulatory authority as the effective date or to justify denial of carrying cost burden for the period anterior thereto. In our reading, the expression “provide relief” is of widest amplitude and cannot be



read to limit its scope the way the contesting respondents seek to propagate or the way the Central Commission has determined.

84. It is in the above context that we accept that the regulatory powers of the Central Commission ought to have been properly exercised to do complete justice to the claims for compensation it having been denied by depriving the SPPDs of their legitimate expectation of relief vis-à-vis the burden of carrying cost as well, rendering the dispensation partially unfair.

85. There is one more justification for the view we are taking in the matter and that stems from the provision contained in Section 70 of Indian Contract Act, 1872 which relates to the obligation of person enjoying benefit of a non-gratuitous act.

86. It was pointed out, and there was no denial offered, that the respondent distribution licensees had been deriving benefit of non-payment of GST component during the period the claims of change in law were pending adjudication before the Central Commission. As noted earlier, it is the burden of the SPPDs to pay (to the revenue) the new levies from the date(s) of enforcement of the corresponding laws.

87. As pointed out by learned counsel for Mahoba, under the PPA there is an obligation on the part of SPPDs to ensure "continuance of supply of power throughout the term of Agreement". It is inherent in this that SPD, in order to continue to supply, must reconfigure or repower the plant, if so required, by installing additional modules after the COD since the contractual clause does not create any distinction as to expenditure pre or post COD, for purposes of change-in-law compensation. The plea for relief concerning post COD cannot be rejected, the expenditure incurred being not meant to be gratuitous, the intent instead being to discharge contractual responsibilities. We may quote the following passage from judgment of Hon'ble Supreme Court in State of West Bengal v. BK Mondal, AIR 1962 SC 779, in the context of Section 70 of the Indian Contract Act, 1872

88. The procurers cannot derive undue benefit on this account, not the least at the cost of the SPPDs who could never conceivably have intended to discharge their tax burden as a gratuitous act. Since the burden of carrying cost is a consequence directly flowing from the change in law event, the relief in such regard cannot be complete unless this part of the additional expenditure is also allowed as pass-through.

32. 33 & 34. *****

35. It is reiterated that the APTEL has directed the Commission to take a fresh view on the issue of carrying cost in light of the law developed on carrying cost based on the previous judgments including the Parampujya judgment dated 15.9.2022. While allowing the claim for carrying cost in the Parampujya judgment, the APTEL granted relief not on principles of equity but on the interpretation of contractual terms. Thus, this would be the binding principle for adjudication of the present issue as regards the issue of carrying cost is concerned. Accordingly, we proceed to deal with the present matter in terms of the provisions of the TSA.

36. Since the Change in Law claims in the present Petition pertain to Construction period, the relevant Article for relief is Article 12.2.1 ("During Construction Period"). It is noted that not only the word 'Relief' is used in the heading of Article 12.2 ("Relief for Change in Law"), Article 12.2.4 gives meaning to relief envisaged in the Article 12.2 by using the term 'compensation'. The text 'determination of the compensation mentioned above in Articles 12.2.1 and 12.2.2' used in Article 12.2.4 indicates that the relief envisaged in Article 12.2.1 and 12.2.2 is a compensatory relief for Change in Law.

37. Further, Article 12.2.1 prescribes compensation towards increase in project cost during construction period in terms of increase in non-escalable transmission charges. However, if the impact of Change in Law continues in the operating period or an event of Change in Law occurs in operating period, the responsibility of determination of 'compensation' rests with the Appropriate Commission under Article 12.2.2 of the TSA. It is for such situations that the APTEL in Parampujya judgment has observed that the Commission ought to exercise its regulatory powers under Section 79(1)(b) to do complete justice to the claims for compensation.



38. *****

39. *In light of the above, the question that arises is whether carrying cost can be granted in accordance with provisions of Article 12.2 of the TSA. The APTEL has observed in the Parampuja judgment that the judgment dated 13.4.2018 of the APTEL in Adani Power Ltd.(supra) did not consider the question as to whether the principle of time value of money would apply in examining the impact of Change in Law once Change in Law had been approved. However, the same needs to be considered for the present matter in light of the subsequent development of law on carrying cost, provisions of Article 12.2 of the TSA and, particularly, in accordance with the following guiding principles laid down in the Parampuja judgment.*

(a) *the use of the word “relief” in the context of adjudicatory process, simply means the remedy which the adjudicatory forum may afford “in regard to some actual or apprehended wrong or injury” or something which a party may claim as of right, or making the affected party “feel like easing out of ... hardship”. [Sarsuti v. Kunj Behari Lal, [1883 SCC OnLine All 85]; Dipti Aggarwal v. Ashish Chandra, [2017 SCC OnLine Cal 8835]. In Kavita Trehen v. Balsara Hygiene Products Ltd [AIR (1995) SC 441], it was held by the Supreme court that jurisdiction to make restitution is inherent in every court and can be exercised whenever justice of the case demands.*

(b) *the word ‘compensation’ simply means anything given to make things equal in value, anything given as an equivalent, to make amends for loss or damage.*

(c) *Grant of carrying cost is affording to the party affected the time value of money. [Indian Council of Enviro-Legal Action v. Union of India & Ors. (2011) 8 SCC 16; Torrent Power Limited v. GERC & Ors., [2019 SCC OnLine APTEL 110]; Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power (Mundra) Ltd. & Anr. [2022 SCC OnLine SC 1068]. In Vidarbha Industries Power Limited v. Axis Bank Limited [2022 SCC OnLine SC 841], the Hon’ble Supreme Court held that “the law must ensure that time value of money is preserved, and that delaying tactics in these negotiations will not extend the time set for negotiations at the start”.*

(d) *Principle of restitution is now part of the regime on Change in Law reflecting public policy [Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021].*

(e) *Restitution is a principle of equity which is generally invoked by the adjudicatory authorities – Courts and Tribunals – to render substantial justice. Absence of prohibition in law or contract against award of interest to recompense for delay in payment is also significant [South Eastern Coalfields Ltd v. State of Madhya Pradesh & Ors. (2003) 8 SCC 648].*

(f) *In terms of restitutionary principle, the affected party is to be given the benefit of restitution “as understood in civil law” [Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL) v. Adani Power Limited and Ors. (2019) 5 SCC 325].*

(g) *The claim arising out of Change in Law provisions, across all kinds of PPAs under bidding route, is essentially a claim for compensation, the objective being to relieve the affected party of the impact of Change in Law on its revenues or cost or by way of additional expenditure.*

(h) *Jurisdiction to make restitution is inherent in every court and can be exercised whenever justice of the case demands. [Kavita Trehen v. Balsara Hygiene Products Ltd AIR (1995) SC 441].*

40. *Change in Law has been defined in the TSA dated 24.6.2015 as “occurrence of any of the following after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring / non-recurring expenditure by the TSP or any income to the TSP”. Accordingly, an event of Change in Law may result into additional recurring as well as non-recurring expenditure or income for the TSP. The Commission has allowed various Change in Law*



events to the Petitioner vide order dated 16.6.2021 and granted relief in terms of increase in non-escalable transmission charges under Article 12.2.1 of the TSA. As regards carrying cost, the APTEL in its judgment dated 13.4.2018 in Appeal No. 210 of 2017 observed that there could be substantial time lag between the occurrence of a Change in Law event and approval by the Commission during which the generator had to incur additional expenses during the period of adjudication of Change in Law in the form of working capital to cater to the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. The relevant extract of the judgment is as under:

“ix In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial.”

41. Similar observations regarding requirement of additional finances to meet the expenditure incurred on account of Change in Law have been made by Hon'ble Supreme Court of India in the judgment dated 24.8.2022 in *Uttar Haryana Bijli Vitran Nigam Ltd. &Anr. v. Adani Power (Mundra) Ltd. &Anr.* [2022 SCC OnLine SC 1068] as under:

“17. In the instant case, the respondent No. 1 – Adani Power had to incur expenses to purchase the FGD and install it in view of the terms and conditions of the Environment Clearance given by Ministry of Environment and Forests, Union of India, in the year 2010. For this, it had to arrange finances by borrowing from banks. The interest rate framework followed by Scheduled Commercial banks and regulated by the Reserve Bank of India mandates that interest shall be charged on all advances at monthly rests. In view of the matter, the respondent No. 1 – Adani Power is justified in stating that if the banks have charged it interest on monthly rest basis for giving loans to purchase the FGD, any restitution will be incomplete, if it is not fully compensated for the interest paid by it to the banks on compounding basis.”

42. Thus, the requirement of additional finance is a recurring expense during the operating period from the COD of the project till approval of Change in Law by the Commission. The said recurring expense, namely carrying cost flows directly out of Change in Law event and is nothing but time value of money. Article 12.2.2 is of wide amplitude which allows the Commission to determine compensation for Change in Law without any prohibition on award of interest/carrying cost to recompense for delay in payment [*South Eastern Coalfields Ltd v. State of Madhya Pradesh & Ors.* [(2003) 8 SCC 648]. Denial of carrying cost would defeat the objective of compensatory relief envisaged in Article 12.2.2 read with Article 12.2.4 in the operating period.

43 & 44.....

45. We have considered the submission made by the Petitioner. We are of the considered opinion that since the carrying cost is allowed on the principle of compensation for the loss suffered by the Petitioner on account of time lag in adjudication of the Petition, the rate of carrying cost needs to be deliberated in light of rate of interest for the working capital arranged by the Petitioner.

46. In this regard, the Commission in its order dated 17.9.2018 in *Petition No. 235/MP/2015 (AP(M)L v. UHBVNL & Ors.)* had decided the issue of carrying cost as under:

“24. After the bills are received by the Petitioner from the concerned authorities with regard to the imposition of new taxes, duties and cess, etc. or change in rates of existing taxes, duties and cess, etc., the Petitioner is required to make payment within a stipulated period. Therefore, the Petitioner has to arrange funds for such payments. The Petitioner has given the rates at which it arranged funds during the relevant period. The Petitioner has compared



the same with the interest rates of IWC as per the Tariff Regulations of the Commission and late payment surcharge as per the PPA as under:

Period	Actual interest rate paid by the Petitioner	Working capital interest rate as per CERC Regulations	LPS Rate as per the PPA
2015-2016	10.68%	13.04%	16.29%
2016-2017	10.95%	12.97%	16.04%
2017-2018	10.97%	12.43%	15.68%

25. It is noted that the rates at which the Petitioner raised funds is lower than the interest rate of the working capital worked out as per the Regulations of the Commission during the relevant period and the LPS as per the PPA. Since, the actual interest rate paid by the Petitioner is lower, the same is accepted as the carrying cost for the payment of the claims under Change in Law.

26. The Petitioner shall work out the Change in Law claims and carrying cost in terms of this order. As regards the carrying cost, the same shall cover the period starting with the date when the actual payments were made to the authorities till the date of issue of this order. The Petitioner shall raise the bill in terms of the PPA supported by the calculation sheet and Auditor's Certificate within a period of 15 days from the date of this order. In case, delay in payment is beyond 30 days from the date of raising of bills, the Petitioner shall be entitled for late payment surcharge on the outstanding amount."

47. In line with above order of the Commission, in the instant case, the Petitioner shall be eligible for carrying cost at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per applicable CERC Tariff Regulations or the late payment surcharge rate as per the TSA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of Late Payment Surcharge in the TSA would kick in if the payment is not made by the Respondents."

120. In line with above, the Petitioner shall be eligible for carrying cost from COD till the date of this order at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per applicable CERC Tariff Regulations or the late payment surcharge rate as per the TSA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of Late Payment Surcharge in the TSA would kick in if the payment is not made by the Respondents.

121. It is pertinent to mention that in the Parampujya case, the Hon'ble Supreme Court vide Order dated 12.12.2022 in Civil Appeal No.8880 of 2022 in the case of Telangana Northern Power Distribution Company Ltd. & Anr. v. Parampujya Solar Energy Pvt. Ltd. & Ors. has held as under:

"2. Pending further orders, the Central Electricity Regulatory Commission (CERC) shall comply with the directions issued in paragraph 109 of the impugned order dated 15 September 2022 of the Appellate Tribunal for Electricity. However, the final order of the CERC shall not be enforced pending further orders."

Thus, the directions with regard to carrying cost in this order which were issued in the light of the principles decided by APTEL in judgment dated 15.9.2022 in Appeal No.256 of 2019 (Parampujya Solar Energy Ltd Vs. CERC) & batch appeals shall not be enforced and will be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880 of



2022 in the case of Telangana Northern Power Distribution Company Ltd. & Anr. V. Parampujya Solar Energy Pvt. Ltd. & Ors. Thus, the issue is answered accordingly.”

As per above carrying cost was allowed in terms of referred APTEL and Hon'ble Supreme Court orders it and is subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880 of 2022 in the case of Telangana Northern Power Distribution Company Ltd. & Anr. V. Parampujya Solar Energy Pvt. Ltd. & Ors.

143. We have already allowed the additional expenditure incurred by the Petitioner towards construction of the concrete wall for protection of Dhule Sub-station of BDTCL and the additional expenditure on account of the enhanced compensation for land paid by the Petitioner because of the orders issued by the Government of Maharashtra and Madhya Pradesh. Accordingly, the Petitioner shall be eligible for carrying cost from the date of the actual expenditure towards the construction of the concrete wall for Dhule Sub-station and enhanced compensation paid by the Petitioner till the date of this order at the actual rate of interest paid by the Petitioner for arranging the funds (supported by Auditor's Certificate) or the rate of interest on working capital as per applicable CERC Tariff Regulations or the late payment surcharge rate as per the TSA, whichever is the lowest. Further the above directions with regard to carrying cost issued by us in this order in the light of the principles decided by APTEL in judgment dated 15.9.2022 in Appeal No.256 of 2019 (Parampujya Solar Energy Ltd Vs. CERC) & batch appeals shall not be enforced and will be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880 of 2022 in the case of Telangana Northern Power Distribution Company Ltd. & Anr. V. Parampujya Solar Energy Pvt. Ltd. & Ors.

144. The Petitioner has prayed for to grant an appropriate increase of 12.24% of the non-escalable transmission charges in accordance with Article 12.2.1 of the TSA.

145. It is observed that the reliefs claimed by the Petitioner is on account of "Change in Law" during the construction period. Accordingly, as per Article 12.2.1 of the TSA, for every cumulative increase/ decrease of each ₹7,42,00,000/- (rupees



seven crore forty two lakh) in the cost of the Project up to the revised SCOD of the Project on account of “Change in Law” during the construction period, the Petitioner shall be entitled to be compensated with increase/ decrease in non-escalable transmission charges by an amount equal to 0.313% (zero point three one three percent) of the non-escalable transmission charges. Thus, in terms of the findings of the Commission in the foregoing paragraphs, the Petitioner shall re-compute the increase in the cost of Project, to be audited and supported by CA certificate, and accordingly, shall be entitled to corresponding increase in non-escalable transmission charges as provided under Article 12.2.1 of the TSA.

146. The Petitioner shall provide documentary proof of such increase/ decrease in cost of the Project/ revenue to LTTCs.

147. The summary of our decisions with regard to the Petitioner’s claim is as follows:

Sl. No.	Force Majeure Claims	Allowed /Disallowed
1	Unexpected requirement to divert the KD line to avoid intersection with the proposed Jamphal Dam	Disallowed
2	Delay due to unanticipated imposition of the H+6 criteria for laying of transmission lines by MPPTCL	Disallowed
3	Delay in receiving highway crossing approvals from NHA.	Allowed for KI line from SCOD till Actual COD on 19.3.2020
5	Delay in acquisition of land and subsequent construction of the Khandwa Substation due to agitations by locals.	Allowed for Khandwa substation for period 10.4.2019 till 3.8.2019
6.	Delay due to outbreak of the Covid-19 pandemic	Disallowed

Sl. No.	“Change in Law” Claims	Allowed /Disallowed
1.	Additional expenditure incurred in diverting the KD line to avoid intersection with the Jamphal Dam.	Disallowed
2.	Additional expenditure incurred in construction of the concrete wall protection for Dhule substation of BDTCL.	Allowed
3.	Additional expenditure on account of enhancement of RoW compensation by the Governments of Maharashtra and Madhya Pradesh.	Allowed



4.	Additional expenditure incurred in complying with the H+6 criteria imposed by MPPTCL for construction of the KI Line.	Disallowed
5.	Additional expenditure incurred in diverting the KK line to avoid intersection with NTPC's railway tracks.	Disallowed
6.	IDC	Disallowed

148. The Petition No. 237/MP/2021 alongwith IA No.31/IA/2022 is disposed of in terms of the above discussions and findings.

Sd/

(P.K. Singh)
Member

Sd/

(Arun Goyal)
Member

Sd/

(I.S. Jha)
Member

