

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 470/MP/2019

Coram:

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

Date of Order: 23rd June, 2023

In the Matter of:

Petition seeking extension of Scheduled Commercial Operation Date on account of Force Majeure events and consequential reliefs arising therefrom under Section 79(1)(c) and Section 79(1)(f) of the Electricity Act, 2003, Articles 4, 11 and 16 and other relevant clauses of the Transmission Service Agreement dated 22.09.2015 executed between the Petitioner and the Long-Term Transmission Customers read with Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999.

And

In the matter of:

**Alipurduar Transmission Limited,
101, Part-III, G.I.D.C Estate,
Sector – 28, Gandhinagar - 382028
Gujarat - India**

.....Petitioner

VERSUS

**1. South Bihar Power Distribution Company Limited,
Second Floor, Vidyut Bhawan,
Bailey Road, Patna- 800001**

**2. West Bengal State Electricity Distribution Company Limited,
Link Road, Hooghly, Near IDBI Bank,
Arambagh, West Bengal- 712601**

**3. Manipur State Power Distribution Company Limited,
NH 150, Paona Bazar, Imphal, Manipur- 795004**

**4. Department of Power, Government of Nagaland,
Electricity House, A.G. Colony,
Kohima, Nagaland- 797001**

5. Assam Electricity Grid Corporation Limited,

Bijulee Bhawan (First Floor) Paltan Bazar,
Guwahati- 781001

6. North Bihar Power Distribution Company Limited,
Third Floor, Vidyut Bhawan,
Bailey Road, Patna- 800001

7. GRIDCO Limited,
Janpath, Bhubaneswar- 751022

8. Energy and Power Department, Govt. of Sikkim,
Diesel Power House, Arithang,
Gangtok, Sikkim-737101

9. Jharkhand Bijli Vitran Nigam Limited,
Hazaribag Rd., Kokar Industrial Area, Kokar,
Ranchi, Jharkhand – 834001

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

11. Central Transmission Utility of India Limited,
Saudamini, Plot No. 2, Sector 29,
Near IFCO Chowk,
Gurgaon (Haryana)-122001

12. REC Transmission Projects Company Limited,
Core – 4, Scope Complex,
7, Lodhi Road,
New Delhi-110003

.... Respondents

Parties present:

Ms. Poonam Verma Sengupta, Advocate, ATL
Ms. Gayatri Aryan, Advocate, ATL
Ms. Priyanshi Bhatnagar, Advocate, ATL
Shri. Anant, ATL
Shri. Yogesh Dalal, ATL
Shri. Rahul Chouhan, Advocate, Bihar Discoms
Shri. Shashwat Kumar, Advocate, Bihar Discoms
Shri. Amitanshu Saxena, Advocate, Bihar Discoms
Ms. Swapna Sesahdri, Advocate, PGCIL
Ms. Suparna Srivastava, Advocate, CTUIL
Ms. Astha Jain, Advocate, CTUIL
Shri. V.C. Sekhar, PGCIL
Shri. Prashant Kumar, PGCIL
Shri. Swapnil Verma, CTUIL
Ms. Kavya Bhardwaj, CTUIL

ORDER

The present Petition has been filed by the Petitioner (ATL), seeking extension of Scheduled Commercial Date of Operation (“SCOD”) i.e. 6.3.2019, on account of Force Majeure events and consequential reliefs arising therefrom. The Petitioner has made the following prayers:

- (a) Admit the present Petition;*
- (b) Hold and declare that the events pleaded in the Petition qualify as force majeure events which has obstructed, delayed and adversely affected the completion of the Transmission Project, for which Alipurduar Transmission Limited is entitled to the extension of SCOD as claimed for in the Petition until the adverse impact of the force majeure events has ceased to impede the work and the completion of the Transmission Project;*
- (c) Hold and declare that Alipurduar Transmission Limited is exempted from any financial liabilities due to delay in achieving SCOD due to force majeure;*
- (d) Accept plea of Alipurduar Transmission Limited to permit it to file a separate petition to seek compensation on account of time and cost-overrun, prolongation costs, opportunity costs etc., as claimed for in the Petition; and*
- (e) Pass such further or other Orders as this the Commission may deem just and proper in the facts and circumstances of the case.”*

2. The Petitioner is a fully owned subsidiary of Kalpatru Power Transmission Limited (KPTL), which was selected as a successful bidder through the tariff based competitive bidding under Section 63 of the Act to establish the Transmission system Strengthening in Indian transmission system for transfer of Power from new HEPs in Bhutan transmission system on Build, Own, Operate and Maintain (BOOM) basis comprising the following elements:

S. No.	Name of the Transmission Element	Completion target
1.	Alipurduar (POWERGRID)-Siliguri (POWERGRID) 400 kV D/C line (2 nd) with quad moose conductor	

S. No.	Name of the Transmission Element	Completion target
2.	Kishanganj (POWERGRID)-Darbhanga (DMTCL) 400 kV D/C line with quad moose conductor Sub-station Extn: - 2 nos 400 kV line bays at Darbhanga for termination of Kishanganj-Dharbhanga 400 kV D/C (quad) line - 80 MVAR switchable line reactors (with 400-ohm NGR) in each circuit	38 months

3. The Petitioner was incorporated as a Special Purpose Vehicle ('SPV') by Bid Process Coordinator (in short, 'BPC'), namely, REC Transmission Projects Company Limited (in short ('RECTPCL') for the purpose of developing and implementing the Project under the Tariff Based Competitive Bidding route. PGCIL participated in the competitive bidding process conducted RECTPCL and on emerging as the successful bidder, Letter of Intent (LOI) was issued by RECTPCL to KPTL on 29.10.2015. In accordance with the bidding documents, KPTL acquired 100% of the shareholding in the Petitioner Company by executing a Share Purchase Agreement with RECTPCL on 6.1.2016. KPTL also furnished the Contract Performance Guarantee of Rs. 40.50 crore on 4.1.2016 and accordingly, the TSA dated 6.1.2016 entered into between the Petitioner and the LTTCs became effective from 6.1.2016. The Commission in its order dated 21.3.2016 in Petition No.6/TL/2016 granted transmission license to the Petitioner for inter-State transmission of electricity and vide order dated 22.3.2016 in Petition No.4/ADP/2016 adopted the transmission charges of the Petitioner.

Submissions by the Petitioner

4. The Petitioner has submitted that Element-2 of the Project achieved commercial operation on 14.3.2019. However, Element-1 of the project has achieved commercial operation 20.1.2020 due to the following force majeure events:

- (a) Delay of 1078 days due to Severe Right of Way ("RoW") issues faced by the Petitioner, namely (i) stiff resistance from local land owners during

construction works, (ii) dispute with respect to compensation payable to the land owners, (iii) dispute with respect to multiple land -owners claiming compensation for the same land, (iv) manhandling of ATL personnel, (v) court proceedings and stay/interim injunctions granted therein (vi) Pendency of Applications made by ATL under Section 16(1) of Telegraph Act, 1885, and (vii) lack of appropriate local administrative support, etc.

(b) Delay of 1001 days in obtaining statutory clearances with respect to power line crossing approvals and tree felling approvals.

(c) Delay of 60 days due to heavy floods in 7 districts of West Bengal and 12 districts of Bihar between 13.8.2017 and 12.10.2017 on account of which transmission lines were water-logged and non-accessible.

5. The Petitioner has submitted that due to above force majeure events, the Petitioner was not able to complete the Element 1 of the Project within stipulated time and accordingly is seeking the extension of the SCOD in terms of Article 4.4.2 of the TSA.

6. The matter was heard on 30.6.2020 and notices were issued to the Respondents to file their reply. Reply to the Petition has been filed by the Respondents No. 1 and 6 (Bihar Discoms) and the Petitioner has filed rejoinder thereof.

7. Vide Record of Proceedings for the hearing dated 30.6.2020, the Petitioner was directed to submit the information regarding (a) details of commissioning, COD of entire Project, RLDC certificate which may be linked with the prayers keeping in view of the actual COD, and (b) Project execution plant, time plan as per Article 3.1.3 (c) of the TSA dated 22.9.2015 and PERT/CPM/Gantt Chart of the project.

8. The Petitioner vide its affidavit dated 20.7.2020, has submitted the information called for. With regard to (a) above, the Petitioner has submitted that the Petitioner

vide its Affidavit dated 26.6.2020 has already placed on record Trial Run Completion Certificate issued by POSOCO for the Element 1 and Element 2 dated 7.2.2020 and 5.4.2019 respectively. The Petitioner has also placed on record the documents detailing the commissioning of both Elements 1 and 2 of the Project. With regard to (b) above, the Petitioner has submitted that the Petitioner has placed on record the copy of the execution plan, time plan as per Article 3.1.3(c) of the TSA dated 22.9.2015 which includes the updated PERT/CPM/Gantt chart of the Project.

IA No. 69/IA/2020

9. The Petitioner filed an application bearing I.A. No. 69/2020 seeking directions to the Respondent, SBPDCL and other LTTCs ought not to take any coercive action against the Petitioner including invocation of any CPGs until the present Petition No. 470/MP/2019 is finally decided by the Commission.

Reply of Respondent Nos. 1 and 6

10. The Respondent, Bihar Discoms in their joint reply dated 3.6.2021, has submitted as under:

(a) The Petitioner had issued a letter to the said Respondents titled 'Milestone for – Transmission System Strengthening in India System for transfer of power from new HEPs in Bhutan' and vide the said letter it is to be construed that as per the entry number 19 titled 'Detailed Survey including route alignment, profiling & tower spotting Detailed Soil Investigation' the Petitioner had concluded detailed route alignment, profiling and tower spotting as on 31.3.2016. Thus, the Petitioner was well aware of the route for laying transmission lines and the hurdles, if any, which the Petitioner may face during laying of lines/erecting of towers.

(b) As per Section 2 of the Request for Proposal dated 8.7.2015 (RfP), the Petitioner was well aware of its obligation to familiarize with respect to the time

frame required to obtain consents, clearances, before submission of its bid. However, the Petitioner has delayed in applying for statutory clearances as well as failed to give reasons for the said delays. Thus, the Petitioner has failed to execute the project with adequate prudence and diligence, which in fact led to the delay in project completion. These delays are controllable' events and could have been avoided, possibly, could have even led to early declaration of commissioning of the project by the Petitioner.

(c) The Petitioner was required to provide all details as envisaged under Article 11.3 of the TSA to establish that the Natural Force Majeure event i.e., rains and floods, has led to such *exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years*. However, in the present matter, the Petitioner has failed to produce any evidence of exceptionally adverse weather conditions causing flood (for example rain, etc.) at the respective locations of the project sites where erection work was allegedly hampered.

(d) The certificates of completion of trial operation for the Projects issued by ERLDC have been provided to the Respondent No. 1 by the Petitioner. However, the said certificates are for completion of trial operations for 24 hours instead of 72 hours. Therefore, the Petitioner has failed to comply with the Article 6.2.1 of the TSA resulting in delay in achieving the COD of Element 1 and Element 2 of the Project.

(e) Appellate Tribunal for Electricity (APTEL) vide its judgment *dated* 25.01.2019 in the case of NTPC Limited vs. GRIDCO and Ors. has settled that the *declaration of the COD has to be as per the relevant regulations and not otherwise*. Therefore, as per the RfP, the Petitioner is obligated to make the assets of the Transmission Project available on a commercial basis to LTTCs as per the terms and conditions of the TSA.

(f) The Petitioner's request for return of the Contract Performance Guarantee (CPG) is not tenable. The Respondent No. 1, South Bihar Power Distribution Company Limited vide its letter dated 24.8.2020 has challenged the erroneous declaration of the COD of the Transmission System erected by the

Petitioner and requested to pay Liquidated Damages ('LD') of Rs. 1694.55 lakh as per the provisions of the TSA for delay in commissioning of the Transmission System. Subsequently, the Petitioner filed an Interlocutory Application numbered (IA) I.A. No. 69 of 2020 seeking interim reliefs against the demand of LD by the Respondents and requested for return of the Contract Performance Guarantee of Rs. 40.50 crore under apprehension of encashment of the same by the Respondents. Subsequently, the Petitioner has approached the Hon`ble High Court of Delhi seeking similar relief and vide order dated 4.9.2020 in W.P.(C) 5998/2020, Hon`ble High Court of Delhi has kept the demand of LD made by the Respondent No. 1 vide letter dated 24.8.2020, in abeyance till the matter is next heard. Thus, unless and until the veracity of COD declared by the Petitioner is examined by the Commission, the CPG should not be returned to the Petitioner.

(g) Article 11 of the TSA does not provide for any relief towards cost and time over-run. These costs are simply operational and commercial risks which are to be absorbed by the bidder. As per Article 11.7 (b) of the TSA *“Available Relief for a Force Majeure Event, every party shall be entitled to claim relief for a Force Majeure Event affecting its performance in relation to its obligations under this Agreement.”* The Petitioner is not entitled to claim any relief qua the time and/or cost over-run, as the relief so granted has no nexus with any time or cost over-run which the TSP may have faced due to occurrence of any alleged Force Majeure event.

Rejoinder to the reply of Bihar Discoms

11. The Petitioner in its rejoinder dated 14.4.2022, has submitted as under:

(a) The Petitioner (ATL) had duly ascertained the route of the transmission line before commencement of construction. However, the hurdles faced during laying of transmission line could not have been ascertained by the Petitioner until construction of the lines actually began. The *‘Detailed Survey including route alignment, profiling & tower spotting Detailed Soil Investigation’* referred to by the Respondents was only related to the construction aspect of the

Transmission Project wherein the survey focused on suitability of the route for carrying construction of the transmission project. The Petitioner could not have possibly anticipated or controlled the RoW issues raised by the landowners due to alleged inadequate compensation. In fact, some landowners had sought stay by filing court cases regarding the grant of compensation in January 2019. Thus, such actions by the landowners were beyond the reasonable control of the Petitioner and could not have been anticipated.

(b) There was no delay in applying for statutory clearances on part of the Petitioner. It was only towards the end of 2016 when the Petitioner achieved financial closure and started with construction activities of the Transmission Project. Thereafter, the Petitioner accordingly applied for the requisite statutory clearances starting April 2017. The time taken by government authorities in grant of statutory clearances for (i) power line crossings, and (ii) approval for felling of trees and transit pass in non-forest areas, etc., was beyond reasonable time. It is a settled law that any delay due to grant of statutory approvals, which is beyond the reasonable control of the developer amounts to Force Majeure events under the Agreement. The APTEL in its judgment dated 2.8.2021 in the matter *Clearsky Solar Private Limited vs. KERC & Ors.* in Appeal No. 160 of 2020, has acknowledged that land acquisition approval is a 'herculean task' and hence, delay in grant in land approval was beyond the control of the developer. Further, APTEL in its judgment dated 14.9.2020 in Appeal No. 351 of 2018 in *Chennamangathihalli Solar Power Project LLP and Ors. vs. Bangalore Electricity Supply Company Ltd. & Ors.* held that delay (of 7-8 months) in grant of approvals by government instrumentalities is a Force Majeure event.

(c) The interpretation as to 'floods' being in excess of statistical measures for the last hundred (100) years, is absurd and untenable. The Respondents No. 1 & 6 cannot read into the Petitioner's claim and suggest that 'rain causing floods' was an extreme weather condition and therefore will have to pass the muster of 'excess of statistical measures for the last hundred (100) years.

(d) The phrase '*or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years*' is separated

by a 'comma' before 'or'. It is an 'Oxford Comma', used between the penultimate item in a list and 'and/or' to prevent ambiguity and confusion and to supply the plain meaning. The same has been used by the Hon`ble Supreme Court in interpreting number of cases viz. *Mohd. Shabbir vs. State of Maharashtra (1979) 1 SCC 568*; *M.K.Salpekar (Dr.) vs. Sunil Kumar Shamsunder Chaudhari 1988 (4) SCC 21*; and *Sama Alana Abdulla v. State of Gujarat (1996) 1 SCC 427*.

(e) The declaration of commercial operation of the respective elements, has been done in accordance with Article 6.1.21 of the TSA and the relevant applicable regulations. The Petitioner has placed on record the copy of the trial run completion certificates of both Element 1 and Element 2

(f) The 'commercial operation' of the Transmission Project is linked to 72 hours following the connection of the respective element. "Trial Run" is different from 'commercial operation' where "Trial Run" has to be done in accordance with the Regulation 6.3 A (5) of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 ("IEGC").

(g) As per Article 6.2.1 of the TSA, the commercial operation of both Element 1 and Element 2 has been declared only 72 hours after energization. The Element 2 was energized on 11.3.2019 at 21:41 hrs, trial run completed on 12.3.2019 at 21:41 Hrs and accordingly, the same was commissioned on 14.3.2019. Similarly, Element 1 was energized on 16.1.2020 at 16:38 hrs, trial run for the same was completed on 17.1.2020 at 16:38 hrs and accordingly, was commissioned on 20.1.2020. There are no separate commissioning certificates issued after 72 hours of continuous energization of the respective element. However, the payment of transmission charges by the LTTCs commences after commissioning of the respective element. The commissioning date of Element 1 and Element 2 has also been recognized by PGCIL in its Petition No. 113/TT/2021 Thus, the Petitioner is not liable to compensate LTTCs in the form of LD for any reason whatsoever.

(h) It is a settled position of law that a contracting party is entitled to cost overrun/prolongation costs/ escalation costs on account of an extension of time for the completion of work. In this regard, the Petitioner has placed its reliance

on the judgments of the Hon`ble Supreme Court in the cases of *Assam SEB v. Buildworth (P) Ltd.*, [(2017) 8 SCC 146] and *K.N. Sathyapalan v. State of Kerala*, [(2007) 13 SCC 43] alongwith the APTEL judgment dated 27.4.2011 in Appeal No. 72 of 2010 in the matter of Maharashtra State Power Generation Co. Ltd. v. MERC & Ors. and judgment dated 1.8.2017 in Appeal No. 35 of 2016 in the matter of GMR Kamalanga Energy Ltd. v. CERC & ORs.

Hearing Dated 21.4.2022

12. Vide Record of Proceedings for the hearing dated 21.4.2022, the Petitioner was also directed to implead CTUIL and BPC and file revised memo of the parties. CTUIL and BPC were also given liberty to file their reply including on the aspect of the SCOD of the Petitioner's Project, if any.

13. The Respondent, Power Grid Corporation of India Limited (PGCIL) in its reply dated 12.7.2022, has submitted as under:

(a) Several issues have arisen in respect of the mismatch between the assets of various transmission licensees. Although, the Commission has approved the COD of assets vide its various orders, however, the TBCB licensee who accepts the liability to pay, subsequently claims the reliefs on Force Majeure and Change in Law under the respective TSA provisions by filing their own substantive Petitions wherein they take a stand that since they are affected by Force Majeure events, they are not liable to pay any charges to PGCIL. The same has been done in the present matter at hand by the Petitioner.

(b) With regard to Element 1, the transmission line, namely, the Alipurduar-Siliguri 400 kV D/C line has achieved COD only on 17.1.2020 as against the SCOD of 5.3.2019. However, both bays at the Siliguri sub-station and Alipurduar substation were made ready by the said Respondent on 1.8.2019. Further, PGCIL has filed Petition No. 113/TT/2021 for approval of tariff of these bays wherein PGCIL has sought approval of COD under Regulation 5 (2)

proviso of the Tariff Regulations, 2019 for its bays at both sub-stations as associated TBCB line i.e. Alipurduar – Siliguri 400kV D/C line under the scope of ATL was not ready on 1.8.2019.

(c) SCOD of the bays at Alipurduar & Siliguri was 5.3.2019 and PGCIL made efforts to commission the bays by the SCOD. However, there were severe Right of Way ('RoW') issues faced by PGCIL in the multi circuit portion (400 kV Alipurduar – Jigmeling transmission line of PGCIL also being used by the Petitioner in the execution of the Alipurduar – Siliguri line) and accordingly, delay of 149 days in commissioning of both the bays was beyond the control of PGCIL and detailed justification for delay has been submitted in Petition No. 113/TT/2021. Further, this delay of 149 days did not in any manner, affect the line of the Petitioner which was already delayed.

(d) With regard to qua Element 2 of the Petitioner i.e. the 400 kV Kishanganj – Darbhanga transmission line, PGCIL has filed tariff Petition No. 677/TT/2020 for approval of tariff for associated bays at Kishanganj substation along with 80 MVAR switchable line reactors wherein the Commission has categorically made a finding that the DTPC and PLCC works at Kishanganj (PGCIL) Substation were under the scope of the Petitioner and the same were completed by the Petitioner only on 11.3.2019 and thereafter two days were taken for charging of PGCIL's bays. Thus, the deemed COD of 400 kV Kishanganj-Darbhanga D/C line cannot be claimed as 6.3.2019 by the Petitioner without completion of the DTPC and PLCC works under its scope and may need to be shifted to 14.3.2019 i.e. date of actual commercial operation of the line after completion of trial operation.

(e) With regard to contention of the Petitioner that one no 1x80 MVAR switchable line reactor (SLR with 400 – ohm NGR) at Kishanganj GIS for Circuit – II of Kishanganj – Darbhanga line was commissioned on 22.06.2020 and the PGCIL's scope was not completed, the bays that are the essential elements which connect to the transmission line and non-availability of the 80MVAR switchable line reactor at Kishanganj did not affect the completion or successful operation of the 400 kV Kishanganj- Darbhanga line. The non-availability of the reactor has not affected the operation/availability of the line from 11.3.2019

onwards till the reactor is commissioned on 22.6.2019. Hence, there is no question of Deemed COD in such cases.

(f) The Commission recently after considering similar submissions in respect of the mismatch between the Respondent's assets and the assets of the TBCB licensee has passed a detailed order dated 26.4.2022 in Petition No. 60/TT/2017 and reiterated 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. Extension of SCOD and waiver of payment of LD charges as penalty is the only relief that can be provided under the provisions of the TSA.

14. The Petitioner in its rejoinder dated 19.11.2022, to the reply of PGCIL has submitted as under:

(a) The Petitioner suffered '*Force Majeure Events*' while constructing Element 1 for which the present Petition was filed, as the delay in completion of Element 1 was caused by events beyond the Petitioner's control. Thus, no liability for mismatch can be imposed on the Petitioner before adjudicating the Petitioner's *force majeure* claims. The APTEL vide its judgment dated 14.9.2020 in Appeal No. 17 of 2019 in the case of *NRSS XXXI (B) Transmission Ltd. v. Central Electricity Regulatory Commission and Ors.*, has settled that a TBCB licensee could not be charged for mismatch of commissioning of transmission assets under its scope was condoned on account of *force majeure events* and SCOD was revised. Hence, no claim of mismatch by PGCIL may be decided in the present Petition which limits itself to extension of SCOD of the transmission project of the Petitioner.

(b) As regards Element 2, the delay in commissioning of Element 2 was beyond the control of the Petitioner. The Petitioner installed PLCC equipment by SCOD i.e. 6.3.2019, however, testing and commissioning of PLCC was pending due to pending jumpering works at PGCIL's end. PGCIL completed the jumpering works on the evening of 8.3.2019 after ATL requested for the same via email sent on the same day at 12pm. As regards the DTPC, ATL requested

PGCIL for support (permission to access Kishanganj Substation site) on the morning of 8.3.2019 for completion of cable termination for DTPC. Once the site access for Kishanganj substation was given on 9.3.2019, the end to end test for PLCC and cable termination works for DTPC were completed on 10.3.2019 and the same was confirmed vide PGCIL's email dated 11.3.2019. Thus, ATL has carried out DTPC and PLCC works (the same not being within the scope of ATL as per the TSA) gratuitously at ATL's own cost and ATL cannot be held liable for any delay in completing Element 2 as per the TSA. The testing of DTPC and PLCC is a joint exercise of both sub-station owners (for Darbhanga – ATL and for Kishanganj-PGCIL). Therefore, testing and commissioning was carried out in coordination with PGCIL. The readiness of Element 2 was also established by CEA charging permission dated 21.2.2019.

IA No. 46/IA/2020 dated 14.7.2022

15. During the pendency of the Petition, the Petitioner also moved IA No. 46/2022 seeking amendment of pleadings along with incorporation of the following prayers:

“(a) Hold and declare that Element 2 of the Transmission Project achieved deemed commissioning with SCOD as per the TSA, as declared by Alipurdaur Transmission Limited;

(b) Hold and declare that delay in achieving commercial operation of Element 2, from SCOD i.e. 06.03.2019, till actual date of commercial operation i.e. 14.03.2019, is condoned in view of submissions made in paragraphs 103A to 103S.”

16. With regard to IA, the Petitioner has submitted that PGCIL had filed Petition No. 677/TT/2020 raising erroneous contentions regarding scope of work of the Petitioner as per the TSA. The Commission has passed an Order dated 5.5.2022 in the PGCIL's Petition No. 677/TT/2020. The Petitioner has submitted that the Petitioner was constrained to file said IA to clarify factual position with regard to scope of work. The amendment sought through IA does not prejudice the interest of the Respondent nor change the basic structure of the pleadings. Therefore, the Commission decided to

hear the case on merits. The contentions raised by the Petitioner and PGCIL on the IA have been dealt with in succeeding paragraphs of this order.

Hearing Dated 15.7.2022

17. Vide Record of Proceedings for the hearing dated 15.7.2022, the Respondents were directed to file their reply on the Petition as well as on the IA.

18. PGCIL vide its objection dated 11.7.2022 has opposed the amendment of the Petition and has submitted as under:

(a) By filing the amendment application, the Petitioner is seeking to challenge the findings of the Commission rendered in Order dated 5.5.2022, which is not permissible. The Petitioner is also countering the contentions raised by PGCIL in Petition No. 677/TT/2020 and is using the amendment application to re-argue its case in Petition No. 677/TT/2020. It cannot amend the pleadings in the present matter to re-argue the issue of the communication equipment including DTPC and PLCC not being ready for the Kishanganj-Darbhanga 400kV D/C line on the proposed date of its commercial operation.

(b) There is a finality to the fact that the communication equipment including the DTPC and PLCC were under the scope of ATL and not ready on 5.3.2019 (SCOD) or 8.3.2019 (Date of CEA energization certificate). There is also a categorical finding that the DTPC and PLCC works were completed on 11.3.2019 only pursuant to which the line achieved COD. The entire effort of the Petitioner by filing the said amendment application is to re-argue the stand of ATL that the DTPC and PLCC were not in the scope of ATL.

(c) The basic principles to be taken into consideration while allowing or rejecting the amendment of pleadings under Order 6 Rule 17 of the Code of Civil Procedure 1908, as laid down by the Supreme Court in *Revajeetu Builders and Developers vs. Narayanaswamy and sons & Ors. (2009) 10 SCC 84* as

(d) The amendment sought would prejudice PGCIL in the Order dated 505.2022 passed in Petition No. 677/TT/2020 with regard to the TSA and Connection Agreement are sought to be changed/alterd by seeking the amendment.

Response to the objections filed by PGCIL

19. The Petitioner in its response dated 12.8.2022 to the objections raised by PGCIL has submitted that Order 6 Rule 17 of Code of Civil Procedure (Amendment of Pleadings) as well as Regulation 114 of CERC (Conduct of Business) Regulations, 1999 provides for a 'General Power to Amend'. The Petitioner has further submitted as under:

(a) Hon`ble Supreme Court in the matter of *Pirgonda Hongonda Patil v. Kalgonda Shigonda Patil AIR 1957 SC 363* has laid down that the amendments are ought to be allowed if two conditions are satisfied viz. i) being necessary for the purpose of determining the real questions in controversy between the parties; and ii) not working injustice to the other side. The above judgment further laid down that amendments should not be refused until it is made out that the other party cannot be placed in the same position as if the pleading had been originally correct, or that the amendment would cause the other party an injury which could not be compensated in costs, and PGCIL does not fall in either category. Thus, the amendment IA satisfies both the conditions.

(b) The Petitioner also brings to the notice of the Commission that the controversy regarding commissioning of Element 2 arose only in the Tariff Petition. The Petitioner accordingly made the required submissions in those proceedings. However, it was held by the Commission that the question of time-overrun for Element 2 was to be determined only in the present Petition.

(c) The Petitioner has filed the amendment IA to bring such additional facts, submissions and documents on record which have direct nexus and are necessary for effective adjudication of the issues pending determination in the present Petition, which must be read in light of settled law that courts are

confined to the pleadings made by the parties and in case the Petitioner is not permitted to amend the present petition, the Commission will not be able to adjudicate holistically. Further, no injustice is being caused to PGCIL by way of the present amendment as only grounds and submissions related to Element 2 are being sought to be brought on record and the premise of the Petition i.e. extension of SCOD, is not altered.

(d) Any adjudication of merits of the matter is required to be done only at a later stage. Hon`ble Supreme Court in its judgments in the cases of *Sampath Kumar vs. Ayyakannu & Anr. [(2002) 7 SCC 559]* and *Rajesh Kumar Aggarwal & Ors. vs. K.K.Modi & Ors. [(2006) 4 SCC 385]* has held that while considering whether an application for amendment should or should not be allowed, the court should not go into the correctness or falsity of the case in the amendment. Thus, at the stage of allowing the prayer for amendment no finding on the merits of the amendment should be recorded and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged. Further, in order to decide any issue related to DTPC and PLCC related to Element 2 in the present Petition, the Petitioner's submissions ought to be considered for the same. Even while considering the question of time and cost overrun, the Commission is ought to take into consideration all facts and circumstances leading to such time and cost overrun.

(e) Through the IA, the Petitioner is only seeking to bring on record necessary information about Element 2, which is required by the Commission for proper adjudication.

Hearing dated 17.8.2022

20. During the course of hearing, learned counsel for the Petitioner requested the Commission to direct PGCIL to file its reply on merits. Vide Record of Proceedings for the hearing dated 17.8.2022, PGCIL was directed to file reply to the IA regarding amendment to the Petition on merits. The Petitioner was directed to file the following information (a) DOCO certificate/ deemed DOCO certificate issued by transmission

licensee; (b) Legible copy of SLD/schematic diagram of the transmission scheme; (c) Actual length of each lines of the Petitioner as implemented vis a vis length of line as per BPC routes; (d) Details of route followed (provided by BPC route or any other route) along with necessary proof, for each of the transmission line; (e) Legible copy of map, separately for each line of the Petitioner, depicting the three alternate route(s) as per BPC survey superimposing the route as followed by the Petitioner in respect of all line; (f) the information regarding w.r.t. Force Majeure events for each assets.

21. The Petitioner vide its affidavit dated 5.9.2022, has filed the information as under:

(i) With regard to (a) and (b) above, the Petitioner has placed on record the copy of the DOCO certificate/deemed DCOO certificate issued by the transmission licensee and legible copy of SLD/schematic diagram of the transmission scheme.

(ii) With regard to (c) above, the Petitioner has placed on record the copy of Gazette Notification dated 19.10.2016 and copy of approved line schedule.

(iii) With regard to (d) above, the Petitioner has placed on record the copy of the Survey Report submitted by BPC i.e. REC with the RfP.

(iv) With regard to (e) above, the Petitioner has placed on record the legible copy of map, separately for each line of the Petitioner, depicting three alternate route(s) as per BPC survey superimposing the route as followed by the Petitioner in respect of all line.

(v) With regard to (f) above, the Petitioner has placed on record information w.r.t. to Force Majeure events in relation to each Asset by way of three tabular summaries, wherein, (i) Table 1 - reflects the period of time planned for Foundation, Erection and Stringing of Element 1 and actual time taken due to delay caused by Force Majeure events; (ii) Table 2 - demonstrates details of various Force Majeure events; and (iii) Table 3 - depicts details related to Element 2 of the Petitioner's Project.

Reply of PGCIL on merits of the Amendment Application (IA)

22. PGCIL vide its reply dated 9.9.2022, has submitted as under:

(a) The Petitioner is seeking (i) to challenge the findings arrived at by the Commission pertaining to Element 2 in the above -mentioned order and the same is not permissible, (ii) to re-argue the stand of the Petitioner that the DTPC and PLCC at Kishanganj GIS Substation were not in the scope of the Petitioner, (iii) to raise fresh grounds to challenge the order dated 05.05.2022 and (iv) made other additions/amendments to not only impugn the order dated 05.05.2022 but also alter the very basis of the main petition 470/MP/2019.

(b) The Petitioner in its rejoinder to the objections filed by the Respondent for the present IA has contradicted some of its own submissions made in the IA as the stand of the Petitioner is substantially altered in the amendment application because in the main Petition, the Petitioner has only raised contentions about completion of work regarding Element 2 within SCOD i.e. 6.3.2019 and there is no prayer seeking a declaration that there is deemed commissioning/ deemed COD on 6.3.2019 pertaining to Element 2. In the main petition, the prayer is only with regard to extension of SCOD of Element 1 based on the Force Majeure events pertaining to Element 1. The prayer regarding Element 2 has been made for the first time by the Petitioner in the amendment application.

(c) Further, the Petitioner is not presenting the correct findings arrived at by the Commission in the order dated 5.5.2022 regarding the responsibility of installation of DTPC and PLCC at Kishanganj GIS substation. The Petitioner is only seeking to misinterpret the said order to its advantage while ignoring the combined findings in the other relevant paragraphs. The Petitioner is seeking to project as if the issue of DTPC and PLCC being under the scope of the Petitioner will be re-considered by the Commission in the present proceedings, whereas, what the Commission has deferred for consideration is the decision pertaining to condonation of the time overrun of 9 days in commissioning of PGCIL`s assets associated with Element 2 of the Petitioner and covered under Petition No. 677/TT/2020 and same shall be decided at the time of truing up of the tariff of

the 2019-2024 tariff period. Otherwise also, as per the CTUIL letter dated 19.02.2019 which is an integral part of the Connection Agreement it becomes clear that in accordance with Clause 1.2 of the said agreement, the installation of DTPC and PLCC at Kishanganj GIS sub-station were the responsibility of the Petitioner.

(d) The bays that are essential elements which connect to the transmission line and the non-availability of the 80 MVAR switchable line reactor at Kishanganj did not affect the completion or successful operation of the 400 kV Kishanganj – Darbhanga line as evident from successful trial operation of the assets. Non-availability of the line reactor has not affected the operation/availability of the line from 11.3.2019 onwards till the reactor is commissioned on 22.6.2019. The above-mentioned delays in commissioning of the reactor was for reasons beyond the control of PGCIL.

Rejoinder on behalf of the Petitioner on PGCIL's reply on merits:

23. The Petitioner in its rejoinder dated 26.9.2022, has submitted as under:

(a) The principle of amendment of pleadings is enshrined in Order 6 Rule 17 of the Code of Civil Procedure ,1908 (CPC) which aims to minimize the litigation, minimize the delay and to avoid multiplicity of suits. Based on the above principle, the Petitioner, by way of amending its petition is not changing its stand or relief in any manner, rather the Petitioner is trying to avoid multiplicity of proceedings. In this regard, the Petitioner has placed its reliance on the judgment of the Hon`ble Supreme Court in the case of *Sampath Kumar v. Ayyakannu*, [(2002) 7 SCC 559] wherein it has been laid down that the amendment ought to be allowed where (a) the basic structure of the suit is not altered by the proposed amendment even if the nature of relief sought is different, (ii) if it is permissible for the party to file an independent Petition, why the same relief which could be prayed for in a new petition cannot be permitted to be incorporated in the pending suit, ((iii) allowing the amendment would curtail multiplicity of legal proceedings (iv) Order 6 Rule 17 of the CPC confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such

amendments as are directed towards putting – form and seeking determination of the real questions in controversy between the parties shall be permitted to be made, and (v) Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In former case generally, it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended.

(b) On 27.2.2019, a Connection Agreement was entered into between ATL and PGCIL where ATL was required to provide FODP and approach cable. As the TSA provides for substation works to be completed by ATL only at the Darbhanga end, the requirement under Connection Agreement ought to pertain only to Darbhanga Substation. However, on PGCIL's request, on 10.3.2019, the certain works were completed, tested and commissioned in the presence of PGCIL's representative namely (i) PLCC was installed (within SCOD) at Kishanganj Substation, and (ii) Cable termination works for DTPC including FODP and approach cable.

(c) Thereafter, on 11.3.2019 after receiving permission from ERLDC, charging of Element 2 along with both bays at both ends started. Moreover, there is no mismatch of commissioning as PGCIL in its Petition No. 677/TT/2021 has also sought approval of COD of its bays at Kishanganj from 14.3.2019 and on the same date i.e. 14.03.2019, ATL has also achieved its commercial operation of Element 2. As per the Commission's order in the above Petition, time overrun of PGCIL's bays at Kishanganj end has to be decided along with extension of SCOD of the Petitioner's transmission project (Element 2) in the present Petition.

(d) The switchable line reactors are required for charging of the line i.e. Element 2. As per Schedule 3 of the TSA, it was PGCIL's obligation to complete the switchable line reactors on each circuit at Kishanganj end to control voltage so that there is no tripping in lines which are longer than 200 km. However, PGCIL had only set up a single 80MVAr switchable line reactor with NGR for

circuit - I of Element 2, thus, PGCIL chose to bypass the requirement of installing line reactor for circuit – II. Therefore, PGCIL’s submission that non-completion of switchable line reactors has no effect on commissioning of Element 2 is incorrect.

(e) The original relief sought by the Petitioner was extension of SCOD of the Transmission Project with no financial implication on LTTCs due to commercial operation of Element 2 seven days after the SCOD. In the amended petition, the Petitioner has *inter alia* sought for condonation of delay in commercial operation of Element 2 due to no fault of the Petitioner under TSA. Effect of both, the original Petition and the amended Petition remains the same. However, since determination of time over-run is directly related to SCOD, the Petitioner’s submissions regarding Element 2 are necessary and pertinent to be taken on record for adjudication of time overrun for Element 2.

Hearing Dated 21.4.2022

24. Vide Record of Proceedings for the hearing dated 21.4.2022, the Petitioner was directed to implead CTUIL and BPC and file revised memo of the parties. CTUIL and BPC were directed to file their reply.

Hearing Dated 15.7.2022

25. During the course of hearing, learned counsel for the Respondents No. 1 and 6 sought time to file reply to the IA. Accordingly, Respondents were directed to file reply to the IA. The Respondents have filed their reply.

Hearing Dated 24.11.2022

26. During the course of hearing, learned counsels for the Petitioner and the Respondents made their detailed submissions in the matter. The Petitioner vide Record of Proceedings for the hearing dated 24.11.2022 was directed to provide the

information called for. The Petitioner vide its affidavit dated 22.12.2022 has provided the information called for. The Petitioner has placed on record the details for Element 1 with respect to the Court Cases, Stay/Injunctions for different locations, as well as the details with respect to the Statutory Clearances/Permissions in a tabular format. The Petitioner has also placed on record google earth files for both Elements which includes diagram reflecting the three BPC routes and diagram reflecting ATL route.

27. Vide Record of Proceedings for the hearing dated 24.11.2022, CTUIL was directed to submit the scope of work related to elements in use including installation of PLCC, DTPC etc. and details of the identified responsible entities for each such scope. CTUIL vide its affidavit dated 28.12.2022, has submitted the information in a tabular format detailing the scope of work related to elements in use including installation of PLCC, DTPC, etc. and identified responsible entities for each such scope.

28. Vide Record of Proceedings for the hearing dated 24.11.2022, the parties were permitted to file their written submissions. The Petitioner and the Respondents No. 1 & 6 have filed their written submissions dated 17.12.2022.

Written submissions

29. The Petitioner in its written submissions dated 17.12.2022, has mainly reiterated the submissions made in the pleading and additionally has submitted as under:

- (a) Out of 321 towers on Element 1, ATL faced ROW issues at over 150 locations spread across a length of 81.5 km. The Petitioner has placed on

record details regarding specific locations affected by RoW issues and corresponding delays vide additional affidavit dated 27.1.2023 and 22.12.2022.

(b) The Force Majeure events faced by the Petitioner were unforeseen and completely beyond the control of the Petitioner which cumulatively impacted the critical path of Element 1 caused delays in completion of foundation, erection and stringing works. However, the Petitioner in order to resolve the same, undertook various mitigating steps viz., (i) numerous requests made for support from CEA, local authorities, DM, BDO, SP and LTTCS vide various correspondences issued to authorities; (ii) defended all suits for injunctions filed by the land-owners; (iii) approached the DMs for directions under Section 16(1) of the Telegraph Act, 1885.

(c) Despite numerous requests and correspondences issued by the Petitioner, the LTTCS have not only failed to assist the Petitioner but also they have failed to acknowledge the Petitioner's letters and Force Majeure. Moreover, it was only on 8.8.2019 that the Petitioner had received a letter from Bihar State Power (Holding) Company Ltd stating that the Petitioner's plea raised vide letter dated 4.5.2019 does not qualify as Force Majeure.

(d) The Petitioner's scope was stretched beyond the TSA just 7 days before the SCOD. However, despite the same, the Petitioner completed all works by 10.3.2019. Element 2 was commercially operated from 14.3.2019 along with PGCIL's bays. Hence, there is no mismatch in commissioning.

30. The Respondent Nos. 1 and 6, in written submissions dated 17.12.2022, has mainly reiterated the submissions made in the reply and additionally has submitted as under:

(a) The present Project was awarded to the Petitioner through TBCB route and hence, while submissions of the bid by the Petitioner, issues like statutory clearances and RoW, etc. are expected to be accounted for. It is well known

that any transmission project faces such issues while its implementation and such issues are not unforeseen.

(b) The Petitioner, by 31.3.2016, was well aware of the route for laying the transmission lines and the obstacles it might face therein during laying of lines/erection of towers. Therefore, the delay in the commissioning and implementation of the Project is attributable to failure and negligence on the part of the Petitioner in applying for various statutory clearances and permits.

(c) Moreover, there was a delay on the part of the Petitioner from the very beginning and the same has not been justified, as on one hand, approximately 1 year 3 months i.e. 450 days are lost in seeking approvals from the TSA effective date i.e. 6.1.2016 to 3.4.2017. While on the other hand, the delay from the SCOD to the alleged COD of Element 1 is about 320 days (10-11 months).

(d) The Petitioner has also grossly failed to follow the recommendation of the 'Report of Task Force on Transmission Projects' dated 28.2.2005, issued by the Ministry of Power vide Office Order No. 11/2/2005-PG, as there have been no efforts on the Petitioner's part to reduce the time that was eventually taken in the execution of its Project which clearly depicts the negligent conduct of the Petitioner. Hence, the beneficiaries ought not to be made to face the burden of the Petitioner's defaults and delays.

Analysis and Decision:

31. We have considered the submissions of the Petitioner and the Respondents and perused the pleadings and documents available 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?

Issue No. 2: Whether the Petitioner is entitled for time extension under Force Majeure for Element 1?

Issue No. 3: Whether there is time over-run in respect of Element 2 due to delay in implementation of PLCC and DTPC?

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?

32. The Petitioner has claimed relief under Article 11 (Force Majeure) of the TSA.

Article 11.5.1 of the TSA provides as under:

“11.5 Notification of Force Majeure Event

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

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

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

33. Under Article 11.5.1 of the TSA, an affected party shall give notice to the other party of any event of Force Majeure as soon as reasonably practicable, but not later than seven days after the date on which the party knew or should have reasonably known of the commencement of the event of Force Majeure. It further provides that

such notice shall be a pre-condition to the affected party`s entitlement to claim relief under the TSA.

34. In the present case, the Petitioner has placed on record the various notices issued to the LTTCs intimating the occurrence as well as the cessation of the Force Majeure events. For severe Right of Way issues due to resistance from local land owners, court proceedings, lack of administrative local support, etc. the notices were issued by the Petitioner on 25.6.2018, 12.8.2018, 18.7.2018, 13.8.2018, 7.10.2018, 10.12.2018, 20.12.2018, 25.12.2018, 30.1.2019, 20.2.2019, 7.3.2019, 13.3.2019, 26.3.2019, 27.4.2019, 4.5.2019, 11.5.2019, 18.5.2019, 25.5.2019, 1.6.2019, 8.6.2019, 22.6.2019, 29.6.2019, 6.7.2019 and 17.8.2019 informing and keeping apprised the other side about severe RoW issues being faced at various locations and requesting for extension of SCOD. For heavy rainfalls in the States of West Bengal and Bihar, the notices were issued on 17.8.2017 and 30.10.2017. For the delay in grant of statutory approvals viz. power-line crossing, highway crossing, defense aviation and social forest/tree in Government of land, the notice was issued by the Petitioner on 25.1.2019. Further, the Petitioner also issued consolidated notice in respect of all Force Majeure events on 17.8.2019. In the original Petition, the Petitioner had indicated that many of the claimed force majeure events were still on-going as the approval(s) were still pending. However, in the amended Petition, the Petitioner has indicated the receipt of various approval(s) post filing of the Petition and the completion of works relating to Element 1. As such, none of the Respondents have made any submission/objection on the aspect of issuance of notice by the Petitioner under the aforesaid provision.

35. As per Article 11.5.1 of the TSA, it is clear that issuance of notice about the Force Majeure event is a pre-condition to the affected Party's entitlement to claim relief under Force Majeure. In our view, before approaching the Commission, the Petitioner has complied with the requirement of TSA regarding prior notice to the LTTCs regarding occurrence of Force Majeure events relating to (i) Right of Way issues due to disputes and resistance by the local land owners, court proceedings and lack of administrative local support, etc.; (ii) delay due to heavy rainfall in the States of West Bengal and Bihar and (ii) delay in obtaining the statutory clearances.

36. The issue is answered accordingly.

Issue No. 2: Whether the Petitioner is entitled for time extension under Force Majeure for Element 1?

37. The Petitioner has sought time extension under the TSA on account of the occurrence of Force Majeure events during the construction/implementation of the Element 1, which have led to the delay in achieving the commercial operation of the said Element.

38. The Provisions of the TSA with regard to "Force Majeure" are extracted hereunder:

"11.3 Force Majeure

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

(a) Natural Force Majeure Events:

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

(b) *Non-Natural Force Majeure Events:*

i. Direct Non-Natural Force Majeure Events:

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

ii. Indirect Non - Natural Force Majeure Events.

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

11.4 Force Majeure Exclusions

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

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

.....

11.6 Duty to perform and duty to mitigate

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

39. In the light of the provisions of Force Majeure, the claims of the Petitioner have been examined. The Petitioner has submitted that construction of Project was delayed for the reasons beyond its control on account of (a) severe RoW and law & order problems on account of resistance from local land owners during construction works, lack of administrative local support, pending court proceedings and stays, etc., (b) dispute with respect to amount compensation payable to the land owners, (c) dispute with respect to multiple land owners claiming compensation for the same land, (d) manhandling of Petitioners personnel, (e) court proceedings and stay/interim injunctions granted thereof, (f) pendency of application made by Petitioner u/s 16(1) of the Telegraph Act, 1885, (g) lack of appropriate local administrative support, (h) heavy rainfall and floods in the State of West Bengal and Bihar; and (e) delay in grant of the requirement of statutory clearance to be obtained from the various authorities.

40. The Respondents 1 & 6 in their reply & written submissions have objected to the various force majeure claims made by the Petitioner. The Respondents have submitted that the Petitioner has miserably failed in planning and implementation of the Project and it ought to have prudently planned its Project execution activities including acquisition of various statutory clearances to keep itself aligned with the agreed time frame for completion of transmission Project. It is submitted that delays caused by the Petitioner in the present case were controllable events i.e. delays in applying for clearance itself and had the Petitioner acted diligently, the time lapsed in applying for the statutory clearance could have been avoided, which would have led

to early declaration of commissioning of the Project. The Respondents have also submitted that as per the Project Execution Plan submitted by the Petitioner itself, the *'Detailed Survey including route alignment, profiling & tower spotting Detailed Soil Investigation'* was completed by 31.3.2016 and thus, the Petitioner was well aware of the route for laying of transmission line and location of obstacles, if any, which it may face during the laying of lines/erecting towers. It is also submitted that as per Clause 2.14.2.6 of RfP, the Petitioner ought to have been aware of the route for laying of transmission line and should have familiarised itself with the timeframes involved in obtaining the permits and clearances and thus, the delays claimed by the Petitioner, which attributed to its delay in applying for the consents/clearances in first place, ought not to be allowed. The Respondents have also relied upon the 'Report on Task for on Transmission Project' to contend that the said Report at Article 4.1 clearly provides that the activities which can be taken up simultaneously include (a) route alignment, detailed survey & soil investigations for transmission lines & sub-station, and (b) initiating Forest, Environmental & other statutory clearance after detailed survey and such practice has the potential to reduce the completion period by 12 months. The Respondents have submitted that in the present case, the Petitioner has failed to follow the recommendation of the said Report issued by the Ministry of Power and there had been no efforts on its part to reduce the time that was eventually taken in execution of its Project. It has been further submitted that the time lost in seeking various approvals from the effective date of TSA i.e. 6.1.2016 to 3.4.2017 i.e. the date from which the Petitioner started applying for statutory clearance, is approximately 450 days whereas the delay from the SCOD to the claimed COD of Element 1 is about 320 days.

41. *Per contra*, the Petitioner has replied that duly ascertained the route of transmission line before the commencement of construction. However, the hurdles faced during laying of line could not have been ascertained until the construction of line actually started. It has been further submitted that while carrying out the various targets as per the RfP for the Project, the Petitioner had also applied to the relevant authorities for consent and approvals/statutory clearances. However, construction of the Project started only after obtaining the financial closure in October, 2016 and obtaining the Ministry of Power's approval under Section 164 of the Act on 19.10.2016. It is submitted that '*Detailed Survey including route alignment, profiling & tower spotting Detailed Soil Investigation*' as referred to by the Respondents was only related to the construction aspect of the Project, which focused on suitability of the route for carrying construction of Project. The Petitioner could not have possibly anticipated or controlled the RoW issues raised by the landowners. Similarly, there is no delay by the petitioner in applying for the various statutory clearances. It was only towards the end of 2016 when the Petitioner achieved financial closure and started with construction activities of the line and accordingly, it applied for the statutory clearances starting April, 2017. It is submitted that the responsibility of the Petitioner was only with respect to applying to statutory government authorities, which it did and the delay in grant of these approval was not within the control of the Petitioner. The Petitioner has submitted that it is settled law that any delay due to grant of statutory approvals, which is beyond a reasonable control of the developer, amounts to force majeure under the agreement and in this regard, has placed the reliance on APTEL's judgment dated 2.8.2021 in Appeal No. 160/2020 titled as *Clearsky Solar Pvt. Ltd. v. KERC and Ors.* and judgment dated 14.9.2020 in Appeal No. 351 of 2018 titled *Chennamangathihalli*

Solar Power Project LLP and Ors. v. Bangalore Electricity Supply Company Ltd. and Ors.

42. We have considered the submissions made by the parties. Clause 2.14.2.6 of the RfP provides as under:

“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.

As per the above provision, the bidders were required to obtain all necessary Consents, Clearances and Permits as required and also to familiarize itself with the procedure and time frame required to obtain such Consent, Clearance and Permits. Thus, the bidders were duly required to factor into the timeline required for obtaining the various Consent, Clearances and Permits in the course of implementation of the Project and accordingly, it is expected to apply for Consent, Clearance and Permits at first opportune moment. We are of the view that there may not a straitjacket approach in laying down the timelines for applying for the various Consents, Clearance and Permits as required for the construction of transmission projects but the developer has to be prudent in timely applying for the requisite the Consent, Clearance and Permits and the inordinate delays on the part of the developer in making the necessary applications and the consequent delays in grant thereof cannot be overlooked as it amounts to negligence on its part and thus, delays caused thereof cannot be considered under the plea of force majeure as the negligence on the part of TSP is clearly excluded under the force majeure. Furthermore, the petitioner is expected to diligently follow up such consents and clearances. Thus, it has to be seen in context of each statutory approval in respect of the which the Petitioner has raised the force

majeure plea. Hence, it would be appropriate to examine this aspect while dealing with the individual force majeure claim(s) of the Petitioner in the subsequent paragraphs.

(a) Delay due to Severe ROW issues faced by the Petitioner

43. The Petitioner has submitted that since December 2016, ATL has been facing RoW issues during the execution of the project works in the form of (i) resistance from local land owners during construction works; (ii) disputes with respect to the amount of compensation payable to the land owners in terms of Section 10(d) of the Telegraph Act, 1985; (iii) Dispute with respect to multiple land-owners claiming compensation for the same land; (iv) construction of illegal permanent structures under or in the vicinity of existing Extra High Voltage (“EHV”) transmission lines corridor; (v) manhandling of ATL personnel, (vi) court proceedings and stay/interim injunctions granted thereof (vii) pendency of application made by Petitioner under Section 16(1) of the Telegraph Act, 1885 (viii) lack of appropriate local administrative support, etc. The Petitioner has on several occasions written numerous letters to the District Magistrate (“DM”), of various regions, the Inspector-In charge of different police stations, the Superintendent of Police of different areas notifying and apprising each of them of the above-mentioned issues and requesting their co-operation to resolve the same. The Petitioner has further submitted that the CEA, in its monthly report of Transmission Projects has acknowledged that there were RoW constraints being faced by the Petitioner in construction of Element 1 of the Transmission Project. These reports are in the public domain and are accessible by the LTTCs. Therefore, the LTTCs are clearly aware of the hardship faced by the Petitioner in implementing the Transmission Project and the reasons for the delay. Thus, in view of the above, the Petitioner is entitled to extension in achieving SCOD on account of RoW issues faced by the Petitioner during the construction stage of the Transmission Project.

44. The Petitioner has submitted that it faced the severe RoW issues at over 150 locations (out of 321 locations) spread across the length of 81.5 km of Alipurduar-Siliguri 400 kV D/c line. The Petitioner has submitted that at the beginning of the construction of the aforesaid line, the Petitioner vide its letter dated 25.11.2016 apprised the District Magistrate (DM), Jalpaiguri about the construction of aforesaid transmission line and requested for co-operation for all potential administrative issues. It has been submitted that since December, 2016, the Petitioner continued to face the severe RoW issues during the execution works. CEA, in its monthly progress report of Transmission Projects awarded through TBCB route as on 31.12.2016, also acknowledged the Petitioner facing the RoW issues in construction of the aforesaid line. It is indicated that the keeping in view the severe RoW issues being faced by the Petitioner during the execution works, the Petitioner had approached the various administrative authorities seeking necessary support to resolve the RoW issues till the commissioning of the aforesaid line. The details of such correspondence as furnished by the Petitioner, in brief, are as under:

Sr.	Date	Particulars
1	9.6.2018	Requested the Officer In-Charge, New Jalpaiguri to resolve the issues relating to resistance by the land owners demanding the unreasonably high crop compensation.
2	23.6.2018	Requested the Inspector In-Charge, Dhugpuri to extend the administrative support to the Petitioner against the local resistance.
3	6.9.2018, 1.12.2018, 5.12.2018, 8.12.2018, 17.12.2018	The Petitioner again wrote to the Inspector-In-Charge of different Police Station and Superintendent of Police of different areas notifying the location specific RoW issues and requested for intervention of the police personnel to resolve the RoW issues.
4	8.8.2018	Informed the DM, Jalpaiguri & Alipurduar about the some landowners objecting to the execution works at site and

		sought support to resolve the above issues in order to avoid delays.
5	31.8.2018, 10.9.2018, 30.11.2018, 28.12.2018, 20.2.2019, 14.3.2019, 7.5.2019 & 10.5.2019	The Petitioner again notified the DM, Jalpaiguri & Alipurduar about the location specific RoW issues giving details of the concerned land owners and requested for intervention to resolve the issues.
6	21.7.2018, 10.8.2018, 4.10.2018, 29.11.2018, 26.12.2018, 31.12.2018, 31.1.2019, 13.2.2019, 15.4.2019, 25.6.2019, 12.7.2019	The Petitioner also wrote to Business Development Officers (BDOs) of different districts requesting their intervention to RoW issues at different location with respect to foundation, erection and stringing works.
7	17.9.2018, 26.9.2018 & 28.9.2018	BDO, Dhugpuri, Jalpaiguri informed the Petitioner, various local administrative authorities and few specific landowners about meetings regarding RoW issues faced by the Petitioner.

45. In the meantime, the Petitioner also sought assistance of CEA in resolving the RoW issues faced by it and the assistance extended by CEA was as under:

Sr.	Date	Particulars
1	12.9.2018	In a meeting conducted by Chief Engineer, Power System Project Monitoring Division, CEA, the Petitioner informed CEA about the RoW issues being faced by it and requested to direct the concerned authorities to intervene and resolve the issue. The said request was accepted by CEA.
2	28.9.2018	CEA informed South Bihar Discom about conducting of a meeting by CEA on 8.10.2018 to resolve the RoW issues faced by it and also to attend the said meeting.
3	8.10.2018	A meeting was conducted by Chief Engineer, Monitoring Division, CEA to review the construction of transmission lines and the RoW issues faced in construction. Despite specific direction, South Bihar Discom did not attend the said meeting.
4	15.10.2018	Chief Engineer, CEA informed Additional Chief Secretary, Govt. of West Bengal to instruct the relevant government authorities to intervene to resolve the issues being faced in completion of balance works by the Petitioner.

5	2.11.2018	Joint Secretary, Govt. of West Bengal forwarded the copy of Chief Engineer, CEA's letter dated 15.10.2018 to DM Jalpaiguri & Alipurduar – requesting them to intervene in the prevailing RoW issues at the Project locations.
6	29.11.2018	A meeting was conducted by the DM, Jalpaiguri regarding the RoW issues wherein it was decided that the sub-Divisional Officers will meet the MLAs, Petitioner's representatives, BDOs, Shabhapati and resolve the issues and that the Block Land and Land Reforms Officer would monitor the same. Deputy Director, CEA also attended the said meeting.
7	18.3.2019-19.3.2019	Deputy Director, CEA also conducted a site visit in order to review the progress and situation of construction of Alipurduar- Siliguri 400 kV D/c line wherein the petitioner apprised the Deputy Director, CEA about the RoW issues faced in West Bengal areas. Taking note of the above, the Deputy Director, CEA gave instructions to respective DMs and asked them to depute an officer from their departments to take up the RoW issues with respective district authorities of Jalpaiguri & Alipurduar and extend the support to the Petitioner for timely completion of works.
8	8.4.2019	Chief Engineer, CEA wrote to Principal Secretary, Govt. of West Bengal about the visit of the construction site by team of CEA officers & RoW issues and requested to intervene and render the required assistance for completion of the Project.

46. We have noted the submissions made by the Petitioner on the RoW issues faced by it at various locations during the implementation of the Alipurduar- Siliguri 400 kV D/c line. A slew of correspondences furnished by the Petitioner indicate the severity of RoW issues faced by it and the various persuasive measures undertaken by it including approaching the concerned authorities under the Telegraph Act, 1985, State Government, Hon'ble High Court of Calcutta by way of Writ Petitions as well as the Central Electricity Authority for assistance in resolving these RoW issues. However, it has to be noted that RoW issues are part and parcel of implementation of transmission system projects and the developers are expected to factor into the eventualities of facing of such problems and the consequent time & efforts to be

undertaken in resolving them. Every geographical area from where the transmission line is to be laid / to be passed through has its fair share of difficulties, be it difficult terrain or RoW issues, which the developer undertakes to deal with while bidding for such large scale infrastructure projects. As such, there cannot be any objective criteria for terming the RoW issues faced by the licensee/developer as a force majeure event. In each case, the licensee/developer claiming the RoW issues as force majeure has to satisfactorily demonstrate that despite making an all out efforts and exhausting all the available remedies to it, the licensee could not resolve such issues for no fault of its own and this ultimately led to the delay in implementation of the transmission project.

47. In other words, whether the RoW issue, in particular case, qualifies as a force majeure event or not has to be examined on the basis of the facts & circumstances involved in each case and also the efforts & remedies availed by the licensee to resolve such issues in such case. As already noted above, the Petitioner has submitted the details of correspondences exchanged with various Authorities along with supporting documents. Insofar as they relate to the obstruction/ resistance from the land owners, request for intervention/ assistance of the Govt. Authorities in dealing with them etc. cannot be considered as force majeure event and no relief under force majeure can flow to the Petitioner as such activities are required to be anticipated by the licensee during the course of implementing the projects. However, what have to be distinguished from these generic efforts of resolving the RoW issues are the delays - owing to the stays/injunctions granted by the Courts and the Court proceedings arising out these RoW issues & in the course of the Petitioner having availed the legal remedies in resolving the RoW issues. Accordingly, the delays attributable to the above aspect have been dealt with separately.

(b) Delay due to stay/injunction granted by the court and delay due to various proceedings initiated, either by the landowners or the Petitioner.

48. The Petitioner has further indicated that on 18.2.2019, it filed 9 Nos. of applications under Section 16(1) of the Telegraph Act, 1885 requesting District Magistrate (DM), Jalpaiguri and DM Alipurduar to intervene in terms of the power conferred under the Telegraph Act in respect of its applications under Section 16(1) of the Telegraph Act before the District Magistrate (DM), Jalpaiguri, *inter-alia* for exercise the power of telegraph authority and to resolve the RoW issues, DM, Jalpaiguri, on 25.2.2019, directed the Land Reform Officers to submit a report regarding the feasibility of the construction of the Petitioner's transmission line. Therefore, in view the long pendency of its such applications filed under Section 16(1) before the DM, the Petitioner, on 19.6.2019, was required to file filed Writ Petition No. 152 of 2019 before the Hon'ble High Court of Calcutta in circuit bench Jalpaiguri, *inter alia*, seeking quashing of DM's order dated 25.2.2019 and direction to DM, Jalpaiguri to dispose of its Section 16(1) applications at the earliest. In this regard, the Hon'ble High Court of Calcutta vide order dated 26.6.2019 directed the DM, Jalpaiguri to dispose of the Petitioner's Section 16(1) applications within 3 weeks from the date of the order. Pursuant to the aforesaid order of the Hon'ble High Court of Calcutta, DM, Jalpaiguri, on 9.8.2019, observed that one joint field survey was required to be conducted by the land acquisition surveyor in presence of the Petitioner & the landowners and accordingly, directed the special land acquisition officers to conduct a joint field survey at the disputed plot and submit its report within 10 days from the receipt of the order. The said direction was again challenged by the Petitioner on 27.8.2019 through C.O. No. 60 of 2019 before the Hon'ble High Court of Calcutta on the grounds that (i) despite the order of Hon'ble High Court dated 26.6.2019, DM, Jalpaiguri kept its applications

filed under Section 16(1) pending, and (ii) that an enquiry by the land acquisition surveyor for deciding the compensation was beyond the jurisdiction of DM, Jalpaiguri. Consequently, the Hon'ble High Court of Calcutta in circuit bench Jalpaiguri vide order dated 30.8.2019 allowed the said application and held that the DM, Jalpaiguri acted beyond the jurisdiction in directing the acquisition surveyor to arrive at a conclusion upon a field survey for the purpose of assessing compensation and consequently, the order of DM, Jalpaiguri dated 9.8.2019 was set aside with specific direction to dispose of the Section 16(1) applications within a week by providing appropriate police protection and to record a satisfaction as to whether the resistance was offered to installation of the electric poles on the lands in question. Consequent to the above, DM Jalpaiguri vide order dated 6.9.2019 observed that (i) ATL attempted to resume the construction works on 1.9.2019 but faced stiff resistance from land owners, and (ii) ATL filed a complaint before the concerned police station and intimated the SP and DMs offices along with copy of the photos and videos regarding resistance faced in execution of works. Accordingly, DM Jalpaiguri, directed the investigating officer to submit the report with respect to the obstructions created by the above landowners. Thereafter, on 17.9.2019, DM Jalpaiguri passed an order dated 17.9.2019 which, *inter-alia*, recorded that (i) pursuant to the order dated 6.9.2019, Inspector-in-Charge, Dhugpuri submitted its report on 12.9.2019, (ii) the dispute between the Petitioner and one land owner, namely Shri Makchhedul Hoque was resolved, (iii) other land owners who disputed the compensation were directed to approach the appropriate authority i.e. District Judge in terms of Section 16(3) of the Telegraph Act, (iv) the land owners were directed not to obstruct the Petitioner's activities, and (v) Inspector-in-Charge, Dhugpuri was directed to submit a compliance report upon successful execution of the Petitioner's work on the disputed lands. The Petitioner has further stated that even

after the above order of DM, Jalpaiguri dated 17.9.2019, it continued to face the RoW issues at several location and consequently, filed the various applications under Section 16(1) of the Telegraph Act for such locations (as already noted in above table).

49. Further, in response to the specific query of the Commission vide Record of Proceedings for the hearing dated 24.11.2022, the Petitioner has also furnished the details of Court Proceedings wherein the stay/injunction has been granted against the Petitioner, the period thereof and the remedial action taken by the Petitioner vide its affidavit dated 22.12.2022. The said details are reproduced hereunder

Sr.	Court Proceedings & relevant element/tower loc.	Stay/Injunction order(s)	From - To	Remedial action taken, if any
1	Location No. 4/A	Title Suit No. 19/2019 filed by Ganesh Prasad	22.1.2019 to 10.8.2019 (about 7 months)	<p>1. The Court of Ld. Civil Judge Junior Division passed TS for claiming declaration, Injunction and consequential reliefs along with an application under order 39 Rule 1 & 2 read with section 151 of CPC on 22.1.2019 and advised to appear before the court within 10 days.</p> <p>2. Court allowed injunction till 26.4.2019 vide order dated 22.1.2019.</p> <p>3. On 13.2.2019, KPTL (contractor of ATL) filed an Appeal challenging the Stay Order vide Misc. Appeal No. 7/2019</p> <p>4. ATL intimated the matter to DM, SP, SDO, vide letter dated 14.2.2019.</p> <p>5. Official from CEA visited the site on 18.3.2019 – 19.3.2019 and requested Principal Secretary to extend his kind support for resolving RoW issue vide letter dated 8.4.2019.</p> <p>6. On 22.4.2019 and 26.4.2019 the matter was adjourned since the case record was transferred to the Appellate Court.</p> <p>7. ATL wrote a letter dated 27.6.2019 to Chief Secretary, West Bengal Gov. for support in</p>

				<p>resolving various RoW issues along with this court case of Ganesh Prasad.</p> <p>On 10.8.2019, Settlement Agreement was executed between parties.</p>
2	Location no. 143/0	PS/40/2018 by Kamala Roy	16.11.2018 to 7.2.2019 (2 Months 7 days)	<p>1. Kamala Roy filed case no. PS/40/2018 on 1.10.2018.</p> <p>2. On 16.11.2018, Court issued injunction till 26.11.2018 and thereafter extended till 22.1.2019.</p> <p>3. Prior to this, the actual dispute regarding the same land has been started.</p> <p>4. ATL was served a legal notice dated 25.1.2018. Another notice was received on 12.2.2018 also demanding compensation for the same land.</p> <p>5. ATL replied to the notice sent by Swapan vide its lawyer on 13.2.2018.</p> <p>6. Again ATL received another notice on 17.4.2018 from Swapan.</p> <p>7. Swapan Seal sent another letter on 31.12.2018 to DM demanding compensation on the same land.</p> <p>8. ATL on 21.1.2019 sent a letter to BLLRO, Alipurduar, for ownership verification of the said land.</p> <p>9. ATL received Memo dated 7.2.2019 from DM, Alipurduar instructing settle down the case and submitting compliance report.</p> <p>10. Only Sudhir Roy able to produce the original documents and Panchayat certified him as the actual owner of the land.</p>
3	Location No. 107/1	Title Suit No. 5/2019 by Nilmani Das	15.2.2019 to 8.4.2019 (About 3 months)	<p>1. The Court on 15.2.2019 passed the injunction against ATL till 16.3.2019.</p> <p>2. Subsequently, ATL appeared before the court and the court has vacated the injunction by Order No. 10 dated 8.4.2019.</p>
4	Location No.107/1	Title Suit No. 4/2019 by Tarapada Das	6.2.2019 to 23.7.2019 (5 Months and 18 days)	<p>1. The Court on 6.2.2019 passed the injunction against ATL.</p>

				<p>2. Subsequently, ATL appeared before the court and the court has vacated the injunction by Order No. 6 dated 8.4.2019.</p> <p>3. Misc. Appeal 8/2019 dated 7.5.2019 filed by Tarapada Das.</p> <p>4. The case was amicably settled during July' 2019 and compensation paid on dt. 23.7.2019.</p>
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50. The Petitioner has submitted the details relating to various proceedings initiated, either by the landowners or the Petitioner, in respect of the construction of the line at various locations before the District Magistrate, Jalpaiguri & Alipurduar and the District Court, Jalpaiguri, etc. The details of some of the relevant proceedings are reproduced hereunder:

Sr	Loc.	Case	Court/Forum	Petitioner /Applicant	Responden t/Opponent	Comments
1	89/0 - 90/0	Ref.No. ATL/SLG/AS/ 749/2019-2020	District Magistrate Jalpaiguri	ATL	Paritosh Chandra Roy & Ors.	Applications filed by ATL under Section 16 (1) of the Indian Telegraph Act, 1885 on 22.10.2019 seeking support for executing erection work against the landowners obstructing the completion of the project work
2	73/0 - 74/0	ATL/SLG/AS/ 749/2019-2020	District Magistrate Jalpaiguri	ATL	Meghlal Mandal & Ors.	
3	75/0 - 76/0	ATL/SLG/AS/ 749/2019 -2020	District Magistrate Jalpaiguri	ATL	Bapi Roy, Swadesh Roy & Ors.	
4	82/1	ATL/SLG/AS/ 749/2019-2020	District Magistrate Jalpaiguri	ATL	Birendra Nath Barman & Ors.	
5	74/0	ATL/SLG/AS/ 749/2019-2020	District Magistrate Jalpaiguri	ATL	Uttam Roy & Ors.	
6	84A/0	ATL/SLG/AS/ 749/2019-2020	District Magistrate Jalpaiguri	ATL	Ajuar Rahaman & Ors.	
7	81/0	ATL/SLG/AS/ 749/2019 -2020	District Magistrate Jalpaiguri	ATL	Ms. Anjali Roy & Ors.	Applications filed by ATL under Section 10(d) read with Section 16(1) of the Indian Telegraph Act on 2.12.2019 seeking support for executing the erection works against the landowners obstructing the completion of project work.
8	80/2	ATL/SLG/AS/ 748/2019-2020	District Magistrate Jalpaiguri	ATL	Sh. Susanto Roy & Ors.	
9	80/3 - 81/0	ATL/SLG/AS/ 748/2019-2020	District Magistrate Jalpaiguri	ATL	Sh. Shailendra Nath Roy	
10	80/0	ATL/SLG/AS/ 748/2019-2020	District Magistrate Jalpaiguri	ATL	Sh. Briendranath Roy & Ors.	
11	80/1	ATL/SLG/AS/ 748/2019-2020	District Magistrate Jalpaiguri	ATL	Sh. Jainath Roy	
12	81/0 - 82/0	ATL/SLG/AS/ 748/2019-2020	District Magistrate Jalpaiguri	ATL	Sh. Kalidas Roy	
13	97/0	Memo No. 408/2019	District Magistrate Jalpaiguri	ATL	Jagdish Chandra Roy	Applications filed by ATL under Section 16(1) of the Indian Telegraph Act, <i>inter-alia</i> , praying to allow
14	80/2 -	Memo No.	District	ATL	Ripon Roy	

Sr	Loc.	Case	Court/Forum	Petitioner /Applicant	Responden t/Opponent	Comments
	80/3	408/2019	Magistrate Jalpaiguri			commencement of work by removing obstructions.
15	76/2	Memo No. 408/2019	District Magistrate Jalpaiguri	ATL	Ratan Roy	
16	81/0, 76/2	Memo No. 408/2019	District Magistrate Jalpaiguri	ATL	Dilip Roy	
17	76/1	Memo No. 408/2019	District Magistrate Jalpaiguri	ATL	Asim Roy	
18	77/0 - 78/0	Ref.No. ATL/SLG/AS/ 749/2019-2020	District Magistrate Jalpaiguri	ATL	Tapan Roy & Ors.	Applications filed by ATL under Section 10(d) read with Section 16(1) of the Indian Telegraph Act on seeking support for executing the erection works against the landowners obstructing the completion of project work.
19	132/1 - 133/0	Memo No. 2216 (3)	District Magistrate Jalpaiguri	ATL	Kailash Chandra Roy	Application filed under Section 16(1) of the Indian Telegraph Act.
20		Memo No. 2468 / LA	District Magistrate Jalpaiguri	Sri Sribash Sarkar	ATL	A complaint dated 6.12.2019 filed alleging non-payment of compensation for damages related to crops and trees on land.
21	69/0	Misc Case No. 24/2018	District Court of Jalpaiguri	Santosh Biswas	ATL	Application filed under Section 10(d) and Section 16(1) of the Indian Telegraph Act for determination and payment of compensation for diminution of land value and for other losses.
22	15/2	Title Suit No.272/2018	District Court of Jalpaiguri	Paritosh Sarkar	ATL	Application filed under Order 39 Rule 1 & 2 read with Section 151 of CPC alleging that ATL and others demanded the Petitioner to vacate his plot of land.
23	87/1 - 88/0	Memo No. 408/2019	District Magistrate Jalpaiguri	ATL	Krishna Gobindo Roy	Application under Section 16(1) of Indian Telegraph Act seeking direction to enable commencement of work.
24	82/0	Complaint Reference No. Ptn/R/No.794/19 dated 18.10.2019	In Court of Executive Magistrate, Jalpaiguri	Mr. Shashi Mohan Roay	ATL	Application under Section 144 of CrPC alleging breach of peace on his land by ATL and Ors.
25	33/0	Complaint Reference No. Ptn/R/No.949/19 dated 4.12.2019	In the court of Executive Magistrate Jalpaiguri	Khetku Roy	ATL	Application under Section 144(2) CrPC alleging ATL is doing illegal activities on his land.
26	38/0	Complaint Ptn/R/No. 917/2019	Court of Executive Magistrate Jalpaiguri	Jalpesh Agro Pvt. Ltd.	ATL	Application under Section 144 of CrPC alleging that there is a breach of peace on his land by ATL and Ors.
27	37/3 - 37/4	Complaint Reference No. 919/2019 dt. 26.11.2019	Court of Executive Magistrate Jalpaiguri	Madan Ghosh	KPTL (Contractor of ATL)	Application under Section 144 of CrPC alleging that there is a breach of peace on his land by ATL and Ors.
28	37/4 - 37/8	Complaint Ptn/R/O. 922/19 27.11.2019	Court of District Magistrate Jalpaiguri	Manoranjan Ghosh	KPTL (Contractor of ATL)	Application under Section 144 of CrPC alleging that there is a breach of peace on his land by ATL and Ors.
29	108/2	Memo No. 408/2019 dated 10.12.2018	District Magistrate, Alipurduar	KPTL (Contractor of ATL)		(1) KPTL (contractor of ATL) filed an application under 16(1) of Indian Telegraph Act on 10.12.2018 pursuant to which Notice was issued by DM dated 2.1.2019 for appearing before DM. 2) As the OP did not turn up before the court on 02/01/2019 the court has issued another notice for appearing

Sr	Loc.	Case	Court/Forum	Petitioner /Applicant	Respondent/Opponent	Comments
						<p>on 22/01/2019 for hearing of the Section 16(1) petition.</p> <p>3) Order passed by DM, Alipurduar on dated. 22.01.2019 for a joint visit of the proposed land by BDO, BLLRO- Falakata, ATL & OP to assess the valuation of both moveable and immovable to be damaged by ATL during construction activity as per Gov. norms. Further the DM had directed to submit the valuation report assessed by the team to the DM office (RM section) on or before 12.02.2019. And next hearing to be held on 14.2.2019 at office of Collector, Alipurduar.</p> <p>4) BDO serve memo no. 146/1(3) dt. 8.2.2019 to OP to joint survey and inspection of the land on dt. 11.2.2019.</p> <p>5) Title suit 3/2019 dt. 12.2.2019 Filed by OP.</p> <p>6) Court serve show cause notice to ATL on dt. 19.2.2019.</p> <p>7) Hearing of TS 3/2019 done by court on dt. 8.4.2019 and the Court vacated the temporary injunction order on the same day.</p> <p>8) Misc. Appeal No. 7/2019 dt. 8.4.2019 filed by Hazrat Ali.</p> <p>9) Letter no. ATL/SLG/WO-292WB/A-S/537/2019-20 dt. 30/04/2019 to DM for disposing the petition under section 16(1) filed by ATL and last hearing was conducted on 22.1.2019</p> <p>10) Through settlement agreement dated 27th May 2019, the parties have amicably settled the matter.</p> <p>11) Foundation and erection activity was completed after settlement agreement.</p> <p>12) Again the OP resisted KPTL's (contractor of ATL) stringing activity and physically assaulted KPTL's officials at site. FIR was lodged on 06/08/2019 against Hazrat Ali and Ors. (Case no. 412/19 dt. 06/08/2019 under section 363, 365/325/506/34 of IPC)</p> <p>13) The stringing activity resumed in September 2019.</p>
30	108/1 - 108/2	No. G/Complain /181/2019/973	District Magistrate, Alipurduar	Subrata Kantha	ATL	Complaint seeking compensation due to him from ATL.
31	15/3	Application (under 144) No.933 of 2017	Executive Magistrate, Jalpaiguri	Arup Chakraborty	ATL/KPTL	<p>1) KPTL (contractor of ATL) challenged the order (Application no.933 of 2017) in District Judge court. District Judge vacated the order on dt. 20.12.2017</p> <p>2) Caveat No. Order no. 1 dt. 20.12.2017 by KPTL.</p> <p>3) Title suit No. 270 (459) /2017 dt. 8.1.2018 filed by Arup Chakraborty & Manoj Paul.</p> <p>4) Show cause notice issued by Civil Judge, JR Div. dt. 8.1.2018.</p>

Sr	Loc.	Case	Court/Forum	Petitioner /Applicant	Respondent/Opponent	Comments
						5) Order no. TS 270(459)/2017 dt. 15.1.2018 passed by the court where no favourable order has been issued in favour of plaintiff.
32	34/1	Petition No. 205/18	SDEM Court	Asit Kumar Majumder	ATL	<p>1) The court has ordered IC vide order dt. 20.3.2018 to keep strict vigil to ensure the compensation to the petitioner in the meantime court also directed BLLRO to submit a detailed report regarding the land.</p> <p>2) KPTL (contractor of ATL) vide letter no ATL/SLG/WO-292WB/138/2017-2018 dt. 31.5.2018 requested SDO for identifying the actual land owners through proper survey as multiple claimants are arriving for compensation.</p> <p>3) BLLRO vide memo no. 469/BLLRO(S)/Jal/2018 dt. 27.6.2018 informed that the land is disputed one and original land owner could not be found.</p> <p>4) Asit Kumar Majumder filed Misc. Case No. 2 of 2019 in the District Judge Court on dt. 19.1.2019.</p> <p>5) The Court has dismissed the Misc. Case No. 2 of 2019 vide order dt. 6.12.2019.</p>
33	100/4	Caveat No. 27/2019	Civil Judge Court Jr. Div. & Sr. Div.	ATL	Against Krishna Pada Das	<p>1) Two nos. Caveats file against Krishna Pada Das in Civil Judge Court Jr. & Sr. Div. on date 24.1.2019.</p> <p>2) Legal notice dt. 25.1.2019 received from Ujjal Kumar Chakraborty Advocate on behalf of Krishna Pada Das. KPTL (contractor of ATL) replied the vide letter dt. 4.2.2019.</p> <p>3) Application under 16(1) filled on dt. 12.2.2019 against Krishnapada Das.</p> <p>4) Writ petition No. 03 of 2019 filled by Krishnapada Das at the Circuit Bench of Calcutta High Court in Jalpaiguri on dt. 1.3.2019 which was intimated to us through his advocate on 14.3.2019.</p> <p>5) The final order passed by High Court on dt. 1.4.2019. The High Court dispose the matter and instructed the Petitioner to allow KPTL continue their work. The Hon. High Court also ordered DM to determine the compensation within 2 months from the date of order.</p> <p>6) Review Petition No. 1 of 2019 dt. 5.4.2019 filled by Krishnapada Das.</p> <p>7) Agricultural dept. has submitted their assessment report vide Memo No. 647 dt. 25.4.2019.</p> <p>8) The matter related to WPA 3/2019 came to the DM court. The DM on dt. 4.6.2019 instructed both the parties to settle the matter amicably and submit report in the form of affidavit within 20.6.2019.</p> <p>9) DM on 20.6.2019 instructed both the parties to settle the matter amicably and submit report in the</p>

Sr	Loc.	Case	Court/Forum	Petitioner /Applicant	Respondent/Opponent	Comments
						<p>form of affidavit within 2.7.2019. DM also asked KPTL to hand over the proposal for compensation payment to the Petitioner so the Petitioner can go through and express their views.</p> <p>10) KPTL vide letter no. ATL/SLG/A-S/589/2019-2020 dt. 19.6.2019 handed over the proposal for compensation payment to the petitioner.</p> <p>11) DM on 2.7.2019 instructed both the parties to settle the matter amicably and submit report in the form of affidavit within 15.7.2019.</p> <p>12) Krishnapada Das has applied a fresh petition before DM on 15.7.2019.</p> <p>13) DM on 16.7.2019 has passed the order by the Ld. DM seeking Joint Field Survey report by BLLRO, Dhupguri and also asked KPTL to file their reply.</p> <p>14) DM instructed BLLRO vide memo No. 260/1(A)/XXI/16/WPA/CS/2019 dt. 16.7.2019 for conducting joint survey.</p> <p>15) KPTL filed their reply as instructed by DM on 5.8.2019.</p> <p>16) DM passed his final order on dt. 16.8.2019 where the compensation amount of Rs. 2,80,665/- has been ordered to pay to the Petitioner.</p> <p>17) KPTL vide letter no. ATL/SLG/A-S/649/2019-2020 dt. 28.8.2019 handed over the DD to Krishnapada Das and vide letter no. ATL/SLG/A-S/670/2019-2020 dt. 13.9.2019 the submitted the compliance to the court.</p>
34	98/0	Caveat No. 11/2019	Civil Judge Court Jr. Div. & Sr. Div.	ATL	Against Makchhedul Hoque	<p>1) Two nos. Caveats file against Makchhedul Hoque in Civil Judge Court Jr. & Sr. Div. on date 11.1.2019 & 16.1.2019 respectively.</p> <p>2) W.P. No. 1366/2019 dt. 17.1.2019 filled by Makchhedul Hoque in Principal Bench of Calcutta High Court.</p> <p>3) BDO's Memo no. 534/BDO/DPG dt. 25.1.2019 to Sakoajhora – II Gram Panchayat for checking the physical existence of the cold storage of Makchedul Houeq mentioned in the W.P. no. 1366/2019 dt. 17.1.2019.</p> <p>4) Sakoajhora–II Gram Panchayat's memo no. 333/ SKJ-II/18-19 dt. 29.1.2019 where they replied that no such cold storage exists in the mentioned land.</p> <p>5) BDO's memo no. 628/BDO/DPG dt. 30.1.2019 to Sakoajhora – II & Gadong – I Gram Panchayat, requesting assistance / support to completing the execution work of KPTL (contractor of ATL).</p> <p>6) Application under 16(1) filled on 12.2.2019 against Makchhedul Hoque.</p>

Sr	Loc.	Case	Court/Forum	Petitioner /Applicant	Responden t/Opponent	Comments
						<p>7) Counter W.P. No. 152 of 2019 dt. 13.6.2019 submitted in the Circuit bench of Calcutta High Court at Jalpaiguri.</p> <p>8) The Circuit Bench of Kolkata High Court on 26.6.2019 directed the DM, Jalpaiguri to dispose the pending application of 16(1) within 3 months from the date of order.</p> <p>9) High court issued the corrected copy of the order dt. 26.6.2019 on 10.7.2019. Both the order forwarded to DM on 18.7.2019.</p> <p>10) KPTL's letter no. ATL/WO-292WB/A-S/0623/2019-2020 dt. 19.7.2019 for disposing the application under 16(1).</p> <p>11) DM vide order dated 9.8.2019 instructed Special Land Acquisition Officer, Jalpaiguri to conduct joint field survey and submit report within 10 days.</p> <p>12) ATL tries to commence foundation activities with prior intimation to all Gov. authorities (DM, SP, IC, BDO etc.) on dt. 1.9.2019, however due to stiff resistance, man handling and sabotage attempt by Makchhedul Hoque and his family members. ATL vide letter no. ATL/SLG/A-S/Admin/0653/ 2019-2020 dt. 1.9.2019 lodge complain to local Police station against the same incident. Subsequently FIR has been registered vide FIR No. 327/19 dt. 1.9.2019.</p> <p>13) ATL vide letter no. ATL/SLG/Admin/0654/2019-2020 dt. 2.9.2019 highlighted the incident to SP.</p> <p>14) Makchhedul Hoque filled SLP No. 22165 of 2019 dt. 5.9.2019 before the Hon. Supreme Court of India for Prayer for interim relief against final judgment & order dt. 30.8.2019 passed by the Hon. High Court at Calcutta in circuit bench at Jalpaiguri in C.O. No. 60 of 2019.</p> <p>15) Several meetings have been conducted with Makchhedul Hoque in presence of local administration and political leaders to settle the issue amicably and finally on dt. 17.9.2019 settled the matter and subsequently NOC has been issued by Makchhedul Hoque and his son.</p> <p>16) Amicably settled compensation amount, in mode of 5 cheques, has been deposited under the custody of local authority as decided during the meeting vide letter no. ATL/WO-292WB/A-S/674 dt. 17.9.2019.</p> <p>17) DM vide order dt. 17.9.2019 directed the SP, Jalpaiguri to take up the matter accordingly and issue necessary direction to the IC so that Tower can be installed peacefully. Also instructed IC to submit</p>

Sr	Loc.	Case	Court/Forum	Petitioner /Applicant	Respondent /Opponent	Comments
						<p>compliance report after completion of the work.</p> <p>18) Hon`ble Supreme Court of India permitted the withdrawal of SLP No. 22165 of 2019 vide ROP dt. 20.9.2019 and subsequently, the case has been disposed of.</p>

51. Perusal of the above reveals that being aggrieved by the continued resistance by the landowners, the Petitioner, in the present case, had availed the various legal remedies available to it including filing the number of applications before the District Magistrates, Jalpaiguri & Alipurduar under Section 16(1) of the Telegraph Act seeking permission to exercise the power of telegraph authority and to resolve the RoW issues faced by it. Pursuant to the said application, DM-Jalpaiguri, on 25.2.2019, directed the Land Reform Officers to submit a report regarding the feasibility of the construction of the Petitioner's transmission line. Furthermore, keeping in view the long pendency of its Section 16(1) applications before the DM, the Petitioner, on 19.6.2019, also filed Writ Petition No. 152 of 2019 before the Hon'ble High Court of Calcutta in circuit bench Jalpaiguri, *inter-alia*, seeking quashing of DM's order dated 25.2.2019 and direction to DM, Jalpaiguri to dispose of its Section 16(1) applications at the earliest. The Hon'ble High Court of Calcutta vide order dated 26.6.2019 directed the DM, Jalpaiguri to dispose of the Petitioner's Section 16(1) applications within 3 weeks from the date of the order. Pursuant to the aforesaid order of the Hon'ble High Court of Calcutta, DM-Jalpaiguri, on 9.8.2019, observed that one joint field survey was required to be conducted by the land acquisition surveyor in presence of the Petitioner and the landowners and accordingly, directed the special land acquisition officers to conduct a joint field survey at the disputed plot and submit its report within 10 days from the receipt of the order. The said direction was again challenged by the Petitioner on 27.8.2019 through C.O. No. 60 of 2019 before the Hon'ble High Court of Calcutta on the grounds that (i) despite the order of Hon'ble High Court dated 26.6.2019, DM,

Jalpaiguri kept its Section 16(1) applications pending, and (ii) that an enquiry by the land acquisition surveyor for deciding the compensation was beyond the jurisdiction of DM, Jalpaiguri. Consequently, the Hon'ble High Court of Calcutta in circuit bench Jalpaiguri vide order dated 30.8.2019 held that the DM, Jalpaiguri had acted beyond the jurisdiction in directing the acquisition surveyor to arrive at a conclusion upon a field survey for the purpose of assessing compensation and the order of DM, Jalpaiguri dated 9.8.2019 was set aside with specific direction to dispose of the Section 16(1) applications within a week by providing appropriate police protection and to record a satisfaction as to whether the resistance was offered to installation of the electric poles on the lands in question. Above conduct of the Petitioner clearly reflects that not only the Petitioner had been prudent in filing of Section 16(1) applications before the DM, Jalpaiguri, it also went on to approach the Hon'ble High Court for the early and proper disposal of its Section 16(1) applications. However, aggrieved by the decision of Hon'ble High Court at Calcutta in circuit bench at Jalpaiguri, one Mr. Makchhedul Hoque went on to file SLP No. 22165 of 2019 dated 5.9.2019 before the Hon'ble Supreme Court for interim relief. Consequent to decision of Hon'ble High Court at Calcutta, DM Jalpaiguri vide order dated 6.9.2019 observed that (i) ATL attempted to resume the construction works on 1.9.2019 but faced stiff resistance from one Shri Makchhedul Hoque and other land owners, and (ii) ATL filed a complaint before the concerned police station and intimated the SP and DMs offices along with copy of the photos and videos regarding resistance faced in execution of works. Accordingly, DM Jalpaiguri, directed the investigating officer to submit the report with respect to the obstructions created by the above landowners. Thereafter, on 17.9.2019, DM Jalpaiguri passed an order dated 17.9.2019 which, *inter-alia*, recorded that (i) pursuant to the order dated 6.9.2019, Inspector-in-Charge, Dhugpuri submitted its report on

12.9.2019, (ii) the dispute between the Petitioner and one Shri Makchhedul Hoque was resolved, (iii) other land owners who disputed the compensation were directed to approach the appropriate authority i.e. District Judge in terms of Section 16(3) of the Telegraph Act, (iv) the land owners were directed not to obstruct the Petitioner's activities, and (v) Inspector-in-Charge, Dhugpuri was directed to submit a compliance report upon successful execution of the Petitioner's work on the disputed lands. Thereafter, the Hon`ble Supreme Court vide its order dated 20.9.2019 permitted the withdrawal of SLP No. 22165 filed by Mr. Makchedul Hoque against the judgment of the Hon`ble High Court at Calcutta with observation that the matter is amicably settled between the parties and consequently, the case has been disposed of.

52. Insofar as the contention of the Respondents 1 & 6 with regard to delays being contributed by the Petitioner itself is concerned, it does not hold any merit in respect of the Petitioner's force majeure plea for delays caused due to stays/injunctions granted by Courts and/or Court proceedings. Merely because the "*Detailed Survey including route alignment, profiling & tower spotting, Detailed Soil Investigation*" was completed by the Petitioner on 31.3.2016 – thereby the Petitioner being aware of the route for laying of transmission line, the Petitioner cannot be expected to have anticipated or control the proceedings before the various Court that may be instituted by it / against it in course of implementation.

53. The Petitioner has submitted that Location Nos. 4/A, 143/0 and 107/1 were impacted due to the court proceedings. The Petitioner has further submitted that it has filed Writ Petition No. 152 of 2019 before the Hon`ble High Court of Calcutta seeking quashing of DM's order dated 25.2.2019. The Hon`ble High Court of Calcutta vide order dated 26.6.2019 directed the DM, Jalpaiguri to dispose of the Petitioner's

Section 16(1) applications within 3 weeks from the date of the order. Aggrieved by the decision of Hon. High Court at Calcutta in circuit bench at Jalpaiguri, Mr. Makchedul Hoque filled SLP No. 22165 of 2019 dated 5.9.2019 before the Hon`ble Supreme Court for interim relief. Subsequently, on 17.9.2019, DM Jalpaiguri passed an order for determination of compensation for utilization of the land of the Petitioners for installation of high-tension transmission lines. Thereafter, the Hon`ble Supreme Court vide its order dated 20.9.2019 permitted the withdrawal of SLP No. 22165 filed by Mr. Makchedul Hoque against the judgment of the Hon`ble High Court at Calcutta with observation that the matter is amicably settled between the parties and consequently, the case has been disposed of.

54. Perusal of the above proceedings indicate that for the period from 16.11.2018 upto 20.9.2019 i.e. 308 days, the Petitioner was restrained and severely marred from carrying out the construction works on one or the other locations due to injunction/stay granted against the Petitioner in suits/applications filed by the various land owners. Some of these stays/injunctions continued beyond SCOD of 06.03.2019. This severely hampered the progress of the project at one or the other tower location. Thus, we are inclined to consider this period of 308 days during which the Petitioner was effectively restrained from carrying out the construction works at one or the other location as force majeure event and consequently, condone the delay in achieving the COD of the Project to the above effect.

(c) Delay in grant of statutory clearance

(i) NH Crossing Approval

55. The Petitioner has raised the Force Majeure claim in respect of delay in the approval of NH crossing in respect of its tower locations (i) 59/0 – 60/0, (ii) 114/0 – 115/0 and (iii) 89/0 – 90/0. The Petitioner has submitted that for the approvals/NoCs

for the NH Crossing at the aforesaid locations, the Petitioner applied to (i) Executive Engineer, PWD, Matigara, (ii) Executive Engineer, PWD, Alipurduar and (iii) Project Director, National Highway Authority of India respectively on 22.5.2017. However, the approvals were received only on 28.11.2019 (after 920 days), 15.1.2020 (after 968 days) and on 20.12.2019 (after 942 days). The Petitioner has submitted that factoring the standard time of 90 days as per the industry practice, the above approvals were received after the delay of 830 days, 852 days and 878 days respectively and such delays constitute a Force Majeure event, which deserve to be condoned.

56. The Respondents has submitted that the Petitioner was well aware about its obligation to familiarize itself with respect to time frame required to obtain clearances before submission of its bid. The Petitioner should have prudently planned its project execution activities. The Petitioner has delayed in applying for statutory clearances. The delay in obtaining statutory clearances by the Petitioner was 'controllable' and had the Petitioner acted diligently, the time lapsed in applying for statutory clearances could have been avoided. ATL is solely responsible for delay caused in achieving SCOD.

57. We have considered the submissions made by the Petitioner. As already noted above, as per Clause 2.14.2.6 of the RfP, the bidder(s) were required to familiarize themselves with the procedure and the time frame required to obtain various Consent, Clearance and Permits required for the Project. Accordingly, in the course of implementation of the Project, the developer/ licensee has to apply for such Consent, Clearance and Permits duly considering the timeframe in grant of the such Consent, Clearance and Permits by the Government Authorities & Instrumentalities. Accordingly, the delay on account of NH clearance is not extendable under Force

Majeure conditions. In the context of NH crossing approval, it is noticed that despite the route of its transmission line having been finalized on 3.5.2016 and construction works having started after achieving the financial closure on 14.10.2016, the Petitioner applied for the concerned NH Crossing only on 22.5.2017. Thus, there appears to be inexplicable delay on the part of the Petitioner in timely applying for the NH crossing approval. Moreover, the sequence of the events as submitted by the Petitioner in the respect of its applications for NH crossing approval also indicate lapse on the part of the Petitioner in taking timely follow-up with the concerned authorities. For instance, despite its applications having been returned for submissions of additional documents by the concerned authorities way back in August / October/ November, 2017, the Petitioner submitted the revised application with additional details only in March, 2018. All these, in our view, indicate that the substantial delays in receipt of the approval can be attributed to conduct of the Petitioner itself and therefore, such delays cannot be condoned under the force majeure events.

(ii) Delay due to tree-felling

58. The Petitioner has submitted that it applied for the felling trees and transit pass, to the Forest Department, Government of Bengal in October 2018 i.e. 6 months before the SCOD and then in January 2019. The applications for tree felling and transit were submitted after obtaining the approvals of NH crossing from the concerned authority and Element 1 i.e. Alipurduar to Siliguri Transmission Line, was scheduled to cross the National Highway No – 31 (Guwahati – Barhi) at 3 Points and a State Highway No. 12 near Alipurduar. The approval for felling trees and transit pass was not granted even till November 2019 i.e. the date of filing of the present Petition.

59. We have considered the submissions of the Petitioner. As per Clause 2.14.2.6 of the RfP, the bidder(s) were required to familiarize themselves with the procedure and the time frame required to obtain various Consent, Clearance and Permits required for the Project. The Petitioner was well aware about its obligation to familiarize itself with respect to time frame required to obtain clearances before submission of its bid. As noted above, the route alignment of the transmission line was finalized on 3.5.2016 and construction works also commenced after achieving the financial closure on 14.10.2016. However, the Petitioner applied for the tree felling approval to the concerned authorities only on 11.1.2019 i.e. far end of the Project completion date. Such lapse on the part of the Petitioner in timely applying of the approval cannot be condoned. Accordingly, we are not inclined to entertain the claim of the Petitioner toward delay in grant of tree felling approvals under the force majeure event.

(iii) Delays on account of Power line Crossing Approvals

60. The Petitioner has submitted the between 3.4.2017 and 18.10.2017, it submitted multiple applications for power line crossing approval to PGCIL. While the first approval was granted on 16.6.2017, several other approvals were significantly delayed with the last approval being granted only on 1.6.2019 and the three approvals being granted after the SCOD. The key power line crossing approvals in respect of which significant delays has been indicated by the Petitioner are as under:

Power Line Crossing Approval				
Sr.	Tower location	From	Till	Total days
1	Location no. 7A/0 - 8/0	16.10.2017	14.02.2019	486
2	Location no. 9/0 – 9A/0	16.10.2017	01.06.2019	593
3	Location no. 23/0 – 24/0	03.08.2017	21.12.2018	431
4	Location no. 26/0 – 27/0	17.04.2017	21.12.2018	613
5	Location no. 47/0 – 48/0	17.04.2017	16.02.2018	305
6	Location no. 81/0-82/0	16.10.2017	04.04.2019	535

7	Location no. 92/0 – 93/0	16.10.2017	04.02.2019	476
8	Location no. 119/0 – 120/0	06.05.2017	25.01.2018	264

61. We have considered the submissions made by the Petitioner. In respect of the making application for power line crossing approval also, there appears to be significant delays on the part of the Petitioner. As noted above, the route alignment of its line came to be finalized on 3.5.2016 and consequently, the construction works also commenced after achieving the financial closure on 14.10.2016. Therefore, the Petitioner was well in position to timely apply for the necessary approval for the concerned crossing. However, the Petitioner seems to have applied for the power line crossing approval only after significant delays. Such lapse in timely applying for the approval cannot be condoned. Moreover, based on the details furnished by the Petitioner in relation to the follow-up actions taken by the Petitioner after making such applications, lapses appear to be on the part of the Petitioner itself. For instance, in respect of power line crossing between tower loc. No.81/0-82/0, the Petitioner applied for permission on 16.10.2017 and the joint site visit was undertaken only on 2.1.2018. Moreover, after the Petitioner having furnished certain clarification on 27.3.2018, the next follow-up was taken up by the Petitioner only on 25.9.2018. Similarly, in respect of power line crossing between tower loc. No. 7A/0 – 8/0, after the Petitioner having applied for permission on 16.10.2017 and PGCIL having requested ATL to submit the Diamond Crossing Proposal, the Petitioner re-submitted the Diamond Crossing approval only on 6.3.2018 i.e. only after significant delay. While the Petitioner has attempted to justify the said delay by submitted that it required host of activities on its part to submit Diamond Crossing proposal, we are not persuaded by such justification for the delay of more than 4 months in re-submission of application. Similar trend follows more or less in respect of all the power line crossing approvals in respect of

which significant delays have been indicated. Thus, keeping in view the delays on the part of the Petitioner itself firstly in timely applying for such approvals and secondly, in diligently following-up such applications, we are not inclined to consider the force majeure claim of the Petitioner on this account.

(iv) Delays in receipt of PTCC Clearance, Railway Crossing and Defence Aviation

62. The Petitioner has also indicated the delays in receipt of the approval for PTCC clearance, Railway Crossing and Defence Aviation and has prayed for condonation of such delays under force majeure. The delays in receipt of such approval as indicated by the Petitioner is as under:

Power Line Crossing Approval				
Sr.	Approval	From	Till	Total days
1	PTCC Clearance	16.5.2018	10.4.2019	329
2	Railway Crossing 18/0 - 19/0	5.12.2017	31.10.2018	330
3	Defence Aviation	29.8.2018	29.4.2019	317

63. We have considered the submissions made by the Petitioner. In respect of the above approvals as well, there appears to be significant delays on the part of the Petitioner in making the applications itself. The Petitioner has finalized the route of its transmission line on 3.5.2016 itself. We are unable to see as to why the Petitioner could not have made the timely applications for obtaining the above approvals. Keeping in view that significant delays is on the part of the Petitioner itself in making timely application, consequent delays in receipt of such approvals cannot be entertained under the force majeure provisions.

(v) Heavy floods in West Bengal and Bihar between 13.8.2017 to 12.10.2017

64. The Petitioner has submitted that the Element I had suffered construction issues due to torrential rainfall starting August 2017 with severe floods in 7 districts of

West Bengal and 12 Districts of Bihar region. The floods caused a delay of 60 days in construction of the Transmission Project which cannot be attributed to the Petitioner, being absolutely beyond reasonable control of the Petitioner. Due to the floods, there was complete disruption of normal life and the North Bengal region was completely cut off from rest of the country due to inundation of rails and roads. This affected over 2 million people in the State of Bihar. Consequently, the transmission lines were water logged and non-accessible and all activities were to be halted between 11.8.2017 to 12.10.2017. This constituted an event of 'Natural Force Majeure' in terms of Article 11.3 (a) of the TSA.

65. We have considered the submissions made by the Petitioner. The period of floods is much before the SCOD of the project. Although the "flood" is covered under the "Natural Force Majeure Event" in Article 11.3(a) of the TSA, we notice that nothing has been placed on record by the Petitioner indicating the concerned areas/districts of Bihar and West Bengal were declared under the flood. Even otherwise, the Petitioner has also failed to place any details indicating its Project Site being affected by the claimed flood in the above districts. In absence of such details, we are not inclined to consider the relief of force majeure to the Petitioner for the event of heavy floods during the period from 13.8.2017 to 12.10.2017.

66. Now, coming to the available reliefs for Force Majeure events, Article 11.7 of the TSA provides as under:

"11.7. Available Relief for a Force Majeure Event

Subject to this Article 11

(a) no Party shall be in breach of its obligations pursuant to this Agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;

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

(c) For avoidance of doubt, it is clarified that the computation of Availability of the Element(s) under outage due to Force Majeure Event, as per Article 11.3 affecting the TSP shall be as per Appendix III to the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014, as on seven (7) days prior to the Bid Deadline. For the event(s) for which the Element(s) is/are deemed to be available as per Appendix III to the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014, then only the Non Escalable Transmission Charges, as applicable to such Element(s) in the relevant Contract Year, shall be paid by the Long Term Transmission Customers as per Scheduled 5 for the duration of such event(s).

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

67. Article 11.7(b) of TSA provides that every party shall be entitled to claim relief for a force majeure event affecting its performance in relation to its obligations under the Agreement. Article 4.3(a) of TSA provides that TSP shall take all necessary steps to commence work on the Project from the effective date of the Agreement and shall achieve Scheduled COD of the Project in accordance with Schedule 3 of TSA.

68. Further, Articles 4.4.2 & 4.4.3 of the TSA provide as under:

"4.4 Extension of Time:

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

4.4.3 If the Parties have not agreed, within thirty (30) days after the affected Party's performance has ceased to be affected by the relevant circumstances, on how long the Scheduled COD should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 16."

69. In the foregoing paragraphs, against the various force majeure claims of the Petitioner, we have only allowed the delays caused due to the stays/injunctions by various courts and court proceedings arising out of the RoW issues as force majeure event and consequently, have considered the period of only 308 days (as against the actual delay of 320 days) liable to be condoned under the force majeure. Keeping in view that neither side has chosen to terminate the TSA after 180 days as envisaged in Article 4.4.2 of the TSA, we hereby condone the delay of 308 days under the force majeure and as a consequence, the SCOD of Element 1 stands revised to 20.1.2020.

70. Keeping in view that the Element 1 achieved the COD only on 20.1.2020 and the balance delay of 12 days has not been considered by us under the various force majeure pleas raised by the Petitioner, the Petitioner will be liable to the consequences, for this delay, as specified in the TSA. In this regard, Article 6.4 of the TSA provides as under:

71. Article 6.4. of the TSA provides as under:

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

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

In view of the above, the Petitioner is liable to pay the liquidated damages to the LTTCs for the delay of 12 days for achieving the COD of the Element 1 in terms of Article 6.4.1 of the TSA.

72. The Petitioner has further sought permission to file a separate Petition to seek the compensation on account of time and cost-overrun, prolongation costs, opportunity costs, etc. The Petitioner has submitted that it ought to be compensated for the losses suffered and for the additional expenditure incurred which would not have happened had the force majeure events as demonstrated by the Petitioner would not have taken place.

73. *Per contra*, the Respondents 1 & 6 have submitted that Article 11 of TSA does not provide any relief towards cost and time over-run and these costs are simple operational and commercial risks which are to be absorbed by the bidder. It is submitted that relief available under the Force Majeure provision of the TSA including Article 11.7 (b) is limited to the extent of its effect on the performance of affected party, solely in relation to its obligation under the TSA. The relief so granted has no nexus with any time or cost overrun which TSP may have faced due to occurrence of force majeure event. Hence, the Petitioner should not be permitted to claim any relief qua the cost and/or time overrun.

74. The Petitioner, in rejoinder, has submitted that the Petitioner is entitled to claim recovery of additional expenditure incurred towards time overrun on account of force majeure. The Petitioner has submitted that it is settled position of law that a contracting party is entitled to cost overrun/prolongation costs/ escalation costs on account of an extension of time for completion of work and in this regard, the reliance

has been placed on the judgment of Hon'ble Supreme Court in (i) Assam SEB v. Buildworth (P) Ltd., (2017) 8 SCC 145 and (ii) K. N. Sathyapalan v. State of Kerala, (2007) 13 SCC 43 and the judgment of APTEL (i) dated 27.4.2011 in Appeal No. 72/2010 titled as Maharashtra State Power Generation Co. Ltd. v. MERC and Ors. and (ii) dated 1.8.2017 in Appeal No. 35/2016 titled as GMR Kamalanga Energy Ltd. v. CERC and Ors.

75. We have considered the submissions made by the parties. We observe that, during the pendency of the present Petition, the Petitioner has already filed Petition No. 265/MP/2021, inter alia, seeking compensation / relief for the additional expenditure incurred by the Petitioner during the construction of the Project due to certain Change in Law as well as Force Majeure events as per the applicable provisions of the TSA. Therefore, the question of granting a liberty in favour of the Petitioner no longer arises.

76. It is also noticed that PGCIL has raised the issue of mismatch in commissioning of its associated transmission elements in respect of the Petitioner's Element 1 under the TSA. PGCIL has submitted that while Alipurduar- Siliguri 400 kV D/c line achieved the COD only on 20.1.2020, the associated bays at Siliguri and Alipurduar S/S were made ready by PGCIL on 1.8.2019 and accordingly, in Petition No. 133/TT/2021 filed by PGCIL for approval of tariff of these bays, it has sought the approval of COD of these bays under proviso to Regulation 5(2) of Tariff Regulations, 2019 w.e.f. 1.8.2019. It is stated that by the said date, PGCIL had completed its scope and has also filed all documentary evidence pertaining to commercial operation i.e. CEA/

RLDC/ CMD certificates and as such PGCIL is entitled to receive the transmission tariff for the said bays from the date of completion of its scope of work.

77. The Petitioner has, however, submitted that no liability on the Petitioner can arise in regard to delay in completion of Element 1 which was caused by the events beyond the control of the Petitioner. It is also submitted that no liability for mismatch can be imposed before adjudicating the Petitioner's force majeure claims and it a settled law that a TBCB licensee could not be charged for mismatch of commissioning of transmission elements when delay in commissioning of transmission assets under its scope was condoned on account of force majeure events and SCOD was revised. In this regard, the Petitioner has placed the reliance on the judgment of APTEL dated 14.9.2020 in Appeal No. 17 of 2019 titled NRSS XXXI (B) Transmission Ltd. v. CERC and Ors. The Petitioner has submitted that substantial arguments have already been made in this regard during the proceedings of Petition No. 113/TT/2021 and the Commission may adjudicate on the above aspect while deciding the Petition No. 113/TT/2021 and no claim of mismatch by PGCIL may be decided in the present Petition which limits itself to extension of SCOD of the Transmission Project of the Petitioner.

78. We have considered the submissions made by the parties. Keeping in view that PGCIL's claim of tariff in respect of bays at Alipurduar and Siliguri S/S w.e.f. 1.8.2019 is already a subject matter of Petition No. 113/TT/2021 and the parties having already made their detailed submission on the above aspect therein, the issue of sharing of transmission tariff in respect of said bays will be decided in the Petition No. 113/TT/2021 only and as such in the present case, we have examined the claims of the Petitioner confined to the provisions of TSA only.

Issue No.3: Whether there is time over-run in respect of Element 2 due to delay in implementation of PLCC and DTPC?

79. Prior to dealing with the aforesaid issue, it is necessary to deal with the objections raised by PGCIL with regard to IA No. 46/2020 filed by the Petitioner seeking amendment to the main petition as the issue pertaining to readiness of Element 2 has been raised only by the amended petition. Objecting to the amendment sought by the Petitioner, PGCIL has submitted that the IA / amendment seeks to challenge the finding arrived by the Commission in the order dated 5.5.2022 in Petition No. 677/TT/2020 which is not permissible. It is submitted that by amendment to the pleadings, the Petitioner cannot re-argue the issue of communication equipment including DTPC and PLCC not being ready for Kishanganj- Darbhanga 400 kV D/c line on the proposed date of its commercial operation. It is submitted that there is a finality to the fact that communication equipment including DTPC and PLCC were under the scope of the Petitioner and they were not ready on 5.3.2019 (SCOD) or 8.3.2019 (i.e. date of CEA energisation certificate) and there is also a categorical finding in the said order that DTPC and PLCC works were completed on 11.3.2019 only pursuant to which the line achieved COD. PGCIL has further submitted that proposed amendment would not in any manner aid in determining the real dispute/ controversy between the parties and would also prejudice PGCIL since the findings arrived by the Commission in favour of PGCIL in the order dated 5.5.2022 with regard to the TSA and Connection Agreement are sought to be changed/ altered by seeking amendment where the Petitioner has taken a revised stand and re-agitated the issues already discussed and decided by the Commission. In the above background, PGCIL has sought dismissal of the IA seeking amendment to the Petition as, according to PGCIL, the amendments sought not only seek to impugn the order dated 5.5.2022 but also alter the very basis of the Petition which is not permissible as the per basic principles to be taken into

consideration while allowing or rejecting the application for amendment of pleadings as settled by the Hon'ble Supreme Court in *Revajeetu Builders and Developers v. Narayanaswamy and Sons & Ors.*, [(2009) 10 SCC 84].

80. *Per contra*, the Petitioner has submitted that the amendment sought by the Petitioner is not only necessary for determining the real question in controversy but also does not cause any injustice to PGCIL. The Petitioner has submitted that the controversy regarding commissioning of Element 2 arose only in Petition No. 677/TT/2020 and accordingly, the Petitioner had made the required submissions in the said proceedings. Pertinently, the Petitioner had filed the present Petition on 15.11.2019 seeking extension of SCOD as per the TSA based on the certain force majeure events affecting Element 1 and as such only contained certain factual submissions related to Element 2 where the Petitioner contended that the Element 2 was ready for commissioning within SCOD i.e. 6.3.2019. However, vide order dated 5.5.2020 in Petition No. 677/TT/2020, the Commission held that the question of time overrun for Element 2 was to be determined only in the present Petition. Since the question of controversy involved is extension of SCOD as per the TSA, in order to decide the extension of SCOD of the whole Project the requisite submissions regarding Element 2 are required to be brought on record. It is submitted that Order VI Rule 17 provides that the amendment of pleadings may be allowed by the Court at any stage of proceedings. It is also submitted that the no injustice is being caused to PGCIL by way of amendment as only grounds and submissions related to Element 2 are being sought to be brought on record and premise of the Petition i.e. extension of SCOD is not altered. The Petitioner has also submitted the contention of PGCIL that the amendment is prejudicial in light of the Commission's order dated 5.5.2022 is

nothing but mere assumption that by allowing the amendment, the Commission will review its order dated 5.5.2022 and such contention is wholly misconceived. The amendment will only permit the Petitioner to make submissions before the Commission relating to the Element 2 of its Project.

81. We have considered the submissions made by the Petitioner and PGCIL on the maintainability of the IA seeking amendment to the Petition. PGCIL has contended that by way of said amendment(s), the Petitioner is attempting to challenge the findings of the Commission in order dated 5.5.2022 in Petition No. 677/TT/2020 wherein the Commission has, *inter-alia*, held that the communication equipment including the DTPC and PLCC were under the scope of ATL and were not ready on 5.3.2019 (SCOD) or 8.3.2019 (date of CEA energisation certificate). According to PGCIL, by way of said amendment, the Petitioner is trying to re-agitate the issue DTPC and PLCC not being within the scope of the Petitioner, which cannot be permitted. PGCIL has also alluded that by way of this amendment, the Petitioner is trying to alter the very basis of the original petition. In the above context, the relevant portion of the Commission's order dated 5.5.2022 in Petition No. 677/TT/2020 is extracted hereunder:

*"17. The Petitioner has contended that declaration of deemed COD of the transmission line as 6.3.2019 by ATL is not in accordance with the regulations and has requested to issue suitable directions in this regard. We note that ATL has filed Petition No.470/MP/2019, wherein one of the prayers made by ATL was for extension of SCOD of its transmission project as it was affected by force majeure events. The instant petition is for determination of tariff for the bays under the scope the Petitioner and therefore, we are not inclined to deal with the issue of COD of the transmission line under the scope of ATL in the instant order. **The COD of the transmission lines under the scope of ATL shall be dealt in Petition No.470/MP/2019, which is pending adjudication before the Commission.***

....

32. ATL in its reply has raised the issue that works of DTPC and PLCC at Kishanganj Sub-station were under the scope of work of the Petitioner and ATL did the same gratuitously. ATL has contended that it was not legally bound to do the works of DTPC

and PLCC at Kishanganj Sub-station. We observe that the Petitioner vide letter dated 19.2.2019 had conveyed the connection details of transmission system under ATL to the Inter-State Transmission Grid and had requested to sign the “Connection Agreement” with ATL. As per Annexure-III(b) to the said letter, ATL is required to provide OPGW, Approach Cable & FODP.

Sl. No	Name of Equipment	Nos.	Ratings
2(b)	OPGW, Approach Cable and FODP	Two set of FODP and approach Cable required as per site survey	Applicant to provide: 1. For 400 kV Alipurduar- Siliguri D/C line FODP and Approach cable at both ends shall be provided by POWERGRID. Therefore, these are not in scope of M/S ATL. 2. For 400 kV Kishanganj- Darbhanga D/C line FODP (1 set) and Approach cable (Depends on site survey) shall be provided by applicant at both ends.

33. The Connection Agreement was signed between the Petitioner and ATL on 27.2.2019, which provides as follows:

“1.2 The following documents and their schedules which have been initiated by the parties and annexed herewith shall be deemed to form an integral part of this Agreement in the order of precedence listed below:

- (a) Additional information for signing Connection Agreement (details submitted by ATL as per format CON-4)
- (b) Connection Offer letter (Issued to ATL by CTU vide letter dated 19.2.2019)
- (c) This Agreement”

34. From the above, it is clear that DTPC and PLCC at Kishanganj Sub-station are under the scope of ATL.

35. ATL has filed Petition No.470/MP/2019, wherein one of the prayers made by ATL was for extension of SCOD of its transmission project as it was affected by force majeure events and it is pending adjudication before the Commission. The issues with respect to DTPC and PLCC at Kishanganj Sub-station will be dealt with in Petition No.470/MP/2019.

36. We observe that the Petitioner applied for CEA energization of the transmission asset on 1.3.2019 and the SCOD was 5.3.2019. However, CEA energization certificate was issued on 8.3.2019. The DTPC and PLCC works were completed by ATL on 11.3.2019 and thereafter transmission asset was put under commercial operation on 14.3.2019 with a time over-run of 9 days. It is observed that there was a time over-run of 3 days from SCOD till the issue of energization certificate on 8.3.2019. The line could not be energized as DTPC and PLCC works were completed only on 11.3.2019 and 2 days were taken for charging of the bays. As we have observed in paragraph 35 above, extension of SCOD and COD of the transmission line of ATL will be decided in the Petition No.470/MP/2019. Therefore, we are not inclined to take any decision on the time over-run of the transmission assets of the Petitioner at this stage in the present petition. The same will be decided at the time of truing up of the tariff of the 2019-24 tariff period, considering the decisions in Petition No.470/MP/2019 after its disposal.....”

Perusal of the above order indicates that while dealing with the issue of readiness of PGCIL's 2 Nos. of 400 kV GIS line bays at Kishanganj GIS sub-station associated with the Petitioner's Kishanganj- Dharbhanga 400 kV D/c line, the issue of works of PLCC and DTPC at Kishanganj sub-station had come up for the consideration wherein the Commission after considering the submissions of the Petitioner as well as taking note of the Connection Agreement between the Petitioner and PGCIL observed that DTPC and PLCC at Kishanganj sub-station were under the scope of the Petitioner. Further, the Commission held that the COD of the transmission lines under the scope of ATL and issue with respect to DTPC and PLCC at Kishanganj sub-station will be dealt with in the present Petition.

82. Thus, the Commission, in the aforesaid order, having observed that the issues with respect to the DTPC and PLCC at Kishanganj sub-station will be dealt with in the present Petition while dealing with the extension of SCOD and COD of the Petitioner's transmission Project, the Petitioner, in our view, cannot be estopped from bringing on record its submissions with regard to DTPC and PLCC at Kishanganj sub-station as necessary to determine the issues relating thereto. The rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the Court. It is settled position of law that the Court should allow all the amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

83. In the present case, besides the order dated 5.5.2022 itself providing for dealing with the issues of DTPC and PLCC in this case, we find that allowing the Petitioner to amend the Petition for bringing on record its submissions relating to DTPC & PLCC at

Kishanganj sub-station would enable determination of issues relating to SCOD & COD of its Element 2 and consequently, the Project as whole. Moreover, allowing such amendment and dealing the issues relating to DTPC & PLCC in the present Petition would also serve its dominant purpose that is to minimize the litigation. Insofar as injustice or prejudice to the other party, PGCIL has sought to argue that by way of the proposed amendment, the Petitioner is seeking to re-agitate the issues relating to DTPC & PLCC and review of the Commission's findings in order dated 5.5.2022, which are in favour of PGCIL. However, we are not impressed by the aforesaid contention of PGCIL. Firstly, as rightly pointed out by the Petitioner, such apprehension of PGCIL is based on presumption of allowing / accepting the contentions of the Petitioner in the amendment Petition. Furthermore, it is well settled that the merits of the amendments sought to be incorporated by way of amendments are not be adjudged at the stage of allowing prayer for amendment and disallowing such amendment based on the contention of PGCIL that it seeks to re-agitate issue(s) or to challenge the findings as rendered in order dated 5.5.2022 would amount to adjudging the merits of the amendment at the stage of allowing the prayer for amendment, which is not permissible. In view of the foregoing observations, we allow the amendment applications filed by the Petitioner and proceed to deal with the issue relating to readiness of Element 2 (Kishanganj-Darbhanga 400 kV D/c line) of the Petitioner's Project on merits.

84. The Petitioner has submitted that as per the scope of work as clearly specified in the TSA, works at Kishanganj S/s except for extending the OPGW cable till the joint box were not within the Petitioner's scope and therefore, the execution of the DTPC and PLCC works at the Kishanganj sub-station, which were beyond the joint box, was not a legal obligation of the Petitioner. The Petitioner has submitted that it completed

its scope of works in respect of Element 2 before the SCOD and the said element was ready for charging on 5.3.2019 and it also wrote to all concerned authorities and declared the deemed COD for Element 2. However, it is only when the PGCIL's bays at Kishanganj end were made available by PGCIL on 11.3.2019 and 12.3.2019, the commercial operation of Element 2 was declared on 14.3.2019 after the successful completion of trial run. The Petitioner has submitted that insofar as the Connection Agreement dated 27.2.2019, which provided that the Petitioner is to provide 2 sets of Fibre Optic Distribution Panel (FODP) and Approach Cable at both ends', the said Connection Agreement was executed only at the fag-end of the period demarcated for achieving the SCOD and that the TSA and Connection Agreement have to be read harmoniously, so as to mean that the Petitioner was required to provide FODP and Approach Cable only at Darbhanga sub-station as the works only at Darbhanga sub-station were included within the Petitioner's scope of works.

85. The Petitioner further submitted that as per Article 6.1.2 of TSA provides that RLDC/SLDC or CTU/STU or the Lead LTTC may for reasonable cause, including failure to arrange for inter-connection facilities, defer the connection for upto 15 days from the date notified by licensee pursuant to Article 6.1.1 of the TSA if the licensee is notified in writing, the reason for deferral and when the connection is to be rescheduled and in such case, the SCOD would be extended as required for such deferments on day to day basis. The Petitioner has submitted that PGCIL intimation to the Petitioner on 6.3.2019 about pending test related to DTPC and PLCC for Element 2 ought to be considered as deferment by PGCIL in compliance of Article 6.1.2 where PGCIL deferred the connection of Element 2 due to reasonable cause i.e. carrying out PLCC and DTPC tests and since such deferment was only for a period of 8 days, SCOD

ought to be extended for such deferment period. The Petitioner has submitted that in Petition No. 677/TT/2020, PGCIL merely contended that the Petitioner's claim for deemed commissioning of Element 2 was wrong and did not submit that the delay in commissioning of its assets was due to delay in completion of works by the Petitioner and therefore, PGCIL may not be permitted to take contrary stand before the Commission in the present case. The Petitioner has submitted that, vide emails dated 2.3.2019, 3.3.2019 and 4.3.2019, it kept PGCIL informed that it was ready to charge Element 2 and was awaiting completion of bays at PGCIL at Kishanganj sub-station. However, PGCIL for the first time only on 6.3.2019 responded to the Petitioner stating that PLCC and Kishanganj sub-station was to be completed by the Petitioner. The Petitioner thereafter took the immediate steps to complete DTPC and PLCC at Kishaganj sub-station by 8.3.2019 and the first time charging approval was granted by ERLDC on 11.3.2019 and consequently, COD was declared on 14.3.2019. The Petitioner has submitted that since both PGCIL and the Petitioner have claimed the COD of their respective assets from 14.3.2019 only, no prejudice will be caused if the delay of 8 days in COD of Element 2 is condoned.

86. We have considered the submissions made by the parties. We find that the Petitioner has indeed once again raised the issue regarding the scope of DTPC and PLCC at Kishanganj sub-station not being in its scope of work as per the TSA and has also submitted that the provisions of Connection Agreement indicating the installation of FODP and Approach Cable at Kishanganj sub-station have to be read down in line with the provisions of TSA so as to mean that the Petitioner was required to provide the FODP and Approach Cable at Darbhanga sub-station.

87. We may refer to the correspondence exchanged between the parties for the period leading upto the commissioning of Element of the Petitioner and associated bays of PGCIL. It is observed that the Petitioner first issued the notice for connection to the Inter-connection facilities to RLDC, LTTCs as well as CTU/ PGCIL under Article 6.1.1 of TSA on 4.1.2019. The Petitioner thereafter proceeded to obtain the Energization approval on 21.2.2019 and entered into the Connection Agreement on 27.2.2019, to obtain the First Time Charging (FTC) approvals on 2.3.2019, albeit ERLDC granted the FTC approval to charge the bays of Darbhanga end only. The Petitioner vide its e-mails dated 2.3.2019 and 4.3.2019 intimated PGCIL about readiness of its Element 2 while requesting to provide the exact duration and timeline for completion of bays within the scope of PGCIL. Further, vide e-mail to ERLDC dated 5.3.2019 the Petitioner again sought approval for First Time Charging/ Commissioning & Trial Operation of its Kishanganj - Darbhanga 400 kV D/c line citing the imminent SCOD of the said line on 5.3.2019. Later, the Petitioner vide its e-mail dated 5.3.2019 also proceeded to declare deemed COD of its Element 2 w.e.f 6th March, 2019 at 00:00 Hrs. In response to the above, PGCIL vide its e-mail dated 6.3.2019 pointed out to the Petitioner that (i) PLCC commissioning at Kishanganj end and also End to End test, and (ii) Off-line Fault Locator test for defining the healthiness of line, which were within the scope of the Petitioner, were still pending. Moreover, PGCIL also intimated that PGCIL is making every effort to charge the said line by 8.3.2019 subject to the CEA clearance. The relevant extract of the said e-mail reads as under:

“This is in reference to your trailing mail regarding the subject matter. In this regard the matter has been enquired from our Kishanganj site who have confirmed that the following test are still pending from M/s KPTL (as per their scope).

1 PLCC Commissioning at Kishanganj end and also END to END test

2 OFF LINE FAULT LOCATOR TEST for defining the healthiness of Line.

Hence claiming that the line is ready in all respect and ready for charging of Line by 00:00 hrs on 06.03 .19 is not true. However, POWERGRID have made every effort to charge the line by 08.03.2019 subject to CEA clearance.

In view of above M/s KPTL may give their clearance or Time line for completion of above pending issues and accordingly we will commission our bays which are at final stage of commissioning.”

88. Thereafter, the Petitioner vide its e-mail dated 8.3.2019 replied that PLCC installation was successfully completed from its end, however, the End to End test was not performed owing to non-completion of Jumpering works the Cable Termination of DTPC in CPR at Kishanganj S/s of PGCIL. The Petitioner accordingly requested for ensuring the completion of the said activities and to confirm the same for enabling it to conduct the End-to-End test of PLCC. The Petitioner also informed that the Off-line Fault Locator Test for defining healthiness of line was successfully completed prior to declaring its SCOD at 00:00 Hrs. on 6.3.2019. The relevant extract of the said e-mail reads as under:

“With reference to the trailing mail, we would like to inform that we have already been declared the readiness for Charging of our Transmission Line and Sub-station’s Bays (line bays already commissioned) along with L/R at Darbhanga End. Furthermore, we are apprising your queries pointwise as stated in below mail:-

1. PLCC Commissioning at Kishanganj end and also END to END test: PLCC Installation is successfully completed from our end, however End-to- End Test not performed owing to non-completion of Jumpering works and Cable Termination of DTPC in CRP at Kishanganj Sub-station End of PGCIL. We request to Kishanganj Sub-station for ensuring the completion of the said activities and confirm the same for enabling us to conduct the End-to-End Test of PLCC.

2. Off-line Fault Locator Test for defining the healthiness of line: We have successfully completed the Off-line Fault Locator Test of Line prior to “Declare our Scheduled Commercial Operations Date (SCOD) of Element-2 of IPTC-Bhutan Project w.e.f. 06th March, 2019 at 00:00Hrs. [Mid Night between 5th & 6th March’2019]”

89. On very same day, PGCIL vide its e-mail replied that the Cable termination of DTPC in CRP at Kishanganj S/S, which was within the scope of the Petitioner and not PGCIL's, was yet to be completed. PGCIL also informed that without carrying out End to End test, PLCCC cannot be declared as commissioned and that Jumpering work

has already been completed at Kishanganj End and ready for carrying out End to End test. PGCIL also pointed out that Phase sequence test of both Ckts. with its GIS bays had not been done and the same was required to be done for safe charging of line. PGCIL also intimated that bays for Darbhanga lines at Kishanganj S/s have been completed on 8.3.2019. The relevant extract of the said e-mail reads as under:

“With reference to your trailing mail, the following may please be noted:

i) Cable Termination of DTPC in CRP at Kishanganj Sub-station End is yet to be completed till date, which is in the scope of M/S KPTL and not in the scope of POWERGRID. The mail forwarded by M/s KPTL in this regard is attached.

ii) As informed vide trailing mail regarding commissioning of PLCC , please note that without carrying out End to End test, PLCC cannot be declared as commissioned. However, It is to inform that Jumpering work has already been completed at Kishanganj SS and ready for carrying out End to End test. Please advise the concerned to carry out End to End test.

iii) Phase sequence test of Both the CKTs with Our GIS Bays has not been done, the same is required to be done for Safe charging of Line, as Mismatch in phase sequence may damage equipments.

As per our commitment vide our trailing mail, bays for Darbhanga lines at Kishanganj s/s has been completed on 08.03.2019 and CTU has been requested to issue charging instruction.

In view of above M/s ATL is once again requested to complete their balance work as mentioned above at the earliest so as to charge the line by today evening i.e. on 08.03.2019.”

90. Pursuant to the above, the Petitioner has stated that it requested PGCIL for permission to access of Kishanganj sub-station site and upon having been given the site access on 9.3.2019, the end-to-end test for PLCC and cable termination works for DTPC were completed on 10.3.2019, which was confirmed by PGCIL vide e-mail dated 11.3.2019 while furnishing the requisite data to ERLDC for issuing charging clearance. Thereafter, on very same date, the first time charging clearance was issued by ERLDC and Ckt 2 of Element 2 was charged on 11.3.2019 itself and Ckt 1 of Element 2 was charged on 12.3.2019 and consequently, the Element 2 was declared

under the commercial operation on 14.3.2019 i.e. after 72 hours of charging of Element 2.

91. As per the TSA, SCOD of the Element 2 was 6.3.2019 against which it commissioned on 14.3.2019 i.e. with a delay of 9 days. *Article 4.1 and 4.2 of the TSA provides as under:*

“Article 4 Development of the Project

4.1 TSP`s obligations in development of the project: Subject to the terms and conditions of this Agreement, the TSP at its own cost and expense shall observe, comply with perform, undertake and be responsible:

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

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

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

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

- *Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations, 2007 ii. Prudent Utility Practices and the Law:*

Xxxxxxx

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

xxxxxxx

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

xxxxxxx

g. to provide to the Long Term Transmission Customers with a copy to CEA, on a monthly basis, progress reports with regard to the Project and the execution (in accordance with Agreed Form) to enable the Long Term Transmission

Customers/CEA to monitor and co-ordinate the development of the Project matching with the Interconnection Facilities. h. to comply with all its obligations undertaken in its Agreement.

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

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

b. for arranging and making available the Interconnection Facilities to enable the TSP to connect the Project; c. for complying with all their obligations under this Agreement, and ...”

92. Article 4.1 of the TSA deals with TSPs obligations in the development of the Project. In terms of the Article 4.1(c), the TSP, at its own cost and expense, observe, perform, comply with, perform, undertake and be responsible for entering into Connection Agreement with the CTU/STU (as applicable), in accordance with the Grid Code. Article 4.2 of the TSA provides for the LTTCs obligations in implementation of the Project, which includes the arranging and making available the interconnection facilities to enable the TSP to connect to the Project.

93. Article 6.1.2 of TSA dealing with connection with the inter-connection facilities provides as under:

“6.1. Connection with Inter-Connection Facilities

6.1.1 The TSP shall give the RLDC(s), CTU/STU, as the case may be, the Long Term Transmission Customers and any other agencies as required at least sixty (60) days advance written notice of the date on which it intends to connect an Element the Project which date shall not be earlier than its Scheduled COD or Scheduled COD extended as per Article 4.4.1 of this Agreement, unless the Lead Long Term Transmission Customer otherwise agrees.

6.1.2 The RLDC/SLDC (as the case may be) or the CTU/ STU (as the case may be) or the Lead Long Term Transmission Customer may, for reasonable cause, including

failure to arrange for Interconnection Facilities as per Article 4.2, defer the connection for upto fifteen (15) days from the date notified by the TSP pursuant to Article 6.1.1 if it notifies to the TSP in writing, before the date of connection, of the reason for the deferral and when the connection is to be rescheduled. However, no such deferment on one or more occasions would be for more than aggregate period of 30 days. Further, the Scheduled COD would be extended as required, for all such deferments on day for day basis.”

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

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

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

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

95. As per the above said provisions, an element of the project shall be declared to have achieved COD 72 hours following the connection of the element with the interconnection facilities or 7 days after the date on which it is declared by the TSP to be ready for charging, but is not able to be charged for reasons not attributable to the TSP.

96. The COD of the 02 numbers 400 kV GIS line bays under the scope of PGCIL has been approved as 14.3.2019 and the Petitioner has claimed the COD of the transmission line i.e. 400 kV D/C (Quad) Kishanganj (PG)-Darbhanga line as 14.3.2019. In the instant case, the TSA was signed on 22.9.2015 and the Connection Agreement was signed on 27.2.2019. As per Connection Agreement dated 27.2.2019 works like DTPC and PLCC at Kishanganj sub-station are part of scope of work of the

Petitioner. PGCIL vide letter dated 6.3.2019 informed about the balance work like DTPC and PLCC at Kishanganj Sub-station and the Petitioner had sought permission from PGCIL to access of Kishanganj sub-station site and upon having been given the site access on 9.3.2019, the end-to-end test for PLCC and cable termination works for DTPC were completed on 10.3.2019, which was confirmed by PGCIL vide e-mail dated 11.3.2019 while furnishing the requisite data to ERLDC for issuing charging clearance. Thereafter, on very same date, the first-time charging clearance was issued by ERLDC and Ckt 2 of Element 2 was charged on 11.3.2019 itself and Ckt 1 of Element 2 was charged on 12.3.2019 and consequently, the Element 2 was declared under the commercial operation on 14.3.2019 i.e. after 72 hours of charging of Element 2.

97. In terms of the Article 4.1(c), the TSP, at its own cost and expense, observe, perform, comply with, perform, undertake and be responsible for entering into Connection Agreement with the CTUIL/STU (as applicable), in accordance with the provisions of the Grid Code. We find that the declaration of deemed COD by the Petitioner for Element-2 without completing its scope of works on 6.3.2019 is not valid. The delay in completion of the asset was on account of the DTPC and PLCC at Kishanganj sub-station. Hence, we approve the COD of the Element-2 as 14.3.2019. As the delay in completion of the asset has been found to be on account of the DTPC and PLCC at Kishanganj sub-station i.e. from 6.3.2019 to 10.3.2019 cannot be considered as a Force Majeure event as claimed by the Petitioner. After implementation of connection facilities minimum time of 72 hours was required to declare the COD of the assets in terms of the Article 6.2.1 of the TSA. Accordingly, the time taken from 11.3.2019 to 14.3.2019 was beyond the control of the petitioner.

In view of the above, the LLTCs are entitled for liquidated damages for the delay of 5 days for achieving the COD of the Element 2.

98. In view of the foregoing observations, discussions and findings, the Petition No. 470/MP/2019 stands disposed of.

**Sd/-
(P.K. Singh)
Member**

**sd/-
(Arun Goyal)
Member**

**sd/-
(I.S. Jha)
Member**