

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 87/MP/2022**

**Coram:**

**Shri Jishnu Barua, Chairperson**

**Shri Arun Goyal, Member**

**Shri P.K. Singh, Member**

**Date of Order:13<sup>th</sup> May, 2024**

**In the matter of**

Petition under Sections 79(1)(c), 79(1)(d), 79(1)(f) and 79(1)(k) of the Electricity Act, 2003, read with Articles 11, 12 and 16 of the Transmission Services Agreement dated 10.01.2018, seeking declaration, extension of time period for achieving CoD of the Project and compensation on account of occurrence of force majeure and change in law events, and other consequential reliefs.

**And**

**In the matter of:**

Fatehgarh-Bhadla Transmission Limited,  
9<sup>th</sup> Floor, A-wing, Statesman House,  
Barakhmaba Lane, Connaught Place,  
New Delhi-110 001

**...Petitioner**

**VERSUS**

1. Adani Renewable Energy Park Rajasthan Limited,  
Achalraj Building,  
Opp. Mayor Bungalow,  
Law Garden,  
Ahmedabad– 380006, Gujarat

2. Central Transmission Utility of India Limited,  
Plot No. 2, Sector 29,  
Gurugram-122001,  
Haryana

3. Power Finance Corporation Consulting Limited,  
1st Floor, "Urjanidhi" 1,  
Barakhambha Lane,  
Connaught Place,  
New Delhi – 110 001

4. Rajasthan Rajya Vidyut Prasaran Nigam Limited,  
Vidyut Bhawan, Vidyut Marg,

Jaipur – 302005

5. Ajmer Vidyut Vitran Nigam Limited,  
132 kV, GSS RVPNL Sub-station Building,  
Caligiri Road, Malviya Nagar,  
Jaipur - 302017 (Rajasthan)
6. Jaipur Vidyut Vitran Nigam Limited,  
132 kV, GSS RVPNL Sub-station Building,  
Caligiri Road, Malviya Nagar,  
Jaipur - 302017 (Rajasthan).
7. Jodhpur Vidyut Vitran Nigam Limited,  
New Power House, Industrial Area,  
Jodhpur-342003 (Rajasthan).
8. Himachal Pradesh State Electricity Board,  
Vidyut Bhawan, Kumar House Complex Building II,  
Shimla – 171004 (Himachal Pradesh)
9. Punjab State Electricity Board,  
Thermal Shed Tia, Near 22 Phatak,  
Patiala - 147001 (Punjab)
10. Haryana Power Purchase Centre,  
Shakti Bhawan, Sector-6,  
Panchkula -134109 (Haryana)
11. Power Development Department,  
Government of Jammu & Kashmir,  
Mini Secretariat,  
Jammu.
12. Uttar Pradesh Power Corporation Limited,  
(Formerly Uttar Pradesh State Electricity Board),  
Shakti Bhawan, 14, Ashok Marg,  
Lucknow - 226001 (Uttar Pradesh).
13. Delhi Transco Limited,  
Shakti Sadan, Kotla Road,  
New Delhi – 110002
14. BSES Yamuna Power Limited,  
B-Block, Shakti Kiran, Building (Near Karkadooma Court),  
Karkadooma 2nd Floor,  
New Delhi - 110092.
15. BSES Rajdhani Power Limited,  
BSES Bhawan, Nehru Place,  
New Delhi - 110019.

16. Tata Power Delhi Distribution Limited,  
NDPL house,  
Hudson Lines Kingsway Camp  
Delhi – 110009
17. Chandigarh Administration,  
Sector-9,  
Chandigarh
18. Uttarakhand Power Corporation Limited,  
Urja Bhawan, Kanwali Road,  
Dehradun (Uttarakhand)
19. North Central Railway,  
Allahabad (Uttar Pradesh)
20. New Delhi Municipal Council,  
Palika Kendra, Sansad Marg,  
New Delhi - 110002
21. Adani Renewable Energy Park Rajasthan Limited,  
Achalraj Building, Opp. Mayor Bungalow,  
Law Garden, Ahmedabad– 380006,  
Gujarat
22. Central Transmission Utility of India Limited,  
Plot No. 2, Sector 29,  
Gurugram-122001, Harayana
23. Power Finance Corporation Consulting Limited,  
1st Floor, “Urjanidhi” 1,  
Barakhambha Lane,  
Connaught Place,  
New Delhi-110 001

...Respondents

**The following were present:**

Shri Sanjay Sen, Sr. Advocate, FBTL  
Shri Hemant Singh, Advocate, FBTL  
Shri Lakshyajit Bagdwal, Advocate, FBTL  
Ms. Lavanya Panwar, Advocate, FBTL  
Ms. Ruth Elwin, Advocate, FBTL  
Shri Afak Pothiwala, FBTL  
Ms. Sakshi Kapoor, Advocate, AREPRL  
Shri Sachin Dubey, Advocate, BRPL  
Shri Mohit Jain, Advocate, BRPL  
Shri Mohit, Mudgal, BRPL  
Shri Alok Shankar, Advocate, CTUIL  
Shri Kumarjeet Ray, Advocate, CTUIL  
Shri Siddharth Sharma, CTUIL

## **ORDER**

The Petitioner, Fatehgarh Bhadla Transmission Limited (FBTL), has filed the present Petition under Sections 79(1)(c), 79(1)(d), 79(1)(f), and 79(1)(k) of the Electricity Act, 2003 (hereinafter referred to as 'the Act'), read with Articles 11, 12 and 16 of the Transmission Services Agreement ("TSA") dated 10.1.2018, seeking extension of time period for achieving Commercial Operation Date (COD) of the project and compensation on account of occurrence of Force Majeure and Change in Law events, and other consequential reliefs.

### **Facts of the case**

2. The Petitioner was incorporated as a Special Purpose Vehicle (SPV) by the Bid Process Coordinator, namely, PFC Consulting Limited (PFCCL), to develop and implement the "Transmission System for Ultra Mega Solar Park in Fatehgarh, District Jaisalmer, Rajasthan" (hereinafter referred to as "Project"). The Project consisted of the following elements to be executed through Tariff Based Competitive Bidding under Section 63 of the Act on a Build, Own, Operate, and Maintain (BOOM) basis:

- (a) Establishment of 400 kV Pooling Station at Fatehgarh.
- (b) Fatehgarh Pooling station-Bhadla (PG) 765 kV D/C line (to be operated at 400 kV).
- (c) 2 Nos. of 400 kV line bays at Fatehgarh Pooling Station.
- (d) 1X125 MVAR Bus reactor at 400 kV Fatehgarh Pooling Station along with associated bay.
- (e) Space for future 220 kV (12 Nos.) line bays
- (f) Space for future 400 kV (8 Nos.) line bays along with line reactors at Fatehgarh Pooling Station.
- (g) Space for future 220/400 kV transformers (5 Nos.) along with associated transformer bays at each level.
- (h) Space for future 400 kV bus reactor (2 Nos.) along with associated bays.

3. The aforesaid transmission system has been planned to evacuate the power from the solar park of Respondent No 1, namely, Adani Renewable Energy Park Rajasthan Ltd. (AREPRL), located in Fatehgarh, Jaisalmer (Dist), Rajasthan. The Petitioner entered into the Transmission Service Agreement with the Long-Term Transmission Customer (LTTC), i.e., AREPRL on 10.1.2018. Pursuant to the Tariff Based Competitive Bidding conducted by Power Finance Corporation Consulting Limited (PFCCL), Adani Transmission Limited (ATL) was selected as the successful bidder, and a Letter of Intent was issued on 21.2.2018. Post-award of the Project, ATL acquired the SPV (the Petitioner) on 14.3.2018 which became its fully owned subsidiary. The Commission, in its order dated 27.8.2018 in Petition No. 94/TL/2018, granted a transmission licence to the Petitioner for inter-State transmission of electricity. The Scheduled Commercial Operation Date (SCOD) envisaged as per Schedule 3 of the TSA was 30.9.2019.

4. Thereafter, the Petitioner commenced construction of the transmission line and submitted its application dated 28.11.2018 to the office of Nodal Officer, Jaipur, seeking requisite permission and clearances in its favour for Diversion of 0.6466 Ha forest land for 765 kV D/C Fatehgarh-Bhadla Transmission Line. However, the Chief Conservator of Forest (CCF), Jodhpur, vide letter dated 21.1.2019, did not recommend clearance to the proposal of the Petitioner on the ground that the area around the proposed route is a breeding ground for the Great Indian Bustard (GIB), which is a critical importance and an endangered bird. CCF, Jodhpur, further observed that it is not in the interest of the conservation of GIB to grant the approval for the conversion of land in the case. Subsequently, the Deputy Conservator of Forest (Wildlife), Jaisalmer, vide letter dated 5.2.2019, directed the Petitioner to keep the line route outside the GIB Arc. DCF (Wildlife), Jaisalmer provided the coordinates of GIB Arc area vide letter dated 28.2.2019. Since the proposed re-routing of the

transmission line led to an increase in the length of the transmission line from 103 km to 152 km, the Petitioner filed Petition No. 126/MP/2019, *inter-alia*, seeking a declaration that notification of the GIB Arc coordinates, vide letter dated 28.2.2019 by the Deputy Conservator of Forest, Jaisalmer on account of which the Petitioner is required to re-route the 765 kV D/C Fatehgarh-Bhadla Transmission Line, is a 'Change in Law' event under Article 12 of the TSA dated 10.1.2018. The Petitioner made the following prayers in Petition No. 126/MP/2019:

*"a) Declare that the event namely, notification of the GIB Arc coordinates vide letter dated 28.02.2019 by the Deputy Conservator of Forest, Jaisalmer on account of which Petitioner is required to re-route the 765 kV D/C Fatehgarh-Bhadla Transmission Line, is a 'Change in Law' event under Article 12 of the TSA dated 10.01.2018;*

*b) Grant extension in the Scheduled Commercial Operation Date to allow 6 months' time to achieve CoD on account of the above 'Change in Law' event and re-routing of the transmission line and waive any penalties or any other consequences thereof under the TSA, and further allow recovery of Transmission Charges under Schedule 3 of the TSA as per extended CoD as considered and granted by this Hon'ble Commission;*

*c) Direct the Respondent not to take any coercive steps including encashment of Bank Guarantees against the Petitioner considering the present SCoD of Sep'19 as the transmission line will likely get delayed beyond Sep'19 due to above 'Change in Law' event and re-routing of the transmission line;*

*d) Grant liberty to the Petitioner to approach this Hon'ble Commission to assess the actual impact of such 'Change in Law' event, based on the actual and audited expenditure incurred by the Petitioner as per formula specified under Article 12.2.1 of the TSA;*

*e) Pass any such further or other orders as this Commission may deem fit and proper in the facts and circumstances of the present case."*

5. Vide order dated 8.1.2020, the Commission, *inter-alia*, held that the imposition of condition to reroute the transmission lines by the forest authorities is an event of Change in Law in terms of Article 12.1.1 of the TSA. Since the Petitioner had not implemented the Project, no relief was granted at that stage. However, the Commission had granted liberty to the Petitioner to approach the Commission for appropriate relief, if any, in terms of the provisions of the TSA after completion of the

project.

6. As per the Petitioner, the project was commissioned on 31.7.2021, i.e., with a delay of 22 months from the SCOD of 30.9.2019 on account of various Force Majeure and Change in Law events. In the present Petition, the Petitioner is, *inter alia*, seeking relief on the following grounds:

- (i) Declaration of the following as Force Majeure events:
  - (a) Delay on account of re-routing of Fatehgarh-Bhadla line due to GIB Arc and the consequent delay in grant of NOC by the Defence Department;
  - (b) Delay on account of operation of first status quo order dated 11.5.2018 passed by Rajasthan High Court in writ petitions filed by farmers in respect of land allocated to the Respondent to provide it to the Petitioner for 400 kV Pooling Station;
  - (c) Delay in providing adequate land for 400 kV pooling station adjacent to the solar park of the Respondent on account of subsequent Status Quo order dated 8.9.2020 passed by the Rajasthan High Court;
  - (d) Delay due to the ongoing COVID-19 pandemic; and
  - (e) Delay due to intense sandstorm in the State of Rajasthan.
  
- (ii) Declaration of following as Change in Law events:
  - (a) Re-routing of Fatehgarh - Bhadla line due to GIB Arc on account of the conditions mandated by the Chief Conservator, Forest, Jodhpur, and Deputy Conservator, Forest, Jaisalmer;
  - (b) Requirement to lower the height of 54 towers due to the stipulation contained in the NOC issued by Defence Aviation;
  - (c) Increase in cost due to the ongoing COVID-19 pandemic.

7. The Petitioner has made the following prayers in the present Petition:

*“(a) admit and allow the present Petition;*

*(b) Declare and hold that the SCOD provided in the TSA stands extended by 22 months on account of occurrence of Force Majeure events and delays due to Change in Scope and that the date of 31.07.2021 be deemed as the SCOD interim of the TSA*

(c) Declare that the following events are in the nature of force majeure, as per Articles 4.4.2 and 11 of the TSA, affecting the Scheduled Commercial Operation Date (SCOD) of the Transmission Project of the Petitioner:

- i. Delay of 212 days due to requirement of re-routing of Fatehgarh – Bhadla line on account of GIB Arc.
- ii. Delay of 310 days due to delay in grant of NOC by the Chief Conservator, Forests, Jodhpur, and the delay in grant of the NOC by the Defence Aviation Department, in terms stated in the present petition;
- iii. Delay of 566 days due to the status quo order dated 05.011.2018 passed by the Hon'ble Rajasthan High Court in Petition No. 5707 of 2018, in terms stated in the present petition;
- iv. Delay of 295 days due to the status quo order dated 08.09.2020 passed by the Hon'ble Rajasthan High Court in Special Appeal Writ No. 51 of 2020, in terms stated in the present petition;
- v. Delay of 240 days due to the outbreak of COVID-19 pandemic, in terms stated in the present petition; and
- vi. Delay of 20 days due to sand storm, in terms stated in the present petition.

(d) Declare that as Force Majeure events, the Petitioner is entitled to the following relief in the form of compensation, which is to be provided by way of increase in tariff by 19.84% on a year on year basis against transmission tariff adopted by this Hon'ble Commission vide order dated 27.08.2018 passed in Petition No. 93/AT/2018:

<b>Heads</b>	<b>Amount Claimed (Rs. Cr)</b>
IDC	55.54
IEDC	4.75

(e) Declare that the requirement to change/ reduce length of 54 transmission towers, abandonment of another 16 number of foundations as well as 46 number of towers already fabricated, including the requirement to design a special tower as there was no design available for 765 kV D/C Truncated tower, as a result of the conditions stipulated in the letter dated 16.12.2019 issued by Defence Aviation Department, in terms stated in present petition, is on account of change in law event, as well as a change in scope, for the Petitioner with respect to implementation of the transmission project;

(f) Consequent to prayer (e), direct that the Petitioner is entitled for an amount of Rs. 51.18 crores, which is to be provided by way of increase in tariff by 19.04% with respect to transmission tariff adopted by this Hon'ble Commission vide order dated 27.08.2018 passed in Petition No. 93/AT/2018;

(g) *Direct that the Petitioner is entitled to an increase in tariff of 32.58% with respect to transmission tariff adopted by this Hon'ble Commission vide order dated 27.08.2018 passed in Petition No. 93/AT/2018, on account of the approved change in law event of the requirement to re-route the FB Line as a result of GIB Arc, in terms stated in the present Petition;*

(h) *Declare that the Petitioner is entitled to compensation of an amount of Rs. 86.93 Cr, which translates to per year increase in tariff of 28.60% with respect to transmission tariff adopted by this Hon'ble Commission vide order dated 27.08.2018 passed in Petition No. 93/AT/2018, in terms of loss of tariff on account of the delay in achieving COD on 31.07.2021 due to force majeure and change in law/ change in scope events in terms stated in the present petition; or*

*In the alternative, extend the term of the TSA by a period of 22 months, which is the time period of the contract lost on account of force majeure events/ change in law/ change in scope of work as pleaded in the present petition treating actual COD as the 1st contract year;*

(a) *Declare and direct that the Petitioner is entitled for carrying cost/ interest cost towards the additional expenditure incurred pursuant to the change in law events, or change in scope of work, as the case may be, as detailed in the present petition;*

(b) *Direct that the Petitioner is entitled to monetary compensation either through supplementary bill or through monthly tariff invoices, or both, as may be directed by this Commission; and*

(c) *pass any other order as this Commission may deem fit in the facts and circumstances of the present case."*

8. The Petition was admitted on 14.6.2022, and notices were issued to the Respondents, i.e., AREPRL, Central Transmission Utilities of India Ltd (CTUIL) and PFCCCL. Thereafter, during the hearing held on 7.2.2023, the Commission directed the Petitioner to implead the beneficiaries of the Northern Region as party to the Petition. The matter was heard on 20.4.2023, 21.8.2023, 11.10.2023 and 18.12.2023. In compliance with directions issued by the Commission during the hearings, the Petitioner has filed various information vide affidavits dated 5.6.2023, 1.9.2023, 12.12.2023, and 12.2.2024. The Petitioner has also filed written submissions dated 12.3.2024.

9. AREPRL, CTUIL, and BSES Rajdhani Power Limited (BRPL) have filed their

replies dated 9.1.2023, 19.7.2023, and 5.12.2023, respectively. The Petitioner has filed rejoinders to replies filed by AREPRL, CTUIL, and BRPL, vide affidavits dated 27.1.2023, 17.8.2023, and 12.12.2023.

10. We have perused the submissions of the Petitioner and Respondent and relevant documents on record. The reliefs sought by the Petitioner are dealt with in subsequent paragraphs.

**(A) Re-routing of Fatehgarh-Bhadla line due to GIB Arc and the requirement to seek NOC from the Defence Department**

11. The Petitioner has claimed the delay on account of the re-routing of the transmission line and the approval sought from the Defence Department under both Force Majeure and Change in Law provisions of the TSA and mainly submitted as under:

**Re-routing of transmission line**

(a) The Petitioner submitted its application dated 28.11.2018 with the office of Nodal Officer, Jaipur, seeking requisite permission and clearances in its favour for Diversion of the 0.6466 Ha forest land for 765 kV D/C Fatehgarh -Bhadla transmission line.

(b) The Office of Chief Conservator of Forest (CCF), Jodhpur, vide its letter dated 21.1.2019, intimated to the Petitioner that its proposal for clearance is not being recommended on the ground that the area around the proposed route is a breeding ground for the GIB which is of critical importance and an endangered bird. It was further observed by CCF that execution of the proposed overhead transmission lines is likely to adversely impact the bird habitat. Consequently, CCF, Jodhpur suggested exploring the alternative route outside the GIB Habitat Arc. In view of this, CCF, Jodhpur did not recommend approval of the proposed line route.

(c) Subsequently, the Deputy Conservator of Forest (Wildlife), Jaisalmer, issued a letter dated 5.2.2019 directing the Petitioner to keep the line route outside the GIB Arc. In response, the Petitioner held various meetings with the Forest Officials

and issued various communications seeking to (a) understand the extension of the GIB Arc to offer a better solution to the problem and (b) amicably and satisfactorily resolve the objection raised with respect to the laying of overhead transmission line in GIB Arc.

(d) After ample requests to allow its transmission line to proceed as per the CEA-sanctioned line route with the installation of Bird Diverters/ reflectors and to share the coordinates of the said GIB Arc to evaluate the alternative route, the DCF, Jaisalmer vide its letter dated 28.2.2019 provided the coordinates of the GIB Arc area.

(e) After receipt of the GIB Arc coordinates, the Petitioner conducted a -survey for laying the Fatehgarh-Bhadla transmission line to identify the revised route alignment outside the GIB Arc area. It was found that the revised line length of the transmission line shall be 146 KM. Thereafter, the Petitioner submitted the revised forest proposal for the diversion of the 1.3334 Ha of forest land based on the revised route of 146 KM on 27.6.2019. Therefore, there was a delay of around 212 days (28.11.2018 to 27.6.2019) in the submission of the forest clearance request by the Petitioner, which was ultimately granted on 28.7.2020.

(f) Due to the above re-routing of the transmission line due to GIB Arc and delay in approval by the Forest Authorities, the Petitioner lost a substantial amount of time in completing the transmission system as envisaged under the TSA, which was clearly beyond the Petitioner's control.

(g) The Petitioner had approached the Commission by filing Petition No. 126/MP/2019, seeking that the aforesaid notification of CCF, Jodhpur, is a Change in Law event. The Commission, vide order dated 8.1.2020, held that the imposition of condition to re-route the transmission lines by the forest authorities is an event of Change in Law in terms of Article 12.1.1 of the TSA. Further, the Petitioner was granted the liberty to approach the Commission for appropriate relief in terms of the provisions of the TSA after completion of the project.

(h) On account of the aforesaid Change in Law event, the line length increased from 103 km to 146 km. Therefore, the Petitioner is entitled to a proportionate increase in tariff of 32.58% with respect to the transmission tariff adopted by the Commission on account of the re-routing of the FB Line as a result of GIB Arc.

Further, revision in the route of the line had resulted in abandoning 24 foundations already cast by the Petitioner along with the route approved by the CEA under Section 164 of the Act. This resulted in an increase in the overall cost of the project.

### **Approval from the Defence Aviation Department**

(i) Further, the Petitioner had to seek permission from the office of the Phalodi Defence Airbase (of the Indian Airforce) to construct the transmission line on the revised route. For this, the Petitioner submitted a proposal for NOC to obtain clearance of the revised route of 146 km, to the Director Operations (ATS), Air HQ, on 15.7.2019.

(j) The need for approval of the Air Force / Defence arose on account of the adoption of the revised route, in view of the GIB arc issue. In case, the original route had been followed, the issue of Air Force / Defence approval would not have arisen. The delay and difficulty encountered due to Air Force / Defence approval are a fallout of the direction of the Forest Department to keep Fatehgarh-Bhadla line out of the GIB Arc area.

(k) Since there was no response from Defence Aviation regarding the above proposal, and keeping in mind the stringent timelines qua the completion of the transmission project, the Petitioner requested the Central Electricity Authority (CEA), vide its letter dated 25.11.2019, to intervene and expedite issuance of the NOC as there were around 60 nos. of 765 kV towers which could not be constructed as the said towers were situated close to the Phalodi airbase.

(l) It was only on 16.12.2019 that Defence Aviation vide its letter, accorded NOC. As per the conditions of the NOC qua construction around Indian Air Force Aerodromes, the time frame for processing a case for the transmission projects was 60 days. However, Defence Aviation took more than 150 days to provide the NOC (the Petitioner sought NOC on 15.7.2019, and the same was granted on 16.12.2019).

(m) Further, Defence Aviation mandated a height restriction at the range of 46-50 meters with respect to the towers near the Phalodi airbase, which had an overall impact on around 54 nos. of towers. The original height was 69 meters.

(n) The conditions of NOC dated 16.12.2019, granted by Defence Aviation, took the Petitioner by surprise, as it was asked to reduce the height of 50 towers to 35-50 meters near the Phalodi Defence Airport, both within and outside the funnel area. However, the above condition qua reduction of the height of around 50 towers ultimately affected 54 towers and forced the Petitioner to abandon another 16 foundations as well as 46 towers already fabricated. The same also led to an increase in the number of towers due to restricted height. The Petitioner has also submitted a cost-benefit analysis demonstrating reasons for the abandoning of 24 foundations.

(o) The NoC also required a completely new design for the towers, which had never been used in India. As a result, it took a substantial amount of time for designing, subsequent fabrication, and manufacture towers, which not only delayed the project but also led to additional construction costs. In this regard, the Petitioner relies on the communication dated 20.12.2019 issued by the Petitioner's contractor, KEC International Limited.

(p) Since t no design was available for the 765 kV D/C Truncated tower, the Petitioner was required to design a special tower. On account of the same, the Petitioner approached PGCIL, CEA, and other industry-leading EPC agencies vide letter dated 30.12.2019 in order to search for such design readily available to them.

(q) The restrictions imposed by the Defence Aviation Authority could not at all have been envisaged/ foreseen by the Petitioner at the time of execution of the TSA and submission of the bid. As a result, the Petitioner was required to re-orient the entire work plan to overcome the aforesaid challenge.

(r) There was a substantial delay in the grant of an NOC by the Defence Authority and the said NOC imposed various restrictions (and additional conditions) upon the Petitioner, which led to a delay in the implementation of the transmission project envisaged under the TSA. The same is clearly beyond the reasonable control of the Petitioner.

(s) On account of the aforesaid force majeure events, the Petitioner duly issued letters/ notices dated 15.1.2020 to AREPRL. Thereafter, the Petitioner, vide a letter dated 30.6.2020, informed the Respondent that the implementation work, which was severely affected due to the non-receipt of the NOC from the Defence

Department for clearance of the revised route, was back to normalcy, and the Petitioner was able to restart the project work from 29.6.2020.

(t) The delay in implementation of the transmission project, due to aforesaid force majeure events, was also a change in the scope of work for the Petitioner. The Petitioner is entitled to an extension of time for achieving the CoD of the Project in terms of Article 11.7(a) of the TSA. Further, in terms of Article 11.7(b), the Petitioner is also entitled to claim relief, in the form of compensation or otherwise, for force majeure events affecting its performance in relation to the obligations contained in the TSA. The obligations of the Petitioner, *inter alia*, include the obligation to be responsible for financing the project in terms of Article 4.1(b) of the TSA and other obligations mentioned under Article 4.1.

(u) Apart from the ability to grant the relief in the form of just compensation in terms envisaged in the TSA, the Commission can additionally invoke its regulatory powers provided under Section 79(1)(c) of the Act. The compensation, apart from an increase in hard costs, will, *inter alia*, include additional costs towards financing (IDC) and other incidental costs (IEDC). There was an unavoidable delay of 310 days (15.7.2019 to 19.5.2020) in the completion of the transmission project.

(v) The requirement to lower the height of 54 towers due to the stipulation contained in the NOC issued by Defence Aviation is also a Change in Law event in terms of the TSA, as well as a change in scope for the Petitioner with respect to the implementation of the transmission project.

(w) The Petitioner incurred additional expenditure to the tune of Rs. 51.18 crore due to the Change in Law / Force Majeure events on account of the conditions mentioned in the NOC issued by Defence Aviation.

12. AREPRL, vide its reply dated 9.1.2023, sought the following clarification from the Petitioner:

(a) Documentary proof from which it can be ascertained that the Defence NOC was not required for the original route or as per the original proposal.

(b) Could FBTL commence the construction work before the issuance of the Defence NOC? If yes, was there any in-principle approval issued to FBTL

in this regard?

(c) Why did FBTL reduce the tower height in the range of 35 to 50 meters whereas the restriction imposed under the Defence NOC was in the range of 46 to 50 meters?

(d) FBTL is claiming condonation of delay of 310 days with respect to the present claim from 15.7.2019 to 19.5.2020 wherein 15.7.2019 is the date of application of the Defence NOC which was approved on 16.12.2019. The event that happened on 19.5.2020 that eventually led to the cessation of such a force majeure event, is not clear. Accordingly, FBTL may provide a clarification in this regard.

13. The Petitioner, vide its rejoinder dated 27.1.2023 to the reply filed by AREPRL, has clarified the following:

(a) The Route map comparison provided with the Petition shows that the Petitioner's revised route was passing near the Phalodi Defence Airbase whereas the original route was nowhere near the Phalodi Defence Airbase.

(b) Article 5.1.3 of the TSA bestows the responsibility of obtaining Defence Aviation approval on the Petitioner. Accordingly, the Petitioner approached the Defence Department as soon as it encountered the Phalodi Defence Airbase on its revised route. The Petitioner could initiate the construction of its line near the Defence Area only after conditional approval from the Defence Department on 16.12.2019.

(c) The Petitioner has restricted the height of around 54 towers in the range of 46 to 50 meters as per the Defence NoC, thereby, reducing the tower height by 35 to 50 meters from the proposed tower height.

(d) The Petitioner applied for NoC to the Defence Department on 15.7.2019. In turn, the Defence Department gave conditional NoC on 16.12.2019, which took the Petitioner by surprise, as it was asked to reduce the height of around 54 towers by 35 to 50 meters near the Phalodi Defence Airport. The reduction of tower height required a completely new design for the towers, which had never been used in India, and as a result, it took a

substantial amount of time for design, subsequent fabrication, and manufacturing of the towers, which not only delayed the project but also led to the additional cost of construction. Finally, the Petitioner could restart the project implementation work near the Defence Airbase area on 19.5.2020, i.e., after the mobilisation of material at the site. Accordingly, the Petitioner has claimed a delay of 310 days (15.7.2019 to 19.5.2020) due to the Force Majeure event of delay in grant of the Defence NoC.

14. CTUIL, vide its reply dated 19.7.2023, has mainly submitted as under:

(a) The relief on account of force majeure flows from the contract and relief envisaged by the parties in case of occurrence of such events also flows from the contract. Therefore, a party cannot be allowed to claim relief over and above what is envisaged under the contract. Further, the Petitioner had an obligation to give notice to the other party under Article 11.5 of the TSA in case there is an event of force majeure that would affect the performance of obligations under the TSA.

(b) The Petitioner filed Petition No. 126/MP/2019 for the declaration of re-routing of the transmission line due to the GIB arc as a Change in Law event, which was granted by the Commission, vide order dated 8.1.2020.

(c) During the proceedings of Petition No. 126/MP/2019, the Petitioner was aware of other intervening circumstances like defence clearance needed for the tower, restriction on tower height, and status quo orders of the Hon'ble High Court of Rajasthan. The NoC from the Defence Aviation Authority was already obtained on 16.12.2019, and the Petitioner already knew about the change in the height of the towers. The Petitioner knew of the delays that would be caused due to the same. However, the Petitioner never brought forward the same in the Change in Law Petition.

(d) The Petitioner could have broadened the scope of its Change in Law Petition to include all such events. Therefore, the present Petition is barred by the doctrine of constructive *res judicata* which squarely applies in this scenario. In this regard, reliance has been placed on the judgments of the Hon'ble Supreme Court of India in *State of U.P. vs Nawab Hussain, [(1977)*

*2 SCC 806]* and *Alka Gupta vs Narendra Kumar Gupta, [(2010) 10 SCC 141]*.

(e) Further, the re-routing of the transmission line was done by the Petitioner itself, and the same was not prescribed to the Petitioner. It was the obligation of the Petitioner to obtain requisite Government clearance (Clause 4.1 (a) of the TSA). Despite being aware of the delay in project implementation, the Petitioner chose to re-route the transmission line through the way wherein additional government clearance would be required. It is a common practice in the Defence Areas that tower heights would be lower than normal around airstrips.

(f) It is entirely unreasonable for the Petitioner to claim that the work due to delay in obtaining the NOC could not be re-started until 29.6.2020. The work could be resumed in all places where height of the towers did not have to be changed.

(g) Therefore, the Petitioner's claim that delays in obtaining defence aviation clearance is a force majeure event cannot be accepted.

15. The Petitioner, vide its rejoinder dated 17.8.2023 to reply filed by CTUIL, has submitted the following:

(a) The construction of Article 11.3 (definition of "Force Majeure") is that whenever a party is prevented from performing its obligation under the TSA due to reasons beyond its control, such an event would be construed as a force majeure event. The law, to this extent, is absolutely clear.

(b) The Petitioner is seeking the relief on account of force majeure qua such events only, and therefore, in terms of Article 11.7 of the TSA, the Petitioner is entitled to such reliefs, which would mitigate the effect of the force majeure event(s) and place the party suffering from the force majeure event in a similar position had such an event not occurred.

(c) As per the TSA, the Petitioner was only obligated to issue a force majeure notice to the beneficiaries under the TSA, and the said obligation was duly complied with by issuing the notices dated 15.1.2020, 4.6.2018, 19.9.2020, 12.3.2020, 23.3.2020, 26.3.2020, 15.4.2020, 4.5.2020,

18.5.2020, 6.6.2020, 4.7.2020, 20.8.2020, 14.9.2020, 23.10.2020, 28.4.2021 and 17.7.2019 to Respondent No. 1, AREPRL.

(d) Reliance of CTUIL on the principle of constructive res-judicata is not applicable as the scope of Petition No. 126/MP/2019 was the non-grant of forest clearance on account of the restriction on construction of transmission line in the GIB Arc area, which resulted in a Change in Law event. However, the issue in the present Petition is the consequent delay that took place on account of the delay in getting the requisite permits for the revised route. The same could not at all have been anticipated by the Petitioner at the time of filing of Petition No. 126/MP/2019.

(e) Further, NoC for the construction of the transmission line was received from the Air Headquarters, Vayu Bhavan on 16.12.2019, whereas the Commission reserved the judgment in Petition No. 126/MP/2019 on 29.10.2019 and finally issued the Order on 8.1.2020. Hence, the Petitioner was not aware of the issue of transmission tower heights in the defence area during or at the beginning of proceedings of Petition No. 126/MP/2019.

(f) The principle of constructive *res-judicata* finds its basis in Section 11 of the Civil Procedure Code, 1908. Thus, the Commission is not bound to follow the principles of the CPC. In this regard, reliance has been placed on Hon'ble Supreme Court's judgment in Maharashtra State Electricity Distribution Company Ltd. v. MERC & Ors. reported in [(2022) 4 SCC 657] and Appellate Tribunal's judgments in R.P. No. 1 of 2012 in Appeal No. 142 of 2009 (*BSES Rajdhani Power Ltd. v. DERC & Ors.*) and Appeal No. 185 of 2015 (*Kalani Industries Pvt. Ltd. v. RERC & Ors.*).

(g) The need for approval of the Air Force / Defence arose on account of the adopting the revised route, in view of the GIB arc issue. Due to this, the Petitioner had to seek permission from the office of the Phalodi Defence Airbase (of the Indian Airforce) to construct the transmission line on the revised route. The Petitioner could initiate the construction of its line near the Defence Area after conditional approval from the Defence Department on 16.12.2019.

16. BRPL, vide its reply dated 5.12.2023, has mainly submitted as under:

(a) The Appellate Tribunal of Electricity (APTEL) in Appeal No. 153 of 2019 (*Fatehgarh Bhadla Transmission Company Limited v. Central Electricity Regulatory Commission & Ors*) has categorically held that any relief that is sought by the Petitioner has to be in terms of the TSA. Since the TSA is between the Petitioner and AREPRL, any claim has to be made from AREPRL and them alone, and BRPL cannot be saddled with any reliefs.

(b) The Petitioner has impleaded the Distribution Licensees of the Northern Region without showing how Northern Region Discoms are benefitting from the Petitioner's project. The Petitioner has not filed any documents/ evidence to show as to why, it is only the Northern Region Discoms that should be responsible for any of the reliefs that are sought.

(c) It is a settled position of law as laid down by a catena of judgments of the Hon'ble Apex Court that force majeure can be claimed only within the four corners of the contract and as is prescribed therein. [*Energy Watchdog v. CERC*, ((2017) 14 SCC 80)].

(d) As per Article 11.3 of the TSA, the force majeure event does not contemplate events such as GIB re-routing and Defence clearances.

(e) Article 9 of the TSA mandates that the Petitioner maintain insurance in accordance with Prudent Utility practices. The Petitioner has failed to disclose any details in the present Petition as to whether such insurance was maintained and if so, for what purposes.

17. The Petitioner, vide its rejoinder dated 12.12.2023 to the reply filed by BRPL, has submitted as under:

(a) In accordance with the provisions of the Central Electricity Regulatory Commission (Sharing of Inter-state Transmission Charges and Losses) Regulations 2020 (Sharing Regulations), the TSA contains Schedule 1, which under Note C mandates that the transmission project/ scheme is to be included under the national transmission pool so that the transmission charges are recovered through the PoC/ sharing mechanism envisaged in the Sharing Regulations.

(b) Thus, as a natural corollary, in case the Commission allows the prayers of the Petitioner resulting in an increase in transmission tariff, the corresponding increased Yearly Transmission Charges shall be shared by the Designated ISTS Customers (DICs) of the concerned region (being the Northern Region in the instant case) proportionate to the quantum of Long-Term Open Access/ Medium-Term Open Access being availed by them, in terms of the Sharing Regulations.

(c) Thus, the contention of BRPL regarding no privity of contract with the Petitioner/ Respondent No.1 and no consequent liability insofar as reliefs prayed by the Petitioner are concerned, is completely irrelevant as transmission charges being statutory in nature, are to be recovered in terms of Sharing Regulations and there exists no requirement of a contract between the Petitioner and BRPL, insofar as recovery of such transmission charges is concerned.

(d) In fact, the Petitioner originally arrayed only Respondent No. 1, Adani Renewable Energy Park Rajasthan as Respondent. However, the Commission vide Record of Proceedings (RoP) dated 7.2.2023 directed the Petitioner to implead beneficiaries of the Northern Region (including BRPL) as party respondents, based on CTUIL's request to implead beneficiaries/ Discoms as a party to the Petition.

(e) The construction of Article 11.3 of the TSA is such that whenever the party is prevented from performing its obligation under the TSA due to reasons beyond its control, such an event would be construed as a force majeure event.

(f) In the present case, the Petitioner suffered force majeure on account of various issues enumerated in the Petition, and such events are the reasons against which the Petitioner has sought relief in the Petition.

### **Analysis and Decision**

18. We have considered the submissions of the Petitioner, AREPRL, CTUIL, and BRPL and perused the documents available on the record.

19. Pursuant to the Tariff Based Competitive Bidding (TBCB) conducted by PFC Consulting Limited (PFCCL), Adani Transmission Limited (ATL) emerged as a successful bidder for building the “*Transmission System for Ultra Mega Solar Park in Fatehgarh, distt. Jaisalmer, Rajasthan*”. The Petitioner had entered into a Transmission Service Agreement dated 10.1.2018 with AREPRL to provide the transmission service for the aforesaid scheme. PFCCL issued a Letter of Intent (“LoI”) dated 21.2.2018 to Adani Transmission Limited. Thereafter, ATL executed a Share Purchase Agreement (“SPA”) dated 14.3.2018 with the PFCCL to acquire 100% equity of FBTL. The SCOD of the project, as per the provisions of the TSA, was 30.9.2019. However, the Petitioner achieved COD only on 31.7.2021, with a delay of 22 months from its SCOD.

20. The Petitioner had provisioned to install the Bird Diverters while finalizing the original line route and seeking approval under Section 164 of the Act from the CEA vide its letter dated 30.7.2018. The Central Electricity Authority/the Ministry of Power, vide its order dated 26.10.2018, published authorization under Section 164 of the Act and conferred all the powers to the Petitioner under the transmission scheme under the Gazette of India for laying the overhead transmission line which Telegraph Authority possesses under the Indian Telegraph Act, 1885 with respect to the placing of telegraph lines and posts for the purposes of a telegraph established or maintained by the Government or to be established or maintained.

21. The Petitioner submitted its application dated 28.11.2018 to the Office of Nodal Officer, Jaipur, seeking permission/ clearance for the diversion of the 0.6466 Ha forest land for the 765 kV D/C Fatehgarh-Bhadla transmission line. However, the Chief Conservator of Forest, Jodhpur, vide letter dated 21.1.2019 refused to recommend the proposal of the Petitioner for forest clearance on the ground that the

forest land applied for is a natural zone of breeding of GIB and habitat. The CCF, Jodhpur, stated that it is not in the interest of the conservation of GIB to grant the approval of the conversion of forest land in the case. Subsequently, the Deputy Conservator of Forest (DCF) (Wildlife), Jaisalmer, issued its letter dated 5.2.2019 directing the Petitioner to keep the line route outside the GIB Arc.

22. The Petitioner wrote to the forest authorities vide its letters dated 23.1.2019, 29.1.2019, 2.2.2019, and 7.2.2019 to provide clarity on GIB Arc coordinates and sought to lay an overhead transmission line in GIB Arc on the original route with the installation of bird diverter/ reflector. The DCF, Jaisalmer, vide its letter dated 28.2.2019, provided the coordinates of the GIB Arc area.

23. The Petitioner has submitted that upon analysis of the coordinates, it was clear that the approved line route for the 765 kV D/C Fatehgarh- Bhadla transmission line falls within the GIB Arc coordinates notified by the DCF, Jaisalmer. After receipt of the GIB Arc coordinates, the Petitioner conducted a re-survey for laying the Fatehgarh-Bhadla transmission line to identify revised line route alignment, outside the GIB Arc area. According to the Petitioner, the revision of the route resulted in an increase in line length from 103 km to 146 km. Thereafter, the Petitioner submitted the revised forest proposal for the diversion of 1.3334 Ha of forest land based on the revised route of 146 km on 27.6.2019. Therefore, there was a delay of around 212 days (28.11.2018 to 27.6.2019) in the submission of the forest clearance request by the Petitioner. The Petitioner received forest clearance on 28.7.2020.

### ***Re-routing of transmission line- Change in Law***

24. The Petitioner had filed Petition No. 126/MP/2019 seeking declaratory relief that the notification of the GIB Arc coordinates vide letter dated 28.2.2019 by the

Deputy Conservator of Forest, Jaisalmer, is a 'Change in Law' event under Article 12 of the Transmission Service Agreement (TSA) dated 10.1.2018. The Petitioner made the following prayers in Petition No 126/MP/2019:

*"a) Declare that the event namely, notification of the GIB Arc coordinates vide letter dated 28.02.2019 by the Deputy Conservator of Forest, Jaisalmer on account of which Petitioner is required to re-route the 765 kV D/C Fatehgarh-Bhadla Transmission Line, is a 'Change in Law' event under Article 12 of the TSA dated 10.01.2018;*

*b) Grant extension in the Scheduled Commercial Operation Date to allow 6 months' time to achieve CoD on account of the above 'Change in Law' event and re-routing of the transmission line and waive any penalties or any other consequences thereof under the TSA, and further allow recovery of Transmission Charges under Schedule 3 of the TSA as per extended CoD as considered and granted by this Hon'ble Commission;*

*c) Direct the Respondent not to take any coercive steps including encashment of Bank Guarantees against the Petitioner considering the present SCoD of Sep'19 as the transmission line will likely get delayed beyond Sep'19 due to above 'Change in Law' event and re-routing of the transmission line;*

*d) Grant liberty to the Petitioner to approach this Commission to assess the actual impact of such 'Change in Law' event, based on the actual and audited expenditure incurred by the Petitioner as per formula specified under Article 12.2.1 of the TSA;*

*e) Pass any such further or other orders as this Commission may deem fit and proper in the facts and circumstances of the present case."*

25. When Petition No. 126/MP/2019 was first listed on 17.7.2019, the Petitioner submitted that the length of the transmission line had increased by 1.5 times the originally envisaged route on account of GIB Arc, and the lenders are hesitant to fund the additional cost unless the event is declared as Change in Law by the Commission. The Commission observed that since the Scheduled COD of the Project is September 2019, the Petition at that stage was premature. In response, learned counsel for the Petitioner requested a week's time to file an affidavit for withdrawal of the Petition. However, the Petitioner mentioned the matter on 23.7.2019 and submitted that the Petitioner wants to pursue only the prayer with regard to the declaration of GIB Arc as a Change in Law. Accordingly, the Petitioner requested for

withdrawal of prayers (b), (c) and (d) of the Petition with liberty to approach the Commission at a later stage. The Commission allowed the request of the Petitioner. Subsequently, the Petitioner vide affidavit dated 31.7.2019 limited its Petition only to prayer (a), i.e., for a declaration of 'Change in Law' and sought to withdraw prayers (b) to (d) with the liberty to raise the same through appropriate proceedings at the appropriate time.

26. Vide order dated 8.1.2020, the Commission held that the imposition of condition to re-route the transmission lines by the forest authorities is an event of Change in Law in terms of Article 12.1.1 of the TSA. The relevant portions of the order are extracted below:

*“18. The Bid deadline in terms of Bidding documents for the Project was 22.1.2018. Therefore, the cut-off date in terms of the TSA which is seven days prior to bid deadline shall be 15.1.2018. It is noted that all the three alternate routes provided by the Bid Process Coordinator, namely, PFCCL in the Final Survey Report as part of RfP were in the range of about 100 to 108 kms. The Petitioner has submitted that the length of the transmission line on the revised route has increased from the original estimate of 102.98 km to 152 km to avoid GIB Arc. Therefore, it is apparent that there was no consideration of GIB Arc coordinates in the optimum route or other alternative routes selected by BPC. It is also noted that, in response to the proposal submitted by AREPRL to the Forest Officials for setting up its Solar Park, the Deputy Conservator of Forest, Jaisalmer vide its letter dated 17.11.2016, gave no-objection to the proposal for construction of overhead power line with the stipulation of that Bird Diverters of certified quality shall be installed at a distance of 20 metres and the same should be replaced at regular intervals in case of damage to such Bird Diverters. Relevant portion of the said letter dated 17.11.2016 is extracted as under:*

.....

*19. Also, Ministry of New and Renewable Energy, Govt. of India vide its Circular dated 22.2.2019 intimated the power transmission line agencies and wind energy farm developers regarding the measures taken by Ministry of Environment, Forest & Climate Change (MoEF&CC) for ensuring the safety of GIB and other migratory bird species and issued necessary instructions. The relevant extract of the circular is as under:*

.....

*20. Perusal of the above circular reveals that the Hon'ble Supreme Court had directed MoEF&CC on 19.1.2018 in Civil Writ Petition No. 275 of 2015 to*

constitute an inter-ministerial Task Force comprising of officers of the Ministry of Power, PGCIL, Central Electricity Authority and MOEF&CC for suggesting various measures for avoiding death of the birds and other animals due to electrocution and collision with the power transmission lines. Accordingly, as on the cut-off date of 15.1.2018, there were no guidelines on the measures for avoiding death of the birds and other animals due to electrocution and collision with the power transmission lines.

21. The Petitioner has stated to have provisioned to install Bird Diverters while finalizing the original line route and seeking approval under Section 164 of the Act from CEA vide its letter dated 30.7.2018. The Central Electricity Authority, Ministry of power, vide its order dated 26.10.2018, published authorization under Section 164 of the Act, and conferred all the powers to the Petitioner under the transmission scheme "Transmission system for Ultra Mega Solar Park in Fatehgarh, Dist Jaisalmer, Rajasthan" under the Gazette of India, for laying the overhead transmission line, which Telegraph Authority possesses under the Indian Telegraph Act, 1885 with respect to placing of telegraph lines and posts for the purposes of a telegraph established or maintained by Government or to be established or maintained. The relevant extract of the Gazette Notification dated 26.10.2018 is as under

.....

22. As per the above approval under Section 164 of the Act, the Petitioner had to seek the consent of concerned authorities i.e. local bodies, Railways, National Highways and State Highways, etc. before erection of proposed lines. The Petitioner submitted its application dated 28.11.2018 with the office of Nodal Officer, Jaipur seeking requisite permission and clearances in its favour for Diversion of 0.6466 Ha forest land for 765 kV D/C Fatehgarh- Bhadla Transmission Line. However, the Chief Conservator of Forest, Jodhpur vide letter dated 21.1.2019 refused to recommend proposal of the Petitioner for forest clearance on the ground that the forest land applied for is natural zone of breeding of GIB and their habitat. Accordingly, the CCF, Jodhpur stated that it is not in the interest of conservation of GIB to grant approval of conversion of forest land in the case. The relevant text of the letter dated 21.1.2019 is extracted as under:

.....

23. Subsequently, Deputy Conservator of Forest (DCF) (Wildlife), Jaisalmer issued its letter dated 5.2.2019 directing the Petitioner to keep the line route outside the GIB Arc. The relevant extract of the letter dated 5.2.2019 is as under

.....

24. Subsequently, DCF, Jaisalmer vide its letter dated 28.2.2019 provided the coordinates of the GIB Arc area. The Petitioner has submitted that upon analysis of the coordinates, it was clear that the approved line route for 765 kV D/C Fatehgarh Bhadla Transmission Line is falling within the GIB Arc coordinates notified by the DCF, Jaisalmer.

25. It is observed from the letters dated 21.1.2019 and 5.2.2019 that the forest clearance was not denied to the Petitioner on account of any restriction

on construction of transmission line in the GIB Arc area. The Forest authorities have not referred to ban on construction of transmission lines in the GIB Arc area but denied consent on the ground that GIB is a critically endangered bird and it would not be in the interest of conservation of GIB to grant approval for conversion of forest land in the case. Further, perusal of Survey Report of PFCCCL and the circular of MNRE dated 22.2.2019 reveals that there was no restriction on construction of overhead transmission lines passing through GIB habitat areas, except installation of Bird Diverters as on cut-off date. The Petitioner has also submitted that there are already 3 other overhead transmission lines passing through the vicinity where Petitioner was required to construct the transmission line as per original approved route. In fact, the Petitioner wrote to the forest authorities vide its letters dated 23.1.2019, 29.1.2019, 2.2.2019 and 7.2.2019 to provide clarity on GIB Arc coordinates and sought to lay overhead transmission line in GIB Arc on the original route with installation of bird diverter/ reflector.

26. In light of the above discussion, it is held that imposition of condition to re-route the transmission lines by the forest authorities (along with savings on account of non-implementation of bird diverters/ reflectors and other associated cost thereof) is an event of change in law in terms of the Article 12.1.1 of the TSA which is extracted as under:

**“12 CHANGE IN LAW**

**12.1 Definitions**

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

- .....
- **the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;”**

27. Since the Petitioner has not implemented the Project, no relief can be granted at this stage. However, the Petitioner is directed to implement the project at the earliest so that associated generating stations are not stranded. The Petitioner is granted liberty to approach the Commission for appropriate relief, if any, in terms of the provisions of the TSA after completion of the project.”

27. In view of the above order dated 8.1.2020, the Commission held that the imposition of condition to re-route the transmission lines by the forest authorities (along with savings on account of non-implementation of bird diverters/ reflectors and other associated cost thereof) is an event of Change in Law in terms of Article 12.1.1 of the TSA.

## The doctrine of constructive res judicata

28. CTUIL has contended that the present Petition is barred by constructive res judicata as the Petitioner ought to have brought all the issues before the Commission during the pendency of Petition No. 126/MP/2019. In this regard, it would be appropriate to consider Article 12 of the TSA, which is reproduced below:

### *“12.2 Relief for Change in Law*

#### **12.2.1 During Construction Period:**

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

- *For every cumulative increase/decrease of each Rupees One Crore Eighty Four Lakh only (Rs. 1,84,00,000/-) in the cost of the Project up to the Scheduled COD of the Project, the increase/decrease in non-escalable Transmission Charges shall be an amount equal to 0.32 percent (0.32%) of the Non-Escalable Transmission Charges.”*

.....

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

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

29. We note that as per Article 12.2.1 of the TSA, the compensation for the impact of cumulative increase/decrease in the cost of the Project is to be paid to the Petitioner by Respondent LTTCs in terms of increase/decrease of transmission charges. The compensation to be paid to the Petitioner is qualified with the words ‘cumulative increase/decrease.’ Thus, the clear intent of the provision is to consider the impact of all Change in Law events leading to a net increase or decrease of the cost of the Project on a cumulative basis up to the scheduled COD of the Project. Only after the net cumulative increase/decrease in the cost of the Project up to

scheduled COD is crystalized the transmission charges can be increased/decreased by 0.32% of non-escalable transmission charges for every cumulative increase/decrease of Rs. 1.84 crores in the cost of the Project as per this provision. Even if each Change in Law event during the construction period is to be dealt with individually, the relief to the Petitioner needs to be considered on a cumulative basis, which can be crystalized only after the COD of the Project.

30. In view of the above, for the effective determination of the Change in Law relief during the construction period, the Commission has been insisting that the transmission licensees should approach the Commission for adjudication of the Change in Law events only after achieving COD of the project. The Commission had considered Petition No. 126/MP/2019 to grant only the declaratory relief to the Petitioner on account of the re-routing of the transmission lines due to directions from forest authorities. The Commission had taken up the said Petition for adjudication as the lenders had withheld the disbursement of the loan to the Petitioner on the grounds of an increase in project cost. However, the Commission had specifically directed the Petitioner to implement the project and granted liberty to approach the Commission for appropriate relief, if any, in terms of the provisions of the TSA after completion of the project.

31. Thus, the contention of CTUIL that the claim of the Petitioner is barred by the doctrine of constructive *res judicata* is not sustainable.

***Re-routing of transmission line- Force Majeure***

32. The Petitioner has submitted that the delay of around 212 days (28.11.2018 to 27.6.2019) in the submission of the forest clearance request by the Petitioner was beyond the reasonable control of the Petitioner, as it could not have foreseen the

need for re-routing of transmission line due to GIB Arc. Accordingly, the Petitioner has submitted that it is entitled to an extension of time for achieving the CoD of the Project on account of the aforesaid force majeure event of re-routing of the transmission line.

33. The Petitioner has claimed relief under Article 11 (Force Majeure) of the TSA. Article 11.5 of the TSA provides that an affected party shall give notice to the other party of any event of Force Majeure 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. ....”*

34. The Petitioner has not placed on record any notice issued to the beneficiary Respondent with regard to the re-routing of the transmission line on account of the GIB arc. However, the Petitioner had filed Petition No. 126/MP/2019 on 24.4.2019, specifically praying for, *inter-alia*, extension of COD for six months on account of re-routing of the transmission lines. The Petition was filed immediately after conducting the survey for the revised route after receiving co-ordinates of GIB Arc Area from DCF, Jaisalmer, vide letter dated 28.2.2019. The beneficiary, AREPRL, was also impleaded as Respondent to the Petition. We observe that a notice, as a legal concept, describes a requirement that a party be made aware of the legal process affecting their rights, obligations, or duties. Further, a notice may be a formal legal notice, actual notice, constructive notice, and implied notice.

35. Under these circumstances, we have no hesitation in holding that the beneficiary received a constructive notice upon the beneficiary under clause 11.5 of the TSA.

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

**“11.3 Force Majeure**

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

**(a) Natural Force Majeure Events:**

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

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

*i. Direct Non-Natural Force Majeure Events*

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

*ii. Indirect Non ~ Natural Force Majeure Events*

- act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action: or*
- radio active contamination or ionising radiation originating from a source in India or resulting from any other Indirect Non-Natural Force Majeure Event mentioned above, excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into*

*or near the Site by the Affected Party or those employed or engaged by the Affected Party; or*

- industry wide strikes and labour disturbances, having a nationwide impact in India.*

#### **11.4 Force Majeure Exclusions**

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

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

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

38. In the present case, the Deputy Conservator of Forest (DCF) (Wildlife), Jaisalmer, directed the Petitioner vide letter dated 5.2.2019 to keep the line route outside the GIB Arc. The relevant portions of the said letter dated 5.2.2019 are extracted as under:

*“To, Mr. Rajnish Pandey,*

Associate Vice President, Transmission  
Fatehgarh-Bhadla Transmission Limited  
R-19, Housing Board Colony,  
Jethwai Road,  
Jaisalmer

Subject: In relation to finalizing the route of 765 kV D/C Fatehgarh-Bhadla Transmission Line, District Jaisalmer.

In Re: Your letter FBTL/Jaisalmer/F-B/F2 dated 23.01.2019

Sir,

*It is stated in respect of aforesaid subject and context that KML File of the proposal made available by you for 765 kV D/C Fatehgarh-Bhadla Transmission Line, has been examined in the presence of the officers of your company with the KML file of GIB Arc, whereupon it was learnt that approximately 63 km of your proposed transmission Electric line passes through GIB Arc of D.N.P. As you are aware that the Godavan is the State Bird of Rajasthan and is included in the IUCN's Red Data List and is declared as Critically Endangered by IUCN. Apart from this, the same is wildlife animal in the Schedule I of the Wildlife Protection Act of 1972. There have also been incidents of Godavan (GIB) deaths earlier due to crash in the electric transmission lines located in the GIB Arc. The Hon'ble High Court, Jodhpur, has also taken the cognizance of above in view of the serious situation of Godavan. Therefore, it is appropriate in light of the above facts. It will be that you may consider other options in relation to the proposed line and the new route."*

39. In our view, the direction issued by the forest authority vide letter dated 5.2.2019 to re-route the transmission line outside the GIB area unavoidably delayed the TSP's performance of its obligations under the TSA.

40. The Petitioner submitted the revised forest proposal for the diversion of 1.3334 Ha of forest land based on a revised route of 146 km on 27.6.2019, i.e., 212 days after the submission of its original application on 28.11.2018.

41. Therefore, the delay of 212 days in submission of the revised forest proposal is covered under force majeure.

### **NoC from the Defence Aviation Department**

42. As regards the NoC from the Defence Aviation Department, the Petitioner, vide its various affidavits and written submissions dated 12.3.2024, has clarified the following position:

(a) The original route of the 765 kV D/C Fatehgarh-Bhadla line was 15 Km from the Phalodi Defence airbase.

(b) As per the guidelines issued for the grant of an NOC for construction around the Indian Air Force Aerodromes by the Indian Air Force, and Notification No. G.S.R.751(E) dated 30.9.2015 issued by the Ministry of Civil Aviation, Govt. of India, all the structures around a 20 km radius of Aerodrome Reference Point should be notified to the Defence Authority. Further, all structures falling within a radius of 20 km from the Aerodrome Reference Point are required to obtain the NOC from the Defence Authority.

(c) Accordingly, the Petitioner, vide letter dated 13.12.2018, submitted the request for issuance of NOC under the Indian Aircraft Act for construction of the 765 kV D/C Fatehgarh – Bhadla transmission line as per the original route.

(d) However, while seeking forest clearance for the original route, the Petitioner was directed by the Deputy Conservator of Forest (DCF), Jaisalmer, vide letter dated 5.2.2019 to reroute the said line as it was passing through GIB Arc. In the meantime, the NoC was not received for the original route.

(e) As a result of the aforesaid re-routing, the Petitioner had to undertake the entire exercise of seeking NOC from the Defence Department de novo/afresh, which took considerable time and caused delay. Accordingly, the Petitioner issued another letter to the Director Operations (ATS) on 15.7.2019 for issuance of the NOC for the revised route for the construction of the 765 kV D/C Fatehgarh - Bhadla transmission line.

(f) Since there was no response from Defence Aviation, the Petitioner requested the CEA vide its letter dated 25.11.2019 to intervene and expedite issuance of NOC as there were around 60 nos. of 765 kV towers that could not be constructed as the said towers were situated in close proximity to the

Phalodi airbase.

(g) In response to the Petitioner's request, CEA requested the Director of Operation (ATS) expedite the examination of the proposal for issuance of the NOC from the Defence Aviation for the nearby area of Phalodi airbase so that the completion schedule of this national transmission project is not hampered.

(h) Defence Aviation, vide its letter dated 16.12.2019, accorded NOC. However, Defence Aviation mandated a height restriction at the range of 46-50 Meters with respect to the towers near the Phalodi airbase, which had an overall impact on around 54 towers.

(i) The revision of the route led to a completely new design for towers, which had never been used in India, and, as a result, it took a substantial amount of time to design, subsequently fabricate, and manufacture the towers, which not only delayed the project but also led to additional cost of construction.

(j) The revised route passes through a distance of around 3-4 km from the Phalodi Air Base.

43. The Petitioner has placed on record the copy of the Ministry of Civil Aviation (Height Restrictions for Safeguarding of Aircraft Operations) Rules, 2015 (**G.S.R.751 (E)**). The Rule 4, which is extracted below, prescribes a requirement for obtaining the NOC for the height clearance for the construction/erection of a structure within a radius of 20 km from the Aerodrome Reference Point of the civil and defence aerodromes:

***“4. Restrictions on constructions, erections, trees, etc.— (1) No structure shall be constructed or erected, or any tree planted or grown on any land within a radius not exceeding twenty kilometers from the Aerodrome Reference Point of the civil and defence aerodromes, as specified in***

Schedule III to Schedule VII, without obtaining a No Objection Certificate for the height clearance, except in cases specified in subrule (2) of rule 7”

44. Accordingly, the Petitioner applied for the grant of an NOC on 13.12.2018 for the construction of the 765 kV D/C Fatehgarh-Bhadla transmission line as per the original route. Further, it is noted that Schedule II of the aforesaid Rules provides maximum permissible heights for cases where there is a requirement of NOC from AAI or from the Defence Authorities. The relevant extracts of Schedule II are as under:

**“6. Procedure for determining the maximum permissible heights:**

*The following steps shall be taken for calculating the maximum permissible heights for cases where there is a requirement of NOC from AAI or from Defence Authorities.*

*6.5 No Objection Certificate Application System (NOCAS) for applying for height clearance w.r.t. Civil Airports:*

*6.5.1 AAI has introduced “No Objection Certificate Application System (NOCAS)” accessible at the AAI website [www.aai.aero](http://www.aai.aero) for online submission of NOC application for height clearance. .... Guidelines for online submission of NOC application for height clearance are available at NOCAS at [www.aai.aero](http://www.aai.aero).*

*6.5.2 A table of permissible heights w.r.t. Annex 14 OLS criteria at different distances from the runway (Code 3 or 4 Instrument runway) at an airport are given at Appendix-L of Schedule VIII.”*

45. Appendix-L of Schedule VIII provides for the following maximum permissible height for structures around the area:

“

**SCHEDULE VIII**

**APPENDIX -L**

**MAXIMUM PERMISSIBLE HEIGHTS ( IN METERS) OF BUILDING/MAST/CHIMNEY, ETC. BASED ON ANNEX 14 CRITERIA**

*Maximum permissible height may be further restricted due to Annex 10 criteria (owing to various CNS facilities) and also due to DOC 8168 criteria for the protection of PANS-OPS surfaces for different procedures. Site elevation of the site will be subtracted from the permissible top elevation to arrive at maximum permissible height of the building/Mast/Chimneys, etc. Following height table is indicative only and in no way assures the height permissible at a given site.*

Table: MAXIMUM PERMISSIBLE HEIGHTS (in METERS)

ICAO Annex 14 Surface (Height in meters)	Distance from Runway Strip (in meters)											
	500	1000	1500	2000	2500	3000	3500	4000	4500	5000	.....	10000
Approach Surface*	10	20	30	40	45	45	45	48	73	98		150
Take-off clime Surface*	10	20	30	40	45	45	45	48	73	98		150
Inner Horizontal Surface (IHS)**	45	45	45	45	45	45	45	45	-	-	-	-
Conical Surface**	-	-	-	-	-	-	-	-	70	95	.....	300

46. It is evident from the above table that the maximum permissible height has been notified for structures being installed within a 10 km distance from the runway. Since the original route selected by the Petitioner was at a distance of around 15 km from the air base, even though the NOC was required, there was no restriction on the height of the tower around the air base in terms of the aforementioned rules of the Ministry of Civil Aviation.

47. However, the Defence Aviation Department granted its consent dated 16.12.2019 for laying of the transmission line on the revised route with, *inter-alia*, the following condition:

**“(d) 337 towers recommended with the proposed height/elevation and 50 towers are recommended with reduced height /elevation as mentioned in Annexure-I.”**

48. Annexure-I of the approval dated 16.12.2019 reveals that the height of 50 towers, which were recommended with reduced height/elevation, ranges from 35.10 m – 70.10 m. According to the Petitioner, the above condition regarding the reduction of the height of around 50 towers ultimately affected 54 towers. The reduced height of 50 towers allowed by the Defence Aviation Department, read with the maximum

permissible height provided in Schedule VIII of the Ministry of Civil Aviation Rules, establishes that the transmission line of the Petitioner is passing through the Phalodi air base within a radius of 4.5 km.

49. The Guidelines for the issue of the NOC for constructions around Indian Air Force Aerodromes provide a time frame of 60 days for issuance of the NOC. The relevant portions of the guidelines are extracted below:

*“4. The Gazette Notification GSR 751(E) specifies an area of 20 Km around the ARP of an aerodrome to be considered for imposing restrictions on any constructions. However, all Transmission lines, Transmission line structures, WTGs, HT cables etc. beyond 20 km shall be notified to D Ops (Nav) at Air HQ (VB), Rafi Marg, New Delhi -110106, Directorate of Aerospace Safety (DAS) at Air HQ (RKP), West Block-6, New Delhi, prior to commencement of construction work along with an undertaking that structures and cables will be appropriately marked and lighted in accordance with IS 5613 (including amendments) issued from time to time.*

.....

**Time Frame For Processing of the Cases**

11. *IAF is responsive to the needs of citizens in terms of processing NOC cases expeditiously. With this in view, the time frames have been revised as given below:-*

*(a) **Power Projects/WTGs/Airports/Heliports**:- 60 working days”*

50. However, the NOC was issued on 16.12.2019, i.e., 154 days after the revised NOC was applied for by the Petitioner on 15.7.2019. The Petitioner also requested the CEA vide its letter dated 25.11.2019 to intervene and expedite the issuance of NOC as construction of around 60 765 kV towers was impeded around Phalodi air base. The CEA requested the Director Operation (ATS) to expedite the examination of the proposal for issuance of the NOC from Defence Aviation for the nearby area of Phalodi airbase, so that the completion schedule of this national transmission project is not hampered. Thereafter, the consent was granted by the Defence Aviation Department on 16.12.2019 with a delay of around 94 days.

51. The Petitioner has submitted that since there was no design available for the 765 kV D/C truncated tower, it took a substantial amount of time to design, subsequently fabricate, and manufacture the towers, which not only delayed the project but also led to additional cost of the construction. The Petitioner approached PGCIL, CEA, and other industry-leading EPC agencies, vide letter dated 30.12.2019, in order to search for such design readily available to them.

52. On 8.1.2020, PGCIL responded to FBTL's letter dated 30.12.2019 stating that any action required for the development of design of suitable tower needs to be taken by the developer. On 21.1.2020, CEA too responded to FBTL's letter advising FBTL to abide by the requirement of Defence Aviation and to explore various possible technological options to restrict height of the towers within the limit specified by Defence Aviation.

53. In this regard, the Petitioner has placed on record the communication dated 20.12.2019 issued by its contractor, KEC International Limited, who had informed that, due to conditional NOC, a new truncated tower should be used with a reduced span between the towers. Therefore, the already cast 16 foundations in section AP 35/0- AP 50/0 would have to be abandoned along with the already fabricated 46 tower material.

54. The Petitioner has claimed that there was a delay of around 310 days (from 15.7.2019 to 19.5.2020) in the completion of the transmission project on account of the delay in the grant of the NOC and re-designing of towers. In its rejoinder to the reply filed by AREPRL, the Petitioner has clarified that the Petitioner could restart the project implementation work near the Defence Airbase area only on 19.5.2020, i.e., after the mobilization of material at the site. However, in our opinion, the delay ought to be counted from 14.9.2019 (60th day as per the Guidelines to obtain NOC) to

19.5.2020. Therefore, there is a delay of about 249 days on account of the delay in receiving NOC (94 days) and designing, manufacturing, and supplying the truncated towers (155 days).

55. The Petitioner has claimed the aforesaid delay on account of the NOC on the revised route and re-designing of the tower as a Force Majeure event. The Petitioner had given notice of Force Majeure to AREPRL vide letter dated 15.1.2020. The Petitioner has submitted that the construction work was also stalled due to the nationwide lockdown announced by the Government of India on 24.3.2020 (effective from 25.3.2020) to contain the COVID-19 pandemic. Subsequently, the State Government of Rajasthan and the District Magistrates in Rajasthan issued necessary orders imposing restrictions pertaining to the minimal public interface, working of personnel, and restriction on the supply of goods/ materials, etc. The Petitioner has stated to have lost a substantial amount of time in completing the transmission system on account of the above lockdowns and continuous restrictions imposed by the Central Government and the State Government of Rajasthan. The Petitioner has submitted that the Ministry of Power (MoP), Government of India, vide a letter dated 27.7.2020, directed that all the inter-State transmission projects that were under construction as on date of lockdown, i.e., 25.3.2020, shall get an extension of five (5) months in respect of the SCOD. In this regard, it is also noted that the Petitioner had also issued the Force Majeure notice to Respondent under Article 11 of the TSA.

56. We have noted above that the need for a truncated tower would not have arisen on the original route. Therefore, the issue of conditional NOC could not be envisaged by the Petitioner while submitting the bid. The Petitioner took prudent steps in approaching CEA to expedite the NOC and sought existing designs of truncated towers from CEA, PGCIL, and EPC agencies. However, the Petitioner had

to design the towers itself in the absence of any favorable response from the agencies. We are of the view that the period of 5 months taken by the Petitioner for the design, manufacturing, and supply of the truncated tower from the grant of NOC on 16.12.2019 was reasonable.

57. We also find merit in the above submissions of the Petitioner, considering that the Ministry of Power (MoP), vide its letter dated 27.7.2020, granted an extension of five months in respect of the SCOD to the transmission projects specifically on the ground that various transmission project sites have been severely affected by the nationwide lockdown measures announced by the Government of India since 25.3.2020 to contain an outbreak of COVID-19.

58. In view of the above, the delay of NOC by Defence Aviation and delay occurred due to the designing, manufacturing, and supply of the truncated towers was beyond the reasonable control of the Petitioner and prevented the Petitioner from performing its obligations under the TSA. Therefore, the cumulative delay of 249 days (1) in receipt of defence clearance and (2) time taken to comply with conditions imposed in defence clearance is covered under force majeure and is, accordingly, condoned.

59. The Petitioner has further submitted that aforesaid Change in Law event of conditional NOC is a consequence of the force majeure/ Change in Law event i.e., the direction of forest authorities to re-route the transmission lines.

60. As already held in the deliberation above, the need to install the truncated tower arose only on account of the re-routing of the transmission line. It was noted in the order dated 8.1.2020 in Petition No. 126/MP/2019 that there are already three other overhead transmission lines passing through the vicinity where the Petitioner was required to construct the transmission line as per the original approved route.

The Petitioner has submitted vide its written submissions dated 12.3.2024 that none of the towers of the three other transmission lines located around the original route has been truncated. Thus, the need for a reduction in the height of the towers arose only on account of the re-rerouting of the transmission line which has been held as a Change in Law event in Petition No. 126/MP/2019.

61. In the present Petition, the Petitioner has also prayed for a declaration of the requirement to install the 54 truncated towers in terms of the conditions stipulated in the letter dated 16.12.2019 issued by the Defence Aviation Department as a Change in Law event, as well as a change in scope, with respect to the implementation of the transmission project. *Per Contra*, CTUIL, vide its reply dated 19.7.2023, has objected to the contentions of the Petitioner, stating that it is a common practice in defence areas that tower heights would be lower than normal around airstrips.

62. We have already held above that the need to install a truncated tower would not arise on the original route, which was outside the 10 km radius of Phalodi airbase. The requirement to reduce tower height to obtain the NOC from the Defence Aviation Department was a new condition imposed on the TSP after the re-routing of the line. Thus, we are of the view that the conditional NOC granted by the Defence Aviation Department is also an event of Change in Law in terms of Article 12.1.1 of the TSA, the relevant extract of which is as under:

**“ARTICLE 12:**

**12 CHANGE IN LAW**

**12.1 Change in Law**

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

• .....

• ***the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;***

”

63. In view of the above, the Petitioner is entitled to relief under Article 12 of the TSA for the Change in Law events, being re-routing of the transmission lines and conditional NOC granted by the Défense Aviation Department.

#### **I. Operation of status quo order of the Hon`ble Rajasthan High Court**

64. The Petitioner has submitted that it was the obligation of the Respondent/ AREPRL to provide adequate land for the 400 kV pooling station adjacent to the proposed solar park as per Note 1 of Schedule 2 of the TSA.

#### **Status quo order dated 11.5.2018 of the Hon`ble Rajasthan High Court**

65. In this regard, the Petitioner has claimed the delay in implementation of the project on account of the first status quo order dated 11.5.2018 issued by the Hon`ble Rajasthan High Court in Writ Petitions filed by farmers in respect of the land allocated to AREPRL as force majeure event and mainly submitted as under:

(a) Certain litigants filed Writ Petitions before the Hon`ble Rajasthan High Court on account of being aggrieved by the decision of the land authorities to allot the land to AREPRL.

(b) One such Writ Petition was numbered Writ Petition (Civil) No. 5707/2018. In the said Writ Petition, the Hon`ble Rajasthan High Court, vide an order dated 11.5.2018, imposed the status quo until the next date of the hearing (i.e. 2.7.2018) with respect to the land, including 989.53 Ha allocated to AREPRL.

(c) On account of the passage of the aforesaid status qua order, AREPRL,

vide its notice dated 4.6.2018, invoked Article 11.3 of the TSA, thereby stating that the aforesaid interim order is beyond its control and constitutes a force majeure event. Accordingly, AREPRL sought extension of SCOD in terms therein.

(d) Thereafter, AREPRL, vide its notice dated 1.9.2018, again sought relief from the Petitioner on account of the continuation of the force majeure event. AREPRL informed that despite the modification of the aforesaid status quo order dated 11.5.2018 by the Hon'ble Rajasthan High Court, vide an order dated 9.7.2018 passed in Writ Petition (Civil) No. 5707 of 2018, it has been unable to undertake any work due to resistance of the dwellers. AREPRL also informed regarding another order dated 14.8.2018 passed by the Hon'ble High Court in another Writ Petition (Civil) No. 1151/2018 filed by a group of dwellers.

(e) The Petitioner vide a letter dated 3.11.2018 to AREPRL stated that as per Note 1 of Schedule 2 of the TSA, it is the responsibility of AREPRL to provide adequate land for the 400 kV pooling station adjacent to the Solar Park. However, AREPRL did not provide the same. In view thereof, the Petitioner became entitled to an extension of time and consequential compensatory relief in terms of Article 4.4 of the TSA dated 10.1.2018, read with Article 11 of the TSA.

(f) On 4.12.2019, AREPRL issued a notice for cessation of force majeure under Article 11 of the TSA dated 11.1.2018 to the Petitioner. AREPRL informed that the Hon'ble Rajasthan High Court (Jodhpur Bench), vide judgments dated 27.11.2019, dismissed the Writ Petitions filed by farmers/dwellers challenging the allotment of land measuring 989.53 Ha. (6115 Bigha & 6 Biswa) to AREPRL by the State Government of Rajasthan

for the development of the 1500 MW Solar Park.

(g) As a result of such dismissal, the interim orders passed by the Rajasthan High Court directing the status quo, which included the entire land allotted by the Government of Rajasthan to AREPRL, also stood vacated. On account of the same, AREPRL received possession of 4662.13 bigha land allotted to it by the Government of Rajasthan with effect from the date of the dismissal of the Writ Petitions.

(h) However, on account of the above High Court status quo orders and due to the pendency of the Writ Petitions, the Petitioner lost a substantial amount of time in completing the transmission system as envisaged under the TSA, which was clearly beyond the control of the parties. During such period of disruption (11.5.2018 to 27.11.2019), the Petitioner's Project came to a halt, and the Petitioner is entitled to all available relief.

(i) On account of the aforesaid force majeure event qua the status quo order of the Hon`ble Rajasthan High Court (i.e., from 11.5.2018 to 27.11.2019), the Petitioner suffered a delay of 566 days in implementing the project.

(j) As per Articles 11.7(a) and 11.7(b) of the TSA, read with sections 79(1)(c), 79(1)(d) and 79(1)(f) of the Act, the above delay is required to be condoned and the time of achieving SCOD/ CoD be, accordingly, extended, and that the Petitioner is also entitled to reimbursement of actual costs incurred on account of the IDC and IEDC as a result of the above delay.

**Status quo order dated 8.9.2020 of the Hon`ble Rajasthan High Court**

66. The Petitioner has further claimed relief against a subsequent status quo order dated 8.9.2020 passed by the Hon`ble Rajasthan High Court in the Writ Appeals and

submitted as under:

(a) After the above judgment dated 27.11.2019 by the Hon`ble Rajasthan High Court, certain Writ Appeals were filed. One such Writ Appeals was numbered as D.B Spl. App. Writ No. 51/2020.

(b) In the above writ appeal, the Hon`ble High Court, vide an interim order dated 8.9.2020, directed the status quo to be maintained till the matter is heard and disposed of by the Court.

(c) On account of the aforesaid interim order, the Petitioner issued a notice dated 19.9.2020 to AREPRL, thereby invoking force majeure in terms of Article 11 of the TSA, as the Petitioner was also bound by the aforesaid interim order.

(d) After a period of 9 months, the Hon`ble Rajasthan High Court (Jodhpur bench) passed the final judgment on 29.6.2021, thereby, the interim order passed by the Hon`ble Rajasthan High Court qua maintaining the status qua of the land stood vacated.

(e) Pursuant to the aforesaid judgment, the Petitioner issued a letter dated 5.7.2021 to AREPRL, intimating the cessation of force majeure.

(f) On account of the above interim orders and due to the pendency of the Writ Petitions/appeals, the Petitioner lost substantial amount of time (i.e., starting from 8.11.2020 to 29.6.2021) in completing the transmission system as envisaged under the TSA, which was clearly beyond the Petitioner's control, and as such, qualifies as a force majeure event in terms of Article 11 of the TSA.

(g) For reasons mentioned above, and in terms envisaged in Articles 11.7(a) and 11.7(b) of the TSA (read with Sections 79(1)(c), 79(1)(d) and 79(1)(f) of the Act

2003), the time for achieving the SCOD/ CoD is required to be extended. Further, the Petitioner be provided just compensation by reimbursement of actual costs incurred on account of the IDC and IEDC.

67. AREPRL, vide its reply dated 9.1.2023, has submitted that Schedule 2 of the TSA *inter alia* provides for AREPRL's obligation of providing the adequate land (adjacent to the Solar Park) to FBTL for the 400 kV Pooling station to be built by FBTL. As per AREPRL, the 'Status Quo Orders' passed by the Hon'ble Rajasthan High Court (w.r.t the land allocated to Solar Park) had a cascading impact on the implementation of both the Solar Park as well as FBTL's transmission system. Due to the operation of such orders in Petitions filed by the landowners, the handover of land by AREPRL was delayed, which impacted the implementation of the FBTL's transmission system. As the delay in the handover of land by AREPRL was beyond its control, AREPRL invoked Article 11 (force majeure clause) under the TSA and issued timely force majeure notices (various notices issued between June 2018 and June 2021) to FBTL seeking extension in completion of AREPRL's obligation of handover under the TSA. Accordingly, once such force majeure events ceased, AREPRL issued a 'Notice of Cessation' dated 4.12.2019 and 17.7.2021 as per the force majeure clause. Hence, AREPRL fulfilled the prerequisites for invoking the force majeure clause. The Status Quo Orders led to a complete halt on the development activities of AREPRL for a total period of 29 months. AREPRL has further submitted that the Commission, in its earlier orders, has recognized that the delay in land acquisition on account of the protests from the villagers/landowners and the consequent court cases as an event beyond the control of the respective Petitioners and, accordingly, condoned the delay in execution of the project on account of such delay. In this regard, reliance has been placed on the order dated 24.1.2019 in Petition No. 248/MP/2016 of the Commission, the order dated 30.8.2017

in Petition No. 205/TT/2016, and order 29.4.2016 in Petition No. 99/TT/2014.

68. The Petitioner vide its rejoinder dated 21.1.2023 to reply filed by AREPRL has submitted that AREPRL has filed Petition No. 244/MP/2021 seeking extension of SCOD, thereby pleading the status qua orders passed by the Hon`ble Rajasthan High Court as one of the force majeure events. In the present Petition, the case of the Petitioner is that on account of the passage of the status quo orders passed by the Hon`ble Rajasthan High Court, there was a substantial delay of 566 days towards implementation of the transmission system. Such delay is clearly beyond the control of the Petitioner and ought to be considered as a force majeure event.

69. CTUIL, vide its reply dated 19.7.2023, has submitted that the status quo order would have been only operational for the parts of the land where there was a dispute and would not have been for the entire structure of the project. Thus, delay cannot be condoned for the entire project merely because some parts of the land along the project were under dispute. The Petitioner could have acted prudently and continued work on the rest of the project while some part of it was under dispute.

70. The Petitioner, vide its rejoinder dated 17.8.2023 to the reply filed by CTUIL, has argued that the assumption/contentions of CTUIL are completely erroneous and meritless as, in terms of Note 1 of Schedule 2 of the TSA. It was the obligation of AREPRL to provide adequate land for the 400 kV pooling station adjacent to the proposed solar park. However, certain litigants filed Writ Petitions before the Hon'ble Rajasthan High Court on account of being aggrieved by the decision of the land authorities to allot the land to AREPRL. Accordingly, the Hon`ble Rajasthan High Court vide orders dated 11.5.2018 and 8.9.2020 granted status quo orders to the litigants, and the orders were vacated on 27.11.2019 and 29.6.2021, respectively. The Petitioner has further contended that CTUIL has failed to demonstrate how the

Petitioner has failed to undertake its obligations to complete the construction of different transmission system elements.

### **Analysis and Decision**

71. We have considered the submissions made by the parties. Schedule 2 of the TSA provides as under:

*“Schedule : 2  
Project Description and Scope of the Project*

.....  
*Note: 1*

*a).....*

*c) The Solar park developer (M/s AREPRL) to provide adequate land for 400 kV and 220 kV pooling station adjacent to the proposed solar park for which, transmission licensee shall coordinate with M/s AREPL including commercial aspects for transfer of land.”*

72. Thus, it was the responsibility of Respondent No. 1 AREPRL to provide adequate land for the 400 kV and 220 kV pooling stations adjacent to the proposed solar park for which the Petitioner was required to coordinate with AREPRL.

73. As noted above, Adani Transmission Limited acquired the Petitioner SPV after being declared as a successful bidder on 14.3.2018 pursuant to the Tariff Based Competitive Bidding conducted by PFCCL. Subsequently, certain landowners challenged the ownership of AREPRL land before the Hon`ble Rajasthan High Court (Jodhpur). On 11.5.2018, the Hon`ble Rajasthan High Court (Jodhpur) directed to maintain the status quo with respect to the aforesaid land in Civil Writ Petition No 5707/2018. The relevant extract of the Rajasthan High Court order dated 11.5.2018 is as under:

**“HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR**  
*S.B. Civil Write Petition No. 5707/2018*

.....  
**Hon`ble Ms. JUSTICE NIRMALJIT KAUR**

**Order**

**11/05/2018**

*Learned counsel for the respondents prays for time to file reply.  
Reply be filed within two weeks.  
Put up on 2<sup>nd</sup> July, 2018. Till next date status quo with respect to land in question be maintained."*

74. In view of the aforesaid status quo order, AREPRL, vide its notice dated 4.6.2018, invoked Article 11.3 of the TSA, thereby stating that the aforesaid interim order is beyond its control and, as such, constitutes a force majeure event.

75. Thereafter, AREPRL, vide its notice dated 1.9.2018, informed the Petitioner about subsequent development, thereby seeking relief on account of the continuation of the force majeure event. AREPRL informed that the aforesaid status quo order dated 11.5.2018 by the Hon`ble Rajasthan High Court has been modified vide order dated 9.7.2018, whereby the court has restricted the status quo order to the land of the Writ Petitioners only. However, AREPRL further stated it has been unable to undertake any work due to the resistance of the dwellers. In the letter, AREPRL further informed that a separate group of villagers from the same village have also filed Writ Petition (Civil) No. 1151/2018, and the Hon`ble High Court vide order dated 14.8.2018 has granted the status quo in line with the previous order dated 11.5.2018.

76. The relevant portions of the Hon`ble High Court order dated 14.8.2018 are extracted below:

***"HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR  
S.B. Civil Write No. 11551/2018***

.....  
**HON`BLE MR. JUSTICE SANDEEP MEHTA**

**Judgment/Order**

**14/08/2018**

*Admit.*

*Issue notice of the writ petition as well as stay application to the respondents.*

*Connect with S.B. Civil Writ Petition No. 5707/2018.*

*In the meantime, status quo shall be maintained as regard the land owned by the petitioners.”*

77. Thereafter, the Hon`ble Rajasthan High Court (Jodhpur Bench), vide judgments dated 27.11.2019, dismissed the Writ Petitions (Civil) No. 5707 /2018, 11551 /2018 and 11562/2018 filed by the farmers/dwellers challenging the allotment of the land measuring 989.53 Ha. (6115 Bigha & 6 Biswa) to AREPRL by the State Government of Rajasthan for the development of the 1500 MW Solar Park.

78. With the dismissal of the above Writ Petitions, the interim orders passed by the Hon`ble Rajasthan High Court directing Status Quo to be maintained for the entire land allotted by the Government of Rajasthan to AREPRL also stood vacated. Subsequently, AREPRL received possession of 4662.13 Bigha land allotted to it by the Government of Rajasthan with effect from the date of the dismissal of the Writ Petitions. Accordingly, AREPRL issued notice dated 4.12.2019 for cessation of force majeure under Article 11 of the TSA to the Petitioner.

79. As per the Petitioner, a substantial amount of time was lost during the period of disruption, i.e., from 11.5.2018 to 27.11.2019 (566 days), as the Petitioner's project came to a halt. We observe that the Petitioner had undertaken construction work on a transmission line during this period. Therefore, only work pertaining to the sub-station ought to have been impeded due to status quo orders of the Hon`ble Rajasthan High Court.

80. Thereafter, certain Writ Petitions were again filed before the Hon`ble Rajasthan High Court as regards land allotted to AREPRL. Vide an interim order dated 8.9.2020; the Hon`ble Rajasthan High Court again issued a status quo order

in one such Writ Appeals Spl. Appl. Writ No. 223/2020, which was listed with other similar appeals Spl. App. Writ No. 51/2020 and 52/2020. The relevant extracts of the High Court order are as under:

**“Spl. Appl. Writ No. 223/2020**

*Ms. Rekha Borana, learned Additional Advocate General after arguing the matter for quite some time seeks two weeks’ time to complete her instructions.*

*She undertakes that till the matter is heard and disposed of by this Court, the status quo as it exists today, shall be maintained in respect of land in question.”*

81. On account of the aforesaid interim order, the Petitioner issued a notice dated 19.9.2020 to AREPRL, thereby invoking force majeure in terms of Article 11 of the TSA.

82. On 29.6.2021, the Hon`ble Rajasthan High Court passed the final judgment in the Writ Appeals filed by the land owners. Consequentially, the interim orders passed by the Hon`ble Rajasthan High Court qua maintaining the status quo of the land stood vacated.

83. Pursuant to the aforesaid judgment, the Petitioner issued a letter dated 5.7.2021 to AREPRL intimating the cessation of force majeure. The Petitioner has claimed condonation of a delay of 295 days, i.e., 8.9.2020 to 29.6.2021, during such a period of disruption.

84. An event is defined as force majeure in terms of Article 11.3 of the TSA as *'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.'*

85. It is undisputed that AREPRL was required to provide the land for the sub-station to the Petitioner. CTUIL has contended that the status quo orders only affected a part of the Petitioner's project. Admittedly, the Petitioner continued to work on other parts of the project during the operation of status quo orders of the High Court. It is also noted that the Petitioner declared COD on 31.7.2021 immediately one month after the vacation of the stay order vide judgment dated 29.6.2021 in Writ Appeals filed by the land owners. Therefore, it is also evident that the Petitioner worked on the sub-station in the period between the judgment dated 27.11.2019 of the High Court dismissing the Writ Petitions and the next status quo order dated 8.9.2020 in Writ Appeals filed before the Hon`ble Rajasthan High Court.

86. Vide Record of Proceeding for the hearing dated 18.12.2023, the Commission sought clarification from the Petitioner about reasons for the declaration of the deemed COD in respect of its project and the date of actual COD of the project. The Petitioner, vide its affidavit dated 12.2.2024, has submitted that, in terms of Article 6.2.1 of the TSA, 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. Accordingly, the FBTL transmission system was ready for charging on 31.7.2021. In this regard, the Petitioner has submitted a CEA energization certificate dated 5.7.2021. However, due to the non-readiness of the upstream system, FBTL declared deemed COD under the provision of Article 6.2.1 of TSA. As

regards the actual COD of the asset, the Petitioner has submitted that Ckt-1 of Fategarh-Bhadla transmission line was actually commissioned/put to use on 10.8.2021, when power started flowing through LILO of Fatehgarh-Bhadla transmission line at Fatehgar-2 S/s. Ckt-2 of the Fatehgarh-Bhadla transmission line was actually commissioned/put to use on 29.11.2021 through LILO of the Fatehgarh-Bhadla transmission line at Fategarh-2 sub-station. It was further clarified by the Petitioner that the bilateral billing is still being done by the CTUIL as the whole transmission system is not put to use due to the non-commissioning of the assets by the upstream generators.

87. In our view, the Petitioner was indeed prevented from discharging its obligation under the TSA on account of the delay in the allocation of land by AREPRL for the 400 kV pooling station. Therefore, the delay in the allocation of land by AREPRL to the Petitioner was beyond the reasonable control of the Petitioner. Accordingly, the delay of 566 days from 11.5.2018 to 27.11.2019 during the operation of status quo order in Writ Petitions and the delay of 295 days from 8.9.2020 to 29.6.2021 during the operation of status quo order in Writ Appeals deserve to be condoned under force majeure provision of the TSA.

88. Further, we have perused the approval for energization issued by the CEA in respect of the assets covered under the present Petition issued vide letters dated 31.12.2020 and 5.7.2021. It is also noted that NRLDC issued No load charging for the assets vide letters dated 28.7.2021 and 30.7.2021. As per the certificate issued by NRLDC, the last element to be charged on no load was 2<sup>nd</sup> circuit of the Fatehgarh-Bhadla which was charged on no load on 24.7.2021. The relevant portions of the NRLDC letters dated 28.7.2021 and 30.7.2021 are as under:

*"Ref.: NRLDC/SO-1/117/2021/03*

*Date: 28.07.2021*

To,  
 Shri Hitesh Kumar Vaghasiya,  
 Vice President- FBTL,  
 Adani House, Shantigram, 1<sup>st</sup> Floor  
 South Wing, Nr. Vaishnodevi Circle, S G Highway  
 Ahmedabad-382421

**References:**

1. Submission of pre-charging formats A1-A5 and B1-B5 on date 07.07.2021, 08.07.2021, 12.07.2021 & 13.07.2021.
2. Submission of Format-V dated 26.07.2021 & 27.07.2021 for issuance of first time charging certificate.

Based on above references, it is hereby certified that the following Transmission elements were charged first time as mentioned below:

S No.	Name of transmission element	NRLDC code	Date	Time of charging	Remarks
1	400 kV Fatehgarh (FBTL) – Bhadla (PG) (FBTL) – 1 through main bay 401 at Fatehgarh (FBTL)	NR2107-1963	16.07.2021	18:20	Line was charged from both ends on No Load.
2	400 kV Fatehgarh (FBTL)- Bhadla (PG) (FBTL)- 2 through main bay 404 at Fatehgarh (FBTL)	NR2107-2891	24.07.2021	20:11	Line was charged from both ends on No Load.

**“Ref.: NRLDC/SO-1/117/2021/04**

**Date: 30.07.2021**

To,  
 Shri Hitesh Kumar Vaghasiya,  
 Vice President- FBTL,  
 Adani House, Shantigram, 1<sup>st</sup> Floor  
 South Wing, Nr. Vaishnodevi Circle, S G Highway  
 Ahmedabad-382421

**References:**

1. Submission of pre-charging formats A1-A5 and B1-B5 on date 07.07.2021, 08.07.2021, 12.07.2021 & 13.07.2021.
2. Submission of Format-V dated 26.07.2021 & 27.07.2021 for issuance of first time charging certificate.

Based on above references, it is hereby certified that the following Transmission elements were charged first time as mentioned below:

SNo.	Name of transmission element	NRLDC code	Date	Time of charging
1		NR2107-1981	16.07.2021	19:36

	125 MVAR Bus Reactor 1 through tie bay 408 at Fatehgarh (FBTL)			
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89. In view of the above, the Petitioner's transmission system was ready for charging on 24.7.2021. In terms of the Article 6.2.1 of the TSA, the Petitioner was entitled to the declaration of the deemed COD seven days after the date on which it declared to be ready for charging. Accordingly, we allow the deemed COD for the Petitioner's project as 1.8.2021 in place of 31.7.2021 declared by the Petitioner.

90. In light of the above, since the Petitioner has achieved COD of the Project on 1.8.2021, i.e., with a delay of 670 days, the SCOD of the Project is, accordingly, extended till 1.8.2021. Since the Commission has already condoned the delay of 670 days in the implementation of the project with regard to the re-routing of the transmission lines, issuance of the conditional NoC by the Defence Aviation authority and status quo orders of Hon`ble Rajasthan High Court, thereby extending the SCOD of the Project as 1.8.2021 in the foregoing paragraphs, we do not find need to go into the rest of the force majeure claims of the Petitioner.

## **II. Relief to be granted to the Petitioner**

91. We now proceed to consider what relief, if any, should be granted to the Petitioner in the light of the above discussion.

### **Change in Law Relief**

#### **Re-routing of the transmission line**

92. The Petitioner has claimed additional expenditures incurred due to the re-routing of the transmission line, which led to an increase of the line length by 43 km, i.e., from 103 km to 146 km.

93. It is the case of the Petitioner that the requirement of construction of the additional line length is a change in scope of work on account of the Change in Law events. In this regard, the Petitioner has relied on the order dated 8.5.2013 of the Commission in Petition No 162/MP/2011 dated 31.7.2013 in Petition No 162/2011 in the matter of *East North Interconnection Company Limited (ENICL) vs. Punjab State Transmission Corporation Limited (PSTCL)*. The Petitioner has contended that the Commission, in the aforesaid order, had taken a view that the additional transmission line required to be constructed by ENICL was a change in the scope of the project.

94. The relevant extract of the ENCIL order dated 8.5.2013 is as under:

***“Change in the Scope of Work?”***

40. In view of the above discussion, we are of the view that there is a change in the scope of work as the petitioner would be required to construct the transmission lines for more distance than was envisaged on the Survey Report based on which the petitioner has submitted the bid. The distance of both the lines given in the Survey Report was 427 km and the petitioner had also sought and has been granted the transmission licence for 427 km vide our order dated 28.10.2010 in Petition No.131/2010. There is also change in scope of work in so far as the forest clearance is concerned as there was a categorical representation by BPC that there was no forest clearance involved in the route and there is no way that the petitioner can seek interconnection with Bongaigaon sub-station without its line passing through the Satbhendi reserve forest. In our view the additional line length beyond 427 km for which transmission licence has been granted and the expenditure involved in obtaining the forest clearance are expenditure which have emerged after the bidding process is over and are outside the scope of work of the project.

***Relief to be granted to the petitioner***

41. The next question arises as to what relief can be granted to the petitioner for the additional scope of work. The case of the petitioner has resulted in additional scope of work which can be addressed in two ways. Firstly, bidding can be carried out for the additional scope of work and based on the outcome, the work can be executed. This is time consuming and will not conform to the timeline fixed for operationalisation of the transmission system. The other alternative is to direct the petitioner to execute the additional scope of work and to allow the petitioner the transmission tariff on prorata basis. In our view, the second option is more practicable and is in the interest of the completion of the project.

42. *The Commission has the statutory responsibility to balance the interest of the consumers with the need for investment. While the petitioner needs to be compensated for the additional scope of work which has been imposed subsequent to the bidding process, it has to be ensured that the petitioner does not unduly gain by virtue of our decision in this order. The expenditure on the construction of the transmission line has to be optimized in the interest of the consumers. Therefore, we direct that the petitioner shall be entitled to claim the transmission charges on pro rata basis for the expenditure incurred on constructing the transmission lines for the additional scope of work i.e. the difference between the actual length of the transmission lines linking the existing sub-stations of the PGCIL at Bongaigaon, Siliguri, Purnea and Biharshariff and the length of the transmission lines (427 km) for which license has been granted vide our order dated 28.10.2010 in Petition No.131/2010.*

44. *Pending decision in this petition, the petitioner is directed to undertake construction of the transmission lines including other works for connecting the transmission lines with the identified sub-stations of PGCIL within the time schedule.”*

95. Based on the liberty granted to the Petitioner to approach the Commission after the completion of the project, ENCIL approached the Commission for consequential relief. The Commission vide order dated 8.7.2013 decided as under:

*“9. ... ..Keeping in view the decision to allow the transmission charges on pro-rata basis in para 41 of the order dated 08.05.2013, the transmission charges in percentage term for the additional scope of the work have been computed as under:*

<i>Length of line as per transmission license (KM)</i>	<i>Length of line as certified by CEA (KM)</i>	<i>Difference (KM)</i>	<i>% increase over the line length in Transmission license</i>
<i>427.310</i>	<i>453.714</i>	<i>26.404</i>	<i>6.179%</i>

*Accordingly, we direct that the Petitioner shall be entitled for reimbursement of additional transmission charges @6.179% of the transmission charges computed every month in accordance with schedule of levelized tariff in the transmission service agreement which has been adopted in our order dated 28.10.2010 in Petition No. 130/2010... ..”*

96. As per the Petitioner’s submissions, the present case is similar to the ENCIL matter as the Petitioner’s line length has increased due to unforeseen circumstances, and therefore, it is a change in scope of work.

97. Applying the principle adopted in the above case by the Commission, the Petitioner has computed the increase in line length in the present case by 41.78% (146-103/103) and, consequentially, prayed for an increase in the transmission charges of the Fatehgarh-Bhadla transmission line by 32.58%.

98. For the above computation, the Petitioner has worked out the cost of a 765 KV D/C transmission line based on the project cost considered in the Minutes of the Meeting of the 36th Empowered Committee on Transmission held on 26.7.2016. The relevant cost considered for the project of the Petitioner in the said Minutes and recorded in the order dated 17.10.2017 in Petition No. 3/MP/2017 filed by PGCIL seeking regulatory approval for undertaking the development of transmission system for evacuation of power from the Solar Energy generators associated with the Solar Power Park to be developed at Fatehgarh district of Jaisalmer, Rajasthan is as under:

<b>Scope of the Transmission Scheme</b>	<b>Capacity (MVA/km)</b>	<b>Estimated Cost (crore)</b>
(i) Establishment of 400 kV Pooling Station at Fatehgarh (with a provision to upgrade at 765 kV level)		84
(ii) 765 kV Fatehgarh Pooling sub-station-Bhadla (PG) D/C line (initially to be operated at 400 kV)	<b>110</b>	424
(iii) 2 nos. of 400 kV line bays at Fatehgarh Pooling substation		20
(iv) 1x125 MVAR Bus reactor at 400 kV Fatehgarh Pooling sub-station		8
(v) Space for 2 nos. of 400 kV bays for termination of 400 kV D/C line from AREPL Solar Park		
(vi) Space for future 400 kV and 765 kV bays at Fatehgarh Pooling Station		
<b>Total estimated cost</b>		<b>536</b>

99. Considering the above cost of the Project, the Petitioner has calculated a 32.58% increase in transmission charges due to an increase in line length by 41.78%.

The computation placed on record by the Petitioner is as follows:

<b>Increase in tariff due to Re-routing of line</b>	<b>Formula</b>	<b>Impact</b>
Approved Levelized Tariff for the FBTL project	a	38.01

Estimated Cost of transmission line of 103 KM as per CEA on proportionate basis (424*103/110)	b	397
Estimated cost of substation	c	112
Total Estimated Project cost as per CEA	d=b+c	509
Original Line length (KM)	e	103
Revised Line Length due to GIB Arc (KM)	f	146
% increase over the original line length	$g=(f-e)/e$	41.78%
Increase in levelized Tariff based on increase in line length (Rs. crore)	$h=(b/d*a) * g$	12.38
Consequential per year increase in Levelized Tariff of Rs 38.01 crore (in %)	$i=h/a$	32.58%

## **Analysis and Decision**

100. We have considered the submissions made by the Petitioner. Relief under Change in Law during the construction period is provided in Articles 12.2.1, 12.2.3, and 12.2.4 of the TSA, which are extracted below:

### ***“12.2 Relief for Change in Law***

#### ***12.2.1 During Construction Period:***

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

- *For every cumulative increase/decrease of each **Rupees One Crore Eighty Four lakh Only (Rs. 1,84,00,000/-)** in the cost of the Project up to the Scheduled COD of the Project, the increase/decrease in non-escalable Transmission Charges shall be an amount equal to 0.32 percent (0.32%) of the Non-Escalable Transmission Charges.”*

.....

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

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

101. In our view, the change in the scope of work in terms of the construction of an additional line length of 43 km against the line length envisaged in the Survey Report

based on which the Petitioner has submitted the bid is a consequence of the Change in Law event.

102. Accordingly, the Petitioner is entitled to a pro-rata additional cost of the transmission line in accordance with the methodology adopted in ENCIL's order dated 8.7.2013. The transmission charges in percentage terms for the additional scope of the work have been computed in the subsequent paragraphs.

103. The percentage increase in the length of the transmission line due to the direction to re-route is as under:

<i>Length of line as per transmission license (KM)</i>	<i>Actual Length of line (KM)</i>	<i>Difference (KM)</i>	<i>% increase over the line length in Transmission license</i>
103	146	43	41.78%

104. The scope of the project included the following elements:

- (a) Establishment of the 400 kV Pooling Station at Fatehgarh;
- (b) Fatehgarh Pooling station- Bhadla (PG) 765 kV D/C line (to be operated at 400 kV);
- (c) 2 Nos. of 400 kV line bays at Fatehgarh Pooling Station;
- (d) 1X125 MVAR Bus reactor at 400 kV Fatehgarh Pooling Station along with associated bay ;
- (e) Space for future 220 kV (12 Nos.) line bays;
- (f) Space for future 400 kV (8 Nos.) line bays along with line reactors at Fatehgarh Pooling Station;
- (g) Space for future 220/400 kV transformers (5 Nos.) along with associated transformer bays at each level;
- (h) Space for future 400 kV bus reactor (2 Nos.) along with associated bays.

105. Since the Petitioner submitted its bid on 22.1.2018, the cost of the

transmission line ought to be compared with the transmission line constructed in the adjoining area around the same time. We are of the view that it would be prudent to consider the cost envisaged by PGCIL for the construction of the 765 KV D/C Bhadla (POWERGRID)-Bikaner (POWERGRID) which is located in the same area and achieved COD in 2019. The Board of Directors (BoD) of the PGCIL granted investment approval for the scheme '*Transmission System for Solar Power Parks at Bhadla, Rajasthan*' on 22.7.2016 comprising various elements, including the construction of the Bhadla (POWERGRID)-Bikaner (POWERGRID) 765 kV D/C transmission line. The BoD approved the cost of the 765 kV D/C Bhadla (POWERGRID)-Bikaner (POWERGRID) and 400 kV D/C Bhadla (POWERGRID)-Bhadla (RVPN) transmission lines at Rs 600.39 crore (April 2016 level). Based on the actual cost submitted by the PGCIL in Petition No. 9/TT/2021, the cost of the 765 kV D/C Bhadla (POWERGRID)-Bikaner (POWERGRID) of 169.438 km has been worked out at Rs 558.40 crore.

106. Accordingly, the increase in cost for an additional 43 km of the transmission line is worked out at 24.65 % as under:

Increase in cost corresponding to an additional line length of 43 km	$(558.40 / 169.438) \times 43$	141.71 crore
Percentage increase in non-escalable transmission charges for every cumulative increase of <b>Rs 1.84 crore</b> in cost of the project up to COD as per Article 12.2.1 of the TSA.		0.32%
Percentage increase in non-escalable transmission charges	$(141.71 / 1.84) \times 0.32\%$	24.65 %

### **Relief on account of conditional NoC by the Defence Aviation Department**

107. The Petitioner has submitted that it had to incur the additional cost of Rs 41.80 crore for the installation of the truncated towers designed with reduced span to meet

the height restriction criteria. The Petitioner has further submitted that the reduction of the height of around 50 towers ultimately affected the 54 towers and forced the Petitioner to abandon another 16 foundations as well as 46 towers' material (~2389 MT) already fabricated. The Petitioner has also informed that a meeting was held between the Contractor and the Petitioner on 20.1.2020 regarding the abandoned tower material of 46 towers. The Petitioner has placed on record a copy of the CA certificate for the additional costs of Rs 41.80 crore and Rs 0.10 crore incurred on account of the truncation of the tower and abandonment of the 16 foundations.

108. The impact of the aforesaid Change in Law claimed by the Petitioner is as under:

<b>Particulars</b>	<b>Impact (Rs. crore)</b>
Abandonment of 16 nos. of foundations.	0.10
New truncated tower designed with reduced span to meet height restriction criteria.	41.80
Non-utilization of 46 Nos. towers (~2389 MT), which were already fabricated.	9.28
<b>Total impact</b>	<b>51.18</b>

109. The Petitioner has claimed a 19.04% increase in monthly transmission charges due to the above Change in Law event as per the Tariff Regulations notified by the Commission under Section 62 of the Act.

### **Analysis and Decision**

110. We have already condoned the delay in the grant of the NOC by the Defence Aviation Department and the subsequent delay in complying with the requirements stated in the conditional NOC to implement the additional scope of work by declaring the event as a Change in Law and force majeure event.

111. The Petitioner has placed its claim of the additional expense of Rs 41.80 crore

on account of the new truncated tower design with reduced span and Rs 0.10 crore towards the abandonment of 16 foundations falling in the area of Phalodi air base along with the CA certificate vide submission dated 12.2.2024. Therefore, the aforesaid claim of the Petitioner is allowed. As regards the claim of Rs. 9.28 crore towards the non-utilization of the 46 towers (~2389 MT), which were already fabricated, we are of the view that the 46 towers can be utilized in other projects in the future. Thus, the said claim of Rs 9.28 crore is devoid of merits. We do not find merit in the submission of the Petitioner to compute compensation based on the Tariff Regulations issued by the Commission as relief in terms of an increase in project cost before COD on account of the Change in Law event is already quantified in Article 12.2.1 of the TSA. Accordingly, the Petitioner shall be entitled to an increase of non-escalable transmission charges by 7.28%  $[(41.9/1.84) \times 0.32\%]$  on account of the increase in aforesaid cost allowed by the Commission.

### **Force Majeure Relief**

112. We have already allowed the extension of SCOD for the transmission system of the Petitioner till 1.8.2021 on account of the Change in Law and force majeure events. The Petitioner has claimed additional IDC/IEDC on account of the delay in implementation of the project on account of the force majeure and Change in Law events. In this regard, the Petitioner has submitted as under:

- (a) Due to force majeure [Article 11 of the TSA] and Change in Law Events [Article 12 of the TSA], there was a substantial delay, thereby leading to an increase in cost, which the Petitioner could not at all fathom at the time of the bid's submission.
- (b) Once the events qualify as force majeure, the Petitioner becomes

entitled to the IDC and IEDC qua the delay in the SCOD in the elements of the transmission project.

(c) Article 11.7 of the TSA provides for relief in the event of occurrence of force majeure events. The term “relief” under the said Article has wide scope; as such, it would not only include an extension of SCOD but would also allow the Petitioner to seek compensatory/ monetary relief as claimed in the Petition. Furthermore, Article 11.7 of the TSA also provides that the party suffering from force majeure events is excused/ discharged from performing its obligations under the said agreement. The term relief is to be construed in a manner that fulfils the intent of Article 11.7, i.e., to be able to properly offset/ redress the grievance of the contracting party on account of the occurrence of events beyond control and that the above term cannot be given any restrictive meaning so as to render the same otiose.

(d) The issue of claiming the IDC & IEDC on account of the force majeure and Change in Law events is no more res-integra on account of the passage of various orders/ judgments by this Commission, as well as by the APTEL. In this regard, reliance has been placed on the judgment dated 3.12.2021 passed by the APTEL in Appeal No. 129 of 2020 titled NRSS XXXI (B) Transmission Limited vs CERC & Ors. and judgment dated 20.10.2020 passed by the APTEL in Appeal No. 208 of 2019, titled as Bhopal Dhule Transmission Company Limited v. Central Electricity Regulatory Commission & Ors. The Petitioner has also relied on the order dated 11.3.2023 in Petition No. 333/MP/2019 (POWERGRID NM Transmission Ltd. v. IL&FS Tamil Nadu Power Co. Ltd. & Ors.). Therefore, the principle for awarding the IDC and IEDC is that the Project must suffer from a ‘delay’ that

is not attributable to the Project Developer, i.e., it should be on account of Change in Law and/ or force majeure.

(e) In this regard, the Petitioner has also relied on transmission tariff orders of the Commission in Petition Nos. 141/TT/2015, 267/TT/2015, 685/TT/2020 and 60/TT/2017 to contend that whenever the project implementation is delayed due to force majeure and Change in Law events, the delay factor is compensated/remunerated in the form of IDC and IEDC.

(f) The Petitioner was awarded the transmission project through the TBCB route. The Hon'ble Supreme Court in the Energy Watchdog Judgment, [reported in (2017) 14 SCC 80] has held that regulatory powers are available in the event the above bid governing documents are silent on an issue. The Hon'ble Supreme Court, in a recent judgment, titled Haryana Power Purchase Centre v. Sasan Power Ltd. and Others [reported in 2023 SCC OnLine SC 577], has again endorsed the fact that the regulatory powers are wide and are available to this Commission in appropriate cases.

(g) Therefore, for the delay caused due to force majeure and Change in Law events, the Commission has adequate regulatory powers under Section 79(1)(c) and 79(1)(d) of the Act, read with Sections 61 and 62, to compensate the Petitioner qua IDC, other incidental costs IEDC, etc., on actual basis.

(h) The principle of the grant of IDC and IEDC for a transmission project, on account of the occurrence of force majeure events, which are termed as uncontrollable events, has been recognized by the Commission under Regulations 3(25) and 22 of the CERC Tariff Regulations, 2019. The said

Regulations apply to Section 62 projects, which can be referred by the Commission while granting relief in the present Petition on account of force majeure/ change in scope for which there is no specific provision either in the TSA or the bidding guidelines, and as such, powers under Section 62 are required to be invoked. The Petitioner has claimed consequential relief of IDC and IEDC for delay in implementation of the project due to events beyond its control.

(i) Article 4.4.2 of the TSA provides for the extension of SCoD on account of any force majeure events as per Article 11. Hence, relief of extension of SCoD is granted to the TSP under Article 4.4.2 of the TSA in case the TSP is affected by the Force Majeure events under Article 11. Additionally, it is to be noted that Article 11.7 provides for relief for a Force Majeure event which should be seen separately from the extension of SCoD allowed under Article 4.4.2 of the TSA. Article 11.7 (b) of the TSA says FBTL is entitled to seek 'relief' on account of force majeure events. Relief is a wide term as interpreted by the APTEL in the case of Parampujya Solar Energy Pvt. Ltd. Case (Supra) (Parampujya Judgment).

(j) The Commission ought to invoke its regulatory powers under the above principle to compensate the Petitioner on account of the occurrence of force majeure events and Change in Law events.

113. In view of the above, the Petitioner has claimed Rs 60.29 crore (IDC-Rs 59.6 crore; IEDC- Rs 0.69 crore) as an additional cost in the form of IDC and IEDC in the Petition.

114. However, vide affidavit dated 12.2.2024, the Petitioner has provided an

auditor's certificate towards IDC and IEDC incurred till SCOD (30.9.2019) and from SCOD to deemed COD (i.e., 31.7.2021) as under:

<b>Particulars</b>	<b>Incurred till SCoD, i.e. 30.9.2019 (Rs. crore)</b>	<b>Incurred from SCoD, i.e. 30.09.2019, to Deemed CoD i.e. 31.7.2021 (Rs. crore)</b>	<b>Total Expenditure incurred (Rs. crore)</b>
IDC	3.88	59.60	63.48
IEDC	11.82	25.59	37.41
<b>Total</b>	<b>15.70</b>	<b>85.19</b>	<b>100.89</b>

115. The Petitioner has submitted that the IDC considered as per the original financing plan was Rs. 13 crore. In this regard, the Petitioner has relied on its own submission in Petition No. 392/MP/2018 (for creation of security in favour of the lender) vide which the Petitioner had submitted the IDC of Rs. 13 crores considered in the original financing plan. Accordingly, the Petitioner has incurred a total IDC of Rs. 63.48 crore against the provision of Rs. 13 crore IDC as per the original financing plan.

116. As regards IEDC, the Petitioner has submitted that the IEDC, as per the original financing plan, was Rs. 30 crore. The IEDC of Rs. 30 crore was also submitted to the Commission in Petition No. 392/MP/2018, against which the total actual IEDC incurred by the Petitioner till deemed CoD of 31.7.2021 is Rs. 37.05 crore. Further, as per the certificate, the Petitioner has incurred an IEDC of Rs. 25.60 from SCoD till deemed CoD. However, the Petitioner has claimed an additional IEDC of only Rs. 0.69 crore as pre-operative expenses only.

117. The Petitioner has further submitted that the issue relating to the IDC and carrying cost on account of the Change in Law events have been considered by the Appellate Tribunal for Electricity in its judgment dated 20.10.2020 in Appeal No. 208

of 2019 in the matter of Bhopal Dhule Transmission Company Limited v. Central Electricity Regulatory Commission and Ors.

118. CTUIL, vide its reply dated 19.7.2023, has submitted that IDC/IEDC during the period of extension of SCOD on account of the force majeure event as declared by the Commission can be charged under IDC/IEDC. As per CTUIL, the delay that pertains to the period that is attributable to the Change in Law event on account of re-routing due to the GIB arc is the only event that is available for recovery of IDC/IEDC in the present case. However, the compensation to be awarded on account of the Change in Law has been expressly mentioned in the agreement, and the parties are bound by the same. The parties cannot claim any compensatory relief over and beyond the same on account of hardships caused during the performance of the contract.

119. The Petitioner, vide its rejoinder dated 17.8.2023, has submitted that CTUIL is making objections in the present case, which are rarely raised by it when the force majeure claims (inclusive of IDC and IEDC) are claimed by the government- owned licensees. In this regard, the Petitioner has further submitted that the Petitioner is entitled to IDC and IEDC due to the various force majeure and Change in Law events, as the same could not have been fathomed by the Petitioner at the time of submission of the bid. The delay in implementation of the work was due to the force majeure events, which were also changes in the scope of work for the Petitioner.

### **Analysis and Decision**

120. We have considered the submissions made by the parties. The issue of entitlement of IDC and IEDC incurred on account of Change in Law and force majeure events is no longer res-integra in view of the judgment of the APTEL dated

20.10.2020 in Appeal No. 208 of 2019 in Bhopal Dhule Transmission Company Limited. v. CERC and Ors. ('Bhopal Dhule Judgment') and the judgment dated 3.12.2021 in Appeal No. 129 of 2020 in NRSS XXXI (B) Transmission Limited v. CERC and Ors. and Appeal No. 276 of 2021 in Darbhanga-Motihari Transmission Co. Ltd. v. CERC and Ors. ('NRSS Judgment'). The relevant extracts of the said judgments are as under:

**Appeal No.208 of 2019 Dated: 20th October, 2020 Bhopal Dhule Transmission Co. Ltd. v. CERC and Ors.**

*"8.8 Since the spirit of Article 12 of the TSA is to ensure monetary restitution of a party to the extent of the consequences of Change in Law events, such exceptions cannot be read into Article 12 of the TSA. The Appellant has submitted that a crucial factor for the Appellant whilst bidding for the Project was that uncontrollable Change in Law events would be duly accounted for in accordance with Article 12 of the TSA. By the Impugned Order, the Central Commission has wrongly altered the meaning of the Change in Law clause of the TSA long after award of the bid and commissioning of the Project.*

**8.11. Such a denial of the IDC by the Central Commission is in contravention of the provisions of Article 12.1.1 of the TSA in the facts and circumstances of the present case. By adopting such an erroneous approach, the Central Commission has rendered the Change in Law clause in the TSA completely nugatory and redundant. Such an interpretation by the Central Commission is causing the Appellant grave financial prejudice as it has no other means of recovering the IDC which it was constrained to incur for no fault of its own.**

*8.14 Further, the Hon'ble Supreme Court in the Energy Watchdog Judgement dated 11.04.2017 held that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by, such change in law is to restore, through the monthly tariff payments, the affected party to the economic position if such change in law has not occurred.*

**8.15 We are of the view that the Central Commission erred in denying Change in Law relief to the Appellant for IDC and corresponding Carrying Costs on account of admitted Change in Law events after having arrived at unequivocal findings of fact and law that Change in Law events adversely affected the Appellant's Project in accordance with the TSA. Therefore, the impugned order passed by the Central Commission is liable to be set aside as the same is in contravention of settled law laid down by the Hon'ble Supreme Court (Supra) and also the previous orders passed by the Central Commission in Petition Nos. 73/MP/2014 read with 310/MP/2015 and 174/MP/2016 wherein the same issue has been dealt by the Commission differently. In view of these facts, the Appellant is entitled for the change in law**

*relief as prayed for in the instant Appeal. The issue is thus, decided in favour of the Appellant....”*

**Appeal No. 129 of 2020 and Appeal No. 276 of 2021 Dated: 3rd December, 2021  
NRSS XXXI (B) Transmission Limited v. CERC**

*“16.10 The Central Commission failed to understand that the IDC and IEDC is not a financial benefit to the Appellant but due to the financial liability to be borne by the Appellant. This Tribunal vide Judgment dated 20.10.2020 in Appeal No. 208 of 2019in –Bhopal Dhule Transmission Company Limited v Central Electricity Regulatory Commission &Ors.*

....

**16.11 Therefore, we are of the opinion that the Appellant is entitled to be fully compensated for the IDC and IEDC incurred on account of Change in Law & Force Majeure Events.”**

**IA Nos. 2098/2021 & 2099/2021 (For Clarification)**

*“The Appellants have moved these applications seeking clarification. Having heard the learned counsel for the parties, we are clear in our minds that the Judgment dated 03.12.2021 leaves no scope for doubt that the Appellants have been held entitled to be fully compensated for IDC and IEDC incurred on account of Change in Law and Force Majeure Events and also to receive compensation on account of change in Gantry Coordinates and increase in number of power lines crossing. It is inherent in the findings returned and the directions given that while passing a consequential order in terms of the remit, the Commission will be obliged to grant the reliefs in above nature and also to consider the consequential carrying cost.”*

121. Earlier in the Bhopal Dhule Judgment, the APTEL observed that the denial of IDC on the admitted Change in Law by this Commission was in contravention of the provisions of Article 12.1.1 of the TSA and, consequently, held that the licensee is entitled to IDC on the admitted Change in Law events. Whereas, in NRSS Judgment, the APTEL observed that this Commission erred in not allowing the IDC and IEDC once having held the unforeseen requirement of forest clearance as Change in Law and having also granted an extension of time for delay in obtaining such clearance as force majeure. Consequently, the APTEL therein held the licensee entitled to be fully compensated for IDC and IEDC incurred on account of the Change in Law and force majeure events. We notice that in the present case also, the Commission has recognized the direction of the forest authorities to re-route the transmission line of

the Petitioner and conditional NOC by the Defence Aviation department both as Change in Law and force majeure events. Hence, as per the ratio laid down by the APTEL in the NRSS Judgment, we are of the view that the Petitioner is entitled to incremental IDC and IEDC for both the above events as claimed in the Petition.

122. However, the delay on account of the status-quo orders of the Hon`ble High Court of Rajasthan has been held as a Force Majeure event only. As per the TSA, there is no compensation provided for the force majeure event except for relief in the form of an extension of SCOD and, hence, protection from levy of liquidated damages. In this regard, it is noted that the Commission declined to admit IDC vide order dated 31.12.2023 in Petition No 237/MP/2021 on the same ground. The relevant portion of the order dated 31.12.2023 is extracted below

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

123. In light of the above, the Petitioner’s claim for IDC and IEDC on account of operation of status quo orders of the Hon`ble High Court, held as Force majeure events, is not admissible.

124. A summary of delay condoned by the Commission is as under:

<b>S.No.</b>	<b>Force Majeure/Change in Law Event</b>	<b>Delay</b>		<b>Shifting of SCOD</b>
1	Re-routing of line due to GIB Arc- Delay of 212 days	Condoned	28.11.2018 to 27.6.2019	From 30.9.2019 to 29.4.2020 (By 212 days)

	in submission of revised forest approval			
2	Cumulative delay of 249 days on account of			
	(1) delay in grant of NOC (94 days)	Condoned	14.9.2019 to 16.12.2019	[Subsumed in (1) above]
	(2) designing, construction and supply of truncated tower (155 days)	Condoned	17.12.2019 to 19.5.2020	From 29.4.2020 to 30.9.2020 (155 days)
4	Delay of 566 days from 11.5.2018 to 27.11.2019 (operation of status quo orders in Writ Petitions)	Condoned	11.5.2018 to 27.11.2019	[Subsumed in (1) above]
5	Delay of 295 days from 8.9.2020 to 29.6.2021 (operation of status quo order in Writ Appeals)	Condoned	8.9.2020 to 29.6.2021	From 30.9.2020 to 1.8.2021 [Partly subsumed in 2(2) above]

125. In light of the table above, the Petitioner will be entitled to incremental IDC and IEDC for the 12 months for the delay condoned from the SCOD of 30.9.2019 till 30.9.2020 on account of rerouting of line and design, manufacture, supply and installation of truncated tower (S. No. 1 & 2). While the delay on account of the first set of status quo orders (S. No. 4) of the High Court from 11.5.2018 to 27.11.2019 is already subsumed in the delay condoned due to re-routing of line, the delay condoned from 8.9.2020 till 1.8.2021 on account of the second set of status-quo order is only on account of force majeure event. Therefore, the Petitioner will not be entitled to the incremental IDC and IEDC during the last 10 months i.e. from 1.10.2020 to 1.8.2021.

126. The Petitioner has claimed IDC of Rs. 63.47 crore for the total period from 1.4.2018 to 31.7.2021 i.e. 40 months. Against the Petitioner's claim of Rs 63.47 crore for 40 months, the pro-rata IDC worked out for 12 months of delay in project implementation is Rs 19.04 crore  $[(63.47/40) \times 12]$ . Accordingly, we allow an additional

IDC of Rs. 19.04 crore on a pro-rata basis for the 12 months of delay from 30.9.2019 to 30.9.2020. Whereas the claim of IEDC cannot be worked out either from the certificate placed on record or from the other submissions made by the Petitioner. Accordingly, the claim of additional IEDC of Rs 0.69 crore is disallowed.

127. The Petitioner has claimed a 19.84% increase in monthly transmission charges on account of the increase in IDC and IEDC as per the Tariff Regulations notified by the Commission under Section 62 of the Act. As observed above, we do not find merit in the submission to compute compensation based on Tariff Regulations issued by the Commission as relief in terms of an increase in project cost before COD on account of the Change in Law event has been quantified in Article 12.2.1 of the TSA. Accordingly, the Petitioner shall be entitled to an increase of non-escalable transmission charges by 3.31%  $[(19.04/1.84) \times 0.32\%]$  on account of increase in IDC.

128. In light of the above, the Petitioner shall be allowed the following relief on account of force majeure and Change in Law events:

S.No.	Force Majeure/Change in Law Event	Petitioner's claim (Increase in non-escalable transmission charges)	Approved by the Commission (Increase in non-escalable transmission charges)
1	Increase in line length by 41.78% due to re-routing of the line due to GIB Arc	32.58%	24.65%
2	Truncation of Tower Height and abandoned foundations	19.04%	7.28%
3	IDC	19.84%	3.31%

**Reimbursement of loss of tariff due to force majeure events, or in the alternative, extension of the term of the contract/ TSA period**

129. The Petitioner has claimed reimbursement of loss of tariff due to force majeure

events or in the alternative extension of the term of the contract/TSA period and has mainly submitted as under:

(a) In terms of Schedule 6 of the TSA, the tariff for the period of 35 years commencing from 30.9.2019 has been provided. This was based on the project's SCOD being 30.9.2019. Based on the aforesaid SCOD, the year-wise bid for each specific year was submitted by the Petitioner. Further, the tariff stream in the bid was such that a cash flow from SCOD was assumed.

(b) However, the project's SCOD was delayed, *inter alia*, on account of the various force majeure/ change in scope and Change in Law events. The Project achieved the COD on 31.7.2021, i.e. after a delay of 22 months. Hence, the Petitioner started recovering the transmission charges from the year in which the project was commissioned.

(c) As a consequence, the Petitioner could not recover the tariff of Rs. 86.93 crore for the period from 30.9.2019 (SCOD) to 31.7.2021 (Actual COD). Since the term of the TSA is 35 years from the COD, there is an under-recovery of the tariff by 22 months.

(d) There is a loss arising directly due to force majeure and/or Change in Law events for the Petitioner. Consequently, the Petitioner is entitled to be compensated for the same, either through reimbursement of the loss of tariff on account of the loss of tariff for 22 months from the contract period or through an extension of the term of the TSA. The issue of mismatch in tariff, cash flow, and tariff schedule for the term of the TSA is neither addressed by the Competitive Bidding Guidelines nor provided for in the TSA.

(e) Further, Clause 1.1 (d) of Schedule 5 is also not aligned with the definition of the term "Expiry Date" under Article 1.1.1, which stipulates that the term of the project shall be 35 years from Scheduled CoD. Further, Clause 1.1 (d) of Schedule 5 is applicable when the delay is attributable to licensees as Clause 1.1 (d) of Schedule 5 does not refer to an extension of the time period under Articles 4.4, 11 & 12 of the TSA.

Therefore, when the delay is not attributable to the licensees, the project gets delayed due to force majeure or Change in Law events, then Clause 1.1 (d) of Schedule 5 is not applicable

(f) In terms of the judgment of the Hon'ble Supreme Court in the case of Energy Watchdog vs. CERC & Ors. [reported in (2017) 14 SCC 80], the Commission can exercise general regulatory power under Section 79 of the Act in the absence of specific provisions in the bidding documents.

130. We have considered the submissions made with regard to the loss of tariff. The issue of loss of tariff is no more res-integra in terms of the common judgment dated 3.12.2021 of Appellate Tribunal for Electricity in Appeal No 129 of 2020 & Appeal No 276 of 2021. Appeal No. 129 of 2020 was filed by NRSS XXXI (B) Transmission Ltd (NTL), whereas Appeal No. 276 of 2021 was filed by Darbhanga-Motihari Transmission Company Limited (DMTCL) against the common order dated 29.3.2019 passed by the Commission in separate Petitions filed by NTL (Petition No 195/MP/2017) and DMTCL (238/MP/2017). With regard to the claim of the TSPs for loss of tariff, the APTL has decided as under:

**“Issue No. 3**

18.0 The Appellant has claimed for the loss of tariff on account of Force Majeure and Change in Law events which led to under recovery of tariff as against the tariff envisaged at the time of bid submission due to change in the SCOD.

.....

18.2 The Appellant is claiming that the SCOD is 12.09.2016 as per the TSA and because of extended SCOD, the COD for KM line shifted to 18.01.2017 and for MA line to 27.03.2017. On this account the Appellant claim is that there is a tariff loss for 129 days for KM line whereas loss for 139 days for MA line.

18.3 The two lines during this period were not commissioned and no transmission service can be provided by the TSP to LTTCs. There is no provision in the TSA where Transmission Charges can be levied where the TSP cannot serve the LTTCs.

.....

18.5 Further, the Transmission Tariff can be charged against the transmission service actually provided or deemed to have been provided

which can be possible only once the Transmission System is fully commissioned and achieved COD.

.....

18.8 Learned Counsel for Respondent no. 15 submitted that there is no such provision under the TSA in so far as the question related to compensation for loss of first year tariff and also for the consequential interest is concerned. Further, it may also be mentioned that this project was conceived to become operational with a certain time frame. The failure of the Appellant to bring the project within the projected time frame had resulted into operation of the Grid network at sub-optimum level till its operation resulting with higher losses which are borne by the Respondents.

18.9 We inclined to accept the contentions of the Respondents in the light of the fact that the Appellant has already been granted relief in respect of additional expenditures incurred and extended SCOD as mentioned under preceding paras.

18.10 It also need emphasis that tariff can be levied only for the services provided and not on account of Force Majeure or Change in Law Events. In the present case the commissioning of the Transmission System of the Appellant has delayed and any Tariff can be billed only once the COD has been achieved. Any change at this stage will result into amendment to the TSA.

18.11 In the present case, we have agreed to the claims of the Appellant on account of the Change in Law and Force Majeure Events:

- i. Expenses made for obtaining Forest Clearance,
- ii. Extension of SCOD for Forest Clearance, and
- iii. Compensation for increased length of the Transmission Lines.

18.12 The time extension granted has also saved the Appellant from levying of any penalty on account of delay in commissioning of the project.

18.13 It may be seen that the Appellant has already been fully compensated for the delay and others as stated above due to Change in Law and Force Majeure Events.

18.14 As such we decline to accept the submission of the Appellant.”

131. Thus, in terms of the decision of the APTEL, the Petitioner’s claim of loss of tariff is rejected on the ground that the transmission tariff can only be charged against the transmission service actually provided or deemed to have been provided, which can be possible only once the transmission system is fully commissioned and achieved COD.

132. The Petitioner, in the instant Petition, has alternatively prayed for shifting of tariff in terms of extension of the terms of the TSA to enable recovery of the transmission charges for 35 years.

133. In this context, it would be relevant to consider the following definitions and provisions of the TSA:

***“Expiry Date” shall be the date which is 35 (thirty five) years from the Scheduled COD of the Project.***

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

134. It is apparent that the expiry date of the TSA is linked to the SCOD of the project, i.e., 35 years from the SCOD of the project. It is also evident from the definition of ‘Scheduled COD’ that the SCOD of the project can be extended mutually by the parties or in terms of provisions stipulated in Article 4.4. Therefore, the expiry date needs to be adjusted in accordance with the extended SCOD of the project. In other words, the ‘expiry date’ of the TSA may be refixed to a new date 35 years after the commencement of the revised SCOD on 1.8.2021.

135. Further, as per Article 2.2 of the TSA, the Agreement shall remain effective until the Expiry Date, i.e., 35 years from the extended SCOD. The relevant extract of the TSA is as under:

***“Term of Agreement” for the purposes of this Agreement shall have the meaning ascribed thereto in Article 2.2 of this Agreement;***

.....

***2.2 Term and Termination:***

2.2.1 *Subject to Article 2.2.2 and Article 2.4, this Agreement shall continue to be effective in relation to the Project until the Expiry Date, when it shall automatically terminate unless extended by the Appropriate Commission for such period and on such terms and conditions as the Appropriate Commission may specify in this regard in terms of the procedures laid down by the Appropriate Commission for such matters.*

2.2.2 *This Agreement shall terminate before the Expiry Date:*

*a. If a Termination Notice is served in accordance with Article 13*

*i. by the Majority Long Term Transmission Customers following a TSP Event of Default; or*

*ii. by the TSP following the Long Term Transmission Customers' Event of Default;*

*b. If the Long Term Transmission Customers or the TSP serves a Termination Notice in accordance with Article 3.3.2 and 3.3.4."*

136. Since the Agreement shall remain effective from the COD till the expiry date, the Petitioner shall remain entitled to tariff recovery for the entire duration of the Agreement.

137. The definition of Contract Year also makes it evident that the contract year will commence from the date of COD, and the contract will be effective till the 'Term of the TSA'. The definition is extracted as under:

**"Contract Year", for the purpose of payment of Transmission Charges, shall mean the period beginning on the COD, and ending on the immediately succeeding March 31 and thereafter each period of 12 months beginning on April 1 and ending on March 31 provided that the last Contract Year shall end on the last day of the term of the TSA."**

From the combined reading of the provisions of the TSA, it can be concluded that the recovery of tariff for the entire duration of the contract can be ensured only if the tariff stream is shifted as per the extended SCOD and 'expiry date' in terms of Article 4.4 of the TSA. Accordingly, the First Contract year shall be the contract year in which the Petitioner declared COD in the instant case.

138. The above interpretation is also consistent with the intent of the Ministry of Power as reflected in new SBDs issued on 6.8.2021 for the procurement of inter-State Transmission Services through Tariff Based Competitive Bidding Process. It is observed that the Ministry of Power has provided adequate clarity in the new TSA in the form of illustration to ensure recovery of the transmission tariff for the entire term of 35 years. The relevant portion of Schedule 4 of the TSA is extracted below:

*“Illustration 4: In case of delay in achieving COD of Project & all individual Elements (COD of the Project achieved in Contract Year other than Contract Year 1)*

**Quoted Transmission Charges: Rs 140 Million**

**Completion Schedule:**

Element No.	Completion Schedule in Months	Scheduled CoD of the Elements	Actual CoD of the Element	% Charges recoverable on Scheduled COD of the Element
Element 1	38	1-Oct-2019	1-May-2020	25%
Element 2	38	1-Oct-2019	1-May-2020	75%

**Tariff Payment to be paid as:**

Transmission Charges for Element 1			Transmission Charges for Element 2		
1-Oct-19 to 31-Mar-20	--	0.00	1-Oct-19 to 31-Mar-20	--	0.00
1-Apr-20 to 30-Apr-20	-	0.00	1-Apr-20 to 30-Apr-20	-	0.00
1-May-20 to 31-Mar-21	140x100%x (335/365)			128.49	
2	140x100%x1			140	
3	140x100%x1			140	
4	140x100%x1			140	
5	140x100%x1			140	
.....					
.....					
36 (1-Apr to 30-Apr)	140x100%x (335/365)			11.51	

139. As per the above illustration, in case of a delay in the COD of the project from SCOD of 1.10.2019 to 1.5.2020, the first year would start from 1.5.2020, and the

contract would end in the 36<sup>th</sup> year. The tariff would accordingly shift as per the new SCOD and the Expiry Date. It is evident from the construct of the TSA that the TSP is not deprived of tariff legitimately due to it under the TBCB process. The illustration provided in the new SBDs has only clarified the objective of the Ministry of Power behind projects awarded through the TBCB process, i.e., to ensure recovery of the quoted tariff for the entire term of the contract of 35 years. We have no reason to believe that the Ministry of Power had different intent while drafting the SBDs in force before 6.8.2021.

140. In view of the discussion above, the Commission is of the view that the Petitioner shall be entitled to receive the quoted tariff for 35 years commencing from the revised SCOD of 1.8.2021 as the first year. It would be apt to clarify here that the shifting of tariff is strictly premised on the extension of SCOD in terms of Article 4.4 of the TSA.

### **Carrying Cost**

141. The Petitioner has submitted that it is also entitled to the relief of carrying cost incurred as a result of additional expenditure incurred on account of Change in Law events/change in scope of work. The said carrying cost is required for the purpose of off-setting the impact of deferred recovery of the legitimate expenses incurred by the Petitioner. As per the Petitioner, the APTEL and the Hon'ble Supreme Court, in their judgments, have already upheld the concept of carrying cost whenever there is any deferred recovery of costs. In this regard, the Petitioner has relied on the following judgments:

(a) Judgment dated 3.3.2023 of the Hon'ble Supreme Court in Civil Appeal No. 684 of 2021, titled Maharashtra State Electricity Distribution Company Limited V. Adani Power Maharashtra Limited & Ors. (para 92 and 93);

(b) Judgment of the Hon'ble Supreme Court dated 24.8.2022 in Uttar Haryana

Bijli Vitran Nigam vs. Adani Power (Mundra) Limited, Civil Appeal No. 7129 of 2021 (para 17 & 18);

(c) Judgment of the Hon'ble Supreme Court in Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power Ltd., reported in (2019) 5 SCC 325 (paras 10, 13 and 19);

(d) Judgment dated 13.04.2018 passed by the APTEL in Appeal No. 210 of 2017 titled as Adani Power Ltd. vs. Central Electricity Regulatory Commission & Ors, [para d(i) to (x)];

(e) Judgment dated 20.12.2012 passed by the APTEL in SLS Power Limited vs. Andhra Pradesh Electricity Regulatory Commission and Ors, Appeal Nos. 150, 166, 168, 172, 173 of 2011 and 9,18,26,29 and 38 of 2012 (para 35.4 to 35.6).

(f) Judgment dated 12.9.2014 passed by the APTEL in Appeal No. 288 of 2013, titled as Wardha Power Company Ltd. vs. Reliance Infrastructure Ltd. (para 27)

(g) Judgement dated 30.7.2010 passed by the APTEL in Appeal No. 153 of 2009, titled as North Delhi Power Ltd vs. DERC [ reported in 2010 ELR (APTEL) 0891 (para 58)].

(h) Judgment dated 15.2.2011 passed by the APTEL in Appeal No. 173 of 2009, titled as Tata Power Company Ltd vs. Maharashtra Electricity Regulatory Commission, [reported in 2011 ELR (APTEL) 336 (para 43)].

(i) Judgment dated 15.9.2022 passed by the APTEL in Appeal No. 256 of 2019, titled as Parampujya Solar Energy Pvt. Ltd. and Anr. vs. Central Electricity Regulatory Commission and Ors., (para 70 to 83).

142. CTUIL, vide its reply dated 19.7.2023, has contended that the claim of the Petitioner for carrying cost is beyond the terms of the TSA, and, therefore, the Petitioner cannot claim the same. The Petitioner is not entitled to receive any compensation over and above the prescribed compensation of 0.32% of the non-escalable transmission charges for every cumulative increase of Rs 1.84 crore in the cost of the project. CTUIL has submitted that reliance of the Petitioner on the Hon'ble Supreme Court's order in *Adani Power Ltd & Ors (Appeal No 210 of 2017)* and *Uttar*

*Haryana Bijli Vitran Nigam Ltd. Vs Adani Power Ltd ((2019) 5 SCC 325)* is wrong as the facts and circumstances of the present case are different.

143. The Petitioner, vide its rejoinder dated 17.8.2023, reiterated its submissions made in the Petition and submitted that the Petitioner is entitled to relief of carrying cost as a result of additional expenditure incurred on account of Change in Law events. The said carrying cost is required for the purpose of off-setting the impact of deferred recovery of the legitimate expenses incurred by the Petitioner.

144. We have considered the submissions made by the parties. It is noted that, the Commission has already allowed IDC for the delay in implementation of the project. Since the Petitioner has already been allowed the interest in the form of IDC, the Petitioner is not entitled to receive the additional interest in terms of the carrying cost on the same claim. Accordingly, the claim of carrying cost is rejected.

### **Summary of Decision**

145. The summary of our decision in Petition No. 87/MP/2022 in terms of the foregoing paragraphs of this order is as under:

<b>S.No.</b>	<b>Particulars</b>	<b>Decision</b>
1	Direction of forest authorities to re-route the transmission line due to GIB Arc	Allowed both as Change in law and Force Majeure event in terms of Para 27 and Paras 39 to 41
2	NOC from Defence Aviation	Allowed both as Force Majeure and Change in law event in terms of Para 58 and Para 62
3	Status quo orders of Rajasthan High Court (Jodhpur)	Allowed as Force Majeure in terms of Para 87
4	Increase in tariff on account of re-routing of transmission line	Allowed in terms of Para 106

5	Increase in tariff on account to comply with Defence aviation NOC conditions- Truncation of Tower Height	Allowed in terms of Para 111
6	Increase in cost of IDC and IEDC due to delay in completion of line due to Change in Law & Force Majeure events	IDC –Allowed (Pro-rata in terms of Para 120 to 128) IEDC- Disallowed in terms of Para 126
7	Loss of tariff	Disallowed in terms of Para 131
8	Shifting of Tariff	Allowed in terms of Para 140
9	Carrying Cost	Disallowed in terms of Para 144

146. Petition No. 87/MP/2022 is disposed of in terms of the above.

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

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

sd/-  
**(Jishnu Barua)**  
Chairperson