

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

PETITION NO. 170/ MP/2011

Coram:

**Dr. Pramod Deo, Chairperson
Shri S. Jayaraman, Member
Shri V.S. Verma, Member
Shri M. Deena Dayalan, Member**

Date of Hearing: 12.3.2013

Date of Order: 9.5.2013

In the matter of

Miscellaneous petition under Section 79 (1) (c) and (f) of the Electricity Act, 2003

And in the matter of

Talcher-II Transmission Co. Ltd.

Petitioner

Versus

1. Tamil Nadu State Electricity Board
2. Eastern Power Distribution Company of Andhra Pradesh Limited
3. Southern Power Distribution Company of Andhra Pradesh Limited
4. Central Power Distribution Company of Andhra Pradesh Limited
5. Northern Power Distribution Company of Andhra Pradesh Limited
6. Power Company of Karnataka Ltd.
7. Bangalore Electricity Supply Co. Ltd.
8. Gulbarga Electricity Supply Co. Ltd.
9. Hubli Electricity Supply Co. Ltd.
10. Mangalore Electricity Supply Co. Ltd.
11. Chamundeshwari Electricity Supply Co. Ltd.
12. Kerala State Electricity Board
13. Puducherry Electricity Department
14. GRIDCO
15. Central Electricity Supply Utility Of Orissa
16. Western Electricity Supply Co. Ltd.
17. Southern Electricity Supply Co. Ltd.
18. Northern Electricity Supply Co. Ltd.
19. Power Grid Corporation of India Limited

.....Respondents

Present

Shri Amit Kapoor, Advocate for petitioner
Shri Aproova Misra, Advocate for Petitioner
Shri M.G. Ramachandran, Advocate, PGCIL
Shri S. Vallinayagam, Advocate, TANGEDCO
Shri S. Balaguru, Advocate, TANGEDCO
Shri R.B. Sharma, Advocate, GRIDCO

Shri A.K. Asthana, RPTL
Shri Anil Rawal, NKTCL
Shri Alok Roy, RPTL
Shri Janmali Mankara, NKTCL

ORDER

Prayer

The petitioner, Talcher-II Transmission Co. Ltd. in the present petition filed under clause (c) of sub-section (1) of Section 79 of the Electricity Act read with the adjudicatory power of this Commission under clause (f) thereof, has made the following prayers, namely -

“(a) Through a consultation proceeding amongst the parties herein help evolve a fair and reasonable solution to salvage the Project by restoring its original economic equilibrium at the time of award by setting off the adverse effect in time and cost over-runs due to the supervening circumstances and unavoidable delays intervening with the implementation of the Project beyond the control of the Petitioner, amount to an event of Force Majeure in terms of the TSA.

(b) Extend the COD of Project by giving clear working period of 30 months for each element as provided for initially to be reckoned from the date of grant of authorization under Section 164 of the Electricity Act, 2003, and issuance of project import certification as per Project Import Regulation 1986 and compensate for reduction of "Revenue Earning Years"

(c) Grant such escalation of Input/Capital Costs as pleaded above by the Petitioner; and relief for loss of opportunity in view of extension of this project.

(d) Pass such other Order(s) and directions as this Hon'ble Commission deems fit and appropriate in the facts and circumstances of the present case.”

Background Facts

2. The petitioner was incorporated on 1.5.2007 by Rural Electrification Corporation Transmission Projects Company Limited as its wholly owned subsidiary for augmentation of Talcher-II Transmission System ("the Project") comprising the following elements across the States of Orissa and Andhra Pradesh, namely:

(a) 400 kV D/C Talcher II-Rourkela (Quad) Transmission Line (Length 161 Kms),

(b) 400 kV D/C Talcher II - Behrampur Transmission Line (Length 220 Kms),

(c) 400 kV D/C Behrampur- Gazuwaka Transmission Line (Length 290 Kms),

(d) 400/200 kV Behrampur Sub-station.

3. On 6.10.2008, Rural Electrification Corporation Transmission Projects Company invited bids in accordance with Tariff Based Competitive Bidding Guidelines for Transmission Service issued by the Central Government for implementation of the Project as the Transmission Service Provider. While the bid process was under way, Rural Electrification Corporation Transmission Projects Company on 8.12.2008 was granted approval by Ministry of Power ("the Ministry") under Section 68 of the Electricity Act. The approval was subject to the condition that the implementing agency would commence construction of the Project within 3 years from issue of thereof. Reliance Power Transmission Limited which participated in the competitive bidding process was declared as the successful bidder and the Letter of Intent was issued in its favour on 18.12.2009. Prior thereto, the Transmission Service Agreement ("TSA") was signed between the petitioner and the Long Term Transmission Customers ("Beneficiaries") on 10.9.2009. Reliance Power Transmission Limited had furnished Contract Performance Guarantee to the Beneficiaries on 23.4.2010 and the petitioner company was subsequently acquired by Reliance Power Transmission Limited on 27.4.2010 pursuant to execution of the Share Transfer Agreement. The approval earlier issued by the Ministry under Section 68 of the Electricity Act was transferred to the petitioner by REC Transmission Projects Company Ltd under the latter's letter dated 20.5.2010.

4. On 5.5.2010, the petitioner filed two petitions before this Commission; Petition No. 145/2010 under Section 63 of the Electricity Act, 2003 for adoption of the transmission charges discovered through the process of competitive bidding, and Petition No. 146/2010 for obtaining transmission licence. This Commission by order dated 4.11.2010 adopted the levelised annual transmission charges of ₹144.00215 crore and also granted the transmission licence to the Petitioner on 8.11.2010, valid for a period of 25 years.

5. Under the TSA, different elements of the Project were to be commissioned within 30 months of the effective date. The effective date is defined under Article 2.1 of the TSA as under:

“Effective Date:

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

a. The Agreement is executed and delivered by the Parties; and

b. The Selected Bidder has acquired for the Acquisition Price, one hundred percent (100%) of the equity shareholding of REC Transmission Projects Company Limited, in Talcher-II Transmission Company Limited along with all its related assets and liabilities as per the provisions of the Share Purchase Agreement, and

c. The Selected Bidder, on behalf of the TSP, has provided the Contract Performance Guarantee, as per terms of Article 3.1 of this Agreement.”

6. Thus, the effective date is the latest date of the dates of the three events referred to in Article 2.1 of the TSA. The TSA was signed on 10.9.2009, Contract Performance Guarantee was furnished on 23.4.2010 and the shares of the petitioner company were acquired by Reliance Power Transmission Ltd on 27.4.2010. Therefore, the effective date in the present case was 27.4.2010. Accordingly, the Scheduled COD of the Project is latest by 26.10.2012; 42 months counted from 27.4.2010.

Petitioner's Case

7. Firstly, the petitioner has alleged delay in issuing authorisation under Section 164 of the Electricity Act ("the authorisation") by the Ministry. The petitioner has stated that it had been actively pursuing the case for grant of the authorisation in accordance with the procedure notified by the Ministry under Notification dated 13.4.2010 since June 2010, but was not granted till the date of filing of the present petition. The petitioner has stated that on 19.6.2010, it published Public Notices of the proposed inter-State transmission scheme in the newspapers having circulation in each of the two States involving the right of way for the proposed transmission corridor, calling for observations and representations. It has been stated that on 3.7.2010, the petitioner published the Public Notices in the Gazette of India as well, as required under the procedure notified by the Ministry. The petitioner has submitted that it did not receive any observation or representation on its proposal within the prescribed period of two months of the publication of the Public Notices. Thereafter, the petitioner has claimed, it pursued the matter with CEA and the Ministry for grant of the authorisation. The petitioner under its letter dated 15.9.2010 apprised CEA of the publication of the Public Notices and non-receipt of observations or representations. The petitioner has stated that it approached the Ministry first on 9.11.2010 for grant of the authorisation and further by its letter dated 29.12.2010 informed the Ministry of grant of transmission licence by this Commission, seeking to expedite grant of the authorisation. Thereafter the petitioner sent certain reminders as well. Subsequently in response to the Ministry's letter dated 26.5.2011, directing it to furnish an affidavit regarding non-receipt of objections on the route alignment selected for the proposed transmission lines, it submitted the affidavit dated 22.6.2011. The authorisation was, however, granted on 11.8.2011

and published in the Official Gazette on 12.8.2011. The petitioner has alleged that delay in grant of the authorisation by the Ministry adversely affected the implementation of the Project, since for want of the authorisation it was not able to draw funds it had tied up with the financial institutions and could not undertake construction activity. According to the petitioner, authorization was essential for commencement of construction work to pre-empt any risk of disruption of work and also for the safety of the field personnel. In the absence of the authorisation, the petitioner has averred, it was required to negotiate with the owners/occupiers of land through which the transmission lines are to pass and obtain their consent, which, as stated by the petitioner, was a difficult task.

8. The next grievance of the petitioner is about nomination of Sponsoring Authority for availing of concessional customs duty under Section 157 of the Customs Act, 1962 read with Heading 9801 of the First Schedule to the Custom Tariff Act, 1975 and Project Imports Regulations, 1986. The petitioner has stated that under the Project Import Regulations, the transmission lines above 66 kV are entitled to registration for import of goods at a concessional rate of Customs Duty of 5% against the normal rate of 7.5%, on certification by the Sponsoring Authority. The petitioner has stated that the State Governments have been declared as the Sponsoring Authority for private sector intra-State transmission projects but there is no specific designated Sponsoring Authority for private sector inter-State transmission projects. Accordingly, the petitioner approached the Ministry on 18.2.2011 seeking designation of a Sponsoring Authority in this behalf for availing of concessional Customs Duty. However, no response was received by the petitioner who has alleged that the petitioner was unable to import equipment and finalize

procurement of critical goods and inputs though it had obtained the Financial Closure of the loan finance for the Project on 25.10.2010 and had also awarded EPC contracts for the Project on 27.10.2010. The petitioner has claimed that the Project costing/bid was predicated on the understanding that the concession in Customs Duty would be available for implementation of the Project. The petitioner has stated that it has been prejudiced since it is liable to pay the normal customs duty of 7.5%, enhancing the capital cost by ₹3.2 crore and accordingly affecting the viability and the timely implementation of the Project.

9. The petitioner has sought to invoke the *Force Majeure* clause under the TSA on two grounds, firstly the authorisation was not granted by the Ministry till the date of filing of the present petition and secondly to the non-designation of the Sponsoring Authority under the Project Import Regulations. The petitioner has submitted that but for these *Force Majeure* events it would have earned the transmission charges for a period of 25 years as the bid was submitted on that premise. The petitioner has further submitted that the *Force Majeure* events have led to cost and time over-runs. The petitioner has worked out increase in the project cost by approximately ₹ 115 crore on account of increase in the input cost of aluminium and steel by approximately 32% and 70% respectively after September 2009 and till the filing of the petition. The petitioner has further submitted that there was delay of about 65 weeks in implementation of the Project because of delay in issuing the authorisation by the Ministry causing reduction in the Revenue Earning Years and has computed its monetary impact of ₹250 crore on account of opportunity loss. The petitioner has accordingly sought extension of time for implementation of the Project to offset the loss in the Revenue Earning Years.

10. Another grievance of the petitioner is on account of enhancement of Excise Duty by the Central Government by notification dated 26.2.2010 issued by Department of Revenue on certain components such as steel, zinc, and aluminium from 8% to 10%. The petitioner has averred that the increase had a cascading effect as it led to corresponding increase in the countervailing duty levied on imported goods and raw materials. The petitioner has stated that because of these developments also, the cost of the Project has increased and has sought relief by invoking "Change in Law" clause under the TSA.

11. Lastly, the petitioner has pointed out that the approval granted by the Ministry on 8.12.2008 under Section 68 of the Electricity Act was valid up to 7.12.2011 i.e. three years from the date of issue and the construction on the Project was to commence within the validity period. According to the petitioner, the approval granted by the Ministry effectively came into play for the petitioner on 20.5.2010 when it was handed over the approval by REC Transmission Projects Company Ltd. By that time, it has been stated, 18 months' time had already elapsed, eroding the time available for compliance by the petitioner. The petitioner by its letter dated 3.9.2011 made a request to the Ministry to extend the approval. The petitioner has submitted that the time consumed prior to handing over of approval was beyond its control and would necessarily require extension by the Ministry.

12. The petitioner by its notice dated 14.6.2011 informed the Beneficiaries of the delay in implementation of the Project on account of the alleged delay by the Ministry to grant the authorisation and to nominate the Sponsoring Authority and also increase in the Excise Duty from 8% to 10% *ad valorem*. The petitioner requested

the Beneficiaries to agree to suitable compensation on account of increase in Excise Duty. The petitioner also sought an extension in the Scheduled COD and other remedial measures. The Notice by the petitioner was based on the *Force Majeure* and Change in Law clauses in the TSA, pointing out the delays were for reasons beyond its control and cost escalation of major components i.e. steel, zinc and aluminium was due to enhancement of Excise Duty. The Beneficiaries who responded to the petitioner's Notice denied its claim. As such, the present petition has been filed.

Reply

13. Some of the Beneficiaries have filed their replies. They have stated that in accordance with the TSA, it was the petitioner's own obligation to procure all Consents, Clearances and Permits and they had undertaken to render necessary assistance and support to the petitioner to obtain necessary Consents, Clearances and Permits on request made by the petitioner. The respondents have alleged that the petitioner did not approach them for any assistance or support, but in Project Execution Plan dated 27.10.2010, in the footnote just a mention was made that execution was subject to timely receipt of the licence and the authorisation under Section 164 of the Electricity Act. The respondents have further alleged that the petitioner was obligated to provide them monthly progress reports with regard to the Project, but did not provide any time prior to the notice dated 14.6.2011. The respondents have also refuted the petitioner's claim on account of its inability to avail concessional Customs Duty for import of equipment and goods for the fact that the Sponsoring Authority under the Project Import Regulations was not designated. The respondents have further submitted that the petitioner has sought to invoke *Force Majeure* clause in the TSA without giving any notice of occurrence of *Force Majeure*

as required under the TSA. The respondents have further refuted the petitioner's claim for any relief on account of increase in Excise Duty alleging that the petitioner did not serve any notice of Change in Law as required under Article 12.3 of the TSA. Kerala State Electricity Board has additionally stated that in accordance with Article 11.3 (b) i of the TSA the petitioner becomes entitled to relief on account of *Force Majeure* only after it is declared by the competent court of law that delay in grant of authorisation or consent was unlawful or unreasonable. GRIDCO in its reply has stated that this is not an appropriate case to invoke jurisdiction of this Commission under Section 79 of the Electricity Act since the tariff has been discovered through the process of competitive bidding and is not a case of cost-plus tariff. Central Electricity Supply Utility of Orissa, impleaded as Respondent No. 15 has stated that it was not party to the TSA and as such is stranger to the present proceedings.

14. Power Grid Corporation of India Ltd (PGCIL) (Respondent No. 19) in its affidavit dated 12.1.2012 has placed on record a copy of the Ministry's letter dated 30.11.2011, addressed to its CMD, which contains the views of the Ministry on all the substantive issues raised by the petitioner. It has been pleaded that the Project envisaged evacuation of power from the generating stations in Southern Region and is of vital importance and that any delay in completion of the Project will prejudicially affect evacuation of power from these generating stations. PGCIL has submitted that considering the importance of the Project its execution may be given to some other agency in case the petitioner is unwilling or unable, or is otherwise committing defaults.

Issues

15. The issues that arise for our consideration are as follows:

- (a) Whether adjudication of the dispute is within the jurisdiction of this Commission?
- (b) Whether the petitioner is entitled to invoke *Force Majeure* clause under the TSA in the facts and circumstances of the case?
- (c) Whether the petitioner is entitled to be compensated on account of increase in Excise Duty by the Central Government?
- (d) Whether the petitioner's request for extension of period of validity of approval under Section 68 of the Electricity Act is justified?

Re: Jurisdiction

16. GRIDCO has questioned the jurisdiction of this Commission pointing out that the tariff was adopted under Section 63 of the Electricity Act. Therefore it cannot be reopened under clause (f) of sub-section (1) of Section 79 of the Electricity Act. We have considered the submission of GRIDCO but find it to be without substance. Apart from the fact that this Commission has plenary power of adjudication of disputes under clause (f) of sub-section (1) of Section 79 of the Act, the Parties under Article 16.3.1 of the TSA have agreed to the dispute resolution by the Appropriate Commission. It is not in dispute that this Commission is the Appropriate Commission in the present matter since the transmission charges were adopted by this Commission. Therefore, the preliminary objection of GRIDCO as to the jurisdiction of this Commission to adjudicate upon the dispute is hereby rejected.

Re: Force Majeure

17. The petitioner has relied upon Article 11 of the TSA to invoke the *Force Majeure* clause on the ground of delay of the Ministry to grant the authorisation under section 164 of the Act and nominate the Sponsoring Authority for availing concessional rates of the Customs Duty for import of equipment and goods for the Project. The Article 11 is extracted hereunder for ease of reference:

“11 FORCE MAJEURE

11.1 Definitions

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

11.2 Affected Party

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

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

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

11.3 Force Majeure

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

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

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

i. Direct Non–Natural Force Majeure Events:

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

ii. Indirect Non - Natural Force Majeure Events

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

11.5 Notification of Force Majeure Event

11.5.1 The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one (1) day after such reinstatement. Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party shall give the other Party regular reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure.

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

11.6 Duty to perform and duty to mitigate

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

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

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

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

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

Determination of Tariff) Regulations 2004 and related amendments from time to time, then only the Non Escalable Transmission Charges, as applicable to such Element(s) in the relevant Contract Year, shall be paid by the Long Term Transmission Customers as per Schedule 5, for the duration of such event(s).

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

18. We analyse the relevant provisions of Article 11 of the TSA for the purpose of the dispute raised presently. Broadly, the essential elements of Article 11 are:

(a) An event or circumstance amounts to 'Force Majeure', if

(i) the event or circumstance prevents or delays the Affected Party in the performance of its obligations under the TSA,

(ii) such event or circumstance is not within the reasonable control, directly or indirectly, of the Affected Party, and

(iii) the Affected Party could not have avoided occurrence of such event or circumstance even by taking reasonable care or complying with Prudent Utility Practices.

(b) Any unlawful, unreasonable or discriminatory refusal to grant any Consents, Clearances and Permits required for the development/operation of the Project also amounts to *Force Majeure* event, after a Competent Court of

Law has declared the refusal to be unlawful, unreasonable and discriminatory and strikes it down.

(c) The Affected Party is required to give notice to the other Party of any event of *Force Majeure* containing full particulars of the event of *Force Majeure*, its effects on the Party claiming relief and the remedial measures proposed within 7 days after the date on which such Party knew or should reasonably have known of the commencement of the event of *Force Majeure* and thereafter the Affected Party has to furnish the other Party regular reports on the progress of the remedial measures.

(d) The notice by the Affected Party is a condition precedent for entitlement to claim any relief under the TSA.

(e) To the extent not prevented by the Force Majeure Event, the Affected Party has to continue to perform its obligations as provided in the TSA.

19. The petitioner's grievance on account of *Force Majeure* shall be examined in the light of above broad analysis of Article 11. However, before we do that we consider it appropriate to deal with the objection raised by Kerala State Electricity Board. Under clause 11.3 (b) of the TSA, any unlawful, unreasonable or discriminatory refusal to grant Consents, Clearances and Permits required for the development/ operation of the Project amounts to *Force Majeure* event when a Competent Court of Law declares the refusal to be unlawful, unreasonable and discriminatory and strikes down the same. Kerala State Electricity Board has averred

that any refusal to amount to *Force Majeure* should first be declared unlawful, unreasonable and discriminatory by a Competent Court of Law. The “Competent Court of Law” has been defined in Article 1.1.1 of the TSA as “the Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project”. This Commission as a quasi judicial body having powers of adjudication under the law and is, therefore, the “Competent Court of Law” as defined under the TSA. In view of this, this Commission has the jurisdiction to enter upon the dispute. The objection of Kerala State Electricity Board is therefore without merit.

20. Now we come to the petitioner’s claim on merits as to whether it is a fit case to invoke the *Force Majeure* clause to extend the period for construction on account of the time taken by the Ministry in granting the authorisation. We briefly recapitulate the facts relating to grant of the authorisation. The petitioner was issued Letter of Intent on 18.12.2009 and prior thereto, the petitioner had executed the TSA. The petitioner was acquired by Reliance Power Transmission Ltd on 27.4.2010 after completion of the necessary procedural requirements and thereby became a its wholly owned subsidiary. The petitioner published the Public Notices in the newspapers on 19.6.2010. The Public Notice was published in the Gazette of India on 3.7.2010 with a gap of two weeks. The petitioner submitted the necessary documents to CEA on 15.9.2010. The request to the Ministry for grant of the authorisation was sent on 9.11.2010. The request was followed up by the petitioner’s letter dated 29.12.2010 under which it informed the Ministry of grant of transmission licence by this Commission by order dated 8.11.2010. The Ministry under its letter dated 26.5.2011 advised the petitioner to file an affidavit which was submitted on

22.6.2011. The authorisation was granted by the Ministry by its notification dated 11.8.2011, published in the Official Gazette on 12.8.2011. Ministry of Power has submitted that the approval under section 164 was issued within a reasonable period of the petitioner meeting all procedural requirements for such approval.

21. We have considered the submissions of the parties including Ministry of Power. The question to be decided is whether it is a condition precedent for execution of the project under TSA, non-fulfilment of which has resulted in force majeure. Perusal of the RfP and TSA does not reveal that approval under section 164 of the Act is a condition precedent for execution of the project. Section 164 of the Act reads as under:

“Section 164. (Exercise of powers of Telegraph Authority in certain cases):

The Appropriate Government may, by order in writing, for the placing of electric lines or electrical plant for the transmission of electricity or for the purpose of telephonic or telegraphic communications necessary for the proper co-ordination of works, confer upon any public officer, licensee or any other person engaged in the business of supplying electricity under this Act, subject to such conditions and restrictions, if any, as the Appropriate Government may think fit to impose and to the provisions of the Indian Telegraph Act, 1885, any of the powers which the telegraph authority possesses under that Act 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 so established or maintained.”

Thus this section enables the appropriate Government to confer powers of telegraphic authority for the purpose of placing the electrical lines and electrical plants for transmission of electricity on any public officer or any other person engaged in the supply of electricity under the Act in addition to any licensee. ‘Any other person engaged in the business of supplying electricity under the Act’ may include a generating company which intends to lay its own dedicated transmission lines or any of the categories under section 15 of the Act such as any local authority, Panchayat institutions, users’ associations, co-operative societies, non-governmental

organisations or franchisees if they are exempted by the appropriate Commission on the recommendations of the appropriate Government to seek licence. However, in case of the licensees, section 67(2) of the Act enables the appropriate Government to make rules to enable them to lay the electric supply lines. Section 67(2) to (5) of the Act is extracted as under:

- (2) The Appropriate Government may, by rules made by it in this behalf, specify, -
- (a) the cases and circumstances in which the consent in writing of the Appropriate Government, local authority, owner or occupier, as the case may be, shall be required for carrying out works;
 - (b) the authority which may grant permission in the circumstances where the owner or occupier objects to the carrying out of works;
 - (c) the nature and period of notice to be given by the licensee before carrying out works;
 - (d) the procedure and manner of consideration of objections and suggestion received in accordance with the notice referred to in clause (c);
 - (e) the determination and payment of compensation or rent to the persons affected by works under this section;
 - (f) the repairs and works to be carried out when emergency exists;
 - (g) the right of the owner or occupier to carry out certain works under this section and the payment of expenses therefor;
 - (h) the procedure for carrying out other works near sewers, pipes or other electric lines or works;
 - (i) the procedure for alteration of the position of pipes, electric lines, electrical plant, telegraph lines, sewer lines, tunnels, drains, etc.;
 - (j) the procedure for fencing, guarding, lighting and other safety measures relating to works on streets, railways, tramways, sewers, drains or tunnels and immediate reinstatement thereof;
 - (k) the avoidance of public nuisance, environmental damage and unnecessary damage to the public and private property by such works;
 - (l) the procedure for undertaking works which are not repairable by the Appropriate Government, licensee or local authority;
 - (m) the manner of deposit of amount required for restoration of any railways, tramways, waterways, etc.;
 - (n) the manner of restoration of property affected by such works and maintenance thereof;
 - (o) the procedure for deposit of compensation payable by the licensee and furnishing of security; and
 - (p) such other matters as are incidental or consequential to the construction and maintenance of works under this section.

(3) A licensee shall, in exercise of any of the powers conferred by or under this section and the rules made thereunder, cause as little damage, detriment and inconvenience as may be, and shall make full compensation for any damage, detriment or inconvenience caused by him or by any one employed by him.

(4) Where any difference or dispute [including amount of compensation under sub-section (3)] arises under this section, the matter shall be determined by the Appropriate Commission.

(5) The Appropriate Commission, while determining any difference or dispute arising under this section in addition to any compensation under sub-section (3), may impose a penalty not exceeding the amount of compensation payable under that sub-section.

The Central Government has notified the Works of Licensee Rules, 2006 on 18.4.2006. Any licensee can execute the works of laying the transmission lines in accordance with these Rules. No doubt, an authorisation under section 164 of the Act facilitates the licensee to lay the transmission lines over the public land or land and buildings of the private parties. However it cannot be said that in the absence of an authorisation under section 164 of the Act, a licensee is without any legal authority lay the transmission lines as the Works of Licensee Rules, 2006 enables a licensee to lay the transmission lines through the lands and buildings of public authorities and private individuals after obtaining their consents through the prescribed procedure. We also find that an approval under section 68 of the Act which pertains to installing of overhead lines, is a condition precedent to be fulfilled under the TSA whereas an authorisation under section 164 is not a condition precedent either for award of the project or execution of the project. This may be due to the fact that the licensees are authorised under the Works of Licensee Rules, 2006 to lay the transmission lines over the lands and buildings of public authorities and private persons.

22. Next we consider whether the time taken in obtaining the authorisation under section 164 of the Act has really affected the project schedule. The project execution schedules contain various stages such as financial closure, awarding of EPC contract, delivery of equipments, erections of the towers, installation of sub-stations if any, stringing of lines, charging of lines, testing and commissioning of lines. Therefore, authorisation under section 164 of the Act is required at the time of erection of towers and stringing of lines which comes at a much later stage. The

petitioner should have taken actions as per the schedule instead of making the authorisation under section 164 of the Act as a condition precedent for the petitioner to start the work. Moreover, the petitioner seeks the opportunity cost in the form of enhanced transmission charges due to the time taken for approval under section 164 of the Act to start the work on the project. The petitioner started the process for approval under section 164 of the act on 19.6.2010 and the approval was notified in the Gazette of India on 11.8.2011, involving a time of 1 year one month and 22 days. The project was to be executed within a period of 30 months from the effective date (27.4.2010) which comes to 27.10.2012. A period of 1 yr two months were available after the approval of the section 164 authorisation to enable the petitioner to complete the work of erection of towers and subsequent activities which are considered sufficient. In any case, there is a provision under the TSA to extend the time. It was submitted by the respondents during the hearing that extension of time for the completion of the project is not an issue and would be agreed to, provided the petitioner sincerely executes the project. In our considered view, approval under section 164 of the Act was neither a condition precedent for execution of the project nor the time taken for issue of section 164 approval would have adversely affected the execution of the project. Time taken for authorisation under section 164 of the Act is not a "force majeure" event and therefore, the petitioner cannot be granted any relief on this account.

23. Next issue is regarding concessional Customs Duty. The petitioner has claimed that the project costing and the tariff bid by the petitioner was predicated on the concessional Customs Duty available for import of goods and equipment for the Project. It is seen that the petitioner for the first time wrote to the Ministry on

18.2.2011, requesting the Ministry to designate the Sponsoring Authority to enable it to avail the concessional Customs Duty, even though the facility of import on payment of concessional Customs Duty was available much before the Letter of Intent was issued in its favour. The petitioner was also aware that the State Governments were designated as the Sponsoring Authority for import for intra-State transmission projects but there was no designated authority for inter-State transmission projects. The petitioner took up the matter belatedly; after 15 months of selection of Reliance Transmission Power Ltd as successful bidder and 10 months of acquisition of the petitioner by it. There is no explanation for such the long delay. To us it clearly appears to be a case of afterthought. Besides, there is no basis for the petitioner's claim that the project costing and the tariff were predicated on availability of concessional Customs Duty. Neither RFP nor the TSA nor any other document available on record bears testimony to the petitioner's claim. The Ministry in its letter dated 30.11.2011 addressed to CMD, PGCIL has clarified that it had in the past never undertaken any steps toward appointment of the Sponsoring Authority and it was not obliged to do so by practice or convention. From the Ministry's comments it appears that appointment of the Sponsoring Authority was the function of Ministry of Finance. For this reason also, the petitioner's plea to invoke the *Force Majeure* clause cannot be upheld.

24. The petitioner has claimed compensation of an amount of ₹115 crore on account of increase in cost of inputs such as steel, aluminium, etc after submission of the bid. The respondents have opposed the petitioner's claim for compensation.

25. Article 11.4 of the TSA provides for *Force Majeure* Exclusions. It has been provided that the *Force Majeure* shall not include unavailability, late delivery, or changes in cost of the machinery, equipment, materials, spare parts etc. for the Project, except to the extent that they are consequences of an event of *Force Majeure*. The petitioner has not shown to what extent the increase in the cost of steel, aluminium etc is on account of any *Force Majeure* event. The petitioner has claimed lumpsum compensation of ₹115 crore based its averment that there was increase in the prices after it submitted its bids in September 2009. The petitioner's claim therefore is uncertain and vague. Further, under Schedule 7 of the TSA, only Escalable Transmission Charges are to be escalated at the rates specified by this Commission as per the provisions of the Competitive Bidding Guidelines. The petitioner has not claimed any Escalable Transmission Charges. Therefore, for this reason also, the question of any compensation on account of increase in prices of input material cannot be considered. The petitioner was selected based on tariff based competitive bidding. There is no provision in the TSA to allow for the increase in the capital cost on account of increase in the cost of the material used for construction. Any increase or decrease in the capital cost has to be on the petitioner's own account. Therefore, the petitioner's prayer on this account is rejected.

Increase in Excise Duty

26. The petitioner has sought compensation on account of increase in Excise Duty from 8% to 10% notified by the Central Government on 26.2.2010 by invoking "Change in Law" clause under the TSA. The petitioner has claimed a relief for ₹13

Crore on this count. The relevant provisions regarding “Change in Law” under the TSA are set out below:

"12. Change in Law

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

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

27. It is seen that under the TSA the amendment or modification of any Law, including rules and regulations framed pursuant to such Law is included in “Change in Law”. Any changes involving increase or decrease in Excise Duty whether on enactment by the Parliament or by the Central Government under the powers delegated to it fall within the scope of “Change in Law”. The respondents have not contested this position. The petitioner has contended that while formulating its bid, the petitioner had considered the project costing and tariff based on applicable Excise Duty and increase in Excise Duty by the

Central Government will have the effect increasing the project cost considered by the petitioner. The petitioner has claimed relief on that account. Article 12.2 of the TSA provides that during the Construction Period, the impact of increase/decrease in the cost of the Project on the transmission charges shall be governed by the formula given below:

"For every cumulative increase/decrease of each Rupees Four Crore Fifty Lakh (Rs 4.5 Crore) in the cost of the Project up to the Scheduled COD of the Project, the increase/decrease in the non-escalable Transmission Charges shall be an amount equal to Zero Point Three One Three percent (0.313%) of the Non-Escalable Transmission Charges .

28. The TSA itself provides the formula to offset the impact of Change in Law on the transmission charges. This provision of the TSA has to be given effect to. The respondents have pointed out that the petitioner did not give any notice of the Change in Law immediately after becoming aware of it as required under Article 12.3.1. It is an acknowledged fact that the petitioner in its notice dated 14.6.2011 sought compensation on account of increase in Excise Duty by the Central Government. In our view, this is sufficient compliance with Article 12.3.1 of the TSA. The increase in Excise Duty has been published in the Official Gazette and the public at large is deemed to have acquired knowledge of the notification within the reasonable time of its publication. Therefore, we accept the claim of the petitioner for relief on account of increase in Excise Duty even though the notice was not issued immediately after takeover of the petitioner by Reliance Power Transmission Ltd. It is however clarified that if the project is delayed for no genuine and permissible reason and increase in excise duty takes place during the period of such delay, increase in excise duty during the said period will not be admissible.

29. Article 12.2.3 lays down that for any claims made for relief on account of Change in Law, 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. Article 12.2.4 further lays down that the decision of the Appropriate Commission, with regards to the determination of the compensation 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. As already held, the Appropriate Commission in the present case is this Commission. Therefore, the amount of compensation and the date from which such compensation shall be payable are to be determined by this Commission. We leave these two questions open for the present. The petitioner's claim on this count appears premature since it is based on estimates. We direct the petitioner to file an appropriate petition after completion of the Project with necessary details and this Commission shall at that time decide the quantum of relief and the effective date for the relief at that time.

Approval Under Section 68

30. The petitioner has prayed for this Commission's decision for extension of validity of approval issued by the Ministry under Section 68 of the Electricity Act mainly on the ground that the authorisation under Section 164 of the Electricity Act from Ministry was awaited when it filed that petition and, according to the petitioner, such an authorisation was imperative to enable the petitioner to commence construction on the Project. Without going into the merits of the petitioner's contention that the construction on the Project could not at all be commenced till such time the authorisation was granted, we take notice of the fact that the

authorisation was granted by the Ministry long before the expiry of the approval under Section 68 of the Electricity Act on 7.12.2011. The petitioner had sufficient time at its disposal to commence construction on the Project. However, the petitioner by its letter dated 3.9.2011 made a request for extension of time when the validity was to expire. The petitioner's grievance on this count did not survive after the grant of the authorisation and as such no order needs to be passed on this part of the grievances.

31. For the reasons discussed above, the petitioner's prayers are partly allowed as under:

- (a) The petitioner shall not be allowed any compensation on account of increase in cost of the material used for construction or on account of non-notification of the Sponsoring Authority.
- (b) The petitioner shall be entitled to relief on account of increase in Excise Duty by the Central Government and for this purpose the petitioner shall file an appropriate petition in accordance with law on completion of the Project.
- (c) For extension of time for execution of the project, the petitioner shall approach the LTTCs in this regard who shall consider the request of the petitioner and convey their approval within one month.
- (d) The petitioner is not found entitled to any relief other than that decided as per sub-paras (c) and (d) above.

32. PGCIL in its affidavit dated 12.1.2012 has submitted that considering the importance of the Project its execution may be given to some other agency in case the petitioner is unwilling or unable, or is otherwise committing defaults. PGCIL as the CTU has filed a separate petition on this account and no directions on the submissions of PGCIL is issued in this order.

33. In the light of above discussion, the petition stands disposed of.

sd/-
(M Deena Dayalan)
Member

sd/-
(V.S. Verma)
Member

sd/-
(S. Jayaraman)
Member

sd/-
(Dr. Pramod Deo)
Chairperson