

**CENTRAL ELECTRICITY REGULATORY COMMISSION,
NEW DELHI**

Petition No.32/MP/2014

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A.K. Singhal, Member

Shri A.S. Bakshi, Member

Date of Order: 24th August 2016

In the matter of

Petition under Sections 61, 63 and 79 of the Electricity Act, 2003 read with the statutory framework for tariff-based competitive bidding for transmission service of 400 kV D/C quad transmission line from Bongaigaon-Siliguri and 400 kV D/C quad transmission line from Purnia-Biharsharif being implemented by East-North Interconnection Company Ltd.

And

In the matter of

East North Interconnection Company Limited,
C-II, Mira Corporate Suites,
Ishwar Nagar,
New Delhi – 110025

.... Petitioner

Vs

1. Jodhpur Vidyut Vitran Nigam Ltd.,
New Power House, Industrial Area,
Jodhpur – 342 003
2. Jaipur Vidyut Vitran Nigam Ltd.,
Vidyut Bhawan, Janpath,
Jaipur – 302 005
3. Ajmer Vidyut Vitran Nigam Ltd.,
Old Power House, Hathi Bhatta,
Jaipur Road, Ajmer
4. BSES Yamuna Power Ltd.,

- Shakti Kiran Building, Karkardooma,
New Delhi – 110 092
5. BSES Rajdhani Power Ltd.,
BSES Bhawan, Nehru Place,
New Delhi – 110 019
 6. North Delhi Power Ltd.,
(Now known as Tata Power Delhi Distribution Limited)
Sub Station Buidling,
Hudson Lines, Kingsway Camp,
New Delhi – 110 009
 7. New Delhi Municipal Corporation
Palika Kendra Building,
Opp. Jantar Mantar Building,
Parliament Street,
New Delhi – 110 001
 8. Uttarakhand Power Corporation Ltd.,
Urja Bhawan, Kanwali Road,
Dehradun, 248 001
 9. Paschimanchal Vidyut Vitran Nigam Ltd.,
Victoria Park, Meerut – 250 001
 10. Poorvanchal Vidyut Vitran Nigam Ltd.,
Hydel Colony, Bhikharipur,
Post: DLW, Varanasi – 221 004
 11. Dakshinanchal Vidyut Vitran Nigam Ltd.,
220 kV Vidyut Sub-Station,
Mathura Agra by pass road,
Sikandra, Agra – 282 007
 12. Madhyanchal Vidyut Vitran Nigam Ltd.,
4-A, Gokhle Marg,
Lucknow-226 001
 13. Uttar Haryana Bijli Vitran Nigam Ltd.,
Vidyut Sadan, Plot No. 16-C,
Sector-6, Panchkula- 134 109

14. Dakshin Haryana Bijli Nigam Ltd.,
Vidyut Sadan, Vidyut Nagar,
Hissar – 125 005
15. Punjab State Electricity Board,
The Mall, Patiala – 147 001
16. Power Development Department,
Mini Secretariat, Jammu,
Jammu & Kashmir – 180 001
17. Himachal Pradesh State Electricity Board,
Vidyut Bhawan,
Shimla – 171 004
18. North Central Railway,
Subedarganj,
Allahabad – 211 033
19. UT Chandigarh,
Chandigarh Administration,
Sector-9, Chandigarh

... Respondents

Parties present:

For Petitioner: Shri Amit Kapur, Advocate
Ms. Poonam Verma, Advocate
Shri T.A.N.Reddy
Shri Harshit Gupta
Shri Pulkit Sharma

For Respondents: Shri M.K.Sharma, Advocate, Rajasthan Discoms
Shri Pardeep Mishra, Advocate, Rajasthan Discoms

ORDER

Background of the Case:

The petitioner, East North Interconnection Company Limited (ENCIL) is a fully owned subsidiary of Sterlite Technology Limited which was selected as a successful bidder through

the international tariff based competitive bidding under section 63 of the Electricity Act, 2003 (the Act) to establish the following transmission systems on build, own, operate and maintain basis and to provide transmission service to the Long Term Transmission Customers of the project:

(a) Bongaigaon-Siliguri 400 kV Quad D/C transmission line (BS Line)

(b) Purnea-Biharsharif 400 kV Quad D/C transmission line (PB Line)

ENICL approached the Commission for grant of transmission licence in Petition No. 131/2010 and for adoption of tariff of the transmission system in Petition No.130/2010. The Commission in its order dated 28.10.2010 in Petition No. 130/2010 adopted the tariff of the transmission system and in order dated 28.10.2010 in Petition No.131/2010 granted licence to ENICL for inter-State transmission of electricity.

2. The petitioner filed Petition No.162/MP/2011 seeking increase in tariff due to change in geographical co-ordinates viz. the 'start' and 'end' points; and additional expenditure towards forest clearance of 1.84 km (8.46 Ha of forest land). The Commission in its interim order dated 8.5.2013 came to the following conclusion:

“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.

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 time line 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 pro-rata 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.

43. We direct the Central Electricity Authority to verify and certify the additional scope of work to be undertaken by the petitioner over and above 427 kms for which the transmission licence has been granted and report to the Commission by 10.6.2013. The petitioner is directed to place all relevant documents before the CEA and render assistance as may be required. All concerned namely, the LTTCs, CTU and PFC shall render necessary assistance to CEA as may be required. On receipt of the report, the Commission will decide the modalities of reimbursement of the expenditure incurred by the petitioner for the additional scope of work.

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. The petitioner in written submission has submitted for additional time for execution of the additional scope of work. The petitioner may take up the matter first with the LTTC in accordance with the provisions of the TSA and in case of difficulty, the petitioner is at liberty to approach the Commission in accordance with law.”

3. Central Electricity Authority (CEA) submitted its report in which it was indicated that there was an additional line length of 26.714 km in both the transmission lines over and

above 427 km for which licence was granted. Since there was an increase of 6.179% over the line length for which transmission licence was granted, the Commission in the order dated 31.7.2013 allowed additional transmission charges @ 6.179% of the transmission charges computed every month in accordance with the schedule of levelised tariff in the Transmission Service Agreement adopted in the order dated 28.10.2010 in Petition No.130/2010. Further, the petitioner was directed to be treated as a transmission licensee for the additional length of the transmission line.

4. In the order dated 31.7.2013, the Commission further took note of the fact that the petitioner had to incur additional liability for forest clearance as the Bongaigaon sub-station was located in the Satbandh reserve forest and Bongaigaon-Siliguri line would have to pass through 1.84 km of forest area. Since there was a categorical denial in the RfP document that there was no forest clearance involved and the requirement of forest clearance had emerged after award of the project, the Commission came to the conclusion that the expenditure on forest clearance was covered under Change in Law, particularly under “imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier”. Since the expenditure would be incurred during the course of the construction of the transmission line, the Commission directed that in terms of Article 12.2.1 of the Transmission Service Agreement, the petitioner would be entitled for an amount equivalent to 0.32% of the Non-Escalable Transmission Charges for any cumulative increase of Rs.4 crore in the cost of the project. The Commission further directed the petitioner to approach the Long Term Transmission Customers with proof of the expenditure on forest clearance with copy to the Commission in accordance with Article 12.2.3 of the Transmission Service Agreement and the actual expenditure on forest clearance would be

included in the transmission charges in accordance with Article 12.2.1 and would be payable from the date of commercial operation of Bongaigaon-Siliguri Transmission Line.

5. The petitioner had submitted in one of the affidavits filed in Petition No.162/MP/2011 that since the scope of work had increased due to which the SCOD of the transmission line had been delayed and the reasons were beyond the control of the petitioner, the Commission might consider to allow interest during construction from the date of scheduled COD. The Commission had ruled that the said prayer was beyond the scope of Petition No.162/MP/2011 and granted liberty to the petitioner to pursue appropriate remedy in accordance with law.

6. In the above background, the petitioner has filed the present petition seeking compensation for the forest clearance and other unforeseen and uncontrollable events such as riots in Kokrajhar, bandhs in Assam, obstructions caused by the villagers at Mahendra Nagar, floods in Bihar and Uttarkhand, excessive compensation by land owners and theft of conductors which the petitioner encountered in execution of the transmission lines. The petitioner has submitted that it is entitled to an extension in the Scheduled COD by a period of 631 days for the Bongaigaon-Siliguri line and 249 days for the Purnia-Biharsharif line, for the reasons detailed as under:

Cause of Delay	No. of days
Bongaigaon-Siliguri line	
(i) Delay in grant of Forest Clearance	631
(ii) Riots in Kokrajhar	154
(iii) Bandhs in Assam	74
Purnia-Biharsharif line	
(iv) Obstruction at Mahendrapur Village	184
(v) Floods in Bihar	51
(vi) Floods in Uttarakhand	74

7. The petitioner has further submitted that the aggregate financial impact on the project on account of the aforesaid events is as under:

Line	Reason of cost Increase	Cost increase (₹ in crore)
Bongaigaon-Siliguri Line	(i) Delay due to Forest Clearance	85
	(a) IDC	77
	(b) Overheads	5
	(c) Compensatory afforestation	3
	(ii) Excess compensation for Stringing	27
	(iii) Theft of Conductors	8
Total		120
Purnia-Biharsharif Line	(iv) Delay due to obstruction at Mahendrapur and floods	30
	(a) IDC	28
	(b) Overheads	2
	(v) Increase in number of Pile Foundations	24
Total		54

8. The petitioner has made the following prayers in the petition:

“(a) Allow the Petition and declare that the Petitioner is to be reimbursed the additional capital expenditure of Rs.85 crore incurred on account of Change in Law, i.e., the Forest Clearance in furtherance of the Commission’s earlier orders dated 8.5.2013 and 31.7.2013;

(b) Declare that the events factors/events that have occurred subsequent to the submission of the bid and award of the Project constitute Force Majeure as per the TSA;

(c) Grant an extension in the Scheduled Date of Commercial Operation of the Project to enable the Petitioner to implement the Project as per the TSA and allow additional costs and waive any penalties or any other consequences thereof under the TSA;

(d) Establish an appropriate mechanism to offset in the transmission charges the additional cost of Rs.89 crore incurred on account of the unforeseen and uncontrollable events that have occurred subsequent to the submission of the bid and award of the Project;

(e) Pass any other order as this Hon’ble Commission may deem fit in the facts and circumstances of the present case.”

9. The petitioner has supported its claim for compensation and extension in the date of SCOD on account of the following factors:

(a) **Forest Clearance:** Stage I Forest Clearance for the forest areas in Assam and West Bengal was granted on 5.12.2013 and 13.1.2014 respectively. The Stage II Forest Clearance for the forest areas in Assam and West Bengal was granted on 11.3.2014 and 4.7.2014 respectively. By orders dated 18.5.2013 and 31.7.2013 in Petition No.162/MP/2011, this Commission recognized that there had been a change in the scope of work since ENICL would be required to construct transmission lines for more distance than as envisaged in the survey report dated 22.4.2009 based on which the bid was submitted. Due to this additional scope of work, the project schedule was altered and an additional 240 days was required for implementation of the Project.

(ii) **Disturbances/riots and Bandhs in Assam, Obstruction at Mahendrapur and Floods in Bihar and Uttarakhand:** These unforeseen events led to stoppage/suspension of work for a cumulative period of 154 days due to communal riots in Kokrajhar District of Assam and by a cumulative period of 125 days on account of the instances of floods in Bihar. There were recurrent stoppages of works for a cumulative period of 74 days due to frequent bandhs by a range of organizations. Also, with an unprecedented increase in the number of angles/tension towers and rerouting of the transmission lines with over 96% foundations, 93% of towers and 63% of stringing complete, the Project was a soft-target of anti-social elements, unscrupulous locals and landowners.

(iii) **Additional compensation to land owners:** There has been a significant escalation in compensation paid to landowners since landowners often made claims at the time of conductor-stringing activity, leaving ENICL no choice but to accept these claims.

(iv) **Thefts along the transmission lines:** There have been 178 instances of theft along the Project line length for which ENICL has registered FIRs with appropriate authorities. The thefts were mostly of conductors. ENICL had to reconstruct/re-string the affected portion and obtain right of way issues all over again.

Proceedings before the Commission:

10. The petition was taken up for hearing after notice to the respondents. The Commission directed the respondents to file their replies to the petition. However, no reply was filed by any of the respondents. Though the learned counsel for the distribution companies of Rajasthan and Shri Padamjit Singh in his personal capacity appeared in the first hearing and sought time for filing replies but no reply has been filed. Accordingly, the Commission proceeded to hear the petition on merit. Learned counsel for the petitioner submitted that in the present petition, the petitioner has sought relief on account of delay in the grant of forest clearance, riots in Kokrajhar district of Assam, bandhs in Assam, obstruction at Mahendrapur village, floods in Bihar and Uttarakhand. Learned counsel further submitted that notices had been issued by the petitioner to LTTCs in terms of Articles 11 and 12 of the TSA from time to time for the occurrence of events and to resolve the issues. However, no response has been received from LTTCs. He further submitted

that since the petitioner has incurred an expenditure of Rs.85 crore towards forest clearance, it is entitled to 6.8% increase in the non-escalable transmission charges under Article 12.2.1 of the TSA. Learned counsel for the petitioner further submitted that Stage-I Forest Clearance for the forest areas in Assam and West Bengal were granted on 5.12.2013 and 13.1.2014 respectively. The Stage-II Forest Clearance for the forest areas in Assam and West Bengal were granted on 11.3.2014 and 4.7.2014 respectively. With regard to 'Force Majeure Events', learned counsel for the petitioner submitted that each of the events leading to the delay in achieving the SCOD is a force majeure event impacting the progress of the project and therefore, the petitioner is entitled to a grant of time and additional cost of Rs. 89 crore in terms of the TSA. Learned counsel further submitted that the project would be rendered commercially unviable if the relief in the present petition is not granted to the petitioner.

11. The petitioner vide its affidavit dated 2.7.2014 placed on record (i) the copies of letters dated 11.3.2014 and 12.6.2014 of the MoEF regarding grant of Stage-II (final) forest clearance in the State of Assam and West Bengal respectively, (ii) Copies of letters dated 11.4.2014 sent to each of the LTTCs informing them of the readiness of ENICL to commission the Bongaigaon-Siliguri 400 kV D/C (Quad) transmission line by 30.6.2014, (iii) copies of letters sent to each LTTCs in terms of Article 11.3(b)(ii) of the TSA notifying them that the work was completely suspended from 5.5.2014 till 20.6.2014 i.e. for a period of 46 days due to an "indirect non-natural Force Majeure Events" (Riots and imposition of indefinite curfew in Assam's Kokrajhar district) which was beyond reasonable control of the petitioner. The petitioner has submitted that work in the riot affected area could only be resumed with the deployment of 78 home guards and 6 NCO. However, work was

continuing at very slow pace as the employees and labourers working at site in Kokrajhar district were experiencing the prevailing reign of terror. The petitioner has submitted that as per Article 11 of TSA, the petitioner is entitled for extension of 46 days in the scheduled COD.

12. The petitioner has placed on record the correspondences with regard to the forest clearances of the transmission lines made with the forest authorities in Assam and West Bengal, Governments of Assam and West Bengal and Ministry of Environment and Forest, Government of India.

Analysis and Decision:

13. We have heard the learned counsel for the petitioner and perused documents on record. The main reasons for delay in completion of the transmission lines are stated to be as under:

(A) Bongaigaon Siliguri Transmission Line

- (i) Delay in Grant of Forest Clearance
- (ii) Riots in Kokrajhar
- (iii) Bandh in Assam

(B) Purnia Biharsharif Transmission Line

- (i) Obstruction at Mahenderpur village
- (ii) Floods in Bihar
- (iii) Bandhs in Assam

14. The petitioner has claimed the expenditure incurred on forest clearance under change in law and Interest During Construction for the delay on account of forest clearance under force majeure. The petitioner has claimed the delay on account of floods, riots, bandhs and ROW issues under force majeure. The claims of the petitioner have been examined in the succeeding paragraphs.

Change In Law: Forest Clearance in respect of Bongaigaon Siliguri Trnsmission Line

15. The petitioner after award of the project discovered that Bongaigaon Siliguri Transmission Line would traverse through reserved forest, contrary to the categorical and express clarification issued by the Bid Process Coordinator at the time of bidding that no forest in the route of the transmission line was involved. This aspect has been extensively examined in our orders dated 8.5.2013 and 31.7.2013 and the Commission came to the conclusion that the requirement of obtaining the forest clearance which arose after the award of the project was covered under Change in Law within the meaning of Article 12 of the TSA. The Commission had also observed that the petitioner was entitled for additional time required for forest clearance and reimbursement of expenditure incurred by the petitioner on forest clearance. The petitioner has placed on record the correspondences regarding the forest clearance made with authorities at different levels in the State of West Bengal and Assam and Ministry of Environment & Forest, Government of India. The details of forest clearance are as per the table given below:

Name of the Element	Area in Ha. (Forest Diversion)	State	Forest proposal initiated	Stage-I approval	State-II Approval	Date of commissioning of the transmission line

400 kV D/C Bongaigaon- Siliguri Transmission Line	8.4226	Assam	10.1.2011	13.1.2014	11.3.2014	12.11.2014
	1.564	West Bengal	15.3.2011	5.12.2013	2.6.2014	

16. The petitioner has submitted that Rs. 3 Crore has been spent by the petitioner on compulsory afforestation and Rs.5 crore on overhead expenses. The petitioner has not explained the break-up of the expenditure on compulsory afforestation and overhead expenses. On perusal of the documents on record, it is noticed that Principal Chief Conservator of Forest, Government of Assam in its letter dated 27.1.2014 had given an estimate of Rs.1,31,20,409/- for diversion of 8.4226 Ha. of forest land for the purpose of 400 kV D/c transmission line from sub-station of PGCIL in Salakati to Siliguri in Satbhendi reserve forest which included Net Present Value, Compensatory Afforestation, Overhead Charge and Dwarf Specific Plantation. It appears that overhead charges are a part of the charges paid to the State Government/Forest Authorities for diversion of the forest lands. The petitioner has not submitted the details of estimated cost for diversion of forest land received from the Government of West Bengal, Forest Division. In this regard, the petitioner is required to submit the letter in connection with payment towards diversion of forest land in West Bengal Division. In our view, the expenditure incurred by the petitioner and paid to the State Government/forest authorities for obtaining diversion of forest land and any other legitimate expenditure incurred in connection with forest clearance shall be reimbursable on account of change in law, subject to production of documentary evidence.

(B) Force Majeure

17. The petitioner has claimed the delay on account of forest clearance, disruption of work on account of communal riots in Kokrajhar, bandhs in Assam, right of way issues,

theft of conductors and materials affecting the Bongaigaon-Siliguri Transmission line under force majeure. The force majeure provisions under the TSA are extracted as under:

“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 Central Electricity Regulatory Commission (Terms & Conditions for Determination of Tariff) Regulations 2009 and related amendments from time to time, as applicable seven (7) days prior to the Bid Deadline. For the event(s) for which the Element(s) is/are deemed to be available as per Central Electricity Regulatory Commission (Terms & Conditions for Order

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

18. 'Force Majeure' has been defined as any event or circumstance or combination of events and circumstances that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under the TSA, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices. Force Majeure also includes

Natural Force Majeure Events and Non-Natural Force Majeure Events and excludes the events covered under Force Majeure Exclusions unless they are results of force majeure events. Further, the definition of force majeure provides that the Affected Party is entitled to the protection of force majeure to the extent the events or circumstances are not within the reasonable control of the Affected Party.

19. Under Article 11.3 of the TSA, the affected party is required to give notice of the force majeure to the other party within 7 days and in case of failure of communication, not later than one day of the restoration of the communication. Further, such notice shall be a precondition to the Affected Party's entitlement to claim relief under TSA and 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. 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. In the light of the provisions of force majeure, the various events claimed by the petitioner under force majeure have been examined hereinafter.

Bongaigaon Siliguri Transmission Line

(I) Delay in Forest clearance

20. The petitioner has submitted that the delay in obtaining forest clearance was not within the control of the petitioner and therefore, the petitioner was affected by force

majeure. The petitioner has claimed that delay in forest clearance was for a period of 631 days by counting from the scheduled date of commissioning (6.1.2013) till 30.9.2014 (the expected date of commissioning). However, Bongaigaon Siliguri Transmission Line was commissioned on 11.11.2014. Therefore, there is a delay of 675 days in commissioning of the transmission line i.e. from 7.1.2013 till 11.11.2014. It is noted that the requirement of forest clearance occurred after award of the project. Since the Bid Process Coordinator had categorically ruled out the involvement of forest on the route of the Bongaigaon-Siliguri Transmission Line, the time required for forest clearance was not factored within the timeline prescribed in the TSA for completion of the transmission line. Therefore, forest clearance is an additional requirement to be performed by the petitioner which was also recognised in our order dated 8.5.2013 in Petition No.162/MP/2011. The time spent in obtaining the forest clearance is beyond the control of the petitioner except where the petitioner has taken unreasonable time for performing its obligation in the process of forest clearance. The petitioner was required to obtain forest clearance for the diversion of forest land in Satbhendi Reserve forest in the State of Assam and Patla Khowa Protected forest in the State of West Bengal.

21. In respect of the forest clearance for the diversion of forest land in Satbhendi Reserve forest in the State of Assam, the petitioner made application on 10.1.2011 to the Divisional Forest Officer, Kokrajhar, Assam through the Chief Conservator of Forest, Guwahati enclosing therewith application form, topo sheet, licence copy and tree enumeration list. The Commission granted licence to the petitioner on 28.10.2010 and taking into account the other requirement like topo sheet and tree enumeration list for making the application, it appears that the petitioner has made the application within a

reasonable time. The Chief Conservator of Forest referred the application to Divisional Forest Officer, Kokrajhar on 2.2.2011 advising him to re-submit the proposal as per the procedure under Forest Conservation Act, 1980. The Divisional Forest Officer, Korajhar vide its letter dated 10.8.2011 referred a consolidated proposal of four licensees including the proposal of the petitioner to the Deputy Commissioner Kokrajhar for certificate of compliance of Forest Right Act, 2006. Deputy Commissioner, Kokrajhar vide its letter dated 24.1.2012 issued a certificate of clearance for diversion of forest land of 8.4226 Ha after carrying out the exercise of identification and settlement of rights under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and placing the proposals before Gram Shabhas, and obtaining the written consents of Gram Shabhas. Divisional Forest Officer, Kokrajhar vide its letter dated 6.2.2012 forwarded the proposal of the petitioner to Chief Conservator of Forest, Kokrajhar for processing the same for approval of the Ministry of Environment and Forest, Government of India for diversion of forest land. The proposal was forwarded to the Office of Chief Conservator of Forest by the Western Assam Circle Kokrajhar on 8.2.2012. Environment & Forest Department, Government of Assam vide letter dated 23.4.2012 forwarded the proposal alongwith the recommendations of the State Government to the Chief Conservator of Forest, Ministry of Environment & Forest, Government of India, North Eastern Office, Shillong. Office of Chief Conservator of Forest vide letter dated 18.5.2012 sought further information/clarification from the Government of Assam on the proposal. The petitioner vide its letter dated 17.7.2012 requested the Circle Officer & District Land Settlement Officer for allocation of non-forest land for transfer to the Forest Department for compulsory afforestation. On 18.9.2012, Secretary of Bodoland Territorial Council, Kokrajhar forwarded the application of the petitioner dated 17.7.2012 to the Chief Conservator of Forest, Bodoland Territorial

Council for necessary action. The petitioner vide its letter dated 5.10.2012 requested the Principal Secretary, Bodoland Territorial Council to grant permission to buy land in BTAD area of Assam for the purpose of compulsory afforestation. On 20.11.2012, Chief Conservator of Forest, Bodoland Territorial Council informed the Circle Officer, Dotma Revenue Centre that land measuring 8.4226 Ha has been identified and requested the latter to forward the proposal to the Council for No Objection Certificate. Circle Officer, Dotma Revenue Circle sent the proposal on 4.12.2012. On 26.3.2013, Joint Secretary Kokrajhar, Bodoland Territorial Council conveyed the No Objection of the Council for acquisition of land for compulsory afforestation. On 8.4.2013, the petitioner submitted the required information including the permission of Bodoland Territorial Council to the Divisional Forest Officer, Kokrajhar for submission to MOEF Regional Office, Shillong. On 25.4.2013, Divisional Forest Officer Bodoland Territorial Council, Kokrajhar forwarded the letter to Additional Principal Chief Conservator of Forest, Bodoland Territorial Council Assam clarifying the queries of the North Eastern Regional Office of Ministry of Environment & Forest. Additional Principal Chief Conservator of Forest, Bodoland Territorial Council vide letter dated 29.4.2013 forwarded the information to Additional Principal Chief Conservator of Forest, Assam for processing the proposal for necessary approval under Forest (Conservation) Act, 1980. On 3.7.2013, Nodal Officer, O/o Principal Chief Conservator of Forest, Assam sought from the petitioner 3 dimensional drawing of the transmission tower showing the number of conductors and clearance, right of way with proper scale. On 2.8.2013, Additional Principal Chief Conservator of Forest submitted the detailed clarification to Principal Secretary, Environment & Forest Department, Government of Assam for onward transmission to the Regional Office of Ministry of Environment & Forest, Shillong. On 23.9.2013, the clarifications were forwarded by the Environment &

Forest Department, Government of Assam to the Chief Conservator of Forests, Ministry of Environment & Forest, Government of India, NER, Shillong. On 13.1.2014, Stage 1 clearance (in principle approval) was accorded by MoE&F, NER, Shillong for use of 8.4226 Ha of forest land for construction of 400 kV D/C Transmission line from Salakati sub-station of PGCIL to Siliguri in Satbhendi Resrve Forest subject to fulfilment of certain conditions including compensatory afforestation over 8.4226 Ha of revenue land. On 27.1.2014, Additional Chief Conservator of Forest, Government of Assam in its letter to Additional Chief Conservator of Forests, Bodoland Territorial Council directed to ask the user agency (the petitioner) to deposit an estimated expenditure of Rs. 1,31,20,409/- in compliance with the conditions (i) and (ii) of the MOE&F clearance. After compliance of the requirements, Ministry of Environment & Forest, NER, Shillong vide their letter dated 11.3.2014 accorded final approval under section 2 of the Forest Conservation Act, 1980 for diversion of 8.4226 Ha of forest land for construction of the Bongaigaon Siliguri Transmission Line. On perusal of the documents on record, we are of the view that in case of forest clearance of Satbhendi Reserve Forest, the petitioner has diligently pursued the matter and the time consumed was on account of the elaborate process of consultation and involvement of various agencies including Bodoland Territorial Council. We are therefore inclined to hold that the time consumed for getting the clearance from MOE&F in Assam section of the transmission line was beyond the control of the petitioner.

22. Bongaigaon Siliguri Transmission Line was also passing through the Patla Khowa protected forest in West Bengal for 0.232 km or 1.067 Ha of forest land. The petitioner submitted the proposal for forest clearance on 15.3.2011 to Divisional Forest Officer, Cooch Behar, West Bengal. Divisional Forest Officer, Cooch Behar Division vide its letter dated

18.3.2011 advised the petitioner to make the proposal after identifying the exact location in the field. No document has been placed on record as to when the proposal was made after identifying the location. Divisional Forest Officer, Cooch Behar Division in its letter dated 16.8.2011 advised the petitioner to identify the suitable non-forest land for compensatory afforestation in consultation with the respective section of the Land Department of Government of West Bengal and submit the proposal to the Nodal Officer in the Office of Principal Conservator of Forest, MOEF, West Bengal. The petitioner has placed on record a copy of the letter of CEA dated 25.11.2011 requesting the Nodal Officer in the Office of Principal Conservator of Forest, MOEF, West Bengal to extend all possible help to the petitioner to complete the transmission line in time. From the said letter of CEA, it is noticed that the petitioner had submitted the proposal for diversion of land on 18.10.2011. The Conservator of Forest & Nodal Officer, West Bengal in its letter dated 14.12.2011 pointed out the discrepancies in the proposal of the petitioner and directed the petitioner to resubmit the proposal with all relevant documents and maps through the Divisional Forest Officer and Conservator of Forests. The petitioner vide its letter dated 26.12.2012 submitted the proposal to Divisional Forest Officer, Cooch Behar West Bengal. The petitioner has placed on record a letter dated 26.8.2013 written by the Nodal Officer, Forest Conservation Act, West Bengal with reference to the letter dated 3.5.2013 written by the Eastern Regional Office of MOE&F, Government of India, Bhubaneswar in which the Nodal Officer is stated to have obtained No Objection Certificate under the Forest Conservation Act, 2006 from the District Authorities and forwarded the same to the Eastern Regional office of MOE&F at Bhubaneswar. The Eastern Regional Office vide letter dated 5.12.2013 accorded the in-principle approval for diversion of forest land of 1.564 Ha of forest land in Cooch Behar Forest Division for drawal of 400 kV D/c Bongaigaon Siliguri Transmission line subject to

fulfilment of certain conditions. The final approval of MOE&F for diversion of the forest land was accorded on 2.6.2014. On perusal of the documents on record, it is noticed that in case of forest clearance of Patla Khawa reserve forest, the petitioner got the Stage 1 clearance on 5.12.2013 and Stage 2 clearance on 2.6.2014. The order for diversion of forest land has been issued on 12.6.2014. Since both Satbhendi Reserve forest and Patla Khawa fall on the route of same transmission line, we are of the view that the delay in forest clearance was not within the control of the petitioner till 12.6.2014 when Stage 2 clearance for Patla Khawa forest was accorded. Since the petitioner has claimed force majeure from the date of Scheduled COD, it is held that the period from the SCOD i.e. 7.1.2013 till 12.6.2014 (522 days) were beyond the control of the petitioner.

23. In the judgement dated 2.12.2013 in Appeal No. 139 & 140 of 2013, the Appellate Tribunal for Electricity held that delay in obtaining the section 164 approval is to be construed as force majeure. Relevant para of the judgement is extracted as under:

“36. To sum up: In the light of above discussion, we are of the view that the power of Telegraph Authority under 164 of the 2003 Act is essential for laying transmission line both from prior consent of land owner as well as from telephonic or telegraph message point of views. Hence, the delay in obtaining the Central Government’s approval in conferring power of the Telegraph Authority is to be construed to be a force majeure.”

In the present case, forest clearance is a mandatory requirement for laying the transmission lines in the forest area. The petitioner took up the matter with the authorities for forest clearance. Therefore, the time taken for grant of forest clearance which was beyond the reasonable control of the petitioner has affected the project implementation and thereby prevented the petitioner from performance of its obligations under the TSA i.e. to declare commercial operation of the project by SCOD and provide transmission services to the

LTTCs. In our view, the petitioner's project is affected by force majeure event on account of delay in forest clearance which has unavoidably delayed the petitioner in the performance of its obligations under the TSA.

24. The petitioner vide its letter dated 23.12.2013 has given a consolidated notice to LTTCs for delay in forest clearance as well as other force majeure events. The petitioner in the said letter has submitted as under:

“As a result ENICL has been unable to undertake construction of the portion of the BS line that falls in the forest area which has caused undue delay of 15(fifteen) months in execution of the line and has jeopardised the overall commissioning of the BS line.

Moreover, the additional scope of work which is almost 20% of the additional scope in order to connect the transmission lines with the PGCIL's sub-stations, which requires additional time for the construction of the project.”

Since the petitioner could not have commenced the additional scope of work without forest clearance, we are of the view that the petitioner is affected by force majeure on account of delay in getting forest clearance from the SCOD till the forest clearance was granted i.e. from 7.1.2013 to 12.6.2014 (523 days).

(II) Communal riots in Kokrajhar:

25. The petitioner has submitted that the State of Assam has long suffered from significant law and order problems arising out of the ongoing instances of militancy and terrorist attack and ethnic tension on account of illegal immigrants. The petitioner has submitted that due to outbreak of communal riots in Kokrajhar, the work stopped for a cumulative period 154 days from July to December 2012 which led to imposition of curfew which necessitated eviction of manpower, equipment and machinery from the affected

areas. The petitioner has given notices regarding occurrence and cessation of force majeure event on account of communal riot on account of the following:

Period of riots	No of days	Notice of occurrence	Notice of cessation
11.7.2012 to 30.10.2012	112 days	24.7.2012	6.11.2012
15.11.2012 to 26.12.2012	42 days	15.11.2012	28.12.2012

26. The petitioner has relied upon the Annual Report of Ministry of Home Affairs in which it has been mentioned that communal violence flared up in Kokrajhar Assam on 19.7.2012 and spread to other districts and fresh violence took place in Kokrajhar in November 2012. None of the LTTCs have disputed the claim of the petitioner to treat the communal riot in Kokrajhar affecting the execution of the transmission project nor the period of such force majeure on account of riots nor have sought any further information in terms of Article 11.5 of the TSA. "Riot" is covered under Direct Non-Natural Force Majeure under Article 11.3.(b)(i) of the TSA which has prevented the petitioner in the performance of its obligations under the TSA i.e. to complete the project within SCOD and make the transmission services available to the LTTCs. Therefore, the occurrence of force majeure has been reckoned from 11.7.2012 and cessation of force majeure has been reckoned as 30.10.2012, resulting in a period of 112 days. As regards the riots from 15.11.2012 to 26.12.2012, the petitioner has notified the occurrence and cessation vide its letters dated 15.11.2012 and 28.12.2012 respectively which is in terms of Article 11.3 of the TSA and the period of force majeure has been reckoned from 15.11.2012 to 26.12.2012 for a period of 42 days.

27. The petitioner in its affidavit dated 2.7.2014 has placed on record some additional documents. It is noticed that the petitioner has given notice to the LTTCs vide its letter

dated 11.4.2014 that Stage 2 forest clearance for West Bengal side was expected by 15.6.2014 and the transmission line was intended to be connected by 30.6.2014. It is further noticed that the petitioner has given a notice to LTTC vide its letter dated 5.5.2014 under Article 11.5 of the TSA. As per the said notice, the work on the project has been completely suspended as the petitioner was forced by the local authorities to evict manpower, equipment and machinery from Kokrajhar district due to riots and curfew imposed for indefinite period with effect from 2.5.2014. The petitioner has given a notice of cessation of force majeure in which it has been stated that the work was suspended from 5.5.2014 till 20.6.2014 (46 days) which was covered under Article 13.3(b)(ii) of the TSA. No response has been made by the LTTCs to the force majeure notice. Since we have already held that riot in Kokrajhar is covered under Indirect Non-Natural Force Majeure Event, it is held that the petitioner was affected by force majeure for 46 days.

(III) Flood in Assam & West Bengal

28. The petitioner has submitted that on account of flood in Assam and West Bengal, work on the Bongaigaon Siliguri Transmission line was completely stopped/suspended for a period of 53 days from 9.7.2012 to 30.8.2012. The petitioner has submitted that during this period, work on the BS line was delayed for a period of 53 days. He petitioner has given notice regarding occurrence and cessation of flood vide letters dated 24.7.2012 and 11.9.2012 respectively in terms of Article 11.5 of the TSA. The LTTCs have not responded to the notice of the petitioner. In terms of Article 11.3(a) of the TSA, flood is covered under Natural Force Majeure Event. Since on account of flood, there was complete cessation of work on the BS line, the petitioner is held to have been affected by force majeure for a period of 53 days from 9.7.2012 to 30.8.2012.

(IV) Bandhs in Assam

29. The petitioner has submitted that on account of the frequent bandh calls given by a range of organisations having major influence in and around project area, there was recurrent stoppage of work for a cumulative period of 74 days starting from 14.2.2013 to 18.12.2013. The petitioner had given a notice to the LTTCs on 21.10.2013 regarding occurrence of the bandhs and according to the petitioner, the LTTCs have not responded to the notice. The notice given by the petitioner is extracted as under:

“This is to bring to your kind notice that our obligation for construction of 400 kV quad D/C Line from Bongaigaon to Siliguri for system strengthening under the above mentioned ENICL project, has been very badly affected and the actual execution days have been reduced significantly due to frequent “Bandhs” and “Bad Law & Order Situation” in the State of Assam since 14th February 2013 till date. Total 60 execution days have been affected and relevant News Paper articles in support of the said events are annexed herewith as Annexure-I. In order to mitigate the impact of the same, we have left no stone unturned and have approached to various administrative authorities of Assam and have also approached the Central Electricity Authority to intervene and help us to get the execution work started.

The said situation is beyond our reasonable control and the same is a force majeure event as per Transmission Service Agreement (TSA).

Our obligations under the TSA shall be deemed to be suspended for the said entire period due to said Force Majeure Events and the said event is having time and cost impact. The exact commercial impact will be intimated. Further, you may inspect the affected area as per Article 11.7 of the TSA.

This is to notify the same as required under Article 11.5 of the TSA and this is without prejudice to all our other rights.”

The petitioner vide Annexure P-12 has submitted a compilation of the details of recurring Bandhs in Assam between the period from 11.2.2013 to 20.12.2012. The petitioner has not explained as to why the notice regarding bandh was not given immediately after the

occurrence of the bandh or within seven days of the occurrence of the bandh on 14.2.2013. On the other hand, notice has been given on 21.10.2013 after occurrence of recurring bandhs for 60 days. In our view, the petitioner has not complied with the provisions of Article 11.7 for the entire period of the bandh. Therefore, the notice for bandh will cover the period seven days prior to the notice i.e. bandhs which occurred on or after 14.10.2013. Further, the petitioner has filed the newspaper clippings reporting the bandhs in Assam. As regards the stoppage of work, the petitioner has filed a report from its contractor, namely, Simplex Infrastructure Limited, regarding stoppage of work for 5 days in November 2013 (13.11.2013, 19.11.2013, 21.11.2013, 22.11.2013 and 29.11.2013) and for 2 days in December, 2013 (8.12.2013 and 9.12.2013). Under Article 11.4.1(b) of the TSA, delay in performance of any Contractors or their agents shall not be considered as force majeure except to the extent they are result of force majeure events. It is therefore to be considered first whether “bandhs” will be covered under force majeure. There is no event called “bandh” classified as a force majeure event under Article 11.3 of the TSA. However, Article 11.3.b (ii) classifies blockade as an indirect Non-Natural Force Majeure Event. The issue is whether bandhs leading to complete stoppage of work can be covered under “blockade” in terms of Article 11.3 of the TSA. Blockade is traditionally understood as the disposition of troops or armed vessels, so as to cut off all external communication with an enemy's port fortress, city, etc. It is however noticed that courts in India have referred to blockade as any obstruction created for movement of persons or goods in an area. In National Human Right Commission Vs. State of Arunachal Pradesh and Anr. {(1996)1SCC742}, Hon'ble Supreme Court has observed that “it was reported that the AAPSU had started enforcing of economic blockades on the refugee camps, which adversely affected the supply of rations, medical and essential facilities, etc. to the Chakmas.” Further, in Narain Das Jain (Since Deceased)

by Lrs. Vs. Agra Nagar Mahapalika, Agra{(1991)4SCC 212}, Hon'ble Supreme Court has observed that "the importance of the award of solatium cannot be undermined by any procedural blockades." Thus the word "blockade" has been used as synonymous with obstruction. Therefore, the bandhs and strikes resulting in complete paralysis of the normal life and activities in the affected area can be included under "blockade" in terms of Article 11.3.b(ii) of the TSA. According to the report of the petitioner's contractor dated 9.12.2013 (Page 688 to 693 of the petition), in Assam section, running work was stopped due to strikes by various organisations which has affected the contractor in achieving the progress as per the work schedule. Since the contractor's work was affected by a force majeure event like bandhs and strikes, the period in question shall be considered as being affected by force majeure. Accordingly, 5 days in November 2013 (13.11.2013, 19.11.2013, 21.11.2013, 22.11.2013 and 29.11.2013) and for 2 days in December, 2013 (8.12.2013 and 9.12.2013) shall be covered under force majeure.

(V) Right of Way Issues

30. The petitioner has submitted that despite securing authorisation under section 164 of the Act, at select places along the route of Bongaigaon-Siliguri line, the petitioner has been faced with demand for realignment of route and has been threatened with violence in this regard. In the interest of timely execution of the project, the petitioner had to shift/modify the location of towers which required greater number of angle/tension towers. This has resulted in additional expenditure. The petitioner has further submitted that there has been significant escalation in the compensation payable to the land owners due to exorbitant claims raised by land owners at the time of conductor-stringing activity. The petitioner has incurred an additional expenditure of Rs. 27 crore at the time of stringing. The petitioner

has submitted that CEA wrote letters dated 15.5.2013 to the Commissioner of Police, Siliguri requesting for protection and to the District Magistrates of Jalpaiguri and Cooch Behar requesting for help in sorting out right of way problems with regard to crop compensation. The petitioner has given notice on 23.12.2013 to LTTCs. The petitioner has also submitted that there had been theft of conductors which required the petitioner to reconstruct/re-string the affected portion requiring additional expenditure and additional time.

31. We have considered the claim of the petitioner. The petitioner has submitted that it followed the process laid down in authorisation under section 164 of the Act for securing the right of way for building foundations and erecting towers. However, the land owners made additional claims at the time of stringing and in the interest of timely execution of the project, the petitioner has incurred expenditure on additional compensation to the landowners. The petitioner has faced the problem of right of way which has led to realignment of routes and payment of additional compensation to the land owners. In our view, right of way is not a force majeure event as the petitioner had the necessary authorisation under section 164 of the Act. Further, the petitioner has solved the problem of right of way with the intervention of District Administration and Commissioner of Police. As regards the additional expenditure incurred by the petitioner on account of right of way, this is a competitive bidding project and all claims of the petitioner, we are of the view that the petitioner has quoted all-inclusive transmission charges and the petitioner was expected to factor the unforeseen and contingent expenditure in the quoted transmission charges while submitting the bid. Therefore, the additional expenditure incurred at the time of stringing cannot be allowed.

(VI) Theft of Strung Conductors and materials

32. The petitioner has submitted that it faced 178 instances of theft on the Bongaigaon Siliguri Transmission Line. The petitioner has submitted that the miscreants have targeted the uncharged portion of the transmission line and in many instances have stolen portion of the conductors. The petitioner has registered the FIRs with the appropriate authorities for each instance of theft. The petitioner has submitted a compilation of instances of theft at Annexure P-15 of the petition. According to the petitioner, the value of the conductors and other stolen goods is about Rs.8 crore and the petitioner required more time to re-string the transmission line.

33. We have considered the submission of the petitioner. Perusal of Article 11 of the TSA shows that theft is not covered under the force majeure events. However Article 9 of the TSA enjoins upon the petitioner to take insurance against the risks during the construction period and operating period. Article 9 provides as under:

“9 INSURANCES

9.1 Insurance:

9.1.1 The TSP shall effect and maintain or cause to be effected and maintained during the Construction Period and the Operating Period, Insurances against such risks, with such deductibles and endorsements and co-beneficiary/insured, as may be necessary under

- a. any of the Financing Agreements,
- b. the Laws, and
- c. in accordance with Prudent Utility Practices.

The Insurances shall be taken effective from a date prior to the date of the Financial Closure till the Expiry Date.

9.4 Effect on liability of the Long Term Transmission Customers

9.4.1 The Long Term Transmission Customers shall have no financial obligations or liability whatsoever towards the TSP in respect of this Article 9.”

34. Prudent Utility Practices require the Transmission Service Provider (TSP) to maintain insurance against any theft or damage during the construction and operating period. Further, Article 9.4.1 says that the LTTCs shall have no financial obligations whatsoever towards the TSP in respect of Article 9. Therefore, the petitioner as the TSP was required to quote all inclusive tariff including insurance. In our view, the petitioner shall not be entitled for any compensation for theft.

Purnea-Bihar Shariff Transmission Line

(VIII) Obstruction at Mahenderpur Village

35. The petitioner has submitted that the PB line was planned to cross the river Ganga near the village of Mahenderpur-Samho Diara in the District of Begusari. On 23.9.2011, a no-objection letter was issued to the petitioner by the Inland Waterways Authority of India conveying that it had no objection to the navigational clearance sought for crossing Ganga River by the PB line. The petitioner has submitted that starting December 2011, the petitioner was unable to commence work at location numbers 47/0, 47/1, 47/2, 47/3, 47/4, 47/5 and 48/0 near village of Mahenderpur-Samho Diara due to severe obstructions from the villagers. The petitioner has submitted that the villagers were under apprehension that their village would be washed away citing the example of village Ramderi. The petitioner has submitted that the issue was resolved after the petitioner re-routed the transmission line and gave an assurance to the villagers that no such event would occur and if such events were to occur, the petitioner would indemnify the expenses. The petitioner has submitted that in the Purnia-Biharsharif line, work was completely stopped/suspended from 1.12.2011 to 1.6.2012. Further, in order to resolve the issue, the petitioner was constrained to realign the route, resulting in an increase in the number of pile foundations from 3 to 7. The petitioner

has further submitted that even after documented resolution between local authorities and villagers, the obstruction continued until the charging of the line. Further, vide letter dated 25.1.2012 the matter was taken up with District Magistrate, Begusarai and SP, Begusarai for resolution. The petitioner has submitted that it issued letters from 31.01.2012 to 19.4.2012 to Chief Minister of Bihar, Deputy CM, DGP and various functionaries requesting assistance in resolving the issues so that work could be completed in time. The petitioner has further submitted that the issue of obstruction by villagers was also raised by it on 7.6.2012 during meeting held by CEA to review the progress of the project. The petitioner has submitted that on account of the obstruction by villagers, work was stopped for a period of 184 days affecting the time schedule of completion of the project. The petitioner has submitted that this has resulted in increase in the IDC cost by Rs.30 crore and cost overrun by Rs.24 crore on account of additional pile foundation.

36 We have considered the matter. The petitioner has placed on record the sequence of events at Annexure P-19 of the petition. On perusal of the said annexure, it is revealed that though no objection was given by Inland Waterways Authority of India on 23.9.2011 to ENCIL, the petitioner sent the letter to District Magistrate and Superintendent of Police, Begusarai on 25.1.2012 about the crossing of the transmission lines over River Ganga near village Mahendrapur-Sambo diara in Begusari District. On 27.1.2012, Bajaj Electricals which is the contractor of the petitioner informed the petitioner that the villagers of Mahenderpur were not allowing the contractor to enter the village and construct the work on the transmission line or work in Ganga River Crossing. It has been further stated in the said letter that the contractor and officials of ENCIL approached the District Magistrate but no assurance was forthcoming. The Contractor requested the petitioner to take up the matter

at higher level in Government of Bihar to instruct the district authorities to provide protection and advise the villagers to not to obstruct the work on the transmission lines. The petitioner took up the matter with Chief Minister, Dy Chief Minister, Chief Secretary and Director General of Police, Bihar and the District Magistrate and SP of Begusari. A letter was also written by CEA to the Chief Secretary, Bihar soliciting his intervention in the matter. On 1.6.2012, the District Magistrate Begusarai wrote a letter to Diara Kishan Morcha informing that ENCIL would take the responsibility for impact on the village of Mahendrapur in the event of diversion of River Ganga, water logging or siltation, if any, caused by construction of pile foundation. On 3.6.2012, Bajaj Electricals sent a letter to ENCIL that inauguration of the pile foundation work has been completed. From the sequence of events, it appears that the work on the Purnea Bihar Shariff Line was affected on account of agitation/obstruction by the Mahenderpur villagers from 25.1.2012 till 2.6.2012 for 130 days. The petitioner raised the issue of obstructions in the meeting taken by CEA on 14.6.2012. The petitioner has given the notice to the LTTCs vide its letter dated 22.12.2013. We have already held that bandhs and strikes will be covered under blockade within the meaning of force majeure. In the same manner, agitation/obstruction by the villagers of Mahenderpur leading to the complete stoppage of work at the project site is considered as blockade and is covered under force majeure. The period of force majeure is for a period of 130 days from 25.1.2012 to 2.6.2012.

(IX) Floods in Bihar

37. The petitioner has submitted that the works on the PB line at Mahendrapur was completely stopped from 13.9.2012 to 2.11.2012 (51 days) on account of floods in Bihar as a result of which towers were either damaged/washed away by floods. The petitioner has given notice of occurrence and cessation of floods in Bihar vide letters dated 27.9.2012 and

6.11.2012 to the LTTCs claiming relief of tariff and extension of time. Flood is covered under Natural force majeure event and due notice for occurrence and cessation of floods has been given to the LTTCs. Period of force majeure has been reckoned from 27.9.2012 till 2.11.2012 (51 days) will be considered as force majeure.

(X) Floods in Uttarakhand

38. The petitioner has further submitted that the work at the Ganga River (Location 47/0 to 48/0) crossing the transmission line was severely affected between 18.6.2013 and 31.8.2013 (75 days) on account of multiday cloud burst in Uttarakhand which caused devastating flood in downstream Ganga which necessitated eviction of manpower, equipment and machinery from the affected areas, The petitioner is stated to have employed special resources and executed the erection of the last tower and stringing with the help of barges. The petitioner has stated that copies of the e-mails dated 27.7.2013 and 2.8.2013 issued by Bajaj Electricals (EPC Contractor) and the photographs of the effect of flood on PB Line and newspaper reports of the floods in Uttarkhand are placed on record as Annexure 22. We have gone through Annexure P-22. It is noticed that e-mail dated 2.8.2013 is not on record. E-mail dated 27.7.2013 states about the rising water level and at the same time states that “but we are also confident enough and comb acting the Flood situation in order to complete the job/side by side the rescue here in Ganga River.” The EPC Contractor has nowhere indicated that work has been stopped on account of flood due to cloud burst in Uttarakhand. Further, the petitioner in its notice dated 23.12.2013 has not mentioned about the flood during the period from 18.6.2013 and 31.8.2013 (75 days). Though flood is a natural force majeure event, we are of the view that the period from 18.6.2013 and 31.8.2013 (75 days) cannot be treated as force majeure

event in the absence of documentary proof that work on the Purnia Bihar Shariff Transmission Line was affected due to flood and in the absence of notice to that effect to LTTCs.

(XI) Additional Scope of Work

39. The petitioner has submitted that on account of the additional scope of work, the project schedule was altered and an additional 240 days were required to complete the project. The petitioner has submitted that the Commission in order dated 8.5.2013 had directed as under with regard to additional time for additional scope of work:

“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. The petitioner in written submission has submitted for additional time for execution of the additional scope of work. The petitioner may take up the matter first with the LTTC in accordance with the provisions of the TSA and in case of difficulty, the petitioner is at liberty to approach the Commission in accordance with law.”

The Commission vide order dated 31.7.2013 had allowed 26.714 km as additional scope of work on account of the discrepancies on coordinates on both lines. The petitioner was granted liberty to approach the Commission regarding additional time in case of any difficulty after taking up the matter with LTTCs. The petitioner has stated that it require 240 days time to carry out the additional scope of work. It is noted that the petitioner would have started its work on additional scope only after issue of the order dated 31.7.2013 when the Commission allowed the extra kilometres on account of change of coordinates as additional scope of work. In the additional scope of work of Bongaigaon Siliguri Transmission Line, the forest stretch requiring forest clearance was there. Therefore, after undertaking the work on the non-forest stretch falling within the additional scope of work, the petitioner has

undertaken the works on the transmission line pertaining to forest stretch after grant of forest clearance. There was a riot at Kokrajhar till 20.6.2014. Starting the work from 21.6.2014, it has taken 145 days to complete and commission the transmission line. We consider it reasonable time to complete the additional scope of work in Bongaigaon Siliguri Transmission line, particularly considering the fact that the petitioner had to deal with the issue of theft of strung conductors. In case of Purnea-Biharshariff Transmission line, it took 44 days from 1.8.2013 (after issue of the order dated 31.7.2013) till the date of commissioning on 13.9.2013. We find the said period as reasonable to execute the additional scope of work.

Total Period of Force Majeure

40. In the light of the above discussion, we proceed to determine the total period of force majeure in respect of each of the two transmission lines.

41. In case of Bongaigaon-Siliguri Transmission Line, the period of force majeure claimed and allowed are as under:

Sr No.	Reason of Force Majeure	Period of Force Majeure claimed by the petitioner	No of days claimed	Period of Force Majeure Allowed	No of days allowed
Before SCOD					
1	Riot in Kokrajhar	11.7.2012 to 30.10.2012	112	11.7.2012 to 30.10.2012	112
2	Riot in Kokrajhar	15.11.2012 to 26.12.2012	42	15.11.2012 to 26.12.2012	42
3.	Flood in West Bengal & Assam	9.7.2012 to 30.8.2012	53	9.7.2012 to 30.8.2012	53
4.	Overlapping period			11.7.2012 to 30.8.2012	51
5.	Net period (1+2+3-4)				156
6.	Total Period		207		156
After SCOD					

7.	Delay in Forest Clearance	6.1.2013 to 30.9.2014 (tentative)	631	7.1.2013 to 12.6.2014	523
8.	Bandh in Assam	Recurring Bandhs in the period between 14.2.2013 to 18.12.2013	74	13.11.2013, 19.11.2013, 21.11.2013, 22.11.2013, 29.11.2013, 8.12.2013 and 9.12.2013	7
9.	Riot in Kokrajhar	5.5.2014 to 20.6.2014	46	5.5.2014 to 20.6.2014	46
10.	Overlapping period			5.5.2014 to 12.6.2014, 13.11.2013, 19.11.2013, 21.11.2013, 22.11.2013, 29.11.2013, 8.12.2013 and 9.12.2013	46
11.	Net Period (7+8+9-10)				530
12.	Total period		751		530
13.	Additional time for execution (after forest clearance)		240	21.6.2014 to 13.11.2014	145
14.	Total period (1+2+3+7+8+9+12)		1198		*675

* If SCOD is extended for the pre-SCOD force majeure, the said period in serial No. 6 will run concurrently with delay in forest clearance and hence 156 days has not been counted.

42. In case of Purnea-Biharshariff Transmission Line, the period of force majeure claimed and allowed are as under:

Sr No.	Reason of Force Majeure	Period of Force Majeure claimed by the petitioner	No of days claimed	Period of Force Majeure Allowed	No of days
1	Obstruction at Mahenderpur village	December 2011 to June 2012	184	25.1.2012 to 2.6.2012	130 days
2	Flood in Bihar	27.9.2012 to 2.11.2012	51	27.9.2012 to 2.11.2012	51
3.	Flood in Uttarkhand	18.6.2013 to 31.8.2013	75	Nil	Nil
4	Additional time		240	8.5.2013 to	44

	for execution			13.9.2013	
5	Total period				225

Relief for Force Majeure

43. Article 4.4 of the TSA provides for extension of time on account of force majeure events. Article 4.4 is extracted as under:

“4.4 Extension of time

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

44. It may be observed from para 41 that Bongaigaon-Siliguri Transmission Line is affected by force majeure for 675 days and Purnea-Biharshariff Transmission Line is affected by force majeure for 225 days. In both cases, the time has exceeded the limit of 180 days. Though the petitioner had the option to terminate the TSA after 180 days if the force majeure event continued, the petitioner has completed and commissioned the project after cessation of force majeure event. The LTTCs are availing the transmission services provided by the petitioner. Therefore, we consider it appropriate to allow extension of the SCOD of Bongaigaon Siliguri Transmission Line by a period of 675 days and Purnea-Biharshariff Transmission Line by a period of 225 days.

45. The petitioner has claimed IDC of Rs.77 crore for Bongaigaon-Siliguri Transmission Line and Rs.28 crore for Purnea-Biharshariff Transmission line. Article 6.3.1 (a) (b), (c) and (d) of TSA are reproduced as under:

“(a) In case of delay on account of the Long Term Transmission Customer Event on Default, the Long Term Transmission Customer(s) shall make payment to the TSP of Non-Escalable Transmission Charges in proportion to their Allocated Project Capacity, calculated on Target Availability for and during the period of such delay.

b) In case of delay due to Direct Non Natural Force Majeure Event, the Long Term Transmission Customer (s) shall make payment to the TSP of Non Escalable Transmission Charges calculated on target availability for the period of such events in excess of three(3) continuous or non continuous Months in the manner provided in (d) below.

c) In case of delay due to indirect Non-Natural Majeure Event (or Natural Force majeure Event affecting the Long Term Transmission Customer(s), the Long Term Transmission Customer(s) shall make payment to the TSP for debt service, subject to maximum of Non Escalable Transmission Charges calculated on Target Availability, which is due under the financing agreement for the period of such event in excess of three (3) continuous or non-continuous Months in the manner provided in (d) below:

d) In case of delay due to direct Non Natural Force Majeure Event or indirect Non Natural Force majeure Event (or Natural Force Majeure Event affecting the Long Term Transmission Customer(s), the Long Term Transmission Customer(s) shall be liable to make payments mentioned in (b) and (c) above, after commencement of Transmission Service, in the form of an increase in Non Escalable Transmission Charges. These amounts shall be paid from the date, being the later of a) the date of cessation of such Direct Non Natural Force Majeure Event or indirect Non Natural Force Majeure Event (or natural Force Majeure Event affecting the Long Term Transmission Customer(s) and b) the completion of sixty (60) days from the receipt of the financing agreement by the Long Term Transmission Customer(s) from the TSP.

Provided such increase in Non Escalable Transmission Charges shall be determined by Appropriate Commission on the basis of putting the TSP in the same economic position as the TSP would have been in case the TSP had been paid amounts mentioned in (b) and (c) above in a situation where the Force Majeure Event had not occurred.”

46. The petitioner was affected by both Natural Force Majeure and Non-Natural Force Majeure before the COD of the transmission lines which has resulted in extension of the SCOD as directed in para 34 above. The petitioner shall be entitled for payment of debt service for the said period in the form of increase in Non-Escalable Transmission Charges

in terms of provisions of 6.3.1 of the TSA. Therefore, the petitioner shall be entitled for compensation for IDC to the extent of debt service during the period of force majeure. The petitioner shall provide to the LTTCs and this Commission the documentary proof regarding the loan outstanding for this project on the date of commencement of force majeure and the interest serviced on this debt upto the date of cessation of force majeure. The interest amount shall be reimbursed by the LTTCs as part of the non-escalable transmission charges over a contract period under the TSA.

47. The petitioner has claimed compensation of Rs. 24 crore for increase in the number of pile foundations. The petitioner had quoted an all inclusive tariff and the petitioner should have factored all possible eventualities for executing the transmission lines. In our view, this expenditure cannot be compensated to the petitioner under any of the provisions of the TSA.

Summary of our decisions:

48. The summary of our decisions are as under:

(a) The petitioner is entitled to all legitimate expenditure incurred for obtaining forest clearance including the expenditure on compensatory afforestation. The petitioner shall be required to submit the documentary proof of the expenditure made in getting the diversion of forest land for laying the transmission lines. However, the petitioner has submitted a letter No. FG 27/Nodal Proposal/Trans Line ENIC Ltd., dated 27.1.2014 in connection with payment of Rs.1,31,20,304/- towards diversion of forest land in Assam Division. The petitioner is directed to submit similar letter received from West Bengal Division.

(b) Overhead expenditures are not separately reimbursable unless they form part of the forest clearance.

(c) Delay in forest clearance, riots in Kokrajhar, floods in Assam and West Bengal, Bandhs in Assam, Obstructions at Mahenderpur village are covered under force majeure.

(d) Flood in Uttarakhand has not been held as force majeure as no evidence has been placed on record to substantiate that work on the project was affected due to the said flood.

(e) Expenditure on account of compensation for right of way, excess compensation for carrying out stringing, expenditure on account of theft of conductors and increase in number of pile foundations are not covered under force majeure and no compensation for the same can be given.

(f) The petitioner is entitled to extension of SCOD of Bongaigaon Siliguri Transmission Line by a period of 675 days and Purnea-Biharshariff Transmission Line by a period of 225 days.

(g) The petitioner is entitled for payment of debt service for the period of force majeure in the form of increase in Non-Escalable Transmission Charges in terms of provisions of 6.3.1 of the TSA.

(h) The petitioner shall be required to provide to the LTTCs and this Commission the documentary proof regarding the loans outstanding for this project drawn by it on the date

of commencement of force majeure and the interest serviced on this debt upto the date of cessation of force majeure.

(i) In the event of non-response by LTTCs or of disputes with LTTCs, the petitioner is at liberty to approach the Commission for appropriate directions.

49. The petition is disposed of in terms of the above.

Sd/-

(A.S.Bakshi)
Member

Sd/-

(A.K.Singhal)
Member

Sd/-

(Gireesh B.Pradhan)
Chairperson