

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 216/MP/2016

Subject : Petition under Section 63 and 79 (1)(f) read with Section 79(1)(c) of the Electricity Act, 2003 seeking compensatory and declaratory relief under the Transmission Services Agreement dated 7.12.2010 on account of 'Change in Law' and 'Force Majeure' events.

Petitioner : Bhopal Dhule Transmission Company Limited (BDTCL).

Respondents : Chhattisgarh State Power Trading Company Limited and Others.

Date of hearing : 25.5.2017

Coram : Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member

Parties present : Shri Sitesh Mukherjee, Advocate, BDTCL
Shri Deep Rao, Advocate, BDTCL
Shri Gautam Chawla, Advocate, BDTCL
Shri T.A.N. Reddy, BDTCL
Ms. Swapna Seshadri, Advocate, CSPTCL
Ms. Saloni Sacheti, Advocate, CSPTCL
Shri Rohit Gera, CSPTCL

Record of Proceedings

At the outset, learned counsel for the petitioner submitted that the present petition has been filed seeking compensatory and declaratory relief under the Transmission Services Agreement (TSA) dated 7.12.2010 on account of 'Change in Law' and 'Force Majeure' events. Learned counsel further submitted as under:

(a) The petitioner is developing the project and has been constructing the transmission lines to the best of its ability and prudent utility practices. However, due to various delays not attributable to the petitioner, the implementation of the project at the bid out tariff has become commercially impracticable.

(b) Due to change in the "Guidelines for diversion for forest land for non-forest purposes under the Forest (Conservation) Act, 1980" issued by the Ministry of Environment and Forest (MoEF), the grant of forest clearance to the petitioner was inordinately delayed. The petitioner sought forest clearances in respect of 189.2 Ha of forest land which the project traverses in the States of Madhya Pradesh (119.2 Ha.), Maharashtra (31.61 Ha.) and Gujarat (38.39 Ha.).

The total forest affected part of the project is about 9% of the total line length of the project.

(c) Article 6.3.1 read with Article 11.7 of the TSA provide for compensatory relief to be granted to the petitioner on account of Force Majeure events affecting the project in addition to an extension of time. The petitioner's claims for IDC, IEDC and overhead costs are squarely covered by Article 6.3.1 of the TSA. Article 11.3 (b) (i) squarely covers delays by statutory authorities/agencies in providing necessary consents required by the petitioner to proceed with establishing the project.

(d) Requisite non-forest land was not available in Maharashtra and Madhya Pradesh. The only way in which forest clearances for the project could be obtained was if the Chief Secretary to the State Government provided his/her certificate as to the non-availability of non-forest land. Moreover, considering the factual situation and the past practices of Chief Secretaries in the relevant States, the petitioner and its promoters proceeded on the legitimate expectation that the said certificate would be issued, which it was entitled to do at the time of bidding for the project. The petitioner could not have proceeded with Compensatory Afforestation as there was inadequate non-forest land in Madhya Pradesh and Maharashtra along the Project route.

(e) MoEF's 2012 Notification changing the Forest Guidelines amounts to a Change in Law under Article 12 of the TSA.

(f) The petitioner undertook all efforts to expedite the grant of forest clearance. However, the MoEF's letter permitting all types of transmission projects to raise compensatory afforestation over de-graded forest land of twice the quantum of the forest area being diverted/de-reserved in respect of a proposed transmission project was issued only on 11.7.2014.

(g) The revised FRA Clearances issued for Maharashtra and Gujarat are in *pari material* with those issued in respect of Madhya Pradesh. The letter dated 22.10.2013 issued by the Forest Department, Govt. of Madhya Pradesh clearly refers to all pending cases of forest diversion' and not pending cases for issuance of FRA Clearances. Obtaining FRA Clearances is a condition precedent to obtaining approval for diversion of forest land.

(h) There was an inordinate delay in issuance of the Section 164 notification by the Ministry of Power.

(i) PGCIL's delay in communicating the gantry points and approving the final route of the DV line amounts to a Force Majeure event. A transmission line cannot be commissioned if its termination points are not finalized and it is not connected to a sub-station.

(j) In support of his contentions, learned counsel for the petitioner relied upon the judgment of the Hon'ble High Court of Delhi in NTPC Limited Vs. Hindustan

Construction Co. Ltd. [O.M.P. 626/2014] and the Commission's order dated 16.10.2015 in Petition No. 73/MP/2014.

2. In its rebuttal, learned counsel for Chhattisgarh State Power Trading Company Limited (CSPTCL) submitted as under:

(a) The petitioner has proceeded on a misconception by claiming the very same events as a Force Majeure as well as Change in Law and seeking compensation for the same. The petition is not maintainable at all in the present form. The TSA provides one set of relief for Force Majeure and another for Change in Law.

(b) The petitioner has also sought to misinterpret the provisions of Article 11.3 of the TSA by contending that any delay caused in the implementation of project is 'an event that wholly or partly prevents or unavoidable delays the performance of its obligations' under the TSA. The reasons cited by the petitioner are only the general approvals which are required in setting up transmission project and which are known much in advance to all bidders.

(c) The MoEF's 2012 notification does not amount to change in law in any manner and in fact, only meant that route or exemption was no longer available to the petitioner. As per the law, the petitioner was to carry out compensatory afforestation and in case the Chief Secretary's certificate was produced, there would be an exemption. However, the petitioner need not have waited for the exemption letter from the Chief Secretary from 2011 onwards when it had applied for forest clearance.

(d) The petitioner made an application for land acquisition to District Collector, Jabalpur on 26.5.2012 and the land was allocated to the petitioner vide letter dated 16.7.2012. There was no inordinate delay in allocation of land for compensatory afforestation as being contended by the petitioner.

(e) There is no delay in the grant of Section 164 approval as the petitioner had submitted all its documents to the CEA with a copy to the Ministry of Power on 4.5.2012 and received by the CEA on 28.6.2012. After verification, Section 164 approval itself was notified on 29.1.2013 in the Gazette. Publication in Gazette is a notification to the general public and it is not even believable that the petitioner got to know of Section 164 approval on 20.1.2014 when the same was communicated by the Ministry of Power. Even during the bidding process, all bidders were put on notice that Section 164 permission is not a pre-condition for commencing and implementing the contract. In support of her contentions, learned counsel relied upon the APTEL's judgment dated 6.4.2016 in Western Region Transmission (Maharashtra) Pvt. Ltd. v. CERC &Ors., Appeal No. 86 of 2015.

(f) The gantry position needs to be known for termination of the line and it does not mean that the line itself could not be finalized by the petitioner because the gantry position was not known. If so, it is not clear as to how the petitioner

applied for Forest clearance, FRA clearance, etc. when the route of the line itself was not finalized.

(g) Increase in the rates of service tax and excise duty is not change in law in terms of the TSA. The incidence on tax is required to be on transmission of electricity.

3. Learned counsel for the petitioner in its response submitted that the 'Transmission Service' is a defined term under the TSA and includes all aspects appurtenant to making the project available for the LTTC's. It is not possible for the petitioner to provide transmission services without constructing and operating the project and paying applicable statutory taxes. Service tax and excise duty are taxes payable on the providing Transmission Services. Under Article 12.1.1 of the TSA, the parties have agreed that a change in tax would amount to Change in Law. Therefore, change in Service Tax and Excise Duty is covered as a Change in Law event under Article 12 of the TSA. Learned counsel further submitted that the judgment referred by the learned counsel for CSPTCL is not applicable in this case.

4. After hearing the learned counsels for the petitioner and CSPTCL, the Commission directed the petitioner to submit the following information/clarification on affidavit, on or before 16.6.2017:

(a) Whether a comprehensive proposal for Forest Clearance was submitted by the petitioner to the forest authorities and if so, copy thereof be placed on record.

(b) Loan-wise detailed computation of gross interest indicating the outstanding loan, rate of interest applied pertains to the period from actual drawal to SCOD and from SCOD to till the actual COD of concerned assets.

(c) Accrual and cash interest income made from the temporary parking of fund upto SOCO and from SCOD to actual COD.

(d) Net interest capitalized pertains to the period from actual drawal to SCOD and from SCOD to till the actual COD of concerned assets.

(e) Details of finance charges, separate computation thereof during these period.

(f) The basis of allocation of IDC among the assets which were commissioned in different dates ranging from 12.8.2014 to 9.6.2015.

(g) Clarify how the scheduled COD (SCOD) has been decided as 31.3.2014 with reference to Article 2.1 and Schedule 3 of Transmission Service Agreement (TSA).

(h) Documentary proof for Original Project Cost and IDC considered in deciding the original Project Cost.

5. Subject to the above, the Commission reserved the order in the petition.

By order of the Commission

**Sd/-
(T. Rout)
Chief (Legal)**