

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 195/MP/2017**

**Coram:**

**Shri P. K. Pujari, Chairperson  
Dr. M. K. Iyer, Member**

**Date of Order: 29.03.2019**

**In the matter of:**

Petition under Sections 61, 63 and 79 of the Electricity Act, 2003 read with statutory framework for tariff based competitive bidding for transmission services.

**And**

**In the matter of**

NRSS XXXI (B) Transmission Limited  
A-26/3, Mohan Cooperative Industrial Estate,  
Mathura Road, New Delhi-110044

**....Petitioner**

**Versus**

1. U.P. Power Corporation Limited  
14th Floor, Shakti Bhawan Extension,  
14-Ashok Marg, Lucknow,  
Uttar Pradesh-226001.
2. AD Hydro Power Limited  
A-12 Bhilwara Tower, Sector-1,  
Noida, Uttar Pradesh-201301.
3. Haryana Power Purchase Centre  
Shakti Bhavan Energy Exchange,  
(Room No.446), Top Floor,  
Sector-6, Panchkula, Haryana-134109.
4. Punjab State Power Corporation Limited  
D-3, Shakti Vihar, PSPCL,  
Patiala-147001



5. Himachal Sorang Power Private Limited  
D-7, Lane-1, Sector-1,  
New Shimla, Shimla,  
Himachal Pradesh-171009
6. Adani Power Limited, Mundra  
3rd Floor, Achalraj Building,  
Opp. Mayor Bungalow, Law Garden,  
Ahmedabad-380006
7. Rajasthan Urja Vikas Nigam Limited  
Vidyut Bhawan, Janpath, Jyoti Nagar  
Jaipur-302005.
8. Lanco Anpara Power Limited  
Lanco House, Plot No.397,  
Udyog Vihar, Phase-3,  
Gurgaon-122016.
9. Lanco Budhil Hydro Power Private limited  
Plot No.397,  
Udyog Vihar, Phase-3,  
Gurgaon - 122016.
10. Power Development Department,  
Government of Jammu & Kashmir, SLDC Building,  
220 kV Grid Station Premises, Gladni,  
Narwal-Bala, Jammu -180006.
11. North Central Railways  
Head Quarter's Office, Subedarganj,  
Allahabad-211033.
12. Jaiprakash Power Ventures Limited  
Sector-128, Noida-201304.
13. BSES Yamuna Power Limited  
2nd Floor, Shakti Kiran Building,  
Karkardooma, New Delhi-110092.
14. BSES Rajdhani Power Limited  
BSES Bhawan, Nehru Place,  
New Delhi-110019.



15. Tata Power Delhi Distribution Limited  
NDPL House, Hudson Lines,  
Kingsway Camp, New Delhi-110009.
16. New Delhi Municipal Council  
NDMC, Palika Kendra, Parliament Street,  
New Delhi-110001.
17. Electricity Wing of Engineering Dept., Union Territory of Chandigarh  
Electricity OP Circle, 5th Floor,  
New Deluxe Building, Sector-9,  
Chandigarh-160009.
18. Power Grid Corporation of India Limited  
HVDC Dadri & HVDC Rihand, "Saudamini",  
Plot No.2, Sector-29, Near IFFCO Chowk,  
Gurgaon-122001
19. PTC (Budhil), PTC India Limited  
2nd Floor, NBCC Tower, 15,  
Bhikaji Cama Place, New Delhi-110066.
20. PTC (Everest), PTC India Limited  
Through its Senior Vice President,  
2nd Floor, NBCC Tower, 15,  
Bhikaji Cama Place, New Delhi-110066.
21. Uttarakhand Power Corporation Limited  
Victoria Cross Vijeyta, Gabar Singh Bhawan,  
Kanwali Road, Balliwala Chowk,  
Dehradun-248001, Uttarakhand.
22. Himachal Pradesh State Electricity Board Limited  
HPSEB Ltd., Vidyut Bhawan,  
Shimla-171004
23. REC Transmission Projects Company Limited  
ECE House, 03rd Floor,  
Annexe-II, 28 AI KG Marg,  
New Delhi-110001

...Respondent(s)



**Parties present:**

Shri M.G. Ramachandran, Advocate, NRSS  
Ms. Ranjitha Ramachandran, Advocate, NRSS  
Ms. Astha Sharma, NRSS  
Ms. Amal Nair, NRSS  
Mr. Neeraj Verma, NRSS  
Ms. Suparna Srivastava, Advocate, PGCIL  
Ms. Swapna Sesadri, PSPCL  
Ms. Parchita Choudhery, PSPCL  
Ms. Ranjana Roy Gawai, Advocate TPDDL  
Ms. Vasudha Sen, Advocate, TPDDL

**ORDER**

The Petitioner, NRSS XXXI (B) Transmission Limited (NTL) has filed the present petition seeking compensatory and declaratory reliefs under the Transmission Services Agreement (TSA) dated 2.1.2014 on account of various change in law and force majeure events, affecting the construction of the project. The Petitioner has made the following prayers:

- a) Allow the Petition and declare that the unforeseen and uncontrollable events/factors that have occurred on account of the events subsequent to the submission of the bids and award of the Project, constitute Force Majeure as per the TSA;
- b) Grant an extension in the Scheduled Date of Commercial Operation of the Project till Actual Date of Commercial Operation of the respective Element of the Project to enable the Petitioner to take benefit of the tariff which it could not earn due to delay in implementation of the Project as per the TSA and allow additional costs and waive any Liquidated Damages or any other consequences thereof under the TSA and
- c) Grant an increase in the transmission charges to offset the cost of Rs. 51.93 Crores incurred on account of the additional IDC and unforeseen & uncontrollable events that have occurred subsequent to the submission of the bid and award of the Project.”

2. The Petitioner is a wholly owned subsidiary of Essel Infraprojects Limited which was selected as a successful bidder through the international tariff based competitive bidding under Section 63 of the Electricity Act, 2003 (hereinafter referred to as ‘the Act”)



to establish the following transmission systems on Build, Own, Operate and Maintain (BOOM) basis and to provide the following transmission service to the Long Term Transmission Customers (LTTCs):

- a) 400 kV D/C Kurukshetra - Malerkotla Line (KM Line)
- b) 400 kV Malerkotla – Amritsar Transmission Line (MA line)

3. The Petitioner was incorporated as a special purpose vehicle by REC Transmission Project Company Limited (RECTPCL) as part of Tariff Based Competitive Bidding process for implementing the project on BOOM basis. Essel Infraprojects Limited participated in the competitive bidding process conducted by RECTPCL and on emerging as the successful bidder, Letter of Intent (LOI) was issued by RECTPCL to Essel Infraprojects Limited on 26.2.2014. In accordance with the bidding documents, Essel Infraprojects Limited acquired 100% of the shareholding in the Petitioner Company by executing a Share Purchase Agreement with RECTPCL and the Petitioner Company on 12.5.2014.

4. The Petitioner approached the Commission for grant of transmission license in Petition No. 90/TL/2014 and for adoption of tariff of the transmission system in Petition No. 89/TT/2014. The Commission in its order dated 25.8.2014 in Petition No. 90/TL/2014 granted transmission license to the Petitioner for inter-State transmission of electricity and in order dated 7.8.2014 in Petition No. 89/TT/2014 adopted the tariff of the transmission system.



5. The Petitioner has submitted that it has encountered a number of hindrances which were unforeseen and uncontrollable events and were beyond the control of the Petitioner. Due to the said unforeseen and unavoidable events, the Petitioner could not complete the Project on the Scheduled Date i.e. 11.9.2016. As per the transmission license dated 25.8.2014, the Project was to be completed 28 months from its Effective Date. The Commercial Operation Date (COD) of 400 kV D/C Kurukshetra–Malerkotla Transmission Line was declared on 18.1.2017 with a delay of 128 days. The deemed Commercial Operation Date of 400 kV D/C Malerkotla–Amritsar Transmission Line was declared on 27.3.2017 with a delay of 196 days.

6. The Petitioner has submitted that due to various reasons, not attributable to it, there is an increase in the overall cost of the Project, which the Petitioner has incurred during the successful implementation of the Project in addition to the loss of revenue for delay in completion of Project. Consequently, the present petition has been filed to seek extension of time and the mechanism to compensate the Petitioner and to offset the adverse impact on the Capital Cost on account of unforeseen and uncontrollable events which clearly fall under Article 11.3(b) (i) of Force Majeure clause and Article 12 of Change in Law clause in TSA dated 2.1.2014. The petitioner has also submitted that the transmission scheme of NRSS XXXI (B) Transmission Limited was required in matching timeframe of 800 kV HVDC Champa - Kurukshetra being developed by PGCIL. The Pole-I with rate capacity of 1500 MW of the 800kV HVDC Champa - Kurukshetra line was declared under operation w.e.f. 24.3.2017.



## **Submissions of the Petitioner**

7. The Petitioner has submitted that the construction of the project has been delayed and affected on account of the following force majeure and/or change in law events:

- I. Unforeseen Requirement of Forest Clearance and delay in forest clearance;
- II. NGT Stay Order;
- III. Delay in transfer of SPV;
- IV. Issue with PSPCL relating to Conversion of 66 KV Lines from Poles to Towers;
- V. Change in Scope, Order and Execution related to : -
  - a) Delay in Confirmation of Gantry Coordinates and Change in Gantry Coordinates at Malerkotla and Kurukshetra Sub-stations
  - b) Change in tower extension;
  - c) Requirement of Multi circuit Towers for transmission line termination at Malerkotla Substation end;
- VI. Stoppage of Work at Amritsar entry due to PGCIL request for re-alignment of the route;
- VII. Fault at PGCIL Malerkotla sub-station end during first charging of Kurukshetra-Malerkotla Line;
- VIII. Local Unrest and communal violence and Farmers Agitation;
- IX. Right of Way due to multiple court litigation;
- X. Assembly Elections in Punjab;
- XI. Change in Taxes ;
- XII. Increase in Compensation payments towards Right of Way (RoW) due to Ministry of Power Notification dated. 15.10.2015; and
- XIII. Demonestisation;



**(I) Unforeseen Requirement of Forest Clearances and Delay in Forest Clearance:**

8. The Petitioner has submitted that in the Survey Report enclosed with the RFP documents, issued by RECTPCL, there were no forest areas in the route of the Transmission Lines to be constructed by the Petitioner. After the transfer of SPV to the Petitioner and upon conducting the detailed survey of the route, it came to the knowledge of the Petitioner that the information given in the RFP with regards to the forest was incorrect and in fact patches of forest land existed in the route of 400 kV D/C Kurukshetra - Malerkotla and 400 kV D/C Malerkotla-Amritsar Transmission Lines.

9. The Petitioner has found patches of forests in the route of transmission line, the Petitioner applied for forest clearance for Kurukshetra – Malerkotla Transmission Line for Haryana Portion and Punjab Portion on 25.11.2014 and 2.1.2015 respectively and Stage I approval for Haryana portion and Punjab portion was granted to the Petitioner on 2.5.2016 and 27.9.2016 respectively and Stage II approval for the Haryana portion and Punjab portion was granted to the Petitioner on 4.7.2016 and 16.6.2017 respectively. The Petitioner had also applied for forest clearance for Malerkotla – Amritsar Line on 18.2.2015 and Stage I approval was granted to the Petitioner on 16.9.2016 and Stage II approval is awaited, still the Petitioner has been able to complete the project.

10. The Petitioner has submitted that due to unforeseen requirement of forest clearances and delay in issuance of forest clearance as well as issuance of conditional Forest Stage I Approval for the forest area falling in Punjab, has resulted in delays in



implementation of the transmission lines beyond scheduled COD and, therefore, the Petitioner was unable to start the construct work of the transmission lines in respective forest stretches. The Petitioner has submitted that as per Notification dated 14.3.2014 issued by Ministry of Environment, Forest & Climate Change, Government of India (MoEFCC), the timeline for grant of Stage I permission is approximately 10 months. However, the Stage I permissions for both the States were granted by the respective Forest Departments after lapse of about 22 months from date of the application by the Petitioner. The Petitioner has further submitted that an amount of approximately ₹9.37 crore was an additional financial impact on the Petitioner Project Cost towards applicable charges paid to Forest Department and time over run of approximately 4 months post receipt of Stage I forest clearance, to complete the work in forest stretches falling in the route of the Transmission Lines apart from equivalent impact on Project IDC. The Petitioner has also sent updates to the LTTCs and the CEA on the difficulties faced by the Petitioner while obtaining the forest clearances, through its Monthly Progress Reports and various communications.

## **(II) NGT Stay Order and High Court Proceedings:**

11. The Petitioner has submitted that during the pendency of the proposal for grant of forest clearance, the National Green Tribunal (NGT) vide interim order dated 19.5.2016, passed in Petitions No. O.A. No. 161 and 162 of 2016 put a blanket ban on cutting of trees in the State of Punjab, which delayed the execution of the Project. Consequently, the Petitioner approached Hon'ble High court of Punjab and Haryana seeking stay of NGT order dated 19.5.2016. The Hon'ble High Court vide its order dated



24.1.2017 suspended the NGT order dated 19.5.2016 for the period of four months from the date of receipt of certified copy of the order. The certified copy of the said order was made available to the Petitioner only on 30.3.2017. In the absence of the certified copy of the High Court order dated 24.1.2017, the forest department did not allow the Petitioner to cut the tress till 29.3.2017. Therefore, as per the TSA dated 2.1.2014, the NGT order dated 19.5.2016 prohibiting the project proponent from felling and cutting of any trees without its permission, qualifies for force majeure event.

**(III) Delay in transfer of SPV:**

12. The Petitioner has submitted that the LOI of the Project was received on 26.2.2014, but the SPV was transferred on 12.5.2014 i.e. after more than 2 months. As per RFP, the SPV was scheduled to be transferred on 4.3.2014. Therefore, the delay (over two months from 4.3.2014 to 12.5.2014) in transfer of SPV has resulted in Scheduled COD falling in the Monsoon season i.e. in September 2016 and due to Monsoon, the project progress was affected during that period. Therefore, delay in transfer of SPV led to delay of 65 days in the execution of the Project.

**(IV) Assembly Elections in Punjab:**

13. The Petitioner has submitted that the State Legislative Assembly elections in Punjab were notified on 11.1.2017. Due to said notification for elections, the movement of vehicles at site to carry the material and manpower was restricted by the locals and the Petitioner was also not able to get the shutdown of LT/HT Transmission Lines for crossing by 400 kV Malerkotla – Amritsar Transmission Line. The Petitioner has



submitted that the assembly elections in Punjab delayed the scheduled COD by approximately 2 months.

**(V) Change in Scope, Order and Execution :**

**(a) Change in Gantry coordinates at Malerkotla and Kurukshetra:**

- (i) **At Kurukshetra end:** The actual co-ordinates of the terminating point at Kurukshetra Sub-station (692518 Easting, 3310118 Northing) were different from RFP Specification (Easting: 692351 E, Northing: 3310156 N) that caused the Petitioner to change the entry alignment of 400 kV D/C Kurukshetra- Malerkotla line and increased the line length by 2.5 km.
- (ii) **At Malerkotla end:** The actual co-ordinates of the terminating point at Malerkotla are also different from RFP Specification, which caused the Petitioner to change in the entry alignment of 400 kV D/C Kurukshetra - Malerkotla line and increase the line length by 1 km.

14. The difference between actual and RFP Specification caused change in the entry alignment of 400 kV D/C Kurukshetra – Malerkotla line and also increased line length. The routes of 400 kV D/C Kurukshetra – Malerkotla Line given by BPC were different from the actual (due to change in Gantry Co-ordinates) coordinates, plotted on toposheets at terminating point at Kurukshetra and Malerkotla Sub-station of PGCIL.

15. The change in connection arrangement at Kurukshetra as well as Malerkotla end has resulted in an additional cost of approximately ₹6.88 crore due to increase in length of 400 kV D/C Kurukshetra – Malerkotla transmission Line by 3.5 km and EHV Powerline crossings by 4 Nos. The total EPC cost of 400 kV D/C Kurukshetra –



Malerkotla Line having line length of 135.15 km is ₹265.80 crore. The pro-rata increase in cost for 3.5 km length will be ₹6.88 crore.

**(b) Delay in confirmation of Gantry coordinates at PGCIL Kurukshetra and Malerkotla**

**Sub-station:**

16. The Petitioner has submitted that the gantry coordinates for termination points specified in the RFP document were modified after the award of scheme to the Petitioner. The revised coordinates were confirmed by PGCIL at a very late stage vide letter dated 10.10.2015 for Malerkotla and dated 12.3.2016 for Kurukshetra. Therefore, the delay in confirmation of Gantry Co-ordinates by PGCIL has delayed the scheduled COD of Transmission Line by approximately 4 months.

**(c) Change in Tower extension at Location No. 71/0**

17. The Petitioner has submitted that during the meeting held in CEA on 27.5.2016, PGCIL requested the Petitioner to extend the height of the transmission tower at location no. 71/0 (of 400 kV D/C Kurukshetra – Malerkotla Line) by 25 meters near Malerkotla substation, so that the future transmission lines may not get obstructed while emanating/terminating at Malerkotla substation. However, the Petitioner was unable to accede to the above request of PGCIL since the transmission project was in an advanced stage of construction and foundation at location no. 71/0 had already been casted. Hence, the Petitioner informed PGCIL that any change near Malerkotla substation would be difficult at such an advanced stage. However, after much deliberation and with the intervention of CEA, the Petitioner was directed to increase the



height of Tower location no. 71/0 by 9 meters instead of 25 meters. Thus, on account of change in tower extension, the Petitioner had to put in additional time as well as additional cost to bring above changes in tower height, as per direction of CEA. Since the above change has taken place after casting of foundation at location no. 71/0, the led to time over run of 90 days and consequential impact on Project IDC.

**(d) Requirement of Multi circuit Towers for transmission line termination at Malerkotla Substation end -**

18. The Petitioner has submitted that as per the scope of work mentioned in the RFP, no Multi-Circuit Towers were envisaged. However, as per PGCIL, both 400 kV D/C Kurukshetra - Malerkotla and 400 kV D/C Malerkotla – Amritsar Lines needed to terminate/ emanate at double level gantry at PGCIL 400 kV Malerkotla substation, due to which Multi-Circuit Tower was required to be installed in order to facilitate the entries of both lines at Malerkotla Sub-station. Therefore, the petitioner had to design an additional tower so as to complete the lines as per requirement of PGCIL. Therefore, the new requirement of Multi Circuit Towers was a change in scope of work post submission of bid, issuance of LOI and execution of TSA, which delayed the scheduled COD of KM Transmission Line by approximately 3 months.

**(VI) Stoppage of Work at Amritsar entry due to PGCIL request for re-alignment of the route**

19. The Petitioner has submitted that PGCIL vide letters dated 2.2.2016 and 5.2.2016, requested the Petitioner to realign the route of 400 kV D/C Malerkotla –



Amritsar Line near Amritsar Sub-station. The Petitioner vide its letter dated 12.2.2016, informed PGCIL that as construction of above transmission line is in advance stage, any change in the route alignment at this point will have cost and time overrun. The issue was finally resolved with the intervention of CEA, on 27.5.2016 and request of PGCIL to realign the route of line near Amritsar Sub-station was not agreed. It affected the construction work including the work of transmission line and Railway line crossings near Amritsar Sub-station during above period. The Petitioner has submitted that the said unforeseen deadlock situation has resulted in loss of approximately 4 months (from 2.2.2016 to 2.6.2016) of project period.

**(VII) Fault at PGCIL Malerkotla sub-station end during first charging of Kurukshetra-Malerkotla Line-**

20. The Petitioner has submitted that on 11.1.2017, during first time charging of the 400 kV D/C Kurukshetra – Malerkotla Transmission Line, fault occurred at PGCIL Malerkotla sub-station end due to wrong switching operation of Amritsar-line bus isolator. However, due to wrong switching operation of bus isolator of Amritsar-line, bus bar protection operated at PGCIL Malerkotla Sub-station and tripped all the lines. The fault at PGCIL Malerkotla Sub-station was cleared on 15.1.2017 and the Transmission Line was charged on 15.1.2017.

**(VIII) Local unrest, communal violence and farmers agitation amounting to Force Majeure events:**



21. **Conflict in the Sikh community on management of Gurudwara:** The Petitioner has submitted that due to conflict in Sikh community on management of Gurudwara, a riot-like situation in Kurukshetra disturbed the law and order situation there from 2.8.2014 to 7.8.2014. The Petitioner has been updating the LTTCs and CEA through its Monthly Reports dated 2.2.2016, 1.3.2016 and 1.4.2016. Apart from the monthly reports, the Petitioner also sent various communications to LTTCs giving updates.

22. **Conflict and Communal tension in Malerkotla:** The Petitioner has submitted that due to communal tensions in Malerkotla area, a riot-like situation disturbed the law & order situation in the nearby areas of Malerkotla from 12.9.2015 to 29.9.2015, which affected the site work progress. The Petitioner has submitted that conflict and communal tension in Malerkotla area is covered under Article 11.3(b) (ii) of the TSA which specifically records that any riots/ civil wars are events of indirect non-natural force majeure.

23. **Farmer agitation in Punjab:** The Petitioner has submitted that from 8.10.2015 to 16.10.2015, there was severe agitation by the farmers in the State of Punjab for claiming compensation for their crops. Farmers blocked the main highways, railway tracks and other connecting roads to show their protest and agitation. A large number of farmers were also taken into police custody and matter was addressed even at the level of the Chief Minister of the State. During the said period, the execution work of the transmission project was severely affected.



24. **Desecration of Shri Guru Granth Sahib**-The Petitioner has submitted that from 14.10.2015 to 31.10.2015, there was agitation by the locals throughout the State of Punjab against dishonouring of Shri Guru Granth Sahib. Further, there was also curfew and imposition of Section 144 in most of the areas. Some incidents of serious clashes between two different communities also occurred in some of the areas including complete blockade of roads due to Dharna and Pradarshan by agitating community. Therefore, during above period, the execution work was severely affected.

25. **Jat Agitation for caste-based reservation in Haryana:** The Petitioner has submitted that from 19.2.2016 to 25.2.2016, there were agitations and riot-like situation in the whole of the State of Haryana on account of reservation issues, which caused blockade of roads including National Highway 1 and State Highway. Further, there was also violence and extensive damage to public and private properties in many districts of Haryana. The blockade of highways and violence across the State adversely affected the supply of material in Haryana as well as Punjab, which led to stoppage of work execution at Project site.

26. **Desecration of Quran**-The Petitioner has submitted that from 24.6.2016 to 26.6.2016, there were several incidences of violence, blockade and agitation in Malerkotla following the alleged desecration of Quran. During the said period, the execution work of the transmission line was severely affected.

27. The Petitioner has submitted that the issues relating to communal riots, civil disturbances and farmer agitation were unexpected events which were beyond the



control of the Petitioner and the same fall under the category of Force Majeure events as defined in the TSA. The said events resulted in obstructions in the movement of machinery, material and labour at the project sites. The Petitioner has submitted that it has lost 55 days due to above communal disturbances. The Petitioner has given the following details of the loss of 55 days:

S. No	Event	Start	End	Delay
1.	Conflict in Sikh community on Management of Gurudwara	2.8.2014	7.8.2014	5
2.	Conflict and communal tension in Malerkotla	12.9.2015	29.9.2015	17
3.	Farmer agitation in Punjab	8.10.2015	16.10.2015	8
4.	Desecration of Shri Guru Granth Sahib	14.10.2015	31.10.2015	17
5.	Jat Agitation for caste-based reservation in Haryana	19.2.2016	25.2.2016	6
6.	Desecration of Quran	24.6.2016	26.6.2016	2

28. The Petitioner has submitted that the situation during the said events were such that the Petitioner was in a life-threatening situation and as such could not have risked its manpower and other resources. The only remedy was to wait till the District Administration was able to control the situation and put life back to normal. The Petitioner has submitted that in the course of occurrence of all the events as stated above, apart from monthly Reports, it has sent various letters to the LTTCs and CEA giving updates about the same.

### **(IX) Severe Right of Way Issues**

29. The Petitioner has submitted that multiple litigations were filed in various forums by private individuals on account of Right of Way in the route of transmission lines. The



hindrances due to RoW issues cannot at all be anticipated at the time of RFP and the Petitioner had to fight to sort out the said issues with intervention of the CEA and District Authorities. The Petitioner has submitted that it has duly and regularly apprised the RoW issues to the various LTTCs and the CEA through its Monthly Project Reports as well as through various letters. The aforesaid RoW issues resulted in delay in completion of the project beyond scheduled COD and apart from litigation cost, a huge amount of compensation was also paid by the Petitioner.

**(X) Demonetisation**

30. The Petitioner has submitted that the Government of India on 8.11.2016 demonetized High Denomination Bank Notes of ₹500/- and ₹1,000/-. This adversely affected the execution of the Transmission Project on account of the fact that the construction labour is paid daily wages in hard cash. Due to restricted cash withdrawal limits imposed by the Government of India, there was delay in payment of wages to the labourers. The Petitioner has submitted that demonetisation has severely affected the site execution from 9.11.2016 to 1.1.2017 and delayed the completion of project.

**(XI) Increase in compensation payments towards Right of Way due to MoP Notification**

31. The Petitioner has submitted that the Ministry of Power vide Notification No. 3/7/2015-Trans. dated 15.10.2015, issued guidelines for payment of compensation towards damages in regard to Right of Way for transmission lines. Pursuant to the said guidelines, farmers started demanding the enhanced compensation in line with above guidelines, which led to increase in RoW issues and also cost of RoW compensation.



Therefore, in order to resolve the issue and as per the guidelines of the MoP, the Petitioner had to pay high compensation of ₹4.72 crore to the agitating farmers, which resulted in additional financial burden upon the Petitioner.

**(XII) Change in Taxes**

32. The Petitioner has submitted that various taxes/ cess/ duties changed after the work was awarded to the Petitioner viz. (i) the rate of Excise Duty increased from 12.36% to 12.5% with effect from 1.3.2015; (ii) the rate of service tax increased from 12% to 14% (including cess) with effect from 1.6.2015; (iii) imposition of Swachh Bharat Cess with effect from 15.11.2015 at the rate of 0.5% on the value of taxable services, imposition of Krishi Kalyan Cess with effect from 1.6.2016 on all taxable services, other than services which are fully exempt from Service Tax or services which are otherwise not liable to Service Tax under section 66B of the Finance Act, 1994, at the rate of 0.5%; and (iv) imposition of Krishi Kalyan Cess at the rate of 0.5% with effect from 1.6.2016 on all taxable services, other than services which are fully exempt from Service Tax or services which are otherwise not liable to Service Tax under section 66B of the Finance Act, 1994, at the rate of 0.5%. The Petitioner has submitted that change in taxes resulted in additional financial burden of ₹5 crore (approx).

**(XIII) Issue with PSPCL relating to conversion of 66 kV Lines from Poles to Towers:**

33. The Petitioner has submitted that Punjab State Power Corporation Ltd. (PSPCL) converted 5 nos. of their existing 66 kV transmission lines from poles to towers, in the route of 400 kV D/C Malerkotla – Amritsar Transmission Line of the Petitioner, which was not envisaged at the time of RFP. Therefore, the Petitioner had to provide



additional tower extensions in the particular crossing segment to maintain suitable electrical clearances from these 66 kV tower lines. Thus, the said work was an additional task which the Petitioner was required to do as per the requirement of PSPCL.

34. The Petitioner has submitted that the Petitioner vide its letters dated 21.3.2016 and 28.6.2016 requested PSPCL to under-cross their 66 kV transmission lines. However, no response was being received in spite of repeated letters and physical visits made by the Petitioner. However, PSPCL on 18.10.2016, agreed to lower the heights of its 66 kV towers subject to payment of ₹12.43 lakh towards the cost of doing the needful and the Petitioner deposited the said amount with PSPCL on 25.1.2017. The Petitioner has contended that the said unforeseen deadlock situation resulted in loss of approximately 7 months (from 21.3.2016 to 18.10.2016) and additional cost of ₹0.124 crore as per PSPCL demand letter dated 18.10.2016. The Petitioner has submitted that it has sent updates to the LTTCs and the CEA, through its various monthly Reports and other communications.

**Financial impact on the Project:**

35. The Petitioner has submitted that as a result of the combined factors as stated above, there has been a loss of 128 days in the 400 kV D/C Kurukshetra–Malerkotla Transmission Line which was put into commercial operation on 18.1.2017 and a loss of 196 days in the 400 kV D/C Malerkotla–Amritsar Transmission Line which was declared as deemed commissioned on 27.3.2017. The said delay on account of unforeseen circumstances and also due to change in law, Force Majeure and change in Design &



work scope has had a material adverse impact on the project in terms of cost. There has been an additional cost burden of ₹25.83 crore due to the said delay on account of additional IDC and ₹26.10 crore on account of additional expenditure on Forest Clearance, Change in Law and Change in Scope, Design & Law. Due to the said delay, the Petitioner lost ₹58.67 crore of its revenue for the first year which was the highest in the entire span of 35 years. Therefore, there has been an increase in the total cost of the project which necessitates ₹14.04 crore increase in the levelised Transmission Charges as per Clause No. 12.2.1 of the TSA and extension of Scheduled COD to Actual COD of the Project.

36. The Petitioner has submitted that it is seeking recompense for the actual additional expenditure incurred on account of the unforeseen and uncontrollable events that have taken place subsequent to the award of the Project.

**Submissions of the Respondents and Rejoinders of the Petitioner:**

37. Petition was admitted on 15.2.2018 and notices were issued to the respondents to file their reply. PGCIL, UPPCL, RECTPCL and PSPCL have filed their reply and Petitioner has also filed its rejoinder to the same.

38. Power Grid Corporation of India Limited (PGCIL) vide its reply dated 31.10.2017 has submitted as under:

a) **Delay in confirmation of Gantry Co-ordinates and change in Gantry Co-ordinates at Malerkotla and Kurukshetra Sub-station:** PGCIL has submitted that the



Petitioner vide its letter dated 14.5.2014 requested for gantry coordinates and PGCIL vide its letter dated 4.7.2014 had informed the Petitioner that there may be change in the North Coordinate by few meters during detailed engineering. Thereafter, the Petitioner after a gap of more than one year vide its letter dated 27.8.2015 sought clarification pertaining to change in North Coordinate gantry at Kurukshetra. In the said letter, the Petitioner had also acknowledged the receipt of GA & SLD of the bays at Malerkotla, Kurukshetra & Amritsar substation on 4.7.2014 and the coordinates were provided on 10.10.2015.

b) **Change in Tower Extension:** It is prime responsibility of transmission line executing agency to ensure that line terminating at the substation does not block the future corridor of the existing substation and route alignment near substation must be shared with respective site in-charge of substation. But same was not taken into consideration by the Petitioner, which resulted in blockage of future corridor at Malerkotla end. Therefore, the matter was taken up with the Petitioner vide letter dated 11.5.2016 and subsequent meeting was held with CEA on 27.5.2016 for resolving the issue. During the meeting, CEA advised the Petitioner to raise the height of only one tower by 9 meters to avoid blockage of future corridor. Therefore, there was no delay on this account as height of only one tower no 71/0 has to be raised by 9 meters which can be done within 10-15 days.

c) **Requirement of Multi circuit Towers for transmission line termination at Malerkotla Substation end:** PGCIL vide letter dated 4.7.2014 have provided GA & SLD of Malerkotla substation wherein it was clearly mentioned that 400 kV D/C Amritsar-



Malerkotla line and Kurukshetra-Malerkotla line has to be terminated on double level Gantry. However, the contention of Petitioner that multi-circuit tower is required to terminate the same is not correct as same can be done by installing two number of D/C towers as done at Kurukshetra end by the Petitioner. Therefore, there was no requirement from PGCIL side to install M/C tower and the same was installed for the Petitioner's own convenience.

d) **Stoppage of Work at Amritsar entry due to PGCIL request for re-alignment of the route:** PGCIL vide its letter dated 2.2.2016 has raised its concern for blockage of future corridor by the Petitioner and vide its letter dated 5.2.2016 additionally requested the Petitioner with a copy to CEA for providing the final dead end location, so that line side equipment foundation can be freezed. A subsequent meeting with the CEA was also convened on 7.3.2016 but the Petitioner was not present in the meeting. Finally, a meeting was held on 27.5.2016 with CEA wherein the issue was resolved with no change in route. Therefore, there is no delay on part of PGCIL as the matter was immediately brought to the notice of CEA.

e) **Fault at PGCIL Malerkotla Substation end during charging of Kurukshetra-Malerkotla:** The Petitioner's contention that charging on 11.1.2017 was not possible due to wrong switching operation at Malerkotla end is not true. The fault occurred due to failure of one of the equipment and despite that 400 kV Kurukshetra-Malerkotla TL was charged on 15.1.2017 i.e. after a gap of 4 days which is negligible.

39. The Petitioner vide affidavit dated 27.3.2018 has filed rejoinder to the reply of PGCIL and has submitted as under:



a) Although, PGCIL vide letter dated 4.7.2014 provided the SLD & Layout of the sub-station and at the same time also conveyed to Petitioner that North coordinate may be changed during detailed engineering. Hence, Petitioner was unable to consider the coordinates provided by PGCIL as the final one. So, despite having received GA and SLD showing the bays allotted at Malerkotla, Kurukshetra and Amritsar Substations vide PGCIL response dated 4.7.2014, the Petitioner again requested PGCIL to confirm gantry coordinates on 27.8.2015. In response, PGCIL vide letter dated 10.10.2015 provided (confirmed) gantry coordinates of Malerkotla Substation only. Thus, the Petitioner waited for more than one year for confirmation of the gantry coordinates from PGCIL. It was only after the direction of CEA vide MoM dated 15.1.2016 that PGCIL vide its letter dated 12.3.2016, confirmed the gantry coordinates for Kurukshetra Substation to Petitioner. Hence, the gantry coordinate confirmation for PGCIL Kurukshetra end was provided only on 12.3.2016, at a very later stage of project construction, in absence of which Petitioner was unable to finalize its transmission line route near the PGCIL substation locations. The actual gantry coordinates of PGCIL at Kurukshetra and Malerkotla end were different from RFP, which ultimately led to increase in the Petitioner's line. The difference between the Actual and RFP Specified coordinates caused change in the entry alignment of 400 kV D/C Kurukshetra – Malerkotla line.

b) The issue related to change in Tower extension at location no. 71/0 was resolved after the intervention of CEA. However, at that time Petitioner had completed the foundation work of the location and the Petitioner was required to carry out the dismantling of existing foundation, casting of new foundation and manufacturing and supply of extra tower extension, for which additional time was required.



c) As per the scope of work mentioned in the RFP, no Multi-Circuit Towers were envisaged. However, as per PGCIL, both 400 kV D/C Kurukshetra - Malerkotla and 400 kV D/C Malerkotla – Amritsar Lines needed to terminate/ emanate at double level gantry at PGCIL 400 kV Malerkotla substation, due to which Multi-Circuit Tower was required to be installed in order to facilitate the entries of both lines at Malerkotla Sub-station. The same was a change in scope of work post submission of bid, issuance of LOI and execution of TSA. The same caused time overrun in implementing the transmission project qua the original time lines. On account of the above, the Petitioner had to design an additional tower so as to complete the lines.

40. UPPCL in its reply dated 30.5.2018 has submitted as under:

a) The Commission does not have any jurisdiction to decide the present petition. The Commission has powers to revise the tariff in a concluded PPA keeping in view the change in circumstances of the case where revision of tariff is required to meet the objective of the Electricity Act, 2003.

b) Maximum period of Non-Natural Force Majeure condition is as follows:

(i) In case of Asset (a) i.e. 400 kV Kurukshetra - Malerkotla line, the maximum period of Force Majeure condition from 11.9.2016 (scheduled COD) to 11.1.2017 is 120 days.

(ii) In case of Asset (b) i.e. 400 kV Malerkotla -Amritsar line, the maximum period of Force Majeure condition from 11.9.2016 (scheduled date of completion) to 18.2.2017 is 157 days.



However, the actual delay in case of Asset (a) is 128 days and in case of Asset (b) it is 196 days.

c) In case of Asset (a), the period of liquidated damages is 128 days - 120 days i.e. = 8 days. Therefore, the period for which IDC is permissible is only 120 days and the period for which liquidated damages is applicable is only 8 days. Similarly in case of Asset (b) the period of liquidated damages is 196 days - 157 days i.e. = 39 days. Therefore, the period for which IDC is permissible is only 157 days and the period for which liquidated damages are applicable is only 39 days.

41. RECTPCL in its reply dated 30.5.2018 has submitted as under:

a) The PSR highlighted that one route out of the three indicated routes had forest area. Further, the routes were only indicative in nature and the same was clarified as per the disclaimer provided under the PSR according to which the bidders had to carry out their own investigations and detailed surveys before submission of their respective bids.

b) The reading of the provisions of RFP makes it clear that the PSR provided an indicative route alignment for the Project and the prospective bidders were adequately put on notice and ought to have done their own surveys and investigations in order to fully assess the implementation risks and the forest areas involved in the Project. Therefore, the BPC bears no responsibility or liability to the Petitioner, or the bidders.



c) Clause 5.1.4 of the Draft TSA (which formed a part of the RFP) made it clear that the TSP alone shall be responsible for the survey and geo-technical investigation of the line route in order to determine the final route of the transmission lines.

d) As per the terms of the RFP and the Lol, the selected bidder was required to complete the activities mentioned in Clause 2.4 of the RFP within 10 day of the issue of Lol. It is only upon completion of the activities as mentioned in Clause 2.4 of the RFP that RECTPCL proceeded to obtain the requisite internal approvals and pursuant to having obtained the same, executed the SPA on 12.5.2014. The transfer of the SPV on 12.5.2014 cannot be said to have caused any prejudice to the Petitioner since the Scheduled COD (of 28 months) is computed from the Effective Date. Effective Date is defined in the Draft TSA as being the later of:

- i. execution of the TSA;
- ii. Selected bidder has acquired 100% shares of the SPV; and
- iii. date of submission of the Contract Performance Guarantee.

Therefore, the Effective Date commenced only on 12.5.2014 and the Petitioner did not suffer any delay or prejudice in implementation of the Project as per the terms of the RFP and the TSA

e) The PSR provided indicative route alignments and termination point/ gantry coordinates. The bidders were well aware that the final gantry coordinates are within the sole domain of the PGCIL and the BPC relied on the information furnished by the PGCIL for indicating gantry coordinates on the indicative routes. It was known to the



bidders that the final position of terminating points would depend on the final route chosen by the Petitioner for the transmission lines.

42. The Commission vide RoP dated 12.4.2018 directed REC to submit the following information, on affidavit:

“a) Clarify on the claim of the petitioner that forest area was not envisaged in the survey report.

b) Position in the bidding documents to ensure co-ordinates are granted to bidder on time and what is procedure to ensure the same? How is associated commercial implication covered under TSA?”

43. RECTPCL with regard to query (i) above, has submitted that the Survey Report submitted by RECTPCL mentioned existence of forest land on one of the three alternative routes for the Kurukshetra - Malerkotla transmission line. While the Survey Report did not mention existence of forest land on other routes indicated for the transmission line, the prospective bidders were adequately forewarned to conduct their own independent surveys and investigation of the transmission line routes prior to submission of their bids. The disclaimer contained in the Survey Report made amply clear that the Survey Report was only indicative in nature. Further, the RFP issued by RECTPCL also made it clear that the bidders should visit the route concerning the Project and its surrounding areas to obtain or verify all the required information and also conduct the requisite investigation before submitting their bids.

44. With regard to query no. (ii) above, RECTPCL has submitted that as per the disclaimer contained in the Survey Report, the bidders were required to coordinate with and obtain the transmission line termination points from the responsible agency, i.e.



PGCIL and coordinates provided in the Survey Report was only for the purpose of location of sub-stations. Further, Clause 1.5 of the RFP states that the bidders be provided the coordinates (indicative in nature as per the Disclaimer provided in the PSR) at least 45 days prior to the bid deadline and the same were provided to the bidders sixty one (61) days in advance. Further, there is no provision for any time extension or cost escalation for any delay associated in obtaining gantry coordinates/ termination points of the transmission lines since as per the RFP (and the Draft TSA), the bidder had assumed responsibility for obtaining the same from the concerned agency.

45. The Commission vide RoP dated 12.4.2018 had directed the Petitioner to submit the following information and the same has been submitted by the Petitioner as under:

- a) Documentary proof for original estimated project cost and IDC and IEDC considered in deciding original project cost;
- b) Auditor's certificate clearly mentioning the actual capital cost and actual debt equity during construction period with documentary proof;
- c) Audited accounts for all the years during construction up to the financial year 2016-17; and
- d) Clarification as to how the effective date and SCOD has been determined for each element with reference to Article 2.1 and Schedule 3 of the Transmission Service Agreement.



e) The Petitioner has submitted that as per Article 2.1 of Transmission Service Agreement, the Effective Date has been defined as under:

“ .....

**“2.1 Effective Date:**

The Agreement shall be effective from later of the following events:

- a) The Agreement is executed and delivered by the Parties;
- b) The selected Bidder has acquired for the Acquisition Price, 100% of the equity shareholding of REC Transmission Projects Co. Ltd. in NRSS XXXI (B) Transmission Ltd. along with all its related assets and liabilities as per the provisions of the Share Purchase Agreement;
- c) The Bidder, on behalf of the TSP, has provided the Contract Performance Guarantee, as per terms of Article 3.1 of this Agreement.

.....”

The sequence of events (as per Article 2.1 of TSA) are as below:

<b>Sr. No.</b>	<b>Event</b>	<b>Completion date</b>
1	Execution of Transmission Service Agreement	2.1.2014
2	Submission of Contract Performance Guarantee by successful Bidder	18.3.2014
3	Acquisition of SPV (NRSS XXXI (B) Transmission Ltd.) by successful Bidder (Essel Infraprojects Ltd.)	12.5.2014

Accordingly, as per Article 2.1 of Transmission Service Agreement, the Effective Date of the Project is 12.5.2014. Further, as per Schedule 3 of TSA, the Scheduled COD of the Project is 28 months from Effective date. It is submitted that as per Article 2.1 of TSA read with Schedule-3 of TSA, the Scheduled COD of both the Elements of the Project is 12.9.2016

f) The Petitioner was asked to “categorize the events under force majeure and change in law separately along with the details of additional cost incurred linking with the clauses of TSA”. The Petitioner has categorized the events as under:



**For 400 kV D/C Kurukshetra-Malerkotla Line:**

**1. Events under Change in Law:**

Sr. No.	Event	TSA Clause	Delay (Days)	Additional cost incurred (₹ in crore)
1	Unforeseen requirement of forest clearance	Article 12.1.1	439	3.34
2	NGT Order dated 19 <sup>th</sup> May 2016, banning cutting of trees in entire State of Punjab and proceedings of Hon'ble High Court of Punjab and Haryana seeking relief from NGT Order	Article 12.1.1	237	IDC
3	Change in Taxes & Duties (Excise Duty, Service Tax, Swachh Bharat Cess, Krishi Kalyan Cess) *This cost is for both Elements.	Article 12.1.1	–	0.57*
4	Increase in Compensation payments towards Right of Way (RoW) due to Ministry of Power Notification dated 15.10.2015	Article 12.1.1	–	3.91
5	Change in Kurukshetra sub-station Gantry coordinates and subsequent change in connection arrangement for 400 kV D/C Kurukshetra-Malerkotla Transmission line	Article 12.1.1	120	6.88 + IDC
6	Change in Malerkotla sub-station Gantry coordinates and subsequent change in connection arrangement for 400 kV D/C Kurukshetra-Malerkotla Transmission line	Article 12.1.1	60	
7	Change in extension of Tower at Loc. No. 71/0	Article 12.1.1	82	IDC

**2. Events under Force Majeure:**

Sr. No.	Event	TSA Clause	Delay (Days)	Additional cost incurred (₹ in crore)
1	Delay in grant of forest clearance	Article11.3	439	IDC
2	Delay in confirmation of Gantry Coordinates at PGCIL Kurukshetra end	Article11.3	120	IDC
3	Delay in confirmation of Gantry Coordinates at PGCIL Malerkotla end	Article11.3	60	IDC
4	Fault at PGCIL Malerkotla Substation end during first charging of 400 kV D/C Kurukshetra - Malerkotla Line	Article11.3	04	IDC



Sr. No.	Event	TSA Clause	Delay (Days)	Additional cost incurred (₹ in crore)
5	Local unrest, communal violence and Farmer Agitation			
A	Conflict in the Sikh Community in management of Gurudwara	Article11.3	05	IDC
B	Conflict and Communal tension in Malerkotla	Article11.3	17	IDC
C	Farmers agitation in Punjab	Article11.3	08	IDC
D	Desecration of Shri Guru Granth Sahib	Article11.3	17	IDC
E	Jat Agitation for caste based reservation in Haryana	Article11.3	06	IDC
F	Desecration of Quran	Article11.3	02	IDC
6	Severe Right of Way issues	Article11.3	596	IDC
7	Demonetisation	Article11.3	53	IDC
8	Delay in transfer of SPV	Article11.3	65	IDC

**For 400 kV D/C Malerkotla-Amritsar Line:**

**1. Events under Change in Law:**

Sr. No.	Event	TSA Clause	Delay (Days)	Additional cost incurred (₹ crore)
1	Unforeseen requirement of forest clearance	Article 12.1.1	396	6.03
2	NGT Order dated 19 <sup>th</sup> May 2016, banning cutting of trees in entire State of Punjab and proceedings of Hon'ble High Court of Punjab and Haryana seeking relief from NGT Order	Article 12.1.1	314	IDC
3	Change in Taxes & Duties (Excise Duty, Service Tax, Swachh Bharat Cess, Krishi Kalyan Cess) *This cost is for both Elements.	Article 12.1.1	—	*0.57
4	Increase in Compensation payments towards Right of Way (RoW) due to Ministry of Power Notification dated 15.10.2015	Article 12.1.1	—	0.82



Sr. No.	Event	TSA Clause	Delay (Days)	Additional cost incurred (₹ crore)
5	Issue with PSPCL relating to conversion of 66 kV lines from Poles to Towers (Amritsar)	Article 12.1.1	211	IDC
6	Requirement of Multi-circuit tower for Transmission line termination at Malerkotla Substation end	Article 12.1.1	90	IDC

## 2. Events under Force Majeure:

Sr. No.	Event	TSA Clause	Delay (Days)	Additional cost incurred (₹ in crore)
1	Delay in grant of forest clearance	Article 11.3	396	IDC
2	Stoppage of work at PGCIL Amritsar S/s entry due to PGCIL request for re-alignment of 400 kV D/C Malerkotla-Amritsar Line	Article 11.3	121	IDC
3	Delay in confirmation of Gantry Coordinates at PGCIL Malerkotla end	Article 11.3	60	IDC
4	Local unrest, communal violence and farmers agitation			
A	Conflict and Communal tension in Malerkotla	Article 11.3	17	IDC
B	Farmers agitation in Punjab	Article 11.3	08	IDC
C	Desecration of Shri Guru Granth Sahib	Article 11.3	17	IDC
D	Jat agitation for caste based reservation in Haryana	Article 11.3	06	IDC
E	Desecration of Quran	Article 11.3	02	IDC
5	Severe Right of Way issues	Article 11.3	689	IDC
6	Assembly Elections in Punjab	Article 11.3	30	IDC
7	Demonetisation	Article 11.3	53	IDC
8	Delay in transfer of SPV	Article 11.3	65	IDC



g) The Petitioner was directed to indicate “How the increase in the levelised transmission charges of ₹14.04 crore has been quantified”. The petitioner has submitted that it has computed the increase in the levelised transmission charges as per the Article 12.2.1 of Transmission Service Agreement, as reproduced below:

“.....

**12.2.1 During Construction Period:**

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

- For every cumulative increase/decrease of each Rupees One Crore Fifteen Lakhs Eighty Thousand Only (Rs. 1.158 Cr.) in the cost of the Project up to the Scheduled COD of the Project, the increase/decrease in non-escalable Transmission Charges shall be an amount equal to Zero Point Three One Three percent (0.313%) of the Non-Escalable Transmission Charges.....”

h) As directed the Petitioner has submitted the “Auditor certified IDC computation for the period from actual drawl to SCOD and from SCOD to till the actual COD of concerned assets as per the details given below:-

- i. Loan-wise gross interest indicating the outstanding loan, rate of interest applied along with documentary proof for outstanding loan and rate of interest;
- ii. Interest income made from the temporary parking of fund up;
- iii Net interest capitalized and booked into Profit and Loss account;
- iv Basis of allocation of IDC and FC among the assets (Element 1 and 2) which were commissioned in different dates;
- v. Provide the above computations in Excel format along with all computation links;

i) The Petitioner was directed to submit the details of computation for the increase in tax separately for service tax and excise duty worked out on the original estimated cost after deducting the estimated exclusions for which the service tax and excise duty are not applicable, duly certified by Auditor Certificate along with the documentary proof for payment of these taxes;



In response, the Petitioner has submitted the computation for the increase in tax separately for service tax and excise duty worked out on the original estimated cost after deducting the estimated exclusions for which the service tax and excise duty are not applicable, duly certified by the Auditor Certificate along with the documentary proof for payment of these taxes. The details of increase in service tax and excise duty are as follows:-

Sr. no.	Tax type	Additional Cost incurred (in ₹)
1	Excise duty (Increased from 12.36% to 12.50%)	18,02,149
2	Service Tax (Increased from 12.36% to 15.00%)	38,94,573
<b>Total</b>		<b>56,96,722</b>

j) As directed by the Commission, the Petitioner has submitted the PERT Chart detailing the schedule of different activities envisaged to be undertaken in execution of the project.

k) As regards details of areas for which forest clearance was applied, the petitioner has submitted that the details of Geo Maps showing details of all forest patches along the roads, rivers, canals and Railways alongwith application of forest, for 400 kV D/C Kurukshetra - Malerkotla and 400 kV D/C Malerkotla - Amritsar Transmission Lines.

l) As regards the route adopted for execution, of the three alternative routes provided in the survey report, the petitioner has submitted that it has followed Route-01 of the three routes provided in the survey report enclosed with the RFP documents for the construction of this Transmission Project.



46. The Petitioner in its rejoinder to the reply filed by UPPCL, vide affidavit dated 28.6.2018, has submitted as under:

a) UPPCL's contention that since the tariff of the present assets was not determined by this Commission and, therefore, the Commission does not have the jurisdiction to adjudicate in the present petition is not sustainable. The Petitioner submits that provisions of the Transmission Service Agreement (TSA) and the Competitive Bidding Guidelines provide that the Commission has power to adjudicate any dispute regarding TSA or tariff.

b) The Petitioner has submitted that UPPCL has allowed the maximum period of Force Majeure conditions and the permissible IDC for the project Elements as under:

<b>Sr. No.</b>	<b>Project Element</b>	<b>Scheduled COD</b>	<b>End of Force Majeure event as per Respondent no. 01</b>	<b>No. of days</b>
1	400 kV D/C Kurukshetra-Malerkotla Line	12.9.2016	11.1.2017	122
2	400 kV D/C Malerkotla-Amritsar Line	12.9.2016	18.2.2017	160

c) The 400 kV D/C Kurukshetra-Malerkotla Line was first time charged on 11.1.2017. However, due to wrong switching operation of Amritsar line bus isolator by PGCIL, fault occurred at PGCIL Malerkotla Substation, which also tripped all the lines. Thereafter, the system was restored by PGCIL after GIS fault removal on 15.1.2017 and 400 kV D/C Kurukshetra- Malerkotla Line could be charged again on 15.1.2017. Hence, the force majeure event in 400 kV D/C Kurukshetra-Malerkotla Line persisted till 17.1.2017.



d) The Petitioner was unable to complete the transmission line work, pending tree cutting in 400 kV D/C Malerkotla- Amritsar Line in absence of signed copy of Order of High Court of Punjab & Haryana dated 24.1.2017 as the Forest Department did not allow tree cutting in absence of that. After pursuing the matter, the Petitioner declared the deemed commercial operation of 400 kV D/C Malerkotla-Amritsar Line on 27.3.2017. Hence, the force majeure event in 400 kV D/C Malerkotla- Amritsar Line extended till 26.3.2017. It is submitted that after consideration of the events as described above, the maximum period of Force Majeure conditions and the permissible IDC for the project Elements are as under:

<b>Sr. No.</b>	<b>Project Element</b>	<b>Scheduled COD</b>	<b>End of Force Majeure event as per Petitioner</b>	<b>No. of days</b>
1	400 kV D/C Kurukshetra- Malerkotla Line	12.09.2016	17.01.2017	128
2	400 kV D/C Malerkotla-Amritsar Line	12.09.2016	26.03.2017	196

Hence, the delay in transmission project is mainly due to unforeseen force majeure and Change in Law events, which were beyond the control of Petitioner.

47. The Petitioner vide affidavit dated 28.6.2018 has filed rejoinder to the reply filed by RECTPCL where the Petitioner has mainly reiterated the submission made in the Petition.

48. PSPCL vide its reply dated 9.7.2018 has submitted as under:-



a) The Appellate Tribunal vide its judgment dated 6.4.2016 in Appeal No. 86 of 2015 considered the scope of the Force Majeure and Change in Law clauses qua a Competitive Bidding Transmission Services Agreement as under:—

- (I) In terms of the Bid Documents, the only relief available for Force Majeure events under the TSA is an extension of SCOD without having to pay liquidated damages;
- (II) An increase or enhancement in tariff cannot be claimed for Force Majeure events;
- (III) Even if an event is declared to be a Force Majeure, the framework of the competitive bidding under Section 63 of the Electricity Act permits time extension and not cost escalation;
- (IV) The principle which applies to a Change in Law clause is different and permits parties to make certain claims provided the threshold mentioned in the said clause are satisfied.

b) The Petitioner has made its claim under both Force Majeure and Change in Law for the same events. The term 'relief' does not account for Force Majeure events as an inclusive term which permits grant of restitutive relief to the Petitioner. This is the misconception on which the petition proceeds and is against the express provisions of the TSA and the above judgment of the Appellate Tribunal.

c) The Hon'ble Supreme Court in its Energy Watchdog judgment dated 11.4.2017 considered the scope of the Force Majeure clauses in similar PPAs and held that mere change in prices/ costs of inputs would not be a Force Majeure. The Judgment also settles the position that the Regulatory Commissions do not have general regulatory powers to grant compensatory/ restitutory relief. Further, the 'Force Majeure' Exclusion clause provided in the PPA (which is the same as Article 11.4 of the present TSA) specifically states that the agreement becoming onerous to perform is not to be treated as a force majeure event. The Petitioner has wrongly claimed reimbursement of costs incurred as a result of Force Majeure Events under Article 11.3. This is entirely



impermissible. The events cited by the Petitioner are not force majeure events and in any case, no cost escalation can be granted to the Petitioner on account of the alleged Force Majeure Events.

d) The petition is not maintainable in the present form. The TSA provides one set of relief for Force Majeure and quite another for Change in Law.

e) The reasons cited by the Petitioner for the delay in SCOD are only the general approvals which are required for setting up transmission Project and which are known much in advance to all bidders. For instance, land acquisition, procurement of equipment, getting authorisation under Section 164 of the Act which are usual processes and for which the bidding conditions allowed a period of 28 months, are all now being claimed by the Petitioner as force majeure events.

f) As regards delay in grant of forest clearance, it was within the knowledge of the Petitioner that it was its responsibility to seek access to the sites and places where the project was to be executed at its own cost including payment of any compensation for the same. The TSA also states that even when a resettlement and rehabilitation package is to be implemented, it would have to bear the cost for the same and no charges will be allowed in the form of transmission cost for the same. PSPCL has further submitted that the Disclosures made in the Survey Report of RECTPTL clearly has a 'DISCLAIMER' to the effect that the bidders had to fully inform and equip themselves of the sites/ routes. This cannot be raised by the Petitioner as a Force Majeure against the Respondents.



- g) The 'Preliminary Survey Report' only relates to methodology, weather chart and rainfall, location detail of sub-stations, GPS coordinates of three proposed alternative, drawing showing three proposed alternatives on topo-sheets, comparative statement of three proposed routes, technical profile of project, details of major crossings encountered, angle point details and final proposed route on digitized topo-sheets.
- h) There are data gaps in the contentions of the Petitioner and it has only produced part of the records to contend that the delay in forest clearance is a Force Majeure event. The Petitioner has contended that the forest clearance process is time consuming and cumbersome and therefore needs to be treated as a force majeure event under the TSA.
- i) As regards Petitioner's claim of delay in commissioning the lines on account of NGT stay order, PSPCL has stated that the order of NGT putting a blanket ban on cutting of trees in the State of Punjab was passed on 19.5.2016 i.e. almost after two years of signing the TSA. As per the transmission license dated 25.8.2014, the Project completion period was 28 months from its Effective date i.e. 11.9.2016. The interim order passed by NGT was 4 months prior to the completion date of the project. Therefore, there is no basis at all for the Petitioner to claim the change in format for obtaining FRA clearance as either a force majeure or a change in law.
- j) The change in law provision in the TSA i.e. clause 12.2.1 only incorporates the change in tax or introduction of any tax made applicable for providing Transmission Service by the TSP and not for other purposes. The Petitioner cannot claim relief of



change in law and ask for a compensation of ₹5 crore by stating that introduction of such taxes such as Swachh Bharat Cess and Krishi Kalyan Cess are enactments which came into effect pursuant to the present law. Such a clause in the TSA is only a general clause which cannot override the specific clause on taxes under Article 12 of the TSA.

k) Krishi Kalyan Cess and Swachh Bharat Cess have been imposed to finance and promote initiatives to improve agriculture or for any other purpose relating thereto. The Excise Duty is only applicable in case there is any kind of import or export. None of the above tax/cess relates to transmission services and, therefore, cannot come under the purview of Clause 12 of the TSA related to change in law. Thus, the contention of the Petitioner in regard to change in taxes is wrong and denied. The Petitioner has also not identified the equipment on which excise duty has increased nor the services on which the service tax has gone up. With regard to Swachh Bharat Cess and Krishi Kalyan Cess, again the services on which the increase is being claimed needs to be identified by the Petitioner.

l) As regards claim of delay in transfer of SPV, as per the RFP, the SPV was scheduled to be transferred on 4.3.2014. However, there has been a delay of about 65 days in transferring the SPV. The transfer took place on 12.5.2014. The relation between May 2014 and September 2016 is not very clear. Merely because the SCOD would fall in September 2016 cannot be a reason for delay in project execution.

m) As regards Petitioner's claim of delay due to State Assembly Election in the State of Punjab, PSPCL has submitted that the State Assembly Elections in Punjab were



notified only on 11.1.2017 whereas the SCOD was 11.9.2016. Any event that takes place post the SCOD cannot be seen to have any effect on the COD of the project and cannot, therefore, be considered a force majeure event as per Article 11.3 of the Transmission Service Agreement.

n) As regards Petitioner's claim of delay due to change in scope on account of gantry coordinates, PSPCL has submitted that the possibility of a change in North Coordinates by few meters during detailed Engineering was communicated to the Petitioner vide letter dated 4.7.2017. However, the Petitioner did not respond to the said letter and it was only after one year that the Petitioner sought clarifications regarding the change in North coordinate of the gantry at Kurukshetra. PGCIL immediately replied to the queries raised by the Petitioner and also informed them that the change in the North coordinates of the gantry shall have negligible impact on the finalization of the dead end tower.

o) It was the responsibility of the Petitioner to ensure that the transmission lines built by it should not result into blockage of future corridor at Malerkotla end. As the Petitioner had not done its due diligence properly, the Petitioner was asked by the CEA to raise the height of only one tower by 9 meters to avoid blockage of future corridor.

p) PSPCL has submitted that despite bringing it to the knowledge of the Petitioner vide letter dated 4.7.2014 that both the transmission lines need to be terminated on double level Gantry, the Petitioner installed M/C tower as per its convenience. The Petitioner was well aware of all the circumstances before-hand.



q) Delay due to stoppage of work at Amritsar entry due to PGCIL request for re-alignment of the route, PSPCL has submitted that PGCIL vide its letter dated 2.2.2016 brought out the above issue to CEA. In addition, PGCIL also requested the Petitioner vide another letter dated 5.2.2016 to provide the final dead end location so as to freeze the line side equipment foundation. Subsequently, a meeting was convened by CEA on 7.3.2016, but the Petitioner did not attend the meeting. Finally, the meeting was again held on 27.5.2016 wherein the issue was resolved and it was decided that there is no need for change in the route. If the Petitioner was present at the meeting convened on 7.3.2016, the matter would have resolved earlier and there would not have been any delay due to re-alignment of the route. It is because of non-receipt of response from the Petitioner that there was stoppage of work at Amritsar entry.

r) The charging of the transmission line was done on 11.1.2017 whereas the 400 kV Kurukshetra-Malerkotla Transmission Line was charged on 15.1.2017. The charging of the transmission line does not take 4 days. The above-mentioned delay of 4 days in charging of the transmission line was not on account of occurrence of any force majeure events and was solely due to negligence of the Petitioner. Thus, the Petitioner cannot claim any relief of force majeure on the ground of wrong switching operation of the Amritsar-line bus isolator.

s) Extension of scheduled COD may be allowed only on account of delay due to local unrest and communal violence.



- t) The contention of the Petitioner with regard to the delay caused by agitation by the farmers in the State of Punjab is incorrect and cannot be covered under the force majeure clause. The scheduled COD may be extended on this ground without any consequential financial benefit.
- u) As per the transmission license, the Petitioner was required to complete the project within a period of 28 months from 12.5.2014. The issues of right of way, land acquisition, etc. are always faced in execution of a project. The Petitioner should have asked for a period of more than 28 months for completion of the project at the time of granting the transmission license.
- v) The concept of grant of additional IDC and IEDC is necessarily related to the concept of delay in implementation of transmission projects qua the investment approval obtained by transmission licensees whose tariff gets determined under Section 62 of the Act. In case of tariff adoption under Section 63 of the Act, there is no concept of Additional IDC. The Petitioner is expected to implement the transmission system by SCOD. If the project gets delayed, then the Petitioner is required to pay liquidated damages. If the reasons for such delay however get adjudicated as Force Majeure, then the Petitioner need not pay the liquidated damages. But the additional IDC incurred by the Petitioner due to delay is not to be compensated.
- w) The compensation claimed by the Petitioner on account of price variation and margin money is also without any basis and cannot be entertained. Even in case of tariff determination under Section 62, delay due to change in gantry coordinates, farmers agitation, forest clearance, change in extension of tower, etc. are considered by the



Commission as controllable factors. As such, the additional cost on account of the above reasons cannot be passed on to the beneficiaries when the tariff is determined under Section 63 of the Act

49. The Petitioner vide affidavit dated 18.7.2018 has filed rejoinder to the reply of PSPCL. The Petitioner has reiterated the submission made in the Petition.

50. The Commission vide RoP dated 12.4.2018 had directed PGCIL to clarify the reasons for change in gantry coordinates at Malerkotla and Kurukshetra sub-stations of the petitioner and the procedure of informing co-ordinates in all TBCB cases. PGCIL vide affidavit dated 20.7.2018 has submitted as under:-

a) With regard to the procedure adopted by CTU for informing co-ordinates in TBCB projects, the identified BPC approaches CTU for various inputs including co-ordinates for substations associated with the transmission project, for inclusion in the Request for Qualification (RfQ) document. On receipt of such request, in case coordinates pertain to existing substation owned by CTU or ISTS substations under construction by CTU, the co-ordinates of these substation are provided to BPC in consultation with their Engineering Department/Site with the disclaimer that “the coordinates furnished herewith are only tentative coordinates within the substation boundary wall for locating the respective substation site. These should not be treated as the final line termination coordinates”.

b) In case the co-ordinates pertain to intra-State substation or substation of other ISTS licensee, the BPC is informed about the same with a request to seek the information from the respective owner of the substation. In case co-ordinates pertain



to any new ISTS/Intra-State substation, the BPC is suitably informed about the non-availability of the co-ordinates.

c) Further, the BPC while publishing the RfQ documents and survey report mentions the disclaimer about the coordinates and data mentioned in the said documents.

### **Analysis & Decision**

51. After hearing the learned counsels for the Petitioner and the Respondents and perusal of documents on record, the following issues arise for our consideration:-

**Issue No.1.** Whether the Petitioner has duly complied with the provisions of the TSA before approaching the Commission?

**Issue No.2.** Whether the claims of the Petitioner are covered under 'Change in Law' provisions of the TSA?

- (i) Unforeseen requirement of forest clearance and expenditure incurred on account of obtaining forest clearance;
- (ii) Increase in taxes and duties;
- (iii) Change in guidelines issued by Ministry of Power of compensation towards damages in regard to right of way for transmission lines;
- (iv) NGT Order dated 19.5.2016, banning cutting of trees in entire State of Punjab and proceedings of Hon'ble High Court of Punjab and Haryana seeking relief from NGT Order; and
- (v) Issue with PSPCL relating to conversion of 66 kV lines from Poles to Towers.

**Issue No.3.** Whether the following claims of the Petitioner qualify to be covered under Force majeure provisions of the TSA?

- (i) Delay in obtaining forest clearance;



- (ii) Delay in confirmation of gantry coordinates at PGCIL Kurukshetra end and Malerkotla end;
- (iii) Stoppage of work at PGCIL Amritsar Sub-station entry due to PGCIL request for re-alignment of 400 kV D/C Malerkotla- Amritsar Line;
- (iv) Fault at PGCIL Malerkotla Sub-station;
- (v) Local unrest, communal violence and farmers agitation;
  - a. Conflict in the Sikh Community in management of Gurudwara
  - b. Conflict and communal tension in Malerkotla
  - c. Farmers agitation in Punjab
  - d. Desecration of Shri Guru Granth Sahib
  - e. Jat Agitation for caste based reservation in Haryana
  - f. Desecration of Quran
- (vi) Delay due to severe right of way issues in transmission line;
- (vii) Demonetisation;
- (viii) Delay in transfer of SPV; and
- (ix) Assembly Election in Punjab.

**Issue No.4.** Whether the Petitioner is entitled for any relief on account of change in the scope of Request of Proposal relating to design, order and execution.

- (i) Change in gantry coordinates at Malerkotla and Kurukshetra Sub-station ;
- (ii) Change in Tower Extension; and
- (iii) Requirement of Multi circuit Towers for transmission line termination at Malerkotla Sub-station end.

**Issue No.5. What relief the Petitioner is entitled to in the light of answers to the above issues?**

The above issues have been dealt with in succeeding paragraphs.



**Issue No.1. Whether the Petitioner has complied with the provisions of the TSA before approaching the Commission?**

52. The Petitioner has claimed relief under Article 11 (Force Majeure) and Article 12 (Change in Law) of the TSA. The relevant portions of Article 11 and 12 of the TSA are extracted as under:-

**“Article 11 of the TSA provides for Force Majeure as under:**

**“11.2 Affected Party**

“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 the Scheduled COD and/or operation thereafter.

**11.3 Force Majeure**

A ‘Force Majeure’ means any event or circumstance or combination or events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an affected party in the performance of its obligation under the said 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:

Article 12 provides for Change in Law as under:-

**12.1 Change in Law**

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

- The enactment coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India of any law, including rules and regulations framed pursuant to such law;
- A change in the interpretation or application of any law by any Indian Government instrumentality having legal power to interpret such law, or any competent court of law.”

53. Article 11.5 of the TSA provides for notification of Force Majeure events as under:-



#### **“11.5 Notification of Force Majeure event**

11.5.1 the affected party shall give notice to the other party of any event of Force Majeure as soon as reasonably practicable but not later than 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 the breakdown of communication rendering it unreasonable to give notice within the applicable time limit specified therein, then the party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one day after such reinstatement.

Provided that such notice shall be a pre-condition to the affected party 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 measure 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.”

54. A perusal of aforesaid Article 11.5.1 of the TSA, makes it clear that an affected party is mandatorily required to give notice to the other party of any event of Force Majeure as soon as reasonably practicable, but not later than seven days after the date on which the party knew or should have reasonably known of the commencement of the event of Force Majeure. It further provides that such notice of any event of Force Majeure shall be a pre-condition to the affected party`s entitlement to claim relief under the TSA.

55. Article 12.3.1 of the TSA, provides that an affected party is required to give notice to the other party about the occurrence of Change in Law. Relevant excerpt of Article 12.3.1 of the TSA is as under:-



“12.3.1 If the TSP is affected by a Change in Law in accordance with Article 12.1 and wishes to claim relief for such Change in Law under this Article12, it shall give notice to Lead Long TERM Transmission Customer of such Change”

56. It is observed that the Petitioner issued appropriate intimation to the LTTCs under Articles 11 and 12 of TSA qua the Force Majeure and Change in Law events respectively as soon as it became aware of Force Majeure and Change in Law events. The Petitioner has furnished the details of those events in the petition and the gist of these events is as under:-

**Intimation of Change in Law Events**

<b>Srl. No.</b>	<b>Change in Law event</b>	<b>Details of LTTC Intimation</b>
1	Unexpected and unforeseen requirement of forest clearance.	Annexure P18
2	NGT Order dated 19.5.2016, banning cutting of trees in entire State of Punjab and proceedings of Hon'ble High Court of Punjab and Haryana seeking relief from NGT Order	Annexure P21
2	Increase in taxes and duties.	Annexure P14
3	Change in guidelines issued by MoP of compensation towards damages in regard to Right of Way (RoW) for transmission lines.	Annexure P27
4	Change in Gantry Co-ordinates.	Annexure P35, P36 & P37
5	Change in extension of Tower Location 71/0.	Annexure P38
6	Issue with PSPCL relating to conversion of 66 kV lines from poles to towers.	Annexure P33

57. As regards the change in design, order, execution and work scope from RFP, the Petitioner gave due intimation to the LTTC's which are available on record, which are as under :

<b>Srl. No.</b>	<b>Force Majeure event</b>	<b>Details of LTTC Intimation</b>
1	Delay in grant of Forest clearance	Annexure P25
2	Delay in confirmation of Gantry Co-ordinates at PGCIL Kurukshetra end and Malerkotla end;	Annexure P37



<b>Srl. No.</b>	<b>Force Majeure event</b>	<b>Details of LTTC Intimation</b>
3	Stoppage of work at PGCIL Amritsar S/s entry due to PGCIL request for re-alignment of 400 kV D/C Malerkotla- Amritsar Line	Annexure P14
4	Fault at PGCIL Malerkotla Substation	Annexure P43
5	Local unrest, communal violence and Farmer Agitation	Annexure P14 & P44
6	Delay due to severe right of way issues in transmission line	Annexure P14, P44 & P47
7	Demonetisation	Annexure P29
8	Delay in transfer of SPV	Annexure P14
9	Assembly Election in Punjab	Annexure P14

58. The documents placed on record by the Petitioner show that the Petitioner before approaching the Commission had given prior intimations to the LTTC's for occurrence of change in law, Force Majeure and change in scope of work in terms of provisions of TSA. Thereafter, the Petitioner has approached the Commission by filing the present petition. In our view, the Petitioner has complied with the requirement of TSA regarding prior notice to the LTTC's before approaching the Commission. This issue is accordingly answered in favour of the Petitioner.

**Issue No.2. Whether the following claims of Petitioner are covered under the Change in Law provision of the TSA?**

- (i) Unforeseen requirement of forest clearance;
- (ii) NGT Order dated 19.5.2016, banning cutting of trees in entire State of Punjab and proceedings of Hon'ble High Court of Punjab and Haryana seeking relief from NGT Order;
- (iii) Increase in Taxes and Duties;
- (iv) Change in guidelines issued by MoP for compensation towards damage in regard to right of Way for transmission lines



59. The provisions of Change in Law in the TSA are extracted hereunder:

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

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

In the light of the change in law provision, the claims of the Petitioner have been examined.

**(i) Unforeseen requirement of forest clearance and delay in forest clearance**

60. The Petitioner has submitted that as per the Survey Report enclosed with the RFP documents, issued by RECTPCL, there were no forest areas in the routes of the Transmission Line. However, during the detailed survey of the route of the Transmission lines, post-acquisition of the SPV, it came to the knowledge of the Petitioner that the information given in the RFP with regards to the forest was incorrect and infact patches of forest land existed in the route of 400 kV Kurukshetra-Malerkotla and 400 kV



Malerkotla-Amritsar Transmission Lines. This unexpected requirement resulted in the Petitioner applying for permissions with the forest departments of different Districts in State of Haryana as well as Punjab. The Petitioner has further submitted that obtaining Clearance from the Department of Forest is a lengthy, expensive and time taking process which is divided into two stages. The Petitioner informed the said hindrance to the LTTCs through the monthly reports as well as through separate intimations. The Stage I permissions for both the States were granted by the respective Forest Departments after lapse of about 22 months from date of the Application. The Petitioner has submitted that it has also incurred an additional expenditure of about ₹9.37 crore towards the charges paid to the Forest Department for obtaining the said permissions.

61. RECTPCL i.e. the Bid Process Coordinator has submitted that the Survey Report mentioned existence of forest land on one (1) of the three alternative routes for the Kurukshetra - Malerkotla transmission lines. While the Survey Report did not mention existence of forest land on other routes indicated for the transmission lines, the prospective bidders were adequately forewarned to conduct their own independent surveys and investigation of the transmission line routes prior to submission of their bids. It was made amply clear that the Survey Report was only indicative in nature. Further, the RFP too, which was issued on 9.12.2013, clearly stated that the bidders should survey the route concerning the Project and its surrounding areas to obtain or verify all the required information and also conduct the requisite investigation before submitting their bids.



62. PSPCL, has submitted that Petitioner was clear that it was its responsibility to seek access to the sites and places where the project was to be executed at its own cost including payment of any compensation for the same and there is no merit in the claim of the petitioner for claiming ₹9.37 crore towards the charges paid to the Forest Department.

63. We have considered the submission of the Petitioner and Respondents. The Survey Report enclosed with the RFP documents, issued by RECTPCL showing Comparison Statement of three alternative routes is extracted as under:

(a) 400 kV D/C Kurukshetra-Malerkotla Transmission lines

**8.0. COMPARISON FOR THREE ALTERNATIVE ROUTES**  
**400kV D/C Kurukshetra-Malerkotla Transmission Line**

Description	Alternative-I	Alternative-II	Alternative-III
Color in MAP	BLUE	RED	GREEN
B-Line	128.99 Kms.	128.99 Kms.	128.99 Kms.
Route Length	135.15 Kms.	140.63 Kms.	140.86 Kms.
a) Plain Terrain	100%	97%	95%
b) Undulated/Hilly terrain	0%	3%	5%
No. of Angle Points	72	82	89
Population Density	High	High	High
Forest Area	NIL	NIL	2.03Km

(b) 400 kV D/C Malerkotla-Amritsar Transmission lines



**8.0. COMPARISON FOR THREE ALTERNATIVE ROUTES**  
**Malerkotla-Amritsar 400kV D/C Transmission Line**

Description	Alternative 1	Alternative 2	Alternative 3
Color in MAP	BLUE	RED	GREEN
B-Line	143.45 Kms.	143.45 Kms.	143.45 Kms.
Route Length	147.01 Kms.	151.21 Kms.	156.83 Kms.
a) Plain Terrain	100%	100%	96%
b) Undulated/Hilly terrain	0%	0%	4%
No. of Angle Points	91	110	107
Population Density	High	High	High
Forest Area	NIL	NIL	NIL

64. The Petitioner has followed Route-1 from amongst the three alternative routes provided in the survey report for the construction of the transmission project. It can be seen from the tables provided above that neither in case of 400 kV D/C Kurukshetra-Malerkotla Transmission lines nor in case of 400 kV D/C Malerkotla-Amritsar Transmission lines, forest area is mentioned in the survey report in case of Route-1 and Route-2. Prima facie, it appears that there is a merit in case.

65. RECTPCL has submitted that the Survey Report mentioned existence of forest land on one (1) of the three alternative routes for the Kurukshetra-Malerkotla transmission lines. While the Survey Report did not mention existence of forest land on other routes indicated for the transmission lines, the prospective bidders were adequately forewarned to conduct their own independent surveys and investigation of the transmission line routes prior to submission of their bids. It was made clear that the Survey Report was only indicative in nature. Further, the RFP too, which was issued on 9.12.2013, clearly stated that the bidders should survey the route concerning the Project



and its surrounding areas to obtain or verify all the required information and also conduct the requisite investigation before submitting their bids

66. PSPCL has submitted that Petitioner was clear at the time of the bidding that it was its responsibility to seek access to the sites and places where the project was to be executed at its own cost including payment of any compensation for the same and there is no merit in the claim of the petitioner for claiming ₹9.37 crore towards the charges paid to the Forest Department.

67. We have analysed the submissions of the parties on this issue. We feel it appropriate to make a reference here of the Commission's Order dated 8.5.2013 in Petition No. 162/MP/2011 in the matter of East North Interconnection Company Limited Vs. Punjab State Transmission Corporation Limited and Ors., wherein the Commission observed that it was the obligation of the Bid Process Coordinator to prepare a reliable and accurate survey report. The relevant extract of the *ibid* order is as under:-

“45 .....BPC was under obligation to furnish correct information in the bid documents and the disclaimer relied upon by the BPC cannot absolve it of its basic responsibility. We do not approve of the manner in which the process was handled by the Bid Process Coordinator in this matter and direct that for the projects in future, the Bid Process Coordinator should ensure that the scope of work indicated in the bid documents is accurate so that the bidders get correct information for deciding their bids before submission.”

68. On perusal of the record, we find that there was categorical denial in the RFP document prepared by BPC regarding the involvement of any forest area in the transmission line route and same was indicated as “Nil” forest area in the RFP document and survey report. In other words, as per RFP, there was no forest clearance



requirement involved initially at the time of bidding. However, the requirement of forest clearance cropped up for the first time after award of the project work to the Petitioner.

69. We have considered the material on record, we find that the contentions of the petitioner qualify the test laid down under Article 12 "Change in Law" of TSA, particularly under "imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier". The Petitioner has placed on record the intimations sent by it to LTTCs as well as monthly progress reports which testify the fact that before approaching the Commission it exhausted the procedural requirements of sending Notifications to the LTTCs as contemplated under the TSA.

70. The Commission in order dated 24.8.2016 in Petition No. 32/MP/2014 in the matter of East North Interconnection Company Limited vs. Jodhpur Vidyut Vitran Nigam Limited and Ors. observed as under:-

".....The petitioner after award of the project discovered that Bangaigaon-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....."

71. Accordingly, we are of the view that the need to obtain forest clearance was not in the knowledge of the Petitioner before the award of the project and discovered later was a "Change in Law" event as defined in Article 12 of the TSA. To obtain forest clearance of the forest area which was not required earlier, the Petitioner submitted the



forest proposals to Forest Departments. The details of the same are summarised below:-

Srl. No.	Name of Element	Date of forest proposal submitted	Stage I Approval	Stage II Approval
1	400 kV D/C Kurukshetra -Malerkotla Transmission Line	25.11.2014 ( Haryana Portion) & 2.1.2015 9 Punjab Portion)	2.5.2016 (Haryana Portion) & 27.9.2016 (Amritsar Portion)	4.7.2016 (Haryana Portion) & 16.6.2017 (Amritsar Portion)
2	Malerkotla-Amritsar - Transmission line	18.2.2015	16.9.2016	Still Awaited

72. The Petitioner has submitted that it has incurred significant expenditure relating to NPV cost, compensatory afforestation cost, dwarf tree cost and cost of tree falling etc. to the forest authorities and also furnished the details of demand notes issued by forest authorities and subsequent payments made by it against them.

73. The Commission in its order dated 24.8.2016 in Petition No. 32/MP/2014, in the matter of East North Interconnection Company Limited Vs. Jodhpur Vidyut Vitran Nigam Limited and Ors., observed 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.  
 .....

74. Taking into consideration the above submissions of the Petitioner duly supported by documentary evidence, we are of the view that the amount paid by the Petitioner to the forest authorities is unexpected requirement of forest clearance and all expenditure



incurred by the Petitioner on account of securing forest clearance is covered under “Change in Law”. Accordingly, the amount paid by the Petitioner to the forest authorities for obtaining diversion of forest land and other legitimate expenditure incurred in connection with forest clearance shall be reimbursable on account of Change in Law.

## **(ii) Increase in Taxes and Duties**

75. The Petitioner has submitted that there was increase in taxes, duties and levies post the bid submission date and subsequent to the award of the project due to which additional financial burden was incurred by it. The details of the same are as under:-

- The rate of Excise Duty increased from 12.36% to 12.5% with effect from 1.3.2015.
- The rate of Service Tax increased from 12% to 14% (including cess) with effect from 1.6.2015.
- Swachh Bharat Cess with effect from 15.11.2015 at the rate of 0.5% on the value of taxable services.
- Krishi Kalyan Cess with effect from 1.6.2016 levied on all taxable services at the rate of 0.5%.

76. As per Article 12.1.1 of the TSA, the Change in Law events should have occurred after the date which is seven days prior to the Bid Deadline resulting into any additional recurring/non-recurring any expenditure by the TSP or any income to the TSP. The Bid Deadline has been defined as “the last date and time for submission of the Bid in response to the RFP”. Hence, in terms of TSA, bid deadline was 7.2.2014. Therefore, cut-off date for considering the claims under change in law is 31.1.2014. Accordingly, we proceed to deal with the Petitioner’s claims related to change in taxes and duties under Change in Law under Article 12 of the TSA.



77. The Petitioner has furnished the Circular No. 194/04/2016-ST, dated 26.5.2016 issued by Ministry of Finance, Department of Revenue notifying Krishi Kalyan Cess w.e.f. 1.6.2016. The Petitioner has also intimated the beneficiaries about the said change in taxes, duties and levies through its monthly progress reports as well as through letters separately. The changes in service tax, excise duty, imposition of Swachh Bharat Cess and Krishi Kalyan Cess fall within the definition of Change in Law event as they constitute “the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal in India, of any law, including rules and regulations framed pursuant to such Law” and are, therefore, a Change in Law, which came into effect subsequent to cut-off dates and are admissible.

78. The Petitioner has furnished the certificate from the Chartered Accountant certifying the additional amount paid by it due to change in various taxes and duties.

The details of the same are as follows:-

Sl. No.	Description	Amount (₹)
1.	The rate of Excise Duty increased from 12.36% to 12.5% with effect from 1.3.2015.	2381177
2.	The rate of Service Tax increased from 12% to 14% (including cess) with effect from 1.6.2015.	6913592
3.	Swachh Bharat Cess with effect from 15.11.2015 at the rate of 0.5% on the value of taxable services.	
4.	Krishi Kalyan Cess with effect from 1.6.2016 levied on all taxable services at the rate of 0.5%.	
Total		9294769

79. The Petitioner is required to bear the statutory taxes and duties on the material, equipment and services during the construction period. The Commission in orders



dated 1.2.2017, 8.5.2017, 3.4.2018 and 26.6.2018 in Petition Nos. 8/MP/2014, 310/MP/2015, 110/MP/2016 and 216/MP/2016 respectively has considered the increase in Excise Duty as Change in Law events. Appellate Tribunal for Electricity in Appeal No. 161 of 2015 vide judgment dated 19.4.2017 held that change in rates of Excise Duty and Service Tax are Change in Law events. The Petitioner incurred additional expenditures on account of change in taxes and duties, which is admissible and allowed to be considered under Article 12.2.1 of TSA for granting relief under Change in Law events.

**(iii) Change in guidelines issued by MoP for compensation towards damages in regard to Right of Way (RoW) for transmission lines**

80. The Petitioner has submitted that the Ministry of Power vide Notification No. 3/7/2015-Trans. dated 15.10.2015, issued guidelines for payment of compensation towards damages in regard to Right of Way for transmission lines. Pursuant to the said guidelines, farmers started demanding the enhanced compensation in line with above guidelines, which led to increase in RoW issues and also cost of RoW compensation. In order to resolve the issue and as per the guidelines of the MoP, the Petitioner had to pay high compensation of ₹4.72 crore to the agitating farmers and this resulted in additional financial burden on the Petitioner.

81. We have considered the claim of the Petitioner. We understand that the Petitioner had followed the process laid down under Section 164 of the Act for securing the RoW for building foundations and erecting towers. It is observed that the document quoted by the Petitioner is not a Notification as claimed by the Petitioner. It is general



guidelines issued by the Ministry of Power, Government of India for determining the compensation to be paid to the land owners. This letter of Ministry of Power cannot be considered as “Change in Law” as claimed by the Petitioner.

82. As regards the additional expenditure incurred by the Petitioner on account of right of way, we make it clear that the case at hand is a competitive bidding project and we are of the view that the Petitioner has quoted all-inclusive transmission charges and the Petitioner was also expected to factor all unforeseen and contingent expenditure on account of right of way settlement in the quoted transmission charges while submitting the bid. Therefore, the additional expenditure incurred by Petitioner to settle the issues of RoW with land owners does not constitute a Change in Law event and any claim under this is not admissible.

**(iv) Conversion of PSPCL’s 66 kV lines from poles to towers**

83. The Petitioner has submitted that PSPCL has converted 05 nos. of their existing 66 kV transmission lines from poles to towers, in the route of 400 kV D/C Malerkotla–Amritsar Transmission Line of the Petitioner, which was not envisaged at the time of RFP. The Petitioner had to provide additional tower extensions in the particular crossing segment to maintain suitable electrical clearances from these 66 kV tower lines. Thus, the said work was an additional task which the Petitioner was required to do as per the requirement of PSPCL. The Petitioner vide its letters dated 21.3.2016 and 28.6.2016 requested PSPCL to under-cross their 66 kV transmission lines. However, no response was received in spite of repeated letters and personal visits made by the Petitioner.



84. Further, the Petitioner has submitted that PSPCL on 18.10.2016, agreed to lower the heights of its 66 kV towers subject to submission of an amount of ₹12,43,296/- towards the cost of doing the needful. The said unforeseen deadlock situation resulted in loss of approx. 7 months (from 21.3.2016 to 18.10.2016) and additional cost of ₹0.124 crore as per PSPCL demand letter dated 18.10.2016.

85. We have considered the submission of Petitioner and PSPCL. We have also gone through the Petitioner's letter dated 21.3.2016 wherein the Petitioner informed PSPCL that while executing the transmission line, the Petitioner has been encountering the clearance problem from the newly constructed 66 kV line on tower structure. However, during the check survey, the lines were on poles and accordingly the height was considered by maintaining statutory clearance and the work was accordingly carried out.

86. We are of the view that although the conversion of the 66 kV lines from poles to towers has been done by PSPCL after the site survey done by the Petitioner but the same would not amount to change in law as claimed by the Petitioner since the conversion of 66kV lines from poles to tower was a legitimate activity on the part of PSPCL. In, the light of above discussion, we are not inclined to grant any relief in this regard.

**Issue No.3. Whether the following claims of the Petitioner qualify to be covered under Force Majeure provisions of the TSA?**

- (i) Delay in obtaining forest clearance;
- (ii) Delay in confirmation of gantry coordinates at PGCIL Kurukshetra end and Malerkotla end;



- (iii) Stoppage of work at PGCIL Amritsar S/s entry due to PGCIL request for re-alignment of 400 kV D/C Malerkotla- Amritsar Line;
- (iv) Fault at PGCIL Malerkotla Substation;
- (v) Local unrest, communal violence and Farmer Agitation ;
  - a. Conflict between Sikh Community on management of Gurudwara
  - b. Conflict & Communal tension in Malerkotla
  - c. Farmers agitation in Punjab;
  - d. Desecration of Shri Guru Granth Sahib;
  - e. Jat Agitation for caste based reservation in Haryana;
  - f. Desecration of Quran;
- (vi) Delay due to severe right of way issues in transmission line;
- (vii) Demonetisation;
- (viii) Delay in transfer of SPV; and
- (ix) Assembly Election in Punjab.

87. The Articles 11.3 and 11.4 of the TSA defines Force Majeure and the same is as under:-

“.....

### **11.3 Force Majeure**

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

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



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

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

i. **Direct Non - Natural Force Majeure Events**

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

ii. **Indirect Non - Natural Force Majeure Events**

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



## 11.4 Force Majeure Exclusions

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

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

### (i) Delay in obtaining forest clearance

88. Section 2 of the Forest (Conservation) Act, 1980, provides that forest land can be diverted for non-forest purposes with the approval of the Central Government on the proposal of the Forest Advisory Committee and after furnishing of compliance report by the State Government with regard to the conditions for such compliance. Under Rule 6 of the Forest (Conservation) Rules, 2003, every user agency which wants to use forestland for non-forest purposes shall make a proposal to the Nodal Officer designated for the purpose by the State Government, complete in all respects. The State Government after being satisfied that the proposal requires prior approval under



Section 2 of the Forest Conservation Act will send the proposal to the Central Government. The Central Government after receipt of the proposal shall send the same to the Forest Advisory Committee for its advice thereon. The Forest Advisory Committee after considering the proposal may advise the Central Government on the proposal and may suggest any conditions or restriction for use of any forest land for non-forest purposes which in its opinion would minimize the adverse environmental impact. The Central Government after considering the advice of the Committee and after making such enquiry as may be considered appropriate may grant approval to the proposal with or without conditions or reject the proposal. As per the Forest (Conservation) Amendment Rules, 2004 notified on 3.2.2004, a time period of 210 days after submission of the proposal for forest clearance has been envisaged for recommendations of the State Government and a time period of 90 days has been envisaged for approval by the Forest Advisory Committee under Central Government.

89. We have noted that the requirement of forest clearance in the case at hand occurred after award of the project. Bid Process Coordinator in RFP denied the involvement of forest on the route of the 400 kV D/C Kurukshetra-Malerkotla Transmission Line and Malerkotla-Amritsar Line. Therefore, 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 was an additional requirement that was to be performed by the Petitioner. The Petitioner was required to obtain forest clearance for the diversion of forest land in the districts of Haryana and Punjab. The time spent in obtaining the forest clearance in the present case can be said to be



beyond the control of the Petitioner except where the Petitioner has taken unreasonable time for performance of its obligation in the process of forest clearance.

90. As regards the forest clearance for the diversion of forest land in the districts of Haryana and Punjab for 400 kV D/C Kurukshetra- Malerkotla and Malerkotla- Amritsar Line, the Petitioner made application on 25.11.2014 and 2.1.2015 for the forest in the districts of Haryana and Punjab portions in Kurukshetra- Malerkotla Transmission line and on 18.2.2015 for the forest in the districts of Punjab in Malerkotla- Amritsar Transmission Line. It is observed that the Petitioner received the forest approvals as per details given below:-

<b>Srl. No.</b>	<b>Name of Element</b>	<b>Date of forest proposal submitted</b>	<b>Stage I Approval</b>	<b>Stage II Approval</b>
<b>1</b>	400 kV D/C Kurukshetra - Malerkotla Transmission Line	25.11.2014 ( Haryana Portion) & 2.1.2015 Punjab Portion)	2.5.2016 (Haryana Portion) & 27.9.2016 (Amritsar Portion)	4.7.2016 (Haryana Portion) & 16.6.2017 (Amritsar Portion)
<b>2</b>	Malerkotla- Amritsar - Transmission line	18.2.2015	16.9.2016	Still Awaited

91. On receipt of approval as discussed hereinabove, the Petitioner had declared the COD of the 400 kV D/C Kurukshetra- Malerkotla Transmission on 18.1.2017 and the deemed CoD of 400 kV D/C Malerkotla- Amritsar Transmission Line was declared on 27.3.2017. As per the Transmission Service Agreement, the Scheduled Commercial Operation Date (SCOD) is 28 months from the effective date. The term effective date has been defined under Article 2.1 of the TSA which is later of three dates, namely, date of execution and delivery of the TSA by the parties, the date of acquiring of NTL



by the successful bidder and date of providing Contract Performance Guarantee by the successful bidder. On 12.5.2014 by way of a Tripartite Share Purchase Agreement between RECTCPL, NTL and Essel Infraprojects Ltd., the entire shareholding of NTL was transferred on in favour of the Essel Infraprojects Ltd. Therefore, the effective date is 12.5.2014 and accordingly the Kurukshetra-Malerkotla and Malerkotla-Amritsar Line were scheduled to achieve COD by 11.9.2016. As against the SCOD, the actual COD of the lines are as under:-

Srl. No.	Transmission Line	SCOD	Actual COD	Delay
1	400 kV D/C Kurukshetra-Malerkotla Line	11.9.2016	18.1.2017	128 days
2	Malerkotla- Amritsar Line (Deemed Cod)	11.9.2016	27.3.2017	196 days

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

**“11.3 Force Majeure**

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

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



94. In the present case, as per RFP and the Survey Report issued by RECTCPL, there were no forest areas in the route of transmission lines. The Petitioner encountered forest areas in the districts of Haryana and Punjab, which is contrary to stipulation of RFP documents that there was no forest in the route. The Petitioner was unable to start the construction of the transmission line in respective forest stretches. The unforeseen requirement of obtaining forest clearance and delay in issuance of forest clearance, resulted in delays in implementation of the transmission project. 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 was beyond the reasonable control of the Petitioner and has affected the project implementation and thereby prevented the Petitioner from performing its obligations under the TSA.

95. In our view, the Petitioner was prevented from discharging its obligations under the TSA on account of unexpected requirement and delay in grant of forest clearance which was not there in the RFP documents and as such delay beyond one year in grant of forest clearance is covered under Force Majeure. Accordingly, the SCOD shall stand extended till the actual CODs of Kurukshetra – Malerkotla and Malerkotla – Kurukshetra Transmission Lines which are 18.1.2017 and 27.3.2017 respectively. However, we would like to make it clear that the extension of COD of the instant assets does not entail any financial benefit in the form of IDC and IEDC to the Petitioner.



### **(iii) Delay due to other events**

96. As we have concluded in the preceding paragraph that SCODs of 400 kV D/C Kurukshetra- Malerkotla and Malerkotla- Amritsar Transmission Line have been extended till their actual COD, we are of the view that there is no requirement to make any observations on merits on the following events :

- (I) Stoppage of work at PGCIL Amritsar S/s entry due to PGCIL request for re-alignment of 400 kV D/C Malerkotla- Amritsar Line;
- (II) Fault at PGCIL Malerkotla Substation;
- (III) Local unrest, communal violence and Farmer Agitation;
  - a. Conflict between Sikh Community on management of Gurudwara
  - b. Communal tension in Malerkotla
  - c. Farmers agitation in Punjab
  - d. Desecration of Shri Guru Granth Sahib
  - e. Jat Agitation for caste based reservation in Haryana
  - f. Desecration of Quran
- (IV) Delay due to severe right of way issues in transmission line;
- (V) Demonetisation;
- (VI) Delay in transfer of SPV;
- (VII) Assembly Election in Punjab; and
- (VIII) NGT Order dated 19.5.2016, banning cutting of trees in entire State of Punjab and proceedings of Hon'ble High Court of Punjab and Haryana seeking relief from NGT Order

### **Issue No. 4. Whether the Petitioner is entitled to any relief on account of:-**

- i. Change in Kurukshetra and Malerkotla Sub-station gantry coordinates and subsequent change in connection arrangement for 400 kV D/C Kurukshetra-Malerkotla Transmission Line



ii. Change in Tower Extension; and

iii. Requirement of Multi circuit Towers for transmission line termination at Malerkotla Sub- station end

**(i) Change in Kurukshetra and Malerkotla Sub-station gantry coordinates and subsequent change in connection arrangement for 400 kV D/C Kurukshetra-Malerkotla Transmission Line and delay in confirmation of Coordinates**

97. The Petitioner has submitted that the gantry coordinates for termination points specified in the RFP document were modified after the award of scheme. The revised coordinates were confirmed by PGCIL at a very late stage vide communications dated 10.10.2015 in case of Malerkotla and in case of 12.3.2016 for Kurukshetra. The delay in confirmation of Gantry Co-ordinates by PGCIL has led to postponing the scheduled COD of Transmission Line by approximately 4 months.

98. The Petitioner has further submitted that at Kurukshetra Sub-station the actual co-ordinates of the terminating point were different from RFP and these caused the Petitioner to change the entry alignment of 400 kV D/C Kurukshetra- Malerkotla line and increase the Line length by 2.5 km. At Malerkotla Sub-station, the actual co-ordinates of the terminating point were different from RFP Specification and these caused the Petitioner to change in the entry alignment of 400 kV D/C Kurukshetra - Malerkotla line and increase the Line length by 1 km. It has resulted in an additional cost of approximately ₹6.88 crore for increase in length of 400 kV D/C Kurukshetra – Malerkotla transmission Line by 3.5 km.



99. The Commission had sought information from RECTPCL regarding the provision in the bidding documents to ensure that co-ordinates are granted to bidder on time and the underlying procedure in this regard. RECTPCL has submitted that as per the Disclaimer contained in the Survey Report, the bidders were required to coordinate with and obtain the transmission line termination points from the responsible agency, i.e. PGCIL and coordinates provided in the Survey Report was only for the purpose of location of sub-stations. Further, Clause 1.5 of the RFP states that the bidders be provided the coordinates (indicative in nature as per the Disclaimer provided in the PSR) at least 45 days prior to the bid deadline. The same were provided to the bidders sixty one (61) days in advance. There is no provision for any time extension or cost escalation for any delay associated in obtaining gantry coordinates/ termination points of the transmission lines since as per the RFP (and the Draft TSA), the bidders had assumed responsibility for obtaining the same from the concerned agency.

100. The respondent, PSPCL has submitted that there is no merit in contention of the Petitioner as PGCIL has informed them that the change in the North coordinates of the gantry shall have negligible impact on the finalization of the dead end tower.

101. We have gone through the reply of PGCIL in compliance of our directions vide ROP dated 12.4.2018 pertaining to procedure adopted by CTU for informing co-ordinates in TBCB projects. PGCIL has submitted that the identified BPC approaches CTU for various inputs including co-ordinates for substations associated with the transmission project, for inclusion in the Request for Qualification (RfQ) document. On receipt of such request, in case coordinates pertain to existing substation owned by



PGCIL or ISTS substations under construction by PGCIL, the co-ordinates of these substation are provided to BPC in consultation with their Engineering Department/Site with the disclaimer that “the coordinates furnished herewith are only tentative coordinates within the substation boundary wall for locating the respective substation site. These should not be treated as the final line termination coordinates.

102. We have considered the submission of the parties. The Petitioner’s main contention is that there has been change in gantry coordinates as specified in the RFP document to the actual coordinates provided by the PGCIL due to which it took extra time for completion of work due to delay in confirmation of co-ordinates and due to which there has been 60 days delay at Malerkotla substation and 120 days delay at Kurukshetra substation. The respondent, RECTPCL has submitted that as per the Disclaimer contained in the Survey Report, the bidders were required to coordinate with and obtain the transmission line termination points from the responsible agency, i.e. PGCIL.

103. The details of Coordinates provided by BPC in RFP documents and actual documents provided by PGCIL is given as under:

<b>1</b>	<b>At Malerkotla end</b>		
	BPC Coordinates	Easting: 584292 m E	Northing: 3380586 m N
	Actual Coordinates	Easting: 583600.09 m E	Northing: 3380606.67 m N
<b>2</b>	<b>At Kurukshetra end</b>		
	BPC Coordinates	Easting: 692351 E	Northing: 3310156 N
	Actual Coordinates	692518 Easting	3310118 Northing

It is observed that the actual coordinates provided were different from RFP documents, due to which the petitioner has to align to actual coordinates.



104. The Petitioner vide its letter 14.5.2014 requested for gantry coordinates and PGCIL vide its letter dated 4.7.2014 had informed the Petitioner that there may be change in North Coordinate by few meters during detailed Engineering. Thereafter, the Petitioner after a gap of more than one year vide its letter dated 27.8.2015 sought clarification pertaining to change in North Coordinate gantry at Kurukshetra. In the said letter, the Petitioner had also acknowledged the receipt of GA & SLD of the bays at Malerkotla, Kurukshetra and Amritsar Substations on 4.7.2014. The coordinates were provided by PGCIL on 10.10.2015 for Malerkotla and on 12.3.2016 for Kurukshetra.

105. It is observed that the Petitioner wrote the first letter on 14.5.2014 and the next letter was written on 27.8.2015. The Petitioner has not explained the delay of one year in pursuing the matter. Moreover, the Petitioner has not placed on record any document to show that it was pursuing the matter with the CTU during the said period. As a TSP, it is expected on the part of the Petitioner to pursue the matter diligently with CTU. However, there was slackness on the part of the Petitioner. Therefore, we are not inclined to grant any relief in this regard.

#### **(ii) Change in Tower Extension**

106. The Petitioner has submitted that PGCIL has requested it to extend the height of the transmission tower at location no.71/0 by 25 meters in 400 kV D/C Kurukshetra – Malerkotla Line. Subsequently, after joint discussion with CEA, it was agreed to raise the tower height by 9 meters. Due to dismantling of existing foundation and recasting of new foundation at location no. 71/0, there was delay in completion of line. The Petitioner



has further submitted that due to these casting of foundation at location no. 71/0, it has incurred time over run of 90 days and it has equivalent impact of Project IDC.

107. PGCIL has submitted that line terminating at the substation cannot be allowed to block the future corridor of the existing substation and route alignment near substation must be shared with respective site in charge of substation. However, same was not taken into consideration by the Petitioner, NTL resulting in blockade of future corridor at Malerkotla end.

108. We have considered the submissions of the parties. As per the submissions of the Petitioner, the change in tower extension has resulted in the delay of 90 days and impact on project IDC. The additional time of 82 days claimed by the Petitioner has already been taken care by the extension of the scheduled COD to actual COD.

**(iii) Requirement of Multi circuit Towers for transmission line termination at Malerkotla Substation end**

109. The Petitioner has submitted that as per the scope of work mentioned in the RFP, no Multi-Circuit Towers were envisaged. However, as per PGCIL, both 400 kV D/C Kurukshetra - Malerkotla and 400 kV D/C Malerkotla-Amritsar Lines needed to terminate/ emanate at double level gantry at PGCIL 400 kV Malerkotla substation, due to which Multi-Circuit Tower was required to be installed in order to facilitate the entries of both lines at Malerkotla Sub-station and therefore, the same amounts to change in scope of work post submission of bid, issuance of LOI and execution of TSA, which has caused delay in implementing the transmission project qua the original timelines.



Therefore, the Petitioner had to design an additional tower so as to complete the lines as per the requirement of PGCIL and the same caused the delay of 3 months.

110. PGCIL has submitted that PGCIL vide its letter dated 4.7.2014 had provided GA and SLD of Malerkotla substation wherein it was clearly mentioned that line of 400 kV D/C Amritsar-Malerkotla line and Kurukshetra-Malerkotla line has to be terminated on double level Gantry. However, the Petitioner's contention that multi circuit tower is required to terminate the same is not correct as same can be done by installing two nos. D/C towers as done at Kurukshetra end by NTL and therefore, there was no requirement from PGCIL side to install M/C tower. The Petitioner has installed M/C tower as per their convenience.

111. PSPCL has submitted that Petitioner was well aware of all the circumstances beforehand. Such aspects cannot by any stretch of imagination amount to be a force majeure event.

112. We have considered the submissions of the parties. As per the submissions of the Petitioner, the change in Tower extension has resulted in the delay of 3 months. The additional time of 3 months claimed by the Petitioner has already been taken care by the extension of the scheduled COD to actual COD.

**Issue No.5. What relief the Petitioner is entitled to in the light of answers to the above issues?**

113. The Petitioner has submitted that on account of events of Force Majeure and unexpected requirement of forest clearance, there was delay as a result of which there



was time over-run of 128 days in case of Kurukshetra-Malerkotla Line and 196 days in case of Malerkotla-Amritsar Line. The Petitioner has submitted that it had incurred IDC during the period beyond SCOD till the respective dates of commercial operation of the Kurukshetra-Malerkotla and Malerkotla-Amritsar Transmission Lines. We have already extended the scheduled COD of the Kurukshetra-Malerkotla and Malerkotla-Amritsar Transmission Lines upto the actual CODs without the benefit of consequential IDC. Accordingly, the Petitioner's prayer for grant of IDC for the period beyond the scheduled COD is rejected. However, the Petitioner is allowed to recover the amount paid by the Petitioner to the forest authorities for obtaining the forest clearance and other legitimate expenditure made for obtaining the forest clearance, service tax, excise duty, Swachh Bharat Cess and Krishi Kalyan Cess from the LTTCs. The Petitioner is directed to submit the documentary evidence in support of the amount paid to the forest departments for obtaining the forest clearance and payment of taxes along with the Auditor Certificate to the LTTCs while claiming the relief under Change in Law.

### **Summary of Decisions**

114. The summary of our decisions with regard to Petitioner's claim is as under:

<b>S. No.</b>	<b>Change in law</b>	<b>Allowed /Disallowed</b>
1.	Unexpected requirement of obtaining forest clearance and expenditure incurred on account of obtaining forest clearance.	Allowed
2.	Increase in taxes and duties.	Allowed
3.	Change in guidelines issued by MoP for compensation towards damages in regard to Right of Way (RoW) for transmission lines.	Disallowed
4.	Delay in obtaining forest clearance under Force Majeure and extension of SCOD	Allowed
5.	Issue with PSPCL relating to conversion of 66	Disallowed



S. No.	Change in law	Allowed /Disallowed
	kV lines from poles to towers	
6.	<p>Extension of SCOD due to</p> <p>(i) Stoppage of work at PGCIL Amritsar S/s entry due to PGCIL request for re-alignment of 400 kV D/C Malerkotla-Amritsar Line;</p> <p>(ii) Fault at PGCIL Malerkotla Substation;</p> <p>(iii) Local unrest, communal violence and Farmer Agitation;</p> <p>a. Conflict between Sikh Community on management of Gurudwara</p> <p>b. Communal tension in Malerkotla</p> <p>c. Farmers agitation in Punjab</p> <p>d. Desecration of Shri Guru Granth Sahib</p> <p>e. Jat Agitation for caste based reservation in Haryana</p> <p>f. Desecration of Quran</p> <p>(iv) Delay due to severe right of way issues in transmission line;</p> <p>(v) Demonetisation;</p> <p>(vi) Delay in transfer of SPV; and</p> <p>(vii) Assembly Election in Punjab</p> <p>(viii) NGT Order dated 19.5.2016, banning cutting of trees in entire State of Punjab and proceedings of Hon'ble High Court of Punjab and Haryana seeking relief from NGT Order</p>	Not considered on merits as the additional time claimed is subsumed in extended SCOD.
7.	Change in Kurukshetra and Malerkotla Substation gantry coordinates and subsequent change in connection arrangement for 400 kV D/C Kurukshetra- Malerkotla Transmission Line and Delay in confirmation of Coordinates.	The Additional time claimed is subsumed in extended SCOD.
8.	Change in Tower Extension	The Additional time claimed is subsumed in extended SCOD.



<b>S. No.</b>	<b>Change in law</b>	<b>Allowed /Disallowed</b>
9.	Requirement of Multi circuit Towers for transmission line termination at Malerkotla Substation end	The Additional time claimed is subsumed in extended SCOD.
10.	IDC and IEDC beyond scheduled COD till actual COD.	Disallowed

115. In terms of above, the Petition No. 195/MP/2017 is disposed of.

sd/-  
**(Dr. M.K. Iyer)**  
**Member**

sd/-  
**(P.K. Pujari)**  
**Chairperson**

