

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 8/RP/2019
in Petition No. 238/MP/2017**

Coram:

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

Date of Order: 13.01.2020

In the matter of

Petition under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, seeking review of order dated 29.3.2017 in Petition No. 238/MP/2017.

And in the matter of

Darbhanga-Motihari Transmission Company Limited
Essel Infra Projects Limited, 6th Floor,
Plot No. 19, Film City, Sector 16 A,
Gautam Buddha Nagar, Noida, U.P. – 201301

...Review Petitioner

Vs

1. Bihar State Power Transmission Co. Ltd.
Transmission Vidyut Bhawan, 04th Floor,
Bailey Road, Patna,
Bihar- 800021.
2. Bihar State Power Holding Company Limited,
Vidyut Bhawan, Bailey Road,
Patna,
Bihar-800021.
3. West Bengal State Electricity Distribution Company Ltd.,
Vidyut Bhawan,
Kolkata-91.
4. Power Grid Corporation of India Ltd.,
HVDC Pusauli, Saudamini,
Plot No. 02, Sector-29,



Near IFFCO Chowk, Gurgaon,
Haryana - 122001.

5. Grid Corporation of Orissa Ltd.,
Janpath,
Bhubaneshwar-751022.
6. Power Department,
Government of Sikkim,
Gangtok- 737101.
7. Damodar Valley Corporation Ltd.,
DVC Towers, VIP Road,
Kolkata- 700054.
8. Jharkhand State Electricity Board,
Engineering Building, HEC,
Dhurwa, Ranchi – 834004.
9. Maithan Power Ltd.,
MA-5, Gogna,
PO- Maithan DAM,
Distt.-Dhanbad,
Jharkhand-828207.
10. PFC Consulting Ltd.,
9th Floor (A Wing), Statesman House Building,
Bharakamba Road, Connaught Place,
Delhi-110001.

....Respondents

For Review Petitioner : Shri M.G Ramchandran, Sr. Advocate, DMTCL
Shri Shubham Arya, Advocate, DMTCL
Shri Neeraj Kumar, DMTCL

For Respondents : None

ORDER

The Darbhanga Motihari Transmission Company Limited (hereinafter referred to as “DMTCL” or “Review Petitioner”) has filed the present Review Petition under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 103 of the Central



Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking review of the order dated 29.3.2019 in Petition No.238/MP/2017.

Background

2. DMTCL filed Petition No. 238/MP/2017 seeking compensatory and declaratory reliefs under Transmission Service Agreement dated 6.8.2013 on account of “Change in Law” and “*Force Majeure*” events which affected the construction of Asset-I: 2X500 MVA, 400/220 kV GIS Sub-station at Darbhanga, 400 kV D/C Muzaffarpur–Darbhanga Transmission line with triple snowbird conductor and Asset-II: 2 X 200 MVA 400/132 kV GIS Sub-station at Motihari, LILO of both circuits of 400 kV of D/C Barh–Gorakhpur Transmission Line at Motihari GIS Sub-station (hereinafter referred to as the “transmission assets”), implemented under the Transmission Scheme “Eastern Region System Strengthening Scheme-VI (hereinafter referred to as the “Transmission Projects”) by DMTCL.

3. The Commission vide order dated 29.3.2019 in Petition No. 238/MP/2017 observed that the need to obtain forest clearance was not in the knowledge of DMTCL before the award of the project and therefore, was a “Change in Law” event in terms of Article 12 of the Transmission Service Agreement. Accordingly, the amount paid by DMTCL to the forest authorities for obtaining the forest clearance was held to be covered under “Change in Law” event. In the said order, the Commission further allowed certain other taxes and duties to be falling under Article 12.2.1 of the Transmission Service Agreement and as such they were also allowed as “Change in Law” events. The Commission further observed that requirement for obtaining the forest clearance was not there in the Request for Proposal (RFP)



documents and as such the time taken for obtaining forest clearance was held to be covered under *force majeure*. The Commission accordingly extended the scheduled commercial operation date till the actual commercial operation dates of Darbhanga and Motihari transmission elements which were 31.3.2017 and 10.8.2017 respectively, without any financial benefit in the form of IDC and IEDC to DMTCL. However, the Commission disallowed the compensation towards damages paid to settle RoW issues due to change in guidelines of Ministry of Power, change in gantry coordinates, increase in number of power line crossings, IDC and IEDC from scheduled COD to actual COD and additional expenditure in terms of order dated 1.9.2017 in Petition No.209/TT/2016.

4. Aggrieved with disallowance of certain claims in the impugned order, DMTCL has filed the instant review petition on the ground that there are certain errors apparent on the face of record and that there are otherwise sufficient reasons for review of the impugned order. The Review Petitioner has prayed as under:-

- a) Admit the present Review Petition and review and rectify the order dated 29.3.2019 to the extent stated in the review petition;
- b) Allow oral hearing of the present Review Petition before deciding the present review petition;
- c) Consider the above-mentioned submissions made by the Review Petitioner and review the order dated 29.3.2019 passed in Petition No.238/MP 12017 to grant appropriate relief to the Review Petitioner; and
- d) Pass any other or further orders as the Commission may deem fit in the facts and circumstances of the present case.



Submissions of DMTCL, Review Petitioner

5. The Review Petitioner has enumerated the following grounds for review of the impugned order:-

- a) The original petition was mainly filed for extension of time and to devise a mechanism to compensate the Review Petitioner for the adverse impact on its transmission project's capital cost owing to unforeseen and uncontrollable events in terms of Article 11.3 (a) and (b) of *Force Majeure* and Article 12 of "Change in Law" in the TSA. The Commission having acknowledged the fact that the requirement of obtaining forest clearance falls within the ambit of "Change in Law" and also that the time spent in obtaining forest clearance for the project was beyond the control of the Review Petitioner, negated the relief of IDC and IEDC to it. Hence, the Review Petitioner was not restored to the same economic position as if the events of "Change in Law" and "*Force Majeure*" had not occurred.
- b) After allowing the delay in commencement of the Project and extension of the scheduled date of commercial operation, the Commission has failed to consider that the Review Petitioner was not liable to make payment of additional amount of ₹55,34,000/- to PGCIL in terms of Commission's order dated 1.9.2017 in Petition No. 209/TT/2016.
- c) The RFP document contemplated that 02 nos. of EHV power lines were required to be crossed by 400 kV D/C Muzaffarpur-Darbhanga Transmission Line and 8 nos. EHV power lines to be crossed by LILO of Barh-Gorakhpur 400 kV D/C line at Motihari for the final selected route.



However, the Commission failed to consider that during the execution of the project, besides 2 nos. of underpass crossings, the number of EHV power line crossings increased by another 5 nos. of crossings for 400 kV D/C Muzaffarpur-Darbhanga Transmission Line. Further, the number of EHV power line crossings was also increased by 8 nos. of crossings by LILO of Barh-Gorakhpur 400 kV D/C line at Motihari. Resultantly, the Review Petitioner incurred additional cost of ₹1.84 crore approximately due to increased number of crossings in addition to corresponding IDC for the same. Failure to consider the increase in the number of crossings falls within the ambit of “Change in Law” under Article 12.1.1 of the TSA.

- d) The Commission failed to consider that the difference between actual gantry coordinates and the coordinates as per the RFP specifications resulted in the requirement of two additional EHV power line crossing as well as increase in 1.5 km route length of 400 kV D/C Muzaffarpur-Darbhanga Transmission Line. Thus, change in connection arrangement at Muzaffarpur end caused an additional financial impact of ₹3.15 crore by such increase in line length of 1.5 km in addition to corresponding IEDC and IDC. The Auditor’s Certificate in support of additional cost of ₹3.15 crore was filed vide affidavit dated 6.4.2018 and as such the observation of the Commission that there was no document or Auditor’s Certificate in support of additional cost of ₹3.15 crore on account of increase in line length of 400 kV D/C Muzaffarpur-Darbhanga Transmission Line in the impugned order is erroneous.



- e) The Commission's failure to consider the geo-technical investigation at Motihari Sub-station land which revealed that the strata of the land is prone to liquefaction with consequences of bearing failure, lateral spreading and settlement and in turn necessitated specific ground improvement measures before commencement of construction work for which the Review Petitioner incurred additional expenditure of about ₹7.32 crore. The geo-technical surprise faced by the Review Petitioner at Motihari Sub-station was beyond its expectations and as such the Review Petitioner's claim for additional expenditure of about ₹7.32 crore should have been allowed.
- f) The Commission has not considered the fact that due to the flooding of the Gandak River, the FGL of Motihari Sub-station was further increased by 800 mm which was beyond the control of Review Petitioner for which it incurred an additional expenditure of ₹0.64 crore.
- g) The Commission even after observing that change in taxes and duties comes under "Change in Law" in terms of the TSA, it did not consider the Auditor Certificate amounting to ₹44,99,841/- and ₹5,57,890/- submitted by the Review Petitioner vide affidavit dated 24.12.2018 in the original petition pertaining to taxes and duties. Similarly, the Commission did not consider the combined Auditor certificate amounting to ₹2,65,41,861/- filed in the original petition vide affidavit dated 6.4.2018 which included the



amount mentioned at Sl. No. 2.2, 2.3, 2.4 and 2.5 of Table 1.1 given in the Review Petition that was allowed in the impugned order dated 29.3.2019.

- h) The Commission while extending the scheduled COD of each element has failed to consider that tariff for the first year was ₹158.59 crore which is higher than the second year tariff of ₹142.97 crore and the differential tariff of ₹142.93 crore regarding the tariff for 10 months duration for Darbhanga element and 8 months for Motihari element could not be realized due to force majeure events which were beyond the control of Review Petitioner and an observation to that effect is required to be given by the Commission. The monetary impact also needs to be allowed and recovered from the extended SCOD of respective transmission element. The approved tariff schedule under tariff adopted by the Commission in order dated 20.5.2014 in Petition No. 323/TT/2013 is submitted in the Review Petition.
- i) The Review Petitioner is allowed to recover the amount paid by it to the forest authorities for obtaining the forest clearance and other expenditure incurred due to change in several taxes and duties from the LTTCs with submission of documentary proof thereof. The documentary proof of the payments made to the forest authorities for obtaining the forest clearance and other expenditure incurred due to change in taxes and duties was submitted in the original petition and was also provided to the LTTCs and a brief account thereof is given in the Review Petition.



- j) The impugned order allowed the Review Petitioner to recover the amount paid by it to the forest authorities for obtaining forest clearance and other legitimate expenditure incurred due to change in several taxes and duties from the LTTCs. However, the quantum of relief allowed in the form of percentage increase in yearly transmission charges in terms of Article 12 of Transmission Service Agreement was not specified. Clarification is required to be given that the Review Petitioner is entitled to recover the amount paid by it to the forest authorities for obtaining forest clearance and other legitimate expenditure incurred due to change in several taxes and duties from the LTTCs in terms of the above and recover the same as revised transmission charges.

6. We have heard learned senior counsel for the Review Petitioner at length and have also gone through the record. The matter was heard on 16.9.2019 and order was reserved on admissibility of the Review Petition.

Analysis and decision

7. The Review Petitioner has submitted that the original petition was filed for extension of the scheduled date of commercial operation and for grant of compensation by devising a mechanism that offsets the adverse impact on capital cost of the transmission project due to unforeseen and uncontrollable events falling under Article 11.3(a) and (b) of *force majeure* clause and Article 12 of the “Change in Law” clause. The Review Petitioner has submitted that the Commission in order dated 29.3.2019 observed that Review Petitioner was prevented from discharging its obligations under the TSA on account of unexpected requirement of forest clearance



which was not there in the RFP document and grant of forest clearance is covered under *force majeure*. However, the Commission disallowed the IDC and IEDC from scheduled COD to actual COD in respect of Darbhanga and Motihari transmission elements which is an error apparent on record. The Review Petitioner has further contended that IDC and IEDC is required to be allowed in the present case especially after observation of the Commission in the impugned order that the Review Petitioner was prevented from discharging its obligations under the TSA on account of unexpected requirement of forest clearance and this event is covered under *force majeure*.

8. We have considered the submissions of the Review Petitioner on the issue of disallowance of IDC and IEDC and have also perused the order dated 29.3.2019. The Commission in order dated 29.3.2019 has dealt with the issue of “*force majeure*” including Article 11.3 (a) and (b) in paragraphs 55 to 65 and issue of “change in law” in paragraphs 33 to 43 regarding unexpected requirement of forest clearance and the expenditure incurred by Review Petitioner on account of securing forest clearance. The Commission further observed that the amount paid by the Review Petitioner to the forest authorities for obtaining diversion of forest land and any other legitimate expenditure incurred in connection with forest clearance shall be reimbursable on account of “Change in Law” events. Further, in order dated 29.3.2019, it was observed that the scheduled COD shall stand extended till the actual CODs of Darbhanga and Motihari transmission elements which were 31.3.2017 and 10.8.2017 respectively without any financial benefit of IDC and IEDC to the Review Petitioner. We further notice that it was also observed in the impugned



order that the Review Petitioner was prevented from discharging its obligation under the TSA on account of unexpected requirement of forest clearance which was not there in RFP and that the delay in grant of forest clearance is covered under *force majeure*. We are unable to agree with the contention of the Review Petitioner that once scheduled CODs of Darbhanga and Motihari transmission elements were extended till their actual CODs on the ground of *force majeure*, then the benefit of IDC and IEDC should necessarily be granted to it on the ground that failure to do so deteriorates its financial position.

9. The Commission extended the scheduled COD of Darbhanga and Motihari transmission elements till their actual CODs as the Review Petitioner was prevented from performing its obligations due to unexpected requirement of forest clearance which was not there in the Request for Proposal documents of the bid and the same is in accordance with Article 4.4.2 of the TSA. We are of the view that in our order dated 29.3.2019, the Commission took the conscious and considered view not to grant IDC and IEDC from SCOD till actual CODs of Darbhanga and Motihari Transmission elements as allowing the same would amount to cost plus tariff. Thus, we see no reason to deviate from our findings given in order dated 29.3.2019. Accordingly, review of the order dated 29.3.2019 for allowing IDC and IEDC is rejected.

10. As regards the disallowance of IDC and IEDC, the Review Petitioner has submitted that the scheduled COD of 400 kV D/C Muzaffarpur-Darbhanga line and LILO of Barh-Gorakhpur 400 kV D/C line at Motihari was extended to actual COD as 31.3.2017 and 10.8.2017 respectively due to unexpected requirement and delay in



grant of forest clearance and the same was adjudged as an event of *force majeure*. The Review Petitioner has contended that the Review Petitioner is not liable to pay IDC and IEDC amounting to ₹55,34,000/- to PGCIL in terms of the Commission's order dated 1.9.2017 in Petition No. 209/TT/2016.

11. Powergrid Corporation of India Limited (PGCIL) had filed Petition No. 209/TT/2016 for determination of transmission tariff from actual COD to 31.3.2019 in respect of 02 no. 400 kV line bays at Muzaffarpur Sub-station for termination of Muzaffarpur (PG)-Darbhanga (TBCB) 400 kV D/C (Triple Snowbird) Line under "Eastern Region System Strengthening Scheme VI (ERSS-VI)" in Eastern Region. The Commission in the said petition, vide order dated 1.9.2017, observed that the Review Petitioner is responsible for the delay in COD of the said transmission assets of PGCIL. Accordingly, the Commission observed that the Review Petitioner shall bear the IDC and IEDC for the period from 31.8.2016 to 21.4.2017. Learned senior counsel for the Review Petitioner contended that the amount of ₹55,34,000/- paid as IDC and IEDC for the period from 31.8.2016 to 21.4.2017 to PGCIL has an additional financial implication on it.

12. We have considered the contentions of the Review Petitioner and have also perused the impugned order. All these submissions were earlier raised by the Review Petitioner in the original petition and they were duly considered in para 80 and 81 of the order dated 29.3.2019. No fresh ground is pointed out by the Review Petitioner as to why the amount of ₹55,34,000/- paid as IDC and IEDC for the period from 31.8.2016 to 21.4.2017 to PGCIL is required to be allowed. The Review Petitioner is trying to agitate the issue on merit at the stage of review which is not



permissible. We do not find any error apparent on record or any sufficient reason to review our order dated 29.3.2019 on this ground. Accordingly, review of the impugned order on this ground is rejected.

13. The Review Petitioner has submitted that as per RFP, 2 EHV power lines were required for 400 kV D/C Muzaffarpur-Darbhanga Transmission Line and 8 EHV power lines were required for LILO of Barh-Gorakhpur 400 kV D/C line at Motihari for the final selected route. The Review Petitioner has contended that during execution of the project, besides 2 no. of underpass crossings, the number of EHV power line crossings increased by another 5 for 400 kV D/C Muzaffarpur-Darbhanga Transmission Line and by 8 EHV power line crossings for Barh-Gorakhpur 400 kV D/C line at Motihari due to which Review Petitioner incurred additional cost of ₹1.84 crore approximately in addition to corresponding IDC for the same and the same is covered as “Change in Law” event under Article 12.1.1 of the TSA.

14. We have considered the contentions of the Review Petitioner on the issue of increased EHV power line crossings and have also perused the impugned order. It has been contended that increase in EHV power line crossings is covered under the “Change in Law”. Article 12 of the TSA dated 6.8.2013 defines “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 (7) days prior to the Bid Deadline resulting into any additional recurring/ non-recurring expenditure by the TSP or any income to 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 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.

12.1.2 Notwithstanding anything contained in this Agreement, Change in Law shall not cover any change:

- a. on account of regulatory measures by the Appropriate Commission including calculation of Availability; and
- b. In any tax applied on the income or profits of the TSP.”

15. We have examined the record of the original petition and have also gone through the impugned order. The Commission in order dated 29.3.2019 on the issue of increase in power line crossings in para 75 observed as under:-

“75. We are of the view that though there is a change in the number of power line crossings vis-a-vis information provided by BPC in RFP document. However, as per Article 5.1 of TSA, the Petitioner was liable at its own cost and expense, for designing, constructing, erecting, completing and commissioning of transmission elements. It was also responsible for obtaining all consents, clearances and permits required for the development and construction of transmission project. It is noticed that the Petitioner obtained the entire power line crossing proposal in order to discharge its obligations under TSA and to complete the transmission line construction. Accordingly, this does not constitute any Force Majeure event and claim of the Petitioner on this account is disallowed.”

16. From the perusal of our above findings, it is clear that as per Article 5.1 of the TSA, the Review Petitioner was liable at its own cost and expense for designing, constructing, erecting, completing and commissioning of transmission elements. The Commission further observed that it was also responsible for obtaining all consents,



clearances and permits required for development and construction of the transmission project. The Review Petitioner in the original petition argues that increase in EHV power line is a *force majeure* event. Now, the Review Petitioner is raising the same issue once again under “Change in Law” under Article 12.1.1 of the TSA. In our opinion, the Review Petitioner is re-arguing the same issue once again and the same is not permissible in review. We do not find any error apparent on record or any other sufficient reason to review our order regarding the increased EHV power line crossings and additional cost of ₹1.84 crore. Accordingly, review of the impugned order on this ground is rejected.

17. The other contention of the Review Petitioner is that the difference between actual gantry coordinates and the coordinates as per the RFP specifications resulted in two additional EHV power line crossing as well as increase in 1.5 km route length of 400 kV D/C Muzaffarpur-Darbhanga Transmission Line. The Review Petitioner has further contended that connection arrangement at Muzaffarpur end caused an additional financial impact of ₹3.15 crore due to increase in line length of 1.5 km in addition to corresponding cost of IEDC and IDC. It is also contended that the Auditor’s certificate in support of additional cost of ₹3.15 crore was filed vide affidavit dated 6.4.2018 in the original petition. It is further contended that the observation of the Commission in the impugned order is erroneous that there was no document or Auditor’s Certificate in support of additional cost of ₹3.15 crore on account of increase in line length of 400 kV D/C Muzaffarpur-Darbhanga Transmission Line.

18. We have considered the above contention of the Review Petitioner and have



perused the order dated 29.3.2019. We note that the issue of EHV power line crossing and increase of 1.5 km in the route length of 400 kV D/C Muzaffarpur-Darbhanga Transmission Line was discussed in paragraphs 68 to 72 of the said order. The Commission did not examine the claim of the Review Petitioner in the absence of any documents or Auditor's certificate. The Review Petitioner has submitted that in page no. 2914 of original petition, the Review Petitioner had filed the certificate of Auditor dated 23.12.2017 indicating the additional cost of ₹3.15 crore on account of increase in line length of 400 kV D/C Muzaffarpur-Darbhanga Transmission Line. We have gone through the original record and find that Sl. No.4 of the Auditor Certificate at page 2914 of the original petition notes the following:-

Sl. No.	Description of Cost	Total Additional Cost (Rs. Crores)
4.	Increase in length of 400 kV D/C Muzaffarpur-Darbhanga Line due to change in Gantry Co-ordinates at PGCIL Muzaffarpur S/S	3.15

The Review Petitioner has given details with regard the EHV crossings on account of change of coordinates and the additional expenditure incurred thereon.

19. The coordinates given in the RFP documents are indicative in nature and the prospective bidders are required to conduct a survey, assess the requirement and quote the bids. The following provision in the RFP clarifies that the coordinates provided in the survey report should not be considered as point of termination/emanation of the transmission line:

"Note:- The address and coordinates of Sub-station land at Muzaffarpur have been provided by the CTU and the same is reflected in the Survey Report issued to the Bidders. Bidders may note that the coordinates provided in the Survey Report are to facilitate the bidders to locate the Sub-station/switchyard as this coordinate should not



be considered as the point of termination/emanation of transmission line. The TSP shall coordinate with the agency providing Inter Connection facility for exact point of termination/emanation of transmission line.”

20. As per the above provision, the TSP (bidder who has been selected for execution of the transmission line) is required to coordinate with the agency providing inter-connection facility for exact termination/emanation of the transmission line. Therefore, it was made known to the Review Petitioner that coordinates indicated in the RFP were indicative in nature, subject to confirmation by the agency providing inter-connection facility. The Review Petitioner should have factored the cost of possible variation in the coordinates in its bid. Therefore, no relief can be granted to the Review Petitioner in terms of the TSA for change in coordinates for termination of the transmission lines.

21. The other ground of review is that the Commission did not entertain the issue of geo-technical investigation at Motihari Sub-station land in the original petition. The Review Petitioner has contended that on account of the fact that the strata of the land was prone to liquefaction with consequences of bearing failure, lateral spreading and settlement, specific ground improvement measures were taken by it before commencement of construction work and for that reason it incurred additional expenditure of about ₹7.32 crore. It was contended that the geo-technical surprise was beyond reasonable expectations of the Review Petitioner and as such its claim for additional expenditure of about ₹7.32 crore should be entertained.

22. We have examined the above contentions of the Review Petitioner and have gone through the impugned order. We find that the issue of geo-technical



investigation at Motihari Sub-station land was considered by us in the main petition and a clear finding to this effect was given in the impugned order. The relevant portion of the order dated 29.3.2019 is as under:-

“67. The Petitioner has claimed additional expenditure of ₹64 lakh and ₹7.32 crore due to raising the level of sub-station land at Motihari level upto FGL + 800 mm in line with the recommendation of Petitioner’s Engineering Consultant and towards ground improvement at Motihari Sub-station land due to geo-technical surprise. We are of the considered view that the said events cannot be considered as Force Majeure events as provided under Article 11.7 of the TSA. Accordingly, the Petitioner’s claim is rejected.”

23. On perusal of our above finding, we are of the view that the Review Petitioner is trying to agitate and re-argue the issue of geo-technical surprise once again and the same is not permitted in review. We do not notice any error apparent in our order dated 29.3.2019 on this score. Accordingly, the review of the order dated 29.3.2019 on the issue of geo-technical surprise is rejected.

24. The other contention of the Review Petitioner is that the Commission in the original petition did not entertain the fact that due to the flooding of the Gandak River, the FGL of Motihari Sub-station was further increased by 800 mm which was beyond the control of Review Petitioner for which it incurred an additional expenditure of ₹0.64 crore.

25. We have considered the above contention of the Review Petitioner and perused the order dated 29.3.2019. The Commission in the said order in paragraph 67 has categorically observed that flooding of the Gandak River and raising of FGL of Motihari Sub-station further by 800 mm cannot be said to be an event of *force*



majeure as provided under Article 11.7 of the TSA and accordingly rejected the claim of the Review Petitioner. No fresh reasons have been given by the Review Petitioner as to why the Commission should deviate from its findings given in the order dated 29.3.2019. We do not notice any error apparent in our said order. Accordingly, review of the order dated 29.3.2019 on this score is rejected.

26. The Review Petitioner has contended that the Commission observed that change in taxes and duties are “Change in Law” events in terms of the TSA, but it failed to consider the Auditor certificate amounting to ₹44,99,841/- and ₹5,57,890/- submitted by the Review Petitioner vide affidavit dated 24.12.2018 in the original petition pertaining to taxes and duties. The Review Petitioner has further contended that the Commission also did not consider the combined Auditor’s certificate amounting to ₹2,65,41,861/- filed in the original petition vide affidavit dated 6.4.2018 which included the amount mentioned at Sl. No. 2.2, 2.3, 2.4 and 2.5 of Table 1.1 given in the Review Petition that was allowed in favour of the Review Petitioner through the impugned order dated 29.3.2019.

27. The above contentions of the Review Petitioner are inter-linked with certain other claims of the Review Petitioner such as amount paid by it to the forest authorities in obtaining forest clearance to be recovered from LTTCs under “Change in Law” events. Hence, the above contentions of the Review Petitioner were considered with the other “Change in Law” claims as allowed by us vide order dated 29.3.2019.



28. The Review Petitioner has submitted that the Commission has allowed recovery from LTTCs certain amount paid by the Review Petitioner i.e. amount paid to the forest authorities in obtaining forest clearance and other legitimate expenditure incurred due to change in several taxes and duties. The Review Petitioner has submitted that the documents in respect of the amount paid by the Review Petitioner to the concerned authorities were placed by it in the original petition and a brief account of the same is also given in Table 1.1 of the instant Review Petition. The Review Petitioner has submitted that the quantum of relief allowed in the form of percentage increase in yearly transmission charges in terms of Article 12 of Transmission Service Agreement was not specified by the Commission in its order. He submitted that a clarification is required so that the Review Petitioner can recover the same from the LTTCs as revised transmission charges.

29. We have considered the above contentions of the Review Petitioner and have perused the record. The quantum of relief allowed in the form of percentage increase in yearly transmission charges was not specified in order dated 29.3.2019. The relief on account of "Change in Law" during the construction period is provided in Article 12.2.1 of the TSA dated 6.8.2013 between the Review Petitioner and the LTTCs and is as follows:-

"

12.2.1 During Construction Period

For every cumulative increase/decrease of each Rupees one Crore Seventy Five Lakh (Rs.1,75,00,000/-) in the cost of the Project up to Scheduled COD of the Project, the increase/decrease in Non-Escalable Transmission Charges shall be an amount equal to 0.32 percent (0.32%) of the Non-Escalable Transmission Charges.

....."



30. The Review Petitioner is affected by “Change in Law” events and is entitled to recover the amount paid by the Review Petitioner to the forest authorities for obtaining forest clearance and other legitimate expenditure due to change in taxes and duties as allowed in order dated 29.3.2019. Accordingly, as per the above provision, the Review Petitioner is entitled for increase in non-escalable transmission charges which shall be equal to 0.32% of non-escalable transmission charges for every cumulative increase of ₹1,75,00,000/- in the cost of the project upto scheduled COD. The Review Petitioner may claim the same from the LTTCs in terms of the above provision in TSA and as per order dated 29.3.2019.

31. The other contention of the Review Petitioner is that while extending the scheduled COD of each element, the Commission did not consider that tariff for the first year was ₹158.59 crore that was higher than the second year tariff of ₹142.97 crore and the differential tariff of ₹142.93 crore qua tariff for 10 months duration for Darbhanga element and 8 months for Motihari element could not be realized due to *force majeure* events which was beyond the control of Review Petitioner. The Review Petitioner has further contended that that the monetary impact needs to be allowed to be recovered from the extended SCOD of respective transmission elements.

32. We have considered the contentions of the Review Petitioner on this issue and have also gone through the record. On perusal of the record, we find that in para 209 of the original petition, the Review Petitioner has submitted that due to the delay, the Review Petitioner has lost ₹142.9 crore (₹112.3 crore for the first year which was the highest in the entire span of 35 years and ₹30.6 crore revenue for the second year).



It was also submitted that the increase in the total cost of the project requires ₹21.75 crore increase in the levelized transmission charges to be allowed through Article 12.2.1 of the TSA and extension of scheduled COD to actual COD of the project. The Commission in order dated 29.3.2019 has decided that since the Review Petitioner was prevented from discharging its obligations under the TSA due to unexpected requirement of forest clearance which was not there in RFP documents, SCOD of 400 kV D/C Muzaffarpur-Darbhanga line and LILO of Barh-Gorakhpur 400 kV D/C line at Motihari were extended from 9.6.2016 and 9.8.2016 to 31.2.2017 and 10.8.2017 respectively, terming the event as *force majeure* without any financial benefit of IDC and IEDC to the Review Petitioner. In the present petition, the Review Petitioner has contended that the monetary impact needs to be allowed to be recovered from the extended SCOD of the respective transmission elements. In other words, the Review Petitioner is seeking to treat that the commencement of first contract year should start from the date of actual COD of the transmission lines, and not from the dates indicated in the TSA in order to enable the Review Petitioner to recover the tariff envisaged for the first contract year which is more than the tariff for the second contract year and correspondingly extend the last contract year.

33. Further, during the hearing on 16.9.2019, the learned senior counsel for the Review Petitioner prayed to consider the first year tariff from the extended COD, to which the Commission observed that the Review Petitioner is entitled to suitable remedy in accordance with law. In this regard, Schedule: 5(d) of the TSA provides as under: -

“Schedule: 5

Computation of Transmission charges



- d. *In case of any extension of time period for the Scheduled COD, the applicable Transmission Charges in relation to an Element shall be the Transmission Charges of the Contract Year in which the COD of such Element occurs or it has deemed to have occurred, and in relation to the Project, the Transmission Charges applicable will be for the Contract Year in which the COD occurs.”*

As per the above provision in the TSA, in case of any extension of time period from the SCOD, the applicable transmission charges for an element shall be of the contract year in which the COD of the element has occurred. Hence, the prayer of Review Petitioner to allow first year tariff is rejected.

34. Review Petition No. 8/RP/2019 is disposed of in terms of the above, at the admission stage.

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

sd/-
(P.K. Pujari)
Chairperson

