

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 216/MP/2016

Coram:

Shri A.K. Singhal, Member

Shri A.S. Bakshi, Member

Dr. M.K. Iyer, Member

Date of Order: 25th of June, 2018

In the matter of

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

And

In the matter of

Bhopal Dhule Transmission Company Ltd.
F-1, The Mira Corporate Suites,
1 & 2 Ishwar Nagar,
Mathura Road, New Delhi - 110065

...Petitioner

Vs.

1. Chhattisgarh State Power Trading Company Limited.
2nd Floor, "Vidyut Sewa Bhawan"
Danganiya
Raipur-492013
2. Sterlite Energy Limited
1st Floor, City Mart Complex
Baramuda
Bhubaneswar
3. GMR Kamalanga Energy Limited
10th Floor, C&D Block
IBC Knowledge Park
Opposite Fire Station, Bannerughatta Road
Bangalore
4. Navbharat Power Private Limited
Malaxmi House, 82583/3
Road No.2 Banjara Hills
Hyderabad-500034

5. Monnet Power Company Limited
Monnet House, 11 Masjid Moth
Greater Kailash Part II
New Delhi-110048
6. Jindal India Thermal Power Limited
B-1, Local Shopping Complex
Vasant Kunj
New Delhi-110070
7. Lanco Babandh Power Private Limited
Plot No.-397, Udyog Vihar V
Gurgaon-122016
8. IndBarath Energy (Utkal) Limited
Plot No. 30 A, Road No.1
Film Nagar
Jubilee Hills
Hyderabad-500033
9. MB Power (Madhya Pradesh) Limited
235 Okhla Industrial Area, Phase III
New Delhi-110020
10. RKM Powergen Limited 147
Gitanjali Avanti Vihar Sector 1
Raipur (C.G.-492004)
11. Athena Chhattisgarh Power Limited
7-1-24 B Block, 5th Floor
Roxana Towers
Greenlands, Begumpet
Hyderabad-500016
12. Jindal Power Limited
2nd Floor, DCM Building
Plot No-94 Sector 32
Gurgaon-122001
13. SKS Power Generation (Chhattisgarh) Limited
501 B, Elegant Business Park
Andheri, Kurla Road
J.B. Nagar, Andheri (East)
Mumbai-400059
14. Korba West Power Company Limited
6th and 7th Floor, Vatika City Point
M.G. Road,
Gurgaon-122002

15. DB Power Limited
813, Phase V
Udyog Vihar
Gurgaon-122016
16. Visa Power Limited
No.9, HLL Building
Shakespeare Sarani
Kolkata-700071
17. KSK Mahanadi Power Company Limited
82/293/82/A/431/A, Road No. 22
Jubilee Hills
Hyderabad-500033
18. Bharat Aluminum Company Limited
C/o Administrative Building
Balco Nagar
Korba-495684
19. Vandana Vidyut Limited
Vandana Bhawan
MG Road, Raipur
Chhatisgarh-492001
20. Lanco Amarkantak Power Limited
Plot No.397
Udyog Vihar, Phase-3
Gurgaon-122016
21. Chhattisgarh Steel & Power Limited
142, Saheed Smarak Complex
G.E. Road, Raipur
Chhatisgarh-492001
22. GMR Chhattisgarh Energy Pvt. Limited
10th Floor, Tower D
IBC Knowledge Park
4/1 Bannerghatta Road, Near Dairy Circle
Bangalore-560029
23. Power Grid Corporation of India Limited
400/220 kV ASOJ M/s GETCO Substation
AT &PO: Amaliyara, Halol Road
Vadodara-390022

.... Respondents

Parties present:

Shri Gautam Chawla, Advocate, BDTCL

Shri T.A.N. Reddy, BDTCL

Shri, Harshit Gupta, BDTCL
Shri Rohit Gera, BDTCL
Ms. Swapna Sheshadri, Advocate, CSPTCL

ORDER

The Petitioner, Bhopal Dhule Transmission Company Limited (BDTCL) has filed the present petition seeking compensatory and declaratory reliefs under the Transmission Services Agreement dated 7.12.2010 (TSA) on account of force majeure and change in law events, which have adversely affected the construction of the project with the following prayers:

- “(a) Allow the present Petition and declare that the delay in grant of forest clearance, change in formats for FRA Clearance, delay in Section 164 Authorization, the delay in communication of the coordinates of PGCIL substation, the delay in allotment of land for the Bhopal Substation and the delays in transportation of the transformer to the Bhopal Substation that have occurred subsequent to the submission of the bid and award of the project, constitute Force Majeure events as per the TSA.
- (b) Declare that the Petitioner would not be liable in any manner for a breach of its obligations under the TSA due to a delay in construction of the project in accordance with Article 11.7 (a) of the TSA.
- (c) Declare that the amendment to the forest Guidelines by notification dated 13.2.2012 issued by MoEF and the change by MoEF vide its letter dated 5.7.2013 in the formats to be issued by District Collectors in lieu of FRA Clearances to be obtained by the Petitioner are Change in Law events as per the TSA.
- (d) Declare that change in taxes subsequent to the bid deadline by Ministry of Finance Circular nos. DOF No. 334/3/2012-TRU and D.O.F. No. 334/1/2012-TRU dated 16.3.2012 are Change in Law events as per the TSA.
- (e) Grant an extension in the Scheduled Commercial Operation Date of the project up to 9 June 2015 i.e. actual commercial operation date of the last element of the project as per the TSA, and waive any penalties or any consequences under the TSA.
- (f) Grant an increase of ₹21.23 crore per annum in the levellised transmission charges payable with effect from the commercial operation date of each of the elements of the project.
- (g) Without prejudice to the above prayer, grant the Petitioner relief in accordance with Article 12.2 of the TSA on account of the Change in Law events which adversely impacted the project.
- (h) Declare the Petitioner is entitled to receive transmission charges in respect of the DV Line with effect from its Commercial Operation Date i.e. 9.2.2015.”

2. The Petitioner is a fully owned subsidiary of Sterlite Grid Limited (SGL) 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 transmission service to the Long Term Transmission Customers (LTTCs) of the Project which requires establishing the transmission system for system strengthening of Western Region comprising the following transmission lines and substations:

(a) Transmission Lines:

- (i). Jabalpur-Bhopal 765kV S/C Transmission Line (JB Line)
- (ii). Bhopal-Indore 765 kV s/C Transmission Line (BI Line)
- (iii). Bhopal-Bhopal 400 kV D/C Transmission Line (BB Line)
- (iv). Aurangabad-Dhule 765 kV S/C Transmission Line (AD Line)
- (v). Dhule-Vadodara 765 kV S/C Transmission Line (DV Line)
- (vi). Dhule-Dhule 400 kV D/C Transmission Line (DD Line)

(b) Sub-stations:

- (i) 765/400 kV 2X1500 MVA substation at Bhopal (Bhopal Substation)
- (ii) 765/400 kV 2X1500 MVA substation at Dhule (Dhule Substation)

3. The Petitioner was incorporated as a special purpose vehicle by PFC Consulting Ltd. (PFCCL) as part of Tariff Based Competitive Bidding process for implementing the project on BOOM basis. SGL participated in the competitive bidding process conducted by PFCCL and on emerging as the successful bidder, Letter of Intent (LOI) was issued by PFCCL to SGL on 31.1.2011. In accordance with the bidding documents, SGL acquired 100% of the shareholding in the Petitioner Company by executing a Share Purchase Agreement with PFCCL on 31.3.2011. The Petitioner entered into the Transmission Service Agreement with Long Term Transmission Customers on 7.12.2010. The Commission in its order dated 12.10.2011 in Petition No. 110/2011 granted the transmission licence to the Petitioner

for inter-State transmission of electricity and in order dated 28.10.2011 in Petition No. 108 of 2011 adopted the transmission charges for the project.

4. As per the TSA, the transmission lines were to be completed and commissioned within 36 months from the effective date. Effective date has been defined as the later of the dates of (i) the execution of the TSA, (ii) acquisition of the SPV by the selected bidder, and (iii) submission of Contract Performance Guarantee on behalf of the TSP. Accordingly, the effective date is the date of signing of the Share Purchase Agreement i.e. 31.3.2011 and the date of scheduled COD is 31.3.2014. The Petitioner has submitted that it has been developing the project and the detailed construction progress has also been reported on a monthly basis to the Central Electricity Authority in terms of Article 4.1(g) of the TSA. However, due to various unforeseen and uncontrollable events that have taken place subsequent to the award of the Project, the Petitioner is not able to complete the Project on time. The Petitioner has submitted that the construction of the transmission lines has been delayed and affected on account of the following force majeure and/or change in law events:

Force Majeure and Change in Law event:

- (a) Delay in grant of Forest clearance;
 - i. Change in MoEF Guidelines;
 - ii. Change in Format for obtaining FRA Clearances

Force Majeure events:

- (b) Delay in Grant of Section 164 Authorization;
- (c) Delay due to finalization of coordinates of the gantry of PGCIL's substation;
- (d) Delay in allotment of land for the Bhopal Substation and delay in transportation of equipment; and

Change in Law event:

- (e) Change in Taxes.

5. The Petitioner has submitted that as a result of the Force Majeure and Change in Law events, there has been a cumulative loss of at least 14 months of working time, which has in-turn rendered it impossible to complete the project within the timelines stipulated in the TSA. The Petitioner has submitted that on account of Force Majeure events, it is entitled to (i) compensatory relief under Article 11.7 (b) of the TSA, (ii) Interest During Construction and overhead costs with effect from 31.3.2014 up to the date of the commissioning of the project; and (iii) extension of the SCOD of the project up to 9.6.2015 i.e. the actual commercial operation date of the last element of the Project. With regard to Change in Law, the Petitioner has submitted that while bidding, it has taken into account the consents, clearances and permits required for the project. However, owing to the subsequent uncontrollable events, there has been a substantial deviation in the manner of obtainment of the requisite consents, clearances and permits, in as much as there have been addition/change of terms and conditions which led to additional work and resultant cost over-run.

6. The Petitioner has submitted that since the total additional expenditure on account of Change in Law and Force Majeure event is ₹180.51 crore, the Petitioner is required to be compensated in a proportionate manner for an increase of ₹21.23 crore per annum in the levelised transmission charges (considering the project cost estimate as ₹1696 crore). The Petitioner has submitted that it will be entitled to receive transmission charges for the DV Line with effect from the COD of the DV Line i.e. 9.2.2015 in accordance with the provisions of the TSA, the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010 and Billing, Collection and Disbursement Procedure. However, the Petitioner is presently receiving transmission charges only from

13.6.2015 onwards, without any justification or basis. The Petitioner has categorized the increase in total project cost under the following heads:

(a) **Interest During Construction:** The Petitioner has submitted that delay in commissioning of the project has resulted in an increase in the Interest During Construction (IDC) during the extended construction period and amounts to ₹94.20 crore. The Petitioner actually incurred IDC of ₹152.17 crore as on 31.3.2014 i.e. the SCOD. Thereafter, on the actual commercial operation date of the various elements of the project, the IDC incurred by the Petitioner amounted to ₹246.37 crore.

(b) **Overhead Costs:** The Petitioner has submitted that on account of delay in commissioning of the project, the Petitioner had to incur additional costs on account of salaries, travel expenses, administrative charges, office expenses, rent, etc. during the extended period of construction. The additional expenditure incurred by the Petitioner towards overhead costs incurred from 31.3.2014 i.e. the SCOD to the actual commercial operation date is ₹13.02 crore.

(c) **Price Variation and Margin Money:** The Petitioner has submitted that it procured conductors for the project from reputed companies like Apar Industries, Sterlite Technologies Ltd., JSK Industries Pvt. Ltd. and Hind Aluminum Ltd. as per the requirements of the project. Due to delay in commissioning of the project, the Petitioner was required to delay the delivery of the conductors on an on-going basis. As a result, there has been a substantial increase in the project cost due to the price variation and margin money paid to conductor suppliers. The total amount paid by the Petitioner as

margin money and price variation is ₹71.30 crore. Out of the total amount, ₹34.42 crore was incurred from 2013-2014 till COD only on account of deferment of conductors beyond the SCOD i.e. 31.3.2014.

(d) **Change in Taxes:** The Petitioner has submitted that the Service Tax as well as Excise Duty payable by the Petitioner were revised by the Department of Revenue, Ministry of Finance vide its Notification dated 16.3.2012. On account of such change, the Petitioner had to bear an additional burden of ₹36.27 crore.

(e) **Increase in afforestation Rates:** The Petitioner incurred an additional expenditure of ₹2.6 crore on account of an increase in the afforestation rates. The said increase was not anticipated by the Petitioner at the time of bidding for the project.

(f) The Petitioner has summarized his claims towards the additional expenditure as under:

S. No.	Reason for Cost Increase	Cost Increase (₹ in crore)
1.	Additional expenditure towards IDC during extended construction period of 435 days	94.20
2.	Additional expenditure towards overhead cost	13.02
3.	Additional expenditure towards price variation and margin money on account of delay in delivery of conductors due to delay in commissioning of the project	34.42
4.	Additional expenditure towards taxes and duties, especially on account of an increase in the afforestation rates	36.27
5.	Additional expenditure on account of an increase in the afforestation rates	2.6
	TOTAL	180.51
	Increase in levelised transmission charges	21.23 crore per annum

7. The Petitioner has submitted that the said compensation is required to offset the additional cost incurred on account of unforeseen and uncontrollable events that have occurred subsequent to the submission of the bid and award of the project. The increase in levelised tariff is essential at least to offset the impact of the additional cost and restore minimum economic viability of the project for the remaining term of the contract.

8. After admitting the Petition, notices were issued to the Respondents to file their replies. The Commission directed the Petitioner to file the following information:

- (a) Whether PFCCCL had indicated about the requirement of forest clearance in the RfP and if so, whether the Petitioner had made the survey and factored all expenditure relating to forest clearance or not?
- (b) The reasons for delay in commissioning of bays of PGCILs sub-station at Vadodara. Whether the Petitioner brought this fact to the notice of the CEA and CTU? Place on record the all relevant correspondences in this regard.
- (c) The details of the items of expenditure on which the taxes and duties have been levied, supported by Auditor's Certificate.
- (d) Whether the notices for revision of tax and rates have been issued to the LTTCs in terms of the TSA.
- (e) The details of the interim arrangement for termination of transmission line at Waghodia, Vadodara and the authority for such interim arrangement.

9. The Petitioner vide its affidavit dated 30.12.2016 has filed the above information. Replies to the petition have been filed by Chhattisgarh State Power Trading Company Limited (CSPTCL) and Power Grid Corporation of India Limited.

10. CSPTCL in its reply dated 30.1.2017 has submitted as under:

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

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

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

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

(e) There is no delay in the grant of Section 164 approval as the Petitioner had submitted all documents to the CEA with a copy to the Ministry of Power on 4.5.2012 which was received by the CEA on 28.6.2012. After verification, Section 164 approval itself was notified on 29.1.2013 in the Gazette. Publication in Gazette is a notification to the general public and it is not even believable that the Petitioner got to know of Section 164 approval on 20.1.2014 when the same was communicated by the Ministry of Power. Even during the bidding process, all bidders were put on notice that Section 164 permission is not a pre-condition for commencing and implementing the contract.

(f) The gantry position needs to be known for termination of the line and it does not mean that the line itself could not be finalized by the Petitioner because the gantry position was not known. If so, it is not clear as to how the Petitioner applied for Forest clearance, FRA clearance, etc. when the route of the line itself was not finalized.

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

11. The Petitioner in its rejoinder dated 28.2.2017 has reiterated the submissions made in the petition.

12. During the course of hearing, learned counsel for the Petitioner submitted that as per the amendment in the 2004 Forest Guidelines in 2012, the availability of forest land for compensatory afforestation was restricted to the States that have 50% forest cover of their total geographical area. Considering that the forest areas in Madhya Pradesh, Maharashtra and Gujarat is not more than 50%, the notification dated 13.2.2012 disentitled the Petitioner from obtaining compensatory afforestation land in Madhya Pradesh, Maharashtra and Gujarat. Learned counsel submitted that following the notification, the Petitioner was constrained to renew the process of identifying non-forest land for compensatory afforestation leading to an additional capital outlay on account of price increase in the input materials, such as conductor, steel, cement, labour, etc. This amendment therefore, is 'Change in Law' in terms of Article 12 of the TSA. Learned counsel further submitted that there was delay of approximately 20 months in grant of Right of Way authorization under Section 164 of the Electricity Act, 2003. The said delay was beyond the control of the Petitioner. Learned counsel argued that the application for seeking the authorization under Section 164 was submitted on 5.11.2011 whereas the Ministry of Power intimated the Section 164 approval to the Petitioner on 20.1.2014. Therefore, the Petitioner is not liable for the delay in grant of the authorization under Section 164 of the Act. PGCIL's delay in communicating the gantry points and approving the final route of the DV Line amounts to a Force Majeure event. A transmission line cannot be commissioned, if its termination points are not finalized and it is not connected to a sub-station.

13. Learned counsel for CSPTCL submitted that Section 164 approval itself was notified on 29.1.2013 in the Gazette which is a notification to the general public and it is not even believable that the Petitioner got to know of Section 164 approval on 20.1.2014 when the same was communicated by the Ministry of Power. Even during the bidding process, all bidders were put on notice that Section 164 permission is not a pre-condition for commencing and implementing the contract. Learned counsel for CSPTCL submitted that the gantry position needs to be known for termination of the line and it does not mean that the line itself could not be finalized by the Petitioner because the gantry position was not known.

14. The Petitioner was directed to file the following information/clarification:

- (a) Whether a comprehensive proposal for Forest Clearance was submitted by the Petitioner to the forest authorities and if so, copy thereof be placed on record.
- (b) Loan-wise detailed computation of gross interest indicating the outstanding loan, rate of interest applied pertains to the period from actual drawal to SCOD and from SCOD to till the actual COD of concerned assets.
- (c) Accrual and cash interest income made from the temporary parking of fund upto SOCO and from SCOD to actual COD.
- (d) Net interest capitalized pertains to the period from actual drawal till SCOD and from SCOD till the actual COD of concerned assets.
- (e) Details of finance charges, separate computation thereof during these periods.

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

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

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

15. The Petitioner, vide its affidavit dated 17.6.2017, has filed the information called for. The Petitioner has submitted that it had submitted the comprehensive forest clearance proposal in a timely manner with the competent forest authorities in accordance with the applicable law. The Petitioner has submitted that the gross interest paid by the Petitioner from SCOD till actual COD is ₹1,42,10,83,955 /-, the cash interest earned from the temporary parking of funds from SCOD to actual COD is ₹34,41,524/-, the interest charged to profit and loss account is ₹74,64,20,055/-, the net interest capitalized paid by the Petitioner from SCOD to actual COD is ₹67,12,22,376/-, the finance charges from SCOD to actual COD is ₹16,89,41,491/-. Therefore, the total IDC on original project cost is ₹84,01,63,867/-. The Petitioner has computed the total IDC as under:

(Amount in ₹)

Particulars	From Actual Drawal to SCOD	From SCOD to Actual COD
Gross Interest	97,69,89,675.00	1,42,10,83,955.00
Less: Interest Earned	2,42,56,792.00	34,41,524.00
Less: Interest Charged to Profit & Loss Account	-	74,64,20,055.00
Net Interest Capitalized	95,27,32,883.00	67,12,22,277.00
Finance Charges	21,94,51,212.00	16,89,41,491.00
Total IDC	1,17,21,84,095.00	84,01,63,867.00

16. The Petitioner, vide letter dated 5.10.2017, was directed to furnish the information regarding (a) 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, and (b) Auditors certificate clearly mentioning the actual Debt Equity maintained during construction period and the documentary proof for the debt-equity ratio as committed by the Petitioner at the time of bidding. The Petitioner vide its affidavit dated 16.10.2017 has submitted the Auditor certificate for increase in tax i.e. service tax and excise duty and Actual Debt Equity ratio. The Petitioner has submitted that it has incurred ₹19.59 crore on account of change in taxes and duties.

17. Power Grid Corporation of India Limited (PGCIL) vide its reply affidavit dated 16.11.2017 has submitted that the possession of the land for the Vadodara GIS Substation implemented by PGCIL was given by the district administration on 13.8.2013. Subsequent to that PGCIL communicated to the Petitioner the GPS co-ordinates of the 765 kV line gantries of Dhule line at Vadodara GIS sub-station vide letter No. WRTS-II/VDR/SOJ/STRLT/2013/66 dated 11.9.2013. PGCIL has submitted that the Petitioner served copy of the Petition to PGCIL at 400/220 kV ASOJ M/s GETCO substation, AT&PO: Amaliyara, Halol Road, Vadodara-390022 which was a temporary office of PGCIL.

18. The Petitioner in its rejoinder dated 17.11.2017 has submitted that the copy of the Petition was served at the address from which PGCIL was regularly corresponding with the Petitioner. In fact, the address: "400/220 kV ASOJ M/s GETCO Substation AT&PO: Amaliyara, Halol Road, Vadodara-390 022", was formally set out in the header of the correspondence addressed by PGCIL to the

Petitioner. PGCIL never communicated to the Petitioner that it was merely a temporary office or that future correspondence should be addressed to any alternate address. The Petitioner has submitted that it was PGCIL's obligation to inform the Petitioner of any address change and set up adequate internal processes to ensure correspondence received at the erstwhile address is expeditiously communicated to the appropriate departments. The Petitioner has submitted that PGCIL has clearly admitted that there was a delay of approximately 3 years from the award of the Project up to when it communicated the gantry co-ordinates for the termination of the Dhule-Vadodara 765 kV S/C Transmission Line ("DV Line") at PGCIL's substation at Waghodia, Vadodara and approved the line route of the DV Line on 19.10.2013. The Petitioner has submitted that it has no control whatsoever over PGCIL's communication of the gantry co-ordinates and the same falls squarely within the meaning of a Force Majeure event under Article 11 of the TSA.

Analysis and Decision:

19. We have considered the submissions of the Petitioner, CSPTCL and perused the documents on record. The following issues arise for our consideration:

- (a) Whether the Petitioner has complied with the provisions of the TSA before approaching the Commission?
- (b) Whether the Petitioner's case for delay in grant of forest clearance is covered under force majeure and change in law provisions of the TSA?
- (c) Whether the delay in grant of Section 164 authorization, delay due to finalization of coordinates of the gantry of PGCIL's substation, Delay in commissioning of Dhule sub-station, delay in allotment of land for Bhopal

Substation and delay in transportation of Equipment is covered under the provisions of force majeure of the TSA?

(d) Whether the Petitioner's case for change in taxes is covered under the change in law provisions of the TSA?

(e) Whether the Petitioner is entitled to receive transmission tariff for DV Line from the date of its commissioning?

(f) What reliefs should be granted to the Petitioner in the light of the answer to the above issues?

The above issues have been dealt with in the succeeding paragraphs.

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

20. The Petitioner has claimed relief under Article 11 (Force Majeure) and Article 12 (Change in Law) of the TSA. Article 11.5.1 of the TSA provides 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 seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one (1) day after such reinstatement.

Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party shall give the other Party regular reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure.

11.5.2 The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this

Agreement, as soon as practicable after becoming aware of each of these cessations.”

Article 12.3.1 of the TSA provides 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 in Law as soon as reasonably practicable after becoming aware of the same.”

21. Under Article 11.5.1 of the TSA, an affected party shall give notice to the other party of any event of Force Majeure as soon as reasonably practicable, but not later than seven 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 shall be a pre-condition to the affected party`s entitlement to claim relief under the TSA. Under Article 12.3.1 of the TSA, the affected party is required to give notice to the other party about the occurrence of change in law.

22. The Petitioner gave notices dated 10.11.2012 to the LTTCs under Article 11 of the TSA regarding the delay in grant of Section 164 authorization and on 3.02.2014 for delay in grant of forest clearance. In response, SKS Power Generation Ltd. responded by advising the Petitioner to approach the Commission for appropriate relief. Lanco Babandh Power Ltd. in its letter dated 12.12.2012 advised the Petitioner to appraise CEA and MoP of the problem in presence of the beneficiaries and assured its help and support within the framework 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 LTTCs regarding occurrence of change in law and force majeure before approaching the Commission.

Issue No. 2: Whether the Petitioner's case for delay in grant of forest clearance is covered under force majeure and change in law provisions of the TSA?

23. The Petitioner has submitted that the delay in grant of Forest Clearance to the Petitioner is covered under both Force Majeure and Change in Law provisions of the TSA in as much as the delay was entirely beyond the reasonable control of the Petitioner and prevented the Petitioner from performing its obligations under the TSA in a timely manner. The Petitioner has submitted that the project traverses through 189.2 Ha. of forest land in the States of Madhya Pradesh, Maharashtra and Gujarat which affect over 9% of the total line length of the project. The Petitioner has submitted that consequent to the acquisition of BDTCL by Sterlite, the Petitioner has taken necessary steps for securing grant of forest clearance in accordance with the procedure prescribed in the Forest (Conservation) Rules, 2003 and Forest Guidelines, 2004. The Petitioner initiated a survey of the transmission line in April 2011 to determine the line-length falling in forest areas. Thereafter, the Petitioner submitted applications to the designated nodal officers seeking forest clearance as per Rule 6 of the Forest (Conservation) Rules, 2003 on 26.8.2011 for Maharashtra (DA Line), on 20.9.2011 for Maharashtra and Gujarat (DV Line), on 12.9.2011 for Madhya Pradesh (BJ Line), on 12.9.2011 for Bhopal (BB Line) and (BI Line) and on 8.10.2011 for Maharashtra (DD Line). The Petitioner has submitted that its project was delayed at the stage of compensatory afforestation on account of the amendment in the Forest Guidelines for forest clearance by MoEF. The Petitioner has submitted that as per the Forest Guidelines, 2004, where the non-forest lands were not available or non-forest land is available in less extent to the forest area being diverted, then compensatory afforestation may be carried out over degraded forest land being diverted or a compensatory afforestation in the same State or Union Territory would be accepted by the Central Government only on the basis of a

certificate from Chief Secretary of the State. According to the Petitioner, this stipulation of certificate by Chief Secretary was amended by Notification of MoEF dated 13.2.2012 by providing that certificate of non-availability of non-forest land shall be accepted only for those States having area of forest land more than 50%. The Petitioner has submitted that forest areas in Madhya Pradesh, Maharashtra and Gujarat are not more than 50% and therefore, the notification dated 13.2.2012 disentitled the Petitioner to obtain land compensatory afforestation in Madhya Pradesh, Maharashtra and Gujarat based on the certificate of Chief Secretary. The Petitioner has submitted that the above amendment to the Forest Guidelines of 2004 constitutes a Change in Law within the meaning of Article 12 of the TSA impacting the development of the project. The Petitioner has submitted that since it's project was also not treated as a Central Government project by the Governments of Madhya Pradesh, Maharashtra and Gujarat, the exemption from obtaining a certificate from the Chief Secretary of the State for non-availability of the land applicable under para 3.2(ix) of the Forest Guidelines in case of 'Central Government Projects' or 'Central Government Undertaking Projects,' was not available to the Petitioner at the relevant time. The Petitioner has submitted that from 13.2.2012 onwards, when the MoEF amended the Forest Guidelines, the Petitioner was unable to procure alternate land for compensatory afforestation.

24. The Petitioner obtained no-objection certificates and FRA clearance from the District Magistrate and Collector under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 on 1.6.2013, 2.7.2013, 18.7.2013, 30.7.2013, 13.9.2013 and 3.10.2013, 12.9.2013, for Gujarat, Maharashtra and Madhya Pradesh. However, on 5.7.2013, the MoEF issued letter to all the Principal Secretaries (Forest) of all the States and Union Territories stipulating that

the no-objection certificates in respect of FRA Clearances should be issued by all District Collectors as per the revised formats. Even FRA Clearances issued prior to the MoEF's said notification was required to be re-issued as per the new format prescribed by MoEF. The said change in formats delayed the grant of FRA Clearances to the Petitioner. The delays in receiving Forest Clearance caused due to the change in the formats for FRA Clearance amounts to a Change in Law and Force Majeure under the TSA.

25. CSPTCL has contended that the Petitioner has proceeded on a misconception by claiming the very same events as a Force Majeure as well as Change in Law and seeking compensation for the same. The petition is not maintainable at all in the present form. The TSA provides one set of relief for Force Majeure and another for Change in Law. CSPTCL has submitted that the MoEF's 2012 notification does not amount to change in law in any manner and in fact, only meant that route of exemption was no longer available to the Petitioner. As per the law, the Petitioner was to carry out compensatory afforestation and in case the Chief Secretary's certificate was produced, there would be an exemption. However, the Petitioner need not have waited for the exemption letter from the Chief Secretary from 2011 onwards when it had applied for forest clearance. CSPTCL has submitted that Clauses 5.1.4 and 5.1.5 of the TSA provide that it is the responsibility of the Petitioner 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. Further, from para 38 of the petition, it becomes clear that as against the Petitioner's proposal for land acquisition

to District Collector, Jabalpur on 26.5.2012, the land was allocated vide letter dated 16.7.2012. There was no inordinate delay in allocation of land for compensatory afforestation as being contended by the Petitioner. The MoEF circular dated 5.7.2013 clearly shows that no change was brought about and in fact only the earlier letters dated 3.8.2009 and 5.2.2013 by which detailed guidelines on submission of evidence for having initiated and completed the process of settlement of rights under the Scheduled Tribes and other Traditional Forest Dwellers Act, 2006 were asked to be followed. In fact, there is no change in law since the guidelines for the issuance of the FRA certificate had already been framed as far back as 3.8.2009 and 5.2.2013. CSPTCL has submitted that the original FRA clearances placed on record by the Petitioner are in respect of Gujarat, Madhya Pradesh and Maharashtra and are all dated in early 2013 whereas the Petitioner has only placed the revised FRA clearances in respect of Madhya Pradesh. This itself indicates that the MoEF Circular dated 5.7.2013 was not applicable retrospectively as has been contended by the Petitioner. Even the circular dated 5.7.2013 does not say that it is applicable retrospectively and earlier FRA clearances need to be reissued as per the format. Further, even the letter dated 22.10.2013 issued by the Forest Department, Government of Madhya Pradesh clearly says that the certificate for the new format have been enclosed only for the pending cases of diversion of forest land, and not where the certificate has already been issued.

26. The Petitioner has argued that the Petitioner undertook all efforts to expedite the grant of forest clearance. In this regard, the Petitioner approached the Association of Power Producers (APP), a forum of private power companies representing more than 90% of the power capacity being set up by the private sector in India, to request the Government of India to facilitate grant of Forest Clearance

and highlight the importance of the project. On 27.12.2013, APP sent a letter to MoP with a copy to CEA and the Cabinet Secretariat requesting MoP to ensure that the grant of Forest Clearance is expedited. On 23.1.2014, MoP called a meeting of forest officials, PGCIL, CEA, APP and the Petitioner to discuss the issue of delays in grant of forest clearance. In this meeting, the Petitioner sought early resolution of the forest clearance issue to enable completion of the project. In this regard, the Additional Secretary, MoP advised the Director (Trans.), MoP to arrange a meeting with MoEF and State Forest Officials. However, the MoEF's letter permitting all types of transmission projects including the Petitioner to raise compensatory afforestation over degraded forest land of twice the quantum of the forest area being diverted/de-reserved in respect of proposed transmission project was issued only on 11.7.2014. Therefore, despite the Petitioner's efforts, the Petitioner could proceed with the process for diversion of forest land only after the MoEF issued its letter dated 11.7.2014.

27. In response to our query whether PFCCL had indicated about the requirement of forest clearance in the RfP bid and if so, whether the Petitioner had made the survey and factored all expenditure relating to forest clearance or not, the Petitioner, vide its affidavit dated 2.1.2017 has submitted that PFCCL had indicated the requirement of forest clearance in the RfP and had taken all necessary steps required to fulfill its obligation under the RfP including conducting a survey and factoring for all expenditure related to forest clearance. The expenditure factored was based on the extant laws and legal framework including the procedure and timeline for obtaining forest clearances in the various States through which the project traverses, at the time when the Petitioner submitted the levelled transmission tariff for the project. According to the Petitioner, at the time of issuance

of RfP, PFCCL had initiated forest clearance for approximately 45 km of the area under forest cover whereas the actual areas under forest cover turned out to be approximately 64 km. Accordingly, the process for initiation and obtainment of forest clearance for the rest of the line under forest cover contributed to the delay and additional expenditure. The Petitioner vide affidavit dated 17.6.2017 has placed on record the copies of the comprehensive forest clearance proposals.

28. We have considered the submissions of the Petitioner and CSPTCL. Under Section 2 of the Forest (Conservation) Act, 1980, 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 forest land 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.

29. The Petitioner initiated a survey of the transmission line in April, 2011 to determine the line length falling in forest areas. The Petitioner made applications to the designated nodal officers in Madhya Pradesh, Maharashtra and Gujarat on 22.12.2010 for forest clearance under Rule 6 of the Forest (Conservation) Rules, 2003. The Petitioner also obtained no objection certificates from the Collectors under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 on 1.6.2013, 2.7.2013, 18.7.2013, 30.7.2013, 13.9.2013 and 3.10.2013, 12.9.2013 in cases of Gujarat, Maharashtra and Madhya Pradesh. The Petitioner has contended that as per the Forest Guidelines in operation as on the date of the bid, it was eligible for compensatory afforestation on the degraded forest land and available non-forest land after obtaining a certificate of the Chief Secretary of the concerned State to the effect that non-forest land is not available or available in less extent to the forest land being diverted. The Forest Guidelines, 2004 provides as under:

“3.2 Land for Compensatory Afforestation:-

- (i) Compensatory afforestation will be done over equivalent area of non-forest land.
- (ii) As far as possible, the non-forest land for compensatory afforestation should be identified contiguous to or in the proximity of Reserved Forest or Protected Forest to enable the Forest Department to effectively manage the newly planted area.
- (iii) In the event that non-forest land of compensatory afforestation is not available in the same district, non-forest land for compensatory afforestation may be identified anywhere else in the State/Union Territory as near as possible to the site of diversion, so as to minimise adverse impact on the micro-ecology of the area.
- (iv) Where non-forest lands are not available or non-forest land is available in less extent to the forest area being diverted, compensatory afforestation may be carried out over degraded forest land being diverted and available non-forest land, as the case may be.
- (v) The non-availability of suitable non-forest land for compensatory afforestation in the entire State/Union Territory would be accepted by the Central Government only on the Certificate from the Chief Secretary to the State/Union Territory Government to that effect.

(vi) An exception to 3.2(i) above, compensatory afforestation may be raised over degraded forest land twice in extent of the forest area being diverted/deserved in respect of following types of proposals:

(a).....

(b).....

(c) For laying transmission lines upto 220 kV.”

30. MoEF, in order to ensure that such certificates are issued after thorough scrutiny, vide Notification dated No. F. No. 11-423/2011-FC dated 13.2.2012 added the following provisos under para 3 (v) of the Guidelines:

“Provided that no such certificate shall be issued by the Chief Secretary, unless he/she obtains joint certificates to this effect from each district collector and Division Forest Officer in respect of area under their jurisdiction.

Provided further that in case it is found by the Central Government that after issue of such certificate by the Chief Secretary, non-forest land has been made available for plantation of forestry and/or commercial or horticulture tree species by Government departments, the Central Government may issue such direction to the State or UT Government concerned, to transfer and mutate such land in favour of State or UT Forest Department and notify such non-forest land as Reserved Forests/Protected Forests in accordance with the provisions of Indian Forest Act, 1927 or the concerned local Act.

Provided further that certificate of non-availability of non-forest land shall be accepted only from those States having area of forest land more than 50% of their geographical area.”

31. The Petitioner has submitted that, since the forest areas in Madhya Pradesh, Maharashtra and Gujarat were below the threshold of 50% of the geographical areas of these States, the Petitioner could not obtain the certificate from the Chief Secretary and therefore, was rendered ineligible to develop compensatory afforestation on the degraded forest land. In support, the Petitioner has relied upon the Report No. 21 of 2013 of CAG in which it has been observed that no forest land has been received for compensatory afforestation for the forest land diverted for non-forest use in Madhya Pradesh, Maharashtra and Gujarat. The Petitioner has submitted that Chief Secretaries of Madhya Pradesh, Maharashtra and Gujarat as recently as 2010 have issued certificates of non-availability of non-forest land for

compulsory afforestation. It is observed from the India State of Forest Report, 2013 that the forest areas in Madhya Pradesh, Maharashtra and Gujarat constitute 25.15%, 16.45% and 7.48% respectively of the total geographical area. Therefore, the certificate of the Chief Secretaries regarding non-availability of forest land is not acceptable for diversion of degraded forest land for compulsory afforestation. It is further noticed that clause (vi) of the para 3.2 of the Forest Guidelines makes an exception to para 3.2 (i) by permitting compensatory afforestation over degraded forest land twice in extent of forest area being diverted if the proposal is for laying for transmission lines upto 220 kV. Since, the Petitioner has been granted transmission licence for Jabalpur-Bhopal 765 kV S/C Transmission Line (JB Line), Bhopal-Indore 765 kV S/C Transmission Line (BI Line), Bhopal-Bhopal 400 kV D/C Transmission Line (BB Line), Aurangabad-Dhule 765 kV S/C Transmission Line (DA Line), Dhule-Vadodara 765 kV S/C Transmission Line (DV Line) and Dhule-Dhule 400 kV D/C Transmission Line (DD Line), the Petitioner could not avail the benefit of the provisions. In view of the above, it is apparent that the change in the Forest Guidelines in February 2012 which is after the project was awarded to the Petitioner has significantly affected the Petitioner's capacity to arrange degraded land for compulsory and has affected the pace of implementation of the project by the Petitioner.

32. The Petitioner has submitted that MoEF vide its letter No. F.No.11-68/2014-FC (pt.) dated 11.7.2014 addressed to Principal Secretary (Forest) of all States/Union Territory Governments under which an amendment has been issued to Para 3.2 (vi)(c) of the Forest Guidelines. Relevant paras of the said letter are extracted below:

"I am directed to say that Ministry of Power has drawn attention of this Ministry to clause (c) of sub-para (vi) of para 3.1 of the guidelines for diversion of forest land for

non-forest purpose under the Forest (Conservation) Act, 1980 provides that as an exception to para 3.2 (i) of the said guidelines, compensatory afforestation may be raised over degraded forest land twice in extent of the forest area being diverted/de-reserved in respect of the proposals for laying of transmission lines upto 220 kV. The Ministry of Power has requested this Ministry that the said provisions may be extended to all transmission lines.

The matter has been examined in this Ministry and after careful consideration this Ministry hereby decides that provisions of the said clause (c) of sub-para (vi) of para 3.1 of the guidelines for diversion of forest land for non-forest purpose under the Forest (Conservation) Act, 1980 shall be extended to all proposals for laying of transmission lines. The said clause which reads as "For laying of transmission lines upto 220 kV" shall therefore be read as "For laying of transmission lines".

I am further directed to say that provisions of the said clause (c) of sub-para (vi) of the para 3.1 of the guidelines for decision of forest land for non-forest purpose under the Forest (Conservation) Act, 1980 shall not be applicable in respect of the forest land required for sub-stations, switching stations, and other components of the HVDC terminal or invertors etc."

33. As per the above amendment issued to the Guidelines vide letter dated 11.7.2014, all transmission lines irrespective of voltage have been made eligible for diversion of degraded forest lands for the purpose of compensatory afforestation. It is however seen that the Petitioner received the forest clearance as per the details given below:

Name of the Element	Date of making of application for forest clearance	In-principle Approval for forest clearance	Time taken for forest clearance
DA Line	26.8.2011	30.5.2014	2 years, 9 months and 5 days
DV Line	20.9.2011	27.8.2014	2 years, 11 months and 8 days
DD Line	8.10.2011	15.5.2014	2 years, 7 months and 8 days
BJ Line	12.9.2011	31.12.2014	3 years, 4 months and 20 days
BB Line	12.9.2011	20.6.2014	2 years, 9 months and 9 days
BI Line	12.9.2011	24.6.2014	2 years, 9 months and 13 days

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 have been envisaged for approval by the Forest Advisory Committee under Central Government. Therefore, the period taken for obtaining forest clearance beyond 300 days is not attributable to the Petitioner.

34. After receipt of the Forest Clearance as above, the Petitioner has commissioned Jabalpur-Bhopal 765kV S/C Transmission Line on 9.6.2015, Bhopal-Indore 765 kV s/C Transmission Line on 19.11.2014, Bhopal-Bhopal 400 kV D/C Transmission Line on 30.6.2014 and 12.8.2014, Aurangabad-Dhule 765 kV S/C Transmission Line on 5.12.2014, Dhule-Vadodara 765 kV S/C Transmission Line on 9.2.2015 and Dhule-Dhule 400 kV D/C Transmission Line on 6.12.2014. As per the Transmission Service Agreement, the Scheduled Commercial Operation Date (SCOD) is 36 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 BDTCL by the successful bidder and date of providing Contract Performance Guarantee by the successful bidder. The TSA was pre-signed between BDTCL and LTTCs on 7.12.2010, the Contract Performance Guarantee was provided on 31.3.2011. Therefore, the effective date is 31.3.2011 and the project was to be completed within 36 months from effective date. In other words, the lines were to achieve COD by 31.3.2014. As against the SCOD, the actual COD of the lines are as under:

S. No.	Transmission line	SCOD	Actual COD	Delay
1.	Jabalpur-Bhopal 765 kV S/C Transmission Line	31.3.2014	9.6.2015	15 months 6 days
2.	Bhopal-Indore 765 kV S/C Transmission Line	31.3.2014	19.11.2014	7 months 19 days
3.	Bhopal-Bhopal 400 kV D/C Transmission Line on	31.3.2014	30.6.2014	3 months
4.	Aurangabad-Dhule 765 kV S/C Transmission Line	31.3.2014	5.12.2014	8 months 5 days

5.	Dhule-Vadodara 765 kV S/C Transmission Line on	31.3.2014	9.2.2015	10 months 9 days
6.	Dhule-Dhule 400 kV D/C Transmission Line on	31.3.2014	6.12.2014	8 months 6 days

35. The Petitioner has also claimed that delay in obtaining forest clearance is covered under force majeure provisions of the TSA. The Petitioner has submitted that as 9% of the project was affected by forest areas and on account of delay in grant of forest clearance, it was unable to commission the project by SCOD. Force Majeure has been defined in the TSA 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.”

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”. In the present case, the execution of the transmission lines was affected on account of delay in grant of forest clearance. It is pertinent to note that as per para 4.4 of the guidelines issued by MoEF, “if a project involves forest as well as non-forest land, it is advisable that work should not be started on non-forest land till approval of the Central Government for release of forest land under the Act has been given.” Therefore, without obtaining forest clearance, the Petitioner could not execute the work. In our view, the Petitioner was prevented from discharging its obligations under the TSA on account of delay in grant of forest clearance and therefore, the delay

beyond one year in grant of forest clearance is covered under force majeure. Accordingly, the SCOD shall stand extended.

36. The Petitioner has also claimed the changes in the requirement for obtaining forest clearance under Change in law. The question arises whether the MoEF Notifications dated 13.2.2012 and letter dated 5.7.2013 amending the guidelines for diversion of forest land are covered under Change in Law provisions of the TSA. Law has been defined in the TSA as under:

“Law or Laws in relation to this Agreement shall mean all laws including electricity laws in force in India and any statute, ordinance, rule, regulation, notification, order or code, or any interpretation of any of them by an Indian Government Instrumentality having force of law and shall include all rules, regulations, decisions and orders of the Appropriate Commission.”

37. The Guidelines issued by the MoEF are in the nature of Code of Procedure issued by the Government of India to give effect to the Forest (Conservation) Act, 1980 which are required to be complied with by all persons or agencies seeking forest clearance. In our view, the guidelines are covered under law as per the provisions of the TSA. Change in Law under the TSA covers certain events or circumstances after the date which is 7 days prior to the Bid Deadline resulting in additional recurring or non-recurring expenditure. Article 12.1.1 of the TSA reads 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/nonrecurring 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 applicable of any Law by any Indian Governmental Instrumentally 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.”

38. In our view, the letter dated 13.2.2012 issued by MoEF disentitling the persons to utilize degraded forest land on the basis of certificate from the Chief Secretary regarding non-availability of non-forest land for the purpose of compensatory afforestation where the forest cover in the State is less than 50% is covered under “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” and is therefore covered under Change in Law. However, from the documents placed on record, it cannot be conclusively proved that the Petitioner’s case falls under the change in law. In particular the following need clarification and supporting documents:

- (a) Whether the Petitioner had applied for certificate from the Chief (Secretary) and the outcome thereof;
- (b) The efforts made by the Petitioner to acquire the non-forest land for compulsory afforestation;
- (c) Whether the guidelines dated 13.2.2012 of MoEF were issued during the pendency of its application before the Chief (Secretary);

(d) Whether the Petitioner acquired the degraded forest land after the issue of MoEF letter dated 11.7.2014;

(e) Whether the forest clearance was granted after the petitioner made available the degraded forest land in accordance with the MoEF letter dated 11.7.2014.

Therefore, the claims of the Petitioner needs to be examined in the light of the explanation/ documents as noted above. We therefore, grant liberty to the Petitioner to approach the Commission with all the relevant documents for consideration in this regard.

Issue No. 3: Whether the delay in grant of Section 164 authorization, delay due to finalization of coordinates of the gantry of PGCIL's substation, delay in commissioning of Dhule sub-station, delay in allotment of land for Bhopal Substation and delay in transportation of Equipment is covered under the provisions of force majeure of the TSA?

(i) Delay in grant of Section 164 authorization:

39. The Petitioner has submitted that Section 164 of the Act provides that the government may, for the purpose of placing electric lines or electrical plant for the transmission of electricity or for the purpose of telephonic or telegraphic communication necessary for the proper coordination of the work, confer upon a transmission licensee any of the powers which the telegraph authority possesses under the Indian Telegraph Act, 1885 with respect to the placing of Telegraph lines and posts. The Petitioner has submitted that Section 164 authorization empowers a transmission licensee to lay transmission lines without having to first obtain the consent of the owner and occupier of the land. The Petitioner has further submitted that the importance of Section 164 authorization has been recognized by the Regulatory Authorities from time to time and delay in Section 164 authorization has been held to amount to force majeure. In this connection, the Petitioner has relied

upon the order of the Commission dated 31.12.2010 in Petition No. 296/2010 titled Western Region Transmission (Gujarat) Pvt. Ltd. & Anr. V. Power Grid Corporation of India Ltd. and judgment dated 2.12.2013 of Appellate Tribunal for Electricity in Appeal No. 139 of 2013 titled North Karanpura Transmission Co. Ltd. v. Central Electricity Regulatory Commission and Ors. The Petitioner has submitted that in the absence of Section 164 authorization, the Petitioner faced significant Right of Way challenges and litigation from land owners which were primarily on the ground that the Petitioner did not have authorization under Section 164.

40. CSPTCL has submitted that during the bidding process, all bidders were put on notice that Section 164 permission is not a pre-condition for commencing the implementation of the project. As per Article 4.1 (b) and Article 5.1, the TSP is responsible for the development and construction of the project. If the Petitioner was not able to comply with the provisions of the TSA without Section 164 authorization, there was no reason for the bidder to enter into the TSA. Having accepted the bid terms and having been selected as the successful bidder on that basis, it is now not open to the Petitioner to take a different stand. CSPTCL has argued that the Petitioner cannot claim that it was not aware of the grant of Section 164 approval which was published in the Gazette on 29.1.2013 but was waiting for one more year i.e. till 20.1.2014 when a letter to this effect was sent to the Petitioner by the Ministry of Power. The Petitioner has submitted that the Ministry of Power sent the Section 164 approval to the Petitioner and the Chief Secretaries of Maharashtra, Madhya Pradesh and Gujarat on 20.1.2014. The Petitioner has submitted that since critical feature of Section 164 authorization is the State Government's support in facilitating the laying of transmission line, such facilitation is not possible in the absence of official communication by the Ministry of Power to the respective State Government.

41. We have considered the submissions of the Petitioner and CSPTCL. The law regarding Section 164 authorization is now well settled in the light of the decision of the Appellate Tribunal for Electricity in its judgment dated 2.12.2013 in Appeal No. 139/2013. The relevant portion of the said judgment is extracted as under:

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

42. The Petitioner has placed on record a copy of the modified procedure issued by Ministry of Power obtaining Section 164 authorization vide Letter No. 11/4/2007-PG dated 20.10.2011. The said procedures provide as under:-

“In order to process the request from private transmission companies as well as generating companies who are required to construct, maintain and operate dedicated transmission lines, the following procedure has been prescribed:

- (a) The licensee/applicant shall cause such inter-State transmission scheme to be published in the Official Gazette of the State concerned or in Government of India Gazette in case of Inter-State Schemes and in at least two local daily newspapers along with a notice of the date, not being less than two months after the date of such publication, before which any interested person may make a representation on such scheme. The licensee/applicant shall take into consideration the objections/ representations, before finalizing the optimal route alignment. Thereafter licensee/applicant shall submit a certificate along with application under Section 164 of this effect.
- (b) The licensee/applicant will submit to the Central Electricity Authority the following documents:
 - (i) Newspaper publications of Scheme.
 - (ii) Authenticated maps showing the details of selected route alignment of the transmission lines.
 - (iii) Justification of the selection of the route alignment. CEA will issue an acknowledgment in the prescribed format for receipt of copies of documents which the licensee will attach along with the application to the Ministry.
- (c) The licensee/applicant should separately send a copy of the application as also a Notarized Affidavit duly signed by the authorized signatory to the Ministry of Power after the expiry of the notice period of 60 days indicated in the Gazette Notification and newspaper publications, regarding receipt or otherwise of

objections on the route alignment selected for the proposed transmission line, clearly indicating how the objections were resolved.”

43. In accordance with the above procedure, the Petitioner has published the inter-State transmission scheme in Free Press (Indore Edition), Central Chronicle (Bhopal Edition and Raipur Edition) on 5.11.2011, Indian Express (Ahmedabad and Vadodara editions), Hitvada (Jabalpur edition), Lokmat (Aurangabad edition) and Desh Toot Times (Nasik edition) on 4.11.2011 and in Navbharat (Bhopal, Indore and Jabalpur Edition) and Haribhoomi (Raipur and Bilaspur Edition), Gavkari (Thane, Nasik, Dhule, Aurangabad, Ahmednagar and Jalgaon editions), on 5.11.2011 and in the Gazette of India on 7.4.2012. The Petitioner on 4.5.2012 submitted the relevant documents to the Central Electricity Authority for 164 authorization which included copies of the newspaper publication of the scheme, authenticated maps showing the route alignment of the project and a justification of the route alignment which was acknowledged by CEA on 20.6.2012. The Petitioner has sent a letter on 4.5.2012 to MOP enclosing a duly notarized undertaking stating that no objection had been received from any individuals to the transmission scheme published in the newspapers and the Government of India Gazette. However, Section 164 authorization was notified in the Gazette of India only on 29.1.2013 and was communicated to the Petitioner by MOP on 20.1.2014. Thus, there is a gap of seven and half months between the submission of all relevant documents to CEA/MoP and publication of authorization under Section 164 of the Act. Allowing a processing time of one and half months, there is clearly a delay of 6 months in publishing in the Gazette of India which has not been explained. In our view, the Petitioner is affected by Force Majeure for a period of 6 months on account of delay in getting the Section 164 approval. It is further noted that MoP has officially sent the copy of the notification to the Chief Secretaries of the Government of Madhya Pradesh,

Maharashtra and Gujarat, Chairperson, CEA, CMD, PGCIL and the Petitioner vide its letter dated 20.1.2014. We are of the view that Gazette notification is a public document and is available on the website on egazette.nic.in. The Petitioner cannot say that it was not aware of the publication of Section 164 authorization in the Gazette. The Petitioner has submitted that since the State Governments have to facilitate the laying of the transmission line based on Section 164 authorization, it is necessary that the notification is officially endorsed to the State Government. We are of the view that since the Petitioner needed Section 164 approval to execute the transmission system, it was in the interest of the Petitioner to pursue the matter with MoP and get the Gazette notification officially endorsed to the State Governments immediately after its publication. We are of the view that the period from the publication of the notification in the official gazette and the forwarding of such notification to the State Government cannot be considered as force majeure. Therefore, we hold that the project was affected by force majeure conditions on account of delay in issue of Section 164 authorization for a period of 6 months.

(ii) Delay in commissioning of Dhule sub-station:

44. The petitioner has submitted that the Dhule sub-station was scheduled to be commissioned on 31.3.2014 whereas the same was put under commercial operation on 6.12.2014.

45. We have considered the submission of the Petitioner. It is noted that there is delay of 8 months in commissioning of Dhule sub-station. However, the petitioner has not given any reason for such delay. It can be observed from the CEA letter dated 8/9.7.2015 that the Dhule sub-station could be put to use only with combinations of DD Line and AD Line or VD line and DD Line. We have also

observed herein earlier that DD Line and AD line were put under commercial operation with delay of 8 months and 10 months respectively because of delay in grant of forest clearance and delay in grant of authorization under Section 164 of the Act which we have concluded as events covered under the provisions of force majeure of the TSA. Accordingly, the delay in commissioning of the Dhule sub-station is attributable to delay in commissioning of associated lines such as DD Line and AD line and hence, condoned the delay.

(iii) Delay due to finalization of coordinates of the gantry of PGCIL's sub-station:

46. The Petitioner has submitted that the co-ordinates of the gantry of PGCIL substation were required by the Petitioner to finalize the route alignment of the DV Line. In this regard, the Petitioner vide its letters dated 20.11.2012 and 21.2.2013 requested PGCIL to provide a single line diagram of PGCIL sub-station at Waghodia, Vadodara to enable the Petitioner to complete the survey of the line. PGCIL vide its letter dated 11.9.2013 communicated to the Petitioner the co-ordinates of the gantry. The main reason for delay is that the land for PGCIL's substation could not be finalized earlier. Based on the notified co-ordinates, the Petitioner finalized the route of the DV Line and submitted the same to PGCIL vide letter dated 20.9.2013 which was approved by PGCIL vide letter dated 19.10.2013. The Petitioner has submitted that the route of the DV Line could be finalized only after almost 3 years of the award of the project and almost one year after the Petitioner has sought coordinates from PGCIL. The Petitioner has submitted that the delay on the part of PGCIL in providing the Petitioner with the requisite gantry details of PGCIL's substation led to a loss of 30 months of working time for the Petitioner and amounts to a Force Majeure event under the TSA.

47. CSPTCL has submitted that the Petitioner itself vide letter dated 20.11.2012 asked PGCIL to give the details of the substation at Wagodia, Vadodara and by letter dated 21.2.2013 intimated PGCIL that its line was at an advanced stage of construction and was likely to be completed shortly and therefore, the exact position of the substation was required to be known. CSPTCL has submitted that as on 21.2.2013, the Petitioner had no issue in construction of its DV Line in the absence of the consideration of the gantry position which was required at the time of termination of the line. CSPTCL has submitted that after receiving the coordinates from PGCIL on 11.9.2013, the Petitioner should have immediately commissioned the line, as it was in the advanced stage of commissioning as on 21.2.2013. According to CSPTCL, since the line was commissioned on 9.2.2015, non-finalization of the coordinates from PTCA did not have any effect on the project and therefore, is not a force majeure event as per the TSA.

48. The Petitioner in its affidavit dated 2.1.2017 has submitted that the development of the sub-station at Vadodara is within the scope of work of PGCIL. The Petitioner had regularly followed up with PGCIL in respect of the progress of the sub-station as the route for DV line could not be finalised without the exact coordinates of the sub-station. Subsequently, a meeting was convened by Chairperson, CEA on 24.9.2013 to examine the progress of transmission projects being developed by the Petitioner. At this meeting, the representative of the Petitioner requested PGCIL to match the construction of bays at Jabalpur, Bina, Indore, Aurangabad and Vadodara sub-stations with the progress of the transmission lines executed by the Petitioner. In a meeting held at the office of PGCIL on 27.12.2013, CTU stated that in case of non-availability of Vadodara 765/400 kV substation matching with the commissioning of DV line, DV line may be

charged at 400 kV by-passing Vadodara sub-station and utilizing Vadodara-Pirana 400 kV line. On 14.1.2015, PGCIL apprised Chief Engineer, (SP & PA), CEA that the Vadodara 765/ 400 kV sub-station was expected to be commissioned by April, 2015 whereas the Dhule-Vadodara 765 kV line was expected to be commissioned by January, 2015 and PGCIL proposed that the DV line could be charged at 400 kV utilizing Vadodara-Pirana 400 kV S/c line (by-passing Vadodara 765/ 400 kV sub-station) as an interim arrangement. PGCIL vide its letter dated 3.2.2015 requested CEA to grant in-principle approval for the interim arrangement at the earliest. The Petitioner has submitted that the issue regarding delay in commissioning of bays of PGCIL's substation at Vadodara was also brought before this Commission in Petition No. 66/TT/2015 by the Petitioner.

49. PGCIL in its reply dated 16.11.2017 has submitted that the possession of the land for Vadodara GIS sub-station being implemented by PGCIL was given by the District Administration on 13.8.2013 and immediately after possession of land, PGCIL vide its letter dated 11.9.2013 informed the Petitioner about GPS co-ordinates of the 765 kV line gantries of Dhule line at Vadodara GIS sub-station. PGCIL has submitted that it is a normal practice in construction of transmission line that around 4 to 5 kms of the line at terminating end is kept under hold for construction, pending GPS co-ordinates of the line end gantry or matched with the completion of the terminating sub-station. Since, DV line was commissioned on 2.2.2015 (declared deemed DOCO as 9.2.2015), it is beyond comprehension that the Petitioner could not complete the balance portion of the line of around 4-5 kms at Vadodara end, within the 17 months available to the Petitioner from the date of intimation of the gantry position by PGCIL. PGCIL has submitted that it is not clear

as to how the Petitioner applied for the forest clearance, FRA, etc. for DV Line in September, 2011 when the route of the line itself was not finalized.

50. The Petitioner in its rejoinder dated 17.11.2017 has submitted that though PGCIL communicated the gantry co-ordinates for the termination of DV Line at PGCIL's sub-station at Waghodia, Vadodara and approved the line route of the DV Line on 19.10.2013, there were various other force majeure and change in law events which concurrently affected the commissioning of DV line. With regard to PGCIL's contention that the Petitioner could have known the exact line route right from 2011 because it applied for forest clearance and FRA certificates, the Petitioner has submitted that it identified the parcels of forest land over which the DV Line would pass and this cannot under any circumstances mean that the entire route of the DV Line over non-forest land was finalized and known to the Petitioner from the year 2011. The Petitioner has submitted that it received forest clearance for the DV line on 15.5.2014 and commissioned the DV line on 9.2.2015 i.e. within less than 7 months.

51. We have considered the submissions of the Petitioner and PGCIL. The Petitioner approached PGCIL vide letters dated 20.11.2012 and 21.2.2013 requesting for exact coordinates gantry of sub-station at Waghodia for termination of the DV Line. After allocation of the land to PGCIL for Vadodara GIS sub-station by District Administration, PGCIL vide its letter No. WRTS-II/VDR/SOJ/STRLT/2013/66 dated 11.9.2013 intimated to the Petitioner regarding the GPS co-ordinates of the 765 kV line gantries at Dhule-Vadodara line at Vadodara GIS sub-station. The Petitioner received the forest clearance for DV line on 15.5.2014 and achieved deemed commercial operation on 9.2.2015. According to the Petitioner, the delay in

intimation of the coordinates is beyond the control of the Petitioner and is therefore a force majeure event. Both PGCIL and CSPTCL have disputed the claims of the Petitioner on the ground that after intimation of the coordinates, the Petitioner had sufficient time to implement the transmission line as per the SCoD.

52. Perusal of the TSA reveals that as per Article 4.3 of the TSA, TSP is required to take all necessary steps to commence work on the Scheduled COD and is required to achieve COD of the project in accordance with the time schedule specified in Schedule 3 of the TSA. The DV line executed by the Petitioner was to terminate at the Waghodia, Vadodara sub-station of PGCIL. On account of delay in allotment and possession of land, PGCIL could intimate about the GPS coordinates of the sub-station on 11.9.2013. The SCoD of the line was 31.3.2014 which means that 7 months were available with the Petitioner to execute the final portion of the transmission line which was connected to the sub-station. This period would have been sufficient to execute the transmission line of about 4 to 5 kms terminating at the sub-station. However, on account of delay in forest clearance in respect of DV Line which was granted on 27.8.2014, the Petitioner could not execute the transmission line by SCoD. In our view, cumulative delay in intimation of the coordinates of the sub-station by PGCIL and receipt of the forest clearance are in nature of force majeure events which resulted in achieving actual COD of the DV line and such events were beyond the control of the Petitioner.

53. Further, the Commission has received cases wherein the petitioners have prayed to declare the delay in intimations of gantry co-ordinates by POWERGRID as the events beyond the control of the Petitioner. Since, the tariff based competitive bidding (TBCB) projects are time bound projects wherein prospective project

developers are required to factor all eventualities while quoting for the project, any delay in project causes huge financial implication on the developers. We direct CTU to finalize all co-ordinates for transmission assets before going ahead with bidding process in consultation with all stakeholders so that any delay on this account is minimized. Ministry of Power (MoP) may consider amending the bid documents so that the defaulting entities should also be liable to bear the cost.

(iv) Delay in allotment of land for the Bhopal Substation and delay in transportation of equipment:

54. The Petitioner has submitted that it required approximately 120 acres of land for the purpose of constructing the Bhopal Substation and applied to the District Magistrate, Bhopal for the allotment of land on 11.4.2011. The Petitioner requested Chief Minister, Madhya Pradesh vide letter dated 27.6.2011 for allotment of land. CEA also took note of the delay in the grant of land to the Petitioner and addressed a letter dated 15.3.2012 to the Principal Secretary (Energy), Government of Madhya Pradesh requesting for expeditious allotment of the land to the Petitioner. However, the Petitioner was allotted the requisite land only on 8.2.2013. The Petitioner has submitted that the said delay in allotment of land resulting in a loss of working time of 22 months for the Bhopal Substation constitutes a Force Majeure event under the TSA. The Petitioner has submitted that it faced further uncontrollable delays and loss of working time in respect of the Bhopal sub-station on account of delays in the transportation of transformer equipment to the site of Bhopal Substation. The transformer had arrived at the Jawaharlal Nehru Port Trust on 26.6.2013 and was ready to be transported soon thereafter. However, the transformer could not be transported until 2.1.2014 because the Mumbra bypass road, which was the only access point to the site, had caved in due to incessant rain and was closed to

vehicular traffic. The said delay in transportation of the transformer resulted in a loss of working time of approximately 6 months. The Petitioner has submitted that a delay in allotment of land for the construction of the Bhopal Substation and transportation of the transformer to the site also constituted a Force Majeure event.

55. CSPTCL has submitted that the Commission even under the tariff determination as per the provisions of the 2014 Tariff Regulations has held that land acquisition and dealing with contractors is a controllable factor and will not give the benefit of time overrun and cost overrun with the transmission licensee setting up the project. Therefore, delay in allotment of land and transportation of equipment cannot be claimed as force majeure in a competitive bidding under Section 63 of the Act.

56. The Petitioner in its rejoinder has submitted that the project is a competitively bid out inter-State transmission line. Any reference to the 2014 Tariff Regulations to draw any conclusions there from is irrelevant. The Petitioner has submitted that CSPTCL has failed to show how the delay in allocation of land for the Bhopal substation and the delay in transportation of equipment do not amount to force majeure events under the TSA.

57. We have considered the submissions of the Petitioner and CSPTCL. It is noted that immediately after acquisition of the SPV, the Petitioner made an application to the District Magistrate, Bhopal on 11.4.2011 for allotment of land for the sub-station. The relevant portion of said letter dated 11.4.2011 is extracted as under:

“Sub: Allotment of land for construction of 765 kV sub-station at Bhopal as per GOI initiative.

In this regard, we are pleased to inform you that we have been selected by the Government of India (Ministry of Power) as the transmission service provider for the development of a 765 kV line (Project name is "System Strengthening of WR").

Kindly note that our Zero date for project execution has already begun on 31.3.2011 and the date for completion of construction (COD) for the same is due by 31.3.2014. Hence, in this regard it is requested that the suitable land (120 acres) already requested by PFCCL vide their letter Ref. No.03/IT03/JCL/11 dated 29.10.2010 for the sub-stations at Bhopal as per the following details may kindly be considered for allotment in the name of SPV ("Bhopal Dhule Transmission Company Limited") for construction of 765 KV Substation."

58. Subsequently, the Petitioner vide its letter dated 27.6.2011 requested the Chief Minister of Madhya Pradesh for expeditious allotment of land in the interest of completing the project in a timely manner. Relevant portion of the said letter is extracted as under:

"BDTCL through the Power Finance Corporation Consulting Limited (PFCCL) vide their letter dated 29.10.2010 had requested the District Magistrate, Bhopal for allotment of said land

BDTCL have once again approached the Collector, Bhopal vide their letter dated 11.4.2011 for acquisition of 120 acres of land for the construction of 765/400 kV Substation at Village- Mugaliya Kot, Halka-Mugalia Kot, Tehseel- Huzur, District – Bhopal.

The above project is a time-bound project and is required to be completed by BDTCL before March 2014. Our Zero Date for project execution has already begun on 31.3.2011. Hence in this regard we are requested that the suitable land (120 acres) as per the above details may kindly be consider in the name of SPV (Bhopal Dhule Transmission Company Ltd.) for construction of the 765 kV sub-station."

59. The Central Electricity Authority, Ministry of Power also took note of the delay in the grant of land to the Petitioner and requested the Principal Secretary (Energy), Government of Madhya Pradesh vide letter dated 15.3.2012 to provide requisite land to the Petitioner for the sub-station. Relevant portion of the said letter dated 15.3.2012 is extracted as under:

"Ref: In continuation to letter reference number 15.6.2010-Trans from Ministry of Power dated 27.5.2011.

Subject: Allotment of land for construction of 765/400 kV sub-station in Bhopal (MP)

In view of the fact that this is a time bound project and is required to be completed by BDTCL before March, 2014 we request that the allocation of suitable land as per the above details may kindly be expedited in the name of SPV (Bhopal Dhule Transmission Company Limited) for construction of 765 kV sub-station. You are requested to extend your support to BDTCL to enable them to complete the said project in time for the interest of national development.”

60. From the perusal of the documents on record, it is clear that the Petitioner had made efforts for expeditious allotment of land for the sub-station. However, land for Bhopal substation was allotted to the Petitioner on 8.2.2013 after a delay of 22 months from the date of application i.e. 11.4.2011. The normal time considered for allotment of land is 6 months. After deducting 6 months, a period of 16 months is considered as the period beyond the control of the Petitioner and is covered under Force Majeure in terms of the TSA. Accordingly, the period from 11.10.2011 to 8.2.2013 shall be considered as force majeure, as the said event prevented the Petitioner from carrying out work on the Bhopal substation.

61. The Petitioner has submitted that it faced further uncontrollable delays and loss of working time in respect of the Bhopal Substation on account of delays in the transportation of transformer equipment to the site of Bhopal Substation. The transformer had arrived at the Jawaharlal Nehru Port Trust, Port on 26.6.2013 and was ready to be transported soon thereafter. However, the transformer could not be transported until 2.1.2014 because the Mumbra bypass road, which was the only access point to the site, had caved in due to incessant rain and was closed to vehicular traffic. The said delay in transportation of the transformer resulted in a loss of working time of approximately 6 months.

62. The Petitioner has placed on record the photographs showing the condition of the Mumbra Bypass and has submitted that the Mumbra Bypass is the only access route through which equipment of the size and dimension of the transformers could

be transported to the site of the Bhopal Sub-station. The respondents have not refuted the said position of the Petitioner. We have considered the submissions of the Petitioner in respect of delay in transformers for Bhopal sub-station due to closure of Mumbra Bypass. We have already held at para 60 above that the allotment of land for the Bhopal sub-station to petitioner is covered under Force Majeure in terms of the TSA which covers the total delay of 8 months in commissioning of Bhopal sub-station. In view of the above decision, the Petitioner is held to be affected by force majeure from 11.10.2011 to 8.2.2013 on account of delay in allotment of land for Bhopal sub-station.

Issue No. 4: Whether the Petitioner's case for change in taxes is covered under the change in law provisions of the TSA?

63. One of the conditions of Article 12.1.1 of the TSA is that the events should have occurred 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. Bid Deadline has been defined as "the last date and time for submission of the Bid in response to the RFP". In terms of TSA, bid deadline was 12.1.2011. Therefore, cut-off date for considering the claims under change in law is 5.1.2011.

64. Keeping in view the above broad principles, we proceed to deal with the claims of the Petitioner under Change in Law in respect of TSA.

65. The Petitioner has submitted that there have been several changes or increase in taxes post the bid date and subsequent to the award of the project, which have had an additional financial burden on the Petitioner. The Petitioner has submitted that there was an increase in the applicable rates of service tax vides the Department of Revenue, Ministry of Finance's letter D.O.F. No 334/1/2012-TRU

dated 16.3.2012 and an increase in excise duty vide the Department of Revenue, Ministry of Finance's letter D.O.F. No. 334/3/2012-TRU dated 16.3.2012. The Department of Revenue, Ministry of Finance's letter D.O.F. No 334/1/2012-TRU dated 16.3.2012 and letter D.O.F. No. 334/3/2012-TRU dated 16.3.2012. The Petitioner has submitted that changes in service tax and excise duty 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 and the Petitioner is entitled to an increase in the Transmission Charges in accordance with the formula laid down in Article 12.2.1 of the TSA. The Petitioner has submitted that it has incurred additional amount of ₹36.27 crore on account of changes in taxes and duties.

66. CSPTCL has submitted that the additional claims sought to be made by the Petitioner as change in taxes cannot be permitted. The incidence on tax is required to be on transmission of electricity. The terms of the PPA are clear and unambiguous. The TSA specifically qualifies for only such taxes applicable on transmission of electricity that is to be reimbursed by the LTTCs. It is not the case that any and every tax which has an effect on the cost, revenue, cash flow, etc. is to be allowed as a pass-through in the tariff. The Petitioner has submitted that the Commission in its order dated 1.2.2017 in Petition No. 8/MP/2014 (Emco Energy Limited Vs. Maharashtra State Electricity Distribution Company Limited) had analyzed the Change in Law clause in parimateria with Article 12 of the TSA and relief was granted.

67. We have considered the submissions of the Petitioner and CSPTCL. As per Article 12 of the TSA, Change in Law means the occurrence, inter alia, of any change in tax or introduction of any tax made applicable for providing transmission service by the Transmission Service Provider as per the terms of the TSA, which is seven days prior to the bid deadline resulting into any additional recurring expenditure by the TSP or any income to the TSP. In the present case, there has been a change in the Service Tax and Excise duty subsequent to the cutoff date i.e. 5.1.2011. The details of the change in taxes and duties submitted by the Petitioner are as under:

Type of Tax	Tax Rate seven days prior to bid deadline (15.1.2011)	Revised Tax Rate (Post cut-off date) (17.3.2012)	Revised Tax Rate (Post cut-off date) (1.3.2015)
Central Excise Duty	10.3%	12.36%	12.50%

Type of Tax	Tax Rate seven days prior to bid deadline (12.1.2011)	Revised Tax Rate (Post cut-off date) (1.3.2015)
Service Tax	15.30%	12.36%

68. The Petitioner has placed on record the detailed calculation of impact of change in rate of service tax and excise duty, as certified by the Petitioner's Chartered Accountant dated 13.10.2017. The Petitioner has submitted that on account of increase in the rate of service tax and excise duty, the Petitioner has incurred ₹19.59 crore. Since the changes in service tax and excise duty have occurred on account of the Act of the Parliament, they constitute Change in Law and the expenditure incurred by the Petitioner is admissible under Change in Law. It is clarified that relief under change in law for service tax and excise duty shall be admissible on the capital expenditure covered within the original cost of the project subject to production of the receipt of the actual taxes paid.

Issue No. 5: Whether the Petitioner is entitled to receive transmission tariff for the DV Line from the date of its commissioning?

69. The Petitioner has submitted that PGCIL had proposed the interim arrangement to allow the DV line to be connected to 400 kV Vadodara-Pirana line by-passing the Vadodara sub-station on account of non-readiness of Vadodara sub-station. Thereafter, PGCIL recommended the interim arrangement to CEA for its in-principle approval which was accorded on 3.2.2015. CEA vide its letter dated 2.2.2015 accorded approval to the Petitioner for anti-theft charging of DV line. Since the sub-station was not ready, the Petitioner in terms of Article 6.2.1 of the TSA declared deemed COD of DV line. On 6.4.2015, PGCIL accorded its approval to the Petitioner to charge the DV line using the interim arrangement. Accordingly, the transmission line was put to commercial use with effect from 13.6.2015. During the interim period between deemed COD (9.2.2015) and actual use of DV line (13.6.2015), PGCIL did not provide the necessary interim arrangement required for operating the transmission line.

70. The Petitioner has submitted that based on the above approval from CEA, and in accordance with Article 6.2.1 of the TSA due to non-availability of the Vadodara S/s elements to be constructed by PGCIL, the Petitioner declared deemed COD of the transmission line with effect from 9.2.2015 well before COD of the Vadodara sub-station on 13.6.2015. Accordingly, the Petitioner is entitled to receive the transmission charges from the date of deemed COD i.e. 9.2.2015, given that Vadodara sub-station is not a pre-required element under Schedule III of the TSA. However, the Petitioner is receiving transmission charges only with effect from 13.6.2015 that is after the date on which the Vadodara substation was commissioned by PGCIL.

71. We have considered the submissions of the Petitioner and CSPTCL. The Petitioner has submitted that it is entitled to receive transmission charges for the DV Line with effect from i.e. 9.2.2015 in accordance with the provisions of the TSA, the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010 and the Billing, Collection and Disbursement Procedure. However, the Petitioner is presently receiving transmission charges only from 13.6.2015 onwards. Let us consider Article 6.2.1 and Schedule 3 of the TSA which provides as under:

“6.2 Commercial Operation:

6.2.1 An element of the project shall be declared to have achieved COD seventy two (72) hours following the connection of the Element with the Interconnection Facilities or seven (7) days after the date on which it is declared by the TSP to be ready for charging but is not able to be charged for reasons not attributable to the TSP or seven (7) days after the date of deferment, if any, pursuant to Article 6.1.2.

Provided that an element shall be declared to have achieved COD only after all the elements, if any, which are pre-required to have achieved COD as defined in Schedule 3 of this Agreement, have been declared to have achieved their respective COD.”

As per Schedule 3 of the TSA, the payment of transmission charges for any element irrespective of its successful commissioning on or before its Scheduled COD are required to be considered after successful commissioning of the Elements (s) which are pre-required for declaring the commercial operation of such elements as mentioned in the Table given in Schedule 3. Accordingly, for calculation of payment of transmission charges in respect of the DV Line, the elements which are pre-required for declaring the commercial operation (COD) of the respective element are:

- (i) Aurangabad-Dhule 765 kV S/C Line, successfully commissioned on 5.12.2014;

(ii) Dhule substation (2X1500 MVA, 765/400 kV), successfully commissioned on 6.12.2014; and

(iii) Dhule –Dhule , 400 kV D/C line, successfully commissioned on 6.12.2014

72. On a combined reading of Schedule 3 and Article 6.2.1 of the TSA, it becomes clear that an element shall be declared to have achieved COD only after all the elements, if any, which are pre-required to have achieved COD as defined in Schedule 3 of this Agreement, have been declared to have achieved their respective COD. The pre-required elements for declaring of the commercial operation of the DV Line are Aurangabad-Dhule 765 kV S/C Line, Dhule substation (2X1500 MVA, 765/400 kV) and Dhule-Dhule, 400 kV D/C line which had achieved their COD on 5.12.2014, 6.12.2014 and 6.12.2014 respectively. After obtaining the permission of CEA for anti-theft charging, the Petitioner has declared COD of the DV Line on 9.2.2015 which is in compliance with the provisions of Article 6.2.1 of the TSA. The Petitioner`s DV line could be actually put into use from 13.6.2015 after the COD of the sub-station of PGCIL. We are of the view that the Petitioner is entitled for transmission charges with effect from 9.2.2015 in terms of the TSA. Since the actual use of the line was delayed on account of non-readiness of the sub-station of PGCIL, we are of view that the Petitioner is entitled to recover the tariff from 9.2.2015 till 12.6.2015 from PGCIL in respect of the 765 DV transmission line, proportionate to the transmission charges calculated on the basis of the contracted transmission charges for the relevant years.

Issue No. 6: What reliefs should be granted to the Petitioner in the light of the answer to the above issues?

73. The Petitioner has sought extension in the scheduled COD of the project by a period of 14 months 9 days and an increase in the levelised transmission charges to

the tune of ₹21.23 crore to offset the additional cost incurred on account of the unforeseen and uncontrollable events in the form of delay in forest clearance, delay in grant of Section 164 authorization, delay in allotment of land and transfer of equipment's which have occurred subsequent to the submission of the bid and award of the project.

74. We have already held in this order that the delay in getting forest clearance delay in Section 164 approval and delay in intimation of the coordinates of the sub-stations of the PGCIL are events of force majeure which have affected the execution of the project within the SCOD. Therefore, the Petitioner is entitled for relief under force majeure. Article 11.7 of the TSA provides for relief for force majeure events which is extracted as under:-

“11.7 Available Relief for a Force Majeure Event

Subject to this Article 11

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

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

Further, Article 4.4 provides for extension of time.

“4.4. Extension of time

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

75. Though Article 4.4.2 provides for extension of SCOD upto a maximum period of six months, after considering the circumstances for delay in grant of forest clearance, Section 164 authorization and allotment of land for Bhopal Sub-station and the efforts made by the Petitioner to mitigate the force majeure events, we allow extension of SCOD from 31.3.2014 till the dates of actual COD of the different elements of the project.

76. The Petitioner has claimed relief for change in law seeking an increase of ₹21.23 crore in the levelised transmission charges to offset the additional cost incurred. We have not decided the issue of change in law and have granted liberty to the Petitioner to establish its case with proper documentary evidence, hence, no relief for change in law has been granted. However, the Petitioner is entitled for expenditure on the differential rate on central excise duty and service duty as decided in para 68 above.

Additional expenditure towards increase in Afforestation rates:

77. With regards to increase in Afforestation rates post bid deadline as prescribed by MoEF, the Petitioner has placed on record the detail of additional expenditure of ₹2.6 crore which they have made to concerned Forest Department:

(₹ in crore)				
S No.	Transmission lines	Forest Cost 2010	Forest Cost 2014 (Actual)	Cost Increase
1	765 kV S/C BJ Line	19.31	20.82	1.5
2	765kV S/C BI Line	1.17	1.75	0.6
3	400kV D/C BB Line	0.47	1.01	0.5
	Total			2.6

78. Requirement of Forest Clearance was indicated in the RFP documents. Therefore, the Petitioner was expected to factor in the expenditure involved in

obtaining the Forest Clearance. Further, the Petitioner has not placed on record the Notification of the Ministry of Forest and Environment with regard to the forest cost prevailing as on 2010 and as on 2014. In the absence of relevant documents, it cannot be examined that the claims are covered under Change in Law. Therefore, the expenditure incurred towards increase in afforestation rates cannot be allowed under Change in law.

Additional expenditure for overhead cost

79. The Petitioner has claimed the additional expenditure for overhead cost of ₹13.02 crore and towards price variation and margin money on account of delay in delivery of conductors due to delay in commissioning of the lines of ₹34.42 crore. In our view, the above expenditure is not reimbursable.

80. The summary of our decision with regards to the Petitioner's claim on additional expenditure towards IDC on loans, afforestation rates and taxes and duties is as under:

Sl. No.	Claims	Allowed
1.	Additional expenditure towards IDC on loans during extended construction	Not allowed but liberty granted to file application with relevant documents
2.	Additional expenditure towards increase in afforestation rates post bid deadline as prescribed by MoEF.	Not allowed
3.	Additional expenditure towards taxes and duties, especially on account of change in excise duty and service tax post the bid dead line.	Allowed
4.	Transmission charges of DV line from 9.2.2015 to 13.6.2015 (124 days) will be borne by PGCIL.	At actual
5.	Additional expenditure for overhead cost and price variation and margin money on account of delay in delivery of conductors.	Not allowed

81. In terms of Article 12.2.1 of the TSA, the Petitioner is entitled to claim the relief regarding the Change in law allowed in this order.

82. The Petition is disposed of in terms of the above.

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

sd/-
(A.S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member