

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 297/MP/2018

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

Date of Order: 24th of April, 2019

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 Services Agreement dated 7.12.2010 on account of certain Change in Law events inter alia pursuant to the liberty granted by this Commission vide its order in Petition No. 216/MP/2016 dated 25.6.2018.

**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. Ind Barath 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 Aluminium Company Limited
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 and 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 Jafar Alam, Advocate, BDTCL
Shri Deep Rao, Advocate, BDTCL

Shri Divyanshu Bhatt, Advocate, BDTCL
Shri Tan Reddy, BDTCL
Ms Anisha Chopra, BDTCL
Ms Suparna Srivastava, Advocate, PGCIL
Shri Tushar Mathur, Advocate, PGCIL

ORDER

Pursuant to the liberty granted by the Commission in its order dated 25.6.2018 in Petition No. 216/MP/2016, the Petitioner, Bhopal Dhule Transmission Company Ltd, has filed the present Petition for seeking *inter alia* compensation for certain Change in Law events along with the following prayers:

(a) Declare that the Petitioner's Project was impacted by the issuance of Notification F. No. 11-423/2011-FC dated 13.02.2012 by the Ministry of Environment and Forests, Government of India, which has been held to be a Change in Law event by this Commission's vide its Order in Petition No. 216/MP/2016 dated 25.06.2018, entitling the Petitioner to relief in accordance with Article 12 of the TSA;

(b) Grant an increase of 2.9872% in the levelized Transmission Charges payable to the Petitioner as compensation for the Change in Law events that impacted the Petitioner's Project in terms of Article 12 of the TSA, payable with effect from the commercial operations date of each of the elements of the Project along with appropriate carrying costs;

(c) Without prejudice and in addition to prayers (a) and (b) above, declare that this Commission's Order dated 20.09.2017 in Petition No. 227/TT/2014 is a Change in Law event under Article 12 of the TSA and pass consequential directions granting the Petitioner compensation payable with effect from the commercial operation date of each of the elements of the Project to restore the Petitioner to the same economic position as if such Change in Law event had not occurred; and

(d) Without prejudice, grant the Petitioner appropriate carrying costs of the Change in Law compensation awarded under Article 12 of the TSA in Petition No. 216/MP/2016 as well as under the instant Petition."

Background of the Case:

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 765 kV S/C Transmission line (“**BJ 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 (“**DA Line**”);
- (v) Dhule-Vadodara 765 kV S/C Transmission Line (“**DV Line**”); and
- (vi) Dhule-Dhule 400 kV D/C Transmission Line (“**DD Line**”).

(b) Substations:

- (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. The Petitioner filed Petition No. 216/MP/2016 *inter alia* claiming Force Majeure and Change in Law relief on account of delay in grant of Forest Clearance due to various delays not attributable to the Petitioner along with the following reliefs:

a. Allow the instant Petition and declare that the delays in grant of Forest Clearance, change in the formats for FRA Clearance, the delay in Section 164 Authorization, the delay in the communication of the coordinates of the 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 the 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 of the Scheduled Date of Commercial Operation of the Project up to 9 June 2015 i.e. the actual commercial operation date of the last element of the Project, to enable the Petitioner to implement the Project as per the TSA and waive any penalties or any other consequences thereof under the TSA;

f. Grant an increase of Rs. 21.23 Crores per annum in the levelized transmission charges payable with effect from the commercial operation date of each of the elements of the Project;

g. Without prejudice to the aforesaid, 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 that the Petitioner is entitled to receive transmission charges in respect of the DV Line with effect from its Commercial Operation Date i.e. 09.02.2015.”

5. The Commission in its order dated 25.6.2018 observed that the delay beyond one year in grant of Forest Clearance was covered by Force Majeure. The Commission accordingly extended the Scheduled Commercial Operation Date (“**SCOD**”) and held that the said delay beyond 300 days (the typical timeline within which Forest Clearance is to be obtained) was not attributable to the Petitioner. The Commission further observed that 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. The Commission granted liberty to the Petitioner to file fresh Petition to place on record the following relevant information/ 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.

6. Relevant portion of the said order dated 25.6.2018 is extracted as under:

“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 nonforest 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.

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 nonforest 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.

* * * * *

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 Order in Petition No. 216/MP/2016 Page 30 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....

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....

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...”

Submission of the Petitioner:

7. The Petitioner has submitted that with respect to the Change in Law relief sought, the Commission observed that the Ministry of Environment and Forests, Government of India (“**MoEF**”) Notification F. No. 11-423/2011-FC dated 13.2.2012 (“**MoEF Notification**”) was a Change in Law event under the terms of the TSA. The Commission requisitioned further information and documents to ascertain whether the said Change in Law event brought about due to issuance of the MoEF Notification affected the Project. In this regard, the Petitioner has submitted head-wise responses to the clarifications/ documents sought by the Commission at Paragraph 38 of its order dated 25.6.2018.

8. The Petitioner has submitted that a critical element in the process of being granted Forest Clearance for the Project was obtaining no-objection certificates from the concerned District Collectors under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (“**FRA Clearance**”). Without FRA Clearances, the Petitioner could not have received a Forest Clearance. The Petitioner had obtained the requisite no-objection certificates and the FRA Clearances in Madhya Pradesh, Maharashtra and Gujarat by early 2013.

9. The Petitioner has submitted that on 5.7.2013, the MoEF issued Letter F. No. 11-9/98-FC(pt.) 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 annexed therein. Consequent to the MoEF's said Letter, the Forest Departments of the State Governments informed the District Collectors that even FRA Clearances issued prior to the MoEF's said Letter were required to be re-issued as per the new format prescribed by the MoEF. For instance, the Forest Department, Government of Madhya Pradesh vide its letter dated 22.10.2013 informed all the District Collectors in Madhya Pradesh that FRA Clearances would be issued only if information was provided in the new formats. As a result, the Petitioner was constrained to re-apply for the no-objection certificates from all the relevant District Collectors and re-submit the same for the purpose of obtaining its FRA Clearances. This further delayed the entire process of receiving Forest Clearance for the Project. The total delay due to the change in FRA Clearance formats is tabulated below:

Element	Original FRA Clearance	Revised FRA Clearance	Delay from 5.7.2013 (Date of MoEF Modification of FRA Format)
BI Line	21.2.2013	1.5.2014	300 days
BB Line	21.2.2013	1.5.2014	300 days
BJ Line	21.2.2013	24.6.2014	354 days

10. The Petitioner has further submitted that the delay in obtaining Forest Clearance and loss of working time due to the change in the format for FRA Clearance amounts to a Change in Law under the TSA. The change in FRA Clearance formats is an independent, concurrent Change in Law event in terms of Article 12.1.1 of the TSA, and the same was submitted as such before this

Commission in Petition No. 216/MP/2016 for appropriate relief. However, the Commission did not return a finding on this issue in its order dated 25.6.2018. The Petitioner has submitted that since change in FRA Clearance formats is a Change in Law event in terms of the TSA, it is entitled to appropriate relief in terms of the TSA.

11. The Petitioner has placed on record the correspondences with regard to the forest clearances of the transmission lines made with the forest authorities in Maharashtra, Madhya Pradesh and Gujarat and Ministry of Environment and Forest. The same would be dealt in the succeeding paragraphs.

12. The matter was heard on 12.12.2018. Notices were issued to the Respondents to file their replies. Reply to the Petition has been filed by Power Grid Corporation of India Ltd.(Respondent No. 23)

13. PGCIL vide its reply dated 11.1.2019 has submitted that on perusal of the contents of the Petition and the reliefs claimed therein, only prayer (c) in the context of order dated 20.9.2017 in Petition No.227/TT/2014 relates to PGCIL and rest of the prayers concern the long term transmission customers of the Petitioner who are to use the transmission system implemented by the Petitioner and pay transmission charges for the same. However, during the course of hearing in the instant Petition on 12.12.2018, the Petitioner has withdrawn the prayer (c) with liberty to place it later. Therefore, no claims or relief survive in the present Petition qua PGCIL. PGCIL has submitted that no response on merits is presently required from PGCIL.

14. During the course of hearing on 12.12.2018, learned counsel for PGCIL submitted that the Petitioner is pursuing the same matter in two forums which is not permissible as per law. Learned counsel further submitted that the Petitioner has

filed an appeal before the APTEL in respect of the matter in question. Whereas, in the instant Petition, the Petitioner has undertaken to withdraw the appeal if the Commission grants the relief sought in the present Petition. Learned counsel further submitted that the appeal filed by the Petitioner before APTEL has been heard partly and requested the Commission to keep the instant petition in abeyance till decision in the appeal. In response, learned counsel for the Petitioner submitted that the appeal filed by the Petitioner before the APTEL and the instant Petition are distinct and severable matters pertaining to the same parties with different causes of action. Learned counsel submitted that the Petitioner has filed an appeal before the APTEL challenging the Commission's order dated 20.9.2017 in Petition No. 227/TT/2014 wherein the Petitioner was directed to bear transmission charges of PGCIL's transmission assets from their respective commercial operation dates till the commissioning of the Petitioner's transmission elements. Learned counsel submitted that the Petitioner has prayed before the APTEL that it is not liable to bear such transmission charges. However, the present Petition has been filed in pursuance to the liberty granted by the Commission vide order dated 25.6.2018 in Petition No. 216/MP/2016 regarding additional expenditure incurred by the Petitioner towards IDC on loans during the extended construction period since the Change in Law events allowed under the said Petition has burdened the Petitioner with *inter alia* an additional IDC liability.

15. As stated earlier in Paragraph 13 of this order, the learned counsel for the Petitioner sought permission to withdraw clause (c) from the prayer of the present Petition with liberty to plead it later. The prayer of the Petitioner was allowed by the Commission. Accordingly, the Commission disposed of the Prayer (c) of the Petition as withdrawn.

16. The Petitioner, vide its written submissions dated 25.1.2019, has reiterated its submissions made in the Petition and has submitted as under:

(a) The Petitioner had received a letter dated 13.12.2018 from one Shri Naveen Gupta, the Insolvency Resolution Professional (“**IRP**”) of Monnet Power Company Limited, which is arrayed as Respondent No. 5 in the instant Petition. By the said letter dated 13.12.2018, Shri Naveen Gupta informed the Petitioner that vide order dated 23.2.2018, the National Company Law Tribunal (“**NCLT**”), Mumbai Bench admitted Company Petition No. 1696 of 2017 against Monnet Power Company Limited and appointed Mr. Naveen Gupta as the IRP. Therefore, in terms of Section 14 of the Insolvency and Bankruptcy Code, 2016 (“**IBC**”) the moratorium period had begun from the date of the said order, i.e., 23.2.2018. IRP of Monnet Power Company Limited vide its letter dated 3.1.2019 has made the similar contention.

(b) Similarly, the Respondent, Visa Power Limited (Respondent No. 16), vide its letter dated 3.11.2018 *inter alia* has informed the Petitioner that vide order dated 11.10.2018 (“**Liquidation Order**”), the NCLT, Kolkata Bench has ordered the liquidation of VISA Power Limited. A perusal of the said Liquidation Order evidences that vide an earlier order dated 22.12.2017, NCLT, Kolkata Bench had appointed Shri Anil Goel as the IRP of VISA Power Limited, and accordingly, the moratorium under Section 14 of the IBC was initiated with effect from 22.12.2017. Upon the pronouncement of the Liquidation Order, a separate moratorium under Section 33(5) of the IBC came into force.

(c) The aforesaid facts are relevant in light of Sections 14 and 33 of the IBC which prohibit *inter alia* the continuation of any suit or proceedings in any court of law/ tribunal during the subsistence of the moratorium period. Accordingly, the Petitioner is not pressing claims against Respondent Nos. 5 and Respondent No. 16.

(d) Even though the tariff and recovery of change in law and force majeure reliefs is to be collected under the Sharing Regulations, this submission ought not to be construed as a waiver or relinquishment of the Petitioner's claims as against Monnet Power Company Limited or VISA Power Limited, and the Petitioner reserves all rights and contentions to be raised at an appropriate stage.

Analysis and Decision:

17. We have heard the learned counsel for the parties and perused the documents on record. The following issues arise for our consideration :

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

Issue No. 2: Whether the claims of the Petitioner under Change in Law in respect of the project are admissible?

Issue No. 3: What reliefs should be granted to the petitioner in the light of the answer to the above issues?

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

18. The Petitioner has claimed relief under Article 12 (Change in Law) of the TSA. 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 Article 12, 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.”

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.

19. The Petitioner gave notices dated 3.2.2014 to the LTTCs under Article 12 of the TSA regarding delay in grant of forest clearance. However, no response was received from the LTTCs in this regard. Thereafter, the Petitioner approached the Commission by filing Petition No. 216/MP/2016 seeking relief for Change in Law events. 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 claims of the Petitioner under change in law in respect of the project are admissible?

20. The Commission, after examining the matter, in its order dated 25.6.2018 in Petition No. 216/MP/2016, has observed that the MoEF's letter dated 13.2.2012 is a change in law, but required further clarifications and documents to establish that the Petitioner was impacted by such change in law. Relevant portion of the said order dated 25.6.2018 is extracted as under:

“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 document:

(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; and

(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.”

21. In response to the Commission`s query, the Petitioner has submitted its responses along with the requisite clarifications and supporting documents. The queries raised by the Commission have been dealt with in the succeeding paragraphs.

(a) Whether the Petitioner had applied for certificate from the Chief Secretary and the outcome thereof?

(c) Whether the guidelines dated 13.2.2012 of MoEF were issued during the pendency of its application before the Chief Secretary.

22. The Petitioner has submitted that it promptly submitted applications seeking certificates of non-availability of suitable non-forest land to the Chief Secretaries of Maharashtra, Gujarat, and Madhya Pradesh on 15.12.2011, 16.12.2011, and 22.12.2011 respectively. The Petitioner`s applications were pending before the respective Chief Secretaries of Maharashtra, Gujarat and Madhya Pradesh when the MoEF Notification dated 13.2.2012 was issued.

23. Consequent to the award of the Project and the acquisition of the Petitioner Company (as an SPV) by Sterlite Grid Ltd., the Petitioner had undertaken the necessary steps for securing grant of the Forest Clearance in accordance with the procedure prescribed in the Forest (Conservation) Rules, 2003 (“**Conservation**

Rules") and the Guidelines for diversion of forest land for non-forest purposes under the Forest (Conservation) Act, 1980 ("**Forest Guidelines**"). The Petitioner initiated the Forest Clearance application as per Rule 6 of the Forest (Conservation) Rules, 2003 on the following dates:

Element	Initial dates of submission of Forest Clearance proposals to respective Nodal Offices	State
BB Line	12.9.2011	Madhya Pradesh
BI Line	12.9.2011	Madhya Pradesh
BJ Line	12.9.2011	Madhya Pradesh
DA Line	26.8.2011	Maharashtra
DD Line	8.10.2011	Maharashtra
DV Line	20.9.2011	Maharashtra and Gujarat

24. The Petitioner has submitted that its applications for Forest Clearance were brought to a standstill at the stage of obtaining land for compensatory afforestation as there was no suitable non-forest land available for compensatory afforestation in the States through which the Petitioner's Project traverses.

25. The Petitioner has submitted that prior to amendment of Forest Guidelines on 13.2.2012 [paras 3.2 (iv) and 3.2 (v)] non-availability of non-forest land for compensatory afforestation in a State as certified by the Chief Secretary of the concerned State, was permitted. The Petitioner bid for the Project and arranged its affairs, insofar as acquisition of forest land is concerned, on the basis of the law prevalent at the time of bidding for the Project. The Petitioner neither had control over nor had any way of foreseeing that the Forest Guidelines would be amended vide the MoEF Notification of 13.2.2012. In particular, Madhya Pradesh and Maharashtra had scarce non-forest land to be acquired and diverted for the purpose of compensatory afforestation. In these circumstances, the approval by the Chief

Secretary of the concerned State was the only route under which the Petitioner could have obtained certification that inadequate non-forest land existed for compensatory afforestation in the concerned States. Consequently, it was only after obtaining such authorisation from the concerned Chief Secretary that grant of Forest Clearances to the Petitioner would have been possible.

26. The Petitioner has submitted that the Chief Secretary of Madhya Pradesh as recently as 2010 had issued certificates of non-availability of non-forest land for compensatory afforestation. The Commission in Para 23 of its order dated 4.2.2015 in Petition No. 21/MP/2013 (Sasan Power Limited vs. MP Power Management Company Limited & Ors) has recorded one such instance. The Petitioner has submitted that there was no suitable non-forest land available for compensatory afforestation in the States where the Petitioner's Project encountered forest land.

27. We have considered the submission of the Petitioner and perused the Petitioner's applications to the Chief Secretaries of Maharashtra, Gujarat, and Madhya Pradesh dated 15.12.2011, 16.12.2011, and 22.12.2011. It is noted that it was imperative for the Petitioner to obtain the aforesaid certification from the concerned Chief Secretaries in order to ensure diversion of the requisite quantum of forest land for the timely completion of the Project. However, on 13.2.2012, the MoEF issued notification amending the Paragraph 3.2(v) of the Forest Guidelines stating that a certificate of non-availability of non-forest land could be issued by the Chief Secretary only when the area of forest land in the State is more than 50% of the total geographical area. The relevant part of the MoEF Notification dated 13.2.2012 is extracted as under:

“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.”

28. The Petitioner has submitted that the India State of Forest Report, 2013 issued by the Forest Survey of India, MoEF states that the forest area in Madhya Pradesh constitutes 25.15% of the total geographical area; in Maharashtra, it constitutes 16.45% of the total geographical area; and in Gujarat, it constitutes 7.48% of the total geographical area. Therefore, the forest cover in all the three States through which the Project traverses is below 50% of their aggregate geographical area. As a result, the Petitioner could no longer avail the exemption permitted in Paragraphs 3.2 (iv) and 3.2 (v) of the Forest Guidelines after issuance of the said MoEF Notification.

29. It is observed that the MoEF Notification dated 13.2.2012 was issued during the pendency of Petitioner’s applications before the respective Chief Secretaries of Maharashtra, Gujarat and Madhya Pradesh. According to the Petitioner, no response was received from the Chief Secretaries of Maharashtra, Gujarat and Madhya Pradesh after the issuance of the MoEF Notification. Therefore, we conclude that the Petitioner was impacted by the MoEF Notification dated 13.2.2012.

The efforts made by the Petitioner to acquire the non-forest land for compulsory afforestation.

30. The Petitioner has submitted that it made diligent and extensive efforts for arranging non-forest land for compensatory afforestation. Out of the six transmission elements of the Project for which a proposal seeking Forest Clearance was made, the Petitioner was able to arrange non-forest land for compensatory afforestation for five elements, i.e., all elements but the BJ Line. The procurement of non-forest land is an inherently uncertain and time-consuming process which the Petitioner was constrained to undertake *inter alia* due to the issuance of the MoEF Notification. Had it not been for the MoEF Notification, the Petitioner would not have had to undertake the time-consuming steps to procure non-forest land.

31. The Petitioner had submitted its Forest Clearance proposal on 26.8.2011 for DA Line in the State of Maharashtra. The Petitioner first wrote to the District Collector, Aurangabad on 17.7.2012 for acquisition of non-forest land for fulfilling compensatory afforestation obligations in lieu of diversion of forest land along the line route proposed for construction of the DA Line. Thereafter, the Petitioner promptly followed up with the relevant Governmental authorities such as the Deputy Conservator of Forest, Aurangabad regarding its aforesaid proposal. Upon receiving the Site Suitability Certificate on 17.5.2013, the Petitioner followed up with the Sub-Divisional Magistrate, Chiplun and subsequently with the Additional Collector, Ratnagiri requesting permission and transfer of the proposed compensatory afforestation compensation. Only in March, 2014, the Petitioner discovered existence of uncontrollable encumbrances on the initially proposed parcels of compensatory afforestation land, which foreclosed the possibility of carrying out requisite compensatory afforestation on the said land.

32. The Petitioner has stated that it proceeded to identify other land parcels and swiftly moved to transfer the newly identified parcels of Compensatory Afforestation (CA) land by 8.8.2014. The entire process of acquiring suitable non-forest land for CA in respect of the DA Line took almost 2 years from 17.7.2012 up to 8.8.2014 despite the Petitioner's best efforts. It is pertinent to mention that in-principle Forest Clearance was obtained on 30.5.2014, after a lapse of 1009 days (from 26.3.2011 to 30.5.2014) from the date of application as opposed to the typical 300 days mandated by the Conservation Rules. The Petitioner has submitted that this delay is attributable to a Change in Law brought about by the MoEF Notification dated 13.2.2012 necessitating the identification and procurement of alternate land for compensatory afforestation, which is beyond the control of the Petitioner.

33. For the DD transmission Line, the Petitioner submitted Forest Clearance proposal on 8.10.2011. The Petitioner first wrote to the District Collector, Dhule on 27.8.2012 for the acquisition of non-forest land for fulfilling CA obligations in lieu of diversion of forest land along the line route proposed for construction of the DD Line. The Petitioner has submitted that upon receiving the Site Suitability Certificate on 17.5.2013, the Petitioner followed up with the Sub-Divisional Magistrate, Chiplun and subsequently with the Additional Collector, Ratnagiri requesting permission and transfer of the proposed compensatory afforestation land. The Petitioner has submitted that since Chiplun is in Ratnagiri district and its transmission line is in Aurangabad district, it could acquire non-forest land anywhere in Maharashtra due to which it acquired non-forest land in Ratnagiri. The Petitioner has submitted that only in March, 2014, the Petitioner discovered existence of uncontrollable encumbrances on the proposed CA land, which foreclosed the possibility of requisite compensatory afforestation on the said land. The Petitioner has submitted that due to above, the

Petitioner proceeded to identify other land parcels and moved to transfer the newly identified land parcels by 8.8.2014. The entire process of acquiring suitable non-forest land for CA in respect of the DD transmission line took almost 2 years from 27.8.2012 up to 8.8.2014 despite the Petitioner's best efforts. The Petitioner has submitted that in-principle Forest Clearance for DD transmission line was obtained on 15.5.2014, after a lapse of 951 days (from 8.10.2011 to 15.5.2014) from the date of application as opposed to the typical 300 days window mandated by the Conservation Rules. The Petitioner has submitted that this delay is attributable to a Change in Law brought about by the MoEF Notification dated 13.2.2012 necessitating the identification and procurement of alternate land for compensatory afforestation, which is beyond the control of the Petitioner.

34. With regards to DV transmission line, the Petitioner has submitted that the Forest Clearance proposal was submitted on 20.9.2011 and it started the process of identifying appropriate land parcels in both Maharashtra and Gujarat shortly after the issuance of the MoEF Notification. Since the area of land was close to 97.5 Acres in Gujarat, it took considerably long time to identify suitable private non-forest land adjacent to forest for handing it over to Gujarat's Forest Department. The Petitioner first wrote to the District Collector, Dhule on 3.10.2012 for the acquisition of non-forest land for fulfilling compensatory afforestation obligations in lieu of diversion of forest land along the line route proposed for construction of the DV Line in Maharashtra. Thereafter, the Petitioner followed up with the relevant Governmental authorities such as the Deputy Conservator of Forest, Dhule regarding its aforesaid proposal. Upon receiving the Site Suitability Certificate on 17.5.2013, the Petitioner followed up with the Sub-Divisional Magistrate, Chiplun and subsequently with the Additional Collector, Ratnagiri requesting permission and transfer of the proposed

compensatory afforestation compensation. Only in March, 2014, the Petitioner discovered existence of uncontrollable encumbrances on the initially proposed CA land in Maharashtra, which foreclosed the possibility of requisite compensatory afforestation on the said land. Further, on 29.3.2014, the Chief Conservator of Forests, Bhuj granted technical approval to the Petitioner's compensatory afforestation scheme regarding 39 Ha. of forest land (Gujarat), and issued a Site Suitability Certificate. The Petitioner has submitted that due to the above setback in Maharashtra, the Petitioner proceeded to identify other land parcels and moved to transfer the new parcel by 8.8.2014. Thereafter, the Petitioner handed over the possession of 27.5539 Ha and 11.5640 Ha of CA land on 8.7.2014 and 5.8.2014, respectively, to Range Forest Officer, Nalia (Gujarat). On 22.10.2014, Joint Secretary, Forest and Environment Department granted permission for tree cutting and for commencement of work for diversion of 38.3986 Ha of forest land (Gujarat). Therefore, the entire process of acquiring suitable non-forest land for compensatory afforestation in respect of the DV Line took almost 2 years from 3.10.2012 up to 22.10.2014 despite the Petitioner's best efforts. The Petitioner has submitted that in-principle Forest Clearance for the DV transmission line was obtained on 27.8.2014, after a lapse of 1073 days (from 20.9.2011 to 27.8.2014) from the date of application as opposed to the typical 300 day window mandated by the Conservation Rules. The Petitioner has submitted that this delay is attributable a Change in Law brought about by the MoEF Notification dated 13.2.2012 necessitating the identification and procurement of alternate land for compensatory afforestation, which is beyond the control of the Petitioner.

35. With regards to the BB and BI transmission lines, the Petitioner has submitted that the Petitioner made an application for grant of Forest Clearances on 12.9.2011.

On 3.10.2012 and 19.10.2012, the Petitioner received letters from the Chief Conservator of Forest, Bhopal inquiring about details of proposed compensatory afforestation of non-forest land to be provided in lieu of diversion of forest land for the construction of BB and BI transmission lines, respectively. Thereafter, the Petitioner followed up with various Governmental authorities such as the District Forest Officers of Bhopal and Jabalpur and the Conservator of Forest, Bhopal in January, 2013 regarding its forest diversion and corresponding compensatory afforestation proposals. Apprehending delay, the Petitioner requested District Forest Officer, Hoshangabad and Chief Conservator of Forest, Bhopal to expedite the preparation of compensatory afforestation scheme in June, 2013. Despite best efforts towards obtaining Forest Clearance, only in February, 2014, the Petitioner discovered only about half of the initially proposed compensatory afforestation land. The Petitioner has submitted that meanwhile, the Petitioner acquired 7.963 hectares of private land for compensatory afforestation and the same was intimated to the Additional Principal Chief Conservator of Forest & Nodal Officer, Bhopal in March, 2014. Subsequently, the Petitioner fully cooperated with the Governmental authorities and, among other things, made available the requisite payments for compensatory afforestation; the transfer of the said land to the Forest Department was completed by 29.09.2014. Thus, the entire process of acquiring and finalizing of suitable non-forest land for compensatory afforestation in respect of the BB and BI Lines took almost 2 years from 3.10.2012 up to 29.9.2014. According to the Petitioner, the in-principle Forest Clearances for BB and BI transmission lines were obtained on 20.6.2014 and 24.6.2014 after a lapse of 1013 days and 1017 days, respectively, from the date of application (i.e. 12.09.2011) as opposed to the typical 300 day mandated by the Conservation Rules. The Petitioner has submitted that

this delay is attributable to a Change in Law brought about by the MoEF Notification dated 13.2.2012 necessitating the identification and procurement of alternate land for compensatory afforestation, which is beyond the control of the Petitioner.

36. With regard to the BJ transmission line, the Petitioner has submitted that it had made all possible efforts for arranging non-forest land for compensatory afforestation. Out of the six transmission elements of the Project, the Petitioner was eventually able to successfully arrange non-forest land for compensatory afforestation for five elements. However, the Petitioner undertook sincere efforts to procure non-forest land for the BJ Line as well. The Petitioner has submitted that in order to identify the requisite non-forest land, the Petitioner approached several District Collectors seeking non-forest land for compensatory afforestation. In particular, on 26.5.2012, the Petitioner made an application to the Collector, Jabalpur for allotment of revenue land for the purpose of compensatory afforestation in respect of the Project. Pursuant to the report submitted by the Sub Divisional Officer (Rev.) Jabalpur, Madhya Pradesh and a letter of recommendation issued by the Forest Conservator, Jabalpur, the Additional Collector of Jabalpur, by order dated 16.7.2012, allotted 110 Ha. of government land for the purpose of compensatory afforestation. However, despite the issuance of this order, the said land was not handed over in time to the Petitioner due to encroachments and the process was significantly delayed by 23 months. The Petitioner has submitted that from 13.2.2012 onwards, when the MoEF amended the Forest Guidelines, the Petitioner was making all possible efforts within its control to procure non-forest land for compensatory afforestation. However, due to various unforeseeable and uncontrollable delays not attributable to the Petitioner, the non-forest land was not handed over to the Petitioner in time. Apprehending the same, from March, 2012 onwards itself, the

Petitioner simultaneously started identification of private land and conducted negotiations for its acquisition with various private agencies/ parties. The identified private lands were also shown to the Forest Department seeking their consent in respect of suitability of those lands towards the fulfilment of compensatory afforestation obligations. Subsequently, the Petitioner successfully negotiated with the concerned farmers and finally acquired 68.28 Ha of private land by 8.7.2014. The Petitioner has submitted that subsequent to the acquisition of aforesaid private lands by the Petitioner, MoEF vide its letter F. No 11-68/2014-FC (Pt.) dated 11.7.2014 directed the Principal Secretary (Forest), of all States/Union Territory Governments to permit compensatory afforestation raised over degraded forest land in terms of Paragraph 3.2 of the Forest Guidelines. Prior to the said amendment, this option was available only to developers of transmission lines of a rating *below 220 kV*. The Petitioner's Project involves 765 kV transmission lines. Therefore, as per the amendment issued to the Forest Guidelines vide the letter dated 11.7.2014, all transmission lines irrespective of their voltage were made eligible for diversion of degraded forest lands for the purpose of compensatory afforestation. In accordance with the revised Forest Guidelines, the Petitioner acquired degraded forest land.

37. The Petitioner has submitted that in respect of the Forest Clearances, in addition to the element-wise steps highlighted, it also undertook all other steps/additional steps possible for early resolution of the issue pertaining to Forest Clearances. In this regard, the Petitioner made the following efforts:

- (a) The Petitioner, to expedite the resolution of the issue, approached the Project Monitoring Group of Cabinet Committee on Investment constituted by the Government of India by the Notification dated 2.1.2013 with the objective,

inter alia, to “consider and decide measures required for expeditiously granting/refusing approvals/clearances in identified sectors including simplification of rules/procedures followed by the respective Ministries/Departments for decision making”. The Petitioner raised the issue of delays in receiving Forest Clearances before the Cabinet Committee on Investment.

(b) 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 Clearances and highlight the importance of the Project. In this regard:

- (i) 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 Clearances is expedited.
- (ii) On 23.1.2014, MoP called a Meeting of forest officials, Power Grid Corporation of India Ltd., 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 Clearances’ 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.

38. We have considered the submissions of the Petitioner and examined the documents on record. We are of the view that the Petitioner has taken all possible steps for early resolution of issues pertaining to forest clearance. We are also of the

view that in case of forest clearance for all the transmission lines, the Petitioner has pursued the matter with relevant authorities and the time consumed was on account of delay in grant of forest clearance owing to change in MoEF guidelines dated 13.2.2012 .

39. 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 Change in Law in terms of Article 12 of the TSA. In our view, the time consumed for getting the final forest clearances from MOEF in the States of Maharashtra, Madhya Pradesh and Gujarat was beyond the control of the petitioner and was due to a change in law on account of MOEF Notification dated 13.2.2012.

40. The relevant portion of the letter dated 5.7.2013 issued by Ministry of Environment and Forests amending the guidelines for diversion of forest land and change in formats for FRA Clearance is extracted as under:

“To,

The Principal Secretary (Forests)
All State/Union Territory Government

Subject: Diversion of forest land for non-forest purposes under the Forest (Conservation) Act, 1980-ensuring compliance of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

Sir,

I am directed to refer to this Ministry's letter of even number dated 3rd August 2009 and dated 5th February, 2013 on the above mentioned subject wherein this Ministry issued detailed guidelines on submissions of evidences, for having initiated the completed the process of settlement of rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, and to say that certificate in accordance with the

said letters in respect of (a) linear, and (b) other projects shall be submitted in the formats enclosed as Annexure-I (Form-I) and Annexure-II (Form-II) respectively.

Sd/-
(H.C.Chaudhary)
Assistant Inspector General of Forests”

41. Thus, MoEF vide its letter dated 5.7.2013 mandated that the no-objection certificates in respect of FRA Clearances should be issued by all District Collectors as per the revised formats. As a consequence of which, the Petitioner was constrained to re-apply for the no-objection certificates from all the relevant District Collectors and re-submit the same for the purpose of obtaining its FRA Clearances. The same is also covered under the clause of TSA “a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of new terms or conditions for obtaining such consents, clearances and Permits” and is, therefore, a Change in Law.

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

42. The Petitioner has submitted that it had initiated sincere efforts subsequent to the MoEF Notification dated 13.2.2012 to acquire private land for fulfilment of compensatory afforestation. The Petitioner has submitted that with respect to the DA, DD, and DV Lines, non-forest land was transferred (mutated) in the Petitioner’s name on 11.7.2014, and subsequently, transferred in the name of the Forest Department on 8.8.2014. Similarly, with respect to BB and BI Lines, non-forest land was transferred (mutated) on 29.9.2014. Therefore, requirement for procurement of degraded forest land only arose with respect to the BJ Line.

43. We have considered the submission of the Petitioner. According to the Petitioner, 68.28 Ha. of private land was acquired with respect to the BJ Line by 8.7.2014. The Petitioner has submitted a MoEF 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 dated 11.7.2014 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.”

As per the amendment issued to the guidelines issued by MOEF vide letter dated 11.7.2014, all transmission lines irrespective of voltage were made eligible for diversion of degraded forest lands for the purpose of compensatory afforestation. In accordance with this provision, the Petitioner has processed the case for diversion of forest land for construction of BJ line.

44. In view of the amended Paragraph 3.2 of the Forest Guidelines, the Petitioner had to obtain 224.74 Ha (twice the quantum) and transfer the same to the Forest

Department for fulfilment of its compensatory afforestation obligations. To this end, the Petitioner obtained the following degraded forest land:

- (a) 100 Ha in Compartment No. R.F. 345 under West Raisen; and
- (b) 125 Ha in Compartment No. P.F. 152A, B, R.F. 17 under Begumganj Range.

45. The Divisional Forest Officer, Raisen vide its letter dated 21.7.2014 communicated the Petitioner's proposal for identified degraded forest land to the Chief Conservator of Forests ("CCF"), Bhopal. CCF, Bhopal vide order dated 28.7.2014 agreed for 10 years compensatory afforestation scheme with respect to the BJ line. The relevant portion of the said order dated 28.7.2014 is extracted as under:

"According to the Govt. of Madhya Pradesh Finance Department their Memo No. 621/03/Rule/4/ dated 3.9.2003 & Book of financial powers 1995 Part II IN Serial No. 14 after used the powers regarding installation of 765 k V S/C transmission line within the jurisdiction of Forest Division Riasen Silvani Western Gadhi & Raisen affected forest land 103.490 hectors and within the boundaries of Forest Division Bhopal, Tehsil huzur Village Karond, Khurd, Survey No. 162 & 165 therein used 8.88 hectors Revenue forest land, total 112.37 hector forest land due to affected the above land and therefore, to give alternate land under companionate grounds according to the guidelines issued by the Additional Principle Chief Forest Conservator (Land Manager) M.P. sending to them along their letter No. F-4/3/16/2014/10-11/Electricity/1915 dated 16.7.2014 affected double the forest land area 225 Hectors which was spoiled and therefore to be used another Non-forest land for afforestation (Plantation of trees) the technical agreed the scheme of 10 years period afforestation (Plantation of trees) scheme which is agreed by Dist. Forest Officer, Gen. Forest Division Raisen for a total amount of Rs. 5,85,4, 896."

Further, MoEF vide its letter dated 25.3.2015 to Principal Secretary (Forests), Government of Madhya Pradesh accorded approval for diversion of 112.370 Ha of forest land towards the construction of the BJ Line. The said letter is extracted as under:

"To,
The Principal Secretary (Forests)

Government of Madhya Pradesh
Bhopal

Sub: Diversion of 112.370 hectares of forest land in favour of Bhopal Dhule Transmission Company Limited for construction of 765 kV single circuit Jabalpur-Bhopal Transmission in Bhopal and Raisen Districts, Madhya Pradesh.

Sir,

I am directed to refer to the Addl. Principal Chief Conservator of Forests (Land Management) and Nodal Officer, Forest (Conservation) Act, 1980, Government of Madhya Pradesh's letter No. F-4/16/2014/10-11/Vidyut/2402 dated 5th September 2014 on the above mentioned subject, wherein prior approval of the Central Government for the diversion of 112.370 hectares of forest land in favour of Bhopal Dhule Transmission Company Limited for construction of 765 kV single circuit Jabalpur-Bhopal Transmission in Bhopal and Raisen Districts, Madhya Pradesh, was sought, in accordance with Section 2 of the Forest (Conservation) Act, 1980. After careful consideration of the proposal by the Forest Advisory Committee constituted under Section 3 of the said Act, Stage-I approval for the said proposal was granted vide this Ministry's letter of even number dated 31st December, 2014, subject to fulfillment of certain conditions. The State Government has furnished compliance report in respect of the conditions stipulated in the Stage-I approval and has requested the Central Government to grant final approval.

2. In this connection, I am directed to say that on the basis of the compliance report furnished by the Addl. Principal Chief Conservator of Forest (Land Management) and Nodal Officer, Forest (Conservation) Act, 1980, Government of Madhya Pradesh vide letter No. F-4/3/16/2014/10-11/Vidyut/261 dated 24th January 2015, approval of the Central Government is hereby granted under Section 2 of the Forest (Conservation) Act, 1980 for diversion of 112.370 hectares of forest land in favour of Bhopal Dhule Transmission Limited for construction of 765 kV single circuit Jabalpur-Bhopal Transmission in Bhopal and Raisen Districts, Madhya Pradesh subject to the following conditions....

Your's faithfully,
Sd/-
(M.Rajkumar)

Assistant Inspector General of Forest"

46. After receipt of the Forest Clearances as above, the Petitioner has commissioned Jabalpur-Bhopal transmission line on 9.6.2015. 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 the three dates, namely, date of execution and delivery of the TSA by the parties, the date of acquiring of the BDTCL by the successful bidder and date of providing contract performance

guarantee by the successful bidder. The TSA was signed between the BDTCL and LTTCs on 7.12.2010, the Contract Performance Guarantee was provided on 30.3.2011 and the BDTCL entity was acquired by the successful bidder on 31.3.2011. Therefore, the effective date is 31.3.2011 and thus the project was scheduled to be completed within 36 months from the effective date, i.e. 31.3.2014. As against the SCOD of 31.3.2014, the actual commissioning of Jabalpur-Bhopal 765 kV S/C transmission line was on 9.6.2015 which resulted in delay of 14 months 9 days. In view of the reasons submitted by the Petitioner, the delay is attributable to the delay in grant of forest clearance.

(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.

47. The Petitioner has submitted that as recorded at Paragraph 33 of the Commission's order dated 25.6.2018 in Petition No. 216/MP/2016, the in-principle Forest Clearances for all the transmission elements of the Project apart from the BJ and DV Lines were received before the said MoEF Letter dated 11.7.2014. Perusal of the in-principle Forest Clearances placed on record by the Petitioner reveals that the in-principal Forest Clearance for the DV Line was obtained on 27.8.2014, while the in-principle Forest Clearances for the BJ Line was obtained on 31.12.2014, for DA Line on 30.5.2014, for DD Line on 15.5.2014, for BB Line on 20.6.2014 and for BI Line on 24.6.2014.

Issue No.3: What reliefs should be granted to the Petitioner in the light of the answer to the above issues?

48. The project scope consists of the transmission lines as well as sub-stations. Bhopal sub-station is interlinked with Jabalpur-Bhopal transmission line, Bhopal-Bhopal transmission line and Bhopal -Indore transmission line. Dhule sub-station is

interlinked with Dhule-Dhule transmission line, Dhule-Aurangabad transmission line and Dhule-Vadodara transmission line. Since the Petitioner has claimed relief for all the assets including the sub-stations, it has accordingly submitted the details of IDC for all the assets including the sub-stations.

49. The Petitioner has submitted that the Change in Law events, namely delay in grant of Forest Clearance and change in formats of FRA Clearances has burdened the Petitioner with *inter alia* an additional IDC liability. The Petitioner has submitted that the gross interest paid by the Petitioner from SCOD, i.e., 12.8.2014 till actual COD, i.e., 9.6.2015 is Rs. 1,42,10,83,955/-, the cash interest earned from the temporary parking of funds from SCOD to actual COD is Rs. 34,41,524/-, the interest charged to profit and loss account is Rs. 74,64,20,055/-, the net interest capitalized paid by the Petitioner from SCOD to actual COD is Rs. 67,12,22,376/-, the finance charges from SCOD to actual COD is Rs. 16,89,41,491/-. Therefore, the total IDC on original project cost is Rs. 84,01,63,867/-.

50. The Petitioner has submitted that Change in Law relief for the very same issue, i.e. delay in grant of Forest Clearance on account of the said MoEF Notification was granted to Jabalpur Transmission Company Limited (“JTCL”) by the Commission in terms of its order dated 16.10.2015 in Petition No. 73/MP/2014 read with its order dated 8.5.2017 in Petition No. 310/MP/2015. The Commission in its above orders allowed JTCL’s claims regarding additional expenditure towards IDC on loans during the extended construction period; increase in afforestation rates as prescribed by MoEF; and increase in taxes and duties. Similarly, in its order dated 13.9.2017 in Petition No. 174/MP/2016, the Commission held that since the delay in getting forest clearance was beyond the control of the Petitioner, East North

Interconnection Company Limited (**ENICL**), and ENICL should be allowed IDC for the extended period in order to put the ENICL in same economic position as if the Change in Law had not occurred. The Petitioner has prayed to compensate the Petitioner for the adverse economic impact of the aforesaid Change in Law event and restore the Petitioner to the same economic position as if such Change in Law event had not occurred.

51. The relevant provision of the TSA (Article 12.2) as regards relief on account of change in law is as under:

“12.2 Relief for Change in Law

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

For every cumulative increase/decrease of each Rupees Nine Crores (Rs. 9,00,00,000/=) in the cost of the Project up to the Scheduled COD of the Project, the increase/decrease in non-escalable Transmission Charges shall be an amount equal to 0.32 percent (0.32%) of the Non-Escalable Transmission Charges.

12.2.2 During the Operation Period:

During the Operation Period, the compensation for any increase/decrease in revenues shall be determined and effective from such date, as decided by the Appropriate Commission, whose decision shall be final and binding on both the parties, subject to rights of appeal provided under applicable Law.

Provided that the above mentioned compensation shall be payable only if the increase/decrease in revenues or cost to the TSP is in excess of an amount equivalent to one percent (1%) of Transmission Charges in aggregate for a Contract Year.

12.2.3 For any claims made under Article 12.2.1 and 12.2.2 above, the TSP shall provide to the Long Term Transmission Customers and the Appropriate Commission documentary proof of such increase/decrease in cost of the Project/revenue for establishing the impact of such Change in Law.

12.2.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Articles 12.2.1 and 12.2.2, and the date from which such compensation shall become effective, shall be final and binding on both the Parties subject to the rights of appeal provided under applicable Law.”

From the above provision of TSA, we note that “during the construction period, the impact of increase/decrease in the cost of the Project in the Transmission Charges shall be governed by the formula given”.

52. The Commission has in its order dated 29.3.2019 in Petition No. 195/MP/2017, held as under:

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

* * * * *

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

53. Similarly, the Commission in its order dated 29.3.2019 in Petition No. 238/MP/2017, held as under:

“82. The Petitioner has submitted that on account of events of Force Majeure and unexpected requirement of forest clearance, there was delay as a result of which there was time over-run of 295 days in case of Darbhanga line and 366 days in case of Motihari Line. The Petitioner has submitted that it incurred IDC during the period beyond SCOD till the respective dates of commercial operation of the Darbhanga and Motihari Transmission Lines. We have already extended the scheduled COD of the Darbhanga and Motihari Transmission Lines upto the actual CODs without the benefit of consequential IDC and IEDC. Accordingly, the Petitioner’s prayer for grant of IDC for the period beyond the scheduled COD and the IEDC for the said period is rejected. However, the Petitioner is allowed to recover the amount paid by the Petitioner to the forest authorities for obtaining the forest clearance and other legitimate expenditure made for obtaining the forest clearance, service tax, excise duty, Swachh Bharat Cess and Krishi Kalyan Cess from the LTTCs. The Petitioner is directed to submit the documentary evidence in support of the amount paid to the

forest departments for obtaining the forest clearance and payment of taxes alongwith the Auditor Certificate to the LTTCs while claiming the relief under Change in Law.”

54. The TSAs in the above two Petitions are similarly worded as in the instant case as regards relief from events of change in law. Therefore, the above orders are applicable in the present case also. We are not in agreement with the prayer of the Petitioner to allow IDC or IEDC during the construction period. In our view, only that impact of change in law can be governed by the given formula that is a direct consequence of change in law. In the instant case, these events are change in norms of forest clearance and change in formats of FRA Clearance. These change in law events have a bearing on schedule of commissioning but the Petitioner cannot claim IDC or IEDC due to such delay. This being a competitively bid project, these parameters are neither disclosed nor evaluated while bids are submitted.

55. The Petitioner has requested to allow carrying cost of the Change in Law compensation awarded under Article 12 of the TSA in Petition No. 216/MP/2016 as well as under the instant Petition. Since, the claim of the Petitioner for allowing IDC and IEDC has been rejected, the prayer for allowing carrying cost no more survives.

56. The Petition No. 297/MP/2018 is disposed of in terms of the above.

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

sd/-
(P.K. Pujari)
Chairperson