

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 265/MP/2020

**Coram:
Shri P.K. Pujari, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member**

Date of Order: 25th January, 2021

In the matter of

Petition under Sections 63 and 79(1)(c) and (d) of the Electricity Act, 2003 read with Regulation 86 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 for providing relief under Change in Law, Article 12.2 of Transmission Service Agreement, for Transmission System associated with Gadarwara Super Thermal Power Station (2x800 MW) of NTPC (Part-A).

And

In the matter of

Powergrid Warora Transmission Limited
(Formerly known as Gadarwara (A) Transco Limited)
B-9, Qutub Institutional Area,
Katwaria Sarai, New Delhi-110016

....Petitioner

vs.

1. Madhya Pradesh Power Management Company Limited
Block No-11, Ground floor,
Shakti Bhawan, Vidhyut Nagar, Rampur,
Jabalpur – 482008, Madhya Pradesh.
2. Maharashtra State Electricity Distribution Company Limited
Prakashgad, 4th Floor,
Bandra (East), Mumbai – 400 051.
3. Chhattisgarh State Power State Distribution Company Limited
P.O. Sunder Nagar, Dangania,
Raipur – 492013, Chhattisgarh.
4. Gujarat Urja Vikas Nigam Limited
Vidhyut Bhawan, Race Course,
Vadodara – 390007.
5. Electricity Department, Government of Goa,
Curti-Ponda, Goa-403 401.

6. Electricity Department, Dadar and Nagar Haveli,
Administration of Dadar Nagar Haveli, 66 kV, Amla Road,
Silvassa– 396230.

7. Electricity Department, Administration of Daman & Diu,
Plot No.- 35, OI DC Complex, Near Fire Station, Somnath,
Daman – 96210.

8. Chief Engineer (PSPM)
Central Electricity Authority
PSPM Division, Sewa Bhawan,
Rama Krishna Puram, New Delhi – 110 066.

9. Chief Operating Officer
Central Electricity Utility,
Saudamini, Plot No.2, Sector-29
Guargaon-122 001

.....**Respondents**

The following were present:

Shri M. G. Ramachandran, Sr. Advocate, PWTL
Shri Shubham Arya, Advocate, PWTL
Shri C. S. Gupta, PWTL
Shri Prashant Kumar, PWTL
Shri Shashwat Kumar, Advocate, MSEDCL
Ms. Himangini Mehta, Advocate, MSEDCL
Shri Rahul Chouhan, Advocate, MSEDCL
Shri Manoj Dubey, Advocate, MPPMCL
Shri Rajeev Gupta, MPPMCL

ORDER

The present Petition has been filed by the Petitioner, Powergrid Warora Transmission Limited (PWTL) formerly known as Gadawara (A) Transco Limited under Section 63 and Section 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') seeking compensatory and declaratory reliefs under Article 12 of the Transmission Services Agreement (in short 'TSA') dated 9.2.2015 on account Change in Law events, which has adversely affected the construction of the Project. The Petitioner has made the following prayers:

"a) Admit and entertain the present Petition under Section 63 read with Section 79(1) (c) and (d) of the Electricity Act, 2003 for declaration of the Project being affected by Change in Law events for providing relief under Article 12.2 of the Transmission Service Agreement as set out hereinabove;

(b) Declare that the Petitioner shall be entitled to get the increase in cost of Project amounting to Rs. 88.49 crore during execution and completion of transmission project.

(c) Declare that the Petitioner shall be entitled to increase in adopted non-escalable charges by 3.51% on account in increase in aforementioned cost of project due to Change in Law.....”

2. The Petitioner, a fully owned subsidiary of Power Grid Corporation of India Limited (in short ‘PGCIL’), was selected as a successful bidder through the tariff based competitive bidding under Section 63 of the Act to establish “Transmission System associated with Gadarwara STPS (2X800 MW) of NTPC (Part-A)” on Build, Own, Operate and Maintain (BOOM) basis. The Petitioner is required to provide transmission service to the Long-Term Transmission Customers (in short ‘LTTCs’) (arrayed as Respondents 1 to 7) of the Project which requires establishing the transmission system comprising of the following transmission lines and sub-stations:

| S. No. | Scheme/Transmission Works | Completion Target /Scheduled Commercial Operation Date | Actual Commercial Operation Date |
|--------|---|--|----------------------------------|
| 1 | As per the interim arrangement, LILO of existing Seoni-Bina 765 kV S/C line at Gadarwara STPP would be established. At a later date, LILO portion would be delinked from Seoni-Bina 765 kV S/C line to restore the Seoni-Bina 765 S/C direct line, and the LILO portion would be extended to the Jabalpur 765/400 kV Pooling Station to form the proposed Gadarwara 765/400 kV Pooling Station to form the proposed Gadarwara-Jabalpur Pool 765 kV D/C line | 20 months (November 2016) | 30.11.2016 |
| 2 | Gadarwara STPS-Jabalpur Pool 765 kV D/C line | 26 months (May 2017) | 31.5.2017 |
| 3 | Gadarwara STPS-New Pooling Station within the jurisdiction/boundary of Warora 765 kV D/C line | 32 months (November 2017) | 16.5.2018 |
| 4 | LILO of both circuits of Wardha - Parli (PG) 400 kV D/C line at Warora* Pooling Station (Quad) | 32 months (November 2017) | 10.7.2018 |
| 5 | Establishment of 2X1500 MVA 765/400 kV (New Pooling Station within the jurisdiction/boundary Warora) 765kV : ICTs : 7X500 MVA 765/400kV (1 spare unit) ICT bays : 2 no. Line bays : 6 no. (2 no. bays for Gadarwara STPS) | 32 months (November 2017) | 10.7.2018 |

| | | |
|---|--|--|
| <p>– Warora PS D/c line; 2 no. bays for Warora PS-Parli (New) S/s D/c line covered under Transmission System Associated with Gadawara STPS (2X800 MW) of NTPC (Part-B); 2 no. bays for Rajnandgaon-Warora PS D/c line covered under additional system strengthening scheme for Chhattisgarh IPPs)</p> <p>Bus Reactor : 3X110 MVAR</p> <p>Bus Reactor Bay : 1 no. Line Reactors : 7X 110 MVAR (1 unit spare) along with associated NGR and its auxiliaries (for Gadawara line)</p> <p>Line Reactors switchable : 6X110 MVAR along with associated NGR and its auxiliaries (for Parli line)</p> <p>2 x 80 MVAR switchable line reactor along with 500ohm NGR and Warora Pool end of Parli (PG) – Warora Pool 400 kV D/C line (quad) (one reactor at each ckt) (formed after LILO of Wardha-Parli (PG) 400kV D/C quad line at Warora Pool sub-station)</p> <p>Space for future Bays: 4 nos. 400 kV</p> <ul style="list-style-type: none"> • ICT Bays : 2 Nos. • Line Bays : 4 Nos. • Provision for future Bays : 4 Nos. <p>NTPC to provide following at Gadawara STPS switchyard</p> <ul style="list-style-type: none"> • 765 kV line Bay : 4 No. • Bus Reactor Bay : 1 No. • Bus Reactor : 1X330 MVAR <p>Switchable line reactor : 2X330 MVAR along with associated NGR and its auxiliaries (for Gadawara-Warora 765 kV D/C line)</p> | | |
|---|--|--|

3. The Petitioner was incorporated as a special purpose vehicle by Bid Process Coordinator (in short 'BPC'), REC Transmission Projects Company Limited (in short 'RECTPCL'). PGCIL participated in the competitive bidding process conducted by RECTPCL and on emerging as the successful bidder, Letter of Intent (LOI) was issued by RECTPCL to PGCIL on 11.3.2015. In accordance with the bidding documents, PGCIL acquired 100% of the shareholding in the Petitioner Company by executing a Share Purchase Agreement with RECTPCL on 24.4.2015. The Petitioner entered into the TSA with LTTCs on 9.2.2015. Under the TSA, Madhya Pradesh Power Management Company Limited (MPPMCL) has been appointed as

the lead LTTC to represent all the LTTCs for discharging the rights and obligations as specified therein. The Commission in its order dated 5.8.2015 in Petition No. 126/TL/2015 granted transmission licence to the Petitioner for inter-State transmission of electricity and vide order dated 23.6.2015 in Petition No.125/ADP/2015 adopted the transmission charges of the Petitioner.

4. As per the TSA, the Project was to be completed and commissioned by November 2017, which was initially revised to January 2018 by the lead LTTC, MPPMCL on the request of NTPC to match the expected commissioning date of its generation units. As per the Petitioner, implementation of the Project was affected due to various Force Majeure and Change in Law events encountered during the construction of the Project and its elements that led to delay in achieving the Commercial Operation date.

Submissions by the Petitioner

5. The Petitioner has submitted that the matter of extension of Scheduled Commercial Operation Date (in short 'SCOD') owing to various Force Majeure events was taken up with LTTCs in accordance with Article 4.4.2 of the TSA. In this regard, a joint coordination meeting was held between the Petitioner and the LTTCs on 28.9.2018 to discuss the extension of time for the Project. As an outcome of the said discussion, the lead LTTC, MPPMCL vide its letter dated 12.3.2019 requested the Petitioner to submit its consent in writing confirming that there will not be any additional tariff burden on the LTTCs pursuant to the extension of SCOD. Accordingly, considering the request of the lead LTTC, the Petitioner vide its letter dated 29.3.2019 has undertaken that no tariff burden shall be levied on the LTTCs pursuant to the extension of the SCOD owing to the Force Majeure events. Consequently, Supplementary TSA was signed between the Petitioner and LTTCs

on 20.1.2020 providing for extension of time from SCOD to actual COD. Therefore, the issue regarding time overrun and time extension for the Project from SCOD to actual COD has been duly settled with LTTCs and the Petitioner is not seeking any relief on account of Force Majeure events that resulted into time overrun for the Project.

6. The Petitioner has submitted that the construction of the Project has been affected on account of the following Change in Law events:

- (a) Increase in acquisition price of Special Purpose Vehicle by BPC,
- (b) Notification of Good and Service Tax (in short 'GST') Laws by the Government of India, and
- (c) Notification of payment of land compensation for tower base as well as corridor of transmission line by the Government of Maharashtra and the Government of Madhya Pradesh.

7. The Petitioner has submitted the following details regarding the increase in total Project cost under each of the above heads.

(a) Increase in acquisition price of Special Purpose Vehicle by BPC

8. The Petitioner has submitted that prior to submission of bid, BPC vide its letter dated 12.12.2014 had intimated to the bidders the acquisition price payable by the selected bidder for acquisition of 100% equity shareholding of Gadarwara (A) Transco Limited along with its related assets and liabilities as Rs. 17,82,07,000/- (Rs. seventeen crore eighty two lakh seven thousand). However, subsequent to bidding, BPC vide its letter dated 24.3.2015 informed the successful bidder (PGCIL) about final acquisition price as Rs.18,22,47,703/- (Rs. eighteen crore twenty two lakh forty seven thousand seven hundred and three). This increase in acquisition price by Rs. 40.40 lakh constitutes a Change in Law event as covered under Article

12.1.1 of the TSA as it has occurred after cut-off date (seven days prior to the bid deadline).

(b) Notification of GST Laws by Government of India

9. The Petitioner has submitted that introduction of GST Laws by the Government of India after the cut-off date (7 days prior to the bid deadline) i.e. 12.2.2015 qualifies to be a Change in Law. The Petitioner has further submitted that the Commission in its order dated 17.12.2018 in Petition No. 1/SM/2018, *inter-alia*, has already held that the introduction of GST and subsuming/ abolition of specific taxes and duties, etc. in the GST constitute Change in Law event. The Petitioner's claim on account of introduction of GST Laws is Rs. 18.97 crore.

(c) Notifications of payment of land compensation for tower base as well as corridor of transmission line issued by Government of Maharashtra and Government of Madhya Pradesh

10. The Petitioner has submitted that Government of Maharashtra vide Resolution No. 2016/Pra.Kra 520/Urja-4 dated 31.5.2017 and Government of Madhya Pradesh vide GO No. R/3283/2016/7/2A dated 11.5.2017 have separately notified payment of land compensation for tower base as well as for corridor of transmission line to the land owners. These notifications are covered under Change in Law. The Petitioner has further submitted as under:

(i) Since the notifications of Government of Maharashtra and Government of Madhya Pradesh were issued after the cut-off date i.e. 12.2.2015 (7 days prior to bid deadline), they qualify as Change in Law events in terms of Article 12.1.1 of the TSA.

(ii) The notifications issued by Governments of Maharashtra and Madhya Pradesh require compensation to be paid to the land owners so as to obtain consent and clearances for execution of the Project and as such fulfils the requirement of the provisions of Article 12.1.1 of the TSA.

(iii) Additional expenditure incurred and anticipated to be incurred by the Petitioner on this account is Rs. 63.74 crore.

11. The Petitioner has submitted that due to reasons of above Change in Law, the over-head cost of the project has increased. The Petitioner, therefore, has submitted that in terms of Article 12.2 of the TSA, the impact of Change in Law for the construction period is to be given as an increase in the cost of the Project, including increased over-head cost. The cost of the Project or the Project cost refers to and encompasses within its scope all costs in regard to the establishment of the Project incurred by the entity i.e. not only the hard cost of the capital assets (i.e. plant, machinery and equipment, etc.) installed in the Project but also the interest cost and finance charges during the construction and other soft costs related to the establishment of the Project.

12. The Petitioner has submitted that the scope of Project cost can be understood with reference to Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (in short, 'the 2014 Tariff Regulations), which deal with various components of capital cost. As per the scheme of the 2014 Tariff Regulations, Interest During Construction (IDC), which essentially comprises of the interest payable on debt part, is allowed to be capitalized along with other hard costs. The total expenditure incurred in the Project including on account of time overrun is capitalized with IDC as an additional cost to the extent of 70% of the increased Project cost and the balance 30% of the increased Project cost is serviced as equity providing for return of 15.5% post-tax.

13. The Petitioner has submitted that for competitively bid transmission projects, increase in Project cost on account of Change in Law events need to be fully serviced, namely, the cost overrun in regard to increase in Project cost on account

of Change in Law and funding during the construction period. The entire increase in the Project cost (100%) on account of capital expenditure incurred by the Petitioner on account of Change in Law as well as the funding and financing cost of such capital expenditure, in full, during the construction period need to be serviced by increase in the transmission charges payable over and above the quoted transmission tariff during the entire period of the TSA in order to enable the Petitioner to be compensated fully for the Change in Law events. Therefore, the compensation/ relief should not be restricted to only the capital expenditure incurred but should include funding and financing cost as well as the overheads.

14. The Petitioner has summarized the increase in the cost of Project on account of Change in Law events along with funding cost and overhead cost as under:

(Rs. in crore)

| S. No. | Reason for cost increase | Basic amount | Associated increase in funding costs | Associated increase in overhead costs | Increase in project cost on account of Change in Law |
|---------------|---|---------------------|---|--|---|
| 1. | Increase in acquisition price by BPC | 0.40 | 0.15 | 0.02 | 0.57 |
| 2. | Notification of GST laws by Government of India | 18.97 | 0.24 | 0.97 | 20.18 |
| 3. | Notification of payment of land compensation by Governments of Maharashtra and Madhya Pradesh | 63.74 | 0.24 | 3.76 | 67.74* |
| | Total impact on Project cost | 83.11 | 0.63 | 4.75 | 88.49 |

[*Vide affidavit dated 26.6.2020, this amount has been revised to Rs. 74.78 crore and consequently total impact on Project cost to Rs. 95.53 crore]

Hearing dated 26.5.2020

15. The Petition was admitted on 26.5.2020 and notices were issued to the Respondents to file their reply. The Respondents, M.P. Power Management Company Limited and (MPPMCL) and Maharashtra State Electricity Distribution

Company Limited (MSEDCL) have filed their reply and the Petitioner has filed rejoinder to the same.

16. Vide Record of Proceedings (RoP) for the hearing dated 26.5.2020, the Petitioner was directed to file the following information:

- (a) Reasons for increase in acquisition price by BPC;
- (b) Whether notices for revision of tax and rates have been issued to the LTTCs in terms of the TSA;
- (c) Auditor certified calculation (in comparison with original tax estimations based on original estimated project cost) of amount claimed due to introduction of GST mentioning the adjustment of service tax and other such taxes/duties which were earlier envisaged in the project cost estimations, however, subsumed in GST in reconciliation with the amount specified in the auditor certificate submitted with the Petition along with supporting documents. Details of reduction in the rate of any other taxes, if any, contributing in reduction of capital cost during construction period separately;
- (d) Auditor certified calculation of funding cost separately for cost of debt and return on equity, claimed under land compensation, GST introduction and acquisition price difference together with the Auditors certificate clearly mentioning the actual capital cost and actual Debt & Equity during the relevant construction period;
- (e) Details in support of claim of increase in actual land compensation / RoW payments over those prevailing as on cut-off date; and
- (f) How additional overheads have been incurred due to more amount of GST/ taxes paid to Government, RoW payments made to the land owners and higher acquisition price paid to BPC.

17. The Petitioner vide its affidavit dated 26.6.2020 has filed the information called for vide RoP of hearing dated 26.5.2020. In addition, the Petitioner has submitted that an inadvertent error had crept in the amount mentioned in the Petition with regard to base cost of increased land compensation (i.e. Rs.63.74

crore) on account of nomenclature given in the audited accounts. In the audited account of the company, the tower compensation claim paid has been booked under the head 'Tower Compensation Package' though the same relates to land compensation paid. Such amount booked under Tower Compensation Package is Rs. 6.46 crore and with associated funding costs and overheads, the same works out to Rs. 7.04 crore, which has been missed in the Statement filed along with the instant Petition. Therefore, increased land compensation is Rs. 74.78 crore (Rs.67.74 crore + Rs. 7.04 crore) and accordingly, cumulative claim of Change in Law events stands revised to Rs. 95.53 crore instead of Rs. 88.49 crore.

Reply of the Respondent MPPMCL

18. MPPMCL in its reply dated 8.6.2020 has submitted as under:

(a) The Petitioner has not submitted the copy of the TSA dated 9.2.2015 executed with LTTCs.

(b) BPC in its letter dated 12.12.2014 had clearly mentioned that the acquisition price of Rs. 1782.07 lakh was subject to adjustment based on the audited account of SPV as on the closing date. Since the instant case is a competitively bid Project, it should be assumed that all-inclusive transmission charges was quoted and it was expected to factor all unforeseen and contingent expenditure including increase in acquisition price as indicated by BPC in its letter dated 12.12.2014 in the quoted transmission charges. Therefore, the additional expenditure to the tune of Rs. 40.40 lakh incurred on account of increase in acquisition price of SPV does not constitute Change in Law event and any claim in this regard is not admissible.

(c) The Petitioner's claims towards above 'overheads' and 'funding cost' are specifically opposed for the same were not envisaged in the bid documents or in the TSA. Reliance placed by the Petitioner on the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 is misconceived as these Regulations are not applicable in present case.

(d) With regard to the Petitioner's claims of Rs. 18.97 crore as additional impact on account of imposition of GST Laws, the Petitioner has suppressed exhibition of clear and one to one correlation between the Project, the supply of goods and services and the invoices raised by the supplier of goods and services backed by an independent and competent Auditor's certificate. The certification to the effect that all the norms as per GST Laws have been complied with by the Petitioner and the claim of the amount being made by the Petitioner are correct as per the effective taxes in pre and post-GST regime were neither made available to MPPMCL before nor are present on records of the present case.

(e) The Auditor certificate dated 8.2.2020 submitted by the Petitioner does not meet the mandates as specified by the Commission in its order dated 17.12.2018 in Petition No. 1/SM/2018. Moreover, the Petitioner is solely responsible at its own cost and risk for designing, constructing, erecting, commissioning, completing and testing the transmission project in accordance with the prudent utility practices. Therefore, it is the duty of the Petitioner to prudently incur expenditure and mitigate the effect.

(f) GST Laws provide for a tax slab (previously exempted) of 5% to 28% with respect to goods and services required for execution, construction and operation of transmission projects w.e.f. 1.7.2017. The goods and services in the context of the present Petition can be broadly categorized under two heads, namely, EPC Stage i.e. Construction stage which is covered under 'goods', and (b) O & M Stage i.e. post-construction stage which is covered under 'services'. Under GST Laws, it has been provided that if point of taxation of goods/ services is before implementation of GST Laws, it will be taxed under earlier law. Any portion of a supply whose point of taxation is after implementation of the GST Laws will be taxed under GST. The time of supply of goods/ services shall be the earlier of the date of issuing invoice (or the last day by which invoice should have been issued) or the date of receipt of payment whichever is earlier. As per the GST Laws, in cases where the invoice is raised or consideration for the supply of goods/ services have been received before 1.7.2017 and tax has already been paid under the earlier law, GST will not be applicable in such cases.

(g) In the absence of the component-wise details of the Project and respective percentage share of each such components in the overall capital cost of the competitively bid Projects, the reliance could be placed on the Commission's order dated 23.3.2016 in Petition No. 17/SM/2015 for the purpose of determining the 'weightage of components of capital cost' and the percentage impact of the taxation due to enactment of GST Laws for the purpose of calculation.

(h) The Petitioner may be directed to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the Project and the supply of goods or services, duly supported by relevant invoices and Auditor's certificate in order to enable the Respondents to reconcile the claims for Change in Law on receipt of the relevant documents.

(i) The Petitioner is also not entitled for Rs. 0.97 crore towards overheads cost and Rs. 0.234 crore towards funding costs on account of impact of GST.

(j) The documents quoted by the Petitioner and issued by the Government of Maharashtra and Government of Madhya Pradesh are not the 'notifications' as claimed by the Petitioner. They are general Guidelines issued by the respective Governments for determining the compensation to be paid to the land owners on the basis of the Guidelines issued by Ministry of Power (in short 'MoP') dated 15.10.2015. These documents issued by the Departments of the respective State Governments cannot be considered as Change in Law. The Petitioner is required to follow the process laid down under Section 164 of the Act for securing the Right of Way (in short 'RoW') for building foundation and erecting towers. Being competitively bid Project, it should be assumed that the Petitioner has quoted all-inclusive transmission charges and the Petitioner was also expected to factor all unforeseen and contingent expenditure on account of settlement of RoW while submitting the bid. Therefore, the additional expenditure incurred by the Petitioner to settle the issue of RoW with land owners does not constitute a Change in Law event.

Reply of the Respondent MSEDCL

19. MSEDCL in its reply dated 20.6.2020 has submitted as under:

(a) Based on the letters of BPC, it is understood that the final acquisition price of SPV has increased by Rs. 40,40,703/-. However, it is not clear as to which parameters have led to this increase in the acquisition price as the details about the same along with reasons is not provided by the Petitioner. The Commission vide its RoP for the hearing dated 26.5.2020 had directed the Petitioner to submit the '*Reasons for increase in acquisition price by BPC*'. Accordingly, the claim of the Petitioner on this count may be allowed only after prudent check.

(b) In terms of the Commission's order dated 17.12.2018 in Petition No. 1/SM/2018, the Commission has held the differential between the taxes subsumed in GST and the rates of GST on various items as admissible under Change in Law and the TSPs are accordingly directed to provide the details of increase or decrease in the tax liability in respect of introduction of GST to LTTCs duly supported by Auditor's Certificate. However, in the Auditor certificate furnished, the Petitioner has directly provided the total differential amount on account of Change in Law for different financial years without any details of calculations for differential tax liability. It is also not clear whether the impact of taxes subsumed in GST is considered or not while deriving the differential tax liability.

(c) As per the Auditor's certificate, the Petitioner has calculated the overhead cost @5% plus applicable taxes as per the Consultancy Agreement entered into with PGCIL for execution of the Project. However, no such Agreement has been furnished with the instant Petition. It is also not clear as to how the overhead cost has been incurred by the Petitioner towards payment of such differential tax.

(d) From the figures mentioned in Auditor's certificate towards land compensation, it is not clear whether it is a differential amount towards land compensation or total amount for land compensation. The details such as compensation amount for land acquisition payable prior to the Policy issued by the Government of Maharashtra and Guidelines issued by the Government of Madhya Pradesh and the amount became payable after the notifications of the Policy/ Guidelines has not been provided. Accordingly, the claims of the Petitioner regarding impact of said Policy and Guidelines for land compensation may be allowed only after prudence check.

(e) There might be certain taxes whose tax rates might have reduced during the construction period from date of the submission of bid. Accordingly, the Petitioner ought to provide the impact of the same on capital cost of the Project or to certify that there is no reduction in tax rate after cut-off date for any of the taxes considered while evaluating the capital cost of the Project.

Rejoinders of the Petitioner to Replies of MPPMCL and MSEDCL

20. The Petitioner in its rejoinder dated 30.6.2020 to the reply filed by MPPMCL has submitted as under:

(a) The Petitioner has filed a copy of TSA dated 9.2.2015 entered into with LTTCs along with its reply dated 26.6.2020 filed pursuant to the RoP for the hearing dated 26.5.2020.

(b) Cost incurred towards increase in acquisition price of SPV constitutes a Change in Law event as recognized in the 6th bullet of Article 12.1.1 of TSA. The acquisition price is indicated by BPC and the Petitioner has no control over the same. It was required to include the acquisition price as specified on cut-off date in the quoted transmission charges and there was no requirement to anticipate any possible increase in acquisition price and include it in the price quoted by it.

(c) It is wrong and denied that the Petitioner is not entitled to overhead and/or funding cost. In case of increase in Project cost, there is an associated funding cost and overhead cost which is also part of the Project cost. In the present case, increase in Project cost pertains to Change in Law events and the associated funding cost and overhead cost is claimed as part of the increased Project cost due to the Change in Law. The funding cost and overhead cost would not have burdened the Petitioner had the increase in Project cost not occurred on account of Change in Law. TSA recognizes relief for increase in cost of Project on account of Change in Law and such funding and overhead costs are due to Change in Law event and, therefore, ought to be allowed.

(d) The Petitioner has provided a detailed break-up of implication of GST vis-à-vis the taxes applicable prior to introduction of GST on each package of the transmission project implemented by the Petitioner vide its affidavit dated

26.6.2020 and Auditor certificate in this regard. As certified by the Auditor, the claim is made only with regard to GST liable/ paid for supply of goods or services after its introduction (i.e. 1.7.2017) and the taxes paid as per pre-GST rates are not being claimed.

(e) The claim of MPPMCL on reduction in impact of GST by means of procurement at lower rates is unsubstantial and vague. MPPMCL has not provided any rationale or basis to claim that taxes could have been lower. In any case, the Petitioner had entered into contracts for packages and the prices are to be paid as per the applicable tax rate. The impact of GST on each such contract value has been furnished by the Petitioner.

(f) Reliance placed by MPPMCL on the Commission's order dated 23.3.2016 in Petition No. 17/SM/2015 for component and percentage is also misplaced. The said order relates to solar PV Projects and thermal generation projects. There is also no question of any agreement on mechanism or annuity when TSA itself provides for formula/ methodology for Change in Law for payment of increase in Project cost.

(g) MPPMCL's contention that the Policies/ Guidelines issued by the Government of Maharashtra dated 31.5.2017 and Government of Madhya Pradesh dated 11.5.2017 do not constitute Change in Law event is erroneous. MPPMCL's attempt to categorise them as general Guidelines which have been issued in pursuance to MoP's Guidelines dated 15.10.2015 is misconceived.

(h) Undisputedly, MoP's Guidelines dated 15.10.2015, Government of Maharashtra's Policy dated 31.5.2017 and Government of Madhya Guidelines dated 11.5.2017 have been issued after the cut-off date i.e. 12.2.2015 and the Petitioner was required to make additional payments for land compensation. Therefore, irrespective of whether MPPMCL considered the letter dated 15.10.2015 or the Policy dated 31.5.2017 and Guidelines dated 11.5.2017 as law, all of them constitute Change in Law events for the Petitioner's Project. If the notifications of the State Governments had no relevance or value, the same would not have been required to be issued.

(i) The Governments of Maharashtra/ Madhya Pradesh and their Departments fall within the definition of 'Indian Governmental Instrumentality'

as provided in the TSA and the Government Order No. Dhoran-2016/Pra.Kra/520/Urja-4 dated 31.5.2017 issued by Industry, Power and Labour Department, Government of Maharashtra and GO No. R/3283/2016/7/2A dated 11.5.2017 issued by Government of Madhya Pradesh qualify as Change in Law which includes any statute, ordinance, rule, regulation, notification, order or code. The said orders have been implemented by revenue authorities of Maharashtra and Madhya Pradesh for raising demand for such compensation on the Petitioner and the Petitioner was required to make payment as per the same.

(j) As per Section 164 of the Act, Appropriate Government may impose restrictions and conditions and the Government of India recognizes that since land acquisition is State subject, the State Government would issue direction in this regard. Thus, there can be no dispute that the State Government has power to issue directions on land acquisition including compensation. Hon'ble Supreme Court in *Energy Watchdog v. Central Electricity Regulatory Commission and Ors.* [(2017) 14 SCC 80] has recognized the policies and letters issued by Government as having force of law.

21. The Petitioner in its rejoinder dated 30.6.2020 to the reply filed by MSEDCL has submitted as under:

(a) Information sought by MSEDCL has been filed by the Petitioner in its affidavit dated 26.6.2020. Pursuant to RoP for the hearing dated 26.5.2020, the Petitioner had requested BPC vide letter dated 3.6.2020 to provide the reason for increase in acquisition price. Vide letter dated 16.6.2020, BPC has submitted its response, which has been placed on the records of the Petition.

(b) A detailed break-up of implication of GST vis-à-vis the taxes applicable prior to introduction of GST related to the various packages covered in the Project implemented has been provided in the additional affidavit dated 26.6.2020 along with Auditor certificate in this regard. Also, the Consultancy Agreement entered into by the Petitioner with PGCIL has also been provided. The overhead cost includes the consultancy charges along with applicable taxes paid by the Petitioner to PGCIL as per the agreement. The overhead cost is calculated @5% of Project cost + applicable taxes and

since Change in Law increases the Project cost, overhead cost also increases.

(c) Details of expenditure incurred under land compensation as per new Government Policy/ Guidelines issued by Governments of Maharashtra and Madhya Pradesh vis-à-vis earlier Policies/ guidelines issued by the respective Governments have been furnished along with additional affidavit dated 26.6.2020.

(d) Auditor certificate to the extent that there is no reduction in the rate of other taxes/ duties which contributed in reduction of capital cost during the construction period has already been furnished.

Hearing dated 25.8.2020

22. The matter was heard at length on 25.8.2020. During the course of hearing learned senior counsel for the Petitioner and learned counsel for the Respondents, MSEDCL and MPPMCL reiterated the submissions made in their respective pleadings, which are not repeated herewith for the sake of brevity. Learned counsel for MSEDCL referring to the details of land compensation paid and claimed by the Petitioner submitted that there is no clarity in the justification furnished by the Petitioner towards such claims. He added that even considering increase in land compensation for tower base to twice the ready reckoner/ market rate vide Government of Maharashtra's Resolution No. 2016/Pra.Kra 520/Urja-4 dated 31.5.2017 (in short, 'GR, 2017'), the substantial increase in the expenditure incurred by the Petitioner is not tenable. In response, learned senior counsel for the Petitioner submitted that the land compensation amount indicated by the Petitioner is the actual paid amount as certified by the Auditor. He added that as per the Government of Maharashtra Resolution No. Sankirna 021/Pra.Kra.29/Urja-4 dated 1.11.2010 (in short, GR, 2010), as prevalent on the cut-off date, land compensation for tower base was categorized into 4 types depending upon the type of land

varying from 25% for dry irrigated land to 65% for non-agricultural land. However, as per GR, 2017, land compensation for tower base has been increased to twice the ready reckoner/ market rate.

23. Vide Record of Proceedings for hearing dated 25.8.2020, the Petitioner was directed to provide the following details/ information:

- (a) Copy of the orders of district administration for payments towards land compensation to the Respondents for the respective States;
- (b) An affidavit to the effect that payment towards land compensation has been made as per the orders of the State Government and district administration;
- (c) Auditor certificate certifying year-wise land compensation amount paid, prior to financial year 2017-18; and
- (d) Copy (with English Translation) of the Government of Maharashtra's GR, 2010.

24. The Petitioner vide its affidavit dated 14.9.2020 has furnished the details/ information called for vide RoP of hearing dated 25.8.2020. The Petitioner has stated that as per the directions of the Commission, the comprehensive orders issued by district administration for payment towards land compensation during implementation of transmission lines related to the Project has been forwarded to the respondents for the respective States including the lead LTTC i.e. MPPMCL and MSEDCL. The Petitioner has submitted that prior to financial year 2017-18, no orders for payment of land compensation were issued by State Government and district administration. Accordingly, no land compensation was paid by the Petitioner prior to financial year 2017-18. In this regard, the Petitioner has placed on record the Auditor certificate. The Petitioner has submitted that only the usual crop compensation for the damages assessed during the construction of the transmission lines was paid, which is not being claimed in the instant Petition.

Analysis and Decision

25. We have considered the submissions of the Petitioner, MSEDCL and MPPMCL, and perused the documents on record. Based on the above, 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 are covered under Change in Law in terms of the TSA? and,

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

The above issues have been dealt with in succeeding paragraphs.

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

26. The Petitioner has claimed relief under Article 12 of the TSA. Article 12.3.1 of the TSA provides as under:

“12.3 Notification of Change in Law Event

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.

12.3.2 The TSP shall also be obliged to serve a notice to Lead Long Term Transmission Customer even when it is beneficially affected by a Change in Law.

12.3.3 Any notice served pursuant to Articles 12.3.1 and 12.3.2 shall provide, amongst other things, precise details of the Change in Law and its effect on the TSP.”

27. Under Article 12.3 of the TSA, 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, it shall give notice to the lead LTTC of any event of Change in Law as soon as reasonably practicable after being aware of the same. It further provides that any notice served pursuant to Articles 12.3.1 and 12.3.2 of the TSA shall provide amongst other things, precise details of Change in Law and its effect on the TSP.

28. With regard to notice, the Respondents have not raised objections. It is noticed that the Petitioner gave notices to the LTTCs dated 3.6.2017 regarding payment of compensation due to introduction of land compensation for transmission lines in the State of Maharashtra, dated 7.7.2017 regarding introduction of GST with effect from 1.7.2017 and dated 18.8.2017 about payment of compensation due to introduction of land compensation for transmission lines in the State of Madhya Pradesh. However, no response was received from the LTTCs. As regards increase in the acquisition price of SPV, while the Petitioner has not placed notice intimating the LTTCs about the aforesaid Change in Law, it has been pointed out that all the LTTCs were duly informed by the Petitioner regarding increase in the acquisition price of SPV by BPC in Petition No. 125/ADP/2015 filed by the Petitioner under Section 63 of the Act seeking adoption of tariff and also served copies of the Petition *inter alia* stating reimbursement of increased acquisition price of SPV, on all the LTTCs including the BPC. Perusal of the records reveals that the Petitioner had in fact indicated/ intimated the LTTCs about the increase in the acquisition price in the aforesaid Petition filed after the selected bidder (PGCIL) acquired the SPV as per the bid process, which in our view suffices the requirement of notice to LTTCs. Since through the Petition No. 125/ADP/2015, LTTCs were made aware about increase in acquisition price by BPC, in our view, the Petitioner has complied with the requirement of TSA regarding prior notice to the lead LTTC regarding occurrence of Change in Law before approaching the Commission.

Issue No. 2: Whether the claims of the Petitioner are covered under Change in Law in terms of the TSA?

29. The provisions of the TSA with regard to Change in Law are extracted as under:

“12.1 Change in Law

12.1.1 Change in Law means the occurrence of any of the following after the

date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/non-recurring expenditure by the TSP or any income to the TSP:

- *The enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- *A change in the interpretation or application of any Law by Indian Governmental Instrumentality having the legal power to interpret or apply such Law, on 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.*

30. A perusal of the above article of the TSA reveals that for an event to be 'Change in Law', its occurrence has to be after seven days prior to the bid deadline and result into any additional recurring/ non-recurring expenditure by TSP or any income to TSP. The events broadly covered under Change in Law are following:

- (a) Any enactment, coming into effect, adoption, promulgation, amendment, modification or repeal, of any Law;
- (b) Any change in interpretation of any law by a Competent Court of law, or Indian Governmental Instrumentality having the legal power for such interpretation; or
- (c) Imposition of a requirement for obtaining any consents, clearances and permits which was not required earlier;
- (d) A change in terms and conditions prescribed or inclusion of any new terms and conditions for obtaining consents, clearances and permits or the inclusion of new terms and conditions for obtaining such consents, Clearances and Permits;
- (e) Any change in the Commission's Transmission Licence Regulations;
- (f) Any change in the Acquisition price; and

(g) Any change in tax or introduction of any tax made applicable for providing transmission service by the TSP as per the terms of the agreement.

31. The Petitioner has submitted that as per Article 12 of the TSA, an event constitutes a Change in Law if it occurred after the date which is seven days prior to the bid deadline which was 19.2.2015. Therefore, cut-off date for considering the claims under Change in Law will be 12.2.2015. In the light of the above provisions of Change in Law, the claims of the Petitioner which have occurred after cut-off date during the construction and operating period have been examined as under:

(a) Increase in acquisition price of BPC

32. The Petitioner has submitted that prior to submission of bid, BPC vide its letter dated 12.12.2014 had intimated to the bidders the acquisition price payable by the selected bidder for acquisition of 100% equity shareholding of SPV - 'Gadarwara (A) Transmission Limited' along with all its related assets and liability as Rs.17,82,07,000/-. However, subsequent to bidding, BPC vide its letter dated 24.3.2015 intimated to the successful/ selected bidder the final acquisition price as Rs. 18,22,47,703/-. The Petitioner has submitted that the increase of Rs. 40.40 lakh in the acquisition price of SPV is a Change in Law event in terms of Article 12.1.1 of TSA and accordingly, the same may be allowed.

33. MPPMCL has submitted that the BPC in its letter dated 12.12.2014 had mentioned that the acquisition price of Rs.1782.07 lakh was subject to the adjustment based on the audited accounts of SPV as on the closing date. Therefore, in the competitive bid Project, the Petitioner ought to have quoted all-inclusive transmission charges factoring in all unforeseen and contingent expenditure including increase in the acquisition price of SPV as indicated in BPC's letter dated 12.12.2014. Therefore, the additional expenditure incurred by the

Petitioner towards acquisition price of SPV does not constitute Change in Law and any claim made thereunder is not admissible.

34. MSEDCL has submitted that the Petitioner has not provided the requisite details/ reasons as to which parameters have resulted into increase in the acquisition price and the claim of the Petitioner on this count may be allowed after prudence check.

35. *Per contra*, the Petitioner has submitted that cost incurred towards increase in acquisition price of SPV clearly constitutes a Change in Law event as per the 6th bullet of Article 12.1.1 of the TSA dealing with Change in Law. It has been submitted that the Petitioner was only required to include the acquisition price as specified by BPC as on the cut-off date in the quoted transmission charges and there was no requirement for the Petitioner to anticipate any possible increase therein and include in the quoted charges. This is the very reason for inclusion of any change in acquisition price as a Change in Law event under Article 12.1.1 of the TSA. The Petitioner has placed on record the letter dated 16.6.2020 of BPC indicating the reasons for increase in the acquisition price.

36. We have considered the submissions made by the parties. In the present case, BPC vide its letter dated 12.12.2014 had informed all the bidders about the acquisition price payable for acquiring 100% equity shareholding of SPV, Gadawara (A) Transco Limited as Rs. 17,82,07,000/-. Subsequently, the BPC vide its letter dated 24.3.2015 intimated the successful bidder the final acquisition price as Rs. 18,22,47,703/-. MSEDCL has submitted that the Petitioner has not furnished the requisite details/ reason for increase in acquisition price of SPV along with its claim. It is noted that vide RoP for the hearing dated 26.5.2020, the Petitioner was

directed to furnish the 'Reasons for increase in acquisition price by BPC'. Pursuant to the said direction, the Petitioner wrote to BPC on 3.6.2020 seeking reason for increase in acquisition price. In response, BPC vide its letter dated 16.6.2020 has submitted the reason for increase in the tentative acquisition price from Rs. 1782.07 lakh as intimated to the bidders vide its letter dated 12.12.2014 and the final acquisition price of Rs.1822.47 lakh as intimated to the selected bidder after conclusion of the bidding vide its letter dated 24.3.2015. The details of the acquisition price as provided by BPC are as under:

| | | (Rs. in lakh) | |
|-------------|---|--|--|
| Particulars | | Final Acquisition Price intimated after bidding vide letter dated 24.3.2015 | Tentative Acquisition Price intimated before bidding vide letter dated 12.12.2014 |
| 1 | Professional Fee | 1500.00 | 1500.00 |
| 2 | Reimbursement of Expenses | 115.76 | 77.55 |
| 3 | Interest on Expenses | 1.78 | 0.01 |
| | Total of 1, 2 and 3 without service tax | 1617.54 | 1577.76 |
| | Service Tax | 199.93 | 199.31 |
| 4 | Share Capital | 5.00 | 5.00 |
| | Total 1, 2,3 & 4 with Service tax | 1822.47 | 1782.07 |

37. Perusal of above reveals that the increase of Rs.40.40 lakh is due to increase in expenses, interest and payment of service tax to the Government of India. As per Article 12.1.1 of the TSA, 'Change in Law' means the occurrence of any of the events after the date which is seven days prior to the Bid Deadline resulting into any additional recurring/ non-recurring expenditure by the Transmission Service Provider or any income to the Transmission Service Provider. One such event for operation of Change in Law as per sixth bullet of Article 12.1.1 of the TSA is 'any change in the acquisition price'. Therefore, such change in the acquisition price by BPC after the cut-off date i.e. 12.2.2015 and resulting into any additional recurring or non-recurring expenditure to TSP constitutes a Change in Law event. Thus, the contention of MPPMCL that the Petitioner ought to have factored into its bid the possible increase in the acquisition price of SPV in terms of

BPC's letter dated 12.12.2014 is not tenable. It is noticed that in terms of the bid documents, BPC is required to intimate the bidders about the acquisition price to be payable by the selected bidder thirty days prior to bid deadline to enable them to factor into such price while submitting their bids. However, the TSA itself provides for an eventuality of 'any change in the acquisition price by BPC' after the cut-off date and specifically makes the same an event for operation of Change in Law. If the argument of MPPMCL that the bidders were also required to envisage any change in the acquisition price of SPV is to be accepted, it would lead to the 6th bullet of Article 12.1.1 redundant, which cannot be the case. The provisions of the bid documents as well as TSA do not require for the bidders to anticipate and factor into its bid possible changes in the acquisition price of the SPV. In view of the above, the Petitioner is entitled to the increase in transmission charges on account of increase in acquisition price in accordance with Article 12.1.1 of the TSA.

(b) Notification of Goods and Service Tax Act, 2017 by Government of India w.e.f. 1.7.2017

38. The Petitioner has submitted that the Goods and Service Tax Act, 2017 has been notified by the Ministry of Finance, Government of India with effect from 1.7.2017, which is after the cut-off date of 12.2.2015 and, therefore, constitutes a Change in Law event. The Petitioner has further submitted that the Commission in its order dated 17.12.2018 in Petition No. 1/SM/2018 has held that the introduction of GST w.e.f. 1.7.2017 constitute a Change in Law and that the differential between the taxes subsumed in GST and the rates of GST on various items shall be admissible under Change in Law and also that the TSPs shall work out and provide the details of increase/ decrease in the tax liability in respect of introduction of GST to the LTTCs duly supported by Auditor's certificate. The Petitioner has claimed the

additional expenditure incurred by it on account of introduction of GST Laws as Rs. 18.97 crore.

39. MPPMCL has submitted that the Petitioner has not exhibited clear and one to one correlation between the Project, the supply of goods or services and invoices raised by the supplier of goods and services backed by the Auditor's certificate. The Auditor certificate dated 8.2.2020 furnished by the Petitioner does not meet the requirement of the Commission's order dated 17.12.2018 in Petition No. 1/SM/2018 inasmuch as the said certificate does not provide (i) the differential between the taxes subsumed in GST and the rates of GST on various items, and (ii) details of increase or decrease in tax liability in respect of introduction of GST. Also, GST implication will be applicable only if the point of taxation occurs on or after 1.7.2017 and not when the point of taxation has occurred prior to 1.7.2017, in which case the taxes shall be payables under pre-GST Laws. As a prudent utility, the Petitioner ought to have considered the reduction in the impact of GST by arranging to buy assets as a part of transmission system at the cost of paying the GST at a lower rate instead of purchasing it individually by paying higher GST. It has been further submitted that in absence of any reference relating to the component-wise details of the Project and respective percentage share of each such component in the overall capital cost, the reliance could also be placed on the Commission's order dated 23.3.2016 in Petition No. 17/SM/2015 for the purpose of determining 'weightage of component of capital cost' and the percentage impact of taxation due to enactment of GST for the purpose of calculation.

40. MSEDCL has submitted that the Petitioner has directly provided total differential amount in the Auditor's certificate on account of Change in Law for the different financial years and has not furnished the details of calculations for the

differential tax liability. In such case, it is not clear whether the impact of taxes subsumed in GST is considered or not while deriving the differential tax liability. It has been further submitted that the Petitioner ought to have also provided the details of taxes which might have reduced during the construction period from the time of bidding and benefitted the Petitioner or to certify that there is no reduction in taxes after cut-off date for any of the taxes considered while evaluating capital cost of the Project.

41. *Per contra*, the Petitioner has submitted that it has provided a detailed break-up of implication of GST vis-à-vis taxes applicable prior to introduction of GST on each package of the Project vide its affidavit dated 26.6.2020 along with Auditor's certificate. The Petitioner has further submitted that the claim is made only with regard to GST liable/ paid for supply of goods and services after its introduction i.e. 1.7.2017 and taxes paid as per pre-GST are not being claimed. MPPCL's contention regarding reduction in impact of GST by means of procurement at lower rates is unsubstantial and without any basis. The Petitioner had entered into contracts for packages and the prices are to be paid as per the applicable tax rate. The impact of GST on each such contract values has also been provided by the Petitioner vide its affidavit dated 26.6.2020. It has been submitted by the Petitioner that MPPMCL's reliance on the order dated 23.3.2016 in Petition No. 17/SM/2015 for components and its percentage weightage is also misplaced as the said order relates to solar PV and thermal generation Projects. The Petitioner has clarified that there is no reduction in the rate of other taxes/ duties which contributed to the reduction of capital cost during the construction period.

42. We have considered the submissions made by the Petitioner and the Respondents, MSEDCL and MPPMCL. Change in Law has been defined in Article

12.1.1 as “the occurrence of any of the following after the date, which is seven (7) days prior to the bid deadline resulting into any additional recurring/non-recurring expenditure by the TSP or any income to the TSP”. Thus, any of the occurrences specified in the bullets under Article 12.1.1 of the TSA which have occurred after the cut-off date and which result into any additional recurring or non-recurring expenditure to the TSP or income to the TSP shall be covered under Change in Law. The Commission in its order dated 17.12.2018 in Petition No. 1/SM/2018 in the matter of ‘Additional tax burden on transmission licensees on introduction of Goods and Service Tax compensation cess’ has held that the introduction of GST with effect from 1.7.2017 shall constitute a Change in Law event. In the said order, the Commission has also directed that TSPs shall work out and provide the details of increase or decrease in the tax liability in respect of the introduction of GST to the LTTCs duly supported by the Auditor’s certificate and the additional expenditure on account of GST shall be reimbursed by the LTTCs as per the relevant provisions of the TSA. The relevant extract of the order dated 17.12.2018 in Petition No. 1/SM/2018 is reproduced below:

“27.From the forgoing, it is observed that due to varied nature of such taxes, duties and cess etc. that have been subsumed/abolished on introduction of GST, it is not possible to quantify the resulting impact in a generic manner for all the TSPs. The abolition of taxes, duties, cess, etc. on the introduction of GST are “Change in Law” events and the savings arising out of such “Change in Law” should be passed to the beneficiaries of the TSPs. Similarly, the introduction of GST has also resulted in imposition of new or increase in existing taxes, duties, cess etc. which constitute “Change in Law” events and accordingly the additional impact due to introduction of GST shall be borne by the beneficiaries. The details of the increase or decrease in the taxes, duties, cess etc. shall be worked out by the TSPs and the beneficiaries. The TSPs should provide the details of increase or decrease in the taxes, duties, cess etc. supported by Auditor Certificate and relevant documents to the beneficiaries and refund or recover the amount from the TSPs due to the decrease or increase in the taxes, duties, cess etc. as the case may be. Since the GST liveable on the transmission licensees pertain to the construction period, the impact of GST shall be disbursed by the beneficiaries to the transmission licensees in accordance with the provisions in the TSA regarding relief for Change in Law during construction period. In case of any dispute on any of the taxes, duties, cess etc.,the beneficiaries may approach the Commission.

Summary

28. Summary of our decision in the order is as under:-

(a) Introduction of GST with effect from 1.7.2017 shall constitute a Change in Law event if the cut-off date (7days prior to the bid deadline) as per the relevant TSA falls on or after 1.7.2017.

(b) The differential between the taxes subsumed in GST and the rates of GST on various items shall be admissible under Change in Law.

(c) The TSPs shall work out and provide the details of increase or decrease in the tax liability in respect of introduction of GST to the beneficiaries/Long Term Transmission Customers duly supported by Auditor's Certificate.

(d) The additional expenditure on account of GST shall be reimbursed by the beneficiaries/Long Term Transmission Customers as per the relevant provisions of the TSA regarding Change in Law during the construction period or operating period, as the case may be.

(e) In case of dispute, either party is at liberty to approach the Commission in accordance with law."

43. In the present case, as on cut-off date i.e. 12.2.2015, there was no GST. Subsequently, the Parliament and State Legislative Assemblies, in order to introduce a unified indirect tax structure, have introduced a fresh set of taxation laws, which has replaced various Central and State level taxes, through various enactments collectively referred to as the GST Laws which came into effect from 1.7.2017. Since the additional recurring and non-recurring expenditure which has been incurred by the Petitioner is through an Act of Parliament after the cut-off date, i.e. 12.2.2015, the same is covered under Change in Law. The relief for additional expenditure incurred by the Petitioner due to introduction of GST shall be admissible on the capital expenditure incurred as on the commercial operation of the Project within the original scope of work.

44. The Petitioner has submitted that the total impact on account of enactment of the GST Laws amounts to Rs. 18.97 crore and in support, the Petitioner has placed on record the Auditor's certificate. However, the Respondents, MSEDCL and MPPMCL have contended that the said certificate does not provide the requisite details/ workings of the differential between the taxes subsumed in GST and the rates of GST on various items. Vide RoP for the hearing dated 26.5.2020, the

Petitioner was directed to furnish the detailed calculation regarding its claim on account of introduction of GST Laws with Auditor's certificate. The Petitioner vide its affidavit dated 26.6.2020 has furnished the Auditor's certified calculations of amount claimed due to introduction of GST in comparison with the original tax estimation based on the original estimated Project cost. The Petitioner has submitted that for implementation of the Project, it had entered into contracts for the various packages and prices are to be paid as per the applicable tax rates and that the Petitioner has indicated impact of GST on each of such contract values. The Petitioner has further clarified that its claim is only with regard to GST liable/ paid for supply of goods and services after its introduction i.e. 1.7.2017 and not for the taxes paid pre-GST. In addition, the Petitioner has placed on record the Auditor certificate stating that there is no reduction in the rate of other taxes/ duties which contributed in the reduction of capital cost during construction period.

45. In view of the above, the Petitioner is entitled to increase in transmission charges on account of introduction of GST Laws in accordance with Article 12.1.1 of the TSA.

(c) Notification of payment of land compensation for tower base as well as corridor of transmission line by Government of Maharashtra and Government of Madhya Pradesh

46. The Petitioner has submitted that Government of Maharashtra vide GR. 2016/Pra.Kra 520/Urja-4 dated 31.5.2017 and Government of Madhya Pradesh vide GO No. R/3283/2016/7/2A dated 11.5.2017 have notified the payment of land compensation for tower base as well as for corridor of transmission line, to the land owners. According to the Petitioner, the above notifications, which have been enacted after the cut-off date and which required the Petitioner to pay land compensation for tower base as well as the corridor of transmission line, qualify as

Change in Law in terms of Article 12.1.1 of the TSA. The Petitioner has submitted that the additional expenditure incurred and anticipated to be incurred by the Petitioner is Rs.70.2 crore.

47. MPPMCL has submitted that the documents quoted by the Petitioner and issued by the Government of Maharashtra and Government of Madhya Pradesh are not 'notification' as claimed by the Petitioner and rather they are general Guidelines issued by the respective Governments for determining the compensation to be paid to the land owners. Therefore, the said documents issued by the Ministries of respective Governments cannot be considered as Change in Law. Also, in the competitively bid project, the Petitioner ought to have quoted all-inclusive transmission charges factoring in all unforeseen and contingent expenditure on account of Right of Way (RoW) settlement while submitting its bid. Accordingly, the additional expenditure incurred by the Petitioner to settle the issues of RoW with land owners does not constitute Change in Law event and any claim on this ground cannot be admissible.

48. MSEDCL has submitted that it is not clear from the figures indicated in Auditor's certificate as to whether it is a differential amount towards land compensation or total amount for land compensation. The Petitioner has not provided the details such as compensation amount for land acquisition payable prior to issue of the new Policy and Guidelines of Governments of Maharashtra and Madhya Pradesh respectively and amount that became payable after notification of the above documents. MSEDCL has submitted that the claims of the Petitioner regarding impact of the said Policy/ Guidelines for land compensation may be allowed after prudence check.

49. *Per contra*, the Petitioner has submitted that MPPMCL's attempt to categorise the Policy/ Guidelines of Governments of Maharashtra and Madhya Pradesh as 'general Guidelines' issued in pursuance of the MoP's Guidelines dated 15.10.2015 is misconceived. The Guidelines dated 15.10.2015 issued by MoP, Policy dated 31.5.2017 issued by Government of Maharashtra and Guidelines dated 11.5.2017 issued by Government of Madhya Pradesh which have been issued after the cut-off date and require the Petitioner to make additional payments for land compensation and, therefore, constitute Change in Law event. In the Guidelines dated 15.10.2015, MoP has recognized that the issue of land acquisition was a State subject and requested the State Governments to implement or adopt the recommendations contained in the said Guidelines. In pursuance thereto, Governments of Maharashtra and Madhya Pradesh have issued the Policy and Guidelines regarding payment of land compensation. Both the Policy and Guidelines issued by Governments of Maharashtra and Madhya Pradesh respectively and their Departments, fall within the definition of 'Indian Governmental Instrumentality' and the notification issued by them under the definition of 'Law' in the TSA. It has been further stated that under Section 164 of the Act, the State Government has power to issue direction on land acquisition including compensation. The Hon'ble Supreme Court in the Energy Watchdog case has recognized that the Policies and letters issued by Government have force of law. The Petitioner has submitted that it is not asking for any amount which it had factored at the time of submitting the bid. It has provided the details of expenditure incurred under the land compensation as per the new Policy/ Guidelines issued by the Government of Maharashtra and Government of Madhya Pradesh vis-à-vis earlier Policies/ Guidelines passed by the respective Governments.

50. We have considered the submissions made by the parties. According to the Petitioner, Policy issued by Industry, Power & Labour Department, Government of Maharashtra, vide Government Order No. Dhoran-2016/Pra.Kra.520/Urja-4 dated 31.5.2017 and 'Guidelines' issued by the Revenue Department, Government of Madhya Pradesh vide Circular No. R/3283/2016/7/2A dated 11.5.2017 as well as the MoP's Guidelines dated 15.10.2015, whereby the payment of land compensation for tower base and corridor for transmission line to the land owners has been notified, constitute Change in Law in terms of Article 12.1.1 of the TSA. MPPMCL has submitted that these documents are not 'notification' as claimed by the Petitioner and that they are general Guidelines issued by the respective Governments for determining the compensation to be paid to the land owners.

51. It is noted that Ministry of Power, Government of India under its letter dated 15.10.2015 issued the Guidelines for payment of compensation towards damages in regard to Right of Way for transmission lines. In the said Guidelines, Ministry of Power *inter alia* also requested all the States/UTs to take suitable decision regarding adoption of the Guidelines for determining the compensation for land considering that the acquisition of land is a State subject. On the basis of the said Guidelines, Department of Revenue, Government of Madhya Pradesh on 11.5.2017 issued Guidelines for determining the compensation for damages payable to the land owners on account of laying of transmission lines of 66 kV and above by PGCIL and similarly Department of Industry, Power and Labour, Government of Maharashtra on 31.5.2017 issued the Policy for payment of compensation for the land lying/ coming under the transmission lines and increase in the rate of compensation for the land covered by the towers to be erected/ constructed for installation of High Tension transmission line of 66 kV or more.

52. At the outset, it is noticed that issue as to whether the 'Guidelines' dated 15.10.2015 issued by the Ministry of Power for compensation towards damages in regard to RoW for transmission line constitutes a Change in Law or not had come up for the consideration of the Commission in Petition No. 195/MP/2017 (NRSS XXXI (B) Transmission Limited v. UPPCL and Ors.). In this case, the Commission in its order dated 29.3.2019 observed as under:

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

.....

81. We have considered the claim of the Petitioner. We understand that the Petitioner had followed the process laid down under Section 164 of the Act for securing the RoW for building foundations and erecting towers. It is observed that the document quoted by the Petitioner is not a Notification as claimed by the Petitioner. It is general guidelines issued by the Ministry of Power, Government of India for determining the compensation to be paid to the land owners. This letter of Ministry of Power cannot be considered as “Change in Law” as claimed by the Petitioner.

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

53. In the above order, the Commission observed that since the 'Guidelines' dated 15.10.2015 as relied upon by the Petitioner therein was not a notification but merely a general Guidelines issued by MoP for determination of compensation to be paid to the land owners, the said letter of MoP cannot be considered as 'Change in Law' as claimed by the Petitioner therein. These Guidelines are recommendatory in nature and the respective States were requested to take suitable decision on the adoption of the said Guidelines considering that the acquisition of land is a State subject. The relevant extract of the MoP's Guidelines dated 15.10.2015 reads as thus:

“4. All the State/UTs etc. are requested to take suitable decision regarding adoption of the guidelines considering that acquisition of land is a State subject.”

54. In other words, even after the issuance of the aforesaid Guidelines by MoP, the applicable land compensation for the tower base and transmission line corridor continued to be governed by the respective State Policies. It was only upon either the State adopting the aforesaid Guidelines or formulating its own Guidelines, circular, Policy, direction and letter, etc. on the above basis, it would have resulted into a change in the land compensation policy.

55. However, it is noted that the present case stands on different footing than that of the case in Petition No. 195/MP/2017. In the present case, the Petitioner has also relied upon the Policy and Guidelines issued by the Governments of Maharashtra and Madhya Pradesh respectively after the cut-off date which provide for rate of land compensation to the land owners for transmission tower base and for RoW corridor under the transmission line. According to the Petitioner, both of these Policy and Guidelines issued by the ‘Indian Governmental Instrumentality’ would qualify to be ‘Law’ under the TSA and that the same have been implemented by the concerned revenue authorities of Governments of Maharashtra and Madhya Pradesh for raising demand for compensation on the Petitioner requiring the Petitioner to make payment as per the same. At this juncture, it would be apt to quote the translated versions of Policy and Guidelines issued by the State Governments of Maharashtra and Madhya Pradesh respectively as under:

“Policy to be adopted for payment of compensation for the land laying/coming under the transmission lines and increase in the rate of compensation for the land covered by the towers to be erected/constructed for the installation of the High-Tension transmission lines of 66 kv or more

State of Maharashtra
Industry, Power & Labour Department
Govt. Order No. :Dhoran-2016/Pra.Kra.520/Urja-4
Ministry, Mumbai – 400 032.
Date : 31 May, 2017

Reference: 1) Govt. Order No.: Sankirna 0210/Pra.Kra.29/Urja-4 Dt.01/1/2010
2) Central Govt. Letter No. 3/7/2015-Praeshan, Dt. 15/10/2015.
3) Govt. Letter, Industry, Power & Labour Deptt. Kra. Sankirna-2015/pr.kra.398/Urja-4 Dt. 25/08/2015.
4) Mahapreshan Co. letter no. mravipakam/sanka/13279 Dt. 16/12/2016

Preface:

Under section 164 of India Electricity Act 2003 as well as u/s 10(D) of Telegraph Act 1885 and also as per Maharashtra Govt. Order No.06/CR 312/4, dt. 24/08/2006, the High Power Transmission Company has the powers for lying of transmission lines and erection of towers for the same. Moreover, while exercising this powers there are provisions also for payment of compensation to those to whom damages have been caused due to lying of transmission lines an erection of towers.

There are number of government and private transmission companies and license holders who are engaged in the business of lying of transmission lines of 66 kv or more which are entrusted with the job of looking after the transmission and repairs and Renovation etc. While during practical work of installation of transmission lines and renovation of existing lines there is a protest by the farmers and landowners for the compensation from whose lands these transmission lines are passing. At present in accordance with the state order dt. 1/11/2010 and decision therein the compensation for the land covered under the towers is given to the farmers and landowners. However, there is a consistent demand by the farmers and landowners to the state government for increase in the compensation as well as compensation for that land also which is coming under the installation line. Therefore this demand by the farmers and landowners was under consideration by the state government. In this respect after taking into consideration the guidelines issued by the state government as per Ref. no.2 above and also as per the direction given in the meeting of Hon. Chief Minister and the minister (Power) the High Transmission Company had submitted the proposal to the state government as per Ref. no.4 above then after at the meeting held with the Chief Minister on 16/5/2017 and as per the decision taken thereat, for taking a policy decision, a note was produced on 22/5/2017 in the cabinet meeting and as per the decision arrive there at the policy is decided as hereunder as per the decision of the state government while Ref. no. 1 above.

The Decision of the State Government:

Maharashtra State Transmission Company and all other license holders companies are hereby permitted to pay compensation for the land taken for installation of towers for transmission lines (without acquiring the said land).

1. *The compensation of the area covered under the High Tension tower should be given in accordance with the State Ready Reckoner prevalent/ in force in the said area as implemented /decided by the state level committee from time to time which should be double the valuation of the Ready Reckoner.*

2. The compensation for the land area below the very heavy tension line (wire corridor) will be paid 15% of the Ready Reckoner fixed by the State government which is prevalent in the said area from time to time.
3. The compensation for the damages to the crops, fruits and other trees if any shall be paid in accordance with the policy prevalent at that time.
4. This compensation policy shall be applicable to the Maharashtra Rajya Vidhyut Transmission Company – MARYA, Power Grid Corporation of India Limited, other government and private transmission license holders who are erecting transmission line of 66 kv and of more capacity such as High Tension HVC /DC transmission lines also.
5. This compensation policy shall be applicable to all the area of the Maharashtra state except Bruhan Mumbai Mahanagar Palika and its suburban area. So far as the compensation for the land of the city area upon which High Tension Transmission lines are to be laid is concerned the Central government vide its letter dt. 11/8/2016 has constituted a committee at the central level. After receipt of the necessary guidelines from the said committee the policy for Bruhan Mumbai Mahanagar Palika and its suburban area will be made applicable.\
6. In the city area where it is not possible to construct traditional towers thereat if technically possible, monopole tower, narrow base tower, Bahu path tower, special tower should be erected and high ampacity conductor and also new technology for cable utilization should be used.

2. Date of implementation:

This new policy is applicable and implemented from the date of decision taken by the state.

3. Implementation Committee at district level:

3.1 The district collector shall constitute a committee in accordance with the government letter no. sankirna-2015/pra.kra.398/Urja-4, dt.25/08/2015 for deciding the compensation of the land which is covered under the high tension tower and the land below the transmission line

| Sr. No. | Officer | Designation |
|---------|---|-------------|
| 1. | Dy. Division Officer (District Officer) | President |
| 2. | Dy. Supdt. land Revenue | Member |
| 3. | Town/Dist. Agriculture officer | Member |
| 4 | The Representative of the concerned transmission license holder company (high transmission, power grid, Maharashtra Eastern grid power trans. Co. E.) | Member |

3.2 The said committee shall, within its division shall conduct the admeasurement of the land covered by the tower and also of the land coming below the transmission line and decide the valuation thereof and decide the amount of compensation.

3.3 If the compensation decided by the committee is not agreeable to the concerned land owner, he shall be entitled to lodge an appeal to the district collector. If the district collector is satisfied that the appeal is reasonable, he shall ask/order the committee for revaluation. In this matter all the powers shall vest in the collector.

4. Procedure for implementation of Policy.

.....

6. Procedure for payment of compensation:

6.1 Procedure for compensation of the land lying below the tower and the transmission lines:

The compensation for the land covered under the tower shall be paid in two instalments. The first instalment shall be paid after laying foundation (plinth) and second will be paid after the erection of tower. The land from which transmission line is laid, the third instalment compensation should be paid of the land below the wires only after physical and actual installation of such line.

6.2 The compensation only for the land below the transmission wires:

The land from which only the transmission wire has passed, the compensation for land below such wires will be paid only after physical and actual installation for this purpose the procedure is specified in the annexure herewith.

6.3 Compensation for Crops/Fruits & Trees :

Over and above the compensation, the damages caused to the crops/ fruits and trees and other trees whatever during the laying foundation (plinth) of the tower, construction and transmission line installation, shall be paid in two instalments.

7. In case of transfer/ change of ownership of the land the new owner shall not be entitled to any compensation whatsoever.

8. State government, local self government, local authority, municipality, municipal corporation, MMRDA, State sponsored public projects, national highway authority, public park, amusement centre, mithagare, special economic zones, main/small ports, rivers & beaches, sports centre, granted and non-granted institutions, etc. are not entitled to be any compensation for the land covered by the tower and land under the transmission lines. Only under exceptional circumstances the concerned transmission company shall be able to take the decision. In the same way the compensation for the land under the central government or under the railway authority should be paid in accordance with the rules and procedures of the concerned ministry.

9. In case of enhancement in the capacity of the existing transmission lines or renovation thereof, the compensation should be paid only after the land below the tower and for additional land occupied below the transmission line.

10. For settlement and solution of any problems in implementation of this decision or if any clarification arises, a committee under the chairmanship of chief secretary (power) should be constituted for settlement of the same. The rep. of Transmission Company and Power Grid Co. of India should be included in the said committee. The chief engineer, state transmission (project) shall be the chief secretary and member of the committee.

11. This order of the state government is issued after consultation and concurrence of the town planning department, revenue, forest and finance department and in response to the concerned given by the finance department vide its ref. no.122/2017 dt.19/4/2017 and is hereby issued.

This decision of the Maharashtra government's is available on the www.maharashtra.gov.in and its code is 201706011123568510. This order is generated through digital signature.

Under name and order of the Governor of Maharashtra.

.....”

56. The Guidelines dated 11.5.2017 issued by Revenue Department, Government of Madhya Pradesh reads as thus:

**Govt. of Madhya Pradesh
Ministry of Revenue Department**

Sr. No : R/3283/2016/7/2A

Date: 11.05.2017

To,
**All Collectors,
Madhya Pradesh**

Subject: About determination of compensation amount payable to private landlords because of setting up transmission lines by the POWERGRID in the state.

Ministry of Power, Govt. of India vide letter ref 3/7/2015- Trans. dated 15.10.2015 has issued the guidelines regarding determination of compensation payment for utilisation of land proposed under Right of way in laying of transmission lines.

2. Hence, in consideration of the Ministry of Power, Govt of India letter dated 15.10.2015 and in the interest of public, following guidelines are being issued for the payment of compensation amount for the land used for the installation of the High-Tension transmission lines of 66 kV and above.

1. In addition to the compensation for the damage caused by the entry on the land, 85% of the existing market rates of the land used for the establishment of the tower will be paid to Land owner.

2. 15% of the existing market rates will be paid for the area of land situated under the transmission line between the width of the outer wires of both the sides of transmission lines tower. For this purpose, the width between the two outer wires will be considered as follows;

| Sl no | Transmission capacity | Width between both outer conductors (in Meters) |
|--------------|------------------------------|--|
| 1 | 66 kV | 18 meters |
| 2 | 110 kV | 22 meters |
| 3 | 132 kV | 27 meters |
| 4 | 220 kV | 35 meters |
| 5 | 400 kV S/C | 46 meters |
| 6 | 400 kV D/C | 46 meters |
| 7 | +/- 500 kV HVDC | 52 meters |
| 8 | 765 kV S/C | 64 meters |

| | (in Delta configuration) | |
|----|--------------------------|-----------|
| 9 | 765 kV D/C | 67 meters |
| 10 | +/- 800 kV HVDC | 69 meters |
| 11 | 1200 kV | 89 meters |

2. The amount to be given above will only be compensation amount. The land will remain registered in the name of the former land owner as before.

3. Even if otherwise provided in any rule, compensation for agricultural land will be payable on the basis of prevailing market rates of agricultural land and similarly compensation for non- agricultural land will be payable on the basis of prevailing market rates of non-agricultural land.

4. This circular is applicable only to Power transmission lines. Under this, compensation is to be paid to Power transmission line. Under this Power distribution is not included....”

57. In the present case, as on cut-off date, the prevalent Policy governing the land compensations for laying of transmission line in the State of Maharashtra was the Government Order No. Sankirna 021/Pra.Kra.29/Urja-4 issued by Industry, Power & Labour Department, Govt. of Maharashtra dated 1.11.2010. According to the said GR of 2010, compensation for tower base was categorized into four categories – 25% of market value for dry irrigated lands, 50% of market value for wet irrigated lands, 60% of market value for irrigated and fruit bearing land and 65% of market value for non-agricultural land, while there was no provision for land compensation along the corridor of transmission line. However, as per Policy issued by Industry, Power & Labour Department, Government of Maharashtra, vide Government Order No. Dhoran-2016/Pra.Kra.520/Urja-4 dated 31.5.2017, compensation for tower base is required to be paid at twice the total amount of ready reckoner rate/ market rate irrespective of type of land and in addition 15% of the total amount of ready reckoner rate/ market rate for the transmission line corridor (except for the Brihan Mumbai Municipal corporation and its suburban area). Similarly, in the State of Madhya Pradesh, there was no provision of land compensation for tower base and corridor of transmission line as on cut-off date. However, subsequently as per the ‘Guidelines’ issued by the Revenue Department, Government of Madhya Pradesh vide Circular No. R/3283/2016/7/2A dated

11.5.2017, the compensation for tower base @85% of market value of land and the compensation for the transmission line corridor @15% of the market value of land are required to be paid.

58. MPPMCL has submitted that the documents of the Governments of Maharashtra and Madhya Pradesh relied upon by the Petitioner are not 'notifications' and don't qualify to be 'Law' under the TSA and are merely general Guidelines. Perusal of both these documents i.e. Policy dated 31.5.2017 issued by the Government of Maharashtra vide Government Order No. Dhoran-2016/Pra.Kra.520/Urja-4 and Guidelines dated 11.5.2017 issued by Government of Madhya Pradesh vide Circular No. R/3283/2016/7/2A reveals that these are directions of the State Governments which are binding on the State authorities for determination of compensation for transmission lines.

59. 'Indian Government Instrumentality' as defined in the TSA as under:

"'Indian Governmental Instrumentality' shall mean Government of India, Government of any State in India or any ministry, department, board, authority, agency, corporation, commission under direct or indirect control of the Government of India or any State Government or both, any political sub-division of any of them including any court or Appropriate Commission or tribunal or judicial or quasi-judicial body in India but excluding TSP and Long Term Transmission Customers;"

60. Further, the '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 Governmental Instrumentality having force of law and shall include all rules, regulations, decisions and orders of the Appropriate Commission;"

61. Thus, 'Law' under TSA includes any statute, ordinance, rule, regulation, notification, order or code or any interpretation of any of them by an Indian Governmental Instrumentality having force of law. Therefore, the Policy dated 31.5.2017 issued by Industry, Power & Labour Department, Government of

Maharashtra vide an order bearing No.:Dhoran-2016/Pra.Kra.520/Urja-4 dated 31.5.2017 and 'Guidelines' dated 11.5.2017 issued by the Revenue Department, Government of Madhya Pradesh would qualify as 'Law' under the TSA and their introduction/ implementation being after the cut-off date in the present case, qualify them as a Change in Law event in terms of Article 12.1.1 of the TSA.

62. In contrast with the MoP's Guidelines, Policy/ Guidelines issued by the Government of Maharashtra/ Madhya Pradesh are not merely recommendatory or are general guidelines, rather their provisions are to be applied by the State authorities mandatorily. In other words, the Policy/ Guidelines issued by the State Governments prescribing the rates of land compensation for laying of transmission lines have force of law.

63. While one could argue that even prior to the issuance of the above Policy and Guidelines by the Governments of Maharashtra and Madhya Pradesh respectively, the relevant district administrations were awarding the land compensation for tower base and transmission line corridor to the land owners and that the Petitioner could or ought to have factored into such scenario while submitting its bid. However, it cannot be disputed that the Change in Law in this case has taken place upon issuance of the aforesaid Policy and Guidelines issued by Governments of Maharashtra and Madhya Pradesh respectively. Consequently, the Petitioner shall be entitled for relief to the extent of incremental amount paid as compensation.

64. In light of the above, we are of the view that Policy and Guidelines issued by the Governments of Maharashtra and Madhya Pradesh respectively regarding land compensation constitute Change in Law in terms of the TSA and accordingly, the

Petitioner is entitled to increase in transmission charges on account of additional expenditure incurred towards payment of land compensation in terms of the above policies.

(d) Increase in the over-head cost on account of Change in Law events

65. The Petitioner has submitted that in terms of Article 12.2.1 of the TSA, the impact of Change in Law during the construction period of the Project is to be given as an increase in the cost of the Project and the expression cost of Project or Project cost during the construction period also refers to and encompasses within its scope, all costs in regard to the establishment of Project, which not only includes the hard cost of capital assets (plant, machinery and equipment, etc.) but also the interest cost and finance charges during construction and other soft costs related to establishment of the Project. Relying upon the Tariff Regulations, 2014, it has been submitted by the Petitioner that even as per the said Regulations, IDC, which essentially comprises of interest payable on debt part is allowed to be capitalized and the total expenditure incurred in the Project including on account of time overrun is capitalized with IDC as an additional cost to the extent of 70% of the increased Project cost and the balance 30% of the increased Project cost is serviced as equity providing for a return of 15.5% post-tax. Similarly, for competitively bid transmission Projects, increase in Project cost on account of Change in Law events needs to be fully serviced, namely, the cost overrun in regard to increase in Project cost on account of Change in Law and the funding cost during the construction period. For that purpose, the quantum of Project cost related to increase in the Project cost is to be apportioned as debt-equity in the ratio 70:30 and increased equity deployed related to such increase in Project cost is to be serviced at a higher return consistent with the rate of return applicable to equity.

66. The Petitioner has further submitted that the entire increase in the Project cost on account of the capital expenditure incurred by the Petitioner by reason of Change in Law as well as the funding and financing cost of such capital expenditure, in full, during the construction period needs to be serviced by increase in transmission charges payable over and above the quoted transmission tariff during the entire period of TSA in order to enable the Petitioner to be compensated fully for the effect of Change in Law event. Therefore, the compensation/ relief to the Petitioner should not be restricted to the capital expenditure incurred but should also include the funding and financing costs as well as overheads. Accordingly, the Petitioner has claimed Rs.5.13 crore as funding cost and Rs.0.83 crore as overhead costs for the aforesaid Change in Law events.

67. MPPMCL has opposed the Petitioner's claims towards 'overheads' and 'funding cost' on the ground that they were not envisaged in the bid documents or in the TSA. MPPMCL has further submitted that reliance placed by the Petitioner on Tariff Regulations, 2014 for these claims is misplaced as the said Regulations are not applicable in the present case of adoption of tariff by bidding mode. MSEDCL has submitted that the Petitioner has not furnished a copy of Consultancy Agreement with PGCIL on basis of which overhead cost @5% is claimed. It is also not clear as to how the overheads cost has been incurred by the Petitioner towards payment of such differential tax.

68. *Per contra*, the Petitioner has submitted that in case of increase in Project cost, there is an associated funding cost and overheads cost which is also a part of the Project cost. In the instant case, increase in Project cost is identified pertaining to Change in Law events and the associated funding costs and overheads is claimed as part of the increased Project cost due to Change in Law. The funding

cost and overhead cost would not have burdened the Petitioner, had the increase in Project cost not occurred on account of Change in Law. TSA recognizes relief for increase in cost of Project on account of Change in Law and such funding and overheads costs are due to Change in Law events and, therefore, ought to be allowed. The Petitioner has further submitted that overheads costs included the consultancy charges along with the applicable taxes paid by the Petitioner to PGCIL as per the Consultancy Agreement. Since the overheads cost is calculated @5% of the Project cost + applicable taxes, any increase in Project cost due to Change in Law event leads to increase in overheads cost as well.

69. We have considered the submissions made by the parties. Change in Law relief during the construction period entails a stipulated percentage increase/decrease in the non-escalable transmission charges for the corresponding increase/decrease in the cost of Project upto SCOD. Therefore, the compensation to the Petitioner has to be according to provisions of Article 12 of the TSA. Further, it is not the contention of the Petitioner that the above provision is insufficient to compensate for the impact of Change in Law. Since the Petitioner while entering into the contract i.e. TSA was fully aware of the above formula for compensation, it is not entitled to claim any additional cost on account of Change in Law events. Moreover, the overhead cost claimed by the Petitioner as consultancy charges to PGCIL is not directly linked to Change in Law event as it is governed by the contract executed between the Petitioner and PGCIL. Therefore, it cannot be allowed to be passed on to the consumers under the Change in Law provisions of the TSA.

70. Further, the Petitioner has submitted that the matter of extension of SCOD owing to various Force Majeure events was taken up with LTTCs in accordance

with Article 4.4.2 of the TSA and in this regard a joint coordination meeting was held between the Petitioner and the LTTCs on 28.9.2018 to discuss the extension of time for the Project. Based on the request of LTTCs, the Petitioner vide its letter dated 29.3.2019 had undertaken that no tariff burden shall be levied on the LTTCs pursuant to the extension of the SCOD owing to the Force Majeure events. Consequently, Supplementary TSA was signed between the Petitioner and LTTCs on 20.1.2020 providing for extension of time from SCOD to actual COD. Admittedly, the issues regarding time overrun and time extension for the Project from SCOD to actual COD have been duly settled with LTTCs and the Petitioner has not sought relief on account of Force Majeure events that resulted into time overrun for the Project. Therefore, the Petitioner has already forgone the IDC for the period from SCOD till the revised COD of the project. None of the Change in Law events deliberated in the present Petition has resulted in delay in Project implementation. Therefore, the Petitioner cannot claim any additional IDC on account of Change in Law from SCOD till actual COD over and above the compensation allowed in terms of Article 12 of the TSA.

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

71. Article 12.2 of the TSA provides for relief for Change in Law 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 Seven Crore Ninety Lakh in the cost of the Project upto the Scheduled COD of the Project, the increase/decrease in Non-Escalable Transmission Charges shall be an amount equal to zero point three one three percent (0.313%) of the Non-Escalable Transmission Charges.

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., 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.”

72. Accordingly, as per the Article 12.2.1 of the TSA, for every cumulative increase/ decrease of each rupees seven crore ninety lakh in the cost of the Project upto the Scheduled COD of the Project on account of Change in Law during the construction period, the Petitioner shall be entitled to be compensated with increase/ decrease in non-escalable transmission charges by zero point three one three percent (0.313%).

73. In light of the above, the Petitioner shall be compensated for the following on account of the Change in Law events:

- a) Increase in acquisition price by BPC;
- b) Additional expenditure on account of GST Laws; and
- c) Notification of Policy on land compensation dated 31.5.2017 by the Government of Maharashtra.

74. As regards compensation for Change in Law on account of Policy of the Government of Maharashtra dated 31.5.2017 and Guidelines of the Government of Madhya Pradesh dated 11.5.2017, the LTTCs shall be liable to pay the additional cost that the Petitioner became liable to pay on account of the Policy/ Guidelines. For this purpose, the Petitioner shall submit to the LTTCs the difference in cost of compensation for laying the transmission line in the State of Maharashtra on account of the Policy of 31.5.2017 and that which would have been payable in terms of GR of 2010 of Government of Maharashtra dated 1.11.2010. Similarly, the Petitioner shall submit to the LTTCs the difference in cost of compensation for laying the transmission line in the State of Madhya Pradesh on account of the Guidelines of 11.5.2017 and that which would have been payable in terms of

relevant Guidelines that was in force before the Guidelines came into existence. The LTTCs shall verify the claims of the Petitioner within 30 days of submission of details by the Petitioner.

75. Impact of GST in terms of this order shall be payable after the proof of payment is made available by the Petitioner to LTTCs in terms of order dated 17.12.2018 in Petition No. 1/SM/2018.

76. LTTCs arrayed as Respondents in this Petition shall make payment of claims of Change in Law approved in this Petition within a period of 90 days of raising the demand by the Petitioner, failing which they shall be liable to pay Late Payment Surcharge at the rates provided in the TSA.

77. In terms of the above, Petition No. 265/MP/2020 is disposed of.

Sd/
(Arun Goyal)
Member

-sd/-
(I.S. Jha)
Member

sd/-
(P.K. Pujari)
Chairperson