

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 453/MP/2019

Coram:

Shri P.K. Pujari, Chairperson

Shri I.S. Jha, Member

Shri Arun Goyal, Member

Shri P.K. Singh, Member

Date of Order: 16th June, 2021

In the matter of:

Petition under Section 79 of the Electricity Act, 2003 read with Article 12 of the Transmission Service Agreement dated 24.6.2015 entered into between the Petitioner and the Respondents seeking Change in Law compensation.

And

In the matter of

Sipat Transmission Limited
C-105, Anand Niketan,
New Delhi – 110 019

.....Petitioner

Vs

1. Maharashtra State Electricity Distribution Company Limited
Prakashgad, 4th Floor,
Bandra (East), Mumbai – 400 051

2. Madhya Pradesh Power Management Company Limited
Block No. 11, Ground Floor, Shakti Bhawan,
Vidyut Nagar, Rampur, Jabalpur – 482 008, Madhya Pradesh

3. Chhattisgarh State Power Distribution Company Limited
P.O. Sunder Nagar,
Dangania, Raipur – 492 013, Chhattisgarh

4. Gujarat Urja Vikas Nigam Ltd.
Vidyut Bhawan, Race Course,
Vadodara – 390 007

5. Electricity Department of Goa,
Govt. of Goa, Aquem Alto Margaon Goa – 403 601

6. DNH Power Distribution Corporation Limited
66kV, Amlu Ind. Estate, Silvassa – 396 230,
Dadar Nagar Haveli

7. Electricity Department, Administration of Daman and Diu

Parties present:

Shri Sourav Roy, Advocate, STL
Shri Pabudh Singh, Advocate, STL
Shri Shashwat Kumar, Advocate, MSEDCL
Shri Rahul Chouhan, Advocate, MSEDCL
Shri Bhavesh Kundalia, STL
Shri Afak Pothiawala, STL

ORDER

The present Petition has been filed by Sipat Transmission Limited under Section 79 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') seeking compensatory relief under Article 12 of the Transmission Service Agreement (TSA) dated 24.6.2015 on account of Change in Law events, which have adversely affected the project cost. The Petitioner has made the following prayers:

- "A. *Admit the Petition.*
- B. *Hold and declare that the following events amount to a Change in Law event under the Transmission Service Agreement dated 25.06.2015, namely:*
- a. *The enactment of Central Goods and Services Act, 2017.*
 - b. *The enactment of Chhattisgarh Goods and Services Act, 2017.*
 - c. *The enactment of Integrated Goods and Services Act, 2017.*
 - d. *The imposition of Krishi Kalyan Cess.*
 - e. *The imposition of Swaccha Bharat Cess.*
 - f. *The imposition of increased Maharashtra Value Added Tax.*
 - g. *The increase in the amount of compensation to be paid to land owners in relation to Right of Way for transmission lines.*
 - h. *The change in the configuration of tower to 'D' – 'D' type at both sides of the crossing.*
 - i. *The increase in the effective customs duty to be paid for aluminium products.*
- C. *Hold and declare that the Respondents is entitled to an amount of INR. 10,16,64,345 (Rupees Ten Crore and Sixteen Lacs and Sixty-Four Thousand and Three Hundred Forty-Five) as Change in Law Compensation (inclusive of carrying cost) for the period up till 25.03.2019 as quantified in Para 41.*
- D. *Permit the Petitioner to raise monthly supplementary bills in order to recover the non-escalable transmission charges at the rate of 0.88% of the monthly transmission charges in accordance with Article 10.10 & 12.2.1 of the Transmission Service Agreement."*

2. The Petitioner is a fully owned subsidiary of Adani Transmission Limited which was selected as a successful bidder through the Tariff Based Competitive Bidding process conducted by PFC Consulting Limited to establish the transmission system, namely, “Additional System Strengthening for Sipat STPS” on Build, Own, Operate and Maintain basis (in short, ‘the Project’). The Petitioner is required to provide transmission service to the Long-Term Transmission Customers (LTTCs) (Respondents 1 to 7) of the Project which required establishing the Sipat– Bilaspur Pooling Station 3rd 765 kV S/C transmission line and Bilaspur Pooling Station- Rajnandgaon 765 kV D/C transmission line.

3. The Petitioner has entered into a TSA with LTTCs on 24.6.2015 and Maharashtra State Electricity Distribution Company Limited (MSEDCL) has been appointed as the lead LTTC to represent all the LTTCs for discharging their rights and obligations as specified in the TSA dated 24.6.2015. The Commission in its order dated 16.2.2016 in Petition No. 289/TL/2016 granted transmission licence to the Petitioner for inter-State transmission of electricity and vide order dated 28.1.2016 in Petition No. 286/ADP/2015 adopted the transmission tariff of the Project of the Petitioner. The Petitioner achieved commercial operation of the Project on 25.3.2019.

Submissions by the Petitioner

4. The Petitioner has submitted that since certain Change in Law events during the construction period have resulted in increase in cost of the Project, it has filed the present Petition seeking reliefs for the following Change in Law events in terms of Article 12 of the TSA:

- (a) The enactment of Central Goods and Services Act, 2017.
- (b) The enactment of Chhattisgarh Goods and Services Act, 2017.
- (c) The enactment of Integrated Goods and Services Act, 2017.
- (d) The imposition of Krishi Kalyan Cess.
- (e) The imposition of Swachha Bharat Cess.
- (f) The imposition of increased Maharashtra Value Added Tax.
- (g) The increase in the amount of compensation to be paid to land owners in relation to Right of Way for transmission lines.
- (h) The change in the configuration of tower to 'D' – 'D' type at both sides of the crossing.
- (i) The increase in the effective customs duty to be paid for aluminium products.

5. The Petitioner has submitted that since the aforementioned Change in Law events came in force after the cut-off date (23.6.2015), they are covered under Article 12 (Change in Law) of the TSA.

6. The Petitioner has submitted the following regarding increase in total cost of the Project under the above heads of Change in Law:

Levy of Swachha Bharat Cess, levy of Krishi Kalyan Cess and increase in Maharashtra Value Added Tax

7. The Petitioner has submitted that the effective service tax rate of 14%, prevailing as on cut-off date, was increased to 14.5% on account of levy of Swachha Bharat Cess at the rate of 0.5% on taxable services from 15.11.2015 vide Ministry of Finance Notification No. 21/2015-Service Tax dated 6.11.2015 and Notification No. 22/2015 – Service Tax dated 6.11.2015.

8. It has been further submitted that Krishi Kalyan Cess @0.5% on taxable services was also levied through the Finance Act, 2016 with effect from 1.6.2016. Further, Finance Department, Government of Maharashtra, in exercise of power

conferred under sub-section (1) of Section 9 of Maharashtra Value Added Tax Act, 2002, amended Section 'C' of the said Act vide Notification No. 1516/CR 123/Taxation-1 dated 16.9.2016 thereby increasing rate of Maharashtra Value Added Tax from 5.5% to 6%.

Increase in effective customs duty on primary aluminium products

9. The Petitioner has submitted that as on cut-off date, the effective tax rate on import of primary aluminum products was 23.65% which included Basic Customs Duty @5%, Countervailing Duty @12.5%, Special Duty @4% and Education Cess @3%. However, the effective Customs Duty was increased to 26.69% on account of increase in the Basic Customs Duty from 5% to 7.5% through the Union Budget, in the year 2016.

10. Further, in exercise of the powers conferred under sub-Section (1) of Section 5 of Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as 'the IGST Act'), Ministry of Finance, Department of Revenue, Government of India, notified rate of integrated tax @18% in respect of goods specified in Schedule III of the said Act vide Notification No.1/2017-Integrated Tax (Rate) dated 28.6.2017, thereby increasing the effective tax rate to 27.4% comprising of Integrated Goods and Services Tax (IGST) @18%, Basic Customs Duty @7.5%, and Education cess @3% on the Basic Customs duty.

Increase in compensation towards damages in relation to Right of Way for Transmission Lines

11. The Petitioner has submitted that as on the cut-off, the Petitioner was liable to pay 50% of the market value of land as compensation to the land owners for acquiring the Right of Way as per the Notification dated 20.2.2015 issued by the

Government of Chhattisgarh. However, vide Notification dated 1.6.2016, Government of Chhattisgarh increased the amount of compensation to 85% of the market value of land to align the compensation payable with the '*Guidelines for Payment of Compensation towards damages in regard to the Right of Way for transmission lines*' issued by Ministry of Power vide Notification No. 3/7/2015-Trans dated 15.10.2015.

Change in configuration of type of towers to 'D'-'D' at both sides of the crossing

12. The Petitioner has submitted that it had applied to various agencies for power line crossing approvals with various types of towers which included DHC, DHB and DHD as per the stipulated requirement. However, Chhattisgarh State Power Transmission Company Ltd. (CSPTCL) and Power Grid Corporation of India Limited (PGCIL) rejected all power crossing proposals with DHC and DHB type towers.

13. As per the Petitioner, CSPTCL and PGCIL insisted on the use of DHD towers whereas there is no such requirement in either the Electricity Rules, 2005 (hereinafter referred to as 'the Electricity Rules') or any standards. Aggrieved by the said stand of CSPTCL and PGCIL, the Petitioner brought the issue to the notice of the Central Electricity Authority (CEA). On 27.7.2016 and 16.9.2016, CEA convened two meetings to discuss the issue of power line crossing using DHD type tower only. During the meeting held on 16.9.2016, after deliberation, CEA decided as under:

- i. Power line crossing for 400 kV and above should be done only with D-D type towers.
- ii. Crossing of 200 kV and 132 kV transmission lines could be done with angular type tower as per requirements.
- iii. Crossing of 66 kV lines and below could be done with any type of towers.

Increase in Tax rates due to enactment of the Integrated Goods and Service Act, 2017

14. The Petitioner has submitted that the cost of following goods and services have increased due to the enactment of the Central Goods and Service Act, 2017 (hereinafter referred to as 'the CGS Act'), Chhattisgarh Goods and Service Act, 2017 (hereinafter referred to as 'the Chhattisgarh GST or SGS Act') and the IGST Act:

Increase in the tax rates applicable on works contracts:

a) The Petitioner has submitted that works contracts, being contracts for execution of original works, have elements of supply and services. It has been submitted that the assesseees in the pre-GST regime were given two options for payment of service tax: (i) payment of service tax at full rate on value of services after deducting value of goods for gross value of the works contract, and (ii) payment of service tax at a composite rate of 40% on the gross value of works contract in case of original works. As per the Petitioner, the second option of paying service tax was generally utilized on account of practical difficulties faced in bifurcating supplies and services. Accordingly, as on cut-off date, the effective tax rate on works contracts under composite scheme of payment of service tax was 5.6% (40% of the then prevailing service tax rate i.e. 14%).

b) The Petitioner has submitted that the service tax was abolished under Section 173 of the CGS Act with omission of Chapter V of the Finance Act, 1994. For inter-State works contract, IGST Notification No. 8/2017 dated 28.6.2017 was made applicable, which prescribed the rate at 18% for composite supply of works contract. Similarly, under the Central GST Notification and the State GST Notification, CGST and SGST at the rate of 9% each is being levied.

Levy of GST at the rate of 18 % on services for electricity transmission as against the service tax @ 14% prevalent at the time of cut-off date:

c) The Petitioner has submitted that, as on cut-off date, service tax was leviable @14% on such services and no special rates or abatement was applicable. However, with effect from 1.7.2017, vide Section 173 of the CGS

Act, service tax has been abolished and GST has been made applicable at the rate of 18% on the basis of IGST Notification No. 8/2017, Central Goods and Service Tax Notification No. 11/2017 dated 28.6.2017 and Chhattisgarh Goods and Service Tax Notification No. 11 of 2017.

Levy of GST @ 18% on transportation of goods on supplier:

d) The Petitioner has submitted that, as on cut-off date, no service tax was leviable for transportation of goods by road except if the services were provided through Goods Transport Agency (GTA) or a courier agency in terms of Section 66 of Finance Act, 1994. Since the contracts were not awarded to GTAs but to the Petitioner's suppliers who arranged the services of the GTAs for transportation of goods, no service tax was leviable on the transaction leg between the Petitioner and the supplier in spite of service tax being leviable at the rate of 4.2% on the transaction leg between the supplier and the GTA. However, with effect from 1.7.2017, vide Section 173 of the CGS Act, with abolishment of service tax, GST has been made applicable on both the legs of the transaction. The transaction leg between the supplier and the GTA is taxed at the rate of 5% (2.5% + 2.5%) under Central Goods and Service Tax Notification No. 11/2017 dated 28.6.2017 and Chhattisgarh Goods and Service Tax Notification No. 11 of 2017. Further, the transaction leg between the supplier and the Petitioner is taxed @18% under the aforementioned notifications.

Levy of GST on finished transmission line & substation material:

e) The Petitioner has submitted that, as on cut-off date, Excise Duty at the rate of 12.5% and CST at the rate of 2% were leviable leading to an effective tax rate of 14.75% for various transmission and sub-station materials.

f) With the abolishment of Excise Duty and CST in the GST regime, the GST levy is notified @ 18% to 28% based on respective items i.e. 18% for transmission line structure, etc. and 28% for transformers, etc. However, for items on which GST @ 28% was leviable, the GST council, in its meeting held on 11.6.2017, reduced the GST rate from 28% to 18%.

Levy of GST on Right of Way payments to be made to land owners @ 18%:

g) The Petitioner has submitted that, prior to the enactment of the CGS Act and the SGS Act, there was no tax payable on the compensation which was paid to the land owners. However, under Section 7(1) read with the Serial No. 2 of the CGS Act and the SGS Act, any lease, tenancy, easement and licence to occupy land is a supply of services. Consequently, tax @ 9% each was made applicable on the payment of compensation to land owners under the Central Goods and Service Tax Notification No. 11/2017 dated 28.6.2017 and Chhattisgarh Goods and Service Tax Notification No. 11 of 2017 dated 28.6.2017.

Carrying Cost

15. The Petitioner has submitted that the cornerstone of Change in Law relief is restitution i.e. relief be granted in a manner so as to place an affected party in the same economic position as if such Change in Law had not occurred. Restitution is, therefore, inherent to compensation. In this regard, the Petitioner has placed reliance on the judgments of Appellate Tribunal for Electricity (APTEL) in Appeal No. 150 and Appeal No. 210 of 2017. It is submitted that compensation is a comprehensive term and is aimed at restoring a party to the same economic position as if no injury was caused to it, as held by the Hon'ble Supreme Court in the case of Yadava Kumar vs. The Divisional Manager, National Insurance Co. Ltd. and Anr., [(2010) 10 SCC 341]. The Petitioner has claimed Rs. 2.05 crore as carrying cost on the aforementioned Change in Law events.

16. Accordingly, the Petitioner has submitted that the claims, including carrying cost till 31.7.2019, are as follows:

Sr. No.	Head of Claim (a)	Impact of Change in Law Event from the date it was incurred (Rs.)	Carrying cost from the date it was incurred till 31.07.2019 (Rs.) (c)	Total as on 31.7.2019 (Rs.) (b) + (c)
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		(b)		
1	Swachha Bharat Cess	2546066	1328137	6103810
2	Krishi Kalyan Cess	2229607		
3	Increase in effective customs duty on primary aluminium products	21930441	6327337	28257778
4	Increase in amount of compensation to be made to land owners.	5105501	1013790	6119291
5	Levy of GST	15255926	2985048	18240973
6	Change in configuration of tower to 'D'- 'D' type at both sides of crossing	34030984	8911508	42942492
	Total (Rs.)	81098525	20565820	101664344

Hearing held on 26.5.2020

17. The Petition was admitted on 26.5.2020 and notices were issued to the Respondents to file their reply. The Respondents, MSEDCL and MPPMCL have filed their reply and the Petitioner has filed rejoinders to the same.

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

(a) Auditor's certificate containing item-wise details of taxes actually paid during construction period along with input tax credits;

(b) Whether any of the taxes applicable at the time of bidding have been subsumed/ abolished with GST. If yes, submit Auditor Certificate on savings of such taxes;

(c) Whether there is any reduction in the rate of other taxes which results into reduction in capital cost during construction period;

(d) Proof of sourcing aluminum conductor from abroad or audited details of invoices and customs duties actually paid at higher rate than before, if any, for claiming relief; and

(e) Reasons for not considering the DD type angle towers for power line and for not estimating such requirement by consulting the appropriate owners of lines at the time of bidding.

19. The Petitioner vide its affidavit dated 22.6.2020 has filed the information called for.

Reply of MSEDCL

20. MSEDCL in its reply dated 7.2.2020 has submitted as under:

(a) As the Petitioner has not provided supporting invoices for the claim of taxes, it is not clear whether the claimed amount is for the invoices after enactments of laws or otherwise. It is also not clear that the figures mentioned are audited or otherwise. Before allowing the claim towards Change in Law for the enactments, prudence check is required.

(b) The Petitioner has not given the details of quantum of aluminum purchased within the country and quantum of aluminum imported. Further, the Petitioner has given the calculations based on quantum of ingots. It is not clear from calculations how much quantum of ingots has been utilized by the Petitioner for works associated with the Project.

(c) The Electricity Rules do not specify any type of tower for construction of transmission line and crossings of transmission lines. The Electricity Rules only specify the minimum clearances to be maintained from safety point of view. Hence, justification of the Petitioner on the basis of the Electricity Rules for usage of 'D' type tower as per the directions of CSPTCL and PGCIL is not acceptable.

(d) PGCIL in its 'User's Manual' circulated in June 1996 for construction of transmission line has categorically mentioned about utilization of 'D' type tower for power line crossing. Karnataka Power Transmission Corporation Limited in its detailed survey report published on 3.3.2014 has also recommended the use of 'D' types of towers for power line crossings. It seems that there is a deliberate ignorance on the part of the Petitioner in not considering 'D' type of

towers for power line crossings while participating in the bidding to take advantage of competitive bidding.

(e) The Petitioner has not mentioned that it was also agreed during the meeting held on 16.9.2016 with CEA that Transmission Service Providers (TSPs) would discuss the decision regarding installation of 'D' type tower within their organization and would also see if the differential cost could be absorbed by the TSPs. The Petitioner has not submitted the details about whether the matter was taken up with the management to absorb the additional cost due to use of 'D' type of towers.

(f) Further, the Petitioner has not given any documentary evidence to show that at the time of tendering, tower requirement was of different type for power line crossings. Accordingly, use of D-D type of towers for power line crossings should not be considered as 'Change in Law' and the Petitioner should bear the additional cost for the same.

(g) After incorporation of PoC mechanism in the Central Electricity Regulatory Commission (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010 (hereinafter referred to as 'the Sharing Regulations'), Article 10.10 (Payment of Supplementary Bill) of the TSA is obsolete and infructuous.

(h) In terms of the provisions of the TSA read with the Sharing Regulations, amount, if any, approved towards Change in Law, is required to be recovered through PoC mechanism. Hence, the prayer of the Petitioner to recover payment towards Change in Law through supplementary bills should not be allowed.

Reply of MPPMCL

21. MPPMCL in its reply dated 8.6.2020 has submitted the following:

(a) For the claim of Swachha Bharat Cess and Krishi Kalyan Cess, the Petitioner has claimed the same for the entire period and entire component. The Petitioner is required to unbundle the components to values and time from which such components became due for payment of such Cess. Certain

services and expenditures may have been incurred pre-imposition of such Cess and certain others after imposition of the Cess.

(b) The Petitioner has not disclosed the component-wise details of the off-shore aluminum products relating to the Project and respective percentage share of each such component in overall capital cost. In the absence of any related references in the Project selected through competitive bidding process, the impact of Customs Duty cannot be ascertained. Further, the Petitioner is required to justify the cost effectiveness in off-shore procurement of aluminum products as against their availability in home market.

(c) The Petitioner has failed to bring on record the total length of transmission line relating to the Project in the State of Chhattisgarh so as to enable prudent assessment of the land put to use by the Petitioner. The time when such compensation towards Right of Way (RoW) first became due to individual land owners has not been disclosed. In absence of a competent Auditor's Certificate setting out details as regards reasonability of land procured as RoW, the time when compensation first became due, impact due to increase in price of land and payment made to individual land owners, the claim of the Petitioner is not maintainable.

(d) Change in configuration of type of towers to "D"- "D" at both sides of crossings is not a Change in Law. Not admitting but for the sake of arguments, the number of crossings suffered by the transmission line would be necessary to ascertain the quantum of such 'D'- 'D' type towers really required and their overall impact on the bid tariff. The Petitioner has not disclosed such type of crossings and in absence of the same, the claim on this count is denied as it is not just and proper. In absence of statutorily codified information and also in absence of the requirement of a specific configuration of towers at levels of crossings in the TSA and bid documents, the claim of the Petitioner towards alleged change in configuration of towers is not maintainable.

(e) As regards enactment of GST Act, the Petitioner has suppressed exhibition of clear and one to one correlation between the Project, the supply of goods or services and the invoices raised by the supplier of goods and services

backed by an independent and competent auditor's certificate. The GST implications 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 payable only under the pre-GST laws. The O&M is the responsibility of the Petitioner and in the event of the Petitioner choosing to employ the services of other agencies, it cannot increase the liability of Respondents (and consequentially the distribution licensees) in terms of tariff. The outsourcing of the O&M to a third party is not a requirement of the TSA and is a commercial decision of the Petitioner for its own advantage and any increase in cost including on account of taxes, etc. is entirely to the account of the Petitioner (Order of the Commission dated 9.10.2018 in Petition No. 188/MP/2018 *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors.*). 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.

(f) The Petitioner's claim towards carrying cost being absurd and not borne out from the TSA is outrightly denied and the Petitioner is not entitled to carrying cost. It is submitted that maxim "expressum facit cessare tacitum" refers that when there is express mention of certain things, then anything not mentioned is excluded. Reliance is placed on the decision of the Constitution Bench of the Hon'ble Supreme Court in the case of *Union of India v. Tulsiram Patel [(1985) 3 SCC 398]*, the maxim is the principle of logic and common sense and not merely a technical rule of construction.

Rejoinders by the Petitioner

22. The Petitioner in its rejoinder dated 22.6.2020 to the reply filed by MSEDCL has submitted as under:

(a) Imposition of GST has been declared as a Change in Law event by this Commission vide its order dated 21.8.2017 in Petition No. 13/SM/2017. The Petitioner has submitted an auditor's certificate, certifying the additional cost which was borne by the Petitioner.

(b) The total quantity of the aluminum ingots for which relief has been sought in this Petition, was used for the Project. Further, the aluminum ingots were not purchased from domestic market but were imported. Reliance is placed on the auditor's certificate which includes the impact due to increase in Basic Customs Duty of aluminum ingots.

(c) During the second meeting convened by CEA on 16.9.2016, the issue of power line crossing was deliberated upon. The Petitioner had made it very clear that it cannot be forced to bear the additional cost of DHD towers especially when there was no requirement under law. During the course of the meeting, the Petitioner had also highlighted that since the tariff for transmission licensees such as the Petitioner had been fixed through bidding, the proposal to only install DHD type tower would put a higher financial burden on the Petitioner for which it would have to be compensated. The stand of the Petitioner stood vindicated by the CEA. It was also agreed that the TSP would absorb the higher financial burden only for the time being until CEA discusses the methodology regarding realization of differential cost with CERC and comes out with a proper notification. CEA was thus supposed to come up with a detailed notification for compensation payable to the Petitioner and other similarly situated parties for use of DHD towers.

(d) 'The User's Manual circulated by PGCIL in June 1996 for construction of a Transmission Line and the Surveying Report' of Karnataka Transmission Corporation Limited published on 3.3.2014, merely 'recommend' and 'suggest' the use of DHD type towers and were not made 'mandatory'. Moreover, the Petitioner is not bound by the User Manual circulated by PGCIL.

(e) Under Article 12.4 of the TSA, compensation for Change in Law is to be paid through supplementary bills under Article 10.10 of the TSA. Therefore,

the Petitioner is entitled to raise the supplementary bills as per Article 10.10 of the TSA.

(f) If directed by the Commission, the Petitioner may also recover the amount due from the LTTCs as per the applicable provisions of the Sharing Regulations. This contention of the Petitioner is without prejudice to the rights of the Petitioner to recover the full amount of compensation for Change in Law, through any mechanism as may be directed by the Commission.

23. The Petitioner in its rejoinder dated 22.6.2020 to the reply filed by MPPMCL has submitted the following:

(a) The Petitioner had submitted a bid after taking into account the costing of various components, sourcing them from Indian market and from abroad and quoted the lowest evaluated annual levelized transmission charges. There is no dispute that the Basic Customs Duty on import of aluminum was increased after the cut-off date.

(b) The Petitioner has claimed Swachh Bharat Cess and Krishi Kalyan Cess after the cut-off date. The Petitioner has not claimed Swachh Bharat Cess and Krishi Kalyan Cess for the services and expenditures incurred by the Petitioner before the imposition of the aforementioned cess. The same can be ascertained from the Annexure-28 of the Petition by verifying that in certain items associated with transmission line, the Petitioner has not claimed Change in Law even though for these items the Petitioner has paid the tax.

(c) The total quantity of aluminum ingots for which relief has been sought in this Petition, was used for the Project. In this regard, along with the details of total number of aluminum ingots imported and used by the Petitioner for the Project, the Petitioner has submitted auditor's certificate verifying the impact due to increase in Basic Customs Duty of aluminum ingots.

(d) The Petitioner in the notice of Change in Law dated 10.8.2019 sent to the Respondents had enclosed a document mentioning details of total area of land acquired from each land owner along with village name, amount of compensation paid to individual land owners and extra cost incurred by the

Petitioner due to change in compensation formula of RoW. The same details are provided in the Petition. The names of each land owner and location has been mentioned in the said notice including the date of payment which clarifies that the claim of RoW compensation is for the payment made after issuance of notification by Government instrumentality.

(e) The Respondent has not denied the fact that as on the cut-off date, there was no requirement for the Petitioner to install 'D'-'D' towers under the Electricity Rules. Contrary to the submission of MPPMCL, the Petitioner has provided the details of crossings and the cost incurred by it due to change in configuration to 'D'-'D' towers in the Petition.

(f) The order of CEA directing the Petitioner to install 'D'-'D' towers amounted to *"change in 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"* in terms of Article 12.1.1 of TSA and CEA being the Indian Governmental Instrumentality and order of CEA being law as per Article 1.1 of TSA, change in tower configuration would amount to Change in Law.

(g) The Petitioner is claiming additional taxation incurred by it due to implementation of GST regime only with respect to those goods and services for which the point of taxation was after 1.7.2017. The Petitioner is not claiming cost of any additional expenditure from the Respondent but is only demanding the reimbursement for increased cost incurred by the Petitioner for goods and services in normal course of executing the agreement due to increase in taxation rate after implementation of GST regime. In this regard, the Petitioner has submitted the certificate of Chartered Accountant, certifying the additional costs borne by the Petitioner due to Change in Law. The Petitioner has not claimed any additional tax burden on outsourcing of 'Operations and Management' services. However, the Petitioner reserves its right to claim impact of Change in Law during operation period i.e. for the period beyond the cut-off date.

Hearing held on 15.4.2021

24. The matter was heard on 15.4.2021 through video conferencing. During the course of hearing, learned counsels for the Petitioner and the Respondent, MSEDCL reiterated the submissions made in their respective pleadings, which are not repeated herewith for the sake of brevity. In response to the specific query of the Commission regarding Custom Duty on primary aluminum products and nature of the transaction involved, learned counsel for the Petitioner submitted that the Petitioner has been impacted by the increase in Basic Custom Duty on the import of aluminum ingots. It was further submitted that these imports have been done in the name of the Petitioner itself, which were then given to the supplier/ manufacturer to convert them into the conductors. Based on the requests of learned counsels, the Commission directed the Petitioner and the Respondent, MSEDCL to file their respective written submissions.

25. MSEDCL, vide its written submissions dated 28.4.2021, has mainly reiterated its submissions. MSEDCL has, on the issue of 'change in configuration of towers to 'D'-'D' type at both sides of power line crossing', additionally submitted as under:

(a) The Petitioner has failed to respond to the basic queries raised by the Commission vide Record of Proceedings for the hearing dated 26.5.2020 as to (i) what were the reasons for not considering the 'D'-'D' type angle towers for power line, and (ii) what were the reasons for not estimating such requirement by consulting the appropriate owners of line at the time of bidding.

(b) The Electricity Rules or any regulations do not specify the type of tower for construction of transmission line and crossing associated. It is the responsibility of the TSP to inspect and examine the site conditions and inform itself fully with the line route and the corresponding requirements before preparing its bid.

(c) It is the Petitioner who made certain assumption with respect to types of towers which it may require to install at various power line crossing without familiarizing itself with the site conditions and without collecting all requisite information which may be necessary to ascertain which of tower are to be installed at which site. While the Petitioner submitted its bid on 30.5.2015, it was only in February, 2016 when the Petitioner approached the line owners i.e. PGCIL and CSPTCL seeking their consent to install towers for power line crossing at various sites. Pertinently, the Petitioner should have done this exercise prior to the submission of its bid and should have accordingly prepared bid.

(d) There is no new imposition of a requirement for obtaining clearance or consents or permits which were not required earlier and neither is there any change/ inclusion in term and conditions prescribed thereto for obtaining such clearance or consents or permits. It is a rather clear case of mistake on part of the Petitioner to simply presume the type of towers which may be required at crossing, without consulting the line owners. It is not a case of Change in Law but a case of 'mistake of facts' or to some stretch 'change of facts' which were presumed by the Petitioner while submitting its bid.

(e) Letters sent by the Petitioner to PGCIL and CSPTCL and also the Change in Law notice dated 10.8.2019 clearly show that the Petitioner was fully aware that at least at one side of crossing, the Petitioner would be required to install 'D' type tower. It was, however, an absolute presumption on part of the Petitioner wherein it deemed itself allowed to install different types of towers on the other side of the power line crossing. Such assumption is again in contravention of the requisite mentioned in the RfP document wherein the Petitioner is supposed to make itself fully aware regarding the circumstances and requirements which may have an impact on its bid.

26. The Petitioner, vide its written submissions dated 28.4.2021, has also reiterated its submissions made in the Petition and the rejoinders. The Petitioner has additionally submitted as under:

(a) The decision to import aluminum was a commercial decision of the Petitioner. The Bid Evaluation Committee, vide its certificate dated 15.7.2015 had certified that the bid submitted by the Petitioner was in line with the prevalent market prices. Therefore, the Petitioner was well within its rights to take the commercial call to import aluminum that was used in the Project.

(b) In the present case, the Petitioner imported ingots in its own name. The Petitioner has imported circa 7466.92 MT of aluminum ingots, out of which 7426.92 MT of ingot was utilized, and for remaining 40 MT, a Credit Note for duty amount involved in closing stock of raw material was given to the Petitioner.

(c) The Petitioner got the ingots converted to conductor material through Purchase Orders placed by the Petitioner with Apar Industries Ltd. and Gammon India Limited. The Petitioner, through the Purchase Orders (mentioned above) got the said imported quantity measuring 7426.92 MT of aluminum converted into 6049 km of conductor material.

(d) Further, all the imports made by the Petitioner were after the cut-off date i.e., 23.6.2015. The Bill of Entry (BoE) is the incident of taxation that is filed by the importers with the Customs Department as part of customs clearance procedure. The Petitioner has provided details of BoE of the imported aluminum ingots to get the same converted into conductor material.

(e) The Petitioner had entered into an agreement/ Purchase Order with Apar Industries Limited for conversion of imported aluminum ingots into conductor material as per which Apar Industries Limited were to utilize the aluminum ingots imported by the Petitioner and supply Bersimis Conductor for 24 km Sipat-Bilaspur transmission line. Pursuant to the same, Apar Industries Limited had supplied 248.96 km of Bersimis Conductor to the Petitioner for a total length of 24 km. As per the Purchase Order, quantity of aluminum ingot required per kilometer of Bersimis Conductor was to be 1.913 MT. The same is an industry standard as per IEEMA Standards, in addition to allowable wastage up to 0.6%. Therefore, total aluminum ingot used by Apar Industries Limited for supplying 248.96 km of Bersimis Conductor was 479.12 MT.

(f) Similarly, the Petitioner had entered into an agreement with Gammon India Limited for conversion of imported aluminum ingots into conductor material, as per which Gammon India Limited were to utilize the aluminum ingots imported by the Petitioner and supply Zebra Conductor for 161.50 km Bilaspur-Rajnandgaon transmission line. Pursuant to the same, Gammon India Limited had supplied 5800.18 km of Zebra Conductor to the Petitioner. As per the Purchase Order, quantity of aluminum ingot required per kilometer of Zebra Conductor was to be 1.186 MT, which is an industry standard as per IEEMA Standards, in addition to allowable wastage up to 1%. Therefore, total aluminum ingot used by Gammon India Limited for supplying 5800.18 km of Zebra Conductor was 6947.80 MT.

(g) The Petitioner has claimed an increase in Customs Duty only on those imports which had impacted the Project i.e. out of around 7466.98 MT of import, the Petitioner has claimed Change in Law only on 6130.40 MT of import which has also been certified by a Chartered Accountant. However, if the Commission directs, a reconciliation exercise can be carried out for determining the veracity of the same. The Commission in Petition No. 264/MP/2020 titled *Powergrid Parli Transmission Limited vs. Maharashtra State Electricity Distribution Company Limited & Ors* and 265/MP/2020 titled *Powergrid Warora Transmission Limited vs. Madhya Pradesh Power Management Company Limited & Ors*. while upholding the claims for Change in Law had ordered for reconciliation of accounts between the parties.

(h) Chief Engineer, CEA in the meeting held on 27.7.2016 had stated that as per the Electricity Rules and Regulations, there was no mandate that power line crossings have to be done with "D" towers on both sides. In the said meeting, the representative of the Petitioner pointed out that PGCIL in its proposal to cross Mundra - Mahindragarh HVDC transmission line, had planned to use "D" type tower on one side whereas "B" type tower on the other side in its Bhuj – Banaskantha transmission line. It was also pointed out that PGCIL in its Vemagiri and Nagapattnam projects had also allowed "D" type tower on one side and any angle tower on the other side depending upon the crossing angle. PGCIL did not refute the claims made by the Petitioner. However, the

representative of PGCIL in the meeting said that PGCIL cannot allow any crossing of its transmission lines unless it was with “D”-“D” type towers. The directive of CEA itself amounts to Change in Law as it is a statutory authority under Section 70 and Section 73 of the Act. Furthermore, CEA had itself acknowledged that there was no requirement under law for compulsory use of “D-D” tower while crossing, but that CEA was mandating it from 16.9.2016 onwards i.e. after the cut-off date.

Analysis and Decision

27. We have considered the submissions of the Petitioner, MSEDCL and MPPMCL, and perused the documents placed 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?

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

The above issues have been dealt with in succeeding paragraphs.

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

28. The Petitioner has claimed relief under Article 12 (Change in Law) of the TSA. As regards notification for Change in Law, Article 12.3.1 of the TSA provides as under:

“12.3 Notification of Change in Law.

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 of the TSP.”

29. 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 Article 12.3.1 and Article 12.3.2 of the TSA shall provide amongst other things, precise details of Change in Law and its effect on the TSP.

30. It is noticed that the Petitioner gave Change in Law notices to LTTCs vide letters dated 14.4.2016, 4.7.2016, 14.11.2016, 22.12.2016, 11.4.2017, 31.7.2017 and 10.8.2019. GUVNL and MPPMCL vide their reply letters dated 31.12.2016 and dated 28.2.2017 to the Petitioner's notice dated 14.11.2016 rejected the claim of Change in Law with regards to mandate for installation of 'D'-'D' type tower at power line crossings. Vide its letter dated 10.8.2019, the Petitioner had informed LTTCs about the financial impact of the Change in Law events on the basis of actual cost incurred in terms of Article 12.2.3 of the TSA. In response to the Petitioner's letter, MSEDCL advised the Petitioner to approach the Appropriate Commission for determination of compensation and the date from which such compensation shall be effective. Accordingly, 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?

31. 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 any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any competent Court of Law;*
- The imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- A change in 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.”*

32. Perusal of the above provisions of Article 12 in the TSA reveal that for an event to be Change in Law, its occurrence has to be after the seven days prior to the bid deadline and should 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;

(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.

33. Indian Government Instrumentality as defined in the TSA is 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 the direct or indirect control of 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”

34. Further, ‘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;”

35. 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.

36. 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 30.6.2015. Therefore, cut-off date for considering the claims under Change in Law will be 23.6.2015. In the light of the above provisions, the claims of the Petitioner with regard to Change in Law during the construction period have been examined in the following paragraphs.

(a) Levy of Swachha Bharat Cess, Levy of Krishi Kalyan Cess and increase in Maharashtra Value Added Tax

37. The Petitioner has submitted that the effective service tax rate of 14%, prevailing as on cut-off date, was increased to 14.5% on account of levy of Swachha Bharat Cess @0.5% on taxable services from 15.11.2015 vide Ministry of Finance Notification No. 21/2015-Service Tax dated 6.11.2015 and Notification No. 22/2015-Service Tax dated 6.11.2015. Further, Krishi Kalyan Cess @0.5% on taxable services was also levied through the Finance Act, 2016 with effect from 1.6.2016. The Petitioner has submitted that Ministry of Finance is an Indian Governmental Instrumentality as defined under the TSA and the introduction of Swachh Bharat Cess and Krishi Kalyan Cess have been effected through an amendment to the Finance Act, 1994, by an Act of the Parliament. Therefore, the same are Change in Law events in terms of Article 12.1 of the TSA.

38. *Per Contra*, the Respondents, MSEDCL and MPPMCL have pointed out the need for prudent check in terms of the components and the time from which such components became due for payment of such cess. MSEDCL vide its written submission dated 28.4.2021 has conceded that both these events have been declared as Change in Law by the Commission and APTEL in various orders.

39. We have considered the submissions of the Petitioner and the Respondents. As on cut-off date i.e. 23.6.2015, there was no Swachh Bharat Cess and Krishi Kaiyan Cess. Swachh Bharat Cess was introduced by Finance Act, 2015 and was implemented with effect from 15.11.2015. Krishi Kalyan Cess was introduced by Finance Act, 2016 and was implemented with effect from 1.6.2016. It has been submitted by the Petitioner that the Commission has already allowed Swachh Bharat Cess and Krishi Kalyan Cess as Change in Law events vide order dated 1.2.2017 in

Petition No. 8/MP/2014, order dated 6.2.2017 in Petition No. 156/MP/2014, order dated 7.4.2017 in Petition No. 112/MP/2015 and order dated 21.8.2020 in Petition No 217/MP/2016. We note that the orders quoted by the Petitioner are in respect of PPAs (Power Purchase Agreements) between contracting parties and not for TSAs. Nonetheless, the provisions of the PPAs referred to by the Petitioner related to Change in Law are similar to the provisions of Change in Law in the TSA in the instant petition.

40. Sections 119(2) and 119(3) of the Finance Act, 2015 provide as under:

“119....

(2). There shall be levied and collected in accordance with the provisions of this Chapter, a cess to be called the Swachh Bharat Cess, as service tax on all or any of the taxable services at the rate of two percent, on the value of such services for the purposes of financing and promoting Swachh Bharat initiative or for any other purpose relating thereto.

(3). The Swachh Bharat Cess leviable under sub-section (2) shall be in addition to any cess or service tax leviable to such taxable services under Chapter V of the Finance Act, 1994 or under any other law for the time being in force.”

41. Sections 161(2) and 161(3) of the Finance Act, 2016 provide as under:

“161....

(2). There shall be levied and collected in accordance with the provisions of this Chapter, a cess to be called the Krishi Kalyan Cess, as service tax on all or any of the taxable services at the rate of 0.5 percent, on the value of such services for the purposes of financing and promoting initiatives to improve agriculture or for any other purpose relating thereto.

(3) The Krishi Kalyan Cess leviable under sub-section (2) shall be in addition to any cess or service tax leviable to such taxable service under Chapter V of the Finance Act, 1994, or under any other law for the time being in force.”

42. Therefore, both Swachh Bharat Cess and Krishi Kalyan Cess, having been introduced through an Act of Parliament, are admissible under Change in Law in terms of Article 12 of the TSA. The Petitioner has submitted the total impact on account of levy of Swachh Bharat Cess and Krishi Kalyan Cess are Rs 25.46 lakh

and Rs 22.29 lakh respectively. As per the direction of the Commission vide RoP of hearing dated 26.5.2020, the Petitioner has placed on record the certificate of Chartered Accountant containing item-wise details of taxes actually paid during the construction period. The Chartered Accountant has also certified that the Petitioner has not received any Input Tax Credit.

43. In light of the above, the Petitioner is entitled to recover expenditure incurred towards Swachh Bharat Cess and Krishi Kalyan Cess from LTTCs.

44. The Petitioner has not made any claim on account of increase in Maharashtra Value Added Tax. Accordingly, the same has not been dealt with in the Petition.

(b) Increase in effective customs duty on primary aluminium products

45. The Petitioner has submitted that, as on cut-off date, the effective tax rate on import of primary aluminum products was 23.65% comprising of Basic Customs Duty @5%, Countervailing Duty @12.5%, Special Duty @4% and Education Cess @3%. However, the effective tax was increased to 26.69% on account of increase in the Basic Customs Duty from 5% to 7.5% vide the Union Budget, 2016. Further, with enactment of GST, the effective tax rate has increased to 27.4% which includes IGST @18%, Basic Customs Duty @7.5%, and Education Cess @3% on the Basic Customs Duty.

46. *Per Contra*, the Respondents have submitted that the Petitioner has not provided the details of quantum of aluminum purchased within the country and quantum of aluminum imported. It has been further submitted that the Petitioner has not provided any justification for importing aluminum ingots instead of purchasing domestically and also as to who was the importer of such ingots. The Respondents

have also contended that it is not clear whether the aluminum ingots imported by the Petitioner have actually been utilized by the Petitioner for the Project only. The Respondents have also pointed out that after importing the aluminum ingots, the Petitioner seems to have supplied to the same to domestic companies for manufacturing end products. However, the Petitioner has not clarified as to what was the total quantity of aluminum required for the Project and its correlation with the final manufactured products supplied to the Petitioner by its domestic manufacturers. It has been further pointed out by the Respondents that for the Petitioner to be eligible to get relief under Change in Law, it is necessary for the Petitioner to establish that total quantity of aluminum imported and the total aluminum required for the Project are same. Further, it is also important for the Petitioner to establish that the total imported quantity of aluminum has actually been utilized in the Project.

47. The Petitioner vide its written submission has submitted that the decision to import aluminum was a commercial decision of the Petitioner and the Commission while adopting the tariff quoted by the Petitioner vide its order dated 28.1.2016 in Petition No. 286/ADP/2015 expressly recognized that since the Petitioner's bid was aligned with the prevailing market prices, the Commission was not required to go into the cost details of the bids, as the tariff was discovered through the transparent bidding process under Section 63 of the Act as per the guidelines issued by Ministry of Power. It has been submitted that the Petitioner imported aluminum ingots in its own name. For conversion of ingots to conductor material, the Petitioner entered into separate contracts with Apar Industries Ltd. and Gammon India Limited. The Petitioner has submitted that it imported 7466.92 MT of aluminum ingots, out of which 7426.92 MT of ingot was utilized, and for remaining 40 MT, a Credit Note for

duty amount involved in closing stock of raw material was given to the Petitioner by Transrail Lighting Limited (TLL), a subsidiary of Gammon India Limited. The Petitioner has submitted the following table (details of which have been certified by the Chartered Accountant in the certificate submitted with affidavit dated 22.6.2020) indicating how imported aluminum ingots were used by the Petitioner in the Project as conductor material:

	Total quantity of aluminium ingot imported by the Petitioner (in MT)	Vendor to whom the ingot was supplied by the Petitioner to get converted into conductor	Length of transmission line for which the Vendor supplied conductor material (in km)	Length of Conductor material supplied by the Vendor (in km)	Quantity of imported aluminium used for converting into conductor (in MT)	Balance available with Job worker (in MT)
765 kV S/C Sipat- Bilaspur Pooling Station transmission line	478.63	APAR	24	248.96	479.13	(0.492)
765 kV D/C Bilaspur Pooling Station – Rajnandgaon transmission line	6988.34	TLL (Gammon India)	161.50	5800.182	6947.81	40.538
Total	7466.98			6049.15	7426.93	40.05

48. The Petitioner has submitted that all the imports were made after the cut-off date. The Petitioner has also submitted the following details of BoE with regards to import of ingots:

Company	Date	Import (MT)
Sipat Transmission Ltd	8.4.2017	1345.356 MT
	22.12.2015	572.683 MT
	12.12.2015	763.894 MT
	26.10.2016	1194.146 MT
	15.11.2016	979.425 MT
	23.11.2016	747.364 MT
	21.12.2016	744.614 MT

	31.12.2016	381.947 MT
	31.12.2016	742.179 MT

49. To justify its claim for utilization of aluminum ingots for conductor material for Sipat Transmission Ltd., the Petitioner has submitted Purchase Orders of Apar Industries Limited and Gammon India Limited. As per the Purchase Order, Apar Industries Limited was to supply Bersimis Conductor for 24 km Sipat-Bilaspur transmission line while Gammon India Limited was to supply Zebra Conductor for 161.50 km Bilaspur-Rajnandgaon transmission line.

50. The Petitioner has submitted that quantity of aluminum ingot required per kilometer of Bersimis conductor was 1.913 MT apart from allowable wastage up to 0.6% as per IEEMA Standards. Therefore, total aluminum ingot used by Apar Industries Limited for supplying 248.96 km of Bersimis Conductor was 479.12 MT. The Petitioner has further submitted that the quantity of aluminum ingot required per kilometer of Zebra Conductor was 1.186 MT apart from allowable wastage up to 1% as per IEEMA Standards. Therefore, total aluminum ingot used by Gammon India Limited for supplying 5800.18 km of Zebra Conductor was 6947.80 MT.

51. The Petitioner has clarified that it has claimed an increase in Customs Duty only on those imports which were impacted due to such increase in Customs Duty i.e. out of around 7466.98 MT of import. the Petitioner has submitted that it has claimed relief under Change in Law only on 6130.40 MT of import. The Petitioner has submitted that the total impact on account of increase in Customs Duty on 6130.40 MT of import is Rs 2.19 crore, which has also been certified by the Chartered Accountant in the certificate submitted by the Petitioner vide its affidavit dated 22.6.2020.

52. We have considered the submissions of the Petitioner and the Respondents. We agree with the submission of the Petitioner that it is the commercial decision of the Petitioner to procure machinery/ equipment or raw material from domestic market or import from international market under competitive bidding regime. For the competitively discovered tariffs, it is neither envisaged nor considered necessary for the Commission to go into the aspects of efficiency of procurement or related cost details. It is assumed that the Petitioner would have done prudence check in terms of assessment of domestic and international market. For any inefficiency on part of the TSP in implementation of the Project, the additional cost is to be borne by the TSP itself. As far as relief under Change in Law is concerned, the Commission is required to consider whether the event is covered as Change in Law under Article 12 of the TSA and whether the Petitioner's claim for relief on account of Change in Law flows from the terms of the TSA.

53. As on cut-off date, the Basic Customs Duty @5% was levied on import of primary aluminum products. The Basic Customs Duty was raised from 5% to 7.5% by the Union Budget, 2016. Ministry of Finance, an Indian Government Instrumentality, increased the Customs Duty on import of primary aluminum products from 5% to 7.5% vide Notification No. 334/8/2016-TRU dated 29th February 2016 w.e.f. 1.3.2016. Accordingly, increase in Customs Duty on aluminum products is admissible under Article 12 of the TSA as Change in Law. The Petitioner has submitted that there has been further increase in effective tax rate after coming into effect of GST regime. GST has been held to be a Change in Law event by the Commission in several previous orders including in the order dated 17.12.2018 in Petition No. 1/SM/2018 and in the instant order. Any claim as regards Change in Law on account of coming into effect of GST regime is admissible only if import of

aluminum ingots has taken place on or after 1.7.2017. The Petitioner has to clearly show that it had imported the aluminum ingots on or after 1.7.2017.

54. In view of the above, as increase in Customs Duty on aluminum products is admissible under Article 12 of the TSA as Change in Law, the Petitioner is entitled to increase in transmission charges on account of said increase in Customs Duty on aluminum products in accordance with Article 12.1.1 of the TSA.

(c) Increase in tax rates due to enactment of the GST Acts

55. The Petitioner has submitted as on cut-off date, the indirect tax regime, prevailing in India, comprised of multiplicity of taxes and elaborate compliance obligations. However, a new indirect taxation system i.e. GST was introduced w.e.f. 1.7.2017, representing a paradigm shift in the mode and levy of indirect taxes leading to increase in cost of following goods and services.

56. Increase in the tax rates applicable on works contracts: The Petitioner has submitted that in the pre-GST regime, as was the common practice, it had utilized the option of '*Payment of Service Tax at a composite rate of 40% on the Gross Value of works contract in case of Original Works*'. The other option of '*Payment of Service Tax at full rate on value of services after deducting value of goods for gross value of the works contract*' was avoided due to difficulties faced in bifurcation of supply and services. The effective tax rate on works contracts under composite scheme of payment of service tax was 5.6% (40% of the then prevailing Service Tax rate i.e. 14%). However, service tax was abolished under Section 173 of the CGS Act. For inter-State works contract, rate of 18% for composite supply of works contract has been prescribed under IGST Notification No. 8/2017 dated 28.6.2017.

Similarly, under the Central GST Notification and the State GST Notification, CGST and SGST @ 9% each is being levied.

57. Levy of GST @18% on services for electricity transmission as against the service tax @14% prevalent at the time of cut-off date: The Petitioner has submitted that as on cut-off date, service tax @14% was applicable on such services for which no special rates or abatement was applicable. However, after the enactment of GST Laws w.e.f. 1.7.2017, GST has been made applicable @18% on the basis of IGST Notification No.8/2017, Central Goods and Service Tax Notification No. 11/2017 dated 28.6.2017 and Chhattisgarh Goods and Service Tax Notification No. 11 of 2017.

58. Levy of GST at the rate of 18% on transportation of Goods on its supplier: The Petitioner has submitted that as on cut-off date, no service tax was leviable for transportation of goods by road except if the services were provided through Goods Transport Agency (GTA) or a courier agency in terms of Section 66 of Finance Act, 1994. Since, in the Petitioner's case, the contracts were not awarded to GTAs but to the Petitioner's suppliers who arranged the services of the GTAs for transportation of goods, no service tax was leviable on the transaction leg between the Petitioner and the supplier in spite of service tax being leviable @4.2% on the transaction leg between the supplier and the GTA. However, with effect from 1.7.2017, GST been made applicable on both legs of the transaction. The transaction leg between the supplier and the GTA is taxed @5% (2.5% + 2.5%) under Central Goods and Service Tax Notification No. 11/2017 dated 28.6.2017 and Chhattisgarh Goods and Service Tax Notification No. 11 of 2017. Further, the transaction leg between the supplier and the Petitioner is taxed @18% under the afore-mentioned notifications.

59. Levy of GST on finished transmission line and sub-station material @ 18-28% as against the effective tax of 14.75% at the time of cut-off date: The Petitioner has submitted that as on cut-off date, Excise Duty @12.5% and Central Sales Tax @2% were leviable leading to an effective tax rate of 14.75 for various transmission and sub-station materials. However, upon the introduction of GST regime, GST was notified at the rate of 18% to 28% based on respective items i.e. transmission line structure, etc. attracted 18% GST and transformers, etc. attracted 28% GST, which was later reduced to 18% pursuant to the decision of GST Council in its meeting dated 11.6.2017.

60. Levy of GST on Right of Way payments to be made to land owners at the rate of 18%: The Petitioner has submitted that prior to enactment of CGS Act and SGS Act, there was no tax payable on the compensation to be paid to landowners. However, under the CGST Notification No.11/2017 and Chhattisgarh GST Notification No. 11/2017, tax at the rate of 9% each was levied on payment of compensation to land owners.

61. *Per Contra*, the Respondents have acknowledged enactment of GST as Change in Law subject to prudence check of claims by the Commission. MPPMCL has submitted that the Petitioner has not exhibited clear and one to one correlation between the Project, supply of goods/ services and invoices raised by the supplier of goods/ services backed by an independent and competent auditor's certificate. MPPMCL has further submitted that the GST implications will be applicable only if the point of taxation occurs on or after 1.7.2017. It has been further contended by MPPMCL that O&M of the Project is the responsibility of the Petitioner and in the

event of the Petitioner choosing to employ the services of other agencies, it cannot increase the liability of the Respondents (and consequentially the distribution licensees) in terms of tariff.

62. 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 event specified in the bullets under Article 12.1.1 which have occurred after the date which is seven days prior to the bid deadline 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 constitutes 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.”

63. In the present case, as on cut-off date i.e. 23.6.2015, 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, (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. 23.6.2015, the same is covered under Change in Law. The relief for additional expenditure incurred by the Petitioner due to

introduction of GST on account of (1) increase in the tax rates applicable on works contracts, (2) levy of GST at the rate of 18% on services for electricity transmission, (3) levy of GST on finished transmission line & substation material at the rate of 18-28%, and (4) levy of GST on RoW payments to be made to land owners at the rate of 18% shall be admissible on the capital expenditure incurred as on the commercial operation of the Project.

64. As regards levy of GST on transportation of goods on the supplier of the Petitioner, the Petitioner has submitted that as on cut-off date, as per Section 66 of Finance Act, 1994, as amended from time to time, no service tax was leviable for transportation of goods by road except if the services were provided through Goods Transport Agency (GTA) or a courier agency. As per the Petitioner, its suppliers arranged the services of the GTAs for transportation of goods and services tax was leviable at the rate of 4.2%. However, after enactment of GST, service tax was abolished and the GTA is taxed under the GST. Therefore, with enactment of GST, the incremental value of tax that the supplier can charge from the Petitioner is "GST actually paid less 4.2%". Accordingly, the Commission allows recovery of incremental GST, subject to such incremental tax impact having being passed on to the Petitioner by its supplier and the payment being made by the Petitioner thereof. The Commission also directs that the details of the increase or decrease in tax rate on account of implementation of GST shall be worked out by the TSP and the LTTCs in terms of order dated 17.12.2018 in Petition No. 1/SM/2018 and the TSPs shall provide the details of increase or decrease in the taxes, supported by Auditor Certificate and relevant documents to the beneficiaries and refund or recover the amount from the TSPs due to decrease or increase in such taxes.

65. The Petitioner has submitted that the total impact on account of the enactment of GST Laws is Rs. 1.52 crore. Vide Record of Proceedings for the hearing dated 26.5.2020, the Petitioner was directed to furnish Auditor's certificate containing item-wise details of taxes actually paid during construction period along with input tax credits. The Petitioner was also directed to furnish information regarding taxes applicable at the time of bidding which have been subsumed/abolished with GST, supported by Auditor Certificate on savings of such taxes. The Petitioner vide its affidavit dated 22.6.2020 has placed on record the copy of the certificate of Chartered Accountant containing item-wise details of taxes actually paid during the construction period and certifying the calculations of amount claimed due to introduction of GST in comparison with tax based on original estimated Project cost. The Chartered Accountant has certified that the Petitioner has not received any Input Tax Credit and that all taxes applicable at the time of bidding which have been subsumed/abolished with GST have been considered for working out impact of Change in Law and accordingly savings due to such abolished/subsumed taxes has been passed on. The Petitioner has clarified in the affidavit that there are reduction in the rates of taxes (rope wire and vehicle hiring charges, etc.) as compared with taxes on cut-off date and the Petitioner has appropriately considered the same for reduction of cost. We observe that, as claimed by the Petitioner, reduction of taxes on account of rope wire and vehicle hiring is reflected in the Chartered Accountant's certificate. 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.

(d) Increase in compensation towards damages in relation to Right of Way for Transmission Lines

66. The Petitioner has submitted that as on the cut-off date i.e. 23.6.2015, the prevailing rate of compensation (50% of the market value of land) towards RoW damages in the State of Chhattisgarh was in accordance with the Notification dated 20.2.2015 issued by Revenue and Disaster Management Department, Government of Chhattisgarh. However, vide Notification No. F-7-7/7-1/2014 dated 1.6.2016, the Revenue and Disaster Management Department, Government of Chhattisgarh increased the amount of compensation to 85% of the market value of land on 1.6.2016, modifying its earlier notification for the purpose of aligning the compensation rates with that of the Guidelines issued on 15.10.2015 by Ministry of Power, Government of India. The notification by the Government of Chhattisgarh, which has resulted in additional expenditure to the Petitioner, fulfills all the pre-conditions and qualifies as a Change in Law event under Article 12.1.1 of the TSA.

67. MPPMCL in its reply has submitted that the Petitioner has not disclosed when compensation towards RoW first became due to individual land owners. It has submitted that a competent Auditor's Certificate setting out the reasonability of land procured as RoW, the time when compensation first became due, impact due to increase in price of land and payment made to individual land owners would be necessary for the Petitioner's claim to be maintainable.

68. We have considered the submissions made by the Petitioner and MPPMCL. As on cut-off date, Order No F 7-7/SAT-1/2014 dated 20.2.2015 of Department of Revenue and Disaster Management, Government of Chhattisgarh was in force which specified, *inter-alia*, that compensation to be provided by transmission service provider to the land owners was @ 50% of the prevalent market value of the land

utilized for installing the towers for establishment of 132 kV transmission lines or lines having higher power. Ministry of Power, Government of India vide its letter dated 15.10.2015 issued 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 under the Indian Constitution. On the basis of the said Guidelines, Department of Revenue and Disaster Management, Government of Chhattisgarh issued amended order No K/F-7-7/Sat-1/2014 on 1.6.2016 thereby increasing, *inter-alia*, the compensation to be provided by the TSP to the land owners to 85% of the prevalent market value of the land utilized for installing the towers for establishment of 132 kV transmission lines or lines having higher power.

69. According to the Petitioner, the order issued by Government of Chhattisgarh for making the compensation for RoW by the TSPs qualifies as Change in Law under the TSA. It would be apt to quote the translated version of the above order dated 1.6.2016 issued by the Government of Chhattisgarh submitted by the Petitioner:

*"Chhattisgarh Government
Revenue and Disaster Management Department
Mantralaya
Mahanadi Bhavan, New Raipur
//Amended Order//*

New Raipur Dated 01/06/2016

K/F-7-7/Sat-1/2014:- Vide departmental order of even number dated 20/02/2015, provision for paying compensation and the rate at which the compensation shall be paid has been determined for the land acquired or affected by the establishment of electricity transmission lines of 132 kv or more in the State.

2. Vide Government of India, Ministry of Power's letter no. 3/7/2015-Trans., dated 15 .10.2015 guidelines have been issued for assessment of compensation payable for "Right of Way" acquired over the land required to establish transmission line. Under these guidelines, the compensation has been decided by the Ministry of

Power, Government of India for lines of 66kv or greater capacity in place of 132 kv, which is more than the rate fixed in the State.

3. Hence, to keep the State Government's rate of compensation in accordance with those of the Government of India, it hereby omits paragraph-4 of departmental order dated 20.02.2015 and substitutes it with new paragraph-4 as given hereafter in its place:-

4/ The abovementioned situation has been seriously contemplated upon. Accordingly, keeping the public interest in mind, for establishment of 132 kV transmission line or lines having higher power, the following decisions have been taken:

1. In addition to the compensation paid for the damage caused due to entry upon the land, the landowner will be given compensation equivalent to 85 percent of the prevalent market value of the area of land utilised for installing the tower.

2. The compensation will be given up to 15 percent of the market value of the land covered by the external ends of the wire connecting towers. For this, the width of both external wires will be determined as given hereunder:

Sr. No.	TRANSMISSION CAPACITY	WIDTH OF BOTH EXTERNAL WIRES (in metres)
1	66 KV	18m
2	110 KV	22m
3	132 KV	27m
4	220 KV	35m
5	400 KV	46m
6	500 KV	52m
7	765 KV	64m
8	800 KV	67m
9	1200 KV	89m

3. The amount to be given as above will only be compensatory. The land will remain registered in the ownership of the earlier landowner.

4. Notwithstanding anything to the contrary provided in any other rule, compensation for any agricultural land will be payable based on its prevalent market value and compensation for any non-agricultural land will be payable based on its prevalent market value.

5. This compensation will be payable only for the electricity transmission line. Electricity distribution lines are not included in this.

In the name and as per the order of the Governor of Chhattisgarh

(K.R. Pisda)
Secretary,
Chhattisgarh Government
Revenue and Disaster Management Department
Raipur, Date: 01/06/2016

P. No. F 7-7/7-1/2014

Copy-

1. *Special Assistant, Hon'ble Minister Chhattisgarh Government, Revenue and Disaster Management Department, Mantralaya, Mahanadi Bhavan, New Raipur.*
2. *Sent to Principal Secretary, Chhattisgarh Government, Energy , Mantralaya, Mahanadi Bhavan, New Raipur for information in the context of his Letter No. 352/F21/11/2015/13/2 dated 09.02.2016.*
3. *Commissioner, Raipur/Durg/Bilaspur/Sarguja and Bastar Division, .*
4. *Commissioner/Coordinator, Land Records, Chhattisgarh, Raipur.*
5. *All Collectors, Chhattisgarh for information and necessary action.*

*Secretary,
Chhattisgarh Government
Revenue and Disaster Management Department”*

70. Perusal of the above order issued by the Government of Chhattisgarh reveals that it is a direction of the State Government which is binding on the State authorities for determination of compensation for RoW of transmission lines.

71. Government of Chhattisgarh, being the State Government, is an Indian Governmental Instrumentality in terms of the TSA. Therefore, the order dated 1.6.2016 issued by Department of Revenue and Disaster Management, Government of Chhattisgarh, being after the cut-off date, qualifies as a Change in Law event in terms of Article 12.1.1 of the TSA.

72. 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 order of the Government of Chhattisgarh.

73. However, at the same time, it is pertinent to note that as on cut-off date, compensation payable for land covered under the transmission lines corridor (i.e. land covered by the external ends of the wire connecting towers) in terms of Government of Chhattisgarh's order dated 20.2.2015 was up to 20% of the market

value of such land. Subsequently, vide order dated 1.6.2016, the compensation payable for the land covered under the transmission line corridor has been specified as up to 15% of the market value of such land. It is noticed that the Petitioner has not clarified as to whether this reduction in the rate of compensation payable for the land covered under the transmission line corridor has resulted into any savings to the Petitioner. Accordingly, we direct that while claiming the additional expenditure incurred towards payment of land compensation for the installation of towers, the Petitioner will also factor into the savings, if any, resulted on account of reduction in the rate of compensation payable for the land covered under the transmission line corridor. In case this reduction has not resulted into any savings to the Petitioner, the Petitioner will furnish an undertaking to the effect to the LTTCs/ beneficiaries.

(e) Change in configuration of type of towers to ‘D’-‘D’ at both sides of the power line crossing

74. As per the Petitioner, Chhattisgarh State Power Transmission Company Limited (CSPTCL) and PGCIL had rejected all power crossing proposals with DHC and DHB type towers and insisted on using ‘DHD’ type towers though there is no such requirement in either the Electricity Rules or any standards. The Petitioner brought the issue to the notice of the Central Electricity Authority (CEA). CEA held two meeting to discuss the issue of power line crossing. During the second meeting, CEA decided that Power line crossing for 400 kV and above should be done only with ‘D’-‘D’ type towers. Consequently, the Petitioner had to incur an additional expenditure of Rs 3.40 crore towards installation of towers with ‘D’-‘D’ configuration. It has been contended by the Petitioner that this amounts to a change in “requirement” for obtaining a “consent/clearance” and the same amounts to “Change in Law” as per Article 12 of the TSA.

75. *Per contra*, the Respondents have rejected the claim of the Petitioner on the ground that the Electricity Rules do not specify any type of tower for construction of transmission line or crossings of transmission lines. Further, it has been submitted that the bidding documents/RFP is clear with respect to the obligations and responsibilities of the bidders to acquaint themselves prior to bid submission and make themselves fully aware of the site conditions and all required information, inputs, conditions and circumstances and factors which may have any effect on their bids. MSEDCL has contended that there is no new imposition of a requirement for obtaining clearances or consents or permits which were not required earlier and neither is there any change/ inclusion in terms and conditions prescribed thereto for obtaining such clearances or consents or permits. It is clearly not a case of Change in Law but a clear case of mistake on part of the Petitioner to simply presume the type of towers which may be required at power line crossings, without consulting the owners of such transmission lines.

76. We have considered the submissions made by the parties. On being denied approval for power line crossing without implementation of 'D'-'D' configuration by CSPTCL and PGCIL, the Petitioner approached CEA for resolution of the dispute. CEA held two meetings on the issue on 27.7.2016 and 16.9.2016. The Petitioner has placed minutes of both the meetings on record.

77. Perusal of the minutes of the meeting held on 27.7.2016 reveals that Chief Engineer (EI), CEA had informed that as per the Electricity Rules, there is no mandate that power line crossings have to be done with "D" towers on both the sides. However, there has to be sufficient margin in the crossing towers depending on the angle of crossing. The Petitioner had informed CEA that PGCIL is insisting on

D-D configuration when PGCIL itself has proposed “D” type tower on one side where as “B” type on other side in its proposal to cross Mundra-Mahindragarh HVDC transmission line of Adani Transmission Ltd. in case of Bhuj-Banaskantha transmission line of PGCIL. It was further informed that even in its TBCB projects, namely, Vemagiri and Nagapattnam, PGCIL has allowed “D” type tower on one side and any angle tower on the other side depending upon the crossing angle. During the meeting, PGCIL categorically admitted that *‘their management have now taken a view that any power line crossing has to be done with “D” type tower on both sides to avoid any kind of disruption of power due to mis-happening during stringing over their line and subsequently to minimize the probability of snapping of their line due to tower collapse of the other utility’*.

78. The second meeting on the said issue was held in CEA on 16.9.2016. During the meeting Chief Engineer, PSETD, CEA reiterated that as per IS there is no stipulation regarding the use of D type tower for power line crossing. Further, Chief Engineer (PSPM) stated that there is a need to emphasize more on safety while dealing with the power line crossing involving transmission lines of 400 kV and above. As per the minutes, Chief Engineer, PSETD emphasized as under:

“CE, PSETD insisted that the 400 KV as well as 765 KV lines carries huge quantum of power and in the event of their failure due to collapse of tower would lead to huge financial loss due to failure of power transmission and long outage. The same if quantified in terms of monetary loss, would be very high compared to the differential cost of ‘D-D’ type of tower and angular tower or tower with other combination. Further, grid security due to failure HVAC system is also another dimension to it. Considering this Railways are strictly following the practice of line crossing with only ‘D-D’ towers. As such he advised the TSPs to seriously think over the issue again.”

79. The Petitioner and other Transmission Service Providers present during the meeting pointed out that for competitively bid projects, tariff has been fixed through bidding and the proposal of installation of ‘D-D’ tower would put higher financial

burden on the TSP. As stated in the minutes of meeting, as the issue was discussed in detail, Chief Engineer, *inter-alia*, proposed that it would be pragmatic if power line crossing is done only with 'D-D' type of tower for crossing lines of 400 kV and above. After detailed deliberation, the proposal was in general agreed by all the participants. However, the TSPs insisted for mechanism for recovery of differential cost due to the change in type of tower as the same was not covered in the TSA. In this regard, Director, CEI stated that there could be problem of recovery of differential cost due to Change in Law prior to the notification, as the notification may take some time so it may not be easy for the Transmission Service Providers to recover the differential cost through the CERC. Based on the discussion, the following was agreed during the meeting (extract from the minutes).

“(a) Power line crossing for 400 KV and above should be done only with D-D type of towers.

.....

(d) The proposal as indicated at (a), (b) and (c) above would be discussed by all the TSPs within their organization and would also see of the differential cost could be absorbed by the TSPs.

(e) CEA would discuss the methodology regarding realization of differential cost with CERC till the same is notified.”

80. 'Law' or 'Laws' has been defined in the TSA as '*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*'. After going through the minutes of the meetings, we are of considered opinion that decision of CEA in the meetings cannot be classified as enactment of 'Law' under Article 12.1.1. It is evident that the outcome of the meeting was only a consensus amongst the various stakeholders for resolution of the dispute. The apprehension regarding 'Change in Law' claim was

also shared by CEA during the meeting and, for the same reason, CEA had requested licensees to discuss the issue with their organizations to see if the differential cost can be absorbed by the TSPs. Therefore, the aforesaid decision of CEA upholding the requirement of only 'D'-'D' type of tower for power line crossing of 400 kV cannot be considered as Change in Law under Article 12 of the TSA .

81. Further, the Petitioner has contended that PGCIL and CSPTCL insisted the Petitioner to use 'D-D' type in order to allow crossing of their transmission lines. It has been contended that it amounts to a change in "requirement" for obtaining a "consent/clearance" under Article 12.1.1 and the said action amounts to a Change in Law event as both PGCIL and CSPTCL are government instrumentality as per Article 1.1 of the TSA. We do not find merit in the argument of the Petitioner in view of the fact that the power line crossing approvals are granted by the transmission licensees to each other in the capacity of transmission licensees only. Neither PGCIL nor CSPTCL have acted as Indian Government Instrumentality in any sense in the instant matter. Also, admittedly, there was no prescribed configuration for crossing of transmission lines which was changed. Change in Law is admissible when 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 undergoes change, which is not the case in the instant matter.

82. As per Article 5.1.1 of the TSA, the Petitioner is responsible for designing, constructing, erecting, completing and commissioning each element of the Project by the scheduled COD, at its own cost and expense. Further, in accordance with Article 5.1.3 of the TSA, the Petitioner is responsible to obtain all consents, clearances and permits including approval for crossings in order to carry out its obligations under the

TSA in general and Article 5.1.1 in particular. It is the responsibility of the Petitioner under the TSA to obtain consents/ clearances by fulfilling the desired criteria. Accordingly, we opine that imposition of the requirement of installation of 'D' type towers on both the side of power line crossing for obtaining clearance from PGCIL and CSPTCL is not admissible under Change in Law.

83. In light of the above, the Petitioner is not entitled to increase in transmission charges on account of additional expenditure incurred towards installation of 'D' type tower on both the side of the power line crossing.

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

84. 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 Three Crore Seventy Lakh (Rs. 3,70,00,0001) in the cost of the Project up to the Scheduled COD of the Project, the increase/decrease in Non-escalable Transmission Charges shall be an amount equal to 0.32 percent (0.32%) of the Non-Escalable Transmission Charges.

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

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

85. Accordingly, as per Article 12.2.1 of the TSA, for every cumulative increase/decrease of each rupees three crore seventy 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 an amount equal to zero point three two percent (0.32%) of the non-escalable transmission charges.

86. In light of the above, the Petitioner shall be compensated on account of the Change in Law events allowed in this order during the construction period. For every cumulative increase of each rupees three crore seventy lakh in the cost of the Project up to the Scheduled COD of the Project on account of Change in Law events allowed in this order, the Petitioner's non-escalable transmission charges shall be increased by 0.32%.

87. The Petitioner shall provide documentary proof of such increase/ decrease in cost of the Project/ revenue to LTTCs.

88. The Petitioner has submitted that as per Article 12.4 of the TSA, the payment of Change in Law shall be through Supplementary Bill as mentioned in Article 10.10 of the TSA. MSEDCL has submitted that after incorporation of PoC mechanism through the Sharing Regulations, Article 10.10 of the TSA has become obsolete and infructuous. MSEDCL has further submitted that, as per directives of the Commission, CTU submitted the draft Model Transmission Service Agreement to the Commission after due consideration of the public comments and the Commission has approved Model Transmission Service Agreement vide its order dated 29.4.2011. It has been pointed out that as per Article 9 (Sharing of Other Charges) of Model Transmission Service Agreement, other charges such as license fee, petition filing fee, publication expenses, ULDC charges for non-POSOCO assets, charges for communication systems and EMSS/SCADA charges, etc. which are approved by the

Commission shall be billed separately by CTU and paid by the respective beneficiaries/DICs. MSEDCL has further relied on Note C and D of Schedule 1 of TSA dated 24.6.2015 to contend that the Petitioner may be directed to recover the same through PoC mechanism only.

89. We have considered the submissions of MSEDCL. After COD of the transmission system, the Petitioner's asset has been included in the PoC Pool and the Petitioner has been recovering its transmission charges through PoC mechanism under the 2010 Sharing Regulations. With effect from 1.11.2020, the Central Electricity Regulatory Commission (Sharing of inter-State transmission Charges and Losses) Regulations, 2020 has come into force. Therefore, the impact of Change in Law payable to the Petitioner shall be recovered by the CTU in accordance with the provisions of Regulation 15(2)(b) (second bill to the DICs) of the Central Electricity Regulatory Commission (Sharing of inter-State transmission Charges and Losses) Regulations, 2020.

Carrying Cost

90. The Petitioner has claimed carrying cost for the costs incurred due to the Change in Law events. It has been submitted that carrying cost is the compensation for time value of the money and any compensation for Change in Law is incomplete if it does not come with carrying cost that is inherent to the very provision. The Petitioner has contended that the cornerstone of Change in Law relief is restitution i.e., relief be granted in a manner so as to place an affected party in the same financial position as if a Change in Law had not occurred. Reliance is placed on Section 70 of the Indian Contract Act, 1872 by the Petitioner to contend that if a person enjoys the benefit of a non-gratuitous act, the said person has to compensate

the person performing the said non-gratuitous act. In support of its arguments, the Petitioner has relied on various judgments of Hon'ble Supreme Court in the cases of *South Eastern Coalfields Ltd. vs. State of M.P. and Ors.* [(2003) 8 SCC 648], *Kavita Trehan and Anr. vs. Balsara Hygiene Products Ltd.* [(1994) 5 SCC 380], *Indian Council for Enviro-Legal Action vs. Union of India (UOI) and Ors.* [(2011) 8 SCC 161], *Alok Shanker Pandey vs. Union of India (UOI) and Ors.* [(2007) 3 SCC 545], *Central Bank of India vs. Ravindra and Ors.* [(2002) 1 SCC 367] and judgments of Appellate Tribunal in the cases of *SLS Power Limited vs. Andhra Pradesh Electricity Regulatory Commission and Ors.*, Appeal Nos. 160, 166, 168, 172, 173 of 2011 and 9,18,26,29 and 38 of 2012, *Adani Power Ltd. vs. Central Electricity Regulatory Commission and Ors.*, Appeal No. 210 of 2017, *GMR Kamalanga Energy Limited and Anr. vs. Central Electricity Regulatory Commission and Ors.*, Appeal No. 193 of 2017, *Maharashtra State Electricity Distribution Co. Ltd. vs. Maharashtra Electricity Regulatory Commission and Ors.*, Appeal No. 15 of 2007, *PTC India Ltd. vs. Gujarat Electricity Regulatory Commission and Anr.*, Appeal No. 47 and 62 of 2013.

91. The Respondents have submitted that the Commission has time and again held that unless there exists a provision which requires restitution of a party to the same economic position as if such change in law had not occurred, carrying cost cannot be allowed. Reliance was placed on the order of the Commission in Petition No 43/MP/2019 (*Prayatna Developers Private Ltd. Vs. NTPC Ltd. & Ors.*). MSEDCL has contended that neither the provision related to relief under the Change in Law clause of the TSA nor any other provision of Article 12 of the TSA provides for restitution of the affected party to the same economical position as if such Change in Law event has not occurred. Hence, in view of the orders passed by the Commission

and APTEL, the Respondents have sought dismissal of the plea of the Petitioner seeking carrying cost on the approved Change in Law events.

92. We have considered the submissions of the Petitioner and the Respondents. The issue of carrying cost has been dealt with by APTEL vide judgement dated 13.4.2018 in Appeal No. 210 of 2017 in Adani Power Limited v. Central Electricity Regulatory Commission and Ors, wherein it was held that since Gujarat Bid-01 PPA had no provision for restoration to the same economic position, the decision of allowing carrying cost will not be applicable. The relevant extract of the judgment dated 13.4.2018 reads as under:

“ISSUE NO.3: DENIAL OF CARRYING COST

x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of ‘restitution’ i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon’ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.”

93. The judgment of APTEL dated 13.4.2018 in Appeal No. 210 of 2017 in Adani Power Limited v. Central Electricity Regulatory Commission and Ors., was challenged before the Hon’ble Supreme Court wherein the Hon’ble Supreme Court vide its judgment dated 25.2.2019 in Civil Appeal No.5865 of 2018 with Civil Appeal No. 6190 of 2018 (Uttar Haryana Bijili Vitran Nigam Limited & Anr. Vs. Adani Power Ltd. & Ors.) held as under:

“10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from

the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal.”

16.....There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by the CERC.”

94. In light of the above judgments of APTEL and the Hon`ble Supreme Court, in the absence of the restitution provisions in the TSA, the claim of the Petitioner regarding carrying cost is not admissible.

Summary of Decisions

95. The summary of our decisions with regard to the claims of the Petitioner is as under:

Sr. No.	Change in Law	Allowed/Disallowed
1	Levy of Swachha Bharat Cess and Krishi Kalyan Cess	Allowed
2	Increase in effective customs duty on primary aluminium products	Allowed
3	Increase in tax rates due to enactment of the GST Acts: (a) Increase in tax rates application on works contracts (b) Levy of GST on services for electricity transmission (c) Levy of GST on finished transmission line and sub-station material (d) Levy of GST on Right of Way payments to be made to land owners (e) Levy of GST on transportation of goods on supplier	Allowed Allowed Allowed Allowed Allowed in terms of

		paragraph 64
4	Increase in compensation towards damages in relation to Right of Way for transmission lines	Allowed
5	Change in configuration of type of towers to 'D' – 'D' at both sides of the crossing	Disallowed
6	Carrying Cost	Disallowed

96. The Petition No. 453/MP/2019 is disposed of in terms of the above.

Sd/-
(P.K.Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S.Jha)
Member

sd/-
(P.K. Pujari)
Chairperson